

2024 INTERIOR DEPARTMENT REGULATIONS AND THE REALIZATION OF NAGPRA'S LEGISLATIVE INTENT

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ABSTRACT

In 2024, the Department of the Interior issued a new rule implementing the Native American Graves Protection and Repatriation Act ("NAGPRA"). This rule requires museums to obtain tribal consent before displaying or researching Indigenous remains and mandates deference to Indigenous Traditional Knowledge, such as oral histories, during cultural repatriation proceedings. In response, major museums have closed their Native American exhibitions, and critics have questioned the rule's prudence and legality. Despite these controversies, the 2024 regulations align the implementation of NAGPRA with Congress's original intent by (1) prioritizing Indigenous civil rights, (2) closing loopholes that have delayed returns, and (3) correcting errors in the application of NAGPRA's evidentiary standard.

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I. INTRODUCTION

In 1990, President George H.W. Bush signed the Native American Graves Protection and Repatriation Act (“NAGPRA” or “the Act”).¹ Crafted as a response to centuries of dispossession and destruction of Native American² graves, NAGPRA provided for the repatriation of the hundreds of thousands of Indigenous American bodies and sacred objects held by museums and the government.³ Despite its sweeping mandate ordering large-scale repatriation, most museums and agencies remain out of compliance with the law more than thirty years later.⁴ Such

1. 25 U.S.C. §§ 3001–13 (1990).

2. In this Note, I will use the terms “Native American” or “Native,” “American Indian” or “Indian,” and “Indigenous” interchangeably to refer to or describe the indigenous peoples of what is now the United States of America. Although none of these terms serve as a perfect descriptor, each is generally accepted by leading Native American advocacy groups. See, e.g., *The Impact of Words and Tips for Using Appropriate Terminology*, NAT'L MUSEUM OF THE AM. INDIAN: NATIVE KNOWLEDGE 360° (Aug. 20, 2020), <https://americanindian.si.edu/nk360/informational/impact-words-tips> [https://perma.cc/5ZPH-9R3S].

3. See *infra* Sections I.A–C. In this context, “[r]epatriation is the process whereby human remains and certain types of cultural items are returned to lineal descendants, Indian tribes, and Native Hawaiian organizations.” *Repatriation*, NAT'L MUSEUM OF THE AM. INDIAN, <https://americanindian.si.edu/explore/repatriation> [https://perma.cc/DEX5-LKQF] (last visited Mar. 9, 2026); see also 25 U.S.C. § 3005 (defining the federal repatriation process).

4. See, e.g., Gabriella Angeleti, *Three Decades Ago, U.S. Museums Were Told to Report All Native Remains in their Collections—so Why Are They Still There?*, ART NEWSPAPER

institutions have been able to circumvent NAGPRA's aims due to several loopholes within the Act.⁵

In 2024, however, as part of a larger initiative to improve relations with federally recognized tribal groups, the Department of the Interior promulgated a new rule implementing NAGPRA meant to speed repatriations by closing these loopholes.⁶ These regulations, *inter alia*, command federal agencies and museums to defer to Native American Traditional Knowledge when making repatriation decisions and to obtain permission from tribes before displaying or researching any objects subject to the Act's terms.⁷

This new rule has caused many major museums to pull their Native American art collections from display as they determine a path forward.⁸ Critics of NAGPRA have taken to the media to contend that the new regulations are illegal and deviate from Congress's original intent in passing the Act, stirring significant debate.⁹ The opponents argue that the regulations (1) impermissibly benefit Native Americans at the expense of museums and scientists, (2) illegally mandate return of culturally unidentifiable human remains that were never meant to leave museums, and (3) deviate from Congress's intended evidence standard by requiring deference to Traditional Knowledge during repatriation proceedings.¹⁰

This Note will demonstrate that critics' assertions are unsupported by the law and that the new rule, in fact, brings implementation of the Act closer to what Congress intended and will help the United States fulfill its legal and moral obligations to Native Americans. Part I of this Note will explore how the American property law developed to deprive American Indians of their own ancestral remains, leading to a necessary repatriation movement and the passage of NAGPRA.¹¹ Part II will

(Nov. 8, 2022), <https://www.theartnewspaper.com/2022/11/08/three-decades-ago-us-museums-reported-all-the-native-remains-in-their-collectionsso-why-are-they-still-there> [<https://perma.cc/FC5S-GRQH>] (noting that less than half of the 208,698 human remains or artifacts reported by museums between 1990 and 2022 have been returned).

5. See *infra* Section I.C; see also Mary Hudetz, *New Federal Rules Aim to Speed Repatriations of Native Remains and Burial Items*, PROPUBLICA (Dec. 8, 2023, at 13:15 ET), <https://www.propublica.org/article/interior-department-revamps-repatriation-rules-native-remains-nagpra> [<https://perma.cc/UGM4-RW8Y>] (reporting that a 2023 investigative report "revealed that archaeologists and scientists at some of the nation's top universities and museums have exploited loopholes in NAGPRA to delay or resist turning over holdings reported under the law").

6. See *infra* Section II.A.1; Hudetz, *supra* note 5.

7. See *infra* Section II.A.2.a.

8. See *infra* Section II.B.

9. See *infra* Part III.

10. See *infra* Part III.

11. See *infra* Part I.

examine the 2024 regulations implementing NAGPRA, as well as the ensuing fallout in U.S. museums and criticisms by opponents of repatriation.¹² Finally, Part III will address and disprove each of the high-profile arguments against the regulations.¹³ In so doing, this Note will demonstrate that the regulations realize Congress's intent for NAGPRA by (1) prioritizing the civil rights of Native Americans, (2) providing for the return of culturally unidentifiable human remains, and (3) mandating deference to Native American Traditional Knowledge.¹⁴

II. NAGPRA BACKGROUND

A. *Historic Dispossession of Native American Graves, 1585–1990*

The desecration, looting, and plundering of Indigenous graves began as soon as Europeans arrived on North American shores.¹⁵ Perhaps inspired by accounts of Spaniards raiding Inca tombs, English colonists at Roanoke opened local graves to study Native American religion and determine whether it would be feasible to convert tribes to Christianity.¹⁶ The residents of Jamestown, the first permanent English colony in what is now the United States,¹⁷ recorded “ransack[ing Powhatan] temples[,] [taking] down the corpses of their dead kings from . . . their tombs[,] and carr[y]ing away their pearls[,] copper[,] and bracelets, [which] they [used to decorate] their kings['] funerals” in 1609.¹⁸ By 1610, the looting of Indigenous funerary temples was so pervasive in Jamestown that leaders

12. *See infra* Part II.

13. *See infra* Part III.

14. *See infra* Part III.

15. *See, e.g.*, 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); Tom Arne Midtrød, “Calling for More Than Human Vengeance”: *Desecrating Native Graves in Early America*, 17 EARLY AM. STUD. 281, 283 (2019); Vincent Gabrielle & Joshua Eaton, *How Indigenous Grave Robbing Took Hold in What's Now New England: 'Astonishing How Destructive It Was'*, CONN. INSIDER (Mar. 3, 2023), <https://www.ctinsider.com/news/article/indigenous-grave-robbing-new-england-17810749.php> [<https://perma.cc/NSX9-Y6FH>].

16. *See* Christopher Heaney, *A Peru of Their Own: English Grave-Opening and Indian Sovereignty in Early America*, 73 WM. & MARY Q. 609, 626–27 (2016).

17. *A Short History of Jamestown*, NAT'L PARK SERV. (Sep. 16, 2022), <https://www.nps.gov/jame/learn/historyculture/a-short-history-of-jamestown.htm> [<https://perma.cc/3PYC-DGMY>].

18. Hiroyuki Tsukada, *Another Origins Debate: Settler Colonialism in Early Virginia History*, SOCARXIV 1, 8 (June 12, 2021), [osf.io/preprints/socarxiv/73afw](https://arxiv.org/abs/2106.00001) [<https://perma.cc/UT97-VETF>].

banned the practice to protect the colony from attacks by the angered Powhatans.¹⁹

As one of their first acts in what is now Massachusetts, the Pilgrims looted an Indigenous grave and kept the goods for themselves.²⁰ Thereafter, the colonists frequently desecrated Native burials, looting for “trinkets” in some cases and defacing the grave-markers of important leaders in others.²¹ By the mid-1600s, Dutch colonists were aware “that the Natives held grave desecration to be a serious offense,” probably as a result of encounters between European grave-robbers and angered Native people in New Netherland.²²

During and after the Revolutionary War, the systematic exhumation of Indigenous corpses served to “nullify[] [Indian] claims [of title]” to their traditional lands, furthering the settlers’ expansionist goals and laying the groundwork for the development of a distinctly American property law rooted in the dispossession of Native peoples.²³ By the 1820s, the symbolic pillage of graves was only one tool available to post-revolutionary European-Americans to “eras[e] . . . historic Native claim[s]”²⁴ to property. The Supreme Court further legitimized expansionism that decade in *Johnson v. M’Intosh*, when it determined that Native American occupancy of land was insufficient to establish title, thus allowing the United States government to seize Indigenous lands legally by showing: (1) no Europeans claimed the land, and (2) control, or actual possession, of that land.²⁵ The conquest of land was largely complete in the continental United States by the 1870s, and focus

19. See Heaney, *supra* note 16, at 636–37.

20. Trope & Echo-Hawk, *supra* note 15, at 40 (“The first Pilgrim exploring party [in 1620] returned to the Mayflower with . . . items removed from a grave: ‘[w]e brought sundry of the prettiest things away with us, and covered up the corpse again.’”).

21. Gabrielle & Eaton, *supra* note 15; Heaney, *supra* note 16, at 642.

22. Midtrød, *supra* note 15, at 284.

23. *Id.* at 283–85 (noting that “white Patriots dedicated to territorial conquest repeatedly targeted the buried Indian dead for desecration, both as an expression of the intense racial animosity that unified and motivated the Patriot movement, and as a way of symbolically contesting the continued Native ownership of the land”). Such violence was an effective means of displacement because “[t]o [many] Native people[s], the presence of buried ancestral bones served as a spiritual and territorial anchor to the land that both symbolized their legitimate ownership and conferred on them a strong sense of belonging to their homelands.” *Id.* at 287. See generally K-Sue Park, *Race and Property Law*, in THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (Devon W. Carbado et al. ed., forthcoming 2026) (discussing how American property law developed as distinct from the English common law because of, inter alia, its subjugation and dispossession of Indigenous Americans).

