

INCLUSIVITY IN CONTEMPORARY ART: ASSESSING THE WALKER'S *SCAFFOLD* CONTROVERSY

Susan L. Allen[†] & Amy B. Weisgram Engstrom^{††}

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I. INTRODUCTION

In the summer of 2017, artist Sam Durant's exhibition *Scaffold* evoked the collective memory of atrocities committed against the Dakota people.¹ The sculpture represented seven gallows used in

[†] Susan L. Allen is an attorney and is the first American Indian woman to be elected to the Minnesota House of Representatives. Susan is an enrolled member of the Rosebud Sioux Tribe and is of Dakota descent. Her legal practice focuses on representing tribal governments and business entities in activities ranging from corporate governance to mergers and acquisitions to tax issues. Susan has a B.A. in economics from Augsburg College, a J.D. from University of New Mexico School of Law, and an L.L.M. in taxation from William Mitchell College of Law.

^{††} Amy B. Weisgram Engstrom is an attorney and adjunct professor at the Mitchell Hamline School of Law. Her legal training focuses on federal Indian law, economic development, and civil litigation. Amy has a B.A. in economics from St. Olaf College, an M.A. from University of St. Thomas, and a J.D. from Mitchell Hamline School of Law.

1. Alicia Eler, *Walker Art Center Postpones Sculpture Garden Opening After 'Scaffold' Protests*, STAR TRIB. (May 30, 2017, 10:38 AM), <http://www.startribune.com/scaffold-artist-issues-statement-apologizing-reconsidering-work-in-light-of-sculpture-garden-protests/425148453/#1> [<http://perma.cc/6E64-K6SC>].

historic U.S. government executions, including one used in 1862 in Mankato, Minnesota for the mass execution of thirty-eight Dakota prisoners—the “Dakota 38.”²

The Walker Art Center (“Walker”), located in Minneapolis, Minnesota commissioned *Scaffold* for placement in the Minneapolis Sculpture Garden as part of a multi-million-dollar renovation.³ Durant intended his artistic expression to be retrospective of “the difficult histories of the racial dimension of the criminal justice system in the United States, ranging from lynchings to mass incarceration to capital punishment.”⁴ But to the Dakota, *Scaffold* represented a clear, personal reminder of a painful time in their tribe’s history.⁵

In the Walker’s Open Letter (“Open Letter”) regarding Sam Durant’s *Scaffold*, the Walker acknowledged “that the artist’s intent to create a work meant ‘as a space of remembering’ may [have been] misread.”⁶ The Walker admitted its mistake in showcasing *Scaffold* in the Minneapolis Sculpture Garden, a Minneapolis city park,⁷ without any interactive educational explanation.⁸ The *Open Letter* states: “Because the structure can serve as a gathering space, which allows visitors to explore it in un-ceremonial ways, we realize it requires heightened attention and education in all of our visitor orientation

2. *Id.*

3. Euan Kerr, *Walker Art Center’s “Scaffold” to be Dismantled, Burned*, MPR NEWS (May 31, 2017), <https://www.mprnews.org/story/2017/05/31/walker-art-center-dismantle-scaffold-sculpture-burn-it> [<https://perma.cc/5PTT-N4TH>].

4. Sam Durant, *A Statement from Sam Durant*, WALKER ART CTR. (May 29, 2017), <https://walkerart.org/magazine/a-statement-from-sam-durant-05-29-17> [<http://perma.cc/ZQE4-K6XU>].

5. Kerr, *supra* note 3.

6. Olga Viso, *Learning in Public: An Open Letter on Sam Durant’s Scaffold*, WALKER ART CTR. (May 26, 2017), <https://walkerart.org/magazine/learning-in-public-an-open-letter-on-sam-durants-scaffold> [<http://perma.cc/HZQ8-3ZSM>].

7. See *Minneapolis Sculpture Garden Reconstruction and Cowles Conservatory Renovation: Public Hearing*, MINNEAPOLIS PARKS & RECREATION BD. (Apr. 15, 2014), https://www.minneapolisparcs.org/_asset/ml3dky/mpls_sculpture_garden_public_hearing_presentation.pdf [<http://perma.cc/YBG8-V7LV>]. The Minneapolis Park and Recreation Board owns the land on which the Minneapolis Sculpture Garden is located. *Id.* In 2015, the state of Minnesota issued an \$8.5 million general obligation bond, and the Mississippi Watershed Management Organization provided a \$1.5 million grant to fund a \$10 million reconstruction for the Minneapolis Sculpture Garden. *Id.*

8. Viso, *supra* note 6.

and interpretation.”⁹ Durant removed *Scaffold* after much controversy and strong opposition from Dakota elders.¹⁰ Durant also transferred the intellectual property rights of *Scaffold* to the Dakota people.¹¹

The recent *Scaffold* controversy was not about artistic expression protected under the Free Speech Clause of the First Amendment. Instead, the controversy exposed the Walker’s failure to address the “complex questions” that *Scaffold* raised and its failure to engage with the Dakota people prior to commissioning a structure for remembrance.¹² Summarily, the *Scaffold* controversy made the public aware of how Native people are excluded from mainstream art culture.¹³

This article begins by briefly exploring the turbulent history shared between tribes native to the upper Midwest and the U.S. government.¹⁴ After reviewing the course of events that led to the execution of the Dakota 38,¹⁵ this article views the complex questions *Scaffold* raises in light of First Amendment protections.¹⁶ After demonstrating the underlying problem in the Walker’s actions¹⁷ and explaining how engaging contemporary Native artists will benefit both museums and society,¹⁸ this article ends by discussing ways to avoid further marginalization of Native art.¹⁹

9. *Id.*

10. Carolina Miranda, *Artist Sam Durant was Pressured into Taking Down His ‘Scaffold.’ Why Doesn’t He Feel Censored?*, L.A. TIMES (June 17, 2017, 2:30 AM), <http://www.latimes.com/entertainment/arts/la-et-cam-sam-durant-scaffold-interview-20170617-htmlstory.html> [<http://perma.cc/S8YU-NNBH>].

11. *Id.*

12. See Viso, *supra* note 6 (acknowledging “complex questions” raised by *Scaffold* and discussing Sam Durant’s intent to create a “space of remembering”).

