Montana Law Review

Volume 63
Issue 1 *Winter 2002*

Article 2

1-2002

"Kennewick Man" or "Ancient One"? - A Matter of Interpretation

Maura A. Flood
Visiting Associate Professor of Law, University of Idaho College of Law

ARTICLE

"KENNEWICK MAN" OR "ANCIENT ONE"? - A MATTER OF INTERPRETATION

Maura A. Flood*

> Our dead never forget the beautiful world that gave them being. . . . At night, when the streets of your cities and villages are silent and you think them deserted, they will throng with the returning hosts that once filled and still love this beautiful land.[1]

INTRODUCTION

In the summer of 1996, two young men watching hydroplane races from the banks of the Columbia River near Kennewick, Washington, stumbled across what would turn out to be one of the most complete and well-preserved set of ancient, human skeletal remains ever discovered in this country.[2] As

* Visiting Associate Professor of Law, University of Idaho College of Law.

1. Seattle, Chief of the Dwámish and Suquámish Tribes, in a speech at the signing of the Treaty of Medicine Creek (Jan. 22, 1855) (transferring the aboriginal lands of his and other tribes to the United States government).

2. Stang, John, *Skull Found on Shore of Columbia*, TRI-CITY HERALD (Kennewick Washington), July 26, 1996, *available at* http://www.kennewick-man.com/news/0729.html; *See also,* Stang, John, *Tri-City Skeleton Dated at 9,000 Years Old*, TRI-CITY HERALD, August 28, 1996, *available at* http://www.kennewick-man.com/news/0828.html; and Michael Parfit, *The Dawn of Humans: Who Were the First Americans*, NATIONAL GEOGRAPHIC MAGAZINE, Dec. 2000 at 58-59; James C.

soon as radiocarbon dating determined these remains to be between 9,200 and 9,600 years old, legal wrangling over access to them began.[3] Scientists want to study and test the remains; Native American tribes want to rebury the remains; and the federal government wants to ensure that the remains are treated in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA).[4]

The legal wrangling continues in *Bonnichsen v. U.S.*,[5] an action commenced by eight anthropologists seeking to study the ancient remains. These plaintiffs, the news media, and most of America know the remains by the name of "Kennewick Man," a name based on the area in which the remains were discovered.[6] They were so named by James Chatters, the anthropologist who examined the remains for the local sheriff when they were first discovered, and who announced that discovery to the world.[7] These remains also have another name, the name of "Ancient One," which was conferred upon them by the tribes that have claimed them.[8]

The authority to name something or someone is, and always has been, a significant power.[9] The act of naming the remains is

---

Chatters, *Ancient Encounters: Kennewick Man and the First Americans,* 55 (2001).

3. *Id.*

4. 25 U.S.C. §§ 3001-3013 (2001).

5. Bonnichsen v. United States, 969 F. Supp. 614 (D. Or. 1997) (hereinafter, Bonnichsen v. U.S. or, simply, Bonnichsen).

6. See *supra* note 2.

7. Stang, John, *Tri-City Skeleton Dated at 9,000 Years Old,* TRI-CITY HERALD, August 28, 1996, *available at* http://www.kennewick-man.com/news/0828.html; James C. Chatters, *Ancient Encounters: Kennewick Man and the First Americans,* 55 (2001); The custom and practice among scientists is that the one who makes a discovery has the right to give it a name. *See, e.g.*, DAVID HURST THOMAS, SKULL WARS: KENNEWICK MAN, ARCHAEOLOGY, AND THE BATTLE FOR NATIVE AMERICAN IDENTITY, xli (2nd ed. 2001); *See also*, Roger Downey, *Riddle of the Bones: Politics, Science, Race and the Story of Kennewick Man* at 7-14 (2000).

8. The tribes have chosen to refer to the remains as *Oytpamanatityt*, which translates into English as "the Ancient One." *Native American Graves Protection and Repatriations Act: Hearing Before the Senate Comm. on Indian Affairs,* 106th Cong. at 3 (2000) (Statement of Armand Minthorn of the Confederated Tribes of the Umatilla Indian Reservation); *See also*, SKULL WARS, *supra,* note 7, at xli.

9. The Book of Genesis, for example, recites that God gave Adam dominion over all creatures, including, specifically, the power to name them (*Genesis* 2:18). England anglicized all Gaelic names after conquering the peoples of Ireland, Scotland and Wales; Spain imposed Spanish names on the peoples it found already residing in the Americas; and the United States required Indians to take on English names in order to qualify for land allotments and other benefits. *See also,* SKULL WARS, *supra,* note 7, at xl. Horace Axtell, a Nez Perce Elder, explains that his family got the name Axtell when his grandfather tried to register for an allotment of land from the federal government and was told he had to have an English name. "He started to leave, saying 'Well, I gotta go

an exercise of such power, an assertion of the right to claim such power. These opposing claims of the scientists and the tribes are grounded in fundamental beliefs: on the one hand, a belief in the supreme importance of scientific knowledge and investigation; on the other hand, a belief in the supreme importance of cultural history, practices and values. The scientists believe that Kennewick Man may reveal information about the development of mankind and the peopling of the Americas, and that this information may be lost forever if the remains are not made available for extensive study and testing.[10] The tribes believe that the remains of the Ancient One must be treated with respect, that testing of the bones is a desecration, that the spiritual journey of the Ancient One has been disrupted by his removal from the earth, and that he must be reburied as soon as possible.[11] These contrasting beliefs of the scientists and the tribes are so diametrically opposed as to have no common ground between them.[12]

The battle over these fragile, ancient bones has given rise to several significant issues, relating to constitutional rights, administrative law, the meaning of NAGPRA, and the unique relationship between the federal government and American Indian tribes. The focus of this article is the meaning and import

---

find a name.'" The secretary in the government office stopped him and told him he could use her last name. "Her name was Axtell. That's where we got the name Axtell." HORACE P. AXTELL & MARGO ARAGON, A LITTLE BIT OF WISDOM: CONVERSATIONS WITH A NEZ PERCE ELDER, 2-3 (1997).

10. *Plaintiffs' Amended Complaint*, Bonnichsen v. U.S., *supra* note 5, at paragraph 32, page 10. (This amended complaint was filed on January 2, 2001 and is Document #372 in the records of the U.S. District Court for the District of Oregon in the Bonnichsen case; a copy is on file with the author.)

11. Armand Minthorn, "Human Remains Should Be Reburied," position paper dated Sept. 1996, available at http//www.umatilla.nsn.us/kennman.html (last visited on 12/18/01).

12. Some have characterized the Bonnichsen case as a collision between science and religion. *See, e.g.*, DAVID L. FAIGMAN, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW, 177 (1999)(2nd ed. 2000). It might be more accurate to characterize it as a collision between two religions. "Science has been called 'the American faith.' . . . Many Americans with little understanding of science unquestioningly accept both its process and its products. This faith in science has permeated American society since the colonial era, shaping our culture as well as our social and governmental institutions." Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy,* 75 WASH. U.L.Q. 1029 (1997)(possibly add a parenthetical here). Antone Minthorn, Chairman of the Board of Trustees of the Umatilla, asserts: "It is not science versus religion, . . . it is science versus law." Antone Minthorn, *Kennewick Man Issue Damages Relationships,* Confederated Tribes of the Umatilla Indian Reservation, *at* http:www.umatilla.nsn.us/kennman3.html (last visited on December 18, 2001).

of NAGPRA, which can be fully appreciated only through thorough scrutiny and interpretation. This statute is facing its first significant court challenge – its first opportunity for full interpretation – in *Bonnichsen v. U.S.* The court's interpretation of NAGPRA will be the key to the resolution of this case and, undoubtedly, of other cases yet to come. For this reason, the "dynamic"[13] or comprehensive method of statutory interpretation should be used, because it will lead to the most honest and accurate interpretation of NAGPRA.

According to federal Magistrate Judge John Jelderks, who presides over *Bonnichsen v. U.S.*, "the threshold issue" in the case is whether the ancient remains found in Kennewick are "Native American" within the meaning of NAGPRA.[14] That is the pivotal question: are these prehistoric remains "Native American" and therefore subject to the mandates of NAGPRA? And, if they are, the next crucial inquiry becomes: Have the claimant tribes established a "cultural affiliation" with the remains pursuant to NAGPRA, so as to entitle them to possession of the remains?

This article reviews the factual and legal context of *Bonnichsen v. U.S.* It examines the aims, reasoning, and effectiveness of several canons and theories of statutory construction, as a necessary prelude to the work of interpreting NAGPRA. The statute is then interpreted and explicated with the assistance of those canons and theories, and with particular focus on the statutory terms, "Native American" and "cultural affiliation." This interpretation leads to the conclusions that Ancient One/Kennewick Man is "Native American" within the meaning of NAGPRA, and that the claimant tribes have established the requisite "cultural affiliation" to entitle them to ownership of these ancient remains.

In order to conduct a comprehensive interpretation of NAGPRA, it is first necessary to examine the language of the

---

13. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994). Professor Eskridge describes this dynamic process of interpretation:

> Just as the changing factual contexts for interpretation render it dynamic . . . , so the independent and changing nature of the interpreter ensures dynamic interpretation . . . . The interpreter's role involves selection and creativity, which is influenced, often unconsciously, by the interpreter's own frame of reference – assumptions and beliefs about society, values and the statute itself.

Id. at 58.

14. Author's personal notes from observation of arguments in court on June 19, 2001 in federal district court for the District of Oregon [hereinafter, *"Personal Court Notes"*].

statute, in light of the relevant canons and theories of statutory construction. In addition, it is necessary to read congressional committee reports and hearing transcripts; research legal precedent; and become familiar with the historical and social circumstances that prompted enactment of the statute. Every bit of this effort is essential to a complete and accurate understanding of NAGPRA. Judges should have no less an understanding when they construe and apply this or any other federal statute, and thereby affect the lives not only of the litigants in the controversy before them, but of much of American society as well. This article suggests that it is incumbent upon judges, when faced with an unclear or ambiguous federal statute, to engage in rigorous, "dynamic,"[15] comprehensive construction of that statute.

The process of statutory interpretation is equal in importance to its product. That product, a statute whose meaning has been comprehensively construed in the context of an actual controversy, can best be appreciated through participation in the process that led to it. This article is intended to replicate that process, that "comprehensive construction" of a statute, with all of its twists, turns and crossroads. Accordingly, significant attention will be given to the canons and theories of construction, and the traditional methods used in interpreting statutes, before those canons, theories and methods are applied to the interpretation of NAGPRA.

BONNICHSEN V. U.S. – BACKGROUND, PROCEEDINGS AND STATUS

> The anthropologists are busy, indeed, and ready to transport us back into the savage forest where all human things . . . have their beginnings; but the seed never explains the flower.[16]

The Ancient One[17] was discovered on federal property under the control of the Army Corps of Engineers (the "Corps"), property the United States purchased from the Walla Walla,

15. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 13.

16. EDITH HAMILTON, THE GREEK WAY (1943).

17. In light of this article's conclusion that the remains are Native American within the meaning of NAGPRA and that the claimant tribes have established a "cultural affiliation" with the remains, these tribes clearly have the superior right to name the remains. Accordingly, hereinafter the remains will be referred to solely by the name of Ancient One.

Cayuse and Umatilla Indian tribes in 1855.[18] Due to the age of the remains, the Corps gave notice of the discovery to the Confederated Tribes of the Umatilla Indian Reservation ("Umatilla") and other local tribes. NAGPRA requires, among other things, that all Native American human remains discovered on federal property must be repatriated to the appropriate Indian tribe, in accordance with the provisions of the statute and its implementing regulations.[19] Five American Indian tribes, each having a history of residing upon or using the land on which these remains were discovered, subsequently joined together to submit a claim for repatriation of the remains.[20] These claimant tribes are the Umatilla, the Confederated Tribes of the Colville Reservation ("Colville"), the Nez Perce Tribe of Idaho, the Wanapum, and the Confederated Tribes and Bands of the Yakama Nation ("Yakama").[21]

The Corps, and subsequently the U.S. Department of the Interior (the "DOI"), determined that the remains found in Kennewick are "Native American" within the meaning of NAGPRA, that a "cultural affiliation" exists between the remains and the claimant tribes, and that, accordingly, the remains must be repatriated to those tribes.[22] A group of anthropologists commenced a federal court action to challenge the government's determinations and to oppose the repatriation[23] of the remains to the tribes.[24] If the *Bonnichsen*

18. "Treaty Between the United States and the WallaWalla, Cayuse, and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, June 9, 1855 (ratified March 8, 1859), *reprinted in* 2 Indian Affairs*: Laws & Treaties, Vol. II ,694-698* (Charles J. Kappler, ed., Washington, D.C. Government Printing Office)(1904). Pursuant to this treaty, these several bands and tribes were moved to a single reservation, and were thenceforth identified by the federal government as the "Confederated Tribes of the Umatilla Indian Reservation".

19. 25 U.S.C. §3005 (2001).

20. Bonnichsen v. U.S., 969 F. Supp. 614, 618 (D. Or. 1997).

21. The Yakama were formerly known as the Yakima. The tribe is referred to by either spelling throughout the documents in the Bonnichsen case. The spelling (or misspelling), "Yakima," was used by the federal government in its 1855 treaty with this tribe and has survived as a correct spelling for the name of the tribe.

22. *See, Defendants' Memorandum in Opposition to Plaintiffs' Motion to Vacate and in Support of Agency Decisionmaking,* Document #439 in the *Bonnichsen* record; *also available at* www.kennewick-man.com/documents/fedbrief.html.

