

2011

Note: Tipping Nagpra's Balancing Act: The Inequitable Disposition of "Culturally Unidentified" Human Remains Under Nagpra's New Provision

Matthew H. Birkhold

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Birkhold, Matthew H. (2011) "Note: Tipping Nagpra's Balancing Act: The Inequitable Disposition of "Culturally Unidentified" Human Remains Under Nagpra's New Provision," *William Mitchell Law Review*: Vol. 37: Iss. 4, Article 5.
Available at: <http://open.mitchellhamline.edu/wmlr/vol37/iss4/5>

This Note is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

NATIONAL NATIVE AMERICAN
LAW STUDENTS ASSOCIATION (NALSA)
10TH ANNUAL STUDENT WRITING COMPETITION WINNER

**NOTE: TIPPING NAGPRA'S BALANCING ACT:
THE INEQUITABLE DISPOSITION OF "CULTURALLY
UNIDENTIFIED" HUMAN REMAINS UNDER NAGPRA'S
NEW PROVISION**

Matthew H. Birkhold[†]

| | |
|---|------|
| I. INTRODUCTION..... | 2047 |
| II. NAGPRA..... | 2049 |
| A. <i>Background and Intent</i> | 2049 |
| B. <i>How Does NAGPRA Work?</i> | 2053 |
| C. <i>Overall, NAGPRA Effectively Repatriates Native American Remains</i> | 2056 |
| D. <i>With Regard to Unidentified Remains, NAGPRA Has Fallen Out of Balance</i> | 2058 |
| III. WHAT ARE CULTURALLY UNIDENTIFIED NATIVE AMERICAN HUMAN REMAINS?..... | 2061 |
| A. <i>What Is a Human Remain?</i> | 2061 |
| B. <i>What Is a Native American Human Remain?</i> | 2062 |
| C. <i>What Does It Mean to Be Culturally Affiliated?</i> | 2064 |
| D. <i>What Are Culturally Unidentified Native American Human Remains?</i> | 2067 |
| IV. THE FINAL RULE ON THE DISPOSITION OF CULTURALLY UNIDENTIFIED NATIVE AMERICAN HUMAN REMAINS | 2069 |
| A. <i>Background</i> | 2069 |
| B. <i>What Is the New Rule?</i> | 2073 |

[†] B.A. Columbia University (2008); J.D. Candidate, Columbia Law (2014); Ph.D. Candidate, Princeton University. The author is indebted to Professors John Borrows, Lawrence Rosen, and Richard Leventhal for inspiring conversations about cultural patrimony and Federal Indian Law. The author would also like to thank Professor Jane Ginsburg for opening up the world of cultural property and generously supporting his first research efforts.

| | | |
|-------|---|------|
| 2011] | TIPPING NAGPRA'S BALANCING ACT | 2047 |
| | | |
| V. | EVALUATING THE NEW RULE FOR THE DISPOSITION OF CULTURALLY UNIDENTIFIED NATIVE AMERICAN HUMAN REMAINS..... | 2077 |
| A. | <i>Does the New Rule Effectively Restore NAGPRA's Equilibrium?</i> | 2078 |
| B. | <i>The New Rule Enables the Inappropriate Disposition of Human Remains</i> | 2081 |
| C. | <i>The New Rule Violates NAGPRA's Guiding Principles</i> | 2085 |
| 1. | <i>Does the New Rule Demonstrate Respect for Native American Human Remains?</i> | 2085 |
| 2. | <i>Does the New Rule Respect the Rights of Native Americans?</i> | 2087 |
| 3. | <i>Does the New Rule Enhance Native American Control of Self-Identity?</i> | 2088 |
| VI. | CONCLUSION AND SOLUTIONS | 2091 |
| A. | <i>Coalition Claims for Unidentified Remains</i> | 2091 |
| B. | <i>Differentiating Three Classes of Unidentified Remains</i> | 2094 |

I. INTRODUCTION

The Native American Graves Protection and Repatriation Act,¹ or NAGPRA, is a carefully constructed balancing act. Accommodating “human rights, race relations, religion, science, education, [and] ethics,”² NAGPRA marries four distinct areas of law (property, administrative, civil rights, and federal Indian law), while reconciling often antithetical interests.³ The result is a deftly calibrated equilibrium balancing the interests of the museum,

1. 25 U.S.C. §§ 3001–3013 (2006).

2. 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, 37 (1992) (analyzing the Native American Graves Protection and Repatriation Act (NAGPRA) legislation).

3. See, e.g., 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, 154–55 (2002) (discussing the passage of NAGPRA). As Nafziger notes, before the implementation of NAGPRA, scientists and archaeologists enjoyed largely unlimited access to study found or discovered human remains for the purpose of advancing scientific knowledge. Many Native Americans, however, oppose this practice on religious and cultural grounds. See James A.R. Nafziger, *Protection and Repatriation of Indigenous Cultural Heritage in the United States*, in CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE 43 (James A.R. Nafziger & Ann M. Nicgorski, eds., 2009).

scientific, and Indian communities in Native American cultural items, including human remains, funerary objects, sacred objects, and objects of cultural patrimony.⁴

In recent years, NAGPRA's characteristic equilibrium has fallen out of balance. In an effort to restore the law's equipoise, the Department of the Interior published a new final rule, effective May 14, 2010, delineating procedures for the disposition of culturally unidentified Native American human remains in the possession or control of museums and federal agencies.⁵ In this attempt, however, the new law swung too far.

By evaluating the new rule's impact on culturally unidentified human remains, this article interrogates the notion that the new regulation is an "important step toward fulfilling the intent of Congress as expressed in NAGPRA."⁶ Because NAGPRA itself is silent on the appropriate disposition of culturally unidentified remains, the only guidance about the intent of the new law comes from the legislative history of the Act, the Department of the Interior, and the courts.⁷ Each source establishes NAGPRA as human rights legislation designed to protect Native Americans' rights and demonstrate respect for remains while achieving an agreeable counterpoise between the competing interests of the Native American and scientific communities.

Instead of enriching NAGPRA, however, the new rule effectively undermines NAGPRA's core principles. By treating culturally unaffiliated remains as one monolithic category, the new rule discounts Native American rights, mistreats remains, and disenfranchises Native American groups from controlling their own cultural identities.

4. See 25 U.S.C. § 3002.

5. Native American Graves Protection and Repatriation Regulations, 43 C.F.R. pt. 10 (2010).

6. NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT REVIEW COMMITTEE MEETING MINUTES 21 (May 14, 2010), available at <http://www.nps.gov/nagpra/REVIEW/meetings/RMS041.pdf> [hereinafter 2010 NAGPRA REVIEW COMMITTEE] (discussing 43 C.F.R. § 10.11).

7. Because NAGPRA establishes federal jurisdiction over actions brought alleging violations of the Act, several federal courts have heard NAGPRA cases on a variety of issues from standing to temporal scope. See, e.g., *Jacobs v. Pataki*, 68 F. App'x 222 (2d Cir. 2003) (standing); *Castro Romero v. Becken*, 256 F.3d 349 (5th Cir. 2001) (motion to dismiss for failure to state a claim); *United States v. Tidewell*, 191 F.3d 976 (9th Cir. 1999) (vagueness).

This article focuses on the new rule's disposition of "unidentified" remains that are affiliated with non-federally-recognized tribes, highlighting its potentially inequitable disposition practice and inconsistency with NAGPRA's balancing principles. Part I of this article reviews the background and legislative history of NAGPRA before briefly surveying how NAGPRA works and its effectiveness to date. Dissecting the legal definitions of "Native American" and "cultural affiliation" under NAGPRA, Part II considers what it means for remains to be "culturally unidentified." Part III investigates the procedures established by the new rule for the disposition of these remains, and Part IV evaluates the effect of the new rule on the principles undergirding NAGPRA. Finally, Part V explores potential alternatives that satisfy the principles meant to guide the disposition of culturally unidentified remains.

II. NAGPRA

A. *Background and Intent*

From the first Pilgrim exploring party, which returned to the Mayflower with artifacts removed from a Native American grave in 1620, the mistreatment of Native American graves has been a long-lasting and widespread practice that has affected nearly every Native American group in the country.⁸ Still today, Native American graves are regularly looted by those looking for intriguing artifacts or valuable treasures.⁹ Over the centuries, soldiers, government agents, pothunters, museum officials, and scientists have collected Native American human remains for profit, science, and entertainment.¹⁰ Consequently, it is estimated that up to two million deceased Native people have been dug up and kept in collections by museums, universities, and government agencies.¹¹

8. See Trope & Echo-Hawk, *supra* note 2, at 40.

9. As recently as August 2010, several Native American graves were looted. See Dennis Ferrier, *5,000-Year-Old Indian Burial Ground Looted*, WSMV NASHVILLE (Aug. 26, 2010, 4:18 PM), <http://www.wsmv.com/news/24775122/detail.html>.

10. See Trope & Echo-Hawk, *supra* note 2, at 40.

11. *Id.*

As a result of these enduring abuses, Native Americans launched a collaborative national effort in 1986¹² to secure legislation for the protection of human remains and cultural artifacts and their repatriation to Indian tribes and the descendants of the disinterred deceased.¹³ The same year, Congress introduced the first bill addressing these concerns.¹⁴ Designed to create a commission to resolve disputes between Native Americans and museums concerning repatriation,¹⁵ the legislation was conceived “to demonstrate basic human respect to Native Americans.”¹⁶ Despite its lofty aims, however, the bill was opposed by many organizations, including the Smithsonian Institution, the Society for American Archaeology, and the American Association of Museums.¹⁷ In the end, the bill failed, in part, because the scientific and museum communities feared that the legislation would devastate their ability to conduct research.¹⁸

As Senator John McCain rightly observed during discussion on NAGPRA four years later, the subject of repatriation “is charged with high emotions in both the Native American community and the museum community.”¹⁹ Accordingly, the goal of repatriation legislation, in Senator Daniel Inouye’s estimation, was “to strike a balance between the interest in scientific examination of skeletal remains and the recognition that Native Americans, like people from every culture around the world, have a religious and spiritual reverence for the remains of their ancestors.”²⁰ Finding a

12. *Id.* at 54–55.

13. *Id.* at 55.

14. *Id.*

15. *Id.*

16. *Id.* (quoting *Hearing on S. 187 Before the S. Select Comm. on Indian Affairs on Native Am. Museum Claims Comm’n Act*, 100th Cong., 2d Sess., at 92 (1988) (statement of Sen. Melcher)).

17. *Id.*

18. As early as 1986, for example, the Society for American Archaeology asserted the following: “Research in archaeology, bioarchaeology, biological anthropology, and medicine depends upon responsible scholars having collections of human remains available both for replicative research and research that addresses new questions or employs new analytical techniques.” *SAA Repatriation Policy: Statement Concerning the Treatment of Human Remains*, SOC’Y FOR AM. ARCHAEOLOGY, <http://www.saa.org/AbouttheSociety/GovernmentAffairs/RepatriationIssues/SAAREpatriationPolicy/tabid/218/Default.aspx> (last visited Mar. 13, 2011).

19. 136 CONG. REC. S17,173 (1990) (statement of Sen. McCain).

20. Daniel K. Inouye, *Repatriation: Forging New Relationships*, 24 ARIZ. ST. L.J. 1, 2 (1992) (discussing repatriation and passage of NAGPRA).

satisfactory balance between the competing interests, however, necessitated a protracted effort. In all, twenty-six different bills concerning the repatriation of human remains and the protection of burial sites were proposed in the four-year period preceding the passage of NAGPRA in 1990.²¹

Meanwhile, additional non-legislative measures were also undertaken in an attempt to devise agreeable policies to redress the historic and ongoing wrongs perpetrated against Native Americans. One measure was the creation of a Panel for a National Dialogue on Museum/Native American Relations, to which the Senate Select Committee on Indian Affairs ultimately turned for guidance when drafting the final version of NAGPRA.²² The Panel concluded that “the process for determining the appropriate disposition and treatment of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony should be governed by respect for Native human rights.”²³ In response, the subsequent legislation sought to “establish[] a

21. See McKeown & Hutt, *supra* note 3, at 155 (“[Twenty-six] separate bills were proposed or introduced, and two public laws were enacted over a four-year period as a compromise on these multiple issues was negotiated.”); *id.* at 155–56, n.12 (“Native American Graves Protection and Repatriation Act, Pub. L. No. 101-60, 104 Stat. 3048 (1990); National Museum of the American Indian Act, Pub. L. No. 101-185, 103 Stat. 1336 (1989); Native American Grave Protection and Repatriation Act, H.R. 5237, 101st Cong. (1990, three versions); Native American Repatriation and Cultural Patrimony Act/Native American Grave Protection and Repatriation Act, S. 1980, 101st Cong. (1989–1990, four versions); Bill to Amend the National Historic Preservation Act, Historic Sites Act, Archaeological Resources Protection Act, and Abandoned Shipwrecks Act, S. 1579, 101st Cong. (1990, two versions); Native American Grave and Burial Protection Act, S. 1021, 101st Cong. (1990); Amendment to the National Defense Authorization Act for Fiscal Year 1991, H.R. 4739, 101st Cong. (1990); Indian Remains Reburial Act, H.R. 1124, 101st Cong. (1990); National American Indian Museum Act, S. 978, 101st Cong. (1989); Native American Burial Site Preservation Act of 1989, H.R. 1381, 101st Cong. (1989); Native American Grave and Burial Protection Act, H.R. 1646, 101st Cong. (1989); National American Indian Museum Act, H.R. 2668, 101st Cong. (1990); Bill to amend the National Historic Preservation Act, Historic Sites Act, Archaeological Resources Protection Act, and Abandoned Shipwrecks Act, H.R. 3412, 101st Cong. (1989); Comprehensive Preservation Act, S. 2912, 100th Cong. (1988); National Museum of the American Indian Act, S. 1722, 100th Cong. (1987, two versions); Native American Cultural Preservation Act/Native American Museum Claims Commission Act, S. 187, 100th Cong. (1987–1988); Indian Remains Reburial Act, H.R. 5411, 100th Cong. (1987); National Museum of the American Indian Act, H.R. 3480, 100th Cong. (1987); Native American Cultural Preservation Act, S. 2952, 99th Cong. (1986).”).

