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The New Challenge to Native Identity: An Essay on “Indigeneity” and “Whiteness”

Rebecca Tsosie *

INTRODUCTION

It has never seemed controversial that Native peoples in the United States are “indigenous.” In fact, pow-wow pundits often joke that in the 1940s, “Indians” were classified by U.S. census takers as being of the “Mongolian race,” and then, by the 1960s, they had their own “American Indian” category, until the 1980s, when they became “Native American.” However, that term became somewhat discredited in the 1990s when Native political activists disclaimed “American” identity in favor of the more globally politically correct term “indigenous peoples.”¹ “Today,” the joke continues, “I’m Other.”² This joke has always inspired enthusiastic howls from the crowd, most of whom understand themselves in the context of a particular tribal identity—Dine, Tohono O’odham, Lakota. Unfortunately, however, the tide has turned. Now there is a concerted effort to challenge the notion of “indigeneity” and to suggest that the concept is somehow distinct from Native identity, and furthermore, may be constructive of Euro-American identity!³ This essay builds upon Cheryl Harris’s claim that “whiteness” is a form of “property” and suggests that the current challenges to Native “indigeneity”

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1. Wallace Coffey, Remarks at the Arizona State University Cultural Sovereignty Lecture (Jan. 21, 2000). Mr. Coffey, a Comanche tribal leader and pow-wow emcee told this joke at a lecture on Cultural Sovereignty at Arizona State University.

2. *Id.*

3. See Christina Stage, *We Celebrate 100 Years: An “Indigenous” Analysis of the Metaphors That Shape the Cultural Identity of Small Town, U.S.A.*, in *WHITENESS: THE COMMUNICATION OF SOCIAL IDENTITY* 69 (Thomas K. Nakayama & Judith N. Martin eds., 1999).

respond to the perception that “privilege” and “status” have attached to the racial and cultural identity of Native peoples in recent years through various “special” legal rights.⁴ This article suggests that, with respect to indigenous peoples, the discourse of “whiteness” requires analysis within a global, as well as national context. This article examines four areas within which there is an active debate over “indigenous status”: political rights under international human rights law; cultural rights under international human rights law; rights to land and to ancestral human remains under domestic law; and rights to genetic resources. The root issue within each of these areas is who “owns” Native identity—political, cultural, ancestral, genetic—and what role does the concept of “indigeneity” play in these assertions of “ownership”? The article concludes by suggesting that Native cultural sovereignty, including tribal law and tribal epistemologies, will have an important role in asserting and maintaining Native rights to tangible and intangible tribal resources.

I. THE LINK BETWEEN RACIAL IDENTITY AND PROPERTY: “INDIGENEITY” AND “WHITENESS”

Critical race theory has explored the legal construction of race, providing a point of departure for scholars to discuss the construction of “White” identity. The link between racial identity and privilege is undeniable and is carefully illuminated by scholarly work on “whiteness,”⁵ and in particular by the theme of this conference, which is to explore the ways in which “whiteness” and “white privilege” create, entrench, and reproduce themselves. But what possible relationship could exist between “whiteness” and contemporary debates over “indigeneity”? This relationship is perhaps best understood within the context of work on “race-consciousness,” which is often held to comprise at least two different aspects. First, some scholars have responded critically to the notion that the legal system is (or should be) “color-blind.”⁶ Under this view, we ought to

4. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1995).

5. See, e.g., WHAT WHITE LOOKS LIKE: AFRICAN-AMERICAN PHILOSOPHERS ON THE WHITENESS QUESTION (George Yancy ed., 2004); WHITENESS: THE COMMUNICATION OF SOCIAL IDENTITY (Thomas K. Nakayama & Judith N. Martin eds., 1999).

6. IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 19

explicitly recognize and encourage recognition of races and racial difference. Second, scholars increasingly acknowledge the importance of race to personal identity and world view.⁷ This perspective seems to respond to the idea that constituent citizens of a “color-blind” society ideally engage from an “objective, race-less perspective.”⁸ If our race, ethnicity and culture produce our individual identity, then we are constituted as members of groups and not purely as individuals. The values shared by members of those groups—however different from those of other groups—inform our particular “race-consciousness.” Not surprisingly, the law works in concert with social norms that perceive “group-based” claims as unnecessary, or even downright dangerous.⁹ Professor Harris asserts, for example, that the law’s denial of the existence of racial groups is based partly on a desire to disclaim the continuing effects of past (overt) racial subordination, and partly on the liberal notion that rights, including constitutional rights, inhere in individuals and not in groups.¹⁰ Liberalism thus asserts that “equality” mandates only the equal treatment of individuals, and does not require that “groups” are made whole, even if past discrimination was specifically targeted against those groups.¹¹

Not surprisingly, the bulk of the scholarship on race consciousness was generated from “outsider” perspectives initially, which expressly or implicitly meant that “whiteness” was the unexamined “norm” in the law, and that race-consciousness entailed an affirmative recognition of “Black” or “Latino” or “Native” identity as an epistemological as well as social phenomenon. The recognition of separate group identity as a positive force for social change was a key function of the literature on race consciousness.¹² Ultimately, however, some scholars began advocating race-consciousness as a step toward the elaboration of “a positive White

(1996).

7. *Id.* at 19–20.

8. *Id.* at 20.

9. Harris, *supra* note 4, at 1761.

10. *Id.*

11. A good example of this perspective is the continuing unwillingness of United States politicians and their constituents to support group-based reparations for slavery.

12. LÓPEZ, *supra* note 6, at 20–21.

racial identity,”¹³ leading critics to charge that this, in fact, already exists and may further subordinate minority identities as “tropes of hierarchical difference.”¹⁴ The debate over “indigenous” identity tests out both theories. How does the construction of “indigeneity” track efforts to define “Native American” identity as separate from, and prior to “white” identity? And to the extent that the descendants of European colonizers now seek to define their identity as “Americans” (or “Pakeha” in New Zealand) as different from that of their European forebears, how do they use the trope of “indigeneity” to support their own status and privilege? And what impact does this have on Native peoples in those countries? In many ways, the ultimate question is one of appropriation, and it is best evaluated through a historical, as well as contemporary, lens.

As Ian F. Haney López has demonstrated, not only is race “socially constructed,” but the law is one of the most powerful mechanisms available in this process.¹⁵ “Law constructs race,” and it does so within the larger context of society.¹⁶ As social knowledge and social norms shift, so the role of the law in constructing race shifts. However, as Haney López further notes, the “law does more than simply codify race.”¹⁷ Legislatures and courts not only “fix the boundaries of race in the forms we recognize today,” but they also “define the content of racial identities” and use this to “specify their relative privilege or disadvantage in U.S. society.”¹⁸

In relation to “whiteness,” Cheryl Harris observes that “the law’s construction of whiteness defined and affirmed critical aspects of identity (who is white); of privilege (what benefits accrue to that status); and of property (what *legal* entitlements arise from that status).”¹⁹ “Whiteness at various times signifies and is deployed as identity, status, and property, sometimes singularly, sometimes in tandem.”²⁰ Similarly, the law is now turning to examine critical

13. *Id.* at 15.

14. *Id.* at 21.

15. *Id.* at 10.

16. *Id.*

17. *Id.*

18. *Id.*

19. Harris, *supra* note 4, at 1725.

20. *Id.*

aspects of Native identity, deciding who is “indigenous” (rather than who is “Indian” or “Native American”) and what rights accrue from that status.²¹ Ironically, the legal effort to define “indigeneity” seems focused on narrowing the category of rights-holders in order to preserve status and entitlements for non-indigenous people.²² In the United States, “white identity” appears to be crafting an “indigenous” component.²³

Harris’s work provides a detailed historical analysis of the connections between property, identity and the law.²⁴ From the country’s inception, America’s social, legal and economic institutions utilized conceptions of race and property to establish and maintain the racial and economic subordination of non-White peoples. In the earliest years, this was done primarily through the use of racial hierarchies and stereotypes that “justified” the enslavement of Africans and the dispossession of Native people from their lands and resources. Jurists posited that both were uncivilized groups of people who could not qualify for citizenship or rights commensurate with those of civilized persons.²⁵ Africans were deemed to be on the lowest order of humanity, little more than chattel, and so, were completely subject to the will of their “master,” who could “discipline” them (read as assault or murder) at will without fear of liability for tort damages or criminal prosecution.²⁶ African

21. The Draft Declaration on The Rights of Indigenous Peoples, for example, does not yet contain a definition of “indigenous peoples” because of the general disagreement among the nation-states about who is “indigenous.” See U.N. Draft Declaration on the Rights of Indigenous Peoples, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., U.N. Doc. E/CN.4/Sub.2/2/Add.1 (1994) [hereinafter Draft Declaration].

22. See generally PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 1–10 (2002) (outlining arguments for and against the conceptual category of “indigenous rights” at the international level).

23. See Stage, *supra* note 3.

24. See Harris, *supra* note 4.

25. For example, the U.S. Constitution, in its original form, did not consider African-American slaves or Native Americans full legal persons or entitled to the full rights of “citizens”.

26. See, e.g., *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829) (holding that defendant’s assault upon a slave is not a crime against the state subject to prosecution because the slave has “no will of his own” and his role in life is purely to “profit” his master). This case demonstrates how the law permitted “uncontrolled authority” over the body of the slave without criminal liability. The only cause of action available would have been the master’s tort action against the

enslavement commodified human beings into a “resource” that could be exploited by White “owners.”

Native Americans were considered by some Enlightenment philosophers and politicians to be one step up in the evolutionary order.²⁷ They were noble “savages” living in a “state of nature,” and these Europeans romanticized their impressions of Native people by imagining that at the dawn of civilization their own ancestors likely shared such a free-spirited and nomadic life.²⁸ As Thomas Jefferson stated in a 1785 letter:

I am safe in affirming, that the proofs of genius given by the Indians of North America, place them on a level with whites in the same uncultivated state. The North of Europe furnishes subjects enough for comparison with them, and for a proof of their equality. I have seen some thousands myself, and conversed much with them, and have found in them a masculine, sound understanding. . . . I believe the Indian, then, to be in body and mind equal to the white man. I have supposed the black man, in his present state, might not be so; but it would be hazardous to affirm, that, equally cultivated for a few generations, he would not become so.²⁹

Of course, “savages” did not have a legal system or lifestyle capable of maintaining actual property rights that would have to be respected as a “preexisting legal title” to the lands “conquered,” as would another “civilized” nation. Therefore, the Doctrine of Discovery that was used to claim “title” by the first European sovereign to discover “vacant lands” was extended to lands occupied

perpetrator for “permanent impairment” of the economic value of the slave.

