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## Looted Cultural Objects

Elena Baylis

University of Pittsburgh School of Law, ebaylis@pitt.edu

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**Looted Cultural Objects**  
**Elena Baylis\***  
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**ABSTRACT**

In the United States, Europe, and elsewhere, museums are in possession of cultural objects that were unethically taken from their countries and communities of origin under the auspices of colonialism. For many years, the art world considered such holdings unexceptional. Now, a longstanding movement to decolonize museums is gaining momentum, and some museums are reconsidering their collections. Presently, whether to return such looted foreign cultural objects is typically a voluntary choice for individual museums to make, not a legal obligation. Modern treaties and statutes protecting cultural property apply only prospectively, to items stolen or illegally exported after their effective dates. But while the United States does not have a law concerning looted foreign cultural objects, it does have a statute governing the repatriation of Native American cultural items and human remains. The Native American Graves Protection and Restoration Act requires museums to return designated Native American cultural objects to their communities - even if they were obtained *before* the law went into effect. This statute offers a valuable model for repatriating foreign cultural objects that were taken from formerly colonized peoples.

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## INTRODUCTION

### **An Example: The Benin Bronzes**

The Smithsonian National Museum of African Art has the largest collection of African artwork in the United States. One thinks of museums as obtaining, keeping, and conserving art, not giving it away. But the Smithsonian Institution made headlines by returning ownership of twenty-nine Benin Bronzes from its collection to Nigeria.<sup>1</sup> The Benin Bronzes are a spectacular set of thousands of sculptures and plaques that once adorned the Benin Royal Palace in Benin City. They were looted by British forces in 1897 during an attack on Benin City to enable the expansion of British colonial power. The Kingdom of Benin was conquered and incorporated into the British colonial empire. The Benin Bronzes were eventually disseminated to more than 150 museums and an unknown number of private collections around the world. Nigeria has long requested that the Benin Bronzes be returned.<sup>2</sup>

In repatriating some of its Benin Bronzes, the Smithsonian was not acting under a legal obligation. Rather, this was a voluntary action undertaken as a matter of ethics, under the auspices of a new policy authorizing ethical returns. The Smithsonian is reviewing the provenance of an additional twenty Benin Bronzes in its collection and has announced it will return any that it finds were acquired during the 1897 raid.<sup>3</sup> But if it were to change its mind about this commitment, it would be entirely within its legal rights to keep and continue to display the remaining Benin Bronzes, even after acknowledging their original illicit acquisition.

### **Looted Cultural Objects in Museums**

The Benin Bronzes are just one example of this phenomenon. In the United States, Europe, and elsewhere, many museums possess cultural objects<sup>4</sup> that were unethically taken from their communities long ago under the auspices of colonialism. Indeed, central to the history of foreign colonization was the deliberate, systematic extraction, not only of economic resources, but also of cultural resources from colonized peoples and into personal collections, art markets, and

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<sup>1</sup> Kelsey Ables, Smithsonian Gives Back 29 Benin Bronzes to Nigeria, Washington Post (Oct. 11, 2022), <https://www.washingtonpost.com/arts-entertainment/2022/10/11/smithsonian-benin-bronzes-nigeria/>.

<sup>2</sup> Alex Greenberger, The Benin Bronzes, Explained, ARTnews (Apr. 2, 2021), <https://www.artnews.com/feature/benin-bronzes-explained-repatriation-british-museum-humboldt-forum-1234588588/>.

<sup>3</sup> Jacquelyne Germain, The Smithsonian Returns a Trove of Benin Bronzes to Nigeria, Smithsonian Magazine (Oct. 11, 2022), <https://www.smithsonianmag.com/smithsonian-institution/benin-bronzes-going-back-to-nigeria-180980917/>.

<sup>4</sup> Whereas characterizing an item as art focuses on its aesthetic qualities, characterizing it as a cultural object focuses primarily on its meaning to a community. Cultural objects are “‘shared significance embodied in form.’ ...As externalized manifestations of ideas, cultural objects make it possible to share meaning and therefore culture.” Terence McDonnell, Cultural Objects, Material Culture, and Materiality, 49 Annual Review of Sociology 195, 196 (2023) (quoting Wendy Griswold, *Renaissance Revivals: City Comedy and Revenge Tragedy in the London Theater, 1576–1980* (University of Chicago Press 1986)).

museums.<sup>5</sup> More than 90% of historical African art and cultural objects is held outside of Africa, much of it taken by European colonizing forces.<sup>6</sup>

For many years, such collections were considered unexceptional within the art world. Questions about provenance focused on authenticity, not on how artworks were obtained. Leaders of formerly colonized states began demanding the repatriation of their cultural heritage as their countries gained independence. But then and in the decades that followed, museums only rarely acceded to those requests.<sup>7</sup> Instead, museum directors pointed to their missions of fostering cross-cultural understanding and exchange, educating the public, and preserving, protecting, and studying such cultural objects. They argued that these acquisitions were considered both legal and ethical at the time. By keeping these pieces, museums were not endorsing colonization, but rather, were preserving formerly colonized peoples' cultures and showcasing their artworks for a world audience.<sup>8</sup>

Now, a longstanding movement to decolonize museums is gaining momentum. Rather than focusing solely on the ethics or legality of the circumstances under which an object was acquired, decolonization scholars link the past and the present. Restitution is of course about the past harm done by the exploitation of colonization - but it is not solely about the past. Instead, the present-day choices of museums to continue to keep and exhibit looted cultural objects, over the objections of their source communities, create ongoing cultural and relational harms. Museums extend the harm of colonialism into the present by displaying items that were taken as symbols of subjugation. Source communities are cut off from their cultural heritage. The importance of these objects as aesthetic works and educational tools is privileged over their meanings as functional or sacred objects.<sup>9</sup>

Museum professionals' views on this issue have been evolving. Some museum curators now contend that a true cosmopolitan role for museums must be grounded in voluntary exchange, rather than relying on objects taken by force, coercion, and the commodification of sacred or communal objects. They endorse a reimagined vision of the museum that would explore the

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<sup>5</sup> Felwine Sarr & Bénédicte Savoy, *The Restitution of African Cultural Heritage* 49-59 (Nov. 2018) (tr. Drew S. Burk) ("Sarr-Savoy Report") (Felwine Sarr & Bénédicte Savoy, *Rapport sur la restitution du patrimoine culturel africain: Vers une nouvelle éthique relationnelle* 42-51 (Novembre 2018) ("Rapport Sarr-Savoy"); Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* 53-63 & 67-71 (Cambridge University Press 2006).

<sup>6</sup> Sarr-Savoy Report, *supra* note 5, at 3 (Rapport Sarr-Savoy 3).

<sup>7</sup> Carsten Stahn, *Confronting Colonial Objects: Histories, Legalities, and Access to Culture* 357-62 (Oxford University Press 2023); Bénédicte Savoy, *Africa's Struggle for its Art: History of a Postcolonial Defeat* (tr. Susanne Meyer-Abich, Princeton University Press 2022).

<sup>8</sup> Declaration on the Importance and Value of Universal Museums (2002), <https://ia804708.us.archive.org/33/items/cmapr4492/20030000%20Information%20Declaration%20on%20the%20Importance%20and%20Value%20of%20Universal%20Museums.pdf>; James Cuno, *Culture War: The Case Against Repatriating Museum Artifacts*, *Foreign Affairs* (Nov./Dec. 2014).

