NOTE

Empty Graves and Full Museums: The Need to Include Non-Federally Recognized Tribes in NAGPRA Claims

Manda N. McElrath[*]

TABLE OF CONTENTS

INTRODUCTION

A house is haunted; a family terrorized. The American mind runs to one place first: the mystical — and theoretically cursed — "Indian Burial Ground."[1] Popular films including *Poltergeist*,[2] *Pet Sematary*,[3] and *The Shining*[4] all attribute their respective hauntings and supernatural experiences to the spiritual nature, burial ceremonies, and remains of the Natives[5] who owned and inhabited the land previously.[6] However, the curse of the burial ground is nothing more than a myth, a story perpetuated across several centuries to delegitimize and mythicize the entire existence of Native peoples. Consequently, this elimination of Natives and their histories allows for the further robbery of their peoples' bodies from their "final" resting place.[7]

Since the 1800s, Native American and Indigenous remains have been systematically disinterred and stolen from their graves. These thefts were permitted through government rules and resulted in massive archeological collections of corpses and artifacts, numbering in the millions.[8] Many of these excavations were conducted in the name of

[1] *See* Colin Dickey, *The Suburban Horror of the Indian Burial Ground*, NEW REPUBLIC (Oct. 19, 2016), https://newrepublic.com/article/137856/suburban-horror-indian-burial-ground [https://perma.cc/DMB9-ESYV]; Matt Kim, *'The Darkness', 'The Shining', and the Persistent Myth of the "Indian Burial Ground"*, INVERSE (May 13, 2016, 7:24 AM), https://www.inverse.com/article/15601-the-darkness-the-shining-and-the-persistent-myth-of-the-indian-burial-ground [https://perma.cc/76XF-KNY9].

[2] POLTERGEIST (Metro-Goldwyn-Mayer 1982).

[3] PET SEMATARY (Paramount Pictures 1989).

[4] THE SHINING (Warner Bros. 1980).

[5] I use Native American, Native, Indian American, and Indian interchangeably throughout this Note, as neither term is inherently correct and different people prefer the usage of one over the other.

[6] *See supra* note 1; *see also* KATHLEEN S. FINE-DARE, GRAVE INJUSTICE: THE AMERICAN INDIAN REPATRIATION MOVEMENT AND NAGPRA 56 (2002) ("Most Americans still define Indians as a very tiny 'minority group' . . . that makes ridiculous demands regarding issues such as sports team mascots, 'tomahawk chops', and ancient bones.").

[7] *See* Franc Menusan, *Perspectives*, 9 AM. INDIAN RITUAL OBJECT REPATRIATION FOUND. 1, 3 (2003) ("If we are not 'real,' if we are 'invisible,' then there is no conflict in developing our sacred ceremonial ritual objects into 'objects of art.'").

[8] NOVA SCIENCE, NATIVE AMERICAN GRAVES AND REPATRIATION 5 (Kathy J. Bergmann ed., 2011); *see also* 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, 46 (1992) (demonstrating that Indians were not legally considered "a person" until 1879 and were not granted citizenship until 1924). Currently, there are more than 116,000 Native American ancestors' remains still held by institutions in the United States that are considered culturally unaffiliated. *See* Zachary Small, *Push to Return 116,000 Native American Remains Is Long-Awaited*, N.Y. TIMES (Aug. 6, 2021),

scientific advancement or cultural preservation[9], or simply to prove that the Indian was a "racially inferior 'savage' . . . naturally doomed to extinction."[10] Any excavated artifacts or remains instantly became the property of the United States, violating common law precedent which declared that no viable property interest existed in a dead body.[11]

In the latter half of the twentieth century, Congress made several attempts to address Native post-mortem rights, including the Archaeological Resources Protection Act of 1979 ("ARPA")[12] and the National Museum of the American Indian Act.[13] The most comprehensive legislation passed was the Native American Graves & Repatriation Act ("NAGPRA").[14] Enacted in 1990, NAGPRA promulgates a statutory and regulatory framework to address the systemic atrocities perpetrated against Native burial rights for over 200 years.[15] Through the NAGPRA process, select groups of Indians, predominantly federally recognized tribes, can request and attempt to re-possess their cultural items and ancestral remains from museums and federal agencies.[16] However, NAGPRA falls short of its goal as human rights legislation by excluding non-federally recognized tribes from bringing claims for repatriation.[17] This Note analyzes the issues arising from the inability of non-federally recognized tribes to bring claims

https://www.nytimes.com/2021/08/06/arts/design/native-american-remains-museums-nagpra.html [https://perma.cc/5UTC-6MEU].

[9] *See* Amanda Daniela Cortez, Deborah A. Bolnick, George Nicholas, Jessica Bardill & Chip Colwell, *An Ethical Crisis in Ancient DNA Research: Insights from the Chaco Canyon Controversy as a Case Study*, 21 J. SOC. ARCHAEOLOGY 157, 158 (2021) ("The view that human remains are just another historical resource to be mined is seen by many as a form of colonialist violence against Indigenous peoples.").

[10] Trope & Echo-Hawk, *supra* note 8, at 40.

[11] Antiquities Act of 1906, 16 U.S.C §§ 431-33 (1906); *see Repatriation Act Protects Native Burial Remains and Artifacts*, 16 NARF LEGAL REV. 1, 2 (1990) ("Untold thousands of Native remains . . . were turned over by law to state and federal museums.") [hereinafter *Repatriation Act Protects*].

[12] 16 U.S.C. §§ 470aa-470mm (1979).

[13] 20 U.S.C. § 80q (1989).

[14] 25 U.S.C. §§ 3001-3013 (1990).

[15] *Id.*; *see* Dylan Brown, *The Spoils of Wars and Massacres: NAGPRA 25 Years Later*, INDIAN COUNTRY TODAY, https://indiancountrytoday.com/archive/the-spoils-of-wars-and-massacres-nagpra-25-years-later (updated Sept. 13, 2018) [https://perma.cc/6XKQ-PJ2B] ("NAGPRA established a process by which those remains would be returned . . . righting the historic wrong remains a monumental undertaking.").

[16] 25 U.S.C. §§ 3001-13.

[17] *See* Angela Neller, Ramona Peters & Brice Obermeyer, *NAGPRA's Impact on Non-Federally Recognized Tribes*, *in* ACCOMPLISHING NAGPRA 161, 165 (Sangita Chari & Jaime M. N. Lavallee eds., 2013).

under NAGPRA and argues that the current statutory framework and definitions inhibit the statute's effectiveness.

This Note proceeds in five parts. Part I provides an analysis of NAGPRA, the prior legislation that impacted its formation, and the federal recognition process.[18] Part II turns to issues regarding ambiguity and contradictions in the statutory language.[19] It first discusses the different statutory and regulatory definitions of "Native" and "Indian," then turns to a discussion of *Bonnichsen v. United States* to illustrate the modern legal conception of what constitutes "Native" remains.[20] Part III explores the inequitable obstacles presented by the current methods of determining standing for repatriation, including federal recognition, lineal descendance, and tribal membership definitions.[21] Part IV addresses policy concerns about the inherent flaws currently present within the NAGPRA process.[22] Finally, Part V calls upon Congress and the Bureau of Indian Affairs to update the statutory definition of Indian tribe to include non-federally recognized tribes who are culturally affiliated with any remains available for repatriation.[23]

I. NAGPRA AND THE FEDERAL RECOGNITION PROCESS

Grave robbery and corpse tampering are serious crimes in many states, often accorded their own statutes and criminal punishments by legislatures aiming to protect the body after death.[24] However, the graves and bodies of Native Americans have long been an exception to these laws, disinterred and collected in the name of scientific progress and so called "cultural preservation."[25] The Antiquities Act of 1906,[26] for example, allowed for the disinterment of thousands of Native bodies by statutorily classifying them as "archaeological resources" and

[18] *See infra* Part I.

[19] *See infra* Part II.

[20] *See infra* Part II.

[21] *See infra* Part III.

[22] *See infra* Part IV.

[23] *See infra* Part V.

[24] *See* CAL. PENAL CODE § 594.35 (2003); N.Y. PENAL LAW § 145.23 (2007); TEX. PENAL CODE ANN. § 42.08 (2017); *see also* Douglas Preston, *The Kennewick Man Finally Freed to Share His Secrets*, SMITHSONIAN MAG. (Sept. 2014), https://www.smithsonianmag.com/history/kennewick-man-finally-freed-share-his-secrets-180952462/?page=1 [https://perma.cc/ZH9P-7WPS] ("Until NAGPRA, museums were filled with American Indian remains acquired without regard for the feelings and religious beliefs of Native people.").

[25] FINE-DARE, *supra* note 6, at 97; *see* NOVA SCIENCE, *supra* note 8, at 5.

[26] 16 U.S.C § 432 (1906).

