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AN UNINTENDED AND ABSURD EXPANSION: THE APPLICATION OF THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT TO FOREIGN LANDS

ANDREW ADLER*

I. INTRODUCTION

The federal government currently utilizes a variety of legal tools to deter the looting of cultural property and archaeological resources in foreign nations.¹ Most attention has focused on two major legal tools used to achieve this objective: bilateral agreements restricting the importation of cultural objects² and the National Stolen Property Act (NSPA), which criminalizes the knowing possession of stolen

* J.D., University of Miami; B.A., Emory University. I would especially like to thank Stephen Urice for repeatedly discussing this article with me and offering numerous comments on previous drafts. I am also indebted to Josh Knerly for graciously offering his excellent suggestions. All omissions and errors are my own.

1. See, e.g., James A.R. Nafziger, *The Underlying Constitutionalism of the Law Governing Archaeological and Other Cultural Heritage*, 30 WILLAMETTE L. REV. 581, 587 (1994) (“[T]he United States has assumed major international responsibilities to bar imports of stolen and pillaged objects and to return such objects to their countries of origin. Although courts generally refuse to apply the blank check rule of automatically enforcing foreign export laws to bar imports, the United States has cooperated in global efforts to combat illegal trafficking in archaeological and other cultural heritage, often to support the retention policies of source nations.” (emphasis omitted) (internal quotation marks and footnotes omitted)). This policy objective directly implicates the polarized debate surrounding the international movement of illicit cultural property. See Alexi Shannon Baker, *Selling the Past: United States v. Frederick Schultz*, ARCHAEOLOGY, Apr. 22, 2002, <http://www.archaeology.org/online/features/schultz/collectors.html> (“One of the problems in this debate, which some people call the ‘cultural property wars,’ is that there are two sides who are really polarized.... Many antiquities dealers, collectors, and their organizations argue that more stringent antiquities restrictions disrupt free enterprise and prevent people with the best ability to care for antiquities from doing so.... Archaeologists and their colleagues believe that routine looting destroys the information that could be learned about cultures in situ.” (internal quotation marks omitted)). Compare John Henry Merryman, *Cultural Property Internationalism*, 12 INT’L J. CULT. PROP. 11 (2005) (arguing for a regulated trade in cultural property so as to promote the international—rather than national—interests of preservation and access), with Lyndel V. Prott, *The International Movement of Cultural Objects*, 12 INT’L J. CULT. PROP. 225 (2005) (responding to Merryman by arguing that source nations’ retentionist policies are reasonable given that their cultural heritage flows mainly to wealthy, market nations, and that dealers have not taken action to help curb the illicit trade). The merits of this polarized debate are beyond the scope of this Article.

2. The authority for these bilateral agreements is the Convention on Cultural Property Implementation Act of 1983 (CCPIA), implementing Article 9 of the 1970 United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. 19 U.S.C. §§ 2601–2613 (2000); UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 9, Nov. 14, 1970, 823 U.N.T.S. 231. The CCPIA authorizes the President to enter into renewable five-year bilateral and multilateral agreements with foreign nations to restrict the importation of certain designated items of cultural property in jeopardy of pillage. 19 U.S.C. § 2602. Before entering into such an agreement with the requesting country, the CCPIA requires the President to determine that (1) the cultural patrimony of the nation is in jeopardy of pillage; (2) the nation has taken measures consistent with the 1970 UNESCO Convention to protect its cultural patrimony; (3) the “import restrictions would be of substantial benefit in deterring a serious situation of pillage”; (4) less drastic remedies are unavailable; and (5) the import restrictions are “consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.” *Id.* § 2602(a)(1)(D). Subject to certain limitations, the Act also grants the President an emergency power to enter into import restrictions with requesting nations. *Id.* § 2603. “The United States government currently has agreements with 11 nations to restrict the import of culturally significant artifacts. To this day it has never failed to grant an initial request for import controls.” Jeremy Kahn, *Is the U.S. Protecting Foreign Artifacts? Don’t Ask*, N.Y. TIMES, Apr. 8, 2007 S2 (late edition), at 26. These nations are: Bolivia, Cambodia, Canada, Cyprus, El Salvador, Guatemala, Honduras, Italy, Mali, Nicaragua, and Peru. See U.S. State Dep’t Bureau of Educ. & Cultural Affairs, International Cultural Property Protection, U.S. Response, <http://exchanges.state.gov/culprop/chart.html> (last visited Oct. 19, 2007). The CCPIA authorizes the civil forfeiture of archaeological and ethnological material imported in violation of such an agreement. 19 U.S.C. § 2609.

property.³ This Article does not focus on these enforcement mechanisms,⁴ but rather

3. 18 U.S.C. §§ 2314–2315 (2000). This federal statute criminalizes the knowing transportation, possession, sale, and receipt of stolen property worth \$5,000 or more and imposes criminal penalties of up to ten years in prison. *Id.* The NSPA has been at the center of the debate surrounding the international movement of illicit cultural property. Since 1974, a handful of federal courts construing the statute have found that the knowing possession of cultural property removed from its country of origin in violation of that nation's cultural patrimony law amounts to a violation of the NSPA. *See United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003) (upholding criminal conviction for conspiracy to violate the NSPA based on possession of antiquities stolen from Egypt in violation of that nation's foreign patrimony law); *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) (upholding the same grounds for criminal conviction with respect to Mexico's foreign patrimony law); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974) (assuming without discussion that a violation of Guatemala's patrimony law could serve as the basis for a prosecution under the NSPA); *United States v. An Antique Platter of Gold*, Known as a Gold Phiale Mesomphalos C. 400, 991 F. Supp. 222, 231–32 (S.D.N.Y. 1997) (holding in the alternative that, in an action for civil forfeiture, an object was stolen in violation of the NSPA by virtue of Italy's 1939 patrimony law), *aff'd on other grounds*, 184 F.3d 131 (2d Cir. 1999); *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 547 (N.D. Ill. 1993) (holding that Guatemala's patrimony law—despite not vesting ownership in the Republic until the moment of exportation—provided a basis for liability under the NSPA); *see also Gov't of Peru v. Johnson*, 720 F. Supp. 810, 814–15 (C.D. Cal. 1989) (holding that under a civil replevin action, Peru could not establish ownership of the artifacts in question because its patrimony laws did not clearly vest ownership in Peru and, therefore, were the equivalent of unenforceable export regulations). Unlike the patchwork of federal laws used to protect the cultural heritage of the United States, these foreign patrimony statutes typically vest ownership of the nation's archaeological resources in the nation itself. *See Nafziger, supra* note 1, at 587 (“Unlike many other countries, the United States does not claim a comprehensive patrimonial right to bar the export of cultural heritage. Instead, the federal government prohibits the export only of objects illegally removed from federal and Indian lands. Otherwise, archaeological and other cultural heritage may be freely exported.” (footnote omitted)). As long as the patrimony law clearly declares the nation to be the owner of such cultural property, unauthorized exportation of an object makes it stolen for purposes of the NSPA. *See Schultz*, 333 F.3d at 399–402, 410; *McClain*, 545 F.2d at 992, 1000–01.

Significantly, an underlying violation of the NSPA permits the civil forfeiture of the object under various statutory provisions. *See* 18 U.S.C. § 545 (2000) (providing for the forfeiture of merchandise brought into the country contrary to law); *id.* § 981(a)(1)(c) (2000) (providing for civil forfeiture of any personal property that constitutes or is traceable to a violation of specified unlawful activities listed in 18 U.S.C. § 1956(c)(7), which includes offenses listed in 18 U.S.C. § 1961(1), which includes violations of the NSPA); 19 U.S.C. § 1595a(c) (2000) (providing for civil forfeiture of merchandise imported contrary to law); Complaint for Forfeiture ¶¶ 29–32, *United States v. One Red-Figure Calyx Krater*, Signed by Asteas, No. CV04-2844 (C.D. Cal., Apr. 22, 2004); Verified Complaint ¶¶ 13–14, *United States v. A South Arabian Alabaster Plaque or Stele c. 300–400 A.D., Located at Sotheby's, 1334 York Avenue, New York, N.Y.*, No. 03 Civ. (S.D.N.Y. Aug. 28, 2003); *United States v. Portrait of Wally, A Painting by Egon Schiele*, No. 99 Civ. 9940, 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002); *United States v. An Antique Platter of Gold*, Known as a Gold Phiale Mesomphalos, C. 400 B.C., 991 F. Supp. 2d 222, 231–32 (S.D.N.Y. 1997), *aff'd on other grounds*, 184 F.3d 131 (2d Cir. 1999).

4. Nor does this Article assess the wisdom or effectiveness of these enforcement mechanisms. For example, there has been criticism against relying on criminal prosecution to deter the looting of antiquities. *See generally* Derek Fincham, *Why US Federal Criminal Penalties for Dealing in Illicit Cultural Property Are Ineffective, and a Pragmatic Alternative*, 25 CARDOZO ARTS & ENT. L.J. 597 (2007) (arguing that criminal prosecution, by itself, will not significantly reduce the illicit antiquities trade). There has also been heavy criticism of the lack of transparency and neutrality of the Cultural Property Advisory Committee (CPAC), the State Department body responsible for recommending entry into bilateral agreements under the CCPIA. *See Kahn, supra* note 2 (“But critics claim that [CPAC] now tilts heavily in favor of the archaeological lobby, even in cases when the foreign countries seeking import restrictions have not met the criteria set down by the law.”); Steven Vincent, *The Secret War of Maria Kouroupas*, ART & AUCTION, May 2002, at 62 (describing how Kouroupas, director of CPAC and supported by the archaeological community, has “pursued a veritable—and intensifying—fatwa against the antiquities trade” and has “threaten[ed] the livelihood of dealers and imperil[ed] the ability of museums and private citizens to enrich their collections”).

Other notable legal tools used by the United States to protect the cultural property of foreign nations include bilateral treaties. *See, e.g.*, Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, U.S.-Mex., July 17, 1970, 22 U.S.T. 494; Agreement Between the United States of America and the Republic of Peru for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, U.S.-Peru, Sept. 15, 1981, 33 U.S.T. 1607; Agreement Between the United States of America and the Republic of Guatemala for

analyzes an unlikely addition to this legal arsenal: the Archaeological Resources Protection Act (ARPA) of 1979.⁵

The addition of ARPA to this legal arsenal is unlikely because it was originally designed to further a distinct cultural policy objective: the protection of archaeological resources found on federal and Indian lands within the United States.⁶ Accordingly, ARPA has traditionally represented an integral component of the federal statutory regime protecting cultural heritage within the United States.⁷ Yet, despite these domestic moorings, federal prosecutors have successfully employed ARPA in at least three antiquities investigations since 1996—including the government's January 2008 raids on four California museums—in an effort to combat the possession of archaeological resources stolen from foreign nations.⁸ As a result, the scope of ARPA remains unclear nearly thirty years after its enactment. Is the Act limited to archaeological resources discovered in the United States, or does it extend to archaeological resources discovered around the world?

