An Old World Discovery for New World Justice: The FSIA Path to Repatriate Stolen Native American Art

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The legacy of imperialism thrives in the modern European museum. From Alutiiq masks in Berlin to a Pawnee Chief's remains in Stockholm, museum displays resign tribal emblems to the same fate as the people who produced them: forcibly separated from their culture and assimilated into a foreign one. Although U.S. courts recognize a cause of action under the Foreign Sovereign Immunities Act (FSIA)'s expropriation exception for Nazi-era stolen art claims, these same courts refuse to recognize jurisdiction over repatriation claims for stolen Native American art.

The Art Museum Amendment, a 2016 reform to the FSIA, stands to resolve these jurisdictional challenges by providing a viable repatriation avenue for stolen Native American art. This legislation, this Note argues, establishes an avenue for "targeted and vulnerable groups" to seek retribution against foreign governments who stole work "as part of a systematic campaign of coercive confiscation or misappropriation." This exception, when read in accordance with the Indian ambiguity canon of statutory interpretation, provides a path toward the return of Native American art and artifacts from foreign museums.

Part I of this Note surveys how the FSIA, the Native American Graves Protection and Repatriation Act (NAGPRA), and the Indian ambiguity canon are used to further indigenous repatriation efforts. Part II demonstrates how these statutes and interpretive methodologies, alone, are insufficient to repatriate Native American stolen art. Part III advocates for interpreting the FSIA through the Indian ambiguity canon, leveraging NAGPRA's acknowledgement that Native Americans constitute a "targeted and vulnerable group" to establish a repatriation avenue for stolen Native American art under the FSIA.

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INTRODUCTION

"We need acts of restoration, not only for polluted waters and degraded lands, but also for our relationship to the world."
Robin Wall Kimmerer[1]

American Indian[2] law jurisprudence is clear: by failing to adopt classical conceptions of property law, tribes effectively concede their claims over their art, artifacts, and bodies.[3] The American doctrine of first possession dispossessed what it would view as America's first property owners, nullifying tribal assertions of chain of title against European explorers.[4] The American notion of the fundamental right to exclude, imposed upon indigenous parties in U.S. courts, questioned whether tribes who did not

1. ROBIN WALL KIMMERER, BRAIDING SWEETGRASS 195 (2013).

2. This Note uses a variety of terms to refer to indigenous communities. The terms "Native American," "indigenous" or "tribe" are used when speaking generally about indigenous communities. This Note uses "Indian" only when referring to legislation, agencies, or doctrine with specific meanings, such as "Indian canon." Although it is the position of this Note that indigenous groups may be considered "targeted and vulnerable" under the FSIA for the purpose of claiming its privilege, this Note does *not* take the position that indigenous groups are targeted or vulnerable outside of the statutory context. Rather, this Note affirms that indigenous groups' perseverance in their traditions, language, and communities against centuries of targeted misappropriation campaigns is a hallmark of extraordinary resilience. Further, the author acknowledges that indigenous tribes are not a monolith and hold different customs, beliefs, and conceptions of possession. Therefore, any generalizations drawn in this Note for the sake of legal argument may not apply to all indigenous tribes. *See, e.g.*, *Terminology Style Guide*, NATIVE GOVERNANCE CTR., https://nativegov.org/resources/terminology-style-guide [https://perma.cc/DVK9-52YM] (last visited Apr. 4, 2025); *see also The Impact of Words and Tips for Using Appropriate Terminology: Am I Using the Right Word?*, NAT'L MUSEUM AM. INDIAN, https://americanindian.si.edu/nk360/informational/impact-words-tips [https://perma.cc/YQ9W-HVY5] (last visited Apr. 4, 2025).

3. *See* Tara Nieuwesteeg, *Stolen History*, COWBOYS & INDIANS MAG. (Aug. 16, 2019), https://www.cowboysindians.com/2019/08/stolen-history [https://perma.cc/J2A3-QX9H].

4. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 562 (1823).

recognize an analogous exclusion right retained the authority to protect their burial sites.[5]

The spoils from these lands were declared not stolen art but discoveries, and their benefactors declared not criminals but art collectors. The perpetrators and beneficiaries of this mass art heist—although officially recognized as state-sponsored exploration—evaded legal accountability.[6] Rather than engage with the tribal systems of possession, they cited the challenge of determining the true owner to justify their ownership.[7] The museums that eventually inherited these works appointed themselves custodians of sacred, tribal objects, implying that indigenous art and the cultural value therein are better protected within their walls.[8]

As is so often the case in political conflict, victors monopolize and reinvent the histories of their vanquished. Accordingly, Western institutions erased the seizure of indigenous land and the forced assimilation of indigenous communities from collective historical memory.[9] Now, the abiding legacies of those cultures and violent campaigns against their existence hold a place of looted reverence in museums in almost every European capital.[10]

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5. *See* Charrier v. Bell, 547 F. Supp. 580 (M.D. La. 1982) (finding that, in the absence of a perfect chain of title, a federally recognized tribe can establish ownership over excavated burial goods).

6. *See* Dan Jibréus, *The Long Journey of White Fox*, 95 NEB. HIST. 100, 101 (2014); *see also* Catherine Hickley, *Berlin's Ethnological Museum Returns Alaskan Grave Artefacts Looted by Explorer*, ART NEWSPAPER (May 17, 2018), https://www.theartnewspaper.com/2018/05/17/berlins-ethnological-museum-returns-alaskan-grave-artefacts-looted-by-explorer [https://perma.cc/5U9M-HV24].

7. *See* Nanette Asimov, *UC Berkeley Struggles with How to Return Native American Remains*, S.F. CHRON. (Oct. 3, 2018, 4:08 PM) (on file with the *Columbia Journal of Law & Social Problems*), https://www.sfchronicle.com/bayarea/article/UC-Berkeley-struggles-with-how-to-return-Native-13270422.php; *see also* Christopher Zheng, *31 Years of NAGPRA: Evaluating the Restitution of Native American Ancestral Remains and Belongings*, CTR. FOR ART L. (May 18, 2021), https://itsartlaw.org/2021/05/18/31-years-of-nagpra-evaluating-the-restitution-of-native-american-ancestral-remains-and-belongings [https://perma.cc/LQ46-EVHV]

8. *See* Jibréus, *supra* note 6, at 101.

9. *See generally* Chase Wilson, Decolonizing Memory: Erasure and Resurgence of Indigenous History in the Intermountain West (2023) (M.S. thesis, Utah State University) (on file with digital commons, Utah State University).

10. *See European & U.S. Museums / Exhibitions / Collections with American Indian / Inuit Objects*, AM. INDIAN WORKSHOP, https://www.american-indian-workshop.org/museums.html [https://perma.cc/2HEW-SPD4] (last visited Apr. 4, 2025); *see, e.g.*, *Indiens des Plaines*, MUSÉE DU QUAI BRANLY JACQUES CHIRAC, https://www.quaibranly.fr/en/exhibitions-and-events/at-the-museum/exhibitions/event-details/e/indiens-des-plaines-35252/ [https://perma.cc/2BPB-NFGY] (last visited Apr. 4, 2025); *On the Trail of the Sioux*,

More than 500 years after the first European explorers arrived to dispossess Native Americans of their land and art, members of the Pawnee nation filed a pioneering legal claim to repatriate stolen property from a European institution.[11] In 1874, White Fox, a member of the Pawnee Tribe inhabiting present-day Nebraska, traveled to Sweden to participate in a "Wild West" exhibition during which White Fox and other tribe members would perform Native dances and rituals in front of European audiences.[12] Shortly after arriving in Sweden, White Fox died of tuberculosis.[13] White Fox's Pawnee travel companions requested that his remains and personal property be returned to the United States for a proper burial in accordance with tribal rituals.[14] The Swedish government refused, claiming White Fox's remains for "scientific purposes."[15] Despite repeated requests, White Fox's remains, war shirt, leggings, moccasins, earrings, and necklace remain overseas, displayed in Sweden's National Museum of World Culture.[16] In 2018, Roy Taylor, White Fox's descendant, brought an action against the Kingdom of Sweden for the "repatriation and return of his ancestors' regalia and other personal belongings."[17] Taylor based his claim on the FSIA's expropriation exception, but the

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MUSÉE DES CONFLUENCES, https://museedesconfluences.fr/en/exhibits/temporary-exhibits/trail-sioux [https://perma.cc/KN9N-V9LB] (last visited Apr. 4, 2025).

11. *See* Taylor v. Kingdom of Swed., 2019 WL 3536599 (D.D.C. Aug. 2, 2019).

12. *See Taylor*, 2019 WL 3536599, at *1; James Giago Davies, *Return of a Lost Warrior*, NATIVE SUN NEWS TODAY (Aug. 28, 2019), https://www.nativesunnews.today/articles/return-of-a-lost-warrior [https://perma.cc/Y2WK-FJQX]; *see also* Jibréus, *supra* note 6, at 102.

13. *See Taylor*, 2019 WL 3536599, at *1; Davies, *supra* note 12; Jibréus, *supra* note 6, at 114.

14. *See Taylor*, 2019 WL 3536599, at *1.

15. *Id.* After claiming possession of White Fox's remains, Swedish scientists abused them; specifically, the scientists "dismembered the corpse, taking the skin off the head and torso and plac[ed] it on a plaster cast for public display at an exhibition." Jibréus, *supra* note 6, at 101.

16. *See* Davies, *supra* note 12.

17. *Taylor*, 2019 WL 3536599, at *2; *see also* Chris Owen et al., *A Beginners Guide to the Repatriation of Stolen or Looted Art and Cultural Material*, NORTON ROSE FULBRIGHT (Jan. 2024), https://www.nortonrosefulbright.com/en/knowledge/publications/dd56579f/a-beginners-guide-to-the-repatriation-of-stolen-or-looted-art-and-cultural-material [https://perma.cc/3EMU-7WDH] ("Repatriation refers to the return of stolen or looted cultural material to their countries of origin."); *cf.* Erich H. Matthes, *Repatriation and the Radical Redistribution of Art*, 4 ERGO 931, 932 (2017) ("Repatriation claims are typically made on behalf of groups rather than individuals. This seems to require some understanding of a group as the rightful owner or possessor of an object, and hence appeal to the concept of cultural property.").

district court dismissed the case with prejudice for lack of subject matter jurisdiction.[18]

White Fox's story not only recalls an injustice of the past but also reveals a modern one unfolding in European museums and in U.S. courts: both the refusal of European museums to return stolen Native American art and the reluctance of U.S. courts to abrogate these institutions' sovereign immunity preclude repatriation efforts.[19] Indeed, Congress *expanded* foreign sovereign immunity for these institutions in the 2016 Foreign Cultural Exchange Jurisdictional Immunity Clarification Act—the Art Museum Amendment[20] to the Foreign Sovereign Immunities Act (FSIA).[21] In the second exception to the Art Museum Amendment, Congress provides a repatriation avenue for actions "based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group."[22]

This Note argues that descendants of Native Americans who were the targets of European campaigns to rob indigenous property and burial sites fit squarely within the second exception's category. Their right to pursue litigation against the institutions and foreign sovereigns unlawfully holding this stolen property should accordingly be recognized. Part I summarizes the FSIA and

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18. *See* Taylor v. Kingdom of Swed., 2019 WL 3536599, at *4 (D.D.C. Aug. 2, 2019) (explaining that the claim must be dismissed with prejudice for lack of subject matter jurisdiction "because the Court . . . finds that Defendants are immune under the FSIA from suit on Plaintiff's breach of contract and quantum meruit claims" (quoting Kettey v. Saudi Ministry of Educ., 53 F. Supp. 3d 40, 49 (D.D.C. 2014))).

19. *See* Taylor, 2019 WL 3536599, at *4.

20. *See* 28 U.S.C. § 1605(h)(1). Under the Art Museum Amendment, "participation in specified art exhibition activities does not qualify as a commercial activity within the meaning of the expropriation exception." *Id.* The Obama Administration intended to increase both the frequency of and ease with which cultural exchanges with foreign museums may be facilitated in the United States. *See* Ingrid Wuerth Brunk, *An Art Museum Amendment to the Foreign Sovereign Immunities Act*, LAWFARE (Jan. 2, 2017, 12:48 PM), https://www.lawfaremedia.org/article/art-museum-amendment-foreign-sovereign-immunities-act [https://perma.cc/4LA7-8586]. Further, sovereign immunity—protection from lawsuits that may result in the loss of art and artifacts—is key, according to the Obama Administration, in enabling these exchanges. *See id.*

21. The FSIA establishes a presumption that foreign states, along with their agencies and instrumentalities, are immune from the jurisdiction of U.S. courts. *See generally* 28 U.S.C. § 1604. Although four exceptions to the FSIA abrogate sovereign immunity for foreign states under specific conditions, the FSIA represents the preeminent legislative attempt to both honor the central international law principle of state sovereignty and to maintain strong foreign relationships. *See id.*

22. 28 U.S.C. § 1605(h)(2)(B)(ii).

the Native American Graves Protection and Repatriation Act (NAGPRA)—two key statutes framing prior indigenous repatriation efforts—as well as the Indian ambiguity canon of statutory interpretation. Part II argues that the FSIA, when analyzed with standard canons of statutory interpretation, stymies repatriation attempts. Part II then concludes that NAGPRA lacks a clear enforcement directive and fails to adequately incorporate indigenous understandings of property and possession. Part III contends that interpreting the FSIA through the Indian ambiguity canon and qualifying Native Americans as under Section 1605(h)(2)(B)'s protections establishes a viable repatriation avenue for stolen Native American art.