22. See Trope & Echo-Hawk, *supra* note 2, at 57–58.

23. *Id.* (citing S. REP. NO. 101-473, at 2–3 (1990)) (recapping the Senate Committee’s summarized major conclusions of the Panel).

process that provides the dignity and respect that our Nation's first citizens deserve."²⁴

The driving aim of NAGPRA is thus the acknowledgment of Native American rights and the recognition of global respect for human remains. Just days before NAGPRA was ratified, Senator Daniel Inouye explicitly asserted that the Act "is about human rights."²⁵ As such, NAGPRA is designed to address the "civil rights of America's first citizens [that] have been so flagrantly violated for the past century" by remedying the unequal treatment of Native American remains by generations of Americans.²⁶ This goal would be accomplished by providing "equal treatment to all human remains under the law, without consideration of 'race' or cultural background."²⁷

Importantly, the emphasis on Native American rights in NAGPRA did not cause lawmakers to discount other interests. After all, the Panel's conclusion referred to by the Senate Committee also recommended that "reasonable accommodations should be made to allow valid and respectful scientific use of materials when it is compatible with tribal religious and cultural practices."²⁸ Correspondingly, NAGPRA safeguards the scientific interest in remains by reserving several exceptions to prevent their wholesale repatriation. A federal agency or museum may retain control of Native American human remains or cultural items if any of three conditions apply: if there are multiple disputing claimants pending dispute resolution;²⁹ if the federal agency or museum has a right of possession;³⁰ or if the item is part of a federal agency or museum collection and is indispensable to the completion of a specific scientific study, the outcome of which is of "major benefit to the United States."³¹ As a result, unlike many of its predecessor bills in the House and Senate, NAGPRA had the support of a diverse array of organizations, including those institutions and

24. 136 CONG. REC. S17,173 (1990) (statement of Sen. McCain).

25. 136 CONG. REC. S17,174 (1990) (statement of Sen. Inouye).

26. *Id.*

27. Joe Watkins, *Becoming American or Becoming Indian?: NAGPRA, Kennewick and Cultural Affiliation*, J. SOC. ARCHAEOLOGY, Feb. 2004, at 60, 65 (discussing the inadequacies of NAGPRA).

28. S. REP. NO. 101-473, at 2-3 (1990).

29. 25 U.S.C. § 3005(e) (2006).

30. *Id.* § 3005(c).

31. *Id.* § 3005(b).

museums that first opposed repatriation legislation.³² NAGPRA's successful enactment is thus owed, in part, to its thoughtful consideration of competing interests. At the time of its passage, Senator McCain named NAGPRA "a true compromise,"³³ and today, NAGPRA is still generally considered a successful "attempt to accommodate the competing interests of Native American tribes, scientists (both physical anthropologists and archaeologists), and museums."³⁴ NAGPRA reconciled these potentially conflicting concerns by crafting a favorable equilibrium, evidenced by NAGPRA's passage with a voice vote in the Senate and unanimous approval in the House.³⁵

B. *How Does NAGPRA Work?*

The decades-long effort by Native Americans to repatriate deceased relatives and to recover improperly acquired cultural patrimony culminated on November 23, 1990, when NAGPRA was signed into law.³⁶ NAGPRA fulfills the goals of the Native American community by facilitating the identification and disposition of human remains, funerary objects, sacred objects, and objects of cultural patrimony.³⁷ Although NAGPRA applies to a range of items, the present discussion is limited to human remains in light

32. NAGPRA was supported by a diverse group of representatives of a range of institutions, including the American Association of Museums, Society for American Archaeology, American Anthropological Association, American Association of Physical Anthropologists, Archaeological Institute of America, Association on American Indian Affairs, Native American Rights Fund, National Conference of State Historic Preservation Officers, National Congress of American Indians, National Trust for Historic Preservation, Preservation Action, Society for Historical Archaeology, and Society of Professional Archaeologists, American Civil Liberties Union, American Baptist Churches, American Ethical Union, Evangelical Lutheran Church in America, American Jewish Congress, Friends Committee on National Legislation, and the Mennonite Central Committee. See McKeown & Hutt, *supra* note 3, at 154.

33. 136 CONG. REC. S17,173 (1990) (statement of Sen. McCain).

34. Patty Gerstenblith, *Cultural Significance and the Kennewick Skeleton: Some Thoughts on the Resolution of Cultural Heritage Disputes*, in CLAIMING THE STONES/NAMING THE BONES: CULTURAL PROPERTY AND THE NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY 162, 169 (Elazar Barkan & Ronald Bush eds., 2002).

35. McKeown & Hutt, *supra* note 3, at 153 ("With McCain's urging, the Senate passed the bill by a voice vote. The House of Representatives passed the amended version by unanimous consent the next day.")

36. See Trope & Echo-Hawk, *supra* note 2, at 36.

37. 25 U.S.C. §§ 3005(a)(4)–(5) (2006).

of the new final rule's narrow focus. To better understand the changes enacted by the new rule, this article will first briefly summarize NAGPRA's repatriation process. Despite its broad scope, NAGPRA is limited in two fundamental ways: it restricts groups with standing to make claims and limits which remains are subject to repatriation. NAGPRA applies only to remains that are in possession or control of a federal agency or a museum that receives federal funding.³⁸ The reach of NAGPRA is also limited to those remains that are excavated intentionally or inadvertently discovered on federal or tribal land.³⁹ Remains held by private individuals and states, as well as museums and agencies that do not receive federal support, are not regulated under NAGPRA.⁴⁰ In addition to restricting the remains eligible for repatriation under NAGPRA, the law also confines standing to lineal descendants, Indian tribes, and Native Hawaiian organizations.⁴¹

There are three primary steps in the repatriation process: identification, consultation, and notification. Under NAGPRA, federal agencies and museums are required to identify all cultural items in their collections subject to NAGPRA and create corresponding summaries and inventories.⁴² To the fullest extent possible, the inventory is to identify the geographical and cultural affiliation of each item based on the information possessed by the museum or Federal agency.⁴³

The purpose of the inventory is two-fold. First, the inventory is designed to aid repatriation by providing a clear description of what remains a museum or agency holds, and allows affected parties to search the database and make requests.⁴⁴ Additionally, the inventory is used to establish the cultural affiliation between the objects and present-day Indian tribes and Native Hawaiian organizations.⁴⁵ This is accomplished through an analysis of the items and statutorily required consultations. Under NAGPRA, museums and federal agencies must consult with tribal officials and traditional religious leaders to help identify the cultural affiliation

38. *Id.* § 3003(a).

39. *Id.* §§ 3002(c)–(d).

40. *See id.* §§ 3001(8), 3003(a).

41. *Id.* §§ 3001(2), 3002(a).

42. *Id.* § 3003(a).

43. *Id.*

44. *Id.* § 3003(b)(2).

45. *Id.* § 3003(a).

of items recorded in their inventories,⁴⁶ as well as lineal descendants, in order to determine the time and manner of return.⁴⁷

Following consultation, museums and agencies must notify lineal descendants, Indian tribes, and Native Hawaiian organizations if a cultural affiliation is determined.⁴⁸ In addition to sending notices, NAGPRA also requires the Secretary of the Interior to publish notifications in the Federal Register.⁴⁹ If an individual or group affiliated with the item subsequently requests its return, it must be granted.⁵⁰ To further expedite repatriation, NAGPRA also authorizes federal grants to Indian tribes, Native Hawaiian organizations, and museums to assist with the documentation of Native American cultural items.⁵¹ The law also established the Review Committee to monitor the repatriation process and to facilitate dispute resolution between competing parties.⁵² Furthermore, civil penalties can be levied under NAGPRA against federal agencies and museums that fail to comply with the law⁵³ and against individuals for illegal trafficking in Native American human remains and cultural items.⁵⁴

NAGPRA delineates a strict priority of custody for remains intentionally excavated or inadvertently discovered on federal or tribal lands after November 16, 1990. Custody is first given to the lineal descendant of the deceased individual.⁵⁵ If a lineal descendant cannot be ascertained, or no claim is made, custody is given next to the tribe on whose tribal land the human remains were excavated or discovered.⁵⁶ The remains go next to the Indian tribe or Native Hawaiian organization that has the closest affiliation with the human remains in question.⁵⁷ Finally, if there is no group bearing affiliation, custody is given to the Indian tribe aboriginally occupying the federal land from which the remains were

46. *Id.* § 3003(b)(1)(A).

47. *Id.* § 3005(a)(3).

48. *Id.* § 3003(d)(1).

49. *Id.* § 3003(d)(3).

50. *Id.* § 3005.

51. *Id.* § 3008.

52. *Id.* § 3006.

53. *See id.* §§ 3007(a)–(b).

54. 18 U.S.C. § 1170 (2006).

55. 25 U.S.C. § 3002(a)(1).

56. *Id.* § 3002(a)(2)(A).

57. *Id.* § 3002(a)(2)(B).

removed.⁵⁸ However, if it can be shown by a preponderance of the evidence that a different tribe or Native Hawaiian organization has a stronger cultural relationship with the human remains, the remains will be given to the Indian tribe or Native Hawaiian organization that has the strongest demonstrated relationship with the objects.⁵⁹

The only groups eligible to make claims under NAGPRA are lineal descendants and federally-recognized Indian tribes. As of October 1, 2010, 564 tribal entities are recognized and eligible for funding and services from the Bureau of Indian Affairs, including making claims under NAGPRA.⁶⁰ This number, however, is not static, but is gradually changing as more Native American groups secure federal recognition.⁶¹ Without this recognition, Native American groups do not have standing to make a claim for repatriation under NAGPRA.

These limitations are imposed by NAGPRA to ensure that the law remains balanced between adversarial interests. As the Ninth Circuit succinctly stated in the controversial *Bonnichsen v. United States* decision, “NAGPRA . . . was not intended merely to benefit American Indians, but rather to strike a balance between the needs of scientists, educators, and historians on the one hand, and American Indians on the other.”⁶² Accordingly, one of NAGPRA’s defining characteristics is the creation of a workable balance achieved by limiting repatriation while still acknowledging the rights of Native Americans by protecting graves and respecting their ancestral remains.

C. Overall, NAGPRA Effectively Repatriates Native American Remains

Over the last twenty years, NAGPRA has enjoyed considerable success. The law has secured the repatriation of countless Native American human remains while fostering a positive relationship

58. *Id.* § 3002(a)(2)(C)(1).

59. *Id.* § 3002(a)(2)(C)(2).

60. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810 (Oct. 1, 2010).

61. In 2008, 562 tribes were federally recognized. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553 (Apr. 4, 2008). In 2007, 561 tribes were federally recognized. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648 (Mar. 22, 2007).

62. 367 F.3d 864, 874 n.14 (9th Cir. 2004).

between seemingly irreconcilable interests. NAGPRA has also resulted in the wider distribution of information regarding museum and agency collections, a richer understanding of cultural diversity across diverse institutions, a closer relationship among all the affected parties, and a reduction in the trafficking of cultural materials.⁶³ Largely, NAGPRA has effectively met its goals.

The range of interests at stake, however, has made conflict inescapable, especially because NAGPRA seeks to regulate remains that are part of extant cultures.⁶⁴ Since its implementation twenty years ago, there have been a number of lawsuits involving NAGPRA. Litigation has centered on a number of issues, including questions of standing, cultural affiliation, and what constitutes an injury in fact.⁶⁵ Although the Supreme Court has not yet heard a NAGPRA case, two circuit courts have addressed repatriation issues and many lower courts have heard NAGPRA-related complaints.⁶⁶ Overall, court decisions have aided the practicable execution of NAGPRA by resolving ambiguous language and delineating the limits of the law.⁶⁷

Between 1990 and March of 2011, approximately 52,488 Native American human remains have been affiliated under NAGPRA.⁶⁸ The affiliated remains, representing 5,685 records submitted by 451 different museums and federal agencies in the “Culturally Affiliated (CA) Native American Inventories Database,” testify to NAGPRA’s notable success.⁶⁹ Nevertheless, the disposition of many remains must still be completed. There are more than 116,000 remains left in museum and agency collections waiting to be repatriated or even affiliated.⁷⁰ According to the National

63. See, e.g., Gerstenblith, *supra* note 34, at 170 (enumerating more fully the positive effects of NAGPRA).

64. *Id.* at 168.

65. See, e.g., Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation*, 25 J. LAND RESOURCES & ENVTL. L. 259, 268–73 (2005) (analyzing the first fifteen years of NAGPRA litigation).

66. See, e.g., Julia A. Cryne, Comment, *NAGPRA Revisited: A Twenty-Year Review of Repatriation Efforts*, 34 AM. INDIAN L. REV. 99, 112 (2010) (summarizing the judicial response to NAGPRA).

67. See *id.*

68. *Culturally Affiliated (CA) Native American Inventories Database*, NAT'L PARK SERV., <http://www.nps.gov/history/nagpra/ONLINEDB/INDEX.HTM> (last visited Mar. 8, 2011).

