

2019

The Indigenous McClain Doctrine: A New Legal Tool to Protect Cultural Patrimony and the Right to Self-Determination

Matthew H. Birkhold

Moritz College of Law, Ohio State University

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [Cultural Heritage Law Commons](#), [Indigenous, Indian, and Aboriginal Law Commons](#), [Jurisprudence Commons](#), [Law and Race Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Matthew H. Birkhold, *The Indigenous McClain Doctrine: A New Legal Tool to Protect Cultural Patrimony and the Right to Self-Determination*, 97 WASH. U. L. REV. 113 (2019).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol97/iss1/7

This Article is brought to you for free and open access by Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

THE INDIGENOUS MCCLAIN DOCTRINE: A NEW LEGAL TOOL TO PROTECT CULTURAL PATRIMONY AND THE RIGHT TO SELF- DETERMINATION

MATTHEW H. BIRK HOLD*

ABSTRACT

In December 2010, the United States endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which obligates the United States to respect indigenous self-determination and protect Native American cultural objects. Yet, nearly a decade later, the United States has made little progress to meet these commitments, resulting in growing frustration in the indigenous and international human rights communities. At its 2017 meeting on the implementation of UNDRIP, the U.N. expert group condemned the United States for its inaction. But the failure to act is not the result of indifference. Current U.S. law makes it impossible for the United States to satisfy its human rights obligations.

This Article identifies a paradoxical conflict resulting from the dual obligation imposed by UNDRIP: the current statutory scheme for protecting indigenous cultural property in America (NAGPRA) actually undermines tribal self-determination. By carefully analyzing NAGPRA case law, this article shows that non-indigenous judges, lawyers, and defendants identify what constitutes Native Americans' cultural property. Tribal law represents the ideal legal scheme for respecting self-determination, but tribal criminal law cannot be extended over non-Indians, making it an ineffectual safeguard of cultural heritage. The seeming irreconcilability of these two goals amounts to the "indigenous cultural patrimony problem." Can a law effectively protect Native American cultural patrimony while simultaneously respecting the right of indigenous peoples to exercise cultural self-determination?

This article offers an innovative solution by applying art law jurisprudence to Federal Indian law. Specifically, this article argues that the paradox can be resolved by utilizing the legal instrument deployed to address stolen foreign cultural property (the McClain doctrine) in the

* Assistant Professor of Law, Moritz College of Law, Ohio State University; former attorney-adviser, Office of the Legal Adviser, U.S. Department of State. My especial thanks to John Borrows and Larry Rosen.

domestic context. This Article proposes a new legal tool: the “indigenous McClain doctrine,” which effectively extends criminal tribal jurisdiction over non-Indians in cases involving stolen Native American cultural property, thereby resolving the conflict and meeting America’s obligations under UNDRIP. Importantly, this article demonstrates that the “indigenous McClain doctrine” faces no jurisprudential bar—despite the prohibition of extending tribal criminal law to non-Indians—and it makes recommendations on how to achieve its implementation.

TABLE OF CONTENTS

INTRODUCTION.....	115
I. AMERICA’S DUAL COMMITMENT TO INDIGENOUS PEOPLES.....	119
II. NAGPRA.....	121
A. <i>Case Law</i>	125
1. <i>Corrow</i>	125
2. <i>Tidwell</i>	127
3. <i>Kramer</i>	128
B. <i>Shortcomings of NAGPRA</i>	129
1. <i>NAGPRA Frustrates the Free Exercise of Cultural Self-</i> <i>Determination</i>	130
2. <i>NAGPRA Does Not Dependably Protect Indigenous Cultural</i> <i>Property</i>	134
III. A TRIBAL LAW APPROACH	138
IV. THE MCCLAIN DOCTRINE	145
A. <i>The National Stolen Property Act</i>	145
B. <i>Cultural Property Case Law and the McClain Doctrine</i>	147
1. <i>Hollinshead</i>	147
2. <i>McClain</i>	148
3. <i>Schultz</i>	152
V. THE INDIGENOUS MCCLAIN DOCTRINE: SOLVING THE INDIGENOUS CULTURAL PATRIMONY PROBLEM	155
A. <i>The Solution</i>	156
B. <i>Full Respect for Cultural Self-Determination</i>	157
C. <i>Equal Value for Native American and Foreign Cultures</i>	158
D. <i>No Jurisprudential Bar</i>	159
NEXT STEPS AND CONCLUSION	162

INTRODUCTION

The United States is not fulfilling its obligations under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹ In particular, since endorsing the groundbreaking human rights Declaration in 2010, the United States has failed to adequately protect Native American cultural objects and respect Native Americans’ right to self-determination. These shortcomings have recently been the subject of frustrated discussion at the United Nations. The U.N. expert group, convened in January 2017 to assess the implementation of UNDRIP,

1. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

described the United States' "reluctan[ce] to make a high-level commitment to indigenous rights instruments."² The United States' unwillingness, though, is not the result of indifference, but rather the consequence of a legal conundrum: the current federal statutory scheme safeguarding indigenous cultural objects actually undermines self-determination, and the laws that would best respect self-determination would prove ineffective safeguards of these objects.³ This Article offers a solution. Without requiring new legislation or statutes, this Article provides a path for the United States to easily comply with UNDRIP and realize its ostensibly opposed obligations.

The United States has long been a champion of cultural objects, helping to prevent their looting, regulate their flow, and curb the adverse consequences of their illicit trafficking.⁴ As a robust marketplace for

2. Permanent Forum on Indigenous Issues, Rep. of the International Expert Group Meeting on the Theme "Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: The Role of the Permanent Forum on Indigenous Issues and Other Indigenous-Specific Mechanisms (Article 42)," ¶ 14, U.N. Doc. E/C.19/2017/10 (Feb. 13, 2017).

3. The term "cultural objects" is used in this article as a synonym of "cultural property" and "cultural patrimony." Although the different terms are often used to connote different political positions, the subject matter to which they refer is largely the same. See Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 380 n.14 (1995). The 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property defines cultural property as:

(a) [r]are collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered, (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand . . . ; (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest . . . ; (i) postage, revenue and similar stamps, singly or in collections; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments.

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO 1970].

4. The problems stemming from the illicit trade in cultural property can be divided into three broad categories: scientific and archaeological; matters of national identity; and economic. Looting has the potential to destroy both the cultural object and the historical information about it. The connection between looting and the destruction of cultural property was established as early as 1969 by Clemency Coggins, who argued that the trade in illicit art caused the loss of vital historical and archaeological data when cultural artifacts are hastily removed from their original locations. See Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94, 94 (1969) (investigating the decontextualization of Pre-Columbian artifacts). Because "the art of a society is both a manifestation and a mirror of its culture," trafficking in cultural property can also threaten a state's national identity. Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 304 (1982). The

foreign cultural objects,⁵ the United States has developed several legal mechanisms for dealing with stolen cultural objects imported into the country, including the Convention on Cultural Property Implementation Act (CPIA)⁶ and the National Stolen Property Act (NSPA).⁷ But less congressional and scholarly attention has been devoted to America's position as a "source nation," rich in Native American cultural objects.⁸ Like cultural artifacts abroad, Native American objects are subject to destructive plundering and trade. And there is little doubt that these objects are as priceless as those trafficked from abroad.

Following years of an "apathetic posture" toward controlling its own indigenous cultural property, the United States is now committed to protecting its domestic cultural heritage.⁹ The United States' affirmation of

Preamble to UNESCO 1970 also documents this connection: "Considering that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting." UNESCO 1970, *supra* note 3, at 232. Other scholars, conversely, consider cultural property as the supranational heritage of all humankind, holding that the illicit trafficking and destruction of cultural objects harms not just a nation, but humankind more generally. For a description of the two ways of thinking, see generally John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986). The third harm resulting from the illicit trade in cultural objects is economic. After the illicit trade in drugs and illegal arms, the illegal trade in cultural objects represents the third most profitable illicit trade in the world. Janene Marie Podesta, Note, *Saving Culture, but Passing the Buck: How the 1970 UNESCO Convention Undermines Its Goals by Unduly Targeting Market Nations*, 16 CARDOZO J. INT'L & COMP. L. 457, 461, 461 n.15 (2008). The \$6 billion dollar trade exploits artifact-rich source nations and undermines legitimate attempts to regulate the art trade. See, e.g., Graham Green, Recent Development, *Evaluating the Application of the National Stolen Property Act to Art Trafficking Cases*, 44 HARV. J. ON LEGIS. 251, 252-53 (2007).

5. See, e.g., Andrea Cuning, *U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property & Destructive Aspects of Retention Schemes*, 26 HOUS. J. INT'L L. 449, 455 (2004); Kimberly L. Alderman, *Ethical Issues in Cultural Property Law Pertaining to Indigenous Peoples*, 45 IDAHO L. REV. 515, 520 (2009).

6. 19 U.S.C. §§ 2601-2613 (2012). The CPIA implements U.S. treaty obligations under the 1970 UNESCO Convention. UNESCO 1970, *supra* note 3; James A.R. Nafziger, *The Protection and Repatriation of Indigenous Cultural Heritage in the United States*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 175, 179 (2006).

7. 18 U.S.C. §§ 2314-2315 (2012).

8. John Henry Merryman coins the terms "source nation" and "market nation" in the cultural patrimony context in *Two Ways of Thinking About Cultural Property*. Merryman, *supra* note 4, at 832 ("In source nations, the supply of desirable cultural property exceeds the internal demand. Nations like Mexico, Egypt, Greece and India are obvious examples. They are rich in cultural artifacts beyond any conceivable local use. In market nations, the demand exceeds the supply. France, Germany, Japan, the Scandinavian nations, Switzerland and the United States are examples. Demand in the market nation encourages export from source nations. When, as is often (but not always) the case, the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property." (citations omitted)).

9. Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 64 (1993). The Antiquities Act of 1906 was the first regulation of cultural property in the United States. *Id.* Together with the Historic Sites Act of 1935 and the National Historic Preservation Act of 1966, the Antiquities Act established the early framework for domestic cultural property protection. *Id.* at 68-70; see also 1 LYNDAL V. PROTT & PATRICK J. O'KEEFE, LAW AND THE CULTURAL HERITAGE: DISCOVERY AND EXCAVATION 65 (1984). The Archaeological Resources

UNDRIP has obligated the United States to rethink its laws governing Native Americans and their cultural heritage to fully respect the right to self-determination.¹⁰ To do so requires lawmakers and judges to allow indigenous communities to define what items constitute their cultural patrimony. Such a decision made outside the group wrongly circumscribes this right. As the United States redoubles its commitment to safeguarding indigenous cultural property, this Article looks to the legal mechanisms developed in response to international looting to meet the seemingly paradoxical goals articulated in UNDRIP.

Part I of this Article briefly summarizes the importance of cultural property and the decisive role its protection plays in respecting indigenous rights. This Part identifies America's dual commitment to Native Americans: protecting their cultural objects and respecting their self-determination. Part II analyzes the current legal framework safeguarding indigenous cultural property in America, focusing on the Native American Graves Protection and Repatriation Act (NAGPRA).¹¹ This Part also explains why the current statutory scheme fails to satisfy America's new policy goals concerning the protection of indigenous rights. The harms are not theoretical. Although tribes "win" under NAGPRA, they ultimately lose because they must surrender their cultural sovereignty to prevail in court. Part III next discusses tribal law as the ideal legal scheme for meeting these goals. Expounding the difficulties associated with adopting such a framework, this part questions whether there is a solution to what this article dubs the "indigenous cultural patrimony problem." Can a law effectively protect Native American cultural patrimony while simultaneously respecting the right of indigenous peoples to exercise cultural self-determination?

Through the development of the so-called "indigenous McClain doctrine," this Article argues that such a legal instrument is both conceivable and implementable. More broadly, this Article demonstrates that it is possible to pass effective legislation advancing Native American self-determination that is consistent with broader U.S. policy goals. After turning to the NSPA and the McClain doctrine in Part IV, Part V contemplates the possibility of applying the legal instrument used to deal with stolen foreign cultural property to the domestic context, highlighting the favorability of such an approach. Finally, potential difficulties and

Protection Act of 1979 further strengthened internal regulations of cultural property. Phelan, *supra* note 9, at 75. The National Museum of the American Indian Act of 1989 was a precursor to NAGPRA. Nafziger, *supra* note 6, at 179. More recently, additional protection has been realized through NAGPRA and the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101–2106 (1994). See, e.g., Nafziger, *supra* note 6, at 177–80.

10. See *infra* Part I.

11. 25 U.S.C. §§ 3001–3013 (2006).

recommendations are explored in the Article's conclusion, offering a new way of both protecting indigenous cultural property and meeting the goals of UNDRIP.

I. AMERICA'S DUAL COMMITMENT TO INDIGENOUS PEOPLES

By endorsing UNDRIP in December 2010, the United States assumed a new set of goals relating to Native Americans and indigenous cultural property.¹² Although the Declaration is not a legally-binding instrument under international law, as an official United Nations statement, it carries considerable moral and political force meant to guide signatories' domestic policies.¹³ In forty-six articles, the Declaration enumerates the rights of indigenous peoples and sets an agenda for the United States to "design a reasonable approach to a progressive realization of the duties and responsibilities in it."¹⁴ Consequently, current and future laws concerning Native Americans should be measured against the rights outlined in UNDRIP; if they fail to satisfy the requirements of the Declaration, they should be accordingly adjusted.¹⁵ Nevertheless, over the past six years, the United States has not satisfied its responsibilities. This Part briefly outlines the dual obligations the United States assumed by endorsing UNDRIP.

An important right outlined by UNDRIP in Article 3 is the right of indigenous peoples to self-determination, by virtue of which they may "freely determine their political status and freely pursue their economic, social and cultural development."¹⁶ Article 4 affirms that part of exercising self-determination includes the right to autonomy or free government.¹⁷ Notably, the right to self-determination is linked to the free development of indigenous culture, including the "right to maintain, protect and develop

12. *President Obama Announces U.S. Support for United Nations Declaration on the Rights of Indigenous Peoples*, NAT'L CONGRESS AM. INDIANS (Dec. 16, 2010), <http://www.ncai.org/news/article/s/2010/12/16/president-obama-announces-u-s-support-for-united-nations-declaration-on-the-rights-of-indigenous-peoples> [https://perma.cc/F5NC-4N9D]; UNDRIP, *supra* note 1; see Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539, 546 (2009) (describing the history of the Declaration, its enactment, and remaining debates about its terms).

13. Coulter, *supra* note 12, at 546.

14. See Robert T. Coulter, *UN Declaration Sets New Agenda for US-Indian Relations*, INDIAN L. RESOURCE CTR. (Dec. 16, 2010), <http://www.indianlaw.org/undrip/un-declaration-sets-new-agenda-us-indian-relations> [https://perma.cc/3QY8-7V4Y].

15. The Declaration can be used as a guide and a measuring stick for laws that are now on the books and for laws that may be proposed. Does such a law measure up to the standards of the Declaration? Does the law or bill satisfy the requirements of the Declaration? It should. And if it does not, then it should be changed or discarded.

Coulter, *supra* note 12, at 552.

16. UNDRIP, *supra* note 1, art. 3.

17. *Id.* art. 4.

the past, present and future manifestations of [indigenous] culture[], such as archaeological and historical sites, [and] artefacts.”¹⁸ Article 31 explicitly establishes the right of indigenous peoples to “maintain, control, protect and develop their cultural heritage.”¹⁹ Read together, these provisions establish the right of indigenous peoples, through their self-government, to protect their cultural property as an exercise of self-determination, or the right to practice what can be termed cultural self-determination.²⁰ As part of this cultural self-determination, indigenous peoples may define what constitutes their cultural patrimony and may develop their own cultural protection laws, importantly, without the intervention of the State.²¹

Cultural patrimony is an important part of self-determination because cultural objects and cultural identity are tightly bound together.²² Cultural property is both a manifestation and a mirror of a society’s culture through which members shape their identities.²³ The control of cultural properties is accordingly crucial to the well-being of the community connected to the objects.²⁴ If others control the objects—or determine which objects are important or unimportant—the community in question is deprived of an essential part of its self-determination. When the international community first recognized the right to self-determination, the right was therefore not confined to allowing peoples to freely determine their political status “by and for themselves,” but was extended to cultural matters as well.²⁵ Recognizing self-determination also includes respecting the “right of peoples to choose their cultural system and freely pursue their cultural development.”²⁶ Each group has a right to its *own* cultural identity.²⁷

18. *Id.* art. 11(1).