27. See DAVID GETCHES ET AL., FEDERAL INDIAN LAW 126 (2004) (quoting Count de Toqueville’s statement that “[t]he Indians . . . have unquestionably displayed as much natural genius as the peoples of Europe in their greatest undertakings; but nations as well as men require time to learn”). The actual treatment of Native people, however, was not consistent with this view, as demonstrated by the genocidal military campaigns levied against Native peoples and the forced removal of many Nations from their traditional lands.

28. See generally JEAN-JACQUES ROUSSEAU, A DISCOURSE ON INEQUALITY (1755).

29. Letter from Thomas Jefferson to the Marquis de Chastellux (June 7, 1785), in THOMAS JEFFERSON: WRITINGS 801 (Merrill D. Peterson ed., 1984), cited in JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 185 (2000).

by “uncivilized” peoples.³⁰ Native peoples’ occupancy of the lands did not constitute legal possession for purposes of claiming title. Again, the racialized identity of “Indians” as the “Savage Other” was contrasted with the “civilized” European who was capable of holding “title” to the land. Like many of his peers, John Quincy Adams drew on Locke’s work to assert that Indians had a “questionable” claim to title as “first possessors” because these lands “lay in the common, left ‘wholly to nature,’” and thus were a “proper subject of appropriation by one’s labor.”³¹ “The right of the hunter could not preempt” the right of the millions of settlers who actually “needed” the land and would make constructive use of it.³² Of course, none of these men actually questioned whether Indians were actually first in time. Rather, they focused only on the question of why being first in time didn’t give rise to the legal rights that ordinarily would follow from this status.

As Harris demonstrates, in a society structured on racial subordination, “white privilege” became the expectation and the law constructed “whiteness” as an objective fact, designed to govern the relationship of different members of society according to the reification of a “thing” (whiteness).³³ Thus, although slavery was ultimately abolished and the reconstruction era-amendments to the Constitution enacted in the search for “equality” of citizenship, “whiteness” still was used to confer a “host of societal privileges, in both the public and private spheres,” including rights to vote, travel freely, attend particular schools, and marry a person of one’s choosing.³⁴ *Plessy v. Ferguson*³⁵ stated that separate public facilities

30. See, e.g., *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) (holding that discovery resulted in fee ownership of land in the United States by the British Crown, and then by the United States as its successor in interest, except for the Indians’ “right of occupancy”). Most of the common law jurisdictions followed this line of thinking to justify the British Crown’s ownership of lands occupied by Native peoples, pending extinguishment of the Indians’ “right of occupancy.” Australia was the lone exception, deeming Native occupancy to be absolutely irrelevant until 1992, when the Australian Supreme Court decided *Mabo v. Queensland*, [No 2] (1992) 175 CLR 1, which provided that Native people had a form of “title” which should be respected until the Europeans exercised their “preemptive” right to acquire the land from the Natives.

31. Harris, *supra* note 4, at 1722 (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT).

32. *Id.* at 1722 n.46.

33. *Id.*

34. *Id.* at 1745.

did not interfere with equality of citizenship because only social rights were affected by these policies and not political rights.³⁶ Similarly, until the United States Supreme Court's 1967 decision in *Loving v. Virginia*,³⁷ many state courts upheld laws prohibiting the miscegenation of the races as purely designed to protect the "social" values and practices of the state and its citizens, and found that these laws did not impair any "political" rights.³⁸

Even after the twentieth-century civil rights era, Harris claims that the law's approach to group identity continues to reproduce subordination.³⁹ In the older cases this occurred through the explicit "race-ing" of a group: assigning a racial identity that supported the perception that the group had an "inferior" status.⁴⁰ In the contemporary era, the backlash against affirmative action has worked to "erase" racial group identity. The old "color-blind" notion used to overtly discriminate against racial minorities is now used to assert that they do not exist!⁴¹ We are all "equal" because "race" is irrelevant for legal purposes.⁴² Importantly, Harris's research demonstrates that the "property interest in whiteness" still exists.⁴³

Over time it has changed in form, but it has retained its essential exclusionary character and continued to distort outcomes of legal disputes by favoring and protecting settled expectations of white privilege. The law expresses the dominant conception of "rights," "equality," "property," "neutrality," and "power": rights mean shields from interference; equality means formal equality; property means settled expectations that are to be protected; neutrality means

35. 163 U.S. 537 (1896).

36. *Id.* at 551–52.

37. 388 U.S. 1 (1967).

38. *See, e.g.,* *Naim v. Naim*, 87 S.E.2d 749, 750 (1955) (upholding constitutionality of statute making it "unlawful for any white person . . . to marry any save a white person, or a person with no other admixture of blood than white and American Indian"); *Loving v. Virginia*, 388 U.S. 1, 6 (1967) (noting that, as of 1967, Virginia was one of sixteen states which prohibited and punished marriages on the basis of racial classifications).

39. Harris, *supra* note 4, at 1761.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 1778.

the existing distribution, which is natural; and, power is the mechanism for guarding all of this.⁴⁴

I would like to suggest, at least with respect to Native peoples' rights claims, that we must expand the discussion about "whiteness" to include the international dialogue about "human rights" and its implications for Native peoples' substantive rights to land, ancestral remains, and genetic resources at the domestic level. In doing so, I equate the dialogue about "whiteness" in American society with the dialogue about "colonialism" at a global level. Importantly, both dialogues are about politics, power, and property in the sense of "ownership" claims to valuable and scarce resources. For indigenous peoples, these areas have always overlapped, and they continue to coalesce in important ways in both the national and international discourses about rights.

II. "INDIGENEITY" AND POLITICAL RIGHTS

International human rights law increasingly has become a focal point for indigenous peoples' claims for political and cultural rights within the nation states that colonized them. The leading scholar on international indigenous rights, S. James Anaya, has advocated building a human rights framework for indigenous rights founded on the idea that "self-determination" constitutes a "universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies."⁴⁵ Of course, the concept of self-determination has done a great deal of work in the decolonization era to dismantle unjust colonial orders and reconstruct nations that were involuntarily colonized.

Not surprisingly, there have been vehement challenges to the effort to recognize indigenous groups as "peoples" entitled to a right of self-determination. Article 1 of the Covenant on Civil and Political Rights guarantees that all "peoples" have a political right to self-determination.⁴⁶ However, under Article 27 of the same instrument,

44. *Id.*

45. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 98 (2004).

46. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1, 999

minority, ethnic and religious groups have a different sort of right, a cultural right to freely practice their own customs and religions within the pluralistic nation's society.⁴⁷ Do "indigenous" groups constitute "peoples" or are they merely "ethnic groups"? It appears to matter a great deal for purposes of the rights claim. If indigenous peoples have a true "political" right to self-determination, then they have a full range of rights to governmental autonomy and a territorial base for that autonomy that arguably would justify remedial actions to correct present injustice, including, in particular cases, a right to secession from the nation-state. If they merely have "cultural rights" as ethnic groups, then they would seem to have only have a more limited right to "self-government" within the larger framework of the nation-state, including the right to freely practice their religions and customs and speak their languages. The "political/cultural" rights distinction within contemporary international human rights law is almost reminiscent of the old "political/social" rights distinction made in the years of *Plessy*'s "separate but equal" doctrine.⁴⁸ If indigenous peoples are recognized as "peoples," but not recognized as having a full right of self-determination, does that ensure their equality with other "peoples"? Does it ensure their equality with other individual "citizens" of the nation-state? It is almost ironic that the European "discoverers" set up a sixteenth-century tribunal to adjudicate whether Native peoples were "people" at all for purposes of European expansion into the New World (*e.g.*, could they be granted the "status of legitimate humans in the eyes of the church and state"),⁴⁹ while today the issue is whether they have a political identity that is coequal with the other "peoples" in the world.⁵⁰ The terms might change, but the hierarchies of privilege continue.

U.N.T.S. 171.

47. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 27, 999 U.N.T.S. 171.

48. 163 U.S. 537, 551-52 (1896).

49. SHARON HELEN VENNE, *OUR ELDERS UNDERSTAND OUR RIGHTS: EVOLVING INTERNATIONAL LAW REGARDING INDIGENOUS RIGHTS* 7 (1998).

50. For a very interesting discussion of the 1550 Council of the Indies that met to debate this issue, as well as the implications of the debate for indigenous peoples within modern human rights law, see *id.* at 6-8.

Of course, none of this has yet been decided. The draft Declaration on the Rights of Indigenous Peoples has been winding its way through various subcommittees and working groups for several years, and has not even begun the formal process that would result in an international convention on the subject.⁵¹ However, even at these initial stages of formulation, there has been an active debate among the members of the United Nations as to whether indigenous peoples are, in fact, “peoples” and whether they should be recognized as having a right to “self-determination.”⁵² The draft Declaration currently asserts that indigenous peoples have a right to self-determination,⁵³ which is in direct contrast to the previous human rights instruments on indigenous rights: ILO 107 (which maintained an assimilationist posture designed to ensure equality and nondiscrimination for citizens who are members of indigenous “populations”)⁵⁴ and ILO 169 (which does refer to “indigenous peoples,” but is careful to note that the use of the term “peoples” is *not* coextensive with the use of the term in other human rights documents, such as the Covenant on Civil and Political Rights).⁵⁵

In the end, this entire discussion may not revolve around the terminology of “peoples” at all, but rather the issue of whether “indigenous” status is even a category that merits global recognition. What *are* “indigenous” peoples? Should we draft an instrument to ensure a basic threshold of rights for those “peoples” that we categorize as “indigenous”? Are “American Indian,” “Alaska Native” or “Native Hawaiian” peoples “indigenous”? How about the multitude of groups in Africa, Asia, and Latin America who claim “indigenous” status? Many of these groups have very little in common with “federally recognized” tribes in the United States. So, how could they all share a uniform identity? Importantly, the draft

51. Draft Declaration, *supra* note 21.

52. See VENNE, *supra* note 49, at 68–96.

53. Draft Declaration, *supra* note 21, art. III.

54. The International Labor Organization Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 328 U.N.T.S. 247 (June 2, 1957).

