

COMMENT

Contested Objects, Contested Meanings: Native American Grave Protection Laws and the Interpretation of Culture

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INTRODUCTION

At the close of King Philip's War in 1676, Pilgrims in the town of Plymouth beheaded the Wampanoag Chief, Metacom.¹ The colonists placed Metacom's severed head on a spike, where it remained on display for nearly twenty years.² The Colony's religious leaders described their action as the proper way to deal with Native Americans, whom many of these leaders considered servants of the devil.³ The display served as a reminder — to both the Pilgrims and the Wampanoag — of the colonists' dominance over the native people.⁴ Thus, this first exhibit of Native American remains served both a political and religious purpose for the European exhibitors.⁵

In the nineteenth century, museums provided more extensive displays of Native American remains and cultural objects.⁶ Museum curators determined which cultural objects in their possession would represent Native American culture.⁷ More importantly, these curators also determined how to display those objects and influenced the meanings attached to them.⁸ Without property rights over their ancestral remains, the tribes were unable to control the representation of those objects.⁹

¹ G. Peter Jemison, *Who Owns the Past?*, in NATIVE AMERICANS AND ARCHAEOLOGISTS: STEPPING STONES TO COMMON GROUND 57, 58 (Nina Swidler, et al. eds., 1997) [hereinafter STEPPING STONES]. Colonists, and later, historians, referred to Metacom as King Philip. *Id.*; see also Yashide Kawashima, *Part One: Interdisciplinary Perspective: The Pilgrims and the Wampanoag Indians, 1620-1691: Legal Encounter*, 23 OKLA CITY U.L. REV. 115, 115-20 (1998) (discussing relations between Pilgrims and Wampanoags and circumstances surrounding King Philip's War).

² Jemison, *supra* note 1, at 58; see also Kawashima, *supra* note 1, at 115-20 (detailing events leading to King Philip's War).

³ Jemison, *supra* note 1, at 58. Many of these leaders viewed Native Americans as servants of the devil. *Id.* Thus, "our first exhibits had what you might call a spiritual explanation for a political end." *Id.*

⁴ See *id.*

⁵ See *id.*

⁶ Peter H. Welsh, *Repatriation and Cultural Preservation: Potent Objects, Potent Pasts*, 25 U. MICH. J.L. REFORM 837, 844 (1992); cf. Robert M. McLaughlin, *The Native American Graves Protection and Repatriation Act: Unresolved Issues Between Material Culture and Legal Definitions*, 3 U. CHI. L. SCH. ROUNDTABLE 767, 781-82 (1996).

⁷ Throughout this paper, I will use "museum curator" to refer to archaeologists working in museum settings. Welsh, *supra* note 6, at 844; see Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, in AFTER IDENTITY: A READER IN LAW AND CULTURE 251, 257 (Dan Danielsen & Karen Engle, eds., 1994) (describing phenomena of cultural objects being defined by outsiders).

⁸ Welsh, *supra* note 6, at 844; see Coombe, *supra* note 7, at 257.

⁹ McLaughlin, *supra* note 6, at 784; Welsh, *supra* note 6, at 845; see Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 730 (1997)

Like the Pilgrims' display of Metacom's head, these subsequent exhibits of native remains failed to incorporate the views of those they purported to represent.¹⁰

Since the early excavations of their burial sites, Native Americans sought recognition of their rights over their ancestors' remains and funerary objects.¹¹ However, for much of the period after initial contact with Europeans, Native Americans lacked sufficient political influence to bring about any change.¹² This condition of political powerlessness began to shift in the 1980s, when Native American activists focused on the theft of their tribes' ancestral remains and sacred objects.¹³ These activists raised concerns about the desecration of their ancestors' burial sites and the removal and collection of their ancestors' remains and sacred objects by museum curators and archaeologists.¹⁴ Further, the activists sought the return of Native American remains so that the tribes could rebury their ancestors according to their cultural traditions.¹⁵ Native Americans, however, lacked any legal claim to the remains and

(describing failure of law to address repatriation claims); Rebecca Tsosie, *Indigenous Rights and Archaeology*, in STEPPING STONES, *supra* note 1, at 64, 66 (discussing property aspect in disputes between archaeologists and Native Americans evidenced by oft-repeated question: "Who owns the past?"); *see also* discussion *infra* Part I.B.

¹⁰ McLaughlin, *supra* note 6, at 781; *see* Jemison, *supra* note 1, at 58 (discussing political purpose served by exhibit of Metacom's severed head); Welsh, *supra* note 6, at 845 (discussing museums' response to criticisms that collections represent cultural predisposition of collectors rather than Native Americans).

¹¹ ENCYCLOPEDIA OF AMERICAN INDIAN CIVIL RIGHTS 260 (James S. Olson et al. ed., 1997) [hereinafter CIVIL RIGHTS ENCYCLOPEDIA]; Harding, *supra* note 9, at 730; June Camille Bush Raines, *One Is Missing: Native American Graves Protection and Repatriation Act: An Overview and Analysis*, 17 AM. INDIAN L. REV. 639, 646 (1992).

¹² CIVIL RIGHTS ENCYCLOPEDIA, *supra* note 11, at 37; Raines, *supra* note 11, at 646; *see also* George E. Stuart, *Working Together to Preserve Our Past*, in THE ETHICS OF COLLECTING CULTURAL PROPERTY 249 (Phyllis Mauch Messenger ed., 1989) [hereinafter COLLECTING CULTURAL PROPERTY] (discussing desire of Native Americans to achieve recognition of their rights over remains).

¹³ *See* Robert E. Bieder, *A Brief Historical Survey of the Expropriation of American Indian Remains* (1990), reprinted in *Hearings Before the Senate Select Comm. on Indian Affairs on S. 1021 & S. 1980*, 101st Cong., 2d Sess. 278-363, 283 app. (May 14, 1990) (attachment to statement of Jerry Flute & Robert E. Bieder, Association on American Indian Affairs) [hereinafter *Bieder Survey*].

¹⁴ Raines, *supra* note 11, at 646; Stuart, *supra* note 12, at 249. This is not to imply that there is a consensus among Native Americans regarding the use of ancestral remains for scientific purposes. Tsosie, *supra* note 9, at 66. Some Native Americans view scientific testing of remains as inappropriate. *Id.* Others may object to the warehousing of remains for potential future research, but believe such use is permissible if scientists conduct the research for a specific purpose and limited time. *Id.*

¹⁵ *Bieder Survey*, *supra* note 13, at 283 app.; *see* 134 CONG. REC. 26,822 (1988) (statement of Rep. Dorgan) (introducing repatriation legislation for return of remains held by Smithsonian).

sacred objects.¹⁶

Congress addressed the activists' demands by passing two laws granting Native Americans greater control over their tribes' ancestral remains and cultural objects.¹⁷ The first is the National Museum of the American Indian Act (Museum Act), passed in 1989.¹⁸ The second is the Native American Graves Protection and Repatriation Act (NAGPRA), passed in 1990.¹⁹ These laws provide Native Americans the right to control their ancestral remains and funerary objects.²⁰ Control over the physical objects of their culture is vital to the ability of these tribes to communicate their own cultural image.²¹

While the Museum Act and NAGPRA grant Native American tribes the right to control the physical objects of their cultures,²² many Native

¹⁶ *Bonnichsen v. United States Army Corps of Eng'rs*, 969 F.Supp. 628, 649 (D. Or. 1997) (noting inadequate protections for Native American graves before passage of NAGPRA); *Tsosie*, *supra* note 9, at 66; *see, e.g., Carter v. City of Zanesville*, 52 N.E. 126, 127 (Ohio 1898) (stating that older human skeletal remains are not considered dead bodies under Ohio law); *State v. Glass*, 273 N.E.2d 893, 896 (Ohio Ct. App. 1971) (holding long-decomposed remains are not "bodies" under Ohio law). As the *Glass* court explained, "a cadaver is not an everlasting thing. After undergoing an undefined degree of decomposition, it ceases to be a dead body in the eyes of the law." *Id.* at 898.

¹⁷ 20 U.S.C. §§ 80q to 80q-15 (1994 & Supp. IV 1998); 25 U.S.C. §§ 3001-3013 (1994 & Supp. IV 1998); *see* 135 CONG. REC. 28,522 (1989) (statement of Rep. Rahall) (discussing Museum Act as correction of years of unequal treatment of Native American remains); 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, 56-59 (1992) (detailing legislative history of NAGPRA and Museum Act).

¹⁸ 20 U.S.C. §§ 80q to 80q-15; *see* Frances X. Clines, *Smithsonian Making Room for Indian Museum*, N.Y. TIMES, Sept. 29, 1999, at A14 (discussing efforts of Native Americans to regain control over their ancestral remains, cultural objects, and cultural meaning).

¹⁹ 25 U.S.C. §§ 3001-3013; *see* Raines, *supra* note 11, at 642; Rennard Strickland & Kathy Supernaw, *Back to the Future: A Proposed Model Tribal Act to Protect Native Cultural Heritage*, 46 ARK. L. REV. 161, 162 (1992); Trope & Echo-Hawk, *supra* note 17, at 59.

²⁰ Before the passage of the federal laws, several states had enacted their own repatriation laws. Trope & Echo-Hawk, *supra* note 17, at 53. For example, Hawaii, Kansas, and Nebraska all passed repatriation laws in 1989. *Id.* Arizona's legislature adopted its repatriation statute in 1990; California in 1991. *Id.* at 54.

²¹ *See* Coombe, *supra* note 7, at 262 (discussing vital role cultural objects play in cultural identity); McLaughlin, *supra* note 6, at 781-82 (describing inaccurate portrayals of native culture as resulting from "non-indigenous control of material culture"); *see also* 20 U.S.C. § 80q (reporting need for curatorial opportunities for Native Americans); *cf.* Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" 36 (Amy Gutmann, ed., 1992). "The projection of an inferior or demeaning image on another can actually distort and oppress, to the extent that the image is internalized." *Id.*

²² 20 U.S.C. § 80q-9; 25 U.S.C. § 3002(a); *see also* Christopher S. Byrne, *Chilkat Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects?*, 8 J. ENVTL. L. & LITIG. 109, 111 (1993) (discussing provisions of NAGPRA granting control of cultural patrimony to tribes).

Americans continue to seek control over nonmaterial aspects of their cultures, including control over the meaning ascribed to their history and culture.²³ Although it is important to remember that there is not one unified view of native culture held by all — or even most — Native Americans, such control is nevertheless essential to a tribe's ability to construct and debate its own cultural identity.²⁴ The extent to which physical control of objects provides for the control of cultural identity is the focus of this paper.

This Comment argues that the Museum Act and NAGPRA recognize a property right that extends beyond the ownership of cultural objects. Part I of this paper provides an historical, social, and legal context to the issue of control of Native American culture. Part II discusses the Museum Act and NAGPRA in detail. Part III argues that these laws supplement traditional notions of property by granting control over not only objects, but also the meaning attached to those objects. Even if not exclusive, this grant of control ensures that Native American voices are considered in the representation of native culture.

I. BACKGROUND

Thomas Jefferson inaugurated the American fascination with Native American remains and cultural objects when he excavated a Native American burial mound near his home in 1788.²⁵ Even before Jefferson's

²³ See, e.g., *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1749 (Trademark Trial & Appeal Bd. 1999) (seeking revocation of "redskin" trademark as offensive to Native Americans); Lenore Keeshing-Tobias, *Stop Stealing Native Stories*, *GLOBE & MAIL*, Jan. 26, 1990, at A8 (discussing effect on native communities when nonnatives tell native stories).

²⁴ See Coombe, *supra* note 7, at 262; Keeshing-Tobias, *supra* note 23; see also Taylor, *supra* note 21, at 36 (describing damage that results from cultural misrepresentation). While recognizing that Native Americans hold varied and differing views of their cultures and traditions, this article does not address those differences *within* native communities. Rather, it focuses on the disconnect between the descriptions of native culture offered by those outside the native community, i.e., archaeologists and museums, and the ability of the tribes to use the Museum Act's and NAGPRA's provisions to correct misrepresentations of their culture by defining and presenting it as it is understood by members of that culture. For a discussion on the importance of recognizing cultural dissent and plurality within cultures, see Madhavi Sunder, *Cultural Dissent*, 54 *STAN. L. REV.* 495 (2001). See also Madhavi Sunder, *Piercing the Veil* (March 1, 2002) (draft on file with author). The NMAI also recognizes that individual Native Americans have individual perspectives on their culture. According to an exhibit pamphlet, "[e]ach artist who happens to be a Native American experiences the word differently, and these works reflect those diverse realities." Smithsonian, National Museum of the American Indian, *Who Stole the Tee Pee?*, Oct. 2000 (museum pamphlet for exhibit, *who stole the tee pee?*) (copy on file with author).

²⁵ *Bieder Survey*, *supra* note 13, at 284 app.; Raines, *supra* note 11, at 642.

excavation, however, European Americans²⁶ eagerly searched for the origins of the native people they encountered.²⁷ The initial push to find these origins was part of an effort to explain the presence of these heretofore unknown people in the context of Christian biblical lore.²⁸ Later, many colonists sought to legitimize their belief in Native American inferiority and to determine whether the tribes could ever become “civilized.”²⁹ Much of this research relied on Native American remains.³⁰ This section describes the historical and social context in which researchers studied Native American remains and cultural objects. It also outlines the legal context that governed the researchers’ access to and use of those remains and objects.

A. Historical and Social Context

Since their arrival in North America, European Americans were fascinated with Native American graves and relics.³¹ As early as 1620, Pilgrims from the Mayflower uncovered and removed objects from a Native American grave.³² This fascination flourished with more sustained contact between Native and European Americans.³³ Indeed,

²⁶ In this Comment, I use the term “European Americans” loosely to include European colonists and their descendants before and after the creation of the United States. I use the terms “Native American” and “Indian” interchangeably. “Indian” is used in most legal literature to describe current members (or those eligible for membership) of a federally recognized tribe. See e.g., 20 U.S.C. § 80q-14 (2000) (using “Indian” in reference to NMAI); 25 U.S.C. § 3001 (1994 & Supp. IV 1998) (defining “Indian tribe” as “any tribe, band, nation, or other organized group or community of *Indians*, including any Alaska Native village . . . which is recognized as eligible for the special programs and services provided by the United States to *Indians* because of their status as *Indians*.”) (emphasis added). Although this Comment uses the term “Native American” it is important to note that both the Museum Act and NAGPRA equally apply to Native Hawaiian and Alaska Native cultures as they do to those tribes in the forty-eight contiguous states. See 20 U.S.C. § 80q-14; 25 U.S.C. § 3001.

²⁷ *Bieder Survey*, *supra* note 13, at 284 app.; Jemison, *supra* note 1, at 58; Deborah L. Nichols, et al., *Ancestral Sites, Shrines, and Graves: Native American Perspectives on the Ethics of Collecting Cultural Properties*, in COLLECTING CULTURAL PROPERTY 27, *supra* note 12, at 27.

²⁸ *Bieder Survey*, *supra* note 13, at 284 app.; see Trope & Echo-Hawk, *supra* note 17, at 40; John B. Winski, Note, *There are Skeletons in the Closet: The Repatriation of Native American Human Remains and Burial Objects*, 34 ARIZ. L. REV. 187, 190 (1992).

²⁹ *Bieder Survey*, *supra* note 13, at 285 app.; Jemison, *supra* note 1, at 59; McLaughlin, *supra* note 6, at 782.

³⁰ Trope & Echo-Hawk, *supra* note 17, at 40; see *Bieder Survey*, *supra* note 13, at 285 app. (outlining use of Native American remains in research).

³¹ See generally *Bieder Survey*, *supra* note 13, at 278-363 (surveying long history of European American acquisition of Native American remains and cultural objects).

³² Nichols, *supra* note 27, at 27-28; Trope & Echo-Hawk, *supra* note 17, at 40.