19. *Id.* art. 31(1).

20. Angelique EagleWoman, *Cultural and Economic Self-Determination for Tribal Peoples in the United States Supported by the UN Declaration on the Rights of Indigenous Peoples*, 28 PACE ENVTL. L. REV. 357, 360 (2010) (describing cultural self-determination).

21. Lincoln L. Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, 68 MD. L. REV. 290, 369 (2009) (asserting that true self-determination means the ability to implement any mode of government without the interference of the federal government). Just as self-determination means that “indigenous peoples have the right to govern themselves, free from outside interference and control,” cultural self-determination would be similarly free from outside interference and control. Steven J. Gunn, *Introduction: Contemporary and Comparative Perspectives on the Rights of Indigenous Peoples*, 19 WASH. U. J.L. & POL’Y 155, 156 (2005).

22. DEREK GILLMAN, *THE IDEA OF CULTURAL HERITAGE* 47 (rev. ed. 2010).

23. See Bator, *supra* note 4, at 304.

24. This is considered “cultural nationalism” and is one of many ways of thinking about cultural property. See, e.g., Merryman, *supra* note 4, at 846.

25. Ana Filipa Vrdoljak, *Self-Determination and Cultural Rights*, in CULTURAL HUMAN RIGHTS 41, 53 (Francesco Francioni & Martin Scheinin eds., 2008) (citation omitted).

26. *Id.* at 54 (quoting Aureliu Cristescu (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, ¶ 83, U.N. Doc. E/CN.4/Sub.2/404/Rev. 1 (1981)).

This is particularly true for indigenous peoples, whose cultures have been systemically undermined by colonial powers. Many scholars consider cultural sovereignty “the bedrock of Native peoples’ self-determination.”²⁸ Others believe that self-determination constitutes not the ground but the “protective shell around tribal life and culture.”²⁹ The competing conceptions highlight how closely tribal self-determination and culture are intertwined. Erica-Irene Daes accounts for the strength of the connection between self-determination and cultural property for indigenous peoples by explaining that “[i]ndigenous peoples regard all products of the human mind and heart as interrelated, and as flowing from the same source: the relationships between the people and their land, [and] their kinship with the other living creatures that share the land.”³⁰ Unsurprisingly, then, UNDRIP crystallizes the right of indigenous groups to self-determination, including cultural self-determination.

The United States has made a dual commitment to indigenous peoples.³¹ To meet the standards outlined by the U.N. Declaration, the United States must both create effective protections of indigenous cultural patrimony and respect the right of indigenous people to cultural self-determination.³² The next Part will evaluate whether current U.S. laws respecting Native American rights and laws protecting Native American cultural objects satisfy these new requirements.

II. NAGPRA

This part will provide an overview of NAGPRA, the primary legal vehicle for protecting Native American cultural property in the United

27. This has been a long-established principle of the United Nations. *See, e.g.*, General Conference, *Draft Declaration on Race and Racial Prejudice*, ¶ 3(5), U.N. Doc. 20/C/18, annex (Sept. 25, 1978).

28. Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 209 (2001).

29. *See, e.g.*, Sarah Krakoff, *The Virtues and Vices of Sovereignty*, 38 CONN. L. REV. 797, 804–05 (2006).

30. ERICA-IRENE DAES, PROTECTION OF THE HERITAGE OF INDIGENOUS PEOPLE, at iii, U.N. Sales No. E.97.XIV.3 (1997).

31. The U.S. commitment to Native Americans stems not just from the recent affirmation of UNDRIP, but American jurisprudence as well. Today, the Court is a defender of Indian tribal rights, including the right to self-determination. As evidenced by *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court has acknowledged Native Americans’ “unique legal status,” *id.* at 546, and that the trust relationship is now fulfilled by promoting self-government, “turning over to the Indians a greater control of their own destinies.” *Id.* at 553. From the viewpoint of current U.S. case law, self-determination is therefore more than a shell protecting culture. Nevertheless, because of the continuous shifts in Federal Indian policy, discussed *infra* Part III, the commitment to respecting tribal self-determination is stronger if grounded in the U.N. Declaration rather than in a congressional act or Supreme Court decision. *See* discussion *infra* Part III.

32. The Declaration obligates signatory states to take “effective measures” to protect this self-determination, as well as the group’s cultural heritage. UNDRIP, *supra* note 1, art. 31(2).

States.³³ After discussing the criminal provisions of the statute, this Part will analyze the three principal trafficking cases litigated under NAGPRA, highlighting the shortcomings of the Act. By relying on practices that actually undermine tribal cultural self-determination, NAGPRA ultimately fails to respect indigenous rights and dependably safeguard Native American cultural property.

Since the landing of the Mayflower, pothunters, soldiers, museum officials, scientists, and government agents have collected Native American cultural objects and human remains for the sake of profit, science, and entertainment.³⁴ In response to these enduring abuses, Native Americans launched a collaborative national effort in 1986 to secure legislation for the protection of human remains and cultural artifacts and for their repatriation to Indian tribes.³⁵ The result, NAGPRA, was enacted by Congress in 1990 to “protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian and Native Hawaiian lands.”³⁶

To meet this goal, NAGPRA established three sets of provisions.³⁷ The first governs the discovery and excavation of Native American remains and cultural items on federal or tribal lands.³⁸ The second provision regulates the identification, consultation, inventory, and repatriation procedure for Native American remains and cultural items in the possession of federal agencies and federally-funded museums.³⁹ Finally, a third provision, “[t]ucked into the middle” of NAGPRA,⁴⁰ creates a new law criminalizing trafficking in Native American human remains and cultural items.⁴¹ To protect Native American objects from future plunder and marketing, NAGPRA proscribes “financially benefitting from a protected item, without the right of possession.”⁴² NAGPRA’s criminal provision thus prohibits “the knowing sale, purchase, use for profit, or

33. 25 U.S.C. §§ 3001–3013 (2006). Several other laws are also aimed at preventing the destruction of cultural objects, for example the Archaeological Resources Protection Act of 1979, Pub. L. No. 96–95, 93 Stat. 721 (codified as amended at 16 U.S.C. §§ 470aa–470mm (2012)). For a brief discussion of other acts and the development of NAGPRA, see Sherry Hutt, *Illegal Trafficking in Native American Human Remains and Cultural Items: A New Protection Tool*, 24 ARIZ. ST. L.J. 135, 136–42 (1992).

34. 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, 40 (1992).

35. *Id.* at 54–58.

36. H.R. REP. NO. 101-877, at 8 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4367.

37. See C. Timothy McKeown & Sherry Hutt, *In the Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act Twelve Years After*, 21 UCLA J. ENVTL. L. & POL’Y 153, 156 (2003).

38. 25 U.S.C. § 3002(a) (2012).

39. *Id.* §§ 3003–3005.

40. Hutt, *supra* note 33, at 135.

41. 18 U.S.C. § 1170 (2012).

42. Hutt, *supra* note 33, at 145, 150.

transportation for sale or profit of two categories of Native American objects—human remains and cultural items.”⁴³ This Article focuses on cultural items.

Under NAGPRA, “cultural items” include funerary objects,⁴⁴ sacred objects,⁴⁵ and cultural patrimony.⁴⁶ The Act defines “cultural patrimony” as an “object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself.”⁴⁷ The definition goes on to distinguish cultural patrimony from property that is owned by an individual Native American. Cultural patrimony, “therefore, cannot be alienated, appropriated, or conveyed by an individual regardless of whether . . . the individual is a member of the Indian tribe.”⁴⁸ Trafficking

43. Roberto Iraola, *A Primer on the Criminal Penalty Provisions of the Native American Graves Protection and Repatriation Act*, 28 AM. INDIAN L. REV. 431, 434–35 (2004) (footnote omitted). Hutt describes this as the “financial incident,” which places the burden on the prosecution to “prove some financial incident attendant to the violation.” Hutt, *supra* note 33, at 145. This requirement excludes museum and institutional transfers of Native American objects for study and allows private individuals to return items to the appropriate tribe without exposing them to criminal liability. As Hutt explains, “[t]he focus on financial motivation goes to the heart of NAGPRA” because the Act’s purpose is to protect burial sites and cultural objects from looting by curtailing market trading. *Id.*

44. Under NAGPRA, there are two classes of funerary objects. “Associated funerary objects” encompass:

[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.

25 U.S.C. § 3001(3)(A) (2012).

“Unassociated funerary objects” include:

[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, 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, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe.

Id. § 3001(3)(B).

45. “Sacred objects” are “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.” *Id.* § 3001(3)(C).

46. *Id.* § 3001(3)(D).

47. *Id.* Zuni War Gods and Confederacy Wampum Belts of the Iroquois are identified as examples of objects of cultural patrimony by federal regulations. 43 C.F.R. § 10.2(d)(4) (2018). Considered “communal tribal property . . . not to be displayed, traded, or sold,” Zuni War Gods are hand-carved wooden figures which “are considered vital to Zuni spiritual health.” ANDREW GULLIFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS 43–44 (2000). Wampum belts are “ritual objects of great spiritual significance” that often symbolize treaties between tribes and states or nations. ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800, at 51–52 (1997).

48. 25 U.S.C. § 3001(3)(D) (2012). To be considered cultural patrimony, the object must also “have been considered inalienable by such Native American group at the time the object was separated from such group.” *Id.*

in Native American cultural items is illegal where they have been obtained in violation of the Act, broadly covering items discovered on tribal or federal lands that are not turned over to their Native American owners, as well as objects obtained without the voluntary consent of the Native American group with the authority of alienation.⁴⁹

A first conviction for illegally trafficking in Native American cultural items is a misdemeanor punishable by up to one year in prison.⁵⁰ Subsequent offenses are felonies, carrying a sentence of up to five years in prison. For each misdemeanor offense, a violator may be fined up to \$100,000.⁵¹ Felony offense fines are set at up to \$250,000.⁵² As a general-intent crime, the offense of illegal trafficking in Native American cultural items requires that the defendant knowingly engaged in a financial activity, but does not require knowledge that the item at issue is protected under NAGPRA.⁵³ Importantly, while there must be a financial incident for a violation to occur, no specific financial or commercial value must be attached to the protected item to trigger NAGPRA's criminal provision.⁵⁴ It is also possible for tribes to file civil actions for violations of NAGPRA, but these are limited to objects already held by museums and not trafficking cases.⁵⁵

In its first twenty-five years, NAGPRA has successfully secured the return of hundreds of thousands of cultural objects.⁵⁶ Moreover, the criminal provision of NAGPRA has been productively used to prosecute illegal trafficking, helping to eliminate the profit incentive that motivates looters of Native American cultural items.⁵⁷ Although there have been

49. See SHERRY HUTT ET AL., HERITAGE RESOURCES LAW: PROTECTING THE ARCHAEOLOGICAL AND CULTURAL ENVIRONMENT 234, 237 (1999).

50. 18 U.S.C. § 1170 (2012). There is an exception for remains and objects "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." 25 U.S.C. § 3001(13) (2012).

51. 18 U.S.C. § 3571(b)(5) (2012).

52. *Id.* § 3571(b)(3). A corporation can be fined up to \$200,000 for a misdemeanor offense and up to \$500,000 for a felony offense. *Id.* § 3571(c)(3), (5).

53. Hutt, *supra* note 33, at 146. No profit needs to be realized in order to violate NAGPRA's trafficking provision, so long as the Native American items were transported for intended sale or profit. *Id.*

54. *Id.* at 142.

55. "Any museum that fails to comply with the requirements of this chapter may be assessed a civil penalty by the Secretary of the Interior pursuant to procedures established by the Secretary through regulation." 25 U.S.C. § 3007(a) (2012). The civil penalties, however, do not reach individuals trafficking in Native American cultural objects. See *id.*

56. Steven J. Gunn, *The Native American Graves Protection and Repatriation Act at Twenty: Reaching the Limits of Our National Consensus*, 36 WM. MITCHELL L. REV. 503, 506 (2010).

57. See Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation*, 25 J. LAND RESOURCES & ENVTL. L. 259, 278 (2005) (naming NAGPRA's criminal provision a "major tool . . . [in] the fight against the illegal trade in Native American remains and cultural items").

numerous prosecutions under NAGPRA,⁵⁸ there are only three reported appellate cases concerning NAGPRA's criminal provision under § 1170(b) for trafficking in cultural items.⁵⁹ Collectively, they have established the precedent that lower courts follow when deciding NAGPRA disputes. After briefly discussing the facts of each case, this Part will examine the grounds on which the courts concluded that the defendants had illegally trafficked in Native American cultural items. Analyzing the case history reveals two fundamental shortcomings with American domestic cultural property protection laws: NAGPRA does not provide a permanent protection for indigenous property, and NAGPRA does not fully respect Native Americans' right to cultural self-determination.

A. Case Law

1. Corrow

In *United States v. Corrow*,⁶⁰ the defendant challenged the constitutionality of NAGPRA's definition of "cultural patrimony."⁶¹ Corrow, a non-Indian artifacts collector knowledgeable about Navajo traditions and culture, was convicted for trafficking in protected Native American cultural items in violation of 18 U.S.C. § 1170(b) by purchasing ceremonial Navajo masks (Yei B'Chei),⁶² headdresses, and Navajo religious artifacts and subsequently attempting to sell them.⁶³ By explaining that he intended to deliver the masks to a young Navajo chanter, Corrow obtained the cultural items from the eighty-one-year-old widow of a Navajo *hataali* religious singer. Corrow then tried to sell the items to an undercover National Park Service ranger posing as a buyer in an elaborate sting operation.⁶⁴

58. For a discussion of NAGPRA litigation, see generally *id.* at 269–85.

59. See *United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999); *United States v. Kramer*, 168 F.3d 1196 (10th Cir. 1999); *United States v. Corrow*, 119 F.3d 796 (10th Cir. 1997). Several prosecutions under NAGPRA's criminal provision have also resulted in plea agreements. Sherry Hutt & C. Timothy McKeown, *Control of Cultural Property as Human Rights Law*, 31 ARIZ. ST. L.J. 363, 385 (1999).

60. 119 F.3d 796 (10th Cir. 1997).

61. 25 U.S.C. § 3001(3)(D) (2012).

62. As the court explains:

Yei B'Chei or Yei B'Chei *jish* are ceremonial adornments, Native American artifacts whose English label, "masks," fails to connote the Navajo perception these cultural items embody living gods. Traditionally, a *hataali* passes the Yei B'Chei to a family or clan member who has studied the ceremonies or loans the Yei B'Chei to another Navajo clan

Corrow, 119 F.3d at 798.

63. *United States v. Corrow*, 941 F. Supp. 1553, 1556 (D.N.M. 1996).

64. *Id.* Corrow was also convicted under the Migratory Bird Treaty Act for being in possession of protected feathers. *Id.* at 1557.