69. *Id.*

70. Chip Colwell-Chanthaphonh, *Remains Unknown: Repatriating Culturally Unaffiliated Human Remains*, ANTHROPOLOGY NEWS, Mar. 17, 2010, at 4, 8.

Association of Tribal Historic Preservation Officers, only 19 percent of inventoried remains have actually been returned using NAGPRA's cultural affiliation process.⁷¹

Because the original law made no provision for the disposition of unidentified remains, the only available guidance comes from the courts' interpretation of cultural identification, the legislative history of the Act, and specific principles defined by the NAGPRA Review Committee. Broadly, the same principles guiding NAGPRA's disposition of culturally affiliated remains also apply to unidentified remains. This was made clear by the Department of the Interior in 1999 when it asserted that "[c]ulturally unidentifiable human remains are no less deserving of respect than those for which culturally affiliation can be established."⁷² For nearly twenty years, however, the law remained silent about the disposition of culturally unidentified remains.

D. With Regard to Unidentified Remains, NAGPRA Has Fallen Out of Balance

In recent years, NAGPRA's carefully calibrated equilibrium has become imbalanced. The breakdown is due in large part to the law's long-lasting silence on unidentified remains and the ways in which museums and agencies establish cultural affiliation. In July 2010, the United States Government Accountability Office (GAO) evaluated federal agencies' compliance with NAGPRA, finding several key agencies in noncompliance.⁷³ In addition to highlighting the regularity with which agencies make determinations based on predetermined objectives, the GAO reported that agencies erroneously find a lack of cultural affiliation with considerable frequency.⁷⁴ Courts, too, have found that

71. *Oversight Hearing on the Native American Graves Protection and Repatriation Act Before the H. Comm. on Natural Resources*, 111th Cong. 6 (2009) (statement of D. Bambi Kraus, President, National Association of Tribal Historic Preservation Officers) ("To date, about 38,000 ancestors have been returned using the NAGPRA cultural affiliation process—which is roughly 19% of 200,000 . . .").

72. Notice of Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains—Extended Date for Comments, 64 Fed. Reg. 41,135, 41,136 (July 29, 1999).

73. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-768, NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: AFTER ALMOST 20 YEARS, KEY FEDERAL AGENCIES STILL HAVE NOT FULLY COMPLIED WITH THE ACT (2010) [hereinafter GAO Report], available at <http://www.gao.gov/new.items/d10768.pdf>.

74. *Id.* at 41.

agencies have reached decisions about affiliation arbitrarily and capriciously.⁷⁵

The problems identified by the GAO corroborate the concern of the Native American community that countless unidentified remains are actually affiliated with tribes.⁷⁶ The Review Committee has also recently substantiated this fear, estimating that approximately 80 percent of remains listed as culturally unidentifiable “could reasonably be culturally affiliated,” but that museums and agencies have not taken the time nor made the effort to correctly affiliate the remains.⁷⁷ Part of the difficulty arises from the feeble requirements of the law itself. Under NAGPRA, museums and federal agencies are not required to go to great lengths to establish cultural affiliation. In preparation of the inventory, a museum or agency is required only to use the information it already possesses to identify the geographic and cultural affiliation of each item.⁷⁸ This provision does not require museums to conduct exhaustive studies to determine the cultural affiliation, but only requires a “good faith effort” to identify cultural affiliation based upon presently available evidence.⁷⁹

The tendency to apply a lax standard for determining cultural affiliation has resulted in an over-classification of Native American human remains as “culturally unidentified.” In addition to cursory analyses, this tendency stems from the dismissal of nontraditional evidence, such as oral histories, that might lead to findings of cultural affiliation where other scientific evidence might fail.

75. See, e.g., *Bonnichsen v. United States*, 367 F.3d 864, 880–81 (9th Cir. 2004) (holding that the Department of the Interior decision was arbitrary and capricious); *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207, 1224 (D. Nev. 2006) (holding that the Bureau of Land Management decision was arbitrary and capricious).

76. See, e.g., Rob Capriccioso, *Scientists Ponder NAGPRA Lawsuit*, INDIAN COUNTRY TODAY (Oneida, NY), Apr. 14, 2010, available at <http://indiancountrytodaymedianetwork.com/2010/04/scientists-ponder-nagpra-lawsuit/> (quoting a repatriation officer with the Bay Mills Indian Community alleging that 80 percent of unidentified remains are actually affiliated with tribes).

77. NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REVIEW COMMITTEE MEETING MINUTES 17 (May 23–24, 2009), available at <http://www.cr.nps.gov/nagpra/REVIEW/meetings/RMS039.pdf> (reporting on the implementation of NAGPRA).

78. 25 U.S.C. § 3003(a) (2006) (requiring inventory of remains “to the extent possible based on information possessed by [a] museum or Federal agency”).

79. Trope & Echo-Hawk, *supra* note 2, at 69 (citing S. REP. NO. 473, 101st Cong., 2d Sess. 1, 3–4 (1990)).

Many Native American groups, however, have identified a more sinister motivation to account for the fact that less than one-third of human remains in museum and agency collections have been affiliated.⁸⁰ In some cases, Native Americans feel “that institutions [use] the law’s ‘unaffiliated’ category to block repatriation.”⁸¹ One author suggests museums or federal agencies may purposefully hold on to human remains for scientific study.⁸² In its May 2010 comments accompanying the publication of the new rule, the NAGPRA Review Committee noted “the frustration that tribes have felt when requesting disposition of remains on the [culturally unidentifiable Native American human remains] database only to be told that the institution is ‘waiting for the final regulations to be published.’”⁸³ Before the promulgation of the new rule, culturally unidentified remains could be held by museums and agencies in perpetuity and were not required to be repatriated upon request.⁸⁴ As of March 2, 2011, some 125,762 Native American human remains have been inventoried by 667 museums and federal agencies as “unidentified.”⁸⁵ Of those, 8,640 have been affiliated or transferred since first being inventoried as culturally unidentifiable.⁸⁶ This figure further reinforces the allegation that museums and agencies misidentify remains in many cases.

80. Stephen E. Nash & Chip Colwell-Chanthaphonh, *NAGPRA After Two Decades*, 33 MUSEUM ANTHROPOLOGY 99 (2010) (“Only some 27 percent of human remains in collections have been affiliated.”).

81. Andrew Lawler, *Grave Disputes*, SCIENCE, Oct. 8, 2010, at 168.

82. Debra Harry, *Indigenous Peoples and Gene Disputes*, 84 CHI-KENT L. REV. 147, 164 (2009) (“DNA analysis has been used as a stopgap measure to block the repatriation efforts of tribes in an effort to hold remains in institutions and preserve their availability for study.”).

83. 2010 NAGPRA REVIEW COMMITTEE, *supra* note 6, at 17.

84. NAGPRA did not include language mentioning the disposition of culturally unidentified human remains. Ryan M. Seidemann, *Altered Meanings: The Department of the Interior’s Rewriting of the Native American Graves Protection and Repatriation Act to Regulate Culturally Unidentifiable Human Remains*, 28 TEMP. J. SCI. TECH. & ENVTL. L. 1, 11 (2009) (discussing the proposed regulations for culturally unidentifiable human remains). Instead, NAGPRA required the Review Committee to compile data and recommend a process to dispose of remains in control by federal agencies. 25 U.S.C. § 3006(c)(5) (2006).

85. *Cultural Unidentifiable (CUI) Native American Inventories Database*, NAT’L PARK SERV., <http://www.cr.nps.gov/nagpra/ONLINEDB/INDEX.HTM> (last visited March 29, 2011).

86. *Id.*

Considering the profusion of unidentified remains, Native American concern is understandable. Regardless of institutional intent, it is clear that the unique equilibrium achieved by NAGPRA tipped under the strain of the law's silence.⁸⁷ It could be argued that museums were allowed to retain so many unidentified remains because the Review Committee was essentially controlled by scientific interests. Recognizing this imbalance, national NAGPRA officials believe that the Review Committee had "become too weighted toward the interests of the museum and scientific communities."⁸⁸ Consequently, in an attempt to restore balance, the Department of the Interior finalized a new rule for the disposition of unidentified remains.⁸⁹ To comprehensively examine the treatment of these remains under NAGPRA's latest provision, however, the term "culturally unidentified Native American human remains" must be precisely understood.

III. WHAT ARE CULTURALLY UNIDENTIFIED NATIVE AMERICAN HUMAN REMAINS?

A. *What Is a Human Remain?*

NAGPRA defines human remains as "the physical remains of the body of a person of Native American ancestry."⁹⁰ The term has been broadly interpreted to include mummified or preserved soft tissues, bones, teeth, hair, and ashes.⁹¹ Remains that "may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained" are exempted from the definition, "such as hair made into ropes or nets."⁹² Although the law limits the definition of remains, NAGPRA does not make any distinction between "fully articulated burials and isolated bones and teeth."⁹³ Furthermore, NAGPRA does not differentiate between ancient and recent Native American human remains, unlike other federal laws affecting Native Americans.⁹⁴

87. See *supra* note 4 and accompanying text.

88. See GAO Report, *supra* note 73, at 44.

89. 43 C.F.R. § 10.11 (2010).

90. 43 C.F.R. § 10.2(d)(1).

91. See McKeown & Hutt, *supra* note 3, at 164.

92. 43 C.F.R. § 10.2(d)(1).

93. McKeown & Hutt, *supra* note 3, at 164.

94. See, e.g., *id.* at 164, n.73 ("NAGPRA sets no age limit for protection, unlike ARPA, 16 U.S.C. § 470aa (2000), which only applies to items in excess of 100 years of age . . .").

Also, remains incorporated into “objects of cultural patrimony are considered as part of that object,” and are not considered remains.⁹⁵ What might otherwise seem a straightforward task is thereby complicated by considerable statutory complexity. Nevertheless, over the last twenty years a variety of remains have been repatriated under NAGPRA, including “complete and partial skeletons, isolated bones, teeth, scalps, and ashes.”⁹⁶

If remains are human, discovered on federal or tribal land, or held in a museum or federal agency collection, they may be subject to repatriation under NAGPRA.⁹⁷ The 2004 decision in *Bonnichsen v. United States* crystallized the two-part test to determine whether remains must be repatriated.⁹⁸ If remains are considered “Native American” under the first prong, the second inquiry is triggered to determine whether the remains are culturally affiliated with a present-day tribe, and thus eligible for repatriation under NAGPRA’s original requirements.⁹⁹ Because *Bonnichsen* sharply demarcates how determinations of “Native American” and “cultural affiliation” are made, the following sections will describe the court’s dual inquiry in more detail.

B. *What Is a Native American Human Remain?*

Because *Bonnichsen* questions whether human remains are Native American, the circuit court’s decision has engendered a wealth of scholarship on the appropriateness of the court’s understanding of the term “Native American.”¹⁰⁰ Most scholarship is critical of the court’s application of NAGPRA’s definitions, noting the range of potentially devastating effects on the Native American community from impairing repatriation efforts to symbolic degradations of cultural sovereignty.¹⁰¹ Although the issue of defining “Native American” undoubtedly warrants a more exhaustive examination, the scope of this article necessarily curtails

95. *Id.* at 164 (noting that this provision is designed to prevent the destruction of cultural items affiliated with one tribe that incorporate remains affiliated with another).

96. *Id.* at 165.

97. *See supra* Part II.B.

98. 367 F.3d 864 (9th Cir. 2004).

99. *Id.* at 875.

100. *See* Alex Tallchief Skibine, *Culture Talk or Culture War in Federal Indian Law?*, 45 TULSA L. REV. 89, 98–100 (2009) (summarizing the various aspects of the dispute and briefly cataloging scholarship on the Ninth Circuit’s decision).

101. *Id.*

a larger discussion of the court's definition. Because the new rule "does not affect the definition" of Native American, according to the Department of the Interior,¹⁰² contextualizing its impact within the existing framework laid out by the court will yield the best analysis, regardless of the ideological merit of the court's decision.

Under NAGPRA, the term "Native American" means "of, or relating to, a tribe, people, or culture that is indigenous to the United States."¹⁰³ As the court noted in *Bonnichsen*, however, NAGPRA "does not specify precisely what *kind* of a relationship or precisely *how strong* a relationship ancient human remains must bear to modern Indian groups to qualify as Native American."¹⁰⁴ Likewise, NAGPRA does not detail the evidence required to establish the relationship or indicate the relative weight to be afforded different kinds of evidence.¹⁰⁵ Instead, for guidance on what type of relationship may suffice, the court suggests turning to NAGPRA's legislative history.¹⁰⁶ In many cases, remains and newly discovered cultural items are clearly Native American; the location, age, and characteristics of the item are sufficient to prove a relationship to a modern tribe, people, or culture.¹⁰⁷ In other cases, however, the determination is more obscure, especially in cases involving prehistoric or ancient items.¹⁰⁸

The term is further confused by the lack of a consistent definition. In one context, tribes set the definition themselves by establishing criteria for membership. Some use blood quantum, federal roll registry, residency, matrilineal descent, marriage, or adoption.¹⁰⁹ From a legal standpoint, the problem of identifying what it means to be "Native American" is additionally complicated by the fact that there are more than "thirty-three separate

102. NAGPRA Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12,378, 12,385 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10) (explaining the changes made by the new rule for the disposition of culturally unidentifiable human remains on the pre-existing law).

103. 25 U.S.C. § 3001(9) (2006).

104. *Bonnichsen*, 367 F.3d at 874.

105. See, e.g., 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, 526 (2010) (cataloging many of the difficulties resulting from NAGPRA's design).

106. See *Bonnichsen*, 367 F.3d at 876–77.

107. See Gunn, *supra* note 105, at 526–27.

108. *Id.* at 527.

