

TIME FOR A CHANGE? THE KENNEWICK MAN CASE AND ITS IMPLICATIONS FOR THE FUTURE OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

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I. INTRODUCTION

In 1990, following more than twenty years of lobbying on the part of the Native American community, the United States Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA).¹ This piece of legislation set in place a mechanism for the return and reburial of certain Native American skeletal remains and sacred objects from museum and university collections across the United States as well as provided for the protection of in situ remains.² NAGPRA is seen by many as

legislation [that] effectively balances the interest of Native Americans in the rightful and respectful return of their ancestors with the interest of our Nation's museums in maintaining our rich cultural heritage, the heritage of all American peoples. Above all, . . . this legislation establishes a process that provides the dignity and respect that our Nation's first citizens deserve.³

This paper contains a review of the recent case, *Bonnichsen v. United States*,⁴ in which a group of scientists sought to study the skeletal remains of an ancient individual, nicknamed Kennewick Man, who was found in Washington state. What the case showed is that the NAGPRA legislation contains a substantial gap regarding whether it applies to extremely ancient human remains.

Although the question of whether or not a temporal limit to the claims for repatriation under NAGPRA has been addressed previously,⁵ this issue has often been treated tangentially with no substantial consideration of viable support for its delineation and addendum to the NAGPRA legislation.⁶ This paper

¹ Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. § 3001-3013 (2000)).

² FRANCIS P. MCMANAMON, *The Reality of Repatriation: Reaching Out to Native Americans*, in IMPLEMENTING THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT 25 (Roxana Adams ed., 2001). The federal legislation that became NAGPRA was not the first statement by legislatures in the United States on the treatment of Native American human remains. It was preceded by the National Museum of the American Indian Act (NMAIA), 20 U.S.C. § 80q to 80q-15 (2000), which covered repatriation of the Smithsonian Institution's collections. Additionally, a few states issued burial protection laws prior to 1990. See H. Marcus Price, III, *Bones of Contention: Reburial of Human Remains Under RS MO. 194.400-410*, 5 MO. ARCHAEOLOGY SOC. Q. 4 (1988).

³ 136 CONG. REC. S17,173-02 (daily ed. Oct. 26, 1990) (statement of Sen. McCain).

⁴ 217 F. Supp. 2d 1116 (D. Or. 2002).

⁵ See, e.g., Robert W. Lannan, *Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Human Remains*, 22 HARV. ENVTL. L. REV. 369 (1998).

⁶ See generally Douglas W. Ackerman, *Kennewick Man: The Meaning of "Cultural Affiliation" and "Major Scientific Benefit" in the Native American Graves Protection and Repatriation*

addresses this issue in a detailed manner, considering new legal developments such as the *Bonnichsen* case, and the legislative history of the NAGPRA and NMAIA legislation.

From the outset, it is prudent to identify what this paper is not about. Unlike claims by some legal commentators⁷ and anthropologists⁸ alike, I do not advocate a complete rescission, or even substantial revision, of the NAGPRA legislation. The temporal limitation currently lacking in the NAGPRA legislation is the main revision that I am suggesting, and is the focus of this article. When a culturally affiliated group can be identified, with consideration given to “temporal relativity”⁹ to ensure that the correct modern people are speaking for the correct remains, the religious beliefs of the identified group or groups must be respected, even if this means reburial. What I propose in this paper is that NAGPRA was never intended to apply to unaffiliated, ancient remains and that the Kennewick Man decision represents a reasonable balance of the interests of all groups involved in the debate.

II. A BRIEF HISTORY OF THE REPATRIATION DEBATE

A. *Historic Developments*

The tension between indigenous peoples and the anthropological¹⁰ community began during the civil rights movements of the 1960s.¹¹ While the African-American civil rights protests and demonstrations dominated the news, other minority groups also began to assert their dissidence with Anglo-America. The so-called “Red Power”¹² movement began in the mid-1960s.¹³ This move-

Act, 33 TULSA L.J. 359 (1997).

⁷ See, e.g., M. June Harris, *Who Owns the Pot of Gold at the End of the Rainbow? A Review of the Impact of Cultural Property on Finders and Salvage Laws*, 14 ARIZ. J. INT'L. & COMP. L. 223, 252-53 (1997). The intention of this author is implicit. It is that property interests of collectors should supersede all cultural property protections, including NAGPRA. See *id.*

⁸ See generally Clement W. Meighan, *Burying American Archaeology*, ARCHAEOLOGY, Nov.-Dec. 1994, at 64; Clement W. Meighan, *Some Scholars' Views on Reburial*, 57 AM. ANTIQUITY 704 (1992).

⁹ “Temporal relativity” refers to the reality that groups can be linked to ancient remains in some areas to older dates than in other areas. This may be due to an incomplete archaeological record or significant amounts of population movement prehistorically, among other factors.

¹⁰ The term “anthropology” is used in this paper to refer to the field that includes cultural anthropology, physical anthropology, archaeology, and linguistics. Particular subfields will be referenced individually where relevant (primarily archaeology and physical anthropology, which clash with the indigenous communities on the issues discussed herein much more often than the other subfields).

¹¹ See generally DAVID HURST THOMAS, *SKULL WARS: KENNEWICK MAN, ARCHAEOLOGY, AND THE BATTLE FOR NATIVE AMERICAN IDENTITY* (2000).

¹² The Red Power movement of the 1960s and 1970s included sit-ins, disruptions of archaeo-

ment was a Native American backlash against nearly five hundred years of oppression.¹⁴

During the Red Power movement, Vine Deloria, Jr. published his provocative book, *Custer Died for Your Sins: An Indian Manifesto*.¹⁵ In this book, Deloria attacked virtually all non-Native American institutions in the United States; one entire chapter is devoted to anthropologists.¹⁶ While making light-hearted jabs at the anthropological community, such as "Indians are certain that all societies of the Near East had anthropologists at one time because all those societies are now defunct,"¹⁷ some of Deloria's observations were acute and have become a sounding board for Native Americans across the United States. Deloria commented that "[a]cademia [including anthropology], and its by-products, continues to become more irrelevant to the needs of the people."¹⁸ Further, and more to the point of the current situation, Deloria characterized anthropology and Native American relations as a "[c]ompilation of useless knowledge 'for knowledge's sake' [that] should be utterly rejected by the Indian people."¹⁹ Moreover, Deloria asserted that "[w]e should not be objects of observation for those who do nothing to help us."²⁰ Over the past thirty years, this attitude has developed into a general distrust of the pronouncements of academic anthropology.²¹ More specifically, the indigenous religious establishment

logical excavations, and generating media attention to combat police brutality and to highlight the plight of modern Native Americans. *Id.* at 198-202. Josephy characterized the movement by stating that "Red Power . . . reflects a determined and patriotic Indian fight for freedom—freedom from injustice and bondage, freedom from patronization and oppression, freedom from what the white man cannot and will not solve." Alvin M. Josephy, Jr., *The New Indian Patriots, in RED POWER: THE AMERICAN INDIANS' FIGHT FOR FREEDOM* 13, 14 (1971). The movement was not only a backlash against mainstream, non-Native America, but it was also an attack by young Native Americans against what they perceived to be their own elders who had sold out to the United States. "The oppressed and desperate Indians on the reservations and the lonely and anxious ones in the cities and at white men's educational institutions sat up, took notice, and began to put pressure on 'Uncle Tomahawks' [a derogatory term for these sell-out elders] who had abdicated their responsibilities and loyalties to their peoples." *Id.*

¹³ See Duane Anderson, *Reburial: Is It Reasonable?*, *ARCHAEOLOGY*, Sept.-Oct. 1985, at 48.

¹⁴ See THOMAS, *supra* note 11, at 201-03 (detailing such events as Native American civil disobedience in the late 1960s and early 1970s).

¹⁵ VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* (Macmillan Co. 1969).

¹⁶ See *id.* at 78.

¹⁷ *Id.* at 79.

¹⁸ *Id.* at 93.

¹⁹ *Id.* at 94.

²⁰ *Id.*

²¹ See, e.g., James Riding In, *Repatriation: A Pawnee's Perspective*, in *REPATRIATION READER: WHO OWNS AMERICAN INDIAN REMAINS?* 106 (Devon A. Mihesuah ed., 2000).

has begun to rebut long-held scientific truisms regarding the peopling of the New World.²²

In the United States, many Native American groups²³ have begun to break free of scientific notions of their migration across the Bering Strait land bridge some 13,000 years ago.²⁴ This theory has been replaced by creationist theories derived from oral histories, placing Native Americans in the New World since the beginning of time.²⁵ Such interpretations of the world are leading indigenous groups to become increasingly wary of scientific evidence to the contrary of their religious views.²⁶ A considerable amount of this disputed evidence is currently coming from studies of human skeletal remains by physical anthropologists.²⁷

The general consensus of Native American communities with respect to the researching of skeletal remains for the purpose of understanding past cultures, indeed, their own cultures, is that they do not need to know such scientific interpretations of their past.²⁸ Many Native American religions contain concepts of creation that describe how their people came to their current locations, how they have interacted within and without their groups from the dawn of time, and why they have acted in this way.²⁹ Under such a belief system, Western science divining contradictory or even supportive evidence is of no consequence. In-

²² See THOMAS, *supra* note 11, at 255.

