

LOOTED CULTURAL OBJECTS

*Elena Baylis**

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 cultural heritage is typically a voluntary choice, 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 cultural objects taken from formerly colonized peoples overseas, it does have a statute governing the repatriation of Native American cultural items and human remains. The Native American Graves Protection and Repatriation Act (NAGPRA) 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 case study for repatriating cultural objects taken from other formerly colonized peoples.

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I. INTRODUCTION

A. *An Example: The Benin Bronzes*

The Smithsonian National Museum of African Art is the premier public institution for African artwork in the United States.¹ It is committed to the mission of advancing understanding of African art and culture.² One thinks of museums as obtaining, keeping, and conserving art, not giving it away. But the Smithsonian made headlines by returning ownership of twenty-nine Benin Bronzes from its collection to Nigeria.³ The Benin Bronzes are a spectacular set of thousands of sculptures and plaques that once adorned the Benin Royal Palace in Benin City.⁴ In 1897, British forces looted the Benin Bronzes during an attack on Benin City to expand British colonial power.⁵ The Kingdom of Benin was conquered and incorporated into the British colonial empire.⁶ The Benin Bronzes were eventually disseminated to more than 150 museums and an unknown number of private collections around the world.⁷ Nigeria has long requested that the Benin Bronzes be returned.⁸

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.⁹ The Smithsonian is reviewing the provenance

1. National Museum of African Art, Smithsonian, <https://www.si.edu/about/african-art-museum> [<https://perma.cc/NV82-WEBJ>] (last visited Aug. 15, 2024).

2. Smithsonian, National Museum of African Art, <https://africa.si.edu/about/#history> [<https://perma.cc/5V8R-X29S>] (last visited Oct. 19, 2024).

3. Kelsey Ables, Smithsonian Gives Back 29 Benin Bronzes to Nigeria: 'We Are Not Owners', Wash. Post (Oct. 11, 2022), <https://www.washingtonpost.com/arts-entertainment/2022/10/11/smithsonian-benin-bronzes-nigeria/> (on file with the *Columbia Law Review*).

4. Alex Greenberger, The Benin Bronzes, Explained: Why a Group of Plundered Artworks Continues to Generate Controversy, ARTnews (Apr. 2, 2021), <https://www.artnews.com/feature/benin-bronzes-explained-repatriation-british-museum-humboldt-forum-1234588588/> [<https://perma.cc/8894-JYJM>].

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Ables, *supra* note 3; Jacquelyne Germain, The Smithsonian Returns a Trove of Benin Bronzes to Nigeria, Smithsonian Mag. (Oct. 11, 2022), <https://www.smithsonianmag.com/smithsonian-institution/benin-bronzes-going-back-to-nigeria-180980917/> [<https://perma.cc/JHN5-JWNC>].

of an additional twenty Benin Bronzes in its collection.¹⁰ The museum has announced it will return any that it finds were acquired during the 1897 raid.¹¹ But if the Smithsonian 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.

B. *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 objects¹² that were unethically taken from their communities long ago under the auspices of colonialism.¹³ 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 encyclopedic museums.¹⁴ More than ninety percent of historical sub-Saharan African artworks and cultural objects are held outside of Africa, many of them taken by European colonizing forces.¹⁵

For many years, such collections were considered unexceptional in the art world.¹⁶ Questions about provenance focused on authenticity, not on how artworks were obtained.¹⁷ Leaders of formerly colonized states

10. Germain, *supra* note 9.

11. *Id.* (acknowledging “the role of museums in continuing to perpetuate a kind of violence that strips African peoples and artists of the power of self-determination and representation and knowledge building” (internal quotation marks omitted) (quoting Ngaira Blankenberg, Director of the Smithsonian’s National Museum of African Art)).

12. 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 E. McDonnell, *Cultural Objects, Material Culture, and Materiality*, 49 *Ann. Rev. Socio.* 195, 196 (2023) (quoting Wendy Griswold, *Renaissance Revivals: City Comedy and Revenge Tragedy in the London Theatre, 1576–1980*, at 5 (1986)). This Piece primarily uses the term “cultural objects” because it focuses on the cultural significance of the items in question (which is the very reason that possession of these items is contested), and because the terms “cultural objects,” “cultural property,” and “cultural heritage” are used in many of the relevant laws and treaties. This Piece also intermittently uses the terms “art” and “artwork” to describe these items in the museum and art market contexts, where their aesthetic qualities are particularly valued.

13. Felwine Sarr & Bénédicte Savoy, *The Restitution of African Cultural Heritage. Towards a New Relational Ethics* 49–59 (Drew S. Burk trans., 2018); Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* 53–63, 67–71 (2006).

14. Sarr & Savoy, *supra* note 13, at 49–59; Vrdoljak, *supra* note 13, at 53–63, 67–71.

15. See Sarr & Savoy, *supra* note 13, at 3.

16. Carsten Stahn, *Confronting Colonial Objects: Histories, Legalities, and Access to Culture* 43–46 (2023) (discussing museums’ complicity in collecting and exhibiting objects taken from formerly colonized peoples).

17. *Id.* at 43 (describing the art market for objects deemed “authentic” by colonizers).

began demanding the repatriation of their cultural heritage as their countries gained independence.¹⁸ But then, and in the decades that followed, museums only rarely acceded to those requests.¹⁹ 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.²⁰ Encyclopedic museums like the British Museum and the Metropolitan Museum of Art were meant to serve a unique cosmopolitan role by juxtaposing art and cultural objects from many times and places.²¹ 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.²² Furthermore, these acquisitions were considered both legal and ethical at the time.²³

Now, a longstanding movement to decolonize museums is gaining momentum.²⁴ Rather than focusing solely on the ethics or legality of the circumstances under which an artifact was acquired, decolonization scholars link the past and the present.²⁵ Restitution is of course about the past damage 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.²⁶ Museums extend the injuries caused by colonialism into the present by

18. Bénédicte Savoy, *Africa's Struggle for Its Art: History of a Postcolonial Defeat* 1–2 (Susanne Meyer-Abich trans., 2022).

19. *Id.*; see also Stahn, *supra* note 16, at 357–62 (“Former colonial powers and states hosting collections remained reluctant to accept an obligation to return objects to countries of origin.”).

20. See, e.g., James Cuno, *Culture War: The Case Against Repatriating Museum Artifacts*, 93 *Foreign Affs.* 119, 119–20 (2014) (describing the purpose of universal or encyclopedic museums).

21. *Id.*; see also 2002 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> [<https://perma.cc/YY5Y-H2LQ>] [hereinafter 2002 Declaration] (arguing that encyclopedic museums “are agents in the development of culture” and “serve not just the citizens of one nation but the people of every nation”).

22. See 2002 Declaration, *supra* note 21; see also Cuno, *supra* note 20, at 122 (“By preserving and presenting examples of the world’s cultures, [universal museums] offer their visitors the world in all its rich diversity.”).

23. See 2002 Declaration, *supra* note 21.

24. See Dan Hicks, *The British Museums: The Benin Bronzes, Colonial Violence and Cultural Restitution* 235–36 (2020) (describing movements to repatriate Benin Bronzes spanning from the Rhode Island School of Design to the Brooklyn Museum).

25. *Id.* at xii–xiii; see also Victor Ehikhamenor, *Opinion, Give Us Back What Our Ancestors Made*, *N.Y. Times* (Jan. 28, 2020), <https://www.nytimes.com/2020/01/28/opinion/looted-benin-bronzes.html> (on file with the *Columbia Law Review*) (describing the contemporary harm the author experienced when he viewed Benin Bronzes outside of their original setting).

26. Ehikhamenor, *supra* note 25.

displaying items that were taken as symbols of subjugation. Source communities are cut off from their cultural heritage.²⁷ The importance of these items as aesthetic works and educational tools is privileged over their meanings as functional or sacred objects.²⁸

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, through coercion, or by means of the commodification of sacred or communal objects.²⁹ They endorse a reimagined vision of the museum that would explore the modern art and culture of formerly colonized peoples, rather than focusing predominantly on artifacts of the past.³⁰

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.³¹ French President Emmanuel Macron publicly called for the return of colonial-era African art and cultural objects in 2017.³² Since then, of those 90,000 items, twenty-eight have been returned.³³ 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.³⁴ Meanwhile, in the United States and elsewhere in the world,

27. *Id.*; see also Hicks, *supra* note 24, at 232–34.

28. See George Okello Abungu, *Museums: Geopolitics, Decolonization, Globalisation, and Migration*, in *Reinventing the Museum 17* (Gail Anderson ed., 2023) (“West-based museum curators can continue to singlehandedly interpret and create narratives of the others that are not only inaccurate, but could be considered demeaning to those being exhibited.”).

29. See Hicks, *supra* note 24, at 239–40 (advocating that museums return looted cultural heritage and commission new artwork from the source community for their collections); Ted Loos, *A Long Way Home for Looted Art Is Getting Shorter*, *N.Y. Times* (Apr. 27, 2022), <https://www.nytimes.com/2022/04/27/arts/design/victoria-reed-museum-of-fine-arts-stolen-artwork.html> (on file with the *Columbia Law Review*) (“We can’t be public institutions and displaying stolen artwork . . .” (internal quotation marks omitted) (quoting Victoria Reed, Boston Museum of Fine Arts curator for provenance)).

30. See Hicks, *supra* note 24, at 239–40 (“Let us re-imagine and reinstate the anthropological, archaeological and world culture museum as a site of conscience, of transitional and restorative justice, and of cultural memory. The museum as process, not an end-point.”); Loos, *supra* note 29.

31. Sarr & Savoy, *supra* note 13, at 44.

32. *Id.* at 1.

33. Vincent Noce, *Why Macron’s Radical Promise to Return African Treasures Has Stalled*, *Art Newspaper* (Feb. 3, 2022), <https://www.theartnewspaper.com/2022/02/03/why-macrons-radical-promise-to-return-african-treasures-has-stalled> (on file with the *Columbia Law Review*).

34. See Code du patrimoine [Heritage Code] art. L451-5 (Fr.), https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006074236/LEGISCTA00006189177 [<https://perma.cc/4DJN-XZ3K>] (establishing the inalienability of items that are part of the public collections of French museums); see also British Museum Act 1963,

whether to make such returns remains a voluntary choice, not a legal obligation.³⁵

Thus, vast collections of historical cultural objects are legally kept by the museums that hold them, even though if they were taken or exported today under the same circumstances, many would be treated as stolen.³⁶ It may be that the trend toward museums reexamining their own collections and developing policies will emerge as an effective restitution tool.³⁷ But thus far, the lack of a legal regime has seemed to predominantly enable inaction.³⁸ The broader history of the development of greater protections for cultural property suggests that to effect real change, it may be necessary to develop a legal obligation requiring institutions to engage with claims concerning the cultural objects they hold.³⁹

C. *Legal Standards*

Cultural objects seized under the auspices of colonialism were not legally protected when taken. But since then, the importance of cultural heritage to particular societies and to humanity as a whole has been increasingly recognized in both international and national law.⁴⁰

Throughout the twentieth century, international humanitarian law gradually developed protections for cultural heritage. Now, several widely ratified treaties and customary international law prohibit destroying or taking cultural property during armed conflict.⁴¹ Beginning with the 1970

c.24, § 3 (UK), <https://www.legislation.gov.uk/ukpga/1963/24/contents> [<https://perma.cc/WH4M-8Q3G>] (prohibiting deaccession of items by the British Museum).

35. See *infra* sections I.C.–D [under headings “Legal Standards” and “Evolving Legal Frameworks”].

36. See *infra* notes 46–48 and accompanying text.

37. See *supra* notes 28–30 and accompanying text.

38. See generally Savoy, *supra* note 18 (detailing the long history of unsuccessful repatriation claims for African art).