109. See EVA MARIE GARROUTTE, REAL INDIANS: IDENTITY AND THE SURVIVAL OF NATIVE AMERICA 16 (2003).

definitions of [Native Americans] in . . . different pieces of federal legislation,” which “may or may not correspond with those [definitions] any given tribe uses to determine its citizenship.”¹¹⁰ Furthermore, NAGPRA fails to define “indigenous” in its statutory language, making it difficult to determine the eligible groups to which remains must be related. Notwithstanding the statutory ambiguity, NAGPRA’s definition of Native American is significant because it only requires a relationship to one of several groups: a tribe, people, or culture—a notably broader standard than that required by the second prong of the dual inquiry to determine whether human remains should be repatriated.

C. What Does It Mean to Be Culturally Affiliated?

Once recognized as Native American, the second determination is whether remains are culturally affiliated.¹¹¹ Under NAGPRA, “‘cultural affiliation’ means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.”¹¹² A finding of cultural affiliation should be based upon an overall evaluation of the evidence available.¹¹³ Evidence of cultural affiliation can include: geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral tradition, historical, or other relevant information or expert opinion.¹¹⁴ Importantly, cultural affiliation need not be established with scientific certainty.¹¹⁵ Additionally, cultural affiliation should theoretically be resolved in favor of Indian tribes.¹¹⁶ Finding cultural affiliation is satisfied as long as three basic requirements are met: a present-day Indian tribe with standing to make a claim under NAGPRA; an earlier Native group; and a shared identity between the two.

110. *Id.*

111. *See Bonnichsen*, 367 F.3d at 875.

112. 25 U.S.C. § 3001(2) (2006).

113. 43 C.F.R. § 10.14(d) (2010).

114. 25 U.S.C. § 3005(a) (4).

115. 43 C.F.R. § 10.14(f).

116. *See, e.g., Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (“[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit . . .”).

Despite the low standard, cultural affiliation has “raised some of the most difficult problems in understanding NAGPRA”¹¹⁷ Part of the trouble arises from the definition itself. Gerstenblith notes that “[t]his formula mixes different types of evidence, thus setting the stage for a fundamental cultural and legal conflict.”¹¹⁸ This conflict thus pits scientific data, to which Western cultures and their courts are accustomed, against evidence based on oral, folkloric, and religious information, more prevalent in indigenous societies.¹¹⁹ In addition to debates about the relative weight that should be afforded each type of evidence, much of the criticism about cultural affiliation centers on the ostensible superfluousness of the inquiry.

The Department of the Interior asserted in *Bonnichsen* that the two-prong test outlined by the lower court was unnecessarily redundant.¹²⁰ The Secretary argued that the district court’s decision “‘improperly collapses’ NAGPRA’s first inquiry (asking whether human remains are Native American) into NAGPRA’s second inquiry (asking which Native Americans or Indian tribe bears the closest relationship to Native American remains).”¹²¹ Subsequent scholarship has echoed the government’s argument, asserting that it is “difficult to envision how a finding of a ‘significant’ relationship could be made without focusing on the strength of the link between the remains and a contemporary Native American or Native Americans, which is the issue on which the second NAGPRA inquiry is focused.”¹²² Asserting that the inquiries are the same, however, overlooks an important difference. If remains are considered Native American because they bear a relationship to a present-day tribe, the second prong is necessarily satisfied. Cases in which remains are considered Native American based on a connection to a Native culture or people, including non-federally-recognized tribes, however, do not automatically satisfy the second inquiry.

117. Gerstenblith, *supra* note 34, at 173.

118. *Id.*

119. *Id.* at 173–74.

120. *Bonnichsen v. United States*, 367 F.3d 864, 877 (9th Cir. 2004) (summarizing the government’s argument).

121. *Id.* at 877.

122. Allison M. Dussias, *Kennewick Man, Kinship, and the “Dying Race”: The Ninth Circuit’s Assimilationist Assault on the Native American Graves Protection and Repatriation Act*, 84 NEB. L. REV. 55, 136 (2005).

As the court in *Bonnichsen* clarified, “[t]hough NAGPRA’s two inquiries have some commonality in that both focus on the relationship between human remains and present-day Indians, the two inquiries differ significantly.”¹²³ The court goes on to state that:

[t]he first inquiry requires only a *general* finding that remains have a significant relationship to a presently existing “tribe, people, or culture,” a relationship that goes beyond features common to all humanity. The second inquiry requires a more *specific* finding that remains are most closely affiliated to specific lineal descendants or to a specific Indian tribe.¹²⁴

Satisfying the first prong requires a relationship to an existing group. Notably, this group can be a “tribe, people, or culture,” hence the “general” inquiry.¹²⁵ Significantly, the second prong stipulates that remains must be culturally affiliated with “specific lineal descendants or to a specific Indian tribe.”¹²⁶ Accordingly, Native American remains can only be culturally affiliated if a relationship to an existing, federally-recognized tribe can be shown. Demonstrating a shared identity with a Native people or culture is insufficient to establish cultural affiliation. By excluding extant cultures without federal recognition, the narrowing of the second prong to include only federally-recognized tribes creates a more specific inquiry about “cultural affiliation” patently distinct from the question of whether remains are “Native American.”

Although the difference in specificity is often downplayed or ignored in scholarship,¹²⁷ the result is significant. Coupling the specific requirements to find “cultural affiliation” with the broader definition of “Native American” has resulted in the creation of a distinctive category of remains, namely, culturally unidentified Native American human remains.

123. *Bonnichsen*, 367 F.3d at 877.

124. *Id.* (emphasis added).

125. 25 U.S.C. § 3001(9).

126. *Bonnichsen*, 367 F.3d at 877.

127. See, e.g., Robert Van Horn, Note, *The Native American Graves Protection and Repatriation Act at the Margin: Does NAGPRA Govern the Disposition of Ancient, Culturally Unidentifiable Human Remains?*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 227, 247 (2008) (describing “Native American” and “culturally affiliated” inquiries but not the difference in specificity).

D. What Are Culturally Unidentified Native American Human Remains?

NAGPRA defines culturally unidentified Native American remains as “human remains . . . in museum or Federal agency collections for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified through the inventory process.”¹²⁸ As “Native American,” these remains evidence a connection to a people or culture indigenous to the United States, but because they do not share a common group identity with a present-day Indian tribe or Native Hawaiian organization or specific lineal descendant, these remains are culturally unidentified.¹²⁹

Native American human remains can be designated “culturally unidentifiable” for several reasons. As Rebecca Tsosie notes,

[i]n some cases, faulty curation practices led to storage of hundreds of Native American crania and femurs in random boxes with only a general geographical designation to guide identification. In other cases, the remains are from a tribe that was exterminated or from a tribe that is currently not federally recognized.¹³⁰

Additionally, remains can be so old that the available evidence cannot link them convincingly to a present-day tribe, as the court concluded in *Bonnichsen*.¹³¹

There are, accordingly, two fundamentally different types of culturally unidentified human remains: those that are truly unidentifiable and those fallaciously unidentified. In the first category, affiliation is unknown because age or collection practices have made evidence in support of affiliation unknowable or unreliable. In the second, remains are “unidentified” because they are affiliated with the “wrong” kind of Native group; that is, the culture or people with whom they share a relationship do not constitute a federally-recognized tribe. As a result, the remains are rendered “culturally unidentified,” despite what might otherwise be

128. 43 C.F.R. § 10.2(e)(2) (2010).

129. 43 C.F.R. § 10.14(c).

130. Rebecca Tsosie, *Native Nations and Museums: Developing an Institutional Framework for Cultural Sovereignty*, 45 TULSA L. REV. 3, 13 (2009).

131. *Bonnichsen*, 367 F.3d at 882 (“[B]ecause Kennewick Man’s remains are so old and the information about his era is so limited, the record does not permit the Secretary to conclude reasonably that Kennewick Man shares special and significant genetic or cultural features with presently existing indigenous tribes, people, or cultures.”).

considered a cultural affiliation outside the meaning of the statute. The unique definitions in NAGPRA's dual inquiry process, therefore, result in remains that are affiliated in fact, but not in law.¹³²

The nomenclature for this category of "unidentified" remains is patently inaccurate, as the remains in this category have a clear affiliation with a Native group indigenous to the United States.¹³³ Nevertheless, despite routine criticism and suggested alternatives, the Review Committee chose to apply the same designation to all remains that satisfy the first prong but fail the second. This was not always the case, though. In its 1995 Draft Recommendations, the Review Committee designated three categories of culturally unidentifiable remains:

1. remains for which there is cultural affiliation with Native American groups who are not formally recognized by the [Bureau of Indian Affairs];
2. ancient remains for which there is specific information about the original location and circumstances of the burial; and
3. remains which may be Native American but which lack information about their original burial location.¹³⁴

This classification scheme, however, has since been abandoned. In the new final rule, culturally unidentified Native American human remains are treated as one monolithic category.¹³⁵ To an extent, the Review Committee's new categorization is logical. Legally, the remains all share distinguishing characteristics because they all fail the second inquiry after meeting the first. The reasons why remains fail the second prong, however, are strikingly different.

132. Seidemann, *supra* note 84, at 4.

133. Commentators have observed the fallacy of the designation and recommended redefining "culturally unidentifiable." For example, in response to the new regulation, one commentator suggested changing "culturally unidentifiable" to "human remains for which a relationship of shared group identity cannot be reasonably traced historically or prehistorically between members of present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group." See NAGPRA Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12,378, 12,384, cmt. 32 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10).

134. Draft Recommendations Regarding the Disposition of Culturally Unidentifiable Human Remains and Associated Funerary Objects, 60 Fed. Reg. 32,163 (June 20, 1995).

135. See *infra* Part IV.B.

To date, most of the scholarship on culturally unidentified remains has been concentrated on the first category.¹³⁶ The age of ancient remains raise questions about the relative value of these remains to the scientific, museum, and Native communities, and foregrounds the difficulty of evaluating the credibility of evidence used to establish cultural affiliation. Consequently, much scholarly attention has been devoted to prehistoric remains, especially those embroiled in cases like *Bonnichsen*, centered on defining “Native American” and “cultural affiliation.”¹³⁷ Very little has been written, however, about the third category of culturally unidentified Native American human remains: those affiliated in fact but not in law.¹³⁸ In an effort to fill this gap, the following two sections will focus primarily on the evolution and effects of NAGPRA’s new rule in light of the principles guiding the creation and implementation of NAGPRA.

IV. THE FINAL RULE ON THE DISPOSITION OF CULTURALLY UNIDENTIFIED NATIVE AMERICAN HUMAN REMAINS

A. *Background*

Although NAGPRA delineates a clear method for the inventory, consultation, and repatriation of Native American remains with a known cultural affiliation, until the summer of 2010, NAGPRA did not establish guidelines for the disposition of culturally unidentified human remains. Instead, when the Act was passed, it merely established the Review Committee.¹³⁹ The Review Committee is composed of members of Indian tribes and Hawaiian organizations, as well as representatives from national museums and scientific organizations.¹⁴⁰ The makeup of the Review

136. Seidemann’s article, for instance, discusses unidentified remains in great detail, but focuses on ancient remains, specifically distinguishing the category of unidentified remains that are classified as such because of the “technical incongruity in the NAGPRA statutory language.” Seidemann, *supra* note 84, at 3. Although Seidemann continues to note that remains affiliated in fact but not in law represent a “conundrum” that frustrates the purposes of the law, his article, like most scholarship after *Bonnichsen*, is concerned with the disposition of ancient remains. *Id.* at 11.

137. *See supra* Part III.B–C.

138. *See supra* notes 133 & 136 and accompanying text.

139. 25 U.S.C. § 3006(a) (2006) (“Within 120 days after [November 16, 1990], the Secretary shall establish a committee . . .”).

140. *Id.* § 3006(b)(1).

Committee is another way in which the legislative intent of maintaining a balanced equilibrium is manifest.

NAGPRA charged the Review Committee with monitoring the implementation of the inventory and identification process, and with reviewing repatriation activities required under the Act.¹⁴¹ Additionally, the Committee was tasked with compiling an inventory of unidentified remains and “recommending specific actions for developing a process for [disposition of] such remains.”¹⁴² Until 1990, museums and federal agencies did not have to complete consultations or repatriate unidentified remains in their control or possession.

The disposition of culturally unaffiliated remains has long been thought of as a problematic aspect of repatriation legislation. When Congress discussed what would eventually become NAGPRA, “it was clear to Congress that culturally unidentifiable remains represented a particularly difficult problem.”¹⁴³ The difficulty stemmed from the disagreement among tribes, museums, and members of the scientific community about the relative value of unidentified remains.¹⁴⁴ Because such remains cannot be affiliated with a particular tribe, some believe that Native American concern for the remains should not outweigh the interests of the scientific community if no ancestral or cultural relationship can be demonstrated.¹⁴⁵ Others, conversely, believe that there is no meaningful scientific value to be gained from remains that lack the basic information about the remains’ provenance that might lead to affiliation, arguing instead that unidentified remains “should be buried and laid to rest.”¹⁴⁶ Even among those who support their repatriation, the ideal scope of a rule governing the disposition of unidentified remains has been widely debated. Whereas some insist museums should be compelled to repatriate all Native American remains, others advocate a more selective process.¹⁴⁷

141. *Id.* §§ 3006(c)(2), (3).

142. *Id.* § 3006(c)(5).

143. William A. Lovis et al., *Archaeological Perspectives on the NAGPRA: Underlying Principles, Legislative History, and Current Issues*, in *LEGAL PERSPECTIVES ON CULTURAL RESOURCES* 165, 180 (Jennifer R. Richman & Marion P. Forsyth eds., 2004).