24. Midtrød, *supra* note 15, at 285.

25. See *Johnson v. M’Intosh*, 21 U.S. 543, 591–92 (1823); see also Park, *supra* note 23, at 4 (describing “[Chief Justice John] Marshall’s iteration of the Discovery Doctrine”).

moved to acquiring other kinds of Native American property through grave-robbing, looting, and artifact- and bone-collecting.²⁶

By the Civil War, gathering Native bones for scientific collections was an established practice. For example, in 1868, the Surgeon General “directed army personnel to procure Indian crania and other body parts for the Army Medical Museum.”²⁷ The late nineteenth century also saw increased interest in artifact-hunting in Indigenous graves, both by hobbyists and formally trained archaeologists.²⁸ Ancestral remains procured at this time “formed the basis of prestigious museum collections.”²⁹ Notably, much of this material was treated poorly at every stage of its time in museums, from accession to storage.³⁰ And perhaps most harmfully, these collections were used to support pseudoscientific research meant to portray Native people as “racially inferior ‘savage[s]’ who [are] naturally doomed to extinction.”³¹

With the passage of the Antiquities Act of 1906,³² the United States further entrenched its policy of dispossessing Native Americans of their human and cultural remains.³³ In violation of the American common law tradition that a dead body is not property, the Antiquities Act converted all Indigenous skeletal remains found on federal property to “archaeological resources” owned by the state.³⁴ As a result, thousands of

26. Trope & Echo-Hawk, *supra* note 15, at 40–43; *see also* Gabrielle & Eaton, *supra* note 15 (“Indigenous grave sites were routinely dug up for bone collecting and artifact hunting.”).

27. Trope & Echo-Hawk, *supra* note 15, at 40.

28. *See* Gabrielle & Eaton, *supra* note 15; *see also* Trope & Echo-Hawk, *supra* note 15, at 43–44 (noting that, in the fifty years following 1875, there was an “enormous transfer of cultural property” from Indigenous to white American custody, much of which was acquired “through illegitimate means”).

29. Gabrielle & Eaton, *supra* note 15; *see also* Trope & Echo-Hawk, *supra* note 15, at 41 (“During this period, collecting crews from America’s newly founded museums engaged in competitive expeditions to obtain Indian skeletons.”).

30. *See* Trope & Echo-Hawk, *supra* note 15, at 41–42 (describing the unethical and unscientific means by which museums of this era obtained American Indian remains); Gabrielle Despain, *A Look into NAGPRA: Application, Issues, and the Future*, 24 WYO. L. REV. 139, 142 (2024) (discussing how museum workers stored American Indian artifacts and remains “haphazardly” and, often, “in toxic conditions” that make repatriation unsafe even in the present day).

31. Trope & Echo-Hawk, *supra* note 15, at 40–41; *see also* Gabrielle & Eaton, *supra* note 15.

32. *See generally* 54 U.S.C. §§ 320301–320303 (1906).

33. *See* Trope & Echo-Hawk, *supra* note 15, at 43 (discussing how “it has been commonplace for public agencies to treat Native American dead as archaeological resources, property, pathological material, data, specimens, or library books, but not as *human beings*” (emphasis added)).

34. Trope & Echo-Hawk, *supra* note 15, at 42 (discussing 54 U.S.C. §§ 320301–320303); *id.* at 42 n.28; Edward D. Melillo, Note, *Make No Bones About It: The Need to Reform the*

Native American skeletons were taken from their original resting places.³⁵

Although Congress acted several times to protect Native patrimony in the 1960s and 1970s,³⁶ courts continued to afford less protection to Indigenous people and their cultural property than that given to those of other racial groups. In *Wana the Bear v. Community Construction, Inc.*, a state appeals court held that statutory and public policy protections for “places where the dead are buried” did not apply to Indian burials.³⁷ The case arose from the destruction of a Miwok burial site by construction workers in 1979, after which a descendant sued under a California cemetery-protection statute.³⁸ This case, along with several “[s]hocking incidents [. . .] widely publicized in the press” in the 1980s, spurred the repatriation movement that culminated in the passage of NAGPRA.³⁹

B. NAGPRA’s Legislative History and Intent

The repatriation movement that arose in the 1980s was fueled by grassroots organizing within Indian country and by outrage from the American public at large.⁴⁰ Published images brought attention to thousands of boxes holding Native American remains in the Smithsonian, as well as the displacement of ancient bones to make way for resorts in Hawai‘i, galvanizing popular support for laws protecting Native patrimony.⁴¹ As a result, organizations such as the Native American Rights Fund and the National Congress of American Indians led successful litigation and lobbying efforts that resulted in the passage of state and federal repatriation laws.⁴²

Native American Graves Protection and Repatriation Act, 30 QUINNIPIAC PROB. L.J. 149, 153 (2017).

35. Trope & Echo-Hawk, *supra* note 15, at 42.

36. See, e.g., National Historic Preservation Act of 1966, 16 U.S.C. § 470 (current version at 54 U.S.C. §§ 300101–307108); American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996; Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa–470mm; Gabrielle & Eaton, *supra* note 15 (noting the legislation Congress passed in the 1960s and 1970s that “provided further protections for Indigenous sacred sites and practices”).

37. *Wana the Bear v. Cmty. Constr., Inc.*, 180 Cal. Rptr. 423, 427 (Cal. Ct. App. 1982); see also WALTER R. ECHO-HAWK, in *THE COURTS OF THE CONQUEROR* 237–71 (2010) (providing a detailed analysis of *Wana the Bear*); Trope & Echo-Hawk, *supra* note 15, at 46 (referring to *Wana the Bear* as a “highly ethnocentric decision[]”).

38. *Wana the Bear*, 180 Cal. Rptr. at 424–25.

39. ECHO-HAWK, *supra* note 37, at 255.

40. See *id.*

41. *Id.* at 255–56.

42. See *id.* at 256.

During the height of the repatriation movement, Democratic Senator John Melcher of Montana introduced bills that would have created a commission to mediate the return of Native American human remains and culturally significant objects.⁴³ Each of these bills failed due to the opposition of museums.⁴⁴ Thereafter, several legislators, including Senators John McCain of Arizona and Daniel Inouye of Hawai'i, introduced bills meant to address the concerns of the repatriation movement.⁴⁵ In 1989, Congress passed the National Museum of the American Indian Act⁴⁶ as a "first step" toward rectifying the historic injustices associated with the plundering of Native graves.⁴⁷ That statute specifically dealt with repatriation issues associated with the Smithsonian collection and paved the way for the enactment of NAGPRA the following year.⁴⁸

In early 1990, the Senate created the Panel for a National Dialogue on Museum/Native American Relations, whose purpose was to determine how to move forward with respect to Native human remains and cultural objects in museum custody.⁴⁹ The Panel concluded that the "process for determining the appropriate disposition and treatment of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony should be governed by respect for Native human rights."⁵⁰ The suggestions laid out in the Panel's report provided the framework for NAGPRA, which was passed that November.⁵¹

Although it was created through a process integrating both museum and Native American interests,⁵² NAGPRA was intended by its framers

43. Trope & Echo-Hawk, *supra* note 15, at 55.

44. *Id.*

45. *Id.* at 55–56.

46. 20 U.S.C. § 80q.

47. Trope & Echo-Hawk, *supra* note 15, at 56–57; see Peter H. Welsh, *Repatriation and Cultural Preservation: Potent Objects, Potent Pasts*, 25 U. MICH. J.L. REFORM 837, 849 (1992).

48. Trope & Echo-Hawk, *supra* note 15, at 57.

49. *Id.* at 57–58; ECHO-HAWK, *supra* note 37, at 257.

50. S. REP. NO. 101-473, at 2 (1990).

51. Trope & Echo-Hawk, *supra* note 15, at 58; ECHO-HAWK, *supra* note 37, at 257.

52. Trope & Echo-Hawk, *supra* note 15, at 60 (referring to NAGPRA as "a compromise . . . [between] the museum, scientific, and Indian communities"); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 627 (1995) (noting that "NAGPRA represents an attempt to accommodate the competing interests of Native American tribes, archaeologists, and museums"); see also Stephen E. Nash & Chip Colwell, *NAGPRA at 30: The Effects of Repatriation*, 49 ANN. REV. ANTHROPOLOGY 225, 230 (2020) (noting that many view the Act as a "balancing act, accommodating human rights, race relations, religion, science, education, and ethics").

to be a human rights law with transformative impact.⁵³ The processes laid out by NAGPRA to return human remains and cultural items to American Indian tribes and Native Hawaiian organizations had and continue to have “the potential to radically transform America’s art, anthropology, and natural history museums.”⁵⁴ Indeed, as of NAGPRA’s thirtieth anniversary in 2020, the law had provided for the return of 67,000 ancestral human remains, 1.9 million funerary objects, and 15,000 sacred objects.⁵⁵ However, full compliance with its terms has yet to be achieved, underscoring the need for regulations that will be discussed in Part II of this Note.⁵⁶

C. Repatriation Provisions

NAGPRA provides detailed, robust processes for the repatriation of Native American cultural property from agencies and institutions to tribal custody.⁵⁷ The Act mandates the return of five kinds of American Indian or Native Hawaiian “cultural items”: (1) human remains, (2) associated funerary objects, (3) unassociated funerary objects, (4) sacred objects, and (5) cultural patrimony.⁵⁸ Funerary objects include artifacts “reasonably believed to have been placed with individual human remains either at the time of death or later.”⁵⁹ If a museum or institution possesses both the human remains and the funerary object, the object would be considered “associated” under the Act. Still, if the institution only possesses the object, it would be considered “unassociated.”⁶⁰ Sacred objects are defined as “specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of [their] religions.”⁶¹ Cultural patrimony includes any artifact “having ongoing

53. Trope & Echo-Hawk, *supra* note 15, at 58–61 (pointing to evidence in NAGPRA’s legislative history stating that legislators considered it “human rights” legislation); *see also* United States v. Corrow, 119 F.3d 796, 800 (10th Cir. 1997) (describing NAGPRA’s “aspirational” far-reaching impacts).

