

---

# YALE LAW & POLICY REVIEW

---

## The Public Values of Repatriation in the Native American Graves Protection and Repatriation Act

Alexandra Eynon\*

*This Note examines the implementation of the Native American Graves Protection and Repatriation Act and finds that repatriation has generated significant public benefits by making collecting institutions better fulfill their role as stewards and researchers. This is contrary to existing critiques of cultural property laws that argue that repatriation is a compromise by the public to benefit minoritarian groups. This Note argues instead that stronger repatriation laws may be better for all of us.*

INTRODUCTION .....	230
I. CRITIQUES OF CULTURAL PROPERTY REGIMES.....	234
A. “Grouphood” Critics.....	235
B. “Cosmopolitan” Critics .....	237
II. MUSEUMS AND PRESERVATION, KNOWLEDGE PRODUCTION, AND ACCESS .....	241
A. “We don’t know what we have here”: the experiences that informed NAGPRA.....	242
B. Museums and Access.....	245
III. NAGPRA: A MODEL FOR THE PUBLIC BENEFITS OF REPATRIATION .....	247
A. The Structure of NAGPRA’s Repatriation Mandate.....	247
i. Inventory Requirement .....	249
ii. Cultural Affiliation and Repatriation .....	250
iii. Dispute Resolution and Enforcement .....	252
B. Humanity and Human Connections: Advances in preservation, knowledge production, and access under NAGPRA .....	258

---

\* Yale Law School, J.D. 2019.

IV. CONCLUSION.....	263
---------------------	-----

## INTRODUCTION

Cultural property law is the body of law—both domestic and international—that regulates culturally significant material, including issues around the protection and repatriation of objects.<sup>1</sup> The Native American Graves Protection and Repatriation Act (NAGPRA),<sup>2</sup> enacted in 1990, is a landmark cultural property law. It recognizes the validity of

- 
1. The term “cultural property”—like the objects it refers to—is the subject of some debate and covers a broad range of tangible and intangible material, ranging from real property to oral traditions and expressions. Article 1 of UNESCO’s 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the landmark international document on the international trade of moveable cultural objects, defines cultural property in that context as those objects “which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science” and which fall into one of 15 categories, ranging from animal and plant specimens, to paintings, to postage stamps. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 823 U.N.T.S. 231. Some scholars and practitioners now employ the term “cultural heritage” to refer to these objects because they feel that it better captures the connection of these objects to their cultures of origin, and because it offers a more capacious understanding of rights and obligations than traditional property law concepts. *See, e.g.*, Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 PENN. ST. L. REV. 642 (2011); Lyndel V. Prott & Patrick J. O’Keefe, *‘Cultural Heritage’ or ‘Cultural Property’?*, 1 INT’L J. CULTURAL PROP. 307 (1992). Because I agree with those who argue that property law is in fact capacious enough to account for concepts of grouphood and communal ownership, *see* Kristen A. Carpenter, Sonia K. Kaytal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009), and because the main thrust of this Note is in any case that proponents of repatriation should not focus all of their efforts on defining cultures of origin and their sources of rights, but should also engage with anti-repatriation critics on their own values, I use the term “cultural property” throughout this Note.
  2. 25 U.S.C. §§ 3001-3013 (2018).

## THE PUBLIC VALUES OF REPATRIATION IN NAGPRA

Native claims to culturally affiliated<sup>3</sup> human remains as well as funerary, religious and other significant objects; an emerging awareness of a history of mass disinterment and theft; and a policy of self-governance and self-determination by Indian tribes. The statute requires Federal agencies and museums receiving Federal funds to inventory holdings of Native American human remains and funerary objects and provide written summaries of other cultural items. These institutions are required to consult with Indian Tribes and Native Hawaiian groups during the process of identifying remains and objects within their collections<sup>4</sup> and return those remains and objects that are determined to be associated with a Federally recognized tribe.<sup>5</sup>

NAGPRA's repatriation mandate has resulted in some important victories for Native American and Hawaiian groups seeking the return of human remains and cultural objects. This Note argues that it has also generated important returns for the public. In short, NAGPRA's repatriation mandate provides broad public benefits, because it has made federally-funded institutions—mainly museums—better at doing their jobs. This is because NAGPRA's structure requires institutions to identify and inventory the Native American remains and implicated cultural property in their collections, creates mechanisms for productive collaboration with federally recognized tribes, and shines a light on outdated preservation practices. Put more simply, NAGPRA has generated returns for the American public—which pays for museums directly with government funds as well as through generous tax subsidies—by making it more likely that museums will identify and care for implicated objects in their collections and by creating broader access to those collections. In other words, repatriation under NAGPRA has been good not just for Native groups, but for everyone. This observation has widespread implications not only for debates about repatriation and NAGPRA in the United States, but for cultural property law and scholarship more broadly. By bringing these benefits to light through an examination of existing scholarship on NAGPRA from academic, museum, and Native perspectives; data about museums rarely examined in other cultural property scholarship; and interviews with four NAGPRA practitioners, this Note aims to reframe

- 
3. Cultural affiliation is a term of art referring to the process by which human remains or funerary objects are associated with a present-day group. This process is described in detail at Part III. A. ii. *Infra*.
  4. 25 U.S.C. § 3003(b)(1)(A); 25 U.S.C. § 3004(b)(1)(B).
  5. 25 U.S.C. § 3003.

these debates and to introduce a more accurate and optimistic picture of the realities of repatriation.

Existing cultural property scholarship has failed to address the public benefits of repatriation regimes. The observation that repatriation as embodied by NAGPRA improves the quality of museum stewardship and research thus necessitates a shift in current debates for and against greater repatriation. Critics who favor strong repatriation regimes in turn emphasize the validity of identity- and group-based claims on cultural property, as well as the feasibility of communal ownership regimes.<sup>6</sup> While pro-repatriation critics may be rightly focused on the rights of indigenous groups and other cultures of origin, they should not concede the territory of the public good. Where appropriate, these pro-repatriation critics should make these benefits explicit in their calls for regimes that promote the return of culturally significant objects to their cultures of origin. Critics of cultural property regimes who favor a relatively free market and weak repatriation requirements frame repatriation as a compromise of the universal public value of these significant cultural objects in order to accommodate the humanitarian interests of national or minoritarian groups.<sup>7</sup> They assert that giving cultures of origin—which may be difficult

- 
6. See, e.g., CHIP COLWELL, *PLUNDERED SKULLS AND STOLEN SPIRITS: INSIDE THE FIGHT TO RECLAIM NATIVE AMERICA'S CULTURE* (2017) (outlining debates and case studies in NAGPRA repatriation and arguing for the recognition of Native American perspectives and kinship and property norms); Kristen A. Carpenter, Sonia K. Kaytal & Angela R. Riley, *In Defense of Property*, 118 *YALE L.J.* 1022, 1028 (2009) (outlining a theory of “peoplehood” that “dictates that certain lands, resources, and expressions are entitled to legal protection as cultural property because they are integral to the group identity and cultural survival of indigenous peoples.”); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 *B.U. L. REV.* 559, 561 (1995) (arguing for greater protection of cultural property from the premise that “cultural property embodies the physical manifestation of a group’s identity”); Pemina Yellow Bird, *NAGPRA at Twenty: A Report Card*, 44 *ARIZ. ST. L.J.* 921, 921 (2012) (employing first person and grouphood narratives to argue for the importance of a strong NAGPRA); John Moutsakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 *CORNELL L. REV.* 1179 (1989) (arguing that the current legal framework does not adequately account for notions of cultural and national identity).
  7. See, e.g., KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* 121 (2006) (“Framing the problem... as an issue for all mankind—should make it plain that it is the value of the cultural property to

to identify—rights over these precious objects deprives all mankind of its patrimony by removing them from public collections. These anti-repatriation critiques that ignore the real and potential public benefits of a repatriation regime such as NAGPRA are premised on flawed assumptions about the realities of collecting institutions. Such critiques must engage head on with these realities to begin an honest conversation about the benefits and drawbacks of repatriation.

Part I outlines current debates in cultural property law and divides them into two rough camps: “grouphood” critics, who argue that cultural property law should make group- and identity-based claims cognizable, recognize past harms, and account for communal forms of ownership and “cosmopolitan” critics, who favor relatively unfettered markets and weak or no repatriation requirements. Part II argues that cosmopolitan critics offer universalizing public interest-based justifications for anti-repatriation policies that are premised on fundamentally flawed assumptions about museum stewardship and access to collections. Part III argues that NAGPRA provides an example of a repatriation regime that has produced broad public benefits even as it vindicates the social and political integrity of Native groups. Finally, Part IV proposes that this framework for thinking about repatriation regimes requires a shift in cultural property scholarship, and a rethinking of repatriation by scholars, policymakers, and museums.

---

people and not to peoples that matters.”); JAMES CUNO, WHO OWNS ANTIQUITY (2006) xxxiv-xxxvi (outlining the “cosmopolitanist aspirations” and public value of encyclopedic museums and against most national laws that retain cultural property); John Henry Merryman, *Cultural Property Internationalism*, 12 INT’L J CULTURAL PROP. 11, 11 (2005) (defining “cultural property internationalism” as “shorthand for the proposition that everyone has an interest in the preservation and enjoyment of cultural property, wherever it is situated, from whatever cultural or geographic source it derives.”); Hugh Eakin, Opinion, *The Great Giveback*, N.Y. TIMES (Jan. 26, 2013), <http://www.nytimes.com/2013/01/27/sunday-review/the-great-giveback.html> [<http://perma.cc/876H-4M4X>] (asserting that museums “are supposed to be in the business of collecting and preserving art from every era, not giving it away” and that repatriation “impoverish[es] Americans’ access to the ancient world”). See also Declaration on the Importance and Value of Universal Museums, Dec. 2002, <http://ia801608.us.archive.org/11/items/cmapr4492/20030000%20Information%20Declaration%20on%20the%20Importance%20and%20Value%20of%20Universal%20Museums.pdf> [<http://perma.cc/3ART-NJHE>] [hereinafter Declaration].

