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SOME PHILOSOPHICAL, POLITICAL AND LEGAL IMPLICATIONS OF AMERICAN ARCHEOLOGICAL AND ANTHROPOLOGICAL THEORY

John W. Ragsdale, Jr.*

I. INTRODUCTION

Archeological and anthropological theories about the origins and practices of ancient peoples, and about events and histories, distant in time, but blending into the present, have had impacts that transcend the tenets and borders of the sciences as discrete disciplines. Our suppositions about the factual past can influence our present beliefs—not only our understandings and conclusions about the tangible and practical—but our feelings and faiths about the intangible and the spiritual as well. Our values, principles, world views, and cosmologies may thus be shaped by our scientific backdrop. Beyond this, our social activity, our national policy, our institutions, and our confirmatory law may flow, in part, from the scientific descriptions of our history and prehistory.

What happens when the science changes? What happens when presumptively neutral methodologies give us a revision of the world and, in a particular sense, the past? To the extent that the changing archeological or anthropological views occur in contexts disassociated or marginalized from core personal values, the impact may be minimal—of interest, perhaps, but not of real consequence to our intellectual lives. For example, when archeologists discovered a pueblo-style habitation in a western Kansas stream basin south of Oakley, and discerned that it had been occupied by both Picuris Pueblo Indians and Athapascan Apaches in the years following the 1680 Pueblo Revolt against the Spanish, it prompted a revised conclusion about the range of Pueblo civilization and about the interrelation between fundamentally different native cultures.¹ This find and revision may provide an intriguing illustration of social and locational accommodation in the face of pressure by invaders, but it probably does not challenge our associated values or institutions.

The impact of discoveries and new hypotheses may, however, move beyond the boundaries of science and destabilize some central principles of personal belief and social direction. An illustration may be provided by the impact of the

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¹ See JACK D. FORBES, APACHE, NAVAHO, AND SPANIARD 270-71 (1994). The combined group lived together in El Cuartelejo from 1696 until 1706, when the Spanish governor, Cuervo y Valés, sent Sargento mayor, Juan de Ulibarri, to El Cuartelejo to escort the Picuris back to the Pecos area near Santa Fe. See also JOHN L. KESSELL, KIVA, CROSS, AND CROWN: THE PECOS INDIANS AND NEW MEXICO, 1540 – 1840, at 360-61 (1979); OAKAH JONES, JR., PUEBLO WARRIORS AND SPANISH CONQUEST 73-76 (1966) (suggesting that the Pueblos were held hostage by the Apaches and welcomed the Spanish escort).

modern archeological investigations on the battlefield of the Little Big Horn River in southern Montana. The legitimacy of white expansion onto the Indian lands of the western United States and the specific legality of the federal government's breaching of the 1868 Treaty of Fort Laramie, which had guaranteed perpetual possession of the Black Hills to the Sioux,² was supported in significant part by the preliminary factual conclusions and resulting imagery that followed the demise of George Armstrong Custer on June 25, 1876.³ For much of the ensuing national history and collective course of individual beliefs, Custer was viewed as a dashing and courageous, if impetuous, military hero who was rubbed out in a direct engagement with a vastly superior force, but only after a valiant hill-top "last stand" in which his outnumbered but still disciplined troops inflicted highly disproportionate losses among the Sioux and Cheyenne before they succumbed.⁴ Historians began to reform the vision with a new conclusion that Custer's troops were cut down, not after a pitched battle within the traditional guidelines of conventional war, but by a furious Indian response to Custer's signature attempt at attacking a sleeping village of women, children, and old persons, as well as warriors.⁵ Archeologists have further compromised the heroic image of Custer's defeat with solid scientific evidence that Custer's command and his troop's organization disintegrated under the pressure of a disciplined and methodical Indian encirclement and infiltration, which dispatched the confused and terrified soldiers at relatively minimal costs.⁶

These historical and archeological reassessments of events on the Little Big Horn were not confined to the repository of minutia or trivia. They helped prompt changes in personal visions and values among the national populace,⁷ and this, in turn, led to institutional changes⁸ and legal consequences.⁹

² Treaty with the Sioux Indians, 15 Stat. 635, Art. 2, signed April 29, 1868, ratified February 16, 1869.

³ United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).

⁴ See Brian W. Dippie, *What Valor Is: Artists and the Mythic Moment*, in LEGACY – NEW PERSPECTIVES ON THE BATTLE OF THE LITTLE BIGHORN 209, 213 (Charles E. Rankin ed., 1996) ("Custer's Last Stand is a white mythic construct, responsive to white American concerns.").

⁵ Custer's previous early morning assault on the Cheyenne encampment on the Washita River was, in part, responsible for his nickname, "Son of the Morning Star." EVAN S. CONNELL, SON OF THE MORNING STAR 182-96 (1985).

⁶ RICHARD ALLAN FOX, JR., ARCHEOLOGY, HISTORY, AND CUSTER'S LAST BATTLE 130-31, 294, 319-322, 333-36 (1993).

⁷ RAYMOND WILLIAM STEDMAN, SHADOWS OF THE INDIAN 223 (1982); Paul Andrew Hutton, *Correct in Every Detail*, in LEGACY – NEW PERSPECTIVES ON THE BATTLE OF LITTLE BIGHORN 231, 259-64 (Charles E. Rankin ed., 1996).

⁸ John P. Hart states:

"The most symbolic act in the contemporary history of the battlefield was probably the changing of the name in 1991 from Custer Battlefield National Monument to Little Bighorn Battlefield National Monument. The official rationale for the change was that the original name was unique and did not fit with the National Park Service . . . criteria for naming parks . . .

"Although . . . supporters of the name-change legislation, House Resolution 848, specifically denied it, textual analysis betrays other reasons for the name change. Statements such as 'The time has come to . . . cease 'honoring'

Archeological and anthropological discoveries may prompt even more fundamental transformations of personal belief and sociopolitical response. The initial Spanish supposition that the fabled Indian cities of Cibola and Quivera were made of gold may have spurred the rapacious conquistadors such as Coronado across much of the American Southwest and high plains.¹⁰ The ensuing discovery from actual experience revealed that the gold was, at best, the reflected light of sunset on the rock and adobe walls.¹¹ This forced a reordering of personal motivation, political and religious objectives, and economic expectations.¹²

This article will deal with some paradigmatic changes in contemporary archeological and anthropological theory and the results of such changes on personal values, collective institutions, and the law. It will begin, in Chapter II, with a general assessment of the roles and interactions of science, personal belief, and the law. It will then deal with the significance of a fundamental transformation of central scientific theory. In Chapters III, IV, and V, the article will present a more focused analysis of some particular changes in the modern archeological and anthropological science, and how these new perspectives may effect the values and responses of the dominant society. Chapter III will cover the modern reassessment of the Indian as an ecologist. Chapter IV will consider

Custer,' 'Custer symbolizes . . . a U. S. government bent toward genocidal policies with regard to American Indians,' and 'it would be a very small gesture of atonement for past U. S. policies to change the name of the park,' suggest other motivations."

John P. Hart, *Contemporary Perspectives on the Little Bighorn*, in *LEGACY – NEW PERSPECTIVES ON THE BATTLE OF THE LITTLE BIGHORN* 271, 272 (Charles E. Rankin ed., 1996).

⁹ In the aftermath of the Sioux triumph on the Little Bighorn, the government saw an opportunity to capitalize on public outrage and secure ownership of the Black Hills, which was rich with gold, but was promised to the Sioux under the provisions of the Treaty of 1868. Hart, *supra* note 8. The Congress imposed the nation's desire for vengeance on the Sioux that had remained on the reservation and avoided the fighting in Montana. To these helpless targets the United States made its infamous "sell or starve" offer: cede the Black Hills or face a total cut-off in food and supplies to the reservation. See Act of Aug. 15, 1876, 19 Stat. 176, 192. The Sioux were forced to capitulate and their extorted agreement was embodied in the Indian Appropriation Act of 1877, 19 Stat. 254. See EDWARD LAZARUS, *BLACK HILLS, WHITE JUSTICE* 71-95 (1991). In 1980, the United States Supreme Court confirmed that the 1877 Act was not a good faith effort; rather, the 1877 Act represented a taking of tribal property for which there is an obligation of just compensation. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 424 (1980). That the majority opinion was influenced by the recent changes of national attitudes toward the action of nineteenth century frontiersmen such as Custer is reflected in Justice Rehnquist's dissent and feeling that the white man, as well as the Indian, was "entitled to the benefit of Biblical adjuration: 'Judge not, that ye be not judged.'" *Id.* at 437.

¹⁰ DAVID J. WEBER, *THE SPANISH FRONTIER IN NORTH AMERICA* 24-25 (1992); PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST* 224-25 (1987).

¹¹ LIMERICK at 224, *supra* note 10, at 224.

¹² The Spanish, once disabused of the notion of fabulous, easily procured mineral wealth, concentrated on the religious conversion of the Indians to Catholicism, upon the economic exploitation of the tribes through the exaction of tributary produce and, in some cases, upon the actual imposition of slavery. See WEBER, *supra* note 10, at 77-78; 124-28; LIMERICK, *supra* note 10, at 225-27.

the new scientific challenges to the view of the Chacoan Anasazi and the Hopi as complex, harmonious communitarians, and Chapter V will treat the ongoing theorizing about the origins and the primacy of Indian tribes on the North American continent.

II. SCIENCE, BELIEF, AND LAW

Personal values—beliefs, visions, world views, and cosmologies—are the building blocks of consensus which, in turn, underlies the politics, the customary restraints, and the codified law.¹³ The origins of law, even the supposedly non-political decisional law of judicial opinions, are rarely neutral, since they flow from multi-faceted feelings and passions.¹⁴ Moreover, in the long-term sense, there must generally be an ongoing union between the personal values and beliefs of an effective majority of the polity and the law for the precepts to survive. Thus, the values and purposes of the people reflect themselves in the mirror of the law. If, for example, a society generally favors a decent, meaningful life for all of its citizens, and an obligation to the surroundings and the future, then these objectives will resonate in laws of equal treatment, proportional redistribution, and environmental responsibility. If a society desires and pursues selective and increasing concentrations of wealth and privilege, then these values will be confirmed by laws vesting and insulating exclusive rights in property.¹⁵

In spite of the general necessity for congruence between value and positive

¹³ Grant Gilmore wrote:

Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven, there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.

GRANT GILMORE, *THE AGES OF AMERICAN LAW* 110-11 (1977).

¹⁴ See, e.g., *George W. Bush v. Albert Gore*, 531 U.S. 98 (2000). Justice Stevens said, in dissent:

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

Id. at 128-29.

¹⁵ GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 3-8 (4th ed. 2001).

law, there may well be short-term disconnects. There may be an appropriation of the legal and political machinery by an unsupported minority and the ensuing passage of laws that exceed or fail to reflect the will or approval of the majority.¹⁶ Even when laws are legitimately enacted, they may exceed the mandate conferred by the majority or there may be an erosion of the value predicate while the shell of the law remains.¹⁷ Over time, however, a union of popular belief and support with the law is essential for legitimacy, enforceability and continuity, and society will persistently seek to reestablish and maintain a union in an ongoing process best described as balance-seeking or homeostatic.¹⁸

Several implications flow from the premise of an essential accord between law and value. For one thing, fundamental changes in values or personal philosophy will continually result in political and legal change. Another corollary is that a significant divergence between personal valuations and the law will result in evasion or erosion of the law, reform of the law or, in the most extreme cases, revolution.¹⁹ There is, however, an important qualification to this model. A law inconsistent with popular sentiment or general belief may escape evasion or suppression if the law, while still vital, reshapes existing values or inculcates the minds of emerging generations. Thus, though value may be the predominant determinant of law, there is still a reverse flow whereby law can affect belief.²⁰

¹⁶ Some see the recent presidential election as an illegitimate usurpation of power.

On the basis of the available evidence—not least of the ruthless determination of the Republican Party to use all the powers at its command, from the executive and legislative branches of the Florida state government to the five-person Supreme Court block (now exposed not as jurisprudential conservatives, but as ideological and nakedly partisan ones), for the single purpose of preventing a fair count of the ballots of Florida's citizens—it may now be inferred, pending the eventual recount by scholars and journalists under Florida's freedom-of-information laws, that the President-elect (a suddenly Orwellian honorific) lost not only the popular but also the true electoral vote. Nevertheless, the election of 2000 was not stolen. Stealing, after all, is illegal, and, by definition, nothing the Justices of the Supreme Court do can be outside the law. They are the law. The election was not stolen. It was expropriated.

Hendrik Hertzberg, *Epper S: Muore*, THE NEW YORKER, Dec. 25, 2000, at 56. See also ALAN DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001).

¹⁷ An example might be the twentieth century laws of prohibition. See Charles H. Whitebread, "Us" and "Them" and the Nature of Moral Regulation, 74 S. CAL. L. REV. 361 (2000).

¹⁸ See Fred P. Bosselman & A. Dan Tarlock, *The Influence of Ecological Science on American Law: An Introduction*, 69 CHI-KENT L. REV. 847, 866-69 (1994). "The changing nature of private interest and public emphasis necessarily dictates that the public interest is but an ambiguous goal, always sought but never ultimately found." COGGINS, *supra* note 15, at 4.

¹⁹ Some notable examples are afforded by the history of American land law.

[T]hrough most of American history, it has been common practice to ignore, evade, circumvent, or violate the laws on the books governing the public lands. The Teapot Dome scandal in the 1920's was not an isolated incident; defrauding the government already had been a national sport for over a century.

COGGINS, *supra* note 15, at 3.

²⁰ The idea that separate is "inherently unequal" and the schools should be desegregated "with all

Archeological and anthropological theory, as science, may relate to personal world views and philosophies. The relationship is not a prescriptive one, as is the case where law prescribes conduct in accord with the values commonly agreed on.²¹ Rather, the relation of scientific theory with belief is a contemplative one. Science describes the background upon which individual choices are made and values are held. These values, in turn, lead to confirmation in statute, decision, and custom.

In a larger sense, it must be said that values and principles are generally formed, not as a facet of pure, imperial reflection, but as a function of interaction and experience with the external world—which is described in part by science. Much of the world affecting personal valuation is, of course, not measurable by science. Religion, myth, biological necessity, hope, fear, climate, topography, and economic opportunities are the progenitors of belief as well. However, it is still fair to say that scientific methods, descriptions and conclusions are significant facets of the template underlying personal value choices, philosophy and ultimately the law.²²

deliberate speed,” as proclaimed in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), and *Brown v. Board of Education*, 349 U.S. 294, 301 (1955), was heavily resisted in the deep South. See LOUIS LUSKY, *BY WHAT RIGHT?* 217-19 (1975). The deliberate speed experiment was eventually abandoned, *id.* at 219, as were efforts to push the equal protection doctrine into the contours of affirmative action. See *Adarand Constructors, Inc. v. Pea*, 515 U.S. 200, 237-39 (1995) (holding that the use of race-based affirmative action measures must be subject to strict scrutiny analysis). The core of *Brown*, despite initial resistance, has remained in place and, with time, has become an accepted, fundamental part of our jurisprudence, and an assurance of equal opportunity without regard to race. See *Adarand*, 515 U.S. at 237-39. See also *Rice v. Cayetano*, 528 U.S. 495 (2000).

The incidence of departure from the norm will be higher and the resultant change of popular value greater in the arena of casual, non-fundamental customs where, because of the lack of formal sanctions for non-conformity and the presence of numerous rewards for originality, the variance from the traditional consensus may actually be encouraged.

²¹ See GILMORE, *supra* note 13. “The function of law, in a society like our own . . . is to provide a mechanism for the settlement of disputes in the light of broadly conceived principles on whose soundness, it must be assumed, there is a general consensus among us.” *Id.* at 109.

²² See Nancy Levit, *Listening to the Tribal Legends: An Essay on Law and the Scientific Method*, 58 *FORDHAM L. REV.* 263, 295-97 (1989).

Initially and perhaps most importantly, the historical sweep of law and science attests to the necessity of interdisciplinary thinking. The interaction of the two disciplines has offered new and substantially different ways of viewing perennial legal problems, both in terms of specific conceptual transplants and broader theoretical approaches. For example, the Heisenberg uncertainty principle—which postulates that it is impossible to determine simultaneously the velocity and the location of a subatomic particle because the act of determining one characteristic makes uncertain the determination of the other—has been applied to the process of constitutional adjudication and the allocation of contract risks.

More broadly, the advance of scientific theorizing has led to greater refinement in the development of jurisprudential theories. Classical thought was flawed by the formalism of its method, which relied on the proposition that legal rules are an unchanging and transcendent body of doctrine. Later theories, such as realism, law and society and critical legal studies, exhibit

There is a caveat here, in the relation of science to value, that is similar to that in the relation of value to law. The qualifier is that, although science can and does shape values, values may also shape science. What a people fundamentally believe as a result of interaction with other value predicates, such as economic opportunities, may in part shape scientific hypotheses or conclusions. Thus, for example, the values associated with individual competition in a free market may promote the conclusions—or the acceptability of the conclusions—of Charles Darwin on natural selection.²³ In general, however, there is a rough congruence between science and value, and structural changes of scientific theory can lead to changes in basic values and, eventually, to changes in the law.

Archeology and the associated discipline of anthropology follow these models. Scientific conclusions or theories from these areas, as tangible history,²⁴ can relate to the formation of personal value and belief, and may eventually result in confirmatory law. The law may then form a flow-back loop which can shape—but not absolutely determine—the science and beliefs of new generations. Radical change in archeological and anthropological theory may then emerge and again escape the systemic inertia and begin anew the transformation of personal views and ultimately the law. Thus, the system of science, belief, and law remains in motion although continually and rhythmically it seeks equilibrium and accord.²⁵

There is a prominent early example of this process which precedes and underlies much of American Indian law. The preliminary scientific assessments of the native population in the newly discovered Americas concluded that the Indians were racially inferior,²⁶ vulnerable to disease and alcohol,²⁷ prone to

increasing depth—a recognition that legal rules are not reducible solely to observable phenomena, but are a product of underlying forces, such as creativity, politics, or empathy.

Id. at 295.

²³ See Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEXAS L. REV. 645, 651-56 (1985).

The great genius of *On the Origin of Species* was its application of a simple, plausible theory to a problem that people in many disciplines had been trying to solve. In fact, the simplicity of Darwin's model must have embarrassed some of his predecessors who had not thought of it first. The theory of natural selection in biology required only the production of numerous organisms and an environment so impoverished that it could accommodate only a few of them. The organisms thrown into this predicament were forced to compete, with the result that only a small number survived and reproduced. The theory relied on but three essential ingredients: scarcity, variation, and inheritance. It needed nothing else, and the variation could be absolutely random.

Id. at 651.

²⁴ FOX, *supra* note 6, at 7-13.

²⁵ ALAN MCGLASHAN, GRAVITY AND LEVITY 136-37 (1976).

