

# ASSESSING NAGPRA: AN ANALYSIS OF ITS SUCCESS FROM A HISTORICAL PERSPECTIVE

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*We cannot address NAGPRA in isolation. This statute is part of the pervasive set of federal laws that governs the relationship between Native peoples and the United States government. The rights of Native peoples are sui generis and the relationship between the federal government and the indigenous peoples of this land implicate both cultural and political rights.*<sup>1</sup>

## I. Introduction

Native American peoples<sup>2</sup> are survivors. Their cultures and

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<sup>1</sup> *National Park Service and Native American Graves Protection: Oversight Hearing on The Native Graves Protection and Repatriation Act (NAGPRA) Before the Senate Comm. On Indian Affairs*, 105th Cong. 5 (2000) (statement of Rebecca Tsosie, Professor of Law, Ariz. St. Univ.) [hereinafter *Tsosie Testimony*].

<sup>2</sup> 25 U.S.C. §§ 3001-13 (1990). NAGPRA defines Native Americans as those “of, or relating to, a tribe, people, or culture that is indigenous to the United States.” *Id.* at § 3001(9). While the statute focuses on all indigenous peoples including American Indians,

traditions have endured despite the West's<sup>3</sup> campaign to assimilate Native Americans into European colonialist civilization. Significantly, Western museums also contributed to the destruction of Native American culture and history.<sup>4</sup> For example, inaccurate museum exhibits have portrayed indigenous peoples as the "exotic other" whose stagnant culture quickly vanished with the advancement of Western civilization.<sup>5</sup>

During the colonialist era, the public's interest in indigenous cultures grew,<sup>6</sup> leading to the collection<sup>7</sup> and display of Native

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Native Alaskans, and Native Hawaiians, this note uses the term Native Americans to refer only to American Indians since its focus is on the background and subsequent effects of NAGPRA in relation to American Indians. The term "indigenous peoples" is used interchangeably in this note with "Native Americans." This note also uses the plural form of the term in many circumstances to acknowledge the variations among Native Americans in terms of their beliefs and overall cultural diversity within the entire group of Native American peoples.

<sup>3</sup> Rosemary Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CANADIAN J.L. & JURISPRUDENCE 249, 252 n.20 (1993). The term "West" or "Western" in this note draws from the ideas of Edward Said's work *Orientalism* (1979), which uses the term "orientalism" to express the notion that Western peoples projected onto non-Westerners the qualities directly opposed to those they valued in themselves. *Id.* This action not only devalued non-Western cultures but also allowed Westerners to present these other cultures as internally homogeneous and without histories and traditions of their own. *Id.* This imposed inferiority on non-Western cultures enabled Westerners to create a culture for themselves which was dramatically opposed to the non-Westerners they portrayed as having no culture at all. *Id.* In this note, the term "West" embodies many of the same concepts of Said's term "orientalism."

<sup>4</sup> Christopher Byrne, *Chilkut Indian Tribe v. Johnson & Native American Grave Protection and Repatriation Act: Have We Finally Recognized Communal Property Rights in Cultural Objects?*, 8 ENVTL. L. & LIT. 109, 117 (1993).

<sup>5</sup> Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175, 177 (1992). The attempt to "Americanize" the Indian reflected the ethnocentric desire to juxtapose the colonized European with the barbaric Native American. *Id.* Furthermore, variations within and among Native American groups themselves were disregarded and it became standard to generalize all these differences and mold them into a one sided stereotype of the Native American as opposed to the nuanced multi-dimensional European. *Id.* The enactment of recent legislation signals an attempt to redress this long-standing disparity. *Id.* at 178.

<sup>6</sup> Jack Trope & Walter Echo-Hawk, *The Native American Grave Protection and Repatriation Act Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 40 (1992). As early as 1620, Pilgrim exploratory parties removed objects from a Native American gravesite and brought them back to the Mayflower. *Id.*

<sup>7</sup> June Camille Bush Raines, *One is Missing: Native American Graves Protections and Repatriations Act: An Overview and Analysis*, 17 AM. INDIAN L. REV. 639, 642 (1992). Other early archaeological endeavors involving Native Americans occurred when Thomas

American objects. Such objects were often displayed in museums or other civic forums, without regard for the dignity of Native American peoples.<sup>8</sup> The colonialist era instilled in the public's mind the idea that Native Americans were "vanishing peoples" whose cultures came to a virtual standstill and subsequent end upon European contact.<sup>9</sup>

Today, Native Americans are asserting their cultural identities in the midst of a politically charged dispute with museums and the federal government.<sup>10</sup> This tension involves Native American property, and implicates rights of ownership, protection, and display.<sup>11</sup> Within this context, Native Americans are reestablishing their political and cultural identities.<sup>12</sup>

The colonialist mindset of the Western world and its self-

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Jefferson conducted a calculated excavation of Native American burial mounds located on his property. *Id.* Even though Jefferson was credited with doing a thorough scientific analysis of the burial mounds, he was also criticized for his callous disregard of Native Americans religious rights as well as his destruction of American history. *Id.*; see also Trope & Echo-Hawk, *supra* note 6, at 40. Collection of Native American crania started in 1849 when Dr. Samuel Morton collected many skulls in an effort to prove, through scientific analysis, that Indians were indeed the uncivilized savages Western society thought them to be. *Id.* In 1868, it became a federal policy, as ordered by the United States Surgeon General, to collect Indian crania for further scientific study. *Id.*

<sup>8</sup> Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 578 (1995). The 1876 Centennial Exposition included a Smithsonian Institution exhibit displaying Native American objects from the museum's collection. *Id.*

<sup>9</sup> *Id.* at 574.

<sup>10</sup> Many other groups of people are weighing in on this dispute, but for the purposes of this note, these are the major players and tend to encompass other important tangential fields such as scientists and academics.

<sup>11</sup> Gene A. Marsh, *Walking the Spirit Trail: Repatriation & Protection of Native American Remains & Sacred Cultural Items*, 24 ARIZ. ST. L.J. 79, 68 (1992). Marsh attributes the complexity of this debate to the extreme variety of competing interests. *Id.* The debate not only encompasses the tension between Native Americans and museums, but also the individual interests of private land owners, art dealers, auction houses, and amateur collectors. *Id.* at 86. What convolutes the discussion even further is the fact that many of these groups have conflicting opinions within them. *Id.* Not even Native Americans can all agree on how to deal with this problem due to the great disparity among tribes' cultural and religious beliefs. *Id.*

<sup>12</sup> *Id.* at 83. While Congress in many cases still feels that it possesses the appropriate authority to preside over Native American affairs without input from indigenous peoples themselves, extreme pressure from the tribes, as well as other groups, they have successfully galvanized, ultimately encouraged Congress to sit down with Native Americans and begin to fashion some solution to the problems surrounding the treatment of Native American human remains and sacred objects. *Id.*; see also Thomas Boyd, *Disputes Regarding the Possession of Native American Religious and Cultural Objects and Human Remains: A Discussion of the Applicable Law and Proposed Legislation*, 55 MO. L. REV. 883 (1990).

proclaimed superiority pervaded much of the legislation drafted during this era.<sup>13</sup> Notions of Western supremacy dominated the colonialist worldview, encouraging all people, including politicians and the general public, to view Native Americans as inferior and uncivilized. Thus, the colonialist mindset had little regard for Native Americans' perspectives or beliefs.<sup>14</sup>

The West historically disregarded Native Americans' religious beliefs, cultural practices, and concepts of ownership, and, as a result, America's legal system developed without consideration of Native Americans' cultural concepts.<sup>15</sup> For example, early American property law, which emphasized private property ownership, ignored Native American concepts of communal property ownership.<sup>16</sup> This distinction between communal ownership and individual property rights remains central to the current debate over rightful possession of Native Americans' human remains and cultural properties.<sup>17</sup> Native Americans have recently strengthened their social and political voices and revived their cultural identities and traditions within American politics and culture.<sup>18</sup> They are speaking out against the discriminatory practices

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<sup>13</sup> Coombe, *supra* note 3, at 249. In its creation of categories of culture, including cultural property and real property, colonialism almost single-handedly relegated Native American peoples to a position of historical and cultural inferiority. *Id.* The colonial discourse shaping the development of law which addressed both cultural and real property had little regard for Native American peoples' beliefs and concepts. *Id.* Both were ignored during the construction of the legal concepts still at issue today. *Id.*

<sup>14</sup> Strickland, *supra* note 5, at 177.

