If Geronimo Was Jewish: Equal Protection and the Cultural Property Rights of Native Americans

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In any discussion of the Equal Protection Clause of the United States Constitution, the question must arise as to whom is protected in the Bill of Rights. The government of the United States affords equal protection to all persons subject to its jurisdiction and the Fourteenth Amendment requires that, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."\(^1\) The Fourteenth Amendment was adopted in the aftermath of the Civil War out of a persistent desire that the states defeated in war be prohibited in the Constitution from any power to discriminate against "emancipated Negroes and their white protectors."\(^2\)

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1. U.S. CONST. amend. XIV.
However, this constitutional protection was not intended to be limited to one group of newly emancipated people. Or was it? This paper asks whether the Equal Protection Clause applies to Native Americans and, if it does, whether a different standard of rights applies to Native Americans than to other people under the jurisdiction of the laws of the United States.

The totality of Indian Law in the United States is a vast and complicated subject. This paper attempts a narrow focus to examine the dual standard that persists with regard to the cultural property rights of Native Americans. It is the thesis of this paper that if equal protection under the law is indeed available to Native Americans, then “special” laws to protect their rights would not be necessary. In a nation where equal protection of property rights is afforded to all, then there should be recognition and respect for the right to maintain the culture of a people and the right to enforce the cultural property rights of Native Americans as a matter of constitutional law.

This paper begins with a look at the differences in progress between Native Americans and minority groups in achieving equal protection of the law, both in daily life and for their property. To further examine how Native Americans became “special,” but not equal, under the law, a brief review of the history of Indian law is necessary. This paper then focuses on one notable Native American, Geronimo, chronicling his life and then contrasting the ways in which the laws of the United States currently provide equal protection for the cultural property rights of groups other than Native Americans. Where the disparity of impact on Native American cultural property rights cannot be explained but for a distinction based on race, the legal culture which has persisted in allowing the disenfranchisement of a group cannot be justified in a nation which espouses equal protection under the law.

I. APPLICATION OF THE EQUAL PROTECTION CLAUSE TO NATIVE AMERICANS

In an historical perspective, the equal protection clause of the Fourteenth Amendment was enacted so that, “[w]hatever law protects the white man shall afford “equal” protection to the black man.”\(^4\) Initially the effect of the provision was thought to apply only to blacks and only to enforce equal protection in the context of state and not federal law.\(^5\)

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3. U.S. CONST. amend. V.
4. MASON & BEANEY, supra note 2, at 381.
5. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). These cases questioned
However, neither limitation has been upheld. Rather the reach of Congress under the "Civil War Amendments" has been enlarged as necessary and proper in order to make equal protection of the law fully effective. The Civil Rights Act of 1871 assumed human liberty and human rights to be protected by the Bill of Rights as to the federal government and the states.

In similar fashion, if the Fourteenth Amendment is not confined to any class or race, "[w]e do not say that no one else but the negro can share in this protection." Courts have extended the concept of equal protection to examine patterns of disparity of impact upon different races as indicia of impermissible discrimination. The application of equal protection to "any person" applies not only to blacks, but to Mexican aliens, Chinese business owners, and to a jury of one's peers regardless of race.

Equal protection of law shall not be abridged in access to employment, education, housing, eating areas in restaurants, public transportation facilities, public transportation, public housing, as well as other aspects of daily life subject to regulation by federal or state law.
The hard won advances in human rights from the 1860s through the 1960s were primarily focused upon redress for the circumstances of African Americans, who had been separated from their culture, brought into this country with little or no possessions, and placed in a social structure of slavery. Thus, the gains in civil justice did little for Native Americans who often lived far apart from urban American life on reservations and who did not, as a practical and legal matter, have access to housing, medical care, schools, restaurants or other public or private facilities. During the same century that civil rights advances were being fought and won for African Americans, Native Americans saw their families divided and their children sent to boarding schools, their medical needs, housing and other services tightly controlled by the federal government and administered separately from the rest of American society by the Bureau of Indian Affairs (BIA). Those Native Americans who resided on reservations or ancestral lands designated as Indian country did not experience the economic opportunities made available to impoverished urban areas through federal block grants administered through the states. Indian country was regarded as separate and “special,” but not equal.20

Despite the social gains made by other minority groups in the United States, Native American people remained apart from mainstream society. Although slavery was abolished by the Thirteenth Amendment in 1865, and African Americans were guaranteed the right to vote in 187021 and women in 1920,22 none of these rights applied to Native Americans, with few exceptions by treaty,23 until they were granted citizenship in 1924.24 Native Americans then headed to court to enforce the right to serve as jurors,25

20. See HRI, Inc. v. EPA, 198 F.3d 1224, 1245 (2000) (holding that the federal government has a “special trust obligation” to protect the interests of Indian tribes, including their property). The special relationship between the federal government and tribes is a product of treaties which created the trust relationship, which is a government-to-government relationship. The BIA maintains a list of all federally recognized tribes, which includes communities of Indians and Alaskan Native villages. When referring to this relationship this paper will refer to “tribes.” However, in the complex rubric of Indian law there are also trust relationships between the federal government and individual Native Americans. When referring to individual rights and rights as part of the group, including Native Hawaiians, but not as a government, this paper will refer to “Native Americans.” See also Stuart Minor Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 YALE L.J. 537 (1996).
21. U.S. CONST. amend. XV.
22. U.S. CONST. amend. XIX.
attend public school, obtain a business license, or receive municipal services. The right of Native Americans to vote was not fully resolved until 1975.

While all of the monumental and hard fought victories in the pursuit of equal access to the accoutrements of life for Native Americans were being established, there was little or no focus upon the rights to personal property, family property, or the accumulated cultural property of groups. Certainly the standards for analyzing property rights under the Fifth Amendment are identical to those for analyzing the right to equal protection for all citizens of the United States, as administered by the states subject to the Fourteenth Amendment. Emancipated slaves may have had little personal property. However, they and new immigrants retained what little they possessed free of government interference, while the cultural property of Native Americans during this same period was treated by the federal government as government property. The assumption of all rights on conquered territory by the United States government was a particularly critical issue for Native Americans who had buried their ancestors on this continent for a millennium or more and were tied to the land in innumerable ways. Since 1906, the federal government has given permits for scientific data recovery on federal and Indian lands, which are contracts between the government and the educational or other contracting institution for the exhumation and study of items for a period of time, to which those people or tribes with cultural ties to the area and items have not been a party. The law regards as government property those items exhumed

26. See Dewey County v. United States, 26 F.2d 434 (8th Cir. 1928) (recognizing that Indian children may attend public school regardless of whether tribal land is subject to state or local taxes).


30. See Nicholas v. Tucker, 114 F.3d 17, 19 (2d Cir. 1997).


32. See 16 U.S.C. §§ 432, 470cc. See also Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015 (9th Cir. 2002) (dismissing an action involving a gaming license for failure to join an indispensable party, where the tribes were not parties to the action and the tribes had a gaming compact with the state); Lummi Nation v. Golder Assoc., Inc., 236 F. Supp. 2d 1183 (W.D. Wa. 2002) (determining the tribe was a third party beneficiary to a contract for archaeology between the city and the private archaeology contracting firm and could bring a claim for damages for negligence by the firm).
subject to the permits, although effectively the items have remained in the control of the contractor for an indefinite basis.33

Therefore, while Native Americans should enjoy equal protection of the law, as residents of the United States, whether they live on or off reservations and regardless of state boundary, a dichotomy has persisted in the ways in which Native Americans are treated.34 The disparity in treatment is particularly evident in the regard for Native American cultural property, as will be further discussed below in detail. Before embarking on a further discussion of cultural property, however, it would seem appropriate at this point to review those aspects of Indian law which set the stage for the special, but less than equal, treatment of Indians.

II. A SHORT HISTORY OF INDIAN LAW: SPECIAL IS NOT EQUAL

The history of Indians in America is a story written by the victorious. If one examines an American history textbook, it begins with the discovery of America and its exploration and conquest by the Spanish, Dutch, French and English. If mentioned as part of the story at all, Indians are described as early hosts, and later renegades, in the path of the manifest destiny of a nation's westward expansion.35 Indian history is taught in pre-collegiate courses as a footnote to American history, sanitized of the genocide and savagery perpetrated by pioneers and the American military on Indians. It is no wonder that the very idea of what constitutes Indian culture as held by non-Indian lawyers and jurists who enforce the constitutional guarantees of equal protection, is a product of popular movies and the occasional trip to an Indian art market for the very fortunate.