<sup>9</sup> Dan Hicks, *The Brutish Museums* (2021); George Okello Abungu, *Museums: Geopolitics, Decolonization, Globalisation, and Migration*, in *Reinventing the Museum* (Gail Anderson, ed. 2023); Viktor Ehikhaminor, *Give us Back What Our Ancestors Made*, *New York Times* (Jan. 28, 2020), <https://www.nytimes.com/2020/01/28/opinion/looted-benin-bronzes.html>.

modern art and culture of formerly colonized peoples, rather than focusing predominantly on artifacts of the past.<sup>10</sup>

But while some museums have been reconsidering their approaches to their collections, the actual number of repatriations of contested items has remained small. For example, France holds more than 90,000 cultural objects from sub-Saharan Africa in its state museums, most obtained in its former colonies. French President Emanuel Macron publicly called for the return of colonial-era African art and cultural objects in 2017. Since then, of those 90,000 items, 28 have been returned.<sup>11</sup> That is because in France, as well as some other European countries, rather than facilitating such repatriations, national law actually presents a barrier to restitution.<sup>12</sup> Meanwhile, in the United States and elsewhere in the world, whether to make such returns remains a voluntary choice, not a legal obligation.

### **Legal Standards**

On the one hand, the importance of cultural heritage is well recognized by the law today. International law protects cultural objects during armed conflict<sup>13</sup> and peacetime;<sup>14</sup> it prohibits the possession of stolen or illegally exported cultural items.<sup>15</sup> Human rights law affirms the rights of peoples, and particularly indigenous communities, to their culture and cultural heritage.<sup>16</sup> Many countries have established national laws protecting their cultural patrimony.<sup>17</sup> U.S. federal law prohibits the importation of illegally acquired cultural objects into the United States and criminalizes the possession of such works as stolen property.<sup>18</sup> The European Union has protective cultural property laws as well.<sup>19</sup>

But these laws apply only prospectively to items taken or transferred after their effective dates. This is, of course, long after the time when many cultural objects were originally acquired from then-colonized peoples. Indeed, during the period of colonization, rather than protecting colonized peoples' cultural heritage, European and American legal structures were organized to facilitate acquisition of cultural objects from colonized peoples. For example, even as treaties

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<sup>10</sup> Hicks, *supra* note 9; Ted Loos, A Long Way Home for Looted Art is Getting Shorter, *New York Times* (Apr. 27, 2022), <https://www.nytimes.com/2022/04/27/arts/design/victoria-reed-museum-of-fine-arts-stolen-artwork.html>.

<sup>11</sup> Sarr-Savoy Report, *supra* note 5, at 17-18.

<sup>12</sup> Code du patrimoine, Art. L451-5, [https://www.legifrance.gouv.fr/codes/section\\_lc/LEGITEXT000006074236/LEGISCTA000006189177](https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006074236/LEGISCTA000006189177).

<sup>13</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention (1954).

<sup>14</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 823 UNTS 231 (1970).

<sup>15</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 2421 UNTS 457 (1995).

<sup>16</sup> United Nations Declaration on the Rights of Indigenous Peoples (2007); International Covenant on Economic, Social, and Cultural Rights (1966).

<sup>17</sup> UNESCO List of National Cultural Heritage Laws, <https://en.unesco.org/cultnatlaws/list>.

<sup>18</sup> 19 U.S.C. §§ 2601-13.

<sup>19</sup> Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods, PE/82/2018/REV/1; Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods.

protecting cultural heritage during war became part of international law at the end of the 19th and beginning of the 20<sup>th</sup> centuries, those protections did not extend to armed conflict with colonized peoples.<sup>20</sup>

Nonetheless, there are several legal frameworks that endorse the premise that the law can and should be used as a mechanism to protect community interests and address widespread social harm. Restorative justice models use legal processes to facilitate healing social groups' historical trauma,<sup>21</sup> while reparative justice models treat reparations as a mechanism for redressing past injustices to communities.<sup>22</sup> Transitional justice theories emphasize that, when social communities have been engaged in conflict, recognition of and accountability for conflict-related harms is foundational to future peace and stability.<sup>23</sup> Theories of social reconciliation posit that a society must engage in processes that remedy structural power inequalities among its communities and address communities' core needs and interests to enable positive transformation of community relationships.<sup>24</sup>

Furthermore, while most cultural property law is purely prospective, there is a law that requires repatriation of cultural objects taken in the past. The United States does not have a law concerning the return of foreign cultural objects taken from formerly colonized peoples overseas, but it does have a legal regime requiring the repatriation of Native American<sup>25</sup> cultural objects and human remains.

### **A Second Example: A Native American Bundle**

In December 2023, the Andy Warhol Museum quietly announced that it was returning a Native American bundle to the Cheyenne River Sioux Tribe of South Dakota.<sup>26</sup> The bundle had been part of Andy Warhol's collection of millions of diverse objects, papers, and artworks.<sup>27</sup> The bundle's history before Mr. Warhol acquired it is unknown. The Andy Warhol Museum discovered the bundle in 2018, intermingled with other items in a donation from the foundation that had

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<sup>20</sup> Laws and Customs of War on Land (Hague II), July 29, 1899, 32 Stat. 1803, Treaty Series 403; Laws and Customs of War on Land (Hague IV), October 18, 1907, The Convention, entered into force 26 January 1910; The Lieber Code (General Orders No. 100, April 24, 1863); see also Vrdjolak, *supra* note 5, at 63-67.

<sup>21</sup> Moira G. Simpson, *Museums and Restorative Justice*, 61 *Museum International* 121, 122 (2009).

<sup>22</sup> Patty Gerstenblith, *Cultural Objects and Reparative Justice: A Legal and Historical Analysis* 249-52 (Oxford University Press 2023).

<sup>23</sup> Stahn, *supra* note 7, at 53-56; Elena Baylis, *Cosmopolitan Pluralist Hybrid Tribunals*, in *Oxford Research Handbook on Global Legal Pluralism* 595, 596 (Paul Schiff Berman, ed., Oxford University Press 2020).

<sup>24</sup> Elena Baylis, *Post-Conflict Reconciliation in Ukraine*, 5 *Revue européenne du droit* 71, 71-72 (2023); Arie Nadler and Nurit Shnabel, *Intergroup reconciliation: Instrumental and socio-emotional processes and the needs-based model*, 26 *European Review of Social Psychology* 93, 94 (2015).

<sup>25</sup> The concerned statute uses the term "Native American" to refer to "a tribe, people, or culture that is indigenous to the United States," 25 U.S.C. § 3001(9). This paper follows suit. I recognize that individuals and communities have different preferences about this language choice, and my intention is to use language that is respectful and widely accepted.

<sup>26</sup> Notice of Intent To Repatriate Cultural Items Amendment: The Andy Warhol Museum, Pittsburgh, PA, 88 Fed. Reg. 86367, 86367 (Dec. 13, 2023).