<sup>15</sup> *Id.* at 85.

<sup>16</sup> See Byrne, *supra* note 4, at 117. The construction of a new social system in America by European settlers mirrored the one existing in their homeland. *See id.* Such similarities in social structure required the transplant of the European legal system and its corresponding concepts in order to support it. *See id.* This European social structure was completely at odds with Native American belief systems because it failed to incorporate or recognize any concepts familiar or important to Native Americans. *See id.* Therefore, it has been difficult for Native Americans not only to make claims under this legal system with its European foundations, but also to receive the appropriate remedies for the denigration and destruction of their land, property, and sacred objects. *See id.*

<sup>17</sup> *Id.* at 116. "In a system that is founded on concepts of private property rights, the notion of restricting alienability on property because it, by its very nature, belongs to the community, is bound to be strenuously opposed." *Id.*

<sup>18</sup> Marsh, *supra* note 11, at 85. The public image of Native Americans, formed early in the colonial era and capitalized upon as of late by modern Hollywood, has never truly been updated. *Id.* Because of this commercial exploitation, many average people are ignorant of Native American religious beliefs and social practices. *Id.* "Even though Native Americans have survived, however, few people today appreciate that Native American culture is not a thing of the past. The culture is not static but rather is dynamic." *Id.*

rooted in the colonialist era and their pervasive effects on legislation, as well as the popular view of indigenous peoples that museums helped perpetuate. Additionally, Native Americans have demanded that museums return human remains for proper reburial and surrender sacred objects for use in religious ceremonies.<sup>19</sup> These demands have led many to reconsider the role of Native Americans within Western society and history.<sup>20</sup> Current legislation represents an attempt to remedy past injustice.<sup>21</sup>

In 1991, Congress passed the Native American Grave Protection and Repatriation Act (hereinafter "NAGPRA")<sup>22</sup> to address the ownership and treatment of Native Americans' human remains, funerary objects, sacred items, and artifacts of cultural patrimony.<sup>23</sup> The legislature's reevaluation of its prior conduct signals efforts to recognize and embrace Native Americans' worldviews, a desire to redress past wrongs, and an attempt to ultimately resolve these issues through dialogue and compromise.<sup>24</sup>

Part II of this Note will analyze the concept of colonialism throughout Western society as it was perpetuated by legislation

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<sup>19</sup> *Native American Graves Protection: Hearing on the Implementation of the Native American Graves Protection and Repatriation Act Before the Senate Comm. on Indian Affairs*, 105th Cong. 2 (1999) (statement of Ernie Stevens, Jr., First Vice President National Congress of American Indians) [hereinafter *Stevens Testimony*] "Indian people see the return of their ancestors and sacred objects as a return of their cultural and spiritual foundations, which is the very heart of Indian nations." *Id.*

<sup>20</sup> Leonard D. DuBoff, *500 Years After Columbus: Protecting Native American Culture*, 11 *CARDOZO ARTS & ENT. L.J.* 43, 44 (1992). DuBoff notes that the trend in recent legislation dealing with Native Americans reflects a greater sensitivity toward their cultural beliefs. *Id.*

<sup>21</sup> *Stevens Testimony*, *supra* note 19, at 3.

It [NAGPRA] was enacted to address and correct standards and behavior of the scientific community which were discriminatory, paternalistic, and a violation of human rights and property rights. It was drafted as a delicate compromise between the scientific community and Indian country, with an understandable emphasis on the perspectives and needs of Native peoples. Overall, NAGPRA is human rights legislation signed into law in order to provide a legal avenue for tribes to right one of the wrongs committed against them in the past and the present.

*Id.*

<sup>22</sup> 25 U.S.C. § 3001-3013 (1990).

<sup>23</sup> DuBoff, *supra* note 20, at 44. This marks a substantial improvement from past legislation that virtually ignored any Native American rights. *Id.* See also Strickland, *supra* note 5, at 177. The adoption of NAGPRA is a recognition that native cultures are vital and previous legislation ineffectively served their needs. *Id.*

<sup>24</sup> DuBoff, *supra* note 20, at 44.

concerning Native Americans and the popular image of indigenous peoples created by museums and other cultural institutions. This Note will also discuss current legislative attempts to rectify years of Western disregard for the political and religious sovereignty of Native American cultures. Part III outlines the history and development of prior legislation intended to protect Native American gravesites, human remains, and cultural properties. Part IV will address the specific mandates of NAGPRA. Part V analyzes whether NAGPRA actually signals a shift in modern thinking and discusses the shortcomings that may inhibit the success of the Act. Finally, Part VI of this Note briefly reflects the author's analysis and thoughts on the success of NAGPRA, and specifically considers whether Native Americans view NAGPRA as a significant step towards cultural preservation.

## II. *The Pervasive Effects of the Colonialist Worldview*

The West's fascination with Native Americans runs deep.<sup>25</sup> Largely due to the influences of colonialism - an effect only mildly diluted by the passage of time - the mass destruction of Native American cultures seemingly became national policy.<sup>26</sup> In order to survive in the New World, Europeans molded this concept of colonialism into a cultural creation.<sup>27</sup> This cultural notion reflected the network of relationships, power struggles, and multiple histories present in the new world.<sup>28</sup> Colonialism allowed Europeans to forge a homogenous identity as conquerors of this new land and separate themselves from the indigenous inhabitants whom they conquered.<sup>29</sup> These cultural practices segregated European groups from one another by promoting group identity.<sup>30</sup> At the same time, colonialism provided

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<sup>25</sup> Professor Scott Taylor, Lecture at Seton Hall University School of Law, Federal Indian Law (January 17, 2001). From virtually their first encounter with Native American Indians, Europeans were intrigued. *Id.* As new explorers and settlers to America, Europeans knew that Native Americans had many things they needed to survive in the new world, as well as many things which the Europeans wanted, particularly fur pelts. *Id.* An extensive fur trade arose from this European desire and laid part of the foundation upon which the controversial relationship between Native Americans and Europeans grew. *Id.*

<sup>26</sup> See Boyd, *supra* note 12, at 883. "Until just three decades ago the federal government actively pursued a policy of cultural destruction through assimilation of Native American tribes into mainstream American culture." *Id.*

<sup>27</sup> NICHOLAS DIRKS, COLONIALISM AND CULTURE 3 (1992).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 6

<sup>30</sup> *Id.*

social cohesion and enabled Europeans to recreate the social structure of their homeland.<sup>31</sup> This recreated social structure ensured their survival in this new setting, and reinforced the idea that colonizers were free to subjugate the Native Americans, whom they viewed as different and inferior.<sup>32</sup>

Museums evolved, in part, from the West's desire to preserve and protect its newly defined concept of culture.<sup>33</sup> Throughout the period of forced assimilation by colonizers and the federal government,<sup>34</sup> museums served as repositories for Native American artifacts. Tragically, the relationship between Native American tribes and Western museums has been tarnished almost from its inception.<sup>35</sup> Museums were often motivated more by scientific curiosity or economic incentives, rather than a sincere desire to preserve history.<sup>36</sup> Instead of conscientiously conserving these cultural resources,