I. FACTUAL AND LEGAL BACKGROUND

Two key statutes govern Native American attempts to regain stolen art and artifacts: the FSIA and NAGPRA. This Part surveys the FSIA's doctrinal framework—the expropriation exception and the commercial activity requirement—and then addresses the relevant Supreme Court jurisprudence on the FSIA's applicability to foreign stolen art claims. After examining NAGPRA, this Part assesses its ability to protect Native American burial sites and the art and artifacts contained therein. Finally, this Part examines the Indian ambiguity canon of statutory construction and surveys its application in litigation involving indigenous parties.

A. THE FOREIGN SOVEREIGN IMMUNITIES ACT

The FSIA affords sovereign immunity to foreign states and their associated agencies and instrumentalities, exempting them from U.S. jurisdiction.[23] But the grant of foreign sovereign immunity under the FSIA is not absolute.[24] The expropriation exception under the Art Museum Amendment[25] waives sovereign

23. *See* 28 U.S.C. § 1604.

24. The Foreign Sovereign Immunities Act does not provide immunity when (1) the foreign state waives its immunity, (2) the action relates to a commercial activity carried out by the foreign state in the United States, (3) property rights taken in violation of international law, (4) property rights acquired by succession or gift or rights in immovable property situated in the United States are in issue, (5) a litigant seeks money damages against a foreign state, or (6) a party seeks to enforce an arbitration agreement. *See* 28 U.S.C. § 1605(a).

25. *See id.* § 1605(a)(3); *see also* Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co., 581 U.S. 170, 173 (2017) (applying the expropriation exception); Fed.

immunity for foreign states if (1) the factual allegations present a legally viable claim that the claimant's property rights were seized in violation of international law, and (2) there is a relationship between the foreign state, a commercial activity it is engaged in within the United States, and the expropriated property at issue.[26]

1. *Expropriation Exception Framework*

To qualify for the expropriation exception, plaintiffs must first allege that the seizure of property violated international law.[27] Under the first prong, plaintiffs must show that (a) the defendant nation expropriated the property of the plaintiff in violation of international law—largely duplicative of the initial analysis—and (b) the plaintiff was not a national of the foreign state at the time of the alleged expropriation.[28] Expropriation is not illegal per se, so states may expropriate the property of their nationals and foreigners with due process of law, compensation, and without discrimination.[29] The second prong of the expropriation exception is the dispositive one: evaluating whether the activity satisfies the commercial activity requirement. To satisfy this requirement, plaintiffs must demonstrate a nexus between the foreign state defendant, the impermissibly seized property, and a commercial activity in the United States.[30]

Some jurisdictions, however, disagree on what constitutes "commercial activity."[31] In *Guevara v. Republic of Peru*, for

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Republic of Ger. v. Philipp, 592 U.S. 169, 185 (2021) (same); Republic of Austria v. Altmann, 541 U.S. 677, 685 (2004) (same).

26. *See* Republic of Hung. v. Simon, 145 S. Ct. 480, 488 (2025).

27. *See id.* at 494 ("[T]he exception requires a commercial nexus with the United States and a taking of property 'in violation of international law.'" (quoting 28 U.S.C. § 1605(a)(3))). The international law of expropriation includes the domestic takings rule. *Philipp*, 592 U.S. at 176. A requirement that encompasses the domestic takings rule effectively exempts genocidal takings by a foreign state against its own nationals. *See id.* at 187. Thus, citizenship of the plaintiff at the time of the alleged seizure of property becomes a threshold question for qualification under the expropriation exception. Under *Philipp*, the domestic takings rule affirms that a foreign state's seizure of its own nationals' property does not constitute a violation of the international law of expropriation. *See id.*

28. *See Phillipp*, 592 U.S. at 187.

29. *See* CHRISTOPH SCHREUER, WORLD BANK, THE CONCEPT OF EXPROPRIATION UNDER THE ETC AND OTHER INVESTMENT PROTECTION TREATIES 1 (2005).

30. *See Simon*, 145 S. Ct. at 486.

31. *Compare* Guevara v. Republic of Peru, 468 F.3d 1289 (11th Cir. 2006) (holding that a foreign state engages in a commercial activity under the FSIA when the purpose for its engagement in the activity is to produce a profit), *with* El-Hadad v. U.A.E., 496 F.3d 658 (D.C. Cir. 2007) (finding that "commercial" under the FSIA relates to the type of commercial actions usually engaged in by a private party).

instance, the Eleventh Circuit held that an activity is "commercial" when the activity is carried out for the purpose of producing "a profit."[32] The *Guevara* court's construction of "commercial" also presumes that the statutory meaning of "profit" refers to both monetary and non-monetary "profit[s]," a metric beyond merely assessing corporate revenues of the activity.[33] By contrast, in *El-Hadad v. United Arab Emirates*, the D.C. Circuit defined "commercial activity" as the exercise of powers reserved for private citizens,[34] relying on the restrictive theory of foreign sovereign immunity.[35] For example, "when a government becomes a partner in a trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."[36]

The Supreme Court has refrained from resolving the circuit split and clarifying the definition of commercial activity in the FISA; instead, in *Saudi Arabia v. Nelson*, the Court provided examples of activities *not* included under the commercial activity exception,[37] such as illegal detainment or torture.[38] The Supreme Court's reluctance to define "commercial activities" reflects a broader reticence to bind the United States to clear sovereign immunity rules that necessarily implicate questions of American foreign relations.[39] Ambiguity in these rules, therefore, permits

32. *Guevara*, 468 F.3d at 1302–03.

33. *Id.*

34. *El-Hadad*, 496 F.3d at 667 (finding that the United Arab Emirates was not engaged in a commercial activity because the activity was not one that could also be carried out by private citizens).

35. *See id.*; *see also* Fed. Republic of Ger. v. Philipp, 592 U.S. 169, 184 (2021) (citing Saudi Arabia v. Nelson, 507 U.S. 349, 361 (1993)). The restrictive theory of foreign sovereign immunity rejects all attempts to abrogate foreign sovereign immunity unless the claim involves an activity that could be carried out by a private person. *See Foreign Sovereign Immunities Act*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFS., https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Service-of-Process/Foreign-Sovereign-Immunities-Act.html [https://perma.cc/448H-YY3N] (Dec. 19, 2023).

36. *El-Hadad*, 496 F.3d at 658 (quoting United States v. Planters' Bank of Ga., 22 U.S. (9 Wheat) 904, 907 (1824)).

37. *See* 507 U.S. at 358.

38. *See id.* at 361.

39. To justify this restrictive approach, the Supreme Court concluded that the United States' preeminent interest in maintaining its foreign relationships creates tension with the abrogation privileges offered by the FSIA. *See Philipp*, 592 U.S. at 184 (finding that courts should interpret the FSIA in a manner that would not create tensions between the United States and foreign nations); *see also Nelson*, 507 U.S. at 359 (holding immunity privileges may be waived under a restrictive theory of foreign sovereign immunity only when the foreign sovereign engages in acts that are private or commercial in nature); Republic of Hung. v. Simon, 145 S. Ct. 480, 488 (2025) (affirming that the FSIA codified the restrictive

the Court to adjust their application in accordance with U.S. foreign policy.[40]

Native American claims, regardless of the definition of "commercial activity" applied, have a strong chance of success. Selling tickets to an exhibition or merchandise related to the stolen artwork, for example, would satisfy both the *Guevara* court's "for profit" and the *El-Hadad* court's private citizen activity criteria for "commercial" activities.[41] Further, the Court's argument in *Nelson* that other, better suited legislation exists to adjudicate these claims is not dispositive in the Native American context because analogous alternative dispute mechanisms do not exist for these claimants.[42] Also, the second exception to the Art Museum Amendment, this Note argues, signals an express legislative intent to provide a repatriation avenue through the FSIA. Accordingly, Native American claims present a strong justification for the abrogation of foreign sovereign immunity, even under the Court's restrictive theory.

In sum, under the FSIA, Native American claimants must prove that (1) the foreign state seized the claimant's property rights in violation of international law, and (2) there is a relationship between the foreign state, the state's engagement in some commercial activity within the United States, and the expropriated property at issue.[43] Under the first prong, the claimants must meet a standing requirement by showing that they were not a national of the foreign state at the time of the alleged expropriation.[44] Under the second prong, the claimants must show a nexus between the foreign state defendant, the impermissibly

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theory of sovereign immunity and thereby emphasizing that federal courts lack subject matter jurisdiction over claims against a foreign state unless a statutory exception applies).

40. *See Philipp*, 592 U.S. at 187. *But cf.* Fed. Republic of Ger. v. Philipp, 592 U.S. 169, 184–86 (2021 (holding that the FSIA should not be applied as a human rights statute when other, better suited legislation exists to address such claims).

41. *Guevara*, 684 F.3d at 1302; *El-Hadad*, 496 F.3d at 677. In *Republic of Austria v. Altmann*, the "alleged commercial acts of the Gallery"—publishing and advertising activities related to the stolen art—proved sufficient to persuade the Supreme Court to grant certiorari. Petition for Writ of Certiorari at 20, Republic of Austria v. Altmann, 541 U.S. 677 (2004) (No. 03-13).

42. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 361 (1993); *see also Philipp*, 592 U.S. at 182.

43. *See Philipp*, 592 U.S. at 181.

44. *See* Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co., 581 U.S. 170, 181 (2017) (holding that a foreign state's taking of *its own* national's property is an issue for domestic rather than international law).

seized property, and a commercial activity in the United States.[45] The definition of commercial activity varies by jurisdiction, although it invariably requires a minimum showing of profit directly flowing from engagement in the activity.[46]

Although the Supreme Court's restrictive approach to foreign sovereign immunity narrows the scope of permissible abrogation, Native Americans' claims—the result of states' engagement in private activity and the lack of legislation encouraging the repatriation of their stolen objects—may nevertheless prevail under this more stringent review.

2. *An Art Repatriation Tool*

Before the Supreme Court's landmark decision in *Republic of Austria v. Altmann*, the FSIA was neither applied retroactively nor used as a tool to repatriate stolen art held by foreign states.[47] In *Altmann*, the Supreme Court affirmed that the FSIA may apply retroactively to regulate "conduct that occurred prior to the Act's 1976 enactment, and . . . prior to the State Department's 1952 adoption of the restrictive theory of sovereign immunity."[48] Explicitly, this decision established that art repatriation claims must satisfy one of the exceptions to foreign sovereign immunity outlined in the FSIA.[49] Implicitly, *Altmann* forges a rough, yet discernible, path toward institutional accountability for the colonial legacies museums' collections reflect.[50]

Altmann's progeny strongly affirm the retroactivity rule,[51] yet note that this rule is not without limits.[52] Under the second exception of the Art Museum Amendment, the rule extends only to

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45. *See id.*

46. *Compare* Guevara v. Republic of Peru, 684 F.3d 1289, 1302 (11th Cir. 2006) (defining "commercial activity" as foreign state conduct that most resembles conduct of a market *participant* rather than a market *regulator*), *with* El-Hadad v. U.A.E., 496 F.3d 658, 663 (D.C. Cir. 2007) (distinguishing "commercial activit[ies]" under the FSIA from governmental or public ones).

47. *See* Michael D. Murray, *Stolen Art and Sovereign Immunity: The Case of* Altmann v. Austria, 27 COLUM. J.L. & ARTS 301, 312 (2004); *see also* Michael R. Cosgrove, *Still Seeing Red: Legal Remedies for Post-Communist Russia's Continued Refusal to Relinquish Art Stolen During World War II*, 12 GONZ. J. INT'L L. 4, 5 (2008).

48. 541 U.S. 677, 692 (2004).

49. *See id.* at 697.

50. *See* Cosgrove, *supra* note 47, at 4.

51. *See, e.g.*, Fed. Republic of Ger. v. Philipp, 592 U.S. 169, 173 (2021) (applying the FSIA's exceptions retroactively).

52. *See* 28 U.S.C. § 1605(h)(2)(B)(iii).

takings that occurred after 1900.[53] Additionally, the first exception to the Art Museum Amendment limits retroactivity to only those claims arising from the Nazi regime.[54] These express limitations to *Altmann* suggest congressional disagreement regarding the Court's broad pronouncement of retroactivity under the FSIA.[55] Nevertheless, the FSIA maintains at least some retroactive effect, which Native American plaintiffs may leverage to advocate for the return of their stolen art.[56]

B. THE NATIVE AMERICAN GRAVES AND REPATRIATION ACT

The Native American Graves Protection and Repatriation Act (NAGPRA) establishes affirmative protections for Native American burial sites and artifacts.[57] More broadly, this statute attempts to restitute indigenous communities for harm suffered as a result of Western campaigns of indigenous misappropriation and confiscation.[58] This Note argues that NAGPRA is to the second exception of the Art Museum Amendment as the Holocaust Expropriated Art Recovery Act of 2016 (HEAR Act) is to the first exception: an expression of congressional intent to repatriate stolen artwork from both Native Americans and victims of Nazi-era persecution.[59] Unlike the HEAR Act, however, NAGPRA was not passed in the same year as the Art Museum Amendment and does not establish independent forums for litigating stolen art claims.[60]

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53. *See id.*
54. *See* 28 U.S.C. § 1605(h)(2)(A).
55. *See Philipp*, 592 U.S. at 183.
56. *See infra* Part III.B.
57. *See* 25 U.S.C. § 3001(3)(D); *see also* 136 CONG. REC. 31937–38 (1990) (statement of Sen. Ben Nighthorse Campbell) (explaining that the legislation seeks to protect indigenous burial and religious sites as well as the art and artifacts contained therein).
58. *See generally* 25 U.S.C. § 3001(3)(D).
59. *See* Fed. Republic of Ger. v. Philipp, 592 U.S. 169, 185 (2021).
60. While this Note argues that NAGPRA serves as a normative analog to the *Philipp* Court's reference to the HEAR Act, it recognizes that this analogy is imperfect. First, the HEAR Act established an alternative forum to pursue Nazi-era stolen art claims against foreign institutions. *See Philipp*, 592 U.S. 169 at 186. NAGPRA established no similar alternative forum for Native American claimants to pursue repatriation claims. *See generally* 25 U.S.C. § 3005. Further, NAGPRA, unlike the HEAR Act, was not adopted concurrently with the Art Museum Amendment, therefore rendering the chronological link more attenuated. *See id.* The shortcomings inherent in this analogy, however, should be read more as a consequence of the U.S. government's failure to adequately restitute Native Americans than as undermining the value of this methodological tool.

