Identity and cultural property: The protection of cultural property in the united states.

Patty Gerstenblith
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THE PROTECTION OF CULTURAL PROPERTY IN
THE UNITED STATES

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INTRODUCTION

Four score and seven years ago, our fathers brought forth on this continent a new nation . . .

The idea of the United States as a "new" nation founded upon pristine land, a new experiment in liberty and democracy, is perhaps the most central notion in our political consciousness and our understanding of our own history. The fact that the ancestors of few of us who now inhabit the United States were present at this birthing detracts but little from the majoritarian national pride in this shared understanding of our origins. Fundamental to this myth is the belief that the European explorers and colonists and their descendants who formed the "founding fathers" instituted their great experiment in democracy on a blank slate—a virgin territory that offered land of great promise and opportunity, unsullied by the failings, intolerance, and internecine and interreligious fighting that plagued European history and that the colonists sought to escape by coming to the New World.

The new society that was established on this shore owed its entire cultural history—language, religion, art, science, literature, and history itself—to Europe and the Mediterranean world. It was a long time before the thought took root that there was any culture of value that grew autochthonously from this soil; it was even longer before this new society recognized that there had been a culture of value in the New World that predated the advent of Europeanism. This yearning for a European and Mediterranean-based past led to a desire for and valuing of the cultural objects that symbolize that past, while respect for artifacts representing the native cultural heritage has lagged significantly.

Before examining the protection of cultural property in the United States, one must first attempt to define what is meant by culture and, in particular, what significance culture and cultural identity hold for a society. John Frohnmayer, the recent Chair of the National Endowment for the Arts, addressed these issues:
Culture is, on the one hand, the very expression of our soul both individually and collectively, and on the other, the source of criticism, confrontation and discontent.

First, culture, to the anthropologist, the folklorist and the archeologist, is part of the immutable web of what a society is and does. It is the tribal dance, the sacred ground, the strain of rice, the herbal remedy, the architecture, the folk wisdom, the flora and the fauna and the oral tradition. In short, it is the best manifestation of what a society has created, what a society values and what a society believes. These activities and objects come alive only in the context of the whole society.

A second view is that culture can be defined as what is collected by a country's museums and libraries. It includes what prior generations have prized enough to preserve and honor, so by this definition, United States culture would include Greek vases, Klikitat masks and bronzes from the Chi'n dynasty. It is derivative and collective.

A third view contends that our culture resides in those commodities that we are able to buy and sell, and the greater the price, the more prized the item.

Cultural anthropologists emphasize culture as a description of the behavior of a group of people, organized into a society. For example, one definition of "culture" offered by Clyde Kluckhohn states,

[I]f whole groups or societies learn to do certain things in a more or less uniform fashion, we can make some sort of a general statement concerning the group. This kind of learned behavior, ... transmitted in some portion by any member of one group to a member or members of another group, is called "culture."

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2 CLYDE KLUCKHOHN, CULTURE AND BEHAVIOR 22-23 (1962). Another familiar definition states:

Culture consists of patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols, constituting the distinctive achievement of human groups, including their embodiments in artifacts ... [C]ulture systems may, on the one hand, be considered as products of action, on the other as conditioning influences upon further action.

Id. at 73. Alfred Kroeber offered the following definition:

[Culture] include[s] speech, knowledge, beliefs, customs, arts and technologies, ideals and rules. That, in short, is what we learn from other men, from our elders or the past, plus what we may add to it. ... [C]ulture might be defined as all the activities and non-physiological products of human personalities that are not automatically reflex or instinctive.

ALFRED L. KROEBER, ANTHROPOLOGY: RACE, LANGUAGE, CULTURE, PSYCHOLOGY, PREHISTORY 253 (rev. ed. 1948); see also ALFRED L. KROEBER & CLYDE KLUCKHOHN, CULTURE: A CRITICAL REVIEW OF CONCEPTS AND DEFINITIONS 11-142 (1952) (collecting definitions of "culture" and describing the history of the word).
Physical acts and physical objects that are the products of those acts are not themselves "culture" but are the tools with which culture is studied. Most definitions of culture are dependent upon and emphasize that culture is the result of a group of people and not merely of individuals. Thus, culture "is that part [of human life] which is learned by people as the result of belonging to some particular group, and is that part of learned behavior which is shared with others."\(^3\)

In evaluating these concepts of culture, the one constant is the physical embodiment of culture in tangible objects, which are generally classified as cultural property. Although these objects of cultural property undoubtedly symbolize different traditions, thoughts, and ideals, it is the objects themselves that remain with us throughout the passage of time. How we treat and regard these objects in turn becomes an important measure of our own cultural identity.

An example of this is the American experience. The irony of American cultural history is that although the North American continent is blessed with a significant indigenous culture, this culture has gone largely unrecognized and unprotected. Because the dominant culture in North America identifies almost exclusively with the European background,\(^4\)

\(^3\) Kluckhohn, supra note 2, at 25. Kluckhohn also wrote, "'A culture' is an historically derived system of explicit and implicit designs for living that tends to be shared by all or specially designated members of a group." \textit{Id.} at 56.

\(^4\) To demonstrate the extensive role of the European and, in particular, Greek and Roman cultural heritage in the development of American culture in the 18th and 19th centuries, one may cite examples as diverse as the private collections of European art and archaeological objects that formed the bases for the major public museums founded in the 19th century, such as the Metropolitan Museum of Art in New York, Karl E. Meyer, \textit{The Art Museum: Power, Money, Ethics} 17-31 (1979); the influence of Greek oratory and literary forms, as seen in the Gettysburg address and other 19th-century speeches, Garry Wills, \textit{Lincoln at Gettysburg: The Words that Remade America} 41-62 (1992); and the influence of Greek and Roman architecture on the Neoclassical and Greek revival styles of the late-18th-century and early-to-mid-19th-century architecture, H.S. Janson, \textit{History of Art} 459-62 (1969).

The study of American archaeology also lagged behind the study of Old World and Mediterranean archaeology, both in the Western Hemisphere and in Europe. In comparing the study of Old World history, which seemed to flow uninterrupted from ancient times to the modern, with New World history, Alfred Kroeber wrote in 1948: [I]n the historyless Western Hemisphere, everything pre-Caucasian seemed not so much strung on a long thread of sequence as it seemed one great amorphous mass of data, alike only in that they all preceded Caucasian history. All the data here seemed 'old'; but the question of how old, or how much older than others, did not at first obtrude. Kroeber, supra note 2, at 774. In writing his history of world archaeology, Glyn Daniel ignored American and New World archaeology until the developments of the 1945-70 time period and even then devoted only 10 out of 400 pages to the subject. Glyn Daniel, \textit{A Hundred and Fifty Years of Archaeology} 343-52 (1976). Daniel also described the lack of attention paid by others writing about American
considerable efforts are made to ensure access to the European heritage. This access, though threatened by the restrictions that art-source nations have increasingly placed on export of their cultural property, has been facilitated by a virtual lack of United States import controls and significant tax advantages.\(^5\) The inward flow thus continues virtually unabated.\(^6\) At the same time, the United States has made no attempt to restrict export of cultural property from its shores, a phenomenon that may be the result of a belief in free markets, or perhaps of a belief that we have little cultural property worth protecting.\(^7\)

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\(^5\) Meyer, supra note 4, at 31-36; see also Craig M. Bargher, The Export of Cultural Property and United States Policy, 4 Depaul J. Art & Ent. L. 189, 201-02 (1994) (discussing the question of whether the United States should seek to protect its cultural property through export regulation).

\(^6\) The literature discussing the international trade in antiquities and the status of such imported cultural property under United States law is extensive. See, e.g., Paul N. Bator, An Essay on the International Trade in Art, 34 Stan. L. Rev. 275 (1982) (discussing current and potential methods for regulating the international art trade and noting that a large proportion of stolen art is smuggled into the United States); Leah E. Eisen, The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World, 81 J. Crim. L. & Criminology 1067, 1068, 1070-71 (1991) (noting how unsuccessful the National Stolen Property Act has been at deterring art theft, and discussing the legal theory upon which a prior owner can sue a bona fide purchaser); Spencer A. Kinderman, The Unidroit Draft Convention on Cultural Objects: An Examination of the Need for a Uniform Legal Framework for Controlling the Illicit Movement of Cultural Property, 7 Emory Int'l L. Rev. 457, 458 (1993) (indicating that the international trade of stolen art is a serious crime second only in scope to international drug trafficking); Andrea E. Hayworth, Note, Stolen Artwork: Deciding Ownership Is No Pretty Picture, 43 Duke L.J. 337, 340-41 (1993) (stating that the United States is the largest market for stolen art).

\(^7\) Bator, supra note 6, at 314 & n.71 (stating that the United States is among the few countries that do not restrict or regulate the export of cultural property); James A.R. Nafziger, The Underlying Constitutionalism of the Law Governing Archaeological and Other Cultural Heritage, 30 Willamette L. Rev. 581, 581-82 (1994) (noting a “sharp imbalance” between the United States’ policy of limited protection of domestic cultural property and its broad support for expansive deterrent measures aimed at international art trafficking). The subject of whether the United States should regulate export of its cultural property as part of a comprehensive effort to protect its cultural heritage falls outside the scope of this study. For a discussion of this subject, see Antonia M. DeMeo, More Effective Protection for Native American Cultural Property Through Regulation of Export, 19 Am. Ind. L. Rev. 1, 70 (1994) (advocating the adoption of express export regulations to restrict export of significant cultural property). A brief evaluation of cultural resource management within the United States under international agreements demonstrates that current protections for archaeological resources within this nation are not adequate for a large variety of
Effective archaeological resource protection requires the recognition that archaeological resources are finite, depletable, and nonrenewable. Although such resource protection may seem initially intended to protect primarily the objects themselves, a second and even more significant goal is the preservation of the archaeological and historical context in which an object is found. Preservation of an object in situ often allows the object to be placed in its correct chronological sequence and to be used to date other objects or even stratigraphic levels. It also allows those studying past cultures to reconstruct the functions of such objects and to learn more about diet, technology, trade, living patterns, religion, literature—in short, about every aspect of a past society. Once the object is ripped out of that context, all this knowledge is lost forever, and most archaeologists believe that it is better to leave an object or a site unexcavated and undiscovered for a while than to risk loss of such irretrievable information.

Unfortunately, there are numerous statistics that bear testimony to the fact that a considerable amount of cultural property has been destroyed.


Gene A. Marsh, *Walking the Spirit Trail: Repatriation and Protection of Native American Remains and Sacred Cultural Items*, 24 *Ariz. St. L.J.* 79, 113 (1992) (quoting CHARLES R. MCGIMSEY III, *PUBLIC ARCHAEOLOGY* 24 (1972)). The Society for American Archaeology has now recognized the principles of stewardship and conservation as a part of the ethical requirements for archaeologists. The justification for this conservation model has been described as follows:

[^564:](#)
through looting of sites. Throughout the late nineteenth century, pothunters vandalized large numbers of ancient dwelling sites and cemeteries for their personal gain. Some, such as the Wetherill brothers, profited by outfitting major museums, including the American Museum of Natural History in New York, from their personal collections. In 1987, it was estimated that thirty-two percent of the known archaeological sites on federal property in the southwest had been damaged. Last year, the National Park Service reported more than six hundred thefts of artifacts from Native American sites.

Although protection of our indigenous cultures has become progressively stronger over the course of this century, the legal regime remains inadequate and generally reactive in its formulation. Only after particular resources are threatened and society decides that they are worth protecting, very specific laws are enacted to protect only those particular endangered resources. Because of the highly particularistic nature of such legislation, many cultural resources are today left unprotected and are thus subject to destruction. By the time society decides in twenty or thirty years that these resources are also important, they will be gone or irreparably injured.

In addition, enforcement of existing protective legislation is often weak because of overlapping jurisdictions, inadequate funding and personnel, and much inefficient duplication of effort. Because of the plethora of statutory schemes, the public has a poor understanding of exactly what the law requires regarding protection of cultural resources. Furthermore, existing legislation is plagued by the perception that only those artifacts on public land may be protected. This Article argues that we need to

10 In her seminal article that brought the problem of looting of sites to the forefront, Clemency Coggins noted that if looting of sites in Guatemala and Mexico continued at the then-current rate, there would soon be little Mayan sculpture left in situ. Clemency Coggins, Illicit Traffic of Pre-Columbian Antiquities, 29 ART J. 94, 94-98 (1969); see also KARL E. MEYER, THE PLUNDERED PAST (1973) (chronicling several notorious examples of looting of antiquities).


13 The Struggle to Protect Indian Graves, N.Y. TIMES, Mar. 26, 1995, § 1, at 16; see also DeMeo, supra note 7, at 8-10 (chronicling the increasing values of Native American artifacts on the international art market and the extensive destruction and desecration of archaeological sites and cemeteries that have resulted from this increase).
take steps to ensure that society as a whole, and not just our government, is committed to the protection of our cultural resources.

The first Part of this Article discusses various theories of property and their implications for defining cultural property. It concludes that because cultural property embodies the physical manifestation of a group's identity, group ownership of cultural property may be justified. Recognition of group ownership of cultural property provides the basis for the effective and uniform treatment of cultural property in the United States.

Part II presents a history of the development of thought about the cultural past within the United States. The thread running through this section is the idea that a society chooses to protect those elements of its past that it values as indicia of its identity. This cultural historiography charts the development of the protection of our cultural past as a reactive response to the evolution of our thoughts about our past and our identity.

In Part III, this Article presents a summary of the current treatment of cultural property in the United States. The purpose of this summary is both to describe our current cultural identity and to examine whether our response to threats to our cultural property is adequate. Part III concludes by focusing on the fact that cultural resource protection in the United States is the product of reactions to specific threats to cultural property. Effective cultural resource protection is further hindered by the fact that the law consists of a patchwork of common law property doctrines that were not developed to respond to these particular problems.

Finally, this Article proposes, and in Part IV defends, a comprehensive model statute for protection of cultural property, drawing from the commonalities underlying the various separate schemes outlined in the previous sections. The basis of this protective scheme derives from the recognition of two principles. First, any protective scheme must grant equal recognition to the inherent rights of all cultural groups and, in particular, respect for the treatment of human remains and burial goods. Recognition of this principle allows for proactive protection of all cultural property, rather than our current approach of reactive protection of the cultural property of those groups that happen to be in vogue in the public consciousness. Second, an effective scheme must focus on preservation of the archaeological context so that historical, archaeological, and scientific knowledge may be maximized. This Article posits that cultural property is a finite, depletable, and nonrenewable resource that requires uniformity of protection throughout the United States. The statute this Article presents will promote uniformity by proposing a theoretical basis for group ownership of cultural property, regardless of the circumstances of discovery and recovery of such property, largely informed by re-examination of the applicability of the public trust doctrine. Because of its comprehensiveness and the singular nature of the problems of protecting
cultural property, this statute has broad application and would effectively protect all cultural property found in the various states that adopt it.

I. Definition of Cultural Property

A culture is the external manifestation of a particular group or segment of population. Such a group may at times be predominately defined by its ethnicity, language, religion, or particular history but often represents an amalgam of these characteristics. A cultural group may be coterminous with a particular nation-state, is often smaller than a nation, and may perhaps extend over more than one nation. The definition of a particular cultural group is often comparative; its scope will vary depending on the characteristics of the larger universe of which the cultural group is a subset.\footnote{John Moustakas, Comment, Group Rights in Cultural Property: Justifying Strict Inalienability, 74 CORNELL L. REV. 1179, 1194 (1989) ("Groupness is relative because it depends upon comparison to the entity of which it is a subset.").}

The concept of "cultural property" is composed of two potentially conflicting elements.\footnote{Roger W. Mastalir, A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law, 16 FORDHAM INT'L L.J. 1033, 1037-39 (1993) (discussing the tangible and cultural aspects of cultural property).} The term "culture" describes the relationship between a group and the objects it holds important. The concept of "property" in its traditional sense of focusing on legal rights of individuals to possession of objects is foreign to this notion. For example, Jeremy Waldron emphasizes the private ownership aspects of property, which he defines as "the idea of one person being in charge of a resource and free to use or dispose of it as she pleases."\footnote{Jeremy Waldron, Property, Justification and Need, 6 CANADIAN J.L. & JURIS. 185, 188 (1993).} Stephen Munzer defines "property rights" as "a bundle that includes claim-rights to possess, use, manage, and receive income; powers to transfer, waive, exclude, and abandon; liberties to consume or destroy; and immunity from expropriation without compensation."\footnote{Stephen R. Munzer, Kant and Property Rights in Body Parts, 6 CANADIAN J.L. & JURISPRUDENCE 319, 320 (1993); see also Stephen R. Munzer, The Acquisition of}

In yet another approach, Joseph Singer and Jack Beermann do not
focus on ownership by an individual but rather suggest defining property law "in legal realist terms as rules regulating relationships among people with regard to control of valued resources . . . and differ[ing] depending on the social context and relationships at issue." Thus, they criticize the trend in Supreme Court takings jurisprudence of severing property into distinct strands of a bundle of rights and instead argue that property is an evolving concept that is the product of social context, human relationships, value judgments, government policies, and private action.

Three theoretical bases traditionally offered as justifications for private property "ownership" are generally categorized as libertarianism, utilitarianism, and personality theory. A libertarian, or Lockean, justification for private property posits that individuals acquire rights in property because of the labor they invest to create the property. Locke proposed that when in a state of nature, people owned property in common. As individuals "mixed" their labor with particular property, however, they acquired rights over the property. This justification for private property ownership is also premised on the idea that individuals should be rewarded for the industry and labor that goes into the process of obtaining first possession of the property. A second justification for private property ownership is the utilitarian theory that society as a whole benefits from private, as opposed to communal, ownership of various forms of property.

The personality theory is an extension of Hegel's theory of personality in that one gains ownership of an external object by imposing one's will upon it. In her explanation of the personality theory of private property, Margaret Radin defines "personal property" as property that is particularly important to the self-realization and fulfillment of an individual's personality, and "fungible property" as property held by an individual primarily for its economic or use value. The degree of legal protection given to private ownership of property will vary in different contexts

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Property Rights; 66 Notre Dame L. Rev. 661, 664 (1991) (defining property as both objects and a "bundle of claim-rights, liberties, powers, and immunities").


19 See, e.g., Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 958 & n.3 (1982).

20 See Richard Epstein, Possession as the Root of Title, 13 Ga. L. Rev. 1221 (1979); Carol M. Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73, 73-76 (1985).


22 Radin, supra note 20, at 958 & n.3 (tracing utilitarian philosophy to Bentham).

23 Id. at 222-24, 228.

24 See, e.g., Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 958 & n.3 (1982).

25 Id. at 958-59.
depending on whether the property is considered personal or fungible. The classification of property as either unique or fungible permits us to develop legal rules tailored to enhance the personality aspect of property ownership. It also may lead to a limitation or even elimination of the market in some types of "property." Cultural property is that specific form of property that enhances identity, understanding, and appreciation for the culture that produced the particular property. Cultural objects should not be confused with "art." The designation of an object as "art" is a method of conferring value, both monetary and aesthetic, within a system of what Rosemary Coombe describes as a nineteenth-century "way of categorizing expressive works of aesthetic value in a context of European imperialism and colonialism and the collection of objects in imperialist forays around the globe." Art objects are "examples of a human creative ability that transcend the limitations of time and place to speak to us about the 'human' condition; representing the highest point of human achievement, they are regarded as testaments to the greatness of their individual creators." On the other hand, cultural objects are valued "as the authentic works of a distinct collectivity, as integral to the harmonious life of an ahistorical community and incomprehensible outside of 'cultural context'—the defining features of authentic artifacts." As used in this Article, "cultural property" refers to those objects that are the product of a particular group or community and embody some expression of that group's identity, regard-

26 See id. at 991-1013 (applying this dichotomy of treatment to issues of Fourth Amendment search and seizure, takings, and landlord-tenant relations).

27 In fact, use of the term "property" to describe what is here called "cultural property" may be questioned because the term may imply the commodification of such objects and the necessity of a concomitant market. Nevertheless, Radin has demonstrated that not all forms of property need be alienable or salable, and that a market need not exist in order to vindicate the inalienable right to property. See Margaret Jane Radin, Market-Inalienability, 100 HARV. L. REV. 1849, 1903 (1987) (discussing utilitarian and libertarian approaches to private property). In fact, in order to maximize personal liberty, which depends on freedom, identity, and contextuality, id. at 1903-09, Radin suggests that it is necessary to develop a scheme of partial or complete commodification for certain types of property and services. Id. at 1921-36.

28 DeMeo, supra note 7, at 2-4 (defining cultural property as those "objects [that] represent the cultural heritage of their creators and are in fact the cultural patrimony of these people").


30 Id. at 257-58.

31 Id. at 258. A third category of objects is created when a cultural object moves out of its specific context and gains recognition as "art"—thus acquiring a universal value as part of the progressive development of human civilization. Id.
less of whether the object has achieved some universal recognition of its value beyond that group.

Recognition of group rights in cultural property may be premised on different theories. Group ownership premised on the personality theory is derived from the fact that the essence of cultural property lies in its identification with the particular cultural group that produced it. Cultural property is "integranantly related to group cultural identity." Cultural property thus epitomizes Radin's definition of "personal" property, but as applied to a cultural group, rather than to an individual. To achieve the purposes of the personality theory of property ownership and to ensure that the group has the opportunity to define itself autonomously, the cultural group must provide the definition of its cultural property.

Once a group designates items of property as cultural property, the rights of cultural groups may be founded on three ideas. First, because the identity of the group is bound up in the object (and similarly, the identity of the object relies on recognition by the group), the group acquires ownership rights over that object. Second, because the property is so closely tied to the identity of the group, it should be inalienable "because future generations are unable to consent to transactions that threaten their existence as a group." Finally, group ownership may also be premised on a Lockean theory. Cultural groups have rights in their cultural property because such property is the product of the group.

Pursuant to the theory of Singer and Beermann, notions of group property are perfectly legitimate because property rights depend on value judgments and can be socially and politically constructed. As the result

32 Id. at 262-63 (describing the argument for "cultural nationalism" as put forth by John Moustakas).
33 The application of Radin's theory of personal property to group ownership of cultural property was first suggested by John Moustakas, supra note 14, at 1190-93.
34 The fact that the group defines its own cultural property is an essential element in the recognition of group ownership. This self-definition stands in contrast to cultural appropriation which, as Rosemary Coombe has pointed out, has been marked by the experience of having Native cultural identity extinguished, denied, suppressed, and/or classified, named, and designated by others . . . . This long colonial history of having Indian identity legally defined by a government simultaneously determined to eliminate all vestiges of that identity in Canadian society has left a bitter residue of distrust. Coombe, supra note 29, at 273-75. Although Coombe was describing Canadian history, this observation is equally true of the treatment of the Native American culture in the United States. The attempt of one cultural group to impose its own concept or definition of cultural significance onto a different cultural group may also be termed "cultural elitism."
35 Id. at 263.
36 Id. at 262.
37 Singer & Beermann, supra note 18, at 228.
of a political decision, legislation should be able to recognize the rights of a particular group in its cultural property, even if that group has been denied possession for a long time. The recognition of group ownership of property is not an entirely new concept for the Anglo-American system of property law, in light of the recognition now given to group property ownership by entities such as corporations and governments. Our nation also includes within its borders and respects, at least for some purposes, the independent sovereignty of legal systems that utilize communal property ownership, even to the exclusion of private property ownership. Recognition of Native American communal property rights can be seen as early as the nineteenth century. In Journeycake v. Cherokee Nation, which involved a land dispute, the United States Court of Claims framed a definition of the communal property concept:

The distinctive characteristic of communal property is that every member of the community is an owner of it as such. He does not take as heir, or purchaser, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property . . . as perfect as any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners.

Singer and Beermann appear to suggest that legislation refusing to recognize property rights of cultural groups would be equally legitimate because concepts of property are constructed and can change: “It is true that settlers often illegally invaded Indian lands and their titles were later confirmed by government. . . . It was a government policy choice whether to protect the rights of first possessors—American Indian nations—or to arrange for a transfer of possession from Indian nations to non-Indians.” Id. at 229.

If “property” is an inalienable right originating in natural law and the government must pay compensation when divesting the owner, however, such legislation and government policies would violate both the Constitution and most theoretical justifications for property ownership. On the other hand, it is possible for legislation to grant statutory recognition or definition to pre-existing property rights.

In this century, the voluntary return of the Zuni war gods by the Denver Art Museum in 1978, although illustrating the reluctance of the museum and anthropological communities to recognize the concept of communal property, clearly indicated the irrepressible nature of this concept. Christopher S. Byrne, Chilkut Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects?, 8 J. ENVTL. L. & LITIG. 109, 124-26 (1993) (discussing the central role of the war gods to Zuni culture, and the museum’s initial decision not to return the war gods because they were “communally owned by all the people of Denver”);
In addition, legal literature and case law have gradually recognized group property rights in other contexts, and the extension of this trend to the right of group property ownership seems logical enough.

II. History of the Treatment of Our Cultural Past

A gradually awakening consciousness of the value of our cultural past can be traced through the two-hundred-year history of the United States. This Part follows this development and links it with our contemporary protective legal scheme.

Despite the lack of value that European colonists assigned to the indigenous population of North America, the two earliest known incidents of


See, e.g., Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 Cornell L. Rev. 1, 11 (1989) (arguing for the recognition of group or communal property rights in the context of residential associations). Recognition of the importance of groups in our society has been fostered by the communitarian movement, which emphasizes the parallel operation, and potential conflict, of the rights and responsibilities of group membership. See, e.g., Amitai Etzioni, *The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda* 11 (1993) (stressing the inequality between claimed rights and assumed responsibilities).

The burial mounds and antiquities associated with them held considerable fascination for the colonists and pioneers, but these archaeological materials were not associated with living Native Americans. Caleb Atwater, one of the first to publish extensive descriptions of Native American antiquities, wrote that the “antiquities of Indians of the present race are neither numerous nor very interesting.” A. Irving Hallowell, *The Beginnings of Anthropology in America, in Contributions to Anthropology: Selected Papers of A. Irving Hallowell* 36, 114 (1976) (quoting Caleb Atwater, *Description of the Antiquities Discovered in the State of Ohio and Other Western States* (1820)). Atwater attributed the more impressive mounds and earthworks to an Asiatic people. *Id.* Hallowell has explained this attitude by commenting that the keen interest taken in the antiquities of the New World was not founded on a hope that these remains would illuminate the prehistoric past of the Indians. Instead, American archeology became a fascinating subject in the public mind because it was based on the myth of a vanished race. It was thought that people superior to and distinct from the contemporary living Indians may have occupied this continent prior to them. If so, they must have been some superior “grade” of Indians or have had some close connection with the past civilizations of the Old World. For the white pioneers held the contemporary Indians in low esteem; they were essentially savages.
interest in archaeology involved Native Americans. One of the first acts of preservation was the setting aside of two pyramids and a great mound as a public square by the Ohio Land Company in Marietta, Ohio, in 1788.43 In 1793, Thomas Jefferson conducted the first known systematic excavations of Indian mounds, which were located on his Virginia property.44 Although Jefferson has been criticized for disregarding the religious rights and concerns of Native Americans in the process of excavating burials,45 many have praised him for his scientific methodology and the prompt publication of his explorations.46 Jefferson has also been criticized for not demonstrating concern for the conservation aspects of archaeology.47

Jefferson's scientific curiosity notwithstanding, interest in contemporary indigenous North American cultures was sparse; Indians were more typically considered to be uncouth heathens with little of cultural value to offer to the European settlers and their descendants.48 Although the Native American was at first taken to epitomize Rousseau's "noble savage," Native Americans were also demonized as a way of justifying the unilateral acquisition of their land and eradication of their culture.49

43 Id. at 111-12 (crediting late-18th-century descriptions of the Marietta earth works as among the earliest archaeological studies in the United States); see also Edward Friedman, Antecedents to Cultural Resource Management, in PROTECTING THE PAST, supra note 12, at 27, 27 (cataloguing preservation efforts).

44 Id. (noting that Jefferson's motivation was curiosity as to the origin of the mounds).

45 See, e.g., James Riding In, Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians, 24 ARIZ. ST. L.J. 11, 15-17 (1992) (noting that Jefferson's stature in American society gave the desecration of Indian graves an "illusion of morality").

46 E.g., Friedman, supra note 43, at 27 (noting that Jefferson has been dubbed "the father of American archaeology" and praised for his scientific techniques in using a stratigraphic approach, testing explicit hypotheses, and prompt publication). Jefferson also was prominent in the study of Native American languages and showed an appreciation for the significance of the ethnographic study of Native Americans, particularly as demonstrated in the instructions that he gave to the Lewis and Clark expedition for observing and recording characteristics of Native American life. HALLOWELL, supra note 42, at 50-53.

47 Id.

48 See ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 194-96 (1990) (noting that colonists viewed Indians as "dehumanized entry barriers" and referring to Indians as brutes and savages); see also HALLOWELL, supra note 42, at 37-39 (discussing the impact of the encounter with Native Americans on European religious, philosophical, and anthropological thought, and stating that "[w]hen the Spanish first came in contact with the Indians it was not assumed without debate that they were thoroughly human, that they possessed reason, that they could be brought into a state of grace and acquire a Christian civilization").

49 For a history of the development of British legal, philosophical, and religious
Indeed, Native Americans’ status as heathens served as a justification for the British wars of conquest as early as the sixteenth century.\(^5\)

The colonists focused instead almost exclusively on their Mediterranean and European cultural ancestry and on the question of whether a legitimate North American but European-derived culture with its own style of art, architecture, and literature could develop. Jefferson in particular, as an advocate for a new cultural identity, hoped that “his fellow citizens would soon be pulling themselves up by their bootstraps, culturally speaking.”\(^6\) Jefferson fostered the nascent interest in local North American architecture, especially through his efforts in the design of his home at Monticello and of the University of Virginia.\(^7\) Ironically perhaps, in Jefferson one can see the twin spheres of the preservation movement—the interest in developing and protecting European cultural elements to be embodied in an American culture, and at the same time interest in Native American culture that would lead to both scientific exploration and market exploitation. This latter interest would, unfortunately, languish within the American political sphere for over a century before any significant attempts at protection were undertaken.

Interest in preservation throughout most of the nineteenth century focused almost exclusively on the more recent past, primarily on monuments and battlefields associated with the revolutionary period. Between 1813 and 1816, a major grassroots preservation effort fought to preserve Independence Hall in Philadelphia.\(^8\) This campaign was followed by unsuccessful efforts in 1846 to save the Deerfield, Massachusetts Old

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\(^5\) Justifications during the 16th and 17th centuries for the conquest and eradication of native Americans based on their status as heathens, see Williams, supra note 48, at 193-225.

\(^6\) Alberico Gentili’s 1598 work, De iure belli libre tres (“On the Law of War in Three Parts”) presented an early justification for the idea that “Europeans could lawfully wage war against normatively divergent peoples who violated Eurocentrically conceived natural law.” Id. at 195-96.

\(^7\) On the other hand, the impressive burial mounds and other prehistoric remains were linked, even until the first half of the nineteenth century, by many to ancient Old World civilizations of wide variety, with the Ten Lost Tribes of Israel as one of the more frequently mentioned possible ancestors. Hallowell, supra note 42, at 39-41, 110-13.

\(^8\) Walter L. Creese, The Crowning of the American Landscape: Eight Great Spaces and Their Buildings 9-15 (1985) (discussing Jefferson’s distaste for agrarian log cabins, and his desire to provide architectural models that would stir the imagination).

\(^9\) In designing the University of Virginia, Jefferson intended to avoid an excessively provincial American flavor, so as to appeal even to the English. Id. at 9-11; cf. Daniel J. Boorstin, The Americans—The Colonial Experience 271-316 (1958) (discussing the struggle in the development of a literary culture independent of that of England in the 17th and 18th centuries).

\(^10\) Friedman, supra note 43, at 28.
Indian House, the last remaining structure from the site of a 1704 Indian massacre, and the loss of John Hancock’s home in 1863. Further advancing the preservationists’ cause, the federal government in 1846 established the Smithsonian Institution, which, that same year, supported its first excavation of Indian mounds. In the 1850s, several successful projects were undertaken involving sites associated with George Washington, including the beginning of construction of the Washington Monument, preservation of Mount Vernon, and the acquisition by New York State of the Hasbrouck House, where Washington had his headquarters during the last two years of the Revolutionary War.

Two facets of these early preservation efforts have remained largely characteristic of preservation movements even today. First, most significant preservation efforts resulted from community involvement and grass-roots interest in specific projects. The largely reactive nature of today’s preservation movement may be the product of the government’s historical failure to seek out preservation projects. Second, successes have largely depended on private sources of funding and the private acquisition of the particular site or structure involved. Because no appropriation issues arose from these acquisitions, there was little conflict between notions of private property ownership and the public interest in historical or archaeological preservation.

The early and middle nineteenth century saw the beginnings of three strands of thought that were later to become interwoven into the American preservationist movement. The first strand, patriotism, became manifest in the early nineteenth century, when, as part of the public interest and pride in the Revolutionary War, buildings associated with revolutionary heroes were preserved, and the battlegrounds associated with major victories, particularly the Concord, Bunker Hill, and Lexington battle-

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54 Id. (suggesting that “[i]n dying, the Hancock house contributed more to the preservation movement than it ever could have by remaining intact”).

55 Id. Between the 1820s and 1840s, extensive surveys and excavations of burial mounds in the Mississippi Valley were undertaken and subsequently published. Hallowell, supra note 42, at 115.

56 Friedman, supra note 43, at 28.

57 Id. at 27 (noting that early protection was due to spontaneous grassroots efforts).

58 Id. at 28. The purchase of the Hasbrouck House by New York State was an early exception to the more general practice of private funding. Preservation of Mount Vernon provided the more typical example in that it was saved from destruction by the efforts of the privately funded Mount Vernon Ladies’ Association. Kathryn R.L. Rand, Note, Nothing Lasts Forever: Toward a Coherent Theory in American Preservation Law, 27 U. Mich. J.L. Reform 277, 284 (1993). F.W. Putnam provided the impetus for private funding to purchase the Serpent Mound in 1900; he then transferred title to the mound to the Ohio State Archaeological and Historical Society. Hallowell, supra note 42, at 119.
fields, were dedicated. The second and third strands were interests in death and nature, both outgrowths of the rural cemetery movement. This movement reflected the principles of transcendentalism and viewed cemeteries as not only places for memorializing the dead but also as places for contemplation and communion with nature. Some of the most significant early exemplars of American architectural and landscaping style combined with the rural cemetery movement to create such cemeteries as the Mount Auburn Cemetery in Cambridge, Massachusetts.

The three strands that ultimately shaped the attitude of American society to its past may thus be discerned in this nineteenth-century movement—memorialization of the past linked to patriotism, nature, and death.

The interweaving of these strands attained its pinnacle in the dedication of the Gettysburg Battlefield as a national cemetery in 1863. This dedication represented the melding of the public's interests in patriotism, nature, and death, which may well have been one of the factors that led to the establishment of the national parks system. Indeed, the first

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69 Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 481-84 (1981) (noting that early preservation efforts reflected "the political purpose of fostering a sense of community" and the understanding that "visual surroundings work a political effect on our consciousness").

60 *Blanche Linden-Ward, Silent City on a Hill: Landscapes of Memory and Boston's Mount Auburn Cemetery* 131-48, 197-213 (1989) (discussing the significance of nature, landscaping, and gardens in the design of 19th-century cemeteries); *Wills, supra* note 4, at 63-79 (discussing the mid-19th century fascination with death and nature).

61 Linden-Ward, *supra* note 60, at 167-72 (noting that the "rural cemetery" movement represented the idea that the contemplation of death would lead to a more moral life, an emphasis on the individual arising from the Enlightenment, and the desire to memorialize the dead through burial in beautifully landscaped natural surroundings). The founders of the first American rural cemetery, Mount Auburn, intended that it "would not be purely functional, for disposal of the city's dead, but would fill many other cultural needs—honoring the deceased, cultivating the civilizing emotion of melancholy, teaching moralistic lessons, and fostering a sense of the past as pertinent to the present and future." *Id.* at 172.

62 *Id.* at 12 (noting that "Mount Auburn served as catalyst for the 'rural' cemetery movement"); *see also id.* at 180-96, 199-203 (discussing the process of designing the cemetery).

63 *Wills, supra* note 4, at 63-77. In fact, the Gettysburg memorial was designed by William Sanders, who had designed the Chicago rural cemetery, Rose Hill, which was itself greatly influenced by Mount Auburn. *Id.* at 66-67.