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<sup>31</sup> *Id.* Dirks argues that the concept of culture was integral to colonialism, because a culture had to be viewed as foreign or "the other." *See id.* Before colonialist power could be exercised over a group, it had to be viewed as the opposite in every respect, thus allowing the colonizer to assert its power and control over it. *See id.*

<sup>32</sup> *Id.*

<sup>33</sup> Gerstenblith, *supra* note 8, at 561. Museums were responsible for collecting culture. *See id.* Objects cherished by prior generations were deemed collectible and thus worthy of preservation for national posterity. *See id.* Since Native Americans were considered predecessors to the burgeoning civilized European society in the new world, their objects were considered collectible, but were not accorded the same respect as historical objects of the Europeans, which colonists brought with them to the new world. *See id.* Despite the fact that the Europeans were newcomers to the Native Americans' lands, their conception of history did not include Native Americans, and therefore Native American remains and cultural objects did not deserve the same reverence. *Id.* at 562. The desire to collect Native American remains and objects was more a function of the Western desire to juxtapose their self-presumed superiority with the obvious differences and presumed inferiority of indigenous cultures. *Id.* at 563.

<sup>34</sup> Boyd, *supra* note 12, at 883.

<sup>35</sup> Walter R. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native American Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437 (1986).

<sup>36</sup> Gerstenblith, *supra* note 8, at 578. Growing interest throughout the scientific community during the nineteenth century in conducting craniometric studies in an effort to prove the superiority of the white race over other ethnic groups based on a correspondence between cranium size and intelligence, led to the excavation of many Native American burial grounds. *Id.* Looters or antiquities hunters swarmed over these exposed sites since both the demand and the financial rewards for human remains and associated grave goods were on the rise. *Id.* Since little respect was accorded to Native American cultures because of their presumed inferiority, minimal protection was available for them in their attempts to protect their cultural property. *Id.* Instead of protecting those in need of protection, property laws evolved to protect Western mainstream culture. *Id.*

museums often misused, and in some cases, abused the valuable assets they obtained.<sup>37</sup> Museums often exacerbated problems by acquiring these objects illicitly.<sup>38</sup> Later, museums ignored requests to return these artifacts since claims brought by Native Americans were not grounded in any legal basis.<sup>39</sup> Legislation dealing with these issues traditionally supported the colonialist worldview.<sup>40</sup>

Western domination framed the relationship between Native American tribes and the federal government throughout the colonialist period.<sup>41</sup> As the government seized Native Americans' sacred and tribal lands, contemporary legislation supported forced assimilation and stripped the property rights of Native Americans.<sup>42</sup> These actions were

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<sup>37</sup> Gerstenblith, *supra* note 8, at 579. Not only were Native American human remains publicly displayed without respect for the sanctity of the dead and proper burial, but also sacred objects were improperly handled. *Id.* Native Americans were rarely, if ever, consulted with regard to the care and conservation of such objects, and their requests for return of such objects to use in their ongoing religious practices, or remains to give them proper burials, were often either ignored or denied. *Id.*

<sup>38</sup> Echo-Hawk, *supra* note 35, at 441. While museums often claimed title to Native American objects in their possession by virtue of good faith purchase or gift, these objects often came into their possession through less virtuous channels. *Id.* In many cases, Native American remains and sacred objects were looted and stolen from burial grounds or religious shrines which tribes had been forced to leave because of assimilation. *Id.* Thus, museums did not always acquire these objects from Native Americans themselves, but rather from third parties who had less than perfect title to the object themselves. *Id.* Furthermore, when museums did acquire sacred objects from individual Native Americans, they often did not check to see whether the individual had sole title to the object, or whether it was communal property of the tribe. *Id.* In the latter case, the individual had no right to sell it to another party without permission of the entire tribe. *Id.* at 441-42. Because museums did not always take care to determine whether the objects they were acquiring were coming to them through a proper transfer of title, they often acquired objects without having legal title to them in the eyes of Native Americans. *Id.* at 441. This is still an extremely sensitive issue in today's debate over the ownership and return of Native American objects and remains still held by museums. *Id.* at 444.

<sup>39</sup> *Id.* at 441-48. Museums waged several arguments against Native American requests for repatriation prior to NAGPRA. *Id.* These arguments included claims to title through good faith purchase or gifts from individual Indians, obtaining them through excavation of private lands over which private owners had control of any discoveries, or excavation of public lands through federally regulated procedures. *Id.*

<sup>40</sup> *Id.* at 448-49. Federal legislation historically favored museums because statutes governing excavation often had requirements that they benefit a public museum and contained an underlying assumption that the archaeological objects discovered on federal land belonged to the US despite the fact that such land might have belonged to a tribe prior to assimilation. *Id.*

<sup>41</sup> Gerstenblith, *supra* note 8, at 573.

<sup>42</sup> Byrne, *supra* note 4, at 111. "[T]he pantheistic character of Native religions embodies a relationship between the spiritual and material world that clashes with the Anglo-American legal and social systems pertaining to private property." *Id.*



justified under Western notions of property ownership that focused heavily on the concepts of private property and unrestricted alienability.<sup>43</sup>

By contrast, Native Americans perpetuated a communal property system where the entire tribe owns sacred objects.<sup>44</sup> Native American tribes developed rules regarding communal property based upon their individual social traditions.<sup>45</sup> A central tenet of the Native American communal property system is the tradition of transferring property from one generation to the next.<sup>46</sup> Generally, communally owned property is not transferred between individuals.<sup>47</sup> The tribe has the right to regulate possession if the objects are essential to the cultural history of the tribe.<sup>48</sup> The tribal court has jurisdiction over any internal proceedings regarding this regulation.<sup>49</sup> The assumption that museums are entitled to rightful possession of objects acquired from individual Native Americans must, therefore, be reconsidered, particularly when tribal law holds that the community, and not individual members of the tribe, determines the right to possession.<sup>50</sup>

Comparatively, Western legislation emphasized private property and free alienability, thereby displacing the rights of Native Americans to their confiscated homelands, burial grounds, or cultural property.<sup>51</sup> As a result, Native Americans were unable to ground their claims for repatriation in any solid legal theories.<sup>52</sup> Native Americans had few

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<sup>43</sup> *Id.* at 118-19. "Indeed, private property is the cornerstone of the Western social order. . . Western culture has moved towards private control of cultural objects, and the law has established standards enforcing this trend." *Id.*

<sup>44</sup> *Id.* at 117. "Cultural property can develop communal qualities because it is created for a group purpose or through long-term use by a community. Such use may imbue the property with value that is fully realized only when the object is available to the group as a whole." *Id.*

<sup>45</sup> Echo-Hawk, *supra* note 35, at 443.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 442.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 444.

<sup>50</sup> *Id.*

<sup>51</sup> Byrne, *supra* note 4, at 116.

<sup>52</sup> *Id.* at 120-21.

The lack of recognition of communal rights in cultural property combines with a well-developed bias in Anglo-American law against Native American cultural views. . . Thus marriage of Anglo-American law to modern capitalist economic theory presents a serious institutional problem for groups raising communal claims to artistic objects. . . Because Native Americans must adopt Anglo legal concepts that are in some ways fundamentally incompatible with Native

other alternatives than to formally ask for the return of their cultural property.<sup>53</sup> Museums often refused their requests, even though they had no claim to legal title.<sup>54</sup>

Originally museums avoided Native American requests for repatriation by invoking fundamental concepts of American property law.<sup>55</sup> By the turn of the twentieth century, federal Indian law began to recognize the Native American concepts of tribal sovereignty and communal property.<sup>56</sup> As a result, courts have held that a museum cannot invoke a good faith purchase defense when it knows that an individual Native American seller did not have legal title upon transfer.<sup>57</sup> Lack of knowledge is no longer a valid defense for museums that have acquired stolen Native American artifacts from third parties.<sup>58</sup> Federal courts have applied federal criminal statutes in some cases,<sup>59</sup> holding that Native Americans are entitled to pursue claims for damages under an implied private cause of action.<sup>60</sup> It now seems clear

American modes of experience—the tribes face an inherent and daunting disadvantage.

*Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Bowen Blair, *Indian Rights: Native Americans Versus American Museums—A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125 (1979). See generally Echo-Hawk, *supra* note 35, at 442-43.

<sup>55</sup> Byrne, *supra* note 4, at 120-21.

<sup>56</sup> Echo-Hawk, *supra* note 35, at 442. As early as 1894, the Supreme Court held that there is a difference between individual and communal property as viewed by Native American tribes. See *id.* In *Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281, 302 (1893), *aff'd*, 155 U.S. 196 (1894), the court said that,

The distinctive characteristic of [tribal] communal property is that every member of the community is an owner of it as such. He does not take as heir, or purchaser, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property in the lands as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners.

*Id.*

<sup>57</sup> *Id.* While a museum cannot assert this defense, it is entitled to relief on a claim against the seller for a breach of implied warranty of title. See *id.*

<sup>58</sup> *Id.* at 444. Under federal criminal statutes, it is illegal to knowingly receive stolen property. See *id.*

<sup>59</sup> *Id.* at 445.

<sup>60</sup> *Id.* One recent example of a Native American tribe that succeeded in pursuing a private cause of action against a museum involves a controversy over a Zuni war god. See *id.* The Denver Art Museum came into possession of a sacred Zuni war god statue through a third party, non-Indian donor. See *id.* The Zuni tribe claimed that the statue was communally owned and that it had never given anyone permission to remove the statue

that museums do not have the right to retain stolen Native American objects when they are identified as communal property of a particular tribe.<sup>61</sup>

Perhaps one of the most significant issues surrounding the possession of Native American objects involves those artifacts acquired when museums excavate private land.<sup>62</sup> American property law supported museums' claims to ownership in these instances, since ownership of possessions found on private land has conventionally been vested in the landowner.<sup>63</sup> Conflicts arose over excavation of private lands because of the inherent differences between the common law and ancient Native American cultures.<sup>64</sup>

The need for compromise and understanding between Native American groups has recently come to light.<sup>65</sup> As a result, civic institutions such as museums are being held to a higher standard when they acquire artifacts from private individuals, or discover them on private land that originally belonged to Native Americans.<sup>66</sup> To help

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from the religious shrine housing it. *See id.* Since the statue was communally owned and the museum knew that its removal from tribal lands was illegal, the museum had no legal right to it. *See id.* The museum was moved to return the statue only after the Attorney General of Colorado admonished the museum in its role as a public trustee and preserver of American culture for trying to assert an invalid title claim for a piece of stolen property. *See id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 445-48. Based on the notion in American property law that the landowner retains sole ownership rights to objects found on his property, landowners often sold Native American objects they discovered to museums. *See id.* Museums thus claimed they acquired title from the seller, who derived legal title to the object since discovered on the land he owned. *See id.* Native Americans countered by arguing that the land upon which these objects were found originally belonged to them, and they left it only because they were forced to during the process of assimilation. *See id.* This scenario is different from objects excavated from public lands under control of the federal government, where the law also favors the museum since federal permits were needed prior to excavation. *See id.* This allowed the government to control the disposition of discovered goods. *See id.* Federal legislation still governs these types of excavations, but has been modified over the years to give Native Americans more of a say in the process than before. *See id.*

<sup>64</sup> *Id.* at 446-47. Native American cultures exhibit extreme reverence and respect for their dead and feel that violating their peaceful rest has significant consequences to their world. *See id.* Westerners did not feel they were committing a wrong by disturbing Native American burial sites, since it occurred under the pretense of scientific study and historical preservation. *See id.* In general, the resting places of Native American human remains have not been treated with the same equality as American cemeteries. *See id.*

<sup>65</sup> Boyd, *supra* note 12, at 883.

<sup>66</sup> Echo-Hawk, *supra* note 35, at 447. Museums are now held to a higher standard and must take precautions to determine exactly how the objects they intend to acquire came into

resolve such controversies, Congress enacted several bills specifically intended to govern property disputes arising between Native Americans and museums.<sup>67</sup> NAGPRA is the most significant piece of legislation enacted to help the Native Americans successfully repatriate their cultural property.<sup>68</sup>

### III. Legislation Leading to the Passage of NAGPRA

Early legislation and the common law often protected Western ideas regarding property interests, and ignored the interests of Native Americans.<sup>69</sup> For example, Native Americans were denied equal access to the court system.<sup>70</sup> Further, when the courts finally heard cases involving Native American property interests, they had difficulty interpreting the governing legislation. Poor interpretation of these laws led to ineffective enforcement.<sup>71</sup> As a result, the courts' decisions most often favored museums.<sup>72</sup> Over time, Congress began to recognize and

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the seller's possession and whether the seller has title to the objects he is selling. *See id.*

<sup>67</sup> Blair, *supra* note 52, at 128. Not all museums favor such legislation and some argue against it because they do not want to give up their Native American collections.

Museums generally rely on four pervasive points: (1) their public responsibility to preserve and exhibit the artifacts for the benefit of all Americans; (2) their doubt as to specific Indian ownership; (3) their unwillingness to establish a precedent of returning a part of their collections to original owners; and (4) their legal claims to the artifacts. The reason most cited by museums for refusing to return the Indian artifacts concerns their presumed public responsibility to preserve and exhibit the artifacts for the benefit of all Americans, not just the Indians.

*Id.*

<sup>68</sup> Strickland, *supra* note 5, at 178. The adoption of NAGPRA is in part the result of a guilty conscience for past wrongs and in part the acceptance that Native Americans make a strong argument for their cause. *See id.*

<sup>69</sup> Trope & Echo-Hawk, *supra* note 6, at 45. The common law concepts were transplanted directly from Europe and did not develop with Native Americans in mind at all. *See id.* "Common law is judge-made law that is supposed to safeguard considerations of justice and equity; it evolves and changes over time to meet society's changing needs. Unfortunately, during its development in this country, the common law failed to take into account unique indigenous burial practices and mortuary traditions." *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 46-47. Court decisions based on common law principles were often highly ethnocentric since Native American belief systems were not contemplated in the drafting of such legislation and were not well understood by those trying to interpret it. *See id.* The courts also failed to take into account the forced assimilation of Native Americans causing them to involuntarily leave their lands and homes thereby involuntarily leaving behind their burial grounds and religious shrines. *See id.*

protect Native Americans' cultural properties.<sup>73</sup>

To combat the increasing scientific interest and commercial market for Native American cultural objects born in the colonialist era, a grass-roots preservation movement began early in the twentieth century.<sup>74</sup> The growing interest in Native American artifacts had encouraged the desecration of historical lands and the destruction of historical information.<sup>75</sup> Thus, the grass-roots movement sought to preserve historic locations such as battlefields, buildings, and cemeteries, many of which were associated with triumphs of the Revolutionary War.<sup>76</sup> By preserving cemeteries, this group attempted to rectify the ambivalence for nature and the dead reflected in the federal legislation of the time.<sup>77</sup> As a result of the efforts of preservationists, federal legislation was enacted to conserve the history of Native Americans.<sup>78</sup>

The Antiquities Act of 1906 was one of the first laws passed by Congress to protect the physical cultural property of indigenous cultures.<sup>79</sup> The Act contemplated the preservation of archaeological sites through a systematic method of excavation supervised by the federal government.<sup>80</sup> By supervising archaeological sites, the government ultimately sought to control the permanent preservation of recovered items in public museums.<sup>81</sup>

Specifically, the Act mandated that those wishing to unearth archaeological sites acquire a permit from the secretary of the particular federal department that had jurisdiction over the land.<sup>82</sup> The Act also

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<sup>73</sup> Strickland, *supra* note 5, at 179.