The Indian policy of the United States is largely attributed to Thomas Jefferson who established as his legacy the dichotomy of treating tribes as independent nations,36 not requiring government support for their survival even as their lands were diminished, and “domestic dependent nations,”37


35. Fergus M. Bordewich, Revolution in Indian Country, 47 AM. HERITAGE 34, 43 (July/Aug. 1996).

36. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). According to the Court, the tribes retained “their original natural rights.” Id. at 559.

under the regulation of Congress, so that they might not have the ability to make alliances with the British. This policy and the court cases enforcing it established a special relationship between the federal government and the tribes, that has been described as a trust relationship, that of the United States as a guardian for its wards, the tribes. While it would seem that this "special" relationship would mean that Indians must receive at least equal treatment under the law, in historical fact, the opposite has been true. That Indians had a special status with the federal government was used as a basis by states to deny equal protection for Native Americans under state law. In meeting its trust obligation, the United States has had "a critical failure in the perception of the Federal-Indian relationship." The Indian Civil Rights Act of 1968 actually had the effect of narrowing the rights of tribes and imposing federal regulation on internal tribal affairs.

Another view of the policy toward Indians is that the attitudes developed much earlier as Columbus brought to the new territory an old world ethic "which justified denying rights of self-rule and property to peoples whose cultures and religions were different from Christian Europeans that was already nearly four centuries old by the time Columbus reached the new world." The crusader ethic of cultural racism held that if the occupants of an area desired for conquest could be dismissed as heathens and infidels, then their subjugation and appropriation of their property would be justified in the name of Christian European norms for society. To seal the justification of preemption, the conquered must be

38. U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause states "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Id.
41. See supra notes 25-29.
44. See Talton v. Mayes, 163 U.S. 376 (1896) (holding that the Constitution does not require fidelity from tribes as tribes are self governing).
seen as savages, devoid of religion, and in need of conversion to Christianity.

In the new world John Cabot was given the authority to take the towns belonging to the infidels by King Henry VII in 1497. The process of converting to Christianity all of the Indians not annihilated thus began and persisted for the next 400 years. In the post Civil War years, when African Americans were set free to devise a life for themselves, Native Americans were living on reservations still under the control of the federal government, which allocated each of the tribal lands among the major religions, with each church assigned federal funds to engage in the "civilizing process" of Native Americans. Native Americans were to be assimilated sans their property, native languages, religions and cultural practices.

By 1887, there were almost 300 Indian reservations established by treaties between the tribes and the federal government. Some reservations were established on the ancestral homeland of the tribes, such as the Navajo and Hopi in the west, while others were "removed" from eastern states to reservations in Oklahoma, where tribal distinctions were not always respected in the conglomeration of tribes into reservation boundaries. While the bargained-for peace placed Native Americans in a barely sustainable position, socially and economically, they were free from annihilation in what Indian law scholar Charles Wilkinson refers to as a "measured separatism." Any hope that the Indians held that the United States would abide by these treaties was dispelled by the passage of the General Allotment Act, commonly known as the Dawes Act of 1887. The Dawes Act allowed reservation land to be divided into parcels owned by individual tribal members, which they could then sell and thus disperse the tribe into the community as a final act of assimilation. The lands could then be placed into the marketplace. By the time the Dawes Act was repealed by the Indian Reorganization Act of 1934, the size of reservation land in the United States was reduced to less than a third of what it had been almost fifty years before. The Dawes Act left within the exterior

46. Id. at 361.
52. See generally Williams, supra note 45, at 363-64.
boundaries of a reservation privately held “in-holdings,” the regulation of which has been a source of ongoing contention. Then between 1954 and 1966 Congress used its authority again, this time to terminate over one hundred tribes, mostly in Oregon and California, thus ending any obligation to provide services predicated on earlier treaties.\footnote{See Prevar, supra note 23, at 57.}

The courts perpetuated the idea of the American savage in a refusal to apply either common law concepts of property law or Constitutional precepts to Indians. The 1823 decision of Chief Justice John Marshall in \textit{Johnson v. M'Intosh}\footnote{21 U.S. (8 Wheat.) 543 (1823).} is regarded as the beginning of United States Federal Indian law. In the case, both parties purchased the same parcels of land; the plaintiffs made their purchases directly from the Indian land owners prior to the Revolutionary War, and the defendants bought the same land from the United States after the conclusion of the peace treaty between the United States and Great Britain. At issue was “the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.”\footnote{\textit{Id.} at 572.} If the Court applied the common law of property and recognized the ownership of the plaintiffs, it would then give legitimacy to, and recognize the equal rights of, Indians to own and transfer title in property. Instead, the Court held that American Indian tribes had no power to transfer title to lands as they held no legally enforceable rights to the land. Justice Marshall based the decision on the Doctrine of Discovery,\footnote{\textit{Id.} at 573-75.} defined as “an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.”\footnote{\textit{Id.} at 587.} The natural right to own and contract for property and exclude trespassers, enforced for farmers and merchants, would not be extended to Indians.\footnote{\textit{Id.} at 591-92.}

That the legacy of \textit{Johnson} has proceeded into the twentieth century and overtaken the holding in \textit{Worcester v. Georgia}\footnote{31 U.S. (6 Pet.) 515.} can be seen in the Supreme Court decisions: \textit{Oliphant v. Suquamish Indian Tribe},\footnote{435 U.S. 191 (1978).} which placed limits on tribal sovereignty by denying tribes criminal jurisdiction over non-Indians who commit crimes on Indian land in violation of tribal law; \textit{Montana v. United States},\footnote{450 U.S. 544 (1981).} which limited civil jurisdiction over non-Indians who hunt and fish on the reservation in violation of tribal code; and

\begin{itemize}
\item \textbf{53.} \textit{See} Prevar, supra note 23, at 57.
\item \textbf{54.} 21 U.S. (8 Wheat.) 543 (1823).
\item \textbf{55.} \textit{Id.} at 572.
\item \textbf{56.} \textit{Id.} at 573-75.
\item \textbf{57.} \textit{Id.} at 587.
\item \textbf{58.} \textit{Id.} at 591-92.
\item \textbf{59.} 31 U.S. (6 Pet.) 515.
\item \textbf{60.} 435 U.S. 191 (1978).
\item \textbf{61.} 450 U.S. 544 (1981).
\end{itemize}
Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation and Strate v. A-I Contractors, both of which limited the extent of tribal regulatory jurisdiction and authority within Indian country to a strict interpretation of Indian land, not to include private in-holdings or highways running through the reservation.

Lest the idea that the special and less than equal regard for the human rights of Native Americans is an historical antiquated notion, or that it only applies to dismantling Native American society with regard to land and political organizations, the following discussion of Native American cultural property law is situated in the present tense and looks at cultural slavery present in the United States by a refusal of the courts to apply the common law and constitutional law to human remains, cultural items and intellectual property of Native Americans. Before looking at the present state of special and less than equal regard for the cultural property rights of Native Americans in contemporary society, it is necessary to introduce the central figure in this discussion, Geronimo.

III. Geronimo: From Arizona to Florida

In contrast to much of what is written about Indian history by non-Indians, the story of Geronimo is known from his own words as dictated in 1906. Geronimo was born in Arizona in 1829, during a period of peaceful relations among the Apache tribes and between the Apaches and the Mexicans in the area. By age seventeen he was admitted to the council of warriors, married and thereafter had three children. Then, in the summer of 1858, when on a trip to the Mexican state of Chihuahua to trade for supplies, while the men were in town, Mexican troops raided the encampment where the women, children and a token guard remained, slaughtered the Apaches in a grisly manner and took whatever they could. The dead included the mother, wife and three children of Geronimo. Geronimo returned from the town to face his worst nightmare, a scene from which he never recovered. He returned to Arizona, united several Apache tribes and waged war on the Mexicans until his arrest and transfer to the

63. 520 U.S. 438 (1997). See also Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059 (9th Cir. 1999) (holding that the tribal court lacks jurisdiction over a tort action arising from an accident on a railroad right-of-way that crosses the reservation).
64. Geronimo, GERONIMO'S STORY OF HIS LIFE (S.M. Barrett ed., 1906).
65. Odie B. Faulk, THE GERONIMO CAMPAIGN 21 (1969). Geronimo was the grandson of Maco, Chief of the Mimbreno Apaches, but was, under the Apache matrilineal rules of descent, a Bedonkohe Apache.
San Carlos Reservation in Arizona in 1877. Keeping Geronimo on a reservation was not an easy task. While other Apache tribes were fighting with the American Army, Geronimo used the diversion to head back into Mexico in 1881, where he visited his vengeance on Mexican towns until his surrender in 1884, when he was returned to San Carlos.66

