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The Sunset of the Holocaust Expropriated Art Recovery Act of 2016 and the Rise of the Demand and Refusal Rule

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THE SUNSET OF THE HOLOCAUST EXPROPRIATED ART RECOVERY ACT OF 2016 AND THE RISE OF THE DEMAND AND REFUSAL RULE

Fallon S. Sheridan*

During World War II, hundreds of thousands of works of art were confiscated by Nazis under the direction of Adolf Hitler or sold for less than market value by members of the Jewish community fleeing Nazi Germany. Shockingly, an estimated 100,000 of the 600,000 works that were taken are still missing today. In recognition of the need for laws that adequately assist original owners (and their heirs) in recovering these works of art, the U.S. Congress passed the Holocaust Expropriated Art Recovery Act of 2016 (“the HEAR Act”). The HEAR Act supplanted state statutes of limitations for Nazi-confiscated artwork with a national six-year statute of limitations. A cause of action for replevin of Nazi-confiscated artwork under the HEAR Act accrues once the original owner has “actual knowledge” of a claim against the current possessor. The HEAR Act contains a sunset provision—causing it to expire on January 1, 2027. Upon expiration, the law applied to cases of Nazi-confiscated art recovery will revert to state statutes. This Note examines two state accrual rules for causes of action for replevin of personal property—the discovery rule and the demand and refusal rule—and proceeds to examine their strengths and weaknesses. This Note suggests that the HEAR Act should be used as a model for states to address the need for claimant-friendly accrual rules for causes of action for replevin. Ultimately, this Note argues that upon expiration of the HEAR Act: (1) states, rather than the federal government, should adopt the demand and refusal rule; (2) the rule should be applied to all types of stolen chattels, not just Nazi-confiscated art; (3) demand and refusal should be applied to thieves and bad-faith purchasers, not just good-faith purchasers; (4) the rule should not be applied retroactively to avoid constitutionality concerns; and (5) the duration of the statute of limitations should be shortened.

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INTRODUCTION

The fundamental question posed by the HEAR Act is, have we here in the United States done enough to ensure fair and equitable solutions? I believe we have done a great deal, but we still could and should do much more.

—Ronald S. Lauder¹

During the 1930s and amidst World War II, Adolf Hitler's National Socialist German Workers' Party undertook what was later coined "the greatest art theft in history."² Hitler's regime ultimately took an estimated 600,000 works of art, and the United States has undertaken a number of efforts since World War II to repatriate this stolen art.³ These efforts culminated in the passage of the Holocaust Expropriated Art Recovery Act of 2016⁴ ("the HEAR Act"), which supplanted state statutes of limitations and replaced them with a national six-year statute of limitations for "artwork or other property that was lost during the covered period" of January 1, 1933 to December 31, 1945 "because of Nazi persecution."⁵

Absent the HEAR Act, a cause of action for replevin of a Nazi-confiscated work of art would fall under a state's statute of limitations; the majority of state jurisdictions, such as New Jersey, employ the discovery rule,⁶ while New York employs a minority demand and refusal rule.⁷ Scholars and courts disagree over which of these rules better protects stolen artwork.⁸ Upon the HEAR Act's expiration on January 1, 2027, states will decide whether the discovery rule or the demand and refusal rule is the better method to continue to protect and repatriate stolen works of art.⁹

1. *The Holocaust Expropriated Art Recovery Act—Reuniting Victims with Their Lost Heritage: Hearing on S. 2763 Before the Subcomms. on the Const., Oversight, Agency Action, Fed. Rts. & Fed. Cts. of the S. Comm. on the Judiciary*, 114th Cong. 2 (2016) [hereinafter *HEAR Act Hearing*] (statement of Ambassador Ronald S. Lauder, Chairman of the Council, World Jewish Restitution Organization).

2. Soffia H. Kuehner Gray, Note, *The Holocaust Expropriated Art Recovery Act of 2016: An Ineffective Remedy for Returning Nazi-Looted Art*, 2019 U. ILL. L. REV. 363, 369 (quoting Alex Shoumatoff, *The Devil and the Art Dealer*, VANITY FAIR (Mar. 19, 2014), <https://www.vanityfair.com/news/2014/04/degenerate-art-cornelius-gurlitt-munich-apartment> [<https://perma.cc/C8E8-TZVN>]); see also Holocaust Expropriated Art Recovery Act of 2016 § 2(1), 22 U.S.C. § 1621 note (calling this time period the "greatest displacement of art in human history").

3. Stuart E. Eizenstat, Opinion, *Art Stolen by the Nazis Is Still Missing. Here's How We Can Recover It.*, WASH. POST. (Jan. 2, 2019), https://www.washingtonpost.com/opinions/no-one-should-trade-in-or-possess-art-stolen-by-the-nazis/2019/01/02/01990232-0ed3-11e9-831f-3aa2c2be4cbd_story.html [<https://perma.cc/97N5-KBKF>]. For a discussion of efforts by the United States to repatriate Nazi-confiscated art, see *infra* notes 27–29 and accompanying text.

4. Pub. L. No. 114-308, 130 Stat. 1524 (codified at 22 U.S.C. § 1621 note).

5. *Id.* § 5(a), 130 Stat. at 1526.

6. See generally *O'Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980).

7. See generally *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991).

8. See *infra* Parts I.D–E.

9. See Holocaust Expropriated Art Recovery Act of 2016 § 5(g).

This Note argues that the expiration of the HEAR Act should be the impetus for placing the issue of discovery versus demand and refusal on states' agendas. This Note further argues that the HEAR Act's sympathy for claimants and emphasis on owner protection should be used as a model to apply the demand and refusal rule to all cases of stolen chattels.

Part I discusses the circumstances and historical context behind Nazi-confiscated art and its present implications. Part I also introduces the purposes ascribed to causes of action for replevin and statutes of limitations. From there, Part I discusses three rules for accrual of a cause of action for replevin: (1) accrual at the time of the theft, (2) the discovery rule, and (3) the demand and refusal rule. Part I then provides a general overview of the HEAR Act. Part II discusses arguments advanced by scholars and judges for and against the two more modern accrual rules: the discovery rule and the demand and refusal rule.

Part III argues that upon expiration of the HEAR Act, states should reevaluate their statutes of limitations for causes of action for replevin of stolen chattels. This Note suggests state legislatures adopt the demand and refusal rule and provides a number of considerations for that future legislation: (1) state rather than federal implementation of the demand and refusal rule; (2) application of the demand and refusal rule to all stolen chattels, not just Nazi-confiscated art; (3) application of demand and refusal to thieves and bad-faith purchasers; (4) nonretroactivity of newly implemented demand and refusal rules; and (5) a shortening of the durations of statutes of limitations for causes of action for replevin upon implementing demand and refusal.

I. NAZI-CONFISCATED ART AND THE RUNNING OF THE STATUTE OF LIMITATIONS

Part I.A discusses the historical context of Nazi-confiscated art to provide the basis for understanding the HEAR Act. Part I.B explains causes of action for replevin and the purposes underlying statutes of limitations generally. Parts I.C–E explain three accrual rules for statutes of limitations for causes of action for replevin: accrual from the time of the theft; the discovery rule; and the demand and refusal rule. The latter two of these rules are the focus of this Note.¹⁰ Part I.F details the structure and contents of the HEAR Act, as well as the applicability of the doctrine of laches to cases under the HEAR Act.

10. Although outside the scope of this Note, some states, such as California, have variations on these rules. See Tarquin Preziosi, *Applying a Strict Discovery Rule to Art Stolen in the Past*, 49 HASTINGS L.J. 225, 247–48 (1997). Preziosi identifies other laudable suggestions besides these accrual rules: “Legislation that requires victims of art theft to register their stolen works and/or that requires purchasers to do a title search in order to preserve their rights is desirable.” *Id.* at 252. However, J. Christian Kennedy has stated that the U.S. government “does not have any leverage to force compliance” with registration and museum disclosure programs. J. Christian Kennedy, Special Envoy for Holocaust Issues, U.S. Dep’t of State, *The Role of the United States Government in Art Restitution* (Apr. 23, 2007), <https://2001-2009.state.gov/p/eur/rls/rm/83392.htm> [<https://perma.cc/Z4RA-K9FS>].

A. *The Greatest Art Theft in History*

Under Hitler's oppression, Jewish property, including art, was often seized by Nazis or sold for less than market value by members of the Jewish community forced to flee Nazi Germany.¹¹ Hitler's anti-art agenda was in large part motivated by his obsession with cultural cleansing—a cleansing he felt could be accomplished by “merciless war” against “cultural disintegration.”¹² Inspired by Max Nordau's *Entartung (Degeneration)*,¹³ Hitler called for the eradication of all nonrepresentational art.¹⁴ Hitler's “degenerate artists” cleanse extended to painters, such as Vincent van Gogh, Paul Cézanne, and Henri Matisse; filmmakers, such as Fritz Lang and Billy Wilder; and writers, such as Franz Kafka, Sigmund Freud, Karl Marx, and Bertolt Brecht.¹⁵

Under Hitler's direction, “degenerate art” exhibitions were held to “reveal the philosophical, political, racial and moral goals and intentions behind this movement, and the driving forces of corruption which follow them.”¹⁶ For example, minister of public enlightenment and propaganda, Joseph Goebbels, established an art confiscation commission in 1937.¹⁷ The confiscated art was collected and displayed at the “Degenerate Art Show” in Munich.¹⁸ A pamphlet created for the art show and circulated by the Ministry of Science, Education, and Culture stated: “Dadaism, Futurism, Cubism, and the other isms are the poisonous flower of a Jewish parasitical plant, grown on German soil. . . . Examples of these will be the strongest proof for the necessity of a radical solution to the Jewish question.”¹⁹

11. See, e.g., *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 189 (2d Cir. 2019); Alex Shoumatoff, *The Devil and the Art Dealer*, VANITY FAIR (Mar. 19, 2014), <https://www.vanityfair.com/news/2014/04/degenerate-art-cornelius-gurlitt-munich-apartment> [<https://perma.cc/C8E8-TZVN>]. For example, Jewish art dealer, Alfred Flechtheim, who owned multiple modern art galleries, “fled to Paris and then London, leaving behind his collection of art. He died impoverished in 1937. His family has been trying to reclaim the collection, including *The Lion Tamer* for years.” Shoumatoff, *supra*. Cornelius Gurlitt, who sold Max Beckmann's *The Lion Tamer* to the Lempertz Auction House in 2011 for \$1.17 million, entered into a settlement agreement with the Flechtheim estate, in which “Gurlitt acknowledged that the Beckmann had been sold under duress by Flechtheim in 1934 to his father, Hildebrand Gurlitt.” *Id.*

12. Shoumatoff, *supra* note 11.

13. MAX SIMON NORDAU, *DEGENERATION* (trans., London, William Heinemann 1898). Nordau's *Entartung* “postulated that some of the new art and literature that was appearing in *fin de siècle* Europe was the product of diseased minds.” Shoumatoff, *supra* note 11. Ironically, while Hitler's anti-Semitic agenda was inspired by Nordau's writing, Nordau himself viewed anti-Semitic sentiments as “alarming . . . a point that seems to have been lost on Hitler.” *Id.*

14. *Id.* Nonrepresentational art can summarily be defined as “anything that deviate[s] from classic representationalism . . . [e.g.,] new Expressionism, Cubism, Dadaism, Fauvism, futurism . . . objective realism . . . Impressionism” and abstractism. *Id.*

15. *Id.*

16. Lucy Burns, *Degenerate Art: Why Hitler Hated Modernism*, BBC NEWS (Nov. 6, 2013), <https://www.bbc.com/news/magazine-24819441> [<https://perma.cc/W6G3-HEZ5>]; see also Shoumatoff, *supra* note 11.