³³ See generally *Bieder Survey*, *supra* note 13, at 278-363 (describing history of European

since the Mayflower's landing, European American archaeologists and artifact collectors have continued to excavate the graves and burial mounds of Native American peoples.³⁴

The purposes for which the excavators sought the artifacts and remains varied.³⁵ The first excavators sought native remains to perform racial origin studies and to compile scientific justification for their theory that Native Americans were inferior.³⁶ Later, archaeologists collected cultural information about the early inhabitants of North America in order to reconstruct the continent's history.³⁷ Excavators also sought the artifacts and remains to sell to private collectors.³⁸

Although private collectors acquired many native remains and cultural objects, by the mid-twentieth century, museums held the vast majority of excavated remains.³⁹ By 1990, museums and private collections in the United States held more than six hundred thousand skeletons.⁴⁰ Since its founding in 1846, the Smithsonian Institution had collected and stored these remains.⁴¹ Nearly a century and a half later, the Smithsonian held more than eighteen thousand skeletons, making it

American excavation and removal of Native American remains and funerary objects from burial sites).

³⁴ CIVIL RIGHTS ENCYCLOPEDIA, *supra* note 11, at 260; *Bieder Survey*, *supra* note 13 at 290 app.; Trope & Echo-Hawk, *supra* note 17, at 43-44 (noting effect of large-scale transfer of cultural property on native communities). Indeed, such indiscriminate removal of cultural property ultimately left "more Kwakiutal material in Milwaukee than in Mamalilikulla, more Salish pieces in Cambridge than in Comox. . . [while t]he City of Washington [D.C.] contained more Northwest Coast material than the state of Washington and New York City probably housed more British Columbia material than British Columbia itself." *Id.*

³⁵ Trope & Echo-Hawk, *supra* note 17, at 40; Winski, *supra* note 28, at 190-94. See generally *Bieder Survey*, *supra* note 13, at 278-363 (surveying history of European American acquisition of Native American remains and cultural objects).

³⁶ *Bieder Survey*, *supra* note 13, at 290-91 app.; Trope & Echo-Hawk, *supra* note 17, at 40; Winski, *supra* note 28, at 190.

³⁷ *Bieder Survey*, *supra* note 13, at 284-85 app.; Winski, *supra* note 28, at 192-93.

³⁸ Winski, *supra* note 28, at 194. For example, after uncovering a six hundred-year-old burial ground on his farm, a farmer in Salinas, Kansas, charged tourists a fee to see the 146 skeletons on display at his farm. *Id.* The more typical commercial exploitation involved the sale or trade of Native American remains or funerary objects. *Id.*; see also *Bonnichsen v. United States Army Corps of Engineers*, 969 F.Supp. 628, 649 (D. Or. 1997) (noting problem of "pot-hunters who vandalize and desecrate Indian graves").

³⁹ Winski, *supra* note 28, at 190; see 20 U.S.C. § 80q (1994 & Supp. IV 1998) (noting vast holdings of Heye Foundation's Museum of the American Indian and Smithsonian Institution).

⁴⁰ Winski, *supra* note 28, at 188 (citing David Arnold, *Indian Artifacts: Where Do They Rightfully Belong?*, BOSTON GLOBE, Apr. 2, 1990 at A29); see 20 U.S.C. § 80q (noting that Heye Foundation held over one million native art objects and artifacts and Smithsonian held over eighteen thousand human skeletal remains when Congress passed Museum Act).

⁴¹ 20 U.S.C. § 80q; CIVIL RIGHTS ENCYCLOPEDIA, *supra* note 11, at 260.

the largest single repository of Native American remains.⁴²

In the mid-nineteenth century, while museums collected Native American remains, anthropologist Lewis Henry Morgan⁴³ endeavored to study disappearing peoples to understand humankind's progress to civilization.⁴⁴ Under Morgan's theory, humanity evolved along a series of three evolutionary stages: from "savagery," to "barbarism," to "civilization."⁴⁵ Placed on the savagery rung of Morgan's evolutionary ladder, Native Americans were prime targets of Morgan's attempt to chart this societal progression.⁴⁶ In similar research, Dr. Samuel Morton⁴⁷ studied the skulls of Native Americans to substantiate the view that Native Americans were inherently inferior and naturally doomed to extinction.⁴⁸ Such theories, later recognized as scientific racism,⁴⁹ underlay much of the early study of Native American culture.⁵⁰ In fact,

⁴² 20 U.S.C. § 80q; *Bonnichsen*, 969 F. Supp. at 649 n.18; CIVIL RIGHTS ENCYCLOPEDIA, *supra* note 11, at 260.

⁴³ Present day anthropologists consider Morgan the "father of modern anthropology." Jemison, *supra* note 1, at 58.

⁴⁴ ALICE B. KEHOE, NORTH AMERICAN INDIANS: A COMPREHENSIVE ACCOUNT 599-600 app. (2d ed., 1992); Jemison, *supra* note 1, at 58-59. According to Morgan, one needed to study those cultures in the early stages of development in order to understand the history of "civilized" peoples. *Id.* at 59.

⁴⁵ KEHOE, *supra* note 44, at 599-600 app.; Jemison, *supra* note 1, at 58-9.

⁴⁶ Jemison, *supra* note 1, at 58-9.

⁴⁷ A founder of physical anthropology. *Bieder Survey*, *supra* note 13, at 294 app.

⁴⁸ *Id.*; see generally STEPHEN J. GOULD, THE MISMEASURE OF MAN (1996). Underlying Morton's work were the theories of craniologists and phrenologists. *Bieder Survey*, *supra* note 13, at 290 app. Craniology is "the science that deals with the size, shape, and other characteristics of human skulls." WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 338 (1989) [hereinafter WEBSTER'S]. In contrast, phrenology is "a psychological theory or analytical method based on the idea that certain of one's mental faculties and character traits are indicated by the configurations of one's skull." *Id.* at 1086. Although both involve the use of human skulls, craniology and phrenology differ with respect to the way skulls are used. See *Bieder Survey*, *supra* note 13, at 288-89 app. While both phrenologists and craniologists study human skulls, not all craniologists are phrenologists. *Id.* Craniologists used human skulls to delineate distinctions between the "assumed varieties of mankind." *Id.* at 287 app. Craniologists divided humanity into five different races, each purported to possess a unique skull shape. *Id.* at 288. app. Phrenologists later used the work of craniologists to correlate skull shape to brain size and intelligence. *Id.* at 289 app. Specifically, by comparing the skulls of each race, phrenologists believed that they would reveal the relative intelligence and capabilities of the races. *Id.* at 288-89. app. Developed in the mid-1800s, phrenology soon fell into "disrepute but not before it took root in American thought and contributed to American racial prejudice." *Id.* at 295. app.

⁴⁹ Jane H. Hill, *Language, Race, and White Public Space*, 100 AM. ANTHROPOLOGIST 680, 680 (1998).

⁵⁰ Jemison, *supra* note 1, at 58; see 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye) (decrying differential treatment accorded Native American remains); Trope &

the U.S. government used Morton's work to justify its policy of forced removal of Native Americans from their lands.⁵¹ The adoption of Morgan's evolutionary viewpoint by both the Smithsonian Institution and the Bureau of American Ethnology demonstrates its acceptance within the museum and anthropological community, particularly as these institutions gained dominance over museum anthropology in the latter part of the nineteenth century.⁵²

In 1868, the U.S. Surgeon General incorporated Morgan's and Morton's views into official government policy, issuing an order directing U.S. soldiers to collect the skulls of deceased members of Native American tribes.⁵³ Soldiers removed crania from hospitals, battlefields, and Native American graves and burial scaffolds.⁵⁴ Ultimately, these collections resulted in the largest ever cranial study of Native Americans.⁵⁵ In the study, the Army used Morton's theory to assign intelligence rankings to each race based on the size and shape of the skulls, in an effort to establish the supposed superiority of European Americans over nonwhites.⁵⁶

As museums developed in the nineteenth century, they assembled large collections of Native American cultural objects.⁵⁷ Fear that Native

Echo-Hawk, *supra* note 17, at 40 (describing use of Morton's study as "scientific justification for relocating Indian tribes, taking tribal land, and conducting genocide — in certain instances — against American Indians").

⁵¹ Trope & Echo-Hawk, *supra* note 17, at 40; see *Bieder Survey*, *supra* note 13, at 286 app. (discussing views of critics of federal Indian policy and philanthropic religious organizations that sought to assimilate Native Americans). According to critics of federal Indian policy, "neither Africans nor Indians could ever advance beyond their allegedly low mental states and must either be kept in slavery or exterminated (or allowed to pass into extinction) in order to make room for progress." *Id.*

⁵² McLaughlin, *supra* note 6, at 782.

⁵³ *Bieder Survey*, *supra* note 13, at 320 app.; Trope & Echo-Hawk, *supra* note 17, at 40; see 20 U.S.C. § 80q (1994 & Supp. IV 1998) (noting U.S. Army's role in collecting Native American skulls); 134 CONG. REC. 26,822 (1988) (statement of Rep. Dorgan). The Army engaged in such collections before this order however. *Id.*; Alvin M. Josephy, Jr., 500 NATIONS: AN ILLUSTRATED HISTORY OF NORTH AMERICAN INDIANS 364-78 (1994). In 1864, for example, the Colorado Militia massacred unarmed Cheyenne people camping on the banks of Sand Creek. *Id.* After the massacre, the troops shipped the heads of the dead to Washington, D.C. for examination. Winski, *supra* note 28, at 191.

⁵⁴ Trope & Echo-Hawk, *supra* note 17, at 40-41.

⁵⁵ *Bieder Survey*, *supra* note 13, at 318-19 app.; Harding, *supra* note 9, at 727.

⁵⁶ *Bieder Survey*, *supra* note 13, at 319-20, 322-23 app.; Winski, *supra* note 28, at 190.

⁵⁷ McLaughlin, *supra* note 6, at 782-83; Welsh, *supra* note 6, at 844; see Manuel Rios Morales, *Community as Identity*, in ALL ROADS ARE GOOD: NATIVE VOICES ON LIFE AND CULTURE 156, 158 (National Museum of the American Indian, Smithsonian, 1994) (noting number of objects missing from native communities that are held in museums). Using what James Clifford describes as an "art-culture system," designed within a system of colonialism and imperialism, museums categorized these objects as ethnographic artifacts

American cultures were vanishing compelled archaeologists and museum curators to focus on preserving remnants of the traditional ways of Native American culture.⁵⁸ In differentiating between traditional and nontraditional objects, however, archaeologists largely relied on their own nostalgia rather than any distinction made by the native culture itself.⁵⁹ Using this artificial line of demarcation, these archaeologists and curators determined what culture practices and objects were traditional and which were not.⁶⁰ Under this approach, archaeologists collected, studied, or displayed only those objects they deemed "traditional."⁶¹

Moreover, because the objects were taken from native control, Native Americans had no input into the meaning attached to the objects archaeologists studied.⁶² Rather, the meanings ascribed to the objects reflected archaeologists' conception of native culture.⁶³ This divestiture of control over native objects from natives to outsiders resulted in both cultural appropriation and misrepresentation.⁶⁴ Cultural appropriation occurs when an outsider defines or describes another's culture, acting as a presumptive expert on the culture's experience.⁶⁵ Museum displays of native artifacts that contain only archaeologists' interpretations of native culture and which fail to include the views of the members of that culture are an example of cultural appropriation.⁶⁶

for display. Coombe, *supra* note 7, at 255 (citing JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE: TWENTIETH CENTURY ETHNOGRAPHY, LITERATURE, AND ART* 215 (1988)). It is important to note that many of the objects in museum collections were acquired from tribal members either through sales or as gifts. *ENCYCLOPEDIA OF NORTH AMERICAN INDIANS* 408 (Frederick E. Hoxie, ed., 1996).

⁵⁸ See Welsh, *supra* note 6, at 842. To these collectors, "traditional" largely meant the culture's "old things." *Id.* In contrast, nontraditional items were those produced on a large scale and used by current members of the culture. *Id.*; see also Coombe, *supra* note 7, at 257 (discussing museums' focus on traditional native artifacts).

⁵⁹ Welsh, *supra* note 6, at 843.

⁶⁰ *Id.*; see Coombe, *supra* note 7, at 257.

⁶¹ Welsh, *supra* note 6, at 843.

⁶² *Id.*, at 845.

⁶³ See *id.*

⁶⁴ Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 *CAN. L.J. & JURIS.* 249, 279 (1993) [hereinafter *Properties of Culture*]; Welsh, *supra* note 6, at 843; see Coombe, *supra* note 7, at 257; Morales, *supra* note 57, at 158 (discussing importance of native study of cultural artifacts so that native voices are "part of [their] own history").

⁶⁵ See Coombe, *supra* note 64, at 279.

⁶⁶ See Morales, *supra* note 57, at 158 (discussing predominance of nonnative voices in native histories and need for inclusion of native voices in these histories).

Cultural misrepresentation happens when nonnatives create an inaccurate image of a culture, as when archaeologists, using a limited notion of native culture, created a limited image of native culture.⁶⁷ Indeed, the views of nonnatives can eventually dominate the image of that culture, and silence native voices.⁶⁸ Thus, cultural appropriation may damage the culture by misrepresenting it and disseminating an inaccurate view of that culture.⁶⁹ More importantly, because the view of outsiders in part shapes cultural identity, misrepresentation may distort a culture's image of itself.⁷⁰ One example of this was archaeologists' focus on the collection and display of only those items archaeologists designated traditional.⁷¹ By defining traditional culture as that which occurred before the archaeologists' contact with the tribe, archaeologists established the notion that authentic native culture is in the past.⁷² This is, however, a misrepresentation of a vibrant, contemporary culture as a relic of the past.⁷³ The resulting misrepresentation spilled over into the perceptions of the larger public, whose only exposure to native culture was an occasional museum display.⁷⁴

⁶⁷ Roger Echo-Hawk, *Forging a New Ancient History for Native America*, in STEPPING STONES, *supra* note 1, at 88, 97-98. "Central to all of these practices [such as possessing Native American cultural property] is the experience of having Native cultural identity extinguished, denied, suppressed, and/or classified, named, and designated by others." *Properties of Culture*, *supra* note 64, at 273.

⁶⁸ Keeshing-Tobias, *supra* note 23; see Clines, *supra* note 18 (discussing NMAI as working to include native voices in telling of own culture in effort to "set the record straight").

⁶⁹ Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69, 73 (2000).

⁷⁰ *Id.* Such damage occurs because cultural "identity is partly shaped by recognition or its absence, often by the *mis*recognition of others." Taylor, *supra* note 21, at 24; see Richard Delgado, *Storytelling for Oppositionists and Others*, in THE LATINO/A CONDITION: A CRITICAL READER 298 (Richard Delgado & Jean Stefancic, eds., 1998). As Richard Delgado explains, "A principal cause of demoralization of marginalized groups is self-condemnation. They internalize the images that society thrusts on them — they believe that their lowly position is their own fault." *Id.*

⁷¹ Coombe, *supra* note 7, at 257; Welsh, *supra* note 6, at 843.

⁷² Welsh, *supra* note 6, at 842-43; Clines, *supra* note 18. The tribes from which these objects came are therefore "permitted no histories of their own, relegated [instead] to an a-historical perceptual present, [where they are] perceived as [following] essential traditions that are vanishing, being destroyed, or tainted by the forces of modernization." Coombe, *supra* note 7, at 257.

⁷³ Coombe, *supra* note 7, at 257; Welsh, *supra* note 6, at 843; Clines, *supra* note 18.

⁷⁴ Ivan Karp, *Culture and Representation*, in EXHIBITING CULTURES: THE POETICS AND POLITICS OF MUSEUM DISPLAY 15 (Ivan Karp & Steven D. Lavin, eds., 1990). According to Karp, "the most powerful agents in the construction of identity [from one point of view,] appear to be neither the producers of objects nor the audience but the exhibition makers themselves, who have the power to mediate among parties who will not come into face-to-

The opposite of this cultural appropriation and misrepresentation is cultural autonomy, which allows the members of a culture to define and describe their own history and culture.⁷⁵ However, because they lacked physical control over their ancestral artifacts, the tribes had no input into the meaning attached to these artifacts.⁷⁶ Before the Museum Act and NAGPRA, archaeologists routinely failed to incorporate Native American voices into their interpretations of native remains and artifacts.⁷⁷ While a few early archaeologists worked closely with Native Americans, by the early twentieth century archaeologists simply ignored Native American oral history in their reconstructions, rejecting it as an invalid source of information.⁷⁸ Without the input of native voices, a disconnect arose between the descriptions of the past offered by archaeologists and that offered by Native Americans.⁷⁹ At best, the

face contact." *Id.*; see also Sunder, *supra* note 69, at 73. Such a lack of recognition of the reality of the culture also damages the culture itself because what it reflects back to the culture is a distorted image. Taylor, *supra* note 21, at 36; *Who Owns the Past?* (PBS television broadcast, Nov. 15, 2000) (transcript on file with author) (quoting archaeologist Alan Harn on Dickson Mounds Museum, "We are so isolated here in Central Illinois that the average Illinois citizen has never seen a real Indian. His [or her] only contact with Indian people or with Indian culture comes through a visit to a museum like Dickson Mounds.").

