THESIS

POWER INEQUITY AND THE REPATRIATION RIGHT IN THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

Submitted by

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ABSTRACT

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The Native American Graves Protection and Repatriation Act of 1990 sought to empower Native communities to reattain their ancestral human remains, funerary objects, sacred objects, and objects of cultural patrimony. Issues both in theory and in practice have arisen in regard to the law and have made implementation difficult and controversial. This paper seeks to analyze the power provided by the legislation and how it applied in the practice of compliance. This power dynamic is then reconciled within the repatriation ethic of the United States as well as internationally. As the scope broadens, an international repatriation ethic emerges that establishes repatriation of culturally affiliatable human remains and sacred objects as a basic human right for indigenous peoples.

ACKNOWLEDGEMENTS

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PREFACE

It seems an egregious injustice that this country had to develop a law to protect rights of some people that the rest of the people in the United States enjoyed as common law since their arrival. It has always been illegal in this country to dig up graves or harbor bones without consent of Christian white folks in this country. For Native peoples within the United States, the same cannot be said. The unveiling of this injustice and its lingering affects motivated my desire to "fight the good fight" in this field and defend the interests of the extreme minority of this country, but a minority science and academia leans on to a degree that it has at times seemingly found itself as the inheritor of Native culture and heritage more so than the Native peoples themselves.

It is with this ardently Post-Colonial mentality that I took on the NAGPRA project at Colorado State University and that I began forging a path for my research. At first, for both my work and my research, it was imperative to distance myself from ethnocentrism as much as possible and to absorb the knowledge, beliefs, and opinions of the Native peoples and their representatives in order to be hyper considerate during two processes that have often been drowned in insensitivity, anthropological work and NAGPRA consultations.

I do however recognize some of the inherent problems with the Post-Colonial approach, as addressed by Linda Tuhiwai Smith in her book Decolonizing Methodologies. The Post-Colonial approach, while recognizing the colonial aspects of research and academia, is also still colonial in that it affirms Western, academic power by utilizing a greater degree of cultural sensitivity in the research. This sensitivity of Post-Colonialism theoretically makes this a more appealing approach to academia for me. However, I try to be Post-Colonial in its truest form, by directing my comments to and from specifically my own epistemology and allowing those of a differing epistemology (i.e. Native Americans) to comment on their own epistemology.

For my mentorship on NAGPRA, I am deeply in debt to Sheila Goff and Bridget Ambler, of History Colorado, Jan Bernstein, of Bernstein & Associates, and especially Terry Knight and Lynn Hartman, of the Ute Mountain Ute Tribe. The time outside of consultations I spent with Karen Little Coyote of the Southern Cheyenne and Bryan Montoya of the Pueblo of San Ildefonso were critical to my understanding of Native interests in their own heritage, as well as the many varied socio-political circumstances reservations and Native Americans find themselves in today.

With their assistance, as well as numerous others, I came to find my professional path. I also came to understand what my research must be about, despite my initial impression that I would be a conventional cultural anthropologist studying Native culture and processes and reporting back to the rest of the world my own interpretation. I found this to be distasteful, and my relationships with all the people that were a part of my "research" were in fact teaching and mentoring me the entire time. In this way I hoped to utilize my experience to highlight the problems that applications of the law inspire – both from a practical and a philosophical perspective.

Notable aspects of my sensitivity mentorship have been included in this paper. For the purposes of referring to the human remains in CSU's collection, I use the term that is preferred by the tribes that I have consulted with: individuals. When the term "individuals" is used in this paper, it will always be referring to human remains, not currently breathing people. I also use the term Native as a shorthand way of specifically referring to Native Americans. At no point will a capitalized "Natives" refer to anything other than Native Americans. The term "indigenous" is used for all native peoples and is used for geographically or culturally specific indigenous peoples outside the United States. In places which more specificity is needed, the most generally accepted scholastic terms will be used for indigenous peoples (i.e. Maori, First Nations, Australian indigenous, etc.)

In this way, this paper has become less of a conventional cultural anthropology study and more of a legal anthropology review with a reconciliation of broader trends in repatriation to the

practice in the United States. It is by this process that I hope to advocate many of my friends and colleagues. The fact of the matter is that the issues that NAGPRA addresses are not a national priority. However, in many ways NAGPRA is thought of as a comprehensive, be-all-end-all legislation on cultural heritage and repatriation. If we are striving toward genuine equality in this country then we must constantly be reconsidering what equality currently means and what we are doing to fight for it. This paper is my part – for now. Ask yourself, what need was NAGPRA addressing, and to what degree have we actually addressed it?

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INTRODUCTION – THE POWER PROBLEM

As NAGPRA (Native American Graves Protection and Repatriation Act) Coordinator for Colorado State University (CSU), I had the opportunity to participate in consultations with tribal representatives from tribes that at some point had settled in northern Colorado. The second of these consultations I hosted and led. I welcomed traditional religious leaders, elders, and tribal heritage experts as official government representatives of their respective tribes. These representatives came to Fort Collins, Colorado from Wyoming, Oklahoma, New Mexico, Arizona, and southwestern Colorado.

They came to Fort Collins to consult on 78 individuals who were indicated or likely to be from Colorado and Arizona (there was one additional individual at the university that was most likely Californian which meant there were 79 total individuals at CSU). Colorado State University had acquired these remains mostly through donations and salvage archaeology projects on private land. The Front Range of Colorado is notorious for its swift erosion, which exposes many archaeological resources. Unfortunately for these tribal representatives, it also exposes many humans' remains who were never intended to be uncovered, let alone removed, from their resting places.

These religious leaders, elders, and heritage experts sat down together at a table within a building on Colorado State University's campus. Many of them had worked together in the past and had strong relationships. I was meeting most of them for the first time. According to NAGPRA and the university's policy, they were there to help me determine whether or not any of the individuals could be culturally affiliated to one of the tribes. Throughout the consultation, I presented them the information we had in regard to these individuals and asked them for any insights on what might indicate a shared culture between the present day tribes and the individuals.

Case after case I presented and at points I received feedback that might be used to indicate cultural affiliation, but mostly there was very little information on the individuals. In fact 50 of them had no provenience whatsoever. After beginning with the individuals with provenience, we began to look through all the individuals without provenience. Because there were no claims of cultural affiliation at any point, it was agreed that 77 individuals – representing all the individuals with provenience in Colorado – of the 78 should be considered "culturally unidentifiable" and repatriated to one of the tribes represented at the meeting. The other individual would go to another represented tribe whose land it was apparently from.

Cultural affiliation is the main reason why consultation is conducted. It is mandated within NAGPRA that potentially affiliated tribes have an opportunity to review the remains and associated artifacts in order to determine whether or not they are related to them. The definition of tribes both NAGPRA and this paper uses is those self-defined cultures of indigenous peoples of the United States. By requiring consultation with the tribes in the affiliation process, tribal representatives have the opportunity to make claims for their apparent ancestors. This process is typical of burial common law in which the next of kin receive the responsibility over the corpse in order to assure expedient and proper burial.

This resolution to qualify all the human remains as "culturally unidentifiable" was reached shortly after I offered it. The solution may have come up naturally, as it was the most obvious. It was the priority of the tribes to have the individuals most expediently reburied by whoever had the resources (mostly time). By labeling the individuals as culturally unidentifiable, there would be fewer Notices of Inventory Completion, fewer Transfer of Control documents, and much less paperwork in general. This would theoretically expedite reburials for the remains.

This was a moment that deeply affected me. Here was a room of very important government representatives who were collaborating to dictate the future of 78 human remains and

so much of the power in the room seemed to be situated in my own hands. I had the power of invitation to this consultation. As a representative of the institutions that is really empowered by law, I ultimately was deferred the power to make cultural affiliation determinations. I had the power to determine what would happen to these human remains, none of which am I related to or have any right to govern, regardless of the tribal representatives' interests. That is not to say that the tribes could not sue CSU for my decision, and they likely would if I acted against their interests, however litigation is expensive. It would have taken significant tribal resources to appeal a decision not made in their best interest and ultimately the appeal may or may not be successful.

Regardless of my personal policy of allowing the tribes to dictate the process, the fact that I am the inherent power bottleneck got me thinking. Was I meant to be empowered by NAGPRA? Is NAGPRA accomplishing its intent? Who is meant to have the power in the process? Who can actually utilize whatever power it issues? These are the questions that guide this paper and my research has been a process of uncovering what repatriation means and how it operates in the local, national, and international context.

I became interested in NAGPRA as a museum intern at the Fort Collins Museum. In this position, I learned about the law and how it had been operationalized at the museum. Later I came to realize how revolutionary their approach had been. In 2002, they led consultations to determine cultural affiliation, as well as to develop reburial plans for both culturally affiliated *and* culturally "unidentifiable" individuals (Martin 2004). In 2006, and long before the 2010 culturally unidentifiable (CUI) regulation was promulgated, both affiliated and "unidentifiable" individuals were reburied (National Park Service 2006). At this time, reburials of these "unidentifiable" remains were very rare and controversial (Colwell-Chanthaphonh 2010; Liebmann and Rizvi 2008; Watkins 2004). Learning about the Fort Collins Museum policy the year prior to 2010 "CUI" regulation publishing drove my passion. Especially in tracking the controversy surrounding the 2010

regulation, I found myself fixated on what seemed to be the overarching question: what should be done with these Native remains?

It seemed to me that there must be an answer to this question, and that the answer must be sympathetic to Native interests. I did not understand what right archaeologists and museum professionals thought they had to retain skulls and assorted body part of deceased Natives. It was in light of these concerns that I decided to pursue graduate studies. It just so happened that Colorado State University was both looking for graduate students and help on their NAGPRA project.

At CSU, the supervisors over the NAGPRA project asked me to put together a consultation in order to finalize their initial inventory. Funds for the project had just been provided by the College of Liberal Arts and were seemingly more than enough to complete the project. I coordinated this consultation, and originally had 18 tribes RSVP for the event. After making several follow-up calls, 12 had confirmed they would be there the next week and an additional 4 had RSVP'd but I was unable to contact them in the weeks leading up to the event. On the first day of this initial consultation effort, only three tribes were present. The geographic expanse these three tribes only represented the area of 2 of our individuals. Accordingly, we could only consult on 2 of the 78 and get general consensus on the approach for any individuals without provenience. To me and others at CSU, the consultation was a massive disappointment and a tremendous waste of CSU's resources, although we were able to secure a request for repatriation of one individual from one of the represented tribes.

Afterwards, I coordinated a follow-up consultation meant to address the remaining 77 individuals. The inclusion of tribes from the areas around Fort Collins and areas that some of the individuals were apparently from was critical. Because of this, the consultation was completely planned around the schedules of the tribes. Unfortunately this meant that it had to take place during

CSU's spring break, when most of the faculty is away at conferences or otherwise travelling. The consultation, at the acquiescence of the tribal representatives, was led by me.

As I mentioned above, this consultation was very productive and a tentative plan for the 77 individuals was forged. The plan previously developed for the individual claimed during the first consultation was also approved by this second group. Since then, I have presented a plan of disposition for individuals without provenience to the National NAGPRA review committee, published Notices of Inventory Completion, developed and completed Transfers of Control, and I am currently working on finalizing disposition/repatriation and reburial plans for these individuals as I am writing this paper.

Throughout this work, ethical issues have paralyzed me periodically. Going into the first consultation, I spoke with one of the representatives that had RSVP'd. She said, "You should know, less than half of the tribes that RSVP'd will be there." Due to my optimism and what I believed to be sufficient persistence (and borderline annoyance) in securing commitments to attend, I did not take her seriously. However, she could not have been more accurate. To my mind however, this was meant to benefit the tribes and CSU paying expenses. The way I saw it, all I needed was their time in order to do something good for the people and the remains. Why was it that so few would show up despite it seeming from a museum standpoint to be an easy project for the tribes?

The second consultation brought two more significant ethical issues to my attention. On one hand was my awakening to the power disparity in the room regarding these remains. On the other hand was the issue of using NAGPRA as a tool by which Native purposes could be achieved regardless of the intent or purpose of the law. Specifically, the tribes agreed that cultural affiliation – one of the highest priorities of NAGPRA – was not a priority of the consultation. The top priority of the consultation for the tribes was to determine the most effective and expedient plan for reburial of all the remains – preferably as near to where they were exhumed as possible. Because the tribes

all agreed on this point, the determination was made to label the remains as "culturally unidentifiable" with the intent to keep them all together to be repatriated and reburied by one tribe. Especially considering this in terms of the interests of the deceased, this seemed problematic.

Some of the remains had provenience and evidence that might have been sufficient to indicate cultural affiliation. According to NAGPRA, this evidence is to be utilized in a determination of whether or not the remains could be culturally affiliated, and if so to identify that modern tribe. In accordance with the wishes and interests of the tribes, this evidence was largely disregarded in order to determine a plan of reburial. As an advocate for the tribes, I was content to acquiesce to their determinations in the consultation. However, as a NAGPRA Coordinator and an anthropologist, the ethics of disregarding the legal process supposedly meant to lead to equitable disposition of NAGPRA material and information to tribes was somewhat problematic.

In order to better understand my position on these matters, I began to investigate the causes for these issues. As an anthropologist – and student of Kathy Pickering – I began my understanding of the issue from a Constructivist approach (Ross et all 27-54). This approach acknowledges that our understanding of the world around us results from historical constructs. That is to say any individuals' or groups' worldview is dictated by the culture they are raised in, and that culture is a construct of its distinct history (Agrawal 1995; Gegeo and Watson-Gegeo 2001; Kuper et al. 2003; Ross 2008). This approach recognizes the distinctly different epistemologies – a collective system of knowledge and ways of knowing – of different cultures. Native Americans of the United States are raised within systems that still integrate varying degrees of traditional knowledge and lifeways alongside Western systems and knowledge. In this way, Native epistemologies will significantly differ from those of specifically Western epistemologies. By using this approach, I have tried to ground any understanding of the law, its intent, and its function as firmly entrenched within the Western, Judeo-Christian American epistemology.

Analyzing this Western epistemology and its effects on the repatriation process was particularly meaningful to me after my awakening during the second consultation. Not only was I put off by the power inequity, but of my role in a colonialist system that forced my actions to be implicitly colonialist. It was clear to me that based on my own ontology having been formed within the constructs of Western history. I must appreciate the restraints these constructs have created for me, as well as my inability to operate within a separate construct I am sympathetic to but not raised within. For this reason, my research focused on power as utilized by those of my shared epistemology and the effects of that use of power.

In evaluating the mutual influences of culture, indigenousness, and epistemology, each must first be defined. The definition of culture in this paper generally follows Tylor's original definition from *Popular Science Monthly* in 1884:

> "…that complex whole which includes knowledge, belief, art, morals, law, custom and any other capabilities and habits acquired by man as a member of society." Indigenousness is notoriously difficult to define and this difficulty has inspired many political problems for those collectively classified as "indigenous."

For this paper, the term indigenous refers to groups of people and communities that have a history of occupancy prior to a colonial power and has been subject to a dominating colonial power which has lasting repercussions today. To situate indigenous and Western constructions, we also must define the crucial concept of epistemology. By this, the paper refers to knowledge systems and constructs as determined and reinforced by a group's environment and history. Understanding my use of these three terms is important in understanding both my approach and the point of my analysis.

