AMERICAN CULTURAL HERITAGE'S EMBRACE OF TRIBAL CULTURAL HERITAGE

*By: Lauren van Schilfgaarde**

ABSTRACT

Historically, Tribal cultural heritage has been conceptualized as fundamentally distinct from American cultural heritage. Consequently, Tribal cultural heritage has received only piecemeal protection under the typical American cultural heritage law framework. However, as Tribal advocates have pressed for protections of Tribal cultural heritage, they have influenced the ways in which American cultural heritage law is interpreted and implemented. There has been accordingly, a recent shift in how American cultural heritage law values and identifies Tribal cultural heritage law as fundamentally American—and with it, a promising embrace of Indigenous rights. This essay will explore that shift, noting two of the most recent developments—the 2023 NAGPRA regulations and the STOP Act of 2021, and the need for more institutionalized protection, predominately protections for confidentiality.

I. INTRODUCTION

A Tribe's cultural heritage is intertwined with the Tribe's very existence—it is the quintessential expression of collective identity.[1] Culture is alive. It tethers us to our ancestors. It propels us through future generations. It roots us to the land and defines our obligations to the land, to our relatives — human and non–human, and to those yet to emerge. It is often framed by traditions,

* Lauren van Schilfgaarde (Cochiti Pueblo) is an Assistant Professor at the UCLA School of Law. van Schilfgaarde previously served as the San Manuel Band of Mission Indians Director of the Tribal Legal Development Clinic at the UCLA School of Law and as the Tribal Law Specialist at the Tribal Law and Policy Institute. van Schilfgaarde graduated from the UCLA School of Law in 2012. Sincere gratitude to the Kansas Journal of Law and Public Policy Symposium for inviting these remarks and providing a forum for engaging this material.

[1] *See e.g.* Study on the Protection of Cultural and Intellectual Property of Indigenous Peoples, U.N. Sub–Commission on prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1993/28, ¶¶23–30 (1993) (noting cultural "heritage" is a more useful descriptor than cultural "property, because it encompasses the "ancient and continuing relationship between the people and their territory," and the communal aspects of culture).

protocols, rules, and laws.[2] Since contact, Tribal culture has been perceived by non–Natives as antithetical to the settler colonial nation–state. Laws like the Civilization Regulations of the nineteenth century reflect federal efforts to assimilate Native peoples by criminalizing expressions of Native culture, including dances and traditional medicines.[3] On the other hand, Native cultural items and physical bodies have been commercialized and coveted by non–Natives.[4] In short, Tribal cultural heritage is extremely vulnerable.

Tribal cultural heritage has long lacked meaningful protection under federal law. Federal policies may no longer explicitly target the elimination of Tribal culture, but the remnants of framing Tribal heritage in contrast to the United States persists. For as long as Native people have sought autonomy over their cultural heritage, there have been non–Native enthusiasts who have felt threatened by the prospect of Tribal involvement.[5] Critics have argued that cultural heritage should not be given preferential treatment because those who value it most will simply buy it.[6] Others argue that the world, our collective commons, has a superior interest to Tribes to access Indigenous cultural heritage,[7] and to ensure the dynamic and free movement of culture.[8]

Whether through intentional exceptionalism or merely an afterthought, American cultural heritage laws have historically excluded Tribes.[9] As a result, Tribes have been forced to work within an imperfect system—an assortment of

---

[2] Angela R. Riley, The Ascension of Indigenous Cultural Property Law, 121 MICH. L. REV. 75, 83 (2022); Pat Sekaquaptewa, Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal lawmaking, 32 AM. INDIAN L. REV. 319, 320 (2008).

[3] VINE DELORIA JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 113 (1983); Michael McNally, DEFEND THE SACRED: NATIVE AMERICAN RELIGIOUS FREEDOM BEYOND THE FIRST AMENDMENT 40–61 (2020) (detailing Civilization Regulations regarding dances and feasts, medicine men, funerary giveaways and potlatches, and customary practices of marriage). It is notable that the regulations exempted the so–called "five civilized tribes," which had their own court systems. Hiram Price, Dep't of the Interior, *Rules Governing the Court of Indian Offenses* (1883).

[4] Robert Alan Hershey, "Repatriation of Sacred Native American Cultural Belongings from Historical Racism," ARIZONA ATTORNEY, 42–44 (July/August 2020). Also see H. Cong. Res. 122, 114th Cong. (2016) (enacted) (in which Congress finds that "Tribal cultural items continue to be removed from the possession of Native Americans and sold in black or public markets in violation of Federal and tribal laws, including laws designed to protect Native American cultural property rights.").

[5] Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property,* 118 YALE L. J. 1022, 1025–26 (describing scholarly critiques of Indigenous claims of "ownership" over their cultural heritage, in part out concern that such claims will be used to "exclude others – a practice that would inevitably limit the free flow of culture.").

[6] *Id.* at 1040, citing Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT'L L. 213 (2007).

[7] Carpenter, Katyal & Riley, *supra* note 5 at 1044–45, *citing* KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS 115–35 (2006).

[8] Carpenter, Katyal & Riley, *supra* note 5 at 1041–43, *citing* MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? (2003), LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2002), and Naomi Mezey, *The Paradoxes of Cultural Property,* 107 COLUM. L. REV. 2004, 2005 (2007).

[9] Riley, *supra* note 2 at 84–92 (describing the mismatch between existing Western law and Indigenous Peoples' cultural property claims).

laws that were not intended for Tribes, but nevertheless offer varying opportunities for protecting Tribal culture. These legal tools include among others—the Antiquities Act of 1906,[10] the National Stolen Property Act of 1934,[11] the National Historic Preservation Act of 1966,[12] and the Archaeological Resource Protection Act ("ARPA") of 1979.[13] These respective statutory protections are largely confined to the protection of cultural resources located on federal and Tribal lands, or those impacted by federally funded projects. These statutes were not drafted to center on Tribes, or even with Tribes in mind, and so their effectiveness in protecting Tribal cultural heritage varies.[14]

But both the law, and the values informing the law, are changing. Laws such as the Native American Graves Protection and Repatriation Act ("NAGPRA") evince the rise of Tribal insistence to participate and influence the protection of Tribal cultural heritage.[15] NAGPRA has contributed to a growing field of cultural heritage laws that, at least tepidly, acknowledge Tribal

---

[10] 16 U.S.C. §§ 431–433. Criminalizes, among other things, the appropriation or excavation, without permission, of any historic or prehistoric ruin or monument or any other object of antiquity situated on land owned or controlled by the federal government.

[11] 18 U.S.C. §§ 2314–2315. Criminalizes, among other things, the transport in interstate and foreign commerce of any good with a value of $5,000 or more, knowing that the good was stolen or taken in fraud. Note that despite misguided efforts, cultural heritage, by its very nature, eludes monetary valuation. Therefore, efforts to permit the export of cultural heritage below a certain valuation is an inappropriate and unworkable avenue.