54. Nash & Colwell, *supra* note 52, at 226.

55. *Id.*

56. *Id.* at 232; *see infra* Part II.

57. *See, e.g.*, Trope & Echo-Hawk, *supra* note 15, at 37, 61–76; *Compliance*, NAT’L PARK SERV.: NATIVE AM. GRAVES PROT. & REPATRIATION ACT (Oct. 4, 2024), <https://www.nps.gov/subjects/nagpra/compliance.htm> [<https://perma.cc/WZ4K-QJW2>]; Thorpe v. Borough of Thorpe, 770 F.3d 255, 262 (3d Cir. 2014) (citing Pueblo of San Ildefonso v. Ridlon, 103 F.3d 936, 938 (10th Cir. 1996)).

58. 25 U.S.C. § 3001(3) (defining cultural items); 25 U.S.C. § 3005(a) (repatriating cultural items).

59. *Id.* § 3001(3)(A)–(B).

60. *Id.*

61. *Id.* § 3001(3)(C).

historical, traditional, or cultural importance central to the Native American group or culture itself.”⁶²

To begin the repatriation process of human remains and associated funerary objects under NAGPRA, each possessor institution must “compile an inventory of such items and, to the extent possible . . . , identify the[ir] geographical and cultural affiliation.”⁶³ After completion of the inventories, the institutions must notify affected Indian tribes or Native Hawaiian organizations.⁶⁴ The inventoried cultural items must then be returned if the tribe can establish cultural affiliation with the remains or objects.⁶⁵ Cultural affiliation is defined as “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group.”⁶⁶ NAGPRA sets out ten kinds of evidence that tribes can offer to establish such a relationship, and affiliation need not be established with scientific certainty to warrant repatriation.⁶⁷

NAGPRA offers two exceptions that allow delays in the return of human remains and affiliated funerary objects. First, remains can be retained by institutions where they are “indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States.”⁶⁸ If this exception applies, the remains are to be

62. *Id.* § 3001(3)(D).

63. *Id.* § 3003(a).

64. *Id.* § 3003(d)(1); *see also* Trope & Echo-Hawk, *supra* note 15, at 62 (noting that “[t]he legislative history recognizes that § 3003(d) is to be liberally construed to include all tribes that have ‘a potential cultural affiliation[,] regardless of whether the showing of such affiliation would be based upon museum records or non-museum sources[.]’” (quoting H.R. REP. NO. 101-877, at 16 (1990))).

65. *Thorpe v. Borough of Thorpe*, 770 F.3d 255, 262 (3d Cir. 2014) (quoting 25 U.S.C. § 3005(a)(1)); Trope & Echo-Hawk, *supra* note 15, at 61–62 (citing 25 U.S.C. § 3005(a)(4)) (noting that if institutions do not themselves establish cultural affiliation, Indigenous claimants may still obtain return by proving cultural affiliation with disputed items by a preponderance of the evidence); *see also* STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 345 (5th ed. 2024) (“[T]ribe[s] ha[ve] the right to inspect [inventoried] items and request the return of any that belonged to the tribe.”).

66. 25 U.S.C. § 3001(2).

67. *Id.* § 3005(a)(4) (“Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation . . . based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.”); *see also* Despain, *supra* note 30, at 147–48 (discussing NAGPRA’s cultural affiliation requirement); Nash & Colwell, *supra* note 52, at 228 (describing cultural affiliation as NAGPRA’s “axial term”).

68. 25 U.S.C. § 3005(b); Trope & Echo-Hawk, *supra* note 15, at 63–64 (quoting 25 U.S.C. § 3005(b)).

returned within three months of the conclusion of the study.⁶⁹ The second exception applies where there are multiple claimants and the possessor institution cannot determine which has the best claim to the object.⁷⁰ Institutions may retain items subject to such disputes “until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of [the Act] or by a court of competent jurisdiction.”⁷¹

Unaffiliated funerary objects, sacred objects, and Indigenous cultural patrimony must be returned to tribes but are subject to a separate, albeit similar, repatriation process under NAGPRA.⁷² The claimant must first show that the item in question belongs to one of those three categories.⁷³ Next, the tribe must either show cultural affiliation by a preponderance of the evidence or demonstrate that the item had been previously owned by the tribe or a member of the tribe.⁷⁴ The claimant is then entitled to “present[] evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession.”⁷⁵ Finally, the possessor institution has an opportunity to prove that it has a right of possession over the object; if it cannot do so, the item must be returned.⁷⁶

NAGPRA authorizes the Secretary of the Interior to assess civil penalties to noncompliant institutions.⁷⁷ The Act prescribes a framework to determine the amount of such penalties, considering (1) the archaeological, historical, or commercial value of the item, (2) economic and non-economic damages, and (3) the number of violations.⁷⁸ However, these penalties have been ineffective and are rarely imposed, leading some to suggest that this portion of the law should be overhauled.⁷⁹

69. 25 U.S.C. § 3005(b).

70. *Thorpe*, 770 F.3d at 262 (citing 25 U.S.C. § 3005(e)).

71. 25 U.S.C. § 3005(e). Where the cultural affiliation of remains is unable to be determined, the statute provides for a Review Commission whose purpose is to make recommendations for the disposition of such remains. 25 U.S.C. § 3006.

72. 25 U.S.C. § 3005(a)(2).

73. Trope & Echo-Hawk, *supra* note 15, at 65 (citing 25 U.S.C. §§ 3001(3), 3005).

74. 25 U.S.C. § 3005(a)(4)–(5); Trope & Echo-Hawk, *supra* note 15, at 66 n.176.

75. 25 U.S.C. § 3005(c). “In making its prima facie case, the claimant is entitled access to ‘records, catalogues, relevant studies or other pertinent data’ possessed by the federal agency or museum that relate to ‘basic facts surrounding acquisition and accession’ of the items being claimed.” Trope & Echo-Hawk, *supra* note 15, at 67 (quoting 25 U.S.C. § 3004(b)(2)).

76. 25 U.S.C. § 3005(c); *see also* Trope & Echo-Hawk, *supra* note 15, at 68 (discussing the possessor institution’s burden of proof).

77. 25 U.S.C. § 3007; *Compliance*, *supra* note 57.

78. 25 U.S.C. § 3007(b).

79. *See* Trope & Echo-Hawk, *supra* note 15, at 76. *See generally* Carol Grace Engel, Comment, *Underutilization and Unworkability of the Current NAGPRA Civil Penalties*

NAGPRA does, however, create a legal cause of action that any person may invoke to enforce its provisions and to support and supplement its civil penalties.⁸⁰

Congress also included criminal provisions in NAGPRA intended to stop the trafficking of wrongfully obtained Indigenous human remains and cultural items.⁸¹ Enacted to “give teeth to [NAGPRA’s] statutory mission,” the criminal provisions directly address the root cause of the plundering of Indigenous graves by “eliminat[ing] the profit incentive” of such actions.⁸² Remains may still be sold legally wherever the seller has a right of possession under the Act, which is established where the items were “excavated, exhumed or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization.”⁸³

D. Challenges

NAGPRA was immediately controversial, with opponents of the statute raising questions regarding its constitutionality.⁸⁴ For example, the defendant in *United States v. Corrow*, a criminal case brought under NAGPRA’s provision prohibiting trafficking of Native American cultural items, argued that the Act’s definition of cultural patrimony was unconstitutionally vague.⁸⁵ The Tenth Circuit rejected Corrow’s argument, and subsequent courts have rejected similar arguments challenging the Act’s constitutionality.⁸⁶ Ultimately, the Act has

Provision, 49 U. DAYTON L. REV. 329 (2024) (arguing that the current civil penalty structure is rarely utilized and requires structural reform to ensure effective enforcement and compliance). Civil enforcement was ineffective and underfunded from the beginning of NAGPRA’s implementation.

80. Trope & Echo-Hawk, *supra* note 15, at 75 n.260 (quoting 25 U.S.C. § 3013).

81. *Id.* at 56; *see* 18 U.S.C. § 1170.

82. *United States v. Kramer*, 168 F.3d 1196, 1201–02 (10th Cir. 1999) (citing *United States v. Corrow*, 119 F.3d 796, 800 (10th Cir. 1997)).

83. Trope & Echo-Hawk, *supra* note 15, at 73 (quoting 25 U.S.C. § 3001(13)).

84. *See* Nash & Colwell, *supra* note 52, at 228.

85. *Corrow*, 119 F.3d at 799–801; *see also* Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation*, 25 J. LAND, RES., & ENV’T L. 259, 279–80 (2005) (discussing *Corrow*).

86. *See Corrow*, 119 F.3d at 802–05 (rejecting defendant’s void-for-vagueness argument because although “cultural patrimony ‘might reflect some uncertainty as applied to extreme situations, the conduct for which [defendant] was prosecuted and convicted falls squarely within the core of the [Act].’” (quoting *United States v. Amer*, 110 F.3d 873, 878 (2d Cir. 1997) (alteration in original))); Yasaitis, *supra* note 85, at 280–81; *see also* Nash & Colwell, *supra* note 52, at 228 (noting NAGPRA’s legal resilience).

“survived numerous tests in the courts” and no longer faces significant opposition from within the legal community.⁸⁷

NAGPRA has also stirred academic debate during its three decades of existence. Many archaeologists, especially in the immediate aftermath of its implementation, have viewed the law as “complicated, difficult, burdensome, or even worse.”⁸⁸ However, attitudes toward the Act have changed significantly, and many academics no longer have tolerance for NAGPRA’s dissenters.⁸⁹ Indeed, since 1990, the archaeological and museum communities have become more attuned to the needs of Indigenous communities.⁹⁰ While certainly not perfect, NAGPRA has allowed for some of the “meaningful individual, community, and intercultural healing” its drafters intended, and has challenged the American museum industry to address glaring ethical concerns regarding its collections.⁹¹

II. REGULATIONS AND TRADITIONAL KNOWLEDGE

A. 2024 Regulations

1. Implementation and Contents

On December 6, 2023, the Biden-Harris administration announced a final rule revising the regulations implementing NAGPRA; the purpose of the new rule is to “streamline requirements for museums and federal agencies to inventory and identify Native American human remains and cultural items in their collections.”⁹² An earlier version of this rule was

87. Nash & Colwell, *supra* note 52, at 228. “NAGPRA applies to remains and objects discovered on federal lands, which provides Congress with a direct interest. In addition, Congress has a special obligation to legislate for the benefit of Native Americans.” RESTATEMENT OF THE L. OF AM. INDIANS § 9 cmt. a (A.L.I. 2024) (quoting *Bonnichsen v. U.S. Dep’t of the Army*, 969 F. Supp. 628, 649 (D. Or. 1997)) (discussing NAGPRA’s constitutionality).