On appeal, the defendant argued that the definition of cultural patrimony under NAGPRA was unconstitutionally vague and challenged the sufficiency of the evidence supporting his conviction.⁶⁵ To meet the statutory definition of cultural patrimony, the government had to establish that the trafficked objects “(1) w[ere] not owned by an individual Native American; (2) . . . could not be alienated, appropriated, or conveyed by an individual; and (3) had an ongoing historical, traditional, or cultural importance central to the Native American group.”⁶⁶ Contending that the first and second elements of the definition were unintelligible, Corrow argued that his due process was violated because the statute had failed to give ordinary people notice about what conduct was prohibited.⁶⁷ In the district court case, Corrow also challenged the third element of the definition, arguing that “there was nothing unique about the[] Yei B’Chei.”⁶⁸

In response to the defendant’s argument that the conflicting evidence on the alienability of the Navajo items “sufficiently clouds the meaning of ‘cultural patrimony’ to render it unconstitutional,”⁶⁹ the court evaluated the vagueness challenge based on the facts of the case. At trial, a medicine man testified on behalf of Corrow, and an ordained *hataali* as well as a Navajo anthropologist testified for the government about the inalienability of the Yei B’Chei.⁷⁰ Despite the disparate views on alienability, the court dismissed Corrow’s void-for-vagueness challenge. Because Corrow was familiar with Navajo culture, and “would have been aware that various tribal members viewed ownership of property differently,”⁷¹ the court distinguished the defendant from an “unsuspecting tourist,” noting that Corrow had “some notice the Yei B’Chei he purchased were powerfully connected to Navajo religion and culture.”⁷² Admitting that “the parameters of the designation ‘cultural patrimony’ might be unclear in some of its applications and at its edges,” the court nevertheless held that the defendant had notice that the Native American objects were cultural patrimony, given the facts of the case.⁷³

65. *Corrow*, 119 F. 3d at 798. The defendant also argued that the court should read a scienter requirement into the Migratory Bird Treaty Act. *Id.*

66. *Id.* at 801 (referencing elements of 25 U.S.C. §3001(3)(D)).

67. *Id.* This would not discourage the law’s arbitrary and discriminatory enforcement, according to the defendant. *Id.*

68. *Id.* at 801 n.6 (noting that Corrow dropped his argument about the cultural importance of the Native American items, targeting instead the question of alienability).

69. *Id.* at 802.

70. *Id.* at 801.

71. *Id.* at 803 (quoting *United States v. Corrow*, 941 F. Supp. 1553, 1561 (D.N.M. 1996)).

72. *Id.*

73. *Id.* at 803, 804. The court also noted that the notice must be “reasonably obtainable,” not necessarily actual. *Id.* at 804 (quoting *United States v. Vasarajs*, 908 F.2d 443, 449 (9th Cir. 1990)).

After settling the issue of notice, the court considered whether the law was arbitrarily or discriminatorily applied.⁷⁴ In so doing, the court examined the process followed by law enforcement personnel to determine whether the Native American items constituted cultural patrimony. In *United States v. Corrow*, a Department of the Interior National Park Service officer, Phillip Young, undertook several steps to verify the importance of the Yei B'Chei to the Navajo before concluding that the objects were cultural patrimony. Young "examined a photograph of the Yei B'Chei and discussed their significance with other knowledgeable Park Service officers."⁷⁵ Additionally, Young consulted "representatives of the Navajo Nation."⁷⁶ Because the statute prompted the law enforcement officer to interview several sources before deciding that the items had "ongoing historical, cultural, or traditional importance" to the Native American tribe, the Tenth Circuit agreed with the district court that the definition of "cultural patrimony" sufficiently prevented the arbitrary and discriminatory application of the law.⁷⁷ Holding that "a rational jury could find beyond a reasonable doubt the Yei B'Chei are cultural patrimony which Mr. Corrow could not resell for profit," the court affirmed Corrow's conviction for illegal trafficking under NAGPRA.⁷⁸

2. *Tidwell*

The second case also concerns a vagueness challenge to NAGPRA's trafficking provision, centering again on the definition of cultural patrimony.⁷⁹ In *United States v. Tidwell*, the defendant appealed from his jury conviction of seven counts of illegal trafficking in Native American cultural items under 18 U.S.C. § 1170.⁸⁰ In an undercover investigation, a Bureau of Indian Affairs agent purchased Native American items from Tidwell, including eleven Hopi masks, known as Kwaatsi or Kachina, and priest robes from the Pueblo of Acoma.⁸¹ At trial, the government introduced expert witnesses on Native American culture who testified that the items at issue were prohibited from being sold under NAGPRA.⁸² Tidwell, in defense, introduced Native Americans who testified that the

74. *Id.* at 804.

75. *Id.*

76. *Id.*

77. *Id.* at 804–05.

78. *Id.* at 805.

79. *United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999).

80. The defendant was also convicted of "conspiracy under 18 U.S.C. § 371, . . . eleven counts of theft of tribal property under 18 U.S.C. § 1163, and one count of trafficking in unlawfully removed archaeological resources under 16 U.S.C. § 470ee." *Id.* at 979.

81. *Id.*

82. *Id.*

masks were inauthentic and were not cultural items protected by NAGPRA.⁸³ Like Corrow, Tidwell challenged the definition of “cultural patrimony” as vague, but focused on the second and third elements: an object’s “inalienability” and its “ongoing historical, traditional, or cultural importance” to a Native American group.⁸⁴ Tidwell maintained that he did not have fair notice that his conduct was proscribed by NAGPRA because the key terms were defined by Native Americans, whose law regarding cultural patrimony was unwritten, rendering fair notice impossible.⁸⁵ Echoing Corrow, Tidwell also pointed to the conflicting evidence of the objects’ status as cultural property as proof of the uncertainty of the law.⁸⁶

Adopting the reasoning of the Tenth Circuit in *Corrow*, the court emphasized Tidwell’s position as a dealer in Native American art, holding that “he had sufficient understanding of Native American art and the NAGPRA to know that he would have to inquire further or consult an expert when he purchased the items.”⁸⁷ Further relying on *Corrow*, the court also held that NAGPRA does not promote arbitrary application because law enforcement officials must undertake consultations about an item’s cultural patrimony status before investigating and arresting a subject.⁸⁸ The court, therefore, rejected the defendant’s vagueness challenge and affirmed his convictions as supported by sufficient evidence.⁸⁹

3. *Kramer*

In *United States v. Kramer*, the defendant challenged the denial of his motion to withdraw his guilty plea to illegally trafficking in Native American cultural items in violation of 18 U.S.C. § 1170(b).⁹⁰ Before the Tenth Circuit Court of Appeals, Kramer argued that his initial guilty plea was involuntary, based on extreme illness and ineffective counsel.⁹¹ For over twenty years, defendant Kramer profitably sold Native American items, but in 1996, Kramer was charged with multiple offenses for attempting to sell a tablita, a prayer stick containing bird feathers, and a sun disk.⁹² In the court’s estimation, “[a]ll three items were considered

83. *Id.*

84. *Id.* at 980. For the NAGPRA definition of cultural property, see *supra* notes 44–49 and accompanying text.

85. *Tidwell*, 191 F.3d at 980.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 982.

90. *United States v. Kramer*, 168 F.3d 1196 (10th Cir. 1999).

91. *Id.* at 1198.

92. *Id.*

religious and cultural objects bearing significant ritual status.”⁹³ On appeal, Kramer claimed that his attorney failed to investigate whether the items were actually “cultural patrimony,” as defined in 25 U.S.C. § 3001(3)(D).⁹⁴ Based on his counsel’s ineffectiveness at trial, Kramer argued that his plea was involuntary.⁹⁵ The court, however, held that it would have been “fruitless” for counsel to have claimed that the items were not cultural patrimony.⁹⁶ The ruling was based primarily on the defendant’s failure to dispute the items’ patrimony status in response to the court’s inquiry at the plea hearing.⁹⁷

The court made special note that Kramer actually corrected the court on this count. Reviewing the procedural history, the Tenth Circuit explained that, when the district court originally asked the defendant whether the items he offered for sale were sacred objects, “Kramer corrected the court by responding, ‘Patrimony items, as opposed to sacred, I believe.’”⁹⁸

Secondarily, the court based its decision on the readiness of tribal witnesses to testify that the items were considered inalienable objects.⁹⁹ In light of the evidence available, and the defendant’s correction of the objects’ status, the court held that Kramer’s guilty plea was voluntary and that the disputed items constituted cultural patrimony protected by NAGPRA.¹⁰⁰

B. Shortcomings of NAGPRA

As the three reported appellate decisions indicate, NAGPRA has met its initial goal of creating an effective legal sanction to dissuade and punish commercially motivated looters through its criminal trafficking provision.¹⁰¹ That success, however, is largely limited to prosecuting knowledgeable dealers trafficking in Native American cultural objects.

93. *Id.*

94. *Id.* at 1201.

95. *Id.* at 1200. Kramer also argued that the district court lacked subject matter jurisdiction, maintaining that NAGPRA was established to facilitate the return of cultural objects from agencies and museums, not individuals. *Id.* at 1201. Citing *Corrow* and NAGPRA’s legislative history, the Tenth Circuit rejected the jurisdictional claim, holding that the criminal provision to which Kramer plead guilty encompasses violations by individual traders such as the defendant. *Id.* at 1201–02.

96. *Id.* at 1201.

97. *Id.*

98. *Id.* at 1201 n.3.

99. *Id.* at 1201. And, thirdly, on the lack of evidence supporting Kramer’s assertion that the items were not communally owned. *Id.*

100. *Id.* at 1201–02.

101. See *supra* Parts II.A.1–3. This was the same motivation driving the passage of the Archaeological Resources Protection Act in 1979. See PROTTE & O’KEEFE, *supra* note 9, at 64. Other scholars, conversely, believe that NAGPRA’s criminal provision needs strengthening to curb the growing black market for Native American cultural objects. See, e.g., Suzan Shown Harjo, *Native Peoples’ Cultural and Human Rights: An Unfinished Agenda*, 24 ARIZ. ST. L.J. 321, 326 (1992).

With the recent endorsement of UNDRIP, the United States assumed new goals related to protecting indigenous cultural property. Today, regulating illegal trafficking is only one part of a multidimensional policy of respecting Native American rights. Laws designed to protect cultural objects must now also respect cultural self-determination. As applied, NAGPRA's criminal provision fails to fully respect indigenous rights on two counts: NAGPRA does not guarantee permanent protection of Native American cultural objects and NAGPRA actually undermines indigenous cultural self-determination.

1. NAGPRA Frustrates the Free Exercise of Cultural Self-Determination

In *Corrow*, the defendant challenged as unconstitutionally vague the first two elements of the statutory definition of cultural patrimony: that the Yei B'Chei he trafficked "(1) w[ere] not owned by an individual Native American; [and] (2) . . . could not be alienated, appropriated, or conveyed by an individual."¹⁰² To dismiss the vagueness challenge, the court had to determine whether the defendant was put on notice that his behavior was prohibited and decide whether the law was arbitrarily or discriminatorily applied.¹⁰³ In each determination, the court undercut the tribe's ability to exercise its cultural determination.

To evaluate whether *Corrow* had fair notice, the Tenth Circuit considered expert testimony from a variety of witnesses to determine whether the Yei B'Chei were inalienable and communally owned.¹⁰⁴ An ordained Navajo *hataali* testified for the government that "the Yei B'Chei must remain within the four sacred mountains of the Navajo for they represented the 'heartbeat' of the Navajo people."¹⁰⁵ An anthropologist, Harry Walters, also testified for the government, declaring that there is "no such thing as ownership of medicine bundles and that these are viewed as

102. *United States v. Corrow*, 119 F.3d 796, 801 (10th Cir. 1997). These two elements are a part of NAGPRA's definition of "cultural patrimony" under 25 U.S.C. § 3001(3)(D).

103. *Corrow*, 119 F.3d at 803–05.

104. *Id.* at 801.

105. *Id.*

He stated, "This is my heartbeat, this is my life, this is my teaching. This causes me to behave right. It allows me to teach my children to behave. So it's a God-given gift to the Navajos and it has everything to do with the welfare and the health and wisdom." He explained the *hataali* is responsible for caring for the *jish*, restoring them in the event of exposure to the wrong people or places: "when they do come back we would have to use what we call a diagnosis to see what can be done and how we can treat them and bring them back to the respect that they should have." He explained the Navajo tradition of compensating a person who gives his Yei B'Chei to another chanter.

Id. at 801 n.8.

living entities.”¹⁰⁶ In support of Corrow, Jackson Gillis, a “medicine man from Monument Valley,” testified that Yei B’Chei may pass to the widow of the singer if clan relatives or other singers do not claim the masks.¹⁰⁷ Summarizing Gillis’s testimony, the court explained, “[i]f the widow feels uncomfortable keeping the [masks] . . . she has the right to sell them.”¹⁰⁸ Another Navajo witness for the defendant, Harrison Begay, similarly testified that the Yei B’Chei may be sold if the widow felt “uneasy about their remaining unused.”¹⁰⁹ Finally, Billy Yellow, another *hataali*, testified on behalf of Corrow, confirming the disposition of the Yei B’Chei described by the other witnesses.¹¹⁰ The conflicting evidence, marshaled by the defendant to support his void-for-vagueness argument, was characterized by the amicus curiae “as a conflict between orthodox and moderate Navajo religious views.”¹¹¹

In the discussion of whether NAGPRA was arbitrarily or discriminatorily applied, the court described the process of determining cultural affiliation, further highlighting the court’s intrusion on indigenous self-determination. According to the Tenth Circuit, a Park Service officer determined that the Yei B’Chei constitute cultural patrimony.¹¹² Following the sting operation that resulted in Corrow’s indictment, Young “examined a photograph of the Yei B’Chei and discussed their significance with other knowledgeable Park Service officers and representatives of the Navajo Nation.”¹¹³ Considering the evidence, Young “concluded that the Yei B’Chei were items having ‘ongoing historical, traditional or cultural importance’ to the Navajo people.”¹¹⁴ In addition to the officer’s consultations, the district court clarified that it is “apparent from the language of the statute that law enforcement personnel also must decide whether or not an item is property owned by an individual Native American because if it is the item is alienable.”¹¹⁵ Based on these two acts, the district court then concluded that “the statutory language of NAGPRA

106. *Id.* at 801.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* “The Antique Tribal Art Dealers Association, a trade organization promoting authenticity and ethical dealing in the sale of Native American artifacts, filed an amicus brief contending the government in this case ‘exploited a controversy between orthodox and moderate Navajo religious perspectives.’” *Id.* at 801 n.7.

112. *Id.* at 804.

113. *Id.* According to the district court, Young also discussed the Yei B’Chei with the undercover agent, James William Tanner, who had posed as a private collector; Dave Burgee, a retired Park Service curator and specialist in Navajo culture; and William Yazzie, a National Park Service law enforcement ranger. *United States v. Corrow*, 941 F. Supp. 1553, 1564 (D.N.M. 1996).

114. *Corrow*, 941 F. Supp. at 1564.

115. *Id.*

defining ‘cultural patrimony’ provides sufficient objective guidance to law enforcement personnel to avoid the likelihood of arbitrary enforcement.”¹¹⁶ Relying on the evidence presented at trial and the decisions of the Park Service agents, the Tenth Circuit ultimately held that “a rational jury could find beyond a reasonable doubt the Yei B’Chei are cultural patrimony which Mr. Corrow could not resell for profit.”¹¹⁷

As applied in *United States v. Corrow*, NAGPRA harmfully interferes with the ability of Native Americans to freely exercise their cultural self-determination. If self-determination encompasses the right to define what items constitute cultural patrimony, any decision about what can be considered cultural patrimony made from outside the group wrongly circumscribes that right. Here, the court acknowledged the internal dispute among the Navajo about whether the Yei B’Chei were inalienable.¹¹⁸ Accordingly, to respect cultural self-determination, the final decision about the objects’ status should have been with the group whose cultural patrimony was at stake. Instead, the court in *Corrow* made the decision about the objects’ cultural status. As the court noted, it was a Park Service officer who first “concluded” that the items in question were cultural patrimony.¹¹⁹ Determining cultural patrimony, therefore, is encompassed in the degree of police judgment the court finds acceptable. Based on this judgment and the conflicting expert testimony, the Tenth Circuit held that a jury could have properly weighed the evidence and reasonably found that the Yei B’Chei constituted cultural patrimony.¹²⁰ In so holding, the court not only upheld Corrow’s conviction, meaning the masks could not be trafficked under NAGPRA, but also decided that the Yei B’Chei constitute cultural patrimony, circumscribing the tribes’ free exercise of cultural self-determination in the process.

