

# Tulsa Law Review

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Volume 33  
Issue 1 *Dedicated to the U.S. Supreme Court*

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Fall 1997

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### **Recommended Citation**

Douglas W. Ackerman, *Kennewick Man: The Meaning of Cultural Affiliation and Major Scientific Benefit in the Native American Graves Protection and Repatriation Act*, 33 *Tulsa L. J.* 359 (2013).

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# KENNEWICK MAN: THE MEANING OF “CULTURAL AFFILIATION” AND “MAJOR SCIENTIFIC BENEFIT” IN THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

Douglas W. Ackerman†

## I. INTRODUCTION

Passed quietly and without dissent<sup>1</sup> in 1990, the Native American Graves Protection and Repatriation Act<sup>2</sup> (“NAGPRA”) was intended to terminate centuries of plundering of Native American grave sites.<sup>3</sup> Native American cultural and religious beliefs with respect to the dead, most of which differ significantly with Anglo-American traditions, were affronted by the collection of thousands of Native American skeletal remains in attics, basements, and glass enclosures in museums, universities, and private collections across the country—including over 18,000 alone in the federally run Smithsonian Institution.<sup>4</sup> Perhaps more

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1. Not a single senator or representative in Congress rose in opposition to the bill which later became NAGPRA. See 136 CONG. REC. H10,985-91 (daily ed. Oct. 22, 1990); 136 CONG. REC. S17,173-77 (daily ed. Oct. 26, 1990).

2. 25 U.S.C. §§ 3001-13 (1994).

3. See, e.g., *The Great Artifact War*, TALLAHASSEE DEMOCRAT, March 10, 1996, at 10E (describing the activities of the *Coonbottom Artifact Militia* which, without apology, digs up artifacts in violation of state and federal law).

4. See Jack F. Trope & Walter R. Echo-Hawk, *Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 54 (1992). Interestingly, the Smithsonian Institution is not subject to NAGPRA’s purview. See 25 U.S.C. § 3001(8) (1994). The Smithsonian is instead subject to the less demanding National Museum of the American Indian Act, 20 U.S.C. § 80(q) (1989). See Steven Platzman, Comment, *Objects of Controversy: The Native American Right to Repatriation*, 41 AM. U. L. REV. 517, 541-43 (1992) (arguing that not subjecting the Smithsonian to NAGPRA weakens the United States’ commitment to Native American human rights).

Federal involvement in the collection of Native American skeletons is further exemplified by the infamous 1896 Order of the Surgeon General which led to Army Medical Officers collecting, frequently under dubious circumstances, approximately 5,000 Native American skeletal remains. See DANIEL K. INOUYE, ESTABLISHING THE NATIVE AMERICAN MUSEUM CLAIMS COMMISSION, S. REP. NO. 100-601, at 4 (1988).

The total number of Native American remains collected has been approximated at 200,000. See June Camille Bush Raines, *One is Missing: Native American Graves Protection and Repatriation Act: An Overview*

offensive was a lively market for sale and purchase of Native American remains and cultural objects.<sup>5</sup>

The scientific community endorsed the intent of NAGPRA,<sup>6</sup> expressing remorse at centuries of collecting human remains without scientific value,<sup>7</sup> except to those who wish to gawk. Although the problem of what to do with human remains that were scientifically valuable was contemplated by those who enacted NAGPRA, no one anticipated that potentially irreplaceable scientific data could be lost under the language of NAGPRA.<sup>8</sup> Part II of this Article details the factual background of Kennewick Man. Part III examines the complexities of NAGPRA, as well as its legislative history, regulations, and case law. Part IV discusses the religious and cultural abyss which stretches between Native Americans and Anglo-Americans. Finally, Part V makes some suggestions for resolving cases such as Kennewick Man.

## II. THE FACTUAL BACKGROUND

On July 28, 1996, in Kennewick, Washington, while attending a local hydroplane race, two men came upon the remains of a human skeleton (Kennewick Man) lying in the Columbia River.<sup>9</sup> After the police were notified, they left the remains where they were and notified the coroner,<sup>10</sup> who turned the matter over to James Chatters, an area anthropologist.<sup>11</sup> Because the bones were located amongst late-nineteenth and early-twentieth century artifacts, Chat-

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*and Analysis*, 17 AM. INDIAN L. REV. 639, 667 (1992).

5. See PROVIDING FOR THE PROTECTION OF NATIVE AMERICAN GRAVES AND THE REPATRIATION OF NATIVE AMERICAN REMAINS AND CULTURAL PATRIMONY, S. REP. NO. 104-473, at 4 (1990) [hereinafter SENATE REPORT]; 136 CONG. REC. S17,176 (daily ed. Oct. 26, 1990). See also *FBI Holds Up Sale of Indian Artifact by Md. College*, WASH. POST, Dec. 13, 1996, at G5 (discussing delayed payment for buckskin shirt, auctioned by Sotheby's for \$211,000, because shirt claimed by Sioux tribe).

6. See 136 CONG. REC. H10,989 (daily ed. Oct. 22, 1990) (noting that NAGPRA was supported by the Society of American Archeology); Trope & Echo-Hawk, *supra* note 4, at 60 n.133 (citing the American Anthropological Association, Association of Physical Anthropologists, Archeological Institute of America, National Conference of State-Historic Preservation Officers, National Trust for Historic Places, Society for Historical Archaeology, and Society for Professional Archaeology as supporters of NAGPRA).

7. A plausible argument exists, of course, that *all* remains and artifacts are of scientific value because, *inter alia*, the sheer number of items creates logical inferences. See *Native American Museum Claims Commission Act: Hearings on S. 187 Before the Senate Select Committee on Indian Affairs*, 100th Cong. 66 (1988) (statement of Dean Anderson, Smithsonian Institution) [hereinafter *Senate Hearing #1*].

8. See George Johnson, *Archaeologist: Repatriation "About to Put Us out of Business,"* Oct. 27, 1996 <<http://www.tri-cityherald.com/BONES/nyt.html>>.

9. Andrew L. Slayman, *A Battle Over Bones*, ARCHAEOLOGY, Jan./Feb. 1996, at 16; *Scientists Sue to Block Burial of Ancient Bones*, WASH. POST, Oct. 19, 1996, at A10 [hereinafter *Scientists*]; Aviva L. Brandt, *Anthropologist Is Digging Up Controversy with 9,000-Year-Old Bones*, L.A. TIMES, Oct. 6, 1996, at A25 [hereinafter Brandt, *Digging Up*]; Aviva L. Brandt, *Ancestral Remains or Science Find? The Tall, Lanky Man Lived 9,000 Years Ago. Anthropologists Want to Study His Skeleton. Native Americans Want It Reburied*, PHILA. INQUIRER, Dec. 14, 1996, at A5 [hereinafter Brandt, *Remains*]; Deean Glamsner, *9,300-Year-Old Skeleton Caught in Modern Dispute*, USA TODAY, Oct. 23, 1996, at A3; *Unearthed 9,000-Year-Old Remains Could Lead to NAGPRA Challenge*, NATIVE AMERICAN NEWS, (visited Jan. 16, 1997) <<http://www.bpinews.com/hr/issues/nan.htm#3>> [hereinafter *Unearthed*]; Mike Santangelo, *The War Over Indian Remains*, NEWSDAY, Nov. 5, 1996, at B21; *A Premature Burial*, BOSTON GLOBE, Oct. 3, 1996, at A16 [hereinafter *Premature*].

10. Ironically, the coroner is a Native American. See Santangelo, *supra* note 9, at B21.

11. See Slayman, *supra* note 9, at 16; *Unearthed*, *supra* note 9.

ters initially thought the skeleton to be of that era as well.<sup>12</sup> In accordance with the Archaeological Resources Protection Act (ARPA)<sup>13</sup> of 1979, Chatters applied to the United States Army Corps of Engineers (Corps) for a permit, which was granted on July 31, 1996.<sup>14</sup> Chatters returned to the river and excavated more bones, eventually finding one of the oldest and most intact skeletons ever found in North America.<sup>15</sup>

Examination of the pelvis, teeth, and skull indicated that the skeleton was that of a man, approximately five feet ten inches tall and between forty and fifty-five years of age at death, making him extremely old for his time.<sup>16</sup> Because the skull was long and narrow, the nose large and sharply protruding, the cheeks receding, the chin high, the brows thick and bony, and the mandible square, Chatters reasoned that the skeleton was that of a Caucasian because these traits are not characteristic of Native Americans living in the area.<sup>17</sup> A fragment of a stone spearhead, which apparently caused the man's death because of its attendant infection, was found buried in the skeleton's hip.<sup>18</sup>

Chatters next asked three other anthropologists to study the bones: Catherine J. MacMillan, R. Ervin Taylor, Jr., and Grover S. Krantz. MacMillan corroborated Chatters' opinion that the skeleton was likely that of a Caucasian.<sup>19</sup> Cat Scans indicated the spearpoint would be properly dated between 9000 and 4500 B.P.<sup>20</sup> Because one of the bones had remaining organic material in it, Taylor had its DNA tested.<sup>21</sup> The date, approximately 8410 B.P., confirmed MacMillan's research.<sup>22</sup> After examining the bones, Krantz wrote to Chatters saying that the bones could not be anatomically assigned to any of the Native American tribes living in the area and that, while he was uncertain, the bones were "more commonly encountered in material from the eastern United States or even of European origin . . . ."<sup>23</sup>

The Corps, however, determined that because of the skeleton's age and location the remains were probably of Native American ancestry and thus subject to NAGPRA.<sup>24</sup> On September 2, 1996, the Corps took custody of the bones.<sup>25</sup>

12. See Slayman, *supra* note 9, at 16.

13. 16 U.S.C. § 470(cc) (1979); see also 25 U.S.C. § 3002(c)(1) (1994).