23. The use of the word "repatriation" in this statute is noteworthy. This word is a rarity in American legislation. It is more commonly found in international law. Its ordinary meaning is "to bring or send back (a person, esp. a prisoner of war, a refugee, etc.) to his country or the land of his citizenship." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1966.) In NAGPRA, "repatriation" refers to the process by which native human remains and cultural articles are to be identified, claimed, and returned to native groups. The statute does not separately define this term, however, which means

plaintiffs prevail, they will have an opportunity to secure access to the remains for the purpose of conducting extensive studies and tests. If the defendant United States prevails, the determinations of the Corps and DOI will be upheld, and the remains will be repatriated to the claimant tribes for reburial in accordance with tribal traditions.

In September 1996, two months after the remains of the Ancient One were discovered, the Corps published notice of its intent to repatriate the remains to the claimant tribes.[25] *Bonnichsen v. U.S.* was the response to that notice.[26] The plaintiffs sought a restraining order to prevent the repatriation, and "demanded a detailed scientific study to determine the origins of the man before the Corps decided whether to repatriate the remains."[27] In addition, the plaintiffs alleged that they have a First Amendment right to study the remains; that NAGPRA is unconstitutional because it promotes Native American religion;[28] and that their civil rights have been violated by the Corps.[29]

The defendants, who include the Corps and several named Corps employees, moved promptly for dismissal on several grounds, including failure to exhaust administrative remedies and failure to state a claim.[30] Judge Jelderks granted that motion in part, dismissing the civil rights claims, but also denied it in part, finding that plaintiffs' other claims were legally sufficient and that the matter was ripe for adjudication.[31]

---

that its ordinary definition is operative. I believe the various implications and ramifications attendant upon the use of this single word are, potentially, of great importance, and should be thoroughly examined. Such examination, however, is outside the scope of this article.

24. Bonnichsen v. U.S.,969 F. Supp. 614 (D. Or. 1997). The decision to repatriate in this instance is a recognition of tribal ownership of the remains, pursuant to Section 3002 of N.A.G.P.R.A.

25. *Id.* at 618.

26. The plaintiffs are: Robson Bonnichsen, C. Loring Brace, George W. Gill, C. Vance Haynes, Richard L. Jantz, Douglas W. Owsley, Dennis J. Stanford, and D. Gentry Steele. Owsley and Stanford are affiliated with the Smithsonian Institute; the others are university professors. In addition, Bonnichsen is the director of the Center for the Study of the First Americans, in Portland, Oregon. *See, Plaintiffs' Amended Complaint, supra* note 10.

27. *See* Bonnichsen, *supra* note 24, at 618.

28. *See Plaintiffs' Amended Complaint, supra* note 10, at 13.

29. *See* Bonnichsen, *supra* note 24, at 625.

30. *See* Bonnichsen, *supra* note 24, at 619.

31. *See* Bonnichsen, *supra* note 24. Included in the motion for dismissal, and in the judge's decision, was a companion lawsuit brought by a religious group, the Asatru Folk Assembly, to prevent repatriation of the remains to the tribes (Civ. Action No. 96-1481-

Following that decision, the Corps withdrew its previous notice of intent to repatriate the remains, and announced that it would reconsider the evidence of cultural affiliation between the remains and the claimant tribes.[32] The Nez Perce and Umatilla tribes then filed briefs in this case, as *amicus curiae*.[33]

In June of 1997, despite the Corps' withdrawal of its prior determinations, Judge Jelderks vacated those determinations.[34] The judge explained his action as follows:

> A change of activity by the defendant under the threat of judicial scrutiny is insufficient to negate the existence of an otherwise ripe case or controversy. . . . I conclude that this action has not been mooted . . . The dispute here concerns a tangible object, whose custody remains in dispute, and also the rights of various parties to study (or to forbid the study) of that object. . . . Nor am I persuaded that the Corps has entirely abandoned its earlier decision and is now objectively considering the evidence and the law without any preconceived notions concerning the outcome. [35]

Judge Jelderks remanded for reconsideration of the statutory meaning of "Native American" and "cultural affiliation," and of whether NAGPRA applies to these particular remains. He also provided the Corps with a list of specific questions, and directed the Corps to answer those questions during its reconsideration of this matter.[36] Those questions included the following:

1. Whether these remains are subject to NAGPRA, and why (or why not);
2. What is meant by terms such as 'Native American' and 'indigenous' in the context of NAGPRA and the facts of this case;
3. . . .
4. Whether NAGPRA requires (either expressly or implicitly) a

JE). The Asatru practice a pre-Christian religion that originated in northern and eastern Europe. They claimed Kennewick Man/Ancient One as an ancient member of their religion, following news reports that he exhibits "caucasoid" features. The Asatru have not filed an amended complaint, and did not appear to present arguments in court on June 19-20, 2001. For these reasons, they are excluded from the focus of this article.

32. Bonnichsen v. U.S., 969 F. Supp. 628, 637-638 (D. Or. 1997).
33. *Id.* at 632.
34. *Id.*
35. *Id.* at 640-41.
36. *Id.* at 632, 651-54.

biological connection between the remains and a contemporary Native American tribe;

5. Whether there has to be any cultural affiliation between the remains and a contemporary Native American tribe . . .;
6. The level of certainty required to establish such a biological or cultural affiliation, e.g., possible, probable, clear and convincing, etc. [37]

Finally, the judge stayed the proceedings, retained jurisdiction, denied plaintiffs' motion for an order permitting them to study the remains, and ordered the Corps to retain custody of the remains.[38]

The Corps, pursuant to the provisions of NAGPRA,[39] requested that DOI take responsibility for making the requisite determinations concerning the Ancient One, and DOI consented to do so.[40] Once it agreed to lead agency status, DOI set about the business of answering Judge Jelderks' questions. It authorized additional study and testing of the remains in order to resolve the issues of "cultural affiliation" and "Native American" status. This testing was extensive and invasive; it included the pulverization of bone for the purpose of extracting DNA.[41] It was carried out despite vigorous opposition from the claimant tribes.[42] Many of the tests were done at the urging of the plaintiffs, and by experts recommended by the plaintiffs.[43]

---

37. *Id.* at 651-52.

38. Bonnichsen, *supra* note 32, at 632.

39. 25 U.S.C. § 3002(d)(3) (2000): "If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the . . . head of any other agency or instrumentality may be delegated to the Secretary . . . ."

40. Interagency Agreement, signed March 24, 1998. A copy is on file with the author; *also available at* http://www.cr.nps.gov/aad/kennewick/agree.htm. NOTE: As of 12/05/01, access to DOI documents has been been severly restricted by a federal court order intended to protect Indian trust data. All documents cited herein as available at cr nps [Cultural Resources, National Park Service] are not presently accessible, and will not be accessible until the DOI can certify that they contain no data on individual Indian trusts.

41. Bone samples are taken from the remains, then bone is pulverized into a powder for purposes of attempting to extract mitochondrial DNA. *See* DNA Analysis Reports, copies on file with author, also *available at* www.cr.nps.gov/aad/kennewick/merriwether_cabana.htm and www.cr.nps.gov/aad/kennewick/kaestle.htm. In addition, five carbon-dating tests, which also require pulverization of the bone, were conducted on these remains. See, letter of Francis P. McManamon, DOI Consulting Archaeologist, dated Jan. 11, 2000, available at http://www.cr.nps.gov/aad/nagpra/kennew.htm.

42. Statements made by counsel to the *amicus* tribes and counsel to the U.S., in *personal court notes.*

43. *See, Defendants' Memorandum, supra* note 22.

As it turned out, DNA could not be extracted in a sufficient amount to allow accurate testing, due to the mineralized condition of the bones.[44] However, a great deal of other information was gathered and examined, [45] including the following:

> The Kennewick remains represent a single individual who most probably was interred rather than left to decompose on the surface. . . . Like other early American skeletons, the Kennewick remains exhibit a number of morphologicalfeatures that are not found in modern populations. . . . The most craniometricallysimilar samples appeared to be those from the South Pacific and Polynesia, as well as the Ainu of Japan, a pattern observed in other studies of early American crania in North and South America. . . . Kennewick is clearly not a Caucasoid.[46]

In January 2000, DOI concluded that the remains known as Ancient One are "Native American" within the meaning of NAGPRA.[47] The statutory definition of Native American is contained in Section 3001(9) of NAGPRA:

> Native American' means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

DOI's determination "was based upon chronological information supplied by the radiocarbon analysis of bone samples and previously conducted scientific examinations."[48] Those examinations included physical investigation of the bones, study of the lithic spear point, and investigation of the area in

---

44. *See,* DNA Analysis Reports, *supra* note 41.

45. The various scientific reports are *available at* www.cr.nps/gov/aad/kennewick. Most of these reports are extremely technical, but some of the information is comprehensible even to non-scientists. Two bits of useful information are: (1) the Ancient One is thousands of years older than any of the specimens with which he was compared; and (2) all conclusions about which "race" he most closely resembles are based on probabilities, and those probabilities are based on scientific theories (*i.e.,* enlightened guesses) about how humans developed over time.

46. Joseph F. Powell and Jerome C. Rose, "Report on the Osteological Assessment of the 'Kennewick Man' Skeleton," copy on file with the author (also *available at* http://www.cr.nps.gov/aad/kennewick/powell_rose.htm.)

47. *See* page 1 of Secretary Babbitt's announcement letter *available at* http://www.cr.nps.gov/aad/kennewick/babb_letter.htm. The Secretary confirmed this conclusion in a Decision Memo dated 9/21/00 (*see, Defendants' Memorandum, supra,* note 22).

48. *Id.*

which the remains were discovered. The remaining issue to be addressed was that of the appropriate disposition of the Ancient One. NAGPRA requires, in connection with inadvertent discoveries, that ownership of claimed cultural items[49] shall be established in accordance with Section 3002(a). That section provides, in pertinent part, as follows:[50]

> (a) The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed) –
>
> (1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or
>
> (2) in any case in which such lineal descendants cannot be ascertained, . . .
>
> (A) in the Indian tribe . . . on whose tribal land such objects or remains were discovered;
>
> (B) in the Indian tribe . . . which has the closest *cultural affiliation* with such remains . . .and which, upon notice, states a claim for such remains . . .; or
>
> (C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe –
>
> (2) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, ...

Due to the age of these remains, DOI concluded that no direct lineal descendants exist.[51] The remains were not discovered on "tribal land," because that term refers only to land within reservations and dependent Indian communities.[52] Nor is there a U.S. Court of Claims or an Indian Claims Commission "final judgment" recognizing the site where the remains were

49. "Cultural items" is a defined term that includes human remains. 25 U.S.C. § 3001(3) (2000).

50. 25 U.S.C. § 3002(a) (2000)(emphasis supplied).

51. Babbitt letter, *supra* note 47, at pages 3-4. *See also, Defendants' Memorandum, supra* note 22.

52. 25 U.S.C. § 3001(15) (2000).

found as the aboriginal land of one particular tribe.[53] Therefore, the focus of DOI's investigation had to be whether a cultural affiliation exists between the remains and the claimant tribes, pursuant to subsection 1 of Section 3002(a)(2)(C). NAGPRA defines "cultural affiliation" as follows:

> '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. [54]

The statute does not specify a requisite standard of proof for establishing cultural affiliation in order to determine ownership of inadvertently discovered remains. However, subsection 2 of §3002(2)(C) provides that, in the event of competing claims submitted by different tribes, the tribe which shows "by a preponderance of the evidence" that it has a "stronger cultural relationship with the remains" is the tribe in whom ownership shall vest. A preponderance of the evidence standard is also specified in §3005(a)(4), which governs repatriation of remains in the possession of museums or federal agencies at the time of NAGPRA's enactment. In addition, that section lists relevant evidence to be considered on the issue of cultural affiliation as: "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion."[55]

The regulations pertinent to DOI's handling of the issues concerning the Ancient One include 43 CFR Sections 10.6 and 10.14.[56] These regulations mirror the language of NAGPRA Section 3002, with only slight variation. Section 10.6 provides

53. Babbitt letter, *supra* note 47, at 3-4. There is, however, a settlement agreement of an Indian Claims Commission case pertaining to this land, which includes findings of fact that recognize this area as land utilized by all the tribes that have joined in the N.A.G.P.R.A. claim for the Ancient One. That is not, however, a "final judgment" delineating aboriginal land boundaries, so it does not necessarily have preclusive effect under N.A.G.P.R.A. § 3002(15). The Secretary gave consideration to the settlement agreement, as evidence of aboriginal occupation of this land, but did not deem it determinative on the disposition issue. Id. *See also, Defendants' Memorandum, supra* note 43.

54. 25 U.S.C. § 3001(15) (2000).

55. *See supra* note 40. 25 U.S.C. § 3005(a)(4) (2001). This section refers only to repatriation of remains and other cultural articles already in the possession of museums and federal agencies. However, it offers guidance to the Secretary of the Interior on the types of evidence Congress deemed acceptable and relevant on the subject of cultural affiliation.

56. 56 C.F.R. §§ 10.6 and 10.14 (2001).

that human remains that have not been claimed by lineal descendants and were not found on tribal lands, shall belong to "the Indian tribe or Native Hawaiian organization that has the closest cultural affiliation with the human remains . . . , as determined pursuant to §10.14(c)." Section 10.14 provides, in relevant part, as follows:

> (c)(3) . . . Evidence [of shared group identity] . . . must establish that a present-day Indian tribe or Native Hawaiian organization has been identified from prehistoric or historic times to the present as descending from the earlier group.
>
> (d) A finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.
>
> (e) Evidence. Evidence of a kin or cultural affiliation between a present-day individual, Indian tribe, or Native Hawaiian organization and human remains, . . . 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.
>
> (f) Standard of Proof. . . . Claimants do not have to establish cultural affiliation with scientific certainty. [57]

In September 2000, after considering all the evidence gathered, which comprises approximately 25,000 pages of material,[58] DOI concluded: "that the evidence of cultural continuity is sufficient to show by a preponderance of the evidence that the Kennewick remains are culturally affiliated with the present-day Indian claimants."[59] The evidence that established a sufficient nexus between the tribes and the Ancient One was: "The oral tradition, folklore, traditional history and geographic evidence . . . ." [60] The "geographic

57. *Id.* § 10.14.