This paper traces my discovery of the written intent of the legislation and the actual practice of the law. By doing so, my hope is to illuminate deficiencies in the law as well as to indicate the broader trends in repatriation that may render NAGPRA outdated. How will repatriation operate

moving into the future? How will people in the future view the repatriation efforts of the present? These questions are critical to understand what should be done in the now.

Chapter 2 begins by parsing out the Constructivist approach and how it can be applied to repatriation. It then digs into the history of repatriation and its rise in the United States, looking at Native and scholarly calls for legislation and the first precedents for such a law. A short section of this chapter will be devoted to the legislative history, which was explored in depth by Timothy McKeown in his recent book (McKeown 2012). By evaluating this history we can discern some basic tenets of intent. This gives us our measuring stick for the next chapter.

Chapter 3 starts with a look at the glaring holes in the legislation and how they were addressed with regulations. Whether or not these regulations were in keeping with the intent is subject to debate, however the measuring stick of intent developed in Chapter 2 can be used to evaluate these claims. Then follows a look at what NAGPRA actually accomplishes in practice relative to this intent. It becomes clear that there are many significant issues that NAGPRA insufficiently addresses. This critical look at the law will be guided by our measuring stick of intent.

Chapter 4 takes a look at repatriation trends globally. These trends help illuminate the state of repatriation in the United States. We will also notice trends that give strong indication of the future of repatriation and perhaps at one point its normalized status as a "human right." The concept of a human right will be analyzed and its application to indigenous peoples of the world will be scrutinized. Finally the last section is a look back at NAGPRA from the future, approximately 50 years from now, exposing some of the jarring problems of the law and its practice in our modern context.

The intent of this paper is to give guidance on the ethical issues that NAGPRA inherently presents. By developing this guidance, broader trends in practice and normalization will be exposed that demonstrate that there is a "right" and "wrong" side of history on this issue. If indigenous

peoples of the world utilize the concept of human rights and repatriation becomes normalized as a human right, as I indicate, then those in the United States and elsewhere acting contrary to what is emerging as the "repatriation ethic" will be seen as on the "wrong" side of history.

CHAPTER 1: WHAT WAS NAGPRA INTENDED TO DO?

In order to determine whether or not NAGPRA is effective, the need for NAGPRA must first be determined and then the intent of NAGPRA must be discerned. If repatriation were unnecessary and unwanted, the law would also be unnecessary and unwanted. If it can be demonstrated that it was warranted, then the approach of legislators can then be measured in a couple different ways. First, the intent of the legislation can be measured against the actual practice of the dictates of the legislation. This measurement will be the focus of Chapter 2. Second, the legislation itself can be measured against the national and international repatriation ethics throughout the world, which will be the focus of Chapter 3. This chapter will set the basis for each of these discussions by looking at the development of the repatriation ethic and NAGPRA legislation in the United States.

Any discussion that involves federal Indian law and policy should begin and end with acknowledgement of the epistemological differences between the culture dictating the policy and the people subject to the policy. Of course, speaking in universal terms for all Natives of the United States, the boundaries of which are Western constructions, and their supposedly collective way of knowing is a tendency of the Western epistemology in and of itself. In consideration of that fact, the discussion will focus on the Western epistemology and how and why this shared system of thought and knowing is not a part of the ontology of the indigenous peoples of the United States.

The constructivist approach to understanding the differences in ways of knowing acknowledges that each culture or group's shared knowledge is a result of its unique history and individuals (Agrawal 1995; Ross et al. 27-54). Each group has a unique system and interpretation in understanding the world around them. Many groups share very many similarities in their interpretation of the world and those people often have a shared culture, with an overarching shared

epistemology. However, subcultures within the larger culture also include sub-epistemologies within the larger epistemology (Myhre 2006). This epistemology tree has parallels to the way we understand language. Although we do not see any particular modern languages as "parent" languages of its contemporaries, we see their influences on each other and their shared roots (Myhre 2006).

In this way we can see many similarities in the priority of supposedly value-neutral, scientific knowledge in Europe, the United States, and Canada. However, subcultures with a shared overarching ontology differ from group to group. Consider the limits that groups put on scientific knowledge. Within the United States, there are a vast amount of people that believe, contrary to scientific evidence, that the world was created by the Christian God approximately 6,000 years ago and that a great flood wiped out the dinosaurs that had previously lived alongside humans (answersingenesis.org 2014). Scientific evidence puts the creation of the world billions of years prior to that and the extinction of dinosaurs millions of years prior to the first humans (answersingenesis.org 2014). In Ukraine and Russia, many people refuse to use ice in their beverages or even eat ice cream cold (Moscowmom 2007; Simone 2011). Modern reasoning for this varies, though the most popular answer seems to be that the cold would make you sick (Moscowmom 2007). This also does not seem to be grounded in modern Western scientific understanding.

These differences are not unexpected but are meant to highlight the varying degrees of investment in the universalizing ideology of scientific secularism by different groups. The central tenets of this ideology are shared throughout these regions, however peculiarities still exist that contradict the ideology as a whole. This demonstrates two things. First, there is still inherent resistance to these concepts coming from people that have seemingly subscribe to this system of knowing. Westerners raised within this epistemology have a colonialist tendency to think that once

everyone is "civilized" everyone will share this scientific secular ideology (Matthews and Jordan 2011), however regional and cultural resistance may indicate otherwise.

In fact, if you consider the world economy system and its two central tenets of capitalism and scientific secularism (Matthews and Jordan 2011) and how it has been applied on the world stage today, it becomes obvious that the more diverse the epistemology the more resistance there is to the universalizing world economy system. Even major world powers like Russia and China have not adopted this system in its entirety due to their own priorities that are likely born from their own epistemologies that still co-exist with the Western epistemology in their countries. Because of this, varying degrees of capitalism and scientific secularism have been adopted throughout the world. The financial incentives for working within this system are very significant, however people with inherently contrasting ideologies have seemingly struggled to adopt these Western systems and their epistemology (Maffie 2005).

The second thing that regional distinctions in a shared overarching epistemology indicate is sub-epistemologies within larger shared epistemologies. On one hand, the Native peoples in the United States have adopted a shared, universal culture and epistemology in collaboratively operating through the National Congress of American Indians, Native American Rights Fund, American Indian Movement and other groups formed in the Red Power Movement. On the other hand, there are currently 566 federally-recognized tribes that are their own sovereign nations within the United States (Bureau of Indian Affairs 2012). Of these tribes, at least 325 live on their own reservation lands and there are about 169 distinct languages spoken amongst all of them (Siebens and Julian 2010; U.S. Census Bureau 2013). The diversity of groups and the lack of shared culture between them certainly indicate that there are nearly as many epistemologies as there are federally-recognized tribes in Indian Country of the United States. However, it is clear that these groups have very little

political power or influence and they must rely upon universalizing organizations and movements for representation.

The differing epistemologies can even be seen in repatriation ethics of individual tribes. Some groups, like that Navajo, Zuni, and Eastern Shoshone have been reticent to have human remains repatriated and reburied on their reservations, due to religious beliefs. For each group, the religious justification is unique, as are the interests of every separate tribe involved in repatriation consultation. Each of these tribal epistemologies are certainly different than the Western, scientific secular epistemology. This is key in evaluating the interests of the tribes and the interests of the government and where those worlds meet: federal Indian law and policy. NAGPRA is certainly a part of Indian Law and can be seen as a model of the problems that differences in epistemologies and the ignorance of these differences cause.

Genesis of the Repatriation Debate

The origins of the contemporary power dynamic began as the colonies were formed in the current United States. The capitalist ideologies that the European colonists brought with them created a perfect storm of destruction and oppression of the natural environment and Native communities (Wallerstein 191-256). In fact capitalism and colonialism paralleled each other in development out of the Middle Ages (see also Wallerstein 1989). As capital was created that could fund colonial expeditions and new territories, the rewards of colonialism and the subsequent resource extraction from those colonies generated new capital. The capital generated from colonialism translated to European nation-state wealth and power, which only further subjected people indigenous the colonial territories to gross injustices.

This political economy understanding of the development of power in the United States and other former European colonies demonstrates how a paradigm of inherent racism was instituted.

The indigenous peoples of the colonies were not interested in the capitalistic endeavors and typically had less expansive and complex economic systems. Accordingly, the capitalist system incentivized manipulation of the indigenous resources and relegating indigenous peoples to a lower class.

It is within this context that Anthropology began in the United States. These fields arose as a means within the emerging scientific secular ideology that justified colonialism as well as a form of Manifest Destiny. The earliest efforts sought to uncover the assumedly non-Native origins of the Moundbuilders, record dying cultures, and to demonstrate the inherent inferiority of Native peoples via phrenology.

One of the earliest and most meticulous of early, amateur archaeologists in the United States was Thomas Jefferson. Interested in the Moundbuilders of eastern and central US, Jefferson conducted meticulous and thorough excavations of the mounds (Hurst Thomas 2000a; Trigger 2006). At the time, theories as to the builders of the mounds ranged from Aztecs to Welshmen (Trigger 2006). Very few people thought that the contemporary Native peoples of the United States could be descendants of the Moundbuilders as the mounds seemingly represented a point on the cultural evolutionary scale that was beyond the people living at the time (Hurst Thomas 2000a; Trigger 2006). These racist, though often well-intentioned, narratives were partly dispelled by Jefferson and later by other archaeologists that could not draw a connection between the mounds and any other peoples than the contemporary Native peoples of the surrounding areas (Hurst Thomas 2000a).

Shortly after the height of the Moundbuilder discourse, Social Darwinism became very popular in the mid-to-late 19th century. This concept, largely advocated by sociologist Herbert Spencer[1], indicated that there were more and less evolved cultures that are all on the same trajectory

[1] Spencer also coined the phrase "survival of the fittest" which though often attributed as an aspect of Darwinism is actually a separate concept; in this way Spencer's evolution was based on inherent superiority of the surviving and

towards what Westerners considered "modern civilization" (Claeys 2000). The evolution could be scaled from the "primitive" nomads of central Africa to the highly sophisticated peoples of Western Europe (Claeys 2000). This overtly implied superiority of the people of Western European ancestry over all other peoples, and even scaled how much "more advanced" they were than each kind of peoples (Claeys 2000; Ross et al. 2010; Trigger 2006).

This school of thought was fueled by the contemporaneous phrenology movement that purported to understand cultural, and even individual, tendencies based on the size and shape of skulls (Bieder 2000; Fine-Dare 2002a; Hurst Thomas 2000b; Trope 2013). World renowned anthropologist Samuel Morton began the practice of collecting Native human remains, and most importantly skulls. Known by many as the father of biological anthropology (Bieder 2000; Fine-Dare 2002b; Hurst Thomas 2000b), Morton became famous for his "American School" of anthropology that used the measurements of the skull to discern mental capacity for such things as law, spirituality, and morality (Bieder 2000; Hurst Thomas 2000b). Though veiled as an honest scientific pursuit, the conclusions made by phrenologists reflected the racism prevalent at the time surmising that "the general size [of Native heads] is greatly inferior to that of the average European head; indicating inferiority in natural mental power" (Trope 2013). Morton and his American School concluded that Anglo-Saxons and Teutons had the most mental capacity and that both African-Americans and Native Americans were naturally meant to be enslaved or terminated by the European stock (Hurst Thomas 2000b).

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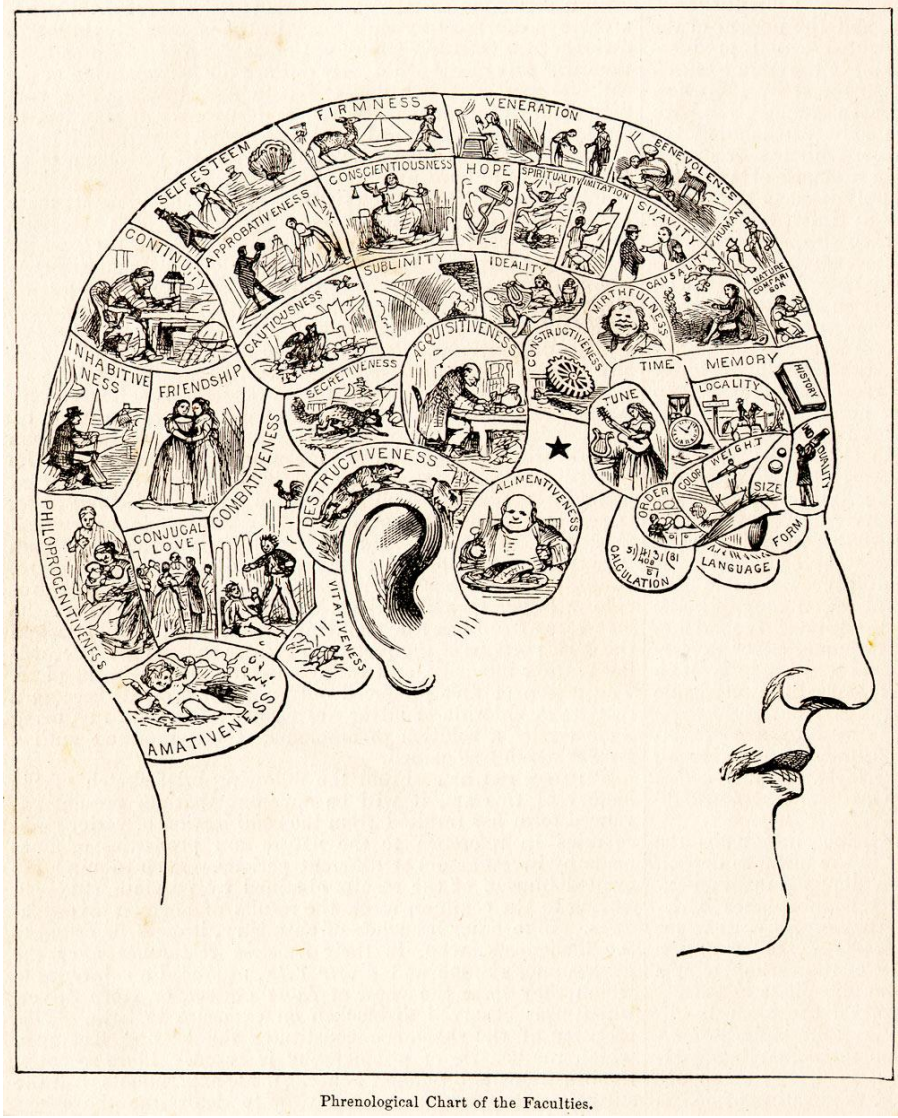
thriving populations whereas Darwin's concepts were purely based on advantageous adaptations; Spencer's concepts were a huge factor in the eugenics movements of the late 18th and early 19th centuries



Phrenological Chart of the Faculties.

Figure 1 - Phrenology behavioral diagram from People's Cyclopedia of Universal Knowledge (1883)

The phenomenon of phrenology in American academia generated an industry for skull collecting on a scale that had never occurred before (Fine-Dare 2002a; Hurst Thomas 2000b; Trope 2013). Even Morton himself was surprised by the shortage of legal specimens. In a 1830 lecture to medical students, a baffled Morton exclaimed, "Strange to say, I could neither buy nor borrow a cranium of each of these races" (Hurst Thomas 2000b). Facing the lack of potential data, Morton and other phrenologists began collecting skulls both legally and illegally. One visitor was impressed

with Morton's collection of about 600 skulls in 1846, and before his death in 1851, it was estimated that Morton alone had approximately 1,000 skulls in his personal collection (Hurst Thomas 2000b).

