

# INSIDERS AND OUTSIDERS: THE CASE FOR ALASKA RECLAIMING ITS CULTURAL PROPERTY

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## ABSTRACT

*Because of the historically troubling treatment of American Indians by the United States government, the nation's native populations have been largely unable to control their cultural identities. Cultural property laws provide a framework for transferring stolen art and cultural objects to their native owners in an attempt to return cultural sovereignty to native communities. Despite Alaska's large and thriving native population, Alaska Natives have trailed behind other states' native populations in asserting their cultural property rights. This Note considers the current cultural property framework and its evolution in an effort to understand why Alaska Natives are not seeking return of their cultural objects to the same extent as other native groups.*

## INTRODUCTION

Years of oppression and unfair treaties have strained American Indians' relationship with the United States government<sup>1</sup> and have hampered their ability to control their cultural identities. Since the arrival of Europeans in the United States, settlers have taken land,

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1. See generally Rosita Worl, *The First Peoples of Alaska: A Path to Self-Determination*, in *LIVING OUR CULTURES, SHARING OUR HERITAGE: THE FIRST PEOPLES OF ALASKA* 36, 36-38 (Aron L. Crowell et al. eds., 2010) (discussing the federal government's taking of indigenous land in 1867 and the following treatment of the native community); Lisa M. Poupart, *The Familiar Face of Genocide: Internalized Oppression Among American Indians*, *HYPATIA*, Spring 2003, at 86, 87-97 (discussing the American Indian experience of colonization); Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation*, 25 *J. LAND RESOURCES & ENVTL. L.* 259, 259 (2005) (citing Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Disclosure of Treaty Rights*, 47 *UCLA L. REV.* 1615, 1662 (2000) (comparing massacres of American Indians to enslaved Africans and Jews during the Holocaust)).

cultural objects, funerary remains, and other tangible objects from their original American Indian owners. With these objects went American Indians' cultural sovereignty and freedom to tell their stories through art and cultural objects. In many cases, objects acquired by European settlers have been displayed in museums beyond the control of American Indian audiences, thereby excluding American Indian perspectives.<sup>2</sup>

Alaska Natives endured maltreatment along with their mainland counterparts.<sup>3</sup> Alaska Native art and cultural objects were taken from their creators.<sup>4</sup> For centuries, Alaska Native artists have created carvings, baskets, dolls, drums, prints, etchings, and other art forms to express religious and cultural identity.<sup>5</sup> A number of materials used, such as flexible jaw material from baleen whales and Alaskan mammal furs, are not only visually appealing but also important from educational and art historical perspectives.<sup>6</sup> Objects made from these materials reveal much about the history of Alaska Native groups and their traditional lifestyles and cultures.<sup>7</sup> Techniques employed by Alaska Native artists, such as serigraphy<sup>8</sup> and relief carving, are central to both art history and education.<sup>9</sup>

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2. Cf. Douglas Cole, *Tricks of the Trade: Some Reflections on Anthropological Collecting*, 28 ARCTIC ANTHROPOLOGY 48, 50 (1991) (describing how museums are largely a western invention and that few museums have "collected objects from Natives for Native viewing").

3. See Worl, *supra* note 1, at 36 (discussing the federal government's taking of indigenous land in 1867 and the treatment of the native community afterwards).

4. Cf. Rosita Worl, *The Treaty of NAGPRA and Religious Renewal*, An Address to Keepers of the Treasures - Alaska, ARCTIC STUDIES CENTER, <http://www.mnh.si.edu/arctic/html/repatrw.html> (last visited Mar. 29, 2012) (speaking as an Alaska Native and anthropologist about the Native American Graves Protection and Repatriation Act and noting "[t]he assaults on Native cultures, including the removal of cultural and sacred objects, have been extensive and continuous").

5. ALASKA STATE COUNCIL ON THE ARTS, ALASKA NATIVE ART (2007), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro05.pdf>.

6. See *id.* (discussing art forms employed by Alaska Native artists).

7. See *id.* The term "object" is used throughout this Note to collectively refer to the wide variety of American Indian funerary remains and cultural items. I do not intend to infer that these treasures are mere "objects" or aesthetic goods devoid of cultural or religious significance. Rather, I use the term for ease of discussing an otherwise diverse body of religious, spiritual, and cultural works, recognizing them to be more than mere "objects" to their respective cultures.

8. A silk-screening process.

9. See ALASKA STATE COUNCIL ON THE ARTS, *supra* note 5.

Modern cultural property laws were enacted in part to celebrate American Indians' unique art forms and their respective cultures<sup>10</sup> as well as to compensate native communities for past injustices.<sup>11</sup> Cultural property laws also give native communities a means of regaining control over their cultural property and cultural identities.<sup>12</sup> Unlike some native tribes in the contiguous states, Alaska Natives have not taken advantage of these laws to their full potential. Only a small number of Alaska Natives have sought recovery of stolen art, and those that have done so hail primarily from the largest Alaska Native cultures.

Now more than ever, considering Alaska Natives' position in the cultural property discourse is critical. Legislation in 1990 ushered in a modern cultural property framework,<sup>13</sup> but this area of law remains largely unsettled and many issues have not yet been addressed. The national attention focused on American Indian cultural property laws has increased since the 1970s, and this area is likely to become more important in coming years. Although Alaska has a large and thriving native population, Alaska Natives have been relatively silent in this discourse. Alaska Natives' silence may limit their ability to control their cultural destiny into the future, and it suggests problems inherent in the current legal framework. The current cultural property regime does not treat all native groups equally; while American Indians as a group are generally viewed as "outsiders" to the cultural property discourse, some native groups are further limited in their ability to use the laws.

This Note considers the evolution and current status of cultural property law. It also considers why Alaska Natives are not as active as some other native groups in asserting cultural property rights. Part I gives an overview of American Indian cultural property's position in the larger cultural property discourse. Part II discusses the development of American Indian cultural property rights with an overview of the relevant statutes. Part III describes the complexity surrounding NAGPRA, the most important law pertaining to American Indian cultural property. Part IV discusses Alaska Natives limited utilization of NAGPRA and the importance of Alaska Native cultural property. Part V considers possible explanations for Alaska's relative silence in the

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10. See *infra* notes 91–93 and accompanying text (describing the objectives of the Native American Graves Protection and Repatriation Act).

11. See Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 739 (1997) (explaining repatriation as a form of collective compensation for past losses).

12. See *infra* notes 91–113 and accompanying text (explaining the availability of repatriation under the Native American Graves Protection and Repatriation Act).

13. See 25 U.S.C. § 3001 (2012).

cultural property discourse. Part VI considers affirmative steps Alaska Natives could take to assert cultural property rights.

### I. AMERICAN INDIAN ART IN CULTURAL PROPERTY LEGAL DISCOURSE

Before considering the relationship between American cultural property law and Alaska Native art, this Note considers the placement of American Indian art within cultural property law more generally. Although terms such as “cultural property” and “repatriation” can be defined broadly enough to encompass American Indian art, an inspection of key definitions reveals that American Indian art was not initially included within the protected class of cultural property.

*Black’s Law Dictionary*, which places cultural property within the category of international law, defines “cultural property” as:

Movable and immovable property that has cultural significance, whether in the nature of antiquities and monuments of a classical age or important modern items of fine arts, decorative arts, and architecture. Some writers prefer the term *cultural heritage*, which more broadly includes intangible cultural things such as folklore, crafts, and skills.<sup>14</sup>

The definition’s first clause, “moveable and immovable property that has cultural significance,”<sup>15</sup> delineates art protected by cultural property laws from art beyond protection. The criterion for protection is “cultural significance,”<sup>16</sup> requiring courts to judge art’s importance. This contrasts with other American legal traditions that aspire to view art forms as equal.<sup>17</sup> Copyright law, for example, theoretically applies to all art fixed in a tangible medium of expression so long as the art meets a threshold originality requirement.<sup>18</sup> Judges are not meant to inquire into the underlying value of the art.<sup>19</sup>

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14. BLACK’S LAW DICTIONARY 436 (9th ed. 2009).

15. *Id.*

16. *Id.*

17. *See, e.g.*, The Copyright Act § 102, 17 U.S.C. § 102 (2012) (laying the foundation for copyright law, which advocates against aesthetic discrimination).

18. *Id.*; *see, e.g.*, *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (holding copyright should be considered without inquiring into the subjective novelty of a work of expression).

19. *Bleistein*, 188 U.S. at 251–52. An argument can be made that the Visual Artists Rights Act (VARA) changed this baseline assumption. *See* 17 U.S.C. § 106A (2012). Although judges continue to struggle with VARA’s reach and other moral rights elements that have been inserted into U.S. law, a strong argument can be made that the American legal community does not intend to impose

The cultural property definition also gives examples of protected art forms, listing “antiquities and monuments of a classical age or important modern items of fine arts, decorative arts, and architecture.”<sup>20</sup> Using the phrase “classical age” suggests a traditional American legal view of defining what cultural property is important historically. By including “important modern works,”<sup>21</sup> the definition reinforces the burden of judging a work’s importance. Significantly, the definition places cultural property law squarely into the category of international law, reflecting a traditional view that foreign objects are more highly valued from a cultural property perspective than those created locally.