<sup>74</sup> Gerstenblith, *supra* note 8, at 575. Successful preservation movements started at the community level because the government did not actively search for sites to preserve. *See id.*

<sup>75</sup> *Id.* at 574.

<sup>76</sup> *Id.* at 575-76. This led to a widespread effort to preserve cemeteries as architectural and natural treasures due to their design and unique landscaping. *See id.*

<sup>77</sup> *Id.*

<sup>78</sup> Boyd, *supra* note 12, at 893.

<sup>79</sup> 16 U.S.C. §§ 431-433 (1982).

<sup>80</sup> Boyd, *supra* note 12, at 893.

<sup>81</sup> 16 U.S.C. § 432 (1982). The statute acknowledges only a limited field of applicants who are eligible for permits. *See id.* It allows permits to be issued only "if undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions with a view to increasing the knowledge of such objects, and that the gathering shall be made for permanent preservation in museums." *Id.*

<sup>82</sup> *Id.* "Permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon lands under their respective jurisdictions may be

included explicit enforcement provisions.<sup>83</sup> Nevertheless, it was ineffective, primarily because it did not provide sufficient protection or adequate penalties.<sup>84</sup> Additionally, the Act pertained only to nationally owned lands. The limited scope of the legislation had virtually no effect on the excavation of Native American burial grounds or religious sites, which differed in structural form from traditional Western cemeteries or places of worship.<sup>85</sup> Moreover, this legislation overlooked Native American lands that were involuntarily abandoned as a result of colonialist assimilation and later reclaimed by private landowners or individual states.<sup>86</sup>

Over the next few decades, legislative efforts to preserve Native American and colonial American cultural heritage continued with minimal success.<sup>87</sup> For example, the National Register was formed under the National Historic Preservation Act of 1966.<sup>88</sup> The Register allowed the Secretary of the Interior to preserve general areas of historic importance and specific historical structures for the public's benefit.<sup>89</sup> Any state that had a site listed on the register qualified for matching grants-in-aid to help local preservation groups conserve vital pieces of

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granted by the Secretary of the Interior, Agriculture, and Army to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering." *Id.*

<sup>83</sup> 16 U.S.C. § 433 (1982). The Act calls for the punishment of "[a]ny person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity... without the permission of the Secretary of the Department of government having jurisdiction." *Id.*

<sup>84</sup> Boyd, *supra* note 12, at 893-94. The Act's penalties for excavating without the appropriate permits was merely a \$500 fine, ninety days in prison, or, in limited cases, both. *See id.* Such penalties did not severely impact those who were excavating illegally primarily because seasoned pothunters could make several times that amount by selling only one pot which they had illegally extracted from the site. *See id.* Ultimately, the Act was rendered unconstitutionally vague by the Ninth Circuit Court since it failed to clearly define the meaning of terms such as "ruin," "monument" and "object of antiquity," thus making the Act extremely difficult to effectively apply. *See id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 894-95. In 1935, the Historic Sites Act was enacted with the goal of collecting and preserving the country's cultural heritage for public consumption in museums and institutions of public education through the creation of a National Trust for Historic Preservation. *See id.*

<sup>88</sup> 16 U.S.C. § 470 (1966).

<sup>89</sup> 16 U.S.C. § 470(b)(4) (1966). "[T]he preservation of [America's] irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans." *Id.*

American history,<sup>90</sup> particularly through scientific research and community involvement.<sup>91</sup> The Act made it a priority to preserve the culture of Native Americans, as well as the histories of transplanted Europeans, which was embodied primarily in battlefields and other historical colonial sites.<sup>92</sup>

While the Act represented a significant attempt to preserve the histories of Native Americans, it was primarily ineffective due to two shortcomings. First, it contained an exception for religious sites that substantially restricted the scope of protection available to Native American tribes.<sup>93</sup> Second, although the Act intended to protect general areas of historical significance, it primarily protected historic architectural structures. This was problematic for Native Americans, since their historical and religious sites were conceptually different and design from Western historical or religious architectural structures.<sup>94</sup> Thus, Native Americans gained very little advantage from this legislation, although it contemplated a symbiotic relationship with them.<sup>95</sup>

In an attempt to clearly define the scope of the Antiquities Act,<sup>96</sup>

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<sup>90</sup> 16 U.S.C. § 470(b)(7) (1966). “[I]t is . . . necessary and appropriate for the Federal government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means. And to assist state and local governments . . . expand and accelerate their historic preservation programs and activities.” *Id.*

<sup>91</sup> Boyd, *supra* note 12, at 895. The Act emphasized the importance of scientific involvement and attempted to unite multiple community groups including educational institutions, historical, and scientific groups, to work together in an effort to preserve, study, and understand American history and culture. *See id.*

<sup>92</sup> *Id.* The Preservation Act marked one of the first occasions where Congress began to encourage input from Native American groups on how to preserve and understand their own history both in relation to that of the West and as a history separate and distinct from it. *See id.*

<sup>93</sup> *Id.* at 896. The major failure of the Preservation Act in attempting to protect Native American cultures is the fact that it did not acknowledge that culture and religion are so intertwined that the two cannot be truly be separated. *See id.* Since the symbiotic relationship between the Native American cultures and religions is so foreign to Western sensibilities, the Act did not contemplate how it would apply and adapt to the Native American worldview. *See id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> 16 U.S.C. § 470bb(1) (1982). The statute defines “archaeological resources” as: any material remains of past human life or activities which are of archaeological interest . . . [they] shall include but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any

Congress enacted the Archaeological Protection Act (ARPA) in 1979.<sup>97</sup> Like the Antiquities Act, ARPA required a permit in order to excavate on federal land.<sup>98</sup> This requirement was imposed to ensure that skilled individuals excavated the sites.<sup>99</sup> ARPA also gave the government the right to dictate where archaeological discoveries would be housed, studied, and displayed.<sup>100</sup> However, unlike the prior acts, ARPA required the applicant to obtain the consent of the appropriate Native American tribe as part of the permit process.<sup>101</sup> Additionally, ARPA included stricter enforcement provisions than the earlier acts. For instance, violations of ARPA were punishable by fines up to \$10,000 and imprisonment up to one year.<sup>102</sup>

This protective legislation eventually led to the enactment of the National Museum of the American Indian Act (NMAIA).<sup>103</sup> NMAIA

portion or piece of any of the foregoing items. . . No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.

*Id.*

<sup>97</sup> 16 U.S.C. §§ 470aa-470ll (1982). Boyd, *supra* note 12, at 897. While not formally repealed by the legislature, the Antiquities Act of 1906 has largely been superseded by ARPA. See Boyd, *supra* note 12, at 897.

<sup>98</sup> 16 U.S.C. § 470cc(a) (1982).

<sup>99</sup> *Id.*

<sup>100</sup> Boyd, *supra* note 12, at 897. Again, this usually involves a museum or institution of higher learning. See *id.*

<sup>101</sup> *Id.* at 898. The Act allows Native Americans significant influence over who is granted a permit. The Act further acknowledges that it is essential to have knowledge of the Native American belief system to aid in the preservation of their own archaeologically and culturally significant objects. See 16 U.S.C. § 470cc(g)(2) (1982).

In the case of any permits for the excavation or removal of any archaeological resource located on Indian lands, the permit may be granted only after obtaining the consent of the Indian or Indian tribe owning or having jurisdiction over such lands. The permit shall include such terms and conditions as may be requested by such Indian or Indian tribe.