17. Shoumatoff, *supra* note 11.

18. *Id.*

19. *Id.* (alteration in original).

While there is a need to return these Nazi-confiscated works of art back to their original owners (or their heirs),²⁰ an estimated 100,000 works of art—that is, approximately one-sixth of the works stolen—have yet to be recovered.²¹ Problems associated with Nazi-confiscated art restitution include: that many heirs of deceased owners are unaware, or have no means of tracking, what works have been lost,²² and some countries, such as Germany, have “no law preventing an individual or an institution from owning looted art.”²³ A lost art website established by the German government only displayed 458 works as of 2014²⁴—a bare-bones representation of the 100,000 works that are still missing. Most shockingly, as of 2014, the German law permitting the Nazi’s confiscation of “Degenerate Art” had yet to be repealed.²⁵ Lastly, the cost of litigation for art restitution can be very high.²⁶

The U.S. government has undertaken a number of efforts to address Nazi-confiscated art. These efforts have included convening The Washington Conference on Holocaust Era Assets in 1998 and creating the Principles on Nazi-Confiscated Art;²⁷ enacting the Holocaust Victims Redress Act;²⁸ and participating in the Prague Holocaust Era Assets Conference in 2009, which

20. *See id.*

21. Eizenstat, *supra* note 3.

22. *Contra* Preziosi, *supra* note 10, at 250 n.206. “The problems of proving ownership to art lost during and before World War II are not necessarily as daunting as they seem; the Nazis often left accurate records of what they took and where it was taken from.” *Id.*

23. Shoumatoff, *supra* note 11.

24. *Id.*

25. *See id.*

26. *See* Emily J. Henson, Comment, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners—Can Moral Obligations Be Translated into Legal Duties?*, 51 DEPAUL L. REV. 1103, 1147 (2002).

27. *See* Holocaust Expropriated Art Recovery Act of 2016 § 2(3), 22 U.S.C. § 1621 note. The Washington Conference established eleven nonbinding principles, to be recognized by participating countries. Off. of the Special Envoy for Holocaust Issues, U.S. Dep’t of State, Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> [<https://perma.cc/D5F8-7TGH>]. These principles are: (1) identifying Nazi-confiscated artwork; (2) making records and archives available to researchers; (3) making identification resources available; (4) recognizing that provenances of Nazi-confiscated artwork are not easily discoverable; (5) promoting publication of identified Nazi-confiscated art; (6) creating a central registry of Nazi-confiscated art; (7) encouraging original owners to make claims for their artwork; (8) creating “just and fair solution[s]” for identified, original owners and heirs of Nazi-confiscated artwork, using fact-specific considerations; (9) taking “steps . . . expeditiously to achieve a just and fair solution” for unidentified, original owners and heirs; (10) creating commissions to identify Nazi-confiscated art and “address[] ownership issues”; and (11) creating and implementing procedures in participating countries to effectuate these principles, especially alternative dispute resolution procedures. *See id.*

28. Pub. L. No. 105-158, 112 Stat. 15 (1998). The Holocaust Victims Redress Act addresses Nazi-confiscated art by stating: “It is the sense of Congress that . . . governments should undertake good faith efforts to facilitate the return of . . . works of art[] to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule . . .” *Id.* § 202, 112 Stat. at 16–17. The Holocaust Victims Redress Act is highlighted in the HEAR Act. Holocaust Expropriated Art Recovery Act of 2016 § 2(4).

issued the Terezin Declaration.²⁹ Nonetheless, lawsuits commenced by victims of Nazi art confiscation “face significant procedural obstacles partly due to State statutes of limitations, which typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered.”³⁰ Furthermore, in *Von Saher v. Norton Simon Museum of Art*³¹ (*Von Saher I*), the Ninth Circuit held that state exceptions to statutes of limitations for Nazi-confiscated art are unconstitutional as violative of the federal foreign affairs power. Congress seemed to underwrite that decision by positively citing *Von Saher I* in the HEAR Act.³² Specifically, Congress stated that “[i]n light of [*Von Saher I*], the enactment of a Federal law is necessary to ensure that claims to Nazi-confiscated art are adjudicated in accordance with United States policy.”³³

B. Restitution and Restrictions: Causes of Action for Replevin and the Purposes of Statutes of Limitations

When a chattel,³⁴ such as a work of art, has been stolen and resold to a good-faith purchaser, the original owner has a cause of action for replevin.³⁵ Replevin is a “lawsuit to repossess personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it.”³⁶

Rules regarding replevin, including those rules regarding statutes of limitations,³⁷ differ by jurisdiction.³⁸ Therefore, decisions about the length of the statute of limitations and when it starts to run are up to states.

Statutes of limitations serve the purpose of ensuring that claims are brought in a timely fashion, so that meritorious claims can be evaluated based

29. See Holocaust Expropriated Art Recovery Act of 2016 § 2(5). The Terezin Declaration urged participating countries to make “[e]very effort . . . to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress of property, which were part of the persecution of these innocent people and groups, the vast majority of whom died heirless.” Eren Waitzman, *Terezin Declaration: The Restitution of Property*, U.K. PARLIAMENT: HOUSE OF LORDS LIBRARY (July 20, 2020), <https://lordslibrary.parliament.uk/terezin-declaration-the-restitution-of-property> [<https://perma.cc/HRE3-G5AL>].

30. Holocaust Expropriated Art Recovery Act of 2016 § 2(6) (“In some cases, this means that the claims expired before World War II even ended.”).

31. 592 F.3d 954 (9th Cir. 2010).

32. See Holocaust Expropriated Art Recovery Act of 2016 § 2(7). *But see infra* Part II.C.

33. Holocaust Expropriated Art Recovery Act of 2016 § 2(7).

34. See *Chattel*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “chattel” as “[m]ovable or transferable property; personal property; esp., a physical object capable of manual delivery and not the subject matter of real property”).

35. See *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429 (N.Y. 1991).

36. *Replevin*, BLACK’S LAW DICTIONARY (11th ed. 2019).

37. See *Statute of Limitations*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “statute of limitations” as “[a] law that bars claims after a specified period; specif., a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued”).

38. See *Replevin*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/replevin> [<https://perma.cc/GP52-27VA>] (last visited Apr. 14, 2021) (“Rules on replevin actions vary by jurisdiction.” (citing FED. R. CIV. P. 64)).

on reliable evidence.³⁹ While in the case of stolen valuable artwork it may seem unfair to statutorily bar an original owner from making a claim for return of an item, statutes of limitations also serve to discourage negligent, and even calculated, delay by plaintiffs bringing causes of action.⁴⁰ Although some meritorious claims will inevitably be time-barred, states impose these procedural bars on recovery out of fairness to defendants and on the assumption that claimants with meritorious claims “will not delay in asserting them.”⁴¹

One difficulty in applying statutes of limitations is determining at what point a cause of action “accrues,” or the statute begins to run.⁴² The accrual rules applied by states are not uniform, and they are often left to courts to establish because they are not addressed in state statutes; even when they are addressed by statute, they are often left vague.⁴³ While a cause of action for replevin of stolen art originally accrued “at the time of the wrongful taking,”⁴⁴ courts relied on equitable doctrines to alter the time of accrual in cases of stolen art.⁴⁵ These equitable considerations led to the discovery rule⁴⁶ and the demand and refusal rule.⁴⁷

C. *The Original Rule: Accrual from the Time of Theft*

The original rule for the accrual of a cause of action for replevin provided that “the cause of action for the recovery of stolen art [or any other chattel] traditionally accrued at the time of the wrongful taking.”⁴⁸ This original rule was a direct result of the vagueness with which state legislatures described “accrual” in their statutes of limitations.⁴⁹ Most state legislatures only

39. *See Statute of Limitations, supra* note 37 (“Statutes of limitations, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” (quoting *Ord. of R.R. Tels. v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944))).

40. *See* Leah E. Eisen, Commentary, *The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World*, 81 J. CRIM. L. & CRIMINOLOGY 1067, 1072 (1991).

41. *See id.* at 1072–73.

42. *See id.* at 1073.

43. *See id.* at 1073–75.

44. *Id.* at 1074.

45. *Id.* at 1074–75. “[D]ue to the growing recognition of the difficulty of discovering who possesses stolen property and the ease with which individuals can hide property,” these other doctrines emerged. *Id.* For a discussion of why the doctrine of adverse possession is inconducive to cases of stolen art, see *id.* at 1075–78 (citing *O’Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980)).

46. *See infra* Part I.D.

47. *See infra* Part I.E.

48. Eisen, *supra* note 40, at 1074; *see also* *Detroit Inst. of Arts v. Ullin*, No. 06-1033, 2007 WL 1016996, at *3 (E.D. Mich. Mar. 31, 2007) (holding that a woman’s claim for a van Gogh painting, sold under Nazi persecution, accrued in 1938 when the painting was sold and thus the statute ran while World War II was still going on).

49. *See* Eisen, *supra* note 40, at 1073 (“While state legislatures typically designate the length of a limitations period, they tend to leave the responsibility for determining when the accrual period begins to the courts.”).

provide that the statute of limitations begins to run when the cause of action accrues but do not define accrual.⁵⁰ Courts thus originally premised accrual on the idea that “the cause of action accrues upon the commission of the tortious act”—which, for a cause of action for replevin, would be the time of the theft.⁵¹ From there, the thief would be said to be in “adverse possession” of the chattel—such that upon the running of the statute, the thief would acquire good title.⁵²

This original accrual rule gradually changed as courts began to recognize the difficulty of identifying the possessor of a stolen chattel and the “ease with which” movable chattels can be hidden.⁵³ Thus, courts developed judicial doctrines to defer the accrual of a cause of action for replevin of a stolen chattel past the date of the theft and to some other date in the future.⁵⁴ The two modern accrual rules relevant to this Note are the discovery rule⁵⁵ and the demand and refusal rule.⁵⁶

D. Modern Adaptations: The Discovery Rule

The discovery rule provides that “in an appropriate case, a cause of action [for replevin] will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action.”⁵⁷ Courts have adopted the discovery rule “[t]o avoid harsh results from the mechanical application of the statute.”⁵⁸ In applying the discovery rule to a cause of action for replevin of artwork, the Supreme Court of New Jersey held that renowned artist Georgia O’Keeffe’s statute of limitations for replevin of allegedly stolen paintings began to run only when she knew or should have known “of the cause of

50. *See id.* at 1073 n.32.

51. *Id.* at 1074.