Although not without constraints,[61] NAGPRA serves a critical role in securing the repatriation of Native American objects from European institutions for two reasons. First, NAGPRA, in reaffirming the "right of possession" of items of cultural patrimony, implicitly acknowledges that European explorers and, later, American citizens expropriated Native American property.[62] Second, examining NAGPRA jurisprudence highlights its legitimacy as a repatriation tool for Native American objects held by federally funded museums or on public lands.

1. *Statutory Purpose*

NAGPRA signals both an explicit legislative acknowledgement that Native American art, artifacts, and remains warrant repatriation,[63] as well as an implicit acknowledgement that Native Americans qualify as a targeted group requiring this protection.[64] This section surveys NAGPRA's structure and legislative history to argue that the statute's express repatriation protections should be interpreted against NAGPRA's animating purpose.

NAGPRA requires American museums in possession of indigenous human remains to "inventory those remains, notify the affected tribe, and, upon the request of a known lineal descendant of the tribe, return such remains."[65] Analysis of the statute's structure expresses a legislative intent[66] to create a process for federal agencies and museums receiving federal funds to reunite

61. NAGPRA's jurisdiction is limited to U.S. public lands and federally funded museums. *See* 25 U.S.C. § 3002(a) (restricting NAGPRA to those cultural items found on federal or tribal land).

62. *See* 25 U.S.C. §§ 3001(3)(D) & (13) (defining both items of cultural patrimony and the "right of possession").

63. *See* 25 U.S.C. § 3001(3)(D).

64. *See* Thorpe v. Borough of Thorpe, 770 F.3d 255, 257 (3d Cir. 2014). NAGPRA, to the *Thorpe* court, represented the preeminent legislative attempt to provide reparations to Native American tribes for atrocities suffered from the beginning of the colonial period to the present. *See id*.

65. *Id. See generally* 25 U.S.C. §§ 3001–13. Under its enforcement provision, NAGPRA imposes criminal and civil penalties. *See Native American Graves Protection and Repatriation Act: Enforcement*, NAT'L PARK SERV., https://www.nps.gov/subjects/nagpra/enforcement.htm [https://perma.cc/C99X-5327] (last visited Sept. 24, 2024). NAGPRA imposes criminal liability on any person who knowingly (1) "sells, purchases, uses for profit, or transports for sale or profit the human remains for a Native American;" or (2) "sells, purchases, uses for profit, or transports for sale or profit any Native American cultural item obtained in violation of NAGPRA." *Id.* It imposes civil liability on a federal agency or a museum receiving federal funds that fails to adhere to its identification, notification or return obligations under the statute. *See id.*

66. *See* 136 CONG. REC. 31937–38 (1990) (statement of Sen. Ben Nighthorse Campbell).

family members with their dead.[67] Further, the inclusion of both criminal and civil penalties reflects not only a need to repatriate these remains and objects, but also an express intent to enforce compliance.[68]

Examination of the relevant legislative history demonstrates that Congress also acknowledged a need to repair in light of past harms.[69] In the floor debate, NAGPRA's proponents noted that the practice of looting Native American burial sites originated from the U.S. Surgeon General's desire to study "Indian skeletons . . . to determine whether the Indian was inferior to the white man due to the size of the Indian's cranium."[70] Likewise, Senator Campbell noted that "under current law native American human remains found today on public land are still considered to be Federal property."[71] His remarks reveal how little the American legal regime has progressed in its protection of Native Americans. Ultimately, the legislative history confirms—both historically and legally—that the federal government targeted Native Americans in furtherance of "scientific" and political motives.

2. *Jurisprudence*

Examining NAGRPA jurisprudence reveals a clear framework for defining works of cultural patrimony, a guideline that may be exported beyond direct statutory application. Federal courts rejected several challenges to NAGPRA's constitutionality, which was pivotal to preserving the statute's ability to protect Native

67. *See* 25 U.S.C. §§ 3001–13. Additional support for viewing NAGPRA as a restorative rather than retributive statutory scheme can be discerned from the meager enforcement provision included in the last section of the statute: "The United States district courts shall have jurisdiction over any action brought by a person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter." 25 U.S.C. § 3013. Although defenders of this text may argue that the ambiguity in Section 3013 provides a blank check for courts to "issue such orders" for violations of the identification, notification or return requirements, this statutory ambiguity does not mandate issuing "such orders" even if the court concludes that a federal agency or a museum receiving federal funds violated its statutory obligations, thus rendering NAGPRA enforcement and discipline purely discretionary. While such a focus may feel like justice, it also distracts from a more sinister question: who authorized these government campaigns of looting for the purpose of museum display? *See also infra* Part II.B.

68. *See generally* 25 U.S.C. § 3007.

69. *See* 136 CONG. REC. 31937–38 (1990) (statement of Sen. Ben Nighthorse Campbell).

70. *Id.* at 31937.

71. *Id.*

American property.[72] The Ninth Circuit Court of Appeals was at the forefront of NAGPRA's progressive jurisprudential development.[73] In *United States v. Tidwell*,[74] the Ninth Circuit rejected a challenge to NAGPRA as "unconstitutionally vague," holding that although the tribal law regarding cultural patrimony is unwritten, the statutory requirements mandating (1) scienter, and (2) consultation with Native American officials suffices to protect against arbitrary enforcement.[75] The Ninth Circuit also held that the National Park Service's (NPS) application of NAGPRA to Navajo remains and objects "constituted final agency action"[76] under the Administrative Procedure Act (APA),[77] thereby allowing tribes to exercise the rights protected under the APA's "comprehensive remedial scheme for those allegedly harmed by agency action."[78] Binding in the Ninth Circuit and persuasive everywhere else, this progressive interpretation of NAGPRA establishes a framework for Native Americans to repatriate their predecessors' remains.[79]

The Tenth Circuit, in contrast, adopted a different approach. Rather than establishing repatriation access through the APA, the Tenth Circuit in *United States v. Corrow* clarified NAGPRA's definition of cultural patrimony.[80] To qualify as an object of cultural patrimony or a "cultural item" under NAGPRA, objects "must have (1) ongoing historical, cultural or traditional importance; and (2) be considered inalienable by the tribe by virtue

72. *See* United States v. Tidwell, 191 F.3d 976, 980 (9th Cir. 1999); United States v. Corrow, 941 F. Supp 1553, 1560 (D.N.M. 1996).

73. *See Tidwell*, 191 F.3d 976; Navajo Nation v. U.S. Dep't of Interior, 819 F.3d 1084 (9th Cir. 2016); Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004); White v. Univ. of Cal., 765 F.3d 1010 (9th Cir. 2014); Brown v. Haw., 424 F. App'x 642 (9th Cir. 2011).

74. The United States had charged Rodney Tidwell with conspiracy and illegal trafficking of indigenous artifacts in violation of NAGPRA. *Tidwell*, 191 F.3d at 978–79. Judge Sidney Thomas, affirming the decision of the lower court, found that NAGPRA was not unconstitutionally vague, and that the Defendant was thus subject to criminal liability. *See id.*

75. *Id.* at 980.

76. *Navajo Nation*, 819 F.3d at 1091.

77. *See generally* Administrative Procedure Act, 5 U.S.C. §§ 551–59. The central purposes motivating the enactment of the Administrative Procedure Act were "to introduce greater uniformity of procedure and standardization of administrative practice among diverse agencies whose customs departed widely from each other . . . [and] to curtail and change the practice embodying in one person or agency the duties of prosecutor and judge." Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950).

78. *Navajo Nation*, 819 F.3d at 1090.

79. *See* Navajo Nation v. U.S. Dep't of Interior, 819 F.3d 1084, 1090 (9th Cir. 2016).

80. *See* 119 F.3d 796, 800 (10th Cir. 1997).

of the object's centrality in tribal culture."[81] On the second requirement, the *Corrow* court explained that the object claiming cultural patrimony status must occupy a position "inalienable" to the tribe "such that the property cannot constitute the personal property of an individual tribal member."[82] This definition imposes a higher standard on Native American objects seeking protection under NAGPRA: not only must the object occupy a place of irreplaceable importance to the tribe, but also be owned collectively by the tribe—and not just by one individual tribe member.[83]

Although both the "irreplaceable importance" standard and the collective ownership requirement would seem to foreclose Native American efforts to repatriate *all* of their objects held by American museums, succeeding under this higher standard may increase the likelihood of protection and respect for these objects in other contexts. If, for example, a court deems a tribal object displayed in an American museum irreplaceably important to the tribe, a court deciding whether to abrogate the foreign sovereign immunity of a European museum in possession of a similar object may be more inclined to do so because this type of object received protection under NAGRPA's higher standard. Therefore, a *Corrow* showing would be persuasive evidence to support an FSIA claim.

Despite being a domestic statute only applicable to American museums and federal land, NAGPRA establishes an important regulatory framework for the identification and return of stolen Native American art and artifacts. The Ninth and Tenth Circuits, notably, clarified the definition of cultural patrimony, establishing an exportable framework by which courts may more easily assess the cultural importance of objects in weighing both repatriation and sovereign immunity claims. NAGPRA's emphasis on restoration rather than retribution, however, eliminates a punitive deterrence mechanism and, in turn, undermines its enforcement.[84]

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81. *Id.* Although the resulting definition of "cultural patrimony" provided by the court is distinct from the ordinary meaning of the term, the *Corrow* court nevertheless includes the Webster's dictionary definition in a footnote. *See id.* at 800 n.4.

82. *Id.* at 800. The liberty taken by the court to construe a non-ownership requirement based on an object's centrality to the tribe ignores the reality that tribes maintain distinct definitions of "ownership" that govern their relationships with both property and one another. *See id.*; *see also infra*, text accompanying notes 171–183.

83. *See Corrow*, 119 F.3d at 800.

84. *See infra* Part II.B.2.

3. *The Indian Ambiguity Canon of Statutory Interpretation*

The Indian ambiguity canon of statutory interpretation urges courts to interpret both treaties and statutes liberally to favor indigenous parties.[85] The evolution and application of this canon, this Note argues, is persuasive in finding Native Americans to be a protected class under the second exception of the Art Museum Amendment. The Supreme Court recognizes and applies four different Indian canons,[86] depending on whether there is ambiguity in a treaty or a legislative act. The first two canons relate to treaty interpretation and treaty abrogation.[87] When interpreting a treaty, courts employing the Indian treaty interpretation canon should construe treaties "in the sense in which they would naturally be understood by the Indians."[88] When considering whether a "subsequent Act of Congress abrogated or modified an Indian treaty,"[89] courts require express evidence "that Congress actually considered the treaty right and decided to abrogate that right."[90] The third canon applies only to cases where Congress intends to abrogate tribal sovereign immunity.[91]

The Indian ambiguity canon, the fourth and most relevant canon for art repatriation claims, reaches beyond the treaty and tribal sovereign immunity contexts to implicate "all statutes enacted for the benefit or regulation of Indians."[92] This canon instructs courts that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[93]

Professor Alexander Tallchief Skibine, surveying the Supreme Court's usage of the four canons, argues that courts apply a two-prong rule when applying the Indian ambiguity canon: courts must both (1) liberally construe statutes, and (2) resolve ambiguous

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85. *See* Alexander Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. MICH. J.L. REFORM 267, 269–70 (2022).

86. Each of the four Indian canons applies to a different type of text or legislative act. *See id.* at 270.

87. *See id.* at 270.

88. *Id.* at 274 (quoting Herrera v. Wyoming, 587 U.S. 329, 345 (2019)).

89. Skibine, *supra* note 85, at 268 (citing United States v. Dion, 476 U.S. 734, 739–40 (1986)).

90. Skibine, *supra* note 85, at 268.

91. *See id.* at 269.

92. *Id.*

93. *Id.* at 289 (quoting Chickasaw Nation v. United States, 534 U.S. 84, 93–94 (2001)).

provisions in favor of the tribe.[94] In the last 35 years, only one Supreme Court decision of the 26 cases involving Federal Indian Law and non-treaty statutes invoked Indian ambiguity canon deference because, according to some scholars, "the judiciary too often treats these canons as voluntary."[95] As substantive rather than semantic canons of statutory interpretation, they are grounded in constitutional values, and thus justified as conventions or customs.[96] The literature advocating for increased use of the Indian canon argues that the "the structural, institutional, and cognitive biases permeating the judiciary and legal system" lead courts to ignore their interpretive obligation to adhere to customary interpretive practices and, ultimately, disregard this canon.[97]

In the singular case invoking the Indian ambiguity canon, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, the Court found two possible constructions of "taxation of land" under the Indian General Allotment Act of 1887: one that would allow Yakima County, Washington, to impose and enforce an excise tax on sales of reservation land, and another that would permit only its imposition.[98] Justice Scalia, writing for the Court, concluded that in the face of statutory ambiguity, the interpretation most favorable to the indigenous party wins.[99] Although its infrequent usage may, for some, serve as grounds to deny its legitimacy as a tool of statutory interpretation, its classification as a substantive canon speaks volumes because substantive canons must have strong grounding in policy and constitutional values. In contrast to the higher courts, district courts more regularly apply the Indian ambiguity canon to

94. *See* Skibine, *supra* note 85, at 270.