Because this Note focuses on cultural property in the context of American Indian and Alaska Native art and objects, an additional term must be considered. Repatriation is central to the American Indian cultural property discourse,<sup>22</sup> and returning objects represents a tangible means of gauging which objects American law deems central enough to outside societies’ cultures to be completely returned. *Black’s Law Dictionary* does not provide a definition for “repatriation,” suggesting this area of law may not yet be central in American legal discourse. The National Museum of the American Indian, a branch of the Smithsonian Institution,<sup>23</sup> defines “repatriation” as:

[T]he process whereby specific kinds of American Indian cultural items in a museum collection are returned to lineal descendants and culturally affiliated Indian tribes, Alaska Native clans or villages, and/or Native Hawaiian organizations. Human remains, funerary objects, sacred objects, and objects of cultural patrimony are all materials that may be considered for repatriation.<sup>24</sup>

“Human remains, funerary objects, sacred objects, and objects of cultural patrimony”<sup>25</sup> are terms that are not self-defining.<sup>26</sup> Moreover, American

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outright requirements of artistic significance or importance as a prerequisite to such protection.

20. BLACK’S LAW DICTIONARY 436 (9th ed. 2009).

21. *Id.*

22. Harding, *supra* note 11, at 723–27 (discussing the increased role of repatriation in the protection of American Indian art and its legal justification).

23. *Repatriation*, NATIONAL MUSEUM OF THE AMERICAN INDIAN, <http://americanindian.si.edu/subpage.cfm?subpage=collections&second=collections&third=repatriation> (last visited Feb. 18, 2012). As a museum with a significant American Indian collection that is central to developing American Indian voices in cultural depictions, the National Museum of the American Indian has an acute interest in representing this issue fairly and accurately.

24. *Id.*

25. *Id.*

26. *See id.*

Indian religions vary significantly,<sup>27</sup> and no single definition will adequately protect every unique culture or religious belief.

Beyond definitions, American Indian cultural property is often in the shadow of international cultural property in the art law discourse. Discussions of art law elites have often overlooked American Indian art, at least historically, and focused on issues surrounding antiquities and Nazi-era art thefts.<sup>28</sup> Much of the American legal community remains preoccupied with works created and often sold beyond U.S. borders. The website of the American Bar Association Committee on Art and Cultural Heritage Law<sup>29</sup> lists as topics recently considered: “1970 UNESCO Convention and international trade in antiquities, underwater cultural heritage, art works stolen during the Holocaust, ratification of the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, and the impact of war on the cultural heritage of Iraq.”<sup>30</sup> American Indian art is not addressed.<sup>31</sup> In the United States and abroad, the art law community’s preoccupation with international cultural property issues may explain why American Indian art has been slow to receive protection. While European and Middle Eastern artists are “insiders” from the perspective of the cultural property community, American Indian artists were slow to receive protection even on a domestic scale.

## II. THE DEVELOPMENT OF AMERICAN INDIAN CULTURAL PROPERTY RIGHTS

The United States legal tradition has not protected American Indian art until relatively recently. The slow pace at which American Indians were able to gain cultural sovereignty over their cultural works demonstrates American Indians’ outsider status in the cultural property sphere. After the oppression faced by American Indians at the hand of

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27. See ÅKE HULTKRANTZ, *THE RELIGIONS OF THE AMERICAN INDIANS* 3 (1979) (writing that American Indian religions only “constitute a unity” from a “superficial perspective” and giving examples of different native belief systems).

28. See, e.g., *ILLICIT CULTURAL PROPERTY: A WEBLOG ABOUT ART, ANTIQUITIES AND THE LAW*, <http://illicit-cultural-property.blogspot.com> (last visited Feb. 18, 2012) (discussing primarily works of international origin and not addressing works created in the United States).

29. The committee is composed of attorneys with a special interest in “the field of art, cultural heritage, and cultural property” and the representatives include many prominent lawyers experienced in private practice, museums, government, and academia. *Art and Cultural Heritage Committee*, AMERICAN BAR ASSOCIATION, <http://apps.americanbar.org/dch/committee.cfm?com=IC936000> (last visited Feb. 18, 2012).

30. *Id.*

31. *Id.*

the United States government, laws partially benefiting injured tribes began to emerge in the 1930s.<sup>32</sup> Laws addressing American Indian cultural property were, in large part, drafted by those outside the native community, and groups and tribes within the American Indian umbrella were protected differently. The development of American Indian cultural property and repatriation laws can be divided into a number of periods based on the reasoning behind the laws' enactments.<sup>33</sup>

### A. Precursors to "Modern" American Indian Cultural Property Laws

As a general trend, early laws implicating American Indian art focused primarily on cultural objects' archaeological or economic significance on a national scale. The laws did not attempt to expand American Indians' property rights in their own works. Efforts to protect American Indian art, even early efforts, reveal gaps in protection present in the current framework and partially expose the unique position of Alaska Natives.

The 1906 Antiquities Act was the first significant American law involving cultural property protection.<sup>34</sup> The Antiquities Act authorizes the President to protect historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest located on federally owned land as national monuments.<sup>35</sup> The Fifth Circuit Court of Appeals perceived the Act's purpose as facilitating preservation of historically significant objects.<sup>36</sup> The Ninth Circuit Court of Appeals held that the Antiquities Act was enacted to promote the public interest in protecting American Indian land.<sup>37</sup> The court stressed the need to protect American Indian sacred places against "commercial plundering" to encourage "respect for the culture and heritage of [N]ative

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32. See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 817 (10th Cir. 1999) (stating that government attitudes towards American Indians began to change in the 1930s and laws in the last sixty-five years have "valued and protected tribal governments and cultures").

33. The periods discussed in this Note are grouped by the justifications and reasoning behind the laws, not necessarily in terms of chronological passage.

34. Yasaitis, *supra* note 1, at 264-65.

35. Barbara J. Van Arsdale, *Validity, Construction, and Application of Antiquities Act of 1906*, 16 U.S.C.A. §§ 431 *et seq.*, 11 A.L.R. FED. 2D 623 (2006); see also *Utah Ass'n of Cnty. v. Bush*, 316 F. Supp. 2d 1172, 1198-99 (D. Utah 2004) (stressing the President's discretion in establishing national monuments, but holding that the Antiquities Act does not violate the nondelegation doctrine or the Constitution's Property Clause because it contains clear standards and limitations such as the limitation on monument size).

36. *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 341 (5th Cir. 1978).

37. *United States v. Diaz*, 499 F.2d 113, 114 (9th Cir. 1974).

Americans.”<sup>38</sup> Nevertheless, the Antiquities Act reinforces the historical notion of American Indians as objects of study and protects archaeological resources for this purpose.<sup>39</sup>

The 1935 Historic Sites Act requires federal agency heads to consider the effect of actions on sites listed in the National Register of Historic Places.<sup>40</sup> The Historic Sites Act now allows protection of some American Indian sacred sites by providing that “properties of traditional religious and cultural importance to an Indian tribe” may be eligible for inclusion on the Register.<sup>41</sup> These protections were political when enacted, supporting President Roosevelt’s westward expansion goals and protecting American Indian objects as natural resources and subjects of scientific study.<sup>42</sup> Thus, protection is based on the federal government’s determination of the site’s significance and not upon any positive right of native tribes to protect their property.<sup>43</sup>

The 1960 Reservoir Salvage Act protects “historical and archaeological data (including relics and specimens)” that might be destroyed in dam construction projects.<sup>44</sup> This law protects only sites of “exceptional significance,”<sup>45</sup> and it has overlooked most American Indian sites because they were not the focus of larger federal government protection efforts.<sup>46</sup>

Between 1966 and 1977, Congress passed additional historic preservation acts, including the National Historic Preservation Act,<sup>47</sup> the National Environmental Policy Act,<sup>48</sup> and the Surface Mining Control and Reclamation Act.<sup>49</sup> Importantly, although these acts seek to protect historic and archaeological sites, they do not address American Indian rights in any significant way.<sup>50</sup>

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38. *Id.*

39. See Yasaitis, *supra* note 1, at 264.

40. 16 U.S.C. § 462 (2012).

41. Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 329 (2008) (citing 16 U.S.C. § 470a-f (Westlaw 2008)).

42. Yasaitis, *supra* note 1, at 262.

43. See 16 U.S.C. § 470 (2012).

44. *Id.* § 469.

45. KATHLEEN SUE FINE-DARE, GRAVE INJUSTICE: THE AMERICAN INDIAN REPATRIATION MOVEMENT AND NAGPRA 71 (2002) (“Only sites of ‘exceptional significance’ were to be preserved . . .”); Yasaitis, *supra* note 1, at 264.

46. See Yasaitis, *supra* note 1, at 264 & n.47 (“[T]he Reservoir Salvage Act did very little to protect Native American sites.” (citing MARCUS H. PRICE III, DISPUTING THE DEAD: U.S. LAW ON ABORIGINAL REMAINS AND GRAVE GOODS 26 (1994))).

47. 16 U.S.C. § 470.

48. 42 U.S.C. § 4321 (2012).

49. 30 U.S.C. § 1201 (2012).

50. Yasaitis, *supra* note 1, at 264.



The Archaeological Resources Protection Act (ARPA) of 1979 was enacted to support the preservation of resources with scientific value<sup>51</sup> and to discourage the lucrative business of illegally trafficking American Indian artifacts.<sup>52</sup> ARPA gives the federal government flexibility to preserve and protect irreplaceable archeological resources.<sup>53</sup> To protect American Indian resources, the Act attempts to increase cooperation between government officials, the archaeological community, and private parties.<sup>54</sup> Under ARPA:

No person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit . . . . No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated or removed from public lands or Indian lands in violation of . . . Federal law. . . . No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any . . . State or local law.<sup>55</sup>

One potential issue for tribes relying on ARPA to protect treasures may be their age; ARPA defines “archaeological resource” as “material remains of past human life or activities” and limits the Act’s reach to remains at least one hundred years old.<sup>56</sup> Although many other areas of confusion have been settled through litigation, confusion persists on issues such as mens rea and sentencing.<sup>57</sup> Another area of uncertainty is the Act’s breadth. While courts applying the Act may focus efforts on capturing professional looters, the Act’s application to people who inadvertently stumble upon artifacts and pick them up remains uncertain.<sup>58</sup>

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51. See 16 U.S.C. § 470aa(b).