58. This enormous administrative record includes scientific and anthropological data and reports, expert opinion, information submitted by the plaintiffs, and also oral history and cultural evidence submitted by the tribes. It is assembled into more than 50 volumes of documents, which volumes are on file in the Bonnichsen court records as Documents 310 through 366.

59. Babbitt letter, *supra* note 47, at page 6.

60. *Defendants' Memorandum, supra,* note 22, at page 11. *See also,* Babbitt letter, *supra* note 47, at 5-7. DOI considered the Indian Claims Commission cases as evidence of aboriginal occupation. It explained its reliance on this evidence as follows:

[D]isposition under §3002(a)(2)(C)(1) may not be precluded when an ICC

evidence" included evidence that all of the claimant tribes had lived on or used the land where the Ancient One was discovered. On the basis of the determination of cultural affiliation, the Secretary directed that the remains be repatriated to the claimant tribes.[61]

The plaintiffs in *Bonnichsen v. U.S.* filed an amended complaint, and moved to have DOI's disposition decision vacated.[62] Presiding Judge John Jelderks heard arguments for and against that motion on June 19 and 20, in the federal district courthouse in Portland, Oregon. In addition to hearing the arguments of counsel for the parties, Judge Jelderks allowed counsel for each *amicus* party to present arguments as well.[63] He also allowed the president of the Society for American Archaeology, who attended the proceedings without legal counsel, to make a statement concerning his organization's position on the issues raised in this case.[64]

During the proceedings, Judge Jelderks asked numerous questions about the meaning and requirements of NAGPRA. Several questions that he revisited throughout the full day of argument on June 19th pertained to the statutory terms, "Native American" and "cultural affiliation." This article has taken its cue from the judge, and will focus on the meaning of these terms in its examination and interpretation of the statute. The various methods and means of interpreting statutes must

---

> judgment did not specifically delineate aboriginal territory due to a voluntary settlement agreement. If the ICC's findings of fact and opinions entered prior to the compromise settlement clearly identified an area as being the joint or exclusive territory of a tribe, this evidence is sufficient to establish aboriginal occupation for purposes of §3002(a)(2)(C)(1) . . . The Federal land where the Kennewick remains were found was the subject of several ICC cases brought by the Confederated Tribes of the Umatilla Reservation . . . These cases culminated in a final judgment in accordance with a compromise settlement. Although the compromise settlement did not delineate the aboriginal territory of the Umatilla, the ICC had previously determined in its opinion and findings of fact that several Indian tribes, including the Umatilla (WallaWalla and Cayuse) and Nez Perce, used and occupied this area where the Kennewick remains were found.

Id. at 6-7.

61. *Defendants' Memorandum, supra* note 22, at Part IV(B).

62. The Amended Complaint also added DOI, its then-Secretary Bruce Babbitt, and its consulting archaeologist, Francis McManamon, to the roster of defendants.

63. *Personal court notes.* Arguments were presented by legal counsel for the Colville, Nez Perce, Umatilla, and Yakama tribes; and also by counsel for the National Congress of American Indians.

64. *Personal court notes.* It was refreshing to observe Judge Jelderks' open courtroom demeanor, and his willingness to let every party with some stake in the proceeding have an opportunity to speak.

be explored, before NAGPRA can be properly and fully construed.

THEORIES AND METHODS OF STATUTORY INTERPRETATION

There are thousands of articles and books on the subject of statutory interpretation,[65] most of them produced in the last twenty years.[66] These works promote several different theories of interpretation, including Intentionalism, Purposivism, Public Choice Theory, Positivism, Pragmatism, Realism, and Textualism. They propose that the correct way to interpret statutes is objective, subjective, hermeneutical, structuralist, or even "post-structuralist." This theorizing and posturing has reached fever pitch in the courts as well as the law journals, resulting in several instances of dueling opinions issued by Supreme Court justices on the subject of statutory interpretation.[67]

This state of affairs will inevitably affect the interpretation of NAGPRA, as it wends its way through the federal courts, in *Bonnichsen* and other matters yet to come. It is necessary, therefore, to examine the various theories of interpretation and canons of construction that remain popular among the judiciary and the scholars, in order to make some sense of the interpretation process before we attempt to make sense of NAGPRA.

---

65. There is an extensive listing of these materials in Footnote 1 of 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:01 (West Group 6th ed. 2001). Particularly interesting works include: REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (Little, Brown & Co., 1975); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY AND ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION (Foundation Press, 2000); POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION (1999); ANTONIN SCALIA, A MATTER OF INTERPRETATION (Princeton Univ. Press, 1997); and CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (Harvard University Press, 1990). Other books and articles on the subject of statutory interpretation are cited throughout this article.

66. At the time of this article, a search for "statutory interpretation" (with no additional modifiers) in the Westlaw "JLR" (Journals & Law Reviews Combined) database produced 13,465 articles written after 1981, and 258 articles written in 1981 and earlier years (as of August 1, 2001).

67. *See, e.g.*, PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 114 S.Ct. 1900 (1994); NASA v. Federal Labor Relations Authority, 527 U.S. 229, 119 S.Ct. 1979 (1999); National Federation of Federal Employees, Local 1309 v. Dep't of the Interior, 526 U.S. 86, 119 S.Ct. 1003 (1999); Johnson v. U.S., 529 U.S. 694, 120 S.Ct. 1795 (2000); Carter v. U.S., 530 U.S. 255, 120 S.Ct. 2159 (2000); and Chickasaw Nation v. U.S., __ U.S. __, 122 S.Ct. 528 (2001).

Constitutional Restraints on Statutory Interpretation

The Constitution imposes two clear constraints on the process of statutory interpretation. First of all, it makes the enactment of statutes the exclusive domain of Congress.[68] Secondly, a bill introduced in one of the houses of Congress can become a statute, and thus the law of the land, only if it progresses through the enactment and presidential signing process required by Article I, Section 7 of the Constitution.[69] In addition, there are two "constitutional assumptions" that have traditionally affected statutory interpretation.[70] The first is that Congress must comply with certain norms and expectancies in communicating with its constituents. Simply put, Congress must use ordinary English in all of its communications, including statutes. The second assumption is that the Constitution requires Congress to make its laws reasonably available to the American people.[71] In other words, laws cannot be kept secret, but must be publicized and made accessible to all persons who will be expected to comply with those laws.

The Basic Rules of Construction

The two most basic rules of statutory construction are known as the "plain meaning rule" and the "golden rule." The "plain meaning rule" holds that, when the meaning of a statute is "plain," or clear and unambiguous, no further inquiry is necessary.[72] The sole exception to this is the "golden rule" of interpretation, which holds that the words of a statute must be given their ordinary meanings, unless Congress has directed otherwise or unless doing so would lead to an absurd or incongruous result.[73]

Generally, the supposition is that a statute must be "plain" or clear in meaning on the basis of the text alone. Some judges, however, look beyond the text to determine whether the

68. U.S. Const. Art. I, § 1. *See,* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (Little, Brown & Co., 1975) 7; and WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION, *supra* note 13.

69. DICKERSON, *supra* note 68, at 7.

70. *Id.* at 10.

71. *Id.* at 11.

72. Maine v. Thiboutot, 448 U.S. 1, 7 n.4 (1980); 2A SINGER, *supra* note 65, at § 45:02.

73. SINGER, *supra* note 65, at § 45:12. Some refer to this as the "ordinary meaning canon." Watson, *Liberal Construction of CERCLA,* 20 HARV. ENVTL. L. REV. 199, 224 (1996).

statute's meaning is "plain" when viewed in light of its context.[74] Context may affect the "golden rule" as well, since the ordinary meanings of words inevitably vary depending upon the context in which they are used. Judges disagree over what context consists of, and how much of it is relevant to statutory meaning. This disagreement about context has created a sort of "continental divide" between the two primary schools of thought on statutory interpretation. On one side of the divide are those who believe that the text of a statute is the primary indicator of statutory meaning; on the other side are those who believe that statutory meaning is affected by, and dependent upon, context.

There is only one theory of interpretation currently in general use which regards the text as determinative of statutory meaning. That theory is known, not surprisingly, as Textualism. There are several different theories, however, which advocate the importance of context, and these shall be referred to collectively, for the sake of simplicity, as "contextual" theories of interpretation.[75]

Textualism

Whether the interpreter favors a textual or a contextual approach, every exercise in statutory interpretation must begin with an examination of the statute's text.[76] Textualism[77] is a

74. "To determine the plain meaning of a statutory provision, we examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy." Children's Hosp. and Health Ctr. v. Belshe, 188 F.3d 1090, 1096 (9th Cir. 1999).

75. Some classify these two schools of thought as "objective" (text-oriented) and "subjective" (context-oriented). The real difference, in practice, is "between disregarding the legislative history and taking it into account." REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, *supra* note 68, at 83. Others characterize the continental divide as being between "formalists," who believe in the "determinacy" of the text, and "realists," who believe the text has no meaning until its words are interpreted. KENNETH S. ABRAHAM, STATUTORY INTERPRETATION AND LITERARY THEORY: SOME COMMON CONCERNS OF AN UNLIKELY PAIR, in INTERPRETING LAW AND LITERATURE – A HERMENEUTIC READER, 116 (Sanford Levinson and Steven Mailloux eds., 1988).

76. Watt v. Alaska, 451 U.S. 259, 265 (1981); Demarest v. Manspeaker, 498 U.S. 184, 187 (1991). "Though we may not end with the words in construing a disputed statute, one certainly begins there." Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 535 (1947).

77. According to Supreme Court Justice Antonin Scalia, a textualist is not wedded to the literal meaning of a text, but rather is one who construes a statute "... reasonably, to contain all that it fairly means." SCALIA, A MATTER OF INTERPRETATION, *supra* note 65, at 23. Scalia also makes the statement that "In textual interpretation, context is everything." Id. at 37. The context he is referring to, however, is extremely narrow, and often consists of little more than statute itself.

theory that has been in use, though not necessarily in vogue, since the late nineteenth century.[78] When faced with the task of interpreting a statute, most judges, including textualists, start with the plain meaning rule and the golden rule, giving the words of a statute their ordinary meanings.[79] If the statute's meaning cannot be gleaned from such a reading of the text, then a textualist may consult a dictionary or dictionaries in order to construe the language of the statute.[80] A textualist does not look to extrinsic sources, such as legislative history, for assistance in determining the meaning of a statute.[81] If necessary, however, a textualist will rely on traditional canons of statutory construction.[82]

Textualism posits that the goal of statutory interpretation is the discernment of statutory meaning, and that the only relevant sources of meaning are the text and text-related materials.[83] The presumption underlying Textualism is that the use of extrinsic sources, such as congressional committee reports and other legislative history, is not appropriate, for several reasons. First, since those extrinsic materials have not gone through the requisite process for the enactment of law, they are not law, and cannot be regarded as official pronouncements of law.[84] Secondly, legislative history materials are not a reliable source of information about legislative meaning, due to the self-

78. Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law,* 78 B.U. L. REV. 1023, 1025 (1998); WILLIAM D. POPKIN, STATUTES IN COURT (Duke Univ. Press, 199).

79. LIEF H. CARTER, REASON IN LAW 61 (Harper Collins, 1988). This emphasis on ordinary meaning is in keeping with the "constitutional assumption" that Congress will speak to its public in language that they can understand.

80. *See* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 65, at 114; Ellen P. April, *The Law of the Word: Dictionary Shopping in the Supreme Court,* 30 ARIZ. ST. L. J. 275 (1998); Richard J. Pierce, Jr., *Justice Breyer: Intentionalist, Pragmatist, and Empiricist,* 8 ADMIN. LAW. J. AM. U. 747, 747 (1995).

81. William N. Eskridge, Jr., *The New Textualism,* 37 U.C.L.A. L. REV. 621, 625 (1990). Eskridge calls the textualism espoused by Justice Scalia and others the "New Textualism." The Textualism described in this article is really the "New Textualism" practiced by Justice Scalia and others. The "old Textualism" was nothing but Literalism with the addition of the "golden rule."

82. Siegel, *Textualism and Contextualism in Administrative Law,* 78 B.U. L. REV. 1023, 1043 (1998); *See also,* SCALIA, A MATTER OF INTERPRETATION, *supra* note 65 at 34-35.