64 *Creese, supra* note 51, at 207 (citing the attempts by A.J. Downing to promote the idea of a national park modeled after the rural cemeteries). A.J. Downing had suggested as early as 1849 that public parks be created on the model of Mount Auburn cemetery so as to benefit the living within their cities as well as in rural settings. *Id.* at 182.
national park was established not long after, in 1872 at Yellowstone. The Mount Auburn cemetery also served as the inspiration for Boston's Metropolitan Park System, which in 1890 became associated with the Trustees of Public Reservations, the first private institution with the express purpose of acquiring and maintaining historic places. The Trustees had the responsibility “to be ‘like . . . the trustees of a public art museum, standing ready to undertake the care of such precious things as may be placed in its charge’ ” and to undertake private stewardship for “acquiring and maintaining ‘beautiful and historical places and tracts of land.’ ”

Beginning in the 1870s, interest in North American archaeology and anthropology began to flourish as a distinct element. This interest was in part stimulated by the inclusion of Native American artifacts in the Smithsonian Institution exhibition in Philadelphia as part of the Centennial Exposition in 1876. Some consider the year 1879 a watershed in the public’s appreciation of American archaeology. In that year, two major organizations, the Anthropological Society of Washington (a forerunner of the American Anthropological Association) and the Archaeological Institute of America, were founded. Further, the Bureau of American Ethnology was established at the Smithsonian Institution. An anthropologist, Lewis Henry Morgan, became president of the American Association for the Advancement of Science. Finally, the first significant survey of Pueblos in Arizona and New Mexico, the Report Upon United States Geographical Surveys West of the One Hundredth Meridian, was published by Frederick Putnam. Surveys of sites in the Southwest not

65 Freeman Tilden, The National Parks 20 (1970); Friedman, supra note 43, at 29. The link between patriotism and historic preservation in the 19th century has been firmly established by Rose, supra note 59, at 481-84 (observing that “reminders of a common past . . . link [people] together in a national community”); see also Rand, supra note 58, at 284-88.

66 Creese, supra note 51, at 183-84. This trust preceded by two years and served as the model for the British National Trust for the preservation of landscape and buildings. Id. at 183. The acquisition of land by the Trustees in the early 1890s was “coincident with a rising national interest in the combination of landscape and architecture in the attainment of civic beauty.” Id.

67 Id. at 183 (quoting Sylvester Baxter, A Trust to Protect Nature’s Beauty, XXIII American Monthly Review of Reviews, Jan. 1901, at 48).

68 Hallowell, supra note 42, at 118.

69 E.g., Rogers, supra note 11, at 48-49 (calling 1879 the “nascence of the cultural resource preservation movement in the United States”).

70 Friedman, supra note 43, at 28.

71 Id.

72 Id.

73 Id. The appointment of Putnam as curator of Harvard’s Peabody Museum of American Archaeology was another significant event of that year. Rogers, supra note 11, at 48-49. During the 1880s and 1890s the linkage of the contemporary Native Americans with prehistoric remains finally gained general acceptance as the result of
only revealed the beginnings of destruction and looting of sites but also
stirred interest, along with the development of ethnographic and anthropo-
logical study of Native Americans, in the market for the products of
that looting. These developments led in turn to a series of efforts, which
continue today, involving legislation, public education, and scientific stud-
ies, to find effective means for protecting these sites and their associated
artifacts.

A dichotomy has dominated our thinking. Efforts to preserve the cul-
tural artifacts of the dominant European-based elements of American
society have been based on respect for the past, while interest in Native
American cultures has been largely motivated by scientific curiosity and
the desire for economic profit. For example, throughout the nineteenth
century, the scientific community excavated Indian burials to obtain skel-
etal materials for their collections and to conduct craniometric studies,
while antiquities hunters quickly learned the market value of both Indian
skeletal remains and associated burial goods, as well as nonburial Indian
artifacts. Because of the lack of respect for a culture sometimes consid-
ered exotic, sometimes inferior, the legal regime that has arisen has
sought to preserve the interests of the mainstream culture, not those of
Native Americans.

the work of Cyrus Thomas on the Ohio mounds and F.H. Cushing with the Zuni and
Pueblo Indians in the Southwest. Brian M. Fagan, In The Beginning: An Intro-
duction to Archaeology 36-37 (1975); see also Hallowell, supra note 42, at
120-24.

74 Rogers, supra note 11, at 49 & n.12, 50 n.19.

75 Id. at 51-55 (noting that pressure on Congress to take action grew immense as a
result of increased public concern); see also Ellen Herscher & Francis McManamon,
Public Education and Outreach: The Obligation to Educate, in Ethics in Ameri-
can Archaeology, supra note 8, at 42 (describing the ethical obligation of archaeolo-
gists to enlist support for site preservation through public education).

76 See, e.g., Margaret B. Bowman, The Reburial of Native American Skeletal
Remains: Approaches to the Resolution of a Conflict, 13 Harv. Envtl. L. Rev. 147,
149 (1989) (noting that 99% of the human remains in federal institutions are of Native
American origin, representing an estimated 300,000 people); Rita Sabina Mandosa,
American remains were “routinely viewed as archaeological resources rather than as
human remains”); Riding In, supra note 45, at 17-23 (describing the desecration of
graves to uncover Indian skeletal remains); Jack F. Trope & Walter R. Echo-Hawk,
The Native American Graves Protection and Repatriation Act: Background and Legis-
lative History, 24 Ariz. St. L.J. 35, 43 (1992) (finding that the government has treated
“Native American dead as archeological resources, property, pathological material,
data, specimens, or library books, but not as human beings”).

77 In fact, government action exacerbated the situation. Many of the skeletal
remains in the Smithsonian were obtained under an 1868 order of the U.S. Surgeon
General to collect Native American crania for research. Trope & Echo-Hawk, supra
note 76, at 40 (noting that the remains were “needed” for the Army Medical
Museum).
By the early twentieth century, growing public and academic interest in Native American sites in the Southwest led to two major developments: enactment of the Antiquities Act of 1906, and the designation of Mesa Verde as the first Native American site protected as a national monument. The Antiquities Act provides that the President may set aside as national monuments “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” located on lands owned or controlled by the federal government (including Indian tribal land, forest reserves, and military reservations) and penalizes the destruction, damage, excavation, appropriation, or injury of any historic or prehistoric ruin or monument or object of antiquity. The purpose of the Antiquities Act was not so much to “stop the removal of artifacts . . . [but] to promote investigation of historic sites by the scientific community, rather than by amateurs . . . so that artifacts and remains would end up in public museums.” The effectiveness of the statute against unauthorized excavation, however, suffered from years of lax enforcement and relatively minor penalties.

In contrast with the virtual lack of enforcement under the Antiquities Act, the 1910s and 1920s saw significant increases in protection for buildings and sites associated with the early history of the colonies and the United States. This development is epitomized by the congressional

80 16 U.S.C. § 431 (1988). The Secretary of the Interior, Agriculture, or Army, whichever has jurisdiction over the land involved, may grant permits for the examination of ruins and the excavation and exploration of archaeological sites to those institutions deemed properly qualified. Id. § 432 (1988).
81 Id. § 433 (1988) (imposing fines of no more than $500 and imprisonment for no more than 90 days).
82 Leonard D. DuBoff, Protecting Native American Cultures, OR. ST. B. BULL., Nov. 1992, at 9, 10.
83 See United States v. Diaz, 499 F.2d 113, 114 (9th Cir. 1974) (noting the paucity of prosecutions under the Antiquities Act). The first officially recorded federal investigation of pothunting activity did not occur until 1936; it did not result in a prosecution. Rogers, supra note 11, at 56.

The Antiquities Act was declared unconstitutional in 1974 by the United States Court of Appeals for the Ninth Circuit. Diaz, 499 F.2d at 115 (finding that the legislation failed to define such terms as “ruin,” “monument,” and “object of antiquity” and thus violated due process by failing to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited).
authorization for the historic restoration of Colonial Williamsburg in 1926.\textsuperscript{84} and in the establishment of the National Park Service in 1916 to provide unified management and protection of historic sites located on federal lands.\textsuperscript{86} In 1935, Congress enacted the Historic Sites, Buildings, and Antiquities Act\textsuperscript{86} which authorized the Secretary of the Interior to restore and maintain historic sites and properties and declared a national policy of “preserv[ing] for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States.”\textsuperscript{87} In 1949, Congress established the National Trust for Historical Preservation as a private institution to receive donations of sites, buildings, and objects and to administer them in the public interest.\textsuperscript{88}

During the 1930s, federal government programs led to a renewed interest in and urgency for protection of Native American sites. The creation of the Civilian Conservation Corps and Works Progress Administration placed many people in archaeology-related field activities.\textsuperscript{89} Additionally, New Deal dam projects, such as those of the Tennessee Valley Authority, created a considerable need for exploration of sites that were to be flooded.\textsuperscript{90} These developments combined to generate a renewed interest in Native American archaeology and led to an epidemic of pothunting, even on protected federal lands, which went virtually unpunished.\textsuperscript{91}

Concern for the protection of sites from destruction continued follow-


\textsuperscript{87} 16 U.S.C. § 461 (1988); see also Phelan, supra note 78, at 69 (discussing the same). In Barnidge v. United States, 101 F.2d 295 (8th Cir. 1939), the United States Court of Appeals for the Eighth Circuit held that the Act authorized the federal government to acquire property by eminent domain for the purpose of preserving sites of national historic significance “to commemorate and illustrate the nation’s history.” \textit{Id.} at 299.

\textsuperscript{88} Act of Oct. 26, 1949, ch. 755, § 1, 63 Stat. 927, 927 (codified as amended at 16 U.S.C. § 468 (1988)). In Landmarks Preservation Council v. City of Chicago, 531 N.E.2d 9 (Ill. 1988), the Illinois Supreme Court held that the National Trust had standing to challenge the destruction of private buildings even though they were not yet declared to be “national landmarks.” \textit{Id.} at 14.

\textsuperscript{89} Friedman, supra note 43, at 30.

\textsuperscript{90} \textit{Id.}

\textsuperscript{91} See McAllister, supra note 12, at 93-94 (noting that between 1906 and 1979, vandalism charges were brought in fewer than 20 cases).
ing World War II. The increasing activity of the National Corps of Engineers in topographical leveling and flooding of sites led to more emphasis on site surveys and heightened attempts to salvage as much information as possible.\textsuperscript{92} Congressional enactment of the Archaeological and Historic Data Preservation Act of 1974 not only required that data be preserved from any sites affected by federally related construction projects but also permitted the federal authorizing agency to require such projects to budget funds for the survey, excavation, and salvage of sites and materials found at such sites.\textsuperscript{93}

In 1966, Congress authorized establishment of the National Register of Historic Places ("National Register") through enactment of the National Historic Preservation Act ("NHPA").\textsuperscript{94} The National Register lists specific federally owned structures and historic areas or districts significant in the history, architecture, archaeology, and culture of the United States.\textsuperscript{95} The Act also encourages states to survey and preserve comparable structures and areas through the provision of federal funds.\textsuperscript{96} Because the Act only emphasizes protection of architectural structures as opposed to objects and is restricted primarily to federally owned lands, however, it provides limited protection to this nation's archaeological preservation effort.

During the 1970s, some pothunters were prosecuted under the Antiqui-

\textsuperscript{92} See Reservoir Salvage Act of 1960, Pub. L. No. 86-523, 74 Stat. 220 (codified as amended at 16 U.S.C. §§ 469 to 469c-1 (1988)) (requiring notification of the Secretary of the Interior when any federal dam construction project may cause the loss of significant scientific or prehistoric data, and providing for the preservation of such data but not of the sites themselves). The many state and regional archaeological survey projects initiated at this time provided the impetus for large-scale survey and salvage work, which shifted the focus of American archaeology from excavation of specific sites to the daunting task of preserving as much information as possible before its destruction. Charles R. McGimsey III, Protecting the Past: Cultural Resource Management—A Personal Perspective, in PROTECTING THE PAST, supra note 12, at xvii, xviii-xx.

\textsuperscript{93} 16 U.S.C. §§ 469 to 469c-2 (1988). Reasonable costs for the survey, excavation, and salvage of sites and materials may be charged to federal licensees and permittees, as a condition to receipt of the license or permit. Such costs are to be treated for the purposes of compliance with this mandate as planning costs of the project and not as costs of mitigation. Id. § 469c-2 (1988).


\textsuperscript{96} Id. § 470c (1988).
ties Act. Some prosecutions were unsuccessful; others, though successful, resulted in minimal penalties. These decisions set the stage for enactment of the Archaeological Resources Protection Act of 1979 ("ARPA"). The primary provisions of ARPA criminalize the excavation, destruction, unauthorized removal, sale, and purchase of archaeological resources from federally owned or controlled land. ARPA also prohibits the interstate trafficking of archaeological resources obtained in violation of any state or local law.

Although ARPA was originally hailed by American archaeologists as the solution to the problems of illegal excavation and site destruction, it quickly became a source of considerable frustration, primarily because it took an additional four and one-half years before the various agencies responsible for promulgating uniform regulations to implement the Act completed their task. Many states have mirrored ARPA by enacting statutes asserting state owner-

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97 E.g., United State v. Diaz, 499 F.2d 113 (9th Cir. 1974) (reversing a conviction on the ground that the Act was unconstitutionally vague as applied to artifacts less than five years old).

98 E.g., United States v. Smyer, 596 F.2d 939 (10th Cir.), cert. denied, 444 U.S. 843 (1979) (affirming convictions, and distinguishing Diaz because the artifacts involved were approximately 800-900 years old). The defendants, experienced commercial pothunters, ultimately served only 90 days in jail. They also paid a civil fine of only $7000 to settle a subsequent civil suit, although the artifacts involved were worth considerably more. Rogers, supra note 11, at 65-66 n.120; see also United States v. Jones, 607 F.2d 269 (9th Cir. 1979) (permitting prosecution under general criminal theft and destruction of government property statutes), cert. denied, 444 U.S. 1085 (1980). In Jones, the defendants ultimately pleaded guilty under the subsequently enacted Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470ee (1988), and received relatively light punishments, including imprisonment ranging from one year to 18 months and fines of $1000 each. Rogers, supra note 11, at 67-68.

99 Pub. L. No. 96-95, 93 Stat. 721 (1979) (codified as amended at 16 U.S.C. §§ 470ee-470mm (1988)). For a discussion of the legislative history of ARPA, see Rogers, supra note 11, at 68, 69 nn.140-41. It is unclear whether ARPA actually repealed the Antiquities Act of 1906, although it impliedly repeals earlier provisions to the extent that they are inconsistent with ARPA. See Thomas 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. 883, 897 (1990) ("Although the 1906 Act was never formally repealed, it has been largely superseded by ARPA.").

100 16 U.S.C. § 470ee (1988). ARPA defines "archaeological resources" as "any material remains of past human life or activities which are of archaeological interest" and are at least 100 years old. Id. § 470bb (1988). The age requirement clarifies the ambiguity that the Ninth Circuit found fatal to the Antiquities Act but serves to limit ARPA's effectiveness.


102 Annetta L. Cheek, Protection of Archaeological Resources on Public Lands: History of the Archaeological Resources Protection Act, in Protecting the Past, supra note 12, at 33, 35-36 (noting that the regulations defining archaeological
ship of all archaeological resources found on land owned or controlled by
the state or its political subdivisions.\footnote{See \textit{infra} note 171 and accompanying text.}

Since the enactment of ARPA, two additional developments have
shaped our nation's treatment of its cultural past. The first of these came
in response to technological developments enabling salvors to recover
previously inaccessible sunken shipwrecks. In many of these cases, con-
siderable sums of money were invested, and even more considerable
sums of money were retrieved. This increased accessibility has produced
a three-way struggle among finders (or salvors), original owners or their
present representatives, and the relevant governmental authority in
whose territorial waters the shipwrecks are located. The conflict between
shipwrecks).} resulted in
transfers title to abandoned and embedded shipwrecks to the relevant
state government\footnote{43 U.S.C. § 2105(a)(1) (1988).} and abrogates the applicability of the law of finds
and of salvage.\footnote{\textit{Id.} § 2106(a) (1988). The United States Court of Appeals for the Seventh Cir-
cuit has upheld the constitutionality of the ASA's abrogation provisions. \textit{Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the "Seabird,"} 19 F.3d 1136, 1141-42 (7th Cir.), \textit{cert. denied,} 115 S. Ct. 420 (1994).}

The final element in the current regulatory regime owes its origin to
the Indian reburial movement, which developed in the 1970s and
obtained considerable recognition and political power in the 1980s.\footnote{See \textit{Riding In, supra} note 45, at 30. Through educational activities and political
action, the Indian reburial movement has achieved a greater degree of burial protection
for Native American grave sites. Since the 1970s, a growing number of states has
passed legislation aimed at preventing the future storage of disinterred Indian
remains in laboratories, universities, and other facilities. In 1986, the North Dakota
Historical Society was convinced to adopt a policy of reinterment of Indian remains
and returned about a thousand skeletal remains to tribes. \textit{Id.}} Native Americans and other aboriginal groups had suffered the desecra-
tion of their dead in the interests of science and the antiquities market for
over two hundred years. Laws criminalizing grave desecration had been
applied unequally and in violation of Native Americans' religious
rights.\footnote{See \textit{supra} note 76 and accompanying text; \textit{see also The Struggle to Protect
Indian Graves, supra} note 13, at 16 (quoting Chris Matson, a Cherokee, as saying, "If
I dig up the Jamestown settlers, I would be locked up. But if our ancestors are dug
resources were the most problematic); Rogers, \textit{supra} note 11, at 74-81 (discussing the
promulgation of ARPA regulations).} Public pressure finally prompted Congress in 1990 to enact the
Native American Grave Protection and Repatriation Act ("NAGPRA"). This statute requires federal museums and agencies to inventory Native American skeletal remains and associated grave artifacts and return them to the tribes with appropriate ethnic or cultural affinity upon request. NAGPRA also requires notification of appropriate tribal groups when graves are found on federal Indian tribal lands and establishes ownership rights to certain cultural objects found on federal or tribal lands. NAGPRA was inspired by and, in turn, served as the model for, comparable state legislation, which, however, varies considerably among the different states.

This history suggests that in the period following World War II, the archeological preservation movement evolved independently from the historical preservation movement. In the 1960s, a third movement—that for environmental protection—also developed. Many environmental protection statutes contained measures that augmented protections for cultural property. For example, the National Environmental Policy Act of 1969 ("NEPA") requires the federal government to prepare and consider impact statements when undertaking certain projects. These statements must take into consideration not only preservation of our natural and ecological heritage, but also our historic, cultural, and archeological resources. Other statutes with the primary goal of environmental up, it is considered archeology.


112 Id. § 3002(d)(1) (Supp. V 1993).

113 Id. § 3002(a) (Supp. V 1993).

114 See infra part III.C.2 (discussing state treatment of human burials and Native American archeological materials).


116 See, e.g., All Indian Pueblo Council v. United States, 975 F.2d 1437, 1446 (10th Cir. 1992) (considering the sufficiency of an environmental impact statement's assessment of a project's impact on cultural, archaeological, and historic resources, and religious sites); Lockhart v. Kenops, 927 F.2d 1028, 1034 (8th Cir.) (noting that NEPA regulations require consideration of a project's impact on nearby historic or cultural resources, sites listed or eligible to be listed on the National Register of Historic Places, and possible loss of significant scientific, cultural, or historical resources), cert. denied, 402 U.S. 863 (1991).

Although NEPA overlaps with other protective federal legislation, courts have held that federal agencies must comply with all the various protective statutes that might apply to a particular situation. See, e.g., Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 859 (9th Cir. 1982) (requiring compliance with both NEPA and NHPA);
This chronological sketch demonstrates that the purposes underlying preservation of Native American artifacts has changed over time. Although early protective legislation only promoted “responsible excavation of burial sites for the purpose of placing remains and antiquities in institutions for display and scientific study,” more recent legislation, in its emphasis on preservation and restitution, is born more out of respect for the rights of Native Americans and their cultures.

The rationales for our previous treatment of archaeological resources were based on goals that included the desire to expand and intensify settlement throughout the United States for political and military purposes, the desire to reward technological improvements, and the sociological desire to increase knowledge and understanding of the past in order to enhance our understanding of the present and thus promote a more informed citizenry. These goals were largely acknowledged as laudable by contemporary mainstream society, and it is not necessary to denigrate their appropriateness for earlier time periods. However, the influence of other preservation movements, which have taught us to conserve rather than to consume our environment, has now moved the focus of American archaeology away from exploration and excavation and toward conservation and preservation.

Although our objectives in protecting cultural property have evolved, the means of achieving that end have not. Even though the three protective movements described above have overlapping goals and ideals, our
approach to protection has not been unified. All of the protective legislation outlined above has been a reaction to what the public has valued at a given time. Because of the largely reactive nature by which the legal system has attempted to respond to threats of imminent destruction of our cultural past, we currently protect only what is already known and already valued. There are thus few safeguards in place for protecting cultural resources that are newly discovered or the value of which has not yet received public recognition. Additionally, because different governmental actors are involved, each responding to a different set of political pressures, much protective legislation has been splintered between federal and state authorities, and among various agencies of the same governmental entity. This makes enforcement difficult and results in wasteful duplication of resources. Though major federal legislation concerning environmental protection and historic preservation in the 1970s utilized both the carrot and the stick of federal funding to promote some degree of uniformity in state legislation, the lack of comparable incentives to create uniformity in protective legislation for archaeological resources has contributed significantly to the present ineffectiveness of preservation efforts.

This Article next presents a cross-sectional view of today's diverse legal treatment of archaeological resources. It then proposes and defends a unitary legal scheme that provides a coherent regime based on the new rationales and policy goals articulated above.

III. CURRENT LEGAL PROTECTION OF ARCHAEOLOGICAL AND CULTURAL RESOURCES IN THE UNITED STATES

The legal regime relating to archaeological resource protection is a complex web of laws derived from many different sources. Although some of this law involves statutes enacted to address archaeological resource protection directly, much of this body of law developed in response to other problems and policy concerns. To demonstrate the complexity of this tangled web of rules, this Part examines the primary legal doctrines that regulate archaeological finds and illustrates how different rules have evolved at different times in varying circumstances to resolve specific disputes and to advance particular policy objectives.

Two considerations, however, are often lacking from this body of law. First, explicit recognition of the value of finds for their historical and archaeological significance is often missing. Accordingly, there is a general failure to apply or fashion legal rules that would further this goal. Second, courts and legislatures often do not seem capable of recognizing that a single, unified set of legal rules is needed to provide protection for such materials even when they are found in widely varying circumstances.
A. Archaeological Finds on Land

1. The Common Law of Finds

The law of finds focuses primarily on previously owned property, as opposed to property that was never owned. Although the law of finds applies to objects found both on land and underwater, this Part focuses on the disposition of land-based finds. The law of finds will also be relevant to the subsequent discussion of objects found underwater and the particular problems that removal of human skeletal remains and associated grave artifacts pose.

Rules regulating the disposition of personal property are motivated primarily by the goal of reuniting the original owner with the object. Depending on an object's classification, this policy is furthered in some circumstances by awarding possession of the object to the finder and in other circumstances by awarding possession to the owner of the real property where the object was found. The policy is evidenced in some states by statutory "incentives." Although the finder is under a duty to report and perhaps even to turn in a found object to some municipal authority, a finder who has complied with applicable statutory requirements in good faith will be awarded ownership of the object if the owner does not reclaim it.119 When the original owner reclams the property, however, the property is generally returned.120 Initially, the party awarded possession does not have title, although such possession may become as valuable as title.121 The policy of permitting the finder to keep the object seeks primarily to provide notice of the find to the original owner's rights supersede those of the current possessor, whether the finder or real property owner, until the statute of limitations for recovery of personal property has run. Leanna Izuel, Comment, Property Owners' Constructive Possession of Treasure Trove: Rethinking the Finders Keepers Rule, 38 UCLA L. Rev. 1659, 1670-71 (1991). The original owner is generally allotted a specified period of time within which to claim the object; after the expiration of this time period, the finder may be awarded the object. See, e.g., Ohio Rev. Code Ann. § 737.31 (Anderson 1991) (giving the owner 30 days in which to reclaim lost property). For a general discussion of statutes of limitation applied to recovery of personal property, see Patty Gerstenblith, The Adverse Possession of Personal Property, 37 Buff. L. Rev. 119, 119 (1989).


120 A prior possessor also generally has a better claim than a finder or real property owner who is a subsequent possessor. Many statutes require that the finder of lost property make a claim of ownership upon turning in the property so as to estab-
owner or to otherwise enable the original owner to locate the property. Lesser policy goals include returning the object to public circulation, rewarding advances in technology that enable finders to retrieve objects, providing amusement to the public, and, in the case of the British version of treasure trove, enhancing the royal fisc.

The law of finds divides found personal property into five classifications: lost, mislaid, abandoned, and embedded property, as well as treasure trove. Each classification has its own distinct elements and its own mode of treatment. However, the initial classification can become quite problematic when different variables exist. These variables often have the effect of severely altering the “normal” mode of treatment appropriate for a particular found object.

Lost property is property with which the owner has involuntarilylish a record for the finder in case the original owner never appears. E.g., ILL. ANN. STAT. ch. 765, para. 1020/34 (Smith-Hurd 1993).

See, e.g., Paset, 378 N.E.2d at 1268 (stating that the principle purpose of the estray statute is “to encourage and facilitate the return of property to the true owner”). Such statutes generally place a duty on some municipal entity or the finder to attempt to provide notice to the original owner. See e.g., ILL. ANN. STAT. ch. 765, para 1020/28 (Smith-Hurd 1993) (requiring the county clerk to give notice “for 3 weeks successively in some public newspaper”; OR. REV. STAT. § 98.005 (1990) (requiring notice “to be published once each week for two consecutive weeks”). See generally Roman Krys, Treasure Trove Under Anglo-American Law, 11 ANOLO-Am. L. REV. 214, 230 (1982) (summarizing methods used to report finds and provide public notice of them).

See Izuel, supra note 120, at 1671 (“Commentators speculate that courts give the finder possession of a lost item as a reward for returning the item to circulation and an incentive to report the find.”). But see Favorite v. Miller, 407 A.2d 974, 977 (Conn. 1978) (rejecting the finder's contention that he should “reap the benefits for bringing to light the existence” of the head of a King George III statue because the finder's interest in excavating the head was purely economic).

According to Roman Krys, treasure trove is no longer considered a valuable source of revenue in Britain. The purpose of modern treasure trove law in England “is to ensure that findings be reported, so that objects of antiquarian value can be preserved for the enjoyment and educational value of the public.” Krys, supra note 122, at 216. To further this policy, England rewards finders of treasure trove “full antiquarian value” in exchange for the items. Id. at 231. On the other hand, failure to report a find promptly to the county coroner may result in loss of the reward or a fine and imprisonment. Id. at 232.

Some jurisdictions do not recognize all five categories. See, e.g., Campbell v. Cochran, 416 A.2d 211, 221 (Del. Super. Ct. 1980) (excluding “embedded” property); Schley v. Couch, 284 S.W.2d 333, 335 (Tex. 1955) (noting that Texas does not recognize the treasure trove classification).

One possible variable occurs if an object was stolen and then lost, mislaid, or abandoned. See, e.g., Campbell, 416 A.2d at 220 (noting that, under state law, a determination that the lost or mislaid money had originally been stolen would have resulted in its becoming the property of the state police retirement fund).
parted through neglect, carelessness, or inadvertence, and of whose whereabouts the owner has no knowledge. Of the five categories, only lost property involves an element of involuntariness. The finder of lost property acquires a complete right against all but the true owner. Because the owner does not know where to look for lost property, awarding possession of the object to the finder furthers the policy of putting the object back into circulation. More importantly, the prospect of gaining a recognized right to the property also encourages the finder to publicize the find, the only mechanism by which the original owner may be reunited with the object.

Certain "infractions" may cause the finder to lose the right to found property. For example, failure to undertake reasonable efforts to discover the true owner may constitute larceny. A finder who commits trespass in acquiring the property may lose the right to possession. Also, in some cases, if the finder finds the object while employed by the locus owner, the latter may be entitled to retain the object.

At common law, the finder of lost property has no duty to take possession of it, but the finder who takes possession is under a duty to keep the property safe and to surrender it to the true owner upon demand. See Campbell, 416 A.2d at 222 (explaining the relationship between the common law and statutory treatment of finder's duties with respect to found property).

127 Izuel, supra note 120, at 1670-71.
128 Campbell, 416 A.2d at 221.
129 Hendle v. Stevens, 586 N.E.2d 826, 834 (Ill. App. Ct. 1992) (holding that because they were not the original owners, the locus owners "lacked standing" to challenge finders' claim to possession of lost property); Paset v. Old Orchard Bank & Trust Co., 378 N.E.2d 1264, 1268 (Ill. App. Ct. 1978) (classifying found money as "lost" and recognizing the finder's right to possession as against the bank in which the money was found).

At common law, the finder of lost property has no duty to take possession of it, but the finder who takes possession is under a duty to keep the property safe and to surrender it to the true owner upon demand. See Campbell, 416 A.2d at 222 (explaining the relationship between the common law and statutory treatment of finder's duties with respect to found property).

130 See, e.g., Idaho v. Evans, 807 P.2d 62, 64 (Idaho 1991) (finder's failure to use all reasonable means of discovering the true owner may constitute larceny).
131 See, e.g., Favorite v. Miller, 407 A.2d 974, 978 (Conn. 1978) (holding that because a trespass was "neither technical nor trivial" the finder should be deprived of his rights to the head of a King George III statue); Bishop v. Ellsworth, 234 N.E.2d 49, 52 (Ill. App. Ct. 1968) (noting that if the property had been classified as lost, the finder would have forfeited claims to possession because of his trespass); Niederlehner v. Weatherly, 54 N.E.2d 312, 315 (Ohio Ct. App. 1943) (excluding the finder from group of claimants because of his trespass); Morgan v. Wiser, 711 S.W.2d 220, 223 (Tenn. Ct. App. 1985) (reclassifying property as embedded, rather than treasure trove, to further the public policy against trespass). Contra Groover v. Tippins, 179 S.E. 634, 636 (Ga. Ct. App. 1935) (awarding a finder treasure trove despite his trespass); but cf. Hendle, 586 N.E.2d at 832 (holding that minor children were not considered trespassers because the land appeared abandoned and the children were deemed to have a license to enter, thereby entitling them to maintain possession of their find).

132 Cf. Hurley v. City of Niagara Falls, 289 N.Y.S.2d 889 (N.Y. App. Div. 1968) (citing the rule under which employers have the rights of finders where property is
The second category is "abandoned" property. This is property to which the original owner has relinquished all right, title, claim, and possession with the intention of terminating ownership but without vesting ownership in any other person and without any intention of reclaiming it in the future.\textsuperscript{133} Unlike the owner of real property, an owner of personal property may abandon it by an act of relinquishment with the specific intent to do so.\textsuperscript{134} Courts consider such property to have returned to a "state of nature" and thus, as unowned property, subject to appropriation by the first person who reduces it to possession.\textsuperscript{135} Thus, unlike the other four categories of found property, the finder of abandoned property who appropriates its possession acquires absolute title to it, with no duties to the original owner.\textsuperscript{136} The finder of abandoned property, however, does bear the burden of proving the original owner's intent to abandon.\textsuperscript{137}

\textsuperscript{133} Izuel, \textit{supra} note 120, at 1672 (citing specialized equipment not removed within three years of the sale of a building as an example of abandoned property).

\textsuperscript{134} As one court has explained, "Not every physical separation of the person and the object . . . constitutes an abandonment of such property . . . . [W]here the defendant . . . puts a suitcase down and takes a few steps away . . . , the property is held not to have been abandoned." O'Shaughnessy v. Florida, 420 So. 2d 377, 378 (Fla. Dist. Ct. App. 1982) (citations omitted). The act of setting the object down implies a subjective intent to retrieve, the "antithesis of abandonment." \textit{Id.} at 379 (rejecting, nonetheless, a subjective standard of intent in favor of an objective test to determine whether one has abandoned property).

\textsuperscript{135} "Occupancy" or possession is considered one of the primary explanations of how property, whether real or personal, is first reduced to private ownership. \textit{See}, \textit{e.g.}, Rose, \textit{supra} note 22, at 74 ("For the common law, possession or 'occupancy' is the origin of property."). Such possession may be either actual or constructive in nature, and ownership based on possession can apply to a wide spectrum of types of property, including, for example, wild animals, as in Pierson v. Post, 3 Cai. Cas. 175 (N.Y. Sup. Ct. 1805), as well as space on the spectrum of radio frequencies, and fugitive resources, such as groundwater, oil, and gas. Rose, \textit{supra} note 22, at 73-76 (noting that courts often draw analogies between reducing fugitive resources to property for the first time and capturing wild animals).


\textsuperscript{137} The court must examine the words used, the conduct exhibited by the owner, the condition of the property, and the circumstances and length of time for which the owner has relinquished the property in determining the intent to abandon. \textit{O'Shaughnessy}, 420 So. 2d at 379 (deriving this standard from a Fourth Amendment context in determining whether an owner had a reasonable expectation of privacy). Classifying property, especially money, as abandoned is rarely appropriate, probably because of the belief that people do not normally abandon anything of value. \textit{See}, \textit{e.g.}, Foster v. Fidelity Safe Deposit Co., 174 S.W. 376, 378 (Mo. 1915) (holding that money found lying on the table in a safe deposit examination room was put down and forgotten, rather than abandoned). \textit{But see} Florida v. Green, 456 So. 2d 1309, 1312-13 (Fla. Dist. Ct. App. 1984) (holding that money stolen from an owner when he was
The third category, "mislaid" property, is property that the owner has intentionally hidden but for some reason has been prevented from returning to reclaim. The means of accomplishing the policy of reunification in this situation differs from that for lost property. Here, the original owner presumably knows or will remember where the property is, and the policy of reunification is furthered by allowing the real property owner to retain possession. The finder must turn over the property to the owner of the premises where it was found. The owner then has the duty to protect the property and to relinquish it if reclaimed by the original owner, who retains superior title. Of the five categories, found objects are most likely to be classified as mislaid. This category is arguably the most difficult to understand, and the distinction between lost and mislaid property is sometimes blurred.

Courts also award possession of items belonging to the fourth category, "embedded" property, to the real property owner, but for different reasons. "Embedded" property is any property, not made of gold, silver, or their paper equivalents, found buried or embedded in the ground. Although similar to lost property, embedded property is given to the real property owner in recognition of the real property owner's expectation of constructive possession of everything contained on and below the surface unconscious was nonetheless abandoned when the owner failed to reclaim it from the police station within the statutory seven-year period; even though the owner did not demonstrate a specific intent to abandon), appeal dismissed, 466 So. 2d 217 (Fla. 1985). Issues concerning abandoned property often arise in both the maritime context and the grave context and are considered infra parts III.B-C.

138 Izuel, supra note 120, at 1671-72.
139 Campbell, 416 A.2d at 222.
140 The distinction depends upon whether the original owner unconsciously dropped the property or intended to place it deliberately. Property that is deliberately put down and then forgotten is deemed to have been left in the care of the owner of the premises, who then has a duty to act as bailee of the property. E.g., Loucks v. Gallogly, 23 N.Y.S. 126, 129 (Albany City Ct. 1892) (classifying money found lying on a bank desk as mislaid and not lost); Lawrence v. State, 20 Tenn. (1 Hum.) 228, 231-32 (1839) (holding that a pocketbook found lying on a table in a barbershop had been deliberately put down and forgotten and was therefore not lost); see also Jackson v. Steinberg, 200 P.2d 376, 378 (Or. 1948) (holding that money found in hotel guest room was not lost, because its concealment indicated an intent to reclaim).
141 Izuel, supra note 120, at 1672-73 (using an Indian canoe found partially embedded in a river bank as an example of embedded property).
of the land.\textsuperscript{142} The classification of property as "embedded" may depend on the extent to which it is buried in the soil and is thus sometimes arguably misclassified as mislaid; the distinction is not significant, however, because possession of both mislaid and embedded property is given to the real property owner.\textsuperscript{143} The other frequent confusion is between embedded property and treasure trove; both are found buried in the ground and the distinction is based solely on the object's composition.\textsuperscript{144} With all four of these types of property, a finder who trespasses to recover property will lose it, even if otherwise entitled to it under applicable law, as a punishment for the trespass.\textsuperscript{145}

The fifth and most problematic category of personal property is treasure trove. The concept of treasure trove had its origins in medieval English law and initially applied to treasure left buried by the Romans when they were expelled from Britain.\textsuperscript{146} Treasure trove includes only gold and silver objects\textsuperscript{147} intentionally hidden in the ground or in a structure by an

\textsuperscript{142} Any property found on private land "is and always has been in the constructive possession of the owner of said premises and in a legal sense the property can neither be mislaid nor lost." Bishop v. Ellsworth, 234 N.E.2d 49, 52 (Ill. App. Ct. 1968) (citing Pyle v. Marine Bank, 70 N.E.2d 257 (Ill. App. Ct. 1946)); see also Allred v. Biegel, 219 S.W.2d 665, 666 (Mo. Ct. App. 1949) (holding that an ancient Indian canoe found partially embedded in flooded property belonged to the real property owner); Ferguson v. Ray, 77 P. 600, 603 (Or. 1904) (holding that gold-bearing quartz embedded in the soil, with evidence of a cloth sack found around it, was not lost or mislaid and thus belonged to the real property owner and not the finder).

\textsuperscript{143} See, e.g., Favorite v. Miller, 407 A.2d 974, 977 (Conn. 1978) (declining to classify a partially embedded head of a statue of King George III because the real property owner would receive the statue in either case); Bishop, 234 N.E.2d at 52 (awarding money found in a partially embedded bottle to the locus owner without classifying it).

\textsuperscript{144} Favorite, 407 A.2d at 978 n.2 (noting that courts traditionally have narrowly defined treasure trove as "any gold or silver in coin, plate, or bullion, found concealed in the earth or in a house or other private place").