Although this outcome satisfies the obligation to protect indigenous cultural items, the means of securing the protection frustrate the goal of self-determination. Under UNDRIP the indigenous community itself should determine what constitutes its cultural property. To respect this right, instead of admitting the possibility that a rational jury could make the decision, the court should defer to the tribal body. After the tribe determines the status of the Yei B’Chei, the court could incorporate that decision into its ruling. Otherwise, the court is actively preventing the free

116. *Id.* (citing *United States v. Murphy*, 977 F.2d 503, 506 (10th Cir. 1992)) (“Effective law enforcement often ‘requires the exercise of some degree of police judgment.’”).

117. *Corrow*, 119 F.3d at 805.

118. *See supra* notes 104–11.

119. *Corrow*, 941 F. Supp. at 1564.

120. *Corrow*, 119 F.3d at 805.

exercise of cultural self-determination by making a ruling on the internal debate.

A similar impairment of cultural self-determination occurs in *United States v. Tidwell* and *United States v. Kramer*. In *Tidwell*, the government “introduced a number of experts on Native American religion and culture who testified that the masks and the robes were prohibited from being sold under the NAGPRA.”¹²¹ In his defense, Tidwell “introduced testimony of Native Americans who testified that the masks were . . . not the type of cultural item protected by the NAGPRA.”¹²² Although the Ninth Circuit does not discuss the witnesses’ tribal status, what is at stake from the perspective of cultural self-determination is the recognition of the internal dispute about the objects’ cultural status and who resolves the conflict. In the original trial, the jury found that Tidwell was guilty of illegal trafficking in Native American cultural items under 18 U.S.C. § 1170, signifying that it was the jury that ultimately decided that the Kwaatsi and robes at issue constituted cultural property.¹²³

Moreover, the court held that the evidence presented was sufficient to uphold Tidwell’s conviction.¹²⁴ By upholding the conviction, the Ninth Circuit suppressed indigenous peoples’ cultural self-determination in two ways. Like the Tenth Circuit in *Corrow*, the Ninth Circuit reaffirmed the position that where there is conflicting testimony about what constitutes cultural patrimony, the decision is left to the court and law enforcement officers. Furthermore, the Court in *Tidwell* ruled on what comprises sufficient evidence to make a decision about cultural patrimony. As a result, indigenous peoples lost the power to determine what constitutes their cultural patrimony and even lost the ability to evaluate the sufficiency of the evidence considered.

Even fewer details are discussed in *Kramer*.¹²⁵ Here, the Tenth Circuit affirmed the district court’s denial of Kramer’s motion to withdraw his guilty plea by looking to the facts surrounding Kramer’s original pleading.¹²⁶ Unlike the courts in *Corrow* and *Tidwell*, the court in *Kramer* refused to consider whether the items at issue constituted cultural patrimony, essentially holding that there is no way that the tablita, prayer stick, and sun disk could not be considered cultural patrimony.¹²⁷ Although upon first consideration this decision seemingly respects

121. *United States v. Tidwell*, 191 F.3d 976, 979 (9th Cir. 1999).

122. *Id.*

123. *Id.*

124. *Id.* at 982.

125. *United States v. Kramer*, 168 F.3d 1196 (10th Cir. 1999).

126. *Id.* at 1201–03.

127. Recall that the court held that it would have been “fruitless” for counsel to have claimed that the items were not cultural patrimony. *Id.* at 1201.

indigenous rights by offering broad protection of cultural objects, the court's ruling profoundly frustrates self-determination.

In *Kramer*, the basis for the court's decision was not the analysis of the Jemez tribal witnesses, who "would have testified that the items were authentic tribal cultural and religious items and were considered inalienable objects."¹²⁸ In fact, the tribal witnesses never testified at all. Instead, the court placed special emphasis on Kramer's own statement that objects were "[p]atrimony items, as opposed to sacred [objects]."¹²⁹ Focusing on Kramer's designation, the court determined that no discussion was necessary, accepting the objects as cultural patrimony. Consequently, the defendant defined what constituted the tribe's cultural patrimony. And by accepting his judgment, the court circumscribed the group's prerogative to exercise cultural self-determination guaranteed by UNDRIP.

To convict art dealers for illegally trafficking in Native American cultural objects, NAGPRA requires a finding that the items at issue are objects of cultural patrimony. Whether it is the court, jury, or even the defendant who pronounces that an object can be considered cultural patrimony, in making and accepting these decisions, the court frustrates the free exercise of cultural self-determination when it applies NAGPRA to criminal cases. If self-determination is to be respected, internal disputes about what constitutes cultural patrimony must be left up to the indigenous group from which the cultural objects derive. As applied, in its attempt to protect cultural objects, NAGPRA's criminal provision actually undermines cultural self-determination. A broader consideration of NAGPRA in light of Federal Indian law, however, reveals that even the goal of protecting cultural objects may not be fully met by NAGPRA.

2. *NAGPRA Does Not Dependably Protect Indigenous Cultural Property*

By failing to establish a permanent legal mechanism for protecting Native American cultural property, NAGPRA also falls short of meeting the cultural property protection goals outlined by UNDRIP, which obligates signatory states to take effective measures to protect the cultural objects of indigenous peoples.¹³⁰ Because NAGPRA can be revoked any

128. *Id.*

129. *Id.* at 1201 n.3.

130. UNDRIP, *supra* note 1, art. 31.

time under the congressional plenary power over Indian affairs, NAGPRA is not a dependable legal protection.¹³¹

As the Supreme Court noted in *Santa Clara Pueblo v. Martinez*, Congressional authority over Indian matters is “extraordinarily broad.”¹³² Based on the discovery doctrine, which left the aboriginal inhabitants of America with only a “right of occupancy,”¹³³ the United States assumed

131. *United States v. Kagama*, 118 U.S. 375, 379–80 (1886) (first acknowledgment of congressional plenary power); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903) (“We must presume that Congress acted in perfect good faith in the dealings with the Indians . . .”). In addition to the plenary power, NAGPRA may be undependable because of its potential vagueness. The first statute in the United States to regulate control of cultural property on federal lands was the Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225 (codified as amended at 16 U.S.C. § 433 (2012)). This act created penalties for destroying or damaging historic ruins on public lands, and prohibited the appropriation, destruction, or damage of any historic or prehistoric ruin or monument, or any object of antiquity on lands owned or controlled by the federal government. *Id.* Congress, however, failed to clearly define many of the key terms, including “object of antiquity.” In 1974, the Ninth Circuit Court of Appeals ruled the Antiquities Act unconstitutional in *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974). *Diaz* had “appropriated . . . masks found in a cave on the San Carlos Indian Reservation” that were identified as having recently been made by a medicine man. *Id.* at 114. Although the masks were used in religious ceremonies by the Apache Indians and never allowed off the reservations, *Diaz* found and removed the masks and was subsequently convicted for violating the Antiquities Act for appropriating objects of antiquities from government land. *Id.* at 113–14. At trial, an anthropologist testified that an “object of antiquity” includes objects “made just yesterday if [they] relate[] to religious or social traditions of long standing.” *Id.* at 114. On appeal, *Diaz* argued that the term “object of antiquity” is unclear, contending that the act should be void for vagueness. *See id.* The Ninth Circuit agreed, noting that the word “antiquity” may refer to both the age and use of the objects, which may not be common knowledge. *Id.* at 115. The court in *Diaz* explained that “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” *Id.* at 114 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). For a fuller history of the Antiquities Act, see generally Raymond Harris Thompson, “*An Old and Reliable Authority*”: Introduction, 42 J. SW. 191 (2000). The Ninth Circuit’s reasoning for finding the Antiquities Act unconstitutional closely parallels NAGPRA cases, which also contend that a key term, “cultural patrimony,” is not clearly defined. *See supra* Part II.A. Thus far, the void-for-vagueness challenges brought against NAGPRA have failed, in part because well-established dealers, knowledgeable in Native American culture, have been convicted, allowing the courts to rule that the defendants should have known better. *See supra* notes 71–73, 87 and accompanying text. If Native American objects were trafficked by non-experts and these “men of common intelligence” would have to guess at the meaning of the statute, however, it seems likely that such a void-for-vagueness argument could prevail along the lines of *Diaz*. 499 F.2d at 114 (quoting *Connally*, 269 U.S. at 391).

132. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978). As Struve observes, “[t]his view is doctrinally well-established but often criticized.” Catherine T. Struve, *Sovereign Litigants: Native American Nations in Court*, 55 VILL. L. REV. 929, 929 n.2 (2010).

133. *Johnson v. M’Intosh*, 21 U.S. 543, 585 (1823) (holding that it “has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it”).

exclusive federal power over the indigenous population,¹³⁴ a principle affirmed in the Constitution's Indian Commerce Clause.¹³⁵ Building on Marshall's conception of tribes as "domestic dependent nations" and "ward[s]" "in a state of pupillage,"¹³⁶ the Supreme Court recognized Congress's responsibility over the Indians in *United States v. Kagama*.¹³⁷ Because of "their . . . weakness and helplessness,"¹³⁸ the Court acknowledged that Indian tribes are "dependent on the United States."¹³⁹ From this arrangement, the United States assumed a trust relationship encompassing a duty of protection over the tribes, and therewith, the power to legislate.¹⁴⁰ The confirmation of this power substantiated the congressional plenary authority over the Indian nations.¹⁴¹ As a result, the courts will "presume that Congress acted in perfect good faith" and "exercised its best judgment" with regard to Indian affairs.¹⁴² Moreover, the judiciary "cannot question or inquire into the motives which prompted the enactment of [such] legislation."¹⁴³ This long-established power can seemingly be used without limitation,¹⁴⁴ and has been recently reaffirmed by the Supreme Court.¹⁴⁵

134. The right is exclusive both in relation to foreign nations and the states. As the Court noted in *Johnson v. M'Intosh*, discovery granted the "sole right of acquiring the soil from the natives, and establishing settlements upon it" at "[t]he exclusion of all other Europeans." 21 U.S. at 573. "The rights thus acquired being exclusive, no other power could interpose between them." *Id.* The federal government's authority is also exclusive insofar as states are excluded from interfering in Indian affairs. See *Worcester v. Georgia*, 31 U.S. 515, 570 (1832) ("The powers exclusively given to the federal government are limitations upon the state authorities."). This idea also applies to the states. *Id.* ("But, with the exception of these limitations, the states are supreme . . .").

135. "Congress shall have the power '[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.'" U.S. CONST. art. I, § 8, cl. 3. The Supreme Court held that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (citing *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974)).

136. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

137. 118 U.S. 375 (1886).

138. *Id.* at 384.

139. *Id.* (emphasis omitted).

140. From this relationship "there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." *Id.*

141. Robert B. Porter claims that "[t]hese decisions laid the groundwork for the development of the ultimate doctrinal tool of American colonialism—that the United States possesses '[p]lenary authority' over the Indian nations." Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 83 (2002) (citation omitted).

142. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903).

143. *Id.*

144. See *id.* at 565 (holding that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government").

145. The Supreme Court described congressional authority over Indian affairs as plenary and exclusive in *United States v. Lara*, 541 U.S. 193, 200 (2004), and *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470–71 (1979).

Given the broad authority of Congress under the plenary power, any legislative act concerning Native Americans can be reworked or revoked at any time, including NAGPRA.¹⁴⁶ The plenary power paradigm has facilitated the adoption and repeal of a variety of congressional acts. The General Allotment Act of 1887, designed to assimilate Native Americans and to “substitute white civilization for . . . tribal culture,”¹⁴⁷ was supplanted by termination legislation from 1951 to 1961, intended to end federal supervision of tribes and discontinue special programs to tribes.¹⁴⁸ More recently, a plethora of congressional acts have been enacted to support tribes by promoting self-determination and providing federal benefits.¹⁴⁹

There is no guarantee, however, that these acts will remain in place as viable protections of tribal self-determination. After all, the “regime of ‘plenary’ federal power over Indians has indeed spawned legislation detrimental to Indian self-determination.”¹⁵⁰ Nevertheless, it should be noted that congressional action has also done much on behalf of the tribes, including passing NAGPRA. The lack of fixity as a result of the plenary doctrine, however, leaves room for the statutory protection to be stronger.

The constant oscillation in U.S. policy toward Native Americans demonstrates both Congress’s broad authority and the relative instability

146. Robert T. Coulter describes the range of actions permissible under the plenary power: Thus, we have completely unconstitutional legal rules that permit Indian land to be taken by the government without any compensation or other legal restraint; rules that permit Congress to pass practically any law it wishes regarding Indians, their governments, and their property; rules that permit the United States to make treaties with Indian nations and then violate the treaties at will without any legal liability; even a rule that Congress can put Indian tribes out of existence at will, at any time, for any reason, or for no reason at all.

Coulter, *supra* note 12, at 541 (footnotes omitted).

147. *History of the Allotment Policy: Hearing on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 430 (1934) (statement of D. S. Otis).

148. See, e.g., Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151–54 (1977).

149. For example, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450f–450n (2012); Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901–1963 (2012); American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (2012); National Indian Forest Resources Management Act, 25 U.S.C. §§ 3101–3120 (2012); American Indian Agricultural Resource Management Act of 1993, 25 U.S.C. §§ 3701–3746 (2012); Indian Mineral Development Act, 25 U.S.C. §§ 2101–2108 (2012); Indian Tribal Justice Act, 25 U.S.C. §§ 3601–3631 (2012); Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. §§ 3651–3682 (2012); Indian Tribal Economic Development and Contract Encouragement Act of 2000, 25 U.S.C. § 81 (2012); Native American Business Development, Trade Promotion, and Tourism Act of 2000, 25 U.S.C. §§ 4301–4307 (2012); Native American Languages Act, 25 U.S.C. §§ 2901–2906 (2012); Indian Alcohol and Substance Abuse Prevention and Treatment Act, 25 U.S.C. §§ 2401–2478 (2012); Indian Health Care Improvement Act, 25 U.S.C. §§ 1601–1682 (2012); Indian Arts and Crafts Enforcement Act of 2000, 25 U.S.C. §§ 305–305e (2012).

150. Carole Goldberg-Ambrose, *Not “Strictly” Racial: A Response to “Indians as Peoples,”* 39 UCLA L. REV. 169, 176 (1991). For a discussion of the harmful legislation flowing from the plenary power and the vulnerability of Native American tribes to federal power, see *id.* at 176–80.

of policies articulated under the plenary power. Consequently, Justice Thomas's diagnosis, that "Federal Indian policy is, to say the least, schizophrenic," seems entirely accurate.¹⁵¹ Still today, Congress can "regulate virtually every aspect of the tribes," including laws governing cultural property.¹⁵² Native American cultural patrimony thus remains vulnerable to the federal plenary power. Accordingly, the current statutory scheme to regulate illegal trafficking in Native American cultural items provides only a weak protection for indigenous cultural property.¹⁵³

To best respect indigenous rights, a fixed legal framework needs to be implemented, free of Congress's plenary power. Additionally, to satisfy the heightened commitment to indigenous rights articulated in UNDRIP, this law must fully respect Native American's cultural self-determination. As it is currently applied, NAGPRA's criminal provision fails these objectives by providing an undependable legal mechanism for protecting indigenous cultural patrimony that undercuts tribal cultural self-determination in the process. Although these cases represent a "win" under the law, it comes at a high cost: the degradation of tribal cultural sovereignty. The next Part explores the best legal solution to meeting the goals of UNDRIP and correcting the shortcomings of NAGPRA.

III. A TRIBAL LAW APPROACH

Fully respecting the rights of indigenous peoples, including the right to cultural self-determination, requires recognizing and implementing tribal law.¹⁵⁴ Unlike NAGPRA, which incentivizes and relies on non-indigenous parties to make judgments about Native American cultural patrimony, tribal law rests on decisions made by the indigenous population itself about what constitutes its cultural property. Initially, this solution seems both obvious and easy to implement: UNDRIP, after all, recognizes the

151. *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring). He is really talking about the current embrace of both tribal sovereignty and the plenary power, which he considers antithetical interests and therefore a paradoxical stance. *See id.* at 217–19.

152. *Id.* at 215.

153. NAGPRA is also beset by other shortcomings that make it a potentially weak protection, including ownership terms, takings problems, and definitional issues. Many are discussed in 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, 127–31 (1993).