"federal property."[27] The Archeological Resources Protection Act of 1979 ("ARPA") governed "the excavation of archaeological sites on Federal and Indian lands" with the aim of securing archaeological resources "for the present and future benefit of the American people."[28] It was not until 1986 that Native leaders and other lawmakers first began the process of drafting nationwide legislation that addressed the Native remains and artifacts possession problem.[29] Even then, these drafts were often opposed by museums and the scientific community who reasoned that they would lose substantial research opportunities if Native remains were no longer easily accessible to them.[30]

Between 1986 and 1990, twenty-six different bills were proposed to solve the repatriation problem. NAGPRA represents the culmination of these attempts and creates a statutory framework under 25 U.S.C. section 3001 and a regulatory implementation process under 43 C.F.R. section 10.[31] Unlike previous federal legislative repatriation and heritage efforts, which were placed in the Conservation Title of the United States Code[32], NAGPRA was placed in Title 25 ("Indians") to further emphasize the legislature's dedication to Native peoples and human rights.[33]

---

[27] Trope & Echo-Hawk, *supra* note 8, at 42. The Antiquities Act specifically did not mention that Native Americans possess any interest in their artifacts or remains that needed to be protected. Kate Fitz Gibbon, *A Primer: NAGPRA, ARPA, and the Antiquities Act*, CULTURAL PROP. NEWS (Dec. 19, 2018), https://culturalpropertynews.org/a-primer-nagpra-arpa-and-the-antiquities-act/ [https://perma.cc/2TKW-SMKV]. Currently, the modern application of the Act is primarily to create National Monuments by Presidential Proclamation. *Id.*

[28] 16 U.S.C. § 470; *Archaeological Resource Protection*, U.S. FOREST SERV., https://www.fs.fed.us/lei/archeological-resources-protection.php (last accessed Oct. 1, 2021) [https://perma.cc/HU9N-TNSS].

[29] *See Repatriation Act Protects*, *supra* note 11, at 1. While Northern Cheyenne leaders were visiting the Smithsonian Institute, they were told the museum contained 18,500 skeletal remains. *Id.* This discovery "helped generate a national Indian movement" which led to the codification of what is now known as NAGPRA. *Id.*

[30] Matthew H. Birkhold, Note, *Tipping NAGPRA's Balancing Act: The Inequitable Disposition of "Culturally Unidentified" Human Remains Under NAGPRA's New Provision*, 37 WILLIAM MITCHELL L. REV. 2046, 2050-51 (2011).

[31] Sangita Chari & Jaime M. N. Lavallee, *Introduction*, *in* ACCOMPLISHING NAGPRA 1, 8 (Sangita Chari & Jaime M. N. Lavallee eds., 2013).

[32] Title 16 of the U.S. Code ("Conservation") contains the statutory provisions that relate to national parks, forest management, paleontological resources protection, ARPA, wildlife restoration, and many others.

[33] *See* Chip Colwell-Chanthaphonh, Rachel Maxson & Jami Powell, *The Repatriation of Culturally Unidentifiable Human Remains*, 26 MUSEUM MGMT. & CURATORSHIP 27, 37 (2011); Trope & Echo-Hawk, *supra* note 8, at 60.

A. The NAGPRA Process: What and Who Does It Apply To?

NAGPRA coordinates the return of Native American remains and "cultural items" from federal agencies or museums to the appropriate lineal descendants, Indian tribes, or Native Hawaiian organizations.[34] NAGPRA only applies to remains currently under the control of a federal agency, which includes all departments, agencies, and instrumentalities of the United States (except the Smithsonian[35]), and all museums that receive federal funding.[36] Federal agencies and museums are statutorily required to complete an inventory of all human remains and associated funerary objects in their possession.[37] After the respective inventory is complete, the federal entity must notify any identified Indian tribes or Native Hawaiian organizations that could potentially be affiliated with or related to the remains or artifacts, in addition to publishing each inventory notice in the Federal Register.[38] Eligibility for repatriation is also dependent on the location where the artifacts or remains were found, as NAGPRA's reach is limited to federal land that is owned or controlled by the United States.[39]

NAGPRA contains several categories of repatriatable objects.[40] "Cultural items" include associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony.[41]

---

[34] 25 U.S.C. § 3005(a)(1)-(2) (2020); *see* Jan I. Bernstein, *The Impact of NAGPRA on Communities*, *in* ACCOMPLISHING NAGPRA 265, 265 (Sangita Chari & Jaime M. N. Lavallee eds., 2013) ("NAGPRA did not bestow new rights or special rights, instead it simply codified rights that, under common law and property law, should have been extended to Native Americans . . . .").

[35] The remains and objects under the control of the Smithsonian Institute are repatriated under the National Museum of the American Indian Act, 20 U.S.C § 80q(9)-(10) (1996).

[36] 25 U.S.C. § 3001(4), (8) (2018) (noting that a museum is "any institution or State or local government agency (including any institution of higher learning) that receives federal funds and has possession of . . . Native American cultural items"). As NAGPRA only applies to federally funded institutions, many private institutions, who are under no legal obligation to return Native artifacts and remains, may continue to keep their collections.

[37] *Id.* § 3003 (2018). Not all institutions and museums have completed inventories of their collections, despite the original completion deadline being 1995. Small, *supra* note 8.

[38] 25 U.S.C. § 3003 (2018). While museums and federal agencies are required to publish notices regarding the transfer of objects, they are not required to report whether the transfers actually occurred. *See* Chari & Lavallee, *supra* note 31, at 13-14.

[39] 25 U.S.C. § 3001(5) (2018).

[40] *See generally id.* §§ 3003-04 (2018) (defining NAGPRA categories).

[41] *Id.* § 3001(3)(A)-(D) (2018). Unassociated objects specifically are artifacts believed to have been buried with human remains, but the remains are no longer in the

"Funerary objects" specifically refer to objects buried with human remains and associated with death rites or ceremonies.[42] Both "sacred objects" and "objects of cultural patrimony" identify artifacts that have significant uses and importance for modern-day tribal practices, modern-day tribal cultures, or both.[43] The definition of "human remains" is limited to the physical remains of a Native American body, not including parts naturally shed, such as hair.[44] If any part of human remains is incorporated into any of the cultural objects mentioned above, then that part is no longer considered "remains" but is instead considered part of that object.[45] Culturally unidentifiable remains and unassociated funerary objects are remains and objects that cannot be associated with any current Indian tribe.[46] The current definition for Indian tribes specifically excludes all non-federally recognized tribes.[47]

Under NAGPRA, standing to bring claims for repatriation is limited to lineal descendants, Indian tribes, and Native Hawaiian organizations, all of which must demonstrate ownership through descent to complete the repatriation process.[48] "Lineal descendant" refers to an individual who can trace their lineage "directly and without interruption" through either a specific tribal kinship system or the common law system of descendance.[49] "Indian tribe," in the context of the statute, specifically refers to any tribe, band, nation, or organized group that receives federal funding and is recognized by the federal government.[50] Lineal descendants must be contacted first for all remains for which

possession of the federal agency or museum. *Id.* The artifact can still likely be identified with a specific individual or an individual associated with an Indian tribe. *Id.*

[42] *Id.* § 3001(3)(A)-(B).

[43] *Id.* § 3001(3)(C)-(D). Objects of cultural patrimony cannot be repatriated to individuals. *Id.*

[44] 43 C.F.R. § 10.2(d)(1) (2020).

[45] *Id.*

[46] *Id.* § 10.2(e)(1)-(2).

[47] *See* DAVID E. WILKINS, HOLLOW JUSTICE: A HISTORY OF INDIGENOUS CLAIMS IN THE UNITED STATES 189 (2013) (discussing the 2010 Department of the Interior updates to the regulation, which required museums to "notify tribal nations whose current or ancestral lands once held the remains" when no cultural affiliation was immediately found).

[48] 25 U.S.C. § 3005(5)(A)-(C) (2018).

[49] 43 C.F.R. § 10.2(b)(1) (2015). Lineal descendants are not defined under 25 U.S.C. § 3001.

[50] 25 U.S.C. § 3001(7) (2018); *see also* JOANNE BARKER, NATIVE ACTS 27 (2011) ("[Indian tribes] possess federal recognition status and all commensurate rights under the law, including right to self-government, sovereign immunity, and tax exemption.").

repatriation is possible.[51] If no lineal descendants are found or interested, or the remains cannot be linked to a specific individual, the Indian tribe on whose current land the remains were discovered is contacted.[52] If that Indian tribe does not express an interest in the artifacts or does not respond, the Indian tribe that had aboriginal occupancy of the land is then asked if they would like the remains or artifacts.[53]

While the initial intentions of NAGPRA were promising, the practical results are hindered by the restrictive scope of standing under the statute. The legislature intended NAGPRA to reflect the special relationship that Indian tribes and the federal government share, and therefore chose to limit standing only to federally recognized tribes.[54] The recognition requirement effectively eliminates all claims from tribes who have either lost federal recognition in the past or never received it.[55] It also means that the presence of a shared identity with a Native culture is not enough to support a repatriation claim.[56] Rather, the federal recognition requirement creates a specific cultural affiliation requirement that ignores the perspectives of Natives and instead forces imposition of white conceptions of Indigenous culture.[57]

---

[51] 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, 79-80 (2005).

[52] *Id.* at 80.

[53] *See id.* at 82-84 ("Congress contemplated that there might be more than one present day tribe sharing some degree of group identity with [an] earlier group . . . .").

[54] *See* Birkhold, *supra* note 30, at 2054; *see also* Robert H. McLaughlin, *NAGPRA, Dialogue, and the Politics of Historical Authority*, *in* LEGAL PERSPECTIVES ON CULTURAL RESOURCES 185, 191 (Jennifer R. Richman & Marion P. Forsyth eds., 2004) ("In fact, standing for tribal claims of repatriation depends on the federal recognition of the tribe."); Jack F. Trope, *The Case for NAGPRA*, *in* ACCOMPLISHING NAGPRA 19, 29 (Sangita Chari & Jaime M. N. Lavallee eds., 2013) ("Congress viewed NAGPRA as part of its trust responsibility to Indian tribes and people . . . .").