83. ESKRIDGE, ET AL., *supra,* note 65, at 228.

84. *Id.* at 228-229; BREYER, *supra* note 58, at 862; and SCALIA, *supra* note 65, at 34-35. *See also,* John F. Manning, *Textualism as a Nondelegation Doctrine,* 97 COLUM. L. REV. 673, 675 (1997): "[G]iving decisive weight to legislative history assigns dispositive effect to texts that never cleared the constitutionally mandated process of bicameralism and presentment."

serving nature of comments made in debates and colloquy, and the sort of deal-making that is inherent in any congressional vote.[85] Thirdly, a court's use of extrinsic materials to assist it in construing a statute would engage the court in legislative, rather than judicial, activity, thereby violating the Constitutional requirement of separation of powers.[86]

Lastly, textualists opine that the use of extrinsic materials in statutory construction is a disservice to the general public. All persons who may be affected by a statute have a right to rely on its apparent meaning, and the only source commonly available to them is the statute itself.[87] One who expressed this position particularly eloquently is former Supreme Court Justice Robert Jackson:

> Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights are... Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyers who can afford neither the cost of acquisition, cost of housing, nor the cost of repeatedly examining the whole congressional history. To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.[88]

Textualism's critics have succeeded in chipping away at all four of its cornerstones. First of all, legislative history does not have to be given conclusive effect, nor treated as the law of the land, in order for it to provide valuable information relevant to a statute's interpretation.[89] An apparently clear statutory meaning may be confirmed by reference to legislative history; and a meaning that is ambiguous may be clarified by reference to legislative history.[90] Secondly, the fact that members of

85. SCALIA, *supra* note 65, at 32-34.

86. ESKRIDGE, ET AL., *supra* note 65, at 228-229: "Justice Scalia argues that the new textualism . . . is also . . . the methodology most consistent with the rule of law and the separation of judicial from legislative powers in our system." *See also* SCALIA, *supra* note 65, at 22.

87. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, *supra* note 65, at 163 and 165.

88. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396 (1951); quoted in EUGENE C. GERHART, SUPREME COURT JUSTICE JACKSON: LAWYER'S JUDGE 100 (1961).

89. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes,* 65 S. CAL. L. REV. 845, 863 (1992).

90. *Id.* at 848-851; William N. Eskridge, Jr., *The New Textualism,* 37 U.C.L.A. L.

Congress may make "deals" in order to get legislation passed is not cause to discount legislative history entirely. Judges review evidence of one sort or another in every case. They learn how to separate the wheat from the chaff, the reliable from the unreliable. Surely this skill is not lost to them when the evidence they are considering relates to the legislative history of a statute.[91]

The textualists' argument that the use of extrinsic sources in statutory construction would turn judges into legislators is spurious. The use of legislative history and other relevant extrinsic materials need not differ from the use of any other sort of interpretational aid, such as dictionaries and traditional canons of construction.[92] While judges are not and cannot be legislators, they are and always have been makers of law. They are Congress's partners, albeit junior partners, in the law-making business. In addition, a court's use of legislative history in order to clarify ambiguous statutory terms does not violate the separation of powers mandate, but rather reinforces Congress's superior law-making role.[93]

The argument that legislative history materials are not accessible to the public was once the most persuasive argument against its use. This argument, however, is no longer persuasive.[94] Legislative history materials, including committee reports, congressional hearing transcripts, and earlier copies of a bill, are readily available to the sole practitioner and to the

---

REV. 621, 622 (1993).

91. "Nor am I convinced that courts can ever do more than bring their generally critical faculties to bear on the totality of evidence in the legislative record in the same way that they deal with other complex evidentiary records." Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,* 68 IOWA L. REV. 195, 214 (1983). In my opinion, that is enough for them to do.

92. BREYER, *supra* note 89, at 870-873.

93. "The traditional notion is that legislative history/intent should be used to interpret texts whose meaning *cannot* be conclusively determined from the text alone. And, if the meaning of the statutory provision *cannot* be determined from the text alone, the idea of trying to discern the intent of the enacting body would seem to further democratic principles rather than undermine them." William L. Funk, *Faith in Texts – Justice Scalia's Interpretation of Statutes and the Constitution: Apostasy for the Rest of Us?"* 49 ADMIN. L. REV. 825, 841-42 (1997).

94. According to Justice Stephen Breyer: "This argument overlooks the fact that courts use history to interpret unclear statutes. The use of legislative history can therefore make it easier, not more difficult, for the law-abiding citizen to plan conduct according to law. Legislative history is not difficult to find . . . Summaries are available in most libraries and the federal government maintains depository libraries with full texts of relevant documents." Breyer, *On the Uses of Legislative History in Statutory Interpretation, supra* note 89, at 869.

general public through the nation-wide system of federal depository libraries and through on-line research services.[95] Finally, if, as Textualism asserts, the ultimate goal of interpretation is the discernment of meaning, then anything and everything that could have bearing on that meaning ought to be considered.[96]

The Traditional Canons of Construction

Textualism does allow for some consideration of context, but only a very narrow, text-based context. For example, a statutory provision may be interpreted in relation to the rest of the statute of which it constitutes a part;[97] or an entire statute may be construed in relation to other statutes, if it is connected with them as part of a regulatory scheme.[98] The use of traditional canons of construction is also permissible under Textualism, when a statute's meaning is not clear and dictionary definitions do not suffice to make it so.[99] These include text-based canons that relate to usage and syntax, as well as substantive canons that apply well-established principles of law or policy to clarify the meaning of a disputed text.[100]

Two of the traditional text-based canons of construction are *noscitur a sociis*, or, "it is known by its companions;"[101] and *ejusdem generis*, or, "of the same sort," which requires that a term of general import be construed in light of more specific

95. Several web sites provide access to legislative history materials, free of charge. Persons who do not have their own internet service may, in most locations, secure such access at their local public library.

96. In the words of Felix Frankfurter, "If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded." *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 541 (1947).

97. William N. Eskridge, Jr. and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning,* 42 STAN. L. REV. 321, 355 (1990). This is referred to as the "whole statute" rule. *See also,* Watson, *Liberal Construction of CERCLA,* 20 HARV. ENVTL. L. REV. 199, 224 (1996). The practice of interpreting a statute so as to ensure that all of its provisions work together as an integral whole has also been called "intratextualism." Akhil Reed Amar, *Intratextualism,* 112 HARV. L. REV. 747 (1999). Interpreting a statutory provision as part of a "whole" may include ensuring that its construction does not make another provision superfluous, or incongruous, and defining terms used in more than one section of a statute in the same way.

98. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, *supra* note 65, at 109. This practice of interpreting a statute in the context of related statutes is referred to as construction *in pari materia. Id.*

99. SCALIA, A MATTER OF INTERPRETATION, *supra* note 65, at 28.

100. *Id.*; Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law,* 78 B.U. L. REV. 1023, 1043 (1998).

101. SCALIA, A MATTER OF INTERPRETATION, *supra* note 65, at 26.

terms listed with it.[102] For example, a state statute prohibiting grave desecration might provide: "[N]o person shall willfully vandalize, deface, mutilate, or otherwise harm any grave, grave marker or grave contents." In accordance with *noscitur a sociis* and *ejusdem generis*, the general term, "harm," should be interpreted in light of the specific terms with which it is listed, namely, the words "vandalize," "mutilate" and "deface".

Most judges, including textualists, have traditionally used several substantive canons to assist them in construing ambiguous or unclear statutes.[103] These include two canons that are particularly relevant to the interpretation of NAGPRA. The first of these is the "remedial purpose" canon, which suggests that a remedial statute must be construed broadly so as to give effect to its purpose.[104] The second is the "Indian law" canon. This canon requires Indian treaties and legislation to be construed in favor of Indian interests.[105] The Indian law canon is "a judge-made rule responding to the inequitable treatment of Indians by the nation in the past. . . . In the face of that history, and obvious disparities in bargaining power, courts give Indian tribes the benefit of the doubt."[106] These substantive canons have a long history of use in the federal courts. Because these canons are so firmly established in judicial tradition and precedent, even textualist judges are often willing to rely upon them, despite the fact that they bring an "extra-textual" element into the process of statutory interpretation.

There is one other "canon" of sorts that is germane to the interpretation of NAGPRA. A reviewing court will defer to an agency's interpretation of a statute, if the agency has been authorized by Congress to implement and administer that statute. The level of deference due will depend upon several

102. *Id.*; also, SUNSTEIN, *supra* note 65, at 151 (discussing all three of these "syntactical" canons or "norms" of interpretation).

103. But, see SCALIA, *supra* note 65, at 28-29. Justice Scalia is not a big fan of the substantive canons. He grudgingly admits, however, that some of them make a certain amount of sense and even serve to preserve important principles of law.

104. WILLIAM N. ESKRIDGE, JR. AND PHILIP P. FRICKEY, LEGISLATION AND STATUTORY INTERPRETATION 331 (Foundation Press 2000); also SCALIA, *supra* note 65, at 28. *And see,* dissenting opinion of Justice Scalia in U.S. v. Williams, 514 U.S. 527, 548 (1995): "If this case involved the interpretation of a statute designed to confer new benefits or rights upon a class of individuals, today's decision would be more understandable, since such a statute would be 'entitled to a liberal construction to accomplish its beneficent purposes.'"

105. ESKRIDGE AND FRICKEY, *supra* note 97, at 340; see also SCALIA, *supra* note 65, at 27, and SUNSTEIN, *supra* note 65, at 156-57.

106. SUNSTEIN, *supra* note 65, at 156-157.

factors, as delineated in *Chevron*,[107] Skidmore,[108] and, most recently, *U.S. v. Mead Corporation*.[109] The DOI's interpretation of NAGPRA may not qualify for the maximum deference due under *Chevron*,[110] but it is certainly entitled to significant deference, pursuant to *Skidmore* and *Mead*.[111] This rule of deference to an administering agency's statutory interpretation is followed by all judges, textualist and contextualist alike.

Contextual Theories of Interpretation

Several different theories of statutory interpretation may be clustered together under the "contextual" umbrella. All of them share the notion that a statutory text read in isolation lacks meaning, and that it is necessary to read a statute in its proper context in order to make its meaning fully apparent and comprehensible. "The statute's text is the most important consideration . . . and a clear text ought to be given effect. Yet the meaning of a text critically depends *upon its surrounding context.*"[112] Two major theories that promote the importance of context in statutory interpretation are Intentionalism and Purposivism. Both theories advocate interpreting a statute so as to determine the "will" of Congress and give it full effect.[113]

Intentionalists focus on determining the original intent of the legislature with regard to a particular statute, and on effectuating that intent.[114] This theory is rooted in the notion

---

107. Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

108. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

109. United States v. Mead Corporation, 121 S.Ct. 2164 (2001).

110. This article is not intended to give an opinion as to whether DOI's interpretation is or is not entitled to "Chevron" deference. A thorough examination of the level of deference due to DOI's interpretation in this case, and the effect of the *Mead* decision, if any, upon that level of deference, is beyond the scope of this article.

111. There is strong language in the *Mead* decision indicating that *Chevron* deference may be due even to an agency determination that is arrived at through less than formal procedures: "[A]s significant as notice- and-comment is in pointing to Chevron deference, the want of that procedure here does not decide the case, for we have sometimes found reasons for Chevron deference even when no such administrative formality was required and none was afforded." U.S. v. Mead Corporation, 121 S.Ct. 2164, 2173 (2001)(citations omitted).

112. ESKRIDGE, THE NEW TEXTUALISM, *supra* note 81, at 621 (emphasis in original).

113. In a case concerning the interplay between NAGPRA and the Freedom of Information Act, the federal district court for Hawaii included the following language in its decision: "When interpreting a statute, the court's objective is to ascertain the intent of Congress and to give effect to legislative will.'" Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F. Supp. 1397, 1412 (D. Haw. 1995).

114. ESKRIDGE, FRICKEY AND GARRETT, *supra* note 65, at 214. Early intentionalists

that legislative intent is of "supreme importance"[115] in statutory interpretation because it constitutes, in a representative democracy, the will of the true sovereign, the people.[116] In contrast with textualists, intentionalists attach great significance to legislative history materials.[117] Such materials include House and Senate committee reports, special commission reports or recommendations, transcripts of congressional hearings, and earlier drafts of a bill. It is from these materials that evidence of legislative intent is derived.[118]

Critics of Intentionalism charge that "legislative intent" is a mere fiction, because only individual persons are capable of having intent, and the legislature is comprised of hundreds of individuals with varying personal intents.[119] It is not likely that all members of Congress would ever have the same intent with regard to a particular piece of legislation.[120] It can also be safely assumed, say the critics, that no member of Congress would have formed any specific intent with regard to "the unique facts of the case before the court."[121]

It certainly would be impossible to discover the intent of every member of Congress with regard to a particular statute. However, evidence of the intent of some members of Congress can be gleaned from the statute itself, committee reports, and sponsors' statements. It may not be unreasonable, once that bill has become law, to project that evident intent onto a majority of the members of Congress.[122] The real flaw of Intentionalism is

---

engaged in "imaginative reconstruction," through which they attempted to determine how the legislators who enacted a statute would decide the case at hand. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 13, at 22.

115. EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES § 159 (1940).

116. ESKRIDGE & FRICKEY, LEGISLATION AND STATUTORY INTERPRETATION, *supra* note 104, at 326.

117. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 13, at 14; Richard J. Pierce, Jr., *Justice Breyer: Intentionalist, Pragmatist, and Empiricist,* 8 ADMIN. L. J. AM. U. 747, 747 (1995). "Intentionalists attempt to draw interpretive references from the legislature's stated goals and from a statute's legislative history." Id.

118. *See* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,* 68 IOWA L. REV. 195 (1983).

119. DICKERSON, *supra* note 65, at 68.

120. *Id.*

121. LIEF H. CARTER, REASON IN LAW, *supra* note 79, at 69; *see also*, John F. Manning, *Textualism as a Nondelegation Doctrine,* 97 COLUM. L. REV. 673, 675 (1997).

122. The critics of Intentionalism would disagree with this. For example, see Scalia, *supra* note 65, at 32. They argue that the intent of committee members cannot be imputed to other members of Congress, because bills are approved for a variety of reasons and not necessarily because individual members ascribe to the intent of the sponsoring committee. However, Justice Stevens, concurring in Bank One Chicago v.

that it focuses on original intent, without regard for the current environment in which the statute operates.