55. The International Labor Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, I.L.O., 76th Sess., *reprinted in* 28 I.L.M. 1382 (1989).

Declaration does not contain a definition of “indigenous peoples,” which makes one wonder whether it is even a meaningful category for legal purposes.

Scholarship in this area is turning from a focus on the meaning of “peoples” to a discussion over whether “indigenous” is a meaningful category to assign rights. For example, Patrick Thornberry suggests that there is a complex “web of ethical, political and epistemological considerations justifying the use of ‘indigenous’, and its contestation.”⁵⁶ In particular, Thornberry draws on the legal dispute between scientists and five Native Nations from the Pacific Northwest over the remains of “Kennewick Man,” a skeleton believed to be approximately 8500 years old, to suggest that there are at least “four interwoven strands in ‘indigenous.’”⁵⁷ The first inquiry relates to the association of a people “with a particular place . . . a locality, a region, a country, a State.”⁵⁸ In this inquiry, “place” is of utmost importance, because it suggests the link of a people with an ancestral territory, as compared with “persons that are native generally to the region.”⁵⁹ The territorial connection implies “land rights” that are distinctive from those of other inhabitants of the region.⁶⁰

The second sense of “indigenous” is that it is “synonymous with prior habitation—‘we were here before you, so we are indigenous.’”⁶¹ Thornberry suggests that it is this “priority” claim that gives “indigenous” groups their “unique status.”⁶² If priority can be established, then the group is “indigenous.” If priority cannot be established, then “indigenous is meaningless.”⁶³ The term then applies to “everyone and no one.”⁶⁴ Thornberry asserts that many Asian states are inclined to assert that priority cannot be established in those states in the same way as in America, where Europeans

56. THORBERRY, *supra* note 22, at 35.

57. *Id.* at 37.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 38 (emphasis omitted).

62. *Id.*

63. *Id.*

64. *Id.*

clearly attempted to “discover” and “colonize” lands that were already inhabited by distinctive groups.⁶⁵

The third sense in which the term is used designates the status of some groups as the “original or first inhabitants.”⁶⁶ Not only are these groups “prior” in a historical sense, but they also assert that they are the “first human beings to inhabit a territory.”⁶⁷ Under such a claim, “origin” refers to “a point in time from which we trace subsequent developments.”⁶⁸ Although a claim to first occupancy would enjoy heightened moral and legal relevance, Thornberry asserts that “very few groups could claim such originality in this sense.”⁶⁹

In Thornberry’s view, the “fourth strand accounts for indigenous peoples as distinctive societies.”⁷⁰ This claim deals not with history or place, but concerns the nature of indigenous groups as “whole societies exhibiting cultural patterns which differ from those of the dominant society.”⁷¹ Although nineteenth-century jurists drew on indigenous peoples’ cultural differences as justification for refusing to accord them the political and territorial rights that would accrue to “civilized nations,” current human rights law construes cultural difference as a category requiring recognition through special “cultural rights” for non-dominant groups. Importantly, however, both uses of difference subordinate the political status of indigenous groups.

It is apparent that each of these strands of “indigeneity” is incomplete to assert the full range of rights claimed by indigenous peoples. Yet, it becomes incumbent upon the indigenous groups themselves to articulate those rights within the framework provided, which is itself limited by the categories and hierarchies that sustain privilege. Thornberry summarizes the various international human rights instruments that refer to indigenous groups and the recommendations of Special Rapporteurs and UN focus groups, concluding that there are a range of claimants to indigenous status

65. *Id.*

66. *Id.* (emphasis omitted).

67. *Id.*

68. *Id.* at 39.

69. *Id.*

70. *Id.* (emphasis omitted).

71. *Id.*

and that it is difficult to reconcile the fundamental nature of the claim, although some have tried to do so by using terms such as “populations,” “tribal groups,” “minority groups,” “colonized groups,” and “vulnerable populations,” all of which suffer problems of inconsistency and incompleteness.⁷² What is obvious, Thornberry concludes, is that “[t]he question of who is indigenous is mired in politics, suffused with ethical considerations and questions centering around the justifications for a new focus in human rights instruments and a specifically addressed body of rights.”⁷³ In other words, by examining the politics of the claim asserted, we can see what justifications are driving a willingness, or a refusal, to recognize a claim for “indigenous” status. By exploring the foundations of privilege, we can understand more about how and when a claim for indigenous status will be recognized. With that in mind, I will turn to three of the most contentious substantive areas for indigenous peoples’ rights claims: land, human remains, and genetic resources.

III. “INDIGENEITY” AND LAND RIGHTS

The issue of land rights has always been the primary area of contested claims between Native peoples and the United States government. This issue is replicated at a global level, and in those countries subject to colonization by the British Crown, the legal framework shares amazing similarity. In the United States, Canada, New Zealand and Australia, the Native peoples have been subjected to the “Discovery Doctrine,” which essentially holds that, upon discovery and settlement, the British Crown was entitled to maintain “sovereignty” and claim the lands to the exclusion of any other colonial sovereign.⁷⁴ In all countries except Australia, this meant that the Native peoples were recognized as having certain rights to occupy their traditional lands until they ceded that right to the Crown.⁷⁵ The concept of Native “aboriginal title” took hold in Canada, the United States, and New Zealand, and was ultimately extended to Australia in

72. *Id.* at 40–52.

73. *Id.* at 60.

74. *See supra* note 30 and accompanying text.

75. *See* ROBERT N. CLINTON, CAROLE E. GOLDBERG & REBECCA TSOSIE, *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 1553 (4th ed. 2003).

1992 with the path-breaking *Mabo v. Queensland*⁷⁶ decision out of the High Court of Australia. Under this legal concept, the British Crown and its successors in title were recognized as having the “preemptive” right over the land.⁷⁷ According to Chief Justice Marshall’s decision in *Johnson v. McIntosh*,⁷⁸ this meant that the Europeans held the full title to the land, except for the Native peoples’ “right of occupancy,”⁷⁹ which could be acquired from them “by purchase or conquest.”⁸⁰

In the United States, claims for loss of aboriginal title have been treated as compensable by federal statute—primarily the Indian Claims Commission Act (ICCA)⁸¹—and not out of any Constitutional duty.⁸² The ICCA sought to extinguish all aboriginal title claims with finality, resulting in monetary compensation to successful groups for lands taken unjustly.⁸³ In the United States, most aboriginal title claims have been settled, although some are still in the Claims process due to procedural irregularities which necessitated further Congressional attention, such as the claim of the Alabama-Coushatta Tribe of Texas.⁸⁴ In Canada, New Zealand, and Australia, however, Native title claims are receiving a great deal of attention. In the western provinces of Canada, such as British Columbia, substantial claims have been made by Native groups and attempts are underway to reach settlement agreements.⁸⁵ In Australia, national legislation was passed after the *Mabo v. Queensland* case to elucidate the legal standard for Native claimants, which requires the Native peoples to

76. [No 2] (1992) 175 CLR 1.

77. *See id.*

78. 21 U.S. 543 (1823).

79. *Id.* at 562.

80. *Id.* at 545.

81. Indian Claims Commission Act, 25 U.S.C. §§ 70–70v (1946) (repealed 1978).

82. *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 283–85 (1955) (holding that Native aboriginal title is not a property interest for purposes of the Fifth Amendment requirement that government takings of property must be compensated). *See generally* Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980).

83. *See* §§ 70–70v; Sandra C. Danforth, *Repaying Historical Debts: The Indian Claims Commission*, 49 N.D. L. REV. 359 (1973).

84. *Alabama-Coushatta Tribe v. United States*, 2000 WL 1013532 (Fed. Cl. June 19, 2000).

85. *See* JOHN BORROWS, *RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW* 77–110 (2002) (discussing aboriginal title claims in British Columbia).

maintain a continuing connection to traditional lands and a continuing framework of traditional law governing their claims to these lands.⁸⁶ In New Zealand, much of the Maori peoples' land was taken through unjust acquisitions in the nineteenth and early twentieth centuries, but the Waitangi Tribunal is charged with interpreting the Treaty of Waitangi to redress this history of injustice.⁸⁷ Maori claims to continuing aboriginal title to fish, water, and other natural resources have been recognized, as well as their continuing "customary law" rights over the management of traditional lands and resources.⁸⁸ Thus, it seems to be merely a matter of time before territorial and land rights are addressed through comprehensive legislation.

In short, Native land rights and associated resource rights are very much alive and part of the international rights discourse. Not surprisingly, this issue has drawn the attention of a noted legal philosopher from New Zealand, Jeremy Waldron, who is best known for his work on property rights and for his critiques of "group rights" within contemporary liberal discourse.⁸⁹ Waldron's latest essay, *Indigeneity? First Peoples and Last Occupancy*,⁹⁰ is a philosophical critique of the term "indigenous," which essentially asks why the term should justify a particular set of rights that is distinct from those of anyone else.⁹¹ In other words, what is special about "indigeneity"?

According to Waldron, there are two possible ways of defining "indigeneity":

(1) Indigenous peoples are the descendants of the first human inhabitants of a land (the "first occupancy" argument), or

86. Native Title Act, 1993 (Austl.), discussed in MCRÆ ET AL., *INDIGENOUS LEGAL ISSUES* 229–32 (1997).

87. See P.G. McHugh, *The Constitutional Role of the Waitangi Tribunal*, 1985 N.Z. L.J. 224 (1985).

88. See generally Michael A. Burnett, *The Dilemma of Commercial Fishing Rights of Indigenous Peoples: A Comparative Study of the Common Law Nations*, 19 *SUFFOLK TRANSNAT'L L. REV.* 389 (1996).

89. See, e.g., JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988); Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 *U. MICH. J.L. REFORM* 751 (1992).

90. Jeremy Waldron, *Indigeneity? First Peoples and Last Occupancy*, 1 *N.Z. J. PUB. & INT'L L.* 55 (2003).

91. *Id.* at 57.

(2) Indigenous peoples are the descendants of those who inhabited the land at the time of European colonization (“prior occupancy” argument).⁹²

In some case (for example, New Zealand), the two categories might overlap. In other cases, they clearly would not. Waldron’s essay directly confronts the “politics and philosophy of cultural rights and the rights of First Peoples.”⁹³ He claims that the concept of “indigeneity” privileges some groups over others, prompting the view in New Zealand that “what is plainly a multicultural reality in this country should be described, at least for certain legal and political purposes, as bi-cultural.”⁹⁴ This obviously impacts the legal structure that is created to achieve justice between disparate cultural groups in a pluralistic society. For example, in the United States, Waldron’s argument might inspire the question whether the claims for “justice” by the descendants of African slaves or the descendants of the Mexican people whose lands were taken unjustly after the Treaty of Guadalupe Hidalgo annexed their lands into the United States, are different (equal to, less than, greater than) the claims of Native peoples.

