

# American Indian Law Review

---

Volume 23 | Number 2

---

1-1-1999

## Galileos or Grave Robbers? Science, the Native American Graves Protection and Repatriation Act, and the First Amendment

Michelle Hibbert

Follow this and additional works at: <https://digitalcommons.law.ou.edu/air>



Part of the [First Amendment Commons](#), and the [Indigenous, Indian, and Aboriginal Law Commons](#)

---

### Recommended Citation

Michelle Hibbert, *Galileos or Grave Robbers? Science, the Native American Graves Protection and Repatriation Act, and the First Amendment*, 23 AM. INDIAN L. REV. 425 (1999), <https://digitalcommons.law.ou.edu/air/vol23/iss2/7>

This Comment is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact [Law-LibraryDigitalCommons@ou.edu](mailto:Law-LibraryDigitalCommons@ou.edu).

## COMMENT

# GALILEOS OR GRAVE ROBBERS? SCIENCE, THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT, AND THE FIRST AMENDMENT

Michelle Hibbert\*

Hailed by some as premier Native American civil rights legislation<sup>1</sup> but lambasted by others as representing an impermissible infringement on scientific inquiry,<sup>2</sup> the Native American Graves Protection and Repatriation Act of 1990 directs all museums and institutions receiving federal money to identify, inventory, and repatriate Native American skeletal remains and cultural items to appropriate lineal descendants.<sup>3</sup> Archaeologists and anthropologists oppose this legislation on the grounds that it has the potential to halt much of their ongoing research and foreclose future opportunity to examine Native American skeletal remains and cultural items.<sup>4</sup> Are these archeologists who disinter skeletal remains like modern Galileos,<sup>5</sup> irrationally

---

\*Third-year student, Chicago-Kent College of Law. B.S., 1995, Arizona State University. First-place winner, 1997-98 *American Indian Law Review* Writing Competition.

1. See 136 CONG. REC. S17,173-02, S17,174-S17,175 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye). Sen. Daniel Inouye (D-Haw.) stated that the intent of Native American Graves Protection and Repatriation Act is to protect the "civil rights of America's first citizens." *Id.* at S17,174; cf. Thomas A. Livesay, *The Impact of the Federal Repatriation Act on State-Operated Museums*, 24 ARIZ. ST. L.J. 293, 296 (1992). Livesay quotes Dr. David Phillips, the original chair of the Committee on Sensitive Materials at the Museum of New Mexico. Dr. Phillips' committee was charged with identifying the items in the museum potentially subject to repatriation. Dr. Phillips stated: "Repatriation is an issue of civil rights for Native Americans and, by extension, for all of us." See *id.*

2. See *Bonnichsen v. U.S. Dep't of the Army*, 969 F. Supp. 614, 66-627 (D. Or. 1997) (*Bonnichsen I*); see also Complaint at 9, *Bonnichsen* (No. 96-1481-JE).

3. See Native American Graves Protection and Repatriation Act of 1990, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001-3013 (1994)); see also Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 69-72 (1992).

4. See *Bonnichsen v. U.S. Dep't of the Army*, 969 F. Supp. 628, 646-49 (D. Or. 1997) (*Bonnichsen II*); see also Peter R. Afrasiabi, Note, *Property Rights in Human Skeletal Remains*, 70 S. CAL. L. REV. 805, 807, 816-17 (1997).

5. See Kenneth J. Chesebro, *Galileo's Report: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637, 1638 (1993). Chesebro writes that due to persecution by the Catholic Church, Galileo was "forced to repent by the Roman Inquisition and spent the last eight years of his life under house arrest." See *id.* at 1638 (citing William D. Montalbano, *Vatican Finds Galileo 'Not Guilty'; Pope Admits Error in Rejecting Theory*, WASH. POST, Nov. 1, 1992, at A40). However, in 1992, "after a thirteen-year study of the case, a special commission of the Pontifical Academy of Sciences" cleared Galileo of conducting "junk science." *Id.*; see also Jack R. London, *Exponential Change: Today Is Already Tomorrow*, 3 ANNALS HEALTH L. 153, 153 (1992) (stating

persecuted because of their scientific method, or are they simply "grave robbers"?<sup>6</sup>

This comment will examine whether the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) could survive a constitutional challenge based on the claim it impermissibly infringes on one's right to scientific inquiry.<sup>7</sup> Part I of this comment discusses the historical development of legislation which applies to Native American cultural items and skeletal remains, and examines how these laws reflect changing legal and social attitudes of who should properly retain custody of those items. Part II outlines the debate between Native Americans who oppose grave excavation and scientists claiming the right to examine ancient Native American skeletal remains and cultural items. In particular, this section will focus on why Native Americans are opposed to skeletal research and why science feels that the disinterring of human remains and other burial goods is both legitimate and necessary. Part III will analyze whether NAGPRA could survive a challenge based upon a First Amendment right of scientific inquiry. In particular, this section focuses on the pending constitutional challenge to NAGPRA brought by plaintiffs in the "Kennewick Man" case;<sup>8</sup> why legal scholars believe such a right exists; and finally, whether NAGPRA constitutes an unconstitutional infringement on such a right. Part IV concludes that even if courts determine that the First Amendment encompasses the right of scientific inquiry, NAGPRA can survive a constitutional challenge. Because NAGPRA represents at least

---

that it took the Catholic Church 383 years to acknowledge and apologize for wrongly persecuting Galileo for his scientific theories); see also George P. Smith, *Toward an International Standard of Scientific Inquiry*, 2 HEALTH MATRIX 167, 169-70 (1992) (writing that "Galileo's legacy is his animation of a movement designed to advance and, indeed, promote freedom of scientific expression").

