

NOTE

A Right, Not a Request: International Human Rights Law and the Repatriation of Remains from Former Indigenous Boarding Schools in the United States

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ABSTRACT

Under international law, Indigenous peoples have the right to the return of their human remains. More broadly, multiple international human rights tribunals have recognized the general human right to the return of the remains of a loved one or family member. In the United States, the Native American Graves Protection and Repatriation Act (“NAGPRA”) governs the return of the bodies of Indigenous peoples under the control of museums or government agencies. Although NAGPRA has been useful in facilitating the return of some cultural artifacts and human remains to associated Indigenous peoples, it has failed to cover a critical category: the cemeteries of former residential schools. In light of the sordid history of thousands of Indigenous children being forcibly sent to off-reservation boarding schools and in order to effectuate NAGPRA’s broad statutory intent and bring the United States into compliance with international human rights law, this Note proposes to amend NAGPRA. The Act should be amended to explicitly include government-controlled cemeteries within its statutory mandate, thereby reaching the resting places of children buried at the sites of former residential schools. Furthermore, the Act should be amended to reach

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the graves of students not currently under the control of a federal agency but who were in the care of the federal government at the time of their death. Finally, a purpose statement should be added to NAGPRA to express the congressional policy of compliance with international law, namely the United Nations Declaration on the Rights of Indigenous Peoples.

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INTRODUCTION

The Carlisle Indian¹ Industrial School closed its doors in 1918.² Thousands of Indigenous students passed through the residential school during its thirty-nine years of operation.³ Most of the children who attended the school in Carlisle, Pennsylvania, eventually left and continued their lives how they saw fit, despite experiencing horrific violence at the school.⁴ Some went on to great fame, like Jim Thorpe: Born Wa-Tho-Huk, he was taken from his home in the Sac and Fox Nation to attend Carlisle and eventually went on to become an Olympic gold medalist and an early star of the National Football League.⁵ Others—like an Arapaho student, known as William Shakespeare, whose given name is unrecorded on his Carlisle student registration card—survived their time at the school.⁶ Shakespeare returned to the Arapaho and continued to live and work as a rancher in what is today Wyoming until at least 1917.⁷ Carlisle, however, never allowed many of its students to leave. Somewhere between 220 and 537 students died while attending

¹ The terminology used to refer to the Indigenous peoples of the United States has changed over time. That change is reflected throughout this Note, which often references historical sources, treaties, cases, and laws using a variety of terminology to refer to Indigenous peoples. The Smithsonian Institution's National Museum of the American Indian has stated that the terms "American Indian, Indian, Native American, Indigenous, [and] Native" are all "acceptable," but that "whenever possible," it is best practice to refer to people by the specific name of their tribe or nation. See *Teaching & Learning About Native Americans*, NAT'L MUSEUM OF THE AM. INDIAN, <https://americanindian.si.edu/nk360/faq/did-you-know> [<https://perma.cc/2RM6-69HR>] (last visited Oct. 17, 2025). This Note addresses the legal regime governing the return of bodies that belong to a number of different nations and tribes. For consistency's sake, whenever this Note is not directly quoting a source that uses alternative terminology and where it is not possible to refer to a specific tribe or nation, this Note utilizes the terms "Indigenous" and "Indigenous American."

² Frank Vitale IV, *Counting Carlisle's Casualties: Defining Student Death at the Carlisle Indian Industrial School, 1879–1918*, 44 AM. INDIAN Q. 383, 386 (2020).

³ *Id.*; Jacqueline Fear-Segal, *The History and Reclamation of a Sacred Space: The Indian School Cemetery*, in CARLISLE INDIAN INDUSTRIAL SCHOOL 152, 153 (Jacqueline Fear-Segal & Susan D. Rose eds., 2016).

⁴ See Margo Tamez, *Necropolitics, Carlisle Indian School, and Ndé Memory*, in CARLISLE INDIAN INDUSTRIAL SCHOOL, *supra* note 3, at 233, 233.

⁵ *Jim Thorpe Student File*, CARLISLE INDIAN SCH. DIGIT. RES. CTR., https://carlisleindian.dickinson.edu/student_files/jim-thorpe-student-file [<https://perma.cc/3ZY5-L4XU>] (last visited Oct. 17, 2025); *Jim Thorpe*, INT'L OLYMPIC COMM., <https://www.olympics.com/en/athletes/jim-thorpe> [<https://perma.cc/RYG3-3DB2>] (last visited Oct. 17, 2025).

⁶ See ARNOLD KRUPAT, BOARDING SCHOOL VOICES 154–56 (2021). Stripping students of their given name and imposing the names of well-known historical figures was a relatively common practice at boarding schools, making it likely that this is how William Shakespeare obtained the name of the Bard at Carlisle. See DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION 118–19 (2d ed. 2020).

⁷ *William Shakespeare Student File*, CARLISLE INDIAN SCH. DIGIT. RES. CTR., https://carlisleindian.dickinson.edu/student_files/william-shakespeare-student-file [<https://perma.cc/WXD7-3DTB>] (last visited Oct. 17, 2025).

Carlisle.⁸ The school's grounds are now a United States Army base and home to the United States Army War College.⁹ The school's cemetery remains a part of the Carlisle Barracks today.¹⁰ It became the resting place of at least 192 Indigenous children who never returned home.¹¹

Carlisle is far from the only residential school where Indigenous American children were taken to have their culture stripped away from them.¹² Hundreds of thousands of children were forcibly sent to boarding schools across the United States and Canada.¹³ Many died and were buried at these schools.¹⁴ In recent years, more attention has come to the issue of residential schools, i.e., government- or church-run boarding schools that Indigenous children were forced to attend in the nineteenth and twentieth centuries.¹⁵ As part of the broader process of imperial conquest, colonizers took Indigenous children by force to be reeducated.¹⁶ At Carlisle and other schools like it, most children lost their language, tradition, beliefs, and given names, as part of an educational program scholars now refer to as "cultural genocide."¹⁷ These schools are part of a long history of attempts by Euro-American settlers to wipe out Indigenous peoples and their culture.¹⁸ Across the United

⁸ Vitale, *supra* note 2, at 387.

⁹ See Fear-Segal, *supra* note 3, at 152.

¹⁰ See *id.*

¹¹ Vitale, *supra* note 2, at 388 (citing the number of students in the cemetery as 192, but recognizing that the number of students both actually buried at Carlisle and that died while attending the school is disputed by historians).

¹² See ADAMS, *supra* note 6, at 62.

¹³ See *id.*; Ian Mosby & Erin Millions, *Canada's Residential Schools Were a Horror*, SCI. AM. (Aug. 1, 2021), <https://www.scientificamerican.com/article/canadas-residential-schools-were-a-horror/> [<https://perma.cc/TSF6-6WQR>].

¹⁴ See *Federal Investigation Finds at Least 973 Children Died in Federal Indian Boarding Schools*, EQUAL JUST. INITIATIVE (July 31, 2024), <https://eji.org/news/federal-investigation-finds-at-least-973-children-died-in-federal-indian-boarding-schools/> [<https://perma.cc/87GN-CR3A>]; see also Terri Cardinal, *Residential School Deaths Are Significantly Higher than Previously Reported*, MACEWAN UNIV. (Sep. 29, 2023), <https://www.macewan.ca/campus-life/news/2023/09/news-conversation-cardinal-23/> [<https://perma.cc/MS2K-ZR7Y>] (detailing the Canadian effort to uncover how many of the more than 150,000 First Nation, Métis, and Inuit students actually died at residential schools).

¹⁵ See *Nearly 1,000 Indigenous Children Died in U.S. Boarding Schools, Report Finds*, AL JAZEERA (July 30, 2024), <https://www.aljazeera.com/news/2024/7/30/nearly-1000-indigenous-children-died-in-us-boarding-schools-report-finds> [<https://perma.cc/V4EJ-VXMS>].

¹⁶ See, e.g., Tamez, *supra* note 4, at 233 ("In 1873 two Lipan Apache (Ndé) children, who came to be known as the Lost Ones, were taken prisoner by the Fourth Cavalry of the U.S. Army after a raid that killed their mother and . . . sent to the Carlisle Indian School . . .").

¹⁷ See David B. MacDonald & Graham Hudson, *The Genocide Question and Indian Residential Schools in Canada*, 45 CANADIAN J. POL. SCI. 427, 430 (2012) (referring to "the attempted destruction of Aboriginal languages, religions and cultures" as the mission of Indigenous residential schools).

¹⁸ See generally JEFFREY OSTLER, *SURVIVING GENOCIDE* (2019) (detailing the United States's use of violence against Indigenous peoples from the mid-eighteenth to mid-nineteenth centuries);

States, thousands of bodies of Indigenous children who never returned to their families are buried at the sites of these schools.¹⁹

In response to this history of violence against Indigenous and colonized peoples around the world, modern international law has built on the framework of human rights law to enunciate fundamental protections owed to Indigenous peoples by states. Passed in 2007, the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”)²⁰ “establishe[d] a universal framework of minimum standards for the survival, dignity and well-being of the Indigenous Peoples of the world.”²¹ Among other things, UNDRIP Article 12 declares that states must return Indigenous human remains to the associated Indigenous group or nation and that the right to return of human remains should be repatriated “through fair, transparent and effective mechanisms.”²² This Note argues that UNDRIP Article 12 reflects customary international law, which is binding on the United States.

In the United States, the statute that governs the return of Indigenous human remains is the Native American Graves Protection and Repatriation Act (“NAGPRA”),²³ which was passed in 1990 in response to the massive number of Indigenous human remains and cultural objects in museums and universities around the country.²⁴ NAGPRA was a major step forward in creating federal protections for the cultural heritage, artifacts, and human remains of Indigenous peoples in the United States.²⁵ It was not, however, designed with the problem of returning bodies buried at boarding schools in mind.²⁶ Courts have

CLAUDIO SAUNT, *UNWORTHY REPUBLIC* (2020) (detailing the United States’s policy of violently expelling Indigenous peoples in the 1830s).

¹⁹ See *Burial Sites Found at 53 Native American Boarding Schools, U.S. Government Says*, INT’L CTR. FOR TRANSITIONAL JUST. (May 12, 2022), <https://www.ictj.org/latest-news/burial-sites-found-53-native-american-boarding-schools-us-government-says> [<https://perma.cc/3VH6-QXAL>].

²⁰ G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sep. 13, 2007).

²¹ *United Nations Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS, <https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples> [<https://perma.cc/YW8L-GTHA>] (last visited Oct. 17, 2025).

²² G.A. Res. 61/295, *supra* note 20, art. 12, ¶ 2.

²³ 25 U.S.C. §§ 3001–3013.

²⁴ See S. REP. NO. 101-473, at 5 (1990) (“[M]any Federal agencies, as well as state and private museums which receive Federal funding have large numbers of human remains of Native Americans in their collections. . . . The Committee finds that many Indian tribes and Native Hawaiians have expressed a clear and unequivocal interest in the return of these remains to the Indian tribe or Native Hawaiian organization so that the tribe, family or organization may determine the appropriate disposition of the remains which is consistent with their religious and cultural practices.”).

²⁵ See Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 36–37 (1992).

²⁶ See *id.* at 59–61 (presenting the legislative history of NAGPRA, which makes no mention of residential schools).

refused to hold that government-controlled cemeteries fall under the statutory command of NAGPRA and, therefore, refuse to mandate the return of the bodies buried in such cemeteries, including at former residential schools.²⁷

In order to comply with international law and the statutory intent of NAGPRA, Congress must amend the statute to include government-controlled cemeteries alongside museums and federal agencies in the list of institutions subject to NAGPRA's repatriation scheme. Doing this will update the statute to meet UNDRIP's command and will help effectuate the original broad remedial intent that Congress had when passing NAGPRA. Furthermore, amendments should be made to reach the graves of children who died while in the care of the federal government or its agents who are not buried in government-controlled cemeteries and to make explicit the congressional goal of effectuating UNDRIP's provisions. If Congress does not update the statute and leaves Indigenous groups with no statutory remedy to recover the remains of their stolen children, it violates the binding command of customary international law. Moreover, failing to amend NAGPRA leaves the United States open to international condemnation, undermines the United States's stated goal of promoting human rights around the world, and fails to uphold the rights guaranteed to all people, Indigenous or otherwise.