In New Zealand, Waldron argues, the Treaty of Waitangi “has been given a status in our constitution that is plainly superior to the status accorded to other treaties that the Crown has entered into.”⁹⁵ Waldron asks why this should be so. Moreover, he claims, this phenomenon is not unique to New Zealand.⁹⁶ He claims that because indigenous groups are perceived to have a “special attachment to their lands,” they are making a claim for a priority of rights.⁹⁷ Thus, in order to assess what is important about “indigeneity,” one must ask what principles or legal or political ideas are evoked by the concept. For purposes of Waldron’s article, this inspires an inquiry into (1) the principles that underlie land rights and (2) the contemporary perspective that distributive justice demands a readjustment of resources if land, wealth, income, and power are wrongly distributed

92. *Id.* at 55.

93. *Id.* at 57.

94. *Id.*

95. *Id.* at 58.

96. *Id.* at 66.

97. *Id.*

in contemporary society. In the case of indigenous peoples, Waldron asserts, this is commonly understood as a need to “restore land rights and sovereignty rights that were once held by their ancestors.”⁹⁸ Waldron draws an explicit connection between domestic claims by the Maori for land rights and the international law concept of “reversion,” which is based on the “continuity of de jure sovereignty, even under adverse conditions like colonization.”⁹⁹ Under this doctrine, the “right of an ousted sovereign to have sovereignty restored under the laws governing belligerent occupation is derived from ultimate de jure title or territorial sovereignty.”¹⁰⁰ Thus, the doctrine perceives that sovereignty does not inure in the belligerent occupant, but rather continues in the dispossessed peoples until it can be restored. Waldron’s response to this argument, within the context of indigenous rights, evokes the connection between “whiteness” and colonialism.

Waldron’s central premise in the article is that indigenous rights advocates have used concepts of “first occupancy” and “prior occupancy” in an opportunist and self-serving manner that ignores the real character of these concepts as “moral principles.”¹⁰¹ Waldron’s entire essay is devoted to proving that the rights claims by indigenous peoples lack any credible moral basis for a claim to “priority” and that they are virtually indistinguishable from the claims of any other aggrieved member of a “multicultural” society. Waldron claims, for example, that for purposes of the “First Occupancy” argument, indigenous peoples are grounding their claims to their assertion that they were the “first inhabitants” of their traditional lands and that they have occupied these lands “since the dawn of time.”¹⁰² In fact, the first occupancy argument is made by scholars such as James Anaya, in support of Native land rights, and it is also embedded in the idea of “aboriginal title.”¹⁰³ Waldron claims that the moral notion at play here is that the first person or community to take possession of a resource or piece of land is

98. *Id.* at 61.

99. *Id.* at 66.

100. *Id.* at 67.

101. *Id.* at 79.

102. *Id.* at 71.

103. *See, e.g.,* ANAYA, *supra* note 45, at 105.

entitled to claim “ownership.”¹⁰⁴ The entitlement is purely based on priority, since there is no conflicting claim to title. There can be successors to title because “first occupancy is not supposed to be inalienable,” but such a transfer must be voluntary and based on consent.”¹⁰⁵

Waldron finds at least two significant problems with this theory in relation to justifications for contemporary land rights. First, as a factual matter, it is necessary to prove that the group was in fact the *first* possessor of land since “time immemorial,” which may be very difficult to do.¹⁰⁶ Waldron demonstrates, for example, that this would be very difficult in a country like India with the long history of various groups claiming the same lands.¹⁰⁷ Secondly, Waldron claims, it is necessary to ensure that the claimant did not gain title through warfare with other indigenous people.¹⁰⁸ Waldron is quite skeptical of Maori claims because of his perception that they historically considered themselves distinct tribes and peoples and that they were often at war with one another.¹⁰⁹ If land title was established by “war and violence,” then first occupancy has no moral force. Nor does Waldron accept the claim that intertribal warfare can be distinguished as “culturally consensual,” while “colonialism” is characterized as “conquest” purely by virtue of cultural difference.¹¹⁰ According to Waldron, this type of argument merely “avoids the issue, which is whether there was an original peaceful acquisition of title, or not.”¹¹¹

In comparison, Waldron associates the “prior occupancy” argument with the assertion that indigenous people have title because they were the occupants at the time of European contact and therefore

104. Waldron, *supra* note 90, at 68–69.

105. *Id.* at 68.

106. The “time immemorial” standard is used in the United States to adjudicate aboriginal title cases. *See, e.g.*, United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 359 (1941). Not surprisingly, this contested notion of “first occupancy” also links up to current archaeological and genetic research on the origins of human populations.

107. Waldron, *supra* note 90, at 63.

108. *Id.* at 72.

109. *Id.* at 72, 76.

110. *Id.* at 77.

111. *Id.*

this title should have been acknowledged.¹¹² He claims that this is the dominant approach used in international human rights law to justify recognition for indigenous land rights.¹¹³ According to Waldron, the problem with this argument relates to whether the wrongful occupation has gone on for a short time or a long time.¹¹⁴ If it has only been a “short time,” then reversion may be an appropriate remedy to ensure justice.¹¹⁵ If it has gone on for a long period of time, then Waldron identifies two potentially insurmountable challenges.

First, the principle of prior occupancy derives its moral strength from the “human interest in stability, security, certainty, and peace.”¹¹⁶ Because those are the operative values, it would be morally unconscionable to overturn existing arrangements—irrespective of how they were arrived at—if the act of restoration would violate these values.¹¹⁷ In other words, the principle of prior occupancy is concerned with preventing injustice by honoring a particular set of values. The principle was operative at the moment of colonization (even if disregarded by the colonizers), but it is equally operative at the present moment.

Secondly, Waldron maintains that if the occupation of the colonists has continued for several generations, then the current possessors have strong expectation interests which would be violated by a sudden change.¹¹⁸ Waldron claims that he is not suggesting that “an initially unjust regime may acquire a title to respect because of the mere passage of time.”¹¹⁹ Time cannot wash away crimes, but the “passage of time can establish patterns of expectation.”¹²⁰ The analogy here is to the principle of prescription within Anglo-American property law, which blocks claims founded in the distant past in order to honor certainty and security of title.¹²¹ The trick, of

112. *Id.* at 71.

113. *Id.* at 65.

114. *Id.* at 74.

115. *Id.*

116. *Id.* at 73.

117. *Id.*

118. *Id.* at 73–74.

119. *Id.* at 74.

120. *Id.*

121. See *New Jersey v. New York*, 523 U.S. 767, 786 (1998) (“The doctrine of prescription and acquiescence ‘is founded upon the supposition, confirmed by constant experience, that

course, is to distinguish when courts are operating according to Waldron's first point (saying that an original illegal act can be "cured" by the passage of time) and when they are honoring the latter point (saying that rewarding expectation interests built up over time is an honorable means to justify a shift in title). A good case in point is *Vermont v. Elliott*,¹²² in which a state court refused to recognize an indigenous group's assertion of rights deriving from un-extinguished aboriginal title based in part on its finding that the Abenaki's claim had been extinguished "by the increasing weight of history."¹²³

In short, Waldron finds that indigenous peoples' claims are not "self-justifying."¹²⁴ He asserts that the moral principles of "first occupancy" and "prior occupancy," derived from natural law, may support or undercut indigenous claims, and this should be acknowledged honestly.¹²⁵ Waldron is offended by the "mystical" quality associated with indigenous claims, which assumes that there is a "timeless and sacred quality" to indigenous occupation, which is not ascribed to any other group merely claiming "prior" occupation.¹²⁶ Furthermore, Waldron worries about the consequences of effecting a massive redistribution of rights and resources by drawing lines between "indigenous" people and "nonindigenous" people, which further requires one to identify the status of "immigrants," when all are supposedly "equal citizens" of a pluralistic society.¹²⁷ This argument is quite similar to that advocated by jurists committed to the notion that we are a color-blind society. In

every person will naturally seek to enjoy that which belongs to him; and the inference fairly to be drawn from his silence and neglect, of the original defect of his title, or his intention to relinquish it.")

122. 616 A.2d 210 (Vt. 1992).

123. *Id.* at 218. For an excellent critique of this case, see Joseph Singer, *Well-Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994).

124. Waldron, *supra* note 90, at 81.

125. *Id.*

126. *Id.* at 82. In this sense, Waldron's critique foreshadows the attack on Native claims to protect "sacred sites." Such claims relate to the spiritual qualities of land within Native world views, but they are commonly dismissed as claims for "religious rights" that are not constitutionally justifiable. *See, e.g.,* *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (holding that Free Exercise Clause is not violated by federal government's plan to construct a road through a portion of national forest traditionally used by several tribes for religious purposes even though this would preclude tribes from effectively practicing their religions).

127. Waldron, *supra* note 90, at 80.

other words, the differences between citizens are not meaningful, and are potentially dangerous, because they draw divisions that upset the norm of “formal equality,” and therefore threaten to destabilize the entire society.

Waldron’s article builds on his previous work, which examines the assertion of indigenous groups that they have special rights to land (and that “reparations” should be made for “past injustice”),¹²⁸ as well as his work criticizing the claims of particular groups for “special” cultural rights that are distinctive from those accorded to any other group.¹²⁹ This body of work illustrates the important connections between domestic and international law for indigenous peoples, the way these bodies of law are influenced by liberal theory, and the assumptions that are made by many liberal theorists about the nature of rights and their derivations. This work raises a number of problematic considerations. Is it true that the label “indigenous” adds nothing to a claim for specific land rights? We live in a world where Native peoples’ land rights have always been treated separately from those of non-Native people, as nations or as individuals. The category of “aboriginal title,” for example, is a purely Western innovation applied to Native peoples subjected to European colonization.¹³⁰ Moreover, as the Navajo-Hopi land dispute demonstrated, intra-tribal land disputes are not treated the same under American law. In that dispute, the Hopi tribe’s claim for rights based on “first occupancy” was awarded by the actual return of land and concomitant removal of Navajo families who had lived on the land for generations.¹³¹ In comparison, involuntary removal and relocation have never resulted from a land settlement between Native and non-Native peoples. In those cases, the Native Americans have received federal or state lands, not subject to individual claims of title, as well as monetary

128. See Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4 (1992).

129. Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, in THE RIGHTS OF MINORITY CULTURES 93, 93–114 (Will Kymlicka ed., 1995).