[55] *See* FINE-DARE, *supra* note 6, at 144; *see also* NOVA SCIENCE, *supra* note 8, at 12 ("Hundreds of Indian groups that are not federally recognized have expressed an interest to [the Bureau of Indian Affairs] in seeking federal recognition.").

[56] *See* Perry G. Horse, *Native American Identity*, 109 NEW DIRECTIONS FOR STUDENT SERV. 61, 63-64 (2005).

[57] *See* Ashley Young, *Continuing an American Legacy of Racial and Cultural Injustice: A Critical Look at* Bonnichsen v. United States, 17 DEPAUL J. ART TECH. & INTELL. PROP. L. 1, 28 (2006). The exclusion of non-federally recognized tribes indicates that this white perception of cultural affiliation is the correct standard. *See* Horse, *supra* note 56, at 63-64.

B. What Is Federal Recognition?

Federal recognition is a status held by certain Native tribes that creates a political, "government-to-government relationship" between that tribe and the United States government.[58] Historically, the federal-Indian relationship struggled to find its footing.[59] The 1830 Indian Removal Act, commonly known as the Trail of Tears, ignored numerous treaties between tribal nations and governments, leading to the forced relocation of thousands of Indians for two decades.[60] The Indian Reorganization Act of 1934 was intended to "foster Indian self-sufficiency" but intentionally excluded a large proportion of tribes.[61] And in 1953, House Concurrent Resolution 108 officially terminated hundreds of tribal relationships, eliminating the tribes' federal recognition status, some of which have never been re-established.[62] The current non-recognized status of a tribe sharply affects how those tribes and individual members of that tribe can exist in American society. The modern application of recognition status specifically creates distinct classes of indigenous peoples, through the bestowment of different rights, protections, and resource availability.[63]

Standardized in 1978, tribal recognition can be obtained by following one of three available paths: through an act of Congress, through administrative procedures, or by a decision of a United States court.[64] Each path requires extensive historical, ethnographic, and genealogical evidence for federal recognition.[65] The administrative recognition

---

[58] Alva C. Mather, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgement Litigation*, 151 U. PA. L. REV. 1827, 1828 (2003); DaShanne Stokes, *Native American Mobilization and the Power of Recognition: Theorizing the Effects of Political Acknowledgement*, 36 AM. INDIAN CULTURE & RSCH. J. 57, 61-63 (2012).

[59] *See* Mather, *supra* note 58, at 1828.

[60] *See* Ethan Davis, *An Administrative Trail of Tears: Indian Removal*, 50 AM. J. LEG. HIST. 49, 52 (2008); Andrew K. Frank, *Trail of Tears*, OKLA. HIST. SOC'Y, https://www.okhistory.org/publications/enc/entry.php?entry=TR003 (last visited Oct. 1, 2021) [https://perma.cc/Z6N4-LZUK].

[61] Mather, *supra* note 58, at 1828.

[62] *Id.* at 1829-32.

[63] Stokes, *supra* note 58, at 63-64.

[64] Federally Recognized Indian Tribe List Act, Pub. L. No. 103-454, 108 Stat. 4791 (1994). Individual states can also confer recognition on tribes within their jurisdiction, but this does not establish a relationship with the federal government or federal recognition. Stokes, *supra* note 58, at 63; *see, e.g.*, *Federal and State Recognized Tribes*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/legislators-staff/legislators/quad-caucus/list-of-federal-and-state-recognized-tribes.aspx#State (last visited Oct. 1, 2021) [https://perma.cc/8YYR-YPXT] (listing all states that recognize tribes and the specific tribes recognized).

[65] 25 C.F.R. § 83.11 (2012).

process for recognition, conducted through the Branch of Acknowledgment ("BAR") contained within the Bureau of Indian Affairs ("BIA"), is the primary model for tribal recognition over both the congressional and judicial routes.[66] Seven criteria must be met for recognition through the administrative process: 1) the Indian tribe has identified as Indian on a continuous basis since 1900; 2) the tribe represents a distinct community; 3) the tribe has maintained political authority over its members since 1900; 4) the tribe has documented its internal government structure and membership criteria; 5) the tribe's members are individuals from a historical Indian tribe; 6) the tribe's membership is composed of individuals who are not members of other federally recognized tribes; and 7) the tribe was never terminated by Congress.[67] These criteria are intended to operate as "markers of authenticity."[68] Instead, they act as artificial components of a narrow litmus test used by the government to find the best representation of Indianness.[69]

II. CONTRADICTIONS WITHIN THE NAGPRA STATUTORY LANGUAGE

As federal recognition hinges on restrictive and antiquated views on what makes an Indian, the language in NAGPRA follows suit. Colloquially, terms used for identifying Native peoples in the United States can include American Indian, Indian, Native American, Indigenous peoples, or specific tribal designations.[70] These designations often depend on the personal choice and preference of the individual describing themselves.[71] No choice is considered ideal: "Indian" is based on a historical inaccuracy, "Native American" could refer to any person born on United States soil, and people who have lineage in multiple tribes may not want to limit themselves to one tribal designation.[72] However, identification as Indian and/or Native does not always equate

---

[66] *See* E. RICHARD HART, AMERICAN INDIAN HISTORY ON TRIAL: HISTORICAL EXPERTISE IN TRIBAL LITIGATION 97 (2017); Neller, *supra* note 17, at 163.

[67] 25 C.F.R. § 83.11(a)-(g) (2020); *see* William A. Starna, *"Public Ethnohistory" and Native-American Communities: History or Administrative Genocide?*, 53 RADICAL HIST. REV. 126, 128 (1992); *see also* HART, *supra* note 66, at 97 (discussing how the BAR has a number of criteria to test "whether a tribe existed historically at the time of first contact with the United States").

[68] Stokes, *supra* note 58, at 64.

[69] *Id.*

[70] Horse, *supra* note 56, at 62.

[71] *Id.*

[72] *Id.* at 62, 66; *see* FINE-DARE, *supra* note 6, at 57 ("Being Indian is [] a cultural, historical, social, political, and experiential form of identity. . . .").

to tribal citizenship, and instead is attributed to a political designation or recognition.[73] Many federal laws simply use the term "Indian" without defining it, which allows administrative agencies to promulgate laws and regulations that independently define who is an Indian.[74] Courts have also included different aggregations of Indians, including non-recognized tribes, to fall under the "Indian tribe" umbrella, as long as they receive funds and assistance from at least one department of the Federal government.[75] NAGPRA contains Congress-created definitions for "Native Americans" to specify "under what circumstances an indigenous community may receive federal recognition as a tribe."[76] The statutory language and federal regulations promulgated by NAGPRA assign disparate definitions to the terms "Indian" and "Native."[77] This creates a gap in the array of people who have standing and the ability to request repatriation.[78]

A. Indian Versus Native: The Confusion of Semantics

Legislative text, including its words, phrases, and sentences, should be given legal effect, so that no parts are made "inoperative, superfluous, void, or insignificant" when read.[79] However, NAGPRA's divisive definitions of "Indian," "Native American," and "Indigenous" make these specific terms void and inoperative on their face. The statutory component of NAGPRA defines "Native American" as a person with a relation to a "tribe, people, or culture that is indigenous to the United

---

[73] Stokes, *supra* note 58, at 60. "The conflict between Indians and anthropologists in the last two decades has been, at its core, a dead struggle over the control of definitions. Who is to define what a Indian really is?" Vine Deloria, Jr., *Anthros, Indians, and Planetary Reality*, *in* INDIANS AND ANTHROPOLOGISTS: VINE DELORIA, JR., AND THE CRITIQUE OF ANTHROPOLOGY 209, 215 (Thomas Biolsi & Larry J. Zimmerman eds., 1997).

[74] *See* Young, *supra* note 57, at 22.

[75] *NAGPRA Compliance*, ASS'N. ON AM. INDIAN AFFS., https://www.indian-affairs.org/nagpra-compliance.html (last visited Nov. 20, 2021) [https://perma.cc/J995-UCNG].

[76] S. Alan Ray, *Native American Identity and the Challenge of Kennewick Man*, 79 TEMP. L. REV. 89, 109 (2006).

[77] *See* 25 U.S.C. § 3001 (2002); 43 C.F.R. § 10.2 (2020). NAGPRA does not define "indigenous" in its statutory language. *See* Birkhold, *supra* note 30, at 2064.

[78] Birkhold, *supra* note 30, at 2064.

[79] C. TIMOTHY MCKEOWN, IN THE SMALLER SCOPE OF CONSCIENCE 173 (2012); *see also* Colwell-Chanthaphonh et al., *supra* note 33, at 37 (arguing that Indian legislation was meant to be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit").

