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Justifying Repatriation of Native American Cultural Property

SARAH HARDING*

I. INTRODUCTION

For the past six years, museums across the country have been scrambling to determine the origins and appropriate resting places for their Native American collections.[1] Museums and agencies that previously had no reason to doubt the security of their entitlements now face the prospect of the loss of significant objects. The legislation that has brought about this change in policy and the subsequent potential alteration in property rights is the Native American Graves Protection and Repatriation Act of 1990 ("NAGPRA" or "the Act").[2]

NAGPRA instructs federal agencies and museums receiving federal funds to identify the origin and cultural affiliation of Native American cultural items and then to expeditiously return some of them to culturally-affiliated Indian tribes. But not all items are treated the same. NAGPRA distinguishes various types of "cultural items" and assigns different repatriation procedures to each category. Although the agencies and museums affected are provided with a defense against some repatriation requests, the Act represents a significant policy shift, enabling Native Americans to reclaim cultural items that have long been in the custody of others. Of particular interest is a class of cultural items referred to as "cultural patrimony." "Cultural patrimony" is defined as objects that were owned by the

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* Assistant Professor, Chicago-Kent College of Law. I am deeply indebted to Carol Rose for reading many drafts of this paper and for her comments and criticisms. Special thanks are also due to Steve Heyman and Richard Wright who provided useful comments on some of the issues raised in this paper. The mistakes are all mine.

1. *See, e.g.*, Mary V. Chandler, *Building a Sacred Trust: Strengthened by New Federal Laws Governing Museum Artifacts, Native Americans Reclaim Their Heritage*, ROCKY MOUNTAIN NEWS, May 29, 1994, at 56A, *available in* 1994 WL 6701562; Eric Gibson, *Giving It Back to the Indians: In Quiet Revolt, Museum Pieces May Be Repatriated*, WASH. TIMES, May 15, 1991, at E1, *available in* 1991 WL 5562308; Marsha King, *Returning a Heritage—A Federal Law Has Changed the Way Museums View Their Mission as Caretakers of Culture*, SEATTLE TIMES, Dec. 6, 1992, at K1; *Museum Set to Lose Indian Treasure*, N.Y. TIMES, Feb. 19, 1993, at A12 (The Oglala Sioux in South Dakota have claimed the entire collection of a small museum in Barre, Massachusetts. The objects have been traced to the massacre at Wounded Knee.); *A Sacred Trust: Museums Returning Disputed Art Objects*, DENVER POST, May 30, 1995, at D-08, *available in* 1995 WL 6574402; *Skeletons in Museum Closets*, ATLANTA J. & CONST., Jan. 2, 1992, at A12, *available in* 1992 WL 4562567; Charles Storch, *At Peace with the Past: Museums Create a Flurry of Mixed Emotions as They Race to Divulge Native American Artifacts*, CHI. TRIB., Nov. 15, 1993, at Tempo 1, *available in* 1993 WL 11124090.

2. Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001-3013 (1994).

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culturally-affiliated tribe and as such were inalienable by any individual, including members of the culturally-affiliated tribe.[3]

The justification for repatriation seems, at first blush, relatively straightforward. The NAGPRA provision, § 3001(3)(D), describes cultural patrimony as objects with ongoing cultural significance that are owned by the tribe *and were owned by the tribe at the time of alienation.* In the absence of evidence that the tribe itself sold or gifted the property in question, it seems that the Act is merely prompting the return of property illegally removed from the tribe—in essence specific restitution ignoring limitation periods. But justifying repatriation is not quite so simple. Determining the illegality of transfers by individual tribal members is certain to be fraught with difficulties given the passage of time. The American Museum of Natural History, for example, has in its possession a calico-wrapped sacred bundle that belonged to Plains Cree Chief Big Bear until his death. The sacred bundle was given to the institution fifty years ago by an unnamed native with the instructions, "keep it well."[4] Now there are numerous tribes and individuals claiming ownership of the bundle. The Montana, Saskatchewan, and Manitoba Crees are all independently claiming ownership as is the adopted great-great-grandson of Plains Cree Chief Big Bear.[5] Determining who owned the bundle after Big Bear's death, and thus whether the transfer was legitimate, will not be an easy task. In such situations, it is safe to assume that if the object is important to the affiliated Indian tribe, the uncertainties of ownership and the circumstances of alienation will be overlooked. In other words, a recognition of the importance of an object will likely be both prior to and *determinative of* a finding of tribal ownership;[6] the importance of an object may in fact by itself be sufficient to categorize property

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3. *Id.* § 3001(3)(D). Throughout the paper, "cultural patrimony" and "cultural property" will be used interchangeably. Since the phrase "cultural items," as used in § 3001(3) of NAGPRA, refers to a much larger group of objects, including human remains, it will only be used in connection with NAGPRA and its definition therein.

4. Rebecca Clements, *Misconceptions of Culture: Native Peoples and Cultural Property Under Canadian Law*, 49 U. TORONTO FAC. L. REV. 8 (1991).

5. *Id.* at 1, 8.

6. Although the importance of an object may lead to a determination of tribal ownership, it cannot be said that a clear indication of tribal ownership carries with it an assumption of importance; not all tribally owned objects have the requisite amount of ongoing tribal significance. *See, e.g.*, Ernest Beaglehole, *Ownership and Inheritance in an American Indian Tribe*, 20 IOWA L. REV. 304, 305-11 (1934) (discussing individual and group ownership of property amongst the Hopi).

There seems to be some dispute regarding ownership patterns in traditional Native American society. Some commentators argue that almost all property was owned by the tribe thus prohibiting any individual transfers. *See* S. REP. NO. 101-473, at 7 (1990) (expressing concern about the definition of cultural patrimony given that "no object could be conveyed by an individual because it was owned by the collective whole"); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 605-06 (Rennard Strickland et al. eds., Michie Co. 1982) (1942) [hereinafter COHEN]. Others have concluded that many Indian tribes had a "well developed legal system that emphasized individual rights and individual ownership." Beaglehole, *supra*, at 305-08 (discussing goods which were considered personal rather than communal property amongst the Hopi); Bruce L. Benson, *Customary Indian Law: Two Case Studies, in* PROPERTY RIGHTS AND INDIAN ECONOMIES 27 (Terry L. Anderson ed., 1992).

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as cultural patrimony. Thus, given the possibility that importance rather than ownership will dictate repatriation, there must be a more compelling justification for repatriation than specific restitution. To put it another way, there must be some justification for asserting Native American ownership when there is no clear evidence in support of tribal ownership. The purpose of this Article is to identify and discuss arguments that might provide such a justification. Although NAGPRA has spawned the most recent repatriations and in fact has created the most significant and widespread return of Native American objects to date, my search for a justification will go well beyond interpreting the Act.

I will address three basic arguments in support of repatriation. The first disregards the issue of ownership per se and views repatriation simply as a means of compensating Native Americans for the destruction of their culture. Under this approach, Native Americans are not necessarily recognized as the rightful owners of cultural patrimony prior to repatriation, but rather the property is given to them as a form of symbolic compensation in recognition of their suffering and the near destruction of their culture. Although this is a compelling justification, we will discover that it alone does not offer a sufficient foundation for repatriation.

The second approach is a series of arguments focused on the relationship between the importance or value of an object and ownership. Why might the importance of an object to a specific tribe lead to a recognition of the tribe's ownership of the object in question and in doing so defeat other legitimate ownership claims? I will look at three ideas that might justify a strong connection between importance and ownership. The first is a relatively barebones efficiency argument based on the recognition of ethnic externalities. The second examines the purported connection between objects and cultural identity relying on an extension of Margaret Radin's personhood theory of property. The third and final idea employs the doctrine of customary right—an ancient doctrine that, as Carol Rose argues, recognizes that some property actually increases in value when a group of people has access to it. I conclude that of the three ideas, customary right provides the best and most complete explanation for recognizing Native American ownership of their cultural objects.

The third approach argues that cultural property can never really be owned. The significance of the objects themselves rather than ownership rights may dictate both appropriate treatment and possession, thus unsettling the normal incidents of ownership. Although this approach provides another justification for repatriation, it is important to recognize that in certain circumstances, it may lead to non-Native American possession and control.[7]

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7. I should mention one last approach here that I do not intend to explore further in this Article. The ownership of cultural property may actually be a cultural right, not unlike a right to speak a certain language or practice a religion. As a cultural right, non-Native Americans would be held under a duty to return cultural property to its original Native American owners, regardless of any intervening interest. The foundation for such a right might be a broader right to membership in a cultural group and cultural survival, requisite elements of individual flourishing. In short, Native American cultural patrimony may be an important external manifestation of Native American culture and as such is essential for cultural survival and the flourishing of a Native American identity.

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Prior to my assessment of these various justifications, I will take a closer look at the NAGPRA provisions concerning cultural patrimony and the relevant features of personal property law. This analysis will be relatively brief as there already exist numerous articles addressing the legislative and common law protection of Native American and other cultural property.[8]

Many will find the discussion so far lacking in sensitivity and respect for Native Americans. The importance of a cultural object and the legality of a transfer are, under the Act, to be determined by the culturally-affiliated tribe in accordance with tribal law.[9] NAGPRA in effect substitutes tribal property institutions for Anglo-American property institutions. Surely the most important aspect of the provisions relating to cultural patrimony is precisely that they rely

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Cultural property may, in this sense, be considered what Denise Reaume has labeled a "participatory good." Denise Reaume, *Individuals, Groups, and Rights to Public Goods*, 38 U. TORONTO L.J. 1, 10 (1988). "Participatory goods" are those that "involve activities that not only require many in order to produce the good but are valuable only because of the joint involvement of many. Production itself is part of what is valued—the good *is* the participation." *Id.* Although most rights are individualized both because of the nature of a right and the types of goods being secured by such rights, Reaume suggests that there may be a group right to participatory goods:

> In such cases, the right cannot be an individual one because it is a claim to a participatory good, and it is a group right because it is a claim to a public good which applies only to a segment of society and must be claimed as against the rest.

Id. at 24.

8. *See, e.g.*, Walter R. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437, 441-51 (1986) (detailing the development of the law relating to Indians and museum treasures); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 586-641 (1995) (discussing the current treatment under both common and statutory law of all cultural property in the United States); Steven Platzman, *Objects of Controversy: The Native American Right to Repatriation*, 41 AM. U. L. REV. 517, 525-49 (arguing that the common law doctrines concerning personal property are not adequately suited to the Native American situation and detailing the various statutory schemes for protecting Native American objects); Symposium, *The Native American Graves Protection and Repatriation Act of 1990 and State Repatriation Related Legislation*, 24 ARIZONA ST. L.J. 1 (1992).

There is also a steadily increasing body of literature on the international movement of cultural property. *See, e.g.*, John E. Bersin, *The Protection of Cultural Property and the Promotion of International Trade in Art*, 13 N.Y.L. SCH. J. INT'L & COMP. L. 125 (1992); Gael M. Graham, *Protection and Reversion of Cultural Property: Issues of Definition and Justification*, 21 INT'L LAW. 755 (1987) (analyzing the various international treaties and conventions dealing with cultural property); Lawrence M. Kaye, *The Future of the Past: Recovering Cultural Property*, 4 CARDOZO J. INT'L & COMP. L. 23 (1996); Mark F. Lindsay, *The Recovery of Cultural Artifacts: The Legacy of Our Archaeological Heritage*, 22 CASE W. RES. J. INT'L L. 164 (1990); Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L. L.J. 1033 (1992-93); M. Catherine Vernon, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT'L. L 435 (1994).

9. Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175, 179-81 (1992).

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on Native American attitudes toward cultural objects and that these attitudes should be a sufficient justification for repatriation. I do not however want to give up on the Anglo-American legal tradition so quickly. The common law legal tradition may very well offer us *additional* reasons to encourage repatriation of cultural patrimony, reasons that are reflected in entrenched legal institutions. Furthermore, the repatriation of cultural property is an issue that extends far beyond the concern of Native Americans. Thus, seeking a justification for repatriation promises to increase our understanding of the importance of cultural property in a wide variety of cases involving artifacts and cultures from all corners of the globe.

II. NAGPRA AND THE COMMON LAW

A. The Legislation

Until recently, there have been no guidelines concerning Native American ownership of cultural items. Some tribes have been successful in negotiating the return of specific collections, but the absence of guidelines and legislative directives has prevented large scale repatriation.[10] For much of the history of the United States, the acquisition and disinterment of cultural objects and grave remains by non-Indians have been officially encouraged.[11] The most notorious example is the Surgeon General's 1868 army personnel directive requesting the collection of Indian skulls and other body parts, primarily for scientific inquiry. The order resulted in the theft of thousands of Indian skulls, many of which were obtained by decapitating dead Indians lying on battlefields and burial scaffolds.[12]

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10. Two of the largest repatriations are Stanford University's return of 550 Ohlone Indians for reburial in 1989, *see* Anne C. Roark, *Stanford Agrees to Return Indian Skeletal Remains*, L.A. TIMES, June 22, 1989, at 1, and the University of Minnesota's return of 1000 American Indian skulls and bones, *see* Patrick Sweeney, *Indians Win Battle to Bury Ancestors*, ST. PAUL PIONEER PRESS DISPATCH, July 16, 1989, at 1B.

As of 1992, the Smithsonian, which is governed by separate legislation, the National Museum of the American Indian Act of 1989, 20 U.S.C. §§ 80q to 80q-15 (1994), had completed six requests for repatriation and had over 50 requests on file. Of the six completed cases, five concerned human remains and one involved sacred objects of the Zuni Tribe. Thomas W. Killion et al., Repatriation at the Smithsonian 3 (Repatriation Office, Smithsonian Institution 1992).

11. *See* Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 42-45 (1992); *see also Native American Grave and Burial Protection Act (Repatriation), Native American Repatriation of Cultural Patrimony Act, and Heard Museum Report: Hearing on S. 1021 and S. 1980 Before the Senate Select Committee on Indian Affairs*, 101st Cong., 193 (1990) [hereinafter *Senate Hearings*] (statement of Walter R. Echo-Hawk, staff attorney for the Native American Right Fund, quoting historian Cole: "'In retrospect it is clear that the goods flowed irrevocably from native hands to Euro-American ones until little was left in possession of the people who had invented, made, and used them.'").

12. The Surgeon General's Order of 1868 as reproduced in ROBERT E. BIEDER, A BRIEF HISTORICAL SURVEY OF THE EXPROPRIATION OF AMERICAN INDIAN REMAINS 36-37 (1990), *available in Senate Hearings*, *supra* note 11, at 278-362.

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The common law also generally favored the interests of non-Indians and granted ownership rights to those in possession of important cultural objects and Indian remains, often failing to recognize the significance of the objects to Native Americans.[13] The federal government has, however, slowly changed its attitude toward Native American cultural objects. In 1979, it passed legislation regulating prospective discoveries of Indian remains and artifacts on tribal lands. With respect to objects discovered on non-tribal federal lands, the legislation requires that the associated Native American tribe be notified and it permits the associated tribe to object to excavation.[14] Then, in 1989, Congress passed the National Museum for the American Indian Act, which, among other things, directs the Smithsonian to inventory human remains and funerary objects and to comply with any legitimate requests made for the repatriation of an artifact.[15]

The most significant policy change, however, occurred in November of 1990 with the enactment of NAGPRA.[16] NAGPRA extends the rights of Native Americans with respect to post-enactment excavations of cultural items[17] on federal and tribal lands.[18] More significantly, it provides for the repatriation of cultural items in the possession of federal agencies and museums (excluding the Smithsonian).[19] The statute divides "cultural items" into five categories: "human remains," "associated" and "unassociated funerary objects," "sacred objects," and "cultural patrimony." NAGPRA instructs museums to inventory and describe their Native American cultural items determining where possible the "cultural affiliation" with a particular Indian tribe.[20] "Cultural affiliation" is loosely defined as "a relationship of shared group identity which can be reasonably

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13. With respect to cultural objects, see, for example, Onondaga Nation v. Thacher, 61 N.Y.S. 1027 (Sup. Ct. 1899), *aff'd*, 62 N.E. 1098 (N.Y. 1901) (rejecting Onondaga Nation's claim of ownership to four wampum belts). The return of the wampum belts was eventually negotiated, 75 years later. *See* Trope & Echo-Hawk, *supra* note 11, at 43 n.30.

With respect to human remains and burial grounds see Wana the Bear v. Community Const., Inc., 180 Cal. Rptr. 423 (Ct. App. 1982). *See also* Trope & Echo-Hawk, *supra* note 11, at 45-47. *But see* Charrier v. Bell, 496 So. 2d 601 (La. Ct. App. 1986).

14. Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-mm (1994); *see also* Echo-Hawk, *supra* note 8, at 448-51.

The discovery of remains or artifacts on private or state lands is covered by state legislation, where it exists, and the common law. H. MARCUS PRICE III, DISPUTING THE DEAD: U.S. LAW ON ABORIGINAL REMAINS AND GRAVE GOODS 122-25 (appendix) (1991); Echo-Hawk, *supra* note 8, at 52-54; Catherine Bergin Yalung & Laurel I. Wala, *A Survey of State Repatriation and Burial Protection Statutes*, 24 ARIZ. ST. L.J. 419 (1992).

15. 20 U.S.C. §§ 80q to 80q-15 (1994). The Smithsonian has subsequently established a repatriation office to deal with inventories and requests.

16. 25 U.S.C. §§ 3001-3013 (1994).

17. "Cultural items" are defined as "associated funerary objects," "unassociated funerary objects," "sacred objects," and "cultural patrimony." *Id.* § 3001(3).