*Id.*

<sup>102</sup> 16 U.S.C. § 470ee (d)(1982).

[I]f the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceed the sum of \$500, such person shall be fined not more than \$20,000 or imprisoned not more than 2 years, or both. In the case of a second or subsequent violation upon conviction such person shall be fined not more than \$100,000, or imprisoned not more than 5 years, or both.

*Id.*

<sup>103</sup> 20 U.S.C. §§ 80q-1 (1989). In part, § 80q-1(b)(1)-(2) states that "[t]he purposes of the National Museum are to (1) advance the study of Native Americans. . . (2) collect, preserve, and exhibit Native American objects." *Id.*



addressed reburial and repatriation, while incorporating the museum community's desire to retain Native American objects for display and scientific study.<sup>104</sup> The NMAIA also realized the Native Americans' interest in preserving and protecting their cultural histories.<sup>105</sup> However, NMAIA only applied to the Smithsonian museum, and excluded other federally funded museums.<sup>106</sup> Although NMAIA acknowledged the idea that Native Americans must regain possession of their cultural property, it failed to establish a clear timeline for the Smithsonian to conduct the mandated inventory of Native American remains and objects.<sup>107</sup> Moreover, because politicians and the museum community continued to disregard the centrality of communal property to the Native Americans' social structure, the repatriation provisions of NMAIA were not

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<sup>104</sup> David Harris, *Respect for the Living and Respect for the Dead: Return of Indian and Other Native American Burial Remains*, 39 J. OF URB. & CONTEMP. L. 195, 206-08 (1991). A 1987 draft of the NMAIA did not advocate reburial or return so the fact that the enacted statute did was a substantial improvement, but the Act did not offer resolution to the question of how to determine cultural affiliation or how to properly dispose of unaffiliated remains, so it still provides many of the advantages to museums. *See id.*

<sup>105</sup> Raines, *supra* note 7, at 651-52. Native Americans supported the National Museum of the American Indian Act. *See id.* As provided for in the NMAIA, a Smithsonian museum was established on the last available space on the National Mall in Washington, D.C., in order to preserve and display the Smithsonian's collection of Native American objects. *See id.* This Act sought to improve the conditions for displaying Native American objects and remains since many have been packed away in the storage facilities of the Smithsonian. *See id.* The museum context was thought to provide the perfect place to appropriately display and educate the public about Native Americans' lives and histories with input directly from Native Americans themselves, including the museum's founding director, a Cheyenne Indian. *See id.* This Act did provide for repatriation of Native American goods and remains but this goal was secondary to the preservation and continuing collection of Native American objects. *See id.* Repatriation was an available option only if it could be proved that the goods belonged to an individual or affiliated with a tribe by a preponderance of the evidence. *See id.* Once again, the burden of proof fell on the Native American tribes to show that the museum did not have any right to the object. *See id.* This was an extremely difficult standard for them to meet due to their lack of financial and cultural resources. *See id.*

<sup>106</sup> Susan Shown Harjo, *Native Peoples' Cultural and Human Rights: An Unfinished Agenda*, 24 ARIZ. ST. L.J. 321, 326 (1992).

<sup>107</sup> Harris, *supra* note 102, at 204. While seemingly amenable to Native American needs the statute lacked the bite to make it enforceable. *Id.* 25 U.S.C. § 80q-9(a)(2) gave the Smithsonian until June 1, 1998, to complete its inventory. *See id.*; *see also* Trope & Echo-Hawk, *supra* note 6, at 57. What is most important about this Act is that it set the stage for the passage of NAGPRA. *See id.* Many provisions found in NMAIA including the mandatory inventory to identify the origin or Native American remains and objects, the prompt notification of tribes, and repatriation upon request of lineal descendants or culturally affiliated tribes, were all incorporated into NAGPRA. *See id.*

undertaken with a sense of urgency.<sup>108</sup>

#### IV. NAGPRA

In 1991, the Native American Graves Protection and Repatriation Act (NAGPRA)<sup>109</sup> became the first piece of legislation to specifically protect and preserve the human remains and sacred objects of Native American tribes.<sup>110</sup> Since then, NAGPRA has been praised as an essential piece of human rights legislation.<sup>111</sup> Further, NAGPRA fulfills the federal-tribal trust relationship by recognizing the validity of the Native American worldview.<sup>112</sup>

First, the Act provides an explicit definition of protected objects and separates these objects into five possible categories.<sup>113</sup> Next, it mandates all federal agencies and museums<sup>114</sup> in possession or control of

<sup>108</sup> Harris, *supra* note 102, at 204.

<sup>109</sup> 25 U.S.C. §§ 3001-3013 (1990).

<sup>110</sup> *Id.* In § 3001(2), the Act specifically sets out the definitions of terms within the Act. Particularly important is the definition of “cultural affiliation” which NAGPRA defines as “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.” *Id.*

<sup>111</sup> *Tsosie Testimony*, *supra* note 1, at 2.

NAGPRA is perceived by many commentators as “human rights legislation” which guarantees “equal rights” to Native American people . . . I do not disagree with this assessment but would like to emphasize the importance of NAGPRA as a statute which explicitly makes reference to tribal cultural knowledge and the role of tribal law and custom in shaping the standards of “ownership” and “cultural affiliation.” In that sense, NAGPRA embodies the federal government’s trust responsibility to ensure Native peoples’ cultural survival by protecting their unique cultures and ways of understanding themselves as the indigenous peoples of this land.

*Id.*

<sup>112</sup> Taylor, *supra* note 25, at January 24, 2001. The unique and distinctive political relationship between the United States and Indian tribes is defined by treaties, statutes, executive orders, judicial decisions, and agreements and differentiates tribes from other entities that deal with, or are affected by, the federal government. *Id.* This relationship has given rise to a special federal trust responsibility, involving the legal responsibilities and obligations of the United States toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. *Id.*

<sup>113</sup> 25 U.S.C. § 3001(3)(A)-(D) (1990) defines the objects encompassed in the Act as “cultural items” which includes “human remains”, “associated funerary objects,” “unassociated funerary objects,” “sacred objects,” “sacred objects,” and “cultural patrimony.” *Id.*

<sup>114</sup> 25 U.S.C. § 3001(4) (1990). NAGPRA defines “federal agency,” “as any department, agency, or instrumentality of the United States. Such term does not include the

Native American human remains or associated funerary objects to conduct an inventory and identify the affiliated tribal owners within five years.<sup>115</sup> Additionally, museums and agencies were required to provide a summary of other holdings that did not fall into these categories.<sup>116</sup> At times this process involved Native American tribes, but when it did not, the statute required the museum or agency to notify the tribe determined to be the rightful owner within six months of the completed inventory.<sup>117</sup> Significantly, the Act encouraged tribes to request repatriation of their ancestors' remains and cultural effects for proper disposition.<sup>118</sup>

To monitor the administration of NAGPRA and promote participation from Native Americans, Congress provided for the establishment of a Review Committee within 120 days of the statute's enactment.<sup>119</sup> In addition, NAGPRA established penalties for recalcitrant museums and federal agencies, and allowed for grants to

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Smithsonian." *Id.* "Museum" is defined as "any institution or state or local government agency (including any institution of higher learning) that receives federal funds and has possession of, or control over, Native American cultural items." *Id.* See also Marsh, *supra* note 11, at 99. While some anthropologists and academics argued against repatriation and saw the statute's definition of museum as a means of limiting their ability to determine how to dispose of Native American objects in the possession of academic museums and research institutions, Congress strongly felt that it was necessary to include them under the act in order to maintain a sense of commonality and equality. *See id.*

<sup>115</sup> 25 U.S.C. §§ 3003-4 (1990); see also Marsh, *supra* note 11, at 97. Attempts to determine the cultural affiliation of human remains were primarily based upon the information already possessed by the museum or federal agency. *See id.* If objects are considered "associated funerary objects" then they were deemed to be owned by the same group determined to own the human remains with which they were found. *See id.* When objects are not found directly with or near human remains, they are assumed to be "unassociated funerary objects." *Id.* These objects must also be included in the inventory compiled by the museum so that Native American tribes know they are in the museum's holdings. *See id.* Pursuing repatriation claims for them requires proof of lineal descent and cultural affiliation. *See id.*

<sup>116</sup> *Id.* These other objects fell under the headings of unassociated funerary objects, sacred objects, or objects of cultural patrimony. *See id.*

<sup>117</sup> *Id.* When a museum or federal agency notifies a Native American tribe that they possess human remains or associated grave goods thought to be the rightful possessions of that tribe, the museum is also required to give the tribe as much information as they have regarding how the museum came to acquire the objects in the first place in an effort to help the tribe verify whether they belong to them. *See id.*

<sup>118</sup> 25 U.S.C. § 3005 (1990).