## I. CRITIQUES OF CULTURAL PROPERTY REGIMES

Critiques of cultural property laws, with a few exceptions,<sup>8</sup> can be grouped roughly into two camps. The first group of critics argues that cultural property law should make group- and identity-based claims cognizable and recognize past harms through more repatriation of certain types of objects.<sup>9</sup> They also often argue that cultural property regimes should account for communal forms of ownership. A second group of critics, which I call the “cosmopolitans,”<sup>10</sup> favor limited repatriation, and emphasize the universal value of cultural property to all mankind.<sup>11</sup> They argue that the best means of promoting cultural property’s universal value is through individual and institutional ownership mediated by a relatively unfettered international market.<sup>12</sup>

- 
8. *See, e.g.*, Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004 (2007) (arguing that laws like NAGPRA attach group identity to particular objects and risks stultifying culture, rather than accounting for its inherent hybridity); Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT’L L. 213 (2007) (arguing that, whatever the source of their value, objects of cultural property should not be accorded any kind of special status with respect to ordinary property, because the market will best resolve issues of access and preservation).
  9. *See supra* note 6.
  10. I am borrowing the formulation of philosopher and cultural theorist Kwame Anthony Appiah. Appiah introduces the term and the theory of “cosmopolitanism” as a way of grappling with the realities of contemporary globalized existence. APPIAH, *supra* note 7. In a chapter entitled “Whose Culture Is It, Anyway?” he discusses this theory in the context of cultural property, as outlined *infra* note 23.
  11. *See, e.g.*, APPIAH, *supra* note 7, at xiii-xxi (introducing the term “cosmopolitanism” as a way of grappling with the realities of contemporary globalized existence).
  12. *See* Merryman, *supra* note 7, at 23-24 (discussing Merryman’s view of trade as an important and “more efficient and productive mechanism” than government-to-government or museum-to-museum exchange and criticizing the UNESCO 1970 convention for excluding market transactions).

A. "Grouphood" Critics

One important group of cultural property hinges on an assertion of the importance of the interests of cultures of origin in their cultural property. The law should make these interests cognizable, they argue, through increased repatriation.<sup>13</sup> In some accounts, this is coupled with an argument that the law should embrace more capacious conceptions of communal ownership.<sup>14</sup> These critics argue "that certain property is so integral to and constitutive of personhood that it must be given special legal protection," including by repatriation laws.<sup>15</sup> Rights over cultural property are bound up with the continued existence and self-determination of these groups, or what Angela Riley refers to as a "living sovereignty."<sup>16</sup> Repatriation laws are thus important because, in giving the culture of origin the right to control its cultural property, they contribute to its autonomy.<sup>17</sup> These laws in turn, must account for a grouphood theory of cultural property and for forms of communal ownership and stewardship of that property.<sup>18</sup>

In the international context, UNESCO's 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property embodies a view of cultural property as constitutive of particular nations and as tied to cultural context.<sup>19</sup> This

- 
13. See, e.g., *supra* note 6 and accompanying text.
  14. Carpenter et al., *supra* note 1, at 1078-89 (arguing that cultural property should be situated within a paradigm of stewardship that accounts for a wider variety of interests and that such a framework supplements traditional ownership concepts).
  15. *Id.* at 1090.
  16. Angela R. Riley, "Straight Stealing": Towards an Indigenous System of Cultural Property Protection, 80 WASH. L. REV. 69, 117 (2005); see also Gerstenblith, *supra* note 6, at 570-72 (discussing notions of group property and communal ownership in property law).
  17. Gerstenblith, *supra* note 6, at 571.
  18. Carpenter et al., *supra* note 1, at 1078-89 (arguing that cultural property should be situated within a paradigm of stewardship that accounts for a wider variety of interests and that such a framework supplements traditional ownership concepts).
  19. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 ("[C]ultural property constitutes one of the basic

conception of cultural property imposes corresponding obligations on state parties to UNESCO to return property that has crossed borders in violation of national cultural property laws.<sup>20</sup> This theory of cultural property as constitutive of peoplehood and, in particular, as essential to the continued cultural and political integrity of indigenous groups is also affirmed in the United Nations Declaration on the Rights of Indigenous Peoples, adopted in 2007.<sup>21</sup>

In the United States, NAGPRA represents a landmark in this view of cultural property as important to the dignitary interests and self-determination of federally recognized tribes. In his statement in support of the NAGPRA bill on the senate floor, Senator Daniel Inouye of Hawai'i, then-chairman of the Select Committee of Indian Affairs, outlined the stakes of the law and the importance of providing legal recourse for tribes seeking repatriation of remains and cultural objects:

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

In light of the important role that death and burial rites play in Native American cultures, it is all the more offensive that the civil rights of America's first citizens have been so flagrantly violated for the past century . . . . In cases where Native Americans have attempted to regain items that were inappropriately alienated from the tribe, they have often met with resistance from museums and have not had the legal ability or financial resources to pursue

---

elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.”), [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html) [<http://perma.cc/L778-Z85E>].

20. *Id.* art. 7(b)(ii) (stating that state parties to the convention must “at the request of the State Party of origin, . . . take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property”).

21. G.A. Res. 61/295 (Oct. 2, 2007).

the return of the goods. It is virtually only in instances where a museum has agreed for moral or political reasons to return the goods that tribes have had success in retrieving property.<sup>22</sup>

NAGPRA, then, represents an important recognition of Native American rights, not just to this property but as people, as well as an acknowledgment by Congress of past harms.

*B. "Cosmopolitan" Critics*

Cosmopolitan critics, in contrast, favor a relatively less regulated market in cultural objects and antiquities with less repatriation to cultures of origin—the peoples, defined by geography, ancestry, or a mix of the two, that are historically affiliated with cultural objects.<sup>23</sup> While they recognize the harms of illicit excavations and black-market sales, they assert that the best disposition of most objects is in circulation.<sup>24</sup> In support of this view, they underline the universal value of cultural property to all mankind.

This view can be traced to international documents like the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which defines cultural property—in the first English-language use of the term—as a universally shared patrimony.<sup>25</sup> The Convention asserts that damage to cultural property “means damage to the

- 
22. 136 CONG. REC. No. S17,174 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye).
  23. Kwame Anthony Appiah and John Henry Merryman also devote significant time to discussing laws—such as Italy’s—that “retain” cultural property by preventing the export of certain types of cultural property above a certain age from within national borders. *See, e.g.,* APPIAH, *supra* note 7, at 125-26 (outlining his concerns with the Italian example and other restrictions on exporting certain types of cultural property); Merryman, *supra* note 7, at 30 (“Excessive source nation retention of cultural property is a potent instrument in the war against acquirers.”).
  24. *See* APPIAH, *supra* note 7, at 131 (discussing the tragedy of modern and historical thefts, but arguing that “[t]he mere fact that something that you own is important to the descendants of people who gave it away does not generally give them an entitlement to it”).
  25. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954. [http://portal.unesco.org/en/ev.php-URL\\_ID=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html) [<http://perma.cc/96WA-HCXT>].

cultural heritage of all mankind” and that there is thus a universal obligation to respect and preserve such property. Cosmopolitan critics build on this logic to argue normatively that “everyone has an interest in the preservation and enjoyment of cultural property, wherever it is situated, from whatever cultural or geographic source it derives.”<sup>26</sup>

Because all of humankind has an interest in cultural property, cosmopolitan critics argue, cultural property laws must be tailored to serve that interest.<sup>27</sup> Some regulation is necessary to provide for preservation and safe circulation of cultural property.<sup>28</sup> However, regulation should be designed to serve the universal interest in cultural property and its dissemination, rather than vesting strong rights in cultural property in cultures of origin.<sup>29</sup>

The legal scholar John Merryman has argued for an “internationalist” view of cultural property administered according to a “triad of regulatory imperatives” that he asserts should motivate cultural property regimes: preservation, truth, and access.<sup>30</sup> Merryman describes this as a policy centered around the object rather than nations or cultural groups, and describes its guidelines as follows:

[W]hether it would be proper for a museum or collector or dealer to acquire an object depends first on whether its export is likely to endanger the object or its context; second, on whether through its acquisition the object’s truth is more or less likely to be fully revealed; and third, whether as a result of the acquisition the

---

26. Merryman, *supra* note 7, at 11. *See also*, APPIAH, *supra* note 7, at 121 (“Framing the problem . . . as an issue for *all* mankind—should make it plain that it is the value of the cultural property to people and not to peoples that matters.”).

27. APPIAH, *supra* note 7, at 130 (asserting that the interests that dictate the shape of good cultural property laws—in this case international laws—are “the interests of all of humankind”).

28. Merryman, *supra* note 7, at 12 (“No thinking person argues for free trade in cultural property. Regulation is necessary in order to preserve cultural property and to support its proper international circulation.”).

29. *Id.* (“Excessive regulation, however, thwarts that same international interest” in cultural property for all mankind). *See also* APPIAH, *supra* note 7, at 122-24 (arguing that while some regulation is necessary, regulation should serve the universal interest in a “cosmopolitan aesthetic experience” rather than vesting strong rights in countries where objects originated).