To date, no judicial or scholarly objections have been levied against the government's global application of ARPA. Thus, this Article is the first to analyze the Act's extension to archaeological resources discovered on foreign lands and concludes that it is improper as a matter of statutory construction.⁹ To be clear, this Article's arguments against ARPA's global expansion do not suggest that the United States should not continue to aggressively assist foreign nations in deterring the looting of their cultural patrimony. Instead, the arguments that follow are grounded in the fundamental principle that efforts to assist foreign nations protect their archaeological resources must be undertaken in accordance with federal law. In other words, laws passed by Congress must not be manipulated improperly if they are to effectively achieve cultural property policy objectives in the long term; the ends cannot justify the means.

The transgression of this fundamental principle can also result in undesirable, practical consequences. For example, as this Article later explains, permitting federal prosecutors to globally apply ARPA may expand the net of criminal liability

the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, U.S.-Guat., May 21, 1984, T.I.A.S. No. 11,077; Agreement Between the United States of America and the Republic of Ecuador for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, U.S.-Ecuador, Nov. 17, 1983, T.I.A.S. No. 11,075 1607. For an additional discussion of how treaties have been used to protect cultural property, see James E. Sherry, Note, *U.S. Legal Mechanisms for the Repatriation of Cultural Property: Evaluating Strategies for the Successful Recovery of Claimed National Patrimony*, 37 GEO. WASH. INT'L L. REV. 511, 523 (2005) (noting that "the U.S.-Mexico Treaty has been invoked in a number of executive actions for the recovery of stolen cultural property, but no U.S. judicial actions have been brought pursuant to the Treaty").

The United States has also signed but not ratified the 1954 Hague Convention safeguarding cultural property in times of war. See Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240; see also Juliana V. Campagna, *War or Peace: It Is Time for the United States to Ratify the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts*, 17 FLA. J. INT'L L. 271 (2005). There are also multinational treaties designed to protect cultural property that the United States has not signed. See, e.g., International Institute for the Unification of Public Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects, opened for signature June 24, 1995, 34 I.L.M. 1322; Convention on the Protection of the Underwater Cultural Heritage, adopted Nov. 2, 2001, 41 I.L.M. 37.

5. 16 U.S.C. §§ 470aa–470mm (2000).

6. See *infra* Part III.A.

7. See *infra* Part II.A.

8. See *infra* Part III.C.

9. See *infra* Part IV.

and subject innocent art dealers and collectors to potential prosecution.¹⁰ Perversely, this potential expansion in criminal liability may actually upset the licit antiquities trade, thereby fueling the black market and more looting.¹¹

In addition, there is a symbolic consequence of the government's global application of ARPA. Specifically, the global expansion of ARPA, an act specifically designed to protect this nation's archaeological resources,¹² may denigrate the significance of our own cultural heritage. In this respect, the government must avoid sending the message that this nation's cultural heritage is somehow subordinate to the heritage of other nations.¹³

This Article proceeds in four parts. Part II surveys the federal statutory framework currently used to protect the cultural property and heritage of the United States. Part III provides a basic overview of ARPA and describes its recent expansion to both private and foreign lands. Part IV sets forth the core argument against ARPA's expansion to foreign lands. Part V proposes that Congress should amend the statute in a manner that precludes its application to archaeological resources discovered outside the United States. This Article briefly concludes by reiterating the importance of limiting the scope of ARPA in this manner.

II. FEDERAL LAW PROTECTING THE CULTURAL HERITAGE OF THE UNITED STATES

A. *A Patchwork of Federal Statutes Limited to Domestic Heritage Protection*

ARPA is a member of a patchwork of federal statutes that protect various types and aspects of cultural property and heritage located or discovered in the United States.¹⁴ The earliest of these statutes is the Antiquities Act of 1906.¹⁵ Although largely superceded by ARPA,¹⁶ the Antiquities Act still permits the President to "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon

10. See *infra* Part IV.E.

11. See, e.g., Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 318-19 (1982) ("The international black market thrives because no alternative is allowed to exist for either buyers or sellers, so that all economic incentives are pushed in favor of the illegal trade."); Fincham, *supra* note 4, at 601 ("By not allowing for a legitimate outlet for these inherently valuable objects, restrictions cause the illicit trade to flourish.").

12. See *infra* Part III.A.

13. See Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 200 (2001), stating that

[a] third aspect of the public interest in the United States lies in the recognition that the United States has a valuable cultural heritage that needs international protection as well....[T]he significance of the United States' own cultural heritage has often been minimized by those who concern themselves primarily with the international movement of cultural objects.

Id.

14. For a useful listing and summary of these federal statutes, see Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559 (1995) (providing a comprehensive overview of applicable federal and state legislation, as well as common law property doctrines); Francis McManamon, *Cultural Resources and Protection Under United States Law*, 16 CONN. J. INT'L L. 247 (2001); Nafziger, *supra* note 1, at 582-88; Marilyn Phelan, *A Synopsis of the Laws Protecting our Cultural Heritage*, 28 NEW ENG. L. REV. 63 (1993).

15. 16 U.S.C. §§ 431-433 (2000).

16. See *infra* Part III.A.

the lands owned or controlled by the Government of the United States to be national monuments.”¹⁷ These sites are protected from unauthorized appropriation, excavation, destruction, and other injury.¹⁸

Another statutory example is the Abandoned Shipwreck Act of 1987, which protects underwater archaeological treasures found in state waters.¹⁹ The Act vests title to such property in the United States but simultaneously transfers title to the states and provides that the states exercise responsibility for the management of abandoned shipwrecks.²⁰ “[The Act] recognizes that ‘[h]istoric shipwrecks... contain both historic information and tangible artifacts [that] are subject to salvage operations, with resultant loss of historical information and artifacts to the public.’”²¹

A final example—and the one that is, quite tellingly, most often analyzed in connection with ARPA²²—is the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990.²³ NAGPRA generally requires American museums, in consultation with Native American tribes, to inventory and summarize their

17. 16 U.S.C. § 431. For general background on the origin and application of the Antiquities Act, see SHERRY HUTT ET AL., *ARCHAEOLOGICAL RESOURCE PROTECTION* 18–29 (1992). For additional historical background, as well as discussion on a recent invocation of the Antiquities Act, see *Utah Association of Counties v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004) (upholding President Clinton’s declaration of the Grand Staircase Monument in 1996), *appeal dismissed*, 455 F.3d 1094 (10th Cir. 2006).

18. 16 U.S.C. § 433.

19. 43 U.S.C. §§ 2101–2106 (2000). For additional discussion on the Abandoned Shipwreck Act, see Roberto Iraola, *The Abandoned Shipwreck Act of 1987*, 25 WHITTIER L. REV. 787 (2004); Sabrina L. McLaughlin, *Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987*, 19 COLUM. J.L. & ARTS 149 (1995); Russell G. Murphy, *The Abandoned Shipwreck Act of 1987 in the New Millennium: Incentives to High Tech Piracy?*, 8 OCEAN & COASTAL L.J. 167 (2003); Timothy T. Stevens, *The Abandoned Shipwreck Act of 1987: Finding the Proper Ballast for the States*, 37 VILL. L. REV. 573 (1992); Mary Ann Becker, Comment, *Regulating the Business of Culture: The Abandoned Shipwreck Act—Can Preservationists, Salvors, and Divers Sail in Calmer Waters?*, 51 DEPAUL L. REV. 569 (2001).

20. 43 U.S.C. §§ 2101(a), 2105(a), (c).

21. Phelan, *supra* note 14, at 85 (quoting H.R. Rep. No. 514 (II), 100th Cong., 2d Sess. 4 (1988)).

22. See, e.g., *id.*; Gerstenblith, *supra* note 14; Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145 (1996); David G. Bercau, Comment, *Requiem for Indiana Jones: Federal Law, Native Americans, and the Treasure Hunters*, 30 TULSA L.J. 213 (1994); see also 25 U.S.C. § 3002(c)(1) (2000) (providing that a permit obtained under section 470cc of ARPA authorizes the otherwise prohibited, intentional excavation or removal of Native American cultural items under NAGPRA). This linkage between NAGPRA and ARPA is illustrative for present purposes because it is impossible, by definition, to extend NAGPRA to objects or remains discovered abroad, for such objects would not be considered Native American.

23. 25 U.S.C. §§ 3001–3013 (2000). There is an abundance of literature on NAGPRA. See, e.g., Thomas H. Boyd & Jonathan Haas, *The Native American Graves Protection and Repatriation Act: Prospects for New Partnerships Between Museums and Native American Groups*, 24 ARIZ. ST. L.J. 253 (1992); Sherry Hutt, *Illegal Trafficking in Native American Human Remains and Cultural Items: A New Protection Tool*, 24 ARIZ. ST. L.J. 135 (1992); Clement W. Meighan, *Burying American Archaeology*, *ARCHAEOLOGY* Nov.–Dec. 1994, at 64–65 (appearing as part of *Debating NAGPRA’s Effects*, *ARCHAEOLOGY*, Nov.–Dec. 1994, at 64–65, available at <http://www.archaeology.org/online/features/native/debate.html>); JAMES D. NASON, *Beyond Repatriation: Cultural Policy and Practice for the Twenty-first Century*, in *BORROWED POWER: ESSAYS IN CULTURAL APPROPRIATION* 291 (Bruce Ziff & Pratima V. Rao eds., 1997); Robert W. Preucel et al., *Out of Heaviness, Enlightenment: NAGPRA and the University of Pennsylvania Museum of Archaeology and Anthropology*, *EXPEDITION*, Winter 2003, at 21; Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49 (2002); Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35 (1992); Larry J. Zimmerman, *Sharing Control of the Past*, *ARCHAEOLOGY* Nov.–Dec. 1994, at 65 (appearing as part of *Debating NAGPRA’s Effects*, *ARCHAEOLOGY*, Nov.–Dec. 1994, at 64–65, available at <http://www.archaeology.org/online/features/native/debate.html>).

collections of Native American religious and funerary objects and remains.²⁴ The Act authorizes the repatriation of such objects and remains if a request is made and the requisite cultural affiliation is established between a present day tribe and the object or remains.²⁵

These statutes and others govern various aspects of the cultural heritage of the United States. Significantly, aside from ARPA, these federal statutes have been employed to protect the cultural property or heritage of the United States, not the cultural property or heritage of foreign nations.²⁶ The one notable exception is now discussed.

B. National Historic Preservation Act and Dugong

The National Historic Preservation Act of 1966 (NHPA)²⁷ authorizes the Secretary of the Interior to develop a “National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture.”²⁸ An important purpose of the statute is to require federal agencies to consider the effect of any federal undertaking on any site or structure on the National Register.²⁹ Federal agencies must “take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register”³⁰ before a license may be issued or funds authorized for such a project.