18. *Id.* § 3002.

19. "Museum" is defined as "any institution or State or local government agency . . . that receives Federal funds and has possession of, or control over, Native American cultural items." *Id.* § 3001(8).

20. *Id.* § 3003 (addressing inventory of human remains and associated funerary objects) and § 3004 (giving a summary of unassociated funerary objects, sacred objects, and cultural patrimony).

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traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group."[21] Upon request of the culturally-affiliated Indian tribe or, in the case of human remains and associated funerary objects, the "known lineal descendants" of the Native American or of the tribe, the items must be repatriated[22] unless the federal agency or museum is able to establish that it has a "right of possession."[23] The "right of possession" defense does not apply to repatriation requests for human remains and associated funerary objects. Furthermore, an examination of a few definitions reveals that "cultural patrimony" is subject to only a limited "right of possession" defense. A "right of possession" is defined as "possession obtained with the voluntary consent of an *individual or group that had authority of alienation.*"[24] And "cultural patrimony" is defined as:

> an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, *cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe* . . . and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.[25]

Together these two definitions permit federal agencies or museums to retain objects of cultural patrimony only if they can trace their title back to a voluntary transfer by the culturally-affiliated Indian tribe.[26] "Cultural patrimony" is classified as inalienable except by the culturally-affiliated tribe and in fact was often referred to as "objects of inalienable communal property" in the legislative history.[27] Thus unlike "sacred objects" or other cultural items, the status of cultural patrimony is determined not by common law personal property rules or some variation of these rules but instead by *tribal* attitudes toward property and the significance of the object.[28] It is difficult to identify precisely what types of cultural objects fall within this category of "cultural patrimony," but the

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21. *Id.* § 3001(2). The definition of "tribe" includes Indian aggregations which are not federally recognized as Indian tribes. *Id.* § 3001(7); *see also* Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (D. Vt. 1992) (Abenaki Nation is not a federally-recognized Indian Tribe under the National Historic Preservation Act, but nonetheless falls within the NAGPRA definition of "tribe.").

22. 25 U.S.C. § 3005(a).

23. *Id.* § 3005(c).

24. *Id.* § 3001(13) (emphasis added).

25. *Id.* § 3001(3)(D) (emphasis added); *see also* Native American Graves Protection and Repatriation Act Regulations, 43 C.F.R. § 10 (1996).

26. *See* Trope & Echo-Hawk, *supra* note 11, at 66.

27. *See, e.g.*, H.R. REP. NO. 101-877, at 12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4371; *id.* at 25-29 (letter from Bruce C. Navarro, Deputy Assistant Attorney General, of the Department of Justice, Office of Legislative Affairs).

28. Trope & Echo-Hawk, *supra* note 11, at 66.

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legislative history defines them as objects of "great importance" such as Zuni War Gods or the wampum belts of the Iroquois.[29]

B. Entitlement and the Common Law

Since the time of the first European settlements in North America, non-Indians have been digging up, raiding, and stealing Native American cultural objects and human remains.[30] For at least over a century, American Indian tribes have attempted to repossess the remains of their ancestors and their cultural heritage. One of the best recorded and earliest attempts to repossess cultural patrimony was the Onondaga nation's appeal for the return of numerous wampum belts. Wampum belts were made out of colorful wampum beads and were used for religious and commemorative events.[31] In 1899, the Onondaga lost a court battle over the wampum belts, one of which was described as "representing the first treaty stipulation between the Six Nations and General George Washington, picturing in wampum beadwork the council house, General Washington, the O-do-ta-ho, or president of the tribes, and thirteen representatives of the colonies."[32] It took the Six Nations Confederacy another seventy-five years before they were able to negotiate the return of the wampum.[33]

For equally long, museums have argued that they have a legal right to possess these objects and an ethical obligation to retain them for scientific inquiry and historical preservation. These ethical considerations are argued as forcefully today by some museum curators as they were a century ago.[34] When Stanford University agreed to return the remains of 550 Ohlone Indians, one Stanford Professor claimed that the reburial of the bones would be "scientifically

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29. S. REP. NO. 101-473, at 7-8 (1990); *see infra* text accompanying notes 56-61 for a discussion of a New York case concerning wampum belts; *see also* 43 C.F.R. § 10. For a discussion of the Zuni war gods, see Echo-Hawk, *supra* note 8, at 444.

30. Deborah L. Nichols et al., *Ancestral Sites, Shrines, and Graves: Native American Perspectives on the Ethics of Collecting Cultural Properties, in* THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY? 27, 27-29 (Phyllis Mauch Messenger ed., 1989) [hereinafter THE ETHICS OF COLLECTING].

Native American objects and remains are still regularly subject to theft, destruction, and desecration. *See* Antonia M. De Meo, *More Effective Protection for Native American Cultural Property Through Regulation of Export*, 19 AM. INDIAN L. REV. 1, 8-10 (1994) (noting how the increased value of Native American artifacts has led to a rise in the frequency of looting and destruction); *The Struggle to Protect Indian Graves*, N.Y. TIMES, Mar. 26, 1995, at A16.

31. Bowen Blair, *Indian Rights: Native Americans Versus America Museums—A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125, 127 (1979) (The wampum are said to be not only religious and historical documents, but also representations of current existence.).

32. Onondaga Nation v. Thacher, 189 U.S. 306, 307 (1903); *see also* Onondaga Nation v. Thacher, 61 N.Y.S. 1027, 1028 (1899) (discussing the purpose of the wampum belts).

33. Trope & Echo-Hawk, *supra* note 11, at 43.

34. *See, e.g.*, *Senate Hearings*, *supra* note 11, at 61-64 (statement of Tom Livesay, Director, Museum of New Mexico, on behalf of the American Association of Museums, arguing that housing these objects in museums serves an educational purpose); H.R. REP. NO. 101-877, at 13 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 4372 ("Testimony from the museum community stressed the responsibilities which museums have to maintain their collections and concern for liability surrounding repatriation.").

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indefensible and academic cowardice."[35] Despite the gravity of this issue for those involved and the protracted nature of ownership disputes, there has been no specific body of law dealing with the disposition of cultural items. With the passage of NAGPRA, the disposition of items in federally-funded institutions will more readily be resolved. Unfortunately, however, the muddled common law approach will continue to have some influence. The legislation combines some of its own ownership inventions with principles borrowed from the common law.[36] Furthermore, the common law will continue to be applicable in disputes involving private collectors, who are said by some to own the majority of Native American cultural items,[37] and the discovery of cultural items on private lands.[38] In the absence of an agreement, general principles of personal property law are the only tools available for legally resolving such disputes and it is to these that we turn to now.

Most disputes about ownership of cultural property will, in the absence of some agreement, concern the doctrine of adverse possession. When can the possessor of a cultural item rest easy knowing that she has proper title and full ownership rights as against all other claimants? The requirements of adverse possession of real property, that the possession be adverse, hostile, open, notorious, exclusive, continuous, and last throughout the entire applicable statutory limitation period,[39] are generally held to apply to personal property with its own set of state statutory limitation periods.[40] The statutory limitation periods for personal property claims are usually only two to five years, rather than the ten to twenty year periods which govern real property.[41]

There are, however, easily recognizable problems with this extension of the doctrine of adverse possession. The most notable problem is the notice requirement, captured in the conditions of open and notorious possession. Open and notorious possession of personal property is less likely to provide notice to

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35. Vicki Quade, *Who Owns the Past? An Interview with Walter Echo-Hawk*, 16 HUM. RTS., Winter 1989, at 24, 28.

36. The "right of possession" defense is a statutory creation, but it provides for the application of property law if the normal operation of the defense results in a Fifth Amendment taking. 25 U.S.C. § 3001(13) (1994).

37. *See* Ellen Herscher, *International Control Efforts: Are There Any Good Solutions?*, *in* THE ETHICS OF COLLECTING, *supra* note 30, at 117, 117-18.

38. *See* Nichols et al., *supra* note 30, at 32-33. The authors tell a particularly troubling story about the Box S site in New Mexico. The Box S site is a 473 room pueblo dating to the mid and late thirteenth century. It is situated partly on a Zuni reservation and partly on private lands, and the Zuni regard it as an ancestral site. In 1982, the private property was sold to developers who started tearing up the site with a back hoe. The Zunis attempted to stop them by challenging the developers' title to the land in question. The Zunis lost the battle and the right to stop the destruction of their ancestral site. The destruction continued and the objects that were unearthed were sold on the antiquities market.

39. Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119, 120 (1988/89); *see also* R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331 (1983) (arguing that there is additionally a subjective element in adverse possession that looks to the possessor's state of mind).

40. *See* Gerstenblith, *supra* note 39, at 120-23.

41. *Id.* at 121-22 n.10.

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the original owner than is the case with adverse possession of real property. The jurisprudence has thus for the most part ignored these requirements and, in their stead, has turned to the good or bad faith of the adverse possessor.[42] Someone who holds personal property adversely but in good faith, often a bona fide purchaser, is said to hold the property in an "open and notorious" manner, thus satisfying the notice requirements regardless of the fact the original owner may have neither actual nor constructive notice.[43] Consequently, in any typical legal dispute over title to personal property, possession of the object in question is prima facie evidence of ownership: "[p]ossession carries a presumption of ownership."[44] On the other hand, a bad faith adverse possessor, typically a thief, will prevent the limitation period from running. Only evidence of actual notice to the original owner of the adverse possession will start the limitation period clock ticking under these circumstances.[45]

John Henry Merryman, one of the most prolific legal academics in the area of cultural property broadly speaking, appears to support this approach to ownership of cultural property. He argues that the principle of repose should govern the allocation of property rights in cultural property: an existing situation should continue unless there is some significant reason for altering it. In the case of adverse possession, this will generally operate in favor of the institutions or individuals in possession.[46]

This approach favoring possessors has been altered in a number of recent cases concerning the ownership of important works of art. The emphasis has switched in these cases from the possessor's behavior to the original owner's diligence in searching for the property. Accordingly, the limitation period does not begin to run until a diligent owner has actual or constructive notice. In the case of *O'Keeffe v. Snyder*,[47] the court settled on a constructive notice test, holding that the limitation period would not run until a reasonably diligent owner could have

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42. *Id.* at 124-25, 130-31.

43. *See, e.g.*, Burroughs Adding Mach. Co. v. Bivens-Corhn Co., 119 P.2d 58, 59 (Okla. 1941) (holding that when property is held "open and notoriously" for more than the statute of limitations period from the date of the wrongful taking, then the right of action by the owner is barred); Gatlin v. Vaut, 91 S.W. 38, 40 (Indian Terr. 1905) (holding that the statute of limitation does not run until property is held in a notorious and open fashion so that the owner has a reasonable chance of asserting his title and an opportunity of knowing its whereabouts).

44. Hammond v. Halsey, 336 S.E.2d 495, 497 (S.C. Ct. App. 1985) (holding that the original owner of a Spanish cannon barrel transferred physical possession to an antiquities society and thus the burden was on his estate to prove superior title).

45. *See, e.g.*, *Gatlin*, 91 S.W. at 38, 40 (In *Gatlin*, two mules were stolen from Indian territory, taken to Texas, and sold to a bona fide purchaser. In a claim for repossession, the court held that the bona fide purchaser could not tack on the thief's ownership to satisfy the limitation period because, by removing the mules from the Territory, the thief had prevented the limitation period from running.).

46. John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1880, 1911 (1985).

47. 405 A.2d 840, 844-45 (N.J. Super. Ct. App. Div. 1979), *rev'd and remanded*, 416 A.2d 862 (1980). The issue of whether O'Keeffe used due diligence in searching for three small paintings that were stolen in 1946 was submitted for retrial. Before retrial, O'Keeffe and Snyder settled the matter by dividing the paintings in question.

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discovered the facts necessary to initiate an action.[48] The court stated, "[i]f a display of the chattel is not such as to give notice to the true owner of the chattel's whereabouts, the latter's claim therefor[e] cannot be barred."[49] But in the case of *Menzel v. List*[50] the court went so far as to require actual notice, stating that the limitation period on the adverse possession of a Chagall did not start running until a demand and refusal had been made.[51]

Under the earlier approach favoring possessors, museums generally had strong adverse possession claims given that many of them are good faith possessors who have maintained and preserved Native American cultural objects for well beyond any statutory limitation period. Furthermore, if a museum detrimentally relied on an honest belief that they were the rightful owners by sinking significant resources into preserving and maintaining the objects in question, this might have strengthened its claim.[52] Neither ignorance with respect to the whereabouts of the items, at least in the absence of fraud or concealment,[53] nor inability to bring a lawsuit would have been adequate excuses for failing to challenge a museum's adverse possession claim. But even under the more recent approach favoring original owners, federally funded museums and institutions may have strong claims to their Native American collections. In many cases, it may be easy to prove the original Indian owners failed to exercise due diligence. In other cases, although demands were made for certain items thus evidencing *actual* notice, the subsequent passage of time has resulted in the expiration of the relevant limitation period. Presumably, both the lack of due diligence and failure to bring suit in time stemmed from cultural and economic barriers[54] separating Native Americans from the rest of American society; but, sadly enough, the common law has traditionally not taken such barriers into account.

There have not been many cases dealing with Native American cultural patrimony, but the few cases that exist are fine examples of the common law's

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48. *Id.* at 844-45; *see also* DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987) (holding that an original owner's attempt to recover an oil painting by Claude Monet was barred because she failed to exercise due diligence in looking for it); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1389-91 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278, 288-90 (7th Cir. 1990) (The Republic of Cyprus and Church of Cyprus successfully recovered four Byzantine mosaics from an Indiana art dealer after proving that they had diligently searched for the mosaics even though they did not do everything they could have done in locating them.).

49. *O'Keeffe*, 405 A.2d at 845.

50. 253 N.Y.S.2d 43, 44 (N.Y. App. Div. 1964), *on remand*, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966).

51. *Id.* at 44. *But see DeWeerth*, 836 F.2d at 107 ("Where demand and refusal are necessary to start a limitations period, the demand may not be unreasonably delayed.").

52. *See* Wilcox v. St. Mary's Univ., Inc., 497 S.W.2d 782, 784 (Tex. Ct. App. 1973) (The University spent more than $40,000 to care for documents that it mistakenly thought were gifts.).

53. *See* Bailey v. Glover, 88 U.S. (21 Wall.) 342, 345 (1874).

54. S. REP. NO. 101-473, at 4 (1990) ("[I]n cases where Native Americans have attempted to regain items that were inappropriately alienated from their tribes, they have met with resistance from museums and have lacked the legal ability of [sic] financial resources to pursue the return of the items.").

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inability to take into account indigenous practices and beliefs. Native American claims for repossession of their cultural heritage have tended to fail on both procedural and substantive grounds, despite the fact courts have occasionally recognized communal ownership rights in accordance with Indian beliefs.[55] In the court battle previously mentioned over numerous wampum belts, the court acknowledged the significance of the wampum to the Onondaga Nation, but refused to recognize that they had any property interests over and above those of a non-Indian good faith purchaser.[56] One of the wampum belts in question was originally owned by the Five Nations, which included the Onondaga.[57] An Onondaga, who was said to be the authorized "wampum keeper,"[58] sold the wampum to the defendant for $500.00. A number of Indians sued for possession of the wampum as representatives of the Five Nations. They were unsuccessful, predominantly because the court refused to acknowledge that the Five or Six Nations "had any active or actual existence."[59] Furthermore, the court held that the Onondaga Indian who sold the wampum was not under any restraints in his ownership such that he was not authorized to sell it as he pleased.[60] The court subsequently found it unnecessary to examine the issue of the passing of the limitation period. But it did apply a version of the demand and refusal rule in holding that the plaintiffs' failure to formally demand the return of the wampum also defeated their claim.[61]

In a more recent case the Chilkat Indian Village Council claimed a "paramount possessory interest" in "four carved wooden posts and a wooden partition called a rain screen," described as "the finest examples of native art, either Tlingit or Tsimshian, in Alaska."[62] The posts and rain screen had been removed by members of the Village who then sold them to an art dealer, Johnson. The

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55. *See, e.g.*, United States v. Jim, 409 U.S. 80, 82 (1972) (holding whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members); Journeycake v. Cherokee Nation, 28 Ct. Cl. 281, 302 (1893), *aff'd*, 155 U.S. 196, 208-10 (1894) (recognizing Cherokee Nation land as "public domain" or "common property" of the Cherokee); Seneca Nation of Indians v. Hammond, 3 Thomp. & C. 347, 348-49 (N.Y. Sup. Ct. 1874) (holding that an individual Indian could not sell hemlock bark because the title rested with the Seneca Nation as a whole).

56. Onondaga Nation v. Thacher, 61 N.Y.S. 1027, 1032 (1899).

57. The other four members of the Five Nations were the Oneidas, Mohawks, Senecas, and Cayugas. The Five Nations became the Six Nations with the addition of the Tuscaroras and, throughout the decision, the court referred to both leagues as the original owners of the wampum. *Id.* at 1028.

58. *Id.* at 1028-29.

59. *Id.* at 1032.

60. *Id.*

61. *Id.* at 1029 ("He was a purchaser in good faith and for value and was entitled to the benefit of a demand before action was brought against him."). This demand and refusal rule is in keeping with the more traditional cases on adverse possession as it serves to protect the adverse possessor. The more recent demand and refusal rule previously mentioned protects the original owner by insuring that the limitation period does not start running until a demand has been made. *See* Menzel v. List, 253 N.Y.S.2d 43, 44 (N.Y. App. Div. 1964).