14. See Slayman, *supra* note 9, at 16.

15. See *Premature*, *supra* note 9, at A16; Brandt, *Remains*, *supra* note 9, at A5.

16. See Brandt, *Digging Up*, *supra* note 9, at A25; *Premature*, *supra* note 9, at A16.

17. See Brandt, *Digging Up*, *supra* note 9, at A25; *Scientists*, *supra* note 9, at A10.

18. See Brandt, *Digging Up*, *supra* note 9, at A25.

19. See *Scientists*, *supra* note 9, at A10; Brandt, *Remains*, *supra* note 9, at A5; *Premature*, *supra* note 9, at A16; Santangelo, *supra* note 9, at B21.

20. See Slayman, *supra* note 9, at 17. "B.P." stands for before present.

21. See *id.*

22. See *Unearthed*, *supra* note 9 (9,200 years old); *Scientists*, *supra* note 9, at A10 (more than 9,000 years old); Brandt, *Digging Up*, *supra* note 9, at A25 (between 7265 and 7535 B.C.).

23. Slayman, *supra* note 9, at 17. Lawyers for the scientists have expressed the argument thus: "[T]he data is insufficient to establish that [Kennewick Man] is 'Native American' as defined in NAGPRA, and that the data is insufficient to establish[] that it has a cultural affiliation as defined in that law." *Unearthed*, *supra* note 9 (quoting the scientists' brief filed with federal district court). See also *Scientists*, *supra* note 9, at A10.

24. See *Unearthed*, *supra* note 9.

25. See Slayman, *supra* note 9, at 17.

In accordance with NAGPRA, the Corps notified<sup>26</sup> the Umatilla, the Yakama and the Nez Perce tribes that the skeleton might be affiliated with them within the meaning of NAGPRA.<sup>27</sup> Chatters informed the Colville tribe.<sup>28</sup> All four tribes claimed the remains as did a fifth tribe, the Wanapum.<sup>29</sup> Umatilla religious leader Armand Minthorn issued a widely-quoted statement in the Umatilla's newsletter:

If this individual is truly over 9,000 years old, that only substantiates our belief he is Native American. From our oral histories, we know our people have been part of this land since the beginning of time. We do not believe our people migrated here from another continent, as the scientists do. We also do not agree with the notion that this individual is Caucasian.

Scientists say that because the individual's head measurement does not match ours, he is not American Indian. We believe humans and animals change over time to adapt to their environment. And, our elders have told us Indian people did not always look the way we look today.

Some scientists say that if this individual is not studied further, we, as Indians, will be destroying evidence of our own history. We already know our history. It is passed on to us through our elders and through our religious practices.

.....

Our tribal policies and procedures, and our own religious beliefs, prohibit scientific testing on human remains. Our beliefs and policies also tell us this individual must be reburied as soon as possible.

.....

... We have a responsibility to protect all human burials, regardless of race.<sup>30</sup>

The Corps announced in a local paper, the *Tri-City Herald*, its intent to repatriate the remains.<sup>31</sup> However, NAGPRA requires a thirty day waiting period before remains may be repatriated.<sup>32</sup> During this period, still other tribes claimed the remains.<sup>33</sup> Meanwhile, controversy amongst the tribes who had originally claimed the remains emerged.<sup>34</sup> While the Umatilla and the Nez

26. See 25 U.S.C. § 3003(d) (1994). NAGPRA's notification provision requires that the federal agency or museum determine cultural affiliation or the lack thereof prior to notification. See *id.*

27. See Slayman, *supra* note 9, at 18.

28. See *id.* Ironically, Chatters, who supports the intent of NAGPRA, is married to and has a child with a Native American. See Santangelo, *supra* note 9, at B21 ("What it does is rob my daughter of her heritage, because she wants to know about where and who she came from," Chatters said."). After being subpoenaed in the civil case and fearing that the government was setting him up for criminal prosecution, Chatters exercised his fifth amendment privilege against self-incrimination. See *Battle over Bones Frustrating*, SEATTLE TIMES, April 12, 1997, at A4.

29. See *Unearthed*, *supra* note 9; *Scientists*, *supra* note 9, at A10; Brandt, *Remains*, *supra* note 9, at A5.

30. Armand Minthorn, *Ancient Human Remains Need to Be Reburied*, (Oct. 27, 1996) <<http://www.tri-cityherald.com:80/BONES/1027.html>>.

31. See Slayman, *supra* note 9, at 18.

32. See *Unearthed*, *supra* note 9.

33. See Slayman, *supra* note 9, at 18. Claims to Kennewick Man are by no means limited to Native American tribes. See *9,000-Year-Old Skeleton Proves Popular*, SEATTLE TIMES, Dec. 23, 1996, at B3 [hereinafter *Skeleton*]. Among the numerous groups or individuals claiming Kennewick Man are the Asatru Folk Assembly (a religious group allegedly linked to the Vikings), the family of one of the men who discovered Kennewick Man, various individuals with "symbolic" claims, and various individuals claiming actual ancestry with Kennewick Man. See *id.*

34. See Slayman, *supra* note 9, at 18-19.

Perce announced that they would secretly rebury the remains immediately, the Colville would allow further “nondestructive” scientific research to be performed on the skeleton.<sup>35</sup>

Meanwhile, the scientific community and others argued that returning Kennewick Man to Native American tribes for reburial would set a dangerous precedent and potentially destroy scientists’ ability to understand America’s earliest human populations,<sup>36</sup> including the theory, rejected by Native Americans, that North America’s earliest settlers came from Asia across the then-dry Bering Straits.<sup>37</sup> From their preliminary studies, scientists have already discovered that Kennewick Man ate a lot of meat and fish, that he likely carried few heavy loads, and that, because of his extensive injuries, including a smashed shoulder, he must have been well cared for in order to survive.<sup>38</sup> United States Representative Doc Hastings of Washington urged the Corps not to return the skeleton until its “origins are determined conclusively or until Congress has the opportunity to review this important issue.”<sup>39</sup> Senator Slade Gorton and Representatives Jack Metcalf and George Nethercutt, Jr., all of Washington state, joined Hastings in a second letter, urging the Corps to allow scientists access to the bones.<sup>40</sup>

The journal *Science* published a news report that the University of California was analyzing DNA from Kennewick Man.<sup>41</sup> The Corps promptly ordered the lab to stop analyzing the bones.<sup>42</sup> Finally, on October 16, 1996, eight scientists filed suit in federal district court in Portland, Oregon, seeking to deny repatriation of the bones.<sup>43</sup> “(The) complaint alleges that the Corps determined that the remains were culturally affiliated (within the meaning of NAGPRA)

35. See *id.* at 19; Brandt, *Remains*, *supra* note 9, at A5. What is meant by “nondestructive” is unclear, especially given reports that the remains may not even be photographed “in deference to tribal sensitivities . . . .” See Brandt, *Digging Up*, *supra* note 9, at A25. Other reports indicate that “nondestructive,” at least, “means no DNA testing.” See Santangelo, *supra* note 9, at B21 (quoting the director of cultural preservation for the Hopi Tribe of Arizona).

36. See Slayman, *supra* note 9, at 19; *Premature*, *supra* note 9, at A 16 (“To bury [Kennewick Man] is to bury an anthropological Rosetta stone.”). Scientists remember well the 1992 loss of a skeleton even older than Kennewick Man to the Shoshone-Bannock Tribe. See Santangelo, *supra* note 9, at B21; see also Johnson, *supra* note 8 (discussing doctor who discovered 10,000 year old site in Montana in 1993 still waiting to analyze ancient human hairs after two-year legal battle); VINE DELORIA, JR., *RED EARTH, WHITE LIES: NATIVE AMERICANS AND THE MYTH OF SCIENTIFIC FACT* 187-88 (1995).

Currently, another potentially irreplaceable find is being contested in Nevada. See David Brown, *Nevada Mummy Caught in Debate Over Tribal Remains*, WASH. POST, May 5, 1996, at A1. “Spirit Cave Man” had been discovered over 50 years ago but only recently have tests shown than he is nearly 10,000 years old. See *id.* The Paiute tribe has claimed the remains under NAGPRA and opposed further scientific study on the remains. See *id.*

37. See *Scientists*, *supra* note 9, at A10.

38. See Brandt, *Digging Up*, *supra* note 9, at A25; Glamser, *supra* note 9, at 3A. Recent techniques developed in England based on cholesterol intake could help scientists further determine what kind of diet Kennewick Man consumed, including the importance of maize in Native American diets. See Bill Dietrich, *Cholesterol Clues in Bone*, SEATTLE TIMES, Jan. 14, 1997, at A6.

39. Slayman, *supra* note 9, at 19.

40. See *Unearthed*, *supra* note 9; Slayman, *supra* note 9, at 19.

41. See Slayman, *supra* note 9, at 20.

42. See *id.*

43. See *Unearthed*, *supra* note 9; *Scientists*, *supra* note 9, at A10.

without sufficient evidence."<sup>44</sup> The Corps, in its notice of intent published in the *Tri-City Herald*, noted only the age of the skeleton and its location.<sup>45</sup> Lawyers for the scientists argued that "[a] reliable determination of whether the skeleton is Native American within the meaning of [NAGPRA] cannot be made without . . . further study."<sup>46</sup> The complaint goes on to state three counts against the Corps for violation of federal law: (1) if the skeleton is not subject to NAGPRA, then ARPA requires that it be given over to scientists to study; (2) even if the skeleton is properly subject to NAGPRA, the statute allows scientific analysis when it would be of "major benefit to the United States"; (3) the Corps' refusal to allow scientists access to the bones violates the Civil Rights Act of 1866 because the Corps' denial is based on the fact that the scientists are non-Native American, whereas Native Americans would be allowed to analyze the remains under the statute.<sup>47</sup>

U.S. Magistrate John Jelderks presided over a hearing on October 23, 1996.<sup>48</sup> He denied the scientists' motion for a temporary restraining order but required the Corps to give fourteen days notice before transferring custody of Kennewick Man, which would allow the scientists time to refile their motion.<sup>49</sup> The *Tri-City Herald* reported that Jelderks asked lawyers for both sides to prepare arguments as to the meaning of "indigenous" under NAGPRA.<sup>50</sup> The Corps announced that it would be weeks or even months before it would decide what to do with the remains.<sup>51</sup> Scientists warned that they would seek their rights in court if the Corps was too long in acting.<sup>52</sup> In December 1996, the Corps filed a motion to dismiss the scientists' complaint.<sup>53</sup>

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44. See *Unearthed*, *supra* note 9; Santangelo, *supra* note 9, at B21.