In 1972, the United Nations Educational, Scientific and Cultural Organization (UNESCO) held a World Heritage Convention in Paris to discuss the current threats to cultural heritage and to propose solutions for the protection of such items.³¹ “The [World Heritage] Convention establishe[d] a list of properties that have outstanding universal value [that are placed on] the World Heritage List.”³² Following the World

24. 25 U.S.C. §§ 3003–3004.

25. *Id.* § 3005; *cf.* *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004) (holding that there was not sufficient evidence to establish a cultural relationship between a presently existing tribe and 9,000 year-old skeletal remains).

26. *See infra* Part II.B.

27. 16 U.S.C. §§ 470–470x-6 (2000).

28. *Id.* § 470(a)(1)(A). The National Register is currently made up of over 80,000 listings, including: All historic areas in the National Park System; [o]ver 2,400 National Historic Landmarks, which have been designated by the Secretary of the Interior because of their importance to all Americans; [and] [p]roperties across the country that have been nominated by governments, organizations, and individuals because they are significant to the nation, to a state, or to a community.

Nat'l Park Serv., National Register of Historic Places, <http://www.cr.nps.gov/nr/about.htm> (last visited Feb. 17, 2008).

29. 16 U.S.C. § 470f.

30. *Id.*

31. United Nations Educational, Scientific and Cultural Organization Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37. *See also* UNESCO World Heritage Convention, <http://whc.unesco.org/en/conventiontext/> (last visited Feb. 17, 2008).

32. Australian Government, Department of the Environment and Water Resources, The World Heritage Convention, <http://www.environment.gov.au/heritage/worldheritage/convention.html> (last visited February 17, 2008) (“These properties are part of the cultural and natural heritage of States that are Parties to the Convention.... Many World Heritage sites in other parts of the world are well known, such as, the Pyramids of Egypt, the Grand Canyon of the United States, the Taj Mahal of India, Westminster Abbey in the United Kingdom,

Heritage Convention, the NHPA authorized the Secretary of the Interior to nominate property in the United States to be included on the World Heritage List.³³

More importantly for present purposes, however, Congress also enacted another provision within the NHPA “to mitigate adverse affects [sic] to cultural artifacts stemming from federal undertakings *outside* the U.S.”³⁴ The statute provides:

Prior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country’s equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.³⁵

This provision of the NHPA was recently construed for the first time in the case of *Dugong v. Rumsfeld*.³⁶ That case involved the threat to the dugong, a marine mammal considered sacred to the people of Okinawa, posed by the construction of an American military base in Henoko Bay, Japan.³⁷ The district court ultimately held that the requirement in section 470a-2 of the NHPA applied to the construction of the military base because (1) the Japanese Law for the Protection of Cultural Properties that protected the dugong was equivalent to the National Register³⁸ and (2) the dugong could be classified as property for purposes of the NHPA.³⁹

Since *Dugong* represents the only international expansion of a federal statute that was designed to protect the cultural heritage of the United States, it is worth briefly highlighting the features of NHPA section 470a-2 that are not shared with section 470ee(c) of ARPA, the key provision discussed throughout this Article.

Sagarmatha National Park (containing Mount Everest) in Nepal and the Great Wall of China.”). For the full list, see UNESCO, World Heritage Centre, World Heritage List, <http://whc.unesco.org/en/list> (last visited May 20, 2007).

33. 16 U.S.C. § 470a-1(b).

34. Ingrid Brostrom, *The Cultural Significance of Wildlife: Using the National Historic Preservation Act to Protect Iconic Species*, 12 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 147, 153 (2006) (emphasis added).

35. 16 U.S.C. § 470a-2.

36. No. C 03-4350 MHP, 2005 WL 522106 (N.D. Cal. Mar. 2, 2005).

37. *Id.*

38. *Id.* at *8.

39. *Id.* at *12. For more discussion on *Dugong*, see Brostrom, *supra* note 34; Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT’L L. 245, 314 (2006) (arguing that the construction of a U.S. Military base at Babylon violates the NHPA); Thomas F. King, *Creatures and Culture: Some Implications of Dugong v. Rumsfeld*, 13 INT’L J. CULT. PROP. 235 (2006); Anna D. Stasch, *Arc Ecology v. United States Department of the Air Force: Extending the Extraterritorial Reach of Domestic Environmental Law*, 36 ENVTL. L. 1065, 1078-83 (2006); Mitsuhiro A. Takahashi, *Okinawa Dugong v. Rumsfeld: Extraterritorial Operation of the U.S. Military and Wildlife Protection Under the National Historic Preservation Act*, 28 ENVIRONS ENVTL. L. & POL’Y J. 181 (2004).

Although not affecting cultural property or heritage, an earlier case worth comparing with *Dugong* involved the application of the National Environmental Policy Act (NEPA) to Antarctica. *See* *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993). Similar to the provision at issue in *Dugong*, section 102(2)(c) of NEPA requires federal agencies to prepare environmental impact statements for actions significantly affecting the quality of the human environment. *See* 42 U.S.C. § 4332(2)(c) (2000). Finding the presumption against extraterritoriality to be inapplicable and relying on the United States’ legislative control of uniquely situated Antarctica, the D.C. Circuit held that this requirement applied to the United States’ incineration of food waste in Antarctica. *Massey*, 986 F.2d at 529.

Unlike section 470ee(c) of ARPA, the provision of the NHPA at issue in *Dugong* unambiguously applies to the cultural heritage of other nations.⁴⁰ Indeed, it was added in order to implement the World Heritage Convention, a multinational treaty.⁴¹ Furthermore, this provision is limited only to “federal undertakings” occurring outside the United States, and does not apply to private actors.⁴² In addition, and in contrast to the statutory purposes of ARPA, the NHPA declares:

It shall be the policy of the Federal Government, in cooperation with *other nations* and in partnership with the States, local governments, Indian tribes, and private organizations and individuals to . . . provide leadership in the preservation of the *prehistoric and historic resources of the United States and of the international community of nations* and in the administration of the national preservation program in partnership with States, Indian tribes, Native Hawaiians, and local governments.⁴³

There was, understandably, no dispute in *Dugong* that this provision of the NHPA was applicable to the cultural heritage of other nations, demonstrating that Congress is capable of clearly expressing its intention to protect international cultural heritage when it so desires.

III. BACKGROUND OF ARPA AND ITS EXTENSION TO PRIVATE AND FOREIGN LANDS

A. Statutory Overview⁴⁴

In response to “the dramatic rise in recent years of illegal excavations on public lands and Indian lands for private gain,”⁴⁵ ARPA was enacted in 1979.⁴⁶ ARPA helped remedy two major deficiencies with the outdated Antiquities Act of 1906.⁴⁷ That Act, by its very terms, was limited to “any object of antiquity, situated on lands owned or controlled by the Government of the United States.”⁴⁸

The first deficiency in the Antiquities Act was exposed in *United States v. Diaz*,⁴⁹ where the Court of Appeals for the Ninth Circuit held that the phrase “any object

40. 16 U.S.C. § 470a-2. See also Gerstenblith, *supra* note 39, at 312–15 (arguing that the construction of a U.S. military base at Babylon during the Second Gulf War violated the NHPA).

41. 16 U.S.C. § 470a-1.

42. *Id.* § 470a-2.

43. *Id.* § 470-1(2) (emphasis added).

44. For the most recent, comprehensive summary of ARPA and its case law, see Roberto Iraola, *The Archaeological Resource Protection Act—Twenty-Five Years Later*, 42 DUQ. L. REV. 221 (2004). For a discussion of the constitutional underpinnings of ARPA, see Uri A. Jurist, Comment, *Wild Burros, Fences, and ARPA: Viewing the Archaeological Resources Protection Act as Property Clause Legislation*, 5 U. PA. J. CONST. L. 109 (2002) (arguing that the Property Clause provides the authority for federal regulation of federal but not Indian lands). *But see* Peter A. Appel, *The Power of Congress “Without Limitation” in the Twenty-First Century*, 24 PUB. LAND & RESOURCES L. REV. 25, 34 & n.36, 42 (2004) (arguing that the Property Clause provides the authority for federal regulation of both federal and Indian lands).

45. H.R. REP. NO. 96-311, at 7 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1709, 1710 (report submitted by the Department of the Interior).

46. ARPA of 1979, Pub. L. No. 96-95, 93 Stat. 721 (codified at 16 U.S.C. §§ 470aa–470mm (2000)).

47. See H.R. REP. NO. 96-311, at 15–16, *reprinted in* 1979 U.S.C.C.A.N. 1709, 1718–19 (report submitted by the Department of the Interior).

48. 16 U.S.C. § 433.

49. 499 F.2d 113 (9th Cir. 1974).

of antiquity” was unconstitutionally vague.⁵⁰ There was no statutory definition of this phrase⁵¹ and the court held that it did not provide “fair warning” to an individual as to what was unlawful activity, thus opening the door to “arbitrary and discriminatory enforcement” in violation of the Due Process Clause.⁵² This holding posed serious enforcement problems for the government, as the vast majority of archaeological resources in the United States are located in jurisdictions within the Ninth Circuit.⁵³ To remedy the fatal lack of clarity, ARPA included a statutory definition of “archaeological resources” that also provided that agencies would adopt uniform regulations further defining this term.⁵⁴

The second deficiency involved the meager penalties imposed for violations of the Antiquities Act, which are a fine of no more than \$500 and/or imprisonment for no more than ninety days.⁵⁵ In order to effectively deter the lucrative business of selling looted archaeological resources, ARPA provides for stricter penalties amounting to, at minimum, a \$10,000 fine and/or one year imprisonment.⁵⁶ Significantly, if the value of the archaeological resources involved and the cost of restoration and repair exceed \$500, the penalty is increased to \$20,000 and/or two years in prison.⁵⁷ Additionally, “[i]n the case of a second or subsequent such violation upon conviction such person shall be fined not more than \$100,000, or imprisoned not more than five years, or both.”⁵⁸

The vast majority of ARPA concerns the “regulation, in the form of civil and criminal penalties, permit requirements, forfeiture provisions, and other regulatory

50. *Id.* at 113–15. *But see* *United States v. Symer*, 596 F.2d 939, 941 (10th Cir. 1979) (holding that “object of antiquity” was not unconstitutionally vague).

51. *Diaz*, 499 F.2d at 114. The court relied on testimony offered by an anthropology professor to support the view that the phrase “any object of antiquity” could have many different meanings to different people. *Id.* “He further testified that... ‘object of antiquity’ could include something that was made just yesterday if related to religious or social traditions of long standing. In his opinion the artifacts in the instant case were antiquities despite the fact that they were no more than three or four years old.” *Id.*

52. *Id.* at 114–15.