[12] 16 U.S.C. §§ 470a–470w-6. Covers historical sites and protects eligible 'Traditional Cultural Properties', including some Native American sacred sites. The Section 106 process of the National Historic Preservation Act has proven particularly bountiful. *See generally e.g.* THOMAS F. KING, PLACES THAT COUNT: TRADITIONAL CULTURAL PROPERTIES IN CULTURAL RESOURCE MANAGEMENT (2003).

[13] 16 U.S.C. §§ 470aa–470mm. Prohibits, among other things, the removal of archaeological resources from public or Indian lands without a permit. Prohibits trafficking in archaeological resources, the excavation or removal of which is wrongful under federal, state, or local law. Specifically, ARPA prohibits the sale, purchase, exchange, transport, receipt, or offer to sell, purchase, or exchange, any archaeological resources excavated or removed without authorization from public or Indian lands. ARPA also prohibits the trafficking in interstate or foreign commerce of archaeological resources, the excavation, removal, sale, purchase, exchange, transportation, or receipt of which is wrongful under state or local law.

[14] Riley, *supra* note 2 at 86; Trevor Reed, *Indigenous Dignity and the Right to Be Forgotten*, 46 B.Y.U L REV. 1119, 1127–28 (2021); and Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 310 (2002) (describing such failures to protect Native culture as "cultural harm.").

[15] *See e.g.,* Kristen Carpenter, *A Human Rights Approach to Cultural Property: Repatriating the Yaqui Maaso Kova*, 41 CARDOZO ARTS & ENT. 159, 160–61 (2022) (noting that while nation–states have sought the repatriation of human remains and sacred objects in fulfillment of State objectives, Indigenous peoples "do not necessarily trust States to act on their behalf in these claims.").

interests.[16] With this shift, Tribal cultural heritage laws are now emerging within American law—and with it, influential new prospects for Tribal cultural heritage protection.

This essay will briefly overview the extent to which Tribal cultural heritage has been distinguished from American cultural heritage; recent new Tribal–centric cultural heritage protection laws within federal law, including the NAGPRA regulations and the Safeguard Tribal Objects of Patrimony ("STOP Act");[17] and areas of ongoing concern, namely—the need for confidentiality protection.

II. WHOSE CULTURAL HERITAGE? THE INFLUENCE OF NAGPRA

In his remarkable work, *Playing Indian*, Philip Deloria traces the American fascination with Native Americans and Native culture since the first moments of contact.[18] In part, there has always been a tension between the American urge to "other" Native peoples, particularly to justify the legal dispossession of Tribal lands and sovereignty, while also attempting to claim affinity with the perceived "nobility" of the Native American, including seemingly exceptional Indigenous qualities of freedom and equality, authentic spiritual access, and entitlement to the land. As the demise of Tribal peoples seemed all but certain toward the end of the nineteenth century and beginning of the twentieth century, the burgeoning fields of archaeology and anthropology felt an altruistic compulsion to preserve what they could.[19] Fields of studies concerning Native American culture, led almost entirely by non–Natives, developed all over the country.[20] What was

---

[16] Angela R.Riley, "Native Nations and Tribal Cultural Property Law," 16 ABA LANDSLIDE (2023) (noting that in the U.S., after years of lawsuits and protests by Indigenous activities, there has been somewhat of a sea change in popular opinion and in corporate practice regarding cultural property protection and cultural appropriation). *But see* D.S. Pensley, *The Native American Graves Protection and Repatriation Act (1990): Where the Native Voice is Missin*g, 20 WICAZO SA REV. 37, 54 (2005) (noting the disappointments of NAGPRA, including "the Act's repression of its long and bloody history, including the treatment of vast institutional holdings of human remains and cultural artifacts and their overwhelmingly Native American composition; the view of Indians as a static and vanishing people; the artificial distinction drawn between the sacred and the everyday; and the elevation of scientific perspectives at the expense of Native relationships to their own dead and to narratives of their own past.").

[17] Safeguard Tribal Objects of Patrimony (STOP) Act of 2021, Pub. L. 117–258 (2022).

[18] *See generally* PHILIP DELORIA, PLAYING INDIAN (1998) (describing the phenomena of how white Americans have used perceptions of Native Americans to shape national identity, ranging from the red-face used at the Boston Tea Party to fraternal clubs to the hippie movement).

[19] *See generally,* SAMUEL J. REDMAN, PROPHETS AND GHOSTS: THE STORY OF SALVAGE ANTHROPOLOGY (2021) (describing the cultural salvage movement of the nineteenth and twentieth centuries that sought not just to collect songs or stories, but everything of a culture perceived to disappearing).

[20] Jonathan Warren and Michelle Lkeisath, *The Roots of U.S. Anthropology's Race Problem: Whiteness, Ethnicity, and Ethnography*, 52 EQUITY & EXCELLENCE IN EDUC. 55, 57–58 (2019).

already a fascination for Native "trinkets" exploded into a global market for relics of the extinct Red Indian, which has simply never relented.[21]

Yet, the othering of Native culture has meant Tribes have limited options under federal law to protect their own cultural heritage. The 1970 United Nations Educational, Scientific, and Cultural Organizations ("UNESCO") Convention defines "cultural property," as property specifically designated by the "State as being of importance of archaeology, prehistory, history, literature, art, or science."[22] Up until 2022, the United States did not designate Native American cultural heritage as American for purposes of cultural property protection under the 1970 UNESCO Convention.[23] This decision by the United States could be due in part to the extent to which the American nation–state distinguishes itself from Tribes.

Settler colonialism is a phenomenon related to, but distinct from, colonialism.[24] Colonialism is primarily motivated by the extraction of natural resources, exerting political control, and acquiring geopolitical influence.[25] Colonialism is predicated on the structured exploitation of Indigenous labor in service of the colonizer. The colonizers are outsiders that specifically rely on the local community for output. In contrast, a settler colony strives to become the local community by displacing, dispossessing, killing, and assimilating the Indigenous population.[26] In doing so, the settler colonial power is guided by an intent to erect a new polity in replacement of the Indigenous population, and is incentivized to erase any Indigenous resistance. As a settler colonizer,[27] American cultural heritage is typically conceptualized as beginning with the

---

[21] Jenna Kunze, *"Potentially Sensitive, Likely Stolen": Native Nonprofit Educating Buyers About Indigenous Artifacts on Auction*, NATIVE NEWS ONLINE (Mar. 18, 2023) https://nativenews online.net/sovereignty/native-auctions [https://perma.cc/Z3S5-UCES] (noting that in 2023, the Association on American Indian Affairs was "tracking 43 domestic and foreign auctions that are selling or have sold at least 1,672 objects that were likely stolen burial objects, or objects of cultural patrimony").

[22] UNESCO Convention on the Means of Prohibiting and Preserving the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 17, 1970, T.I.A.S. 83-1202, 823 U.N.T.S. 231.

[23] Brian D. Vallo, *Law Safeguarding Tribal Objects Is Badly Needed*, SANTA FE NEW MEXICAN (Aug. 6, 2021) https://www.santafenewmexican.com/opinion/my_view/law-safe guarding-tribal-objects-is-badly-needed/article_7234c5d6-f610-11eb-b42a-23dda25c0c31.html ("The STOP Act would build the necessary bridge between existing domestic and international law by prohibiting the export of items already subject to federal law and create an export certification system.").