<sup>119</sup> 25 U.S.C. § 3006 (1990). "The Committee . . . shall be composed of 7 members . . . 3 of whom shall be appointed by the Secretary from nomination submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders." *Id.*

help tribes with repatriation attempts.<sup>120</sup> Lastly, the Act also sets forth the standards for Native Americans to demonstrate ownership of culturally affiliated human remains, funerary objects and unassociated funerary objects.<sup>121</sup>

Upon notification that a museum possesses remains or objects belonging to a specific Native American group, the tribe may request the return of such objects under NAGPRA.<sup>122</sup> The Act provides that these items will be returned quickly as long as Native American claimants establish themselves as lineal descendants.<sup>123</sup> The same standard must be met for the repatriation of unassociated funerary objects, sacred objects and objects of cultural patrimony.<sup>124</sup> Native Americans may still attempt to reclaim undetermined remains or objects repatriated, but this presents a much tougher battle.<sup>125</sup> If a Native American group can show by a preponderance of the evidence that they are culturally affiliated based on a consideration of geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical or other relevant information, they can force a museum to repatriate these remains or objects.

Thus, while NAGPRA attempts to redress past wrongs committed

<sup>120</sup> 25 U.S.C. § 3008 (1990).

<sup>121</sup> 25 U.S.C. §§ 3002(a)(1)-3002(a)(2)(A)-(B) (1990).

The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands . . . shall be (with priority given in the order listed)-(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the native American; or (2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony-(A) in the Indian tribe . . . on whose tribal land such objects or remains were discovered; (B) in the Indian tribe . . . which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects.

*Id.*

<sup>122</sup> 25 U.S.C. § 3005(a)(2) (1990).

<sup>123</sup> Marsh, *supra* note 11, at 98.

<sup>124</sup> *Id.* In some cases this is an extremely difficult burden for Native American tribes to meet because they have few resources with which to pursue such claims both financially and culturally. *See id.* The fact that so many tribes were forced to leave their lands involuntarily during forced assimilation makes it harder for lineal descendants to have the cultural resources in order to prove their affiliation to the goods. *See id.*

<sup>125</sup> 25 U.S.C. § 3001(a)(4) (1990). If a Native American group can show by a preponderance of the evidence that they are culturally affiliated based on a consideration of geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical or other relevant information, they can force a museum to repatriate these remains or objects. *See id.*

against Native Americans, the requirements that must be met prior to repatriation of unidentified remains and objects seems to disfavor Native Americans.<sup>126</sup> Tragically, these criteria tend to deprive Native Americans of their cultural property and the respectful disposition of the remains of their dead. In short, NAGPRA is ineffective in assuring the return of all the remains and objects that rightfully belong to Native American tribes.<sup>127</sup>

#### **V. NAGPRA: Does it Really Reflect a Change in Thinking and Meet its Goals?**

In many respects, the enactment of NAGPRA forecasted a possible resolution to the plight of Native Americans in their efforts to reassert their cultural identities and regain their property.<sup>128</sup> For the first time, legislation considered the Native Americans' views and exhibited a greater sensitivity toward their way of life.<sup>129</sup> NAGPRA acknowledged the Native American concepts of tribal sovereignty and communal property ownership. Further, NAGPRA attempted to reconcile the hardship of proving actual ownership through a perfect chain of title, which was generally a result of the unfair treatment of Native Americans by Western society since the colonialist era.<sup>130</sup>

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<sup>126</sup> Marsh, *supra* note 11, at 98.

<sup>127</sup> *Native American Graves Protection and Repatriation: Hearing on Proposed Final Regulations for Implementation of the Native American Graves Protection and Repatriation Act Before Senate Comm. on Indian Affairs, 95th Cong. 2 (1995)* (statement of Jessie Taken Alive, Chairman of the Standing Rock Sioux Tribe) [hereinafter *Jessie Taken Alive Testimony*].

We therefore wish to state that we have encountered serious problems in our efforts to make the Native American Graves Protection and Repatriation Act do what Congress intended it to do: bring home our relatives, their personal burial belongings, and our items of sacred and cultural patrimony. We are not satisfied with the limited level of input and representation given to tribes throughout the regulatory process.

*Id.*

<sup>128</sup> *Stevens Testimony, supra* note 19, at 2. "Following NAGPRA's enactment, Native Americans rejoiced at the prospect that their lost ancestors and sacred objects would be returned after decades of separation and that their sacred burial sites would now receive some legal protection." *Id.*

<sup>129</sup> Strickland, *supra* note 5, at 181.

<sup>130</sup> *Id.* Ultimately Strickland feels that an understanding and beneficial implementation of NAGPRA comes only through an understanding of Native American cultures. *See id.* "NAGPRA has placed the primary task of factual determination in the Native culture itself. This is consistent with the underlying principles of American jurisprudence because the Native American is, in fact, the only source of accurate and meaningful interpretation of the

Despite these overall improvements, critics claim that NAGPRA places an unfair duty on Native Americans to prove ownership and defend the same cultural beliefs that the West previously attempted to extinguish.<sup>131</sup> Thus, the question remains: How helpful is NAGPRA to Native Americans' plight to regain their cultural property and their dignity in the eyes of the West?

First, Congress recognized Native Americans' right to have their cultural property returned<sup>132</sup> by specifically incorporating indigenous concepts of communal property ownership.<sup>133</sup> Further, NAGPRA expanded many of the central goals of the National Museum of the American Indian Act. For example, NAGPRA required that all federally funded museums and agencies meet its requirements.<sup>134</sup> The Act also amended NMAIA to require the Smithsonian Institution to comply with the same mandates of other federal agencies.<sup>135</sup> Additionally, NAGPRA offered measures, although inadequate, to deal with unaffiliated cultural objects and remains.

Although NAGPRA finally recognized Native American concepts of property ownership that were previously superseded by American property law, many issues remain unsettled.<sup>136</sup> Some of the definitions in the statute are ambiguous, and the interpretation of these terms may give Native Americans broader arguments to prove cultural affiliations to disputed property.<sup>137</sup> Unfortunately, ambiguous language in early

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traditional aspects of Native culture." *Id.*

<sup>131</sup> Marsh, *supra* note 11, at 98.

<sup>132</sup> Blair, *supra* note 52, at 148.

[Indian reclamation attempts are] not a fad so much as a representative facet of the growing interest of American Indians in their own cultural heritage and in their identity as contemporary residents of this country. Museum specimens are not only the physical representations of this heritage and identity, but are also the symbols of the loss of American Indian autonomy and culture by military, legal and demographic processes.