30. Merryman, *supra* note 7, at 11, 22.

object will be more or less readily available to scholars for research and to the public for education and enjoyment.<sup>31</sup>

Under this rubric, preservation is the most important, while truth in the form of the production of knowledge about the object is the next most, and third is access by scholars and by the public.

This set of values, whether explicitly outlined as a test, as in Merryman's work, or expressed in more general terms,<sup>32</sup> leads to a further point that is distinct but often elided: that given the universal value of culturally significant objects, a mixture of private ownership and museum display provides for the best stewardship of cultural property. A relatively unfettered market with fewer restrictions and repatriation obligations is generally the best means of assuring that important cultural property makes its way either into a public museum collection or into possession of a conscientious private collector. In turn, museums, such as the British Museum or the Met, serve as repositories of the heritage of the world.<sup>33</sup> Many museums and some individual curators have also adopted these arguments.<sup>34</sup> Notably, the 2002 "Declaration of the Universal Value of Encyclopedic Museums," drafted in response to the Elgin Marbles controversy and signed by nineteen international museums, asserts the broad value of international museums and the importance of a geographically wide-ranging collection.<sup>35</sup> "Calls to repatriate objects," it argues, must be qualified by the understanding that "museums serve not just the citizens of one nation but the people of every nation."<sup>36</sup>

For most cosmopolitan critics, "if an object is central to the cultural or religious life of a community," there may be a "human reason" to repatriate it to that community.<sup>37</sup> Merryman, for example, explicitly endorsed an

---

31. John Henry Merryman, *The Nation and the Object*, 3 INT'L J. CULTURAL PROP. 61, 64-65 (1994).

32. See, e.g., APPIAH, *supra* note 7, at 130; CUNO, *supra* note 7, at 123-26.

33. APPIAH, *supra* note 7, at 130 ("However self-serving it may seem, the British Museum's claim to be a repository of the heritage not of Britain but of the world seems to me exactly right.").

34. See CUNO, *supra* note 7, at 123-26 (arguing against overly restrictive repatriation regimes and for the importance of encyclopedic museums and their collecting).

35. Declaration, *supra* note 7.

36. *Id.*

37. APPIAH, *supra* note 7, at 132. See also Merryman, *supra* note 7, at 13.

exception for regimes like NAGPRA.<sup>38</sup> Nevertheless, repatriation is framed as external to the proper imperatives of cultural property law of maximizing preservation, truth, and access.<sup>39</sup> Rather, it is a concession to humanitarian values, such as the ongoing interest of a “living” culture in its cultural heritage.<sup>40</sup> In other words, vindication of the grouphood values of peoples come at the expense of people as a whole.<sup>41</sup> Cosmopolitan critics of cultural property laws follow the logic of preservation, truth, and access to the conclusion that, in most instances, museums—generally encyclopedic museums in large cities—best serve the public interest in cultural property.<sup>42</sup> Thus, they argue, although some regulation is necessary and concessions should sometimes be made for humanitarian reasons, current stewards of cultural objects—large museums—should be

- 
38. “It seems right that objects of ritual/religious importance to living cultures remain with or be returned to the representatives of those cultures, as were the Afo-a Kom and, under NAGPRA, American Indian artifacts.” Merryman, *Internationalism*, *supra* note 7, at 13. *See also* Merryman, *Object*, *supra* note 31, at 68 (finding that a case of an Afo-a Kom sculpture is an exception to his triad of regulatory imperatives and should be repatriated).
39. Merryman, *supra* note 31, at 69 (“In the Afo-A-Kom case (and the same would be true in the case of ceremonial objects claimed by American Indian tribal groups and analogous cases in a variety of traditional societies in other parts of the world): 1) the culture and belief system from which the object came were still alive; 2) the object was made to be used in religious/ceremonial ways by that culture according to that belief system; and 3) if returned, the object would again be put to that use. It is the concurrence of these considerations that explains why it seemed right that the Afo-A-Kom return to the Kom.”).
40. *Id.*; APPIAH, *supra* note 7, at 131 (discussing various, exceptional, cases where repatriation makes sense because of other “human reasons”).
41. APPIAH, *supra* note 7, at 121 (“Framing the problem . . . as an issue for all mankind—should make it plain that it is the value of the cultural property to people and not to peoples that matters.”).
42. *See* CUNO, *supra* note 7, at 13-15 (arguing that international cultural property laws have created a landscape in which cultural property is hoarded to be deployed as a tool in international relations, which does not advance the public values served by museums); Merryman, *supra* note 31, at 65-70 (applying the rubric of preservation, truth, and access to find that except in cases of theft, improper excavation, or where the object was part of a culture that was “still alive,” the best disposition was in a public, encyclopedic museum).

## THE PUBLIC VALUES OF REPATRIATION IN NAGPRA

left relatively undisturbed, and market forces should be left relatively unfettered, lest pressures to repatriate deprive humanity of its collective treasures.<sup>43</sup>

Both of these critiques of cultural property invoke compelling interests and concerns in arguing for weaker or stronger repatriation regimes. Cosmopolitan critics invoke the heritage of all mankind, while grouphood critics argue that the repatriation of important objects is essential for the continued existence, self-determination, and dignity of cultures of origin. Although individual narratives are often compelling, this division of interests means that groups seeking repatriation are often left in the unenviable position of arguing from the standpoint of the personhood of a few versus the good of all mankind. Although cosmopolitan critics like Kwame Anthony Appiah and John Merryman may be willing to make exceptions for such humanitarian cases, for them the logic of repatriation stops there. Reframing the debate by acknowledging the benefits of repatriation in improving museum stewardship and increasing knowledge and access shows that the interests of these opposing camps may in fact be complementary rather than mutually exclusive.

## II. MUSEUMS AND PRESERVATION, KNOWLEDGE PRODUCTION, AND ACCESS

While both of these critiques focus on the competing interests at play, they ignore institutional dimensions of a repatriation regime like NAGPRA. In so doing, they miss the benefits of repatriation for the public as a whole—and not only for those groups with identity-based claims for the return of cultural objects. In particular, cosmopolitan critics apply their logic of the public interest to favor stewardship of important cultural objects by museum collections, while relying on faulty assumptions about the realities of museum operation. This Part interrogates the idea that museums left relatively unaffected by repatriation laws will best fulfill their duty to the public in promoting preservation, truth (what this Note will refer to as “knowledge production”), and access by the public. It finds that museums have dramatic room for improvement along all of these imperatives. It argues that sensible repatriation regulation can serve an important role in promoting these imperatives and generate improved returns for the public by directing resources and attention towards making museums better at doing their jobs.

---

43. See, e.g., CUNO, *supra* note 7, at 2-5 & n.3 (discussing museums responding to pressure from nation states to repatriate antiquities).

A. *"We don't know what we have here": the experiences that informed NAGPRA*

One assumption underlying the idea that museums are the best stewards for cultural property is that objects will generally be better preserved in the collections of well-resourced, usually international museums than they would be elsewhere.<sup>44</sup> The history of NAGPRA, however, shows that this promise—that when objects come into museum collections, they will be cared for in the interest of future generations—has not been fully borne out by the reality of collecting and museum practices.

The legislative history shows that NAGPRA explicitly responds to a well-documented history of coercive or illicit takings of Native American remains and cultural objects, including the systematic collection of Indian remains by the U.S. government.<sup>45</sup> Most notably, it responds to an 1868 Surgeon General's Order that made collecting Indian remains an official federal policy.<sup>46</sup> One report made widely available to Congress as historical background on NAGPRA<sup>47</sup> notes that such grave robbing was lucrative, and that there appears to have been a "cottage industry" of collecting Indian skulls at "some frontier military posts" that involved the soldiers digging up dead bodies, decapitating them, and then boiling the heads to prepare the skulls for sale to researchers and institutions.<sup>48</sup>

---

44. See, e.g., Merryman, *supra* note 31, at 65, 67, 69 (discussing examples where objects would be better preserved in museums); APPIAH, *supra* note 7, at 132 ("Were I advising a poor community pressing for the return of many ritual objects, I might urge it to consider whether leaving some of them to be respectfully displayed in other countries might not be part of its contribution to cross-cultural understanding as well as a way to ensure their survival for later generations."). See generally CUNO, *supra* note 7, at 13-15.

45. 136 CONG. REC. S17,174 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye) in Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 59 (1992).

46. Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 40 (1992).

47. *Id.* at 40 n.13.

48. ROBERT E. BIEDER, A BRIEF HISTORICAL SURVEY OF THE EXPROPRIATION OF AMERICAN INDIAN REMAINS 11-12 (1990).

#### THE PUBLIC VALUES OF REPATRIATION IN NAGPRA

Both the bodies and the artifacts that accompanied them were frequently sold to museums and institutional collections such as the Smithsonian, the Field Museum, Harvard, and Yale's Peabody Museum.<sup>49</sup> This conduct, of course, is widely repudiated today. Unfortunately, once they made their way into institutional collections, these remains, the funerary objects that accompanied them, and other cultural and religious objects, did not necessarily fare much better.<sup>50</sup> The objects and remains were often stored haphazardly, and in conditions that ranged from questionable to toxic.