52. See Jay M. Zitter, *Validity, Construction, and Operation of Archaeological Resources Protection Act of 1979*, 16 U.S.C.A. §§ 470aa to 470mm, 184 A.L.R. FED. 139 (2003) (summarizing the Act’s aims).

53. See 16 U.S.C. § 470aa; Roberto Iraola, *The Archaeological Resources Protection Act – Twenty Five Years Later*, 42 DUQ. L. REV. 221, 222–24 (2004).

54. Iraola, *supra* note 53, at 222–23.

55. 16 U.S.C. § 470ee.

56. *Id.* § 470bb(1).

57. See Iraola, *supra* note 53, at 231–44 (discussing mens rea and sentencing issues presented by ARPA).

58. See *id.* at 257 (categorizing the view of ARPA’s reach only to professional looters and not to inadvertent looters as only a “trend”).

The first laws to consider American Indian perspectives, albeit in a limited manner, were the 1992 Amendments to the Historic Preservation Act (NHPA).<sup>59</sup> The amended NHPA requires every federal agency to establish a historic preservation program<sup>60</sup> and consult with American Indian tribes affected by federal undertakings.<sup>61</sup> However, the amended NHPA places the burden of proving cultural affiliation on native tribes, thereby excluding many critical voices in these debates.<sup>62</sup> As will be discussed with respect to later legislation, the trend of requiring tribal representatives to prove cultural affiliation is one that persists in the current cultural property framework.<sup>63</sup>

These laws represent the first federal foray into protecting American Indian cultural property. Early laws focused primarily on furthering external governmental goals or exploiting American Indian cultural property for federal needs. While tribes sometimes benefitted from these laws, they did little to increase American Indian ownership rights or cultural sovereignty.

## **B. Working Towards “Modern” Cultural Property Legislation**

Beginning in the 1980s, a new paradigm of cultural property legislation emerged. Legislators increasingly focused on American Indian concerns and their claims to cultural property. However, while federal recognition of American Indian property rights evolved significantly in this period, the laws reflect a uniform approach for all American Indians. This blanket approach overlooks the religious and cultural interests of Alaska Natives that differ from their mainland counterparts.

The 1989 National Museum of the American Indian Act (NMAIA) was the first law to successfully address the disposition and return of stolen American Indian objects.<sup>64</sup> Although the NMAIA applies only to the Smithsonian Institution, it “requires the inventory, documentation, and in certain instances and upon request, repatriation of Native American human remains and funerary objects to the culturally affiliated and federally recognized Native American tribe.”<sup>65</sup> The NMAIA also established a museum with the primary purpose of

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59. See Yasaitis, *supra* note 1, at 264–65.

60. 16 U.S.C. § 470.

61. Yasaitis, *supra* note 1, 264–65.

62. *Id.* at 265.

63. See *infra* notes 108–113 and accompanying text.

64. Yasaitis, *supra* note 1, at 264.

65. *Id.* at 265; see also 20 U.S.C. § 80q-9 (2012).

preserving and studying American Indian history and artifacts.<sup>66</sup> The National Museum of the American Indian integrated American Indian perspectives into representations of their cultures.<sup>67</sup> The NMAIA also laid the foundation for an ongoing dialogue between museums and American Indian leaders.<sup>68</sup>

The 1990 Indian Arts and Crafts Act created an Indian Arts and Crafts Board,<sup>69</sup> established to promote “the development of American Indian and Alaska Native arts and crafts, improving the economic status of members of Federally-recognized tribes, and helping to develop and expand marketing opportunities for arts and crafts produced by American Indians and Alaska Natives.”<sup>70</sup> This law, however, focuses on economic rather than cultural property rights;<sup>71</sup> it aims at eliminating the \$800 million industry of importing counterfeit American Indian objects.<sup>72</sup> The Act protects tribes’ economic interests by making it a federal felony to “falsely suggest” handmade goods are American Indian-made if they are not.<sup>73</sup> Only artisans certified by a federally or state-recognized tribe are protected under the Act.<sup>74</sup> Although establishing protection by tribal affiliation may be reasonable from an enforcement perspective, enforcement is not straightforward due to variations in American Indian enrollment criteria, which tribes define independently.<sup>75</sup>

A potentially significant step towards international recognition of American Indian cultural property rights was the 1993 Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous

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66. 20 U.S.C. § 80q-1; Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL’Y REV. 95, 106 n.67 (1998).

67. See Patricia Pierce Erikson, *Decolonizing the “Nation’s Attic,”* in THE NATIONAL MUSEUM OF THE AMERICAN INDIAN: CRITICAL CONVERSATIONS 43, 63 (Amy Lonetree & Amanda J. Cobb eds., 2008) (discussing how the National Museum of the American Indian integrated American Indian perspectives by including American Indians on the museum’s governing body).

68. Miranda J. Brady, *A Dialogic Response to the Problematized Past: The National Museum of the American Indian*, in CONTESTING KNOWLEDGE: MUSEUMS & INDIGENOUS PERSPECTIVES 133, 133–34 (Susan Sleeper-Smith ed., 2009).

69. 25 U.S.C. § 305 (2012).

70. Indian Arts and Crafts Board, 61 Fed. Reg. 54,551, 54,551–52 (Oct. 21, 1996).

71. See *id.*

72. William J. Hapiuk, Jr., *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009, 1010 (2001).

73. *Id.* at 1009.

74. *Id.* at 1012.

75. *Id.*

Peoples.<sup>76</sup> The nine tribes of Mataatua in the Bay of Plenty Region of Aotearoa, New Zealand convened the First International Conference on the Cultural and Intellectual Property Rights of Indigenous People and wrote a declaration.<sup>77</sup> Indigenous representatives from fourteen countries, including the United States, met to discuss issues such as the value of indigenous knowledge, biodiversity, arts, music, language, and other spiritual and cultural forms.<sup>78</sup> The declaration acknowledged that “Indigenous Peoples have a commonality of experiences relating to the exploitation of their cultural and intellectual property”<sup>79</sup> and set a potential framework for an internationally unified native front in support of repatriation. The representatives stressed that “the first beneficiaries of indigenous knowledge (cultural and intellectual property rights) must be the direct indigenous descendants of such knowledge.”<sup>80</sup> The declaration also emphasized that “existing protection mechanisms are insufficient for the protection of Indigenous Peoples Intellectual and Cultural Property Rights” and called for countries to “[a]dopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices.”<sup>81</sup> This declaration did not focus on the religious or economic significance of American Indian objects.<sup>82</sup> Instead, the text suggests a moral rights philosophy at the declaration’s core,<sup>83</sup> which may impose significant hurdles should the U.S. attempt to implement the declaration’s recommendations into its existing legal framework.<sup>84</sup> Regardless, the

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76. See *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, ALASKA NATIVE KNOWLEDGE NETWORK (June 1993), <http://www.ankn.uaf.edu/IKS/mataatua.html>.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. See *id.*

83. Although the declaration’s text does not outwardly espouse a moral rights basis, the text suggests this type of philosophy may lurk in the background. See *id.* (emphasizing the “fundamental rights” of indigenous peoples to “control” traditional knowledge and stressing that “indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge,” thereby suggesting these rights as inherent to the artists).

84. The United States has never adopted a moral rights justification underlying intellectual property rights. MARSHALL A. LEAFFER, *UNDERSTANDING COPYRIGHT LAW* § 8.29[A], at 389 (5th ed. 2005). This Note does not argue that reconciling the Mataatua Declaration’s philosophical underpinnings and the American legal framework is impossible, only that it may pose a potential obstacle if implementation is considered seriously.

declaration may play an important role in shaping American Indian tribal attitudes about their ownership rights.

In addition to the enumerated laws, the federal government has implemented committees and agencies to address issues pertaining to American Indian cultural property over the last few decades. For example, the Cultural Heritage Center, a branch of the U.S. Department of State, “supports the foreign affairs functions of the U.S. Department of State related to the protection and preservation of cultural heritage.”<sup>85</sup> This branch administers American responsibilities relating to the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.<sup>86</sup> It also administers the U.S. Ambassadors Fund for Cultural Preservation, the Iraq Cultural Heritage Initiative, and special cultural heritage programs.<sup>87</sup> This branch does not focus solely or even primarily on American Indian issues.

American Indian cultural protection was first grounded in federal economic concerns over American Indian resources. While early laws did not significantly address American Indian protection of their own cultural property, later laws have focused on the religious need of tribes to control their cultural property. This requires the government to decide what is spiritually important to a vastly diverse group. Alaska Natives may be especially disadvantaged because their religions and cultures differ significantly from mainland tribes. This problem persists in today’s most important laws concerning American Indian cultural property.

### C. “Modern” Cultural Property Legislation

American Indians’ current cultural property rights are grounded primarily in two laws. The significant changes in the treatment of cultural property and repatriation embodied in these laws grew in large part from changing political views of American Indians. These laws represent a substantial shift from laws grounded in economic or religious concerns.

#### *1. Migratory Bird Treaty Act*

The Migratory Bird Treaty Act (MBTA) is a law central to many current cultural property claims. MBTA makes it:

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85. *Cultural Heritage Center*, U.S. DEPARTMENT OF STATE, BUREAU OF EDUC. AND CULTURAL AFF., <http://exchanges.state.gov/heritage/index.html> (last visited Jan. 23, 2012).