62. Chilkat Indian Village v. Johnson, 870 F.2d 1469, 1471 (9th Cir. 1989) (quoting George Emmons, *The Whale House of Chilkat*, *in* RAVEN'S BONES 68, 81 (Andrew Hope III ed., 1982)).

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primary hurdle in this case was jurisdictional. The Ninth Circuit concluded that the Village's claim that the defendant took the artifacts in question without the Village's permission was a claim for conversion which was a matter of state law.[63] It further held that the enforcement of a Village ordinance concerning ownership and removal of the artifacts against the Indian defendants arose under tribal law.[64] Only the question of the enforcement of the ordinance against non-Indians was held to be a matter of federal law, falling within federal jurisdiction.[65] Judge Ferguson, focusing on the significance of the artifacts and anticipating federal government involvement in entitlement to Native American cultural property, dissented from the court's decision, stating:

> The Village's property right claims do in fact have a basis in federal law. . . . Congress has made clear its commitment to protecting Indian property. . . [the] safeguarding [of] tribal society as a whole in order to ensure Indian self-determination. Tribal artifacts are central to cultural identity and the maintenance of a distinct tribal society. The Village describes its communally-owned property as playing a central role in the "spiritual, cultural and social" practices of the Chilkat tribal members. Thus, these artifacts implicate important Indian and federal interests which provide a "federal foundation."[66]

So there have been jurisdictional and evidentiary problems which have barred Native American claims to their cultural patrimony even before an examination of the fundamental issues pertaining to adverse possession. One thing that is made clear by *Onondaga* and *Chilkat* is that Native American claims to repossess their cultural patrimony are not immune from the relevant state statutory limitation period for conversion claims, although in neither case was it necessary to examine the passing of the limitation period. This is in stark contrast to Native American land claims which are not subject to statutory limitation periods.[67] Thus by operation of state law, museums may very well have legal title to Native American objects of cultural patrimony regardless of who initially alienated them from the tribe.[68]

NAGPRA radically alters this situation by clearly providing a federal cause of action[69] and recognizing tribal ownership of important cultural items.

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63. *Id.* at 1472-73.

64. *Id.* at 1475-76.

65. *Id.* at 1474-75.

66. *Id.* at 1478. The parties to this action eventually settled their dispute and the Tlingit artifacts were to be returned to Klukwan. *Settlement Reached to Return Ilingit Art to Alaskan Village*, THE SEATTLE TIMES, June 28, 1994, *available in* 1994 WL 3631895.

67. *See, e.g.*, Oneida v. Oneida Indian Nation, 470 U.S. 226, 240 n.13 (1985) ("Under the Supremacy Clause, state-law time bars, *e.g.*, adverse possession and laches, do not apply of their own force to Indian land title claims.").

68. *See* H.R. REP. NO. 101-877, at 27 (1990) (letter from Bruce C. Navarro, Deputy Assistant Attorney General discussing "takings" implication of the repatriation provisions).

69. 25 U.S.C. § 3013 (1994) ("The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter.").

"Any person" is defined in the legislative history to include an Indian tribe, Native Hawaiian organization, museum, or agency. S. REP. NO. 101-473, at 14 (1990).

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Additionally, the Act alters the requirements of adverse possession by requiring proof of alienation by someone who had the authority to do so. As previously mentioned, the authority to alienate cultural patrimony resides exclusively in the culturally affiliated tribe and disputes over such authority are to be resolved according to tribal law.[70] Thus, good faith possessors under the Act are only those museums which acquired cultural objects from those who had rightful ownership and the right to alienate the property in accordance with tribal law. By dictating the conditions of a legal transfer and sanctioning Native American interpretations of such transfers, the Act essentially obliterates the operation of the doctrine of adverse possession.

Furthermore, the burden of proving legal entitlement in accordance with the conditions set out in the Act appears to rest on museums. Under the provisions for repatriation, if a culturally affiliated tribe introduces evidence that the museum in question does not have a "right of possession" to a cultural object, then the museum must return the object "unless it can overcome such inference and prove that it has a right of possession . . . ."[71] The burden of proof is similarly constructed for land claims. Once an Indian has made out a "presumption of title in himself," by showing previous possession or ownership, the ultimate burden of persuasion rests with the non-Indian claimant.[72]

It is unclear what type of evidence, besides proof of cultural affiliation, constitutes prima facie evidence that a museum does not have a right of possession. Given the impossibility of proving the non-existence of a museum's documented title, "oral tradition and historical evidence" are likely to be acceptable in establishing a prima facie case.[73] Earlier drafts of the Act more clearly placed the burden on museums and federal agencies. For example, one draft stated that "the burden shall be upon the federal agency or museum that has possession or control of such remains or objects to prove by a preponderance of the evidence that the museum has the right of possession to such remains or objects."relabeled[SCC this quote, author is checking bill][74] Although the present Act backs away from this more overtly pro-Native American stance, it is nonetheless designed to assist Native Americans in repatriating their cultural

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70. *See* Trope & Echo-Hawk, *supra* note 11, at 67-68 (discussing the "right of possession").

71. 25 U.S.C. § 3005(c) (1994).

> If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this chapter and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects *unless it can overcome such inference and prove that it has a right of possession to the objects.*

Id. (emphasis added).

72. 25 U.S.C. § 194 (1994).

73. Trope & Echo-Hawk, *supra* note 11, at 67.

74. H.R. 5237, 101st Cong. § 6(c)(1) (1990).

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heritage when there is little support for a museum's right of possession, bypassing the nearly impossible hurdles in the common law.[75]

It must be noted that the legislation provides a safety valve for those museums set on retaining their Native American collections. If the operation of the repatriation provisions and the limited effect of the "right of possession" defense result in a Fifth Amendment taking then the "'right of possession' shall be as provided under otherwise applicable property law."[76] This quite dramatically alters the above conclusions, bringing the legislation more closely in line with existing principles of personal property law. But it would be unwise to put too much weight on this safety valve. First, the Takings Clause is not implicated in repatriations from *federal* public museums and agencies, "as the property in question is that of the United States and, hence, may be repatriated by Congress."[77] Second, there is the difficulty of proving a "taking," although the physical removal of the objects would provide a solid basis for a takings claim.[78]

Third, the overall spirit and operation of the Act favors Native American ownership and begins a process of repatriation which museums will find difficult to resist.[79] It is instructive to note that the Attorney General's Office suggested that private museums be exempt from the repatriation provisions or be permitted to refuse repatriation if they have "legal title" to the requested objects, in order

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75. *See* Ralph W. Johnson & Sharon I. Haensly, *Fifth Amendment Takings Implications of 1990 Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 151, 152-53 (1992). *But see* Steven Platzman, Comment, *Objects of Controversy: The Native American Right to Repatriation*, 41 AM. U. L. REV. 517, 547 (1992) (arguing that the burden of proof rests on the culturally affiliated tribe).

76. 25 U.S.C. §§ 3005(c), 3001(13) (1994). Human remains and associated funerary objects are not subject to a "right of possession" defense or a Fifth Amendment Takings exemption. *Id.* § 3005(a)(1).

For a comprehensive discussion of the application of Takings Clause jurisprudence to NAGPRA, see Daniel J. Hurtado, *Native American Graves Protection and Repatriation Act: Does It Subject Museums to an Unconstitutional "Taking"?*, 6 HOFSTRA PROP. L.J. 1 (1993) (arguing that the takings exception in NAGPRA defeats the purpose of the Act and that repatriation should be exempt from the Takings Clause); *see also* H.R. REP. NO. 101-877, at 25-29 (1990) (letter of Bruce C. Navarro, Deputy Assistant Attorney General discussing the takings implication of an earlier draft of the Act); Johnson & Haensly, *supra* note 75.

77. H.R. REP. NO. 101-877, at 25-29 (1990) (letter of Bruce C. Navarro, Deputy Assistant Attorney General discussing the takings implication of an earlier draft of the Act).

78. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (holding that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (finding that takings are more readily found when the interference is a physical invasion (citing United States v. Causby, 328 U.S. 256 (1946))).

79. Although continuance of federal funding is conditional upon compliance with the Act, the federal government may not use its federal spending powers to force museums to engage in unconstitutional activities. In a letter to Congress, the Attorney General's Office states: "A strong argument could be made that Congress may not exercise the spending power to accomplish an uncompensated taking of private property, as such action would contravene the Constitution." H.R. REP. NO. 101-877, at 26-27 (letter from Bruce C. Navarro, Deputy Assistant Attorney General, citing Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)).

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to avoid "Takings clause" implications.[80] The fact that the legislature chose the latter resolution reflects its hope that state and private museums subject to the Act will cooperate with repatriation requests even when they have legal title.[81] Thus, although the legislation provides a technical means of circumventing its application in those circumstances where repatriation will result in a "taking," I suspect that it will rarely be utilized.

The final alteration brought about by the NAGPRA repatriation provisions concerns costs. Engaging in a legal dispute over entitlement to cultural objects can be costly. NAGPRA eradicates this cost for Native Americans by providing federal grants for determining cultural affiliation and to cover the costs of repatriation.[82] Thus not only does the legislation radically shift property entitlements, it has reallocated the cost of establishing cultural affiliation and the responsibility for proving entitlement. NAGPRA has effectively created a presumption in favor of tribal possession of cultural patrimony.

The remainder of this Article is an attempt to find a justification for this presumption. Why should Native Americans regain possession of their cultural patrimony? Whether the legislation is viewed as openly altering legal entitlement, as clarifying who has ownership rights, or as just voicing a forceful change in federal policy, it effectively alters the pre-NAGPRA situation regarding entitlement to Native American cultural patrimony.

There are, as previously stated, three answers to this question which I will explore. One answer relies on external reasons which are not concerned with the property itself but which focus on other circumstances warranting repatriation. Under this approach, repatriation is a form of compensation for past wrongs committed against Native Americans and the theft of Native American cultural items. The second answer begins with the assumption that NAGPRA is clarifying ownership rights and mandating the return of property which morally, if not legally, belongs to Native Americans. The flip-side of this approach is that such property has never rightfully belonged to the institutions which have possessed it. The final answer views NAGPRA as creating a special category of property, immune from the normal operation of property law and the incidents of ownership, not unlike human remains. This latter approach is perhaps the most intriguing and compelling, but customary right, one of the ideas discussed in the second approach, also provides a persuasive justification for repatriation.

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80. H.R. REP. NO. 101-877, at 27 (letter of Bruce C. Navarro, Deputy Assistant Attorney General).

81. This seems to be the attitude of at least one state museum. Thomas A. Livesay, director of the Museum of New Mexico, writes: "After weighing the advantages and disadvantages of repatriation, legal considerations should serve as the lowest common denominator. Ethical and moral issues are the priorities for the Museum's stance in implementing the federal legislation on repatriation." Thomas A. Livesay, *The Impact of the Federal Repatriation Act on State-Operated Museums*, 24 ARIZ. ST. L.J. 293, 301 (1992).

82. 25 U.S.C. § 3008 (1994).

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III. COMPENSATION

The return of cultural patrimony to culturally affiliated tribes can easily be understood as a form of collective compensation. In fact the legislation in general in its attempt to shift the balance of affairs in favor of Native Americans can be understood in light of compensatory and human rights objectives. Under this view, the repatriation of Native American cultural objects is an act of reparation for past injustices. Accordingly, the Act implicitly acknowledges that Native Americans have suffered terrible losses and attempts to rectify these losses by giving tribes the right to reclaim property which was *once* owned by them. It does this enabling Native American tribes to claim legal title to cultural patrimony regardless of the legality of a museum's title. So in at least some cases, compensation under the Act will take the form of a redistribution of property rights. Thus, under this view, the return of property is not dictated by principles of ownership, but is rather the chosen means of compensating Native Americans. The reallocation is a recognition of the human rights of Native Americans and the need to compensate them for their sufferings but it is not a direct recognition of rightful ownership.

It should be made clear here at the outset of this discussion that there are no provisions for compensating museums who lose their collections. As previously stated, if such a loss results in a Fifth Amendment "Taking," then the museum in question is entitled to rely on otherwise applicable private property laws.[83] It is obvious from the inclusion of this provision that the federal government does not intend systematically to compensate museums for repatriated items. Having said this, however, it does appear that some assistance in the form of grants for the creation of replicas may be provided to soften the blow of a significant loss.[84]

Congress appears to have had compensation for Native Americans in mind when it passed NAGPRA. NAGPRA was quite clearly conceived as human rights legislation.[85] It was designed to rectify the violations of the "civil rights of America's first citizens."[86] Congress pursued this human rights initiative by legislatively encouraging a dialogue between museums and Native American tribes which it apparently hopes will lead to some form of settlement or compensation, not necessarily the return of the property in question.[87] As stated by Senator Inouye, "[f]or museums and institutions which have consistently ignored the requests of Native Americans, this legislation will give Native Americans greater ability to negotiate."[88] By placing Native Americans in a better

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83. 25 U.S.C. §§ 3001(13), 3005(c) (1994).

84. *See Museum Set to Lose Indian Treasure, supra* note 1.

85. The human rights dimension of the legislation is the focus of the *Report of the Panel for a National Dialogue on Museum/Native American Relations* (Feb. 28, 1990), *reprinted in* 24 ARIZ. ST. L.J. 487, at 494-95 (1992) ("The Panel believes that human rights should be the paramount principle where claims are made by Native American groups that have a cultural affiliation with remains and other materials.").

86. 136 CONG. REC. S17174 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye).

87. *See* S. REP. NO. 101-473, at 17, 22-23 (1990).

88. 136 CONG. REC. S17174-17175 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye).

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bargaining position and forcing museums to negotiate, Congress clearly hopes that some of the wrongs committed in the past will be rectified.

But it is important to realize precisely how Congress has affected the respective bargaining positions of museums and Native Americans. NAGPRA has done this by altering the rules regarding ownership of cultural items, particularly cultural patrimony. It clearly establishes tribal property interests in cultural patrimony. In some cases tribes may use their property interests to negotiate lucrative settlements, allowing museums to keep the cultural patrimony in question.[89] But in others, the form of compensation generated by NAGPRA will be the return of cultural patrimony; the return of property *once* owned by the tribe. In Barre, Massachusetts, for example, the Oglala Sioux are exercising their rights to reclaim the museum's collection. The Sioux have apparently agreed to replace the cultural items with handcrafted replicas, but they most definitely want possession of, not compensation for, the original Wounded Knee relics.[90]

Compensation is certainly a laudatory objective, but can such an objective justify the redistribution of property rights as dictated in NAGPRA? Jeremy Waldron argues that compensatory measures which seek to correct an historic injustice and reinstate a situation that would have prevailed had the injustice not occurred are morally unstable. Reparations for historic injustices which are "merely symbolic" are morally acceptable and apparently should be encouraged. They serve as a form of public recognition of the injustice and "help sustain a dignified sense of identity-in-memory for the people affected."[91] But, according to Waldron, full compensation for past injustices presents three problems.

First, it forces us to engage in a "counterfactual approach to reparations" which presents us with the impossible task of determining what individuals or groups would have done given freedom or a real choice.[92] This argument seems to boil down to the adage that we can't turn back the clock. We cannot determine retrospectively what individuals or tribes would have done with the property had they retained it or been in better bargaining positions and so we cannot assume that given freedom of choice they would have acted rationally, either retaining the property or securing its fair market value. Waldron recognizes that we do employ counterfactuals in "evaluating the entire basic structure of a society" as this is the foundation for contractarian theories of justice but rejects them in "evaluating some particular distribution among a subset of its members."[93]

There appear to be at least two problems with this argument. First, we do use counterfactuals to affect particular distributions. One example of this is expectation damages. Compensation for an accident or breach of contract seeks to minimize losses which arise out of the diminishment of reasonable expectations, in addition to actual expenditures. In awarding expectation

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89. Some of the objects in question are very valuable. A private art dealer testified that a war shirt in good condition with scalp locks could be sold for $200,000 on the open market. H.R. REP. NO. 101-877, at 13 (1990); *see also* De Meo, *supra* note 30, at 8-10 (noting the increasing value of Native American objects in the international art market).

90. *Museum Set to Lose Indian Treasure*, *supra* note 1, at A12.

91. Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 6 (1992).

92. *Id.* at 9.

93. *Id.* at 13.

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damages, the court is assuming that had the accident or breach not occurred, a reasonable person would have acted in a certain way of which she is no longer capable. The statutory limitation periods for tort and contract actions serve to contain the use of such counterfactuals to relatively recent events, thus setting apart injustices that occurred a long time ago. But the point still holds that under certain circumstances, we do rely on counterfactuals to redistribute property.[94]

More significantly, Waldron's first concern undervalues freedom of choice. Reparations for acts of injustice, whether historic or recent, serve two purposes. First, they rectify a wrongful loss. Second, they serve as a reminder that under certain circumstances we will not tolerate a restriction of freedom of choice. Waldron fails to recognize the significance of this second goal. When someone harms us, we are as frustrated and offended by our resulting inability to make certain choices as we are by the actual losses arising out of our changed circumstances. Native Americans are as aggrieved that they can no longer choose what to do with property that was rightfully theirs as by the loss itself. Reparations serve to remedy both of these injuries. By focusing on the problems of isolating what choices would have been made had the injustice not occurred, Waldron fails to see the significance of the act of choosing itself. It is morally significant that one's freedom to choose a certain course of action is seriously curtailed even if Waldron is correct in asserting that the various choices that could have been made are morally insignificant.

