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THE CREATION OF TRIBAL CULTURAL HEGEMONY UNDER THE INDIAN ARTS AND CRAFTS ACT AND NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

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One ought not to hoard culture. It should be adapted and infused into society as a leaven.
-WALLACE STEVENS

ABSTRACT

Congress enacted the Indian Arts and Crafts Act and the Native American Graves Protection and Repatriation Act with the goal of providing tribes with greater control and authority over their own handicraft traditions and cultural resources. Although both laws have been successful in many aspects, both have also produced unintended consequences that have disadvantaged less powerful tribal groups and individual Native American artisans. This Article explores those consequences, particularly in respect to situations where the Acts enable economically and politically powerful tribal groups to exert control over what constitutes legitimate Native American culture and what does not. This Article concludes with suggestions as to how Congress may make simple amendments to both laws that would address the identified issues and allow for more equitable control over authentic Native American culture by all tribal groups, rather than only those currently empowered under the Acts.

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I. INTRODUCTION

It is a remarkable feat that North America's indigenous peoples retain much of their original culture. Four hundred years of assimilationist pressure and explicit policy would have overcome a people less fiercely protective of their own cultural traditions. Across the United States today, federally recognized and unrecognized tribes continue to perform rituals, pass down oral traditions, and practice arts in the same manner as their ancestors before them. However, native cultural traditions are still at risk—both internally and externally.

Between the mid-1970s and early 1990s, Congress enacted a number of laws aimed at protecting and encouraging tribal culture and economies.[1]

1. *See* Jeff R. Keohane, *The Rise of Tribal Self-Determination and Economic Development*, 33 HUMAN RIGHTS 9–12 (2006), http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol33_2006/spring2006/hr_spring06_keohane.html (providing overview of federal legislation during this period and the rapid growth of tribal autonomy and economic benefits).

Among such laws were the Indian Gaming Regulatory Act,[2] the Indian Arts and Crafts Act ("IACA"),[3] and the Native American Graves Protection and Repatriation Act ("NAGPRA").[4]

Since enactment, both IACA and NAGPRA have caused considerable controversy both inside and outside of Indian country.[5] Congress enacted IACA to prevent non-Indian artisans from presenting their work as authentic Indian work and thereby deceiving consumers.[6] NAGPRA, through its interplay with the Archaeological Resources Protection Act ("ARPA"),[7] ensures that federally funded museums return tribal ceremonial objects and human remains back to the tribes and gives tribes primary rights over all native burial sites located on federal and Indian lands.[8] Though both IACA and NAGPRA have the intended effect of giving tribes enforceable rights with which to protect native culture, both statutes also have the unintended consequence of consolidating tribal cultural authority—much to the detriment of unaffiliated Indians and other less powerful tribal groups.[9] This Article argues that the operation of IACA and NAGPRA has created tribal "cultural hegemonies"[10] in which tribes can diminish minority voices in tribal culture and hinder legitimate anthropological and archeological research. Part I of this Article provides

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2. 25 U.S.C. §§ 2701-2721 (Westlaw through Pub. L. No. 114-316).

3. 25 U.S.C. § 305 (Westlaw through Pub. L. No. 114-316).

4. 25 U.S.C. §§ 3001-3013 (Westlaw through Pub. L. No. 114-316).

5. *See generally* Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004) (concerning the controversy around the ownership remains of the "Kennewick Man"); *see also* James J. Kilpatrick, *A Cozy Little Restraint of Trade Rules Indian Arts and Crafts*, SUN SENTINEL (Dec. 13, 1992), http://articles.sun-sentinel.com/1992-12-13/news/9203060467_1_indian-tribe-indian-arts-indian-blood (describing the adverse economic effects of IACA on Indian artisans not affiliated with a recognized tribe).

6. Jennie D. Woltz, *The Economics of Cultural Misrepresentation: How Should the Indian Arts & Crafts Act of 1990 be Marketed?*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 442, 446 (2007).

7. 16 U.S.C. § 470(aa)-(mm) (Westlaw through Pub. L. No. 114-316).

8. 25 U.S.C. § 3005(a)(1) (Westlaw through Pub. L. No. 114-316) (requiring federal museums and agencies to "expeditiously return" human remains and funerary objects to tribes); 25 U.S.C. § 3002(a) (Westlaw through Pub. L. No. 114-316) (establishing order of control over Native American remains and funerary objects discovered on federal or Indian lands).

9. Matthew H. Birkhold, Note, *Tipping NAGPRA's Balancing Act: The Inequitable Disposition of "Culturally Unidentified" Human Remains Under NAGPRA's New Provision*, 37 WM. MITCHELL L. REV. 2046, 2056 (2011) (recognizing lack of standing under NAGPRA for federally unrecognized tribes and Indian groups); Rob Roy Smith, *The Indian Arts and Crafts Act: What Your Clients Need to Know*, 19 WASH. STATE BAR ASS'N INDIAN L. NEWSLETTER 1, 5 (2011–2012), http://www.wsba.org/Legal-Community/Sections/Indian-Law-Section/~/media/Files/Legal%20Community/Sections/Indian%20Law/Indian%20Newsletters/Winter%2020112012%20Vol%2019%20No%202.ashx (observing that the political definition of "Indian" that IACA uses disadvantages unenrolled Indians and unrecognized tribal entities).