This Note first surveys the historical background of residential schools in Part I. Part II then examines the legal regime governing the repatriation of the human remains of Indigenous peoples, both internationally and in the United States. Part III turns to address the problem of residential schools, analyzing why NAGPRA's provisions are inadequate to address the challenge of repatriation of remains from boarding schools as required by international law. Finally, Part IV proposes amendments to NAGPRA that will both directly address the issue of boarding schools as well as effectuate the goals of UNDRIP.

I. HISTORICAL BACKGROUND

The history of residential schools in North America is long and bleak. In the United States and Canada, governments took Indigenous children from their homes and sent them to boarding schools. These schools were built on a philosophy embodied in the words of Captain Richard Henry Pratt: "Kill the Indian in him, and save the man."²⁸

²⁷ See *Winnebago Tribe v. Dep't of the Army*, No. 24-cv-78, 2024 WL 3884194, at *3 (E.D. Va. Aug. 20, 2024); see also *Thorpe v. Borough of Thorpe*, 770 F.3d 255, 266 (3d Cir. 2014) (holding that the body of aforementioned Indigenous athlete Jim Thorpe did not fall under the purview of NAGPRA).

²⁸ R.H. Pratt, *The Advantages of Mingling Indians with Whites*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION AT THE NINETEENTH ANNUAL SESSION HELD

Pratt, a U.S. military officer who founded and ran Carlisle as superintendent, is considered one of the architects of the residential school movement.²⁹ The schools were designed to perpetuate cultural genocide.³⁰ They were the sites of massive abuse and mistreatment of Indigenous children.³¹ Many children died there.³² Many bodies remain there.³³

In Canada, it is estimated that more than 150,000 Indigenous children were forcibly sent to residential schools between 1883 and 1997.³⁴ In the United States, the exact number of children forced to attend these schools is still unknown, but at least 523 individual schools existed, and at least 408 received federal funding.³⁵ The schools frequently physically punished students for minor infractions.³⁶ Diseases like tuberculosis were rampant throughout both on- and off-reservation schools.³⁷ Some students died after attempting to escape from off-reservation boarding schools.³⁸ Whatever the case was for any individual student, “[t]he boarding school, whether on or off the reservation, was the institutional manifestation of the government’s determination to completely restructure Indigenous minds and identities.”³⁹

Knowing how many children died at, near, or shortly after departing from off-reservation boarding schools is difficult.⁴⁰ In some cases, sick children were returned to their families if the child was well enough to travel and subsequently died on the reservation.⁴¹ Given that Carlisle was the flagship institution, conditions were far worse and records far sparser at other schools around the country,⁴² which spanned from Wisconsin, to Montana, to California, to Kansas.⁴³

IN DENVER, COL., JUNE 23–29, 1892, at 45, 46 (Isabel C. Barrows ed., Boston, Press of Geo. H. Ellis 1892).

²⁹ ADAMS, *supra* note 6, at 53–54.

³⁰ See Zach Levitt, Yuliya Parshina-Kottas, Simon Romero & Tim Wallace, ‘War Against the Children,’ N.Y. TIMES (Aug. 30, 2023), <https://www.nytimes.com/interactive/2023/08/30/us/native-american-boarding-schools.html> [<https://perma.cc/LB59-QVWY>].

³¹ Mosby & Millions, *supra* note 13.

³² See AL JAZEERA, *supra* note 15.

³³ Levitt et al., *supra* note 30.

³⁴ Mosby & Millions, *supra* note 13.

³⁵ Levitt et al., *supra* note 30.

³⁶ See ADAMS, *supra* note 6, at 131–35.

³⁷ See *id.* at 135–49.

³⁸ See *id.* at 135–40 (recounting the failed escape and subsequent death of a Sioux student at Carlisle named Ernest White Thunder).

³⁹ *Id.* at 105.

⁴⁰ *Id.* at 141 (characterizing such a question as “nearly impossible to answer”).

⁴¹ See *id.*

⁴² See *id.* at 142 (describing the horrible conditions and unreliable record keeping at a residential school in South Dakota).

⁴³ See *id.* at 62 tbl. 2.1 (listing the locations of off-reservation boarding schools opened by the U.S. government between 1879 and 1908).

Despite growing public attention to the problem and the consistent efforts of Indigenous communities and activists to seek reparations and healing for what occurred in the residential schools, there is still no clear estimate of how many children remain buried far from their communities around the United States.⁴⁴ As for the graves at Carlisle, the vast majority of the children buried at the school remain there.⁴⁵ The cemetery was moved in 1927 in order to make room for a new parking lot.⁴⁶ This callous project likely foreclosed ever identifying many unknown remains and graves.⁴⁷

Although a small number of bodies have been repatriated after years of advocacy by Indigenous groups and activists,⁴⁸ the Army has consistently maintained the legal positions that it is not subject to NAGPRA, it is not required to disinter or return the remains of children that died at Carlisle, and disinterment is up to its discretion and governed by internal Army regulations.⁴⁹ NAGPRA is even more difficult to apply to former residential schools that remain unlocated or in private hands.⁵⁰ Despite updated regulations regarding the implementation of NAGPRA promulgated by the Department of the Interior (“DOI”) during

⁴⁴ Press Release, U.S. Dep’t of the Interior, Secretary Haaland Announces Federal Indian Boarding School Initiative (June 22, 2021), <https://www.doi.gov/pressreleases/secretary-haaland-announces-federal-indian-boarding-school-initiative> [<https://perma.cc/Z9JD-KWSB>]. Under Secretary Deb Haaland, President Biden’s Department of the Interior (“DOI”) began the Federal Indian Boarding School Initiative (“FIBSI”) in 2021. *Id.* The FIBSI was designed to “serve as an investigation about the loss of human life and the lasting consequences of residential Indian boarding schools.” *Id.* The DOI announced that the FIBSI’s “primary goal will be to identify boarding school facilities and sites; the location of known and possible student burial sites located at or near school facilities; and the identities and Tribal affiliations of children interred at such locations.” *Id.* It is unclear if the second Trump Administration intends to continue the FIBSI. *See id.* (warning that the DOI’s press release is “ARCHIVED content published online before January 20, 2025,” and that “any previously issued diversity, equity, inclusion or gender-related guidance on this webpage should be considered rescinded”).

⁴⁵ *See Tribes Lead Process to Bring Children Home from Carlisle*, NATIVE AM. RTS. FUND (Oct. 11, 2023), <https://narf.org/swo-repatriation-carlisle-cemetery/> [<https://perma.cc/VA9D-3XT7>].

⁴⁶ *One Child’s Journey Home from Carlisle After 120 Years*, NAT’L NATIVE AM. BOARDING SCH. HEALING COAL. (July 15, 2021), <https://boardingschoolhealing.org/ten-more-children-returned-home-from-carlisle/> [<https://perma.cc/ULE2-3EN3>].

⁴⁷ *See, e.g., Army Returns Remains of 9 Indigenous Children Who Died at Boarding School over a Century Ago*, ASSOCIATED PRESS (Oct. 2, 2024, at 14:12 ET), <https://apnews.com/article/native-remains-children-pennsylvania-boarding-school-a8b1c305bc5b4f2708fc985306552ca1> [<https://perma.cc/VWR7-YPZJ>].

⁴⁸ *See, e.g., id.*

⁴⁹ *See infra* Section II.D.

⁵⁰ *See* Native American Graves Protection and Repatriation Act Systematic Processes for Disposition or Repatriation, 88 Fed. Reg. 86,452, 86,471 (Dec. 13, 2023) (codified at 43 C.F.R. pt. 10) (discussing the problem raised during the notice-and-comment period of repatriating remains not located on federal lands as defined by NAGPRA, including boarding schools).

the Biden Administration, the cemeteries at Carlisle and other boarding schools remain out of reach of the statute.⁵¹

II. LEGAL BACKGROUND

The system of law governing the rights of Indigenous Americans, who are citizens both of the United States and of their Indigenous nations, is multilayered and complex.⁵² This Section first addresses the international law regime governing Indigenous peoples and repatriation of remains and then analyzes the U.S. legal regime governing the same.

A. *International Law on Repatriation of Remains to Indigenous Peoples*

1. *The United Nations Declaration on the Rights of Indigenous Peoples and the American Declaration on the Rights of Indigenous Peoples*

UNDRIP states that Indigenous peoples have “the right to the repatriation of their human remains” and that “[s]tates shall seek to enable the access and/or repatriation of . . . human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.”⁵³ Although federal courts have typically been dismissive of UNDRIP as a “non-binding declaration that does not create a federal cause of action,”⁵⁴ at least some of its provisions reflect customary international law, which can be enforceable as part of the federal common law and can and should be used to interpret domestic constitutional and statutory law.⁵⁵ Further, UNDRIP is an instrument of international law that commands overwhelming respect and support among the member states of the United Nations.⁵⁶ Since its original “no” vote against the adoption of UNDRIP, the United States has reversed course and now supports the declaration.⁵⁷

⁵¹ See *id.* at 86,487 (“[T]he Act does not require a Federal agency to engage in an excavation of possible burial sites.”).

⁵² See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–45 (1980).

⁵³ See G.A. Res. 61/295, *supra* note 20, art. 12.

⁵⁴ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 301 F. Supp. 3d 50, 60 (D.D.C. 2018).

⁵⁵ See WALTER R. ECHO-HAWK, *IN THE LIGHT OF JUSTICE* 70–72 (2013).

⁵⁶ See Ken Coates & Carin Holroyd, *Indigenous Internationalism and the Emerging Impact of UNDRIP in Aboriginal Affairs in Canada* (“[UNDRIP] is one of the most significant international political achievements of this generation.”), in *THE INTERNATIONALIZATION OF INDIGENOUS RIGHTS* 5, 5 (2014).

⁵⁷ UNITED NATIONS, *supra* note 21.

Although UNDRIP was passed in 2007, the effort to establish international recognition for the rights of Indigenous peoples through the human rights legal framework goes back to at least the early 1970s.⁵⁸ The United Nations began the formal process of drafting a human rights declaration specific to Indigenous peoples in 1982 when it established the Working Group on Indigenous Populations.⁵⁹ Due to significant pushback by U.N. member states, who opposed the rights that UNDRIP afforded to Indigenous populations, the draft declaration circulated in the United Nations for almost fifteen years before passage.⁶⁰ When it did eventually pass, however, it did so with enormous support, garnering the votes of 143 U.N. member states with only four—the United States, Canada, Australia, and New Zealand—voting against it.⁶¹ All four of the “no” votes to UNDRIP have reversed course in the years since.⁶² In 2021, Canada gave royal assent to a statute that required all Canadian domestic law to comply with UNDRIP.⁶³ Australia endorsed UNDRIP in 2009 but has not adopted the declaration into law.⁶⁴ New Zealand gave its support to the declaration in 2010.⁶⁵ The United States agreed to support UNDRIP in 2011 at the direction of then-President Barack Obama.⁶⁶

As recently as April 2025, the second Trump Administration affirmed its support for UNDRIP through a statement of the United States Mission to the United Nations.⁶⁷ The prepared remarks described

⁵⁸ See Irène Bellier, *‘We Indigenous Peoples . . .’: Global Activism and the Emergence of a New Collective Subject at the United Nations*, in *THE GLOSS OF HARMONY* 177, 177–78 (Brigit Müller ed., 2013).

⁵⁹ UNITED NATIONS, *supra* note 21.

⁶⁰ *See id.*

⁶¹ *Id.* It should be noted that there were eleven abstentions to the UNDRIP vote: Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa, and Ukraine. *Id.*

⁶² *Id.*

⁶³ *Backgrounder: United Nations Declaration on the Rights of Indigenous Peoples Act*, GOV'T OF CAN. (Dec. 10, 2021), <https://www.justice.gc.ca/eng/declaration/about-apropos.html> [<https://perma.cc/3CCZ-6A22>].

⁶⁴ *Implementing UNDRIP*, AUSTL. HUM. RTS. COMM'N, https://humanrights.gov.au/sites/default/files/2020-10/implementing_undrip_-_australias_third_upr_2021.pdf [<https://perma.cc/C29W-2UWG>] (last visited Oct. 17, 2025).

⁶⁵ *See* Press Release, N.Z. Gov't, National Govt to Support UN Rights Declaration (Apr. 20, 2010), <https://www.beehive.govt.nz/release/national-govt-support-un-rights-declaration> [<https://perma.cc/4EZ5-4BPM>].

