

# EXPANDING THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT TO THE U.S. TERRITORIES

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*The U.S. Native American Graves Protection and Repatriation Act (“NAGPRA”) protects cultural objects and human remains of federally recognized Indian tribes, Native Hawaiians, and Native Alaskans. However, NAGPRA does not apply outside the fifty states, meaning indigenous people in the U.S. Territories are not covered by this landmark legislation. The indigenous people of the five inhabited Territories—Guam, Puerto Rico, the Northern Mariana Islands, the U.S. Virgin Islands, and American Samoa—face similar issues regarding dispossession of human remains and cultural property to those faced by indigenous people within the fifty states. NAGPRA is structured largely on the government-to-government relationship between the federal government and Indian tribes, a relationship which does not exist between the federal government and the indigenous people in Hawaii and the Territories. This note proposes amendments to NAGPRA that would extend its application to the U.S. Territories, modeled on the framework that exists currently in Hawaii.*

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### I. BACKGROUND

In an August 2021 memo, Pentagon officials wrote to local preservation authorities in Guam, “We kindly remind you that a local State Historic Preservation Office may not impose local statutes on Federal agencies.”<sup>1</sup> These authorities had expressed concerns about a military base that was to be built on top of ancient burial grounds of the indigenous Chamorro (or “CHamoru”) people.<sup>2</sup> Previous base expansion in Guam had unearthed Chamorro artifacts and human remains that the military had removed without indigenous consent.<sup>3</sup> Removal of human remains and cultural items by a federal entity without tribal consent, consultation, or notification could not occur in the fifty states, which are covered under the Native American Graves Protection and Repatriation Act (“NAGPRA”).<sup>4</sup>

Indian tribes and Native Hawaiian organizations in the fifty states have some legal protections for their cultural items and human remains through NAGPRA.<sup>5</sup> Congress passed this landmark piece of legislation in 1990, and it provides ownership rights for indigenous cultural items and human remains excavated or discovered on federal or tribal lands after 1990.<sup>6</sup> NAGPRA also promulgates regulations on federal agencies and institutions, as well as on state and local

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1. Letter from Sarah Diebel, Env’t Flight Chief, Dep’t of the Air Force, to Patrick Lujan, Acting State Hist. Pres. Officer, Dep’t Parks and Recreation (Aug. 20, 2021) (on file with author).

2. Chris Gelardi, *The US Military Is Bulldozing Sacred Indigenous Sites on Guam*, NATION (Dec. 22, 2021), <https://www.thenation.com/article/activism/guam-military-indigenous/> [<https://perma.cc/Z7N2-FMTH>].

3. *Id.*

4. H.R. 5237, 101st Cong. § 3(c) (1990).

5. *Id.*

6. 25 U.S.C § 3002 (a).

government agencies receiving federal funds, including institutions of higher learning.<sup>7</sup>

One major limitation of NAGPRA is its jurisdictional language. The Congressional Bill does not contain any references to the U.S. Territories, so regulations have consistently excluded them.<sup>8</sup> The Department of the Interior, the agency tasked with enacting the regulations, has stated that “[t]he rule of statutory construction stipulates that Federal law applies to United States Territories only when specifically indicated.”<sup>9</sup> Current regulations define “United States” as “the 50 States and the District of Columbia.”<sup>10</sup> The exclusion of the U.S. Territories from NAGPRA has been given scant consideration by the public. Neither the House nor Senate Reports on the legislative history of NAGPRA contain any references to the Territories.<sup>11</sup> In the initial 1995 rulemaking process, only three out of eighty-two public comments asked about the application of NAGPRA to the Territories.<sup>12</sup> In the 2023 revision process, only one out of 181 public comments mentioned the issue of the Territories.<sup>13</sup> The lack of attention given to the Territories in the legislative process mirrors the lack of discussion around them in American society generally.<sup>14</sup>

NAGPRA’s exclusion of the Territories has led not only to the current controversy in Guam, but also to controversies in the other Territories. This Note focuses on the five inhabited U.S. Territories: Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa. It argues that NAGPRA should apply in these jurisdictions. Much like indigenous people in the fifty states, indigenous groups in the U.S. Territories face similar cultural property theft from federal entities, museums, and private art dealers.

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7. *Compliance*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nagpra/compliance.htm#:~:text=Federal%20agencies%2C%20the%20State%20of,on%20Federal%20or%20Tribal%20lands> [<https://perma.cc/JDX9-LU49>] (last updated Oct. 4, 2024).

8. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (1990).

9. Native American Graves Protection and Repatriation Act Regulations, 60 Fed. Reg. 62,134 (Dec. 4, 1995) (to be codified at 43 C.F.R. pt. 10).

10. 43 C.F.R. § 10 (2023).

11. H.R. REP. NO. 101-877 (1990); S. REP. NO. 101-473 (1990) [<https://perma.cc/V2PN-28J3>] (last updated May 7, 2024).

12. Native American Graves Protection and Repatriation Act Regulations, 60 Fed. Reg. at 62,134, *supra* note 9.

13. See Robert S. Peabody Inst. of Archaeology, Comment Letter on Proposed Revision of 43 CFR Part 10 (Jan. 26, 2023), <https://www.regulations.gov/comment/NPS-2022-0004-0129> [<https://perma.cc/SCY4-DS4S>].

14. See generally DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A SHORT HISTORY OF THE GREATER UNITED STATES* (2019) (highlighting the history of the United States’ often-forgotten overseas possessions).

Cultural property protections for indigenous people are of utmost importance as they safeguard the rich heritage and traditions that have been passed down through generations and that have been suppressed by forced assimilation policies. NAGPRA helps to counteract the historical injustices of such displacement and forced assimilation. Such protections need to extend to the Territories, which currently exist in a legal limbo where they are part of the “United States” when it is convenient and not part of the “United States” when it is inconvenient.<sup>15</sup> The indigenous people of the Territories are marginalized not only by the legacies of colonialism, but also by political disenfranchisement.<sup>16</sup> Residents of the Territories cannot vote in federal elections and can only send one non-voting delegate to Congress. Furthermore, no indigenous people in the Territories are federally recognized.<sup>17</sup>

In 2011, the United States announced support for the United Nations Declaration on the Rights of Indigenous Peoples (“the Declaration”).<sup>18</sup> Article 12 of the Declaration states that indigenous people have “the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains” and that “States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with the indigenous peoples concerned.”<sup>19</sup> Expanding NAGPRA to cover the indigenous people in the Territories would be the first step the federal government could take to show its commitment to the ideals in the Declaration.

Past and present NAGPRA scholarship has been limited to its application to Native Hawaiians and federally recognized tribes, while scholarship on indigenous issues in the U.S. Territories has only mentioned NAGPRA in passing. This Note will discuss the importance of applying NAGPRA to the U.S. Territories and outline possible ways of enacting the legislation in those jurisdictions. Section II of this Note introduces the legal theories surrounding cultural heritage and gives a brief overview of the history of indigenous cultural heritage

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15. *Id.* at 10.

16. See generally DAVID VINE, *BASE NATION: HOW U.S. MILITARY BASES ABROAD HARM AMERICA AND THE WORLD* (First Skyhorse Publishing 2017) (2015) (discussing the disenfranchisement of the Pacific Island Territories and indigenous resistance to colonialism).

17. *Bureau of Indian Affairs: Tribal Leaders Directory Select by BIA Region*, BUREAU OF INDIAN AFFS., <https://experience.arcgis.com/experience/20ad1b9c9f4a40a586f3a4c72abe30bf> [<https://perma.cc/MDB7-R7AE>].

18. *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEP’T OF STATE (Jan. 12, 2011), <https://2009-2017.state.gov/s/srgia/154553.htm> [<https://perma.cc/L2MT-5E4S>].

19. G.A. Res. 61/295, Annex (Sept. 13, 2007).

dispossession in the fifty states. Section III discusses cultural heritage issues in the U.S. Territories and argues why NAGPRA needs to be extended to those areas. Section IV examines the text of NAGPRA, litigation since its passage in 1990, and existing cultural heritage laws in the Territories. Lastly, the Note proposes recommendations for the expansion of NAGPRA to the Territories and how to organize indigenous entities in those regions for the regulatory process, modeled on existing NAGPRA regulations in Hawaii.

## II. CULTURAL HERITAGE THEORIES AND HISTORICAL INJUSTICES

### A. *Theories of Cultural Property*

The legal theories underlying cultural property are rooted in the recognition of the unique value and significance of cultural artifacts, traditions, and practices.<sup>20</sup> Cultural heritage refers to the collective inheritance of a society, encompassing tangible artifacts such as buildings, artworks, and archaeological sites, as well as intangible aspects like languages, rituals, and knowledge systems.<sup>21</sup> It acknowledges that these elements contribute to the identity, sense of belonging, and collective memory of a community or nation.<sup>22</sup> In a general sense, cultural patrimony emphasizes communal ownership of cultural items by specific groups or communities, often rooted in such items' historical, ancestral, or indigenous connections to a given community.<sup>23</sup> It recognizes the need to protect cultural heritage and restore it to its rightful owners, ensuring that it is safeguarded and appropriately managed for the benefit of present and future generations.

The vesting of title in the proper group is crucial due to historical exploitation that led to the pillaging of cultural objects from their original custodians.<sup>24</sup> Vesting title in the proper group enables the cultural group to preserve and maintain its cultural heritage in a manner

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20. See generally *Defining cultural heritage and cultural property*, BLUE SHIELD INT'L (Feb. 11, 2020), <https://theblueshield.org/defining-cultural-heritage-and-cultural-property/> [https://perma.cc/Z6RC-AALP] (discussing the formation of customary international cultural heritage law).

21. *What is Intangible Cultural Heritage?*, UNESCO, <https://ich.unesco.org/en/what-is-intangible-heritage-00003> [https://perma.cc/8R8P-8WHD] (last visited July 30, 2023).

22. Michael Buckland, *Cultural Heritage (Patrimony): An Introduction*, in RECORDS, ARCHIVES AND MEMORY: SELECTED PAPERS FROM THE CONFERENCE AND SCHOOL ON RECORDS, ARCHIVES AND MEMORY STUDIES, UNIVERSITY OF ZADAR, CROATIA, MAY 2013 11 (Mirna Willer et al. eds., 2015).

23. *Id.* at 12.

24. See generally *Stolen Culture*, THE UNIV. OF TEX. AT DALLAS, <https://arthistory.utdallas.edu/videos/stolen-culture/> [https://perma.cc/2KAC-AE48] (last visited Mar. 3, 2025) (discussing the importance of provenance research due to historical looting).

that aligns with its values, traditions, and knowledge systems.<sup>25</sup> Local communities are often best equipped to protect their own heritage, ensuring its preservation or proper use.<sup>26</sup> This approach preserves self-determination among communities, strengthening their cultural identity and promoting the continuity of their practices.<sup>27</sup> This point is especially important for indigenous populations and Global South countries. Ultimately, by recognizing and respecting the rights of the proper group, we can begin to rectify the damage of cultural heritage dispossession.

In recent decades, there has been an increasing push to return artifacts and artwork to their rightful owners.<sup>28</sup> The artifact repatriation movement is driven by a growing recognition of the historical injustices of colonialism and imperialism.<sup>29</sup> The movement seeks redress by advocating for the return of artifacts to their countries of origin or to the cultures from which they were taken. The repatriation movement is most known in the international context, such as many items controversially retained by the British Museum in London.<sup>30</sup> The museum has long resisted returning artifacts that were questionably obtained during the 1800s, most notably the Elgin Marbles of Greece, the Benin Bronzes of Nigeria, and the Rosetta Stone of Egypt.<sup>31</sup>

The discourse surrounding repatriation revolves around two contrasting ideologies: cultural nationalism and cultural internationalism.<sup>32</sup>

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25. Advisory Council on Historic Preservation, *Policy Statement on Burial Sites, Human Remains, and Funerary Objects* 3 (June 30, 2023), <https://www.achp.gov/sites/default/files/policies/2023-07/PolicyStatementonBurialSitesHumanRemainsandFuneraryObjects30June2023.pdf> [<https://perma.cc/23QE-ZKRY>].

26. *Id.* See also *Policy Issues: Cultural Protection*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/section/policy/portfolios/cultural-protection> [<https://perma.cc/D28U-BD4T>] (last visited Mar. 11, 2025).

27. U.N. Hum. Rts. Council, *Report of the independent expert in the field of cultural rights, Farida Shaheed*, ¶ 78, UN Doc. A/HRC/17/38 (Mar. 21, 2011), <https://www.right-docs.org/doc/a-hrc-17-38/> [<https://perma.cc/B8TN-FPU5>].

28. Annie Slaughter, *Why Do the World's Top Museums Still Resist Repatriation?*, CULTURED (Feb. 2, 2023), <https://www.culturedmag.com/article/2023/02/08/museum-repatriation-politics-indigenous-artifacts> [<https://perma.cc/L493-KGHT>].

29. Suyin Haynes, *How Artists and Curators Think We Can Repatriate Colonial Artifacts*, TIME (Oct. 20, 2020), <https://time.com/5901806/african-artifacts-museums/> [<https://perma.cc/25WU-DFZN>].

30. Yoonji Han, *10 Cultural Artifacts the British Empire Took from Other Nations, from the Benin Bronzes to the Koh-i-Noor Diamond*, INSIDER (Jan. 1, 2023), <https://www.insider.com/british-empire-stole-cultural-artifacts-colonialism-repatriation-parthenon-benin-rosetta-2022-9> [<https://web.archive.org/web/20241123020449/https://www.businessinsider.com/british-empire-stole-cultural-artifacts-colonialism-repatriation-parthenon-benin-rosetta-2022-9>].

31. *Id.*

32. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 846 (1986).