88. Nash & Colwell, *supra* note 52, at 229.

89. See, e.g., *id.* at 230 (noting that “[y]ounger practitioners tend to see NAGPRA in a more favorable light than do older practitioners”).

90. See *id.* at 229–30.

91. *Id.* at 229.

92. *Interior Department Announces Final Rule for Implementation of the Native American Graves Protection and Repatriation Act*, U.S. DEP’T OF THE INTERIOR (Dec. 6, 2023) [hereinafter *Interior Dep’t Final Rule*], <https://www.doi.gov/pressreleases/interior-department-announces-final-rule-implementation-native-american-graves> [https://perma.cc/6DSA-24VV]. See generally *Native American Graves Protection and Repatriation Regulations*, 43 C.F.R. § 10 (2025) (stating the purpose of the regulations is to provide systematic processes for the protection and restoration of Native American human remains and cultural items to lineal descendants and Tribes, while requiring deference to Native American traditional knowledge).

proposed in October 2022; during the public comment period, the Department of the Interior prioritized integrating the suggestions of Native American tribes and Native Hawaiian organizations.⁹³ The final rule makes significant changes to existing processes for repatriation under NAGPRA, all of which grant federally recognized tribal groups more power than they had held previously.⁹⁴ These updates to NAGPRA reflect the Biden-Harris administration's "all-of-government approach" to improving relations with Native Americans and correcting some historic injustices.⁹⁵

The new rule makes several changes to the implementation of NAGPRA's repatriation provisions, bringing it closer to Congress's intent. The three changes brought by the new rule that are most relevant to this Note include requiring institutions to: (1) defer to Native American Traditional Knowledge during the repatriation process, (2) eliminate a loophole allowing institutions to retain "culturally unidentifiable human remains," and (3) obtain consent from descendant groups before displaying or researching Native American human remains or cultural items.⁹⁶ The provisions requiring deference to Traditional Knowledge and abolishing the "unidentifiable" category for human remains will likely hasten repatriation of remains that have long been stalled in the NAGPRA process due to ambiguity, uncertainty, and noncompliance.⁹⁷ The change governing the treatment of Traditional Knowledge has invited perhaps the most pushback from critics and

93. See *Interior Dep't Final Rule*, *supra* note 92.

94. See, e.g., Karen K. Ho, *What the New Federal Regulations for Native American Ancestors and Sacred Objects Mean for Museums*, ARTNEWS (Feb. 21, 2024, at 15:24 ET), <https://www.artnews.com/art-news/news/new-federal-regulations-native-american-ancestors-and-sacred-objects-natural-history-museum-1234696299> [<https://perma.cc/P2MA-W96R>]; Despain, *supra* note 30, at 155, 157.

95. *Interior Dep't Final Rule*, *supra* note 92 (quoting Shannon Estenoz, Assistant Secretary of the Interior for Fish and Wildlife and Parks); see also Timna Axel, *The Biden Administration's Record on Tribal Rights*, EARTHJUSTICE (Oct. 11, 2024), <https://earthjustice.org/article/the-biden-administrations-record-on-tribal-rights> [<https://perma.cc/9BFW-2L4W>] ("In contrast to previous administrations, which were often openly hostile to tribes, the Biden administration has taken steps to support Tribal leadership and affirm Native American rights.").

96. *Interior Dep't Final Rule*, *supra* note 92.

97. See, e.g., Corrie Day, *A Balancing Act: Addressing the History and Examining the Changes of NAGPRA and Its Regulations*, NEB. L. REV.: BULL. (Sep. 24, 2024), <https://lawreview.unl.edu/balancing-act-addressing-history-and-examining-changes-nagpra-and-its-regulations> [<https://perma.cc/9R55-8XJD>]; see Ho, *supra* note 94; Zachary Small, *Museum of Natural History Says It Is Repatriating 124 Human Remains*, N.Y. TIMES (July 26, 2024), <https://www.nytimes.com/2024/07/26/arts/design/american-museum-natural-history-native-american.html> [<https://perma.cc/J45R-B5YX>].

confusion among institutions; therefore, the following section of this Note will address Traditional Knowledge and its relation to NAGPRA.

2. Indigenous Traditional Knowledge

a. Traditional Knowledge, Federal Agencies, and Museums

The new regulations urge deference to Native American Traditional Knowledge during the repatriation process. This change came amid a broader initiative to include Traditional Knowledge in federal rulemaking.⁹⁸ In November 2022, the White House Office of Science and Technology Policy and Council on Environmental Quality released a government-wide guidance and implementation memorandum (“OSTP Memo”) urging federal agencies to consider Indigenous Knowledge when making scientific or policy decisions.⁹⁹ The OSTP Memo specifically lists NAGPRA as a statute whose implementation could be informed by Traditional Knowledge.¹⁰⁰

The NAGPRA regulations give a robust definition of Traditional Knowledge:

Native American traditional knowledge means knowledge, philosophies, beliefs, traditions, skills, and practices that are developed, embedded, and often safeguarded by or confidential to individual Native Americans, Indian Tribes, or the Native Hawaiian Community. Native American traditional knowledge contextualizes relationships between and among people, the places they inhabit, and the broader world around them, covering a wide variety of information, including, but not limited to, cultural, ecological, linguistic, religious, scientific, societal, spiritual, and technical knowledge. Native American traditional knowledge may be, but is not required to be, developed,

98. Raychelle Aluaq Daniel et al., *What Is “Indigenous Knowledge” and Why Does It Matter? Integrating Ancestral Wisdom and Approaches into Federal Decision-Making*, WHITE HOUSE: OSTP BLOG (Dec. 2, 2022), <https://bidenwhitehouse.archives.gov/ostp/news-updates/2022/12/02/what-is-indigenous-knowledge-and-why-does-it-matter-integrating-ancestral-wisdom-and-approaches-into-federal-decision-making/> [https://perma.cc/S2DT-T5FS].

99. Memorandum from Arati Prabhakar, Assistant to the President & Dir., Off. of Sci & Tech. Pol’y & Brenda Mallory, Chair, Council on Env’t Quality to Heads of Fed. Dep’ts & Agencies, Guidance for Federal Departments and Agencies on Indigenous Knowledge (Nov. 30, 2022) [hereinafter Memorandum from Prabhakar & Mallory], <https://bidenwhitehouse.archives.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf> [https://perma.cc/XC57-BBZR].

100. *Id.* at 5, 7–8.

sustained, and passed through time, often forming part of a cultural or spiritual identity. Native American traditional knowledge is expert opinion.¹⁰¹

This definition, alongside the rule's requirement that deference be given to Indigenous groups' Traditional Knowledge,¹⁰² complements the NAGPRA's existing language mandating that, inter alia, "folkloric, oral traditional, . . . or other relevant information or expert opinion" be considered during the repatriation process.¹⁰³

Pervasive noncompliance with the NAGPRA's Traditional Knowledge provisions has made these regulations necessary in order to carry out the Act's intended purpose.¹⁰⁴ Museums and other institutions historically have been resistant to considering Traditional Knowledge, thereby imposing significant barriers on the return of tribal ancestors and cultural property.¹⁰⁵ While NAGPRA states that Traditional Knowledge, particularly oral tradition, must be considered by institutions as equal to other forms of evidence, this provision was often ignored.¹⁰⁶ The new rule effectively erases the veto power museums have exercised over repatriation by requiring deference to Traditional Knowledge rather than allowing institutions merely to take it into consideration.¹⁰⁷ As a result, these regulations should make it significantly easier for tribes to regain custody of their ancestors' remains and material culture, aligning with NAGPRA's intended purpose of repatriating all remains under its jurisdiction.¹⁰⁸

101. 43 C.F.R. § 10.2 (2025) (emphasis added).

102. *Id.* § 10.1(a)(3).

103. 25 U.S.C. § 3005(a)(4); *see* Despain, *supra* note 30, at 155; Memorandum from Prabhakar & Mallory, *supra* note 99, at 8.

104. *See, e.g.*, Laura Danielle Robbins, Repatriating the Sacred: Strengthening NAGPRA Against Institutional Resistance 73 (May 2023) (M.A. thesis, Rutgers Univ.) (ProQuest).

105. *See, e.g.*, Press Release, U.S. S. Comm. on Indian Affs., Schatz, Murkowski Lead Bipartisan Group of Senators Urging Institutions to Comply with Native American Graves Protection and Repatriation Act (Apr. 21, 2023), <https://www.indian.senate.gov/newsroom/press-release/democratic/schatz-murkowski-lead-bipartisan-group-senators-urging-institutions-comply-native> [<https://perma.cc/MR3J-GW9F>]; Robbins, *supra* note 104, at 73; Hudetz, *supra* note 5.

106. *See* Day, *supra* note 97; 25 U.S.C. § 3005(a)(4) (weighing oral traditional and folkloric evidence equally to other forms of evidence); Mary Hudetz & Ash Ngu, *Tribes in Maine Spent Decades Fighting to Rebury Ancestral Remains. Harvard Resisted Them at Nearly Every Turn*, PROPUBLICA (Dec. 4, 2023, at 05:00 ET), <https://www.propublica.org/article/inside-wabanaki-tribes-struggle-to-reclaim-ancestral-remains-from-harvard> [<https://perma.cc/H9RX-359U>].

107. *See, e.g.*, Day, *supra* note 97; Hudetz, *supra* note 5; Despain, *supra* note 30, at 155.