10. This Article uses the term "cultural hegemony" as a term of "best fit" rather than the term's traditional use within Marxist social theory.

an overview of the statutory and regulatory schemes of IACA and NAGPRA. Part II outlines some of the controversies and recurring issues that have arisen under the statutes. Part III provides a number of suggestions as to how IACA and NAGPRA could be employed to more effectively safeguard tribal culture for all American Indians rather than for dominant tribal groups.

II. STATUTORY BACKGROUND AND OVERVIEW

Both IACA and NAGPRA are broad, multifaceted statutes that address numerous issues. As such, the following section details only those provisions of IACA and NAGPRA that are necessary for an overall understanding of both statutes' operative mechanisms as well as those provisions directly relevant to the concerns of this Article. Similarly, discussion of ARPA is limited to those areas in which the statute interacts with the substantive provisions of NAGPRA.

A. THE INDIAN ARTS AND CRAFTS ACT

At its heart, IACA is essentially "a truth-in-marketing" consumer protection law that protects Indian manufacturers and consumers alike from knock-off products that companies present as being of genuine Indian make.[11] In the years prior to IACA's enactment, the American consumer market experienced increased demand for traditional Indian-made goods.[12] As a result, many non-Indian retailers and overseas manufacturers began producing and selling generic Indian handicrafts, with resulting economic losses to genuine Indian craft artisans and a cheapening of the cultural integrity of traditional native handicraft traditions.[13] To protect genuine tribal artisans, IACA imposes both civil and criminal liability on individual and organizational violators.[14] The criminal penalties of IACA are strikingly severe. Individual violators can be subject to fines amounting to $250,000 and up to five years imprisonment.[15] Corporate manufacturers

11. 25 C.F.R. § 309.7 (2017); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 20.02[5] (Nell Jessup Newton et al., eds., 2005 ed.) (describing IACA as a consumer and manufacturer protection law).

12. Woltz, *supra* note 6, at 445.

13. H.R. 2006, 101st Cong., pt. 2 (1990) (describing the adverse effect of imitation Indian goods on tribal economies, including the loss of millions of dollars of tribal revenue); *see also* Woltz, *supra* note 6, at 446 (describing the adverse cultural effects on tribes when manufacturers misuse tribal symbols on counterfeit goods).

14. 25 U.S.C. § 305e (Westlaw through Pub. L. No. 114-316); 18 U.S.C. § 1159 (Westlaw through Pub. L. No. 114-316).

15. 18 U.S.C. § 1159.

and retailers may be subject to fines of $1,000,000.[16] Subsequent violations carry the risk of increased fines and terms of imprisonment.[17] Furthermore, courts have interpreted IACA to be a strict liability statute, offering defendants little room to maneuver around its penalties.[18] Tribes and individual Indian artisans can also obtain injunctive relief against violators under the statute's civil provisions.[19]

Though the primary purpose of IACA is to protect traditional Indian artisans, the statute also has the effect of essentially establishing Indian tribes as gatekeepers of the Indian handicrafts market. Under IACA, an "Indian" for the purposes of the statute is a person who is "a member of an Indian tribe" or a person that an Indian tribe certifies as "an Indian artisan."[20] Somewhat atypically for a federal statute, IACA's definition of "Indian tribe" includes not only federally recognized tribes and Alaska native village corporations, but those tribes that have only obtained state-level recognition.[21] Thus, the statute, at first glance, provides a seemingly liberal definition of which artisans are and are not "Indians" for the purposes of IACA. However, IACA has the effect of giving tribes the enormous power of deciding who can and cannot enter the Indian handicrafts marketplace.[22] Though this statutorily-conferred power seems to resemble at first the inherent sovereign power of tribes to determine membership criteria, it is in practice a notably different creature and has proved the source of controversy that has sprung up around IACA. The effect of this power and its consequences will be discussed in greater length below.

B. THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT AND THE ARCHAEOLOGICALRESOURCES PROTECTION ACT

Under the traditional English common law, there is no property interest that vests in a dead human body, although American courts have been willing to recognize a "quasi-right" in corpses for family members who

16. *Id*.

17. *Id*.

18. Native American Arts, Inc. v. Village Orientals, Inc., 25 F. Supp. 2d 876, 882 (N.D. Ill. 1998) ("[T]he court construes [IACA] to impose strict liability for each commercial transaction involving a 'false suggestion' that merchandise was manufactured by Indians.").

19. 25 U.S.C. § 305e (Westlaw through Pub. L. No. 114-316); *see also* Native American Arts, Inc. v. Waldron Corp., 253 F. Supp. 2d 1041, 1044 (N.D. Ill. 2003) (recognizing the right of Indian organizations and individuals to pursue civil actions under IACA, though finding no standing under the facts of that particular case).