The Arizona territory in the post-Civil War era was filled with an abundance of soldiers needing a cause. The soldiers were employed to hold the Apaches on the reservation in a constant state of near starvation and without the ability to learn new skills that would assist Indians in becoming self-sufficient, for fear that they would succeed.67 Those with the most to lose were a group of profiteers in Tucson, known as the "Tucson Ring," who were adept at perpetuating an Apache scare in Washington, which would bring in more troops and further their business ventures in government procurement contracts.68 By 1885, Geronimo lost all patience with the rules placed on his people by government agents. He and several other chiefs left the reservation in an act of defiance that must have struck fear into all those living in the Southwest. The Army responded by murdering Apaches whether or not they were combatants. Initially, Geronimo surrendered to General Cook, whom he trusted to end the slaughter of Apaches.69 The surrender agreement was frustrated by the Tucson Ring, which is credited with delivering rumors to Geronimo that he would be murdered upon return, causing him to flee deeper into Mexico, where he eluded capture until late 1886. Geronimo was enticed to finally surrender on the basis that he, his extended family and his followers, would be removed from Arizona to Fort Marion, Florida, where they could live in peace. In defiance of the terms of the surrender, Geronimo was kept imprisoned apart from his family in Fort Pickens, Florida.70

Geronimo was held as a prisoner of war in Fort Pickens where he was forced into hard labor, while all those who had something to do with his capture, except General Cook, glorified themselves in the press as having valiantly suppressed the savages.71 Eventually, Geronimo was moved to Fort Sill, Oklahoma, where he adapted to his life as a farmer. Later in life he capitalized on the glorified notions of his life and found work in "Wild West" shows.72 When Geronimo died on February 17, 1909, his status was

66. Id. at 25.
67. Id. at 42.
68. Id. at 43.
69. Id. at 90-91.
70. Id. at 174.
71. FAULK, supra note 65, at 207.
72. Id. at 210.
that of a war prisoner and he was buried at Fort Sill in the Apache cemetery.\footnote{Id. at 214.}

Controversy over the human remains of Geronimo began shortly after his burial. It was thought that he was exhumed shortly after the funeral by family and secretly taken back to somewhere in New Mexico. Others believed that the talk of exhumation was a rumor started by family to ward off those who would desecrate the burial looking for souvenirs.\footnote{Id. at 216.} Still others believe that six young Army captains, including the grandfather of President George W. Bush, Prescott Bush, partially exhumed the remains in 1918 and ensconced the skull in the Museum of the Skull and Bones, the secret society at Yale.\footnote{See Brenda Norrell, Geronimo’s Remains Still Held by Skull and Bones?, available at http://www.rense.com/general42/held.htm (last visited Sept. 30, 2003). See also Tim Giago, Where Are They Hiding Geronimo’s Skull?, LAKOTA NATION J. (Sept. 3, 2000), available at http://www.georgewalkerbush.net/wherearetheyhidinggeronimosskull.htm.} As will be discussed below, controversy over the remains of the great chief have persisted for ninety years. Such controversy is illustrative of the way in which Native American human remains, and indeed the rights of Native Americans to determine the disposition of the remains of their dead, are currently viewed.

The following discussion takes a mythological Geronimo through time to the present to view treatment under the law of Native American cultural beliefs as expressed in cultural practices, songs and ceremonies, as well as personal property for the dead and burials, that is, the cultural property of Native Americans. This discussion will turn to cultural property laws that protect cultural property rights, which begs the question of what might occur if equal protection of the law were afforded to Native Americans as it is to all other segments of American society. Would “special” laws be necessary, or would such laws simply be the further codification of property rights already existing in the common law, general cultural property legislation and constitutional law, which could and should be extended to Native Americans? These questions are divided into types of cultural property as follows:

- If Geronimo was Jewish, what protections would be enforced to protect the cultural property of Native Americans as have been afforded to those subject to the atrocities of the Nazis in World War II?
- If Geronimo was a rap star, would the intellectual property of his people, their songs and ceremonies, be given the same protection bestowed on artists in the recording industry?
• If Geronimo was an air traveler, would his human remains be accorded the same respect as provided for the victims of airline tragedies?

Certainly, there has been some special legislation to address Native American cultural property, which has received mixed support in the courts of law and public opinion. While a disparity of application of law to tribes and Native Americans is easily seen, the explanation is elusive. If there is recognition of the applicability of equal protection of the law for Native American cultural property, whether it is physical property, intellectual property, or human remains and burials, then any distinction in treatment should be a violation of constitutional law.

IV. IF GERONIMO WAS JEWISH

In the center of Prague there is a short narrow alleyway, which is home to three synagogues, a testament to the size of the Jewish population that found refuge in this city of religious tolerance prior to World War II. At the alley entrance sits a small stone structure reputed to be the oldest intact synagogue in Europe. At the end of the alley is another synagogue, which is the gateway to the cemetery housing headstones set as close together as books on a shelf. A sign at the entrance reads, “crowded in life, crowded in death.” At the mid-point on the alley there is a third synagogue, remodeled during the war by the occupying Nazi forces to establish the Museum of the Extinct Race. During the war this facility was the collection point for numerous objects of Jewish religious practice taken from synagogues across Europe. No doubt this occurred at the time of the arrest of the congregations and the burning of the structures. In recent years, the museum was reopened as an interpretive center, so that the lessons of history would not be lost, nor repeated. Many of the items collected by the Nazis remain in the glass display cases, while others have been repatriated, if not to the original congregations, then to other Jewish congregations throughout the world.

The appropriation of religious items from Jews was just part of the theft and coercive transfers of art and other personal property perpetrated by the Nazi regime from 1933 through the end of the war. At the close of the war, Allied forces took possession of the recovered art, religious items and currency and made an attempt to return all of the property when an owner or heir could be identified. That zealous effort is ongoing. Unfortunately, those items and family records held by the Russians could

77. Id. at 327-67, 407-44.
not be accessed until the late 1980s and into the 1990s. Thus, the evaluation of items as property of victims of the Holocaust is continuing sixty years later.

In the United States, the response to requests from victims of the Holocaust for assistance in retrieving property has been enthusiastic. Congress responded with the Holocaust Victim Redress Act of 1998, which focused upon gold and other monetary assets of survivors, as well as cultural property, including art and religious items. The Act initially appropriated five million dollars for archival research and created the Presidential Advisory Commission on Holocaust Assets in the United States, tasked with keeping track of the efforts to assist claimants and to recommend additional efforts as needed. The American Association of Museums (AAM) has been exemplary in its voluntary efforts to facilitate the return to Holocaust survivors of items, which may be found in museums in the United States.

The process for the evaluation of Nazi-era items, as outlined by AAM, begins with a search by the museum of its entire collection for "covered objects," which may have been created prior to 1946 and acquired after 1932 and which may have been in continental Europe between those dates. Museums are then advised to make the information easily accessible to the public. Museums are not asked to give up items where a lawful chain of ownership can be shown by the museum, nor are they excoriated as complicit in wrongful acts. Rather, the museum community has taken the position that museums may have entered into otherwise lawful transactions, where there is a cloud on the title, which they shall voluntarily rectify as responsible stewards of the collections they hold and manage. This admirable approach is also consistent with the common law of property, which states that one cannot obtain lawful title to an item that was obtained in an unlawful manner in the first instance.

80. See Nancy H. Yiede et al., THE AAM GUIDE TO PROVENANCE RESEARCH (2001); Helen J. Wechsler et al., MUSEUM POLICY AND PROCEDURES FOR NAZI-Era ISSUES (Roxana Adams ed., 2001). AAM also sponsors a Nazi-Era Provenance Internet Portal (http://www.aam-us.org; http://www.nepip.org) and seminars (the most recent was in December, 2003).
81. Wechsler, supra note 80, at XV.
82. See id. at 65 (directing provenance research without an assessment of fault to move the process of seeking truth forward).
The zeal with which the government and museums in the United States have addressed the issues of Nazi looted cultural property has not been replicated with regard to the cultural property of Native Americans. Certainly collection of Native American items has occurred since the landing of the first Europeans in the new world, and there are innumerable items of Native American art lawfully held in museums and by individuals throughout the world. The issue is not whether tribes can claim an interest in all things Indian, but whether those items not lawfully removed from tribes and individual Native Americans in the first instance should remain in the hands of the possessor in the face of a claim from the lawful owner. In this regard, tribes and Native American individuals ask not for special treatment, but for equal protection of their property rights under the common law of property. If Geronimo was Jewish, he would ask that the same fiduciary standards of the federal government and museums as applied to Nazi-era covered objects be applied to conquest-era collected items. Sadly, this has not been the case.