154. If a top-down scheme of defining Native Americans' own cultural heritage inevitably undermines the right of indigenous people to self-determination, the only satisfactory solution must come from the tribes themselves. Other scholars agree; even though most are thinking about intellectual property, the premise holds. "Finally, relying solely on top-down efforts to define indigenous peoples' own cultural heritage undermines indigenous peoples' rights to self-determination." Angela R. Riley, "Straight Stealing": *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 90 (2005) (citing Erica-Irene Daes, *Intellectual Property and Indigenous Peoples*, 95 AM. SOC'Y INT'L L. PROC. 143, 146 (2001)).

superior capacity of tribal law to justly adjudicate matters related to indigenous culture, and the United States even has the ideological framework to support a robust tribal law regime. A jurisdictional hurdle, however, obstructs the full implementation of tribal law necessary to make it an effective mechanism for protecting Native American cultural objects. After considering the advantages of embracing a tribal law approach to protecting indigenous cultural patrimony, this Part will analyze the contours of Federal Indian Law that help and hinder the realization of the tribal law solution.

Laws made from outside the tribe frustrate the free exercise of cultural self-determination by making decisions that should be left to indigenous peoples themselves.¹⁵⁵ Exogenous judgments about cultural patrimony are accepted under NAGPRA, in part, because the court-conceived alternative is inconceivable. As the New Mexico District Court put it in *Corrow*: the court must make decisions about cultural patrimony because “it would seem almost impossible to provide an exhaustive list of items that would have ‘ongoing historical, traditional and cultural importance’ to every Native American tribe.”¹⁵⁶

Given the cultural diversity of the 566 tribal entities recognized in the United States, compiling such a list under NAGPRA would be unfeasible.¹⁵⁷ Besides, such a statutory list would have the harmful side-effect of freezing a tribe’s cultural patrimony in time, further undermining the right of indigenous peoples to “maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature,” as UNDRIP guarantees.¹⁵⁸ As a result, under NAGPRA, the court must rely on law enforcement officers, jury members, and even defendants to weigh the available evidence and judge whether an object constitutes the cultural patrimony of the Native American group in question.

Conversely, a legal instrument for protecting cultural patrimony devised by the indigenous population itself would meet the goals of UNDRIP. Under a tribal law approach, each tribe could create a law vesting ownership of cultural patrimony in the tribe. The tribal law could also prohibit the trafficking in such items and even define their cultural patrimony based on the tribe’s unique cultural and preservation objectives. Such a “tribal cultural patrimony law” is perhaps the only legal

155. See discussion *supra* Part II.

156. *United States v. Corrow*, 941 F. Supp. 1553, 1564 (D.N.M. 1996).

157. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942 (Jan. 14, 2015).

158. UNDRIP, *supra* note 1, art. 11(1).

mechanism capable of protecting Native American cultural property that simultaneously respects the indigenous right to self-determination. In the end, as the expression of the fundamental beliefs of the tribal community, “[o]nly tribal law can reflect the culturally specific aspects of tribal life and allow for differences among various indigenous groups.”¹⁵⁹ Tribal law is unique because it reflects substantive legal principles inherent to the tribe and because it is embedded in the group’s cultural context, allowing for the creation of a law that respects the community’s values and beliefs.¹⁶⁰

Tribal law is also beneficially more nuanced than NAGPRA. Because each tribe could implement its own law, tribal law could fully enumerate what constitutes cultural patrimony for each tribe. Additionally, tribal law could be more easily updated to reflect changing community beliefs than a federal act. Tribes, after all, are in the best position to evaluate which objects have “ongoing historical, traditional or cultural importance” and to evaluate whether the laws designed to protect them effectively regulate illegal trafficking.¹⁶¹ Exercising tribal law also has the further benefit of “[e]mpowering indigenous peoples to control and direct their culture,” thereby “reinforc[ing] their status as independent, self-governing entities with political and cultural sovereignty and as stewards of their own destiny.”¹⁶² Embracing a tribal cultural patrimony law, therefore, would

159. Riley, *supra* note 154, at 86.

160. See *id.* at 90 (“Tribal law is drawn from a tribe’s traditional customary law, tribal belief systems, and other contemporary forms of tribal governance, including ordinances and tribal constitutions. It therefore reflects not only substantive legal principles, but also the cultural context from which they evolved. Through tribal law, indigenous governance of cultural property and traditional knowledge will correlate specifically to the works tribes seek to protect, allow for forms of punishment consistent with the community’s values, and properly incentivize behavior that is good for the community at large.” (citation omitted)).

161. *Id.* at 123 (“Tribes themselves are in the best position to determine whether laws designed to protect their intangible and tangible cultural property do, in fact, work effectively within the tribal context. As tribal laws are tested in the community, and possibly challenged in tribal courts, tribes gain valuable insight into the effectiveness of those laws. As international (and perhaps domestic) law advances toward the recognition and protection of indigenous peoples’ rights regarding cultural property, tribes that have tried and tested their laws will be able to speak to the ideal regime in terms of substance, scope, and content. These tribes will be in the best position to contribute to a new overarching legal system based on their knowledge and experience rather than hope and speculation.”).

162. *Id.* at 90, 120. There are more advantages, still, in Riley’s estimation:

Either way, a tribe will be well-served if it achieves consensus on its tribal law prior to the emergence of a dispute. This way, a tribe can come together as a community to determine the appropriate treatment of its most valuable resources before infringement occurs. This process could serve to unify tribal members and provide an opportunity for elders to share with others the historical and spiritual significance of the tribe’s cultural property. In addition, defined laws have the benefit of putting others—both members and nonmembers—on notice of applicable restrictions on the use of the tribe’s cultural property.

Id. at 122.

satisfy the self-determination and cultural protection goals outlined in UNDRIP.

Article 11 of UNDRIP makes this point clear: “States shall provide redress through effective mechanisms . . . with respect to [indigenous peoples’] cultural . . . property taken . . . in violation of their laws, traditions and customs.”¹⁶³ UNDRIP thus obligates signatory States to respect indigenous cultural patrimony laws.

At the outset, meeting this goal seems easy because the United States already has a jurisprudential framework that recognizes tribal law. Native American tribes retain all the attributes of sovereignty except for those governmental powers removed by treaty, federal statute, or by virtue of inconsistency with the tribes’ dependent status.¹⁶⁴ Part of this inherent sovereignty is “[t]he ability to define what constitutes ‘property’ and the ability to draw the boundaries between private and public . . . property.”¹⁶⁵ Accordingly, based on their retained inherent sovereignty, Native Americans have a recognized right to create their own property laws because this attribute of sovereignty has not been withdrawn.¹⁶⁶ Tribal laws may vest property interests in the tribe, allowing for the creation and enumeration of cultural patrimony, and may also criminalize trafficking in cultural patrimony.¹⁶⁷ In short, Federal Indian law allows for the creation of tribal cultural patrimony laws, the ideal legal instrument to fulfill the United States’ new policy goals.

Embracing a tribal law approach that reflects indigenous peoples’ own dynamic sense of their own law has other advantages as well. Deferring to tribal law builds the legitimacy of both tribal and U.S. law.¹⁶⁸ Although each tribal law represents a unique answer to the needs of the particular community to devise its own laws based on its own values and traditions,

163. UNDRIP, *supra* note 1, art. 11(2).

164. *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”). That is, their status as “domestic dependent nations.” Struve, *supra* note 132, at 934.

165. Patty Gerstenblith, *United States v. Schultz*, CULTURE WITHOUT CONTEXT, Spring 2002, at 27, 30 [hereinafter Gerstenblith, *United States v. Schultz*].

166. See, e.g., FRED A. SEATON & ELMER F. BENNETT, U.S. DEP’T OF THE INTERIOR, OFFICE OF THE SOLICITOR, FEDERAL INDIAN LAW 395 (2008) (explaining that Indian self-government includes the power of an Indian tribe “to regulate property within the jurisdiction of the tribe”). As an internal affair, property regulations do not conflict with dependent status. See *id.*

167. And there is no reason why the tribe, as a sovereign, cannot vest the property interest in itself as the state. *Cotton v. United States*, 52 U.S. 229, 231 (1850) (“Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property, both real and personal. . . . [A]s a corporation or body politic [the United States] may bring suits to enforce their contracts and protect their property, in the State courts, or in their own tribunals administering the same laws.”).

168. See, e.g., Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 237–44 (1994).

the Navajo well exemplify the importance of encouraging the development of tribal law. Today, the Navajo Nation court system hears more than 50,000 cases per year¹⁶⁹ and has developed a line of precedent constituting a rich common law of the tribe, such that “Navajos see their common law as the base upon which their society functions.”¹⁷⁰ The Supreme Court of the Navajo Nation made this clear in the 1989 decision *In re Validation of Marriage of Francisco*, asserting that

[t]he Navajo Nation must control and develop its own legal system because “the concept of justice has its source in the fabric of each individual society. The concept of justice, what it means for any group of people, cannot be separated from the total beliefs, ideas, and customs of that group of people.”¹⁷¹

Moreover, the court declared that the Nation must “regulate all domestic relations within its jurisdiction if sovereignty has any meaning.”¹⁷² Encouraging the development of tribal law thus fosters the self-determination and jurisprudential legitimacy of tribes.

Applying tribal law to matters related to Native Americans similarly legitimizes U.S. law. In *Santa Clara Pueblo v. Martinez*, the Supreme Court recognized tribal courts as appropriate forums for adjudicating “disputes affecting important personal and property interests of both Indians and non-Indians.”¹⁷³ The Supreme Court even nurtured Native Americans’ sovereign interest in self-government in *Williams v. Lee*, holding that the extension of state jurisdiction over tribes “would infringe on the right of the Indians to govern themselves.”¹⁷⁴ This interest arises from recognition that tribes retain the right to self-government within the United States legal system and that any intrusion on this right denigrates both tribal sovereignty and the legitimacy of U.S. law.¹⁷⁵ The United States, therefore, already has in place a stable framework for reconciling Native American self-determination and U.S. law.

169. *Courts & Peacemaking in the Navajo Nation: A Public Guide*, NAVAJO COURTS (Jan. 30, 2018), <http://www.navajocourts.org/publicguide.htm> [<https://perma.cc/327K-T3CY>].

170. Raymond D. Austin, *Freedom, Responsibility, and Duty: ADR and the Navajo Peacemaker Court*, JUDGES J., Spring 1993, at 8, 11.

171. 6 Navajo Rptr. 134 (Navajo 1989) (quoting T. TSO, CHIEF JUSTICE’S ANNUAL REPORT (1988)), reprinted in MATTHEW L. M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* 440 (2011).

172. *Id.*

173. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65–66 (1978) (citing *Fisher v. District Court*, 424 U.S. 382 (1976); *Williams v. Lee*, 358 U.S. 217 (1959); *Ex parte Crow Dog*, 109 U.S. 556 (1883)).

174. *Williams v. Lee*, 358 U.S. 217, 223 (1959).

175. See Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II–VII, §§ 201–701, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301–1341 (2012)) (recognizing that Indian tribes retain sovereignty and self-government within the United States legal system).

Although Native American tribes have a recognized right to create laws regulating their cultural patrimony, and applying tribal law would have several advantages, effectually enforcing such laws would be problematic. To have impact, the criminal trafficking provisions of tribal cultural patrimony laws would need to be broadly applied to cover all looters, but these laws would have limited reach.¹⁷⁶ Although tribes may exercise civil jurisdiction over non-Indians on their reservations,¹⁷⁷ tribal criminal jurisdiction is narrowly circumscribed.¹⁷⁸ As part of their inherent sovereignty, tribes have criminal jurisdiction over their members,¹⁷⁹ and Congress ensured that a tribe's power of self-government also includes "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians," covering both members and non-member Indians.¹⁸⁰ Tribes' criminal jurisdiction, however, does not extend over non-Indians. The Supreme Court held in *Oliphant v. Suquamish* that "Indian tribes do

176. As Kuruk notes, tribes' jurisdiction is continuously scrutinized by the courts, especially in cases involving non-Indians. Paul Kuruk, *Goaded a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States*, 34 PEPP. L. REV. 629, 645 (2007). Newton conceptualizes tribal court jurisprudence as taking "place against a field of potential federal court interference." Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1044 (1995). In this view, tribal jurisdiction is balanced between tribal sovereignty, the preservation of tribal cultures, and a concern for individual rights. See *id.*

177. In *Montana v. United States*, the Supreme Court explained that "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations." 450 U.S. 544, 565 (1981). The Court clarified that, specifically, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565–66 (citing *Williams*, 358 U.S. at 223; *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152–54 (1980)). And that "tribe[s] may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (citing *Fisher v. Dist. Court*, 424 U.S. 382, 386 (1976); *Williams*, 358 U.S. at 220; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128–29 (1906); *Thomas v. Gay*, 169 U.S. 264, 273 (1898)).

178. For a recent discussion of the history of tribal criminal law jurisdiction, see Struve, *supra* note 132, at 935–44 (outlining the relevant Supreme Court decisions (in 1978 and 1990) limiting tribes' criminal jurisdiction and the congressional response).

179. In 1978, the Supreme Court declared that "[i]t is undisputed that Indian tribes have power to enforce their criminal laws against tribe members." *United States v. Wheeler*, 435 U.S. 313, 322 (1978). Because tribes "have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions," and because "[t]ribal laws and procedures are often influenced by tribal custom and can differ greatly from our own," the Court recognized that "tribal courts are important mechanisms for protecting significant tribal interests." *Id.* at 331–32.

180. Following a congressional amendment, the Indian Civil Rights Act defines as part of a tribe's power of self-government "the inherent power . . . to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2) (2012) (originally enacted as Pub. L. No. 101-511, § 8077(b), 104 Stat. 1892 (1990)). This was passed in response to the Supreme Court's decision in *Duro v. Reina*, 495 U.S. 676, 679 (1990) (holding that Indian tribes could not prosecute non-member Indians for committing crimes on their reservations). For a more complete history, see generally *id.* at 684–88.

not have inherent jurisdiction to try and to punish non-Indians,”¹⁸¹ because such jurisdiction is inconsistent with the tribes’ status under federal law and threatens the liberty interests of non-Indian defendants.¹⁸² Accordingly, criminally punishing traffickers, most of whom are non-Indian, under tribal cultural patrimony laws would be impossible, making the protection largely ineffective.

There are, however, ways around the jurisdictional hurdle. An affirmative delegation by Congress could grant Native Americans criminal jurisdiction over non-Indians.¹⁸³ This would make tribal law an effective mechanism for protecting Native Americans’ cultural patrimony. Yet, even if such jurisdiction over non-Indians who trafficked in tribal cultural patrimony were granted, the accompanying criminal sentences would be disproportionately minimal and potentially ineffective.¹⁸⁴ Originally, the Indian Civil Rights Act limited criminal sentences issued from tribal courts to a maximum of six months.¹⁸⁵ Although the maximum sentence was recently raised to three years, a \$15,000 fine, or both, by the Tribal Law and Order Act of 2010,¹⁸⁶ the punishment imposed under tribal law would still be less than the penalties under NAGPRA.¹⁸⁷ Furthermore, a congressional delegation of criminal jurisdiction would be subject to the same destabilizing plenary power as NAGPRA, ultimately yielding an unreliable protection. Tribal cultural patrimony laws vesting ownership in the tribe and prohibiting trafficking in tribal items are consequently too limited to effectively safeguard Native American cultural objects.

The legal instrument that best satisfies the goals of UNDRIP, therefore, seems impracticable. Perhaps fairly, scholars have been skeptical about the

181. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

182. *Id.* at 210 (“The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.”).

183. *See id.* at 208 (“Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.”).

184. Depending on the prison sentence and fine, the punishment could be so minimal as to be ineffective, as was the case with the Antiquities Act of 1906, under which it was a crime to “appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity” on federal land without a permit. 16 U.S.C. § 433 (2012). A violation now entails a fine of up to \$5,000 and/or a prison sentence of up to six months. *HUTT ET AL.*, *supra* note 49, at 183. Historically, the Act failed to sufficiently protect cultural property because of inadequate penalties that did not deter looters. *See* Thomas H. Boyd, *Disputes Regarding the Possession of Native American Religious and Cultural Objects and Human Remains: A Discussion of the Applicable Law and Proposed Legislation*, 55 MO. L. REV. 883, 893–94 (1990).

185. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 202, 82 Stat. 73, 77 (imposing a maximum punishment for any one offense to “a term of six months or a fine of \$500, or both”).

186. Pub. L. No. 111-211, § 234, 124 Stat. 2279, 2279–80 (2010).

187. NAGPRA, for comparison, stipulates fines up to \$100,000 and twelve months imprisonment for first offenses and fines up to \$250,000 and five years imprisonment for subsequent offenses. 18 U.S.C. § 1170(a) (2006).

“utility of developing tribal laws to protect cultural property if those laws will be unenforceable.”¹⁸⁸ To meet America’s new policy goals, lawmakers must seemingly do the impossible: devise an indigenous cultural patrimony protection law that both respects the right to cultural self-determination and can be effectually applied to all looters of Native American cultural objects, Indians and non-Indians alike. This challenge might be called the “indigenous cultural patrimony problem.” The following Part proposes a solution by looking to the U.S. response to the so-called cultural property wars.

IV. THE MCCLAIN DOCTRINE

By turning to the current legal mechanism governing the flow of foreign cultural property into the United States, this Part identifies a solution to the indigenous cultural patrimony problem.¹⁸⁹ After briefly discussing the National Stolen Property Act (NSPA),¹⁹⁰ this Part focuses on its application to foreign cultural patrimony cases, known as the McClain doctrine. Next, this Part proposes applying the same legal framework employed in the McClain doctrine to domestic indigenous cultural property. This approach facilitates the broad recognition of tribal cultural patrimony laws, thereby allowing Native Americans to exercise cultural self-determination while effecting a viable legal instrument to protect Native American cultural objects.

A. *The National Stolen Property Act*

Although it was originally intended as a tool to prosecute automobile thieves, the NSPA has become the “principal legal instrument for

188. As Riley observes, *supra* note 154, at 118 (citing Gerard Bodeker, *Traditional Medical Knowledge, Intellectual Property Rights & Benefit Sharing*, 11 CARDOZO J. INT’L & COMP. L. 785, 787 (2003)). Riley, herself, also remarks that “[e]xpecting the world to recognize and abide by tribal law may seem idealistic.” *Id.* at 123. To an extent, such skepticism is unfounded; after all, ICWA, among other statutes, successfully enforces tribal law to protect and maintain Native American culture. See *supra* note 149. The more difficult concern is whether a law can effectively protect Native American cultural patrimony while simultaneously respecting the right of indigenous peoples to exercise cultural self-determination.

189. See Andrew L. Adler & Stephen K. Urice, *Resolving the Disjunction Between Cultural Property Policy and Law: A Call for Reform*, 64 RUTGERS L. REV. 117, 118 (2011). According to Adler and Urice, both the National Stolen Property Act (NSPA), 18 U.S.C. §§ 2314–15 (2012) and the Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601–13 (2012) make up “[t]he current legal framework governing the movement of cultural property into the United States.” *Id.* This article only considers the NSPA.

190. 18 U.S.C. §§ 2314–15.

restricting the movement of cultural property into the United States.”¹⁹¹ The NSPA prohibits the transportation, transmission, or transfer of goods worth \$5,000 or more across borders in interstate or foreign commerce, knowing the goods to have been stolen.¹⁹² Additionally, the statute criminalizes the knowing receipt, possession, concealment, storage, barter, sale, or disposition of such goods across a state or United States boundary.¹⁹³ A first offense under the NSPA can be punished with a fine and a prison sentence up to ten years.¹⁹⁴

By recognizing foreign property legislation, the NSPA allows foreign cultural patrimony laws to be effectively enforced within the United States.¹⁹⁵ Similar to the objectives under NAGPRA, this application of the NSPA endeavors to undercut the networks that unlawfully supply cultural objects to the market by imprisoning dealers in the United States who trade in illegally imported artifacts.¹⁹⁶ Due to its application to goods that are “stolen,” a term that remains undefined in the statute, the NSPA is ambiguous and its implementation in cultural property cases is complicated.¹⁹⁷

The NSPA is applied to cultural objects in two types of cases. In the first, objects are brought into the United States after being stolen from a known possessor with an undisputed title. In these cases, the application of the NSPA is uncontroversial.¹⁹⁸ The second application covers property that is stolen in violation of a foreign patrimony law. Many of these laws rely on a theory of constructive possession to claim state ownership of cultural objects; under this theory, even if objects were never in the actual possession of anyone until they were looted and sold by thieves, the state

191. Adler & Urice, *supra* note 189, at 119. For a discussion of the origin of the NSPA, see Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. L. REV. 123, 133–34 (2010).

192. 18 U.S.C. § 2314.

193. *Id.* § 2315.

194. *Id.*

195. Mark J. Petr, Note, *Trading Places: Illicit Antiquities, Foreign Cultural Patrimony Laws, and the U.S. National Stolen Property Act after United States v. Schultz*, 28 HASTINGS INT’L & COMP. L. REV. 503, 505 (2005).

196. *Id.* at 507 (“It is hoped by NSPA prosecution proponents that imprisoning dealers in the United States who trade in illegally imported artifacts will eventually undercut the networks that supply such objects to the trade.”). Green similarly notes that “[b]y supporting nations’ efforts to retain archaeological works, the NSPA promotes the preservation of artifacts, especially monumental and site-specific works.” Green, *supra* note 4, at 257.

197. Petr documents at least three factors related to cultural patrimony that complicate NSPA prosecutions: (1) that excavation and trade practices, and the age of many cultural objects, make it nearly impossible for even legitimate dealers to be sure of an object’s provenance, and it is relatively easy to fabricate a believable provenance; (2) traditional business practices in the art trade rely on informal agreements; and (3) personnel and budget constraints make it difficult to thoroughly research every piece for sale on the art market. Petr, *supra* note 195, at 507.

198. Adam Goldberg, Comment, *Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, 53 UCLA L. REV. 1031, 1035 (2006).

can still claim ownership.¹⁹⁹ Litigating these trafficking claims under the NSPA has been contentious. In these cases, the debate centers on whether a foreign nation's patrimony law or vesting statute renders the objects "stolen" for the purposes of the NSPA. To date, only three federal appellate courts have considered the issue.²⁰⁰ To better understand the NSPA's application to the unique issues surrounding cultural patrimony, this Part will next analyze each case to identify the principles underlying the McClain doctrine.

B. Cultural Property Case Law and the McClain Doctrine

1. *Hollinshead*

In 1974, the Ninth Circuit was the first federal appeals court to consider the application of the NSPA to property obtained in contravention of a foreign patrimony law in *United States v. Hollinshead*.²⁰¹ Hollinshead, a dealer in pre-Columbian artifacts, arranged for the shipment of several cultural objects in Central America, including a pre-Columbian stele found in a Mayan ruin in the Guatemalan jungle.²⁰² After sawing the stele into pieces and importing them into the United States, Hollinshead was convicted for violating 18 U.S.C. § 2314 for conspiracy to transport stolen property in interstate and foreign commerce.²⁰³ Under the NSPA, the stele was deemed "stolen" because Guatemalan law declared that "all such artifacts are the property of the Republic, and may not be removed without permission of the government."²⁰⁴ At trial, the district court received expert testimony regarding the application of Guatemalan law to pre-Columbia artifacts, such as the stele.²⁰⁵

In *Hollinshead*, the defendant did not challenge the application of the NSPA to Guatemalan patrimony law, but appealed on the grounds that the jury was erroneously instructed.²⁰⁶ The court affirmed Hollinshead's

199. Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 228–29 (2001) [hereinafter Gerstenblith, *Public Interest*].

200. Adler & Urice, *supra* note 189, at 126. As Adler & Urice note, the issue has been considered by two federal district courts in civil forfeiture cases. *Id.* at 126 n.44; *see also* *United States v. An Antique Platter of Gold*, 991 F. Supp. 222, 231–32 (S.D.N.Y. 1997) (holding that an Italian patrimony law vested ownership in the disputed object such that it could be considered stolen under the NSPA), *aff'd on other grounds*, 184 F.3d 131 (2d Cir. 1999); *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 547 (N.D. Ill. 1993) (holding the same regarding a Guatemalan cultural patrimony law).

201. 495 F.2d 1154 (9th Cir. 1974).

202. *Id.* at 1155.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* ("Appellants' one arguable contention is that the court erroneously instructed the jury that there is a presumption that every person knows what the law forbids. . . . They point to the fact

conviction with little analysis, devoting scant attention to the issue of national ownership.²⁰⁷ Nevertheless, the Ninth Circuit's acceptance of the prosecution's theory has proven significant. By maintaining that an object is "stolen" as defined by the NSPA if it is obtained in violation of a foreign patrimony law, the court in *Hollinshead* laid the foundation for the application of the NSPA in future cultural property cases.²⁰⁸

2. *McClain*

Three years later, the Fifth Circuit heard *United States v. McClain* in 1977 (*McClain I*).²⁰⁹ The *McClain* defendants had attempted to sell various pre-Columbian artifacts illegally exported from Mexico to an undercover FBI agent.²¹⁰ Subsequently convicted of conspiring to transport and receive through interstate commerce artifacts known to have been stolen in violation of the NSPA, 18 U.S.C. §§ 2314, 2315, the defendants appealed on two grounds. First, they argued that the word "stolen" under the NSPA only covers the wrongful deprivation of ownership rights as understood at common law, namely, physical possession.²¹¹ The defendants maintained that they had simply committed a case of "mere illegal exportation" and not theft because Mexico never alleged the deprivation of the property and because the "Mexican legislative declarations of 'ownership' of pre-Columbia artifacts are . . . not enough to bring the objects within the protection of the NSPA."²¹² Additionally, the defendants challenged the trial court's finding that the Mexican law had vested ownership of all pre-Columbian artifacts in the Republic at the time of the disputed objects' removal from Mexico.²¹³

that it is the law of Guatemala that characterizes the stele as stolen property, and that there is no presumption that they knew Guatemalan law. Essentially their claim is that the instruction was overbroad and that it should have been supplemented with or limited by an instruction requested by appellants which made it clear that there is no such presumption as to knowledge of foreign law." (citation omitted)).

207. *Id.* at 1156.

208. *Id.*

209. 545 F.2d 988 (5th Cir. 1977).

210. *Id.* at 992 (including "terra cotta figures and pottery, beads, and a few stucco pieces"). As the court notes in *McClain I*, "[t]hese articles had not been registered with the Public Register of Archaeological and Historical Zones and Monuments of the Republic of Mexico, or with any government register, and were exported without a license or a permit from Mexico into the United States." *Id.*

211. *Id.* at 994 ("They argue that the word 'stolen' cannot include the pre-Columbian artifacts seized in this case, for there was no evidence showing that the artifacts had been taken without consent from private individuals or that the artifacts had been in the possession of the Republic of Mexico.").

212. *Id.*

213. *Id.* ("Second, the appellants contend that, even if a legislative declaration of ownership would, with export restrictions, invoke the protection of the NSPA, the trial court erred in instructing the jury that Mexico had, since 1897, vested itself with ownership of all pre-Columbian artifacts.").

After finding that the term “stolen” should be broadly interpreted under the NSPA,²¹⁴ the *McClain I* court considered the defendant’s second challenge. For an exported object to be considered “stolen” within the meaning of the NSPA, the court held that “a declaration of national ownership is necessary before illegal exportation of an article can be considered theft.”²¹⁵ Accordingly, the court performed a detailed analysis of the Mexican patrimony law in question, including its language, intent, and history, to determine when ownership of pre-Columbian artifacts were vested in the Republic of Mexico.

Based on the testimony of Dr. Alejandro Gertz, a deputy attorney general of Mexico who “had been instrumental in revising Mexican laws dealing with protection of the Mexican cultural heritage,”²¹⁶ the trial court determined, since 1897, Mexican law declared pre-Columbian artifacts discovered within Mexico to be the property of the Republic.²¹⁷ Finding this conclusion erroneous, the appellate court noted that although “Mexican law has been *concerned* with the preservation and regulation of pre-Columbian artifacts since 1897 . . . ownership of all pre-Columbian objects by legislative fiat, did not come until much later.”²¹⁸ Beginning with the 1897 Mexican Law on Archaeological Monuments,²¹⁹ the court in *McClain I* scrutinized the evolution of Mexico’s cultural patrimony laws pertaining to pre-Columbian artifacts. In total, the court meticulously studied the application and intent of five different statutes relating to cultural property, even analyzing the relevant statutory language in both

214. *Id.* Summarizing its decision in *McClain I* and its interpretation of the term “stolen,” the Fifth Circuit explained that:

This conclusion is a result of our attempt to reconcile the doctrine of strict construction of criminal statutes with the broad significance attached to the word “stolen” in the NSPA. Were the word to be so narrowly construed as to exclude coverage, for example, with respect to pre-Columbian artifacts illegally exported from Mexico after the effective date of the 1972 law, the Mexican government would be denied protection of the Act after it had done all it reasonably could do—vested itself with ownership—to protect its interest in the artifacts. This would violate the apparent objective of Congress: the protection of owners of stolen property. If, on the other hand, an object were considered “stolen” merely because it was illegally exported, the meaning of the term “stolen” would be stretched beyond its conventional meaning. Although “stealing” is not a term of art, it is also not a word bereft of meaning. It should not be expanded at the government’s will beyond the connotation—depriving an *owner* of its rights in property—conventionally called to mind.

Id. at 1001–02 (footnote omitted).

215. *Id.* at 1000.

216. *Id.* at 993.

217. *Id.* at 994 (noting exceptions for cases “where the Government of the Republic of Mexico has, by way of license or permit, granted permission to private persons or parties or others to receive and export in their possession such artifacts to other places or other countries”).

218. *Id.* at 997.

219. Ley Sobre Monumentos Arqueológicos, Diario Oficial de la Federación [DOF] 11-5-1897.

Spanish and English.²²⁰ Based on this review, the Fifth Circuit differentiated export restrictions from cultural patrimony laws vesting ownership in the state,²²¹ ultimately concluding that the Mexican government declared that all pre-Columbian artifacts were owned by the Republic only in 1972.²²²

Because the date the McClain artifacts had been removed from Mexico and brought into the United States had not been precisely determined by the trial court, the convictions were overturned and remanded.²²³ After being convicted again on remand in *United States v. McClain (McClain II)*,²²⁴ the defendants appealed on grounds nearly identical to those raised in *McClain I*.²²⁵ This time, the Fifth Circuit found that NSPA claims based on vague vesting statutes raised due process concerns.²²⁶ Consequently, the court held that property claimed by cultural patrimony laws cannot be considered “stolen”—as defined by the NSPA—unless the ownership declaration is sufficiently clear for U.S. citizens to understand.²²⁷ In the end, the defendants were acquitted on the substantive counts because it was uncertain whether the objects they were selling had been removed before or after 1972; however, because the record indicated that the defendants intended to continue trading in illicit Mexican cultural objects, the court upheld the conspiracy conviction.²²⁸

220. After considering the 1897 law, the court analyzed the Law on the Protection and Conservation of Monuments and Natural Beauty, *Ley Sobre Protección y Conservación de Monumentos y Bellezas Naturales*, Diario Oficial de la Federación [DOF] 31-01-1920, the Law for the Protection and Preservation of Archaeological and Historic Monuments, Typical Towns and Places of Scenic Beauty, *Ley Sobre Protección y Conservación de Monumentos Arqueológicos e Históricos, Poblaciones Típicas y Lugares de Belleza Natural*, Diario Oficial de la Federación [DOF] 19-01-1934., the Federal Law Concerning Cultural Patrimony of the Nation, *Ley Federal del Patrimonio Cultural de la Nación*, Diario Oficial de la Federación [DOF] 16-12-1970, and the Federal Law on Archaeological, Artistic and Historic Monuments and Zones, *Ley Federal Sobre Monumentos y Zonas Arqueológicas, Artísticas e Históricas* [LMZAA], Diario Oficial de la Federación [DOF] 06-05-1972. *McClain I*, 545 F.2d at 997–1000 (“This review of the relevant Mexican statutes demonstrates that the Mexican government has, since 1897, been staking out for itself greater and greater rights in pre-Columbian artifacts. Only in 1972, however, did the government declare that *all* pre-Columbian artifacts were owned by the Republic.”).