86. *Id.*

87. *Id.*

[U]nlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof . . . .<sup>88</sup>

In protecting migratory birds, MBTA implements treaties between the United States and several foreign countries.<sup>89</sup> Under MBTA, migratory birds cannot be killed without the Secretary of the Interior's authorization.<sup>90</sup> Tribes can employ MBTA when objects they hope to repatriate contain feathers or portions of migratory birds. However, this law extends only to those tribes and artists using feathers and birds as part of their religious, artistic, and cultural expression.

## 2. *Native American Graves Protection and Repatriation Act*

The Native American Graves Protection and Repatriation Act (NAGPRA) of 1990<sup>91</sup> is the most important current law pertaining to American Indian cultural property.<sup>92</sup> Congress enacted NAGPRA to achieve two principal objectives: "to protect American Indian human remains, funerary objects, sacred objects, and objects of cultural patrimony presently on Federal or tribal lands; and to repatriate Native American human remains, associated funerary objects, sacred objects, and objects of cultural patrimony currently held or controlled by Federal agencies and museums."<sup>93</sup> Those approving NAGPRA were acutely aware of its impact on museums. Speaking before the Senate on October 26, 1990, Senator John McCain, co-chair of the Senate Select Committee on Indian Affairs, urged his colleagues to pass NAGPRA, saying, "The passage of this legislation marks the end of a long process for many

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88. 16 U.S.C. § 703(a) (2012).

89. James Lockhart, *Validity, Construction, and Application of Migratory Bird Treaty Act*, 16 U.S.C.A. §§ 703 to 712, and its Implementing Regulations, 3 A.L.R. FED. 2D 465 (2005).

90. 16 U.S.C. § 703(a); Larry Martin Corcoran, *Migratory Bird Treaty Act: Strict Criminal Liability for Non-Hunting, Human Caused Bird Deaths*, 77 DENV. U. L. REV. 315, 315-16 (1999).

91. 25 U.S.C. § 3001 (2012).

92. Harding, *supra* note 11, at 728.

93. *United States v. Corrow*, 119 F.3d 796, 799-800 (10th Cir. 1997) (citing H.R. REP. NO. 101-877 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4368-69).

Indian tribes and museums. The subject of repatriation is charged with high emotions in both the Native American community and the museum community. I believe this bill represents a true compromise.”<sup>94</sup>

NAGPRA is the source of the majority of American Indian cultural property claims because it is the only true American Indian cultural property rights legislation to date.<sup>95</sup> It establishes the only mechanism for cultural property repatriation.<sup>96</sup> Upon enactment, NAGPRA represented a startling policy shift—American Indian tribes were, for the first time, able to bring legitimate claims for the return of objects long housed in museum collections.<sup>97</sup> NAGPRA was justified by the constitutionally recognized tribal sovereignty of American Indian tribes and growing recognition of the “government-to-government” relationship between the federal government and tribes.<sup>98</sup>

NAGPRA protects human remains, funerary objects, sacred items, and objects of cultural patrimony.<sup>99</sup> As such, it requires a property rights determination.<sup>100</sup> The Act provides for repatriation of items previously regarded as government property as long as the items were owned by the tribe at the time of alienation.<sup>101</sup> Additionally, NAGPRA establishes a disclosure mechanism for items in federal repositories and museums receiving federal funding.<sup>102</sup> Institutions must prepare summaries, including statements of cultural affiliation, of all currently owned American Indian cultural items, human remains, and funerary items and distribute the list to federally recognized tribes that could have a property interest in them.<sup>103</sup>

Today, NAGPRA is the source of widespread repatriation threats for museums.<sup>104</sup> The net effect of the law is to permit government agencies and museums to retain objects of cultural patrimony only if they can trace title back to a *voluntary* transfer by a culturally-affiliated

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94. 136 CONG. REC. 35677 (1990) (statement of Sen. John McCain).

95. See Harding, *supra* note 11, at 723 (“Museums and agencies that previously had no reason to doubt the security of their entitlements now face the prospect of the loss of significant objects. . . . [NAGPRA] represents a significant policy shift, enabling Native Americans to reclaim cultural items that have long been in the custody of others.”).

96. See *id.*

97. See *id.*

98. C. Timothy McKeown and Sherry Hutt, *In the Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act Twelve Years After*, 21 UCLA J. ENVTL. L. & POL’Y 153, 155 (2003).

99. See 25 U.S.C. § 3001(3) (2012).

100. See *id.* § 3002.

101. See *id.* § 3005.

102. *Id.* § 3003.

103. *Id.*

104. Harding, *supra* note 11, at 728.

tribe.<sup>105</sup> NAGPRA also contains a criminal component punishing anyone who “knowingly sells, purchases, uses for profit, or transports for sale or profit” American Indian human remains or cultural items without permission.<sup>106</sup> Although NAGPRA made strides in expanding tribal protection, tribes and individuals bear the burden of establishing standing to bring suit, and the law is highly technical, as will be discussed in the following section.

NAGPRA has also created significant confusion. One source of confusion is the scope of protection. NAGPRA does not treat religious items equally.<sup>107</sup> NAGPRA distinguishes between various types of “cultural items,” “human remains,” “associated” and “unassociated funerary objects,” “sacred objects,” and “cultural patrimony.”<sup>108</sup> Each category has a different repatriation procedure. “Cultural patrimony” is defined as:

[A]n object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.<sup>109</sup>

Only native tribes and organizations may request objects of cultural patrimony, and the tribe or organization must establish tribal affiliation.<sup>110</sup> Tribes are not consistent in membership requirements, and as a result, this provision applies differently to each tribe. Lineal descendants have priority over tribes and organizations in requesting funerary objects, sacred objects, and human remains, but proving a direct lineal relationship is often extremely difficult or impossible.<sup>111</sup> In some cases, especially cases of contested ownership, an object’s importance rather than ownership will dictate repatriation.<sup>112</sup> This yields additional uncertainty for tribes.<sup>113</sup> NAGPRA has been the source of

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105. *Id.* at 729.

106. 18 U.S.C. § 1170(a) (2012).

107. Harding, *supra* note 11, at 723.

108. 25 U.S.C. § 3001(3) (2012); McKeown & Hutt, *supra* note 98, at 163.

109. 25 U.S.C. § 3001(3)(D).

110. McKeown & Hutt, *supra* note 98, at 160.

111. *See id.*

112. Harding, *supra* note 11, at 725.

113. *Id.*



considerable litigation since its enactment, and through the years, the Act's complexity and nuance has increased.

### III. NAGPRA IN PRACTICE: COMPLEXITY AND UNCERTAINTY FOR POTENTIAL CLAIMANTS

American Indian cultural property rights have evolved tremendously from laws focusing on the economic need to exploit American Indian resources to NAGPRA. The motivations behind NAGPRA stem not only from a continued tradition of American Indians as outsiders to the political, economic, and cultural elite, but also from a shared reaction to a history of injustice experienced by many native communities.<sup>114</sup> Although taking American Indians as an entire class under the wing of "cultural patrimony" affirms the group's outsider status, the special treatment is beneficial where it provides for return of indispensable cultural items to their rightful owners. The problems with NAGPRA are not the result of ill intent by lawmakers;<sup>115</sup> rather, the law is problematic because it is applied uniformly to groups that differ significantly in terms of resources, organization, religion, culture, and history.

NAGPRA's litigation record reveals NAGPRA is a complicated law that is not easily navigated. Although some tribes have been successful in utilizing NAGPRA, one scholar writes, "[W]ith the law's passage, tribal groups quickly realized it was not the panacea they hoped it would be, and Indians quickly spoke out on the inadequacies and ambiguities of NAGPRA."<sup>116</sup> A brief look at the litigation record reveals how complex the law has become and, as a result, how important external factors such as tribal organization and access to political and economic resources are in determining whether tribes are able to take advantage of the law and repatriate stolen goods.

As one NAGPRA litigation survey records, "[I]t is easy to understand what the law does, but not quite as easy to understand when the law applies or to whom."<sup>117</sup> Legal standing is one hurdle that is often difficult to navigate. NAGPRA's implementing regulations make clear who has standing to bring a claim,<sup>118</sup> but even those who meet the statutory requirements are often subject to challenge based on

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114. See Yasaitis, *supra* note 1, at 266.

115. See *id.* at 266-67.

116. JOE WATKINS, INDIGENOUS ARCHAEOLOGY: AMERICAN INDIAN VALUES AND SCIENTIFIC PRACTICE 62 (2000).

117. Yasaitis, *supra* note 1, at 269.

118. 43 C.F.R. § 10.2(b) (2011).

whether they suffered an injury in fact or whether the wrong is within NAGPRA's zone of interest, as seen through a sampling of cases.<sup>119</sup> Even if the property is clearly damaged by a defendant's action, the plaintiff still may lack standing in many cases if the court does not find the requisite descendent or cultural relationship. Proving this relationship can be equally complex and uncertain. For example, in *Idrogo v. United States Army*,<sup>120</sup> the plaintiffs did not have standing to repatriate a Chiricahua Apache's remains, lift his prisoner of war status, or provide him with military honors despite clear harm because they could not establish the required relationship.<sup>121</sup>

Many conflicts responding to NAGPRA reflect social tensions between members of very different cultures with very different beliefs. In *Na Iwo O Na Kupuna O Mokapu v. Dalton*,<sup>122</sup> the court disagreed with the plaintiff's contention that human remains themselves can have standing.<sup>123</sup> The court suggested that to give human remains standing, at the very least the plaintiff would have to demonstrate a benefit to living society members.<sup>124</sup> One scholar argues that such clashes are inevitable in these cases because NAGPRA relies on cultures "reconciling irreconcilable interests and ideas" about culture, human rights, race, spirituality, and science.<sup>125</sup> "The clash in perspectives created by NAGPRA is necessitated by the statute's very nature as a Western legal construct."<sup>126</sup> Any legislation bridging cultures causes an inevitable culture clash, and NAGPRA is no different, incorporating "questionable assumptions" about the cultures and religions that the Act purports to

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119. In *Crow Creek Sioux Tribe v. Brownlee*, the court held that the tribe's fears were merely "speculative," and that a fear of harm would not substitute for the actual harm necessary to provide the grounds for standing. 331 F.3d 912, 915-16 (D.C. Cir. 2003). However, in *Abenaki Nation of Mississquoi v. Hughes*, the court dismissed an American Indian group's claim as "premature" despite the threat that the federal permit in question would raise spillway elevation and possibly destroy remains and cultural items. 805 F. Supp. 234, 252 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993).

