

Restituting Nazi-Looted Art: Domestic, Legislative, and Binding Intervention to Balance the Interests of Victims and Museums

ABSTRACT

The Nazis engaged in widespread art looting from Holocaust victims, either taking the artwork outright or using legal formalities to effect a transfer of title under duress. Years later, US museums acquired some of these pieces on a good-faith basis. Now, however, they face lawsuits by the heirs of Holocaust victims, who seek to have the museums return the artwork. Though good title cannot pass to the owner of stolen property under US law, unfavorable statutes of limitations, high financial hurdles, or discovery problems, among other obstacles, bar many of these claimants from seeking recovery. Though some museums have amicably settled with claimants, museums' otherwise resistant responses are not surprising, considering the "cultural internationalist" attitude they adopt toward restitution in general.

US federal action to resolve the issue of Nazi-art restitution has been aspirational rather than practical, and courts are not ideally suited to handle the difficult policy implications present on a one-off basis. Additionally, museums have not been faithful to their self-imposed ethical guidelines, which promote full out-of-court cooperation with claimants seeking restitution for Nazi-looted art. Therefore, this Note proposes that Congress step in to create a binding, uniform, domestic body to hear and resolve Nazi-art restitution claims brought against museums. Such a forum would eliminate many of the initial obstacles claimants face, and with its narrowly tailored application it would prevent museums from becoming more vulnerable to restitution claims in other contexts. Finally, with a sunset provision followed by a presumption against restitution, such legislation would provide museums a respite from facing these claims eternally.

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In the years leading up to and during World War II, the Nazis engaged in widespread looting of artwork from Holocaust victims, either keeping the pieces for private collections or selling them “as a sort of war currency.”¹ While the word “looting” may conjure up images of chaotic thievery (and there was certainly some of that), in many cases the theft was much more subtle—accomplished through a signed transfer under duress, for example, or a low price in exchange for safe passage out of the country.² This was not simply a method of financial gain for the Nazis but rather a part of their systematic

1. Benjamin E. Pollock, Comment, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 196 (2006) (quoting David Wissbroecker, *Six Klimts, a Picasso, & a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DEPAUL-LCA J. ART & ENT. L. & POL’Y 39, 40–41 (2004)).

2. See, e.g., *Bakalar v. Vavra*, 619 F.3d 136, 149 (2d Cir. 2010); *Museum of Fine Arts, Bos. v. Seger-Thomschitz*, 623 F.3d 1, 2–5 (1st Cir. 2010); *Von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016 (9th Cir. 2009), *amended by* 592 F.3d 954, 959 (9th Cir. 2010).

promotion of Aryanization—to destroy minority races and steal their dignified possessions.³

During and after the war, many of these stolen pieces disappeared into unknown hands and later ended up in US museums that (often) acquired the artwork on a good-faith basis.⁴ Beginning in the late 1990s, thanks to advancements in technology and government declassification of documents after the Cold War, it became easier for heirs of Holocaust looting victims to research the potential ownership of their families' former artwork, and heirs began seeking restitution from the museums that now house these pieces.⁵ Sometimes museums willingly comply with heirs' demands, particularly if there is enough evidence to substantially support a cause of action. But in the event the museum does not acquiesce, the claimants are often unsuccessful in recovering their family's art, due to factors such as statutes of limitations, the foreign affairs doctrine, or financial obstacles of discovery that they cannot surmount.⁶

Another complicating factor is that the parties involved in this litigation—both the heirs of the prior owner and the museum as a good-faith purchaser—are oftentimes “two innocents.”⁷ Though in the United States good title can never pass to the possessor of stolen property, it is also unjust to hold a good-faith party financially liable for a wrong committed by a third party over sixty years ago.

Courts have demonstrated that they are not well equipped to balance the difficult and politicized interests at stake in these cases, and there is an absence of clear precedent on the issue. Also, museums have not fully followed their ethical guidelines and have often been reluctant to relinquish the artwork at issue, in the same way that historically they have been sometimes reluctant to relinquish other forms of cultural property. Thus, it is time for the legislature to step in. Part I of this Note discusses the background of Nazi looting,

3. Pollock, *supra* note 1, at 196.

4. Rebecca Keim, Note, *Filling the Gap between Morality and Jurisprudence: The Use of Binding Arbitration to Resolve Claims of Restitution Regarding Nazi-Stolen Art*, 3 PEPP. DISP. RESOL. L.J. 295, 299–306 (2003).

5. *See id.*

6. *See, e.g., Von Saher*, 592 F.3d at 957.

7. Ashton Hawkins, *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49, 50–52 (1995). Hawkins explains:

Indeed, the tort of conversion is unique in that it permits a plaintiff to recover property or money damages from a defendant who is by definition innocent of any wrongdoing or of inflicting harm on the plaintiff, regardless of the defendant's ability to recover against the actual wrongdoer. Despite this unusual situation, courts have, for statute of limitations purposes, treated innocent purchasers no less harshly—and often more harshly—than “guilty” tortfeasors.

Id. at 50.

the steps the United States has taken in the past to address the issue, and how other areas of Nazi restitution have been addressed. Part II discusses the difficulties that claimants may face, including the running of the statute of limitations, the limits of museums' ethical guidelines, and how the general attitude museums espouse toward restitution informs their behavior on this issue. Part III proposes a solution that uses domestic legislation to create a binding mechanism, such as a US State Commission, to resolve these claims and alleviate some of the financial and procedural burdens rightful claimants face. Such a commission would also protect museums' interests by requiring a threshold evidentiary level for a claim combined with a sunset period for the legislation.

I. BACKGROUND

At the end of World War II, when the Allied forces began finding hordes of stolen artwork in Nazi strongholds, the United States, along with the other victors, sought to return many of the pieces to their country of origin, as opposed to their former individual owners.⁸ For example, the United States created the Reparations, Deliveries, and Restitution Division (RDR) to restore artwork that the Nazis had taken out of Austria.⁹ As part of its external restitution scheme, the United States expected countries receiving assets the United States had located and returned to then create an internal administrative regime to return the property to the rightful individual owners.¹⁰ Though the external restitution scheme was noble in theory, in practice it contained many shortcomings that impeded its usefulness: strict deadlines, political considerations, problems at central collecting points, and biased foreign administrators.¹¹ Despite such shortcomings, the United States actively participated in this repatriation scheme until 1948, when it stopped accepting external

8. *Von Saher*, 592 F.3d at 962–63; *see also* *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 240–41 (S.D.N.Y. 2009) (noting that, in addition to the US Reparations, Deliveries, and Restitution Division, Austria had, for example, a Federal Office for the Preservation of Historical Monuments and a Restitution Commission).

9. *Portrait of Wally*, 663 F. Supp. 2d at 240.

10. PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS IN THE UNITED STATES, FINDINGS: IMPLEMENTATION OF RESTITUTION POLICY IN EUROPE, *in* PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT (2000), *available at* http://pcha.ushmm.org/PlunderRestitution.html/html/Findings_RestitutionEur.html. The United States, however, did not monitor these receiving countries for compliance. *See id.*

11. *See id.*

restitution claims.¹² Subsequently, the issue of dispossession went unaddressed for close to fifty years.¹³

But in the late 1990s, as government and museum archives became digitized, individuals, as opposed to sovereign governments, started publicly seeking recovery of their ancestors' artwork, much of which had eventually landed in US museums.¹⁴ In 1991 members of the art trade and insurance industry created the Art Loss Register (ALR), basing it on the International Foundation for Art Research's "Stolen Art Alert" publications, and it became a major factor in making the requisite information accessible to the public.¹⁵ The ALR expanded its operation and began tracking works that were looted and dispersed between 1933 and 1945 in order to help Holocaust survivors and their heirs identify and recover pieces they had previously owned.¹⁶

With the assistance of a research tool like the ALR, once Holocaust survivors and heirs find the artwork they formerly owned, they then often initiate negotiations with the possessor in an attempt to regain legal title to the work.¹⁷ Most often claimants seek restitution from public institutions such as museums or sovereign governments, as opposed to individual people.¹⁸ When faced with a legitimate claim, many museums will return the claimed artwork if, after researching the piece's provenance,¹⁹ they find that it was in fact taken illegally.²⁰ This allows both parties to avoid the time and expense of a courtroom battle.²¹ But the type of evidence needed to fully substantiate the record of looting is rarely present, which can lead to contentious legal disputes.²²

12. *Von Saher*, 592 F.3d at 963.

13. *See infra* Part I.A.

14. *See* Erin L. Thompson, *Cultural Losses and Cultural Gains: Ethical Dilemmas in WWII-Looted Art Repatriation Claims against Public Institutions*, 33 HASTINGS COMM. & ENT. L.J. 407, 409–10 (2011).

15. *Our History*, THE ART LOSS REGISTER, <http://www.artloss.com/about-us/our-history> (last visited Oct. 1, 2012).

16. Sarah Jackson, *Speech for Sotheby's Symposium: The Art Loss Register Ltd, A Database for Nazi Looted Art Claims* (Jan. 30, 2008).

17. *See, e.g., Von Saher*, 592 F.3d at 954.

18. Thompson, *supra* note 14, at 410–11.

19. The International Council of Museums defines "provenance" as "the full history and ownership of an item from the time of its discovery or creation to the present day, from which authenticity and ownership is determined." *Code of Ethics*, INT'L COUNCIL OF MUSEUMS, <http://icom.museum/professional-standards/code-of-ethics/glossary> (last visited Oct. 29, 2012).

20. *See* Thompson, *supra* note 14, at 411–13, 418, 424.

21. *Id.*

22. *See, e.g., Museum of Fine Arts, Bos. v. Seger-Thomschitz*, 623 F.3d 1, 1–15 (1st Cir. 2010).

Each party in a restitution claim can assert a compelling reason for why it should acquire legal ownership of the artwork.²³ On one hand, returning looted art restores ownership and brings emotional closure to the heirs of Holocaust victims for a past grievance.²⁴ On the other hand, when a museum displays a piece of artwork to which they believe they are legally entitled, that display provides a broader, public, educational good—a good museums are designed to promote.²⁵

The key to the museum's claim is that the museum is often not at fault.²⁶ First, pursuant to the museum's fiduciary obligations to the public, it can relieve itself of ownership of an artifact, known as "deaccessioning," only in rare circumstances, when it has considered both the legality of the item and loss to the public.²⁷ Second, the museum usually has no idea that it acquired the art illegally, for the Nazis often "camouflag[ed] theft with a veneer of legality."²⁸ The Nazis were fond of "legalistic formalities," and they often left a paper

23. See generally Michael J. Reppas II, *Empty "International" Museums' Trophy Cases of Their Looted Treasures and Return Stolen Property to the Countries of Origin and the Rightful Heirs of Those Wrongfully Dispossessed*, 36 DENV. J. INT'L L. & POL'Y 93 (2007) (highlighting the arguments made by both claimants and museums).

24. See Thompson, *supra* note 14, at 412.

25. See, e.g., *About MoMA*, MUSEUM OF MODERN ART, <http://www.moma.org/about/index> (last visited Oct. 28, 2012). The Museum of Modern Art offers the following mission statement:

Founded in 1929 as an educational institution, The Museum of Modern Art is dedicated to being the foremost museum of modern art in the world. . . . The Museum of Modern Art manifests this commitment by . . . presenting exhibitions and educational programs of unparalleled significance; by sustaining a library, archives, and conservation laboratory that are recognized as international centers of research; and by supporting scholarship and publications of preeminent intellectual merit . . . while being accessible to a public that ranges from scholars to young children.

Id.; see also Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT'L & COMP. L. 409, 411–12 (2003).

26. See Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L.J. 955, 965 (2001) ("When stolen art finds its way into the hands of a good-faith buyer, one who has paid substantial value for the art, that buyer is the innocent victim of a chain of possession that began and remained wrongful.").