39. See generally Jason Felch & Ralph Frammolino, *Chasing Aphrodite: The Hunt for Looted Antiquities at the World’s Richest Museum* 299–301 (2011) (describing the effects of the UNESCO Conventions on museum practices and norms); Laetitia La Follette, *Looted Antiquities, Art Museums and Restitution in the United States Since 1970*, 52 *J. Contemp. Hist.* 669, 678–87 (2007) (describing the 1970 UNESCO Convention and other legal tools as triggering transformation of museum practices).

40. E.g., Convention for the Protection of Cultural Property in the Event of Armed Conflict *pmb.*, May 14, 1954, 249 U.N.T.S. 215 [hereinafter 1954 Hague Convention] (finding “that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind” and “that the preservation of the cultural heritage is of great importance for all peoples of the world”).

41. See, e.g., Rome Statute of the International Criminal Court arts. 8, 25, opened for signature July 17, 1998, 37 I.L.M. 1002, 1007, 1016, 2187 U.N.T.S. 3, 95, 105 (defining war crimes to include the appropriation, destruction, and seizure of the enemy’s property unless justified by military necessity); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol II) art. 16, June 8, 1977, 16 I.L.M. 1442, 1447 1125 U.N.T.S. 609, 616 (prohibiting acts of hostility against historic monuments, works of art or places of worship that constitute

UNESCO Convention, a series of treaties has also protected cultural property from looting or destruction during peacetime.⁴²

National laws have also increasingly acknowledged the importance of cultural heritage by safeguarding cultural property. Since the early twentieth century, many countries have established laws protecting their cultural patrimony by claiming national ownership of antiquities and prohibiting unlicensed export of cultural property, among other measures.⁴³ In the United States, the Convention on Cultural Property Implementation Act of 1983 established import restrictions on stolen cultural property and cultural objects that have been designated at risk of being looted.⁴⁴ More recently, the European Union passed regulations controlling the import and export of cultural property so as “to ensure the effective protection against illicit trade in cultural goods and . . . the preservation of humanity’s cultural heritage.”⁴⁵

cultural or spiritual heritage); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 53, June 8, 1977, 16 I.L.M. 1391, 1414 1125 U.N.T.S. 3, 27 (protecting cultural property during armed conflict); 1954 Hague Convention, *supra* note 40; see also Laws and Customs of War on Land (Hague IV) art. 56, Oct. 18, 1907, 6 Stat. 2277 (entered into force Jan. 26, 1910) (forbidding the destruction, seizure, or damage of historic monuments, works of art and science, and property related to religion, charity and education, the arts and sciences); Laws and Customs of War on Land (Hague II) art. 56, July 29, 1899, 32 Stat. 1803, Treaty Series 403 (entered into force Sept. 4, 1900); Brussels International Declaration of 1874 Concerning the Laws and Customs of War art. 8, July 27, 1874, reprinted in *The Laws of Armed Conflicts* 25 (3d ed., 1988) (making the destruction of historic monuments, works of art, and property and institutions dedicated to religion, charity and education, the arts and sciences subject to legal proceedings); Patty Gerstenblith, *The Disposition of Movable Cultural Heritage*, in *Intersections in International Cultural Heritage Law* 17, 20–29 (Anne-Marie Carstens & Elizabeth Varner eds., 2020) [hereinafter Gerstenblith, *Disposition*] (describing this legal regime and critiquing its limits).

42. See UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 2421 U.N.T.S. 457 (establishing rules for the restitution and return of cultural objects, defined as objects of importance for archaeology, prehistory, history, literature, art, or science); Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 94 Stat. 2987, 1037 U.N.T.S. 151 [hereinafter 1972 UNESCO Convention] (establishing state responsibility to protect, conserve, and present natural and cultural heritage and an associated fund); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention] (requiring states parties to develop legal mechanisms to protect their cultural heritage); see also Gerstenblith, *Disposition*, *supra* note 41, at 29–35 (describing these treaties and their implementation).

43. See UNESCO Database of National Cultural Heritage Laws Updated, UNESCO (June 2, 2015), <https://www.unesco.org/en/articles/unesco-database-national-cultural-heritage-laws-updated> [https://perma.cc/593U-FMJY] (chronicling 2756 laws of 188 UNESCO Member States).

44. 19 U.S.C. §§ 2601–2613 (2018).

45. European Parliament and Council Regulation 2019/880, 2019 O.J. (L 151) 1; see also Council Regulation 116/2009, 2009 O.J. (L 39) 1 (controlling exports).

But these restrictions apply only prospectively to items taken or exported after the laws become effective.⁴⁶ 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.⁴⁷ For example, even as treaties protecting cultural heritage during war became part of international law at the end of the nineteenth and beginning of the twentieth centuries, those protections did not extend to armed conflict with colonized peoples.⁴⁸ Thus, these protective international and national cultural heritage laws do not provide a basis for returning items taken under the auspices of colonialism.

Since the 1960s, international human rights law has also progressively affirmed the rights of peoples, and especially Indigenous peoples, to enjoy their cultures and cultural heritage.⁴⁹ But while human rights standards could provide a normative basis for repatriation, particularly for

46. See, e.g., 1970 UNESCO Convention, *supra* note 42, art. 7(a) (“The States Parties to this Convention undertake . . . [t]o take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported *after entry into force of this Convention . . .*” (emphasis added)).

47. Vrdoljak, *supra* note 13, at 63–67 (explaining the development of cultural heritage protections under the rules of war and the lack of protections afforded to non-European nations).

48. See, e.g., Laws and Customs of War on Land (Hague IV), *supra* note 41, art. 56 (creating cultural heritage protections applicable at the time only to the parties to the agreement); Laws and Customs of War on Land (Hague II), *supra* note 41, art. 56 (creating cultural heritage protections applicable at the time only to the parties to the agreement); War Dep't, General Orders No. 100, Instructions for the Government of Armies of the United States in the Field arts. 44, 82, 118 (Apr. 24, 1863) (listing protections for property in the first modern codification of law of war); see also Vrdoljak, *supra* note 13, at 63–67 (“Early efforts to codify the rules of war not only excluded most non-European communities, but they also compromised the protection of the cultural heritage of such communities through the instruments’ conceptualization of culture and its manifestations specifically in European terms.”).

49. See, e.g., G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples art. 11 (Sept. 13, 2007) [hereinafter Declaration on the Rights of Indigenous Peoples] (asserting Indigenous peoples’ right to culture and cultural property); G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights art. 15 (Dec. 16, 1966) (asserting the human right to “take part in cultural life”); see also Karima Bennoune, Report of the Special Rapporteur in the Field of Cultural Rights 6–10, U.N. Doc. A/71/317 (Aug. 9, 2016), <https://documents.un.org/doc/undoc/gen/n16/254/44/pdf/n1625444.pdf> [<https://perma.cc/49AV-5EXM>] (describing human rights protections for cultural heritage); Yvonne Donders, Cultural Heritage and Human Rights, *in* Oxford Handbook of International Cultural Heritage Law 379, 390–99 (Francesco Francioni & Ana Filipa Vrdoljak eds., 2020) (describing international human rights protections for cultural heritage); Francesco Francioni & Lucas Lixinski, Opening the Toolbox of International Human Rights Law in the Safeguarding of Cultural Heritage, *in* Heritage, Culture and Rights: Challenging Legal Discourses 11, 13–34 (Andrea Durbach & Lucas Lixinski eds., 2017) (discussing the relationship between international human rights law and cultural heritage protections).

Indigenous peoples, they do not presently address repatriation through binding, enforceable legal standards. The relevant international human rights treaties do not directly address the question of repatriation of cultural heritage.⁵⁰ Instead, they primarily focus on culture as a form of identity and protect peoples' rights to collectively engage in cultural life and enjoy cultural practices.⁵¹ The associated state obligations concerning cultural heritage are to provide access and protection.⁵² Presently, the most direct statements on the return of cultural heritage are contained in nonbinding declarations and resolutions concerning Indigenous peoples.⁵³

D. *Evolving Legal Frameworks*

There are several conceptual frameworks that support the evolution in protections for cultural heritage described above and affirm the importance of restitution. Each of these frameworks endorses the premise that the law can and should be used as a mechanism to protect community

50. See Marc-André Renold & Alessandro Chechi, *International Human Rights Law and Cultural Heritage*, in *Cultural Heritage and Mass Atrocities* 396, 400–06 (James Cuno & Thomas G. Weiss eds., 2022) (explaining how human rights treaties have historically conceptualized cultural rights as rights of access and association but not possession).

51. See *id.*

52. See *id.* at 403 (“States are also required to take measures to ensure the continued access of minority communities to their heritage along with the ability to create and maintain it.”). The right to property in Protocol 1 of the European Convention on Human Rights has been raised in certain cultural property restitution cases, but several times it has been used to assert an individual’s property rights to cultural property that the state claims as its cultural heritage, rather than being used to facilitate return of cultural heritage to a community. See, e.g., *J. Paul Getty Trust v. Italy*, App No. 35271/19, ¶¶ 356–359 (May 2, 2024), <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2235271/19%22%5D,%22itemid%22:%5B%22001-233381%22%5D%7D>] (on file with the *Columbia Law Review*) (denying the Getty Museum’s claim that its right to property was violated by repatriation of a bronze statue to Italy on the basis of Italian law); see also Rsch. Div., Council of Eur., *Cultural Rights in the Case-Law of the European Court of Human Rights* ¶¶ 25–27 (2017), <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2020/12/Cultural-Rights-in-the-Case-Law-of-the-ECtHR-Artistic-Freedom-RD.pdf> [<https://perma.cc/Z42M-XUXQ>] (describing other cultural property cases).

53. See G.A. Res. 2888 (XLVI-O/16), *American Declaration on the Rights of Indigenous Peoples*, at 13, 47 n.1 (June 15, 2016), <https://www.oas.org/en/sare/documents/DecAmIND.pdf> [<https://perma.cc/MY7K-BSG4>] (asserting a state obligation to “provide redress . . . which may include restitution” of illicitly obtained cultural property and noting the United States’ objection that the Declaration is “not itself legally binding”); Declaration on the Rights of Indigenous Peoples, *supra* note 49, at 6 (encouraging states to “seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned”); Renold & Chechi, *supra* note 50, at 403 (stating that the United Nations Declaration on the Rights of Indigenous Peoples “lacks binding force”). See generally Lucas Lixinski, *Article 11 of the United Nations Declaration on the Rights of Indigenous Peoples – Heritage Recognition, but Little Control and No Remedies* 1, 3 (Dec. 2, 2020), <https://ssrn.com/abstract=3741009> [<https://perma.cc/99HL-FVH3>] (unpublished manuscript) (describing UNDRIP’s cultural heritage rights and lack of enforceable remedies).

interests, like the interest in cultural heritage, and to address significant social harms, like the loss of that heritage. Restorative justice models use legal processes to facilitate healing groups' historical trauma,⁵⁴ while reparative justice models treat reparations as a mechanism for redressing past injustices to communities.⁵⁵ Transitional justice theories emphasize that when social communities have been engaged in conflict or subject to oppressive political regimes, recognition of and accountability for related harms is foundational to future peace and stability.⁵⁶ 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.⁵⁷ As described above, human rights approaches identify and enforce particular rights, including cultural rights, as a means of pursuing individuals' and groups' well-being.⁵⁸ These frameworks suggest that legal mechanisms offer a way of pursuing the aims of decolonizing museums: accountability for the past harms of colonization and a remedy for the present cultural and relational harms produced by keeping and displaying looted cultural objects.

There is also an increasing interest in developing new laws and policies to voluntarily facilitate repatriation of cultural objects taken from formerly colonized peoples. Authorizing voluntary restitutions to former colonies from the government's own holdings has recently become the subject of active legislation and policymaking in Europe.⁵⁹ The Dutch

54. See Moira Simpson, *Museums and Restorative Justice: Heritage, Repatriation and Cultural Education*, 61 *Museum Int'l* 121, 122 (2009) (arguing that the return of Indigenous sacred ceremonial objects helps Indigenous groups "recover from the effects of post-colonial trauma").