Purposivism focuses on the discernment and effectuation of the purpose, or underlying goal, of a statute.[123] A statute's purpose is sometimes made clear by its text.[124] In most instances, however, purposivists must rely upon legislative history in order to interpret a statute.[125] As an approach to statutory construction, purposivism has a long history of use in the federal courts.[126] When Justice Holmes referred to the "will" of the legislature, he was really speaking of the "purpose" of a statute, and Congress's desire to have that that purpose carried out:

> The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.[127]

Justice Frankfurter described statutory "purpose" as follows:

Midwest Bank & Trust Co., 516 U.S. 264 (1996), opined:

> Legislators, like other busy people, often depend upon the judgment of trusted colleagues when discharging their official responsibilities. If a statute . . . has bipartisan support and has been carefully considered by committees familiar with the subject matter, Representatives and Senators may appropriately rely on the views of the committee in casting their votes. In such circumstances, since most Members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of Congress.

Id. at 276-277.

123. *Id.*; ESKRIDGE, FRICKEY AND GARRETT, *supra* note 65, at 213.

124. The words themselves are, "far and away the most reliable source for learning the purpose of a document." Borella v. Borden Co., 145 F.2d 63 (2d Cir. 1944).

125. NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION, § 45:09 (6th Ed 2001).

126. "[L]egislators, like others concerned with ordinary affairs, do not deal in rigid symbols, . . . stripped of suggestion . . . . We can best reach the meaning here, as always, by recourse to the underlying purpose." Borella, 145 F.2d at 64 *supra* note 112; Keck v. United States, 172 U.S. 434, 455 (1899). *See also*, SUNSTEIN, *supra* note 51, at 123: "In cases in which textual and structural approaches are inadequate, a natural and time-honored response is to resort to the 'purpose' of the statute."

127. Holmes, J., opinion in Johnson v. U.S., 163 F. 30, 32 (1st Cir., 1908), quoted in POPKIN, *supra* note 65, at 128.

> Legislation has an aim: it seeks to obviate some mischief, to effect change of policy . . . That aim, that policy is not drawn like nitrogen out of the air; it is evinced in the language of the statute, as read in the light of the external manifestations of purpose. That is what the judge must seek and effectuate . . .[128]

The purpose of a statute may be thought of as the policy upon which it is based, or which it seeks to promote. For example, civil rights statutes are based upon the policy favoring equal treatment under the law for all Americans. The purpose of civil rights statutes is to promote or implement that policy. Based on their observation that every statute has a discernible purpose and that construing a statute with that purpose in mind will resolve any textual ambiguities, Professors Hart and Sacks advocated a purposive approach to statutory interpretation.[129]

It is arguable that Intentionalism and Purposivism allow for considerable flexibility in statutory construction, thereby increasing the risk that judges will in actuality make their own law or policy rather than implement Congress's law and policy.[130] However, it is equally arguable that a textualist interpretation which ignores all legislative history runs the risk of defeating the congressional intent and purpose behind that statute.[131]

> Why continue to announce that only where the statute is ambiguous is it subject to construction? Why should the legislative intent be defeated simply because the statute may seem clear and unambiguous on its face, when the court could by applying any of the existing rules of construction, actually ascertain true legislative intent? [132]

---

128. Frankfurter, *supra* note 92.

129. ESKRIDGE, FRICKEY AND GARRETT, *supra* note 65, at 333-334.

130. SCALIA, *supra* note 65 at 17-18.

131. As Eskridge, Frickey and Garrett put it:

> Even if one accepts Justice Scalia's premise that courts are supposed to play a neutral, nondiscretionary, and perhaps even mechanical role in statutory policy implementation, it is not clear that his new textualism advances that goal.

LEGISLATION, *supra* note 65, at page 238.

132. CRAWFORD, *supra* note 115, at §175. It should be noted that Crawford did not use the terms "interpretation" and "construction" as synonyms. According to Crawford, "interpretation" is the "process of discovering the true meaning of the language" in a statute, using only text-based sources; and "construction" is the process of using extrinsic sources to draw conclusions about statutory meaning, legislative intent, and statutory purpose. Id. at §157. In other words, interpretation is what a textualist does, while construction is what anyone using legislative history materials and other "context-based"

Intentionalism is the less attractive of the two theories, with its focus on original intent and its disregard of legal and social developments. For that reason, statutory purpose is preferable to legislative intent as a focal point for the interpretive process.

"Dynamic" statutory interpretation[133] is the most preferable method of statutory construction because it is the most comprehensive. It utilizes a variety of guidelines, legal precepts, and sources of information in order to construe the meaning of the statutory text, thereby incorporating the best of the text-based and context-based theories. Professor Eskridge describes this dynamic enterprise as follows:

> We do not discover the truth of the provision by limiting our vision to the bare text, or to the original legislative intent, or to current policy. All of these perspectives work together, and each teaches us something. [134]

Professors Eskridge and Frickey have also described the dynamic process as one of "practical reasoning,"[135] which includes consideration of "a broad range of textual, historical, and evolutive evidence" and reflects what judges actually do when they interpret statutes.[136] The dynamic, practical reasoning form of interpretation includes consideration of the text, congressional intent, statutory purpose, and the existing legal and social environment. It also includes recognition of the fact that the interpreting judge is an integral element of the interpretational "mix" – that statutory interpretation is a creative enterprise, and that the judge is a participant in that enterprise.[137]

"Dynamic" or "Comprehensive" Statutory Interpretation

The hard truth of the matter is that American courts have no

---

sources does.

133. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 65.

134. William N. Eskridge, Jr., *Gadamer/Statutory Interpretation,* 90 COLUM. L. REV. 609, 613 (1990).

135. Eskridge & Frickey, *supra* note 97.

136. *Id.* at 322 and 359. "Evolutive" evidence includes things like prior implementation of the statute, current understandings of the Constitution and fundamental notions of fairness and justice, and relationship between the subject statute and newer, related statutes or policies. *Id.* at 359.

137. *Id.* at 345.

intelligible, generally accepted, and consistently applied theory of statutory interpretation. [138]

This statement, when made by Professors Hart and Sacks in 1958, was undoubtedly an accurate description of the current state of affairs in the field of statutory interpretation. And it was, no doubt, equally accurate and descriptive of then-current circumstances when Professor Reed Dickerson used it as a launching point for his book, *The Interpretation and Application of Statutes,* in 1975.[139] Now, in the year 2002, there remains no better way to describe the current state of affairs with regard to statutory interpretation than to borrow the very same words used by Hart and Sacks forty-four years ago.[140]

There are several circumstances that have contributed to the lack of a single, generally accepted theory of statutory construction in American jurisprudence and jurispractice. First of all, theory does not always translate well from the printed page into practice. We can talk and write interminably (and indeed, it seems we have[141]) about how statutes ought to be interpreted, but that does not necessarily bring us closer to accurate interpretation of specific statutes in actual controversies.[142] Secondly, legal scholars have apparently been searching for the Holy Grail of interpretation, the one true and glorious theory that will enable all lawyers and all judges to correctly construe all statutes in all situations. The Holy Grail exists only in mythology.

Another circumstance that has prevented the ascension of one theory of interpretation to a position above all others is the simple fact that judges are human. As human beings, whether

138. HENRY M. HART, JR., and ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, 1201 "Tentative Edition" (Harvard Law School 1958).

139. REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 1 (1975).

140. *See,* SCALIA, A MATTER OF INTERPRETATION, *supra* note 65, at 14 (quoting HART and SACKS, *supra* note 138, at 1201). Justice Scalia sees this as a "sad commentary," and continues: "Even sadder, however, is the fact that the American bar and American legal education, by and large, are unconcerned with the fact that we have no intelligible theory." *Id.* The current state of affairs is *not* that we lack *any* intelligible theory of statutory construction, but that we have so many intelligible theories from which to choose.

141. *See, supra* notes 65 and 66.

142. ESKRIDGE, *supra* note 134, at 322. *See also,* ROBERT S. SUMMERS, Lon L. Fuller 122 (1984) (stating "A theory of interpretation cannot *decide* concrete cases. It can only specify steps to be taken and structure the exercise of judgment").

they realize it or not and whether they admit it or not, judges are influenced in every situation by what they value, what they believe, and what they understand about the world around them.[143] In a diverse society, there will always be divergent views about what is right and good and just.[144] A review of the decisions rendered by the U.S. Supreme Court in the last fifteen months should convince all doubters that it is indeed impossible for justices to completely set aside everything that makes them who they are, even when they make the best of efforts to do so.

Eskridge and Frickey's dynamic interpretation process takes the judge's personal element and adds it to the mix, recognizing that interpretation is a creative process.[145] This dynamic approach is the most inclusive and comprehensive of the established theories and methods. It allows judges to look to a wide variety of sources and circumstances for guidance relating to the meaning of a statute. It takes into account the will of Congress as well as the text of the statute. It also takes into account the "will of the people" by placing importance on developments in the social and legal environment. Eskridge and Frickey describe the process as the weaving together of various threads – text, intent, purpose, legislative history, current policy – into a strong cable that is capable of supporting the end result, the construed and explicated statute.[146] The greater the number of factors looked to for statutory meaning, the more the element of a judge's personal opinions and beliefs is diluted.

The truth of the matter is that comprehensive interpretation mirrors reality, because judges typically do weave together various threads of information, text, and precedent to

143. Max Radin reached a similar conclusion more than seventy years ago, when he noted that the choices a judge must make in the process of interpreting a statute are influenced, "by those physical elements which make him [or her] the kind of person that he [or she] is. That this is pure subjectivism and therefore an unfortunate situation is beyond the point. It is hard to see how subjectivism can be avoided or how the personality of the judge can be made to count for nothing in his [or her] decision on statutory interpretation as on everything else." Max Radin, *Statutory Interpretation,* 43 HARV. L. REV. 863, 881 (1930). *See also*, ESKRIDGE, *supra* note 134; Martha Minow, *Justice Engendered,* 101 HARV. L. REV. 10 (1987); and Kent Greenawalt, *Are Mental States Relevant for Statutory and Constitutional Interpretation?* 85 CORNELL L. REV. 1609, 1617-19 (2000).

144. *E.g.*, "We are, quite simply, a diverse society . . . The fact cannot be avoided that the appropriate vision of society, the individual, and the relationship of individuals, and the appropriate distribution of society's wealth are substantive issues that cannot help but affect judicial decisions." POPKIN, STATUTES IN COURT, *supra* note 65, at 195.

145. ESKRIDGE, *supra* note 134, at 345.

146. *Id.* at 351.

arrive at the meaning and import of a statute. Judges who purport to be concerned mainly with purpose do examine the words and syntax of a statute. Judges who purport to be concerned with nothing but the text do look outside the text for statutory meaning. For example, in *Bush v. Gore,* in which the Supreme Court construed a Florida election statute, Justice Scalia, the champion of New Textualism, stated: "[T]he clearly expressed intent of the legislature must prevail."[147]

If, in some circumstances, judges do not engage in such a "weaving" process, it is because there is no need to do so. Legislative intent, statutory purpose, and textual meaning are woven inextricably together in a symbiotic relationship from the inception of the legislative process. Purpose gives rise to intent, which then augments meaning, which effectuates purpose, and so forth. Societal values and legal policies change and develop and affect purpose, intent and even textual meaning, and the process begins anew.

The process of construing a statute may be regarded as akin to the threading together of a braided cable, as Eskridge and Frickey suggest. Or, it may be regarded as akin to the creation of a stew or ratatouille in which every ingredient complements the others and in which the flavors mingle and transform and work together to create the final product. This is the sort of process that is necessary for honest, reasonable, and accurate interpretation of a federal statute. It is this sort of dynamic, comprehensive interpretation that will enable us to discern the meaning and import of NAGPRA.

COMPREHENSIVE INTERPRETATION OF NAGPRA

A comprehensive construction of NAGPRA requires the use of relevant canons of construction, and the combination of text-based and context-based theories of interpretation. This dynamic, comprehensive approach includes the following:

- Determination of the purpose, or underlying policy goal, of the statute at issue;
- Examination of the statutory text for meaning, using the statutory purpose as a guide to meaning;
- Interpretation of the text with the assistance of traditional text-based and substantive canons of construction, when

147. Bush v. Gore, 531 U.S. 98 (2000) (concurring opinion, Chief Justice Rehnquist, joined by Scalia, J. and Justice Thomas) (emphasis added).

applicable; and

- Further interpretation of the text in light of the circumstances that prompted the statute's enactment, the legislative history of the statute, and the current legal and social environment.

A statute's purpose may be apparent on its face. In some instances, however, legislative history must be consulted early on in the interpretation process, for evidence of the statutory purpose or policy goal. Comprehensive construction, then, is not a linear process, but is instead a back-and-forth-and-back-again process of gauging and re-gauging purpose and meaning in order to arrive at an honest and complete understanding of a statute. This is the process that should be used to interpret NAGPRA. This process begins with the legal and social context that gave rise to the statute.

Social Context

In 1940, legal scholar Felix Cohen wrote with dismay about the continuation of discriminatory practices against American Indians.[148] He called for "positive effort to secure appropriate legislation that will secure to the Indian equal treatment before the law."[149] Decades later, Congress made an effort to meet that challenge, in connection with the treatment of American Indian graves and burial artifacts. That effort culminated in the enactment of NAGPRA by the 101st Congress in 1990.[150] This statute has been hailed as "human rights" legislation,[151] and as the vehicle that has put an end to "academic racism" against Native American graves and ancestral remains.[152]

All states have common law and statutory protections

148. This article uses the term "American Indian" to describe native persons and tribes. This term was chosen because the law still, for the most part, refers to indigenous Americans as Indians, and to avoid confusion with references to the term, "Native American," as it is used in NAGPRA. No disrespect is meant to any native persons or tribes who would prefer to be called Native American instead of Indian.