The second problem discussed by Waldron is more convincing. He argues that compensating a tribe for the wrongful loss of their property entails that they are *still* entitled to the property in question and yet it is not so clear that this is true.[95] That they were *once* entitled to the property is not in issue, but the passage of time may "fade" this entitlement. Entitlement "fades," he argues, because expectations decrease.[96] He states that "[i]f something was taken from me decades ago, the claim that it now forms the center of my life and that it is still indispensable to the exercise of my autonomy is much less credible."[97] As time passes both interest and attachment wane for those who no longer have contact with the property. Conversely, the interests of those in possession grow. It may seem "harsh," he recognizes, that dispossession weakens one's entitlement, but

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94. For a persuasive counter-argument to Waldron's observations on the problems of counterfactual judgments, see A. John Simmons, *Historical Rights and Fair Shares*, 14 LAW & PHIL. 149, 157-59 (1995) (arguing that counterfactual judgments are not "theoretically insuperable" if we assume, as we inevitably do in making most moral judgments, rational choices).

95. Waldron, *supra* note 91, at 15.

96. *Id.* at 16. Waldron's understanding of "expectation" appears to rely on the notion of control. Waldron states, "If a person controls a resource over a long enough period, then he and others may organize their lives and their economic activity around the premise that that resource is 'hers,' without much regard to the distant provenance of her entitlement." *Id.* But in the case of cultural patrimony in the possession of federally funded museums, those whose expectations are at stake are both those who own and manage the museum collection in addition to those who have ready access to the museum exhibit. These expectations may be of a limited sort, both because of the nature of the objects and because of the restricted forms of connection, but are nonetheless expectations worth considering.

97. *Id.* at 18-19.

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it is a widely accepted moral phenomenon and is reflected in various legal doctrines, not the least of which is the doctrine of adverse possession.[98] Limitation periods and the equitable doctrine of laches also recognize the growing interests of those in possession and the need for some security of title.[99]

This argument does not, however, account for the effect of qualitatively different attachments. It may be the case that under certain circumstances and with respect to specific property, attachments do not wane and expectations do not decrease. The unique, culturally specific relationship Native Americans have with their cultural patrimony may nurture ongoing expectations and prevent the weakening of expectations with the passage of time.[100] Waldron briefly acknowledges the possibility of this occurring when the object or land in question is important to the tribe's "sense of identity as a community,"[101] but he mentions this only in passing and seems to minimize its relevance. Furthermore, it is at least arguable that the struggle and desire to regain ownership of property itself intensifies the significance of certain objects, even if only symbolically, thus preserving entitlement. Waldron dismisses this argument, stating that this is not the same as the basis for original entitlement, but he provides no further explanation for rejecting its relevance.[102]

Waldron's third argument against reparations for historic injustices is that injustices can be superseded by a change in circumstances: "one and the same type of action may be injustice in one set of circumstances and not injustice in another."[103] Thus, although it may have been wrong given the circumstances to misappropriate tribal property, we should not assume that it would be wrong to take it from them now given a completely different set of circumstances. Waldron clarifies that this is not simply a matter of the passage of time.[104] In order for an injustice to be superseded, there must be an actual change in circumstances. For example, a rapidly increasing population "might justify our forcing the aboriginal inhabitants of some territory to share their land with others."[105] Thus, although it was originally wrong to take it from them, this injustice is superseded by the fact it would not be wrong to take it from them now.

Waldron's observations about the possibility of superseding past injustices are debatable. Even if there are present circumstances which justify the removal of cultural patrimony from its tribal context, it would be odd if such circumstances

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98. *Id.* at 15-16.

99. For example, as previously discussed, a victim's claim to stolen art objects may be barred by either a statute of limitations or the doctrine of laches if she fails to exercise due diligence in seeking the whereabouts and return of the object. *See* DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987) (barring an original owner's attempt to recover a Monet because she failed to exercise due diligence in looking for it).

100. For the moment, I am disregarding the issue of qualitatively different attachments which are morally unsound, such as those which stem from greed or fetishism. *See infra* text accompanying notes 143-44.

101. Waldron, *supra* note 91, at 19.

102. *Id.*

103. *Id.* at 23.

104. *Id.* at 24.

105. *Id.* at 25.

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seriously affected the fact of an injustice in the past and our responsibility to do something about it. But more importantly, Waldron's third criticism of reparations gets us nowhere; it merely begs the question under what circumstances is it morally acceptable to compensate Native Americans for the loss of their property. Is it the case that the need to preserve the past and to educate non-Native Americans in the ways of tribal life are circumstances that justify placing cultural patrimony in public museums? Do these circumstances supersede the historic injustice perpetrated when the property was initially removed from its culturally affiliated tribe? Waldron's observations provide no guidelines for answering these crucial questions. His argument is tantamount to the statement it is unjust to compensate tribes for the loss of their property when the circumstances of justice indicate so. We still have to determine which circumstances are morally significant.

Waldron's arguments against full reparations for historic injustices are not convincing, but this is not to say that we should rely solely on a compensatory objective to justify the return of cultural patrimony. Although we can construct an argument supporting Native American entitlement to cultural patrimony, such an argument depends on identifying a special connection between tribes and their cultural patrimony. In the absence of a strong, special connection, a compensatory objective or a desire to rectify wrongs that occurred in the past is insufficient to justify the return of cultural patrimony when there are legitimate, intervening claims. Innocent third parties and subsequent holders have developed their own interests in cultural patrimony; they have built-up expectations relying on unencumbered ownership rights; they have become emotionally attached to such objects. It is the existence of intervening claims arising out of such attachments which make it difficult to rely solely on a compensatory objective. These intervening claims do not necessarily supersede past injustices but they do require us to be precise about the value of cultural property to Native Americans. To justify repatriation as a form of compensation it is necessary to argue that there is a unique connection between Native Americans and cultural patrimony, a connection which is both stronger and more significant than a non-Native American attachment.

Thus, the redistribution of cultural patrimony cannot be justified as a straightforward matter of compensation. The fact that such property was wrongfully taken from Native Americans is not by itself a sufficient reason to return it. Although this may have been the primary objective and justification for the NAGPRA repatriation provisions, it is not adequate unless we can identify something unique which creates an irreducible bond between cultural property and culturally affiliated tribes.

In the next Part, I examine arguments which might explain this unique connection and in doing so help justify Native American ownership claims.

IV. OWNERSHIP OF CULTURAL PATRIMONY: EFFICIENCY, IDENTITY, AND COMMUNITY

Ownership claims are typically extinguished after the passage of a significant amount of time and this is thought to be justifiable on any number of theories of ownership. But these same theories might sanction lingering ownership claims

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if indeed there is a recognized incommensurability in how competing groups or individuals value a particular object. In the Part which follows, I will look at three theories of ownership which may recognize and accommodate the unique relationship between Native Americans and their cultural property.

A. Efficiency

It is commonly understood that government regulation of property rights is justifiable if it corrects an obvious imperfection or imbalance in the open market. Thus, government intervention in industries that are prone to natural monopolies or susceptible to holdouts is generally thought to be acceptable. Government regulation of the ownership of cultural patrimony may therefore be justified on the grounds that the market in such objects is somehow imperfect and that it is more efficient for cultural patrimony to be owned by culturally affiliated Native American tribes. Given the fact that NAGPRA will in some circumstances negate non-Indian property rights developed under state law, an efficiency argument will also have to account for the inefficiencies generated by upsetting certainty of title. In the following discussion, I will assess the efficiency-based reasons for recognizing Native American ownership of cultural patrimony. At the end of this discussion, I will also suggest why such reasons override a general interest in certainty of title.

One of the most prominent and frequently cited efficiency explanations for the predominance of a private property regime is the notion of the "tragedy of the commons."[106] Harold Demsetz argues that private property arose to correct the inefficient use of land and resources, the well-known "tragedy of the commons."[107] Because the costs of taking precautions with respect to the maintenance of a resource are higher than the benefit to be gained by an individual when the property is communally used, no one takes precautions and resources are exhausted. The concentration of benefits on a private owner creates an incentive to use the resource efficiently. Once the resource in question is in

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106. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

107. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967). Ernest Beaglehole describes a story told to him by a Hopi about the division of land between the clans which provides a useful example of Demsetz's argument:

> Coyote was the first clan here . . . . Then other clans came. Land was not divided up, it was free for all to use and cultivate. Certain lands were better than others, they had better soil and were closer to water, so that trouble soon arose. Each began to cultivate near the best land. It grew crowded there. Quarrels arose and killings. It got so bad that the clans came to Coyote clan and asked that clan to make rules for the land to prevent further trouble. Coyote clan agreed and asked the swift little fox (coyote) to settle the trouble. . . . He went around the land dividing it up . . . for all the clans and all the villages. Between the fields of each clan and of each village, the fox marked off a space twenty feet wide saying that if a man cultivated this waste land he would go blind, he would be poisoned and die. The fox gave the same size land to each clan and each clan and village was told to keep to its own fields. He reported what he had done to the people and there was no trouble after this.

Beaglehole, *supra* note 6, at 311-12.

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private hands the market then takes over to generate the most efficient allocation. Assuming that a tribal interest in cultural patrimony can be expressed through the market, the tribe or other entity which most values the property in question and which is thought to be the most efficient owner is presumed to be the one willing to pay the most. The market and supporting common law rules are thus said to be the most efficient regulators of property rights.

So what efficiency reasons are there for the government regulation of ownership rights? Why should the federal government declare that cultural patrimony is inalienable by an individual and recognize tribal ownership thus negating other property interests? One reason which typically justifies restricting property rights is the existence of externalities[108] which "prevent the market from achieving an efficient result."[109]

Calabresi and Melamed argue that one type of external cost that might be prevented by inalienability restrictions is large-scale social costs.[110] Social costs arise when there are a significant number of people affected by a single transaction and the costs of internalizing their interests are both too high and too difficult to ascertain. Calabresi and Melamed use the example of pollution. If *X* wants to sell his property to a polluter, *X*'s neighbors will be significantly harmed by the sale. *X* could pay a sum to his neighbor *Y* to account for the devaluation of *Y*'s property, and such sum could be accounted for in the sale of *X*'s property but there may be many *Y*s and it may be difficult to determine their identities. Finally, there may be so many *Y*s that compensation would be too costly in which case "[b]arring the sale to polluters will be the most efficient result because it is clear that avoiding pollution is cheaper than paying its costs."[111]

The other externality identified by Calabresi and Melamed is "moralisms." Assuming that a monetary value can be assigned to people's moral tenets, moralisms arise when a transaction fosters public moral indignation. Thus, if *X* wishes to sell himself into slavery, the moral costs suffered by those who strongly disagree with slavery are external costs of the slavery transaction.[112] Internalizing these costs through a property rule[113] is hindered by the difficulty of identifying all the objectors, and a liability rule[114] is foiled by both the number

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108. Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 937-41, 951-53 (1985). The other efficiency concerns discussed by Rose-Ackerman are free riders, coordination problems (prisoner's dilemma), and the cost of administering alternative policies. *See also* Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985).

109. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1863 (1987).

110. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111 (1972).

111. *Id.*

112. *Id.* at 1112.

113. "An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller." *Id.* at 1092.

114. "Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule." *Id.*

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of objectors and the fact that such an external cost "does not lend itself to an acceptable objective measurement."[115]

Large-scale social costs and moralisms are both implicated in cultural patrimony transactions. Native Americans are harmed by the transfer of cultural patrimony to non-tribal members; such transfers may have a negative impact on tribal life and lead to moral indignation within and perhaps even outside Native American communities. Tribal culture and a Native American way of life is, accordingly, a "capital asset" that is prone to diminish as aspects of tribal culture are alienated from the tribe. In the case of cultural patrimony, we can refer to these external costs as "ethnic externalities."[116] Compensating those affected or buying them out is potentially prohibitive and the harm is, in any event, not easily susceptible to "objective measurement."

Ethnic externalities are more pronounced in tribal land transactions. The alienation of tribal lands to non-members, specifically non-Indians, is bound to undermine tribal life and the security of tribal existence.[117] Although an artifact may not be as important, it may very well be a potent cultural symbol, particularly in the turbulent wake of Euro-American culture. This is arguably true of tribal art work, sacred objects,[118] and items which are of historical significance,[119] although many important objects defy such easy categorization.[120] The transfer of cultural patrimony to non-members of the tribe diminishes tribal power[121] and the strength of tribal tradition. These costs are almost impossible to account for. Restricting ownership can thus be understood as an attempt to prevent these costs from arising. If the tribe as a whole owns objects of cultural patrimony then any ultimate sale will reflect the value of the object to the tribe as a whole.

One might be tempted to believe that government restrictions on the ownership of tribal lands and cultural patrimony are primarily paternalistic.[122] Federally imposed restraints on land transfers are arguably more paternalistic because they force Native Americans to retain their property even if the tribe as a whole

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115. *Id.* at 1112.

116. *See* Fred McChesney, *Government as Definer of Property Rights: Indian Lands, Ethnic Externalities and Bureaucratic Budgets*, *in* PROPERTY RIGHTS AND INDIAN ECONOMIES, *supra* note 6, at 109-11.

117. *Id.* at 120. McChesney raises this argument in his discussion of the possible virtues of the federal government's role as trustee of Native American land. The preservation of a way of life, as he points out, may require restrictions on private ownership. This issue is at present at the forefront of the debate over alienation restrictions on Alaskan lands. *See* Martha Hirschfield, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L.J. 1331 (1992).

118. The Zuni War Gods, for example, are carved wooden figures which are left in specific places in the mountains for ritual purposes. To remove them is not only theft and sacrilege but further is said to rob the Gods of their powers. *See* Nichols et al., *supra* note 30, at 33.

119. The Wampum belts of the Iroquois are said to capture the existence. *See* Blair, *supra* note 31, at 126-27 (relying on the views of Onondaga Chief Oren Lyons).

120. Strickland, *supra* note 9, at 184.

121. *Id.* at 183-84.

122. Paternalistic reasons for ownership restrictions can also be understood as efficiency reasons. *See* Calabresi & Melamed, *supra* note 110, at 1113-14.

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desires to alienate it. A consensus has grown, however, amongst federal policymakers that federal restraints on the alienation of tribal land holdings do not stem from an undesirable paternalism designed to protect Indians from their own improvidence, but rather from the view that a substantial land base is essential to the preservation of a tribal way of life: "[t]he continued enforcement of federal restrictions, in this view, derives not from a presumed incompetence of the 'ward' but from a perceived value in the desirability of a separate Indian culture and polity."[123] Given that this argument can also be applied to cultural patrimony ownership restrictions, perhaps we can dismiss paternalism as a reason for government action.[124]

So far we have determined that ethnic externalities provide a legitimate reason for restricting ownership of cultural patrimony. A further efficiency problem prevented by ownership restrictions is the possibility of a holdout. Holdouts occur when there is something unique and significant about the property to a specific group or when it is specifically required for an alternative use. These features make the property "subject to private rent-seeking":[125] private owners are capable of demanding prices that are well above the market value of the property. With respect to cultural patrimony, non-Native American owners could demand exorbitantly high prices for objects that are irreplaceable to Native Americans. NAGPRA prevents this private rent-seeking by creating a presumption of tribal ownership.

Thus it appears that the presumption of Native American ownership can be justified on efficiency grounds. Native American ownership minimizes external costs and prevents the possible occurrence of holdouts. But can tribal communities efficiently manage and care for cultural patrimony? The circumstances which give rise to "ethnic externalities," in particular the cultural significance of the objects and the communal benefits generated from access and use, should, at least theoretically, also provide incentives to preserve and protect cultural patrimony. But opponents of a *presumption* of Native American ownership argue that this is not sufficient. The preservation of cultural objects usually requires both funding and knowledge which often do not coincide with a desire to retain the objects. It is this separation of interest from ability to preserve which fuels the international debate on cultural patrimony. Those who argue against the retentive laws of third world countries, rich in cultural patrimony, do so partially on the basis of the supposed inability of these countries to properly care for their cultural patrimony.[126]

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123. COHEN, *supra* note 6, at 510.

124. Margaret Radin, however, argues that the moralism-externality argument merges into paternalism: "[b]y imposing paternalistic restraints, we are benefiting those people whose subjective moral beliefs include the 'knowledge' that others would be better off if restrained, and who attach subjective value to seeing them better off." Radin, *supra* note 109, at 1866, n.59. According to this argument, it is hard to escape the conclusion that there are paternalistic reasons at work.

125. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 758-60 (1986).

126. *See* John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477, 506-08, 511-12 (1988).

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But this is a disingenuous argument. There is no basis for believing that the knowledge possessed by non-affiliated groups is better than that held by affiliated groups. Although established museums may have greater scientific knowledge which aids in actual preservation, it is not always the case that this type of knowledge is the most appropriate. Affiliated groups naturally have a better sense of what is appropriate and respectful. In fact many disputes between Native American groups and museums have erupted over inappropriate, at times even sacrilegious, treatment of objects. The lack of funding is also a weak argument against Native American possession given the prominent role of government funds in the maintenance of museums, in particular those museums subject to NAGPRA. Some portion of government funding which goes to museums could be diverted to Native American tribes for the purpose of caring for cultural property. Finally, in general there is no foundation for believing that tribes will abuse their ownership rights by neglecting property once they have gone through the trouble of repatriating it.