95. *See id.* (quoting Matthew L. M. Fletcher, *Textualism's Gaze*, 25 MICH. J. RACE & L. 111, 138 (2020)); *see also* Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992). Justice Scalia, writing for the court in *County of Yakima*, argued that "[w]hen . . . faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Id.* at 269 (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)).

96. *See, e.g.*, NLRB v. Cath. Bishop of Chi., 440 U.S. 490 (1979); Gregory v. Ashcroft, 501 U.S. 452 (1991); United States v. Bass, 404 U.S. 336 (1971) (providing examples of the substantive canons of statutory interpretation, specifically the constitutional avoidance, state sovereignty and rule of lenity canons).

97. *See* Fletcher, *supra* note 95, at 138.

98. *See Cnty. of Yakima*, 502 U.S. at 268–69.

99. *See id.* at 269.

construe ambiguous statutory language—both in Native American-specific and general statutes—to favor indigenous parties.[100] Ultimately, the Supreme Court's acknowledgement of the Indian ambiguity canon as not only a legitimate but a salient interpretive methodology, supported by lower courts' willingness to employ it, renders the canon a powerful tool of statutory interpretation.

Legal efforts to repatriate art, cultural artifacts, and human remains have met various levels of success under both the FSIA and NAGPRA. FSIA jurisprudence produced *Altmann*'s retroactivity rule, establishing a clear doctrinal framework for art restitution claims. Likewise, NAGPRA's focus on both the restoration of Native American burial sites and the reunification of tribe members with the remains of their ancestors promotes a greater awareness of the atrocities of the past and invites courts to protect Native American remains and art in other statutory contexts. Similarly, the Indian ambiguity canon, although never applied to the interpretation of the FSIA or NAGPRA, provides a favorable interpretive method for Native American art repatriation claims.

These victories, however, must be qualified. Post-*Altmann* amendments to the FSIA adding a limit on the retroactive reach of the statute suggest that Congress disagrees with *Altmann*'s broad retroactivity rule.[101] NAGPRA's limited jurisdiction restricts its reach to public lands and federally funded museums. Further, its statutory structure favors restoration over retribution, resulting in a lack of enforcement of NAGPRA penalties. Finally, the Indian ambiguity canon's broad scope may also be its weakness: outside the context of a treaty—such as statutes not directly regulating Native Americans—courts are less inclined to employ the canon. These statutory and interpretive insufficiencies create several gaps, which largely foreclose indigenous repatriation claims.

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100. The application of these canons requires a determination that a statute of general applicability is ambiguous. *See e.g.*, Swinomish Indian Tribal Cmty. v. BNSF Ry. Co., 228 F. Supp. 3d 1171, 1180 (W.D. Wash. 2017). Statutes of general applicability apply prima facie to Native American tribes barring certain exceptions. *See* Donovan v. Cœur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) (citing FPC v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960)).

101. *See, e.g.*, 28 U.S.C. § 1605(h)(2).

II. GAPS IN EXISTING LEGAL PROTECTIONS

The lack of a viable legal avenue for the repatriation of stolen Native American art and artifacts from European institutions is a consequence of (1) failures to both properly classify state museums and to clearly define "commercial activity" under the FSIA, (2) NAGRPA's semantic disconnect between the federal and tribal systems' definitions of property law-related language, and (3) remaining ambiguities as to the permissible scope of the Indian ambiguity canon. These gaps effectively prevent the successful repatriation of stolen Native American art.

A. FSIA: AGENCY-INSTRUMENTALITY AND COMMERCIAL ACTIVITY MISCLASSIFICATIONS

The Pawnee tribe's attempt to regain the remains and property of White Fox is the only example of a Native American attempt to repatriate stolen art, artifacts, jewelry or human remains from a European institution under the FSIA.[102] The case, *Taylor v. Kingdom of Sweden*, however, met a swift end on jurisdictional grounds.[103] White Fox's remains and art continue their exile, today, in Stockholm's National Museums of World Culture.[104]

The *Taylor* court interpreted the FSIA to foreclose an avenue by which the Pawnee tribe could repatriate their stolen art by (1) failing to classify Sweden's National Museum as an "agenc[y] or instrumentalit[y]" of Sweden, instead conflating it with the foreign state itself, and (2) adopting an impermissibly heightened standard to define "commercial activity." This section interrogates the *Taylor* court's reasoning, which significantly diverged from precedent, and finds the second exception to the Art Museum

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102. *See* Taylor v. Kingdom of Swed., 2019 WL 3536599 (D.D.C. Aug. 2, 2019).

103. *See Taylor*, 2019 WL 3536599 at *3. The district court granted the defendant's motion to dismiss for lack of subject matter jurisdiction and dismissed the case with prejudice. The court explained:

> [U]nder the [FSIA,] courts lack subject matter jurisdiction over foreign states unless one of the exceptions in [Sections] 1605 or 1607 applies. A motion to dismiss based on FSIA immunity may challenge not only the legal sufficiency of a plaintiff's jurisdictional allegations, but also "the factual basis of the court's subject matter jurisdiction under the FSIA, that is, either contest a jurisdictional fact alleged by the plaintiff . . . or raise a mixed question of law and fact."

Id. at *4 (quoting Phx. Consulting v. Republic of Angl., 216 F.3d 36, 149 (D.C. Cir. 2000)).

104. *See Taylor*, 2019 WL 3536599, at *3.

Amendment to sufficiently resolve the problems the court found with FSIA repatriation of Native American objects.

1. *Foreign State vs. Agency-Instrumentality Distinction*

To waive the a foreign state's sovereign immunity under the FSIA, claimants must satisfy one of the FSIA's six exceptions.[105] The Pawnee tribe, in *Taylor*, relied on the expropriation exception, arguing in accordance with the dual requirements imposed under Section 1605(a)(3) that (1) property rights seized in violation of international law are at issue and (2) "that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."[106]

At the threshold step to invoke the expropriation exception, courts must decide whether the defendant qualifies as either a foreign state or as its "agency or instrumentality."[107] If the defendant is deemed the "foreign state," the expropriation exception becomes more difficult to invoke, requiring that the stolen property be located in the United States.[108] On the contrary, the requirements for defendants classified as "agencies or instrumentalities" are an easier burden to meet, permitting the litigation to proceed even if the property is located abroad.[109] The express division between foreign states and their agents and instrumentalities, according to the *Taylor* court, suggests a foreign affairs concern: courts must protect defendant sovereigns—via imposing higher burdens on plaintiffs—before waiving the defendant sovereign's immunity.[110] Notably, a foreign state cannot

105. *See* 28 U.S.C. § 1605(h). The six exceptions to foreign sovereign immunity include: (1) waiver of sovereign immunity by the foreign state, (2) actions based on commercial activities that cause a "direct effect on the United States," (3) the expropriation exception, (4) property rights "acquired by succession or gift," (5) claims requesting monetary damages, and (6) claims brought to enforce an arbitration agreement. *Id.*; *see also Phx. Consulting*, 216 F.3d at 149.

106. 28 U.S.C. § 1605(a)(3); *see also Taylor*, 2019 WL 3536599, at *3.

107. *See Taylor*, 2019 WL 3536599 at *3; *see also* De Csepel v. Republic of Hung., 859 F.3d 1094, 1107 (D.C. Cir. 2017) (noting that the FSIA "carefully distinguishes foreign states from their agencies and instrumentalities").

108. *See* Taylor v. Kingdom of Swed., 2019 WL 3536599, at *3 (D.D.C. Aug. 2, 2019).

109. *Id.*

110. *See id.*; *see also De Csepel*, 859 F.3d at 1107 (holding that the distinction between the foreign state and its agencies and instrumentalities—suing the foreign state itself

lose its immunity under the expropriation exception unless the allegedly expropriated property is located in the United States.[111] Thus, for stolen Native American art residing in European institutions, classifying the foreign museum as an agency or instrumentality is the dispositive step. For example, the *Taylor* court rejected the Pawnee Tribe's exercise of the expropriation exception because it did not determine Sweden's National Museums of World Culture (NWMC) to be "an agency or instrumentality of the foreign state" but the foreign state itself.[112] Finding among the functions of the NWMC is "the promotion of Sweden's view of world culture to its own citizens and the international community," the *Taylor* court determined that this mission—albeit incredibly broad and non-specific—establishes the museum as "an intrinsic part of Sweden's sovereign structure and governmental operation."[113]

Courts rely on various criteria to distinguish "agencies and instrumentalities" from the foreign states that control them.[114] The FSIA defines "agencies and instrumentalities" as any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States . . . , nor created under the laws of any third country.[115]

In *Transaero, Inc. v. La Fuerza Aerea Boliviana*, the D.C. Circuit concluded that the FSIA's general definition of "agency or instrumentality" applies to the expropriation exception,[116] but noted that the district court struggled to apply the test balancing

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versus its agents—encourages courts to consider the foreign policy implications of a waiver of foreign sovereign immunity).

111. *See* 28 U.S.C. § 1605(a)(3) (providing sovereign immunity for foreign states where "rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States"); *see also Taylor*, 2019 WL 3536599, at *4 (citing Schubarth v. Fed. Republic of Ger., 891 F.3d 392, 401 (D.C. Cir. 2018)).

112. *See Taylor*, 2019 WL 3536599, at *3.

113. *See id.* at *10.

114. Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 154 (D.C. Cir. 1994).

115. *Transaero*, 30 F.3d at 151 (quoting 28 U.S.C. § 1603(b)).

116. *See Transaero*, 30 F.3d at 153.

the three central characteristics of separate legal status.[117] In light of the challenges below, the D.C. Circuit adopted a "core function test" that examines "whether the core functions of the foreign entity are predominantly governmental or commercial."[118] A "predominantly governmental" determination would sweep the entity under the "foreign state" umbrella while a "predominantly commercial" finding would classify the entity as an "agency or instrumentality of a foreign state."[119] Applying this test, the D.C. Circuit determined that military and other armed forces are inseparable from the foreign state and therefore not its adjacent agent or instrumentality.[120]

This core function test synthesizes textual and purposive analyses of Section 1603;[121] yet, subsequent courts, notably the *Taylor* court, muddle *Transaero*'s bright-line distinction.[122] While the *Taylor* court acknowledged *Transaero*'s determination that armed forces constitute "the quintessential example of intrinsically sovereign entities" under Section 1603, the *Taylor* court overextended *Transaero*'s conclusion.[123] Using the Russian Ministry of Culture as a dispositive analog, the *Taylor* court found that Sweden's National Museums of World Culture perform a predominantly *governmental* function rather than a commercial one.[124] In equating Sweden's National Museums of World Culture

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117. *See Transaero*, 30 F.3d at 151. The *Transaero* court observed that "[s]ome district courts have sought to illuminate them by balancing three 'characteristics' of separate legal status: whether, under the law of the foreign state where it was created, the entity can sue and be sued in its own name, contract in its own name, or hold property in its own name." *Id.* (quoting Bowers v. Transportes Navieros Ecuadorianos, 719 F. Supp. 166, 170 (S.D.N.Y. 1989)); *see also* Unidyne Corp. v. Aerolineas Argentinas, 590 F. Supp. 398, 400 (E.D. Va. 1984). But other courts have thought the distinction is instead a categorical one that depends on whether the defendant is the type of entity "that is an integral part of a foreign state's political structure, [or rather] an entity whose structure and function is predominantly commercial." *Transaero*, 30 F.3d at 151 (quoting Segni v. Com. Off. of Spain, 650 F. Supp. 1040, 1041–42 (N.D. Ill. 1988)) (alteration in original).

118. *Transaero*, 30 F.3d at 151.

119. *See id.*

120. *See id.* at 153; *see also* Crist v. Republic of Turk., 107 F.3d 922, 924 (D.C. Cir. 1997) (relying on *Transaero*'s holding that military forces should be considered a part of and not an instrumentality of a state).

121. *See* Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 151 (D.C. Cir. 1994)

122. *See* Taylor v. Kingdom of Swed., 2019 WL 3536599 (D.D.C. Aug. 2, 2019).

123. *See Taylor*, 2019 WL 3536599, at *4.

124. See *id.* ("The *Magness* court reasoned that, on the one hand, Russia's State Diamond Fund—a state agency 'created to house and oversee Russia's collection of precious stones'—was a fundamentally commercial entity and therefore 'an instrumentality of Russia.' On the other hand, Russia's Ministry of Culture was 'a political subdivision' of the Russian state, the 'core functions' of which were governmental; the Ministry of Culture thus

with Russia's Ministry of Culture, the court understated the distinction between museums and the government ministries that operate them.[125]

By misapplying *Transaero*'s core function test, the *Taylor* court's determination runs counter to the well-established development of the distinction between a foreign state and an agency or instrumentality.[126] The Fourth Circuit, in *Berg v. Kingdom of Netherlands*, more clearly defined the "core function test," albeit not in the context of stolen Native American art and artifacts.[127] In assessing whether the Netherlands's Ministry of Education Culture and Science constituted a "political subdivision" or an agency or instrumentality under Section 1603, the court acknowledged the challenge in assigning a binary to cultural and financial institutions that often straddle both commercial and governmental functions.[128]

The *Berg* court offered some additional measures to assess an institution's place on the agency-instrumentality-foreign state spectrum.[129] First, the court considered whether the commercial transactions in which the entity engaged "resulted in individual profit."[130] Second, the court examined the structure of the institution, noting that an entity "overseen by a board of directors" more closely aligns with a corporate and thus commercial institution while an entity without a "separate identity from the

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was part of the sovereign.") (quoting Magness v. Russian Fed'n, 247 F.3d 609, 611, 613 (5th Cir. 2001)).