6. See James Riding In, *Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians*, 24 ARIZ. ST. L.J. 11, 24 (1992); see also Gene A. Marsh, *Walking the Spirit Trail: Repatriation and Protection of Native American Remains and Sacred Cultural Items*, 24 ARIZ. ST. L.J. 79, 86 (1992) (noting that disinterring of remains runs a broad spectrum, from "professional archaeologists" to "grave robbers").

7. There have also been rumblings among the scientific community that NAGPRA is unconstitutional because it infringes on one's substantive liberty interests in freedom of association or freedom of occupation, as well as a violation of the Establishment Clause's requirement of the separation of church and state. However, both of these claims are beyond the scope of this comment.

8. In 1996 the remains of a man were discovered near Kennewick, Washington. Eight plaintiffs are suing the Army Corps of Engineers in order to gain access to the remains for further scientific study, and are arguing in part that NAGPRA unconstitutionally infringes on their right of scientific inquiry. The Army Corps of Engineers have refused these scientists access to the remains, citing NAGPRA, and intend instead to grant the Umatilla tribe custody of the remains. The court has not decided the merits of this claim. See *Bonnichsen v. U.S. Dep't of the Army*, 969 F. Supp. 614 (D. Or. 1997) (*Bonnichsen I*); *Bonnichsen v. U.S. Dep't of the Army*, 969 F. Supp. 628 (D. Or. 1997) (*Bonnichsen II*).

three compelling governmental interests and is narrowly tailored to further these ends, any incidental infringement on scientific inquiry resulting from NAGPRA is constitutionally permissible.

### *I. The Legal Developments Leading to the Enactment of NAGPRA*

Since the beginning of this century, the United States government has continually adapted how it treats Native Americans, their ancestral skeletal remains and other cultural items because of the shifting attitudes of Americans towards science and the civil rights of Native Americans. The way in which the legal system treats Native American burial sites and associated objects historically conflicts with common law traditions; whereas all jurisdictions agree that human remains may not be disinterred, once properly buried, for less than "weighty and compelling reasons,"<sup>9</sup> archaeologists and anthropologists routinely disturb Native American remains "in the name of scientific curiosity."<sup>10</sup> The federal government's current policy, which dictates that Native Americans themselves should be involved in the decision of who, if anyone, should have custody of their ancestral remains and other "cultural items," is a far cry from the previous legal attitude toward these items.<sup>11</sup> Four major pieces of legislation have been passed regarding who retains custody of items recovered from Native American burial sites evidence an evolution in legal treatment: first, the American Antiquities Act of 1906; second, the Archaeological Resources Preservation Act; third, the National Museum of the American Indian Act; and lastly, the Native Americans Graves Protection and Repatriation Act of 1990.

#### *A. The Antiquities Preservation Act of 1906*

At the turn of the century the federal government passed the American Antiquities Preservation Act of 1906 (Antiquities Act), which legally converted all Native American burial sites, funerary objects and human remains into "objects of antiquity," or "archaeological resources," and thus federal property.<sup>12</sup> The government passed the Antiquities Act as a result of the interest exhibited from both the scientific community and European art and antiquities dealers in obtaining Native American skeletal remains, particularly crania, and other funerary objects.<sup>13</sup> The Antiquities Act

---

9. See Walter E. Stern & Lynn H. Slade, *Effects of Historic and Cultural Resources and Indian Religious Freedom on Public Lands Development*, 35 NAT. RESOURCES J. 133, 160 (1995).

10. Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 73 B.U. L. REV. 559, 578 (1995).

11. See 25 U.S.C. § 3001(3) (1994).

12. See 16 U.S.C. § 470(d)(d) (1994).

13. See Leonard D. DuBoff, 53(2) *Protecting Native American Cultures*, OR. ST. B. BULL., Nov. 1992, at 9, 10.

subjected all grave site contents excavated under legal permits to permanent "preservation" and study by suitable professionals.<sup>14</sup> The Antiquities Act is considered the government's first official act which addressed the scientific community's attitude that studying the remains found in Native American graves was both a noble and legitimate pursuit.<sup>15</sup> However, in the wake of the Civil Rights movement in the 1960s, many Native and non-Native Americans began to see the excavation of human remains and funerary objects as mere graverobbing.<sup>16</sup> Also, excavation is sometimes characterized as another example of a minority group being exploited by science and the federal government.<sup>17</sup> In 1974, the Ninth Circuit held in *United States v. Diaz* that the Antiquities Act's use of the term "object of antiquity" was unconstitutionally vague because it did not adequately warn the public which Native American ceremonial items they were prohibited from removing off federally owned land.<sup>18</sup>

### *B. Archaeological Resource Protection Act*

In response to *Diaz* and the escalating debate between the proponents and opponents of the excavation of skeletal remains, the Government passed the Archaeological Resource Protection Act in 1979.<sup>19</sup> The Archaeological Resource Protection Act reinforced the legal construction that Native American human and funerary remains were "archeological resources" appropriately deemed federal property and therefore properly preserved by federally funded universities, museums or other scientific or educational institutions.<sup>20</sup> Specific examples of "archaeological resources" cited in the Act are human graves and skeletal materials.<sup>21</sup> However, because the statute expressly recognized Native American interests in burial objects located upon their land, archaeologists and anthropologists could continue to excavate in the name of science by averting this law and digging only on land federally or privately owned.<sup>22</sup> However, the continued classification of remains as

---

14. See 16 U.S.C. § 432 (1994).

15. See Gerstenblith, *supra* note 10, at 579.

16. See Afrasiabi, *supra* note 4, at 810-11. Afrasiabi writes that the Indian Reburial Movement of the 1970s, "concerned with past desecrations, strengthened politically and by the 1980s had developed significant political recognition. The movement mainly was composed of tribal Native Americans, but also received strong support from people of different racial backgrounds." *Id.*

17. See Margaret B. Bowman, *The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict*, 13 HARV. ENVTL. L. REV. 147, 151, 181 (1989).