\textsuperscript{145} Izuel, supra note 120, at 1673; e.g., Favorite, 407 A.2d at 977-78 (reasoning that courts should not allow a wrongdoer "to profit by his wrongdoing").

\textsuperscript{146} Izuel, supra note 120, at 1666-69. The American and British law of treasure trove differs from the law of most other nations. See generally id. at 1673-75 (cataloguing the international treatment of treasure trove).

\textsuperscript{147} E.g., Ferguson v. Ray, 77 P. 600, 601 (Or. 1904) (holding that gold-bearing quartz did not constitute treasure trove). In a recent British case, a court refused to classify a hoard of almost 8000 third-century Roman coins as treasure trove because its silver content ranged from less than 1% to approximately 18%. Attorney General of the Duchy of Lancaster v. G.E. Overton (Farms) Ltd., [1982] Ch. 277 (Eng. C.A. 1981) (requiring a minimum silver content of 50%). Several critics have argued that this requirement is too restrictive and leads to the division of single archaeological finds between the Crown and the landowner. E.g., Norman E. Palmer, Treasure Trove and Title to Discovered Antiquities, 2 Int'l J. Cultural Prop. 275, 278-79.
original owner who has been prevented from returning to reclaim it. Under British law, treasure trove belongs to the Crown. Today, however, the rationales of increasing royal revenues and impressing British subjects are of questionable logic.

This rule of treasure trove was abandoned in the United States after the Revolution. Instead of abandoning entirely the distinct treatment of treasure trove, however, the common law has retained the distinction and awards treasure trove to the finder, in many cases even if the finder has committed trespass in the process of obtaining it. Many scholars and some courts have criticized both versions of treasure trove law, particularly to the extent that in the United States it encourages and rewards trespass. Confusion over the law and fear of unfavorable resolution of

(1993) (arguing that such a division diminishes the historical value of the collection as a whole).

148 Palmer, supra note 147, at 279-81 (discussing the difficulties of establishing that the owner had an intent to retrieve the object at the time of concealment, and noting that this requirement excludes a number of antiquarian finds from the category of treasure trove).

149 The finder of treasure trove must report the find to the local coroner's office, which then holds an inquest to make a determination of the find's character. If the find is treasure trove, the coroner may order its placement in either the British Museum or the National Museum of Wales, depending on the location of the find. Although under no legal obligation to do so, the museum generally gives the finder a reward, the amount of which is based on the museum's valuation of the treasure trove. If the museum does not wish to retain the object, it is returned to the finder. The landowner does not have any interest in the find, although were it not for the classification of the object it would have belonged to the landowner. The reward to the finder is meant to encourage the prompt and proper reporting of the find to the government, and failure to do so may result in a reduced reward or none at all. Id. at 281-83.

150 Izuel, supra note 120, at 1668-69 (noting that these rationales disappeared after England gained financial and political stability). Today, the notion that treasure trove serves either to increase the royal revenue or to increase respect for the Crown is dubious because the finder is generally compensated for any treasure trove promptly and voluntarily relinquished.

151 Izuel, supra note 120, at 1669 (noting that “most states adopted a ‘finders keepers’ rule to determine who was entitled to discovered treasure trove”).

152 Id. at 1669-70.

153 Izuel argues that the current majority rule in the United States is economically inefficient. Id. at 1690-92. Although the rule encourages finders to make their discoveries known and provides entertainment to the community observing the finder's adventurous deeds[, these] benefits are outweighed . . . by the costs the finders keepers rule imposes on society by forcing the landowner to guard his land and by giving the finder the incentive to outwit the landowner.

Id. at 1690. Izuel urges adoption of a constructive possession rule that would award all treasure trove to the owner of the real property in which the treasure trove is located. Id. at 1692-1702 (arguing that adoption of this rule would allow courts to
disputes over the disposition of concealed objects may discourage finders from reporting discoveries.\textsuperscript{154} State law also varies as to whether trespassing finders lose rights to possession of the treasure trove.\textsuperscript{155}

In Britain, treasure trove law sometimes serves as a tool for archaeological resource protection by awarding at least those archaeological finds made of gold and silver to the Crown in order to ensure their preservation.\textsuperscript{156} Some critics have argued in favor of an expansion of the English definition of treasure trove to include all objects of archaeological or cultural value, regardless of composition, to provide an incentive for the finder to report the discovery and allow objects to be appropriately preserved.\textsuperscript{157} Scholars view treasure trove law as a primary mechanism for accomplishing comprehensive archaeological resource protection, if the definition can be broadened. Reform legislation has been proposed in England that includes elimination of the requirement of the original owner's intent to reclaim the object, reduction in the amount of precious metal content required, and inclusion of all objects within a single corpus if any object fits the definition of treasure trove.\textsuperscript{158} Scottish law now extends treasure trove to include all objects of antiquity.\textsuperscript{159} The Danish version of treasure trove law holds that all archaeological finds of any importance qualify as treasure trove and belong to the Crown, but all finders are rewarded, not necessarily by the full market price, but with an

\textsuperscript{154} Because of the lack of consistent rationale for the treasure trove doctrine, Texas has explicitly rejected it. All found property, regardless of its content, is classified as either lost or mislaid. Schley v. Couch, 284 S.W.2d 333, 335 (Tex. 1955).

\textsuperscript{155} Compare Groover v. Tippins, 179 S.E. 634, 636 (Ga. Ct. App. 1935) (awarding 37 pounds of gold dust and bullion to the trespassing finder, stating that “this is not a case of trespass, but of trover”) with Morgan v. Wiser, 711 S.W.2d 220, 222-23 (Tenn. Ct. App. 1985) (classifying gold coins as embedded property, thus awarding them to the locus owner rather than the trespassing finder, and stating that the treasure trove doctrine “invites trespassers to roam at large over the property of others with their metal detecting devices and to dig wherever such devices tell them property might be found”). The trespassing finder in England still seems entitled to the reward, although the reward will be reduced or not paid if the finder delays in reporting the discovery. See Palmer, \textit{supra} note 147, at 283-86 (discussing several recent cases discussing misconduct of treasure trove finders).

\textsuperscript{156} Palmer, \textit{supra} note 147, at 278-79 (noting that the Crown receives objects that are substantially composed of gold or silver and the real property owner or finder receives objects of marginal or no precious metal content).

\textsuperscript{157} \textit{E.g.}, Krys, \textit{supra} note 122, at 216 (“English courts should adopt a broader definition of treasure trove that would include all objects of antiquarian value, of whatever materials, so that all objects would have to be reported and the preservation of historical relics would be more secure.”).

\textsuperscript{158} Palmer, \textit{supra} note 147, at 292-94.

\textsuperscript{159} \textit{Id.} at 311 n.49.
amount that is not subject to taxation.\textsuperscript{160}

With the exception of human skeletal remains and their associated grave goods,\textsuperscript{161} the common law of finds would ordinarily categorize archaeological resources as embedded property and assign them to the land owner. The government would thus become the owner of archaeological resources located on public land. Circumstances in which the archaeological resource was not entirely embedded or would qualify as treasure trove might result in the finder, even a trespassing finder, obtaining possession.

2. Statutory Treatment

The federal government, as well as every state government, has to some extent abrogated the common law of finds as it pertains to public lands. ARPA, the primary federal statute, abrogates the law of finds in that it specifies that “resources which are excavated or removed from public lands will remain the property of the United States.”\textsuperscript{162} ARPA also requires a permit for excavation and removal of archaeological resources from federal lands\textsuperscript{163} and criminalizes the interstate commercial transport of artifacts obtained in violation of state or local law.\textsuperscript{164}

\textsuperscript{160} Information provided by Norton Axboe, National Museum, Copenhagen (posting on AIA-L Bulletin Board, Oct. 28, 1994).

\textsuperscript{161} In England, the famous Sutton Hoo Viking treasure, part of an ancient burial, was not considered treasure trove, because the true owner had abandoned it rather than hiding it with an intent to reclaim it. Izuel, supra note 120, at 1668 n.48. One American court has rejected the idea that objects associated with a human burial are to be treated as abandoned property. See Charrier v. Bell, 496 So. 2d 601, 604-05 (La. Ct. App.) (relying in part on French civil law and stating that “[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”), cert. denied, 498 So. 2d 753 (La. 1986).

\textsuperscript{162} 16 U.S.C. § 470cc(b)(3) (1988) (requiring that such property “be preserved by a suitable university, museum, or other scientific or educational institution”).

\textsuperscript{163} Id. § 470ee(a) (1988).

\textsuperscript{164} Id. § 470ee(c) (1988). The United States Court of Appeals for the Seventh Circuit has held that ARPA criminalizes the transport not only of artifacts obtained in violation of local statutes aimed exclusively at the protection of archaeological artifacts, but also of artifacts obtained in violation of general trespass and conversion statutes. United States v. Gerber, 999 F.2d 1112 (7th Cir. 1993) (holding that a violation of ARPA requires violation of a state law that protects archaeological objects, but that the law can have a purpose broader than just protection of artifacts), cert. denied, 114 S. Ct. 878 (1994). In fact, Judge Posner implied that state statutes that specifically prohibit removal of archaeological objects without permission of the landowner are redundant because such activity is already prohibited under state trespass and conversion laws. Id. at 1116 (“A law that comprehensively protects the owner of land from unauthorized incursions, spoliations, and theft could well be thought to give all the protection to buried antiquities that they need.”).
Although ARPA has withstood constitutional challenge, the second significant federal statute, NAGPRA, is primarily concerned with burial goods and human remains, which are fundamentally different from the more ordinary types of property usually subject to the law of finds and which therefore raise very different issues. NAGPRA, however, does contain provisions relating to ownership of "objects of cultural patrimony" that abrogate the common law of finds to some extent. The statute provides that the affiliated tribal groups on whose land the items were found have priority, followed by those tribes with the closest cultural affinity. If the cultural affiliation of the objects is unknown, ownership is to be awarded to the tribe that demonstrates the strongest cultural relationship, or to the tribe that has been judicially recognized as "aboriginally occupying the area in which the objects were discovered."

Like the federal government, state governments explicitly reserve to themselves, or to an agency or commission, the exclusive ability to regulate, explore, excavate, and survey any historic or archaeological resources found on public land, and to collect any items of historical, archaeological, or paleontological interest found on publicly owned or...

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165 United States v. Austin, 902 F.2d 743 (9th Cir.) (rejecting overbreadth and vagueness challenges), cert. denied, 498 U.S. 874 (1990).
166 See, e.g., United States v. Ashford, No. 84-059 (D. Wyo. 1984); United States v. Perkins, No. 83-CR-101 (D. Colo. 1983); United States v. Jaques, No. 83-129FR (D. Or. 1983), aff’d, 753 F.2d 1084 (9th Cir. 1984), cert. denied, 470 U.S. 1087 (1985); United States v. Bender, No. 81-119BE (D. Or. 1981); United States v. Shumway, No. 83-5-W (D. Utah 1979). In these cases, prosecution under ARPA failed either because the definition of archaeological site or archaeological resource was considered too vague or because the artifacts involved could not be proven to be more than 100 years old. Prosecutions based on violations of other federal statutes for destruction or theft of government property, particularly 18 U.S.C. § 1361 (1988), and the National Stolen Property Act, 18 U.S.C. § 2314 (1988), however, have been more successful. These cases and statutes are discussed in Rogers, supra note 11, at 82-86.
167 An object of "cultural patrimony" is one "having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual." 25 U.S.C. § 3001(3)(D) (Supp. V 1993).
168 Id. § 3002(a) (Supp. V 1993). This may not be as great an abrogation as first appears. The law of finds mandates that the finder yield possession to the original owner. This statute may thus be viewed as a legislative declaration of the identity of that original owner.
169 Id.
170 The issues raised by the disposition of paleontological resources are comparable to those raised by archaeological resources. The relationship between historical and archaeological resources and modern cultural groups, however, generally provides sufficient basis for distinct treatment of archaeological and paleontological
controlled land. In addition to an historic preservation commission, archaeological commission, or both, many states have also created an office of the state archaeologist, whose purpose is to coordinate, encourage, and preserve the public's understanding of state archaeological resources. No exploration, excavation, or disturbance of archaeological resources. See David J. Lazerwitz, Note, Bones of Contention: The Regulation of Paleontological Resources on the Federal Public Lands, 69 Ind. L.J. 601, 605-06 (1994) (noting some of the differences between archaeological and paleontological resources). Paleontological resources thus fall outside the scope of this study and are not explicitly considered here.

For examples of state legislation, see La. Rev. Stat. Ann. § 41:1605(b) (West 1993) (stating that no person may "take, alter, damage, destroy, or excavate on state-owned lands" without a permit and that permits may be issued only for "purely scientific and educational" purposes); R.I. Gen. Laws § 42.45.1-4(a) (1993) (reserving to the state the "exclusive right and privilege of field investigation on sites owned or controlled by the state . . . , in order to protect and preserve archaeological and scientific information, matter, and objects"); S.D. Codified Laws Ann. § 1-20-25 (1992) (stating that archaeological information and objects derived from state lands are the property of the state and shall be used for scientific or educational purposes). But see Alaska Stat. § 41.35.020 (1993) (subjecting the state's right to title of historic, prehistoric, and archaeological resources to the rights of persons of aboriginal descent).

The primary duties of such commissions typically include monitoring the discoveries of various state cultural resources, maintaining lists of sites that have been or should be designated as historical sites, recommending sites for acquisition by the state, conducting surveys of the state's historical and archaeological sites, promoting and increasing knowledge and understanding of the history of the state, and compiling and filing an annual report to the governor or some other appropriate official. See, e.g., Del. Code Ann. tit. 7, § 5401 (1991) (assigning extensive duties to the department of state to sponsor, encourage, or directly engage in archaeological research as well as to enforce the laws regulating archaeological sites); Ohio Rev. Code Ann. § 149.30 (Anderson 1994) (allowing the Ohio General Assembly to appropriate funds to the not-for-profit Ohio historical society, established in 1885, to carry on historical and archaeological functions); Vt. Stat. Ann. tit. 3, § 2473 (1985) (creating the division of historic preservation within the agency of development and community affairs); Wis. Stat. Ann. §§ 44.01, 44.22(6) (West 1987) (establishing the state historical society of Wisconsin as a corporation with historic preservation as one of its functions).


In some states, the state archaeologist has additional duties. In Iowa, the state archaeologist is responsible for reinterring discoveries of ancient human remains and establishing a cemetery for such reburials, Iowa Code Ann. §§ 263B.7, 263B.8 (West Supp. 1994), and for locating and excavating archaeological sites, id. § 263B.2 (West Supp. 1994). In Florida, the state archaeologist also has extensive duties regarding
logical resources located on public land may occur without permission from the appropriate governmental agency. The appropriate agency or the state archaeologist generally has authority to grant licenses or permits to qualified individuals to conduct such explorations, and to establish reporting and other requirements.

the care and treatment of human burial remains and identification of such remains with existing cultural or ethnic groups. Fla. Stat. Ann. §§ 872.05(4)-(8) (West 1994); see also Okla. Stat. Ann. tit. 21, § 1168.5 (West Supp. 1995) (allowing the state archaeologist to designate a repository for curation of unclaimed skeletal remains or burial furniture for scientific purposes); Wis. Stat. § 44.47(3)(b) (West Supp. 1994) (providing that one of the duties of the state archaeologist is to encourage the preservation of archaeological sites on privately owned property).


Statutes differ considerably in specificity regarding the procedures and standards to be utilized for the exploration and excavation of sites located on public land. Some statutes, for example, merely limit the purposes for which a permit may be granted. E.g., Del. Code Ann. tit. 7, § 5302 (1991) (mandating that archaeological survey and excavation be carried out only for the "benefit of reputable museums, universities, colleges or other recognized scientific institutions, with the view to increase knowledge of such objects"); Mont. Code Ann. (1993) § 22-3-432(2)(a) (emphasizing that permits are to be granted to reputable museums and scientific and educational institutions "with a view toward dissemination of knowledge about cultural properties"). Some statutes simply delegate to the appropriate agency authority to promulgate regulations for the issuance of permits. E.g., Cal. Pub. Res. Code Ann. § 5020.4 (West Supp. 1995) (providing that the state historical resources commission may adopt guidelines for reviewing applications for excavation of submerged historical resources); id. § 5024.6(k) (West Supp. 1995) (state office of historical preservation may do the same); id. § 5020.5 (West Supp. 1995) (state historical resources commission may develop criteria for determining which sites should be excavated).

Some state legislation, however, is more comprehensive and specific in establishing permit requirements. For example, the Maine legislation specifies the form of a permit application and the possible contents of the permit, including the required presence of a state representative at the site, the type of artifacts to be removed, and grounds for revocation of the permit. Me. Rev. Stat. Ann., tit. 27, § 374(2)-(4) (West 1992) (outlining the procedure for obtaining a permit, the conditions the commission may impose on the granting of a permit, and the actions that warrant permit revocation). Other statutes establish qualifications for the permit holder, explanation of the method of excavation, e.g., Conn. Gen. Stat. Ann. § 10-386(a) (West Supp. 1994) (requiring the applicant to submit evidence of qualifications, including experience, training, and knowledge), and requirements for reporting of the results of the investigation, e.g., Mont. Code Ann. § 22-3-432(2)(b) (1993) (stating that an antiqui-
In addition, virtually every state government has declared its right to ownership and control of any archaeological objects found on publicly owned or controlled land. One of the broadest statements of such ownership rights is found in the Colorado statute, which states:

The state of Colorado reserves to itself title to all historical, prehistorical, and archaeological resources in all lands, rivers, lakes, reservoirs, and other areas owned by the state or any . . . political subdivision of the state . . . . [These] resources shall include all deposits, structures, or objects which provide information pertaining to the historical or prehistorical culture of people within the boundaries of the state of Colorado, as well as fossils and other remains of animals, plants, insects, and other objects of natural history within such boundaries.\(^\text{176}\)

The Colorado statute is noteworthy not only for its broad definition of protected resources but for the specification of ownership of resources found in submerged areas as well as on land. A few states do permit individuals to retain archaeological objects found on public land, although various restrictions may be imposed.\(^\text{177}\) Some states also allow those who perform authorized excavations to retain a portion of the objects they recover as a form of compensation.\(^\text{178}\) On the other hand,

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\(^\text{176}\) COLO. REV. STAT. § 24-80-401(1) (West Supp. 1994); see also FLA. STAT. ANN. § 267.061(1)(b) (West Supp. 1994) (declaring that “all treasure trove, artifacts, and such objects having intrinsic or historical and archaeological value which have been abandoned” belong to the state); N.H. REV. STAT. ANN. § 227-C:6 (1989) (reserving title to the state of all historic resources, except for human remains, found on state-owned or state-controlled land and waters); OR. REV. STAT. § 358.920(4)(a) (1993) (requiring archaeological objects found on public land to be delivered to the state, which acts as steward of the objects).

\(^\text{177}\) E.g., IND. CODE ANN. § 14-3-3.4-13 (West Supp. 1994) (exempting from the archaeological protection statute the collection of “any object (other than human remains) that is visible in whole or in part on the surface of the ground, regardless of the time the object was made or shaped”); MINN. STAT. ANN. § 138.37(1) (West 1994) (allowing a non-state archaeologist to be custodian of objects and data collected at a state archaeological site, but requiring reversion to the state if “the custodian is not properly caring for them or keeping them conveniently available for study”).

\(^\text{178}\) See MISS. CODE ANN. § 39.7.17 (1990) (permitting a private salvor under contract with the state to obtain “fair compensation . . . in terms of a percentage of the reasonable cash value of the objects recovered, or . . . of a fair share of the objects recovered”). The fair share is determined by the relevant state agency, while the reasonable cash value may be determined by expert appraisal when the contract provides. \textit{Id.} The state agency may also purchase such objects from the salvor or
some states entirely prohibit the possession, sale, or other disposition of objects recovered from state lands or prevent their removal from the state.\textsuperscript{179}

Except under very limited circumstances generally relating to human burials, neither the federal government nor any state government has attempted to regulate the disposition of archaeological resources discovered on private land without the consent of the landowner.\textsuperscript{180} A few states have, however, abrogated the rights of a finder who has committed trespass in recovering lost property or treasure trove.\textsuperscript{181}

The balancing of the original owner's rights in cultural property and the public's interest in the knowledge that can be gained from that property will always depend on the particular circumstances of the find. What is clear is that the interests of the finder and the real property owner have always been contingent on a failure to locate the original owner.\textsuperscript{182} Thus,

\begin{itemize}
  \item Permittee or the agency may grant temporary custody of the objects to individuals or institutions that advance money used to purchase the objects. Such objects must be made available to the public and may not be removed from the state without agency permission. \textit{Id.} § 39-7-23 (1990).
  \item \textit{E.g.}, \textsc{Colo. Rev. Stat.} § 24-80-405(1)(f) (West Supp. 1994) (allowing protected resources to be removed from Colorado on a loan basis only); \textsc{Conn. Gen. Stat. Ann.} § 10-390(b) (West Supp. 1994) (forbidding a person to "sell, exchange, transport, receive or offer to sell, any archaeological artifact or human remains collected, excavated or otherwise removed from state lands or a state archaeological preserve"); \textsc{Ohio Rev. Code Ann.} § 149.52 (Anderson 1994) (making the sale, offer for sale, or possession of any artifacts removed from an archaeological preserve a misdemeanor).
  \item The federal statutes outlined above only address resources found on federal or tribal lands. For examples of state statutes, see \textsc{Alaska Stat.} § 41.35.100 (1993) (prohibiting historic, prehistoric, or archaeological remains from being excavated or removed without written approval of the owner); \textsc{Md. Ann. Code art. 83B, § 5-621(b) (1991)} (allowing the owner of private land to perform excavation or any other activity without limitation by the protective statute); \textsc{Okla. Stat. Ann. tit. 53, § 361 M (West 1991)} (discouraging, but not prohibiting, "archaeological excavations on privately owned lands . . . [outside] . . . the spirit and authority of [the] statute"); \textsc{Tex. Nat. Res. Code Ann.} § 191.094(a)-(b) (West 1993) (allowing the antiquities committee to designate an archaeological site as a landmark but requiring the landowner's consent for such designation to be valid). Alabama seems unusual in that it has apparently declared the state the owner of all objects found, even those found on private land, but does not allow excavations to be conducted without the landowner's consent. \textsc{Ala. Code §§ 41-3-1, 41-3-3 (1991)}.
  \item \textit{E.g.}, \textsc{Ark. Code Ann.} § 13-6-307 (Michie 1987) (making it an act of trespass and a misdemeanor to remove any artifacts from private land without the owner's consent); \textsc{N.M. Stat. Ann.} § 18-6-10(B) (Michie 1991) (making it a trespass and misdemeanor to remove any cultural properties without the landowner's prior permission).
  \item The policy justifications for awarding naturally occurring resources, such as underground water, oil, and gas, are quite different. Unlike archaeological and histor-
although the finder and real property owner have traditionally been accorded cognizable property rights in such objects, their rights are in fact limited to possession either for the purpose of increasing the original owner's chances of locating the object or, as in the case of abandoned property, in default of any owner. In light of increasingly powerful notions of the general public interest in archaeological resources and of group ownership of cultural property such as those embodied in NAGPRA, finders and landowners may no longer have as strong a claim to this type of property as do cultural groups.\textsuperscript{183}

The federal government and several states have recently modified their approach to the disposition of certain categories of archaeological resources, including shipwrecks, human skeletal remains, and associated funerary, grave, or religious artifacts. As mentioned above, these modifications have come in response to specific issues that aroused considerable public interest and pressure and have resulted in specific treatment of these two categories. This development of special legal treatment for these two categories of archaeological resources has resulted in further fracturing of what should be a unitary, cohesive system to promote the protection of archaeological resources.

B. The Law Governing Submerged Archaeological Resources

The legal rules discussed in the last section are modified if the object is found submerged in water, so that the object becomes subject to the law of admiralty, which is comprised of both the law of salvage and the law of finds.\textsuperscript{184} As with the common law of finds, the policies for this set of legal resources, this category of resources involves no prior ownership, is entirely fungible, and carries no value other than a purely economic one. Whether one's public policy justification is premised on conservation or exploitation goals, these goals are advanced by assignment of these resources to private property ownership, in which case the owner of the real property where the resource is located is the most obvious choice based on his or her constructive possession of the resource. See, e.g., Rose, supra note 22, at 75 (describing “fugitive” resources as subject to the law of capture or first possession in that they are “being reduced to property for the first time” and not subject to prior ownership).

\textsuperscript{183} Cf. Singer & Beerman, supra note 18, at 244 (portraying property rights as responsive to political and sociological shifts).

\textsuperscript{184} See Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed To Be the SB “Lady Elgin,” 746 F. Supp. 1334, 1345 (N.D. Ill. 1990) (stating that “the law of finds and the law of salvage are significant elements of traditional maritime law”), rev'd on other grounds, 941 F.2d 525 (1991). Many shipwrecks are located in international waters and their disposition may thus be subject to international treaties and conventions. For an analysis of the law of different nations and of international law concerning historic shipwrecks, see Sarah Dromgoole & Nicholas Gaskell, Who Has a Right to Historic Wrecks and Wreckage? 2 INT'L J. CULTURAL PROP. 217 (1993) (arguing that the United Kingdom should adopt a broad but well-defined law asserting rights over historic wrecks found in both national and international waters until a
rules make good sense in the context for which they were developed, but these justifications disintegrate when applied to a modern archaeological context.

1. Traditional Maritime Salvage Law

The Constitution creates original federal jurisdiction over maritime and admiralty law, whereby the federal courts have traditionally determined the disposition of shipwrecks and associated objects. According to maritime and admiralty law, either the law of salvage or the law of finds may apply, depending on an initial determination of whether the owner of the ship intended to abandon it. The law of finds will apply if the owner is deemed to have abandoned the ship and its contents. Otherwise, the law of salvage will apply. These two bodies of law, however, reflect very different goals and provide different incentives to the parties concerned. Generally, courts prefer the law of salvage

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185 U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."); see also 28 U.S.C. § 1333(1) (1988) (granting federal district courts exclusive original jurisdiction over admiralty and maritime cases).

186 The Supreme Court has stated that the purpose of the uniform system of federal admiralty jurisdiction is "to place admiralty and maritime law under national control because of its intimate relation to navigation and to interstate and foreign commerce." Panama R.R. v. Johnson, 264 U.S. 375, 386 (1924); see also Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 566 (5th Cir. 1981) ("Claims arising out of salvage operations—efforts to rescue or recover ships disabled or abandoned at sea or to retrieve their cargo—are, unquestionably, within the admiralty jurisdiction of the federal courts."); H.R. REP. No. 514, supra note 104, pt. 2, at 2, reprinted in 1988 U.S.C.C.A.N. at 371 (acknowledging that traditionally "Federal district courts have [had] original jurisdiction over all admiralty and maritime cases . . . includ[ing] claims for the salvage of abandoned shipwrecks"); Peter Tomlinson, Comment, "Full Fathom Five": Legal Hurdles to Treasure, 42 EMORY L.J. 1099, 1118-19 (1993) (arguing that because federal courts have traditionally had admiralty jurisdiction over abandoned shipwreck litigation, states should be excluded from hearing these issues).

187 See Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 468 (4th Cir. 1992) (rejecting application of the law of finds and utilizing the law of salvage because an owner was determined not to have abandoned a shipwreck), cert. denied, 113 S. Ct. 1625 (1993).

188 See id. at 461 ("Finds law is applied to previously owned sunken property only when that property has been abandoned by its previous owner.").

189 Id. at 464 ("[W]hen sunken ships or their cargo are rescued from the bottom of the ocean by those other than the owners, courts favor applying the law of salvage over the law of finds.").

190 Abandoned property is treated as returned to the state of nature with no prior owner. Thus, the first person to find or possess the property gains full title. On the
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because it is viewed as discouraging competition and secrecy and encouraging the preservation of life and property. Because a court's initial determination of the owner's intent to abandon will have a significant impact on the disposition of the property, a court may make the determination of intent based on the court's desired outcome.

a. Abandonment

As in the case of property found on land, the conclusion that a shipwreck has been abandoned is not easily reached. Abandonment consists of more than the simple desertion of property, and the mere lapse of time and nonuse of a ship are not sufficient to constitute abandonment. Because admiralty law adheres to the belief that items lost at sea were involuntarily taken from their owner by natural forces, courts rely on the presumption that title to property lost at sea remains with the original owner. To show abandonment, therefore, the finder bears the burden

other hand, property that is not abandoned, but rather considered lost at sea, does have an identifiable owner who only involuntarily lost the object. Hence the law of salvage generally encourages a person in a position to save the property to do so by adequately rewarding the salvor. See generally Columbus-America Discovery Group, 974 F.2d at 460 (explaining why courts prefer the law of salvage over the law of finds); 3A M. NORRIS, BENEDICT ON ADMIRALTY § 158, at 11-15 to 11-18 (7th rev. ed. 1991) (describing how the law of finds differs from the law of salvage).

In Hener v. United States, a federal district court summarized the prevalent view of the conflicting policies:

The law of finds is disfavored in admiralty because of its aims, its assumptions, and its rules. The primary concern of the law of finds is title.... Its application necessarily assumes that the property involved either was never owned or was abandoned....

Would-be finders are encouraged by these rules to act secretly, and to hide their recoveries, in order to avoid claims of prior owners or of other would-be finders that could entirely deprive them of the property.... [S]alvage law encourages less competitive and secretive forms of conduct than finds law. The primary concern of salvage law is the preservation of property on oceans and waterways.


Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452, 456 (E.D. Va. 1960) (stating that lapse of time and nonuse are by themselves insufficient to constitute abandonment, though they may be used to give rise to an implication of abandonment).

Columbus-America Discovery Group, 974 F.2d at 459 (stating that under the law of salvage "the original owners still retain their ownership interests" in the property discovered); City of Birmingham v. Wood (The Akaba), 54 F. 197, 200 (4th Cir. 1893) ("When articles are lost at sea the title of the owner in them remains, even if they be found floating on the surface or cast upon shore."); Wilkie v. Two Hundred and Five Boxes of Sugar, 29 F. Cas. 1247 (D.S.C. 1796) (No. 17,662) (stating that time will not suffice to divest the original owner of property rights); 3A Norris, supra note 190, § 150, at 11-1 to 11-2 (stating that title or ownership of a distressed vessel is not lost simply because of a mishap at sea). But see Treasure Salvors, Inc. v. Unidentified
of proving the owner’s intent to abandon.\textsuperscript{194}

There are two general categories of cases in which a court may find intent to abandon a shipwreck. In the first category, the owner must have demonstrated an express intent through a clear, affirmative act.\textsuperscript{195} In the second, a rebuttable inference of abandonment may arise when no owner appears to reclaim recovered objects.\textsuperscript{196} This inference may be rebutted, however, if the owner does attempt to reclaim the objects as long as there is no evidence of a prior express abandonment.\textsuperscript{197}

b. Law of Finds

According to the maritime law of finds, the first finder who lawfully

Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir. 1978) (questioning the logic of attempting to determine the intent of long-dead owners, and stating that “[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths”).

\textsuperscript{194} See Columbus-America Discovery Group, 974 F.2d at 464 (“[A]bandonment of a sunken cargo . . . must be shown not by the mere cessation of attempts to recover, but by the owner’s positive relinquishment of his rights in the property.”); Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB “Lady Elgin”, 755 F. Supp. 213, 214 (N.D. Ill. 1990) (“To show abandonment, a party must prove (1) intent to abandon, and (2) physical acts carrying that intent into effect.”); Hener, 525 F. Supp. at 357 (stating that “a finding that title to such property has been lost requires strong proof, such as the owner’s express declaration abandoning title”); Brady v. Steamship African Queen, 179 F. Supp. 321, 324 (E.D. Va. 1960) (asserting that abandonment should be found only in “extreme cases where the property is wholly derelict and affirmatively abandoned by the owners and underwriters”).

\textsuperscript{195} See, e.g., Nunley v. MV Dauntless Coloctronis, 863 F.2d 1190, 1198 (5th Cir. 1989) (finding abandonment where the owner of the vessel had not searched for the vessel for three years, called his insurance company, and declared the ship a total loss); Nippon Shosen Kaisha, K.K. v. United States, 238 F. Supp. 55, 57-58 (N.D. Cal. 1964) (finding that the owner and its insurance company had abandoned a vessel based on evidence of correspondence declaring an ention to abandon); Florida ex rel. Ervin v. Massachusetts Co., 95 So. 2d 902, 903 (Fla. 1957) (accepting the lower court’s finding that the sunken battleship Massachusetts was abandoned based on evidence of a telegram announcing that the United States had abandoned the ship), cert. denied, 355 U.S. 881 (1957).

\textsuperscript{196} Columbus-America Discovery Group, 974 F.2d at 461.

\textsuperscript{197} Id. For elaboration on what constitutes abandonment, see Douglas S. Cohen, Note, \textit{Should Noli Forfendi Apply to Sunken Ships?} 73 B.U. L. Rev. 193, 200-08 (1993) (comparing alternative judicial approaches to determine if an original owner has abandoned a shipwreck); Craig N. McLean, Comment, \textit{Law of Salvage Reclaimed:} Columbus-America Discovery v. Atlantic Mutual, 13 Bridgeport L. Rev. 477, 481-83 (1993) (explaining as background what constitutes abandonment before analyzing the case); Todd B. Siegler, Note, \textit{“Finders Keepers” Revised for the High Seas:} Columbus-America Discovery Group v. Atlantic Mutual Insurance, 17 Tul. Mar. L.J. 353, 359-64 (1993) (concluding that a finder must show by clear and convincing evidence that the property has been abandoned for the law of finds to apply).
establishes possession over abandoned artifacts with the intention of acquiring ownership rights generally obtains legal title to the objects.\textsuperscript{198} The most difficult issue in determining title under the law of finds is whether the finder has maintained sufficient possession, either actual or constructive, over the abandoned property.\textsuperscript{199} In order to have constructive possession of an abandoned wreck, a finder must be actively and ably engaged in efforts to reduce it to possession.\textsuperscript{200} Any temporary absence from the wreck site must be consistent with the finder's attempt to reduce

\textsuperscript{198} Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1065-67 (1st Cir. 1987) ( awarding primary claim to "the first finder lawfully to appropriate the abandoned artifacts, take dominion over them, and return them to land with aim of acquiring ownership rights"); see also Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 571 (5th Cir. Mar. 1981) ("As a general rule, under the law of finds, a finder acquires title to lost or abandoned property by ... taking possession of the property and exercising dominion and control over it."); Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 337 & nn.11-12 (5th Cir. 1978) (stating that under the law of finds, the property goes to the first salvor who is able to seize possession); Chance v. Certain Artifacts Found and Salvaged from the Nashville, 606 F. Supp. 801, 804 (S.D. Ga. 1984) ("[T]he first finder to take possession of lost or abandoned property with the intention to exercise control over it acquires title."), aff'd, 775 F.2d 302 (11th Cir. 1985).

\textsuperscript{199} See Treasure Salvors, 640 F.2d at 573 (declaring that mere discovery is not enough to establish ownership, because this "would provide little encouragement to the discoverer to pursue the often strenuous task of actually retrieving the property and returning it to a socially useful purpose and yet would bar others from attempting to do so").

\textsuperscript{200} Eads v. Brazelton, 22 Ark. 499, 512 (1861). In Eads, the Arkansas Supreme Court presented a good illustration of the meaning of "actively and ably engaged." Brazelton had found a wreck in the Mississippi River and marked it with a buoy. Id. at 502. He then left the site, intending to return to salvage the wreck when he was better prepared. \textit{Id.} A year later, Brazelton was heading toward the site, only to be overtaken by Eads, who arrived there first and began salvaging the cargo of lead from the ship. \textit{Id.} The court concluded that Brazelton's conduct was not sufficient to constitute possession because "his intention to possess was useless without detention of the property; [h]e was not a finder, in that he had not moved the wrecked property or secured it." \textit{Id.} at 511. The court pointed out, however, that it was not necessary for Brazelton to reduce the property to actual possession, reasoning that he would have acquired sufficient possession to protect his interest by "[p]lacing his boat over the wreck, with the means to raise its valuables, and with persistent efforts directed to raising the lead." \textit{Id.} at 512; see also Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511, 1514 (11th Cir. 1985) (holding that the United States had constructive possession where it had made an archaeological assessment that noted the presence of an 18th-century shipwreck in the area and had an intention to exercise dominion and control over the wreck); Barlow Burke, Jr., \textit{A Reprise of the Case of Eads v. Brazelton}, 44 \textit{Ark. L. Rev.} 425, 432-35 (1991) (interpreting Eads and concluding that possession requires an act as well as intention).
the property to possession. Once either actual or constructive possession is established, the law protects the possessor's legal right to complete recovery of the shipwreck without interference.