125. *See Taylor*, 2019 WL 3536599, at *4. Sweden's National Museums of World Culture belong to the public domain but are not themselves a distinct ministry or arm of Sweden's national government. *See Our Operations*, VÄRLDSKULTUR MUSEERNA (June 14, 2020), https://www.varldskulturmuseerna.se/en/about-us/organization/ [https://perma.cc/K7VA-LHBM].

126. *See, e.g.*, Berg v. Kingdom of Neth., 24 F.4th 987 (4th Cir. 2022); *see also* Segni v. Com. Off. of Spain, 650 F. Supp. 1040 (N.D. Ill. 1988).

127. *See Berg*, 24 F.4th 987. The Fourth Circuit Court of Appeals considered whether an American could bring suit against the Netherlands, its government entities, and several private and public museums in the Netherlands for refusing to return the plaintiff's stolen art after it was returned to the Kingdom of the Netherlands during the post war period. *See id.* at 991–92. The court found that Ministry and the Cultural Heritage Agency constituted "political subdivisions" of the foreign state rather than its agency or instrumentality, and therefore did not lose FSIA immunity. *Id.* at 995. Because the property in question remained on display in the Netherlands, the expropriation exception did not apply on the grounds that sovereign immunity for a political subdivision of a foreign state may be abrogated only if the property at issue is located in the United States. *See id.*

128. *See Berg*, 24 F.4th at 995.

129. *See id.*

130. *Id.*

government" should be regarded as a political subdivision of the foreign state.[131]

Applying *Berg*'s additional metrics would strongly support classifying museums as agencies and instrumentalities.[132] First, museums' commercial transactions—generated from galas, ticket revenues, and other events—often result in individual profits for the museum.[133] For example, the introduction of online ticketing combined with the resurgence of post-pandemic travel[134] give museums "a lot more money to play with than in the past."[135] Second, most major museums have a board of directors that independently manage museum operations.[136] The parallels between museum and corporate leadership—such as the existence of a board of directors who manage museum operations in much the same way as corporate boards of directors—would support that museums operate in a primarily commercial function.[137] Similar to their American counterparts, the composition of European museum boards reflects an overwhelming connection to financial and commercial markets.[138]

Further, museum boards maintain a "separate identity" from their government overseers to control future exhibitions, sponsored artists, renovations, and educational programming,

131. *Id.*

132. *See* Berg v. Kingdom of Netherlands, 24 F.4th 987, 995 (4th Cir. 2022).

133. *See, e.g.*, Peter Gumbel, *Le Louvre Inc.: How the World's Favorite Museum Is Richer, Bolder and Edgier than Ever*, TIME (July 16, 2008, 12:00 AM), https://content.time.com/time/subscriber/article/0,33009,1823385-3,00.html [https://perma.cc/D45G-77FR]; *see also* Mariacristina Bonti, *The Corporate Museums and Their Social Function: Some Evidence from Italy*, 1 EUR. SCI. J. 141, 144 (2014).

134. In 2023, attendance figures for many of the world's most visited museums rebounded beyond 2019 data.
See Lee Cheshire & José da Silva, *Exclusive: International Museum Attendance Figures Back to Pre-Pandemic Levels*, ART NEWSPAPER (Mar. 17, 2024), https://www.theartnewspaper.com/2024/03/17/museum-visitor-numbers-recover-from-pandemic-related-falls [https://perma.cc/6HZE-UWHU].

135. *See* Gumbel, *supra* note 133.

136. *See, e.g.*, BRIT. MUSEUM, REPORT AND ACCOUNTS FOR THE YEAR ENDED 31 MARCH 2022 2 (2022); *see also Our Governance*, LOUVRE: FONDS DE DOTATION, https://www.endowment.louvre.fr/presentation/notre-gouvernance/ [https://perma.cc/J3JT-P8HQ] (last visited Mar. 24, 2025); *The Metropolitan Museum of Art Elects Three New Trustees—Robert Denning, Amanda Lister, and Jamie Singer Soros*, METRO. MUSEUM ART (Feb. 28, 2024), https://www.metmuseum.org/press-releases/2024-board-elections-2024-news [https://perma.cc/PK3R-MNGA].

137. *See, e.g.*, LOUVRE: FONDS DE DOTATION, *supra* note 136; *see also* METRO. MUSEUM ART, *supra* note 136.

138. For example, Lionel Sauvage, the second most senior member of the joint board of directors for the Louvre, formerly served as the President of Capital Group for Europe. *See* LOUVRE: FONDS DE DOTATION, *supra* note 136.

although governments and legislation may establish their charters.[139] Drawing on *Segni v. Commercial Office of Spain*'s clarification, agencies and instrumentalities—distinct from political subdivisions—maintain an independent posture and legal personhood, determined principally by whether the entity may be sued.[140] There is a long history of lawsuits filed both by and against museums.[141] This legal record supports a "separate identity" of museums from their governments and therefore museums' classification as agencies or instrumentalities of their states.

Berg's clarification of Section 1603's distinction between "agency or instrumentality" and "foreign state," and its addition of criteria to further distill that distinction provide sharper edges to an otherwise squishy expropriation exception jurisprudence. The benefits of its clarity, however, have yet to procure the successful repatriation of stolen Native American art. Subsequent Native American claims asserted against European museums should leverage *Berg*'s foreign state/agency-instrumentality clarification to argue that museums maintain a separate identity from their governments, and thus qualify as agencies or instrumentalities of the state. This classification would exempt Native American claimants from the requirement that the expropriated property be located in the United States and, thus, allow them to pursue repatriation efforts against their stolen objects residing in European museums.

2. *Commercial Nexus Confusion*

If a plaintiff is successful in convincing a court that the institution in possession of the stolen art is an "agency or instrumentality" under Section 1603(a)(3), the plaintiff must then satisfy the second expropriation exception requirement: the

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139. *See* Berg v. Kingdom of Netherlands, 24 F.4th 987, 995 (4th Cir. 2022); *see also* BRIT. MUSEUM, *supra* note 136; LOUVRE: FONDS DE DOTATION, *supra* note 136; METRO. MUSEUM ART, *supra* note 136.

140. *See* 650 F. Supp. 1040, 1042 (N.D. Ill. 1988).

141. *See, e.g.*, Republic of Turk. v. Met. Museum of Art, 762 F. Supp. 44 (S.D.N.Y. 1990) (evaluating whether the artifacts excavated in the Ushak region of Türkiye in 1966 and now in possession by the Metropolitan Museum of Art violated Turkish and international laws); Rosenberg v. Seattle Art Museum, 42 F. Supp. 2d 1029 (W.D. Wash. 1999) (alleging that the Seattle Art Museum illegally possessed a Matisse painting that was looted from the Rosenberg family during the Second World War); Williams v. Nat'l Gallery, London, 749 F. App'x 13 (2d Cir. 2018)

commercial activity nexus.[142] Section 1603(d) of the FSIA defines a "commercial activity" as "a regular course of commercial conduct or a particular commercial transaction or act," the commercial nature of which "shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[143]

Interpretations of Section 1603(d) engage not in a textualist analysis of the term "commercial," but rather honor its general and broadly inclusive meaning.[144] For some courts, for example, the threshold question for determining a "commercial activity" rests on whether the activity is ongoing.[145] In *Schubarth v. Federal Republic of Germany*, while the D.C. Circuit declined to affirm the district court's assertion "that a defendant's commercial activity must be ongoing, or must have ceased only recently," it recognized that Congress' use of the present tense—"is engaged"—may indicate a legislative intent to impose this requirement.[146] For other courts, "commercial activities" under the FSIA must "attempt to target the United States market."[147] Thus, to be considered a commercial activity, the conduct must be both ongoing and targeted.[148]

The *Taylor* court's ruling effectively distorted and extended FSIA's requirements. Under the *Taylor* regime, individually profiting and independently directed museums constitute

142. *See* 28 U.S.C. § 1605(a)(3) ("[I]n which rights in property taken in violation of international law are in issue and . . . that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.").

143. 28 U.S.C. § 1603(d).

144. *See, e.g.*, Schubarth v. Fed. Republic of Ger., 891 F.3d 392, 401 (D.C. Cir. 2018) (finding that the plaintiff met her burden in proving the foreign state's engagement in a commercial activity by demonstrating that the activity was ongoing).

145. *Id.* at 399 n.4 ("This interpretation is supported by the FSIA's plain text, which employs the present tense: Sovereign immunity may be abrogated if the "agency or instrumentality is engaged in a commercial activity in the United States." (quoting 28 U.S.C. § 1605(A)(3))); *see also* United States v. Wilson, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes.").

146. 891 F.3d. at 399.

147. Taylor v. Kingdom of Swed., 2019 WL 3536599, at *4 n.6 (D.D.C. Aug. 2, 2019) ("The result is the same even if NMWC is Sweden's 'agency or instrumentality' under the FSIA because plaintiff has not adequately alleged that NMWC is 'engaged in commercial activity in the United States' as required under [Section] 1605(a)(3)'s second clause. Plaintiff alleges that NMWC engages in commercial activity by advertising online in English through visitsweden.com, TripAdvisor, Facebook, and Twitter, but these actions do not 'attempt to target the United States market specifically.'" (quoting *Schubarth*, 220 F. Supp. 3d at 115)).

148. *See Taylor*, 2019 WL 3536599, at *4 n.6.

"political subdivisions"—a determination that upholds foreign sovereign immunity, unless the property in question is located in the United States. Similarly, the commercial activity nexus requirement, beyond simply requiring evidence of "ongoing" commercial or transactional activity, now requires that the activity "attempt to target the U.S. market."[149] Not only do these unauthorized extensions of statutory requirements exceed the court's adjudicative power, but these actions dissuade any subsequent attempts by indigenous groups to undertake repatriation efforts under the FSIA.

B. NAGPRA: JURISDICTIONAL LIMITS, UNCLEAR ENFORCEMENT PROVISIONS, AND SEMANTIC DISCONNECTS

Although NAGPRA represents a progressive step toward the successful repatriation of Native American art and artifacts, the statute (1) does not extend beyond public, domestic institutions, (2) lacks teeth in its enforcement provisions, and (3) fails to incorporate indigenous understandings of property-related concepts, thereby establishing a restorative rather than a retributive statutory framework.[150] Restorative statutory frameworks, especially those seeking to afford reparations to the victims of mass campaigns of erasure and misappropriation, do not possess the requisite enforcement guidance to hold perpetrators liable, rendering courts less inclined to assign penalties for statutory violations.[151] Although the mere existence of the statute proves that Congress considers Native Americans a "targeted and vulnerable group"[152] to whom reparative efforts are owed, the three following failures of NAGPRA preclude repatriation of Native American artifacts.

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149. *Id.*

150. *See, e.g.*, State v. Taylor, 269 P.3d 740, 749 (Haw. 2011) (finding that NAGPRA's central purpose is to "assist" in the repatriation of Native American property found on federal lands).

151. *See id.* A rare example of American law prioritizing victim compensation over perpetrator justice, restorative statutory frameworks leverage judicial resources to repair injuries and restore "wholeness." This Note would be remiss not to question whether justice—punishment—for the perpetrators of these injuries is a crucial element of a restored wholeness. The answer is subjective and necessarily informed by an individual sense of the role of the courts and what they can offer. *See* Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027, 1035 (describing restorative statutory frameworks' shift from punitive statutory objectives to policy goals prioritizing collective decision-making and community development).

152. 25 U.S.C. §§ 1301–13.

First, NAGPRA does not apply to art, artifacts, or human remains "found on private or state land or to items held by museums that do not receive federal funds;"[153] it only applies to public lands and federally funded museums.[154] Second, NAGPRA does not apply to federally funded museums that purchased a disputed item with full knowledge and consent of the tribe.[155] Museums meet this burden under NAGPRA with proof of knowledge and consent of the tribe at the time of the acquisition.[156] Some state courts extended this full knowledge standard to require a showing of good faith, though a good faith requirement has not been adopted substantively in federal court.[157] Both the public lands and full knowledge rules limit NAGPRA's jurisdiction, reducing its scope largely to federally funded museums that acted without the full knowledge and consent of the tribe to acquire Native American property.[158]

Second, NAGPRA's enforcement provisions are vague at best, which affords courts broad discretion in deciding whether to assign a criminal or civil penalty for violations of NAGPRA's identification, notification, or return provisions.[159] NAGPRA's enforcement section authorizes courts to issue "such orders as may be necessary" as a remedy for NAGPRA violations.[160] This statutory ambiguity dissuades affirmative judicial action because judges are often wary of over enforcing statutes, especially amidst complicated questions of cultural patrimony and ownership.[161] The lack of a clear enforcement scheme therefore reflects a judicial reluctance to carry out NAGPRA's statutory protections.[162]

Finally, NAGPRA's conceptions of ownership and rights in property derive from the European perspective on property law.[163] NAGPRA uses, as a foundational idea, Western-centric notions of property and ownership that reject indigenous frameworks for

153. *Taylor*, 269 P.3d at 751 n.22 (quoting State *ex rel.* Comm'r of Transp. v. Med. Bird Black Bear White Eagle, 63 S.W.3d 734, 753 (Tenn. Ct. App. 2001)).

154. *Id.* at 751.