[24] *See* Lorenzo Veracini, *Understanding Colonialism and Settler Colonialism as Distinct Formations*, 16 INT'L J. OF POSTCOLONIAL STUD. 615, 627 (2014) ("the analytical distinction between colonial and settler colonial forms should be emphasized … because in the case of colonialism what is reproduced is an (unequal) relationship, while in the case of settler colonialism, what is reproduced is a biopolitical entity").

[25] *Id.*

[26] Veracini, *supra* note 24.

[27] ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 227–232 (1990).

settlement of English colonies.[28] Consequently, American history, art, and culture are conceptualized as fundamentally distinct from Native American art, history, and cultural heritage.[29]

For example, consider laws relating to human remains. The U.S. has long protected the dignity of the dead through grave desecration laws—criminalizing the molestation of cemeteries, grave sites, and human remains.[30] But Native human remains have been treated as exceptional. They have been coveted as artifacts, relics, treasures, scientific specimens, decorations, tchotchkes, and even toys.[31] It was not until 1990, through NAGPRA[32] that there was closer parity in the law to recognize Native human remains as human. NAGPRA was passed after decades of struggle and advocacy by Tribal governments.[33] NAGPRA protects Native American graves against desecration and facilitates the repatriation of Native American ancestors and improperly acquired religious and cultural items back to Native peoples.[34] This legislation has been landmark, enacting what has been described as one of the more forward–thinking human rights legislation for Native peoples.[35]

A Senate committee report preceding the passage of NAGPRA stated that Native human remains should "be treated with dignity and respect," and that the legislation would encourage continuing a dialogue between museums and Indian Tribes.[36] That dialogue has been slow to materialize as institutions have dragged their feet in compliance.[37] Over thirty years since NAGPRA was enacted, the human remains of 116,000 Native persons still need to be repatriated.[38] Some

---

[28] *See e.g.* NED BLACKHAWK, THE REDISCOVERY OF AMERICA: NATIVE PEOPLES AND THE UNMAKING OF U.S. HISTORY 19–20 (2023) (noting Indigenous contact with Europeans actually began with the Spanish in what is now the Southwestern United States).

[29] *See e.g.*, Library of Congress, "U.S. History Primary Source Timeline," at https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/ [https://perma.cc/27V5-JH6Z] (describing nine primary eras of American history, beginning with "Colonial Settlement, 1600s-1763").

[30] *See generally*, TANYA D. MARSH AND DANIEL GIBSON, CEMETERY LAW: THE COMMON LAW OF BURYING GROUNDS IN THE UNITED STATES (2015).

[31] *See* James Riding In, *Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians,* 24 ARIZ. ST. L.J. 11, 17–23 (1992) (describing widespread grave looting in the 1800s and the 1860s United States Army practice of confiscating Indian bodies from burial sites to fuel the study of "craniology").

[32] 25 U.S.C. §§ 3001–3012; 18 U.S.C. § 1170.

[33] Jack F. Trope & Walter R. Echo-Hawk, *Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 36 (1992).

[34] *Id.* at 36–37.

[35] *See* 136 CONG. REC. S17173-02 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye) ("[T]he bill before us today is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights.").

[36] S. REP. NO. 101–473, at 4 (1990).

[37] *See e.g.*, AUDITOR OF THE STATE OF CAL., REPORT 2022–107: NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT 1 (2023), https://www.auditor.ca.gov/reports/2022-107/index.html [https://perma.cc/STK2-59RS] ("Although NAGPRA has been in effect for more than 30 years, more than half of the CSU campuses with NAGPRA collections have not returned any remains or cultural items to tribes.").

[38] NATIVE AM. GRAVES PROT. & REPATRIATION REV. COMM., ANNUAL REPORT TO CONGRESS: 2020–2021 at 13 (2020).

argue that the statute is an illegal religious preference and improperly hinders scientific study.[39] Critics of NAGPRA argue cultural heritage belongs to all humankind, and since it is endangered and non–renewable, its social, environmental, scientific, education, and cultural importance must trump any singular Tribe's claim.[40] Indigenous peoples have pushed back to critiques of NAGPRA. They have argued that the recognition of Indigenous rights is not actually in opposition to humanity.[41]

Indigenous rights reflected in NAGPRA and within international law are relatively new legal concepts.[42] The 2007 United Nations Declaration on the Rights of Indigenous Peoples recognizes that "Indigenous peoples have the right to … the use and control of their ceremonial objects; and the right to the repatriation of their human remains."[43] The 2007 UN Declaration also states Indigenous Peoples "have the right to practise and revitalize their cultural traditions and customs."[44] Further, States shall provide redress "with respect to their cultural…property taken without their free, prior and informed consent."[45] Foundational to these rights, is the right of Indigenous peoples to self–determination, and by "virtue of that right [to] freely determine their … cultural development."[46] By recognizing the dignity of Indigenous peoples to participate and decide their cultural fate, cultural heritage is actually more fully realized and more robustly protected, including for the benefit of all humanity.

---

[39] *See e.g.,* ELIZABETH WEISS & JAMES W. SPRINGER, REPATRIATION AND ERASING THE PAST, 3–5 (2020) ("[M]iraculous events and interventions of gods, witches, and supernatural phenomena were to be given even greater weight than the results of secular inquiries in physical anthology, archaeology, linguistics, ethnohistory, or ethnography. As such … NAGPRA … can be viewed as a major victory for the religious interests of Native Americans … According to those in support of the Native American agenda, studies should also be undertaken and published in a way that avoids giving offense to any individual or group of American Indians."); Lizzie Wade, *An Archaeology Society Hosted a Talk Against Returning Indigenous Remains. Some Want a New Society*, SCIENCE (Apr. 19, 2021), https://www.science.org/content/article/archaeology-society-hosted-talk-against-returning-indigenous-remains-some-want-new.

[40] *E.g.,* Lakshman Guruswamy, Jason C. Roberts & Catina Drywater, *Protecting the Cultural and Natural Heritage: Finding Common Ground,* 34 TULSA L.J. 713, 737–38 (1999).

[41] Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133, 1200 (2012) ("The upshot of [international indigenous rights] provisions is to place the ownership and control of indigenous human remains, funerary objects, and ceremonial objects with Indigenous peoples. There is nothing within international human rights law that supports the notion currently alleged by many scientists that indigenous human remains are the 'shared patrimony of all Americans' or of 'all peoples elsewhere.'").

[42] *See generally, e.g.* S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES (2009) (describing the modern evolution of Indigenous rights within international human rights law).

[43] G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, Art. 12(1) (Sept. 13, 2007).

[44] *Id.* at Art. 11(1).

[45] *Id.* at Art. 11(2).

[46] *Id.* at Art. 3.