Historically, the cultural property of Native Americans in the United States has been treated as government property subject to government regulation, which was intended as an assertion of protective authority over the open land in order to stem the rampant looting of sites both Indian and non-Indian. Vandalism and looting of ancient Indian sites began with the arrival of the first Europeans and spread westward as development of the railroads afforded access to relic hunters. Federal agents work valiantly to cover vast territory, with few rangers, in an effort to prosecute those who rob the land of a "veritable museum of archaeological treasures." Tribes appreciate the efforts of the federal government to protect sites and prosecute those who would mine the areas for personal gain. The differences between federal regulators and protectors of sites and Native Americans are ones of perspective. Cultural property legislation refers to "antiquities" and "archaeological resources" and seeks to protect government property from the loss of knowledge that could be gained by trained scientists. Native Americans see these same sites as places of cultural heritage, personal history and as sacred sites of their people. The

83. See supra notes 31-32. The authority of the federal government to issue permits for archaeological excavation on lands owned or controlled by the federal government is in the Antiquities Act (1906), and for federal and Indian lands, including United States territories, is in the Archaeological Resource Protection Act (1979).
84. See MIKE TONER, THE PAST IN PERIL 76 (2002).
86. TONER, supra note 84, at 94.
federal government presumes ownership of items on the land, while tribes and individual Native Americans may have ownership interests or common law rights in items placed on the land that are preempted by those assumptions.

ARPA allows for permits for scientific data recovery and the retention of items in federal and educational repositories for study, 87 but those permits are agreements between the federal government and the scientist or his or her institution. Tribes are not parties to the permits. 88 ARPA does not give Native Americans access to the items retrieved in archaeological excavations, the ability to monitor the study, or to obtain the items after a reasonable period of study. The length of the study is controlled by the federal government. The ARPA provides that when a permit is requested of the land manager for a study that will occur on Indian lands the tribe must give permission, 89 and if the study will occur on federal land, but will impact a religious or cultural site of a tribe, the tribe must be notified. 90 The permit request should list the final repository for “copies of records, data, photographs, and other documents derived from the proposed work, and all collections in the event the Indian owners do not wish to take custody or otherwise dispose of the archaeological resources.” 91 That the regulations to ARPA acknowledge Indian ownership of items is a routinely overlooked provision in the regulations. For the “Indian owners” to claim items, they would need knowledge of the items retrieved pursuant to the permit, the location of the items and the permit would need to contain an expiration time to enable a tribe to assert custody. Since the inception of ARPA, permits have not been monitored, time limits have not been enforced and permits have not been concluded. 92 There are no regulations

88. Tribes do have the authority to issue permits to tribal members on tribal lands if the tribe has an applicable tribal law. In the absence of tribal law, ARPA is controlling, 43 C.F.R. § 7.5(b)(3) (2003).
89. 16 U.S.C. § 470cc(g)(2).
90. 16 U.S.C. § 470cc(c).
91. 43 C.F.R. §7.6(b)(6) (emphasis added). See the ARPA regulations for permits and information collection.
92. There are no records to support the lack of monitoring activity on ARPA permits. The office responsible for such monitoring is the Archaeology and Ethnography Division of the National Park Service. The Departmental Consulting Archaeologist is responsible for that department. In 2002, the author asked the DCA how many ARPA permits had been concluded since the inception of the law and he responded, “none.” It should be noted that while ARPA standardized the permit process, each federal land managing agency issuing a permit has oversight responsibilities. The United States Army Corps of Engineers has undertaken a massive project to document and locate all of the items removed from government land pursuant to a permit issued by the Corps. The Curation
to specify how "Indian owners" are to be identified, notified, or how they may take custody of items.

While ARPA places cultural items in the control of the permittee, the earlier Antiquities Act presumes that all "gatherings shall be made for permanent preservation in public museums." The only recourse open for a tribe wishing to assert a common law property right in an item has been to go to court. In 1897, the Onondaga tribe brought an action to obtain return of the Wampum Belts from the New York State Museum, but they were unsuccessful in having the court recognize property rights of the tribe. The Wampum Belts signify the joining of the Onondaga Nation and were removed from the tribe without permission. The long-standing and prevailing assumption of museums is that if a museum acquires a Native American item through purchase or gift, it holds the item lawfully and does not need to look behind the transaction to assess the ownership history of the item.

In addition to an inability to protect items removed from the land, tribes have not had success in protecting sacred sites, which include places of cultural practice on the landscape, even when the requests have been not for fee title ownership of the land to be given to them, but merely for the protection of historical cultural practices. Since 1980, tribes have been rebuffed in court when they have sought protection of: ceremonies on Bear Butte in South Dakota, the sacred mountain of the Lakota Sioux, interrupted by tourists; the ancient capital city of the Cherokee nation, flooded by a reservoir for a hydroelectric project; Navajo ceremonies on Rainbow Bridge, opened to tourism at all times; Hopi ceremonies on a

Regulations, 36 C.F.R. §§79.1-79.11 (2003), set the standard for the long-term placement, care and access to the scientific information obtained through ARPA permits, or activities pursuant to the National Historic Preservation Act, 16 U.S.C. §§ 470a-470x-6 (2000) and the Reservoir Salvage Act, 16 U.S.C. §§ 469-469c.

96. Crow v. Gullet, 706 F.2d 856 (8th Cir. 1983).
98. Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980). But see Natural Arch and Bridge Soc'y v. Alston, 209 F. Supp. 2d 1207 (D. Utah 2002) (dismissing plaintiffs' claim holding that the National Park Service did not violate the First Amendment and forcing anyone to engage in the religious practices of the Navajo and Hopi when they restricted access to the area of the bridge during a tribal sacred ceremony consistent with the Sacred Sites Executive order 30007). This decision was upheld by the Tenth Circuit Court of Appeals on March 23, 2004. Natural Arch and Bridge Soc'y v. Alston, No. 02-4099, 2004 WL 569888, at *5 (10th Cir. Mar. 23, 2004).
sacred mountain, which became a ski resort; and the Hoopa ceremonial sites in California, disturbed by logging roads. In these cases involving the free exercise of religion, the courts have held that the government has the authority to use its land in the public interest and to impose restrictions as the desire of the tribes to conduct ceremonies would be a violation of the First Amendment Establishment Clause. However, the Supreme Court has not been constrained by the Establishment Clause when relying on the Free Exercise Clause to allow non-Indians the freedom to continue cultural traditions unimpeded by state action. Having failed to obtain equal protection of law in the courts, tribes turned to the Congress. Two pieces of legislation are notable as they specifically apply to Native American cultural property and respect the rights of federally-recognized tribes to regulate tribal cultural property. These are the 1992 amendments to the National Historic Preservation Act (NHPA), and the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA). While the American Indian Religious Freedom Act (AIRFA) and the Sacred Sites Executive Order were intended to provide Native Americans with the ability to act unfettered by the government in the practice of traditional religion, they do not provide the compliance and enforcement mechanisms available in the NHPA and NAGPRA.
The NHPA now provides several avenues for tribes to assert equal protection of the law for the cultural property and practices of the tribe. First, on tribal land, the tribe may assume the historic preservation duties under the law and no longer be bound by the decisions of the State Historic Preservation Officer (SHPO) in the designation of sites on tribal land that are eligible for nomination to the National Register and thus, the tribe may determine which sites to protect from development. The NHPA allows for the Tribal Historic Preservation Officer (THPO) to assume the duties of the SHPO.\textsuperscript{107} The 1999 Regulations to the NHPA make it clear that THPOs are on an equal level with SHPOs.\textsuperscript{108} Second, the NHPA allows "[p]roperties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization" (TCP) to be determined as eligible for inclusion on the National Register.\textsuperscript{109} Such sites may occur in the natural landscape such as mountain peaks. Third, the NHPA includes Native American cultural sites when fostering protection of sites on private land by offering grant and tax assistance to private property owners for site preservation.\textsuperscript{110} The federal government shall also encourage private property owners to give notice to, and consult with, Indian tribes or Native Hawaiian organizations prior to excavating or disposing of Native American cultural items in which the groups may have an interest.\textsuperscript{111}

NAGPRA is the quintessential equal protection law for Native American cultural property.\textsuperscript{112} "The NAGPRA represents the culmination of 'decades of struggle by Native American tribal governments and people to protect against grave desecration, to [effect the repatriation of] thousands of dead relatives or ancestors, and to retrieve stolen or improperly acquired cultural property.'"\textsuperscript{113}

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The unanimous support for the law in Congress reflects an acknowledgement that the Constitution and all prior property laws, the common law and legislation, were not being afforded to tribes and Native American individuals. NAGPRA does not create any new rights for tribes or Native Americans. Rather, it applies the common law of property, enjoyed by all others in the United States, and extends those rights to disenfranchised tribes and Native Americans, Native Hawaiians and members of Alaska Village corporations. In so doing, there are four aspects to NAGPRA. NAGPRA is:

1. Indian law, as it is predicated on the government-to-government relationship between the federal government and tribes;

2. Property law, as it extends the common law of property and the Fifth Amendment to tribal and individual property owners;

3. Human rights law, as it affords rights to Native Americans in a remedial manner,

one that occurs in the absence of an “intentional excavation,” that is, where the likely affected tribes and agency in charge of the activity have not yet agreed on a plan in the event of a discovery. Those agencies following the San Carlos rationale are doomed to thirty-day work stoppages upon each discovery. See 25 U.S.C. § 3002(d)(1) (2000). Planned intentional excavation is preferred in the law, while inadvertent discovery requires delay and remedial action.