²⁶ ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 326 (1990); DAVID E. STANNARD, AMERICAN HOLOCAUST 247-58 (1992). But see Francis Prucha, who argues that whites viewed the Indians as racial equals but cultural inferiors. "Even though the unity of mankind with its corollary of innate equality of Indians and whites was firmly held and universally

violence and warfare,²⁸ and low in resistance or adaptability when faced with the loss of land or the diminishment of natural resources.²⁹ These observations produced a unified conclusion that the tribes were a genus destined, inexorably, to be displaced, if not destroyed, by evolutionary principles.³⁰

The paradigm of the vanishing Indian, initiated by experience and followed by reflection and personal moral judgment,³¹ held sway in America throughout the eighteenth and nineteenth centuries, and spawned confirmatory law. Thus, separation of the tribes and the dominant society under the Proclamation of 1763,³² The Non-Intercourse Act,³³ The Removal Act,³⁴ and the ensuing treaties³⁵ was, as a whole, designed to promote the hegemony of individualism, capitalism, white sovereignty and the Judeo-Christian faith,³⁶ and to hasten the inevitable disappearance of the Indians. Likewise, the judiciary promoted the concept of disappearance with doctrines such as the extinguishments of Indian title by abandonment and by conquest, as well as by contract.³⁷ In the latter part of the nineteenth century, the United States sought to make the Indian culture disappear, as well as the tribal entities, through the policies of assimilation,

proclaimed by makers of Indian policy, a second principle must also be noted: The Indians in their existing cultural circumstances were inferior to the whites." FRANCIS P. PRUCHA, *THE INDIANS IN AMERICAN SOCIETY* 8 (1985) [hereinafter PRUCHA, *THE INDIANS IN AMERICAN SOCIETY*].

²⁷ ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* 43-44 (1970); STANNARD, *supra* note 26, at 57-146.

²⁸ FRANCIS P. PRUCHA, *THE GREAT FATHER* 7-14 (1984) [hereinafter PRUCHA, *THE GREAT FATHER*].

²⁹ BRIAN W. DIPPIC, *THE VANISHING AMERICAN* 32-44 (1982).

³⁰ Brian Dippie feels that the scientific conclusion was premised, at least in part, on a prior moralistic judgment.

[A] fully rounded version of the Vanishing American won public acceptance after 1814. By its logic, Indians were doomed to "utter extinction" because they belonged to "an inferior race of men . . . neither qualified to rise higher in the scale of being, nor to enjoy the benefits and blessings of the civilized and Christian state." A popular convention, premised on a moralistic judgment, had become natural law . . . Opinion was virtually unanimous: "That they should become extinct is inevitable."

Id. at 10-11.

³¹ *See generally id.*

³² The proclamation by the British in 1763 was an attempt to establish a western boundary to the colonies and make the land beyond the Alleghany Crest exclusively Indian country. *See* PRUCHA, *THE GREAT FATHER*, *supra* note 28, at 23-25.

³³ The Trade and Intercourse Act of 1790 was enacted by the first Congress after the adoption of the Constitution. Ch. 33, 1 Stat. 137. One of the central components, now codified at 25 U.S.C. § 177, restrains the alienation of Indian lands without the consent of the United States. *See* MONROE E. PRICE & ROBERT N. CLINTON, *LAW AND THE AMERICAN INDIAN* 73-75 (2nd ed. 1983).

³⁴ The Indian Removal Act, Ch. 148, 4 Stat. 411, which authorized the president to negotiate treaties which would exchange Indian lands east of the Mississippi for lands in the west, was passed on May 28, 1830.

³⁵ *See generally* GRANT FOREMAN, *INDIAN REMOVAL* (1976).

³⁶ PRUCHA, *THE INDIANS IN AMERICAN SOCIETY*, *supra* note 26, at 59; PRUCHA, *THE GREAT FATHER*, *supra* note 28, at 623-24.

³⁷ *Johnson v. McIntosh*, 21 U.S. 543 (1823).

which included such measures as allotment of land in severalty,³⁸ restraints on traditional religious practices,³⁹ and inroads on sovereign jurisdiction.⁴⁰

These laws, confirming the concept of the disappearing Indian, also operated to divest the tribes of most of their claims to the American land base,⁴¹ and cynics might say that, at the core of the matter, the white man wanted what the Indians held—the land—and that these economic imperatives fueled both the science and the resulting law. This may be, in significant part, true, but it is also true that scientific hypotheses simultaneously instilled or supported beliefs such as the religious, racial, and cultural inferiority of Indians, the superiority of individual salvation and free competition, and the unrelenting curse of evolution—all of which stood apart in the minds of many from mere materialism.

The hypothesis suggested—that scientific observation and resulting popular values, rather than naked land lust substantially produced the nineteenth century laws of Indian separation, dispossession, and assimilation—is supported by what occurred following some major transformations in scientific theory that occurred in the late nineteenth and early twentieth centuries. By the end of the 1890's, evolutionism was in the process of being replaced by a new scientific model dubbed “historical particularism.”⁴² This approach, a diametric stance from evolutionism's linear pathways of human progress,⁴³ posited that various cultures had unique internal norms and that science should work backward to discern them, accept them, and understand them.⁴⁴

Thus, science began to examine the ancient roots of contemporary remnant societies that were regarded as ends or objectives in themselves, rather than displaced links in an evolutionary chain, or losing contestants in a social contest for survival and advancement. The new scientific model presaged a golden age in American archeology and anthropology. Scientists such as Franz Boas, Adolph Bandelier, Frank Cushing, Edgar Hewitt, Ruth Benedict, Alfred Kroeber, and Alfred Kidder established distinctive personal relationships with particular peoples and places and brought their findings into the public consciousness. Their work remodeled the perception of Indian culture from mechanistic, competitive societies into an understanding of the individual societies as unique, integrated, sustainable entities, defined and vindicated under their own postulates.⁴⁵

³⁸ See generally KENT CARTER, *THE DAWES COMMISSION AND THE ALLOTMENT OF THE FIVE CIVILIZED TRIBES, 1893-1914* (1999).

³⁹ VINE DELORIA, JR., *GOD IS RED* 247-71 (1973).

⁴⁰ The Major Crimes Act, 23 Stat. 362, 385 (1885).

⁴¹ Indian reservations in the lower 48 states total about 52,000,000 acres—or somewhat less than 5 percent of the land area. See WILLIAM S. OSBORN, *THE WILD FRONTIER* 275 (2000).

⁴² BRIAN M. FAGAN, *ANCIENT NORTH AMERICA – THE ARCHEOLOGY OF A CONTINENT* 35 (1995).

⁴³ *Id.*

⁴⁴ *Id.* at 36.

⁴⁵ See, e.g., ADOLPH BANDELIER, *THE DELIGHT MAKERS* (1971); RUTH BENEDICT, *PATTERNS OF CULTURE* (1959); FRANK H. CUSHING, *ZUNI* (Jesse Green ed., 1981). Brian Dippie wrote:

If cultural relativism mirrored intellectual disenchantment with contemporary society, it also represented dissatisfaction in academic circles with unilinear

The cultural relativism⁴⁶ or pluralism spawned by these new scientific observations had a direct impact on personal values and, eventually, on Indian policy and law.⁴⁷ In the early twentieth century, people turned away from the idea that the tribes would vanish or be blended within general American culture. Instead, citizens manifested a fresh curiosity about the content of native life and evidenced a strong sense of nostalgia about the passing of the American frontier and the erosion of the nation's wilderness.⁴⁸ The preservation of the residuum of living Indian cultures was, in part, a hedge against white America's loss of environmental innocence.⁴⁹

Some reformers' beliefs moved them beyond interest and acceptance to emulation. The law that followed them not only renounced assimilation, but sought to preserve the tribal cultures, to restore them, and to help them endure as possible models for the majority. John Collier was the archetype reformer and his soul was stretched between wilderness and human community. Reacting against the excesses and isolation of competitive individualism and industrialization, he devoted his early career to the protection and preservation of beleaguered cultures caught within the grinding homogenization of urban centers like New York City and Los Angeles.⁵⁰ He sought relief from the futility of much of his early effort within the beauty and solitude of the Appalachian Mountains.⁵¹ A Southwestern experience helped Collier integrate these passions for land and community and form a vision that was to drive him and, ultimately, the law.

In 1920, Collier visited Mabel Luhan at her artists' colony near Taos, New Mexico.⁵² There he received the epiphany that not only reshaped his values, but later transformed American law. Collier was allowed to witness the ancient Red Deer dance of the Taos Indians, and the experience ignited a mystical, enduring vision for him, of a society's communion within and with the land.⁵³ He saw,

evolution as a master explanation for social development. Since evolutionary theory posited distinct gradations of culture—and of worth—on a scale ranging from savagery to civilization, value judgments were built into it. The turn of the century questioning of evolution thus served to clear the way for a less ethnocentric, more relative approach to other cultures.

DIPPIE, *supra* note 29, at 282.

⁴⁶ *Id.*

⁴⁷ *See id.* "Cultural relativism was to provide the philosophical basis for an enlightened Indian policy. The crucial question was not whether the Indian would civilize or die, then, but whether diverse cultures could live together in fruitful harmony or were fated to 'poison and devour each other.'" *Id.* at 281.

⁴⁸ FREDERICK E. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920*, at 112-13 (1984); JAMES WILSON, *THE EARTH SHALL WEEP - A HISTORY OF NATIVE AMERICA* 332 (1998).

⁴⁹ J. DONALD HUGHES, *AMERICAN INDIAN ECOLOGY* 137-39 (1983).

⁵⁰ *See generally* JOHN COLLIER, *FROM EVERY ZENITH* 92-94 (1963) [hereinafter COLLIER, *FROM EVERY ZENITH*].

⁵¹ WILSON, *supra* note 48, at 333.

⁵² COLLIER, *FROM EVERY ZENITH*, *supra* note 50, at 124.

⁵³ WILSON, *supra* note 48, at 335.

within the tribe, a social bond extending from the distant past into the infinite future, and a union with the natural world that ranged from the basic elements of life to the patterns of the universe.⁵⁴ “They had what the world has lost. They have it now. What the world has lost, the world must have again, lest it die. Not many years are left to have or have not, to recapture the lost ingredient.”⁵⁵

Collier was convinced that this vital Indian culture should not only be preserved, but embraced by the dominant society as a model of integration that could counter or surmount what he felt were the ultimately unworkable tendencies of modern industrial society.

This is not merely a passing reference to World War III or the atom bomb—although the reference includes these ways of death, too. These deaths will mean the end if they come—racial death, self-inflicted because we have lost the way, and the power to live is dead.

What, in our human world, is this power to live? It is the ancient, lost reverence and passion for human personality, joined with the ancient, lost reverence and passion for the earth and its web of life.

This indivisible reverence and passion is what the American Indians almost universally had; and representative groups of them have it still.

They had and have this power for living which our modern world has lost—as world-view and self-view, as tradition and institution, as practical philosophy dominating their societies and as an art supreme among all the arts.⁵⁶

Collier’s passion and personal perseverance, born in substantial part from his contact with anthropological and archeological evidence, helped fuel the reformation of consensus in New Deal America.⁵⁷ The result was the Indian Reorganization Act,⁵⁸ which, although not a total fulfillment of Collier’s vision,

⁵⁴ COLLIER, FROM EVERY ZENITH, *supra* note 50, at 126.

[A]s years passed, the discovery which came to me out of this first Pueblo Indian experience deepened and broadened, and changed my sociological perspective once and for all.

The discovery that came to me there, in that tiny group of a few hundred Indians, was of personality-forming institutions, even now unweakened, which had survived repeated and immense historical shocks, and which were going right on in the production of states of mind, attitudes of mind, earth-loyalties and human loyalties, amid a context of beauty which suffused all the life of the group. What I observed and experienced was a power of art—of the life-making art—greater in kind than anything I had known in my own world before. Not tiny, but huge, this little group and its personalities seemed. There were solitary vigils which carried the individual out into the cosmos, and there were communal rituals whose grave, tranquil, yet earth-shaking intensity is not adequately suggested by anything outside the music of Bach.

Id.

⁵⁵ JOHN COLLIER, THE INDIANS OF THE AMERICAS 15 (1947) [hereinafter COLLIER, THE INDIANS OF THE AMERICAS].

⁵⁶ *Id.* at 15-16.

⁵⁷ John W. Ragsdale, *The Movement to Assimilate the American Indians, A Jurisprudential Study*,

57 UMKC L. REV. 399, 427-28 (1989).

⁵⁸ 25 U.S.C. §§ 461-79 (1995).

was revolutionary to Federal-Indian relationships in the sense that it abruptly turned the focus away from the course of tribal deconstruction and refocused on the task of restoration.⁵⁹ The Act and the foundational changes in American Indian law stand as testaments to the power of vision forged from experience.

There are, at present, some ongoing controversies in archeology and anthropology, which may have highly significant implications for the values, policies and laws underlying Federal-Indian relationships in the United States. The Indian tribes within the present-day United States have, since the European invasion, been dealt with predominantly on a nation-to-nation basis, even though the tribal sovereignty involved has, for one hundred and seventy years, been downplayed as “dependent.”⁶⁰ In spite of the differentials in size and power, the United States made treaties with the tribes until 1871 and negotiated with them as nations after that.⁶¹ The United States also acknowledged a fiduciary obligation toward the tribes,⁶² established a “measured separatism”⁶³ within reserved Indian homelands, and made a modern day enunciation of a political, rather than a racial, basis as the foundation beneath the treaties, statutes, preferences, and land claim settlements.⁶⁴

Though political relations may well have been the initial concern and may be the predominant present focus, there is, still, a prominent if secondary racial component within the federal-tribal relationship⁶⁵ and this factor coexists uneasily with the current constitutional conception of increasingly rigid, color-blind equal protection.⁶⁶ The unique status of the Indian in America—the tolerated separation, the racial identifiability, the preferences, the special rights under treaty and statute, and the ongoing claims to land and reparation—may depend in

⁵⁹ COLLIER, FROM EVERY ZENITH, *supra* note 50, at 203.

⁶⁰ *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 17 (1831).

⁶¹ A rider to the Indian Appropriations Act of 1871 ended the practice of creating or particularizing relationships through treaty. 16 Stat. 544, 566. In fact, there was little impact on the tribes who continued to negotiate agreements with the executive which were then confirmed by statute. *Antoine v. Washington*, 420 U.S. 194 (1975), noted that “once ratified by Act of Congress, the provisions of the agreements become law, and like treaties, the supreme law of the land.” *Id.* at 204.

⁶² [T]hey are in a state of pupillage. Their relation [to the United States] resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants . . .” *Cherokee Nation*, 30 U.S. 17.

⁶³ A central thrust of the old laws, shared both by the tribes and by the United States, was to create a measured separatism. That is, the reservation system was intended to establish homelands for the tribes, islands of tribalism largely free from interference by non-Indians or future state governments. This separatism is measured, rather than absolute, because it contemplates supervision and support by the United States.

CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 14 (1987).

⁶⁴ See *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974) (stating “[T]he preference is political rather than racial in nature.”); See also *infra* note 185 and accompanying text.

⁶⁵ See *Malabed v. North Slope Borough*, 42 F. Supp. 2d 927, 937 n.70 (1999) (“the continuing validity of Mancari’s analysis is subject to some question.”); see *infra* note 185 and accompanying text.

⁶⁶ *Id.* See also *supra*, note 20; *infra* note 185.

significant part on the continued public perception and valuation of the Indian as an ecologist, a communitarian, and the first denizen of the continent.

III. THE INDIAN AS ECOLOGIST

To restate the hypothesis presented in the previous chapter: values, politics and law flow in substantial part from scientific theories and empirical observations. However, the origins and acceptability of the science may be partially driven by prior valuations of both the scientist and the community, which may themselves have been shaped by non-scientific sources such as law, religion, or economics. Darwin, thus, may have made his investigations and conclusions on evolution under the spur of the free market competitive paradigm and it seems likely that a society that already held tightly to such economic beliefs more readily accepted the scientific model of natural selection. A rough congruence, therefore, lies between personal values and science, although the origins of each may stem from interaction with the other. Beyond this, politics and law can flow out of the reciprocating value and science union, and not only confirm the vision, but possibly predispose the future.⁶⁷

The Indian was, in the sixteenth and seventeenth centuries, viewed by observers as a naïve and primitive child of nature.⁶⁸ Most tribes survived at a subsistence level through hunting and gathering and limited agriculture.⁶⁹ There

⁶⁷ *Supra* notes 15-27; see also VINE DELORIA, JR., *RED EARTH, WHITE LIES* 37-60 (1995).

⁶⁸ SHEPARD KRECH, III, *THE ECOLOGICAL INDIAN: MYTH AND HISTORY* 17 (1999). "In their earliest embodiment, they were peaceful, carefree, unshackled, eloquent, wise people living innocent, naked lives in a golden world of nature." *Id.* See also WILSON, *supra* note 48, at 16-40; STANNARD, *supra* note 26, at 63-64.

⁶⁹ See Richard White & William Cronon, *Ecological Change and Indian-White Relationships in HISTORY OF INDIAN-WHITE RELATIONSHIPS* 417, 418-21 (Wilcomb E. Washburn ed., 1988); J. DONALD HUGHES, *AMERICAN INDIAN ECOLOGY* 1-9 (1983); R. DOUGLAS HURT, *AMERICAN AGRICULTURE: A BRIEF HISTORY* 3-32 (1994). Though the Indian tribes modified their environment, it seems generally agreed that the results were in accord with the principles of balance and the concept of sustainability.

But the Indian attitudes—the Indian philosophy and religion, if those restrictive words can even be used to apply to the wholeness of Indian thought—enabled the Indians to live in and to change the American environment without seriously degrading it.

....

For the Indians, living in careful balance with the natural environment was necessary to survival, since they lived so close to it and depended on it so completely. If they made serious mistakes in their treatment of nature, they felt the results right away; that is, they got immediate feedback. If they acted in ways that would destroy the balance of the natural communities where they found their food, clothing and shelter, then those communities would not provide for their needs any longer.

HUGHES, *supra* note 49, at 4-5.

In retrospect, the history of Indian agriculture is the story of supreme achievement. Nearly three millennia before the arrival of white settlers, Native American farmers learned to cultivate plants of local and Mesoamerican

was, in general, no enclosure of the lands and no conception of private property in land that was recognizable by the emigrants from Europe.⁷⁰ The observations of tribal cultures, the unfavorable comparison with the Europeans, and the additional perception of tribal decomposition along the Indian-white encounter lines led, as previously noted,⁷¹ to a long-unshakeable prediction of the disappearance of the tribes. The observations of tribal culture and economy also led to a jurisprudential conclusion that the Indians and their inferior societies were subject to physical dispossession of land and to a displacement of their sovereignty by the higher culture, religion, and economy of the Europeans.⁷² This position of justified divestiture of the weak and inefficient by the strong was related at origin, but ultimately different from, the perception of the inevitable vanishing Indian. The idea of justified divestiture countenanced the morality of active, aggressive displacement, a disappearance imposed by conscious choice and force. It thus was distinguished from disappearance occasioned by inherent deficiencies in the capacity for adaptation and survival that presumably rendered

origins. They discovered how to select the seeds that would yield maximum harvests in local soil and climatic conditions. By so doing, they made great strides toward farming in harmony with nature.

HURT, *supra* note 69, at 32.

⁷⁰ In general, Indian tribes tended to hold or relate to land communally. Within this context of tribal sovereignty, clan or family tenure and use rights were common. The subgroup could use as much land as necessary and for as long as needed. See HURT, *supra* note 69, at 25-29; See also IRENE SUTTON, *INDIAN LAND TENURE* 25-39 (1975).