20. 25 U.S.C. § 305e(a)(1).

21. 25 U.S.C. § 305e(a)(3); *see also* 25 C.F.R. § 309.2(e) (2017).

22. 25 C.F.R. § 309.25(a) (2017).

must obtain a body for funeral purposes.[23] Following several highly publicized incidences of grave-looting and desecration, and subsequent outrage from tribal communities, Congress sought to develop a solution concerning the control of native human remains.[24] In response, Congress enacted NAGPRA to give tribes greater regulatory control over native burial sites and human remains.[25] The coverage of NAGPRA is extraordinarily broad. To some extent, the operation of NAGPRA causes the international drama over Greece's Elgin Marbles to play out daily on the domestic stage.[26] As its primary operative mechanism, NAGPRA establishes an affirmative duty for all federally funded museums and research institutions to catalogue and return native funerary objects and human remains to their affiliated tribes.[27] Notably, this so-called "repatriation" provision applies to *all* relics, regardless of when a museum initially acquired them.[28] Thus, NAGPRA provides tribes with considerable authority to reclaim traditional objects, even from public educational institutions. Second, NAGPRA imposes criminal liability on any individual for trafficking in Native American human remains and cultural objects.[29] Accordingly, NAGPRA provides a strong incentive against the long history of grave-robbing that has caused considerable anguish in Indian communities. Finally, and most importantly for the purposes of this Article, NAGPRA provides tribes with significant regulatory oversight of cultural resources, human remains, and archaeological excavations on tribal lands.

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23. *See* Janicki v. Hospital of St. Raphael, 744 A.2d 963, 967–69 (Conn. Super. Ct. 1999) (providing an excellent overview of property rights in human corpses from the time of Blackstone to the present).

24. Hugh Dellios & Rick Pearson, *Neighbors Mourn Dickson Mounds' Demise*, CHICAGO TRIB. (Nov. 26, 1991), http://articles.chicagotribune.com/1991-11-26/news/9104170045_1_native-americans-jim-edgar-archeologists (describing tension between Illinois residents and Native American groups over the treatment of native human remains on display at the Dickson Mounds burial site); *see also* N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 161–62 (2008) (describing the theft of the skull and funerary objects of the great Native American leader Geronimo by Yale University's notorious "secret" Skull & Bones Society).

25. 25 U.S.C. §§ 3001-3013 (Westlaw through Pub. L. No. 114-316).

26. *See* Michael Kimmelman, *Elgin Marble Argument in a New Light*, N.Y. TIMES (June 23, 2009), http://www.nytimes.com/2009/06/24/arts/design/24abroad.html?pagewanted=all&_r=0 (describing the ongoing disagreement between the United Kingdom and Greece over the ownership of the Elgin Marbles). In many ways, the debate over the proper ownership of the Marbles resembles the debates between tribes and scientists over the proper place for tribal funerary relics and human remains.

27. 25 U.S.C. § 3005(a)(4) (Westlaw through Pub. L. No. 114-316).

28. *See* Pueblo of San Ildefonso v. Ridlon, 103 F.3d 936, 939-40 (10th Cir. 1996) (holding that NAGPRA applies to all artifacts, even those acquired before the enactment of the statute).

29. 18 U.S.C. § 1170 (Westlaw through Pub. L. No. 114-316); *see* United States v. Kramer, 168 F.3d 1196, 1201-02 (10th Cir. 1999) (upholding the criminal provisions of NAGPRA against an individual defendant).

NAGPRA's definition of "tribal lands" is extremely broad and encompasses lands that would not normally be considered as "Indian country."[30] Accordingly, tribes have considerable control over cultural resources, even those discovered outside of "traditional" Indian country. NAGPRA's provisions in this regard apply to both intentional archaeological excavations and the inadvertent discovery of cultural resources or human remains during other activities.[31] In regard to those resources discovered on tribal lands, however, NAGPRA gives the landowning tribe essentially unbridled authority over those cultural resources.[32] Although NAGPRA is far-reaching, the Act's provisions are subject to several important limits, namely possession of resources for legitimate scientific study, delayed possession in the case of competing ownership claims, and takings claims.[33]

However, NAGPRA's efficacy is significantly influenced by the statute's simultaneous operation and jurisdictional overlap with ARPA. A slightly earlier statute, ARPA provides a scheme for federal oversight of archaeological excavations and the discovery of cultural resources on federal and public lands.[34] Accordingly, the protection of tribal cultural resources is essentially split between NAGPRA and ARPA.[35]

ARPA generally requires a permit for archaeological excavations on federal property.[36] This requirement applies to tribal lands, though ARPA does define those lands more narrowly than NAGPRA does.[37] The most significant interplay between NAGPRA and ARPA, however, is that obtaining a permit for an excavation on tribal lands requires the consent of the tribe or the tribal landowner, in addition to the Department of the Interior.[38] Notably, tribes themselves are exempt from the permit requirements of ARPA on tribal lands and individual tribal members can also be exempt from the requirements of the Act.[39] Thus, the intersection between NAGPRA and ARPA creates different requirements and rights for Indian tribes than other parties in regard to the excavation of cultural