Whereas prior legal frameworks with Indigenous peoples assumed a paternalistic relation,[47] and Indigenous cultural heritage was looted and otherwise obtained without their consent out of fear it needed to be preserved[48]—NAGPRA and the right to self–determination recognize that Indigenous peoples exist, and their own protocols should be heeded. The potential is massive and exciting. NAGPRA is notable in not just extending dignity to Native human remains and cultural items—but also in extending dignity to living Native communities. Through NAGPRA, the federal government recognizes Tribal cultural heritage laws.[49] NAGPRA defers to Tribal laws that preclude removal of tangible cultural patrimony that is collectively owned by the Tribe, and recognizes such restrictions are binding upon both members and non–members.[50] Tribes recognized by NAGPRA as well as for archaeological resources under the Archaeological Resources Protection Act ("ARPA"),[51] can repatriate objects of cultural patrimony and criminalize the trafficking of protected cultural objects.[52]

Despite years of reluctance, the many advocates pushing for NAGPRA compliance have started to permeate broader thinking and marked a shift in cultural heritage policy. Professor Angela R. Riley traces the evolution of Tribal

---

[47] *See e.g.,* International Labour Organization, Indigenous and Tribal Populations Convention No. 107 (1957) (the first binding international convention regarding Indigenous persons, this document was revolutionary at the time, including its embrace of a non–discrimination framework. But it largely executed those rights through a paternalistic model in which nation–states must safeguard Indigenous persons (Art. 4), who are "less advanced" (Art. 1), with the ultimate goal that they be incorporated or assimilated into the dominant polity (Art. 2).).

[48] REDMAN, *supra* note 19 at 26, 237 ("[M]erchant traders, entrepreneurs, railroad officials, and, most important, Indian agents…either were explicitly directed by federal agencies to take action in the face of threats to jeopardized Indigenous cultures or did so on their own initiative, likely inspired by media reports, artwork, and other influences connected to the myth of the 'vanishing Indians.' … In cases in which an object's removal represented a profoundly hurtful loss to a tribal community, its return through successful repatriation could serve as a valuable step in a still ongoing healing process for many Native Americans.").

[49] *See e.g.*, 43 C.F.R. § 10.2 "cultural items" (defining "cultural items" as "a funerary object, sacred object, or object of cultural patrimony according to the Native American traditional knowledge or a lineal descendant, Indian tribe, or Native Hawaiian organization"), § 10.2 "object of cultural patrimony" (defining "object of cultural patrimony" to include those that "[m]ust have been considered inalienable by the group at the time the object was separated from the group"), § 10.2 "right of possession" (defining "right of possession to include "human remains or associated funerary objects which were exhumed, removed, or otherwise obtained with full knowledge and consent of the next of kin, or when no next of kin is ascertainable, the official governing body of the appropriate Indian Tribe or Native Hawaiian organization") and § 10.6(a) (requiring that any excavation on Tribal lands comply with any permitting that the Tribe requires).

[50] *See, e.g.*, 25 U.S.C. § 3005(a)(5) (providing that upon request, sacred objects and objects of cultural patrimony shall be expeditiously returned where the requesting party is either a direct lineal descendant, the requesting Tribe can show the object was controlled by the Tribe, or the Tribe can show the sacred object was owned or controlled by a member of the Tribe).

[51] 16 U.S.C. §§ 470aa–470mm. (prohibiting, among other things, the removal of archaeological resources from public or Indian lands without a permit).

[52] 25 U.S.C. §§ 3005(a)(5), 3005(c).

cultural heritage protection laws,[53] which are having massive influence in injecting Tribal standards for what and how cultural heritage is protected.

Yet, value–shifting remains slow. In describing the need for updated regulations to NAGPRA, the National Park Service pointed to a specific comment stating:

> [a] fundamental shift in priorities is necessary at institutions who have fallen short in their efforts to comply with the legislation's intent. It is time for institutions to prioritize this work, in both the allocation of resources and the ethical commitment to genuinely engage in consultation with Native Nations. The passage of these proposed revisions is a necessary step towards addressing the legacy of colonial injustices imposed upon Indigenous Peoples in the United States.[54]

To expediate the shift in priorities, the National Park Service issued updated regulations to NAGPRA in December 2023.[55] The regulations evince a further shift toward Indigenous rights and a sense of urgency to uplift those rights.[56] For example, the updates to the regulations include a timeline to allow five years for museums and federal agencies to consult and update inventories of human remains and associated funerary objects.[57] That is, after thirty four years, the National Park Services is aiming to finally achieve NAGPRA compliance regarding simply identifying what human remains and associated items are out there.

It may have taken several generations, but commenters to the new regulations, which included Tribes and museums alike, expressed general

---

[53] Angela R. Riley, *The Ascension of Indigenous Cultural Property Law*, 121 MICH. L. REV. 75, 135 (2022) (noting the new "jurisgenerative moment" within Indigenous People's rights that Tribal cultural property laws). *See also* Native Am. Rts. Fund, Univ. Colo. L. Sch., & Univ. Cal. L.A. L. Sch., TRIBAL IMPLEMENTATION TOOLKIT 38–42 (2020) (describing efforts of Tribes to protect Tribal cultural heritage through human rights law).

[54] 88 Fed. Reg. 86453 (Dec. 13, 2023).

[55] Native American Graves Protection and Repatriation Act Systematic Processes for Disposition or Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony, 88 Fed. Reg. 86452 (Dec. 13, 2023).

[56] Mary Hudetz, *New Federal Rules Aim to Speed Repatriations of Native Remains and Burial Items*, PROPUBLICA (Dec. 8, 2023) https://www.propublica.org/article/interior-department-revamps-repatriation-rules-native-remains-nagpra [https://perma.cc/F79D-VAA2] ("[I]nstitutions have dismissed tribes' oral histories and other evidence of a connection to the ancestors they sought to claim…The new regulations will direct institutions to defer to tribal nations' knowledge of their customs, traditions and histories when making repatriation decisions. … NAGPRA is almost 33 years old, and many museums and all of the federal agencies are still not in full compliance with the Act.").

[57] 43 C.F.R. § 10.10(d)(6)(v).

support for NAGPRA, and for its underlying premise that repatriation is desirable, and ultimately makes for better institutions.[58] As the Department of Interior reflected in its comments to the new regulations, "[t]hough some argue that repatriation is a weighing of interests between science and human rights, that interest is absent from the Act."[59] Rather, NAGPRA is restitution for "harms that have been called out by Congress as genocide and human rights violations."[60]

The part of the new regulations which received the most media attention was the requirement that federal agencies, museums, universities and repositories must obtain the free, prior, and informed consent of Tribes before any exhibition of, access, to, or research on Native American human remains or cultural items.[61] The language "free, prior and informed consent" is drawn directly from the U.N. Declaration, and signals the importance of Tribal participation.[62] NAGPRA does not ban the exhibition of Native human remains or cultural items—rather it requires Tribal participation and consent.[63] Tribal consent comports with the statute, and yet reflects a monumental shift in perspective—recentering Tribes as the gatekeepers of their culture.