52. *See Adverse Possession*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The doctrine by which title to real property is acquired as a result of such use or enjoyment over a specified period of time.”); *see also* O’Keeffe v. Snyder, 416 A.2d 862, 870 (N.J. 1980) (“The acquisition of title to real and personal property by adverse possession is based on the expiration of a statute of limitations. . . . To establish title by adverse possession to chattels, the rule of law has been that the possession must be hostile, actual, visible, exclusive, and continuous.” (citations omitted)). For a more thorough discussion of adverse possession, see Henson, *supra* note 26, at 1136–37.

53. Eisen, *supra* note 40, at 1074–78 (describing that the moveable nature of chattels supports a change in the accrual rules for stolen chattels, stating: “one can readily move and easily conceal art objects”). Compare, for example, a cause of action for the eviction of an adverse possessor of real property, which is not moveable: “The considerations are different with real estate. . . . Real estate is fixed and cannot be moved or concealed. The owner of real property knows or should know where his property is located and reasonably can be expected to be aware of. . . [adverse] possession on it.” O’Keeffe, 416 A.2d at 873. For a further discussion of the mobility of artwork, see Henson, *supra* note 26, at 1148.

54. *See* Eisen, *supra* note 40, at 1075.

55. *See infra* Part I.D.

56. *See infra* Part I.E.

57. O’Keeffe, 416 A.2d at 869 (citing *Burd v. N.J. Tel. Co.*, 386 A.2d 1310, 1311 (N.J. 1978)).

58. *Id.*

action, including the identity of the possessor of the paintings.”⁵⁹ The discovery rule, in calling for the accrual of an action for replevin upon actual or constructive discovery, emphasizes due diligence.⁶⁰

In *O’Keeffe v. Snyder*,⁶¹ the Supreme Court of New Jersey employed the discovery rule. O’Keeffe sought to replevy three of her paintings that turned up in Barry Snyder’s possession, who at the time was doing business as the Princeton Gallery of Fine Art.⁶² O’Keeffe filed her complaint in 1976 and alleged that the paintings had gone missing from An American Place Art Gallery in 1946.⁶³ Factually significant to the court’s use of the discovery rule was that O’Keeffe, upon noticing her paintings were missing from the gallery, told no one and did not report the missing paintings to the proper authorities.⁶⁴ Furthermore, the paintings were uninsured; O’Keeffe sought no reimbursement for the paintings; O’Keeffe did not publish the missing paintings; and in mentioning the missing paintings to the director of The Art Institute of Chicago, she took no measures to ask him to help locate the paintings.⁶⁵

It was not until 1972, about twenty-six years after the paintings went missing, that O’Keeffe allowed the paintings’ loss to be reported to the Art Dealers Association of America.⁶⁶ In 1975, O’Keeffe discovered the paintings were in the Andrew Crispo Gallery in New York, and in 1976, she discovered that Ulrich A. Frank had sold the paintings to Snyder.⁶⁷ Frank claimed that his father was in possession of the paintings prior to their alleged disappearance.⁶⁸ Frank therefore claimed good title by adverse possession, even if the paintings had been stolen.⁶⁹

The Supreme Court of New Jersey began its discussion of the discovery rule by citing its use in determining accrual for medical malpractice actions.⁷⁰ From there, the court noted the proliferating use of the discovery rule in other areas of the law, before concluding that “the discovery rule applies to an action for replevin of a painting under N.J.S.A. 2A:14-1.”⁷¹ The court remanded to the trial court to determine if O’Keeffe was “entitled to the

59. *Id.* at 870.

60. See Jason Barnes, Note, *Holocaust Expropriated Art Recovery (HEAR) Act of 2016: A Federal Reform to State Statutes of Limitations for Art Restitution Claims*, 56 COLUM. J. TRANSNAT’L L. 593, 607 (2018).

61. 416 A.2d 862 (N.J. 1980).

62. *Id.* at 864.

63. *Id.* at 864–65.

64. See *id.* at 865–66.

65. *Id.*

66. *Id.* at 866.

67. *Id.*

68. *Id.* There was a factual dispute between the parties regarding Frank’s father’s acquisition of the paintings. *Id.* O’Keeffe claimed the paintings were stolen, while Frank claimed that he saw the paintings in his father’s apartment years before O’Keeffe claims the theft occurred. *Id.* Nonetheless, “[f]or the purposes of this motion, Snyder conceded that the paintings had been stolen.” *Id.*

69. *Id.*

70. See *id.* at 869.

71. *Id.* at 869–70.

benefit of the discovery rule.”⁷² In so holding, the Supreme Court of New Jersey directed the trial court to consider a number of factors, including:

- (1) whether O’Keeffe used due diligence to recover the paintings at the time of the alleged theft and thereafter; (2) whether at the time of the alleged theft there was an effective method, other than talking to her colleagues, for O’Keeffe to alert the art world; and (3) whether registering paintings with the Art Dealers Association of America, Inc. or any other organization would put a reasonably prudent purchaser of art on constructive notice that someone other than the possessor was the true owner.⁷³

The trial court did not have the opportunity to apply the discovery rule in the case because the parties settled prior to retrial.⁷⁴ Of the three paintings at issue, O’Keeffe took one, Snyder took one, and the third was sold at a Sotheby’s auction, with the proceeds used to pay their lawyers.⁷⁵

E. Modern Adaptations: The Demand and Refusal Rule and the Laches Defense

The demand and refusal rule, used in New York, states that “a cause of action for replevin against the good-faith purchaser of a stolen chattel accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it.”⁷⁶ The rule is premised on the idea that “[u]ntil the original owner demands the return of her property, one cannot consider the innocent purchaser’s possession wrongful or unlawful.”⁷⁷

In *Solomon R. Guggenheim Foundation v. Lubell*,⁷⁸ the Solomon R. Guggenheim Foundation, on behalf of the Guggenheim Museum, sought the return of a \$200,000 gouache by Marc Chagall.⁷⁹ Through the use of accession cards, the Guggenheim alleged that it discovered the gouache was missing “sometime in the late 1960s, but [the Guggenheim] claims it did not know that the painting had in fact been stolen until it undertook a complete inventory of the museum collection beginning in 1969 and ending in 1970.”⁸⁰

72. *Id.* at 870.

73. *Id.*

74. JESSE DUKEMINIER ET AL., PROPERTY: CONCISE EDITION 159 (2d ed. 2017). While often employed in cases of artwork recovery, the topic of settlement is outside the scope of this Note.

75. *Id.*

76. *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429 (N.Y. 1991). For a discussion of one of the first uses of the demand and refusal rule, see Henson, *supra* note 26, at 1110–12 (citing *Menzel v. List*, 253 N.Y.S.2d 43 (App. Div. 1964)).

77. Eisen, *supra* note 40, at 1079; *see also Lubell*, 569 N.E.2d at 429 (“Until demand is made and refused, possession of the stolen property by the good-faith purchaser for value is not considered wrongful.”).

78. 569 N.E.2d 426 (N.Y. 1991).

79. *Id.* at 427. Chagall painted the gouache entitled *Menageries*, or alternatively *Le Marchand de Bestiaux*, in 1912. *Id.* at 428.

80. *Id.* These facts were disputed by the defendant. *Id.*

Upon learning of the theft, the Guggenheim took no steps to publicize the missing painting.⁸¹ The Guggenheim did not notify any art organization nor did it notify the proper authorities about the theft.⁸² The Guggenheim claimed that its decision not to publicize the theft was “tactical.”⁸³ It feared that such a publicization would force the gouache further into the black market, making it all the more difficult to locate the painting and effectuate its return.⁸⁴

The New York Court of Appeals stated that New York had explicitly rejected the discovery rule and instead had chosen to continue use of the demand and refusal rule.⁸⁵ Notably, the court pointed to Governor Mario Cuomo’s veto of a New York State Senate bill that would cause the statute of limitations to run once a museum, in possession of an artwork, had given notice of its possession.⁸⁶ In applying the demand and refusal rule, the New York Court of Appeals rejected the defendant’s suggestion that the Guggenheim’s failure to search with due diligence barred recovery under the statute of limitations.⁸⁷ However, the court emphasized that its rejection of the discovery rule was not intended to “sanction[] the museum’s conduct or suggest[] that the museum’s conduct [was] no longer an issue in this case.”⁸⁸ Upon an additional showing of actual prejudice, which is not required to invoke the statute of limitations, the court noted that the defendant would be able to assert lack of due diligence as part of a laches defense.⁸⁹

Thus, unlike the discovery rule, the demand and refusal rule places no importance on diligent search for a stolen chattel.⁹⁰ However, diligent search still factors into an action for replevin in New York through the doctrine of laches; even under New York’s demand and refusal rule, “a defendant may still assert a laches defense.”⁹¹

Where a defendant asserts a laches defense, the defendant “must show that the plaintiff has inexcusably slept on its rights so as to make a decree against the defendant unfair. Laches . . . requires a showing by the defendant that it has been prejudiced by the plaintiff’s unreasonable delay in bringing the

81. *See id.*

82. *Id.*

83. *Id.*

84. *See id.*

85. *See id.* at 430.

86. *See id.* Governor Cuomo’s veto message stated that the implementation of such a rule “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.* (alteration in original) (quoting Memorandum #22 Filed with Assembly Bill Number 11,462-A, in PUBLIC PAPERS OF GOVERNOR MARIO M. CUOMO 1986, at 355, 356 (1990)). For discussion of New York’s rejection of a due diligence requirement as part of demand and refusal, see Henson, *supra* note 26, at 1125 n.200.

87. *Lubell*, 569 N.E.2d at 431.

88. *Id.*

89. *See id.*

90. *See id.* at 430 (“[T]here is no reason to obscure [the rule’s] straightforward protection of true owners by creating a duty of reasonable diligence.”).

91. *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 196 n.12 (2d Cir. 2019) (citing *Lubell*, 569 N.E.2d at 426).

action.”⁹² The two elements of a laches defense—unreasonable delay by the plaintiff and prejudice to the defendant—prevent claimants from “delay[ing] bringing their claims indefinitely without consequence.”⁹³ Both demand and refusal plus laches and the discovery rule are accrual rules worth examining through the lens of the HEAR Act.

F. The HEAR Act

In 2016, Congress enacted the HEAR Act⁹⁴ “[t]o provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis.”⁹⁵ The HEAR Act supplants state statutes of limitations for “artwork or other property that was lost during the covered period because of Nazi persecution.”⁹⁶ Actions that fall within these parameters “may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—(1) the identity and location of the artwork or other property; and (2) a possessory interest of the claimant in the artwork or other property.”⁹⁷ The HEAR Act does not “create a civil claim or cause of action under Federal or State law.”⁹⁸

The accrual of a cause of action under the HEAR Act is based on “actual discovery,” which the HEAR Act defines as “knowledge” or “having actual

92. *Id.* at 193 (citing *Merrill Lynch Inv. Managers v. Optibase Ltd.*, 337 F.3d 125, 132 (2d Cir. 2003)).

93. *Id.* at 197 n.12.