45. See *Unearthed*, *supra* note 9. Attorneys for the scientists also said the Corps' notice of intent was not for the proper time period and that the Corps' ignored the advice of testimony from the three archaeologists who had examined the remains and opined that they did not look like the remains of Native Americans. See *id.*

46. Slayman, *supra* note 9, at 22.

47. See *id.* at 22-23.

48. See *id.* at 23.

49. See *Unearthed* *supra* note 9.

50. See Slayman, *supra* note 9, at 23. "Native American" means of, or relating to, a tribe, people, or culture that is *indigenous* to the United States." 25 U.S.C. § 3001(9) (1994) (emphasis added). As the rest of NAGPRA relies heavily on the term "Native American," it is easy to see why Judge Jelderks is interested in the meaning of indigenous. See also OXFORD ENGLISH DICTIONARY 867 (2d ed. reprinted 1991), (defining indigenous as "[b]orn or produced naturally in a land or region . . ."). Because the oldest human remains by far have been found in Africa and China, arguably *no one* is indigenous to the Americas. But see DELORIA, *supra* note 36, at 70-72 (discussing the dismissal by the scientific community of human remains, found in North America and dated at 250,000 B.P., contradicting the prevailing theory that Native Americans arrived in North America approximately 13,000 years ago).

51. See Slayman, *supra* note 9, at 23.

52. See *id.*

53. See *Skeleton*, *supra* note 33, at B3.

### III. RIGHTS AND QUESTIONS UNDER NAGPRA

#### A. *The Statute*

NAGPRA's statutory scheme creates an "ownership or control"<sup>54</sup> interest based on classification of the person(s) or entity seeking control.<sup>55</sup> If the lineal descendants of Native American human remains and/or associated funerary objects<sup>56</sup> are ascertainable, they have first priority under NAGPRA.<sup>57</sup> Native American tribes<sup>58</sup> on whose tribal land the cultural items<sup>59</sup> were found (tribal land test) take possession of human remains and associated funerary objects where lineal descendants cannot be ascertained; the same tribes take possession of unassociated funerary objects,<sup>60</sup> sacred objects,<sup>61</sup> and objects of cultural patrimony.<sup>62</sup> Next in line under NAGPRA, is the Native American tribe "which has the closest cultural affiliation with such remains or objects . . . ." <sup>63</sup>Finally, NAGPRA creates a presumption, rebuttable by another tribe proving closer affiliation by a preponderance of the evidence, that the objects whose cultural affiliation cannot be reasonably ascertained belong to the Native Ameri-

54. 25 U.S.C. § 3002(a) (1994).

55. *See id.* § 3002.

56. NAGPRA defines "associated funerary objects" as:

objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary object are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

*Id.* § 3001(3)(A).

57. *See id.* § 3002(a)(1).

58. NAGPRA defines "Indian tribe" as "any tribe, band, nation, or other organized group or community of Indians . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *Id.* § 3001(7). Case law has ostensibly broadened this definition. *See infra* notes 111-112 and accompanying text.

59. NAGPRA defines "cultural items" as including associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony. *See* 25 U.S.C. § 3001(3) (1994).

60. NAGPRA defines "unassociated funerary objects" as:

objects, that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe.

*Id.* § 3001(3)(B).

61. NAGPRA defines "sacred objects" as "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents . . . ." *Id.* § 3001(3)(C).

62. *See id.* § 3002(a)(2)(A). NAGPRA defines "cultural patrimony" as:

an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

*Id.* § 3001(3)(D).

63. *See id.* § 3002(a)(2)(B).



can tribe which aboriginally<sup>64</sup> occupied (aboriginally occupied test) the area where the objects were found.<sup>65</sup>

The aboriginally occupied test seems only to apply where a tribe has a final judgment of the Indian Claims Commission or the United States Court of Claims establishing aboriginal title.<sup>66</sup> Although reference to this provision is almost wholly absent from the legislative history and critical commentary surrounding NAGPRA, the aboriginally occupied test is a potentially enormous "catch-all" provision. The Indian Claims Commission existed from 1946 to 1978, and its judgments are codified in one document.<sup>67</sup> The document contains a map geographically applying the ICC's judgments.<sup>68</sup> The map reveals that with the exception of the eastern and southeastern United States, the vast majority of mainland United States has been declared the aboriginal land of some tribe.<sup>69</sup>

In cases such as Kennewick Man, where lineal descendants are obviously unascertainable, the location where the human remains are found and the meaning of "cultural affiliation" will be critical to judicial determination of what person or entity will take possession of the human remains or objects. NAGPRA defines "cultural affiliation" as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe . . . and an identifiable earlier group."<sup>70</sup> Even if cultural affiliation cannot be determined, ownership should inure in any tribe which aboriginally occupied the area where the remains were found or on whose land the remains were found.

Non-Native Americans, including the scientific community, are given no ownership rights to Native American human remains or objects discovered after November 16, 1990, determined to be culturally affiliated under NAGPRA unless no tribe claims the remains or objects.<sup>71</sup> Moreover, if the human remains or other items are found on tribal land, intentional excavation can only occur with the tribe's consent.<sup>72</sup> However, repatriation of the human remains or objects is subject to the completion of scientific study where the outcome of the study "would be of major benefit to the United States"<sup>73</sup> (major scientific benefit test). An obvious question remains unanswered by NAGPRA. What will happen to the scientific exception after a tribe refuses permission? If the items are never excavated, there will be nothing to repatriate and, arguably, the scientific exception will not apply.

64. NAGPRA does not define "aboriginally."

65. See 25 U.S.C. § 3002(a)(2)(C)(1) (1994).

66. See *id.* But see *infra* note 102 and accompanying text.

67. See generally UNITED STATES INDIAN CLAIMS COMMISSION FINAL REPORT H.R. Doc. No. 96-383 (Sept. 30, 1978) [hereinafter ICC REPORT].

68. See *id.* Map entitled Indian Lands Judicially Established is located in the back pocket of the ICC Report.

69. See *id.*

70. 25 U.S.C. § 3001(2) (1994).

71. See *id.* § 3002(a)-(b).

72. See *id.* § 3002(c)(2).

73. *Id.* § 3005(b).

Multiple requests from different tribes such as is the case with Kennewick Man are to be considered by a statutorily created review committee and, if necessary, by a court.<sup>74</sup> The committee's recommendations, however, are not legally binding.<sup>75</sup> The committee has already suggested that Congressional action may be necessary to decide cases like Kennewick Man.<sup>76</sup> The committee consists of three members chosen by Native Americans, three chosen by the scientific and museum community, and one chosen by both groups.<sup>77</sup> Where the parties take irreconcilable positions, as with Kennewick Man, it seems reasonable to assume that the committee will be of little value because after the "swing vote" is cast, the losing party will simply file in federal district court after having exhausted NAGPRA's administrative process.<sup>78</sup> Whether scientific study is permitted pending the committee's decision is not settled by NAGPRA. In the case of Kennewick Man, the Corps has not allowed scientific study while the dispute remains unsettled.

It seems logical to assume that much of the litigation that will occur under NAGPRA will be due to the extensive requirements NAGPRA places on museums<sup>79</sup> because museums house large numbers of human remains. Each museum is required to compile and inventory all of its human remains.<sup>80</sup> Although one court has read NAGPRA's museum provisions to allow scientific investigation pursuant to the compiling of a museum's inventory,<sup>81</sup> NAGPRA requires compilation of the inventory "to the extent possible based on information *possessed*."<sup>82</sup> The use of past tense and the exclusion of any additional phrase—e.g., "to the extent possible based on information possessed or compiled pursuant to an initial inventory"—arguably gives rise to a reading that scientific research is not permitted to determine cultural affiliation. This interpretation is consistent with the requirement that, with respect to unassociated funerary objects, sacred objects, and objects of cultural patrimony, federal agencies and museums must summarize in writing their holdings "based upon *available* information . . ."<sup>83</sup> The argument that scientific research is necessary to determine cultural affiliation is further rebutted by a reading that NAGPRA, in

74. *See id.* § 3005(e).

75. *See id.* § 3006(c); H.R. REP. NO. 101-877 (1990) reprinted in U.S.C.C.A.N. 4367, 4375; Native American Graves Protection and Repatriation Regulations, 43 C.F.R. § 10.16(b) (1997).

76. *See* H.R. REP. NO. 101-877, at 10 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4370.

77. *See* 25 U.S.C. § 3006(b)(1)(A-C) (1994).

78. *See id.* § 3005(e).

79. NAGPRA defines museum as "any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency." *Id.* § 3001(8).

80. *See id.* § 3003(a).

81. *See infra* notes 131-137 and accompanying text.

82. 25 U.S.C. § 3003(a) (1994) (emphasis added).