Though land could be used as long as necessary, and could pass through the clan members by inheritance, an individual or a tribe could not sell the land.

After contact with white civilization, various individuals or groups in a village occasionally gave white settlers permission to occupy their territory and to use certain lands. Those transactions usually involved payment in some form. Although whites almost always considered such transactions sales in which they obtained exclusive ownership, the Indians invariably regarded such proceedings as nothing more than temporary permits to use the land, pending compliance with the terms of the agreement. Since the Indians did not recognize individual rights to land other than the right of use or occupancy, thus making absolute ownership by individuals an impossibility, the individual could not sell or alienate the land in any fashion. Moreover, because the village did not have sole ownership of the land any more than past generations had absolute ownership, the tribal group could not alienate it.

HURT, *supra* note 69, at 30. See also R. DOUGLAS HURT, *INDIAN AGRICULTURE IN AMERICA* 228-34 (1987).

⁷¹ DIPPIE, *supra* note 29, at 10-11.

⁷² See generally Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power*, 20 N.Y.U. REV. L. & SOC. CHANGE 303, 313-14 (1993); Robert A. Williams, *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous People's Rights of Self Determination*, 8 ARIZ. J. INT'L L. COMP. L. 51, 70 (1991).

Colonial governments were inclined to recognize Indian rights to land only in cases where the tribalists employed European practices such as field enclosure and cultivation by plowing. See PAULA MITCHELL MARKS, *IN A BARREN LAND: AMERICAN INDIAN DISPOSSESSION AND SURVIVAL* 13-14 (1998).

the tribalist vulnerable to subtle natural changes in his environment.⁷³

American politics and law followed and confirmed both scientifically inaugurated paths. Legislation facilitated the displacement of the Indian and sought to fulfill the evolutionary premise that Indian society was destined to vanish.⁷⁴ In a related, but still distinctive sense, the law confirmed the anthropologically-generated jurisprudence holding that religiously benighted and economically-primitive tribes were subject to legal dispossession by the more enlightened and sophisticated European societies.⁷⁵

The eighteenth and nineteenth century Indian, marginalized by white science and law, in part because of the perception of his evolutionary inertia and his inefficient utilization of land, was revisited and reinstated by a different scientific model in the twentieth century. The initial reassessment was not made by archeologists or anthropologists, but by the adherents of ecology. This science, keyed to interrelationships between plants and animals within a modifiable environment, was developed in the nineteenth century⁷⁶ and was not, like the science of evolution, derived from or driven by principles of the free market. In fact, ecology, or at least the popular acceptance of ecology, was based in part on the observation of and reaction to the externalities of free market operation and the accompanying environmental impacts. In the twentieth century, the scientific demonstrations of waste, shortage, pollution, extinction and disruption as consequences of overpopulation, and the growth of production and consumption were major factors behind the post-1970 revolution in environmental law.⁷⁷

The popular valuation of ecology and the resulting laws of the 1970's harbored within themselves an implicit, generally unstated hope or belief that ecology and the implementing laws could be directed at the excesses of economic growth and which, when properly refined and environmentally compatible, could go forward, thus providing society with both pleasant, stable surroundings and

⁷³ See DAVID GETCHES ET AL., FEDERAL INDIAN LAW 55-57 (4th ed. 1998).

⁷⁴ *Supra* notes 4-40 and accompanying text.

⁷⁵ Newcomb, *supra* note 72, at 335-37; see also Johnson v. McIntosh, 21 U.S. 543 (1823) (holding that discovery of particular areas of North America by Christian Europeans not only instilled the discoverer with priority vis a vis other European nations, but simultaneously vested the discoverer with a legal fee interested in the Indians' lands). "Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them." 21 U.S. at 589. See also Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955) ("The position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conqueror's sovereignty over and ownership of the lands thus obtained.").

⁷⁶ In 1964, George Perkins Marsh wrote *Man and Nature*, which illustrated the impact that man has on the fragile, interconnected web of relationships between plants and animals. See JOSEPH M. PETULLA, AMERICAN ENVIRONMENTALIST HISTORY 220-21 (1977); WILLIAM ASHWORTH, THE ECONOMY OF NATURE 8-11 (1995).

⁷⁷ See generally Charles J. Meyers, *An Introduction to Environmental Thought: Some Sources and Some Criticisms*, 50 IND. L.J. 426, 439-445 (1975); Douglas O. Linder, *New Direction for Preservation Law: Creating an Environment Worth Experiencing*, ENV'T'L. L. 49, 62-68 (1990); Fred P. Bosselman & A. Dan Tarlock, *The Influence of Ecological Science on American Law: An Introduction*, 69 CHI-KENT L. REV. 847, 848 (1994).

the increased material ability to enjoy them.⁷⁸ This assumption certainly did not stem directly from the principles of ecology; rather, it emanated from economics and it meant that there would be limits to the environmental law and that they would never be applied so forcefully as to imperil ongoing national economic growth.⁷⁹ This qualification could not be supported by the science of ecology

⁷⁸ See 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, 259-68 (1996).

Economists stress that efficiency is the paramount goal in making public policy choices about environmental use. Thus, in environmental decision-making, the preferred option should be the one that leads to the most efficient use of resources. "Efficiency" is generally defined as the "maximum consumption of goods and services given the available amount of resources." According to this utilitarian approach to environmental policy, the consumer's preferences are the key to establishing policy and the "only values that count or that can be counted...are those that a market, actual or hypothetical, can price." Realistically, as Aldo Leopold noted, economic feasibility will always play, and perhaps always *should* play, some role in environmental policy-making. However, the thought that economics should *determine* land use undermines the ethical and scientific principles of ecological rationality.

Id. at 262-63 (emphasis in original). See also Lawrence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974).

By treating individual human need and desire as the ultimate frame of reference, and by assuming that human goals and ends must be taken as externally "given" (whether physiologically or culturally or both) rather than generated by reason, environmental policy makes a value judgment of enormous significance. And, once that judgment has been made, any claim for the continued existence of threatened wilderness areas or endangered species must rest on the identification of human wants and needs which would be jeopardized by a disputed development. As our capacity increases to satisfy those needs and wants artificially, the claim becomes tenuous indeed.

Id. at 1326.

⁷⁹ William Ophuls wrote:

Everybody wants clean air and water, but nobody wants to pay the price. Nor do we wish to give up the appurtenances of a high-energy style of life or to accept the major restructuring of the economy and society that would be needed to reduce energy consumption significantly. Even modest invasion of sacrosanct private property rights—for example, in the form of vitally needed land-use law—has also proved to be well beyond our current political capacity. In fact, since the beginning of the decade there has been considerable backlash and backsliding on environmental issues, leading to relaxed standards and blatant avoidance of problems. The only policies that command widespread support are those that seem likely to stave off fundamental changes and permit business to continue as usual for yet a little longer—for example, measures to boost energy supplies as in the Alaska Pipeline decision. In short, although there has been genuine progress since environmental issues first became a matter for political concern, our political institutions have so far mostly avoided the tasks of environmental management and have mostly failed at those they have undertaken.

WILLIAM OPHULS, *ECOLOGY AND THE POLITICS OF SCARCITY* 196-97 (1977). See also John W. Ragsdale, Jr., *Ecology, Growth and Law*, 16 CAL. WEST L. REV. 214, 232-33 (1980).

itself, however, and ecologists whose views had not been compromised by the needs or allure of an expanding economy demonstrated forcefully that ongoing, exponential growth, even if tidied up with high technology pollution control devices, would eventually and inevitably cause massive environmental problems. These observers warned that continuous growth of population, consumption, and production was fundamentally incompatible with maintaining a balanced environment, and sooner or later would collide catastrophically with the finite margins of the natural systems.⁸⁰ Ecology and growth were thus seen to be on a collision course; and the initial unity behind the environmental law reform of the early 1970's began to shatter and diverge. Proponents of deep ecology and steady state economics began to suggest that the concept of ongoing growth was fatally flawed and could not be allied with effective environmental law.⁸¹

When the extended, unreduced principles of ecology came to bear on the western world's secular religion of growth, not as fine tuners of the ongoing economic status quo, but as fundamental postulates of limitation and reform, their adherents sought a socio-economic model to present in the campaign. Indian societies were reevaluated in light of the deep ecology principles and advanced, in general, as examples of stable-state environmentally compatible, internally harmonious, spiritually rich communities which could be economically

⁸⁰ See ASHWORTH, *supra* note 76, at 173-77.

Growth of the human household within a finite physical environment is eventually bound to result in both a food crisis and an energy crisis and in increasingly severe problems of depletion and pollution. Within the context of overall growth, these problems are fundamentally insoluble, although technological stopgaps and palliatives are possible. Technological adaptation has been the dominant reaction, aided by the information and incentives provided by market prices. We need, however, to shift the emphasis toward ecological adaptation, that is, to accept natural limits to the size and dominion of the human household, to concentrate on moral growth and qualitative improvement rather than on the quantitative imperialist expansion of man's dominion. The human adaptation needed is primarily a change of heart, followed by a shift to an economy that does not depend so much on continuous growth.

HERMAN E. DALY, *STEADY-STATE ECONOMICS* 12 (2nd ed. 1991).

⁸¹ See JEREMY RIFKIN, *ENTROPY: INTO THE GREENHOUSE WORLD* 273-91 (2nd ed. 1989).

There is no way to escape the Entropy Law. This supreme physical rule pervades every facet of our existence. Because everything is energy, and because energy is irrevocably moving along a one-way path from usable to nonusable forms, the Entropy Law provides the framework for all human activity. As we have seen, the entropy world view challenges our most treasured, and commonplace, assumptions about our environment, our culture, our very biological being. The trappings of modern culture—our great urban areas, our mechanized agriculture, our massive production and consumption, our weapons, our education, and our medical technologies—are all revealed in a radical new light. The Entropy Law shatters our view of material progress. It reorients the very foundation of economics. It transforms the notion of time and culture, and strips technology of its mystique.

Id. at 273. See also OPHULS, *supra* note 79, at 86-137.

sustained into the indefinite future and which could avoid the inescapable environmental breakdown that threatened the unrepentant growth societies.⁸²

The science-aided reassessment of the Indians and the attendant and derivative popular reevaluation actually proceeded along two related, but independent lines. One arena of presentation focused on the Indians as personal, philosophical, and spiritual ecologists,⁸³ and another, somewhat more objective,

⁸² WENDELL BERRY, *THE UNSETTLING OF AMERICA: CULTURE AND AGRICULTURE* 3-14 (1977); JERRY MANDER, *IN THE ABSENCE OF THE SACRED: THE FAILURE OF TECHNOLOGY AND THE SURVIVAL OF THE INDIAN NATIONS* 211-24 (1991); HEATHER PRINGLE, *IN SEARCH OF ANCIENT NORTH AMERICA* 189-200 (1996); GARY SNYDER, *THE REDISCOVERY OF TURTLE ISLAND, IN DEEP ECOLOGY FOR THE 21ST CENTURY* 454-462 (George Sessions ed., 1995).

Indeed, what North American archeology now demonstrates with increasing clarity is that nothing is as simple as researchers once thought it was. The strange and diverse cultures of this continent are far older, far more ingenious, and far more successful than earlier scholarship ever hinted. In every major sphere of prehistoric life, from economics to politics and religion, researchers from the icy coasts of Alaska to the everglades of Florida are uncovering a new and unexpected sophistication.

PRINGLE at 192.

⁸³ See, e.g., ED MCGAA, *MOTHER EARTH SPIRITUALITY* (1990); JOSEPH EPES BROWN, *THE SPIRITUAL LEGACY OF THE AMERICAN INDIANS* (1992); JOHN BIERHORST, *THE WAY OF THE EARTH: NATURE, AMERICANS AND THE ENVIRONMENT* (1994); WALLACE BLACK ELK AND WILLIAM S. LYN, *BLACK ELK: THE SACRED WAYS OF A LAKOTA* (1990); DOUG BOYD, *ROLLING THUNDER* (1974). Rolling Thunder, a Shoshone medicine man, is quoted by Boyd as saying: °

As long as so many people accept this modern-day competition, willing to profit at the cost of others and believing it's a good thing; as long as we continue this habit of exploitation, using other people and other life, using nature in selfish, unnatural ways; as long as we have hunters in these hills drinking whiskey and killing other life for entertainment, spiritual techniques and powers are potentially dangerous. The medicine men and traditional Indians who know many things know also that many things are not to be revealed at this time.

The establishment people think they have a pretty advanced civilization here. Well, technically, maybe they've done a lot, although we know of civilizations that have gone much further in the same direction. In most respects this is a pretty backward civilization. The establishment people seem completely incapable of learning some of the most basic truths.

The most basic principle of all is that of not harming others, and that includes all people and all life and all things. It means not controlling or manipulating others, not trying to manage their affairs. It means not going off to some other land and killing people over there—not for religion or politics or military exercises of any other excuse. No being has the right to harm or control any other being. No individual or government has the right to force others to join or participate in any group or system or to force others to join or participate in any group or system or to force others to go to school, to church or to war. Every being has the right to life his own life in his own way.

Every being has an identity and a purpose. To live up to his purpose, every being has the power of self-control, and that's where spiritual power begins. When some of these fundamental things are learned, the time will be right for more to be revealed and spiritual power will come again to this land.

BOYD at 199.

if not prosaic, area dealt with the issues surrounding traditional tribalism as a social, political, and economic accommodation with the land.⁸⁴ Most of the popular attention focused on the first arena of inquiry, probably because it is more accessible and embraceable on the personal or layman's level. Perhaps less immediately acceptable were archeological and anthropological studies indicating that traditional, subsistence tribalism was in the long-term sense, and in contrast to the high-technology growth society, more compatible with natural rhythms, solar flows, bio-diversity, and environmental margins.⁸⁵ This branch of scholarship, through associated with Indian philosophy and perhaps in part derivative from it, could still stand independently. For instance, even after setting aside statements of spirituality or personal belief in cooperation, reciprocity, unity, or harmony,⁸⁶ it can still be empirically observed and factually demonstrated that an economic system keyed to hunting, gathering, and subsistence agriculture is more consistent with stability, sustainability, flexibility, and permanence than one keyed to ongoing growth, technological acceleration, and capital accumulation. Societies oriented toward the natural harvesting of plants and animals rather than the intensive exploitation of natural resource capital tend to be less aggregated and more decentralized, less internally competitive and more cooperative, less materially acquisitive, more egalitarian, more in tune with natural cycles and flows, and more resilient.⁸⁷

⁸⁴ See generally HUGHES and HURT, *supra* note 69. See also PRINGLE, *supra* note 82, at 189-200.

⁸⁵ See HUGHES, *supra* note 49, at 139. "One of the inescapable facts which emerge when we contrast the Indian past with the present is that the American Indian's cultural patterns, based on careful hunting and agriculture carried on according to spiritual perceptions of nature, actually preserved the earth and life on the earth." *Id.* Barry Lopez wrote: "The true wealth that America offered, wealth that that could turn exploitation into residency, greed into harmony, was to come from one thing—the cultivation and achievement of local knowledge." BARRY LOPEZ, *THE REDISCOVERY OF NORTH AMERICA* 21 (1990).

⁸⁶ Rebecca Tsosie states that "[t]he interrelationship of people and land, combined with the deeply rooted ethics of reciprocity and balance, lead to a long-term view of ecological stability or, in contemporary terms, a concern with sustainability." Tsosie, *supra* note 78, at 285.

⁸⁷ See generally AMERICA IN 1942 (Alvin M. Joseph, Jr. ed., 1992). See also DONALD WORSTER, *UNDER WESTERN SKIES: NATURE AND HISTORY IN THE AMERICAN WEST* 244-45 (1992); George J. Gumerman & Murray Gell-Mann, *Cultural Evolution in the Prehistoric Southwest*, in *THEMES IN SOUTHWEST PREHISTORY* 11-31 (George J. Gumerman ed., 1994).

On the issue of resilience, Peter Iverson wrote:

Whatever caused the depopulation of the Anasazi communities reinforced a guiding principle, an overriding understanding that already has been suggested: life was fragile, and harmony was difficult to achieve and to maintain. Such a realization inspired both conservatism and innovation in the Southwest. The people lived in a world filled with fury, and the spirits of the earth and sky had to be placated. Their religious leaders were entrusted with the terrible responsibility of serving as intermediaries between the people and their gods. They had to balance the duty to live in the proper way and conserve the good of the past with the need to incorporate changes that could ensure the continuity of one's people. If they borrowed certain elements from other societies, they could make such additions their own over time. And over a still more extended period these innovations could become well enough embedded in the culture to be considered traditional.

When the key proponents of the environmentally compatible, steady economic state tied the extended principles of ecology to the image of the Indian tribalist as a working model, they, perhaps inevitably, provoked a reaction from the undissuaded adherents of growth economics. The modern free marketers, whose forerunners physically displaced the Indian in the name of evolution, now sought to intellectually and scientifically unseat the Indian as a paragon of ecological virtue. The implicit objective: if the Indian could be successfully disparaged as an ecologist, then the science of ecology would be forced to stand against the continuation of growth as a biocentric model-free, naggingly unlovable abstraction.⁸⁸ If no successful, practical, and inherently desirable societal example of long-term environmental compatibility existed, then the growth men could more easily argue that the competitive, individualistic pursuit of profit, progress, increase and dominance of the natural was an inevitable human characteristic, universally occurring albeit at different rates. They could contend that the harmonious, interconnected environmental web need not be seen as the sacred boundary for all life and purposeful endeavor but could, instead, be viewed as the material springboard for an ever-ascending mankind.⁸⁹ The intellectual and scientific unmasking of the Indian as a working ecological alternative to growth would thus help pave the way toward the dream of the

Peter Iverson, *Taking Care of Earth and Sky*, in *AMERICA IN 1492*, *supra*, at 85, 107. The resilience and the accommodation with the North American continent was ruptured with the European invasion and the introduction of an environmental variable for which there was no effective response: disease. See C. MATTHEW SNIPP, *AMERICAN INDIANS: THE FIRST OF THIS LAND* 1-25 (1989).

⁸⁸ See James C. Huffman, *An Exploratory Essay on Native Americans and Environmentalism*, 63 U. COLO. L. REV. 901, 918 (1992).

The only alternative theoretical foundation for biocentrism is rooted in the claim that the ecology has a correct condition which can be determined by human study. Because a biocentric philosophy cannot argue for the preservation of this correct ecological condition as important or necessary to human survival, it must be based upon the inherent value of this correct ecology. This has the quality of a moral claim. Environmentalists tend to articulate it as a moral claim. But like the assertions for self-interested species and ecologies, this idea of a morally correct ecology is anthropocentric, not biocentric. It attributes to the ecology the human capacity for moralizing. If the ecology has no interests, it has no morals. Thus the moral claims made on behalf of the ecology are expressions of human morality.

Id. at 918.

⁸⁹ See, e.g., Terry L. Anderson, *Conservation—Native American Style*, POLITICAL ECONOMY RESEARCH CENTER, Policy Series, Issue Number PS-6: Summary (July 1996), at <http://www.perc.org/ps6.htm> (last visited Aug. 27, 2001).

Non-Indians also would do well to stop promulgating myths as a solution to modern environmental problems. Especially in a multi-cultural society where world-views vary widely, devolution of authority and responsibility offers the best hope for resource conservation. Rather than shunning property rights solutions, we should embrace them, as did our Indian predecessors on this continent.