⁷⁵ See *Properties of Culture*, *supra* note 64, at 279.

⁷⁶ Welsh, *supra* note 6, at 845; Clines, *supra* note 18. "Tribal leaders emphasized their long struggle 'to get our dead relatives out of museums' of the past that had confiscated sacred relics and celebrated only the supposed 'end-of-the-trail' defeat of the tribes." *Id.*; see Sherry Hutt & C. Timothy McKeown, *Control of Cultural Property as Human Rights Law*, 31 ARIZ. ST. L.J. 363, 364 (1999) ("The importance of controlling one's own cultural property is so basic that it is often taken for granted."); Karp, *supra* note 74, at 23 n.1 ("[P]roblems arise when objects made by humans are exhibited in natural-history museums and the exhibitors believe that theories of nature can substitute for accounts of cultural factors such as beliefs, values, and intentions."); see also 20 U.S.C. § 80q (1994 & Supp. IV 1998) (noting vast holdings of Heye Foundation and Smithsonian Institution and need for Native American curatorial opportunities).

⁷⁷ STEPPING STONES, *supra* note 1, at 12; Roger Anyon, et al., *Native American Oral Tradition and Archaeology: Issues of Structure, Relevance, and Respect*, in STEPPING STONES, *supra* note 1, at 77, 77; Larry J. Zimmerman, *Remythologizing the Relationship Between Indians and Archaeologists*, in STEPPING STONES, *supra* note 1, at 44, 45-46.

⁷⁸ Anyon, *supra* note 77, at 77; Alan S. Downer, *Archaeologists-Native American Relations*, in STEPPING STONES, *supra* note 1, at 23, 29; Zimmerman, *supra* note 77, at 45-46.

⁷⁹ Downer, *supra* note 78, at 29; Zimmerman, *supra* note 77, at 45-46. Perhaps what anthropologists call the "myth of the moundbuilders" best exemplifies what can happen when an outsider seeks to explain cultural phenomena without input from the culture under study. Nichols, *supra* note 27, at 27-28. Throughout North America, early native peoples built earthmound complexes. See Robert J. Wenke, *PATTERNS IN PREHISTORY: HUMANKIND'S FIRST THREE MILLION YEARS 570-77(1990)*. The mound complexes included "hilltop crests with circumvallations" and "metrically precise geometric embankments in the shape of circles, squares, and octagons." *ENCYCLOPEDIA OF NORTH AMERICAN INDIANS*, *supra* note 57, at 398. Because many were topped by large, old trees, the mounds were presumed to have ancient origins. *Id.* Obviously built by humans, the mounds sparked

archaeologists' interpretations created an incomplete representation of Native American history.⁸⁰ At worst, they reflected complete nonrecognition of actual Native American culture as understood by members of that culture.⁸¹ Lacking any visible resistance, many archaeologists — who viewed themselves as protective of Native American history — believed that Native Americans agreed with their interpretations of the past.⁸² However, by the late 1960s, Native Americans challenged this belief by demanding greater control over their cultural objects and ancestral remains.⁸³

B. Legal Context

Native Americans assert that if they had possessed the right to control their ancestors' remains, they might have prevented research like that conducted by the U.S. Army.⁸⁴ However, traditional Anglo-American property law did not allow ownership of human remains.⁸⁵ Rather, the

intense interest among the Euro-American settlers that encountered them. Downer, *supra* note 78, at 26. Although these mounds actually served as burial sites and ceremonial centers, Wenke, *supra*, at 570-77, European Americans actively debated their origins, Downer, *supra* note 78, at 27. In an effort to determine their origins, early explorers mapped and excavated the mounds. *Id.* at 26. The explanation that gained popular acceptance outside native communities attributed the origin of the mounds to an ancient "moundbuilding" culture. *Id.* Potential candidates of that moundbuilding culture included any group other than the ancestors of contemporary Native Americans, including the lost tribes of Israel, Phoenicians, Aztecs, and Tartars. *Id.* at 26-27. Under the moundbuilder theory, contemporary Native Americans expelled the ancient culture that built the earthworks. *See id.* The Smithsonian Institution conducted its own research into the origins of the mounds. *Id.* In its research, the Smithsonian questioned contemporary Native Americans about the origins and purposes of the mounds. *Id.* Using the oral history of the native persons it interviewed, the Smithsonian postulated that the ancestors of the native inhabitants of the region built the mounds. *Id.* This position was not accepted, however, until the late 1800s. *Id.*

⁸⁰ Downer, *supra* note 78, at 29; *see* Zimmerman, *supra* note 77, at 46 (discussing Native American resistance to archaeologists' constructions of past).

⁸¹ Taylor, *supra* note 21, at 36; *see* Keeshing-Tobias, *supra* note 23 (describing inaccurate narrative portrayals of native culture by nonnatives); Morales, *supra* note 57, at 158 (discussing need for native voices in construction of tribal history).

⁸² Zimmerman, *supra* note 77, at 46. Zimmerman notes, that "in what became a truism, many archaeologists believed that the Indian past was lost unless archaeologists reconstructed it. The past quarter-century has demonstrated just how wrong archaeology has been." *Id.*

⁸³ CIVIL RIGHTS ENCYCLOPEDIA, *supra* note 11, at 260; Zimmerman, *supra* note 77, at 46; *see* Clines, *supra* note 18 (describing long struggle of Native American activists for return of their ancestral remains and cultural objects).

⁸⁴ *Bieder Survey*, *supra* note 13, at 320 app.; Tsosie, *supra* note 9, at 66.

⁸⁵ Tsosie, *supra* note 9, at 66; *see* *Larson v. Chase*, 50 N.W. 238, 239 (Minn. Sup. Ct. 1891) (refusing to characterize dead body as property, but nevertheless finding that next of kin

next of kin held only a quasi-property right in the body allowing them to control internment.⁸⁶ While it would seem that such laws would protect Native American graves, this has not been the case.⁸⁷

An important gap in the law results from differing funerary practices of Native Americans and European Americans.⁸⁸ Generally, grave protection laws reflected a European American sensibility in terms of disposition of the dead.⁸⁹ Thus, until the 1980s, these laws largely failed to protect such Native American practices as tree burial and unmarked graves.⁹⁰ Similarly, burial laws generally did not protect those graves outside the walls of European American sectarian cemeteries.⁹¹ For example, in 1982, the California Court of Appeals ruled that California's burial law did not apply to an ancient, unmarked Native American burial ground.⁹² Consequently, the city of Stockton authorized the

has possessory right recognized and protected by law).

⁸⁶ Tsosie, *supra* note 9, at 66; *Neighbors v. Neighbors*, 65 S.W. 607, 607-08 (Ky. Ct. App. 1901) (holding no commercial property right in body). The *Neighbors* court held that under "current authority in this country . . . there is not a property right to a dead body in a commercial sense, but there is a right to bury it which the courts of law will recognize and protect." *Id.* (cited in *Trope & Echo-Hawk, supra* note 17, at 46); *see also* *Leno v. St. Joseph's Hosp.*, 302 N.E.2d 58, 59 (Ill. Sup. Ct. 1973) (holding that there is no property right in dead body); *Enos v. Snyder*, 63 P. 170, 171 (Cal. Sup. Ct. 1900) (holding that deceased's body does not form part of deceased's estate); *Larson*, 50 N.W. at 239 (holding that there is no commercial property right in dead body; rather next of kin holds possessory right for purpose of internment).

⁸⁷ Margaret Bowman, *The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict*, 13 HARV. ENVTL. L. REV. 147, 169 (1989) (discussing lack of protection for Native American remains); *see e.g.*, *Carter v. City of Zanesville*, 52 N.E. 126, 127 (Ohio 1898) (stating that older human skeletal remains are not considered dead bodies under Ohio law); *State v. Glass*, 273 N.E.2d 893, 896 (Ohio Ct. App. 1971) (holding law does not consider decomposed remains "a body").

⁸⁸ Sherry Hutt, *Native American Cultural Property Law*, ARIZ. ATT'Y, Jan. 1998, at 18, 20 (discussing modest penalties for disturbing Native American graves compared to European American graves); *Raines, supra* note 11, at 647-49; *Trope & Echo-Hawk, supra* note 17, at 46-47; *see e.g.*, *Wana the Bear v. Cmty. Constr., Inc.*, 128 Cal. App. 3d 536, 541, 180 Cal. Rptr. 423, 426-27 (Cal. Ct. App. 1982) (finding no protection for unmarked Native American burial ground); *Newman v. State*, 174 So. 2d 479, 481-82 (Fla. Dist. Ct. App. 1965) (acquitting student of burial desecration charge due to lack of malice and because Seminole burial customs were "unfamiliar" compared to Christian burials).

⁸⁹ *Trope & Echo-Hawk, supra* note 17, at 46; *see e.g.*, *Wana the Bear*, 128 Cal. App. 3d at 541, 180 Cal. Rptr. at 426-27; *Newman*, 174 So. 2d at 481-82.

⁹⁰ *Raines, supra* note 11, at 647-49; *Trope & Echo-Hawk, supra* note 17, at 46.

⁹¹ *Hutt & McKeown, supra* note 76, at 366; *Raines, supra* note 11, at 647-49; *see Wana the Bear*, 128 Cal. App. 3d at 541, 180 Cal. Rptr. at 426-27 (holding that Miwok burial ground not cemetery and therefore not afforded statutory protection).

⁹² *Wana the Bear*, 128 Cal. App. 3d at 541, 180 Cal. Rptr. at 426-27. Responding to this decision, the California legislature amended California law to explicitly include unmarked Native American burial grounds. CAL. GOV'T CODE § 6254(r) (West Supp. 2001); CAL.

destruction of a Miwok cemetery and over two hundred Miwok graves.⁹³ Further, because grave protection laws only recognized the rights of the next of kin, Native Americans had no control over the remains of long-dead ancestors.⁹⁴

Native Americans also faced the hurdle of unequal application of even modest grave protection laws.⁹⁵ For instance, one state court ruled that a Native American skeleton, disinterred after forty years, was not a "body" within the meaning of a grave protection statute.⁹⁶ The court reasoned that the terms "body" and "corpse" did not apply to decomposed remains.⁹⁷ Seventy years later, another state court ruled that 125-year-old remains did not constitute a corpse within the meaning of an Ohio grave robbing statute.⁹⁸ Thus, state grave protection laws often left the ancestral remains of Native Americans unprotected.⁹⁹

HEALTH & SAFETY CODE § 7050.5 (West Supp. 2001); CAL. PUB. RES. CODE §§ 5097.94, .98, .99 (West Supp. 2001). Similarly, most states have now extended legislative protection of cemeteries to unmarked burial sites. See David J. Harris, Note, *Respect for the Living and Respect for the Dead: Return of Indian and Other Native American Burial Remains*, 39 WASH. U. J. URB. & CONTEMP. L. 195, 213 (1991) (summarizing state laws on unmarked-burial protection). Some states have also passed their own repatriation legislation. See sources cited *supra* note 20.

⁹³ *Wana the Bear*, 128 Cal. App. 3d at 538, 541, 180 Cal. Rptr. at 424, 426-27.

⁹⁴ Trope & Echo-Hawk, *supra* note 17, at 46. Likewise, the law failed to protect Native American cultural relics in many respects. Gary White Deer, *Return of the Sacred: Spirituality and the Scientific Imperative*, in STEPPING STONES, *supra* note 1, at 37, 39; Hutt & McKeown, *supra* note 76, at 364-65. For instance, under the American view of property rights, objects that are old and buried on public lands are considered part of the public domain. See *id.* But see *Charrier v. Bell*, 496 So. 2d 601, 604-05 (La. Ct. App. 1986) (concluding that funerary objects were not "abandoned" property).

⁹⁵ See Raines, *supra* note 11, at 647-49; see, e.g., *Wana the Bear*, 128 Cal. App. 3d at 541, 180 Cal. Rptr. at 426-27 (holding that cemetery not protected property); *Newman v. State*, 174 So. 2d 479, 481-82 (Fla. Dist. Ct. App. 1965) (reversing defendant's conviction because evidence failed to show that defendant removed skull from Native American grave wantonly or maliciously). As Timothy McKeown, NAGPRA team leader with the National Park Service in Washington, D.C., explained, "If a burial was found and it was Native American, generally those remains were put in a museum. . . . If they were from another group, they were reburied." Jonathan Saltzman, *Hawaiian Artifact at Center of Custody Dispute: Providence's Museum of Natural History Wants to Sell the Spear Rest, But Native Hawaiians Say the Object Should be Returned to Them*, PROVIDENCE SUNDAY J., Jan. 19, 1997, at B1. But see *Charrier*, 496 So. 2d at 607 (concluding that deceased's Native American descendants had "right to enjoin the disinterment of their deceased relatives, as well as receive damages for the desecration involved").

⁹⁶ *Carter v. City of Zanesville*, 52 N.E. 126, 126-27 (Ohio 1898).

⁹⁷ *Id.*

⁹⁸ *State v. Glass*, 273 N.E.2d 893, 898 (Ohio Ct. App. 1971); Winski, *supra* note 28, at 201 (discussing *Glass*).

⁹⁹ Trope & Echo-Hawk, *supra* note 17, at 46-47. In 1788, after Kings College medical students started robbing the graves of European Americans at Trinity Church, residents

Native Americans fared no better under federal law.¹⁰⁰ Federal laws routinely designated Native American remains and cultural objects as archaeological resources and promoted excavation rather than protection of burial sites.¹⁰¹ For instance, in 1906, Congress passed the Antiquities Act, which granted the federal government exclusive jurisdiction and control over all remains found on government land.¹⁰² Thirty years later, the Historic Sites, Buildings and Antiquities Act of 1935 made preservation of historic sites a national policy.¹⁰³ The Act, however, afforded more protection to historic sites than to Native American remains or funerary objects.¹⁰⁴ More recently, Congress passed the Archaeological Resources Protection Act (ARPA), which designated Native American remains more than one hundred years old as "archaeological resources."¹⁰⁵ ARPA granted ownership over these

began a vocal protest that culminated in days of rioting. Winski, *supra* note 28, at 192. The medical college's failure to provide cadavers for the students' study forced students to find corpses for dissection on their own. *Id.* However, similar thefts from Native American and African American graves caused no protests. *Id.* Despite the subsequent passage of grave protection laws, the students continued to rob Native American and African American graves without residents' objecting. *Id.* This disparate treatment continued well into the twentieth century. *Id.* at 193. In 1971, an Iowa road crew uncovered twenty-seven graves, twenty-six of which contained the remains of white settlers. *Id.* The twenty-seventh grave contained the bodies of a Native American woman and her baby. *Id.* Unlike the other remains, which the state reburied, the state sent the Native American remains to a state archaeologist for analysis. *Id.*; see, e.g., *Wana the Bear*, 128 Cal. App. 3d at 541, 180 Cal. Rptr. at 426-27 (holding Native American burial ground not protected cemetery under California law); *Glass*, 273 N.E.2d at 898 (finding long-dead remains not "a body" under Ohio law); *Carter*, 52 N.E. at 126 (finding forty year old remains not "a body" under Ohio law).

¹⁰⁰ See Michelle Hibber, Comment, *Galileos or Grave Robbers? Science, the Native American Graves Protection and Repatriation Act, and the First Amendment*, 23 AM. INDIAN L. REV. 425, 425-26 (1998-99) (detailing developments in federal law governing archaeological remains and comparing these developments to changes in attitudes toward Native Americans); Trope & Echo-Hawk, *supra* note 17, at 48-52 (describing failure of U.S. Constitution or treaties between U.S. government and tribes to protect cultural objects and remains); Winski, *supra* note 28, at 195.

¹⁰¹ Winski, *supra* note 28, at 195; see Hibber, *supra* note 100, at 425-26; Trope & Echo-Hawk, *supra* note 17, at 42 (describing Antiquities Act as defining Native American remains as "archeological resources" and as "federal property").