13. Paul Schmelzer, *How Can Contemporary Art Be More Inclusive of Native Voices?*, WALKER ART CTR. (Oct. 12, 2017), <https://walkerart.org/magazine/inclusion-native-american-art-panel-discussion> [<http://perma.cc/8RZB-TPXG>] (considering “necessary steps to make the field of contemporary art more inclusive and reflective of Native American art”).

14. See *infra* Part II.A.

15. See *infra* Part II.B.

16. See *infra* Part III.

17. See *infra* Part IV.

18. See *infra* Part V.

19. See *infra* Part VI.

II. HISTORICAL ANALYSIS

A. *Tribal History in the Upper Midwest*

Initial contact between Europeans and Indian tribes in Minnesota was rooted in trade. “Over a 200-year span beginning in the mid-1600s, European traders exchanged manufactured goods for valuable furs with Indian people.”²⁰ French fur traders operating in Montreal and Quebec moved south and west to trade with various Minnesota tribes, including the Dakota.²¹ As the European fur trade declined in the early 1800s, “it became a matter of survival [for the Dakota] to enter into exchanges of land for money, goods, and services; to maintain their welfare; and to pay off debts claimed by traders.”²²

In 1805, the Dakota ceded more than 100,000 acres of land to the United States near where the Mississippi River and the Minnesota River meet in exchange for miniscule reimbursement.²³ Seven tribal leaders attended the 1805 land cession negotiations, but only two leaders signed the treaty.²⁴ Such a lopsided and unfair transaction was standard practice for U.S. government officials negotiating with tribes in the nineteenth century.²⁵ During negotiations, tribal leaders and members generally did not read English, forcing them to rely on U.S. government officials for representation of what they were agreeing to when signing the treaties.²⁶ Government-paid translators seemingly addressed the language barriers between tribes and government officials,²⁷ but it

20. *The US-Dakota War of 1862: Traders*, MINN. HIST. SOC'Y, <http://www.usdakotawar.org/history/newcomers/traders> [https://perma.cc/5LMH-3FUV] (last visited July 2, 2018).

21. *See Fur Trade in Minnesota: Overview*, MINN. HIST. CTR. (Feb. 2, 2018), <http://libguides.mnhs.org/furtrade> [https://perma.cc/54PN-GT4C].

22. *The US-Dakota War of 1862: Traders*, *supra* note 20.

23. *The US-Dakota War of 1862: Minnesota Treaties*, MINN. HIST. SOC'Y, <http://www.usdakotawar.org/history/treaties/minnesota-treaties> [https://perma.cc/AZ4C-BMB9] (last visited July 2, 2018) (explaining that although the land was valued by the U.S. government at around \$200,000, compensation paid to tribal leaders equaled about \$200 in “gifts” and another \$2,000 the U.S. Senate elected to send the tribe as “payment”).

24. *Id.*

25. William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 26 n.137 (2004).

26. *The US-Dakota War of 1862: Minnesota Treaties*, *supra* note 23.

27. *Id.*

seems unlikely that these translators provided an authentic representation to the tribal leaders of what was truly being exchanged through the treaty.²⁸

The U.S. government was interested in Indian-held lands in Minnesota during the nineteenth century for two primary purposes: (1) establishing sites for military forts; and (2) acquiring farmland for white settlers.²⁹ Pike's Treaty—signed on September 23, 1805—is the first example of the U.S. government seizing land for military use and agricultural settlement in this region.³⁰ In negotiating this treaty, U.S. Army personnel who met with Dakota leaders were openly seeking land for future military sites.³¹ Subsequent treaties, signed from 1837 to 1852, took even more land from Dakota and Ojibwe tribes.³² When Minnesota became a U.S. territory, pressure from settlers and the U.S. military on Native groups in the region increased and eventually forced Native people off their land.³³

In addition to lopsided land negotiations, the U.S. government employed policies designed to force tribal relocation and assimilation. Relocation policies systematically removed tribes from their ancestral lands and forced occupancy on land within reservation boundaries.³⁴ Assimilation policies stripped Native people of their languages, religions, cultures, and traditions.³⁵

28. *See id.*

29. F. Paul Prucha, *The Settler and the Army in Frontier Minnesota*, 29 MINN. HIST. 231 (Sept. 1948), <http://collections.mnhs.org/MNHHistoryMagazine/articles/29/v29i03p231-246.pdf> [<https://perma.cc/W5A2-NJYN>].

30. *The US-Dakota War of 1862: Minnesota Treaties*, *supra* note 23.

31. *Id.*

32. *Id.*

33. *See The US-Dakota War of 1862: Broken Promises*, MINN. HIST. SOC'Y, <http://www.usdakotawar.org/history/treaties/broken-promises> [<https://perma.cc/3B38-3L5P>] (last visited July 2, 2018).

34. *See Indian Treaties and the Removal Act of 1830*, U.S. DEP'T STATE, <https://history.state.gov/milestones/1830-1860/indian-treaties> [<https://perma.cc/6RQA-FJAT>] (last visited July 2, 2018). Federal removal policies became official when the Indian Removal Act passed in 1830. *See id.* This policy transitioned to the Reservation Era, where tribes were relocated to tracts of land determined by the federal government, leading to hardship for Indian communities. MATTHEW FLETCHER, FEDERAL INDIAN LAW § 1.3 (2016).

35. Assimilation policies in the U.S. developed the practice of “civilizing” Indian people into mainstream, white culture by removing children from their homes to educate them in urban boarding schools; forcing Indian families to begin

B. *The Dakota Conflict*

In response to densely populated urban centers in eastern states and ongoing immigration from Europe, Congress passed the Homestead Act in 1862, offering millions of acres of free or discounted land to white settlers willing to farm it.³⁶ This displaced Native people to very small tracts of land that were often barren of the natural resources necessary to grow food, hunt, or fish.³⁷ Consequently, tribal members across central and southern Minnesota faced large-scale starvation in the months to come.³⁸ Because of treaties with the U.S. government prior to 1862, tribes had come to rely on government rations and annuity payments that were promised in exchange for giving up their much-needed natural resources.³⁹ Unsurprisingly, these payments and rations often went missing, were stolen, or otherwise never arrived as promised—the treaties were dishonored.⁴⁰

With their fertile lands taken from them, negotiated payments and rations unavailable, and settlers competing with the tribes for game animals and fish, Native people in the region were in dire straits.⁴¹ Tribal officials reached out to the U.S. government's regional Indian Agent, Thomas Galbraith, but no solutions were reached.⁴² “We have waited a long time. . . . We have no food but here these stores are filled with food. We ask that you, the agent,

European farming methods and eliminating traditional communal ownership of tribal land, among other atrocities. MATTHEW FLETCHER, *FEDERAL INDIAN LAW* § 1.3 (2016). Federal Indian policy in the nineteenth century removed Indian children to religious schools operated by the federal government, criticized traditional lifestyles of tribal Indians, and sought to eliminate Indian culture and religion. *See id.* § 3.6.