This fervor for skulls rippled across the United States, and the majority of those held by academics of the American School were those of Native Americans (Hurst Thomas 2000b). In fact in 1867, the Surgeon General ordered that military collect crania to send to the Army Medical Museum which was "forming this collection to aid in the progress of anthropological science by obtaining measurements of a large number of skulls of the aboriginal races of North America" (Fine-Dare 2002a). This practice continued throughout the rest of the 19th century and into the 20th century when in 1903 Aleš Hrdlička became the first curator of physical anthropology at what is now the Smithsonian Institution National Museum of Natural History (McKeown 2012; Mihesuah 2000). There, he arranged for the transfer of over 4,500 skulls, as well as other human remains, collected by the Army Medical Museum to the Smithsonian (Mihesuah 2000).

It is through this sordid history that the first and largest collections of Native American human remains were assembled. Remains of white people were also collected and studied, and sometimes illegally, during this period (Hurst Thomas 2000b), however much more stringent laws and better protected burials kept grave robbers and collectors focused on Native human remains (Fine-Dare 2002a; Hurst Thomas 2000b). These large collections, already well established by the early 20th century in most academically prestigious institutions (Hurst Thomas 2000b), only normalized the concept of collecting non-white human remains. Throughout the 20th century, archaeological praxis demanded the collection and study of Native remains found in excavations. At the same time, human remains of white peoples were always reinterred, usually as quickly as possible (Zimmerman 1989).

This history normalized an astonishing double standard in the United States: white remains when found were to be reinterred and Native remains when found were to be collected and studied.

Prior to NAGPRA, this double standard was recognized by both Native peoples and academics alike (Rosen 1980; Zimmerman 1989b; Zimmerman 1989a; Zimmerman 1986). It was clear that common law burial rights were not being applied to Native peoples in the United States (Pendleton 2003; Rosen 1980). Some people began calling for the empowerment of Native communities to regain their ancestors – as well as the other sacred objects taken throughout the period of the Indian Wars.

Common Burial and Property Law

Burials rights are a part of English common law as applies to the US law system through a reception statute enacted at the creation of the United States as an independent nation. This means that the legal precedents of English common law prior to the establishment of the United States government would apply in United States courts. This burial common law gives "quasi-property" designation to the deceased for the purposes of affording next of kin control over the remains. However, they are not truly property in that burial law also dictates the deceased has a right to a decent and expedient burial, and those with quasi-property rights over the remains cannot act contrary to that right for the deceased. Common law also assures the release of any kind of next-of-kin quasi-property rights upon the interment of an individual into the ground, at which point they become a part of the land (West's Encyclopedia of American Law 2008)

It became clear, however, that this common law did not apply to unmarked Native American burials. According the ruling in the 1982 case *Wana the Bear v. Community Construction, Inc.*, these unmarked Native American burials were not subject to burial common law due to these burials likely predating the establishment of that set of laws in the United States. Accordingly, Native American burials could be excavated, robbed, or obliterated without any significant consequence (see also Echo-Hawk and Trope 2000; Hutt and McKeown 1999).

Early Recognition of the Problem

As early as 1938, a repatriation claim for objects that would later be covered by NAGPRA was made and won by the Hidatsa for a medicine bundle that had been collected by George Heye (NMAI 2014). Heye spent decades amassing the largest collection of Native American materials, including human remains, funerary objects, sacred objects, and cultural patrimony – the latter defined as items that were of such importance to the tribe collectively that they could not be individually owned. Heye's collection did not include many human remains or funerary objects relative to many of the contemporary mortuary collection, although he did specifically seek sacred objects and objects of cultural patrimony (NMAI 2014). His collection still today represents the majority of the holdings in the National Museum of the American Indian, as will be detailed later.

Ever the collector, Heye agreed to repatriate the medicine bundle to the Hidatsa, whose representatives travelled from the Great Plains to New York City, in exchange for other artifacts. The Hidatsa agreed to exchange a powder horn and war club for the sacred objects. Although this was not repatriation in its truest sense, it did represent a very early appreciation for Native interests – and in some cases, their needs – regarding their material heritage (NMAI 2014).

Nearly half a decade later, in 1971, a faculty member in the Anthropology Department at Colorado State University excavated three individuals that had apparently been buried in a crevice along the Front Range of Colorado (78 FR 72706). These individuals were brought back to CSU to be analyzed and studied, however there was some controversy in the socially charged atmosphere of the early 70's. The Denver chapter of the American Indian Movement, led by Clyde Bellecourt, occupied the Anthropology Department and took most of the remains of these three individuals, including much of the teaching collection of bones (Goldstein 2011; Johnson 1996; McGuire 2008). Bellecourt demanded the return of the rest of the Native human remains held by the university as well as the cessation of excavations of Native remains (Johnson 1996). The university did not

acquiesce to either of these demands and many individuals were excavated by CSU in the subsequent years.

A couple years prior, in 1969, Red Power activist Vine Deloria, Jr. published his renowned book *Custer Died for your Sins: An Indian Manifesto* (Deloria, Jr. 1969). In this book, Deloria criticized anthropologists' claimed scientific objectivity and pointed out that their work was both a result and creator of racism. He and other Red Power activists, such as those that occupied CSU, called for anthropology to return ancestors and quit unapproved excavations (Deloria, Jr. 1969). Their occupations of archaeological sites, artifact repositories, and disputed land made national headlines and prompted governmental response, including new laws and an FBI standoff at Wounded Knee (Biolsi and Zimmerman 1997; Hurst Thomas 2000c). However, the response of mainstream anthropology was much the same as CSU's: silence.

A constructivist approach to understanding this situation starts with the contrasting epistemologies. On one hand, there was a collection of minority epistemologies that were projected upon by the majority epistemology. This majority epistemology was at the same time oppressive and unapologetic to the minority epistemology while at the same time staying dismissive of calls for recognition of Native interests. This oppression could be explained by cultural Marxism, in which the dominant culture is incentivized to maintain the oppressive paradigm against the cultural minority (Habermas 1985; Kellner 2004). In this case, scientists from the dominant culture, representing the majority of the population, political power, and wealth were capitalizing on finding and studying Native heritage. Although Natives have a strong common law (Hutt and McKeown 1999) claim for their heritage, the claims are largely dismissed due to the oppressive system which advocates its own culture. During the Red Power Movement, Native advocates sought to change this paradigm and realize better and more accountable representation for Native interests in the

media and politics. This movement largely set the stage for a sympathetic group of mainstream anthropologists and politicians to make change (Biolsi and Zimmerman 1997).

Despite the isolated fervor coming from Native communities and their advocates, not many requests for repatriation seem to have been made prior to NAGPRA (Echo-Hawk and Trope 2000; Fine-Dare 2002b; Trope 2013). Certainly not enough had been made to naturalize repatriation processes for museums that held Native human remains and sacred objects. No doubt, the 20th century was a time of adaptation and change for Native peoples in the face of oppressive and disinterested governance, and repatriation oftentimes was not within the scope or priorities of tribal governments. It wasn't until 1980 that an anthropologist, sympathetic to the rising volume of Native disapproval with museum and archaeological practice, proposed a policy of repatriation in academia. From this point, the topic began to snowball until 10 years later when federal legislation mandating repatriation was promulgated by the United States government.

This anthropologist was Lawrence Rosen, a legal anthropologist at Princeton University. His proposal set forth three plans based on two criteria: whether or not remains were found on reservations and whether the remains could be considered "recent" or "ancient" (Rosen 1980). Rosen situated repatriation within burial common law, which also standardizes rights of disinterment – often occurring in cases which post-burial autopsies must be performed. In accordance with common law, he determined that for individuals found on reservation land, the tribe(s) on whose land it was found should be the sole possessor of the individuals. This determination was purely based on contemporary property and sovereignty rights of the tribes and did not take into consideration potential cultural affiliation or the age of remains.

For those remains found off reservation lands, Rosen proposed two courses of action depending on the age of the remains. For "recent" remains, when there is

> "reason to believe that the remains are those of an identifiable tribal group that presently exists, or where the remains are in an area to which a contemporary tribe has historic ties, after the relationship has been demonstrated through an appropriate hearing, the Indians should be accorded control over the remains" (Rosen 1980).

For Rosen, the burden of the proof, as well as the initial request for repatriation is an obligation of the interested tribe. He also outlined "probable relationship" as the necessary demonstration for repatriation. The determinations were to be made by a regional court to an administrative law judge with the potential help of a "master – an expert in the field of archaeology – to advise him" (Rosen 1980).

For "ancient" remains found off-reservation, Rosen was much more demanding of the tribes requiring a "much heavier burden of demonstrating their relationship" (Rosen 1980). Rosen says that if the connection is ambiguous then the claim of the tribes is no stronger than the parties interested in keeping or studying the remains. Alternatively, if remains are not necessarily connected with modern tribes, nor are they of sufficient scientific value, then the burden of proof shifts to rest on the scientific community to prove why they should be kept. If a judge deems this to be insufficient reason, then the remains should be turned over to the tribe.

Much of this early plan is problematic, not the least of which that the shift in burden of proof would be legally untenable. However, this initial plan can be seen as very similar to many of the final tenets of NAGPRA, as we shall see in the next chapter. Both are concerned with tribal sovereignty and property law priority, strength of case in shared relationship between modern tribes and the remains, and empowering tribes to reattain culturally sensitive property. The questions to consider for the purposes of this paper are: Was this directly influential in the creation of NAGPRA? Or were the parallel considerations of both Rosen's proposal and NAGPRA representing a shared repatriation ethic?

This concept of an emerging repatriation ethic was reaffirmed by academics over and over throughout the next decade. Shortly after Rosen's article was published, Larry Zimmerman, an

archaeologist in South Dakota, began publishing a series of scholarly pieces on repatriation issues. In 1983, Zimmerman and a colleague published an account of Lakota elders' opinions on reburials (Zimmerman 1986a). A few years later, Zimmerman published a review of recent scholarly work on repatriation, collating information on the topic that made it even more accessible (see Zimmerman 1986a). The same year, he published a pair of vignettes illustrating the epistemological differences between Natives and scientists in terms of Native burials (Zimmerman 1986b).

Zimmerman was not the only academic addressing this issue, nor were all academics in agreement (Zimmerman 1986a; Zimmerman 1989). However, the repatriation issue was thrust into the anthropological discourse of the 1980's. Debates arose between those that were pro-repatriation and those that were anti-repatriation (Echo-Hawk and Trope 2000; Fine-Dare 2002b; McKeown 2012). The emergence of this sensitive issue onto the anthropology scene should be seen as indicative of a changing repatriation ethic within the field of anthropology. Practitioners of anthropology just a quarter of a century prior would likely not have given a second thought to repatriation whereas the 1980's saw enough of a change within the field that the case was brought to the (supposed) proprietors of federal Indian law and policy: the US Senate.

Legislative History

In the same year that Zimmerman published his review of repatriation literature, a traditional religious leader of the Northern Cheyenne, William Tallbull, visited the Smithsonian Institution in Washington, D.C. by invitation (McKeown 1)[2]. There, Tallbull found himself searching for the sacred pipe that was taken from his grandfather Chief Tall Bull's body shortly after he was killed in 1869. Tallbull did find and was allowed to see and hold the sacred pipe, a moment that overwhelmed the religious leader (McKeown 4). However, by chance Tallbull and other tribal

[2] In this section, unless otherwise noted, all references on the legislative history come from McKeown's *In the Smaller Scope of Conscience: The Struggle for National Repatriation Legislation, 1986-1990*

representatives were exposed to the skeletal collections at the Smithsonian, which housed nearly 18,500 Native individuals. This discovery deeply disturbed Tallbull and his companions, enough for him to visit Senator John Melcher from Montana later that day to plead for the return of the pipe and human remains to their home (McKeown 4).

Melcher thus began in 1986 the first efforts at what would eventually become NAGPRA and the National Museum of the American Indian Act (McKeown 4-8). The political atmosphere that lent itself to the creation of such laws was largely generated by the Red Power movement and two key federal rulings. In 1971, Congress passed the Alaska Native Claims Settlement Act which acknowledged that over 40 million acres of land were illegally taken from Native Alaskans and they would subsequently be compensated $1 billion for the land that would be managed by new Native Alaskan corporations created by the act (Hirschfield 1992; Walsh 1985). Though in retrospect the new organization structure has proven to be problematic, at the time the settlement was viewed as a major victory for Natives in the United States. Shortly thereafter, the Sioux Nation's claim for the Black Hills was again brought to the courts. In 1980, the Supreme Court ruled that the Black Hills were indeed taken improperly and that the nine tribes of the Sioux Nation should be awarded $106 million for the land (Simmons-Ritchie 2013). Clearly the precedent was established in the 70's and 80's for the recognition of valid Native claims.

It was in this light that Senator Melcher first created the proposed Native American Cultural Preservation Act in 1986 and 1987 (McKeown 4-16). This act would create a Native American Advisory Council that would adjudicate claims for Native remains from scientific institutions. Melcher was clear that the act meant to weigh the Native claims against the scientific value of the remains, either of which could be determined more valuable than the other (McKeown 6-7). The act also provided for the return of "recent" remains and not "ancient" remains to claimant tribes

(McKeown 9-12). It was clear that Melcher very much respected the potential scientific value of the remains and ultimately the scientific value could very well trump Native claims in many cases.

Melcher amended the bill in 1988, but when he lost his re-election bid that year he was unable to continue sponsoring the effort (McKeown 16-27). Fortunately, the year prior Melcher's efforts had inspired efforts in Congress to create a national museum for Native Americans on the National Mall. This effort would combine the Native collections at the National Museum of Natural History and the Heye collection at the Museum of the American Indian in New York City (McKeown 28). Amidst the ongoing discussions on repatriation, it was revealed that the Smithsonian Institution alone had 18,500 individuals. Upon hearing this from Suzan Shown Harjo during a testimony requesting repatriation legislation, Representative Sidney Yates asked, "Did you know about [the human remains collection] before now?" and when Harjo answered that she did, Yates replied, "How come you didn't tell us?" (McKeown 10).

The creation process for what would become the National Museum of the American Indian (NMAI) on the National Mall included several legislative incarnations that directly or indirectly addressed repatriation. Likely due to the significance of a national museum, its location on the national mall, and the involvement of the Smithsonian Institution, this bill seemed to take priority over general repatriation legislation. However, the original version of the bill had provisions that required the inventory and cultural identification of all Native American human remains in the collection (McKeown 31). After identification, the Smithsonian was required to consult the related tribes in regard to every individual on the proper reburial processes. For those individuals that could not be identified, they would be reinterred at a monument site on the National Mall (McKeown 31). This plan met resistance however, as reinterment of all human remains in the collection, including those unclaimed and unidentified, was contradictory to the mission of museums as scientific institutions (McKeown 31). A second version of the bill was proposed by Representative Theodore

Weiss that did not include the repatriation provisions, though Senator John McCain pointed out that it had been formulated without consultation of Natives (McKeown 33). It is clear that this version of the legislation did not gain any traction.