One account details Senator Inouye's 1987 visit to the warehouse of the Museum of the American Indian in New York City, then the primary location for the Smithsonian's Native American collections. There, a very small percentage of mainly "guns and gold" was displayed in an exhibition space in the U.S. Customs House at Battery Park, and the remaining ninety-seven percent of the vast collection was warehoused in the Bronx. The night before the date of the senator's visit, there had been a flood in the warehouse housing the artifacts, and the inventory of the collection, which—to the extent that it existed—was recorded on "recipe cards" had become damaged, rendering many of the cards illegible. The senator's companion recalls that the cards "had gotten wet and were curled up like big Fritos" and that the water damage had caused the ink to bleed on some of the cards such that "[y]ou would not in the future really be able to tell what they said."<sup>51</sup>

Another account describes a similar situation during a visit to a North Dakota collection in the mid-eighties. The writer recalls:

"I saw a box that said '66 pieces of human skeletal remains.' I said, 'Is that 66 pieces of one person, or 66 people?' The state

---

49. *See id.* at 25-29.

50. *Id.* (discussing how collecting fever and competition amongst institutions led to "generally indiscriminate" collecting and how poor practices led to remains that were poorly excavated and identified).

51. Liz Hill, *A Warrior Chief Among Warriors: Remembering U.S. Senator Daniel K. Inouye*, 15 AM. INDIAN MAG., no. 1, Spring 2014, <http://www.americanindianmagazine.org/story/warrior-chief-among-warriors-remembering-us-senator-daniel-k-inouye> [<http://perma.cc/QLL9-V67S>].

archeologist shrugged and casually responded, ‘Or any combination in between. We don’t know what we have here.’”<sup>52</sup>

In addition to being warehoused for decades in disorganized and potentially dangerous storerooms and warehouses, Native American artifacts and remains in American museum collections were also systematically “preserved”—in what was once standard practice—using cyanide and other pesticides.<sup>53</sup> Today, these objects pose serious health risks both to museum curators and to tribes who cannot now store the objects or use them in rituals and ceremonies.<sup>54</sup> As one curator and anthropologist put it at a conference on the issue,

“Have the actions of our predecessors destroyed those many sacred and other objects of heritage now in our collections? . . . Can they ever be used for anything—or must they be only distantly seen and rarely handled objects secured behind glass, in bags, or sealed in some storage array?”<sup>55</sup>

Recent conversations with NAGPRA practitioners at the Yale Peabody Museum, Indiana University, and at Andover’s Peabody Institute of Archaeology, all institutions with collections of Native American remains and objects that number in the many thousands, confirm the disorganization associated with the pre-NAGPRA era.<sup>56</sup> None of these institutions had completely inventoried collections of Native American remains and cultural objects before NAGPRA’s enactment. Andover’s Peabody Institute of Archaeology, for example, was closed and dormant for

---

52. Yellow Bird, *supra* note 6, at 921.

53. James D. Nason, *A New Challenge, A New Opportunity*, 17 *CONTAMINATED COLLECTIONS: PRESERVATION, ACCESS AND USE* (Apr. 6-9, 2001), [http://www.spnhc.com/media/assets/cofo\\_2001\\_V17N12.pdf](http://www.spnhc.com/media/assets/cofo_2001_V17N12.pdf) [<http://perma.cc/S2KJ-T2RT>].

54. *Id.* at 10 (“[T]he very persistence of many pesticide residues, combined with their likely pervasiveness in collections large and small across the nation, means that any actions we take to deal with this issue will require a long and sustained effort.”).

55. *Id.* at 11.

56. Interview with Erin Gredell, Repatriation Coordinator, Yale Peabody Museum in New Haven, Conn. (Dec. 13, 2017); Interview with Jayne-Leigh Thomas, NAGPRA Dir., Ind. Univ. in Bloomington, Ind. (Apr. 16, 2018); Telephone Interview with Ryan Wheeler, Dir., Peabody Inst. of Archaeology at Andover (Feb. 14, 2019).

## THE PUBLIC VALUES OF REPATRIATION IN NAGPRA

much of the 1980s. There had never been a complete inventory of the collection, and the human remains and funerary objects that make up an important part of their large archaeological collection were largely unidentified and not inventoried. After the passage of NAGPRA, they appointed a repatriation coordinator and began the work of inventorying their collection and complying with the law.<sup>57</sup> Today, they are still in the process of discovering previously unidentified NAGPRA objects as they fully inventory their collection of approximately 500,000 items.

As the above accounts demonstrate, these conditions fall far short of an ideal of preservation that hinges on the availability of these objects for posterity. Many of the objects implicated by NAGPRA pose as much a risk of poisoning future generations as they do of enlightening them. Their availability for research and knowledge production was equally as inadequate. It is difficult to imagine how the “truth” of these objects can be revealed if no one knows quite where or what they are, as a wide range of accounts confirm was the predominant situation in the pre-NAGPRA era. This history shows that acquisition by institutional collections is not the end of the story of fulfilling the public trust.

### *B. Museums and Access*

In addition to falling short on the metrics of preservation and knowledge production, museums are not unimpeachable models for broad access either. As it turns out, placement in the collection of publicly funded museum does not guarantee broad access for the public. The figure cited in the account of Senator Inouye’s visit to the collection of the Museum of the American Indian—where ninety-seven percent of the collection was housed in the Bronx warehouse—seems surprisingly high. In reality, however, it is not an outlier. Top museums generally exhibit only a twentieth of their collections or less.<sup>58</sup> Most objects that make their way into museum collections, then—including those objects that cosmopolitans like John Merryman and Kwame Anthony Appiah consider so important for the general public to experience as part of their universal patrimony--

---

57. *NAGPRA, Repatriation, and the Peabody*, ANDOVER, <http://www.andover.edu/learning/peabody/nagpra-and-repatriation> [<http://perma.cc/59SA-SGDX>].

58. Michael O’Hare, *Museums Can Change—Will They?*, DEMOCRACY (Spring 2015), <http://democracyjournal.org/magazine/36/museums-can-changewill-they> [<http://perma.cc/96CV-78YF>] (“Any top-rank museum exhibits no more than a twentieth of its collection, often much less.”).

are actually stored away in warehouses far from public view. Who then, is accessing these objects? Some curators, the occasional researcher, and—as it seems in the NAGPRA case—often no one at all.<sup>59</sup> Certainly not the public. This despite their interest in the patrimony of all humankind and, more concretely, in public institutions themselves, which, in the United States, are funded through a combination of direct public funding and generous tax subsidies.<sup>60</sup>

Curiously, many cosmopolitan critics of cultural property laws raise the specter of the “hoarding” of objects in national collections as an argument against giving weight to the claims of cultures of origin.<sup>61</sup> Merryman, for example, writes disappointedly of the “hoarded stocks of redundant antiquities that languish unconserved, unstudied, unpublished, unseen, and unloved in the warehouses of major source nations.”<sup>62</sup> In fact, this formulation may more accurately describe what elite museums do. As Michael O’Hare points out, it is more often top museums that have a near monopoly on cultural patrimony, stemming from a combination of ethical and accounting rules that incentivize donations but prevent them from selling or “deaccessioning” works that have made their way into museum collections.<sup>63</sup> The result is that ninety percent or more of top museum collections are warehoused rather than displayed, while lesser institutions—those outside major cities or not under the aegis of wealthy schools—are relatively impoverished. This leaves very little of the wealth of cultural patrimony accessible to most people, to the detriment of the public.

The picture does not improve with a closer look at who the museum-going public actually is. As Pierre Bourdieu demonstrated in his classic 1960s study on Europe’s museum-going public, museum visitors split dramatically along class lines, and museums may be just as much spaces

---

59. See sources cited *supra* note 56. Interviews with NAGPRA practitioners indicated that NAGPRA-implicated collections in particular are rarely or never displayed and researcher access is limited.

60. See O’Hare, *supra* note 58.

61. Merryman, *supra* note 7, at 22-23 (discussing the “the widespread practice of over-retention or, less politely, hoarding of cultural property” and how “poorer countries” “hoard” marketable objects). See also CUNO, *supra* note 7.

62. Merryman, *supra* note 7, at 31.

63. O’Hare, *supra* note 58.

## THE PUBLIC VALUES OF REPATRIATION IN NAGPRA

for reinforcing cultural hierarchies as forums for democracy.<sup>64</sup> These findings still ring true today: “[h]alf of people with graduate degrees went to art museums last year, but only ten percent of high school graduates; twenty-four percent of whites went, but only twelve percent of blacks.”<sup>65</sup>

According to the cosmopolitan’s own report card, this record leaves dramatic room for improvement. More importantly, it calls into question a key assumption underlying critiques of repatriation—that museums will fulfill their role as “repositor[ies] of the heritage . . . of the world” best when they are left relatively unencumbered by regulatory constraints. As the following Part outlines, NAGPRA provides an example of a regime that generated improved outcomes for the public in terms of preservation, knowledge production, and access.

### III. NAGPRA: A MODEL FOR THE PUBLIC BENEFITS OF REPATRIATION

This Part argues that NAGPRA provides an example of a repatriation regime that has produced broad public benefits even as it vindicates the social and political integrity of Native groups. It examines NAGPRA’s incentive and penalty structure and mechanisms for dispute resolution as catalysts for knowledge production and collaboration. Three decades of NAGPRA show how a repatriation mandate, coupled with the statute’s inventory requirement, has produced important new knowledge about what federally funded museums have and how those objects and remains should be preserved. It contains interviews with NAGPRA practitioners who work on behalf of both institutions and tribes to fill in the statutory outlines with concrete examples of NAGPRA’s results.