¹⁰² Antiquities Act, 16 U.S.C. §§ 431-433mm (1994); Hibber, *supra* note 100, at 427-28; Winski, *supra* note 28, at 195.

¹⁰³ Historic Sites, Buildings, and Antiquities Act, 16 U.S.C. §§ 461-470 (1994 & Supp. V 1999). Section 461 states: "It is hereby declared that it is a national policy to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States." 16 U.S.C. § 461. The Act authorized the Secretary to enter into agreements with state and local governments, private organizations, and individuals to preserve and protect historic and archaeological sites, objects, or property. 16 U.S.C. § 462.

¹⁰⁴ Raines, *supra* note 11, at 649.

¹⁰⁵ Archaeological Resources Protection Act, 16 U.S.C. § 470bb(1) (1994).

archaeological resources to the United States.¹⁰⁶ With a government-issued permit, archaeologists could excavate and remove the remains — which remained the property of the federal government — for display or storage in public museums.¹⁰⁷

Thus, state and federal law afforded little protection to Native Americans wishing to control their ancestral remains and cultural objects.¹⁰⁸ Frustrated, Native American activists sought reform and tribal control over their ancestral remains and cultural objects.¹⁰⁹ In response, Congress passed the Museum Act and NAGPRA.¹¹⁰

II. THE MUSEUM ACT AND NAGPRA

In 1988, *National Geographic Magazine* published an article on the destruction of more than eight hundred Native American graves located on a Kentucky farm.¹¹¹ Reacting to this story, and the inability to legally protect against future desecration, Congress began to explore legislative means to provide for more adequate protection for Native American graves.¹¹² Ultimately, Congress passed two new laws, the National Museum of the American Indian Act (Museum Act) and the Native American Graves Protection and Repatriation Act (NAGPRA).¹¹³

By passing these laws, Congress also responded to the demands of Native American activists for the return of their ancestors' remains and sacred objects.¹¹⁴ Because it had the largest collection of such remains,

¹⁰⁶ 16 U.S.C. § 470cc(a)-(b); 135 CONG. REC. 9,547 (1989) (statement of Sen. McCain) (noting that ARPA and Antiquities Act granted ownership of remains and archaeological resources to United States).

¹⁰⁷ 16 U.S.C. § 470bb(1); Winski, *supra* note 28, at 195; *see* Kickapoo Traditional Tribe v. Chacon, 46 F. Supp. 2d 644, 650 (W.D. Tex. 1999) (noting ARPA structured to protect archaeological resources, including "material remains of past human life . . . which are of archaeological interest").

¹⁰⁸ *See* Harding, *supra* note 9, at 727 ("For much of the history of the United States, the acquisition and disinternment of cultural objects and grave remains by non-Indians have been officially encouraged.").

¹⁰⁹ *Bieder Survey*, *supra* note 13, at 283 app.; Harding, *supra* note 9, at 765 (noting Native American efforts to secure equal treatment for their dead).

¹¹⁰ 20 U.S.C. §§ 80q to 80q(15) (1994 & Supp. IV 1998); 25 U.S.C. §§ 3001-3013 (1994 & Supp. IV 1998); Harding, *supra* note 9, at 765; Hutt & McKeown, *supra* note 76, at 370-71.

¹¹¹ Hutt & McKeown, *supra* note 76, at 369 (citing Harvey Arden, *Who Owns Our Past?*, NAT'L GEOGRAPHIC, Mar. 1989, at 376, 378).

¹¹² 136 CONG. REC. 31,940 (1990) (statement of Rep. Bennett); Hutt & McKeown, *supra* note 76, at 369.

¹¹³ 20 U.S.C. §§ 80q to 80q-15; 25 U.S.C. §§ 3001-3013; *see* Trope & Echo-Hawk, *supra* note 17, at 55.

¹¹⁴ CIVIL RIGHTS ENCYCLOPEDIA, *supra* note 11, at 307; 135 CONG. REC. 28,522 (1989) (statement of Rep. Rahall); *see* Harding, *supra* note 9, at 723 (detailing efforts by Native

activists focused their attention first on the Smithsonian Institution.¹¹⁵ Consequently, the Museum Act, the first of the two acts passed by Congress, applies only to the Smithsonian's holdings.¹¹⁶ Native Americans later lobbied for a more comprehensive act to ensure their control over remains held by museums outside the Smithsonian system.¹¹⁷ Together, the Museum Act and NAGPRA provide tribes with long-sought control over their ancestral remains and cultural objects.¹¹⁸

A. *The National Museum of the American Indian Act*

The Museum Act represents the first accomplishment by Native Americans seeking inclusion of their voices in the representation of their cultures.¹¹⁹ Passed in 1989, the Museum Act created a separate National Museum of the American Indian (NMAI) within the Smithsonian

Americans to secure repatriation); *see also* 20 U.S.C. § 80q (noting Native Americans have long sought repatriation of their ancestral remains and cultural objects).

¹¹⁵ 135 CONG. REC. 28,522 (1989) (statement of Rep. Rahall); Trope & Echo-Hawk, *supra* note 17, at 54-55; *see* 20 U.S.C. § 80q (noting expansive collection of human remains held by Smithsonian); CIVIL RIGHTS ENCYCLOPEDIA, *supra* note 11, at 260. Section 80q of the Museum Act states that, "through archaeological excavations, individual donations, and museum donations, the Smithsonian Institution has acquired approximately 14,000 . . . Indian human remains" in addition to 4,000 acquired from the U.S. Army Medical Museum. 20 U.S.C. § 80q.

¹¹⁶ *See* 20 U.S.C. § 80q-9(a)(1)(A); Hutt & McKeown, *supra* note 76, at 370; Trope & Echo-Hawk, *supra* note 17, at 61 n.136.

¹¹⁷ *Id.* NAGPRA more fully addressed these concerns and represented a major victory for Native American activists. *Id.*; 25 U.S.C. § 3001. Section 3001 of NAGPRA defines "museum" 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" and explicitly exempts the Smithsonian. *Id.*; *see also* 25 U.S.C. § 3005 (applying repatriation provisions to all federal agencies and museums receiving federal funds); 25 U.S.C. § 3007 (providing for assessment of penalties against noncompliant museums).

¹¹⁸ 20 U.S.C. § 80q-9; 25 U.S.C. § 3002(a); *see Bieder Survey, supra* note 13, at 283 app.; Raines, *supra* note 11, at 641; Stuart, *supra* note 12, at 249-50.

¹¹⁹ 20 U.S.C. § 80q-1 to -15; Statement on Signing the National Museum of the American Indian Act, 25 WEEKLY COMP. PRES. DOC. 1840 (Nov. 28, 1989). "Established by an act of Congress in 1989, the museum works in collaboration with the Native peoples of the Western Hemisphere to protect and foster their cultures by reaffirming traditions and beliefs, encouraging contemporary artistic expression, and empowering the Indian voice." *About the National Museum of the American Indian, available at* <http://www.nmai.si.edu/musinfo/about.html> (last visited Mar. 18, 2002); *see Hearing on Impact of Fiscal Year 1996 Rescissions in Indian Programs Before the Senate Committee on Indian Affairs*, 104th Cong., 1st Sess. 1 (1995) (statement of W. Richard West, Jr., Director, National Museum of the American Indian, Smithsonian Institution) (describing NMAI as "an institution of American Indians and not merely about them.") [hereinafter *West Hearing Statement*].

Institution.¹²⁰ With a collection that spans more than ten thousand years and includes objects from native cultures in the United States, Canada, Mexico, Central America, and South America, the NMAI is the first national museum to exclusively focus on the cultures of various native peoples.¹²¹ Its collection includes artifacts from the Paleo-Indian period as well as contemporary arts and crafts.¹²² The museum actively collaborates with Native Americans to protect their cultures and to empower the Native American viewpoint.¹²³ For instance, the NMAI consults with native people regarding the care of the museum's collections and the design of its exhibits and facilities.¹²⁴ It also includes Native Americans on its staff and Board of Directors.¹²⁵

The Museum Act also requires that the Smithsonian create a system of repatriation¹²⁶ of its Native American artifacts and remains to the culturally affiliated tribe.¹²⁷ Specifically, section 80q-9 instructs the Smithsonian to inventory its collection and identify the remains using the best methods available.¹²⁸ If testing reveals the tribal origin, the

¹²⁰ 20 U.S.C. § 80q-1; Statement on Signing the National Museum of the American Indian Act, 25 WEEKLY COMP. PRES. DOC. 1840 (Nov. 28, 1989). Actually, the NMAI is comprised of three separate facilities: the George Gustav Heye Center at the Alexander Hamilton U.S. Custom House in New York City, the Community Resources Center in Suitland, Maryland, and the NMAI to be located on the National Mall in Washington, D.C. *Id.*; *National Museum of the American Indian Locations*, available at <http://www.nmai.si.edu/musinfo/locations/index.html>; Clines, *supra* note 18. The Heye Center opened in 1994; the Community Resources Center opened in 1988. *Id.* The Smithsonian plans to open the NMAI in 2004. *Welcome from Rick West*, available at <http://www.nmai.si.edu/musinfo/index.html> (last visited Mar. 18, 2002).

¹²¹ 20 U.S.C. § 80q; Statement on Signing the National Museum of the American Indian Act, 25 WEEKLY COMP. PRES. DOC. 1840 (Nov. 28, 1989); Winski, *supra* note 28, at 197; Clines, *supra* note 18; *About the National Museum of the American Indian*, available at <http://www.nmai.si.edu/musinfo/about.html> (last visited Jan. 20, 2001). The majority of the NMAI's collection was amassed by George Gustav Heye and housed in the Museum of the American Indian, Heye Foundation, in New York City until the passage of the Museum Act. 20 U.S.C. § 80q. The Heye Museum held "one of the largest Native American collections in the world [with] more than 1,000,000 art objects and artifacts and a library of 40,000 volumes relating to the archaeology, ethnology, and history of Native American peoples." 20 U.S.C. § 80q. Section 80q of the Museum Act authorized the transfer of the Heye Foundation's collection to the NMAI. 20 U.S.C. § 80q-2.

¹²² *About the National Museum of the American Indian*, available at <http://www.nmai.si.edu/musinfo/about.html> (last visited Jan. 20, 2001).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*; 20 U.S.C. § 80q-3(e)(2) (1994 & Supp. IV 1998).

¹²⁶ "Repatriation" means "[t]he return or restoration of a person or object to his[her] or its country [or place] of origin." BLACK'S LAW DICTIONARY 1299 (6th ed. 1990).

¹²⁷ 20 U.S.C. § 80q-9; Trope & Echo-Hawk, *supra* note 17, at 56-57.

¹²⁸ 20 U.S.C. § 80q-9(a); Trope & Echo-Hawk, *supra* note 17, at 56.

Smithsonian must contact the tribe so that it may request repatriation of the remains or sacred object.¹²⁹ The Smithsonian must return the remains or sacred objects if the tribe requests repatriation.¹³⁰ If testing fails to determine the cultural affiliation, the requesting tribe must establish cultural affiliation by a preponderance of the evidence.¹³¹ To this end, section 80q-9a authorizes the use of folkloric information and oral tradition to establish cultural affiliation.¹³²

The reach of the Museum Act is limited because it applies only to those remains and funerary objects in the possession of the Smithsonian Institution.¹³³ This limitation meant that Native Americans lacked access to those items held by private or state-owned museums, or to remains held by other federal agencies.¹³⁴ It also provided no protection against any future excavation of Native American graves located on public or private lands.¹³⁵ In 1990, Congress partly addressed this issue when it passed the more comprehensive Native American Grave Protection and Repatriation Act.¹³⁶

B. Native American Grave Protection and Repatriation Act

NAGPRA recognizes the property rights of Native American tribes¹³⁷ in their ancestral remains or associated funerary objects.¹³⁸ Specifically, NAGPRA requires that federal agencies¹³⁹ and federally funded

¹²⁹ 20 U.S.C. § 80q-9(b)-(c). The testing must establish cultural affiliation by a preponderance of the evidence. *Id.* If the testing reveals the exact identity of the individual, the Smithsonian must contact that individual's lineal descendants. *Id.* Lineal descendants may also request repatriation. *Id.*; see Trope & Echo-Hawk, *supra* note 17, at 56-7 (discussing repatriation provisions of Museum Act).

¹³⁰ 20 U.S.C. § 80q-9a(b); Trope & Echo-Hawk, *supra* note 17, at 56-7.

¹³¹ 20 U.S.C. § 80q-9a(b); Trope & Echo-Hawk, *supra* note 17, at 56-7.

¹³² 20 U.S.C. § 80q-9a(b).

¹³³ 20 U.S.C. § 80q-9(a)(1)(A); Hutt & McKeown, *supra* note 76, at 370; Trope & Echo-Hawk, *supra* note 17, at 61 n.136.

¹³⁴ See 20 U.S.C. § 80q-9(a)(1)(A); Hutt & McKeown, *supra* note 76, at 370 (discussing limitations of Museum Act); Trope & Echo-Hawk, *supra* note 17, at 61 n.136 (describing protections missing from Museum Act).

¹³⁵ Hutt & McKeown, *supra* note 76, at 370; Trope & Echo-Hawk, *supra* note 17, at 61 n.136.

¹³⁶ 25 U.S.C. §§ 3001-3013 (1994 & Supp. IV 1998).

¹³⁷ NAGPRA defines "Native American" to mean "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). Its provisions also apply to Native Hawaiian and Alaska Native cultures. § 3001.

¹³⁸ 25 U.S.C. § 3002(a); see *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 817 (10th Cir. 1999); Hutt & McKeown, *supra* note 76, at 370-71; Trope & Echo-Hawk, *supra* note 17, at 38.

¹³⁹ 25 U.S.C. § 3001(4). "Federal agency means any department, agency, or

museums¹⁴⁰ return any human remains or associated funerary object in their possession to the culturally affiliated¹⁴¹ tribe.¹⁴² NAGPRA also grants native tribes control over cultural items and human remains discovered on federal lands.¹⁴³ By its own terms, NAGPRA does not apply to private or state-owned museums that do not receive federal funds.¹⁴⁴

Section 3001 of NAGPRA defines cultural items to include human remains, funerary objects,¹⁴⁵ sacred objects,¹⁴⁶ and items of cultural

instrumentality of the United States. Such term does not include the Smithsonian Institution." § 3001(4)

¹⁴⁰ 25 U.S.C. § 3001(8). "[M]useum' means 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. Such term does not include the Smithsonian Institution or any other Federal agency." § 3001(8).

¹⁴¹ 25 U.S.C. § 3001(2). Cultural affiliation is defined as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group." § 3001(2).

¹⁴² 25 U.S.C. §§ 3003(d), 3005(a); see *Bear Lodge*, 175 F.3d at 817. Under section 3007, the Secretary of the Interior may impose a civil fine on any museum that fails to comply with NAGPRA's requirements. 25 U.S.C. § 3007 (1994). NAGPRA also imposes criminal sanctions in some situations for anyone caught buying, selling, or trafficking in any Native American remains or cultural objects. 18 U.S.C. § 1170 (1994). The statute states in part:

Whoever knowingly sells, purchases, uses for profit or transports for sale or profit any Native American cultural items obtained in violation of [NAGPRA] shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than five years, or both.

§ 1170(b). Unlike other NAGPRA provisions, criminal sanctions apply when someone takes remains or objects from either private or federal land. § 1170(b). The sanctions include the imposition of fines, a jail term, or both. § 1170(b).

¹⁴³ 25 U.S.C. § 3002(a); see *Bear Lodge*, 175 F.3d at 817; *United States v. Corrow*, 119 F.3d 796, 800 (10th Cir. 1997); *Hutt & McKeown*, *supra* note 76, at 370-71; *Trope & Echo-Hawk*, *supra* note 17, at 38.

¹⁴⁴ See 25 U.S.C. § 3001(8).