The final efficiency issue to be addressed is should the efficiencies of tribal ownership outweigh the inefficiencies generated by instability of title? Although NAGPRA recognizes tribal ownership and may do so for efficiency reasons, those in possession of cultural patrimony have operated under the assumption that they are the rightful, legal owners. Upsetting this assumption creates significant uncertainties amongst those in possession of Native American artifacts. But there are at least two considerations which mitigate this problem. First, the total number of objects of cultural patrimony is likely to be relatively small. Only a few items will likely satisfy the requirement of "ongoing historical, traditional, or cultural importance central to the Native American group or culture itself."[127] Thus the effects of the NAGPRA cultural patrimony provisions should be minimal. Secondly, and more importantly, museums are entitled to rely on their assumption of legal title if repatriation results in Fifth Amendment Takings.[128] This safety valve permits the federal government to recognize Native American ownership without seriously disrupting those museums that do not wish to cooperate. Certainty of title will thus not be seriously undermined given that repatriation is voluntary when there is proof of an otherwise legal title.

Thus it is not difficult to construct an efficiency justification for repatriation. The problems of "ethnic externalities" and holdouts arguably make tribal ownership the most efficient form of ownership. But this is not a wholly satisfactory place to rest our case for repatriation. The efficiency arguments outlined above take for granted that the property is more valuable to Native Americans. The discussion of "ethnic externalities" alludes to some reasons why this is the case but more extensive exploration is necessary. As one may recall, the compensation argument failed in the end because specific compensation is not morally justified unless the property has some highly unique connection to the tribe in question—a connection which neither diminishes as time passes nor is replicable in other ownership situations. When these circumstances are present, it is this unique connection and not compensation which provides the

127. 25 U.S.C. § 3001(3)(D) (1994).
128. *See id.* § 3001(13).

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real basis for repatriation. The same can be said of the "ethnic externality" argument. The existence of "ethnic externalities" shifts the focus from efficiency to the unique connection which gives rise to such externalities. The concept of a cultural externality hinges on a vague and likely complex cultural connection between a tribe and its cultural patrimony. This connection must be explored if we are to arrive at a complete justification for the return of cultural patrimony.

In the remainder of this Part, I will examine two reasons why cultural patrimony is more valuable to Native Americans. The first reason is that cultural patrimony may be said to be constitutive of cultural identity.[129] Although this argument has been used by others to justify repatriation of cultural patrimony, it turns out to be both incoherent and incapable of justifying repatriation. The second reason draws on the common law notion of inherently public property.[130] According to this argument, cultural patrimony may be like publicly held commons or recreational property in that its publicness increases its value within a specific community.

B. Identity and Property

Margaret Radin has argued, as have many others before her, that people need to have some control over resources external to them for proper self-development and this is effected through property rights.[131] Most of these property rights are sufficiently protected by a property rule which prevents forced transfers but permits voluntary alienation, usually through the market.[132] But there may be certain items that are of such great importance to an individual that a property rule does not provide sufficient protection. These things are, according to Radin, items which we might consider being constitutive of individual identity, or "personal property." The essential features of "personal property" are that it be substantially bound up with individual identity and that its retention does not result in "bad object relation."[133] Property of this sort might be a home, an heirloom, or perhaps something more mundane, such as a car.[134] If, according to Radin, we recognize some property as being essential to personal identity then we should protect it against cancellation by conflicting fungible property claims. This argument is used to support the market regulation of certain goods, for example residential accommodations,[135] babies,[136] and body parts.[137]

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129. The discussion of property and identity will rely predominantly on Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982), and a note extending her theory to the ownership of cultural patrimony, John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989).

130. The discussion of inherently public property will rely primarily on the work of Carol Rose, *supra* note 125.

131. Radin, *supra* note 129, at 957.

132. Calabresi & Melamed, *supra* note 110, at 1092.

133. Radin, *supra* note 129, at 968-69.

134. Relatively mundane objects that are neither unique nor central to one's well-being may violate the prohibition against "bad object relations."

135. *See* Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUBL. AFF. 350 (1986).

136. *See* Radin, *supra* note 109, at 1925-36.

137. *See infra* text accompanying note 212.

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Disregarding for the moment any trouble spots in Radin's argument, can it be extended to the ownership of property by groups? Is it the case that some property is so vital to the well-being and preservation of a particular cultural community that it can be said to be constitutive of the identity of that cultural group? This question has been examined in a Note on the Parthenon Marbles by John Moustakas.[138] Moustakas begins with the assumption that cultural groups have an intrinsic right to exist. He then argues that just as individuals have protected claims to those goods which are essential to their well-being and development, so groups have a corresponding entitlement to those goods which promote "grouphood." Moustakas states: "[t]he notion that groups have intrinsic rights to exist, develop, flourish and perpetuate themselves, and that these rights often are intertwined with groups' relations to history and objects, justifies both creating a category of property which promotes grouphood and distinguishing between that property and merely fungible property."[139]

Moustakas argues that objects that serve as historical records or that are strong cultural symbols promote "grouphood." Such property is substantially bound up with group identity and to interfere with group control of it undermines the group's existence and well-being.[140] This justifies the repatriation of most cultural patrimony, including most Native American cultural patrimony. Thus in the absence of a clear and legitimate transfer by the tribe, the concept of "property for grouphood" provides a sufficient reason to override other potentially legitimate but less intimate interests. But Moustakas goes one step further arguing that cultural patrimony which can be said to be "property for grouphood" should be strictly inalienable; it should never be separated from its affiliated group even if the group itself decides the property is no longer of any value. Moustakas states there are:

> [a]t least three reasons which explain why grouphood property demands absolute restraints on alienation. . . . First, all the factors supporting [the importance of cultural patrimony to a community] depend upon actual possession of the very thing itself. . . . Second, . . . [cultural patrimony items] are nonreplenishable resources. . . . Third, intergenerational justice demands the prohibition of any transfers . . . . [A] transfer of grouphood property by currently ascertained members necessarily alienates the unascertained members from their own identity.[141]

Thus Moustakas is in favor of returning the Parthenon Marbles which were arguably legally removed from the Parthenon,[142] and he would argue against the inclusion of a right of possession defense with respect to cultural patrimony in NAGPRA.

There are, however, problems with Moustakas's argument. To begin with, the notion of "bad object relations" or fetishism is insufficiently dealt with, both in

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138. Moustakas, *supra* note 129.

139. *Id.* at 1185.

140. *Id.* at 1192-93, 1196-1201 (discussing whether the Parthenon Marbles qualify as "property for grouphood").

141. *Id.* at 1207-09.

142. *See* Merryman, *supra* note 46, at 1895-1902 (arguing that the Elgin Marbles were legally removed from the Parthenon).

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Radin's original article and in Moustakas's extension. As Moustakas recognizes, Radin views "bad object relations" as merely an intuitive concept. We know, according to Radin and Moustakas, that a "bad object relation" exists when an "objective moral consensus would agree that being bound up with [the object] is incompatible with personhood."[143] But drawing the line between "healthy" and "fetishistic" object relations is not an easy task. Radin seems to think that the task is made possible by the introduction of an "*objective* moral consensus"[144] but her entire argument for the existence of "personal property" relies on recognizing and elevating the *subjective* element in property ownership. The whole notion of property being constitutive of identity must rely on a subjective, personal assessment of possession if it is to have any real force or legitimacy. The introduction of an objective test separating personhood or grouphood property from fungible property creates an arbitrary division and potentially undermines Radin's primary argument for the special treatment of property that is essential to identity.

The problems of determining when an object relation is fetishistic are magnified when dealing with different cultures. The possibility of arriving at an acceptable "objective" assessment of when a claimed special attachment is fetishistic is at most slim. Native American tribes will forcefully claim that a wampum belt is essential to their tribal identity even if it is the one-hundredth or a very poor example of its kind. And the museum community will wish to dispute such a claim if they desire to keep the wampum belt. There are simply no reasonable internal limitations to the category of cultural patrimony as property for grouphood in the absence of an objective test. However, no objective test is going to be acceptable across cultural borders nor in keeping with the arguments supporting property for grouphood.

Secondly, it is difficult to see why possession is so essential to Moustakas's argument. Moustakas states emphatically that his whole argument depends on actual possession[145] but this seems to be at the very least overstated. It may be the case that with respect to personal property owned by individuals, possession and the ability to exclude others is essential at the very least to guarantee access. Furthermore, most personally owned objects serve some useful function which often requires constant or at least predictable access. But this is not the case with respect to cultural patrimony unless the object in question continues to have a functional purpose. It is difficult to see how a wampum belt is less a part of tribal identity when it resides in the Smithsonian than when it is placed within the full control of its original tribal owners. In fact, it may be the case that constant external recognition of the tribal origin of an object reinforces its tribal connection. Moustakas's argument may provide the basis for tribal input into the display of Native American cultural patrimony, but full possession seems to be unwarranted.[146] Recognizing the right of Native American tribes to hold property

143. Moustakas, *supra* note 129, at 1189.

144. Radin, *supra* note 129, at 969 (emphasis added).

145. Moustakas, *supra* note 129, at 1208.

146. The relationship of an artist to her work of art, after it has been sold or given to someone else, is often treated in this manner. Artists are sometimes said, particularly in civil law countries, to retain "moral rights" in their works of art. An artist should be given some say

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may be essential to tribal identity but this is something quite different from Moustakas's argument. The right not to be excluded from the class of property-holders and the link between this and identity is wholly different from Moustakas's link between objects themselves and cultural identity.[147]

Finally, it is difficult to argue that certain objects are essential to group identity when they have been separated from the group for, in some cases, centuries. The logical conclusion of Moustakas's argument for return of the Parthenon Marbles is that the Greeks are somehow less Greek now and have been ever since Lord Elgin removed the Marbles. If the Greeks are as Greek as they have ever been, however it is that one defines being Greek, it must be the case that either the Parthenon Marbles are not part of their identity in any real sense of that word or that possession of the Marbles is not necessary for them to continue to be strong cultural symbols. In either case Moustakas's argument fails.

There is undoubtedly something intuitively appealing about the notion of cultural property being intricately tied to, although not constitutive of, cultural identity. There is also something sensible about requiring that ownership be inalienable; the assumption behind repatriation is that the objects should never have left their original context.[148] To return the objects only to have them sold again in the next generation, or perhaps even sooner, makes a mockery of the process and the sacrifice of those individuals and institutions whose property interests are negated by repatriation. But the notion that identity, whether individual or group, must forever remain attached to a particular object is unsettling. An immutable, intrinsic connection between identity and property may unduly limit, at least in theory, an ongoing process of cultural redefinition. Hegel, the primary source for Radin's theory of property as personhood, would most certainly object to Moustakas's inalienability requirement. Hegel's notion of "embodiment" hinges on an act of *free will*. It is one's *will* which is embodied in an object in the external world. Only through the assertive, positive force of the will does an object become part of one's personality. The imposition of an inalienability requirement which ignores the will of a community desiring to rid itself of a certain object runs contrary to the initial premise of the theory connecting identity and property.[149] These objections to Moustakas's approach, in addition to the problems outlined above, lead to the conclusion that we must

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in what becomes of his works "since they are the material and publicly visible fruit of his emotions, vision of the world and personality." Quentin Byrne-Sutton, *The Owner of a Work of Visual Art and the Artist: Potential Conflict of Interests*, *in* INTERESTS IN GOODS 281, 287 (Norman Palmer & Ewan McKendrick eds., 1993); *see also* JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 143-44 (1987); John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023-28 (1976).

147. *See* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 20-21 (1988) ("[T]he claim not to be ruled out of the class of people who *may* own property . . . of course, does not guarantee that anyone . . . will actually get to *be* an owner . . . .") (emphasis in original).

148. It is important to remember that NAGPRA does not consider cultural patrimony inalienable but consent of the tribe as a whole is required for a legitimate transfer. 25 U.S.C. § 3001(3)(D) (1994).

149. STEPHEN R. MUNZER, A THEORY OF PROPERTY 67-70 (1990); WALDRON, *supra* note 147, at 360-61, 363-65.

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search elsewhere for an adequate explanation of the specific value of cultural patrimony and its subsequent repatriation.

C. Community and Property

1. Public Property

At the height of nineteenth-century industrialism and its near religious addiction to the institution of private property, a few English intellectuals[150] began to worry about the destruction of England's great historical monuments. Prior to this movement for preservation, the ancient sites in England, according to the work of Joseph Sax, were considered nothing but nuisances: "just mounds, ditches, or piles of stone with neither aesthetic nor utilitarian value."[151] As one English gentleman put it: "[a]re the 'absurd relics' of our 'barbarian predecessors' who 'found time hanging heavily on their hands and set about piling up great barrows and rings of stones' really to be preserved, and that at the cost of infringement of property rights?"[152]

The change in attitude, according to Sax, stemmed from a realization that although these great monuments were and would continue to be private property, there was something public about them, something that belonged to all English people and that was worth preserving for the nation.[153] Although the notion of public ownership appears to be the predominant idea behind the Lubbock Bill, England's first attempt at historic monuments preservation,[154] there was another idea which bolstered the preservation movement. John Ruskin believed that great monuments and historical artifacts were creations of human genius that no one had a right to destroy.[155] He stated:

> What we have ourselves built, we are at liberty to throw down; but what other men gave their strength and wealth and life to accomplish, their right does not pass away with their death: still less is the right to the use of what they have left vested in us only. It belongs to all their successors.[156]

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150. The most notable is John Ruskin. *See* Joseph L. Sax, *Is Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England*, 78 CAL. L. REV. 1543, 1560 (1990).

151. *Id.* at 1545-46.

152. Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1151 (1990) (quoting Lord Francis Hervey, a lawyer).

153. *Id.* at 1545.

154. *Id.* at 1547-49. Discussing the Lubbock Bill, the author noted that:

> [The] bill marked a radical turn in the development of property law. His was the first piece of legislation in the Anglo-American world to embrace two related principles: that the protection of cultural property was a governmental duty, and that public ownership and control should be brought to bear on unwilling proprietors.

Id. at 1549.

155. *Id.* at 1562-63.

156. *Id.* at 1561 (quoting JOHN RUSKIN, THE SEVEN LAMPS OF ARCHITECTURE 201 (1956)).

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Despite the persistence of private ownership, Ruskin argued that the public has a duty to care properly for and preserve these works of genius, a duty passed on to us by the creators themselves.[157] It was this notion of duty, rather than ownership rights, which dominated Ruskin's thoughts on cultural heritage. These two concepts, public ownership and duty, form the foundation respectively of the last explanation in this Part and the final Part of this Article which examines a non-ownership based justification for tribal control and possession of cultural patrimony. The latter argument is relatively uncharted territory and as a consequence provides rather uncertain conclusions about repatriation. The former, however, has been more thoroughly discussed and provides convincing justifications for tribal ownership and repatriation. It is to this explanation that I now turn.

Public property, in the sense of being owned by the "unorganized public"[158] is not a foreign concept to the common law although its present day application is relatively limited. Traditionally, the public has maintained property rights in roads, highways, streets, tidal and submerged lands, and navigable waterways.[159] Most recently, a public right to beach front property has been recognized.[160] As with cultural patrimony, it is not completely clear why such property rights are vested in the public at large. There are, as Carol Rose discusses in her work on public property, efficiency reasons for public ownership: inherently public property is necessarily susceptible to holdouts and monopolization. We have already explored some of the possible efficiency justifications for tribal ownership of cultural patrimony and although efficiency is a necessary feature in Rose's analysis, it is by no means a sufficient reason to subvert individual ownership. The property in question additionally must be more valuable when used by "indefinite and unlimited numbers." Thus, as Carol Rose discovers, some inherently public property served to protect and encourage commercial activity—an activity which benefitted from increased numbers. But, as Rose points out, commerce was thought to be an educational and socializing activity and it was this more fundamental purpose that was served by inherently public property.[161] It was the socializing feature of commons and recreation grounds which made their value to the public far superior to the value such property could

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157. Sax, *supra* note 152 at 1562 ("[T]he work did not and should not, if we respected its makers and their sense of commitment, belong to us. It was not the buildings, but their builders, who had a *claim* upon us.").

158. Rose, *supra* note 125, at 711, 721, 730-31 (1986) (discussing the distinction between the government as the public and the "unorganized public" owning property).

159. *Id.* at 723-30 (discussing law pertaining to roadways and waterways). Some of these same public rights in property were recognized in Roman law. Justinian states:

> [A]ll rivers and harbours are public, so that all persons have a right to fish therein. . . . Again, the public use of the banks of a river, as of the river itself, is part of the law of nations; consequently every one is entitled to bring his or her vessel to the bank . . . as freely as he may navigate the river itself. . . . Again, the public use of the sea-shore, as of the sea itself, is part of the law of nations . . . .

J. INST. 2.1.

160. Rose, *supra* note 125, at 713.

161. *Id.* at 774-82.

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have had to any given individual. Perhaps historic sites most clearly convey the notion of increased value from shared recognition and participation. Rose states: "[A]s *United States v. Gettysburg Electric Railway* eloquently reminded us a hundred years ago, the commemoration of a great battle would not have been so valuable had it not been shared by all at common expense—nor would it have been so poignant anywhere other than the battlefield itself."[162]

The concept of "inherently public property" as explicated in Rose's work applies only to immovables—land, water, and historic sites. In fact, it is the fixed location which both concentrates and enhances the attention of a particular community. The use, gathering, and socializing functions so integral to "inherently public property" are contingent on the fixity of location. Because a particular piece of property has certain features and is in a particular place, it serves an essential and valuable communal function. Thus at first, it appears unlikely that moveables, mere objects, could satisfy the requirements of "inherently public property." And yet it is precisely cultural patrimony's educational and communal value which makes it so desirable and valuable to museums.[163] Objects of cultural patrimony "nourish a sense of community"[164] and cultural awareness and serve as a "source of knowledge and wisdom,"[165] thus enhancing the general welfare of the community—the community being all those who have access to the objects.