117. 25 U.S.C. § 3001(3) identifies NAGPRA protected property as human remains and cultural items, which include funerary objects, sacred objects and objects of cultural patrimony. 25 U.S.C. § 3001(13) requires that no Fifth Amendment taking be caused by this law in that no museum will be forced to give up property lawfully held and tribes will not be made to continue in a government process which does not take into consideration the common law of property and apply it to tribes. See Sherry Hutt ET AL., CULTURAL PROPERTY LAW: A PRACTITIONER’S GUIDE TO THE MANAGEMENT, PROTECTION AND PRESERVATION OF HERITAGE RESOURCES 26-27 (Am. Bar Ass’n 2004). The intent of Congress, as seen in the early drafting stages, was to “promulgate guidelines and regulations for repatriation of human remains, ceremonial objects and grave goods consistent with American common law and principles of Federal Indian Law.” Native American Museum Claims Commission Act: Hearing on S. 187 Before the Senate Select Comm. on Indian Affairs, 100th Cong. 33 (1988).

118. McKeown & Hutt, supra note 114, at 155 (asserting that property rights guaranteed to Native Americans by NAGPRA are already guaranteed to them by the Fifth and Fourteenth Amendments; thus, NAGPRA is remedial and is human rights legislation). See Hearing on S. 1021 and S. 1980 Before the Senate Select Comm. on Indian Affairs, 101st Cong. 192 (1990) (statement of Walter Echo-Hawk that the courts were not enforcing the property rights of Native Americans); Protection of Native American Graves and the
4. Administrative procedure law, as it sets forth a process to remediate past inappropriate assumptions about tribal and Native American cultural property as government property, without input from those with a first party interest in the items.\(^{119}\)

NAGPRA protects four types of cultural property: human remains, funerary items, sacred items and items of cultural patrimony.\(^ {120}\) Funerary items held in collections as associated with human remains are treated as part of the human burial, and unassociated funerary items, those made for burials and not held in collections with the human remains, are treated as other protected cultural items for purposes of the NAGPRA process.\(^ {121}\) "[S]acred objects" are those "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents."\(^ {122}\) These may be communally or individually owned, depending on the rules of the tribe at the time the item left the possession of the owner. Cultural patrimony may only be communally owned as, at the time it left the group, it was the inalienable property of the group and had ongoing central importance to the history and meaning of the group.\(^ {123}\) The law will not remove items from owners who have a right of possession, but it does seek to restore possession to those whose rights were abridged.\(^ {124}\) Items that are in federal agency and museum\(^ {125}\) collections by virtue of a government issued permit, transferred in the marketplace by covert means, acquired through military conquest, or other means by which property was transferred without the knowledge and consent of the owner, may be repatriated to their lawful owners through claims made by those with standing, that is, federally recognized tribes and Native Hawaiian

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organizations. Tribal members may make personal claims for their personal property, or that of their ancestors, if, according to the laws of the tribe at the time the item was removed, the individual had rights of personal possession. For Native American cultural items newly discovered or unearthed on federal or Indian land after the date of the law, November 16, 1990, NAGPRA provides that a determination of ownership will be made.

If Geronimo was Jewish, he would be in a position to avail himself of the voluntary efforts of the museum community to self-audit their collections and make known the location and provenance of items in which he may have an interest. In contrast, there was no such voluntary effort to audit federal agency and museum collections to determine the ownership of Native American cultural items. In the year prior to NAGPRA, Congress passed the National Museum of the American Indian Act (NMAIA), which established the newest museum on the mall, and set forth a separate repatriation process for the Smithsonian Institution. That process did not require an information source for tribes, so that those willing to make a claim would have no means to know of the location of cultural items in which they might have an interest. In the ensuing year, Congress added within NAGPRA a detailed process for the inventory of human remains and associated funerary objects, and the more general summary of potential cultural items, that is, unassociated funerary objects, sacred objects and objects of cultural patrimony, which may be in the repository. In rectifying the shortcomings of the NMAIA process, Congress also established in NAGPRA a process for the dissemination of information to and consultation with tribes to further refine the information known to the repository. This enabled tribes to learn of the location of items, so that

127. McKeown & Hutt, supra note 114, at 165-66 (stating that according to the laws of the tribe certain ceremonial items may be owned by the individual or the tribe and the party with the right of possession at the time the item was removed without permission of the lawful entity would be entitled to make a NAGPRA claim).
130. Id. The original NMAI Act did require the Smithsonian Institution museums to complete an inventory of human remains and funerary items, but there was no date for completion and none was completed prior to the amendments in 1996. See infra note 133.
they might make decisions on what items to claim. The NMAIA has since been amended to conform to the NAGPRA process.134

Obtaining compliance with the disclosure provisions of NAGPRA from federal agencies and museums has been a long and sometimes difficult journey. The drafters of the law anticipated such a result and included a Review Committee in the statute, charged with facilitating disclosure and dispute resolution.135 The Secretary of the Interior has the authority to issue penalty assessments against museums that do not comply with disclosure.136 Twenty-two formal allegations of non-compliance have been lodged since the regulations first went into effect in 1997, three of which were found to be without merit, six were given periods of forbearance and the remainder are still pending.137 To date, no museum has been assessed a civil penalty.138

When tribes have been frustrated in obtaining compliance with the NAGPRA process, they have gone directly to court. If the statute of limitations for penalty assessments runs against those museums for which complaints are pending, then the tribes would have no recourse but to proceed to court to assert common law claims to the items at issue. While this would lead to a cumbersome discovery process in the absence of NAGPRA disclosure documents, the tribes would not be encumbered by a statute of limitations.139 In the nine NAGPRA collections related cases resolved to date, all have upheld the NAGPRA disclosure requirements.140

Legislation to protect Native American, Native Hawaiian and Alaska Village corporation (ANCSA) cultural property rights offers equal protection, but to make such laws meaningful, these groups must be part of the process when decisions are made that will affect them. Perhaps the most profound step in the advancement of equal protection of Native

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138. There is no time-bar for claims brought to establish title to, or right of possession of Indians to real or personal property. This would apply if the penalty provisions are determined to be time barred for lack of government action. Oneida Indian Nation of N.Y. v. City of Sherrill, New York, 337 F.3d 139, 168 (2d Cir. 2003).
140. See McKeown & Hutt, supra note 114, at 180-83, for a discussion of the history of NAGPRA collections litigation.
American cultural property rights in recent years has been the inclusion of tribes, Native Hawaiian organizations, ANCSA Corporations and Alaska Village governments\textsuperscript{141} in consultation. Consultation occurs when tribes are well-informed and advised of intended federal activity, are given a meaningful opportunity to have input into the decision making process, and the discussion that ensues is given serious consideration in the final analysis.\textsuperscript{142} ARPA,\textsuperscript{143} NAGPRA\textsuperscript{144} and the NHPA,\textsuperscript{145} as well as the National Environmental Policy Act,\textsuperscript{146} recognize the responsibility of the federal government to consult with tribes on a government-to-government basis. There have also been five Executive Orders since 1993 that reaffirm the obligation of the federal government to consult with tribes.\textsuperscript{147}

\textsuperscript{141} 16 U.S.C. § 470w(4) (2000) (ANCSA corporations and Alaska Village governments are tribes for the purpose of NHPA); 16 U.S.C. § 470bb(4), (5) (ANCSA lands are tribal lands for the purposes of ARPA).