149. Felix S. Cohen, *Indian Rights and the Federal Courts,* 24 MINN. L. REV. 145, 191 (1940).

150. 7 U.S.C. § 4367 (1990).

151. *Native American Grave Protection and Repatriation Act of 1990: Senate Committee Report on S.R. 101-473,* 101st Cong. (1990)(Statement of Senator Daniel Inouye).

152. Walter Echo-Hawk, in argument on behalf of amicus tribes and NAIA, arguments in Bonnichsen v. U.S. before Judge Jelderks in the federal district court for the District of Oregon, June 20, 2001 (personal court notes). *See also,* Jack F. Trope and Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History,* 24 ARIZ. ST. L. J. 35, at pages 36, 59 (1992).

against the desecration of burial sites and cemeteries.[153] These laws are not intended to, nor do they, promote certain religious beliefs, although many persons do have strong religious beliefs regarding treatment of the deceased. These laws do, however, recognize a certain sensibility that is common to many persons of differing beliefs and backgrounds. That sensibility is one of respect for the remains of deceased human beings.[154] Courts have traditionally held, however, that this country's laws protecting burial places do not cover American Indian burial grounds and human remains.[155]

The differential treatment of native burials has not been relegated to our distant past. In 1982, a California appellate court held that a Native American burial ground was not a "cemetery" within the meaning of the state statute affording protection to the contents of cemeteries.[156] That decision was based upon legal precedent, which in turn was based upon attitudes that prevailed in this country for centuries. The remains of deceased Indians were never accorded the respect or care with which society usually treats human remains, and they were never protected from harm by the common law or state statutory law.[157] As a result, it became necessary for Congress to afford them such protection, through federal legislation.[158]

---

153. *See also,* New York Penal Law § 145.23 (cemetery desecration in first degree is a felony); Texas Health & Safety Code § 711.0311 (desecration or removal of remains, and other acts of damage to cemetery, constitutes a felony); Idaho Code § 18-7027 (damage to any marker, crypt or other place of burial is a misdemeanor) and § 18-7028 (removal of remains from place of interment is a felony punishable by fine or imprisonment or both).

154. Trope and Echo-Hawk, *supra,* note 152, at 38; Virginia H. Murray, *A "Right" of the Dead and a Charge on the Quick: Criminal Laws Relating to Cemeteries, Burial Grounds and Human Remains,* 56 J. Mo. Bar 115 (Mar./Apr. 2000).

155. Trope & Echo-Hawk, *supra, n*ote 152, at 39-42.

156. Wana the Bear v. Community Construction, Inc., 128 Cal.App.3d 536 (1982); *see also* Trope and Echo-Hawk, *supra* note 152, at 46. The failure to treat Indian burial places as sacred is related, in part, to the fact that non-Indians expect burial places to be marked with stone monuments and other memorials to the dead. Indian burial grounds contain no such markers or memorial monuments. It has taken centuries for the rest of America to understand that, for American Indians, there is no memorial more fitting, respectful, and beautiful than earth itself.

157. Trope and Echo-Hawk, *supra* note 152, at 38-48. Scientists have long looted Indian burial sites for Indian remains and subjected those remains to study, destruction, or display in museums. The U.S. Surgeon General, by order issued in 1868, directed the removal of the heads and other body parts of Indian war dead for study at the Army Medical Museum. *Id. See also,* THOMAS, SKULL WARS, *supra n*ote 7, at 57.

158. Legislation is well suited to furthering the goal of equality. "Clear delineations of permissible and prohibited forms of conduct contribute significantly to the realization of equal treatment under the law, which is one of the basic requirements of justice . . . ."

NAGPRA, in addition to protecting the sanctity of native burial grounds, mandates that all museums receiving federal funds shall inventory the native human remains and burial artifacts in their possession, notify the tribes associated with those items, and return the items to those tribes.[159] The statute also requires that Native American remains and burial artifacts inadvertently discovered on tribal or federal land be repatriated to the tribe that establishes the closest cultural affiliation with those remains or items.[160] It is this requirement that has come into play in *Bonnichsen.*

Pursuant to NAGPRA, the Corps was required to make the discovery of the Ancient One known to all tribes with a history of use or occupation of the land where the discovery was made.[161] In accordance with the statute, the tribe that makes a claim for such remains, and establishes a "cultural affiliation" with the remains, is entitled to custody and ownership of the remains.[162] The issues of whether the Ancient One is "Native American," and whether the claimant tribes have sufficiently established a "cultural affiliation" with him cannot be resolved until the statutory terms, "Native American" and "cultural affiliation," are construed. Before we turn to those terms, however, we must examine the purpose of the statute and explore whether the substantive canons of construction govern the way in which we should interpret this statute.

The Substantive Canons Applied to NAGPRA

The "remedial purpose" canon provides that remedial legislation should be construed broadly, or liberally, so as to give full effect to its purpose.[163] This canon of statutory construction is firmly established in judicial tradition, having been used by

---

EDGAR BODENHEIMER, POWER, LAW AND SOCIETY: A STUDY OF THE WILL TO POWER AND THE WILL TO LAW (1972).

159. 25 U.S.C. § 3003 (2001). This is a simplified description of what is in reality a complex process.

160. 25 U.S.C. § 3002(d) (2001). This requirement put an end to what was apparently the government's common practice of making such remains available to scientists who wished to study them, according to a comment made by one of the plaintiffs during the *Bonnichsen* court proceedings (*personal court notes*).

161. *Id.*

162. 25 U.S.C. § 3002(a) (2001).

163. *See, e.g.,* Primer v. Kuhn, 1 U.S. 452, 453 (1789); Ex Parte McCardle, 73 U.S. 318, 323 (1867); U.S. ex rel Marcus v. Hess, 317 U.S. 537, 557 (1943); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

the Supreme Court since its earliest days.[164] A statute is remedial if it creates new rights, addresses a social evil or "mischief," or establishes a remedy for redress of an injury.[165] NAGPRA does all three. It establishes in American Indians, Native Hawaiians and Native Alaskans the right to claim, and recover ownership of, human remains and cultural patrimony with which they have some connection. It aims to eradicate the looting of native burial sites and sale of burial artifacts by criminalizing such behavior, and it provides a remedy (repatriation) for the injuries resulting from past occurrences of such looting and desecration.

The statutory provisions are sufficient in and of themselves to inform us that NAGPRA is remedial in nature. The statute's legislative history confirms this conclusion. According to Senator Daniel Inouye, co-chair of the Senate Select Committee on Indian Affairs and one of the sponsors of NAGPRA, the statute's purpose is to put an end to a certain form of racism:

> When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are . . . different from and inferior to non-Indians. This is racism . . . [T]he bill before us today is not about the validity of museums or the value of scientific inquiry. It is about human rights. [166]

Whether regarded as human rights legislation,[167] or simply as legislation that redresses an old and continuing injury and aims to prevent its reoccurrence, NAGPRA is undoubtedly a remedial statute. In accordance with the traditional canon, therefore, NAGPRA should be construed in such a way as to give full effect to its remedial purpose. Additional support for this position comes from the language of the statute itself:

> Nothing in this chapter shall be construed to –
>
> (1) limit the authority of any Federal agency or museum to –
>
> (A) return or repatriate Native American cultural items to

---

164. 165 Id.

165. SUTHERLAND STAT CONST § 60.2 (6th Ed., Singer, ed.).

166. 136 Cong. Rec. S17174 (daily ed. Oct. 26, 1990)(statement of Sen. Inouye).

167. Trope and Echo-Hawk, *The Native American Graves Protection and Repatriation Act, supra* note 152, at 36.

Indian tribes, Native Hawaiian organizations, or individuals, and

(B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by this Act;

. . .

(4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; . . . .[168]

The import of this section is that NAGPRA should not in any event be construed so as to limit or restrict rights native peoples have in connection with securing custody of ancestral remains and cultural articles. This is a clear directive from Congress that NAGPRA is to be construed liberally, and that the rights of Native Americans and the underlying purpose of the statute should guide that construction. When Congress has made its desires known, the courts must abide by them.[169]

The "Indian law" canon of statutory construction, which is also firmly established in judicial tradition, requires that Indian legislation be construed in favor of Indian interests.[170] This canon was first utilized in the interpretation of treaties between tribes and the federal government. However, courts have long applied the canon to statutes as well, construing Indian-related statutes liberally, so as to resolve ambiguities in favor of Indian rights.[171] NAGPRA confers on Indian tribes and individuals a new right, and it provides mechanisms for the protection of this right. That makes it Indian legislation.[172] Any reasonable doubt of that should be put to rest by the final section of the statute:

This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect

168. 25 U.S.C. § 3009 (2001).

169. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 65, at 133-34. *See also,* BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW, 94 (1924).

170. *See, e.g.,* Choctaw Nation v. U.S., 119 U.S. 1, 28 (1886); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226, 247 (1985).

171. SCALIA, A MATTER OF INTERPRETATION, *supra* note 65, at 27. In connection with statutes (as opposed to treaties), the Indian law canon is really just a specialized version of the remedial purpose canon.

172. Counsel to the *Bonnichsen* plaintiffs argued in court that NAGPRA is not Indian legislation (*personal court notes*).

to any other individual, organization or foreign government. [173]

Pursuant to the traditional canon, therefore, NAGPRA must be construed in favor of the Indian rights or interests at stake. The primary Indian interest protected by NAGPRA, and at issue in *Bonnichsen*, is the right to bury one's dead in accordance with cultural traditions and to expect their burial places to remain undisturbed. The statute carves out no exception for human remains or cultural articles of great antiquity. In fact, the requirement that cultural affiliation be established "prehistorically" indicates that ancient remains are intentionally within the scope of the coverage afforded by NAGPRA.[174] Therefore, even remains as ancient as the Ancient One may well be subject to NAGPRA, if they otherwise meet the definition of "Native American." Any interpretation of the statute that would exempt ancient remains from its reach would be detrimental to the Indian interest at stake, and contrary to the established Indian law canon of construction.

The Meaning of "Native American"

§3001(9). Native American means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

It is clear from the language of the statute that it applies only to "Native American" remains and artifacts: "The ownership or control of Native American cultural items . . . shall be . . . ."[175] It is also clear that "Native American," in NAGPRA, is not a synonym for "American Indian," as it is in common usage. This is apparent from a reading of the definition in relation to the statute as a whole. Elsewhere in NAGPRA, the words Indian and Indian tribe are used. Congress could have used these terms in its definition of Native American, but it did not. Therefore, Congress did not intend Native American to be understood as a synonym for American Indian in this particular statute.

In order to understand the statutory term Native American, then, we must make certain that we understand the meaning of the words used to define that term. We must determine what "indigenous," "tribe," "people" and "culture" mean, as used in the

173. 25 U.S.C. § 3010 (2001).

174. 25 U.S.C. § 3001(9) (2001).

175. 25 U.S.C. § 3002(a) (2001)(emphasis supplied).

statute. These are familiar words, but they are words that have multiple meanings. When a word or phrase is capable of being understood in more than one way, it is said to be ambiguous, and it requires further clarification.[176] The statutory definition of "Native American" is intended to help us interpret the statute, but we cannot do that properly until we interpret the definition itself.

The component words of the definition of Native American are not separately defined. The word "indigenous" commonly means native to a particular place.[177] Dictionary definitions are not evidence, and cannot be given conclusive effect in connection with statutory meaning, but they can provide useful guidance.[178]

Indigenous is defined in two standard dictionaries as follows:

> **Indigenous**: 1. Originating in and characterizing a particular region or country; native . . . 2. Innate; inherent; natural . . . . Syn. 1. Autochthonous, aboriginal, natural. [179]

> **Indigenous**: 1. Born or produced naturally in a land or region; native or belonging naturally *to* (the soil, region, etc.). (Used primarily of aboriginal or natural products.)[180]

Since the word "aboriginal" is used in these definitions of indigenous, it may be helpful to have the precise meaning of that word as well. Random House defines aboriginal as: "1. Of, pertaining to, or typical of aborignies. . . . 2. original or earliest known; native; indigenous. "[181] The Oxford English Dictionary offers the following:

> **Aboriginal:** 1. First or earliest so far as history or science gives record; primitive; strictly native, indigenous. Used both of the races and natural features of various lands. 2. Dwelling in any

176. *See, e.g.,* POPKIN, *supra* note 65, at 187; Donna D. Adler, *A Conversational Approach to Statutory Analysis: Say What You Mean and Mean What You Say,* 66 MISS. L. J. 37, 37 (1996); SUTHERLAND STAT CONST § 45.2 (6th Ed., Singer, ed.).

177. Judge Jelderks commented during the court arguments that indigenous is a word that might seem simple, "but isn't really quite that simple." *Personal court notes,* June 19, 2001.

178. MCI Telecommunications v. AT&T, 512 U.S. 218, 240, 114 S.Ct. 2223, 2236 (1994)(Justice Stevens, dissenting opinion).