#### *A. The Structure of NAGPRA’s Repatriation Mandate*

NAGPRA demonstrates that a view of repatriation as a recognition of past harms and ongoing interests in group identity is not at odds with bona fide public interests in preserving precious objects, generating new knowledge through conscientious research, and providing for broad access. Rather, these goals are complementary, and are best served through regulation that promotes dispute resolution and collaboration.

---

64. PIERRE BOURDIEU, *FOR THE LOVE OF ART: EUROPEAN MUSEUMS AND THEIR PUBLIC* (1966).

65. O’Hare, *supra* note 58.

This Note primarily addresses the portions of NAGPRA that require federally funded museums and agencies that possess indigenous human remains, associated funerary objects, or objects of cultural patrimony to inventory those objects and provide notice to the implicated tribes, a process that sometimes results in repatriation. NAGPRA is administered by the department of the interior, which makes NAGPRA grants and assesses civil penalties. In addition to the aspects of NAGPRA implicated in this Note, the statute encompasses several components that include setting out procedures for the disposition of Native American remains newly discovered on federal land,<sup>66</sup> the inventories,<sup>67</sup> repatriation,<sup>68</sup> a review committee,<sup>69</sup> civil penalties for institutions that fail to comply with the new requirements,<sup>70</sup> grants for repatriation and inventories,<sup>71</sup> and ultimate enforcement by United States District Courts.<sup>72</sup>

NAGPRA's inventory and repatriation requirements address roughly four categories of objects. The categories are narrowly tailored to balance tribal interests with institutional and scientific interests in Native American cultural objects. The requirements also reflect Native American cultural norms and conceptions of property. The categories are: 1) human remains, 2) funerary objects that are either associated with human remains in an institutional collection or otherwise believed to have been associated with culturally affiliated human remains, 3) sacred objects, or "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents," and 4) cultural patrimony, or "object(s) having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself."<sup>73</sup> An important feature of objects in the cultural patrimony category is that they must have been considered inalienable by the tribe itself and subject to communal tribal ownership at the time the object was "separated from such a

---

66. 25 U.S.C. § 3002 (2018).

67. 25 U.S.C. § 3003 (2018).

68. 25 U.S.C. § 3005 (2018).

69. 25 U.S.C. § 3006 (2018).

70. 25 U.S.C. § 3007 (2018).

71. 25 U.S.C. § 3008 (2018).

72. 25 U.S.C. § 3013 (2018).

73. 25 U.S.C. § 3001 (2018).

## THE PUBLIC VALUES OF REPATRIATION IN NAGPRA

group”.<sup>74</sup> This structure and its accompanying dispute resolution mechanisms has—in addition to providing greater vindication of Native American interests in their cultural patrimony—created opportunities for mutually beneficial exchange and improved outcomes for the public at large.

### i. Inventory Requirement

NAGPRA charges federally funded museums and agencies with inventorying (for human remains and associated funerary objects) or providing summaries (of unassociated funerary objects, sacred objects, or objects of cultural patrimony) for collections of implicated objects, affiliating them with specific federally recognized tribes or geographic regions where possible, and notifying any implicated tribes of the objects or remains so that the tribes could begin the repatriation process if they wished. Museums were given five years from the time the statute was enacted in 1990 to complete this inventory requirement, with the option to request an extension.<sup>75</sup>

The Secretary of the Interior is authorized to assess civil penalties for institutions that fail to comply with the inventory requirement.<sup>76</sup> In reality, only \$42,679 in civil penalties have actually been assessed despite widespread noncompliance by publicly funded institutions.<sup>77</sup> Commentators have noted these and other weaknesses in NAGPRA’s enforcement mechanism, including the notable fact that the Department of

---

74. *Id.* Kristen A. Carpenter, Sonia K. Kaytal, and Angela R. Riley have argued that the fact that NAGPRA incorporates concepts of inalienability and communal ownership necessitates a re-thinking of a traditional “bundle of rights” view of property law. *In Defense of Property*, 118 YALE L.J. 1022, 1088 (2009) (internal citation omitted).

75. 25 U.S.C. § 3003 (2018).

76. 43 C.F.R. § 10.12 (2019).

77. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-768, NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: AFTER ALMOST TWENTY YEARS KEY FEDERAL AGENCIES HAVE STILL NOT COMPLIED WITH THE ACT (2010); U.S. DEP’T INTERIOR, NAT’L PARK SERV., NATIONAL NAGPRA PROGRAM FISCAL YEAR 2017 REPORT, <http://irma.nps.gov/DataStore/DownloadFile/606134> [<http://perma.cc/A4UN-29PK>].

the Interior administers NAGPRA, but the federal agencies that the Department oversees are themselves out of compliance with the law.<sup>78</sup>

Nevertheless, the inventory requirement spurred many institutions to undertake a thorough inventory of their NAGPRA-related holdings for the first time.<sup>79</sup> This has had significant positive effects for the production of knowledge about the objects implicated by NAGPRA. As of 2016, 1,111 institutions (museums and federal agencies) had submitted inventories for human remains and associated funerary objects, and institutions had submitted 1,151 summaries of unassociated funerary objects, sacred objects, or objects of cultural patrimony. All of these lists are easily available for public review on the Internet.<sup>80</sup> Each time an institution culturally affiliates human remains or an object, the notice is published in the Federal Register, producing valuable information about objects and creating access to this information about objects that were previously hidden from study.<sup>81</sup> As this Note discusses in Section III, *infra*, these inventories have also paved the way for valuable collaborations between tribes and institutions.

#### ii. Cultural Affiliation and Repatriation

In addition to identifying which objects and remains are associated with Native Americans generally, federally funded museums and agencies are also required to “culturally affiliate” these objects where possible. Cultural affiliation entails trying to identify a present-day group that is associated with the human remains or funerary objects. This cultural affiliation is in turn the gateway to repatriation. Once an object is culturally affiliated and the tribe is notified, the museum or agency is

---

78. Interview with James Pepper Henry, CEO, Anchorage Museum at Rasmuson Center (Nov./Dec. 2010), <http://www.aam-us.org/programs/peer-review/20-years-and-counting> [<http://perma.cc/WQ4Z-FM96>].

79. See sources cited *supra* note 56.

80. U.S. DEP'T INTERIOR, NAT'L PARK SERV., NAT'L NAGPRA ONLINE DATABASES, <https://www.nps.gov/orgs/1335/databases.htm> [<https://perma.cc/U3H8-C4BU>].

81. See, e.g., Notice of Inventory Completion: American Museum of Natural History, New York, NY, 83 Fed. Reg. 39777 (Aug. 10, 2018), <http://www.federalregister.gov/documents/2018/08/10/2018-17217/notice-of-inventory-completion-american-museum-of-natural-history-new-york-ny> [<http://perma.cc/76CE-3JH9>].

#### THE PUBLIC VALUES OF REPATRIATION IN NAGPRA

obligated to repatriate the object pursuant to 25 U.S.C. § 3005 if the tribe so wishes. The standard for cultural affiliation is preponderance of the evidence, and the objects must be affiliated with a present-day Native American tribe or Native Hawaiian organization that shares group identity with the group of origin.<sup>82</sup>

Not every object that is identified as Native American or Native Hawaiian in origin can be affiliated with a present-day group cognizable by NAGPRA. Evidence of an identifiable prior group associated with the current group with standing (i.e. only federally recognized tribes) is required.<sup>83</sup> The existence of the affiliated material culture must be shown by the following: “Geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion.”<sup>84</sup> Given the circumstances under which many objects and remains were introduced to museum collections, and the forced migrations and fragmentation of tribal groups, marshaling this evidence can prove challenging, although the Code of Federal Regulations does permit some “gaps in the record.”<sup>85</sup> In addition to providing a procedure for remedying the past harms engendered by the wrongful taking of human remains and cultural property, this process also provides an opportunity to learn more about the origins of previously unidentified objects.

Cultural affiliation may often be a labor-intensive process that requires access to both institutional and tribal knowledge. Accordingly, NAGPRA explicitly requires that museums completing their inventories consult with lineal descendants and tribal leaders.<sup>86</sup>

The process does not end when the object is culturally affiliated. Rather, after the institution publishes a notice, the affiliated tribe and the reporting institution must work together to determine the appropriate disposition for the object. This may prove difficult where a tribe has limited resources or where preservation practices have made the object toxic. These challenges require further collaboration, and NAGPRA grants offer some support for repatriation and related work.<sup>87</sup>

---

82. 25 U.S.C. § 3001(2) (2018); 43 C.F.R. 10.2 (2019).

83. 43 C.F.R. § 10.14(c) (2018).

84. 43 C.F.R. § 10.14(e) (2018).

85. 43 C.F.R. § 10.14(d) (2018).

86. 43 C.F.R. § 10.9(b) (2018).

87. 25 U.S.C. § 3010 (1990).

Given the tangled history of many objects and human remains in museum collections, as well as the understandable room for debate about what constitutes a cognizable group for the purposes of NAGPRA, disputes about which objects are culturally affiliated and should be repatriated sometimes arise. NAGPRA provides mechanisms for resolving these disputes.