108. *See, e.g.*, Hudetz, *supra* note 5; Despain, *supra* note 30, at 155.

The integration of Traditional Knowledge in federal rulemaking is not merely an attempt at inclusion, but potentially an important development for all Americans. The continued rejection of Traditional Knowledge imposes unfair burdens on Native Americans, significantly inhibiting their rights.¹⁰⁹ Eurocentric biases against unwritten forms of knowledge ignore the sometimes-blatant inaccuracies of historic writings, potentially at the expense of acknowledging information that could benefit all of society.¹¹⁰ Indeed, Indigenous Knowledge systems have much in common with other forms of knowledge, and often can corroborate and complement Western knowledge.¹¹¹ Finally, as demonstrated above, the integration of deference to Traditional Knowledge in NAGPRA's regulations helps the government to enforce the Act's provisions in the way Congress intended, by treating Indigenous perspectives as equal to Western science.

b. Traditional Knowledge as Evidence in Courts

NAGPRA is primarily implemented through the active participation of and cooperation between agencies, museums, and tribal authorities; thus, most repatriation claims under NAGPRA are resolved outside of court.¹¹² However, some claims, especially the most contentious, have been considered by federal courts, which are not necessarily bound by regulations.¹¹³ Therefore, it is important to examine the unique way courts have dealt with Traditional Knowledge.

109. Cathay Y. N. Smith, *Oral Tradition and the Kennewick Man*, 126 YALE L.J.F. 216, 221 (2016).

110. *See id.* at 219.

111. Memorandum from Prabhakar & Mallory, *supra* note 99, at 4–5 (describing, *inter alia*, five major methodological similarities between Indigenous Knowledge and non-Indigenous scientific epistemologies).

112. Day, *supra* note 97, at 5; *Law and Policy*, NAT'L PARK SERV. (Apr. 26, 2024), <https://www.nps.gov/subjects/nagpra/law-and-policy.htm> [<https://perma.cc/NPS6-RZ9V>]; *see generally* NAGPRA Compliance, ASS'N ON AM. INDIAN AFFS., <https://www.indian-affairs.org/nagpracompliance.html> [<https://perma.cc/HKR8-6XUB>] (last visited Mar. 17, 2026) (explaining that the Act emphasizes ongoing consultation between museums, agencies, and tribal leaders, and noting that while federal court review is an option, the NAGPRA Review Committee serves as a non-binding alternative to help resolve disputes and monitor the inventory process).

113. A discussion of the administrative law issues posed by the new regulations is outside the scope of this Note. However, it is important to recognize that, given recent developments in administrative law, it is unclear whether a court would choose to enforce the “deference” standard laid out in the regulations or apply the “consideration” standard codified in the statute. *Compare* United States v. Nixon, 418 U.S. 683, 696 (1974) (noting that the executive branch is bound by its own rules and the other branches must “respect and . . . enforce” those rules), *with* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 386–87 (2024) (holding that the executive’s interpretation of laws is “respect[ed]” by, but does not

NAGPRA's provision allowing consideration of oral tradition, a kind of Traditional Knowledge, is the only statutory exception to the Federal Rules of Evidence's rule against hearsay.¹¹⁴ Just as institutions have been resistant to accepting Traditional Knowledge as evidence warranting repatriation,¹¹⁵ courts have similarly "struggled to recognize [such evidence] as legitimate and reliable."¹¹⁶ Precedent disregarding Traditional Knowledge poses a significant obstacle for tribes seeking repatriation in court.

Bonnichsen v. United States is the leading decision on Traditional Knowledge in NAGPRA repatriation cases.¹¹⁷ In *Bonnichsen*, a group of scientists sued to stop the burial of the Kennewick Man, an eight-to nine-thousand-year-old skeleton found on the banks of Washington State's Columbia River.¹¹⁸ Anthropologist Daniel Boxberger provided an expert report in support of the government, which detailed the oral traditions of six Columbia Plateau Indian tribes that connected them lineally to the Kennewick Man.¹¹⁹ Despite overwhelming scientific evidence corroborating the accuracy of the tribes' oral histories,¹²⁰ the Ninth Circuit declined to give serious consideration to this Traditional Knowledge:

[W]e conclude that these accounts are just not specific enough or reliable enough or relevant enough to show a significant relationship of the Tribal Claimants with Kennewick Man. Because oral accounts have been inevitably changed in context of transmission, because the traditions include myths that cannot be considered as if factual histories, because the value of such accounts is limited by concerns of authenticity, reliability, and

bind, courts). See also 43 C.F.R. § 10.1(h), (k) (discussing district courts' jurisdiction over the regulations).

114. Zia Akhtar, *Indigenous Storytelling and Admissibility in Common Law Courts: Developing the Protocols for the Reception Theory of Evidence*, 27 INT'L J. EVIDENCE & PROOF 143, 150 n.44 (2023); see also FED. R. EVID. 801–02 (defining hearsay and the rule against hearsay).

115. See, e.g., Day, *supra* note 97, at 8; Hudetz & Ngu, *supra* note 106.

116. Kalae Trask, Note, *Toward Mutual Recognition: An Investigation of Oral Tradition Evidence in the United States and Canada*, 13 WASH. J. SOC. & ENV'T JUST. 54, 56 (2023); see *Pueblo of Jemez v. United States*, 366 F. Supp. 3d 1234, 1250–55 (D.N.M. 2018) (discussing how the vast majority of U.S. courts have "give[n] no weight to oral tradition evidence"); see also Akhtar, *supra* note 114, at 150–51 (characterizing courts' treatment of oral tradition evidence as "inconsistent").

117. See *Bonnichsen v. United States*, 367 F.3d 864, 868 (9th Cir. 2004); Day, *supra* note 97, at 11.

118. *Bonnichsen*, 367 F.3d at 868–69.

119. Smith, *supra* note 109, at 230.

120. See *id.* at 231; Trask, *supra* note 116, at 63; *Bonnichsen*, 367 F.3d at 881.

accuracy, and because the record as a whole does not show where historical fact ends and mythic tale begins, we do not think that the oral traditions of interest to Dr. Boxberger were adequate to show the required significant relationship of the Kennewick Man's remains to the Tribal Claimants. As the district court observed, 8340 to 9200 years between the life of Kennewick Man and the present is too long a time to bridge merely with evidence of oral traditions.¹²¹

Thus, this decision blatantly ignored NAGPRA's intended purpose of repatriating tribal ancestors whose affiliation can be determined by Traditional Knowledge evidence.¹²² While government agencies and institutions with collections of Native American bones or cultural property will now be bound to defer to such evidence rather than merely consider it,¹²³ tribal litigants may continue to be faced with *Bonnichsen's* heightened burden due to the lack of a judicial or statutory solution.

B. Reception and Arguments Against the Regulations

The reaction to the new regulations among American Indian groups, museums, and the public has ranged from excitement to skepticism and even outright hostility. Indigenous Americans, their leaders, and their advocates have largely welcomed the new rule requiring deference to Traditional Knowledge.¹²⁴ Notably, many tribes actively collaborated on the new rule by providing feedback during the public comment period.¹²⁵

Almost immediately after regulations were implemented, several major American museums shuttered their Native American wings, covering displays and blocking off entire halls of art and ethnographic materials.¹²⁶ Some museums have used this development to reaffirm their commitment to working with Indigenous groups.¹²⁷ The president

121. *Bonnichsen*, 367 F.3d at 881–82.

122. See Memorandum from Prabhakar & Mallory, *supra* note 99 and accompanying text; 43 C.F.R. § 10.2.

123. See *e.g.*, Day, *supra* note 97 (noting that “[r]epatriation attempts have been squashed for years due to the lack of evidence, and [the new rule] will open the floodgates of tribes able to claim what is rightfully theirs”).

124. See, *e.g.*, Mary Annette Pember, *New NAGPRA Rules: A Sea Change in Federal Regulations*, ICT (Mar. 18, 2024), <https://ictnews.org/news/new-nagpra-rules-a-sea-change-in-federal-regulations> [<https://perma.cc/75KD-NR XR>].

125. See *id.*; *Interior Dep't Final Rule*, *supra* note 92.

126. *E.g.*, Ho, *supra* note 94 (listing The Field Museum, American Museum of Natural History, Cleveland Museum of Art, and Peabody Museum of Archaeology and Ethnology among the major institutions closing their Native American exhibits from public view).

127. *E.g.*, Letter from Sean Decatur, President of Am. Museum of Nat. Hist., to Museum Staff, Statement on New NAGPRA Regulations (Jan. 26, 2024),

of the American Museum of Natural History, for example, stated that the museum's existing Native American and Native Hawaiian displays were "severely outdated."¹²⁸ Thus, the new regulations represent an opportunity for the museum to modernize and collaborate with tribes.¹²⁹

Finally, some have questioned the legality of the new regulations, arguing that they go too far and deviate from the statutory language and the legislature's intent when crafting NAGPRA.¹³⁰ The most vocal in this group are Elizabeth Weiss and James Springer, a controversial pair of perennial NAGPRA opponents who are against the reburial of Indigenous skeletal remains.¹³¹ Critics of the regulations have set forth the following arguments: (1) the regulations undo NAGPRA's status as a "compromise" by unfairly prioritizing the interests of Native Americans over museums; (2) the regulations provide for the unlawful return of unidentifiable human remains that were never meant to leave museums; and (3) the regulations' "deference" standard strays too far from the

<https://www.amnh.org/about/statement-new-nagpra-regulations> [https://perma.cc/4KNY-GY8Q].

128. *Id.*

129. The fact that it took a major change in federal policy to prompt museums to examine their potentially harmful and inaccurate exhibitions may reflect the insincerity of their commitment to righting historic injustices. Furthermore, many museums object to NAGPRA and its new regulations due to the financial cost of repatriation. *See, e.g.*, Letter from Laura L. Lott, President & CEO of Am. All. of Museums, to Melanie O'Brien, Manager of NAGPRA Rule Comments, Native American Graves Protection and Repatriation Act Proposed Rule (RIN 1024-AE19) (Jan. 31, 2023), <https://www.regulations.gov/comment/NPS-2022-0004-0145> [https://perma.cc/J8SQ-7YU3] (scroll to "Attachments"; then click "Download"). Most tribes, however, are disproportionately impacted by the costs of repatriation, as well as additional emotional tolls and the physical consequences of processing materials treated with toxic chemicals. *E.g.*, Ho, *supra* note 94; Robbins, *supra* note 104 at 65 (describing "the great expense put on [a] tribe in repatriation efforts"); Day, *supra* note 97 ("Part of the cost [of repatriation] is th[e] emotional toll, the cultural, spiritual cost that is carried by the community.").