120. 18 F. Supp. 2d 25 (D.D.C. 1998).

121. *Id.* at 28-29.

122. 894 F. Supp. 1397 (D. Haw. 1995).

123. *Id.* at 1408. The court denied the remains standing because it found that the plaintiffs could not show that the remains suffered an injury and that the defendants caused that injury. *Id.* at 1407-08.

124. *See id.* at 1407.

125. Matthew J. Petrich, *Litigating NAGPRA in Hawai'i: Dignity or Debacle?*, 22 U. HAW. L. REV. 545, 561 (2000).

126. *Id.*

protect.<sup>127</sup> NAGPRA's complex language compounds these problems, making effective use of the law even more difficult.<sup>128</sup>

Standing is only one difficult legal issue faced by NAGPRA in its short history. Failure to exhaust all available administrative remedies also threatens cases.<sup>129</sup> Determining whether administrative remedies have been exhausted can be both time-intensive and expensive for prospective plaintiffs. Additionally, inadvertent discoveries of cultural items or human remains pose uncertainty for prospective claimants. For NAGPRA to apply, discovery must take place under certain circumstances.<sup>130</sup>

Subject matter jurisdiction also poses a problem for many bringing suit because NAGPRA applies only to federal or tribal lands.<sup>131</sup> Discoveries on non-federal and non-tribal land must be governed by state and local burial laws if they are to be protected at all.<sup>132</sup> This rule adds confusion when an object was discovered on property that was not federally owned at the time of discovery, but, before the NAGPRA suit, became federally owned.<sup>133</sup> Even if this hurdle is met, courts can dismiss many claims for definitional reasons.<sup>134</sup> As in other areas, religious and cultural beliefs likely result in different understandings of key definitions, and tribes may not be equally satisfied with this result.

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127. See *id.* at 563 (arguing that NAGPRA makes "questionable assumptions" about Hawai'ian native culture).

128. *Id.* at 563-64.

129. See, e.g., *Na Iwo O Na Kupuna O Mokapu*, 894 F. Supp. at 1405-06; see also Yasaitis, *supra* note 1, at 273-74.

130. See Yasaitis, *supra* note 1, at 276. This issue was discussed in *San Carlos Apache Tribe v. United States*, where the court insisted that "NAGPRA is not prospective" and therefore it cannot protect objects underwater if they were not visible even if the government agency knew or should have known that their actions would cause damage. 272 F. Supp. 2d 860, 889-94 (D. Ariz. 2003), *aff'd*, 417 F.3d 1091 (9th Cir. 2005). The court distinguished this from the case of *Yankton Sioux Tribe v. United States Army Corps of Engineers*, where the court held that human remains and cultural items in a cemetery were inadvertently discovered as a result of a flood control operation. 83 F. Supp. 2d 1047, 1056 (D. S.D. 2000).

131. See *Romero v. Becken*, 256 F.3d 349, 354 (5th Cir. 2001) (dismissing the plaintiff's claim based on property found on municipal lands and limiting NAGPRA's application to "federal or tribal lands").

132. McKeown & Hutt, *supra* note 98, at 168.

133. See, e.g., *Monet v. Lee, Henderson & Wong*, Nos. Civ. 94-00884 HG, Civ. 95-00300, 1995 WL 774527, at \*1, 8 (D. Haw. Oct. 30, 1995) (involving property federally owned at the time of litigation but not federally owned when the property was discovered).

134. See, e.g., *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644, 650 (W.D. Tex. 1999) (finding the fact that "human remains" are statutorily within the category of "cultural items" suggests recently buried corpses with no "particular cultural or anthropological interest" are not covered by NAGPRA).

The so-called “Kennewick Man Case” is a prime example of the difficulties surrounding NAGPRA that have yet to be resolved.<sup>135</sup> This case involved ancient human remains—estimated to be between 8,340 and 9,200 years old—discovered in 1966 on the Columbia River in Kennewick, Washington on land controlled by the Army Corps of Engineers.<sup>136</sup> Although the skeleton was originally believed to be of European descent, it was later studied and showed characteristics that did not conform only to American Indian or European skeletons.<sup>137</sup> While the Smithsonian Institution’s National Museum of Natural History sought to acquire the skeleton for scientific study, American Indian tribes argued for return and reburial.<sup>138</sup> The government agreed with the tribe and halted testing pursuant to NAGPRA.<sup>139</sup> Scientists brought suit in district court.<sup>140</sup> The Ninth Circuit Court of Appeals ultimately affirmed the lower court’s decision, preventing transfer of the remains to tribal representatives.<sup>141</sup> The court based this conclusion on the finding that NAGPRA did not apply.<sup>142</sup> As a result, the Smithsonian scientists should be permitted to continue their studies.<sup>143</sup> The court found that American Indian claimants must establish a relationship between the claimed remains and a “presently existing tribe.”<sup>144</sup> Ultimately, the court did not find the tribe’s oral histories persuasive and concluded that the interest in scientific progress should prevail.<sup>145</sup> The controversy is not likely to end soon.<sup>146</sup> This case leaves cultural property scholars and American Indian tribes with a multitude of unanswered questions, not only about who can bring suit under NAGPRA and the requisite level of proof, but also about the law’s ultimate purpose and its role going forward.

Beyond its complex framework, some argue NAGPRA is inadequate to confront issues facing American Indians today. NAGPRA applies only to federally recognized tribes, and federal courts have consistently affirmed the authority to determine membership as one of tribes’ most basic powers. While defining “American Indian” by those officially enrolled appears to be an easy line to draw, some tribes believe

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135. Yasaitis, *supra* note 1, at 283–84.

136. *Bonnichsen v. United States*, 367 F.3d 864, 868–69 (9th Cir. 2004).

137. *Id.* at 869.

138. *Id.* at 870.

139. *Id.*

140. *Id.* at 871.

141. *Id.* at 882.

142. *Id.*

143. *Id.*

144. *Id.* at 879.

145. *Id.* at 881–82.

146. Yasaitis, *supra* note 1, at 284–85.

the distinction between federally recognized and unrecognized tribes is unimportant while other tribes fear allowing NAGPRA to apply to unrecognized tribes would undermine the federal recognition process.<sup>147</sup> Additionally, tribes often have different membership criteria,<sup>148</sup> making this distinction somewhat arbitrary.

These areas represent only a sampling of the complexities and nuances within the NAGPRA cannon and demonstrate the difficulty and unpredictability faced by tribes and individuals hoping to protect cultural or human remains. While not all NAGPRA cases are as complicated as these issues suggest and the majority settle before trial,<sup>149</sup> NAGPRA remains extremely complicated for tribes and lawyers hoping to use the law. Because of NAGPRA's complexity, political and economic resources, tribal organization and cohesion, and significant tribal size are key to successful navigation of the law. Because tribes differ greatly, they have unequal access to repatriation and control of their cultural property. Cultural property rights are, in practice, reserved only for a small minority of tribes. Although instructional materials are available online to help tribal representatives through the NAGPRA process,<sup>150</sup> the materials are introductory. Tribes cannot be reasonably expected to direct themselves through the NAGPRA maze without considerable guidance and resources.

#### IV. PAST AND POTENTIAL NAGPRA CLAIMS BY ALASKA NATIVES

Although NAGPRA was enacted to protect historically marginalized groups and their interests, the current framework cannot adequately protect the tremendously diverse American Indian population. As each NAGPRA case brings added legal nuance, the law becomes even less accessible to certain groups within the American Indian community. Furthermore, American Indian beliefs may not necessarily correspond to the statute's provisions or courts' interpretations of actual harm and who has suffered it.<sup>151</sup> For Alaska

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147. WATKINS, *supra* note 116, at 65.

148. *Id.*

149. Yasaitis, *supra* note 1, at 284.

150. See, e.g., *National NAGPRA: Frequently Asked Questions*, NAT'L PARK SERVICE, <http://www.nps.gov/nagpra/FAQ/INDEX.HTM> (last visited Feb. 12, 2012).

151. See *Na Iwo O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1402-03, 1406-07 (D. Haw. 1995) (suggesting this problem in the context of native Hawai'ian art).

Native communities, the complexity of the current legal structure reduces the ability to protect or recapture cultural property.

#### A. Alaska's Relative Silence in the NAGPRA Discourse

Undoubtedly, Congress did not intend to confine NAGPRA and its precursors to American Indian claimants located within the forty-eight contiguous states.<sup>152</sup> Alaska's substantial and thriving native community was intended to benefit from NAGPRA's protections.<sup>153</sup> In 1999, the Census Bureau estimated that 101,352 Alaska Natives lived within the state's borders.<sup>154</sup> The Alaska Native population constituted 16.4% of the state's total population, placing Alaska among the states with the highest percentages of native population.<sup>155</sup>

Additionally, Alaska does not fall short in terms of federal land.<sup>156</sup> NAGPRA applies only to discoveries made on federal lands and defines "federal lands" as "any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971."<sup>157</sup> Instead of the reservation organization for many state's American Indian populations, Alaska is organized into native villages.<sup>158</sup> Under the 1971 Settlement Act, Alaska Native tribes received forty million acres to be divided into 220 native villages and twelve regional corporations established by the Act.<sup>159</sup> Although NAGPRA does not apply to these

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152. *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1136 (D. Or. 2002), *aff'd and remanded*, 357 F.3d 962 (9th Cir. 2004), *opinion amended and superseded on denial of reh'g*, 367 F.3d 864 (9th Cir. 2004).