155. *See* 25 U.S.C. § 3001(13); *see also White Eagle*, 63 S.W.3d at 753.

156. *See White Eagle*, 63 S.W.3d at 753.

157. *See, e.g.*, *White Eagle*, 63 S.W.3d at 753.

158. *See Taylor*, 269 P.3d at 751.

159. *See* 25 U.S.C. §§ 1301–13; NAT'L PARK SERV., *supra* note 65.

160. 25 U.S.C. § 3013.

161. *See, e.g.*, John Poggioli, *Judicial Reluctance to Enforce the Federal False Statement Statute in Investigatory Situations*, 51 FORDHAM L. REV. 515, 516 (1982).

162. *See id.* at 534.

163. *See, e.g.*, Pierson v. Post, 3 Cai. Cas. 175, 178 (N.Y. Sup. Ct. 1805); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

regulating and transferring property.[164] NAGPRA's adoption of European conceptions of property forces indigenous peoples to conform to a system of property and ownership to which they never belonged or consented.

Modern conceptions of property law stem from John Locke and Jeremy Bentham's theories of possession.[165] From Locke, modern property law adopts in part the idea that to secure "ownership," labor must be attached to the land or item over which the claim of ownership is asserted.[166] Labor, Locke argued, establishes possession or "self-ownership."[167] A century later, Jeremy Bentham diverged from Locke's conclusion that ownership may be individually secured;[168] instead, Bentham argued that ownership cannot exist "outside of what lawmakers provide."[169] American property law, and thus the concepts of ownership and possession contained in NAGPRA, adopted Bentham's view, codifying the inseparability of property rights from the law.[170]

On the contrary, Native American conceptions of ownership, possession, and property rights often departed from individual, exclusive rights in favor of communal rights delegated based on use.[171] Many tribes adopted a notion of land rights under which a claim over land would confer a "use right" protecting "the right to occupy and exploit the land," although not a right to exclude others from it.[172]

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164. *See* Mary Lynn Murphy, *Assessing NAGPRA: An Analysis of its Success from a Historical Perspective*, 25 SETON HALL LEG. J. 500, 520 (2001) (explaining that NAGPRA's ambiguity regarding certain definitions of cultural property incline courts to accept the familiar, Western definitions of property rather than indigenous interpretations); *see also* 25 U.S.C. § 3013.

165. *See* Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 73–74 (1985); *see also* Sukhninder Panesar, *Theories of Private Property in Modern Property Law*, 15 DENNING L.J. 113, 133 (2000).

166. *See id.*; *see also Pierson*, 3 Cai. Cas. at 175 (expanding on Locke's theory of ownership to demonstrate that mere pursuit of real property does not establish a property right; rather, some form of labor plus actual possession is needed to establish ownership).

167. JOHN LOCKE, *Second Treatise of Government* § 25, *in* TWO TREATISES OF GOVERNMENT 327 (Peter Laslett ed., 1965).

168. *See generally* JEREMY BENTHAM, THE THEORY OF LEGISLATION (1789).

169. *Id.*

170. *Id.*

171. *See* Julian C. Juergensmeyer & James B. Wadley, *The Common Lands Concept: A "Commons" Solution to a Common Environmental Problem*, 14 NAT. RES. J. 361, 372 (1974) (noting that while land use and allocation concepts differed among tribes, "it is equally clear that near all contained a strong element of communal ownership, the progenitor of the common lands concept"); John C. Hoelle, *Re-Evaluating Tribal Customs of Land Use Rights*, 82 UNIV. COLO. L. REV. 551, 552 (2011); *see also* KIMMERER, *supra* note 1, at 17.

172. Hoelle, *supra* note 171, at 552.

Approaches to ownership over personal property, especially concerning sacred or culturally important items, often assume a communal form, too.[173] Although Native American communities also recognize private property rights, particularly regarding personal property,[174] tribes commonly employ communal ownership principles over sacred objects with religious or cultural importance to the group.[175] For example, in a dispute between the Zuni tribe and the Denver Art Museum regarding the museum's possession of an item embodying a Zuni War God, the tribe argued that the War God is their "community property" whose purpose is to "perpetuate the continuity" of the tribe rather than serve the personal property rights of one member.[176] The museum, recognizing the important religious function of this object to the Zuni tribe, agreed that it constituted "inalienable community property" and ultimately returned the War God to the Zuni.[177] For the Northern Arapaho people,[178] art and cultural objects are personified as "living vessels" binding their users with their makers.[179]

While the drafters of NAGPRA also considered tribal items of "inalienable communal property"[180] in their discussions on cultural

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173. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 472 (Rennard Strickland et al. eds., 1982) ("The interests that Indian tribes hold in real and personal property represent . . . a form of 'ownership in common' . . . because an individual tribal member has no alienable or inheritable interest in the communal holding."). *But see* Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 724 n.6 (1997) (summarizing "dispute regarding ownership patterns in traditional Native American society:" some scholars argue that almost all tribal property is communal while others conclude that many tribes also embrace systems of private ownership of personal property). Discussions regarding objects of cultural patrimony often conclude that such items carry "communal significance" and therefore appreciated fully only by "those who participated in both creating it and imbuing it" with these communal values. *Id.* at 758; *see also* Sara J. Wolfe & Lisa Mibach, *Ethical Considerations in the Conservation of Native American Sacred Objects*, 23 J. AMER. INST. CONSERVATION 1, 3 (1983) (providing an example of a sacred object held by a tribe as communal property).

174. *See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1572 (2001).

175. Wolfe & Mibach, *supra* note 173, at 3.

176. *Id.*

177. *Id.*

178. *See* WHAT WAS OURS (Independent Lens 2016) (recounting the story of an Arapaho journalist and an Arapaho teenage powwow princess who traveled with a Shoshone elder to recover lost tribal artifacts in the archives of Chicago's Field Museum).

179. *See id.*

180. *See* H.R. REP. NO. 101-877, at 25 (1990). Although the legislative history reveals an awareness of the importance of communal property in Native American tribes, provisions protecting and providing for the specific repatriation of such items is absent from the adopted language. *See* 25 U.S.C. § 3001.

patrimony, NAGPRA's final definition of "ownership" does not acknowledge the variances in indigenous notions of ownership. Key cultural and political distinctions among tribes account for the differences in their definitions of ownership, distinctions that would complicate uniform statutory application.[181] In failing to incorporate the substantive differences between indigenous and Western notions of property in NAGPRA's adopted text, courts may presume that all disputes of tribal property can and should conform to Western definitions.[182]

Expanding statutory meaning to incorporate indigenous understandings of its terms, some may argue, undermines reliance interests and judges' abilities to effectively grant statutory protections.[183] On reliance interests, opponents would argue that expanding the definition of key statutory terms displaces clarity regarding the responsibility museums and federal agencies owe. This, however, incorrectly assumes that the Western conceptions of possession no longer apply. Rather, this Note suggests not redefining key statutory language but expanding its scope to include both Western and indigenous meanings, enabling both parties to introduce evidence in support of their interpretations of key terms. On the limitations to its enforcement, dissenters may argue that an expansion of statutory meaning disincentivizes judges from assigning penalties. This argument also ignores the value of effective presentation of evidence to support a particular statutory construction. Instead, inclusion of indigenous understandings within the statutory definition would help parties better present their arguments and establish a more nuanced NAGPRA jurisprudence.

NAGRPA's limited jurisdiction, its vague enforcement provisions, and its failure to incorporate indigenous understandings frustrate its purpose. NAGPRA's overly vague enforcement provisions deny a clear directive to courts in determining when to enforce the statute, which already only

181. *See* Bobroff, *supra* note 174, at 1571 (discussing the myriad differences among indigenous property systems, varying by "culture, resources, geography, and historical period").

182. *Compare* H.R. REP. NO. 101-877, at 25 (1990), *with* 25 U.S.C. § 3001; *cf.* Hoelle, *supra* note 171, at 553–54 (arguing that the General Allotment Act of 1887 and the Anglo-American concepts of unqualified private ownership it endorsed "almost totally supplanted" tribal land rights customs).

183. *See* 136 CONG. REC. 31937–38 (1990) (statement of Sen. Ben Nighthorse Campbell) (explaining the U.S. government campaigns of targeted misappropriation and abuse against Native American communities to advocate for the passage of NAGPRA).

applies to federal-funded museums and public land. Further, NAGPRA's failure to consider the nuance between Western and tribal definitions of property law, ownership, and possession, foreclosed successful repatriation attempts. Despite these shortcomings, NAGPRA represents an express legislative acknowledgment that Native Americans qualify as a "targeted and vulnerable group" against whom imperialist powers waged campaigns of misappropriation and confiscation. This acknowledgment will serve as the key support for this Note's argument that Congress intended to include Native Americans in the "targeted and vulnerable group" language in the second exception of the Art Museum Amendment.

C. INDIAN AMBIGUITY CANON: UNCERTAINTY IN SCOPE AND APPLICATION

Both the Supreme Court's application of the Indian ambiguity canon and Professor Alexander Tallchief Skibine's interpretation of its use leave a central question regarding the canon's applicability to the FSIA unresolved: whether the Indian ambiguity canon may apply to statutes that do not expressly relate to the benefit of Native American tribes.[184] While *County of Yakima* does not require that the statute *explicitly* relate to Native Americans, the Court's failure to clarify the scope of the Indian ambiguity canon's application likely inhibits its use.[185] For example, courts lacking clarity in determining a statutory provision's relationship to an indigenous party often decline to recognize statutory ambiguity, effectively refusing to grant the broad deference otherwise afforded under the Indian ambiguity canon.[186]

Lacking a clear directive from the Supreme Court, lower courts have somewhat qualified the scope of the Indian ambiguity canon, refusing to afford deference when (1) usage of the canon would "adversely affect the interests of another tribe,"[187] and (2) when the

184. *See* Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992).

185. *See* Skibine, *supra* note 85, at 292.

186. *See id.*

187. Conn. v. United States Dep't of the Interior, 344 F. Supp. 3d 279, 314 (D.D.C. 2018) (quoting Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell, 75 F. Supp. 3d 387, 396 (D.D.C. 2014)).

statutory provisions are not ambiguous.[188] While this test provides some guidance in the assessment of whether the canon should apply, the second prong—evaluating ambiguity—is also ambiguous.[189]

Although the FSIA, NAGPRA, and the Indian ambiguity canon each independently acknowledge the value of statutory repatriation efforts, none has affirmatively confirmed a repatriation avenue for stolen Native American art held by European institutions. *Taylor v. Kingdom of Sweden*, the only application of the FSIA to a Native American repatriation claim, improperly classified the Swedish National Museum as a foreign state rather than its agent or instrumentality, thereby establishing a higher standard for claims asserted against public museums to overcome. Despites its intent to protect Native American art, artifacts, and remains, NAGPRA lacks a clear and effective enforcement provision, rendering the statute more restorative than retributive. The scope of the Indian ambiguity canon's permissible application, similarly, remains unclear, disincentivizing courts from granting the canon's deference to indigenous parties. These shortcomings, in proper classification, clarity, and scope, preclude Native American repatriation efforts.

III. USING STRUCTURE, PURPOSE, AND CANON TO REINTERPRET THE ART MUSEUM AMENDMENT

On their own, the FSIA, NAGPRA, and the Indian ambiguity canon fail to secure the repatriation of Native American art. Together, drawing on NAGPRA's substantive acknowledgments of indigenous protections and read in accordance with the Indian ambiguity canon, Section 1605(h)(2)(B) of the FSIA—the Art Museum Amendment—should be read to provide a legal avenue to regain stolen art and reaffirm liability for institutions who hold them hostage.

First, this approach will leverage the implicit congressional acknowledgment in NAGPRA that Native Americans constitute a "targeted and vulnerable group" and should therefore qualify under the second exception to the Art Museum Amendment of the

188. *See* Northern Arapaho Tribe v. Burwell, 118 F. Supp. 3d 1264, 1287 (D. Wyo. 2015).

189. *See* Smith v. United States, 508 U.S. 223, 230 (1993). Justice O'Connor's majority opinion in *Smith* argued that context provides the clarity to language that individual words lack. *See id.*

FSIA.[190] Next, this approach will apply the Indian ambiguity canon to the second exception of the Art Museum Amendment. Use of the canon will urge courts to read Section 1605(h)(2)(B) liberally to (1) apply to Native Americans, (2) find statutory ambiguity in the provision, and (3) construe the provision to favor indigenous communities. Applying the Indian ambiguity canon to Section 1605(h)(2)(B) will further demonstrate how this provision overcomes the obstacles encountered by the Pawnee tribe in *Taylor* to provide a repatriation avenue for looted Native American art.

A. NAGPRA: A LEGISLATIVE ACKNOWLEDGMENT THAT NATIVE AMERICANS CONSTITUTE A PROTECTED CLASS UNDER THE ART MUSEUM AMENDMENT

Congress in statutory drafting and courts in their interpretation often rely on statutes with common subject matter to determine semantic meaning.[191] An examination of NAGPRA's legislative history proves that Native Americans belong to the "targeted and vulnerable group" class protected under Section 1605(h)(2)(B) and are thus entitled to protection under the Art Museum Amendment's second exception.

First, NAGPRA's legislative history demonstrates that Congress considers Native Americans a "targeted and vulnerable group."[192] During the House floor debate, proponents of NAGPRA described how museums and federal agencies came to possess "thousands upon thousands" of sacred indigenous objects through "the all-too-common practice of digging Indian graves and using

190. *See* 28 U.S.C. § 1605(h)(2)(B)(ii) ("[T]he action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group.").