130. *See, e.g.*, Elizabeth Weiss & James W. Springer, *NAGPRA: From Compromise to Collapse*, 45 REGUL. 16, 17 (2023); Kate Fitz Gibbon, *Elizabeth Weiss and the New Archaeology Wars*, CULTURAL PROP. NEWS (Aug. 30, 2024), <https://culturalpropertynews.org/fall-reading-elizabeth-weiss-the-new-archaeology-wars> [https://perma.cc/X9E9-8YTF] [hereinafter Fitz Gibbon, *Archaeology Wars*]; Kate Fitz Gibbon, *NAGPRA: Major Changes Proposed for 2023 to Native American Repatriation Law*, CULTURAL PROP. NEWS (Jan. 8, 2023), <https://culturalpropertynews.org/nagpra-major-changes-proposed-for-2023-to-native-american-repatriation-law> [https://perma.cc/9G2Q-QW3E] [hereinafter Fitz Gibbon, *NAGPRA Changes*].

131. Elizabeth Weiss and James Springer have ignited significant controversy in the anthropological and legal communities for their blanket opposition to repatriation. *See generally* Colleen Flaherty, *Much More than Bones*, INSIDE HIGHER ED (Feb. 14, 2022), <https://www.insidehighered.com/news/2022/02/15/anthropologist-says-shes-being-punished-views-bones> [https://perma.cc/9S6D-DVXY] (describing Weiss's lawsuit against San José State University, where she alleged the school retaliated against her for her opposition to repatriation).

statutory language and legislative intent of NAGPRA.¹³² Part III of this Note will address each of these arguments, demonstrating that the regulations help NAGPRA fully realize its intended purpose rather than pushing the Act beyond its statutory limitations.

III. NAGPRA'S PRESENT AND FUTURE

A. 2024 Regulations, Criticisms, and NAGPRA's Congressional Intent

As noted above, the new NAGPRA regulations have received high-profile pushback from many of the most vocal opponents of repatriation. The legal arguments proffered by these critics, however, fail under scrutiny. This section addresses and disproves each of these major arguments, and in so doing, demonstrates that the 2024 regulations bring NAGPRA closer to what its drafters envisioned by (1) prioritizing the civil rights of Native Americans, (2) hastening the return of ancestral remains that had been impermissibly retained by museums, and (3) enshrining respect for Indigenous Traditional Knowledge.

1. Prioritization of American Indian Civil Rights

Opponents of the new regulations suggest that the rule's prioritization of Indigenous peoples' needs goes against the legislature's intention for NAGPRA to be a "compromise" between museum and American Indian interests.¹³³ NAGPRA was indeed meant to be a compromise, but the statute and its legislative history demonstrate that this compromise weighs *in favor of* repatriation rights.¹³⁴ It is well documented that NAGPRA emerged from a dialogue between the museum industry and Native American groups.¹³⁵ However, Congress made clear that NAGPRA's purpose is to facilitate "the repatriation of

132. See Elizabeth Weiss, *New Federal Rules Will Empty Museums, Erase Science, and Usher in Superstitious Beliefs*, MINDING THE CAMPUS (Feb. 19, 2024), <https://www.mindingthecampus.org/2024/02/19/new-federal-rules-will-empty-museums-erase-science-and-usher-in-superstitious-beliefs> [https://perma.cc/8N4Q-DCZJ]; Kate Fitz Gibbon, *The New NAGPRA: 'Traditional Knowledge' in, Artifacts Out*, CULTURAL PROP. NEWS (Feb. 12, 2024), <https://culturalpropertynews.org/the-new-nagpra-traditional-knowledge-in-artifacts-out> [https://perma.cc/V4HW-KPLH] [hereinafter Fitz Gibbon, *New NAGPRA*]; Fitz Gibbon, *NAGPRA Changes*, *supra* note 130; Fitz Gibbon, *Archaeology Wars*, *supra* note 130; Weiss & Springer, *supra* note 130, at 19.

133. See, e.g., Weiss & Springer, *supra* note 130, at 16–18; Fitz Gibbon, *NAGPRA Changes*, *supra* note 130.

134. See Weiss & Springer, *supra* note 130, at 16–17.

135. See, e.g., Trope & Echo-Hawk, *supra* note 15, at 57–58. See generally S. REP. NO. 101-473 (1990) (detailing the consultative process leading to NAGPRA).

Native American remains and cultural patrimony.”¹³⁶ Thus, critics’ assertion that NAGPRA was never meant to return the totality of the remains within its purview is not based on the statute’s text or history.¹³⁷

NAGPRA’s requirement that all Indigenous remains under its jurisdiction are properly returned does not undermine its status as a compromise. Although opponents claim otherwise, it is untrue that the Act and its 2024 regulations will “empty museums” of all Indigenous North American objects.¹³⁸ As a compromise to museums, NAGPRA’s framers explicitly allowed them to retain human remains and artifacts that were “originally acquired . . . with the full knowledge and consent of the next of kin or the Indian tribe.”¹³⁹ Further, NAGPRA explicitly allows a *temporary* delay in the return of any remains that are currently undergoing an important study or whose cultural affiliation cannot be determined.¹⁴⁰ Finally, far from clearing out museums, many Indigenous objects are not eligible for return under NAGPRA or its regulations, including items that do not fall within the Act’s discrete categories, those from non-federally recognized tribes, and those originating in Canada, Mexico, or Pacific Islands outside of Hawai‘i.¹⁴¹ NAGPRA’s well-attested concessions to museums were not meant to give institutions the power to keep all remains indefinitely, and the 2024 regulations work within the statutory framework to “improve implementation”¹⁴² of the Act’s mission as understood by Congress.

Opponents of NAGPRA further contend that full compliance with its terms, as facilitated by the new regulations, serves “restorative justice”

136. S. REP. NO. 101-473, at 1; *see also* Trope & Echo-Hawk, *supra* note 15, at 59 (“NAGPRA is, first and foremost, human rights legislation. It is designed to address the flagrant violation of the ‘civil rights of America’s first citizens.’” (quoting 136 CONG. REC. S17174 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye))).

137. *But see* Weiss, *supra* note 132 (suggesting that NAGPRA was only meant to return affiliated remains). The Act explicitly provides for the return of certain categories of objects. *See* 25 U.S.C. §§ 3003–05. The argument that Congress somehow did not intend to repatriate those objects is illogical and not rooted in the law. *See, e.g.,* Oklahoma v. Castro-Huerta, 597 U.S. 629, 642 (2022) (restating the principle of statutory construction that “the legislature says what it means and means what it says” (quoting Henson v. Santander Consumer USA Inc., 582 U.S. 79, 89 (2017))).

138. *Contra* Weiss, *supra* note 132.

139. S. REP. NO. 101-473, at 5 (discussing “right of possession” under the Act).

140. *See supra* notes 68–71 and accompanying text. The new regulations build on, but do not change, these provisions by speeding up the return process for unaffiliated remains and requiring tribal consent for research. *See* Ho, *supra* note 94.

141. *See, e.g.,* Julia Jacobs, *6 Objects that Explain New Rules on Native Displays in Museums*, N.Y. TIMES (Feb. 21, 2024), <https://www.nytimes.com/2024/02/21/arts/design/native-displays-museums-law.html> [<https://perma.cc/7VWX-3LHM>].

142. *See The Regulations*, NAT’L PARK SERV. (Mar. 18, 2025), <https://www.nps.gov/subjects/nagpra/regulations.htm> [<https://perma.cc/3QCE-WGTJ>].

and a “woke consciousness” at the expense of science.¹⁴³ As discussed previously, extensive evidence from NAGPRA’s legislative history demonstrates that it is a human rights law intended to benefit Native Americans.¹⁴⁴ This argument by NAGPRA critics suggests that serving the social needs of Indigenous peoples is not a legitimate role for legislation. It is well established, however, that “Congress has a special obligation to legislate for the benefit of Native Americans.”¹⁴⁵ Indeed, Jack Trope and Walter Echo-Hawk, American Indian civil rights lawyers who were involved in NAGPRA’s legislative negotiations,¹⁴⁶ outlined the legal authority consciously invoked by Congress as it wrote the Act:

Congress viewed NAGPRA as a part of its trust responsibility to Indian tribes and people, specifically stating that it “reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations.” The trust responsibility of the Federal Government to Indian tribes and people is a judicially-created concept that requires the United States to “adhere strictly to fiduciary standards in its dealings with Indians.” The trust doctrine has given rise to the principle that enactments dealing with Indian affairs are to be liberally construed for the benefit of Indian people and tribes—a canon of construction similar to that applicable to remedial civil rights legislation.¹⁴⁷

Thus, any suggestion that the prioritization of Native American civil rights is outside NAGPRA’s intended purpose or Congress’s legal authority is not rooted in the statute’s history or the law supporting it. In fact, the long-term dismissal of Native interests weakened NAGPRA’s intended impact, and the new regulations were enacted to correct those longstanding issues in implementing the Act.

143. Fitz Gibbon, *New NAGPRA*, *supra* note 132; Fitz Gibbon, *Archaeology Wars*, *supra* note 130. It is important to note that, despite the contentions to the contrary, NAGPRA has had a largely positive effect on scientific studies. *See, e.g.*, Jerome C. Rose et al., *NAGPRA Is Forever: Osteology and the Repatriation of Skeletons*, 25 ANN. REV. ANTHROPOLOGY 81, 99–101 (1996) (outlining six “positive contributions” NAGPRA has made to osteology and bioarchaeology).

144. *See, e.g.*, *supra* note 53.