Even if sufficient possession of a shipwreck is demonstrated, the finder may be precluded from establishing ownership because of the "embeddedness exception" to the law of finds. If abandoned property is found embedded or buried in the soil, it generally belongs to the owner of the soil. Courts most often utilize the embeddedness exception when a sovereign entity, such as a state or the federal government, asserts a claim to an abandoned shipwreck embedded in government-owned submerged land.

c. Law of Salvage

If a shipwreck is not held to have been abandoned, a salvor is considered a rescuer as opposed to a finder, and the law of salvage applies. The salvor will be given a maritime lien or award against the salvaged

201 See Rickard v. Pringle, 293 F. Supp. 981, 984 (E.D.N.Y. 1968) (awarding the original finder the exclusive right to the propeller of a steamship despite the finder's departure from the salvage site). The finder, Rickard, had made extensive efforts to remove the propeller when he realized he would have to discontinue salvage until he could acquire the necessary equipment. Id. at 983. While Rickard was absent, Pringle, with full knowledge of Rickard's efforts, dragged part of the propeller along the bottom of the water to land, where he attempted to claim possession. Id. The court held that Rickard's claim to title was superior to Pringle's because, although Rickard was absent, he was "successfully prosecuting the salvage operation and did not abandon it at any time and thus was entitled to the rights of a first salvor legally in possession." Id. at 984.

202 Treasure Salvors, 640 F.2d at 572.

203 See Klein, 758 F.2d at 1514 (finding that under this exception to the law of finds, the United States owned an abandoned shipwreck because it was embedded in land owned by the government).

204 Id. A vessel need not be entirely buried in order to be deemed "embedded." See, e.g., Chance v. Certain Artifacts Found and Salvaged from the Nashville, 606 F. Supp. 801, 806-07 (S.D. Ga. 1984) ("Where a portion of the find is firmly affixed to the land, then even though other portions of it lie in loose surface soil, title to the entire find nevertheless rests with the land owner."). aff'd, 775 F.2d 302 (11th Cir. 1985).

205 See Klein, 758 F.2d at 1514 (awarding title to the United States because the ship was embedded in its land); Chance, 606 F. Supp. at 807 (granting title to the state of Georgia to a vessel partially embedded in the Ogeechee River); Zych v. Unidentified Wrecked and Abandoned Vessel, Believed to be SB "Lady Elgin," 746 F. Supp. 1334, 1343 (N.D. Ill. 1990) (using the embeddedness exception to establish a state's colorable claim of title to a shipwreck that was "likely embedded" in submerged land owned by Illinois), rev'd on other grounds, 941 F.2d 525 (1991).

property to ensure appropriate compensation. This lien has the obvious purpose of encouraging rescue of lives and property through the promise of compensation without the impractical necessity of entry into a formal contractual arrangement with the ship's owner. However, the act of salvage does not confer upon the saltor any initial claim to title superior to that of the original owner.

A valid claim under the law of salvage requires the following three elements: (1) the existence of a maritime peril; (2) service voluntarily rendered and not required as an existing duty or pursuant to a special contract; and (3) success in whole or in part or proof that the service rendered contributed to such success. Even though an ancient shipwreck may have been lying safely in a watery grave for hundreds of years, most courts are willing to find that it is in maritime peril. However, if

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207 The "Sabine", 101 U.S. 384, 386 (1879) ("Salvors, under the maritime law, have a lien upon the property saved, which enables them to maintain a suit in rem against the ship or cargo . . . ."); Lady Elgin, 746 F. Supp. at 1343 n.12 ("Pursuant to the law of salvage, the provision of salvage services to an imperiled vessel gives rise to a maritime lien."); Chance, 606 F. Supp. at 804 (acknowledging a saltor's right to a lien against rescued property); Cobb Coin Co. v. Unidentified, Wrecked, and Abandoned Sailing Vessel, 525 F. Supp. 186, 207 (S.D. Fla. 1981) ("Under traditional salvage rules, the saltor receives a lien against the salved property.").


209 See, e.g., Hener 525 F. Supp. at 356. The Hener court stated:

Salvage law specifies the circumstances under which a party may be said to have acquired, not title, but the right to take possession of property (e.g. vessels, equipment, and cargo) for the purpose of saving it from destruction, damage, or loss, and to retain it until proper compensation has been paid.

Id.

210 The "Sabine", 101 U.S. at 384; Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511, 1515 (11th Cir. 1985); Legnos v. M/V Olga Jacob, 498 F.2d 666, 669 (5th Cir. 1974).

211 See, e.g., Platoro Ltd. v. Unidentified Remains of a Vessel, 695 F.2d 893, 901 n.9 (5th Cir.) (deeming a ship sealed under a layer of sand to be maritime peril because it was uncertain whether the sand would provide adequate protection from "the various perils of the Gulf of Mexico"); cert. denied, 464 U.S. 818 (1983); Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir. 1978) ("Marine peril includes more than the threat of storm, fire, or piracy to a vessel in navigation."); Cobb Coin Co. v. Unidentified, Wrecked, and Abandoned Sailing Vessel, 549 F. Supp. 540, 547 (S.D. Fla. 1982) ("Because the vessel was still in the peril of being lost through the action of the elements or of pirates . . . ., it was subject to a 'marine peril' for purposes of the plaintiff's salvage claim."). But see Subaqueous Exploration & Archaeology, Ltd. v. Unidentified, Wrecked and Abandoned Vessel,
the owner of the vessel does not wish it to be rescued, the element of maritime peril may not be satisfied. The second element is usually easily satisfied unless the salvor is a member of the ship's crew or is under some other legal compulsion to assist the ship. The last element, that of success, is indicative of the great risk that a salvor undertakes in expensive salvage operations; if the operations are unsuccessful, the salvor is not entitled to any compensation for money and time expended.

Once a valid salvage claim is established, the court sets the reward that the salvor is to receive. The preferred form of reward is monetary compensation, rather than a reward in specie. However, in special circumstances the reward may include part or all of the derelict property. If the owner does not have sufficient monetary resources, the property will generally be sold and a court-decreed amount given to the salvor. Courts have traditionally given liberal salvage rewards to encourage voluntary salvage of ships in distress at sea. The amount of the award is there-

577 F. Supp. 597, 611 (D. Md. 1983) (holding that there is no maritime peril where objects have been resting on the ocean floor under protective sand for centuries).

212 Platoro, 695 F.2d at 901 (stating that "[a] salvage award may be denied if the salvor forces its services on a vessel despite rejection of them by a person with authority over the vessel"); see also Klein, 758 F.2d at 1515 (acknowledging the possibility that "the owner of the property [salvaged] may not even have desired for the property to be 'rescued'").

213 See, e.g., Danielson v. Libby, McNeill & Libby, 195 P. 37, 38 (Wash. 1921) (rejecting a claim by crew members for a salvage award because "by their contract [the crew] engaged for the stipulated wages to render such services as were necessary in the ship's behalf").

214 See Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, No. CIV.A.87-363-N, 1993 WL 580900, at *11 (E.D. Va. Nov. 18, 1993) ("[V]olunteer salvors are to a great degree gamblers. They may incur substantial expenses and great risk of danger generally in hope of a substantial reward, but unless successful, there is no reward.").

215 See Platoro, 695 F.2d at 903-04 (noting that salvage awards are almost never in specie).

216 Columbus-America Discovery Group, 1993 WL 580900, at *12 (noting that awarding a salvor the entire derelict property was not the general rule and was limited to very unusual circumstances); see also Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 549 F. Supp. 540, 561 (S.D. Fla. 1982) (granting a reward in specie "because the property saved [was] uniquely and intrinsically valuable beyond its monetary value").

Unfortunately, as these cases illustrate, it is most likely that the court will grant a reward in specie when the property consists of significant historical or archaeological resources.

217 Upon remand, the district court in Columbus-America Discovery Group awarded 90% of the gold recovered to the salvors and 10% to the owners. 1993 WL 580900, at *32 (stating that "[i]f there is not a rewarding gain, the incentive to undertake such an expensive and risky venture, or to invest therein is lost"); see also Allseas Maritime, S.A. v. M/V Mimosa, 812 F.2d 243, 246 (5th Cir. 1987) (recognizing that "to
fore normally greater than the expenses and costs of labor incurred by
the salvor.\footnote{218}

In determining the award amount, a court will consider the following
factors: (1) the labor expended by the salvors in rendering the salvage
service; (2) the speed, skill, and energy displayed in rendering the service
and saving the property; (3) the value of the property used in the salvage
and the danger to which the property was exposed; (4) the risk incurred
by the salvors in securing the property; (5) the value of the property
saved; and (6) the degree of danger from which the property was res-
cued.\footnote{219} The United States Court of Appeals for the Fourth Circuit in
\textit{Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.}
recently added a seventh criterion to be considered in determining the
amount of a salvage award: the degree to which the salvors worked to
protect the historical and archaeological value of the wreck and the arti-
facts salvaged.\footnote{220}

With the exception of the \textit{Columbus-America Discovery Group} deci-
sion, however, courts have rarely considered any associated value, aside
from the purely monetary, in adjudicating the disposition of salvaged
property.\footnote{221} As with the law of finds, the law of salvage was created to
encourage rescue of lives and property in peril and makes sense in that
context. Neither of these two bodies of law, however, recognizes the pub-
lic interest in the nonmonetary value inherent in ancient shipwrecks and
associated materials.

\footnote{218}{The award “is not to be measured in terms of cost per labor hour [and a] volun-
tary salvor is never treated as a mere creditor for work and labor done.” 3A \textsc{Norris}, supra note 190, § 235, at 19-6.}

\footnote{219}{The \textit{Blackwall}, 77 U.S. (10 Wall) 1, 13-14 (1869) (listing these six criteria);
\textit{Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.}, 974 F.2d 450, 468 (4th
Cir. 1992) (same), cert. denied, 113 S. Ct. 1625 (1993); \textit{Platoro}, 695 F.2d at 904 n.16 (same).

\footnote{220}{\textit{Columbus-America Discovery Group}, 974 F.2d at 468; see also \textsc{McLean}, supra note 197, at 487 n.69, 500.

\footnote{221}{See Lawrence J. Kahn, Comment, \textit{Sunken Treasures: Conflicts Between Historic
archaeological and historical values, and exhorting courts to provide more protection).}
2. Federal Legislation

Several celebrated disputes occurred in the 1970s and 1980s that involved tremendous investments in sophisticated technologies often developed specifically for the recovery of deep-sea shipwrecks. These cases generally, but not always, awarded these finds to various private parties with little recognition of the archaeological values at stake. In response, both Congress and several state legislatures enacted various statutes altering the adjudication of ownership rights to shipwrecks and their associated artifacts.

The earliest significant statute was the federal Submerged Lands Act ("SLA"). Enacted in 1953, the Act grants to each state title to the submerged land and natural resources located within three miles of the state’s coastline. The states have used three different arguments based on the SLA to assert title to historic shipwrecks found within this three-mile limit. First, states have argued that abandoned shipwrecks are included in the SLA’s definition of natural resources. Courts have, however, generally been reluctant to stretch this definition to that extent. Second, states have used the SLA to claim title to abandoned shipwrecks

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222 See generally Peter E. Hess, Battles Over Historic Shipwrecks, or Who Owns the Civil War? 11 Del. L. 8, 10 (1993) (discussing the “side-scan” sonar and the custom-made “Remotely-Operated-Vehicle”); Timothy T. Stevens, The Abandoned Shipwreck Act of 1987: Finding the Proper Ballast for the States, 37 Vill. L. Rev. 573, 575 n.6 (citing examples of recent technology making shipwrecks more accessible: the proton manometer (a device attached to ship’s hull to detect ferrous metals on ocean bottom), the metal detector, sonar, aerial photographs, and Trim (a mixture of oxygen, nitrogen, and helium gas enabling divers to explore greater depths without dangerous effects of nitrogen narcosis)).


224 The SLA provides:

It is hereby determined and declared to be in the public interest that title to and ownership of the lands beneath the navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters . . . [be] vested in and assigned to the respective States . . .


225 For example, in the first Treasure Salvors case, the United States Court of Appeals for the Fifth Circuit, although analyzing the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1988 & Supp. V 1993), concluded that “objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil” do not qualify as natural resources, defined as “the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to the sedentary species.” Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 339-40 n.20 (5th Cir. 1978); see also Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB “Lady Elgin,” 746 F. Supp. 1334, 1343 (N.D. Ill. 1990) (rejecting the notion that a shipwreck could be considered “natural”), rev’d on other grounds, 941 F.2d 1525 (1991); Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 525
that are embedded in these submerged lands.\footnote{226 See, e.g., Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511, 1514 (11th Cir. 1985) (declaring the United States the owner of a sunken vessel that was submerged in its land pursuant to the embeddedness exception); Sub-Sal, Inc. v. Debraak, No. CIV.A.84-296-CMW, 1992 WL 39050, at *2-*3 (D. Del. Feb. 4, 1992) (applying the embeddedness exception in conjunction with the SLA and awarding title to the Debraak to the state of Delaware). For fuller discussion of the embeddedness exception, see \textit{supra} notes 203-05 and accompanying text. This analysis only applies if the original owner is found to have abandoned the ship. This argument has also been used by states to establish a colorable claim of title for Eleventh Amendment purposes. See \textit{Lady Elgin}, 746 F. Supp. at 1343. For discussion of the Eleventh Amendment's applicability to cases arising under the ASA, see \textit{infra} notes 233-45 and accompanying text.} Finally, states have used the SLA in conjunction with state statutes that declare state ownership of all historical or archaeological resources situated in or on state-owned or state-controlled land.\footnote{227 See \textit{supra} note 171 and accompanying text.} As with the embeddedness exception argument, the SLA helps to define what land is owned by the state government, rather than directly transferring title to the shipwrecks themselves to the state.

The second federal statute that has profoundly affected salvage litigation is the Abandoned Shipwreck Act of 1987 ("ASA").\footnote{228 Pub. L. No. 100-298, 102 Stat. 432 (1988) (codified at 43 U.S.C. §§ 2101-2106 (1988)). The ASA incorporates the Submerged Lands Act of 1953 as well. 43 U.S.C. § 2105(e) (1988).} The ASA explicitly rejects the law of finds and salvage and grants title to abandoned and embedded shipwrecks to the United States.\footnote{229 The ASA defines "abandoned" shipwrecks as those that "have been deserted and to which the owner has relinquished ownership rights with no retention." id. § 2101(b). The ASA defines "embedded" as "firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof." id. § 2102(a).} Because Congress reasoned that the states were better suited to take care of historic preservation on a local level, the Act transfers title directly to the state in whose waters the wreck is located.\footnote{230 The relevant parts of the ASA provide: § 2105. RIGHTS OF OWNERSHIP (a) UNITED STATES TITLE The United States asserts title to any abandoned shipwreck that is— (1) embedded in submerged lands of a State; (2) embedded in coralline formations protected by a State on submerged lands of a State; or (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.} The ASA thus reinforces state statutes declaring state ownership of historic and archaeological resources

found on state land. Congress recognized that the focus of traditional salvage law was "commercial, not cultural resource management or recreation." It therefore enacted the ASA to ensure the preservation of shipwrecks of historical and archaeological value and to eliminate the inconsistencies of traditional salvage law with those goals in the abandoned shipwreck context. The ASA is also intended to encourage the development of underwater parks and to facilitate cooperation among a variety of parties for purposes of recreation, cultural resource management, sport, and salvage efforts.

Enactment of the ASA has engendered intricate legal problems focusing on two constitutional questions. The first issue is whether the Eleventh Amendment bars admiralty in rem suits brought in federal court by the finder to determine such issues as whether the shipwreck was in fact abandoned and, if so, whether the finder is entitled to a salvage award. The Eleventh Amendment explicitly prevents a suit against a state in federal court by a citizen of another state and has been interpreted to

(b) Notice of Shipwreck Location; Eligibility Determination for Inclusion in National Register of Historic Places

The public shall be given adequate notice of the location of any shipwreck to which title is asserted under this section. The Secretary of the Interior, after consultation with the appropriate State Historic Preservation Officer, shall make a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places.

(c) Transfer of Title to States

The title of the United States to any abandoned shipwreck asserted under subsection (a) . . . is transferred to the State in or on whose submerged lands the shipwreck is located.

§ 2106. Relationship to Other Laws

(a) Law of Salvage and Law of Finds

The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which § 2105 . . . applies.

Id. §§ 2105-2106.


232 See 43 U.S.C. § 2104 (Supp. V 1993) (charging the Secretary of the Interior, through the Director of the National Park Service, with the development of guidelines to achieve these goals).


234 The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.
preclude suits in federal court against a state by citizens of the same state. 235 This prohibition could extend to all admiralty in rem suits because such suits are brought against all the world, 236 including state governments. 237

Various courts of appeal have adopted different standards for determining when a state’s interest is sufficient to invoke the Eleventh Amendment bar. In Zych v. Wrecked Vessel Believed to Be the “Lady Elgin”, 238 Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit arguably adopted an outright ban on in rem admiralty suits in federal court. 239 On the other hand, some courts have refused to

235 Hans v. Louisiana, 134 U.S. 1 (1890). The Amendment does not preclude federal jurisdiction over such cases if the state consents or if Congress clearly abrogates a state’s sovereign immunity. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (holding that Congress has the power to render states liable to suit in federal court when legislating pursuant to the Commerce Clause); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (holding that Congress may override state immunity but must make its intent “unmistakably clear”); In re New York, 256 U.S. 490 (1921) (holding that the Eleventh Amendment barred an admiralty suit brought in personam against the state without its consent).

236 Generally, the Eleventh Amendment is not a bar unless the state, an agent of the state, or a department of the state is named as the defendant. Florida Dep’t of State v. Treasure Salvors, Inc., 458 U.S. 670, 684 (1982) (citing Alabama v. Pugh, 438 U.S. 781, 781-82 (1978) (per curiam)). However, proceedings to adjudicate rights to abandoned shipwrecks “as against all the world” arguably include state governments and thus may be barred from federal court. Florida v. Treasure Salvors, Inc., 689 F.2d 1254, 1256 (5th Cir. 1982) (holding, after remand from the Supreme Court, that a plaintiff had ownership rights in salvaged artifacts against all claimants except the State of Florida).

If the Eleventh Amendment acts as a bar, these suits must be brought in state courts, which may be more sympathetic to the claims of the state and its goals of archaeological and historical preservation. See, e.g., Zych v. Wrecked Vessel Believed to be the “Lady Elgin”, 960 F.2d 665, 670 (7th Cir.), cert. denied, 113 S. Ct. 491 (1992) (holding that Eleventh Amendment barred adjudication in federal court of the state’s interest in shipwreck and stating that “[t]he showdown between Zych and Illinois will occur in state rather than federal court”).

237 The Supreme Court suggested that the Eleventh Amendment might bar admiralty in rem suits in In re New York, 256 U.S. 490, 498 (1921). Although the Court’s language is mere dictum because it deemed the case to be an in personam proceeding, the court nonetheless applied the Eleventh Amendment to an in rem admiralty suit in Florida Dep’t of State v. Treasure Salvors, Inc., 458 U.S. at 683 n.17. The Court did not address the question of whether all admiralty in rem suits are thus barred.


239 In Lady Elgin, Judge Easterbrook stated that when a state is sued in its own name, the Eleventh Amendment bars district court jurisdiction, regardless of the state’s legal position. Id. at 670; see also Fitzgerald v. Unidentified Wrecked and Abandoned Vessel, 866 F.2d 16, 18 (1st Cir. 1989) (stating that the Eleventh Amendment barred an action “irrespective of the actual merit of [Puerto Rico’s] claim to the salvaged wreck and its treasures”); Maritime Underwater Surveys, Inc. v. Unidenti-
bar *in rem* suits, reasoning that the suit is against the property and not against the state. Most courts, however, have adopted a more moderate standard that bars admiralty *in rem* suits when the state government has either a "colorable claim" to the shipwreck or some "conceivable interest" in the shipwreck. Under virtually any standard, however, the state government in whose territorial waters a shipwreck is located would
died, Wrecked and Abandoned Sailing Vessel, 717 F.2d 6, 8 (1st Cir. 1983) (not reaching a colorability analysis "because of the Eleventh Amendment's flat prohibition of suits against states regardless of their merits"); Riebe v. Unidentified, Wrecked and Abandoned 18th Century Shipwreck, 691 F. Supp. 923, 927 (E.D.N.C. 1987) (holding that once a state asserts a claim of title, suit is barred unless the state consents to federal court jurisdiction).

One of the justifications for the Eleventh Amendment bar is that individuals should not have the right to lay claim to a state's treasury in federal court. See, e.g., Edelman v. Jordan, 415 U.S. 651 (1974) (holding that absent consent or waiver by the state of its Eleventh Amendment immunity, a plaintiff may only receive prospective, rather than retroactive, relief). This policy is arguably not implicated when the property sought is not part of the state's treasury or other revenue resources. See, e.g., Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel, Known as "The Sindia", 895 F.2d 116, 119-20 (3d Cir. 1990) (categorizing an admiralty *in rem* action as one against the property and not one against the state, unless it is an "illegitimate circumvention" of the Eleventh Amendment); Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 549 F. Supp. 540, 554 (S.D. Fla. 1982) (stating that "any award to the plaintiff would be in the form of artifacts it recovered from the ocean, not the payment of funds from the state treasury").

This standard was derived by implication from the Supreme Court's plurality opinion in *Treasure Salvors*, which held that the Eleventh Amendment did not prevent issuance of a warrant to arrest artifacts *in the possession* of Florida state officials, because it was an action against the officials and not against the state. The Court applied a three-part test in resolving the Eleventh Amendment issue: whether the action was asserted against state officials or against the state itself; whether the state officials' challenged conduct was *ultra vires*; and whether the relief sought was prospective or analogous to a retroactive award requiring payment of funds from the state treasury. 458 U.S. at 690. Because property is generally not in the possession of state officials, however, the Court held that this test was very case-specific; it could be used only in the arrest-warrant context and not to adjudicate Florida's interest in the artifacts themselves. Id. at 693. The plurality opinion nonetheless noted that the action would have been barred if the state officials had "a colorable basis on which to retain possession of the artifacts." Id. at 682. Courts have subsequently used this "colorable basis" as the test for determining whether a suit should be dismissed. See, e.g., Marx v. Guam, 866 F.2d 294, 299-300 (9th Cir. 1989) (holding that dismissal was warranted if Guam had a colorable claim to two shipwrecks); see also Tomlinson, *supra* note 186, at 1138 (noting that the exact source of the colorable claim standard is unclear, but most courts require it and discern it from the opinion in *Treasure Salvors*).

Judge Easterbrook stated in *Lady Elgin* that:

to know whether a general all-the-world injunction runs against a state, the court must determine whether the state has *some* interest . . . . In this sense, some view
have sufficient basis for a claim so that the Eleventh Amendment would bar the suit in federal court. Once a state successfully asserts an Eleventh Amendment bar to federal suit, the district court may either dismiss the suit entirely or permit the suit to continue but without determining of the merits is inevitable . . . . [I]t is the existence, and not the strength, of the claim that activates the eleventh amendment.

960 F.2d at 670. Although Judge Easterbrook seems to focus on the mere existence of a claim, he would not view any state other than the one in whose territorial waters a shipwreck lies as having a claim sufficient to invoke the Eleventh Amendment’s protection. Id.

A state may establish a “colorable claim” in several ways. If the ASA is constitutional and its criteria of abandonment and embeddedness are satisfied, then the state can unquestionably assert title under the ASA’s transfer of title from the federal to state government. This reasoning was used in the district court’s resolution of Zych v. Unidentified, Wrecked, and Abandoned Vessel, Believed to be SB “Seabird,” 811 F. Supp. 1300, 1321 (N.D. Ill. 1992) (finding the Seabird embedded in the submerged lands of Illinois and thus dismissing plaintiff’s case), aff’d, 19 F.3d 1136 (7th Cir.), cert. denied, 115 S. Ct. 420 (1994).

Even absent the ASA, a combination of the SLA’s transfer to the states of title to submerged lands and the embeddedness exception to the law of finds would confer colorable title on the state. The Seventh Circuit utilized this reasoning in its consideration of the constitutionality of the ASA. Zych v. Unidentified, Wrecked and Abandoned Vessel Believed to be the “Seabird”, 19 F.3d 1136, 1141 n.2 (7th Cir.), cert. denied, 115 S. Ct. 420 (1994). The SLA and specific state statutes declaring state title to historical or archaeological property can also establish colorable title. See, e.g., Marx, 866 F.2d at 301 (holding that Guam had a colorable claim to shipwrecked Spanish galleons in its territorial waters pursuant to the SLA and Guam’s Underwater Historic Property Act); Subaqueous Exploration & Archaeology, Ltd. v. Unidentified, Wrecked and Abandoned Vessel, 577 F. Supp. 597, 608-09 (D. Md. 1983) (holding that federal and state statutes regulating historical and archeological objects found on its submerged lands provided for colorable claim). In the Seabird litigation, however, the district court did not consider the state’s claim colorable to the extent it was based on a comparable statute that failed to specify shipwrecks as a form of archaeological resource. Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed To Be the “Seabird,” 941 F.2d 525, 527 (7th Cir. 1991) (noting that the district court upheld the state’s claim as colorable on the basis of the law of finds in conjunction with the SLA, and not on the basis of state statutes).

Use of either the “colorable claim” or “conceivable interest” standard represents the most logical and consistent approach to application of the Eleventh Amendment to admiralty in rem suits. See Tomlinson, supra note 186, at 1146 (“The colorable claim standard is the most pragmatic, flexible, and realistic approach for determining if a state can invoke its Eleventh Amendment immunity in admiralty in rem suits to determine title to shipwrecks.”).

Such dismissal is based on Federal Rule of Civil Procedure 19(b), which states in part that “[i]f a person . . . cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.” Fed. R. Civ. P. 19(b) (emphasis added); see, e.g., Fitzgerald v. Unidentified
the state's interest. In either case, for final determination of ownership of the shipwreck, the finder must sue in state court.

The second and more fundamental issue is whether the ASA itself is unconstitutional because it transfers an area of admiralty law to state courts and thus arguably conflicts with the Constitution's grant of exclusive jurisdiction over admiralty law to the federal courts. While acknowledging Congress's power to alter admiralty law, the Supreme Court in *Panama Railroad v. Johnson* established two limitations on that power. First, Congress cannot entirely redefine those areas that fall within admiralty law, and, second, Congress must maintain the uniformity of admiralty law throughout the United States.

The United States Court of Appeals for the Seventh Circuit has rejected the argument that the ASA violates these limitations and has held that the Act is constitutional. The ASA implicates the first limita-

Wrecked and Abandoned Vessel, 866 F.2d 16, 18-19 (1st Cir. 1989) (dismissing the suit pursuant to Rule 19(b) because Puerto Rico was a missing party); Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 717 F.2d 6, 8 (1st Cir. 1983) (same).

For example, in *Lady Elgin*, the Seventh Circuit did not actually dismiss the suit but held that the district court could not adjudicate any rights of the state or issue an injunction valid against the state. *Zych v. Wrecked Vessel Believed To Be The Lady Elgin*, 960 F.2d 665, 670 (7th Cir.), *cert. denied*, 113 S. Ct. 491 (1992); *see also Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel, Known as "The Sindia", 895 F.2d 116, 121-23 (3d Cir. 1990) ("Thus, the effect of the proceeding will be, if the Expedition is successful, to award it possession to the Sindia as against these parties and not against the State."). *Florida v. Treasure Salvors, Inc.*, 689 F.2d 1254, 1256 (5th Cir. 1982) (decreeing the salvors to be owners of the artifacts discovered as against all claimants except the state); *Riebe v. The Unidentified, Wrecked and Abandoned 18th Century Shipwreck*, 691 F. Supp. 923, 926 (E.D.N.C. 1987) (stating that the court could not determine the state's ownership interest but could proceed in its determination as to other parties).

See, e.g., *Seabird*, 811 F. Supp. 1300, 1308-09 (noting that Congress provided for exclusive federal jurisdiction over all "admiralty and maritime" cases pursuant to Article III, section 2 of the Constitution); *Tomlinson, supra note 186*, at 1119 (discussing the legislative history of the ASA and its citation to Article III, section 2).

264 U.S. 375 (1924).

Id. at 386-87.

The Supreme Court stated:

[There are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without. Another is that the spirit and purpose of the Constitutional provision require that enactments . . . shall be coextensive with and operate uniformly in the whole of the United States.

Id.

Id. Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed To Be the "Seabird," 941 F.2d 525, 527 (7th Cir. 1991) (remanding the case to the district court
tion because it removes claims for the salvage of shipwrecks from maritime law and federal jurisdiction and commits them to state jurisdiction. Both the district court and the Seventh Circuit concluded during the Zych litigation, however, that this abrogation would not have a "substantial effect" on federal admiralty law because under the embeddedness exception to the law of finds, abandoned ships probably belonged to the state and such suits were previously relegated to state court by the Eleventh Amendment. The ASA thus neither removed from federal admiralty jurisdiction a class of cases clearly falling within it before enactment of the ASA nor effected a "fundamental change" in federal admiralty jurisdiction.

Examination of the ASA from the policy perspective of protection of cultural resources also supports these conclusions. The legislative history makes clear that Congress felt that admiralty law was not suitable for adjudication of disputes involving cultural property and that such disputes were therefore not clearly part of federal maritime jurisdiction.

for determination of the ASA's constitutionality); Zych v. Unidentified, Wrecked and Abandoned Vessel, 19 F.3d 1136, 1140 (7th Cir.) (affirming the district court's holding that the ASA does not violate constitutional admiralty law by excluding the law of salvage), cert. denied, 115 S. Ct. 420 (1994).

251 Zych v. Unidentified, Wrecked, and Abandoned Vessel, Believed to be SB "Seabird," 811 F. Supp. 1300, 1313-15 (N.D. Ill. 1992), aff'd, 19 F.3d 1136 (7th Cir.), cert. denied, 115 S. Ct. 420 (1994). This logic has been questioned, however. Although the plaintiff conceded that Illinois had title to the Seabird and the Eleventh Amendment would thus bar this claim, the ASA also affects shipwrecks that are included or eligible for inclusion on the National Register, 43 U.S.C. § 2105(a)(3) (1988). If such a ship is not embedded, it is not owned by a state government under pre-ASA law, and a salvage or finder's claim against one of these wrecks would not be barred from federal court by the Eleventh Amendment. The ASA thus removes from federal jurisdiction a claim that could otherwise be brought in federal court. Tomlinson, supra note 186, at 1120-24. Indeed, several decisions had previously held that shipwreck cases clearly fell within admiralty jurisdiction. See, e.g., Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1064 (1st Cir. 1987) ("The distinctively salty flavor of this [salvage suit involving an historic wreck] leaves little room to doubt that its provenance is nautical."); Platoro, Ltd. v. Unidentified Remains of a Vessel, 614 F.2d 1051, 1055 (5th Cir.) ("[A] party claiming an award for the salvage of a vessel abandoned at sea could properly proceed under the [federal] court's admiralty jurisdiction."), cert. denied, 441 U.S. 901 (1980); cf. Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 335 (5th Cir. 1978) (the U.S. government, a party to the case, stipulated to the court's admiralty jurisdiction).


253 The legislative history of the ASA states:

[A]dmiralty principles are not well-suited to the preservation of historic and other shipwrecks to which this Act applies. Abandoned shipwrecks . . . are not considered . . . to be in marine peril, necessitating their recovery by salvage companies . . . . In light of today's experience and conditions, the Committee does
Indeed, regulation of cultural resources should be part of a complete system of heritage and cultural preservation that is best enacted and enforced at the state, rather than federal, level of government.

The second prong of the Panama Railroad limitation is the requirement that admiralty law remain uniform throughout the United States. In fact, this concern was presumably the primary motivation for committing admiralty law to exclusive federal jurisdiction. Thus, permitting

not believe that the law of finds and the law of salvage well serve the protection of our nation’s maritime heritage. This heritage is best protected by states acting through their historic preservation programs consistent with federal guidance.


Some courts have noted that the notion that these shipwrecks were in marine peril seriously taxes credibility. See, e.g., Lady Elgin, 941 F.2d at 531 (stating that admiralty law had “only been stretched to apply to litigation over abandoned shipwrecks with some imagination”); Treasure Salvors, 569 F.2d at 337 (stating that application of salvage law to shipwrecks “stretches a fiction to absurd lengths”). Furthermore, the policy of providing incentives for rescue of lives and cargo and for reunification of property with original owners is inappropriate when applied to long-lost cultural resources of primarily historical value. In enacting the ASA, Congress seems to have taken a first step toward unifying the disparate bodies of law that regulate treatment of archaeological resources, and this legislation may serve as a model for completing the unification process.

Panama R.R. v. Johnson, 264 U.S. 375, 386-87 (1924) (explaining that “the spirit and purpose of the constitutional provision require that the enactments . . . shall be coextensive with and operate uniformly in the whole of the United States”).

The Lottawanna, 88 U.S. 558, 575 (1874) (“[I]t certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed.”); see also Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB “Lady Elgin,” 746 F. Supp. 1334, 1348-49 (N.D. Ill. 1990) (expressing the view that national maritime law needs to be uniform to ensure that commerce is not burdened by the application of inconsistent laws among different jurisdictions), rev’d on other grounds, 941 F.2d 1525 (1991).

Unlike the divestment of jurisdiction prong, which courts have never used as the basis for invalidating legislation, Tomlinson, supra note 186, at 1116 n.91, the uniformity principle has been used to strike down an array of congressional legislation, all of which shared the mechanism of transferring some aspect of maritime law to the states. See, e.g., Washington v. W.C. Dawson & Co., 264 U.S. 219, 225 (1924) (striking down a congressional statute permitting the application of state workers’ compensation laws to maritime claims); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 150 (1920) (holding that Congress cannot delegate to the states the power to create or amend maritime law); Southern Pac. Co. v. Jensen, 244 U.S. 205, 218 (1917) (finding unconstitutional the application of a New York workers’ compensation statute to a longshoreman). More recent cases, however, have suggested that the Jensen line has lost some of its vitality or, at least, should be restricted to laws that affect the relationship between vessels and their crews. E.g., Askew v. American Waterways Operators, 411 U.S. 325, 344 (1973) (declining to apply Jensen and confining it to its facts); Standard Dredging Corp. v. Murphy, 319 U.S. 306, 309 (1943) (declining to apply Jensen to
each state to develop its own laws to adjudicate shipwreck disputes could arguably violate the uniformity principle. The Seventh Circuit rejected this argument, however, because the vesting of title in the state governments was, in fact, uniform throughout the nation and variation in regulation of historic shipwrecks would not impose a significant burden on maritime commerce.\textsuperscript{256} This conclusion may be questioned. Although Congress directed the Secretary of the Interior to develop guidelines for the states to use in formulating their protective schemes for such shipwrecks,\textsuperscript{257} a mechanism for requiring states to follow these guidelines would have been better suited to fulfilling the goals of uniformity and preservation.\textsuperscript{258}

3. State Legislation

The influence of such federal legislation as the SLA and the ASA is readily apparent upon examination of the protective statutes enacted by the states in recent years. This process once again illustrates both the

\textsuperscript{256} See also Seabird, 941 F.2d at 533. The Seventh Circuit reasoned that if the ASA passed the first Panama Railroad limitation in that it did not remove something central to admiralty law, then any resulting lack of uniformity is permissible. The opinion states: The uniformity principle leaves states free to enact and enforce legislation that is neither "hostile to the characteristic features of the maritime law or inconsistent with federal legislation." It thus follows that if the management of historic wreck sites is not a concern central to admiralty, state regulation in the area is permissible. Id. at 533 (quoting Just v. Chambers, 312 U.S. 383, 388 (1941)) (emphasis added).

\textsuperscript{257} Abandoned Shipwreck Act of 1987 § 5, Pub. L. No. 100-298, 102 Stat. 433, 433 (codified at 43 U.S.C. § 2104(c) (1988)). In 1990, the National Park Service issued guidelines directing those concerned with the development of state historic shipwreck management programs to ensure that: states establish policies, criteria, and procedures for public- and private-sector recovery of state-owned shipwrecks; states only authorize recovery activities in the public interest; particular shipwrecks be protected from commercial salvage, treasure hunting, and private collecting activities; states develop a licensing system for scientific excavation, commercial salvage, and treasure hunting that will set various conditions, including a requirement that these activities be carried out in a professional manner; and states permit transfer of title to artifacts recovered from shipwrecks to private individuals under specific conditions. Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50,116, 50,118 (1990). The guidelines emphasize that, consistent with the ASA, they remain advisory and nonbinding. Their influence, however, is certainly evident in the protective schemes recently enacted by several states.

\textsuperscript{258} Many commentators have criticized this lack of uniformity. E.g., Tomlinson, supra note 186, at 1126. Tomlinson does not seem to argue that this deficiency should provide the impetus for mandating that states follow the guidelines; rather, he uses it as a justification for declaring the ASA unconstitutional. Id.
reactive nature of such legislation and the fractionation of protective schemes. In reaction to both the extensive litigation concerning shipwrecks and federal legislation, some states now treat submerged vessels and other submerged archaeological resources\textsuperscript{269} as a special category of protected historic and archaeological sites.\textsuperscript{260} Several states now have legislation declaring state ownership of submerged vessels and associated objects.\textsuperscript{261} The practical consequence is that no one may explore or remove objects from such ships without permission from the appropriate state agency.\textsuperscript{262}

\textsuperscript{269} The California statute, for example, defines "submerged archaeological site" and "submerged historic resource" to include virtually any item that "is historically or archaeologically significant, or significant in the prehistory or history or exploration, settlement, engineering, commerce, militarism, recreation, or culture of California." \textsc{Cal. Pub. Res. Code} § 6313(b) (West Supp. 1995). Furthermore, the statute commands that these terms "shall be given the broadest possible meaning," with a presumption of significance if the item has remained in state waters for more than 50 years. \textsc{Id.}

\textsuperscript{260} California has enacted an entire legislative scheme, known as the Shipwreck and Historic Maritime Resources Program, specifically to address maritime resources, which mirrors in most respects the protection of archaeological and historic resources found on land but entrusts the enforcement of this scheme to the State Lands Commission under a separate program. \textsc{Cal. Pub. Res. Code} § 6309 (West Supp. 1995). Other states have also created independent agencies to regulate underwater archaeological resources. \textit{See}, \textit{e.g.}, Mass. Gen. Laws Ann. ch. 6, § 179 (West Supp. 1995) (establishing a board of underwater archaeological resources within the office of environmental affairs); Mich. Comp. Laws Ann. § 299.51b(1) (West Supp. 1994) (establishing the underwater salvage and preserve committee within the Department of Natural Resources to provide technical and other advice to the Department).