¹⁴⁵ NAGPRA divides "funerary objects" into two categories: associated and unassociated funerary objects. 25 U.S.C. § 3001(3)(A)-3001(3)(B). "Associated funerary objects" are:

[O]bjects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

§ 3001(3)(A). "Unassociated funerary objects" are:

[O]bjects that, as a part of the death rite or ceremony of a culture, are reasonably

patrimony.¹⁴⁷ Section 3002(a) assigns control over any cultural objects or remains subsequently discovered on federal lands to the culturally affiliated tribe.¹⁴⁸ Federal agents must consult with the appropriate lineal descendants, tribe, or Native Hawaiian organization before any planned excavation on federal land.¹⁴⁹ If the excavation occurs on tribal land, section 3002 requires tribal consent.¹⁵⁰ Section 3002 also requires this consultation in case of an inadvertent discovery of Native American human remains or cultural objects on federal lands.¹⁵¹

NAGPRA essentially relinquishes property rights the Antiquities Act and ARPA granted the federal government over Native American remains and funerary objects.¹⁵² Instead, NAGPRA grants tribes

believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified, by a preponderance of the evidence, as related to specific individuals or families or to known human remains or, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe.

§ 3001(3)(B).

¹⁴⁶ "Sacred objects" are those "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents." 25 U.S.C. § 3001(3)(C).

¹⁴⁷ NAGPRA defines "cultural patrimony" as:

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

25 U.S.C. § 3001(3)(D); *United States v. Tidwell*, 191 F.3d 976, 980 (9th Cir. 1999). Cultural patrimony includes "items such as Zuni War Gods, the Confederacy Wampum Belts of the Iroquois, and other objects of similar character and significance to the Indian tribe or Native Hawaiian organization as a whole." 43 C.F.R. § 10.2(d)(4) (2002); *Corrow*, 119 F.3d at 801 n.5.

¹⁴⁸ 25 U.S.C. § 3002(a) (1994); Hutt & McKeown, *supra* note 76, at 370; Trope & Echo-Hawk, *supra* note 17, at 71.

¹⁴⁹ 25 U.S.C. § 3002(c). Section 3002 of NAGPRA also requires that the archaeologist prove that a consultation took place. § 3002(c)(4).

¹⁵⁰ 25 U.S.C. § 3002(c).

¹⁵¹ 25 U.S.C. § 3002(d).

¹⁵² See 25 U.S.C. § 3002(a); Winski, *supra* note 28, at 198. The Antiquities Act and ARPA essentially granted property rights over skeletal remains and artifacts found on public land to the United States. 135 CONG. REC. 9,547 (1989) (statement of Sen. McCain). The acts also allowed museums to hold such items in their permanent collections. *Id.* Although NAGPRA withdrew this property right, many of ARPA's other provisions remain intact. Trope & Echo-Hawk, *supra* note 17, at 72. For instance, archaeologists must still comply

ownership rights over affiliated objects and control over ancestral remains.¹⁵³ Establishing a hierarchy of rights, section 3002(a) grants priority of ownership or control of funerary objects and human remains to lineal descendants.¹⁵⁴ If there are no lineal descendants, section 3002(a) assigns the rights to the tribe that owns the land where the remains or objects are located.¹⁵⁵ If the discovery occurs on nontribal federal land, section 3002(a) assigns the right to the tribe or organization with the closest cultural affiliation.¹⁵⁶ When the cultural affiliation cannot be determined, section 3002(a) allocates the right to the tribe that traditionally occupied the land.¹⁵⁷

Similar to the Museum Act, section 3003(a) requires the inventory of remains and funerary objects held by museums.¹⁵⁸ However, section 3003(a) extends this requirement to all federal agencies and any museum receiving federal funds.¹⁵⁹ These museums and agencies must inventory their collections to determine the cultural affiliation of all Native American remains, funerary objects, sacred objects, and cultural patrimony.¹⁶⁰ If the testing reveals the cultural affiliation of the remains, NAGPRA requires that museums notify the relevant tribe so that it can request repatriation.¹⁶¹

If the museum testing does not reveal the cultural affiliation, a tribe may request repatriation if it can demonstrate affiliation through other means.¹⁶² Any party requesting repatriation of human remains or associated funerary objects must prove cultural affiliation by a preponderance of the evidence.¹⁶³ Recognizing that gaps are likely to exist in the record, Congress stressed that evaluations based on the

with ARPA's permit provisions before any planned excavation. 25 U.S.C. § 3002(c)(1); 16 U.S.C. § 470cc (1994).

¹⁵³ 25 U.S.C. § 3002(a); see 43 C.F.R. §§ 10.1-10.17 (2002) (providing methodology for determining cultural affiliation and ownership).

¹⁵⁴ 25 U.S.C. § 3002(a)(1).

¹⁵⁵ 25 U.S.C. § 3002(a)(2)(A).

¹⁵⁶ 25 U.S.C. § 3002(a)(2)(B). "'Cultural affiliation' means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group." 25 U.S.C. § 3001(2) (1994 & Supp. IV 1998).

¹⁵⁷ 25 U.S.C. § 3002(a)(2)(C)(1).

¹⁵⁸ 25 U.S.C. § 3003(a) (1994); see *supra* text accompanying notes 126-32.

¹⁵⁹ 25 U.S.C. § 3003(a).

¹⁶⁰ 25 U.S.C. § 3003(a); Trope & Echo-Hawk, *supra* note 17, at 62-65.

¹⁶¹ 25 U.S.C. §§ 3003(d), 3005(a) (1994).

¹⁶² 25 U.S.C. § 3005(a)(4).

¹⁶³ *Id.*; Trope & Echo-Hawk, *supra* note 17, at 62-63. NAGPRA does not require that the tribe demonstrate this affiliation with scientific certainty. S. REP. NO. 473, at 8 (1990).

totality of the circumstances can determine cultural affiliation.¹⁶⁴ To establish tribal affiliation, section 3005(a) authorizes the use of, among other things, oral history and linguistic and folkloric traditions.¹⁶⁵ Once the tribe establishes cultural affiliation, the burden shifts to the museum or agency to establish its own right of possession.¹⁶⁶ A museum may retain possession if it establishes that it obtained the object legitimately from an individual who had the right to alienate¹⁶⁷ the object at the time of transfer.¹⁶⁸

In at least one case to date, the native view of the cultural meaning of an object has prevailed in a repatriation claim.¹⁶⁹ In *City of Providence v. Hui Malama I Na Kupuna O Hawai'i Nei*, a Native Hawaiian

¹⁶⁴ H.R. REP. NO. 101-877, at 14 (1990); Trope & Echo-Hawk, *supra* note 17, at 63.

¹⁶⁵ 25 U.S.C. § 3005(a)(4). When seeking repatriation of sacred objects or object of cultural patrimony, the tribe must meet an additional burden. § 3005(a)(5). For such repatriation requests, the tribe must demonstrate prior ownership or control of the object by a lineal ancestor, tribal member, or the tribe itself. § 3005(a)(5).

¹⁶⁶ See 25 U.S.C. § 3001(13) (1994 & Supp. IV 1998). NAGPRA defines the right of possession as:

[P]ossession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 7(c) [25 U.S.C. § 3005(c)], result in a Fifth Amendment taking by the United States as determined by the United States Claims Court [United States Court of Federal Claims] pursuant to 28 U.S.C. § 1491 in which event the "right of possession" shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

§ 3001(13). Note, however, that this provision does not apply to human remains or associated funerary objects. § 3001(13).

¹⁶⁷ "Alienate" means "to convey; to transfer the title to property." BLACK'S LAW DICTIONARY, *supra* note 126, at 72.

¹⁶⁸ 25 U.S.C. § 3001(13). The museum or agency may also retain possession if it is necessary to complete a scientific study of "major benefit" to the United States. 25 U.S.C. § 3005(b); Trope & Echo-Hawk, *supra* note 17, at 68. However, once the study is completed, NAGPRA requires that the museum or agency repatriate the object within ninety days. *Id.* 43 C.F.R. § 10.10(c)(1) (2002).

¹⁶⁹ See *City of Providence v. Hui Malama I Na Kupuna O Hawai'i Nei*, 62 Fed. Reg. 23794, 23795 (May 1, 1997) (Native American Graves Protection and Repatriation Review Committee advisory findings and recommendations); Isaac Moriwake, Comment: *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian "Cultural Property" Repatriation*, 20 HAWAII L. REV. 261, 242 (1998).

organization¹⁷⁰ sought the return of a *ki i la au*, or carved wooden image, which it designated as a sacred object.¹⁷¹ The City of Providence, however, argued the object was merely utilitarian¹⁷² and not subject to repatriation under NAGPRA.¹⁷³ While the NAGPRA review committee¹⁷⁴ recommended that the City repatriate the object to the organization, it did not make a determination as to the right of possession.¹⁷⁵ Nevertheless, the committee deferred to the Native Hawaiian organization's definition of the carved figure as sacred and advised the City to repatriate the object.¹⁷⁶

While this case illustrates the advantages of NAGPRA, the Act also has several important limitations.¹⁷⁷ For instance, NAGPRA does not affect Native American graves discovered on state or private land.¹⁷⁸ It also

¹⁷⁰ The organization's name, Hui Malama I Na Kupuna O Hawai'i Nei, translates into English as Group Caring for the Ancestors of Hawaii. Saltzman, *supra* note 95.

¹⁷¹ *City of Providence*, 62 Fed. Reg. at 23794-95; Moriwake, *supra* note 169, at 263. The object in controversy is "a 15 1/2 -inch, rough-hewn wooden figure" that "crouches like a wrestler, muscular legs bent at the knees, right hand resting on the right hip, the left arm raised and merging with the scalloped spear rest above. He has a broad, full-lipped mouth, a short nose and mother-of-pearl shells inset in the eye sockets." Saltzman, *supra* note 95. What the figure represented was the core of the controversy. *Id.* Officials of the City's Museum of Natural History characterized it merely as a "spear rest" with only a utilitarian purpose. *Id.* In contrast, Hui Malama depicted it as a sacred object with more a spiritual purpose. *Id.* According to Hui Malama, "a warrior chief would have imbued it with spiritual powers, or "mana," through prayers and offerings so spears hit their mark." *Id.*

¹⁷² A utilitarian object is one "having regard to utility or usefulness rather than beauty, ornamentation [or sanctity]." WEBSTER'S, *supra* note 48, at 1574. Had the *ki i la au* been designated as merely utilitarian, it would be beyond the scope of NAGPRA, which does not apply to nonsacred cultural objects. See 25 U.S.C. § 3005 (requiring repatriation only of "unassociated funerary objects, sacred objects or objects of cultural patrimony"); S. REP. NO. 473, at 7 (1990).

¹⁷³ *City of Providence*, 62 Fed. Reg. at 23795; Moriwake, *supra* note 169, at 263-64; Saltzman, *supra* note 95.

¹⁷⁴ NAGPRA established a seven-member Review Committee to monitor museums' inventory and identification processes, to make findings upon request regarding cultural affiliation and repatriation, and to facilitate disputes. 25 U.S.C. § 3006(b)-3006(c) (1994). The Committee must also compile inventories of remains in federal possession, consult with affected parties, and make recommendations for the care of cultural items. § 3006(c). Committee findings on the identity, cultural affiliation, or repatriation of an item are admissible in an action brought under NAGPRA's enforcement provision. § 3006(d); Moriwake, *supra* note 169, at 264 n.20.

¹⁷⁵ See *City of Providence*, 62 Fed. Reg. at 23795; Moriwake, *supra* note 169, at 261, 264-65.

¹⁷⁶ *City of Providence*, 62 Fed. Reg. at 23795; Moriwake, *supra* note 169, at 261. The parties ultimately reached a settlement in this case in which the museum transferred the object to the Native Hawaiian organization. Hutt & McKeown, *supra* note 76, at 384. The organization then donated money to the museum. *Id.*

¹⁷⁷ See 25 U.S.C. § 3001 (1994); Moriwake, *supra* note 169, at 273-75 (describing NAGPRA's limited scope).

¹⁷⁸ See 25 U.S.C. § 3001(5). Section 3001 of NAGPRA defines federal land as "any land

does not require the repatriation of items held by museums that do not accept federal funds.¹⁷⁹ Nor does it require the return of nonsacred cultural objects, which may be equally important to a tribe's cultural practices and identity.¹⁸⁰

Nevertheless, NAGPRA, paired with the Museum Act, marks a significant achievement for Native American activists.¹⁸¹ Because of these two laws, Native American tribes finally have some measure of control over their ancestral remains and associated funerary objects.¹⁸² Consequently, the tribes have been granted limited, but important rights to control the image of their own culture.

III. CONTROL OVER THE INTERPRETATION OF CULTURAL OBJECTS

Before passage of the Museum Act and NAGPRA, archaeologists' efforts to recreate tribal history from cultural artifacts often lacked input from the culturally affiliated tribe.¹⁸³ Many Native Americans viewed the archaeologists' control over their ancestral remains and cultural objects as another method of colonialism, an example of European American abuse.¹⁸⁴ This Part argues that neither NAGPRA nor the Museum Act is limited to the control of cultural property. Rather, by granting tribes physical control of their cultural objects, the Museum Act

other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971." § 3001(5).

¹⁷⁹ See 25 U.S.C. § 3001(8). Section 3001 of NAGPRA defines "museum" 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." § 3001.

¹⁸⁰ See 25 U.S.C. § 3005 (1994) (requiring repatriation only of "unassociated funerary objects, sacred objects or objects of cultural patrimony"); S. REP. NO. 473, at 7 (1990).

¹⁸¹ *United States v. Corrow*, 119 F.3d 796, 800 (1997). "NAGPRA's reach in protecting against further desecration of burial sites and restoring countless ancestral remains and cultural and sacred items to their tribal homes warrants its aspirational characterization as 'human rights legislation.'" *Id.*; see also Hutt & McKeown, *supra* note 76, at 370; Winski, *supra* note 28, at 197-98.

¹⁸² Winski, *supra* note 28, at 197-98; see 135 CONG. REC. 28,522 (1989) (statement of Rep. Rahall) (discussing Museum Act as correction of years of unequal treatment of Native American remains). See generally Raines, *supra* note 11, at 641-42 (discussing Native American rights vis á vis their cultural property); Trope & Echo-Hawk, *supra* note 17, at 56-57 (discussing NAGPRA's recognition of native ownership of cultural objects).

¹⁸³ Anyon, *supra* note 77, at 77; Downer, *supra* note 78, at 29; Echo-Hawk, *supra* note 67, at 89.

¹⁸⁴ Zimmerman, *supra* note 77, at 45; Clines, *supra* note 18. Indeed, Rosemary Coombe has described the acts of nonnatives defining native culture as a form of cultural violence. *Properties of Culture*, *supra* note 64, at 272; see also Raines, *supra* note 11, at 658 (describing museum's possession of remains as symbolic of loss of Native American autonomy).

and NAGPRA afford Native Americans an opportunity to control the meaning ascribed to those objects.¹⁸⁵

Such a reading is supported by the practical impact both acts have had on the relationship between archaeologists and Native Americans. Specifically, both NAGPRA and the Museum Act increased the bargaining positions of Native Americans, forcing archaeologists to now communicate with the tribes.¹⁸⁶ Ultimately, this communication and bargaining allows Native Americans to control their own cultural meaning and identity.¹⁸⁷ This broad reading of the acts is also consistent with congressional intent, evident from the legislative history and plain meaning of the statutes.¹⁸⁸ Finally, this reading is good policy because it gives tribes the opportunity to remedy centuries of misrepresentation.¹⁸⁹

A. Increased Bargaining Position, Increased Control

Before the passage of the Museum Act and NAGPRA, Native Americans had little, if any, legal claim to their ancestral remains and cultural objects.¹⁹⁰ Instead, federal laws such as the Antiquities Act and ARPA vested ownership over these objects in the United States.¹⁹¹ Consequently, archaeologists and museums could excavate and remove remains without tribal consent or approval.¹⁹² The Museum Act and NAGPRA changed this practice.¹⁹³

¹⁸⁵ For example, if an archaeologist wishes to excavate on tribal land, the tribe could place conditions on approval of the excavation to ensure the tribe's views are included in the analysis. The tribe could accomplish this by requiring that the archaeological team include tribal members and by requiring tribal input into any meaning ascribed to uncovered artifacts in any reported findings. Similarly, a tribe could negotiate with museums for inclusion of tribal voices in museum displays, allowing a museum to keep a cultural item, instead of requiring repatriation to the tribe, so long as the display includes the tribe's interpretation of that object. See discussion *infra* Part III.A.

¹⁸⁶ See discussion *infra* Part III.A.