Cultural nationalism perceives cultural artifacts as possessing a distinct national identity and strongly advocates for their return to their countries or cultures of origin.<sup>33</sup> Cultural nationalism is the position taken by source countries, which are countries where the supply of desirable cultural art and artifacts exceeds the internal demand.<sup>34</sup> Source countries are often former colonies such as Egypt, Nigeria, Mexico, and India.<sup>35</sup> Contested artifacts were often removed from their country of origin during colonial wars.<sup>36</sup> Source countries combat the illicit antiquities trade by enacting export restrictions or nationalizing ownership of antiquities.<sup>37</sup> For example, in 1972, Mexico passed a law nationalizing undiscovered archaeological artifacts, thus automatically vesting ownership in the Mexican state.<sup>38</sup> Egypt, Greece, and Turkey also have similar national ownership laws.<sup>39</sup> This nation-specific viewpoint on cultural property is embodied in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, which the United States joined in 1983.<sup>40</sup> The Convention was passed in 1970 to address the illicit antiquities trade, specifically by stemming the flow of antiquities from source nations by limiting their importation by market countries.<sup>41</sup>

A competing philosophy is cultural internationalism.<sup>42</sup> This approach sees cultural property as an integral part of human history, transcending geographical boundaries, and is embodied in international treaties like the Convention for the Protection of Cultural Property in the Event of Armed Conflict.<sup>43</sup> Market countries often take a cultural internationalist view.<sup>44</sup> In market countries, the demand for foreign

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33. *Id.* at 832.

34. *Id.*

35. *Id.*

36. Haynes, *supra* note 29.

37. Merryman, *supra* note 32, at 832. *See also* Eleanor Iris Gartstein, *The Pursuit of Preservation through Patrimony Laws*, BERKELEY J. INT'L L. (Apr. 7, 2024), <https://www.berkeleyjournalofinternationallaw.com/post/the-pursuit-of-preservation-through-patrimony-laws> [<https://perma.cc/M5JQ-9GES>].

38. *United States v. McClain*, 545 F.2d 988, 992 (5th Cir. 1977).

39. Patty Gerstenblith, *The Legal Framework for the Prosecution of Crimes Involving Archaeological Objects*, 64 U.S. ATT'Y BULL. 5, 5 (Mar. 2016).

40. Merryman, *supra* note 32, at 832. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, <https://www.unesco.org/en/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and-transfer-ownership-cultural#item-1> [<https://perma.cc/8W4D-NGAL>].

41. Merryman, *supra* note 32, at 843.

42. *Id.* at 831.

43. *Id.* at 832.

44. *Id.*



artifacts exceeds supply, thus resulting in imports from source nations.<sup>45</sup> Market nations are typically western countries who are current or former colonial powers. The British Museum, for instance, justifies its continuing retention of foreign cultural property by saying these objects will be seen and appreciated by more viewers in London than they would if they were returned to their countries of origin.<sup>46</sup> In the last several decades, the tide has shifted in the United States towards favoring cultural nationalism, leading to the establishment of mechanisms facilitating repatriation and the prevention of unauthorized exports.<sup>47</sup> While the United States is typically considered a market country for historical art and artifacts, the international demand for Native American cultural items has also made the United States a source country.<sup>48</sup>

In the arts and antiquities market, ensuring proper chain of title is referred to as “provenance.”<sup>49</sup> Art provenance refers to the documented history and ownership of a work of art, tracing the history of its ownership from creation to the present.<sup>50</sup> It serves as a crucial tool in understanding the authenticity, value, and cultural significance of artworks and artifacts.<sup>51</sup> Provenance can consist of documents such as historic invoices of sales between buyers and sellers, documentation in catalogues, pictures of the art in former owners’ homes, or photos of the work with the artist and past owners.<sup>52</sup> Photographic provenance has been used to stop auctions of cultural property in the past.<sup>53</sup> For example, when a Sioux war shirt came up for bidding in 2013, the sale was stopped when tribal officials presented a photograph that appeared to show the item being worn by a Sioux Chief named Little Thunder.<sup>54</sup>

A persisting conflict in the art and antiquities world involves tribal versus western notions of property rights. Western views of property

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45. *Id.*

46. Eddy Frankel, *Should London Museums Return Their Stolen Colonial Artefacts?*, TIMEOUT LONDON (Nov. 11, 2022), <https://www.timeout.com/london/art/should-london-museums-return-their-stolen-colonial-artefacts> [https://perma.cc/M3KC-UCE4].

47. Merryman, *supra* note 32, at 846.

48. *Id.* at 832.

49. Brian Ng, *Why Provenance Matters to Art Collectors*, ARTSY (July 26, 2022), <https://www.artsy.net/article/artsy-editorial-provenance-matters-art-collectors> [https://perma.cc/3ARJ-A8AC].

50. *Id.*

51. *Id.*

52. *Id.*

53. David Murray, *Trade in Native American Antiques Can Be Tricky*, GREAT FALLS TRIB. (Mar. 15, 2015), <https://www.greatfallsbtribune.com/story/news/local/2015/03/15/trade-native-american-antiques-can-tricky/24825307/> [https://perma.cc/V6VE-QP5J].

54. *Id.*



law are heavily influenced by John Locke's labor theory of private property and Jeremy Bentham's principle of wealth maximization.<sup>55</sup> In the United States, dominant European-American society transformed Native cultures into "property," giving private entrepreneurs the legal ability to sell Native cultural objects.<sup>56</sup> Private dealers may see an object for its aesthetic or commercial value, while many tribal groups see their cultural items as living beings.<sup>57</sup> At a Senate Committee on Indian Affairs hearing in 2016, Governor Kurt Riley of the federally-recognized Pueblo of Acoma tribe testified that "[t]he Pueblo asks this Committee to not to [sic] think of these sacred and ceremonial objects in property right terms like title and 'ownership.' If these objects are merely treated like other pieces of property, their true significance is lost. Instead, it is important to move beyond the Western view of property rights and consider this issue as one of human and cultural rights, unique to the Native people of this country."<sup>58</sup>

### *B. History of Indigenous Cultural Dispossession in the Fifty States*

The looting of indigenous cultural objects began with the first European settlers who arrived in the Americas.<sup>59</sup> English colonists in Jamestown first dug up Native American graves as intelligence gathering and then later as intentional erasure of the tribe.<sup>60</sup> During the first Anglo-Powhatan War, English colonists intentionally destroyed Powhatan burial sites that held bodies of tribal leaders.<sup>61</sup> In an account of the early days of Jamestown, Virginia Colony governor George Percy wrote, "We beat the savages out of the island, burned their houses, ransacked their temples, took down the corpses of their dead kings from their tombs and carried away their pearls, copper and bracelets which they do decorate their kings funerals."<sup>62</sup>

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55. Sherally Munshi, *Dispossession: An American Property Law Tradition*, 110 GEO. L.J. 1021, 1024 (2022).

56. Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 299, 313 (2012).

57. David Smith, *Native Americans Implore France to Halt Artifact Sale*, GUARDIAN (May 25, 2016), <https://www.theguardian.com/us-news/2016/may/25/native-american-france-sacred-objects-auction-smithsonian> [<https://perma.cc/J4N9-JJDP>].

58. *Field Hearing on the Theft, Illegal Possession, Sale, Transfer and Exportation of Tribal Cultural Objects Before the S. Comm. on Indian Affs.*, 114th Cong. 3 (2016) (statement of Kurt Riley, Governor, Pueblo of Acoma).

59. Vincent Gabrielle & Joshua Eaton, *How Indigenous Grave Robbing Took Hold in What's Now New England: 'Astonishing How Destructive It Was,'* CT INSIDER (Mar. 3, 2023), <https://www.ctinsider.com/news/article/indigenous-grave-robbing-new-england-17810749.php> [<https://perma.cc/R2B4-5TRR>].

60. *Id.*

61. *Id.*

62. *Id.*

Looting of Native American artifacts took on a different tone in the 1800s. Phrenology, now discredited as a racist pseudoscience, became a popular field of study among western anthropologists in the late-1800s.<sup>63</sup> Phrenologists hypothesized that various skull measurements were indicative of mental ability and character traits and were driven to develop racial theories that promoted European superiority.<sup>64</sup> Phrenology in the United States was pioneered by a Philadelphia scientist, Dr. Samuel Morton, often called the father of American anthropology.<sup>65</sup> Morton procured hundreds of Native American and African American skulls for the purposes of “proving” his hypothesis that those of German and English ancestry were superior to all other races.<sup>66</sup> Morton’s skull collection remains at the Penn Museum, which began the repatriation process in 2020.<sup>67</sup>

The U.S. military’s disturbance of indigenous remains in Guam in 2021 is not the first incident of its kind.<sup>68</sup> Native skull collection became official U.S. Army policy in the 1860s, as it also searched for scientific support of supposed Native American inferiority.<sup>69</sup> In 1868, the U.S. Surgeon General’s office issued a memorandum ordering Army medical officers stationed in “Indian country or in the vicinity of ancient Indian mounds or cemeteries in the Mississippi Valley or the Atlantic region” to gather Native American remains for study.<sup>70</sup> Remains were gathered from ancient burial sites and in the aftermath of massacres against Native communities.<sup>71</sup> Some studies conclude that up to two million deceased indigenous people have been “dug

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63. *Id.*

64. Akanksha Singh, *What Skulls Told Us*, JSTOR DAILY (Nov. 7, 2023), <https://daily.jstor.org/what-skulls-told-us/> [<https://perma.cc/S354-FG32>].

65. *Morton Crania Collection*, UNIV. OF PA. MUSEUM OF ARCHAEOLOGY & ANTHROPOLOGY, <https://www.penn.museum/sites/morton/> [<https://perma.cc/M6MS-7N9G>] (last updated Dec. 30, 2024). See also Jonathan Marks, *On Demarcation*, HIST. OF ANTHROPOLOGY REV. 45 (2021), <https://histanthro.org/news/observations/on-demarcation/> [<https://perma.cc/P77L-F9GN>].

66. *Morton Crania Collection*, *supra* note 65. See also Lizzie Wade, *The Ghosts in the Museum*, SCIENCE (July 8, 2021), <https://www.science.org/content/article/racist-scientist-built-collection-human-skulls-should-we-still-study-them> [<https://perma.cc/JK27-PELG>].

67. *Morton Crania Collection*, *supra* note 65.

68. Gabrielle & Eaton, *supra* note 59.

69. Margaret Jacobs, *A Long American Tradition*, LAPHAM’S Q. (Oct. 25, 2021), <https://www.laphamsquarterly.org/roundtable/long-american-tradition> [<https://perma.cc/3Y98-QTA3>].

70. *Id.*

71. *Id.*

up from their graves for storage or display by government agencies, museums, universities, and tourist attractions.”<sup>72</sup>

By the 1880s, the reservation system was firmly established.<sup>73</sup> As the American “frontier” closed, a fascination with indigenous cultures emerged among White Americans and Europeans.<sup>74</sup> As Native Americans were no longer perceived as a threat to White settlers, their cultural artifacts became objects of curiosity and fascination rather than fear.<sup>75</sup> It is a common trope that the value of artwork rises when the artist dies, and a similar sentiment fueled a new demand for Native American artwork and artifacts. The perception of Native Americans as a “disappearing” culture fueled a surge of interest from art collectors and museums.<sup>76</sup> This shift in perception perpetuated the idea that acquiring and studying Native American artifacts was a way to document a vanishing culture, leading to extensive looting of archeological sites and contributing to the theft of cultural objects.<sup>77</sup>

In the 1900s, growing urbanization meant the rise of real estate development. Several judicial decisions allowed for the desecration of Native burial grounds by real estate developers.<sup>78</sup> In 1898, the Supreme Court of Ohio ruled in *Carter v. City of Zanesville* that a Native burial site was considered “abandoned” because no further burials had been done for a certain amount of time.<sup>79</sup> This abandonment reasoning is problematic when applied to Native peoples who were often forcibly relocated.<sup>80</sup> In 1971, the Ohio Fourth District Court of Appeals in *State v. Glass* held that older skeletal remains were not protected by an Ohio grave-robbing statute, thus leaving Native remains as the only unprotected type of remains.<sup>81</sup> In *Wana the Bear v. Community Construction*, housing developers in California in 1979 unearthed a Miwok burial ground that contained 200 bodies. The California Court of Appeals admitted that the Miwok were “driven out of the area between

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72. *Id.*

73. NICOLAS LAMPERT, A PEOPLE’S ART HISTORY OF THE UNITED STATES: 250 YEARS OF ACTIVIST ART AND ARTISTS WORKING IN SOCIAL JUSTICE MOVEMENTS 49 (2015).

74. *Id.* at 50

75. *Id.*

76. *Id.*

77. *Id.*

78. Jack Trope & Walter Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 46–47 (1992).

79. *Id.* at 47.

80. *Id.*

81. *State v. Glass*, 273 N.E.2d 893, 896–97 (Ohio Ct. App. 1971). See also Trope & Echo-Hawk, *supra* note 78 at 46–47.

1850 and 1870.”<sup>82</sup> Nevertheless, the court sided with the commercial developers, arguing that a the burial site was not a protected “public cemetery” because the site had not been “used by the inhabitants thereof continuously, without interruption, as a burial-ground for five years” as required by an 1854 cemetery protection law.<sup>83</sup> These judicial decisions allowed thousands of Native American remains to be unearthed and removed from sites by real estate developers.<sup>84</sup> Conflicts surrounding indigenous burial sites and large-scale construction projects are still occurring today.<sup>85</sup>

### III. THE NEED FOR FEDERAL CULTURAL PROPERTY LEGISLATION IN THE TERRITORIES

#### A. *Overview of the U.S. Territories*

At a 2009 NAGPRA congressional oversight hearing, Guam’s congressional delegate Madeleine Z. Bordallo asked Department of the Interior official Dan Wenk whether “there have been any discussions at the Department of the Interior on the initiatives within the Native American Graves and Repatriation Act that considers the needs of the indigenous people of the Territories, the U.S. Territories.”<sup>86</sup> Mr. Wenk responded, “I have not personally been engaged in any discussions, and I am sorry that I can’t—I have to believe that there has been, but I can’t tell you that I have been personally.”<sup>87</sup> In his book *How to Hide an Empire*, Professor Daniel Immerwahr notes that the Territories have often intentionally been left out of the American narrative, leading to exchanges like this one that show how often the Territories are an afterthought.<sup>88</sup>

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82. *Wana the Bear v. Cmty Constr., Inc.*, 180 Cal. Rptr. 423, 424 (Ct. App. 1982) (“The Miwoks were no longer using the burial ground in 1873, when title VII, chapter V of the Political Code replaced the 1854 law; therefore, the burial ground was not made a cemetery by the operation of new section 3106.15”).