The development of idiosyncratic protective schemes is also illustrated by Michigan, which has established very detailed permit requirements and restrictions that apparently apply only to sunken watercraft and aircraft, while setting no specific requirements for permits to excavate on public land. Mich. Comp. Laws Ann. § 299.54(c)(2) (West Supp. 1994).

\textsuperscript{261} \textit{E.g.}, \textsc{Cal. Pub. Res. Code} § 6313(a) (West Supp. 1995) (declaring that title "to all abandoned shipwrecks and all archaeological sites and historic resources on or in the tide and submerged lands" is vested in the state); \textsc{Ohio Rev. Code Ann.} § 1.506.33 (Anderson Supp. 1993) (granting ownership and title to the state to all abandoned property submerged in Lake Erie); \textsc{Va. Code Ann.} § 10.1-2214 B (Michie 1993) (making underwater historic properties "the exclusive property of the Commonwealth"). Michigan not only reserves title to all objects within the Great Lakes but also declares that such title is superior to that of a finder. Mich. Comp. Laws Ann. § 299.51(2) (West Supp. 1994).

Other states merely include sites located underwater within the general list of protected historical or archaeological sites. \textit{E.g.}, \textsc{Fla. Stat. Ann.} § 267.021(3) (West 1991) (defining "historic property" or resource to include "sunken or abandoned ships"); \textsc{Haw. Rev. Stat. tit. 1, § 6E-7(a)} (Michie 1995) (stating that, among other things, the state has title to all objects under waters controlled by the state).

\textsuperscript{262} \textit{E.g.}, Mass. Gen. Laws Ann. ch. 91, § 63 (West Supp. 1995) (requiring a permit
The applicable statute may delineate qualifications or other conditions for an individual to be granted a permit to explore or excavate sunken archaeological resources.\textsuperscript{263} States often allow permits only if the exploration is in the best interest of the people of the state.\textsuperscript{264} The statutes generally provide for a variety of sanctions, including penalties and fines for violation of the protective statute,\textsuperscript{265} compensatory in rem proceedings against any vessel used in explorations that result in the damage, destruction, or loss of an archaeological site or historic resource,\textsuperscript{266} and temporary confiscation of any objects removed without an appropriate

to remove, displace, damage, or destroy underwater archaeological resources and establishing procedures and requirements for issuance of permits); Mich. Comp. Laws Ann. § 299.54b(1) (West Supp. 1994) (requiring a permit to recover abandoned property from sunken aircraft or watercraft); Ohio Rev. Code Ann. § 1506.32(A) (Anderson Supp. 1993) (requiring a permit, approved by both the director of natural resources and the director of the historical society, to "recover, alter, salvage, or destroy" any submerged abandoned property in Lake Erie); Wash. Rev. Code Ann. § 27.53.110(1) (West Supp. 1995) (allowing the state to enter into contracts for the salvage of historic shipwrecks).

\textsuperscript{263} For example, in California, the state lands commission may set several requirements for an individual seeking a permit. A plan must be presented that provides for the protection and preservation of the site and materials removed; individuals must "meet the professional qualifications required of a marine archaeologist;" permits may be denied if the commission determines that the applicant is not qualified to conduct salvage excavations properly; and the permit holder may be required to pay for an official observer to monitor compliance with the permit requirements. Cal. Pub. Res. Code § 6309(b) (West Supp. 1995).

\textsuperscript{264} E.g., Mass. Gen. Laws Ann. ch. 91, § 63 (West Supp. 1995) (requiring the director of the appropriate agency to issue permits for operations involving underwater archaeological resources if the director finds that such operations are in the public interest); see also Md. Ann. Code art. 83B, § 5-620(d)(1)-(2) (1991) (providing that a permit to excavate a submerged archaeological historic property may be issued only in the best interest of the state). Maryland specifically prohibits the issuance of a permit to explore submerged archaeological sites to any individual who is also claiming title to the submerged archaeological historic property unless the value of the property is insignificant and the permit is consistent with the other purposes of the protective act. Id. § 5-620(e) (1991).

\textsuperscript{265} E.g., Cal. Pub. Res. Code § 6314(a) (West Supp. 1995) (providing for imprisonment for up to six months, fine of up to $5000, or both); see also Mass. Gen. Laws Ann. ch. 91, § 63 (West Supp. 1995) (violation constitutes a misdemeanor, punishable by imprisonment for six months, fine of up to $1000, or both, and forfeiture of any object taken). Some states impose more onerous penalties for violation of the protective act with regard to submerged resources than with regard to historic and archaeological sites on land. For example, the Massachusetts fine for violating the act with regard to historic and archaeological sites is a maximum of only $500, id. ch. 9, § 27C (1986 & Supp. 1995). See also infra note 424 (cataloging state prohibitions).

permit.\textsuperscript{267}

Some of the statutes that seek to protect submerged cultural resources demonstrate a balancing between the interests of the public and the interests of the individuals involved that is not typical of statutes protecting land-based archaeological resources. First, some statutes provide for either a division of the finds or a method of compensating the finder for the value of the objects.\textsuperscript{268} Second, a state agency may be authorized to issue "recreational recovery permits" for the recovery of small objects.\textsuperscript{269} Furthermore, permits may not be required for recreational diving so long as the subsurface is not disturbed and no objects are removed from archaeological or historic resources.\textsuperscript{270}

C. Human Burials and Associated Native American Archaeological Materials

The area of most extensive change in the protection of archaeological resources is the treatment of human burial remains and associated funerary or religious artifacts. The legal treatment of Native American archaeological materials perhaps best illustrates the unresolved clash in cultural values that has produced inconsistent treatment of archaeological and historical resources.\textsuperscript{271} This treatment also demonstrates once again

\textsuperscript{267} E.g., id. § 6314(c) (West Supp. 1995).

\textsuperscript{268} E.g., id. § 6309(i) (West Supp. 1995) (providing that the permitholder shall be compensated "in terms of a percentage of the reasonable cash value, or a fair share, of the objects recovered"). The state both selects the experts who will determine the value of the objects and determines the amount "constituting fair compensation, taking into consideration the circumstances of each case." Id. Although the state initially has title to all recovered objects, it may convey title as part of the compensation award. Id. The state may also contract with individuals or institutions for the loan of such objects in order to raise the funds necessary to purchase the permitholder's fair share, but the possessor must make the resources available for review by the general public and such contracts must be subject to a condition that the state may repay the funds at any time and regain possession of the objects. Id. § 6313(h) (West Supp. 1995).

The Mississippi system of compensation is similar but applies to archaeological work both on land and underwater. Miss. Code Ann. § 39.7.17 (1990); id. § 39.7.23 (1990). Other states also have a more lenient policy with regard to the disposition of objects recovered from underwater archaeological sites. For example, Massachusetts allows the holder of a permit to retain 75% of the value of the underwater archaeological resource. Mass. Gen. Laws Ann. ch. 91, § 63 (West Supp. 1995).

\textsuperscript{269} Such permits may allow exploration with "small hand tools, but without mechanical devices." They do not require the extensive application procedures and other requirements associated with salvage permits, but such permits may not be issued for archaeological or historical resources. Cal. Pub. Res. Code § 6309(g) (West Supp. 1995).

\textsuperscript{270} See id.; Mich. Comp. Laws Ann. § 299.54g(a) (West Supp. 1994).

\textsuperscript{271} The treatment of these remains poses a three-way struggle among Native
the reactive nature of our cultural resource management policies and the tendency to splinter the legal scheme into distinct elements for different categories of archaeological resources. This Section considers the legal treatment of burials and associated artifacts generally, aboriginal burials and associated artifacts in particular, and restitution of aboriginal remains. The various protective schemes recently developed by the federal and state governments address some or all of these categories of archaeological resources, while almost universally distinguishing them from other types of archaeological resources found on land and from historic shipwrecks.272

From a situation of almost total disregard for the significance of these cultural remains, the American legal system has in the past few years been transformed by a complete re-evaluation of the treatment of this past. Archaeologists and anthropologists have long studied Native American and other aboriginal civilizations, excavated their archaeological sites, and placed their material cultural remains, as well as their human remains, on exhibit and in storage in museums. In the past, however, there was little protection granted for these remains and little recognition that these remains are part of a continuing extant cultural

American descendants, the museum and archaeological community, and pothunters and antiquities traders. Although the first two groups are somewhat in concert in seeking protection for remains in situ, they are bitterly opposed on the questions of whether remains should be excavated and what should be done with remains that were previously excavated. The archaeological and museum community believes that such research and displays are an important part of the process of understanding history and that there is additional scientific information to be derived. John E. Peterson, Dance of the Dead: A Legal Tango for Control of Native American Skeletal Remains, 15 AM. IND. L. REV. 115, 119 (1990). On the other hand, as one commentator has noted, “[T]he cultural curation of mingled remains of various individuals [by museums] does not suggest reverence for the contents.” H. MARCUS PRICE III, DISPUTING THE DEAD: U.S. LAW ON ABORIGINAL REMAINS AND GRAVE GOODS 16 (1991); see also Marsh, supra note 8, at 92 (noting the conflict between Native Americans and the archaeological and museum communities in that some Native Americans view “any form of archaeological study at any site constitutes desecration”). Native American groups have also argued that curation violates their rights to religious freedom because some tribes believe that the spirits of their dead cannot rest until their remains are reinterred. Id. at 84.

272 An additional irony may be noted in that many shipwrecks are also grave sites, but not formal burials. The legislation that has developed to regulate shipwrecks, however, has entirely ignored the point that the shipwrecks often contain human remains. In addition to claims to personal property that may occasionally be made by descendants, descendants have also objected to publicity surrounding the discovery of some of the more sensational wrecks, such as that of the Titanic, and to the possible disturbance of these sites. The controversy concerning salvage rights to the Titanic led to enactment of The R.M.S. Titanic Maritime Memorial Act of 1985, Pub. L. No. 99-513, 100 Stat. 2082 (codified at 16 U.S.C. §§ 450rr to 450rr-6 (1988)), which prevented salvage of the vessel. See Kahn, supra note 221, at 635-37.
State statutes have long criminalized the desecration or interference with religious structures, grave sites, and cemeteries. However, these statutes were rarely, if ever, applied to the scientific or archaeological study of the graves of Native American cultures. Native American remains have often been subject to judicial determinations that generally applicable laws prohibiting interference with burials do not apply because such burials do not clearly fit within statutorily defined categories. In addition, Native Americans have been denied standing to seek protection for Native American human remains if they are unable to establish a...
direct lineal relationship between the plaintiff and the deceased.\textsuperscript{277} The dichotomy in this treatment has aroused considerable anger, and Native American groups have demanded\textsuperscript{278} (and achieved) significant changes in the legal protection granted to burial and religious sites and in the treatment of particular burials.\textsuperscript{279}

As a result of this re-evaluation of the protective laws regarding Native American remains, many states no longer treat such remains as government property suitable for scholarly research. Rather, human remains, burial sites, and sites with religious significance are beginning to be treated with appropriate respect and as subject to the wishes of the descendants of those who were buried. These changes have been achieved neither uniformly throughout the various states nor without considerable controversy. Both academics and those who promote education and tourism have tended to oppose vigorously the treatment of these remains as private and religious matters.\textsuperscript{280}

1. Federal Legislation

Despite the fact that the Antiquities Act of 1906 was intended to protect primarily Native American sites, it was not until the 1980 amend-

\textsuperscript{277} See Bailey v. Miller, 143 N.Y.S.2d 122, 124 (Sup. Ct. 1955) (holding that a Native American does not have standing to object to excavation of an Indian burial ground in the absence of specific statutory authorization).

One decision perhaps indicates a judicial willingness to re-evaluate this approach, even in the absence of specific legislative enactment. The court recognized the claims of the modern Tunica-Biloxi tribe, even though it was unable to establish an exact line of descent, stating that “the tribe is an accumulation of the descendants of former Tunica Indians and has adequately satisfied the proof of descent.” Charrier v. Bell, 496 So. 2d 601, 604 (La. Ct. App.), cert. denied, 498 So. 2d 753 (La. 1986).


\textsuperscript{279} This dichotomy in treatment has been impliedly recognized in many recent legislative enactments, such as the statement of legislative purpose of the 1987 Florida statute regarding unmarked human burials:

It is the intent of the Legislature that all human burials and human skeletal remains be accorded equal treatment and respect based upon common human dignity without reference to ethnic origin, cultural background, or religious affiliation.

\textit{Fla. Stat. Ann.} \textsection 872.05(1) (West Supp. 1994). The legislative findings of the Nebraska statute recognize that prior law, although purporting to protect human burial sites, did not “provide equal and adequate protection or incentives to assure preservation of all human burial sites in this state.” \textit{Neb. Rev. Stat.} \textsection 12-1202(3) (1992).

\textsuperscript{280} For a discussion of the conflicts between the religious rights of Native American groups and the scientific and museum communities, see Echo-Hawk, \textit{supra} note 40, at 14.
ments to the National Historic Preservation Act that a provision for Native American participation in the process of deciding treatment of artifacts and ancestral remains was included.\(^{281}\) ARPA, though not specifically addressing Native American remains, increased the participation of Native American groups in archaeological decisionmaking\(^{282}\) and can now be seen as a foreshadowing of the direction that more recent legislation has taken. Following increasing pressure from Native American groups and changes in public perception and attitudes,\(^{283}\) and after fierce

\(^{281}\) Pub. L. No. 96-515, sec. 101, § 2, 94 Stat. 2987, 2987 (codified at 16 U.S.C. §§ 470 to 470w-6 (1988)). Although NHPA calls for only limited Native American participation, the 1980 amendments included Indian tribes among those to be consulted in furtherance of NHPA policies. H. Barry Holt, Archeological Preservation on Indian Lands: Conflicts and Dilemmas in Applying the National Historic Preservation Act, 15 ENVTL. L. 413, 431 (1985). State and federal statutes that seek to protect archaeological sites and to encourage their scientific exploration are not necessarily viewed as positive by Native American groups, who often prefer to emphasize private knowledge of sites and noninterference with them. Id. at 428. Although the NHPA has sometimes been used successfully to oppose economic development that interferes with the religious use of Native American land, the Act may also present an obstacle to Native American Indian economic development. Id. at 428-29.

Many of the older state statutes, like the Antiquities Act of 1906, recognized that Native American sites and artifacts were worthy of protection and tended to treat these remains as having archaeological and historical significance to the general public. For example, the Alabama statute enacted in 1915 seeks to protect "aboriginal mounds, earthworks, and other antiquities." ALA. CODE § 41-9-242(3) (1991). The Alabama statute also specifically delineates the sites of Indian treaties and massacres as historic places. Id. The Kentucky statute deems worthy of protection those sites and objects that are the product of human workmanship of "Indians or any aboriginal race or pioneers." KY. REV. STAT. ANN. § 164.710(1)-(2) (Michie/Bobbs-Merrill 1987). Louisiana protects "all prehistoric and historic American Indian or aboriginal campsites, dwellings, habitation sites, burial grounds, and archaeological sites." LA. REV. STAT. ANN. § 41-1604(1)(a) (West 1993). Mississippi protects all "sites, objects, buildings, artifacts, implements, and locations of archaeological significance, including, but expressly not limited to, those pertaining to prehistoric and historical American Indian or aboriginal campsites, dwellings, and habitation sites, their artifacts and implements of culture." Miss. CODE ANN. § 39.7.11(1) (1990). The Mississippi statute also has a separate section prohibiting the intentional and knowing defacement of "any American Indian or aboriginal paintings, hieroglyphics or other marks or carvings on rock or elsewhere which pertain to early American Indian or aboriginal habitation of the country." Id. § 39.7.29 (1990).

\(^{282}\) ARPA requires the consent of Native American owners before archaeological excavation on Native American-owned land is permitted. 16 U.S.C. § 470cc(g) (1988); see also Holt, supra note 281, at 415.

\(^{283}\) The 500th anniversary of Columbus’s voyages sparked debate about their effect on the indigenous people of North America, and movies such as DANCES WITH WOLVES (Orion Pictures 1990) showed the public a different view of the lives of Plains Indians from that traditionally portrayed by Hollywood. See DuBoff, supra note 40, at 53.
debate and several unsuccessful attempts,\textsuperscript{284} Congress followed the voluntary actions of some museums\textsuperscript{286} and the example of some states\textsuperscript{286} and enacted the Native American Graves Protection and Repatriation Act.\textsuperscript{287}

NAGPRA represents an attempt to accommodate the competing interests of Native American tribes, archaeologists, and museums. Its dual purposes are to protect burial sites by regulating the removal of human remains, funerary, sacred, and cultural artifacts, and to provide a mechanism for the restitution of human and cultural remains currently housed in museum collections to Native American descendants. Even more significant than its specific provisions, however, NAGPRA is the first comprehensive approach to treating the Native American cultures as living cultures, both worthy of respect for their past contribution to North American society and worthy of protection for their continuing vitality.\textsuperscript{288}

\textsuperscript{284} Legislation was introduced in Congress in 1986, Senate hearings were held in 1988, and both the Native American Burial Site Preservation Act and the Native American Grave and Burial Protection Act were introduced and defeated in 1989. Passage in 1989 of the National Museum of the American Indian Act, however, represented the first positive step toward restitution, establishing a separate museum to house the Smithsonian's Native American collection and beginning the process of restoring some remains to Native American groups. Pub. L. No. 101-185, § 11(a), 103 Stat. 1336, 1343 (1989) (codified at 20 U.S.C. § 80q-9(a) (Supp. V 1993)). See generally June Camille Bush Raines, \textit{One is Missing: Native American Graves Protection and Repatriation Act: An Overview and Analysis}, 17 Am. Indian L. Rev. 639, 651-52 (1992); Trope & Echo-Hawk, supra note 76, at 54-58.

\textsuperscript{286} For example, in 1978 the Zuni tribe successfully persuaded the Denver Art Museum to return a war god, and in 1989 Stanford University agreed to return over 500 Ohlone Indian remains to their descendants for reburial. DuBoff, supra note 40, at 48-49.

\textsuperscript{286} Although 34 states had enacted unmarked burial protective legislation as of 1991, David J. Harris, Note, \textit{Respect for the Living and Respect for the Dead: Return of Indian and Other Native American Burial Remains}, 39 Wash. U.J. Urb. & Contemp. L. 195 (1991), only five states had enacted restitution statutes. Trope & Echo-Hawk, supra note 76, at 52-54.


\textit{An important threshold consideration . . . is the recognition that Native Americans and Hawaiians . . . are legal, living cultures with vital ongoing lifeways rooted in a rich traditional heritage. . . . NAGPRA recognizes that Native peoples are not themselves museum objects of dead cultures or even isolated remnants of quaint lost tribes; they are members of ongoing governmental, social, economic, religious, and political units. Native peoples are free under the law to define themselves and their lifeways . . . .}

\textit{Id. at 179-80.} Strickland notes that NAGPRA uses Native American concepts in its
NAGPRA's first priority is the restitution of human remains and certain artifacts. It requires all museums that receive federal funding and federal agencies to prepare inventories of their human remains and associated grave artifacts. These inventories must identify the cultural and geographical affiliations of these remains to the extent possible, and notices must be sent to those Native Americans reasonably believed to be culturally affiliated with inventory items. Less detailed summaries of unassociated funerary objects, sacred objects, and cultural items must also be prepared.

Native American groups and tribes can obtain restitution based on the cultural affiliations established in the inventories. Human remains and associated grave goods must be returned expeditiously upon request by a lineal descendant, Indian tribe, or Native Hawaiian organization. If the inventory does not establish a cultural affiliation, a Native American or Hawaiian organization may still obtain restitution by proving by a pre-legal definitions and returns initiative and responsibility to the Native American community to protect its own heritage. Id. at 180-81, 189-91.

289 25 U.S.C. § 3003(a) (Supp. V 1993). For purposes of the Act, "museum" is defined as an institution that receives federal funds, including universities. Id. § 3001(8) (Supp. V 1993). "Associated funerary objects" are defined as objects placed with human remains at the time of death or later as part of a ceremony, as well as objects containing human remains. Id. § 3001(3)(A). (Supp. V 1993).


292 "Unassociated funerary objects" are those reasonably believed to have been placed with human remains at the time of death or later but that subsequently became separated. 25 U.S.C. § 3001(3)(B) (Supp. V 1993).

293 "Sacred objects" are defined as ceremonial objects used by traditional Native American leaders for the practice of traditional Native American religions by their present-day followers. Id. § 3001(3)(c) (Supp. V 1993).

294 Cultural patrimony or items are those objects that have an "ongoing traditional, historical, or cultural importance central to the Native American group or culture itself." Id. § 3001(3)(D) (Supp. V 1993).

295 Id. § 3004 (Supp. V 1993). The process of compiling these inventories has proven to be burdensome and expensive for both museums and federal agencies, and significant doubt as to the feasibility of compliance has been raised. Boyd, supra note 99, at 928.

296 25 U.S.C. § 3005(a)(1) (Supp. V 1993). Immediate restitution is not required if multiple parties claim the same item and the museum "cannot clearly determine which party is the most appropriate claimant," id. § 3005(e) (Supp. V 1993), or if the item is "indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States," id. § 3005(b) (Supp. V 1993).
ponderance of the evidence that it has a cultural affiliation with the items.\textsuperscript{297} If the requested items are unassociated funerary objects, sacred objects, or cultural objects, and if cultural affiliation can be established,\textsuperscript{298} then the requesting group must present a prima facie case that the agency or museum does not have the right of possession to the item.\textsuperscript{299} Upon presentation of a prima facie case, the burden of proof shifts to the museum or agency to establish that it does have the right of possession.\textsuperscript{300}

The second goal of NAGPRA is to provide additional protection for and to permit immediate restitution of newly discovered cultural materials. ARPA still regulates the excavation itself, but certain additional steps must be taken. NAGPRA requires consultation with the appropriate tribes before Native American remains and other objects may be excavated.\textsuperscript{301} Any such objects accidentally discovered must be reported to the agency managing the lands and to the appropriate tribe.\textsuperscript{302} The

\textsuperscript{297} NAGPRA permits a claimant to establish cultural affiliation based on "geographical kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion." \textit{Id.} § 3005(a)(4) (Supp. V 1993). The legislative history indicates that proof of cultural affiliation does not need to be established with scientific certainty and claims will not necessarily be rejected solely because gaps exist in the record of ownership or control. H.R. REP. NO. 877, \textit{supra} note 290, at 14, reprinted in 1990 U.S.C.C.A.N. at 4373.

\textsuperscript{298} If the requested item is either a sacred object or a cultural object, then the requesting Native American group must show that the object was previously owned or controlled by that group, or by an individual who was a member of that group. 25 U.S.C. § 3005(a)(5)(B)-(C) (Supp. V 1993). A direct lineal descendant of an individual who owned a sacred object may also present such a claim. \textit{Id.} § 3005(a)(5)(A) (Supp. V 1993).

Significantly, Congress's intent in enacting NAGPRA was to require museums to make a good-faith effort to identify the cultural affiliation of a discovered item. \textit{See} H.R. REP. NO. 877, \textit{supra} note 290, at 12, reprinted in 1990 U.S.C.C.A.N. at 4367.

\textsuperscript{299} 25 U.S.C. § 3005(c) (Supp. V 1993). Right of possession is defined as "possession obtained with the voluntary consent of an individual or group that had authority of alienation." Generally, the object must have been the property of the tribe or group at the time possession was lost, so that it could not have been owned or transferred by an individual. \textit{See}, e.g., Seneca Nation of Indians v. Hammond, 3 Thomas & Cook 347 (N.Y. 1874) (holding that individual Indians could not convey title to hemlock bark because it belonged to the Seneca Nation as a whole), \textit{cited in} Echo-Hawk, \textit{supra} note 40, at 441-42. Right of possession is not an issue in the case of human remains and associated funerary objects because they are not considered capable of being "owned" or transferred.

\textsuperscript{300} 25 U.S.C. § 3005(c). This shift in the burden of proving title from the claimant to the current possessor has been criticized as a change in traditional property law and as imposing a considerable burden on museums and agencies that may, in fact, have good title.

\textsuperscript{301} \textit{Id.} § 3002(c) (Supp. V 1993). If objects are on tribal lands, permission must be obtained from the appropriate tribe. \textit{Id.}

\textsuperscript{302} \textit{Id.} § 3002(d) (Supp. V 1993).
activity that led to the discovery must cease, and reasonable efforts must be made to protect items before the activity may resume. 303

Human remains and associated funerary objects "excavated or discovered on Federal or tribal lands after November 16, 1990" belong to lineal descendants of the deceased, or where those descendants are unknown, to the tribe upon whose lands the objects were discovered or with the tribe that "has the closest cultural affiliation with such remains." 304 In the case of newly discovered cultural items on federal or tribal land that are not funerary in nature, NAGPRA establishes a priority list of those entitled to ownership or control. 305 Finally, NAGPRA provides further protection of these objects by prohibiting not only trafficking in any items obtained in violation of the statute, but also trafficking in all human skeletal remains, even if obtained before enactment of NAGPRA. 306

2. State Legislation

The influence of NAGPRA and of the Native American political movements seeking reburial and restitution of cultural heritage is readily apparent in many state statutes. While some statutes provide only limited protection, other statutes contain broad, inclusive protections. The amount of protection varies depending on whether only burials or all archaeological resources are affected; whether the objects are found on public or private land; whether the objects are identified as affiliated with Native American cultures; and whether the statutes apply only to newly discovered materials or require restitution of all materials.

Some state statutes treat Native American remains differently from non-native remains. Although others make only brief references to special legal treatment for Native American Indian remains, the ramifications of these references may be more significant than their brevity might seem to indicate. For example, the Massachusetts statute establishes two nearly identical, parallel schemes for dealing with Native American and

303 Id.
304 Id. § 3002(a) (Supp. V 1993).
305 See supra notes 168-69 and accompanying text.
306 Id. § 3001(13) (Supp. V 1993). The only exception is if the remains were obtained "with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe." Violations are punishable by a fine of up to $100,000 and imprisonment for up to one year for the first offense; subsequent violations can result in a fine of $250,000 and up to five years' imprisonment. 18 U.S.C. § 1170(a) (Supp. V 1993). Critics have argued that several of these provisions may present a taking of private property. See Ralph W. Johnson & Sharon I. Haensly, Fifth Amendment Takings Implications of the 1990 Native American Graves and Repatriation Act 24 ARIZ. ST. L.J. 151, 159-72 (1992). NAGPRA also permits the Secretary of the Interior to impose civil penalties for violations of the Act, 25 U.S.C. § 3007(b) (Supp. V 1993), and allows private parties to bring suits in federal district court to enforce its provisions, id. § 3013 (Supp. V 1993).
non-native burials and human remains. On the other hand, the Hawaii statute provides only that burial sites found on public lands are to be held in trust for preservation or proper disposition by the lineal or cultural descendants of those who are buried at the site. The Alaska statute states only that the state's exclusive right and title to archaeological resources does not "diminish[ ] the cultural rights and responsibilities of persons of aboriginal descent" and does not "infringe[ ] upon their right of possession and use of those resources which may be considered of historic, prehistoric, or archeological value." Although brief, these statutes probably accomplish the same goals as other more complex statutory schemes.

At this time, approximately twenty states have enacted legislation that, although varying considerably in complexity, nonetheless now serves as the primary mechanism for the protection of unmarked human burials, skeletal remains, and associated burial goods. These statutes also criminalize the possession, display, sale, transfer, and discarding of human remains, and some require the reburial or restitution of remains.

a. Newly Discovered Human Graves

The comprehensive legislative schemes enacted for dealing with human remains found in unmarked burial sites share considerable similarities.


The Nebraska statute states:

Burial good shall mean any item or items reasonably believed to have been intentionally placed with the human skeletal remains of an individual at the time of burial and which can be traced with a reasonable degree of certainty to the specific human skeletal remains with which it or they were buried.

These statutes generally share the primary motivation of achieving equality in the treatment of all human remains. To a lesser extent, they also seek to protect the interests of descendants, other relatives, and other interested individuals in determining the disposition of human remains. The desire to obtain scientific information from adequate skeletal analyses is also accommodated to some extent. Significantly, most of these statutes refer to all unmarked human burials, regardless of whether they are located on public or private land. As such, they represent a signifi-

311 The Nebraska protective legislation is typical, citing as one of its purposes to [a]ssure that all human burials are accorded equal treatment and respect for human dignity without reference to ethnic origins, cultural backgrounds, or religious affiliations by providing adequate protection for unmarked human burial sites and human skeletal remains located on all private and public lands within this state.

NEB. REV. STAT. § 12-1203(1) (1991). Some other states, without specifically citing this purpose, present an entirely culturally neutral scheme by consistently referring to all human burials. E.g., N.D. CENT. CODE § 23-06-27(1)(c) (defining “human burial site” to include any place of interment, whether marked or unmarked); VA. CODE ANN. § 10.1-2305.A (1993) (applying to “any unmarked human burial regardless of age . . . and regardless of ownership”).

312 E.g., ARK. CODE ANN. § 13-6-404 (Michie Supp. 1993) (requiring that exhumed remains be conveyed to direct descendants or a specific church or tribe); UTAH CODE ANN. § 9-9-403(1) (granting “ownership and control” of remains to the appropriate descendants of the remains).

313 E.g., KY. REV. STAT. ANN. § 164.720(2) (Michie 1987) (granting permits “regularly” when Indian burial grounds are to be explored or excavated “with a view to promoting the knowledge of archaeology or anthropology”); MONT. CODE ANN. § 22-3-802(d) (1993) (stating that “while some human skeletal remains and burial sites may be of interest to science, the needs of the scientific community to gather information and material from burial sites must be balanced with the legal, moral, and religious rights and obligations of tribal groups, next of kin or descendants”); UTAH CODE ANN. § 9-9-403(5) (1992) (allowing scientific study of the remains when consent is granted by the owner); WASH. REV. CODE ANN. § 27.44.020 (West Supp. 1995) (allowing scientific research before reburial if permission is granted by the state agency); W. VA. CODE § 29-1-8a(a) (1992) (declaring that scientific study and recovery of artifacts are worthy activities).

314 Some statutes explicitly apply to burials located on private land. E.g., FLA. STAT. ANN. § 872.05(1) (West 1994) (applying to both public and private land); MINN. STAT. ANN. § 307.08(1) (West Supp. 1995) (protecting all human burials and human skeletal remains, older than 50 years, found on or in all public or private lands or waters). Other states only implicitly regulate burials found on private lands. E.g., LA. REV. STAT. ANN. § 8:678A(1) (West Supp. 1995) (requiring a permit to disturb an unmarked burial site, and not specifying whether the site is located on public or private land); OR. REV. STAT. § 97.745(1) (1993) (providing protection to burials without specifying private or public lands). But see CAL. PUB. RES. CODE § 5097.9 (West 1984) (exempting privately owned land and land owned by cities and counties from burial site legislation); Md. ANN. CODE art. 83B, §§ 5-621(b), 5-627 (1991 & Supp. 1994) (applying the burial site provisions only to state land); NEV. REV. STAT.
cant departure from prior protective legislation, which applied only to archaeological resources located on public land.\textsuperscript{315}

The statutes typically provide that both intentional and inadvertent discoveries of human burials must be reported to either the medical examiner or local law-enforcement agency, the appropriate governmental authority overseeing archaeological and historic research, or both.\textsuperscript{316} In several states, any activity such as agricultural activities or construction must cease immediately upon the inadvertent discovery of a burial.\textsuperscript{317} The medical examiner or other appropriate governmental agent is given the opportunity to examine the remains to determine whether they have any historical or archaeological significance and whether there are any extant groups with an ethnic, cultural, or lineal relationship with the individuals whose remains have been discovered.\textsuperscript{318} A time limit is usually set during which construction and agricultural activities may be suspended in order for the archaeological investigation to be conducted.\textsuperscript{319}

Some states permit excavation of the remains to proceed on an emergency basis without the consent of the relevant ethnic group if necessary to protect the burial from imminent destruction.\textsuperscript{320} If the discovery

\textsuperscript{315} See supra notes 163, 171, 180.

\textsuperscript{316} CONN. GEN. STAT. ANN. § 10-388(a) (West Supp. 1994) (requiring notification of the chief medical examiner and state archaeologist); KY. REV. STAT. ANN. § 164.730 (Michie 1987) (requiring notification of the anthropology department of the University of Kentucky); MASS. GEN. LAWS ANN. ch. 38, § 6B (West Supp. 1995) (requiring notification of the medical examiner, who must notify state archaeologist if remains are suspected of being 100 years old or more); OR. REV. STAT. § 97.745(4) (1993) (requiring notification of the state police, the state historic preservation officer, the appropriate Indian tribe, and the commission on Indian service).

\textsuperscript{317} LA. REV. STAT. ANN. § 680B (West 1994) (requiring cessation of any activity that may disturb an unmarked burial site until a permit governing the disposition of the site is issued); MO. ANN. STAT. § 194.406 (Vernon Supp. 1994) (requiring cessation of all construction, agricultural, and archaeological activities within 50 feet of a burial site pending investigation by the local law-enforcement officer and the state preservation officer); S.D. CODIFIED LAWS ANN. § 34-27-25 (1994) (requiring all activities that may disturb the discovered human skeletal remains to cease immediately).

\textsuperscript{318} E.g., FLA. STAT. ANN. § 872.05(6)(a) (West 1994) (requiring the state archaeologist to determine if an unmarked human burial is scientifically significant); MO. ANN. STAT. § 194.407(1) (Vernon Supp. 1994) (requiring the state historic preservation officer to determine if removal is necessary for the purposes of scientific analysis).

\textsuperscript{319} E.g., COLO. REV. STAT. § 24-80-1302(4)(d) (Supp. 1994) (requiring disinterment within 10 days from the time of notification unless the landowner expressly consents otherwise); MONT. CODE ANN. § 22-3-805(2), (7) (1993) (imposing a 40-day limit for cessation of activities and removal of skeletal remains).

\textsuperscript{320} E.g., NEV. REV. STAT. § 383.170(3) (1993) (permitting emergency excavation
occurs in the course of an archaeological excavation, the archaeologist has responsibility for reporting the location and relevant physical characteristics of the burial to the state officer.\textsuperscript{321}

Some statutes require authorization from the state archaeologist or other state officer for excavation of a human burial.\textsuperscript{322} Many states require special plans for the archaeological exploration or excavation of human burials.\textsuperscript{323} If the burial is located on private land and the protective act applies to it, then the state officer must attempt to reach an agreement with the landowner so that the burial may be excavated.\textsuperscript{324}
Representatives of the Native American tribe or other group with demonstrated ethnic or cultural affinity must also consent. In some states if the landowner, the state officer, and the representatives of the extant Native American or other ethnically related group cannot agree on the disposition of the remains, the statute requires the disinterment of the human remains. In other states, if the parties fail to agree, the human remains must be left in situ. In New Hampshire and North Carolina, if the parties fail to agree, the state is authorized to dictate the terms of the agreement for disposition of Native American remains.

Once the burial is deemed suitable for archaeological examination, it may be excavated, but only by individuals who satisfy qualifications established in the statute. The two most common requirements are for "professional archaeologist" and "human skeletal analyst." The basic requirements include a graduate degree in the relevant academic field, a permit for investigation of a known Native American cemetery, burial site, or other sacred site may not be issued without the review of the Native American heritage advisory council; N.H. Rev. Stat. Ann. § 227-C:8-d (1989) (providing that if the human remains have affinity with an Indian tribe or other specific living group, the state archaeologist must notify the representatives of that group; the Indian tribe has four weeks to respond, and the tribe and state archaeologist then have 90 days to reach agreement about how the remains will be treated); R.I. Gen. Laws § 23-18-11.1(a)(ii) (Supp. 1994) (requiring notification to and participation by the appropriate tribal organization as a requirement for an excavation permit).

E.g., Conn. Gen. Stat. Ann. § 10-386(a) (West Supp. 1994) (stating that if the landowner agrees, the state archaeologist may designate a professional archaeologist to excavate the remains).

E.g., Colo. Rev. Stat. § 24-80-1302(4)(b) (Supp. 1994) (requiring disinterment unless the landowner, state archaeologist, and chair of the Commission of Indian Affairs unanimously agree to leave the remains in situ); Mass. Gen. Laws Ann. ch. 7, § 38A (West Supp. 1995) (providing that if the state archaeologist, commission on Indian affairs, landowner, and other interested parties cannot agree on a means to preserve the remains in their original burial site, the state archaeologist shall excavate and remove the remains); id. ch. 9, § 26A(7) (requiring the same treatment for non-native remains, except without the participation of the commission on Indian affairs).