The 2023 NAGPRA regulations reflect a promising moment in American (Tribal) cultural heritage law. There is growing consensus that repatriation is

---

[58] 88 Fed. Reg. 86454 (Dec. 13, 2023).
[59] *Id.* at 86459.
[60] *Id.*
[61] 43 C.F.R. § 10.10(i)(G); Alex V. Cipolle, *Minnesota Museums Adapt to New Federal Rules Regarding Native Objects and Remains*, MPR NEWS (Feb. 6, 2024), https://www.mprnews.org/story/2024/02/06/minnesota-museums-adapt-to-new-federal-rules-regarding-native-objects-and-remains [https://perma.cc/N82A-AEFZ]; Margo Vansynghel, *Seattle Art Museum Removes Native Objects Amid New Federal Rules*, SEATTLE TIMES (Feb. 2, 2024), https://www.seattletimes.com/entertainment/visual-arts/seattle-art-museum-removes-native-objects-amid-new-federal-rules/ [https://perma.cc/S2FT-D663]; Sam Tabachnik, *Denver Art Museum Removes Case of Native American Ceramics as New Federal Regulations Take Effect*, THE DENVER POST (Feb. 1, 2024), https://www.denverpost.com/2024/02/01/denver-art-museum-nagpra-native-american-ceramics-removed/ [https://perma.cc/P3YK-6CS7]; Julia Jacobs & Zachary Small, *Leading Museums Remove Native Displays Amid New Federal Rules*, N.Y. TIMES (Jan. 26, 2024), https://www.nytimes.com/2024/01/26/arts/design/american-museum-of-natural-history-nagpra.html; Samantha Chery, *Museums Cover Native Displays After Repatriation Rules*, THE WASHINGTON POST (Jan. 26, 2024), https://www.washingtonpost.com/entertainment/art/2024/01/26/museums-remove-native-american-hawaiian-indigenous-exhibit-nagpra/ [https://perma.cc/YM5N-EY3S]; Chandelis Duster & Nicole Chaves, *Museums to Close Exhibits Featuring Native American Artifacts, As New Federal Regulations Take Effect*, CNN (Jan. 26, 2024), https://www.cnn.com/2024/01/26/us/museums-to-close-exhibits-featuring-native-american-artifacts-as-new-federal-regulations-take-effect/index.html [https://perma.cc/Z4CG-4DP4].
[62] G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) (using the similar language about free, prior and informed consent in Arts. 10, 11, 19, 28, 29, and 32) (Art. 11(2) stating, "States shall provide redress through effective mechanisms … with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior, and informed consent or in violation of their laws, traditions and customs.").
[63] 88 Fed. Reg. 86463 (Dec. 13, 2023).

the normative standard and that Tribes should be leading the conversation.[64] There is also growing consensus that rather than dismantle museum studies, NAGPRA has helped to incorporate Tribal voices, and with their inclusion, has uplifted the study of cultural heritage.[65] Unfortunately, Indigenous cultural heritage protection issues do not end at the nation state border.

III. BRIDGING THE GAP: THE STOP ACT

Not all Tribal cultural heritage is intended to be private. In fact, Native peoples have long developed markets of Native art and jewelry intended for public consumption. The appetite for accessing these wares is voracious. Consider the Indian Arts and Crafts of 1990, a truth–in–advertising law prohibiting the misrepresentation in marketing Native arts and crafts produced within the United States.[66] The Indian Arts and Crafts Board was initially established back in 1935, with the explicit aim of expanding the Indian arts and crafts market.[67]

Nevertheless, the appetite for Native culture is simply not satiated by the wares produced by Tribes intended for public consumption. Instead, the market includes, if not driven by, pursuit for cultural items specifically deemed inappropriate for public consumption. Many of these items are considered deeply private, and their removal, display, or sale is exceedingly harmful to the Tribes from which they originate.

There is no comprehensive data on the world market for Native American cultural items. Anecdotally, almost 1,400 items in several auction houses in Paris, France, for example, have been described as being affiliated with U.S. Tribes.[68] At least thirteen Tribes have identified important cultural items that

---

[64] Siân Halcrow, Amber Aranui, Stephanie Halmhofer, Annalisa Heppner, Norma Johnson, Kristina Killgrove, and Gwen Robbins Schug, *Moving Beyond Weiss and Springer's* Repatriation and Erasing the Past: *Indigenous Values, Relationships and Research,* 28 INTERNATIONAL J. CULT. PROP. 211 (2021) (writing in response to the controversial book *Repatriation and Erasing the Past*, the authors note that "[m]any archaeologists are increasingly placing ethics at the forefront our practice, with growing emphasis on the importance of Indigenous consultation and research partnership.").

[65] *See e.g.* Isabella Pipp, *A New Way to Research: The Benefits and Future of Indigenous Archaeologies*, 12 Field Notes: A J. of Collegiate Anthro. 1 (2021) and J. Williams, *Indigenous Voices, Archaeology, and the Issue of Repatriation* in OXFORD HANDBOOK OF ARCHAEOLOGY 1001–1028 (2009).

[66] *See* Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662 (1990) (codified as amended at 18 U.S.C. § 1159 and 25 U.S.C. § 305e).

[67] *See* Pub. L. No. 74-355, 49 Stat. 891 (1935) (25 U.S.C. § 305 *et seq.* and18 U.S.C. § 1158–59).

[68] U.S. Gov't Accountability Off., GAO-18-537, Native American Cultural Property: Additional Agency Actions Needed to Assist Tribes with Repatriating Items from Overseas Auctions at 6 (Aug. 2018).

were inappropriately slated for sale at Paris auctions.[69] Collectors and artifact hunters have claimed ignorance regarding whether some objects, such as medicine bundles and ceremonial masks, are of contemporary religious and cultural significance to Tribes. Yet, there is a troubling hypocrisy that many of these same items have a significant market value because of their purported spiritual power.[70] There appears to be some confusion, real or imagined, about what aspects of Native cultural heritage are permissibly placed into commerce as "art" and which ought to be protected from sale or trade as "cultural property."[71]

In 2016 the FBI and the Bureau of Indian Affairs alerted the Pueblo of Acoma, a federally recognized Tribe in New Mexico, of a rawhide shield for sale by a Parisan auction house.[72] The FBI and Bureau of Indians Affairs suspected the item to be culturally affiliated with the Pueblo[73] because the shield had previously lived in an Acoma's family's three story adobe home, passed down within the family—the designated caretakers of the shield—for generations.[74] As the caretakers, the family did not own the shield. Rather, under Tribal law, the shield was collectively owned by the Tribe.[75] Moreover, because the shield is considered a living being it cannot be sold or destroyed.[76]

The question arises how did the shield end up in Paris. At some point in the 1970s, the shield along with five others had vanished under murky circumstances.[77] The shield was not seen again by the Pueblo until the Pueblo

---

[69] *Id.* at 6 & n.13 (noting that the tribes and other entities that have identified cultural items for sale at overseas auctions include the Pueblo of Acoma, Afognak Native Corporation, Chilkat Indian Village, Chugach Alaska Corporation, Hopi Tribe, Pueblo of Isleta, Hoopa Valley Tribe, Pueblo of Jemez, Pueblo of Laguna, Navajo Nation, Oglala Sioux Tribe, San Carlos Apache Tribe of the San Carlos Reservation, and White Mountain Apache Tribe of the Fort Apache Reservation.)*; also see e.g. Hearing on Tribal–Related Legislation – Including RESPECT and STOP Act Before the S. Comm. for Indigenous Peoples of the United States*, 117th Cong. (May 20, 2021) (testimony of Gov. Brian D. Vallo, Pueblo of Acoma, detailing the tumultuous battle to return "the Acoma Shield" to the Pueblo after being stolen from its caretaker in the 1970s and the set to be auctioned in Paris, France in 2015, and then again in May, 2016; and the return of historic wooden beams and doors from the San Esteban del Rey Mission Church along with 50 other items of cultural items in possession of a French auction house in 2006).