153. *Id.*

154. *States Ranked by American Indian and Alaska Native Population*, U.S. CENSUS BUREAU (July 1, 1999), <http://www.census.gov/population/estimates/state/rank/aiea.txt>.

155. *Id.*

156. See U.S. GEOLOGICAL SURVEY, U.S. DEP'T OF THE INTERIOR, FEDERAL LANDS AND INDIAN RESERVATIONS (2003), *available at* <http://www.nationalatlas.gov/printable/images/pdf/fedlands/AK.pdf>.

157. 25 U.S.C. § 3001 (2012).

158. *American Indian Areas/Alaska Native Areas/Hawaiian Home Lands Cartographic Boundary Files Descriptions & Metadata*, U.S. CENSUS BUREAU, [http://www.census.gov/geo/www/cob/na\\_metadata.html](http://www.census.gov/geo/www/cob/na_metadata.html) (last visited Jan. 10, 2011).

159. Richard S. Jones, *Alaska Native Claims Settlement Act of 1971 (Public Law 92-203): History and Analysis Together with Subsequent Amendments*, ALASKOOL.ORG (June 1, 1981), [http://www.alaskool.org/projects/anca/reports/rsjones1981/ANCSA\\_History71.htm](http://www.alaskool.org/projects/anca/reports/rsjones1981/ANCSA_History71.htm).

lands, Alaska's other vast federally owned areas could support viable NAGPRA claims.<sup>160</sup>

Despite Alaska's thriving native population and vast amounts of federally owned land, Alaska Natives have been underrepresented in the NAGPRA and cultural property discourse. A thorough search through major legal databases reveals no trace of any Alaskans filing suit under NAGPRA, despite Alaska's 229 federally recognized tribes<sup>161</sup> and a host of unrecognized tribes.<sup>162</sup> In contrast, searches for NAGPRA suits brought by individual and tribal representatives from some large mainland tribes produce a number of results.<sup>163</sup>

Alaska Native groups have only one traceable instance of engaging in repatriation efforts. In the recent dispute between Tlingit representatives and the University of Pennsylvania Museum of Archaeology, Hoonah Indian Association and Huna Totem sought to repatriate forty-five items owned by the museum for eighty-seven years.<sup>164</sup> The Tlingit representatives claimed that the tribal leader from whom the museum administration purchased the items did not have authority to sell the collection without unanimous clan consent.<sup>165</sup> The museum argued the objects were fairly purchased.<sup>166</sup> The six-person NAGPRA review committee unanimously concluded the museum should return all Tlingit artifacts, leaving the option for further negotiations or litigation.<sup>167</sup> So far, the museum has returned eight objects to the T'akdeintaan Clan of Hoonah.<sup>168</sup> The remaining objects' fates remain uncertain.<sup>169</sup> This return was achieved following sixteen years of work by relevant tribal representatives.<sup>170</sup>

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160. Cf. U.S. GEOLOGICAL SURVEY, *supra* note 156.

161. *Alaska Region Overview*, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/RegionalOffices/Alaska/index.htm> (last visited Feb. 20, 2012).

162. *Alaska Indians: Alaskan Villages, Native Communities and Alaskan Tribes from A to Z Index*, AAA NATIVE ARTS, <http://www.aaanativearts.com/alaskan-natives/alaska-indians.htm> (last visited Feb. 20, 2012).

163. A search of major legal databases for NAGPRA suits brought by the Apache tribe and tribal representatives yields many recorded court opinions. Sioux and Pueblo cultural representatives have similarly made a number of efforts to take advantage of NAGPRA.

164. Molly Petrilla, *Tlingit Claim on Museum Objects Triggers Federal Scrutiny*, THE PA. GAZETTE, Mar.-Apr. 2011, at 22.

165. *Id.* at 22-23.

166. *Id.* at 24.

167. *Id.*

168. Jonathan Grass, *Cultural Objects Returning to Hoonah after 80 Years*, JUNEAU EMPIRE, Feb. 8, 2011, [http://juneauempire.com/stories/020811/loc\\_782430748](http://juneauempire.com/stories/020811/loc_782430748).

169. *Id.*

170. *Id.*

This success may encourage future NAGPRA actions. For instance, the Central Council Tlingit and Haida Indian Tribes of Alaska recently received a \$90,000 grant from the National Park Service to conduct research and prepare NAGPRA claims.<sup>171</sup> However, other large native cultures, as well as smaller native cultures in Alaska, have not yet made any traceable efforts to recover cultural property under NAGPRA or any other cultural property law.

Theoretically, Alaska Natives should be able to take advantage of NAGPRA. Importantly, Alaska appears to be furthest behind in NAGPRA efforts when compared to other states with large native populations. Even outside the contiguous United States, Hawai'ian tribes have raised NAGPRA claims to protect their cultural heritage.<sup>172</sup> So why have Alaska's tribes been a sleeping giant? Alaska Native cultural objects are certainly widespread enough outside of Alaska to suggest that there are likely some cultural items to which NAGPRA could apply.

#### **B. Alaska Native Art and Artifacts in Prominent U.S. Collections and the Art Market**

Alaska Native art is an important part of American national identity, which is reflected by its presence in many of the nation's prominent art museums. Although the number of works in each museum does not accurately reflect the number of viable NAGPRA claims, the number highlights the frequency with which Alaska Native works are traded outside of Alaska.

New York's Metropolitan Museum of Art houses several dozen Alaskan Inuit and Alaskan Yup'ik items<sup>173</sup> between the "Arts of Africa, Oceania, and the Americas" and "Musical Instruments" sections. At least twenty-eight objects are listed as having likely Alaskan Eskimo origin, and thirty are listed as having likely Alaskan Tlingit origin.<sup>174</sup> Many other objects are labeled as having Alaska Native origin but lack native

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171. Staff Report, *CCTHITA Receives Grant Geared Toward Artifact Repatriation*, JUNEAU EMPIRE, July 19, 2011, <http://juneauempire.com/local/2011-07-19/ccthita-receives-grant-geared-toward-artifact-repatriation>.

172. See, e.g., *Na Iwo O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1402-03 (D. Haw. 1995).

173. See Collections Search for "Alaska," METROPOLITAN MUSEUM OF ART, <http://www.metmuseum.org/collections/search-the-collections?ft=Alaska> (last visited Apr. 16, 2012).

174. See *id.*



culture or tribal identification.<sup>175</sup> Many online descriptions stress the religious importance of the objects.<sup>176</sup>



*Dance Mask, early 20th century, Yup'ik, Alaska, wood, paint, feathers*<sup>177</sup>

For example, the Metropolitan Museum of Art's description of the mask pictured above gives background about the Yup'ik speaking peoples of western Alaska and discusses the tribe's ceremonial life.<sup>178</sup> The museum explains that performing with these masks after the winter freeze-up was "important to these people to maintain proper human and spirit world interactions."<sup>179</sup> Although the mask was likely sold or gifted legally to the museum, its provenance likely cannot be known without extensive research.

The Smithsonian Institution's National Museum of the American Indian similarly contains many Alaska Native objects.<sup>180</sup> The museum currently holds 279 objects described as having Inuit origin, primarily from Alaska and Canada.<sup>181</sup> An additional 332 objects are described as

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175. *See id.*

176. *See id.*

177. Dance Mask, METRO. MUSEUM OF ART, <http://www.metmuseum.org/Collections/search-the-collections/50005975> (last visited Feb. 20, 2012).

178. *Id.*

179. *Id.*

180. *See Collections Search*, NAT'L MUSEUM OF THE AM. INDIAN, <http://www.nmai.si.edu/searchcollections/results.aspx?catids=2%2c1&areaid=9&regid=37&src=1-1> (last visited Apr. 16, 2012).

181. *See id.*

having Yup'ik origin, primarily in Alaska.<sup>182</sup> Over 250 objects are described as owing their origin to the Alaska Tlingit tribe.<sup>183</sup> The image below is an example of an Alaska Tlingit work housed at the Smithsonian Institution.



*Raven Headdress, 1860-1890, Tlingit, Alaska, Wood, ermine skin/fur, wool cloth, cotton cloth, sea lion whiskers, swan down, abalone/haliotis shell, paint<sup>184</sup>*

This work's online description contains information about provenance for interested parties,<sup>185</sup> information not frequently included on museum websites. Even with this level of detail, Alaska Native tribes must conduct further research to determine whether a work might be eligible for return.