In this sense cultural patrimony appears to satisfy the most important requirement of inherently public property—its value increases when the public, an indefinite and unlimited number of people, have access to it. The problem with this conclusion, however, is that there is no limit on public ownership. There is no way to determine which public, group, or community maintains the right of ownership. The argument set out above permits ownership by all the people of the United States, perhaps even the entire world community, certainly not just a particular Native American tribe. Native American cultural objects should, according to this argument, remain in the possession of museums, rather than be returned to their culturally affiliated tribe. In fact similar arguments have been made by those who quite strongly oppose the retention of cultural patrimony by nations of origin. The international movement of cultural property, according to these opponents of retentive laws, promotes understanding between cultures and nations and serves a broad educational and scientific purpose which benefits all of mankind.[166] Thus cultural patrimony does present a unique problem. With respect to immovables, "public" connotes that community which is in close proximity and capable of immediate and steady access to the fixed resource. But

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162. *Id.* at 777 (discussing United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896), in which the United States sought to create a national battlefield memorial at Gettysburg).

163. *Report of the Panel for a National Dialogue on Museum/Native American Relations*, *supra* note 85, at 495-96 (recognizing the knowledge to be gained from and the educational value of cultural objects).

164. John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 349 (1989).

165. *Id.* at 353.

166. *Id.* at 345-49, 353-55; *see also* Merryman, *supra* note 164, at 1895 (explaining why "we care" about cultural property).

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with respect to moveable items of cultural property, this could be any group or community.

2. The Tribe and Property

There are two considerations that help narrow public ownership to culturally affiliated tribes. The first answer is built into Rose's concept of "inherently public property." The "public" in Rose's analysis is not just any random group of individuals. As she states, the public at large must be "capable of acting through the medium of custom and habits . . . ."[167] If the unorganized public in question is not capable of "self-management," it loses its claim as it is unlikely to use and care for efficiently the resource in question. The larger the community and the more distant the individuals are from both knowledge and understanding of the objects in question, the less likelihood there is that they will be suitable members of the "public" in the relevant sense. In fact cultural objects which are available to the public and which are no longer situated in their indigenous communities are not owned by the public at large but rather by the government acting through museums and institutions whose concern it is to educate the public. This does not alter the public nature of the property; it simply restricts ownership rights to the organized, rather than the unorganized public. The ownership of such objects by the unorganized American public is in fact a nonsensical suggestion. The unorganized American public has neither the knowledge, the background, nor the incentive to care for Native American cultural patrimony.

Culturally affiliated Native American tribes as an unorganized public group do, however, satisfy the requirements of "public" with respect to the ownership of their cultural patrimony. Their knowledge of and historical connection to Native American cultural objects make them uniquely qualified property managers. In fact it may be that a cultural connection is the only bond strong enough to engender the "custom and habit" necessary for ownership by an unorganized public. Within the tribal community itself, public ownership is still justifiable for all the reasons discussed above: the value of cultural patrimony is enhanced by communal access and, as a scarce resource, it is susceptible to holdouts and ethnic externalities under a scheme of individual ownership. The fact that culturally affiliated tribes are more capable of managing cultural patrimony than an unorganized American public does not negate the American public's ownership interest through museums and other government institutions. But if Native Americans can manage their cultural patrimony better than the unorganized United States, perhaps this suggests that Native American governmental institutions would also be better caretakers of cultural patrimony than the governmental organizations of the United States. In essence, customary capacity may indicate which public is likely to be a better owner whether acting through official government institutions or as an unorganized community.

The second means by which we can narrow ownership to a culturally affiliated tribe is found in Rose's exploration of customary rights. Customary rights differ

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167. Rose, *supra* note 125, at 774.

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from other public rights in property in that they are "enjoyed not by individuals as such but only as members of a specific locality."[168] Thus customary rights, unlike the general theory of ownership by an unorganized public, limit public participation to a specific, identifiable group; a community capable of maintaining customary rights is not the public at large but rather a smaller, limited group. The most notable customary rights are recreational uses—"maypole dances, horse races, cricket matches, and the like."[169] By the end of the nineteenth century, customary rights were legally out of fashion in the United States,[170] but they continue to be particularly helpful in understanding tribal claims. First, the two theories of the origins of customary rights, the notion of immemorial usage and the existence of a local law predating the introduction of the common law, are nonsensical in the context of Anglo-American society: European settlement is relatively recent and the British introduced the common law to America upon their arrival.[171] But this is not the case for Native Americans. The requirements of immemorial usage and/or a local law predating the advent of the common law are quite easily satisfied by Native American tribes. In fact some tribal claims, including fishing and hunting, are said to be founded on "immemorial custom and practice."[172] Second, in cases rejecting customary rights some concern was expressed that the grantee was too "fluctuating" in character to support such a claim,[173] but again this is not a problem with Native American ownership. The ethnic, familial, and territorial limits of Native American tribes circumvent the perceived problem of the indefinite nature of the grantee of customary rights.

But customary rights were recognized for reasons beyond the often fictitious belief in immemorial usage and ancient law. The most essential feature of a customary right was the value of the use itself. The recreational and social purposes preserved through customary rights were uniquely valuable to *a particular community*. The value of such uses could not be enhanced by opening them up to the world at large unlike something like commerce which flourished under the prospect of an infinite number of participants.[174] The same can be said of cultural patrimony.

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168. *Id.* at 740.

169. *Id.* at 741 (cases cited therein).

170. *See, e.g.*, Graham v. Walker, 61 A. 98, 99 (1905), *discussed in* Rose, *supra* note 125, at 741 ("[S]uch rules of the English common law . . . were unadapted to the conditions of political society existing here, and have never been in force in Connecticut.").

171. *See, e.g.*, Ackerman v. Shelp, 8 N.J.L. 125, 130 (1825) (noting that immemorial usage is impossible in the United States whose history does not extend back to the reign of Richard I), *cited in* Rose, *supra* note 125, at 741 n.145; Delaphane v. Crenshaw & Fisher, 56 Va. (15 Gratt.) 457, 470-71 (1860) (noting that the notion of a law predating the common law is impossible in the United States), *cited in* Rose, *supra* note 125, at 741 n.145.

172. COHEN, *supra* note 6, at 442.

173. *See Graham*, 61 A. at 99, *discussed in* Rose, *supra* note 125, at 741. Rose suggests that this may in any event have been a misguided objection. She points out that the public-at-large which maintained the right of "implied dedication" had a less definite, more "fluctuating" character. Rose, *supra* note 125, at 741-42.

174. Rose, *supra* note 125, at 769 ("Recreation and festivals have meaning and special social value for a given community, not for the world at large.").

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The discussion so far has assumed that as a form of inherently public property, cultural patrimony has a shared universal value but this is not necessarily true. The value of Native American cultural patrimony to its culturally affiliated tribe is different both in kind and in intensity. Although non-Native Americans may appreciate both the aesthetic and educational value of a wampum belt, the same object evokes in Native Americans an emotional solidarity with the past and a dedication to preserve tribal life and society. The world at large may benefit from access to Native American cultural patrimony but this value will pale in comparison to the exclusive socializing effect such property has on its culturally affiliated tribe. Although these interests are not mutually exclusive, Native American ownership must be at least marginally exclusive if the property is to serve as an effective bonding agent for the tribal community. The unique value of cultural patrimony may also stem from the act of creation. The production and enjoyment of cultural property are connected in such a way that those who participated in both creating it and imbuing it with communal significance, an ongoing process, may be the only people truly capable of appreciating it in the fullest sense possible.[175]

This argument takes on greater significance when one considers the possibility of diametrically opposed uses of cultural patrimony. A culturally affiliated tribe may believe that the most appropriate way to care for an item of cultural heritage is to destroy, hide, or bury it[176] while the museum community will want to preserve and display it. Only an argument which accounts for the existence of diverse and incommensurable values will enable a culturally affiliated tribe to deal with its cultural patrimony in a destructive manner.[177]

In certain circumstances, this balance of interests may change. One can imagine a situation in which a non-culturally affiliated group which has possessed an object of cultural patrimony for a lengthy period of time (perhaps centuries) becomes so attached to it that it assumes a significance not unlike the significance it had for its original possessors. For example, the British occasionally argue that the Parthenon Marbles have been in the British Museum for such a long time that they see them as part of their cultural heritage, a vital feature of Britain's role as the instigator of classical archaeology.[178] Although we should not rule out the possibility of such a development, it would require the occurrence of a major, non-exploitative event involving the objects and the passage of a significant amount of time. Even under these circumstances such claims should be scrutinized very closely.

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175. Cultural patrimony is, in this sense, similar to what Denise Reaume has termed "participatory goods." Reaume, *supra* note 7, at 9-10.

176. *See, e.g.*, Nichols et al., *supra* note 30, at 33 (discussing the Zuni War Gods).

177. Those who argue against both repatriation and retention laws designed to prohibit the export of cultural property often do so on the basis of preservation and protection, ignoring the possibility that apparently neglectful indigenous treatment of cultural objects may be culturally required and serve an important cultural purpose. *See, e.g.*, Merryman, *supra* note 126, at 502-08.

178. *See* Merryman, *supra* note 46, at 1915-16. This argument seems somewhat suspect with respect to the Parthenon Marbles, unless one stretches cultural attributes to include imperialism or an aspiring cosmopolitanism.

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Thus, on the one hand, an unlimited number of people could take advantage of the unique benefits of cultural patrimony if it were to remain in the possession of public museums. Cultural patrimony would not, under such circumstances, be inherently public property owned by the public at large, except in rare local cases, but it would continue to be a form of public property whose value increases when made available to unlimited numbers. If, on the other hand, Native American tribes are recognized as the rightful owners, a limited number of individuals, that is members of a culturally affiliated tribe, could do with the property as they see fit and as is appropriate to the original nature of the object, with the potential consequence of obliterating the interest of the public at large outside of the tribe. This is justified by the enhanced value of such property when possessed and utilized by a culturally affiliated tribe. The doctrine of customary rights provides a justification for allocating property rights to culturally affiliated tribes even at the expense of the interests of the American public.

V. PROPERTY AND CULTURAL INTEGRITY

Although Rose's exploration of inherently public property, in particular the doctrine of customary rights, provides a convincing justification for NAGPRA's allocation of property rights in cultural property, one more explanation warrants examination. As with the previous explanation, this approach also focuses on the problem of diverse, if not competing, ways of valuing cultural property. But unlike the previous discussion, this final explanation will step outside the confines of property law and property rights.

Property rights as an idea or a legitimating institution *can* be used to explain almost any relationship we as individuals or as groups have with the external world. Given the arguably all encompassing nature of property rights, how is it possible that I intend to speak outside of this concept? Perhaps the more important question is, why would I choose to do so? If we assume property rights to be the familiar notion of a bundle which includes an abundance of rights, most prominently, the rights to possess, use, capitalize on, and exclude others,[179] evidence of entitlement to just one of these incidents of ownership is sufficient to claim a property right. Property rights in most objects are often scattered amongst a number of people or entities; if you hold just one of the sticks in the bundle, you are assumed to have some property rights in the object in question. Despite this fragmenting of property rights, the concept of ownership in a single person or entity persists and pervades our understanding of the concept of property. We continue to think of real and personal property as *belonging* to someone. When my friend proudly declares she is a new homeowner, there is a sense in which her house *belongs* to her despite the fact the bank actually has a large stake in her property. When I declare I own my car, and in fact I have paid off my car loan so I can even hold the title in hand, there is again an

179. For a discussion of the incidents of ownership, see TONY HONORE, *Ownership, in* MAKING LAW BIND (1987).

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overwhelming sense that this car belongs to me despite the fact my property rights are seriously curtailed by legal restrictions on how I use my car.[180]

This sense of belonging or ownership, which often glosses over the fragmentation of property rights, is not just an intuitive observation of our understanding of property. It is also what economic efficiency and other property theorists bank on in preferring private over group ownership. Give someone a personal stake in their home, a tract of land, a resource, or even something as small as a book, so the economic efficiency story goes, and they are more likely to care properly for, manage, and preserve it for the future. Therefore, this sense of belonging is important to property. It is, in fact, "the organizing idea" behind private property.[181] Ownership and belonging are the hallmarks of property despite the fact that rarely are all the sticks in the bundle concentrated in one set of hands.

It is this notion of belonging that I wish to avoid in the context of cultural property. In this final Part, I will argue that cultural property does not really belong to anyone, that it is not a means to some exclusive human end. Rather, I will argue that all of us have a duty towards cultural property because of its relative scarcity and its profound significance. Cultural property takes on a life and meaning of its own; it acquires something like a soul and it is this soul, not a specific human end, which shapes our relationship with cultural property. This might sound rather odd to some readers. How is it, or why is it, I speak of having duties toward objects? What does this duty entail and who will enforce it in the absence of a right holder?

I want to begin with looking at whether this idea of sanctifying objects is actually as odd as it first appears. The ensoulment of objects is familiar to many Native American tribes.[182] But even in our own Western culture, arguably marked by a constant leaning toward skepticism, there is an inkling of the ensoulment of certain inanimate objects. For example, we do border on believing in the

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180. The legal restrictions on how I use my car, when, where, and how I drive it, is evidence of a public entitlement or interest in my car. In fact, I may even lose my car completely if I violate certain restrictions. For example, my car may be taken away if used in the commission of a crime.

181. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 38 (1988) ("The organizing idea of a private property system is that, in principle, each resource belongs to some individual.").

182. A fine example of the ensoulment or animation of objects is the following story remembered by Jonathan Haas of the Center for Cultural Understanding and Change at the Field Museum of Natural History:

> Haas recalls a visit to the museum a few years ago by some Hopi elders who were concerned about the kachinas on display and in storage. They said that the kachinas stored in plastic bags couldn't breathe and that all of the kachinas needed to be fed sacred cornmeal. With the museum's help, the elders placed all of the kachinas on the ground, faced them west, and conducted a feeding ceremony.

Charles Storch, *Museums Create a Flurry of Mixed Emotions as They Race to Divulge Native American Artifacts*, CHI. TRIB., Nov. 15, 1993, at Tempo 1.

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animation of certain public memorials.[183] One need only watch people filing past the Vietnam Memorial to get a sense of this phenomenon. The Vietnam Memorial resonates for almost all of us, but particularly for those with a close association to the Vietnam War. It reaches out beyond its stone boundaries to recall a time, a place, and an experience in American history and it is that experience which becomes the soul, the essence of the Memorial. Although ensoulment may for some seem a little strong, I think we can all agree that the Vietnam Memorial was designed to speak to us and evoke the memories of the Vietnam War and it succeeds in this purpose. There is something alive about the Memorial, something which requires our profound respect and which elevates it above any specific human end. The Vietnam Memorial has a life of its own, an intrinsically meaningful existence.

Another example of the ensoulment of inanimate objects, or in this case perhaps a refusal to accept the departure of a soul when evidence of life is gone, can be found in our treatment of human remains. Human remains are considered "quasi-property" in the common law but in the following sub-Part, I argue that our relationship with these objects is conceptually distinct from the organizing idea of private property rights—the idea that an object belongs to someone. Human remains also feature prominently in NAGPRA and thus some of the following discussion will focus on the Native American predicament concerning the treatment of the remains of their ancestors. Understanding our treatment of human remains should provide us with some insight into the approach I am advocating for cultural property.

A. Human Remains

The common law has always demonstrated a special solicitude toward human remains and cemeteries. Traditionally, human remains fall outside of the common law concept of personal property: they cannot be owned, bought, or sold.[184] Certain individuals, usually a surviving spouse or the next of kin, maintain a quasi-property right in a dead body which entitles them to give it a proper burial

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183. Hegel seemed to believe in the ensoulment of public memorials. He states, "public memorials are not property, or more precisely, it is their indwelling soul of remembrance and honor which gives them their validity as living and self-sufficient ends." GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT 64 (T.M. Knox trans., 1964).

184. The English common law rule held that "[t]he burial of the Cadaver is *nullius in bonis* and belongs to Ecclesiastical cognizance." 3 CO. INST. 203; *see also* Leno v. St. Joseph's Hosp., 302 N.E.2d 58, 59 (Ill. Sup. Ct. 1973) (holding there is no property right in the ordinary sense in a dead body); Lubin v. Sydenham Hosp., 42 N.Y.S.2d 654, 656 (N.Y. Sup. Ct. 1943). A deceased body does not form part of the deceased's estate. *See* Enos v. Snyder, 63 P. 170, 171 (Cal. Sup. Ct. 1900); Smart v. Moyer, 577 P.2d 108, 110 (Utah Sup. Ct. 1978). Also, it is not considered ordinary commercial chattel. *See* Larson v. Chase, 50 N.W. 238, 239 (Minn. Sup. Ct. 1891) (holding that there is no property right in a dead body in the ordinary commercial sense); Finley v. Atlantic Transp. Co., 115 N.E. 715, 717 (N.Y. Ct. App. 1917).

See also Roger G. Magnusson, *Proprietary Rights in Human Tissue, in* INTERESTS IN GOODS 237, 239, 242-44 (Norman Palmer & Ewan McKendrick eds., 1993) (discussing first the English then the American positions on proprietary right in human corpses); Note, *The Sale of Human Body Parts*, 72 MICH. L. REV. 1182, 1241-44 (1974).