30. 25 U.S.C. § 3001(15) (Westlaw through Pub. L. No. 114-316).
31. 43 C.F.R. §§ 10.3(c), 10.5 (2017).
32. 25 U.S.C. § 3005(a)(2) (Westlaw through Pub. L. No. 114-316).
33. *Id*. § 3005.
34. 16 U.S.C. §§ 470(aa)-(mm) (Westlaw through Pub. L. No. 114-316).
35. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 11, at 1230 (Nell Jessup Newton et al., eds., 2005).
36. 16 U.S.C. § 470aa.
37. *Id*. § 470(bb)(4).
38. *Id*. § 470cc(g)(2); 43 C.F.R. § 7.8(a)(5) (2017).
39. 16 U.S.C. § 470cc(g)(1); 25 C.F.R. § 262.4(c).

resources. The issues that this scenario creates are explored in greater depth in the following section.

III. THE RISE OF TRIBAL CULTURAL HEGEMONY UNDER IACA AND NAGPRA/ARPA

As previously described, both IACA and NAGPRA were enacted with the purpose of providing Native American tribes with greater autonomy and control over tribal cultural heritage, both past and present. As this section will demonstrate, however, both the IACA and the NAGPRA—through their interplay with ARPA—have the unintended effect of concentrating power over tribal culture in the hands of more powerful, established native groups, much to the detriment of marginalized Indians who nonetheless are important voices in tribal culture. Therefore, these statutes create tribal cultural hegemonies that can truly "prescribe what shall be orthodox" in terms of tribal culture.[40] As a result, tribal groups and individuals that hold less political and economic power find themselves on the losing side of IACA and NAGPRA.

A. IACA AND THE REMAKING OF INDIAN CULTURAL IDENTITY

IACA turns on whether an item offered for sale is genuinely Indian-made or not. The statute defines "Indian" as "a member of an Indian tribe" or a person who "is certified as an Indian artisan by an Indian tribe."[41] IACA includes state-recognized tribes within its ambit and in this regard, IACA's definition of "Indian" is seen as the "most deferential used by Congress" in the whole of federal Indian law.[42] The broad definition of "Indian" and the power given to tribes to determine who is an Indian for the purposes of the statue can be seen as a deliberate attempt by Congress to find a more inclusive definition of "Indian."[43]

Despite this, critics sharply contest whether IACA's Indian definition gives tribal groups more power or simply further erodes it.[44] In Indian country, the general reaction to IACA's Indian definition has been harsh, with the act viewed as yet another paternalistic attempt by Congress to control Indian culture and decide who may and who may not participate in

40. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

41. 25 U.S.C. § 305e(d)(1) (Westlaw through Pub. L. No. 114-316).

42. Margo S. Brownell, *Who is an Indian? Searching for an Answer at the Core of Federal Indian Law*, 34 U. MICH. J.L. REF. 275, 282 (2001).

43. *Id.* at 313-14.

44. *Id.* at 315.

it.[45] Ultimately, among many tribes, IACA is seen as a failure, because, in many ways, the act punishes members of the very groups it was passed to protect.[46]

Ultimately, the failure of IACA is due to the fact that for the purposes of determining who is an "Indian," the Act's definition simply resorts to the political measuring stick of official tribal enrollment.[47] Thus, under IACA, Indians that are unenrolled in an official tribal group essentially stop being "Indian" under the statute.[48] As a result, IACA disadvantages many otherwise genuine Indian artisans who may find themselves exposed to criminal or civil liability if they present their work as "Indian."[49] Although IACA allows tribes to certify non-member Indian artisans, certification is ultimately still dependent on a showing of documented Indian lineage.[50]

The situation is further complicated by the fact that many American Indians refuse, for various reasons, to officially enroll as a member of a recognized—be it state or federal—tribe.[51] Many Indian artisans also lament the aesthetic effect of IACA's definition: the authenticity of Indian handicrafts under the statute is nominal only, because it is derived from a restricted definition rather than the expressive authenticity of the work itself.[52] Thus, the "genuine Indian-made" label becomes a statement not about the products themselves, but the cultural identity of their producers.[53] Some Indian artisans view IACA and its definition of Indian as outright racism and have compared its policy to that of a fascist government.[54] If African American artisans or Hispanic artisans do not need to certify their work as genuine, these individuals argue, why should Indian artisans be treated any differently?[55] As a result, many otherwise genuine Indian artisans face increased economic disadvantages imposed by the very statute that was intended to protect their work and artistic identities.[56]

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45. William J. Hapiuk, Jr., *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009, 1033-37 (2001) (providing several Indian opinions about the effect of IACA).

46. Woltz, *supra* note 6, at 448.

47. *Id*. at 450–51.

48. Haipuk, *supra* note 45, at 1012.

49. Woltz, *supra* note 6, at 447.

50. Haipuk, *supra* note 45, at 1026.

51. *See* Woltz, *supra* note 6, at 354 (describing some of the various reasons why many otherwise ethnically and culturally genuine Indians refuse to associate with a formal tribe).