States."[80] The term "Indian tribe" refers to "any tribe, band, nation, or other organized group or community of Indians . . . which is recognized as eligible for the special programs and services" that come with Federal recognition.[81] Both the courts and the executive branch define "Indian tribe" differently, which has repeatedly led to different interpretations of behalf of both entities.[82] Due to the discrepancies present in the current statutory language, situations arise where people could be considered Native American, but not be considered part of an Indian tribe.[83] As standing for repatriation claims legally depends on federal recognition, the discrepancy in definitions creates confusion: something that should be distinctive becomes both inclusive and exclusive when applied.[84] These terms that theoretically should have identical meanings are instead construed to represent two different statuses under federal law.[85]

The identity of "Indian" is a modern protected status, rather than a historical one.[86] Early repatriation bills had much broader definitions for "Indian tribes," which included tribes whose federal status was terminated by federal law after 1940,[87] various state-recognized groups, and other non-federally recognized groups.[88] Before the passage of NAGPRA, non-federally recognized tribes were often the most appropriate, culturally affiliated groups to participate in repatriation, as they were considered to have the most interest.[89] State repatriation statutes also "afforded differing degrees of protection," which led to inconsistency.[90] With the subsequent passage of NAGRPA, all of these previously recognized groups, with the exception of federally

[80] 25 U.S.C. § 3001(9) (2020).

[81] *Id.* § 3001(7); *see* MCKEOWN, *supra* note 79, at 187 ("NAGPRA's statutory definition of Indian tribe includes 336 Indian tribes located in the contiguous forty-eight states and 229 Alaska Native villages.").

[82] MCKEOWN, *supra* note 79, at 187.

[83] Ray, *supra* note 76, at 111.

[84] *See* McLaughlin, *supra* note 54, at 191.

[85] *Id.*

[86] Margaret Bruchac, *Constructing Indigenous Associations for NAGPRA Compliance*, ANTHROPOLOGY NEWS (Mar. 2010), https://repository.upenn.edu/anthro_papers/149/ [https://perma.cc/62SQ-9KTH].

[87] Stokes, *supra* note 58, at 71.

[88] MCKEOWN, *supra* note 79, at 187; *see* Stokes, *supra* note 58, at 71 (discussing how NARF recommended that the definition of Indian tribe include state-recognized groups).

[89] *See* Neller et al., *supra* note 17, at 193.

[90] *Repatriation Act Protects*, *supra* note 11, at 3.

recognized tribes, were ultimately excluded.[91] The Department of the Interior later attempted to clarify the definition of "Indian tribe" to include tribes that were recognized by any federal agency (not just the Secretary of the Interior), but this clarification never occurred.[92] Constrained by "its definitions of key terminology," NAGPRA still excludes non-federally recognized tribes from its definition of "Indian tribe."[93]

The NAGPRA Review Committee also recommended amending the definition of "Native American" for clarity.[94] The "Native American" definition is written in the present tense ("is indigenous")[95] and there have been attempts to amend this definition to include the past tense ("was indigenous") to reflect the historical fluctuations, like relocation and tribal separation, that Native peoples have experienced, but this issue has never been revisited.[96] The BAR often uses these historical fluctuations as a basis to reject applications for federal recognition, arguing that lack of geographic concentration and insufficient interaction between members cannot constitute an Indian or Native American community.[97] The main difference between a statutory "Native American" and a statutory "Indian tribe" is the group or communities level of current dependency on the federal government of the United States for protection of their rights to self-government and territorial integrity.[98] Additionally, the identification of remains as "Native American" in the present does not coincide with the specific

[91] MCKEOWN, *supra* note 79, at 187-88; *see* Penelope Kelsey & Cari M. Carpenter, *"In the End, Our Message Weighs": Blood Run, NAGPRA, and American Indian Identity*, 35 AM. INDIAN Q. 56, 59 (2011) ("Suzan Shown Harjo, a key architect of NAGPRA, notes that the nuanced language of the original, with terms like 'societies, clans, longhouses and other moieties, and Native families and other next of kin,' were omitted by congressional staffers who were not familiar with the intricacies of American Indian identity or re-patriation itself.").

[92] MCKEOWN, *supra* note 79, at 187.

[93] Young, *supra* note 57, at 9.

[94] NOVA SCIENCE, *supra* note 8, at 91.

[95] 25 U.S.C. § 3001(10) (1992).

[96] Native American Omnibus Technical Corrections Act of 2007, S. 2087, 110th Cong. (2007); *see also* Kelsey & Carpenter, *supra* note 91, at 71 ("[NAGPRA, in its current permutation,] fails to fully protect American Indian remains based on its reductive definitions and interpretations of tribal peoples.").

[97] *See* Starna, *supra* note 67, at 131.

[98] *See* BARKER, *supra* note 50, at 31; *see* Stokes, *supra* note 58, at 60 (noting that "being Indian" is not the same as being a tribal citizen, as one is a political status and the other is a form of self-identification "in view of multitribal ancestry").

limitation of "Indian tribe" requiring federal recognition.[99] The BIA itself recommended the legislative distinction between the two terms and believed that the "current membership" requirement was necessary specifically because the *current* eligibility for federal services was more important than a past ability to receive services.[100] NAGPRA's current utilization of federal constructs to determine tribal identity and association inevitably leads to confusion, as it ignores common-sense and historical constructions that would alternatively lead to a clear and discernible standard for who could be a claimant under the statute.[101]

The federal definitions of both "Native American" and "Indian tribe" are over-determinative and racialize the collective statutes, which limit the rights that Native and Indigenous peoples should be legally entitled to.[102] Race theorists argue that identities in modern society are created through "dialogue with others, in agreement or struggle with their recognition of us."[103] However, as historically seen, when members of an outside group have the power to shape identity, such as Congress's ability to define who and what constitute an "Indian tribe" or "Native American," further barriers for participation are created.[104] These barriers predetermine and institutionalize cultural value, leading to the misrecognition and exclusion of certain groups, including those who would be considered Native American, but would not qualify as a member of an Indian tribe.[105] Indian as a legal identity and status is not identical to a racial, biological, or cultural identity, as it was created through federal policy, law, and regulation over time.[106]

To secure their legal rights under NAGPRA, Indian tribes must demonstrate both aboriginality and current existence to satisfy these disparate definitions — categories that discretely work to provide for "continued rearticulation of federal authority over Native peoples."[107] This continuous pattern of recognition, misrecognition, exclusion, and inclusion leads to NAGPRA's subtle failure, as between one-third and one-half of all Native peoples have been excluded from participating in

[99] *See, e.g.*, Richard Day, *Who Is This We that Gives the Gift? Native American Political Theory and the Western Tradition*, 2 CRITICAL HORIZONS 173, 183 (2001) ("[I]ndigenous groups in the United States retain only those powers that have not been 'restricted' by the US Congress.").

[100] Starna, *supra* note 67, at 134.

[101] Bruchac, *supra* note 86, at 5.

[102] BARKER, *supra* note 50, at 217.

[103] Day, *supra* note 99, at 178.

[104] *See id.* at 176.

[105] *See id.*

[106] *See* FINE-DARE, *supra* note 6, at 34.

[107] BARKER, *supra* note 50, at 27, 223.

the process that was originally created to rectify some of the generations of atrocities inflicted upon them.[108] NAGPRA's rhetoric defining Native identity fails to meet the original intentions of the law and reduces the "definition of Indigeneity" to something so restrictive that the law fails in its original goal.[109] Through Congress's misrecognition of Native groups, NAGPRA's definitions create further conflict between indigenous peoples and the United States.[110]

B. Bonnichsen v. United States

The limitations and problems with the statutory definitions present in NAGPRA are especially apparent in the court's reasoning in the case of *Bonnichsen v. United States*.[111] *Bonnichsen* represented a two-decade long battle over a set of remains dubbed "Kennewick Man" by scientists and called "the Ancient One" by tribal affiliates.[112] Kennewick Man was found on federal property under the management of the Army Corps of Engineers ("Corps").[113] The remains were an enigma: the physical features of the face and skull did not coincide with the phenotypical modern Native facial structure, and the bones were estimated to be between 8,340 and 9,200 years old.[114] The Corps attempted to repatriate the remains to local area tribes for burial, but all proceedings were halted when a group of scientists filed suit, claiming the remains had scientific significance and that the "discovery might shed light on the origins of humanity in the Americas."[115] After eight years of litigation,

[108] *Id.* at 28.

[109] Kelsey & Carpenter, *supra* note 91, at 57.

[110] *See* Day, *supra* note 99, at 176.

[111] Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004).

[112] *Bonnichsen*, 367 F.3d at 864. The name attributed to the remains is a source of controversy, as the act of naming is "an assertion of the right to claim such power." *See* Ray, *supra* note 76, at 96-97 ("[The] contrasting beliefs of the scientists and the tribes are so diametrically opposed as to have no common ground between them.").

[113] *Bonnichsen*, 367 F.3d at 869.

[114] *Id.* at 869-79.