Alaska Native community members are almost certainly aware that their cultural treasures are stored in prominent museums outside of Alaska. Alaska Native art exhibits regularly garner substantial attention in the media, as was the case in 2010 when the Smithsonian Institution allowed Alaskans to see its Alaska Native collections in their home state. For the exhibit entitled "Living Our Cultures, Sharing Our Heritage: The First Peoples of Alaska," the National Museum of the American Indian

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182. *See id.*

183. *See id.*

184. *See Item Detail, NAT'L MUSEUM OF THE AM. INDIAN, <http://americanindian.si.edu/searchcollections/item.aspx?irn=9882&culid=453&page=1> (last visited Jan. 10, 2011).*

185. *Id.*

loaned 600 Alaska Native objects to the Anchorage Museum.<sup>186</sup> The Anchorage Museum writes that the exhibit showed how Alaska Natives are unique and “how all are connected.”<sup>187</sup> The exhibit contained masks, parkas, beaded garments, basketry, weapons, and carvings reflecting the diverse environments and practices of their makers.<sup>188</sup> The pictures in the catalog published as part of the exhibition are accompanied by traditional stories and personal accounts by Alaska Native elders, artists, and scholars.<sup>189</sup> The personal accounts and stories “evoke[] both historical and contemporary meaning” of the objects displayed.<sup>190</sup>

Alaska Native objects also comprise a significant sector of the art market. Christie’s New York has annual Native American Art auctions.<sup>191</sup> For their January 18, 2010 sale, Christie’s showcased a selection of eighteen “highlights” from the auction available to view for those who were not regular buyers and did not already have auction catalogs. Among the highlights was this pictured Tlingit rattle.



*Northwest Coast Ceremonial Rattle, probably Tlingit, c. 1850*<sup>192</sup>

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186. Aron L. Crowell, *Introduction*, in *LIVING OUR CULTURES, SHARING OUR HERITAGE: THE FIRST PEOPLES OF ALASKA* 12–14 (Aron L. Crowell et al. eds., 2010).

187. *Living Our Cultures, Sharing Our Heritage-Paperbound*, ANCHORAGE MUSEUM, <http://www.anchoragemuseum.org/shop/DisplayDetail.aspx?pid=498> (last visited Jan. 10, 2011).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Native American Art*, CHRISTIE’S, <http://www.christies.com/features/auctions/0111/native-american/> (last visited Jan. 10, 2011).

192. *Northwest Coast Ceremonial Raven Rattle*, CHRISTIE’S, [http://www.christies.com/LotFinder/lot\\_details.aspx?intObjectID=5400615](http://www.christies.com/LotFinder/lot_details.aspx?intObjectID=5400615) (last visited Feb. 18, 2012).

The lot sold for \$62,500.<sup>193</sup> Similarly, Sotheby's holds regular American Indian Art auctions.<sup>194</sup> Their October 2006 sale of American Indian art was the highest grossing auction of American Indian art ever.<sup>195</sup>

Alaska Native art's popularity is undeniable. However, so far few native cultures have made traceable efforts to repatriate important pieces of Alaskan heritage. At least in Alaska, NAGPRA is not being used to bring claims for the return of objects that have long been part of museum collections.<sup>196</sup> One issue may be that to assess a NAGPRA claim, each individual work of art or cultural artifact must be thoroughly researched to determine provenance, location, age, and additional background facts, requiring substantial amounts of both time and financial resources.<sup>197</sup> However, there are other possible reasons for Alaska's relative silence in the NAGPRA discourse; these are explored in the following section.

## V. WHY NOT ALASKA?

### A. Possible Reasons for Alaska's Relative Silence in NAGPRA Discourse

Alaska Native art is spread across the nation's major American museums, and this has not gone undetected by living members of Alaska Native tribes. A number of possible theories may explain Alaska's relative silence in the NAGPRA discourse. The theories are not mutually exclusive—the true culprit is likely a combination of the theories.

One possible explanation for Alaska's silence is that Alaska Native individuals and cultural groups know about their cultural property rights and do not want to bring suits. Cultural representatives could, additionally, believe none of their cultural objects qualify for

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193. *Id.*

194. See *American Indian Art Records and Notables*, SOTHEBY'S, <http://www.sothebys.com/en/departments/american-indian-art/records.html> (last visited Feb. 18, 2012).

195. See *id.* The sale grossed over seven million dollars. SOTHEBY'S, THE DUNDAS COLLECTION OF NORTHWEST COAST AMERICAN INDIAN ART AUCTION RESULTS (2006), available at <http://www.sothebys.com/en/auctions/results.sale.pdf/2006/the- Dundas-collection-of-northwest-coast-american-indian-art-n08268.pdf>.

196. See *supra* Part IV.A.

197. See Chip Colwell-Chanthaphonh, *Remains Unknown: Repatriating Culturally Unaffiliated Human Remains*, ANTHROPOLOGY NEWS, Mar. 2010, at 8 (discussing the expense of NAGPRA provenance research with respect to objects of uncertain cultural affiliation).

repatriation. Without research into provenance of native art and objects cultural representatives have no way of reliably knowing whether objects may qualify for return.

Another possible explanation is that Alaska Native leaders and those able to bring suit may not be adequately aware of their cultural property rights. Alaska Natives' silence may not be based on any form of apathy on the part of native leaders but, instead, on a lack of knowledge that native cultures are *able* to bring suit. If this explanation is true, it may be due to the fact that the cultural property community has historically been focused outward on international issues.<sup>198</sup> Perhaps native cultures that are furthest removed from the central debates are simply unaware that repatriation is an option. The previous case law may play a role in bolstering this unawareness, as these native cultures may see other larger, more centralized cultural groups bringing suit and believe the law does not protect smaller cultural groups in the same way. Until Alaska Natives and their representatives engage in widespread repatriation activities, these claims may be off the radars of relevant political players.

Some native cultures may be silent based on a lack of federal recognition, a prerequisite to the law's current protection.<sup>199</sup> While recognition may explain the silence of the unrecognized native cultures currently calling Alaska home, this leaves over 200 federally recognized groups that have not questioned the status of their cultural property in any traceable way.<sup>200</sup> Recognition does, however, raise important issues of resources and protection, as those who are not afforded official status are not protected and must endure costly negotiations and private agreements if they wish to achieve the same results possible through NAGPRA.

Legal access may also prevent Alaska Natives from bringing suit to recover art and cultural artifacts. Because NAGPRA and other relevant laws are extremely complicated and nuanced, lawyers bringing these claims must have a thorough understanding of the law. Some lawyers specialize only in NAGPRA litigation.<sup>201</sup> Lawyers who deal primarily in this area often belong to firms that dedicate entire practice teams to

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198. See *supra* Part I.

199. See 25 U.S.C. § 3001(7) (2012) (defining "Indian tribe" as "any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act)").

200. *Alaska Region Overview*, *supra* note 161.

201. See, e.g., *Litigation Matters*, FREDERICKS, PEEBLES & MORGAN, LLP, [http://www.ndnlaw.com/litigation\\_matters.html](http://www.ndnlaw.com/litigation_matters.html) (last visited Jan. 10, 2011) (exemplifying law firms that specialize in NAGPRA litigation).

NAGPRA litigation. Specialized groups of lawyers are centered mainly in regions with larger, more centralized cultural groups and tribes in order to make significant profits.<sup>202</sup> Not only do area lawyers encourage local residents to bring suit, but firms specializing in cultural property likely also raise local awareness about the importance of cultural property and its applicability to local interests. A search for firms specializing in NAGPRA litigation in Alaska or individual attorneys practicing in the state with NAGPRA expertise yielded no results. Also, because Alaska is the only state without a law school, less legal scholarly attention may be devoted to this topic in Alaska.

Access to resources may also help explain why some cultural groups and tribes are able to bring suit and others are not. Because litigation is expensive, the law favors tribes with significant resources. The cost of bringing suit may prevent some native cultures from bringing action even if they are aware of their legal rights and would like to litigate.

State legislation also may play a role in a native culture's ability to bring suit. Some states, particularly those that are home to large tribes, have parallel state legislation to NAGPRA.<sup>203</sup> Parallel state legislation, such as the framework in Arizona, where a high percentage of the population belongs to large American Indian tribes, reinforces and protects interests on a state level.<sup>204</sup> This legislation also serves the important role of garnering attention for cultural property rights generally, allowing local residents to become more cognizant of the current state of the law, its application, and how it may benefit them. By contrast, Alaska Natives can depend only on federal law.

Religious views may also play a vital role in determining who brings suit. NAGPRA favors those with very specific religious ideologies and requires judges to make decisions based on what kind of objects we, as a national culture, value, even if the objects are tied to religious expression. Other relevant laws follow this trend as well, such as the Migratory Bird and Treaty Act, which will likely go untouched by tribes or cultural groups that do not place religious or cultural significance on migratory birds. Current cultural property laws were drafted by people largely outside the American Indian community and

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202. *See id.*

203. *See, e.g.,* ARIZ. REV. STAT. ANN. § 41-844 (2011); *see also* Hon. Sherry Hutt, *Native American Cultural Property Law Human Rights Legislation*, ARIZ. ATT'Y, Jan. 1998, <http://www.myazbar.org/AZAttorney/Archives/Jan98/1-98a3.htm> (discussing the Arizona statute that was enacted to serve as a state counterpart to NAGPRA).

204. *See* Hutt, *supra* note 203.

may not adequately account for differences in religion across American Indian tribes and cultures.

Additionally, Alaska Natives may not be culturally and politically predisposed to utilize cultural property laws. The Alaskan political climate is often characterized by a distrust of government intervention into private matters.<sup>205</sup> NAGPRA and its precursors, which govern ownership rights in art works often created by individuals thousands of miles away, reek of government intervention. Even though these laws could be used to bolster the private property rights of individuals and groups within Alaska, this may still be a cultural hurdle.

Although museums are required to disclose cultural items in their collections, not all museums have completed this process. As a result, the statuses of countless American Indian objects hang in limbo. Given funding constraints for museums, it may be years before the disclosure is completed.