¹⁸⁷ *Id.*

¹⁸⁸ See discussion *infra* Part III.B.

¹⁸⁹ See discussion *infra* Part III.C.

¹⁹⁰ Raines, *supra* note 11, at 646; see *Bonnichsen v. United States Army Corps of Eng'rs*, 969 F.Supp. 628, 649 (D. Or. 1997) (noting lack of protections for Native American graves prior to passage of NAGPRA), *supra* Part I.B..

¹⁹¹ 16 U.S.C. §§ 431-33m (1994); 16 U.S.C. §§ 461-67 (1994); Raines, *supra* note 11, at 649 (discussing provisions of ARPA and Antiquities Act).

¹⁹² Harding, *supra* note 9, at 740; Tsosie, *supra* note 9, at 66; Winski, *supra* note 28, at 188-89.

¹⁹³ Downer, *supra* note 78, at 25; Clines, *supra* note 18. Many Native Americans view the NMAI as "a long overdue antidote to centuries of racist stereotyping, broken land treaties and Federal 'civilization regulations' that failed to rein in rich tribal cultures with a policy of assimilation." *Id.*

The plain meaning of the acts primarily altered archaeological and museum practices by granting Native Americans greater physical control over their cultural objects located on federal land.¹⁹⁴ Specifically, section 3002 of NAGPRA assigns control over cultural objects found on federal land to tribes, explicitly recognizing Native Americans' ownership rights.¹⁹⁵ In addition, the repatriation requirements of both acts recognize the tribes' rightful ownership of these items.¹⁹⁶ Moreover, NAGPRA's requirement that archaeologists conducting excavations on federal land consult with the culturally affiliated tribe firmly establishes tribal control over its cultural objects.¹⁹⁷

Similarly, the acts changed archaeological and museum practices by granting native tribes control over Native American burial sites.¹⁹⁸ Section 3002 protects Native American graves located on federal lands from any future excavation or removal without tribal consultation and requires tribal permission when the site is located on tribal land.¹⁹⁹ This provision secures the right of the culturally affiliated tribe to make the final decision concerning archaeological activity at these sites.²⁰⁰ Taken together, the repatriation and consultation requirements recognize the tribe's right to determine the treatment given its ancestors' remains, subject to the particular tribe's cultural beliefs.²⁰¹ Thus, it is the tribes, rather than the archaeologists or museums, that control treatment of the

¹⁹⁴ 136 CONG. REC. 35,680 (1990) (statement of Sen. Domenici) ("If enacted, this bill will promote the return of these items to their true owners and users."); 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye); see Tsosie, *supra* note 9, at 66 ("This new legal reality [native ownership of cultural items] forced archaeologists to face the fact they no longer have total control of the archaeological record.").

¹⁹⁵ 25 U.S.C. § 3002 (1994); Trope & Echo-Hawk, *supra* note 17, at 71; Winski, *supra* note 28, at 198.

¹⁹⁶ 20 U.S.C. § 80q-9a (1994 & Supp. IV 1998); 25 U.S.C. § 3005 (1994); Winski, *supra* note 28, at 198.

¹⁹⁷ 25 U.S.C. § 3002; Hutt & McKeown, *supra* note 76, at 370; Trope & Echo-Hawk, *supra* note 17, at 73.

¹⁹⁸ 20 U.S.C. § 80q-9; 25 U.S.C. § 3002(a); Trope & Echo-Hawk, *supra* note 17, at 71.

¹⁹⁹ 25 U.S.C. § 3002; Trope & Echo-Hawk, *supra* note 17, at 72 n.228; Winski, *supra* note 28, at 198.

²⁰⁰ 25 U.S.C. § 3002; Trope & Echo-Hawk, *supra* note 17, at 72 n.228; Winski, *supra* note 28, at 198. Section 3001 of NAGPRA defines "burial site" as "any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited." 25 U.S.C. § 3001 (1994 & Supp. IV 1998).

²⁰¹ Trope & Echo-Hawk, *supra* note 17, at 73; Winski, *supra* note 28, at 198; see 20 U.S.C. § 80q (finding that Native Americans have long sought return of their ancestors remains for appropriate burial).

dead.²⁰²

In addition, both acts require increased communication between archaeologists and Native Americans.²⁰³ For instance, both acts promote the inclusion of native voices in archaeological interpretation.²⁰⁴ Indeed, the acts recognize the importance of Native American voices in the construction of the tribe's history by placing it on equal footing with archaeological findings.²⁰⁵ Specifically, the Museum Act and NAGPRA provide that folkloric information and oral history are legitimate sources of information by which the tribe may establish its cultural affiliation.²⁰⁶ Moreover, archaeologists and museums must now communicate with Native Americans to comply with NAGPRA's provisions.²⁰⁷ For instance, archaeologists must rely on Native American folklore and oral history to determine whether an object is sacred or cultural patrimony under NAGPRA's definitions.²⁰⁸ This reliance is necessary because only the tribe possesses the knowledge regarding the significance of a particular object to the tribe's social and religious customs.²⁰⁹

²⁰² Trope & Echo-Hawk, *supra* note 17, at 76; Winski, *supra* note 28, at 198. Indeed, as Trope and Echo-Hawk conclude, "[NAGPRA] finally recognizes that Native American human remains and cultural items are the remnants and products of living people, and that descendants have a cultural and spiritual relationship with the deceased. Human remains and cultural items can no longer be thought of as merely 'scientific specimens' or 'collectibles.'" Trope & Echo-Hawk, *supra* note 17, at 76; *see also* 25 U.S.C. § 3001 (defining "burial site" as predicated on particular culture's burial practices).

²⁰³ Downer, *supra* note 78, at 25; *see* 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye) ("This legislation is designed to facilitate a more open and cooperative relationship between Native Americans and museums.").

²⁰⁴ Downer, *supra* note 78, at 25; *see* 20 U.S.C. § 80q-9a(b) (authorizing use of oral history and folklore to establish cultural affiliation); 25 U.S.C. § 3005(a)(4)(c) (1994) (same).

²⁰⁵ *See* 20 U.S.C. § 80q-9a(b); 25 U.S.C. § 3005(a)(4)(c); 135 CONG. REC. 28,521 (1989) (statement of Rep. Gillmore) ("The bill also promotes opportunities for Indians in museum studies, management and research.").

²⁰⁶ 20 U.S.C. § 80q-9a(b); 25 U.S.C. § 3005(a)(4)(c); Trope & Echo-Hawk, *supra* note 17, at 62.

²⁰⁷ Downer, *supra* note 78, at 25; Marsha King, *Returning a Heritage — A Federal Law Has Changed the Way Museums View Their Mission as Caretakers of Culture*, SEATTLE TIMES, Dec. 6, 1992, at A1.

²⁰⁸ King, *supra* note 207. NAGPRA defines "sacred objects" as "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents." 25 U.S.C. § 3001(3)(C); *see* Strickland & Supernaw, *supra* note 19, at 162 (noting that NAGPRA rejects treating sacred objects as museum specimens, demanding instead that museums treat objects with respect, as "living spiritual entit[ies]").

²⁰⁹ King, *supra* note 207. The statutory definition of "sacred" allows Native American religious leaders to make the ultimate determination of continuing sacredness, a determination that relies on the particular tribe's traditions. Trope & Echo-Hawk, *supra* note 17, at 66. In *City of Providence*, for example, the NAGPRA review committee

These provisions — tribal control over cultural objects, ancestral remains, and archaeological sites — increased Native Americans' bargaining position.²¹⁰ This position is further strengthened by the tribes' possession of the cultural knowledge necessary to the archaeologist's compliance with NAGPRA.²¹¹ Whereas federal law previously granted the United States ownership over these objects and remains, the new laws granted this right to the tribes.²¹² It is this new right of possession created by the more recent acts that ensures the tribes have the ability to negotiate with museums on an equal footing.²¹³

Equally important in this analysis is the right of the tribe to relinquish its property right in the disputed remains or objects.²¹⁴ Thus, a tribe may choose to let a museum keep these items in exchange for a financial settlement, or it may demand repatriation.²¹⁵ Control over access to archaeological sites allows the tribe to demand inclusion of its perspective in any archaeological interpretation as a condition to excavation.²¹⁶ Similarly, the right to negotiate the disposition of cultural objects allows a tribe to require the inclusion of its perspective in a museum's display of its cultural objects.²¹⁷ Consequently, Native Americans now possess a mechanism to control the meaning placed on

recognized the tribe's ultimate authority to determine what objects it held sacred, according to its own culture and beliefs. *City of Providence v. Hui Malama I Na Kupuna O Hawai'i Nei*, 62 Fed. Reg. 23794, 23795 (May 1, 1997) (NAGPRA Review Committee advisory findings and recommendations); *see supra* notes 169-76 and accompanying text; Moriwake, *supra* note 169, at 265-76; Hutt & McKeown, *supra* note 76, at 382. Indeed, courts have held that NAGPRA's reliance on Native American definitions regarding an item's "inalienability" and its "ongoing historical, traditional, or cultural importance" does not render the statute unconstitutionally vague. *United States v. Tidwell*, 191 F.3d 976, 980 (9th Cir. 1999). In *Tidwell*, the court rejected the defendant's argument that he lacked fair notice of his wrongful conduct under NAGPRA despite fact that "these terms are defined by Native Americans and . . . tribal law regarding cultural patrimony is not written." *Id.*; *see also United States v. Corrow*, 119 F.3d 796, 801 n.5 (10th Cir. 1997).

²¹⁰ 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye); Welsh, *supra* note 6, at 846.

²¹¹ 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye); Welsh, *supra* note 6, at 846.

²¹² 20 U.S.C. § 80q-9 (1994 & Supp. IV 1998); 25 U.S.C. § 3005 (1994); Harding, *supra* note 9, at 740.

²¹³ 20 U.S.C. § 80q-9; 25 U.S.C. § 3005; Harding, *supra* note 9, at 740.

²¹⁴ 25 U.S.C. § 3002(e) (1994); *see* 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye); Harding, *supra* note 9, at 740.

²¹⁵ Harding, *supra* note 9, at 740; Hutt & McKeown, *supra* note 76, at 364 (noting that parties in *City of Providence* reached settlement in dispute over sacred object held by city); *see supra* note 176 and accompanying text.

²¹⁶ 25 U.S.C. § 3002; 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye); Harding, *supra* note 9, at 740.

²¹⁷ 25 U.S.C. § 3002; 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye); Harding, *supra* note 9, at 740.

their cultural objects.²¹⁸

By placing control over the objects and sites archaeologists want to study in Native American hands, both acts effectively increase Native Americans' bargaining strength.²¹⁹ With this shift in bargaining position, the tribes can negotiate for a voice in the meaning placed on those objects.²²⁰ Similarly, the tribes may negotiate with the museums or archaeologists by demanding inclusion of native voices in the excavation and presentation of the tribes' cultural objects.²²¹ Furthermore, as discussed below, the acts' legislative histories support reading the acts as increasing the tribes' bargaining strength and ability to control the meaning ascribed to their cultural objects.²²²

B. The Acts' Legislative Histories Support Native American Cultural Control

That the Museum Act and NAGPRA grant tribes some measure of control over the meaning of their cultural objects is consistent with the legislative history of both acts.²²³ By 1990, Congress appeared to

²¹⁸ See 20 U.S.C. § 80q-9a (1994 & Supp. IV 1998); 25 U.S.C. §§ 3002, 3005 (1994); see also *West Hearing Statement*, *supra* note 119, at 1 (noting that NMAI is to be museum that reflects Native American culture from tribes' viewpoint); *City of Providence v. Hui Malama I Na Kupuna O Hawai'i Nei*, 62 Fed. Reg. 23794, 23795 (May 1, 1997) (NAGPRA Review Committee advisory findings and recommendations) (deferring to Native Hawaiian Organization's designation of object's sacredness); 136 CONG. REC. 35,680 (1990) (statement of Sen. Domenici) (describing Native Americans as owners of their cultural objects and ancestral remains); 135 CONG. REC. 28,522 (1989) (statement of Rep. Bennett) (arguing that Museum Act signals change in treatment of Native Americans); Anyon, *supra* note 77, at 77 (discussing how Museum Act and NAGPRA fosters collaboration between Native Americans and archaeologists); Echo-Hawk, *supra* note 67, at 89 (noting change that use of oral history to establish cultural affiliation under Museum Act and NAGPRA imposes on archaeologists' practices); Raines, *supra* note 11, at 646 (discussing negotiation options under NAGPRA's repatriation provisions); Strickland & Supernaw, *supra* note 19, at 162 (noting that Museum Act and NAGPRA changed way museums treat Native Americans); Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values*, 31 ARIZ. ST. L.J. 583, 635 (1999) (discussing NAGPRA's impact on protection of tribe's cultural identity).

²¹⁹ 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye); see Tsosie, *supra* note 9, at 66 (noting that NAGPRA created new legal reality that challenged archaeologists' control of archaeological record).

²²⁰ See 25 U.S.C. § 3002(a); 20 U.S.C. § 80q-9a(c); 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye) (noting that NAGPRA forces museums to seriously consider tribes' repatriation requests); Welsh, *supra* note 6, at 846 (noting that repatriation provisions call into question museums' presumed ownership of remains and cultural objects).

²²¹ See Harding, *supra* note 9, at 740; *supra* note 176 and accompanying text (discussing settlement of Native Hawaiian Organization's repatriation claim).

²²² 136 CONG. REC. 35,680 (1990) (statement of Sen. Domenici); 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye); see discussion *infra* Part III.B.

²²³ 136 CONG. REC. 35,680 (1990) (statement of Sen. Domenici). Such a reading is also

understand the effects of cultural appropriation and misidentification on native communities.²²⁴ During hearings on NAGPRA, for example, Senator Daniel Inouye remarked that,

When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.²²⁵

Congress sought to remedy this misrepresentation by granting tribes control over their cultural objects and remains through the Museum Act

consistent with Congress' general trust responsibility toward Native Americans. *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974). This trust responsibility results from the unique status of Native American tribes in U.S. law. *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (noting that "Congress has plenary authority to legislate for the Indian tribes in all matters."). Specifically, Native American tribes are "quasi-sovereigns," possessing sovereign authority over their tribal members and land. *Id.* Reflecting this sovereign status, the Constitution vests exclusive authority over relations with Native American tribes to the federal government. U.S. CONST, art. I, § 8, cl. 3; see *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)). Tribal sovereignty, however, is subject to congressional authority, which means that the tribes are sovereign only to the extent Congress allows. *Wheeler*, 435 U.S. at 323. Under this scheme, the tribes are "denominated domestic dependent nations" and their relationship to the federal government "resembles that of a ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). That the tribes have placed themselves "under the protection of one more powerful" did not divest from them their right to self-government, however. *Worcester*, 31 U.S. at 561. Consequently, the federal government has a trust obligation toward the tribes. *Mancari*, 417 U.S. at 541-42. Part of this responsibility is the duty to pass legislation benefiting Native Americans. *Bonnichsen v. United States Army Corps of Eng'rs*, 969 F. Supp. 628, 649 (D. Or. 1997) (citing *Mancari*, 417 U.S. at 554-55). Indeed, in section 3010 of NAGPRA, Congress recognized that NAGPRA was an expression of its trust responsibility toward the tribes. 25 U.S.C. § 3010 (1994). In signing the Museum Act, President Bush noted that the issue of repatriation concerned "the trust responsibilities of the Smithsonian." Statement on Signing the National Museum of the American Indian Act, 25 WEEKLY COMP. PRES. DOC. 1840 (Nov. 28, 1989). Moreover, courts must construe such statutes liberally in favor of Native Americans. *Williams v. Babbitt*, 115 F.3d 657, 660 (9th Cir. 1996).

²²⁴ 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye); see also *Bonnichsen*, 969 F.Supp. at 649 (noting that Congress was aware of museums collecting and exhibiting Native American remains); Raines, *supra* note 11, at 658. As Camille Bush Raines points out, "museum specimens are not only the physical representations of [Native American cultural] heritage and identity, [they] are also the symbols of the loss of American Indian autonomy and culture by military, legal and demographic processes." Raines, *supra* note 11, at 658; Trope & Echo-Hawk, *supra* note 17, at 36-37 (noting that "[NAGPRA] represents fundamental changes in basic social attitudes toward Native peoples by the museum and scientific communities and the public at large").