144. *See, e.g., id.* at 167–68 (discussing the scientific and traditional interests in remains).

145. *Id.* at 168–69.

146. *See* H.R. REP. NO. 101-877, at 18 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4375.

147. *See* Colwell-Chanthaphonh, *supra* note 70, at 4, 8.

“[T]he role of unfederally-recognized tribes, the role of DNA testing . . . , and whether associated funerary objects are also to be returned” also complicates the disposition of unidentified remains.¹⁴⁸ And the lack of agreement between Native American organizations further complicates the possibility of devising a favorable solution.¹⁴⁹

Unable to formulate a fairly balanced rule concerning culturally unidentified remains, but still committed to its objective of writing a rule agreeable to all sides, Congress delegated the task to the Review Committee so that the “more complex provisions would not delay implementation of the basic regulations.”¹⁵⁰ It was Congress’s hope that the experience and insight acquired by federal agencies, museums, and tribes through the repatriation of culturally identifiable remains would inspire an acceptable solution for disposing unidentified remains.¹⁵¹ Finally, nearly twenty years after NAGPRA’s enactment, the Department of the Interior published a final rule for the disposition of culturally unidentified remains based on the recommendations of the Review Committee.

The rule, published on March 15, 2010, is the result of almost two decades of work and much debate.¹⁵² The extensive regulatory

148. *Id.* at 4.

149. Lovis et al., *supra* note 143, at 180.

150. NAGPRA Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12,378, 12,378 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10) (explaining why the Department of the Interior decided to “reserve several sections [of NAGPRA] for later development”).

151. *See* Lovis et al., *supra* note 143, at 180.

152. NAGPRA Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12,378 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10) (“[T]he final rule has undergone extensive review in multiple administrations.”). The Review Committee published its first draft recommendations for the rule in June 1995 for public comment, Draft Recommendations Regarding the Disposition of Culturally Unidentifiable Human Remains and Associated Funerary Objects, 60 Fed. Reg. 32,163 (June 20, 1995), and subsequently published a revised draft recommendation the following year, Draft Recommendations Regarding the Disposition of Culturally Unidentifiable Human Remains and Associated Funerary Objects, 61 Fed. Reg. 43,071 (Aug. 20, 1996); *see also* NAGPRA Review Committee Issues and Documents, SOC’Y FOR AM. ARCHAEOLOGY, <http://www.saa.org/AbouttheSociety/GovernmentAffairs/RepatriationIssues/RepatriationArchive/NAGPRAReviewCommitteeIssuesandDocuments/tabid/1410/Default.aspx> (last visited Feb. 19, 2011) (providing links to the review committee documents). In 1999, the Review Committee issued “principles of agreement” concerning the disposition of culturally unidentifiable remains. Notice of Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains—Extended Date for Comments, 64 Fed. Reg. 41,135 (July 29, 1999). The Committee’s final recommendations were published in June 2000.

history, beginning with the first proposed regulations in 1993,¹⁵³ testifies to the difficulty of drafting the final rule.¹⁵⁴ One proposed rule, published for public comment on October 16, 2007, elicited 138 comments from a variety of interested parties including fifty-one different Indian tribes, nineteen Indian organizations, thirty museums, twelve scientific organizations, three federal entities, and fifteen members of the public by January 14, 2008.¹⁵⁵

Before the new rule became effective on May 14, 2010, culturally unidentified human remains were not handled uniformly, but were treated according to two different and opposing policies.¹⁵⁶ Lacking cultural affiliation, and therefore a party capable of bringing a prima facie claim for repatriation, unidentified remains could be held by a museum in perpetuity,¹⁵⁷ in what Tsosie describes as “a timeless limbo.”¹⁵⁸ Alternately, upon application by the museum or agency, and in consultation with recognized tribes and Native Hawaiian organizations, the Review Committee could make determinations for the disposition of culturally unidentified remains.¹⁵⁹ Until May 14, 2010, the Review Committee heard a total of eighty-two cases regarding the disposition of culturally unidentified remains and made recommendations to the Secretary of the Interior for the disposition of over 4,000 individuals.¹⁶⁰ Curiously, in drafting the final rule, the Review Committee commented on the success of the existing process in which museums and agencies have developed

Notice of Meeting of the Utah Resource Advisory Council, 65 Fed. Reg. 36,462 (June 8, 2000). Since then, the Committee has submitted comments to the Secretary in 2000, 2003, and 2008. NAGPRA Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12,378.

153. NAGPRA Regulations, 58 Fed. Reg. 31,122 (May 28, 1993) (to be codified at 43 C.F.R. pt. 10).

154. See, e.g., Trope and Echo-Hawk, *supra* note 2, at 76 (“NAGPRA is a part of a larger historical tragedy: the failure of the United States Government . . . to understand and respect the spiritual and cultural beliefs and practices of Native people.”); see also *Law, Regulations, and Guidance*, NAT’L NAGPRA, NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, <http://www.nps.gov/history/nagpra/MANDATES/INDEX.HTM> (last visited Feb. 19, 2011) (listing the regulatory history of NAGPRA).

155. NAGPRA Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12,378 (“The comments addressed all sections of the proposed rule.”).

156. See *supra* Part II.D.

157. See 25 U.S.C. § 3005(a) (2006).

158. Tsosie, *supra* note 130, at 13.

159. See 25 U.S.C. §§ 3006(c)(3)–(4).

160. 2010 NAGPRA REVIEW COMMITTEE, *supra* note 6, at 17.

individual agreements for the disposition of unidentified remains.¹⁶¹

The primary changes effectuated by the new rule include transforming the process of determining how to handle unidentified remains from a voluntary practice into a legal requirement, and tasking museums and tribes with formulating disposition plans without having to go before the Review Committee.¹⁶² The next section will discuss the procedures established by the new rule and the guiding principles supposedly underlying its design. Part IV will then examine whether the new provision is consistent with NAGPRA's broader goals and longstanding commitment to balancing interests.

B. *What Is the New Rule?*

The new rule fully expounds the procedure to be followed by museums and federal agencies in control or possession of culturally unidentified Native American human remains. In addition to outlining the disposition process, the rule also amends provisions concerning the "purpose and applicability of the regulations, definitions, inventories of human remains and related funerary objects, civil penalties, and limitations and remedies."¹⁶³ Like NAGPRA's other provisions, the new rule establishes guidelines for museums and agencies to consult with tribal leaders, inventory remains in their collections, and ultimate disposition of the remains.¹⁶⁴ Because no cultural affiliation is legally recognized for

161. *Id.* ("The process currently in place for museums and Federal agencies to work with Federally recognized Indian tribes and Native Hawaiian organizations to develop agreements for disposition of CUHRs has worked well.")

162. *Id.*

163. NAGPRA Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12,378 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10); *see also id.* at 12,400–01 (outlining the specific changes to NAGPRA's current regulations); *id.* at 12,402–05 (laying out the specific changes to the regulatory language). Although the additional modifications made by the new rule may also prove to have a considerable impact on NAGPRA, especially changes to the statutory definition of "Native American," the scope of this article is limited to an analysis of the disposition of unidentified remains under the new regulations.

164. 43 C.F.R. § 10.11(c) (2010). In addition to outlining the formal disposition process, the new rule also describes the accompanying administrative procedures, including rules for notification and rules for dispute resolution. *Id.* §§ 10.11(d)–(e). The new rule also requires museums and federal agencies to provide written information to those groups consulted encompassing the original inventory regarding the human remains, *id.* § 10.11(b)(3)(iii), a list of Indian tribes and Native Hawaiian organizations involved in the consultation process, *id.* §

these remains, however, disposition assumes a markedly different form under the new rule.

Under the new regulation, if an Indian tribe or Hawaiian organization requests control of a culturally unidentified human remain, the museum or agency in its control must initiate consultation regarding its disposition within ninety days of the request.¹⁶⁵ Museums and agencies must consult with officials and traditional religious leaders of Indian tribes and Native Hawaiian organizations where remains were removed from their tribal and aboriginal lands.¹⁶⁶ Even if no request is made, museums and agencies must initiate consultations before offering to transfer control of culturally unidentified remains to any group.¹⁶⁷ Ultimately, museums and federal agencies cannot retain unidentified remains in perpetuity; if a museum or federal agency is unable to prove that it has a right of possession to the culturally unidentified human remains, it must arrange for their disposition.¹⁶⁸

10.11(b)(3)(i), and, notably, a list of Indian groups that are not federally recognized but known to have a relationship of shared group identity with the particular remains in question. *Id.* § 10.11(b)(3)(ii). Under the new rule, museums and agencies must also develop a schedule and process for consultation and develop a proposed disposition agreement together with tribes. *Id.* §§ 10.11(b)(4)(v), (b)(5). The new rule stipulates that the Review Committee may facilitate informal resolutions of disputes not resolved through good faith negotiations under NAGPRA, but that the United States District Courts have jurisdiction over any action brought that alleges a violation of the act. *Id.* § 10.11(e).

165. *Id.* § 10.11(b)(1)(i).

166. *Id.* §§ 10.11(b)(2)(i), (ii).

167. *Id.* § 10.11(b)(1)(ii).

168. 25 U.S.C. § 3005(c) (2006). The law in section 3001(13) states that: '[R]ight of possession' means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 7(c) [25 USCS § 3005(c)], result in a Fifth Amendment taking by the United States as determined by the United States Claims Court [United States Court of Federal Claims] pursuant to 28 U.S.C. 1491 in which event the 'right of possession' shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give

Reminiscent of the regulations governing culturally affiliated remains, the new rule establishes a priority order for the disposition of culturally unidentified human remains.¹⁶⁹ The first group to whom a museum or agency must transfer control is the Indian tribe or Native Hawaiian organization from whose tribal land the remains were removed.¹⁷⁰ Next, the remains are offered to the tribe from whose aboriginal land the unidentified remains were removed.¹⁷¹ If neither of these tribes accepts custody, the agency or museum may transfer control to another federally-recognized tribe.¹⁷² Alternately, museums and agencies may seek special permission from the Secretary of the Interior to pursue two alternate disposition procedures: transferring the remains to a non-federally-recognized Indian group or reintering the unidentified remains.¹⁷³ Under the new rule, however, the Secretary of the Interior can only approve transfer to a non-federally-recognized group if the tribes, from whose tribal and aboriginal land the remains were removed, do not object to the transfer of control.¹⁷⁴ Repatriation, however, is not completely unlimited: all of the same exceptions, discussed *supra* Part I, apply to the requirements regulating the disposition of culturally unidentified human remains.¹⁷⁵

All classes of unidentified remains must be offered to Indian tribes according to the prioritized list of recipients once they are established as Native American, including remains that are considered unidentified because they bear a relationship with a

right of possession to those remains.
Id. § 3001(13).

169. 43 C.F.R. § 10.11(c)(1).

170. *Id.* § 10.11(c)(1)(i). Tribal lands encompass all lands within Indian reservations, dependent Indian communities pursuant to 18 U.S.C. § 1151 (2006), and lands administered for the benefit of Native Hawaiians under the "Hawaiian Homes Commission Act of 1920 and section 4 of the Hawaiian Statehood Admission Act (Pub. L. 86-3; 73 Stat. 6)." 43 C.F.R. § 10.2(f)(2).

171. *See id.* § 10.11(c)(1)(ii). "Aboriginal Lands" means federal land recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of an Indian tribe. *Id.* § 10.6(a)(2)(iii).

172. *Id.* § 10.11(c)(2)(i).

173. *Id.* § 10.11(c)(2)(ii)(A).

174. *Id.* § 10.11(c)(3).

175. *Id.* § 10.11(c)(5). A museum or agency may also transfer control of a funerary object associated with culturally unidentified human remains, but is not required to under the new law. However, the Secretary recommends this disposition process if federal or state law do not preclude it. *Id.* § 10.11(c)(4).

present day, non-federally-recognized Indian group.¹⁷⁶ This class of unidentified remains can be repatriated to the group with which they are culturally affiliated only if the museum or agency bypasses the option to transfer control to another tribe, requests special permission from the Secretary, and there are no objections from tribes from whose tribal and aboriginal land the remains were removed, despite tangible differences in why they are classified as “culturally unidentified.”¹⁷⁷

It has been estimated that “[t]he new rules affect roughly 120,000 Native American and Hawaiian remains.”¹⁷⁸ Overall, the Department of the Interior is optimistic that the new rule will address the recent problems facing NAGPRA and growing frustration among the Native American community concerning culturally unidentified remains.¹⁷⁹ The new final rule thus seeks to restore NAGPRA’s prudently constructed equilibrium, by eliminating the potential for abuses perpetrated by way of suspending unidentified remains in a “timeless limbo.”¹⁸⁰

The Department of the Interior anticipates that “consultation as required [by the new rule] will result in determinations that some human remains and associated funerary objects previously determined to be culturally unidentifiable are actually culturally affiliated with an Indian tribe or Native Hawaiian organization.”¹⁸¹ This confidence is underscored by the inclusion of a provision in the new rule stipulating the steps to be taken when a culturally unidentified remain is subsequently affiliated.¹⁸² Scientists, conversely, are skeptical. Many argue that the disposition of unidentified remains will cut short new opportunities to identify unaffiliated remains by removing them from museums and

176. *Id.* § 10.11(c)(1).

177. *Id.*

178. Lawler, *supra* note 81, at 168.

179. *Id.*

180. *See id.* at 170.

181. NAGPRA Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12,378-01, 12,388 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10).