Id. at 16.

integrated global free market, toward the creation and deployment of high technology, toward ever-increasing levels of population, production, and consumption, and toward the laws that would confirm and facilitate this headlong, ever accelerating, never ending race to nowhere.⁹⁰

The scientific remodeling of the Indian as both a failed ecologist and as a nascent free market capitalist has tended to highlight episodes of environmental overuse, miscalculation, or irresponsibility. Historic and prehistoric evidence of buffalo jumps, over-trapped streams, deforestation, salinated fields, prairie fires, and eroded water courses are primarily advanced as proof that tribalists, often carelessly, sometimes consciously, and occasionally cynically, manipulated their environment and overstressed it in the pursuit of material advantage.⁹¹ Some have cited contemporary examples such as overgrazing and erosion on the Navajo Reservation, land commodification such as strip mining, dam building, or hazardous waste storage, or aesthetic insensitivity such as reservation litter problems⁹² as proof that modern tribalists, if not traditional ones, are quick to respond to the economic incentives and hit the pitfalls of the dominant growth society. These reports would gleefully conclude that, in spite of the rhetoric of spirituality, equality, and balance, the traditional and modern Indian tribalists are actually quite comparable to the white man. They would state that Indians have been inclined to be homocentric, individualistic, manipulative, short-sighted, and that Indian societies were—and are—oriented toward stability and balance only in the absence of the opportunity to grow and advance.⁹³

To focus on episodic inconsistency between a society's particular performances and its general structure and orientation is to misperceive or ignore the incremental dynamic tendencies of a society and, ultimately, its future. There will always be a gap between goals and achievement, but it is a fundamental mistake and misinterpretation to equate deviance with essential direction. Traditional Indian societies were socially, politically, philosophically and

⁹⁰ When growth is the central social goal rather than a means to a defined and observable end (such as stability or balance), it can never be achieved in any lasting sense. Rather, the precarious satisfaction exists in the contemplation of the exponentially increasing pace. William Ophuls wrote:

Growth is still central to American politics. In fact, it matters more than ever, for the older social restraints—the Protestant ethic, deference, isolation—have all been swept away. Growth is the secular religion of American society, providing a social goal, a basis for political solidarity, and a source of individual motivation; the pursuit of happiness has come to be defined almost exclusively in material terms, and the entire society—individuals, enterprises, the government itself—has an enormous vested interest in the continuation of growth.

OPHULS, *supra* note 89, at 185.

⁹¹ KRECH, *supra* note 68, at 211-13.

⁹² *Id.* at 215-16.

⁹³ James Huffman writes, "When they could control nature they did, and when they could not do so, they appealed to nature to control itself. Their appeals were for nature's delivery of those things necessary and important to their lives, not for those things necessary and important to nature." Huffman, *supra* note 88, at 918-19.

economically oriented toward the core concepts of stability, harmony, and balance. The integrated societies pursued these goals along a time spectrum emanating out of the past and stretching into the indefinite future.⁹⁴ Mistakes and miscalculations with respect to the environment certainly occurred, perhaps not uncommonly. The orientation, however, was toward stability, balance was at least honored in the breach, and the ongoing, reorienting decisionmaking of both the individuals and the society tended toward these poles. Thus, neither the fact of inconsistency or the non-attainment of lasting balance belies the significance or the centrality of the quest.

In another sense, archeologists and anthropologists have long noted the Indians adaptability. If perfect balance with the environment is not maintainable or even temporarily achievable, then flexibility and resilience are vital. Thus, the archeological records show that tribalists added and abandoned elements of their culture, and evolved as societies.⁹⁵ What remains of central significance, however, is that they evolved in their relationship to the land and did not resort to hubristic attempts at non-reciprocating domination.

In diametric contrast, the modern growth society is uncompromisingly oriented toward increase and control. Stability and balance tend to be the anomalistic episodes—short term or limited in spatial scope. Stability exists only at a point in time or in a limited place and, thus, an observer would be in fundamental error to equate these islands of repose with the surrounding, ongoing river of growth.

It is, likewise, highly misleading to focus on excesses or miscalculations that have followed the assimilative impacts of the Indian Reorganization Act (IRA) and the establishment of tribal council governments. Many council decisions regarding resource extraction and economic endeavor do not represent the tribal majority will and have caused great division between tribal traditionals and IRA progressives.⁹⁶ Perhaps the best evidence of the residual centrality of ecological

⁹⁴ Rebecca Tsosie notes,

For Indian peoples, who traditionally interpreted their relationship with the land and with future generations as holistic, cyclical, and permanent, sustainability was the natural result, if not the conscious goal, of deeply rooted environmental ethics and traditional land-based economies. Many contemporary indigenous peoples thus advocate a Native concept of sustainability that “means ensuring the survival of the people, the land and the resources for seven generations.”

Tsosie, *supra* note 78, at 286-87 (quoting LINDA CLARKSON ET AL., OUR RESPONSIBILITY TO THE SEVENTH GENERATION: INDIGENOUS PEOPLES AND SUSTAINABLE DEVELOPMENT 65 (1992)).

⁹⁵ Snipp, *supra* note 87, at 24.

⁹⁶ Richard White has written:

The final alternative available to native societies was purposeful modernization, which involved the acceptance not only of modern technology, but also of much of the attendant social organization and values of the larger society. The goal of this modernization was not assimilation, but rather the retention of an independent national identity by a group in control of its own destiny...This option almost inevitably resulted in internal strife as groups

balance in the pantheon of traditional tribal values is the continuation of this precept in the modern economic climate, where the incessant allure of growth makes the observance of balance a matter of faith, obligation, and conscious choice rather than just a byproduct of social structure.⁹⁷

within the nation resisted the efforts of modernizers as strenuously as they did those of various white conquerors, traders, and reformers. Modernizers, for all their sincere nationalism and genuine concern for the poverty and exploitation of their nation, still represented yet another attempt to alter traditional society and create an economic man and economic woman where no such people existed.

This internal revolution in values was nearly as difficult when native elites forced it as when colonial powers did. In traditional society kinship, clan, and village relations determined economic decisions; no one sold land, and no one sold labor. These were natural or social elements, not mere commodities. With their subsistence systems intact, the older societies promised support for all. No one starved or went hungry unless everyone did. Material desires were culturally limited; generosity was the supreme economic virtue. When modernizers, native or alien, sought to make security an individual concern, not a communal one; when they sought to make the individual acquisition of wealth the sole end of economic endeavor; and when they sought to make the market the sole regulator of land and labor, then turmoil became inevitable. Very often their programs threatened to impoverish the mass of the people while enriching an elite.

RICHARD WHITE, *THE ROOTS OF DEPENDENCY* 321-22 (1983). See also EDWARD H. SPICER, *CYCLES OF CONQUEST* 351-52 (1976); *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975).

⁹⁷ Rebecca Tsosie concludes:

A common theme that emerges in tribal economic development is that land, and hence the use of land, is a repository of community, rather than individual, values. The connections of the Indian people to their reservation lands are deeply-rooted and complex. Tribal governments clearly perceive that the future of the people is linked to the land; land is not fungible for Indian people, nor is it merely of instrumental value. This sense of rootedness, connection and place makes environmental decision-making particularly difficult for Indian nations.

The tribal "ethic of place" is clearly influenced by contemporary economic realities and the historic inequities that continue to permeate American property law and environmental policy. However, it is important not to underestimate the capacity of tribal governments to continue the commitment to the lands that largely defines the identity of their people. Traditional indigenous values can play a unique role in formulating tribal environmental policy and establishing systems of law that are compatible with the current economic needs of Indian people. Contemporary environmental decision-making will determine, after all, the future of Indian people and Indian lands for generations to come.

Tsosie, *supra* note 78, at 331. See also Charles F. Wilkinson, *Land Use—Science and Spirituality: The Search for a True and Lasting Relationship with the Land*, 21 PUB. LAND & RESOURCES L. REV. 1 (2000).

In addition to establishing formal resource management agencies and engaging in more entrepreneurial activities, including gaming on or about one-third of the reservations, the modern era in Indian country has also seen a revival in tribal traditions. This affects land management in various ways. Tribal people can promote better land practices on the reservations and outside

To sum up this brief description of the competing scientific theories and their implications for value and law, it is submitted that the alliance between ecologists, archeologists, and anthropologists that resurrected and reintroduced the prototypical steady-state Indian society represents an intellectual union bonded by neutral observations and principled conclusions. In contrast, the revisionist association of free market adherents and their conscripted phalanx of complicit scientists who purport to find the foundational seeds of individualism, competition, manipulation, and the endless pursuit of accumulation in all social permutations, have presented empirical data and conclusions that are not neutral, but are stalking horses for an economic model of autonomous technology, personal gain, loosened environmental restraints, and other business-oriented laws that would facilitate a continuation of what has been called “the great barbeque” of the American West.⁹⁸

Thus, the battles within the realms of science and value carry implications for the environment, economics, and the laws that control the utilization of the public lands and resources. The ecologists, aided by scientists convinced of the traditional tribalists’ central concern with balance and of their economic sustainability, clash with the free market enthusiasts who remain certain that the laws of supply and demand, aided by limitless technology, can triumph over finite natural limits and who have enlisted a new scientific view of the Indian as environmental manipulator and capitalist *wannabee*. The soul of Congress, if that is not an oxymoron, sways with this conflict as well as the transition of lawmakers.

IV. THE INDIAN AS COMMUNITARIANS

John Collier, the Commissioner of Indian Affairs under Roosevelt, and the primary architect of the Indian Organization Act, had an abiding faith in local community as the building block for an enduring society.⁹⁹ In the Indians,

of Indian country, in cooperative watershed efforts through their deep knowledge of the land and a sophisticated worldview that for millennia has been based on notions that we now call biocentrism and sustainability.

Id. at 14. See also Allison M. Dussias, *Asserting a Traditional Environmental Ethic: Recent Developments in Environmental Regulation Involving Native American Tribes*, 33 NEW ENG. L. REV. 653, 654-55 (1999).

⁹⁸ T. H. WATKINS & CHARLES S. WATSON, JR., *THE LANDS NO ONE KNOWS: AMERICA AND THE PUBLIC DOMAIN* 45-71 (1975). It is not insignificant that Terry Anderson, who is director of the Political Economy Research Center and who has written on the thesis that traditional tribalists venerated private property and responded to market-style incentives, was a public land policy advisor to George W. Bush, and has authored a proposal to privatize the federal public lands. See Anderson, *supra* note 89. See also Terry L. Anderson et al., *How and Why to Privatize Federal Lands*, THE CATO INSTITUTE, Policy Analysis No. 363 (Dec. 9, 1999), at <http://www.cato.org/pubs/pas/pa-363es.html> (last visited Aug. 17, 2001); Timothy Egan, *The Death of a River Looms Over Choice for Interior Post*, N.Y. TIMES, Jan. 7, 2001 § 1, at 1.

⁹⁹ *Supra*, notes 50-58. See also JOHN COLLIER, *ON THE GLEAMING WAY* (1962) [hereinafter COLLIER, *ON THE GLEAMING WAY*].

There came the world changes, which have brought us to where we are. The

especially the Pueblo, he saw the possibility of binding, reciprocating unions among the people, and between the tribe and its environment—unions that could be sustained into the distant and indefinite future.¹⁰⁰ He believed that these unions were not only the source of tribal permanence, but the possible salvation of an overly-individualistic world order.¹⁰¹ The scientifically perceived relationship of Indian tribes with their physical environment, as a substantial determinant of popular value, policy and law, was explored in the preceding chapter; this section will focus on the anthropological and archeological theories regarding the internal integration of the Indian societies, and the impact of these hypotheses on the dominant, non-Indian society.

The prototype of the integrated Indian society can be derived as a composite from the writings and observations of both Indian scholars and Euro-American academics. At the most foundational level, it has long been observed that

nineteenth century did not guess, other than in the minds of a few thinkers like William Morris and W. H. Hudson and Ferdinand Tönnies and Tolstoy, toward what pit of sorrow and fear the changes were trending. The twentieth century does not guess, but knows. The local community, for most Western men, dissolved. The great society and world community, for all men, unattained. Exploitation in place of reciprocity, working as a silent corrosive in the neighborhood, a tempest and flood around the globe. Wastage of cultures and value systems which ages have made, wastage of natural resources stored by the organic life of a billion years, wreckage of the web of life. Power conflicts, ever narrowing in their emotion-charged dogmatisms, lunging toward war. Things and machines, exploiters through things and machines, the masters of men. Increasingly a world of social isolates, but no isolate can remain withheld from the power drives making toward the ending catastrophe.

There is no hope, except in the reattainment of community. That reattainment must commence at the local level, reach to the scale of the world, return myriadly from the world to the local level; for it is locally, and there alone, that the fateful years of personality formation and attitude formation are lived out.

Id. at 161.

¹⁰⁰ COLLIER, INDIANS OF THE AMERICAS, *supra* note 55, at 7.

¹⁰¹

As the Indian societies move from their four-centuries-long delaying action into a confident and rejoicing advance, expression along many lines of literature, of the arts, of religion and of philosophy will come into being. The ancient-modern Indian affirmation of the deathless man-nature relationship will flow into poetry and symbolic art of cosmic intensity, tranquility and scope.

The movement will be inward and outward at one and the same time—inward to the world-old springs, buried or never buried, which still flow because the societies have not died; outward to the world of events and affairs.

There will come to dawn in the nations, the Indians playing their part, two realizations. The first, that their soils, waters, forests, wild life, the whole web of life which sustains them, are being wasted—often irreparably and fatally. The other, that their local community life, their local democracy, their values which are required for beauty, wisdom and strength—their very societies—are wasting away even as their natural resources are wasting. As these realizations increase, the nations will turn to their Indian societies increasingly, seeking the open secrets they have to reveal.

Id. at 187.

virtually all the tribes have demonstrated a sacred communal relationship with their traditional land bases,¹⁰² with particularized tenure held by usage only and with reversionary rights in the group.¹⁰³ Through commonality with respect to land and resources has led to overuse and destruction among the competitive, individualistic non-Indian societies,¹⁰⁴ it has tended to foster—or accord with—the primacy of tribal identity over personal preference among Indians¹⁰⁵ and the Indian belief in the non-commodification of land.¹⁰⁶ Commonality may also relate to the Indian communities' demonstrable tendencies toward internal generosity and cooperation instead of self-serving individualistic competition, material accumulation, and capitalization of wealth and resources.¹⁰⁷ This centrality of

¹⁰² See Frank Pomersheim, *The Reservation as Place: A South Dakota Essay*, 34 S. DAK. L. REV. 246 (1989).

Land is inherent to Indian people; they often cannot conceive of life with out it. They are part of it and it is part of them; it is their Mother. Nor is this just a romantic commonplace. For most Indian groups, including the Lakota people, it is a cultural centerpiece with wide-ranging implications for any attempt to understanding contemporary reservation life.

Id. at 250.

¹⁰³ D'ARCY McNICKLE, *NATIVE AMERICAN TRIBALISM* 78-79 (1993).

¹⁰⁴ Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243-48 (1968), available at <http://www.athene.freeserve.co.uk/sanaterre/tragedy.htm> (last visited Aug. 20, 2001).

As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, "What is the utility to me of adding one more animal to my herd?" This utility has one negative and one positive component.

1. The positive component is a function of the increment of one animal. Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility is nearly +1.
2. The negative component is a function of the additional overgrazing created by one more animal. Since, however, the effects of overgrazing are shared by all the herdsmen, the negative utility for any particular decision-making herdsman is only a fraction of -1.

Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.

Id.

¹⁰⁵ JAMAKE HIGHWATER, *THE PRIMAL MIND: VISION AND REALITY IN INDIAN AMERICA* 168-89 (1981).

¹⁰⁶ See WUB-E-KE-NIEW, *WE HAVE THE RIGHT TO EXIST* (1995). "The Euro-Americans' culture defines land by the abstract edges, as exploitable resources, space and chattel circumscribed by violently enforced lines. The [traditional tribes] see land as life." *Id.* at 4.

¹⁰⁷ K. N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* 229 (1978); CHARLES F. WILKINSON, *THE EAGLE BIRD* 39-40 (1992). See also OHIYESA (CHARLES A. EASTMAN) *THE SOUL OF AN INDIAN* (1993).

internal sharing and redistribution is historically linked to the pervasive and foundational egalitarianism,¹⁰⁸ where natural hierarchies of power or knowledge were inextricably linked with a heightened public responsibility rather than with discrete and unaccountable privilege,¹⁰⁹ and where decision-making tended to be based on consensus rather than autocratic fiat or majority rule.¹¹⁰ Crime, although not unknown, was rare,¹¹¹ as the precepts of the people, as well as the legends, rituals, and histories, had been passed down to the successor generations in an extensive and extended face-to-face educational process and had been individually internalized. Thus, adherence to the way of the people was by individual choice and aspiration rather than through coercion.¹¹²

It is significant, perhaps obvious, that the community within the traditional Indian group resembles the community between the tribe and the land. Reciprocity, obligation, and balance have been the focal points of individual social behavior as well as the environmental objectives of tribal behavior. These goals are achievable and sustainable, and disruption both aberrational and temporary.¹¹³ The best evidence of this is the testimony of the Indian people,¹¹⁴

It has always been our belief that the love of possessions is a weakness to be overcome. Its appeal is to the material part, and if allowed its way it will in time disturb the spiritual balance for which we all strive.

Therefore we must early learn the beauty of generosity. As children we are taught to give what we prize most, that we may taste the happiness of giving; at an early age we are made the family giver of alms. If a child is inclined to be grasping, or to cling too strongly to possessions, legends are related that tell of the contempt and disgrace falling on those who are ungenerous and mean.

Public giving is a part of every important ceremony. It properly belongs to the celebration of birth, marriage, and death, and is observed whenever it is desired to do special honor to any person or event.

Upon such occasions it is common to literally give away all that one has to relatives, to guests of another tribe or clan, but above all to the poor and the aged, from whom we can hope for no return.

OHIYESA at 23-24.

¹⁰⁸ HIGHWATER, *supra* note 105, at 168-89.

¹⁰⁹ See, e.g., LAURA THOMPSON, *CULTURE IN CRISIS: A STUDY OF THE HOPI INDIANS* 71-73 (1973). "Hopi traditional leadership is unsought, self-effacing, and fraught with heavy moral obligation The emphasis is always on responsibility for tribal welfare attached to a ceremonial office, rather than on the prestige or power of the individual who assumes it." *Id.* at 73.

¹¹⁰ *Id.* at 65. See also BIL GILBERT, *GOD GAVE US THIS COUNTRY* 19-21 (1989).

¹¹¹ OHIYESA, *supra* note 107, at 33-37.

¹¹² LAURA THOMPSON & ALICE JOSEPH, *THE HOPI WAY* 105-107 (1965). See also Thompson, *supra* note 109, at 93.

¹¹³ This is in decided contrast to the goal of the modern industrial-informational society which is, inevitably and pervasively, growth. BILL MCKIBBEN, *THE AGE OF MISSING INFORMATION* 103-120 (1992). The problem with using a nonqualitative relativistic measure such as growth as a goal is that it provides a constantly shifting target. As McKibben says "our material vision of the future keeps receding over the horizon." *Id.* at 117.