18. See *United States v. Diaz*, 499 F.2d 113, 115 (9th Cir. 1974) (holding the Antiquities Act unconstitutionally vague and its enforcement provisions ineffective).

19. See 16 U.S.C. §§ 470aa-470ii (1994).

20. 16 U.S.C. § 470aa(a)(1) (1994); see also Leonard D. DuBoff, *500 Years After Columbus: Protecting Native American Culture*, 11 CARDOZO ARTS & ENT. L.J. 43, 47 (1992).

21. See 16 U.S.C. § 470bb(1) (1994).

22. See John E. Peterson II, *Dance of the Dead: A Legal Tango for Control of Native*

"resources" and conversion of human remains into "property" incensed those who opposed burial desecration and arguably acted as a legitimizing shield for those who were more interested in studying dead Native Americans than respecting the living.<sup>23</sup>

### C. National Museum of the American Indian Act

In response to their dissatisfaction with continued archaeological and anthropological excavation under the Archaeological Resources Protection Act, Native American activists began to demand the return of their ancestral skeletons and funereal objects from museums, universities and science labs for proper burial.<sup>24</sup> However, archaeologists and museum professionals insisted that these human remains and other items were archaeological resources — as defined by the Antiquities Act and the Archaeological Resources Protection Act — and therefore not only belonged in display cases and exhibits, but were essential to ongoing scientific studies examining, for example, the migration of Native Americans across the Bering Strait.<sup>25</sup> But in 1989 Congress passed the National Museum of the American Indian Act which mandated that the Smithsonian Institute, which housed the largest collection of Native American skeletal remains, inventory and repatriate the Indian remains and grave goods in its collection to requesting tribes who could present a preponderance of evidence showing they were familiarly related to the remains.<sup>26</sup>

### D. Native American Graves Protection and Repatriation Act of 1990

But the National Museum of the American Indian Act proved unsatisfactory to opponents of burial excavation because the legislation applied only to items held by the Smithsonian.<sup>27</sup> In response, Congress passed the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA).<sup>28</sup> Under NAGPRA, *all* federally funded museums and institutions must identify the origin and cultural affiliation of their Native American cultural items and repatriate these items to requesting tribes.<sup>29</sup>

*American Skeletal Remains*, 15 AM. INDIAN L. REV. 115, 117 (1990).

23. See Trope & Echo-Hawk, *supra* note 3, at 43. Trope and Echo-Hawk wrote: "Unfortunately, it has been common place for public agencies to treat Native American dead as archeological resources, property, pathological material, data, specimens, or library books, but not as human beings." *Id.*; see also Riding In, *supra* note 6, at 26.

24. See Gerstenblith, *supra* note 10, at 583-84.

25. See ARLENE HIRSCHFELDER & PAULETTE MOLIN, THE ENCYCLOPEDIA OF NATIVE AMERICAN RELIGIONS 32 (1992).

26. See Pub. L. No. 101-185, Nov. 28, 1989, 103 Stat. 1226, amended by Pub. L. No. 104-278, Oct. 9, 1996, 110 Stat. 3355.

27. *Id.*

28. 25 U.S.C. §§ 3001-3013 (1994).

29. See Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 723 (1997).

The legislative history of NAGPRA proves its purpose is to reinforce the notion that "human remains must at all times be treated with dignity and respect," as well as protect Native Americans' rights of possession to objects needed to preserve or renew their traditional religion and culture.<sup>30</sup> Thus, NAGPRA and the National Museum of the American Indian Act represent a "significant policy shift, enabling Native Americans to reclaim cultural items that have long been in the custody of others," including many archaeologists and anthropologists.<sup>31</sup>

However, NAGPRA has not resolved but merely redefined the debate between Native Americans and the scientific community.<sup>32</sup> For instance, NAGPRA applies only to cultural items discovered on federal or tribal land and to items held by federally funded agencies and museums.<sup>33</sup> Because there was concern at the time of NAGPRA's inception that the statute would effectuate a federal taking of property without due compensation in violation of the Fifth Amendment,<sup>34</sup> NAGPRA does not apply to items found on private or state held land,<sup>35</sup> to items currently held by institutions which do not receive any federal money; or where a museum or archaeologist could prove they were good faith purchasers of the item and thus, hold a legal "right of possession."<sup>36</sup> Similarly, even federally funded institutions are not required to repatriate cultural items if they hold a legal right of possession, or where a tribe cannot establish, through a preponderance of evidence, that they meet the statutory definition of the closest living "culturally affiliated" group.<sup>37</sup> NAGPRA also allows future excavation of burial sites on federal or tribal land if the group conducting the excavation receives prior consent from the lineal descendants of the remains.<sup>38</sup>

Some argue that NAGPRA is overly broad and ambiguous. The NAGPRA definition of "cultural items" encompasses "human remains," "associated funerary objects," "unassociated funerary objects," "sacred objects" and

---

30. See S. REP. NO. 101-473, at 7, 9 (1990).

31. See Harding, *supra* note 29, at 723.

32. See Leora Frankel-Shlosberg, *Conflicts Unearthed Along with Bones*, DALLAS MORNING NEWS, Nov. 19, 1995, at 45A.

33. 25 U.S.C. §§ 3001(4), 3002 (1994).