27. See Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37, 40–41 (2009). Kreder explains:

Fiduciary obligations arise under state statutory law, common law, or both and, at least in a theoretical sense, these obligations also arise as a consequence of seeking not-for-profit corporate status and tax treatment. Further, ethics codes are voluntarily accepted by museums when they seek membership in various organizations, such as the Association of Art Museum Directors (AAMD), the American Association of Museums (AAM), or the International Council of Museums (ICOM). Museums also self-regulate by adopting their own bylaws.

Id.

28. *Bakalar v. Vavra*, 619 F.3d 136, 152 n.2 (2d Cir. 2010).

trail documenting the “legal” transfer of ownership from a Jewish owner of art to the state, though executed under duress, in order to “legitimize” the operation.²⁹ For example, the Nazis might have forced an imprisoned victim to sign a power of attorney granting control of his assets to his spouse, allowing the Nazis to then compel that spouse to transfer the assets to pay statutory penalties or taxes.³⁰ As one opinion quoted, “the signature of the person despoiled [was] always obtained, even if the person in question ha[d] to be sent to Dachau in order to break down his resistance.”³¹ These pieces were often sold into the art market, and the various collectors who purchased them were the parties who later sold or donated them to the museums, presenting a seemingly valid chain of title with no ostensible connection to Nazi possession.

In addition to the innocence of both parties, unclear precedent and incomplete discovery complicate restitution claims. For example, oftentimes museums will return the artwork and choose not to enter into litigation unless they believe that they acquired the artwork in question appropriately from a party with valid title.³² This means a museum’s definition of “looting,” or “acquired appropriately” is critical, but these terms can be ambiguous and discovery is not often complete enough to indicate whether or not the artwork fits the museum’s definition.³³ Consequently, some claimants have suggested, unsuccessfully, that courts should consider all pieces sold by Jews in the post-1933 “depressed art market” as sales under duress, due to the general economic and political climate.³⁴ This argument is not without merit; as part of its external restitution scheme, the United States expected countries implementing internal restitution schemes to operate under a presumption of duress, meaning that “any transfer of property from persecutees from September 15, 1935 to May 8, 1945

29. *Id.*

30. *See id.* at 137–38.

31. *Id.* at 152 n.2 (citation omitted).

32. *See, e.g.,* Lee Rosenbaum, *About-Face: MoMA and Guggenheim Settle with Heirs of Nazi-Era Owners of Major Picassos*, ARTSJOURNAL BLOG (Feb 2, 2009, 10:24 PM), http://www.artsjournal.com/culturegrll/2009/02/moma_and_guggenheim_settle_wit.html.

Rosenbaum explains:

The case began more than a year ago, when the museums teamed up to try to preempt an expected lawsuit from the heirs [T]he museums had asserted in a joint statement that “evidence from our extensive research makes clear the museums’ ownership of these works and also makes clear that Mr. [Julius] Schoeps [one of the heirs] has no basis for his claim.”

Id.

33. *See* Rachel Dubin, *Museums and Self-Regulation: Assessing the Impact of Newly Promulgated Guidelines on the Litigation of Cultural Property*, 18 U. MIAMI BUS. L. REV. 101, 138 (2010).

34. Kreder, *supra* note 27, at 61–62.

was done under duress.”³⁵ As one commentator noted, “the declaratory actions are inviting US judges to draw the line between forced and voluntary sales.”³⁶ Foreseeing such problems, the United States has attempted to address the issue of restitution through varying forms of federal action, including domestic legislation and foreign agreements. Such action, however, has fallen short of meaningfully resolving the issue.

A. Federal Action

In the late 1990s, public interest in resolving the restitution problems of Nazi-looted artwork resurfaced, so the US federal government took part in several separate actions to address this concern.³⁷ First, the government enacted the Holocaust Victims Redress Act, which established a congressional mandate that “all governments should undertake good faith efforts to facilitate the return of Nazi-confiscated property.”³⁸ The Act gave the president the authority to commit up to \$5 million for research and provenance work to help resolve the issue of ownership.³⁹

Second, Congress enacted the US Holocaust Assets Commission Act of 1998, which created the Presidential Advisory Commission on Holocaust Assets (Advisory Commission).⁴⁰ The Advisory Commission created an extensive report covering the history of Nazi looting as well as then-current problems and policy considerations in addressing the issue.⁴¹ The Advisory Commission’s

35. PRESIDENTIAL ADVISORY COMM’N ON HOLOCAUST ASSETS IN THE UNITED STATES, *supra* note 10.

36. Kreder, *supra* note 27, at 62.

37. *See, e.g.*, *Museum of Fine Arts, Bos. v. Seger-Thomschitz*, 623 F.3d 1, 12 (1st Cir. 2010).

38. *Id.* at 12–13 (internal quotation marks omitted); *see* Holocaust Victims Redress Act, Pub. L. No. 105–158, § 202, 112 Stat. 15 (1998). In a case against an individual (actress Elizabeth Taylor, no less), the claimant argued that the Act created an implied federal right of action for Holocaust victims and their heirs. *See Orkin v. Taylor*, 487 F.3d 734, 736 (9th Cir. 2007). Using a four-factor test, the court ruled that no such right existed, focusing particularly on the lack of congressional intent to support such a reading of the statute, as well as the fact that providing a remedy for the recovery of stolen art is a traditional state power. *Id.* at 738–40. The court also noted that the purpose of the Act was to help claimants gain access to information, not to provide them with another means of initiating litigation. *Id.* The claimants stated that this “taunt[ed] Holocaust victims by providing them with information to help them locate Nazi-confiscated assets, while denying them a judicial remedy to reclaim their property if they can find it.” Kreder, *supra* note 27, at 61 (citation omitted).

39. Holocaust Victims Redress Act § 103(b).

40. *See* 22 U.S.C. § 1621 (2006).

41. PRESIDENTIAL ADVISORY COMM’N ON HOLOCAUST ASSETS IN THE UNITED STATES, PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY

final report suggested taking several actions, which included enacting legislation to facilitate restitution and creating a foundation to support research in the area.⁴² The Advisory Commission emphasized that “an organized Federal role in implementing these initiatives must be maintained, although it is equally of the belief that the Federal government should not, and cannot, accomplish these goals by itself.”⁴³ Currently, the federal government has not implemented any of the Advisory Commission’s recommendations regarding concrete action such as passing “legislation that removes impediments to the identification and restitution of Holocaust victims’ assets.”⁴⁴

Finally, the government signed three executive agreements supporting peaceful resolution of conflicts over Nazi-confiscated art.⁴⁵ The first of these agreements, the Washington Conference Principles on Nazi-Confiscated Art, signed by representatives from various countries and NGOs, stated eleven vague, non-binding guidelines that interested parties should use in reaching a “just and fair solution” when artwork is determined to have been confiscated by the Nazis.⁴⁶ The second executive agreement, the Vilnius Forum Declaration, expressed the same sentiment outlined in the Washington Conference Principles. It committed to “reasonable effort[s] to achieve the restitution of cultural assets” with no helpful guidelines and no binding enforcement mechanism.⁴⁷ The final and most recent

COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT (2000), *available at* http://pcha.ushmm.org/PlunderRestitution.html/html/Home_Contents.html.

42. PRESIDENTIAL ADVISORY COMM’N ON HOLOCAUST ASSETS IN THE UNITED STATES, RECOMMENDATIONS, *in* PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT (2000), *available at* <http://pcha.ushmm.org/PlunderRestitution.html/html/Recommendations.html>.

43. Transmittal letter from Edgar M. Bronfman, Chair, Presidential Advisory Comm’n on Holocaust Assets in the United States, to the President of the United States (Dec. 15, 2000) [hereinafter Bronfman Transmittal Letter], *available at* <http://pcha.ushmm.org/PlunderRestitution.html/html/TransmittalLetter.html>.

44. PRESIDENTIAL ADVISORY COMM’N ON HOLOCAUST ASSETS IN THE UNITED STATES, *supra* note 42.

45. Executive agreements indicate support for an international declaration, but they are not approved by Congress. *See* Museum of Fine Arts, Bos. v. Seger-Thomschitz, 623 F.3d 1, 12 (1st Cir. 2010).

46. Conference Report, U.S. Dep’t of State, Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), *available at* <http://www.state.gov/p/eur/rt/hlcst/122038.htm>. Such vague guidelines include: “Efforts should be made to establish a central registry of [artworks’ ownership history],” and “Nations are encouraged to develop national processes to implement these principles.” *Id.*

47. *Vilnius Forum Declaration*, LOOTEDART.COM: THE CENT. REGISTRY OF INFO. ON LOOTED CULTURAL PROP. 1933–1945 (Oct. 5, 2000), <http://www.lootedart.com/MFV7EE39608>. The Vilnius Forum was designed to help the signatory nations implement the policies expressed in the Washington Conference Principles. *See* Lauren F. Redman, *A Wakeup Call for a Uniform Statute of Limitations in Art Restitution Cases*, 15 UCLA ENT. L. REV. 203, 222 (2008).

executive agreement, the Terezin Declaration (signed in 2009), “urged” countries to “facilitate just and fair solutions” when dealing with Nazi-confiscated art and to ensure that claims are decided on their facts and merits (as opposed to procedural technicalities).⁴⁸ Therefore, although there are five federal actions that address Nazi-confiscated art, none sets forth detailed and binding rules regarding how to resolve conflicts over ownership of such art. Thus, this job is left to the courts.

B. Restitution through Claims of Replevin and Conversion

Aggrieved Holocaust heirs can bring two types of claims in US courts when seeking to recover stolen art. The first is a claim for replevin, defined as “a common law action by which the original owner of goods may recover the goods from someone who has wrongfully taken or retained possession.”⁴⁹ In US federal jurisprudence, good title cannot pass to the purchaser of stolen property, even if the purchase was made in good faith (i.e., the purchaser did not know the item was stolen).⁵⁰ Initially, some defendants in Holocaust-victim replevin lawsuits argued that the political-question doctrine judicially barred the issue.⁵¹ The US Court of Appeals for the Ninth Circuit has dismissed that theory: “[C]laims stemming from World War II atrocities tinge this case with political overtones, but the underlying property issues are not ‘political questions’ that are constitutionally committed to the political branches.”⁵² Even though courts are amenable to hearing these cases, a rightful claimant may still lose on a replevin claim through myriad avenues, including when the statute of limitations has run.⁵³

48. Conference Report, U.S. Dep’t of State, Prague Holocaust Era Assets Conference: Terezin Declaration (June 30, 2009), available at <http://www.state.gov/p/eur/rls/or/126162.htm> (noting that claims should be decided on the substantive merits of the facts, as opposed to reaching an outcome based on “legal technicalities” like statutes of limitations).

49. Kelly Diane Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 549, 578 (1999) (citing Brian Bengs, Note, *Dead on Arrival? A Comparison of the Unidroit Convention on Stolen or Illegally Imported Cultural Objects and U.S. Property Law*, 6 TRANSNAT’L L. & CONTEMP. PROBS. 503, 517–18 (1996)).

50. *Id.*

51. See *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005).

52. *Id.* (finding that restitution claims brought by Holocaust survivors, or their descendants, did not present a “nonjusticiable political question” under the political-question doctrine, despite the implications of a foreign defendant with ties to a foreign government).

53. See *infra* Part II.A; see, e.g., *Museum of Fine Arts, Bos. v. Seger-Thomschitz*, 623 F.3d 1, 14 (1st Cir. 2010).

In addition to (or instead of) a replevin suit, plaintiffs also have the option of bringing a conversion claim.⁵⁴ The difference between replevin and conversion claims lies in the remedy.⁵⁵ A successful claim of conversion provides a claimant with damages instead of ordering the return of the physical property at issue.⁵⁶ But in cases seeking restitution for Nazi-looted artwork, most claimants sue under a claim of replevin, probably because the piece itself emotionally connects heirs and survivors to their lost loved ones.⁵⁷ As one commentator suggested, “the objects are symbols of a terrible crime; recovering them is an equally symbolic form of justice.”⁵⁸ One should not discount the value of a conversion claim, however. Bert Demarsin, a law professor well-versed in the international art trade, noted:

[I]t seems reasonable to assume that the popular interest in spoliated art is partially due to the soaring prices in the booming art market of the recent decades. Whereas, in the past, the potential price tag of litigation had a deterrent effect, the expected value of the case—particularly given the high valuation of artwork in the early 2000s—is likely to exceed litigation costs, encouraging victims to come forward.⁵⁹

Although both types of claims provide a successful litigant with some form of compensation, both suffer from the same problems, most importantly restrictive statutes of limitations, which prevent rightful Nazi-restitution plaintiffs from ever receiving such compensation. Recognizing that these obstacles apply to any form of Nazi-looting restitution, outside the context of artwork, governments have established various domestic and international schemes to appropriately return the property at issue.