As we chase this mirage, the collateral consequences became ever more ominous, and the tribal pursuit of balance seems more reasonable and necessary.

The mountain offers a great deal of information about coming of age. It is settled, sustainable. On its own, without any outside inputs—without fertilizer

and the verifiable physical presence of places like Acoma, Zuni, Taos, and Oraibi, which have achieved environmental compatibility, economic sustainability, cultural depth, egalitarian social cohesion, and individual fulfillment for over a millennium in places striking in both beauty and difficulty.¹¹⁵

Archeological and anthropological evidence of the internal community of the Indian tribes has had a long history of influence on America's popular values, policy, and law. From the first European contacts, the tribes' communal relation with the land was noted with interest and was subsequently regarded as an excuse for dispossession.¹¹⁶ Later on, in the Revolutionary era, the tribal models of internal equality and sovereign federation influenced both colonial political theory and the drafting of the United States Constitution.¹¹⁷

or irrigation—it can run almost indefinitely, maintain itself at about the same size and density and composition. It has a correct size, a maturity. It doesn't seem to be lacking. You don't walk around saying, 'We could squeeze a few more trees in there,' or 'Maybe the pond needs another boulder.' It's fine—it's complete. But we haven't heeded this kind of silent witness, so now the physical world is sending us alerts. The increasing temperature, the thinning ozone—these are signals about the correct size of our society. Reminded hourly of our glittering destiny, though, we can hardly recognize them.

Id.

¹¹⁴ See, e.g., Winona LaDuke, *Traditional Economic Knowledge and Environmental Futures*, 5 *COLO. J. INT'L. ENVTL. L. & POL'Y* 127 (1994).

Traditional ecological knowledge is the culturally and spiritually based way in which indigenous peoples relate to their ecosystems. This knowledge is founded on spiritual-cultural instructions from "time immemorial" and on generations of careful observation within an ecosystem of continuous residence. I believe that this knowledge represents the clearest empirically based system for resource management and ecosystem protection in North America, and I will argue that native societies' knowledge surpasses the scientific and social knowledge of the dominant society in its ability to provide information and a management style for environmental planning. Frankly, those native societies have existed as the only example of sustainable living in North America for more than 300 years.

Id. at 127. Charles F. Wilkinson wrote: "I've never seen such permanence. The Hopis' whole way of seeing the world is, and always has been, built on stability, staying power, loyalty to people and place, on endurance." CHARLES F. WILKINSON, *FIRE ON THE PLATEAU* 341 (1999).

¹¹⁵ See generally WILLIAM M. FERGUSON & ARTHUR H. ROHN, *ANASAZI RUINS OF THE SOUTHWEST IN COLOR* (1987).

¹¹⁶ Chester E. Essinger, *The Puritan's Justification for Taking a Land*, (cited in DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW* 55-57 (4th ed. 1998)). See also *supra* notes 72-75.

¹¹⁷ See BRUCE E. JOHANSEN, *FORGOTTEN FOUNDERS* 12-20, 98-118 (1982). "Public opinion, freedom of action and expression, and the consent of the governed played an important role in Jefferson's perception of Indian societies. The guideline that Jefferson drew from the Indian example (and which he earnestly promoted in the First Amendment) allowed freedom until it violated another's rights . . ." *Id.* at 113. See also JACK WEATHERFORD, *INDIAN GIVERS* 117-131 (1988).

When Americans try to trace their democratic heritage back through the writings of French and English political thinkers of the Enlightenment, they

With the shifting of the political winds, and the balances of power, the tribal community became the target of national attack, as opposed to political imitation. The assimilation movement of the late nineteenth and twentieth centuries hypothesized that collective land holding was the diseased root of Indian society, and that mandatory allotment of tribal lands in severalty would foster competitive, self-sufficient individualism, cut the heart out of tribal power and, not incidentally, free up millions of acres for white use and settlement.¹¹⁸

The tribes, somehow, survived the assimilative firestorm and their weakened, but still distinctive communities, once slated for eradication, became projects for revival and protection and, to some, models for emulation.¹¹⁹ The Janus-faced policy and law of the dominant society reemerged within several decades, however. The yin of the Indian Reorganization Act swung abruptly after World War II into the yang of the termination movement, as the cold war prompted a renewed valuation of competitive individualism, and a reinvigorated attack on things collective, including Indian tribalism.¹²⁰

Termination was short-lived. The civil rights movement, the emerging

often forget that these people's thoughts were heavily shaped by the democratic traditions and the state of nature of the American Indians. The concept of the "noble savage" derived largely from writings about the American Indians, and even though the picture grew romanticized and distorted, the writers were only romanticizing and distorting something that really did exist. The Indians did live in a fairly democratic condition, they were egalitarian, and they did live in greater harmony with nature.

The modern notions of democracy based on egalitarian principles and a federated government of overlapping powers arose from the unique blend of European and Indian political ideas and institutions along the Atlantic coast between 1607 and 1776. Modern democracy as we know it today is as much the legacy of the American Indians

Id. at 129.

¹¹⁸ See generally JANET A. McDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIANS 1887-1934*, at 1-2 (1991).

¹¹⁹ See COLLIER, *INDIANS OF THE AMERICAS*, *supra* note 55, at 154-71.

And last, the Indians and their societies disclose that social heritage is far more perduring than is commonly believed. On how small a life-base, on a diminished and starved life-base for how many generations, the motivations and expectations of a society, and its world-view and value system and loyalties, can keep themselves alive; how these social possessions, which are of the soul, can endure, like the roots and seeds on the Mojave desert, through long ages, without one social rain; and how they rush, like these roots and seeds, into surprising and wonderful blossom when the social rain does come at last. Perhaps no other ethnic groups have revealed this old, all-important truth so convincingly as the Indians have done. Indeed, this capacity for perdurance is one of the truths on which the hope of our world rests—our world grown so pallid in the last century, and now so deathly pallid, through the totalitarian horror. The sunken stream can flow again, the ravaged desert can bloom, the great past is not killed. The Indian experience tells us this.

Id. at 171.

¹²⁰ Charles F. Wilkinson & Eric R. Biggs, *The Evolution of Termination Policy*, 5 *AM. INDIAN L. REV.* 139, 149 (1975).

environmental consciousness, and the Great Society programs of the mid-1960's fostered yet another pendulum shift in the national regard for tribalism.¹²¹ By 1970 both wings of the political spectrum supported the concept of tribal self-determination—a commitment that was welcomed by the tribes but was, justifiably, regarded with considerable wariness.¹²²

In short, then, the anthropologically verified model of an integrated, egalitarian Indian community has been the centerpiece for a shifting array of national policies and laws. Two possibilities of repose exist for this pendulum pattern. It might occur that the tribal example could, through new evidence or reflection, secure itself in the value, policy, and law of the dominant sovereign, and fulfill Collier's vision of a balanced world of decentralized, self-sufficient communities.¹²³ It might also happen that archeology or anthropology could reveal a hidden dark heart in tribalism, re-energize the forces of individualism, and precipitate another, perhaps final, attempt at termination.

John Collier found his paragon and living communitarian model among the Taos Indians of New Mexico,¹²⁴ and scholars continue to view and review the Anasazi and Pueblo tribes¹²⁵ of the American Southwest as compelling examples of internally balanced, environmentally compatible and economically sustainable communities. The prehistoric Chaco Canyon complex, which flourished in the eleventh and twelfth centuries, has long seemed the epitome of the tribal paradigm,¹²⁶ and intensive archeological studies in the 1980's only added to the luster.¹²⁷

¹²¹ GETCHES, ET AL, *supra* note 73, at 226.

¹²² Felix Cohen wrote:

The Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.

Felix S. Cohen, *The Erosion of Indian Rights 1950-53: A Case Study in Bureaucracy*, 62 YALE L. J. 348, 390 (1953).

¹²³ See generally COLLIER, INDIANS OF THE AMERICAS, *supra* note 55.

¹²⁴ See generally *supra* notes 50-57 and accompanying text.

¹²⁵ The names given by whites to prehistoric and historic native peoples are problematic in both the sense of their origin and in the sense of their meaning. "Anasazi" is a Navajo word meaning, roughly, "enemy ancestors". See DAVID ROBERTS, *EXPLORING ANCIENT NATIVE AMERICA: AN ARCHAEOLOGICAL GUIDE* 94 (1994). The word is offensive to many modern-day Pueblo. See DAVID ROBERTS, *IN SEARCH OF THE OLD ONES* 13 (1996). The word "Pueblo" is Spanish for city or village and is thus a remnant or reminder of a period of severe racial, cultural, and economic oppression. ROBERTS, *supra*, at 13; see also DAVID J. WEBER, *THE SPANISH FRONTIER IN NORTH AMERICA* 122-46 (1992).

John W. Ragsdale, Jr., *Anasazi Jurisprudence*, 22 AM. IND. L. REV. 393, n.2 (1998).

¹²⁶ John W. Ragsdale, Jr., *The Rise and Fall of the Chacoan State*, 64 UMKC L. REV. 485 (1996).

¹²⁷ See generally CHACO AND HOHOKAM: PREHISTORIC REGIONAL SYSTEMS IN THE AMERICAN SOUTHWEST (Patricia L. Crown & W. James Judge, eds. 1991).

In a physical sense, Chaco Canyon appears an improbable place for the apogee of Anasazi civilization. The low-walled canyon lies in the arid, treeless southern reaches of the San Juan River basin, and features few outstanding topographical or agricultural advantages other than the natural hydraulics of the sandstone benches which confine the irregularly flowing Chaco Wash.¹²⁸ Yet, there is something instinctively compelling, if disquieting, about the place. One can stand on the upslope beyond the canyon's north rim, at the ruin of Pueblo Alto, the gateway city, and, surrounded by a vast openness, bordered on all sides by distant mountain ranges, feel one's self to be at the absolute center of the universe.¹²⁹

The Anasazi built a complex in the canyon that unified the culture, politics, and economy over a region approaching 100,000 square kilometers in size.¹³⁰ The canyon constructions, which were integrated into an urban whole,¹³¹ consisted of massive, multiple-story great houses, with hundreds of rooms and intricate masonry, sophisticated water capture and deployment systems, terraced gardens, vast ceremonial centers called great kivas, central plazas, and highly engineered roadways which were obsessively straight, carefully surfaced, up to

¹²⁸ Crown and Judge feel that the rock ledges on the Canyon's north side afforded a unique opportunity to capture summer rainwater and irrigate the alluvium on the floor of the wash. They wrote, "[p]erhaps Chaco was the only place in the San Juan Basin that would facilitate water control of the sort that was implemented in the A.D. 900's." CROWN & JUDGE, *supra* note 127, at 294.

¹²⁹ STEPHEN H. LEKSON, *THE CHACO MERIDIAN: CENTERS OF POLITICAL POWER IN THE ANCIENT SOUTHWEST* 158 (1999). See also KATHRYN GABRIEL, *ROADS TO CENTER PLACE: A CULTURAL ATLAS OF CHACO CANYON AND THE ANASAZI* (1991).

Turning 360 degrees, one can view the San Juan and La Plata Mountains to the north, the Chuska Mountains to the west...Mt. Taylor and the Jemez Mountains are to the southeast . . . The concave earth and sky form a bowl and all the geographical gouges seem to empty into Chaco Canyon. Here Chaco Canyon looks like the crossroads of the cosmos—the Center Place for opportunities and spirit dancers alike.

Id. at 46. I personally confess to both fascination and unease about Chaco. I first visited the Canyon with my parents in the early 1950's. I have made numerous repeat visits with my own family. I admire Chaco immensely, but I do not feel the warmth of places like Mesa Verde, Betatuakin, Bandelier, or Keet Seal. My daughter, Sydney, loves all the ruins but Chaco. She says that it was an unhappy place. See *infra*, notes 152-169.

¹³⁰ David E. Doyel & Stephen H. Lekson, *Regional Organization in the American Southwest*, in MAXWELL MUSEUM OF ANTHROPOLOGY, *ANTHROPOLOGICAL PAPERS* 5, 15 (1992).

¹³¹

In A.D. 1100 a person looking out from Pueblo Bonito would have seen a built landscape: almost everything in sight, save the canyon walls themselves, would have been built, shaped, or modified. The quantity and density of architecture was unprecedented; rather than a canyon full of pueblos, Chaco was in fact an integrated construct of substantial size. Individual buildings were not independent pueblos or villages; each building was an architectural element of a dense, complex, nearly urban community comprising many different kinds of building types and nonbuilt landscape architecture.

Stephen H. Lekson, *Thinking About Chaco*, in *CHACO CANYON: A CENTER AND ITS WORLD* 11, 30 (1994).

thirty feet in width, often over a hundred miles in length, and deeply fascinating to modern observers, especially since there is no evidence that the Chacoans had wheeled vehicles.¹³²

Architecture at this level of complexity involves obvious and daunting material demands. Millions of stones had to be quarried and shaped, hundreds of thousands of pine trees had to be felled in distant mountain forests and transported by hand into the treeless canyon center, and countless hours of skilled, organized human labor had to be employed to construct these carefully designed monuments¹³³ which, until late in the nineteenth century were the largest apartment buildings in the world.¹³⁴

Beyond the physical requirements were the requirements of community. Chaco Canyon was a quantum and unprecedented leap beyond the predecessor Anasazi unit houses¹³⁵ which, limited in height, volume, and material demands, could be assembled, or added to incrementally, by a clan or extended family. The very nature of Chaco demanded more complex, integrated functioning. These cities and their environs were conceived and designed in advance and built as an integrated project rather than gradually evolving through sporadic additions over time.¹³⁶ This necessitated a division of labor and specialization of functions

¹³² Ragsdale, *supra* note 126, at 495-517.

¹³³ Stephen P. Kelly, *Potshards and Sun Calendars: BLM Management of Cultural Resources on The Colorado Plateau*, 18 PUB. LAND & RESOURCES L. REV. 87, 89 (1997).

¹³⁴ The impressive number of contiguous rooms and floors in these great houses prompted the observation by Neil Judd, an archeological pioneer at Chaco, that Pueblo Bonito was the largest apartment building in the world until a larger one, the Spanish Flats, was built in New York in 1882. See KENDRICK FRAZIER, *PEOPLE OF CHACO: A CANYON AND ITS CULTURE* 153 (1986).

¹³⁵ The unit pueblo, or unit house, was the standard component of Anasazi villages from the 700s onward. It was basically a household module with six to fifteen adjacent rooms employed for storage, living space and ceremonial use. It was inhabited by an extended family or lineage and was loosely clustered with other such units into villages of east-west rows fronting a plaza. See Ragsdale, *supra* note 126, at 489.

¹³⁶

A distinguishing aspect of the Chaco Canyon great houses, one with social and political implications as well as architectural, is that they are planned as to shape, scale, location, and function. The existence of a plan was vital in the case of the larger great houses, as construction operations often extended over several generations, and a plan was necessary for temporal and physical continuity. Chetro Ketl, in particular, was constructed in accordance with an ongoing plan adhered to over an eighty-year span.

The ground plan, or "footprint," of the great house was often symmetric and shaped like the letters D, E, L or O. The stone foundation of such patterns was occasionally constructed in advance of room-block completion that never came. It thus remains a clear, present-day manifestation of the Anasazi planning process.

The design of the great house was both practical and ideological. On the first count, the south-facing D-shape of Pueblo Bonito, the ascending levels of floors, and the massive stone construction formed a concave bowl of high solar efficiency. The buildings were clearly intended to make maximum use of the low-riding winter sun, to retain internally generated warmth in cold weather, and to insulate against summer heat. In another sense, the great house layout were monuments to the cosmic order and its movements. The lines and angles

such as planning, engineering, transportation, core construction, finishing and supplying of food and water.

The developmental surge or florescence at Chaco¹³⁷ also demanded a hierarchical social and political structure to provide leadership and coordination for the multiple specialized processes and undertakings in the canyon, and to spread the Chacoan model and influence into the outlying areas of the region.¹³⁸ The archeological evidence and hypothesizing, until recently, suggested that the hierarchy remained compatible with and committed to the egalitarian principles of community.¹³⁹ Chaco, though elaborate as a whole, did not seem marked internally by obvious material privilege. In addition, there was extensive commitment to public function, welfare, and space in the form of plazas, roadways, great kivas and, arguably, the redistribution of food.¹⁴⁰

In addition to the apparent enshrinement of internal community was the astonishing effort to forge a physical bond with the land and the sky. The buildings, kivas, and roadways united precise solar, lunar, and astronomical movements and alignments with the geology and topography, and the lives of the

of the walls, and the niches, doors, and windows of the rooms tracked and framed the motions of the sun, moon, and stars and perhaps the magnetic forces of the earth itself.

The planning and construction of the great houses became more standardized as the florescence proceeded. Early twelfth century canyon projects, such as the great house Wijiji, were built quickly in a single stage according to a carefully designed pattern. Such streamlining was in contrast to early works which were planned but then erected incrementally over an extended period. The formalized model was exportable out of the canyon and was copied, usually on a smaller scale but still unmistakably, in numerous outlying communities at the height of florescence.

See Ragsdale, *supra* note 126, at 497.

¹³⁷ FRAZIER, *supra* note 134, at 171-87.

¹³⁸ LEKSON, THE CHACO MERIDIAN, *supra* note 129, at 158.

¹³⁹ See Ragsdale, *supra* note 126, at 523-25. Stephen Lekson, in comments on the scale of building in Chaco, and the physical demands, said,

[F]ew authors can agree on the implication of these expenditures of energy and skill. [Edgar] Hewett, ever the New World democrat, insisted that the "prodigious task . . . was no unwilling work under the lash of priestly or kingly task masters. It was the spontaneous impulse of a virile people . . ." Recent opinion has swung more in favor of the priestly task master; lashless perhaps, but still a figure or institution controlling the deployment of labor.

STEPHEN H. LEKSON, GREAT PUEBLO ARCHITECTURE OF CHACO CANYON, NEW MEXICO 257 (1984).

¹⁴⁰ See LEKSON, THE CHACO MERIDIAN, *supra* note 129, at 157; Linda S. Cordell et al., *Processes of Aggregation in the Prehistoric Southwest*, in THEMES IN SOUTHWEST PREHISTORY 109, 132 (George J. Gumerman ed., 1994); Gregory A. Johnson, *Far Outside—Looking In*, in DYNAMICS OF SOUTHWEST PREHISTORY 371, 375 (Linda S. Cordell & George J. Gumerman, eds. 1989); VINCENT SCULLY, PUEBLO/MOUNTAIN, VILLAGE DANCE 15 (1972). See also Douglas Preston, *Cannibals of the Canyon*, THE NEW YORKER, November 30, 1998, available at http://www.prestonchild.com/thunder/thunder_cannib.htm (last visited Aug. 17, 2001). "[R]emarkable was the Chacoan society. It seemed to be almost utopian, the Anasazi, the traditional view held, had no absolute rulers, or even a ruling class, but governed themselves through consensus, as the Pueblo Indians do today. They were a society without rich or poor . . ." *Id.*

people literally were one with the interplay of the cosmic forces on the earth.¹⁴¹ Perhaps the Chacoans miscalculated the long-term stability of the climate and sacrificed flexibility. They then became vulnerable to shifting precipitation patterns.¹⁴² This, however, does not necessarily give lie to the centrality of the attempt at community; rather, it underscores the reality that the pursuit of balance is an ongoing, perpetually readjusting quest.¹⁴³

The thesis that Chaco's essence and focus was a community within, and a union with the natural order can be drawn from archeological and architectural gleanings. There is, moreover, additional anthropological proof. The living successors to the Chacoans, especially the western Pueblos of Zuni, Acoma, and Hopi,¹⁴⁴ embrace a similar orientation, although the physical scale and spatial range have been deescalated and decentralized, in a concession to flexibility.¹⁴⁵

The Hopi Indians, as a prototype of the present day succession to the Chacoan Anasazi demonstrate a central social and environmental commitment to equality, cooperation, balance, and reciprocity.¹⁴⁶ This obligation is a personal one, with each member of the society internalizing the philosophy and tenets of appropriate behavior and fulfilling the responsibility to the group and to the land, willingly and without formalized coercion.¹⁴⁷ The community transcends the

¹⁴¹ RAY A. WILLIAMSON, *LIVING THE SKY: THE COSMOS OF THE AMERICAN INDIAN* 132-50 (1984).