E.g., Nev. Rev. Stat. § 383.170(2) (1993) (requiring the landowner "at his own expense, [to] reinter with appropriate dignity all artifacts and human remains associated with the site in a location not subject to further disturbance").


minimum amount of experience in field work or laboratory reconstruction of human skeletal remains, and a prior record of the presentation of the results of research and analysis. The statute may also specify the type of research that must be performed as part of the human skeletal analysis.

In addition to mandating the excavation of such burials, the appropriate state authority has responsibility for determining whether there are any related kin or descendants of the individual whose burial has been excavated. If such descendants can be identified, they must be notified and the remains either returned to them for proper treatment or disposed of by the state subject to the descendants’ approval. If no direct descendants or kin can be determined, but “the burial or remains can be shown to have ethnic affinity with living peoples,” then the state officer must consult with the leaders of the relevant ethnic group as to proper disposition. If no kin or descendants can be determined and no culturally related extant group is identified, the relevant state authority must report the discovery to a commission established by the state legislation or to individuals listed in the legislation.

(Vernon Supp. 1994) (listing the qualifications necessary for a professional archaeologist and skeletal analyst).

E.g., N.H. Rev. Stat. Ann. § 227-C:1 VIII-a (1989) (defining “skeletal analyst” as a professional having a postgraduate degree in a relevant field, a minimum of one year’s experience, and a prior record of written reports of analyses and interpretations).

E.g., id. § 227-C:8 VI (1989) (stating that documentation of human skeletal remains must include a description of the skeletal material, including age at death, sex, metrical data and pathologies, description of associated artifacts, age of the remains, and cultural association).

E.g., La. Rev. Stat. Ann. § 681A(2) (West 1994) (requiring the board to make reasonable efforts to locate the relatives of the deceased); Md. Ann. Code art. 83B, § 5-627(b)(2)(i) (Supp. 1993) (allowing the state to transfer human remains and associated funerary objects to the descendants of the deceased); Neb. Rev. Stat. § 12-1208(2)-(3) (1991) (providing that a relative or any Indian tribe “reasonably identified as tribally linked to such remains or goods” may determine reburial or other disposition).

Mo. Stat. Ann § 194.408 (Vernon Supp. 1994); see also Ark. Code Ann. § 13-6-403(b) (Michie 1993) (requiring consultation with the appropriate tribe before the excavation, investigation, removal, and analysis of human skeletal remains); Mont. Code Ann. § 22-3-805(4) (1993) (providing that within 24 hours of being notified by the state coroner of the discovery of human skeletal remains, the state historic preservation officer must notify a board member of the nearest reservation).

E.g., Colo. Rev. Stat. Ann. § 24-80-1302(4)(f) (West Supp. 1993) (requiring that the state archaeologist “consult” with the commission of Indian affairs regarding reinterment); Okla. Stat. Ann. tit. 53, § 1168.2 (West 1991) (requiring consultation with the state historic preservation officer, the state archaeologist, and the director of the Oklahoma Museum of Natural History on the disposition of human remains when the appropriate tribal group cannot be determined). The Delaware statute provides
The ultimate disposition of the human remains varies among the states. Most states following the general scheme permit scientific examination of the remains by a skeletal analyst before reinterment, although reinterment cannot be delayed for more than a specified time period except with the permission of a consultation committee. Some statutes refer only to the restitution of the remains to culturally related groups, without specifying what should happen if no such group can be identified, while other states permit unidentified remains to become the property of the state or to be disposed of as the appropriate state authority determines.

Many of the legislative schemes not only protect burials in situ but also seek to criminalize the possession, sale, transfer, and display of human remains and associated grave goods. Several states now prohibit the obtaining, possession, sale, and transfer of Native American artifacts or human remains taken from a grave or cairn after the effective date of a state statute. Other states have gone even further in that they have

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335 E.g., Fla. Stat. Ann. § 872.05(6)(a) (1994) (requiring that any human remains deemed by the state archaeologist to be “historically, archaeologically, or scientifically significant” be examined by a qualified human skeletal analyst before their reinterment); Mass. Gen. Laws Ann. ch. 7, § 38A (West Supp. 1995) (providing that skeletal analysis of American Indian remains must be completed within one year unless the commission on Indian affairs agrees to a longer period); Neb. Rev. Stat. § 12-1208 (1994) (permitting a one-year scientific study of unidentified remains only when study is considered necessary or desirable by the state historical society); Tenn. Code Ann. § 11-6-119 (Supp. 1992) (allowing six months of scientific analysis of remains before reinterment is required, with an option for an additional six months if necessary).

336 The Florida statute demonstrates a balancing of the competing interests by permitting the remains to become the property of the state if the commission or individuals who were consulted agree. Fla. Stat. Ann. § 872.05(6) (1994). Associated burial artifacts may then be made available for educational purposes, id. § 872.05(8)(a) (1994), and human remains may be put on public display subject to guidelines developed by the relevant state authority, id. at § 872.05(8)(b) (1994); see also La. Rev. Stat. Ann. § 8:681C (Supp. 1994) (making all burial artifacts found in an unmarked burial site the property of the state); Mass. Gen. Laws Ann. ch. 9, § 26A(7) (West Supp. 1995) (providing that the state archaeologist determine the disposition of non-native remains, and that the commission on Indian affairs be responsible for reinterment of Native American remains); Neb. Rev. Stat. § 12-1208(2) (1994) (mandating that unidentified remains be reburied at county expense, and providing that unidentified human remains and burial goods may be curated by the state historical society when they “are clearly found to be of extremely important, irreplaceable, and intrinsic scientific value”).

337 E.g., Cal. Pub. Res. Code § 5097.99(b) (West Supp. 1995) (making it a felony, punishable by imprisonment, knowingly or willfully to obtain or possess any
also prohibited any public display of such remains or objects.\textsuperscript{338} A few states, however, still permit the private ownership of associated grave artifacts by the person owning the land on which the burial was located.\textsuperscript{339}

These regulatory schemes provide for a variety of penalties for violation of specific provisions, including forfeiture of any artifact removed from an unmarked burial with restitution either to the state or other rightful owner.\textsuperscript{340} In addition to criminalizing violations of the act protecting unmarked human burials, some states have created a private right of action on behalf of Indian tribes, and enrolled members of Indian tribes, to obtain injunctions, damages, and other appropriate relief for the violation of the statute.\textsuperscript{341}

b. Restitution of Human Remains

A second area of major controversy is the treatment of human remains and associated grave goods that were excavated prior to the enactment of protective legislation. In some situations, Native American remains have been returned or reinterred simply as the result of publicity and political

\textsuperscript{338} E.g., ARK. CODE ANN. § 13-6-407 (Michie 1993) (making each day of display of human skeletal burial remains a misdemeanor offense); NEB. REV. STAT. § 12-1208(2) (1994) (prohibiting the display of “any human skeletal remains that are reasonably identifiable as to familial or tribal origin” by any entity that receives public funding or official recognition); N.H. REV. STAT. ANN. § 227-C:8-i (Supp. 1994) (prohibiting the knowing exhibition of any human remains from an unmarked burial acquired at any time).

\textsuperscript{339} E.g., N.M. STAT. ANN. § 18-6-11.2G (1991) (permitting the landowner to retain associated grave artifacts unless the excavation permit specifies the reinterment or other disposition of such objects).

\textsuperscript{340} E.g., LA. REV. STAT. ANN. § 679 (West 1994) (allowing civil penalties and remedies including forfeiture, costs for restoration, protection, and reinterment, costs associated with determining and collecting civil remedies, and injunctive relief); N.M. STAT. ANN. § 18-6-12H (1991) (providing, however, that if the object is forfeited to the state, the state may not sell it).

\textsuperscript{341} NEV. REV. STAT. ANN. § 383.190 (1991); see also NEB. REV. STAT. §§ 12-1211 to 12-1212 (1994) (extending the right of action to any person, but providing that no suit may be brought until extensive dispute resolution procedures have been satisfied).
pressure.\textsuperscript{342} A few states have enacted legislation providing for restitution. For example, Delaware has required that any previously excavated skeletal remains of Native Americans uncovered or on display be reinterred by June 5, 1987, one year after the enactment of its protective statute, and that all Native American skeletal remains discovered after the statute's enactment be reinterred within 90 days.\textsuperscript{343} Nebraska enacted legislation in 1989 requiring state public museums to restore Native American human remains and associated funerary objects to their appropriate tribal representatives for reburial.\textsuperscript{344} Arizona followed Nebraska in 1990 in passing legislation requiring restitution of Native American materials in the possession of state agencies before 1990 and owned by the state.\textsuperscript{345} In 1991, the California legislature added to its statute's statement of legisla-

\textsuperscript{342} An interesting example is presented by the controversy surrounding Dickson Mounds in southern Illinois. Dickson Mounds encompasses an extensive Native American burial site that had been excavated in the early decades of this century. A museum was subsequently constructed on the site, with several burials left open or partially open so that visitors could view skeletons and associated grave goods \textit{in situ}. Daniel Egler, \textit{Changing Attitudes Doom Indian Remains Exhibit}, CHI. TRIB., Jan. 30, 1990, at 1. The town population felt that the exhibit was an excellent educational tool and a valuable tourist attraction drawing numerous visitors to the town. Native American groups, however, felt that the exposed burials and the ability of visitors to view these burials was a sacrilege that violated their fundamental religious tenets. After the threat of a lawsuit and considerable public pressure on the state governor, the state agreed to close the burial exhibit and reinter the skeletal remains with the associated burial goods after an opportunity for anthropological study. Hugh Dellios, \textit{Controversy Laid to Rest as Dickson Mounds Closes}, CHI. TRIB., Apr. 4, 1992, at 1. For an anthropological and archaeological discussion of the Dickson Mounds, see Alan D. Harn, Illinois State Museum, \textit{The Prehistory of Dickson Mounds: The Dickson Excavation} (1980).


\textsuperscript{344} 1989 Neb. Laws LB 340 §§ 9-11 (codified at Neb. Rev. Stat. §§ 12-1209 to 12-1211 (Supp. 1994)) (requiring publicly funded or identified entities upon request to return any human skeletal remains or burial goods "of American Indian origin which are reasonably identifiable as to familial or tribal origin" to such relative or Indian tribe or to reinter the remains within one year of the request). The details of this legislation and, more interestingly, a full account of the history of the enactment of this legislation are recounted in Robert M. Peregoy, \textit{The Legal Basis, Legislative History, and Implementation of Nebraska's Landmark Reburial Legislation}, 24 Ariz. St. L.J. 329 (1992). This statute served as a model for NAGPRA, described supra notes 289-306 and accompanying text.

tive intent that "it is the policy of the state that Native American remains and associated grave artifacts shall be repatriated" but did not enact any specific implementation of this policy.\(^{346}\) Connecticut also has an apparently limited restitution policy in that it requires the state museum of natural history to develop procedures for "loans and transfers of sacred objects and other materials, including archaeological artifacts, to Native American museums or other institutions"\(^{347}\) but without any absolute directive to return all such objects upon request.

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This description of the current legal scheme pertaining to archaeological materials demonstrates many of the recurrent problems with archaeological resource protection in the United States. The struggle to achieve meaningful protective legislation is hindered by a myriad of obstacles, including the splintering of jurisdiction between federal and state governments and among various governmental agencies; general lack of enforcement of such legislation, often caused by inadequate funding; lack of public understanding, which may result in minimal prosecution or minimal penalties for violations of protective statutes; and the continuing notion that only sites and monuments located on public land can be protected.

The combination of the variety of particularistic statutes and the underpinning of our legal system in the common law has produced significant variations in treatment of different archaeological resources that should, in fact, be treated the same. Legal treatment of finds depends on whether they are located on land or submerged in water, are found on public or private land, or land owned by state government or the federal government or associated with Native American tribes; whether they consist of burials or habitations or other type of archaeological site; whether they are previously known or newly discovered; and whether they are remains of Native Americans or European descendants. Each of these variables interrelates with the other variables, thus producing an almost infinite number of possible methods of treatment of archaeological resources throughout the nation. These laws thus become confusing, unwieldy, and difficult to enforce. What is needed, therefore, is the development of a single unifying theory for evaluation of these resources, which will in turn

\(^{346}\) 1991 Cal. Stat. ch. 370 § 2 (codified at CAL. PUB. RES. CODE § 5097.991 (West Supp. 1995)). Among the legislative purposes stated are the fact that "m[any believe keeping these remains in institutional collections objectifies Native Americans and fosters the notion that these remains are collectibles," as well as the desire to show respect for "tribal religious or cultural practices." Id. § 1(d).

\(^{347}\) CONN. GEN. STAT. ANN. § 10-383(b) (West Supp. 1994).
provide the basis for the development of a single legal structure with accompanying appropriate statutory and judicial treatment.

The original contexts in which the applicable legal rules developed had policy considerations that justified each approach. These considerations, however, are not worthy justifications for formulation of a policy to manage our cultural resources. The public interest in archaeological and historical knowledge calls for uniformity of treatment and the development of a set of legal rules that will further that interest. For example, the rewarding of the finder's labor, industry, and technology used in finding the object is no longer the appropriate goal in our society. The one thing that is absolutely certain is that knowledge is not increased by individual, haphazard discoveries, which generally destroy whatever scientific and historical value might have been gleaned through careful excavation and preservation of the archaeological context. The earlier approach encouraging exploration must be replaced by the policy of preserving the past, enhancing our understanding of that past, and recognizing the interests of various cultural groups in their cultural heritage. This may even mean that it is better to encourage leaving objects in the ground, rather than blindly encouraging their excavation and retrieval through awarding these objects to finders, salvors, and real property owners. Although we have learned the worthiness of conservation rather than consumption in other contexts such as the environmental and historical preservation movements, archaeological preservation and resource management have lagged significantly behind.

This Article next proposes a single unified statutory model for the treatment of archaeological resources, which will attempt to remedy the confusion and inconsistency present in the current legal regime. To ensure that protection of archaeological resources will be comprehensive and proactive, rather than haphazard and reactive, this model aims to protect all archaeological resources of significant historical and cultural value, regardless of the circumstances and location of their discovery. To ensure equality of all religious and ethnic groups, this model makes no distinctions in the treatment of cultural and archaeological resources on the basis of religious or ethnic affiliation and aims to engender respect for all cultural traditions. Finally, this model incorporates a sensitivity to the need for conservation of resources and preservation of the archaeological and historical context so as to maximize our understanding and knowledge of the past.

IV. Model for the Uniform Protection and Treatment of Cultural Property

As one commentator has noted, "A multiplicity of sometimes contradictory legal solutions to a problem suggests that the host culture has not
resolved the priorities for competing values into a modal ordering.\textsuperscript{348} The preceding discussion of the variety of legal treatments our society affords to cultural property stands as strong evidence that this country has not yet resolved the cultural conflicts that result from our society's differing views of its past. In an attempt to overcome conflicting concepts of cultural property, this Part presents and defends a unitary theory that will make both the physical protection and the continuing vitality of cultural property a priority for the future.

The underlying premise of this theory is that cultural property is a finite, depletable, and nonrenewable resource. Therefore, the theory balances preservation of the archaeological, historical, and cultural contexts of cultural property, including preservation of stratigraphical and associated materials, with respect for a variety of cultural traditions. In addition, the theory recognizes an equality of treatment among traditions, particularly in the protection of human remains and burial goods.

To achieve these goals, this theory requires recognition of the group right to ownership of cultural property. The theory bases the enforcement of this group right to cultural property in the public trust doctrine. Application of the public trust doctrine to the protection of cultural property serves to counter any constitutional challenges to the protective scheme. This Article culminates with the presentation of a model state statute for protecting cultural property. This model statute presents a realistic option for states to adopt to address the gaps in existing federal and state protective legislation.\textsuperscript{349}

\section{Overview of Model Statute}

This Article proposes a model statute for the uniform protection and treatment of cultural resources that responds to the many concerns previously raised.\textsuperscript{350} Although this statute draws on several of the statutory

\textsuperscript{348} PRICE, supra note 271, at 3.

\textsuperscript{349} Other commentators have recently noted the existing gaps in federal and state protective legislation, and some have proposed amendments to existing statutes or new legislation. See Michael J. Bushbaum, Beyond ARPA: Filling the Gaps in Federal and State Cultural Resource Protection Laws, 23 ENVTL. L.J. 1353, 1367-74 (1993) (proposing a model local or county ordinance to protect Native American archaeological resources and burials located on public and private land); Constance M. Callahan, Warp and Weft: Weaving a Blanket of Protection for Cultural Resources on Private Property, 23 ENVTL. L.J. 1323, 1326-29, 1338-39 (1993) (discussing the limited extent to which states control excavation of archaeological resources located on private land); Rennard Strickland & Kathy Supernaw, Back to the Future: A Proposed Model Tribal Act to Protect Native Cultural Heritage, 46 ARK. L. REV. 161, 171-99 (1993) (proposing a model cultural heritage ordinance to be adopted by Native American communities and tribes to facilitate restitution of cultural property under NAGPRA and to regulate exploration and excavation of archaeological resources).

\textsuperscript{350} The model statute is set forth in the Appendix to this Article.
IDENTITY AND CULTURAL PROPERTY

schemes already in existence, many of which have been discussed in the preceding section, it also attempts to present an innovative approach for the protection of cultural property and, in particular, of archaeological materials. First, this statute subjects archaeological sites found on private land to a protective scheme comparable to that applied to sites on public land, although care has been taken not to raise a constitutional question based on the Takings Clause. Second, this statute entitles all archaeological sites to the same protection and the same legal rules, regardless of whether the site is located on land or is submerged. Third, the statute reformulates the treatment of archaeological materials, explicitly recognizing that human remains and funerary objects are not subject to private ownership, and aiming to restore such remains to descendants, when these can be identified, for appropriate treatment. Finally, the statute imposes upon both private and governmental owners of material with archaeological, historical, and cultural significance an obligation to care for such objects pursuant to the public trust.

The statute requires that, upon the accidental discovery of an archaeological site, the appropriate state agency must be notified and any activity that may disturb the site, such as farming or construction, must cease for a time sufficient to permit the state agency to investigate the site. The state agency has the exclusive right to control archaeological excavation and other exploration on both public and private land, although in the case of the latter, the landowner's consent is also required. The state agency may issue licenses for field work only to qualified professional archaeologists who must satisfy several requirements, including submission of a publication plan for the results of the field work.

In the case of human remains and funerary objects, the statute explicitly recognizes the common law principle that human remains are not subject to ownership and are only entrusted to family or other culturally or ethnically related individuals for the purpose of reburial or other appropriate treatment. The statute provides for comparable treatment of funerary objects as well. Sacred objects are owned by the relevant cultural group, but if the group voluntarily consents to their alienation, then such objects can be transferred to private ownership.

As is currently the case, the state government, federal government, or Native American tribal group is the owner of archaeological objects

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351 Model Statute § 3(A), (C).
352 Id. § 1(4).
353 Id. § 7(A).
354 Id. § 5(C).
355 Id. § 3(A).
356 Id. § 4(A).
357 Id. § 4(C).
358 Id. § 7(A).
359 Id. § 6(C), (E).
found on land owned or controlled by one of these entities.\textsuperscript{360} In the case of archaeological objects found on private land, the agency may either release title to objects to the landowner or purchase the object from the landowner.\textsuperscript{361} Ownership of archaeological objects remains subject to the public trust, which imposes duties upon the owner to care properly for the object, make it available for study and occasional public display, and notify the agency of transfers in ownership.\textsuperscript{362} Nonetheless, the protective scheme permits the market in such cultural objects to continue, although subject to specific controls. These controls are designed to ensure that objects enter the market with the consent of the relevant cultural group, the most significant objects remain accessible to the public, and the objects are excavated in such a manner as to provide a proper provenance and with the preservation of as much scientific information and original context as possible.

One of the unique aspects of the protective statute is its application of the public trust doctrine to the protection of archaeological resources. The public trust doctrine has long been used as a means of protecting the rights of the public to use and preserve various natural and environmental resources. These resources were considered so significant to the public's well-being that their owners, whether governmental entities or private individuals, took ownership subject to an obligation to protect the public's right of access and use. The statute now brings archaeological resources within the doctrine's prior protection of other forms of natural and environmental resources by recognizing that all these resources share certain vital characteristics including their depletable and nonrenewable nature. This element of the statute emphasizes the concept of stewardship and preservation for future generations of archaeological resources and other forms of cultural property.

The public trust doctrine thus provides both a theoretical justification for this treatment of cultural property and a rationale for avoiding any violation of the Fifth Amendment Takings Clause. The public trust doctrine also provides a framework for recognizing the right of the cultural group that produced the object in maintaining some control over the physical manifestations of its culture. This recognition of ownership of cultural property by the cultural group thus becomes a mechanism for allowing the cultural group to attain fuller self-understanding in accordance with the personality theory of property ownership.

\textsuperscript{360} Id. § 5(A).
\textsuperscript{361} Id. § 5(B). The statute provides strong incentive to comply with its requirements in that one who violates the statute, including the requirement to report accidental discovery of archaeological materials, sacred objects, and burial sites, may obtain neither title to nor compensation for any objects.
\textsuperscript{362} Id. § 5(C).
B. Re-evaluation of Ownership of Archaeological Resources

1. Human Remains and Associated Artifacts

Before entering upon a full consideration of the nature of group ownership of cultural property, it is necessary to clarify that one category of archaeological resources is not cultural property at all. According to Blackstone, human skeletal remains were not subject to private ownership, apparently because human bodies did not have any commercial or monetary value. In the United States, the heir or next of kin also has not historically had a conventional property right in the body but has had the right to hold and protect the body until burial, to determine its disposition, to select the place and manner of burial, to carry out the burial, and to have undisturbed repose of the body.

The possessor of such remains is regarded as the trustee for the limited purpose of securing appropriate reburial. However, it has been recognized that bodies may be subject to removal and reinterment when necessitated by some public need, and once skeletal material has disintegrated or if the grave site is considered to have been abandoned, the burial may no longer be worthy of the same degree of protection. It is unclear,

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368 Hugh V. Bernard, The Law of Death and Disposal of the Dead 16 (1979) (citing 2 William Blackstone, Commentaries, *429). The objects and clothing buried with a corpse were, however, still regarded as the property of the heir of the deceased, and thus the person who wrongfully removed them committed larceny. Id.

364 Id. at 15-17; see also Bogert v. City of Indianapolis, 13 Ind. 134, 138 (1859) (asserting that surviving relatives inherit the bodies of the dead as property, but that the government may require reasonable restrictions for burials so that the bodies are not a nuisance). For an historical view of the treatment of human remains in both Europe and the United States, see David C. Sloane, The Last Great Necessity: Cemeteries in American History 17-19, 28-29 (1991) (discussing the transition from treating human remains with little respect in mass churchyard graves to purchasing single lots designed to last in perpetuity).

In situations in which it is not feasible or possible for the heir or next of kin to determine proper reinterment, the court may direct disposition of the remains. E.g., United States v. Unknown Heirs of All Persons Buried in the Post Oak Mission Cemetery, 152 F. Supp. 452, 455-56 (W.D. Okla. 1957) (deciding court has wide discretion in determining the proper place for the reburial of remains of the last chief of the Comanche Indians, when necessitated by the expansion of a military installation and decedent's heirs could not agree on disposition); In re Indian Cemetery, Queens County, 7 N.Y.S.2d 404, 405-06 (Sup. Ct. 1938) (directing the reburial of Indian remains necessitated by the expansion of a nearby highway, despite a dispute among descendants).

365 See, e.g., Carter v. City of Zanesville, 52 N.E. 126, 127 (Ohio 1898) (refusing to award damages to the next of kin when cemetery owners commingled the remains of the deceased with those of others, because the statute prohibiting interference with bodies was not intended to apply to cemetery owners and did not apply to the remains of persons "long buried and decomposed"); Ohio v. Glass, 273 N.E.2d 893, 897-98
however, whether human skeletal remains ever attain sufficient age as to evolve into the category of cultural property.

Congress and the Justice Department took the position during the NAGPRA hearings that NAGPRA’s restrictions on transfer, possession, and ownership of Native American human remains and burial goods were merely a codification of pre-existing common law in the United States. Although the general criminal statutes protecting graves and cemeteries have not always been applied to protect Native American human remains and burials, interpretation of such statutes to include Native American burials is not only desirable but probably also necessitated by principles of equal protection. Interpretation of general statutes to achieve equality of treatment and enactment of particular statutes to protect Native American human remains and burials are thus merely clarifications of traditional common law precepts founded upon respect for the dead.

2. Public Trust Doctrine and Group Ownership of Cultural Property

Under the Anglo-American legal system, archaeological resources that are not religious or that are not associated with human remains are subject to ownership. Such goods may have an original owner and may continue to be owned by the heir or descendant of the original owner. In the absence of an original owner, most found objects are assigned as a default mechanism to the finder or real property owner based on policies designed, in the first instance, to reunite the original owner and the object. In situations in which other policy concerns prevail over the justi-

(Ohio Ct. App. 1971) (finding that the defendant had not violated a statute prohibiting “grave robbing” when she reinterred remains in another cemetery but had violated a statute prohibiting the removal of grave markers).

DuBoff, supra note 40, at 54.

There is a difference in opinion as to proper disposition of human remains among indigenous peoples, in part because there are distinct religious traditions among the various indigenous groups. Price, supra note 271, at 2, 10. Some indigenous groups may not care about reinterment, while others do, and the religious beliefs of the same group may vary over time. Id. at 40. Despite these differences in beliefs, all indigenous groups agree that disposition of human remains should be subject to the wishes of the closest ethnically related group that can be identified, at least in the absence of direct lineal descendants. Id. at 2.

Such diversity has been reduced somewhat by the pan-Indian movement in North America during this century. Id. at 11-12. Of greater significance, however, is the recognition that indigenous groups are merely seeking the same levels of respect routinely granted to remains of nonindigenous groups. Id. at 16. For the latter, the scientific interest has given way to the belief systems of the individuals; only in the case of indigenous human remains has the scientific viewpoint prevailed. Id. at 15. Thus resolution of the conflicting moral values only requires equal treatment of aboriginal and nonaboriginal remains. Id. at 16.
fication for these default ownership rules or in which the original owner
no longer exists, however, the resource in question becomes cultural
property, subject to group ownership. Statutory law may clarify a
group's rights and may utilize certain presumptions or norms, based on
factors such as age or ritual use, in establishing which resources constitute
cultural property. The culture that created the resource, however, defines
its own cultural property within the particular context of the object's
function and significance for the group. Factors such as whether the
resource was found on land or underwater and whether it was found on
publicly or privately owned land become irrelevant to designating cul-
tural property.

The public trust doctrine is the most appropriate legal doctrine for
explaining the public interest and for protecting the rights of a cultural
group in its cultural property. In its Roman and subsequently British ori-
gins, the doctrine preserved the public's right to make use of natural
resources, particularly rivers, the sea, and the shore, for purposes such as
recreation, navigation, and fishing. During the nineteenth century,
courts in the United States recognized the public trust doctrine as both a
federal right to control admiralty and interstate commerce in navigable
waters and a state right to preserve and to make available waterways,
including rivers, lakes, lake beds, coasts, and shorelines, for public use

368 For a discussion of the definition of cultural property, see supra part I.
369 See supra note 34 and accompanying text.
370 For background of the public trust doctrine, see Richard J. Lazarus, Changing
Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public
trust doctrine in Roman and English common law); Patricia E. Salkin, The Use of the
Public Trust Doctrine as a Management Tool over Public and Private Lands, 4 A.L.B.
L.J. SCI. & TECH. 1, 2-3 (1994) (following the development of the public trust doctrine
from the Roman Empire to England and to the United States); Joseph L. Sax, The
Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68
MICH. L. REV. 471, 475-78 (1970) (providing historical background to the public trust
dctrine); Susan D. Baer, Comment, The Public Trust Doctrine—A Tool to Make
Federal Administrative Agencies Increase Protection of Public Land and its Resources,
15 B.C. ENVTL. AFF. L. REV. 385, 387-92 (1988) (describing the origins and develop-
ment of the public trust doctrine).
371 This right of the federal government is known as the federal navigation servti-
ude and was first set out by Chief Justice Marshall in Gibbons v. Ogden, 22 U.S. (9
Wheat.) 1, 197 (1824) (stating the power of Congress "comprehends navigation within
the limits of every state in the Union; so far as that navigation may be, in any manner,
connected with 'commerce with foreign nations, or among the several states, or within
the Indian tribes' "); see also Lazarus, supra note 370, at 636-37 (explaining that the
Gibbons ruling spawned decisions at a time when the federal government sought to
expand its waterway system, thereby interfering with plans of states and private
individuals).
and access.\textsuperscript{372} In 1892, the Supreme Court applied the public trust doctrine in \textit{Illinois Central Railroad v. Illinois}\textsuperscript{373} to permit the state to rescind a sale that transferred a significant amount of land along Lake Michigan into private hands.\textsuperscript{374} The Court held that the transaction violated the public trust because it did not ensure adequate public access.\textsuperscript{375} Although land subject to the public trust may be sold to private individuals, the land remains impressed with the public trust, and the owner must respect the public's continuing rights.\textsuperscript{376}

The public trust doctrine remained limited largely to the public interest in waterways and the subjacent and adjacent land until Joseph Sax argued in a seminal article published in 1970 that the protection of the public trust doctrine applies to a wide variety of natural resources in which the public has a strong interest.\textsuperscript{377} Sax pointed to three policy justifications for this extension of the doctrine. First, no individual or group should control certain resources in such a way as to exclude the public because "their free availability tends to mark the society as one of citizens rather than of serfs."\textsuperscript{378} Second, certain natural resources "are so particularly the gifts of nature's bounty" that they should belong to the public.\textsuperscript{379}

\textsuperscript{372} The states' sovereign right to control waterways, which originated with the federal government or, in the case of the colonies, with the British Crown and was then later transferred to the respective state governments, was first recognized in Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 416 (1842) (confirming the transfer of "prerogatives and regalities" from the British Crown to the state of New Jersey); see also Lazarus, \textit{supra} note 370, at 637-38 (noting that the modern public trust doctrine originates in the "notion of 'sovereign capacity' ownership"); Baer, \textit{supra} note 370, at 389 (stating that title to the waterways "passed from English Crown to the Colonies after the American Revolution and then vested in the States in trust for their public use").

\textsuperscript{373} 146 U.S. 387 (1892).

\textsuperscript{374} \textit{Id.} at 463-64. The disputed tract of land consisted of over 1000 acres of submerged lands. \textit{Id.} at 454. Because of the importance of keeping the Chicago port open to commerce, the relinquishment of control and management was a "gross perversion of the trust over the property under which it was held." \textit{Id.} at 454-55.

\textsuperscript{375} \textit{Id.} at 453-54 ("The trust doctrine devolving upon the State for the public, and which can only be discharged by the management and control of the property in which the public has an interest, cannot be relinquished by a transfer of property."). The Court did note, however, that transfers of small parcels along the waterfront are permissible if for construction of structures in the aid of commerce, such as wharves, piers, and docks. \textit{Id.} at 452-53.

\textsuperscript{376} See Sax, \textit{supra} note 370, at 528-29 (discussing the obligation of private grantees to preserve public access to lands subject to the public trust).

\textsuperscript{377} See \textit{id.} at 474 (asserting that the public trust doctrine has the "breadth and substantive content" to protect natural resources).

\textsuperscript{378} \textit{Id.} at 484. This is similar to the personality theory of property propounded by Radin. See \textit{supra} notes 24-27 and accompanying text.

\textsuperscript{379} Sax, \textit{supra} note 370, at 484. Sax specifically cites to early New England laws setting aside the "great ponds" for public use, which he suggests was one impetus for
Third, the public nature of natural resources makes any private use inappropriate. Sax argued forcefully that the public trust doctrine serves as the most effective tool for enforcing public duties to preserve natural resources and thus to protect the environment for the benefit of the public.

Both before and after the publication of Sax's article, courts expanded the public trust doctrine's application to cover other natural resources, such as wildlife, public lands, marine life, and rural parklands. Of importance for this Article is the question of whether the doctrine extends its protection to archaeological resources. In Wade v. Kramer, an Illinois appellate court accepted the plaintiff's contention that the public trust doctrine protects archaeological resources, although in that circumstance, the court found that the state had not violated the trust. A California appellate court differed in its approach when it held that the public trust doctrine does not extend to archaeological resources located on private land because the state had never owned the objects. The California Supreme Court rejected this reasoning in

the later system of national parks "built around unique natural wonders and set aside as natural national museums." Id. at 485.

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380 Id.

381 Id. at 556 ("Public trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals.").

382 See Lazarus, supra note 370, at 640-41 (discussing 19th-century cases that used the public trust doctrine to protect wildlife and public lands).

383 Id. at 649-50 (noting that courts expanded the doctrine to protect resources other than water, such as beaches, rural parklands, a historic battlefield, wildlife, archaeological remains, and a downtown area); see also Salkin, supra note 370, at 3 (citing the evolution of the public trust doctrine to include "conservation, scenic resources, open space, generation of energy, and preservation of ecosystems and historical sites" under its aegis); Baer, supra note 370, at 387 n.13 (listing migratory waterfowl, parkland, and sport-caught fish as other resources the public trust doctrine protects). Sax also continued to write on the subject. Joseph L. Sax, Liberating the Public Trust Doctrine from its Historical Shackles, 14 U.C. Davis L. Rev. 185, 188 (1980) (arguing that the public trust doctrine should protect public expectations of property from destabilizing changes).


385 Id. at 1027.

386 Id. at 1028 (holding that when balancing the construction of a public highway against the public trust doctrine, "the Legislature may reallocate property from one public purpose to another without violating the public trust doctrine").

387 San Diego County Archaeological Soc'y, Inc. v. Compadres, 146 Cal. Rptr. 786, 788 (Ct. App. 1978) ("[T]he public trust doctrine ... does not involve private property except where the state has conveyed the land into private hands. It does not cover artifacts located on private property.").
City of Los Angeles v. Venice Peninsula Properties and found that the public trust doctrine can apply to private property that the public has never owned. Furthermore, in Pennsylvania v. National Gettysburg Battlefield Tower, Inc., the Pennsylvania Supreme Court noted that, according to the state constitution, Pennsylvania served as trustee of public natural resources. In the absence of specific legislation defining the contours of the public trust, however, the court did not prohibit construction on private land that would interfere with an historic battlefield and cemetery.
The development of the public trust doctrine from a narrow application to protect specific natural resources to a more expansive use to protect the environment\textsuperscript{393} parallels the development of our society’s consciousness of, and appreciation for, first, scenic beauty, and then later, the broader environment. The growing recognition that archaeological resources are also finite, nonrenewable, and depletable makes protection of archaeological resources the next logical step for the public trust doctrine to take.

In its application to the protection of cultural property, the public trust doctrine provides the basis for a state’s authority to legislate protection of these resources. As a corollary to this function, the doctrine explains why archaeological resource protection that applies to cultural property found on private land does not trigger a takings challenge.\textsuperscript{394} Furthermore, the doctrine defines a trust standard for evaluating the conduct of both the government and any private owner of cultural property. It thus imbues the protection of cultural property with the doctrine’s trust relationship and imposes a fiduciary standard upon that relationship.\textsuperscript{395}

Susan Baer analogizes the duties and the high fiduciary standards owed under the public trust doctrine to those owed by the federal government to Native American tribes under the federal Indian trust doctrine.\textsuperscript{396} The

\textsuperscript{393} See, e.g., M. Casey Jarman, The Use of the Public Trust Doctrine for Resource-Based Area-Wide Management: What Lessons Can We Learn from the Navigable Waters Trust, 4 ALB. L.J. SCI. & TECH. 7, 8-10 (1994) (arguing that the public trust doctrine should be used to permit area-wide management for environmental and ecological protection purposes); Ruthann Knudson, The Archaeological Public Trust in Context, in PROTECTING THE PAST, supra note 12, at 3, 5 (describing the “archaeological public trust” as encompassing every individual’s “inalienable right to intellectually understand, and be spiritually secure in, her or his place in the physical and social world, within that individual’s natural capabilities”); Salkin, supra note 370, at 3 (stating that “[a] more appropriate approach [to defining the public trust doctrine] might be to accept the notion that as public values change, so do the resources that the public trust doctrine might protect”).

\textsuperscript{394} See infra part IV.C.3; see also Martin H. Belsky, The Public Trust Doctrine and Takings: A Post-Lucas View, 4 ALB. L.J. SCI. & TECH. 17, 30-32 (1994) (arguing that the public trust doctrine justifies land-use regulations so that they are not subject to constitutional takings challenges).

\textsuperscript{395} See Baer, supra note 370, at 421 (“Because federal agencies are de facto trustees of federal public land and its resources, courts should be receptive to the premise that federal agencies, as public trust trustees, are subject to the same fiduciary standard as other trustees.”). Application of the fiduciary standard of the public trust doctrine to the protection of cultural property would require the state or federal government to act in the sole interests of the trust beneficiary, which is the public or, at times, the relevant cultural group. To enforce these fiduciary obligations, courts would apply principles of private and charitable trust law. See id.