⁶⁶ *See* Press Release, U.S. Dep't of St., Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Jan. 12, 2011), <https://2009-2017.state.gov/sr/gia/154553.htm> [<https://perma.cc/7H65-WLWE>].

⁶⁷ U.S. Mission to the United Nations, Remarks on Item 3: Discussion on the Theme “Implementing the United Nations Declaration on the Rights of Indigenous Peoples Within United Nations Member States and the United Nations System, Including Identifying Good Practices and Addressing Challenges” (Apr. 21, 2025), <https://usun.usmission.gov/>

efforts to return land and cultural artifacts to federally recognized tribes and stated that these efforts reflect “the Administration’s commitment to strengthening Tribal sovereignty . . . and enhancing the quality of life for Indigenous Peoples.”⁶⁸ More explicitly, it endorsed “the principles of [UNDRIP]” and stated that “[f]rom the beginning, the Trump Administration has been committed to fostering self-determination and expanding opportunities for Tribal nations.”⁶⁹ Despite other changes in U.S. foreign policy,⁷⁰ support for UNDRIP remains steady.⁷¹

The provisions of UNDRIP that have received the most attention are those regarding the right of Indigenous peoples to self-determination,⁷² Indigenous land rights,⁷³ and the “free, prior, and informed consent” standard.⁷⁴ Most relevant to this Note, however, is UNDRIP Article 12. It reads in full,

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; *and the right to the repatriation of their human remains.*
2. *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 indigenous peoples concerned.*⁷⁵

This provision enunciates the right to the return of Indigenous human remains. It further declares that the appropriate standard of doing so is through “fair, transparent and effective” means “developed in conjunction” with Indigenous groups.⁷⁶

remarks-on-item-3-discussion-on-the-theme-implementing-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-within-united-nations-memb/ [https://perma.cc/5AJ7-47ZS].

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See, e.g., Press Release, Marco Rubio, Sec’y of St., U.S. Dep’t of St., Priorities and Mission of the Second Trump Administration’s Department of State (Jan. 22, 2025), <https://www.state.gov/priorities-and-mission-of-the-second-trump-administrations-department-of-state> [https://perma.cc/W8LK-EK46].

⁷¹ See U.S. Mission to the United Nations, *supra* note 67.

⁷² See Anna Cowan, *UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Northern Territory of Australia*, 22 PAC. RIM L. & POL’Y J. 247, 255–56 (2013).

⁷³ See Kelsey Peden, *Dissenting into the Future: The Supreme Court’s Dissent in McGirt, UNDRIP, and the Future of Indigenous Land Rights*, 48 ECOLOGY L.Q. 729, 738 (2021).

⁷⁴ See Jason Searle, Note, *Exploring Alternatives to the “Consultation or Consent” Paradigm*, 6 MICH. J. ENV’T & ADMIN. L. 485, 487, 501 (2017).

⁷⁵ G.A. Res. 61/295, *supra* note 20, art. 12 (emphasis added).

⁷⁶ *Id.* art. 12, ¶ 2. Although the relevant meaning of “fair, transparent and effective mechanisms” has not been widely interpreted, UNDRIP’s standards, most notably the “free, prior, and

It is important to note that UNDRIP draws on the broader application of existing human rights law to Indigenous peoples.⁷⁷ As a declaration, it did not create new rights for Indigenous peoples but rather articulated how preexisting rights apply to their unique situations around the world.⁷⁸ UNDRIP drew explicitly on the International Covenant on Civil and Political Rights (“ICCPR”),⁷⁹ a foundational human rights treaty which has been ratified by the United States.⁸⁰ This Note demonstrates that even before the passage of UNDRIP, general human rights principles have been used to mandate the repatriation of remains to Indigenous peoples.⁸¹

UNDRIP is not, however, the only instrument of international law that speaks directly to the repatriation of human remains to Indigenous peoples. The declaration promulgated by the Organization of American States (“OAS”) and the rulings of the Inter-American Court of Human Rights (“IACHR”) make clear that the specific right of Indigenous peoples to the return of their human remains is found throughout international law.⁸²

The OAS is the intergovernmental organization that has the most comprehensive membership among the thirty-five independent states of North, Central, and South America, and it is the oldest regional organization in the world.⁸³ In 2016, the OAS ratified the American Declaration on the Rights of Indigenous Peoples (“ADRIP”).⁸⁴ Article XVI, paragraph 3 of ADRIP declares that “Indigenous peoples have the right to preserve, protect, and access their sacred sites, including their burial grounds, to use and control their sacred objects and relics, and to recover their human remains.”⁸⁵ Significantly, in its unilateral interpretation of

informed consent” standard, have been the subject of legal and scholarly attention. *See, e.g.*, Carla F. Fredericks, *Operationalizing Free, Prior, and Informed Consent*, 80 ALB. L. REV. 429, 429–30 (2017) (arguing that “indigenous peoples must develop and implement their own [free, prior, and informed consent] protocol in order to assert their human rights” and offering “a model under United States law for Indian tribes to assert their sovereign and human rights without waiting for member state implementation”).

⁷⁷ *See* Cowan, *supra* note 72, at 254–55 (“[UNDRIP] does not create wholly new rights that do not exist in other instruments, but pulls together pre-existing rights of general and specific application and spells out how they relate to the specific conditions of indigenous peoples.”).

⁷⁸ *See id.*

⁷⁹ International Covenant on Civil and Political Rights, Dec. 19, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171.

⁸⁰ *See* ECHO-HAWK, *supra* note 55, at 31.

⁸¹ *See infra* Section II.A.2.

⁸² *See infra* Section II.A.2.

⁸³ *See Who We Are*, ORG. OF AM. STATES, https://www.oas.org/en/about/who_we_are.asp [<https://perma.cc/E5EL-PVTG>] (last visited Oct. 17, 2025).

⁸⁴ *See* Organization of American States AG/RES. 2888 (XLVI-O/16), American Declaration on the Rights of Indigenous Peoples (June 15, 2016).

⁸⁵ *Id.* art. XVI, ¶ 3.

this declaration, the United States stated that it did not view ADRIP as legally binding, but it did so by stating that member states of the OAS should focus their efforts on implementing UNDRIP throughout the Americas.⁸⁶ This goes to demonstrate first that international bodies have continued to express support for the principle of repatriation after the passage of UNDRIP and second that the United States explicitly stated that the implementation of UNDRIP is one of its policy goals.

2. *Rulings of the Inter-American Court of Human Rights on Indigenous Human Remains*

The IACHR has, in multiple cases, spoken directly to the rights of Indigenous peoples regarding possession and protection of their human remains.⁸⁷ Two IACHR cases, *Plan de Sánchez Massacre v. Guatemala*⁸⁸ and *Moiwana Community v. Suriname*,⁸⁹ warrant special attention here. Their importance is twofold: (1) Each of these cases establishes that Indigenous communities have been able to hold states accountable for failing to return human remains, and (2) each of these cases was decided before the passage of UNDRIP, strengthening the claim that the right of repatriation in UNDRIP Article 12 reflects customary international law as it existed before the adoption of the declaration.⁹⁰

In *Plan de Sánchez Massacre*, the IACHR found that Guatemala had violated the human rights of the Maya Achí people.⁹¹ Guatemalan military forces deemed the Maya Indigenous communities as a threat to the state, and those groups suffered “complete destruction of their communities, . . . their culture, the use of their own cultural symbols, . . . [and] their cultural and religious values and practices.”⁹² After a military massacre of the village of Plan de Sánchez in which the Guatemalan military killed 268 Maya people, the survivors were “only able to bury *some* of their next of kin in accordance with Mayan ceremonies, their beliefs and their religion.”⁹³ The court held that, in addition to other human rights violations, Guatemala had violated the rights of the Maya people to “express their religious, spiritual, and cultural beliefs”

⁸⁶ See *id.* at 47 n.1 (“The United States reiterates its longstanding belief that implementation of [UNDRIP] should remain the focus of the OAS and its member states.”).

⁸⁷ See Alexandra Xanthaki, *Culture: Articles 11(1), 12, 13(1), 15 and 34*, in THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 273, 290–91 (Jessie Hohmann & Marc Weller eds., 2018).

⁸⁸ Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 105 (Apr. 29, 2004).

⁸⁹ Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005).

⁹⁰ See *infra* Section II.C.

⁹¹ *Plan de Sánchez Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 105, ¶ 52.

⁹² *Id.* ¶ 42(7) (providing that Guatemala had termed the Maya Indigenous communities “domestic enemies”).

⁹³ *Id.* ¶ 42(30) (emphasis added).

by denying all of the victims burial in the manner culturally acceptable to the Maya.⁹⁴

In *Moiwana Community*, the IACHR found that Suriname violated the rights of the Moiwana people—an Indigenous group that has its roots in “Maroon communities,” remote settlements created by runaway slaves when Suriname was a Dutch colony—by not allowing them access to the bodies of their dead for burial in the custom of their people.⁹⁵ In an attack in 1986, the army of Suriname drove the Moiwana community from their traditional homelands.⁹⁶ The army killed at least thirty-nine people in the attack.⁹⁷ The court found further that “[t]he Moiwana community members have been unable to recover the remains of their relatives killed during the attack; in consequence, it has been impossible for them to provide the deceased with the appropriate death rites as required by fundamental norms of N’djuka culture.”⁹⁸ Upon finding that this was a violation of the human rights of the Moiwana community, the court ordered that “Suriname must employ all technical and scientific means possible . . . to recover promptly the remains of the Moiwana community members killed during the 1986 attack . . . [and] it shall deliver them as soon as possible thereafter to the surviving community members.”⁹⁹

These two cases shed critical light on the application of fundamental human rights principles to Indigenous peoples. Both *Plan de Sánchez* and *Moiwana Community* were decided before the 2007 passage of UNDRIP. This suggests strongly that the UNDRIP Article 12 requirement to return human remains to Indigenous communities reflects and reiterates preestablished existing human rights law, such as the rights expressed in foundational human rights instruments and in customary international humanitarian law—i.e., the customary law of armed conflicts¹⁰⁰—all of which predate the passage of UNDRIP. Further, both of these cases demonstrate that the IACHR is willing to place the burden of locating and repatriating bodies missing for decades on the state, rather than on the Indigenous communities seeking return. In her analysis of this line of case law’s connection to UNDRIP, Professor Alexandra Xanthaki declared that “in fulfilling Indigenous peoples’ cultural rights, States are now under the obligation to act in positive and precise ways in order to recover the remains of Indigenous members.”¹⁰¹

⁹⁴ See *id.* ¶¶ 36(4), 52.

⁹⁵ See *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 86(1)–86(5), 87, 233 (June 15, 2005).

⁹⁶ *Id.* ¶¶ 3, 71, 86(6)–86(20).

⁹⁷ *Id.* ¶¶ 86(15)–86(16).

⁹⁸ *Id.* ¶ 86(20).

⁹⁹ *Id.* ¶ 208.

¹⁰⁰ See *infra* Section II.B.1.

¹⁰¹ See Xanthaki, *supra* note 87, at 291.

B. *International Law on the Repatriation of Remains Generally*

Beyond specific rights of Indigenous peoples, there are more general principles of international law regarding the obligation of states to repatriate the remains of deceased persons. These principles are found in several primary areas of international law: first, in the law governing warfare and prisoners of war; second, in foundational civil and political rights instruments; and finally, in the international law governing the protection of all persons from forced disappearance. Further, the decisions of multiple regional human rights courts make clear that the right to repatriation of remains is a human right based in broader principles of international law.

1. *Conventions, Treaties, and Other Statements of International Law on Repatriation of Remains*

First, the oldest international law regime regarding the repatriation of remains by states is that expressed in the Geneva Conventions regarding the proper care, documentation, and return of the remains of foreign nationals who die as prisoners of war.¹⁰² The Third Geneva Convention¹⁰³ lays out general procedures for the return of the remains and personal effects of the dead in the context of war prisoners.¹⁰⁴ This is especially relevant given that Carlisle was administered, was run, and remains under the control of the United States Army¹⁰⁵ and the United States is a party to the Third Geneva Convention.¹⁰⁶ More directly, the International Committee of the Red Cross classifies the obligation to return human remains as one of customary international humanitarian law, accepted by the practice and manuals of armed services around the world, which “should apply equally in both international and non-international armed conflicts.”¹⁰⁷ This designation carries enormous weight, because the International Committee of the Red Cross serves

¹⁰² See 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 412–13 (2005).