55. See Patty Gerstenblith, *Cultural Objects and Reparative Justice: A Legal and Historical Analysis* 249–52 (2023) [hereinafter Gerstenblith, *Cultural Objects*] ("The purpose of reparations is to eliminate the consequences of the illegal act and return to the prior circumstances.").

56. See Lucas Lixinski, *Legalized Identities: Cultural Heritage Law and the Shaping of Transitional Justice* 20–22, 135–36 (2021) (discussing the core principles of transitional justice and how they may be applied to museums); Stahn, *supra* note 16, at 53–56 (arguing that, under a transitional justice framework, museums must face accountability).

57. See Elena Baylis, *Post-Conflict Reconciliation in Ukraine*, 4 *Revue Européenne du Droit* 71, 71–72 (2023) ("[A] more ambitious aim of [social reconciliation is] shifting the dynamic between the concerned groups to a positive social, economic, and political interdependence . . ."); Arie Nadler & Nurit Shnabel, *Intergroup Reconciliation: Instrumental and Socio-Emotional Processes and the Needs-Based Model*, 26 *Eur. Rev. Soc. Psych.* 93, 94 (2015) (defining the goal of social reconciliation as "changes on structural, relational, and identity-related aspects of intergroup relations").

58. See Bennoune, *supra* note 49, ¶ 53 (arguing that "[t]he human rights approach to cultural heritage obliges one to go beyond preserving and safeguarding an object or a manifestation in itself to take into account the rights of individuals and communities in relation to such object or manifestation").

59. See, e.g., *Advisory Comm. on the Nat'l Pol'y Framework for Colonial Collections*, Council for Culture, *Colonial Collection: A Recognition of Injustice* 65–73 (2021), <https://www.raadvoorcultuur.nl/binaries/raadvoorcultuur/documenten/adviezen/2021/01/>

Ministry of Education, Culture, and Science has now adopted guidelines for repatriation of certain cultural objects from its government collections to former colonies.⁶⁰ Belgium has recently passed a law authorizing its Executive to enter agreements with its former colonies for return of certain cultural heritage items from its government holdings.⁶¹ Australia has a government repatriation policy, and the province of Alberta, Canada, has a law promoting return of Indigenous cultural heritage on a discretionary basis.⁶² Restitution initiatives have also been advancing in other contexts. For example, in the context of Nazi-looted art, there is strong international consensus supporting the non-binding Washington Principles, which endorse restitution of confiscated artworks to the pre-World War II owners and their heirs.⁶³

22/colonial-collection-and-a-recognition-of-injustice/Colonial+Collection+a+Recognition+of+Injustice.pdf [https://perma.cc/7MF5-EFTF] [hereinafter Netherlands Report] (recommending restitution guidelines to the Dutch Ministry of Culture, Science, and Education).

60. Redressing an Injustice by Returning Cultural Heritage Objects to Their Country of Origin, Gov't Neth. (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> (on file with the *Columbia Law Review*); see also Netherlands Report, supra note 59, at 65–80.

61. Loi du 3 juillet 2022 reconnaissant le caractère aliénable des biens liés au passé colonial de l'État belge et déterminant un cadre juridique pour leur restitution et leur retour [Law of July 3, 2022, Recognizing the Alienable Nature of Property Linked to the Colonial Past of the Belgian State and Establishing a Judicial Framework for Their Restitution and Return], M.B., Sept. 28, 2022, art. 2, https://www.ejustice.just.fgov.be/mopdf/2022/09/28_1.pdf#page=11no.2022042012 [https://perma.cc/4K2Z-GR9J]; see also Marie-Sophie de Clippele & Bert Demarsin, Pioneering Belgium: Parliamentary Legislation on the Restitution of Colonial Collections, 8 *Santander Art & Culture L. Rev.* 277, 282–90 (2022) (describing the law and critiquing its limits).

62. First Nations Sacred and Ceremonial Repatriation Act, R.S.A. 2000, c F-14 § 2 (Can.) (“The Minister must agree to the repatriation of a sacred ceremonial object unless, in the Minister’s opinion, repatriation would not be appropriate.”); Dep’t of Comm’n and the Arts, Austl. Gov’t, Australian Government Policy on Indigenous Repatriation 5–6 (2016), https://www.arts.gov.au/sites/default/files/documents/australian_government_policy_on_Indigenous_repatriation.pdf [https://perma.cc/8KK2-5BHP] [hereinafter Australian Government Policy on Repatriation]. But these initiatives “ha[ve] not coalesced in actual effective repatriation legislation, but rather executive-level government response or responses among the museums themselves.” Honor Keeler, *Indigenous International Repatriation*, 44 *Ariz. St. L.J.* 703, 707 (2012).

63. Off. of the Special Envoy for Holocaust Issues, U.S. Dep’t of State, Washington Conference Principles on Nazi-Confiscated Art (1998), <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> [https://perma.cc/7G5Y-ZXUM]; see also Catherine Hickley, Nations Agree to Refine Pact That Guides the Return of Nazi-Looted Art, *N.Y. Times* (Mar. 5, 2024), <https://www.nytimes.com/2024/03/05/arts/nations-agree-to-refine-pact-that-guides-the-return-of-nazi-looted-art.html> (on file with the *Columbia Law Review*) (“Though only nations signed on to the Washington Principles 25 years ago, they have since been more broadly embraced by museums and the art world as a whole as an important moral guidepost.”). While implementation of the principles has been limited, a few countries have established claims commissions for repatriation of Nazi-confiscated art. Off. of the Special Envoy for Holocaust Issues, U.S. Dep’t of State, Justice for Uncompensated

Finally, there is one law that not only authorizes but actually requires repatriation of cultural objects taken in the past. The United States does not have a law concerning the return of cultural heritage taken from formerly colonized peoples overseas. But it does have a legal regime mandating the repatriation of Native American⁶⁴ cultural objects and human remains.

E. *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.⁶⁵ The bundle had been part of artist Andy Warhol's collection of millions of diverse objects, papers, and artworks.⁶⁶ The bundle's history before 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 inherited Warhol's estate.⁶⁷ Museum curators identified the bundle as a Native American cultural object.⁶⁸ Within a few months, the museum circulated a notification of its discovery to potentially affiliated tribes.⁶⁹

Such bundles are considered sacred, and the museum's notice identifies this bundle as an "object of cultural patrimony,"⁷⁰ that is, an object so central to a group's identity and culture that it is inalienable from that community.⁷¹ The museum described the bundle it was repatriating as follows:

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

Survivors Today (JUST) Act Report 1–2 (2020), <https://www.state.gov/wp-content/uploads/2020/02/JUST-Act5.pdf> [<https://perma.cc/3ST5-5NL6>] [hereinafter JUST Act Report] (listing Austria, France, Germany, the Netherlands, and the United Kingdom). While many of these confiscations were illegal at the time, in most countries there are procedural barriers or other legal obstacles to pursuing restitution. *Id.* (describing such obstacles).

64. 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) (2018). 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.

65. Notice of Intent to Repatriate Cultural Items Amendment: The Andy Warhol Museum, Pittsburgh, PA, 88 Fed. Reg. 86,367, 86,367 (Dec. 13, 2023).

66. History, Andy Warhol Found. for Visual Arts, <https://warholfoundation.org/about/history/> [<https://perma.cc/LC5J-38NR>] (last visited Sept. 9, 2024).

67. Notice of Intent to Repatriate Cultural Items: The Andy Warhol Museum, Pittsburgh, PA, 88 Fed. Reg. 51,345, 51,345 (Aug. 3, 2023); History, *supra* note 66.

68. Notice of Intent to Repatriate Cultural Items: The Andy Warhol Museum, Pittsburgh, PA, 88 Fed. Reg. at 51,345.

69. *Id.*

70. Notice of Intent to Repatriate Cultural Items: The Andy Warhol Museum, Pittsburgh, PA, 88 Fed. Reg. at 51,345.

71. 25 U.S.C. § 3001(3)(D) (2018); 43 C.F.R. § 10.2 (2024).

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.⁷²

In many ways, the Andy Warhol Museum's decision to return this bundle to the Cheyenne River Sioux Tribe is like the Smithsonian's repatriation of its Benin Bronzes to Nigeria. The bundle and the Benin 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.⁷³

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, Native American cultural items and human remains have also been systematically looted within the United States under the auspices of colonialism and postcolonial laws, policies, and social norms.⁷⁴ Native American bodies, clothing, and cultural objects were plundered directly from battlefields.⁷⁵ 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.⁷⁶ Funerary objects were excavated from their burial sites without consent, along with the associated human remains.⁷⁷ Many of these cultural objects and human remains were

72. Notice of Intent to Repatriate Cultural Items: The Andy Warhol Museum, Pittsburgh, PA, 88 Fed. Reg. at 51,345.

73. Ables, *supra* note 3; see also Notice of Intent to Repatriate Cultural Items Amendment: The Andy Warhol Museum, Pittsburgh, PA, 88 Fed. Reg. at 86,367 (Dec. 13, 2023).

74. See Kathleen S. Fine-Dare, *Grave Injustice: The American Indian Repatriation Movement and NAGPRA 13–14* (2002) (arguing that religion, culture, empire building can help explain “the reasons why millions of American Indian and Native Hawaiian human remains and cultural objects were obtained by museums and private collections”).

75. See Roger C. Echo-Hawk & Walter R. Echo-Hawk, *Battlefields and Burial Grounds: The Indian Struggle to Protect Ancestral Graves in the United States* 25 (1994) (describing how “army doctors sent in thousands of Indian remains from battlefields and burial grounds”); Russell Thornton, *Repatriation as Healing the Wounds of the Trauma of History: Cases of Native Americans in the United States of America*, *in* *The Dead and Their Possessions: Repatriation in Principle, Policy, and Practice* 17, 17, 20, 22–23 (Cressida Fforde, Jane Hubert & Paul Turnbull eds., 2002) [hereinafter Thornton, *Repatriation as Healing*] (describing the taking of Native bodies and sacred Ghost Dance shirts from massacre sites).

76. See Richard Hill, Sr., *Reflections of a Native Repatriator*, *in* *Mending the Circle: A Native American Repatriation Guide* 72, 74–78 (Barbara Meister ed., 1995) (discussing examples of theft and unauthorized sale).

77. See Fine-Dare, *supra* note 74, at 33, 62–63 (describing several forms of grave looting, including federal permitting of excavation of Native bodies and funerary objects under the Antiquities Act); Amy Lonetree, *Decolonizing Museums: Representing Native America in National and Tribal Museums* 160–61 (2012) (describing the Anishinabek

channeled to museums, universities, and government agencies.⁷⁸ Some have been prominently exhibited in museums and galleries.⁷⁹ Others were put away in long-term storage for future display or study.⁸⁰ Yet others, like this bundle, were kept in private collections.⁸¹ Of course, we do not know the origin or acquisition history of this particular bundle before it was purchased by Warhol, and in this way it is different than the Benin 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's discovery of the bundle triggered a series of legal obligations.⁸² The Andy Warhol Museum was complying with a law that

people's efforts to claim ancestors and cultural items taken from three burial sites); Margaret Bruchac on Erasure and the Unintended Consequences of Repatriation Legislation, *in* *Speaking of Indigenous Politics: Conversations with Activists, Scholars, and Tribal Leaders* 52, 54 (J. Kēhaulani Kauanui ed., 2018) [hereinafter Bruchac on Erasure] (detailing how university collectors looted Native graves and distributed human remains and funerary objects into different collections for study); Thornton, Repatriation as Healing, *supra* note 75, at 17–19 (delineating how the U.S. Army Medical Examiner collected the bones of the Northern Cheyenne from a mass grave).

78. See Fine-Dare, *supra* note 74, at 30–31 (discussing major collectors and collection practices); Lonetree, *supra* note 77, at 9–16 (describing museum collection and exhibition practices); Bruchac on Erasure, *supra* note 77, at 54 (“[P]eople from the Peabody Museum at Harvard, the Peabody Museum at Yale, Warren K. Morehead, collectors from all of these prominent institutions found the Connecticut River Valley to be a very prime collecting place and, as a result, individuals from the same gravesite were often scattered into different collections” (internal quotation marks omitted) (quoting Margaret Bruchac)); Thornton, Repatriation as Healing, *supra* note 75, at 19 (discussing the large numbers of Native human remains and funerary and cultural items estimated to be held in public and private collections).