34. See Daniel J. Hurtado, *Native American Graves Protection And Repatriation Act: Does It Subject Museums to an Unconstitutional 'Taking'?*, 6 HOFSTRA PROP. L.J. 1, 7, 14 (1993).

35. However, most states have passed statutes similar to NAGPRA or other burial legislation to protect Native American graves from unnecessary disturbance. See, e.g., ARIZ. REV. STAT. § 41-841 (1998).

36. See 25 U.S.C. § 3001(13) (1994); see also Hurtado, *supra* note 34, at 16-17.

37. See 25 U.S.C. § 3002(a)(2)(B) (1994). In *Bonnichsen v. U.S. Department of the Army*, 969 F. Supp. 628 (1997) (*Bonnichsen II*), the court stated that "[t]he following types of evidence are used to make this determination: Geographical, kinship, biological, archaeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion." *Id.* at 637-38 (citing 43 C.F.R. § 10.14(a)).

38. See 25 U.S.C. §3002(c) (1994); see also Hurtado, *supra* note 34, at 19.

"cultural patrimony."<sup>39</sup> In 1997, the Tenth Circuit Court of Appeals upheld NAGPRA against a void-for-vagueness challenge by stating NAGPRA "is not infirm because it fails to list examples of cultural items."<sup>40</sup>

## *II. What Is Really at Stake in the Debate over NAGPRA: Is It Just Science Under Fire?*

"Accused of being associated with war and deterioration of the natural environment and social structure, science finds itself under fire on all sides."<sup>41</sup> Is this what is really going on? Is NAGPRA a legislative manifestation of the notion that science is under fire in all arenas, including archaeology and anthropology? In order to consider this question, one must first understand the fundamental principles which Native Americans and scientists disagree about.

### *A. Why Native Americans Demand Repatriation and Cessation of Further Excavations Without Their Prior Consent*

Those Native Americans who oppose the excavation and removal of human skeletal remains and other grave goods hope to repatriate these items because: first, their religion dictates that once these items are placed back into the earth, they cannot be disinterred without causing great global psychological and potentially physical harm to the living; second, many Native Americans argue that scientific research utilizing these items is unnecessary, intrusive and discriminatory; and third, because the repatriation movement represents immense political consequences for Native Americans.

#### *1. Religious Reasons for Opposing the Disinterment of Native American Graves*

To understand the arguments against the excavation and research conducted on skeletal remains and other burial goods, it is important to understand essential underlying Native American religious beliefs regarding the spirit life after the physical body dies. Although there is not a single belief or absolute truth among the numerous tribes, most all Native American religions believe that life is a circular process which must not be interrupted.<sup>42</sup> Interruption occurs when human remains and their burial objects are disinterred, thus trapping the spirit associated with the remains on earth and halting its progression to its next stage.<sup>43</sup> Disturbing skeletal

---

39. 25 U.S.C. § 3001(3) (1994). "Cultural patrimony" is defined as "an object having ongoing historical, traditional or cultural importance central to the Native American group or culture itself." *Id.* § 3001(3)(D).

40. See *United States v. Carrow*, 119 F.3d 796, 804 (10th Cir. 1997).

41. See J.J. Salomon, *Science and Scientists*, in *SCIENTISTS IN SEARCH OF THEIR CONSCIENCE* 169 (Anthony R. Michaelis & Hugh Harvey eds., 1973).

42. See *Bonnichsen II*, 969 F. Supp. at 632.

43. However, the Navajo believe that any disturbance of remains means that the ghosts, or



remains and funeral objects also disturbs the spirits, who then bring misfortune not only upon those who actually excavated the remains, but also upon those who failed to protect the remains.<sup>44</sup> Thus, many Native Americans regard NAGPRA as a prophylactic measure to prevent disturbing these ghosts and bringing global misfortune.

## 2. *Scientific Research is Unnecessary, Intrusive and Discriminatory*

Aside from this religious belief about the active psychic lives of the deceased, most Native Americans also oppose any disturbance of skeletal remains because of the perceived oppression the practice causes. Native Americans argue that science has never given a satisfactory explanation of why Native American remains are more scientifically valuable than those of white Americans, or why skeletal research is "necessary, proper or beneficial."<sup>45</sup> Often Native Americans feel that the desire to research on their ancestral skeletal remains is just another example of discrimination by "racist state laws" which "deprive them of equal burial rights."<sup>46</sup>

In fact, one archaeologist who supports repatriation agrees that the process of excavating remains is "victimizing and without scientific or moral justification."<sup>47</sup> Many Native Americans believe that instead of acting in the interest of scientific truth, archaeologists are motivated by furthering their own professional careers "and tenure without giving anything back to the tribe except disrespect, humiliation, and useless studies written in incomprehensible jargon."<sup>48</sup> Vine Deloria, professor of history, law, religious studies and political science at the University of Colorado, Boulder, writes that science has "always been available as apologists for the majority who wished to dehumanize minorities for commercial and political purposes," which explains why most Native Americans generally distrust scientists.<sup>49</sup> Deloria further points out that only Native Americans "have become the exclusive province (and property) of scholars to the extent that

---

*ch'iidii*, of the remains will plague the community of the living. Because of their great aversion to the dead, the Navajo are requesting the repatriation of the ancestral bones, but instead of burying them they are setting up their own museum in Window Rock, Arizona, for the preservation of these remains in an effort to avoid further disturbance of the *ch'iidii*. See CHARLOTTE J. FRISBIE, *NAVAJO MEDICINE BUNDLES OR "JISH": ACQUISITION, TRANSMISSION, AND DISPOSITION IN THE PAST AND PRESENT* 332 (1987).