53. *See* H.R. REP. NO. 96-311, at 7 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1709, 1710.

54. “Archaeological resource” is defined under ARPA as

any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.

16 U.S.C. § 470bb(1); *see also* 43 C.F.R. § 7.3(a) (1995) (regulations promulgated by the Department of the Interior clarifying the statutory definition of archaeological resources); Iraola, *supra* note 44, at 224 n.11 (citing federal regulations adopted by the Departments of the Interior, Agriculture, and Defense and the Tennessee Valley Authority to implement this provision of ARPA). This revised definition of archaeological resources has been upheld against a challenge on vagueness grounds. *See United States v. Austin*, 902 F.2d 743 (9th Cir. 1990).

55. 16 U.S.C. § 433.

56. *Id.* § 470ee(d); *see also* HUTTON ET AL., *supra* note 17, at 26–27 (discussing the prosecution of the looting of archaeological and historical sites).

57. 16 U.S.C. § 470ee(d).

58. *Id.*

devices, of archaeological activities *on federal and Indian lands*.”⁵⁹ The key section of ARPA for present purposes, however, is section 470ee, which delineates the three types of prohibited activities under the Act.⁶⁰

The first prohibited act is the “excavation, removal, damage, alteration, or defacement of archaeological resources...located on public lands or Indian lands unless such activity is pursuant to a permit.”⁶¹ The second prohibited act is the sale, purchase, exchange, transportation, or receipt of any archaeological resource excavated from public or Indian lands in violation of the above prohibition or any provision in effect under federal law.⁶² The third prohibited act, set out in section 470ee(c), is the key provision around which the remainder of this Article revolves.

Section 470ee(c) prohibits the sale, purchase, exchange, transportation, or receipt in interstate or foreign commerce of archaeological resources excavated in violation of any provision in effect under state or local law.⁶³ Noticeably absent in this provision, however, is the requirement that the archaeological resource be excavated from public or Indian land. Indeed, it is this omission that provided the textual support for the Seventh Circuit’s holding in *United States v. Gerber* that section 470ee(c) applied to archaeological resources located on privately owned land.⁶⁴

B. Extension to Private Lands: United States v. Gerber

Arthur Gerber challenged his conviction under section 470ee(c) for “transport[ing] in interstate commerce Indian artifacts that he had stolen from a burial mound on privately owned land in violation of Indiana’s criminal laws of trespass and conversion.”⁶⁵ A heavy-equipment operator named Bill Way, during the course of construction on lands owned by General Electric, uncovered “hundreds of artifacts, including copper axeheads, inlaid bear canines, and tooled leather.”⁶⁶ It was later discovered that these artifacts were part of one of the five largest Hopewell earthen burial mounds, containing numerous Indian artifacts and even two human skeletons.⁶⁷ Way, who was also a collector of Indian artifacts, was put into contact with Gerber, who purchased both the artifacts in Way’s possession and information on the location of the burial mound for \$6,000.⁶⁸ Gerber then returned to the site several times (where he encountered other people digging) and removed hundreds of additional artifacts, some of which he eventually sold in Kentucky.⁶⁹ Gerber conceded that he had violated the trespass and conversion laws of Indiana by failing to obtain permission from General Electric to enter the

59. *United States v. Gerber*, 999 F.2d 1112, 1114 (7th Cir. 1993).

60. 16 U.S.C. § 470ee(a–c).

61. *Id.* § 470ee(a).

62. *Id.* § 470ee(b).

63. *Id.* § 470ee(c).

64. *Gerber*, 999 F.2d at 1114–16.

65. *Id.* at 1113 (footnote omitted).

66. *Id.* at 1114.

67. *Id.* These mounds were over 1,500 years old and were the “product of a civilization that included the beginnings of settled agriculture, an elaborate ceremonialism, and far-flung trading networks...dubbed the ‘Hopewell phenomenon.’” *Id.*

68. *Id.*

69. *Id.*

property or remove the artifacts, and he further admitted that he had transported the artifacts in interstate commerce.⁷⁰

Gerber challenged his conviction on two grounds: first, he contended that ARPA did not apply to archaeological resources located on private lands; and, second, he argued that section 470ee(c) contemplated violations of state laws expressly limited to the protection of archaeological sites or objects, not general laws such as trespass and conversion.⁷¹ Writing for a unanimous panel, Judge Posner held that (a) section 470ee(c) applied to archaeological resources found on private lands and (b) the violation of general state laws “related to the protection of archaeological sites or objects”—such as trespass or conversion laws—could properly form the basis of a violation under section 470ee(c).⁷² The rationale of the opinion is analyzed in Part IV.B, but at this juncture in the Article, it is sufficient to note that *Gerber* remains the only reported judicial opinion to extend ARPA beyond federal and Indian lands.

C. Extension to Foreign Lands: The Etruscan Vase, Barchitta, and Asian Antiquities Investigations

In at least three federal antiquities investigations since 1996, federal prosecutors have successfully applied section 470ee(c) to the possession of archaeological resources stolen from foreign lands. The implications of this unprecedented extension of ARPA have not been subject to any examination, as federal courts have not yet been required to address the issue.⁷³

The first of these investigations, referred to here as the *Etruscan Vase* case, involved an in rem civil forfeiture claim brought pursuant to ARPA⁷⁴ by the United States in December 1996, seeking “an archaic Etruscan pottery ceremonial vase c. late 7th century, B.C., and a set of rare Villanovan and archaic Etruscan blackware with bucchero and impasto ware, c. 8th–7th century, B.C.”⁷⁵ These objects were allegedly illegally excavated from a protected archaeological zone in Rome, Italy and were subsequently purchased by a company called “Antiquarium” in 1987 for \$24,500.⁷⁶ A default judgment was entered on March 24, 1997 after no responsive pleading or motion was filed.⁷⁷

The second case involved criminal charges brought in May 2003 under ARPA against 74-year-old Taddeo Barchitta, who ultimately pled guilty for attempting to

70. *Id.*

71. *Id.* at 1113.

72. *Id.* at 1117.

73. See Jori Finkel, *Thai Antiquities, Resting Uneasily*, N.Y. TIMES, Feb. 17, 2008, at Arts (“[F]ederal courts ha[ve] not yet upheld the application of Archaeological Resources Protection Act to foreign antiquities.”).

74. See 16 U.S.C. § 470gg(b) (2000); Stefan D. Cassella, *Using Forfeiture Laws to Protect Archaeological Resources*, 41 IDAHO L. REV. 129 (2004) (discussing this forfeiture provision under ARPA, which may be used when there is an underlying violation of section 470ee).

75. Verified Complaint ¶ 1, *United States v. An Archaic Etruscan Pottery Ceremonial Vase C. Late 7th Century, B.C. and a Set of Rare Villanovan and Archaic Etruscan Blackware with Bucchero and Impasto Ware, c. 8th–7th Century, B.C.*, Located at Antiquarium, Ltd., 948 Madison Avenue, New York, N.Y., 10021, No. 96 CIV. 9437 (S.D.N.Y. Dec. 12, 1996).

76. *Id.* ¶¶ 3, 6.

77. Default Judgment, *United States v. An Archaic Etruscan Pottery Ceremonial Vase C. Late 7th Century, B.C. and a Set of Rare Villanovan and Archaic Etruscan Blackware with Bucchero and Impasto Ware, c. 8th–7th Century, B.C.*, Located at Antiquarium, Ltd., 948 Madison Avenue, New York, N.Y., 10021, No. 96 CIV. 9437 (S.D.N.Y. Mar. 24, 1997).

sell twenty-nine Peruvian artifacts to an undercover Immigration and Customs Enforcement (ICE) agent for \$150,000 each.⁷⁸ Many of the objects were over one thousand years old and included “colorful textiles from the Huari culture that dated to 800 AD, a shell used by the Moche civilization as early as 350 AD and ceramics made by the Incas in about 1400 AD.”⁷⁹ An archaeologist at the Smithsonian commented that he was “stunned by the scope of the collection, particularly the well-preserved textiles,” and that it “could reveal valuable insight about a culture’s ceremonial customs, trading and daily life.”⁸⁰

The third investigation, referred to here as the *Asian Antiquities* investigation, was revealed on January 24, 2008, when federal agents, as part of a potentially groundbreaking five-year investigation into the smuggling of looted antiquities from Thailand, Myanmar, China, and Native American sites, coordinately raided four California museums: the Los Angeles County Museum of Art, the Pacific Asia Museum in Pasadena, the Bowers Museum in Santa Ana, and the Mingei International Museum in San Diego.⁸¹ Three of the four search warrants were made public and revealed that the government obtained the warrants by alleging violations of section 470ee(c) of ARPA with respect to archaeological resources smuggled out of foreign nations.⁸²

Based on the government’s filings in the *Etruscan Vase* and *Asian Antiquities* investigations, it is clear that federal prosecutors employ section 470ee(c) to encompass archaeological resources stolen from foreign lands in the following way: Section 470ee(c) provides in full that “[n]o person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.”⁸³ As opposed to the conversion and trespass laws used in *Gerber*, the government purports to satisfy section 470ee(c) in these cases with a state theft law that criminalizes the receipt or possession of stolen property.

For example, in the *Etruscan Vase* case, the government cited a New York theft statute providing that “[a] person is guilty of criminal possession of stolen property in the fourth degree when he knowingly possesses stolen property, with intent to

78. Maria Glod, *Arlington Man Pleads Guilty to Selling Protected Artifacts*, WASH. POST, Sept. 25, 2003, at B3.

79. *Id.*

80. *Id.*

81. Edward Wyatt, *Four California Museums Are Raided in Looted Antiquities Case*, N.Y. TIMES, Jan. 25, 2008, at Arts.

82. Search Warrant on Written Affidavit ¶¶ 4, 10, *United States v. The Premises Known as: Charles W. Bowers Museum Corp.*, No. 08-0093M (C.D. Cal. Jan. 19, 2008) [hereinafter *Bowers Museum*]; Search Warrant on Written Affidavit ¶¶ 3(a), 6, *United States v. The Premises Known as: Los Angeles County Museum of Art*, No. 08-0100M (C.D. Cal. Jan. 19, 2008); Search Warrant on Written Affidavit ¶¶ 4, 8, *United States v. The Premises Known as: Pacific Asia Museum*, No. 08-0118M (C.D. Cal. Jan. 22, 2008). See Jason Felch, *Raids Suggest a Deeper Network of Looted Art*, L.A. TIMES, Jan. 25, 2008, at A1.

The detailed warrants gave the agents broad authority to search the museums’ galleries, offices, storage areas and computer archives. They were looking for objects and records related to the primary targets of the investigation: an alleged art smuggler, Robert Olson, and the owner of a Los Angeles Asian art gallery, Jonathan Markell.

Id. At the time of this writing, no additional details about the investigation had been revealed.