130. *Johnson v. McIntosh*, 21 U.S. 543 (1823), was the first case to articulate the legal notion of an “indigenous right to occupancy,” which led to the notion of “aboriginal title.”

131. See The Navajo-Hopi Land Settlement Act of 1974, Pub. L. No. 93-531, 88 Stat. 1712 (1974) (codified as amended in 25 U.S.C. § 640d). The Navajo-Hopi Land Settlement Act set up the system for dividing the land and removing families under a complex federal bureaucracy. The dispute continues today, and certain Navajo families have refused to relocate and have gone so far as to claim an abridgment of their international human rights.

judgments for their extinguished title.¹³² Individual non-Indian landowners have been secured in the title to their lands, and the only transfers to date have been voluntary and fully compensated.

It is possible that “indigenous” land rights cannot be appropriately understood within Western liberal theory. If Western categories of human rights and property rights depend on the moral framework described by Waldron, then intercultural views of the appropriate ethical and normative principles to consider “rights” may never be acknowledged. So, how can indigenous people justify their claims for land and other important resources? The next part of this essay, which deals with Native claims to ancestral human remains, further illustrates the complexity of these issues.

IV. “INDIGENEITY” AND CULTURAL RIGHTS: THE KENNEWICK CASE

The most overt challenge to the notion of “indigeneity” in recent American jurisprudence has emerged from the debate over a group of scientists and five Native Nations from the Pacific Northwest who claimed an ancient set of human remains in Washington (dubbed “Kennewick Man” by the news media) as their common ancestor.¹³³ The case arose in July 1996, when a group of spectators attending a boat race discovered human skeletal remains on the shore of the Columbia River, just outside of Kennewick Washington.¹³⁴ A local anthropologist, James Chatters, secured an Archaeological Resources Protection Act permit to remove the remains, and his initial testing of the remains indicated that the remains were between 8000 and 9000 years old.¹³⁵ Because of the asserted age of the remains and Chatters’s observation that they were more “Caucasoid” in appearance than “Native American,” the skeleton attracted the

132. See, e.g., Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721–35 (2000) (settling the claims of the Passamaquoddy tribe, Penobscot Nation, and the Houlton Band of Maliseet Indians for unextinguished aboriginal title and violations of the federal Nonintercourse Acts).

133. *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1121 (D. Or. 2002). For a factual background on the case, as well as an analysis of the district court’s initial decisions, see Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values*, 31 ARIZ. ST. L.J. 583 (1999).

134. *Bonnichsen*, 217 F. Supp. 2d at 1120.

135. *Id.*

attention of several scientists, including Douglas Owsley of the Smithsonian Institution, who sought to remove the remains for further study.¹³⁶ Four Indian tribes opposed that plan and filed a claim under the Native American Graves Protection and Repatriation Act (NAGPRA).¹³⁷ NAGPRA provides that the ownership of Native American human remains excavated on federal lands after the effective date of the statute belongs to tribes who can show cultural affiliation to the remains, or, alternatively, a sufficiently strong cultural relationship to the remains based, for example, on their aboriginal ownership of the lands where the remains were found.¹³⁸ A fifth tribe later joined the group, agreeing with the other tribal claimants that this set of remains was their common ancestor. The Army Corps of Engineers accepted the assertion and prepared a Notice of Intent to Repatriate Human Remains, pursuant to NAGPRA's requirement.¹³⁹ This decision became the subject of a legal action by a group of scientists who sought to enjoin the repatriation on the grounds that the Army Corps did not have sufficient evidence of cultural affiliation, and that the cultural affiliation of this skeleton was provable only by scientific testing.¹⁴⁰ The scientists also asserted that they had a legal right to study the remains and that the application of NAGPRA in this case was unconstitutional.¹⁴¹

After a very complicated set of procedural wranglings, the Secretary of the Interior conducted a full evidentiary analysis of the cultural affiliation issue and made a final decision that the skeleton was culturally affiliated to the joint claimants by a "preponderance of the evidence."¹⁴² The Secretary further determined that, in the alternative, "a claim based on aboriginal occupation . . . is also a basis for the disposition of the Kennewick remains to the claimant

136. *Id.* at 1121.

137. *Id.*; Native American Graves Protection and Repatriation Act, 18 U.S.C. § 1170, 25 U.S.C. §§ 3001–13 (2000).

138. 25 U.S.C. § 3002 (2004).

139. *Bonnichsen*, 217 F. Supp. 2d at 1121–22.

140. *Id.* at 1122.

141. *Id.*

142. *Id.* at 1130 (internal citations omitted).

Indian tribes.”¹⁴³ The plaintiff scientists appealed the decision to the district court, which ruled in their favor, asserting that the Secretary erred in finding that the Kennewick remains were “Native American” within the meaning of NAGPRA¹⁴⁴ and had also erred in finding that aboriginal title was an alternative basis for the claim because none of the tribes possessed a final judgment from the Indian Claims Commission confirming title to the site.¹⁴⁵ In fact, the lands were within the original claim area of the Colville tribe’s aboriginal title action, but the tribe’s subsequent settlement agreement placed the site outside of the final judgment area by less than one mile.¹⁴⁶ The federal defendants appealed the district court’s decision, and the tribal claimants intervened in that appeal.

The Ninth Circuit issued its opinion on February 4, 2004.¹⁴⁷ The court upheld the district court’s opinion, but used a slightly different analysis. Importantly, the opinion is devoid of any assumption that “Native Americans” were the “first” to occupy the lands of North America. The court describes Kennewick Man not by his race, ethnicity, or culture, but rather as “one of the most important American anthropological and archaeological discoveries of the late twentieth century.”¹⁴⁸ He is a scientific discovery and not a real person. Moreover, according to the court, this case is not about Native rights to ancestral remains, but rather it is about who owns:

The ancient human remains of a man who hunted and lived, or at least journeyed, in the Columbia Plateau an estimated 8340 to 9200 years ago, a time predating all recorded history from any place in the world, a time before the oldest cities of our world had been founded, a time so ancient that the pristine and untouched land and the primitive cultures that may have lived on it are not deeply understood by even the most well-informed men and women of our age.¹⁴⁹

143. *Id.* (internal citations omitted).

144. *Id.* at 1139.

145. *Id.* at 1160.

146. *Id.* at 1158.

147. *Bonnichsen v. United States*, 357 F.3d 962 (9th Cir. 2004).

148. *Id.* at 966.

149. *Id.*

The circuit court's opinion holds that "Kennewick Man's remains are not Native American human remains within the meaning of NAGPRA and that NAGPRA does not apply to them."¹⁵⁰ The court finds that there was insufficient evidence that Kennewick Man was "Native American" because the evidentiary record would "not permit the Secretary to conclude reasonably that Kennewick Man shares special and significant genetic or cultural features with presently existing indigenous tribes, people, or cultures."¹⁵¹ Because Kennewick Man was not "Native American," the Secretary's alternative ground, based on aboriginal title, was unavailable as a means of proving tribal ownership of the remains. Furthermore, because Kennewick Man was not "Native American," the remains were "federal property" available for study by the plaintiff scientists under ARPA.¹⁵² According to the court, Native people have no claim to ownership of a set of remains that predates historic European colonization of the New World; rather, the federal government is the "owner" of these human remains.¹⁵³ Thus, the Native people have no cultural right to access the remains or require any limitations on the study, but the scientists have a full right to study the remains, even if this would require destructive analysis that is completely antagonistic to Native beliefs about appropriate treatment of human remains.

How could this be? Why is an "indigenous" set of remains *not* "indigenous"? Or is it the Native American people themselves who are not "indigenous"? The key to this opinion is the court's finding that Congress had already determined this issue in the statute, and its concomitant refusal to recognize that the Secretary had any authority to interpret the term "Native American" to include ancient sets of human remains.

In fact, NAGPRA defines human remains as "Native American" if they are "of, or relating to, a tribe, people, or culture that is indigenous to the United States."¹⁵⁴ Through notice and comment rulemaking, the Secretary generated a regulation defining "Native

150. *Id.* at 979.

151. *Id.*

152. 16 U.S.C. §§ 470aa–470mm (2000); *Bonnichsen*, 357 F.3d at 979.

153. *Bonnichsen*, 357 F.3d at 979.

154. 25 U.S.C. § 3001(9) (2000).

American” to mean “of, or relating to, a tribe, people, or culture indigenous to the United States.”¹⁵⁵ Under the Secretary’s definition, all graves and remains found in the United States that predate European settlement would be “indigenous” to the United States and subject to NAGPRA. The remains would be “Native American” for purposes of NAGPRA, although they may in fact not be able to be “culturally affiliated” to a specific contemporary tribe. In this case, the statute reserves a category for “culturally unidentifiable” Native American human remains, and another category for Native American remains that are “unclaimed” for any reason.

The court of appeals reinterpreted NAGPRA, asserting that Congress intentionally used the present tense language (“that is” indigenous)¹⁵⁶ to restrict the statute’s coverage only to human remains that “bear some relationship to a presently existing tribe, people, or culture to be considered ‘Native American.’”¹⁵⁷ Although there is no specific reference to such an intent in the statute itself or its legislative history, the court draws on the “ordinary meaning” of the word “indigenous” as well as grammatical rules about when to use the present tense, alongside Congressional intent to respect the burial traditions of modern-day American Indians.¹⁵⁸ Ultimately, the court concludes that Congress never intended to preclude the “exhumation, study, and display of ancient human remains that are unrelated to modern American Indians,”¹⁵⁹ since, by definition, modern tribes would have no interest in such remains.¹⁶⁰

The court’s interpretation of NAGPRA creates two significant obstacles for Native Nations seeking to claim control over ancestral human remains. First, the opinion increases the tribe’s burden of proof for asserting cultural affiliation to a set of remains.¹⁶¹ NAGPRA’s standard for proving “cultural affiliation” is already quite onerous, although it permits the tribe to demonstrate cultural affiliation through a variety of means, including historical,

155. 43 C.F.R. § 10.2(d) (2005).