[115] *Id.* at 870-72. A more in-depth explanation of the analysis of Kennewick Man's remains sheds some light on the conflicting opinions on what constituted an Indian American in this case. The Secretary of the Interior and the Corps agreed to assign the Secretary the "responsibility to decide whether the remains were 'Native American' under NAGPRA." *Id.* at 871. The experts hired determined that Kennewick Man's remains were not similar to modern American Indians, but that this did not "completely rule out the possibility that the remains might be biologically ancestral to modern American Indians." *Id.* at 871-72. On January 13, 2000, the Secretary determined that the remains were in fact Native American and did fall under the corresponding definition in NAGPRA's language. *Id.* at 872. After this determination and an announcement that the Secretary would award Kennewick Man's remains to the Tribal

the Ninth Circuit Court of Appeals held that the Ancient One was not Native American under the NAGPRA definition and, therefore, NAGPRA did not apply.[116]

The court based its findings on the its answer to the application of one particular question: are the remains "Native American" within NAGPRA's meaning?[117] The statute's inclusion of the present tense phrase "is indigenous to the United States" and its attributed ordinary meaning led the court to conclude that NAGPRA's applicability was limited to "presently existing" tribes, peoples, and cultures.[118] Accordingly, the court believed that there must be a significant "biological link" between the remains and *modern* Native tribes.[119] The court primarily relied on the craniometric data provided by the plaintiff-anthropologists, which theoretically exemplified that the skull was not morphologically similar to Native Americans, and therefore could not fall within NAGPRA's definition.[120] The court further reasoned that ancestral remains of an age like the Ancient One were almost impossible to prove as related to a presently existing Indian tribe.[121] They cited continuity problems between cultures due to "substantial changes in settlement, housing, diet, trade, subsistence patterns, technology," and other rituals which only began 2,000–3,000 years ago in the modern Plateau Culture as the predominant factors that led to their decision.[122] The court's ruling categorized the Ancient One as a Paleoamerican, a designation for the first peoples to enter the Americas, rather than Native or Indian.[123] This court-created construction of race effectively severed the "cultural and biological ties" between older remains and the Native peoples who currently occupied the land, based purely on statutory word precision and verb tense,[124] and created further confusion about the statutory limits of NAGPRA's definitions.[125]

Claimants, the Plaintiff Scientists amended their complaint and challenged the Secretary's determination. *Id.*

116 Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation*, 25 J. LAND RES. & ENV'T L. 259, 283 (2005).

117 Ray, *supra* note 76, at 104.

118 *Bonnichsen*, 367 F.3d at 875; *see* Ray, *supra* note 76, at 104-05.

119 Young, *supra* note 57, at 18.

120 Ann M. Kakaliouras, *The Repatriation of the Palaeoamericans: Kennewick Man/The Ancient One and the End of a Non-Indian Ancient North America*, 4 BJHS: THEMES 79, 82 (2019).

121 *Bonnichsen*, 367 F.3d at 879, 881.

122 *Id.* at 881.

123 *See* Kakaliouras, *supra* note 120, at 82, 91.

124 *Id.* at 82.

125 *See id.*

Bonnichsen set forth a two-part test that highlights the discrepancies in the applicability of the NAGPRA standard.[126] The first part of the test 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.[127] The second part requires a more specific finding that remains are most closely affiliated to "specific lineal descendants or to a specific Indian tribe."[128]

If the NAGPRA definition of "Indian tribe" is applied to the second part of the *Bonnichsen* test, no non-federally recognized tribe would be able to satisfy the test's requirements, even if the tribe has a direct connection to the remains and has evidentiary proof of such connection. [129] Originally, the Secretary of the Interior found that Kennewick Man's remains were Native American, as he viewed the term "Native American" as encompassing "tribes, peoples, or cultures indigenous to the United States, irrespective of whether or not they presently exist."[130] The court's decision to reject this definition demonstrated a lack of consistency between governing bodies who had been assigned the duties of creating the applicable definitional standards.[131] The emphasis the court placed on the present nature of relatability between remains and Indian tribes could include non-federally recognized tribes, as they fall under a present-tense definition of "Native American."[132] The existing legal definitions do not effectively capture what a Native American or Indian American identity actually is, and the requirement of recognition does not inherently or immediately sever a person or tribe's connection to ancestors and their remains.[133]

The Ancient One's remains were eventually repatriated in 2017 after DNA evidence proved that the skeleton did in fact have a "very, very close link" to the Indian tribes that originally attempted to claim repatriation rights.[134] In several other cases, sequenced genomes have

[126] *See* Birkhold, *supra* note 30, at 2062.

[127] Bonnichsen v. United States, 367 F.3d 864, 881 (9th Cir. 2004).

[128] *Id.* at 877.

[129] *See* Birkhold, *supra* note 30, at 2065.

[130] Ray, *supra* note 76, at 113; *see supra* note 115 and accompanying text.

[131] Ray, *supra* note 76, at 113.

[132] *Id.*

[133] *Id.* at 114.

[134] Cary Rosenbaum, *Ancient One, Also Known as Kennewick Man, Repatriated*, TRIBAL TRIB. (Feb. 18, 2017), http://www.tribaltribune.com/news/article_aa38c0c2-f66f-11e6-9b50-7bb1418f3d3d.html [https://perma.cc/FZU4-5GKR]; *see* Carl Zimmer, *New DNA Results Show Kennewick Man Was Native American*, N.Y. TIMES (June 18, 2015), https://www.nytimes.com/2015/06/19/science/new-dna-results-show-kennewick-man-

led to the repatriation of other remains whose Native status had been questioned, including Anzick Boy in Montana and the Spirit Cave Mummy in Nevada.[135] Scientists now acknowledge that genetics "allows those living people who share DNA variants with skeletons/ancestors an immediate identification with the people of a distant past."[136] This ability to connect remains and artifacts previously thought to be too old to be related to current Indian tribes illustrates that the criteria mandated by NAGPRA to determine native-ness should be regulated more by cultural affiliation than by an artificially created federal recognition status.[137]

III. DIFFERENT STANDARDS FOR STANDING TO BRING REPATRIATION CLAIMS DIG THEIR OWN GRAVES

Federal recognition is a communicative process that culminates in a formal relationship between Native and non-Natives, through which the differences in power, status, prestige, resources, and opportunities are apparent.[138] Federal recognition is a status that must be acquired through the exhibition of both a collective identity and a sufficient relationship with a governing body.[139] The problems and limitations of the " sufficient relationship" requirement of federal recognition were observed before NAGPRA was passed, as some identifiable Indian groups were simply not recognized because they never "transacted business" with the United States or its agencies, even though they were generally viewed as a collective organization.[140] And despite the requirement of receiving support from the federal government, further inconsistencies in the federal recognition requirement arise as some non-recognized tribes can still gain access to federal resources and benefits — effectively rendering the recognition distinction moot.[141] Due to this lack of consistency and the federal recognition process's roots in "settler colonial anxieties and the practices of exclusion, racism,

was-native-american.html [https://perma.cc/SGE9-6YTK] ("It's very clear that Kennewick Man is most closely related to contemporary Native Americans . . . . In my view, it's bone solid.").

135 *See* Kakaliouras, *supra* note 120, at 92, 94.

136 *Id.* at 94.

137 *See id.* at 95.

138 Stokes, *supra* note 58, at 63, 66 ("[T]ribal recognition status is a social construction and resource reflecting cultural-political power relations that have been codified into law.").

139 *See id.* at 63. State recognition does not equate to federal recognition. *Id.*

140 *See* Starna, *supra* note 67, at 127.

141 *See* Stokes, *supra* note 58, at 71.

and dispossession," the legislature should look to other means to determine who has standing for repatriation claims.[142]

A. Federal Recognition Is an Improper Standard for Repatriation Claims

The relationship between federally recognized tribes and the United States government is authorized through the Indian Commerce Clause;[143] however, gaining recognition status is not a guarantee that an Indian tribe will have full access to federal resources.[144] The choices of tribal leadership often affect what rights and protections apply to their tribes, leading to disparity among tribes who legally maintain the same recognition status.[145] The emphasis placed on recognition instead of acknowledgement of collected "groups" or "tribes" creates an assumption that "there is only one system of social life in which one might participate" or be excluded from.[146] Many factors affect a tribe's choice to attempt the federal recognition process, including past government mischief, coercion, or a tribe's choice to protect their inherent sovereign rights by refusing to sign treaties.[147] These tribes are often the more appropriate tribal affiliates for repatriation under NAGPRA, despite not having federal recognition.[148] Federally recognized tribes thus do not represent the best legal classification for who can bring claims under NAGPRA.[149]

The usage of federal recognition as a statutory standard is in direct opposition to another of NAGPRA's statutory ideas: cultural

---

[142] *See* María Montenegro, *Unsettling Evidence: An Anticolonial Archival Approach/Reproach to Federal Recognition*, 19 ARCHIVAL SCI. 117, 119 (2019).

[143] U.S. CONST. art. I, § 8; *see* Horse, *supra* note 56, at 63. For an in-depth discussion on the Indian Commerce Clause and its impact on tribal nations, see generally Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015).

[144] Stokes, *supra* note 58, at 70. Resources may include health care, housing, and gaming rights. Montenegro, *supra* note 142, at 121.

[145] *See* Stokes, *supra* note 58, at 70-71.

[146] Day, *supra* note 99, at 176.

[147] *See* Neller, *supra* note 17, at 64; *see also* Montenegro, *supra* note 142, at 121 ("Federal Recognition contradictorily enables tribes to gain (limited) control over their affairs while incrementally imposing federal authority onto the tribal system.").

[148] Montenegro, *supra* note 142, at 121; *see* DIALOGUE PANEL, REPORT OF THE PANEL FOR A NATIONAL DIALOGUE ON MUSEUM/NATIVE AMERICAN RELATIONS 13 n.2 (Feb. 28, 1990).