44. See FERGUS M. BORDEWICH, *KILLING THE WHITE MAN'S INDIAN 173* (1996). Bordewich states that some tribes "go so far as to blame alcoholism, AIDS and social disintegration on the wandering spirits of the unshriven dead." *Id.*

45. See Riding In, *supra* note 6, at 26-27 (quoting Vine Deloria).

46. See *id.* at 26.

47. Riding In, *supra* note 6, at 28 (citing Lawrence Rosen, *Give Indian Remains Back to Tribes*, N.Y. TIMES, Nov. 15, 1988, at 30A).

48. See *id.* at 34.

49. See BORDEWICH, *supra* note 44, at 173.

the bones of their dead can be disinterred with impunity to be displayed in museum cases or used in speculative scientific experiments."<sup>50</sup>

And in June 1997, the Oregon district court concurred with these sentiments. The court rejected the claim that NAGPRA was passed to utterly foreclose scientific research utilizing Native American remains, but instead the court found that it is merely intended to restrict the use of remains in order to accord these remains the same dignity shown to non-Native American remains.<sup>51</sup> First, the court stated that "it is not aware of any significant predominantly cultural objects and remains stolen from predominantly Caucasian graveyards in the United States, or of museums cataloguing thousands of Caucasian skeletons, or of any parallel to the 'pot-hunters' who vandalize and desecrate Indian graves."<sup>52</sup> Additionally, the court stated that "[t]he legislative history of NAGPRA also contains extensive documentation of the abuses that led to the enactment of this law."<sup>53</sup>

Native Americans are also particularly offended by especially intrusive scientific research, such as DNA analysis, which they consider "desecration with devastating spiritual consequences."<sup>54</sup> Tissues subjected to DNA analysis are inherently destroyed; therefore there exists the potential that Native Americans would not have anything to repatriate after DNA analysis is performed.<sup>55</sup> DNA analysis is also particularly offensive to Native Americans because it is generally used to identify tribal migration patterns of ancient Native Americans, a goal which Native Americans find useless and discriminatory.<sup>56</sup> Because Native Americans have their own genesis stories, which do not include tribal migration but most often spirits rising from the earth, Native Americans are not terribly interested in what science has to tell them.<sup>57</sup> Sebastian LeBeau, repatriation officer of the Lakota tribe,

---

50. *Id.*

51. See *Bonnichsen II*, 969 F. Supp. at 649.

52. *Id.* (citing Trope & Echo-Hawk, *supra* note 3).

53. See *Bonnichsen II*, 969 F. Supp. at 649 (citing *Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects: Hearings on H.R. 1381, H.R. 1646, and H.R. 5237 before the House Committee on Interior and Insular Affairs*, 101st Cong. (1990); *Native American Grave and Burial Protection Act: Hearings on S. 1021 and S. 1980 Before the Senate Select Committee on Indian Affairs*, 101st Cong. (1990)).

54. See Courtenay Thompson & Richard L. Hill, *Testing Possible for Kennewick Man*, OREGONIAN (Portland), Oct. 2, 1997, at D07.

55. See *id.*; see also Robert W. Lannan, *Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Human Remains*, 22 HARV. ENVTL. L. REV. 369, 377 (1998) (stating that "DNA analysis of bone requires a sample to be powdered").

56. See VINE DELORIA, RED EARTH, WHITE LIES 39 (1995) (refuting the Bering Strait theory of migration).

57. See *id.*; see also Bill Dietrich, *Skeleton Leads to Bones of Contention: Science Collides with Tribal Beliefs*, ARIZ. REPUBLIC, Sept. 1, 1996, at A28; see also Leslie Alan Horvitz, *Indians*

argued for the repatriation of skeletal remains slotted to become archaeological study by stating "we never asked science to make a determination as to our origins."<sup>58</sup>

It has been this historical discrimination, dehumanization, and commodification which prompted Congress to pass NAGPRA under the rubric of "civil rights" legislation.<sup>59</sup> During the 1830s, two new "scientific" disciplines, craniology and phrenology, advocated the excavation of Native American remains as part of an attempt to ethnically categorize humans and estimate intelligence based upon the size and shape of crania.<sup>60</sup> The purpose of studying and comparing the skulls of Native Americans and other non-Anglos was to bestow intelligence and morality rankings based on the ethnic class. Ultimately, these "scientific" craniology and phrenological studies determined all non-Anglos were intellectually and morally inferior.<sup>61</sup> In 1868, the United States Surgeon General instituted his own crania study and ordered that all troops stationed near Native American burial sites fulfill their "patriot" duties and collect and contribute more "specimens" for the purposes of the study.<sup>62</sup> It is estimated that all of the remains collected by the Surgeon General's crania study are now "preserved" as part of the Smithsonian's collection.<sup>63</sup>

### 3. NAGPRA's Political Consequences for Native Americans

Just as many Native Americans see NAGPRA as civil rights legislation, many Native American leaders view NAGPRA as a major political movement as well. Most Native American tribes feel they are losing their identity; not only are they losing their ancestral bones and cultural items, but living Native Americans are becoming "Americanized."<sup>64</sup> For instance, many Native Americans feel that "more than a few people in the scientific and museum communities have had no contact with living Native Americans," but only with Native American "bones, artifacts, and burial

---

and Anthropologists Are Battling over Old Bones, INSIGHT MAG., Nov. 18, 1996, at 40.