83. 16 U.S.C. § 470ee(c) (2000).

benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof.”⁸⁴ Similarly, in the *Asian Antiquities* investigation, the government cited the California theft statute that “makes it a violation of state law to receive property stolen in another country and to bring it into California knowing the property to be stolen.”⁸⁵ Thus, under the government’s theory, ARPA’s extension to foreign lands through section 470ee(c) consists of the following two complementary halves: (1) possessing archaeological resources removed in violation of a foreign nation’s patrimony law is a violation of state law criminalizing the possession or receipt of stolen property; and (2) a violation of state law is a violation of section 470ee(c) of ARPA, regardless of the geographic origin of the archaeological resources.

IV. THE CASE AGAINST ARPA’S EXTENSION TO FOREIGN LANDS

This section will discuss the core argument against ARPA’s extension to foreign lands. First, this section begins by summarizing the relevant statutory language and legislative history of ARPA, which unambiguously establish that the statute was never intended to apply to archaeological resources discovered on foreign lands.⁸⁶ This section continues by returning to the rationale of the Seventh Circuit’s holding in *Gerber* and argues that this opinion misinterpreted a critical aspect of section 470ee(c) that, if corrected, would preclude the extension of ARPA to foreign lands.⁸⁷ Next, this section sets forth the argument that interpreting ARPA to encompass archaeological resources of foreign lands takes an uncharted legal route through state law⁸⁸ and produces an absurd result.⁸⁹ This section then anticipates (and refutes) a potential, textual counterargument and raises the issue of extra-territorial application.⁹⁰ Lastly, this section critiques the likely strategic motivation behind the government’s global application of ARPA and offers a strong policy argument against this application.⁹¹

A. Unambiguous Expressions of Statutory Purpose and Legislative Intent

Both the plain language of ARPA and its legislative history repeatedly and unambiguously proclaim the purpose of ARPA to be the protection of archaeological resources found on public⁹² and Indian lands.⁹³ Unlike the

84. Verified Complaint, *supra* note 75, ¶ 14(c) (quoting N.Y. PENAL LAW § 165.45 (McKinney 2006)).

85. *See, e.g.*, Search Warrant on Written Affidavit ¶ 10(a), *Bowers Museum*, No. 08-0093M (citing CAL. PENAL CODE § 497 (West 1999)).

86. *See infra* Part IV.A.

87. *See infra* Part IV.B.

88. *See infra* Part IV.C.1.

89. *See infra* Part IV.C.2.

90. *See infra* Part IV.D.

91. *See infra* Part IV.E.

92. “Public lands” are defined under ARPA as

lands which are owned and administered by the United States as part of— (i) the national park system, (ii) the national wildlife refuge system, or (iii) the national forest system; and (B) all other lands the fee title to which is held by the United States, other than lands on the Outer Continental Shelf and lands which are under the jurisdiction of the Smithsonian Institution.

16 U.S.C. § 470bb(3) (2000); *see also* 43 C.F.R. § 7.3(d) (2007).

93. “Indian lands” are defined under ARPA as “lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except

NHPA,⁹⁴ at no point does any source ever refer to or suggest ARPA's extension to the archaeological resources of other nations.

Before addressing the language of the Act, it is worth reiterating that ARPA "superseded the Antiquities Act of 1906, which had been expressly limited to federal lands."⁹⁵ It is no surprise based on this historical fact alone—and in the absence of any contrary indication—that "[m]ost scholarly commentators on the Act assume that [ARPA] is limited to federal and Indian lands."⁹⁶

The self-description of ARPA is as follows: "An Act [t]o protect archaeological resources on public lands and Indian lands, and for other purposes."⁹⁷ The first sentence of the Preamble reads, "The Congress finds that (1) archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of *the Nation's heritage*["]."⁹⁸ The next provision of the Preamble states in equally unambiguous language, "The purpose of this chapter is to secure, for the present and future benefit of the *American people*, the protection of archaeological resources and sites which are on public lands and Indian lands...."⁹⁹ These are key statutory provisions not only because they express the legislative intent that ARPA applies exclusively to archaeological resources found on federal and Indian lands, but they also make clear above all else that Congress was concerned with the archaeological resources that constituted an irreplaceable part of *this nation's heritage*, and not the heritage of other nations.

The legislative history repeatedly expresses the same unambiguous intent: "The purpose...is to provide protection for archaeological resources found on public lands and Indian lands of the United States.... The bill prohibits the removal of archaeological resources on public lands or Indian lands without first obtaining a permit from the affected federal land manager or Indian tribe."¹⁰⁰ A separate Senate conference report similarly states that the purpose is "to provide greater protection...for archaeological resources on public lands and Indian lands."¹⁰¹ Numerous statements made during congressional floor debates express the same clear intent, especially the statement of Arizona Congressman Morris Udall, the principal sponsor of ARPA. At the debates, Congressman Udall unequivocally stated, "I want to emphasize in the boldest terms what the bill does not do: . . . It does

for any subsurface interests in lands not owned or controlled by an Indian tribe or an Indian individual." 16 U.S.C. § 470bb(4); *see also* 43 C.F.R. § 7.3(e) (2007).

94. *See* 16 U.S.C. § 470a-2.

95. *United States v. Gerber*, 999 F.2d 1112, 1115 (7th Cir. 1993) (internal citation omitted).

96. *Id.* *See also* Petition for Writ of Certiorari at *14 n.6, *Gerber*, 510 U.S. 1071 (1994) (No. 93-635), 1993 WL 13075131 (listing numerous scholarly articles assuming ARPA's limited scope).

97. ARPA of 1979, Pub. L. No 96-95, 93 Stat. 721 (codified at 16 U.S.C. § 470aa). Presumably, the "other purposes" are those mentioned in the Preamble, and include "foster[ing] increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before October 31, 1979." 16 U.S.C. § 470aa(b).

98. *Id.* § 470aa(a)(1) (emphasis added).

99. *Id.* § 470aa(b) (emphasis added).

100. H.R. REP. NO. 96-331, at 7 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1709, 1710; *see also id.* at 13, *reprinted in* 1979 U.S.C.C.A.N. 1709, 1716 (stating that "[t]he lands involved in the legislation are entirely Federally owned or Indian lands").

101. Brief for Am. Numismatic Ass'n et al. as Amici Curiae Supporting Petitioner at *10, *Gerber v. United States*, 510 U.S. 1071 (1994) (No. 93-635), 1993 WL 13076621 (quoting S. REP. NO. 96-179, at 6 (1979)).

not affect any lands other than the public lands of the United States and lands held in trust by the United States for Indian tribes or individual Indian allottees.”¹⁰² Indeed, he further stated that ARPA “prohibits the wanton destruction of archaeological sites and resources located on the public domain or Indian lands [and] provides that recovered archaeological resources will remain the property of the United States.”¹⁰³

Furthermore, a favorable report submitted by the Department of the Interior, included in the House Report, predicted that “the bill will solve a number of problems in present authorizations and will provide much greater protection of the archaeological resources of the United States.”¹⁰⁴ The report assumed that “the only archaeological resources covered are those on Federal land.”¹⁰⁵ Another report submitted by the Department of Justice “question[ed] whether non-Indian lands within a reservation should be made subject to this legislation which is directed to federal and Indian lands only.”¹⁰⁶ These sources all indicate that the framers of the Act did not have the archaeological resources of foreign nations in mind.

It is important to recognize for those who refuse to look to legislative history that these expressions were not only codified in the Preamble, but also in another provision of the statute. Indeed, within ARPA’s “savings provisions”¹⁰⁷ is a provision entitled “Lands within this chapter” that reads in full, “*Nothing in this chapter shall be construed to affect any land other than public land or Indian land or to affect the lawful recovery, collection, or sale of archaeological resources from land other than public land or Indian land.*”¹⁰⁸

In sum, the background and language of the statute, the statements made by its drafters, and the reports submitted by affected federal agencies all manifest an unambiguous intent against ARPA’s application to foreign lands. Indeed, these sources declare that the Act was only intended to protect the archaeological resources discovered on federal and Indian lands.

102. *Id.* at **10–11 (quoting 125 CONG. REC. 17,393–94 (1979) (statement of Rep. Udall)); *see also id.* at *10 (“The purpose... is to provide greater protection... for archaeological resources located on public and Indian lands.” (quoting 125 CONG. REC. S10,832 (1979) (statement of Sen. Bumper)); *id.* (“[T]his measure will protect archaeological resources located on the public and Indian lands.”) (quoting 125 CONG. REC. S14,721 (1979) (statement of Sen. Bumper)).

103. *Id.* at *10 (quoting 125 CONG. REC. 17,393–94 (1979) (statement of Rep. Udall)).

104. H.R. REP. NO. 96-311, at 14, *reprinted in* 1979 U.S.C.C.A.N 1709, 1717.

105. *Id.* at 16, *reprinted in* 1979 U.S.C.C.A.N 1709, 1719.

106. *Id.* at 24, *reprinted in* 1979 U.S.C.C.A.N. 1709, 1727.

107. 16 U.S.C. § 470kk (2000).

108. *Id.* § 470kk(c) (emphasis added). One commentator would curiously read the second clause in this provision in a manner that eviscerates the first clause:

In detailing the lands ARPA applies to, ARPA’s savings provisions provide that ARPA will not “affect the lawful recovery, collection, or sale of archeological resources from land other than public land or Indian land.” Read in the converse, this provision suggests that ARPA *will* be applicable if there is an unlawful “recovery, collection, or sale of archaeological resources” located somewhere other than public or Indian lands.

Stephanie Ann Ades, Comment, *The Archaeological Resources Protection Act: A New Application in the Private Property Context*, 44 CATH. U. L. REV. 599, 618 n.165 (1995).

B. Revisiting the Rationale of *Gerber*

The reader will recall that the Seventh Circuit in *Gerber* held that ARPA, through section 470ee(c), did apply to lands in the United States that were neither federal nor Indian lands.¹⁰⁹ In light of the above expressions of congressional intent that ARPA remain limited to federal and Indian lands, the question arises whether *Gerber's* interpretation of ARPA was correct.

Judge Posner's opinion can be divided into two holdings: (1) ARPA applied to private lands¹¹⁰ and (2) section 470ee(c) could be satisfied by violations of any state law generally "related to the protection of archaeological sites or objects."¹¹¹ This Article contends that these holdings were analyzed in the wrong order and, as a result, do not correctly interpret section 470ee(c).

The analysis should begin with Judge Posner's second holding concerning what type of state law violations may satisfy section 470ee(c). Judge Posner correctly identified the two options: (1) general state laws (such as conversion and trespass) that are related, but not limited, to the protection of archaeological resources or (2) state laws that specifically protect archaeological resources, laws that Judge Posner acknowledged exist in all fifty states.¹¹² This is the proper starting point because if section 470ee(c) is read to include violations of general state law, such as conversion and trespass laws, then ARPA would extend to private lands. If, however, section 470ee(c) is limited to violations of state archaeological protection laws, then ARPA would only extend to the lands protected under the applicable state law.