²²⁵ 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye); Trope & Echo-Hawk, *supra* note 17, at 59.

and NAGPRA.²²⁶ By returning possession to Native Americans, Congress sought to ensure Native American control over their cultural property.²²⁷ Speaking before the passage of NAGPRA, Senator Domenici commented on the importance of returning sacred objects and cultural patrimony to tribal control.²²⁸ Such items, Domenici noted, were important to the tribe's present-day religious and cultural practices.²²⁹ In NAGPRA, Congress sought to "establish a process that provides the dignity and respect that our Nation's first citizens deserve."²³⁰ By protecting a tribe's right to its cultural property, NAGPRA ensures its right to cultural integrity and survival.²³¹

²²⁶ 136 CONG. REC. 31,939 (1990) (statement of Rep. Collins); 135 CONG. REC. 28,525 (1989) (statement of Rep. Richardson). In *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 817 (10th Cir. 1999), the court discussed NAGPRA in the context of federal Indian policy.

Starting in the 1930s federal policy toward Indians changed, and over the past 65 years, has valued and protected tribal governments and cultures . . . Congress passed the Native American Graves and Repatriation Act (NAGPRA) requiring federal land managers, including the [National Park Service], to protect Indian graves, consult with Indian tribes concerning religious and cultural sites and objects, and to repatriate cultural and religious items found on federal lands.

Id. Thus, courts have rejected constitutional challenges that NAGPRA violates the equal protection clause because it only applies to Native American remains and sacred objects. *Bonnichsen*, 969 F. Supp. at 649. The court in *Bonnichsen* doubted "whether the [plaintiffs] can establish that Congress lacked an adequate justification for the distinction." *Id.* According to the court, it "[was] not aware of any significant market in cultural objects and remains stolen from predominantly Caucasian graveyards in the United States, or of museums exhibiting and cataloguing thousands of Caucasian skeletons, or of any parallel to the 'pot-hunters' who vandalize and desecrate Indian graves." *Id.* Rather, the court noted that "[t]he legislative history of NAGPRA . . . contain[ed] extensive documentation of the abuses that led to the enactment of this law." *Id.* (citations omitted). Moreover, the court noted that Congress likely recognized that state burial laws provided adequate protection only for modern cemeteries and that it chose to provide special protection for historic Native American graves to combat the continued desecration. *Id.* The court determined that, "Congress reasonably could have concluded that state and local laws against abusing a corpse, vandalism, and grave-robbing were adequate to protect most modern cemeteries, but that special measures were required to address the unique problem of the theft and desecration of Native American cultural objects and remains." *Id.*

²²⁷ 136 CONG. REC. 35,680 (1990) (statement of Sen. Domenici); *Winski*, *supra* note 28, at 198; *see* 20 U.S.C. § 80q-9a (1994 & Supp. IV 1998) (requiring repatriation of Native American remains and associated funerary objects held by Smithsonian); 25 U.S.C. § 3005 (1994) (requiring repatriation of Native American remains and associated funerary objects held by federal agencies and museums that receive federal money).

²²⁸ 136 CONG. REC. 35,680 (1990) (statement of Sen. Domenici).

²²⁹ *Id.*

²³⁰ 136 CONG. REC. 35,677 (1990) (statement of Sen. McCain); *see United States v. Corrow*, 119 F.3d 796, 800 (1997).

²³¹ *Raines*, *supra* note 11, at 658. Cultural property is vital to cultural survival because it

Throughout debate on both acts, Congress repeatedly stressed the importance of the right of Native Americans to control their burial sites.²³² The text of the Museum Act reflects Congress' concern for this right.²³³ Section 80q of the Museum Act notes that Native Americans have long sought the right to properly inter their ancestors.²³⁴ Indeed, Congress tailored the inventory provisions of the Museum Act for that purpose.²³⁵ For Congress, the Museum Act represented the right of Native Americans to rebury their ancestors in keeping with the tribe's cultural practices and beliefs.²³⁶ As Representative Udall explained,

What we are saying to American Indians today, . . . is simply that your ancestors and their burial grounds are sacred, and will remain so. In the larger scope of history, this is a very small thing. In the smaller scope of conscience, it may be the biggest thing we have ever done.²³⁷

Congress expressed the same concerns during discussions leading to its adoption of NAGPRA.²³⁸ Senator Inouye, for instance, remarked on the importance of death and burial practices in Native American

allows communities to pass their traditions on to future generations. Jonathan Drimmer, *Hate Property: A Substantive Limitation for America's Cultural Property Laws*, 65 TENN. L. REV. 691, 703 (1998). Before the enactment of NAGPRA, however, museums held many of the sacred objects vital to Native Americans' ability to perpetuate their cultural practices. Strickland & Supernaw, *supra* note 19, at 162. Many tribal leaders viewed the return of these objects as critical to their culture's continued vitality. *Id.* at 521. The Museum Act and NAGPRA's repatriation provisions responded to this loss by safeguarding the tribes' right to their cultural patrimony. 20 U.S.C. § 80q-9a; 25 U.S.C. § 3005. Specifically, by designating cultural patrimony as "inalienable," NAGPRA ensures tribes continued access to cultural objects of ongoing importance to the tribe. 25 U.S.C. § 3001(3)(D) (1994 & Supp. IV 1998). By vesting ownership rights over cultural patrimony with the culturally affiliated tribe rather than individual tribal members, NAGPRA ensures the tribe's continued access to its cultural property. *Id.* NAGPRA bolsters this protection by requiring tribal consultation or consent for any future excavations. *Id.*; 25 U.S.C. § 3002.

²³² 136 CONG. REC. 35,677 (1990); 136 CONG. REC. 31,940 (1990); 135 CONG. REC. 9,546 (1989); 135 CONG. REC. 11,752, 28,517 (1989).

²³³ 20 U.S.C. § 80q.

²³⁴ 20 U.S.C. § 80q.

²³⁵ 20 U.S.C. § 80q.

²³⁶ 136 CONG. REC. 31,940 (1990) (statement of Rep. Udall); 135 CONG. REC. 28,524 (1989) (statement of Rep. Akaka); 135 CONG. REC. 28,522 (1989) (statement of Rep. Bennett); 135 CONG. REC. 28,524 (1989) (statement of Rep. Lagomarsino); 135 CONG. REC. 28,522 (1989) (statement of Rep. Rahall).

²³⁷ 136 CONG. REC. 31,940 (1990) (statement of Rep. Udall).

²³⁸ See generally 136 CONG. REC. 35,677 (1990) (recording Senate debate on NAGPRA); 136 CONG. REC. 31,934 (1990) (chronicling House of Representatives debate prior to passage of NAGPRA).

communities.²³⁹ Lamenting the lack of respect afforded Native American graves, Inouye described NAGPRA as a remedy to that injustice.²⁴⁰ Thus, Congress stressed that the tribes' cultural beliefs regarding treatment of their burial sites should prevail over the views of nonnatives.²⁴¹

Congress also understood that the museums' possession of native cultural property interfered with a tribe's ability to control its cultural meaning.²⁴² During the vote on NAGPRA, Representative Collins emphasized that museums' possession of remains and artifacts resulted in museum displays that undermined Native American pride.²⁴³ Representative Richardson acknowledged that museums often portrayed Native Americans as historical relics rather than as contemporary communities.²⁴⁴ Similarly, during passage of the Museum Act, Representative Rahall noted the importance of returning Native American remains to tribal control.²⁴⁵

Congress saw the inclusion of native voices as necessary to rectify the museums' misrepresentation of Native Americans.²⁴⁶ On the passage of NAGPRA, Representative Collins noted that the inclusion of native

²³⁹ 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye); Trope & Echo-Hawk, *supra* note 17, at 59.

²⁴⁰ 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye); Trope & Echo-Hawk, *supra* note 17, at 59; *cf.* 135 CONG. REC. 28,521 (1989) (statement of Rep. Anderson) (describing Museum Act as response to requests by Native Americans and Hawaiian organizations for return of ancestors remains to their descendents).

²⁴¹ See Trope & Echo-Hawk, *supra* note 17, at 76 (noting that NAGPRA recognized Native American views on treatment of dead); see 25 U.S.C. § 3001 (1994 & Supp. IV 1998) (defining burial site as dependent on cultural practices of tribe); Winski, *supra* note 28, at 198.

²⁴² S. REP. NO. 473, at 6 (1990); 136 CONG. REC. 31,939 (1990) (statement of Rep. Collins); 135 CONG. REC. 28,522 (1989) (statement of Rep. Rahall); 135 CONG. REC. 28,525 (1989) (statement of Rep. Richardson).

²⁴³ 136 CONG. REC. 31,939 (1990) (statement of Rep. Collins).

²⁴⁴ 135 CONG. REC. 28,525 (1989) (statement of Rep. Richardson).

²⁴⁵ 135 CONG. REC. 28,522 (1989) (statement of Rep. Rahall). In his statement, Representative Rahall described the Museum Act as corrective of past injustice:

[M]ore importantly, [the Museum Act] will right some of the injustices done to Indian people over the years. There has been strong sentiment in Indian country that the Indian human remains which have been housed in museums across the country should be returned to their proper resting place. This bill includes a monumental agreement between Indian tribes and the Smithsonian which acknowledges the respect and equal treatment that Indian people have been striving for in respect to their cultural and spiritual beliefs and the return of Indian remains.

Id.

²⁴⁶ S. REP. NO. 473, at 6 (1990); 136 CONG. REC. 31,939 (1990) (statement of Rep. Collins); 135 CONG. REC. 28,521 (1989) (statement of Rep. Gillmore).

voices was necessary to counter the long-standing abuse of native culture.²⁴⁷ During the debate on the Museum Act, Representative Richardson stressed the importance of the Museum Act in correcting this misrepresentation by allowing Native Americans to present their culture as it is lived in the present.²⁴⁸ Representative Gillmore noted that positions on the NMAI's board of trustees provided Native Americans a powerful voice in representations of native culture.²⁴⁹ Moreover, the text of the Museum Act itself evinces Congress' concern about presenting Native Americans as contemporary people.²⁵⁰ Section 80q of the Museum Act states that the NMAI will "give all Americans the opportunity to learn of the cultural legacy, historic grandeur, and contemporary culture of Native Americans."²⁵¹

According to the Museum Act, the NMAI's objective is to enhance cultural understanding and knowledge of Native American cultures.²⁵² To that end, Congress believed that inclusion of native voices in the NMAI was essential to ensure that the meaning of those objects in the Smithsonian's possession reflected native perspectives.²⁵³ Indeed, as

²⁴⁷ 136 CONG. REC. 31,939 (1990) (statement of Rep. Collins).

²⁴⁸ 135 CONG. REC. 28,525 (1989) (statement of Rep. Richardson); see 135 CONG. REC. 28,525 (1989) (statement of Rep. Conte) (noting importance of Native American voices in creation of museum that would reflect Native American cultural diversity).

²⁴⁹ 135 CONG. REC. 28,521 (1989) (statement of Rep. Gillmore). Representative Gillmore noted that, "through the board of trustees of the American Indian Museum, American Indians are assured a strong voice in the presentation of their culture, and traveling exhibits will enhance awareness of this culture nationwide." *Id.*

²⁵⁰ 20 U.S.C. § 80q (1994 & Supp. IV 1998). During debate on the bill, Representative Hammerschmidt stated that the NMAI will "bring greater understanding of the life and times of Indians in the past, [and] can also be viewed as a proper monument and living memorial to the present and future of the American Indian." 135 CONG. REC. 28,524 (1989) (statement of Rep. Hammerschmidt); see Judith Weinraub, in *N.Y., Indian 'Traditions,' With a Twist; An Exhibit That Promises a New Look at Native Americans*, WASH. POST., Nov. 23, 1992, at B1 (noting that Museum Act "mandates that, in addition to preserving and exhibiting the past, the museum be an institution of living culture").

²⁵¹ 20 U.S.C. § 80q; 135 CONG. REC. 28,524 (1989) (statement of Rep. Akaka); see Ashley Dunn, *A Heritage Reclaimed; From Old Artifacts, American Indians Shape a New Museum*, N.Y. TIMES, Oct. 9, 1999, at 45 (noting pleas by Native Americans that Smithsonian exhibit objects "as part of living cultures, not mere anthropological specimens"); Weinraub, *supra* note 250.

²⁵² 20 U.S.C. § 80q-1; *About the National Museum of the American Indian* (Jan. 20, 2001), at <http://www.nmai.si.edu/musinfo/about.html>. The stated mission of the NMAI is to "[help] foster, protect, and promote understanding of Native American cultures by collaborating with indigenous peoples across the Western Hemisphere." *Id.*

²⁵³ 135 CONG. REC. 28,525 (1989) (statement of Rep. Richardson); see *West Hearing Statement*, *supra* note 119, at 1; 135 CONG. REC. 28,525 (1989) (statement of Rep. Conte) (noting that Native Americans "are now full partners in creating an institution reflecting their culture"); 135 CONG. REC. 28,521 (1989) (statement of Rep. Gillmore).

Representative Richardson explained, the NMAI's goal of accurately presenting native culture "can only be realized if the Native American community and its leaders are involved fundamentally and integrally."²⁵⁴ Moreover, NMAI founding director, W. Richard West, Jr., has noted that Congress designed the NMAI as a collaborating partner with Native Americans as a means to perpetuate Native American culture.²⁵⁵ To ensure this collaboration, Native Americans are involved in the design of the NMAI's facilities and exhibits and are included among the curatorial staff and Board of Directors.²⁵⁶ Thus, the NMAI strives to become "an institution of American Indians and not merely about them."²⁵⁷

The legislative histories of the acts also reflect Congress' intent to increase the tribe's bargaining position.²⁵⁸ Speaking before NAGPRA's passage, Senator Inouye²⁵⁹ remarked that museums have failed to consider Native American requests for the return of objects held in the museums' collections.²⁶⁰ Inouye noted that NAGPRA increases a tribe's negotiating strength by forcing museums to honor Native American requests for repatriation or settlement.²⁶¹ Though its repatriation provisions are limited to the Smithsonian, the Museum Act has a similar effect on the Smithsonian Institution.²⁶²

Some members of Congress did express concern about the effect of granting the tribes control over archaeological sites.²⁶³ During debate on

²⁵⁴ 135 CONG. REC. 28,525 (1989) (statement of Rep. Richardson).

²⁵⁵ *West Hearing Statement, supra* note 119, at 1; Raines, *supra* note 11, at 651.

²⁵⁶ 20 U.S.C. § 80q-3(e)(2); *About the National Museum of the American Indian, available at* <http://www.nmai.si.edu/musinfo/about.html> (last visited Jan. 20, 2001).

²⁵⁷ *West Hearing Statement, supra* note 119, at 1; Raines, *supra* note 11, at 651.

²⁵⁸ 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye); Harding, *supra* note 9, at 740.

²⁵⁹ Senator Daniel Inouye (D-Haw.), along with Senator John McCain (R-Ariz.), co-sponsored NAGPRA's legislation. 136 CONG. REC. 35,677 (1990) (statement of Sen. McCain).

²⁶⁰ 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye) (noting that Congress designed NAGPRA to facilitate open and cooperative relations between Native Americans and museums); Harding, *supra* note 9, at 740.

²⁶¹ 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye); Harding, *supra* note 9, at 740.

²⁶² 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye); Harding, *supra* note 9, at 740.

²⁶³ 136 CONG. REC. 31,939, 36,814 (1990) (statement of Rep. Richardson) (articulating unease that NAGPRA might be used to penalize legitimate collectors of Native American art); 136 CONG. REC. 35,677 (1990) (statement of Sen. Simpson) (expressing concern regarding effect of NAGPRA on mining interests and also on potential liability of private collectors).

NAGPRA, Senator Simpson questioned whether native control over archaeological sites would interfere with other commercial interests such as coal mining.²⁶⁴ Similarly, Representative Richardson urged that NAGPRA properly balance the competing interests of scientists and Native Americans.²⁶⁵ In this respect, Richardson sought to ensure that the Act protected Native American rights while at the same time allowing for scientific research.²⁶⁶

Supporters were quick to respond to these concerns.²⁶⁷ Senator McCain responded to Simpson's concern by noting that NAGPRA does not bar development on federal land.²⁶⁸ Rather, NAGPRA ensures that tribes have notice and an opportunity to decide the proper treatment afforded its cultural objects or remains found on federal lands.²⁶⁹ Supporters also noted that neither act bars scientific study of remains.²⁷⁰ Instead, the repatriation provisions balance the interests of both scientists and Native Americans.²⁷¹ For instance, Section 3005 of

²⁶⁴ Specifically, Senator Simpson worried that if "permitted mining development could be halted on the assertion that it included a 'sacred site,' that could be potentially devastating to the coal industry in Wyoming and the uranium mining industry as well." 136 CONG. REC. 35,679 (1990) (statement of Sen. Simpson).