52. *Id*. at 464.

53. *Id*. at 491.

54. *See* Haipuk, *supra* note 45, at 1036.

55. *Id*.

56. Woltz, *supra* note 6, at 447–48.

IACA has caused several high profile casualties.[57] Shortly after the statute's enactment, the Museum of the Five Civilized Tribes in Muskogee, Oklahoma was forced to close.[58] The museum contained numerous works of art that were created by Indian artisans, yet the museum curators feared that many of the artists did not fall within IACA's definition of "Indian."[59] Rather than subject itself to possible criminal and civil liability, the museum closed.[60]

Two of North America's most prominent Indian artists, Jimmie Durham and Bert Seabourn, also found themselves on the wrong side of IACA's Indian classification.[61] Both artists had successful careers producing work that incorporated Indian themes, with some of Seabourn's paintings being put on permanent display in the Vatican.[62] However, under the terms of IACA, neither artist could present his work as "Indian" despite the fact that both artists are culturally and ancestrally Cherokee.[63] Durham declined to seek admission as an enrolled member of the Cherokee tribe, whereas Seabourn had his requested certification as an Indian artisan denied by the Cherokee tribe.[64] Likewise, some Indian artists, such Jeanne Walker Rorex, have refused to seek certification altogether, viewing IACA's cultural certification of "authentic" Indian art as ideologically objectionable.[65]

The statute has also adversely impacted entire tribes. The most prominent example is an ongoing dispute between the Hopi and the Navajo.[66] Recently, the Navajo have begun producing imitation Hopi Kachina dolls without adhering to traditional Hopi materials and workmanship.[67] Although the imitation dolls are undoubtedly counterfeit and exactly the sort of imitation goods that IACA was enacted to prevent from flooding the marketplace, there is no recourse under the statute for the Hopi.[68] Because the Navajo tribe is the group producing the dolls, the work is *technically* Indian-made under IACA's definition, although the dolls themselves are not culturally Navajo. The ongoing Hopi-Navajo feud is but

57. Haipuk, *supra* note 45, at 1011, 1034.
58. *Id*. at 1011.
59. *Id*.
60. *Id*.
61. *Id*. at 1034.
62. *Id*.
63. Haipuk, *supra* note 45, at 1034.
64. *Id*.
65. *Id*. at 1035.
66. Woltz, *supra* note 6, at 465.
67. Haipuk, *supra* note 45, at 1073–74.
68. *Id*. at 1074.

the first prominent example of what many Indians feared IACA would lead to: the emergence of an economically powerful tribe or class of Indians that would control the global market in Indian handicrafts without heed for the workmanship and traditions of less powerful groups.[69]

B. POWER IMBALANCE AND CULTURAL AMBIGUITY UNDER NAGPRA AND ARPA

Before Congress enacted NAGRPA, all Native American remains were considered federally owned property under the Antiquities Act of 1906.[70] Culminating with NAGRPA, under each subsequent archaeology law that Congress passed, Indian tribes were given greater and greater authority over cultural resources and human remains.[71] This trend also roughly corresponds with the development of ethical codes and standards by the United States' major professional archaeological associations, which have given more weight to cultural appreciation over time.[72] As the field of archaeology became more culturally sensitive in its pursuits, NAGPRA sought to put Native American groups in a better bargaining position than they had been historically—and perhaps, in a better position than archaeologists.[73] As a result, many commentators have criticized NAGPRA for permitting Native American groups to hinder further development of a historical understanding that would be of value to all humankind.[74]

For example, one anthropologist has likened the repatriation of ancient human remains without first performing molecular and DNA scientific studies of the remains to a person burning a lost work of Shakespeare after reading it only once and then attempting to explain the work to the rest of the world.[75] In other words, repatriation of ancient remains without study leaves anthropologists with only the most vague and impressionistic conclusions as to what the scientific importance of such remains may be.

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69. *Id*. at 1056.

70. Lucus Ritchie, *Indian Burial Sites Unearthed: The Misapplication of the Native American Graves Protection and Repatriation Act*, 26 PUB. LAND & RESOURCES L. REV. 71, 74 (2005).

71. Michelle Hibbert, *Galileos or Grave Robbers? Science, the Native American Graves Protection and Repatriation Act, and the First Amendment*, 23 AM. INDIAN L. REV. 425, 427 (1999).

72. *See* Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation*, 25 J. LAND RESOURCES & ENVTL. L. 259, 263–64 (2005) (providing an overview of the development of ethical codes among professional archaeologists).

73. *See id*. at 268.

74. Hibbert, *supra* note 71, at 435–36.

75. Robert W. Lannan, *Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Human Remains*, 22 HARV. ENVTL. L. REV. 369, 392 (1998).