¹⁰³ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

¹⁰⁴ See *id.* art. 120.

¹⁰⁵ See ADAMS, *supra* note 6, at 56–60 (detailing military support for Carlisle and the interactions between Captain Richard Henry Pratt, its founder, and his superior General William Sherman).

¹⁰⁶ Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 103, 6 U.S.T. at 3428, 75 U.N.T.S. at 246.

¹⁰⁷ 1 HENCKAERTS & DOSWALD-BECK, *supra* note 102, at 411–14 (“Rule 114. Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon . . . the request of their next of kin. They must return their personal effects to them.”).

as the “guardian[] of international humanitarian law”¹⁰⁸ and is explicitly recognized as a neutral arbiter and authorized provider of aid in armed conflicts by the Third Geneva Convention.¹⁰⁹

Second, the right to perform funeral rituals and possess the remains of the dead is often rooted in religious freedom, which is protected by the ICCPR, to which the United States is a party.¹¹⁰ The ICCPR lays out human rights which all signatories recognize as fundamental in light of the fact that “the inherent dignity and . . . the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”¹¹¹ Article 18 of the ICCPR establishes that “[e]veryone shall have the right to freedom of thought, conscience and religion . . . [and] to manifest [their] religion or belief in worship, observance, practice and teaching.”¹¹² Article 12 of UNDRIP, broadly covering spiritual and religious rights, is explicitly related to Article 18 of the ICCPR.¹¹³ And it is in Article 12 of UNDRIP that the obligation of states to repatriate Indigenous human remains is enunciated.¹¹⁴ Despite the fact that the United States ratified the ICCPR as a non-self-executing treaty,¹¹⁵ its provisions constitute an international law “obligation” or “commitment” for the United States.¹¹⁶ Further, the ICCPR was ratified by the Senate just over one year after the passage of NAG-PRA,¹¹⁷ a law described by scholars as “human rights legislation.”¹¹⁸

Third, the right of repatriation can be found in more modern instruments of international human rights law. Passed in 2006, the International Convention for the Protection of All Persons from Enforced Disappearance declares that states “shall afford one another the

¹⁰⁸ *Our Mandate and Mission*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/en/our-mandate-and-mission> [<https://perma.cc/K7ST-WG6J>] (last visited Oct. 17, 2025).

¹⁰⁹ See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 103, art. 125 (“The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times.”).

¹¹⁰ See International Covenant on Civil and Political Rights, Dec. 19, 1966, S. TREATY DOC. NO. 95-20 (1992).

¹¹¹ International Covenant on Civil and Political Rights, *supra* note 79, T.I.A.S. No. 92-908 at 1, 999 U.N.T.S. at 172.

¹¹² *Id.* art. 18.

¹¹³ See Xanthaki, *supra* note 87, at 290 (“The recognition of Indigenous spiritual and religious beliefs relates to Article 18 of the ICCPR . . .”).

¹¹⁴ See *supra* Section II.A.1.

¹¹⁵ International Covenant on Civil and Political Rights, *supra* note 110 (“[T]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.”).

¹¹⁶ See *Medellín v. Texas*, 552 U.S. 491, 504 (2008) (providing that although non-self-executing treaties can create “international law obligation[s] on the part of the United States,” such “international law obligations [do not] automatically constitute binding federal law enforceable in United States courts” (emphasis omitted)).

¹¹⁷ See International Covenant on Civil and Political Rights, *supra* note 110; S. REP. NO. 101-473, at 1 (1990).

¹¹⁸ Trope & Echo-Hawk, *supra* note 25, at 36.

greatest measure of mutual assistance . . . in searching for, locating and releasing disappeared persons and, in the event of death, in . . . returning their remains.”¹¹⁹ The situation of Indigenous children at residential schools was in some ways analogous to that of disappeared persons in dictatorial regimes in that the location of the body was known to state agents—i.e., the particular school and its administrators—but often inaccessible to the family. Although the United States is not a party to this convention,¹²⁰ it commands broad support among the member states of the United Nations.¹²¹

Taking these international law provisions together, various facets of international human rights and humanitarian law incorporate the right of repatriation for the dead. Whether or not these treaties are directly binding on the United States, all treaties are evidence of customary international law, and the more widely adopted and followed the treaty, the more weight that evidence will carry.¹²² Beyond just these declarations and statements, however, the rights of the dead and their loved ones have been recognized by multiple human rights tribunals. Such cases are considered next.

2. *International Rulings on Repatriation as a Human Right*

Various international courts have held that as a human rights issue, all people have the right to the return of their deceased family member’s body when it is in the state’s power to do so.¹²³ In *Akpinar & Altun v. Turkey*,¹²⁴ the European Court of Human Rights (“ECHR”) held that protections for the dead arise from the human rights of their living

¹¹⁹ See International Convention for the Protection of All Persons from Enforced Disappearance art. 15, Dec. 20, 2006, 2716 U.N.T.S. 3.

¹²⁰ 16. *International Convention for the Protection of All Persons from Enforced Disappearance*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en [<https://perma.cc/P8D2-HAZH>] (last visited Oct. 18, 2025) (omitting the United States in a list of participants to the convention).

¹²¹ See *id.* (providing that ninety-eight states signed the convention and seventy-seven states ratified or acceded to it).

¹²² See *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 256–57 (2d Cir. 2003) (“All treaties that have been ratified by at least two States provide *some* evidence of the custom and practice of nations. However, a treaty will only constitute *sufficient proof* of a norm of customary international law if an overwhelming majority of States have ratified the treaty, *and* those States uniformly and consistently act in accordance with its principles. The evidentiary weight to be afforded to a given treaty varies greatly depending on (i) how many, and which, States have ratified the treaty, and (ii) the degree to which those States actually implement and abide by the principles set forth in the treaty.”).

¹²³ For a thorough treatment of these cases and others that deal with the law of human rights and human remains, see Morris Tidball-Binz (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Protection of the Dead*, U.N. Doc. A/HRC/56/56 (Apr. 25, 2024).

¹²⁴ App. No. 56760/00 (Feb. 27, 2007), <https://hudoc.echr.coe.int/tur?i=001-79602> [<https://perma.cc/W4T3-8AZC>].

relatives or descendants.¹²⁵ There, Turkey was accused of violating the right of dignity guaranteed by Article 3 of the European Convention on Human Rights.¹²⁶ Article 3 details that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”¹²⁷ Turkey was accused of having removed body parts of the decedents after death, which qualifies as inhuman or degrading punishment.¹²⁸ The ECHR declined to hold that the rights of the deceased had been violated by mutilation of the bodies, but did hold that the rights of the deceased family members had been violated by having to see and know that their loved one had been mutilated after death.¹²⁹ This is further evidence that customary human rights law affords protections to human remains and the rights of the people who were associated with the deceased.

Further, the IACHR found in *Blake v. Guatemala*¹³⁰ that the failure to either disclose the location of or to return the body of a deceased person to their family constituted a human rights violation.¹³¹ Nicholas Blake, an American national, had traveled to Guatemala as a reporter and was killed there by state actors.¹³² Not only did Guatemala violate Mr. Blake’s human rights, but it also violated the rights of his family members, who were denied access to their loved one’s remains.¹³³ This further shows that the rights of deceased persons extend past their death to those who are associated with that person.

These cases demonstrate that, whether Indigenous or not, the human right to repatriation of the remains of a relative or loved one is a right that international tribunals around the world are willing to enforce. Treaties, U.N. declarations, prominent legal scholars, and global courts all recognize this right, which strongly supports that the human right to repatriation of remains is customary international law. UNDRIP, which announced how the already existing international law of human rights applied to the specific situation of Indigenous peoples around the world,¹³⁴ provides the strongest evidence that Indigenous peoples have a right under customary international law to repatriation of their associated human remains. Just as the right of repatriation of human remains has crystallized into customary international humanitarian

¹²⁵ See *id.* ¶¶ 84–87.

¹²⁶ *Id.* ¶ 62.

¹²⁷ Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.

¹²⁸ *Akpinar & Altun*, App. No. 56760/00, ¶¶ 76–77.

¹²⁹ *Id.* ¶¶ 82–83, 86–87.

¹³⁰ Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36 (Jan. 24, 1998).

¹³¹ *Id.* ¶¶ 112–16, 124.

¹³² *Id.* ¶ 52.

¹³³ *Id.* ¶ 112–16, 124.

¹³⁴ See Cowan, *supra* note 72, at 254–56.

law,¹³⁵ meaning that it applies in armed conflicts, this Note posits that it has crystallized into a customary international human rights law related to Indigenous peoples.¹³⁶ And as a rule of customary international law, it is enforceable as federal common law and must be used in interpreting relevant statutes.¹³⁷ This Note discusses that argument next.

C. *Enforceability of Customary International Law in Domestic Courts*

Customary international law is a part of American common law and is enforceable in domestic courts.¹³⁸ This goes back to some of the earliest judicial decisions in the republic¹³⁹ and has consistently been upheld as binding on U.S. jurisprudence.¹⁴⁰ International law has specifically always heavily influenced the creation and interpretation of federal Indian law, as federally recognized tribes are quasi-sovereign entities.¹⁴¹ Today, at least some of UNDRIP's provisions reflect customary international law and are enforceable in U.S. domestic courts as well as international human rights tribunals.¹⁴² Given the widespread custom among nations and long-standing obligation of states to repatriate human remains, Article 12 of UNDRIP should be considered such customary international law.

Customary international law requires two components in order to be binding: The custom must be “(1) a general practice of states (2) that is accepted as law.”¹⁴³ The Supreme Court demonstrated how both of these principles worked in practice in the well-known case of *The Paquete Habana*.¹⁴⁴ In *Paquete Habana*, Cuban fishing vessels and their cargo had been taken as prizes of war by the United States during the Spanish-American War.¹⁴⁵ When the owners sued for the return of their vessels, the Court held that despite the lack of treaty provisions obligating the United States not to seize commercial fishing vessels, custom nonetheless dictated that the ships should have been exempt from

¹³⁵ See 1 HENCKAERTS & DOSWALD-BECK, *supra* note 107, at 411.

¹³⁶ See G.A. Res. 61/295, *supra* note 20.

¹³⁷ See KENNETH BOBROFF ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.07[4][a] (Nell Jessup Newton et al. eds., 2005 ed. 2005).

¹³⁸ See *id.*; ECHO-HAWK, *supra* note 55, at 78–81.

¹³⁹ See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (opinion of Wilson, J.) (“When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”).

¹⁴⁰ See *The Paquete Habana*, 175 U.S. 677, 686 (1900) (declaring that the United States is bound to follow practices with an “ancient usage among civilized nations, beginning centuries ago, [that have] gradually ripen[ed] into a rule of international law”).

¹⁴¹ See ECHO-HAWK, *supra* note 55, at 63.

¹⁴² See *id.* at 81, 91.

¹⁴³ See LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW 54–55 (7th ed. 2019).

¹⁴⁴ 175 U.S. 677 (1900).

¹⁴⁵ *Id.* at 678.

capture.¹⁴⁶ The Court's analysis on the role of customary international law in the American system is as follows:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, *where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations*; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.¹⁴⁷

In the context of *Paquete Habana*, the Court conducted an exhaustive historical analysis to determine that the practice of exempting commercial fishing vessels from capture in war was the practice of nations going back centuries, satisfying the requirement that the custom be the general practice of states.¹⁴⁸ Further, these states had not refrained from capturing fishing vessels as a courtesy, but rather because they believed they were bound by international law to do so, satisfying the requirement that the custom be accepted as law.¹⁴⁹ Thus, where the majority of states have carried out a practice that they believe themselves obligated to carry out, it has ripened into customary international law and is enforceable in U.S. courts.

Recent cases have brought more attention to the enforcement of customary international law in domestic courts.¹⁵⁰ As Justice Gorsuch pointed out in his concurrence in *Turkiye Halk Bankasi A.S. v. United States*,¹⁵¹ modern scholars vigorously disagree about the applicability and enforcement of customary international law as a form of federal common law.¹⁵² There is significant conflict between the “modern position” and the “revisionist position” on how to apply customary international law in U.S. courts.¹⁵³ This debate is complex, and this Note assumes that “customary law is a part of federal common law applicable to the same extent as any other aspect of federal common law.”¹⁵⁴

¹⁴⁶ *Id.* at 700–08, 714.