58. See George Johnson, *Indian Tribes' Creationists Thwart Archaeologists*, N.Y. TIMES, Oct. 22, 1996, at A1, B6.

59. 136 CONG. REC. S17,173-02, S17,174 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye) (stating that the intent of Native American Graves Protection and Repatriation Act is to protect the "civil rights of America's first citizens").

60. See John B. Winski, *There Are Skeletons in the Closet: The Repatriation of Native American Human Remains and Burial Objects*, 34 ARIZ. L. REV. 187, 191 (1992).

61. See *id.*

62. *Id.*; accord Harding, *supra* note 29, at 727.

63. See June Camelle Bush Raines, Comment, *One Is Missing: Native American Graves Protection and Repatriation Act: An Overview and Analysis*, 17 AM. INDIAN L. REV. 639, 643 (1992) (noting that the Smithsonian stored "all but eighteen of . . . [the] 4000 skulls" collected under the Surgeon General's study).

64. See BORDEWICH, *supra* note 44, at 171.

sites.<sup>65</sup> W. Richard West, attorney and director of the Museum of the American Indian, as well as a member of the Cheyenne-Arapaho Tribe, stated:

Repatriation is the most potent political metaphor for cultural revival that is going on at this time. Political sovereignty and cultural sovereignty are inextricably linked, because the ultimate goal of political sovereignty is protecting of a way of life.<sup>66</sup>

Thus, many Native Americans view NAGPRA as a means of gaining access to the political process. Under NAGPRA, museums and scientists work directly with members of tribes in the identification, inventory and possible repatriation of remains. This partnership has actually defused some of the tensions between these two factions, and thus may increase the likelihood of scientists retaining custody of remains where they can convince a requesting tribe such research is legitimate and important.<sup>67</sup> NAGPRA liberates not only the spirits of the dead, but also the spirits of living Native Americans.

#### *B. Arguments Regarding the Effects of NAGPRA on Science*

Scientists have been particularly opposed to NAGPRA not because they are interested in the possessions themselves,<sup>68</sup> but because of the potential valuable data and historical information they represent.<sup>69</sup> Scientists, museums, private art dealers, and historians are committed to preserving history for the "public good,"<sup>70</sup> and private art dealers testified that "Native Americans should not be the sole conservators of their cultural items because all Americans have a right to their history."<sup>71</sup> Those who oppose

---

65. See Marsh, *supra* note 6, at 85.

66. See BORDEWICH, *supra* note 44, at 171.

67. Increased political sovereignty is important because Native Americans would like to represent themselves in Congress instead of relying on representation by members of the Bureau of Indian Affairs. See DELORIA, *supra* note 56, at 29. Deloria states that the Bureau of Indian Affairs has most often totally ignored the needs of Native Americans — such as improved health care, education and employment opportunities — and instead has fostered the cycle of Native American dependence on the federal government. See *id.*

68. See Marsh, *supra* note 6, at 86-87. March writes: "The true professional archaeologist is not concerned with the possession of artifacts as with the interpretation of the artifacts relative to their position in the ground." *Id.*

69. See Peterson, *supra* note 22, at 117.

70. See LOUIS A. BRENNAN, BEGINNER'S GUIDE TO ARCHAEOLOGY 13 (1973) (stating that an archaeologist's duty is to "contribute to the public good by committing oneself to archaeological recovery of the remains of American prehistory").

71. See H. REP. NO. 101-877, at 13 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4372 (comments during a legislative hearing presenting testimony from "professional scientific and museum associations, archaeologists, representatives of individual museums, Indian organizations, Tribal religious leaders, Native Hawaiian representatives, and private art dealers").

repatriation and NAGPRA do so based upon: first, the fact that they feel they owe humanity a duty to preserve the historical record; second, the fact that ancient skeletal remains and grave goods lack sufficiently close links to modern Native American tribes to justify repatriation to them; and third, the threat that widescale repatriation will interrupt ongoing research.

### *1. Need to Preserve the Historical Record*

The main argument for continued grave excavation is that the information gathered through osteological research is unique and the importance of this potential information overshadows any detrimental effects on the Native American culture.<sup>72</sup> Scientists argue that not only is their research necessary, but that they have a "right and responsibility" to examine the remains.<sup>73</sup> The scientific community argues that they are meticulously preserving the historical record which would otherwise likely be destroyed or enormously altered should unregulated excavation and natural forces act upon these burial sites.<sup>74</sup> Also, they argue that they must "intervene on behalf of the common good" because Native Americans are working against their own best interests by not studying these skeletal "artifacts" themselves and instead demanding repatriation.<sup>75</sup> Thus, most scientists feel that the argument that their research destroys the culture of Native Americans is absurd and that these opponents simply do not understand their work.<sup>76</sup> Douglas Ubelaker, a senior anthropologist at the National Museum of Natural History, offers a moral defense of scientific research on skeletal remains:

I explicitly assume that no living culture, religion, interest group, or biological population has any moral or legal right to the exclusive use or regulation of ancient human skeletons since all humans are members of a single species, and ancient skeletons are the remnants or unduplicable evolutionary events which all living and future peoples have the right to know about and understand. In other words, ancient skeletons belong to everyone.<sup>77</sup>

---

72. See Peterson, *supra* note 22, at 117-18.

73. See Report of the Panel for a National Dialogue on Museum/Native American Relations 3 (Feb. 28, 1990) [hereinafter Panel Report], cited in Winski, *supra* note 60, at 189 n.28.