<sup>27</sup> History, Andy Warhol Foundation for the Visual Arts, <https://warholfoundation.org/about/history/>.

inherited Mr. Warhol's estate. Museum curators identified the bundle as a Native American cultural object. Within a few months, the museum circulated a notification of its discovery to potentially affiliated tribes.<sup>28</sup>

Such bundles are considered sacred, and the museum's notice identifies this bundle as an "object of cultural patrimony," that is, an object that is so central to a group's identity and culture that it is inalienable from that community.<sup>29</sup> The museum described the bundle it was repatriating as such:

The bundle consists of a large adult eagle wrapped in an embroidered wool shawl, patterned silk, linen, and multiple layers of patterned cotton. Most of the fabrics used in the bundle had been previously worn. The outermost layers of the bundle are wrapped in plain cotton. Hand-stitched wool stroud and silk ribbons are wrapped around the eagle's chest, silk ribbons are tied around its ankles, and a runtee shell is tied around its neck.<sup>30</sup>

In many ways, the Andy Warhol Museum's decision to return this bundle to the Cheyenne River Sioux Tribe is like the Smithsonian Institution's repatriation of its Benin Bronzes to Nigeria. The bundle and the Bronzes are both of great cultural significance to their source communities. In both instances, there is no indication that the original acquisition of the item was illegal under the then-applicable laws. Both the Cheyenne River Sioux Tribe and Nigeria want their cultural heritage to be returned.

Like the Benin Bronzes, the restitution of the Cheyenne River Sioux bundle is also emblematic of a broader phenomenon. Just as cultural heritage was looted under the auspices of foreign colonialism overseas, so also Native American cultural items and human remains have been systematically looted within the United States, under the auspices of colonialism and post-colonial laws, policies, and social norms. Native American bodies, clothing, and cultural objects were plundered directly from battlefields. Communally owned sacred objects and items of cultural patrimony were taken from communities without their consent, whether stolen or purchased from individuals who did not have community authority to sell them. Funerary objects were excavated from their burial sites without consent, along with the associated human remains. Many of these cultural objects and human remains were channeled to museums, universities, and government agencies. Some have been prominently exhibited in museums and galleries. Others were put away in long-term storage for future display or study. Yet others, like this bundle, were kept in private

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<sup>28</sup> Notice of Intent To Repatriate Cultural Items: The Andy Warhol Museum, Pittsburgh, PA, 88 Fed. Reg. 51345, 51345 (Aug. 3, 2023); History, Andy Warhol Foundation for the Visual Arts, <https://warholfoundation.org/about/history/>.

<sup>29</sup> Notice of Intent To Repatriate Cultural Items: The Andy Warhol Museum, Pittsburgh, PA, 88 Fed. Reg. 51345, 51345 (Aug. 3, 2023); 25 U.S.C. § 3001(3)(D).

<sup>30</sup> Notice of Intent To Repatriate Cultural Items: The Andy Warhol Museum, Pittsburgh, PA, 88 Fed. Reg. 51345, 51345 (Aug. 3, 2023).

collections.<sup>31</sup> Of course, we do not know the origin or acquisition history of this particular bundle before it was purchased by Mr. Warhol, and in this way it is different than the Bronzes.

The Cheyenne River Sioux bundle repatriation is also different in another, critically important way: unlike the Smithsonian's return of the Benin Bronzes, the Andy Warhol Museum's action was not voluntary. Instead, the museum was complying with a law that required it to publicly report that it had the bundle in its collection, required it to identify the Native American communities with whom the bundle might be affiliated, required it to engage with those communities, and required it to repatriate the bundle at an affiliated community's request. Unlike the Smithsonian Institution with the Benin Bronzes, the Andy Warhol Museum could not legally change course and choose to retain other such bundles. Rather, it must return to their communities all Native American sacred objects, funerary objects, and objects of cultural patrimony that meet the statutory requirements.

## A LEGAL FRAMEWORK FOR REPATRIATION

### The Native American Graves Protection and Restoration Act

The Native American Graves Protection and Restoration Act ("NAGPRA") was enacted in 1990.<sup>32</sup> NAGPRA requires federally-funded institutions and federal agencies to repatriate Native American human remains and certain cultural objects in their collections – most notably, even if these entities acquired the items or remains *before* the statute went into effect. Thus, unlike the other laws discussed above, NAGPRA mandates the return of designated cultural objects that were taken in the past.<sup>33</sup>

Before NAGPRA was passed in 1990, when Native American communities sought the return of their ancestors and cultural heritage, museums often refused. But NAGPRA fundamentally changed the balance of power between institutional collectors and Native American communities. Since 1990, it has facilitated the return of more than 2 million cultural objects and more than 100,000 human remains.<sup>34</sup>

This essay argues that NAGPRA is a valuable example for laws and policies concerning repatriation of cultural objects taken from other formerly colonized peoples. The core aims of NAGPRA are the same as those of repatriations to other formerly colonized peoples. Many of the issues that NAGPRA addresses are versions of the concerns that are central to these other

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<sup>31</sup> Amy Lonetree, *Decolonizing Museums: Representing Native America in National and Tribal Museums* 9-14 (2012); Kathleen S. Fine-Dare, *Grave Injustice: The American Indian Repatriation Movement and NAGPRA*, Chapter 1, (2012); Margaret Bruchac on Erasure and the Unintended Consequences of Repatriation Legislation, in *Speaking of Indigenous Politics* 52, 55 (Kauanui, J. K., Ed., (2018) ("Bruchac").

<sup>32</sup> Pub. L. 101-601, 25 U.S.C. §§ 3001 et seq., 104 Stat. 3048 (Nov. 16, 1990).

<sup>33</sup> 25 U.S.C. § 3005.

<sup>34</sup> Fiscal Year 2023 Report, National NAGPRA Program, National Park Service 2 (Nov. 21, 2023), <https://irma.nps.gov/DataStore/DownloadFile/694455>.

repatriations. The nuances and uncertainties it must address are also often shared with such repatriations.

NAGPRA is a useful example in several ways. First, NAGPRA offers proof of concept that a repatriation law can be passed and can have a measurable impact. Also, NAGPRA's framework could serve as a model for other repatriation processes. Finally, due to NAGPRA's decades of implementation experience, it is most valuable as a case study of a repatriation mechanism in practice.

This question is particularly salient at this moment. Whether to pass legislation enabling repatriations is being debated in France.<sup>35</sup> The Dutch Ministry of Education, Culture, and Science has adopted a policy facilitating repatriation of cultural objects to its former colonies on a case by case basis.<sup>36</sup> Museums and museum associations have been developing voluntary guidelines.<sup>37</sup> In the United States and overseas, the Black Lives Matter movement has made the present-day legacies of racism, slavery, and colonialism evident; for some museums, it has illuminated the issue of looted foreign art as one that is not just about the past but also about the legitimacy of our social structures in the present and the future.<sup>38</sup> For all of these groups and purposes, NAGPRA's design and implementation of a repatriation mechanism represents an important resource.

### **NAGPRA as Proof of Concept**

First and foremost, NAGPRA is proof of concept: it is possible to enact a repatriation law, possible to require the return of objects acquired in the past, and possible to have measurable real-world impact with that requirement. More than thirty years after NAGPRA was enacted, it is still in effect and being actively implemented. It has not been rescinded or even amended by Congress. It has not been overturned by the courts. To the contrary, new 2023 agency regulations update the interpretation and implementation of NAGPRA to make it easier to repatriate items and to defer more to Native American communities' knowledge in doing so.<sup>39</sup>

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<sup>35</sup> Remise du rapport Patrimoine partagé (Apr. 27, 2023), <https://www.culture.gouv.fr/fr/Espace-documentation/Rapports/Remise-du-rapport-Patrimoine-partage-universalite-restitutions-et-circulation-des-aeuvres-d-art-de-Jean-Luc-Martinez>.