[149] *See* DIALOGUE PANEL, *supra* note 148, at 13 ("[A] majority of the panel believes that all Native human remains are ultimately entitled to a decent burial, even when their cultural affiliation is unknown.").

affiliation.[150] Cultural affiliation is defined as a relationship between a present-day Indian tribe and a historic or prehistoric Indian tribe, and includes a reasonable establishment of a continuous group identity between the two groups.[151] One can establish cultural affiliation through a showing of geographical, kinship, biological, archaeological, anthropological, linguistic, oral tradition, or other historical evidence.[152] Affiliation is a reasonable determination based on biology and an "overall evaluation of the totality of the circumstances and evidence," but without the inclusion of non-federally recognized tribes, this broad standard can still not be reached: currently thousands of remains and objects have been labeled culturally unaffiliated and are still in the possession of museums.[153] Native "legitimacy" is linked to cultural authenticity through recognition, but this affiliation actually reinforces "Native subjugation" using the same "racist ideologies and identificatory practices" that have limited tribal status and rights in the past.[154] Federal recognition acts as an unofficial societal gatekeeper, locking out groups that do not fit its narrow definition and failing to "grasp the existence of relations of power" that exist in identity.[155] By allowing cultural affiliation with non-federally recognized tribes, thousands of remains and artifacts currently being stored in museums would be made available for repatriation.[156]

There are also other alternative options for federal recognition touted by scholars, such as lineal descendance and tribal membership, but the

150 "Once a Federal agency or museum makes a determination of cultural affiliation of human remains or objects in its possession, [NAGPRA] would require the agency or museum to provide notice to all culturally affiliated Indian tribes or Native Hawaiian organizations." SELECT COMM. ON INDIAN AFFS., PROVIDING FOR THE PROT. OF NATIVE AMERICAN GRAVES AND THE REPATRIATION OF NATIVE AMERICAN REMAINS AND CULTURAL PATRIMONY, S. REP. NO. 101-473, at 7 (2d Sess. 1990). If the remains or objects are culturally affiliated to a non-federally recognized tribe, there is no statutory requirement to notify that tribe, therefore inhibiting repatriation efforts.

151 43 C.F.R. § 10.2(e)(1) (2020).

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

153 Colwell-Chanthaphonh et al., *supra* note 33, at 28.

154 BARKER, *supra* note 50, at 28; *see* Birkhold, *supra* note 30, at 2066 (arguing that cultural affiliation and federal recognition are unnecessarily linked).

155 *See* Day, *supra* note 99, at 176. Natives and the United States government have different views on sovereignty. The effects of "genocidal integration" further divide individuals and communities. *See id.* at 177.

156 For example, the Smithsonian Institute may take into consideration repatriation requests from non-federally recognized tribes, but there is no requirement. *See* NAT'L MUSEUM OF NAT. HIST., SMITHSONIAN INST., GUIDELINES AND PROCEDURES FOR REPATRIATION 6 (amended 2012).

same problems involved in federal recognition are echoed in the philosophies and definitions these alternatives represent.[157]

The standard for lineal descendance is an inherently difficult standard to meet, despite being a path through which individuals from non-federally tribes are allowed to request repatriation. Lineal descendance, absent in the statutory definitions of NAGPRA, allows direct descendants of remains to bring repatriation claims.[158] NAGPRA requires a "preponderance of the evidence" standard of proof, which has historically proven difficult in the process of litigating NAGPRA claims.[159] Historical forced migration, fragmentation of tribal groups, and age of artifacts and remains all contribute to difficulties faced by claimants when trying to meet the burden of proof to receive their ancestors' remains, often creating an insurmountable burden.[160] The current standards often present overwhelming difficulties for many communities and current legislation does not provide adequate recourse for communities seeking return of their belongings.[161]

Some opponents of the inclusion of non-federally recognized tribes allege that open availability to bring claims would lead to a decrease in tribes seeking federal recognition and to the wrongful repatriation of remains to people who do not actually have a connection to the objects or remains.[162] Other critics of the inclusion of non-federally recognized tribes state that the standards created for recognition and the exclusion of so many tribes are based on "murky precedents, quirky administration, and indefensible bureaucratic decisions."[163] This would create an inequitable system.[164] However this argument is unsupported by evidence. The recognition process leads to inconsistent and negligent decisions, but there is no evidence of tribes halting their attempts to gain recognition status because of its inherent problems or specifically

157 *See* Ray, *supra* note 76, at 94.

158 43 C.F.R. § 10.2(b) (2020); *see also* MCKEOWN, *supra* note 79, at 186 (noting that the Department of the Interior defines lineal descendant as an "individual tracing his or her ancestry directly and without interruption").

159 *See* Yasaitis, *supra* note 116, at 271-72.

160 Alexandra Eynon, Note, *The Public Values of Repatriation in the Native American Graves Protection and Repatriation Act*, 38 YALE L. & POL'Y REV. 229, 255 (2019).

161 Ben Garcia, Kelly Hyberger, Brandie MacDonald & Jaclyn Roessel, *Ceding Authority and Seeding Trust*, AM. ALL. OF MUSEUMS (July 1, 2019), https://www.aam-us.org/2019/07/01/ceding-authority-and-seeding-trust/ [https://perma.cc/ABZ8-SLBB].

162 *Cf.* NOVA SCIENCE, *supra* note 8, at 37 ("The most significant challenge to repatriations has been the lack of requests from culturally affiliated entities.").

163 Starna, *supra* note 67, at 128.

164 *See id.*

attempting to gain recognition for the express purpose of repatriation.[165]

B. Tribal Membership Standards Are Inconsistent

The inconsistencies in tribal membership qualifications further diminish the relevance of federal recognition for bringing a NAGPRA claim. The process for recognition relies on a "member" standard to prove the existence of an Indian community and has the ability to result in a negative finding for the tribe.[166] Tribal membership is determined by respective tribal governments in both federally recognized and non-recognized tribes, and the criteria for membership differs among most nations.[167] Recognition within each tribe is validated through a combination of blood quanta, clan relationships, kinship patterns, descendant status, federal roll registry, place of residence, and adoption, among other qualifications.[168] Historically, the Bureau of Indian Affairs has recommended that a legislative distinction exist between tribal membership and federal service eligibility.[169]

However, as each tribe has its own criteria for membership, "one person could be recognized as an Indian by the U.S. federal government but not by her own tribe, while another person could be recognized by his tribe but be ineligible for benefits from the US government if that tribe is not federally recognized."[170] Non-Indian courts also tend to racialize membership and "impose cultural performance requirements," which would eliminate tribal members simply because they are non-practicing in their faith or are not active enough in their community.[171] This standard is also incompatible with the lineal descendant's ability to receive their direct ancestor's remains or body, as it is entirely possible that the descendant lacked the ability to enroll in their tribe

---

165 *Id.* at 134.

166 *See id.* at 131, 134.

167 Horse, *supra* note 56, at 63.

168 *See* Birkhold, *supra* note 30, at 2063-64; Horse, *supra* note 56, at 62-63; Ray, *supra* note 76, at 111. Blood quantum, a non-Native invention, was created to define "Indianness." It became a prominent standard for tribal membership, under which the "more fractionated one's quantum of tribal blood, the less authentically 'Indian' one is." *Id.* at 117 ("[T]he construction of blood quanta is a proxy for racial authenticity and the value of racial authenticity itself originated not in Native American communities, but among colonial-era Euro-Americans . . . .").

169 *Id.*

170 FINE-DARE, *supra* note 6, at 55.

171 BARKER, *supra* note 50, at 224.

due to the aforementioned stringent qualifications.[172] Under the current system, tribal membership within a non-federally recognized tribe still does not afford rights to bring claims under NAGPRA.

IV. THE CURRENT SYSTEM IS FUNDAMENTALLY FLAWED DUE TO LACK OF OVERSIGHT AND INSTITUTIONAL COOPERATION

The current system in place for the federal recognition of tribes is a lengthy, complicated, and expensive process that results in tribes waiting decades to receive benefits, with the potential likelihood that still none will be given.[173] The difficulties of the system have created an atmosphere in the scientific and museum communities that allows, and even encourages, non-compliance with NAGPRA's numerous requirements.[174] The rules "give institutions too much power over the process when their intent is to not repatriate," which results in a power imbalance between the institutions and the tribes requesting repatriation.[175] Furthermore, as there is no NAGPRA requirement to include non-recognized tribes, museums have no legal incentive to actively repatriate remains, further allowing them the opportunity to hold onto a significant number of remains.[176]

A. The Federal Recognition Backlog Allows Museums to Abuse the System and Control Objects and Remains

The current backlog and requirements for federal recognition create a system that allows for museums and federal agencies to continue their control of remains and artifacts without any real oversight.[177] NAGPRA was meant to be a means of protection for Natives and tribes from being exploited, but the requirement of federal recognition continually perpetuates subjugation through the necessity of proving authenticity.[178] Tribes have to meet a multitude of requirements and

172 *See* Stokes, *supra* note 58, at 66.

173 *See id.* at 71.

174 *See Authorization, Standards, and Procedures for Whether, How, and When Indian Tribes Should Be Newly Recognized by the Federal Government: Perspective of the Department of the Interior: Oversight Hearing Before the Subcomm. on Indian and Alaska Native Affs. of the Comm. on Nat. Res.*, 113th Cong. 3 (2013) (statement of Rep. Colleen W. Hanabusa, Member, Subcomm. on Indian & Alaskan Native Affs.) [hereinafter *Whether, How, and When*].

175 Small, *supra* note 8.

176 *See* Colwell-Chanthaphonh et al., *supra* note 33, at 37.