191. *See* Cont'l Can Co. v. Chi. Truck Drivers Pension Fund, 916 F.2d 1154, 1158 (7th Cir. 1990). Judge Easterbrook, writing for the court, relied on IRS precedent and other tax statutes to determine the meaning of "substantially all" in 29 U.S.C. § 1383(d)(2). *Id.* Although Easterbrook affirmed that "the text of the statute . . . is the law," he also included legislative history proving that Congress looked to IRS precedent to determine that "substantially all" is equivalent to 85%. *Id.* at 1157. Easterbrook also noted the fact that after Representative Thompson offered as context the IRS precedent, the House voted to approve the amendment. *See id.* Thus, statutes with common subject matter are persuasive evidence in resolving ambiguity for both Congress and courts.

192. 28 U.S.C. § 1605(h)(2)(B); *see also* Train v. Colo. Pub. Int. Rsch. Grp., 426 U.S. 1, 8 (1976) (providing an example of legislative history as a legitimate method of statutory interpretation).

the contents for profit or to satisfy some morbid curiosity."[193] Further, the record indicates that "human remains, funerary objects, and only the most sacred of religious items . . . were taken from a tribe without permission."[194] While neither the House debate nor the statute explicitly identifies Native Americans as a targeted and vulnerable group, the existence of the statute and the strong language supporting its enactment implicitly recognize the legislative need to repair and protect Native Americans against past and future harm.[195] In considering Congress' acknowledgment of indigenous communities' targeting in the NAGPRA context,[196] the Art Museum Amendment's "targeted and vulnerable group" language should be read to include Native Americans.

A survey of the arguments made against NAGPRA's enactment also supports the finding that Congress considers Native Americans a "targeted and vulnerable group." Even the lobby against NAGPRA, composed of scientists whose research benefits from museums' collections of human remains, confirms that governments often engaged in campaigns of misappropriation of Native American art and artifacts.[197] Curiously, these same scientific justifications also informed museums' acquisition of these objects.[198] A myriad of examples exist of European voyages whose central mission included the "systematic confiscation" and "misappropriation" of Native American art, artifacts, and burial

193. 136 CONG. REC. 31937 (1990) (statement of Sen. Ben Nighthorse Campbell).

194. *Id.*

195. *See id.*

196. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 551–53 (1974) (holding that federal legislation prioritizing Native American employment in the Bureau of Indian Affairs does not constitute unconstitutional discrimination but a "reasonable" and "rational" policy designed to further Native American self-governance).

197. *See* Clayton W. Dumont, Jr., *Contesting Scientists' Narrations of NAGPRA's Legislative History: Rule 10.11 and the Recovery of "Culturally Unidentifiable" Ancestors*, 26 WICAZO SA REV. 5, 18 (2011); *see also* 28 U.S.C. § 1605(h)(2)(B)(ii) ("[T]he action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group.").

198. *See* 136 CONG. REC. 31937 (1990) (statement of Sen. Ben Nighthorse Campbell) ("In 1868 the Surgeon General issued an order to all Army field officers to send him Indian skeletons. This was done so that studies could be performed to determine whether the Indian was inferior to the white man due to the size of the Indian's cranium. These studies were also expected to show that the Indian was not capable of being a landowner. Today this study may be considered grotesque but the result of such an attitude in the name of the U.S. Government was the desecration of countless sacred grounds in which Indian ancestors were buried.").

objects.[199] Additionally, the forced assimilation of indigenous children in "Indian boarding schools"—whose express purpose included the erasure of indigenous culture[200] provides further evidence that Native Americans constitute a "targeted and vulnerable group" subject to campaigns of misappropriation under Section 1605(h)(2)(B)(ii).

NAGPRA provides an express legislative acknowledgment of the colonial legacies of museums whose collections maintained, if not encouraged, the further targeting of indigenous communities.[201] When interpreting the Art Museum Amendment, courts should therefore consider NAGPRA as a strong justification for the inclusion of Native Americans in the "targeted and vulnerable group" category.

B. INDIAN AMBIGUITY CANON APPLIED

This section first addresses the Art Museum Amendment and its two notable exceptions. Next, this section examines how the second and still unadjudicated exception purports to overcome the statutory and procedural challenges faced by the first exception. Finally, this section leverages both NAGPRA and the Indian ambiguity canon of statutory construction to interpret Section 1605(h)(2)(B) to infer a repatriation avenue for Native American claimants pursuing litigation against foreign institutions.

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199. *E.g.*, Christopher F. Schuetze, *Berlin Museum Returns Artifacts to Indigenous People of Alaska*, N.Y. TIMES (May 16, 2018) (on file with the *Columbia Journal of Law & Social Problems*), https://www.nytimes.com/2018/05/16/arts/design/berlin-museum-artifacts-chugach-alaska.html.

200. *See generally* Davina Ruth Two Bears, *SHIMÁSÁNÍ DÓÓ SHICHEII BI'ÓLTA'* - My Grandmother's and Grandfather's School: The Old Leupp Boarding School, A Historic Archaeological Site on the Navajo Reservation (Aug. 2019) (PhD dissertation, Indiana University) (Proquest); *see also* Ashlee Sierra, *The History and Impact of Residential Schools*, PBS (Dec. 19, 2023), https://www.pbs.org/articles/the-history-and-impact-of-residential-schools) [https://perma.cc/YY3V-6XMG] ("[G]overnments and churches used residential schools to systematically separate, abuse and indoctrinate Indigenous children . . . residential schools housed abducted Indigenous children far away from their families and often punished them for any display of their native language, customs, beliefs or values.").

201. *See* Stephen E. Nash & Chip Colwell, *NAGPRA at 30: The Effects of Repatriation*, 49 ANN. REV. ANTHROPOLOGY 225, 226 (2020). Chief among the lobby against NAGPRA and its expansion are scientists who utilize Native American human remains for research and experimentation. *See* Dumont, *supra* note 197, at 8.

1. *The Art Museum Amendment: Powers and Exceptions*

The Art Museum Amendment affords "jurisdictional immunity for certain art exhibition activities" provided that the work:

> (A) . . . is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States; (B) [the Executive branch] determined . . . that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest; and (C) the notice thereof has been published in accordance with subsection (a) of Public Law 89-259.[202]

The Supreme Court considered this Amendment in *Republic of Germany v. Philipp*, finding that "participation in specified art exhibition activities does not qualify as commercial activity within the meaning of the [FSIA's] expropriation exception."[203] By framing their activity as "commercial," foreign sovereigns could receive the benefit of the FSIA's expropriation exception—the loophole through which otherwise immune foreign sovereigns may be subject to suit in the United States.[204] But *Philipp* precluded the classification of art exhibition activities as "commercial activit[ies]" under the FSIA, which incentivized increased cultural and art exchanges among museums at the expense of individual art claims.[205] As a result, injured parties could not bring

202. 28 U.S.C. § 1605(h)(1); *see also* Brunk, *supra* note 20. Section 1605(h)(1), on its face, purports to expand the immunity of foreign states whose art and educational institutions house stolen Native American artifacts. *See* 28 U.S.C. § 1605(h)(1). The expansion of sovereign immunity for foreign statutes in the context of such cultural and education exchanges is, however, a rebuttable presumption that can be overcome through the invocation of the exceptions to sovereign immunity listed in Section 1605(h)(2).

203. *Philipp*, 592 U.S. at 185 (internal quotation marks and citations removed).

204. *See* Andrea Russell, *Warhorse: The Ongoing Conflict Between Cultural Heritage Protection and International Trade*, 25 J. INT'L ECON. L. 92, 100 (2022). Russell argues that "that the 'commercial nature of the activity does not depend upon whether it is a single act or a regular course of conduct;'" rather, the dispositive question is whether the act is commercial in *nature*. *Id.* at 100 (quoting Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 612 (1992)).

205. *See Philipp*, 592 U.S. at 185.

repatriation claims for stolen art exhibited in the United States on loan from foreign museums.[206]

But there are two major exceptions. First, there is no immunity for Nazi-era claims;[207] foreign nationals can bring suit under the FSIA against museums exhibiting art stolen during the Nazi regime.[208] Though not explicitly stated in the text, the *Philipp* Court found an extratextual requirement that only foreign nationals can bring suit. In its reasoning, the Court cited the Holocaust Expropriated Art Recovery Act (HEAR Act) noting that Congress established an alternate forum for pursuing Nazi-era art restitution "outside the public courts" entitled to statute of limitation exceptions.[209] The HEAR Act, enacted concurrently with the Art Museum Amendment, created a forum for victims of Nazi-era persecution to pursue stolen art claims otherwise barred by statutes of limitations and discovery requirements.[210] Further, the *Philipp* Court read the FSIA as inclusive of the domestic takings rule and therefore exclusive of all Nazi-era claims under the Art Museum Amendment except those made by *foreign* nationals.[211] Thus, the alternative dispute resolution under the

206. *See* 28 U.S.C. § 1605(h); *see also Philipp*, 592 U.S. at 185; Brunk, *supra* note 20.

207. *See* 28 U.S.C. § 1605(h)(2)(A); *see also* Fed. Republic of Ger. v. Philipp, 592 U.S. 169, 185 (2021).

208. *See Philipp*, 592 U.S. at 185. The requirements to assert forced waiver of sovereign immunity are dual partite: "the 'expropriation exception' applies in any case in which 'rights in property taken in violation of international law are in issue' and there is a specified commercial nexus to the United States." *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 9, Fed. Republic of Ger. v. Philipp, 592 U.S. 169 (2021) (No. 19-351).

209. *Philipp*, 592 U.S. at 186. The language of the decision relies on the HEAR Act, which urges the use of "alternative dispute resolution mechanisms [to] yield just and fair resolutions in a more efficient and predictable manner than litigation in court." *Id.* (internal quotation marks and citations omitted). Foreign nationals, excluded from pursuing Nazi-era restitution claims in these alternate forums, may still pursue their claims under the FSIA. *See id.*

210. *See Holocaust Expropriated Art Recovery (HEAR) Act Signed into U.S. Law*, CLAIMS CONF. WRJO LOOTED ART & CULTURAL PROP. INITIATIVE, https://art.claimscon.org/advocacy/holocaust-expropriated-art-recovery-hear-act-signed-u-s-law/ [https://perma.cc/ME6W-DNTD] (last visited Apr. 7, 2025).

211. *See Philipp*, 592 U.S. at 176–77. Section 1605(h)(2)(A) applies only to "foreign nationals" because the statute's language providing "rights in property in violation of international law" incorporates the "domestic takings rule." *Id.* at 187. The "domestic takings rule," explained the Court, "assumes that what a country does to property belonging to its own citizens within its own borders is not the subject of international law." *Id.* at 176. Therefore, the domestic taking rule relegates a taking of a foreign national's property by its own sovereign to a domestic affair. *See id.* The foreign sovereign state of Germany, as the defendant in *Philipp*, invoked the domestic takings rule to preclude a takings claim brought by the heirs of German nationals residing in the United States. *See id.* at 175.

HEAR Act has largely surpassed the efficacy of the first exception.[212]

2. *The Art Museum Amendment's Second Exception*

The second and still unadjudicated exception to the Art Museum Amendment remains a strong source of hope for Native American art repatriation claims. This exception governs "other culturally significant works"[213] and should be constructed in accordance with indigenous conceptions of property law to enable the abrogation of foreign sovereign immunity for European museums. Courts must deny sovereign immunity to a foreign institution when a claimant—foreign or domestic—invokes the expropriation exception[214] regarding an impermissible seizure of property in violation of international law and—

(i) the property at issue is the work [of cultural significance and imported into the United States for purposes of temporary exhibition];
(ii) the action is based upon a claim that such work was taken in connection with acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group;

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212. *See* Fed. Republic of Ger. v. Philipp, 592 U.S. 169, 185 (2021). The statute of limitations protections of the HEAR Act, however, extend only to December 31, 2026; the foreign nationals requirement of the Nazi-era exception may therefore cease with the expiration of the HEAR Act's key protections. *See* CLAIMS CONF. WRJO LOOTED ART & CULTURAL PROP. INITIATIVE, *supra* note 210. Further, the Second Circuit's HEAR Act jurisprudence limited the jurisdiction of these forums to only "a small group of restitution claimants" whose claims would survive the equitable doctrine of laches. *See* Recent Case, Zuckerman V. Metropolitan Museum of Art, 133 HARV. L. REV. 2196, 2199 (2020) ("[T]he court affirmed on the grounds that Zuckerman's claims were barred by the equitable defense of laches. The court stated that the doctrine of laches protects defendants against unreasonable and prejudicial delay by scrutinizing the claimant's due diligence in bringing a claim and its effect on the defendant's case. Writing for the unanimous panel, Chief Judge Katzmann held that under New York law, the fact that neither the Leffmanns nor their heirs had made a demand for the painting until 2010 constituted an unreasonable delay that had prejudiced the Met by the loss of documentary evidence, deceased witnesses, and important memories."). Thus, in *Zuckerman v. Metropolitan Museum of Art*, repatriation yielded to civil procedure, denying any forum—public or alternate—to those whose claims fail under laches. *See* Zuckerman v. Metro. Museum of Art, 928 F.3d 186, 193–94 (2d Cir. 2019). The equitable doctrine of laches permits courts to deny relief "when the party bringing the claim unreasonably delayed asserting the claim to the detriment of the opposing party." *Laches*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/laches [https://perma.cc/65NA-P3GQ] (last visited Mar. 1, 2024).

213. 28 U.S.C. § 1605(h)(2)(B).

214. *See* 28 U.S.C. § 1605(a)(3).