<sup>36</sup> Redressing an injustice by returning cultural heritage objects to their country of origin, Government of the Netherlands, (Jan. 29, 2021), <https://www.government.nl/latest/news/2021/01/29/government-redressing-an-injustice-by-returning-cultural-heritage-objects-to-their-country-of-origin>; Advisory Committee on the National Policy Framework for Colonial Collections, Council for Culture, Colonial Collection: A Recognition of Injustice (January 2021) (“Netherlands Report”).

<sup>37</sup> *E.g.*, American Association of Museum Directors, Guidance on Art from Colonized Areas (October 2022) (“AAMD Guidelines”); Arts Council of England, Restitution and Repatriation: A Practical Guide for Museums in England (2023), <https://www.artscouncil.org.uk/supporting-arts-museums-and-libraries/supporting-collections-and-cultural-property/restitution-and-repatriation-practical-guide-museums-england>.

<sup>38</sup> How to Return Stolen Art, Freakonomics Radio (May 17, 2023), <https://freakonomics.com/podcast/how-to-return-stolen-art/> (transcript).

<sup>39</sup> Native American Graves Protection and Repatriation Act Systematic Processes for Disposition or Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony, 88 Fed. Reg. 86452 (Dec. 13, 2023) (“2023 Regulations”).

As described above, a fundamental limitation of most cultural property laws is that they apply only prospectively. In contrast, NAGPRA's repatriation provisions apply even to Native American cultural objects that were acquired before it came into effect. Congress accomplished this by narrowing NAGPRA's applicability to two groups that have ongoing relationships with the federal government that render them subject to Congress's Spending Clause and Necessary and Proper Clause authority: institutions receiving federal funding and federal agencies.<sup>40</sup> As a result, individuals and private entities that do not receive federal funds do not have any repatriation obligations under NAGPRA. However, the expanded applicability of NAGPRA to human remains and cultural objects taken before 1990 is nonetheless quite extensive, reaching numerous universities, museums, and agencies with substantial Native American holdings in their collections.

In addition to providing a constitutional grounding for its requirements, NAGPRA's focus on the ongoing obligations of federally-funded and federal institutions is connected conceptually to the idea discussed above that the harm to formerly colonized peoples is not just a past harm, but an ongoing one. NAGPRA is not solely correcting a past injustice. It is also aligning the policies of present-day federally-funded and federal institutions with the present-day commitment of the federal government to deal ethically with Native American communities.

A similarly designed U.S. law concerning repatriations to other formerly colonized peoples could also rely on Congress's Necessary and Proper Clause and Spending Clause authority. NAGPRA's constitutionality is further supported by Congress's plenary authority over Native American matters under the Supremacy and Commerce Clauses. This would of course not be applicable to foreign repatriations, but such a law could rely instead on Congress's Commerce Clause authority over commerce with foreign nations.<sup>41</sup> Finally, NAGPRA includes a failsafe to revert to otherwise applicable principles of property law if necessary to avoid a Takings Clause violation. A U.S. law on repatriations to other formerly colonized peoples could utilize a similar provision.<sup>42</sup>

Of course, the corresponding legal questions to be addressed will be different in foreign states considering such laws. For example, as noted above, France and some other states must address laws prohibiting deaccessions by state museums. Appropriately integrating a repatriation requirement into the national legal context is one area in which NAGPRA can serve as proof of concept for the United States, but not for other countries.<sup>43</sup>

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<sup>40</sup> 25 U.S.C. §§ 3001(4) & 3001(7); *see also* 20 U.S.C. §§ 80q-9 – 80q-12 (addressing the Smithsonian Institution).

<sup>41</sup> U.S. Constitution, art. I, § 8, cl. 1, 3 & 18; art. VI, cl. 2; *see also* Patty Gerstenblith, Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public, 11 *Cardozo J. Int'l & Comp. L.* 409, 431 (2003); Isaac Moriwake, Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian "Cultural Property" Repatriation, 20 *Hawaii L. Rev.* 261, 285, n. 158 (1998).

<sup>42</sup> U.S. Constitution, art. I, § 8, cl. 1, 3 & 18; art. VI, cl. 2; *see also* Gerstenblith, Acquisition, *supra* note 41, at 434-36; Moriwake, *supra* note 41, at 283-85; Kristen A. Carpenter, et al., In Defense of Property, 118 *Yale L.J.* 1022, 1093 (2009).

<sup>43</sup> *E.g.*, Sarr-Savoy Report, *supra* note 5, at 71-79.

In addition to demonstrating the legal feasibility of a repatriation law, NAGPRA has also proven such a law's ability to achieve real-world impacts. As noted above, NAGPRA has facilitated the return of millions of cultural items to Native American communities.<sup>44</sup> It has also had a noticeable effect in other, less quantifiable ways. Public consciousness of the issue has increased due to media coverage of NAGPRA.<sup>45</sup> Museums and communities have reached other kinds of agreements in lieu of repatriation when communities have not wished to pursue physical returns.<sup>46</sup> Some museums that have engaged in the required consultative process with tribes report that doing so has enabled better communication, mutual understanding, and collaboration.<sup>47</sup>

To be sure, the concerned communities and institutions, as well as advocates and scholars, have also expressed significant dissatisfaction with how NAGPRA is conceptualized, organized, and implemented.<sup>48</sup> Indeed, a primary purpose of the new 2023 administrative regulations is to address some of these persistent concerns.<sup>49</sup> As discussed below, these complexities are exactly what makes NAGPRA a useful case study.

### **Key Issues**

In addition to being proof of concept, NAGPRA and its long history of implementation could also serve as a model or case study for other repatriation mechanisms. For either purpose, NAGPRA offers a useful point of comparison, because it addresses many of the same key issues that are also fundamental for repatriations to other formerly colonized peoples:<sup>50</sup>

***Who can reclaim cultural objects?*** Should any source community or descendant be eligible to reclaim an object, or only particular people, communities, or political entities? States may choose to focus on claims by communities with which they have significant relationships, such as their own former colonies. Some source communities no longer exist,

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<sup>44</sup> Fiscal Year 2023 Report, National NAGPRA Program, National Park Service 2 (Nov. 21, 2023), <https://irma.nps.gov/DataStore/DownloadFile/694455>.

<sup>45</sup> *E.g.*, Logan Jaffe, et al, The Repatriation Project, Propublica, (Jan 11, 2023), <https://www.propublica.org/article/repatriation-nagpra-museums-human-remains>; Samantha Chery, Museums Cover Native Displays After New Repatriation Rules, Washington Post (Jan. 6, 2024), <https://www.washingtonpost.com/entertainment/art/2024/01/26/museums-remove-native-american-hawaiian-indigenous-exhibit-nagpra/>; Julia Jacobs, Once A Roadside Attraction, A Native Burial Site Nears Repatriation, New York Times, (March 25, 2024), <https://www.nytimes.com/2024/03/25/arts/native-repatriation-dickson-mounds-nagpra.html>.

<sup>46</sup> Wendy Giddens Teeter, et al, Creating a New Future: Redeveloping the Tribal-Museum Relationship in the Time of NAGPRA, 28 International Journal of Cultural Property 201 (2021).

<sup>47</sup> Teeter, *supra* note 46; Fine-Dare, *supra* note 31, Chapter 4.