In large part due to resistance from the Smithsonian Institution, the second version of the bill proposed in April 1988 removed the inventory burden from the Smithsonian and placed it with a repatriation task force appointed by Congress and the president (McKeown 39). The task force was required to complete the inventory and make recommendations for repatriations to Congress for the entirety of the NMAI collections within one year. This version of the bill also removed the certainty from the reinterment monument for unidentifiable individuals on the National Mall but left it a possibility (McKeown 39).

As the resistance to the repatriation tenets of the proposed National Museum of the American Indian Act grew, Representative Byron Dorgan proposed the Indian Remains Reburial Act, which again placed responsibility for identification, inventories, and repatriations of human remains of the NMAI collection on the Smithsonian Institution for all remains from after 1600 AD (McKeown 40-41). This version of the bill was unique for its proposed empowerment of terminated tribes and state-recognized tribes. A revision of this bill proposed in February 1989 pushed back the affiliation date to 1500 AD (McKeown 56). However, Dorgan's bill was not comprehensive enough to gain any traction in the face of the proposed NMAI bill and seemingly was only meant to impress the importance of repatriation in any plan for the NMAI.

On May 8, 1989, a Memorandum of Understanding was signed between the Smithsonian Institution and the Heye Foundation with the Smithsonian thus gaining the Heye collection (McKeown 57). On May 11, Senator Daniel Inouye proposed a NMAI act based on the memorandum (McKeown 58). This act again provided for the identification and affiliation of human remains within one year and recommendations to Congress for their repatriation within three

years. A month later another bill was proposed in the House of Representatives that added associated funerary objects to the affiliation and inventory process. It also was the first bill to propose appropriations to fund inventory and repatriation activities (McKeown 59).

An updated version of the House of Representatives bill in November of 1989 included more detailed directions for the Smithsonian as to how repatriation would be conducted. The Smithsonian would be responsible for inventorying and affiliating the human remains. They then would notify the respective tribes and repatriate the remains upon request to the related tribes (McKeown 73-74). It also authorized the creation of a task force to oversee the inventory and repatriation process to ensure fairness.

When the Senate's version of the NMAI act reached the House of Representatives, the House replaced much of the text with that of their own bill (McKeown 75-76). It was then passed and sent back to the Senate where it was again passed. On November 28, 1989 the National Museum of the American Indian Act became law (McKeown 77). The final law included provisions for the inventorying of human remains and funerary objects associated with the remains with the intent of determining cultural affiliation (Association on American Indian Affairs n.d.; Repatriation Office 2013). Those remains or funerary objects that could be culturally affiliated were identified and then the tribes with a shared culture were informed and allowed to make claims for repatriation. At the time of promulgation, the NMAIA did not require any repatriation efforts for sacred objects or cultural patrimony, both of which were the instigators of the legislation when William Tallbull requested the return of his tribe's sacred pipe (Association on American Indian Affairs n.d.; Repatriation Office 2013).

The road was longer for nationwide repatriation legislation. Melcher's second repatriation bill effort culminated in a revised version of now called the Native American Museum Claims Commission Act (McKeown 16-17). This new version reduced the size of the claims commission to

three members appointed by the president, one of which was required to be Native American. This bill provided for the repatriation of human remains, funerary objects, and ceremonial artifacts. In doing so, the bill explicitly was intended to protect what rights had intended to be protected by the American Indian Religious Freedom Act (McKeown 16-18). In this way, the bill framed the repatriation issue strictly within the confines of freedom of religion.

Melcher was not able push this bill for long as he was not re-elected in 1988. However, Senator Wyche Fowler from Georgia and Representative Charles Bennett from Florida fronted efforts at integrating the repatriation tenets into existing historic preservation law (McKeown 43-47). These efforts turned into expansive and difficult amendments to the National Historic Preservation Act, Historic Sites Act, Archaeological Resources Protection Act, and Abandoned Shipwrecks Act. The difficulties in passing these wide-ranging changes in the Senate were damning for the bills, however it is important to note a few aspects of the acts. Fowler's bill provided for the prevention of non-necessary exhumation of remains, repatriation after non-invasive studies for exhumed remains, and for the ability of scientists to retain remains in cases of extreme scientific significance of the remains (McKeown 43-44). This proviso is one of the most debated in every version of the law, and even in the modern application of NAGPRA today. Bennett's bill was in keeping with Melcher's efforts in creating legislation that better protected religious rights seemingly afforded by the American Indian Religious Protection Act (McKeown 45-47).

Shortly following the introduction of Bennett's act in the House, Representative Morris Udall from Arizona presented his version of a repatriation bill called the Native American Grave and Burial Protection Act (McKeown 47). This bill, meant to inspire further dialogue on the issue, included expanded efforts to deter illegal trafficking of burial artifacts and sacred objects. It also provided strict guidelines for determining the validity of a repatriation claim (McKeown 47-48). First priority went to tribes on whose reservation the objects were found. Second priority went to

tribes who aboriginally occupied the land on which the object was found. The third priority went to tribes that could demonstrate a cultural affiliation to the object (McKeown 48). It also required inventories including all possibly relevant items to be finished within two years of the act's promulgation and notification to the respective tribes within three years. Tribes that had valid claims based on the identification made by the museum could then reacquire the items within two years of their request (McKeown 48).

In April of 1989, Senator John McCain created a largely parallel bill to Udall's for the Senate's consideration (McKeown 49). This bill, also called the Native American Grave and Burial Protection Act, most significantly differed from Udall's in that it introduced "grave goods" and sacred ceremonial objects as protected items under the law (McKeown 50). It is important to note that to this point, versions of both what would become NAGPRA and NMAIA consistently in disagreement as to whether or not they would include ceremonial objects – as clearly demonstrated by the absence of ceremonial objects in Udall's bill. In fact, the NMAIA surprisingly did not include these objects in their federally mandated repatriation process.

Both Fowler and Bennett presented revised versions of their bills amending the historic preservation acts (McKeown 51-55). Minor changes were made to both that brought them a great deal of consideration in Congress. However, still neither dealt with ceremonial objects and their approach to amend several laws rather than create a new one was eventually surpassed by the efforts of McCain, Udall, and Senator Inouye.

In November of 1989, Inouye entered his own bill, utilizing many parts of Melcher's original bill, including the claims commission concept of adjudicating claims on a case by case basis, as well as some parts from McCain's and Udall's bills(McKeown 79-82). Inouye's was more extreme in its protections of Native interests, allowing any interested tribe to request repatriation of excavated human remains, funerary objects, or sacred objects. Inouye didn't want the law to consider these

types of objects as archaeological resources under the Archaeological Resources Protection Act and wanted them to have their own unique status as religious tribal resources (McKeown 81-82). In addition, Inouye sought to have the burden of proof on the museums to prove legal title or lack of validity to tribal claim for human remains, funerary objects, sacred objects, and cultural patrimony (McKeown 80-81). This was also the first time cultural patrimony was introduced separately of sacred objects, defined as inalienable communal property. The extreme proposals of the bill met considerable resistance from the Society of American Archaeology (McKeown 82).

The revised version of Inouye's bill took a new name, the Native American Grave Protection and Repatriation Act, and a new sponsor, Senator McCain (McKeown 94). The tenets of this bill stayed the same, with updated definitions, directions, and penalties that helped clarify much of the original text. One new aspect of the bill included provisions for a review committee to inventory culturally unidentifiable remains and advise on actions towards disposition of these individuals (McKeown 95). Despite the momentum this version of the bill seemed to be gaining with the widespread support from the legislators pushing for a repatriation law, the bill faced just as ardent opposition in the Society for American Archaeology (SAA) and the American Association of Museums (AAM) as well as other, less powerful organizations and individuals (McKeown 98-112). The SAA in particular did not approve of much of the bill, especially the section including provisions for disposition of culturally unidentifiable individuals by saying, "We cannot live with this subsection. By including implementation of the return of unaffiliated remains, this creates an enormous task that has not been adequately considered" (McKeown 97). Representatives from the Society for American Archaeology pled that Congress reconsider the former repatriation bills in light of this new and extreme bill (McKeown 97-98).

In July of 1990, Representative Udall introduced a new version of the Native American Graves Protection and Repatriation Act that was meant to be a compromise between previous

repatriation bills, scientific concerns, and McCain's bill that was under consideration (McKeown 113-120). Udall included the Smithsonian under the bill's purview, something legislators had been considering in light of the NMAIA's blatant deficiencies (McKeown 113). Udall's bill also placed priority of claim on cultural affiliation over aboriginal occupation, though finds on reservation lands still took highest priority. Also of note was that Udall included no exceptions to repatriation claims or archaeological excavations in terms of scientific significance. It was clear that Udall felt that there was no excuse for remains to not be returned or exhumations to occur without approval. Much to the chagrin of many lobbyists fighting aspects of the repatriation legislation, Udall again included provisions for the disposition of culturally unidentifiable human remains (McKeown 116).

By August of 1990, a general repatriation bill was seemingly imminent. As Timothy McKeown put it,

> "the number of repatriation bills ostensibly under consideration…had grown from the single ill-fated effort introduced without a cosponsor by Montana Senator John Melcher…to seven different measures sponsored by five different senators and representatives and cosponsored by fifty-eight of their colleagues" (McKeown 139).

The field quickly narrowed to Inouye's bill in the Senate and Udall's bill in the House (McKeown 140). Negotiations on Udall's Native American Graves Protection and Repatriation Act between lobbyists from both sides of the issue rendered new definitions for cultural affiliation, funerary objects, and sacred objects as well as outlined a new process for the burden of proof (McKeown 140-153). In the days prior to the passage of the act, the Smithsonian was excluded from the repatriation legislation, despite what had clearly been an attempt to subject the Smithsonian Institution to a higher repatriation standard (McKeown 163-164).

Finally, on November 16th 1990, President George H. W. Bush signed the Native American Graves Protection Act into law (McKeown 166). The act provided for the repatriation of human remains, funerary objects, sacred objects, and cultural patrimony to federally-recognized tribes on the basis of cultural affiliation, jurisdiction via reservation lands, jurisdiction via aboriginal lands, or a

vested interest. In order to accomplish this goal, museums – which are defined as any institution receiving federal funds – must make publically available inventories and summaries of NAGPRA related material. Subsequently, determinations of cultural affiliation are to be made by the museums in consultation with the relevant tribes (Department of the Interior 1990).

The law also includes prohibitions on the sale or illegal excavation of NAGPRA related material, however the repatriation tenet will be the focus of this paper to deduce what might be considered the American repatriation ethic. By understanding the current repatriation ethic in the United States we can reflect on the priorities in archaeology, anthropology, museums, science, and Indian Policy. We can also situate the American repatriation ethic alongside the repatriation ethics of other countries, in international organizations. At a global scale, new considerations also emerge when reconciling what is generally considered human rights protection that has broad and lasting implications for the present and these repatriation ethics.

Deciphering the Intent

To comprehend the moving target that is an ethic at the center of the repatriation efforts in Congress, we must ask ourselves why Congress addressed this issue and then how Congress addressed this issue. As a social body, Congress represents an elite sub-culture that has the majority of political power over US and Native American – though that has been subject to controversy in recent years – affairs. In our democratic-republic, the members of Congress represent the people within certain geographic boundaries. The incentive for these political figures is to not alienate their constituency, both in votes and funding, that has the power to re-elect them. There is little systemic incentive for going beyond this bare-minimum, and in fact controversial positions on legislation are discouraged regardless of the broader cost-benefit of the potential law. In this way, politician's loyalty exclusively lies with his or her constituency in operating within the political system. This is

not to say that politicians have not and will not act contrary to the wishes of those that have the power to re-elect them, however they are not systemically incentivized to do so.

Because of the direct influence of a constituency with the power to re-elect, Native American affairs have suffered in Congress. Native Americans only represent about 1% of the population of the United States (U.S. Census Bureau 2013) and only in states with very high percentages of Native Americans such as Alaska, Hawai'i, and South Dakota are there some degrees of political influence for Native peoples. Unable to have their concerns addressed by Congress, Native agendas have increasingly been settled by the US Supreme Court (Echo-Hawk 2013). However, when Native affairs are addressed in modern Congress, it has often been the case that it was in regard to what many considered human rights issues (Indian Self-Determination and Education Assistance Act, American Indian Religious Protection Act, Native American Languages Act, Native American Housing Assistance and Self-Determination Act, Tribal Law and Order Act, and controversially the Indian Child Welfare Act).

When Senator Melcher brought forth the "Bones Bill" as the first repatriation legislation to the Senate floor, shortly after William Tallbull decried the fact that human remains and sacred objects were held at the Smithsonian, it was clear that this proposal was protecting what Melcher considered a "human right" of return of those objects. In fact, Melcher specifically called Congress to "protect Native American rights to the remains of their dead and to sacred objects" (McKeown 5). In his bill, Melcher seemed to indicate that Native rights over their dead were not necessarily higher priority than the institutional and professional rights of museums and archaeologists that kept and studied them (McKeown 12). In cases in which the remains were deemed sufficiently valuable to non-Native institutions the claims commission were meant to prioritize the non-Native claim.

This aspect of the repatriation ethic was confirmed by Fowler's historic preservation amendments (McKeown 43-44), Bennett's repatriation provisions in the historic preservation

amendments proposed in the House (McKeown 45-47, and Udall and McCain's respective general repatriation bills (McKeown 47-51). It wasn't until Inouye proposed his radical changes in his Native American Repatriation and Cultural Patrimony Act in November of 1989 that this trend switched (McKeown 80-81). In his bill, Inouye based repatriation of human remains, funerary objects, sacred objects, and cultural patrimony on the concept of valid title, which required museums to demonstrate they had proper and legal title to the objects (McKeown 81). If this could not be demonstrated, then the objects would be repatriated to the tribes for whom title could be assumed based on the preponderance of evidence. NAGPRA eventually followed this later ethic, though it is clear that even advocates of repatriation, who also are generally members of the Western, secular ideologies, gave ultimate priority to science in the event that the remains or objects were of extreme scientific significance.

Although it seems as though the original and general intent did favor this scientific priority, a precedent was set by Senator Inouye that was not retracted in the year leading up to NAGPRA's promulgation. In this way, we can consider this precedent as an unmet ethic with precedence, indicating that because it was not retracted, Congress – despite the fact that the advocates of this legislation clearly did not wholeheartedly agree with this tenet – confirmed this tenet as an ethic that would be realized by the American people at some point in the future. This concept we will call the ethic realization trajectory. When a precedent is set for an ethic that may not be normalized at the time, tacit complicity with the ethical precedent as well as advocation for the ethic – especially by those that benefit from it – will eventually see the normalization of the ethic sometime in the future.

There are many good examples of this ethic realization trajectory, especially in law. Laws providing for women's suffrage, African-American civil rights, Native American self-determination all were not normalized ethics of the time. They were ethical precedents set by the establishments of bills that were voted into law by people that often were not in agreement with their tenets.

However, if we again consider the primary objective of politicians in the political system of the United States, it is to get re-elected. Politicians must consider these forthcoming ethics regardless of their own interests in order to remain popular throughout social movements. They may also have some incentive to be on the "cutting edge" of these movements in the event that they will be normalized. Many political careers, regardless of the politician's actual position, have been gambled on action or inaction in respect to these movements and emerging ethics.