177 *See id.*

178 *See* Christopher A. Amato, *Using the Courts to Enforce Repatriation Rights: A Case Study Under NAGPRA*, *in* ACCOMPLISHING NAGPRA 232, 244 (Sangita Chari & Jaime M.

allocate a significant amount of funds to secure recognition and gain the ability to be automatically considered for repatriation under the NAGPRA scheme.[179]

The recognition review process requires significant research and investigation, often complicated by a lack of access to historical records and the loss of pertinent information over time.[180] Numerous tribes have had negative experiences when attempting to receive recognition, including misrepresentation from ethnohistorians, misreading of historical sources, and incorrect interpretation of evidence and data sets.[181] The entire process is considered by many to be unfair, inequitable, and negligent, leading to many tribes existing in a legislative purgatory.[182] Inconsistencies and long wait times have also had severe consequences for many tribes. For example, the Tejon Indian Tribe was left off the 1979 registry list, due to administrative error, and their federal recognition status was not reaffirmed until December 2011.[183] Additionally, the Lumbee tribe in Mississippi has been attempting to obtain federal recognition status for a hundred years without success.[184] While hundreds of tribes sit in recognition limbo, artifacts and remains belonging to their ancestors are kept in museums that have no legal obligation to repatriate to non-recognized tribes.[185]

N. Lavallee eds., 2013) ("We are being told that anthropological ideas of material culture, biologically distinct populations, and scientific reliability must be met and approved by scientists or they will not return the dead whose graves they justify violating using the same constructs.").

[179] BARKER, *supra* note 50, at 35-37; HART, *supra* note 66, at 98, 131 ("[T]he recognition process, for better or for worse, has evolved over the years into a lengthy — unbelievably lengthy — and costly process requiring substantial research, substantial documentation. I'm told that some petitions may fill an entire room."); *see, e.g.*, Native American Rights Fund, *Little Shell Tribe of Chippewa Indians Obtains Federal Recognition*, 45 NARF LEGAL REV. 1, 5 (2020) ("The Little Shell Tribe sent a letter in 1978 indicating an intent to proceed under the regulations. The process required extensive historical, genealogical, and anthropological evidence of a tribe's continuous existence as a governing body over time. Little Shell submitted over 60,000 pages of documentation in support of its recognition.").

[180] Starna, *supra* note 67, at 129.

[181] *Id.* at 130-33.

[182] *See id.* at 134.

[183] *Whether, How, and When*, *supra* note 174, at 8.

[184] *Id.* at 12.

[185] *See* Melvin Wright, Jr., *Finding Our Way Home: Achieving Policy Goals of NAGPRA*, 44 ARIZ. ST. L.J. 913, 917 (2012) ("Since 1990, burial collections in museums and institutions are frozen and have increased immensely . . . . The number of human remains currently stands at 125,000, while burial items amount to approximately 875,000.").

NAGPRA only establishes a minimum set of standards for museums to follow; having found these standards lacking, some museums created their own standards to meet their ethical obligations owed to society and let go of their presumed "decision-making authority."[186] However, these policies are not nationally implemented or required, and instead, many institutions still choose to obstruct tribal government efforts to repatriate.[187] In 2011, twenty years after the implementation of NAGPRA, only twenty-seven percent of human remains were declared culturally affiliated, leaving many remains unclaimed and kept in storage.[188] However, a large portion of these current culturally unidentified remains could be identified if non-recognized tribes were included as mandatory repatriation parties.[189] The inclusion of non-recognized tribes in consultations would also further decrease the number of unidentifiable remains, as more information would be available during the examination stages of the inventory process.[190] The 2010 regulatory amendment to NAGPRA increased a museum's ability to transfer control of unaffiliated remains to non-federally recognized tribes, but tribes explicitly objected to the provision, as it still allowed museums to act at their own discretion when it came to voluntarily transferring control.[191] Nothing prevents a museum from consulting with and including non-recognized tribes,[192] but without a mandatory requirement, the majority of remains sit "forgotten, unvisited, untouched, and unstudied" in museum archives.[193]

Museums claim that an increase in repatriation due to the inclusion of non-federally recognized tribes will lead to a loss of access to

---

186 Garcia, *supra* note 161.

187 Ethan Edward Coston, *Governor Brown Signs Bills Supporting Repatriation of Indigenous Remains at UC Campuses*, TRITON, https://triton.news/2018/10/governor-brown-signs-bill-supporting-repatriation-indigenous-remains-uc-campuses/ (last updated Oct. 16, 2018) [https://perma.cc/E2BB-XVEH]. The University of California system created its own repatriation policy in 2001 to comply with both NAGPRA and Cal NAGPRA, but UC Berkeley has not effectively complied with the process. *Id.*

188 *See* Chari & Lavallee, *supra* note 31, at 13-14 (illustrating that only 10,000 individual repatriations were voluntarily reported to the National NAGPRA program, as reporting is not legally required under the statute); *see also* Birkhold, *supra* note 30, at 2059 (discussing how the Review Committee estimated that "80 percent of remains listed as culturally unidentifiable 'could reasonably be culturally affiliated'").

189 Colwell-Chanthaphonh et al., *supra* note 33, at 27-28.

190 NOVA SCIENCE, *supra* note 8, at 87.

191 *Id.* at 60; *see also* Garcia, *supra* note 161 ("By simply labeling displayed items with a donor or purchase acknowledgement, the museum effectively erased the genocide, warfare displacement, and oppression perpetrated against indigenous communities.").

192 Neller, *supra* note 17, at 163.

193 *Id.* at 29.

important scientific materials and that the knowledge potentially gained through study benefits society.[194] Studies of Native artifacts and remains can "increase awareness of the past [and] enhance knowledge of ancestral people," providing insight not available in other mediums, and the loss of the bodies could theoretically hinder research for years.[195] However, similar concerns were raised when NAGPRA was originally passed, and there is no real evidence that this outcome has transpired.[196] Native people argue that while scientists claim that benefits will come from the study of their ancestors' remains, they have personally received none and the only benefits that have occurred were "for the careers of Euroamerican scientists."[197] Studies in the fields of archaeology, biological anthropology, and museum studies have not reported any delay in research results since NAGPRA's enactment, and the inclusion of non-federally recognized tribes would not set studies back any more through the resulting slight increase in repatriated objects and remains.[198]

Museums have also argued that the definitions of possession contained within NAGPRA ignored state laws that gave them legal title to any human remains or items removed from private property.[199] These contentions illustrate that museums were overly concerned with losing their possessions and considered the remains to be their property, rather than artifacts meant to be returned.[200] Scholars hold that the human interest in science is limited by "other human interests such as justice, religious freedom, promises made in treaties, respect for cultural differences" and human rights.[201] These interests represent the very reasons that NAGPRA was originally passed — to help Native tribes and people reclaim their own justice for their ancestors.[202] The habits of museums to misuse the culturally unaffiliated category to circumvent

194 HEARD MUSEUM & BARRY M. GOLDWATER CTR. FOR CROSS-CULTURAL COMM., REPORT OF THE PANEL FOR A NATIONAL DIALOGUE ON MUSEUM/NATIVE AMERICAN RELATIONS 3 (1990) ("[L]oss of access to these materials may limit important professional study and hinder public interpretation.").

195 *Id.* at 13.

196 *See* Colwell-Chanthaphonh et al., *supra* note 33, at 37.

197 Kakaliouras, *supra* note 120, at 88.

198 *See id.* at 86.

199 NOVA SCIENCE, *supra* note 8, at 59.

200 *See* Colwell-Chanthaphonh et al., *supra* note 33, at 37 ("[T]he privilege of science is not a license of absolute freedom."); *see also* Garcia, *supra* note 161 (discussing how museums need to "let go of their presumed decision-making authority" and recognize the validity of "indigenous definitions of ownership").

201 Garcia, *supra* note 161.

202 *Id.*; *see* Preston, *supra* note 24.

full consultation and not direct "enough resources toward affiliation research" lends little credence to this concern and indicates a simple desire to hold onto objects.[203] Collaboration between non-federally recognized tribes and museums would provide further guidance on how to care for the ancestral remains and artifacts in museum possession and would result in "shared resources that support the preparation, reburial, and ceremonial aspects of repatriation."[204]

V. SOLUTIONS

Congress should adjust the definitions of "Indian tribe" and "Native American" within the NAGPRA statute to specifically include non-federally recognized tribes. The enactment of NAGPRA represented a step in the right direction for post-mortem racial equality; however, there is more work to be done.[205] Even with the culmination of efforts by hundreds of people, both Native and non-Native, NAGPRA still cannot fully serve as human rights legislation if it continues to exclude the very people that it intended to help.[206] Congress continuously fails to address the recognition issue, despite many parties arguing for clearer definitions and guidance.[207]

A. CalNAGPRA Demonstrates that States See Gaps in the Legislation

Many states have promulgated their own statutes and regulations to address gaps in the NAGPRA statutory scheme and to work directly with some non-federally recognized tribes to repatriate remains.[208] No state's repatriation scheme is as detailed and in depth as that of California. To supplement the federal statute and regulations, California took NAGPRA a step further than the federal requirements by providing its own distinct processes for repatriation by state agencies and museums.[209] California has approximately 110 federally recognized

[203] *See* Colwell-Chanthaphonh et al., *supra* note 33, at 37.

[204] Neller, *supra* note 17, at 194; *see* Chip Colwell-Chanthaphonh, *Reconciling American Archaeology & Native America*, 138 DAEDALUS 94, 100 (2009) ("Repatriation is a kind of restorative justice . . . .").