Perhaps unintentionally, Judge Posner provided the proper analysis to the above issue as part of his first holding.¹¹³ He suggested that coupling the textual omission of federal and Indian lands from section 470ee(c) with its interstate trafficking language was deliberately intended to "affix federal criminal penalties to state crimes that, when committed in interstate commerce, are difficult for individual states to punish."¹¹⁴ This analysis, however, logically leads to the conclusion that section 470ee(c) must be satisfied by state archaeological protection laws, not general state laws with no genuine relationship to archaeological protection. In light of the section's purpose to "back up" state law,¹¹⁵ it would be incongruous for section 470ee(c) to incorporate general state laws instead of a state's counterpart to ARPA, especially considering that all fifty states have enacted such

109. *United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993).

110. *Id.* at 1116.

111. *See supra* notes 71–72 and accompanying text.

112. *Gerber*, 999 F.2d at 1117 ("Granted, all fifty states have laws expressly protecting their archaeological sites....").

113. The first holding of *Gerber*—ARPA was not limited to federal and Indian lands—was based on two points. First, the court found it "unlikely that a Congress sufficiently interested in archaeology to impose substantial criminal penalties for the violation of archaeological regulations... would be so parochial as to confine its interests to archaeological sites and artifacts on federal and Indian lands." *Id.* at 1116; *see also infra* Part III.C.2. The second point was that extending ARPA to private lands would not infringe the liberty of amateur archaeologists because "there is no right to trespass upon another person's land, without his permission, to look for valuable objects buried in the land and take them if you find them." *Gerber*, 999 F.2d at 1115–16.

114. *Gerber*, 999 F.2d at 1115.

115. *Id.* ("Subsection (c) appears to be a catch-all provision designed to back up state and local laws protecting archaeological sites and objects wherever located.").

archaeological-specific laws.¹¹⁶ Had Judge Posner reached this conclusion first, then section 470ee(c) would apply only to the archaeological resources protected by state archaeological resource protection laws, most of which are limited to state, not private, lands.¹¹⁷

The key point for present purposes, however, is that, had *Gerber* adopted this interpretation of section 470ee(c), it would have precluded the extension of ARPA to foreign lands, because a violation of state theft laws criminalizing possession of stolen property could no longer be used to satisfy section 470ee(c). Instead, to establish a violation of section 470ee(c), the government would be required to prove a violation of a state's archaeological protection law, none of which govern archaeological resources of foreign nations.

C. An Uncharted Path Leading to an Absurd Result

Admittedly, the above argument explaining why *Gerber* was wrongly decided acknowledges that ARPA may be extended to private lands through a violation of a state archaeological protection law, despite the clear legislative intent to the contrary. This departure from the clear statutory purpose and legislative history therefore begs the principal question: even assuming that *Gerber* was correctly decided and that ARPA may be extended beyond federal and Indian lands through general state laws, why is section 470ee(c) not capable of being applied to foreign lands?

The answer emerges from the common law doctrine of statutory construction that statutes will not be read to produce an absurd result. The Supreme Court articulated this doctrine over one hundred years ago:

It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.¹¹⁸

116. It is worth speculating whether Judge Posner incorporated general state laws under section 470ee(c) due to the fact that *Gerber's* actions did not violate Indiana's archaeological protection statute at that time. *See id.* at 1117; *Whitacre v. State*, 619 N.E.2d 605, 608 (Ind. Ct. App. 1993) (relying on *Gerber* in its conclusion that the amended Indiana version of the law applied to private property).

117. *See Ades, supra* note 108, at 609–11 & nn.87, 89, 91, 92 (citing numerous state archaeological protection statutes).

118. *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). Federal and state courts over the last century have consistently applied this doctrine. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 429 (1998); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 453–55 (1989); *Watt v. Alaska*, 451 U.S. 259, 266 (1981); *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (collecting numerous Supreme Court cases prior to 1945); *Veronica M. Dougherty, Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, AM. U. L. REV. 127, 129 n.9 (1994) (noting that "the highest courts of all 50 states and the District of Columbia have endorsed this principle"). Further, "this principle enjoys almost universal endorsement, even by those who are the most critical of judicial discretion and most insistent that the words of the statute are the only legitimate basis of interpretation." *Id.* at 128.

This section contends that the application of section 470ee(c) to archaeological resources stolen from foreign lands takes an uncharted legal route and produces an absurd result.

1. The Uncharted Route Through State Law

Until now, this Article has assumed that possession of an archaeological object stolen in violation of a foreign nation's cultural patrimony law constitutes a violation of state law for purposes of section 470ee(c).¹¹⁹ This section challenges that assumption by identifying numerous legal obstacles that the government would have to overcome in order to establish a violation of section 470ee(c). The following exercise revealing the complex and speculative nature of these obstacles is designed to illustrate that section 470ee(c) was never intended to be applied to archaeological resources discovered abroad.

The first legal hurdle is whether it is a substantive violation of a state theft law criminalizing the possession of stolen property¹²⁰ to possess property taken in violation of a foreign country's cultural patrimony law. To this author's knowledge, no state has ever brought such a charge. Under the *McClain-Schultz* doctrine, the knowing possession of property removed in violation of a foreign nation's patrimony law renders it stolen for purposes of the NSPA.¹²¹ However, it is unclear whether the same act of possession would and should be considered a violation of analogous state theft laws.¹²² Even if state courts could construe state theft laws in such a way, they have not yet done so, and thus, the government's present-day reliance on state law to satisfy section 470ee(c) is unsupported in this respect.

Even assuming that it is a violation of state law to possess property removed in violation of a foreign nation's cultural patrimony law, many states have jurisdictional statutes that address when stolen property brought into its jurisdiction is subject to the state's criminal laws.¹²³ Some states have limited these statutes to

119. See *supra* Part III.C.

120. See, e.g., N.Y. PENAL LAW §§ 165.40–65 (McKinney 1999 and Supp. 2007) (“A person is guilty of criminal possession of stolen property... when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof.”); FLA. STAT. ANN. § 812.019 (West 2006) (“Any person who traffics in, or endeavors to traffic in, property that he or she knows or should know was stolen shall be guilty of a felony....”); VA. CODE ANN. § 18.2-108 (2004 & Supp. 2007) (“If any person buy or receive from another person, or aid in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted.”).

121. See *supra* note 3 (discussing federal courts' treatment of the NSPA and its relationship to cultural patrimony laws).

122. In this respect, it is noteworthy that at least two state court decisions relied on *United States v. Turley*, 352 U.S. 407 (1957), which broadly construed the term “stolen” in the National Motor Vehicle Theft Act (the precursor of the NSPA), when interpreting the word “stolen” in their respective state motor vehicle theft laws. See *State v. Stuart*, 442 P.2d 231, 233 (Ore. 1968) (interpreting the word “stolen” in Oregon's state motor vehicle theft law in accordance with and in reliance on *Turley*); *Kruger v. Brainard*, 161 N.W.2d 520, 522 (Neb. 1968) (holding the same with respect to Nebraska statute). These cases support the view that a state court might rely on the *McClain-Schultz* interpretation of the word “stolen” as used in the NSPA when interpreting its analogous state theft law.

123. See CONG. RES. SERV., EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 22 n.82 (2006), <http://www.fas.org/sgp/crs/misc/94-166.pdf> (listing state statutes providing for criminal jurisdiction over property stolen elsewhere that is brought into the territory of the state).

property stolen in another state;¹²⁴ some are open-ended as to the origin of the stolen property,¹²⁵ and some states, as illustrated by the California statute cited by the government in the *Asian Antiquities* investigation, expressly include property stolen in a foreign country.¹²⁶ The statutes in the first category raise the novel issue of whether possession of stolen foreign property can be considered a violation of state law for purposes of section 470ee(c) where the state lacks criminal jurisdiction to prosecute the violation. Furthermore, and although less problematic, the ambiguous statutes in the second category would appear to require a judicial or legislative determination as to whether the state's criminal jurisdiction encompasses these circumstances. Even where there are no statutory jurisdictional obstacles, there may nonetheless be constitutional barriers to states exercising their jurisdiction under these circumstances. While there is also no case law directly on this point, it appears that a state could exercise its jurisdiction as long as it did not conflict with federal law or otherwise run afoul of the Supremacy Clause.¹²⁷

This question of whether the states may constitutionally exercise their jurisdiction in such cases also raises an additional, unresolved issue. Specifically, the issue is whether a pre-emption analysis is required where a state law, operating through a federal statute, might conflict with another federal statute or foreign policy. In other words, would a court be required to determine whether the application of a state theft law, operating through section 470ee(c), conflicted with the NSPA or the federal government's foreign policy with respect to antiquities looted abroad? While it is certainly arguable that incorporation of the state theft law in section 470ee(c) of ARPA would negate a pre-emption analysis, the author is unaware of any analogous authority that compels this conclusion. Moreover, if a pre-emption analysis is applicable, the issue then becomes whether application of a state law criminalizing possession of property stolen in violation of a foreign

124. See, e.g., R.I. GEN. LAWS § 12-3-7 (2002) ("Whenever the property of another which has been taken or obtained in any other state or area within the jurisdiction of the United States....").

125. See ALA. CODE § 15-2-5 (1995 & Supp. 2007) ("When property is stolen elsewhere and brought into the State of Alabama, venue is in any county into which the property is brought."); IDAHO CODE ANN. § 18-202(2) (2004 & Supp. 2007) ("All who commit larceny or robbery out of this state, and bring to, or are found with the property stolen, in this state."); N.D. CENT. CODE § 29-03-01.1(1) (Supp. 2007) ("Commission of a robbery or theft outside this state and bringing the stolen property into this state."); WIS. STAT. ANN. § 939.03(d) (West 2005) ("While out of this state, the person steals and subsequently brings any of the stolen property into this state.").

126. See CAL. PENAL CODE § 497 (West 1999) ("Every person who, in another state or country steals or embezzles the property of another, or receives such property knowing it to have been stolen or embezzled, and brings the same into this state, may be convicted and punished in the same manner as if such larceny, or embezzlement, or receiving, had been committed in this state." (emphasis added)); MISS. CODE ANN. § 99-11-23 (2007) ("Where property is stolen in another state or country and brought into this state, or is stolen in one county in this state and carried into another, the offender may be indicted and tried in any county into or through which the property may have passed, or where the same may be found." (emphasis added)).

127. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 Reporter's Note 5 (1987).

Under United States law, any exercise of jurisdiction to prescribe by a State is subject to applicable Constitutional limitations, notably Article I, Section 10, and to the supremacy of United States treaties and laws... States of the United States generally exercise jurisdiction on the basis of territoriality, including effects within the State.