The scope of the proposed repatriation bills also differed significantly. The very first bills, proposed by Melcher included human remains, funerary objects, and sacred objects (McKeown 6). The National Museum of the American Indian Act, as we noted above, only included human remains and funerary objects (McKeown 77). Fowler and Bennett's bills followed suit and originally only addressed human remains and funerary objects (McKeown 43; 46). However, Udall and McCain's bills included "sacred ceremonial objects" (McKeown 48; 500 and Inouye's November of 1989 bill introduced "cultural patrimony," which he defined as an item of such significance to a tribe that it could not be owned by any one individual and belonged collectively to the tribe (McKeown 80). Again, the precedent set by Inouye in introducing this new concept stuck in subsequent bills and can be found in the legislation today. However, it is also clear that there was a line between those that felt this bill should only deal with burials and those that felt all material aspects of religious expression should be protected.

On the issue of cultural affiliation and culturally unidentifiable remains there was also a diversity of opinion. Not all bills addressed what NAGPRA would later consider "culturally unidentifiable" individuals (Fowler's, Bennett's, Dorgan's, the latter NMAI bills), however those that did differed significantly in their approach. The early bills proposing the National Museum of the American Indian included a burial and monument for all unidentifiable individuals in the Smithsonian collection on the National Mall. This was a disturbing prospect to many politicians

however, and was the plan was scrapped (McKeown 31). In the end, no provisions were made in the NMAI Act and the Smithsonian's policy is to retain culturally unidentifiable individuals until scientific techniques are developed that could be used to reevaluate their cultural connections, a policy that has caused some controversy (Government Accountability Office 2011). Neither Fowler's nor Bennett's repatriation amendments included provisions for culturally unidentifiable individuals. Repatriation in both Udall and McCain's bills was contingent upon determining cultural affiliation and did not address what should happen to those remains that cannot be identified. Inouye's bill was again revolutionary in its requiring of the claims commission to make recommendations to Congress regarding culturally unidentifiable individuals. Here again a precedent was set, however this provision was dropped from the bill at the last minute in order to gain approval from the SAA and the AAM. In this way, the ethic certainly confirmed ambivalence toward culturally unidentifiable remains though a precedent was set for dealing with culturally unidentifiable remains.

In the end, the legislation largely reflected the repatriation ethic of the time in the United States. Repatriation of human remains, funerary objects, sacred objects, and cultural patrimony was required of museums that could determine cultural affiliation for these kinds of items. For these kinds of items that cultural affiliation could not be determined, the law was resoundingly silent. The only aspects of the law that were not normalized into the professional and public ethics at the time was the inclusion of non-burial objects (many of which possessors claimed were "legally" bought from tribe members around the turn of the 20th century) and the priority of Native interests over scientific interests. The latter materialized in a controversial ruling against the letter and spirit of the law in court years later.

So what was this repatriation ethic and its legal manifestation in NAGPRA meant to do? It is clear that the entire point of creating this legislation was to empower tribes to reattain their

ancestors, necessary ceremonial objects, and objects required for the well-being of their tribe and their culture. The efficiency of this empowerment is suspect. Congress had, and still has, no incentive to do more than realize basic human rights for Indian Country. Action on Congress' part can be seen as empowerment of Indian Country, but only to the extent that seemed necessary based on the repatriation ethic and human rights. Examples of this can be seen throughout the history of federal Indian law and policy. Laws like the American Indian Religious Protection Act defended Native Americans' rights to religious freedom, however it neglected the issues that NAGPRA went on to address. The Indian Land Claims Commission was formed to hear Native property claims but really wasn't empowered to make much change to benefit Natives. By rule, especially since the official position of tribal sovereignty was adopted by the US government in the 1970s, federal Indian policy has meant to minimally empower Native communities in order for their basic rights to be realized.

Ultimately, NAGPRA was addressing a demand of Native peoples for over a century; if their culture and sovereignty are to survive in the United States they must have more power and control over their own interests. This power is recognized by Congress and Natives alike as having been systematically wrested from them for over 500 years. In this case, Natives did not have the power to have family members, including those remains for whom names were known, returned and reburied. Nor did they have the power, as William Tallbull was pointing out, to have familial heritage and sacred objects necessary for the practice of their religion returned, despite being taken illegally. This legislation was meant to give a modicum of power over Natives' own interests and rights.

CHAPTER 2: NAGPRA AS EMPOWERMENT

This "history" of the emergence of NAGPRA is obviously a construct of both my own and the Western epistemology in general. The micro-interactions, the philosophical walls, and many other aspects of a well-rounded "history" are not included in the account above, but are included to orient this paper toward an evaluation of the law and its efficiency. To be clear, this evaluation and its considerations are not comprehensive, nor are they definitively correct. However, the purpose of this paper is to use my own experience and tools to deconstruct a process that could better serve the population it intended to help. In fact this chapter begins with a look at some compensation the government had to make in order to better direct the newly promulgated NAGPRA law. Then the whole of NAGPRA and its regulations can be evaluated against what can be discerned as intent of the law. This will set us up in the next chapter to measure the repatriation process of the United States against the repatriation ethics and processes internationally.

When NAGPRA was promulgated in the last week of the 101st Congress, those that fought for its passage knew it was a flawed law. Jack Trope, whose organization the Association on American Indian Affairs figured prominently in the negotiations for NAGPRA, said "it is axiomatic that it is far easier to block a bill than to pass one" so advocates of a repatriation bill had in 1990 "a narrow window of opportunity to negotiate modest changes to build consensus behind the bill and maximize its chances of passage" (Trope, 2013). According to Walter Echo Hawk, Jr., another prominent figure in the negotiations, "People don't realize that if we hadn't gotten the bill through that year, the SAA and AAM lobbyists, and probably other organizations, would have been able to curb all of the advances we had been able to fight for to that point" (Echo-Hawk, 2013). Despite these problems, NAGPRA and its subsequent regulations have dictated the kinds and processes of repatriation in the United States. Several issues have been addressed by the regulatory bodies of

NAGPRA, however many more have been left unaddressed and are regularly encountered by those working with the law.

Knowing full well that NAGPRA was not perfect, the bill was pushed through Congress and signed into law by President Bush on November 16, 1990. In the months and years after it was passed, there were significant issues in determining who had oversight of the law and how the law would be administered (McKeown 2013). However, even during this time issues, especially around interpretation, arose with the institutions that were trying to implement it. First of all, for large museums like the Peabody Museum at Harvard and the Hearst Museum at University of California, Berkeley, the inventory deadlines were far too short. The amount of institutional investment, both in time and money, to complete summaries and inventories as well as to consult with tribes and make cultural affiliation determinations were vastly underestimated. Many of these large institutions applied for, and received, extensions on their inventory requirements and many of those institutions are still working today to finish those summaries and inventories that were due in 1993 and 1995 respectively (McKeown 2013). In addition, many museums trying to gain compliance with the law, as well as archaeologists trying to retain the material they had excavated, criticized for its vague definition of cultural affiliation, the rising disputes over "culturally unidentifiable" individuals, and the gray area as to whether or not "scientific studies" could be conducted on remains before they are repatriated (Giesen 1996.; Kintigh 1999).

The Regulations

The regulations themselves are publications by the Secretary of the Interior made to detail how the law will be administered (USA.gov 2014). Oftentimes, federal regulations are used to clarify aspects of the law that were seemingly ambiguous in the text or to ensure what the Secretary considers the correct interpretation of the law.

The first set of regulations for NAGPRA was published in December 1995 Department of the Interior 2014). Obviously, this was problematic because the first regulations meant to administer the law were published after the due date established by the law for both summaries (by November 1993) and inventories (by November 1995). In addition to extending the deadlines for these submissions, the new regulations included all current regulations except for 10.7 on unclaimed remains, 10.11 on culturally unidentifiable individuals (CUIs), 10.12 on civil penalties, and 10.13 on future applicability (Department of the Interior 2014). These 1995 regulations outlines how summaries and inventories were supposed to be completed, how consultation should be conducted, how repatriation is to be conducted, as well as how the review committee and dispute resolution will be conducted. These were sorely needed by institutions and tribes fumbling in their utilization of the law.

Since 1995, three regulations have been published as of April 2014: 10.12 in 2003 detailing the penalization process for non-compliance with the law, 10.13 in 2007 creating future applicability of the law beyond the typical statutory limitations, and most controversially 10.11 in 2010 detailing the process of disposition for culturally unidentifiable individuals (Department of the Interior 2014.).

43 CFR 10.11 addresses the glaring hole in NAGPRA's original text, that of human remains – and by extension funerary objects associated with the remains – that could not be culturally affiliated. The regulation had been in the works for over 10 years, with the review committees submitting comments on the proposed regulation in 2000, 2003, and 2008. In October 2007 the proposed regulation was published in the Federal Register to garner comments from the general public for a 90 day period. The Department of the Interior received 138 comments in that period and they were overwhelmingly against the regulation (Department of the Interior 2010).

The regulation outlined the process for repatriating, or in NAGPRA's terms "dispositioning," culturally unidentifiable individuals back to tribes. Obviously this caused considerable controversy due to the fact that the original legislation was notoriously silent on this topic. 10.11 required institutions to disposition unidentifiable remains to tribes on whose reservations the remains were found first, on whose aboriginal lands the remains were found second, and lastly if no geographic provenience was known then to any Native American tribe or Native Hawaiian Organization (Department of the Interior 2010).

Many museums and archaeologists agreed this new requirement was clearly outside the scope and intent of NAGPRA (American Association of Physical Anthropologists 2007; Society for American Archaeology 2007). They argued that a balance between scientific and Native interests in human remains was at the center of the legislation. This regulation, they argued, went beyond the intent of the legislation by clearly favoring Native interests in the human remains. While NAGPRA, they argued, was a dagger in the side of American physical anthropology, the 2010 regulation was essentially the death knell.

The legislative history of NAGPRA describes a split Congress on the issue of culturally unidentifiable remains. Over and over the issue was deliberately left out of proposed bills, and only a few attempts, most notably Senator Inouye's November 1989 bill, included directions for addressing culturally unidentifiable remains. However, it is just as significant that legislators left out provisions for the retention of culturally unidentifiable individuals by possessing, non-Native institutions as it is that they did not create provisions requiring the repatriation of them. And in fact, provisions requiring disposition of unidentifiable remains were included in the bill up until the 11th hour, suggesting a consensus on CUIs had been reached, though it was blocked in the end by lobbyists of the SAA and AAM (McKeown 152-153).

The Department of the Interior justified their authority by citing their authority within NAGPRA's text, the inherent jurisdiction over all Native remains via the text of the original law, and ultimately the federal policy to construe all federal Indian law and policy in favor of the tribes. Ambiguous texts of laws are intended to be interpreted through regulations by the administrative body of the law. In this case, the Department of the Interior was imbued with that power, its authority over the scope of the issue, and was obligated to construe the law in favor of the tribes. It is also important to consider what was seemingly the basic intent of the law: to empower tribes to reattain remains and sacred objects. This regulation again further empowered tribes to reattain remains that are important to many Native people. To generalize the Native position, just because scientists are unable determine to whom they belong does not mean their spirits are contented to still be disturbed by remaining in museum collections (Watkins 2004). Despite the controversial nature of such a ruling, it seems as though the Department of the Interior was fully justified and in fact obligated to create this regulation.

Kennewick Man

The immediacy of the creation of this policy came after the appeals to the case *Bonnichsen v. the United States*, a case also known as the Kennewick Man case. This case ultimately challenged the boundaries of cultural affiliation under NAGPRA's original text. The case involved an individual found by a couple of fans at a hydroplane race along the Columbia River near Kennewick, Washington in 1996. The individual, excavated by the Army Corp of Engineers, is considered the oldest, most complete skeleton found in North America, estimated to be approximately 10,000 years old (Hurst Thomas 2000d; Fine-Dare 2002b; Nilsson Stutz 2012). As if this were not significant enough for scientists, initial studies indicated the Kennewick Man had what scientists described as

"Caucasoid" features, meaning his facial structure seemed more similar to modern Euro-Americans than Native Americans (Burke et al. 2007).

Found near the Confederated Tribes of the Umatilla Indian Reservation, the Army Corps of Engineers originally determined Kennewick Man to be culturally affiliated to the Umatilla and decided to halt scientific studies and repatriate the individual (Burke et al. 2007). The scientists interested in what was considered a remarkable find decided to sue the decision of the Army Corp of Engineers based on their tenuous claim of cultural affiliation. The scientists, including Robson Bonnichsen, C. Loring Brace, George W. Gill, C. Vance Haynes, Jr., Richard L. Jantz, Douglas W. Owsley, Dennis J. Stanford, and D. Gentry Steele, argued that because of the age of the remains and the scientifically understood times of tribal migrations that the preponderance of the evidence indicated that these modern tribes were not related to the Kennewick Man, which ultimately means that the Kennewick Man cannot be considered "Native American" within the definitions of NAGPRA. The Native claims were based on their oral traditions indicating that they had always lived in that region and they claimed Kennewick Man to be a direct ancestor to their tribes, and in fact had to be Native American based on the individual being older than 500 years old and found in the United States. According to the shared aspects of the beliefs of the claimant tribes, the Kennewick Man must be reburied in order for his spirit, as well as those of his descendants, to be at peace (Burke and Smith 2007).

On August 30th, 2002, Magistrate John Jelderks ruled in favor of the scientists, claiming that the definition of Native American under NAGPRA did not cover the Kennewick Man's case and that he should be considered an archaeological resource under the Archaeological Resource Protection Act (Burke et al. 2007). The claimant tribes appealed the decision but on February 4th, 2004 the 9th Circuit Court upheld Judge Jelderks' decision that the remains did not qualify under the terms of NAGPRA as Native American and thus shouldn't be subject to the repatriation law. The

claimant tribes tried to get the case reheard, but when they could not, they dropped the case instead of bringing it to the Supreme Court. Not only were they short the resources to do so, but the tribes also feared that if they were to lose the case at the federal level the case may become law, which the tribes did not want to risk (Burke et al. 2007).

Despite the claimant tribes' reticence to set a negative precedent, *Bonnichsen v. the United States* already set a precedent seemingly against the text of NAGPRA. In the end, the case was determined in favor of the scientists based on the premise that the remains were not Native American (Bruning 2006; Burke and Smith 2007). To come to this finding, the court was specifically relying on scientific evidence that suggested a legally ambiguous identity for the individual. At no time were the plaintiffs suggesting that the remains were anything other than Native American, and in fact studies completed by the Department of the Interior in January of 2000 determined that the remains were certainly Native American (Burke et al. 2007), however they were arguing they were not considered "Native American" as defined by NAGPRA. Additionally the tribes' evidence, including traditional knowledge, is required to be weighed evenly with scientific evidence in determining cultural affiliation under NAGPRA (Department of the Interior 1990). If the oral traditions of the tribes determined that the individual was an ancestor and that their tribes had been in the area at the time the Kennewick Man was alive then this evidence alone would have qualified the Kennewick Man as Native American under NAGPRA. However, the court sided with the scientific evidence, despite its ambiguity, setting a precedent for prioritizing scientific evidence over traditional tribal evidence.