C. Holocaust Restitution Schemes outside the Realm of Stolen Artwork

Several countries and governmental bodies have established restitution schemes in order to compensate heirs of Holocaust survivors for Nazi-stolen assets other than artwork. The International Commission on Holocaust Era Insurance Claims (ICHEIC), created in 1998, provides an example of an international attempt to resolve claims involving unpaid insurance policies held by Holocaust victims.⁶⁰ Under this organization, signatory parties such

54. Thompson, *supra* note 14, at 421 (citing PATTY GERSTENBLITH, *ART, CULTURAL HERITAGE, AND THE LAW: CASES AND MATERIALS* 422 (2d ed. 2008)).

55. *See id.* at 420–21.

56. *Id.* at 421.

57. *See, e.g.*, Grosz v. Museum of Modern Art, 772 F. Supp. 2d 473, 476 (S.D.N.Y. 2010); Pollock, *supra* note 1, at 197.

58. Pollock, *supra* note 1, at 197 (citation omitted).

59. Bert Demarsin, *Let's Not Talk About Terezín: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 *BROOK. J. INT'L L.* 117, 135 (2011).

60. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 406–07 (2003).

as the American National Association of Insurance Commissioners, various European insurance companies, and Holocaust survivor associations worked with countries like the United States and Germany to investigate insurance claims held during the time of occupation and pay reparations in accordance with ICHEIC guidelines.⁶¹ The ICHEIC stopped accepting claims in 2004, and by 2007 it had offered or awarded \$306.24 million to more than forty-eight thousand claimants.⁶²

In 1998, after diplomatic negotiations between Switzerland and other countries, including the United States, Swiss banks established a \$1.25 billion fund to compensate individuals who had filed suit in US courts against Swiss banks and entities that had not returned the money of the plaintiffs' Holocaust-victim family members.⁶³ In exchange for the settlement compensation, plaintiffs agreed never to bring suit against the Swiss government, Swiss banks, or other Swiss entities for claims relating to the Holocaust and its aftermath.⁶⁴ Similarly, the German Parliament established the German Foundation after claimants started bringing lawsuits against the German government in US courts.⁶⁵ The Foundation makes reparations available to former slave laborers, though the Foundation grants compensation only to living survivors and not to their heirs.⁶⁶ Additionally, German law requires that in all relevant US lawsuits that have been filed against Germany, the US government must submit a statement to the court expressing that US foreign policy favors dismissal because the Foundation—not US courts—is the appropriate forum to adjudicate such claims.⁶⁷

The lack of an established art restitution scheme creates a variety of problems. First, given that the US government has not established a collective fund that both pays for litigation costs incurred in conflicts over Nazi-stolen art and reimburses Holocaust

61. *Id.*; *About ICHEIC*, THE INT'L COMM'N ON HOLOCAUST ERA INS. CLAIMS, <http://www.icheic.org/about.html> (last visited Jan. 10, 2013).

62. *The ICHEIC Claims Process*, THE INT'L COMM'N ON HOLOCAUST ERA INS. CLAIMS, <http://www.icheic.org> (last visited Jan. 10, 2013).

63. See Pollock, *supra* note 1, at 199 (citing Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 805–13 (2002)).

64. *Overview*, HOLOCAUST VICTIM ASSETS LITIG. (SWISS BANKS), <http://www.swissbankclaims.com/Overview.aspx> (last updated May 17, 2012).

65. *Id.*

66. *Id.*; see also Pollock, *supra* note 1, at 200.

67. Pollock, *supra* note 1, at 200. Austria established a comparable foundation in 2000 to make reparations to those forced to perform slave labor, as well as to those who experienced property loss or damage. *Id.* at 201. Claims are brought under an arbitration-type proceeding; however, the foundation does not have the authority to hear claims involving stolen artwork. *Id.* at 201–02. The jurisdiction for such claims remains with an Austrian restitution commission, created in Austria's 1998 Restitution Law. *Id.* at 202.

victims for the value of their stolen works,⁶⁸ claimants must handle replevin claims alone.⁶⁹ For example, since the US government has not established a comparable arbitration commission for Nazi-looted art, heirs typically have to initiate litigation without the option of a class action suit since their claims involve diverse pieces and are filed against varying defendants.⁷⁰ Therefore, claimants face tremendous litigation costs that they must bear alone.⁷¹ Similarly, museums are responsible for any recovery awarded to the claimants.⁷²

Second, in most current lawsuits, the original Holocaust-era owner is deceased, meaning that distant relatives—the only surviving family members—are the ones pursuing legal remedies when they discover they are possibly owners of a work displayed in a museum.⁷³ Courts may feel disinclined to reward the claimant heirs with possession when they are far removed from the original owner.⁷⁴ Finally, as noted by one legal writer studying the subject, “these arrangements only resolve the claim between the two involved parties and do not take into account the issues of Nazi-looted art as a whole. While litigation is second to none in encouraging negotiated agreement, a series of individual lawsuits will not solve the overall problem.”⁷⁵ Despite the fact that some governments have addressed Nazi-looting restitution outside of the art context, the US government has yet to craft a meaningful way for claimants to successfully reclaim their formerly owned artwork. Thus, courts and museums are left to handle the issue individually, without any substantive guidance, leading to the problems discussed in Part II of this Note.

68. *Id.* at 207.

69. *See id.* at 226.

70. *See* FED. R. CIV. P. 23; Pollock, *supra* note 1, at 226.

71. Pollock, *supra* note 1, at 226–27.

72. *See id.* Pollock explains:

[T]he costs to museums have been ignored hitherto, and the adversarial system is not likely to take them into account. For example . . . the Seattle Art Museum returned [a Matisse painting] to Rosenberg’s heirs, describing the act as ‘doing the right thing.’ This moral act was an expensive one: the Matisse’s estimated value is \$2 million, and the museum spent hundreds of thousands more in litigation.

Id. (citations omitted).

73. *See* Redman, *supra* note 47, at 221 (citation omitted).

74. *See id.*

75. Pollock, *supra* note 1, at 230.

II. WHY MUSEUMS WANT TO FIGHT—AND DO SO
SUCCESSFULLY—AGAINST CLAIMANTS SEEKING RESTITUTION FOR
HOLOCAUST-LOOTED ARTWORK

Holocaust survivors and their heirs have met with little success in court when trying to reclaim confiscated artwork through a replevin claim.⁷⁶ As discussed below, the fact that courts generally grant museums' motions to dismiss is mainly attributable to the statute of limitations for the replevin claim.⁷⁷ Additionally, museums have historically been averse to restitution in general; the reluctant attitude they adopt in restitution cases concerning Nazi looting parallels the behavior they have exhibited in the past, adding to the difficulties claimants face.⁷⁸ Finally, museums are regulated by self-governing ethical rules that courts have construed as guidelines with no binding effect, meaning that museums may not strictly adhere to their self-imposed restitution practices.⁷⁹

A. Statute-of-Limitations Constraints

Most states have a three-year statute of limitations that restricts the time in which a party may sue for recovery of stolen property.⁸⁰ For many of these claimants, that three-year window has long expired, since the alleged theft occurred at least sixty-five years ago.⁸¹ One state specifically extended the statute of limitations so that survivors may bring a claim of ownership against a museum; the law was ineffective, however, for the Ninth Circuit ruled that the statutory extension was an unconstitutional interference with the foreign-affairs doctrine (as discussed below).⁸² But these claimants could still lose simultaneously under a general statute of limitations.⁸³ Courts have upheld the general statute of limitations as fair in these instances, denying requests for federal laches⁸⁴ to equitably extend the time frame.⁸⁵

76. See, e.g., *Museum of Fine Arts, Bos. v. Seger-Thomschitz*, 623 F.3d 1, 2–5 (1st Cir. 2010).

77. See *id.*

78. See *infra* Part II.B.

79. See *infra* Part II.B.

80. See, e.g., *Seger-Thomschitz*, 623 F.3d at 5.

81. *Id.* at 3.

82. See *infra* text accompanying notes 86–107.

83. See *infra* text accompanying notes 115–116.

84. See, e.g., *Seger-Thomschitz*, 623 F.3d at 11. “Laches is the equitable equivalent of statutes of limitations. However, unlike statutes of limitations, laches leaves it up to the court to determine, based on the unique facts of the case, whether a plaintiff has waited too long to seek

1. *Von Saher*: No State Intervention

In order to alleviate the statute-of-limitations problem that many Holocaust survivors encounter when trying to recover artwork, California enacted section 354.3 of the California Code of Civil Procedure in 2003.⁸⁶ Originally, California had a general three-year statute of limitations for stolen property under section 338, which stated that the cause of action accrued when the plaintiff discovered the whereabouts of the stolen article.⁸⁷ But section 354.3 specifically granted the owners of Holocaust-era artwork, or their beneficiaries or heirs, the right to bring an action of recovery, with a statute of limitations that extended until December 31, 2010.⁸⁸

Now much more vulnerable to suit, a California museum seized the opportunity to challenge the statute's validity under the foreign-affairs doctrine in *Von Saher v. Norton Simon Museum of Art*.⁸⁹ Saher was the only surviving heir of an art dealer who fled the Netherlands upon the Nazi invasion and left his entire collection behind.⁹⁰ When the Nazis looted his gallery, they took hundreds of pieces to Germany, including the two oil paintings at issue in the case.⁹¹ Though the Allied forces returned the two paintings to the Netherlands in 1946, the Dutch government returned the paintings through a restitution proceeding to a third party, who ultimately sold them to the defendant, the Norton Simon Museum of Art, in 1971.⁹²

relief." *Laches*, THE FREE DICTIONARY BY FARLEX, <http://legal-dictionary.thefreedictionary.com/laches> (last visited Jan. 10, 2013).

85. See *infra* text accompanying notes 86–107.

86. *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 958 (9th Cir. 2010).

87. *Id.* at 968. *Von Saher* points to the California Code of Civil Procedure:

[T]he cause of action in the case of theft, as defined in § 484 of the Penal Code, of any art or artifact is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft.

CAL. CODE CIV. PROC. § 338(c).

88. *Von Saher*, 592 F.3d at 958–59. The Presidential Advisory Commission on Holocaust Assets defined Holocaust-era art as works “created before 1945, acquired after 1932 and which were or could have been in Europe between those dates.” PRESIDENTIAL ADVISORY COMM’N ON HOLOCAUST ASSETS IN THE UNITED STATES, AGREEMENTS NEGOTIATED BY THE COMMISSION IN THE PUBLIC AND PRIVATE SECTORS, *in* PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT (2000), available at http://pcha.ushmm.org/PlunderRestitution.html/html/Findings_Agreements.html.

89. *Von Saher*, 592 F.3d at 961.

90. *Id.* at 959.

91. *Id.* at 957, 959.

92. *Id.* at 959.