²³ This term is used as a general name in this paper, with cognizance to the reality that Native America is made up of diverse cultures, all with individual belief systems. This is a reality often missed by the legal community, evident when authors speak of "Native American religion" rather than "Native American religions." See Peter R. Afrasiabi, *Property Rights in Ancient Human Skeletal Remains*, 70 S. CAL. L. REV. 805, 812 (1997). Such a misunderstanding causes overly broad generalizations of the desires of the general Native American community. See generally *Perspectives from Lakota Spiritual Men and Elders* (Jan Hammil & Larry J. Zimmerman, eds., Forty-First Plains Conference, Rapid City, S.D., 1983) (transcript on file with the author) [hereinafter Hammil & Zimmerman]. Additionally, Native American, in this paper, does not refer to a racial grouping. This is because biological race, conceived as discrete morphological groups, does not exist. See generally Leonard Lieberman et al., *The Debate Over Race: Thirty Years and Two Centuries Later*, in RACE & IQ 46 (Ashley Montagu ed., 1999). Rather, Native American refers to a shared cultural identity among a diverse array of groups in the United States.

²⁴ The 13,000 years before present timing used in this paper refers to the oldest documented evidence of Native American activity in the New World that has been agreed upon by a panel of authorities on the peopling of the New World. See generally David J. Meltzer et al., *On the Pleistocene Antiquity of Monte Verde, Southern Chile*, 62 AM. ANTIQUITY 589, 661 (1997). It is in no way intended to imply that no such activity may have occurred prior to that time.

²⁵ See generally THOMAS, *supra* note 11, at 255.

²⁶ See, e.g., ELAINE DEWAR, BONES: DISCOVERING THE FIRST AMERICANS 23 (2001) (stating that "many Native people consider the [crossing of the Bering Straits] to be a ridiculous theory.").

²⁷ See generally Hammil & Zimmerman, *supra* note 23, at 1-7.

²⁸ *Id.* at 5-6.

²⁹ *Id.* at 3-4.

deed, many Native Americans consider Western science as just another of the world's religions, with no greater claim to legitimacy than their own.³⁰

In addition to the general disregard for Western science's methods and questions among Native Americans, many Native American groups have begun to compile their own histories based upon their oral histories.³¹ The compilation of these histories "often means disputing the scientific version—not necessarily because [it] is wrong but because it does not contribute to the version of history which the indigenous communities wish to affirm."³² Religious differences between many Native American communities and Western scientists probably pose the most significant problem for these groups to reaching a resolution on the reburial issue. However, this religious argument has been the most powerful in support of the return of indigenous skeletal remains.³³

B. *The Kennewick Man Problem*

It is within this conceptual framework that a unique challenge to NAGPRA has arisen: Kennewick Man. Briefly, the skeletonized remains of an individual, named Kennewick Man,³⁴ were discovered by several youths on the Columbia River in eastern Washington state in 1996.³⁵ Initial analyses by a local archaeologist, James Chatters, suggested that this individual was morphologically distinct from Native American populations.³⁶ Believing the remains to be those of a Euro-American pioneer from the nineteenth century, Chatters and the United States Army Corps of Engineers (the Corps)³⁷ were shocked to receive radiocarbon dates of 9,200 B.P. on the Kennewick Man remains.³⁸ A fi-

³⁰ José Ignacio Rivera, *The Reburial of Our Ancestors: A Moral, Ethical, and Constitutional Dilemma for California*, NEWS FROM NATIVE CAL., Jan.-Feb. 1989, at 12, 13.

³¹ One example of this has been the efforts of the Pequot Tribe in Connecticut who have used casino revenues to construct an extensive museum whose mission includes the documentation of oral histories. THOMAS, *supra* note 11, at 264-65.

³² D. Gareth Jones & Robyn J. Harris, *Archaeological Human Remains: Scientific, Cultural, and Ethical Considerations*, 39 CURRENT ANTHROPOLOGY 253, 260 (1998) (reference omitted).

³³ "We don't believe in digging up our own people, nor do we believe in digging up other people. When we bury our dead, we use sacred ceremonies, we do certain sacred rituals It is one of our [religious] laws that we leave our dead alone." Hammil & Zimmerman, *supra* note 23, at 6 (statement by Roger Byrd).

³⁴ The remains were so named because of their proximity to Kennewick, Washington. THOMAS, *supra* note 11, at xxxix.

³⁵ ROGER DOWNEY, RIDDLE OF THE BONES: POLITICS, SCIENCE, RACE, AND THE STORY OF KENNEWICK MAN ix (1999).

³⁶ *Id.* at 9; see also JAMES C. CHATTERS, ANCIENT ENCOUNTERS: KENNEWICK MAN AND THE FIRST AMERICANS 27 (2001).

³⁷ The Kennewick Man remains were found on a portion of land controlled by the Corps.

³⁸ "BP" here refers to years before present, where "present" is defined by the radiocarbon

asco of poor handling,³⁹ problematic analyses,⁴⁰ and outrageous amounts of media coverage ensued. Numerous local Native American groups asserted claims to the remains under NAGPRA, and several anthropologists objected on the grounds that the remains were too old and too morphologically distinct from modern groups in the area to assert a claim under NAGPRA.⁴¹ A six-year legal battle over these remains ensued.⁴² Ultimately, the right to study the remains was granted to the scientists.⁴³ The case, as discussed below, has highlighted at least one substantial shortcoming of the NAGPRA legislation: there is no temporal limit to the question of affiliation under NAGPRA. However, before going any further, an understanding of how NAGPRA works is necessary.

III. HOW NAGPRA WORKS

The NAGPRA legislation applies to Native American⁴⁴ human remains in two contexts: curated remains housed in museums or other institutional collections that receive federal funding⁴⁵ and remains found on federal or tribal

present of A.D. 1950. See generally Minze Stuiver et al., *CALIB 4.1 Manual*, at <http://depts.washington.edu/qil/calib/manual/> (last visited Sept. 5, 2003).

³⁹ One example of the mishandling of the Kennewick Man remains is the fact that the Corps was charged with sequestering the Kennewick Man remains from the Native American claimants as well as the scientist/plaintiffs pending a final ruling on their disposition. However, the Corps allowed at least five separate "spiritual observances" over the remains by Native American groups. See DOWNEY, *supra* note 35, at 130.

⁴⁰ This refers to the fact that Dr. Chatters originally determined the "race" of Kennewick Man to be Caucasian when what he really found was that the metric and nonmetric dimensions of the remains simply fell outside what is normally expected for Native Americans. See *id.*; see also CHATTERS, *supra* note 36, at 142. This problem was further perpetuated when Chatters had a facial reconstruction done on the skull, following modern forensic methods, and claimed that the result looked like Scottish actor, Patrick Stewart. See DOWNEY, *supra* note 35, at 134; see also CHATTERS, *supra* note 36, at 142. These characterizations immediately caused dismay among Native American groups, who suddenly felt their sovereignty being challenged by possibly losing their status as America's first people. See, e.g., Bruce E. Johansen, *Great White Hope? Kennewick Man, the Facts, the Fantasies and the Stakes*, 16 NATIVE AM. 36 (1999); see also THOMAS, *supra* note 11, at 234-38.

⁴¹ See generally *Bonnichsen v. United States*, 217 F. Supp. 2d 1116 (D. Or. 2002).

⁴² *Id.*

⁴³ The district court found for the anthropologist plaintiffs. *Id.* at 1119. However, the case is on appeal in the Ninth Circuit, which recently heard oral arguments on Sept. 10, 2003. See generally *Friends of the Past, 9th Circuit Hears Oral Arguments* (Sept. 15, 2003), at <http://www.friendsofpast.org> (last visited Sept. 15, 2003).

⁴⁴ "Native Americans" under NAGPRA include Native Americans, Native Hawaiians, and Alaskan Inuits. Native American Graves Protection and Repatriation Act (NAGPRA) § 2, 25 U.S.C. § 3001(9) (2000).

⁴⁵ *Id.* §§ 3003-3008.

lands.⁴⁶ Both of these situations are relevant to this study and are discussed below.

A. *Curated Remains*

Under NAGPRA, as passed in 1990, all federally funded institutions were required to create an inventory of all "Native American human remains and associated funerary objects"⁴⁷ under their control by November 16, 1995.⁴⁸ If, pursuant to the inventory required under section 5,⁴⁹ a modern lineal descendant group can be identified, and such a group requests the return of the remains, the request must be granted.⁵⁰ Section 9 provides for civil penalties for failing to comply.⁵¹ A "Review Committee" created by the Secretary of the Interior and composed of seven members must review these inventories.⁵² At the request of an "affected party,"⁵³ the Review Committee must make findings from these inventories of cultural affiliation of curated items as well as arrange for the repatriation of *affiliated* remains, when requested.⁵⁴

Under section 7, lineal descendants can make claims for remains identified pursuant to a section 5 inventory as affiliated with a Native American group.⁵⁵ This also extends, as one of the most complicated parts of NAGPRA, to remains not affiliated in a section 5 inventory where the claiming Native American group "can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant infor-

⁴⁶ *Id.* § 3002.

⁴⁷ *Id.* § 3003(a).

⁴⁸ *See id.* § 3003(b)(1)(B). This date was five years after the passage of the Act as provided for in NAGPRA § 5(b)(1)(B), subject to reasonable extensions under § 5(c). *See id.* § 3003(c).

⁴⁹ *Id.* § 3003.

⁵⁰ *Id.* § 3005(a)(1).

⁵¹ *Id.* § 3007. After notice of a violation of the inventory requirements, the Secretary of the Interior must assess a penalty. 43 C.F.R. § 10.12(g)(2) (2003). "The penalty amount must be .25 percent of [the] museum's annual budget, or \$5,000, whichever is less . . ." *Id.* The Secretary of the Interior can also assess additional penalties when considering the value of the materials held by the museum, the damages suffered by the affected groups, and the number of violations. *Id.* § 10.12(g)(2)(i)-(iii). Additionally, a penalty of up to \$1,000 per day may be assessed "after the date that the final administrative decision takes effect . . . if [the] museum continues to violate" NAGPRA. *Id.* § 10.12(g)(3).