79. See Fine-Dare, *supra* note 74, at xiii (describing a museum display of Native ancestors and cultural objects); Lonetree, *supra* note 77, at 9–16 (describing museum collection and exhibition practices); Hill, *supra* note 76, at 72 (describing a museum exhibition of Native ancestors and sacred masks).

80. See Fine-Dare, *supra* note 74, at 34–35 (“One only has to walk through the storerooms of Chicago’s Field Museum or the University Museum of the University of Pennsylvania . . . to be stunned by the quantities of [Native American] objects arrayed on shelves, curled around textile rollers, stored in drawers, and, increasingly, kept in climate-controlled vaults.”); Lonetree, *supra* note 77, at 78–80 (discussing the storage of Native American artifacts by George Gustav Heye, who amassed a collection of over 700,000 pieces in the early twentieth century); Thornton, Repatriation as Healing, *supra* note 75, at 22 (“I remember vividly going with a curator into the attic of the National Museum of Natural History building to examine some of their North American Indian collections.”).

81. See Lonetree, *supra* note 77, at 14; Thornton, Repatriation as Healing, *supra* note 75, at 19.

82. As discussed below, the relevant law does not apply to private individuals or institutions that do not receive federal funds. See 25 U.S.C. §§ 3001(8), 3005(a)(1) (2018); 43 C.F.R. § 10.1(b)(1)(i)–(ii) (2024). Thus, so long as neither Andy Warhol nor the foundation that took possession of his estate received federal funds, they were not legally obligated to return the bundle, and a legal obligation first arose when the Andy Warhol Museum discovered the bundle in 2018.

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.⁸³ Unlike the Smithsonian with the Benin Bronzes, the Andy Warhol Museum could not hereafter 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.⁸⁴

II. A LEGAL FRAMEWORK FOR REPATRIATION

A. *The Native American Graves Protection and Repatriation Act*

The Native American Graves Protection and Repatriation Act (NAGPRA) was enacted in 1990.⁸⁵ It was the culmination of decades of activism by Native American advocates and communities for return of their ancestors and cultural heritage.⁸⁶

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 cultural heritage laws discussed above, NAGPRA addresses cultural objects that were taken in the past.⁸⁷

Furthermore, unlike other new policies authorizing voluntary or discretionary repatriation of cultural objects to formerly colonized peoples, NAGPRA's repatriation mechanism is mandatory and enforceable. The regulated museums and agencies must engage in the statutorily defined process.⁸⁸ They must repatriate the designated cultural objects and human remains if the statutory requirements are met.⁸⁹ Any

83. See 25 U.S.C. §§ 3003–3005 (establishing repatriation requirements for museums in possession of Native American objects); 43 C.F.R. §§ 10.8–10.10 (implementing the statutory requirements with detailed repatriation regulations for museums).

84. See 25 U.S.C. § 3005; 43 C.F.R. §§ 10.9(g), 10.10(h).

85. See Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001–3013). NAGPRA does not address the Smithsonian Institution, whose repatriation obligations are set out in the National Museum of the American Indian Act. See 20 U.S.C. §§ 80q-9 to -12 (addressing the Smithsonian Institution).

86. See Fine-Dare, *supra* note 74, at 47–118 (discussing the history of the repatriation movement and the passage of NAGPRA); James Riding In, *Decolonizing NAGPRA*, in *For Indigenous Eyes Only: A Decolonization Handbook* 53, 54 (Waziyatawin Angela Wilson & Michael Yellow Bird eds., 2005) [hereinafter Riding In, *Decolonizing NAGPRA*] (“The reburial and graves protection movement that began during the 1960s had as its core principle the decolonization of laws and policies that sanctioned grave looting.”).

87. See 25 U.S.C. § 3005; 43 C.F.R. § 10.8.

88. See 25 U.S.C. §§ 3003(a), 3004(a), 3005(a); 43 C.F.R. § 10.8.

89. See 25 U.S.C. § 3005; 43 C.F.R. §§ 10.9(e)(1), 10.10(g)(1).

museum that fails to comply is subject to civil penalties.⁹⁰ Federal courts have jurisdiction to enforce NAGPRA's requirements.⁹¹

Finally, unlike other policies, NAGPRA's requirements are not limited to the government's own collections.⁹² Instead, its obligations extend to private institutions, including museums, universities, and other entities, as long as they receive federal funding.⁹³ The only collections exempt from NAGPRA's obligations are truly private holdings by individuals or by organizations that do not receive any federal funds.⁹⁴

Thus, NAGPRA created a retrospective, mandatory, enforceable, and widely applicable legal standard. It addresses the illicit looting of cultural objects and human remains from formerly colonized peoples. It restructures the relationships between U.S. museums and those peoples in the present day.

In so doing, NAGPRA is aligned with the conceptual frameworks discussed in the previous section. Russell Thornton describes repatriations as offering "closure [for the] trauma" experienced by Native American communities,⁹⁵ while Angela Riley characterizes NAGPRA as "one of the most important pieces of human rights legislation ever enacted in the United States."⁹⁶ Courtney Cottrell understands NAGPRA as "attempt[ing] to alter the power imbalance and reverse the historical wrongs committed by museums, anthropologists, and explorers on American Indians and their communities . . . by attempting to foster

90. 25 U.S.C. § 3007(a); 43 C.F.R. § 10.11.

91. 25 U.S.C. § 3013; 43 C.F.R. § 10.1(h).

92. See First Nations Sacred and Ceremonial Repatriation Act, R.S.A. 2000, § 1(e) (2016) (Alta.); Dep't of Commc'ns & the Arts, Australian Gov't, Australian Government Policy on Indigenous Repatriation 7–9 (2016), https://www.arts.gov.au/sites/default/files/documents/australian_government_policy_on_indigenous_repatriation.pdf (on file with the *Columbia Law Review*) [hereinafter Australian Government Policy on Repatriation] (discussing the Australian Government's policy of repatriating items owned by government entities); Netherlands Report, *supra* note 59, at 57 ("Local authorities, provinces, universities, foundations and private individuals are also owners of these types of cultural heritage objects and these all have individual responsibility for the way in which they deal with them in [the] future, including any requests for return."); de Clippele & Demarsin, *supra* note 61, at 283 ("[T]he adopted legislation only concerns artefacts that are held in a federal institution and owned by the Belgian State.").

93. See 25 U.S.C. § 3001(4), (8); 43 C.F.R. § 10.1(b)(1)(i), (ii).

94. See 43 C.F.R. § 10.1(b).

95. Russell Thornton, Repatriation and the Trauma of Native American History, *in* The Routledge Companion to Indigenous Repatriation: Return, Reconcile, Renew 784, 793 (Cressida Fforde, C. Timothy Mckeown & Honor Keeler eds., 2020).

96. Angela R. Riley, The Ascension of Indigenous Cultural Property Law, 121 Mich. L. Rev. 75, 89 (2022) (considering NAGPRA in the context of Indigenous cultural property legal issues); see also Report of the Panel for a National Dialogue on Museum/Native American Relations 11 (Feb. 28, 1990), <https://documents.saa.org/container/docs/default-source/doc-governmentaffairs/repatriation/heardreport-1990-02-28.pdf> [<https://perma.cc/WYM2-UZTD>] [hereinafter Report of the Panel for National Dialogue] (asserting that "human rights should be the paramount principle" concerning repatriation to culturally affiliated communities).

relationships between federally funded institutions and Native Americans.”⁹⁷

When Native American communities sought the return of their ancestors and cultural heritage before NAGPRA was passed, museums often refused.⁹⁸ But NAGPRA fundamentally changed the balance of power between institutional collectors and Native American communities. Since 1990, the law has facilitated the return of more than two million cultural objects and more than one hundred thousand human remains.⁹⁹

This remarkable degree of success has come as the result of several decades of contestation, critique, advocacy, and evolution since the law was passed.¹⁰⁰ NAGPRA’s achievements did not happen automatically; they have been hard-won.¹⁰¹ They also remain incomplete. Even after so many years, not all of the ancestors and cultural heritage addressed by NAGPRA have been returned.¹⁰² Much can be learned not only from NAGPRA’s successes but also from its limitations and from the ways that NAGPRA repatriation practices have evolved in response to community, museum, and government engagement.

This Piece argues that NAGPRA is a valuable example for laws and policies concerning the 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

97. Courtney Cottrell, NAGPRA’s Politics of Recognition, 44 *Am. Indian Q.* 59, 60 (2020) (footnote omitted).

98. See Report of the Panel for National Dialogue, *supra* note 96, at 3 (“Some Indian nations have, for example, made repeated requests for the repatriation of materials over periods of many years without satisfactory or any response to their requests.”).

99. Nat’l NAGPRA Program, Nat’l Park Serv., Fiscal Year 2023 Report 2–3 (2023), <https://irma.nps.gov/DataStore/DownloadFile/694455> [https://perma.cc/4448-9NUA] [hereinafter U.S. Nat’l Park Serv., Fiscal Year 2023].

100. Advocates have vigorously criticized NAGPRA and pushed for changes to its interpretation and enforcement. See, e.g., Riding In, Decolonizing NAGPRA, *supra* note 86, at 53–54 (arguing that NAGPRA itself needs to be decolonized); Elizabeth Weiss & James W. Springer, NAGPRA: From Compromise to Collapse, *Regulation*, Winter 2022–2023, at 16–17 (arguing that certain interpretations of NAGPRA are in opposition to its original meaning). The federal administrative regulations implementing NAGPRA have been amended several times, most recently in 2023. The Regulations, Nat’l Park Serv., <https://www.nps.gov/subjects/nagpra/regulations.htm> [https://perma.cc/2UGD-768G] (last visited Aug. 14, 2024).

101. For example, while it was initially expected that museums would fully comply with NAGPRA within a few years, in actuality, it took much longer for many museums to grapple with NAGPRA’s requirements. See Sangita Chari & Jaime M.N. Lavalée, Introduction to *Accomplishing NAGPRA* 7, 10–11 (Sangita Chari & Jaime M.N. Lavalée eds., 2013); Fine-Dare, *supra* note 74, at 123–24.

102. See Logan Jaffe, Mary Hudetz, Ash Ngu & Graham Lee Brewer, The Repatriation Project, *ProPublica* (Jan. 11, 2023), <https://www.propublica.org/article/repatriation-nagpra-museums-human-remains> [https://perma.cc/8Z9H-F4ND] (describing the delays in repatriation since NAGPRA’s passage).

issues that NAGPRA addresses mirror the concerns, nuances, and uncertainties central to these other repatriations.

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

This question is particularly salient at this moment. Museums and museum associations have been developing voluntary guidelines on restitution.¹⁰³ The French government is considering whether to pass legislation enabling repatriations.¹⁰⁴ Other European countries have been moving forward with repatriation policies and laws.¹⁰⁵ 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.¹⁰⁶ For all of these groups and purposes, NAGPRA's design and implementation of a repatriation mechanism represents an important resource.

B. *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's enactment, it is still in effect and being actively implemented. It has not been rescinded or

103. See, e.g., Am. Ass'n of Museum Dirs., *Guidance on Art From Colonized Areas 1* (2022), <https://cms.aamd.org/sites/default/files/document/AAMD%20Guidance%20on%20Art%20from%20Colonized%20Areas%20%281%29.pdf> [<https://perma.cc/Q7W3-ECYN>] [hereinafter *AAMD Guidance*]; Arts Council of Eng., *Restitution and Repatriation: A Practical Guide for Museums in England 2* (2023), <https://www.artscouncil.org.uk/supporting-arts-museums-and-libraries/supporting-collections-and-cultural-property/restitution-and-repatriation-practical-guide-museums-england> [<https://perma.cc/KQY5-XPJM>].