In 2007, Saher brought a claim against the museum under section 354.3 in order to recover the paintings.⁹³

The Ninth Circuit, which ruled in favor of the museum, held that the foreign-affairs doctrine preempted the cause of action created in section 354.3, despite the absence of any conflict with a specific federal law or foreign policy.⁹⁴ The doctrine holds that the federal government possesses the exclusive power to regulate the US position on foreign affairs.⁹⁵ While state statutes are typically invalid under this theory because they directly conflict with an express federal directive, like a statute, they may also be unconstitutional if they infringe on a foreign-affairs power that the Constitution reserves for the federal government.⁹⁶

In making this foreign-affairs argument, the museum pointed to two sources—the London Declaration and a policy statement by President Truman—to show that the executive branch supported a federal policy of external restitution, a policy the state statute allegedly infringed.⁹⁷ This argument failed to convince the court.⁹⁸ The United States and other Allied forces had signed the London Declaration in 1943, agreeing to counter the “methods of dispossession” used in enemy countries during World War II, but the Declaration made no mention of actual restitution.⁹⁹ Truman’s policy statement, “Art Objects in U.S. Zones,” provided that dispossessed artwork would be returned under a scheme of external restitution, that is, returned to the country of origin instead of the individual owner.¹⁰⁰ But because the United States stopped accepting external restitution claims in 1948 pursuant to a strict deadline announced

93. *Id.*

94. *Id.* at 963, 965–66.

95. *See id.* at 960–61.

96. *See id.* at 961, 964.

97. *Id.* at 961.

98. *Id.* at 963.

99. *Id.* at 961–62. Specifically, the London Declaration stated (in part):

[T]he governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including juridical persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

Kreder, *supra* note 27, at 51 (citing U.S. Dep’t of State, Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory (Jan. 5, 1943), *in* 8 Dep’t St. Bull. 21, 21–22 (1943)).

100. *Von Saher*, 592 F.3d at 962.

under US Military Law 59,¹⁰¹ the policy was no longer in effect.¹⁰² Thus, California's statute did not *directly* "conflict with any current foreign policy espoused by the Executive Branch."¹⁰³

The absence of a direct conflict with current foreign policy would seemingly favor the plaintiffs. But the court focused on the fact that California's apparent true purpose in enacting section 354.3 was not to regulate stolen property within the state, but rather to create a worldwide "friendly forum for litigating Holocaust restitution claims."¹⁰⁴ With its repeated references to the Nazis and the atrocities they committed during World War II, it was evident to the court that the state statute was a response to the federal government's inaction on the issue.¹⁰⁵ Thus, rather than making a stricter enforcement regime for an existing set of rights, the court held that the state sought instead to create a new cause of action with the "aim of rectifying wartime wrongs."¹⁰⁶ Section 354.3 therefore infringed on the exclusive federal power to make and resolve war because it only sought to address wartime injuries for a particularly limited group of people.¹⁰⁷

In a prior case, *Alperin v. Vatican Bank*,¹⁰⁸ the court had held that, despite inherent political effects, the judiciary has the power to hear property claims brought by Holocaust survivors.¹⁰⁹ The Ninth Circuit used *Von Saher* as an opportunity to clarify the scope of that ruling:

Our holding that the judiciary has the power to adjudicate Holocaust-era property claims does not mean that states have the power to provide legislative remedies for these claims. . . . [T]he relevant question is whether the power to wage and resolve war, including the power to legislate restitution and reparation claims, is one that has been

101. PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS IN THE UNITED STATES, *supra* note 10.

102. *Von Saher*, 592 F.3d at 963.

103. *Id.*

104. *Id.* at 965.

105. *Id.* at 965–66 (recognizing that the statute was not limited to museums in California but applied to any museum or gallery outside the state as well).

106. *Id.* at 966 (citing *Deutsch v. Turner Corp.*, 324 F.3d 692, 708 (9th Cir. 2003)).

107. *See id.* at 965–66. The court relied heavily on a prior case that involved a California statute aimed at resolving Holocaust-era insurance claims, *Von Saher*, 592 F.3d at 961 (citing *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003)). California had enacted a statute, the Holocaust Victim Insurance Relief Act, which required insurance companies in the United States to disclose their European policies from 1920–1945, and also extended the statute of limitations for Holocaust-victim claimants until 2010. *Garamendi*, 539 U.S. at 401, 409–10. The Supreme Court ruled the statute unconstitutional, finding that it was federally preempted due to its interference with the ICHEIC and also possibly the German Foundation Agreement. *Id.* at 396. See Kreder, *supra* note 27, for a discussion about the factual differences between *Garamendi* and *Von Saher*, and why *Garamendi* should not control.

108. *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005).

109. *Id.* at 551.

exclusively reserved to the national government by the Constitution. We conclude that it has.¹¹⁰

The court further supported its holding by addressing the actions the federal government had recently taken on the restitution issue for Nazi-confiscated art.¹¹¹ The court pointed to the government's participation in the Washington Conference on Holocaust-Era Assets and its establishment of the Presidential Advisory Commission on Holocaust Assets in the United States under 22 U.S.C. § 1621.¹¹² The court thus determined, on the one hand, that no express federal policy on the issue existed.¹¹³ On the other hand, it also decided that the aforementioned federal actions, which provide no substantive, binding law on the issue's resolution, were enough to show that "this history of federal action is so comprehensive and pervasive as to leave no room for state legislation."¹¹⁴

But the court stated that Saher, and other potential claimants, could still bring an action within the general three-year replevin statute of limitations, based on the idea of "constructive notice" implicit in section 338.¹¹⁵ Under such a standard, Saher's claim would begin to accrue when "she discovered or reasonably could have discovered her claim to the [two oil paintings] and their whereabouts."¹¹⁶

When a dissatisfied Saher filed a petition for certiorari with the Supreme Court, the US Solicitor General, representing the federal government, filed a brief in support of the Ninth Circuit's ruling and

110. *Von Saher*, 592 F.3d at 966–67. For a criticism of this ruling, see Jennifer Anglim Kreder, *State Law Holocaust-Era Art Claims and Federal Executive Power*, 105 NW. U. L. REV. COLLOQUY 315, 326–27 (2011), in which Kreder cites an earlier concurring opinion by Justice Harlan stating that "the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations." *Id.* at 326 (quoting *Zschernig v. Miller*, 389 U.S. 429, 459 (1968) (Harlan, J., concurring)). Kreder contends that the court interpreted *Garamendi* too broadly and exaggerated the effects on foreign relations (since Holocaust-era claims can be brought at the state judicial level), particularly because section 354.3 was narrowly tailored to apply to entities falling under California's personal jurisdiction, as opposed to creating "extravagant jurisdictional claims," which was an issue in *Garamendi*. *Id.* at 326–27.

111. *Von Saher*, 592 F.3d at 967.

112. *Id.*

113. *Id.* at 963.

114. *Id.* at 967–68 ("No organization comparable to the International Commission on Holocaust Era Insurance Claims has been established yet to resolve Holocaust-era art claims. This does not, however, justify California's intrusion into a field occupied exclusively by the federal government.")

115. *Id.* at 968–69.

116. *Id.* at 969.

asked the Court to deny a rehearing of the case.¹¹⁷ The Court obliged, thus leaving Saher with the Ninth Circuit's constructive-notice argument as the only method of achieving a court-ordered remedy.¹¹⁸

2. *Seger-Thomschitz*: No Equitable Judicial Remedy

In *Museum of Fine Arts, Boston v. Seger-Thomschitz*, the plaintiff faced a procedural obstacle similar to the one Saher encountered: a three-year statute of limitations for replevin actions, this time in Massachusetts.¹¹⁹ Seger-Thomschitz was the sole surviving heir of a Jewish art collector in Austria who had transferred, under apparent duress, a valuable oil painting to a Parisian gallery after the Nazi annexation of Austria in 1938.¹²⁰ Details about the circumstances of the painting's transfer, involving questions of good faith and legal title, were unclear.¹²¹ But the important issue (at least for purposes of this discussion) arose when the court considered the appropriateness of applying federal laches.¹²²

Massachusetts had a three-year statute of limitations for actions to recover stolen property, which implicitly included a "discovery rule" like the constructive-notice rule in *Von Saher*.¹²³ In missing-art cases, courts have often held that the claimant must have "acted with due diligence in pursuing his or her personal property."¹²⁴ Seger-Thomschitz did not meet this requirement for several reasons, one of which was that the location of the painting was well known and widely advertised, as was the painting's ownership history, which specifically listed Seger-Thomschitz's Austrian ancestor.¹²⁵ Seger-Thomschitz alternatively argued that the case involved important national interests, and the court should therefore apply the federal common-law principle of equitable laches to alleviate Massachusetts's harsh cutoff.¹²⁶

117. Mike Boehm, *Supreme Court Won't Hear Looted-Art Claim Against Norton Simon*, L.A. TIMES ENT. BLOG "CULTURE MONSTER" (June 27, 2011, 3:35 PM), <http://latimesblogs.latimes.com/culturemonster/2011/06/supreme-court-holocaust-norton-simon.html>.

118. *Id.*

119. *Museum of Fine Arts, Bos. v. Seger-Thomschitz*, 623 F.3d 1, 7 (1st Cir. 2010).

120. *Id.* at 2.

121. *See id.* at 3–6.

122. *Id.*

123. *Id.* at 7; *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 968–69 (9th Cir. 2010).

124. *Seger-Thomschitz*, 623 F.3d at 7 (citation omitted).

125. *Id.* at 7–9.

126. *Id.* at 9.

As in *Von Saher*, the court ruled in the museum's favor and declined to apply equitable remedies.¹²⁷ The court explained that federal common law should be exercised narrowly and only when the claimant can show a "significant conflict between some federal policy or interest and the use of state law," since the decision to supersede state law with federal rule is more appropriately determined by Congress, not the courts.¹²⁸ Seger-Thomschitz's argument focused on the museum's tax-exempt status, claiming that its reason for being tax-exempt hinged on the fact that museums provide public benefits.¹²⁹ She asserted that this tax-exempt status expressed a federal policy to support museums' beneficial work, which was undermined when the museum played an active part in accepting stolen artwork and then escaping liability thanks to a favorable statute of limitations.¹³⁰ But the court found that the federal interest in assuring the legal and beneficial work of tax-exempt museums was properly served by subjecting the organizations to both state-law and common-law fiduciary duties.¹³¹ The court stated: "We perceive no need to create additional federal common law rules to punish and deter bad behavior by tax-exempt organizations."¹³²

Seger-Thomschitz then advanced a final argument: unlike the claimant in *Von Saher*, Seger-Thomschitz sought preemption under the foreign-affairs doctrine.¹³³ She contended that the foreign-affairs doctrine preempted the Massachusetts statute of limitations due to an alleged federal policy "disfavoring the application of rigid limitations periods to claims for Nazi-looted artwork," as outlined in the Holocaust Victims Redress Act of 1998, the Vilnius Forum Declaration, the Washington Conference Principles on Nazi-Confiscated Art, and the Terezin Declaration on Holocaust Era Assets and Related Issues.¹³⁴

But the court also found this argument unpersuasive.¹³⁵ The court noted that the aforementioned statute and three executive agreements were merely "hortatory," creating no substantive law and

127. *Id.* at 11.

128. *Id.* at 10 (citing *Atherton v. FDIC*, 519 U.S. 213, 218 (1997)).

129. *See id.* at 9–10.

130. *Id.* ("She argues that the application of a state limitations period in this case would frustrate the 'many discrete and compelling federal interests that inhere when judicial claims to recover Nazi-confiscated artworks are brought against U.S. tax-exempt public trustees such as the MFA.'").

131. *Id.* at 10–11.

132. *Id.* at 11.

133. *Id.* at 11–12.