⁵² These seven members are to be composed of three members of the scientific/museum community, three members of Native American organizations, and one "from a list of persons developed and consented to by all of the" other six members. 25 U.S.C. § 3006(b)(1)(A)-(C).

⁵³ *Id.* § 3006(c)(3).

⁵⁴ *Id.* § 3006(c)(3)-(5).

⁵⁵ *Id.* § 3005(a).

mation or expert opinion.”⁵⁶ Remains that are not identifiable through the means discussed *supra* may remain in the possession of the holding institution.⁵⁷ Certain remains, though they have valid claims for repatriation attached, may also be retained by the holding institution under certain circumstances.⁵⁸ This narrow area allows for the retention of claimed remains if “such items are indispensable for completion of a scientific study, the outcome of which would be of major benefit to the United States.”⁵⁹

B. *Remains Found on Federal or Tribal Lands*

Section 3 of NAGPRA applies to Native American remains and objects of cultural patrimony discovered on federal and tribal lands. If remains are found on such lands, after the date of enactment, NAGPRA applies.⁶⁰ Section 3 prioritizes the order of ownership of such items. If lineal descendants can be associated with the items, those individuals hold the primary position of ownership.⁶¹ However, where direct lineal descendants cannot be identified, a tripartite scheme of ownership determination is employed: (a) the ownership shall be “in the Indian tribe . . . on whose tribal land such objects or remains were discovered;”⁶² (b) the ownership shall be “in the Indian tribe . . . which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or”⁶³ (c) “if cultural affiliation . . . cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or

⁵⁶ *Id.* § 3005(a)(4). For the purposes of NAGPRA, cultural affiliation “means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.” *Id.* § 3001(2).

⁵⁷ This is likely true due to the lack of statutory guidance on the issue of disposition of unaffiliated, unclaimed remains. 43 C.F.R. §§ 10.7, 10.11 (2003). Although there is no actual law on this issue, maintaining the status quo by keeping these collections where they are seems reasonable.

⁵⁸ *See* 25 U.S.C. § 3005(b).

⁵⁹ Even when such remains are held in this manner, the remains must be returned “no later than 90 days after the date on which the scientific study is completed.” *Id.*

⁶⁰ For the purposes of NAGPRA, “[f]ederal lands’ means any land other than tribal lands which are controlled and owned by the United States, including the lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971.” *Id.* § 3001(5). “[T]ribal land’ means (A) all lands within the exterior boundaries of any Indian reservation; (B) all dependant Indian communities; (C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.” *Id.* § 3001(15)(A)-(C).

⁶¹ *Id.* § 3002(a)(1).

⁶² *Id.* § 3002(a)(2)(A).

⁶³ *Id.* § 3002(a)(2)(B).

the United States Court of Claims as the aboriginal land of some Indian tribe,"⁶⁴ then (1) the ownership shall be "in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or"⁶⁵ (2) ownership shall be "in the Indian tribe that has the strongest demonstrated relationship . . . if it can be shown by a preponderance of the evidence that a different tribe [from the one identified in section 3(a)(2)(C)(2)] has a stronger cultural relationship with the remains or objects"⁶⁶

It must be remembered that these provisions and means for identifying affiliation only apply to remains or objects discovered after November 16, 1990 and not to remains and objects already curated by that date.⁶⁷ Additionally, this scheme does not restrict the excavation of remains after November 16, 1990; it just sets in place a mechanism for determining who ultimately controls the remains.⁶⁸ Finally, for remains that are not claimed by a group identified under section 3(a), no regulations have yet been promulgated.⁶⁹

IV. THE PROBLEM: LACK OF A TEMPORAL LIMIT TO CLAIMS UNDER NAGPRA

Although NAGPRA has potential problems in many areas, this examination addresses only one of those issues: the absence of a temporal limit to NAGPRA claims under sections 3⁷⁰ and 7(a)(4).⁷¹ This problem has been the focus of several other studies with no apparent effect on the vagueness of the statutory language.⁷² Additionally, these studies were conducted in light of the pending litigation in *Bonnichsen*,⁷³ regarding the disposition of the approximately 9,200 year-old remains, discussed *infra*. This litigation is now complete and an apparent jurisprudential interpretation of the NAGPRA statute addressing the issue of temporality has been created. The old problem of time depth is reviewed here and reassessed in light of the recent decision in *Bonnichsen*.

⁶⁴ *Id.* § 3002(a)(2)(C).

⁶⁵ *Id.* § 3002(a)(2)(C)(1).

⁶⁶ *Id.* § 3002(a)(2)(C)(2).

⁶⁷ Such remains are covered in NAGPRA § 3. *See id.* § 3002 (discussed *supra* Part III.B.).

⁶⁸ *See id.* § 3002(c).

⁶⁹ *See* 43 C.F.R. §§ 10.7, 10.11 (2003).

⁷⁰ 25 U.S.C. § 3002.

⁷¹ 25 U.S.C. § 3005(a)(4).

⁷² *See, e.g.,* Wendy Crowther, *Native American Graves Protection and Repatriation Act: How Kennewick Man Uncovered the Problems in NAGPRA*, 20 J. LAND RESOURCES & ENVTL. L. 269 (2000); *see also* Lannan, *supra* note 5.

⁷³ 217 F. Supp. 2d 1116 (D. Or. 2002).

V. *BONNICHSEN v. UNITED STATES*: IS THERE A CHANGE IN THE MAKING?

Scholarly and popular recapitulations of the events leading up to the Kennewick Man case are legion.⁷⁴ Therefore, a brief review of the facts is all that will be contained herein.

In the summer of 1996, the skeletonized remains of an individual were discovered in the Columbia River in Washington, near the town of Kennewick.⁷⁵ Local law enforcement delivered the remains to anthropologist, Dr. James Chatters. Chatters' initial examination of the remains employed modern forensic methods of identification, as he suspected that the individual was a modern victim of foul play.⁷⁶ However, when Chatters noticed a projectile point fragment imbedded in the pelvis in x-rays of the remains, he began to question the belief that these remains belonged to a recently deceased individual. Because the remains were discovered on lands controlled by the Corps, Chatters had to obtain a permit for the continued excavation and examination of the remains under the Archaeological Resources Protection Act (ARPA).⁷⁷ Pursuant to his ARPA permit, Chatters sent a bone sample for radiometric dating. The results of this and subsequent tests placed the antiquity of the individual at between 8,340 and 9,200 B.P.⁷⁸ Subsequently, several local Native American groups, through the Corps and the Department of the Interior, began to demand the reburial of the remains. The Corps took possession of the remains and published a "notice of intent to repatriate."⁷⁹ At this point, some of the biggest names in the field of physical anthropology and archaeology (including C. Loring Brace, C. Vance Haynes, Douglas Owsley, and Robson Bonnichsen) expressed support for the retention of the remains so that their full scientific potential could be realized.⁸⁰ In response to the Corps' decision to return the remains to the coalition of Native American tribes for reburial, a group of these anthropologists filed suit against the Corps in federal district court in the District of Oregon.⁸¹

⁷⁴ See, e.g., DOWNEY, *supra* note 35; see also Lannan, *supra* note 5.

⁷⁵ DOWNEY, *supra* note 35, at ix.

⁷⁶ *Id.* at 9.

⁷⁷ *Id.* ARPA is codified at 16 U.S.C. § 470bb (2000).

⁷⁸ *Bonnichsen*, 217 F. Supp. 2d at 1120.

⁷⁹ Lannan, *supra* note 5, at 377.

⁸⁰ DOWNEY, *supra* note 35, at 48-49.

⁸¹ The group was comprised of Brace, Haynes, Owsley, and Bonnichsen as well as George W. Gill, Richard L. Jantz, Dennis J. Stanford, and D. Gentry Steele. *Bonnichsen*, 217 F. Supp. 2d at 1119. Robson Bonnichsen is the director of the Center for the Study of the First Americans at Texas A&M University and an active participant in the study of the peopling of the New World. DOWNEY, *supra* note 35, at 48. C. Loring Brace is a professor of anthropology at the University of Michigan and a well-known researcher of human evolution. *Id.* C. Vance Haynes is a geon-anthropologist whose work on the peopling of the New World has been influential for the past forty years. See Eric Holland, Caleb Vance Haynes, at

This case, which bumped around between the district court and the Department of the Interior for nearly six years, represents the most significant challenge to the NAGPRA legislation to date. The well-reasoned decision of Magistrate Judge John Jelderks, though not binding on subsequent courts, creates important persuasive precedent that should provide guidance for any future litigation under this legislation. Of particular interest in this case is the weight that Judge Jelderks placed on the different methods of determining affiliation under NAGPRA.

In the determination of affiliation under NAGPRA, Judge Jelderks held that it was not enough that the remains in question are potentially of Native American origin, but that they must be related to a currently existing culture for a valid NAGPRA claim to be made.⁸² He based this conclusion on the present tense inherent in the definition of “Native American” in 25 U.S.C. § 3001(9).⁸³ The judge reasoned that such an interpretation, “requiring a ‘present-day relationship’ is consistent with the goals of NAGPRA: Allowing tribes and individuals to protect and claim remains, graves, and cultural objects to which they have some relationship . . .”⁸⁴

With respect to the claims of the various Native American groups that the remains are affiliated regardless of age and attenuation of culture, Judge Jelderks commented that, “courts do not assume that Congress intends to create odd or absurd results.”⁸⁵ Taken to its ends, such a presumption, if read into the NAGPRA definition of Native American – that all individuals present before A.D. 1492 are subject to that law – would mean that if remains of the Vikings, known to have inhabited portions of northeastern North America at least as early as A.D. 1000⁸⁶ are found, those remains would have to be turned over to Native

http://emuseum.mnsu.edu/information/biography/fghij/haynes_caleb.html (last visited Sept. 5, 2003). Douglas Owsley is the curator of physical anthropology for the Smithsonian Institution’s National Museum of Natural History (NMNH). See generally JEFF BENEDICT, NO BONE UNTURNED (2003). George Gill is a bioanthropologist at the University of Wyoming and one of Owsley’s mentors. *Id.* at 6-11. Dennis Stanford is the head of the Department of Anthropology at NMNH. DOWNEY, *supra* note 35, at 48. Richard Jantz is a physical anthropologist at the University of Tennessee who is renown for his forensic work as well as his studies of ancient skeletal remains. *Id.* D. Gentry Steele is a bioanthropologist at Texas A&M University who is well known for his skeletal studies of the peopling of the New World. *Id.*

⁸² *Bonnichsen*, 217 F. Supp. 2d at 1136.