179. RANDOM HOUSE UNABRIDGED DICTIONARY 973 (2nd ed. 1993).

180. OXFORD ENGLISH DICTIONARY 867 (2ND ED 1989).

181. RANDOM HOUSE, *supra* note 180. "Aborigine" is defined as: "one of the original or earliest inhabitants of a country or region." *Id.*

country before the arrival of later (European) colonists.[182]

It is possible, using these definitions that clarify the meaning of "indigenous," to construct a more detailed definition of the statutory term, "Native American":

> "Native American" means of, or relating to, a tribe, people, or culture that **originated in or dwelled in** the United States **before the** arrival of European colonists.[183]

It is not possible to reach a full understanding of the term "Native American", until the statutory meaning of the words, "tribe," "people," and "culture" is determined. "Tribe" has many meanings, but those most germane to this discussion appear to be the following:

> **Tribe:** 1. Any aggregate of people united by ties of descent from a common ancestor, community of customs and traditions, adherence to the same leaders, etc. 2. A local division of an aboriginal people.[184]

> **Tribe:** 1.a. A group of persons forming a community and claiming descent from a common ancestor; . . . b. A particular race of recognized ancestry; a family. . . . 3. A race of people; frequently applied to a group of primitive people.[185]

The word "people" may need no explanation, but since it, too, has various meanings, the following dictionary definitions may be helpful:

> **People:** 4. the entire body of persons who constitute a community, tribe, race, nation, or other group by virtue of a common culture, history, religion, or the like . . . . [186]

> **People:** 1. A body of persons composing a community, tribe, race, or nation. 2.a. The persons belonging to a place, or constituting a

182. OXFORD ENGLISH DICTIONARY 35 (2ND ED 1989).

183. The use of the word "indigenous" to refer to people who populated a region before Europeans colonized it is consistent with its use in international law, according to a statement made in court by Walter Echo-Hawk, co-counsel for the National Congress of American Indians. (*Personal court notes*).

184. RANDOM HOUSE UNABRIDGED DICTIONARY 2018 (2ND ED. 1993).

185. OXFORD ENGLISH DICTIONARY 503 (2ND ED. 1989).

186. RANDOM HOUSE UNABRIDGED DICTIONARY 1436 (2ND ED 1993).

tribe, people or culture. This language does not appear to mandate that human remains must be "of or relating to" a modern Indian tribe. On the contrary, the use of the term "indigenous" is an indication that the remains are required only to have some connection to a tribe or people that lived in this country before European colonization. "Relating to" could be construed as "related to," as in "akin to" or "of the same family," but that does not appear to be its meaning in this section of the statute. Other sections of NAGPRA refer specifically to "lineal descendants," a very clear reference to family relationship. It may reasonably be concluded, therefore, from the context of this section within the statute as a whole, that "relating to" in the definition of "Native American" has a broader meaning than relation by blood or family ties.

What, then, does "relating to" mean? In common usage, "relating to" is used interchangeably with the phrases, "in connection with" and "in relation to." According to Webster, "in relation to" means: "concerning; regarding; with reference to."[191] The word "relate" means, among other things, "to connect or associate, as in thought or meaning;"[192] or "to have reference (often followed by *to*)."[193] It appears, then, that "of, or relating to" in Section 3001(9) of NAGPRA means: "belonging to or being a member of, or having some connection or association with." Accordingly, the statutory term "Native American", as applied to human remains, and as enriched and clarified by the definitions of the words comprising that term, may be expressed as follows:

> "Native American" means belonging to or being a member of, or having some connection or association with, a tribe/clan/community/people/group of persons connected by culture, that originated in or dwelled in the United States prior to the arrival of European colonists.

The DOI has defined Native American, in the regulations implementing NAGPRA, as follows: "The term Native American means of, or relating to, a tribe, people or culture indigenous to the United States, including Alaska and Hawaii."[194] This definition mirrors the statutory language, and is congruent with

191. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (1971).

192. *Id.*

193. RANDOM HOUSE DICTIONARY, *supra* note 180.

194. 43 C.F.R. § 10.2(d) (2001).

particular . . . company or class. . . . 3.c. Those to whom any one belongs; the members of one's tribe, clan, family, community. . . etc., collectively.[187]

To complete the triad, "culture" is defined as:

Culture: 5.b. A particular form or type of intellectual development. Also, the civilization, customs, artistic achievements, etc., of a people, especially at a certain stage of its development or history.[188]

Culture: 3. a particular form or stage of civilization, as that of a certain nation or period. 4. the sum total of ways of living built up by a group of human beings and transmitted from one generation to another.[189]

The definitions set forth above indicate that the words, "tribe" and "people," are synonyms. Both terms refer to groups of persons who have some connection with each other. That connection may be based on geography, religion, family relationship, or some other factor. "Culture" refers to the characteristics and accomplishments of a group of people, such as belief systems and practices, social customs, and artistic creations. The traditional canon of construction, *noscitur a sociis*,[190] suggests that "culture" should be interpreted in relation to the words with which it is listed. The application of *noscitur a sociis* turns "culture" into a synonym for "tribe" and "people," and its meaning thus becomes "a group of persons known for their particular culture." Based on these three terms, as fully explicated, the statutory term, "Native American," can be expressed as follows:

Native American means of, or relating to, a tribe/clan/community/people/group of persons connected by culture that originated in or dwelled in the United States prior to the arrival of European colonists.

There is one more portion of this statutory definition that must be clarified, and that is the requirement that Native American human remains be "of, or relating to" an indigenous

187. OXFORD ENGLISH DICTIONARY 504, 505 (2ND ED. 1989).
188. *Id.* at 121.
189. RANDOM HOUSE DICTIONARY, *supra* note 180.
190. Discussed *supra*.

the statutory definition.[195]

DOI has explained its interpretation of this term as follows:

> [W]e consider that the term 'Native American' is clearly intended by NAGPRA to encompass all tribes, peoples, and cultures that were residents of the lands comprising the United States prior to historically-documented European exploration of these lands. [196]

This interpretation corresponds with the dictionary definitions consulted herein and with the detailed explanation of the term "Native American" developed through examination of the statutory text and those dictionary definitions. The DOI's interpretation of "Native American" is, therefore, consistent with the construction of the statutory term derived through examination of the text as clarified by dictionaries and traditional syntactical canons. In other words, using nothing more than the theory of Textualism, it is possible to arrive at a meaning of "Native American" that is clear and comprehensible, and that correlates with the meaning DOI has assigned to that term.

Even when a court concludes that the meaning of a statutory provision is clear, it may look to legislative history to confirm its conclusion.[197] In this case, the meaning of "Native American" as explicated in the foregoing discussion is confirmed by a review of NAGPRA's legislative history. H.R. 5237, the bill that became NAGPRA, contained the definition of Native American that now appears in the statute. Every precursor bill, however, in the Senate and the House, contained a narrower definition of that term. For example, the earliest of these precursors, S. 187, contained the following definition:

---

195. Plaintiffs in Bonnichsen argue otherwise (*personal court notes*). They argue that a difference in meaning is created because the statute reads, ". . . of, or relating to, a tribe, people, or culture that is indigenous to . . ." (emphasis added), while the regulation reads, ". . . of, or relating to, a tribe, people or culture indigenous to . . . ." Plaintiffs contend that the words "that is" in the statute indicate a requirement that human remains be related to an existing Indian tribe, and that the DOI has attempted to remove that requirement by removing those two words from its definition of Native American. Id. This is an untenable position. The words "that is" are not essential to the meaning of the definition; it means the same thing whether they are included or not.

196. Letter of Francis P. McManamon, Departmental Consulting Archaeologist, to Lt. Col. Donald Curtis, Jr., U.S. Army Corps of Engineers, dated Dec. 23, 1997; *available at* http://www.cr.nps.gov/aad/nagpra/kennew.htm and referenced there as "Letter to USACOE on Kennewick Man."

197. Breyer, *supra* note 89, at 848-51; Reves v. Ernst & Young, 507 U.S. 170, 183 (1993).

The term 'Native American' means any individual who is –

(4) an Indian, or

(5) a Native Hawaiian, or

(6) an Alaskan Native, including Aleuts and Inuits.[198]

S. 1021, introduced by Senator McCain, contained a definition of "Native American" that was virtually identical to that contained in S. 187. S. 1980, introduced by Senator Inouye, and based largely upon the language in the National Museum of the American Indian Act,[199] was the first to broaden the definition of Native American. It defines 'Native American' as "an individual of a tribe people or culture that is indigenous to the Americas and such term includes a Native Hawaiian."[200]

The House also had two bills that preceded its final one on the protection of native graves and repatriation of cultural patrimony. In March of 1989, Representative Charles Bennett introduced H.R. 1381, and Representative Morris Udall introduced H.R. 1646. Both bills defined "Native American" in a way that mirrors those definitions in S. 187 and S. 1021 by simple reference to Indians, Native Hawaiians, and Native Alaskans. H.R. 5237, which replaced S. 1980 and was enacted into law, contained from the time of its introduction the definition of "Native American" that is now in the statute.[201] This indicates that Congress fully intended the term "Native American" to have a broader meaning than the earlier bills would have given it, and that this explicated version of the statutory term reflects that Congressional intent.

It is still necessary to determine whether the Ancient One fits the definition of Native American. He lived on land now a part of the United States, long before European settlers arrived.

---

198. 199 *Native American Museum Claims Commission Act, Senate Hearing 100-931 on S. 187,* Senate Select Committee on Indian Affairs, 100th Congress, July 29, 1988.

199. National Museum of the American Indian Act, Pub. L. No. 101-185 (codified as 20 U.S.C. 80q, *et. seq.*) (1989)(creating a new Museum of the American Indian as a part of the Smithsonian Institution. It also requires the Smithsonian to inventory all its native human remains and sacred artifacts, and to repatriate them to the appropriate tribes in accordance with the statute and with regulations promulgated by the Secretary of the Interior).

200. *Senate Hearing 101-952, on S. 1021 and S. 1980,* Senate Select Committee on Indian Affairs, 101st Congress, May 14, 1990 (quoting S. 1980 section 16).

201. Robert W. Lannan, *Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Human Remains,* 22 Harv. Envtl. L. Rev. 369, 415-416 (1998).

For this reason, he can be described as native or indigenous to the continent. He survived life-threatening injuries suffered years before his death – the embedding of a stone spearhead in his hipbone, and the crushing of two ribs. For that reason, it is reasonable to conclude that he belonged to some tribe or group of people, because he could not have survived those injuries on his own.[202] The "culture" that the Ancient One is identified with can be referred to as that of the people of the Windust Plateau in the Late Holocene period of history.[203] It is possible, then, to identify the Ancient One in the way that remains must be identified in order to be deemed "Native American." Therefore, the Ancient One is Native American within the meaning of NAGPRA.

The Meaning of "Cultural Affiliation"

> §3001(2). "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.

NAGPRA mandates that ownership of inadvertently discovered Native American remains shall be in the lineal descendants, or in the tribe on whose tribal (reservation) lands the remains were found, or in the tribe with the closest cultural affiliation.[204] In addition, if cultural affiliation cannot be "reasonably ascertained," then ownership vests in the tribe that has been recognized, in a "final judgment" of the Indian Claims Commission or the U.S. Court of Claims, as the aboriginal occupant of the land on which the remains were found.[205] In any event, it is incumbent upon the interested tribe or lineal descendants to submit a claim pursuant to NAGPRA.

In order to establish a "cultural affiliation" with claimed remains, a tribe must, in accordance with the definition of that term, show a "relationship of shared group identity" between itself and the "earlier identifiable group" with which the remains are associated. The statute does not specify just how close or strong a relationship that must be. The use of the word

202. Powell and Rose, *Report on the Osteological Assessment of the 'Kennewick Man' Skeleton, supra* note 46.

203. *Id.*

204. 25 U.S.C. § 3002(a) and §3002(d) (2001).

205. 25 U.S.C. § 3002(a)(2)(C)(1) (2001).

"prehistorically" in the definition of "cultural affiliation" further obscures the issue of proof. Prehistory is, to a large extent, a great unknown. How close a relationship or connection could possibly be traced "prehistorically"? And just what is a "shared group identity"?

It is advisable, in connection with the comprehensive interpretation of NAGPRA, to use dictionary definitions as an aid to discerning the meaning of cultural affiliation. First, however, it should be recalled that NAGPRA is a remedial statute aimed at redressing past injustice and preventing its future reoccurrence. It is a statute that has as its purpose the eradication of "academic racism"[206] and blatant disregard for the sensibilities of native peoples with regard to their deceased ancestors and burial grounds. It is a statute that must be construed honestly and reasonably in light of this remedial purpose and the Indian interests it protects.

The term "shared group identity," as a component of "cultural affiliation," requires clarification. The word "shared" presents no problem: it means, in common understanding and usage, something owned or enjoyed by more than one person. In the definition of cultural affiliation, it clearly means something attributable to, or associated with, both the claimant tribe and the "earlier identifiable group." In order to understand "shared group identity," however, we need to determine just what the statute means by "group" and "identity." Starting with the word "group" will facilitate explication of both phrases in which the word appears – that is, it will lead to an understanding of both "shared group identity" and "identifiable earlier group."

The word "group" generally means two or more things or persons. It also, however, has numerous more specific meanings. The dictionaries inform us that "group" means, among other things:

> **Group:** *(noun)* 1. any collection or assemblage of persons or things; cluster; aggregation. 2. a number of persons or things ranged or considered together as being related in some way. 3. *Ethnol.* A unit of social organization less complex than a band. [207]

206. Term used by Walter Echo-Hawk, co-counsel for the National American Indian Association, during arguments in federal district court on June 20, 2001 (*personal court notes*). *See also,* SKULL WARS, *supra* note 7, Chapter 4: "A Short History of Scientific Racism in America."

207. RANDOM HOUSE UNABRIDGED DICTIONARY (1966). [Emphasis supplied.]

> **Relationship:** 3: an aspect or quality (as resemblance, direction, difference) that can be predicated only of two or more things taken together: something perceived or discovered by observing or thinking about two or more things at the same time: CONNECTION. 215

Finally, then, the definition of "cultural affiliation" may be fully explicated, as follows:

> "Cultural affiliation" means that there is some identifying trait, custom, characteristic or other identifying feature that the claimant tribe and the earlier band or group of persons have in common with one another; and that this common identifying feature creates a connection between the modern tribe and the earlier group, which can be traced historically or prehistorically.