83. *Id.* § 3004(a) (emphasis added). A panel composed of museums, scientists, and Native American representatives compiled a report at Congress' behest. *See Report of the Panel for a National Dialogue on Museum/Native American Relations (Feb. 28, 1990)*, 24 ARIZ. ST. L.J. 487-500 (1992) [hereinafter *Panel Report*]. One of the Panel's recommendation was "[m]useums should take the initiative to compile inventories and document prior studies of all of their Native American materials." *Id.* at 497 (emphasis added).

the context of items found after November 1990 as opposed to items retained by museums or other entities, expressly contemplated this possibility and provided that, in such circumstances, the remains would go to the tribe on whose land the human remains were found or which aboriginally occupied the area where the remains were found unless another tribe could overcome this presumption.<sup>84</sup>

### B. *The Legislative History*

The discussions which led to the enactment of NAGPRA were highlighted by the formation of a panel featuring museum and Native American representatives and scientists.<sup>85</sup> Unfortunately, the answer to the problem which Kennewick Man presents could not be agreed upon:

The Panel was split on what to do about human remains which are not culturally identifiable. Some maintained that a system should be developed for repatriation while others believed that the scientific and educational needs should predominate . . . . The Panel concluded that Federal legislation on this matter was needed.<sup>86</sup>

Native American representatives testified before a House committee, stressing that "the spirits of their ancestors would not rest until they are returned to their homeland . . . ."<sup>87</sup> Scientific representatives stressed the need to learn about the future from the past.<sup>88</sup> The legislative history attempts to flesh out the meaning of "cultural affiliation" by stating that where reasonable gaps in the historical record are evident, cultural affiliation should be established by a totality of the circumstances.<sup>89</sup>

The legislative history contains a letter from the United States Army which objected to the burden placed on the Corps where human remains were unidentifiable, arguing that requiring consent from a Native American tribe prior to excavation of an area could result in lengthy delays.<sup>90</sup> It is reasonable to assume that Congress was aware of this possibility and, by not amending NAGPRA, chose to place this burden on the Corps.<sup>91</sup>

A letter from the U.S. Department of the Interior suggested that NAGPRA

84. See *supra* notes 64-70 and accompanying text.

85. See H.R. REP. NO. 101-877, at 10 (1990), reprinted in U.S.C.C.A.N. 4367, 4369; *Panel Report*, *supra* note 83.

86. See H.R. REP. NO. 101-877 (1990), reprinted in U.S.C.C.A.N. 4367, 4370.

87. *Id.* at 4372.

88. See *id.*

89. See *id.* at 4373. "Cultural affiliation" should require proof by a preponderance of the evidence. See DANIEL K. INOUE, PROVIDING FOR THE PROTECTION OF NATIVE AMERICAN GRAVES AND REPATRIATION OF NATIVE AMERICAN REMAINS AND CULTURAL PATRIMONY, S. REP. NO. 100-473, at 8 (1990).

90. See H.R. REP. NO. 101-877, at 4383 (1990), reprinted in 1990 U.S.C.C.A.N. 4367.

91. The ramifications of NAGPRA with respect to development projects have already been litigated. See *infra* notes 106-115 and accompanying text. See also *Native American Grave and Burial Protection Act (Repatriation)*; *Native American Repatriation of Cultural Patrimony Act*; and *Heard Museum Report: Hearings Before the Senate Select Committee on Indian Affairs*, 101st Cong. 531 (1990) [hereinafter *Senate Hearing #2*] (statement of Keith Kintigh, Society for American Archeology) (noting that a vast majority of Native American remains are discovered during development projects and that cultural affiliation of the remains cannot be determined prior to excavation and study).

should be amended to allow scientific study where necessary to *determine* cultural affiliation.<sup>92</sup> This idea was not explicitly incorporated into NAGPRA and, as indicated previously, is contrary to the position of four of the five Native American tribes claiming Kennewick Man, as well as the Corps, which has allowed no scientific study of Kennewick Man since the tribes claimed him.<sup>93</sup> Senator Akaka stated unequivocally that NAGPRA should “eliminate the long-standing policy of scientific research on *future remains found . . .*”<sup>94</sup> Other portions of the legislative history state unequivocally that initiation of scientific study to determine cultural affiliation is not required by NAGPRA.<sup>95</sup> The argument that this does not *prohibit* federal agencies to conduct scientific study to determine cultural affiliation is rebutted, in cases like Kennewick Man, by the plain language of the statute which arguably assumes the existence of some unidentifiable remains and places an ownership interest in the tribe on whose land the human remains were found or which aboriginally occupied the area where the remains were found.

In short, the legislative history is of little help in deciding the case of Kennewick Man. Although almost every person or entity on the record noted balancing as necessary between the rights of Native Americans and scientists, the legislative history comes no closer than the statute to deciding the meaning of “cultural affiliation.” Inexplicably, no effort, by example or otherwise, was made at further defining when a scientific study is of major benefit to the United States. The legislative history indicates that a federal agency denying repatriation because of scientific value *also* needed to establish a right of possession.<sup>96</sup>

92. See H.R. REP. NO. 101-877, at 4390-91 (1990), reprinted in 1990 U.S.C.A.N 4367.

93. But see *infra* notes 131-137 and accompanying text.

94. See 136 CONG. REC. S17,175 (statement of Sen. Akaka) (emphasis added).

95. See SENATE REPORT, S. REP. NO. 101-473, at 12. “[NAGPRA] does not . . . require museums or Federal agencies to conduct exhaustive studies and additional scientific research to conclusively determine the cultural affiliation of human remains or objects within their collections.” The previous paragraph states that a substantial number of the remains’ cultural affiliation should be satisfied just by examining the *circumstances of acquisition*. See *id.* The Corps based its decision to repatriate merely on the age and location of Kennewick Man.

With respect to the museum inventory requirement, the legislative history expressly allows, but does not require, scientific research to determine cultural affiliation. See *id.* at 19. Of course, the provisions for museum inventories are not subject to the tribal land test or the aboriginally occupied test which excavations after November 1990, like Kennewick Man, are.

96. See *id.* at 11, 13, 17. NAGPRA defines “right of possession,” in part as “[t]he original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe . . .” 25 U.S.C. § 3001(13) (1994). Use of this definition is of no help in deciding cases such as Kennewick Man because, even if a court found that a federal agency needed to establish “right to possession” in order to deny repatriation, the phrase, as defined, does not include remains whose cultural affiliation is unknown. See *id.*

Museums, however, could arguably be required to return virtually all of their Native American remains, no matter how scientifically valuable, because the legislative history in general suggests that the remains were almost never acquired with tribal consent.

### C. The Regulations

Because the regulations, for the most part, simply adopt verbatim the provisions of NAGPRA itself, the regulations do little to explain NAGPRA's more ambiguous concepts.<sup>97</sup> Consistent with NAGPRA and its legislative history, no attempt is made to define the major scientific benefit test.<sup>98</sup>

The term "human remains" is defined by the regulations to exclude "remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained;"<sup>99</sup> however, if the remains are incorporated into a funerary object, sacred object or object of cultural patrimony, the remains are considered as part of the object.<sup>100</sup>

Potentially the most important aspect of the regulations is their tendency to blur the aboriginally occupied test. While NAGPRA only recognizes the aboriginally occupied test where a final judgment of the Indian Claims Commission or the United States Court of Claims is extant,<sup>101</sup> the regulations, at several instances, simply refer to Native Americans who aboriginally occupied an area.<sup>102</sup> Arguably, Native Americans are now free to argue in court that they aboriginally occupied an area under NAGPRA's regulations without having a judgment of the Indian Claims Commission or United States Court of Claims to establish the aboriginal occupation.

Notably, seven years after NAGPRA's enactment, regulations still do not exist with respect to disposition of unclaimed human remains and cultural items and disposition of culturally unidentifiable human remains.<sup>103</sup> Apparently, civil penalty provisions against museums are a higher regulatory priority.<sup>104</sup>

### D. The Case Law

Only two cases have been decided under NAGPRA.<sup>105</sup> In *Abenaki Nation of Mississquoi v. Hughes*,<sup>106</sup> a dispute arose regarding a permit granted by the Corps to a Vermont village for purposes of raising the spillway of a hydroelec-

97. Compare, e.g., Native American Graves Protection and Repatriation Regulations, 43 C.F.R. § 10.2(b)(2) (1996), with 25 U.S.C. § 3001(7) (1994) (stating identical language for definition of "Indian tribe"); 43 C.F.R. § 10.2(e) (1996), with 25 U.S.C. § 3001(2) (1994), and with 25 U.S.C. § 3005(a)(4) (1994) (using nearly identical language for definition of "cultural affiliation").

98. See 43 C.F.R. § 10.10(c)(1) (1996) (reiterating the language of NAGPRA).

99. 43 C.F.R. § 10.2(d)(1) (1996).

100. See *id.*

101. See *supra* note 65 and accompanying text.

102. See, e.g., 43 C.F.R. §§ 10.3(c)(1), 10.4(d)(iii), 10.5(b)(iii) & 10.9(b)(ii)(C) (1996). The regulations incorporate the necessity of a final judgment of the Indian Claims Commission or the United States Court of Claims only in one instance. See *id.* § 10.6(a)(2)(iii) (1996).

103. See 43 C.F.R. §§ 10.7 & 10.11 (1996) (reserving these sections for future regulations). Other than the future applicability of NAGPRA (see *id.* § 10.13) the Secretary of the Interior has reserved no other sections for future promulgations. A reasonable inference is that disposition of unclaimed and unidentifiable remains continues to be a politically unpopular task.

104. See generally Native American Graves Protection and Repatriation Act Regulations—Civil Penalties, 62 Fed. Reg. 1820-23 (1997) (to be codified at 43 C.F.R. § 10.12).

105. See 25 U.S.C.A. §§ 3001-3013 (West 1996).

106. 805 F. Supp. 234 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993).

tric facility.<sup>107</sup> The Abenaki's claimed, in relevant part, that the granting of the permit violated NAGPRA's section 3005(a)(4)<sup>108</sup> because construction pursuant to the permit would likely uncover Native American cultural items, which items would be controlled by the Corps or village.<sup>109</sup> A federal district court<sup>110</sup> held that, although the Abenaki are not specifically recognized by the Secretary of the Interior, NAGPRA's definitional section<sup>111</sup> and attendant regulations<sup>112</sup> were broad enough to include the Abenaki.<sup>113</sup>

In a potentially very important ruling, the court in *Abenaki* read NAGPRA's section 3001(5), which defines federal land as land "owned or controlled" by the United States, narrowly so as to exclude situations where the Corps or other federal agency, pursuant to its regulatory authority, merely issues a permit to conduct activities on non-federal land.<sup>114</sup> This holding significantly limits claims under NAGPRA because the Corps and other agencies issue thousands of permits per year. The court further held that even if NAGPRA did apply, the fact that no cultural items had yet been discovered rendered the Abenaki's claim premature.<sup>115</sup>

In *Na Iwi O Na Kupuna O Mokapu v. Dalton*,<sup>116</sup> a federal district court for Hawaii granted the United States summary judgment against Na Iwi O Na Kupuna O Mokapu (Na Iwi), a group specifically named in NAGPRA.<sup>117</sup> Na

107. *See id.* at 236.