74. See Peterson, *supra* note 22, at 119.

75. See Bowman, *supra* note 17, at 151-52.

76. See Peterson, *supra* note 22, at 118; see also Gary D. Stumpf, *A Federal Land Management Perspective on Repatriation*, 24 ARIZ. ST. L.J. 303, 305 (1992).

77. See BORDEWICH, *supra* note 44, at 175 (quoting Douglas H. Ubelaker & Lauryn G. Grant, *Human Skeletal Remains: Preservation or Reburial?*, 32 Y.B. PHYSICAL ANTHROPOLOGY 249, 260 (1989)).

2. *Modern Native Americans Lack Preferential Familial Links to the Skeletal Remains*

Science presents another variation of this argument by claiming that because cultures evolve so much, Native Americans today have no more direct lineal ties, beyond basic cultural affiliation, to these skeletal remains than do the rest of humanity.<sup>78</sup> Thus, they conclude that because modern Native Americans do not have stronger, or any more direct, genetic ties to ancient remains than do non-Natives, their desire to repatriate the skeletal remains should not be given precedent over the global benefit of gathering archeological information.<sup>79</sup> But Native Americans do feel akin to the remains, regardless of how genetically affiliated they are, and feel that skeletal remains of any ethnicity should remain undisturbed in order to show dignity and respect for the life process and living individuals, not solely respect to that person who has passed on.<sup>80</sup>

This argument serves as the core of the debate regarding to whom the remains of extinct tribespeople, such as the Salado and Hohokam of the Southwest, should be repatriated. Scientists argue that where existing tribes do not have a close familial link with these remains, in addition to the fact that NAGPRA does not dictate to whom the remains of extinct tribes should be repatriated, remains of this sort should remain federal property and not subject to repatriation.<sup>81</sup> Proponents of repatriation see this argument as the most insidious and offensive argument because it denies the Native Americans their own past.<sup>82</sup> For example, the Navajo point out that although they recognize that the "prehistoric puebloan (Anasazi) ruins" found on their reservation "are remnants of nonancestral people," they "consider the sites sacred and respect them as places of the dead. Thus it is an affront to Navajo religious beliefs for outsiders to disturb the bones of 'ancient enemies' of their own ancestors."<sup>83</sup>

---

78. See Peterson, *supra* note 22, at 125.

79. See *id.* (noting in particular that scientists have argued that a Native American religious desire for repatriation is inadequate justification); see also Stumpf, *supra* note 76, at 305.

80. See Peterson, *supra* note 22, at 121; see also Stumpf, *supra* note 76, at 305; Frankel-Shlosberg, *supra* note 32, at 45A.

81. See Marsh, *supra* note 6, at 98, 100-01; see also Lannan, *supra* note 55, at 370. Lannan wrote: "A controversial aspect that surfaced repeatedly throughout the enactment of NAGPRA was the issue of what disposition should be required for prehistoric remains that have no discernable affiliation with any present-day Native American tribe or organization. . . . Anthropologists believed they should be returned as valuable resources for scientific studies." See *id.*

82. See Larry J. Zimmerman, *Archaeology, Reburial, and the Tactics of a Discipline's Self-Delusion*, AM. INDIAN CULTURE & RES. J., Vol. 16, No. 2, at 37, 41 (1992).

83. See Deborah L. Nichols, Anthony L. Klesert & Roger Anon, *Ancestral Sites, Shrines, and Graves: Native American Perspective on the Ethics of Collecting Cultural Property*, in THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY? 30 (Phyllis Mauch Messenger ed., 1989). The authors are non-Native American archaeologists who work

### 3. Interruption of Ongoing Research

Additionally, scientists oppose NAGPRA because of its potential to interrupt or impede ongoing research.<sup>84</sup> The legislative history of NAGPRA indicates scientists feared the repatriation of remains would result in science losing the opportunity to conduct research, which they view as unacceptable, particularly because research technologies are becoming increasingly advanced.<sup>85</sup> Many archaeologists worry that important information and time spent in ongoing research studies will be lost if the Native Americans are granted absolute power to demand the immediate return of skeletal remains.<sup>86</sup> Scientists argued any interruption or cessation of ongoing and future research potentially prevents Native Americans not only from learning about their ancestors, but about themselves.<sup>87</sup>

Thus, even those scientists sympathetic to the religious desires of the Native Americans oppose NAGPRA because they fear it will eventually lead to a sweeping and absolute repatriation movement. Although NAGPRA specifically provides that remains and other goods shall not be repatriated if they are part of an ongoing study,<sup>88</sup> archaeologists argue this provision does not allow important studies on remains excavated since the passage of NAGPRA because clearly these items could not be considered items of ongoing research for the purposes of the statute.<sup>89</sup> Alternatively, these scientists prefer a system of repatriation executed on a case-by-case basis where those in possession of the remains have equal voice regarding who has custody of the bones they are currently researching.<sup>90</sup>

---

with Native American tribes.