156. *Bonnichsen*, 357 F.3d at 973.

157. *Id.* at 976

158. *Id.* at 973.

159. *Id.* at 974.

160. *Id.* at 976–77.

161. *Id.* at 973 (construing the language in NAGPRA).

anthropological, or cultural proof, including oral histories and oral traditions.¹⁶² NAGPRA specifies that all of these categories of evidence are to be given equal weight and that, in no case, should tribes be held to prove cultural affiliation with “scientific” certainty.¹⁶³ This opinion requires a second (and prior) step for tribes. Before they ever get to the issue of cultural affiliation, they must demonstrate that they have a “special and significant genetic or cultural relationship” to the remains, which justifies a finding that the remains are “Native American.”¹⁶⁴ Importantly, however, the court finds that oral traditions and histories did not provide sufficient evidence, and that without some further corroboration through “documented” or “scientific” evidence, the tribes will fail at this initial step.¹⁶⁵

The second problem is the court’s confusing analysis, which distinguishes the term “indigenous” from the term “Native American.”¹⁶⁶ The court acknowledges that there were peoples in North America prior to European settlement, and that these may be referred to as “indigenous” peoples.¹⁶⁷ However, the court finds that NAGPRA applies only to “Native American” remains, which essentially requires the remains to be tied to “indigenous peoples” that *presently exist* as an “indigenous tribe, people, or culture.”¹⁶⁸ Thus, not only do contemporary “American Indian” peoples have control only over the remains of their “genetic and cultural forbearers” and not “over the remains of people bearing no special and significant genetic or cultural relationship to some presently existing indigenous tribe, people, or culture,” but “human remains that are 8340 to 9200 years old and that bear only incidental genetic resemblance to other peoples” cannot be described as “Native American” at all!¹⁶⁹ Using Waldron’s terminology, this decision indicates that, to the extent that the claims of indigenous peoples are

162. See 25 U.S.C. § 3005(a)(4) (2000).

163. *Id.*; see also 43 C.F.R. § 10.14(f) (2005).

164. *Bonnichsen*, 357 F.3d at 977.

165. *Id.* at 979.

166. *Id.* at 974–76.

167. *Id.* at 975.

168. *Id.*

169. See *id.* at 977.

founded on their status as “prior occupants,” this does not justify any finding of special rights unless they can also demonstrate that they are the “original” occupants of the lands, and possibly that they have been the “exclusive” occupants from the “beginning” of time to the present. Moreover, they must not use “cultural” evidence as a form of proof, but they must prove this status with scientific certainty. In the context of claims for ancestral human remains, this appears to require a genetic match, since the “culture” of a deceased individual would be difficult to ascertain from a set of remains that had washed into a river and lacked the context that might be found within a burial site.

Finally, the court’s opinion contains the dimly articulated, yet troubling, assumption that the remains may not be “Native American” at all because they were initially described as being more “European” than “Native American.”¹⁷⁰ The court explains that the subsequent study of Kennewick Man’s morphology revealed that his features “most closely resembled those of Polynesians and southern Asians” and did not resemble those of any “modern Indian group living in North America.”¹⁷¹ In other words, the reason that Kennewick Man is the most important scientific discovery of this century is because of his capacity to “prove” who, in fact, were the “first Americans.” The identity of the “first Americans” is part of a larger inquiry into the origins of human populations and is therefore an important subject for contemporary geneticists, as the next section of this essay demonstrates.

V. INDIGENEITY AND RIGHTS TO GENETIC RESOURCES

Current research dealing with population genomics and the origins of human populations raises several challenges to Native American identity based on a blend of scientific and legal attacks. This research places a heightened emphasis upon “genetic identity” in accordance with contemporary scientific analysis, but in reality, this research constitutes a twenty-first century manifestation of a very old phenomenon in American social politics: the construction of race. As Cheryl Harris and other scholars have observed, the scientific

170. *Id.* at 978.

171. *Id.*

construction of race in the nineteenth-century worked in tandem with the law to define the rights of Africans and other “non-white” groups.¹⁷² Harris documents that these nineteenth-century cases “assumed the crucial task of racial classification, and accepted and embraced the then-current theories of race as biological fact.”¹⁷³

The law relied on bounded, objective, and scientific definitions of race . . . to construct whiteness as not merely race, but race plus privilege. By making race determinant and the product of rationality and science, dominant and subordinate positions within the racial hierarchy were disguised as the product of natural law and biology rather than as naked preferences. Whiteness as racialized privilege was then legitimated by science and was embraced in legal doctrine as “objective fact.”¹⁷⁴

Although it is no longer considered “politically correct” to assert that there is a biological basis for “race,” the scientific construction of race in the twenty-first century continues through efforts to document the genetic identity of distinct groups, a process often referred to as “population genomics.”¹⁷⁵ Much of this research purports to reveal the susceptibility of certain “groups,” such as African-Americans or Native Americans, to certain diseases, such as sickle cell anemia or diabetes.¹⁷⁶ Researchers contend that if they can identify the genetic basis for such diseases, they can develop treatments which are population-specific and have a greater likelihood of success.¹⁷⁷ In fact, genetic research on Native peoples has been underway for decades through Indian Health Science studies on diabetes that have required blood samples to be extracted from many individuals and

172. See generally Harris, *supra* note 4.

173. *Id.* at 1737.

174. *Id.* at 1738.

175. For an excellent collection of essays dealing with population-based genetic research, see Symposium, *Legal and Ethical Issues in Genetic Research on Indigenous Populations*, 42 JURIMETRICS 121 (2002), available at <http://law.asu.edu/?id=8220>.

176. See *id.*

177. See Richard P. Sharp & Morris W. Foster, *Involving Study Populations in the Review of Genetic Research*, 28 J.L. MED. & ETHICS 41 (2000).

tribal groups. In some of these studies, only individuals who were “full blood” members of tribes were invited to participate.¹⁷⁸

This research has come under close scrutiny by Native groups in the contemporary era for a variety of reasons. First, many Native groups contend that they agreed to research because of the assertion that the blood samples taken and data gathered would only be used for specific purposes, such as diabetes research.¹⁷⁹ Some groups later discovered that the samples and data had been used to support research on topics that they had not consented to, such as the origin of human populations or research on the frequency of mental health conditions.¹⁸⁰

Secondly, many Native groups became politically involved in the issue of genetic research after the Human Genome Diversity Project (HGDP) was announced in the wake of the effort to map the human genome. The Human Genome project relied on genetic samples from European-derived groups.¹⁸¹ Proponents of the HGDP asserted the necessity to gather samples from non-European populations for comparative purposes. They claimed a particular interest in data from indigenous groups and other “population isolates,” contending that it was necessary to preserve this data before these groups lost their genetic identity through admixture or their cultural identity through assimilation.¹⁸² This rationale was highly offensive to Native people, in part because of its underlying assumption that they were a “vanishing” species of human being, similar to the “Vanishing Redman” ideology of the nineteenth century that resulted in troops of

178. My colleague at Arizona State University, Dr. Carol Lujan, recalled this from a conference that she attended where Native participants were recruited to give blood samples to government health officials, but only if they had “pure” Native blood.

179. See Juan A. Avila Hernandez, *Blood, Lies, and Indian Rights: TCU's Becoming Gatekeepers For Research*, 16(2) TRIBAL COLLEGE J. (2004).

180. For example, the Havasupai tribe recently filed a complaint against Arizona State University and several named defendants that maintains that the researchers exceeded the scope of the consent given by the tribe and its members to a medical study on diabetes. *The Havasupai Tribe v. Arizona State University*, No. CV 2004-0146 (Ariz. Super. Ct. Mar. 12, 2004).

181. For a full analysis of the Human Genome Project and its larger impact on minority communities, see RAYMOND A. ZILINSKAS & PETER J. BALINT, *THE HUMAN GENOME PROJECT AND MINORITY COMMUNITIES: ETHICAL, SOCIAL & POLITICAL DILEMMAS* (2001).

182. See Jenny Reardon, *The Human Genome Diversity Project: A Case Study in Coproduction*, 31(3) SOC. STUD. SCI. 357 (2001).

anthropologists visiting reservations to gather data and remove cultural objects before the Indian people “disappeared.”¹⁸³

Third, many Native groups became alarmed after the announcement that researchers were seeking to obtain patents on products derived from Native genetic samples, such as the cell-line of a South Pacific group that was initially patented. However, the patent was revoked after an official outcry from that group.¹⁸⁴ The idea that the genetic data of a Native group could be transformed into a commercial product and marketed for profit is directly tied to the commodification argument that Harris makes.¹⁸⁵

Finally, Native peoples are concerned about the political use that is being made of DNA research as a means to “scientifically establish” their identity as “indigenous” peoples. Kimberly TallBear, for example, associates the contemporary effort to establish “Native American identity” through DNA testing as a “sophisticated form of eugenics” that is being asserted to “support or deny a person’s or a group’s claims to cultural and political rights.”¹⁸⁶ TallBear points to two contemporary cases where DNA testing has been used or suggested for use in order to establish “Native American identity.” First, a state Representative from Vermont sponsored a bill, at the request of the Western Mohegan tribe, to “establish standards and procedures for DNA-HLA testing to determine the identity of an individual as a Native American, at the request and expense of the

183. The Indigenous Peoples Council on Biocolonialism has published several documents intended to mobilize Native people to challenge this research and informing them of the dangers of genetic research for Native groups. *See, e.g.*, Indigenous Peoples Council on Biocolonialism, Key Points for a Resolution Opposing the Human Genome Diversity Project and Genetic Research on Indigenous Peoples, *available at* http://ipcb.org/resolutions/htmls/key_points.html (last visited June 22, 2005); Indigenous Peoples Council on Biocolonialism, Indigenous Peoples, Genes & Genetics: What Indigenous People Should Know About Biocolonialism (2000), *available at* <http://ipcb.org/publications/primers/htmls/ipgg.html>.

184. *See generally* VANDANA SHIVA, *BIOPIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE* (1997).

185. *See* Harris, *supra* note 4, at 1719 (noting “the cruel tension between property and humanity” inherent in slavery and the commodification of women’s bodies); *see also* Aroha Te Pareake Mead, *Genealogy, Sacredness, and the Commodities Market*, 20 *CULT. SURVIVAL Q.* 46 (1996).