¹⁴⁷ *Id.* at 700 (emphasis added).

¹⁴⁸ *Id.* at 708.

¹⁴⁹ *Id.*

¹⁵⁰ *See, e.g.,* *Turk. Halk Bankasi A.S. v. United States*, 598 U.S. 264, 286–87 (2023) (Gorsuch, J., concurring in part and dissenting in part).

¹⁵¹ 598 U.S. 264 (2023).

¹⁵² *Id.* at 287.

¹⁵³ *See* ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, *THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION*, at xiv (2017).

¹⁵⁴ KENNETH BOBROFF ET AL., *supra* note 137, § 5.07[4][a][ii].

Although *Erie Railroad Co. v. Tompkins*¹⁵⁵ famously declared that “[t]here is no federal general common law,”¹⁵⁶ customary international law continues to have great impact in the narrow areas in which federal courts still exercise common law authority.¹⁵⁷ One of these areas in which federal common law still often applies is federal Indian law.¹⁵⁸ Although there is no “general ‘federal common law of Indian affairs,’”¹⁵⁹ federal common law still regularly informs the practice of tribal law because of tribes’ status as sovereigns.¹⁶⁰ The practice of applying customary international law, known historically as the law of nations, to disputes over tribal rights dates back to the earliest decisions of the U.S. Supreme Court regarding tribes.¹⁶¹

Scholars agree that at least some of UNDRIP’s provisions are reflective of customary international law and that “courts can enforce provisions of [UNDRIP] that constitute customary international law.”¹⁶² Among the provisions of UNDRIP that have crystallized into customary international law include the right to self-determination, the right to culture, and the right to reparations and redress for wrongs committed.¹⁶³ The discussion above suggests strongly that the right to the repatriation of remains—both specifically in the context of Indigenous peoples and in general—is already a rule of customary international law.¹⁶⁴ Under the most expansive view of customary international law’s enforceability, Article 12 of UNDRIP, which requires the repatriation of Indigenous remains, would already be enforceable on its own by a tribe bringing suit in federal district court. But even under a more cautious view of the applicability of customary international law in federal courts, existing statutes, like NAGPRA, should be construed to comport

¹⁵⁵ 304 U.S. 64 (1938).

¹⁵⁶ *See id.* at 78.

¹⁵⁷ *See, e.g.,* *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (“[W]e believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law.”).

¹⁵⁸ *See* *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233–36 (1985) (discussing the right of tribes to sue for violations of their possessory rights based on federal common law).

¹⁵⁹ *Coeur d’Alene Tribe v. Hawks*, 933 F.3d 1052, 1055 (9th Cir. 2019) (quoting *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 712 (2003)).

¹⁶⁰ *See* KENNETH BOBROFF ET AL., *supra* note 137, § 4.01[1][a] (“The history of tribal self-government forms the basis for the exercise of modern powers. Indian tribes consistently have been recognized, first by the European nations, and later by the United States, as ‘distinct, independent political communities . . .’” (footnote omitted)).

¹⁶¹ *See, e.g.,* *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 545 (1823) (describing pre-Columbian America as made up of “various independent tribes or nations of Indians, who were the sovereigns of their respective portions of the territory, and the absolute owners and proprietors of the soil”).

¹⁶² ECHO-HAWK, *supra* note 55, at 67.

¹⁶³ *See id.* at 65.

¹⁶⁴ *See* discussion *supra* Sections II.A–B.

with international law,¹⁶⁵ and instruments of international law, like U.N. declarations, can properly be used to interpret both statutory and constitutional provisions.¹⁶⁶

The right of Indigenous peoples to have the bodies of their members repatriated to them is an obligation upon states that carries the force of law in U.S. courts and binds government actors. Within the context of this international law regime, this Note turns to the federal statute governing the return of bodies to Indigenous peoples.

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

1. *Statutory Overview*

NAGPRA was adopted to guarantee protection and return of Indigenous human remains and cultural objects.¹⁶⁷ Congress passed it against the backdrop of public outcry over the revelation that the Smithsonian Institution held the remains of more than 14,000 Indigenous people.¹⁶⁸ This was part of a centuries-long practice of looting Indigenous graves for profit, academic study, government use, or curiosity.¹⁶⁹ The response from tribal leaders around the country to the Smithsonian Institution testimony was swift.¹⁷⁰ Congress responded by drafting and passing NAGPRA.¹⁷¹

¹⁶⁵ See *MacLeod v. United States*, 229 U.S. 416, 434 (1913) (“The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe and which were founded upon the principles of international law.”).

¹⁶⁶ See *ECHO-HAWK*, *supra* note 55, at 71–72.

¹⁶⁷ Deborah F. Buckman, Annotation, *Validity, Construction, and Applicability of Native American Graves Protection and Repatriation Act (25 U.S.C.A. §§ 3001–3013 and 18 U.S.C.A. § 1170)*, 173 A.L.R. Fed. 585, § 2[a] (2001).

¹⁶⁸ S. REP. NO. 101-473, at 1–2 (1990); see also Trope & Echo-Hawk, *supra* note 25, at 54–56 (detailing the discovery by Northern Cheyenne leaders of the scale of the Smithsonian Institution’s collection of Indigenous human remains).

¹⁶⁹ See Trope & Echo-Hawk, *supra* note 25, at 39 (“National estimates are that between 100,000 and two million deceased Native people have been dug up from their graves for storage or display by government agencies, museums, universities and tourist attractions.”).

¹⁷⁰ S. REP. NO. 101-473, at 1–2 (1990) (“Smithsonian Secretary Robert McCormick Adams indicated that of the 34,000 human remains currently in the Institution’s collection, approximately 42.5% or 14,523 of the specimens are the remains of North American Indians, and another 11.9% or 4,061 of the specimens represent [Indigenous Alaskan] populations. Tribal reaction to Secretary Adams’ testimony was swift, and in the months which followed, Indian tribes around the country called for the repatriation of those human remains . . .”).

¹⁷¹ See *id.*

The statute is now more than thirty years old and has had mixed results.¹⁷² Its provisions are directed at “Federal agenc[ies]” and “museum[s].”¹⁷³ Both of these terms are defined by the statute, however, to cover a broad range of institutions. A “Federal agency” means any department, agency, or instrumentality of the United States.¹⁷⁴ “[M]useum” is defined *extremely* broadly as “any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items.”¹⁷⁵ The statute serves two primary functions: protection and repatriation.¹⁷⁶

First, the statute is designed to protect Indigenous burial grounds and cultural sites from unnecessary disruption or destruction by outlawing the trafficking in Indigenous human remains or cultural items.¹⁷⁷ The Act permits the intentional removal or excavation of Indigenous cultural items from federal or tribal lands only if a permit is issued and the excavation is done after “consultation with or . . . consent of the appropriate . . . Indian tribe or Native Hawaiian organization.”¹⁷⁸ This provision of NAGPRA has been held to apply to “ancient human remains or those with some sort of cultural or archaeological interest,” as opposed to protecting the modern human remains of a person who happens to be Indigenous or buried on tribal land.¹⁷⁹ Regarding ownership of unintentionally excavated human remains and associated funerary objects, they belong to the lineal descendant of the person in question, and in the case that a lineal descendant cannot be identified, they go to the tribe or nation on whose land the remains were discovered.¹⁸⁰ “[U]nassociated funerary objects, sacred objects, and objects of cultural patrimony” go to the tribe on whose land they were discovered or the tribe with the closest cultural affiliation if the objects are discovered on federal land.¹⁸¹

¹⁷² Contrast Wendy Crowther, Comment, *Native American Graves Protection and Repatriation Act: How Kennewick Man Uncovered the Problems in NAGPRA*, 20 J. LAND, RES. & ENV'T L. 269, 283–89 (2000) (detailing open questions and concerns left by NAGPRA), with Cecily Harms, Note, *NAGPRA in Colorado: A Success Story*, 83 U. COLO. L. REV. 593, 595 (2012) (presenting a positive analysis of NAGPRA's implementation in Colorado).

¹⁷³ 25 U.S.C. § 3003(a).

¹⁷⁴ *Id.* § 3001(4).

¹⁷⁵ *Id.* § 3001(8).

¹⁷⁶ See *Thorpe v. Borough of Thorpe*, 770 F.3d 255, 260 (3d Cir. 2014) (citing H.R. REP. NO. 101-877, at 10 (1990)).

¹⁷⁷ Trope & Echo-Hawk, *supra* note 25, at 73–74.

¹⁷⁸ 25 U.S.C. § 3002(c).

¹⁷⁹ See *Kickapoo Traditional Tribe v. Chacon*, 46 F. Supp. 2d 644, 650 (W.D. Tex. 1999) (holding that a court order to exhume a recently deceased Indigenous woman's body to obtain an autopsy in relation to a murder investigation did not violate NAGPRA).

¹⁸⁰ 25 U.S.C. § 3002(a).

¹⁸¹ *Id.*

Second, the statute facilitates the return of Indigenous human remains or cultural artifacts wrongfully stored in museums, collections, and holdings. This function responded to a problem identified by the House Report:

Digging and removing the contents of Native American graves for reasons of profit or curiosity has been common practice. . . . This . . . [has] resulted in hundreds of thousands Native American human remains and funerary objects being sold or housed in museums and educational institutions around the country.¹⁸²

The statute required that all museums or agencies of the federal government in possession of Indigenous remains or artifacts after the passage of NAGPRA in 1990 take a full inventory of the objects in their possession within five years of the statute's passage.¹⁸³ Any museum or federal agency that has "possession or control over holdings or collections of Native American human remains" must "identify the geographical and cultural affiliation of such item."¹⁸⁴ Once an object or set of remains is affiliated with a particular culture or tribe, a known lineal descendant or the affiliated tribe or organization can request the return of the object or remains, and the federal agency or museum is obligated to fulfill the request.¹⁸⁵ Any museum that fails to comply with NAGPRA's repatriation requirements may face civil penalties imposed by the Secretary of the Interior.¹⁸⁶ NAGPRA does not list explicit penalties or procedures for federal agencies that fail to comply with the statute.¹⁸⁷

2. *Relevant Case Law*

NAGPRA requires that a "Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization," return properly affiliated human remains to the requesting party.¹⁸⁸ There are, however, court-created limitations on the reach of NAGPRA's repatriation requirements. These limitations are best illustrated by two high-profile cases interpreting the statute: *Bonnichsen v. United States*¹⁸⁹ and *Thorpe v. Borough of Thorpe*.¹⁹⁰

¹⁸² H.R. REP. NO. 101-877, at 10 (1990).

¹⁸³ 25 U.S.C. § 3003(a)–(b).

¹⁸⁴ *Id.* § 3003(a).

¹⁸⁵ *Id.* § 3005(a)(1).

¹⁸⁶ *Id.* § 3007(a).

¹⁸⁷ *See id.* §§ 3001–3009.

¹⁸⁸ *Id.* § 3005(a)(1).

¹⁸⁹ 367 F.3d 864 (9th Cir. 2004).

¹⁹⁰ 770 F.3d 255 (3d Cir. 2014).

Bonnichsen decided control of the famous archaeological find popularly known as “Kennewick Man” but referred to as “the Ancient One” by some Indigenous groups.¹⁹¹ Discovered in 1996, the bones in question belonged to a man who lived between 8,340 and 9,200 years ago.¹⁹² The remains were referred to as “Kennewick Man” because of their discovery on federal property near the Columbia River outside Kennewick, Washington.¹⁹³ Conflict quickly developed between Indigenous groups who wanted the remains to be laid to rest under their control and several museums and academic institutions who wanted to study and display the remains.¹⁹⁴ The U.S. Army Corps of Engineers, attempting to comply with NAGPRA, awarded control of the remains to Indigenous groups from the area of the Columbia River who “opposed scientific study of the remains on religious and social grounds.”¹⁹⁵ A group of scientists and academic institutions filed suit to challenge the decision as arbitrary and capricious under the Administrative Procedure Act.¹⁹⁶ The court agreed with the scientific plaintiffs and ruled that remains must “bear some relationship to a presently existing tribe, people, or culture to be considered Native American.”¹⁹⁷ Commentators have pointed out that this decision ignored the history of Indigenous America and allowed the single factor of Kennewick Man’s age to be dispositive in dismissing the repatriation of remains that Indigenous peoples felt strongly belonged to one of their own.¹⁹⁸ Because of this decision, the burden of showing a connection between the existing tribe and the remains is on the tribe seeking repatriation.