94. Since its enactment in 2016, the HEAR Act has been cited fairly limitedly in case law. *See generally* *Zuckerman*, 928 F.3d at 186 (discussing a request for return of Pablo Picasso’s *The Actor*); *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), *vacated* 141 S. Ct. 703 (2021) (discussing request for recovery of *Welfenschatz*, a medieval relics collection); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951 (9th Cir. 2017) (discussing the forced sale of a Camille Pissarro impressionist painting); *De Csepel v. Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017) (discussing request for recovery of a Nazi-confiscated art collection); *Reif v. Nagy*, 106 N.Y.S.3d 5 (App. Div. 2019) (discussing request for return of two works by Egon Schiele); *Est. of Kainer v. UBS AG*, 34 N.Y.S.3d 58 (App. Div. 2016) (discussing request for return of a Degas painting looted by Nazis from an art collection); *Gowen v. Helly Nahmad Gallery, Inc.*, 77 N.Y.S.3d 605 (Sup. Ct. 2018) (discussing request for return of Amedeo Modigliani’s *Seated Man with a Cane*). For a discussion of the jurisdictional issues involving the HEAR Act recently before the U.S. Supreme Court, see Jess Bravin, *Supreme Court Hears Arguments on Jewish Property in Nazi Germany and Hungary*, WALL ST. J. (Dec. 7, 2020), <https://www.wsj.com/articles/supreme-court-hears-arguments-on-jewish-property-in-nazi-germany-and-hungary-11607386812> [<https://perma.cc/XDC4-TAFH>].

95. Holocaust Expropriated Art Recovery Act of 2016, S. 2763, 114th Cong. (as reported by S. Comm. on the Judiciary, Sept. 29, 2016); *see* Holocaust Expropriated Art Recovery Act of 2016, 22 U.S.C. § 1621 note. The HEAR Act was a triumphant piece of bipartisan legislation, introduced by Senators John Cornyn (R-TX), Ted Cruz (R-TX), and Chuck Schumer (D-NY). *See* Max Kutner, *Obama Signs New Law to Help Recover Nazi-Looted Art*, NEWSWEEK (Dec. 21, 2016), <https://www.newsweek.com/obama-hear-act-law-holocaust-534793> [<https://perma.cc/276C-FEE5>]. The HEAR Act was ultimately passed unanimously. Simon J. Frankel & Sari Sharoni, *Navigating the Ambiguities and Uncertainties of the Holocaust Expropriated Art Recovery Act of 2016*, 42 COLUM. J.L. & ARTS 157, 158 (2019).

96. Holocaust Expropriated Art Recovery Act of 2016 § 5(a).

97. *Id.*

98. *Id.* § 5(f). For a discussion of whether the failure to establish a federal cause of action renders the HEAR Act unconstitutional, *see infra* Part II.C.

knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to actual knowledge thereof.”⁹⁹

In *Zuckerman v. Metropolitan Museum of Art*,¹⁰⁰ the Second Circuit held that the doctrine of laches is an applicable defense to a claim under the HEAR Act. In 1912, Paul Friedrich Leffman purchased Pablo Picasso’s *The Actor*.¹⁰¹ In an effort to flee Nazi Germany, Leffman sold the painting to what was called an “‘Aryan’ corporation[], receiving ‘nominal compensation.’”¹⁰² Käte Perls, on behalf of two others, acquired the painting from Leffman for just \$12,000 in 1938.¹⁰³ The Leffmanns went to Switzerland in 1938 and eventually to Brazil in 1941.¹⁰⁴ In 1947, the Leffmanns returned to Switzerland, where they remained until their deaths.¹⁰⁵

Laurel Zuckerman, the ancillary administrator of the estate of Leffman’s great-grandniece, later filed suit against the Metropolitan Museum of Art (“the Met”) for the return of the Picasso painting on September 30, 2016, in the Southern District of New York.¹⁰⁶ In response, the Met asserted that Zuckerman’s claims were barred by the doctrine of laches.¹⁰⁷ Zuckerman contended that the claim was not time-barred under the HEAR Act’s statute of limitations and that laches is unavailable as a defense in a case under the HEAR Act.¹⁰⁸

The Second Circuit noted the general rule that “in [the] face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief.”¹⁰⁹ Nonetheless, the court held that laches, a traditionally *equitable* defense, is applicable to the HEAR Act because the HEAR Act only explicitly precludes the use of “defense[s] *at law* relating to the passage of time.”¹¹⁰ The court further cited a Senate committee report indicating Congress’s intent to allow laches defenses in cases under the HEAR Act.¹¹¹ While a prior iteration of the bill precluded the use of “any . . . defense at law

99. Holocaust Expropriated Art Recovery Act of 2016 § 4.

100. 928 F.3d 186 (2d Cir. 2019).

101. *Id.* at 190.

102. *Id.* (quoting Joint Appendix Volume 1 of 2 (Pages A-1 to A-293) at A-34, *Zuckerman*, 928 F.3d (No. 18-0634-CV), ECF no. 49-1).

103. *Id.* at 191. In 2010—just before a woman tripped in the museum and caused a six-inch tear in the painting, depreciating its value—*The Actor* was valued at \$130 million. Maureen O’Connor, *The Price of Falling into a Picasso: \$65 Million*, GAWKER (Jan. 26, 2010, 4:42 AM), <https://gawker.com/5457026/the-price-of-falling-into-a-picasso-65-million> [<https://perma.cc/FE2Q-ZWPL>].

104. *Zuckerman*, 928 F.3d at 191.

105. *Id.*

106. *Id.* at 192.

107. *Id.*

108. *Id.* at 195.

109. *Id.* at 195–96 (alteration in original) (quoting *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 679 (2014)).

110. *Id.* at 196 (alteration in original) (quoting Holocaust Expropriated Art Recovery Act of 2016 § 5(a), 22 U.S.C. § 1621 note).

111. *See id.* at 196–97.

or equity relating to the passage of time (including the doctrine of laches),”¹¹² the HEAR Act as enacted did not include this language in its text.¹¹³ The Senate report discussed by the court stated that the enacted HEAR Act intentionally “remove[d] the reference precluding the availability of equitable defenses and the doctrine of laches.”¹¹⁴

Ultimately, the Second Circuit found the Met’s laches defense successful and barred Zuckerman’s claim under the HEAR Act.¹¹⁵ In addressing each of the elements of laches, the court found: (1) the Leffmann’s failure to look for the painting or bring a claim for over seventy years constituted “unreasonable delay”¹¹⁶ and (2) the extensive time that passed resulted in “deceased witness[es], faded memories, . . . and hearsay testimony of questionable value,” as well as the likely disappearance of documentary evidence.¹¹⁷ Thus, the Met was prejudiced by Zuckerman’s delay.¹¹⁸

Additionally, the HEAR Act has a retroactivity scheme in place.¹¹⁹ Under section 5(c), the statute of limitations begins to run as of the date of the HEAR Act’s enactment where: (1) the claimant already had knowledge before enactment of the HEAR Act¹²⁰ but was already barred from asserting a claim under a preexisting statute of limitations¹²¹ or (2) the claimant already had knowledge before the enactment of the HEAR Act¹²² and was *not* already barred under a preexisting statute of limitations.¹²³ Under section 5(d), the HEAR Act applies to cases pending in court as of the date of enactment.¹²⁴ Under section 5(e), the HEAR Act does not apply to cases barred on a date before enactment if: (1) the claimant had knowledge on or after January 1,

112. *Id.* at 197 (alteration in original) (quoting Holocaust Expropriated Art Recovery Act, S. 2763, 114th Cong. § 5(c)(2)(A) (as introduced in Senate, Apr. 7, 2016)).

113. *Id.*

114. *Id.* (alteration in original) (quoting S. REP. NO. 114-394, at 7 (2016)). “Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.” *Id.* (quoting *Russello v. United States*, 464 U.S. 16, 23–24 (1983)).

115. *Id.*

116. *Id.* at 193.

117. *Id.* at 194 (alteration in original) (quoting *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 621 (App. Div. 1990)).

118. *Id.* Zuckerman’s appeal to the Supreme Court was denied—a decision critics say “signal[s] to Holocaust victims and their families that pursuing their property is a fruitless endeavor.” Sam. P. Israel, *The US Supreme Court’s Silence on Nazi Art Theft Fails Holocaust Survivors*, ART NEWSPAPER (Mar. 11, 2020), <http://www.theartnewspaper.com/comment/the-us-supreme-court-s-silence-on-nazi-art-theft-fails-holocaust-survivors> [<https://perma.cc/4CHV-ZPDA>].

119. See Holocaust Expropriated Art Recovery Act of 2016 § 5(c)–(e), 22 U.S.C. § 1621 note. For a discussion of the HEAR Act’s applicability to preexisting claims, see Frankel & Sharoni, *supra* note 95, at 169–72.

120. Holocaust Expropriated Art Recovery Act of 2016 § 5(c)(1)(A).

121. *Id.* § 5(c)(1)(B).

122. *Id.* § 5(c)(2)(A).

123. *Id.* § 5(c)(2)(B).

124. *Id.* § 5(d).

1999¹²⁵ and (2) six or more years have passed since the claimant acquired knowledge.¹²⁶

Finally, the HEAR Act contains a sunset provision, such that the Act expires on January 1, 2027.¹²⁷ The expiration of the HEAR Act and its future implications are the subject of this Note.

II. WHEN SHOULD THE CAUSE OF ACTION ACCRUE?: DISCOVERY VERSUS DEMAND AND REFUSAL

Upon expiration of the HEAR Act, the accrual of a cause of action for recovery of Nazi-confiscated art will revert back to the respective state's rule—that is, the discovery rule in the majority of states and the demand and refusal rule in New York.¹²⁸ Parts II.A and II.B analyze the pros and cons of both the discovery rule and the demand and refusal rule to shed light on the likely choices immediately available to states upon the HEAR Act's expiration. Part II.C addresses the constitutionality concerns surrounding the HEAR Act.

A. *Should Discovery Be the Rule?*

The discovery rule, in predicating the accrual of the cause of action on actual *or* constructive discovery, does well to ensure that original owners, or their heirs, diligently search for their items.¹²⁹ Furthermore, the discovery rule is unlike “[e]arly doctrines,” such as the “adverse possession doctrine” and “demand and refusal,” which “focused on the actions of subsequent purchasers or arbitrary events.”¹³⁰ In that respect, the discovery rule is logical in that it holds the running of the statute accountable to the actions of the party bringing the claim for the item's return.¹³¹

Nonetheless, the discovery rule faces criticism. For example, since the provenances of Nazi-confiscated art are not easily acquired, a rule that is premised on diligent search is inconducive in cases of Nazi-confiscated artwork restitution.¹³² Additionally, under the discovery rule, “the burden rests with the claimant to demonstrate why the limitation period should be extended.”¹³³ Thus, where the ultimate goal is returning art to its original owner, the discovery rule puts an unnecessary (and even impracticable, in the context of Nazi-confiscated art) onus on the original owner to prove diligent

125. *Id.* § 5(e)(1).

126. *Id.* § 5(e)(2).

127. *Id.* § 5(g).

128. *Id.*; *see supra* Parts I.D–E.

129. *See O’Keeffe v. Snyder*, 416 A.2d 862, 869 (N.J. 1980) (citing *Burd v. N.J. Tel. Co.*, 386 A.2d 1310, 1311 (N.J. 1978)).