83. *Id.* at 424–27.

84. *Trope & Echo-Hawk*, *supra* note 78, at 46.

85. See Lucille Sherman, *NC Developers Seek to Build on Land with up to 3,000-Year-Old Native American Remains*, AXIOS (June 10, 2024), <https://www.axios.com/local/raleigh/2024/06/10/native-american-remains-indian-burial-ground-nc-developers> [<https://perma.cc/6VW7-SVG9>].

86. *Native American Graves Protection and Repatriation Act (NAGPRA): Oversight Hearing Before the H. Comm. on Nat. Res.*, 111th Cong. 10 (2009) (statement of Rep. Madeleine Z. Bordallo, Member, H. Comm. on Nat. Res.).

87. *Id.* (statement of Dan Wenk, Deputy Director, Dep’t of Interior).

88. See IMMERWAHR, *supra* note 14, at 13.

The five inhabited U.S. Territories are Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.<sup>89</sup> Puerto Rico and the Virgin Islands are in the Caribbean and were home to the Taíno people.<sup>90</sup> Guam, the Northern Mariana Islands, and American Samoa are located in the Pacific Ocean. Guam and the Northern Mariana Islands are home to the Chamorro and Carolinian people, and American Samoa is home to the Polynesian Samoan people.<sup>91</sup> Guam, Puerto Rico, the U.S. Virgin Islands, and American Samoa have been under United States jurisdiction for more than a century.<sup>92</sup>

Although the Territories entered the American historical narrative at the turn of the 20<sup>th</sup> century, the histories of their indigenous people go back much farther in time. Guam and the Northern Mariana Islands are part of the Mariana Islands chain in the region of Micronesia.<sup>93</sup> Archaeological evidence suggests that the Mariana Islands were settled by people from southeast Asia over 4,000 years ago.<sup>94</sup> The region has been continuously occupied by people who eventually became known as Chamorro and contains a minority community of Carolinian people.<sup>95</sup> Chamorros would eventually develop a matrilineal society based on fishing, agriculture, and trade with Caroline Islanders.<sup>96</sup> Traditional Chamorro homes were built on *latte* stones, cup-shaped stone pillars, which remain an important cultural symbol throughout Micronesia<sup>97</sup> and have received historic designations in Guam.<sup>98</sup> Spanish explorers

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89. *United States Territorial Acquisitions*, BALLOTPEdia, [https://ballotpedia.org/United\\_States\\_territorial\\_acquisitions](https://ballotpedia.org/United_States_territorial_acquisitions) [<https://perma.cc/M9EN-9ZTP>].

90. Robert Poole, *What Became of the Taíno?*, SMITHSONIAN MAG. (Oct. 2011), <https://www.smithsonianmag.com/travel/what-became-of-the-taino-73824867/> [<https://perma.cc/J6U2-DPWE>] (last updated Oct. 5, 2023).

91. *World Directory of Minorities and Indigenous Peoples - Northern Mariana Islands*, REFworld, <https://www.refworld.org/docid/4954ce3c30.html> [<https://perma.cc/CV3X-TGSR>] (last updated May 19, 2024). *History*, NAT'L MARINE SANCTUARY AM. SAM., <https://americansamoa.noaa.gov/learn/history.html> [<https://perma.cc/77Q7-QQ58>].

92. Tom C. W. Lin, *Americans, Almost and Forgotten*, 107 CAL. L. REV. 1249, 1254 (2019).

93. Doug Herman, *A Brief, 500-Year History of Guam*, SMITHSONIAN MAG. (Aug. 14, 2017) <https://www.smithsonianmag.com/smithsonian-institution/brief-500-year-history-guam-180964508/> [<https://perma.cc/LK35-2YV5>].

94. *Id.*

95. James Perez Viernes, *Introducing Guampedia's Micronesian Milestones: A Journey of 4,000 Years*, GUAMPEDIA, <https://www.guampedia.com/micronesia-portal/> [<https://perma.cc/G3W6-W2DS>] (last updated Feb. 17, 2025).

96. Herman, *supra* note 93.

97. VINE, *supra* note 16, at 91.

98. *Letter Details New Latte Site Discovery, Bulldozing at Fena*, KUAM NEWS (July 10, 2019), <https://www.kuam.com/story/40768111/letter-details-new-latte-site-discovery-bulldozing-at-fena> [<https://perma.cc/H595-Y8EC>].

claimed the islands in the 1500s and the indigenous islanders were subsequently decimated by war, forced displacement, and disease.<sup>99</sup>

American Samoa is located in Polynesia, next to the sovereign country of Samoa.<sup>100</sup> Archaeological studies estimate that humans first settled the islands around 3,000 years ago, making Samoans the oldest culture in Polynesia.<sup>101</sup> Artifacts from Samoa's prehistoric period include pottery, stone tools, volcanic glass, fishhooks, and shell ornaments.<sup>102</sup> Samoan society was, and continues to be, based on a collectivist system organized by family units headed by a democratically-elected *matai* (chief).<sup>103</sup> European contact began in 1722 when French and Dutch explorers began trading with the islanders.<sup>104</sup>

Puerto Rico and the Virgin Islands are in the Caribbean and were home to the indigenous Taíno people. Common words in use today like "canoe," "hammock," "barbecue," and "hurricane" are of Taíno origin. Archeological and genetic studies suggest that Taínos are descended from the Arawak tribes of modern-day Venezuela who began voyaging to the Caribbean around 400 B.C.<sup>105</sup> Scholars estimate their population in the Caribbean reached well over three million at the time of first European contact in the 1400s.<sup>106</sup> Spanish explorers described densely settled, well-organized Taíno urban centers.<sup>107</sup> During the 1500s, Christopher Columbus' Spanish settlers forced Taíno men to work in gold mines and colonial plantations, preventing the Taíno community from planting the crops that had fed them for centuries.<sup>108</sup> The Taínos began to starve and die in large numbers from smallpox, measles, and

99. Herman, *supra* note 93.

100. *Samoa vs. American Samoa – What is the Difference?*, VISITING AUSTRALIA (Oct. 3, 2023), <https://www.visiting.com.au/blog/samoa-vs-american-samoa-what-is-the-difference/> [https://perma.cc/4FJA-XAF8].

101. *History*, NAT'L MARINE SANCTUARY AM. SAM., *supra* note 91.

102. US ARMY CORPS OF ENG'RS, HONOLULU DIST., AMERICAN SAMOA FINAL WATERSHED PLAN: CULTURAL RESOURCE ANALYSIS (2022), <https://www.poh.usace.army.mil/Portals/10/docs/Civil%20Works/America%20Samoa%20watershed/06%20Appendix%20E%20-%20AS%20Cultural%20Resources%20Analysis.pdf?ver=nv60I2wRepS02IP2omDsIg%3D%3D&timestamp=1667952521915> [https://perma.cc/A7LT-5EWY].

103. Chara Scroope, *Samoan Culture - Core Concepts*, CULTURAL ATLAS (2017), <http://culturalatlas.sbs.com.au/samoan-culture/samoan-culture-core-concepts> [https://perma.cc/57R4-8YXQ].

104. *History*, NAT'L MARINE SANCTUARY AM. SAM., *supra* note 91.

105. Poole, *supra* note 90. *Ancient Genome Study Identifies Traces of Indigenous "Taíno" in Present-day Caribbean Populations*, UNIV. OF CAMBRIDGE, <https://www.cam.ac.uk/research/news/ancient-genome-study-identifies-traces-of-indigenous-taino-in-present-day-caribbean-populations> [https://perma.cc/MBE2-TH3L].

106. *Id.*

107. *Id.*

108. *Id.*



other European diseases.<sup>109</sup> Spain would rule these islands until the late 1800s.<sup>110</sup>

In 1898, Cuba's war for independence from Spain was greatly harming American business interests, and the United States staged a military intervention after an explosion on a U.S. Navy ship docked in Cuba was blamed on Spain.<sup>111</sup> Newspapers at the time portrayed U.S. incursion into the conflict as a humanitarian intervention, describing Cuba as a damsel in distress and the U.S. as a potential protector.<sup>112</sup> In the aftermath of the Spanish-American war, Spain ceded Guam, Puerto Rico, the Philippines, and operational control over Cuba to the United States.<sup>113</sup> No representatives of Cuba, Guam, Puerto Rico, or the Philippines were consulted in the treaty process.<sup>114</sup>

In 1878, the United States ratified a treaty allowing for the establishment of a naval station on Tutuila, the main island of what is now American Samoa.<sup>115</sup> The region already had a British presence.<sup>116</sup> Throughout the 1880s and 1890s, tensions rose between the Samoans, British, Americans, and Germans before culminating in a series of fatal skirmishes in 1899.<sup>117</sup> The U.S. annexed what is now American Samoa in 1900 through a treaty with Great Britain and Germany.<sup>118</sup> A presidential executive order issued that same year placed American Samoa under military rule until 1951, when administration was transferred to the Department of the Interior ("DOI").<sup>119</sup>

Throughout the latter half of the 1800s, the U.S. had been interested in expanding American economic power in the Caribbean and securing access to the Panama Canal by buying what was then known as the

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109. *Id.*

110. IMMERWAHR, *supra* note 14, at 64–65.

111. *Id.* at 65.

112. *Id.*

113. *Id.* at 72.

114. *Id.*

115. *National Park of American Samoa: World War II*, NAT'L PARK SERV., <https://www.nps.gov/articles/samoawwii.htm> [<https://perma.cc/V5CG-XVQH>] (last updated Apr. 23, 2020).

116. *Id.*

117. *Id.*

118. *Id.* See also *Convention of 1899*, AM. SAM. BAR ASS'N, <https://asbar.org/convention-of-1899/#:~:text=This%20treaty%20was%20entered%20into,all%20future%20misunderstanding%20in%20respect> [<https://perma.cc/6VSR-JYMS>] (last visited Mar. 11, 2025).

119. *History of American Samoa*, BRITANNICA, <https://www.britannica.com/place/American-Samoa/History> [<https://perma.cc/5CK7-A7RX>] (last updated Feb. 17, 2025). *Executive Order 125-A, Placing Certain Islands of the Samoan Group Under the Control of the Navy Department*, AM. SAM. BAR ASS'N (Feb. 19, 1900), <https://asbar.org/executive-order-placing-samoa-under-the-u-s-navy/> [<https://perma.cc/RQ4J-5HKX>].



Dutch West Indies.<sup>120</sup> Purchase was continuously delayed until 1916; fearing imminent German encroachment, the U.S. purchased the Virgin Islands (“V.I.”) from Denmark for 25 million dollars in 1917.<sup>121</sup> The U.S. Virgin Islands were then placed under Navy rule from 1917 to 1931.<sup>122</sup> In 1936, Congress passed the Organic Act of 1936, creating a civilian government for the islanders.<sup>123</sup>

In the aftermath of WWII, the U.S. took control of the Northern Mariana Islands (“NMI”) through a trusteeship pursuant to a U.N. Security Council resolution.<sup>124</sup> The NMI was placed under military rule until 1951 when administration was transferred to the DOI.<sup>125</sup> Amidst international support for decolonization and U.N. criticism of U.S. rule of the Pacific Islands, the U.S. sought to resolve the political future of the NMI.<sup>126</sup> In 1976, the Northern Mariana Islands entered into a commonwealth agreement with the United States.<sup>127</sup>

After the Spanish-American War, the United States had to answer the question of whether people in these newly acquired non-White Territories were citizens.<sup>128</sup> In a series of cases known as the *Insular Cases*, the Supreme Court ruled that full constitutional rights do not apply in the Territories, overturning previous legal precedent that the “Constitution follows the flag.”<sup>129</sup> The judicial opinions referred to people of the Territories as “alien races” and impossible to govern “according to Anglo-Saxon principles.”<sup>130</sup> Although the decisions were based on outdated racist beliefs, the *Insular Cases* remain “good law” in full force today.<sup>131</sup>

The legacy of the *Insular Cases* has rendered the 3.5 million residents of the Territories politically powerless. Residents in all Territories are granted U.S. citizenship at birth, except for American

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120. *Purchase of the United States Virgin Islands, 1917*, U.S. DEP’T OF STATE, <https://2001-2009.state.gov/r/pa/ho/time/wwi/107293.htm> [<https://perma.cc/A6KL-PBDE>].

121. *Id.*

122. *Id.*

123. *Historical Evolution of the Legislature of the United States Virgin Islands*, LEGIS. OF THE V. I., <https://legvi.org/history/> [<https://perma.cc/M5SL-HFT3>].

124. U.N. DEP’T OF POL. AND PEACEBUILDING AFFS., TRUSTEESHIP AND DECOLONIZATION, ISSUE ON THE TRUST TERRITORY OF THE PACIFIC ISLANDS 8–9 (1980).

125. *Id.*

126. *Id.* at 12.

127. *Id.* at 14.

128. IMMERWAHR, *supra* note 14, at 84.

129. *Does the Constitution Follow the Flag?*, HARV. UNIV. PRESS BLOG (May 13, 2025), [https://harvardpress.typepad.com/hup\\_publicity/2015/05/reconsidering-the-insular-cases.html](https://harvardpress.typepad.com/hup_publicity/2015/05/reconsidering-the-insular-cases.html) [<https://perma.cc/E9GK-Z5MV>].