145. RESTATEMENT OF THE L. OF AM. INDIANS § 9 cmt. a (quoting *Bonnichsen v. U.S. Dep’t of Army*, 969 F. Supp. 628, 649 (D. Or. 1997)).

146. Trope & Echo-Hawk, *supra* note 15, at 35.

147. *Id.* at 60 (citations omitted).

2. Return of Unidentifiable Human Remains

NAGPRA's detractors further point to the elimination of the loophole that allowed museums to retain culturally unidentifiable human remains as outside of the Act's intended purpose. Weiss and Springer's contention that "the unidentifiable category is not a loophole[, but] was put in place as part of NAGPRA's compromise"¹⁴⁸ is belied both by the statute's language and its legislative history. Foremost, NAGPRA's text does not define the "unidentifiable" category or provide a repatriation procedure separate from that of other human remains; the process for returning unidentifiable remains was created as part of a 2010 revision to the Act's regulations and was abolished by the 2024 update.¹⁴⁹ NAGPRA does, however, expressly provide for a Review Commission tasked with making recommendations on the disposition of human remains with contested ownership,¹⁵⁰ showing that the legislature did not intend for such remains to be held indefinitely by museums, but to be addressed in an appropriate, case-by-case manner.¹⁵¹

The argument that NAGPRA shielded unidentifiable human remains from repatriation¹⁵² is thus not only an erroneous and atextual representation of the law but also distorts the reality of why such remains have stayed in museum custody for so long. Culturally unidentifiable Indigenous ancestors have always been repatriable under the statute,¹⁵³ but many museums have been able to retain these remains through noncompliance.¹⁵⁴ Three major weaknesses in the law have allowed for this to happen. First, as a federal statute, NAGPRA applies

148. Weiss & Springer, *supra* note 130, at 18.

149. Ho, *supra* note 94; Deborah L. Threedy, *Claiming the Shields: Law, Anthropology, and the Role of Storytelling in a NAGPRA Repatriation Case Study*, 29 J. LAND, RES. & ENV'T L. 91, 98 (2009) ("[T]he Act . . . do[es] not deal with the situation where [remains] are 'culturally unidentifiable.' The legislative history of the Act suggests that the drafters . . . left it for the regulations to address."); see 25 U.S.C. §§ 3001, 3003, 3005; *White v. Univ. of Cal.*, 765 F.3d 1010, 1019–20 (9th Cir. 2014).

150. See 25 U.S.C. § 3006(c)(5); Trope & Echo-Hawk, *supra* note 15, at 64.

151. Indeed, when drafting the Act, the Senate Committee on Indian Affairs noted that the indefinite, purposeless retention of Native American ancestors by museums is disfavored. See S. REP. NO. 101-473, at 3 (1990).

152. See Weiss & Springer, *supra* note 130, at 17.

153. See, e.g., 25 U.S.C. § 3003(d)(2)(C) (requiring museums to give repatriation notices to tribes that *could* be culturally affiliated with remains "by a reasonable belief," even if the "Native American human remains . . . are not clearly identifiable as being culturally affiliated with that Indian tribe").

154. Madeline G. Smith, *We Need to Talk about NAGPRA: Noncompliance & Cultural Affiliation*, MUSEUM STUD. BLOG AT TUFTS UNIV. (Nov. 16, 2023), <https://sites.tufts.edu/museumstudents/2023/11/16/we-need-to-talk-about-nagpra-noncompliance-cultural-affiliation> [https://perma.cc/FA5L-WPA2]. It should be noted that most museums have worked in good faith to become compliant with NAGPRA. *Id.*

only to institutions receiving government funding, which has allowed for a “significant” number of museums to avoid the Act’s terms altogether.¹⁵⁵ Second, the Act’s civil penalties for noncompliance are rarely enforced, and even when they are, they are so low that they do not act as a true deterrent.¹⁵⁶ Third, as addressed previously in this Note, many institutions have simply acted in bad faith by ignoring NAGPRA’s mandate, disregarding tribes’ legitimate claims by discrediting proffered evidence, and even “set[ting] arbitrary dates to limit cultural affiliation.”¹⁵⁷ Therefore, the retention of culturally unidentifiable Native American ancestors is not a result of any provision in the Act itself, but of large-scale noncompliance with its terms and exploitation of its loopholes, many of which the 2024 regulations close.

Finally, critics have suggested that the regulations implicate the Fifth Amendment prohibition against takings by allowing for the return of unidentifiable human remains.¹⁵⁸ When writing the statute, Congress anticipated that Fifth Amendment issues might be raised and, accordingly, designed the law so that any remains over which an institution has legal title are not required to be repatriated.¹⁵⁹ It is unlikely that “finders of [Native American] human remains” would ever have enforceable property rights over them, making the institutions that obtain and house those remains unable to “raise tenable Fifth Amendment takings claims under NAGPRA.”¹⁶⁰ Inter alia, “NAGPRA would not divest a private party [such as a museum] of a property right” because the Antiquities Act has already placed ownership of all Native American remains found on public land with the government.¹⁶¹ Given that there has been no intervening change in law and that institutions holding remains are still, in fact, subject to repatriation and do not have legal title to those remains, it is unclear how the regulations could introduce any new Fifth Amendment issues.

155. *E.g., id.*

156. *See id.* (reporting that “[a]s of April 2022, only 20 institutions had been fined for non-compliance, with an average fine of only \$2,955 per institution”); *supra* notes 77, 79 and accompanying text.

157. Smith, *supra* note 154.

158. Fitz Gibbon, *New NAGPRA*, *supra* note 132; *see also* U.S. CONST. amend. V (“[P]rivate property [shall not] be taken for public use, without just compensation.”).

159. *See* S. REP. NO. 101-473, at 4, 14–15 (1990).

160. Ralph W. Johnson & Sharon I. Haensly, *Fifth Amendment Takings Implications of the 1990 Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 151, 172 (1992). For an overview of the substantial body of federal, state, and tribal law that would preclude most museums from raising takings claims under NAGPRA, *see id.* at 160–67.

161. *Id.* at 155; *see supra* notes 32–35 and accompanying text.

3. Respect for Indigenous Traditional Knowledge and Autonomy

The rule requiring deference to Native American Traditional Knowledge, despite having ignited the most fervent pushback against the changes,¹⁶² brings the Act's implementation closer to what Congress intended and helps the United States to meet international standards of Indigenous human rights law. Critics have argued that "[t]he new NAGPRA regulations [will] upset the previous balance and will result in religious myths replacing scientific information."¹⁶³ This argument raises the idea that the "recent regulatory changes . . . drastically deviate[] from the original intent of the law" by giving weight to oral tradition and other forms of Traditional Knowledge evidence.¹⁶⁴ In its explicit inclusion of folklore and oral tradition as admissible means of proving cultural affiliation, the statute itself "places oral tradition evidence on the same plane as documentary evidence,"¹⁶⁵ giving "no indication that one type of evidence is worth more weight than any other."¹⁶⁶ Institutions and courts have not, however, given Traditional Knowledge evidence the same weight as scientific forms of evidence, despite NAGPRA's designation of both categories as equal.¹⁶⁷ In this way, the Department of the Interior has brought the Act closer to, not further from, its intended purpose of repatriating all remains subject to valid claims by using the regulations to correct a clear, longstanding error in the way the law has been applied.

The contention that American Indian "superstition" will now replace science as a determining factor in repatriation cases,¹⁶⁸ therefore, misreads the evidentiary standard laid out in NAGPRA. The Act and its legislative history make clear that cultural affiliation need not be proved with "scientific certainty" to allow a return.¹⁶⁹ Indeed, NAGPRA's preponderance of the evidence standard was not intended to be difficult for tribes to meet,¹⁷⁰ as would be true if scientific studies, which could be prohibitively expensive, logistically impossible, or religiously impermissible for a tribe to undertake, were meant to overcome all other kinds of evidence listed in the statute. In fact, as critics Weiss and

162. See, e.g., Weiss, *supra* note 132.

163. *Id.*

164. *Id.*; see also Fitz Gibbon, *New NAGPRA*, *supra* note 132.

165. *Pueblo of Jemez v. United States*, 366 F. Supp. 3d 1234, 1251 (D.N.M. 2018) (interpreting 25 U.S.C. § 3005(a)(4)).

166. Threedy, *supra* note 149, at 108; see also H.R. REP. NO. 101-877, at 14 (1990) (noting that "a finding of cultural affiliation should be based upon . . . the totality of the . . . evidence").

167. E.g., *Pueblo of Jemez*, 366 F. Supp. 3d at 1252; see *supra* Section II.A.2.

168. Weiss, *supra* note 132.

169. Trope & Echo-Hawk, *supra* note 15, at 63.

170. See *id.*

Springer themselves note, the very DNA evidence that Weiss fears will be ignored in favor of “superstition”¹⁷¹ cannot be used with reliability to “determin[e] relatedness with a tribe.”¹⁷² Oral tradition, when weighed equally, can fill “gaps in the record” and provide more information than DNA alone could to establish or refute a cultural link.¹⁷³ Therefore, Traditional Knowledge evidence is not meritless as some claim;¹⁷⁴ accordingly, NAGPRA has never treated it as such.¹⁷⁵ The regulations were thus crafted to align institutions’ treatment of Traditional Knowledge with the statute’s intent.¹⁷⁶

The new rule not only aligns the implementation of NAGPRA with Congress’s intent but also helps the United States to meet its obligations under the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) by allowing American Indians more say over the disposition of their cultural patrimony.¹⁷⁷ Despite initially rejecting the resolution, the United States has since announced its support for UNDRIP as having “both moral and political force” and, in 2014, formally committed to advancing its goals by voting in favor of a consensus resolution in the UN General Assembly.¹⁷⁸ The loophole allowing for museums to make decisions unilaterally on the disposition of Native American patrimony violated UNDRIP’s provision guaranteeing Indigenous peoples the right to the “repatriation of ceremonial objects and human remains in their possession through fair, transparent[,] and

171. See Elizabeth Weiss, *The New Archaeology Wars: How Cancel Culture and Identity Politics Have Corrupted Science*, SKEPTIC (Aug. 16, 2024), https://www.skeptic.com/reading_room/how-cancel-culture-identity-politics-corrupted-science [https://perma.cc/B6M3-S6LM].