Even when museum disclosures have been completed, tribes must know what to do with this information and must have the resources to thoroughly investigate sometimes impossible provenance records. As discussed previously, the law is extremely nuanced, complex, and unpredictable. As a result, larger, centrally organized cultural groups and tribes may be better equipped to take full advantage of these laws. Although many Alaska Native cultures are large and have an imposing presence, 229 are spread across the state.<sup>206</sup> In 2009, Alaska Native cultures comprised approximately two-fifths of the total number of federally recognized cultural groups and tribes in the entire country.<sup>207</sup> While American Indian groups dedicated to forging coalitions to face difficult issues exist,<sup>208</sup> the Alaska Native community presently has no large group of cultural representatives dedicated to issues of cultural property and repatriation. Boards dedicated to these issues exist on a national level,<sup>209</sup> but Alaska does not have any similar boards on a state level. Although many other large cultural groups and tribes have been able to bring NAGPRA claims without these types of boards, the

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205. See Gregory S. Fisher, *Law in the Last Frontier: Commemorating the District of Alaska's 50th Anniversary*, 34 AK BAR RAG 19, 19 (2010).

206. *Alaska Region Overview*, *supra* note 161.

207. Maria Shaa Tláa Williams, *Alaska and Its People: An Introduction*, in THE ALASKA NATIVE READER 1, 2 (Maria Shaa Tláa Williams ed., 2009).

208. See, e.g., ALASKA NATIVE HEALTH BOARD, <http://www.anhb.org> (last visited Jan. 10, 2011) (addressing health issues facing the Alaska Native population); AM. INDIAN ALASKA NATIVE TOURISM ASS'N, <http://www.aianta.org> (last visited Jan. 10, 2011) (discussing issues pertaining to tourism).

209. See, e.g., *Indian Arts and Crafts Board*, U.S. DEPARTMENT OF THE INTERIOR, <http://www.doi.gov/iacb/> (last visited Jan. 10, 2011).

situation in Alaska is unique; native cultures are widely dispersed geographically and the state is filled with an extremely large number of cultural groups that, standing alone, may not have sufficient resources or support to bring claims of this magnitude.<sup>210</sup> Although Alaska has the Alaska State Council on the Arts, this is a large and all-encompassing organization and is not narrowly focused on cultural property issues.<sup>211</sup>

## **B. The Relative Silence of Alaska Natives as a Reflection of Problems in the Legal Framework**

Alaska's relative silence in the cultural property arena underscores national issues: some cultural groups and their members can assert cultural property rights and others cannot. Review suggests Alaska Natives may have less ability to enforce their rights than other American Indian groups. Moreover, all American Indians appear disadvantaged when compared to certain non-native groups, such as Holocaust victims.

The unequal treatment afforded by NAGPRA, especially as it relates to items the government deems important to particular religious practices, may raise due process concerns. Also, the Fourteenth Amendment was enacted to prevent "discriminat[ion] against 'emancipated Negroes and their white protectors,'"<sup>212</sup> and this declaration of racial equality under the law extends to those of other races as well. Some argue American Indians are treated as "special" under the current cultural property paradigm and not equal, violating the Constitution's equal protection.<sup>213</sup>

The unique nature of NAGPRA and its inherent special treatment is underscored by statements made surrounding its enactment. On October 26, 1990 Senator Daniel Inouye, John McCain's co-chair on the Senate Select Committee on Indian Affairs, stated to members of the Senate:

When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first

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210. See *American Indian and Alaska Native Tribes for the United States, Regions, Divisions, and States*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/cen2000/briefs/phct18/index.html> (last visited Jan. 10, 2011).

211. See ALASKA STATE COUNCIL ON THE ARTS, <http://www.eed.state.ak.us/aksca> (last visited Jan. 10, 2011).

212. Sherry Hutt, *If Geronimo Was Jewish: Equal Protection and the Cultural Property Rights of Native Americans*, 24 N. ILL. U. L. REV. 527, 527 (2004) (quoting ALPHEUS THOMAS MASON & WILLIAM M. BEANEY, *AMERICAN CONSTITUTIONAL LAW* 381 (4th ed. 1968)).

213. *Id.* at 528.



European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.<sup>214</sup>

Although NAGPRA sought to eliminate this racism through special treatment, its application further complicated American Indian relations. One scholar, Sherry Hutt, argues that the treatment of American Indian cultural property can be starkly contrasted with the treatment of Holocaust-era art stolen from Jewish families.<sup>215</sup> Hutt argues that if Geronimo had been Jewish, the American Indian cultural property would have been treated with the same high fiduciary standards and unilateral response as cultural property subject to Holocaust-era thefts.<sup>216</sup> Sadly, this has not been the case, and American Indian cultural property has instead been treated as highly regulated government property.<sup>217</sup> This treatment was intended to protect American Indian and non-native sites from looting.<sup>218</sup> Current laws, Hutt argues, make the American Indian community unable to protect sacred sites and items removed from sacred lands.<sup>219</sup> Even within this framework, some groups within the American Indian community are favored while others are disfavored. Alaska Natives, like Native Hawaiians, are the unfortunate victims of a regime of laws which purport to protect the artistic and cultural pursuits of the American Indian community.<sup>220</sup>

## VI. WHERE DO WE GO FROM HERE: STEPS TOWARDS REALIZING ALASKAN CULTURAL PROPERTY RIGHTS

While all of these factors undoubtedly have some bearing on Alaska's silence in the cultural property discourse, the central question becomes: do Alaska Native cultures want to take the affirmative steps necessary to reclaim parts of their cultural heritage? If so, they must take the first steps quickly. By failing to exercise their legal authority now, Alaska Natives may be sitting idle while records that would provide for repatriation of cultural items become less traceable and less reliable.

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214. 136 CONG. REC. 35,678 (1990) (statement of Sen. Daniel Inouye).

215. Hutt, *supra* note 212, at 539.

216. *Id.* at 539-41.

217. *Id.* at 541.

218. *Id.*

219. *Id.* at 543.

220. For a discussion of Hawaiian native tribes' position with respect to NAGPRA, see Petrich, *supra* note 125, at 551, 567-68.

To be sure, Alaska Natives have good reason to care about their cultural property. The museum community in Alaska recognizes and appreciates the vast cultural treasure created by Alaska Natives.<sup>221</sup> If Alaska Natives are able to recover their cultural property, the state would be afforded an enormous educational resource. Members of tribes and cultural groups who are able to privately recover objects will be able to use these objects to teach future generations about their ancestors and traditions. If objects are recovered and transferred or loaned to Alaska museums, the state's educational resources are immeasurably enhanced. While this educational goal is persuasive in many areas of the country, it is even more essential in Alaska. Currently, many unique Alaskan works of art and cultural objects are housed on the opposite side of the country, far beyond the reach of the majority of Alaskans. The objects themselves play a vital role in helping the current generation imagine and understand the past.<sup>222</sup> Moreover, ensuring the long-term survival and protection of native cultural property in Alaska could foster a sense of tribal pride, which may be essential to the ongoing survival of Alaska Native cultures.

Increasing awareness will better enable interested parties to realize the return of Native Alaskan art and cultural objects. Non-profit groups, political organizations, and similar bodies can be instrumental in forging the relationships necessary for NAGPRA claims to flourish. By increasing general discourse on this topic, Alaskans may also begin to see a change in other issues contributing to the lack of cultural property assertions. For example, attorneys specializing in NAGPRA litigation may be drawn to the state if there is a viable market for cultural property claims.

The need for a central unifying authority to speak on the behalf of Alaska Natives and to support those with viable claims is of paramount urgency. Alaska Natives could establish a board dedicated to cultural property protection comprised of tribal representatives. The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples could serve as one possible model.<sup>223</sup> The board could adopt a uniform framework for approaching cultural property issues. The dialogue created by a board could help group members raise resources

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221. Crowell, *supra* note 186, at 12-14.

222. Cf. Paul C. Ongtooguk & Claudia S. Dybdahl, *Native Perspectives on Alaska's History*, in *LIVING OUR CULTURES, SHARING OUR HERITAGE: THE FIRST PEOPLES OF ALASKA* 28, 28 (Aron L. Crowell et al. eds., 2010) ("Museums display the art and artifacts of Alaska Native and Native American peoples, and writers, artists, and film makers reimagine the past.").

223. *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, *supra* note 76.

and awareness about cultural preservation. Moreover, the board could serve as a coalition to pursue the claims of Alaska's smaller native cultures or those with fewer resources. Group members may also benefit from working together to realize shared goals.

Alaska could also develop a state corollary to NAGPRA. Enacting state legislation would expand the scope of protectable cultural material as well as increase the awareness of cultural property issues facing Alaska Natives. Allowing Alaska Natives to reclaim their cultural heritage on a state level could, in turn, spur federal action.

## CONCLUSION

While some tribal representatives in Alaska's largest native cultures have begun to contemplate repatriation, Alaska trails behind other states in repatriation efforts. The relative silence leaves Alaska Native cultural property vulnerable not only to illicit trade but also to denigration and destruction. Furthermore, it reduces the educational prospects for Alaska Natives hoping to use these treasures going forward. Alaska could take steps like increasing awareness through external boards and coalitions, establishing a coalition of tribal representatives to act on behalf of all Alaska Natives in addressing cultural property concerns, and enacting a state law parallel to NAGPRA. These steps would all increase awareness of native cultural property issues and encourage action.

Alaska's relative silence in the cultural property discourse underscores important national issues. The unequal treatment of American Indian and Alaska Native objects should be a problem troubling to the American legal community. The current laws, such as NAGPRA, in practice grant some tribes and cultural groups legal access to their cultural objects at the expense of others. The net result is a hierarchy in which some groups are legally favored over others. To solve this problem, Americans must change many of their foundational views on cultural property and American Indian cultural contributions. Political reform, such as expanding NAGPRA's scope of protection, is likely necessary to achieve full equality under the law for American Indians with respect to cultural property. Until this happens, Alaska Natives may want to take proactive steps to protect their cultural property. Otherwise, they may have to face a future with more limited access to their cultural contributions.