[205] Colwell-Chanthaphonh et al., *supra* note 33, at 39-40.

[206] Young, *supra* note 57, at 36.

[207] *Id.*

[208] *See, e.g.*, *State Burial Laws Project*, AM. U. WASH. COLL. OF LAW, https://www.wcl.american.edu/burial/ [https://perma.cc/5TH9-TSLV] (presenting a survey of the various ways states have chosen to protect human remains).

[209] Kim Turner, Improving Cal NAGPRA: Honoring Native American Rights 3 (Dec. 15, 2016) (unpublished Capstone Project) (on file with the University of San Francisco digital repository at Gleeson Library).

tribes and sixty-four non-recognized tribes, the largest numbers in the United States.[210] CalNAGPRA[211] requires all state agencies and museums that receive state funding to provide a process for repatriation to appropriate tribes.[212] The legislation was specifically enacted to "cover gaps" present in the federal statute.[213] California applies a standard of "state cultural affiliation," which requires a relationship of shared group identity with a present day California Indian Tribe.[214] Under CalNAGPRA, claims for repatriation can be made by California Indian Tribes, which are defined as tribes that meet the federal "Indian tribe" standard; that are indigenous to California and listed in the BAR petitioner list under the Federal Code of Regulations; or that are determined to be an organization with a continuous identity of tribe-hood.[215] A tribal identity can be established through the presentation of an autonomous government, aboriginal ties, recognition by the Indian community, or demonstrated membership criteria.[216]

CalNAGPRA illustrates the faults present in the current NAGPRA statutory framework. By including California-recognized tribes, CalNAGPRA allows for tribes that were excluded by the federal framework to have a chance at receiving repatriated remains from their ancestors.[217] As mentioned previously, the federal recognition process is long, arduous, and expensive.[218] CalNAGPRA creates new pathways for some non-federally recognized tribes to engage with institutions, as it "greatly expands both the list of tribes that can participate" and creates sanctions for institutions who fail to comply.[219] The ability to participate in repatriation under the California standard lessens the federal burden slightly, but it still leaves many tribes without access to repatriation based on their lack of recognition. If the federal statutory definitions were changed, there would not be a need for state legislatures to create their own programs, which still exclude tribes who

[210] *Id.* at 5.

[211] *Id.*

[212] Cal NAGPRA, Assemb. B. 978, 2001–2002 Reg. Sess. ch. 818 (Cal. 2001).

[213] *Id.*

[214] *Id.*

[215] *Id.*

[216] *Id.* at art. 2, §§ (j)(2)(B)(i)-(v).

[217] Turner, *supra* note 209, at 4.

[218] *See* BARKER, *supra* note 50, at 28; HART, *supra* note 66, at 98, 113; NOVA SCIENCE, *supra* note 8, at 12; Neller, *supra* note 17, at 164.

[219] Turner, *supra* note 209, at 10.

actively have "expressed an interest to [the Bureau of Indian Affairs] in seeking federal recognition."[220]

B. A Tribe Without Federal Funds Is Still a Tribe that Can Establish Cultural Affiliation and Complete Repatriation

The inclusion of non-federally recognized tribes in the NAGPRA statute is the only solution to the historical and systemic problem surrounding repatriation of Native remains and artifacts. When NAGPRA was drafted, the Congressional panel emphasized that the general policy had to be established through federal legislation to ensure consistency in application.[221] An amendment to NAGPRA to include all tribes, whether recognized or not, is necessary to correct inconsistency and support tribal rights, dignity, agency, religious practices, and identities that exist separate from federal assistance.[222] Government policy and action continue to threaten these tribal aspects by prioritizing the ownership of remains and artifacts through Western ideals, rather than looking at it through the lens of indigenous beliefs, concepts, and goals.[223] As there have not been any substantial changes in the NAGPRA statute since the 2010 regulatory amendment, further inconsistencies will continue to arise as institutions and agencies promulgate their own policies — some of which encourage working with all tribes,[224] while others choose to strictly follow the minimum legal requirements[225] of the statute.[226]

Despite NAGPRA's goal of protecting the rights of the disenfranchised, it actually results in the elimination of rights for tribes

---

[220] NOVA SCIENCE, *supra* note 8, at 12.

[221] *See* HEARD MUSEUM & BARRY M. GOLDWATER CTR. FOR CROSS-CULTURAL COMM., *supra* note 194, at 12.

[222] *See* Eric Hemenway, *Finding Our Way Home*, *in* ACCOMPLISHING NAGPRA 83, 84 (Sangita Chari & Jaime M. N. Lavallee eds., 2013); McLaughlin, *supra* note 54, at 188.

[223] *See* Day, *supra* note 99, at 186-87; *see also* Trope, *supra* note 54, at 76 (noting that government policies still threaten Native American religions by not thinking about them as existing contemporaneously).

[224] *See* Garcia, *supra* note 161 ("The law establishes minimum standards; museums also need an ethical standard to meet their obligations for providing true value to society.").

[225] See NAT'L MUSEUM OF NAT. HIST., SMITHSONIAN INST., *supra* note 156 (indicating that remains will only be repatriated to federally recognized tribes and that "culturally unaffiliated human remains and funerary objects will be retained by the museum" until an appropriate tribe is located).

[226] *See* Jennifer R. O'Neal, *"The Right to Know": Decolonizing Native American Archives*, 6 J.W. ARCHIVES 1, 5 (2015) ("[There should be] an urgent professional call to action to correct injustices across the board.").

who may be culturally affiliated but are denied standing under the law.[227] Native groups are consistently forced to adhere to United States laws, laws which were not developed with Native culture or demands in mind.[228] The federal recognition process is flawed, state recognition is limited, and standards are often impossible to meet when cultural consistency is questioned on its authenticity by those who do not understand it.[229] Courts and Congress must recognize Native "norms, values, and identity, as defined by Native Americans" for NAGPRA to function in the way that it was intended.[230]

CONCLUSION

NAGPRA is a positive piece of legislation, despite its shortcomings.[231] It attempts to balance property, administrative, civil rights, and federal Indian law in one package, while simultaneously reconciling opposite interests.[232] It created a dialogue between scientists, Native peoples, museums, and the federal government that was previously believed to be impossible due to the centuries of pain and exploitation.[233] The Act itself has not experienced any significant updates since it was enacted in the 1990s, aside from the 2010 amendment regarding cultural affiliation standards.[234] However, under the Biden Administration, there are serious indications that change is on the way. In July 2021, the Department of the Interior announced that it is working towards updating NAGPRA through "consultations with Tribal and Native Hawaiian community leaders."[235] A central goal of the changes is to "streamline existing regulatory requirements by eliminating ambiguities, . . . simplifying excessively burdensome and complicated requirements, . . . and removing offensive terminology" from the

[227] Neller, *supra* note 17, at 193.

[228] H. MARCUS PRICE III, DISPUTING THE DEAD: U.S. LAW ON ABORIGINAL REMAINS AND GRAVE GOODS 117 (1991).

[229] *See* BARKER, *supra* note 50, at 37.

[230] Young, *supra* note 57, at 36.

[231] *See* Birkhold, *supra* note 30, at 2047-48.

[232] *Id.*

[233] *See* McLaughlin, *supra* note 54, at 185.

[234] *See* 25 U.S.C. § 3001 (2018).

[235] Press Release, U.S. Dep't of the Interior, Interior Department Announces Tribal and Native Hawaiian Consultations to Discuss Updates to Native American Graves Protection and Repatriation Act (July 15, 2021), https://www.doi.gov/pressreleases/interior-department-announces-tribal-and-native-hawaiian-consultations-discuss-updates [https://perma.cc/R7NA-RF5M].

current statute and regulations.[236] The implementation of a new standard for who can bring repatriation claims would help bring it into the twenty-first century, allowing its goals to actually be accomplished.[237] To fulfill the original goals of NAGPRA and to give Native ancestors the same rights as any other non-Indian, American citizen, NAGPRA must be amended to include non-federally recognized tribes.

[236] *Id.*; Small, *supra* note 8; Staff Reports, *Interior to Talk NAGPRA with Tribes, Native Hawaiians*, CHEROKEE PHOENIX (July 20, 2021), https://www.cherokeephoenix.org/services/interior-to-talk-nagpra-with-tribes-native-hawaiians/article_a735f40c-e8ba-11eb-bae7-9f7470e1ec41.html [https://perma.cc/HC6K-RG9B]; *see also* Andrew Kennard, *Interior Department to Consult with Community Leaders on Major Changes to NAGPRA*, NATIVE NEWS ONLINE (July 22, 2021), https://nativenewsonline.net/currents/interior-department-to-consult-with-native-community-leaders-on-major-changes-to-nagpra-regulations [https://perma.cc/A63U-KRS6] (discussing the repatriation under NAGPRA of the human remains of Native children to their families as "integral to preserving and commemorating Indigenous culture").

[237] There are currently 185,475 sets of human remains inventoried under NAGPRA. If the law is not changed and the procedures not updated, it would take almost 283 years to repatriate the currently inventoried remains. *See* Christopher Zheng, *31 Years of NAGPRA: Evaluating the Restitution of Native American Ancestral Remains and Belongings*, CTR. FOR ART L. (May 18, 2021), https://itsartlaw.org/2021/05/18/31-years-of-nagpra/ [https://perma.cc/Y6AN-97FF]. This number does not account for any associated belongings. *Id.*