Id. (citations omitted); B.J. George, Jr., *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 622 (1966) ("In fact, however, statements by the United States Supreme Court which touch on the problem assume that state laws can have extraterritorial application without contravening the federal constitution, and there is very little state authority actually holding statutes with external application to be unconstitutional." (citing *Skiriotes v. Florida*, 313 U.S. 69 (1941); *Strassheim v. Daily*, 221 U.S. 280 (1911))).

nation's patrimony law actually does conflict with the NSPA¹²⁸ or a broader foreign policy,¹²⁹ as evidenced by the government's use of the NSPA and bilateral agreements entered pursuant to the Convention on Cultural Property Implementation Act of 1983.¹³⁰ Perhaps interference with the NSPA and/or the federal government's foreign policy objectives could occur if state penalties were not strict enough to deter looting, state laws were being directed against the wrong types of violations or artifacts, state laws were being directed against looting occurring in the wrong nations, states lacked the ability to effectively coordinate with foreign governments, or enforcement of state law hampered the ability of the federal government to use the NSPA as a predicate for criminal or civil forfeiture actions.¹³¹

While it is possible that a court could ultimately resolve each of the above issues and sub-issues in the government's favor, the critical point here is that no court has yet done so. This lack of judicial support casts doubt on the government's global application of ARPA. Furthermore, the complexity of these preliminary obstacles strongly suggests that section 470ee(c) was never intended to be applied in such a manner.

2. A Drastic and Infinite Expansion

Even if the government could overcome the obstacles discussed in the preceding section, a key point made by Judge Posner in *Gerber* illustrates the principal reason why extending ARPA to the archaeological resources of foreign nations represents an absurd expansion of the Act. In order to undercut the strong legislative history described above in Part IV.A, Judge Posner wrote that the Act's focus

on federal and Indian lands may simply reflect the fact that the vast majority of Indian sites—and virtually all archaeological sites in the Western hemisphere are

128. See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (describing three types of statutory pre-emption: express pre-emption; field pre-emption, where Congress occupies the field leaving no room for state action; and conflict pre-emption, where compliance with federal and state law is an impossibility "or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (internal quotation marks and citations omitted)).

129. A distinct form of pre-emption may occur where a state interferes with the foreign policy objectives of the federal government. See *Zschemig v. Miller*, 389 U.S. 429 (1968). This so-called dormant foreign affairs doctrine has retained vitality in lower federal and state courts. See *Deutsch v. Turner Corp.*, 324 F.3d 692, 712 (9th Cir. 2003) (striking a California reparations statute under *Zschemig* for "intrud[ing] on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims"); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 49–61 (1st Cir. 1999) (striking Massachusetts law under *Zschemig* for imposing mandatory trade sanctions on companies doing business with Burma, *aff'd on other grounds sub. nom.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Tayyari v. N.M. State Univ.*, 495 F. Supp. 1365, 1380 (D.N.M. 1980) (striking motion passed by university that would deny admission to any student whose home government, such as Iran, permits the taking of hostages); *Bethlehem Steel Corp. v. Bd. of Comm'rs*, 80 Cal. Rptr. 800, 803 (Cal. Ct. App. 1969) (striking California's Buy American Act, which required all contracts for public works to be awarded only to those agreeing to use products manufactured in the United States, on the ground that the law "effectively plac[ed] an embargo on foreign products, amount[ing] to a usurpation by this state of the power of the federal government to conduct foreign trade policy"); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 307 (Ill. 1986) (striking Illinois amendment under *Zschemig* for exempting all nations except South Africa from occupation and use tax).

130. See *supra* notes 2, 3; see also *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (holding that California's Holocaust Victim Insurance Relief Act conflicted with and was therefore pre-empted by the President's foreign policy, as evidenced by three executive agreements with Germany, Austria, and France).

131. See *supra* note 3.

Indian—are located either in Indian reservations or on the vast federal public lands of the West....

...It is also unlikely that a Congress sufficiently interested in archaeology to impose substantial criminal penalties for the violation of archaeological regulations...would be so parochial as to confine its interests to archaeological sites and artifacts on federal and Indian lands merely because that is where most of them are.¹³²

While this may be true with respect to Native American archaeological resources, the same rationale is inapplicable with respect to archaeological resources discovered in foreign lands. Indeed, this key rationale in *Gerber* would not make sense if it contemplated the inclusion of archaeological resources located in foreign lands because the vast majority of archaeological sites in the world are not confined to federal and Indian lands located in the western United States.

This passage in *Gerber* illustrates that applying section 470ee(c) to archeological resources stolen from foreign lands would have the drastic effect of transforming a statute designed to protect America's cultural heritage into a statute used to protect archaeological objects looted from various source nations throughout the world.¹³³ While it is one thing to suggest that Congress may not have been so parochial as to exclude state and private lands within the United States from the coverage of section 470ee(c), it is quite another to include the virtually infinite archeological resources located in every nation of the entire world. This Article proposes that the line of absurdity is drawn where the territorial sovereignty of the United States ends. Application of ARPA to archaeological resources discovered outside the territory of the United States produces an unacceptably infinite and absurd expansion of the Act's scope.

D. "Foreign Commerce" and Extraterritorial Application

1. The Foreign Commerce Language of Section 470ee(c)

It is necessary here to briefly refute a potential, textual counterargument based on the "foreign commerce" language of section 470ee(c). Although, to the author's knowledge, it has never been made, the likely argument would be that the "foreign commerce" language contemplates ARPA's application to archaeological resources stolen abroad and then imported into the United States.

The better explanation for the inclusion of this language, however, is that it was designed to prevent a loophole for the international export of archaeological resources removed from the United States in violation of state law. Indeed, one commentator has interpreted this language to prohibit the *export* of American

132. *United States v. Gerber*, 999 F.2d 1112, 1115–16 (7th Cir. 1993).

133. See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986) ("[T]he world divides itself into source nations and market nations. In source nations, the supply of desirable cultural property exceeds the internal demand. Nations like Mexico, Egypt, Greece and India are obvious examples. They are rich in cultural artifacts beyond any conceivable local use. In market nations, the demand exceeds the supply. France, Germany, Japan, the Scandinavian nations, Switzerland and the United States are examples. Demand in the market nation encourages export from source nations. When, as is often (but not always) the case, the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property.") (footnotes omitted).

archaeological resources: “Unlike many other countries, the United States does not claim a comprehensive patrimonial right to bar the export of cultural heritage. Instead, the federal government prohibits the export only of objects illegally removed from federal and Indian lands. Otherwise, archaeological and other cultural heritage may be freely exported.”¹³⁴

In addition, this language represents standard boilerplate language that Congress uses to exercise its powers under the Commerce Clause. The Supreme Court has specifically dealt with the use of broad jurisdictional language in the context of the presumption against applying federal statutes extraterritorially. In *EEOC v. Arabian American Oil Co.*, the Court stated, “we have repeatedly held that even statutes that contain broad language in their definitions of ‘commerce’ that expressly refer to ‘foreign commerce’ do not apply abroad.”¹³⁵ As discussed below, although the presumption against extraterritoriality is arguably inapplicable with respect to application of section 470ee(c) to foreign lands, the principle remains the same. Mere boilerplate language is insufficient to overcome the contrary expressions of legislative intent or the absurdity of ARPA’s global expansion described above.

2. The Presumption against Extraterritoriality

The presumption against applying federal statutes extraterritorially¹³⁶ applies when a statute regulates conduct outside the United States.¹³⁷ The likely argument here is that the presumption does not apply to the extension of section 470ee(c) to foreign lands because the state theft laws used to satisfy section 470ee(c) criminalize the receipt or possession of stolen property, acts that occur in the United States, and not the actual theft or looting occurring abroad.

The problem with this argument is that this distinction belies the reality of how the government employs section 470ee(c). The strategy behind the government’s extension of ARPA here is one of deterrence. By criminalizing the receipt or possession of archaeological resources stolen from foreign lands, the government ultimately seeks to deter looting abroad. Drawing a territorial distinction between

134. Nafziger, *supra* note 1, at 587 & n.28 (citing 16 U.S.C. § 470ee(c)).

135. 499 U.S. 244, 251 (1991). The Court cited *New York Central Railroad Co. v. Chisholm*, which dealt with the Federal Employer’s Liability Act, for the proposition that “[d]espite this broad jurisdictional language [referring to foreign commerce], we found that the Act contain[ed] no words which definitely disclose an intention to give it extraterritorial effect.” *Id.* (internal quotation marks omitted) (citing N.Y. Cent. R.R. Co. v. Chisholm, 268 U.S. 29, 31 (1925)). The Court also cited *McCulloch v. Sociedad Nacional de Marineros de Honduras* for the proposition that “[e]ven though the NLRA contained broad language that referred by its terms to foreign commerce...this Court refused to find a congressional intent to apply the statute abroad because there was not any specific language in the Act reflecting congressional intent to do so.” *Id.* at 251–52 (internal quotation marks omitted) (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963)). The Court distinguished the case of *Steele v. Bulova Watch Co.*, which held that the Lanham Act applied extraterritorially “[s]ince the Act expressly stated that it applied to the [full] extent of Congress’ power over commerce....By contrast, Title VII’s more limited, boilerplate ‘commerce’ language does not support such an expansive construction of congressional intent.” *Id.* at 252 (citing *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286 (1952)).

136. See *Arabian Am. Oil Co.*, 499 U.S. at 248 (“It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” (citation omitted) (internal quotation marks omitted)).

137. See *Env’tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993) (noting that “the presumption against extraterritoriality is not applicable when the conduct regulated by the government occurs within the United States. By definition, an extraterritorial application of a statute involves the regulation of conduct beyond U.S. borders.”).

possession and theft is therefore at odds with the government's deterrence strategy, which tends to equate the possession with the theft. This strategy is consistent with the Model Penal Code's consolidated theft statute, which treats

receiving stolen property as merely a subset of the general crime of theft. In their commentary to Model Penal Code § 223.6, the drafters cataloged the different formulations of receiving stolen property enacted by various legislatures, and they concluded that "the essential idea" behind all of these formulations was "acquisition of control, whether in the sense of physical dominion or of legal power to dispose[.]" Because of this, the drafters did not view receiving stolen property as distinct from the general definition of theft: "Analytically, the receiver [of stolen property] does precisely what is forbidden by [the general definition of theft contained in] § 223.2(1)—namely, he exercises unlawful control over property of another with a purpose to deprive."¹³⁸

If receiving stolen property under state law is not analytically distinct from committing the theft itself, and if the government is strategically employing section 470ee(c) in order to deter looting abroad, it makes sense to conclude that the government is *effectively* regulating conduct outside the United States, thus triggering the presumption against extraterritoriality.¹³⁹

E. A Policy Argument Against ARPA's Global Expansion: Preventing the Circumvention of the NSPA's Scienter Requirement

An initial policy argument against extending ARPA to encompass the possession or receipt of archaeological resources stolen from foreign nations is that this conduct is already prohibited by federal law. Indeed, over the last thirty years, federal courts have interpreted the NSPA to apply to the receipt and possession of

138. *Saathoff v. State*, 991 P.2d 1280, 1285 (Alaska Ct. App. 1999) (citing MODEL PENAL CODE AND COMMENTARIES § 223.6 cmts. 1–2 (1980)) (footnotes omitted), *aff'd* 29 P.3d 236 (Alaska 2001); *see also* George, *supra* note 127, at 622–23 (noting the "legal fiction [that] common-law larceny...is deemed a continuing offense...[that] serves primarily to create an alternative penalty for possessing stolen property"). It is significant that "[t]he Model Penal Code was the progenitor of all the modern theft statutes (like Oregon's and Alaska's) that create a unified crime of theft, eliminating the common-law distinctions among larceny and larceny-type offenses." *Saathoff*, 991 P.2d at 1284 (citing W. LAFAYETTE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 8.8(d) (1986)).