\textsuperscript{396} Id. at 428-32 (suggesting that the duties the federal government owes to Native American tribes under the federal Indian trust doctrine are applicable to strengthen the federal public trust doctrine for protecting natural resources).
federal Indian trust doctrine imposes duties on the federal government to manage Native American property and other affairs in the best interest of Native Americans, including the protection of environmental and natural resources on tribal land.\(^{397}\) The Indian trust doctrine places the federal government in a guardian- or trustee-like relationship with the tribes.\(^{398}\) Although designed to be a protection of Native American interests, the federal Indian trust doctrine has become the source of Congress's virtually unlimited power over the tribes.\(^{399}\) The Supreme Court supports this plenary power, basing its decisions in the enumerated powers of the Constitution.\(^{400}\) Attempts to hold Congress to a high fiduciary standard often fail because the government has not waived its sovereign immunity.\(^{401}\)

\(^{397}\) The "cornerstone" of Indian policy is that "Native people in this country possess a right to exist as separate tribal groups with inherent authority to rule themselves and their territory." American Indian Policy Review Comm'n, Final Report 622 (Comm. Print 1977) (Separate Views of Indian Commissioners). The report states: "It is our judgment that the goal of Indian self-sufficiency is indeed a matter of over-riding importance." \(^{Id.}\)


The doctrine holds the executive branch to legally enforceable duties. Courts have held executive agencies to the strict fiduciary duties of a common law trustee, particularly in their management of Native American land and resources. See Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919) (holding that the treatment of Indian lands under public land-use laws would be an act of confiscation, not of guardianship).

\(^{399}\) Chambers, supra note 398, at 1226 (noting that the "power of Congress recognized under the [Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)] rendition of the trust responsibility is manifestly awesome, perhaps unlimited").

\(^{400}\) See U.S. Const. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce with Indian tribes); see also Morton v. Mancari, 417 U.S. 535, 551-52 (1974) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself."); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973) (explaining that "the source of federal authority over Indian matters has been the subject of some confusion, but . . . the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making").

\(^{401}\) See Menominee Tribe of Indians v. United States, 607 F.2d 1335, 1341 (Cl. Ct. Cl. 1979)("[W]e cannot find that Congress has empowered us to hear and to determine non-constitutional claims that a fiduciary duty towards Indians has been breached by the passage of legislation by the Congress itself."), cert. denied, 445 U.S. 950 (1980).
Despite the core aim of the Indian trust doctrine to protect the interests of a weaker group, courts consider the trust obligations of Congress to be largely moral and not legally enforceable. Because of the weaknesses in the federal Indian trust doctrine, it should not be confused with the public trust doctrine. Although these doctrines share some common characteristics, such as the basic elements of a common law trust, the expansion of the public trust doctrine's application in recent years sets it apart from the Indian trust doctrine, which has largely failed to achieve its primary purpose.

Critics object to the expanded use of the public trust doctrine, claiming it operates as a judicially created legal fiction that merely compensates for the failure of other legal means to achieve desirable results, particularly in the environmental protection area. This Article, however, posits a legislative solution that seeks to solve the problems of cultural

The court noted, however, that Congress could waive its sovereign immunity for such cases. Id. at 1344; see also Matthew D. Wells, Comment, Sparrow and Lone Wolf: Honoring Tribal Rights in Canada and the United States, 66 WASH. L. REV. 1119, 1135-36 (1991) (suggesting that Congress could waive its sovereign immunity by creating a right to monetary damages for improper management of tribal property).

See Chambers, supra note 398, at 1227 ("[W]hile courts recognize that Congress has a trust responsibility, they uniformly regard it as essentially a moral obligation, without justiciable standards for its enforcement."); Wells, supra note 401, at 1123 (stating that "the trust doctrine provides no legally enforceable rights against Congress for breach of its trust duties" and that sovereign immunity would prevent a suit against Congress for breach of trust claims).

An alternative approach suggests the use of nuisance law instead of the public trust doctrine. See Lazarus, supra note 370, at 660-64 ("In public nuisance cases, courts have had no difficulty finding that threats to the natural environment and to public health from environmental 'pollution implicate rights common to the public.' "). Because of the overlay of tort law principles onto property law, nuisance law adapts well to environmental and natural resource protection. See, e.g., Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970) (awarding damages to residential neighbors from a polluting cement factory, while acknowledging that the more typical nuisance remedy is to enjoin the activity); Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982) (recognizing a cause of action for a nuisance caused by the obstruction of access to light). Nuisance law does not work as well for cultural resource management, however, because tort law does not impose immediate obligations on the finder of cultural
resource management. Although the public trust doctrine provides the rationale for this legislative action, the statutory codification of those interests elevates them above the level of a judicially created legal fiction.

A protective scheme premised on the public trust doctrine requires identification of a trustee who is charged with responsibility for protection of the cultural property in question. For cultural property belonging to the politically dominant, Western European-derived culture in the United States, both federal and state governments stand as the representative of the cultural group. When government possesses cultural property, it acts as trustee on behalf of the relevant cultural group for protecting and utilizing the object for the benefit of the group. The government may convey possession, either temporary or permanent, or ownership, either subject to the trust or free of the trust, to individuals or various types of public institutions. Legislation defines the alienability and appropriate treatment of cultural property, which may vary depending on the particular type of cultural property involved. Individual members of the group would have standing to enforce the public trust if the treatment of the property seems to violate the trust.

Groups that are not part of the politically dominant cultural group would be represented by their own tribal organization standing in the role of trustee.

property, or the ultimate owner of cultural property, to act subject to the public's continuing rights and interest in the cultural property.

There has been considerable debate as to whether there is a private right of action to enforce the federal government's environmental protection responsibilities under either specific government legislation or the common law public trust doctrine. The Supreme Court has seemed to set incrementally higher thresholds for standing in environmental protection cases. See Sierra Club v. Morton, 405 U.S. 727, 739-41 (1972) (denying standing to the Sierra Club under the Administrative Procedure Act because a "mere interest . . . is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA"); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973) (granting standing to SCRAP because the claimed illegal action would harm it directly); Lujan v. National Wildlife Federation, 497 U.S. 871, 885-89 (1990) (denying standing to the National Wildlife Federation ("NWF") when the alleged facts in the NWF's affidavits failed to show that the interests of the NWF were adversely affected); Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2138 (1992) (denying standing to environmental groups challenging federal agency actions under the Endangered Species Act because no injury was demonstrated by the party seeking review).

This debate is less likely to arise here because the model legislation specifically provides for a private right of action in state court, Model Statute § 11(A), where standing requirements may be reduced. Still, some state courts may follow the federal doctrine. In such cases, in addition to the basis for standing created in the statute, standing may also more easily be found because all members of the relevant cultural group would be considered to share an ownership interest in the cultural property as beneficiaries of the public trust. They would thus be enforcing an ownership right and should therefore meet the Court's requirements for standing, including demonstrating injury-in-fact and redressability.
Cultural property is not, by definition, inalienable. The problem of alienability lies in obtaining consent of the relevant "owners"—the cultural group. Although one may posit that the government or group representative, as trustee, may alienate cultural property, the problem is representation of future generations, which are also beneficiaries of the trust. Limited alienability is therefore possible, subject, as appropriate, to such restrictions as maintenance of public access for study or display purposes or to a requirement to remain in a particular geographic area. The nature of these restrictions should depend on the relative uniqueness of the particular object. The trustee has discretion, but individual group members could also object. The court might also have authority to appoint a guardian \textit{ad litem} to represent the interests of future generations. On the other hand, cultural property of considerable value might be inalienable on the international market because of the difficulty of enforcing the public trust in a different legal system. Alienability would thus be restricted, although not eliminated, and such restrictions would be outweighed by the value to cultural identity that is thereby achieved. Thus the statutory model does not aim to eliminate the market in cultural resources but rather to regulate it so that those resources of greatest significance will be properly cared for and will be accessible to the public.

The recognition of group ownership rights in cultural property, although arising from a backdrop of communitarianism and other group rights theories, does not pit the individual against the group, as may occur in other contexts such as those involving the free exercise of religion. In the case of cultural property, there is no owner other than the group, and so the group has not divested any individual of vested property rights. Admittedly, group ownership rights are partially premised on a refusal to recognize ownership rights based on fictions of ancient intent and on a recognition that the rights of the finder and the real property owner have always been regarded as provisional, subject to the claim of the original owner of the property. The assignment of the ownership of such property has always been based on a "default" mechanism for determining who is most suited to be regarded as "owner" in order to achieve certain policy goals. Thus, in the case of cultural property, the best owner is the group, and no individual has a cognizable interest that furthers a better or more coherent policy goal.

C. Challenges to Protective Legislation

A comprehensive proposal for new legislation must both anticipate and take into consideration potential challenges to its validity. This Section analyzes several bases for challenges to such protective legislation and attempts to explain why these challenges would fail. Challenges that could arise under either the federal or a state constitution include allega-

\footnote{405 See supra part III.A.}
tions that the legislation denies due process or equal protection, is vague or overbroad, or constitutes a taking of property without just compensation. It is perhaps surprising that legislation of this type has not been subjected to more frequent attack, with few reported cases directly on point.

1. Vagueness and Overbreadth

In United States v. Diaz, the United States Court of Appeals for the Ninth Circuit declared unconstitutional the Antiquities Act of 1906, the first significant federal legislation that attempted to protect archaeological resources. The court found the statute vague because several terms, such as “object of antiquity,” “ruin,” and “monument,” were beyond the ordinary person’s knowledge or understanding. This decision in part inspired the enactment of the Archaeological Resources Protection Act in 1979. Although ARPA bears similarity to the Antiquities Act, the Ninth Circuit found the statute constitutional in its 1990 decision, United States v. Austin.

In Austin, the defendant challenged the constitutionality of ARPA on both overbreadth and vagueness grounds. The court stated the test for an overbreadth challenge to be whether the legislation curtails constitutionally protected conduct. Austin asserted that ARPA infringed on academic freedom, which the First Amendment protects. The court rejected the notion that Austin had been motivated by academic curiosity and thus held that the conduct affected by ARPA was not constitutionally protected. The Court also rejected the vagueness challenge because the terms of the statute were sufficiently clear so as to give the defendant fair notice of what activity ARPA prohibits.

406 499 F.2d 113 (9th Cir. 1974).
407 Id. at 114-15.
408 Id. (“The statute, by use of undefined terms of uncommon usage, is fatally vague in violation of the due process clause of the Constitution.”).
410 902 F.2d 743, 744-45 (9th Cir.) (holding that ARPA is neither unconstitutionally vague or overbroad), cert. denied, 498 U.S. 874 (1990).
411 Id. at 744.
412 Id.
413 Id. (“[Austin] argues that because curiosity motivated him, his activity was academic, and that academic freedom therefore protects him.”).
414 Id. (“Austin has not demonstrated that he is affiliated with any academic institution, nor has he posited how his own curiosity is otherwise academic.”).
415 Id. at 745.
416 Id. (“[T]here can be no doubt nor lack of fair notice that the scrapers and arrow points for which he was convicted are indeed weapons and tools [within the
In *Craft v. National Park Service*, members of a diving club argued that the regulations permitting the National Oceanic and Atmospheric Administration to assess civil penalties for violations of the Marine Protection, Research, and Sanctuaries Act, which protects the Channel Islands off the California coast, were overbroad and vague. Regulations promulgated pursuant to this statute prohibit activities that adversely affect sanctuary resources, including removal of or damage to cultural or historic resources. The Ninth Circuit rejected the overbreadth challenge because the regulation did not affect a substantial amount of constitutionally protected conduct. The court also dismissed the vagueness challenge because the regulation was sufficiently clear. The court further noted that in the case of criminal sanctions, a scienter requirement may mitigate any vagueness problem.

The model statute proposed here would survive a constitutional chal-

meaning of ARPA].”). For another challenge to ARPA, see United States v. Gerber, 999 F.2d 1112 (7th Cir. 1993), cert. denied, 114 S. Ct. 878 (1994). In *Gerber*, the defendant pleaded guilty to violating ARPA’s prohibition of interstate transport of archaeological resources obtained in violation of state or local law. *Id.* at 1113 (offense codified at 16 U.S.C. § 470ee(c) (1988)). Gerber argued that the statute was vague because it did not refer specifically to archaeological resources found on non-federal, non-Indian land. *Id.* at 1115. Judge Posner rejected this challenge and interpreted ARPA to protect resources found on non-federal and non-Indian lands, even though the statute does not specifically so state. *Id.* at 1116; see also State v. Turley, 633 P.2d 700 (N.M. Ct. App. 1980), *rev’d on other grounds*, 633 P.2d 687 (N.M. 1981) (challenging the New Mexico Cultural Properties Act as vague). The defendant in *Turley*, relying on *Diaz*, claimed that because the statute did not define the terms “archaeological site,” “material evidence” and “past life and culture,” the statute was too vague to be understood. 633 P.2d at 705. The appellate court rejected this argument and held that these terms “have a common meaning sufficient to give notice to people of common intelligence.” *Id.* at 706. The Supreme Court of New Mexico, while reversing for other reasons, did not comment on this argument.

In *People v. Van Horn*, 267 Cal. Rptr. 804 (Ct. App. 1990), an archaeologist raised a vagueness challenge to the California statute protecting Native American graves and grave goods. The defendant argued that by not defining the terms “Native American” and “grave,” the statute was vague. *Id.* at 816-17. The court rejected this argument and noted that because the defendant was an archaeologist, the state had established that the defendant understood the terms. *Id.*

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417 34 F.3d 918 (9th Cir. 1994).
419 *Id.* at 921.
420 *Id.* at 920-21 (citing 15 C.F.R. §§ 935.6-935.7 (1994)).
421 *Id.* at 921 (“Because appellants do not claim that any constitutional or fundamental right is prohibited by the regulation in question, their overbreadth challenge must fail.”).
422 *Id.* at 922.
423 *Id.* The Supreme Court later held that a scienter requirement is necessary for a statute that criminalizes otherwise innocent conduct to be constitutional, and that...
lengen brought on the basis of either overbreadth or vagueness. First, as the *Craft* court noted, the statute does not affect any constitutionally protected activity and would therefore receive a lesser degree of scrutiny. Second, the terms and prohibited conduct are modeled considerably after ARPA itself, as well as a variety of state statutes, which have generally not been challenged. Third, although the model statute allows for criminal sanctions, this should be permissible because of the clear scienter requirement for conduct that violates the act.

2. Equal Protection and Religion Clauses

In the past, Native Americans have failed in their attempts to prevent government projects on the grounds that the projects infringed on their First Amendment right to free exercise of religion by interfering with a religious site. Although the standard by which the Supreme Court

such a requirement should be presumed even in the absence of specific statutory language. United States v. X-Citement Video, Inc., 115 S. Ct. 464, 469 (1994).

Violations of the protective act are usually classified as misdemeanors. *E.g.*, COLO. REV. STAT. § 24-80-409 (1988) (knowing appropriation, excavation, injury or destruction of a protected resource on publicly owned land constitutes a misdemeanor); IND. CODE § 14-3-3.4-7 (1983) (field investigation or knowing alteration of an historical property on state-owned or state-controlled land constitutes a misdemeanor). Some states classify the removal of human remains from a burial site or the disturbance of the contents of a burial as a felony. *E.g.*, ARIZ. REV. STAT. ANN. § 41-865G (1992) (intentional possession, sale or transfer of human remains or funerary objects obtained in violation of the protective act constitutes a felony); IDAHO CODE (1987) §§ 18-7028 (removal of human remains with intent to sell constitutes a felony). In addition, any objects obtained in violation of the protective act may be subject to seizure or forfeiture. *E.g.*, ARIZ. REV. STAT. ANN. §§ 41-846 (1992) (requiring forfeiture of objects and proceeds from sale of such objects to the state museum); KAN. STAT. ANN. § 74-5408 (1992) (any material collected from a site in violation of the protective act shall be given to the state historical society). Fines and additional costs, with widely differing amounts of money involved, may be levied. *E.g.*, ALASKA STAT. § 41.35.215 (1993) (maximum of $100,000 penalty for each violation); DEL. CODE ANN., tit. 7, § 5306 (1991) (fine of up to $100, imprisonment for up to 30 days, or both; each day of excavating or injuring an archaeological site constitutes a separate offense). Further, some states impose other types of penalties as well. *E.g.*, COLO. REV. STAT. § 24-80-409 (1988) (allowing a temporary restraining order or injunction if an individual is knowingly violating the protective act); ILL. ANN. STAT. ch. 20, para. 3435/5 (Smith-Hurd 1993) (allowing for forfeiture of equipment used in acquiring protected materials and assessing costs in cleaning, restoring, and analyzing materials, and costs in restoring land, recovering data, and recovering civil damages).

Model Statute § 9.

See, *e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 441-42 (1988) (holding that the First Amendment's Free Exercise Clause does not prohibit the government from harvesting timber in, or constructing a road through, a portion of a national forest that had traditionally been used for religious purposes by three Native American tribes).
judged whether a government regulation infringed upon the free exercise of religion was unclear for many years. Congress spoke to this issue in 1993 by enacting the Religious Freedom Restoration Act ("RFRA"). RFRA requires any governmental regulation that substantially burdens an individual's free exercise of religion to be subjected to the strictest level of scrutiny, in other words, that the regulation be narrowly tailored to further a compelling government interest. Although RFRA has not yet been authoritatively interpreted, it should bolster a constitutionally based challenge premised on the Free Exercise Clause to government regulation or action. The model statute proposed here will further any claims to the free exercise of religion and will provide a direct statutory, rather than constitutional, basis for enforcement of such a claim.

A more significant basis for constitutional challenge would be any preference granted to specific religious groups, particularly Native American groups, as possibly violative of the Establishment Clause or Equal Protection Clause. Although much of the newer protective legislation is clearly intended to remedy past unequal treatment of Native American burial remains and disregard for their religious concerns, some of the current state statutes could perhaps be challenged for granting a preference or more favorable treatment to aboriginal remains. Integral to this question is the definition of "Native American." This is significant both for the

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427 In Employment Division v. Smith, 494 U.S. 872 (1990), the Supreme Court clarified this ambiguity and held that there was no constitutionally compelled exemption to a generally applicable, otherwise valid statute or regulation and that the validity of such regulation under the Free Exercise Clause should be judged by the standard of minimal scrutiny. Id. at 878-87.


429 Id.

430 Enactment of RFRA has already spawned considerable academic literature proposing different interpretations. E.g., Thomas C. Berg, What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act, 39 VILL. L. REV. 1, 3 (1994) (acknowledging that RFRA raises "bothersome problems of interpretation" that "could undercut the effectiveness of the Act"). Several commentators have questioned the constitutionality of RFRA, see, e.g., Marci A. Hamilton, The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under the Cover of Section 5 of the Fourteenth Amendment, 16 CARDOZO L. REV. 357, 363-69 (1994) (concluding that in enacting the RFRA, Congress exceeded its constitutional powers), and a federal district court recently declared it unconstitutional, Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995) (holding the RFRA unconstitutional because it violates the separation of powers).

431 In Smith, Justice Scalia emphasized his approval of statutory exemptions from government regulation based on the free exercise of religion as representing the will of the legislative majority. 494 U.S. at 890. Such legislatively created exemptions from government regulation would not, in Scalia's view, raise an Establishment Clause problem. Id.
purpose of avoiding a vagueness challenge to a criminal statute and for establishing a specially protected class. Statutory definitions of the protected category vary. Connecticut, for example, defines "Native Americans" as

people who occupied [this state] prior to European settlement and their historic descendants, Indians as defined by [statute], who are residents of this state and all members of other tribes recognized by the United States or by Canada or its Provinces who are residents of this state.\(^{432}\)

The problem of definition is exacerbated by the granting of statutory protection to a specific group based only on religion, which could raise the question of a violation of the Establishment Clause of the First Amendment. For example, the Connecticut statute defines "sacred site" or "sacred land" as "any space . . . of ritual or traditional significance in the culture and religion of Native Americans."\(^{433}\) In addition, only Native American burials, sacred sites, and cemeteries are specifically protected from desecration or disturbance under the statutory provisions regulating archaeological and historical sites.\(^{434}\)

The model statute proposed here is intended to eliminate any challenges premised on either an equal protection or establishment of religion basis. The statute eliminates this problem by requiring equal treatment of all groups' cultural property and, in particular, equal treatment of all human remains and burial goods and religious and sacred sites.\(^{435}\) The statute goes even further in eliminating Establishment


\(^{433}\) Id. § 10-381(5) (West Supp. 1994). The definition further limits this protected category to sites that are listed or eligible to be listed on either the national or state register of historic places including but not limited to, marked and unmarked human burials, burial areas and cemeteries, monumental geological or natural features with sacred meaning or a meaning central to a group's oral traditions; sites of ceremonial structures, including sweat lodges; rock art sites, and sites of great historical significance to a tribe native to this state.

\(^{434}\) Id. § 10-390(c) (West Supp. 1994).

\(^{435}\) In People v. Van Horn, 267 Cal. Rptr. 804 (Ct. App. 1990), the defendant raised both Equal Protection and Establishment Clause objections to a statute protecting human burials and grave goods. The court rejected both claims. Id. at 818-19. In response to the defendant's claim that the statute treated Native American burials preferentially to the burials of other groups, thus violating the Equal Protection Clause, the court stated that the defendant did not have standing to bring such a claim because he did not assert that he was a member of a group or class that was aggrieved or suffered discrimination. Id. at 819. To the defendant's claim that the statute violated the Establishment Clause because it enhanced Native Americans' right to practice their religion, the court responded that the statutes protecting burial sites did not mention religion at all and thus did not violate the Constitution. Id. The defendant
Clause concerns by not distinguishing between human burials that were apparently accompanied by religious ceremony and those that were not.\textsuperscript{436} In addition, any cultural group has the right to reclaim human remains and burial goods for the purpose of reinterment according to its own religious, traditional, and customary practices.\textsuperscript{437} The statute thus grants no preference for one religion over another religion and no preference for religion over nonreligion or any other philosophy concerning treatment of the dead.\textsuperscript{438} The statute also protects all archaeological sites,\textsuperscript{439} whether of religious or secular value, thereby eliminating any need to determine the centrality of a particular religious practice or belief to a religious group.

3. Takings Challenges

Most state and federal statutes have not sought to regulate archaeological resources located on private land.\textsuperscript{440} Some of the recent legislation that protects human burials and skeletal remains applies, however, to

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\textsuperscript{436} Model Statute § 1(6).
\textsuperscript{437} Model Statute § 7(A)(5).
\textsuperscript{438} The Establishment Clause has been consistently interpreted to mean that the government cannot create a preference for one religious group over another or for religion over nonreligion. \textit{E.g.}, Larson v. Valente, 456 U.S. 228, 244 (1982) (stating that the Establishment Clause prohibits preference of one denomination over another); \textit{see also} Arlin M. Adams & William R. Hanlon, Jones v. Wolf: \textit{Church Autonomy and the Religion Clauses of the First Amendment}, 128 U. Pa. L. Rev. 1291, 1337 (1980) (noting that the Establishment Clause requires equality of treatment for all religious groups); Douglas Laycock, \textit{Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy}, 81 Colum. L. Rev. 1373, 1414 (1981) (stating the general understanding that government cannot discriminate among religious groups).
\textsuperscript{439} Model Statute § 1(4).
\textsuperscript{440} Even when a statute may be interpreted to limit archaeological exploration on private land, courts seem to prefer to interpret the statute otherwise, although without citing constitutional considerations. For example, in Turley v. State, 633 P.2d 687 (N.M. 1981), the statute at issue, N.M. Stat. Ann. § 18-6-11 (1978), required a permit for excavation on private land unless the excavation was personal to the landowner. The New Mexico Supreme Court interpreted the word “personal” to include any exploration undertaken by an agent of the owner, 633 P.2d at 689, thus permitting excavations, apparently regardless of how extensive, on private land without a permit.
\end{flushright}
resources found on private as well as public land and thus seeks to regulate or restrict the landowner's ability to interfere with these burials. The model statute proposed here would go even further, seeking to regulate both human burial remains and archaeological resources found not only on public, but also on private, land and to regulate the market in cultural objects after they have been excavated.

This regulation of resources found on private lands could arguably give rise to another line of constitutional attack based on the Takings Clause of the Fifth Amendment and comparable provisions in state constitutions. The Fifth Amendment prohibits the taking of private property for public purposes without the payment of just compensation to the owner.\textsuperscript{441} Several Supreme Court decisions have confronted the question of whether the imposition of regulations that affect an owner's ability to use his or her land effects a regulatory taking of the property comparable to a physical governmental invasion or intrusion upon property that clearly constitutes a compensable taking.\textsuperscript{442} If the regulation is considered equivalent to a physical taking of the property, then the requirement to pay just compensation is triggered.\textsuperscript{443}

The issue of whether historic landmark and historic district legislation effects a taking was the subject of the Supreme Court's opinion in \textit{Penn Central Transportation Co. v. New York City.}\textsuperscript{444} The Court determined that historic preservation legislation did not effect such a regulatory taking, although the precise reason why is difficult to discern.\textsuperscript{445} The rationales provided by Justice Brennan included the facts that the owners could realize a reasonable rate of return on their investment,\textsuperscript{446} that they

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\item \textsuperscript{441} U.S. CONST. amend. V. The Takings Clause has been made applicable to the state governments through the Due Process Clause of the Fourteenth Amendment. \textit{See Chicago, B. & O. R.R. v. Chicago}, 166 U.S. 226, 239 (1897) ("[T]he States cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner, and . . . any attempt so to do . . . would be wanting in that 'due process of law' required by [the Fourteenth Amendment].").
\item \textsuperscript{442} In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), Justice Holmes recognized that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." \textit{Id.} at 415; \textit{see also} \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419 (1982) (holding that even a relatively small but permanent physical invasion constitutes a compensable taking); Jeremy Paul, \textit{The Hidden Structure of Takings Law}, 64 S. CAL. L. REV. 1393, 1465-75 (1991) (discussing the physical invasion test for determining which government actions constitute a taking).
\item \textsuperscript{443} \textit{Mahon}, 260 U.S. at 414 (noting that a regulation that makes it "commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it").
\item \textsuperscript{444} 438 U.S. 104 (1978).
\item \textsuperscript{445} \textit{Id.} at 138.
\item \textsuperscript{446} While acknowledging that a taking may more easily be discerned when the government interference constitutes a physical intrusion, Justice Brennan also stated that
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had been denied only a limited number of possible uses, and that they could continue their prior use undisturbed by the regulation. Whatever the reasoning behind the decision, *Penn Central* is generally accepted to stand for the proposition that historic preservation legislation serves a legitimate public purpose and does not constitute a taking for which the government must pay the landowner compensation.

The Court would examine the economic impact of the regulation and, in particular, "the extent to which the regulation has interfered with distinct investment-backed expectations" of the landowner. *Id.* at 124.

Justice Brennan noted that the owner was only denied permission to build a 50-story office complex and was not "prohibited from occupying any portion of the airspace above the [property]." *Id.* at 136-37. Since the owner never sought approval for a smaller structure, there was no proof that such approval would not have been given. *Id.* at 137.

This rationale raises the question of conceptual severance, which was also considered in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), and was referred to in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). Does a regulation that completely prevents a landowner from using part of his or her land constitute a total deprivation and thus the equivalent of a taking, or is it merely a partial deprivation that is not severe enough to be a taking? Justice Scalia, while acknowledging the issue, *id.* at 2894 n.7, refused to resolve it in *Lucas*. This issue could be relevant here because if an archaeological site is located on private land, restrictions on disturbing the site would prevent the landowner from using a part of his or her land. The relative proportion of the deprivation, however, will depend on the fortuity of how much land the owner owns and the size of the site. Under current takings jurisprudence, is not possible to resolve this question although, as stated below, *Penn Central* seems to remain the most appropriate precedent.

*Penn Central*, 438 U.S. at 136-38. Because the owner could continue to use the building as it previously had, Justice Brennan concluded that the landmark designation and the limitation on further building did not interfere with the owner's primary expectation concerning the use of the land and the owner would be able to continue to earn a reasonable rate of return on its investment.

In his dissent, Justice Rehnquist argued that the landmarking of specific buildings is more burdensome to the landowner than the creation of historic districts. *Id.* at 139-40. Nonetheless, relying on *Penn Central*, courts have consistently held that neither designation as a landmark nor historic districting constitutes a taking that requires the payment of compensation. *See*, e.g., *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 355-57 (2d Cir. 1990) (relying on *Penn Central* to hold that New York City could prevent new uses, thus freezing a building to its current uses, so long as the owner's original expectations regarding the use of the property are met), *cert. denied*, 499 U.S. 905 (1991); *Lai v. City and County of Honolulu*, 841 F.2d 301, 302-03 (9th Cir.) (upholding the imposition of a scenic easement that limited development and relying on *Penn Central* in support of the proposition that a partial reduction in property value, when caused by a regulation reasonably related to the promotion of the general welfare, does not by itself establish a taking), *cert. denied*, 488 U.S. 994 (1988); *International College of Surgeons v. City of Chicago*, No. 91 C 1587, 1992 U.S. Dist. LEXIS 332, at *10-*11 (N.D. Ill. Jan. 14 1992) (concluding that the designation of buildings under a Chicago
The only court opinion that directly considers legislation similar to the model statute proposed here, *Thompson v. City of Red Wing*,450 was decided by the Minnesota Court of Appeals. In that case, landowners claimed that a statute that protected human burials constituted a taking of their property because it prevented them from extracting gravel from a Native American burial mound.451 The court rejected this claim, relying on the fact that the owners could continue their prior agricultural and residential uses of the land and were therefore not denied all reasonable use of their property.452

Although the result in *Thompson* seems logical under *Penn Central*, the Supreme Court has decided two significant takings cases since *Thompson*.453 In the first of these, *Lucas v. South Carolina Coastal Landmark ordinance was not a taking under the federal Constitution in reliance on *Penn Central*’s premise that the owner only has to be able to realize a reasonable return on the property, not the most profitable return); Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 849-50 (E.D. Va. 1980) (holding that designation of 14,000 acres as a National Historic Landmark did not constitute a taking under *Penn Central* analysis, but invalidating the designation on other grounds); Smith v. Zoning Bd. of Appeals, 629 A.2d 1089, 1104 (Conn. 1993) (upholding historic district legislation against a facial challenge that denial of an application to subdivide property constituted a taking), cert. denied, 114 S. Ct. 1190 (1994).

450 455 N.W.2d 512 (Minn. Ct. App. 1990).

451 Id. at 514-15.

452 The trial court had found that the owners were deprived of all reasonable use of the property, but the appellate court rejected this finding as contrary to the evidence. Id. at 517. The appellate court explained that “[t]he burial mounds qualify as a rare and unique portion of the property which can be used to meet open space requirements, with construction arranged around the portion prohibited from being destroyed.” Id. at 516.

453 It must also be remembered that state regulation could be considered a taking under a state constitutional standard, even though it might not be a taking under the federal standard. Some states have specifically declared their standard to be the same as the federal constitutional standard, see, e.g., Nash v. City of Santa Monica, 688 P.2d 894, 898 (Cal. 1984) (stating that federal requirements for determining a taking, as enunciated in *Penn Central*, are the same as the requirements under the California Constitution). Other states have specifically declared that their standard is different. For example, the Illinois Constitution requires compensation for a taking or damage to the property. ILL. CONST. art I, § 15. However, decisional law has defined “damage” as requiring a “direct physical disturbance” peculiar to the property at issue. International College of Surgeons v. City of Chicago, No. 91 C 1576, 1994 U.S. Dist. LEXIS 18989, at *55 (N.D. Ill. Dec. 30, 1994) (citing Department of Transp. v. Rasmussen, 439 N.E.2d 48, 54 (Ill. App. Ct. 1982)). Preventing the physical development of the property does not amount to a physical disturbance, and thus historic preservation designation or other limitations placed on some uses of the property do not constitute a taking even under the Illinois Constitution. Id. at *55-*56; Equity Assocs., Inc. v. Village of Northbrook, 524 N.E.2d 1119, 1124 (Ill. App. Ct.), appeal denied, 122 Ill. 2d 573 (1988).
the Court held that a landowner who had been denied all reasonable use of his beachfront property because of an environmental regulation forbidding new construction in an effort to protect the coastline from erosion was entitled to compensation for a regulatory taking. According to Justice Scalia's majority opinion, the only time such extensive regulation would not constitute a taking is when the regulation affects an activity that would be considered a nuisance under the state's common law. In this situation, the asserted right is never part of the owner's title; there is no deprivation, and the conduct may thus be entirely prohibited without the regulation constituting a taking. The regulation, however, cannot be a retroactive reformulation of state property law principles so as to legitimize governmental action that is in reality a taking of private property. Thus, the regulation must be clearly founded on traditional common law notions of property.

The Supreme Court's most recent takings case, *Dolan v. City of Tigard*, involves a different aspect of this issue. In *Dolan*, although the landowner was not denied all economic value of her property, she was required to dedicate a public easement over part of her property in exchange for receiving a permit to expand her business. The Court

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455 As in *Thompson*, the trial court had found that the owner had lost all economic value in his property. *Lucas*, 112 S. Ct. at 2896. In *Lucas*, however, the Court accepted this finding, *id.*, even though Justice Souter dissented because he thought that the trial court's conclusion was "highly questionable," *id.* at 2925.
456 The only elucidation of what Justice Scalia would consider to be a nuisance may be found in his statement that
457 [a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

*Id.* at 2900.
458 In an opinion dissenting from the denial of a writ of certiorari in which Justice O'Connor joined, Justice Scalia made it clear that a state's pretextual justification that a regulation based on "background law" was not, by itself, sufficient under *Lucas* to establish that the property owner's title was in fact subject to the regulation from the inception of the title. Justice Scalia wrote,
459 Our opinion in *Lucas*, for example, would be a nullity if anything that a State court chooses to denominate "background law"—regardless of whether it is really such—could eliminate property rights. . . . No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation.

459 *Id.* at 2313-14.
stated that the denial of her right to exclude the public from her property constituted the elimination of one of the essential rights associated with property ownership.\footnote{Id. at 2320-21.} This denial would be a compensable taking unless the government could establish an "essential nexus" between the permit conditions and a legitimate state interest.\footnote{Id. at 2317.} If such a nexus is found, as it was in \textit{Dolan}, the inquiry then becomes whether the exaction required by the building permit is roughly proportional to the burden imposed by the development sought by the landowner.\footnote{In explaining what is meant by "rough proportionality," Justice Rehnquist stated "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." \textit{Id.} at 2319-20. Without clearly stating what level of scrutiny this test would entail, he specifically rejected a "rational basis" level as too lenient and a "specific and uniquely attributable" test as too strict. \textit{Id.} at 2318-19. Instead, he adopted an intermediate level of scrutiny used by the majority of state courts in interpreting their state constitutional provisions. \textit{Id.} at 2319. Under this test, the city's conditions for granting the landowner's permit were held to be unconstitutional. \textit{Id.} at 2321-22.} To evaluate the model statute proposed here against current Supreme Court takings jurisprudence, it is necessary to identify the most important aspects of this protection that are likely to trigger allegations of actual or regulatory takings. The first possible basis for a claim involves the denial of all private ownership of human skeletal remains and associated grave goods and the requirement of restoration of these items to descendants or the state officer for the purpose of reburial.\footnote{Model Statute § 7(A)(4).} It has already been demonstrated, however, that under both British and American common law human skeletal remains and burial goods were not subject to private property ownership.\footnote{See \textit{supra} part IV.B.1.} This provision thus fits within the underlying purpose of the "nuisance exception" in \textit{Lucas} and its further explication in Justice Scalia's opinion in \textit{Stevens}—the statute is merely a codification of pre-existing state property law under which individuals cannot gain title to such objects and thus have no realistic expectation of ownership. Consequently, this provision should not raise any takings problems.

The second potentially troublesome aspect is the requirement of notification of governmental authorities and temporary cessation of activities following accidental discovery of archaeological resources or human burial remains upon private land.\footnote{Model Statute § 3(A).} Perhaps even more significant is the government's right, when notified of the accidental discovery or when the agency has a reasonable suspicion that such resources have been discovered, to enter upon private land to evaluate the nature and significance of
the discovered resources.466

The right to enter upon private land, however, is easily distinguished from the denial of the right to exclude the public, which was troublesome in the Dolan decision, because only the government agency, and not the general public, has this right. The right to enter to evaluate the discovered cultural resources is akin to the generally accepted right of government agencies to enter upon private property to make administrative searches when they have been notified of or have a reasonable suspicion of a violation of an existing statute.467

A related concern is that the state’s right to undertake an excavation on private land468 would be the equivalent of a temporary taking, as considered in First English Evangelical Lutheran Church v. County of Los Angeles.469 It is clear that compensation must be paid in this situation, even though the government’s presence on the land is not permanent.470 The model statute has been carefully tailored so that the state must pay rent to the landowner for the temporary physical occupation of the land during which excavation is conducted.471 In addition, if the government wishes to establish a permanent display of an archaeological site upon private land for purposes of education, tourism, or long-term scientific study, then the government must exercise its right of eminent domain and pay compensation for taking the property. Such purposes would be considered legitimate purposes for which the power of eminent domain may be exercised.472

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466 Id. § 10(A).
467 Warrantless searches of businesses or commercial property pursuant to statutory authority were held to be permissible under the Fourth Amendment in New York v. Burger, 482 U.S. 691 (1987), and Donovan v. Dewey, 452 U.S. 594 (1981). The requirements for such searches, as outlined in Burger, are (1) the regulatory scheme must embody a substantial government interest; (2) “the warrantless inspections must be ‘necessary to further [the] regulatory scheme’”; and (3) the regulatory statute must serve the underlying purposes of a warrant in that the owner of the premises must be notified that the search is being conducted pursuant to the statute and the discretion of the inspecting officers must be limited. 482 U.S. at 702-03 (quoting Donovan, 452 U.S. at 600). Furthermore, the fact that the administrative search might produce evidence of a crime would not make the search impermissible. Id. at 716.