108. This section reads:

Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 3003 [the museum provisions] of this title, or the summary pursuant to section 3004 of this title, or where Native American human remains and funerary objects are not included upon any such inventory, then . . . such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe . . . can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

25 U.S.C. § 3005(a)(4) (1994).

Although the reports are unclear, this is likely the section the Native American tribes are using which are claiming Kennewick Man. *But see* Johnson, *supra* note 8 (suggesting that the Native Americans claims are based on aboriginal occupation of the land where Kennewick Man was found).

109. *See Abenaki*, 805 F. Supp. at 251.

110. Federal district courts are given exclusive jurisdiction to enforce NAGPRA. *See* 25 U.S.C. § 3013 (1994).

111. NAGPRA defines "Indian tribe" as:

[A]ny tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act [43 U.S.C. §§ 1601-1629e]), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Id.* § 3001(7) (1994).

112. The court inexplicably relied on 25 C.F.R. § 83 (1992) to buttress its conclusion that the Abenaki were a Native American tribe within NAGPRA's definition. *See Abenaki*, 805 F. Supp. at 251. The court suggested that receipt of federal funds alone might not be enough to satisfy NAGPRA's definition of Native American tribe. *See id.*

113. *See Abenaki*, 805 F. Supp. at 251. The question of whether a particular Native American tribe satisfies NAGPRA is potentially very important. *See Ancient Tequestas Must Be Reburied, Indians Insist*, MIAMI HERALD, Sep. 9, 1996, at B2. Scientists have been free to study the remains of Tequesta people since their discovery over forty years ago because the Tequestas have been extinct since the eighteenth-century and thus do not fulfill NAGPRA's definitional section. *See id.*

114. *See Abenaki*, 805 F. Supp. at 252.

115. *See id.*

116. 894 F. Supp. 1397 (D. Haw. 1995).

117. *See, e.g.*, 25 U.S.C. § 3001(6) (1994).

Iwi sued the federal government and the Bishop Museum, alleging that the defendants had failed to return Na Iwi remains to the Na Iwi and that additional research had been done on the remains of the Na Iwi in violation of NAGPRA. The complaint also requested that the results of the research not be disclosed to anyone without the consent of Na Iwi.<sup>118</sup>

The federal government had given the Bishop museum, the holder of the largest collection of Na Iwi remains, a grant<sup>119</sup> in order to inventory its remains and fulfill its obligations pursuant to the museum provisions of NAGPRA.<sup>120</sup> The inventory was to establish as many identifiable humans from the large amount of remains which the Bishop museum contained, using “morphometric and macroscopic assessments of sex, age, and distinguishing characteristics” in comparison with information previously catalogued by the museum.<sup>121</sup> However, it soon became apparent that the information, held in numerous places and by numerous persons, was in a state of disarray.<sup>122</sup> Ultimately, “standard physical anthropology techniques”—not DNA testing—had to be employed in order to determine which remains belonged to which person, although the court admitted in a footnote that the examiners had used more extensive techniques with respect to four sets of remains: “[t]his was allegedly done only because, on preliminary examination, there was a definite question as to cultural affiliation/ethnicity of the remains.”<sup>123</sup>

The results of the inventory were published by the Secretary of Interior pursuant to NAGPRA.<sup>124</sup> Bishop Museum was later dropped from the law suit.<sup>125</sup> Following settlement discussions, Na Iwi dropped its claim for repatriation of the remains;<sup>126</sup> nevertheless, the court held that Na Iwi’s claim to repatriation would not have been heard, prior to the United States’ final decision on whether to repatriate or not, because the Na Iwi had not exhausted NAGPRA’s administrative appeal process.<sup>127</sup>

The court held that the remains themselves did not have standing pursuant to NAGPRA or common law.<sup>128</sup> Turning to the Na Iwi, the court rejected their claim that NAGPRA itself granted them standing, but held that the Na Iwi did have standing as a corporation.<sup>129</sup>

On the issue of the additional scientific research and the information pub-

118. See *Dalton*, 894 F. Supp. at 1404.

119. Grants to museums for purposes of compiling inventories are explicitly authorized by NAGPRA. See 25 U.S.C. § 3008 (1994).

120. See *Dalton*, 894 F. Supp. at 1402.

121. See *id.*

122. See *id.* at 1402-03.

123. *Id.* at 1403 n.3.

124. See *id.* at 1403; 25 U.S.C. § 3003(d)(3) (1994).

125. See *Dalton*, 894 F. Supp. at 1403 n.4.

126. See *id.* at 1404.

127. See *id.* at 1405-6. The court suggested, as the scientists warned in *Kennewick Man*, that undue delay by the agency in reaching its decision may trigger judicial intervention prior to the exhaustion of NAGPRA’s administration process. See *id.* at 1405 n.5. See also *supra* notes 74-78 and accompanying text (discussing NAGPRA’s administrative appeal process).

128. See *Dalton*, 894 F. Supp. at 1406-08.

129. See *id.* at 1408-10.

lished pursuant thereto, the court held that NAGPRA did not create an exception to the Freedom of Information Act's<sup>130</sup> requirement of disclosure of information held by the federal government. After noting that NAGPRA contains no language precluding scientific research pursuant to compiling an initial inventory,<sup>131</sup> and ignoring a reading that NAGPRA is silent as to such scientific research, the court held that the legislative history<sup>132</sup> clearly contemplated that scientific research may have to be conducted to "determine tribal affiliation."<sup>133</sup>

NAGPRA Section 3003(e) contains no language which proscribes the kind of examination conducted by the Federal Defendant in the course of compiling an original inventory. Examinations done for the purpose of accurately identifying cultural affiliation or ethnicity are permissible because they further the overall purpose of NAGPRA, proper repatriation of remains and other cultural items.<sup>134</sup>

The court held that section 3003(b)(2)'s ostensible prohibition against scientific research was only relevant after the "inventory compilation stage"<sup>135</sup> and in response to a request by tribes.<sup>136</sup> Section 3003(b)(2) was read as preventing "agencies and museums from using a request for additional documentation as an excuse to initiate new studies and further delay the repatriation process."<sup>137</sup>

#### IV. SOME ARGUABLY IRRECONCILABLE CULTURAL DIFFERENCES BETWEEN NATIVE AMERICANS AND ANGLO-AMERICANS

Underlying NAGPRA is the relationship between Anglo-Americans and Native Americans. As will be shown, the cultural differences between the two groups may be irreconcilable: "[Native American and Anglo-American] fundamental approaches to life are at opposite ends of the scale of perception."<sup>138</sup> Many people consider the idea of reburial of a 9,000 year-old skeleton which may have scientific value to be absurd and ridiculous. To Native Americans, however, exposing Kennewick Man to scientific analysis is equally offensive. Arguably, Native Americans and Anglo-Americans have never even been able

130. See 5 U.S.C. § 552 (1966).

131. See *Dalton*, 894 F. Supp. at 1415.

132. See H.R. REP. NO. 101-877, at 31. The court's reading of the legislative history is selective. See *supra* part III(B). Moreover, the case is statutorily distinguishable with respect to cases such as Kennewick Man because neither the tribal land test nor the aboriginally occupied test apply to remains possessed by museums, which may have a right to possession under NAGPRA.

133. See *Dalton*, 894 F. Supp. at 1415.

134. *Id.* at 1415 (quoting PROVIDING FOR THE PROTECTION OF NATIVE AMERICAN GRAVES AND THE REPATRIATION OF NATIVE AMERICAN REMAINS AND CULTURAL PATRIMONY, S. REP. NO. 100-601, at 19).

135. NAGPRA makes no mention of an "inventory compilation stage."

136. See *Dalton*, 894 F. Supp. at 1417.

137. *Id.*

138. Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175, 181 (1992).



to understand, much less agree with, each others' view points, and NAGPRA is not likely to change that problem.

A major cultural difference between Anglo-Americans<sup>139</sup> and Native Americans<sup>140</sup> is the different conceptions of time. Anglo-Americans conceive of time linearly, starting with a beginning and proceeding toward an end, whereas Native Americans have a cyclical, or spatial,<sup>141</sup> conception of time.<sup>142</sup> Because Anglo-Americans view time linearly,<sup>143</sup> it is reasonable to assume that the older the human remains the less likely that we will feel any emotional disconcertion over their being scientifically analyzed. Indeed, in response to Kennewick Man, Armand Minthorn asked, rhetorically: "[h]ow would you feel if we came into your cemetery and dug up your ancestors?"<sup>144</sup> One scientist retorted: "[a]ny time you find an ancient European specimen, you do the same thing: Dig it up and get it as quickly as possible into the laboratory."<sup>145</sup>

Because all natural processes are part of a larger cycle to Native Americans, emotional and religious feelings toward human remains do not fade away as the remains get older.<sup>146</sup> In testimony before the Senate prior to passage of NAGPRA, one Native American described burial practices which included digging up ancestors when the tribe moved in order to rebury the remains of their ancestors close to the tribe's new location: "[t]he same religious ceremonies were used for those people, who died 600 or 700 years ago, as would be used for those people who had died 10 years ago."<sup>147</sup>

Important relationships which Anglo-Americans think of as in the past are conceived by Native Americans as immediate.<sup>148</sup> "The [Native American] cyclical concept demands that death is not an end, but a beginning of a new life, either on this earth (reincarnation as another human or transmigration into

139. This Article assumes that the Anglo-American concept of time is reflected in Anglo-American law, such as NAGPRA. This Article uses "Anglo-American" as a synonym for Caucasians.

140. Of course with over 500 different tribes in North America, this generalization, as well as all of the generalizations in this Article, is open to dispute with respect to any particular tribe(s). See, e.g., AKE HULTKRANTZ, *NATIVE RELIGIONS OF NORTH AMERICA* 20 (1987).

141. See EDUARDO DURAN & BONNIE DURAN, *NATIVE AMERICAN POSTCOLONIAL PSYCHOLOGY* 9, at 14 (1995) ("[Western] temporal thinking means that time is thought of as having a beginning and an end; spatial thinking views events as a function of space or where the event actually took place.").