104. Jean-Luc Martinez, *Remise du rapport Patrimoine partagé : universalité, restitutions et circulation des œuvres d'art* de Jean-Luc Martinez [Submission of the Shared Heritage Report: Universality, Restitutions and Circulation of Works of Art by Jean-Luc Martinez] (Apr. 27, 2023), <https://www.culture.gouv.fr/fr/Espace-documentation/Rapports/Remise-du-rapport-Patrimoine-partage-universalite-restitutions-et-circulation-des-oeuvres-d-art-de-Jean-Luc-Martinez> [<https://perma.cc/SS8M-82ZC>].

105. See Netherlands Report, *supra* note 59, at 2; de Clippele & Demarsin, *supra* note 61, at 1 (explaining the repatriation and restitution legislation efforts in Belgium).

106. Stephen J. Dubner, *How to Return Stolen Art*, Freakonomics Radio, at 23:03 (May 17, 2023), <https://freakonomics.com/podcast/how-to-return-stolen-art/> (on file with the *Columbia Law Review*) ("What sparked . . . a revisiting of . . . cultural repatriation and restitution of objects is an awareness that maybe we did sort of bad things. And it came out of Black Lives Matter, the connection with that, an atonement for transatlantic slavery." (quoting Patricia Allan, Curator of the Glasgow Museums)).

even amended by Congress.¹⁰⁷ It has not been overturned by the courts.¹⁰⁸ On the contrary, the most recent amendments to the administrative regulations implementing NAGPRA update its interpretation to more effectively facilitate repatriation and to more clearly defer to Native American communities' knowledge in the process.¹⁰⁹

As described above, a fundamental limitation of most cultural property laws is that they apply only prospectively.¹¹⁰ 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.¹¹¹ As a result, individuals and private entities that do not receive federal funds do not have any repatriation obligations under NAGPRA. The expanded applicability of NAGPRA to human remains and cultural objects taken before 1990 is nonetheless quite extensive; it reaches numerous universities, museums, and agencies with substantial Native American holdings in their collections.¹¹²

In addition, NAGPRA's focus on the ongoing obligations of federally funded institutions is also 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 institutions with the present-day commitment of the federal government to deal ethically with Native American communities.

107. The only change to NAGPRA's text since 1990 was a purely technical update to a court's name. Native American Graves Protection and Repatriation Act, Pub. L. No. 102-572, 106 Stat. 4516 (codified at 25 U.S.C. § 3001(13)), Editorial Notes; Pub. L. No. 102-572 (1992).

108. See, e.g., *United States v. Tidwell*, 191 F.3d 976, 980 (9th Cir. 1999); *United States v. Corrow*, 119 F.3d 796, 803–05 (10th Cir. 1997), cert. denied, 522 U.S. 1133 (1998).

109. 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. 86,452, 86,460, 86,502 (Dec. 13, 2023) (codified at 43 C.F.R. pt. 10) (“[T]hese regulations require museums and Federal agencies to defer to the Native American traditional knowledge of lineal descendants, Indian Tribes, and NHOs in all decision-making steps. . . . A museum or Federal agency must prove it has a right of possession to refuse to repatriate a cultural item.”).

110. See *supra* notes 43–46 and accompanying text.

111. U.S. Const. art. I, § 8, cl. 1, 18; 25 U.S.C. §§ 3001(4), (8); 43 C.F.R. § 10.1(b)(1)(i), (ii) (2024); see also Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 *Cardozo J. Int'l & Compar. L.* 409, 431 (2003) [hereinafter Gerstenblith, *Acquisition*] (addressing NAGPRA's constitutional basis); Isaac Moriwake, Comment, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian “Cultural Property” Repatriation*, 20 *U. Haw. L. Rev.* 261, 285 n.158 (1998) (same).

112. See Chari & Lavalée, *supra* note 101, at 8.

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.¹¹³ NAGPRA's constitutionality is further supported by Congress's plenary authority over Native American matters under the Supremacy and Commerce Clauses.¹¹⁴ 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.¹¹⁵ Finally, NAGPRA includes a failsafe to revert to otherwise applicable principles of property law if necessary to avoid a Takings Clause violation.¹¹⁶ A U.S. law on repatriations to other formerly colonized peoples could utilize a similar provision.

Of course, the corresponding legal questions to be addressed will be different in foreign states considering such laws. The recent Belgian restitution law had to provide for exceptions to other national laws that prevent the Executive from permanently removing items in the public domain or transferring property overseas without compensation.¹¹⁷ The Dutch restitution guidelines were designed to comply with the Heritage Act's procedures.¹¹⁸ As noted above, France and some other European states would also have to address laws prohibiting deaccessions by state museums.¹¹⁹ 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.

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.¹²⁰ It has also had a noticeable effect in other, less quantifiable ways. Public consciousness of the issue has

113. U.S. Const. art. I, § 8, cl. 1, 18.

114. See U.S. Const. art. VI, cl. 2; *id.* art. I, § 8, cl. 3; 25 U.S.C. § 3010; Gerstenblith, *Acquisition*, *supra* note 111, at 431 (2003) (addressing NAGPRA's constitutional basis); Moriwake, *supra* note 111, at 285 n.158 (same).

115. See U.S. Const. art. I, § 8, cl. 3.

116. See U.S. Const. amend. V; 25 U.S.C. § 3001(13); see also Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 *Yale L.J.* 1022, 1093–94 & n.317 (2009) (“It is precisely because museums never could have acquired good title to human remains or funerary objects in the first place that NAGPRA has survived Fifth Amendment takings challenges.”); Gerstenblith, *Acquisition*, *supra* note 111, at 434–36 (“[T]he NAGPRA repatriation provisions are premised on the notion that the museum did not acquire valid title to such objects and therefore, they also do not raise any Takings Clause concerns.”).

117. de Clippele & Demarsin, *supra* note 61, at 289 (describing the law and its limits).

118. Netherlands Report, *supra* note 59, at 64; Jos van Beurden, *Hard and Soft Law Measures for the Restitution of Colonial Cultural Collections—Country Report: The Netherlands*, 8 *Santander Art & Culture L. Rev.* 407, 413–15 (2022) (discussing the relationship between the repatriation policy and the Heritage Act).

119. E.g., Sarr & Savoy, *supra* note 13, at 71–79.

120. U.S. Nat'l Park Serv., *Fiscal Year 2023*, *supra* note 99, at 2.

increased due to media coverage of NAGPRA.¹²¹ Museums and communities have initiated various forms of collaboration.¹²² Some museums that have engaged in the required consultative process with communities have reported that doing so has enabled better communication and mutual understanding.¹²³

This is not to discount the limitations on NAGPRA's effectiveness. Concerned communities and museums, as well as advocates and scholars, have expressed significant dissatisfaction with how NAGPRA has been conceptualized, organized, and implemented.¹²⁴ When it was first passed, it took substantially longer than expected for museums to even begin to grapple with NAGPRA's requirements.¹²⁵ Since then, NAGPRA compliance has been notoriously slow and incomplete.¹²⁶ Indeed, a primary purpose of the most recent amendments to the administrative regulations was to address some of these persistent concerns.¹²⁷ As

121. This has included both positive and negative coverage. See, e.g., Samantha Chery, *Museums Cover Native Displays After New Repatriation Rules*, Wash. Post (Jan. 26, 2024), <https://www.washingtonpost.com/entertainment/art/2024/01/26/museums-remove-native-american-hawaiian-indigenous-exhibit-nagpra/> (on file with the *Columbia Law Review*); Julia Jacobs, *Once a Roadside Attraction, a Native Burial Site Nears Repatriation*, N.Y. Times (Mar. 25, 2024), <https://www.nytimes.com/2024/03/25/arts/native-repatriation-dickson-mounds-nagpra.html> (on file with the *Columbia Law Review*); Jaffe et al., *supra* note 102.

122. See Wendy Giddens Teeter, Desiree Martinez (Tongva) & Dorothy Lippert (Choctaw), *Creating a New Future: Redeveloping the Tribal–Museum Relationship in the Time of NAGPRA*, 28 Int'l J. Cultural Prop. 201, 204–06 (2021) (outlining multiple creative collaborations that have arisen from NAGPRA consultation).

123. *Id.* at 206–07 (“While conversations with tribes and museum staff deepened, reciprocal relationships have developed.”).

124. Bruchac on Erasure, *supra* note 77, at 55–56 (noting that NAGPRA fails to require museums to work together when they have interrelated collections and critiquing the “culturally unidentifiable” category). See generally Riding In, *Decolonizing NAGPRA*, *supra* note 86; Weiss & Springer, *supra* note 100 (arguing that certain interpretations of NAGPRA are in opposition to its original meaning); 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/R39R-E ECB>] [hereinafter Fitz Gibbon, *Major Changes*] (criticizing proposed changes to NAGPRA as “abandon[ing] precedent” and encouraging a lack of “public accountability”).

125. See Chari & Lavalley, *supra* note 101, at 10–13 (describing the “range of complexities, both theoretical and practical, associated with the implementation of the legislation”).

126. See Jaffe et al., *supra* note 102 (“When the federal repatriation law passed in 1990, the Congressional Budget Office estimated it would take 10 years to repatriate all covered objects and remains to Native American tribes. Today, many tribal historic preservation officers and NAGPRA professionals characterize that estimate as laughable . . .”).

127. See 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. 86,452, 86,452 (Dec. 13, 2023) (codified at 43 C.F.R. pt. 10 (explaining the amendments’ goal to “clarify and improve upon” the repatriation process)).

discussed below, these complexities are exactly what makes NAGPRA a useful case study.

C. *Key Issues*

In addition to being proof of concept, NAGPRA and its long history of implementation could also serve as either a model or a 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.¹²⁸

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, 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.¹²⁹ One issue that arises only in the context of foreign repatriations is that many governments perceive an international relations concern with repatriating to a subnational community within a foreign state.¹³⁰

Who must repatriate cultural objects? Cultural objects are in the collections of government museums and agencies, private individuals, and private institutions. A policy might address repatriation only by the government itself, or also by some or all private collectors.¹³¹

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

128. This section draws from three sources concerning repatriations to formerly colonized peoples as points of comparison to NAGPRA's framework: Netherlands Report, supra note 59, at 6 (recommending measures to the Ministry of Education, Culture, and Science, which have been adopted by the Ministry); Sarr & Savoy, supra note 13, at 61 (recommending that all pieces acquired after 1960 that were illicitly obtained be repatriated, which has not been adopted by the French government); AAMD Guidance, supra note 103, at 1 (providing guidance to museum directors concerning "art from colonized areas").

129. See Netherlands Report, supra note 59, at 72 ("Much time has usually elapsed since cultural heritage objects have left their source countries. During that time national boundaries may have shifted, new states may have developed, communities may have moved, merged or disappeared, and the rights of the rulers may have passed to others.").

130. *Id.* (noting that for some governments it is "possible that a request for the return of a cultural heritage object may support the unique cultural identity of a particular community and that this may be perceived as conflicting with initiatives to unify the State").

131. See Netherlands Report, supra note 59, at 57 (addressing only state-owned collections); Sarr & Savoy, supra note 13, at 44–45 (addressing objects in the French Public Collections); see also 25 U.S.C. §§ 3001(4), (8) (defining the relevant actors in the repatriation process); 43 C.F.R. § 10.2 (defining "federal agency" and "museum"). The AAMD report does not need to address this issue.

culturally significant? A cultural object may have been sacred, communally owned, or cultural patrimony that was central to the identity of the group.¹³²

When were the objects taken? A law authorizing repatriations must determine what parameters, if any, to set around the time of acquisition. For example, parameters could correspond to a particular historical period of colonial involvement.¹³³

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—for example, use of force, use of coercion, or use of power? Should an object having been acquired during the colonial era establish a presumption of illicit acquisition?¹³⁴

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 the creation of new institutions. Governments could assert decisionmaking authority, leave decisionmaking to the concerned institutions, defer to source communities, or engage in collaborative decisionmaking.¹³⁵

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,

132. See Netherlands Report, *supra* note 59, at 67–68, 71–72 (discussing treatment of culturally significant objects); Sarr & Savoy, *supra* note 13, at 63–66 (discussing the pieces that should be prioritized for repatriation); AAMD Guidance, *supra* note 103, at 3, 9 (evaluating the importance of objects for repatriation); see also 25 U.S.C. § 3001(3) (defining cultural items); 43 C.F.R. § 10.2 (defining cultural items).