Looking to the less distant past, *Thorpe* centered on control of the body of American Olympian and famed star of the early National Football League, Jim Thorpe.¹⁹⁹ Thorpe was of Sauk heritage and was a member of the Sac and Fox Nation of Oklahoma.²⁰⁰ He died intestate in 1953.²⁰¹ His third wife, Patricia Thorpe, arranged to have him buried

¹⁹¹ *Bonnichsen*, 367 F.3d at 868–69.

¹⁹² *See id.*

¹⁹³ *Id.*

¹⁹⁴ *See id.* at 870.

¹⁹⁵ *Id.*

¹⁹⁶ Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706. *See Bonnichsen*, 367 F.3d at 874–75.

¹⁹⁷ *Bonnichsen*, 367 F.3d at 875 (emphasis omitted).

¹⁹⁸ Will R. Ripley, Note, *You’re Not Native American—You’re Too Old!*: *Bonnichsen v. United States Exposes the Native American Graves Protection and Repatriation Act*, 9 J. GENDER, RACE & JUST. 137, 160 (2005) (“By allowing the extreme age of these remains to be the dispositive factor in determining that they are not Native American, both courts ignored the fact that Native Americans have always had their own history, and that because Europeans did not write that history, it has too often been ignored.”).

¹⁹⁹ *Thorpe v. Borough of Thorpe*, 770 F.3d 255, 257 (3d Cir. 2014).

²⁰⁰ *Id.*

²⁰¹ *Id.*

in a Pennsylvania town now named in his honor.²⁰² John Thorpe, Jim Thorpe's son by his second wife, Freeda, brought suit under NAGPRA to have his father's remains exhumed and returned to the Sac and Fox reservation in Oklahoma.²⁰³ The Third Circuit declined to hold that the town of Jim Thorpe constituted a "museum" under NAGPRA, because a literal interpretation of the statute would have required that Jim Thorpe be disinterred, which was contrary to the intention of the drafters that NAGPRA protect Indigenous graves from disturbance.²⁰⁴ The court additionally feared that if it were to hold that NAGPRA applied to the town of Jim Thorpe, it "could call into question any 'institution' or 'State or local government agency' that controls a cemetery or grave site where Native Americans are buried."²⁰⁵ Despite the literal interpretation of "holding" or "collection" that would include a cemetery or gravesite, the court in *Thorpe* limited the statute to exclude government-controlled cemeteries.²⁰⁶

Bonnichsen and *Thorpe* set limits on NAGPRA's scope that impact its ability to be used as a tool to repatriate the bodies of children who died at residential schools. *Bonnichsen* establishes that when seeking to prove tribal affiliation under NAGPRA in order to facilitate the return of human remains, a connection to an existing tribe with lineal descent to those human remains is critical.²⁰⁷ *Bonnichsen*'s emphasis on proving lineal descent between the claimant and the human remains has made the bar for the voluntary return of bodies far too high to comply with the customary international law regime governing repatriation of Indigenous remains in the context of the residential schools, which closed their doors more than a century ago. *Thorpe* serves as the only case construing whether NAGPRA governs cemeteries under the control of the federal government or entities that receive federal funds. Based on the facts of that case, the Third Circuit determined that NAGPRA was inappropriate to order disinterment.²⁰⁸ This holding from *Thorpe* was the basis for the decision in *Winnebago Tribe of Nebraska v. Department of the Army*²⁰⁹ that NAGPRA can seemingly never be used to compel disinterment from graves in a cemetery, no matter the context.²¹⁰

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 257, 264–65.

²⁰⁵ *Id.* at 265.

²⁰⁶ *Id.*

²⁰⁷ *Bonnichsen v. United States*, 367 F.3d 864, 870–79 (9th Cir. 2004).

²⁰⁸ *Thorpe*, 770 F.3d at 265.

²⁰⁹ No. 24-cv-78, 2024 WL 3884194 (E.D. Va. Aug. 20, 2024).

²¹⁰ *See infra* Section III.A.

3. Updated Regulations and the Inability to Reach Cemeteries

In an attempt to address some of the defects in NAGPRA, in 2023, the Biden Administration and former Secretary of the Interior Deb Haaland undertook to implement a new NAGPRA final rule through the DOI, which houses the Bureau of Indian Affairs.²¹¹ Some major changes were made to the rules implementing NAGPRA, but in response to public comments about repatriation of bodies from residential schools, the Agency said that its hands were tied.²¹² Two major suggestions were made through the notice-and-comment rulemaking process to strengthen NAGPRA's applicability to the sites of former residential schools: (1) an amendment to NAGPRA's definition of "Federal lands"²¹³ and (2) a regulation requiring agencies to disinter bodies in consultation with the relevant tribe.²¹⁴ The DOI implemented neither suggestion and made clear in its response to comments that the Agency's interpretation of the situation was that only legislative action by Congress could be used to address these problems.²¹⁵

First, in an attempt to reach the sites of former residential schools not controlled by agencies or museums, one comment proposed amendments to NAGPRA's definition of "Federal lands."²¹⁶ The comment suggested that the definition of federal lands be expanded to cover "disposition of Native American children buried at Indian boarding schools on lands not owned or controlled by the Federal Government, but where the Indian boarding school was operated by or for the U.S. Government."²¹⁷ In response, the DOI stated that if Congress had wanted the definition of federal lands to be broad enough to cover the sites of all the former residential schools, it would have said so.²¹⁸

Second, regarding broader comments that a regulation should be promulgated that would require disinterment of bodies from cemeteries in consultation with the concerned tribe, the DOI stated that "[NAGPRA] does not require a Federal agency to engage in an excavation of possible burial sites," and therefore a regulation implementing the Act could not reach cemeteries.²¹⁹ As NAGPRA is currently written,

²¹¹ See Native American Graves Protection and Repatriation Act Systematic Processes for Disposition or Repatriation, 88 Fed. Reg. 86,452, 86,452 (Dec. 13, 2023) (codified at 43 C.F.R. pt. 10).

²¹² See *id.* at 86,471, 86,487 (addressing the inability of a regulation to amend the statute to expand the definition of federal lands to cover boarding schools or to require that agencies excavate bodies buried at cemeteries).

²¹³ See *id.* at 86,470–71.

²¹⁴ See *id.* at 86,487.

²¹⁵ *Id.* at 86,471.

²¹⁶ See *id.* at 86,470–71.

²¹⁷ *Id.*

²¹⁸ See *id.* at 86,471.

²¹⁹ *Id.* at 86,487.

the bodies of children in boarding school cemeteries would only come under the Act if an unauthorized third party excavated their remains.²²⁰

These responses to public comments on NAGPRA show two things. First, interested parties feel strongly that NAGPRA should be able to reach the cemeteries at the site of former residential schools. Second, without explicit statutory amendment, these concerns will continue to go unaddressed.

III. PROBLEM: NAGPRA'S COMPLIANCE WITH INTERNATIONAL LAW

Given the atrocities the U.S. government committed against Indigenous children at residential schools and the unaccounted-for remains of these children, Indigenous peoples must have an actionable right to the return of their human remains, as enunciated in UNDRIP.²²¹ When interpreted by the courts, however, NAGPRA has proven an ineffective tool to aid Indigenous peoples in the return of children who died at the residential schools. Although residential schools' theft of Indigenous children during life falls outside NAGPRA's protection from disinterment after death, the deaths caused by this theft fall squarely within NAGPRA's statutory intent: to ratify and secure the rights of Indigenous peoples to the bodies of their own.²²²

A. *Winnebago Tribe of Nebraska v. Department of the Army*

The decision of the U.S. District Court for the Eastern District of Virginia in *Winnebago Tribe of Nebraska* in August 2024 foreclosed the ability of federally recognized tribes to compel the return of the remains of children buried at residential schools under the control of federal agencies.²²³ Not only does the ruling in *Winnebago Tribe of Nebraska* defy the human rights of Indigenous peoples enunciated in UNDRIP, but it also abrogates the intention of NAGPRA's drafters that the stolen remains of Indigenous peoples be returned to their respective nations.²²⁴

In 2024, the Winnebago Tribe filed a federal suit in the Eastern District of Virginia, which appeals to the Fourth Circuit, seeking the return of the bodies of two Winnebago boys who died at Carlisle.²²⁵ Samuel Gilbert (born La-coo-hee-he-kaw) and Edward Hensley (whose given

²²⁰ *See id.*

²²¹ G.A. Res. 61/295, *supra* note 20, art. 12, ¶ 2.

²²² *See* Trope & Echo-Hawk, *supra* note 25, at 36 (stating that one of the goals of tribal governments advocating for NAGPRA was "to repatriate thousands of dead relatives or ancestors").

²²³ *Winnebago Tribe v. Dep't of the Army*, No. 24-cv-78, 2024 WL 3884194, at *2-3 (E.D. Va. Aug. 20, 2024).

²²⁴ *See* G.A. Res. 61/295, *supra* note 20, art. 12; H.R. REP. NO. 101-877, at 8-10 (1990).

²²⁵ *Winnebago Tribe*, 2024 WL 3884194, at *1.

name is unrecorded on his Carlisle student registration card) were both members of the Winnebago Tribe, and both died while attending Carlisle in the last decade of the nineteenth century.²²⁶ After the Army refused to comply with the tribe's request to disinter and return Samuel's and Edward's remains, the Winnebago Tribe filed an action seeking "declaratory relief stating the Army is subject to NAGPRA and injunctive relief compelling the Army to repatriate [Samuel's and Edward's] remains."²²⁷

The Winnebago Tribe argued that section 3005(a)(4) of NAGPRA required the expeditious return of Samuel's and Edward's remains.²²⁸ Section 3005(a)(4) states that when Indigenous human remains are controlled by the federal government but were not identified in the original inventory that NAGPRA required under section 3003, the remains should be "expeditiously returned where the requesting Indian tribe . . . can show cultural affiliation by a preponderance of the evidence."²²⁹ Although the plain language of this section could indicate that the Army, which falls squarely within NAGPRA's definition of a government agency in possession of Indigenous human remains, is compelled to return remains buried at the Carlisle cemetery, the district court disagreed.²³⁰ Despite acknowledging the Winnebago Tribe's clear interest in the return of Samuel's and Edward's remains, the district court relied on a statutory interpretation of NAGPRA's terms to deny an order compelling the boys' return.²³¹

First, the district court held that section 3005(a)(4) does not apply to all Indigenous human remains controlled by the federal government.²³² Rather, the court held that this section referred only to remains that otherwise *should* have fallen under a section 3003 inventory but were missed or went unaccounted for.²³³ According to the court, this meant that even if the remains were under the control of a federal agency, they were only subject to return if they were part of a government "holding or collection" of the kind subject to section 3003.²³⁴

²²⁶ See *id.*; *Samuel Gilbert (La-coo-hoo-he-kaw) Student Information Card*, CARLISLE INDIAN SCH. DIGIT. RES. CTR., https://carlisleindian.dickinson.edu/student_files/samuel-gilbert-la-coo-hoo-he-kaw-student-information-card [<https://perma.cc/NGS8-LYV8>] (last visited Oct. 17, 2025); *Edward Hensley Student Information Card*, CARLISLE INDIAN SCH. DIGIT. RES. CTR., https://carlisleindian.dickinson.edu/student_files/edward-hensley-student-information-card [<https://perma.cc/4RW2-JD8N>] (last visited Oct. 17, 2025).

²²⁷ *Winnebago Tribe*, 2024 WL 3884194, at *1.

²²⁸ *Id.* at *2.

²²⁹ 25 U.S.C. § 3005(a)(4); see also *id.* § 3003 (requiring that covered institutions conduct an inventory of holdings and collections to locate Indigenous human remains and cultural artifacts).

²³⁰ See *Winnebago Tribe*, 2024 WL 3884194, at *2–3.

²³¹ *Id.*

²³² See *id.* at *2.