### iii. Dispute Resolution and Enforcement

NAGPRA provides two successive mechanisms for dispute resolution and for accommodating competing claims to disputed cultural objects. In addition to adjudicating competing interests in favor of greater access, these mechanisms also provide for the production of greater and more diverse knowledge about sources and dispositions of important objects. The first forum for dispute resolution is a non-binding administrative NAGPRA Review Committee overseen by tribal and museum representatives. Once a tribe has made a written claim of repatriation and it has been denied, it then has the option to pursue non-binding adjudication by the Review Committee before seeking a court remedy.<sup>88</sup> The Review Committee will only enter into a matter once the museum or agency at issue has made an initial determination of whether or not to affiliate the NAGPRA object(s) or human remains.<sup>89</sup> This review process occurs during review committee meetings, which generally occur around two times per year either in person or by conference call.<sup>90</sup> Each party may

---

88. 25 U.S.C. § 3006(c) (1990); *see also* Association on American Indian Affairs, *NAGPRA Compliance* (October 1, 2019, 7:52 PM), <http://www.indian-affairs.org/nagpra-compliance.html> [<http://perma.cc/AC97-NS75>] (“In the case of specific claims, once a written claim for repatriation has been made and denied, the claiming party may seek review of the denial by a Federal Court. The claiming party also has the option to seek review of the denial by the NAGPRA Review Committee before pursuing a court remedy, although the Review Committee’s findings are non-binding. They may be introduced as evidence at any subsequent court proceeding, however.”).

89. *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207, 1220-221 (D. Nev. 2006) (outlining the role of the review committee and noting that the review committee declined to consider the matter).

90. *See* U.S. DEP’T OF THE INTERIOR, MEETING PROCEDURES OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REVIEW COMMITTEE (2018), <http://www.nps.gov/nagpra/Review/Meeting-Procedures-2018-1019.pdf> [<https://perma.cc/2WBX-ESC8>] (outlining general procedures for the

## THE PUBLIC VALUES OF REPATRIATION IN NAGPRA

submit evidence and testify for and against the finding of affiliation, although museum and agency representatives are not required to be present at the Review Committee meeting.<sup>91</sup> As outlined *supra*, evidence of an identifiable prior group associated with the current group with standing (i.e. only federally recognized tribes) is required.<sup>92</sup> The existence of the affiliated material culture must be shown by the following: “Geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion.”<sup>93</sup>

Parties may submit a controversy over a set of human remains or a cultural object to the NAGPRA Review Committee for fact-finding and a non-binding recommendation.<sup>94</sup> In other words, a museum that has declined to culturally affiliate an object to a particular tribe, or that disputes whether the object falls under the aegis of NAGPRA at all, may not be forced to repatriate the object pursuant to a review committee finding that an object or a set of remains is affiliated with a present day tribal group. Like the definitions and requirements outlined in other sections of NAGPRA, the committee review process embodies a compromise between various stakeholders, but also provides an additional value in creating transparency as well as opportunities for implicated parties to air their concerns.

The committee consists of seven members: three representatives from the museum and scientific community, three tribal representatives, and a seventh individual appointed by the Secretary of the Interior from a list approved by the rest of the committee.<sup>95</sup> All committee meeting minutes are easily accessible online, so that both the parties involved and other

---

review committee meetings and the composition of the committee); *see also* NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA) REVIEW COMMITTEE MINUTES (2019), <https://www.nps.gov/subjects/nagpra/meetings.htm> [<https://perma.cc/VC65-JRJ3>] (showing a list of past review committee meetings, ranging from one to four times per year).

91. *Fallon Paiute-Shoshone*, 455 F. Supp. 2d at 1221 (finding that “nothing in the statutes or regulations involved here mandate actual physical presence at the hearing” by the agency that declined to find cultural affiliation).
92. 43 C.F.R. § 10.14(c) (2019).
93. 43 C.F.R. § 10.14(e) (2019).
94. 25 U.S.C. § 3006(c) (2018).
95. 25 U.S.C. § 3006(b).

interested individuals or groups can access and evaluate the process.<sup>96</sup> Like the process for cultural affiliation, the committee review process relies on specific factual and historical inquiries to make decisions about the objects concerned.

A recent committee meeting involved a dispute between California's Wiyot tribe and the Phoebe A. Hearst Museum of Anthropology over "certain cultural items identified as shamanic ('sucking doctor') regalia."<sup>97</sup> The dispute was not about cultural affiliation but concerned whether the objects met NAGPRA's definition of cultural property. As noted above, any object that is not (1) human remains or associated with those remains (2) of essential religious significance or (3) found to have been considered inalienable by the tribe at the moment it was removed does not fall under NAGPRA. Thus, even if the object is clearly associated with a particular tribe, the museum or agency is under no legal obligation to repatriate it.

During the committee review proceedings, each side presents its argument for the record. In the dispute about the sucking doctor regalia, the Wiyot representatives argued that the objects originated in the tribe, were collectively owned, and were essential to a religious ceremony that had been interrupted when they were sold or taken in 1860. In turn the Phoebe Hearst Museum curator argued that the museum had the right of possession and that the objects did not meet NAGPRA's definition of cultural property, mainly because no records showed that they were collectively rather than individually owned (and thus inalienable). What followed was a lively digression by the curator on the perceived biases of the NAGPRA committee system against museum interests, an exchange that highlights some ongoing issues related to NAGPRA's obligations and the committee review system.<sup>98</sup> Despite this tension, each party was able to state its factual and legal claims and air its disagreements on the record.

---

96. NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA) REVIEW COMMITTEE MINUTES, <http://irma.nps.gov/DataStore/Reference/Profile/2229055> [<https://perma.cc/Z48F-4KPH>].

97. Native American Graves Protection and Repatriation Review (NAGPRA) Committee Meeting, July 13-15, 2016, at 22, <http://irma.nps.gov/DataStore/DownloadFile/630201> [<http://perma.cc/M59R-54UG>].

98. For example, "The Hearst Museum believes [that the circumstances around the Wiyot tribe claims] suggest[] a desire on the part of the Review Committee to malign the Hearst Museum, rather than to facilitate resolution. Given these unaddressed structural biases, the Hearst Museum expressed concern that the hearing would not help facilitate the resolution of this matter as the law intends." *Id.* at 24.

#### THE PUBLIC VALUES OF REPATRIATION IN NAGPRA

This information is in turn available to researchers and the public for their own analysis through the online minutes.

In this instance, as it almost universally does, the committee found in favor of tribal interests. The museum may, however, decline to comply with these non-binding findings. After exhausting the committee review process (or without first exercising the right to committee review, if they prefer), parties may seek review in federal court, and any Review Committee fact-finding will be admissible in that proceeding.<sup>99</sup>

In reality, despite a few high profile cases involving human remains, few tribes pursue enforcement through the federal courts.<sup>100</sup> As a first matter, this is because litigation presents often-insurmountable administrative and financial burdens for many smaller tribes.<sup>101</sup> In addition, given the history of forced migration and fragmentation of tribal groups in the United States and the great age of some NAGPRA objects, presenting evidence sufficient to meet the preponderance of the evidence standard under the guidelines outlined in 43 C.F.R. § 10.14 for cultural affiliation presents an insurmountable burden.

Even where such evidence may exist, the path to repatriation through litigation is long and winding. For example, in the case of the “Spirit Cave Mummy,” remains of a man were removed in 1940 from a cave in Northern Nevada that the Fallon Paiute-Shoshone tribe considered to be

---

99. 25 U.S.C. § 3006(d) (2018); 25 U.S.C. § 3013 (2018). Note that the requirement of proof based on some combination of tribal history and current scientific evidence ensures that the number of cultural affiliations that could be subject to successful enforcement proceedings under the preponderance of the evidence standard in United States District Court is limited.

100. *See, e.g.*, *Thorpe v. Borough of Thorpe*, 770 F.3d 255 (3d Cir. 2014) (regarding the remains of Olympic gold medalist Jim Thorpe); *Bonnichsen v. United States*, 357 F.3d 962 (9th Cir. 2004), *and amended by*, 367 F.3d 864 (9th Cir. 2004) (remains of the famous “Kennewick Man”); *Fallon Paiute-Shoshone v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207 (D. Nev. 2006) (the “Spirit Cave Mummy”—North America’s oldest mummy).

101. Indeed, Ms. Gredell at the Yale Peabody Museum and Ms. Thomas at Indiana University explained that their roles as repatriation coordinators included assisting smaller tribes who lacked the infrastructure to fully implement *voluntary* repatriations on their own. Interview with Erin Gredell, Repatriation Coordinator, Yale Peabody Museum in New Haven, Conn. (Dec. 13, 2017); Interview with Jayne-Leigh Thomas, NAGPRA Dir., Ind. Univ. in Bloomington, Ind. (Apr. 16, 2018).

traditional tribal land.<sup>102</sup> The remains were placed in storage in the Nevada State Museum, under the control of the Nevada division of the Bureau of Land Management.<sup>103</sup> During the process of inventorying the remains as required by the 1990 passage of NAGPRA, museum researchers discovered that the remains were in fact about 9,400 years old rather than the 2,000 years that they had initially believed.<sup>104</sup> The tribe sought the return of the remains at this time through the museum's affiliation process and then through the NAGPRA Review Committee process (first in 1998, then in 2000 with an ultimate decision by the Review Committee in 2001).<sup>105</sup> In 2006, the District of Nevada found that the Bureau of Land Management had violated NAGPRA and the Administrative Procedure Act in its handling of the Spirit Cave Man case, in part because the Bureau of Land Management had completely failed to engage with the tribe's evidence and the Review Committee findings in its determination that the remains were not affiliated.<sup>106</sup> Despite this rebuke, it was a decade later in 2016, however, after DNA sequencing of the remains definitively established the link between the remains and present day Native Americans that the remains were finally returned to the Fallon Paiute-Shoshone.<sup>107</sup>

As the above example makes abundantly clear, litigation may not be feasible or desirable as a means of effectuating most NAGPRA repatriations. Nevertheless, the mechanisms provided by NAGPRA create the obligation for museums to inventory their collections and repatriate items where appropriate. This requirement has generated real results in terms of new repatriations.