⁸³ *Id.* Where “Native American” is defined as “‘of, or relating to, a tribe, people, or culture that is indigenous to the United States.’” *Id.* (quoting 25 U.S.C. § 3001(9) (2000)).

⁸⁴ *Id.* at 1136.

⁸⁵ *Id.*

⁸⁶ This is the generally accepted date of the arrival of Norse Vikings on the North American continent. See generally VIKINGS: THE NORTH ATLANTIC SAGA 281 (William W. Fitzhugh & Elisabeth I. Ward eds., 2000). There is, as yet, no evidence suggesting earlier forays into North America by these groups, but the possibility must not be ruled out for lack of data. Another example of possible problems of applying this suggested definition of “Native American” could result from the classification of the culturally unrelated inhabitants of the Caribbean as “Native

American control. The “[a]pplication of this definition [in such a way] could yield some odd results”⁸⁷ to say the least. Judge Jelderks additionally commented that “[t]his court cannot presume that Congress intended that a statutory definition of Native American requiring a relationship to a tribe, people, or culture that is indigenous to the United States yield such far reaching results” as to extend to culturally unrelated groups of unknown origin that inhabited the territory now encompassed by the United States at some time in the distant past.⁸⁸ The court, however, stopped short of deciding that the Kennewick Man remains were not Native American under the terms of NAGPRA, but rather found that the Corps had exceeded the conclusions supported by their extensive (22,000 page) administrative record when they found that the remains were Native American.⁸⁹ By so finding that the Corps failed to establish the Native American affiliation of the Kennewick Man remains, Judge Jelderks held that “NAGPRA does not apply to the remains.”⁹⁰

Despite the fact that Judge Jelderks did away with the Corps’ assertion that NAGPRA applies to the Kennewick Man remains by page thirty-two in a seventy-three page opinion, he went on to address subsequent components of the claims in dicta that should stand as guidance for future courts that may have to consider similar matters. Judge Jelderks began his analysis of the remainder of the issues with an examination of the Corps’ determination that there was a cultural affiliation between the remains and the tribal claimants.

The regulations for the determination of affiliation track the language of the affiliation standards for repatriation under section 7 of NAGPRA very closely.⁹¹ Judge Jelderks singled out a few of these components; namely biological, archaeological, and oral tradition; and analyzes the effectiveness of these methods.⁹² Regardless of the connexity of particular remains and extant Native American groups, the regulations place a higher burden on claimant groups by requiring the lines of evidence suggesting cultural affiliation to be

Americans” under NAGPRA and the return of those remains to an unaffiliated North American group for reburial if their remains are found in the Southeastern United States. Such a scenario is equally as plausible as the Viking scenario. See generally Ryan M. Seidemann, *The Bahamian Problem in Florida Archaeology: Oceanographic Perspectives on the Issue of Pre-Columbian Contact*, 54 FLA. ANTHROPOLOGIST 4 (2001).

⁸⁷ *Bonnichsen*, 217 F. Supp. 2d at 1136.

⁸⁸ *Id.* at 1137 (internal quotations omitted).

⁸⁹ *Id.* at 1139 n.41.

⁹⁰ *Id.* at 1139. This relegated the disposition of the remains to the existing law under ARPA, which allowed the scientist plaintiffs access to the remains for study.

⁹¹ See 43 C.F.R. § 10.2(e) (2003) (“Cultural affiliation is established when the preponderance of the evidence — based on geographical, kinship, biological, archeological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion — reasonably leads to such a conclusion.”).

⁹² *Bonnichsen*, 217 F. Supp. 2d at 1148-55.

supplemented by a showing of “*shared group identity* that may be reasonably traced historically or prehistorically between a present day [Native American group] and an *identifiable* earlier group.”⁹³ This raised burden for showing affiliation ensures that the interests of the dead are protected from claims of unrelated groups’ beliefs about how the dead are to be treated. It is largely on these grounds that Judge Jelderks reasoned through the examination of the cultural affiliation of the Kennewick Man remains. Cognizant of the difficult task that NAGPRA and its attendant regulations placed in the Secretary of the Department of the Interior in establishing a link between Kennewick Man and the tribal claimants, Judge Jelderks found that the Secretary failed in establishing such a link.⁹⁴

“[T]he Kennewick remains are *so* old, and information as to this era is *so* limited, that it is impossible to say whether the Kennewick Man is related to the present-day Tribal Claimants, or whether there is a shared group identity between his group and any of the Tribal Claimants.”⁹⁵ This conclusion rests largely on the lack of archaeological evidence from the period in which Kennewick Man died, despite the Secretary’s findings that the oral traditions of the Native American claimants purportedly demonstrate the presence of these modern groups in the Columbia River region since time immemorial.⁹⁶ This decision shows a clear preference for the scientific means of establishing affiliation under NAGPRA by the court. These oral traditions are largely informed by a fundamental version of Native American creationism which places Native American groups in the New World since the beginning of time,⁹⁷ in contravention to genetic,⁹⁸ archaeological,⁹⁹ and linguistic¹⁰⁰ evidence. This choice of siding with science in a religiously charged debate enjoys a consistent place in American jurisprudence, resting on such cases as those regarding the teaching of evolution in public schools.¹⁰¹ Contrary to the earlier contentions of Native

⁹³ 43 C.F.R. § 10.2(e) (emphasis added). The requirement that remains must be affiliated with “an *identifiable* earlier group” appears to be a tacit acknowledgment on the part of the Department of the Interior that no cultural affiliation can exist for ancient remains where the ancient group is culturally unidentifiable. *Id.* (emphasis added).

⁹⁴ *Bonnichsen*, 217 F. Supp. 2d at 1144.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1152.

⁹⁷ See Ron McCoy, *Bones of Contention: Kennewick Man*, 23 AM. INDIAN ART 115, 115 (1998).

⁹⁸ THOMAS D. DILLEHAY, *THE SETTLEMENT OF THE AMERICAS: A NEW PREHISTORY* 239-45 (2000).

⁹⁹ *Id.* at 15-43.

¹⁰⁰ *Id.* at 245-46.

¹⁰¹ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding the Louisiana Creationism Act as unconstitutional under the Establishment Clause because its purpose was to eliminate the teaching of evolution in public schools in lieu of creationism); *Epperson v. Arkansas*, 393 U.S. 97

American authors,¹⁰² this decision is not indicative of an anti-Native American slant by the American judicial system, but rather brings Native American creationism into line with a long history of opposition to the imposition of Christian creationism on publicly funded institutions.

Despite the religiously charged problems inherent in the use of oral histories to divine cultural affiliation, Judge Jelderks completely examined the evidence and considered it as a component of his affiliation analysis. Judge Jelderks recognized that “[n]arratives can provide information relevant to a cultural affiliation determination in appropriate circumstances.”¹⁰³ However, the ancient date of the remains substantially attenuated the narratives presented in *Bonnichsen v. United States* from the Kennewick Man remains.¹⁰⁴ Additionally, Judge Jelderks implicitly pointed out that the evidence required for affiliation by the Code of Federal Regulations, which includes oral traditions and archaeology are not of equal weight when determining affiliation.¹⁰⁵ Ultimately, the vague relationship of the oral evidence with the geologic evidence led to Judge Jelderks’ conclusion that “the narratives cited in the record here do not provide a substantial basis for concluding that the Tribal Claimants have established a

(1968) (holding a statute criminalizing the teaching of the Darwinian theory of evolution unconstitutional because it violates the First Amendment); *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999) (holding that a disclaimer that the teaching of evolution is not to dissuade a belief in the Creation prior to teaching evolution in public schools is violative of the First Amendment’s Establishment Clause); *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994) (rejecting an assertion that evolution is a religion and thus violative of the First Amendment to be taught in schools); *Webster v. New Lenox Sch. Dist.*, 917 F.2d 1004 (7th Cir. 1990) (holding that a public school teacher does not have a First Amendment right to teach creation science because such activity would violate the Establishment Clause); *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1256 (W.D. Ark. 1982) (holding a statute mandating “balanced treatment to creation-science and to evolution-science” as an unconstitutional violation of the First Amendment’s Establishment Clause); see also DAVID L. FAIGMAN, *LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW* 177 (1999). Interestingly, Faigman comments that “[t]he fight over Kennewick Man . . . appears to offer a contemporary version of the struggle between evolutionary theory and creationism[,]” further lending credence to the analogy made here. *Id.*

¹⁰² Such a notion is explicit in Deloria’s comments such as, “[t]he Supreme Court is decidedly anti-Indian” and “it has seemed as if the Supreme Court simply weaves an argument out of thin air to deprive tribes of long-standing rights.” Vine Deloria, Jr., *Secularism, Civil Religion, and the Religious Freedom of American Indians*, AM. INDIAN CULTURE & RES. J., No. 16-2, at 9-10 (1992). This notion is also implicit in Vizenor’s suggestion that there is a need for a court system to specifically hear bone cases. See generally Gerald Vizenor, *Bone Courts: The Rights and Narrative Representation of Tribal Bones*, 10 AM. INDIAN Q. 319 (1986).