\textsuperscript{142} Pueblo of Sandia v. United States, 50 F.3d 856, 862 (10th Cir. 1995). Failure to make a reasonable effort at meaningful consultation and to give consideration to tribal interests in good faith is arbitrary and capricious, as where the USDA Forest Service failed to acknowledge cultural sites in La Huertas Canyon in New Mexico. \textit{Id.}


\textsuperscript{147} Exec. Order No. 12,875, 3 C.F.R. 669 (Oct. 26, 1993) (reaffirming the federal government responsibility to consult with tribes on a government-to-government basis before taking action on matters that may affect them); Exec. Order No. 12,898, 3 C.F.R. 859 (Feb. 11, 1994) (applying environmental justice precepts to tribes); Exec. Order No. 13,007, 3 C.F.R. 196 (May 24, 1996) (accommodating access to and ceremonial use of Indian sacred sites by tribes, to avoid adverse impacts to sites and maintain confidentiality); Exec. Order No. 13,084, 3 C.F.R. 150 (May 14, 1998) (acknowledging burden on the federal government to initiate consultation with tribes on a government-to-government basis, defer to tribal laws by waiver); Exec. Order No. 13,175, 3 C.F.R. 304 (Nov. 6, 2000) (requiring each agency to have a consultation process in place, to establish regular and meaningful consultation with tribes, to respect treaty rights and to grant wide discretion to tribes in self-governance).
Taken together, the new laws, amendments to existing laws and the Executive Orders pertaining to consultation with tribes, occurring in just the last decade, render this period a momentous one in the advances of Native Americans toward true equal protection for their rights in cultural property. Whether these advances will be recognized in the courts remains to be seen. True equality for cultural property rights would require that courts acknowledge the common law of property as applicable to tribes, regardless of the remedial legislation.

V. IF Geronimo Was a Rap Star: Intellectual Property Law Versus Intangibles in Natural Law

Advances in audio and visual recording technology, and the means to access recordings and to make copies, have put the intellectual property of songwriters and the studios backing them into the legal limelight. Certainly, there is a substantial financial investment in the production and marketing of a recording to be protected from infringement and free riders in the marketplace. Protection of capital investment and ownership rights in intellectual property exists in the rubric of intellectual property laws: copyright, patent, trademark and trade-name. The conundrum for Geronimo is whether intellectual property law does apply or should apply to the songs, ceremonies and symbols of his people, or whether these intangible vestiges of Native American cultural property are actually cultural patrimony of the group, inalienable, non-market items, that exist in the realm of natural law.

Intellectual property is generally divided into two main categories: industrial property, such as patents, utility models, industrial designs, trademarks, and trade names; and copyright eligible property, such as literary and artistic works, computer software, and architectural designs. Plant varieties, farming practices and medicinal use of materials in nature form another category of ethnobiological knowledge. Electronic media and the arts are protected in the United States by copyright laws, the Visual Artists Rights Act (VARA), which does not include films, and the National Film Preservation Act of 1997. In addition, the Uniform

148. WORLD INTELLECTUAL PROP. ORG. (WIPO), INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS 31 (2001).
Commercial Code regulates the control of artistic expressions and warranties upon transfer in the marketplace, which are often works made for hire.

To the extent that the intangible cultural property of tribes, such as songs, ceremonies and cultural practices of a people, were not created for the marketplace, scholars have argued that these forms of expression do not fit into the realm of intellectual property simply because they are identifiable as thoughts, practices and artistic expressions rather than tangible physical property. Still other scholars take the position that if scientists capture the cultural practices of Native Americans in their field notes or on tape and then use them in their publications, those cultural practices are put into the body of scholarship for the benefit of mankind. They argue that, "[a] folklorist or anthropologist could, of course, copyright a specific body of native texts."

If natural law, rather than intellectual property law, is the controlling doctrine for the intangible cultural property of tribes, then the tribe would decide what of its property could be placed into the marketplace. Those commercial items would then transfer into the sphere of intellectual property laws. The answer to the question of who owns Native American culture would depend on the decision of the group having natural ownership otherwise recognized by the common law. An assumption of transfer of possession and control of intangible property to those who study Native American culture, because they used the material in their research, is no more a legitimate assumption of the property of another than is the retention of Native American human remains removed for study without the permission of those with the right of authority over them. The

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157. See Gary L. Francione, Experimentation and the Marketplace Theory of the First Amendment, 136 U. PA. L. REV. 417, 424 (1987). The access to study material does not transfer title of that material to the researcher. While the First Amendment protects the "expressive conduct" of the scientist, it does not guarantee access to research material. Id. at 422. The author does not accept "the argument that marketplace theory may provide protection to experimentation through some general right to acquire knowledge. . . . marketplace theory cannot accommodate a right to receive that is not in some sense correlative to a right to transmit information." Id. at 422. See also Robertson, infra note
intangible property of the Apache people held as their patrimony under the natural law of property should not be bounded by the life of Geronimo plus seventy years, unless they chose to place certain property into the marketplace. Air, water and Native American human remains and cultural items have been regarded as open access items from the time of first European contact in North America. Air and water are no longer regarded as boundless commodities free of ownership determinations, while old assumptions still control Native American culture.

VI. IF GERONIMO WAS AN AIR TRAVELER

The National Transportation Safety Board (NTSB), charged with devising protocol in the case of an airline tragedy, has published the "Federal Family Assistance Plan for Aviation Disasters." According to the rules, in the event of air fatalities the NTSB will take charge of the scene, the coroner will be called to assist in identifying the dead, and the families will be notified based on the best records available, including the manifest. The NTSB will then maintain contact with the families and work with other organizations to determine the proper disposition of the remains and the procedures for handling personal effects. There is no assumption that scientific methods, such as DNA testing, will be used. The airline involved is relieved of duties to the site, is delegated the responsibility of giving critical information on the flight in its possession to the NTSB and is responsible for transmitting to the public the information from the NTSB. The airline is also required to make provisions for the surviving family to grieve with their deceased relative(s), although the NTSB and not the airline control the morgue and the investigation. Transfer of the remains to the family is facilitated promptly by the

183, at 1254 (stating that the government "may require that researchers alter the methods employed in acquiring knowledge to protect the rights of research subjects").


160. Id. supra note 159, §7(a) ("NTSB Tasks").

161. Id. §§ 7(a), 7(b), 7(d).

162. Id. § 7(a)(11).

163. Id. § 7(b) ("Airline Tasks").

164. Id. §§ 7(a), 7(b).
Department of Health and Human Services.\textsuperscript{165} In every manner the human remains are to be treated with respect. Transfer to the control of the family of the deceased is to be facilitated, without protracted study or analysis.

The treatment of human remains by the NTSB is not only efficient and respectful, it is also consistent with the common law of the treatment of human remains. The common law tradition in the United States is derived from the Roman Law,\textsuperscript{166} which considered human remains, including burial grounds, to be \textit{res religiosae}, that is sacred property that is thus \textit{res omnium commercium}, not transferable in the marketplace.\textsuperscript{167} Family may have possession of the remains and the authority to determine disposition, but human remains are not owned in the sense of personal property.\textsuperscript{168} In Roman Law, upon death of a person who lived in servitude, the servitude was extinguished,\textsuperscript{169} and this rule was followed in the slavery period in the United States where slaves were released upon death to their family,\textsuperscript{170} so that family members could attend to the disposition of the remains.\textsuperscript{171}

Currently, in the United States human remains are regarded as "a 'quasi-property' right in the nature of a 'sacred trust.'"\textsuperscript{172} Relatives of the deceased are those with the duty of care and the responsibility of disposition and thus have rights to be protected in the performance of that service.\textsuperscript{173} "The invasion or violation of [that right] furnishes a ground for..."\textsuperscript{174}

\textsuperscript{165.} Id. § 7(d).
\textsuperscript{166.} ALBERT KOCOUREK & JOHN H. WIGMORE, SOURCES OF ANCIENT AND PRIMITIVE LAW 88 (1915).
\textsuperscript{167.} RUDOLPH SOHM, THE INSTITUTES OF ROMAN LAW 226 (4th ed. 1892).
\textsuperscript{168.} See id. at 252.
\textsuperscript{169.} Id. at 265.
\textsuperscript{170.} CHARLTON MCILWAIN, DEATH IN BLACK AND WHITE 39 (2003). During the slavery period in the United States, blacks were given the ability to bury their own dead in their custom. \textit{Id.} At death, the remains of a slave were no longer property and were turned over to family or the slave community for burial. Douglas R. Egerton, \textit{A Peculiar Mark of Infamy: Dismemberment, Burial and Rebelliousness in Slave Societies, in MORTAL REMAINS 156 (Nancy Isenberg & Andrew Burstein eds. 2003). Retention and mutilation of slave remains by whites occurred as punishment for errant behavior and to protect against rebellion by the living. Id. at 149, 154. See also KOCOUREK & WIGMORE, supra note 166, at 92 (tracing to the early Gaul tradition the ceasing of servitude at the death of the master and the sanctity of the burial place to early Egypt, as they studied ancient papyrus, the translation of which was published in London in 1859).
\textsuperscript{171.} But see generally BONES IN THE BASEMENT: POSTMORTEM RACISM IN NINETEENTH-CENTURY MEDICAL TRAINING (Robert L. Blakely & Judith M. Harrington eds., 1997) (discussing that while African-Americans were not treated as humans in life, their bodies were used without permission of their families for medical research, a fact unearthed in 1989 at the Medical College of Georgia, Augusta, Georgia).
\textsuperscript{172.} PERCIVAL E. JACKSON, THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES 133 (Prentice-Hall, Inc. 2d ed. 1950).
\textsuperscript{173.} See id. at 132-35.
a civil action for damages."  