This precedent was a significant motivating factor for the publication of 43 CFR 10.11 as well as for an amendment to NAGPRA created by original NAGPRA creators Senator John McCain and Senator Ben Nighthorse Campbell expanding the definition of "Native American" (Burke et al. 2007). It was clear that the Kennewick Man decision contradicted the intent of NAGPRA both by

the people that created it (McCain and Nighthorse Campbell) and the people that administer it (Department of the Interior). In fact the Secretary of the Interior, Bruce Babbitt, had ruled prior to Judge Jelderks' decision that the remains should be considered Native American and repatriated accordingly (Burke et al. 2007).

The result of 43 CFR 10.11 and the amendment to the definition of "Native American" have assured that a case similar to the Kennewick Man's cannot occur again. This further supports the assumption that NAGPRA was meant to be an instrument of empowerment for Native communities. Now Natives are able to reattain all human remains that can be considered Native American (and not in the strict Kennewick Man definition). Here at CSU, remains without any provenience or notes indicating anything about them are to be repatriated to the Ute Mountain Ute based on our assumption that they are Native. This assumption is based on the idea that the Department of Anthropology never collected human remains that were not Native American and that the remains are in weathered and fragmentary condition. To scientists, repatriating remains based on this evidence may seem to be unnecessary and disappointing, however to the Native communities that are working to rebury them it is a significant victory for them and their ancestors.

Is NAGPRA Empowering?

So how effective is NAGPRA as a tool of empowerment? Power in this sense should not be understood in the Marxist sense as an instrument of oppression. Here, it should be understood as both a result and instrument of sovereignty and human rights. The power in question over human remains and sacred objects certainly can be –and has been – used as a tool of oppression. However, the oppressive power – distinct from the sovereignty power – is created from inequitable sovereignty and rights. The void of control in tribal sovereignty and human rights of Natives over their human remains and sacred objects represented an instrument of oppression. The realization

and normalization of sovereignty and rights by the enactment of NAGPRA represents power to self-realize human rights. In this way, NAGPRA should empower Native peoples to self-realize their own right to reattain human remains and sacred objects.

The Department of the Interior presents an image of effectiveness for the law. According to National NAGPRA's 2013 fiscal year report, as of September 30th, 2013, there were 121,623 culturally unidentifiable remains represented in 753 inventories as well as 57,903 culturally affiliated remains in 566 inventories (National NAGPRA 2013). In total, this represents 179,526 individuals that have been inventoried in the United States to this point. This is close to many of the estimates made prior to the establishment of NAGPRA, though some estimates were significantly higher and there are an unknown amount of remains that have not been inventoried in the United States. It is also unknown exactly how many of those remains have been repatriated to date, though the last number provided by National NAGPRA in September 2009 was 38,671 (National NAGPRA n.d.). This was prior to the 2010 CUI regulation and numbers should have significantly increased in the last 5 years.

No doubt that remains, funerary objects, sacred objects, and objects of cultural patrimony have been and will continue to be repatriated as a result of NAGPRA and its administrative body, however if we dissect the process by which it operates some significant issues arise. Not only is NAGPRA inefficient in its approach to guiding repatriation, but it clearly suffers from the same colonial restrictions that have refused to adequately empower Native communities, even when a law was supposedly created specifically to empower them. The limits on this empowerment can be debilitating to the process. Here I outline eight problems of empowerment that NAGPRA should have more effectively addressed.

1. Consultation Power

As I explained at the beginning of the paper, this power of invitation is what spurred me to consider the ethical implications of the NAGPRA process. The law specifically provides me, and other NAGPRA Coordinators throughout the country, the power of invitation to consultations. If a person can justify within reason why you would or would not include certain tribes – or certain personalities within the tribes – then there are no repercussions.

At CSU, in determining the tribes that would be invited to the consultation, I had to first evaluate the proveniences, burial methods, and associated artifacts for indications of who might potentially be related to the remains. Using this method to determine who should be invited grounds cultural affiliation in NAGPRA in scientific knowledge. Tribes with contradicting traditional knowledge to scientific knowledge are at an inherent disadvantage despite the directive in NAGPRA to weigh scientific and traditional knowledge evenly.

In order to prevent inequity in the consultation process, tribes must be diligent about watching Notices of Inventory Completion on the Federal Register and/or stay in close communication with other tribal representatives. Then after finding an instance in which a tribal representative believes he/she should have been consulted, they must create a counter-claim, or perhaps even sue, in order to gain recognition in the process. This requires precious resources of time and money that shouldn't be required of the people meant to have been empowered in the process.

2. *Power of Affiliation Determination*

This is perhaps the most damning part of NAGPRA. It is a law meant to balance Native knowledge and interests with Western, secular-scientific knowledge and interests in Native cultural heritage. As I noted in discussing the Kennewick Man, these are supposed to be weighed evenly in cultural affiliation claim. This is seemingly contradicted by the fact that the museums possessing the

NAGPRA-related items generally have Western, secular-scientific ideologies and are imbued with the power to determine cultural affiliation.

At CSU, we hosted tribal representatives for consultations on two separate occasions. My role in the consultation was to facilitate conversation and listen to all forms of evidence the tribal representatives could provide. These experienced representatives discussed traditions, tribal histories, and traditional burial practices. After the consultation, it was my prerogative to take that information into consideration in determining whether or not any of our remains could be culturally affiliated. The process does not happen in the consultations or with the direct help of the tribes. It takes place behind closed doors after the tribal representatives have left based on whatever evidence the scientific institution holding the remains finds compelling. This is obviously problematic in considering the differing epistemologies of the stakeholders in the process.

Even for those who feel NAGPRA was meant to strike a balance between tribal and scientific interests, this aspect should seem wholly unbalanced. If real empowerment and balance was achieved by the law, tribes would have more direct influence on cultural affiliation decisions. The law clearly puts the burden of the proof on scientific institutions to prove that Native evidence is not compelling, however, they are inexplicably given the choice to disregard Native input if scientifically justifiable. Ultimately, tribes can sue this decision in order to have it overturned, but again Natives shouldn't have to resort to this if they were genuinely empowered by the law.

3. *Tribal Priority*

Each tribe has very different circumstances. Some are well set financially, especially those that have been able to significantly profit from the casino industry. Others are suffering from some of the most significant poverty found in the United States. Obviously, this means that different tribes are able to direct differing amounts of resources toward NAGPRA efforts, if any resources at all.

In CSU's experience, previous efforts were made to consult with tribes even prior to my arrival at the university. Despite several attempts, consultations did not occur do to the busyness of these tribal offices. I was certainly stuck, and very disappointed, about the small showing in our consultation of December 2012, however the message was clear: this may be a high priority for you, but sometimes we have bigger fish to fry. Over and over my conversations with tribal representatives have addressed their overwhelming workload. Tribal Historic Preservation Officers, such as Terry Knight of the Ute Mountain Ute, deal with nearly every aspect State Historic Preservation Officer would, only with fewer resources. This strain does not mean tribal representatives are invested in the best interests of the human remains, however they are often stretched too thin to take several days out of their schedule to travel and consult.

This priority problem has two implications. First, many of the tribes that are meant to be empowered by this law are not able to utilize it due to lack of resources. National NAGPRA offers no grants to tribes trying to fund repatriation positions[3]. Second, tribes that do not have resources during this repatriation era will be left without the ability to repatriate remains they might have an interest in after all or most of the remains are repatriated and reburied. Currently, if cultural affiliation can be made and the potentially affiliated tribe does not claim the individuals the museum can then repatriate the individuals to any other affiliated or interested tribe(s) (43 CFR 10.15).

4. *Power of the Courts (and Language)*

It seems silly to note, but it is important, that this is a law made by Euro-Americans using the Euro-American legal system in the Euro-American legal English language. When we consider how the different constructed realities of those that live within this Euro-American system and those on a Native American reservation where the traditions and language are trying to be preserved,

[3] National NAGPRA's "project" grants can fund positions for specific projects – but unless a tribal representative is able to secure a position that can enter into a "project" with a museum is a matter of tribal resources

problems in their reconciliation emerge. Though Native organizations, most notably the Native American Rights Fund and the Association of American Indian Affairs, were involved in the development of this law, the law was made to reflect and adhere to the Euro-American ideology.

When consulting with a tribe from whom we received a request for repatriation, I asked whether or not the tribal representative considered the individual to be "culturally affiliated" to them or "culturally unidentifiable" for the purposes of NAGPRA. The representative said he appreciated the question, but did not really know how to answer the question, "From my understanding, I would say you would call this person 'culturally unidentifiable,' but obviously we [the tribe] don't look at it that way."

The language and definitions within the law are created (with some Native input) by Euro-American legislators. The structure of the law, what it addresses and does not address, are subject to the Euro-American legal process. The most obvious examples of this problem are all the points that are addressed in this section of the paper. If more effort were put into making this a truly Native law, there would not be so many power disparities within it.

5. *The Dead without Power*

Too often forgotten in this process are the dead themselves. So much of burial common law in the United States functions on the basis of the wishes of the deceased (West's Encyclopedia of American Law 2008). NAGPRA is a law that was made to empower modern Native Americans on the basis of their interests and religious beliefs. However, very little can be found in the proposed bills, the hearings, or other dialogues addressing the interests of the deceased themselves. This has become especially problematic with the new CUI regulation requiring the disposition of all culturally unaffiliated individuals. In some cases, individuals may be dispositioned to a tribe that

were enemies or potentially could have even killed them. Burial common law makes the wishes of dead in terms of their burial the priority right to be recognized post-mortem.

Many tribal NAGPRA leaders, like those that consulted with Colorado State University, have chosen to keep individuals listed as culturally unidentifiable in order to expedite the process and keep the remains together. In those cases, individuals that likely could be affiliated may not be represented in their own best interest. It may be that they are – if the deceased's priority would be to get reburied as quickly as possibly – but in other cases the deceased may much prefer being reburied with their own people or much nearer to where they were found. Unfortunately, many of the issues already addressed, such as resource issues and the power of language, also negatively affect this process and often adequate consideration.

6. *Power "Balance" Between Stakeholders*

In the SAA's memorandum detailing why they opposed 43 CFR 10.11, the first point was that NAGPRA intended to balance the interests of Natives and scientists (Society for American Archaeology 2007). It is debatable whether or not NAGPRA was created with the intent to balance interests. I would argue it was strictly intended to be an empowerment legislation that had limitations built in based on Western, secular scientific interests that are prioritized by the ideology of the people that created the legislation. It also seems short-sighted to call NAGPRA "human rights" legislation, as will be addressed in further detail in the next chapter, and then say that it should balance Native human rights with scientific interests.

However, if you figure that NAGPRA was meant to balance these interests, the CUI ruling is genuinely problematic. Institutions now have no power to retain human remains unless control is given to them by the tribes. As we shall see in the next chapter, this CUI ruling is not in keeping with the repatriation ethics throughout the world. It is again problematic considering problems

number 3 and 5. If scientific techniques are able to advance to a point that could affiliate currently unidentifiable individuals, would it be in the deceased best interest to wait until that technique is developed? And if it could be affiliated to a tribe that currently does not have the resources to participate in the repatriation era to the degree they might like, would it behoove those potential stakeholders to wait? In both cases, I am not suggesting that the answers should contradict modern praxis, however it seems as though this praxis was developed without much consideration of these questions.

7. *Lack of International Power*

It became painfully obvious in 2013 how little influence NAGPRA has outside our borders. Sacred objects of the Hopi and Apache appeared twice at a French auction house. In both cases, a French lawyer, Pierre Servan-Schreiber, represented the tribes pro-bono but could not convince the French judge to delay the auction in order to prepare a case against the sales (Mashberg 2013; Oakes 2013). Servan-Schreiber's cases were based on using NAGPRA to demonstrate there was no legal title to the sacred objects, as well as the UNESCO 1970 Convention on cultural property. As sacred objects and cultural patrimony, it would be illegal to have bought these items in the United States, whether as an American or Frenchman, and thus no title for the objects could be justified. However, the French judge specifically pointed out that NAGPRA did not apply internationally.

Obviously, this needs to change if the tribes are to be empowered to the degree that seems to have been intended by the legislation. Natives have power to reattain human remains and sacred objects from federally-funded institutions in the United States; however they have no power whatsoever internationally. Even in cases which the the title can be found invalid based on NAGPRA, the tribes have no means to put pressure on organizations internationally. In the past, the United States government has made country to country deals ensuring items taken illegally from

other countries and sold in the United States would be returned to that country. The United States government needs to now do the same for their own people as every day Native human remains and sacred items are sold internationally.

More recently, a German museum devoted to a creator of the romanticized Wild West, writer Karl May, was found to still display Native American scalps in its collection. To this point, the US government has advised the tribes work with the museum directly without US government intervention. As of March 2014, the museum has no interest and is not compelled to return the scalps or take them off of display. It seems clear that this type of human rights abuse is exactly what NAGPRA intended to prevent, however the US government has no interest in expanding their efforts for justice for their own people internationally.

8. Lack of "Teeth"

This problem goes hand in hand with number 7. The government is not invested in accomplishing the intent of the law. It seems as though the law was created and a small budget set aside in order for the government to relieve itself from needing to deal with this issue. However, Native remains are still dug up and sold. In fact, one oil company manager – not knowing who I was or what I do – once told me he sells all the Native remains they find when they put in pipelines. "You can actually make a pretty penny for a good, whole Indian skull." On the other side, museums have had little to no incentive to accomplish this work.

Until the recent CUI regulation, many institutions, including CSU, were non-compliant on the basis that they could list all their remains as "culturally unidentifiable" and then did not have to make any repatriation or NAGPRA efforts. Some civil penalties have been issued (Iraola 2003; McKeown 2013). Some grave robbers have been prosecuted (McKeown 2013). However, there is

little to no threat of force behind this legislation and everyone in the NAGPRA world is keenly aware of it. If NAGPRA was meant to empower, it has fallen flat without forcing compliance.

A Law of Good Faith

Though there is still yet one last reserved regulation section undeveloped, NAGPRA is a deeply flawed law in terms of what it intended. It is able to accomplish the tangible result of the law – the physical repatriation of culturally sensitive materials – but the law falls far short of an instrument of empowerment. Too much of the utilization of the law depends on good faith efforts from the people that are genuinely empowered by the process – the museums. If the museums do not like the power they have been given, because they disapprove of repatriation or other reasons, they can wield the law in such a way that has become very problematic for the people it was meant to help.

The failings of NAGPRA begin where all failings of federal Indian law and policy begin, and that is Congress. There is no direct representation of Natives in Congress, despite being sovereign nations and Congress' status as directors of Indian affairs (Echo-Hawk and Trope 2000; Echo-Hawk 2013). Legislation generally cannot be accomplished properly for Natives of this country because of this basic structure. Like other laws governing Indian Country, NAGPRA has suffered from being a Euro-American law, in Euro-American language, empowering Euro-American institutions to help Native peoples. Genuinely Native-centric legislation would be much more inclusive and collaborative with Native peoples and their knowledge structures, and ideally would not even come from Congress.