¹⁴²

When, after 1130, the rains repeatedly failed and drought intensified within the San Juan Basin, the celestial blessing, the environmental sanctification, and the secular legitimacy of the Chacoan state were called into question. The outlying participants became less willing—or less able—to continue the contributions of labor and materials that sustained the integrated monuments.

Ragsdale, *supra* note 126, at 544.

¹⁴³ The ultimate demise of the Chacoan State “was not violence or traumatic collapse, but apparently a dignified departure from the Canyon and the Basin, and a subsequent de-escalation of the law, economy, and public architecture. The holographic representation of cosmic interconnection was recapitulated at the city level, rather than regionally.” *Id.*

¹⁴⁴ FERGUSON & ROHN, *supra* note 115, at 275-76.

¹⁴⁵ Ragsdale, *supra* note 126.

¹⁴⁶ This commitment, as an ethical code, is called, “The Hopi Way.” See ALICE JOSEPH & LAURA THOMPSON, *THE HOPI WAY* (1965).

The Hopi Way expresses, at the emotional and behavioral level, the Hopi world view. It is an integrated code containing rules for acting, feeling and thinking in every role which a human being, male or female, is required to assume in his life cycle from birth to death. The individual's success in life and also the welfare of the tribe depend on whole-heartedly, and with an effort of the will, cultivating the Hopi Way. Responsibilities increase with age and reach their peak in ceremonial participation, especially in the role of chief priests. And the heaviest responsibility is carried by the ranking priest in his role of Village Chief

Id. at 40-41.

¹⁴⁷ Every individual in the Pueblo, of whatever age, had to fulfill his obligations to the group regularly. Indeed, under such constant emergency conditions as the setting imposed, there was no time or energy for elaborate supervision and external controls by means of centralized authority established or maintained by physical force. THOMPSON, *supra* note 109, at 88-89.

individual, and self-serving or self-regarding behavior is antithetical to the traditional Hopi.¹⁴⁸ Religious and political hierarchy are inextricably linked with social responsibility rather than privilege.¹⁴⁹

In sum, then, the architectural and anthropological models of the Southwestern Pueblo tribes, stretching from the prehistoric Anasazi to the modern day inhabitants of places like Acoma, Zuni, Taos, and Hopi, have been examples of singular and enduring community—an integrated stability within, and a balanced, sustainable relation with the surrounding lands.¹⁵⁰ These models, drawn from science, became a foundational component of valuation within the dominant, non-Indian society, and were instrumental in the formulation of the policy and law of protection and revival of the tribal sovereigns.¹⁵¹

The paradigm of an integrated, egalitarian harmony among the prehistoric and contemporary Pueblo has received a shuddering broadside from the recent work of the iconoclastic physical anthropologist Christy Turner. Turner's general proposal holds, in part, that the external façade of Pueblo pacifism and equanimity hides internal episodes of raw and loathsome terrorism—including violence, mutilation, and cannibalism practiced within the tribe. Beyond this, his work suggests that the apparent cooperation and common vision of the prehistoric Chacoan nirvana was produced by force and fear, rather than the

¹⁴⁸ *Id.* at 124-25.

¹⁴⁹ *Id.* at 65. See also LESLIE A. WHITE, *THE ACOMA INDIANS* (1974) who notes: “[w]hile the cacique is regarded as the highest of officers, he is not to be distinguished from other men in mode of living . . . The cacique is the symbol . . . of a tradition which is very sacred. But there is nothing sacred about the person of the cacique.” *Id.* at 42.

¹⁵⁰

The Pueblos, I suggest, in their philosophy and practice of the man-nature relationship, and in their ecological practice which makes of the human society a co-operant part of the planetary and cosmical ecological creation, are the askers of a question and the propounders of an answer even more universal than were the question and answer of Rochdale. The question and answer of the Pueblos ring like bells in the heart of every human child, and ring like bells muffled by many veils and almost drowned in many noises, yet audible, in the forsworn deeps of the adults of our epoch which is rushing to its terminus. They tell that happy man, unwounded earth, and long, endless future can be had by our race still.

Such is one view of the Pueblos, from one of the many angles. I now suggest some other views from other angles.

. . . .

Pueblo life is complicated and is almost uniquely many-sided, while at the same time its integration is so complete and profound that every particular item or expression is found to involve, and to be involved with, all the rest of the many-sided complication. The interrelatedness of all the parts is not a matter of mere physical proximities or of formalized prearrangements; rather, it is like the interrelatedness of the organs and cells of a living being, and it suggests that unique goal-seekingness and striving-togetherness of all the organs and functions of a living body, which is the distinguishing character and the ultimate mystery of organic life.

JOHN COLLIER, *PATTERNS AND CEREMONIALS OF THE INDIANS OF THE SOUTHWEST* 60-61 (1995).

¹⁵¹ See *supra* notes 119-121 and accompanying text.

internalized precepts of balance and harmony.¹⁵² Thus, the seeming egalitarian community of Chaco featured, in reality, only an equality among a ruthless elite who bestrode a conscripted and unwilling subclass.¹⁵³ The implications of this work for alternative models, valuation, policy, and law are already becoming apparent.¹⁵⁴

Before considering Turner's recent Chaco thesis, one should reconsider his work which centered on the documented destruction of the Hopi City of Awatovi in 1700. Awatovi was, then, the largest of the autonomous Hopi city-states, and was located on the Antelope Mesa, at a distance from the other Hopi villages which were concentrated on southern spurs of the Black Mesa. Awatovi was more accessible to outside influence and it was often visited by the Spanish priests and conquistadors who traversed the area beginning in 1540. Awatovi was, apparently, quite willing to accept Spanish and Catholic influence.¹⁵⁵ The Chief of Awatovi, distressed by his own people's complicity and abandonment of the Hopi Way, enlisted the other Hopi villages which had remained steadfast in the practice of their traditional religion and the resistance to the Spanish.¹⁵⁶ They made a surprise attack at dawn, killed most of the Awatovian men, and took women and children captive. A disagreement arose as to the disposition of the spoils which culminated in violence, the deaths of most of the captives,¹⁵⁷ and an event that the Hopi do not particularly like to talk about.¹⁵⁸ That event was cannibalism.

Christy Turner's subsequent analysis of the bones from Polacca Wash, the site of the outbreak, suggested that the unfortunate victims had not only been murdered, but had been tortured and then eaten.¹⁵⁹ Turner's suggestion, first

¹⁵² CHRISTY G. TURNER II & JACQUELINE A. TURNER, MAN CORN: CANNIBALISM AND VIOLENCE IN THE PREHISTORIC AMERICAN SOUTHWEST 459-84 (1999).

¹⁵³ *Id.* Indeed, even the mainstream archeological theorists on Chaco, such as Stephen Lekson, would now agree that Chacoan sociopolitical structure was elitist rather than merely hierarchical, LEKSON, THE CHACO MERIDIAN, *supra* note 129, at 158, even if they would not agree that the structure was the product of terror rather than religious suasion.

¹⁵⁴ See, e.g., John J. Miller, *Buffaloed: Fighting the Truth About American Indians*, 52 NAT'L REV., No. 19 (October 9, 2000).

American Indians occupy a unique moral high ground in the public imagination This aura of victimhood has won Indians a whole series of special rights involving everything from building casinos to going on whale hunts

. . . .

Who can blame the descendants of the Anasazi—today's Hopi, Pueblo, and Zuni peoples—for wishing the cannibalism stories weren't true?

Id. at 34; see also Preston, *supra* note 140.

¹⁵⁵ HOPI RUIN LEGENDS 277 (Ekkehart Malotki, trans. & ed. 1993).

¹⁵⁶ HARRY C. JAMES, PAGES FROM HOPI HISTORY 51-58 (1974).

¹⁵⁷ *Id.* at 63-64.

¹⁵⁸ This is confirmed by the author's personal experience based on numerous trips to the Awatovi area, beginning in 1957. Frank Waters feels that the event "stamped forever an ineradicable guilt upon the heart of every Hopi." FRANK J. WATERS, BOOK OF THE HOPI 324-25 (1974).

¹⁵⁹ Preston, *supra* note 140.

made in 1969, that the peaceful Hopi had killed, mutilated, and devoured a helpless group of women and children from their own culture, flew directly in the face of deeply held values and imagery that had long been associated with Southwestern archeology and anthropology, as well as with popular perception, policy and law.¹⁶⁰ Turner's findings and hypothesis remained uneasily marginalized for the next 30 years.¹⁶¹

Though Turner's work on Awatovi was anathematic to the Hopi, it was not widely disseminated in and did not have a major impact on the non-Indian society. This was not to be the case with his latest study. In 1999, Turner dropped the bombshell that is currently reverberating through the world of archeology and beyond. The shock waves emanate from Chaco Canyon, the font from which the contemporary Pueblo societies of the Southwest trace their origins.¹⁶² When Turner discerned cannibalism and terror instead of unified vision at the base of Chacoan society he unleashed a postulate that could conceivably affect all subsequent branching and evolution of the Pueblo form and thought.

Turner had found what he had long suspected at Chaco: "ten known sites...with taphomic evidence of probable cannibalism and violence."¹⁶³ Thus, the long-nurtured vision of a people, united in faith and purpose, creating a balanced, complex state was called into serious question. If the Chacoan cities—Pueblo Bonito, Chetro Ketl, Panasco Blanco, and Pueblo Alto—were not the result of collective inspiration and belief, and were not unified entities themselves aspirationally bound on regional, environmental, and astronomical planes, but were, rather, the products of violence, coercion, and death, then the morality of Chaco and the Pueblo, and Collier's dreams of a cooperative alternative to competition were severely qualified or compromised.

¹⁶⁰ *Id.*

¹⁶¹ DAVID ROBERTS, *IN SEARCH OF THE OLD ONES* 159-64 (1996).

¹⁶² FRAZIER, *supra* note 134, at 206-212. Simon J. Ortiz of Acoma wrote:

I've never heard an elder explicitly say that the Acoma people and their culture came from Chaco Canyon, Mesa Verde, or any of the other sites found throughout the Southwest. However, traditional oral stories speak about Kashkahruutih as being located to the north-northwest. At Chaco Canyon, I have touched the stone walls of Pueblo Bonito and felt the sacred existence that has sustained my people and culture from the beginning, a presence within the walls of the dwellings built a thousand and more years ago. And at Chaco, I've realized there is no past and no present, although some people insist an "ancient civilization" achieved the construction of Pueblo Bonito, Chetro Ketl, and Casa Rinconada and that this civilization vanished by the thirteenth century. To the Acoma people and other Native Americans, time and place are linked, a sacred continuum in which human consciousness is interdependent with creation and its process. And Chaco Canyon and its marvelous prehistoric communities attest to the undeniable truth of the existence of Native Americans a thousand years ago and more, very much as they exist today.

Simon J. Ortiz, *What We See: A Perspective on Chaco Canyon and Its Ancestry*, in *CHACO CANYON: A CENTER AND ITS WORLD* 65, 72 (1994).

¹⁶³ TURNER & TURNER, *supra* note 152, at 461.

Turner left an escape hatch. Socially pathological cannibalism involves the employment of the practice in non-starvation situations against one's own group.¹⁶⁴ If the Chacoan violence was inflicted from without, and was not indigenous to the Anasazi, then the vision of Southwestern community might remain relatively uninfected.¹⁶⁵ Turner suggests that the explanation for Chacoan cannibalism may stem from central Mexico and from some northward-roving bands of Toltecs who used cannibalism for ritual purposes, intimidation, and social control.¹⁶⁶ These armed and organized thugs may have terrorized the peaceful Anasazi of the San Juan Basin, forced them to build and maintain the Chacoan regional system, and sacrificed them for ceremonial purposes. After the death or departure of the invaders, sacrifice and cannibalism generally disappeared in the Southwest.¹⁶⁷ Still, the aura of cannibalism is so odious in the popular mind that, even with the exculpatory caveat, the thesis is widely and fiercely resisted by other archeologists and by the Pueblo people.¹⁶⁸ Beyond this, the exotic cannibal explanation cannot explain away the events at Polacca Wash.¹⁶⁹

Perhaps the best answer to the incidence of cannibalism at both Chaco and Awatovi lies not in denial, but in a holistic reflection. There is no evidence or

¹⁶⁴ *Id.* at 462.

¹⁶⁵ There still remains the troublesome issue of the events at Polacca Wash near Awatovi. See *supra* notes 155-158.

¹⁶⁶ TURNER & TURNER, *supra* note 152, at 469-70.

¹⁶⁷

They entered the San Juan Basin around A.D. 900 and found a suspicious but pliant population whom they terrorized into reproducing the theocratic lifestyle they had previously known in Mesoamerica. This involved heavy payments of tribute, constructing the Chaco system of great houses and roads, and providing victims for ceremonial sacrifice. The Mexicans achieved their objectives through the use of warfare, violent example, and terrifying cult ceremonies that included human sacrifice and cannibalism. After the abandonment of Chaco, human sacrifice and cannibalism all but disappeared, suggesting some kind of prehistoric discontinuity.

Id. at 483.

¹⁶⁸ See Kurt E. Dongoske et al., *Critique of the Claim of Cannibalism at Cowboy Wash*, 65 *Am. Antiquity* No. 1 (Jan. 1, 2000).

We also are concerned with how allegations of cannibalism in the popular press affect contemporary Native Americans, especially the descendants of the Ancestral Puebloans. Historically, science and archaeology have been used to denigrate and dehumanize Native Americans, justifying the taking of land and the perception of Native American cultures as static and destined for extinction. We don't contend that the claims of cannibalism by Billman et al. or other archaeologists are intentionally designed to disparage contemporary Native Americans, but we are concerned with the media's presentation of the issue to the greater American public, therein forming contemporary views about Native Americans. We think the sensationalistic approach to reporting claims of cannibalism inadvertently encourage racist views in American society.

Id.

¹⁶⁹ *Supra* notes 155-158.

suggestion of these practices in the last three hundred years, and there is no veneration or even acceptance of internal violence or terror in the oral traditions of the people.¹⁷⁰ Indeed, the message that one can take, as description, explanation, and aspiration of the people, and as a basis for value, policy, and law in the dominant sovereign, is one of internal, encompassing, and enduring peace. Thus, though Chaco as the apotheosis of complex egalitarianism may have to be reviewed as the coerced product of a terrorized, enslaved people, one can still perceive the course of Anasazi prehistory and Pueblo history as, in general, one of singular community. Awatovi, like Chaco, can be seen as an isolated aberration, a flashback, and not as an enduring trait, much less as the soul, of the Pueblo peoples.

V. THE INDIAN AS FIRST INHABITANT

Archeological and anthropological theories on the primacy of the Indian habitation of North America are directly related to popular values, public policy and the ensuing law. A general and fundamental premise in the Anglo-American legal structure and tradition is that first in time is first in right—even in the absence of formal or titled ownership. Examples abound in the American movement west. The prior appropriation of surface water to a beneficial use,¹⁷¹ the discovery of valuable mineral deposits on public land,¹⁷² the securing of possession under the preemption and homestead laws¹⁷³ are the American common law and statutory embodiments of Lockean theory and popular values whereby the first individual to unite presence and labor with natural bounty can secure a protectable property interest¹⁷⁴--even in cases where the ultimate title might rest in a distant national government.¹⁷⁵ Thus, despite the various rationales for dispossession of the Indian tribes such as race, religion, economy, and collective methods of land holding, there were the inescapable realities that the Indians were in prior occupation of the Americas when the white incursion began at the end of the fifteenth century, that this Indian occupation deserved recognition,¹⁷⁶ and that dispossession involved legal consequences.

¹⁷⁰

I think it should be pointed out that, with only a handful of other exceptions where deaths occurred, the Awatovi affair was the only one of consequence to physically mar the peace during the last thousand years of Hopi existence. If the rest of the world could match that record, think how secure and serene life would have been and be for everyone.

Thomas E. Mails & Dan Evehema, *Hotevilla* 101 (1995).

¹⁷¹ See generally A. DON TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* 5-1 to 5-182 (2000).

¹⁷² See generally COGGINS ET AL., *supra* note 15, at 450-62.

¹⁷³ *Id.* at 73-85.

¹⁷⁴ James R. Stoner, Jr., *Property, the Common Law, and John Locke*, in *NATURAL LAW AND CONTEMPORARY PUBLIC POLICY* 195, 204-06 (David F. Forte ed., 1998).

¹⁷⁵ COGGINS, ET AL., *supra* note 15, at 84-90.

¹⁷⁶ Francisco de Victoria, a Spanish scholar in the 16th century, wrote on the respective rights of Indian and European explorers in the Americas. Victoria rejected the idea that Europeans could claim full ownership by means of divine right or discovery; rather, the Indians were regarded as the

One somewhat ironic consequence of displacement was the formalization of the concept of tribal sovereignty.¹⁷⁷ The colonists and, later, the fledgling United States used treaties as the predominant method of securing possession of the land.¹⁷⁸ As treaties were considered the exclusive prerogative of governmental sovereigns, they were, simultaneously, emblematic of both sovereignty among the contracting parties, and of government-to-government dealings.¹⁷⁹

In another sense, displacement created the continuing basis for tribal legal claims to land and monetary reparations. Under the Indian Claims Commission Act¹⁸⁰ and numerous acts of specific jurisdiction,¹⁸¹ tribes were able to seek monetary recompense for unconscionable treaties and for previously uncompensated extinguishments of aboriginal title.¹⁸² Beyond this, the various federal non-intercourse acts¹⁸³ rendered federally unapproved transfers of Indian

true possessory owners of the land until or unless they voluntarily consented to transfer. See FELIX S. COHEN, *FEDERAL INDIAN LAW* 50-51 (Renard Strickland ed., 1982). Victoria's theories were highly influential in international law during the sixteenth, seventeenth and eighteenth centuries, and were major factors in early American Indian Law. *Id.* at 52.

¹⁷⁷ A simple, yet effective definition of tribal sovereignty comes from the case of *Williams v. Lee*, 358 U.S. 217 (1959), where Justice Black called it "the right of the reservation Indians to make and enforce their own laws and be ruled by them." *Id.* at 220.

¹⁷⁸ See Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947).