A violation occurs in either of two ways: 1. Disinterment or putting foreign matter into the grave; or, 2. Interference with the access to the grave or corpse by the descendents. The age of the grave or human remains is not a factor as the right is in the living descendents and the damages are measured by their indignity and wounded feelings, in addition to punitive damages.

By the close of the twentieth century, the graves and human remains of Native Americans were still receiving disparate treatment in the United States from those of other human remains in derogation of the common law. This disparity was discussed at length in the congressional hearings on NAGPRA. Since human remains cannot be owned and the study, once quickly and respectfully accomplished, should otherwise result in the immediate release of the remains to the descendents, it would seem that there could be no basis for the estimated 200,000 Native American human remains held in federal agency and museum collections, many for fifty years or more. NAGPRA was drafted specifically to rectify this imbalance.

174. Id. at 133 (quoting Foley v. Phelps, 37 N.Y.S. 471, 474 (N.Y. App. Div. 1896). See also Charrier v. Bell, 496 So. 2d 601, 605 (La. Ct. App. 1986) (holding that an Indian burial is an intentional placement, not treasure trove). The court also discussed the ability of the tribe to bring an action for damages. Id. at 607.

175. Humphreys v. Bennett Oil Corp., 197 So. 222 (La. 1940) (drilling into graves and allowing them to fill with oil); Michels v. Crouch, 150 S.W.2d 111 (Tex. Civ. App. 1941) (plowing over graves).

176. Jackson, supra note 172, at 154-55. Removal of a body by the one in possession or the trustee without the necessary religious rites and without notice to family is sufficient for a cause of action. See also Koerber v. Patek, 102 N.W. 40 (Wis. 1905); Hines v. State, 149 S.W. 1058 (Tenn. 1911) (interference with access cases).


178. H.R. REP. NO. 101-877, at 13 (1990) ("There was testimony that non-Indian remains which are unearthed are treated much different than those of Indians. The non-Indian remains tend to be quickly studied and then reburied while so many Indian remains are sent to museums and curated.").

179. See McKeown & Hutt, supra note 112, at 177-78.

180. 25 U.S.C. §§ 3002, 3005 (2000) (concerning determination of ownership upon discovery and repatriation of human remains in collections). Note: NAGPRA does not abrogate study, but rather allows for an initial determination of whether the act is applicable and permits the tribe's signatory to the plan of action in the Intentional Excavation to agree to the study. 25 U.S.C. §3002(c) (2000). In addition, the Repatriation section allows studies "of major benefit to the United States" to continue upon application to the Secretary
The application of NAGPRA to human remains has been under assault by scientists, scholars and the courts. In *Bonnichsen v. United States* 181 eight scientists 182 brought an action to assert a constitutional right to study human remains 183 found on lands under the administration of the U.S. Corps of Engineers in 1996 and determined by the District Commander, in compliance with NAGPRA, to be Native American remains subject to disposition in favor of the claimant tribe, given the age of the remains, of over 9,300 years. 184 The plaintiffs did not request an ARPA permit 185 from the Corps prior to proceeding to court on the basis that a right to study trumped property rights and NAGPRA. 186 The trial court found that the

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181. *969 F. Supp. 628 (D. Or. 1997).*
182. There was a ninth scientist who took immediate custody of the remains as a contractor for the coroner and who eventually requested and received an ARPA permit. *Bonnichsen, 969 F. Supp.* at 631 n.1. The court discussed the affidavit of the ninth scientist and his tests on the human remains. *Id.* at 653 n.28. Later, the court also discussed his part on the team that collected information and conducted an investigation to acquire some knowledge. *Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1124 n.16 (D. Or. 2002).* Having been granted the access he sought, he could not be a plaintiff and was not required to become a party when one of the bones was thought to be missing. The court discusses this scientist in the opinion and, without a hearing, held the Corps responsible for the missing bone and for jeopardizing the case. *Id.* at 1123. Later, when the bone was discovered in a locker belonging to the ninth scientist, the court stated that it "now appears to have been an innocent oversight." *Id.* at 1123 n.12.
183. *See United States v. Austin, 902 F.2d 743 (9th Cir. 1990) (no constitutional right to study).* *See also John A. Robertson, The Scientist’s Right to Research: A Constitutional Analysis, 51 S. CAL. L. REV. 1203, 1206 (1978) (stating that scientists have the right to study, but access to the materials for the study must come from willing sources). But see Robert W. Lannan, Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, 22 HARV. ENVTL. L. REV. 369 (1998) (arguing that NAGPRA should be amended to allow scientific study on newly discovered remains without regard to a property rights or civil rights analysis).*
186. The initial complaint requested “possession” of the remains and an “access to study” as a matter of right and mentioned neither a request for an ARPA permit, nor the agency responsibilities under NAGPRA. *Bonnichsen v. United States, 357 F.3d 962 (9th Cir. 2004).* Plaintiff’s attorney Alan L. Schneider announced to those at the Philadelphia meeting of the Society for American Archaeology in March, 2001, that the First Amendment right to study was so important that he would take the *Bonnichsen* case to the Supreme Court if he were not successful at trial. The constitutional issues raised of a First Amendment right to study and a “taking” of the rights of scientists by the Native American claims to human remains were discussed in Jennifer R. Richman, *NAGPRA: Constitutionally Adequate?, in LEGAL PERSPECTIVES ON CULTURAL RESOURCES 216, 218-223*
plaintiffs had standing to make a claim for the remains, the tribe did not have standing to enter the lawsuit as an interested party and that the court would decide the terms of a judicial ARPA permit, having found that remand under the Administrative Procedures Act\(^\text{187}\) was inappropriate as the Secretary of Interior, having substituted in the action for the Corps, would likely consult with the five tribes making a joint claim for the remains.\(^\text{188}\) The court also found that it was incredible that the Secretary could make a determination that the remains were culturally affiliated to a present day tribe as the remains were so old.\(^\text{189}\) The court held that it was arbitrary and capricious to weigh the evidence of cultural affiliation in

(Richman & Forsyth eds. 2004). The trial court began to recognize such a right when the court found that “Dr. Owsley has repeatedly requested access to the skeleton for additional analysis. . . . He and all other members of the scientific community have been denied direct access because of the district’s commitment to the tribal coalition.” Bonnichsen, 969 F. Supp. at 635. The court did not note in what manner requests were made, although there was never a dispute that the plaintiffs never requested an ARPA permit. The court found that the scientist plaintiffs had standing to receive the remains, as did the Asatru plaintiffs—an unspecified religious order. Id. at 635-37. The court further noted that the First Amendment may apply as “[t]he skeletal remains are analogous to a book that they can read. . . . Plaintiffs simply want the government to step aside and permit them to ‘read that book’ by conducting their own tests.” Id. at 646.


\(^\text{188}\) Bonnichsen, 217 F. Supp. 2d at 1126-30. See Letter from Bruce Babitt, Secretary of the Interior, to Louis Caldera, Secretary of the Army (Sept. 25, 2000) available at http://www.cr.nps.gov/aad/kennewick/babb_letter.htm (giving a complete analysis of the NAGPRA process relative to the case and an evaluation of all of the information from scientists and tribal people considered in coming to the decision).