Conversely, many Native American groups view the scientific study of ancestral human remains as outright desecration and cultural destruction.[76] Such a view is hardly unwarranted: an estimated one hundred thousand to two million Native American graves across the United States have been excavated and the human remains and sacred funerary objects relocated to museums and research installations without tribal consent.[77]

However, NAGPRA—and its interplay with ARPA—ultimately presents the same problem, albeit more removed, that IACA does, as who—or whose remains—are "Indian" for the purposes of the Act can become incredibly arbitrary and disadvantage certain legitimate Indians.[78] Under NAGPRA, those human remains found on tribal lands are supposed to be returned to their lineal descendants, though in practice finding those lineal descendants often proves to be an impossibility and the rightful owners cannot be established with any certainty.[79] Furthermore, those archaeologists that wish to conduct legitimate excavations on tribal lands—normally conducted under ARPA—must obtain tribal consent under NAGPRA.[80] This alone creates enormous problems, as the policy objectives of ARPA and NAGPRA—to promote the scientific study of cultural resources and to protect cultural integrity, respectively—are often at odds with one another.[81]

Much like IACA, under NAGPRA, varying notions of tribal culture and "Indianness" can allow more vocal, powerful tribal entities to assert cultural hegemony over smaller and less organized cultural groups. To assert jurisdiction over human remains under NAGPRA, a current Indian tribe must show a "cultural affiliation" with the remains.[82] The courts examine a wide array of factors in determining cultural affiliation, including geography, kinship, biological links, archaeological evidence, linguistics, folklore, oral traditions, and expert opinion.[83] Of course, given the tragic

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76. Gene A. Marsh, *Walking the Spirit Trail: Repatriation and Protection of Native American Remains and Sacred Cultural Items*, 24 ARIZ. ST. L.J. 79, 92 (1992).

77. 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, 39 (1992).

78. *See* S. Alan Ray, *Native American Identity and the Challenge of Kennewick Man*, 79 TEMPLE L. REV. 89, 94 (2006) (noting that in contentious NAGPRA claims, the question ultimately becomes whether someone's bones are "Indian").

79. Trope & Echo-Hawk, *supra* note 77, at 71; Lannan, *supra* note 75, at 398.

80. *See* Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values*, 31 ARIZ. ST. L.J. 583, 610-11 (1999) (noting that as the more recent, specific statute, NAGPRA controls the less specific provisions of ARPA).

81. *Id*. at 609.

82. *Id*. at 601.

83. *Id*. The efficacy of oral tradition to establish cultural affiliation is cast in serious doubt by the Ninth Circuit's opinion in *Bonnichsen v. United States*. *See* 367 F.3d at 881–82 (rejecting

trajectory of American Indian history in the United States, a substantial number of Native American groups no longer reside on what were their aboriginal lands.[84] As a result, those remains found on "tribal" lands can actually belong to now distantly located tribal groups, with the result being that the wrong tribes often end up asserting jurisdiction over remains with which they have no cultural ties.[85] Furthermore, due to the lingering effects of federal termination and assimilationist policies, many otherwise legitimate Indian tribes cannot muster enough information to show the cultural links necessary to obtain custody of human remains under NAGPRA.[86] This is complicated by the fact that cultural practices vary wildly throughout the North American Indian tribes, which can lead courts to impose inconsistent standards in NAGPRA disputes.[87] Additionally, NAGPRA gives presumptive custody of human remains to the tribe on whose lands the remains were located, regardless of whether that tribe resided there historically.[88] This quirk of NAGPRA is exacerbated by the fact that law further requires archaeologists that discover native remains to consult with the culturally affiliated tribe, rather than the tribes that were historically present in the same area.[89] Thus, the implementation of NAGPRA has the potential for disputes over the control of cultural resources to develop between Indian tribes and archaeologists as well as between Indian tribes and other Indian tribes. As one commentator has noted, NAGPRA has not particularly resolved any disputes over cultural resources, but rather reinvented the manner in which those disputes occur.[90]

The basic interplay between NAGPRA and ARPA is as follows. NAGPRA does not come into effect until native human remains are located—either advertently or inadvertently—on federal or tribal lands.[91] If for some reason NAGPRA does not apply, then the provisions of ARPA fully cover the cultural resources and archaeologists, with a permit from the

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tribes' use of oral histories to establish a link between modern tribes and the remains of Kennewick Man). For an extensive critique of the *Bonnichsen* decision, see Allison M. Dussias, *Kennewick Man, Kinship, and the "Dying Race": The Ninth Circuit's Assimilationist Assault on the Native American Graves Protection and Repatriation Act*, 84 NEB. L. REV. 55 (2005).

84. Marsh, *supra* note 76, at 100.

85. *Id*.

86. *See* Hibbert, *supra* note 71, at 437.

87. Suzianne D. Painter-Thorne, *Contested Objects, Contested Meanings: Native American Grave Protection Laws and the Interpretation of Culture*, 35 U.C. DAVIS L. REV. 1261, 1265 (2002).

88. *See* Lannan, *supra* note 75, at 398.

89. Painter-Thorne, *supra* note 87, at 1288.

90. Yasaitis, *supra* note 72, at 285.

91. *Id*. at 277.