Between 1990 and 2016, NAGPRA provided for the cataloging of 57,847 individuals' human remains and 1,479,923 associated funerary

---

102. *See Fallon Paiute-Shoshone*, 455 F. Supp. 2d at 1209-11 (outlining the story of the Spirit Cave Man and the background for the NAGPRA dispute).

103. *Id.* at 1209.

104. *Id.* at 1211.

105. *Id.* at 1211-12.

106. *Id.* at 1225.

107. Ewen Callaway, *North America's Oldest Mummy Returned to US Tribe After Genome Sequencing*, 540 NATURE 178 (Dec. 8, 2016), <http://www.nature.com/news/north-america-s-oldest-mummy-returned-to-us-tribe-after-genome-sequencing-1.211108> [<http://perma.cc/NB5A-Z3TD>].

#### THE PUBLIC VALUES OF REPATRIATION IN NAGPRA

objects.<sup>108</sup> Of these, 57,847 sets of human remains were identified as culturally affiliated and eligible for repatriation, according to figures published in the National Register.<sup>109</sup> It also resulted in the return of nearly 15,000 sacred and cultural objects to tribes.<sup>110</sup> These numbers alone testify to NAGPRA's success in identifying Native American remains and cultural objects and in returning many thousands of them. It also clearly shows that museum and other research collections have not had their storerooms and exhibition halls stripped bare by NAGPRA's mandate

In most cases, the end result of this process will ultimately depend in large part on collaboration between the parties, as well as the soft pressure of public opinion and bad publicity. In other words, NAGPRA takes a morally and emotionally fraught problem and adjudicates the interests of various stakeholders by "provid[ing] a mechanism to craft values, forge relationships, and configure social institutions."<sup>111</sup> In Part III. B. *infra*, this Note examines those relationships amongst stakeholders and their results. NAGPRA's requirements have also shed light on improper preservation practices, which are now being remedied;<sup>112</sup> catalyzed important new connections between museums and Native groups;<sup>113</sup> and

---

108. U.S. DEP'T OF THE INTERIOR, NATIONAL PARK SERVICE, FISCAL YEAR 2016 REPORT: NATIONAL NAGPRA PROGRAM 1, 6 (2016) <https://irma.nps.gov/DataStore/DownloadFile/606133> [<https://perma.cc/UG6A-8M2U>] [hereinafter 2016 REPORT]; see U.S. DEP'T OF THE INTERIOR, NATIONAL PARK SERVICE, NATIONAL NAGPRA: FREQUENTLY ASKED QUESTIONS, <https://www.nps.gov/subjects/nagpra/frequently-asked-questions.htm> [<https://perma.cc/9MZ7-FFGM>] (note that the number of "associated funerary objects" includes very small objects, such as beads).

109. 2016 REPORT, *supra* note 108.

110. *Id.* Specifically, NAGPRA has resulted in the repatriation of 5,136 sacred objects, 8,130 objects of cultural patrimony, and 1,662 objects that are both sacred and patrimonial.

111. S.E. Nash & C. Colwell-Chanthaphonh, *NAGPRA After Two Decades*, 33 MUSEUM ANTHROPOLOGY 99, 100 (2010).

112. For instance, NAGPRA has brought the practice of spraying objects with cyanide and other toxic chemicals to light, *see id.* at 99 (2010) (noting the ongoing problem of toxic remains), and opened the door to culturally appropriate preservation practices. Interview with Erin Gredell, Repatriation Coordinator, Yale Peabody Museum in New Haven, Conn. (Dec. 13, 2017).

113. This observation was emphasized by each of the NAGPRA practitioners interviewed for this Note, as examined in more detail *infra*. It is also

provided a forum for dispute resolution accessible to a wider range of stakeholders (and to everyone on the Internet).<sup>114</sup> In other words, NAGPRA has made museums and federally-funded agencies better at fulfilling their role in promoting the public's interest in preservation, knowledge production, and access. In addition, and perhaps most exciting, NAGPRA's combination of incentives and penalties have generated new and productive collaborations between institutions and tribes that have benefitted each of these stakeholders as well as the public more broadly.

*B. Humanity and Human Connections: Advances in preservation, knowledge production, and access under NAGPRA*

In addition to the requirements enunciated by NAGPRA, the statute has also created opportunities for tribes and institutions to work together to implement culturally sensitive preservation and storage practices, expand and diversify knowledge about cultural objects, and open greater access to collections.

NAGPRA's requirements became a significant new administrative burden, both in coordinating inventories and repatriation and in securing grant funding. Several institutions with significant collections of Native American remains and objects created new positions specifically to administer NAGPRA requirements and funding. This Note incorporates recent interviews with Erin Gredell, the Repatriation Coordinator at the Yale Peabody Museum; Jayne-Leigh Thomas, the NAGPRA Director at

---

reflected in other accounts. *See, e.g.*, Henry interview, *supra* note 78 (“One good thing that NAGPRA has done is to compel museums to have a dialogue with their Native constituents and the descendants of the people who created many of the objects that are in these repositories and museums. That’s a good thing—it’s getting people to talk about things and to talk about perspectives and interpretation and also cultural sensitivities. That has been positive for all museums, now that museums have to open up their doors more and be accountable to the populations or the communities they’re representing in their own institutions.”); Nash & Colwell-Chanthaphonh, *supra* note 111, at 99 (noting that the authors—curators at the Denver Museum—have “received three National Park Service NAGPRA grants to consult with more than 125 tribes on remains from the Rocky Mountains, Great Plains, and the East Coast.”)

114. NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA) REVIEW COMMITTEE MINUTES, <http://irma.nps.gov/DataStore/Reference/Profile/2229055> [<https://perma.cc/Z48F-4KPH>].

#### THE PUBLIC VALUES OF REPATRIATION IN NAGPRA

Indiana University, and Ryan Wheeler, the Director of the Peabody Institute of Archaeology at Andover.<sup>115</sup> In addition, Angela Neller, the Curator at the Wanapum Heritage Center in Mattawa, Washington offered a tribal perspective on repatriation.<sup>116</sup> Each described how NAGPRA's mandate, despite ongoing challenges, has created rich new opportunities for collaboration and knowledge exchange. Each of the practitioners emphasized the importance of creating human connections between institutions and tribes in order to facilitate their work.<sup>117</sup>

Both Ms. Gredell and Ms. Thomas explained that success in their roles was contingent on cultivating personal and collaborative relationships with tribal members. Ms. Thomas dramatically increased the scope of the repatriation program at Indiana University, which has over 5,000 sets of Native American remains, by getting in her car and driving across the country to personally introduce herself and to consult with tribes. Her efforts have resulted in consultations with over one hundred tribes, most of which have aboriginal interests in Indiana. Indiana has completed ten repatriations in the past two years, and Ms. Thomas emphasized that the often-lengthy preparations for reburial have been sped up by in-person consultation. Thanks to \$85,000 in NAGPRA funds, Indiana University and

---

115. Interview with Erin Gredell, Repatriation Coordinator, Yale Peabody Museum in New Haven, Conn. (Dec. 13, 2017); Interview with Jayne-Leigh Thomas, NAGPRA Dir., Ind. Univ. in Bloomington, Ind. (Apr. 16, 2018); Telephone Interview with Ryan Wheeler, Dir., Peabody Inst. of Archaeology at Andover (Feb. 14, 2019).

116. Interview with Angela Neller, Curator, Wanapum Heritage Center in Mattawa, Wash. (May 21, 2018). Note that the Wanapum are not a federally recognized tribe, and thus do not benefit explicitly from the requirements of NAGPRA. However, Ms. Neller explained that although the Wanapum will not appear in the notice of repatriation, they can be recognized as far as having a cultural relationship with a federally recognized tribe, and so they can be included and recognized in repatriation proceedings that way. Mr. Wheeler also noted that the Peabody Institute at Andover had completed repatriations in this way. This is another clear example of the ways in which NAGPRA's structure creates a framework for collaboration, in which cooperating institutions and individuals must fill in the gaps to ensure mutually beneficial outcomes.

117. Other accounts confirm the importance of collaborative effort to fulfill the "spirit of NAGPRA" while filling in its interpretive gaps. See Cecily Harms, *NAGPRA in Colorado: A Success Story*, 83 U. COLO. L. REV. 593, 593 (2012) (arguing that "[t]he collaboration between Colorado museums and tribes is . . . a model for NAGPRA implementation today and for the future.").

fifteen tribes are planning a massive reburial of remains from the university collections at the Angel Mounds archaeological site.<sup>118</sup> Ms. Gredell also noted that success in her role requires travel and relationship building with the tribes. Grants have also allowed tribes to come to the institutions themselves. NAGPRA grants provided funds to bring tribal members to New Haven to identify and perform a ceremony with culturally affiliated objects,<sup>119</sup> as well as supported a recent gathering of nineteen tribes at Indiana University.<sup>120</sup> Gathering the institutional will and resources necessary for such collaborations would have been unimaginable before NAGPRA. It would also be difficult without NAGPRA practitioners willing to fill in the gaps in the statutory framework by creating opportunities for those collaborative relationships.