130. Eisen, *supra* note 40, at 1070.

131. *See id.*

132. *See Barnes*, *supra* note 60, at 596.

133. *Id.* at 608.

search.¹³⁴ In other words, the restoration goal of the discovery rule is at odds with its due diligence requirement.¹³⁵

Leah Eisen points to a number of other issues raised by the discovery rule.¹³⁶ Eisen argues that the inconsistent application by courts of the discovery rule is detrimental to both the claimant and the current possessor—presumably for its lack of uniformity, consistency, and predictability.¹³⁷ According to Eisen, “[t]his lack of clarity and consistency among the various jurisdictions places owners and possessors of stolen art in precarious positions.”¹³⁸ Owners may undertake unnecessary investigation for fear of being barred if they do not, and possessors who face diligently searching owners will receive no repose so long as the owner continues searching.¹³⁹ For Eisen, it is unfair to subject good-faith purchasers to lawsuits where the good-faith purchaser has been in possession for “ten, twenty, or even one hundred years” merely because the original owner has continued to diligently search for the item.¹⁴⁰ Moreover, where a purchaser fears a retribution claim from a diligently searching owner in a discovery jurisdiction, the purchaser is incentivized to hide the object from the public.¹⁴¹

Eisen also faults the discovery rule for its one-sidedness; since the rule fails to place a “duty of diligence” on the possessor in the same way it does the original owner, the discovery rule misses an opportunity to effectuate retribution from both sides.¹⁴² Under Eisen’s proposed reciprocal rule, the incentive for thieves to engage in the stolen art market would decrease because both the original owner and the purchaser would be tasked with due diligence.¹⁴³

Finally, Eisen “argues that the implementation of the discovery rule creates an irreconcilable conflict with the previously-established legal notion that a

134. *See id.*

135. *See id.*

136. *See generally* Eisen, *supra* note 40.

137. *See id.* at 1071 (“[T]he courts have not established objective standards of conduct for possessors and owners to follow.”).

138. *Id.* at 1091.

139. *See id.*

140. *Id.* at 1089–90.

141. *Id.* at 1091.

142. *Id.* at 1094–95. Eisen suggests that “a more efficient method of determining whether an owner has the right to sue a subsequent purchaser would be to retain the discovery rule’s investigatory duty on the owner and add a reciprocal investigatory duty on the purchaser.” *Id.* at 1096. Now Judge Steven A. Bibas, in his *Yale Law Journal* student note, furthers this argument for placing an onus on the purchaser. *See generally* Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 *YALE L.J.* 2437, 2463 (1994). Uniform Commercial Code section 2-312(1)(a) provides for a warranty of good title. U.C.C. § 2-312(1)(a) (AM. L. INST. & UNIF. L. COMM’N 2012). Under this section, if an original owner is able to recover his stolen art from a purchaser, the purchaser is then able to recover his loss from the merchant that he purchased from by using the warranty of good title. Bibas, *supra*, at 2463. By placing the cost on the purchaser, who can ultimately shift that cost to the merchant, purchasers will be incentivized “to buy from reputable, solvent merchants who investigate.” *Id.* For another argument for placing a burden of diligence on the purchaser, see Henson, *supra* note 26, at 1150–52.

143. Eisen, *supra* note 40, at 1097.

thief does not obtain good title to stolen property.”¹⁴⁴ Eisen illustrates that if a thief can never acquire good title, then a subsequent good-faith purchaser can never acquire good title because the thief cannot transfer title that he does not have.¹⁴⁵ Thus, “[s]ince a subsequent possessor does not have title to the stolen art object, an owner automatically has the right to bring an action for its recovery.”¹⁴⁶ Yet, the discovery rule’s bar on a claim where the owner does not diligently search for the item strips the owner of his right to bring a claim of superior title that he has, at least under this long-held doctrine, always had.¹⁴⁷ The two options that then stand before courts are to “punish good faith purchasers for accidentally buying stolen art” or to grant good title to thieves—neither of which is a particularly desirable choice.¹⁴⁸

B. New York’s Push for Demand and Refusal

Proponents of New York’s idiosyncratic demand and refusal rule argue that the rule “affords the most protection to the true owners of stolen property.”¹⁴⁹ In so arguing, proponents of the rule laude its “straightforwardness” and ability to “eliminate some judicial discretion.”¹⁵⁰ The bright-line aspect of the demand and refusal rule thus results in more consistent and predictable court decisions.¹⁵¹ This consistency and predictability is arguably more efficient and less costly for claimants.¹⁵² The demand and refusal rule also deserves consideration simply because it is the preferred accrual rule of New York—the “mecca of the art world.”¹⁵³

The demand and refusal rule further prevents the judicial hindsight bias that impedes fair application of the discovery rule.¹⁵⁴ There is concern that the discovery rule’s “reasonableness standard” can result in judicial

144. *Id.* at 1071.

145. *Id.* at 1099.

146. *Id.* at 1100.

147. *Id.* at 1099–100. Note, however, that allowing a thief to obtain good title is precisely what a statute of limitations does in the first place.

148. *Id.* at 1100.

149. *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 430 (N.Y. 1991); *see also Henson*, *supra* note 26, at 1145 (arguing not for a demand and refusal rule but for a rule that at least better protects original owners).

150. *Barnes*, *supra* note 60, at 609. Raymond Dowd suggests that constructive knowledge under the discovery rule was a legal fiction created by judges that stripped claimants of their “traditional common law rights”—ultimately allowing judges, rather than juries, to decide cases. *See* Email from Raymond J. Dowd, Partner, Dunnington Bartholow & Miller, LLP, to author (Oct. 6, 2020, 09:42 EST) [hereinafter Dowd Email] (on file with author); *see also* U.S. CONST. amend. VII (“In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”).

151. *Barnes*, *supra* note 60, at 609.

152. *See id.* Uncertainty is especially costly where the steps necessary to satisfy “due diligence” may counterintuitively drive the stolen work further underground. *See Lubell*, 569 N.E.2d at 428.

153. *Barnes*, *supra* note 60, at 609.

154. *See id.*

determinations of lack of due diligence simply because judges have the benefit of time and information that was not available to original owners.¹⁵⁵

Proponents also argue that the demand and refusal rule's use of a laches defense is a better way to incorporate a due diligence requirement than requiring due diligence to rebut a statute of limitations defense; under demand and refusal, the burden shifts to the defendant to prove lack of diligence.¹⁵⁶ This ultimately allows a claimant to at least have a day in court without having to carry the initial burden of meeting an uncertain due diligence standard.

The demand and refusal rule nonetheless faces criticism. The primary concern with the demand and refusal rule is it is supplemented by laches, which, it is argued, "adds uncertainty to the bright-line demand and refusal rule, especially since the level of diligence required 'depends on the circumstances of the case.'"¹⁵⁷ Further, the burden-shifting framework for diligence under laches can be viewed as too claimant friendly.¹⁵⁸ Successful laches defenses are infrequent, exacerbating the claimant bias of the rule.¹⁵⁹

Raymond Dowd argues that laches (in addition to statutes of limitations generally) "ought not be available in cases of stolen artworks of European provenance that entered the United States after 1932 and that were created prior to 1946."¹⁶⁰ Dowd argues against defenses such as laches, specifically in cases of Nazi-confiscated art, for two primary reasons: the stolen artwork should be considered contraband and thus violative of criminal law¹⁶¹ and Holocaust victims should not be punished for having "been frozen out of records that might help them track assets for decades."¹⁶²

155. *See id.*

156. *Cf. id.*

157. *Id.* at 610 (first quoting *DeWeerth v. Baldinger*, 836 F.2d 103, 110 (2d Cir. 1987); and then citing *Lubell*, 569 N.E.2d at 429–30).

158. *See id.*

159. *See id.*; *see also* 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, 52 (1995) (calling laches a "fact intensive inquiry [that] can rarely be resolved without protracted litigation"). *But see* *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186 (2d Cir. 2019); Raymond J. Dowd, *Finding Hope for Restitution of Nazi-Looted Art?: The Holocaust Expropriated Art Recovery Act of 2016*, in *BUILDING BRIDGES AMONG ABRAHAM'S CHILDREN: A CELEBRATION OF MICHAEL BERENBAUM* (Ed Gaffney ed., forthcoming 2021).

160. Raymond J. Dowd, *Nazi Looted Art and Cocaine: When Museum Directors Take It, Call the Cops*, 14 *RUTGERS J.L. & RELIGION* 529, 529 (2013).

161. *Id.* at 529–30 ("If a museum director asserted statutes of limitations or laches when caught with a kilo of cocaine, such defenses would not pass the laugh test.")

162. *Id.* at 530; *see also* Herbert I. Lazerow, *Holocaust Art Disputes: The Holocaust Expropriated Art Recovery Act of 2016*, 51 *INT'L LAW* no. 2, 2018, at 195, 258 ("HEAR is also likely to make litigation more expensive by shifting from the simple question of whether the statute of limitations has expired to the question of whether the claimant is barred by the doctrine of laches, with its requirement of discovery and a separate trial on that issue."); Rachel Sklar, *Holocaust-Era Restitution Claims: Is the HEAR Act a Game Changer?*, 12 *REVISTA DE DERECHO PRIVADO* 159, 194 (2017) (proposing the HEAR Act be amended to preclude laches defenses).

An oft-overlooked issue with the demand and refusal rule is its treatment of thieves.¹⁶³ The demand and refusal rule applies only to good-faith purchasers¹⁶⁴ and “is premised on the theory that the defendant’s possession is not wrongful until he or she refuses to return the property to the claimant.”¹⁶⁵ As Eisen states: “if the possessor is a wrongful taker or a purchaser with knowledge, courts should not require a demand, because the possessor already has notice of his wrongful retention of the original owner’s property.”¹⁶⁶ It is further suggested by Judith Wallace that the rule does not apply to thieves because “demand would be futile . . . if the possessor is a thief who would know his possession is wrongful,” he would “presumably refuse any demand.”¹⁶⁷ This wrinkle leads to the result that a thief or bad-faith purchaser may be advantaged over a good-faith purchaser.¹⁶⁸

A hypothetical can illustrate this result. If a thief (T) steals a work of art from an owner (O) in a demand and refusal jurisdiction with a three-year statute of limitations, the statute begins to run when the theft occurs because the demand and refusal rule applies only to good-faith purchasers, not thieves. Thus, if T holds on to the art for the requisite three-year period, or sells it to a bad-faith purchaser who is aware that the art has been stolen, and holds on to the art for three years, T or the bad-faith purchaser will acquire title upon the running of the statute. However, if T sells the art to a good-faith purchaser who is unaware that the art had been stolen, O’s cause of action against the good-faith purchaser would not begin to run until there was a demand by O and a refusal by the good-faith purchaser. Thus, T or the bad-faith purchaser could acquire title within three years of the theft, while the good-faith purchaser could not acquire title until three years after a demand and refusal. Note, however, that once O has made a demand, the good-faith purchaser will either acquiesce and return the art or refuse its return, and O will immediately file suit. Thus, there is no practical situation where the statute can run and transfer title to the good-faith purchaser. Therefore, T and the bad-faith purchaser will be treated *better* than a good-faith purchaser.