130. H.R. Res. 279, 117th Cong. (2021).

131. IMMERWAHR, *supra* note 14, at 84–85.

Samoans who are considered U.S. “nationals.”<sup>132</sup> Territorial citizens cannot vote in federal elections unless they move to a U.S. state and can only elect a congressional delegate with no voting powers.<sup>133</sup> The Territories are administered by the Office of Insular Affairs at the DOI,<sup>134</sup> except for Puerto Rico, which is administered by the Office of Intergovernmental Affairs at the White House.<sup>135</sup> American Samoa, Guam, and the U.S. Virgin Islands remain on the U.N. Special Committee on Decolonization’s list of Non-Self Governing Territories.<sup>136</sup> Puerto Rico was removed in 1953 after it ratified its own constitution,<sup>137</sup> and the Northern Mariana Islands was removed in 1990 after it attained commonwealth status and the U.N. trusteeship concluded.<sup>138</sup>

Today, the Territories have some of the highest poverty rates in the United States.<sup>139</sup> The Territories do not have consistent access to federal social programs such as Supplemental Security Income and food stamps.<sup>140</sup> Public health studies have found Guam’s Chamorro population has higher levels of psychological distress compared to Guam’s Caucasian population, the difference being attributed to the effects of colonialism.<sup>141</sup> No indigenous people of the Territories are federally recognized, but some have local recognition; the Chamorros are recognized by the government of Guam,<sup>142</sup> and a Taíno revivalist

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132. *Citizenship Status in Territories of the United States*, BALLOTPEDIA, [https://ballotpedia.org/Citizenship\\_status\\_in\\_territories\\_of\\_the\\_United\\_States](https://ballotpedia.org/Citizenship_status_in_territories_of_the_United_States) [https://perma.cc/YP6C-FNR6].

133. *Id.*

134. *Office of the Assistant Secretary for Insular and International Affairs*, DEP’T OF INTERIOR (2018), <https://www.doi.gov/asiia> [https://perma.cc/ALE9-QR95].

135. *Office of Intergovernmental Affairs*, THE WHITE HOUSE, <https://bidenwhitehouse.archives.gov/iga/> [https://perma.cc/7VM7-H9YV] (last visited Mar. 11, 2025).

136. *Non-Self-Governing Territories*, U.N., <https://www.un.org/dppa/decolonization/en/nsgt> [https://perma.cc/7J5G-7SXW] (last visited Mar. 11, 2025).

137. G.A. Res. 742 (VIII), at 26 (Nov. 27, 1953). *List of Former Trust and Non-Self-Governing Territories*, U. N., n.11 <https://www.un.org/dppa/decolonization/en/history/former-trust-and-nsgts> [https://perma.cc/87QR-85UP] (last updated May 9, 2024).

138. *List of Former Trust and Non-Self-Governing Territories*, *supra* note 137.

139. Rosanne Trissler, *Our World 2022: Stepping Forward: National & Regional Demographics*, LA SALLE ACAD. LIBR. GUIDES, <https://lasalle-academy.libguides.com/ourworldpoverty/demographics> [https://perma.cc/K3Y8-AWZD] (last updated Apr. 16, 2023).

140. Karl A. Racine & Leevin T. Camacho, *Dear Supreme Court: 3.5 million Americans in Territories Deserve Same Federal Benefits*, USA TODAY (Nov. 9, 2021), <https://www.usatoday.com/story/opinion/2021/11/09/social-security-puerto-rico-supreme-court-justice/6307011001/> [https://perma.cc/ZVN5-E4UU].

141. Tania J. Bosqui et al., *Ethnic Inequalities in Psychological Distress: A Population Data Linkage Study on the Pacific Island of Guåhån/Guam*, 21 J. IMMIGRANT & MINORITY HEALTH 1026, 1032 (2019).

142. Letter from Frank J. Schacher, Chairman, Chamorro Tribe, to Valerie Curtis, Naval Facilities Eng’g command Pac. (Aug. 24, 2010), <https://ftpcontent.worldnow.com/kuam/custom/news/Public%20docs.pdf> [https://perma.cc/MQG6-V636].

organization is recognized by the government of the U.S. Virgin Islands.<sup>143</sup> Puerto Rico does not currently recognize any indigenous tribes, but some Taíno revivalist organizations have gained status as religious organizations under the Puerto Rico State Department, which allows them to host spiritual ceremonies at certain locations and give public presentations.<sup>144</sup>

Interestingly, because of a lack of federal judicial oversight,<sup>145</sup> American Samoa was able to enact a law banning the sale of land to non-Samoans.<sup>146</sup> Today, over ninety percent of land is communally owned by Samoans and is overseen by local *matai* leaders.<sup>147</sup> The Northern Mariana Islands has a similar land alienation law, allowing land ownership only by those of Chamorro or Carolinian ancestry.<sup>148</sup>

There is no explicit relationship that the U.S. federal government has with any indigenous group in the U.S. Territories. In the lower forty-eight states, the federal government has a trust responsibility towards Native American tribes. The Indian Reorganization Act of 1934 allowed tribes to self-govern with recognition of these sovereign tribes by the federal government.<sup>149</sup> The Supreme Court in *Seminole Nation v. United States* in 1942 stated that the federal government “has charged itself with moral obligations of the highest responsibility and trust” toward Native American tribes.<sup>150</sup> Similar federal recognition rights were extended to Native Alaskans through the Alaska Native Claims Settlement Act of 1971.<sup>151</sup> Unlike the Native American tribes in the continental states,

143. Amy Roberts, *USVI Taino Chief Seeks Members*, ST. THOMAS SOURCE (Apr. 6, 2022), <https://stthomassource.com/content/2022/04/06/usvi-taino-chief-seeks-members/> [https://perma.cc/T439-SW3J].

144. Coraly Cruz Mejías, *Puerto Rican Indigenous Communities Seek Recognition, Return of Their Ancestral Lands*, GLOB. PRESS J. (Oct. 14, 2019), <https://globalpressjournal.com/americas/puerto-rico/puerto-rican-indigenous-communities-seek-recognition-return-ancestral-lands/> [https://perma.cc/5EFC-DPLE].

145. Rose Cuison Villazor, *Indigenous Ownership of Lands and Culture*, PROPERTYPROF BLOG (June 21, 2007), <https://lawprofessors.typepad.com/property/2007/06/indigenous-owne.html> [https://perma.cc/47AL-2K79].

146. AM. SAM. CODE ANN. § 37.0204 (2024).

147. Ben Youngwood, *American Samoa: Can the Home of the Brave Help More Lands Be Free?*, BROWN POL. REV. (Apr. 6, 2022), <https://brownpoliticalreview.org/american-samoa-tribal-sovereignty/> [https://perma.cc/HN6U-2VA4].

148. N. MAR. I. CONST. art. 12, § 1.

149. Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 984.

150. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

151. Pub. L. No. 92-203, 85 Stat. 688 (1971). Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, tit. I, 108 Stat. 4791 (1994) (stating that Alaska Native tribes and villages are “Indian Tribes” in a government-to-government relationship with the United States). See also *Federal Recognition of Alaska Tribes and Relations with the State of Alaska*, UNIV. OF ALASKA FAIRBANKS, <https://www.uaf.edu/tribal/academics/112/unit-4/federalrecognitionofalaskatribesandrelationswiththestateofalaska.php>

Native Hawaiians do not have the same explicit self-governing or federal recognition rights, though the federal government does have an implicit and limited trust responsibility to Native Hawaiians.<sup>152</sup> While there is technically a government-to-government relationship between the federal government and the territorial governments, this limited sovereignty is a creation of Congress, whereas the distinctive and inherent sovereignty of Native American tribes was recognized by the earliest European settlers.<sup>153</sup>

### B. *Cultural Heritage Loss in the Territories*

Indigenous groups outside the fifty states have experienced the same loss of lands and cultural objects as those in the fifty states but with even less legal recourse. The people of the Territories thus far can only rely on voluntary repatriations.<sup>154</sup> Many of the current controversies in the Territories stem from the military, private land developers, museums, and auction houses.

By 2021, in anticipation of the relocation of 5,000 Marines from Okinawa, the Pentagon had begun expanding its bases in Guam.<sup>155</sup> The site of the expansion is called Sabānan Fadang and contains at least thirteen Chamorro bodies from the pre-Spanish colonial period.<sup>156</sup> “For one thousand years, Sabānan Fadang has been the resting place of our ancestors, until they were disturbed for military construction purposes,” said Carlotta Leon Guerrero, an official from the Guam State Historic Preservation Office.<sup>157</sup> In other areas of Guam, the Air Force has found

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[<https://perma.cc/2LPC-SMKY>] (last visited Mar. 4, 2025) (discussing the Alaska Native Claims Settlement Act and federal recognition).

152. See generally *Reconciliation at a Crossroads: The Implications of the Apology Resolution and Rice v. Cayetano for Federal and State Programs Benefiting Native Hawaiians*, U.S. COMM’N ON CIV. RTS. <https://www.usccr.gov/files/pubs/sac/hi0601/report.htm> [<https://perma.cc/BVK5-FS4T>].

153. Maggie Blackhawk, *The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 93 (2023).

154. *2,000-year-old CHamoru Ancestral Remains Return to Guam*, PAC. DAILY NEWS (Nov. 9, 2023), [https://www.guampdn.com/news/2-000-year-old-chamoru-ancestral-remains-return-to-guam/article\\_83bd2e68-7e05-11ee-8c5c-7f9542bfc999.html](https://www.guampdn.com/news/2-000-year-old-chamoru-ancestral-remains-return-to-guam/article_83bd2e68-7e05-11ee-8c5c-7f9542bfc999.html) [<https://perma.cc/U2JA-PTUQ>].

155. Gelardi, *supra* note 2.

156. Diann Rosenfeld, *Marine Corps Base Camp Blaz Holds Ribbon Cutting Ceremony for Sabānan Fadang Memorial*, U.S. MARINE CORPS (2023), <https://www.marines.mil/News/News-Display/Article/3277036/marine-corps-base-camp-blaz-holds-ribbon-cutting-ceremony-for-sabnan-fadang-mem/> [<https://perma.cc/5J5V-9ZWG>].

157. Daily Post Staff, *New Monument Honors Ancestral Burials Found at Sabānan Fadang*, GUAM DAILY POST, [https://www.postguam.com/news/new-monument-honors-ancestral-burials-found-at-sab-nan-fadang/article\\_bebfd8ec-9925-11ec-88d6-7b3030276a0a.html](https://www.postguam.com/news/new-monument-honors-ancestral-burials-found-at-sab-nan-fadang/article_bebfd8ec-9925-11ec-88d6-7b3030276a0a.html) [<https://perma.cc/NJF7-S9TS>] (last updated Feb. 18, 2025).

Chamorro bones, ancient tools, ruins, and other artifacts that it has removed from their original locations and stowed away, often without Chamorro consultation or consent.<sup>158</sup> Furthermore, the military has engaged in attempts to censor information about artifact discoveries.<sup>159</sup> Military officials told local preservation authorities they could not discuss new archeological findings at a base expansion site with a local newspaper,<sup>160</sup> and they refused to release maps of archaeological finds; many Guam residents believe that such maps would reveal networks of ancient villages and burial sites, which could delay the base expansion.<sup>161</sup> While various branches of the armed forces have internal policies regarding preservation of cultural artifacts,<sup>162</sup> internal agency policies do not have the same force as federal legislation. Another major cultural artifact issue in Guam surrounds the collection of over 10,000 Chamorro artifacts by the Bishop Museum in Hawaii.<sup>163</sup> The items were brought to Hawaii from Guam by Hans Hornbostel, an archaeologist hired by the Bishop Museum.<sup>164</sup> Hornbostel brought the items to Hawaii on military ships between 1922 and 1927.<sup>165</sup> Chamorro oral histories allege that Hornbostel engaged in coercion to gather these artifacts by brandishing weapons at Chamorros before asking to survey their land.<sup>166</sup> The Bishop Museum has committed to a voluntary repatriation process and created a long-term partnership with the Government of Guam in August 2024.<sup>167</sup> If NAGPRA applied to Guam, the military

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158. Gelardi, *supra* note 2.

159. *Id.*

160. Anumita Kaur, *Preservation Office Sought Military's Perspective before Releasing Information*, PAC. DAILY NEWS (May 10, 2021), [https://www.guampdn.com/news/local/preservation-office-sought-militarys-perspective-before-releasing-information/article\\_4402791e-cd09-53c8-8f9d-a3f064b58797.html](https://www.guampdn.com/news/local/preservation-office-sought-militarys-perspective-before-releasing-information/article_4402791e-cd09-53c8-8f9d-a3f064b58797.html) [<https://perma.cc/7GBJ-5SSC>].

161. Gelardi, *supra* note 2.

162. Steve Limtiaco, *Cultural Facility Prepares to Receive Artifacts Found During Military Construction*, PAC. DAILY NEWS (Jan. 18, 2023), [https://www.guampdn.com/news/cultural-facility-prepares-to-receive-artifacts-found-during-military-construction/article\\_b47b4dc4-96d3-11ed-b39c-9f21860e3a4f.html](https://www.guampdn.com/news/cultural-facility-prepares-to-receive-artifacts-found-during-military-construction/article_b47b4dc4-96d3-11ed-b39c-9f21860e3a4f.html) [<https://perma.cc/H4MM-VA4X>]. See also *Cultural Resources Management*, U.S. ARMY ENV'T COMMAND, <https://aec.army.mil/Conservation/Cultural-Resources-Management/> [<https://perma.cc/M5UA-RTJM>].

163. Cassie Ordonio, *Repatriation Efforts Underway for Ancient Chamorro Stone Carvings at Bishop Museum*, HAW. PUB. RADIO (Apr. 8, 2024) <https://www.hawaiipublicradio.org/local-news/2024-04-08/repatriation-efforts-ancient-chamorro-stone-carvings-bishop-museum> [<https://perma.cc/3MH5-HD29>].