[70] *See* Hershey, *supra* note 4 at 44.

[71] Rebecca Tsosie, *International Trade in Indigenous Cultural Heritage: An Argument for Indigenous Governance of Cultural Property*, *in* INT'L TRADE IN INDIGENOUS CULTURAL HERITAGE, 237 (Christoph Beat Graber et al. eds., 2012).

[72] Elena Saavedra Buckley, *Unraveling the Mystery of a Stolen Ceremonial Shield: How a sacred object from the Pueblo of Acoma turned up at a Paris auction house, and how the tribe fought for its return*, HIGH COUNTRY NEWS (Aug. 1, 2020), https://www.hcn.org/issues/52-8/indigenous-affairs-unraveling-the-mystery-of-a-stolen-ceremonial-shield/ [https://perma.cc/9UKD-J5QP].

[73] *Id.*

[74] *Id.*

[75] *Hearing on the Safeguard Tribal Objects of Patrimony (STOP) Act of 2019, H.R. 3846 Before the House Natural Resources Subcommittee on Indigenous Peoples of the United States*, 116th Cong. 1, 2 (2019) (written testimony of Gov. Brian Vallo, Pueblo of Acoma) https://www.congress.gov/116/meeting/house/109959/documents/HHRG-116-II24-20190919-SD009.pdf.

[76] Buckley, *supra* note 72.

[77] *Id.*

was shown the auction photograph in 2016, advertising the item as "Very rare war shield…Probably Acoma or Jemez, 19th century or older."[78] It was listed at 7,000 euros.[79] Despite petitions from the Pueblo of Acoma, the French court system allowed the auction to move forward.[80] Thankfully for the Pueblo, the shield received no bids.[81]

In this situation, the United States had limited options to assist the Tribe. While NAGPRA protects against the trafficking of Tribal cultural items within the United States, there were no laws preventing items from being internationally exported.[82] Between 2012–2017, over 1,400 Native American items were listed in overseas auctions—an overwhelming majority originating from the Southwest United States.[83] Most cultural property protection regimes are state–centric, which has proven to be a stumbling block for Indigenous peoples.[84] As noted above, the United States had not implemented the 1970 UNESCO Convention's export provisions to Tribal cultural heritage until 2022.[85]

The United States became a party to the Convention in 1972 and Congress enacted the Cultural Property Implementation Act of 1983 ("CPIA") to enforce select provisions of the Convention.[86] As of April 2024, the United States has twenty-eight bilateral agreements in effect with other countries to protect their cultural property.[87] Despite any bilateral agreement, however, enforcement of the 1970 UNESCO Convention depends on nation states to recognize

---

[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] U.S. Gov't Accountability Off., *supra* note 68, at 16–17.
[83] U.S. Gov't Accountability Off., *supra* note 68.
[84] Carpenter, *supra* note 15 at 159; Guruswamy, Roberts & Drywater, *supra* note 40 at 725 ("Although… state–centered international instruments have serious shortcomings, they embody concepts and ideas that can be constructively linked to the emerging ethno–centered international laws that protect the rights of indigenous peoples.").
[85] Safeguard Tribal Objects of Patrimony (STOP) Act of 2021, Pub. L. 117–258 (2022). *See infra* note 23.
[86] Convention on Cultural Property Implementation Act of 1983, Pub. L. No. 97–446, 96 Stat. 2350 (1983) (codified at 19 U.S.C. §§ 2601–2613).
[87] *Current Agreements and Import Restrictions*, U.S. Dep't of State, Bureau of Education and Cultural Affairs https://eca.state.gov/cultural-heritage-center/cultural-property/current-agreements-and-import-restrictions [https://perma.cc/4LJN-PWET] (listing bilateral agreements between the United States and Albania, Algeria, Belize, Bolivia, Bulgaria, Cambodia, China, Chile, Colombia, Costa Rica, Cyprus, Ecuador, Egypt, El Salvador, Greece, Guatemala, Honduras, Italy, Jordan, Libya, Mali, Morocco, Nigeria, Pakistan, Peru, Tunisia, Turkey, and Uzbekistan. In 1997, at the request of Canada, the United States entered into a bilateral agreement under the Convention on Cultural Property Implementation Act that included a provision requiring Canada to take reasonable steps to prohibit the importation into Canada of Native American cultural items that were illegally removed from the United States. This agreement expired after 5 years, as required by the act, and was not renewed.").

Indigenous cultural property as part of the nation state's cultural patrimony.[88] In its 1983 implementation of the 1970 UNESCO Convention, the United States Congress did not designate any items as Indigenous cultural property or authorize export controls on Indigenous cultural property.[89] In effect, while the United States has agreed to honor the import and export cultural heritage protections of twenty-eight other nation states, the United States asked for no reciprocity to protect the cultural heritage of the Native American Tribes to which it owes a trust responsibility.

The Safeguard Tribal Objects of Patrimony ("STOP") Act of 2021[90] filled that gap. The STOP Act slows the export and facilitates the international repatriation of Tribal cultural heritage items already protected under federal law.[91] It essentially extends the inter–state trafficking prohibitions regarding "cultural items"[92] under NAGPRA and "archaeological resources"[93] under ARPA to an international export prohibition. Items prohibited from being trafficked as defined by NAGPRA and ARPA are now also be prohibited from export.[94] Meanwhile, cultural items and archaeological resources that are not prohibited from trafficking are eligible for export, so long as the exporter obtains "export certification."[95] Critically, in addition to federal requirements, an export certificate must include a written confirmation from the Department of Interior in consultation with Tribes.[96] Acoma Pueblo was instrumental in lobbying for and ultimately securing passage of the STOP Act.[97]

In many ways, the provisions of the STOP Act are marginal—simply connecting the procedural dots between domestic federal repatriation law and international export agreements.[98] The STOP Act does not recognize American Indians, Alaska Natives, or Native Hawaiians themselves as claimants in international repatriation matters nor does it address the claims of Indigenous Peoples from other countries to repatriate their cultural properties.[99] The

---

[88] U.S. Gov't Accountability Off., *supra* note 68 at 16

[89] U.S. Gov't Accountability Off., *supra* note 68 at 16–17.

[90] *See* The Safeguard Tribal Objects of Patrimony Act of 2021, Pub. L. No. 117-258, 136 Stat. 2372 (2022).

[91] 25 U.S.C. § 3071(3).

[92] 25 U.S.C. § 3001(3) (defining "cultural items" to include "associated funerary objects," "unassociated funerary objects," "sacred objects," and "cultural patrimony").

[93] 16 U.S.C. § 470bb(1).