36. The Homestead Act of 1862, ch. LXXV (repealed 1976), <https://www.ourdocuments.gov/doc.php?flash=false&doc=31&page=transcript> [<https://perma.cc/T27L-3QC9>] (last visited July 2, 2018) (stating that any person shall be entitled to lands “at one dollar and twenty-five cents, or less, per acre”).

37. Anna Khomina, *The Homestead Act of 1862: Dreams and Realities*, U.S. HISTORY SCENE, <http://ushistoryscene.com/article/1862-homestead-act/> [<https://perma.cc/9V59-RDFG>] (last visited July 2, 2018).

38. *See id.*

39. *The US-Dakota War of 1862: Minnesota Treaties*, *supra* note 23.

40. *Id.*

41. *The US-Dakota War of 1862: Causes of the War*, MINN. HIST. SOC'Y, <http://www.usdakotawar.org/history/war/causes-war> [<https://perma.cc/XDX3-2JCZ>] (last visited July 2, 2018).

42. *Id.*

make some arrangement so we can get food. . . .”⁴³ Taoyateduta, the Chief of the Mdewakanton Dakota, keenly observed that government stores were full and agricultural products in the region were plentiful, yet the government would not share with the Dakota people.⁴⁴ Furthermore, government payments to the Dakota were delayed,⁴⁵ and local traders, fearing nonpayment, cut off credit to Dakota hunters.⁴⁶ Rather than watch their loved ones starve, Dakota warriors broke into one of the nearby food stores.⁴⁷ When confronted, their actions escalated, and the Dakota hunting party killed five white settlers.⁴⁸ This was met with hostility, and war between Native people and white settlers erupted.⁴⁹

The 1862 Dakota War was one of the bloodiest and most consequential conflicts in American history.⁵⁰ “[I]t launched a series of Indian wars on the northern plains that did not end until 1890 with the massacre at Wounded Knee in South Dakota.”⁵¹ Many people died over the course of the month-long conflict.⁵² Eventually, the Dakota warriors were put on trial.⁵³ More than 300 Dakota were sentenced to death,⁵⁴ and on September 28, 1862, the Dakota 38

43. *Id.* (quoting Little Crow (Taoyateduta), Mdewakanton Dakota, speaking to agent Thomas Galbraith in 1862).

44. *Id.*

45. *Id.*

46. *The US-Dakota War of 1862: Andrew Myrick*, MINN. HIST. SOC’Y, <http://www.usdakotawar.org/history/andrew-myrick> [https://perma.cc/GBG6-T4GR] (last visited July 2, 2018).

47. *The Dakota War of 1862*, U. OF MINN.: CTR. FOR HOLOCAUST AND GENOCIDE STUD., <https://cla.umn.edu/chgs/holocaust-genocide-education/dakota-war-1862> [https://perma.cc/CW9D-AMPX] (last visited July 2, 2018).

48. *Id.*

49. *Id.* The government was initially slow to send troops due to the Civil War. *Id.*

50. Alexandra E. Stern, “War is Cruelty:” *The Civil War Lessons of the Dakota War of 1862*, U.S. HIST. SCENE (Nov. 6, 2015), <http://ushistoryscene.com/article/civil-dakota-war/> [http://perma.cc/WG62-RUSR].

51. KENNETH CARLEY, *THE DAKOTA WAR OF 1862: MINNESOTA’S OTHER CIVIL WAR 1* (2001).

52. *The US-Dakota War of 1862: During the War*, MINN. HIST. SOC’Y, <http://www.usdakotawar.org/history/war/during-war> [https://perma.cc/9SXW-T59B] (last visited July 2, 2018).

53. *The US-Dakota War of 1862: The Trials & Hanging*, MINN. HIST. SOC’Y, <http://www.usdakotawar.org/history/aftermath/trials-hanging> [https://perma.cc?Q2G6-E2H8] (last visited July 2, 2018).

54. *Id.*

were hanged under Lincoln's authorization.⁵⁵ Unfortunately, this proved only the first of many recriminations the Dakota endured.

Speaking to a legislative session shortly after the Dakota Conflict, Minnesota Governor Ramsey stated: "Our course then is plain. The Sioux Indians of Minnesota must be exterminated or driven forever beyond the borders of Minnesota."⁵⁶ Dakota people who surrendered after the conflict, and not sentenced to death or imprisonment, were removed to an internment camp at Fort Snelling.⁵⁷

Then, Minnesota settlers attacked the Dakota people on their march to Fort Snelling.⁵⁸ While being held at Fort Snelling, an estimated 300 more Dakota died from starvation, measles, and various diseases.⁵⁹ The Dakota who survived the winter at Fort Snelling were then moved to another internment camp located in South Dakota.⁶⁰

III. FRAMING CONTROVERSY IN HISTORY AND TODAY

Fast forward to the summer of 2017, where *Scaffold* reintroduced the conflict that led to the Dakota 38, effectively reopening the wounds felt since 1862. The Walker fell short in framing the controversy generated by *Scaffold* in its Open Letter stating, "Durant's sculpture raises complex questions about how contentious moments in history are remembered."⁶¹ Labeling the largest mass execution in U.S. history—not to mention the other brutal acts committed by local militia and federal troops against the Dakota after their defeat in the 1862 Dakota War⁶²—as "contentious

55. *Id.*

56. *The US-Dakota War of 1862: Alexander Ramsey*, MINN. HIST. SOC'Y, <http://usdakotawar.org/history/alexander-ramsey> [https://perma.cc/LRC8-BRSZ] (last visited July 2, 2018).

57. *The US-Dakota War of 1862: Forced Marches & Imprisonment*, MINN. HIST. SOC'Y, <http://usdakotawar.org/history/aftermath/forced-marches-imprisonment> [https://perma.cc/8UPH-RVBE] (last visited July 2, 2018).