¹⁰³ *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1152 (D. Or. 2002).

¹⁰⁴ Indeed, the Department of the Interior’s expert, Dr. Boxberger, noted that “attempting to use oral traditions to create a time line or establish particular dates ‘does not meet with much success’” *Id.* at 1151.

¹⁰⁵ This is evident in the statement that “[n]arratives can provide information regarding the history of Indian cultures, and Congress clearly indicated that, *where appropriate*, this evidence should be considered in establishing cultural affiliation.” *Id.* at 1152 (emphasis added).

cultural affiliation between themselves and an earlier group of which the Kennewick Man was a member."¹⁰⁶

Importantly, but not the focus of the case-in-chief, the court went on to address the contentions of the Native American claimants that NAGPRA mandates repatriation to "the claimant with the 'closest cultural affiliation' – no matter how attenuated that relationship."¹⁰⁷ Such an interpretation of the statutory language detrimentally affects the interests of the dead by allowing them to be returned to completely unrelated groups in certain cases. In addition to this, the court interpreted NAGPRA as allowing only the affiliated group (federally recognized) to make a claim for the return of remains.¹⁰⁸ In so concluding, Judge Jelderks stated that the tribal coalition making a claim for the Kennewick Man remains is not valid under the law.¹⁰⁹ This conclusion seems to support the need for extensive front-end study of remains prior to the institution of any action to repatriate in order to ensure that the remains are returned to the appropriate group.

Judge Jelderks clearly demonstrated that Congress intended NAGPRA to apply to the remains of extant groups whose cultural connection with relatively recently deceased individuals have "remained relatively intact through the years."¹¹⁰ The general tenor of this case, while harsh towards the shortcomings of the Corps and the Department of the Interior, also illustrates Congress' intent to provide reparations to extant Native American groups for wrongs committed against them in the historic period of American history and that prehistoric remains were not to be included where there is a lack of cultural continuity.¹¹¹ Due to the decision of the Corps to accept oral traditions as establishing affiliation in this case, as well as the failure of the Corps and the Department of the Interior to fully consider the issues related to affiliation, Judge Jelderks found the agency's decision to return the remains to the Native American claimants arbitrary and capricious.¹¹² Rather than remanding to the agency, the court entered judgment in favor of the anthropologist plaintiffs.¹¹³

¹⁰⁶ *Id.* at 1155. Judge Jelderks also commented that "[t]he 9,000 years between the life of the Kennewick Man and the present is an extraordinary length of time to bridge with evidence of oral traditions." *Id.*

¹⁰⁷ *Id.* at 1156.

¹⁰⁸ *Id.* at 1141-43.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1147.

¹¹¹ Indeed, Judge Jelderks commented that, "NAGPRA was intended to reunite tribes with remains or cultural items whose affiliation was known, or could be reasonably ascertained." *Id.*

¹¹² *Id.* at 1156.

¹¹³ This was because, after a previous remand, the judge concluded that the agency was too biased against the plaintiffs to render a reasonable decision. *Id.* at 1134.

VI. LEGISLATIVE HISTORY OF NAGPRA

Little has been written on the hearings and debates that led to the passage of NAGPRA in 1990. During the height of the Kennewick Man controversy and litigation in 1998, Robert W. Lannan, a lawyer for the Corps, published an extensive legislative history of NAGPRA, examined in light of the pending Kennewick Man case.¹¹⁴ At first blush, this study appears impressive, impartial, and comprehensive. However, an independent review of the legislative history reveals problems with Lannan's study. Specifically, Lannan examines what the legislative history says about ancient remains, such as those that are the subject of the Kennewick Man case. Indeed, Lannan states that

[t]here are many indications in the legislative history that Congress intended NAGPRA to apply to some prehistoric remains. A controversial issue that surfaced repeatedly throughout NAGPRA's legislative history (and was never resolved statutorily) concerned whether and how this legislation should apply to ancient remains that cannot be 'culturally affiliated' with any modern Native American tribe or organization.¹¹⁵

Such a statement is compelling, but it is also false. The legislative history is virtually devoid of references to material older than A.D. 1492.¹¹⁶ Lannan cites

¹¹⁴ See Lannan, *supra* note 5.

¹¹⁵ *Id.* at 407.

¹¹⁶ See generally *Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects: Hearings on H.R. 1381, H.R. 1646, and H.R. 5237 Before the H.R. Comm. on Interior and Insular Affairs, 101st Cong. (1990)* [hereinafter *1990 House Hearings*]; *Native American Grave and Burial Protection Act (Repatriation); Native American Repatriation of Cultural Patrimony Act; and Heard Museum Report: Hearings on S. 1021 and S. 1980 Before the Senate Comm. on Indian Affairs, 101st Cong. (1990)* [hereinafter *1990 Senate Hearings*]; *National Memorial Museum of the American Indian: Hearings on S. 978 Before the Senate Comm. on Indian Affairs and Senate Comm. on Rules and Admin., 101st Cong. (1989)*; *Establishment of the National Museum of the Native American: Hearings on H.R. 2668 Before the H.R. Comm. on Interior and Insular Affairs, H.R. Comm. on House Admin., and H.R. Comm. on Pub. Works and Transp., 101th Cong. (1989)* [hereinafter *1989 House Hearings*]; *Native American Museum Claims Commission Act: Hearings on S. 187 Before the Senate Comm. on Indian Affairs, 100th Cong. (1988)* [hereinafter *1988 Senate Hearings*]; *National American Indian Museum Act (Part 2): Hearings on S. 1722 and 1723 Before the Senate Comm. on Indian Affairs and Senate Comm. on Rules and Admin., 100th Cong. (1987)* [hereinafter *1987 Senate Hearings Part 2*]; *National American Indian Museum Act (Part 1): Hearings S. 1722 and S. 1723 Before the Senate Comm. on Indian Affairs and Senate Comm. on Rules and Admin., 100th Cong. (1987)*; *Native American Cultural Preservation Act: Hearings on S. 187 Before the Senate Comm. on Indian Affairs, 100th Cong. (1987)* [hereinafter *1987 Senate Hearings*]; H.R. REP. NO. 101-877 (1990); S. REP. NO. 101-473 (1990); H.R. REP. NO. 101-340, pt. 2 (1989); H.R. REP. NO. 101-340, pt. 1 (1989); S. REP. NO. 101-143 (1989); S. REP. NO. 100-601 (1988); S. REP. NO. 100-494 (1988). This legislative history includes the history of NAGPRA and the NMAIA. Inclusion of the history of the NMAIA is due to the fact that many of the provisions of NAGPRA are modeled

only one quotation from the hearings as evidence of an intention to apply NAGPRA to ancient, unaffiliated remains. This quote was a statement by Senator Inouye (D-HI) that read, "[w]e are also fully in concurrence with the importance of knowing how we lived a thousand years ago or a million years ago, whatever it may be."¹¹⁷ This statement is more of an indication of Senator Inouye's lack of understanding of anthropological concepts and the time depth of modern human history than an intention to apply NAGPRA to ancient remains.¹¹⁸

To the contrary, what is abundantly evident from the legislative history is that Congress was especially concerned with reparations for the wrongs committed against Native Americans since A.D. 1492.¹¹⁹ Issues of the age of remains are dominated by an interest in United States Army acquisitions in the nineteenth century.¹²⁰ Indeed, the members of the museum and anthropological community attempted to raise questions of ancient remains in their testimony

on this earlier law. See S. REP. NO. 101-473, at 3.

¹¹⁷ 1988 Senate Hearings, *supra* note 116, at 66; see also Lannan, *supra* note 5, at 412 n.264.

¹¹⁸ What is meant by the Senator's lack of understanding is the fact that no modern human skeletal remains exist, nor did modern humans exist, one million years ago. Such a lack of understanding is exemplified in the following statement by Senator Inouye:

I can, for example, understand a museum claiming title to the jawbone of Peking man [sic] because there is no one around to lay claim to that or to the big tooth of the Australia pithecus [sic] found in the Otowi [sic] Canyon, but we are talking about thousands of bodies that were sent to Washington from battlefields, bodies that somehow can be identified as far as tribe or region is concerned.

1988 Senate Hearings, *supra* note 116, at 89. What is demonstrated by this quote is the Senator's lack of understanding of anthropological concepts (evident in the numerous mispronunciations and the lack of relatedness of those items to the current debate) as well as his ignorance of the testimony from earlier that day stating that the number of battlefield remains was less than 100 and that affiliation was next to impossible due to the poor records kept from those acquisitions. *Id.* at 48-51. For other examples of such misunderstandings, see 1990 Senate Hearings, *supra* note 116, at 44, 46; 1988 Senate Hearings, *supra* note 116, at 70. What is additionally demonstrated by this quote is Congress' unique interest in the disposition of recent rather than all or ancient human remains.

¹¹⁹ See S. REP. NO. 100-601, at 2.

It is the view of this Committee that there is a need for legislation in order to rectify the harm which has been inflicted upon Native American religious liberty and cultural integrity by the systematic collection of Native American skeletal remains, grave goods, and certain ceremonial objects which are required for the on-going conduct of religion.

Id.