133. See, e.g., Netherlands Report, *supra* note 59, at 15 (“This guidance focuses on cultural heritage objects and collections that were acquired in the period that began in the 17th century, when the first ships sailed from the Netherlands to Asia, and ended in 1975, the year in which Suriname became an independent republic.”); Sarr & Savoy, *supra* note 13, at 61–62 (outlining recommendations for restituting objects acquired during colonial and post-colonial timeframes); AAMD Guidance, *supra* note 103, at 1 (focusing on items obtained “during a period of colonial rule”). NAGPRA does not differentiate on the basis of timeframe.

134. See Netherlands Report, *supra* note 59, at 67–70 (establishing that items gained through illicit means should be repatriated); Sarr & Savoy, *supra* note 13, at 61–62 (recommending the repatriation of illicitly gained items); AAMD Guidance, *supra* note 103, at 4, 9 (emphasizing the importance of the method of acquisition); see also 25 U.S.C. §§ 3001(13) (defining “right of possession”), 3005(c) (describing the duty of entities to return items to which they do not have “right of possession”); 43 C.F.R. § 10.2 (defining “right of possession”).

135. See Netherlands Report, *supra* note 59, at 73–79 (discussing repatriation procedures and decisionmakers); Sarr & Savoy, *supra* note 13, at 77–81 (recommending repatriation procedures and decisionmakers); AAMD Guidance, *supra* note 103, at 8–9 (describing the decisionmaking process); see also 25 U.S.C. § 3005 (establishing the repatriation process); 43 C.F.R. §§ 10.8–10.10 (detailing repatriation procedures).

the legal context in both the claimant's state and the collector's state will be relevant.¹³⁶

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.¹³⁷ But these questions are not necessarily contentious. There may be consensus concerning the outcome or an interest in cooperative action.¹³⁸

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.¹³⁹ 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, tend to 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.¹⁴⁰

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

136. See Netherlands Report, *supra* note 59, at 59–64 (discussing the relevant legal rules); Sarr & Savoy, *supra* note 13, at 77–79 (discussing the potential legal framework for repatriation); AAMD Guidance, *supra* note 103, at 5–6 (describing the legal analysis of repatriation). Concerning NAGPRA, see *supra* notes 128–135.

137. See, e.g., Netherlands Report, *supra* note 59, at 56–57 (discussing factors including risk of destruction, handling of conditions, and accessibility to the public).

138. See Netherlands Report, *supra* note 59, at 56–57 (discussing “conditions after return”); Sarr & Savoy, *supra* note 13, at 32–33, 68–69, 80–81 (discussing African communities’ control of cultural heritage and agreements for international cooperation). NAGPRA and the AAMD Guidance do not address this issue.

139. See, e.g., Sarr & Savoy, *supra* note 13, at 75–79 (describing two major difficulties of restitution).

140. See Netherlands Report, *supra* note 59, at 65–67, 79–80 (recommending a policy framework and provenance research); Sarr & Savoy, *supra* note 13, at 75–79 (discussing questions of provenance and the need for partnerships to research provenance); AAMD Guidance, *supra* note 103, at 2–3 (describing the difficulty in determining the history of an object). Concerning NAGPRA, see discussion *infra* notes 162–166.

among the concerned institutions, communities, and states throughout the entire process.¹⁴¹

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.¹⁴² This difference, however, does not render NAGPRA less relevant for purposes of assessing all the other shared issues noted above. In addition, a primary motivation for NAGPRA was the looting of Native American burial sites.¹⁴³ The return and reburial of ancestors continues to be a central focus of Native American advocacy and repatriation claims under NAGPRA.¹⁴⁴ 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.¹⁴⁵ But NAGPRA's provisions for cultural objects are substantial, even though they are not the law's sole focus.¹⁴⁶ Furthermore, the extraordinary number of cultural objects repatriated under NAGPRA demonstrates that the return of

141. See Netherlands Report, *supra* note 59, at 51–53, 80–82 (emphasizing the importance of source countries' views and requiring international cooperation); Sarr & Savoy, *supra* note 13, at 67–69, 80–81 (recommending mechanisms of cooperation); AAMD Guidance, *supra* note 103, at 2, 8 (suggesting contacting source communities); see also 25 U.S.C. §§ 3003(b)(1)(A), 3004(b)(1)(B), 3005(a)(3) (requiring consultation with Native American communities); 43 C.F.R. §§ 10.9(b)–(c), 10.10(b)–(c) (detailing consultation requirements).

142. 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 (noting a “unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations”); see also Honor Keeler, *International Indigenous Repatriation*, 44 *Ariz. St. L.J.* 703, 733 (2012) (“For museums, it is vitally important in international repatriation to recognize that federally recognized tribes in the United States have a government-to-government relationship with the U.S. federal government and that a majority of laws . . . which directly affect Native American communities, reflect this political relationship in a repatriation context.”).

143. S. Select Comm. on Indian Affs., *Providing for the Protection of Native American Graves and the Repatriation of Native American Remains and Cultural Patrimony*, S. Rep. No. 101-473, at 1–3 (1990) [hereinafter *Senate Report*].

144. See Bruchac on Erasure, *supra* note 77, at 51–53 (emphasizing the importance of return and reburial of ancestors); Lonetree, *supra* note 77, at 158–64 (describing how the return of ancestors deemed culturally unidentifiable is “the central contentious issue”).

145. See, e.g., Human Tissue Act 2004, c. 30 (U.K.), <https://www.legislation.gov.uk/ukpga/2004/30/section/47> [<https://perma.cc/BA3N-86N5>] (discussing only human remains); Netherlands Report, *supra* note 59 (discussing only cultural heritage); Sarr & Savoy, *supra* note 13 (discussing only cultural heritage); AAMD Guidance, *supra* note 103 (discussing only cultural heritage).

146. See, e.g., 25 U.S.C. § 3004 (mandating a written summary of Native American cultural objects in museum collections); 43 C.F.R. § 10.1(a) (explaining the purpose of NAGPRA to protect Native American funerary objects, sacred objects, and objects of cultural patrimony).

cultural objects is a significant aspect of the statute's implementation.¹⁴⁷ 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.

D. *NAGPRA as a 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.¹⁴⁸ Institutions must then notify and consult with the possible source communities.¹⁴⁹ 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.¹⁵⁰ The existence of the Benin Bronzes and the location of some of them at the Smithsonian National Museum of African Art were well known to Nigeria.¹⁵¹ But many other cultural objects, like the Native American bundle at the Andy Warhol Museum, have not been publicly exhibited.¹⁵² The bundle's existence and location would never have been known to the Cheyenne River Sioux Tribe if the Andy 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. Patty Gerstenblith proposes that NAGPRA's procedural requirement that museums provide this information could serve as a model for similar affirmative obligations in other repatriation laws and policies.¹⁵³ Similarly, she suggests that other aspects of NAGPRA's repatriation mechanism could be adapted to other settings.¹⁵⁴

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

147. More than two million cultural objects have been repatriated under NAGPRA. U.S. Nat'l Park Serv., Fiscal Year 2023, *supra* note 99, at 2.

148. 25 U.S.C. § 3004; 43 C.F.R. § 10.9(a). For associated funerary objects, museums must proactively produce itemized inventories instead of summaries. 25 U.S.C. § 3003; 43 C.F.R. § 10.10(a).

149. 25 U.S.C. § 3004; 43 C.F.R. § 10.9(b), (c). For associated funerary objects, museums must engage in consultation before finalizing their inventories. 25 U.S.C. § 3003; 43 C.F.R. § 10.10(b), (c).

150. See Ables, *supra* note 3 (describing how the Benin Bronzes have been an international symbol in the worldwide movement for the return of looted artifacts).

151. *Id.*

152. See Notice of Intent to Repatriate Cultural Items: The Andy Warhol Museum, Pittsburgh, PA, 88 Fed. Reg. 51,345, 51,345 (Aug. 3, 2023).

153. See Gerstenblith, Cultural Objects, *supra* note 55, at 258 (discussing how NAGPRA's inventory and summary procedure could be a model for repatriation).

154. *Id.* at 261–62 (“A restitution scheme based to some extent on the NAGPRA priority could be adapted to the international context.” (footnote omitted)).

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.¹⁵⁵ 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.¹⁵⁶ 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.”¹⁵⁷ Repatriation demands can be made both by individual descendants and by communities affiliated with the objects.¹⁵⁸ 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.¹⁵⁹

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;¹⁶⁰ from all Native American communities to only federally recognized tribes and Native Hawaiian organizations;¹⁶¹ and from all cultural objects to only certain items designated as funerary objects, sacred objects, or cultural patrimony.¹⁶²

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

155. 25 U.S.C. § 3005(a) (2018); 43 C.F.R. § 10.8(b) (2024).

156. 25 U.S.C. §§ 3001(13), 3005(c); 43 C.F.R. §§ 10.9(d)(3)(iii), 10.10(f)(3).

157. 25 U.S.C. § 3001(13); 43 C.F.R. § 10.2 (definition of “right of possession”); see also Gerstenblith, *Cultural Objects*, *supra* note 55, at 252 (“The right to repatriation . . . is also premised on the failure of the current possessor institution or federal agency to have acquired title”); Stahn, *supra* note 16, at 404 (“NAGPRA builds on the findings of the 1979 study of the Interior Federal Agencies Task Force, which found that many indigenous objects were stolen or acquired from persons who lacked title or authority to alienate them.”); Moriwake, *supra* note 111, at 269–71 (discussing common law standards).

158. 25 U.S.C. § 3005(a)(5); 43 C.F.R. §§ 10.9(d)(3)(ii), 10.10(d)(1)(iii), 10.10(f)(3)(ii).

159. 25 U.S.C. § 3005(a)(4); 43 C.F.R. § 10.3; see Stahn, *supra* note 16, at 405–06 (“NAGPRA sought to mitigate problems of ‘cultural affiliation’ through flexible means of proof”).

160. 25 U.S.C. § 3001(4), (8); 43 C.F.R. § 10.1(b)(1)(i), (ii) .

161. 25 U.S.C. §§ 3001(7), 3001(11), 3005(a); 43 C.F.R. §§ 10.2 (defining “Indian Tribe” and “Native Hawaiian organization”); see also *id.* §§ 10.9(d), 10.10(f).

162. 25 U.S.C. §§ 3001(3)(A)–(D), 3005(a); 43 C.F.R. § 10.2 (defining “cultural items”). Of course, NAGPRA also addresses human remains.

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.¹⁶³ Rather than treating NAGPRA as a template for this purpose, the 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 two overarching issues identified in the previous section: promoting meaningful engagement and addressing uncertainty and unknowns. 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.¹⁶⁴ Concerning engagement, NAGPRA requires consultation beginning immediately after institutions review their collections, and that consultation is meant to continue throughout the process.¹⁶⁵ It obliges institutions to rely on communities' knowledge and expertise in making determinations.¹⁶⁶ But NAGPRA ultimately leaves repatriation decisions to museums and agencies.¹⁶⁷ Policies concerning repatriation to other formerly colonized peoples could similarly incorporate rules addressing the issues of uncertainties and engagement.

Of course, NAGPRA is not the only possible model for such repatriation measures. But the modern international legal protections for cultural objects discussed above do not provide such a model because they are not accompanied by comprehensive repatriation regimes.¹⁶⁸ Instead,

163. See *infra* notes 183–196 and accompanying text.

164. See *supra* note 157 and accompanying text.

165. 25 U.S.C. § 3005(a)(3); 43 C.F.R. §§ 10.9(b), 10.10(b).