<sup>48</sup> Jaffe, *supra* note 45; Bruchac, *supra* note at 55; Kate Fitz Gibbon, NAGPRA: Major Changes Proposed for 2023 to Native American Repatriation Law, Cultural Property News (Jan. 8, 2023), <https://culturalpropertynews.org/nagpra-major-changes-proposed-for-2023-to-native-american-repatriation-law/>.

<sup>49</sup> 2023 Regulations, *supra* note 39.

<sup>50</sup> This section draws from three sources concerning repatriations to formerly colonized peoples as points of comparison to NAGPRA's framework: the Netherlands Advisory Committee on the National Policy Framework for Colonial Collections' 2021 report (which has been adopted by the Ministry of Culture), Felwine Sarr and Bénédicte Savoy's 2018 report for the French Prime Minister (which has not been adopted by the French government), and the American Association of Museum Directors' 2022 Guidance on Art from Colonized Areas.

and some new communities and political states have arisen, often as a consequence of the colonial conflicts that were the context of the object's acquisition. One issue that arises only in the context of foreign repatriations is that many governments perceive an international relations concern with repatriating to a sub-national community within a foreign state.<sup>51</sup>

***Who must repatriate cultural objects?*** Cultural objects are in the collections of government museums and agencies, private individuals, and private institutions. A policy might require repatriation only by the government itself, or also by some or all private collectors.<sup>52</sup>

***Which kinds of objects should be eligible for repatriation?*** Should all cultural objects be considered eligible for repatriation or only objects of particular cultural importance? If the latter, what are the qualities that make an item culturally significant? A cultural object may have been sacred, communally owned, or cultural patrimony that was central to the identity of the group.<sup>53</sup>

***When were the objects taken?*** A law authorizing repatriations must determine what parameters, if any, to set around the time of acquisition, for example, corresponding to a particular historical period of colonial involvement.<sup>54</sup>

***How were the objects acquired?*** Another set of questions concerns the way in which the cultural object was acquired: Which kinds of taking are considered illicit and should trigger consideration of repatriation, *e.g.*, use of force, use of coercion, abuse of power? Should an object having been acquired during the colonial era establish a presumption of illicit acquisition?<sup>55</sup>

***What procedures should be used?*** Processes could be cooperative or adversarial, direct or mediated, proactive or instigated by repatriation claims, and could take place within existing institutions or through creation of new institutions. Governments could assert decision-making authority or could leave decision-making to the concerned institutions.<sup>56</sup>

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<sup>51</sup> Sarr-Savoy Report, *supra* note 5, at 82-83; Netherlands Report, *supra* note 36, at 72-73; AAMD Guidance, *supra* note 37, at 8; 25 U.S.C. §§ 3001(7), 3001(9)-(11), & 3005(a)(1).

<sup>52</sup> Sarr-Savoy Report, *supra* note 5, at 77; Netherlands Report, *supra* note 36, at 61-80; 25 U.S.C. §§ 3001(4) & 3001(7). The AAMD report does not need to address this issue.

<sup>53</sup> Sarr-Savoy Report, *supra* note 5, at 60-66; Netherlands Report, *supra* note 36, at 64-65 & 68-70; AAMD Guidance, *supra* note 37, at 3 & 9; 25 U.S.C. § 3001(3).

<sup>54</sup> Sarr-Savoy Report, *supra* note 5, at 61-62; Netherlands Report, *supra* note 36, at 61-80; AAMD Guidance, *supra* note 37, at 1. NAGPRA does not differentiate on the basis of timeframe.

<sup>55</sup> Sarr-Savoy Report, *supra* note 5, at 61-62; Netherlands Report, *supra* note 36, at 55 & 65-80; AAMD Guidance, *supra* note 37, at 4 & 9; 25 U.S.C. § 3005(c).

<sup>56</sup> Sarr-Savoy Report, *supra* note 5, at 77-79; Netherlands Report, *supra* note 36, at 74-79; AAMD Guidance, *supra* note 37, at 8-9; 25 U.S.C. §§ 3005-06.

***What is the relevant legal context?*** A repatriation law must be integrated with existing constitutional and legal requirements. There also may be relevant standards in international or national law, such as obligations to compensate the current possessor of the object. For foreign repatriations, the legal context in both the claimant's state and the collector's state will be relevant.<sup>57</sup>

***What will happen to the objects after repatriation?*** Objects may be publicly displayed, actively used by the community, kept, sold, or transferred. This can be a controversial issue, as questions about whether claimants can properly safeguard or conserve objects are sometimes raised as an objection to repatriation. However, these questions are not necessarily contentious. There may be consensus concerning the outcome or an interest in cooperative action.<sup>58</sup>

In addition to these discrete questions, there are also several important overarching issues, including:

***Addressing uncertainty and unknowns:*** Due to the nature of colonial acquisitions, institutional practices, and the passage of considerable time, there are often uncertainties concerning the provenance, provenience, and even the existence and whereabouts of cultural objects collected under the auspices of colonialism. Because such unknowns are so dominant, the kinds of rules that are common to other types of claims, such as rules that place the burden of proof primarily on claimants, systematically hinder repatriation claims. When these uncertainties stem directly from the colonial context and institutional failures of due diligence and recordkeeping, they are themselves an aspect of the harm to be remedied by repatriation.<sup>59</sup>

***Ensuring meaningful engagement:*** Repatriation is not solely about the end result of a return, but also about shifting power from collecting institutions to source communities in determining the treatment, control, and possession of the cultural objects. In this sense, it is aimed at addressing the present-day cultural and relational tensions between museums and source communities and between former colonial powers and formerly colonized states, rather than solely at remedying past wrongs. Accordingly, repatriation mechanisms must incorporate meaningful engagement among the concerned institutions, communities, and states throughout the entire process.<sup>60</sup>

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<sup>57</sup> Sarr-Savoy Report, *supra* note 5, at 72-79 & 83-85; Netherlands Report, *supra* note 36, at 67; AAMD Guidance, *supra* note 37, at 5-6; concerning NAGPRA, see discussion *supra*.

<sup>58</sup> Sarr-Savoy Report, *supra* note 5, at 66-69 & 80-81; Netherlands Report, *supra* note 36, at 67. NAGPRA and the AAMD Guidance do not address this issue.

<sup>59</sup> Sarr-Savoy Report, *supra* note 5, at 61; Netherlands Report, *supra* note 36, at 65 & 68-70; AAMD Guidance, *supra* note 37, at 2-3. Concerning NAGPRA, see discussion *infra*.

<sup>60</sup> Sarr-Savoy Report, *supra* note 5, at 67-69 & 78-81; Netherlands Report, *supra* note 36, at 65-67; AAMD Guidance, *supra* note 37, at 2; 25 U.S.C. §§ 3003(b)(1)(A), 3004(b)(1)(B), & 3005(a)(3).

Of course, there are also some significant differences between NAGPRA's context and that of other potential repatriation mechanisms. Because NAGPRA applies only within the United States, it does not address issues of international law or foreign relations. However, this difference does not render NAGPRA less relevant for purposes of assessing all the other shared issues noted above.<sup>61</sup> In addition, a primary motivation for NAGPRA was the looting of Native American burial sites.<sup>62</sup> While repatriation of human remains is also important in other contexts, human remains and cultural objects are typically addressed in separate laws and policies, rather than together as they are in NAGPRA.<sup>63</sup> The return and reburial of ancestors continues to be a central focus of Native American advocacy and repatriation claims under NAGPRA.<sup>64</sup> However, NAGPRA's provisions for cultural objects are also substantial.<sup>65</sup> Furthermore, the extraordinary number of cultural objects repatriated under NAGPRA demonstrates that the return of cultural objects is a significant aspect of the implementation of the statute.<sup>66</sup> Overall, there is a strong convergence between the key issues addressed by NAGPRA and those that are relevant to repatriation of cultural objects taken from other formerly colonized peoples.