¹²⁰ This is evidenced by the following: "How many were acquired during the Indian Wars?" 1988 Senate Hearings, *supra* note 116, at 50 (question by Senator Inouye); see also 1989 House Hearings, *supra* note 116, at 115, 119, 181-85; 1987 Senate Hearings, *supra* note 116, at 32; S. REP. NO. 100-601, at 2, 4; S. REP. NO. 100-494, at 28.

before Congress,¹²¹ but these attempts were not addressed by the Congressional committees.¹²² Instead, the Congressmen immediately reverted to questions of the whereabouts and disposition of recent remains.¹²³ Indeed, in at least one report issued by Congress subsequent to hearings on the NMAIA,¹²⁴ the House of Representatives Committee on Public Works reports that "H.R. 2668 provides a reasonable method and policy for the repatriation of Indian bones and funerary objects in the possession of the Smithsonian Institution. However, many human remains in the collection are of unknown origin and will, therefore, remain in the collection."¹²⁵

The record from the Congressional hearings on pre-NAGPRA bills are replete with references to and concerns about remains that are 200 or less years old.¹²⁶ Indeed, Senator Inouye went as far as stating that remains as old as 2,000 years were not the primary interest of the bill.¹²⁷ Additionally, Senator Melcher, who was the author of the original Senate repatriation bill,¹²⁸ stated that, "remains were also obtained by archaeologists. In general those are older remains, gathered for study to piece together the millennium of our unknown beginning.

¹²¹ E.g., "I don't think that it necessarily follows that the bill pertains only to extremely recent remains." *1987 Senate Hearings, supra* note 116, at 50 (comment by Dr. Thomas King); *see also 1989 House Hearings, supra* note 116, at 276 (Dr. Richard Stamps' commenting, "I have been told that all artifacts from the Earth are spiritual and should be returned. Where do you draw the line?").

¹²² Immediately after the comment by Dr. King, *supra* note 121, Senator Inouye returned to questions of recent remains, never addressing the issue of the application of the bill to ancient remains. *1987 Senate Hearings, supra* note 116, at 50; *see also 1990 House Hearings, supra* note 116, at 138 (comments of Dr. Keith Kintigh). In this case, the problem was acknowledged by the Congressmen, but they, too, quickly returned to a discussion of recent remains, admitting that they did not know what to do about ancient, unaffiliated remains. *1990 House Hearings, supra* note 116, at 230; *see also 1989 House Hearings, supra* note 116, at 228, 265-67 (statements of Dr. Robert Adams). These discussions did not amount to any resolution of note.

¹²³ *1990 House Hearings, supra* note 116, at 230; *1987 Senate Hearings, supra* note 116, at 50. Indeed, S. REP. NO. 100-601, at 4, indicates that at least the Senate was not at all concerned with remains recovered through legitimate archaeological excavations.

¹²⁴ National Museum of the American Indian Act, 20 U.S.C. § 80q to 80q-15 (2000) (sister legislation to NAGPRA).

¹²⁵ H.R. REP. NO. 101-340, pt. 1, at 16 (1989); *see also id.* at 15 (commenting that repatriation was only intended to apply to the remains of known individuals); H.R. REP. NO. 101-340, pt. 2, at 9, 25 (1989) (restating the same policy).

¹²⁶ *See, e.g., 1988 Senate Hearings, supra* note 116, at 48, 50, 65; *1987 Senate Hearings, supra* note 116, at 50, 60, 68. There was no addressing of the age of remains in the *1990 Senate Hearings, supra* note 116. *See also 1990 House Hearings, supra* note 116, at 36; H.R. REP. NO. 101-877, at 10 (1990).

¹²⁷ *1987 Senate Hearings, supra* note 116, at 50.

¹²⁸ Native American Cultural Preservation Act, S. 187, 100th Cong. (1987).

We do not intend in any way to interfere with this study and science in the bill."¹²⁹

In only a few places were there vague references to a question of ancient items and the difficulty of cultural affiliation on the part of Congress. One such reference was to cultural material and not human remains.¹³⁰ The remainder of comments addressing the application of this legislation to ancient remains were raised by the archaeological, museum, and Native American communities. In testimony before the Senate Select Committee on Indian Affairs, representatives of the archaeological and museum communities raised issues of problems with the legislation's application to ancient remains. The Senators ignored these issues.¹³¹ Representative Charles Bennett (D-FL) directly addressed the issue of ancient remains in the House of Representatives hearings in 1990. He commented that "we should not overlook the fact that there are some of the deceased who don't have modern descendants, and *their remains still should be kept with care.*"¹³² This strongly suggests that Congress' intent for the repatriation legislation was that it should not apply to ancient remains.¹³³ Senator Daniel Akaka (D-HI) also touched on this notion and stated, "I think there should be some consideration in the bill that would speak to this, so that the Government may be . . . the caretaker of peoples who are extinct."¹³⁴

Lannan was correct in his statement that the issue of the difficulty of cultural affiliation was addressed at several points in the hearings.¹³⁵ However,

¹²⁹ 1987 Senate Hearings, *supra* note 116, at 27 (emphasis added).

¹³⁰ 1990 Senate Hearings, *supra* note 116, at 68. The House of Representatives hearings in 1989 did address the problematic issue of cultural affiliation. See 1989 House Hearings, *supra* note 116, at 195. However, the consideration of this important issue was limited to a question posed by Rep. Ben Campbell (R-CO) regarding whether tribes would fight over reburial rights to remains of questionable affiliation. *Id.* No answer to this question appears in the record, and the issue was not addressed again. See *id.*

¹³¹ See, e.g., 1988 Senate Hearings, *supra* note 116, at 64; 1987 Senate Hearings, *supra* note 116, at 50. For a similar response in the House of Representatives, see 1990 House Hearings, *supra* note 116, at 138; 1989 House Hearings, *supra* note 116, at 17, 228. The Native American community also mentioned ancient remains on several occasions; their attempts at getting this issue addressed were also largely unsuccessful. See, e.g., 1990 House Hearings, *supra* note 116, at 111, 123; 1989 House Hearings, *supra* note 116, at 149-53, 181-85 (Mr. Echo-Hawk addressing the disposition of all remains and Congress responding by questioning nineteenth century actions, with no reference to ancient remains).

¹³² 1990 House Hearings, *supra* note 116, at 130 (emphasis added).

¹³³ Although Representative Bennett's statement, "I think that they would feel that these remains and their ways of being buried should also be respected and taken care of in any legislation we pass," seems to suggest an intent to have NAGPRA apply to ancient remains (at least to ensure respect for them), Bennett quickly dispels this notion by stating that "[w]e should not overlook the fact that they [sic] are not modern descendants to take care of those remains and we as a nation should take care of those remains." *Id.*

¹³⁴ *Id.* at 135.

¹³⁵ Lannan, *supra* note 5, at 407.

contrary to Lannan's contention that the outcome of these debates had the archaeologists attempting to force the burden of proving such affiliation on the Native American groups,¹³⁶ such proof was indeed what the Native American groups testifying before Congress had requested for themselves.¹³⁷ The issue of what is meant by "cultural affiliation" was left unresolved by Congress, with the clearest statement, to date, on this issue coming from Judge Jelderks in the recent Kennewick Man case. In the case, as discussed *supra*, the Judge undertook an extensive examination of the boundaries of "cultural affiliation," ultimately deciding that it required a showing of cultural continuity between the ancient group and the modern claimants. Based upon the foregoing reexamination of the legislative history, Judge Jelderks' interpretation of "cultural affiliation," whereby NAGPRA does not affect such ancient and unaffiliated remains as the ones that were the subject of the Kennewick Man case, is in line with Congress' intent for the law.¹³⁸ Indeed, the continuity that Judge Jelderks required between the modern and ancient groups in the Kennewick Man case¹³⁹ is explicitly supported by the legislative history.¹⁴⁰

VII. SUGGESTED REVISIONS

A. *Recent Revision Attempt and a New Suggestion*

It is apparent, after the Kennewick Man controversy, that there are substantial holes in the NAGPRA legislation that need to be addressed legislatively in order to create an equitable legal structure for all parties involved. In 1997, Representative Hastings (R-WA) attempted such a revision.¹⁴¹ While intro-

¹³⁶ *Id.* at 410.

¹³⁷ *See, e.g., 1987 Senate Hearings, supra* note 116, at 40-46 (testimony of Lionel John).

¹³⁸ *See* S. REP. NO. 100-601, at 5 (1988).

The Committee view on this matter is that tribes should be able to claim skeletal remains which are clearly identified as the members or ancestors of the tribe, unless the museum can clearly demonstrate that the remains were acquired with the permission of the tribe, family or individual descendent involved. The Committee does not believe that the tribes should be able to claim skeletal remains when identification by tribal affiliation is unclear or when the museum can document that the graves from whence such remains were taken were disturbed with the consent of the tribe or family of the individual which had the authority, under common law as it pertains to sepulchre, to authorize the disturbance of graves.

Id.

¹³⁹ *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1143 (D. Or. 2002).

¹⁴⁰ "The requirement of continuity between present day Indian tribes and materials from historic or prehistoric Indian tribes is intended to ensure that the claimant has a reasonable connection with the materials." S. REP. NO. 101-473, at 9 (1990).

¹⁴¹ *See* H.R. 2893, 105th Cong. (1997).

duced to address the ongoing Kennewick Man problem, House Bill 2893 was probably too broad in that it attempted to repeal a presumption of affiliation afforded the Native American community under NAGPRA section 3(a)(2)(C) when remains are found on ancestral aboriginal lands.¹⁴² Additionally, this bill proposed that remains found on federal lands “shall be reasonably recorded according to generally accepted scientific standards.”¹⁴³ The bill also provides for substantial scientific analysis of remains that cannot be culturally affiliated,¹⁴⁴ and it does not provide for any reburial or repatriation if the remains are not determined to be culturally affiliated with any extant tribe pursuant to the scientific studies.

Although Representative Hastings’ bill did go a long way to clarifying otherwise ambiguous provisions of NAGPRA, it did not cover the extent of the affiliation and age problem sufficiently. The legislation did not attempt to clarify the meaning of “cultural affiliation,” but rather provided for what could be done with remains prior to and immediately after a determination of affiliation.¹⁴⁵ This shortcoming would have left a substantial hole in the original legislation unsealed. Any attempted revision should be expanded to cover a clarified definition of “cultural affiliation” in light of Judge Jelderks’ reasoned decision as well as addressing the extent to which scientific studies can be performed in order to protect the common history of humanity as evidenced in the remains of ancient peoples. Additionally, the broad repeal of the presumption of affiliation when remains are identified on ancestral aboriginal lands is not necessary. If such remains are reasonably proven to be ancient, pursuant to permitted analysis, this should be sufficient, in most cases, to rebut the presumption of affiliation.