Department of the Interior, may study the resources and human remains.[92] However, as previously noted, this jurisdictional split between NAGPRA and ARPA—while certainly affording greater protection to Native American cultural resources—can actually inhibit repatriation and proper scientific studies that themselves could abet repatriation efforts.

As critics of NAGPRA note, primacy is given to the current, rather than historical, occupancy of tribal lands in terms of determining cultural affiliation, though that presumption was slightly eroded in *Bonnichsen v. United States*.[93] Though the *Bonnichsen* case, regarding the controversy over the ownership of the so-called "Kennewick Man," has been written about ad nauseum, a brief explication of some of the issues in that case will serve to illustrate the problems that can arise under NAGPRA in its current form.

In *Bonnichsen*, several Native American tribes battled a group of anthropologists for control of the remains of the Kennewick Man (or "Ancient One"), an 8300 to 9200 year old skeleton discovered along the banks of the Columbia River.[94] The tribes sought custody of the remains to rebury them, whereas the anthropologists wanted the remains for study, given that a skeleton from Kennewick Man's era of human history was an extremely rare discovery.[95] Though the district and circuit courts examined a surfeit of historical and cultural evidence, the question in the case was ultimately the same question that arises under IACA and the broader sweep of federal Indian law: was Kennewick Man an Indian? Ultimately, because the tribes could not muster enough evidence to establish that Kennewick Man was an Indian, the remains passed into the custody of the anthropologists under ARPA.[96] Although the tribes were unable to repatriate Kennewick Man's remains, many commentators lauded the decision, noting that since NAGPRA obviously does not apply to other ancient human remains in North America—Viking, Spanish, English, etc.—it is perfectly logical that NAGPRA should not apply to Kennewick Man either.[97] Ironically, subsequent DNA testing by anthropologists revealed

92. *Id.* at 283.

93. *See* Ray, *supra* note 78, at 90–91 (analyzing the state of NAGPRA jurisprudence after the *Bonnichsen* decision and observing that location of human remains is no longer enough evidence to establish cultural affiliation with a modern tribe).

94. 367 F.3d 864, 866 (9th Cir. 2004).

95. *Id.* at 869.

96. *Id.* at 882.

97. Tsosie, *supra* note 80, at 599.

that Kennewick Man is indeed genetically related to modern Native Americans.[98]

Thus, NAGPRA and ARPA can actually disrupt the very Indian culture that the statutes are supposed to protect. First, the disruption of tribes' historical geographies and the NAGPRA presumption of returning unidentified human remains to the current landowning tribe can actually prevent human remains from being repatriated to the proper ancestral tribe. Second, the great discretion of tribes to approve excavation and study permits under NAGPRA and ARPA can inhibit legitimate scientific and anthropological study that could perhaps further proper repatriation efforts.

IV. ESTABLISHING GREATER HORIZONTAL CONTROL OVER NATIVE CULTURE

As previously discussed, the implementation of both IACA and NAGPRA inadvertently allow particular, and often random, Native American tribes to wield considerable control over other Indians, tribes, and segments of the academic community for the purposes of determining Indian identity and ownership of cultural resources. Thus, tribes with less economic or political power can find themselves in the uncomfortable position of having other Indian groups resolving cultural questions for them. The following sections suggest some solutions to this problem and offer safeguards to prevent more powerful Native American tribes from imposing "cultural hegemony" over less prominent groups.

A. RESOLVING THE IACA INDIAN IDENTITY PROBLEM

As previously mentioned, IACA, despite its unusually broad definition of "Indian," leaves many genuine Indian artisans by the wayside and places sole authority over certification of non-member artisans in the hands of recognized tribes.[99] Additionally, the ongoing Kachina doll feud, between the Hopi and the Navajo, exposes the risk of Indian tribes illegitimately manufacturing the handicrafts of other tribes.[100] Although some of these issues could be resolved by retailoring the statute's definition of "Indian," some commentators have noted that it would be difficult to do so without

98. Carl Zimmer, *New DNA Results Show Kennewick Man Was Native American*, N.Y. TIMES (June 18, 2015), http://www.nytimes.com/2015/06/19/science/new-dna-results-show-kennewick-man-was-native-american.html?_r=0.

99. 25 U.S.C. § 305e(a)(3)(A)-(B) (Westlaw through Pub. L. No. 114-316).

100. Woltz, *supra* note 6, at 464-65.

treading on the inherent sovereign power of tribes to define and enforce their own standards of tribal membership.[101]

A mechanism that would allow for more inclusive certification of non-tribal Indian artisans would be an IACA Certification Board. Although this panel would be a government instrumentality, it would be pan-Indian and staffed entirely by members who are representative of the full breadth of North America's state and federally recognized tribes, rather than Bureau of Indian Affairs functionaries or other bureaucrats. Unenrolled Indian artisans could approach the comprehensive board for certification rather than a tribe in which the artisan would not necessarily be able—or want—to establish membership. Furthermore, such a board could also serve as a forum for Indian crafts disputes that arise between tribes, such as the Hopi and Navajo. Decisions of the board would be legally binding and thus allow tribes or individuals the ability to challenge them under the Administrative Procedure Act, thereby providing an avenue for otherwise unavailable relief.