164. *Id.*

165. Matsuki Hirayama, *Repatriation Efforts Underway for Guam Artifacts in Hawaii*, KUAM NEWS (Sept. 12, 2023), <https://www.kuam.com/story/49632103/repatriation-efforts-underway-for-guam-artifacts-in-hawaii> [<https://perma.cc/TUP5-VP75>].

166. Ordonio, *supra* note 163.

167. Press Release, UFISINAN I MAGA'HÅGA Office of the Governor, Lieutenant Governor Tenorio Leads Effort to Return Latte Stones to Guam, Address

and the Bishop Museum would be required by federal law to make complete inventories of artifacts in their possession available to the Chamorro community, consult with Chamorro officials, and repatriate cultural objects and remains.

Puerto Rico has likewise experienced indigenous artifact loss by federal entities and private collectors. In 2021, Puerto Rican activists protested a French auction house that was selling off thirty-eight Taíno artifacts, many of them from the pre-Columbian era.<sup>168</sup> A petition, signed by over 50,000 people, called for repatriation of the artifacts to the Caribbean.<sup>169</sup> Controversy also arose in 2022 when the University of Georgia announced it was the new caretaker of the world's largest collection of Puerto Rican artifacts on loan from the Navy.<sup>170</sup> The artifacts were obtained from the Puerto Rican island of Vieques.<sup>171</sup> In 1941, the Navy evicted the roughly 10,000 residents of Vieques and forcibly relocated them to a narrow strip of land in the center of the island.<sup>172</sup> The Navy then used most of the island to test weapons of mass destruction from the 1940s until 2003.<sup>173</sup> Due to the circumstances in which the local people were removed from the area, some activists claim these artifacts were looted and do not rightfully belong to the Navy.<sup>174</sup> Without NAGPRA or any similar type of federal law, there is no legal recourse for the people of Puerto Rico to reclaim possession of these artifacts from the Navy.

In the fall of 2022, the locally recognized Guainía Taíno tribe of the U.S. Virgin Islands welcomed Taíno chiefs from Puerto Rico,

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CHamoru Artifacts at the Bishop Museum in Hawai'i (Aug. 30, 2024), [https://governor.guam.gov/press\\_release/lieutenant-governor-tenorio-leads-effort-to-return-latte-stones-to-guam-address-chamoru-artifacts-at-the-bishop-museum-in-hawaii/](https://governor.guam.gov/press_release/lieutenant-governor-tenorio-leads-effort-to-return-latte-stones-to-guam-address-chamoru-artifacts-at-the-bishop-museum-in-hawaii/) [https://perma.cc/4ZNX-S9AN].

168. Constanza Eliana, *On the Christie's Auction of Taino Artifacts*, LATINO REBELS (Nov. 19, 2021), <https://www.latinorebels.com/2021/11/19/christiestaino/> [https://perma.cc/826R-RTJT].

169. Stephanie Sherman, *Stop Christie's Auction of Sacred Taino Artifacts: Return to Them to the Taino Homelands*, CHANGE.ORG (2021), <https://www.change.org/p/taino-indigenous-sovereign-nation-stop-christie-s-auction-of-sacred-taino-artifacts-return-to-them-to-the-taino-homelands> [https://perma.cc/TD2G-CYR2].

170. Ciara Pyszczynski, *Archaeology Lab Preserves Puerto Rican History*, UGA TODAY (Feb. 16, 2022), <https://news.uga.edu/archaeology-lab-preserves-puerto-rican-history/> [https://perma.cc/2H59-9H6X].

171. *Id.*

172. Wilfred Chan, *'I Thought They'd Kill Us': How the US Navy Devastated a Tiny Puerto Rican Island*, GUARDIAN (May 1, 2023), <https://www.theguardian.com/world/2023/apr/30/vieques-puerto-rico-us-navy-base-training> [https://perma.cc/H73H-B5H9].

173. *Id.*

174. E.g., @midnucas, TWITTER (Feb. 17, 2022, 11:35 AM), <https://twitter.com/midnucas/status/1494349718247202818?s=20> [https://perma.cc/6FDB-NR69].



Barbados, and Guyana to engage in inter-tribal diplomatic activities.<sup>175</sup> The group met with officials from the V.I. State Historic Preservation Office (“VISHPO”) to view Taíno funerary artifacts that were unearthed during construction activity at a local mall in the early 1990s and at Main Street in the V.I. capital Charlotte Amalie in 2014.<sup>176</sup> Roberto Mukaro, head of the Guainía Taíno Tribe of Puerto Rico, discussed how the cohort seeks more information about remains and artifacts currently under the purview of VISHPO.<sup>177</sup> Mukaro stated the tribal coalition hopes to “engage in a positive way to be more respectful of those ancestors” and that until they are able to do so, the ancestors are not completing their spiritual journeys.<sup>178</sup> Because the V.I. Governor recognized the Virgin Islands Taíno tribe only in 2022, it is unclear what rights, if any, they have over cultural objects under local V.I. law. However, David Brewer, senior archaeologist at VISHPO, told local media, “We keep all of our historic sites restricted,” and “We don’t give out the location except to researchers.”<sup>179</sup> In May 2023, a local news article detailing the debate over where to house the Taíno artifacts found in the 1990s and 2014 did not mention any potential consultations with the recognized Guainía Taíno Tribe, which might have been required under NAGPRA.<sup>180</sup>

Less information is available regarding cultural property loss in American Samoa and the Northern Mariana Islands, possibly due to their unique indigenous land alienation laws. However, extending NAGPRA to cover American Samoa and the Northern Mariana Islands would still provide much needed legal protection. The Harvard Peabody Museum recently faced repatriation calls for its 400 Samoan artifacts.<sup>181</sup> After a presentation on Samoan artifacts in the American Samoan capital of Pago Pago, Peabody Oceania curator Dr. Ingrid Ahlgren

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175. Amy Roberts, *Virgin Islands Taino Welcome Tribal Members from Caribbean*, ST. THOMAS SOURCE (Nov. 25, 2022), <https://stthomassource.com/content/2022/11/25/virgin-islands-taino-welcome-tribal-members-from-caribbean/> [https://perma.cc/CEJ3-2PVE].

176. *Id.*

177. Virgin Islands Source, *Meeting of the Chiefs*, YOUTUBE (Nov. 25, 2022), <https://www.youtube.com/watch?v=18N22b6eo2M&t=7s> [https://perma.cc/BC54-2CPB].

178. *Id.*

179. Roberts, *supra* note 175.

180. Amy Roberts, *The First People to Call Our Islands Home*, ST. THOMAS SOURCE (May 10, 2023), <https://stthomassource.com/content/2023/05/10/the-first-people-to-call-our-islands-home-3/> [https://perma.cc/979P-F3NJ].

181. Prianka Srinivasan, *Hunt for More Information on Hundreds of Samoan Artefacts Kept at US Museum*, ABC: PACIFIC BEAT (Dec. 20, 2022), <https://www.abc.net.au/pacific/programs/pacificbeat/samoa-artefacts-harvard/101796338> [https://perma.cc/N6XK-CS8R].



faced questions from locals about the provenance of the objects.<sup>182</sup> Dr. Ahlgren stated that the Peabody Museum has historically only returned items to indigenous groups in North America as required under federal law—presumably NAGPRA—but has begun discussions on revising its ethics procedures for its Pacific collection.<sup>183</sup> Additionally, a U.S. Army Corps of Engineers report noted cultural artifacts in Samoa are being increasingly washed away in climate-induced flooding,<sup>184</sup> leaving these objects vulnerable to theft.

Many NMI cultural items are held by foreign museums, various government agencies, private company collections, and personal collections, some of which have been voluntarily repatriated to the Northern Mariana Islands Museum of History and Culture (“NMI Museum”), the repository by statute of all historic objects of the NMI.<sup>185</sup> The NMI has a Division of Historic Preservation (“HPO”) tasked with finding and repatriating human remains held in museums around the world, a task made much more difficult without federal legislation such as NAGPRA and given the existing issues surrounding international repatriation, discussed below.<sup>186</sup>

#### IV. CURRENT FEDERAL AND TERRITORIAL LAWS

##### A. *Legislative History of NAGPRA*

U.S. policy has historically treated indigenous remains differently than those of other races.<sup>187</sup> In 1971, road construction in Iowa unearthed both White and Native skeletal remains.<sup>188</sup> The Native remains were sent to an archaeology lab while the White remains were quickly reburied.<sup>189</sup> This practice caught the attention of Yankton Sioux member Maria

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182. Samoa News Staff, *Harvard Oceania Curator Shares Information on Samoan Artifacts at the Harvard Museum*, SAMOA NEWS (Dec. 23, 2023), <https://www.samoanews.com/local-news/harvard-oceania-curator-shares-information-samoan-artifacts-harvard-museum> [https://perma.cc/W5KJ-PENY].

183. Srinivasan, *supra* note 181.

184. US ARMY CORPS OF ENG'RS, *supra* note 102.

185. Robert Hunter, *NMI Museum: Worth Nine Hours of CUC Operations*, SAIPAN TRIB. (June 20, 2008), [https://www.saipantribune.com/news/local/nmi-museum-worth-nine-hours-of-cuc-operations/article\\_c7789bba-b5fe-55f5-9976-c15149c13eaa.html](https://www.saipantribune.com/news/local/nmi-museum-worth-nine-hours-of-cuc-operations/article_c7789bba-b5fe-55f5-9976-c15149c13eaa.html) [https://perma.cc/38SF-YL2X].

186. Scott Russell, *Dealing with Human Remains: An Approach from the Northern Marianas*, 24 CULTURAL RES. MGMT., no. 1 2001, at 23, 24, <https://www.nps.gov/crps/CRMJournal/CRM/v24n1.pdf> [https://perma.cc/47VQ-55ZF].

187. Trope & Echo-Hawk, *supra* note 78, at 46–47.

188. Alexis Redshaw, *The Rosa Parks of NAGPRA*, CTR. FOR ART L. (Feb. 14, 2022), <https://itsartlaw.org/2022/02/14/the-rosa-parks-of-nagpra/> [https://perma.cc/Z7HL-YS9V].

189. *Id.*

Pearson.<sup>190</sup> Pearson was dismayed at the practice and began lobbying the Iowa state government for equal treatment of non-Native and Native remains; her efforts culminated in the passage of the Iowa Burials Protection Act of 1976.<sup>191</sup> Pearson's activism and efforts by other tribal advocacy groups eventually led to the passage of NAGPRA in 1990.<sup>192</sup>

NAGPRA is considered landmark human rights legislation.<sup>193</sup> Upon passage of the bill in the Senate, Hawaii's Senator Daniel Inouye stated, "The bill before us today is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights."<sup>194</sup> Congress saw NAGPRA as part of its trust responsibility to Native Americans.<sup>195</sup> The law specifically states that NAGPRA "reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations."<sup>196</sup>

During congressional hearings on the topic of Native American cultural property, tribal testimony revolved around issues of racially disparate treatment and spirituality.<sup>197</sup> Tribal leaders testified that the spirits of their ancestors would not rest until they were returned to their homeland and that museums generally ignored these beliefs.<sup>198</sup> Several witnesses testified that the lack of accessible museum inventory information meant that tribes did not know what types of remains or objects museums possessed in the first place.<sup>199</sup> Tribal witnesses objected to museums retaining human remains without a clear purpose, especially when those human remains were identifiable and affiliated with a specific Indian tribe.<sup>200</sup> In such cases, tribal witnesses felt strongly that these remains should be returned for proper burial, which is an important part of the religious life cycle of many indigenous cultures.<sup>201</sup>

NAGPRA faced stiff opposition from scientists, art dealers, and museums. Lynne Goldstein, an anthropology professor at the University of Wisconsin-Milwaukee, testified in Congress that knowledge of past cultures and ways of life were part of the heritage of the entire

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190. *Id.*

191. *Id.*

192. *Id.*

193. Trope & Echo-Hawk, *supra* note 78, at 59.

194. 136 CONG. REC. S35678 (daily ed. Oct. 26, 1990) (statement of Sen. Daniel Inouye).

195. Trope & Echo-Hawk, *supra* note 78, at 60.

196. 25 U.S.C. § 3010.

197. H.R. REP. NO. 101-877, at 13 (1990).

198. *Id.*

199. S.R. REP. NO. 101-473, at 3.

200. *Id.*

201. *Id.*

country, not just affiliated tribes.<sup>202</sup> Archeologists worried NAGPRA would result in the demise of the field in the United States, with students being steered towards countries where they could conduct excavations with fewer restrictions.<sup>203</sup> Museum curators objected to NAGPRA's definition of cultural patrimony.<sup>204</sup> Tom Livesay, Director of the Museum of New Mexico, testified that the definition of cultural patrimony was too broad and that the inventory process for millions of objects, the tribal notification process, and the number of claims would impose too immense a cost on the museum.<sup>205</sup> The Antique Tribal Art Dealers Association ("ATADA"), an association of tribal arts dealers and museums, strongly objected to the burden of proving cultural affiliation being shouldered by museums and dealers.<sup>206</sup> Upon ATADA's objection, the legislation was amended and shifted the burden of proof onto the tribe or lineal descendant.<sup>207</sup>

Despite tension and discord in much of the testimony, many witnesses highlighted examples of compromise.<sup>208</sup> When scientists discussed the importance of studying remains due to recent technological advances, some tribal witnesses indicated they did not object to the study of remains when there was a defined purpose and time period for the study.<sup>209</sup> Museum curators testified about several instances where a museum and a tribe agreed to the repatriation of human remains and cultural objects.<sup>210</sup> There was also testimony about agreements where museums retained possession of sacred objects but gave the objects to the tribes when such objects were required for tribal religious ceremonies during specific times of the year.<sup>211</sup> The final version of H.R. 5237 reflected agreements between negotiators representing tribes, archaeologists, and museums.<sup>212</sup> The resolution passed both the House and Senate without opposition.<sup>213</sup>

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202. Christine Baker, *Native Americans Anthropologists and NAGPRA: A Continuing Controversy* 32 (2001) (M.A. thesis, University of Montana) (on file with the Maureen and Mike Mansfield Library, University of Montana).