221. *McClain I*, 545 F.2d at 1002–03 (“Exportation restrictions guard that jurisdiction and power. But, except for this effect on jurisdiction, restrictions on exportation are just like any other police power restrictions. They do not create ‘ownership’ in the state. The state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner; the declaration is an attribute of sovereignty.”).

222. *Id.* at 1000.

223. *Id.* at 1003–04.

224. 593 F.2d 658 (5th Cir. 1979).

225. See Gerstenblith, *Public Interest*, *supra* note 199, at 216.

226. *McClain II*, 593 F.2d at 665–66.

227. *Id.* at 670 (“And under this view of Mexican law, we believe the defendants may have suffered the prejudice of being convicted pursuant to laws that were too vague to be a predicate for criminal liability under our jurisprudential standards.”).

228. After the sale for which they were originally arrested, in clear violation of the 1972 patrimony legislation. *Id.* at 670–72.

Although the court did not sustain all of the convictions, the *McClain* decisions are significant for establishing the legal framework that has become the principal instrument for restricting the movement of cultural objects into the United States.²²⁹ In *McClain*, the Fifth Circuit defined central principles concerning foreign patrimony laws and adumbrated the limitations of imposing criminal liability under the NSPA based on such laws.²³⁰ These principles establish what is known today as the McClain doctrine.²³¹ Broadly, the McClain doctrine establishes the theory that “legislation may vest ownership of [cultural objects] in the national government, regardless of . . . actual possession,” and that these ownership laws are recognizable by the United States.²³² To better understand the possibilities afforded by this jurisprudential framework, however, it is worth looking at the principles underlying the McClain doctrine in greater detail.

By recognizing national ownership declarations as an attribute of sovereignty, the *McClain I* court found no legal distinction between property owned by a private person holding it in physical possession and property owned by a nation based on a theory of constructive possession.²³³ Unlawfully removing an object from a foreign country with a cultural patrimony law, however, does not automatically result in a violation of the NSPA. Convictions under the NSPA require a scienter element, such that the defendant knows the “objects are claimed by a foreign state before they can be considered stolen.”²³⁴

The *McClain* decisions thus delineate three requirements for the doctrine to apply. First, to be recognized in U.S. courts, the foreign cultural patrimony laws must be more than export restrictions and must clearly and unambiguously establish national ownership. Second, because national vesting statutes are not given extraterritorial effect, to be

229. Adler & Urice, *supra* note 189, at 119 (“Despite the fact that the NSPA was never intended to address the unique issues surrounding cultural property, the Fifth Circuit’s seminal *McClain* decisions in the late 1970s . . . effectively transformed the statute into the Executive’s principal legal instrument for restricting the movement of cultural property into the United States.” (footnote omitted)).

230. The limitations would be more fully delineated by the court in *United States v. Schultz*, discussed *infra* Part IV.B.3.

231. Andrea Cuning, *U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property & Destructive Aspects of Retention Schemes*, 26 HOUS. J. INT’L L. 449, 486 (2004) (explaining that the *McClain* decision “has given rise to what is known as the ‘McClain Doctrine’”).

232. Gerstenblith, *Public Interest*, *supra* note 199, at 216 (highlighting this as the primary principle established by the *McClain* cases).

233. *United States v. McClain (McClain I)*, 545 F.2d 988, 1002–03 (5th Cir. 1977) (“The state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner; the declaration is an attribute of sovereignty.”).

234. Goldberg, *supra* note 198, at 1042.

considered stolen under the NSPA, cultural objects must have been found within the modern borders of the nation claiming ownership. Finally, the unlawful removal of the object must have occurred after the effective date of the patrimony legislation.

Notably, the courts in *McClain* never questioned whether the objects at issue constituted cultural patrimony, that is, whether the objects had ongoing historical, traditional, or cultural importance central to Mexico. The decision about what constitutes protected cultural objects was left to Mexico alone. Instead, the court inquired only into the history of the cultural patrimony *law* to determine its validity and date of application.

3. *Schultz*

The third case that applied this framework in a federal appellate court was *United States v. Schultz*.²³⁵ A successful art dealer in New York City, Schultz was indicted in 2001 for conspiring to receive stolen Egyptian antiquities transported in interstate and foreign commerce between 1991 and 1996 in violation of the NSPA, 18 U.S.C. § 2315.²³⁶ The items included “a stone sculptural head of the 18th Dynasty pharaoh Amenhotep III, a faience figure of a king kneeling at an altar, a pair of wall reliefs from the tomb of Hetepka in Saqqara, and a 6th Dynasty statue of a striding figure.”²³⁷ Like *McClain*, the case centered on a cultural patrimony law, this time, Egypt’s 1983 Law on the Protection of Antiquities (“Law 117”).²³⁸ By vesting ownership of all antiquities in the national government, Law 117 renders all antiquities excavated and removed without permission after the law’s enactment stolen property under Egyptian law.²³⁹

Initially, Schultz moved to have the indictment dismissed, attacking the validity of the *McClain* doctrine.²⁴⁰ Schultz’s argument was threefold: (1) that Law 117 was an export control and not an ownership law; (2) that objects taken in violation of foreign ownership laws are not considered stolen property under the NSPA; and (3) that the *McClain* doctrine was

235. 333 F.3d 393 (2d Cir. 2003). As Gerstenblith notes, until shortly before his indictment, Schultz was the president of the National Association of Dealers in Ancient, Oriental and Primitive Art and one of the “most prominent and respected dealers” in the trade. Gerstenblith, *United States v. Schultz*, *supra* note 165, at 27.

236. *Schultz*, 333 F.3d at 395.

237. Patty Gerstenblith, *The McClain/Schultz Doctrine: Another Step Against Trade in Stolen Antiquities*, *CULTURE WITHOUT CONTEXT*, Autumn 2003, at 5, 5.

238. Law No. 117 of 1983 (Law on the Protection of Antiquities), *al-Jaridah al-Rasmiyah*, vol. 32 bis, 11 Aug. 1983 (Egypt) [hereinafter Law No. 117].

239. *Id.* art. 6–8.

240. *United States v. Schultz*, 178 F. Supp. 2d 445, 446–47 (S.D.N.Y. 2002).

preempted by the Convention on Cultural Property Implementation Act (CPIA).²⁴¹

Turning to the plain language of Law 117, the district court held that the Egyptian law “vests with the state most, and perhaps all, the rights ordinarily associated with ownership of property, including title, possession, and right to transfer,” and concluded that the law “is far more than a licensing scheme or export regulation.”²⁴² In defense of his first contention, Schultz offered the testimony of Abou El Fadl, a professor of law, who argued that Law 117 does not prevent an antiquity discovered in Egypt after 1983 from remaining in private hands.²⁴³ In response, the government presented Dr. Gaballa Ali Gaballa, Secretary General to the Supreme Council of Antiquities, and General Ali Sobky, Director of Criminal Investigations for the Antiquities Police, who testified that Egypt takes immediate custody of newly discovered antiquities and that violators are punished under Law 117.²⁴⁴ Based on this evidence, the court held that Law 117 effectively transfers ownership of Egyptian antiquities to the state.²⁴⁵

After dismissing the defendant’s first argument, the court next considered whether American law recognizes “the kind of ‘special’ property interest created by ‘patrimony’ laws like Law 117.”²⁴⁶ Analogizing to the hypothetical prosecution of an American who conspired to steal the Liberty Bell under the NSPA, the court asked, “[W]hy should it make any difference that a foreign nation, in order to safeguard its precious cultural heritage, has chosen to assume ownership of those objects in its domain that have historical or archeological importance, rather than leaving them in private hands?”²⁴⁷ Recognizing in both instances an implicit government interest to deter residents from dealing in unlawfully obtained items, the court reaffirmed the notion that the NSPA can be applied to thefts in foreign countries, including thefts based on cultural patrimony laws.²⁴⁸

Lastly, noting that § 2315 of the NSPA is applied only “in cases of intentional theft and knowing disposal of stolen goods,” the court distinguished the CPIA and found that there is no conflict that would bar

241. *Id.* The CPIA implements the United States’ ratification of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. 19 U.S.C. §§ 2601–13 (2012); *see supra* note 6.

242. *Schultz*, 178 F. Supp. 2d at 447.

243. *Id.*

244. *Id.* at 448.

245. *Id.*

246. *Id.* (citing *United States v. McClain (McClain I)*, 545 F.2d 988, 994 (5th Cir. 1977)).

247. *Id.* at 448–49.

248. *Id.* at 449 (“*Mutatis mutandis*, the same is true when, as here alleged, a United States resident conspires to steal Egypt’s antiquities.”).

prosecution under the McClain doctrine.²⁴⁹ Thus upholding the McClain doctrine, the trial court dismissed the motion and convicted Schultz of conspiracy to violate the NSPA, levying a \$50,000 fine and imposing a 33-month prison sentence.²⁵⁰

Although Schultz raised several issues on appeal, only two are significant for the present discussion of the McClain doctrine. Primarily, Schultz argued that the antiquities he allegedly conspired to receive were not owned by anyone, and therefore could not be considered stolen.²⁵¹ Schultz contended that even if Egyptian law deemed cultural objects government property, they should not be considered owned by Egypt for the purposes of U.S. law and the enforcement of the NSPA.²⁵²

In response to Schultz's arguments, the Second Circuit first analyzed Law 117 to determine whether it was a valid ownership law. Clarifying its own methodology, the court asserted that it is "capable of evaluating foreign patrimony laws to determine whether their language and enforcement indicate that they are intended to assert true ownership of certain property, or merely to restrict the export of that property."²⁵³ Law 117 provides that all Egyptian antiquities are property of the state, where antiquities are defined as "objects over a century old having archaeological or historical importance."²⁵⁴ In pertinent part, the statute straightforwardly declares that "[a]ll antiquities are considered to be public property."²⁵⁵ Notably, the court limited itself to an analysis of the law and its application. Weighing the testimony of the Egyptian officials,²⁵⁶ the plain language of the law, and Schultz's failure to present evidence refuting that Law 117 "is not what its plain language indicates," the court held that the Egyptian law is a "clear and unambiguous" ownership law.²⁵⁷

249. *Id.*

250. See Celestine Bohlen, *Antiquities Dealer Is Sentenced to Prison*, N.Y. TIMES (June 12, 2002), <https://www.nytimes.com/2002/06/12/arts/antiquities-dealer-is-sentenced-to-prison.html> [<https://perma.cc/GTX8-3J95>]. The court further ordered Schultz to return a relief still in his possession to the Egyptian government. *Id.* The decision was upheld on appeal. *Schultz v. United States*, No. 05 Civ. 246 (JSR), 2005 U.S. Dist. LEXIS 12836, at *1 (S.D.N.Y. June 24, 2005).

251. *United States v. Schultz*, 333 F.3d 393, 400 (2d Cir. 2003).

252. *Id.* at 401.

253. *Id.* at 410.

254. As *Schultz* interprets the law, specifically Law No. 117, art. 1. *Schultz*, 178 F. Supp. 2d at 446.

255. *Schultz*, 333 F.3d at 399 (quoting Law No. 117, art. 6).

256. The court also makes special note of Professor Abou El Fadl's ostensible unreliability: On cross-examination, Professor Abou El Fadl stated that he had never practiced law in Egypt, nor was he licensed to practice law in Egypt. He testified that he had never read Law 117 prior to being requested to do so by Schultz's counsel, and that he had been unable to locate any treatises discussing Law 117.

Id. at 401.

257. *Id.* at 401-02.

To dismiss Schultz's contention that the antiquities were not stolen within the meaning of the NSPA because they were never truly owned by the Egyptian government, the court turned to *McClain*.²⁵⁸ Citing Supreme Court precedent that the NSPA "should be broadly construed," the Second Circuit held that the application of the NSPA is broad enough to cover goods stolen in foreign countries.²⁵⁹ Correspondingly, receipt of antiquities stolen in Egypt and then shipped to the United States amounts to a violation of the NSPA. Additionally, the court determined that "the fact that the rightful owner of the stolen property is foreign has no impact on a prosecution under the NSPA."²⁶⁰ Upholding the McClain doctrine, the Second Circuit clearly explained that "the NSPA applies to property that is stolen in violation of a foreign patrimony law."²⁶¹

Two important principles emerge from the Second Circuit's reasoning. First, that the application of the NSPA to cultural patrimony cases entails the evaluation of the disputed foreign patrimony law to ensure that it asserts true ownership. Importantly, this inquiry does not require the corollary evaluation of the historical or cultural importance of the contested object to the country from which it was taken. Second, *Schultz* reaffirms the theory that the NSPA can be broadly applied to cover theft under both American and international property laws, underscoring the notion that the identity of the rightful owner of the stolen property is inconsequential.

V. THE INDIGENOUS MCCLAIN DOCTRINE: SOLVING THE INDIGENOUS CULTURAL PATRIMONY PROBLEM

Although the McClain doctrine was developed in response to foreign laws, its domestic application offers a practicable solution to the indigenous cultural patrimony problem. To meet the new standards set by UNDRIP, the United States must devise effective legal protections for Native American cultural objects that simultaneously respect the right of indigenous peoples to freely exercise self-determination. Because NAGPRA compels courts to make judgments about indigenous cultural patrimony, the current U.S. framework fails to satisfy the goals outlined by the UN Declaration regarding self-determination. Tribal cultural patrimony laws represent the only legal scheme that fully respects this right. In the United States, however, tribal criminal jurisdiction cannot be

258. *Id.* at 403.

259. *Id.* at 402 (first citing *McElroy v. United States*, 455 U.S. 642, 655 (1982); then citing *United States v. Wallach*, 935 F.2d 445, 469 (2d Cir. 1991)).

260. *Id.*

261. *Id.* at 410.

exercised over non-Indians. As a result, tribal law would not effectively safeguard indigenous cultural property, thereby failing UNDRIP's protection goals. The best option for meeting both objectives is the imposition of criminal sanctions on all violators of *tribal* cultural patrimony laws, a seeming impossibility.

Applying the legal framework established by the McClain doctrine, however, offers a solution to the indigenous cultural patrimony problem. This Part will explore how this framework can be mapped onto domestic cultural patrimony cases. Considering the principles undergirding the McClain doctrine, this Part will show that the same principles that apply to foreign cultural objects should also apply to Native American cultural patrimony. Finally, this Part will highlight the advantages of applying the McClain doctrine to tribal law and discuss potential disadvantages of implementing this jurisprudential scheme.

A. The Solution

Importantly, the McClain doctrine does not enforce foreign laws. The defendants in *Hollinshead*, *McClain*, and *Schultz* were convicted of violating the NSPA. Where the foreign law at issue clearly and unambiguously vests ownership of cultural property in the State, the NSPA will recognize a violation of the foreign law as theft, such that the disputed object is also considered "stolen" within the meaning of U.S. law. As a result, the substantive violation is of U.S. law, even if it is based on a foreign law. The McClain doctrine, in short, transforms a violation of foreign cultural patrimony law into a violation of the NSPA.

The structure of this legal framework offers an ideal solution to the indigenous cultural patrimony problem. Because tribal criminal jurisdiction is narrowly circumscribed, tribes cannot punish non-Indians who take cultural property in violation of tribal cultural patrimony laws. Through the McClain doctrine, a violation of tribal law could be transformed into a violation of the NSPA, effectively expanding the jurisdictional reach of tribal cultural patrimony laws. This would allow tribes to punish non-Indian traffickers, enhancing the effectiveness of tribal law. Further, it would enable indigenous peoples to exercise their right to cultural self-determination. This application might be termed the "indigenous McClain doctrine," because it applies both to Native American cultural patrimony and because it applies domestically to objects found in the United States, unlike other applications of the McClain doctrine.