186. Kimberly TallBear, *Genetics, Culture and Identity in Indian Country* (2000) (paper presented at Seventh International Congress of Ethnobiology), *available at* <http://iiirm.org/publications/Articles%20Reports%20Papers/Genetics%20and%20Biotechnology/ISEPaper.pdf>.

individual.”¹⁸⁷ The Mohegans’ claimed intent was to “help other Indian people,” like themselves, who lacked adequate genealogical documentation of their “Indian” identity and thus had difficulty gaining federal status.¹⁸⁸ The Mohegans had voluntarily submitted themselves to DNA testing to “prove” their affiliation to related tribes, at least one of which is a federally recognized tribe in Wisconsin.¹⁸⁹ The legislation drew a heated reaction from other tribes in the state that understood the legislative intent to be mandatory DNA testing and associated the bill with an act of “genocide.”¹⁹⁰ The bill was ultimately defeated.¹⁹¹ However, TallBear demonstrates that many federally recognized tribes have been approached by private companies marketing DNA tests as a means to establish the authenticity of enrolled members or those petitioning for enrollment.¹⁹² Moreover, TallBear points to a number of products marketed on the internet which purport to help individuals ascertain their ancestry as European, African, Asian, or Native American.¹⁹³ These tests appear to be quite appealing to Americans seeking to “prove” their “Native American” family lineage, based on family stories of a remote “Indian” ancestor rather than any continuing cultural or political connection to a particular Native community.

These scientific methods of documenting ancestry, as TallBear points out, are quite problematic for a number of reasons. First, they represent a return to the overt racism of nineteenth-century lawmakers who believed that an individual’s culture and identity are primarily biologically determined rather than socially constructed.¹⁹⁴ As TallBear asserts, scientists and policymakers in support of genetic testing to determine “cultural identity” are making an assumption that “genetic markers are synonymous with culture and somehow guarantee cultural continuity.”¹⁹⁵ In fact, however, it is “cultural and

187. *Id.* at 2.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 3.

192. Kimberly TallBear, “Native American DNA,” Race, and the Search for Origins in *Molecular Anthropology* 9 (May 2005) (unpublished manuscript, on file with author).

193. *Id.* at 10.

194. TallBear, *supra* note 186, at 4.

195. *Id.*

political continuity and self-determination [which are] the heart of what it is to be a tribe or tribal nation.”¹⁹⁶ Secondly, the effort perpetuates the continuing assumption that a particular “blood quantum” justifies “Native American” status.¹⁹⁷ As a result of federal policies designed to define a limited group of persons entitled to federal benefits, most federally recognized tribes continue to require a certain level of blood quantum to qualify for tribal membership. This can be as much as 1/2 blood or as little as 1/32 blood.¹⁹⁸ Because of these disparate requirements, along with the fact that some tribes have rejected blood quantum in favor of a “lineal descent” standard that permits enrolled members to have a fractional blood quantum measured in the hundredths of degrees, there is obviously no uniform approach to establish “Indian” identity. In fact, as TallBear notes, the blood quantum methodology is a significant departure from the practices of most nations and ethnic communities which would assess citizenship or membership using a variety of nonracial factors, including residence, family relationship, language, and religion.¹⁹⁹ Yet, as Native Nations strive for a more nuanced understanding of their political status as autonomous groups with a right of “self-determination,” they continue to face pressure to prove their identity “scientifically,” and they continue to encounter widespread assumptions about the “authenticity” of Indian identity as primarily correlated to one’s “racial,” rather than “cultural” identity.²⁰⁰

Genetic testing of individuals to determine “Native American” identity shares an interesting intersection with the efforts of scientists to extract DNA from ancient skeletal remains to determine their “cultural affiliation” and, ultimately, to demonstrate the origins of human populations and “who were the first Americans.” Not surprisingly, TallBear associates the Kennewick case with the Vermont DNA bill to establish contemporary Native identity because both types of research seek to prove “cultural affiliation” through the

196. *Id.* at 3.

197. *Id.* at 4.

198. *Id.*

199. *Id.*; see also Hilary N. Weaver, *Indigenous Identity: What Is It, and Who Really Has It?*, 25 AM. INDIAN Q. 240 (2001) (analyzing the politics of “Indigenous Identity” within the context of internalized colonialism).

200. TallBear, *supra* note 186, at 6.

use of “genetic markers.”²⁰¹ In the Kennewick Man case, scientists were unable to extract a viable sample of DNA due to the age of the remains in the initial set of tests that were approved to demonstrate “cultural affiliation.”²⁰² However, now that the Ninth Circuit Court of Appeals has held that the remains are not “Native American” for purposes of NAGPRA, the scientists have submitted a request to do further DNA testing of the remains in connection with a full scientific assessment of the remains.²⁰³ And what would this assessment show? According to Robson Bonnichsen of The Center for the Study of the First Americans at Texas A&M University, the forty page study plan that has been submitted to the Department of the Interior and Army Corps of Engineers (the federal custodians of the remains) represents a “state-of-the-art proposal to do the most detailed look at a first American that has ever been put together.”²⁰⁴ The Kennewick Man, they believe, may hold the key to determining the identity of the “first Americans.”

It appears that the litigation over Kennewick Man has been a way to prove (scientifically, of course) that the “first Americans” were not the ancestors of contemporary Native American people. In a series of articles published in various popular science magazines, there is a lively and on-going exchange about the “identity of the first Americans.”²⁰⁵ For many years, the prevailing scientific theory about the “peopling of America” asserted that the Clovis people were the first Americans, and that they were big-game hunters who crossed the Bering Land Bridge from Siberia to North America approximately 12,000 years ago.²⁰⁶ The Clovis people were alleged to have been the direct ancestors of present-day American Indians.²⁰⁷ Further research posited that there could have been about three successive waves of

201. *Id.* at 1–2.

202. TallBear, *supra* note 192, at 13.

203. Constance Holden, *Kennewick Man: Court Battle Ends, Bones Still Off-Limits*, SCIENCE, July 30, 2004, at 55.

204. *Id.*

205. Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains & Contemporary Cultural Values*, 31 ARIZ. ST. L.J. 583, 625–26 (1999).

206. *See generally* DAVID HURST THOMAS, SKULL WARS 155–56 (2000).

207. *See id.*

human migration from northeast Asia, but that each of these groups shared a common ethnic identity as “Mongoloid” populations.²⁰⁸

The “newest” scientific research challenges these theories and asserts that “not all early American populations were directly related to present-day Native Americans.”²⁰⁹ Under this view (which is based on a comparative study of early historic human skulls in North America) the “first arrivals” into North America were Paleoamericans who “were from south Asia or the Pacific Rim.”²¹⁰ These skeletons share “similar craniofacial features (skull form) [demonstrating a] shared common ancestry” and genetic relationship, which is quite different from those of the first Native American populations.²¹¹ Scientists allege that these peoples “probably shared ancestry with ancient Australians and other southern populations.”²¹² They are distinct from the “second group of humans” to reach North America, who “arrived from northeast Asia or Mongolia . . . and gave rise to the modern Amerindians,” who were the ancestors of contemporary Native Americans.²¹³ Thus, “according to this theory, the Paleoamericans are unrelated to most modern Amerindians and to the Native Americans.”²¹⁴ Much of this work has been done by a group of scientists who have studied skulls of early populations in Baja California and other parts of Mexico.²¹⁵ González-José’s study, for example, asserts that the skulls of the “Pericu” peoples of Baja California “closely resemble 8000–10,000 year old skulls unearthed in Brazil . . . [that] look strikingly like those of today’s Australian aborigines.”²¹⁶ The article alleges that the Spanish conquest resulted in “the demise of the Pericu in the sixteenth century,” but that they were the “living links to America’s first settlers” until they were

208. *See id.* at 173.

209. Tom D. Dillehay, *Tracking the First Americans*, NATURE, Sept. 4, 2003, at 23.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *See* Rolando González-José et al., *Craniofacial Evidence for Palaeoamerican Survival in Baja California*, NATURE, Sept. 4, 2003, at 62.

216. Bruce Bower, *Baja Skulls Shake Up American Ancestry*, SCI. NEWS, Sept. 6, 2003, at 150.

exterminated.²¹⁷ The scientists assert that the Pericu were “unrelated to modern Native American and eastern Asian groups.”²¹⁸ All of this research is founded upon craniometric analysis of the skulls, which demonstrates that the “Baja and Brazilian skulls exhibit telling similarities,” including “long, narrow braincases and short, thin faces, [which is] a pattern akin to that of modern inhabitants of southern Asia and South Pacific islands.”²¹⁹

The analysis of the Baja skulls is asserted to be remarkable evidence in support of the theory that the Americas had been peopled by a “double migratory event: a first migration led by Palaeoamericans originating from an ancestral population inhabiting Asia in pre-glacial times, and a second migration of the so called Mongoloids from which derived most of the modern Amerindians.”²²⁰ “If this hypothesis is correct,” the González-José team asserts, “we should observe relicts of the former Palaeoamerican stock somewhere in the New World, especially in geographically isolated areas where the lack of gene flow could have enabled the persistence of genetic and phenotypic ancestral traits.”²²¹ And this, the researchers contend, is made possible with the results of the Baja study.²²²

The importance of this discussion to contemporary Native peoples seeking to protect their rights to ancestral human remains is obvious. It is no surprise that the lead plaintiff in the Kennewick case was Robson Bonnichsen, Director of the Center for the Study of the First Americans at Texas A&M University.²²³ Bonnichsen openly maintained that “[t]he court’s interpretation of NAGPRA” in the Kennewick case would “have ‘major implications’ in other cases in which Native groups” claim human remains.²²⁴ Bonnichsen cited, as an example of this, a U.S. Army Corps of Engineers project in Texas in which “Native Americans at first claimed remains from a 4000-

217. *Id.*

218. *Id.*

219. *Id.*

220. González-José, *supra* note 215, at 62.

221. *Id.*

222. *Id.*

223. Holden, *supra* note 203, at 591.

224. *Id.*

year-old burial ground,” but later reached a “compromise” so that “scientists will have access to them.”²²⁵ It is also no surprise that the scientific reaction to the Baja study is one of excitement about the profound implications of that study. Anthropologist Tom Dillehay sums up the discussion as follows:

What we really want to know is what took place within and between these [early] populations, how they changed over time, and how quickly they changed. These issues can be resolved only by obtaining more skeletal data and by combining them with regional archaeological records, which should provide information on the social and cultural histories of the different populations.²²⁶

There is light at the end of the tunnel for the theorists who assert that the “first Americans” were not “Native Americans.” Who were they? And who are contemporary Native Americans? If the definition of “indigenous” relates to a status of first in time, of being the “original” peoples of this land, then scientific studies may be used to demonstrate that Native Americans cannot factually make this claim. If the definition of “indigenous” relates to priority, as being prior to the first documented arrival of European peoples, then Native Americans are still “indigenous,” and yet their cultural right to protect ancestral remains is denied because they cannot prove the requisite “cultural affiliation” given the “scientific” evidence that these ancient people are not genetically related to contemporary Native Americans.