There is hope for repatriation in the United States and throughout the world, however. Laws like NAGPRA have occurred in many countries that still have a majority population of the colonizing people (Feikert and Clarke 2009). Additionally, repatriation has been addressed by major

world organizations, indicating an emerging worldwide consensus on repatriations, as will be shown in the next chapter. What can that consensus tell us? Where is repatriation headed? A look at repatriation in the international arena can show us.

CHAPTER 3: LOOKING TO THE FUTURE: REPATRIATION AS A HUMAN RIGHT

By analyzing legislative and policy trends on repatriation throughout the world we can discern the emerging repatriation ethics. The United States is not the only country that has needed to address repatriation. Colonized countries like Canada, New Zealand, Australia, South Africa and others have had a history of colonial oppression that included appropriation of indigenous human remains and sacred objects, amongst other things. When the indigenous peoples of these countries did not die out, as many of their colonizers had anticipated, they began to call for the return of their heritage and ancestors. In most cases, the government has needed to respond, although in some countries repatriation is a matter of policy rather than law.

Australia

Australia has a very similar, though later, colonial history as the United States. Officially a colony of Britain as of 1770, Indigenous population of Australia was near 3,000,000 people on the large island prior to the arrival of the British (Ross et al. 2010). As was the case for Native Americans, Indigenous Australians suffered horrifically from the diseases brought with the Europeans with an estimated 50% of the population dying of smallpox between 1789 and 1830 (Ross et al. 2010). Though indigenous population numbers were not tracked historically, in 2011 Australian indigenous numbered 548,370 (Australian Bureau of Statistics 2012), which represented about 2.5% of the country's population – compared to Native Americans representing 1% of the US population (U.S. Census Bureau 2013).

Human remains were collected in Australia for many of the same reasons as in the United States. In the era of phrenology and Social Darwinism, diverse collections of human remains were critical to scientists' interpretation of perceived racial differences. In order to accommodate the calls

by indigenous Australians to return the human remains of their ancestors, Australia began its Return of Indigenous Cultural Property Program in 1996. This initiative of the Cultural Ministers' Council requires the "major government-funded" museums of Australia to accomplish four objectives: (1) identify the origins of human remains and "secret/sacred" objects in their collection (2) notify all indigenous communities that may have ancestral remains or objects associated with them in the collection (3) store remains or objects in accordance with relevant indigenous community wishes. Four, arrange for repatriation when requested (Feikert and Clarke 2009).

The operation of this law, which is obviously similar to NAGPRA, has many of the same problems that NAGPRA does. Repatriation requires geographic identities to be determined, a process that is difficult and problematic – and is the sole responsibility of the museums (Truscott 2006). After identify is determined, indigenous peoples must confirm this determination as proper geographic disposition is critical to the peace of the remains in the opinion of most indigenous communities. Similar to NAGPRA, reburial lands are hard to find and their protection is not provided for in the initiative. Additionally, the burden of conducting repatriations, consultations, and reburials is on the indigenous communities. Although there are government funds available for communities conducting this work, acquiring those funds may be inherently problematic for some communities (Truscott 2006).

Similarities in repatriation ethic between the Australian initiative and NAGPRA can be found in requiring museums to identify human remains and sacred objects within their collection and working to repatriate those items to affiliated, indigenous communities.

New Zealand

Across the Tasman Sea from Australia lies another couple of islands that were subjected to extreme colonizing during the same era: New Zealand. When the islands were first settled by the

British in the late 18th century, the Maori were engaged in a large-scale war that was only worsened by the introduction of guns. A traditional practice of the Maori at the time was to preserve the heads of those killed in battle as an honor to them. However, when traders living on and visiting the island began trading for the heads to have and display as curiosities, a market developed for the heads that turned the collection of them from a point of pride to an economic practice of harvesting slave heads and those of fallen enemies.

The popularity of these heads in curio shops and museums throughout the Western world saw them widely collected and dispersed throughout the world. Fortunately for the local museums, human remains were not widely collected within the country itself. In order to regain the heads of the ancestors of the indigenous population of New Zealanders that had left the country, the government created the Protected Objects Act in accordance with the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property (Feikert and Clarke 2009). This act makes any Maori human remains or artifacts found in the country property of the government and in turn provides for the return of the remains to the proper *iwi* or Maori group.

In 2003, The Museum of New Zealand Te Papa Tongarewa (Te Papa) was ordered to spend a portion of its federal funding on directing and coordinating the repatriation programs throughout the country (Feikert and Clarke 2009). The program, called the Karanga Aoteroa Repatriation Unit, provides for the expenses of boxing and shipping the remains, as well as repatriation representatives' expenses and burial costs. The program is run by a repatriation team of Maori ancestry and receives advice from an all Maori Repatriation Advisory Panel. The repatriation and reburial process is entirely dictated by the *iwi* receiving the remains and accommodated by Te Papa (Feikert and Clarke 2009; Te Papa n.d.).

To many people, New Zealand represents the ideal example of collaborative repatriation. Maori peoples are empowered to request whatever process they prefer for repatriation or reburial without qualification or limitations by the law or administering body. The text of the policies are infused with Maori language, using Maori terms and their definitions as official legal terms rather than English terms and definitions for Maori concepts (Te Papa n.d.). The process is also directed and advised by people of Maori ancestry. To the benefit of the Maori, they represent a proportionally high amount of the population (8%) and the country is very small (Feikert and Clarke 2009). Not only that, but unlike in the United States, the Maori collectively share many aspects of their culture with some local particularities which helps the policy to be more comprehensive without compromising any one group's interests. Ultimately, New Zealand's repatriation ethic shares the processes of identification and repatriation of identified human remains to the appropriate group with the ethics of the United States, Canada, and Australia.

Canada

The United States' neighbor to the north shares a very similar colonial history. The First Peoples of Canada represent just over 4% of the country's population, with just over 1 million people. Thus the First Peoples represent a much higher percentage than the United States. Historically, Canada had better relations with Natives than the United States government. In fact, when Sitting Bull was at war with the United States, he fled across the northern border where he knew the Queen's government would not pursue him.

However, repatriation legislation is suspiciously absent in Canada. There is a general governmental policy advocating repatriation, however all institutions are free to dictate their own repatriation guidelines, or lack thereof. This has at times been very problematic and at others been successfully collaborative. However, there are several prominent repatriation policies:

1. The Royal Ontario Museum is committed to repatriating human remains for which descendency or cultural affinity can be determined (The Royal Ontario Museum 2012).
2. The Canadian Museum of Civilization and its subsidiaries will repatriate human remains and associated funerary objects on the basis of demonstrable links to modern aboriginal groups and archaeological objects on the basis of evidence that it was used or would still be used by religious practitioners of aboriginal groups (The Canadian Museum of Civilization Corporation 2011).
3. The First Nations Sacred Ceremonial Objects Repatriation Act and the subsequent First Nations Sacred Ceremonial Objects Amendment Act allow for sacred objects that are needed to perform modern religious rites to be repatriated to the appropriate First Nations group. This legislation is unique to the province of Alberta.

The policies of Canada are clear; cultural affiliation is critical to any repatriation claim. It seems as though the institutions themselves, similarly to NAGPRA, are responsible for determining this relationship. Despite the subjectivity of each institution, these policies affirm the repatriation ethic that provides for the repatriation of culturally affiliatable human remains and sacred objects needed to practice modern traditional religions.

Professional Code of Ethics

As demonstrated in Canada, nations and their governments are not the only determiners of repatriation ethic. Organizations, even in nations with comprehensive repatriation laws, create their own policies on repatriation. Many museums and archaeological organizations have been reticent to repatriate potentially valuable data and objects to indigenous peoples, who upon receipt often rebury or destroy those objects. However, most of the organizations of colonial power that address repatriation in their policies do follow much of the same repatriation ethic established by NAGPRA,

the repatriation laws of Australia and New Zealand, as well as the institutional policies in Canada. The similarities between nearly all of them are the support for repatriation of culturally affiliatable human remains and sacred objects.

Society for American Archaeology

Both the SAA and the AAM were very involved in the establishment of NAGPRA. Representing professional archaeologists and museum professionals, respectively, the organizations took it upon themselves to defend the interests of these professions. Both organizations vehemently opposed establishment of federal repatriation legislation. Neither wholly reject repatriation, however they both thought repatriation should be considered on a case-by-case basis (McKeown 2013). Much of this fear revolved around the popular idea that federal repatriation legislation, even if specifically for human remains and sacred objects, would set a precedent that would lead to the forced repatriation of all Native American objects from museums. Ultimately, both organizations accepted the fact that repatriation legislation would be established and they engaged in discourse with advocates of the law in order to make a compromise to which both sides could agree (McKeown 2013).

The SAA human remains policy takes very seriously what it considers the obligation of professional archaeologists as stewards of artifacts and interpreters of the past (Society for American Archaeology 1986). Although the policy opposes NAGPRA and any universalizing repatriation legislation, it is open to repatriation in certain circumstances. Specifically, in cases which the individual's identity can be discerned, the next of kin should hold the rights of control over the individual (Society for American Archaeology 1986). This means repatriation and reburial is the kin's prerogative. However, in cases which the specific identity cannot be understood, the SAA believes that the scientific significance should be weighed against the strength of a cultural affiliation

claim from a tribe. In cases which the remains are not of scientific import and a strong case for cultural affiliation can be made to an extant tribe, the SAA seems amenable to repatriation (Society for American Archaeology 1986).

This policy, coming from one of the most vocal and ardent oppositional organizations to NAGPRA, affirms the repatriation ethic that we can see emerging. Again, cultural affiliation is to be determined for human remains and for those that show a shared relationship to the remains should have the remains repatriated to them (except in the event that the remains are of significant scientific value).

Association of American Museums

The AAM was always the quieter of the partners against the repatriation legislation (McKeown 2013). The same largely holds true today. No generally accessible policy on repatriation or human remains can be found on their website, as can be found on many museums' and cultural heritage organizations' websites. Only two documents by the AAM could be found that indirectly suggest a policy on repatriation or human remains.

The first document is a brief on a meeting with Congress regarding the 2010 CUI regulation. The brief begins with a summary of NAGPRA which AAM describes gives Natives the "right to repatriate" NAGPRA-related materials "when certain criteria are met" (Association of American Museums 2013). This statement itself is indicative of what the AAM hoped NAGPRA to be, ~~a~~ legislation that enabled Native Americans to reattain their human remains and cultural patrimony when criteria – usually cultural affiliation – are met. The law itself, as we previously discussed, does not necessarily enable ~~to~~ tribes to do so based on criteria. The burden of proof was specifically required of scientific institutions to disprove affiliation, which also implies that the "right to repatriate" is inherent and without qualification (Department of the Interior 1990).

However, the AAM brief goes on to criticize the 2010 regulation as outside the scope of NAGPRA's original text and intent. By claiming the regulation "undercuts the constitutional underpinnings" of NAGPRA, the AAM suggests they consider the original law to have been intended as a balance between Native and scientific interests (Association of American Museums 2013). The AAM also asserts that the 2010 regulation subjects museums to new legal risks on the basis of being forced to repatriate remains to tribes that may not be affiliated with them. Ultimately, the AAM opposes the mandate of disposition for culturally unidentifiable individuals and the recommended disposition of associated funerary objects (Association of American Museums 2013).

In a second document, the Code of Ethics for Curators by the AAM Curators Committee, NAGPRA is briefly mentioned (AAM Curators Committee 2009). The only obligation for curators operating under AAM policy is to comply with NAGPRA. There are no recommendations as to how this might be best accomplished nor is there a commitment to the intent of the law. The silence in this section certainly seems to betray a resentful acceptance.

It is difficult to parse out the AAM's general repatriation policy based on two documents that do not directly address it, however two points from the brief indicate affirmation of our repatriation ethic. First, the brief describes the rewarding processes that NAGPRA has put forth, including consultation with Native American tribes (Association of American Museums 2013). Describing the process as rewarding falls short of an endorsement for repatriation of culturally affiliatable human remains and sacred objects, but if the process has been mutually viewed positive then it has likely been done in good faith. Second, the objection of the AAM was on the basis of forcing disposition of culturally unidentifiable individuals. In combination, these two pieces of evidence seem to suggest the AAM has at least some degree of agreement with the repatriation ethic.

Though both the SAA and AAM both campaigned against repatriation legislation in the United States, both seem to affirm the repatriation ethic that requires cultural identification of human remains and repatriation to the affiliated indigenous groups.

British Museum

The British Museum felt the impact of NAGPRA after its enactment. Though some claims had come for repatriations, the largest museum in the UK could not begin its repatriation efforts due to its trust obligations to the public and students of the country (Feikert and Clarke 2009). However, in 2004 the UK enacted the Human Tissues Act that allowed museums to repatriate human remains that were less than 1,000 years old and that could be associated with living peoples. This law did not have very strict parameters and repatriation policies from the nine museums affected were practically essential (Feikert and Clarke 2009).

The British Museum's policy allows for the repatriation of human remains that are either less than 100 years old or that are between 100 and 1,000 years old and can be found to have cultural continuity with modern people (The British Museum n.d.). Artifacts associated with those remains that are considered to be indivisible from the remains can also be repatriated. However, if the museum considers the repatriation to be a breach of the public trust, likely meaning they are scientifically indispensable, the museum may deny the request for repatriation however strong the claim of cultural continuity (as long as the remains are not less than 100 years old) (The British Museum n.d.).

This again affirms the repatriation ethic that requires the repatriation of culturally affiliatable human remains. The burden of proof is on the claimants for the remains although in keeping with the ethic the museum provides an inventory that is publically available on their website.

German Museums Association Ethical Guidelines

Before 2013, there were no organizational or governmental guidelines for human remains or sacred objects in Germany, despite its former standing as a colonial power. In fact there were no proven means of using the legal system to enforce repatriation of human remains that were not still being grieved for, including known, named individuals (Deterts 2013).

In an attempt to provide guidance for organizations potentially in possession of human remains in Germany, the German Museums Association published the Recommendations for the Care of Human Remains in Museums and Collections. An extensive and well-researched treatise, the Recommendations find that museums should create standardized and comprehensive inventories of their human remains to be made publically available (Deterts 2013). For those human remains that can be culturally affiliated to a group that no longer exists as a result of injustice, they should be buried immediately. Remains can be determined to be associated with modern peoples if the remains can be identified as a person having lived in the last 125 years or if there is a demonstrated geographical, religious, spiritual, and/or cultural connection. If this can be determined, the course of action, potentially including repatriation, should be negotiated between the stakeholders (Deterts 2013).

In regard to the study of human remains, scientific investigations should only be conducted on remains with very significant scientific potential that clearly are not associated with any form of injustice (Deterts 2013). If the remains belong to a group as a result of injustice, the remains are to be consulted on with that group and their approval is required prior their study. In the event that affiliation cannot be determined, scientific study should not be conducted in part due to deference to human dignity and in part because questionable provenience currently yields little scientific benefit.

Again, for the German Museums Association as with all the other organizations and nations analyzed in this paper, cultural association remain critical in the validity of a repatriation claim. The GMA Recommendations are also compelling for their depth of consideration for all other types of human remains. In Germany, where a central principle of law is the protection of human dignity (Deterts 2013), much of their advice considers what might be assuring human dignity for every individual represented in museum collections. They do consider it a professional obligation of museums as scientific institutions to study remains when ethical, however the GMA places priority with the concept of human dignity and the abstention from studying remains. To them, human dignity is a fundamental right whereas scientific study is a professional right.