Ms. Gredell noted that the inventory and notice requirements have generated new research and unprecedented connections with tribes as institutions work to identify and appropriately manage objects.<sup>121</sup> The NAGPRA inventory requirement generated large quantities of new documentation about what remains and objects museum collections contain. This knowledge benefits tribes as well as researchers and other interested parties. The mandatory notice requirement and the accompanying possibility of repatriation also facilitate productive exchange. While some objects may be repatriated, others remain in museum collections by agreement. This may be for a finite period of time, until the tribe has prepared for a reburial or to house a cultural object. Ms. Thomas noted that once collections are returned to tribes and they are directing the process, there are additional opportunities for research in collaboration with research institutions. For example, Indiana University

---

118. Steve Hinnefeld, *Indiana University, Tribes Proceeding with Repatriation of Remains to Angel Mounds*, NEWS AT IU BLOOMINGTON (Jun. 20, 2018), <http://news.iu.edu/stories/2018/06/iub/inside/20-tribes-proceeding-with-repatriation-of-remains-and-artifacts-to-angel-mounds.html> [<http://perma.cc/JVC6-25V5>].

119. Interview with Erin Gredell, Repatriation Coordinator, Yale Peabody Museum in New Haven, Conn. (Dec. 13, 2017).

120. Steve Hinnefeld, *IU Hosts 19 Tribal Nations for NAGPRA Consultation Event*, INSIDE IU BLOOMINGTON (May 18, 2016), <http://archive.inside.indiana.edu/editors-picks/campus-life/2016-05-18-nagpra-conference.shtml> [<http://perma.cc/QZN4-EXUY>].

121. Gredell interview, *supra* note 119.

#### THE PUBLIC VALUES OF REPATRIATION IN NAGPRA

has been able to conduct research using non-destructive DNA testing with the consent of the implicated tribes.<sup>122</sup>

Within the new structure facilitated by NAGPRA, tribes may benefit from culturally specific accommodations for objects in museums. This might include for example, religiously appropriate storage, ritualistic cleaning with burning herbs (“smudging”) or feeding objects, or allowing tribal members to visit the objects and perform ceremonies. Museums and the public in turn benefit from additional contextual knowledge about the objects in their collections. This conscientious preservation is a far cry from the crowded warehouses and poor storage conditions described in the pre-NAGPRA era. In addition to the improved physical conditions since that period, institutions that have embraced NAGPRA’s help preserve more than the physical object, but also important cultural knowledge and practices.

Finally, accessing NAGPRA grant funding for research and documentation of Native American objects requires collaboration with tribes.<sup>123</sup> This funding incentivizes museums to further their own research goals while also accommodating tribal interests. This in turn serves a public interest in the production of quality research at federally funded institutions. Tribes benefit from the often-superior administrative infrastructure and grant-writing expertise of institutions and the NAGPRA practitioners embedded within them, without which smaller tribes might be unable to access grants at all. For example, a recent NAGPRA grant to the Peabody Museum included a project to photographically document a collection of Alaskan indigenous objects for the first time.<sup>124</sup> At the University of Indiana, nineteen tribes recently came to campus for a consultation on NAGPRA objects.<sup>125</sup> Even without grants, the connections forged by NAGPRA’s mandate have fostered new initiatives. Mr. Wheeler at the Andover Peabody described a project in which a Band of Muscogee and Porch Creek, who were forced to relocate from their ancestral homelands in Alabama to Oklahoma during the Trail of Tears, took a bus tour to view their ancestral homelands in Alabama for the first time in connection with a NAGPRA consultation. In turn, a large repatriation to the Pueblo Haymans tribe of nearly 2,000 sets of remains has generated ongoing

---

122. Interview with Jayne-Leigh Thomas, NAGPRA Dir., Ind. Univ. in Bloomington, Ind. (Apr. 16, 2018).

123. 25 U.S.C. § 3008 (2018).

124. Gredell interview, *supra* note 119.

125. Hennefield, *supra* note 120.

collaboration leading to student trips and visits by tribal members to classes.<sup>126</sup> Chip Colwell, a curator at the Denver Museum, has co-produced an exhibition with an Osage tribal member and Anthropology student, Jani Powell, and has also coordinated collaborative efforts with the Zuni Tribal Museum.<sup>127</sup>

In these ways, the additional constraints and obligations imposed by NAGPRA in fact serve to foster a more collaborative and dynamic approach to cultural objects than did the pre-regime status quo. In so doing, they increase access and knowledge, while encouraging better documentation and conservation practices.

Finally, the cultural changes generated by NAGPRA and the increased control, albeit tenuous, that federally recognized tribes now exercise over affiliated objects in addition to the remains of their ancestors, has increased access not just for tribes but for the public more broadly. Since the passage of NAGPRA, around 200 tribes have opened their own museums.<sup>128</sup> One such museum is the Wanapum Heritage Center, where Angela Neller is the curator. The Wanapum Heritage Center opened in 2015, with funding from the Public Utility District.<sup>129</sup> It brings a larger, interactive cultural heritage center to a rural area of Washington State, where the cultural objects it contains will be accessible to the kind of people who, for reasons of geography or demographics, are unlikely to make it the American Museum of Natural History in New York. In this way, the sea change brought about by NAGPRA has increased access both by offering tribes a way in, and a seat at the table, and by offering objects a way out to a greater diffusion of institutions with a wider public.

---

126. Telephone Interview with Ryan Wheeler, Dir., Peabody Inst. of Archaeology at Andover (Feb. 14, 2019). *See also*, Catherine C. Robbins, *Pueblo Indians Receive Remains of Ancestors*, N.Y. TIMES (May 23, 1999), <http://www.nytimes.com/1999/05/23/us/pueblo-indians-receive-remains-of-ancestors.html> [<http://perma.cc/PCH7-3T7B>].

127. COLWELL, *supra* note 6, at 265.

128. *Id.*

129. Christine Pratt, *Wanapum Heritage Center Opening on Oct. 15*, QUINCY VALLEY POST-REG. (Oct. 9, 2015), <http://qvpr.com/wanapum-heritage-center-opening-on-oct-15> [<http://perma.cc/6HEG-4NDM>].

IV. CONCLUSION

NAGPRA should be seen as more than just a compromise between two sets of competing values. Rather, the repatriation mandate embodied in NAGPRA promotes the public good. In so doing, it shows that the interests of “all mankind” and the interests of discrete, often minoritarian, groups might both be served by repatriation regimes.

To be sure, NAGPRA is imperfect, and both tribes and museums are understandably dissatisfied with what has been an un- or under-funded mandate with limited enforcement mechanisms, and which has led to a morass of interpretive and empirical struggles.<sup>130</sup> However, three decades of experiences with NAGPRA show that despite all of these flaws and barriers, NAGPRA has brought Native American tribes and indigenous Hawaiian groups into conversation with institutions, often for the first time, and has given them the ability to vindicate their interest in self-determination through increased control over their cultural property. As a direct result of these changes, NAGPRA has improved museum practices around preservation, generated a wealth of new knowledge about previously neglected and unidentified objects, and created greater access both to information and to the objects themselves. If we are to judge cultural property regimes by how they advance public interests in preservation, knowledge production, and access, NAGPRA shows that *more* repatriation, not less, might be better.

This observation has important implications for cultural property scholarship and for cultural property regimes, including in the international context. Anti-repatriation critics must engage head-on with the realities and shortcomings of museum practice in the absence of such regulations and begin a more honest conversation about the benefits as well as the drawbacks of repatriation. They should do so by first addressing the widely available factual information about publicly funded museums—including about past preservation practices and the generally small percentage of objects currently on display.<sup>131</sup> Pro-repatriation

---

130. See, e.g., Henry interview, *supra* note 78; Carpenter et al., *supra* note 1, at 1097 (“[W]e ultimately contend that NAGPRA does not in fact go far enough to protect indigenous peoples’ cultural property interests. Even with the law firmly in place and mandated compliance on the part of federally-funded museums, many institutions continue to balk at NAGPRA’s directive with little cost or consequence.”); Nash & Colwell-Chanthaphonh, *supra* note 111; Yellow Bird, *supra* note 6.

131. O’Hare, *supra* note 58.

critics, in turn, should make the benefits of repatriation and the shortcomings of museums and other institutions explicit in their calls for regimes that promote the return of culturally significant objects to their cultures of origin.

Second, policymakers and international bodies should consider the potential public benefits of repatriation regimes, both to indigenous peoples and across borders. While cosmopolitan critics of cultural property regimes would limit NAGPRA's lessons to its specific facts, the observation that institutional practices can be improved by giving legal weight to the claims of more diverse stakeholders has broad implications. NAGPRA shows that a legal regime that gives weight to the claims of cultures of origin against collecting institutions and creates a framework for adjudicating these claims is not a bogeyman destined to result in the impoverishment of cultural institutions for the benefit of a few groups. Rather, it demonstrates that such a regime can improve outcomes for all involved, including the public—who fund and participate in a universal patrimony. This model of stakeholder empowerment, collaboration, and institutional reform engendered by NAGPRA is applicable in contexts far beyond the domestic landscape.

Accordingly, the lessons of NAGPRA should be considered and implemented in international cultural property regimes and by individual institutions. Organizations such as UNESCO, which administers the largest international cultural property agreement, should look to NAGPRA's example in refining guidelines for repatriation and crafting mechanisms for dispute resolution. Institutions with large collections of objects that originated in other cultures such as, say, Greek urns or Egyptian mummies, should seek out opportunities to collaborate in curation and research and should foster a culture of greater transparency and mutual engagement to resolve ongoing disputes about the appropriate disposition of objects of cultural significance.

The lesson of NAGPRA shows that the real winner where such efforts are made is humankind, which will reap the benefits as collecting institutions are encouraged to increase access to better fulfill their mission as stewards of precious cultural objects.