### **NAGPRA as Model**

In addition to serving as proof of concept, NAGPRA's statutory framework also offers a model for addressing each of the key issues discussed above. For instance, NAGPRA's first procedural requirement is that museums must proactively create summaries of the Native American cultural objects in their collections. Institutions must then notify and consult with the possible source communities.<sup>67</sup> For communities to reclaim their cultural heritage, they have to know that it exists and where it is located. Some items, like the Benin Bronzes at the Smithsonian, have been on prominent public display. The existence of the Bronzes and their location at the Smithsonian National Museum of African Art were well known to Nigeria. But many other cultural objects, like the Native American bundle at the Warhol Museum, have not been publicly exhibited. The bundle's existence and location would never have been known to the Cheyenne River Sioux Tribe if the Warhol Museum had not proactively disclosed that information. Thus, for a legal right of repatriation to be effective, communities must have access to transparent, comprehensive information about cultural objects in museum collections. NAGPRA's procedural requirement that

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<sup>61</sup> This distinction is also not absolute. Federally recognized tribes are not solely subnational communities, but rather have a degree of sovereignty. The political relationship between the federal government and federally recognized tribes is central to the statute. 25 U.S.C. § 3010.

<sup>62</sup> Select Committee on Indian Affairs, Providing for the Protection of Native American Graves and the Repatriation of Native American Remains and Cultural Patrimony, Senate Report 101-473, at 1-3 (Sept 25, 1990) (“Senate Report”).

<sup>63</sup> E.g., Sarr-Savoy Report, *supra* note 5 (discussing only cultural heritage); Netherlands Report, *supra* note 36 (discussing only cultural heritage); AAMD Guidance, *supra* note 37 (discussing only cultural heritage); Human Tissue Act (2004) (UK), <https://www.legislation.gov.uk/ukpga/2004/30/section/47> (discussing only human remains).

<sup>64</sup> Lonetree, *supra* note 31, at 158-64; Bruchac, *supra* note 31.

<sup>65</sup> 25 U.S.C. § 3004.

<sup>66</sup> More than two million cultural objects have been repatriated under NAGPRA. Fiscal Year 2023 Report, National NAGPRA Program, National Park Service 2 (Nov. 21, 2023), <https://irma.nps.gov/DataStore/DownloadFile/694455>.

<sup>67</sup> 25 U.S.C. § 3004. For human remains and associated burial objects, museums must initially produce itemized inventories in consultation with the concerned communities. 25 U.S.C. § 3003.

museums provide this information could serve as a model for similar affirmative obligations in other repatriation laws and policies.<sup>68</sup> Similarly, other aspects of NAGPRA's repatriation mechanism could be adapted to other settings.<sup>69</sup>

In addition, the key issues identified in the previous section need to be resolved not only one by one, but also as an integrated whole that coalesces into a functional legal regime. Thus, NAGPRA offers an example, not only of how to address each individual issue, but also of the collective effects of these choices. Overall, NAGPRA establishes the possibility of repatriation for many cultural items while systematically excluding other categories of items from its repatriation requirements.

On the one hand, NAGPRA creates broad parameters for permissible repatriation claims. Unlike other laws and treaties concerning cultural heritage, it allows repatriation claims for objects regardless of when they were acquired.<sup>70</sup> It allows claims for objects that were taken in a wide variety of ways, including objects that were found, excavated, taken by force, plundered, coerced, or given by an individual who had no right to do so. Institutions are considered to be properly in possession only of objects that were obtained with the “voluntary consent of an individual or group that had authority of alienation.”<sup>71</sup> Repatriation demands can be made both by individual descendants and by communities that are affiliated with the objects. NAGPRA permits an affiliation to be shown between a community and a cultural object through many kinds of evidence and at a modest standard of proof.<sup>72</sup>

But while it establishes these expansive parameters, NAGPRA also focuses on only certain claimants, collectors, and types of cultural objects. Specifically, Congress deliberately narrowed NAGPRA's scope: from all collectors holding Native American cultural objects to only federal agencies and federally-funded institutions;<sup>73</sup> from all Native American communities to only federally recognized tribes and certain Hawaiian organizations;<sup>74</sup> and from all cultural objects to only certain items designated as funerary objects, sacred objects, or cultural patrimony.<sup>75</sup>

A law or policy concerning returns to other formerly colonized peoples might adopt a similar approach, balancing the broad legitimation of claims concerning cultural objects taken in the past with a relatively narrow set of permitted claimants, regulated institutions, and repatriatable objects. Of course, NAGPRA's trade-offs are tailored to its particular circumstances and to Congress's priorities in passing it. In addition, as discussed below, some of these parameters have been controversial in practice. Rather than treating NAGPRA as a template for this purpose, the

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<sup>68</sup> Gerstenblith, *supra* note 22, at 258.

<sup>69</sup> Gerstenblith, *supra* note 22, at 261-62.

<sup>70</sup> 25 U.S.C. § 3005(a).

<sup>71</sup> 25 U.S.C. § 3001(13) & 3005(a); Moriwake, *supra* note 41, at 269-71; Stahn, *supra* note 7, at 404; *but see* Gerstenblith, *supra* note 22, at 252.

<sup>72</sup> 25 U.S.C. § 3005(a)(4); Stahn, *supra* note 7, at 405-06.

<sup>73</sup> 25 U.S.C. §§ 3001(4) & (7).

<sup>74</sup> 25 U.S.C. §§ 3001(7), 3001(11), & 3005(a).

<sup>75</sup> 25 U.S.C. §§ 3001(3)(A)-(D) & 3005(a). Of course, NAGPRA also addresses human remains.

scope of another repatriation law or policy could be calibrated to the needs and interests it addresses, taking NAGPRA's approach into account without being constrained by it.

Finally, NAGPRA also addresses the overarching issues of pervasive uncertainty and promoting engagement. In these areas, NAGPRA deliberately shifts some power away from the institutions holding Native American collections and to the source communities. NAGPRA's treatment of uncertainties tends to enable successful repatriation claims, rather than allowing such unknowns to be a barrier to repatriation, by applying favorable presumptions, shifting burdens of proof, and establishing modest evidentiary thresholds.<sup>76</sup> Concerning engagement, NAGPRA requires consultation beginning immediately after institutions review their collections, and that consultation is meant to continue throughout the process. It obliges institutions to rely on communities' knowledge and expertise in making determinations throughout the process.<sup>77</sup> However, NAGPRA ultimately leaves determinations concerning repatriation to museums and agencies.<sup>78</sup> Policies concerning repatriation to other formerly colonized peoples could similarly incorporate rules addressing the issues of uncertainties and engagement, either closely following NAGPRA's template or instead adapting its general approach to other settings.