In addition to offering a workable mechanism for solving the indigenous cultural patrimony problem, the application of the McClain

doctrine to tribal law is consistent with the principles undergirding the court's original exercise of the doctrine. Although the McClain doctrine has been subject to scholarly criticism, the courts that have confronted the doctrine have never disapproved of the underlying legal principles.²⁶² For its domestic application, the most important principles of the McClain doctrine are its acknowledgement of the special interest in cultural property and its focus on legal—not cultural—matters. Because no jurisprudential bar limits the application of the McClain doctrine to tribal law, and such an application actually affirms the principles for which the doctrine stands, it can and should be applied to Native American cultural patrimony laws.

B. Full Respect for Cultural Self-Determination

Applying the “indigenous McClain doctrine” would transform tribal cultural patrimony laws into effective protections of Native American cultural objects on par with NAGPRA. But, unlike the existing statute, these laws would respect tribes' right to cultural self-determination. Unlike NAGPRA cases, in which the inquiry focuses on whether the unlawfully obtained object actually has ongoing historical, traditional, or cultural importance central to the Native American group, courts applying the McClain doctrine do not consider whether the trafficked items constitute cultural patrimony. Instead, these courts only analyze the laws purporting to vest ownership of the cultural objects in the state.

In *McClain I*, the court undertook a comprehensive analysis of the Mexican patrimony law.²⁶³ As part of its inquiry, the court heard evidence from a deputy attorney general of Mexico and evaluated his testimony. Although the court's appraisal of the Mexican government official may initially resemble the court's self-determination-limiting evaluation of tribal witnesses in the NAGPRA cases, the court limited its inquiry, preventing intrusions on cultural self-determination. The Fifth Circuit looked in detail at the language, intent, and history of five different statutes to determine if they actually vested ownership of the object in the Republic. But the court never sought to determine whether the trafficked object actually had cultural importance to Mexico. Importantly, the court looked only to the law itself, fully accepting Mexico's judgment that the

262. Gerstenblith, *United States v. Schultz*, *supra* note 165, at 28 (“Over the past twenty-five years, several courts in the United States have confronted the *McClain* doctrine in a variety of legal contexts. None has ever disapproved of the underlying legal principles, although the factual outcomes have varied.”).

263. *See supra* Part IV.B.2.

object constituted cultural patrimony. In so doing, the *McClain* court fully respected Mexico's cultural self-determination.

In *Schultz*, the Second Circuit once more weighed conflicting evidence about cultural patrimony, but limited itself again to a consideration of the law at issue, foregoing an analysis of the trafficked object.²⁶⁴ Here, the court was clear about its task, stating that the court is "capable of evaluating foreign patrimony laws."²⁶⁵ Conducting this evaluation, the court assessed the testimony of several witnesses, not all of whom were Egyptian nationals. This review, however, did not violate Egyptian cultural self-determination because it was restricted to a discussion of the law.

Notably, when the court outlined its role in adjudicating foreign cultural patrimony cases, it did not make a statement about its capacity to evaluate an object's cultural patrimony status. This omission is owed not to its inability to make this determination, as NAGPRA jurisprudence amply demonstrates. Rather, the omission highlights the irrelevance of such an evaluation in *McClain* doctrine cases. In *Schultz*, the decision about what constituted protected cultural objects was left to Egypt alone. Because the *McClain* doctrine uncritically accepts the judgment of the state that enacted the ownership law, this doctrine respects the cultural self-determination of the sovereign state. Unlike NAGPRA, the *McClain* doctrine fully respects this right, making the legal scheme a better answer to meeting the goals outlined by UNDRIP than the current U.S. statutory protection for Native American cultural objects.

C. Equal Value for Native American and Foreign Cultures

In addition to more fully respecting tribal cultural self-determination than NAGPRA, the indigenous *McClain* doctrine would also more highly value indigenous culture than the current legal protection. The *McClain* doctrine applies to a narrow class of laws protecting a unique kind of property. In *McClain I*, the court clarified that the main question was whether the NSPA should be extended to cover "property of a very special kind."²⁶⁶ In the Fifth Circuit's estimation, the property at issue was special because its cultural importance made it government-owned, even before it was discovered or physically possessed.

The court in *Schultz* similarly acknowledged the significance of the property at stake. The effusive language used by the Southern District of New York to describe the disputed patrimony testifies to its importance:

264. See *supra* Part IV.B.3.

265. *Schultz*, 333 F.3d at 410.

266. *United States v. McClain (McClain I)*, 545 F.2d 988, 996 (5th Cir. 1977).

The marvelous artifacts of ancient Egypt, so wondrous in their beauty and in what they teach of the advent of civilization, inevitably invite the attention, not just of scholars and aesthetes, but of tomb-robbers, smugglers, black-marketeers, and assorted thieves. Every pharaoh, it seems, has a price on his head (at least if the head is cast in stone); and if the price is right, a head-hunter will be found to sever the head from its lawful owner.²⁶⁷

Rhapsodizing the “highly valuable ancient Egyptian artifacts,”²⁶⁸ the opinion bases its acceptance of the McClain doctrine, in part, on the inherent value of the cultural objects.

The *McClain* and *Schultz* decisions document the courts’ willingness to apply the NSPA to thefts defined by foreign patrimony laws because of the significance of the property at stake. If the court eagerly celebrates Egyptian and Mexican artifacts, it should afford Native American cultural objects the same reverential attitude. Yet, the current legal scheme governing cultural patrimony differentiates foreign and domestic objects.

Under U.S. law, if the punishments imposed for violating cultural patrimony laws correspond to the cultural worth of the unlawfully trafficked object, Native American items are implicitly treated as less valuable than foreign artifacts. A first-time conviction under NAGPRA for illegally trafficking in Native American cultural items is a misdemeanor, the maximum punishment for which is one year in prison.²⁶⁹ In contrast, a first offense under the NSPA for violation of a foreign cultural patrimony law can be punished with a prison sentence of up to ten years.²⁷⁰ Limiting NAGPRA violations to misdemeanors signals the relative unimportance of Native American cultural objects. But Native American objects are also a “property of a very special kind.”²⁷¹ Applying the NSPA to cultural property discovered within the United States and trafficked in violation of tribal patrimony laws would signify the equal importance of American indigenous cultural patrimony by allowing for the same degree of punishment.

D. No Jurisprudential Bar

Although the McClain doctrine has not yet been applied to tribal law, no jurisprudential bar limits its application to cases concerning unlawfully trafficked Native American cultural objects obtained in violation of tribal

267. *United States v. Schultz*, 178 F. Supp. 2d 445, 446 (S.D.N.Y. 2002).

268. *Id.*

269. *See supra* notes 51, 187 and accompanying text.

270. *See supra* note 194 and accompanying text.

271. *McClain I*, 545 F.2d at 996.

laws. Tribes can devise cultural patrimony laws analogous to the national vesting laws in Mexico and Egypt.²⁷² If the law clearly and unambiguously vests ownership of the cultural objects in the tribe, then a violation of that law should also amount to a violation of the NSPA if the item is trafficked in interstate or international commerce. The only potential obstacle stems from the McClain doctrine's requirement that the foreign jurisdiction actually enforce its cultural property law.²⁷³ Accordingly, tribes must have a practice of applying their cultural property laws to known violations for the "indigenous McClain doctrine" to function. Initially, this may seem impossible, because tribal cultural property laws are criminal and thus do not apply to non-Indians. Tribes, however, can apply their criminal laws to Native Americans in their tribes as well as to other nonmember Indians.²⁷⁴ Because it is not uncommon for Native Americans to illegally trade in cultural property belonging to both their own tribes and others, it would be possible to prosecute these individuals under the tribal cultural property law. In so doing, the tribe would then produce a record of enforcement against outsiders, thus fulfilling the requirements of the McClain doctrine. Tribal law should be afforded the same coverage under the McClain doctrine as Egyptian or Mexican law. Considering its proximity and occasional application in the United States already, applying tribal law through the NSPA will be easier than applying Egyptian law.

Doctrinally, applying tribal law through the NSPA is not inconsistent with current U.S. law. By mandating full faith and credit for tribal court judgments, other U.S. policies enforce tribal laws in specific subject areas, paralleling the indigenous McClain doctrine's proposed application of tribal law in cultural patrimony cases.²⁷⁵ The Indian Child Welfare Act (ICWA), for instance, allows tribes to exercise jurisdiction in child custody and adoption decisions, even where they affect non-Indians.²⁷⁶ Because many children were adopted away from tribes without tribal control, and because "there is no resource . . . more vital to the . . . tribes than their children,"²⁷⁷ Congress passed ICWA to bolster tribes' ability to

272. See *supra* Part III.

273. See *supra* note 253 and accompanying text.

274. 25 U.S.C. § 1301(2) (2012); see also *United States v. Lara*, 541 U.S. 193, 202 (2004) (confirming that Congress had authority to "relax" judicial restrictions earlier placed on the tribes' inherent authority to try nonmember Indians).

275. The National Indian Forest Resources Management Act is an example of a U.S. law that requires both state and federal courts to extend full faith and credit to tribal court judgments, in cases regarding forest trespass. 25 U.S.C. § 3106(c) (2012).

276. 25 U.S.C. § 1911(d) (2012).

277. 25 U.S.C. § 1901(3) (2012).

protect their existence and integrity.²⁷⁸ ICWA recognizes broad jurisdiction for tribal law in these cases in acknowledgment that the tribe occupies the best position to protect and preserve tribal resources.²⁷⁹ Considering the centrality of cultural objects to a group's identity, ICWA's recognition of the importance of tribal responsibility over tribal resources could easily be expanded to include cultural property resources as well. The indigenous McClain doctrine, therefore, is not dissimilar from an ICWA-like cultural property regime that would recognize criminal and civil jurisdiction over non-Indians.

The McClain doctrine extends the application of the NSPA to foreign ownership laws, in part, because such laws are "an act inherent in the notion of sovereignty," and recognizing these laws "is regarded as an aspect of comity among nations."²⁸⁰ Justifying the application of the NSPA, the Court in *McClain I* held that "[t]he Republic of Mexico, when stolen property has moved across the Mexican border, is in a similar position to any state of the United States in which a theft occurs and the property is moved across state boundaries."²⁸¹ The court thus makes clear that the NSPA can be applied to violations of state, federal, or foreign laws.

Native American tribes occupy a distinct position in the American legal landscape; they are "subordinate and dependent nations," so less than a foreign nation like Egypt or Mexico, but "have a status higher than that of states."²⁸² Given this status and the broad application of the NSPA, tribal law should be afforded the same deference as state law or foreign cultural patrimony laws.²⁸³ The fact that it is a tribe in which ownership is vested

278. As Congress noted in 25 U.S.C. § 1901(3) (2012). For a general background of the ICWA, see generally Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 601–05 (2002).

279. See § 1901(2).

280. Gerstenblith, *Public Interest*, *supra* note 199, at 216.

281. *United States v. McClain (McClain I)*, 545 F.2d 988, 994 (5th Cir. 1977).

282. *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959) ("But as declared in the decisions hereinbefore discussed, Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States.").

283. Some scholars even dispute that state criminal laws get more protection than tribal laws; this would be one way of leveling the playing field. Why are states' criminal laws more respected than tribes' criminal laws when tribes are considered to be more sovereign than states?

Under *Oliphant*, tribes cannot enforce their criminal laws against non-Indians but must instead depend upon other sovereigns' law enforcement interests. Yet, when criminal defendants in state court come to federal court to assert protection from state prosecution, the federal court declines—because of the centrality of criminal law to the states as "sovereign."

Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 734 (1989) (footnotes omitted).

should not make a difference. As the court in *Schultz* announced: the identity of the rightful owner of the stolen property is inconsequential.²⁸⁴

The indigenous McClain doctrine satisfies the seemingly incompatible goals of America's new policy commitments toward Native Americans affirmed by UNDRIP. The McClain doctrine fully respects the right to self-determination by unquestioningly accepting a tribe's decision about what constitutes its cultural patrimony. Moreover, if the tribal cultural patrimony law clearly and unambiguously vests ownership in the tribe, the indigenous McClain doctrine would recognize objects taken in violation of this law as "stolen" within the meaning of the NSPA, effectively giving broad jurisdictional reach to the tribal law. Accordingly, the indigenous McClain doctrine would satisfy the objective of implementing an effective legal protection of Native American cultural objects.

NEXT STEPS AND CONCLUSION

Although implementing the indigenous McClain doctrine satisfies America's new dual commitment to safeguard Native American cultural objects and respect the right to cultural self-determination, applying the framework to tribal patrimony laws raises several questions.

Perhaps the most immediate concern is that most tribes in the United States do not have cultural patrimony laws. Before the McClain doctrine can recognize theft of Native American cultural objects as "stolen" under the NSPA, tribal laws must first define what constitutes a tribe's patrimony and vest ownership of the objects in the tribe, criminalizing unpermitted excavation and removal. In her 2010 study of tribal codes, Angela Riley found that only some fourteen percent of the tribes studied had laws addressing cultural preservation and protection, including cultural patrimony laws.²⁸⁵

The relative dearth of tribal cultural patrimony laws, however, could be advantageous. Today, tribes could tailor their patrimony laws with knowledge of which foreign laws met the requirements delineated by the *McClain* court. In addition to identifying which objects constitute their cultural patrimony, Native American groups could devise laws that clearly and unambiguously establish tribal ownership, ensuring the laws would be recognized by U.S. courts. But it is questionable whether requiring tribes to tailor tribal cultural patrimony laws to meet U.S. legal standards is a

284. *United States v. Schultz*, 333 F.3d 393, 402 (2d Cir. 2003) ("[T]he fact that the rightful owner of the stolen property is foreign has no impact on a prosecution under the NSPA.").

285. Riley, *supra* note 154, at 100–02, app. 133–64 (explaining that twenty-seven of the 193 tribes with websites had "tribal codes that addressed, in some respect, the preservation of tribal cultural property").

more insidious infringement on self-determination than letting U.S. courts decide what constitutes cultural patrimony under NAGPRA.²⁸⁶

The Fifth Circuit's requirements raise additional concerns for the practicability of the indigenous McClain doctrine. The McClain doctrine limits its application to objects found within the border of the nation claiming ownership. If foreign patrimony laws are not given extraterritorial effect, what territory can tribal laws be said to govern? If the territorial limit means that tribal cultural patrimony laws would only be applied to objects found on reservations, this framework would provide a more limited protection than NAGPRA, which covers cultural objects found on reservations and federal lands. However, if the indigenous McClain doctrine recognizes the modern border of the United States as the applicable territory, then this framework would provide a robust protection more extensive than NAGPRA because it would cover private and state lands as well.

NAGPRA does have one clear advantage over the indigenous McClain doctrine. While no specific financial or commercial value must be attached to the protected object to trigger NAGPRA's criminal provision,²⁸⁷ to be convicted under the NSPA the trafficked items must be worth \$5,000 or more.²⁸⁸ In this way, NAGPRA actually offers a more expansive legal protection than applying the framework proposed.

Nevertheless, the indigenous McClain doctrine would allow tribes to decide what is best for them and how best to protect their cultural objects. If tribes so chose, the indigenous McClain doctrine provides an effective mechanism for punishing all looters, Native Americans and non-Indians alike, for violating tribal laws protecting the cultural objects that Native Americans have decided for themselves constitute their cultural patrimony.

286. After all, even writing laws could break with traditional tribal practices; other tribes choose to keep laws private and known only to members. *See* Riley, *supra* note 154, at 94. Riley also notes the other obstacles to codification besides the idea that

a written code may feel culturally foreign, and the resulting law may be inconsistent with what the community values, as well as how it functions. The process of codification may also require an enormous expenditure of valuable resources in terms of the time, energy, and funds required for the tribal community to collect, discuss, come to agreement, and reduce to writing an entire body of laws.

Id. at 97.

287. Hutt, *supra* note 33, at 142.

288. 18 U.S.C. § 2314 (2012).