203. *Id.* at 46.

204. *Id.* at 36.

205. *Id.*

206. 136 CONG. REC. 31940 (daily ed. Oct. 22, 1990).

207. *Id.*

208. S. REP. NO. 101-473, at 3 (1990).

209. *Id.*

210. *Id.*

211. *Id.*

212. *See generally* C. TIMOTHY McKEOWN, *IN THE SMALLER SCOPE OF CONSCIENCE: THE STRUGGLE FOR NATIONAL REPATRIATION LEGISLATION, 1986-1990*, at 165 (2013).

213. Native American Graves Protection and Repatriation Act, H.R. 5237, 101st Cong. (1990) (enacted). *See also* McKEOWN, *supra* note 212, at 167.

### B. NAGPRA Overview

NAGPRA was codified into law as 25 United States Code, Chapter 32 and is administered by the Department of the Interior.<sup>214</sup> It establishes procedures for the return of Native remains and cultural items to their affiliated tribes or lineal descendants,<sup>215</sup> and it is enforced by civil and criminal penalties.<sup>216</sup> Museums and federal agencies are required to create public inventories, consult with lineal descendants or associated tribes, evaluate repatriation requests for cultural objects, and provide public notice prior to repatriation or transfer of remains and cultural items.<sup>217</sup>

Section 3001 lists important definitions<sup>218</sup> and was the subject of contentious debate.<sup>219</sup> “Burial site” refers to any location where human remains are deposited as part of a cultural death rite or ceremony.<sup>220</sup> This definition overturned former, more problematic definitions that appeared in past judicial decisions such as *Carter v. City of Zanesville*.<sup>221</sup> “Cultural affiliation” is established when there is a historical or prehistorical relationship of shared group identity between a present-day federally recognized tribe or Native Hawaiian organization and an identifiable earlier group.<sup>222</sup> “Cultural Items” includes four categories of objects: “associated funerary objects,” “unassociated funerary objects,” “sacred objects,” and “cultural patrimony.”<sup>223</sup>

Section 3002 creates an ownership hierarchy for remains and cultural items excavated or discovered on federal or tribal lands after 1990.<sup>224</sup> Human remains and associated funerary objects belong to the lineal descendants.<sup>225</sup> If it is not possible to determine the lineal descendants, then the remains or objects should be given, in order of

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214. 25 U.S.C. §§ 3001–3013.

215. *Native American Graves Protection and Repatriation Act: Getting Started*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nagpra/getting-started.htm> [<https://perma.cc/GW5U-AESE>] (last updated Oct. 4, 2024).

216. *Native American Graves Protection and Repatriation Act: Enforcement*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nagpra/enforcement.htm> [<https://perma.cc/28NC-753U>] (last updated Sept. 24, 2024).

217. *Native American Graves Protection and Repatriation Act: Compliance*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nagpra/compliance.htm> [<https://perma.cc/8JRJ-5YYU>] (last updated Oct. 4, 2024) [hereinafter *Compliance*].

218. 25 U.S.C. § 3001.

219. 136 CONG. REC. 31939 (daily ed. Oct. 22, 1990).

220. 25 U.S.C. § 3001.

221. Trope & Echo-Hawk, *supra* note 78, at 47.

222. 25 U.S.C. § 3001.

223. *Id.*

224. *Id.* § 3002.

225. *Id.*

priority, to the federally recognized tribe or Native Hawaiian organization on whose land they were found or to the organization which has the closest cultural affiliation.<sup>226</sup> Items that remain unclaimed will be dealt with according to rules set by the Secretary and after consultation with Native American groups, museums, and the scientific community.<sup>227</sup> The governing body of a tribe or Native Hawaiian organization can choose to give up control or ownership of certain items.<sup>228</sup>

Section 3003 requires museums and entities that receive federal funds to create inventories of Native American human remains and cultural objects within their collections.<sup>229</sup> These inventories must be made available to the affiliated tribes and organizations, enabling them to identify and claim their ancestral artifacts.<sup>230</sup>

Section 3005 establishes a process for repatriation whereby federally recognized tribes, Native Hawaiian organizations, and lineal descendants can request the return of human remains and cultural items from museums and federal agencies.<sup>231</sup> It mandates the repatriation of items that are proven to have “cultural affiliation,” meaning the item can be traced to federally recognized tribes, lineal descendants, and Native Hawaiian organizations. Cultural affiliation must be proven by a preponderance of the evidence by the requesting individual or Native organization.<sup>232</sup> Such evidence can include geographical, archaeological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.<sup>233</sup> Remains or objects that are indispensable for the completion of a specific scientific study are an exception to the repatriation mandate.<sup>234</sup> Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.<sup>235</sup>

NAGPRA establishes both criminal and civil penalties.<sup>236</sup> Museums may be penalized by the Department of the Interior for not completing an inventory, not notifying culturally affiliated Indian Tribes and Native Hawaiian organizations of a collection or holding, refusing to repatriate, repatriating cultural items before publishing a Federal Register notice,

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226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* § 3003.

230. *Id.*

231. *Id.* § 3005.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Compliance*, *supra* note 217.

and not consulting with relevant tribal parties.<sup>237</sup> Individuals may be criminally prosecuted if they sell, purchase, use for profit, or transport for sale or profit Native remains without right of possession or cultural items obtained in violation of NAGPRA.<sup>238</sup>

NAGPRA establishes a Review Committee responsible for overseeing the law's implementation.<sup>239</sup> Committee members are appointed by the Secretary of the Interior, based on nominations from Indian Tribes, Native Hawaiian organizations, traditional Native American religious leaders, national museum organizations, and national scientific organizations.<sup>240</sup> The Committee's duties include monitoring the inventory process, making findings on cultural item identity and affiliation, resolving disputes, creating an inventory of culturally unidentifiable human remains held by federal agencies and museums, consulting with relevant indigenous groups and museums, advising the Secretary of the Interior on NAGPRA regulations, and making recommendations on the future care of repatriated cultural items.<sup>241</sup>

The DOI provides grants in furtherance of NAGPRA.<sup>242</sup> Consultation and Documentation Grants support the efforts of museums, tribes, and Native Hawaiian organizations in conducting consultations and documenting human remains and cultural items in non-federal collections.<sup>243</sup> Repatriation Grants offset costs associated with the packaging, transportation, decontamination, and storage of human remains and cultural items.<sup>244</sup> Museums with NAGPRA collections, Indian Tribes, and Native Hawaiian organizations, all as defined under NAGPRA, are eligible to apply for these grants.<sup>245</sup> Funding for NAGPRA grants is part of the National Park Service budget appropriated annually by Congress.<sup>246</sup> Because these grants are only available for entities covered under and complying with NAGPRA,

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237. *Id.*

238. *Id.*

239. *Native American Graves Protection and Repatriation Act: Review Committee*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nagpra/review-committee.htm> [<https://perma.cc/ZTD8-F6PC>] (last updated Dec. 2, 2024).

240. *Id.*

241. *Id.* 25 U.S.C. §§ 3006(c)(5), (c)(9).

242. *Native American Graves Protection and Repatriation Act: Grant Opportunities*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nagpra/grant-opportunities.htm> [<https://perma.cc/Q32N-EAHL>] (last updated Sept. 12, 2024).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

territorial authorities engaging in voluntary repatriations must either rely on donations or bear the entire financial burden of the repatriation process, such as the costs of cargo and shipping, documentation, and reimbursement for any costs incurred by the holding museum or organization.<sup>247</sup>

### C. NAGPRA in Practice

While much progress has been made since NAGPRA's passage in 1990, many obstacles remain, such as communication difficulties, statutory interpretation, and an international loophole.<sup>248</sup> A Government Accountability Office ("GAO") report in 2022 noted tribal complaints that agencies consulted tribes far too late in project development stages and limited tribal input to a single round of consultation.<sup>249</sup> At the same time, agencies reported difficulty in maintaining consistent channels of communication with tribal leaders after leadership changes.<sup>250</sup>

Statutory ambiguities often result in costly litigation. In 1996, a 9,000 year old skeleton was unearthed in Washington state and a battle for possession ensued between the local Umatilla tribe and a group of scientists who wanted to study the remains.<sup>251</sup> The scientists argued that the statute required the skeleton's relationship with a "presently existing" tribe be established in order for it to be repatriated and that this ancient skeleton could not be determined to have any affiliation with a presently existing tribe.<sup>252</sup> The Ninth Circuit in 2004 ruled in favor of the scientists, though DNA testing and congressional action a decade later resulted in the repatriation of the skeleton to the local

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247. *2,000-year-old CHamoru Ancestral Remains Return to Guam*, *supra* note 154; ANCESTRAL REMAINS TASK FORCE, REPORT ON THE DISPOSITION OF ANCESTRAL REMAINS TO CARL T. C. GUTIERREZ, GOVERNOR OF GUAM 9, 29 (2000) <https://historicguam.net/wp-content/uploads/2020/07/part-I.pdf> [<https://perma.cc/7M65-XX33>].

248. Christopher Zheng, *31 Years of NAGPRA: Evaluating the Restitution of Native American Ancestral Remains and Belongings*, CTR. FOR ART L. (May 18, 2021), <https://itsartlaw.org/2021/05/18/31-years-of-nagpra-evaluating-the-restitution-of-native-american-ancestral-remains-and-belongings/> [<https://perma.cc/MU52-YMYG>].

249. *The Long Journey Home: Advancing the Native American Graves Protection and Repatriation Act's Promise After 30 Years of Practice: Hearing Before the S. Comm. on Indian Affs.*, 117th Cong. 9, 11 (2022) (statement of Dr. Anna Maria Ortiz, Director, Natural Resources and Environment, U.S. Government Accountability Office), <https://www.gao.gov/assets/gao-22-105685.pdf> [<https://perma.cc/839T-QQSQ>].

250. *Id.* at 11. *See also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-22, TRIBAL CONSULTATION: ADDITIONAL FEDERAL ACTIONS NEEDED FOR INFRASTRUCTURE PROJECTS 27 (2019), <https://www.gao.gov/assets/gao-19-22.pdf> [<https://perma.cc/CRF2-35QG>].

251. Zheng, *supra* note 248.

252. *Id.*



tribes.<sup>253</sup> Another controversial case involved the bodies of Native children buried at the notorious Carlisle Indian Industrial School in Pennsylvania.<sup>254</sup> Native children were sent to the Carlisle school to be forcibly assimilated into White society, and abuse was rampant.<sup>255</sup> When the school closed in 1918, the property was transferred to the U.S. Army.<sup>256</sup> In 2017, the Army began returning the remains of these children at the request of their closest living relatives.<sup>257</sup> In the ongoing case of a Sisseton Wahpeton Oyate child, Amos LaFromboise, the Army published its intent to exhume the body without any notice to the relevant tribal officials or living relatives as required under NAGPRA.<sup>258</sup> Tribal relatives assert that the Army's repatriation process should be subject to NAGPRA, whereas the Army argues that NAGPRA does not apply because "[i]ndividually marked graves located within the Carlisle Barracks Post Cemetery do not constitute 'holdings or collections' of the Army nor does NAGPRA require the Army to engage in the intentional excavation or exhumation of a grave."<sup>259</sup> The Army instead argues its own internal policies govern this process.<sup>260</sup> As of January 2025, the Winnebago tribe has appealed the case to the Court of Appeals for the Fourth Circuit, seeking a reversal of the District Court's dismissal of the case.<sup>261</sup>

A third challenge involves international repatriation. Currently, NAGPRA applies only domestically; tribes have no legal resource for

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253. *Bonnichsen v. U.S.*, 367 F.3d 864, 882 (9th Cir. 2004); Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, § 1152, 130 Stat. 1628, 1662 (2016); Associated Press, *DNA Ties 8,500-year-old 'Kennewick Man' Skeleton to Native American Tribes*, WASH. POST (Apr. 28, 2016), [https://www.washingtonpost.com/national/health-science/dna-ties-8500-year-old-kennewick-man-skeleton-to-native-american-tribes/2016/04/28/9daced86-0d47-11e6-bfa1-4efa856caf2a\\_story.html](https://www.washingtonpost.com/national/health-science/dna-ties-8500-year-old-kennewick-man-skeleton-to-native-american-tribes/2016/04/28/9daced86-0d47-11e6-bfa1-4efa856caf2a_story.html) [<https://perma.cc/QX9S-U85F>].

254. Alaa Elassar, *The Remains of Five Native American Children Who Died at an Indigenous Boarding School Are Being Returned to Their Tribes over a Century Later*, CNN (June 4, 2023), <https://www.cnn.com/2023/06/04/us/native-american-children-remains-retained/index.html> [<https://perma.cc/6XVT-9JG7>].