134. *Id.*

135. *Id.* at 12.

only espousing a general dedication to ensuring justice for those seeking to recover Nazi-confiscated property.¹³⁶ Therefore, those four sources of law did not amount to an express policy discouraging the application of time requirements that may ultimately generate harsh results: “the four documents are, for the most part, phrased in general terms evincing no particular hostility toward generally applicable statutes of limitations.”¹³⁷

The court went on to conclude that, even if an express federal policy on the issue did exist, it would not clearly conflict with the state statute of limitations.¹³⁸ As opposed to *Von Saher*’s unconstitutional statute of limitations that narrowly applied to one specific group of people for one particular purpose—restituting Nazi-looted art to victims of Nazi persecution—“[t]he enactment of *generally applicable* statutes of limitations is a traditional state prerogative, and states have a substantial interest in preventing their laws from being used to pursue stale claims.”¹³⁹ The court also highlighted both the legislatively determined value of providing time requirements and the flexibility of the discovery rule in the statute of limitations, thus allegedly providing claimants with some ameliorating effects.¹⁴⁰

The opinion concluded with a directive that museums should resolve all title inquiries before acquiring any pieces with “unmistakable roots in the Holocaust era,” as suggested in the guidelines in the American Association of Museums.¹⁴¹ But this contention addressed only artwork that museums might acquire in the future and not the property that they currently possess.¹⁴²

The application of equitable laches requires a high threshold for claimants to surpass, as evidenced by *Seger-Thomschitz* and other similar cases where the court declined to allow the claim to toll the statute of limitations.¹⁴³ In one such case, *Grosz v. Museum of Modern Art*, the US District Court for the Southern District of New York,

136. *Id.* at 11–13.

137. *Id.* at 12.

138. *Id.* at 13.

139. *Id.* at 13–14 (emphasis added).

140. The First Circuit explains:

[The Massachusetts statute of limitations] strikes a reasonable balance between restitution and repose, permitting a claimant who has diligently pursued her rights to have her day in court. Indeed, because a claimant in a missing or confiscated art case may be able to defeat summary judgment by demonstrating that she diligently pursued her property, the Massachusetts discovery rule may not be that different in practice from the federal common law laches defense that *Seger-Thomschitz* would like us to apply.

Id. at 14.

141. *Id.* at 14–15.

142. *Id.*

143. *See, e.g., Grosz v. Museum of Modern Art*, 403 F. App’x 575 (2d Cir. 2010).

applying New York state law, stated that ongoing settlement negotiations between the museum and the claimant (prior to filing suit) did not necessitate the extension of the statute of limitations when the claimant still had the right to bring a replevin suit within that time period.¹⁴⁴ The court would grant laches only in an exceptional case where the plaintiff could not properly have exercised his rights, which normally would involve some sort of fraud or deception on the part of the defendant.¹⁴⁵

As evidenced by *Von Saher* and *Seger-Thomschitz*, many claimants face a lose-lose situation when it comes to the statute of limitations.¹⁴⁶ While the *Von Saher* court concluded that US federal action on the issue of Nazi-art restitution was so pervasive that it preempted state action under the foreign affairs doctrine, the *Seger-Thomschitz* court concluded that such actions were merely “hortatory” and therefore could not preempt a state statute of limitations under an equitable laches theory.¹⁴⁷ In response to *Von Saher*, California passed another statute, section 338(c), to serve the same purpose, but instead extended the time to bring suit for all claimants seeking art restitution generally, whether or not it involved Nazi looting.¹⁴⁸ Though this appeared to solve the problem of foreign-affairs infringement identified by the court, the US District Court for the Central District of California ruled in May 2012 that it, too, was unconstitutional.¹⁴⁹ The court noted that, although the statute did not facially reference Holocaust-art restitution, the two California statutes had very similar language and the same apparent purpose, meaning that section 338(c) also infringed on the federal government’s power to conduct foreign affairs.¹⁵⁰

144. *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473, 490 (S.D.N.Y. 2010). The court explains:

Nothing . . . prevented the plaintiffs from bringing suit during the period when Katzenbach was reviewing the matter or at any time thereafter. Indeed, by January 18, 2006, litigation was clearly warranted—more than two years had passed since plaintiffs had made their original demand, MoMA still had not returned the Paintings, and it had repeatedly indicated that it would not do so.

Id.

145. *Grosz*, 403 F. App’x at 577.

146. *See supra* Part II.A.1–2.

147. *See supra* Part II.A.1–2.

148. *Case Summary: Von Saher v. Norton Museum of Art, INT’L FOUND. FOR ART RESEARCH*, http://www.ifar.org/case_summary.php?docid=1286569240 (last visited Jan. 9, 2013).

149. Memorandum and Order Regarding Defendant’s Motion to Dismiss, *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. CV 05–3459–GAF (C.D. Cal. May 24, 2012).

150. *Id.*

3. Variations on Applications of the Statute of Limitations

While the *Von Saher* ruling may not be satisfying for Saher herself, some claimants lack even the option to make a constructive-notice argument, depending upon the jurisdiction in which they bring suit.¹⁵¹ For example, a federal court applying Michigan law declared that Michigan public policy weighed against the application of the discovery rule in commercial-conversion cases.¹⁵² Therefore, the claim would have accrued when the alleged wrong occurred, which, in this particular case, was 1938, when the original owner sold the painting and fled to France to escape persecution.¹⁵³

But there is some variation among the rules courts apply and some seem, at least facially, to be more favorable for restitution claimants.¹⁵⁴ For example, New York law typically promotes a “demand-and-refusal” rule.¹⁵⁵ Under the demand-and-refusal system, a replevin claim accrues after the alleged rightful owner demands the property’s return and the possessor refuses to return it.¹⁵⁶ Thus, under New York law, the statute of limitations does not begin to run until the possessor refuses demand.¹⁵⁷

New York specifically adopted this rule because it benefits replevin claimants the most.¹⁵⁸ The demand-and-refusal rule places the burden on purchasers to research a piece’s provenance, rather than burdening claimants with the task of expending investigative

151. See *Detroit Inst. of Arts v. Ullin*, No. 06–10333, 2007 WL 1016996, at *1 (E.D. Mich. Mar. 31, 2007).

152. *Id.* at *3.

153. See *id.* at *1, *3.

154. See, e.g., *Grosz v. Museum of Modern Art*, 403 F. App’x 575, 577 (2d Cir. 2010) (applying New York’s “demand and refusal” law rather than a discovery rule).

155. See *Bakalar v. Vavra*, 619 F.3d 136, 140–42 (2d Cir. 2010). The Second Circuit explains:

[U]nder New York law, as *Menzel v. List* specifically held . . . absent other considerations an artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that she was buying stolen goods.

Id. at 141 (internal quotation marks omitted).

156. See *id.* at 140–42.

157. See *id.*

158. See *id.* at 141–42. For an alternative point of view of the demand-and-refusal rule’s benefits, see Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 *FORDHAM L. REV.* 49, 51–52 (1995). Hawkins argues that under this rule, “New York effectively has no statute of limitations for the recovery of stolen property, and innocent purchasers are perpetually at risk of a claim of theft by a former owner.” *Id.* at 51. On this theory, the rule over-protects former owners who may allegedly be relieved of performing any due diligence in a timely fashion, while restricting the rights of another innocent party—the good-faith purchaser. *Id.* at 60.

resources within a limited timeframe.¹⁵⁹ But heirs may still fall outside the statute of limitations based on the court's definition of a museum's "refusal."¹⁶⁰ As evidenced by *Grosz*, a museum need not give an explicit statement to constitute refusal.¹⁶¹ A court can instead imply refusal if the museum's action "clearly conveys an intent to interfere with the demander's possession or use of his property."¹⁶² A museum can sometimes satisfy this standard without explicit words of refusal or by a museum's attempts to ignore a demander.¹⁶³

In *Grosz*, the claimant argued that the Museum of Modern Art's refusal occurred when he received a letter from the museum formally indicating that, after researching his claim, the Board of Trustees had voted that it had no obligation to return the paintings he sought.¹⁶⁴ But the court held that the museum's refusal took place almost one year prior to the sending of that letter, when the museum, amidst settlement negotiations with *Grosz*, explained in a written statement that it had considered all evidence, and there was no definitive evidence contradicting the museum's ownership.¹⁶⁵ The statute of limitations therefore barred *Grosz* from bringing suit.¹⁶⁶

159. *Bakalar*, 619 F.3d at 141–42. Borrowing language from the lower court, the Second Circuit explains:

[A] bill proposing that a museum would be immune from future claims once it gave required public notice of acquisition and a three year statute of limitations period had passed, . . . was vetoed by Governor Mario Cuomo, who stated that . . . if it went into effect, [it] would have caused New York to become a haven for cultural property stolen abroad since such objects [would] be immune from recovery under the limited time periods established by the bill.

Id. (citation omitted) (quoting *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 319 (N.Y. 1991)) (internal quotation marks omitted).

160. *See Grosz v. Museum of Modern Art*, 403 F. App'x 575, 577 (2d Cir. 2010).

161. *See Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473, 483–84 (S.D.N.Y. 2010).

162. *Id.* at 483 (citing *Feld v. Feld*, 720 N.Y.S.2d 35, 35 (App. Div. 2001)).

163. *Id.* at 484.

164. *Id.* at 485.

165. Glenn Lowry, MoMA's director, expresses the following in a letter to the *Grosz* Estate's managing director:

We have . . . a fiduciary obligation to our collection. Before we remove a work from the Museum's collection, we need to establish convincing and conclusive evidence that another party . . . has ownership rights superior to the Museum's . . . [W]e believe that the available evidence *does not lead to any definitive conclusion that challenges the Museum's ownership of the picture. In fact, much of what we know argues in favor of MoMA's clear title.*

Id. at 484–85 (citation omitted)

166. *Id.* at 495–96.

B. Museum Action

Not all museums opt to litigate instead of granting restitution.¹⁶⁷ Many museums have honored claims without the initiation of a lawsuit.¹⁶⁸ Typically, however, the reluctant stance museums take parallels the sentiment they evince toward restitution claims in general. Additionally, though museums may adhere to several sets of ethical rules, such standards are not powerful enough to procure results that may be more favorable to Holocaust claimants.

1. Museums, the Public Role They Serve, and Their Attitude toward Restitution

The Declaration on the Importance and Value of Universal Museums (Declaration) is indicative of museums' position on art-looting restitution in general.¹⁶⁹ The Declaration, signed in 2002 by the directors of some of the most renowned museums in the world, espouses a "yes, but" sentiment: *yes*, museums should discourage the trafficking of looted art, *but* such artifacts acquired in the past only reflect the now-prohibited practices of a different time, and these artifacts should remain in the museums that have cared for and displayed them.¹⁷⁰

In the Declaration, museums basically grant themselves a reprieve for displaying pieces that had been looted from other countries when the art trade considered such looting acceptable or at least turned a blind eye to it.¹⁷¹ They now seek to show their current good intentions by extolling the care with which they display the artifacts and describing how such pieces are now an immutable part of

167. See Thompson, *supra* note 14, at 411–12.

168. *Id.* (noting that US museums such as the Art Institute of Chicago, the Detroit Institute of Arts, the Metropolitan Museum of Art, and the Museum of Modern Art, have all returned pieces to the heirs of Holocaust victims).

169. Reppas, *supra* note 23, at 105.

170. See *id.* at 105–06. Reppas highlighted part of the Declaration's text:

Over time, objects so acquired—whether by purchase, gift, or partage—have become part of the museums that have cared for them, and by extension part of the heritage of the nations which house them. Today we are especially sensitive to the subject of a work's original context, but we should not lose sight of the fact that museums too provide a valid and valuable context for objects that were long ago displaced from their original source.

Id. (citation omitted).