Every American schoolboy is taught to believe that the lands of the United States were acquired by purchase or treaty from Britain, Spain, France, Mexico, and Russia, and that for all the continental lands so purchased we paid about 50 million dollars out of the Federal Treasury. Most of us believe this story as unquestioningly as we believe in electricity or corporations. We have seen little maps of the United States in our history books and big maps in our geography books showing the vast area that Napoleon sold us in 1803 for 15 million dollars and the various other cessions that make up the story of our national expansion. As for the original Indian owners of the continent, the common impression is that we took the land from them by force and proceeded to lock them up in concentration camps called "reservations."

Notwithstanding this prevailing mythology, the historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar, but from its original Indian owners. What we acquired from Napoleon in the Louisiana Purchase was not real estate, for practically all of the ceded territory that was not privately owned by Spanish and French settlers was still owned by the Indians, and the property rights of all the inhabitants were safeguarded by the terms of the treaty of cession. What we did acquire from Napoleon was not the land, which was not his to sell, but simply the power to govern and to tax, the same sort of power that we gained with the acquisition of Puerto Rico or the Virgin islands a century later.

Id. at 34-35.

¹⁷⁹ DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U. S. SUPREME COURT* 21 (1997).

¹⁸⁰ 25 U.S.C. §§ 70 to 70V-3.

¹⁸¹ COHEN, *supra* note 176, at 563.

¹⁸² See generally MICHAEL LIEDER & JAKE PAGE, *WILD JUSTICE* (1997).

¹⁸³ See COHEN, *supra* note 176, at 510-522. The current embodiment is 25 U.S.C. § 177, which states in part, "No purchase, grant, lease, or other conveyance of land . . . shall be of any validity in

land to state, local or private entities presumptively invalid and laid the basis for ongoing tribal claims to both money damages and specific lands.¹⁸⁴

In a derivative, but still directly-linked manner, the treaties, statutes, and tribal land claims surrounding displacement provided a foundation for the modern notion that federal-tribal relations are matters of politics rather than race—a view that, to date, has shielded the multitude of federal Indian dealings from the strict judicial scrutiny which is ordinarily visited upon government action tainted by the suspect criterion of race.¹⁸⁵ Federal treaties and Indian legislation, freed so far from the demanding tests of compelling ends and critical means inherent in strict judicial scrutiny, have thus allowed the “measured separatism”¹⁸⁶ for Indian tribes that is distinguishable from all other relationships that the federal government maintains with minority groups.

The federal-Indian relationship is, in truth, a unique amalgam of racial, historical, political, and cultural concepts, and it sits rather precariously in a social and legal milieu which increasingly makes an insistence on literal legal equality.¹⁸⁷

If the impact of tribal displacement or the illegitimacy of the dispossession is minimized in the public’s perception, then the basis for land claims, tribal sovereignty, political relationships, and measured separatism may be simultaneously diminished—even if the rationale of first in time, first in right

law or equity unless the same be made by treaty or convention entered into pursuant to the Constitution.”

¹⁸⁴ See, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

¹⁸⁵ See *Morton v. Mancari*, 417 U.S. 535 (1974). In declining to exercise strict scrutiny of a Bureau of Indian Affairs employment preference which favored Indians from recognized tribes, the Court said, “The preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature. *Id.* at 554 n.24.

But see *Malabed v. North Slope Borough*, 42 F. Supp. 2d 927 (D. Alaska 1999), which states that, “after *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the continuing validity of *Mancari’s* analysis is subject to some question.” 42 F. Supp. 2d at 938 n.70. See *supra* notes 64, 65.

¹⁸⁶ *Supra* note 63.

¹⁸⁷ See *Rice v. Cayetano*, 528 U.S. 495 (2000).

When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii. In this case the Fifteenth Amendment invalidates the electoral qualification based on ancestry.

Id. at 524.

continues.¹⁸⁸ For example, if the current tribes can be scientifically described as relatively recent immigrants or as themselves the unjustified displacers of predecessor tribes, then post-discovery dispossession by the European invaders may be revisioned as somewhat less egregious or unprecedented, and thereby less supportive of continuing sovereignty and political distinctiveness for the contemporary tribal remnants.¹⁸⁹ In contrast, the longer the demonstrated continuity of undisturbed inhabitation and possession by current tribes and their affiliated predecessors, the greater will be the public acceptance of land and sovereignty claims, and the more substantial and significant will be the evidence of long-term ecological and social stability.¹⁹⁰

The prehistoric course of North American habitation has become a modern scientific battleground. Because fundamental policy and legal changes can attend scientific discovery, and because archeology, like other sciences, is neutral neither in inception or consequence, the fighting is bitter. As Vine Deloria says, “[t]hese ideas have great impact on how non-Indians view the claims for justice made by Indians.”¹⁹¹

¹⁸⁸ VINE DELORIA, JR., *RED EARTH, WHITE LIES* (1995). “By making us immigrants to North America they are able to deny the fact that we were the full, complete, and total owners of this continent.” *Id.* at 84.

¹⁸⁹ See Rebecca Tsosie, *Privileging Claims to the Past: Ancient, Human Remains and Contemporary Cultural Values*, 31 ARIZ. ST. L. J. 583, 629-31 (1999). See also Ed Quillen, *Once Land is Stolen It Should Stay Stolen*, DENVER POST, July 21, 1991, in *The Archives of Denver Post Columnist Ed Quillen*, at <http://www.custerguide.com/quillen/eqcols/19917217.htm> (last visited Aug. 15, 2001). Quillen, in discussing contemporary Indian land claims based on past dispossession says,

[T]he Crow, as well as the Blackfeet, Atsina and Hidatsa, will have to oppose a Sioux claim to any land west of the Missouri. They were already there when the Sioux invaded their ancestral homelands in the 17th and 18th centuries and pushed them west after many fierce battles.

The Sioux claim to western South Dakota has the same moral basis as the American claim—the right of conquest by occupation, settlement, and force of arms.

Id.

¹⁹⁰ See the remarks of Bronco Le Beau, Repatriation Officer for the Lakota Sioux, contained in *Bones of Contention* (Sept. 27, 1997), at <http://www.uiowa.edu/~anthro/reburial/bbcbones.html> (last visited Aug. 15, 2001).

The world view that we have for the Lakota is that we have always been here, we didn’t migrate here, we didn’t evolve here, we were created in our lands in the Pahatzapa, the Black Hills, at Wind Cave, and we reject the dominant society’s world view of the migration theory. When you’re talking about theories of evolution, the Lakota don’t believe in that—they believe in creation. If we want to discard—I say ‘discard,’ not ‘discredit’—discard the dominant society view, we have the right to do that. We’re people too. We’re not biological specimens, we’re not anthropological specimens—we’re people.

Id.

¹⁹¹ DELORIA, *supra* note 67, at 82.

The oldest and most widely accepted—at least among the non-Indian public—of the theories of North American inhabitation, postulates an entrance by Siberian hunters across the Bering Strait about 13,500 years ago.¹⁹² These intrepid nomads are supposed to have traversed formidable topographic barriers in Asia, crossed the land or ice bridge in the strait, conquered more rugged mountain ranges in Alaska, and descended into what is now the central United States by means of an ice-free corridor lying east of the Rockies between the massive glaciers of the last ice age.¹⁹³ These rovers—who by necessity must have included women and children—are also theorized to have thereafter rapidly occupied and populated two continents¹⁹⁴ and to have, just as quickly, exterminated most of the indigenous species of large mammals.¹⁹⁵ The hallmark lithic or stonework of this immigration was the Clovis point, a distinctively shaped stone projectile named for the site of first discovery in eastern New Mexico. The pervasive dissemination of the Clovis points in the North American interior is supposed to indicate the absence of any previous human occupation or competition.¹⁹⁶

Native scholars and tribal traditionalists despise the land bridge thesis, as it connotes a relatively short reign of Indian occupancy in the western hemisphere. It depicts the Indians—like the Europeans—as fairly recent, and similarly unentitled, immigrants.¹⁹⁷ Critics point to several problems with the Clovis first theory.¹⁹⁸ For one thing, there is an absence of significant evidence either of motivation for the immigration, or of material linkage between Siberia, the

¹⁹² JAMES C. CHATTERS, *ANCIENT ENCOUNTERS: KENNEWICK MAN AND THE FIRST AMERICANS* 244 (2001).

¹⁹³ DELORIA, *supra* note 67, at 89-97; E. JAMES DIXON, *BONES, BOATS, & BISON: ARCHEOLOGY AND THE FIRST COLONIZATION OF WESTERN NORTH AMERICA* 244-47 (1999).

¹⁹⁴ CHATTERS, *supra* note 192, at 245-46.

¹⁹⁵ See Will Durham, *Human Hunters Spelled Doom for Ice Age Behemoths*, REUTERS NEWS, June 8, 2001, http://dailynews.yahoo.com/h/nm/20010607/sc/science_extinction_dc_1.htm (last visited Aug. 16, 2001), available at *Environmental Investors Network News Service Page* <http://www.environmentalinvestors.com/asp/newsletrZ.asp.id=8883> (last visited Aug. 16, 2001).

John Alroy, evolutionary biologist at University of California at Santa Barbara, ran a complicated computer model of North American ecology late in the Pleistocene epoch stimulating the population dynamics of 41 large plant-eating mammals and humans, who were arriving on the scene for the first time. Regardless of how he adjusted the variables, Alroy found that human hunting inevitably caused mass extinctions—particularly devastating the populations of the largest animals such as mammoths and mastodons, whose slow growth rates and long gestation periods made it hard for them to rebound.

The first large populations of people arrived in North America about 13,400 years ago. Alroy said the extinction appeared to unfold within about 1,200 years after that.

Id. See also DIXON, *supra* note 193, at 245.

¹⁹⁶ CHATTERS, *supra* note 192, at 246.

¹⁹⁷ DELORIA, *supra* note 67, at 81-84.

¹⁹⁸ Tony Baker, *The Clovis First/Pre-Clovis Problem*, November 5, 1997, at http://www.ele.net/art_folsom/preclvis.htm (last visited Aug. 15, 2001).

Bering Strait, and middle America, where the Clovis points were originally found.¹⁹⁹

Another major problem with the Clovis-Bering Strait thesis, noted by tribal traditionalists, as well as non-Indian scientists,²⁰⁰ is the growing amount of evidence of pre-Clovis civilization in the Americas. One of the first of the major discrepancies was the Monte Verde site of southern Chile, which has been dated to precede the first Clovis points and the purported crossing of the Bering Strait by thousands of years.²⁰¹ Though the dating of Monte Verde has been controversial and has elicited strong resistance from scientists tied to the Clovis first-Bering Strait doctrine, the furor seems to be dying down,²⁰² in significant part because of the growing number of other discoveries suggesting pre-Clovis human presence.²⁰³

A new population model, one that puts North Asian immigrants in the Americas thousands of years earlier than Clovis, is the Pacific Rim theory. Under this conception, adventurers entered North America well before the ice-free corridor emerged in Alaska, by tracing the edges of the massive ice-age glaciers in boats, and eating fish and sea mammals.²⁰⁴ Proof for this approach is difficult, as the supposed routes now lie under seas that are much deeper due to the post-ice age glacier melt,²⁰⁵ and because, when the boatmen did venture ashore, they probably employed non-distinctive stone technology.²⁰⁶ A further difficulty in proof, one that affects the Clovis-Bering Strait thesis as well, is the absence of any clear evidence of progenitive cultures in Siberia that might have

¹⁹⁹ See Wendy Crowther, *Native American Graves Protection and Repatriation Act: How Kennewick Man Uncovered the Problems in NAGPRA*, 20 J. LAND, RESOURCES & ENV'T'L. L. 269, 279 (2000).

The problem with this theory has been a gap in the archeological record. What are known as Clovis culture artifacts have been found in the middle United States which date back to 11,500 years ago. It would therefore be expected that similar artifacts could be traced back through the Northwestern United States, Canada, Alaska, and into Siberia. However, this has not been the case—no related artifacts have been found in those areas which would link a Bering Strait migration to the artifacts found in the middle United States.

Id.

²⁰⁰ DELORIA, *supra* note 67, at 73-80.

²⁰¹ CHATTERS, *supra* note 192, at 247-49; THOMAS D. DILLEHAY, *THE SETTLEMENT OF THE AMERICAS* 160-68 (2000).

²⁰² David Hurst Thomas, *One Archeologist's Perspective on the Monte Verde Controversy*, ARCHEOLOGY ONLINE FEATURES, at <http://www.archaeology.org/online/features/clovis/thomas.html> (last visited Aug. 15, 2001).

²⁰³ CHATTERS, *supra* note 192, at 249-50.

²⁰⁴ Jenni Meknox, *The Ancient American Melting Pot*, at <http://www.idir.net/~meknox/jenni/main.htm> (last visited Aug. 15, 2001); DIXON, *supra* note 193, at 247-50.

²⁰⁵ CHATTERS, *supra* note 192, at 256; Robson Bonnichsen & Karen Turnmire, *An Introduction to the Peopling of the Americas*, in *ICE AGE PEOPLES OF NORTH AMERICA* 1, 9 (Robson Bonnichsen & Karen Turnmire eds., 1999).

²⁰⁶ "A migration of this sort would mean that the initial peopling of the Americas was tied to a littoral or maritime lifeway, most likely characterized by simple unifacial tools rather than large, elaborate, projectile points like Clovis." DILLEHAY, *supra* note 201, at 183.

been the staging ground for the out-movers to America and the ensuing Clovis technology.²⁰⁷

The failure to fix a direct evidentiary link between northern Asia and the Americas has inspired a few archeologists to theorize about other possible connections. The Solutrian connection envisions migrations from Europe rather than—or in addition to—traffic from Asia.²⁰⁸ Courageous boatpersons are seen as possibly hugging the ice-age glaciers of the North Atlantic in a manner similar to that of the Pacific Rim model, and beginning the population of the Americas from the eastern shore.²⁰⁹ This thesis, though providing a possible explanation for the anomalous ancient sites in eastern Canada and the Eastern United States, also has substantial difficulties, not the least of which are the fierce navigational problems and the absence of sufficient material evidence to counter the argument that any apparent similarities between European and North American sites are a matter of coincidence rather than direct intercontinental dissemination.²¹⁰

The oral traditions of the various Indian tribes cuts uniformly and directly against the grain of the non-Indian scientists' immigration theories—an appropriate opposition in the mind of Indian scholar Vine Deloria, Jr., who states, "(L)ike any other group of priests and politicians . . . scientists lie and fudge their conclusions as much as the most distrusted professions in our society—lawyers and car dealers."²¹¹ The oral histories speak generally of tribal creation in the Americas, in the first instance, and of tribal association with geological and astronomical cataclysm and other physical phenomenon that predate—and thus preclude—any of the time configurations associated with the various immigration theories of the non-Indian scientists.²¹² Since the oral accounts are repositories of fact, observation, and history intertwined with personal belief and analogy, they have been resisted or discounted by most of the purportedly hard-

²⁰⁷ CHATTERS, *supra* note 192, at 357; DELORIA, *supra* note 67, at 87-88. See also Robson Bonnichsen & Alan L. Schneider, *Breaking the Impasse on the Peopling of the Americas*, in ICE AGE PEOPLES OF NORTH AMERICA 497, 505-06 (Robson Bonnichsen & Karen L. Turnmire eds., 1999). "If there is a relationship between Clovis and the Paleo-Arctic tradition, it remains elusive. As a result, one is forced to the conclusion that so far there is a total absence of convincing evidence that can be used to support the proposition that Clovis originated in Siberia or with populations newly arrived from Siberia." *Id.*

²⁰⁸ DAVID HURST THOMAS, SKULL WARS 168-71 (2000).

²⁰⁹ *Id.*

²¹⁰ *Id.* See also CHATTERS, *supra* note 192, at 261.

²¹¹ DELORIA, *supra* note 67, at 41. I would point out that Professor Deloria teaches not only history, religious studies, and political science at the University of Colorado, but also law. He was, in fact, a classmate of mine in Professor Douglas Parker's jurisprudence class at the University of Colorado Law School in 1969, about the same time he was finishing the legendary work, *Custer Died for Your Sins* (1969).

²¹² See Armand Minturn, *Human Remains Should be Reburied*, CONFEDERATED TRIBE OF THE UMATILLA INDIAN RESERVATION, (Sept. 1996), at <http://www.umatilla.nsn.us/kennman.html>. (last visited Aug. 15, 2001). "From our oral histories, we know that our people have been part of this land since the beginning of time. We do not believe that our people migrated here from another continent, as the scientists do." *Id.*

eyed, empirically focused scientists.²¹³ Tribalists, however, and increasing numbers of more flexible non-Indian scientists, recognize that the oral tradition is premised on fact rather than imagination, and that both the nature and necessity of accurate recounting within oral societies make these histories invaluable indicators of the past.²¹⁴

The debate between proponents of non-Indian objective science and advocates of the Indian oral traditions escalated dramatically in 1996.²¹⁵ The discovery of a skeleton, to be later dubbed the “Kennewick Man,” after a nearby Washington town, would drag law and public policy into what had primarily been an intellectual fracas, and would ultimately present challenges not only to the particular provision of statutes like the Archeological Resource Protection Act²¹⁶ (ARPA) and the Native American Graves Protection and Repatriation Act²¹⁷ (NAGPRA), but also to the very structure of Federal-tribal relationships. The furor would, in sum, reaffirm the observations of Rebecca Tsosie, who said, “[d]espite allegations to the contrary, the discipline of science, like that of history, is not neutral,” and “archeology has a political context which can be used to help or to harm Native American interests.”²¹⁸

The discovery of the Kennewick Man was on the banks of the Columbia River, and was therefore within the jurisdiction of the United States and under the coverage of both ARPA and NAGPRA. Both statutes are concerned with the possession and treatment of archeological resources including human remains, but each approaches it from a different angle. ARPA, an embellishment on the

²¹³ See Ronald J. Mason, *Archeology and Native North American Oral Traditions*, 65 AM. ANTIQUITY 239 (April 2000).

Of course, people are entitled to their beliefs and ought not be belittled for them. But just as those raised in and participating in a social world ordered by a pre-scientific metaphysics are not to be required to jettison their beliefs for those of scientists, unless they presume to work at science, so are the latter relieved of analogous constraints. When incompatible statements are made or positions taken on the basis of those quite disparate ‘ways of knowing’ mutual respect and tolerance are simply humane accommodations. But this does not license importing folk beliefs into scientific discourse any more than mandating its reverse. Such mutual proscriptions do not thereby imply epistemological equivalence in either the reliability of factual claims or the means by which they are attained, but simply respect for the inviolability of what some would liken to the rules of different games. But seeking the past is more than games or gamesmanship, otherwise who would care?

Id.

²¹⁴ WILLIAM SULLIVAN, *THE SECRET OF THE INCAS* 14-15 (1996). “Andean myth interweaves celestial, social, political, religious, and spiritual elements into disarmingly simple and charming stories [T]he technical language of myth is simply too idiosyncratic to have been reinvented independently over and over again.” *Id.*

²¹⁵ THOMAS, *supra* note 208, at 239-53.

²¹⁶ 16 U.S.C. §§ 470aa-mm (1994).

²¹⁷ 25 U.S.C. §§ 3001-13 (1994).