142. See HULTKRANTZ, *supra* note 140, at 32-33 ("Some Indian languages lack terms for the past and the future; everything is resting in the present."); JAMAHE HIGHWATER, *THE PRIMAL MIND* 89-90, 97 (1981) (syntax of Hopi language "totally remote" from Western languages); Allison M. Dussias, *Science, Sovereignty, and the Sacred Text*, 55 MD. L. REV. 84, 97 (1996).

143. Some postulate that the Westerner is incapable of conceiving time in any other way. See HIGHWATER, *supra* note 142, at 94-95 ("[A] group of Midwestern farmers who opposed the introduction of Daylight Saving Time in their region summarized their position by pointing out that 'the extra hour of sunlight will burn the grass.'").

144. Brandt, *Digging Up*, *supra* note 9, at A25. A collection of 600 German American remains from near Pittsburgh was recently studied by the Smithsonian Institution. See *Senate Hearing #1*, *supra* note 7, at 49 (statement of Dean Anderson, Smithsonian Institution).

145. Brandt, *Digging Up*, *supra* note 9, at A25 (statement of anthropologist David Murray).

146. See *Native American Cultural Preservation Act: Hearings Before the Senate Select Committee on Indian Affairs*, 100th Cong. 36-37 (1987) [hereinafter *Senate Hearing #3*] (statement of Nelson Wallulatum, Chief of Wasco Tribe).

147. *Id.* at 37.

148. See HIGHWATER, *supra* note 142, at 91.

some animal, most often an owl) or in a transcendent hereafter."<sup>149</sup> The cyclical conception of time is exemplified by Native American belief in pre-existence, i.e., that, in addition to prior lives as an animal or other human, a person exists prior to incarnation on the earth.<sup>150</sup> The creation of the world is conceived, not as having happened eons ago, but as part of a recurring cycle which continues today.<sup>151</sup> Kennewick Man, one would assume, is part of that cycle and must not be disturbed.

Some of the high emotion surrounding the drafting of NAGPRA<sup>152</sup> might be attributable to a cyclical conception of time: in the Anglo-American mind, the conquest of Native Americans by Anglo-Americans, with all its attendant brutality and trickery, is ancient history, whereas for Native Americans, it is in the present.<sup>153</sup>

Another fundamental difference between Native Americans and Anglo-Americans is the perception of humans vis-a-vis other forms of life. This idea is exemplified by Native American burial practices. For example, prior to European contact, the decedent was typically buried in the fetal position facing west,<sup>154</sup> symbolizing his passing only to be reborn into a *similar* world.<sup>155</sup> Because Anglo-American religious tradition speaks of the spirit leaving the body and going to heaven, no longer a part of natural processes, Anglo-Americans are typically buried prostrate facing the sky. Whereas Anglo-American traditions see humans as clearly below God and above other animals, Native American traditions do not make sharp distinctions among these three groups;<sup>156</sup> further, humans are free to interact with gods and other animals.<sup>157</sup>

149. HULTKRANTZ, *supra* note 140, at 33.

150. See AKE HULTKRANTZ, CONCEPTIONS OF THE SOUL AMONG NORTH AMERICAN INDIANS 415 (1953).

151. See HIGHWATER, *supra* note 142, at 90.

152. See *Senate Hearing #3*, *supra* note 146, at 89 (statement of Bill Tall Bull, Northern Cheyenne Tribe, Inc.).

What would be your response and feeling if your grandmother's grave were opened and the contents shipped back East to be boxed and warehoused with 31,000 other separate boxes of similar remains and even before this was done, that on the day after her death, itinerant pot-hunters were allowed to ransack her house in search of "artifacts" with the blessing of the United States government? Would you welcome these acts or would you strive to change those practices and rectify the damages?

You know, of course, that this will never occur to members of your family. It is uncivilized. [I]t is savage. It is barbaric. It is inhuman. It is sick behavior. It is unChristian. It is punishable by law.

Yet, year after year, since the advent of Europeans upon this continent, has that same behavior been provided Native Americans in the name of archeology, museumology, hobbyists, amateur collectors, pot-hunters, anthropologists, social scientists, etc, etc. Moreover, has such behavior been protected, fostered, and condoned in major mockery and double standard time and time again by conquering caucasoid nations as they seek to preempt the freedoms of indigenous people all over the world.

*Id.*

153. Cf. DURAN, *supra* note 141, at 25.

154. See JAMES AXTELL, THE EUROPEAN AND THE INDIAN 114-116 (1981).

155. See CARL F. STARKLOFF, THE PEOPLE OF THE CENTER 42-43 (1974).

156. See AXTELL, *supra* note 154, at 75 (stating Native American shamans were not mere intermediaries between living and dead but themselves possessed supernatural power).

157. See HULTKRANTZ, *supra* note 140, at 26-27. See also DURAN, *supra* note 141, at 15 ("In Western experience it is common to separate the mind from the body and spirit and the spirit from mind and body. . . . Most Native American people experience their being in the world as a totality of personality and not as separate systems within the person."); Strickland, *supra* note 138, at 182 (explaining that the Native American worldview avoids the "shackling of the imagination in Western traps of dialectical opposition"); Deloria, *supra* note 36, at 233 (explaining Native American accounts of creation depict "no essential spiritu-

Arguably, Kennewick Man is perceived by Anglo-Americans as a lifeless resource of scientific value, but by Native Americans as a living connection to the past.<sup>158</sup>

Various goods and tools, sometimes of considerable value, were placed in Native American graves because it was thought that the decedent would need them when he or she was reborn.<sup>159</sup> Even after the decedent had been dead a long time, a gift or freshly prepared food might be placed near his or her grave.<sup>160</sup> Further, “[f]rom a tribal point of view all dead in the past are common ancestors . . . .”<sup>161</sup> Although practices centered around individuals occur, the dead are usually conceived of anonymously and collectively.<sup>162</sup> The offerings to the dead are made in hopes that the dead will bless the offeror or the entire tribe.<sup>163</sup> The dead can serve as intermediaries between the living and supernatural entities.<sup>164</sup> Native American adolescents, particularly boys, must go on a vision-quest as part of their transition to adulthood; the dead can serve as guardians to the adolescents.<sup>165</sup> Skulls of non-tribal decedents are sometimes worshipped.<sup>166</sup> A Native American who buries the scattered bones of another is said to be rewarded therefore.<sup>167</sup> Grave desecrations can have disastrous results:

Ghosts return to earth to avenge some offense. Improper burial of a corpse, holding back belongings of the deceased, failure to kill a horse and a sheep for the use of the deceased, disturbing or taking away from the grave parts of the earthly body or things buried with it . . . may impel the ghost to return to claim belongings or to locate missing parts . . . .<sup>168</sup>

Some Native Americans talk to the dead,<sup>169</sup> although until European contact, Native Americans abhorred the mentioning of a decedent’s name.<sup>170</sup> Periodic reburial of human remains serves to tie the living to the dead.<sup>171</sup> To summa-

al/intellectual difference between people and animals”).

158. Cf. Dussias, *supra* note 142, at 107; *see also* Brown, *supra* note 36 (“As far as the [Paiute] thinks, further study is inflicting more pain on the spirit of that body, which is still alive . . .”).

159. *See* STARKLOFF, *supra* note 155, at 42-43; Axtell, *supra* note 154, at 74 (explaining that European missionaries, though able to somewhat influence Native Americans, were unable to alter Native American grave goods practice). Europeans considered the placing of material wealth into graves a waste; this perception may have started the onslaught of Native American grave robbing. *See* AXTELL, *supra* note 154, at 117. Because of the Native American demand for European goods, they sometimes disinterred their own ancestors in order to retrieve Native American goods with which to trade. *See id.* at 119.

160. *See* AKE HULTKRANTZ, BELIEF AND WORSHIP IN NATIVE NORTH AMERICA 96-97 (1981). *See also* ELLEN R. EMERSON, INDIAN MYTHS 172-201 (1965).

161. HULTKRANTZ, *supra* note 160, at 97.

162. *See id.* at 113.

163. *See id.* at 98-100. The origin of the potlatches—ceremonial feasts—is thought to be out of respect for the dead. *See id.* at 101.

164. *See id.* at 103; AXTELL, *supra* note 154, at 74.

165. *See* HULTKRANTZ, *supra* note 160, at 103; AXTELL, *supra* note 154, at 74 (explaining belief that spirit encountered on vision-quest accompanied adolescent the rest of his or her life).

166. *See* HULTKRANTZ, *supra* note 160, at 104.

167. *See id.* at 106.

168. JOHN J. COLLINS, NATIVE AMERICAN RELIGIONS 99 (1991) (quoting L.C. Wyman et al, *Navaho Eschatology*, UNIVERSITY OF NEW MEXICO BULLETIN #377 (1942)).

169. *See id.* at 107.

170. *See* AXTELL, *supra* note 154, at 126.