171. One commentator noted how some museums turn a blind eye to the possibility of acquiring illegally traded antiquities, pointing out that in 2006 the Getty Museum "found that 350 objects in their collection had disputed provenances." Lauren Fae Silver, *Recapturing Art: A Comprehensive Assessment of the Italian Model for Cultural Property Protection*, 23 N.Y. INT'L L. REV. 1, 11 (2010).

the museum's own culture.¹⁷² As one recent example, the Nigerian government has demanded that the Museum of Fine Arts in Boston return thirty-two artifacts that a New York collector gifted to the museum in June 2012, asserting that the British took the pieces as spoils of war in 1897.¹⁷³ So far, the museum has responded by stating: “[A]fter careful deliberation, the Museum decided to accept the gift as a way of sharing this private collection, giving access to these long-hidden objects to our more than one million annual visitors.”¹⁷⁴

The debate over Nazi-restitution claims is similar to the debate over the propriety of exhibiting other cultural property.¹⁷⁵ Two main camps espouse competing theories regarding such property. “Cultural internationalists” believe that cultural artifacts reflect a global heritage and should be displayed worldwide, regardless of the original owner.¹⁷⁶ “Cultural nationalists,” meanwhile, believe that such property represents something special to the territory from which it came and should thus be displayed in its place of origin.¹⁷⁷ Many museums are cultural internationalists, which is unsurprising, especially considering they were reluctant to repatriate art allegedly looted from former colonies or occupied countries.¹⁷⁸

Looting from “source countries”—countries “rich in art and artifacts”—is still an ongoing phenomenon.¹⁷⁹ Recently, however, some countries, including Turkey, Greece, and Italy, have been successful in their restitution claims against US museums.¹⁸⁰ Italy, in

172. Reppas, *supra* note 23, at 105–06.

173. *Boston's Museum of Fine Arts Urged to Return Looted Artifacts to Nigeria*, HUFFPOST ARTS & CULTURE (July 20, 2012, 1:56 PM), http://www.huffingtonpost.com/2012/07/20/bostons-museum-of-fine-ar_n_1690062.html.

174. Tajudeen Sowole, *Ahead of 2013 Show of Looted Benin Artefacts, U.S. Museum Plots Legitimacy*, GUARDIAN NIGERIA (Sept. 28, 2012), http://www.ngrguardiannews.com/index.php?option=com_content&view=article&id=99914.

175. Leah J. Weiss, Note, *The Role of Museums in Sustaining the Illicit Trade in Cultural Property*, 25 CARDOZO ARTS & ENT. L.J. 837, 870–71 (2007). Cultural property differs from the art at issue here, which was once private property. See Walton, *supra* note 49, at 583–84. Cultural property is regulated separately through international and domestic sources, including the 1970 UNESCO Convention and the 1983 Convention on Cultural Property Implementation Act. See *id.* The 1970 UNESCO Convention defines cultural property as something “specifically designated by each state as being of importance for archeology, prehistory, history, literature, art or science.” *Id.* at 583 (citation omitted).

176. Weiss, *supra* note 175, at 842–43 (highlighting that most museums and art-world professionals still subscribe to the internationalist view, defining this theory as the “universal museum concept” (quoting William Mullen, *Museums Balk at Art Returns; Objects Acquired Centuries Ago Not Negotiable*, CHI. TRIB., Dec. 15, 2002, at C1)).

177. *Id.*

178. *Id.*

179. Silver, *supra* note 171, at 1–4.

180. Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT'L L. 169, 177 (2007).

particular, has been able to recover many artifacts that thieves illegally exported, achieving restitution agreements with the Metropolitan Museum and the Boston Museum of Fine Arts, among others.¹⁸¹ But individuals seeking restitution for Holocaust-looted art cannot replicate the model these countries have successfully used. Oftentimes museums predicated restitution on receiving long-term loans of artwork in exchange, giving source countries a strong bargaining position.¹⁸² Additionally, under national protectionist laws,¹⁸³ these countries often had much stronger legal claims than the individuals at issue in this Note.¹⁸⁴

Holocaust-art restitution cases lack both of these factors because individual claimants do not possess any bargaining power comparable to that of countries who can offer loaned artwork in exchange for repatriation, and their legal claims are generally less clear cut. Thus, many museums maintain the same “cultural internationalist” attitude toward Nazi-acquired art that they have concerning other “source country” art not being aggressively sought after for repatriation. Indeed, the Advisory Commission noted that “[a]s early as 1946, the State Department notified museums and other institutions that stolen art was entering the country, but in the years following the war it was not the standard practice for museums, collectors and dealers to investigate the provenance of works they acquired.”¹⁸⁵

But museums had to take a public stance on the Nazi-restitution issue due to the recent increase of claims, the accompanying publicity, and the Nazi atrocities pervading the claims.¹⁸⁶ When the Advisory Commission made its report over ten years ago, it stated:

In an effort to forge a common policy in response to the Commissioners’ concerns, the directors present agreed to full disclosure, which means: (1) all Holocaust-era works will be identified and disclosed and all provenance information in the possession of the museums regarding those works will be disclosed; (2) such provenance information will be disclosed, even where there are no known gaps; and (3) provenance research by museums will be a continuing process with additional information disclosed as it

181. Silver, *supra* note 171, at 44–52.

182. *Id.* at 44–46.

183. *Id.* at 2, 19–25.

184. See Gerstenblith, *supra* note 180, at 177 n.36 (“The fact that these museums agreed to return these artifacts suggests a recognition by the parties that Italy could likely have recovered these artifacts in a legal action.”).

185. See *supra* note 88.

186. See Weiss, *supra* note 175, at 870 (citing Gerstenblith, *supra* note 25, at 446).

becomes known. They also agreed to restitution where claims are clearly established.¹⁸⁷

Other researchers have noted that there is a disconnect between the lofty mentality of the late 1990s actions and the current method of operation.¹⁸⁸ As scholar Bert Demarsin notes, “The dismay, or perhaps even shame, and corollary obligingness of the late 1990s that propelled many of the first cases to settlement quickly evolved into dogged defense of ownership among current possessors.”¹⁸⁹ Thus, museums are often still reluctant to look past the legalistic formalities that obtain to ownership when discussing the possibility of restitution.

Opposition to restitution still exists. For example, the former Exhibitions Secretary of the British Royal Academy of Arts, Sir Norman Rosenthal, whose parents fled from Nazi persecution, declared:

If valuable objects have ended up in the public sphere, even on account of the terrible facts of history, then that is the way it is. . . . [T]he vast majority of individuals, who were beaten up or killed during the Nazi period—or indeed by other oppressors in different parts of Europe—did not have art treasures that their children and grandchildren can now claim as compensation.¹⁹⁰

He proposed investing only in the future, as opposed to dwelling in the past, and noted that financial gain (like bounty-hunter lawyers’ fees, for example) often motivates restitutionary efforts.¹⁹¹

Many disagree with Rosenthal’s position, stating that heirs need emotional closure, justice, and the fulfillment of a desire to establish a connection to their persecuted ancestors.¹⁹² Additionally, not only did families often find it difficult, both financially and politically, to perform the provenance research for a suspected heirloom, but they may not have wanted to broach and relive the subject of personal tragedy.¹⁹³ In past discussions of the topic, many took for granted that the government should resolve this historical

187. PRESIDENTIAL ADVISORY COMM’N ON HOLOCAUST ASSETS IN THE UNITED STATES, *supra* note 88.

188. Demarsin, *supra* note 59, at 163.

189. *Id.*

190. Kreder, *supra* note 27, at 42–43 (quoting Sir Norman Rosenthal, *The Time Has Come for a Statute of Limitations*, ART NEWSPAPER, Dec. 11, 2008, at 30).

191. *Id.*

192. *Id.*

193. Weiss, *supra* note 175, at 866. Weiss explains:

[I]n the immediate post-war era, the psychology of Holocaust survivors made the suggestion of the restitution of material possessions a “taboo” topic, as most were grateful for having survived the war. “In many families it was impossible even to mention the word Holocaust, distasteful to hint at the subject of restitution.”

Id. (quoting Godfrey Barker, *The Art of War*, EVENING STANDARD, Dec. 8, 2006, at 24).

injustice in favor of the claimant, but doing so would force an innocent museum to incur substantial loss.

2. The Morality of Restitution

In the context of addressing historical injustices, property restitution is often particularly contentious. In contrast to claims handled by governmental commissions of inquiry or “addressed” with government apologies, restitution claims can involve substantial resources.¹⁹⁴ Moral rights have often justified compensation for historical injustices.¹⁹⁵ Some theories question whether such moral rights sufficiently outweigh the property rights of an innocent adversary.¹⁹⁶ This is particularly augmented when the direct victim is generations removed from the claimant, who under normal circumstances may never have received the property if the original owner had made decisions that denied the property as a family inheritance.¹⁹⁷ Presumably, though, the legislature took such considerations into account when creating a cause of action for replevin, and as courts have determined that current claimants have standing to bring these claims, the fact that the claimants are not the direct victims does not outright bar them from recovery.¹⁹⁸

But it is also appropriate to account for the museum’s general interests, especially since museums serve a greater public purpose.¹⁹⁹ Museums provide access to cultural and historic education, and a piece of artwork, if properly maintained in a museum, can teach and benefit a much broader audience than if the artwork remained in a private home.²⁰⁰ Museums take their fiduciary duties seriously, which is why many are hesitant to retribute a piece without substantial evidence in support of the claim.²⁰¹

Victims of Nazi-looting are not the only claimants seeking restitution from museums.²⁰² Museums could be worried that opening the door to a particular type of restitution may open a “can of worms” that will foster other restitution claims, either from private parties or countries seeking to rectify the looting that occurred by Western

194. Katrina Miriam Wyman, *Is There a Moral Justification for Redressing Historical Injustices?*, 61 VAND. L. REV. 127, 140 (2008).

195. *Id.* at 147.

196. *Id.* at 157.

197. *Id.*

198. *See supra* note 2 and accompanying text.

199. *See Gerstenblith, supra* note 25, at 411–12.

200. *See generally* Thompson, *supra* note 14.

201. *Id.* at 423 n.107.

202. *See, e.g., Konowaloff v. Metro. Museum of Art*, No. 10 Civ. 9126 (SAS), 2011 U.S. Dist. Lexis 107262, at *2–10 (S.D.N.Y. Sept. 22, 2011).

entities hundreds of years ago. Most recently, the heir of a Russian merchant initiated a lawsuit against the Museum of Metropolitan Art, alleging that the state took the merchant's paintings in 1918 pursuant to a Bolshevik decree that granted the state full ownership of his collection—without compensation or voluntary relinquishment.²⁰³ The federal district court dismissed the claim, ruling that the “act of state” doctrine prevented the heir from pursuing a replevin action.²⁰⁴ The doctrine precludes US courts from considering the legitimacy of the “public acts of a recognized foreign sovereign power committed within its own territory.”²⁰⁵

According to precedent, Bolshevik nationalization decrees qualify as official acts that satisfy the doctrine, due to the historical recognition of the Soviet government as a legitimate, acting state.²⁰⁶ Therefore, the legality of the painting's ultimate sale to the Museum was irrelevant; since the Bolshevik's appropriation of the painting was valid, the heir no longer had a proper stake of ownership in the piece.²⁰⁷ Other articles have considered whether the doctrine may also bar some Nazi restitution claims in the United States, since many paintings were first restored to Allied governments that then determined the fates of the artwork on their own.²⁰⁸

3. Limits of Nonbinding Guidelines

Claimants have generally failed to successfully use museum guidelines as a technical basis for legal claims. In one case before the US District Court for the Northern District of Ohio, heirs argued that the museum had waived its laches and statute-of-limitations defenses based on its actions pursuant to the Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, which the American Association of Museums adopted in 1999.²⁰⁹ These guidelines sought to “assist museums in addressing issues raised by holding Nazi-era artwork in their collections.”²¹⁰ One such guideline

203. *Id.* at *3.

204. *Id.* at *16–18.

205. *Id.* at *13 (citing *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

206. *Id.*

207. *Id.* at *18.

208. Kreder, *supra* note 110; see generally Bert Demarsin, *The Third Time Is Not Always a Charm: The Troublesome Legacy of a Dutch Art Dealer—The Limitation and Act of State Defenses in Looted Art Cases*, 28 CARDOZO ARTS & ENT. L.J. 255 (2010).

209. *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 808 (N.D. Ohio 2006). Even though, in this instance, the original owner may have disposed of the painting under legitimate circumstances, the case is significant because it highlights the limitations claimants face when trying to use self-regulatory “museum guidelines” as the basis for a cause of action.