139. It is important to note that the central statutory arguments of this Article against ARPA's expansion to foreign lands do not depend on acceptance of this point, as these arguments all operate with independent force. Nonetheless, if one does accept the point, the preceding statutory arguments would then be cast under the framework of the presumption, rendering it irrebuttable.

It is also interesting to note that this same point regarding extraterritoriality could be made with respect to the government's application of the NSPA to cultural property stolen abroad. The Fifth Circuit in *McClain* only cursorily addresses this point:

Sections 2314 and 2315 refer not only to interstate commerce, but to foreign commerce as well.

It is no surprise, then, that the NSPA has been applied to thefts in foreign countries and subsequent transportations into the United States. The Republic of Mexico, when stolen property has moved across the Mexican border, is in a similar position to any state of the United States in which a theft occurs and the property is moved across state boundaries.

United States v. McClain, 545 F.2d 988, 994 (5th Cir. 1977) (citations omitted). The court relied on *United States v. Rabin*, 316 F.2d 564 (7th Cir. 1963), *United States v. Greco*, 298 F.2d 247 (2d Cir. 1962), and *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974), for this proposition, none of which appear to consider the possibility that such an application of the NSPA might trigger the presumption against extraterritoriality.

archaeological resources stolen abroad.¹⁴⁰ The absence of any practical necessity to use ARPA in this way counsels against its unintended and absurd expansion.

In this respect, it is worth asking why federal prosecutors in the *Etruscan Vase*, *Barchitta*, and *Asian Antiquities* investigations used ARPA in the first place.¹⁴¹ As is true under the NSPA, in a criminal prosecution or civil forfeiture action under ARPA, the government would still need to prove, in order to render the archaeological resource stolen, that a foreign nation's cultural patrimony law clearly vested ownership rights in the foreign nation, and that the objects in question were removed from that nation's territory at a time when the patrimony law was in effect.¹⁴² In addition, if a defendant—unlike in *Etruscan Vase* and *Barchitta*—actually objected to the prosecution or forfeiture action, the government would potentially need to overcome the legal hurdles described in Part IV.C.1 of this Article, which should make the NSPA a more attractive tool for federal prosecutors.

The most likely explanation, therefore, lies in a subtle, yet critical, distinction between the standard of proof required under ARPA and the NSPA. Actions brought under the NSPA require the defendant to know that the property is stolen.¹⁴³ Actions brought pursuant to ARPA section 470ee(c), however, only require that the defendant knowingly receive archaeological resources that have been obtained or removed in violation of state law; unlike the NSPA, section 470ee(c) does not require the government to prove that the defendant knows that the property is stolen.¹⁴⁴

140. See *supra* note 3.

141. See *supra* Part III.C.

142. See, e.g., *Gov't of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989) (holding that Peru could not prove the artifacts originated from within its territory at a time when a valid patrimony law was in effect).

143. 18 U.S.C. § 2314 (2000) ("Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud...." (emphasis added)); *Id.* § 2315 ("Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of \$500 or more, which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken...." (emphasis added)); see also *United States v. Schultz*, 333 F.3d 393, 411–12 (2d Cir. 2003) ("The only knowledge requirement in the NSPA is knowledge that the goods were 'stolen, unlawfully converted, or taken.'... The jury did not have to find that Schultz knew what he was doing was illegal. As long as the jury found beyond a reasonable doubt that Schultz knew the antiquities were 'stolen', the jury, following the law, would have been required to convict Schultz even if it believed he had misunderstood American law."); *Hollinshead*, 495 F.2d at 1156 ("It follows that it was not necessary for the government to prove that appellants knew the law of the place of the theft. Appellants' knowledge of Guatemalan law is relevant only to the extent that it bears upon the issue of their knowledge that the stele was stolen.").

144. 16 U.S.C. § 470ee(d) (2000) ("Any person who knowingly violates...any prohibition contained in subsection (a), (b), or (c) of this section" is subject to criminal penalties). Recall the language of section 470ee(c), which provides that "[n]o person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law." *Id.* § 470ee(c). This subsection requires the defendant to knowingly perform the prohibited act; it does not require that the defendant have knowledge that the archaeological resource involved is obtained in violation of state law. This distinction reflects the fact that, unlike larceny and other specific intent crimes,

[a] violation of ARPA is a general intent crime. This means that to be found guilty of an ARPA offense, offenders must have known what they were doing, e.g., digging or selling, but they did not need to know that they were on federal or Indian lands. A general intent offense only requires the government to show that the persons were acting of their free will, but not that they

Significantly, employing section 470ee(c) in this way circumvents the scienter requirement of the NSPA and neglects the critical policy underlying this requirement: the “protect[ion] of innocent art dealers who unwittingly receive stolen goods.”¹⁴⁵ Preventing the government from circumventing the scienter requirement of the NSPA, therefore, is a strong policy argument against extending ARPA to foreign lands.¹⁴⁶

V. STATUTORY RESOLUTION

The best way to ensure that ARPA is limited to archaeological resources discovered within the United States is to simply amend the Act. The time is long overdue for Congress to clarify the scope of section 470ee(c),¹⁴⁷ a section that Judge Posner acknowledged was probably nothing more than a mere “afterthought.”¹⁴⁸

Congress first needs to determine what state law violations may satisfy section 470ee(c). Before making this decision, and although *Gerber* was silent on this point, Congress should carefully consider the effects of any amendment on private property rights and the attendant constitutional implications.¹⁴⁹ It can either codify the decision in *Gerber*, thereby extending the Act wholesale to private lands, or it can partially overrule *Gerber*, as this Article contends, by clarifying that the only state law violations capable of satisfying section 470ee(c) are violations of state archaeological protection laws.

More importantly for present purposes, however, Congress should clearly and unequivocally declare that ARPA does not apply to archaeological resources discovered outside of the United States.¹⁵⁰ Whether it chooses to clarify this in section 470ee(c) or in a separate provision is a matter of legislative discretion.

knew in their minds that it was wrong to proceed.

HUTT ET AL., *supra* note 17, at 43 (footnote omitted); *see also* Iraola, *supra* note 44, at 231–36 (summarizing the case law developing mens rea requirements under ARPA).

145. *Schultz*, 333 F.3d at 410 (noting that the scienter requirement of the NSPA would “protect innocent art dealers who unwittingly receive stolen goods, while our appropriately broad reading of the NSPA will protect the property of sovereign nations”).

146. *See* Bator, *supra* note 11, at 353 (“Criminal liability... is appropriate in clear and egregious cases (such as *Hollinshead*), where a known national monument is dismembered and smuggled out of a country, or where there is a specific showing that antiquities were unlawfully appropriated and that the defendant knew that this had occurred.”).

147. *See* Ades, *supra* note 108, at 604 (arguing in 1995 that “ARPA should be amended or its regulations should be revised to provide more specific language that would clarify to which lands ARPA is applicable and under what incorporated state law a violator can be prosecuted”).

148. *United States v. Gerber*, 999 F.2d 1112, 1115 (7th Cir. 1993).

149. The issue here is whether application of ARPA to private lands would constitute a taking without just compensation in violation of the Fifth Amendment. *See* Patty Gerstenblith, *Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings Doctrine After Lucas*, 13 ST. THOMAS L. REV. 65 (2000); Sherry Hutt & C. Timothy McKeown, *Control of Cultural Property as Human Rights Law*, 31 ARIZ. ST. L.J. 363, 374–78 (1999); Nafziger, *supra* note 1, at 601–04; Norbert Lee Bartochowski, Comment, *Takings, Archaeological Sites, and Artifacts*, 8 ALB. L. ENVTL. OUTLOOK J. 134 (2002). Under ARPA, the archaeological resources of private lands would be subject to forfeiture to the United States, not the private landowner. *See* 16 U.S.C. § 470gg(b); *cf.* 25 § U.S.C. 3001(13) (2000) (subjecting the repatriation of Native American sacred and funerary objects and remains to the Takings Clause of the Fifth Amendment); Ralph W. Johnson & Sharon I. Haensly, *Fifth Amendment Takings Implications of the 1990 Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 151 (1992).

150. Of course, should Congress fail to act, the arguments presented in this Article will be available for use by defense counsel and the federal courts should prosecutors continue to use section 470ee(c) of ARPA in this manner.

VI. CONCLUSION

It is important to reiterate that limiting the scope of ARPA to the archaeological resources of the United States is not intended to hamper the federal government's ability to assist foreign nations in deterring the looting of their cultural patrimony. While assisting foreign nations in deterring the destruction of their cultural property is a worthy objective, the law must remain predictable and respectable if it is to effectively achieve cultural policy objectives in the long term. Indeed, limiting ARPA in this way may actually further such objectives by ensuring that cultural property laws are not subject to improper manipulation.

For example, and as discussed above, ARPA's global expansion may subject wholly innocent American art collectors to criminal liability, thus chilling the licit antiquities trade. Many would argue that this chilling effect could reduce transparency and fuel the illicit trade.¹⁵¹ Therefore, not only would the expansion of ARPA constitute a legally improper construction of the Act, but it may also produce undesirable consequences as a matter of cultural property policy.

Finally, as mentioned at the outset, the government's global application of ARPA reaffirms that efforts to protect the cultural property of foreign nations must not be undertaken at the expense of our own valuable cultural heritage.¹⁵² In this respect, it is necessary to reiterate that ARPA was designed to protect this nation's archaeological resources.¹⁵³ It follows that ARPA's drastic, global expansion to foreign lands may denigrate the significance of this country's own cultural heritage by subordinating it to the cultural heritage of foreign nations.

151. See *supra* note 11.

152. See Gerstenblith, *supra* note 13.

153. See *supra* Part III.A.