²¹⁸ Tsosie, *supra* note 78, at 630.

largely ineffective Antiquities Act of 1906,²¹⁹ establishes a mandatory permit and consultation process²²⁰ as a prerequisite to removal of archeological resources greater than 100 years old from the public lands. The statute is backed with substantial, enforceable²²¹ sanctions, but cannot be considered to be cultural preservation legislation as it contemplates both scientific study of artifacts and remains, as well as ultimate possession by the federal government, which may be passed on to an appropriate institution or certain designated private collectors.²²² In fact, one can suspect that the interests of university scientists, and their need to deter looters and protect the grist for their ongoing research and educational programs, are strong, driving forces behind the enactment of ARPA.²²³

NAGPRA, on the other hand, is concerned not with non-Indian science or federal property, but predominantly with Indian civil rights, cultural preservation, and statutory entitlements.²²⁴ NAGPRA may accommodate science at points, but its principal thrust is tribal ownership and repatriation of Native American remains that are either in federally sponsored possession or are inadvertently discovered on federal lands.²²⁵ Inadvertently discovered remains become the property of lineal descendants, culturally affiliated tribes, or tribes whose aboriginal range has been held to include the site of discovery, in that order.²²⁶ Human remains of Native Americans in any federally controlled facility are

²¹⁹ 16 U.S.C. § 431-33 (1994). 16 U.S.C. § 433 prohibits the appropriation, excavation or injury of "any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated." 16 U.S.C. § 433 essentially provides for a minimalist sanction of a \$500 dollar fine or a maximum of 90 days in jail, and even that has been compromised by a Ninth Circuit Court of Appeals decision which found the language "object of antiquity" to be unconstitutionally vague. *See United States v. Diaz*, 499 F.2d 113, 114-15 (9th Cir. 1974).

²²⁰ Tsosie *supra* note 78, at 605, nn. 109, 110.

²²¹ *See, e.g., United States v. Austin*, 902 F.2d 743 (9th Cir. 1990).

²²² 16 U.S.C. § 470cc(b)(3) (2000) states that "archeological resources which are excavated or removed from public lands will remain the property of the United States . . ." *See United States v. Shivers*, 96 F.3d 120 (5th Cir. 1996); *see also* COGGINS, ET AL, *supra* note 15, at 1089-99.

²²³ Michael Hibbert, *Galileos or Grave Robbers? Science, the Native American Graves Protection and Repatriation Act, and the First Amendment*, 23 AM. INDIAN L. REV. 425, 428-29 (1999).

²²⁴ Brief for the Dep't of Justice, Env'tl. & Natural Resources Div. at 3-6, *Bonninschsen v. United States*, 969 F. Supp. 628 (D. Or. 1997) (Nos. 96-1481-JE, 96-1516-JE), KENNEWICK MAN VIRTUAL INTERPRETIVE CENTER (May 31, 2001), at <http://www.kennewick-man.com/documents/fedbrief.html> (last visited Aug. 15, 2001). *See also* Michael J. Kelly, *A Skeleton in the Legal Closet: The Discovery of the Kennewick Man Crystallizes the Debate Over Federal Law Governing Disposal of Ancient Human Remains*, 21 U. HAW. L. REV. 41 (1999).

It is important to note that human rights principles formed the basis for the negotiation and subsequent promulgation of NAGPRA. The law was enacted in an effort to rectify past desecrations of Native American Burial sites and human remains. These desecrations grew out of a societal bias for preserving white American cultural artifacts while exploiting Native American antiquities for economic profit and scientific analysis.

Id. at 51.

²²⁵ 25 U.S.C.A. §§ 3002(d) and § 3005 (2000).

²²⁶ 25 U.S.C.A. § 3002(a) (2000).

subject to expeditious repatriation in accord with requests from either lineal descendants or culturally affiliated tribes.²²⁷ There is only a limited right to study the remains prior to repatriation from museums,²²⁸ and, arguably, there is no right to study remains found by inadvertent discovery beyond that examination necessary to determine if the remains fall within NAGPRA.²²⁹

NAGPRA was, thus, a significant effort to fulfill the federal government's trust responsibility to the Indian tribes.²³⁰ The Act was also a body blow to non-Indian science and its structural need to study the remains of prehistoric Native Americans.²³¹ The tension between the two poles was to become dramatically visible in the Kennewick case.

Several elements combined to make the Kennewick case pivotal. For one thing, the age of the skeleton, estimated at around 9,300 years, seemed to preclude any demonstration of lineal descendency or cultural affiliation with a federally recognized tribe—especially since the tribes would necessarily depend on oral testimony.²³²

²²⁷ 25 U.S.C.A. § 3005(a) (2000).

²²⁸ 25 U.S.C.A. § 3005(b) (2000).

²²⁹ See Tsosie, *supra* note 78, at 611.

In sum, a careful reading of both NAGPRA and ARPA, along with their accompanying regulations, suggests that scientists are not precluded from studying Native American human remains discovered on federal lands. However, such study is contingent upon consultation with and agreement by the Native American group or groups holding the ownership and custodial rights to these remains. The statutes and regulations do not indicate that scientists have any statutory right to study such remains. The statutes and regulations do not indicate that scientists have any statutory right to study such remains. The legal rights of ownership and custody reside with the Native American groups, and these groups have the authority to permit scientific study—or to deny such study—when it would harm tribal interests.

Id. See also *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1417 (D. Haw. 1995) (discussed in Renee M. Kosslak, *The Native American Graves Protection and Repatriation Act: The Death Knell for Scientific Study?*, 24 AM. INDIAN L. REV. 129, 145-47 (2000)). “Thus, according to the district court’s interpretation of NAGPRA, scientific study is permissible to identify accurately remains and cultural items in the possession or under the control of federal agencies.” Kosslak at 147.

²³⁰ In enacting NAGPRA, Congress recognized the special relationship between the federal government and Indian tribes. 25 U.S.C.A. § 3010 (2000) (“This Chapter reflects the unique relationship between the Federal Government and Indian Tribes and Native Hawaiian organizations . . .”). Congress’ purpose for enacting NAGPRA was “to protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian and Native Hawaiian lands.” H.R. REP. 101-877, at 8 (1990) *reprinted in* 1990 U.S.C.C.A.N. 4367. More importantly, NAGPRA was intended to “establish a process that provides the dignity and respect that our Nation’s first citizens deserve.” 136 CONG. REC. S17173 (daily ed. Oct. 26, 1990) (statement of Sen. McCain). Clearly, NAGPRA must be construed as Indian legislation. See Brief, *supra* note 224, at 4.

²³¹ Hibbert, *supra* note 223, at 438; Kelly, *supra* note 224, at 50.

²³² See Tsosie, *supra* note 78, at 601-02. The tribes involved in the Kennewick case did, in fact, claim cultural affiliation.

Perhaps the most noted—or notorious—aspect of the Kennewick case was the underscoring of America's pathological double-stance of obsession with and denial of racial relevance. Archeologist James Chatters lit the fuse of this explosive issue by suggesting in his original forensic evaluation, and later in his book, that the features of the Kennewick man were "Caucasoid" and unlike those of contemporary tribes in the area of discovery.²³³ The media jumped at this statement, changing "Caucasoid" to "Caucasian" and later publishing a picture of a reconstruction of Kennewick Man's countenance that bore a striking resemblance to Patrick Stewart, a white regular in the Star Trek series.²³⁴ Speculation rapidly emerged, especially in the right-wing press, that Kennewick Man demonstrates that white men had preceded the Indian tribes of today to the continent, that they had been displaced sometime in pre-history by the savage tribes and, perhaps, that the current concerns with the dispossessions of the last 500 years were unwarranted.²³⁵

In conclusion, it seems rather futile to require contemporary Native Americans to scientifically "prove" their "cultural affiliation" to ancient remains. The complex world views discussed above encompass radically different notions of life, death, kinship, and cultural continuity, and suggest that the scientific proof standard is a complete mismatch for Native American claims to ancient remains. Science is incapable of demonstrating what Kennewick Man's "culture" was. Even the proponents of the HGD Project assert that "no particular genes make a person Irish or Chinese or Zulu" and specify that these are "cultural labels not genetic ones." It is important to contemporary Native Americans to affirm their connection to the ancient peoples of this land as a means of expressing their unique cultural identity. That is the "cultural" value of NAGPRA, and that is the cultural interest that should be weighed against the competing claims of scientists.

Id. at 640.

²³³ CHATTERS, *supra* note 192, at 90-91.

²³⁴ *Id.* at 142-43.

²³⁵ See Lynn Fisher, *Controversy: Kennewick Man*, at <http://www.uis.edu/~lfisher/Kennewick.htm> (last visited Aug. 15, 2001).

Unfortunately, the first informal description of Kennewick Man used the term "Caucasoid" to refer to several features of the skull that do not resemble modern Native American populations. This has resulted in confusion, as journalists identified the Ancient One as possibly "European" or "Caucasian," terms irrelevant to 9,000-year-old populations. Some commentators have taken this notion and run with it, claiming that "Europeans" were among a diverse set of early settlers of North America, and modern Native Americans were latecomers. Some have even claimed that the government's efforts to rebury Kennewick Man were part of a cover-up by "a politically correct elite in academia and elsewhere in the culture who have a stake in painting Europeans as the lone and loathsome recent invaders." As journalist Douglas Preston rightly points out, "[t]his is clearly racist nonsense: [new finds] cannot erase or negate the existing history of genocide, broken treaties, and repression."

Id. (citations omitted); see also THOMAS, *supra* note 208, at 116-119.

The careless use of racially charged language not only demeans legitimate anthropological science; it also plays directly into the hands of those who

To fully answer the delicate, politically charged cultural and racial issues would, at least in the minds of the non-Indian scientists and their right-wing supporters, require considerable amounts of detailed study. How restrictive were the structures and provisions of NAGPRA? In the analysis of the federal administrative agencies, the provisions were held to be a confinement of the full range of scientific inquiry, a strong concession to Indian culture, and, in the case of discovery on federal lands, permissive of only the study necessary to determine the operative reach of the statute.

The Army Corps of Engineers, with jurisdiction over the point of discovery on the Columbia River bank and at least preliminarily over the skeleton, focused on the jurisdictional definition of "Native American" in NAGPRA, which means "of, or relating to a tribe, people or culture that is indigenous to the United States."²³⁶ The Corps felt that the provision, though not free from doubt, covered the Kennewick Man. On September 7, 1996, the Corps announced that there would be no further testing and that it intended to vest ownership of the remains with the tribal claimants.²³⁷

Eight prominent anthropologists and archeologists²³⁸ filed suit in federal court, asserting that the Army Corps of Engineers did not have adequate evidence that the remains were "Native American" or that they were "culturally affiliated"²³⁹ with any of the contending tribes. The initial litigation was not dispositive of the ownership or study issues; instead, after resolving procedural issues of standing and finality, Judge Jeldirks employed primary jurisdiction and remanded the case to the Corps with a list of issues to be considered and clarified.²⁴⁰

would use race in a hateful way . . . So viewed, Kennewick Man becomes the Great White Hope and that is why the far right promotes a detailed scientific investigation as "a means by which this long-dead kinsman of ours can tell his saga and renew his glory."

Id. at 118.

²³⁶ 25 U.S.C.A. § 3001(9) (2000).

²³⁷ The tribes in the coalition were: the Confederated Tribes of the Umatilla Indian Reservation, the Wanapum Band, the Confederated Tribes and Bands of the Yakima Indian Nation, the Nez Perce Tribe and the Confederated Tribes of the Colville Reservation. The coalition, led by the Umatilla, sent a claim to the Corps upon notification of the discovery of the remains. The coalition announced that it would rebury the remains in a secret location and that it wished no further testing prior to this. Crowther, *supra* note 199, at 277.

²³⁸ The plaintiffs include Robson Bonnicksen, C. Loring Brace, George W. Gill, C. Vance Haynes, Richard L. Jantz, Douglas W. Owsley, Dennis J. Stafford, and D. Gentry Steele. *See* Bonnicksen v. United States, 969 F. Supp. 628 (D. Or. 1997).

²³⁹ 25 U.S.C.A. § 3001(2) (2000) states, "'cultural affiliation' means that there is a relationship of shared group identity which can be traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group."

It is significant that the ownership provisions for human remains discovered on federal lands do not demand a showing of either lineal descendency or cultural affiliation, but can be premised on a sharing of aboriginal occupation in the area of discovery. *See* 25 U.S.C.A. § 3002(2)(C) (2000).

²⁴⁰ *See* Bonnicksen v. United States, 969 F. Supp. 628 (D. Or. 1997). In particular, the court asked:

(a) Whether these remains are subject to NAGPRA, and why (or why not);

The Corps, seeking expert assistance, referred two of the central questions to the Department of the Interior, which responded to the first on January 13, 2000. Interior announced that Kennewick Man was to be considered “Native American” for purposes of NAGPRA because preliminary testing indicated that the bones were over 9,000 years old. This meant that Kennewick Man and his tribal associates had necessarily existed “well before the historically documented arrival of European explorers,” which was the administrative benchmark used by Interior to define NAGPRA’s statutory coverage of “indigenous” tribes.²⁴¹

On September 25, 2000, Interior answered the second of the questions referred by the Corps, and again it concurred with the Corps’ original decision that Kennewick Man be returned to the five tribes claiming him as their ancestor. Secretary Babbitt concluded that the remains were culturally affiliated with the

(b) What is meant by terms such as “Native American” and “indigenous” in the context of NAGPRA and the facts of this case:

(e) Whether there has to be any *cultural* affiliation between the remains and a contemporary Native American tribe—and if yes, how that affiliation is established if no cultural objects are found with the remains . . .

Id. at 651-52 (citations and notes omitted).

²⁴¹ Office of the Secretary, U. S. Department of the Interior, *Kennewick Man Over 9,000 Years Old and Native American According to NAGPRA Law* January 13, 2000, at <http://www.doi.gov/news/archives/000113b.html>.

As defined in NAGPRA, “Native American” refers to human remains and cultural items relating to tribes, peoples or cultures that resided within the area now encompassed by the United States prior to the historically documented arrival of European explorers. This definition exists irrespective of when a particular group may have begun to reside in a particular area, and irrespective of whether any or all of these early indigenous Americans were or were not culturally or biologically affiliated with present day Indian tribes.

Id.

Wendy Crowther notes that this interpretation is not compelled by the statute.

This is a significant interpretation of the definition of “Native American” and is quite different from the statute, which simply says “Native American” means of, or relating to, a tribe, people, or culture that is indigenous to the United States. As discussed, there is no statute, regulation, or case law which interprets the meaning of indigenous as applied to ancient remains. Yet, with the McManamon report, the Department of Interior has stated that any ancient remains pre-dating the documented arrival of European explorers are simply Native American and subject to NAGPRA. This determination was made without the benefit of rulemaking, with its notice and comment requirements, and without Congressional authority. If Kennewick Man proves to be older than Columbus’ discovery of America, he will be subject to NAGPRA regardless of his physical characteristics or any possible DNA evidence, and the only remaining determination will be with which tribe he is culturally affiliated.

Crowther, *supra* note 199, at 282.

tribes, based on “the geographic data and the oral histories...”²⁴² With this input from the relevant agencies, the Bonnischen case began again.

The Plaintiffs challenged Babbitt’s interpretations of “Native American” and “cultural affiliation” and claimed further that the use of oral history to determine cultural affiliation violated the Establishment Clause.²⁴³ The defense responded that the interpretations had been consistently used,²⁴⁴ though it must be acknowledged that NAGPRA had not been used before in cases of ancient remains like those of Kennewick Man and that, as Michael Kelly wrote, “Kennewick [Man] hits NAGPRA right where it is weakest.”²⁴⁵

Can NAGPRA and the statutory balance set between the cultural rights of tribal minorities, and non-Indian science withstand the shockwaves sweeping out from the Kennewick Man discovery? An early attempt by Washington Congressman Richard (Doc) Hastings to amend the aboriginal range for inadvertent discovery, to limit ownership to lineal descendants and culturally affiliated tribes, and to loosen the restraints on scientific study failed.²⁴⁶ Further efforts at reform, however, seem likely.²⁴⁷ Beyond this looms a much larger question: can federal Indian relations, and the concepts of trust, tribal sovereignty and measured separation withstand the fall-out from an archeological sea-change indicating not only multiple routes of origin to the populating of North and South America, but also a lack of continuity between ancient peoples and present tribes? The answers, at this point are unclear, but we can be reasonably certain that the point of resolution will be well beyond archeological discovery—and will lie within the inexact contours of popular value, political process and law.

VI. CONCLUSION

Beyond the tautologies of legal positivism, the law is neither self-defining nor self-fulfilling. Law is defined, validated, or disregarded on the basis of its function as a tool of implementation. We ultimately accept or reject a law because of its success in securing or confirming our beliefs, values, and policies. Archeology, anthropology, and their windows into the past course of life and civilization on the continent may be the source of such values and may inspire the confirmatory law. The view of the evidence and events of the past may be occluded; other values and agenda such as political theory or economics may

²⁴² Office of the Secretary, U. S. Department of the Interior, *Interior Department Determines “Kennewick Man” Remains To Go To Five Indian Tribes*, September 25, 2000, at <http://www.doi.gov/bia/news/kennewick.htm>. Babbitt also noted that the site of discovery was within the aboriginal range of several of the tribes and that this, as well as cultural affiliation, would be a basis for a claim of ownership. *Id.*

²⁴³ Brief, *supra* note 224, at 3.

²⁴⁴ *Id.* at 5.

²⁴⁵ Kelly, *supra* note 224, at 59.

²⁴⁶ H.R. 2893, 105th Cong. (1997); Crowther, *supra* note 199, at 280-81.

²⁴⁷ THOMAS, *supra* note 208, at 275: “NAGPRA remains a very murky piece of legislation and clarifying it will be a bumpy political process.”

have predisposed the viewer and biased the reflection. The view of the past may sometimes be hidden by the law.

Archeologists have recently made discoveries and advanced theories that have the potential for major changes in popular value and public law, especially in the area of federal-Indian relationships. Newly discovered evidence of Indians' relationship with the land, communitarian functioning, and prehistoric migration may inspire a social reassessment of both Indians' distinctiveness and non-Indian obligation. This may in turn lead to either affirmation of measured separatism or another round of assimilations and termination.

The transformatory potential of archeological discovery has not been fully forthcoming, in part because a collateral law, NAGPRA, has limited the scope and results of archeological investigation. NAGPRA is properly seen as a law securing minority civil rights and culture, and not as a law serving or resulting from scientific inquiry. Can such a law stand across the course of science, neutral or otherwise? Can NAGPRA continue to constrain inquiry that might lead to value shifts and legal transformation? The particular future remains cloudy, but one is hard pressed to find historical examples of science cabined by culture or even law on a permanent basis. Even confinement in the name of safety or morality rather than in the service of standard ideology or traditional dogma will eventually fail. Scientists willing to persevere legally, to take perhaps unconscionable advantage of tribalists and their culture, and to forge Faustian intellectual bargains will eventually achieve results, and then shepherd their trade-off laden products into a society which will be forced to adjust its values and ultimately its laws. Thus, the stories of Kennewick Man and the Anasazi cannibals will eventually come forth without restraint and, if history is a guide, the Indian law—like the miner's canary—may be fundamentally changed.