182. *See* 43 C.F.R. § 10.11(b)(6) (2010) (“If consultation results in a determination that human remains . . . previously determined to be culturally unidentified are actually related to a lineal descendant or culturally affiliated with an Indian tribe or Native Hawaiian organization, the notification and repatriation of the human remains . . . must be completed as required by § 10.9(e) and § 10.10(b).”).

agencies.¹⁸³

Notwithstanding the rule's future effects on identification, the Department of the Interior reminded the public that "the Act was enacted for the benefit of Indians."¹⁸⁴ Despite the Department's optimism, however, the implementation of the new rule will likely result in unjust and harmful consequences, both for the scientific community and the Native American community at large. To evaluate the appropriateness of the new rule, the following section will consider its impact in light of NAGPRA's unique balancing act and its goal as human rights legislation¹⁸⁵ by examining whether the new act benefits Native Americans while also satisfying NAGPRA's core principles.

V. EVALUATING THE NEW RULE FOR THE DISPOSITION OF CULTURALLY UNIDENTIFIED NATIVE AMERICAN HUMAN REMAINS

Although NAGPRA did not originally address culturally unidentified remains, the principles undergirding their eventual disposition were formally declared in 1999, when the Department of the Interior published "[g]uidelines for the disposition of culturally unidentifiable human remains."¹⁸⁶ These guidelines delineate four principles that "must serve as the foundation" for regulations governing the disposition of unidentified remains.¹⁸⁷ Encapsulated under the four subheadings "respectful," "equitable," "doable," and "enforceable," these guidelines will form the basis on which the appropriateness of the new rule is evaluated.¹⁸⁸ After analyzing whether the law is "doable" and what effect it has on NAGPRA's unique balancing of competing interests, Parts B and C will consider the new rule's effect on unidentified remains in light

183. See Lawler, *supra* note 81, at 168 (summarizing scientists' responses to the new regulation).

184. NAGPRA Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. at 12,384 (explaining why NAGPRA was enacted and why the Indian Canon of Construction applies to NAGPRA disputes).

185. See S. Alan Ray, *Native American Identity and the Challenge of Kennewick Man*, 79 TEMP. L. REV. 89, 142 (2006) (noting that "NAGPRA is primarily human rights legislation intended by Congress to remediate great wrongs done to American Indians").

186. Notice of Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains, 64 Fed. Reg. 33,502, 33,503 (June 23, 1999).

187. *Id.*

188. *Id.*

of NAGPRA's other objectives, focusing on remains that are legally unidentified yet culturally affiliated with non-federally-recognized tribes.

A. *Does the New Rule Effectively Restore NAGPRA's Equilibrium?*

Contrary to the spirit of the law, which seeks to balance both scientific and Native American interests, the intentional or inadvertent over-classification of unidentified remains caused NAGPRA to fall out of balance. The new rule, however, is already restoring equilibrium. By compelling the disposition of unidentified remains, the new rule incentivizes museums to reevaluate their inventories, yielding new findings of affiliation.¹⁸⁹ In instances when additional analyses do not yield affiliations and cases in which museums do not reevaluate their collections, the new rule still compels repatriation by eliminating the option to perpetually hold unidentified remains in collections, making the rule immediately effective.

Recent notifications in the "Culturally Unidentifiable Native American Inventory Database" highlight the first successes of the new rule, exemplified by the September 29, 2010 notice by the Denver Museum of Nature and Science.¹⁹⁰ According to the notice, the museum originally listed the remains of two individuals as culturally unidentifiable in 1994.¹⁹¹ After the new rule's implementation, however, the museum has ostensibly reconsidered the remains and subsequently affiliated them to the Osage Tribe.¹⁹² The same process has already been undertaken by a number of museums and agencies, documenting the accuracy of the Department's assumption that the new regulation would motivate museums and agencies to reconsider their initial findings of cultural un-identification.¹⁹³

189. See Capriccioso, *supra* note 76 (noting that the manager of the national NAGPRA Program has stated that the new rule "makes institutions go back to address the law's 1995 rule to make sure they properly identify remains.").

190. See *Culturally Unidentifiable Native American Inventory Database: Denver Museum of Nature and Science*, NATIONAL NAGPRA ONLINE DATABASES, NAT'L PARK SERV., U.S. DEP'T OF INTERIOR, http://grants.cr.nps.gov/CUI/generate_Institution_report.cfm (follow "Select a Museum/Agency" hyperlink; select "Denver Museum of Nature and Science;" then follow "Preview" hyperlink) (last visited Mar. 13, 2011).

191. *Id.*

192. *See id.*

193. See NAGPRA Regulations—Disposition of Culturally Unidentifiable

The new rule has also impacted the means by which these reevaluations are occurring. While new findings of cultural affiliation are the unambiguous result of additional time and resources committed to analyzing collections, part of the rule's effect is also due to an increased institutional willingness to consider a wider scope of evidence to establish affiliation.¹⁹⁴ The GAO report found that some remains were classified as culturally unidentified because museums discounted a broad scope of evidence, even if sanctioned under NAGPRA.¹⁹⁵ Now, under NAGPRA's new rule, museums and agencies have new incentive to broaden the scope of evidence they will consider when determining cultural affiliation. This, in turn, will help restore NAGPRA's balance by validating nontraditional forms of evidence presented by Native Americans in repatriation disputes.

Although NAGPRA's new rule has already sparked the reevaluation and repatriation of culturally unidentified remains, many in the scientific community do not consider the result part of NAGPRA's unique balancing act.¹⁹⁶ Instead, they see the provision as distorting the equilibrium in favor of the Native American community.¹⁹⁷ Summarizing the responses received by the

Human Remains, 75 Fed. Reg. 12,378, 12,388 (to be codified at 43 C.F.R. pt. 10) (Mar. 15, 2010) ("It is anticipated that consultation as required in § 10.11(b) will result in determinations that some human remains and associated funerary objects previously determined to be culturally unidentifiable are actually culturally affiliated with an Indian tribe or Native Hawaiian organization."). See, e.g., *Culturally Unidentifiable Native American Inventories Database: Memphis Pink Palace Museum*, NATIONAL NAGPRA ONLINE DATABASES, NAT'L PARK SERV., U.S. DEP'T OF INTERIOR, http://grants.cr.nps.gov/CUI/generate_institution_report.cfm (follow "Select a Museum/Agency" hyperlink; select "Memphis Pink Palace Museum;" then follow "Preview" hyperlink) (last visited Mar. 13, 2011). The Memphis Pink Palace Museum, for example, notified the National NAGPRA office of a similar reevaluation of remains this past August, finding that over one dozen human remains previously classified as culturally unidentifiable could actually be reasonably affiliated. *Id.*

194. See Notice of Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains, 64 Fed. Reg. 33,502 (June 23, 1999) ("Th[e] determination must be made through a good faith evaluation of all relevant, available documentation and consultation with any appropriate Indian tribe.").

195. See *supra* notes 73–74 and accompanying text.

196. See *supra* note 82 and accompanying text.

197. See, e.g., Rex Dalton, *Rule Poses Threat to Museum Bones*, 464 NATURE 662 (2010) (quoting several curators and scientists claiming that "[the new rule] is a major departure, going way beyond the intent of the original law" and that the law will result in a loss to science greater than before).

Department of the Interior, Seidemann explains that while representatives from museum and scientific organizations “support the moral foundation behind NAGPRA,” most believe that the new rule “stray[s] too far from that foundation.”¹⁹⁸ In the estimation of its detractors, the new law will severely limit scientific research on human remains by mandating the return of thousands of culturally unidentified remains.¹⁹⁹ Whereas limiting repatriation to culturally affiliated human remains represents a fair balance between the interests of Native Americans and scientists, requiring the repatriation of unidentified remains “impermissibly expands the scope of the act.”²⁰⁰ Correspondingly, virtually every commentator in Seidemann’s comprehensive survey makes the point that the new regulation “will shatter the delicate cooperative balance between Native Americans and scientists forged by the passage of NAGPRA.”²⁰¹ Just as proponents of the new rule predict its restorative effects, members of the scientific community have presaged the new rule’s destructive potential, declaring that its implementation “will result in an incalculable loss to science.”²⁰²

Rightly or wrongly, the new rule is bound to have a lasting impact on the collections of museums and federal agencies holding culturally unidentified Native American human remains.²⁰³ In this sense, the new rule fulfills the guiding principles characterized as “doable” and “enforceable,” mandating the creation of a process that is both possible for agencies and museums to implement and enforceable when not observed.²⁰⁴ The fact that both groups perceive that the new rule affects the equilibrium of NAGPRA either positively or negatively, however, complicates the possibility of making a straightforward assessment of the rule based on these principles alone.

198. Seidemann, *supra* note 84, at 40.

199. See Capriccioso, *supra* note 76.

200. GAO Report, *supra* note 73, at 75.

201. Seidemann, *supra* note 84, at 40.

202. Letter from Bruce D. Smith, Smithsonian Inst. et al., to Ken Salazar, Sec’y of the Interior, Dep’t of the Interior (May 17, 2010), at 2, *available at* <http://www.friendsofpast.org/nagpra/2010NAGPRA/Smith517.pdf> (concerning the new final rule’s negative impacts on the current and future state of science).

203. See Dalton, *supra* note 197, at 662 (assessing the impact of the new rule on museum and agency collections). “Overall, there are more than 124,000 culturally unidentified ancient human remains in US institutions; although estimates vary widely, at least 15% of these could be affected by the new rule.” *Id.*

204. Notice of Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains, 64 Fed. Reg. 33,502 (June 23, 1999).

Accordingly, a comprehensive evaluation of the new rule requires looking to the other principles guiding the disposition of culturally unidentified remains. Although restoring the law's equilibrium was a central impetus for the rule's implementation, a discussion of NAGPRA's principles necessarily transcends a consideration of balance alone. Ultimately, those involved with drafting the new rule share a widespread belief that the provision will help remedy the discriminatory treatment of Native American human remains in a way "consistent with NAGPRA's legislative intent that extends a basic human right . . . to Native Americans . . . enacted for the benefit of Indian people."²⁰⁵ But that is precisely what the new rule gets wrong. In the attempt to restore equilibrium, the new provision harms the Native American community as a whole. Although select tribes might gain control of so-called unidentified remains, the newfound control cannot be described as strictly beneficial, especially when the remains are actually affiliated with a non-federally-recognized Native American group.

B. The New Rule Enables the Inappropriate Disposition of Human Remains

Notably, all three classes of unidentified remains are subject to the same repatriation procedure under NAGPRA's new provision, including those affiliated in fact, but not in law. Nevertheless, even if a preponderance of the evidence confirms that remains are culturally affiliated with a non-federally-recognized Indian group, under NAGPRA, these remains would still be considered "culturally unidentified."

Paradoxically, the uniform treatment of unidentified remains is based on the belief that NAGPRA is human-rights legislation that protects the rights of all Native Americans and their ancestral remains.²⁰⁶ By treating all unidentified remains equally, however, the new rule actually undermines these aspirations. Occupying the

205. Colwell-Chanthaphonh, *supra* note 70, at 4; *see also* NAGPRA Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12,378, 12,379 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10) (asserting that the new regulations for the disposition of unidentified remains is consistent with the intent and language of the Act).

206. Part of NAGPRA's objective as human rights legislation is to accord all human remains the same respect, *see supra* notes 26 and 79 and accompanying text.

fourth spot in a strict priority, non-federally-recognized tribes affiliated with unidentified remains must first wait for the preferred tribes to decline control of the remains and then hope that the museum or agency in possession of the remains seeks special permission from the Secretary to repatriate the remains to them because they lack federal recognition.²⁰⁷ Then, only if the Secretary gives permission and no other federally-recognized tribe eligible to receive the remains objects, can the group related to the remains assume control of its ancestors.²⁰⁸

For some “culturally unidentified” human remains, this process leaves the door open for considerable abuse.²⁰⁹ NAGPRA operates on the principle that remains should be returned to their ancestors. Consequently, the rules governing the disposition of culturally affiliated remains favor repatriation to the Indian group that has the “stronger cultural relationship with the remains” over tribes with just a historical geographical connection to the remains.²¹⁰ Normally, NAGPRA privileges cultural relationships over geographic connections because early American Indians travelled considerable distances and their tribal territories have shifted radically over time, making geographic connections between tribes and remains potentially meaningless.²¹¹

207. 43 C.F.R. § 10.11(c) (2010).

208. *Id.* § 10.11(c) (2) (ii) (A).

209. When, for instance, the Peabody Museum of Archaeology wished to repatriate remains and culturally affiliated objects to the non-federally recognized Abenaki group, the museum was required to get permission from the Review Committee. See James Nafziger, *The Protection and Repatriation of Indigenous Cultural Heritage in the United States*, in PROTECTION OF FIRST NATIONS CULTURAL HERITAGE: LAWS, POLICY, AND REFORM 110, 122–24 (Catherine Bell & Robert K. Paterson eds., 2009). The Review Committee supported repatriation only after receiving letters supporting the plan from federally recognized tribes that were “potentially interested parties” in the remains. *Id.* at 126. If the recognized groups had objected, however, the remains would not have been repatriated to the unrecognized Abenaki group. See *id.* at 125. Under the new rule, which requires the disposition of nearly all unidentified remains, this situation will be repeated many times. Considering the animosity between some federally recognized tribes and those lacking federal recognition, the potential for abuse is high. This is especially true because “if any federally recognized tribe decides to claim material rightfully belonging to an unrecognized tribe, the unrecognized tribe has no legal standing under NAGPRA to contest the claim.” Elizabeth Chilton, *Farming and Social Complexity in the Northeast*, in NORTH AMERICAN ARCHAEOLOGY 138, 154 (Timothy R. Pauketat & Diana DiPaolo Loren eds., 2005) (offering an interesting scientific perspective on unrecognized tribes).

210. 25 U.S.C. § 3002(a) (2) (C) (2006).