IACA Indian certification is essentially a trademark.[102] However, simply relying on existing United States patent and trademark law to avoid the pitfalls of IACA would be to fundamentally disregard the distinct nature of the products that IACA protects. The Indian handicrafts safeguarded under the statute are more than mere commodities. Rather, they are living examples of Indian handicraft and artistic traditions. An IACA Certification Board would still protect the cultural integrity of these traditions while simultaneously providing a rational solution to the problems under the statute.

B. RESOLVING REPATRIATION DISPUTES UNDER NAGPRA

As previously explored in greater, the repatriation provisions under NAGRPA do not always produce desirable results for all tribes and competing scientific entities. The *Bonnichsen* decision demonstrates that the statute in its current form can produce absurd results, such as giving a finding by the Secretary of the Interior greater controlling weight than scientific data.[103] However, on the whole, NAGPRA accomplishes what Congress intended the statute to do: to protect Native American burial sites and establish a process for current tribes to obtain custody of remains

101. *Id*. at 496.

102. *Id*. at 447.

103. Renee M. Kosslak, *The Native American Graves Protection and Repatriation Act: The Death Knell for Scientific Study?*, 24 AM. IND. L. REV. 129, 149 (2000).

discovered or held by museums.[104] Regardless of its general efficacy, the statute could be tweaked slightly in order to better hone its purpose and corresponding results.

First, NAGPRA and its implementing regulations should be revised to place a primary presumption on the geographically historic tribe—rather than the current landowning tribe—for repatriation purposes when human remains are discovered on tribal or federal lands. As previously discussed, the history of Native Americans in the United States often makes it difficult to establish cultural affiliation between human remains and a current Indian tribe.[105] The current NAGPRA regime requires archaeologists or government actors that discover human remains to consult with the landowning tribe rather than the historically present tribe.[106] Because many current tribes no longer reside on their ancestral lands, the current NAGPRA presumption should be reversed to require consultation with historical tribes *first*, and then the current tribes *second*. Thus, even if the culturally affiliated historical tribe cannot be located, the human remains will at least receive proper care at the hands of another Native American group rather than falling into the hands of a museum or researcher, and thereby, defeating NAGPRA's purpose. This alteration would ensure that tribes experiencing geographic and cultural disruption at the hands of the United States government would still be able to repatriate remains even though they may now only occupy small, distant tracts of non-ancestral land.

Second, NAGPRA and its regulations should be implemented to allow for a balancing test between scientific study and cultural repatriation in exceptional cases, such as that of Kennewick Man. Under the current regime, scientists may only study human remains under an ARPA permit when NAGPRA does not apply, essentially preventing researchers from conducting any work on the history of North America's indigenous peoples.[107] In fact, many archaeologists advocate for a change to the law where the scientific community would have equal bargaining power with Native American tribes in regard to the study of human remains.[108]

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104. *See generally NAGPRA at 10: A Critique*, MUSEUM NEWS 43–49, 67–75 (2000), http://www.academia.edu/3158470/NAGPRA_at_10_Examining_a_decade_of_the_Native_American_Graves_Protection_and_Repatriation_Act (providing a series of viewpoints evaluating NAGPRA's successes and shortcomings ten years following the statute's enactment).

105. Hibbert, *supra* note 71, at 437.

106. Painter-Thorne, *supra* note 87, at 1288.

107. Yasaitis, *supra* note 72, at 283; *see also* Kosslak, *supra* note 103, at 131–32 (noting that NAGPRA may have the practical effect of discouraging legitimate scientific study, even though that was not the statute's purpose).

108. Hibbert, *supra* note 71, at 438.

Furthermore, some commentators have argued for a "testing exception" to NAGPRA in those cases where it is clear that substantial scientific knowledge will be gained through study of the remains.[109] Accordingly, NAGPRA, or its regulations, should be amended to allow for such a process. In those exceptional and rare situations where it is clear than an archaeological discovery of human remains will yield significant scientific knowledge, a federal court could impose guidelines for a limited study under the oversight of the culturally affiliated tribe. At the conclusion of the study, the remains would be returned to the culturally affiliated Native American group for ceremonial reburial. Thus, should the future unearth another Kennewick Man, NAGPRA will be able to accommodate the interests of all parties.

V. CONCLUSION

Congress enacted both IACA and NAGPRA to better protect Native American culture and give Indian tribes greater control over their own cultural output. However, in some circumstances, both statutes have actually alienated legitimate members of the Indian community and allowed particular tribes to assert greater authority over pan-Indian culture. Simple revisions of both IACA and NAGPRA would allow for greater cultural autonomy for Native American groups nationwide and encourage cultural exchange between Indians and non-native communities. Although such revisions would ultimately benefit many Native Americans, the power to make such changes remains in Congress and the Department of the Interior. Doing so, however, would greatly benefit many Native American tribes and unaffiliated American Indians.

109. Kosslak, *supra* note 103, at 151.