172. Weiss & Springer, *supra* note 130, at 17.

173. Trope & Echo-Hawk, *supra* note 15, at 63 (citation omitted).

174. See *supra* notes 106–08 and accompanying text.

175. See 43 C.F.R. § 10.1(a)(3) (2025).

176. See *id.*

177. See G.A. Res. 61/295, art. 11, ¶ 2 (Sep. 13, 2007); *Advancing the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEP’T OF THE INTERIOR (Jan. 14, 2025), <https://www.doi.gov/blog/advancing-united-nations-declaration-rights-indigenous-peoples> [https://perma.cc/654J-NJ42] (“[T]he United States committed to ‘taking, in consultation and cooperation with Indigenous Peoples, appropriate measures at the national level . . . to achieve the ends of the Declaration’ . . .” (citation omitted)); Pember, *supra* note 124.

178. See Press Release, U.S. Dep’t of State, Off. of the Special Rep. for Glob. Intergovernmental Affs., Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples 1 (Jan. 12, 2011), <https://2009-2017.state.gov/documents/organization/154782.pdf> [https://perma.cc/C5FL-8YNN] (noting that UNDRIP is a political obligation and not legally binding); G.A. Res. 69/2 (Sep. 22, 2014).

effective mechanisms developed in conjunction with [those] peoples.”¹⁷⁹ Thus, the new NAGPRA regulations not only help the United States implement the Act to reflect its own legislative purpose, but also help it meet standards of international law concerning the autonomy of Indigenous peoples, further cementing NAGPRA’s legacy as a human rights law.¹⁸⁰

B. Potential Positive Outcomes of the 2024 Regulations

The 2024 regulations will allow the Department of the Interior to implement NAGPRA as Congress intended, thereby righting some historic wrongs inflicted against Native Americans through the repatriation of their ancestors and sacred items. While the regulations have been controversial, most in the museum industry have kept an open mind and agreed with the general mission to decolonize collections.¹⁸¹ Two potential outcomes of the new regulations below demonstrate how Congress’s social mission for NAGPRA may be realized.

1. Collaboration Between Native Americans and Scientists

One of the main goals of NAGPRA was to end harmful scientific practices inflicted on Native Americans by facilitating a respectful dialogue between tribes and researchers.¹⁸² The new regulations help achieve this goal by requiring consent before remains may be used in research.¹⁸³ One potential outcome of the 2024 regulations that would be particularly beneficial for all Americans is the co-production of knowledge between Indigenous peoples and Western scientists.¹⁸⁴ Inter

179. G.A. Res. 61/295, art. 12, ¶ 1 (Sep. 13, 2007); *see also* Pember, *supra* note 124 (noting that allowing institutions to make decisions about repatriation without tribal input violated UNDRIP).

180. *See Interior Dep’t Final Rule*, *supra* note 92. The same loophole violating UNDRIP also represents Native Americans’ leading criticism of NAGPRA from its inception. *See* Patricia Failing, *Top Art World Professionals: Attorneys Weigh in on New Legislation Affecting Collectors, Museums, and Artists*, ARTNEWS (Oct. 21, 2024, at 05:00 ET), <https://www.artnews.com/art-news/news/top-art-world-professionals-attorneys-weigh-in-on-new-legislation-affecting-collectors-museums-and-artists-1234720827> [<https://perma.cc/UYE2-E282>] (“Many tribes were critical of NAGPRA for empowering museums to make decisions about whether Indigenous people had valid connections to their ancestors.”).

181. *See* Failing, *supra* note 180 (noting that “much of the recent and highly publicized criticism [of the regulations] originates with people who have never worked at a museum or have not worked at a museum long enough to see through policy, process, or other necessary institutional changes”).

182. *See, e.g.*, S. REP. NO. 101-473, at 3–4 (1990).

183. *See Interior Dep’t Final Rule*, *supra* note 92.

184. Memorandum from Prabhakar & Mallory, *supra* note 99, at 8

alia, Traditional Knowledge can inform and contextualize scientific findings.¹⁸⁵ Research that incorporates Traditional Knowledge often makes novel findings, leading to an enhanced understanding of data.¹⁸⁶ Collaborations in scientific research can help strengthen relationships between institutions and tribes, fostering a two-way exchange of information beneficial to both groups.¹⁸⁷ Thus, the 2024 regulations encourage scientists to treat Native communities as equal partners in research and publish results in ways that could benefit all Americans, building on NAGPRA's mission of promoting intercultural understanding and healing.

2. Balancing the Indigenous-Museum Relationship

The regulations' provisions on Traditional Knowledge will grant tribes greater say over the disposition of their cultural property and give them leverage in negotiations with museums, which was Congress's intention when passing NAGPRA.¹⁸⁸ Armed with newly enforceable property rights over items in the possession of museums, Indigenous Americans will now have more power to pursue options beyond repatriation, such as loaning or selling their cultural property.¹⁸⁹ This autonomy could allow some tribes open to alternatives to repatriation to reap financial benefits from their patrimony, something they have been denied in the past.¹⁹⁰ Furthermore, tribes that choose to leave objects in

185. See *supra* notes 106–08, 169–74 and accompanying text; see also Memorandum from Prabhakar & Mallory, *supra* note 99, at 5–8 (listing ways that Traditional Knowledge can complement western science).

186. See generally Tyler D. Jessen et al., *Contributions of Indigenous Knowledge to Ecological and Evolutionary Understanding*, 20 FRONTIERS ECOLOGY & ENV'T 93 (2022) (emphasizing the legitimacy and value of scientific studies that integrate Indigenous perspectives).

187. See, e.g., Nash & Colwell, *supra* note 52, at 229 (noting that “in spite of ‘100 years of archaeological insensitivity . . .,’ the Hopi Tribe has come to recognize the benefits of osteological analyses that are ‘relevant to their understanding of their heritage,’ thus demonstrating the potentially reciprocal nature of relationships established under NAGPRA.” (citations omitted)).

188. See S. REP. NO. 101-473, at 8 (1990) (“Although [NAGPRA] requires expeditious return of [objects] . . . , the Committee recognizes that Indian tribes and museums may agree to a mutually acceptable alternative to repatriation. The Committee intends that this process will facilitate the negotiation of agreements as to appropriate disposition of objects and remains in museum collections.”).

189. See generally Amy Bitterman, *Settling Cultural Property Disputes*, 19 VILL. SPORTS & ENT. L.J. 1 (2012) (illustrating possible outcomes of negotiations between museums and claimants of cultural property).

190. See *supra* Section I.A.; Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 727 n.11, 747 (1997) (noting that Native Americans

museums will now have greater say not only in what is displayed but also in how it is described.¹⁹¹ Thus, Indigenous peoples may elect to take a more active role in museums to dispel racial misinformation and present a more accurate depiction of their cultures than had been previously shown. Displays that are curated or co-curated by Indigenous peoples have the potential to address past harms and provide the public with a more accurate understanding of Native American history and culture, countering the outdated portrayals found in many current exhibitions. Thus, the new regulations will allow tribes to engage with institutions on equal footing, as Congress intended when first passing NAGPRA.¹⁹²

IV. CONCLUSION

NAGPRA has allowed for the return of tribal ancestors and cultural property that had been stolen from Native Americans.¹⁹³ However, loopholes within the law allowed institutions to retain a large portion of remains that Congress had intended to be repatriated.¹⁹⁴ Notably, institutions have long been able to retain “culturally unidentifiable” remains and objects, ignore Indigenous Traditional Knowledge, and even disregard the law entirely due to underenforcement.¹⁹⁵ The legislative history, however, makes clear that Congress always intended to give

were historically dispossessed of much of their cultural property and that Native artifacts were often sold at high prices by non-Natives).

191. See 43 C.F.R. § 10.1(d) (2025) (imposing a duty on possessors of Native American cultural property to consult with and accommodate Native American tribes regarding the handling of cultural items, and to obtain consent prior to exhibiting cultural items). Indeed, the educational value of out-of-context objects to the average museumgoer is dubious at best, and their haphazard display can be not only misleading but also harmful to descendant communities. See Erin Thompson, Opinion, *Mighty Shiva Was Never Meant to Live in Manhattan*, N.Y. TIMES (Feb. 4, 2024), <https://www.nytimes.com/2024/02/04/opinion/museums-artifacts-stolen.html> [https://perma.cc/F3Y2-WZ7B]; Ned Blackhawk, *The Radical Potential of America's Indigenous Art History*, in THE ART OF NATIVE AMERICA 53, 53–55 (Gaylord Torrence ed., 2018); Erich Hatala Matthes, *Repatriation and the Radical Redistribution of Art*, 4 ERGO 931, 943 (2017); cf. Larry J. Zimmerman, *Plains Indians and Resistance to “Public” Heritage Commemoration of Their Pasts*, in CULTURAL HERITAGE AND HUMAN RIGHTS 144, 145–48 (Helaine Silverman & D. Fairchild Ruggles eds., 2007) (describing how public commemoration of historic sites can be harmful to American Indians); RACHEL D. GODSIL ET AL., THE SCIENCE OF EQUALITY IN EDUCATION: THE IMPACT OF IMPLICIT BIAS, RACIAL ANXIETY, AND STEREOTYPE THREAT ON STUDENT OUTCOMES 7 (2017) (noting negative effects exposure to racial stereotypes may have on Indigenous youth).

192. See *supra* Section III.A.

193. See Nash & Colwell, *supra* note 52, at 226.

194. See Trope & Echo-Hawk, *supra* note 15, at 63–64.

195. See Smith, *supra* note 154.

Indigenous Americans substantial power over the disposition of their cultural property through NAGPRA.¹⁹⁶

The Department of the Interior corrected some longstanding issues in the application of the law with its 2024 regulations.¹⁹⁷ The new regulations align enforcement of NAGPRA with the law's intended purpose because they prioritize Native American civil rights, close loopholes stalling repatriation, and give weight to forms of evidence that had been impermissibly ignored. Thus, the 2024 NAGPRA regulations have opened a new chapter in Indigenous-museum relations, one that will bring radical changes to museum collections, displays, and their composition.

196. *See supra* Section III.A.1.

197. *See id.*