211. See Dalton, *supra* note 197 at 662 (“Most scientists say that geographical

Accordingly, the appropriate recipient under NAGPRA is the group with the closest relationship to the remains; any other group is necessarily an inappropriate recipient. In some cases, however, it is impossible to identify the proper or improper group for repatriation.

Because the age of ancient remains can make it “almost impossible to establish *any* relationship between the remains and presently existing American Indians” and unproveniented remains lack identifying information, no affiliation can be shown.²¹² As a result, no group can be identified as the most appropriate claimant and no group can be branded inappropriate since no one group has a closer relationship to the remains than any other. In the case of remains that are unidentified simply because they are affiliated with non-federally-recognized tribes, however, the law tacitly recognizes one group as proper.

NAGPRA's two-pronged process for determining affiliation plays an important role in determining the fair treatment of this class of unidentified remains. Labeling remains “culturally unidentified” means that they do not share a cultural relationship with a federally-recognized tribe. “[B]y definition, there are no federally recognized tribes that are culturally affiliated with culturally unidentifiable remains.”²¹³ Yet, designating these same remains “Native American” indicates that some “people or culture” bears a “significant relationship” to the remains. When this people or culture is an extant tribe that lacks federal recognition, the law implicitly identifies this group's cultural relationship with the remains as the strongest, making the non-federally-recognized tribe the appropriate recipient of the remains.

Under NAGPRA's new rule, however, unidentified remains are not straightforwardly repatriated to the appropriate claimant. Instead, the remains are first offered to federally-recognized tribes that share a common geography with the remains, but no cultural relationship.²¹⁴ Despite the law's recognition that the non-federally-

connections between remains and current tribes may be meaningless . . .”).

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

213. Ed Hagen, *Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains*, AM. ASS'N OF PHYSICAL ANTHROPOLOGISTS, <http://physanth.org/association/position-statements/draft-principles-of-agreement-regarding-the-disposition-of-culturally-unidentifiable-human-remains> (May 27, 2009, 01:23 PM) (posting a letter from Clark Spencer Larsen, President, Am. Ass'n of Physical Anthropologists, to the NAGPRA Review Comm.).

214. 43 C.F.R. § 10.11(c) (2010).

recognized Indian group shares a “significant relationship” with so-called unidentified remains in such cases, their clear interest in the remains will be bypassed in favor of geography-based dispositions to federally-recognized tribes.²¹⁵ Because geographic proximity does not necessarily define a relationship of shared identity, and because these remains are actually affiliated in fact, the new rule appears extraordinarily unjust.

Provisions of the new rule implicitly recognize the inequity of the process it establishes. During the statutorily required consultations, museums and agencies must request the names of “Indian groups that are not federally-recognized who should be included in the consultations.”²¹⁶ By allowing the possibility that non-federally-recognized tribes be included in the process, the rule highlights a latent belief that unrecognized tribes might be the proper parties to which control of “unidentified” remains should be transferred. The Review Committee has made the same claim explicitly, acknowledging that some “[h]uman remains . . . are, technically, culturally unidentifiable because the appropriate claimant is not federally recognized.”²¹⁷ Under the new rule, however, this group is positioned fourth in a strict priority, allowing those groups ahead of it to exploit their superior positions.²¹⁸ As a result, the law violates the guiding principle to create an “[e]quitable” rule that is “perceived as fair and within the intent of the statute.”²¹⁹

The Department of the Interior, however, has repeatedly defended the new rule as upholding the intent of the statute, albeit while remaining silent about whether the new rule is perceived as fair. According to the Department, “a mandate for return of control to Indian groups that are not federally-recognized would be contrary to the terms of NAGPRA.”²²⁰ Priority is given to

215. *Id.* §§ 10.11(c)(i), (ii).

216. *Id.* § 10.11(b)(4).

217. Notice of Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains—Extended Date for Comments, 64 Fed. Reg. 41,135, 41,136 (July 29, 1999).

218. *See infra* note 231 and accompanying text.

219. Notice of Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains—Extended Date for Comments, 64 Fed. Reg. at 41,136.

220. NAGPRA Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12,378, 12,396 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10).

recognized tribes “in recognition of the government-to-government relationship between such tribes and the United States.”²²¹ Because of their special relationship with the United States, federally-recognized tribes are entitled to receive certain federal benefits, services, and protections.²²² These rights do not flow from a person’s identity as Native American in an ethnological sense, but are based solely on membership in a federally-recognized tribe.²²³ Accordingly, only federally-recognized tribes are afforded the benefits accorded by NAGPRA. Non-federally-recognized tribes, consequently, cannot be prioritized ahead of recognized tribes, even if they demonstrate a significant cultural relationship to remains with which recognized tribes bear no cultural relationship.

Even if the priority is legally recognized, a closer examination of NAGPRA’s intent reveals that the new rule actually undermines the Act’s guiding principles, particularly in cases involving the repatriation of remains affiliated in fact, but not in law. As discussed in Part I.C. the only available guidance about the intent of the law comes from the legislative history of the Act and the limited case law on NAGPRA. According to Congressional intent, NAGPRA is “first and foremost” human rights legislation.²²⁴ The Review Committee, the courts, and Congress articulate this tenet in three primary ways: respecting the remains of the deceased; respecting the rights of American Indians; and, empowering American Indians to control their cultural identity.

C. *The New Rule Violates NAGPRA’s Guiding Principles*

1. *Does the New Rule Demonstrate Respect for Native American Human Remains?*

The first principle underlying NAGPRA is the belief that all human remains should be protected and shown respect, encapsulated in the Department of the Interior’s guideline “respectful.”²²⁵ NAGPRA’s legislative history evidences a steadfast

221. *Id.* at 12,395.

222. See DAVID E. WILKINS, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 13–14, 17 (1st ed. 2002).

223. See *id.* at 13 (explaining the two perspectives from which “tribe” can be defined: ethnological and political-legal).

224. See Trope & Echo-Hawk, *supra* note 2, at 59.

225. Notice of Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains—Extended Date for Comments, 64

commitment to protecting the dignity of remains: while formulating the law, the Senate Select Committee on Indian Affairs announced that “human remains must at all times be treated with dignity and respect.”²²⁶ The *Bonnichsen* court later corroborated this belief, writing that “NAGPRA was also intended to protect the dignity of the human body after death by ensuring that Native American graves and remains be treated with respect.”²²⁷ By specifying the broader category of Native American, the court extended the respectful treatment of remains to unidentified remains as well. In the 1995 Guidelines for Draft Principles, the Review Committee even stated that “[c]ulturally unidentifiable human remains are no less deserving of respect than those for which culturally affiliation can be established.”²²⁸

The new rule’s disposition of remains affiliated with unrecognized tribes, however, actually undermines this principle. Culturally affiliated remains are shown respect by being returned to their ancestors, those who can care for them properly, follow the corresponding cultural practices, and observe the proper burial customs.²²⁹ Respect is thus shown by repatriating remains to the group with which they bear a cultural relationship. Contrary to respectful practice, offering so-called “culturally unidentified” remains first to tribes that share no cultural relationship with them does not demonstrate respect for the remains in question, especially when a group with a demonstrated relationship to the remains is known. For this class of remains, the new rule is incompatible both with the legislative intent of NAGPRA and the principles meant to guide the formulation of the new rule.

Fed. Reg. 41,135 (July 29, 1999).

226. S. REP. NO. 101-473, at 6 (1990).

227. *Bonnichsen v. United States*, 367 F.3d 864, 876 (9th Cir. 2004).

228. Notice of Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains—Extended Date for Comments, 64 Fed. Reg. 41,135.

229. See, e.g., Lynn S. Teague, *Respect for the Dead, Respect for the Living*, in HUMAN REMAINS: GUIDE FOR MUSEUMS AND ACADEMIC INSTITUTIONS 245, 249 (Vicki Cassman et al. eds., 2007) (“Because there is no one simple answer to how human remains should be treated, legally or ethically, consultation with biologically and culturally affiliated groups . . . is the cornerstone of any reasonable treatment plan . . .”).

2. *Does the New Rule Respect the Rights of Native Americans?*

In addition to protecting the dignity of Native American remains, NAGPRA was also enacted to respect the rights of the living.²³⁰ According to the court in *Bonnichsen*, this objective is achieved in part by “sparing [modern Native Americans] the indignity and resentment that would be aroused by the despoiling of their ancestors’ graves and the study or the display of their ancestors’ remains.”²³¹ If remains are considered “Native American,” but are not “culturally affiliated” because they do not bear a relationship with a recognized tribe, the remains may still be sensibly considered the ancestors of Native Americans, just Native Americans who happen to lack federal recognition.

Based on the legislative intent, these Native Americans should be afforded the same respect under NAGPRA as recognized groups. Especially as “human rights legislation,” NAGPRA applies to all Native Americans equally. If NAGPRA was intended to “demonstrate basic human respect to Native Americans,” as Senator Melcher asserted,²³² then non-federally-recognized tribes should similarly be spared the indignity caused by the despoiling of their ancestors’ graves and should be shown the same respect by having their ancestors returned to them. The legislative history, therefore, indicates that Native American is an inclusive category, including not just federally-recognized tribes, but cultures and peoples as well. The definition of “Native American” under NAGPRA similarly includes both federally-recognized tribes and those cultures lacking recognition.²³³ In a remarkable statement, the court in *Bonnichsen* even claimed that “NAGPRA also protects graves of persons not shown to be of current tribes.”²³⁴

230. See, e.g., David J. Harris, *Respect for the Living and Respect for the Dead: Return of Indian and Other Native American Burial Remains*, 39 WASH. U. J. URB. & CONTEMP. L. 195, 198–99 (1991) (discussing the Native American religious belief that the dead must be reburied).

231. *Bonnichsen*, 367 F.3d at 876.

232. *Hearing on S. 187 Before the S. Select Comm. on Indian Affairs on Native Am. Museum Claims Comm’n Act*, 100th Cong. 92 (1988) (statement of Sen. John Melcher, Member, S. Comm. on Indian Affairs).

233. 43 C.F.R. § 10.2(d) (2010) (“The term Native American means of, or relating to, a tribe, people, or culture indigenous to the United States, including Alaska and Hawaii.”).

234. *Bonnichsen*, 367 F.3d at 876.

In opposition to these goals, however, NAGPRA's new rule prioritizes the return of "culturally unidentified" remains to recognized tribes over groups for whom the remains are cultural ancestors.²³⁵ If a tribe is not related to remains, neither indignity nor resentment should be engendered by the study or display of the remains. Correspondingly, returning these remains to recognized tribes does not comport with the stated goals of NAGPRA because it would not spare the tribe any indignity and does not demonstrate respect for basic human rights.

Contrarily, the disposition process articulated by the new rule violates NAGPRA's objectives. By potentially giving this class of "unidentified" remains to recognized tribes, NAGPRA effectively perpetuates the indignity suffered by the true cultural descendants of the remains. Instead of demonstrating basic respect, such a practice only intensifies the disrespect and resentment felt by Native Americans by returning their ancestors to another group. As a result, the new rule erodes NAGPRA's ability to fulfill its own goals.

3. Does the New Rule Enhance Native American Control of Self-Identity?

NAGPRA's third broad goal was to empower the Native American community by restoring their ancestors and therewith their own cultural identity.²³⁶ The passage of NAGPRA implicitly recognizes the importance of cultural property rights and the often destructive disparity between "Eurocentric views of personal private property, which dominate American jurisprudence, and the less formalized system of property rights seen in Native communities."²³⁷ By incorporating legal measures customary to Native communities—for instance the inclusion of oral tradition in determinations of cultural affiliation²³⁸—NAGPRA impliedly

235. 43 C.F.R. § 10.11(c).

236. See Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49, 55 (2002) (discussing the goals of NAGPRA).

237. *Id.*

238. 43 C.F.R. § 10.14 (e) ("Evidence of a kin or cultural affiliation between a present-day individual, Indian tribe, or Native Hawaiian organization and human remains, funerary objects, sacred objects, or objects of cultural patrimony must be established by using the following types of evidence: Geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion.").

acknowledges the importance of returning not just remains, but also control to Native Americans of their cultural identity. Before the publication of the new rule, it was claimed that “[t]he ultimate result [of NAGPRA] is that Native American groups once again have the ability to control their history and their heritage (religious, spiritual, and mythic), which are crucial to the formation of their identity”²³⁹ If NAGPRA was “enacted for the benefit of Indians”²⁴⁰ as an inclusive category, then it follows that non-federally-recognized tribes were also the intended beneficiaries of the Act’s promotion of self-determination.

The new rule, however, is potentially damaging to the Native American community, both by encouraging infighting among Indian groups and by impairing non-federally-recognized tribes from controlling their own cultural identity. By offering remains first to federally-recognized tribes over unrecognized groups who demonstrate a significant relationship with the remains, the new rule further undermines the objective of augmenting Native American self-control. Furthermore, for recognized tribes, assuming custody of remains to which they are not related does not enhance their control of their own identity. In such cases, the new rule’s disposition priority only enables tribes to dominate non-federally-recognized Native American groups.

The creation of a potentially damaging hegemonic hierarchy within the Native American community only weakens the self-determination of unrecognized groups. According to Brown and Bruchac, NAGPRA has changed the terminology of indigenous nationhood. Noting that “[i]n NAGPRA-speak, the term *Native American* encompasses all of the continent’s indigenous peoples, but only federally-recognized ‘tribes’ can claim to be ‘culturally affiliated’ . . . with museum collections,” Brown and Bruchac explain that “[t]he terminology of the NAGPRA legislation has had an insidious effect on intertribal discourse regarding sovereignty.”²⁴¹ The new law excludes their members from

239. Gerstenblith, *supra* note 34, at 170.

240. NAGPRA Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12,378 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10).