Overall, NAGPRA's statutory framework could operate as a model for laws and policies concerning repatriations to other formerly colonized peoples, in whole or in part. It addresses each of the key issues discussed in the previous section individually. It offers an example of how an integrated repatriation mechanism could function. It adopts standards for addressing uncertainty and requirements that institutions consult with tribes in making repatriation determinations. However, the complexities that have emerged over the many decades of NAGPRA's implementation suggest that states, museums, and associations should consider NAGPRA not solely as a template, but also as a case study.

### **NAGPRA as Case Study**

NAGPRA's several decades of implementation offer valuable insights for other repatriation mechanisms as a robust case study. NAGPRA is a long-established legal mechanism. There is considerable analysis of its successes, failures, and controversies from the perspectives of the concerned communities and institutions, as well as the standpoints of scholars, lawyers, policymakers, and activists. For the United States and for other countries, museums, and professional associations considering repatriation policies, what is needed is not only models of legal mechanisms, but also information about how those models function and how they evolve. Since repatriation is not just about the possession of objects but also about their meanings, this includes not only quantitative data about NAGPRA's repatriation numbers, but also qualitative understandings of its cultural and relational impacts.

As described above, NAGPRA has repatriated a large number of cultural objects and human remains. It has also achieved other qualitative indicators of success. But an examination of

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<sup>76</sup> 25 U.S.C. § 3005.

<sup>77</sup> 25 U.S.C. §§ 3003(b)(1)(A), 3004(b)(1)(B), & 3005(a)(3).

<sup>78</sup> 25 U.S.C. §§ 3004-05.

the experiences of museums and communities under NAGPRA reveals nuanced and varied results. While many cultural objects and human remains have been repatriated, many others remain in museum collections over tribal objections.<sup>79</sup> While some museums and communities have interacted cooperatively, others have been at odds.<sup>80</sup> And while NAGPRA's statutory framework has remained constant, its implementation has not. The experience of claiming and repatriating cultural objects under NAGPRA has evolved over time, as communities, institutions, and the implementing federal agency have all responded to the law's requirements and to each other.

Thus, one reason that NAGPRA presents a useful case study is that repatriation is not a one-time or simple process. Many aspects of NAGPRA's statutory framework are more controversial, complex, and dynamic as implemented than as written. Some examples can illustrate the intricacies of a repatriation framework in action.

As discussed in the previous section, NAGPRA's framework shifts some power from collecting institutions to Native American tribes, while maintaining decision-making authority in the institutions themselves. These choices have been controversial. Some advocates and scholars contend that Native American communities should have greater authority to make determinations about cultural affiliation and repatriation.<sup>81</sup> Others argue that NAGPRA's implementation is insufficiently protective of museum interests.<sup>82</sup> The implementation of this division of power has also been complicated. Some museums and agencies have used their control at various stages of the process to avoid reporting their holdings or to deny claims.<sup>83</sup> NAGPRA's procedures have been notoriously burdensome and slow. This has impacted some tribes' abilities to bring claims effectively as well as some museums' capacities to comply with NAGPRA's mandates promptly.<sup>84</sup> In response to Native American communities' advocacy, the newest administrative regulations establish additional incentives for institutional compliance, encourage greater efficiencies, and redirect agency policy to eliminate loopholes.<sup>85</sup> Thus, NAGPRA's transfer of power to tribes was not a onetime event that was accomplished when the statute was passed. Rather, it has evolved over time as museums and tribes have leveraged their statutory authority in various ways.

Another question that illustrates NAGPRA's utility as a case study is the first key issue listed above: to whom cultural objects should be repatriated. This is a significant question for repatriations to other formerly colonized peoples, as well as in NAGPRA. This subject is also particularly complex in practice. It arises in multiple ways at multiple points in the design and

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<sup>79</sup> Jaffe, *supra* note 45.

<sup>80</sup> Eric Hemenway, Finding Our Way Home, in Accomplishing NAGPRA 83, 91-92 (Sangita Chari & Jaime M.N. Lavalley, eds., Oregon State University Press 2013); Lonetree, *supra* note 31, at 160-64.

<sup>81</sup> Shannon Keller O'Loughlin, Moving Forward from the Last Twenty Years: Finding a New Balance, in Accomplishing NAGPRA 223, 225 (Sangita Chari & Jaime M.N. Lavalley, eds., Oregon State University Press 2013); Juliana Keeping, Native American Scholar James Riding In: Stored Remains a Human Rights Violation, Ann Arbor News (Nov. 17, 2009), <https://www.annarbor.com/news/native-american-scholar-visits-university-of-michigan-discusses-holdings-of-indian-remains/>.

<sup>82</sup> Fitz Gibbon, *supra* note 48.

<sup>83</sup> Hemenway, *supra* note 80, at 89-90; Lonetree, *supra* note 31, at 160-64; Jaffe, *supra* note 45.

<sup>84</sup> Hemenway, *supra* note 80, at 88 & 91; Fine-Dare, *supra* note 31, Chapter 5; Jaffe, *supra* note 45.

<sup>85</sup> 2023 Regulations, *supra* note 39.

implementation of a repatriation process. How communities, museums, and the implementing agency have addressed this issue under NAGPRA has changed dynamically over time.

This question first arises in a repatriation mechanism's design. NAGPRA's statutory framework relies on a series of trade-offs that promote Congress's priorities for the law, as described above. By allowing only federally recognized tribes to make repatriation claims, Congress favored communities with which it has a direct, singular relationship and grounded the law in its constitutional authority over Native American matters.<sup>86</sup> However, this choice has also produced inequities in who is entitled to reclaim cultural objects that are affiliated with their communities. While federally recognized tribes can request repatriation of cultural objects using NAGPRA's procedures, the many similarly situated non-federally recognized tribes cannot.<sup>87</sup> In the context of repatriations to other formerly colonized peoples, similar considerations are at play. In electing which claimants to permit, governments may wish to give precedence to claims from source communities and states with which they have strong relationships, such as claims from their own former colonies. Any such prioritization may have a reasonable rationale. Inevitably, however, such choices mean that other communities' interests are not addressed.

Another moment at which this issue emerges is during the implementation of a repatriation mechanism. At this point, it is necessary to determine the appropriate recipient of a particular object. While the source of the Benin Bronzes is indisputable, there is considerable uncertainty around the provenience of other cultural objects. Furthermore, there have been substantial changes in social groups and political structures since these objects were taken, including many changes caused by the violence and disruption of colonialism. Even if the origin of an object is known, there may be multiple present-day successor communities that could act as claimants.

This question has arisen in both of the examples discussed in this paper. The Kingdom of Benin has been succeeded by a social community whose leader is a descendant of the Oba that ruled the Kingdom of Benin, and also by a political state, Nigeria. The Benin Bronzes have been claimed by both. In the absence of any guiding law or policy, it is up to individual institutions and other collectors to determine on a case by case basis how to address such situations.<sup>88</sup> The appropriate recipient of the Warhol Museum's Native American bundle was also initially uncertain. The origin of the bundle was unrecorded, and the museum's 2018 notification of the existence of the bundle in its collection went to over forty tribes.<sup>89</sup> The bundle was originally

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<sup>86</sup> 25 U.S.C. § 3010; *see also* E. Sunny Greer, A Call for Healing from the Tragedy of NAGPRA in Hawaii, in *Accomplishing NAGPRA* 99, 102 (Ed. Sangita Chari & Jaime M.N. Lavalley, Oregon State University Press 2013) (discussing the ramifications of "the absence of a Native Hawaiian sovereign government recognized by the United States").