58. *Id.*

59. *Id.*

60. *Dakota Commemorative Walk Remembers 1862 Forced March to Fort Snelling*, PIONEER PRESS (Nov. 11, 2012), <https://www.twincities.com/2012/11/11/Dakota-commemorative-walk-remembers-1862-forced-march-to-fort-snelling/> [https://perma.cc/5JUM-SK9N].

61. Viso, *supra* note 6.

62. See, e.g., Alexandra E. Stern, "War is Cruelty:" *The Civil War Lessons of the Dakota War of 1862*, U.S. HIST. SCENE (Nov. 6, 2015), <http://ushistoryscene.com/>

moments in history” is a gross understatement of the brutality that followed the War. The Walker’s choice to characterize controversy in this way served only to further marginalize the Dakota. But, the Open Letter appropriately recognized that *Scaffold* raised “complex questions” about remembrance for the Dakota.⁶³

The *Scaffold* controversy also raised questions about whether its removal, on the basis that it was offensive or insensitive to the loss experienced by the Dakota,⁶⁴ is contrary to the belief that artistic expression should not be silenced in a free and democratic society.⁶⁵ For example, the Dakota were free to exercise their own free speech by voicing their objections to *Scaffold* or declining to visit.⁶⁶

A. *The Impact of Art in Public Spaces*

Controversy and disagreement about artistic representations of Native people in public spaces in Minnesota is not new; it began with the opening of the Minnesota State Capitol in 1905.⁶⁷ Under Minnesota law, all Capitol art “possess[es] historical value for the people of Minnesota,” and no Capitol art can be “relocated or removed” without approval of the Minnesota Historical Society.⁶⁸ Yet, Native people and tribal leaders have voiced concern about, and called for the removal of, paintings in the Capitol that depict American Indians which the State deems historical, but Native people view as historically inaccurate, insensitive, and offensive.⁶⁹

The 2017 restoration of the Minnesota State Capitol building presented a significant opportunity for Native people and tribes to have their perspectives heard about art depicting Native people in the Capitol building.⁷⁰ In 2011, the Minnesota State Legislature and

article/civil-dakota-war/ [http://perma.cc/WG62-RUSR]; *Punitive Expeditions*, MINN. HIST. SOC’Y, <http://www.usdakotawar.org/history/aftermath/punitive-expeditions> [https://perma.cc/Y2FM-PPBA] (last visited July 2, 2018).

63. See Viso, *supra* note 6.

64. Miranda, *supra* note 10.

65. *Id.*

66. See *infra* Part V.

67. *Reconciling History*, MINN. HIST. SOC’Y, <http://www.mnhs.org/capitol/learn/art/reconciling-history> [https://perma.cc/J93D-7NUF] (last visited July 2, 2018).

68. MINN. STAT. § 138.68 (2016).

69. *Reconciling History*, *supra* note 67.

70. See SUBCOMMITTEE ON CAPITOL ART, FINAL REPORT TO THE MINNESOTA STATE CAPITOL PRESERVATION COMMISSION (Aug. 15, 2016), https://mn.gov/admin/assets/2016-08-15-art-subcommittee-final-report_tcm36-252309.pdf

the Governor created a twenty-two member Minnesota State Capital Preservation Commission (the “Commission”) to review and make recommendations on “the purpose, placement, display, conservation, and preservation of art in the Capitol.”⁷¹ The Commission established a Subcommittee on Art in the Capitol (the “Art Subcommittee”), composed of fifteen Governor-appointed members, which included individuals “who have a wide range of expertise in art, history, American Indian and Minnesota culture, and architecture.”⁷² With nearly 300,000 annual visitors to the Capitol, the Art Subcommittee held eleven statewide meetings to obtain public input on “the Capitol’s visitor experience” and to develop a vision statement on the role and purpose of art in the Capitol.⁷³

One of the themes the Art Subcommittee identified in the vision statement was that the role and purpose of Capitol art was the importance of ensuring that “art depicting native peoples provides a full description of the historical events depicted in the art and the artistic interpretations, including American Indian perspectives.”⁷⁴ To provide expertise in American Indian culture, the Governor appointed Gwen Westerman (Dakota)⁷⁵ and Anton Treuer (Ojibwe)⁷⁶ as members of the Art Subcommittee. Westerman and Treuer.⁷⁷ Both Westerman and Treuer advocated that the five

[<https://perma.cc/DD4K-6PQQ>]. See generally Briana Bierschbach, *The Restoration of the Minnesota Capitol Has Also Restored One of Its Original Purposes: To Showcase Art*, MINN. POST (Aug. 8, 2017), <https://www.minnpost.com/politics-policy/2017/08/restoration-minnesota-capitol-has-also-restored-one-its-original-purposes-sh> [<https://perma.cc/U59L-SCLG>].

71. SUBCOMMITTEE ON CAPITOL ART, *supra* note 70, at 6.

72. *Id.*

73. *Id.*

74. *Id.* at 11.

75. Gwen Westerman has a Ph.D. in English from the University of Kansas and is the Dakota educator at Minnesota State University Mankato. *Gwen Westerman*, MINN. ST. UNIV. MANKATO, <https://grad.mnsu.edu/research/cesr/westerman.html> [<https://perma.cc/K9LM-NZRC>] (last visited July 2, 2018).

76. Anton Treuer is the Executive Director of the American Indian Resource Center at Bemidji State University. *Dr. Anton Treuer*, BEMIDJI ST. UNIV., <https://www.bemidjistate.edu/directory/facstaff/wj2863th/> [<https://perma.cc/X9A7-6HNG>] (last visited July 2, 2018).