166. 25 U.S.C. §§ 3003(b)(1)(A), 3004(b)(1)(B), 3005(a)(3); 43 C.F.R. § 10.1(a)(3).

167. 25 U.S.C. §§ 3004–3005; 43 C.F.R. §§ 10.9(e), 10.10(g).

168. Perhaps the most relevant international convention is a 1995 treaty that requires state parties to establish repatriation mechanisms for stolen or illegally exported cultural property. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 2421 U.N.T.S. 457. But even this treaty depends on enforcement through national courts or other national mechanisms, and it concerns recently stolen or exported objects and so does not address many of the key issues discussed above. *Id.* Also, an international consensus has not developed around this mechanism; it has only a modest number of ratifications, and these include very few of the market states that tend to be the recipients of looted cultural property. *Id.* Other international statements on repatriation are predominantly nonbinding soft law principles or recommendations rather than binding hard law. See, e.g., G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); Human Rights Council Res. 42/19, U.N. Doc A/HRC/42/19 (Sept. 26, 2019) (calling for international and national repatriation mechanisms for Indigenous cultural property); Off. of the Special Envoy for Holocaust

implementation of these international standards depends on national adoption of laws and enforcement mechanisms.¹⁶⁹ In addition, even under national law, repatriation is often achieved through generally applicable laws concerning stolen property rather than specialized repatriation regimes of the kind needed to effectively address the key issues listed above.¹⁷⁰

The most fully developed of the new repatriation policies discussed above is the Dutch policy, which includes guidance on procedures, standards for repatriation, and proposals addressing other key issues.¹⁷¹ While some of these procedures were determined by the need to comply with the Heritage Act,¹⁷² as noted above, the Dutch approach could provide a useful model, particularly for other European states.¹⁷³ For the United States, NAGPRA is likely to offer a more relevant parallel, due to its basis in the U.S. Constitution and relationship to other U.S. laws and

Issues, Washington Conference Principles on Nazi-Confiscated Art, U.S. Dep't State (Dec. 3, 1998), <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> [<https://perma.cc/7G5Y-ZXUM>] (calling for national restitution mechanisms for Nazi-confiscated art).

169. E.g., Katarzyna Januszkiewicz, Note, Retroactivity in the 1970 UNESCO Convention: Cases of the United States and Australia, 41 *Brook. J. Int'l L.* 329, 342 (2015) (“[T]he [1970] UNESCO Convention is more of a model than a set rule of law; it proposes an international mission and leaves its signatories ‘to implement its tenets through their own national legislation.’” (quoting Matthew R. Hoffman, *Cultural Pragmatism: A New Approach to the International Movement of Antiquities*, 95 *Iowa L. Rev.* 665, 677 (2010))). Accordingly, while international law prohibits looting of cultural objects, when such items are nonetheless taken, there are limited remedies under international law for those losses. But see *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Reparations Order 41–42 (Aug. 17, 2017) (International Criminal Court order requiring reparations for destroying cultural heritage sites).

170. See *J. Paul Getty Tr. v. Italy*, App. No. 35271/19, ¶¶ 356–359 (May 2, 2024) <https://hudoc.echr.coe.int/eng#%7B%22appno%22%3A%2235271%2F19%22%22itemid%22%3A%222001-233381%22%7D> (on file with the *Columbia Law Review*) (upholding Italy’s confiscation order for repatriation of a bronze statue); Kate Fitz Gibbon, *National Stolen Property Act: Primary US Cultural Property Law*, *Cultural Prop. News* (Nov. 26, 2018), <https://culturalpropertynews.org/national-stolen-property-act-primary-us-cultural-property-law/> [<https://perma.cc/8KGD-NXE7>] (describing use of the U.S. National Stolen Property Act to return looted cultural objects).

171. Netherlands Report, *supra* note 59, at 65–67. The Belgian law does not include a detailed repatriation mechanism, but rather leaves the question primarily to the discretion of the Executive. de Clippele & Demarsin, *supra* note 61, at 286–87 (discussing the lack of detailed procedures in the Belgian law). The Belgian law does, however, make certain key choices that could be emulated by other states, such as designating bilateral cooperation agreements between the Executive and the relevant foreign state as the vehicle for repatriations. *Id.* at 280–82.

172. Wet van 9 december 2015, houdende bundeling en aanpassing van regels op het terrein van cultureel erfgoed [Law Concerning Bundling and Adapting Rules in the Field of Cultural Heritage] Stb. 2015, 511 art. 2, <https://www.cultureelerfgoed.nl/binaries/cultureelerfgoed/documenten/publicaties/2015/01/01/erfgoedwet/stb-2015-511.pdf> [<https://perma.cc/FT3K-4JUA>].

173. See *supra* notes 117–119 and accompanying text.

policies.¹⁷⁴ But the Dutch guidelines and other policies may well present some beneficial alternatives for a potential U.S. law. Alternative approaches could be particularly constructive on issues for which there has been considerable dissatisfaction with NAGPRA's approach, as well on foreign relations issues that NAGPRA does not address.¹⁷⁵

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. The framework might be particularly useful if considered in combination with other models offering alternative approaches. NAGPRA's framework 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 communities in making repatriation determinations.

One distinct advantage that NAGPRA offers over other models that are specific to formerly colonized states is its long experience of implementation. The Dutch policy and Belgian law were adopted quite recently, for example.¹⁷⁶ The complexities that have emerged over the many decades of NAGPRA's implementation suggest that states, museums, and associations should consider NAGPRA not primarily as a template, but as a case study.

E. *NAGPRA as a 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

174. See *supra* notes 105–116 and accompanying text.

175. In response to the Washington Principles, some European states have developed independent Nazi-confiscated art repatriation mechanisms. See JUST Act Report, *supra* note 63, at 8. The advisory committee that drafted the Dutch guidelines took that approach, using its own national mechanism as a model to some extent. Netherlands Report, *supra* note 59, at 73; van Beurden, *supra* note 118, at 420–21 (noting the “many parallels” between the two). But the Nazi-confiscated art context has significant differences from the colonial context; for example, the problems of determining provenance are far less, due to the considerably shorter lapse of time and meticulous Nazi recordkeeping. See Netherlands Report, *supra* note 59, at 63; van Beurden, *supra* note 118, at 420–21. In addition, for the United States, there is not a separate U.S. mechanism on which to draw as a model. See JUST Act Report, *supra* note 63, at 4–5.

176. Loi du 3 juillet 2022 reconnaissant le caractère aliénable des biens liés au passé colonial de l'État belge et déterminant un cadre juridique pour leur restitution et leur retour [Law Recognizing the Alienable Nature of Property Linked to the Colonial Past of the Belgian State and Determining a Legal Framework for Their Restitution and Return], M.B., Sept. 28, 2022, https://www.ejustice.just.fgov.be/mopdf/2022/09/28_1.pdf [<https://perma.cc/4K2Z-GR9J>]; Neth. Ministry of Educ., Culture & Sci., Government: Redressing an Injustice by Returning Cultural Heritage Objects to Their Country of Origin, EIN Presswire (Jan. 29, 2021), <https://www.einpresswire.com/article/558445947/government-redressing-an-injustice-by-returning-cultural-heritage-objects-to-their-country-of-origin> [<https://perma.cc/3FEF-LHRE>].

successes, failures, and controversies from the perspectives of the concerned communities and institutions, as well as from the standpoints of scholars, lawyers, policymakers, and activists.¹⁷⁷ 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 generated the repatriation of a large number of cultural objects and human remains.¹⁷⁸ It has also achieved other qualitative indicators of success.¹⁷⁹ But an examination of 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 communities' objections.¹⁸⁰ While some museums and communities have interacted cooperatively, others have been at odds.¹⁸¹ 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,

177. E.g., Nat'l Park Serv., Native American Graves Protection and Repatriation Act: Program Reports, <https://www.nps.gov/subjects/nagpra/reports.htm> [<https://perma.cc/6U9E-LZ5G>] (last visited Aug. 14, 2024) (posting annual reports detailing National NAGPRA program efforts); Accomplishing NAGPRA, supra note 101 (compiling reflections and strategies aimed at navigating and improving NAGPRA implementation); Fine-Dare, supra note 74 (describing the cultural, political, and legal context of NAGPRA); Greg Johnson, Sacred Claims: Repatriation and Living Tradition (2007); Lonetree, supra note 77 (arguing that decolonizing museums can have a positive impact on Indigenous communities); Repatriation Reader: Who Owns American Indian Remains? (Devon A. Mihesuah ed., 2000) (anthologizing the many lenses through which the repatriation issue can be analyzed); Manley A. Begay Jr., The Native American Graves Protection and Repatriation Act After Twenty Years: A View From Indigenous Country, 44 Ariz. St. L.J. 625 (2012) (arguing that, twenty years after NAGPRA's enactment, many museums are still yet to fully comply with its spirit and mandates); Fitz Gibbon, Major Changes, supra note 124 (critiquing recent proposed changes to NAGPRA).

178. U.S. Nat'l Park Serv., Fiscal Year 2023, supra note 99, at 2.

179. See Teeter et al., supra note 122, at 203 (describing how NAGPRA improved the care of collections).

180. See Jaffe et al., supra note 102 (explaining how many museums and institutions across the country have circumvented repatriation through actions like questionable labeling).

181. See Eric Hemenway, Finding Our Way Home, in Accomplishing NAGPRA, supra note 101, at 91, 92 (describing how difficult and time-consuming it can be to negotiate with museums over the repatriation of human remains); see also Lonetree, supra note 77, at 160–64 (detailing the difficulties that the Michigan Anishnabek tribes had in their request for the return of 405 ancestors in the possession of the University of Michigan).

institutions, and the implementing federal agency have all responded to the law's requirements and to each other.¹⁸²

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 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 communities, while maintaining decisionmaking 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.¹⁸³ Others argue that NAGPRA's implementation is insufficiently protective of museum interests.¹⁸⁴ The implementation of this power shift 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.¹⁸⁵ NAGPRA's procedures have also been notoriously burdensome and time-consuming. This has impacted some communities' abilities to bring claims effectively as well as some museums' capacities to promptly comply with NAGPRA's mandates.¹⁸⁶ In response to Native American communities' advocacy, the newest amendments to the administrative regulations establish additional incentives for institutional compliance, encourage greater efficiencies, and redirect agency policy to eliminate

182. See discussion *infra* notes 185–197 and accompanying text.

183. See, e.g., Shannon Keller O'Loughlin, *Moving Forward From the Last Twenty Years: Finding a New Balance, in Accomplishing NAGPRA*, *supra* note 101, at 223, 225 (museums and agencies have “use[d] this power to frustrate the purpose of NAGPRA”); 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/> [<https://perma.cc/8MW9-MHRC>] (“[NAGPRA] gives museums and institutions too much power.”).

184. See Fitz Gibbon, *Major Changes*, *supra* note 124 (arguing proposed changes to NAGPRA will limit the actions of museums and potentially give too much authority to Native peoples).

185. See Lonetree, *supra* note 77, at 160–64 (detailing the long battle between the University of Michigan and the Michigan tribes about the return of human remains); Hemenway, *supra* note 181, at 89–90 (“NAGPRA clearly states that a tribe’s oral tradition is a viable line of evidence, yet when it comes time to consult, oral history is not given the merit it deserves. . . . [B]ecause the decision to honor a repatriation claim ultimately resides with the museum.”); Jaffe et al., *supra* note 102 (“[M]any institutions have interpreted the definition of ‘cultural affiliation’ so narrowly that they’ve been able to dismiss tribes’ connections to ancestors and keep remains and funerary objects.”).