\(^\text{189}\) Bonnichsen, 217 F. Supp. 2d at 1138. See JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES (Cambridge Univ. Press 2d ed. 1995). The author is an anthropologist who points out that the same argument was offered by the British Museum in support of its desire to maintain the Elgin marbles, that is, that the ancient Greeks have no relationship to modern day Greeks and therefore the property is that of the world society. She finds such an argument “startling” to scientists as it denies “the legitimacy of any cultural continuity.” Id. at 71. In Bonnichsen, the court required the government to show a political tribal membership in common between the claimants and the remains, that the remains found had a discrete affiliation present in an existing tribe, and required proof of a membership in a common identified tribal group, rather than a cultural relationship, as stated in the law. Bonnichsen, 217 F. Supp. 2d at 1136, 1138, 1156. Thus, the court was fixated upon membership in a tribe as recognized by the United States, rather than upon “closest cultural affiliation,” as was settled upon by Congress. 25 U.S.C. § 3002(a)(2)(B) (2000). In NAGPRA the recognition of a tribe is a factor in having standing to make a claim for the remains, as the federal government recognizes tribes on a government-to-government basis. 25 U.S.C. § 3010 (2000). The distinction between standing to be given property under NAGPRA and standing to question arbitrary and capricious conduct of the government was not made by the court. See Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871 (1990); Administrative Procedures Act, 5 U.S.C. § 704 (2000) (giving a basis for review of a final decision of a government agency).
favor of the tribes given that the scientists had scientific hypotheses that included that the remains were not of a person indigenous to the United States. While the court went on at length on the fine qualifications of the plaintiffs as scientists and the inability of the government to prove with certainty the political affiliation of the remains, the court did not address the Congressional decision not to put an age limit on ownership determinations of human remains. Assuming cultural affiliation did not apply to the decision in this instance, or could not be substantiated, the court did not address how it could disregard the ownership determination of the Secretary of the Interior based upon aboriginal territory, required in the law when cultural affiliation cannot be determined. The court did not find that there is a right to study for scientists, although scholars continue to assert that when it comes to Native American items, the right to study prevails.

On February 4, 2004, the Ninth Circuit issued its opinion upholding the trial court in all respects. In reaching its decision, the court judicially amended the law. NAGPRA requires a two-step process when remains are found on federal land. First, determine in the first instance whether the remains are Native American. Second, determine the disposition of the remains according to the following priorities: (1) to descendants if known; (2) if descendants are not known, then to the tribal land owner, if the remains are on tribal land, and if the remains are on federal land, then to the tribe having the "closest cultural affiliation"; or (3) "if the cultural affiliation of the objects cannot be reasonably ascertained," then "in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered," unless another tribe can show a "stronger cultural relationship." In contrast, the Ninth Circuit established a two step process, requiring that first, to determine applicability of the law, the

191. Id. at 1123-25.
194. Bonnichsen v. United States, 357 F.3d 962, 967 (9th Cir. 2004).
“remains have a significant relationship to a presently existing ‘tribe, people or culture.’” Second, the court “requires a more specific finding that remains are most closely affiliated to specific lineal descendants or to a specific Indian tribe.” In so doing, the court collapsed the NAGPRA first step with part of the second step, refused to recognize that a claim based on aboriginal territory exists in the law and raised the bar to tribal claims for disposition by inserting that a “significant” relationship be shown rather than a “reasonably ascertained” affiliation. The decision also disallows claims by joint claimants having historical affiliation to the remains. While the Ninth Circuit discussed the noble purpose of the law, the court was incredulous that Congress would have intended the law to apply to all indigenous remains.

If Geronimo was an air traveler involved in a fatal accident, no doubt he would prefer his remains to be handled under the procedures of the NTSB rather than under the process established in Bonnichsen. The Ninth Circuit decision reveals the deep-seated assumption that Native Americans have no authority over their past.

VII. GERONIMO: CAPTIVE IN LIFE, SOVEREIGN IN DEATH

Although during his life Geronimo was vilified and pictured as a savage killer, “he gradually came to symbolize the brave fight of a brave people for independence and ownership of their homeland.” A biographer of Geronimo wrote in 1909 that,

I venture to prophesy that as time passes and all the obtainable material is collected and properly compiled, leaving us at a point sufficiently remote and high from

199. Bonnichsen, 357 F.3d at 974.
200. Id.
202. Bonnichsen, 357 F.3d at 977.
203. The court preferred to give eight individuals ownership of the remains under the mistaken assumption that the remains are headed for the Smithsonian Institution. See id. at 967-68, 967 n.7. The Court distinguished Idrogo v. United States Army, 18 F. Supp. 2d 25 (D.D.C. 1998), which held that those with no relationship to the remains could not claim ownership of them, on the basis that, “unlike Plaintiffs here, the Idrogo plaintiff had not alleged any interest in studying the remains.” Id. at 971-72 n.13. However, the Ninth Circuit in Austin, 902 F.2d 743 (9th Cir. 1990), held that a desire for study was not a defense to taking custody of remains for personal use. There is no right to an ARPA permit. ARPA items remain government property. Id.
204. Faulk, supra note 65, at 218.
contradictory statements or facts distorted because of the lack of sufficient detail; that, when we shall be able to look back upon this Indian war chief with a historical perspective, we will decide that he was one of the greatest "Americans" that ever lived.\textsuperscript{205}

However, the glory that was visited on Geronimo as an icon of a spirit of leadership and independence has somehow been disassociated with the fact that he was also a member of a family and community that is Apache. Almost ninety years after his death, a case was brought in federal district court for the "repatriation" of the remains of Geronimo to a man and a group having no association with any band of Apaches.\textsuperscript{206} Michael Idrogo and the Americans for Repatriation of Geronimo sought to have the Army release the remains of Geronimo to them for removal from Fort Sill to an unnamed location in Arizona or New Mexico.\textsuperscript{207} The plaintiffs predicated the claim upon NAGPRA and asserted that Idrogo, as a Spanish speaker like Geronimo and being about the same height as the deceased, is a distant relative.\textsuperscript{208}

In dismissing the claims of Idrogo and the Americans for Repatriation of Geronimo, the court succinctly held that mere belief of a relationship is insufficient to bring a claim.\textsuperscript{209} Further the court found that, as neither Idrogo, nor the other plaintiffs, had any ties to any Indian tribe, they lacked standing upon which to bring a claim for the remains of Geronimo under NAGPRA, or any other grounds recognized in the courts of the United States.\textsuperscript{210} The brevity with which the court dismissed the claims of non-Indians for control over Native American human remains was profound as a statement that recognized Native American cultural property rights.

The questions of whether the exhumation of Geronimo would produce a complete set of human remains, and whether the location of the skull at Yale is a grandiose myth or a carefully guarded reality, have returned to the attention of the press, as both President George W. Bush and a contender to unseat him, John Kerry, are members of the Skull and Bones society.\textsuperscript{211}

\textsuperscript{207} Id. at 26.
\textsuperscript{208} Id. at 26-27.
\textsuperscript{209} Id. at 27.
\textsuperscript{210} Id. at 27-28.
NAGPRA does not apply to private organizations, such as the Skull and Bones, and there are no living members of the group that would have perpetrated the alleged theft, but the San Carlos Apache are interested in resolving the matter.212 It is possible that at some point a court will be asked to grant an exhumation order.213 If such a request is made, hopefully the court will decide the matter by deferring to the descendents of Geronimo and thus grant equal protection of the law to Native Americans.

It has been surmised that the late twentieth century recognition of Native American culture and the recent respect for cultural property rights of Native Americans, as expressed in law, if not in fact, is a new tolerance of diversity that may reflect less of a fear of Indians, having finally won the Indian wars, than the majority culture seeing in Native Americans a religious faith and sense of identity that is to be admired.214 If to be civilized means that a sense of cultural identity and preserving that identity is admirable, then much is to be learned from the noble savage who has persevered despite all attempts at assimilation. Equal protection for Native American cultural property exists in the law and should be part of the ethic with which the law is applied.

In life, Geronimo was a pawn of those in the Tucson, Arizona business community, who sought to profit from his demise, and a captive of the United States Army. In death, Geronimo has been accorded the respect given to deceased members of the dominant culture and his tribe recognized as the guardians its people. It is important to note that in coming to the decision in Idrogo, the court did not devise or rely upon any special law for the treatment of Indians. Rather, the court simply relied upon the constitutional concept of equal protection under the common law, as the court considered the rights of the plaintiffs and of those who may have a lawful interest in the deceased. The simplicity of the logic of the court belies the beleaguered path of Native Americans in coming to this point in history.


Historians have described Geronimo as a reluctant warrior. If so, as he sought to live in peace, so may he rest in peace.

215. See Faulk, supra note 65, at 21.