[94] Pub. L. No. 117-258, § 5(a)(1), 136 Stat. 2372, 2374..

[95] *Id.* at Sec. 5(b).

[96] *Id.* at Sec. 5(b)(3)(D).

[97] Native News Online Staff, *Pueblos Applaud the Signing of the STOP Act into Law*, NATIVE NEWS ONLINE (Dec. 23, 2022), https://nativenewsonline.net/sovereignty/pueblos-applaud-the-signing-of-the-stop-act-into-law [https://perma.cc/93LN-GKLA].

[98] Note that the U.S. regularly connects such procedural dots. *See e.g.* Endangered Species Act of 1973, 16 U.S.C. §1538(f).

[99] Pub. L. 117-258, Sec. 5(b)–(c) , codified at 25 U.S.C. § 3073 (establishing an export certification system and process by which the Secretary of Interior and Commissioner of U.S. Customs and Border Protection shall repatriate an item they deem eligible) and Sec. 3(4) defining "Indian Tribe" pursuant to 25 U.S.C. § 3001, which in turn defines "Indian tribe" as a federally recognized Tribe

sentiments of the STOP Act are, however, that Native peoples have the right to self–determine their access to and ability to protect their own cultural heritage across international borders, extends a crescendo of domestic and international support for Indigenous rights. The STOP Act is a natural reflection of the values shift that Indigenous peoples have been pushing for decades, if not centuries.

IV. CALLS FOR CONFIDENTIALITY

In pursuing their shield, Acoma Pueblo faced a dilemma encountered by numerous Tribes engaged in cultural heritage protection—whether to further expose Tribal culture in pursuit of protection.[100] From the specific geographical coordinates of a sacred place, to the intimate components of a ceremonial practice, to genetic data, Tribes are compelled to reveal a staggering amount of detail to trigger protection for their cultural resources.

Is the item sacred? It is *really* sacred? *How* is it sacred? Like the black market driving the looting of Tribal cultural heritage items,[101] cultural heritage protection processes seek to extract sensitive information, even if only marginally necessary to the process of protection and repatriation. Once such information is released, it can become publicly accessible through its inclusion in a federal findings report, comment letter, or other innocuous bureaucratic filing, and public information laws that permit the access to such filings by any person and institution.

Contemporary non–Indian intrigue regarding cultural resources—both professional[102] and amateur—can threaten a resource's existence, necessitating

---

within the United States ("any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act [43 U.S.C. § 1601 et seq.]), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.").

[100] Buckley, *supra* note 72 (noting that after the shield had vanished in the 1970s, "[n]o outside investigation took place; for Acoma, and for many tribes, matters of cultural patrimony are meant to be held within the community rather than be exposed to a world that has so often threatened their existence.").

[101] Consider, for example, a website regarding investment in "alternative" assets, describing the reason a Navajo blanket was so valuable was because its "size and quality … mean the blanket[was] only distributed to Chiefs, making [it] even more unique." Stefan von Imhof, *Investing in Native American Artifacts*, ALTS.CO (Nov. 27, 2022) https://alts.co/investing-in-native-american-artifacts/ [https://perma.cc/KFW4-N9N3].

[102] *See, e.g.*, Mark Strauss, *When Is It Okay To Dig Up The Dead?*, NATIONAL GEOGRAPHIC (April 7, 2016) https://www.nationalgeographic.com/history/article/160407-archaeology-religion-repatriation-bones-skeletons [https://perma.cc/R2ST-5SMY] ("Some bioarcheologists are staunchly opposed to returning bones to the ground. Duncan Sayer, an archaeologist at the University of Central Lancashire, writes, 'The destruction of human remains prevents future study; it is the forensic equivalent of book burning, the willful ruin of knowledge.'").; David G. Bercaw,

secrecy as to their location and cultural relevance.[103] As Tribal attorneys and advocates have noted, these filings have resulted in a figurative "Dig here!" announcement—compromising other culturally sensitive sites, items, and practices.[104] This compulsion to extract sensitive information fails to respect Indigenous cultural, intellectual, religious, and spiritual assets, and it ultimately fails to provide meaningful control to Indigenous Peoples to access and re–access their culture.

In part, the vulnerability of sensitive cultural information is due to the inverted nature of cultural heritage protection. Rather than require institutions and individuals to bear the burden of proving their possession of a cultural resource is with the free, prior, and informed consent of the Tribe,[105] Tribes instead bear the burden of proving their cultural resource exists, is theirs, and is of value.[106] United States courts have typically provided minimal deference to Indigenous interests. For example, the Federal District Court in *Navajo Nation v. U.S. Forest Service* noted it was "very troubled that the [Indigenous] plaintiffs didn't want to specifically identify those aspects of their religion that they were saying would be harmed."[107] To convince parties to protect their cultural resources, Tribes are often forced to disclose Traditional knowledge with minimal guarantees that the knowledge will be safeguarded.[108]

Secondly, Tribes tend to be asked to divulge more information than would typically be required of other source materials. Traditional knowledge has been treated as less reliable than academic and Western scientific sources in administrative and court hearings, and so its probative value, such as

---

Requiem for Indiana Jones: Federal Law, Native Americans, and the Treasure Hunters, 30 TULSA L. J. 213, 239–40 (1994) ("The confidentiality provision of the ARPA, and the limitations on the right of possession in the NAGPRA, are official censorship and suppression of information. Many archaeological finds are never written about, and even fewer are published. When not published, the information is useless. If geographic information (site location) is not allowed to be published with those reports that find their way into print, even that information will be useless.").

[103] Ethan Plaut, *Tribal–Agency Confidentiality: A Catch–22 for Sacred Site Management?*, 36 ECOLOGY L. Q. 137, 144 (2009) ("Fear of increased site use resulting from sacred-site disclosure also contributes to Native Americans' emphasis on sacred-site secrecy.").

[104] Angela R. Riley, *Straight Stealing: Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV.69, 89 n.118 (2005).

[105] *See* 43 C.F.R. § 10.1(d) (reflecting the new 2024 NAGPRA regulations that now require institutions to first obtain Tribal consent before displaying Tribal human remains or cultural items).

[106] *See* 88 Fed. Reg. 86459 (Dec. 13, 2023) (regarding the 2023 NAPGRA regulations, "[o]ne comment noted that despite the positive changes, the proposed regulations still had not truly shifted the burden of having to prove the identity or cultural affiliation of human remains or cultural items of Indian Tribes or [Native Hawaiian Organizations] because the regulations did not give the power of decision making to Indian Tribes or [Native Hawaiian Organizations].). *Also see, e.g.*, Bonnichsen v. United States, 367 F.3d 864, 875–876 (9th Cir. 2004) (holding that NAGPRA requires that human remains must relate to a presently existing tribe indigenous to the United States, that the burden of proof was on the tribes, and that the tribes could not meet that burden in their attempts to repatriate the 9,000 year old human remains known as "Kennewick man.").

[107] Rebecca Tsosie, *Challenges to Sacred Site Protection*, 83 DEN. U. L. R. 963, 971 (2006) (discussing Navajo Nation v. U.S. Forest Service, 408 F.Supp. 2d 866 (D. Ariz. 2006)).