210. *Id.*

pronounced that museums should post on their websites artwork in their possession with a Holocaust-era provenance.²¹¹ The Toledo Museum of Art complied, listing the painting at issue on its website and designating the claimant ancestor as the appropriate original owner.²¹² The heirs brought suit to reclaim the piece and argued that the museum had waived its defense to any statute-of-limitations claims by adopting the guidelines and posting notice of the artwork, considering this a “general invitation to the public to come forward, make a claim, and collect damages.”²¹³

The district court held that a museum’s mere act of posting the relevant artwork on its website does not amount to an automatic waiver of defenses, emphasizing that the guidelines did not intend to impose an “undue burden” on these beneficial institutions.²¹⁴ The court further clarified that the purpose of the guidelines was not to create a legally binding body of rules, but to assist museums in behaving in a legal and moral manner when these cases arise.²¹⁵ Therefore, the court granted the museum’s declaratory motion against the heir’s replevin claim and found the cause of action time-barred.²¹⁶

The US District Court for the Eastern District of Michigan reiterated this interpretation of the guidelines when the same heir once again unsuccessfully raised the arguments above.²¹⁷ The court pointed out the permissive language of the guidelines: “[I]n order to achieve an equitable and appropriate resolution of claims, museums *may elect* to waive certain available defenses.”²¹⁸ Additionally, the court stated that such an election would have to be clear and intentional, an element lacking in the case, as evidenced by the museum’s desired method of resolution—initiating a claim to quiet title.²¹⁹

Therefore, though museums and the US government have addressed Nazi-art restitution in a vague, theoretical sense, rightful claimants still face myriad obstacles. Courts apply varying standards with differing, unjust results, and museums are often reluctant to retribute a piece without absolute certainty of its illegal

211. *Id.* at 805.

212. *Id.* at 805, 808.

213. *Id.* at 808.

214. *Id.* at 809.

215. *Id.*

216. *Id.*

217. *Detroit Inst. of Arts v. Ullin*, No. 06–10333, 2007 WL 1016996, at *1–2 (E.D. Mich. Mar. 31, 2007).

218. *Id.* (citation omitted).

219. *See id.*

provenance—a high evidentiary hurdle for most rightful claimants to meet. Thus, fairness demands binding, uniform action.

III. SOLUTION

Within the past decade, scholars and those involved in the art trade have proposed various solutions to address the ownership rights of Nazi-looted art.²²⁰ These proposals include, *inter alia*, international arbitration panels (some of which somewhat parallel the ICHEIC),²²¹ a federal statute of limitations,²²² a financial compensation or “display of provenance” system,²²³ a federal ban on the harsh statutes of limitation,²²⁴ and civil forfeiture.²²⁵ But courts are unwilling to adopt any of the judicial solutions, and museums are not abiding strictly to their self-policing rules and guidelines.²²⁶ More importantly, the Advisory Commission specifically envisioned the federal government taking a substantive role in art-restitution, stating, “[A]n organized federal role . . . must be maintained.”²²⁷ Indeed, the Commission even recommended that “[t]he President should urge Congress to pass legislation that removes impediments to the identification and restitution of Holocaust victims’ assets.”²²⁸ Courts also necessitate such a role for the federal government when they state, for example (in *Von Saher*), that state legislatures cannot resolve the issue, and such resolution must come, if at all, from the federal government.²²⁹ It is necessary for the federal legislature to weigh the policy decisions present in these cases, rather than allow courts to determine, piecemeal, the rights of two parties that have both acted in good faith.

220. See, e.g., Pollock, *supra* note 1, at 194; Thompson, *supra* note 14, at 410.

221. See Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal*, 73 BROOK. L. REV. 155, 156–60 (2007).

222. See Redman, *supra* note 47, at 204.

223. See Walton, *supra* note 49, at 553.

224. See Stephanie Cuba, Note, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L.J. 447, 449–50 (1999).

225. See Jennifer Anglim Kreder, *Executive Weapons to Combat Infection of the Art Market*, 88 WASH. U. L. REV. 1353, 1354 (2011).

226. See *supra* Part II.B.

227. Bronfman Transmittal Letter, *supra* note 43.

228. PRESIDENTIAL ADVISORY COMM’N ON HOLOCAUST ASSETS IN THE UNITED STATES, *supra* note 42.

229. *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 965–66 (9th Cir. 2010).

A. Legislative Creation of a US Commission to Resolve Claims

Though it is the judiciary's role to determine the rights and privileges of the parties before it, in these cases it is more appropriate to have a legislative determination that balances the policy interests of the two often innocent parties, since courts cannot make the real wrongdoer, the Nazi Party, answer for its past actions.²³⁰ Such legislative action is particularly relevant because courts around the country have reached varying results and have applied varying standards when adjudicating these cases.²³¹ As one scholar studying the issue stated, "It is nearly impossible for a judicial decision to provide a means for recovery and simultaneously be fair to all sides, as the adversarial system cannot take these multifaceted issues into account."²³² Additionally, "When it comes to true downstream innocents, the point is not to punish, but rather to protect the market from further infection and to assist claimants in accordance with the Washington Principles, Vilnius Declaration, and Terezín Declaration."²³³

Thus, the legislature should create a domestic resolution mechanism binding on museums and claimants, should claimants choose to use such an avenue for restitution, instead of litigating in the courts.²³⁴ Beginning in 2010, key players involved with Nazi-art

230. See Redman, *supra* note 47, at 224. Redman explains:

There are features of Congress that make it a logical place for this issue to be resolved. Congress is well equipped to deal with an issue that is very complex, with claims that are over fifty years old and thousands of pieces of art that have entered the international art market. To consider a solution to the problem, vast amounts of data must be gathered and analyzed. First of all, Congress has the power to investigate issues related to proposed legislation. Hand and hand [sic] with this power are the resources necessary to carry out the investigation. In addition, Congress is the proper forum for making difficult policy determinations that favor one innocent party above another (the victim of art expropriation versus the innocent purchaser) since it is a branch of government that must answer politically to the people of the United States.

Id. (citations omitted).

231. *Id.* at 223–24.

232. Pollock, *supra* note 1, at 228.

233. Kreder, *supra* note 225, at 1362.

234. As a nonprofit institution, a museum's legal existence can take a variety of forms (including, *inter alia*, a trust, partnership, or public or private museum), and a discussion about the many state statutory and common-law rules that govern these forms is beyond the scope of this Note. See Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes Over Title*, 31 N.Y.U. J. INT'L L. & POL. 15, 16 (1998). Should a question arise regarding the federal government's jurisdiction to create a commission with binding effect on private museums, however, there are many possible avenues to consider. Under the low threshold for gaining jurisdiction under the Commerce Clause, "the billion dollar art trade is irrefutably 'commerce,'" and the Commerce power includes the "power to prohibit trade of stolen goods." See Stephanie Cuba, *supra* note 224, at 480. Additionally, the federal government has already enacted a comprehensive scheme to regulate the research and return of

restitution, including some officials that were involved with the Terezin Declaration, have discussed the possibility of creating a US State Department Commission (Commission) to handle Nazi-art restitution claims.²³⁵ Such a mechanism would provide a comprehensive means of implementing a domestic resolution. With domestic legislation, the United States could control the time and manner in which claimants could bring suit against domestic museums. But the early literature surrounding the creation of this Commission has suggested that it would still be nonbinding.²³⁶ In order for the commission to have true teeth, it must have binding jurisdiction over both parties (claimants and museums) when an heir seeks restitution from a museum; otherwise, it is likely that such a mechanism will be as ineffective as museum self-regulation.

But such a commission that hears claims is not meant to completely lessen any traditional standards that claimants must satisfy when filing in court, as that would expose museums to meritless inquiries. In order to successfully achieve a resolution with a museum under this scheme, a claimant must still meet some threshold requirements he would have had to meet in court, such as having the proper standing (i.e., by presenting a will or some sort of documentary evidence that the heirs have a legitimate claim to the artwork).²³⁷ This initial threshold equates to a motion-to-dismiss standard to ensure that he at least has a legitimate claim for restitution. But the claimant will not face the statute-of-limitations problem he would face in court, and the Commission would get federal

certain Native American objects under the Native American Graves Protection and Repatriation Act, with jurisdiction contingent on the museum receiving federal funds. *Frequently Asked Questions*, NAT'L PARK SERV., <http://www.nps.gov/nagpra/FAQ> (last visited Oct. 1, 2012). Many private museums receive some federal funding, though the amount may be very small. See, e.g., *To Charge or What to Charge?*, ART NEWSPAPER (Sept. 26, 2011), <http://www.theartnewspaper.com/articles/To+charge+or+what+to+charge%3F/24451>. But the amount of funding has no disposition on the statute's binding effect. Another possibility would be to make museums' 501(c)(3) tax-exempt status contingent on participation in the commission. "Section 501(c)(3) organizations must be aware of the possibility of having their tax-exempt status revoked if they engage in actions that influence legislation or fail to serve a public purpose" Joseph F. Sawka, Note, *Reconciling Policy and Equity: The Ability of the Internal Revenue Code to Resolve Disputes Regarding Nazi-Looted Art*, 17 U. MIAMI INT'L & COMP. L. REV. 91, 111 (2009) (proposing that museums and claimants seeking restitution for Nazi-looted art resolve their disputes through settlements involving tax-code deductions under §§ 501(c)(3) and 170).

235. Jennifer Anglim Kreder, *Wrestling the Dead Hand of History: Perspectives on a Proposed State Department Commission on Nazi Looted Art*, 1 CULTURAL HERITAGE & ARTS REV. 6, 6-7 (2010).

236. *Id.*

237. See, e.g., *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 968 (9th Cir. 2010) (noting that the district court ruled the claimant's action time-barred because the statute of limitations had run before she inherited her interest in the paintings at issue, implying an interest in the paintings was necessary to bring suit).

funding to alleviate the financial burdens both claimants and museums face in performing costly provenance research. With the financial help, museums may feel less like the Commission is something they must participate in and more like it is a helpful method of resolution. The Advisory Commission recognized the costs faced by both parties in these claims, noting that provenance research is “costly and time consuming, often involving access to records that are hard to obtain.”²³⁸ Because of this, in addition to the Commission receiving an appropriation of federal funds, Congress should allow private groups and individuals to make charitable, tax-deductible donations to the Commission.²³⁹ The Advisory Commission supported the idea of using tax-deductible donations to fund a federal foundation to research the provenance of potential Holocaust-looted art.²⁴⁰

The Commission should first consider the appropriate method of resolution under legal rules and then use more equitable factors to determine the outcome if legal rules do not provide a clear answer. For example, if Nazis unequivocally looted the artwork at issue, and only the statute of limitations precluded the claimant from restitution, then the Commission would not need to resolve the case using equitable factors when legal rules clearly provide the correct result. The same holds true when the former owner of a piece of art sold it under legitimate circumstances. A normal art market still existed during the war, and, before becoming victims of the Holocaust, many individuals sold their artwork in a standard transaction for fair market value.²⁴¹ If the evidence indicates that the then-owner sold the artwork in a routine transaction for a fair price with no questionable gaps in provenance, then legal rules would dictate that the artwork should not be restituted. This position respects the stance that courts have taken in declining to accept the proposition that all Jewish individuals in the post-1933 European art market made their sales under duress. Though the United States did suggest that other countries adopt such a proposition in the immediate aftermath of the war, that theory is too extreme, as it is unjust toward rightful purchasers and countered by factual evidence.²⁴²

238. PRESIDENTIAL ADVISORY COMM’N ON HOLOCAUST ASSETS IN THE UNITED STATES, *supra* note 88.

239. Donations should remain anonymous to the Commission adjudicators in order to avoid a conflict of interest if a potential defendant-museum donates in hopes of receiving a more favorable result.

240. PRESIDENTIAL ADVISORY COMM’N ON HOLOCAUST ASSETS IN THE UNITED STATES, *supra* note 42.

241. *See* Kreder, *supra* note 221, at 181 (“[Q]uite a few sales were legitimate. In fact, some survivors were able to sell art on the open market at fair prices, which enabled them to obtain safe passage for themselves and their families to the United States and other countries.”).