186. Fine-Dare, *supra* note 74, at 143–44 (“NAGPRA implementation is such an enormous and expensive undertaking that the inevitable result has been that of delays and backlogs.”); Hemenway, *supra* note 181, at 88, 91 (discussing how smaller museums often do not proactively address NAGPRA compliance due to lack of staff); Jaffe et al., *supra* note 102.

loopholes.¹⁸⁷ Thus, NAGPRA's transfer of power to Native American communities was not a onetime event that was accomplished when the statute was passed. Rather, it has evolved over time as museums and communities have leveraged their statutory authority in various ways.

Another topic that illustrates NAGPRA's utility as a case study is the first key issue listed above: to whom cultural objects should be repatriated. As noted above, this is a significant question for repatriations to other formerly colonized peoples, as well as in NAGPRA.¹⁸⁸ This subject is also particularly complex in practice. It arises in multiple ways at multiple points in the design and 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 surfaces 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.¹⁸⁹ By allowing only federally recognized tribes to make repatriation claims, Congress favored communities with which the federal government has a direct, singular relationship and grounded the law in its constitutional authority over Native American matters.¹⁹⁰ This choice, however, 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.¹⁹¹ Cottrell argues that, in addition to "undermin[ing] Indigenous rights to cultural items because of federal standards of recognition," this distinction "removes self-determination and identity politics from the hands of Native communities."¹⁹² In so doing, NAGPRA frustrates some of its purposes that are in keeping with human rights, restorative justice, and social reconciliation conceptual frameworks.

In the context of repatriations to other formerly colonized peoples, similar considerations are at play. In electing which claimants to permit,

187. 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. 86,452, 86,452–53 (Dec. 13, 2023) (codified at 43 C.F.R. pt. 10).

188. See *supra* section II.C.

189. See *supra* notes 160–167 and accompanying text.

190. 25 U.S.C. §§ 3001(7), 3010 (2018); see also E. Sunny Greer, A Call for Healing from the Tragedy of NAGPRA in Hawaii, *in* Accomplishing NAGPRA, *supra* note 101, at 99, 102–03 (discussing the ramifications of "the absence of a sovereign Hawaiian Nation recognized by the United States").

191. See Bruchac on Erasure, *supra* note 77, at 58 ("[P]art of what is problematic in NAGPRA is that it pays very little attention to the historical connections among different tribal groups, and a great deal of attention to the modern political connections."); Angela Neller, Ramona Peters & Brice Obermeyer, NAGPRA's Impact on Non-Federally Recognized Tribes, *in* Accomplishing NAGPRA, *supra* note 101, at 163, 163.

192. Cottrell, *supra* note 97, at 78.

governments may wish to give precedence to claims from source communities and states with which they have strong relationships. The Dutch policy prioritizes former Dutch colonies,¹⁹³ while the Belgian law restricts the right to make claims to former Belgian colonies, for example.¹⁹⁴ Any such prioritization, whether concerning claimants or other key issues, may have a reasonable rationale. Inevitably, however, such choices mean that other communities' similar interests are not addressed.¹⁹⁵

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.¹⁹⁶ 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.¹⁹⁷ Even if the origin of an object is known, there may be multiple present-day successor communities that could act as claimants.¹⁹⁸

This question has arisen in both of the examples discussed in this paper. The Kingdom of Benin was succeeded by both the political state of Nigeria and by a social community whose leader descends from the Oba that ruled the Kingdom of Benin. Accordingly, both Nigeria and the Oba have a basis for claiming the Benin Bronzes.¹⁹⁹ In the absence of any guiding law or policy, it is up to the collectors and claimants to ascertain on a case-by-case basis how to address such situations.²⁰⁰ The appropriate

193. Netherlands Report, *supra* note 59, at 70.

194. de Clippele & Demarsin, *supra* note 61, at 284–85.

195. Netherlands Report, *supra* note 59, at 70 (“Regardless of whether the Netherlands was, or was not, jointly culpable for the involuntary loss of possession of a particular cultural heritage object, as the current owner it is the only entity that can actively redress the injustice.”).

196. E.g. Netherlands Report, *supra* note 59, at 33; Sarr & Savoy, *supra* note 13, at 60.

197. See Netherlands Report, *supra* note 59, at 72 (“During that time national boundaries may have shifted, new states may have developed, communities may have moved, merged or disappeared, and the rights of the rulers may have passed to others.”); Sarr & Savoy, *supra* note 13, at 33 (“As a result of colonialism, certain objects produced by communities today find themselves straddling several borders.”); Fine-Dare, *supra* note 74, at 153–56 (describing an example of cultural affiliation issues under NAGPRA).

198. See Fine-Dare, *supra* note 74, at 153–56 (describing an example of cultural affiliation issues under NAGPRA); see also Netherlands Report, *supra* note 59, at 72; Sarr & Savoy, *supra* note 13, at 33.

199. Alex Marshall, Who Owns the Benin Bronzes? The Answer Just Got More Complicated, *N.Y. Times* (June 4, 2023), <https://www.nytimes.com/2023/06/04/arts/design/benin-bronzes-nigeria-ownership.html> (on file with the *Columbia Law Review*) (last updated June 5, 2023).

200. In the instance of the Benin Bronzes, several institutions and governments returned some Benin Bronzes to the Nigerian government, and the Nigerian President thereafter announced that returned items would be turned over to the Oba, causing

recipient of the bundle found by the Andy Warhol Museum was also initially uncertain. The origin of the bundle was unrecorded, and the museum's 2018 notification of the bundle's discovery went to over forty tribes.²⁰¹ The bundle was originally claimed by the Flandreau Santee Sioux Tribe before that community voluntarily withdrew its claim in favor of the Cheyenne River Sioux Tribe.²⁰²

Unlike the circumstances of the Benin Bronzes, NAGPRA provides a framework for addressing claims by multiple source communities and related issues.²⁰³ Of course, the restitution of the bundle found by the Andy Warhol Museum was resolved consensually. But in other cases involving multiple claimants or changes in tribal identity over time, a particularly controversial aspect of NAGPRA's implementation has been museums' designation of certain human remains and cultural objects as "culturally unidentifiable."²⁰⁴ This designation has enabled museums to continue to keep objects and ancestors, notwithstanding repatriation claims from communities.²⁰⁵

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.²⁰⁶ These coalitions allow non-federally recognized tribes to

controversy among some collectors. See *id.*; see also Gerstenblith, *Cultural Objects*, *supra* note 55, at 265–66 (discussing the role of treaties in determining this issue).

201. Native American Graves Protection and Repatriation Act: Summaries, Nat'l Park Serv., <https://grantsdev.cr.nps.gov/NagpraPublic/Home/Summary> (on file with the *Columbia Law Review*) (last visited Mar. 21, 2024) (choose "The Andy Warhol Museum" from the "Museum or Federal Agency" dropdown).

202. Notice of Intent to Repatriate Cultural Items: The Andy Warhol Museum, Pittsburgh, PA, 88 Fed. Reg. 51,345, 51,345 (Aug. 3, 2023); see also Notice of Intent to Repatriate Cultural Items Amendment: The Andy Warhol Museum, Pittsburgh, PA, 88 Fed. Reg. 86,367, 86,367 (Dec. 13, 2023).

203. See 25 U.S.C. §§ 3003(a), 3004(a), 3005(e) (2018); 43 C.F.R. § 10.3 (2024).

204. See Riding In, *Decolonizing NAGPRA*, *supra* note 86, at 57–60 (arguing that all human remains and objects should be returned); Weiss & Springer, *supra* note 100, at 17 (arguing that continued university possession is authorized by the statute and enables scientific research).

205. See Lonetree, *supra* note 77, at 158–65 (describing efforts by the Saginaw Chippewa Tribe and Michigan Anishinaabek Cultural Preservation and Repatriation Alliance to repatriate twelve hundred ancestors held by the University of Michigan in Ann Arbor); Riding In, *Decolonizing NAGPRA*, *supra* note 86, at 57–60 ("Museums, supported by the scientific community, often claim that present-day Indians are not related to those remains because they want to keep large collections for the purpose of study."); see also Cottrell, *supra* note 192, at 80 (arguing that the intersection of the cultural affiliation requirement with the mandate that a tribe be federally recognized "undermine[s] Indigenous rights to cultural items because of federal standards of recognition").

206. See, e.g., Hemenway, *supra* note 181, at 92–93 ("The tribes in Michigan all work together on NAGPRA issues, forming a coalition to strengthen [their] efforts. Other tribes in different parts of the country have formed similar coalitions and have had similar success." (footnote omitted)); Lonetree, *supra* note 77, at 158–60 (describing the Michigan Anishinaabek Cultural Preservation and Repatriation Alliance, a statewide Native American

claim their heritage through federally recognized tribes that have authorization to make such claims under NAGPRA.²⁰⁷ They also address uncertainties of cultural affiliation by aggregating many potentially affiliated tribes into the same claim.²⁰⁸ A further response has recently been enacted by the federal agency that implements NAGPRA. The 2023 amendments to the agency regulations eliminated the “culturally unidentifiable” designation and urged institutions to use the available information to affiliate cultural objects with communities to a reasonable degree of certainty.²⁰⁹

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. Many decades of experience with NAGPRA show that it is necessary instead to understand the realities of such laws and policies in action. Its longstanding, evolving implementation offers a useful case study for doing so.

III. 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.²¹⁰ But restitution continues to be intermittent and unsystematic. While some museums, like the Smithsonian, are adopting policies enabling repatriations, other museums are still unwilling to consider restitution.²¹¹

NAGPRA demonstrates the viability of a legal repatriation mechanism for cultural objects taken in the past. In contrast to the handful of

tribal consortium); Neller et al., *supra* note 191, at 169 (describing the formation of the Columbia Plateau Inter-Tribal Repatriation Group).

207. See Neller et al., *supra* note 191, at 164–65 (“[N]on-federally recognized Indian groups have found ways to actively engage in NAGPRA and repatriation.”).

208. Hemenway, *supra* note 181, at 92–93; Lonetree, *supra* note 77, at 159–60.

209. 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. 86,452, 86,482–83 (Dec. 13, 2023) (codified at 43 C.F.R. pt. 10).

210. See Ables, *supra* note 3 (describing how the Benin Bronzes have been an international symbol in the worldwide movement for the return of looted artifacts).

211. See, e.g., Devorah Lauter, *Restitution, Repatriation Efforts See Halting Progress Across Europe and the US, Amid Shifts in Public Opinion* (Feb. 19, 2024), <https://www.artnews.com/art-news/news/restitution-repatriation-art-efforts-europe-united-states-progress-1234696438/> [<https://perma.cc/YLL6-C7FB>] (“Despite progress, some countries and institutional collections have stalled restitution efforts.”).

voluntary repatriations of cultural objects taken from formerly colonized peoples elsewhere, NAGPRA has enabled the return of millions of items to Native American communities.²¹² While there are 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 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."²¹³ 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."²¹⁴

Within the U.S. context, one might fairly ask whether it is realistic that Congress would consider enacting legislation addressing this issue. 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.²¹⁵ As compared to the Congress of 1990, today's Congress is notoriously polarized and gridlocked, and at the time of this writing, the immediate political environment does not seem likely to favor such a law. As with NAGPRA, such legislation would require long term advocacy by domestic constituencies, as well as careful consideration of how such a law might best be designed for the foreign repatriation context. Although it may seem counterintuitive, one influential constituency could eventually 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 was 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.²¹⁶ 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

212. U.S. Nat'l Park Serv., Fiscal Year 2023, *supra* note 99, at 2.

213. Senate Report, *supra* note 143, at 3.

214. *Id.* at 4.

215. Fine-Dare, *supra* note 74, at 47–118; see also 25 U.S.C. § 3010 (2018).

216. Senate Report, *supra* note 143, at 1–2.

professional standards alone [could not] substitute for the federal legislation [it] recommend[ed].”²¹⁷ Finally, even in the absence of the opportunity to pass federal legislation, NAGPRA also offers an example for museums and museum associations to consider in developing their own voluntary policies and guidelines.

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. 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 governments and institutions considering repatriation of looted cultural objects.

217. Report of the Panel for National Dialogue, *supra* note 96, at 15.