International Organizations

The scope of repatriation ethics is not specifically national. International organizations have come to agreements on cultural materials and property, as in the case of the UNESCO Convention of 1970. These agreements and organizational codes represent large numbers of people, institutions, and countries so the policies become notably milder. However the repatriation ethic is still addressed by some international groups, signaling a strong degree of international consensus on the issue.

ICOM Code of Ethics for Museums

In representing over 20,000 museums in 236 countries, the International Council of Museums has had to take a broad approach in creating their code of ethics (ICOM: The World Museum Community 2014). The variation in types of museums and cultural ideologies render this code of ethics document more general than at the Denver Museum of Nature & Science or even for

the German Museums Association. In this way, the document is rather benign and conservative although it does include advice on repatriation.

In addition to very general provisions on museum best practices, the ICOM code of ethics provides for the return of culturally sensitive materials, including human remains, to groups related to the materials (International Council of Museums 2013). Again, this affirms the repatriation ethic but it also signals a trend in ethics. As the geographic scope broadens, the repatriation ethics place less responsibility on the institutions themselves and more on the people claiming the remains. For Te Papa in New Zealand, the museum is responsible for all repatriation efforts in concert with the *iwi*. A little larger, but still just a national effort, NAGPRA places the responsibility of inventories on the museums and the repatriation claims on the tribes. Even larger, the ICOM code of ethics does require good inventories, but leave all aspects, including the burden of proof, on the claimant groups trying to reattain the human remains or sacred objects (International Council of Museums 2013). However, all of the policies include provisions for repatriation of culturally affiliated human remains and sacred objects.

UN Declaration on the Rights for Indigenous Peoples

The UN Declaration of Rights for Indigenous Peoples (UNDRIP) was the result of 25 years' of work (Echo-Hawk 29-32). Inspired by the civil rights movements throughout the world in the 1970's, the United Nations investigations into the status of indigenous peoples' rights yielded the Working Group on Indigenous Populations (WGIP) in 1982. This group created UN Convention Number 169 which sought to defend indigenous peoples from discrimination and suggested some degree of self-determination for indigenous peoples (UN Working Group on Indigenous Populations 1989). The document was only signed by 20 countries, as even as this convention was

being promulgated, the WGIP was drafting what would eventually become the Declaration of Rights for Indigenous Peoples (Echo-Hawk 29-32).

The drafting of the document began in 1985 and the first draft was finished and considered in 1993 (Echo-Hawk 31-32). This draft was then forwarded to the Commission on Human Rights where it was debated and changed over a 13 year period. Finally in 2006, the amended document was revised one last time according to some final requests from African representatives. On September 13, 2007, the document was approved by 144 countries, with only 4 dissentions and 11 abstentions (Echo-Hawk 32). Of course, the four dissentions came from colonial nations, Canada, Australia, New Zealand, and the United States. However, all four of these nations, including two previously abstaining countries have since supported the document, meaning all 150 members that voted on the document have approved it (Echo-Hawk 32).

Of the 46 articles, Article 12 explicitly mentions repatriation.

"Article 12

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned." (Assembly 2007)

This explicitly affirms the repatriation ethic concerning affiliated human remains and sacred objects. Not only does it demonstrate that this ethic is shared at an individual institution level, national level, and international level, but it points to this ethic as a result of a human right. By doing so, the UN went beyond making this a matter of ethics – what a country, people, or profession should consider to be just and unjust – but a matter of inalienable rights. This designation requires much more consideration.

Repatriation as a Human Right

In the Congressional dialogue concerning the creation of NAGPRA, the terms "rights" and "human rights" were used on several occasions suggesting that this was the basis of its tenets (McKeown 2012). Additionally, many scholars that study NAGPRA and its application point to it as an example of "human rights law" (Biggs 2011; Birkhold 2011; Echo-Hawk and Trope 2000; Hanna 2003; Hemenway, Henry, and Holt 2012; Luby and Nelson 2008; Niesel 2011; Nilsson Stutz 2005; Ousley, Billeck, and Hollinger 2005; Riley 2002; Watkins 2004). Equating repatriation of human remains and sacred objects was not unique to UNDRIP even though the term cannot be found in the legislations, policies, or ethical codes of any groups addressing the issue. The concept has been controversial and political and for good reason. The establishment of a human right has significant and lasting effects.

Before we consider repatriation as a right, or possibly even a human right, we must first establish how the concept of a "right" has been constructed. The definition of a right is an inalienable entitlement that can apply at a professional, national, or international level. Although the concept of rights originated in Classical Philosophy, it was during the Enlightenment that rights were initially defined by those that could be considered as legal rights versus those that were natural rights. Philosopher John Locke popularized the concept – subsequently appropriated by the founding fathers of the United States – that people had a "right" to life and liberty. Philosopher Immanual Kant then extended this concept with his deontological principle (Alexander and Moore 2012).

The development of "rights" and "human rights" has a long tradition grounded in Western philosophy. In this way, the concept is a construct of Western, secular scientism. The application of scientism on indigenous epistemologies devalues both internally and externally the unique knowledge system and its priorities. However, insofar that human rights as a concept have afforded

indigenous peoples protections from oppressive domestic power structures, they have been popularly used by many native peoples. This dynamic creates an interesting catch-22: indigenous people's epistemologies are devalued and deconstructed by the necessity of using human rights as a tool of justice.

A human right is differentiated from a right in that it is by definition universal to all people[4]. A right may be a legal right – you may be entitled to a lawyer prior to speaking to prosecution. A right may be a professional right – as the primary investigator of an archaeological site, you may be entitled to all data and artifacts found at a site. However, a human right is an inalienable and universal entitlement that applies to all people in all cases.

The concept of human rights is also differentiated from the concept of indigenous rights on the basis that indigenous rights are specific to what can be considered indigenous peoples. This does include human rights, as those apply to indigenous people as well, however indigenous rights concern issues that do not apply to people that are not of indigenous communities, such as land rights, right of self-determination, and language rights.

This special rights status has been the subject of much confusion and controversy from those that feel indigenous peoples are not entitled to any additional rights beyond normalized human rights (Echo-Hawk 130-131; Hutt and McKeown 1999). However, it is important to note that indigenous rights are still human rights. Their lack of universal applicability to non-indigenous populations does not make them special rights. They are rights to which all people are originally entitled, however these rights are only required for populations that are colonized in order to provide for the human right of cultural survival.

Human rights can be established in a number of ways. All require the normalization of that right in customary international law and normalization within the public sphere. Establishment of a

[4] The universality of human rights has been subject to much debate, see also David Kennedy's *The International Human Rights Movement: Part of the Problem*? Harvard Human Rights Journal / Vol. 15, Spring 2002

right is not the creation of a right, but a normalized realization of that right. They have emerged as a result of activism, as in the case of the civil rights movement in the United States. They have emerged as a result of governmental proclamation, as in the Declaration of Independence[5]. They have been set by collaborative and international documents, such as the UN Declaration of Human Rights established in 1948.

In each of the cases outlined above, a precedent was set prior to the realization of those rights. Precedents indicating a trajectory toward the realization of civil rights for African Americans in the United States were established by the abolition of slavery, the work of Frederick Douglas, and the voting rights of women and Native Americans. Precedent for the Declaration of Independence was set by John Locke's works and the French revolution. Precedent for the UN Declaration came in the form of the reaction to atrocities committed in World War II, as well as the eugenics movements prior.

The precedents are obviously easy to interpret in retrospect; however it is not difficult to discern modern day precedents for emerging human rights. Rights for homosexuals, especially spousal rights, are obviously on this trajectory. At this point, their rights are still not normalized, but the precedent has been set by activism and human rights organizations. These rights can be determined to be basic human rights for a group that is currently being denied them. In this way, homosexual spousal rights can be considered to be on the human rights recognition trajectory.

I assert that repatriation of human remains and sacred objects to affiliated indigenous peoples is also currently on this trajectory toward normalization. Precedent has been established at a local, national, and international level. Resistance still occurs from organizations that find value or power in these objects. In my experience, archaeologists, biological anthropologists, and museum

[5] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness" – Declaration of Independence, 1776 – taken from http://www.archives.gov/exhibits/charters/declaration_transcript.html

professionals that work with artifacts are more likely to not favor repatriation than to favor it. This may not be true of the United States at large; however there are very many people that actively oppose repatriation.

However, a clear international ethic has emerged on repatriation. This consensus and the establishment of repatriation as a "right" in the UNDRIP are the precedents that indicate repatriation is on the human rights trajectory. This means that when the right is normalized, there will be no debate about its merits. Those institutions, such as can be found in the United States, that have deliberately contradicted the tenets of this repatriation right will be seen on the wrong side of history. These institutions should comply with the current ethical trajectory in order to save prevent what could be perceived as the perpetration of human rights abuses in the 21st century.

Situating NAGPRA in the Trajectory

It is important to point out that although this repatriation right is being realized by NAGPRA and its application in the United States, the repatriation right is much narrower than the breadth of NAGPRA. The repatriation right applies to affiliatable human remains and sacred objects. NAGPRA additionally deals with funerary objects and objects of cultural patrimony (which debatably could be considered "sacred objects"). Not only that, but the 2010 regulation also gives NAGPRA the power to require disposition of unidentifiable human remains. This clearly is outside the repatriation ethic of every other repatriation policy in this study. This discrepancy certainly deserves a deeper look.

The most obvious reason why the repatriation right would not include culturally unidentifiable human remains would be the inability of museums to discern whether or not the remains are from indigenous populations. It also should be noted that human remains that could generally be affiliated to the Maori, without the ability to be associated with a specific *iwi*, are

required to be returned to Te Papa regardless (Te Papa n.d.). Additionally, cultural affiliating remains to Native Hawaiians is relatively easy due to the fact that there were no tribal divisions, per se (Greer 2012; Greer 2013). However, culturally affiliating Native American remains to one of the 566 federally recognized tribes in the United States is a very difficult task.

In this way, culturally unidentifiable remains are still definitively Native American – or should be – and in that case they still fall largely under the umbrella of the intent of the repatriation ethic. If we consider the rationale for the German Museums Association, all remains that were taken in the context of injustice should be considered for repatriation. Additionally, the UNDRIP describes the right of "Indigenous peoples…to the repatriation of their human remains" (Assembly 2007). Within these loose parameters, identifying remains as Native American would justify the repatriation of culturally unidentifiable individuals in most cases, as they are both of indigenous peoples and were usually taken in the context of injustice.

CONCLUSION

Clearly a strong repatriation ethic providing for the return of culturally affiliated human remains and sacred objects has emerged in the United States and throughout the world. Based on consensus and precedent, indications are that this ethic will be cemented as a human right at some point in the future. This should help museums, organizations, and governments to guide their own policies on repatriation. For those few that have not supported this ethic, it is clear that contradicting the ethic will be seen as human rights abuse only prolonging the oppressive colonialism that should be resigned to the past.

NAGPRA as a manifestation of this ethic provides tools for Native peoples in the United States to realize their repatriation right. However, it falls short of the empowerment it was likely intended to address. Significant issues remain in how the law operates and what it requires of the stakeholders. Though NAGPRA served as a model for repatriation policy the world over, the law suffers from having been fought for and passed during an era it was difficult to justify indigenous rights. Otherwise the law may have been better considered for all stakeholders.

A terrific example of a truly collaborative repatriation law policy can be found in New Zealand where the Maori are genuinely empowered to participate in the repatriation process. People of Maori ancestry direct the national repatriation program. An advisory council of Maori peoples oversees the action of the program. And the *iwi* are empowered to make any requests within reason that the Te Papa will accommodate to ensure proper repatriation and reburial of remains. Not only that, but the program in New Zealand endeavors internationally to return remains home. The United States makes no international efforts on behalf of Natives for these materials and will not respond to calls to action from its own people.

However, there are several more countries and organizations that are far behind NAGPRA. In Canada, though there has been better collaboration in this repatriation era between the First Peoples and museums than in many former colonial nations, the lack of national direction on repatriation is bewildering. Clearly, First Nation people of Canada's rights to their human remains and sacred objects are not normalized nor nationally supported. Other nations like Australia and the United Kingdom have laws that assist repatriation efforts, however in my opinion they fall short of empowerment as well.

Despite the focus on dissemination of power in NAGPRA, the repatriation ethic that is affirmed by so many professional and group ethics throughout the world does not concern itself with empowerment. This international repatriation ethic, and the tentative repatriation right, provide for the accommodation of repatriation requests based on solid evidence. There is no strong consensus on whom the burden of proof should be in this process. Accordingly, NAGPRA does in fact conform to the international repatriation ethic in that it accommodates repatriation without empowering indigenous communities. It should be said, though, that this is certainly not the "spirit" of NAGPRA or the repatriation ethic in general. As detailed in the UN Declaration of Rights for Indigenous Peoples, the rights of self-determination, cultural survival, and religious freedoms should all be afforded indigenous peoples of the world. If NAGPRA were to meet these standards at the highest level, the application and form of the law would certainly be more sympathetic to Native epistemologies and community needs.

EPILOGUE: NAGPRA 50 YEARS FROM NOW

By 2064, the majority of human remains in contemporary collections will have been repatriated and reburied in the United States. The fear that scientists had been so consumed with during the development of NAGPRA will have been realized. As seen by the numbers provided by National NAGPRA, the majority of inventoried remains have not yet been repatriated and it will probably take all of the next 50 years before the majority of the remains are repatriated or dispositioned. It is difficult to overstate how severely the legislators, and even the museum professionals themselves, underestimated the amount of time needed to gain compliance with NAGPRA.

Despite the relative success of this program, people of the future will have a different view of NAGPRA and whether or not it was successful. In the current climate, there is still significant fervor for and resistance against the right to repatriation and reburial. However, the future will be more distanced from this debate. The repatriation right will be much closer to normalization. Repatriation programs throughout the world will have given back the majority of indigenous collections.

From this standpoint, there will be significant criticisms of NAGPRA. Did it go beyond the repatriation right? Are tribes of the future at all put off by their ability in the past to have participated in the repatriation era? Are tribes of the future any more concerned with allowing better techniques to develop that could help determine cultural affiliation for previously unidentifiable individuals? No doubt archaeologists, and maybe especially Native archaeologists themselves, will run into problems with the fact that databases of reburial locations were not required by the law. It is very likely that both Natives and scientists will still see NAGPRA as a flawed law.

However, NAGPRA and the repatriation affirming policies throughout the world will have inspired more and better collaboration between indigenous peoples and scientists. By including Natives in the disposition of their own heritage and remains, NAGPRA will have served as an instrument of equilibrium. Prior to the law, scientists and their institutions had a disproportionate amount of power over Native remains and objects. Through NAGPRA, Natives were empowered, albeit inefficiently, to assert control. Many scientists argued that perhaps more power was given to Natives than should have been to maintain a balance between scientific and Native interests in these materials. However, this "over-empowerment" will only benefit scientists of the future by removing so many of the apprehensions and inhibitions Native people had about scientists for so long. When scientists no longer have a disproportionate amount of power over Native people, Native people will be much more open to collaborating on a balanced plane.

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