²³³ *Id.*

²³⁴ *Id.*

NAGPRA does not define government holding or collection.²³⁵ Notably, the regulations promulgated by the DOI *do* define a holding or collection as “an accumulation of one or more objects, items, or human remains for *any* temporary or permanent purpose.”²³⁶ Regardless of the broad language of “any temporary or permanent purpose,” the court looked instead to *Webster’s Dictionary* to determine that “neither [holding nor collection] applies naturally to graves in a cemetery.”²³⁷ Given this, the court cited the ruling in *Thorpe* to justify setting aside the literal reading of NAGPRA’s requirements.²³⁸ Looking to *Thorpe* as persuasive authority that NAGPRA does not cover cemeteries, the district court seemed to foreclose ever using NAGPRA for this purpose.²³⁹ The court held that “applying the Act to order disinterment would run contrary to Congress’s intent to protect Native American burial sites.”²⁴⁰

The *Winnebago Tribe of Nebraska* district court’s analysis fails on at least two grounds. First, the analysis of whether the Carlisle cemetery fell under NAGPRA was based on an overbroad reading of *Thorpe*. Second, the ruling goes against the broad remedial intentions of NAGPRA’s drafters and the established precedent of reading federal Indian law broadly and in favor of tribal sovereignty. To allow this interpretation to remain the law governing repatriation from residential schools would undercut the goals of the Act, disrespect the rights of Indigenous peoples, and violate binding customary international law.

First, the district court’s reading of *Thorpe* is overbroad. The case at hand in *Thorpe* was entirely unique in its facts, dealing with the body of a celebrity buried in a public memorial to him at the center of a contentious family dispute.²⁴¹ If the court in *Thorpe* had allowed the NAGPRA claim to go forward, it would have required disinterment of “human remains buried in accordance with the wishes of the decedent’s next-of-kin.”²⁴² In *Thorpe*, the Third Circuit found that this was in contravention of Congress’s stated goals of repatriating human remains that had been improperly looted, stolen, or otherwise unjustly taken from the tribe.²⁴³ To apply this same logic to *Winnebago Tribe of Nebraska*, however, fails to recognize the reality of American history: Children at residential schools *were* improperly taken from their tribes and families

²³⁵ See 25 U.S.C. §§ 3001–3008.

²³⁶ 43 C.F.R. § 10.2 (2024) (emphasis added).

²³⁷ *Winnebago Tribe*, 2024 WL 3884194, at *2.

²³⁸ *Id.* at *3.

²³⁹ See *id.*

²⁴⁰ *Id.*

²⁴¹ See *Thorpe v. Borough of Thorpe*, 770 F.3d 255, 258–59 (3d Cir. 2014).

²⁴² *Id.* at 264.

²⁴³ *Id.* at 266.

by being forced to attend those schools.²⁴⁴ They were not buried in accordance with the wishes of their families, as Jim Thorpe was, but instead far away from their home in schools designed to strip them of their culture and violently force them to assimilate with their colonizers.

Second, the district court's interpretation of NAGPRA is contrary to the broad remedial nature of its statutory scheme. The *Winnebago Tribe of Nebraska* interpretation of NAGPRA makes no mention of the Supreme Court's established canon that statutory ambiguities in federal Indian law should be interpreted in favor of tribal rights.²⁴⁵ Instead, the district court turned to definitions taken from a single dictionary to interpret the terms "holding" and "collection."²⁴⁶ Regardless of the fact that opinions in the legal field are starkly divided on whether dictionaries are even a valid source of authority for courts to consult,²⁴⁷ this approach disregards a more fundamental aspect of NAGPRA: The statute's terms are intentionally broad to provide a remedy to a long-ignored problem and were written in the context of the Court's presumption in favor of tribal rights.²⁴⁸ Indeed, courts have recognized the goals of the statute and noted that respect for Indigenous human rights is the appropriate touchstone when resolving any claim brought under NAGPRA.²⁴⁹

Further, many terms defined in NAGPRA are construed exceptionally broadly to remedy the widespread problem of cultural theft from Indigenous peoples. For example, when NAGPRA refers to a museum, that statutorily defined term encompasses a broad range of institutions that do not fit within the ordinary meaning of the term museum.²⁵⁰ A museum, as defined by NAGPRA, is "any institution or State or local

²⁴⁴ See *Chapter 3: Boarding Schools*, NAT'L MUSEUM OF THE AM. INDIAN, <https://american-indian.si.edu/nk360/code-talkers/boarding-schools/> [<https://perma.cc/9CM9-NR48>] (last visited Oct. 17, 2025).

²⁴⁵ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978); see also *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 177 (1989) ("[A]mbiguities in federal law are, as a rule, resolved in favor of tribal independence . . ."); *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 669 (2022) (Gorsuch, J., dissenting) ("Any ambiguities in Congress's work must be resolved in favor of tribal sovereignty and against state power.").

²⁴⁶ *Winnebago Tribe v. Dep't of the Army*, No. 24-cv-78, 2024 WL 3884194, at *2 (E.D. Va. Aug. 20, 2024).

²⁴⁷ See, e.g., Jason Weinstein, Note, *Against Dictionaries: Using Analogical Reasoning to Achieve a More Restrained Textualism*, 38 U. MICH. J.L. REFORM 649, 651 (2005); Stephen C. Mouritsen, Note, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. REV. 1915, 1916; Phillip A. Rubin, Note, *War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles*, 60 DUKE L.J. 167, 168 (2010).

²⁴⁸ See Trope & Echo-Hawk, *supra* note 25, at 36–38. For further discussion on congressional awareness of judicial interpretations, see *Lorillard v. Pons*, 434 U.S. 575, 580–85 (1978) (stating that Congress is presumed to be aware of administrative and judicial interpretations).

²⁴⁹ See *United States v. Corrow*, 119 F.3d 796, 799–801 (10th Cir. 1997).

²⁵⁰ See 25 U.S.C. § 3001(8).

government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items.”²⁵¹ Similarly, “Federal agency” is also broadly defined by the statute as “any department, agency, or instrumentality of the United States.”²⁵² These terms are defined broadly precisely for the purpose of addressing the “breathtaking” scope of the cultural theft from Indigenous peoples.²⁵³ This broad interpretation of NAGPRA, designed to remedy a problem of enormous scope, is undermined by a narrow reading of the statute that keeps Indigenous remains in the hands of a government agency and out of the hands of the associated Indigenous group.

Based on these two mistakes, in *Winnebago Tribe of Nebraska*, the district court declined to hold that the Army and, therefore, the cemetery at the former Carlisle Indian Industrial School under its modern-day control were subject to NAGPRA’s repatriation requirements.²⁵⁴ The Winnebago Tribe filed an appeal of the ruling on October 21, 2024, which is now awaiting decision by the Fourth Circuit.²⁵⁵ In its opening brief on appeal, the Winnebago Tribe points out many of the same issues addressed above, including the overbroad reliance of the district court on *Thorpe*,²⁵⁶ the contravention of NAGPRA’s statutory intent,²⁵⁷ and the strong argument that the Carlisle cemetery can properly be considered a “holding or collection.”²⁵⁸ After a delay in filing on the part of the Army,²⁵⁹ oral argument was held on September 10, 2025.²⁶⁰ As of the time of writing, a decision has not yet been announced by the Fourth Circuit.

If the Fourth Circuit embraces the opinion of the district court, then this case will not only enshrine an interpretation of NAGPRA that goes against its statutory purpose, but it will also create serious human rights violations in the manner in which the United States deals with Indigenous peoples. Regardless of whether the Fourth Circuit upholds

²⁵¹ *Id.*

²⁵² *Id.* § 3001(4).

²⁵³ See *Thorpe v. Borough of Thorpe*, 770 F.3d 255, 260 (3d Cir. 2014) (“The scope of the cultural plundering is breathtaking.”).

²⁵⁴ *Winnebago Tribe v. Dep’t of the Army*, No. 24-cv-78, 2024 WL 3884194, at *2–3 (E.D. Va. Aug. 20, 2024).

²⁵⁵ Notice of Appeal, *Winnebago Tribe*, No. 24-cv-78, 2024 WL 3884194.

²⁵⁶ Opening Brief of Appellant Winnebago Tribe of Nebraska at 49–54, *Winnebago Tribe v. U.S. Dep’t of the Army*, No. 24-2081 (4th Cir. Jan. 22, 2025).

²⁵⁷ *Id.* at 29–32.

²⁵⁸ *Id.* at 35.

²⁵⁹ *Winnebago Tribe v. U.S. Dep’t of the Army*, No. 24-2081 (4th Cir. Apr. 1, 2025) (order granting extension of filing time for response brief).

²⁶⁰ Crystal Owens, *4th Circ. Hears Neb. Tribe’s Fight for Children’s Repatriation*, LAW360 (Sep. 10, 2025, at 19:05 ET), <https://www.law360.com/articles/2385893/4th-circ-hears-neb-tribe-s-fight-for-children-s-repatriation> [<https://perma.cc/M58S-ZDVW>].

or reverses the statutory interpretation of the trial court in *Winnebago Tribe of Nebraska* on appeal, the failure of NAGPRA to reach the cemeteries of former residential schools run or sponsored by the federal government creates a serious problem for American compliance with international law and fails to uphold the rights of Indigenous peoples around the nation. Given NAGPRA's openness to misinterpretation by future courts in other circuits, a uniform federal solution is required.

More broadly, even if Carlisle is brought under NAGPRA by the Fourth Circuit, the problem of human remains buried at other former boarding schools remains to be addressed. Although Carlisle is the most well-known of the residential schools and lies at the center of the animating example for this Note, many other schools were in operation around the United States, and it is unclear how many children died and were buried at those schools or whether those burial sites would fall under NAGPRA as it is currently written.²⁶¹

B. *Human Rights Implications of Winnebago Tribe of Nebraska*

The interpretation of NAGPRA supported by the district court in *Winnebago Tribe of Nebraska* contravenes the right of Indigenous peoples to have their ancestral remains returned to them as declared by UNDRIP and other international human rights instruments.²⁶² UNDRIP's command is clear, enunciating that "[s]tates shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms."²⁶³ The command of UNDRIP is even more direct, stating that "Indigenous peoples have the right to preserve, protect, and access their sacred sites . . . and to recover their human remains."²⁶⁴ The United States now stands behind UNDRIP as a document that details human rights guaranteeing protections to Indigenous peoples around the world,²⁶⁵ and the requirement to repatriate Indigenous human remains enunciated in UNDRIP constitutes customary international law.²⁶⁶ To construe NAGPRA narrowly not only violates international law but also fails to effectuate the stated U.S. policy goal of supporting UNDRIP and carrying out its mission.²⁶⁷

²⁶¹ See *supra* Part I.

²⁶² See *supra* Part II.

²⁶³ G.A. Res. 61/295, *supra* note 20, art. 12, ¶ 2.

²⁶⁴ See Organization of American States AG/RES. 2888 (XLVI-O/16), *supra* note 84, art. XVI, ¶ 3.

²⁶⁵ See Press Release, U.S. Dep't of St., *supra* note 66.

²⁶⁶ See *supra* Sections II.A–C.

²⁶⁷ See Organization of American States AG/RES. 2888 (XLVI-O/16), *supra* note 84, at 47 n.1 ("The United States reiterates its longstanding belief that implementation of [UNDRIP] should remain the focus of the OAS and its member states.").

NAGPRA was intended to be “human rights legislation” aimed at the “massive scope of the repatriation problem.”²⁶⁸ Federal statutes are supposed to be interpreted to comport with existing rules and obligations under international law.²⁶⁹ And beyond UNDRIP, the international right to have the body of a relative returned to a family member has been established by human rights courts around the world,²⁷⁰ and both international and domestic authorities support the position that Article 12 of UNDRIP reflects customary international law.²⁷¹ If the district court’s ruling in *Winnebago Tribe of Nebraska* is affirmed, those human rights and customary international law will be violated.

IV. PROPOSAL

A. Amending NAGPRA

As demonstrated by the DOI’s recent regulatory efforts and the court’s analysis in *Winnebago Tribe of Nebraska*, NAGPRA is a statute written before the adoption of international Indigenous human rights law and does not legislate in the context of boarding school cemeteries and burial sites.²⁷² In order to bring the United States into compliance with international law and effectuate the intentions of NAGPRA’s drafters, Congress must amend the statute to bring residential school cemeteries under the scope of the law and compel disinterment at the request of a tribe or descendants of the deceased. To accomplish these aims, this Note proposes three amendments to the statutory language of NAGPRA. The first amendment adds a new section that explicitly brings government- or museum-controlled cemeteries within NAGPRA’s purview:

Cemeteries under the control of a Federal agency or museum are subject to section 3005(a)(4), unless—

- (1) a living relative of the deceased provides notice that they are opposed to exhumation of their relative; or
- (2) the relevant Federal agency or museum can show by a preponderance of the evidence that it was the will of the deceased or their executor or next of kin that they be buried in the current cemetery.