77. See Gwen Westerman, *Statement on the Report of the Minnesota Capitol Art Subcommittee*, MINNESOTA.GOV 1, 2 (June 21, 2016), https://mn.gov/admin/assets/Westerman-statement-on-mn-capitol-restoration-art-subcommittee-report-8-3-2016_tcm36-251404.pdf [<https://perma.cc/FS4H-2RK6>]; Anton Treuer, *Subcommittee on*

paintings depicting Native peoples of Minnesota be moved from the Capitol to a space (such as the Minnesota Historical Society) that allows for more extensive interpretation.⁷⁸ When explaining how art depicts Native people, Westerman commented:

Our society remains constrained by images that depict Indians as violent, treacherous, and racially inferior, and by a reliance on warfare as the chronological markers of history. . . . This is how Dakota people are depicted in the Capitol, and it often serves as justification for continued vilification of our Dakota people today. . . . It is time to move the paintings of the stereotyped uncivilized and savage Indian—we are human beings with a rich and enduring culture.⁷⁹

Professor Treuer emphasized the need for art placement at a location able to educate and provide context, stating:

We need to move offensive art from the Minnesota state capitol to a venue that will let us contextualize, learn from, and appreciate them. The reason this decision has been so difficult is because it is really a contest between two positive public “goods”—healthy inclusive politics on the one hand and unfettered timeless freedom for artistic representation in the capitol on the other.⁸⁰

The Art Subcommittee also consulted with Minnesota’s eleven Indian tribes in an effort to understand their “perspectives on the historical context of existing art in the Capitol,” and met individually with leaders of nine tribes.⁸¹ Tribal leaders consistently expressed concern about the painting “Father Hennepin at the Falls of St. Anthony”—located in the Governor’s Reception Room—because of its inaccurate representation of the relationship between Father Hennepin and Minnesota Native peoples.⁸² Tribal leaders,

Capitol Art: Preliminary Report to the Minnesota State Capitol Preservation Commission Appendix Dissenting Recommendation, MINNESOTA.GOV 1, 1–4 (2016), https://mn.gov/admin/assets/Treuer-capitol-arts-report-appendix-8-3-2016_tcm36-251403.pdf [<https://perma.cc/5Z9E-62WS>].

78. Westerman, *supra* note 77, at 1; Treuer, *supra* note 77, at 2.

79. Westerman, *supra* note 77, at 2.

80. Treuer, *supra* note 77, at 1.

81. SUBCOMMITTEE ON CAPITOL ART, *supra* note 70, at 22.

82. Guelda Voien, *Images of Native Americans in Capitol Stir Controversy*, OBSERVER (Oct. 16, 2015, 6:34 PM), <http://observer.com/2015/10/images-of-native-americans-in-minnesota-capitol-stir-controversy/> [<https://perma.cc/H4F6-5U6K>].

particularly Dakota leaders, strongly recommended the “Treaty of Traverse des Sioux” be removed from the Governor’s Reception Room in the Capitol because its location served as “the backdrop for virtually every important gubernatorial bill signing, press conference, or guest appearance taking place in the Governor’s Reception Room.”⁸³ Tribal leaders recommended that these paintings be removed from the Capitol, “or from their ‘priority of placement,’ to a place where they could be properly interpreted.”⁸⁴

Because all Capitol art are state assets controlled by the Minnesota Historical Society— whose primary objective is the preservation of Capitol art⁸⁵—the removal of all paintings Native peoples deem inaccurate or offensive was not practical. However, the Art Subcommittee could make recommendations on the placement and use of the art in the Capitol.⁸⁶ Due to the Art Subcommittee’s extensive work, the significant input by tribal leaders, and committee members Westerman and Treuer, the most controversial paintings were either relocated to other, less prominent areas within the Capitol or they were moved to the Minnesota Historical Society.⁸⁷ Even so, the question of whether the new locations for these paintings depicting Native people will allow for more extensive interpretation is unknown.

B. *Background on Art and the First Amendment*

Throughout American history the First Amendment is often the focus of discussion regarding art presentations and continues to be a contemporary area of concern.⁸⁸ Congress specifically addressed the need for encouraging and protecting the arts when it codified the National Endowment for the Arts (“NEA”) in 20 U.S.C. § 954.⁸⁹

83. SUBCOMMITTEE ON CAPITOL ART, *supra* note 70, at 25.

84. *Id.* at 24.

85. MINN. STAT. § 138.68 (2016) (“No monument, memorial or work of art shall be relocated or removed from, or placed in such areas or altered or repaired in any way without the approval of the Minnesota State Historical Society.”).

86. SUBCOMMITTEE ON CAPITOL ART, *supra* note 70, at 2.

87. Bierschbach, *supra* note 70.

88. Ken Paulson, *Arts & First Amendment Overview*, NEWSEUM INST. (Jan. 3, 2004), <http://www.newseuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/arts-first-amendment-overview/> [<https://perma.cc/Q85Y-9WQ3>].

89. *See* 20 U.S.C. § 954 (1965). This agency financially supports arts, artists, and communities to develop projects and exhibits fostering creativity and imagination. *See About the NEA*, NAT’L ENDOWMENT FOR THE ARTS, <https://www.arts.gov/about-nea> [<https://perma.cc/N7NY-27PY>] (last visited July 2, 2018).

This legislation recognized that art and communicating issues through art is a necessary component of American discourse, as explained in the NEA's purpose statement: "The National Endowment for the Arts is an independent federal agency that funds, promotes, and strengthens the creative capacity of our communities by providing all Americans with diverse opportunities for arts participation."⁹⁰ Through project funding, the NEA highlights the importance of artistic freedoms and of upholding First Amendment protections when controversial art—especially controversial art commissioned in part through federal funding—receives public scrutiny.⁹¹ NEA often grants supplement operating budgets based on private funding or state grants so that artists, museums, and communities can maintain or expand voices, cultural representations, and appreciation in the arts.⁹² While the Walker previously hosted exhibits that received NEA grant funding,⁹³ the *Scaffold* piece is not one of those exhibits. The funding of *Scaffold*'s construction and exhibition was exclusively from private resources.⁹⁴

90. NAT'L ENDOWMENT FOR THE ARTS, <https://www.arts.gov/?campaignID=251871&patronID=703468922&linkNum=4&memberID=6a283a8c8a1f696d22d9b3a5c99a0816> [<https://perma.cc/S4N9-5PQG>] (last visited July 2, 2018).

91. See *About the NEA*, *supra* note 89.

92. See *generally Grants*, NAT'L ENDOWMENT FOR THE ARTS, <https://www.arts.gov/grants-organizations/art-works/grant-program-description> [<https://perma.cc/RL78-7522>] (last visited July 2, 2018).

93. For example: (1) *Art Works—Presenting & Multidisciplinary Works* received an NEA grant in 2017 allowing the Walker to commission up to five new performance works; and (2) *Field/Discipline: Presenting & Multidisciplinary Works* received an NEA grant in 2014 for commissions, residencies, and presentations of premiers for New York playwrights and interdisciplinary performance. *National Endowment for the Arts FY 2017 Spring Grant Announcement*, NAT'L ENDOWMENT FOR THE ARTS (June 5, 2017), https://www.arts.gov/sites/default/files/Spring_2017_State_List_FINAL3v2.pdf [<https://perma.cc/YSL9-G3TQ>]; *National Endowment for the Arts—2014 Fall Grant Announcement*, NAT'L ENDOWMENT FOR THE ARTS (Nov. 24, 2014), https://www.arts.gov/sites/default/files/Fall_2014_Grant_List_by_State_FINAL.pdf [<https://perma.cc/3RES-TXDB>].