²⁶⁵ 136 CONG. REC. 31,939 (1990) (statement of Rep. Richardson).

²⁶⁶ *Id.*

²⁶⁷ 136 CONG. REC. 35,677 (1990) (statement of Sen. McCain). McCain responded to concerns about private collectors by noting that NAGPRA does not apply to private or state-owned land, so private collectors could continue their "pastime" on those lands. *Id.* Moreover, McCain noted that NAGPRA's "definitions do not include objects which were created for a purely secular purpose, such as for sale or trade in Indian art. The definitions include objects which are necessary for the continuing practice of Native American religions, funerary objects and objects that are of central cultural importance to the tribe such that they cannot be owned, alienated or conveyed by any individual." *Id.*

²⁶⁸ 136 CONG. REC. 35,677 (1990) (statement of Sen. McCain); 135 CONG. REC. 9,547 (1989) (statement of Sen. McCain); *see* 136 CONG. REC. 35,680 (1990) (statement of Sen. Domenici).

²⁶⁹ 136 CONG. REC. 35,677 (1990) (statement of Sen. McCain); 135 CONG. REC. 9,547 (1989) (statement of Sen. McCain); *see* 136 CONG. REC. 35,680 (1990) (statement of Sen. Domenici).

²⁶⁹ 136 CONG. REC. 35,677 (1990) (statement of Sen. McCain); 135 CONG. REC. 9,547 (1989) (statement of Sen. McCain); *see* 136 CONG. REC. 35,680 (1990) (statement of Sen. Domenici).

²⁷⁰ 136 CONG. REC. 35,677 (1990) (statement of Sen. McCain); 135 CONG. REC. 9,547 (1989) (statement of Sen. McCain); *see* 136 CONG. REC. 35,680 (1990) (statement of Sen. Domenici).

²⁷¹ 136 CONG. REC. 35,677 (1990) (statement of Sen. McCain) (noting that NAGPRA balanced interests of scientists and Native Americans and resulted from compromise between these groups); 135 CONG. REC. 9,547 (1989) (statement of Sen. McCain) (noting that NAGPRA allows museums to retain possession of remains when "items were indispensable for the completion of a specific scientific study"); *see* 136 CONG. REC. 35,680 (1990) (statement of Sen. Domenici) ("I believe the House provisions we are passing today

NAGPRA allows a museum to retain possession of any remains necessary for the completion of scientific study.²⁷² In addition, the acts are limited in scope, applying only to remains and objects held by the Smithsonian or by a federal agency or federally funded museum.²⁷³

Congress' exclusion of private and state-owned museums from the reach of the acts does not diminish their importance to the tribes' ability to control their cultural objects and the meaning attached to those objects. Indeed, because federal museums contain the majority of Native American remains, the acts reach a great number of contested objects and remains.²⁷⁴ More importantly, the repatriation and collaboration policies of these federal institutions will undoubtedly influence other collections.²⁷⁵ If nothing else, the acts urge a new national policy of including Native American voices in the descriptions of their culture.²⁷⁶

reflect the agreement reached between scientists, museums, and Indian tribes.”).

²⁷² 25 U.S.C. § 3005(b) (1994); Trope & Echo-Hawk, *supra* note 17, at 68; see 43 C.F.R. § 10.10(c)(2) (1998) (requiring return of remains held for scientific study within ninety days of study's completion).

²⁷³ 20 U.S.C. § 80q-9(a) (1994 & Supp. IV 1998); 25 U.S.C. §§ 3003(d), 3005(a) (1994); Hutt & McKeown, *supra* note 76, at 370; Trope & Echo-Hawk, *supra* note 17, at 61 n.136; see Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 817 (10th Cir. 1999) (discussing NAGPRA's repatriation provisions); United States v. Tidwell, 191 F.3d 976, 980 (9th Cir. 1999) (discussing repatriation requirements under NAGPRA); Moriwake, *supra* note 169, at 274 (proposing improvements to NAGPRA including its extension to private museums). It is important to note that the balance tilts in favor of Native American claims. See United States v. Corrow, 119 F.3d 796, 800 (10th Cir. 1997). The Panel of National Dialogue on Museum-Native American Relations “convened to address the divergent interests of the museum and Native American communities, reported to Congress that “[r]espect for Native human rights is the paramount principle that should govern resolution of the issue when a claim is made.” *Id.*; 136 CONG. REC. 35,677 (1990) (statement of Sen. McCain).

²⁷⁴ 20 U.S.C. § 80q; CIVIL RIGHTS ENCYCLOPEDIA, *supra* note 11, at 260; Trope & Echo-Hawk, *supra* note 17, at 54-5.

²⁷⁵ Trope & Echo-Hawk, *supra* note 17, at 57 (citing 135 CONG. REC. S12397 (daily ed. Oct. 3, 1989) (statement of Sen. McCain)). According to McCain, the Museum Act “is an important first step . . . [that] sends a clear signal to those in the museum community who have dismissed repatriation as a transitory issue that they would be wise to carefully consider the bills [pertaining to museums and federal agencies other than the Smithsonian] currently before the Congress.” *Id.*; see also 136 CONG. REC. 35,678 (1990) (statement of Sen. Inouye) (noting that Smithsonian's agreement to Museum Act's repatriation provisions set standard for other museums to follow); 136 CONG. REC. 35,679 (1990) (statement of Sen. Moynihan) (noting that many museums changed their repatriation policies prior to passage of NAGPRA in response to efforts by NAGPRA's sponsors); White Deer, *supra* note 94, at 38-39 (discussing how repatriation provisions challenged scientific imperative and resulted in abandonment of collection of remains by “most reputable venues”).

²⁷⁶ See Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 817 (10th Cir. 1999) (discussing NAGPRA as part of federal policy that “valued and protected tribal governments and cultures”); 136 CONG. REC. 31,939 (1990) (statement of Rep. Collins) (discussing importance of including Native Americans in development and operation of NMAI); 135 CONG. REC. 28,522 (1989) (statement of Rep. Bennett) (“[T]he National

Such a policy is vital to the tribes' ability to overcome centuries of misrepresentation.

C. Native American Cultural Control Counteracts the Appropriation and Misrepresentation of Native Culture

From Native American remains and funerary items, archaeologists create narratives of a tribe's culture and history.²⁷⁷ Museum displays then disseminate this decontextualized meaning to the public.²⁷⁸ The histories archaeologists described and museums displayed, however, often failed to incorporate the views of the tribes they purported to represent.²⁷⁹ Thus, the image disseminated was often a misrepresentation of Native American culture, one that depicted Native Americans as relics of the past rather than as members of vital, contemporary communities.²⁸⁰ This section argues that broadly reading both acts to ensure the inclusion of native voices in the construction of native identity and culture is essential to counter the appropriation and misrepresentations of Native American culture. Indeed, such a reading allows the tribes to reclaim their own cultures.²⁸¹

American Indian Museum Act represent a new sensitivity to the culture and beliefs of Native Americans."); 135 CONG. REC. 28,517, 28, 521 (1989) (statement of Rep. Clay) (arguing that NMAI is important step in affording "the cultures of the first Americans with the respect and appreciation they deserve"); 135 CONG. REC. 28,521 (1989) (statement of Rep. Gillmore) (noting that inclusion of Native Americans on board of trustees allows greater inclusion of native voice in presentation of their own culture).

²⁷⁷ THE DICTIONARY OF ANTHROPOLOGY 23-24 (Thomas Barfield, ed., 1997); EMILY A. SCHULTZ & ROBERT H. LAVENDA, CULTURAL ANTHROPOLOGY: A PERSPECTIVE ON THE HUMAN CONDITION 12 (3d ed., 1995).

²⁷⁸ Karp, *supra* note 74, at 15; see *Properties of Culture*, *supra* note 64, at 276; Welsh, *supra* note 6, at 843; Clines, *supra* note 18.

²⁷⁹ Downer, *supra* note 78, at 29; see *Properties of Culture*, *supra* note 64, at 276; Welsh, *supra* note 6, at 843; Clines, *supra* note 18. As Armand Minthorn, Trustee, Umatilla tribe, explained, "They always tell us that the information yield[ed] from studies would tell us our history. We already know our history. It may not be written down, but we already know our history." *Who Owns the Past?*, *supra* note 74.

²⁸⁰ 136 CONG. REC. 31,939 (1990) (statement of Rep. Collins); Coombe, *supra* note 7, at 257; Welsh, *supra* note 6, at 843-44; Clines, *supra* note 18; see Karp, *supra* note 74, at 15 (discussing distortion created by placement of contemporary cultures in natural history exhibits). As one Native American activist complained, "[o]ur culture and our heritage have been taken over by scientific people and historians who feel that they're in a better position to relate our history. Indians are not only a people of the past, but they're people of the present and people of the future." *Who Owns the Past?*, *supra* note 74 (statement of Kathy Baird, Crow).

²⁸¹ See Coombe, *supra* note 7, at 262; Keeshing-Tobias, *supra* note 23; cf. Taylor, *supra* note 21, at 36 (discussing damage done to culture by misrepresentations of that culture by outsiders).

For too long, museum displays presented Native American culture as that of a defeated people or as an historical relic.²⁸² This cultural appropriation and misrepresentation was a consequence of archaeologists' failure to include native voices in their constructions of native histories. Many European American scholars traditionally rejected oral histories, particularly when the accounts related to events that occurred more than a century ago.²⁸³ For these scholars, no alternative to European American historical scholarship existed.²⁸⁴ Similarly, by the early twentieth century archaeologists relied exclusively on the material record itself in reconstructing native histories, eschewing the tribe's own oral history as an invalid source of information.²⁸⁵ As archaeologists emphasized the archaeological record in constructing tribal histories, a disconnect arose between their explanations and the experiences of "the people whose ancestors had left most of the archaeological remains."²⁸⁶ The disconnect created by this appropriation and misrepresentation then spilled over into museum displays purporting to describe authentic native culture.²⁸⁷

Recognizing the tribes' right to control the meaning attached to its cultural objects allows natives to present the past in their own voices, correcting the distorted image created by such displays and allowing the tribes to describe their cultures as they are actually lived.²⁸⁸ Consequently, Native Americans can play an active role in the construction of their present identity, countering the stories told by outsiders and demonstrating the diversity and vitality of their communities.²⁸⁹ This control is important both for the increased understanding of nonnatives and for the dignity of Native Americans.²⁹⁰ Anthropologist Maureen Mahon has described how the ability to control

²⁸² 136 CONG. REC. 31,939 (1990) (statement of Rep. Collins); 135 CONG. REC. 28,525 (1989) (statement of Rep. Richardson); Coombe, *supra* note 7, at 257; *c.f.* Welsh, *supra* note 6, at 842-44 (arguing museums have misrepresented meaning and usage of native artifacts); Clines, *supra* note 18.

²⁸³ Anyon, *supra* note 77, at 77; Downer, *supra* note 78, at 29; Echo-Hawk, *supra* note 67, at 89; Zimmerman, *supra* note 77, at 45-46.

²⁸⁴ Anyon, *supra* note 77, at 77; Downer, *supra* note 78, at 29; Echo-Hawk, *supra* note 67, at 89; Zimmerman, *supra* note 77, at 45-46.

²⁸⁵ Anyon, *supra* note 77, at 77; Downer, *supra* note 78, at 29; Zimmerman, *supra* note 77, at 45-46.

²⁸⁶ Downer, *supra* note 78, at 29.

²⁸⁷ Karp, *supra* note 74, at 15; *see Properties of Culture*, *supra* note 64, at 276; Welsh, *supra* note 6, at 843; Clines, *supra* note 18.

²⁸⁸ *Properties of Culture*, *supra* note 64, at 279; Weinraub, *supra* note 250.

²⁸⁹ Keeshing-Tobias, *supra* note 23; *see Morales*, *supra* note 57, at 158.

²⁹⁰ Keeshing-Tobias, *supra* note 23; Morales, *supra* note 57, at 158.

representation may affect marginalized groups:

As historically marginalized people assert control over the practice of representation, they engage in a visible and frequently influential form of cultural politics by defining “the meaning and value of acts and events in the arena of inter-ethnic interaction” and by taking control of the images and meanings through which their cultures and histories are represented in local, national, and transnational locations.²⁹¹

Critics, however, have argued that oral histories told by Native Americans are not as reliable as the reconstructed histories of archaeologists and have questioned the historical accuracy of NMAI presentations.²⁹² Responding to concerns regarding potentially conflicting histories, NMAI spokesperson Thomas Sweeney noted that, despite disagreement about the NMAI’s representations, the museum’s goal was to present native viewpoints.²⁹³ Indeed, as NMAI Director West explained, the new museum’s “approach is an attempt to use the collection to communicate the elements of our world, and by interpreting them in the Indian voice, to give an authenticity and a completeness that other interpretations [that relied on archaeology, ethnology, anthropology] may have lacked before.”²⁹⁴

Allowing Native Americans control over the meaning ascribed to their cultural objects gives voice to a perspective long dominated by the descriptions of archaeologists.²⁹⁵ When nonnatives, who lack any deep understanding of the culture, speak for natives, they may silence native voices, their descriptions dominating the image of that culture.²⁹⁶ Granting Native American tribes the right to define the meaning ascribed to their cultural objects counters this misrepresentation. More importantly, it serves as an important step in ensuring the tribes’ cultural autonomy by allowing the tribes to define and describe their own

²⁹¹ Maureen Mahon, *The Visible Evidence of Cultural Producers*, 29 ANN. REV. ANTHROPOLOGY 467, 476 (2000).

²⁹² Anyon, *supra* note 77, at 77; Downer, *supra* note 78, at 29; Echo-Hawk, *supra* note 67, at 89; Zimmerman, *supra* note 77, at 45-46; Clines, *supra* note 18.

²⁹³ Clines, *supra* note 18.

²⁹⁴ Weinraub, *supra* note 250.

²⁹⁵ *Id.*; see Anyon, *supra* note 77, at 77; Downer, *supra* note 78, at 29; Echo-Hawk, *supra* note 67, at 89; see also Dunn, *supra* note 251 (discussing Native Americans’ requests that Smithsonian exhibits depict their cultures as living cultures, not as archaeological display).

²⁹⁶ Morales, *supra* note 57, at 158; Keeshing-Tobias, *supra* note 23; see Clines, *supra* note 18 (discussing Native Americans’ desire to have voice in presentation of own culture).

histories and cultures.²⁹⁷ This control is critical to the continued vitality of Native American communities. As Kathy Baird, a member of the Crow tribe and a repatriation activist, explained,

A lot of the problems that exist today in urban Indian communities are a direct result of . . . not having an identity, of not having anything to cling to. By restoring a little bit of this . . . dignity and respect of our ancestors gives us a place, and therefore, gives us a base to combat some of these problems.²⁹⁸

CONCLUSION

The Museum Act and NAGPRA both recognize the property right of Native Americans to control the physical objects of their culture.²⁹⁹ In granting Native Americans a property right in the objects of their culture, Congress placed the objects back into the control of the culture that created them. Because they ensure native control over these physical objects, the acts offer Native Americans the ability to control the meaning ascribed to those objects. Moreover, by placing this control in native hands, the acts may ultimately provide Native Americans with greater control over their cultural meaning and identity.

²⁹⁷ Mahon, *supra* note 291, at 476; see *Properties of Culture*, *supra* note 64, at 279; see also Clines, *supra* note 18 (describing Native American reaction to NMAI as forum to define their culture in their own voices); cf. Drimmer, *supra* note 231, at 703 (discussing importance of cultural property to cultural integrity).

²⁹⁸ *Who Owns the Past?*, *supra* note 74.

²⁹⁹ 20 U.S.C. § 80q-9a(c) (1994 & Supp. IV 1998); 25 U.S.C. § 3002(a) (1994).