242. *See id.*

When claims are more factually complicated, as they so often are, the Commission should resolve the case by balancing equitable factors such as: (1) how much research the museum put into the artwork's provenance when the museum first acquired the piece; (2) whether the artwork's provenance has gaps to suggest a period of unknown and possibly illegal ownership;²⁴³ and (3) what sort of plans the museum has for the piece (i.e., will it be on display or stored away, and which choice promotes the best public good). Members of the Art Loss Register regularly negotiate with museums on behalf of Nazi-restitution claimants;²⁴⁴ those members, along with various similarly situated professionals practicing in art law and the art business generally, are qualified to make these kinds of determinations as adjudicators for the Commission.²⁴⁵ In addition to these experts, it may be appropriate to have a former judge act as an adjudicator for the Commission as well, particularly since the UK Spoliation Advisory Panel has had success with two former judges as its chairmen.²⁴⁶ However such adjudicators choose to balance these and other factors, they should do so as consistently as possible to try and create uniformity in their decisions. Each claim will of course have unique facts, however, and the Commission should decide what would be fairest under these factors: restitution, compensation, a display of provenance, or granting an undivided half interest to each party,²⁴⁷ among other options.

Additionally, the statute creating such a Commission should have a sunset provision to provide repose for museums, and the Commission should only accept claims for ten years. The UK Holocaust (Return of Cultural Objects) Act, passed in 2009 to allow claimants to seek restitution on moral grounds, has a legislative life of ten years.²⁴⁸ One US attorney experienced in the art trade noted that a claim involving artwork stolen during World War II takes between

243. The Presidential Advisory Commission on Holocaust Assets stated that "gaps in provenance do not create a presumption that a work was looted but merely present an opportunity for claimants to come forward with the understanding that they would have to meet the burden of proof currently required by law." PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS IN THE UNITED STATES, *supra* note 88.

244. See Jackson, *supra* note 16.

245. Marion Maneker, *A Look at Art Loss Register*, ART MARKET MONITOR (Apr. 22, 2009), <http://artmarketmonitor.com/2009/04/22/a-closer-look-at-the-art-loss-register>.

246. *Government Bodies: Spoliation Advisory Panel—United Kingdom*, LOOTEDART.COM, <http://www.lootedart.com/MFEU4P88744> (last visited Jan. 11, 2013).

247. See, e.g., *Case Summary: Goodman v. Searle*, INT'L FOUND. FOR ART RESEARCH, http://www.ifar.org/case_summary.php?docid=1179627363 (last visited Jan. 11, 2013) (providing an example of a museum and claimant settling on an undivided half-interest scheme).

248. Charlotte Woodhead, *UK Restitution Update: The Holocaust (Return of Cultural Objects) Act 2009*, 1 CULTURAL HERITAGE & ARTS REV. 25, 25–26 (2010).

seven and twelve years to resolve.²⁴⁹ Ten years would also provide ample time to generate enough publicity so that all rightful claimants will have the best possible chance of hearing about the Commission and bringing a claim if they so desire.

If a claimant does not bring a claim within the requisite time period and later files a lawsuit, the US government should submit a statement on behalf of the museum asserting that public policy favors dismissal, in the same manner that it does for the German Foundation (as described in Part I of this Note).²⁵⁰ The statement should express that the appropriate forum to decide the claim would have been the Commission. It is true that museums often win in the early stages of litigation because the statute of limitations bars the claimant, but such a statement would still mitigate the time and cost a museum incurs in preparing a defense. Additionally, courts should bar claimants from bringing suit against a museum if they have already sought to resolve the claim through the Commission and are unhappy with the result. Jurisdiction is binding for both parties (once claimants decide to seek restitution through the Commission), and thus the courts should foreclose the alternative judicial avenue to claimants for the same claim.

Such a commission avoids the undesirable effect of a prolonged statute of limitations. First, it is true that oftentimes museums acquired pieces in good faith, and they should not be susceptible to litigation for an indefinite amount of time. Second, it is also unlikely that the legislature would allow such a rule, particularly when the statutes of limitation are a traditional designation of state power. The legislature would also want to restrict actionable claims with the Commission to Nazi-looting claims in order to avoid opening the “can of worms” of museum restitution from all periods throughout history.²⁵¹ Whether or not that is the correct result under a moral-rights theory is a separate question,²⁵² but in practical terms, the government will not want to expose US museums to constant restitution attacks for every piece taken from a foreign jurisdiction, even if some may support such a theory in principle. This balance reflects tough policy decisions but decisions that are necessary to create uniformity and promote justice and the public good.

249. Lerner, *supra* note 234, at 36.

250. See HOLOCAUST VICTIM ASSETS LITIGATION (SWISS BANKS), *supra* note 64 and accompanying text.

251. See *supra* Part II.B.2.

252. For a discussion of this issue, see Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003).

B. Jurisdiction over All Pieces of Art? Implications of the Foreign Cultural Exchange Judicial Immunity Clarification Act

As this resolution scheme is a domestic one governing only US museums, Congress would have to determine whether the statute should also govern foreign pieces of artwork that are temporarily displayed in the United States on loan from international museums.²⁵³ It is interesting to note that the United States has been somewhat passive in handling Nazi-art-restitution cases involving domestically owned paintings, but it has alternatively been aggressive in filing claims (under the National Stolen Property Act) to seize loaned foreign pieces once they enter the United States if the government believes Nazis stole the artwork as part of their looting.²⁵⁴ Normally, the Immunity from Judicial Seizure statute protects objects of cultural significance, imported into the United States for temporary exhibition, from judicial seizure in order to encourage cultural loans from abroad.²⁵⁵ But in March 2012, Congress introduced a bill entitled the “Foreign Cultural Exchange Judicial Immunity Clarification Act,” which would provide a limited exception for Nazi-looted art.²⁵⁶

The bill had not passed as of February 20, 2013, and those opposed to it worry that it will prevent foreign museums from loaning work to the United States.²⁵⁷ But passage of the bill would obviously affect the jurisdiction of the Commission or the similar resolution scheme proposed in this Note. If the Commission could not hear claims involving foreign paintings on loan, it may draw criticism for being too narrowly construed, since a large volume of artwork is often

253. This issue is most famously highlighted in *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009). In 1997, New York’s Museum of Modern Art (MoMA) exhibited a painting on loan from the Austrian Leopold museum. *Id.* at 246. The painting (“Wally”) had a long and tangled history of ownership, and the estate of its 1930s Austrian-Jewish owner asserted that the painting had either been stolen by the Nazis or granted to them under duress when their ancestor fled the country to avoid persecution. *Id.* at 236–38. After the MoMA exhibit ended, the New York District Attorney’s Office issued a subpoena for the painting, claiming that the Leopold Museum had violated the National Stolen Property Act by knowingly shipping a stolen artifact into the United States. *Id.* at 236. The court, after many years of litigation, ruled that a triable issue of fact existed as to whether the Leopold knew that “Wally” had been stolen, and therefore knew its illegal status when exporting it to the United States. *Id.* at 237. Before a jury could resolve the issue, the two parties settled. Thompson, *supra* note 14, at 438–39. The painting was eventually returned to the Leopold after the museum paid the heirs \$19 million. *Id.*

254. See *Portrait of Wally*, 663 F. Supp. 2d at 232; see also Laura Gilbert, *Italy Caves on Restitution, Defaults After U.S. Seizes Painting in Florida*, ART UNWASHED BLOG (Jan. 10 2012, 7:49 PM), <http://art-unwashed.blogspot.com/2012/01/italy-caves-on-restitution-defaults.html>.

255. See Nikki Georgopoulos, *Revisiting Senate Bill 2212–Part One*, PLUNDERED ART BLOGSPOT (Oct. 18, 2012), <http://plundered-art.blogspot.com/2012/10/revisiting-senate-bill-2212part-one.html>.

256. *Id.*

257. *Id.*

displayed via a loan. The bill itself has also drawn criticism for providing an exception only for Nazi-looted art, thereby impeding redress for cultural looting outside that specific context.²⁵⁸ One international law specialist asked: “Why are Nazi storm troopers looting art any different from Bolshevik storm troopers?”²⁵⁹ Whether or not one agrees with this criticism, as this Note has shown, such a narrow exception keeps with the general attitude that museums and the government have displayed in the past. The government has vaguely addressed Nazi restitution, while at the same time trying to avoid exposing US museums to general restitution claims from any type of prior looting.²⁶⁰

Indeed, museums support the bill because, outside of the Holocaust-art exception, the bill strengthens their immunity from suit for exhibiting loaned artifacts of questionable provenance.²⁶¹ Under the current law, a US museum must get a special waiver from the State Department to protect a loaned piece of art from seizure while the museum exhibits it in the country.²⁶² But, feeling that this protection is no longer sufficient, museums seek to eliminate the waiver requirement in the new bill and institute a per se bar preventing any claimants from filing suit against them.²⁶³ Even with the narrow exception for Holocaust-art restitution, opponents of the bill fear that such claimants will face a more difficult legal struggle if Congress passes the bill.²⁶⁴ This proposed bill exemplifies why claimants need a binding legislative mechanism to resolve Holocaust-era–restitution claims. Museums continue to adhere to their “cultural internationalist” perspective while espousing vague commitments to restituting Nazi-looted art that are—to use a word from the *Seger-Thomschitz* court—merely “hortatory.”²⁶⁵

IV. CONCLUSION

The problem of Holocaust-era art restitution has been discussed worldwide, and there is general agreement that there needs to be justice. But the popular sentiment and resolutions to rectify

258. *Id.*

259. Doreen Carvajal, *Dispute Over Bill on Borrowed Art*, N.Y. TIMES (May 21, 2012), <http://www.nytimes.com/2012/05/22/arts/design/dispute-over-bill-to-protect-art-lent-to-museums.html>.

260. *See supra* Part II.B.

261. *See Carvajal, supra* note 259.

262. *See id.*

263. *See id.*

264. *See id.*

265. *Museum of Fine Arts, Bos. v. Seger-Thomschitz*, 623 F.3d 1, 11 (1st Cir. 2010).

these injustices lack teeth in the United States, and no substantial, comprehensive, and rational method of implementation exists.²⁶⁶ Despite the ethics and guidelines to which museums adhere, the self-enforcement of these guidelines is just the problem—there is no outside, binding regulation to force museums into a specific course of action.²⁶⁷ Though many museums perform due diligence in their provenance work and espouse lofty goals of justice and fairness, a mandatory legislative mechanism should bind these museums in order to help realize such goals.

Such a mandatory legislative mechanism is particularly necessary considering the passive role that courts have played in adjudicating Nazi-looting claims.²⁶⁸ Fears of interfering with the executive branch and foreign affairs have led courts to dismiss these matters, evincing an aversion to applying equitable tolling when a statute-of-limitations challenge is involved.²⁶⁹ Because one-on-one litigation will not solve the overarching problem, the legislature should step in. Indeed, it is the legislature's duty to weigh difficult policy decisions, particularly in cases such as the ones this Note presents, in which the two parties involved in the litigation may both be "innocent" of any wrongdoing and forced into the predicament due to Nazi actions over sixty years ago.²⁷⁰

But in all practicality, the legislature will be fearful of opening a "can of worms" and will not want museums to face restitution claims for alleged looting from any time period, whether or not this result is really the "just" thing to do. Instead, the legislature should mitigate financial and procedural burdens rightful claimants face but protect museums' interests by requiring a threshold evidentiary level for a claim and establishing a sunset period for the legislation.

*Katharine N. Skinner**

266. *See supra* Parts I.A, II.

267. *See supra* Part II.B.3.

268. *See supra* Part II.A.

269. *See supra* Part II.A.

270. *See, e.g.*, Hawkins, *supra* note 7, at 49–54.

* J.D. Candidate, Vanderbilt University Law School, 2013; B.A., Political Science, University of Florida, 2010. The Author would like to thank the members of the VANDERBILT JOURNAL OF ENTERTAINMENT AND TECHNOLOGY LAW editorial staff for their invaluable edits, with particular thanks to Francie Kammeraad, Katie Kuhn, Mike Dearington, Shane Valenzi, and Kendall Short. The Author would also like to thank her family members for their continued love and support.