255. *Id.*

256. *Id.*

257. Notice of Intended Disinterment, 82 Fed. Reg. 28306 (June 21, 2017).

258. Elassar, *supra* note 254.

259. Notice of Intended Disinterment, 88 Fed. Reg. 33584 (May 24, 2023).

260. *Id.*

261. See Brief of Petitioner-Appellant, Winnebago Tribe of Neb. v. Dep't of the Army, No. 24-2081, 15 (4th Cir. Jan. 22, 2025) (citation omitted) ("The District Court granted Defendants' motion to dismiss on August 20, 2024. The District Court held that NAGPRA's repatriation provisions apply only to Native American human remains that are part of 'holdings or collections' and concluded that Carlisle Cemetery does not meet this definition.").

claims over contested objects in foreign countries.<sup>262</sup> In 2014, the Drouot Auction House in France put up several Navajo religious masks, Hopi dolls, and Pueblo masks for bidding.<sup>263</sup> The U.S. Embassy in Paris asked Drouot to postpone the sale until Navajo and Hopi officials could verify whether the items were stolen.<sup>264</sup> The auction house refused, arguing that French courts had previously ruled that similar sales were legal.<sup>265</sup> Navajo officials traveled to Paris and successfully purchased the masks, while the Hopi Nation boycotted the auction out of principle.<sup>266</sup> To address this problem, Congress passed the Safeguard Tribal Objects of Patrimony (“STOP”) Act in 2021 which enacts export regulations on NAGPRA items.<sup>267</sup> A caveat of export regulations is that foreign countries generally do not enforce other countries’ export regulations because of the doctrine of territoriality which states that the laws of one country are not enforceable in another country.<sup>268</sup> On the other hand, countries that have nationalized ownership of antiquities, such as Mexico, Greece, and Turkey, do have legal recourse to repatriate their objects. Courts, both foreign and American,<sup>269</sup> have demonstrated greater willingness to recognize foreign national ownership claims rather than foreign export restrictions because theft is universally recognized as a crime unlike export restrictions.<sup>270</sup> While there are many shortcomings with the NAGPRA legislation, indigenous people in the U.S. Territories do not have what little protection NAGPA offers to indigenous people in the fifty states.

#### D. Existing Cultural Protections in the Territories

Various federal and local laws regarding cultural heritage exist in the Territories. Two major pieces of federal legislation apply in the Territories: the National Historic Preservation Act of 1966 (“NHPA”) and the Archaeological Resources Protection Act of 1979 (“ARPA”).<sup>271</sup> NHPA applies to buildings and land, while ARPA applies

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262. Zheng, *supra* note 248.

263. *Navajos Reclaim Sacred Masks at Auction*, CBS NEWS (Dec. 16, 2014), <https://www.cbsnews.com/news/navajo-indians-buy-back-sacred-masks-in-france-auction/> [<https://perma.cc/3QVA-PFTF>].

264. *Id.*

265. *Id.*

266. *Id.*

267. Zheng, *supra* note 248.

268. Aaron Haines, *Will the STOP Act Stop Anything? The Safeguard Tribal Objects of Patrimony Act and Recovering Native American Artifacts from Abroad*, 39 CARDOZO L. REV. 1091, 1106 (2018).

269. *See* United States v. McClain, 545 F.2d 988 (5th Cir. 1977).

270. Haines, *supra* note 268, at 1094–95.

271. *NAGPRA-ARPA-NHPA-Procedures*, NAT’L PARK SERV. (2019), <https://nrfirescience.org/sites/default/files/2023-08/NAGPRA-ARPA-NHPA-Procedures.pdf> [<https://perma.cc/G522-NWEP>].

to archaeological resources.<sup>272</sup> Although NHPA provides some heritage protections, it does not cover moveable objects.

The triggering event for NHPA is when a project, activity, or program is funded in whole or part under the direct or indirect jurisdiction of a federal agency.<sup>273</sup> Historic structures that would be affected by federally funded projects must be documented to standards issued by the Secretary of the Interior.<sup>274</sup> NHPA Section 106 contains rules for a review process in determining whether the project will harm a site, and if so, ways to avoid or minimize that harm.<sup>275</sup> Each state and territory has its own historic preservation office and is required to complete an inventory of important sites.<sup>276</sup> The military buildup in Guam is subject to the NHPA Section 106 process, whereby military officials are required to consult with Guam's State Historic Preservation Office ("SHPO").<sup>277</sup> However, due to the Supremacy Clause of the U.S. Constitution, the SHPO has limited power to protect the sites, and the military has final say over what to do with them.<sup>278</sup> Furthermore, the NHPA Section 106 process does not contain protections for cultural items and remains, as NHPA only applies to buildings and land, not the moveable objects found on them.

ARPA establishes federal ownership of "archeological resources" on federal or Indian land, requires permits for excavations, and prohibits trafficking of any archaeological resources taken or possessed in violation of any U.S. federal, state, or local law.<sup>279</sup> ARPA interacts with NAGPRA in that items covered under NAGPRA cannot be removed from tribal or federal lands without an ARPA permit.<sup>280</sup> ARPA mandates the confidentiality of information concerning the location of archeological

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272. *Id.*

273. *Id.*

274. *Historic Preservation: National Historic Preservation*, NAT'L PARK SERV., <https://www.nps.gov/subjects/historicpreservation/national-historic-preservation-act.htm> [<https://perma.cc/FL3W-BTM5>] (last updated Nov. 1, 2023).

275. *Id.*

276. 54 U.S.C. § 302303. *See also What is a SHPO?*, NAT'L CONF. OF STATE HISTORIC PRES. OFFICERS, <https://ncshpo.org/about-us/what-is-shpo/> [<https://perma.cc/X4VT-2MES>] (last visited Mar. 11, 2025).

277. Diebel, *supra* note 1.

278. *See id.*

279. *Archeology: Archaeological Resources Protection Act of 1979*, NAT'L PARK SERV., <https://www.nps.gov/subjects/archeology/archaeological-resources-protection-act.htm> [<https://perma.cc/63SR-J6NU>] (last updated Feb. 10, 2025).

280. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-466T, NATIVE AMERICAN ISSUES: EXAMPLES OF CERTAIN FEDERAL REQUIREMENTS THAT APPLY TO CULTURAL RESOURCES AND FACTORS THAT IMPACT TRIBUNAL CONSULTATION 7 (2020).

sites.<sup>281</sup> The confidentiality requirement was enacted out of respect for tribal desires to keep information about culturally sensitive locations confidential,<sup>282</sup> but it has become a double-edged sword in cases such as that of the Guainía Taíno tribe in the Virgin Islands.<sup>283</sup>

Each territory has their own cultural heritage laws, but many say the enforcement and penalties are too lax.<sup>284</sup> For example, the local Puerto Rico cultural property laws impose a maximum fine of \$10,000, whereas the maximum fine for a similar offense under NAGPRA is \$100,000 and possible jail time.<sup>285</sup> Some Territories recognize their local indigenous tribes, such as the U.S. Virgin Islands, which affords those groups some cultural protections.<sup>286</sup> Other Territories, such as Puerto Rico, do not recognize any indigenous tribes.<sup>287</sup> There is also no federal tribal recognition of any indigenous people in the Territories. There have been Chamorro<sup>288</sup> and Taíno revivalist<sup>289</sup> attempts at gaining federal recognition that have been unsuccessful. The federal recognition process is extremely long and expensive<sup>290</sup> and often relies on colonialist frameworks of indigeneity.<sup>291</sup> Unfortunately, even if these

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281. *Frequently Asked Questions on Protecting Sensitive Information About Historic Properties Under Section 304 of the NHPA*, ADVISORY COUNCIL ON HISTORIC PRES. (Aug. 16, 2016), <https://www.achp.gov/digital-library-section-106-landing/frequently-asked-questions-protecting-sensitive-information> [<https://perma.cc/3FRL-LCWW>].

282. *Policy Statement on the Confidentiality of Information About Indian Sacred Sites*, ADVISORY COUNCIL ON HISTORIC PRES., <https://www.achp.gov/sites/default/files/2021-01/PolicyStatementontheConfidentialityofInformationaboutIndianSacredSites.pdf> [<https://perma.cc/5MET-X98M>].

283. Roberts, *supra* note 175.

284. Ley del Consejo para la Protección del Patrimonio Arqueológico Terrestre de Puerto Rico, Ley Núm. 112 de 20 de Julio de 1988; A.S.A.C. 26.0220(C) (1988); 21 G.C.A § 76201 (2024); N. Mar. I. Public Law No. 3-39 (1982); V.I. Admin. Code, Chapter 17, Subchapter I, § 954 (2019).

285. Jose Marrero Rosado, *Puerto Rico and NAGPRA: Protection of Archaeological Patrimony under a Colonial Government*, AGARWAL SKELETAL BIOLOGY LAB (2020), <https://www.sabrinaagarwal.com/post/puerto-rico-and-nagpra-protection-of-archaeological-patrimony-under-a-colonial-government> [<https://perma.cc/XFS6-535S>].

286. Roberts, *supra* note 175.

287. Cruz Mejías, *supra* note 144.

288. John O'Connor, *Tribal Designation Sought*, GUAM DAILY POST (Oct. 4, 2017), [https://www.postguam.com/news/local/tribal-designation-sought/article\\_a46782a4-a813-11e7-a27d-67b542a4a2a8.html](https://www.postguam.com/news/local/tribal-designation-sought/article_a46782a4-a813-11e7-a27d-67b542a4a2a8.html) [<https://perma.cc/4ZFE-N3YY>] (last visited Aug. 4, 2023).

289. Cruz Mejías, *supra* note 144.

290. Dorothy Alther, *The Long and Winding Road to Federal Recognition*, CAL. INDIAN LEGAL SERVS. (Feb. 22, 2021), <https://www.calindian.org/the-long-and-winding-road-to-federal-recognition/> [<https://perma.cc/4ECW-VCHU>].

291. Margaret M. Bruchac, *Constructing Indigenous Associations: Protocols of Recognition and NAGPRA Compliance*, 51 ANTHROPOLOGY NEWS, Mar. 2010, at 5, 7.

groups received federal recognition, they would still not be protected by NAGPRA due to the regulations specifically stating that the Territories are not covered.<sup>292</sup> Additionally, attempts by territory-level historic preservation authorities to intervene against offending federal agencies, such as in the case between the Guam SHPO and the U.S. military, raise questions of the Supremacy Clause of the U.S. Constitution.<sup>293</sup>

## V. PROPOSED AMENDMENTS FOR NAGPRA IN THE TERRITORIES

To begin to address the cultural loss experienced by indigenous people in the Territories, NAGPRA should be expanded to cover the Territories and use the legal framework it currently uses with Native Hawaiian organizations. These changes must be done through a congressional amendment to § 3010, which currently states, “This chapter reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.”<sup>294</sup> This view is echoed by the Department of the Interior. In its 2023 revised rules for NAGPRA, it states:

We received three comments requesting clarification to the definition of “United States.” All three comments wanted to understand how the Act and the regulations apply in the U.S. Territories. *DOI Response:* The Act and these regulations only apply to the 50 states and the District of Columbia. Unlike other statutes referenced by one of the comments, the Act does not provide a definition of the United States that includes its Territories and possessions. Any change to this limitation would require Congressional action.<sup>295</sup>

### A. Geographical Language

Similar federal cultural heritage legislation already applies to the Territories.<sup>296</sup> The National Historic Preservation Act (“NHPA”) was passed in 1966, and its geographical language expressly lists the Territories in addition to the fifty states.<sup>297</sup> It defines “state” as “a State, the District of Columbia, Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Northern Mariana Islands; and the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic

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292. 43 C.F.R. § 10 (2023).

293. Diebel, *supra* note 1.

294. 25 U.S.C. § 3010.

295. 43 C.F.R. § 10 (2023).

296. *NAGPRA-ARPA-NHPA-Procedures*, *supra* note 271.

297. 54 U.S.C.A. § 300317 (West).

of Palau.”<sup>298</sup> Should an expanded NAGPRA ever pass, Congress could easily use the same geographical language.

*B. Potential Claimant and Consultative Organizations*

Congress should use NAGPRA’s framework for Native Hawaiians due to the unlikelihood of indigenous tribes in the Territories gaining federal tribal recognition. “Federal recognition” is a term used to describe the government-to-government relationship between the federal government and tribal governments in a political relationship with the United States.<sup>299</sup> Native Hawaiians are not a federally recognized tribe, so NAGPRA uses the term “Native Hawaiian Organization” (“NHO”). “Native Hawaiian Organization” is defined broadly as an organization that “[s]erves and represents the interests of Native Hawaiians,” “[h]as as a primary and stated purpose the provision of services to Native Hawaiians,” and “[h]as expertise in Native Hawaiian affairs.”<sup>300</sup> Organizations include environmental, cultural, and educational advocacy groups.<sup>301</sup>

Similar consultative organizations already exist in the Territories and may be considered suitable organizations for NAGPRA claims and consultations. An executive order from the Guam Governor’s office created an advisory council in response to concerns surrounding military build-up.<sup>302</sup> The council includes several Chamorro tribal and advocacy organizations, such as the locally recognized Chamorro Tribal Council, who fit very similar requirements to the DOI’s regulations on Native Hawaiian organizations.<sup>303</sup> In the NMI, the NMI Museum of History and Culture is a museum established by local Public Law 10-5 in 1996 and may be an appropriate candidate for DOI recognition.<sup>304</sup> Its stated mission is to “acquire, preserve, interpret, and exhibit artifacts and other historical materials to increase public awareness, understanding, and appreciation of the rich history and cultural traditions of the Northern Marianas, a history that dates back nearly 4,000 years.”<sup>305</sup>

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298. *Id.*

299. Justin Pybas, *Native Hawaiians: The Issue of Federal Recognition*, 30 AM. INDIAN L. REV. 185, 186 (2005/2006).

300. 25 U.S.C. § 3001.

301. U.S. DEP’T OF INTERIOR, NATIVE HAWAIIAN ORGANIZATIONS (2022), <https://www.doi.gov/sites/default/files/documents/2024-08/nhol-complete-list-final-web.pdf> [<https://perma.cc/FJT2-G9MF>].

302. Guam Exec. Order, No. 2012-06 (Feb. 21, 2012).

303. *Id.*

304. *History and Mission*, NMI MUSEUM, <https://nmimuseum.org/history-mission/> [<https://web.archive.org/web/20231029045730/https://nmimuseum.org/history-mission/>] (last visited Oct. 29, 2023).