So, where does all of this lead us? The “scientific racism” of the nineteenth century is alive and well in the twenty-first century. Today, many scientists claim ownership of these ancient skeletons and, in doing so, they purport to control the narrative about human origins. These theories are employed to provide a “factual basis” to deny the validity of Native traditions that establish the connection between contemporary Native peoples and the ancestral peoples “indigenous” to the lands that they shared for centuries prior to the arrival of the Europeans. “Indigenous” identity is up for grabs

225. *Id.*

226. Dillehay, *supra* note 209, at 24.

through DNA analysis, through craniometrical analysis, and through a variety of other methods that attempt to establish “cultural” identity scientifically. “Cultural identity” is a euphemism for racial identity, and the genetic study of “populations” is merely a way to mask the true nature of these studies. So, the question is, who “owns” Native identity? And why are non-Native peoples engaged in an effort to appropriate “indigenous” identity for themselves?

VI. INDIGENEITY AND WHITENESS: SOME FINAL THOUGHTS

Interestingly, the concept of “indigeneity” is being used by contemporary non-Native scholars arguing for the construction of “white culture.” For example, Christina Stage purports to use an “indigenous perspective” to examine “white culture” as expressed through “the communication patterns of an all-white rural community and the metaphors that shape its cultural identity.”²²⁷ She claims that “the explicit study of white culture is imperative in order fully to understand intercultural communication and the role of power and privilege in these encounters.”²²⁸ Thus, by examining a small, “all-white” town in the Midwest, Stage claims that it is possible to gain “insight into how this segment of our population views its position within the center of society.”²²⁹

Professor Stage claims that the need for “indigenous research” has been articulated by a variety of scholars. She draws on work by Nakayama and Krizeck that, according to Stage, asserts that “white is a relatively uncharted territory that has remained invisible as it continues to influence the identity of those both within and without its domain.”²³⁰ “Study of the center is never easy,” she states, because “[t]he place from which power is exercised is often a hidden place.”²³¹ She also points to the work of white scholars indicating discomfort with their perception that “white is not anything” and

227. Christina Stage, *We Celebrate 100 Years: An “Indigenous” Analysis of the Metaphors that Shape the Cultural Identity of Small Town, U.S.A.*, in *WHITENESS: THE COMMUNICATION OF SOCIAL IDENTITY* 69–70 (Thomas K. Nakayama & Judith N. Martin eds., 1999).

228. *Id.*

229. *Id.*

230. *Id.* at 71.

231. *Id.*

doesn't represent an identity or any particular quality.²³² Stage supports the work of scholars who "explore European American experience" and thereby "help fill the cultural void felt by many" white people, as well as expanding "our conceptualization of intercultural communication issues in the United States."²³³

Adding an "indigenous perspective" will provide "texture" to white identity.²³⁴ In particular, Stage examines the intersection of two points of white identity—"white" and "rural"—to understand "movement and communication within the center."²³⁵ She sees the community of Laurel as a community that has "slipping into the margins of the center" and, like many rural communities across America, has become economically marginalized and perhaps politically disenfranchised as well.²³⁶ The "cultural identity" of this community, she claims, is distinctive and founded on a sense of shared history and experience that is different from other white groups "at the center."²³⁷

Is it possible that all groups have a claim to an "indigenous" identity to the extent that they have been living in a particular geographic region and have a shared sense of history and "cultural" traditions? So, a rural Montana ranching community is "indigenous" and so is a rural Appalachian coal mining community, or a rural Georgia farming community? Who is at the "center" and why does it matter? It matters because all of these "indigenous" populations are making a claim that they are somehow distinctive and marginalized in society. If this is perceived as true by society generally, then it goes a good distance toward proving Waldron's argument that Native peoples are merely making group claims on the same basis as other purportedly "disadvantaged" groups and should enjoy no unique priority or entitlement to rights. The appropriation of "indigenous" identity in the politics of representation is obviously quite telling.

The term "indigenous" has become a trope to argue for a broader entitlement to rights among various groups in society. This type of

232. *Id.* (discussing work by Richard Dyer).

233. *Id.*

234. *Id.*

235. *Id.* at 71–72.

236. *Id.* at 74.

237. *See generally id.*

appropriation evokes the unspoken assumption in American society that justice can be achieved for particular groups through the dominant society's norms and institutions. Cheryl Harris points to the current attack on affirmative action laws and policies in support of her point that formal equality is used by the dominant society to protect power and privilege for white citizens.²³⁸ She advocates for a more expansive concept of affirmative action, similar to that in South Africa, which would permit a redistribution of property and power to truly "equalize" disparate groups. What would this process entail in the United States? Clearly, all groups are not situated "equally," and true "equality" will only emerge from a recognition of their inherent differences. For Native Nations, this process necessarily entails a respect for their sovereignty and their unique political, legal, cultural and social institutions. Who owns "Indigenous" identity? That is a question for Native people, and it triggers discussion about "cultural appropriation" and "assimilation." As we all know, one of the most powerful forms of assimilation is to appropriate the key cultural symbols of another group and transform them into part of the dominant society. This has occurred for years, as tribal names, religious icons, symbols, and places have been converted into symbols of the dominant society. Tribal names are used to refer to automobiles (the Jeep "Cherokee"), sacred symbols are used as commercial icons ("Kachina Cadillac"), and sacred places, such as the Black Hills, are carved into National Monuments for the United States (Mt. Rushmore). By taking core elements of Native culture and mass producing them as part of "American" culture, the entire notion of "indigeneity" becomes convoluted and contested. And now that "scientific" evidence is being used to challenge Native narratives that identify Native peoples as the "original" people of this land, entire narratives of Native America are being converted into a "scientific" narrative about the "true" identity of the first Americans. What is missing in all of this is an ethic of respect for Native values, identities and narratives, and the core concepts within Native epistemologies.

238. Harris, *supra* note 4, at 1778.

CONCLUSION

In writing this essay, I came across an edited volume that presented the overarching ethical issues within the context of literature on whiteness.²³⁹ The essays in that volume probe how whiteness is constructed and practiced, how it structures social relations, and how it “produces power and is produced by power” in various social institutions,²⁴⁰ including legal and political institutions. The first chapter, entitled “Whiteness and the Great Law of Peace,”²⁴¹ describes the Great Law of Peace, which structured the “cooperative relations between five Iroquoian nations—Mohawk, Seneca, Cayuga, Oneida, and Onondaga—“as an example of ‘practical wisdom,’ that is, how to live well individually and collectively.”²⁴² Within this framework, “[r]elations within the nation and with other peoples were placed in a context of proper living.”²⁴³

The authors point out that one feature of the “white world view” that is not masked is its “universalizing tendency.”²⁴⁴ Whiteness “liquidates all others [in] its hegemonic discursive frames—such as civilization, modernization, progress, or development.”²⁴⁵ The truth of this observation is apparent in the historical development of international law, which gave rise to the discovery doctrine as a pillar for colonialism, and even in the current applications of international human rights law, which marginalize and subordinate the political status of indigenous peoples in relation to the nation-states. Moreover, the “engulfing presence of whiteness includes the loss of . . . the ability to recognize its historical contingency and the loss of the capacity to imagine alternative ways of living.”²⁴⁶ Thus, the historical and current legal and moral frameworks are perceived as representing a truth about the political and cultural status of divergent peoples. The authors compare modern Western thought, which often

239. CYNTHIA LEVINE-RASKY, WORKING THROUGH WHITENESS: INTERNATIONAL PERSPECTIVES (2002).

240. *Id.* at 2.

241. *Id.* at 25.

242. *Id.*

243. *Id.*

244. *Id.* at 27.

245. *Id.*

246. *Id.*

views the human being as an individual “autonomous entity existing in a lifeless and disinterested cosmos,”²⁴⁷ with the Great Law of Peace, which expressed a “vision of human life as interconnected, as existing within a network of relationships.”²⁴⁸

The system that Bedford and Workman describe can be analogized to what Deloria and Wildcat have referred to as the difference between Western and Native metaphysics.²⁴⁹ The Western scientific model, with its categories, hierarchies, and mechanistic world view, is replicated in law and in the secular models of ethics that form the predominant framework for evaluating moral issues within liberal societies.²⁵⁰ Native epistemologies, in comparison, which tend to see the Universe as a web of life, in constant motion and balance, give rise to an ethics of responsibility, which imposes reciprocal duties and obligations among all of its constituent entities, both human and nonhuman.²⁵¹ Within Native ethical systems, there is a pervasive belief that every aspect of the natural world has a spiritual essence and this context informs human experience.²⁵² Under this ethical structure, the essence of “human” identity is a spiritual and not a scientific enterprise.

The only way in which Native ethical systems can be appreciated is within the context of specific tribal epistemologies. The indigenous peoples of this land maintain an important basis of knowledge and wisdom that can teach a great deal about the place that we now call the United States. The United States, as a nation, is so young compared to the indigenous nations of this land. Americans search for an “indigenous” identity within their scientific and secular models, but they forget the most important thing of all: “Wisdom sits in Places.” This is the title of Keith Basso’s work on the tribal narratives of the Western Apache people, in which they memorialize

247. *Id.* at 29.

248. *Id.*

249. VINE DELORIA, JR. & DANIEL R. WILDCAT, POWER AND PLACE: INDIAN EDUCATION IN AMERICA 2 (2001)

250. *Id.* at 11–12.

251. Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 276–87 (1996).

252. DELORIA & WILDCAT, *supra* note 249, at 23.

their cultural histories through association with particular sites and places.²⁵³ The brash assertions of geneticists that they can prove cultural affiliation by DNA testing can never replace the cultural histories of the indigenous peoples of this land, which tell us who they are and how they came to be.

253. KEITH BASSO, WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE (1996).