241. Michael F. Brown & Margaret M. Bruchac, *NAGPRA from the Middle Distance: Legal Puzzles and Unintended Consequences*, in *IMPERIALISM, ART, AND RESTITUTION* 193, 202–03 (John Henry Merryman ed., 2006). More troubling still, Brown and Bruchac have diagnosed a “general prejudice against unrecognized tribes” claiming that the statutory preference for tribes has resulted in the improper reparations of remains affiliated with non-federally recognized tribes. *Id.*

government benefits, creates an inequitable priority, and potentially results in the “painful alienation of individuals from their own heritage.”²⁴² As a result, the new rule transforms NAGPRA into a law of disenfranchisement.²⁴³ Instead of empowering Native Americans, NAGPRA now explicitly marginalizes non-federally-recognized Native American tribes in cases involving remains with which they are affiliated in fact, but not in law.²⁴⁴

As the court made clear in *Bonnichsen*, “Congress’s purposes would not be served by requiring the transfer to modern American Indians of human remains that bear no relationship to them.”²⁴⁵ Although the Review Committee sees the new rule “as an important step toward fulfilling the intent of Congress as expressed in NAGPRA,”²⁴⁶ in practice, the new rule is conspicuously out of step with NAGPRA’s overarching goals.

Particularly with regard to “unidentified” remains affiliated with non-federally-recognized tribes, the new rule not only fails to satisfy NAGPRA’s objectives, but actually undermines the law’s guiding principles. Instead of drafting an “equitable” rule, “fair and within the intent of [NAGPRA],”²⁴⁷ the Department of the Interior has finalized a rule that is potentially inequitable and antithetical to the greater purpose of NAGPRA.

at 204–05. According to their study, “many museums, and some federal agencies, fail to review evidence provided by unrecognized Native communities. . . . Tragically, this means that some of the Native peoples most devastated by the colonial experience are least likely to benefit from NAGPRA.” *Id.* This rejection of evidence presented by these Native American groups, including that NAGPRA purposefully included for the benefit of Indians, further worsens the ability of non-recognized tribes to practice their own cultural identity.

242. Ray, *supra* note 185, at 141.

243. See Letter from Dennis O’Rourke et al., President, Am. Ass’n of Physical Anthropologists, to Dr. Sherry Hutt, Manager, Nat’l NAGPRA Program (May 10, 2010), available at <http://physanth.org/association/position-statements/AAPA%20Comment%20on%20CUHR%20Rule%205-10-10-1.pdf>.

244. Brown & Bruchac, *supra* note 241, at 203; see also Ray, *supra* note 185, at 141 (listing marginalization of non-federally-recognized tribes as a consequence of NAGPRA).

245. *Bonnichsen v. United States*, 367 F.3d 864, 876 (9th Cir. 2004).

246. 2010 NAGPRA REVIEW COMMITTEE, *supra* note 6, at 21.

247. Notice of Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains—Extended Date for Comments, 64 Fed. Reg. 41,135, 41,136 (July 29, 1999).

VI. CONCLUSION AND SOLUTIONS

Although the new rule fails to satisfy the principles established to guide its formulation, there are several solutions that could potentially realign the law with NAGPRA's core objectives. The new rule for the disposition of culturally unidentified Native American human remains undermines NAGPRA's aims in large part because of its treatment of culturally unidentified remains as one monolithic class of remains. Differentiating between the three classes of culturally unidentified Native American human remains would allow the new rule to bypass the inequity engendered by its treatment of remains affiliated with non-federally-recognized tribes. Building coalitions between tribes or rewriting the provision to distinguish remains affiliated in fact, but not in law, would circumvent the law's harmful effects.

A. *Coalition Claims for Unidentified Remains*

Promoting coalition claimants could effectively overcome the potential inequity in the treatment of remains affiliated with non-federally-recognized tribes under the new provision. If federally-recognized tribes worked cooperatively with unrecognized Indian groups to secure the repatriation of their remains, these remains would be afforded the dignity and respect essential to meeting NAGPRA's objectives. The Review Committee considered the possibility of coalitions as early as 1999, explaining that unidentified remains affiliated with unrecognized groups "may be repatriated once federal recognition has been granted, or if the claimant works with another culturally affiliated, federally recognized Indian tribe."²⁴⁸ Since then, there have been several successful joint repatriation efforts.²⁴⁹

248. *Id.*

249. See Peter d'Errico, *NAGPRA's Nasty Loophole*, INDIAN COUNTRY TODAY, Aug. 22, 2009 ("Coalitions of 'recognized' and 'non-recognized' peoples have formed in various regions to facilitate the proper restitution of remains. The Wampanoag Confederation was an early example, inspiring similar groupings in California and elsewhere."). The Auk Kwaan, a non-federally-recognized group in Alaska, for example, achieved the repatriation of human remains through the Central Council of the Tlingit and Haida Indian Tribes. See 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, 198 (2006).

In addition to incorporating Native American groups without standing directly into the repatriation process, forming coalitions can also encourage greater understanding between disparate factions of the Native American community. Through coalition building, for instance, “unrecognized tribes have also revived ancient intertribal relationships to initiate successful partnerships with their neighboring recognized tribes.”²⁵⁰ As a result, this solution would help promote a deeper historical understanding of the living Indian cultures.

Although this solution sounds practicable, coalition claims have potentially insurmountable disadvantages. Many states do not have any federally-recognized tribes, leaving non-federally-recognized groups with nowhere to turn.²⁵¹ Moreover, in many NAGPRA proceedings, non-federally-recognized tribes are dismissed as ineligible litigants, including the initial *Bonnichsen* proceedings.²⁵²

Besides inconsistency with regard to standing, cooperative repatriation efforts may also provoke disagreeable relationships between collaborating groups. *Coalitions depend on the willingness of recognized people to “reach across the legal chasm of ‘non-recognition’ to help all Native Americans.”*²⁵³ Non-federally-recognized tribes are consequently placed into an inferior role, creating a dependency that does not necessarily accord with the principle that the remains of all Native Americans deserve respect and that the human rights of all Native Americans should be recognized. Moreover, there is no guarantee that coalitions would be successfully formed, as most federally-recognized groups are opposed to augmenting the rights of unrecognized groups.

250. Brown & Bruchac, *supra* note 241, at 204.

251. Nafziger, *supra* note 249, at 198 (explaining that “19 of the 50 states do not have any federally recognized tribes” and “[n]on-federally recognized tribes in these states cannot readily turn to recognized tribes for assistance”).

252. *Bonnichsen v. United States*, 367 F.3d 864, 872, n.11 (9th Cir. 2004) (stating that “only an individual Indian tribe—not a coalition of Indian tribes—could be a proper claimant under NAGPRA”); *see also* *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1142–43 (D. Or. 2002) (explaining that coalition claims are not consistent with the statutory requirement of cultural affiliation and are appropriate only in the most exceptional circumstances).

253. d’Errico, *supra* note 249 (discussing the ways in which NAGPRA divides Native nations).

Just as the new rule exacerbates tensions between tribes and unrecognized groups as they vie for control of so-called "unidentified" remains, making unrecognized tribes dependent upon the decision of recognized tribes when forming coalitions may have a similar effect. After her group was left out of a coalition repatriation effort, Donna Roberts Moody, an Abenaki reparation coordinator, well embodied the feelings of many non-federally-recognized groups when she asked: "Do these people somehow believe that because they are federally recognized tribes they have special consideration from Creator, or that they are better loved by Creator, or that their ancestral remains are more important than those of non-federally recognized tribes?"²⁵⁴ In many instances, federally-recognized tribes endeavor to maintain a sharp distinction between themselves and unrecognized groups in order to preserve the advantages they have been afforded under the law.

An examination of the transcripts of the Review Committee's twice-yearly public meetings reveals the animosity felt by some Native Tribal Historic Preservation Officers from recognized tribes toward unrecognized groups, especially regarding the prospect of incorporating them into NAGPRA's repatriation process.²⁵⁵ The 1997 Review Committee meeting minutes document the primary reason for this opposition: federally-recognized groups fear that expanding "standing for groups in repatriation issues might extend into other areas not related to NAGPRA."²⁵⁶ Brown and Bruchac explain that the concern "refers to the important role that receiving repatriated items might have in validating a group's authenticity, thus bolstering its case for federal recognition."²⁵⁷

But maintaining the priority established by the new rule will only exacerbate tension between Native American groups. While the promotion of coalitions could result in the proper transfer of remains, the lack of guaranteed cooperation and subordinating power structure undercuts the ability of coalitions to sidestep the problems associated with the new provision. Coalitions would not be necessary, however, if the rule distinguished the different classes

254. *Id.*

255. Brown & Bruchac, *supra* note 241, at 204.

256. NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT REVIEW COMMITTEE MEETING MINUTES 9 (Mar. 25–27, 1997), *available at* <http://www.nps.gov/nagpra/review/meetings/RMS013.pdf>.

257. Brown & Bruchac, *supra* note 241, at 204–05 (citing NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT REVIEW COMMITTEE MEETING MINUTES (Mar. 25–27, 1997)).

of unidentified remains.

B. Differentiating Three Classes of Unidentified Remains

Although the new rule was explicitly designed to eliminate the need for museums and tribes to go before the Review Committee to rule on the proper disposition of unidentified remains, leaving the Review Committee in the process would prevent many of the potentially invidious effects engendered by NAGPRA's new provision. Because the Review Committee routinely recognized three different classes of culturally unidentified remains and recommended that each follow a different disposition plan, the Review Committee allowed for the differentiation of remains necessary to securing their fair and appropriate disposition. Eleven years before the publication of the new rule, the Department of the Interior openly contended that "[s]ince human remains may be determined to be culturally unidentifiable for different reasons, there will be more than one appropriate disposition/repatriation solution."²⁵⁸

In formulating the new rule, however, the Review Committee ostensibly forgot its own recommendations in a myopic attempt to restore NAGPRA's equilibrium. The inequity stemming from the new rule is the direct result of the treatment of culturally unidentified remains as one monolithic category of remains. If remains that are culturally affiliated with non-federally-recognized tribes were not subject to the same disposition process as ancient or unprovenienced remains, the key principles undergirding NAGPRA would not be violated.

The Department should follow its own early advice and create three different rules for the disposition of the three different kinds of unidentified remains.²⁵⁹ Because coalitions do not offer the ideal solution for remains affiliated with unrecognized tribes, an idiosyncratic rule specific to these remains needs to be developed

258. Notice of Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains—Extended Date for Comments, 64 Fed. Reg. 41,135, 41,136 (July 29, 1999).

259. The Department of the Interior originally suggested that "[h]uman remains for which there is little or no information . . . should be speedily repatriated since they have little educational, historical or scientific value." *Id.* For the other two categories of remains, the Department recommended that non-federally recognized Indian groups form coalitions with recognized tribes or holding remains until recognition is granted. *Id.*

to ensure that NAGPRA remains both balanced and consistent with its goals.

Unfortunately, the most straightforward solution, that is, repatriating so-called “unidentified” remains bearing a “significant relationship” to non-federally-recognized tribes directly to those tribes, is infeasible. This practice would violate the trust relationship between the federal government and federally-recognized tribes. As the Department of the Interior made clear:

To ensure that the rights of federally-recognized Indian tribes are protected, a museum or Federal agency may only transfer control of culturally unidentifiable human remains . . . to an Indian group that is not federally-recognized after full consultation with relevant federally-recognized Indian tribes, with no objection from any of those tribes, and upon receiving a recommendation from the Secretary.²⁶⁰

In light of the special government-to-government relationship and the corresponding rights afforded to Native American tribes, custody of remains cannot be offered to unrecognized tribes before recognized tribes. As a result, the Review Committee established a priority system in which the appropriate claimants occupy the fourth position, behind tribes.

The trust relationship, however, does not require that tribes be offered control of remains with which they share no significant relationship. By differentiating remains, an alternative rule could require the disposition of truly unidentified remains while prohibiting the disposition of remains that are culturally affiliated with non-federally-recognized groups. The “timeless limbo” would thereby be eliminated for all but those remains that would be appropriately repatriated to unrecognized groups. This way, the remains would be on hold until the group gained federal recognition, at which point the remains could legally be considered “culturally affiliated” and eligible for repatriation.²⁶¹ Prohibiting

260. NAGPRA Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12,378, 12,394 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10).

261. This disposition practice is well exemplified by the Muwekma tribe. The Muwekma people knew of many collections in which their ancestral remains were being held. As an unrecognized tribe, however, the Muwekma people could not claim their remains until their recognition process was completed. For more than ten years, the Muwekma tribe sought federal recognition. As the judge observed in *Muwekma Tribe v. Babbit*, not having recognition disadvantaged the tribe in

the disposition of these remains would circumvent the unjust effects of the new rule, transforming the provision from one undermining NAGPRA's goals to a fair solution that effectively restores NAGPRA's equilibrium.

As it stands now, however, NAGPRA's new provision facilitates the inequitable disposition of "culturally unidentified" Native American human remains. Although the new regulation was enacted to restore the law's equilibrium, by undermining NAGPRA's broader principles in the process, the new rule capsizes NAGPRA's balancing act to the detriment of all the diverse interests invested in Native American human remains.

several ways, including inhibiting their ability to demand repatriation. *See* *Muwekma Tribe v. Babbit*, 133 F. Supp. 2d 42, 44 (D.D.C. 2001). Once the Muwekma tribe received recognition, they were able to claim their remains. If the remains had not been held in reserve, however, but were eligible to be transferred to other tribes, it is possible that in the long interim period they could have been disposed to another Native American group.