163. See generally Eisen, *supra* note 40, at 1080–81.

164. See Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429 (N.Y. 1991).

165. Frankel & Sharoni, *supra* note 95, at 172; see also Lubell, 569 N.E.2d at 429 (“Until demand is made and refused, possession of the stolen property by the good-faith purchaser for value is not considered wrongful.”); Eisen, *supra* note 40, at 1079.

166. Eisen, *supra* note 40, at 1080. *Contra infra* Part III.C.

167. Judith Wallace, *New York’s Distinctive Rule Regarding Recovery of Misappropriated Art After the Court of Appeals’ Decision in Mirvish v. Mott*, SPENCER’S ART L.J. (June 2012), <http://www.artnet.com/magazineus/news/spencer/spencers-art-law-journal-7-18-12.asp> [<https://perma.cc/38XQ-QEXN>].

168. See Eisen, *supra* note 40, at 1080–81. For a discussion of thieves being treated better than good-faith purchasers, see Lubell, 569 N.E.2d at 429 (“In *DeWeerth v. Baldinger*, which the trial court in this case relied upon in granting Mrs. Lubell’s summary judgment motion, the Second Circuit took note of the fact that New York case law treats thieves and good-faith purchasers differently and looked to that difference as a basis for imposing a reasonable diligence requirement on the owners of stolen art.” (citing *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987))). Note, however, that the New York Court of Appeals rejected the Second Circuit’s imposition of a due diligence requirement. *Id.* at 430.

C. Is the HEAR Act Even Constitutional?

William L. Charron has suggested that the HEAR Act may be unconstitutional.¹⁶⁹ Charron argues that the HEAR Act, by supplanting states' statutes of limitations without creating a federal cause of action or rooting itself in any provision of Article I, Section 8 of the Constitution, should be seen as an exclusively procedural statute.¹⁷⁰ According to Charron, the HEAR Act's failure to create a federal cause of action is inconsistent with the Tenth Amendment's principles of federalism, and "procedural rules governing state law claims should be deemed reserved to the states under the Tenth Amendment."¹⁷¹

Charron's unconstitutionality argument results in a difficult tension between state and federal powers with respect to statutes of limitations for Nazi-confiscated art. Recall that the court in *Von Saher I* held that the state of California was unable to carve out an exception from its statute of limitations specifically for Nazi-confiscated art.¹⁷² In response to this decision, Congress passed legislation to protect Nazi-confiscated art in a way that states, under *Von Saher I*, could not.¹⁷³ While the HEAR Act attempts to root its validity in *Von Saher I* and Congress's foreign affairs power,¹⁷⁴ Charron notes the Ninth Circuit's decision in *Von Saher v. Norton Simon Museum*¹⁷⁵ (*Von Saher II*): "the court in *Von Saher II* held that a claim for restitution asserted against a private party (not against a foreign government), under 'a state statute of general applicability' (such as for replevin) rather than under 'Holocaust-specific legislation,' raises no foreign policy conflicts sufficient to trigger foreign affairs preemption."¹⁷⁶ Thus, Charron's argument raises an interesting issue: who, Congress or the states, is able to address Nazi-confiscated art in this way?¹⁷⁷

Emily J. Cunningham raises another constitutionality argument against the HEAR Act by asserting that the HEAR Act's retroactivity may render the Act unconstitutional under the Fifth Amendment.¹⁷⁸ Cunningham cites

169. See generally William L. Charron, *The Problem of Purely Procedural Preemption Presented by the Federal HEAR Act*, 2018 PEPP. L. REV. 19.

170. *Id.* at 61.

171. *Id.* at 60–61; see U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). But see Jennifer A. Kreder & Virginia L. Schell, *The Constitutionality of the HEAR Act: Empowering American Courts to Return Holocaust-Era Artwork and Honor History*, 30 DEPAUL J. ART TECH. & INTELL. PROP. L. 1, 68 (2020) ("The HEAR Act is constitutional and does not violate the principles of federalism.").

172. See *supra* note 31 and accompanying text.

173. See *supra* notes 32–33 and accompanying text.

174. See Charron, *supra* note 169, at 36; see also Dowd Email, *supra* note 150. For a discussion of how Congress may have the power to regulate the art market through the Commerce Clause, see Henson, *supra* note 26, at 1154.

175. 754 F.3d 712 (9th Cir. 2014).

176. Charron, *supra* note 169, at 36 n.83 (quoting *Von Saher II*, 754 F.3d at 719, 723).

177. Part III assumes the validity of Charron's argument and the validity of *Von Saher I*. See *infra* Part III.A.5.

178. See Emily J. Cunningham, Note, *Justice on the Merits: An Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 69 CASE. W. RESV. L. REV. 427, 452 (2018); see also

*Campbell v. Holt*¹⁷⁹ as evidence of her proposition. In *Campbell*, the Court indicated, albeit in dicta, that in a case of recovery of personal property, “[i]t may . . . very well be held that . . . where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law.”¹⁸⁰ Cunningham then rebuts her own claim by stating that since the HEAR Act provides for subsequent trial or arbitration, such taking of property would not violate procedural due process rights because cases would be heard before a court or tribunal before any property was taken.¹⁸¹ Nonetheless, Cunningham raises interesting questions of the constitutionality of retroactivity under the Fifth Amendment, and Part III addresses these concerns.¹⁸²

III. THE HEAR ACT PROMOTES DEMAND AND REFUSAL AND HOW STATES SHOULD IMPLEMENT IT

Upon the expiration of the HEAR Act, states must address important questions regarding the trajectory of statute of limitations rules for Nazi-confiscated art. This part argues that: (1) the HEAR Act invites state legislation implementing the demand and refusal rule; (2) the rule should be applied to *all stolen chattels* upon expiration of the HEAR Act; (3) the rule should extend to thieves and bad-faith purchasers, not just good-faith purchasers; (4) the rule should not be applied retroactively; and (5) states should shorten the duration of statutes of limitations upon implementing demand and refusal.

A. *The HEAR Act Invites State Legislation Implementing the Demand and Refusal Rule*

When the HEAR Act expires, discovery-rule states should adopt the demand and refusal rule. The HEAR Act, while predicated on “actual discovery,” adopts a rule that is actually more similar to the demand and refusal rule than to the discovery rule.¹⁸³ The HEAR Act, by addressing the immorality of Nazi-confiscation of artwork and the unfairness of statutory bars to recovery, should be a model for states of the need for more claimant-friendly rules affecting stolen personal property. Therefore, this section

Lazerow, *supra* note 162, at 258 (noting that “any attempt to apply HEAR to lengthen the statute of limitations for those properties” where good title was acquired by adverse possession “would be an unconstitutional taking of the property barred by the Fifth Amendment”). The Fifth Amendment states, in pertinent part: “No person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

179. 115 U.S. 620 (1885).

180. Cunningham, *supra* note 178, at 453–54 (quoting *Campbell*, 115 U.S. at 623).

181. *See id.* at 455.

182. *See id.* at 453–55; *infra* Part III.D; *see also* Dowd Email, *supra* note 150 (“The constitutional problem for any proposal is passing a law that appears to be a taking of property.”).

183. *Contra* Alexander Hull, Note, *Shoring up the HEAR Act: Proposed Amendments to Federal Legislation Designed to Assist Heirs and Claimants of Nazi-Looted Art*, 28 J.L. & POL’Y 238, 267–71 (2019) (calling the HEAR Act a discovery rule).

argues that states that currently follow the discovery rule should learn from the HEAR Act and recognize the need for an independent, yet uniform, switch to the demand and refusal rule.

1. The Goals of the HEAR Act Are Most in Line with the Demand and Refusal Rule

The “Findings” and “Purposes” sections of the HEAR Act indicate that the Act is designed to ensure that meritorious claims are not unjustly barred by restrictive statutes of limitations.¹⁸⁴ Thus, as the purpose of the HEAR Act is claimant friendliness,¹⁸⁵ a shift away from discovery (i.e., actual *or* constructive discovery) and toward demand and refusal is ultimately necessary. Since the demand and refusal rule provides the longest time for claimants to recover their items, and since laches shifts the burden of proof for diligence onto the defendant,¹⁸⁶ the demand and refusal rule’s claimant friendliness is most in line with the stated goals and purposes of the HEAR Act. Thus, upon expiration of the Act, states should adopt the demand and refusal rule.

2. “Actual Discovery” Is More Like Demand and Refusal than Discovery

While the HEAR Act has been described as adopting a discovery rule,¹⁸⁷ this Note argues that “actual discovery,” as used in the HEAR Act, is more analogous to demand and refusal than it is to discovery. The description of the HEAR Act as creating a discovery rule has some credibility given that the HEAR Act is predicated on “actual *discovery*.”¹⁸⁸ However, in practice, actual discovery is more similar in its use and application to demand and refusal than to discovery. Thus, states should see the HEAR Act’s rule as an invitation to shift to a demand and refusal rule.

In a case brought under the HEAR Act, once a potential claimant has actual knowledge, his lack of due diligence in instituting a suit may still jeopardize his claim under laches.¹⁸⁹ Similarly, under the demand and refusal rule, if a claimant, after actual discovery, does not send a demand in a reasonable time so as to avoid prejudice to the defendant, the claim will be barred by laches.¹⁹⁰ In both instances, once the claimant knows where the item is, the claimant must either demand the item’s return from the possessor or bring a suit. Additionally, once the claimant has made a demand and received a refusal, there is no reason not to immediately bring a suit for return of the

184. See Holocaust Expropriated Art Recovery Act of 2016 §§ 2–3, 22 U.S.C. § 1621 note.

185. Dowd has suggested that the law of decedents, “an area that is [also] governed by state law,” is similarly claimant friendly. Thus, there is evidence that state law is, and should be, generally claimant friendly. Dowd Email, *supra* note 150.

186. See *supra* Parts I.E, II.B.

187. See Hull, *supra* note 183, at 267–71.

188. See *id.*

189. See generally Zuckerman v. Metro. Museum of Art, 928 F.3d 186 (2d Cir. 2019); *supra* notes 100–18 and accompanying text.

190. See *supra* Part I.E.

item. In that sense, initiating suit upon demand and refusal and bringing suit upon actual discovery become nearly synonymous in practice. In either case, to avoid being barred under laches, the claimant must act by either demanding the return of the property or filing suit upon actual knowledge. The facts of *O’Keeffe* (although the court employed the discovery rule) illustrate that actual discovery is, in practice, temporally similar to demand and refusal.¹⁹¹ O’Keeffe actually discovered the location of her paintings in September 1975, demanded their return—which was refused by Snyder—and ultimately filed her complaint in March 1976.¹⁹² In the span of a mere six months, actual discovery and demand and refusal were made.¹⁹³

Dissimilarly, in a discovery-rule jurisdiction, “constructive discovery,” or the time when one *should have known* the whereabouts of one’s item, may be very far off from actual discovery, a demand, and the commencement of a lawsuit. Since constructive discovery is merely a hypothetical fiction,¹⁹⁴ the time difference between constructive discovery and a demand/suit may be substantial. For example, perhaps O’Keeffe, had she been diligently searching for her paintings, should have known the whereabouts of her paintings long before she actually discovered them.¹⁹⁵ Thus, the HEAR Act’s “actual discovery” requirement is more temporally similar to demand and refusal than it is to constructive discovery under the discovery rule. Therefore, in learning from the HEAR Act, states should seek to adopt a demand and refusal rule upon the HEAR Act’s expiration.