94. See Alicia Eler, 'Scaffold' Sculpture to Be Dismantled, Then Burned in Dakota-Led Ceremony, STAR TRIB. (June 1, 2017), <http://www.startribune.com/dakota-elders-gather-at-walker-art-center-to-decide-fate-of-scaffold-sculpture/425508723/> [<https://perma.cc/58W2-KCX9>] (quoting Park Board Superintendent Jayne Miller, stating that "'Scaffold' was funded by private money, and no public funds will be used for its dismantling").

Supreme Court case law spans generations to uphold First Amendment protections of the arts. Showcasing a piece of art that is controversial or offensive to some does *not* create a situation appropriate for censorship.⁹⁵ The government may not discriminate against art on the bases of subject matter, the speaker's viewpoint, or the speaker's identity.⁹⁶ Regardless of an artist's identity or message, the First Amendment protects artists and their art.⁹⁷

Discussion surrounding the Walker's commission of *Scaffold* extended to concerns about the First Amendment's protection of artistic expression, *Scaffold*'s placement in the Minneapolis Sculpture Garden—public land—and the use of public funding for museum projects.⁹⁸ Protecting art and artistic expression by government grant funding or through the active practice of applying First Amendment arguments does not extend to museums commissioning projects in a way that excludes Native voices.⁹⁹

Criticism of the Walker excluding Native voices in the commission of *Scaffold* is very different from discussions about the First Amendment or government censorship. The *Scaffold* project received no NEA grant funding, no government attempted to censor Durant's work, and no government called for the dismantling of the *Scaffold* piece.¹⁰⁰ In response to a question related to the National

95. See generally *NEA v. Finley*, 524 U.S. 569 (1998); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976).

96. See generally *NEA v. Finley*, 524 U.S. 569 (1998); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976).

97. See generally *NAACP v. Button*, 371 U.S. 415 (1963).

98. See Sheila Eldred, *Walker Art Center's Reckoning with 'Scaffold' Isn't Over Yet*, N.Y. TIMES (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/arts/design/walker-art-center-scaffold.html>. See generally Eler, *supra* note 94.

99. See *Finley*, 524 U.S. 569 (finding that requiring the Chairperson of the National Endowment for the Arts to ensure “artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public” is not discriminatory and does not interfere with First Amendment rights); *Contemporary Native Voices*, TAM, <http://www.tacomaartmuseum.org/voices/dr-adrienne-keene/> [<https://perma.cc/N9GH-VBB3>] (last visited July 2, 2018) (“[I]ncluding contemporary Native voices is the biggest thing that is often overlooked in galleries and museums.”).

100. See generally *FY 2017 Fall Grant Announcement State and Jurisdiction List*, NAT'L ENDOWMENT FOR ARTS 125–34 (Dec. 7, 2016), <https://www.arts.gov/sites/Default/files/fall-2016-grant-announcement-state-listing.pdf> [<https://perma.cc/7P9W-3DBF>].

Coalition Against Censorship's concern that dismantling *Scaffold* was a form of censorship, the artist, Sam Durant, stated:

Censorship is when a more powerful group or individual removes speech or images from a less powerful party. That wasn't the case. The Dakota are certainly not more powerful, in political terms, or in terms of the international art world. I could have said at any point, "No, I want the work to stay up as it is, end of story. Walker, you deal with it."¹⁰¹

Thus, Durant voluntarily agreed to dismantle *Scaffold*.¹⁰² The artist was not regulated, controlled, or fined by a government entity. *Scaffold*'s commission and exhibition by the Walker, followed by its subsequent removal, is not a First Amendment issue. The focus here is on cultural and historical exclusion, not constitutionality.

IV. AFFECTED PEOPLE ARE EXCLUDED FROM ARTISTIC AND CULTURAL REPRESENTATION

Whether the Walker, a contemporary art center, has an obligation to consider the impact of artistic representations of atrocities, such as the execution of the Dakota 38, when planning for the commission of contemporary art is a question to consider.

The Walker's former Director, Olga Viso, sought out *Scaffold*.¹⁰³ Ms. Viso first viewed *Scaffold* several years ago on exhibition in Europe. She proposed the exhibit to the Walker, and "the board signed off on the \$450,000 purchase in 2014, according to minutes from the Walker board's acquisition committee."¹⁰⁴ The Walker has since "acknowledged that it should have engaged in a meaningful way with Native American leaders before mounting *Scaffold*."¹⁰⁵

Although the Walker is arguably not financially accountable to the public for *Scaffold* since the sculpture was privately funded,¹⁰⁶ the

101. See Miranda, *supra* note 10.

102. *Id.*

103. Jenna Ross & Rohan Preston, *Olga Viso Quits Walker Art Center Amid Tensions with Board*, STAR TRIB. (Nov. 14, 2017, 10:19 PM), <http://www.startribune.com/Walker-art-center-director-olga-viso-stepping-down/457475003/#1> [<https://perma.cc/PHA6-4T8U>].

104. Eldred, *supra* note 98.

105. *Id.*

106. See *FY 2018 Grantees*, MINN. ST. ARTS BOARD, <http://www.arts.state.mn.us/grants/2018/2018-awarded-aa.htm> [<https://perma.cc/VPB4-CEVN>] (last visited July 2, 2018). While no public funds were used to specifically commission *Scaffold*,

Walker does emphasize education as a core experience for visitors and patrons.¹⁰⁷ Accordingly, the Walker should hold itself to a higher standard by seeking input and guidance from affected communities when it chooses to commission artistic representations of atrocities.