[108] Lauren van Schilfgaarde, "The Need for Confidentiality Within Tribal Cultural Resource Protection," Tribal Legal Development Clinic, UCLA School of Law, 6 (Dec. 2020).

determining cultural affiliation, is diminished.[109] Traditional knowledge must therefore be revealed to a greater extent, and/or be accompanied by a scientific source, such as Traditional knowledge that has already entered the public sphere via a published citation.[110]

Finally, confidentiality protection is rarely built into federal or state cultural resource protection statutes, providing limited statutory confidentiality protections.[111] No federal cultural resource protection statute, except for the STOP Act, includes an explicit, mandatory confidentiality protection for Tribal information at the Tribe's request.[112]

Other confidentiality laws that do exist tend to be limited in scope.[113] For example, the Bureau of Indian Affairs ("BIA"), under Secretarial Order 3206, has the strongest federal administrative Tribal confidentiality protection: "[i]n the course of the mutual exchange of information, the Departments shall protect, to the maximum extent practicable, tribal information which has been disclosed to or collected by the Departments."[114] However, the BIA does not generally facilitate significant cultural resource protection because, for example under the Section 106 process, federal involvement is dictated by whether a project is proposed on federally controlled property, receives federal funds, or requires federal approval.[115]In those instances, the federal agency facilitating the cultural resource protection is the agency that controls the military base, park, or forest; or the source of federal funds, such as the Federal High way Administration or the Department of Housing and Urban Development; or the agency issuing permits, such as the Federal Energy Regulation Commission.[116]

The American Indian Religious Freedom Act has a confidentiality provision incorporated through Executive Order 13007, "where appropriate,

---

[109] *Id.* Note, the 2023 updated regulations to NAGPRA specifically seek to address this historical imbalance. *See* 88 FED. REG. 86477 (Dec. 13, 2023) ("Under the Act and these regulations, all information available is equally relevant to determining cultural adulation, and our intent in defining this type of information is to ensure that Native American traditional knowledge is considered alongside scientific and historical information.").

[110] van Schilfgaarde, *supra* note 108 at 6.

[111] *Id.* Consider, for example, there is no Freedom of Information Act exemption directly applicable to Tribes and Tribal information. Congress has, at least twice, considered specific proposals to create such an exemption, but with no success. *See* Indian Amendment to Free of Information Act: Hearings on S. 2652 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 94th Cong., 2d Sess. (1976); Indian Trust Information Protection Act of 1978, S. 2773, 95th Cong., 2d Sess. (1978).

[112] Pub. L. No. 117-258, Sec. 9, 136 Stat. 2385, codified as 25 U.S.C. § 3077.

[113] *See, e.g.*, Archaeological Resources Protection Act, 16 U.S.C. § 470hh (2014); Cultural and Heritage Cooperation Authority, 25 U.S.C. § 3056 (2008); National Historical Preservation Act, 54 U.S.C. § 307103 (2014).

[114] Department of Interior Secretarial Order 3206, Principle 5 (1997).

[115] Pub. L. No. 89-665, Sec. 106, 80 Stat. 917 (1966); 36 C.F.R. § 800.16(y).

[116] *See* Advisory Council on Historic Preservation, "Protecting Historic Properties: A Citizen's Guide to Section 106 Review" at 9 (2017).

agencies shall maintain the confidentiality of sacred sites."[117] However, the qualifier "where appropriate" transfers discretion to the federal agency to determine what Tribal information is worthy of protection, and only concerning the location of sacred sites.

The updated NAGPRA regulations call for institutions to "protect sensitive information…from disclosure to the general public to the extent consistent with applicable law."[118] In the final regulations, the Department of Interior attempted to remove requirements for museums or Federal agencies to disclose sensitive information in an inventory, summary, or notice, but noted they were restricted from dictating how a museum or federal agency responds to a request for disclosure of sensitive information.[119] Only the STOP Act squarely provides Tribal confidentiality by providing an explicit FOIA exemption for information that a Tribe designates as sensitive according to Tribal law, submits it to a federal agency for purposes of enforcement of the STOP Act.[120]

As American cultural heritage law comes to embrace Tribal cultural heritage law, Tribes require meaningful reliance that their information will not be overly exposed. Just as the NAGPRA regulations now require Tribal free, prior, and informed consent to display human remains or cultural items, Tribes should also be entitled to the free, prior, and informed consent before their information is shared, including through a public information request. In September 2020, then Representative Deb Haaland introduced H.R. 8298, seeking to amend NAGPRA to provide such confidentiality protections:

> (a) Fulfillment of Obligations.—Notwithstanding any other provisions of law, all information related to the fulfillment of obligations imposed by this Act, regardless of form, shall be deemed confidential and not subject to public disclosure by the Secretary, a museum, or a Federal agency, unless such disclosure is required to fulfill an obligation imposed by this Act or regulations promulgated thereto.
>
> (b) Submitted to the Review Committee.—Notwithstanding any other provision of law, all information submitted to the Review Committee by an affected party seeking findings or resolution of disputes pursuant to section 8(c)(3) and (4) shall be deemed confidential and not subject to public disclosure by the Review Committee, if the affected party indicates upon submission that such information shall be kept confidential.[121]

---

[117] Pub. L. No. 95–341, 92 Stat. 469 (1978) (codified in part at 42 U.S.C. § 1996).
[118] 43 C.F.R. §§ 10.7(c)(5)(i)(C), 10.7(d)(4), 10.9(g)(1)(iii), 10.10(h)(1)(iii) (2023).
[119] 88 Fed. Reg. 86452, 86484 (Dec. 13, 2023) (to be codified at 43 C.F.R. pt. 10).
[120] 25 U.S.C. § 3077(a).
[121] H.R. 8298, 116th Cong. § 16 (2020).

Such legislative language as H.R. 8298 and Sec. 9 of the STOP Act should continue to be pursued for both NAGPRA, as well as other cultural resource protection statutes, like the Archaeological Resources Protection Act, the Cultural Heritage Cooperation authority, and the National Historical Preservation Act.

V. CONCLUSION

Native cultural heritage transcends the classic Anglo–American legal concepts of markets, titles, and alienability, particularly as those concepts are rooted in liberal individualism and a wealth–maximization mindset.[122] The 2007 U.N Declaration on the Rights of Indigenous Peoples, which the United States originally rejected but later endorsed, provides a prescriptive outline for nation states regarding the minimum standards of Indigenous peoples' human rights.[123] Indigenous Peoples have long advocated for the right to both access culture and determine how cultural information is handled. In doing so, American cultural heritage law is finally embracing Indigenous rights, and with it—Tribal cultural heritage protection. While there were once fears that such an embrace would compromise humanity's access to such cultural heritage, or even the very survivability of such cultural heritage, Indigenous peoples are showcasing there are actually more possibilities when Indigenous rights are upheld.

[122] Carpenter, Katyal & Riley *supra* note 5 at 1027–28.
[123] G.A. Res. 61/295, U.N. Doc. A/61/L.67 and Add.1 (Sept. 13 2007).