3. Applicability of Laches in *Zuckerman* Promotes Demand and Refusal Plus Laches

The Second Circuit’s application of the doctrine of laches to actions brought under the HEAR Act is evidence that courts,¹⁹⁶ in addition to Congress, recognize that the HEAR Act’s rule is more analogous to the demand and refusal rule. The Second Circuit extensively discussed the legislative history of the HEAR Act to determine that equitable defenses such as laches were meant to be applicable under the HEAR Act.¹⁹⁷ Once again, states should thus learn from the HEAR Act that the best way to incorporate due diligence in art restitution cases is through a laches defense, rather than through a discovery rule.

Critics of this idea would likely claim that the demand and refusal plus laches rule should not be adopted because laches defenses are often

191. *See generally* *O’Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980).

192. *Id.* at 864–66.

193. *See id.*

194. *See* Dowd Email, *supra* note 150.

195. *See generally* *O’Keeffe*, 416 A.2d at 862.

196. *See generally* *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186 (2d Cir. 2019).

197. *See id.* at 196–97; *supra* notes 109–14 and accompanying text. Note that laches could technically still apply to a case in a discovery rule jurisdiction. However, this Note argues that the due diligence importance that laches holds in demand and refusal rule jurisdictions closely ties laches and the demand and refusal rule.

unsuccessful.¹⁹⁸ However, *Zuckerman* illustrates plainly that courts will find laches defenses successful under the HEAR Act where appropriate.¹⁹⁹ Thus, the fear of widespread, unsuccessful laches claims, even where warranted, is not a concern under the HEAR Act and should not dissuade states from adopting demand and refusal rules.

4. The HEAR Act Intentionally Keeps the Demand and Refusal Rule in Place

The sunset provision in the HEAR Act ensures the continuation of the demand and refusal rule.²⁰⁰ Upon expiration of the HEAR Act, “a claimant, who for whatever reason could not or did not want to bring a claim under the HEAR Act, may still be able to bring a claim under New York’s demand and refusal rule.”²⁰¹ Put differently, “the sunset provision preserves New York’s demand and refusal rule, but delays its potential invocation until January 1, 2027.”²⁰²

However, those that note the preservation of the demand and refusal rule ignore the potential intentionality behind leaving the rule in place. Jason Barnes, for example, simply notes the existence of this caveat—calling it “a one-way ratchet in favor of claimants.”²⁰³ Though Barnes cites the Senate subcommittee testimony of Agnes Peresztegi, president of the Commission for Art Recovery—noting that the HEAR Act should not supplant “statute of limitation rules more favorable to claimants”—he fails to tackle head-on the idea that, in allowing this caveat to exist, Congress had, in essence, *endorsed* the demand and refusal rule.²⁰⁴

Simon Frankel and Sari Sharoni concur that the HEAR Act preserves New York’s demand and refusal rule.²⁰⁵ They state that, “[p]erhaps, for claims arising on or after the Act’s enactment, a New York claimant potentially has two bites at the apple.”²⁰⁶ However, where Barnes fails to address the intentionality behind this preservation of the demand and refusal rule, Frankel and Sharoni rightfully highlight it:

This appears consistent with the Act’s legislative history, which states, “[n]othing, however, bars the claimant from asserting claims that remain timely under applicable State law.” And, arguably, an implicit purpose of

198. *See supra* note 159 and accompanying text.

199. *See generally Zuckerman*, 928 F.3d 186.

200. *See Barnes, supra* note 60, at 632–33.

201. *Id.* at 633.

202. Hull, *supra* note 183, at 270; *see also Lazerow, supra* note 162, at 257 (stating that the HEAR Act “will have little effect in New York, the most popular state for litigating Holocaust recovery cases”).

203. Barnes, *supra* note 60, at 633.

204. *See id.* at 612 (quoting *HEAR Act Hearing, supra* note 1, at 3 (statement of Agnes Peresztegi, President, Commission for Art Recovery)). Note that laches would still apply to a claimant who tries to file a claim under New York’s demand and refusal rule after the HEAR Act expires.

205. *See Frankel & Sharoni, supra* note 95, at 173.

206. *Id.*

the Act is to extend existing state limitations periods, rather than constrain them in some way. . . .

[Thus], the language used by Congress seems significant and should be given effect.²⁰⁷

Finally, Frankel and Sharoni note Congress's use of "may" rather than "shall," for the purposes of commencing an action under the HEAR Act, as evidence that Congress wanted to preserve state statutes already more favorable to claimants.²⁰⁸

Despite the likely intentionality by Congress, the preservation of the demand and refusal rule has been called "a nonsensical result that rewards or at least allows claimants to wait before bringing claims."²⁰⁹ "This runs contrary to the sensible policy rationale at the heart of laches, which is to avoid prejudice and unreasonable delay in bringing claims."²¹⁰ However, this argument against the preservation of the demand and refusal rule fails because it muddles the policy implications of laches and the application of laches. Where the demand and refusal rule remains, laches still applies; the preservation of the demand and refusal rule cannot run counter to the policy rationale of laches because the demand and refusal rule *employs* laches as a possible defense.²¹¹ Furthermore, the preservation of the demand and refusal rule in no way "rewards" a claimant who delays bringing a claim because a laches defense still imposes a due diligence requirement.²¹² Any claim that is brought under New York's demand and refusal rule after January 1, 2027, would still be barred by laches if unreasonably delayed to the prejudice of the defendant.²¹³ Thus, it is likely that Congress intentionally left the demand and refusal rule in place—relying on laches to bar unreasonably delayed claims.

5. State Implementation to Avoid Unconstitutionality Concerns

While it has been suggested that Congress could alternatively "replac[e] the discovery rule with New York's demand and refusal rule, thereby making it so that this claimant-friendly rule preempts each state's statute of limitations in the Nazi-looted art context, without a sunset provision,"²¹⁴ such a solution is flawed. Instead, states, rather than Congress, should implement demand and refusal rules on their own—thereby promoting ultimate art restitution and preserving due diligence through laches, all the while allowing statutes of limitations to remain a power of the states.

207. *Id.* (first alteration in original) (quoting S. REP. NO. 114-394, at 10 (2016)).

208. *Id.* at 173–74.

209. Hull, *supra* note 183, at 270.

210. *Id.*

211. *See supra* Part I.E.

212. *See supra* Part I.E.

213. *See supra* Part I.E.

214. Hull, *supra* note 183, at 271.

Importantly, this suggestion of state implementation avoids Charron's unconstitutionality argument.²¹⁵

Prior iterations of the HEAR Act and its revisions, as well as the final version of the HEAR Act, indicate that Congress is apprehensive about remaining in this area of the law for too long; an earlier version of the bill stated that “the enactment of a Federal law is the *best* way to ensure that claims to Nazi-confiscated art are adjudicated,” while the final version of the Act stated that “the enactment of a Federal law is *necessary* to ensure that claims to Nazi-confiscated art are adjudicated.”²¹⁶ This change in language may indicate Congress's intent to remove itself from this area once the issue has been addressed—remaining only as long as is needed to bring the issue to the states' attention.

Furthermore, the better argument regarding Congress's intention not to involve itself perpetually in this area lies in the text of the HEAR Act itself. The inclusion of the sunset provision²¹⁷ demonstrates clear congressional intent to not eternally involve itself in this area of the law. While Barnes, for example, argues that Congress cites *Von Saher I* in the HEAR Act “as if to blame the HEAR Act, and its erosion of state sovereignty, on the Judiciary,” the HEAR Act does not “ero[de] . . . state sovereignty” simply because it contains a sunset provision.²¹⁸ If Congress truly intended to overtake the power of states to determine statute of limitations rules on Nazi-confiscated art, it could have ensured that the Act endured.²¹⁹

A number of other federal responses to the HEAR Act have been suggested.²²⁰ For example, “Congress could have passed legislation that would have allowed or encouraged states to establish alternative procedures for restitution claims for art lost during the Nazi era.”²²¹ However, this alternative would merely duplicate the work the HEAR Act is already doing. The HEAR Act, and its inclusion of a sunset provision, encourages states to recognize that the discovery rule is not the most effective way to protect stolen art and thus further encourages states to adopt the demand and refusal rule. Congress then included the sunset provision so that, at the end of this

215. See *supra* Part II.C. Alexander Hull's student note, in contrast to this Note, suggests that upon expiration of the HEAR Act, Congress could pass a federal cause of action that would supplant state statute of limitations rules with a *federal* demand and refusal rule. See Hull, *supra* note 183, at 274. Although creating a federal cause of action would appease Charron's unconstitutionality argument, it seems that the better solution is to allow states to adopt these rules independently. See *supra* Part II.C. Since statutes of limitations for stolen chattels have historically been a state law arena, this Note argues federal legislation is too strong a response. See Dowd Email, *supra* note 150.

216. Compare Holocaust Expropriated Art Recovery Act of 2016, S. 2763, 114th Cong. § 2(7) (as reported in Senate, Sept. 29, 2016) (emphasis added), with Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2(7), 130 Stat. 1524, 1525 (codified at 22 U.S.C. § 1621 note) (emphasis added).

217. Holocaust Expropriated Art Recovery Act of 2016 § 5(g), 22 U.S.C. § 1621 note.

218. See Barnes, *supra* note 60, at 624.

219. See Hull, *supra* note 183, at 271.

220. See Barnes, *supra* note 60, at 624–25.

221. *Id.* at 624.

“test period,” states could, on their own, implement rules closer to the demand and refusal rule.²²²

Therefore, it appears that Congress specifically included the sunset provision in the HEAR Act to indicate its apprehension about involving itself too heavily in an otherwise state-law-dominated area.²²³ The sunset provision has the precise purpose of ending federal power in this area and returning the power to the states.²²⁴

B. Application to All Stolen Chattels to Avoid *Von Saher I*

States that adopt a demand and refusal rule should further apply that rule to *all* stolen chattels, not just Nazi-confiscated art.²²⁵ This expansion of the rule would avoid the holding in *Von Saher I*²²⁶ and expand claimant-friendliness to cases of any stolen personal property.²²⁷

The demand and refusal rule adopted by states can be applied to *all* stolen chattels to avoid the holding in *Von Saher I* that states cannot create exceptions to their statutes of limitations for Nazi-confiscated art because doing so infringes on Congress’s foreign affairs power.²²⁸ By applying the rule to *all* chattels, no such exception would exist.

While some have suggested that the holding in *Von Saher I* was wrongly decided,²²⁹ mere application to *all* chattels, not just Nazi-confiscated art, would avoid that conflict. Moreover, it is unlikely that Congress disagreed with the holding in *Von Saher I*²³⁰ because Congress positively cited the case in the HEAR Act.²³¹ More likely, Congress’s citation to *Von Saher I* was an underwrite of, or congressional concurrence with, its holding. This Note’s suggestion to broaden the rule to all stolen chattels would avoid the issues that arise under *Von Saher I* and the suggestions of those who find its holding erroneous.²³²

Lastly, the application of the rule to *all* stolen chattels, not just Nazi-confiscated art, would ensure that claimant friendliness is provided in any case of a stolen item; such a rule would mean that no more importance is

222. *See id.*

223. *See id.* at 622–23.