NAGPRA needs to reflect a temporal limit to cultural affiliation. Defining such a limit is difficult, as the known histories of extant Native American groups extend to varying distances into the past. No year can be given as to when the cultural link is too attenuated to allow a living group to speak to the disposition of the remains of deceased individuals.

Judge Jelderks was on the right path in the Kennewick Man case when he placed less reliance on oral histories in determining group affiliation when ancient remains are involved.¹⁴⁶ This is not to suggest that oral histories cannot

¹⁴² *Id.* § 1(a).

¹⁴³ *Id.* § 1(c) (an addition to NAGPRA that would be added as § 3(f) and codified at 25 U.S.C. 3002).

¹⁴⁴ *Id.* § 3.

¹⁴⁵ In section 3 of House Bill 2893, Congress would have provided a mechanism for studying those remains that are determined to be affiliated, but that might also “provide significant new information concerning the history or prehistory of the United States.” *Id.* Such a provision could be very important to the study of the human past.

¹⁴⁶ *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1153-55 (D. Or. 2002).

be used in the NAGPRA affiliation analysis,¹⁴⁷ rather than that all of the lines of evidence are not always equal. As Judge Jelderks stated with respect to the modern stories as evidence of the tribal coalition's presence in the Columbia River region during Kennewick Man's time, "[t]he origins of the narrative are unknown, and the narrative doesn't establish a link between the Tribal Claimants and anyone who may have witnessed the Columbia River in the Grand Coulee or a change in the channel."¹⁴⁸

As for a revision to NAGPRA to reflect the spirit of the Kennewick Man decision and the legislative history, I suggest the following. Replace NAGPRA section 7(b)¹⁴⁹ with:

(b) Scientific Study and Retention of Remains: In situations where human remains cannot be culturally affiliated with a living group by a showing of shared group identity by a preponderance of the evidence, such remains should be held in stewardship by a museum or institution equipped to analyze them to the fullest extent possible using modern scientific methods. If, at any time, pursuant to such a study, cultural affiliation is identified, the relevant Native American group must be notified within 90 days, and that group's wishes as to the ultimate disposition of the remains must be fully accommodated. Additionally, such remains, should they remain unaffiliated following complete scientific analysis, should be maintained by the curating institution in perpetuity to allow for further analysis and examination as new methods are developed.

This provision should also apply to remains discovered subsequent to November 16, 1990, under NAGPRA section 3.

B. Reasons for the Suggested Revision

1. Support for Scientific Research by Certain Native American Groups

It is impossible to know the ultimate wishes of extinct cultures as to the disposition of their mortal remains. Although some Native American groups oppose scientific study of their remains, this opposition is not universal. Examples of indigenous groups interested in the results of studies of their ancestors'

¹⁴⁷ Indeed, oral traditions are among the lines of evidence possible to establish affiliation under 43 C.F.R. § 10.2(e) (2003).

¹⁴⁸ *Bonnichsen*, 217 F.Supp. 2d at 1154.

¹⁴⁹ 25 U.S.C. § 3005(b) (2000).

remains have occurred from Canada¹⁵⁰ to Texas.¹⁵¹ To automatically assume that past peoples would not agree to such analyses as a means of having their voices heard across time would be to ignore the dichotomy that exists among modern groups and to erase the memory of these people and their role in our collective human history.

In addition to the role that skeletal analyses play in our understanding of humanity's past,¹⁵² such studies also play a vital role in the medical and forensic sciences.¹⁵³ For this reason, the continued curation of large skeletal samples representing every cultural group in the world is essential.

2. Scientific Uses of Human Skeletal Material

Human skeletal remains have been studied by anthropologists since the mid-nineteenth century.¹⁵⁴ The uses of these remains can largely be divided into two categories: general human history and medical/forensic applications. It should be borne in mind that indigenous populations do not constitute the entirety of curated skeletal collections.¹⁵⁵

Human skeletal remains are used to better understand the lifeways of past peoples.¹⁵⁶ These remains offer a glimpse into human morphological varia-

¹⁵⁰ See Heather McKillop & Lawrence Jackson, *Discovery and Excavations at the Poole-Rose Ossuary*, ARCH NOTES (Ontario Archeological Society Inc., Ontario, Canada), Feb. 1991, at 9. (An Iroquois ossuary was excavated, and pursuant to a request by the Alderville First Nation, the human remains have been under investigation for over ten years.)

¹⁵¹ See James E. Bruseth et al., *Involving the Caddo Tribe During Archaeological Field Schools in Texas: A Cross-Cultural Sharing*, in WORKING TOGETHER: NATIVE AMERICANS AND ARCHAEOLOGISTS 129-32 (Kurt E. Dongoske et al. eds., 2000) (Caddo elders agreed to a scientific examination of remains excavated by the Texas Archaeological Society from a Caddo site in northeastern Texas.)

¹⁵² See, e.g., Patricia M. Landau & D. Gentry Steele, *Why Anthropologists Study Human Remains*, in REPATRIATION READER: WHO OWNS AMERICAN INDIAN REMAINS?, *supra* note 21, at 74-94.

¹⁵³ See generally Phillip V. Tobias, *On th [sic] Scientific, Medical, Dental and Educational Value of Collections of Human Skeletons*, 6 INT'L J. ANTHROPOLOGY 277 (1991).

¹⁵⁴ See generally THOMAS, *supra* note 11.

¹⁵⁵ Such a belief is often implicit in the writings of those who oppose research on indigenous skeletal remains. See, e.g., Donald A. Grinde, Jr., *The Reburial of American Indian Remains and Funerary Objects*, NORTHEAST INDIAN Q., Summer 1991, at 35. Indeed, in the United States alone, extensive collections of nonindigenous skeletal remains exist at the National Museum of Natural History, the American Museum of Natural History, the Cleveland Museum of Natural History, and the Maxwell Museum in Albuquerque. See AMERICAN ANTHROPOLOGICAL ASSOCIATION, THE AAA GUIDE 1999-2000, at 36, 41-42, 48-49, 60-62 (1999). Additionally, at the time of the passage of the NAGPRA legislation in the United States, only 54.4% of the National Museum of Natural History's collection of 34,000 human specimens were of Native American or Native Alaskan ancestry. See Senator Daniel K. Inouye, *Repatriation: Forging New Relationships*, 24 ARIZ. ST. L.J. 1, 1 (1992).

¹⁵⁶ See generally ARKANSAS ARCHEOLOGICAL SURVEY, STANDARDS FOR DATA COLLECTION

tion between groups and across time. But, one may ask, "Who cares?" The general consensus in academia regarding studies of human remains, especially on ancient skeletal material, is that "bones . . . offer a picture of time in our collective history."¹⁵⁷ Yet another scholar captures the collective history argument by stating that "all humans are members of a single species, and ancient skeletons are the remnants of unduplicable evolutionary events which all living and future peoples have the right to know about and understand."¹⁵⁸

Data derived from the study of human skeletal remains can provide insights into population movement and migration as well as the specific genetic composition of individual populations.¹⁵⁹ Additionally, skeletal studies provide insights into the impacts of pathological conditions on humans.¹⁶⁰ Such studies allow for the interpretation of the interactions of humankind with various diseases and have applications to both the study of past peoples and the investigation of remains associated with modern crimes. Examinations of dentition and skeletal remains have led to the reconstruction of prehistoric diets and health patterns,¹⁶¹ a necessity to understanding the complex lifeways of past cultures.

FROM HUMAN SKELETAL REMAINS (Jane E. Buikstra & Douglas H. Ubelaker eds., 1994).

¹⁵⁷ Afrasiabi, *supra* note 23, at 808.

¹⁵⁸ Christy G. Turner, II, *What is Lost With Skeletal Reburial? I. Adaptation*, 7 Q. REV. ARCHAEOLOGY 1, 1 (1986).

¹⁵⁹ All of these tests can be accomplished (with varying degrees of accuracy) through the use of nondestructive means by the examination, recordation, and statistical analysis of metric and non-metric traits of the human skeleton and dentition. See ARKANSAS ARCHEOLOGICAL SURVEY, *supra* note 156; Christy G. Turner, II, et al., *Scoring Procedures for Key Morphological Traits of the Permanent Dentition: The Arizona State University Dental Anthropology System*, in ADVANCES IN DENTAL ANTHROPOLOGY 13 (Marc Kelley & Clark Spencer Larsen eds., 1991). See generally G. HAUSER & G.F. DE STEFANO, EPIGENETIC VARIANTS OF THE HUMAN SKULL (1989). Specific instances of such studies are numerous and diverse. See, e.g., Christopher M. Stojanowski, *Cemetery Structure, Population Aggregation, and Biological Variability in the Mission Centers of La Florida* (2001) (unpublished Ph.D. dissertation, University of New Mexico) (on file with Dept. of Anthropology, University of New Mexico); see also Ericka L. Seidemann, *Analysis of the Non-metric Traits of the Skull in the Poole-Rose Ossuary, Ontario, Canada* (1999) (unpublished M.A. thesis, Louisiana State University) (on file with the author).

¹⁶⁰ Innumerable studies have been accomplished on individual samples, leading to the creation of pathological compendia. E.g., DONALD J. ORTNER & WALTER G.J. PUTSCHAR, IDENTIFICATION OF PATHOLOGICAL CONDITIONS IN HUMAN SKELETAL REMAINS (1981); see also ARTHUR C. AUFDERHEIDE & CONRADO RODRÍGUEZ-MARTÍN, THE CAMBRIDGE ENCYCLOPEDIA OF HUMAN PALEOPATHOLOGY (1998); CHARLOTTE ROBERTS & KEITH MANCHESTER, THE ARCHAEOLOGY OF DISEASE (2d ed. 1995).