(iii) the taking occurred after 1900;

(iv) the court determines that the activity associated with the exhibition or display is commercial activity, as that term defined in section 1603(d); and

(v) a determination under clause (iv) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).[215]

The second exception to the Art Museum Amendment a priori overcomes the standing limitations of the first exception; likewise, it establishes a general category of "targeted misappropriation" under which Native Americans clearly fall.[216] Unlike the HEAR Act, Congress has not enacted analogous legislation or alternative dispute resolution mechanisms to adjudicate these claims. Further, the second exception makes no reference to a specific political movement or genocidal campaign; rather, it serves as a catchall provision for "members of a targeted or vulnerable group."[217] This ambiguity confers judicial discretion to determine which groups qualify for statutory protection.[218]

3. *Indian Ambiguity Canon Applied to the Art Museum Amendment*

Leveraging NAGPRA's indication that Native Americans constitute a "targeted and vulnerable group," courts should consider Section 1605(h)(2)(B) a statute for the "benefit" of Native Americans.[219] In considering the Art Museum Amendment a statute "regulating or for the benefit of Native Americans," the Indian ambiguity canon applies, thereby instructing courts to read statutory provisions favorably to the tribe.[220] Accordingly, U.S.

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215. 28 U.S.C. § 1605(h)(2)(B).

216. *Cf. Philipp*, 592 U.S. at 186.

217. 28 U.S.C. § 1605(h)(2)(B).

218. The theory that Section 1605(h)(2)(B) serves as a catchall provision encompassing all reasonably feasible members of targeted or vulnerable groups is supported by the fact that the definitions section of the Art Museum Amendment exceptions, Section 1605(h)(2)(C), defines only those terms of ambiguity present in paragraph (A), the Nazi-era claims exception provision. *See* 28 U.S.C. § 1605(h)(2)(C).

219. *See* Skibine, *supra* note 85, at 292.

220. *See* Christine Bacon, Annotation, *Indian Canon of Construction*, 76 A.L.R. FED. 3D ART. 2 (2022).

courts may abrogate the foreign sovereign immunity for foreign institutions in possession of stolen Native American art.[221]

Section 1605(h)(2)(B)(ii) requires that "the action [be] based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a 'targeted and vulnerable group.'"[222] Applying the Indian ambiguity canon, this language can and should be construed as recognition of the European campaign to misappropriate Native Americans of their land, art, and cultures. The Indian ambiguity canon instructs courts to (1) find ambiguity in the provision, and (2) read the provision favorably to the tribe.[223] This analysis may be conducted in four steps pursuant to the statutory requirements.[224]

In step one, the FSIA does not define "targeted and vulnerable group." To resolve the statutory ambiguity, courts should leverage NAGPRA's acknowledgment that Native Americans constitute a targeted and vulnerable group to determine that the statute intends to regulate and benefit indigenous communities.

In step two, courts should read "targeted and vulnerable group" favorably to the tribe; this construction would reflect Congress's intent to include Native Americans as claimants receiving this special protection. A comparison between the Nazi regime's and foreign governments' campaigns of misappropriation and systematic confiscation affords further support to this construction of the text. Both campaigns—the Nazis against the Jews, Roma, Sinti, queer or disabled people, and other groups and the colonizers against indigenous communities—sought to erase the cultures of the targeted groups, a legacy the exceptions to the Art Museum Amendment purport to combat. While the Nazi regime expressly endeavored to commit genocide against Europe's Jewish and other vulnerable populations, American political developments—such as Manifest Destiny and the Trail of Tears—imply that the U.S. government pursued a similar goal of erasure and misappropriation.[225] Examination of both NAGPRA's enactment

221. The relevant FSIA Section 1605(h)(2)(B) provisions for analysis are subsections (ii) through (iv). *See* 28 U.S.C. § 1605(h)(2)(B)(ii–iv).

222. 28 U.S.C. § 1605(h)(2)(B)(ii).

223. *See* Skibine, *supra* note 85, at 292.

224. *See* 28 U.S.C. § 1605(h)(2)(B)(ii)–(iv).

225. *See* 28 U.S.C. § 1605(h)(2)(B)(ii) ("The action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic

and the American dispossession of indigenous lands supports a reading of "targeted and vulnerable group" to include Native Americans.

In step three, Section 1605(h)(2)(B)(iii) requires "the taking [to have] occurred after 1900."[226] This is a curious addition to the other statutory requirements, especially considering the absence of legislative history regarding its inclusion.[227] This provision also complicates this Note's position, seemingly requiring nothing short of a legislative amendment to provide a viable repatriation avenue for indigenous property stolen prior to 1900.[228] Indeed, some may argue that, in conformity with the legislative history, this exception serves as a catch-all for Nazi-era misappropriation campaigns, intending to encompass property taken by the Nazis and their allies, and nothing beyond.[229]

This Note proposes two potential solutions, short of a legislative amendment, to remedy or, at the very least, raise a challenge to the integrity of the 1900 requirement as a part of the FSIA. One solution is to emphasize the retroactive power of the FSIA. In *Altmann*, the Supreme Court held that the FSIA's retroactive application is essential to its functionality.[230] Notably, the Court found that claims arising under the FSIA—and thereby sub-issues such as whether the entity qualifies as a foreign state or its agency or instrumentality—should be evaluated "at the time the suit is brought rather than when the conduct occurred."[231] Furthermore, the Court found persuasive the language in the preamble establishing that "*claims* of foreign states to immunity should

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campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group."). Manifest Destiny motivated, in large part, the United States' policy goals of the 19th century. *See, e.g.*, *Removing Native Americans from their Land*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/immigration/native-american/removing-native-americans-from-their-land/ [https://perma.cc/T7WH-BUTJ] (last visited Apr. 7, 2025). As a vision that provided a physical manifestation of America's growing political and economic influence as a world power, presidents, notably James Monroe and Andrew Jackson, pursued aggressive campaigns of misappropriation of indigenous lands to enable Westward expansion. *See id.* The forced relocation of Native Americans to West of the Appalachian Mountains, known as the Trail of Tears, was one such campaign. *See id.*

226. 28 U.S.C § 1605(h)(2)(B)(iii).

227. *See* 158 CONG. REC. 1370–72 (2012).

228. *See* 28 U.S.C. § 1605(h)(2)(B)(iii).

229. *See* 158 CONG. REC. 1370–72 (2012) ("The immunity provided by this bill does not apply to claims arising from artwork and objects of cultural significance that were taken in violation of international law by the Nazi government of Germany and its allied and affiliated governments between January 30, 1933 and May 8, 1945.").

230. *See* 541 U.S. 677, 697 (2004).

231. *Id.* at 698.

henceforth be decided by courts of the United States" to support a statutory presumption of retroactive application.[232] So, *Altmann* instructs courts applying the FSIA to consider the evolution and downstream effects of the conduct of the foreign state rather than the alleged wrongful conduct itself.[233] Therefore, Native American claimants may benefit from evidence of *both* the initial taking and how the taking continues to influence the operation of the foreign entity to support a waiver of foreign sovereign immunity.[234] Although the scope of the statute's retroactivity may be limited, any such limitation may not wholly restrict potential claimants that the statute originally intended to empower.[235]

A second solution recommends that courts view the taking as continuous with the commercial activity. The fact that museums continue to exhibit, produce merchandise regarding, and thereby profit from the stolen property may permit a court to view the taking as occurring concurrently to the commercial activity. A reading of both statute and facts favorable to the tribe would, for example, find a Swedish museum exhibiting art and artifacts stolen from midwestern Native American tribes to be *currently* taking and misappropriating the tribe's property.[236] Under U.S. property law's regulatory takings regime, both a physical appropriation and a use restriction of property may constitute a per se taking for which just compensation must be provided.[237] In the context of stolen Native American art, a physical appropriation argument would likely not pass muster under the post-1900 requirement. An argument focusing on a use restriction, however, *would* likely persuade a court that an art exhibition constitutes a *present* taking and thus satisfactory of the post-1900 requirement. Native American claimants would argue that museums' possession of their property for the purpose of exhibition restricts the tribe's

232. *Id.* at 697 (quoting 28 U.S.C. § 1602) (emphasis added).

233. *See id.*

234. *See id.*

235. *See id.* In considering the question of whether the FSIA should apply retroactively, the Court found clear evidence that Congress intended the Act to apply to pre-enactment conduct: "To begin with, the preamble of the FSIA expresses Congress' understanding that the Act would apply to all post-enactment claims of sovereign immunity." *Id.*

236. Property law's regulatory takings jurisprudence instructs courts to consider statutes or regulations that constitute any physical intrusion or use restriction as a "permanent physical invasion." *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); Cedar Point Nursery v. Hassid, 594 U.S. 139, 148–49 (2021); Lucas v. S.C. Coastal Council, 503 U.S. 1003, 1019 (1992).

237. *See Loretto*, 458 U.S. at 426; *see also* Penn. Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 123–27 (1978).

ability to exhibit these objects on their own lands. Therefore, this possession demonstrates an illegal use restriction violating domestic takings law. From a policy perspective, allowing these museums to evade liability by shifting the blame to their predecessors for their suspect acquisitions while continuing to *presently* benefit from the looted objects would betray the purpose of Section 1605(h)(2)(B). Ultimately, *Altmann*'s well established rule of retroactivity and the rules on regulatory takings may persuade a court to adopt a more nuanced understanding—and result in a more favorable application—of the 1900 requirement in the Native American context.

In step four, Section 1605(h)(2)(B)(iv) obligates courts to determine whether "the activity associated with the exhibition or display is a commercial activity as defined in Section 1603(d)."[238] This requirement is easily satisfied on the grounds that the Art Museum Amendment implicitly acknowledges that art trading among institutions for the purpose of cultural exchange constitutes a "commercial activity" under the FSIA.[239] The purpose of the amendment, to protect art museums engaged in cultural exchanges of artwork from liability under the expropriation exception, precludes courts from asserting liability for these otherwise commercial activities.[240] Thus, the need for such an amendment demonstrates that these cultural exchanges of artwork among museums ordinarily, and perhaps prior to the enactment of this amendment, constitutes a commercial activity.[241]

The second exception to the Art Museum Amendment, when interpreted in accordance with the Indian ambiguity canon, presents strong grounds for courts to accept repatriation arguments under this statutory framework. First, courts should find that Congress intended to include Native Americans within the "targeted and vulnerable group" language. Second, courts should adopt a dynamic interpretation of the 1900 requirement, leveraging the FSIA's retroactivity rule and the takings doctrine to overcome this obstacle. Third, courts should conduct a commercial activity analysis favorable to the tribe. Ultimately,

238. 28 U.S.C. § 1605(h)(2)(B)(iv).
239. *Id.* § 1605(h)(1)(C).
240. *See id.* § 1605(h)(1).
241. *See id.*

this approach establishes a viable repatriation avenue for Native American stolen art claims.

C. LEVERAGING THE INDIAN AMBIGUITY CANON CONSTRUCTION OF THE ART MUSEUM AMENDMENT TO OVERCOME *TAYLOR*'S EXPROPRIATION ANALYSIS

If a court accepts Part III.B's approach under Section 1605(h)(2)(B), claimants then need to satisfy the expropriation exception to secure the successful repatriation of their art. Although denied in *Taylor*, a future court—relying instead on the Indian ambiguity canon—stands on strong precedential and statutory interpretive grounds to grant the expropriation exception protections.

The *Taylor* ruling highlighted two key obstacles confronting Native American repatriation efforts under the expropriation exception. First, the Pawnee tribe failed to establish that Sweden's National Museums of World Culture constituted an "agency or instrumentality" rather than a "foreign state" under the FSIA.[242] This challenge may be overcome by demonstrating the flaws in the district court's analysis and juxtaposing its conclusion with those reached by courts addressing similar questions. For example, the district court in *Taylor* incorrectly analogized Sweden's *national museums* of world culture to Russia's *ministry* of culture.[243] Future courts can correct this mistake by recognizing the distinction between commercially inclined museums and the ministries that establish them,[244] and by using the Indian ambiguity canon to resolve the sovereign immunity question in favor of tribes.[245]

Second, the next Native American plaintiff must overcome *Taylor*'s imposition of the requirement that the commercial activity "attempt to target the U.S. market."[246] While the merits of this new requirement, as well as the district court's authority to impose it, should be reviewed, Native American plaintiffs need only demonstrate that the purpose of the commercial aspect of cultural exchanges between American and European museums is ongoing. Future courts should therefore feel empowered to

242. Taylor v. Kingdom of Swed., 2019 WL 3536599, at *4 (D.D.C. Aug. 2, 2019).
243. *See id.*
244. *See supra* Part II.A.1.
245. *See supra* Part I.C.
246. *Taylor*, 2019 WL 3536599, at *4 n.6.

distinguish *Taylor* and to conclude instead that (1) European museums constitute agencies and instrumentalities of foreign states, and (2) that cultural exchanges among museums generate ongoing commercial activity.

CONCLUSION

Section 1605(h)(2)(B) of the FSIA, the Art Museum Amendment, affords a viable legal avenue for the repatriation of stolen Native American art from foreign museums. The exception, when supported by NAGPRA's legislative purpose and interpreted in accordance with the Indian ambiguity canon, concludes (1) that Native Americans constitute a protected class under the "targeted and vulnerable group" language of the second exception, (2) that the museums holding their stolen property constitute agencies and instrumentalities of foreign states, rather than the foreign state itself, and (3) that foreign cultural exchanges qualify as commercial activities.

The truth endures that indigenous peoples' resistance against assimilation to European conceptions of property and ownership waives any claim over their art, artifacts and bodies. As public opinion increasingly sounds the alarm of dubious provenance and looted collections, it is the duty of legislators and courts to answer this call for museum liability—both within and outside of American borders.