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and to ensure that no one disturbs its rest.[185] The right to bury a relative includes choosing the place and rites of burial, and, if appropriate reinterring the remains. Any tortious interference with the right, such as an unlawful autopsy, improper burial, or unauthorized reinternment gives rise to an action for damages including damages for mental distress. The surviving spouse or next of kin also retains a limited property right in the spot where the individual is buried.[186] Beyond this, human remains belong to the earth.

Cemeteries also have protected status under the common law. In the early days of the common law, protected cemeteries were only those burial grounds found within the church yard. However, the definition of a cemetery was broadened in the United States to include any formal, marked burial ground.[187] Disturbing a cemetery is now a crime in all fifty states.[188] If a burial site has been abandoned or if it does not satisfy the definition of a cemetery, the remains vest in the owner of the land upon which they are found. Otherwise, even a subsequent purchaser of land which includes a burial site is not permitted to disturb the plot.[189]

Under the law set out above Native Americans could seek the return of the remains of their ancestors through their quasi-property right to give them a proper burial and to protect the burial site.[190] And prevention of further plundering of Native American graves could be ensured by enforcing state laws against disturbing cemeteries. But Native Americans have until recently[191] been excluded from this special legal regime governing the dead. To begin with, the age of many remains has made it very difficult to prove a sufficient ancestral

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185. *See, e.g.*, Travelers Ins. Co. v. Welch, 82 F.2d 799, 801 (5th Cir. 1936); Pettigrew v. Pettigrew, 56 A. 878, 880 (Pa. Sup. Ct. 1904); Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 237-38, 242-43 (1872); *see also* Note, *supra* note 184, at 1245-46.

186. *See* Rivers v. Greenwood Cemetery, 22 S.E.2d 134, 135 (Ga. 1942).

187. PRICE, *supra* note 14, at 23.

188. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 8100, 8101 (West 1970 & Supp. 1997).

189. *See* Anderson v. Acheson, 110 N.W. 335, 340 (Iowa 1907) (stating that a subsequent owner of land is not permitted to disturb a burial plot found on the land).

190. *See Rivers*, 22 S.E.2d at 135 (asserting that a surviving spouse or next of kin retains an ongoing right to have the body properly buried).

191. In addition to the recent changes brought about through NAGPRA and other federal laws, including the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm (1994) and the American Indian Religious Freedom Act, 42 U.S.C. § 1996, most states have extended legislative protection of cemeteries to unmarked burial sites. *See, e.g.*, ALASKA STAT. § 41.35.020 (Michie 1988); COLO. REV. STAT. § 24-80-401 (1988). Such legislation has been passed in Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Tennessee, Virginia, Washington, and Wisconsin. Alaska, Arizona, Colorado, Montana, South Dakota, and West Virginia have passed such legislation in the past five years. *See* PRICE, *supra* note 14, at 122-25; David J. Harris, *Respect for the Living and Respect for the Dead: Return of Indian and Other Native American Burial Remains*, 39 WASH. U. J. URB. & CONTEMP. L. 195 (1991) (summarizing state laws on unmarked-burial protection); Yalung & Wala, *supra* note 14.

Some states have also passed their own repatriation legislation dealing primarily with human remains. *See, e.g.*, Unmarked Human Burial Sites and Skeletal Remains Protection Act, NEB. REV. STAT. § 12-1201 (1990); Yalung & Wala, *supra* note 14.

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connection. In many cases Indian remains are not included in this special legal regime simply due to their age.[192] The courts, the federal government, and museums have in the past displayed a blatant disregard for Native American remains and burial customs.[193] The sheer number of estimated Native American remains in federal institutions is incontrovertible evidence of this problem. It is estimated that there are over 300,000 Native American skeletal remains in the possession of federal institutions. This comprises approximately ninety-nine percent of all human remains in federal institutions.[194] Most of the remains were collected and are being held under the broad justification of scientific value.[195] Even if we accept scientific investigation as a legitimate interest and one worth subverting the claims of living Native Americans, it is insupportable, indeed disingenuous, given the number of remains in federal institutions which have been sitting in boxes for decades.[196]

Native Americans face a different problem with respect to preserving their burial grounds: the definition of "cemetery" under the common law and under most state statutes has until quite recently been limited to Judaeo-Christian burial practices. A "cemetery" is typically defined as several burials with visible grave

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192. The case law dealing with dead bodies generally concerns recently dead bodies; skeletal remains are often excluded from the definition of a dead body. *See* Carter v. City of Zanesville, 52 N.E. 126, 127 (Ohio 1898) (stating that older human skeletal remains are not considered dead bodies under Ohio legislation); State v. Glass, 273 N.E.2d 893, 896 (Ohio Ct. App. 1971); *see also* Margaret Bowman, *The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict*, 13 HARV. ENVTL. L. REV. 147, 169 (1989).

Tribes will occasionally refuse an offer of repatriation because of the age of the remains and/or because the desecration committed in the removal is irreversible and return thus serves no purpose. *See* Livesay, *supra* note 81, at 297-98 (The Zuni rejected an offer from the New Mexico State Museum for the return of Zuni remains as they were "permanently desecrated," and the Nambe rejected a similar offer because the remains were over 800 years old.).

193. *See, e.g.*, Newman v. State, 174 So. 2d 479, 481-82 (Fla. Dist. Ct. App. 1965) (acquitting a student who removed a skull from a burial in the Everglades of wantonly and maliciously disturbing the contents of a tomb on the basis that there was no malice and that the Seminole burial customs were "unfamiliar" as compared to Christian burials).

For a "shameful account" of the collecting, stealing, and exhuming of Native American human remains, see BIEDER, *supra* note 12, at 278-363.

194. *See* Bowman, *supra* note 192, at 149; Quade, *supra* note 35, at 28 (stating that estimates range from 100,000 to 2.5 million).

Information from the Office of Repatriation at the Smithsonian does not provide a final tally. It does state, however, that approximately 17,600 "skeletal lots" in the Physical Anthropology collection will be inventoried under direction from the National American Indian Museum Act, 20 U.S.C. § 80q (1994). The most immediate concern for the Smithsonian is dealing with four thousand skeletal remains transferred from the Army Medical Museum, which include remains collected by military officials from "battlefields, army posts and other locations." Killion et al., *supra* note 10, at 2.

195. Bowman, *supra* note 192, at 150-53 (discussing the conflict between the scientific community and Native Americans with respect to the disposition of remains).

196. *Id.* at 152 ("I think it is arrogance in the extreme to say that those sites have scientific value and should be exploited for their scientific value when the legacy is 300,000 human remains in cardboard boxes.").

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markers.[197] Unless a burial ground is clearly marked as such, it is often denied protection under the various laws dealing with cemeteries. Furthermore, if a "cemetery" is abandoned, it is no longer protected by the law. Many Native American burial sites are considered abandoned even though the "abandonment" was involuntary.[198] Most burial sites were deserted when tribes were forced from their land. In the case of *Wana the Bear v. Community Construction, Inc.*,[199] Community Construction disinterred the remains of over 200 Indians in the course of an excavation. The site was indisputably identified as a significant burial ground by both archaeologists and descendants of the Miwok. But the plaintiff, a direct descendant of the Miwok, was denied an injunction to stop the excavation on the basis that the site did not constitute a "cemetery" as contemplated by the California statute under which the action was brought. In a rhetorical flourish at the outset of the opinion, Associate Justice Blease quite remarkably captured both the passion of the descendants and the harsh insensitivity of the law:

> This case comes to us shrouded in the history of an ancient Indian people whose remains, bulldozed from their resting place, stir the anguish of their descendants. But there is no succor for these profound sensitivities in the law to which plaintiff appeals, the sepulchral confines of the California cemetery law.[200]

Other courts have been more sympathetic to Native American requests for protection of their ancestral burial grounds.[201] But in general success has only been achieved through the dedication of concerned state lawmakers.[202]

The discussion so far has focused on the exclusion of Native American burial sites and human remains from the protections of statutory and common law without considering the specific views of Native Americans regarding the dead. It is impossible to speak of a unified Native American view on human remains.

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197. See, for example, CAL. HEALTH & SAFETY CODE § 8100 (West 1970 & Supp. 1997); *supra* note 191 for a list of the states which have recently extended grave protection legislation to include unmarked burial sites.

198. *But see* Charrier v. Bell, 496 So. 2d 601 (La. Ct. App.); *see* discussion in text *infra* at note 201.

199. 180 Cal. Rptr. 423 (Ct. App. 1982).

200. *Id.* at 424. In response to this decision, California amended its laws pertaining to cemeteries so that they now explicitly include unmarked Native American burial grounds. CAL. GOV'T. CODE § 6254(r) (West 1990); CAL. HEALTH & SAFETY CODE § 7050.5 (West Supp. 1988); CAL. PUB. RES. CODE §§ 5097.94, .98, .99 (West 1984 & Supp.).

201. *See, e.g., Charrier*, 496 So.2d at 601 (noting that burial ground discovered on private land was not considered abandoned and descendants were given the "right to enjoin the disinternment of their deceased relatives, as well as receive damages for the desecration involved").

Native Americans have also unsuccessfully sought protection of their burial grounds through the free exercise clause of the First Amendment. *See* Lyng v. Northwest Indian Cemetery Ass'n, 485 U.S. 439 (1988) (rejecting free exercise argument against building a road and logging on a historically significant religious site on the basis that although the plan would seriously interfere with Indian religious practices, they were not "coerced by the Government's actions into violating their religious beliefs").

202. *See supra* note 191 for a list of the states which have recently extended grave protection legislation to include unmarked burial sites.

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Some tribes believe that the human spirit is connected with the remains until they are completely decomposed.[203] Walter Echo-Hawk, an advocate for repatriation, states that "[m]ost of the tribes believe that if you rob the dead . . . it disturbs the spirit and visits harm upon not only those who disturbed the grave, but on the relatives of the dead who allowed that to happen."[204] For example, the Kumeyaay believe that if the remains of an ancestor are disturbed, the spirit returns from the afterworld and remains in pain until the remains are again returned to the earth.[205] But there are other tribes who have no interest in the remains of their ancestors. The Mesquakie tribe believes that four days after death the spirit leaves the remains and never returns.[206]

The sensitivity of some Native American tribes to the disposition of their ancestral remains is a particularly compelling reason to mandate legislatively their return. But Native Americans have generally sought the return of remains not on the basis of their unique cultural and religious beliefs but rather on the basis that they deserve the same treatment and respect accorded to others.[207] Walter Echo-Hawk states: "The Indian belief is not out of the ordinary and we're just trying to secure protection for what everyone else already believes."[208] The NAGPRA provisions relating to human remains do precisely what Echo-Hawk has argued for: they grant Native Americans the same legal rights as other Americans have concerning their ancestral remains. Such commensurate treatment is pivotal to cultural integrity and pride and thus the preservation of cultural identity, regardless of particular Native American beliefs about the spiritual afterlife of their ancestors. The treatment of human remains in NAGPRA is thus neither a recognition of a unique Native American attitude toward human remains, nor is it a departure from the law itself.[209] The NAGPRA provisions merely rectify a gap in common law protection and in doing so permit Native Americans the same level of spiritual ease other Americans enjoy when they ponder the fate of their ancestors.

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203. *See* PRICE, *supra* note 14, at 15.

204. Quade, *supra* note 35, at 29.

205. Bowman, *supra* note 192, at 149.

206. *Id.* at 149.

207. *Id.* at 150.

> [W]hen excavating an area in Tennessee to be flooded by the Tellico Dam, remains of white settlers, black slaves, and Native Americans were uncovered. The white remains and, after brief study, the black remains were reburied, both with suitable religious services. Only the Native American remains were retained for extensive study and have still not been returned to the earth.

Id.

208. Quade, *supra* note 35, at 29.

209. However, the fact that culturally affiliated individuals other than proven lineal descendants can request human remains for reburial may be a departure from the common law approach which only grants to descendants the quasi-property right entitling them to bury the remains of their relatives. 25 U.S.C. § 3002(a) (1994); *see, e.g.*, Bailey v. Miller, 143 N.Y.S.2d 122, 123-24 (Sup. Ct. 1955) (holding that an Indian who was not a direct descendant of anyone buried in a burial ground to be excavated was denied standing to prevent the disinternment of human remains).

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The legal treatment of human remains, as reflected in NAGPRA, is somewhat of an anomaly in property law. There are, however, similar restrictions on the property rights we have in our own bodies.[210] In particular the buying and selling of essential body parts is prohibited.[211] The justification for restrictions on the alienation of body parts might be nothing more than paternalism. Arguably, the government believes that individuals should not, and given ideal circumstances would not, have essential parts of their bodies removed simply for financial reasons.[212] But under this paternalistic directive may lie a much more significant reason for the restrictions. In the hearings leading up to the passage of federal legislation prohibiting the sale of essential body parts, then Senator Al Gore stated:

> It is against our system of values to buy and sell parts of human beings. It is against our system of values to auction off life to the highest bidder. . . . The notion has perhaps superficial attraction to some because we have learned that the market system will solve lots of problems if we just stand out of the way and let it work. It is very true. This ought to be an exception. It ought to be the exception because you don't want to invest property rights in human beings. . . . It is just wrong.[213]

Why is it "just wrong"? Why is it that we tend to avoid property rights in human beings, either dead or alive? One plausible answer, implicit in Senator Gore's statement and in the law pertaining to human remains, is a belief in the importance and preservation of human dignity. It is true that the exceptionally narrow range of "rights" that one has in human remains differs from culture to culture and religion to religion. But basic respect for human remains appears to rise above cultural and religious barriers. Safeguarding human dignity is a universal justification for this peculiar, spiritual attitude we all share toward the remains of our ancestors. This helps us understand why the supposed quasi-property right in human remains is more aptly described as a duty—a duty to preserve the dignity of the deceased individual and human beings in general. Some might argue that the duty to bury human remains stems from a concern for public health rather than human dignity. But this does not explain why we tend to believe as the common law affirms, that even indigents deserve a proper burial

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210. Although the restrictions on the ownership of human remains and body parts are similar, they are by no means identical. Human remains are strictly inalienable, or in Susan Rose-Ackerman's taxonomy, purely inalienable: sales and gifts of human remains are forbidden. Whereas some body parts are only subject to a "modified" inalienability restriction. Rose-Ackerman, *supra* note 108, at 935, 948-49.

211. *See* The National Organ Transplant Act, 42 U.S.C. § 274e (1994). The Uniform Anatomical Gift Act of 1987 § 10 also prohibits the "purchase or sale" for "valuable consideration" of human organs if the removal is "intended to occur after the death of the decedent." UNIF. ANATOMICAL GIFT ACT § 10(a), 8A U.L.A. 58 (1993).

212. Another possible reason is the prevention of murder for the sale of body parts.

213. *House Hearing on H.R. 4080, "National Organ Transplant Act": Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 98th Cong., 128 (1984).

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rather than indiscreet removal.[214] The existence of a right in this case appears to be wholly dependent on a preexisting duty to care properly for human remains. As stated by a Pennsylvania court: "When a man dies, public policy and regard for the public health, *as well as the universal sense of propriety*, require that his body should be decently cared for and disposed of. The *duty of disposition* therefore devolves upon someone and must carry with it the right to perform."[215] A logical extension of this argument is that there is no right to bury those who do not deserve a respectful burial—an unlikely but plausible situation.[216]

Thus it appears that human remains are objects for which the limited right of custody is contingent on and circumscribed by a preexisting duty; a duty to preserve the dignity of human life; a duty to respect the memory of the dead. It is this duty which dictates a code of acceptable moral and legal conduct. Whether we speak of this duty as a duty to the preservation of human dignity or to the memory of a specific person or to the remains themselves because of what they symbolize, it is a duty which we accept as both necessary and appropriate. It is also a duty which persists regardless of whether there is anyone capable of accepting the "right." When there are no next of kin or other obvious persons to assume the responsibility of burial, the common law will appoint someone to properly care for the remains.[217] To be certain, carrying out such a duty is a burden and a responsibility but one which, as with many responsibilities, is also regarded as a privilege and an honor. Our willingness to assume this responsibility is a sign of our humanity. The responsibility we share to treat the remains of our deceased relatives with respect is essentially a duty for which there is no preestablished concomitant right and thus to speak of our brief possession of human remains as a "quasi-property right" is somewhat misleading. There are no conventional property rights in human remains. Human remains do not belong to anyone.

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214. *See, e.g.*, Finley v. Atlantic Transp. Co., 115 N.E. 715, 717 (N.Y. Ct. App. 1917) (holding that a body cannot be cast out so as to expose it to violation or offend the *feelings* or safety of the public).

215. Pettigrew v. Pettigrew, 56 A. 878, 879 (Pa. Sup. Ct. 1904) (emphasis added); *see also* Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 238 (1872) ("There is a duty, imposed by the universal feelings of mankind, to be discharged by some one towards the dead, a duty, and we may also say a right, to protect from violation, and a duty on the part of others to abstain from violation.").

216. In the story of Antigone, for example, Polynices, one of Antigone's brothers, participates in a revolt against Thebes and is killed. As punishment for his actions, his remains were to be left unburied but Antigone defies the order, buries her brother, and is consequently condemned to death.

217. *See, e.g.*, 22A AM. JUR. 2D *Dead Bodies* § 19 ("It would seem, at common law, that if a poor person of no estate dies and there is no other person bound to perform the burial function, it is the duty of him under whose roof the body lies to carry it, decently covered, to the place of burial."); *see also Finley*, 115 N.E. at 715.