¹⁶¹ See, e.g., M.W. Elvery et al., *Radiographic Study of the Broadbeach Aboriginal Dentition*, 107 AM. J. PHYSICAL ANTHROPOLOGY 211 (1998); Mary Jackes et al., *Healthy but Mortal: Human Biology and the First Farmers of Western Europe*, 71 ANTIQUITY 639 (1997); Judith Littleton & Bruno Frohlich, *Fish-Eaters and Farmers: Dental Pathology in the Arabian Gulf*, 92 AM. J. PHYSICAL ANTHROPOLOGY 427 (1993); Lori E. Wright, *Biological Perspectives on the Collapse of the Pasion Maya*, 8 ANCIENT MESOAMERICA 267 (1997). The variety in the sources cited here illustrates several things: the international scope of skeletal studies, the cross-cultural applicability of research results, see Elvery et al., *supra*, at 218 tbl. 1, and the fact that anthropologists do study

The study of ancient human skeletal remains also contributes to contemporary medical and forensic fields. An example of the relevance of studying ancient remains to current medical problems is the use of DNA analyses of human remains to provide insights into thalassemia.¹⁶² Skeletal research on this disease, which generally affects individuals of Middle Eastern descent and results in anemic symptoms varying in severity, has been conducted in the hopes of identifying data from DNA analyses that may lead to a medical cure.¹⁶³

Perhaps an even more common use for studies of human skeletal remains is for their forensic applications.¹⁶⁴ Many of the techniques used in the identifications of war dead, victims of mass disasters,¹⁶⁵ and the victims of crimes were, and continue to be, developed on prehistoric human remains.¹⁶⁶ One example of this is a recent sexing method for skeletal remains¹⁶⁷ that was initially devised and tested on a six-thousand-year old Native American archaeological sample¹⁶⁸ and has since been developed into a forensic identification method¹⁶⁹ and applied to the identification of American war dead from Southeast Asia.¹⁷⁰ Additionally, nondestructive studies of indigenous remains are currently being used to identify relationships between diet and dental anomalies.¹⁷¹ Finally, the once extensive comparative indigenous skeletal col-

the bones of their ancestors.

¹⁶² Afrasiabi, *supra* note 23, at 821. Thalassemia is "a group of anemias caused by a variety of genetic mutations at different sites of the gene coding for the structure of the globulin chains of hemoglobin." AUFDERHEIDE & RODRÍGUEZ-MARTÍN, *supra* note 160, at 347.

¹⁶³ Afrasiabi, *supra* note 23, at 821; *see also* Virginia Morell, *Who Owns the Past?*, 268 SCI. 1424 (1995).

¹⁶⁴ *See generally* WILLIAM M. BASS, HUMAN OSTEOLOGY: A LABORATORY AND FIELD MANUAL (4th ed. 1995).

¹⁶⁵ An example of this was the use of such methods in the recovery and identification efforts following the Branch Davidian compound standoff in Waco, Texas in the early 1990s. *See, e.g.*, Max M. Houck et al., *The Role of Forensic Anthropology in the Recovery and Analysis of Branch Davidian Compound Victims: Assessing the Accuracy of Age Estimations*, 41 J. FORENSIC SCI. 796 (1996).

¹⁶⁶ Jane E. Buikstra, *Reburial: How We All Lose*, SOC'Y FOR CAL. ARCHAEOLOGY NEWSL. (Soc'y for Cal. Archaeology), February 1983, at 1.

¹⁶⁷ *See* Ryan M. Seidemann et al., *The Use of the Supero-Inferior Femoral Neck Diameter as a Sex Assessor*, 107 AM. J. PHYSICAL ANTHROPOLOGY 305 (1998).

¹⁶⁸ Ryan M. Seidemann, *Sex Assessment of the Human Femur Neck in Prehistoric Populations* (Dec. 14, 1994) (unpublished manuscript, on file with the author).

¹⁶⁹ Christopher M. Stojanowski & Ryan M. Seidemann, *A Reevaluation of the Sex Prediction Accuracy of the Minimum Supero-Inferior Femoral Neck Diameter for Modern Individuals*, 44 J. FORENSIC SCI. 1215 (1999).

¹⁷⁰ E-mail from Franklin Damann, Anthropologist, United States Central Identification Laboratory, to Ryan M. Seidemann (May 4, 2001, 18:32:24 CDT) (on file with the author).

¹⁷¹ Ericka L. Seidemann, Ryan M. Seidemann, & Glen H. Doran, *The Occurrence of the Pala-*

lections around the world are “used in educating medical scientists concerning bone biology and human variation.”¹⁷²

The curation of human skeletal remains over long periods of time has several benefits. The primary benefit is the reality that new technology will be developed that will allow for more information to be obtained from the remains. No one could have imagined that, prior to the advent of PCR amplification of trace DNA material,¹⁷³ genetic data could be gathered on a long extinct population¹⁷⁴ or species.¹⁷⁵

In addition to the use of new technology, the ability to reexamine prior research often leads to a refinement of previous scholars’ interpretations. This was recently demonstrated in a reanalysis of a Florida skeletal sample.¹⁷⁶ In this case, an original analysis of the individuals from the Calico Hill site in Florida identified malignant tumors in the two crania.¹⁷⁷ However, a more recent examination determined that the tumors were actually root damage, a fact that drastically changed the paleopathological status of the sample.¹⁷⁸

VIII. CONCLUSION

“Times change. Not only has archaeology become more professional, but . . . indigenous peoples now have much greater presence in archaeological research.”¹⁷⁹ Archaeology has ceased to conduct clandestine collecting of hu-

tine Torus in the Windover Site Skeletal Sample, Presentation at the American Anthropological Association Annual Meeting (Nov. 21, 2002) (copy on file with the author).

¹⁷² Buikstra, *supra* note 166, at 2; see also Colin Pardoe, *Farewell to the Murray Black Australian Aboriginal Skeletal Collection*, 5 WORLD ARCHAEOLOGY BULL. 119 (1991); Tobias, *supra* note 153.

¹⁷³ PCR, or polymerase chain reaction, is a method developed in the late 1980s that allows for the extraction and amplification of small samples of DNA from ancient bone samples. D. Andrew Merriwether et al., *Ancient and Contemporary Mitochondrial DNA Variation in the Maya*, in BONES OF THE MAYA: STUDIES OF ANCIENT SKELETONS 208 (Stephen L. Whittington & David M. Reed eds., 1997). “Prior to the invention of PCR, it was not possible to retrieve enough high molecular weight DNA from ancient remains to perform DNA sequencing or restriction fragment length polymorphism (RFLP) analyses.” *Id.* In short, this recent development revolutionized the field of archaeological DNA analyses.

¹⁷⁴ See, e.g., WINDOVER: MULTIDISCIPLINARY INVESTIGATIONS OF AN EARLY ARCHAIC FLORIDA CEMETERY 21-24 (Glen H. Doran ed., 2002).

¹⁷⁵ See generally I.V. Ovchinnikov et al., *Molecular Analysis of Neanderthal DNA from the Northern Caucasus*, 404 NATURE 490 (2000).

¹⁷⁶ Rachel K. Smith, *Analysis of Skeletal Material from Calico Hill, Florida: A Question of Paleopathology vs. Taphonomy*, 55 FLA. ANTHROPOLOGIST 59 (2002).

¹⁷⁷ See generally Dan Morse et al., *Prehistoric Multiple Myeloma*, 50 BULL. N.Y. ACAD. MED. 447 (1974).

¹⁷⁸ Smith, *supra* note 176, at 62.

¹⁷⁹ Russell Taylor, *Archaeology and Indigenous Australia* 7 (Jan. 10-14, 1999) (transcript of

man remains for the purpose of creating oppressive race-based theories of population biology. Indigenous peoples are becoming more interested in scientific analyses of the remains of their ancestors as an alternative interpretation of their own past as a people.¹⁸⁰

The revisions to NAGPRA suggested in this study do not diminish the interests of Native American groups in the disposition of the remains of their culturally affiliated ancestors. All that the suggested changes do is clarify the law as it was intended, evidenced by the legislative history, and ensure that the remains of ancient peoples are not buried according to a tradition that does not resemble their own.¹⁸¹

The Kennewick Man case represents a milestone in the history of anthropology. It illustrates the reality that genetic closeness is not the same as cultural affiliation. Just because two groups are Native American, one modern and one ancient, does not automatically mean that their belief systems are even remotely related. Unaffiliated groups should not be allowed to silence the voices of extinct cultures based on their own cultural conventions of what is and what is not "right." Much can be gained from the study of ancient human remains: a clearer picture of our common human history, clues to medical advances, and methods for identifying war dead and crime victims. Such research must be protected and allowed to continue, not just in the interests of a small group of researchers, but for the common benefit of humankind.

presentation at Symposium: Politics of Practice before the World Archaeological Congress 4, University of Cape Town, South Africa, copy on file with the author).

¹⁸⁰ See, e.g., McKillop & Jackson, *supra* note 150, at 9. However, this avenue of divining history is but one alternative for such groups. Other alternatives include religious beliefs and oral traditions.

¹⁸¹ This was a major concern of the Native Americans testifying before Congress during the creation of the NMAIA and NAGPRA legislation. See, e.g., 1987 Senate Hearings Part 2, *supra* note 116, at 69 (statement of Mr. Lonnie Selam); *id.* at 73 (statement of Mr. Roger Buffalohead); *id.* at 83 (statement of Hon. Robert E. Lewis).