*Id.*

<sup>133</sup> 25 U.S.C. § 3001(13) (1990) states that "'right of possession' means possession obtained with the voluntary consent of an individual or group that had authority of alienation." *Id.*

<sup>134</sup> 25 U.S.C. § 3001(4) (1990).

<sup>135</sup> Harjo, *supra* note 104, at 326.

<sup>136</sup> Raines, *supra* note 7, at 661. In fact, many of the issues courts confronted prior to the passage of NAGPRA still exist and still remain unresolved. *See id.* Although NAGPRA has attempted to put forth more specific and explicit definitions of what it pertains to, vagueness still exists over what types of objects the Act's protections extend to and what groups of people can attempt to prove ownership to what objects. *See id.*

<sup>137</sup> *Id.* Two examples that Raines points towards is the Act's definition of "remains,"

legislation was construed against Native Americans.<sup>138</sup> Thus, these provisions might actually make it easier for museums to assert their right to keep objects already in their possession. The author submits that these statutory terms should be amended or redefined by regulations in order to reconcile and protect the interests of Native American tribes and museums.

In addition, NAGPRA does not provide for the disposition of unidentifiable cultural remains and objects.<sup>139</sup> These items may be unidentifiable for a variety of reasons, but most of them are a direct result of Western domination over Native Americans.<sup>140</sup> Because the West is largely responsible for the destruction of Native American cultures, the Act's "cultural affiliation" requirements should be construed liberally in favor of Native Americans.<sup>141</sup> As the Review Committee suggested in regulations proposed in 1995, the disposition of these remains and objects should be left to Native Americans.<sup>142</sup>

Further, NAGPRA is inapplicable to collections of Native American artifacts held by private museums or private individuals, whether acquired through proper or improper channels.<sup>143</sup>

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which may or may not include partially decomposed remains, and the Act's requirement of "shared group identity" or "reasonable relationship," which leaves much room for debate over what type of relationship would suffice to prove this tie to the disputed objects. *See id.* In short, while NAGPRA has cleared up some thorny issues, it is also vague in some areas and has left the door open for much argument and varying interpretations. *See id.*

<sup>138</sup> *Id.* "A better definition would include the kinds of evidence that are sufficient. It might require a showing of tribal papers, museum documents, oral testimony, and such evidence must show, for example, blood relation, religious connection, or tribal orientation." *Id.*

<sup>139</sup> *See generally Tsosie Testimony, supra* note 1.

<sup>140</sup> *Id.* In her testimony, Tsosie notes that the remains or objects may be unidentifiable because museums removed them from the battlefields during colonization or because Western civilization brought about the extinction of a particular tribe. *See id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 3.

The Committee recommended that the ultimate decision about disposition of such remains 'should rest in the hands of Native Americans,' although non-Natives could have input in the process. The Committee acknowledged that the scientific and other values asserted by various interest groups could not supersede the 'spiritual and cultural concerns of Native American people' who had the closest general affiliation to Native American remains. *Id.*

<sup>143</sup> DuBoff, *supra* note 20, at 53. In addition to not making it illegal for private museums or collectors to possess Native American artifacts, NAGPRA more tragically does not provide offer them any encouragement to turn over such objects to their rightful owners on their own volition. *See id.*

Consequently, the authority and sincerity of NAGPRA is greatly undercut. The Act should apply to all collectors and institutions in order to fulfill its legislative intent returning cultural and religious objects to Native American tribes. Although this extension of NAGPRA might create enforcement problems and strain already inadequate funding, such changes in the law should be discussed. For example, more severe criminal and civil penalties should be considered. Greater penalties for illegally acquiring and possessing objects in contravention of Native American beliefs might help to resolve this situation.<sup>144</sup>

More than a decade after its enactment, NAGPRA does not seem to fulfill all of its intended goals, especially from the perspective of Native Americans.<sup>145</sup> The tension that began with the advent of colonialism between the federal government, Native Americans, and museums still exists today.<sup>146</sup> While NAGPRA has led to successful repatriation claims, Native Americans feel that the Act has not restored tribal sovereignty. In short, Native Americans still yield to interests that do not reflect their beliefs.<sup>147</sup>

## V. Conclusion

NAGPRA was enacted in part because legislators heard the collective political voices of Native Americans and sought to effectuate change. However, after Congress passed NAGPRA, which was first hailed as a triumph in human rights advocacy,<sup>148</sup> the burden of

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<sup>144</sup> Harjo, *supra* note 104, at 326. Harjo suggests that one provision of NAGPRA that needs more strengthening is the provision dealing with the prohibition of interstate trafficking. *Id.* She argues that the provision needs more bite if it is to make any sort of a dent in the ever-growing underground black-market for Native American collectibles. *Id.*

<sup>145</sup> *Stevens Testimony*, *supra* note 19, at 2. “[U]nless those involved in the process maximize the law’s mandates and potentials, NAGPRA cannot continue to remedy the problems it was intended to address.” *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Native American Graves Protection: Oversight Hearing on the National Implementation of the Native American Graves Protection and Repatriation Act Before the Senate Comm. on Indian Affairs*, 101st Cong. 3 (1999) (statement of Tex G. Hall, Chairman, Three Affiliated Tribes, Mandad, Hidatsa & Arikara Nation Fort Berthold Reservation & Chairman, Aberdeen Area Tribal Chairmen’s Association). “We do not want anyone but our own Nations deciding the fate of our ancestors. We have already made too many compromises; we do not wish to make them anymore. It’s someone else’s turn to compromise.” *Id.*

<sup>148</sup> Strickland, *supra* note 5, at 178 n.13. Congressman Morris Udall has stated about NAGPRA that it “addresses our civility, and our common decency . . . In the larger scope of



promoting indigenous cultures through preservation and repatriation of cultural items fell upon Native Americans themselves.<sup>149</sup> Ultimately, Native American tribes have the responsibility of successfully implementing NAGPRA.<sup>150</sup>

However, NAGPRA gives tribes minimal power to act on this responsibility.<sup>151</sup> Since Congress constructed NAGPRA around traditional Native American concepts, it must now treat Native American tribes as sovereign entities. Congress should, through legislative efforts, give Native Americans greater means to implement and enforce their requests for repatriation. As survivors of colonialism, assimilation and ineffective legislation, Native American peoples should be granted additional power to effectively administer NAGPRA.<sup>152</sup>

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history, this is a small thing. In the smaller scope of conscience, it may be the biggest thing we have ever done." *Id.*

<sup>149</sup> *Id.* at 179.

The conscience spotlight of conscience and the duty of advocacy has now shifted from Congress, museums, collectors, and the scientific community back to Native peoples and the Indian community. The human rights of Alaska Native, Indian peoples, and Native Hawaiians are now, under the terms of NAGPRA, back in their own hands. The passage of the legislation, even in the compromised and modified consensus form, brought an end to a long, bitter debate and was a great victory. With victory comes responsibility, and that responsibility is to construct a system of law within the structure of Native tribal governments, courts, and legislative powers that will help all citizens fulfill the mandate of NAGPRA. It would, indeed, be a tragedy if the Native community failed in its task. NAGPRA is not self-actuating, but mandates Native group action if its purposes are to be fulfilled.

*Id.*

<sup>150</sup> *Jessie Taken Alive Testimony, supra* note 124, at 3.

NAGPRA, if nothing else, is a series of compromises between Native nations and the science and museum industries, but it was also created as a mechanism to initiate sorely-needed dialogue between Indian country and these industries. If our participation in the dialogue is limited to living with final regulations which have been primarily shaped by federally-employed members of these communities, then nothing will have changed, and NAGPRA's original intent of creating bridges will have failed.

*Id.* Thus, this duty seems to be one that Native Americans are willing to embrace. *See id.*

<sup>151</sup> Strickland, *supra* note 5, at 189.

<sup>152</sup> *Id.* at 190.