305. *Id.*



The locally recognized Guainía Taíno tribe could be an appropriate organization from the U.S. Virgin Islands. While there are no locally recognized Taíno organizations in Puerto Rico, the Taíno Jatibonícu Tribe of Boriken, the Taíno Nation of the Antilles, the United Confederation of the Taíno People, the Guatu Ma-Cu A Boriken Puerto Rico People, and Higuayagua are organizations actively working to revive and protect Taíno culture and may be appropriate organizations for the NAGPRA claim and consultative process.<sup>306</sup>

American Samoa differs from the rest of the Territories due to the fact that indigenous Samoans comprise almost 90% of the islands' population and its unique communal land ownership system headed by *matai* leaders.<sup>307</sup> *Matais* are the leaders of their extended familial clan and are responsible for overseeing family finances and land.<sup>308</sup> There is a hierarchy among *matais*, where the highest *matais* would be equivalent to a county-level leadership position.<sup>309</sup> While cultural Samoan organizations exist,<sup>310</sup> it may make more sense for NAGPRA claimant and consultative processes to center around the familial *matai* system, which is deeply embedded into the legal system in American Samoa.<sup>311</sup> For example, there are judicial procedures for adjudicating *matai* title disputes and the American Samoa Senate requires members to be *matai* title holders. Because *matais* are based on extended family units, claimant entities based on *matais* may be especially appropriate for human remains, where NAGPRA gives ownership priority to lineal descendants.<sup>312</sup>

Another possible method to standardize regulations may be to statutorily designate each territory's State Historic Preservation Office as a claimant and consultative organization. SHPOs were created

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306. Guarocuya Batista-Kunhardt, *Beyond Paper Genocide: Taíno Recognition in Puerto Rico*, BROWN POL. REV. (Feb. 17, 2022), <https://brownpoliticalreview.org/beyond-paper-genocide/> [<https://perma.cc/6F8J-FUGJ>]; see also DeAnna Marie Rivers, *Taino Sacred Sites: An International Comparative Analysis for a Domestic Solution*, 20 ARIZ. J. INT'L & COMP. L. 443, 471 (2003) (discussing NAGPRA as applied to the Taíno people).

307. *American Samoa - 2020 - III.B. Overview of the State*, HEALTH RES. & SERVS. ADMIN. MATERNAL & CHILD HEALTH, <https://mchb.tvisdata.hrsa.gov/Narratives/Overview/be7a1b90-b6cb-4716-ac6e-a27b897be87a> [<https://perma.cc/6S88-SQYD>].

308. A.P. Lutali & William J. Stewart, *A Chieftal System in Twentieth Century America: Legal Aspects of the Matai System in the Territory of American Samoa*, 4 GA. J. INT'L & COMPAR. L. 387, 391 (1974).

309. *Id.* at 390.

310. AMERIKA SAMOA HUMANITIES COUNCIL, <https://www.ashcouncil.org/> / [<https://web.archive.org/web/20250126093053/https://www.ashcouncil.org/>].

311. See generally Lutali & Stewart, *supra* note 308.

312. 25 U.S.C. § 3002.



through NHPA,<sup>313</sup> a piece of federal legislation which specifically includes the five Territories.<sup>314</sup> SHPOs already exist in Guam, Puerto Rico, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands.<sup>315</sup> Guam's State Historic Preservation Office has already been coordinating voluntary repatriation efforts in recent years, such as with the repatriation of archeological remains from the University of California-Riverside laboratories in November of 2023.<sup>316</sup>

### C. Defining "Tribal Lands"

Another major jurisdictional element of NAGPRA is its "on federal or tribal lands" language. NAGPRA defines "tribal land" as all lands within the exterior boundaries of any Indian reservation, all lands of dependent Indian communities, and any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act ("HHCA").<sup>317</sup> Because no indigenous tribes in the Territories are federally recognized, the first two definitions of "tribal land" could not apply in any of the five Territories. Because there is little local tribal recognition framework in the Caribbean Territories, an expanded NAGPRA may only end up covering federal lands in those regions. However, Guam and the Northern Mariana Islands have programs like the HHCA, and expanded NAGPRA legislation could proceed under analogous definitions. The HHCA was passed by Congress in 1920 and created a land trust of 200,000 acres for the benefit of Native Hawaiians.<sup>318</sup> Native Hawaiians may lease these lands for 99 years for an annual rent of one dollar.<sup>319</sup>

In 1975, Guam enacted the Chamorro Land Trust Act, which holds public land for the benefit of the island's indigenous Chamorros, who are allowed to apply for long-term residential and agricultural leases for a rental amount of one dollar per year.<sup>320</sup> The trust's inventory contains

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313. 54 U.S.C. § 302303.

314. 54 U.S.C.A. § 300317 (West).

315. *Id.*

316. *2,000-year-old CHamoru Ancestral Remains Return to Guam*, *supra* note 154.

317. 25 U.S.C. § 3001.

318. *About the Department of Hawaiian Home Lands*, DEP'T OF HAWAIIAN HOME LANDS, <https://dhhhl.hawaii.gov/dhhl/> [<https://perma.cc/2E5R-LMYK>].

319. Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, ch. 42, 42 Stat. 108 (1921) (amended 2011).

320. KUMISION INAGOKKON TANO' CHAMORRO (CHAMORRO LAND TRUST COMMISSION), A REPORT TO THE CITIZENS OF GUAM I (2014) [https://www.opaguam.org/sites/default/files/cltc\\_ccr14.pdf](https://www.opaguam.org/sites/default/files/cltc_ccr14.pdf) [<https://perma.cc/NUF6-GHGP>] [hereinafter *Report*]. However, as of 2020, the Chamorro Land Trust Commission is no longer excluding non-Chamorros from the lease program, *see infra* note 341.

thirty-three percent of the Government of Guam's property throughout the island.<sup>321</sup> While Congress did not pass the Chamorro Land Trust Act, it otherwise matches the framework of the HHCA. Congress could expand the "tribal lands" definition to include language such as "any lands administered for the benefit of Native Chamorros and Carolinians pursuant to the Chamorro Land Trust Act."

Article 11 of the Northern Mariana Islands Constitution states that public lands belong "collectively to the people of the Commonwealth who are of Northern Marianas descent."<sup>322</sup> Section 4 of Article 11 establishes the Marianas Public Land Corporation ("MPLC") to manage public land for the "the benefit of the people of the Commonwealth who are of Northern Marianas descent."<sup>323</sup> Congress could add the MPLC-managed lands to the definition of "tribal land."

As mentioned earlier, over ninety-six percent of land in American Samoa is under Samoan communal ownership, and all communally owned land is owned by indigenous Samoans.<sup>324</sup> American Samoan real property case law provides definitions and evidence of communal land ownership, which Congress could adopt for their "tribal land" definition for American Samoa.<sup>325</sup> American Samoan case law states that the "best evidence of communal ownership of land is shown by family exercising acts of authority over the land such as clearing, planting, cultivating and building upon the land." This specification could be adopted in DOI regulations.<sup>326</sup> On the other hand, arguments could easily be made that communally owned land should be classified as "private land" and not subject to NAGPRA, as the American Samoa real property laws are also *sui generis* within the wider American legal sphere.

#### D. Potential Shortcomings

Using NAGPRA's Native Hawaiian framework for the Territories would provide these regions with much needed legal protections but may also run into problems. A relatively broad definition of "Native Hawaiian Organization" ("NHO")<sup>327</sup> has led to legal battles among NHOs who

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321. *Report, supra* note 320, at 1.

322. N. MAR. I. CONST. art. 11, § 1.

323. N. MAR. I. CONST. art. 11, § 4.

324. Youngwood, *supra* note 147.

325. *Real Property*, AM. SAM. BAR ASS'N., <https://asbar.org/real-property-d100/> [<https://perma.cc/ZDW3-USP8>] (last visited Mar. 18, 2025).

326. *Id.*

327. Lesly Keolanui Awong, *Repatriation in Hawaii: Its Complexities and Challenges* 64 (Dec. 2011) (M.A. thesis, University of Hawai'i) (on file with the Hamilton Library, University of Hawai'i).

have different views on what should be done with cultural objects.<sup>328</sup> Federal agencies have acknowledged the difficulty of identifying the correct recipients for repatriations, stating that repatriation will commence once the ownership dispute is resolved through private negotiations between NHOs or through the courts.<sup>329</sup> Native Hawaiians have expressed concerns over the definitions contained in NAGPRA and how they conflict with Hawaiian cultural norms, namely the “lineal descendant” definition and the four categories of cultural objects.<sup>330</sup> Many early burials lack identifying information, or such information was held in confidence by a non-lineal family member.<sup>331</sup> Non-lineal family members are not recognized as claimants under NAGPRA; only lineal descendants and NHOs are recognized.<sup>332</sup> Some non-lineal family members have resorted to organizing themselves as a NHO to be able to make claims.<sup>333</sup> NAGPRA professionals have also found it difficult to classify artifacts into the four categories of associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony.<sup>334</sup>

There may also be constitutional challenges that arise with indigenous-focused legislation. NAGPRA’s regulations in Hawaii sidestep issues around race-based classifications by not requiring that NHOs actually be comprised of Native Hawaiian members.<sup>335</sup> This framework proceeds differently from NAGPRA regulations in the continental states, which are structured mostly around the concept of Indian tribes as political entities, membership in which the Supreme Court held to be a political rather than race-based classification in *Morton v. Mancari*.<sup>336</sup> Previous attempts of Native Hawaiian political organizing have been held to be impermissible

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328. Martha Cheng, *The Mission: Bringing Home Native Hawaiian Remains*, HONOLULU MAG. (July 21, 2022), <https://www.honolulumagazine.com/edward-halealoha-ayau/> [https://perma.cc/3NS4-QTRT].

329. Kate Fitz Gibbon, *NAGPRA in Hawaii: Museum and Native Hawaiian Conflicts*, CULTURAL PROP. NEWS (May 1, 2019), <https://culturalpropertynews.org/nagpra-in-hawaii-museum-and-native-hawaiian-conflicts/> [https://perma.cc/MB4L-4GX9]; see also Notice of Intent to Repatriate Cultural Items, U.S. Department of the Interior, National Park Service, 74 Fed. Reg. 10,755 (Mar. 12, 2009).

330. Awong, *supra* note 327, at 63.

331. *Id.*

332. *Id.* at 69.

333. *Id.* at 64.

334. *Id.* at 61–62.

335. 43 C.F.R. § 10 (2023).

336. *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (holding that a hiring preference for enrolled tribal members by the Bureau of Indian Affairs is a political classification and not a race-based classification).

race-based classifications, such as in the case of *Rice v. Cayetano*.<sup>337</sup> The State of Hawaii in *Rice* argued that the exclusion of non-Native Hawaiians from voting in a specific state election was a permissible political classification under *Mancari*, a characterization the Supreme Court rejected, stating, “It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes.”<sup>338</sup> Similarly, the Ninth Circuit Court of Appeals has held that indigenous peoples in the Northern Mariana Islands are not members of “quasi-sovereign” tribal entities like enrolled Indian tribal members are and that attempts to exclude non-indigenous residents from certain elections were an impermissible race-based classification in violation of the Fifteenth Amendment.<sup>339</sup> The government of Guam in 2018 attempted to argue that Chamorros are a *Mancari*-like political classification in a racial discrimination lawsuit over the Chamorro Land Trust Act, a law which gave native Chamorros exclusive access to low-cost land leases.<sup>340</sup> However, the case was settled with the Department of Justice in 2020 before the classification question could be ultimately answered, with Guam agreeing to “award leases based on whether individuals lost land or use of land, including during World War II and its aftermath, instead of whether an applicant is a ‘native Chamorro.’”<sup>341</sup>

None of the race-related cases in Hawaii specifically involved NAGPRA NHOs, so it is unclear whether race-based classifications for NAGPRA claimant organizations would ultimately be permissible, though such arrangements would be unlikely to prevail. If Guam, for example, wanted to organize Chamorro organizations for the NAGPRA claimant or consultative organization, it might have to forgo ancestry requirements to avoid tricky constitutional questions.

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337. *Rice v. Cayetano*, 528 U.S. 495 (2000) (holding that a requirement that voters for the trustees for the Office of Hawaiian Affairs be of Native Hawaiian descent is an impermissible race-based classification in violation of the 15<sup>th</sup> Amendment).

338. *Id.* at 518. *But see Doe ex rel. Doe v. Kamehameha Schools*, 470 F.3d 827 (9th Cir. 2006) (holding that the private Kamehameha Schools’ admission requirement that students be of Native Hawaiian descent is a permissible race-based classification that withstands strict scrutiny).

339. *Davis v. Election Comm’n*, 844 F.3d 1087, 1094 (9th Cir. 2016).

340. *U.S. v. Gov’t of Guam*, Civil Case No. 17-00113, 2018 U.S. Dist. LEXIS 215308 (D. Guam Dec. 21, 2018). 21 Guam Code Ann. §§ 75107–75108 (2021).

341. *Justice Department Resolves Fair Housing Act Lawsuit Against Guam’s Government for Racial and National Origin Discrimination*, U.S. DEP’T OF JUST. (June 4, 2020), <https://www.justice.gov/archives/opa/pr/justice-department-resolves-fair-housing-act-lawsuit-against-guams-government-racial-and> [<https://perma.cc/H5ZN-RSXH>].

## VI. CONCLUSION

While NAGPRA has many shortcomings in its implementation, expanding its jurisdiction can be one step towards rectifying the damage of ongoing indigenous cultural property loss in the U.S. Territories. While indigenous cultural objects have become commercialized, their worth to their respective communities has no monetary value; they are an invaluable part of tribal identity and cultural perseverance. Chamorro activist Cara Flores-Mays said, in response to military build-up in Guam, “I think there’s a growing number of people who are realizing that money is not everything and that there are parts of our island that we’ll lose that will be irreplaceable and that are much more valuable than money.”<sup>342</sup> Indigenous groups in the fifty states and Territories have a shared history of cultural dispossession stemming from colonization. Indigenous people of the Territories additionally suffer from political disenfranchisement and exclusion from the American historical narrative. Extending what little cultural property laws exist in the United States to its often-forgotten regions would be an important step in rectifying the historical and on-going expropriation of their cultural heritage.

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342. VINE, *supra* note 16, at 92.