171. *See id.* at 115.

rize, Native Americans have:

a fear of the dead tempered by their affection for them. The conviction is spread that the dead help, destroy, or master one's existence in some mysterious way. People remember their achievements during life, their care, their wrath. As dead they continue to exert the same influence, but now in a supernatural nimbus. Unpremeditatedly, the living turn to them, talk to them, pray to them.<sup>172</sup>

Anglo-Americans will, for the most part, dismiss all of this as superstition, unverifiable by science. Arguably, Anglo-Americans could not understand these and other Native American practices even if they wanted to.<sup>173</sup>

Another fundamental difference between Native Americans and Anglo-Americans is the concept of property. The concept of privately owned property is foreign to many Native American tribes: "in traditional Native American societies no object could be conveyed by an individual because it was owned by the collective whole."<sup>174</sup> Although each tribe knew the borders of its hunting grounds and agricultural areas, the idea that land could be titled, bought and sold, and passed from one generation to the next was incomprehensible to Native Americans.<sup>175</sup> The impracticality of privately owned property was exemplified by Native American nomadism.<sup>176</sup> The lack of private property fostered an egalitarian society.<sup>177</sup> Native American children were taught to utilize property for the welfare of the community, not personal satisfaction.<sup>178</sup> Native Americans who rejected this collectivist mentality faced social ostracism or death.<sup>179</sup> The Native American concept of property is relevant to Kennewick Man because the idea of someone having the "right to possession" of human remains is offensive and incomprehensible. How can one own the dead?<sup>180</sup> Further, evidence suggests that Native Americans are unconcerned if human remains are repatriated to the wrong Native American group.<sup>181</sup>

Perhaps the biggest difference between Native Americans and Anglo-

172. HULTKRANTZ, *supra* note 160, at 114.

173. *Cf. Senate Hearing #1, supra* note 7, at 162 (statement of Bill Tallbull, Northern Cheyenne Tribe) ("[W]ithin the purview of the entire . . . United States government . . . we are highly doubtful that [anyone] exists who adheres to traditional beliefs and can address these concerns from the standpoint of intrinsic knowledge and insight that the practice of those beliefs through ceremonial instruction imparts."); *Cf. Dussias, supra* note 142, at 102 (explaining that government agents unable to understand Black Hills region in South Dakota as anything other than a tangible resource); DELORIA, *supra* note 36, at 251 (stating scientific community was unable to credit non-scientific explanations for phenomena).

174. SENATE REPORT, S. REP. NO. 104-473, at 7 (1990); *Senate Hearing #1, supra* note 7, at 174 (statement of Haudenosaunee Grand Council of Chiefs) (collectively claiming all tribal remains and stating that the tribe's remains are the ongoing responsibility of each generation). Mr. Minthorn would apparently rebury *all* human remains. *See* Minthorn, *supra* note 30.

175. *See* ALICE MARRIOTT & CAROL K. RACHLIN, AMERICAN INDIAN MYTHOLOGY 10 (1968).

176. *See* ROY H. PEARCE, SAVAGISM AND CIVILIZATION 72-73, 120 (rev. ed. 1988).

177. *See id.* at 83-84.

178. *See* STARKLOFF, *supra* note 155, at 78-79.

179. *See* HULTKRANTZ, *supra* note 140, at 109 (describing the culture of the Zuni tribe). Collectivism was most pronounced in agricultural tribes; many hunting tribes allowed the individual much more freedom. *See id.* at 129-130.

180. *See Senate Hearing #2, supra* note 91, at 112 (statement of Paul Bender, Heard Museum).

181. *See Senate Hearing #1, supra* note 7, at 367 (suggesting repatriation is appropriate simply because of general location of the remains).

Americans is how science is valued. Whereas Anglo-Americans perceive science as an objective, important practice in a world where technology is the key to competing in a world economy, Native Americans are indifferent or even hostile toward science. If disputes such as Kennewick Man are to be resolved by a balancing of human rights versus scientific rights, Native Americans might view the science scale as well nigh empty: "I can't imagine the kind of benefit we might get from research on human remains that can compensate for the negative impact that this longstanding violation of human rights has had on the mental health of our American Indian and Alaskan Native communities."<sup>182</sup> In describing a dispute over whether an arrowhead would be reinterred, one Native American spokesperson simply stated the arrowhead had no scientific value.<sup>183</sup> The same person advocated reburying a group of remains which had not been identified.<sup>184</sup> In the balance between human rights and scientific rights, the Native American viewpoint sees the scales heavily weighted toward human rights.<sup>185</sup> Native Americans argued that, with respect to museum holdings, no further research should be allowed because the bones had already been held for so long.<sup>186</sup> Native Americans suggested that the review committee contain no anthropologists or archaeologists,<sup>187</sup> and/or that the committee be involved with the decision of whether the items fall within the scientific exception.<sup>188</sup> Native Americans argued that the scientific exception should be subject to tribal consent: "I wonder whether a scientific study, against an affiliated tribe's expressed will, is morally or legally justified."<sup>189</sup> Finally, Native Americans fear that the scientific exception may amount to a giant loophole which will preclude repatriation of numerous remains:

[T]he Pawnee Tribe has requested a specific, empirical showing of the remaining scientific value in . . . Pawnee remains . . . . Instead, all we have heard are: speculation as to possible, unnamed future uses; glittering generalities (such as "I don't believe in book burning"); and conclusory allegations of overriding scientific importance without any supporting facts to enable anyone to evaluate the validity of the claimed impor-

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182. *Senate Hearing #2, supra* note 91, at 77 (statement of Dr. Emery Johnson). Dr. Johnson based his opinion on his review of the National Library of Medicine. *See id.*

183. *See id.* at 57 (statement of Edward Lone Fight, National Congress of American Indians).

184. *See id.*; *see also* Johnson, *supra* note 8. Arizona Native Americans cannot agree who is most culturally affiliated with over a thousand skeletons excavated pursuant to a dam expansion but all tribes want skeletons reburied with little or no study. *See id.*

185. *See Senate Hearing #3, supra* note 146, at 37 (statement of Chief Wallulatum, Affiliated Tribes of Northwest Indians); *See id.* at 120 (statement of Suzan Harjo, National Congress of American Indians) ("There is a community of interest that seems to value scientific practices more than Indian and Native religious practices. We believe that this value judgment is wrong . . . .").

186. *See Senate Hearing #2, supra* note 91, at 50 (statement of Edward Lone Fight, National Congress of American Indians); *but see Senate Hearing #2, supra* note 7, at 49 (statement of Dean Anderson, Smithsonian Institution) (analogizing each set of remains to a reference book the importance of which might be known in the future when scientific techniques improve).

187. *See Senate Hearing #2, supra* note 91, at 50.

188. *See id.* at 552 (statement of Michael Pablo, Confederated Salish and Kootenai Tribes of the Flathead Nation).

189. *See id.* at 112 (statement of Paul Bender, Heard Museum) (prefacing his remark by suggesting tribal consent be required for scientific research); *see id.* at 269-70 (statement of Jerry Flute, Association of American Indian Affairs).

tance. . . . [I]f the remaining scientific value in these specific remains cannot be articulated by anyone at this late date, it should be obvious that such value is marginal, cumulative, or non-existent, because no scientific value sufficient to overcome the legal, cultural and religious rights of the Pawnee people is self-apparent after all these years of prior scientific studies of these remains.<sup>190</sup>

Evidence also suggests that a general distrust and contempt of the scientific community runs high in Native American circles. Notable Native American scholar Vine Deloria, Jr. in *Red Earth, White Lies: Native Americans and the Myth of Scientific Fact*, attacks Western science and religion.<sup>191</sup> Beginning with the split of religion and science in the Middle Ages, Deloria argues, scientists increasingly took on the role of priests as society, unable to understand for itself, looked to and believed in scientific explanations for its problems.<sup>192</sup> The result is a "willing conspiracy"<sup>193</sup> where scientists, instead of objectively criticizing each other, are quick to accept another academician's theories so that their status within the university and profession is assured.<sup>194</sup> The primary purpose of graduate school is to make "scholars and scientists . . . socially acceptable to people already entrenched in the respective professions."<sup>195</sup> Specialization within the sciences has led to "millions of irrefutable facts" which go unchallenged because scientists have no knowledge of related, though distinct, fields and because of doctrinal pressures.<sup>196</sup>

Deloria details the reasons why evolutionary theory is founded on very weak evidence and that copious data which detract from the theory are ignored because of "doctrinal considerations."<sup>197</sup> The Bering Strait theory is also an unfounded assumption which was asserted a very long time ago and has since remained largely unchallenged because of scientific dogma:

Discordant facts and experiments are simply thrown away when they do not fit the prevailing paradigm. Once a theory such as the progression of human evolution, the Bering Strait land bridge, or the big-game hunters is published, it is treated as if it was PROVEN and it is then popularized by people who rarely read the original documents and vigorously defended by scholarly disciplines more fiercely than they would defend our country if called upon to do so.<sup>198</sup>

190. *Senate Hearing #1, supra* note 7, at 252 (statement of Steven Moore, Native American Rights Fund).

191. DELORIA, *supra* note 36, at 15.

192. *See id.* at 16-17; HIGHWATER, *supra* note 142, at 32.

193. DELORIA, *supra* note 36, at 50.

194. *See id.* at 41-43.

195. *Id.* at 54.

196. *See id.* at 58.

197. *See id.* at 68-70; *see also* Johnson, *supra* note 8 (statement of Sebastian LeBeau, repatriation officer for the Cheyenne River Sioux).

We never asked science to make a determination as to our origins. We know where we came from. We are the descendants of the Buffalo people. They came from inside the earth after supernatural spirits prepared this world for humankind to live here. If non-Indians choose to believe they evolved from an ape so be it. I have yet to come across five Lakotas who believe in science and in evolution.

*Id.*

198. DELORIA, *supra* note 36, at 231; *see also* Johnson, *supra* note 8 (statement of Larry Benallie, Navajo archaeologist) ("There's a real feeling that [Native Americans have] been here forever. The Bering Strait

The Bering Strait theory also ensues from an Anglo-American desire to deny Native Americans the argument that they were here a very long time, as opposed to a few thousand years, before Europeans arrived.<sup>199</sup>

Speaking of time, Deloria attacks the idea of scientific methods which supposedly date artifacts, a practice, of course, central to the debate which Kennewick Man epitomizes.<sup>200</sup> Deloria postulates that current carbon dioxide levels, which affect dating techniques, may be vastly different than those of previous epochs.<sup>201</sup>

If Deloria's book is any indication of Native American perceptions of science, we can expect disputes such as Kennewick Man to be resolved by power, not reason, because compromise cannot be achieved if Native Americans perceive scientists as incredible where Anglo-Americans perceive scientists as possessing objective facts and reasonable opinions.