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B. Cultural Integrity

Our attitude towards human remains provides a precedent for establishing a separate category of goods that we view as ends in themselves. These goods take on a purpose and a life which transcends the vagaries of specific human ends. It is erroneous to say that these goods or resources really belong to someone in the same sense that my car or my house belongs to me. Given the nature of these goods and the enduring human values they objectify, it is my belief that they are ill-suited to the existing private personal property regime.[218] We might say that such goods interest "the feelings of mankind to a much greater degree than many matters of actual property,"[219] and are thus too precious to be left to the whim and fancy of individual right-holders. Surely this is what has driven the unique legal approach to human remains and what should drive our approach to the possession and control of cultural property. But articulating the existence of a duty to cultural property, not unlike a duty to human remains, still leaves unanswered important questions regarding the source of this duty, possession and appropriate treatment of cultural property. What important value gives rise to this duty? Who is to have possession of these cultural objects and how will we know what treatment is appropriate?

Not unlike human remains, cultural property is inextricably tied to our reverence for human experience and the past; we treasure cultural property because it represents human achievement and cultural advancement.[220] It is the embodiment of all that is wonderful, mysterious, sacred, and enduring about a culture. It captures both the achievements and the follies of specific cultural groups and as such forms *living* reminders of past and present cultural experience. Such experience, as with human experience, is deserving of our respect for it provides the context of human life. Cultural property is an objectification of cultural experience and thus our treatment of cultural property should be governed by our obligation to respect and preserve the integrity of a culture. Just as the proper burial of human remains preserves human dignity, the proper care and use of cultural property preserves cultural integrity or the cultural memory and experience associated with these objects.

One obvious stumbling block at this point in the analysis is that if we are sincerely interested in treating cultural property in a way which best preserves cultural integrity, whose culture is relevant? Some might argue that given the length of time these objects have been apart from the tribe or culture with which they were originally affiliated, they are as much if not more a part of our American culture interpreted as either a multi-cultural melting pot, or a museum

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218. We might also compare cultural property to other scarce and precious resources, such as endangered species, to which we owe a duty of preservation. *See* Phyllis Mauch Messenger, *Introduction*, *in* THE ETHICS OF COLLECTING, *supra* note 30, at 1, 19-20 (comparing cultural property to endangered species by arguing that no one has a right to scarce, nonrenewable goods).

219. *Pierce*, 10 R.I. at 237.

220. Sax, *supra* note 152, at 1562-63 (discussing John Ruskin's views on cultural patrimony focusing on human genius).

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culture which cherishes the experiences of conquest, dominion, and appropriation.[221] But this is a disingenuous argument. We do recognize and acknowledge the continuing cultural connection between an object and its culturally affiliated tribe. This is evident in the way museums try to recreate a cultural context for objects through the use of music, lighting, props, and descriptive labels. In many instances, these objects are sufficiently foreign and exotic, or on the other hand pedestrian to the non-Indian population that the creation of a context and description is necessary for us to understand their significance and beauty. As cultural outsiders, we cannot relate to the objects and the created context cannot succeed in its ultimate goal of making the objects resonate for us because the cultural experience captured therein is not our experience. But the creation of a context acknowledges the significance of an object of cultural property and ignites within us a sense of wonder and awe for the cultural experience captured in the object.

There is another related argument that is often used by those desiring to retain cultural property to which they claim no immediate cultural connection. Cultural property is a part of our common heritage, so the argument goes, and thus those who have preserved and displayed these objects for the world to see should be able to continue to do so because doing so helps us to understand other cultures and creates a sense of connection, a world-wide culture or common heritage. Thus, what we do with cultural property should seek to strengthen and preserve this common heritage. One cannot help but notice the imperialistic undertone of this argument, particularly given how little we understand many pieces of Native American cultural property and that in many instances objects have been displayed against the wishes of the culturally affiliated tribe. Violating the wishes and needs of Native American tribes with respect to their cultural property neither helps the non-Indian population understand Indian cultures nor assists in creating a sense of connection. This notion of a common heritage is at best an amorphous idea and at its worst an excuse to impose a museum-going culture on an often not-so-receptive Indian population. It is more often than not an easy excuse to put our own Western educational, scientific, and artistic demands over and above the interests and integrity of another culture. I do not wish to diminish the educational initiative behind this idea of a common heritage. Educating the public is a valid and honorable goal when there is evidence of a common approach to the treatment of cultural property. But even when this commonality exists, what is being preserved are the relics of a culture for the sake of glorifying the accomplishments or mourning the tragedies of that culture. Our common heritage is, if anything, our ability to appreciate the beauty and integrity of another culture and so it should be with an eye on preserving cultural integrity that we go about understanding and dealing with cultural property.

In focusing on the preservation of cultural integrity in our treatment of cultural property, I am not the first to argue for a different approach to cultural property. Others have argued that cultural property requires a separate regime of legal

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221. This is a familiar British response to Greeks arguing for the return of the Parthenon Marbles. The British claim that the Parthenon Marbles are in fact more a part of British history and culture than a part of present day Greek culture. *See* Merryman, *supra* note 46, at 1915-16.

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rules. For example Richard Crewdson argues that cultural property forms a fourth category of property in English law, the other three being real, personal, and intellectual.[222] And an Italian lawyer, Rodata, has stated that:

> "Cultural property" now constitutes a new category of goods. . . . A New form of ownership which fully reflects the inherent value, in various respects, of this new category is needed. . . . The objective should be to introduce a set of new rules which specifically highlight the "cultural" importance of such property and the need for a form of protection that also serves the public interest, which is to conserve and have access to works of art.[223]

Patrick O'Keefe, one of the most prolific writers in the area of cultural property,[224] recognizes the value in steering clear of property concepts altogether. He argues that both moveable and immoveable, tangible and intangible aspects of cultural heritage—cultural property, human remains and folklife—should be governed by the same principles. But as with Crewdson and Rodata, preservation is the central tenet of O'Keefe's "cultural heritage" law.[225] Merryman has also argued that preservation should be the first and foremost goal and principle of cultural property law.[226] But, as previously stated, it must be clear what are our reasons for preservation. Preservation only makes sense if it serves a higher goal. To return to our human remains analogy, the burial of a dead body is not a goal in itself. We go through the process of burying or otherwise respectfully disposing of the remains of our deceased relatives in deference to their memory and as a way of safeguarding human dignity. Preservation of cultural property is appropriate when it is honoring the memory of or reinforcing and protecting the integrity of the culturally affiliated tribe. Neither education nor scientific advancement, goals which are often in conflict with tribal attitudes and which often justify preservation and display, should routinely outweigh the ultimate principle of cultural integrity.

Proceeding on the assumption that our treatment of cultural property should be driven by the integrity of the culture and society most closely associated with the objects in question, who is entitled to possession and what is appropriate treatment? To begin with, whoever bears the responsibility of possession, whether it be an individual or a group, holds such property "only as a sacred trust

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222. Richard Crewdson, *Cultural Property—A Fourth Estate?*, 81 THE LAW SOCIETY'S GAZETTE 126, 129 (1984) (discussing briefly the reasons for establishing a new set of property rules to deal with cultural property).

223. S. Rodata, *Explanatory Memorandum, in* The Art Trade: Report of the Committee on Culture and Education, Doc. No. 1126 (Council of Europe ed., 1988), *as cited in* Patrick O'Keefe, Intellectual Property, Cultural Property, Cultural Heritage: Do These Further Indigenous Interests? 6 (unpublished manuscript, on file with author).

224. *See, e.g.*, 3 LYNDEL V. PROTT & PATRICK J. O'KEEFE, LAW AND THE CULTURAL HERITAGE (1989).

225. O'Keefe, *supra* note 223, at 7.

226. Merryman, *supra* note 164, at 361 (arguing that a plausible solution for determining what to do with cultural property "begins by arranging preservation, truth, and access in declining order of importance, with the corollary that where they conflict the higher controls").

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for the benefit of all who may . . . have an interest in it."[227] Those in possession of such property are more appropriately thought of as guardians or trustees, not property owners. Only those groups which are capable of appreciating and respecting the objects in question in such a way as to best preserve a particular cultural experience should be entitled to custody. This may entail appreciating an object as it was originally intended to be appreciated—as a religious figure, a historical document or a symbol of tribal peace and unity. Thus, as with human remains, the "right" to hold cultural property under a "sacred trust" is contingent on proper care and respect and this may not always mean preservation. As previously stated, preservation is not a value in itself—it is only suitable in those instances where it serves cultural integrity. There may be occasions, as with the Zuni War Gods, when the most respectful treatment is destruction or neglect. Whether destruction, preservation, secrecy, or public display is most appropriate will differ from case to case and object to object.

Cultural integrity will, in most cases, be best served by returning cultural property to those who were closest to it—its original custodians and creators. Again, this is similar to the treatment of human remains in that a surviving spouse or the next of kin are presumed to be the most appropriate trustees.[228] This is particularly true of those objects for which there is either a special use, a particular mode of appreciation, or a unique context which the world at large is not capable of replicating. The Zuni War Gods, for example, are more than just intriguing works of art; to the Zuni, they are essential features of their religious and spiritual life.[229] This can be said of most Native American cultural property. If destruction or concealment reinforces a cultural practice or belief and thus strengthens the culture then we should not prevent such destruction or concealment. Both the Zuni and the non-Indian population benefit by permitting the concealment of the War Gods. The Zuni benefit because they are able to practice their faith and thus strengthen their community without fear of interference from non-Zuni. The non-Zuni population benefits in that we have come just a little bit closer to understanding and respecting foreign practices and beliefs.

There are and will continue to be, however, circumstances in which return is not appropriate, just as there are circumstances in which human remains should be tended to by individuals other than "those most intimately and closely connected with the deceased by domestic ties."[230] If destruction is part of a practice and belief that has long since disappeared into the past or if the object

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227. *Id.* at 243; *see also* Larson v. Chase, 50 N.W. 238, 239 (Minn. Sup. Ct. 1891) ("[T]his right is in the nature of a sacred trust . . . and, if she should neglect or misuse it, of course the courts would have the power to regulate and control its exercise.").

228. *See, e.g., Larson*, 50 N.W. at 238-39:

> [A]ll courts now concur in holding that the right to the possession of a dead body for the purposes of decent burial belongs to those most intimately and closely connected with the deceased by domestic ties, and that this is a right which the law will recognize and protect. . . . [A]nd, if she should neglect or misuse it, of course the courts would have the power to regulate and control its exercise.

229. *See* Nichols et al., *supra* note 30, at 33.

230. *Larson*, 50 N.W. at 238-39.

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in question is no longer revered in a culturally specific way, then preservation and proper display will best serve cultural integrity by providing an educational and aesthetic experience. In this eventuality, the individual or group best capable of preservation and serving the ongoing public interest in cultural integrity should be entitled to custody. This may very well be a culturally affiliated tribe but not necessarily so. However, it may be important to give culturally affiliated tribes the opportunity to preserve and properly display an object if we understand cultural integrity to be a dynamic, rather than a static notion. We should preserve cultural objects not just for the sake of enshrining the beauty and wonder of a tribe's past, but also as a way to shape and strengthen the tribe's future. To the extent that cultural property resonates for culturally affiliated tribes and in doing so evokes and strengthens the cultural forces from which the object emerged, we can more faithfully serve the goal of cultural integrity by insuring culturally affiliated tribes are close to their objects. It may not always be practical or even possible to divert funds from the museums which at present house and display Native American cultural property to culturally affiliated tribes, but if we are to take seriously our responsibility to protect the integrity of cultures, we should consider this option.[231]

There are, needless to say, problems with this approach, not the least of which is determining when a specific tribal claim for possession of cultural property is legitimate and when it may lead to the needless deterioration of an object that should otherwise be preserved. How are we to determine when such claims are legitimate and who is to make such decisions? This is bound to be less of a problem than it might appear. Native American tribes have no incentive to seek the return of objects given the restraint on alienation inherent in this non-property approach unless they truly desire to possess the object for cultural reasons and are capable of preserving it. Given that the preservation of an object is as much, if not more, in the interest of the culturally affiliated tribe as it is in the general public, we must learn to have faith in requests for repatriation. A desire for greater independence and sovereignty may at times influence tribes to make false claims under the cultural integrity approach but there is no reason to think that this will be a significant enough problem that we should distrust claims for repatriation. If a tribe is incapable of caring for its cultural patrimony, it makes more sense for it to use its increased negotiating power, evidenced in the passage of NAGPRA, to negotiate a lucrative settlement for the destruction and alienation of its culture rather than the actual return of the property. There are in fact many examples of tribes consenting to museum custody of their cultural property. For example, the Zuni successfully repatriated their War Gods from museums across the country but refused an offer from the Museum of New Mexico for the return of Zuni remains.[232] When the Nambe were approached by the Museum of New Mexico with a repatriation offer, they too decided that culturally significant objects, including two important sacred items, should remain in the museum for curatorial care until the tribe could itself care for

231. NAGPRA does provide grants to culturally affiliated tribes to assist them in repatriating their cultural patrimony. 25 U.S.C. § 3008(a) (1994).

232. Livesay, *supra* note 81, at 297-98.

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them.[233] A group of Hopi elders visited a collection of Hopi kachinas in the Field Museum of Natural History and instructed the curators on proper care of the kachinas but did not request their return.[234] Culturally affiliated tribes have nothing to gain and everything to lose by requesting the return of cultural property that they desire to preserve but do not have the resources to do so and thus there is no substantial reason for distrusting claims for repatriation.

Another obvious gap in this analysis is an explanation of the significance of cultural integrity. Why should the preservation and vitality of a culture trump property rights? This is obviously a huge issue which is well beyond the scope of this Article and I will not attempt to provide a satisfactory answer at this time. Suffice it to say that I do think the vitality of a culture is morally relevant and in some circumstances worthy of encroaching on that most sacred of individual rights, property rights.[235]

I suspect there are other problems with the cultural integrity approach. I have outlined it here as simply one possible, relatively unexamined justification for the repatriation of cultural property which is worthy of further exploration. It is similar to the previous explanation focusing customary rights in that it operates on the assumption that there is a peculiar connection between Native Americans and their cultural property which provides a sufficient justification for possession and control. But unlike the previous approach it is not based on absolute ownership rights. Tribes are granted possession merely as the holders of a "sacred trust." Possession and control is contingent on their ability to properly care for the object in question and in doing so enhance the integrity of Native American cultures. It is cultural integrity, not ownership rights, which drives this final justification for repatriation.

VI. CONCLUSION

Any full exploration of the repatriation of cultural property should account for, if not rely on, Native American perspectives. But one of the problems of dealing with the issue of repatriation is that it will almost inevitably involve conflicting approaches, both legal and moral. Whether we focus on international disputes, or, as in the case of NAGPRA, domestic controversies over ownership of cultural property, conflicting legal and moral positions will be argued. The main purpose of this Article has been to examine whether common law legal principles and theories of ownership provide any tools for understanding Native American claims to ownership and NAGPRA's endorsement of repatriation.

We have discovered that the most obvious explanation, compensation, is neither the strongest nor the most fitting, despite the fact it was apparently foremost in the minds of the legislators who passed NAGPRA. If we assume that those in possession have over time developed strong claims, the mere fact that the property was improperly removed from the tribe at some distant point in the

233. *Id.* at 298-99.

234. Storch, *supra* note 182.

235. One need not even have a communitarian view of the world to support such an approach. *See* WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE 162-81 (1991).

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past is not alone sufficient to justify repatriation. It is possible to construct a compensation argument supporting Native American entitlement but it depends on identifying a special connection between tribes and their cultural patrimony. Our desire to rectify the wrongs committed against Native Americans is to say the least a worthy objective but insufficient for the actual return of the property in the absence of further evidence regarding the significance of cultural patrimony to Native American tribes.

In the second Part, we explored reasons for assuming that Native American tribes never lost their ownership rights in cultural patrimony—NAGPRA merely recognizes that they are the rightful owners and have been all along. Efficiency considerations, in particular ethnic externalities, provide a straightforward justification for recognizing Native American ownership rights but this again depends on identifying a unique connection between tribes and their cultural patrimony in order to support the conclusion that the value of the property is enhanced when owned by Native American tribes. In an attempt to isolate this unique connection, we first looked at the possibility that cultural patrimony is constitutive of tribal identity and found that this argument is neither coherent in its application nor does it justify actual possession. The most convincing explanation can be found in the doctrine of community customary rights. This doctrine provides an answer to why such property is more valuable to specific groups and thus appropriately owned by tribal communities. Cultural patrimony is, in accordance with this approach, a form of inherently public property in that its value is enhanced by being accessible to a well-defined subset of the public, namely a culturally affiliated tribe. The unique socializing and community-building effect of the property justifies restricting ownership to culturally affiliated tribes.

The final explanation for the repatriation provisions states that cultural patrimony is not really owned by anyone, in the full, paradigmatic sense of the concept of ownership. Our legal and moral attitudes toward human remains elucidate this otherwise rather hazy proposition. Similar to human remains, possession and control of cultural patrimony are granted to those groups or individuals who are reliable guardians—those who can attend to it in a way which enhances cultural integrity, whether that entails destruction or preservation. Culturally affiliated tribes will most often be the best custodians but not always. Repatriation is thus conditioned on tribes asserting an ongoing particular tradition or belief associated with the property in question or proving they are capable both financially and otherwise of adequately caring for it.

Thus there are two justifications that we can turn to when attempting to understand repatriation. Both of them highlight the unique relationship between Native Americans and their cultural property and draw on common law traditions. Common law and Anglo-American theories of ownership may in the end be irrelevant to the question of Native American ownership and the significance of cultural property to tribal life but it is useful to know that they can offer us some guidance when seeking to justify repatriation.

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