468 Model Statute § 3(C)(2).
469 482 U.S. 304 (1987) (requiring compensation for the period during which a land-use regulation constituting a regulatory taking was in effect).
470 Id. at 318-19.
471 Model Statute § 3(C)(2)(c).
472 Landowners might also be encouraged to protect archaeological sites located
The third element of the protective statute that could raise a takings challenge is the recognition of group ownership of cultural resources once they are removed from the ground. Generally these resources will be subject to the control of either the state government, in its capacity as representative of the dominant cultural group in our society, or Native American tribal groups or another cultural group. The private landowner would not be given ownership rights in the cultural property without the consent of the government or other group representative. In addition, in many instances, regardless of who owns the cultural property, such ownership will be subject to the public trust and the owner will owe various duties and obligations to the cultural group.

There are several reasons why this scheme does not constitute a taking. First, owners who have obtained actual possession of cultural property before the effective date of the statute retain their full ownership rights. Owners bear the burden of proving this by obtaining a certificate of registration from the state agency, which then enables the owner to sell or transfer the cultural property freely.

The overall scheme is considerably more generous to the owner than a similar one devised to protect eagles and upheld by the Supreme Court in *Andrus v. Allard*. In *Andrus*, the Eagle Protection Act and the Migratory Bird Treaty Act forbade the commercial transfer of bald or on their land voluntarily through a variety of governmental incentives and other types of private agreements. See James P. Beckwith, Jr., *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 *Wake Forest L. Rev.* 93, 130-48 (1976) (discussing easements, preservation easements, real covenants, and preservation restrictions); see also *Susan L. Henry, National Park Service, Protecting Archaeological Sites on Private Lands* 59-90 (1993) (discussing tax incentives and other forms of inducement for voluntary protection for archaeological sites located on private land).

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473 Model Statute §§ 5-6. Takings jurisprudence applies to other forms of property than real property, including personal property and intangible property. Roberta R. Kwall, *Governmental Use of Copyrighted Property: The Sovereign's Prerogative*, 67 Tex. L. Rev. 685, 693-94 (1989) (stating that the Takings Clause "applies to every property interest that a citizen may possess," including both tangible and intangible property); see, e.g., *Swan Lake Hunting Club v. United States*, 381 F.2d 238, 240-41 (5th Cir. 1967) (discussing the condemnation of the hunting rights of members of a duck-hunting club); *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 845 (Cal. 1982) (upholding the exercise of eminent domain over a football franchise). Cases concerning a taking or condemnation of real property, however, generally far outnumber the cases that involve property other than realty. For example, of 308 public use cases decided by state and federal appellate courts between 1954 and 1986, Thomas Merrill found only five that did not concern land. Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 94-96 (1986).

474 Model Statute § 5(d).


golden eagles and the parts of such eagles, regardless of when they were acquired. The Court concluded that the prohibition on commercial transfers did not constitute a taking. Even though the defendants would lose one of the rights, perhaps even the most lucrative right, that constitute the "bundle" of rights associated with property ownership, there were still many uses that the defendants could make of the property. Thus, in the absence of a compelled surrender, or a physical invasion or restraint imposed on the property, there was no taking. The Court also noted that the prohibition on commercial transfer of legally obtained property served the statutory purpose of protecting endangered eagles in that the prohibition would eliminate incentives to violate the statute.

The second reason this scheme does not trigger a taking is that the Supreme Court seems to have drawn a distinction between the extent of permissible regulation of real and personal property. Although one may question whether the holding in Andrus remains good law in light of subsequent Supreme Court takings jurisprudence, in Lucas, Justice Scalia specifically referred approvingly to Andrus. According to Justice Scalia, the owner of personal property does not have the same degree of expectation of freedom from overly intrusive governmental regulation as does the owner of real property. The diminished expectation concerning freedom from regulation that may be imposed on personal property means that this proposed regulation of cultural property would not constitute a taking.

This point is further illustrated by Nixon v. United States, which held that the extensive restrictions placed on former President Nixon's presi-

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478 Andrus, 444 U.S. at 52-57. Defendants had been convicted of violating the acts even though the artifacts that they sold had been obtained legally before the effective dates of the statutes. Id. at 54. Regulations still permitted the possession and transport of eagles and their parts.

479 The Court pointed out that defendants retained the rights to possess, transport, donate, or devise their property. Id. at 66.

480 Id. at 65.

481 Id. at 58. The Court concluded that this far-reaching disincentive to violate the protective act was permissible, even though the defendants were prepared to offer proof, by dating the artifacts in which the eagle parts were incorporated, that the feathers had been legally obtained. Id.

482 Justice Scalia stated:

[In the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale).]

Lucas, 112 S.Ct. at 2899 (citing Andrus). This approving reference to Andrus in Lucas was also noted by Nafziger, supra note 7, at 603-04.

483 Lucas, 112 S.Ct. at 2899-2900.

dential papers under the Presidential Records and Materials Preservation Act\textsuperscript{485} constituted a taking because President Nixon had a reasonable expectation that the papers were his property based on prior custom and tradition dating back to President Washington.\textsuperscript{486} On the other hand, the court acknowledged that the Presidential Records Act,\textsuperscript{487} enacted in 1978, could prospectively abolish private ownership of presidential materials, apparently without raising a takings problem.\textsuperscript{488}

The third reason that this regulation of cultural property does not constitute a taking lies in the theoretical underpinning of the public trust doctrine. The discussion of the rationale for group ownership of cultural property demonstrates that the public trust doctrine inheres in title to all cultural property. In accord with Scalia's reasoning in \textit{Lucas}, the statute proposed here may be viewed as merely a restatement of pre-existing common law principles. This argument is bolstered by what has always been acknowledged as the provisional nature of the title of the finder or real property owner in found objects—the group is the true owner to whom possession must be yielded. Thus, although the model statute creates a new protective scheme for cultural property, its rationale and justification are premised on the common law public trust doctrine.

The model statute proposed here will function in a manner similar to those regulatory schemes discussed in both \textit{Andrus} and \textit{Nixon}. Under a theory of constructive possession, the real property owner and the finder of treasure trove traditionally had only an expectation of owning the cultural property that he or she found. It seems clear based on Justice Scalia's statements in \textit{Lucas} and the discussion in \textit{Nixon}, however, that the owner's or finder's expectations can be changed by a prospective elimination of private ownership of such cultural property without implicating the Takings Clause.\textsuperscript{489} Thus, these restrictions should survive constitutional challenge and will permit a far more effective mechanism for the protection of cultural property than exists under current law.

\section*{Conclusion}

The current treatment of cultural property in the United States varies considerably depending on where the property is found, what type of property it is, and which cultural group produced the property. This Arti-

\textsuperscript{486} \textit{Nixon}, 978 F.2d at 1275-84.
\textsuperscript{488} \textit{Nixon}, 978 F.2d at 1296-97 (referring to the papers of Presidents Reagan and Bush as subject to the Presidential Records Act). Presumably, the prospective elimination of private ownership removes an owner's expectation, upon which a takings claim must be based.
\textsuperscript{489} State and federal statutes have already abolished the expectation of finders who find cultural property on publicly owned land, even when they might have been entitled to it under common law treatment of treasure trove and lost property.
cle has suggested that these variations result from unresolved conflicts over the relationship between the cultural identity of the dominant political group and the various cultural groups represented in our cultural property. The variations also result from the largely reactive nature of our cultural property policies and an excessive emphasis on the desire to develop and exploit our cultural resources for both scientific and commercial purposes.

This Article proposes that our cultural property policies be reoriented so as to provide uniformity of treatment for all cultural property within this nation with the primary purpose of returning control over cultural property to the cultural group that produced the property. The rights of the group in the cultural property should be enforceable under an expanded view of the public trust doctrine. At the same time, the law should recognize the common law understanding that human skeletal remains and associated grave goods are not property at all and must be returned to descendants or a culturally related group for appropriate treatment. Finally, this Article attempts to effectuate these principles through the drafting of a proposed model statute for the uniform treatment of cultural property to be adopted by all the states.

This proposed model statute will allow for more comprehensive protection of cultural property because it applies to archaeological resources regardless of the circumstances in which they are found and regardless of whether they were located on public or private land. This approach also establishes a mechanism for protection of these resources from the moment of their discovery, thus encouraging their preservation in situ with their associated stratigraphic context and other cultural materials. This proactive approach will permit preservation of the entire archaeological record so as to enhance our knowledge and understanding of the past.

To further encourage in situ preservation, only finders who properly report their discoveries and otherwise comply with the statute will be compensated by the government if the government wishes to obtain title to particular archaeological objects. Finally, the protective scheme is intended to ensure that only properly excavated materials with established provenance will enter the art market. This limited control should permit the legitimate art market to function but should also reduce demand for improperly obtained objects.

This shift in attitude toward the protection of cultural and archaeological resources represents an attempt to resolve conflicts among various cultural groups by extending equality of treatment to all resources, regardless of their cultural origin. It attempts to establish respect for the dead, regardless of religious and cultural differences, through equality of treatment of human remains and burial goods. It attempts to balance preservation of the archaeological and historical record with the concerns of such diverse competing groups as the museum community, the art market, the general public, and specific cultural groups. Finally, this shift in
attitude allows for recognition and protection of the rights of the cultural
group to access to and preservation of cultural property through application of the public trust doctrine to cultural resources.
DECLARATION OF LEGISLATIVE PURPOSE

The legislature of this state finds that archaeological resources found anywhere are acknowledged to be a finite, irreplaceable, and nonrenewable cultural resource and are an intrinsic part of the cultural heritage of this state; that these resources are increasingly endangered because of carelessness in their treatment and their commercial attractiveness; and that existing laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavation and pillage. The purposes of this statute are to secure for the present and future benefit of all people in this state the protection of archaeological and cultural resources and sites that are found on any lands, including submerged lands, to ensure equality of treatment in the cultural resources of all peoples of this state, and to foster increased cooperation and exchange of information among governmental authorities, the professional archaeological community, private individuals having collections of archaeological resources, and in particular the indigenous and other peoples and cultural groups having a cultural, religious, or ethnic connection to these resources. This legislature recognizes the special status in American cultural history of Native American and other indigenous people and for this reason any claims of Native American and other indigenous groups in connection with this statute will be accorded a presumption of validity.

SECTION 1. DEFINITIONS

(1) "Agency" means any state, county, or municipal office, department, division, board, commission or separate unit of government created or established by constitution or law.

(2) "Ancestor" means one from whom a person is lineally descended; a progenitor.

(3) "Archaeological object" means:

(a) any object that is at least 50 years old, unless otherwise determined by the OSA;

(b) any object found on the land or in the waters of the state, including historic shipwrecks, that pertains to the physical record of an indigenous or other culture; or

(c) the material remains of prehistoric or historic life or activity that are of archaeological significance including, but not limited to, monuments, symbols, tools, facilities, technological by-products, and dietary by-products.
Sacred objects, human remains, and associated and unassociated funerary goods are specifically excluded from the definition of "archaeological object."

(4) "Archaeological site" means:

(a) any archaeological site on, or eligible for inclusion on, the National Register of Historic Places, as determined in writing by the OSA, or

(b) any site that contains archaeological objects and the contextual associations of the archaeological objects, located on land, including but not limited to submerged and submersible lands, and the bed of the sea within the state's jurisdiction. Examples of archaeological sites include, but are not limited to: shipwrecks, lithic quarries, house pit villages, camps, burial sites, lithic scatters, homesteads, and townsites.

(5) "Associated funerary objects" means those objects placed with human remains at the time of death or later as part of a ceremony including, but not limited to, objects containing human remains.

(6) "Burial site" means any natural or prepared physical location, whether originally below, on, or above the surface of the earth or submerged lands of the state, where human remains are present.

(7) "Certificate of registration" is a certificate issued and officially notarized by the OSA, stating the origins of the archaeological objects listed on the certificate.

(8) "Cultural affiliation" means a relationship of shared group identity that can be reasonably traced, based on historical or prehistorical evidence, between a present-day cultural group and an identifiable earlier cultural group. This definition is intended to ensure that the claimant has a reasonable connection with the archaeological objects in question.

(9) "Descendant" means any person who is lineally descended from the decedent to the remotest degree.

(10) "Disturbance" includes, but is not limited to, excavation, removal, exposure, defacement, mutilation, destruction, molestation, displacement, or desecration in any way of any archaeological site, archaeological object or burial site without a permit.

(11) "Field work" includes any type of archaeological investigation including, but not limited to, survey, trial excavation, excavation, and salvage.

(12) "Human remains" means the physical remains of a human body, including, but not limited to, bones, teeth, hair, ashes, or mummified or otherwise-preserved soft tissues of a human body.

(13) "Inadvertent discovery" means all discoveries of human remains, sacred objects, or archaeological objects that are not made pursuant to licensed field work.
(14) "Next of kin" means those persons nearest of kindred or most nearly related to the decedent. This term shall not be confined to relatives by blood but includes a relationship existing by reason of marriage and embraces persons who bear no relation of kinship at all.

(15) "Office" or "Office of the State Archaeologist" ("OSA") is the agency responsible for overseeing and coordinating archaeological and cultural resource protection.

(16) "Person" includes natural persons, corporations, or other such entities.

(17) "Principal investigator" means a person authorized by the OSA to lead an archaeological field work project.

(18) "Professional archaeologist" is an individual possessing an appropriate level of educational achievement, expertise, and experience so as to be knowledgeable concerning relevant aspects of the archaeology, history, and culture of this state and who has been certified by and is in good standing with the Society of Professional Archaeologists.

(19) "Public land" means land, including but not limited to partially or completely submerged lands, within the state that is owned or controlled by the state, a state agency, or any political subdivision of the state, such as counties and municipalities.

(20) "Qualified human skeletal analyst" is an individual possessing the appropriate level of educational achievement, expertise, and experience so as to be qualified to conduct forensic and other appropriate analyses of human skeletal remains.

(21) "Sacred object" means any object that is considered holy and worthy of veneration by a particular cultural group for reasons based on religion, tradition, or cultural belief.

(22) "Secretary" means the Director of the Office of the State Archaeologist.

(23) "State archaeological site" means a property acquired by the state and administered by the Office of the State Archaeologist because of its historical, archaeological, architectural, or cultural value in depicting the heritage of the state.

(24) "Unassociated funerary objects" means those objects that are reasonably believed to have been placed with human remains at the time of death or later, but that subsequently became physically separated from the human remains.

SECTION 2. OFFICE OF THE STATE ARCHAEOLOGIST

(A) Creation

There is hereby created the Office of the State Archaeologist ("OSA") to give advice and assistance to the Secretary of Archaeological Resources and to promulgate rules and regulations to be followed in the
acquisition, disposition, preservation, and use of records, artifacts, real and personal property, and other materials and properties of historical, archaeological, architectural, or other cultural value, and in the extension of aid and assistance to other agencies, counties, municipalities, organizations, and individuals in the interest of archaeological preservation and cultural resource management.

(B) Powers and Duties

The Office of the State Archaeologist shall have the following powers and duties:

(1) to advise the Secretary on the scholarly editing, writing, and publication of archaeological information to be issued under the name of the OSA;

(2) to evaluate and approve proposed nominations of archaeological or other cultural properties proposed to be acquired and administered by the state;

(3) to receive accidentally discovered archaeological objects or human remains from individuals or from appropriate law-enforcement agencies and to evaluate said objects or human remains to determine their archaeological or cultural significance;

(4) to dispose of archaeological objects, human remains, and associated and unassociated funerary objects in accordance with this statute;

(5) to issue permits, pursuant to this statute, for the excavation, survey, or other disturbance of archaeological sites located on public or private land and for salvage or other disturbance of historic shipwrecks located in public or private waters;

(6) to issue certificates of registration, pursuant to this statute, to all persons who are rightful owners or possessors of archaeological objects;

(7) to take possession of unidentified or unclaimed human remains and associated or unassociated funerary objects for the purpose of reburial in a state-owned cemetery maintained for such purpose;

(8) to serve as a committee to seek out, interview, and recommend to the Secretary a committee or staff of experienced and professionally trained historians and archaeologists who shall assist in the research and designation of artifacts removed from archaeological and burial sites. Such designation shall include the identification of the culturally or ethnically related group.

(9) to carry out any other functions delineated in this subsection and to promulgate regulations necessary to the effectuation of this statute's purposes.
IDENTITY AND CULTURAL PROPERTY

SECTION 3. INADVERTENT DISCOVERY OF ARCHAEOLOGICAL SITES AND OBJECTS

(A) Notification Requirements and Cessation of Disturbance

(1) If there is an inadvertent discovery of human remains, sacred objects, or archaeological objects on public or private land, all activities that would create a potential disturbance such as, but not limited to, construction, mining, logging, or agricultural activities must temporarily cease.

(2) Any person inadvertently discovering or coming into contact with any human remains on public or private lands is required to notify the nearest law-enforcement agency within 48 hours of the discovery. If the discoverer is not the owner of the land where the discovery is made, then the discoverer must also notify the landowner within the same time limit.

   (a) The law-enforcement agency may conduct a reasonable, nondestructive forensic study on the remains if necessary to determine if the human remains are related to a homicide or other police investigation.

   (b) The law-enforcement agency notified of such a discovery must notify the OSA within 5 days following a determination that such discovery is unrelated to a homicide or other police investigation.

(3) Any person inadvertently discovering or coming into contact with any archaeological or sacred objects that do not include any human remains, whether located on public or private land, shall report the find to the OSA within 10 days. If the discoverer is not the owner of the land where the discovery is made, then the discoverer must also notify the landowner within the same time limit.

(4) The ceased activity may resume after 30 days or sooner if the OSA deems it appropriate.

   (a) After the original thirty-day period, the OSA may apply for extensions of this time limit before the appropriate state court.

   (b) In case of undue hardship, the aggrieved party may appeal the initial thirty-day cessation and any subsequent extensions.

(B) Upon receiving a report of the inadvertent discovery of an archaeological object, sacred object, or human remains or associated or unassociated funerary objects, the OSA must make a determination as to whether the object and the site of discovery have archaeological, historical, or other cultural significance. Within 30 days of notification, the OSA must make a determination as to the appropriate treatment of the discovery.

(1) Upon receiving a report of the inadvertent discovery of an
archaeological object, the OSA may take temporary possession of
the object if necessary to make its determination of significance.
Further disposition of the object shall be made pursuant to section 5
of this statute.

(2) Upon receiving a report of the inadvertent discovery of a sacred
object, the OSA may take temporary possession of the object if nec-
essary to make its determination of significance. Further disposition
of the object shall be made pursuant to section 6 of this statute.

(3) Upon receiving a report of the inadvertent discovery of human
remains or associated or unassociated funerary objects, the OSA
shall attempt to determine any next of kin, lineal descendants, or
culturally or ethnically affiliated group. Further disposition of such
remains and objects shall be made pursuant to section 7 of this
statute.

(C) If the OSA determines that an archaeological site is present, and

(1) if the site is located on public land,
   (A) the OSA may preserve the find by leaving it in situ and
       covering it up; or
   (B) the OSA may allow the site to be excavated under its
       auspices;

(2) if the site is located on private land,
   (a) the OSA may preserve the site by covering it up; or
   (b) the OSA may allow the site to be excavated under its
       auspices.

(c) If necessary, the OSA may authorize payment of rent
to the landowner for temporary preservation of the site or
while excavating a site.

(d) If the OSA determines that the site should be perma-
nently preserved,
   (i) the landowner may donate the site to the state
       as a tax-deductible charitable donation;
   (ii) the landowner may donate a preservation
       easement to the state; or
   (iii) the state may take the property by eminent
domain.

SECTION 4. CONDUCT OF ARCHAEOLOGICAL INVESTIGATION,
SURVEY, EXCAVATION, AND SALVAGE

(A) The state reserves to itself the exclusive right to conduct all archaeo-
logical field work within the state. No person or party shall survey, excava-
tate, or otherwise disturb a site located on public or private land or
salvage a historical shipwreck from public or private waters without a
license from the OSA and, if the site is located on private land, consent of the landowner.

(B) The OSA may only issue licenses for survey, exploration, or excavation when the archaeological activity is undertaken in the public interest and will further public and scientific knowledge.

(C) The OSA may only issue a license to conduct archaeological field work to a principal investigator who demonstrates compliance with the following requirements:

(1) qualification as a professional archaeologist;
(2) completion of any archaeological field work for which a prior license was issued, including, but not limited to, publication of appropriate professional reports of the results of such field work.
(3) no prior violation of this protective statute;
(4) submission of a plan of archaeological field work, including schedules for publication of results of field work and for disposition and treatment of human remains, if it appears likely that these will be found during the course of the field work;
(5) if the field work is to take place on privately owned land, the written consent of the land owner.

(D) In addition, the OSA shall consider the following factors in determining whether to issue a license:

(1) qualifications of the principal investigator who is applying for the license and of other individuals with scientific, anthropological, historical and other forms of expertise who are to be professionally associated with the project;
(2) quality of excavation or survey plan;
(3) likelihood of publication of research (based on evidence of past publication), including adequacy of funding for the publication phases of field work.
(4) Preference in issuance of licenses will be given to educational and scientific not-for-profit organizations.
(5) Licenses will only be granted to commercial operations in unusual situations, generally involving emergency salvage operations.

(E) The disposition of all archaeological objects recovered from licensed field work will be determined pursuant to section 5 of this statute; disposition of all such sacred objects will be determined pursuant to section 6 of this statute; and disposition of all such human remains and associated and unassociated funerary objects will be determined pursuant to section 7 of this statute.
SECTION 5. DISPOSITION OF ARCHAEOLOGICAL OBJECTS

(A) All archaeological objects found on public land are the property of the state and are to be placed in the custody of the OSA, which will then determine appropriate treatment, display, and curation of such objects. The state's ownership of such objects is, however, subject to the public trust as defined in subsection (C) of this section. The common law of finds and of salvage as applied to archaeological objects found on public land, including, but not limited to, submerged, partially submerged, or submersible land, and the bed of the sea within the state's jurisdiction, is specifically abrogated.

(B) In the case of an archaeological object inadvertently discovered on private land, the OSA will make a determination as to whether the object is archaeologically or historically significant. If the object is the product of a Native American or other minority group, the OSA shall make this cultural determination in consultation with tribal leaders or representatives of that cultural group.

1. If the object is not archaeologically significant, the OSA shall release absolute ownership to the owner of the private land where the object was found.

2. If the object is archaeologically significant,
   (a) the OSA may release ownership to the owner of the private land where the object was found. Such ownership shall be subject to the public trust; or
   (b) the OSA may purchase the object from the owner of the private land where the object was found. The OSA shall purchase the object at its full market value, as determined at the source by an independent appraisal, at which time the state becomes the owner of the object, subject to the public trust. If the object is the product of a Native American or other minority cultural group, the OSA may purchase the object on behalf of the group. Upon payment of the same consideration, the cultural group, through its tribal leaders or other representatives, will become the owner of the object, subject to the public trust.

3. In the case of an archaeological object found in the course of a licensed excavation or other field work, the disposition of the object will be determined pursuant to the terms of the license, if such provision was made in the license. If no such provision was made in the license, disposition will be determined as for inadvertently discovered objects, in accordance with this section.

4. Notwithstanding any other provision of this statute, ownership of an archaeological object shall not be released to nor shall any object be purchased from any person who was engaged in committing a trespass when the object was found, or who failed to comply with the
notification requirements of section 3 of this statute, or who committed any other violation of this statute.

(C) The public trust shall impose the following duties and obligations on the finder, possessor, and owner of all such archaeological objects:

(1) The finder, possessor and owner of such archaeological objects shall be responsible for maintenance of OSA documentation and the certificate of registration if the OSA has issued one, which shall include all available information as to the original context of the object and the circumstances under which the object was found.

(2) The possessor or owner shall be responsible for notifying the OSA any time that the object is transferred, sold, or otherwise conveyed.

(3) The possessor or owner must make the object available for scholarly study upon reasonable request and for periodic public display in museums upon reasonable request.

(4) The possessor or owner shall be responsible for the proper care, preservation, and curation of the object.

(5) Breach of any of these terms of the public trust shall cause the possessor or owner to forfeit all rights of possession or ownership of the object and title to the object shall be restored to the state.

(6) In the case of objects owned by the state subject to the public trust, the OSA shall attempt to determine the existence of a group with cultural affiliation to the object. If the existence of a culturally affiliated group is found, the OSA shall transfer ownership to the culturally affiliated group subject to the public trust.

(D) Certificate of Registration

(1) The OSA shall issue a certificate of registration to any person to whom the OSA releases ownership of an archaeological object and to any person who can establish proof of ownership of an archaeological object prior to the effective date of this statute.

(2) The certificate of registration shall include the following information:

   (a) all available information concerning the circumstances, location, and other scientific data relevant to the object's discovery;

   (b) a brief cumulative description of how the object came into the possession of the current owner in accordance with the provisions of this statute;

   (c) a statement that the object is not human remains, an associated or unassociated burial object, or a sacred object;

   (d) a statement as to whether the object is owned subject to the public trust;
(e) in the case of objects obtained before the effective date of this statute, a statement to that effect; and
(f) the official stamp of the OSA or an agency authorized by the OSA to authenticate certificates.

(3) No archaeological object may be sold, transferred, bartered, or exchanged without an accompanying certificate of registration.

SECTION 6. DISPOSITION OF SACRED OBJECTS

(A) All sacred objects found on public or private land are to remain in situ until such time as the OSA can determine the appropriate disposition of such objects. While the object remains in situ, any activity that may disturb the object shall cease pursuant to the provisions of section 3(A). The common law of finds and of salvage as applied to archaeological objects found on public land, including, but not limited to, submerged, partially submerged, or submersible land, and the bed of the sea within the state's jurisdiction, is specifically abrogated.

(B) The OSA shall make a reasonably diligent effort to ascertain the ownership of the sacred object pursuant to section 7(A)(2).

(C) If the OSA is able to determine the appropriate next of kin, descendants, or culturally or ethnically affiliated group, it shall immediately release title and rights of possession to the appropriate party.

(1) The OSA shall have no right to use the objects for scientific purposes or curation without the express written consent of the owner.

(2) The provisions of section 5(C) shall have no application with regard to sacred objects whose owner has been determined and has taken possession of said objects.

(D) If the OSA is unable to determine the existence of the appropriate next of kin, descendants, or culturally or ethnically affiliated group, the OSA shall take possession of the sacred object subject to the public trust.

(E) If a group has taken title and possession and at any time sells or in any manner relinquishes title and possession to any party not affiliated with that group, then the object shall no longer be considered a sacred object for the purposes of this section but shall instead be considered an archaeological object and shall be held subject to the other provisions of section 5 and any other provisions pertaining to archaeological objects. For any sale or transfer to be valid, it must be accompanied by the written consent of the appropriate group.

SECTION 7. DISPOSITION OF HUMAN REMAINS AND ASSOCIATED AND UNASSOCIATED FUNERARY OBJECTS

(A) Whenever discovery of a burial site, human remains, or associated or
unassociated funerary objects is reported to the OSA, the disposition of such sites, remains, or objects shall proceed as follows:

(1) Every reasonable effort shall be made to restore the burial site and to avoid disturbing the human remains and associated and unassociated funerary objects.

(2) The OSA shall determine the existence of next of kin, descendants, or culturally or ethnically affiliated groups.

(a) A totality-of-the-circumstances approach shall be employed for identification of next of kin, descendants, or culturally or ethnically affiliated group. Factors to be considered in determining the existence of next of kin, descendants, or culturally affiliated group include, but are not limited to, the following:

(i) public or private records such as death certificates, wills, property or zoning records;
(ii) identifying marks, symbols, or characteristics of the burial goods or grounds that may be particular to a specific next of kin, descendants, or culturally or ethnically affiliated group;
(iii) location of the burial site, taking into account the history surrounding that location.

(b) If the OSA is able to determine the existence of next of kin, descendants, or culturally or ethnically affiliated group, the OSA must attempt to notify such parties of the discovery.

(3) Upon notification of the next of kin, descendants, or culturally or ethnically affiliated group, the OSA must attempt to reach an agreement with said party as to the disposition of the remains or objects.

(4) The control of the disposition of the remains or objects shall be in the following order of preference:

(a) next of kin
(b) descendants
(c) culturally or ethnically affiliated group.

(5) Upon determining the appropriate party to dispose of the remains or objects, that party's actions with respect to the remains or objects shall be limited to reburial or disposal of the remains or objects according to their religious or cultural beliefs, traditions, or practices. In all circumstances, the appropriate party shall be prohibited from public display of the remains.

(6) If next of kin, descendants, and culturally or ethnically affiliated groups cannot be identified after a reasonable effort, the OSA shall have control of the remains or objects. Such control may include:
(a) reburial
(b) further scientific study; and
(c) curation and public display of burial goods.

(7) If a dispute arises among competing groups concerning disposition of the find and no agreement can be reached after reasonable effort, the OSA shall have control of the disposition of the remains or objects.

(8) The OSA shall maintain a cemetery for the purpose of reinterment of unidentified, unclaimed, or disputed human remains.

(B) Scientific Study of Human Remains and Funerary Objects

Upon agreement with the appropriate next of kin, descendants, or culturally or ethnically affiliated group, or if no such group is found, the state may allow scientific study of the remains before disposition, subject to the following conditions:

(1) The person studying human skeletal remains shall be a qualified skeletal analyst;
(2) Remains that are subject to scientific study shall be reinterred no later than one year from the date of discovery; and
(3) The party studying such remains or objects may apply to the OSA for an extension of the 1-year time limit, but such objects must be reinterred within a maximum of 2 years.

Section 8. Prohibited Conduct

(A) No person may knowingly or intentionally excavate, remove, damage, disturb, or otherwise alter or deface any archaeological resource located on public or private lands unless acting pursuant to a license issued by the OSA.

(B) No person may sell, purchase, trade, barter, exchange, transfer or offer to sell, purchase, trade, barter, exchange, or transfer any archaeological object without a certificate of registration issued by the OSA.

(C) No person may sell, purchase, trade, barter, exchange, transfer, possess, or display or offer to sell, purchase, trade, barter, exchange, transfer, or display any human remains or associated or unassociated funerary objects.

Section 9. Penalties

(A) Any person who knowingly or willfully engages, or who knowingly or willfully employs any other person to engage, in archaeological field work without a license issued by the OSA shall be guilty of a misdemeanor and, upon conviction, shall be subject to any combination of the following:
(1) fine of not more than $1000 nor less than $500 per day of the violation;
(2) imprisonment for no more than 6 months;
(3) forfeiture of all equipment used in engaging in the field work;
(4) payment of compensation necessary to restore the archaeological site to its original condition;
(5) forfeiture to the state of any archaeological objects recovered from such field work; and
(6) disqualification from issuance of a permit for a period of time to be determined by the OSA.

(B) Unless pursuant to licensed field work, any person who knowingly or willfully engages in, or who knowingly or willfully employs any other person to engage in, excavation, removal, mutilation, defacement, injury, destruction, or public display of any cairn, burial, human remains, or associated or unassociated funerary object shall be guilty of a felony and, upon conviction, shall be subject to any combination of the following:

(1) fine of not more than $2000 nor less than $1000 per day of the violation;
(2) imprisonment for no more than 1 year;
(3) forfeiture of all equipment used in engaging in the field work;
(4) payment of compensation necessary to restore the archaeological or burial site to its original condition;
(5) forfeiture to the state of any archaeological objects recovered from such field work;
(6) disqualification from issuance of a permit for a minimum of 5 years; and
(7) payment of compensation necessary for the reinterment of the human remains and associated or unassociated burial objects pursuant to the beliefs and traditions of the next of kin, descendants or culturally or ethnically affiliated group.

(C) Any persons disturbing human remains or associated or unassociated funerary objects through inadvertence, including by agricultural activities, construction, mining, logging or archaeological activity, shall at their own expense, and in accordance with the rituals or practices of the aggrieved group, reinter the human remains and funerary objects under the supervision of the appropriate culturally or ethnically related group and the OSA.

(D) Any person who sells, transfers, barters, exchanges, or donates or offers to sell, transfer, barter, exchange, or donate any archaeological object without a certificate of registration shall be guilty of a misdemeanor and, upon conviction, shall be subject to the following:
(1) forfeiture of the archaeological object to the OSA; and
(2) payment of a fine up to 3 times the current market value of the object.

(E) Any person who knowingly or willfully sells, transfers, barter, exchanges, donates, displays, or possesses or offers to sell, transfer, barter, exchange, or donate any human remains or associated or unassociated funerary object shall be guilty of committing a felony and, upon conviction, shall be subject to the following:

(1) payment of compensation to provide for the reinterment of the human remains and associated or unassociated funerary objects in accordance with the religious and cultural beliefs of the next of kin, descendants, or culturally or ethnically affiliated group or by the OSA; and
(2) payment of a fine up to $100,000.

(F) Any monies received by the OSA paid as fines by those convicted of violating this statute shall be used by the OSA to further the goals of archaeological and cultural resource management and protection.

SECTION 10. Administrative Searches

(A) In order to facilitate further the effective implementation of this statute and to deter violations of the provisions set forth in this statute, the OSA, its officers, agents, employees, and those appointed by it and acting under its authority shall be empowered, subject to the limitations provided in this section, to conduct without notice administrative inspections of archaeological sites or those sites that are likely to contain archaeological or historical or cultural property as defined by this statute.

(B) At all times the privacy interests of those in possession or with title to the property to be searched shall be respected.

(C) Where the inspection necessitates entry into a house or other dwelling, the inspection can only be conducted upon obtaining a search warrant.

(D) The following limitations and guidelines shall be observed when conducting administrative searches:

(1) If the site to be inspected is occupied by a business, then that search shall take place while the business is being conducted.

(2) No inspection of any site shall last more than 24 hours unless:
   (a) there is consent from the landowner or current possessor, or
   (b) the OSA agent has probable cause to believe that there has been or is likely to be a violation of this statute.
(3) No inspection of any house or other dwelling shall last more than 24 hours.

(4) The possessor or owner of the property to be inspected is entitled to be present during the inspection.

(5) No more than 6 inspections can be carried out at one location within any six month period except pursuant to a search warrant or in response to public complaints about violations.

SECTION 11. PRIVATE RIGHT OF ACTION

(A) There shall exist, in accordance with the principles of the public trust and subject to the limitations of this provision, a private right of action to enforce the provisions contained within this statute.

(B) The private right of action shall be limited to the following parties:

(1) any not-for-profit organization, whether incorporated or unincorporated, with a previously demonstrated interest in the provisions of this statute, whose aims and declarations of purpose are in accordance with the provisions of this statute, and that clearly represents the interests of a segment of the general public; and

(2) any not-for-profit society or organization of persons, whether incorporated or unincorporated, not less than 50 in number, that has included in its declaration of purpose an interest in the preservation of the nation's cultural heritage and that has previously demonstrated an affinity with the aims set forth in this statute.

(C) Procedure

(1) Any objection to any actions undertaken by the OSA pursuant to the provisions of this statute that is not filed with the OSA within 90 days from the date of the OSA action or within 90 days from the date when a person with reasonable diligence would have discovered the action is deemed waived.

(2) To file an objection, the complaining party shall give written notice to the OSA stating the nature of the objection and including as many relevant facts as are then known to the complaining party.

(3) If within a period of 30 days the OSA has not resolved the complaining party's grievance, then that party shall have the right to request a referral to an independent arbitration where both parties shall make all reasonable efforts to reach an agreement.

(4) Because the purpose of this provision is to grant to the public direct representation to safeguard the public interest, and because it is also the aim of the OSA to act in the public interest, any dispute must be placed in the hands of an independent arbitrator to enable both sides to reach an agreement without resorting to litigation.

(5) Only upon the failure of this arbitration shall the complaining
party then have the right to file suit in a court with appropriate jurisdiction.

(D) Remedies

(1) Any party eligible to bring suit may only do so in the interest of enforcing the public trust, and not for any profit.

(2) This private right of action shall only be applicable as a public remedy, and any judgment under this provision shall be limited to a decree ordering the OSA to comply with any judicial determination that results from such a suit.

(3) No compensatory, punitive, or other form of monetary damages shall be awarded if such a suit is successful. Reasonable attorneys' fees and costs may be awarded to the successful litigant, if such an award is deemed equitable by the adjudicating court and the imposition of such an award will not undermine the OSA’s ability to function in compliance with the provisions of this statute.

(4) Any party deemed to have brought a frivolous suit may be sanctioned by the court, fines may be imposed, and that party will be liable for all costs and expenses incurred by the OSA in litigating the matter.