Evidence suggests that perceptions of science as a servant of racism are extant,<sup>202</sup> and Deloria argues that racism is "inherent" in the scientific community in general.<sup>203</sup> The original acquisitions of Native American remains were for the purpose of testing the theory that Native Americans were intellectually inferior because of smaller cranium size.<sup>204</sup> The fact that the Smithsonian Institution, for example, has 15,000 skeletons of Africans, Orientals, and Europeans has largely gone ignored.<sup>205</sup>

Anglo-American law, including NAGPRA, assumes the overriding and exclusive importance of logic.<sup>206</sup> Because Native Americans believe, however, that cognitive understanding is finite and that many of the most important things in life, including one would assume the perception of human remains, are understood only by spiritual means,<sup>207</sup> irreconcilable disputes under NAGPRA are inevitable. Mr. Minthorn asserts, for example, that his people believe that Native Americans did not cross the Bering Straits. *Belief*, of course,

theory makes logical sense, but it doesn't override the traditional belief at all. That comes first.").

199. DELORIA, *supra* note 36, at 74-84.

200. *See id.* at 246-48. Scientific findings exposed by Deloria include freshly slaughtered seals dated at 1,300 years old, shells of living mollusks dated at 2,300 years old, and wood growing from a live tree dated at 10,000 years old. *See id.* at 247.

201. *See id.* at 246-47.

202. *See Senate Hearing #1, supra* note 7, at 175 (noting science rooted in Western racist theory of manifest destiny, which theory continues today); HIGHWATER, *supra* note 142, at 33 (noting science used to justify perception that Anglo-American culture was evolution from inferior lower cultures, such as Native American cultures).

203. *See DELORIA, supra* note 36, at 49; *Cf. DURAN, supra* note 141, at 4-5 (explaining that cross-cultural studies are difficult or impossible because "all the human sciences are founded on the Western philosophical tradition").

204. *See H.R. REP. NO. 101-877, reprinted in U.S.C.C.A.N. 4367, at 4369; HIGHWATER, supra* note 142, at 34.

205. *See Senate Hearing #3, supra* note 146, at 66 (statement of Robert McCormick, Smithsonian Institution) (stating that the reason the Smithsonian houses a disproportionate number of Native American remains is because the majority of the Smithsonian's archeological projects have occurred in North America).

206. *Cf. DURAN, supra* note 141 ("[M]ost Western [psychologists] are deeply entrenched in a worldview that will not allow for openness outside of rational empirical thought processes.").

207. *See WALTER L. WILLIAMS, THE SPIRIT AND THE FLESH 20 (1986).*

cannot be argued with.<sup>208</sup>

The irreconcilable cultural differences between Native Americans and Anglo-Americans are thought to be the reason for Native American and Anglo-American military conflict, for if Anglo-Americans could not make Native Americans conform to Anglo-American ideas—e.g., private property, rational empiricism, monotheism—they, instead, conquered them.<sup>209</sup> By analogy, if Native American and Anglo-American perceptions of human remains are irreconcilable, disputes such as Kennewick Man will be resolved by sheer power, albeit legal, rather than military, power. No compromise is possible where belief meets logic.

#### V. SOME SUGGESTIONS FOR RESOLUTION OF THE DEBATE WHICH KENNEWICK MAN EPITOMIZES

By far the most important thing Congress could do to help resolve disputes such as Kennewick Man is to amend NAGPRA to expressly allow or even require scientific study to determine cultural affiliation where disagreement as to cultural affiliation exists.<sup>210</sup> As a threshold issue, Native Americans are only entitled to repatriation of Native American remains under NAGPRA, not all remains.<sup>211</sup> To decide, as the Corps has, that remains may properly be deemed Native American because of their age and location alone begs the question of whether the remains are culturally affiliated to Native Americans.<sup>212</sup> A statutory framework could be created which would establish scientific procedures for determining cultural affiliation beginning with non-destructive analysis and proceeding incrementally toward whatever analysis is required to reasonably establish cultural affiliation.<sup>213</sup>

Congress should also make a value judgment as to the reliability of science to determine cultural affiliation. A statute requiring scientific analysis to determine cultural affiliation will be of little help to those who do not believe in

208. Cf. Johnson, *supra* note 8 (statement of Clement Meighan, anthropologist) (“Indians have a revealed wisdom that is not to be challenged, not to be questioned or investigated.”).

209. See PEARCE, *supra* note 176, at 73. Cf. *id.* at 131 (arguing that the absence of private property in Native American culture inevitably led to conquest by Anglo-Americans). Some believe that the Western idea of human conquest, over the world, other humans, animals, and plants, is foreign to Native American worldviews in which humans are neither above nor below other life forms. See DURAN, *supra* note 141, at 15; Cf. Strickland, *supra* 138, at 183-184 (noting that Anglo-American power is conceived of politically and economically, while Native American power a “metaphysical reality that permeates the cosmos”).

210. See H.R. REP. NO. 101-877, reprinted in U.S.C.C.A.N. 4367, 4390-91 (letter from Scott Sewell, Department of Interior) (suggesting NAGPRA be amended to allow for “additional studies where necessary to ensure a correct determination of affinity”).

211. See 25 U.S.C. § 3002(a)(1).

212. See *Senate Hearing #1*, *supra* note 7, at 67 (statement of Dean Anderson, Smithsonian Institution) (repatriating of remains on location is speculation); *id.* at 80 (statement of Vincent Johnston, Chief Onondaga Tribe) (noting that the Ohio River Valley is the common hunting ground of numerous tribes and contains thousands of human remains); see also Johnson, *supra* note 8 (after permission given by Utes tribe, DNA testing of 8,000 year old remains failed to prove cultural affiliation but remains were nonetheless reburied).

213. See *Senate Hearing #2*, *supra* note 91, at 50 (statement of Edward Lone Fight, National Congress of American Indians) (noting that scientific analysis, which could involve burning bones, is reprehensible in Mr. Lone Fight’s view).



scientific analysis.

The statute could also be amended to establish a *per se* rule providing that remains of a certain age, e.g., more than 500<sup>214</sup> years old, are presumed to be culturally affiliated with no one. This presumption could, of course, be rebutted by evidence establishing cultural affiliation using the standard already employed in NAGPRA. This *per se* rule could perhaps be incorporated into a congressional standard for application of the major scientific benefit test because human remains are one of only a handful of ways to gather knowledge of the prehistoric period.<sup>215</sup>

Because some remains will be culturally unidentifiable even with scientific testing,<sup>216</sup> Congress should take responsibility for this delicate and politically unpopular issue by amending NAGPRA. Because Native Americans and scientists are not going to be able to agree on this issue,<sup>217</sup> Congress, as a politically accountable body, should make what is best described as a value judgment.

Additionally, the aboriginal land test should be deleted from NAGPRA. A reading of the legislative history demonstrates that Congress never contemplated the vast potential of this provision. The aboriginal land test is overly susceptible to abuse by aggressive litigants<sup>218</sup> because the provision presumes that virtually all human remains found west of the Mississippi River are culturally affiliated to Native Americans.<sup>219</sup> As Kennewick Man demonstrates, that is an unreasonable assumption.<sup>220</sup> Already a tribe has attempted to use NAGPRA to claim remains before they were even found.<sup>221</sup> Congress should expressly address this possibility rather than leave it to the judiciary. The fact that remains were found on aboriginal land would, of course, still be *relevant* toward proving cultural affiliation. Moreover, that the regulations ostensibly allow a tribe to argue today that certain land was aboriginally occupied by it without a judgment of the Indian Claims Commission or the United States Court of Claims<sup>222</sup> makes this already vast provision susceptible to further enlargement.

In the case of intentional excavations on tribal land, the requirement of tribal consent should be deleted. Again, this provision presumes cultural affiliation merely because of geographical location and ignores that many Native American tribes were relocated onto their current tribal land. This provision

214. This number is perhaps appropriate because archeological evidence ceases to be the sole evidence of humanity as written documents appear.

215. See *Senate Hearing #1*, *supra* note 7, at 62 (statement of Cheryl Munson, Society for American Archaeology). Study of human remains can reconstruct marriage systems, migration patterns, dietary practices, epidemiology of diseases, pollutants. See *id.*

216. See *supra* note 212.

217. See *supra* note 86 and accompanying text.

218. See Johnson, *supra* note 8 (since NAGPRA tribes have already "stopped important archaeological research on hundreds of prehistoric remains").

219. See *supra* note 68 and accompanying text.

220. See H.R. REP. NO. 101-877, at 4390 (letter from Scott Sewell, Department of the Interior) (suggesting that the aboriginally occupied test be deleted); see also Johnson, *supra* note 8 (10,600 year old skeleton claimed and reburied by Shoshone Native Americans even though many scientists believe Shoshone have occupied the area for fewer than a thousand years).

221. See *supra* notes 109-115 and accompanying text.

222. See *supra* note 102 and accompanying text.

could be read as not subject to the major scientific benefit test because that test only occurs in the context of repatriation. If the remains are found on tribal lands and consent is not given, cases would arise where there would be nothing to repatriate. The remains would simply stay where they are. If Congress intended that Native Americans, because of notions of sovereignty, should be allowed to deny repatriation no matter the scientific value or cultural affiliation of remains, it should do so expressly.

## VI. CONCLUSION

NAGPRA is an example of what happens when a good idea is incorporated in poorly drafted legislation. A reading of the statute and especially the legislative history indicates that too much focus was placed on issues which were not very controversial and truly difficult issues, such as Kennewick Man, were noted as a serious problem—a serious problem which no one took the time to address. Where remains are clearly identifiable, either by lineal descendancy or cultural affiliation, the scientific, museum, and Native American communities are in basic agreement that repatriation is appropriate.<sup>223</sup> This agreement will likely take care of the vast number of cases involving human remains and cultural items.

To presume the cultural affiliation of human remains based merely on geographical location, however, overlooks the fact that many Native American tribes were nomadic and that science has yet to prove many of its theories. If Kennewick Man is over 9,000 years old and Caucasian, explaining how he got where he was, over 8,000 years before Caucasians were supposed to have reached the Americas, is invaluable knowledge. While Native American tribes may be content to rebury any and all human remains, that decision should be expressly made, if at all, by Congress. If NAGPRA, as the Corps, Native American tribes, and I agree, arguably does not allow scientific testing to determine cultural affiliation, repatriation may continually keep irreplaceable knowledge from those who value science.

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223. See *Senate Hearing #1*, *supra* note 7, at 66 (statement of Dean Anderson, Smithsonian Institution).