224. *See* Holocaust Expropriated Art Recovery Act of 2016 § 5(g), 22 U.S.C. § 1621 note (“Any civil claim or cause of action commenced on or after [January 1, 2027,] to recover artwork or other property described in this Act shall be subject to any applicable Federal or State statutes of limitations . . .”).

225. *Contra* *Bibas*, *supra* note 142, at 2468 (“It would be a mistake to lump all chattels together without further thought, just as it was a mistake to lump real and personal property together for purposes of adverse possession doctrine.”).

226. *See generally* *Von Saher I*, 592 F.3d 954 (9th Cir. 2010).

227. *See supra* note 185 and accompanying text.

228. *See generally* *Von Saher I*, 592 F.3d. 954.

229. *See, e.g.*, *Barnes*, *supra* note 60, at 623; Dowd Email, *supra* note 150.

230. *Contra* sources cited *supra* note 229.

231. *See* Holocaust Expropriated Art Recovery Act of 2016 § 2(7), 22 U.S.C. § 1621 note.

232. *See* *Barnes*, *supra* note 60, at 624 (suggesting that Congress could have passed legislation allowing states to “tinker with their own accrual and tolling rules for restitution claims for art lost during the Nazi era,” even though such a suggestion is precisely what *Von Saher I* rejected).

placed on a stolen Picasso than on the stuffed bear your grandmother gave you as a child.²³³ While it can be suggested that the rule should apply only to “unique chattels,”²³⁴ states should not draw lines of demarcation based on personal value and sentimentality.

C. Application of Demand and Refusal to Thieves and Bad-Faith Purchasers

One of the most startling concerns about the demand and refusal rule is that it appears to treat thieves and bad-faith purchasers better than it treats good-faith purchasers.²³⁵ In *Lubell*, the court applied demand and refusal to the oft-encountered case of a demand for return of an object held by a good-faith purchaser—nonetheless noting the “seemingly anomalous” result that by applying demand and refusal only to good-faith purchasers, “a different rule applies when the stolen object is in the possession of the thief. In that situation, the Statute of Limitations runs from the time of the theft.”²³⁶ This notion defies logic and basic senses of morality; thus, upon implementing a demand and refusal rule, states should apply it beyond just good-faith purchasers, to provide ultimate claimant friendliness irrespective of who is in possession of the item.²³⁷ The application of demand and refusal to thieves and bad-faith purchasers, in addition to good-faith purchasers, would effectuate ultimate claimant friendliness in all situations of stolen goods. Not only would the type of chattel not impede an original owner’s right to recover the item, but the type of possessor would also not change the original owner’s rights as against the possessor.

D. Nonretroactivity of Newly Implemented Demand and Refusal Rules to Avoid Fifth Amendment Concerns

Upon implementing the demand and refusal rule for *all* chattels and applying it to *all* possessors, states should classify the statute as purely prospective²³⁸—that is, the statute should not apply to a possessor who has

233. See Email from James Kainen, Professor, Fordham Univ. Sch. of L., to author (Oct. 6, 2020, 11:57 EST) (on file with author) [hereinafter Kainen Email].

234. Dowd suggests that there are public policy reasons, including the “buyer beware rule,” that might indicate that “commercial,” “fungible,” and “commodity-type goods” should be treated differently than something “unique.” Dowd Email, *supra* note 150. As Professor Kainen queries in response: “So I should get my Dad’s watch back, but not my car?” Kainen Email, *supra* note 233.

235. See *supra* notes 163–68 and accompanying text.

236. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429 (N.Y. 1991).

237. See Bibas, *supra* note 142, at 2467 (“Letting owners recover is consistent with the law’s deeply rooted protection of property rights and its refusal to treat a theft as a legal transfer of title.”); see also Nicholas Joy, Note, Cassirer v. Thyssen-Bornemisza Collection Foundation: *The Holocaust Expropriated Art Recovery Act Was Unveiled but Congress Still Has Work to Do*, 49 GOLDEN GATE U. L. REV. 3, 22 (2019) (“If Congress wants to ensure that Cassirer and other Holocaust-era art restitution cases are resolved fairly and justly, then claims of adverse possession for personal property should be prohibited.”).

238. While other issues of retroactivity can be imagined, this Note’s suggestion is to allow retroactivity only to the extent constitutional under the Fifth Amendment.

already acquired title under a preexisting statute but would not yet hold title under the new statute. Put otherwise, the new statute should not revive actions that were previously barred by the old statute.

A hypothetical can illustrate where this might occur. Suppose a thief (T) steals a painting from an owner (O) in a demand and refusal jurisdiction. The applicable statute of limitations is three years. T holds on to the painting for three years. After three years, the jurisdiction adopts this Note's proposed statute—including the provision that demand and refusal applies to thieves and bad-faith purchasers. Under this new rule, O demands the painting's return from T, and T refuses. O subsequently brings a suit for the painting, claiming that the statute began to run when O demanded the painting and T refused. T argues that the statute began to run at the time of the theft and so he has already acquired good title. Since the statute has run, the new statute should not apply to divest T's title.

To avoid any Fifth Amendment concerns of unconstitutional takings of property,²³⁹ this Note suggests that where any statute of limitations for replevin has run on an item in the hands of a subsequent possessor, and thus the subsequent possessor has acquired good title, newly implemented demand and refusal rules should not resurrect the original owner's previously barred cause of action.

E. Shortening the Statute of Limitations Duration

New York's statute of limitations duration for a cause of action for replevin is three years.²⁴⁰ New Jersey's statute is six years.²⁴¹ In reality, where a demand and refusal rule is used, there is no need to have such lengthy statutes of limitations. Upon formal demand and refusal, both parties are on notice of the potential for a lawsuit, and the suit can and should be brought immediately upon formal refusal.²⁴² Shortening the duration of the statute of limitations following formal refusal would serve the purpose of preventing stale claims, lost evidence, and faded memories,²⁴³ without compromising the demand and refusal rule's goal of claimant friendliness.

A number of cases illustrate that a long duration between demand and refusal and filing suit is practically unnecessary and that such a lengthy duration only serves to allow for the type of unreasonable delay that laches seeks to avoid.²⁴⁴ For example, in *Lubell*, demand for the artwork's return was made on January 9, 1986, and the action was commenced on September 28, 1987.²⁴⁵ In *O'Keefe*, although the discovery rule was employed, O'Keefe made a demand for the painting after discovering its location in

239. See *supra* notes 178–82 and accompanying text.

240. N.Y. C.P.L.R. 214(3) (MCKINNEY 2020).

241. N.J. STAT. ANN. § 2A:14-1 (West 2021).

242. Despite the use of the word “immediately,” this Note recognizes the time needed to hire a lawyer and draft a complaint.

243. See *supra* note 39.

244. See *supra* text accompanying note 92.

245. See *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 428 (N.Y. 1991).

September 1975 and its possessor in February 1976; she subsequently filed suit in March of 1976.²⁴⁶ In *Reif v. Nagy*,²⁴⁷ plaintiff was put on notice by the defendant's attorney via email on November 13, 2015, and the complaint was filed in March 2016.²⁴⁸ Therefore, there is no practical reason to have a lengthy statute of limitations in a demand and refusal jurisdiction when suits can and should be filed almost immediately following receipt of refusal.

Furthermore, since statutes of limitations were established *before* these accrual rules were set in place,²⁴⁹ the legislature is free to adjust these durations once accrual rules are defined. Thus, legislatures, upon adopting this Note's proposed demand and refusal rule, should additionally shorten the duration of statutes to promote expediency—and doing so would not really change the practices of claimants.

Finally, lengthy statutes of limitations are only necessary where the running of the statute of limitations is predicated on constructive discovery rather than demand and refusal—such an expansive duration allows “wiggle room” for the uncertainty of constructive discovery²⁵⁰ but would not be needed where a bright-line demand and refusal rule is used. Where a state is apprehensive about implementing the demand and refusal rule for fear it will not result in expeditious filing of claims, both the doctrine of laches and a shortened statute of limitations can be employed.

CONCLUSION

Of the 600,000 works of art taken by Nazis under Hitler's regime, only 100,000 works have been recovered.²⁵¹ Due to the difficulties that arise in tracking these works down, Congress passed the HEAR Act to effectuate the long overdue recovery of stolen Jewish property.²⁵² However, the HEAR Act's claimant friendliness should serve as a lesson to states of the need for rules that effectuate recovery of *all* stolen property. Nazi-confiscated artwork is a striking and necessary example of the need for a nationwide shift toward more claimant-friendly rules for recovery of all stolen personal

246. See *O'Keeffe v. Snyder*, 416 A.2d 862, 864, 866 (N.J. 1980).

247. 106 N.Y.S.3d 5 (App. Div. 2019). For a more thorough elaboration on *Reif* and Dowd's involvement in the case, see Dowd, *supra* note 159; see also William D. Cohan, *Court Says Heirs of Holocaust Victim Can Keep Nazi-Looted Works*, N.Y. TIMES (July 10, 2019), <https://www.nytimes.com/2019/07/10/arts/design/nazi-looted-art-holocaust.html> [https://perma.cc/TG4L-SF5C]; William D. Cohan, *A Suit Over Schiele Drawings Invokes New Law on Nazi-Looted Art*, N.Y. TIMES (Feb. 27, 2017), <https://www.nytimes.com/2017/02/27/arts/design/a-suit-over-schiele-drawings-invokes-new-law-on-nazi-looted-art.html> [https://perma.cc/3LRS-7WYR]; Nicholas O'Donnell, *Heirs of Holocaust Victim Fritz Grünbaum Win Restitution of Nazi-Looted Schiele Drawings*, ART L. REP. (July 11, 2019, 5:05 PM), <https://blog.sullivanlaw.com/artlawreport/grünbaum-heirs-win-restitution-of-nazi-looted-schiele-drawings> [https://perma.cc/TAP5-ZYE4].

248. See generally *Reif*, 175 A.D.3d 107.

249. The judicial imposition of the discovery rule and demand and refusal rule were part of a judicial interpretation of the pre-existing statutes of limitations. See *supra* note 54 and accompanying text; see also Dowd Email, *supra* note 150.

250. See *supra* note 137 and accompanying text.

251. See *supra* note 21 and accompanying text.

252. See *supra* note 95 and accompanying text.

property. Thus, upon the expiration of the HEAR Act, states should evaluate their statutes of limitations for replevin and adopt the claimant-friendly demand and refusal rule. In adopting this rule, states should implement the following principles. States should apply this rule to *all* stolen chattels, not just Nazi-confiscated artwork, and should apply this rule to thieves and bad-faith purchasers, not just good-faith purchasers. Such an application would allow for ultimate claimant friendliness and the recovery of more stolen chattels. Further, application of the doctrine of laches could weed out any nonmeritorious claims. To avoid any unconstitutional takings where title has already vested under a previous statute, this rule should not be applied retroactively. Finally, the duration of the statute of limitations should be shortened to ensure expeditious filing of claims.