How images, remembrances, and artistic representations facilitate the understanding of human atrocities has been extensively studied. For example, guidance from experts is generally available for museums and educators presenting information or exhibits about the Holocaust.¹⁰⁸ Berel Lang, a Professor of Philosophy Emeritus at SUNY Albany, who has written on Holocaust representation, stated:

Writers and artists generally have moral obligations that don't go away in the act of creations; such obligations then only become more refined and demanding. There is the challenge of combining honesty with dispassion, and at the very least, of avoiding exploitation.¹⁰⁹

When art and remembrance or memorial representations intersect, the responsibility is to provide some education about past events or a narrative framework that will guide the perceptions of the visitor.¹¹⁰

the Walker has been partially funded by public means since 1940, beginning with 1939 Works Projects Administration grants. *Id.* The Walker has also received grants from the Minnesota State Arts Board through appropriations by the Minnesota Legislature to the State's general fund and its arts and cultural heritage fund, including a grant to be funded in 2018. *Id.*

107. See *Education and Public Programs*, WALKER ART CTR., <https://walkerart.org/about/education-public-programs> [<https://perma.cc/Y34X-QNDW>] (last visited July 2, 2018) ("Innovative educational activities and a commitment to providing access to art for all people have been at the heart of the Walker Art Center's mission since its inception as a public institution."); see also *Education and Public Programs: Related Articles*, WALKER ART CTR., <https://walkerart.org/about/education-public-programs> [<https://perma.cc/ZY5V-EVTB>] (last visited July 2, 2018).

108. See, e.g., *A Teacher's Guide to the Holocaust*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://fcit.usf.edu/holocaust/sites/USHMM/guideint.htm> [<https://perma.cc/6SHE-JR3M>] (last visited July 2, 2018).

109. Ysabelle Cheung, *Art After Auschwitz: The Problem with Depicting the Holocaust*, VICE (Sept. 15, 2015, 12:30 PM), https://creators.vice.com/en_uk/article/nz445m/art-after-auschwitz-the-problem-with-depicting-the-holocaust [<https://perma.cc/78M8-ZAUV>].

110. See Chelsea J. Meredith and Michelle M. Pizzolato, *How We Represent and Memorialize the Holocaust: Museums, Sites and Memorials in the United States*, U. HONORS PROGRAM: U. S. FLA., ST. PETERSBURG, 9–10 (Apr. 29, 2013), http://dspace.nelson.usf.edu/xmlui/bitstream/handle/10806/6614/Honors_Thesis%20Chelsea_Meredith_and_Michelle_Pizzolato.pdf?sequence=1 [<https://perma.cc/78M8-ZAUV>].

The fact that *Scaffold* was a commissioned artist's creation¹¹¹ elevated the Walker's responsibility to provide education or a narrative framework to guide perceptions.

Instead, the Walker failed to engage in a dialogue with the Dakota in preparation for the *Scaffold* exhibit. The museum missed an opportunity to play an important role in giving artistic expression to the testimony, collective memory, and contemporary experiences of the Dakota. In short, the Walker's process of commissioning *Scaffold* excluded affected Native people from the artistic and cultural representation of *their* history.

V. ENGAGING NATIVE AMERICAN CONTEMPORARY ARTISTS

Another important question raised through the exhibition is why the Walker has, to date, commissioned only one Native American contemporary artist—Frank Big Bear.¹¹² Engaging more contemporary Native American artists would provide a more inclusive, fuller account of the narratives and experiences of the Dakota and other indigenous peoples. Highlighting more Native American contemporary artists would also give greater form to the experiences of indigenous peoples and move away from the all-too-common artistic expressions that objectify indigenous people without their consent.¹¹³

Since the *Scaffold* controversy, the Walker has taken steps to engage Native American contemporary artists. On September 15, 2017, the Walker organized a roundtable of Native American artists via video conference to discuss the Walker's exhibition titled *Jimmy Durham: At the Center of the World*.¹¹⁴ The roundtable organized around questions about Durham's identity as a Native American and "a larger issue: the dearth of opportunities within the contemporary

ma.cc/UR52-3878].

111. Alicia Eler, *Walker Art Center Director Regrets Not Discussing 'Difficult' New Sculpture with American Indians*, STAR TRIB. (May 27, 2017, 2:44 PM), <http://www.startribune.com/walker-art-center-director-regrets-not-involving-american-indians-in-new-sculpture-acquisition/424680473/#1> [https://perma.cc/9QD4-JT78] (describing the commissioning).

112. See *Art & Artists: Frank Big Bear*, WALKER ART CTR., <https://walkerart.org/collections/artists/frank-big-bear> [https://perma.cc/YBA6-DYQ6] (last visited July 2, 2017).

113. Westerman, *supra* note 77, at 2.

114. See *Shmelzer*, *supra* note 13.

field for Native American artists.”¹¹⁵ The roundtable discussion centered on two issues: (1) barriers to entry for Native artists into major contemporary art institutions; and (2) the lack of Native American representation among senior staff and boards of such institutions.¹¹⁶

One participating Native artist, Candessa Tehee, believes that conversations about *Scaffold* and “the identity issues of Durham [have] brought forward . . . how much power non-Native curators have in terms of determining what is and what is not valid Native art or indigenous art . . . and . . . [in terms of] sometimes produc[ing] strictures on American Indian artists. . . .”¹¹⁷ The barriers to entry into the contemporary art world are shared by First Nations’ artists in Canada. One artist aptly summarized these barriers:

The inability to overcome a centuries-old stereotype greatly hinders the ability of Native artists to advance in the contemporary art world. With stagnant concepts of Indian art, contemporary Native art lacks recognition for its intrinsic merits. Further, there is a common resistance to Native art that challenges non-Indian ideas of Indianness.¹¹⁸

It is through inclusive dialogue, such as the Walker’s Roundtable, that museums can facilitate genuine connections between indigenous culture and contemporary exhibits of history.¹¹⁹

During the Walker Museum’s roundtable discussion, participating artists stressed the need to contextualize Native American contemporary art.¹²⁰ Regarding this subject, Jeffery

115. *See id.* (Discussing why more Native artists are not presented at institutions like the Walker, Whitney, and MoMA, and discussing the controversy about Durham’s identification as Cherokee).

116. *Id.*

117. *Id.*

118. Katherine McFadden, *Contemporary Native Art in a Primitive World*, W. UNDERGRADUATE. J. OF ART & VISUAL CULTURE (2007–2008), <http://www.uwo.ca/visarts/research/2007-08/WUJAVC/10mcfadden.html> [https://perma.cc/2QCA-WVM6].