This proposed statutory language remedies the problem demonstrated by *Winnebago Tribe of Nebraska* while accounting for the legitimate concern addressed by the court in *Thorpe*. NAGPRA should

²⁶⁸ See Trope & Echo-Hawk, *supra* note 25, at 37.

²⁶⁹ See *supra* Section III.B.

²⁷⁰ See *supra* Section II.B.

²⁷¹ See *supra* Sections II.B–C.

²⁷² See *supra* Sections II.D.3, III.A.

not be written so broadly as to compel disinterment of remains buried in accordance with the wishes of the deceased's next of kin. Thus, by incorporating exceptions for a living family member contesting the disinterment and for a clear desire by the deceased to be buried in the associated government cemetery, the statute will not become an overbroad tool for mass disinterment. In the case of the children whose bodies are still buried at Carlisle, however, the Army would be mandated to comply with their exhumation and return to their tribes unless the Army could show by a preponderance of the evidence that the particular student at issue wanted to be buried at the school cemetery. Where there is no living relative but the deceased may still have been buried in accordance with their wishes or those of their executor or next of kin, then the disinterment can be precluded through a showing by a preponderance of the evidence. To make this showing, the Army would need to file a motion to block disinterment with a federal court. This reverses the power dynamic established by the decision regarding Kennewick Man, or the Ancient One, in *Bonnichsen* by placing the burden of proof on the government agency, as opposed to the moving tribe.

The first amendment would directly solve the issue of repatriation from Carlisle's cemetery. The children that were forcibly taken to Carlisle did not want to be there in the first place, much less have the school become their final resting place.²⁷³ Under the language of the first amendment, unless a living relative objected to an exhumation request or the Army could show by a preponderance of the evidence that the child or their executor or next of kin had desired that they be buried at Carlisle, the Army would be compelled to return the bodies upon the request of a tribe. Here, however, the concerns raised by the Third Circuit in *Thorpe* are addressed by the intentions of the deceased exception. Although Jim Thorpe died intestate and left no indication of where or how he wished to be interred, his widow explicitly decided that her late husband should be buried in the Pennsylvania town that she had negotiated to be renamed after him.²⁷⁴ In that case, the intention of Thorpe's widow that he be buried in the cemetery in Jim Thorpe, Pennsylvania, would relieve the borough from NAGPRA's statutory command. This exception, in combination with the objecting living relative exception, would address the Third Circuit's concern that NAGPRA could be used to settle familial disputes and disinter someone buried in accordance with a family member's wishes.

In *Winnebago Tribe of Nebraska*, the first amendment would clearly compel the return of Samuel's and Edward's remains to the

²⁷³ See ADAMS, *supra* note 6, at 135–49.

²⁷⁴ See *Thorpe v. Borough of Thorpe*, 770 F.3d 255, 257 (3d Cir. 2014).

Winnebago.²⁷⁵ Unless the Army was able to produce some evidence that the boys or their parents had expressly stated that they wished to be buried at Carlisle, then it would require that the bodies be disinterred and returned to the tribe. This would equally apply to the bodies of the nearly two hundred other children buried at Carlisle. Even if, however, the Fourth Circuit reverses the district court's decision in *Winnebago Tribe of Nebraska* and brings Carlisle under NAGPRA's command, this would still leave uncovered the children who were buried outside of boarding schools, at sites not controlled by the U.S. government or another NAGPRA covered museum or agency, or in unmarked graves. For this reason, a second amendment to the statute is suggested:

An Indian tribe is entitled to injunctive relief requiring the disinterment and return of Native American human remains if—

- (1) a Native American child was in the care of a Federal agency or any other agent operating with the funding and approval of the United States government at the time of that child's death;
- (2) that child died and was buried at the direction of or according to the policy of the Federal agency or other agent; and
- (3) no objection is filed by—
 - (A) a living relative of the deceased who opposes the exhumation of the child; or
 - (B) a Federal agency that shows by a preponderance of the evidence that it was the will of the child or their executor or next of kin that the child be buried in the current cemetery.

The second amendment is designed to address the problem of students buried at sites not under the control of NAGPRA-covered institutions. This ensures that beyond Carlisle, which is the residential school that has received the most attention, tribes can reclaim the bodies of all children who died at residential schools—a class of victims whose size remains unknown. This amendment would place the emphasis on the direction and control of the U.S. government in the operation of the school.²⁷⁶ For instance, suppose the site of a former residential school was located on now privately owned land in state *X* and had

²⁷⁵ See *Winnebago Tribe v. Dep't of the Army*, No. 24-cv-78, 2024 WL 3884194, at *1 (E.D. Va. Aug. 20, 2024).

²⁷⁶ See Native American Graves Protection and Repatriation Act Systematic Processes for Disposition or Repatriation, 88 Fed. Reg. 86,452, 86,471 (Dec. 13, 2023) (codified at 43 C.F.R. pt. 10) (addressing public comment suggesting that all boarding schools that were run by or for the U.S. government be brought under NAGPRA's definition of federal lands).

an associated cemetery containing the bodies of children from tribe *Y*. Under the regime established in the second amendment, it would be the responsibility of the federal government to exhume the body and repatriate it to tribe *Y*, if the school had been run by the federal government or its agents. This removes the necessity for tribe *Y* to negotiate with either the private landowner or the authorities of state *X*. The federal government ran or supported the school, the children died in its care, and the DOI is better equipped now than any private party to locate the bodies associated with any former school. This amended statute would place the responsibility of returning children's remains back on the federal government.

Further, in order to ensure that NAGPRA continues to provide protection for the human rights of Indigenous peoples in regard to the return of their associated human remains, Congress should amend the statute to include a purpose clause:

The purpose of these amendments is to declare the congressional goal of respecting the human rights of Native American peoples in the United States, and to direct regulated entities under this statute to comply with the provisions of the United Nations Declaration of the Rights of Indigenous Peoples Article 12.

This will provide for the recognition and respect of Indigenous rights—particularly the human right to the return of their associated human remains. This is true not only in the context of the residential schools and their cemeteries, but also further on into the future for any situation that might arise in which the rights of Indigenous peoples in the United States require vindication. Looking to *Bonnichsen*, Indigenous conceptions of belonging and membership would have been the touchstone of the analysis in determining whether Kennewick Man, or the Ancient One, should have been repatriated to the claimant tribe.²⁷⁷ Article 12 of UNDRIP specifically recognizes the right of Indigenous peoples to repatriation of their human remains, which would have tipped the scales in favor of returning the remains of Kennewick Man, or the Ancient One. Further, in *Winnebago Tribe of Nebraska*, the respect for Indigenous rights would have been the center of the analysis under the third amendment, rather than an overbroad reading of *Thorpe* and its extremely narrow facts.²⁷⁸ A fair interpretation in that light would have yielded a far different result—one that complies with the international obligation to return the bodies of the children buried at Carlisle.

Together, these three amendments to NAGPRA would comprehensively address the problems raised in this Note. The first amendment would bring Carlisle and other government-controlled cemeteries under

²⁷⁷ See *Bonnichsen v. United States*, 367 F.3d 864, 879 (9th Cir. 2004).

²⁷⁸ *Winnebago Tribe*, 2024 WL 3884194, at *2–3.

the command of the statute, and the second amendment would address all the noncemetery burials or burials in cemeteries not currently under the control of the federal government that occurred during the era of residential schools. The third amendment, serving as a purpose clause, would function prospectively to ensure that the customary international law enunciated in Article 12 of UNDRIP is the cornerstone of the analysis of all repatriation actions brought under NAGPRA. The adoption of these three amendments would conclusively bring the United States into compliance with customary international law governing the repatriation of human remains. Furthermore, this would ensure that NAGPRA stands as a shield to guard the fundamental rights of Indigenous peoples in the United States.

B. Counterarguments

Opponents might suggest that the first amendment is unnecessary to reach boarding school cemeteries and that the DOI could resolve this issue by including cemeteries in a notice-and-comment rulemaking. The DOI rejected this approach, however, in the most recent round of notice-and-comment rulemaking regarding NAGPRA.²⁷⁹ The DOI explicitly stated that without legislative change, its hands were tied on reaching cemeteries through regulation.²⁸⁰ Further, in today's era of regulatory upheaval,²⁸¹ only a legislative amendment to the statute will create a secure and permanent solution for protecting the rights of Indigenous Americans.

Next, opponents of this proposal could charge that the second amendment will sweep too far and require the government to undertake costly efforts to locate the sites of all former boarding schools and conduct expensive exhumations. First, it should be noted that the DOI has already begun the effort to locate the site of all former boarding schools and any affiliated graves through the Federal Indian Boarding School Initiative.²⁸² Second, whether costly or not, customary international law is binding on the United States and is part of U.S. common law.²⁸³ If the United States wishes to avoid a potential negative ruling at

²⁷⁹ See Native American Graves Protection and Repatriation Act Systematic Processes for Disposition or Repatriation, 88 Fed. Reg. at 86,487.

²⁸⁰ See *supra* Section II.D.

²⁸¹ See, e.g., Jack Jones & Max Sarinsky, *What Loper Bright and Statutory Stare Decisis Mean for Deregulation*, YALE J. ON REGUL.: NOTICE & COMMENT (June 30, 2025), <https://www.yalejreg.com/nc/what-loper-bright-and-statutory-stare-decisis-mean-for-deregulation-by-jack-jones-max-sarinsky/> [<https://perma.cc/6VZ9-XS9Z>] (“In eliminating the *Chevron* doctrine, *Loper Bright Enterprises v. Raimondo* changed the landscape of administrative law in ways that courts, litigants, and legal scholars are still sorting out a year later.”).

²⁸² See *supra* note 44.

²⁸³ See *supra* Section II.C.

an international human rights tribunal and to comply with binding law, a full scheme for the repatriation of the bodies of children who died at residential schools is required.

Finally, opponents of the third amendment might claim that it impermissibly usurps the judicial function by telling the courts how they must interpret the statute.²⁸⁴ The proposed statutory language, however, does not offend separation of powers principles because the third amendment is a purpose statement designed to provide clarity to NAGPRA's statutory intent. A purpose statement in a statute can be used by courts to discern congressional intent.²⁸⁵ Further, courts are not the only, nor even the primary, entity that would be interpreting the new amendment. For agencies and museums seeking to comply with NAGPRA in good faith, it is critical that they understand that the correct touchstone when interpreting the statute is Indigenous human rights as enunciated in UNDRIP.

CONCLUSION

Were the boarding schools in operation after the advent of modern human rights law, they would have constituted clear and grave atrocities in violation of the internationally protected rights of all people to life, liberty, and freedom of thought.²⁸⁶ Although it is of course impossible to change the past, we must not confine redress of this crime to the dustbin of history or the hollow comfort of empty promises. It is the solemn duty of the United States to uphold the rights of Indigenous peoples and redress the past wrongs that they suffered at the hands of American citizens, states, and the federal government and its agents. Not only is there a moral obligation to do so, but also binding international law compels that the human rights of Indigenous Americans be enforced and respected. In order to carry out this command, Congress must amend NAGPRA to specifically address the problem of repatriation from residential schools. Doing this will be one step forward on the path to making a better country that recognizes the crimes it committed in the past and dedicates itself to the proposition that the human rights of all will be respected in the future.

²⁸⁴ See, e.g., Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 221 (1994) ("If declaring what laws mean is part of the essence of the judicial function, it would seem that telling the courts how to perform that function would be an impermissible invasion by the legislative branch.").

²⁸⁵ See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 217–20 (2012).

²⁸⁶ See International Covenant on Civil and Political Rights, *supra* note 79, arts. 6, 9, 18; Brief for United South and Eastern Tribes Sovereignty Protection Fund et al. as Amici Curiae in Support of Plaintiff-Appellant and Reversal at 24, *Winnebago Tribe v. U.S. Dep't of the Army*, No. 24-2081 (4th Cir. Jan. 29, 2025).