This statutory term, as construed, must now be applied to the Ancient One. Was he a member of an "earlier group"? The evidence indicates that he was. He had a stone spearhead embedded in his hipbone when he was a young man, yet he survived, and the bone shows no trace of infection.[216] This indicates that he had others to help him with this injury, and that they knew something about healing wounds and preventing infection. He also suffered an injury resulting in crushed ribs some years prior to his death.[217] This, too, was a life-threatening injury that he could not have survived without assistance.[218] Finally, two separate reports concluded that, based on the condition of the remains and other relevant factors, the Ancient One had been interred after death. The persons who buried him likely had some relationship with him or they would not have made the effort to bury him, and they must have believed that burial was the appropriate treatment for the remains of a deceased person. On the basis of this evidence, it would not be unreasonable to conclude that the Ancient One was a member of a group.

It is now necessary to determine the level of proof applicable to the element of cultural affiliation under NAGPRA. The statute does not specify a standard of proof for cultural affiliation, but it does suggest that a preponderance of the

215. Random House Dictionary, *supra* note 208.
216. Powell and Rose, *Osteological Report, supra* note 46.
217. *Id.*
218. *Id.*

evidence might be appropriate.[219] The Secretary of the Interior found that the claimant tribes had established cultural affiliation by a preponderance of the evidence.[220] The brief DOI submitted in *Bonnichsen* avers that the Secretary's finding of cultural affiliation is reasonable because it is based on a preponderance of the evidence.[221] The statute itself, however, does not require this level of proof.

When a tribe submits a claim for remains, and those remains are determined to be Native American within the meaning of NAGPRA, *any reasonable proof* of cultural affiliation should be sufficient for approval of that claim. It is only when there are two or more competing claims that NAGPRA requires a claimant tribe to establish, by a preponderance of the evidence, that it has the closest, or strongest, cultural affiliation with the claimed items.[222] This is the only mention of any standard of proof that appears in the statutory language governing ownership of inadvertently discovered remains and artifacts.[223]

Admittedly, it would be rare for a statute to require proof in an amount less than a preponderance of the evidence. However, NAGPRA is not a typical statute. It is remedial in nature, it is Indian legislation, and it embodies an apology for injuries inflicted upon native peoples not only with the acquiescence of the government but pursuant to government order.[224] NAGPRA is, in essence, a revolution on paper. And revolutions require extraordinary measures. The plain language of the statute appears to require no more than a scintilla of evidence showing a cultural connection between a claimant tribe and the remains or artifacts claimed, except that greater proof is required when necessary to resolve competing tribal claims. Therefore, in the absence of competing tribal claims, the statute does not require that proof of cultural affiliation rise to the level of a preponderance of the evidence.

The legislative history supports this reading of the statute. The Senate Report on S. 1980, which was subsequently replaced

219. See discussion in Bacground Section, *supra*.

220. Babbitt letter, *supra* note 47.

221. *Defendants' Memorandum, supra* note 43,at 11.

222. 25 U.S.C. § 3002(a)(2)(B), (a)(2)(C)(2) (2001).

223. 25 U.S.C. § 3002 (2001).

224. HURST THOMAS, SKULL WARS, *supra,* note 7, at 57. *See also,* Trope and Echo-Hawk, *supra* note 152; In the 1860's, the Surgeon General ordered all field officers to collect Indian crania and skeletons and send them to the Army Medical Museum.

by H.R. 5237, mentions that proof of cultural affiliation should be "by a simple preponderance of the evidence," but that discussion of proof is limited to claims for human remains and cultural articles in the collections of museums or federal agencies. [225] The House Report on H.R. 5237, the bill that became NAGPRA, includes the following discussion concerning proof of cultural affiliation in connection with ancient remains:

> Where human remains and associated funerary objects are concerned, the committee is aware that it may be too difficult, in many instances, to trace an item from modern Indian tribes to prehistoric remains without some reasonable gaps in the historic or prehistoric record. In such instances, a finding of cultural affiliation should be based upon an overall evaluation of the totality of circumstances and evidence . . . and should not be precluded solely because of some gaps in the record. [226]

All that is lacking in the proof submitted with regard to the Ancient One is a continuous connection from the claimant tribes all the way back to the Ancient One's lifetime 9,500 years ago. Even if cultural affiliation must be established by a preponderance of the evidence, the gap in time is not sufficient reason to preclude a finding of cultural affiliation. The evidence suggesting cultural affiliation includes geographical location,[227] oral histories of the claimant tribes that they have resided in that area of Washington State for all time, and the lack of any "migration stories" in the oral histories of these tribes.[228] Another piece of evidence indicating a cultural affiliation between the tribes and the Ancient One is the conclusion, reached by two separate teams of scientists, that the Ancient One was purposefully interred after death. This indicates a belief held by the "earlier group" that burial was appropriate for deceased persons, which corresponds with the belief held by the claimant tribes. All of this information, considered together, is sufficient to establish a nexus between the claimant tribes and the Ancient One.

---

225. *Senate Report on S.101-473, supra* note 152.

226. *House Report 101-877*, Oct. 15, 1990, to accompany H.R. 5237.

227. The findings of fact in the settlement of the ICC actions provided this evidence, along with other historical evidence of the occupancy of this area by the Umatilla and other tribes and bands of American Indians.

228. Babbitt letter, *supra* note 47; also *Defendants' Memorandum, supra* note 22.

ADDITIONAL SUPPORT FOR THE TRIBES' CLAIM TO THE ANCIENT ONE

The 1855 treaty between the U.S. and the Confederated Tribes of the Umatilla Indian Reservation provides additional support for the government's decision to repatriate the Ancient One to the tribes. The Umatilla have an unqualified right to ownership and possession of the Ancient One pursuant to that treaty, by which they sold their tribal lands, including the land on which the Ancient One was discovered, to the U.S. government. Federal courts have frequently held that a tribe may retain certain rights, powers and interests not expressly granted or relinquished by it in a treaty.[229] The Umatilla did not intend to relinquish their rights as kin or caretakers of any human remains buried beneath the lands conveyed in the 1855 treaty. Therefore, they retained such rights and those rights remain in effect to this day.

In accordance with the Indian law canon of construction, treaties must be construed in favor of Indian interests. The interest at stake here is the cultural tradition of honoring deceased ancestors and protecting their remains from disturbance. The tribes and bands of Indians whose lands were transferred to the U.S. through that 1855 treaty, now known collectively as the Umatilla, would never have relinquished their rights to protect the remains of their ancestors. They would never have agreed that, by selling their land, they were also selling the bones of all deceased persons buried in that land. They held those bones sacred, and believed that they should be allowed to rest in the earth for all time.

This belief is expressed in the statement of Armand Minthorn, a member of the Umatilla Board of Trustees, in connection with the Ancient One:

> My tribe has ties to this individual because he was uncovered in our traditional homeland – a homeland where we still retain fishing, hunting, gathering, and other rights under our 1855 treaty with the U.S. Government. . . .

229. U.S. v. Winans, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905); *see also* Trope and Echo-Hawk, *supra* note 152.

Group: *(adj.)*1: of or relating to a group: belonging to or shared by the members of a group as a whole: COLLECTIVE. [208]

The use of the word "band" is worth noting, because it is particularly relevant to the subject matter of NAGPRA and to the tribes that have claimed the Ancient One. The parties to the 1855 treaty with the U.S., by which the U.S. purchased the land on which the Ancient One was discovered, were the "Walla-Wallas, Cayuses, and Umatilla tribes, and bands of Indians".[209] For this reason, it makes sense to examine the definition of "band" also, because it may help us to understand the statutory meaning of "group."[210] The pertinent definitions of this word are as follows:

Band: 4. a division of a nomadic tribe; a group of individuals who move and camp together. [211]

Band: 3.a. a group of persons, animals or things: as b: a body of persons often brought together by a common purpose or bound together by a common fate or lot; *specif:* a relatively self-sufficient tribal subgroup that is mainly united for social and economic reasons. [212]

"Identity" is not the simplest of concepts, because it is the essence of what makes a person herself, and not someone else.[213] Personal identity may include hair color, intelligence, religious affiliation, ancestry, education, height and weight, and more. None of these attributes, other than height and weight, could ever be established in connection with prehistoric, North American remains.

It is necessary to focus on the sorts of qualities or information that might identify several persons as a unified group, because NAGPRA refers to "group" identity. Traits of

208. WEBSTER'S THIRD NEW INTERNATIONAL UNABRIDGED DICTIONARY (1971).

209. Treaty with the WallaWalla (1855), 12 Stat. 945, *supra* note 18.

210. The meaning of "band" may inform the meaning of "group," in the same way that the meaning of "aboriginal" informs the meaning of "indigenous" in the statutory definition of "Native American."

211. RANDOM HOUSE, *supra* note 208.

212. ENTRY 3 FOR WORD "BAND," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 209.

213. "Identity: 2. the condition of being oneself or itself, and not another. 3. Condition or character as to who a person or what a thing is." RANDOM HOUSE DICTIONARY, *supra* note 208.

group identity could include geographic location, cultural rites and customs, diet, artworks, physical characteristics, language, tools, and accoutrements such as baskets and cooking vessels. The ancient Greeks, for example, are known for their temples, sculpture and literature. Individual American Indian tribes may be identified in connection with their traditional customs, artwork, oral histories, and geographic location (for example, the "Plains Indians" or "Indians of the Northern Rockies"). None of these attributes identifies everything of importance about a group, but each provides an element of the group's identity. With this in mind, a comprehensible explanation of the term "shared group identity" may be crafted, as follows:

> "Shared group identity" means some identifying feature that is common to both groups, such as physical characteristics, cultural practices, geographical location, or other identifying feature.

The term "earlier identifiable group" must also be explicated in connection with the construction of "cultural affiliation." The word "earlier" is easy enough: it just refers to a group that existed earlier in time than the modern day. The word "group" has already been examined. It refers to a gathering of individuals bound together by something they have in common. Group may also refer to a tribal sub-group, or a group smaller in size than a band (which is smaller than a tribe), which lives and travels together. The word "identifiable" is likely meant to refer back to "shared group identity"; therefore, it requires that the earlier group have some distinguishing or identifying feature with which it may be associated. It does not mean that the group must have a name that science has bestowed upon it,[214] nor does it require that there be a large collection of tools or textiles or other goods by which the group can be identified.

The meaning of the word "relationship" is the final element necessary for a complete understanding of "cultural affiliation." In ordinary understanding, "relationship" means a connection between two people or two things. The dictionary definition confirms that understanding of the word:

214. During the arguments on June 19 and 20, Judge Jelderks often came back to the question, "Who is this earlier group? What are they called?" This is a natural question to ask, because we all tend to want names for things as a way of understanding and classifying them. The statute does not require, however, that a name exist for the earlier group mentioned in the definition of cultural affiliation.

> Our religious beliefs, culture, and adopted policies and procedures tell us that this individual must be re-buried as soon as possible. Our elders have taught us that once a body goes into the ground, it is meant to stay there until the end of time. [230]

The Umatillas' treaty with the federal government must be construed in light of these beliefs and the understandings the tribes would have had at the time the treaty was signed. Pursuant to such a construction of the 1855 treaty, the Umatilla have the right to take custody of the Ancient One's remains and return them to the earth.

This position is strengthened by the Supreme Court's recent decision in *Idaho v. United States,* in which the Court held that the Coeur d'Alene Tribe retained title to lands submerged under Lake Coeur d'Alene and the St. Joe River.[231] That decision rests, in large part, upon evidence indicating that the Coeur d'Alene tribe viewed the lake and river as vitally important to them at the time they were negotiating their treaty with the federal government. Justice Souter, writing for the majority, noted: "The intent [of Congress], in other words, was that anything not consensually ceded by the Tribe would remain for the Tribe's benefit . . . ."[232] Similarly, in the case of the 1855 treaty between the Umatilla and the federal government, anything not ceded by the Umatilla was retained by and reserved in them. One of the rights retained by and reserved in the Umatilla is the right to recover possession of any human remains buried in their tribal lands before those lands were transferred to the U.S. pursuant to the 1855 treaty.

CONCLUSION

NAGPRA must be construed in light of its remedial purpose, in accordance with its statutory definitions of Native American and cultural affiliation, and in the context of its legislative and social history. The use of a comprehensive or "dynamic" approach to interpretation, including a focus on statutory purpose as a guide to meaning, makes possible an honest, complete, and accurate interpretation of the statute. Such comprehensive construction is necessary in order to determine the meaning and scope of the statute, to give full

230. Armand Minthorn, *Human Remains Should be Reburied, supra* note 11.
231. Idaho v. United States,121 S.Ct. 2135 (2001).
232. *Id.* at 2145.

effect to the statute's remedial purpose and full benefit to the Indian interest at stake, and to give full effect to the will of Congress. In the words of Justice Benjamin Cardozo:

> When the legislature has spoken, and declared one interest superior to another, the judge must subordinate his [or her] personal or subjective estimate of value to the estimate thus declared.[233]

The legislature has spoken: it has declared that the interests of American Indians, Native Alaskans, and Native Hawaiians in the remains of their deceased ancestors, no matter how ancient, are superior to any interests that scientists might have in those remains. The Ancient One is "Native American" as defined by the statute, and the claimant tribes have established a cultural affiliation with him as required by the statute. Accordingly, the Ancient One must be repatriated, without further delay, to the tribes that have claimed him as their own.

233. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW, 94 (1924).