119. *See generally* Chip Colwell, *Native American Art Hasn’t Changed, but Museums Have*, APOLLO ART MAG. (Apr. 21, 2017), <https://www.apollo-magazine.com/native-american-art-hasnt-changed-museums-have/> [https://perma.cc/NQ9Z-QQKQ] (discussing overcoming a history of exclusion by challenging conceptions about who has the power to decide what art is and by recognizing assumptions about Western ethnocentrism).

120. *Schmelzer, supra* note 13.

Gibson¹²¹ said: “[This] just hasn’t been done yet. I mean there is a lot of scholarship that’s been written. But the difference [is] those histories [are] within museology, anthropology, archaeology, [and] it’s a huge leap to suddenly just be working from the perspective of contemporary art.”¹²² Giving context to Native American art within the mainstream art community is difficult for both Native American artists and art institutions, and Gibson notes that mistakes will be made.¹²³ Candessa Tehee¹²⁴ says there is a need for a robust critical review of Native American contemporary art: “It’s either overly celebratory, merely descriptive, or it’s overly critical with a severe focus on authenticity. At this point, for us to be productive, I think we have to move past that, and we’ve got to talk about the art differently.”¹²⁵ To that end, talking about art differently requires inclusion.

The Dakota sought an open and inclusive dialogue about how the power of artistic representations, like *Scaffold*, affect our understanding of Native peoples’ past and their experiences as contemporary Native people in our society.¹²⁶ In 1969, Vine Deloria, Jr. wrote: “The American public feels more comfortable with the mythical Indians of stereotype who were always THERE.”¹²⁷ Kevin Bruyneel explains: “By ‘THERE’ Deloria means temporally located in the past, in colonial time, and spatially located out of sight and mind, on reserved parcels of land.”¹²⁸ Bruyneel observed that “in the 1960s indigenous people began to more aggressively assert that their political identity belongs HERE, in the modern area, expressing their political agency against and over the temporal and spatial boundaries that American colonial rule sought to impose on them.”¹²⁹ *Scaffold* needed contextualization, and engaging the Dakota people before mounting *Scaffold* would have acknowledged the Dakota people as HERE.

121. Jeffrey Gibson (Mississippi Band of Choctaw) is a New York-based mid-career multidisciplinary artist who participated in the Walker’s roundtable. *Id.*

122. *Id.*

123. *Id.*

124. Candessa Tehee, Ph.D. (Cherokee Nation), is a Minneapolis-based artist who participated in the Walker’s roundtable. *Id.*

125. *Id.*

126. Eler, *supra* note 111.

127. VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS 2 (1969).

128. KEVIN BRUYNEEL, THE THIRD SPACE OF SOVEREIGNTY: THE POSTCOLONIAL POLITICS OF U.S.-INDIGENOUS RELATIONS 138 (2007).

129. *Id.*

Contemporary art institutions would do well to follow the lead of The Center for the Future of Museums (“The Center”), an initiative of the American Association of Museums that studies “the shift to a ‘majority minority’ society in the U.S.” and what this means for museums.¹³⁰ One report from The Center states: “at the very least, the definition of ‘mainstream’ will have to be revised.”¹³¹ The report further notes that “the vision of the museum field, our ‘preferred future,’ is one in which our users reflect our communities.”¹³² Additionally, The Center’s report notes that low rates of museum attendance by non-whites could be attributed to “subtle forms of exclusion.”¹³³ For example, “African Americans are more likely to attend events characterized by black themes and in which blacks are well-represented among performers, staff, and audience members.”¹³⁴ The report highlights museums that have developed strong relationships with racially- and ethnically-diverse communities.¹³⁵ The Center found that its research was supported by a survey of the Smithsonian National Museum of American History.¹³⁶ This survey found that second-generation Latino survey respondents have “very strong expectations that museums should include diverse staff, bilingual interpretation, Latino perspectives and some Latino-themed content.”¹³⁷ More simply, broadly representative art is inclusive art, and inclusive art is mainstream art.

Contemporary art institutions must recognize that specific strategies developed for the inclusion of Native American artists will differ from those strategies developed for the inclusion of Latino, African American, Asian Pacific American, or other minority group artists because each group of artists has unique identities and experiences.

130. BETTY FARRELL & MARIA MEDVEDEVA, DEMOGRAPHIC TRANSFORMATION AND THE FUTURE OF MUSEUMS 9 (2010), <http://www.aam-us.org/docs/center-for-the-future-of-museums/demotransaaam2010.pdf> [<https://perma.cc/5NEA-E2Z7>].

131. *Id.* at 9–10.

132. *Id.* at 5.

133. *Id.* at 14.

134. *Id.* (citing Paul DiMaggio & Francie Ostrower, *Participation in the Arts by Black and White Americans*, 68 SOC. FORCES 753, 753–78 (1990)).

135. *Id.* at 15–17.

136. *Id.*

137. *Id.* at 14.

VI. CONCLUSION

Scaffold exposed the invisibility of the Dakota people in modern life and the invisibility of Native American artists in the contemporary art world. For Native Americans, maintaining both political identity and cultural integrity is a matter of survival¹³⁸ and is primarily their responsibility. Native American artists who convey that identity through artistic expression in the contemporary art world risk becoming marginalized.¹³⁹ For the Dakota, efforts to assert and protect their political and cultural identities through opposition to *Scaffold* were marginalized through rhetoric about artistic expression protected by the First Amendment as free speech and about censorship.¹⁴⁰

By failing to engage the Dakota people in presenting *Scaffold* as an exhibit, the Walker missed a valuable opportunity to play an important role in giving artistic expression to the testimony, collective memory, and contemporary experiences of the Dakota and other Native peoples. Since *Scaffold*, the Walker has taken steps to engage Native American contemporary artists by organizing roundtable discussions with Native American artists to prevent ongoing exclusion as illustrated by the *Scaffold* controversy. Moving forward, it is essential to continue to engage Native American contemporary artists and voices to provide a more inclusive, accurate representation of the narratives and experiences of Native people.

138. See *supra* Part IV.

139. See *supra* Part V.

140. See Miranda, *supra* note 10. See generally Jas Chana, *NCAC Releases Statement Criticizing Walker Art Center's Decision to Destroy Controversial Sculpture; UPDATE: Sculpture to Be Ceremonially Buried*, NCAC (June 9, 2017), <http://ncac.org/blog/ncac-criticizes-walker-art-centers-decision-to-destroy-sam-durants-installation> [<https://perma.cc/8GMA-HYJM>] (discussing artistic expression in *Scaffold*).