<sup>87</sup> Angela Neller, et al., NAGPRA's Impact on Non-Federally Recognized Tribes, in *Accomplishing NAGPRA* 161 (Ed. Sangita Chari & Jaime M.N. Lavalley, Oregon State University Press 2013); Bruchac, *supra* note 31.

<sup>88</sup> *See* Alex Marshall, Who Owns the Benin Bronzes? The Answer Just Got More Complicated, *New York Times* (June 4, 2023), <https://www.nytimes.com/2023/06/04/arts/design/benin-bronzes-nigeria-ownership.html>; *see also* Gerstenblith, *supra* note 22, at 265-66 (discussing the role of treaties in determining this issue).

<sup>89</sup> "Andy Warhol Museum" search result, Summaries, National Park Service (downloaded March 21, 2024), <https://grantsdev.cr.nps.gov/NagpraPublic/Home/Summary>.

claimed by the Flandreau Santee Sioux Tribe before that tribe voluntarily withdrew its claim in favor of the Cheyenne River Sioux Tribe.<sup>90</sup>

Unlike the circumstances of the Benin Bronzes, NAGPRA provides a framework for addressing multiple claimants and other issues concerning the affiliation of cultural objects with source communities.<sup>91</sup> Of course, the restitution of the Warhol Museum's bundle was resolved consensually. But in other cases involving multiple claimants or other uncertainties of cultural affiliation, a particularly controversial aspect of NAGPRA's implementation has been museums' designation of certain human remains and cultural objects as “culturally unidentifiable.” This designation has enabled museums to continue to keep objects and remains, notwithstanding repatriation claims from communities.<sup>92</sup>

This issue is also an example of how the experience of repatriations under NAGPRA has evolved through community and institutional actions. For instance, some tribes have formed coalitions to seek group repatriations. These coalitions allow non-federally recognized tribes to claim their heritage through federally recognized tribes that have authorization to make such claims under NAGPRA.<sup>93</sup> They address uncertainties of cultural affiliation by aggregating many potentially affiliated tribes into the same claim.<sup>94</sup> A further response has recently been enacted by the agency implementing the statute. The new 2023 agency regulations eliminate the “culturally unidentifiable” designation and urge institutions to use the available information to affiliate cultural objects with communities to a reasonable degree of certainty.<sup>95</sup>

These examples illustrate the value of NAGPRA as a case study. It is an important resource exactly because repatriation of objects taken from formerly colonized peoples is a complex problem with variable, nuanced outcomes. If it were simple to draft a law or policy that would consistently effectuate meaningful repatriations, those considering such laws and policies could simply develop and replicate a model mechanism. NAGPRA's many decades of experience show that it is necessary instead to understand the realities of such laws and policies in action.

## CONCLUSION

Whether museums should repatriate cultural objects belonging to formerly colonized peoples has become a hot topic. Recent high-profile repatriations like the Smithsonian's return of the Benin Bronzes suggest that the movement to decolonize museums is having an impact. However, restitution continues to be intermittent and unsystematic. While some museums, like the

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<sup>90</sup> Notice of Intent To Repatriate Cultural Items: The Andy Warhol Museum, Pittsburgh, PA, 88 Fed. Reg. 51345, 51345 (Aug. 3, 2023); Notice of Intent To Repatriate Cultural Items Amendment: The Andy Warhol Museum, Pittsburgh, PA, 88 Fed. Reg. 86367, 86367 (Dec. 13, 2023).

<sup>91</sup> 25 U.S.C. §§ 3003(a), 3004(a), 3005(e).

<sup>92</sup> Lonetree, *supra* note 31, at 158-65; James Riding In, Decolonizing NAGPRA, in *For Indigenous Eyes Only: A Decolonization Handbook* (Waziyatawin Angela Wilson & Michael Yellow Bird eds., School for Advanced Research Press 2005).

<sup>93</sup> Neller, *supra* note 87.

<sup>94</sup> Hemenway, *supra* note 80, at 92-93; Lonetree, *supra* note 31, at 159-60.

<sup>95</sup> 2023 Regulations, *supra* note 39, at 86482-83.

Smithsonian Institution, are adopting policies enabling repatriations, other museums are still unwilling to consider restitution.

NAGPRA demonstrates the viability of a legal repatriation mechanism for cultural objects taken in the past. In contrast to the handful of voluntary repatriations of foreign cultural objects taken from formerly colonized peoples, NAGPRA has enabled the return of millions of items. While there are of course differences between domestic and foreign repatriations, many of the core issues and overarching considerations are comparable.

Enacting a repatriation law should of course result in restitution of cultural heritage, but that need not be its only aim. Congress's intent in enacting NAGPRA was also to shift the balance of power between museums and Native American communities and thereby to fundamentally alter the relationships between those groups. The Senate Committee that considered the NAGPRA legislation concluded that museums' "culturally insensitive practices have occurred because of the failure of museums to seek the consent of or consult with Indian tribes."<sup>96</sup> It indicated its hope that "this legislation will encourage a continuing dialogue between museums and Indian tribes and Native Hawaiian organizations and will promote greater understanding between the groups."<sup>97</sup>

Within the U.S. context, one might fairly ask whether it is realistic that Congress would consider enacting legislation on the issue of foreign cultural objects. NAGPRA was predicated on a long history of Native American activism and expressly references the close relationship between Native American tribes and the federal government as a reason for the law.<sup>98</sup> As compared to the Congress of 1990, today's Congress is notoriously polarized and gridlocked. Although it may seem counterintuitive, one influential constituency could be museums themselves. Museums with an interest in restitution might prefer to have a single procedure to use, to have consistency among museum practices, and to ensure that repatriations are an obligation for all museums. Here, NAGPRA once again offers a model. The NAGPRA legislation built directly from the conclusions of the Panel for a National Dialogue on Museum/Native American Relations, a joint group of museum professionals and Native Americans that met repeatedly over the course of a year to discuss repatriation and ultimately reached a consensus on the issue.<sup>99</sup> In addition to its substantive findings, that panel specifically advocated that Congress pass a repatriation law. It concluded that, while it favored the development of national professional standards by museum, archaeology, and anthropology associations, "such professional standards alone cannot substitute for the federal legislation we recommend."<sup>100</sup>

Overall, NAGPRA offers proof of concept, a model, and a case study of a legal framework addressing the key issues for repatriating cultural objects taken from formerly colonized peoples.

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<sup>96</sup> Senate Report, *supra* note 62, at 3.

<sup>97</sup> Senate Report, *supra* note 62, at 3.

<sup>98</sup> Fine-Dare, *supra* note 31, Chapters 2-3; 25 U.S.C. § 3010.

<sup>99</sup> Senate Report, *supra* note 62, at 1-2.

<sup>100</sup> Report of the Panel for a National Dialogue on Museum/Native American Relations 15 (Feb. 28, 1990), <https://documents.saa.org/container/docs/default-source/doc-governmentaffairs/repatriation/heardreport-1990-02-28.pdf>.

NAGPRA is the only such example of a comprehensive repatriation law. It has a substantial history of implementation and evolution. After thirty years, this includes not only the language of the law itself but also the responses of the various concerned institutions and communities and the development and amendment of the government's implementing regulations and practices. NAGPRA represents both an example and a valuable cache of resources for the United States and other countries considering other repatriation policies and laws.