84. See Zimmerman, *supra* note 82, at 53.

85. During the legislative debates of NAGPRA, testimony from the scientific community stressed that "if the remains are reburied now, they will be lost to science forever and not reachable when future study techniques are developed." H.R. REP. NO. 101-877, at 13 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4372 (testimony before the Senate Select Committee on Indian Affairs on July 17, 1990).

86. See *id.*

87. See Winski, *supra* note 60, at 189 (citing Panel Report, *supra* note 73, at 13).

88. See 25 U.S.C. § 3005(b) (1994).

89. The *Bonnichsen* plaintiffs initially claimed the right to study the Kennewick Man remains under 25 U.S.C. § 3005(b), NAGPRA's provision which allows scientific institutions to retain items, after a repatriation request, "indispensable for completion of a specific study, the outcome of which would be of major benefit to the United States." Response to Defendants Motion for Summary Judgment, at 15-16, 15 n.3 (CV No. 96-1481 E) (citing 25 U.S.C. § 3005(b)). However, because excavation of the Kennewick Man occurred six years after NAGPRA took effect, this provision could not apply and thus section 3003(b)(2) applies, which states that after a repatriation request of a newly excavated item, "initiation of new scientific studies of such remains and associated funerary objects" are prohibited without the consent of the culturally affiliated tribe. 25 U.S.C. § 3003(b)(2) (1994).

90. See Marsh, *supra* note 6, at 98-100. Marsh wrote that scientists and museums feared "a wholesale raid on their collections." See *id.* at 98. Furthermore, writes Marsh, "[s]ome archaeologists and anthropologists expressed concern that the federal legislation would preempt

### III. *The Alleged Scientific Right of Scientific Inquiry as Applied to NAGPRA*

Legal scholars, particularly in the last twenty years, have argued that the First Amendment freedom of expression encompasses or indicates that there is also a fundamental right of scientific inquiry.<sup>91</sup> However, no court has explicitly held that such a right exists. A recent discovery of ancient skeletal remains in Washington state, dubbed the "Kennewick Man," has rekindled the debate over whether such a right exists, and if so, whether NAGPRA unconstitutionally infringes on scientific inquiry.<sup>92</sup> This section will discuss: first, the constitutional challenge to NAGPRA based on the perceived First Amendment right of scientific inquiry brought by plaintiffs in the Kennewick Man case; second, three different theories under which this right may be recognized; and lastly, assuming, *arguendo*, that there is a fundamental right of scientific inquiry, whether NAGPRA is an unconstitutional infringement on this right.

#### A. *Imminent Constitutional Challenge to NAGPRA Based on a Perceived First Amendment Right to Scientific Inquiry*

In 1996, researchers unearthed a set of human remains near Kennewick, Washington.<sup>93</sup> These remains, nicknamed the "Kennewick Man," startled researchers because initial radiocarbon dating of the remains indicated the skeleton was at least 9000 years old,<sup>94</sup> and because initial research indicated the remains were in fact Caucasoid, not Native American.<sup>95</sup> In accordance

---

their own efforts to develop policies governing the disposition of remains and artifacts. Congress felt, however, that there should be common standards and mechanisms to resolve these issues . . . ." *See id.* at 99.

91. The announcement that a sheep had been cloned from an adult mammary cell has rekindled the debate whether such a right exists, and if it does, whether the federal government's ban on using federal funding to support such research is an unconstitutional violation of this right. The National Bioethics Advisory Commission stated:

Therefore, even if scientific inquiry were found to be a constitutionally protected activity, the government could regulate to protect against compelling harms, such as the current physical risks posed by the prospective use of somatic cell nuclear transfer techniques to create children. The freedom to pursue knowledge is distinguishable from the right to choose the method for achieving that knowledge, since the method itself may be permissibly regulated.

National Bioethics Advisory Comm'n, *Cloning Human Beings: Report and Recommendations of the National Bioethics Advisory Commission 79* (June 1997).

92. Plaintiffs in the suit seeking to conduct extensive studies on the Kennewick Man before repatriation to the Umatilla tribe argue that there is a right of scientific inquiry and that repatriation of the remains will foreclose further scientific research and thus, unconstitutionally infringe on this right. *See Bonnichsen v. U.S. Dep't of the Army*, 969 F. Supp. 628, 645-46 (1997) (*Bonnichsen II*).

93. *See id.* at 631. These remains are also referred to as the "Richland Man."

94. *See Bonnichsen v. U.S. Dep't of the Army*, 969 F. Supp. 614, 617 (1997) (*Bonnichsen I*).

95. For example, James Chatters, the first forensic anthropologist to examine the remains,



with NAGPRA, the Army Corps of Engineers<sup>96</sup> published a "Notice of Intent to Repatriate Human Remains," stating that the remains were believed to be those of a Native American male and asked any tribe believing itself to be "culturally affiliated" with the remains to contact the Corps of Engineers.<sup>97</sup>

Shortly after publication of the Notice to Repatriate, three scientists individually wrote the Corps of Engineers arguing that Kennewick Man represented a unique discovery of national and international interest and repatriation of the remains would foreclose any further examination of the remains.<sup>98</sup> After the Corps of Engineers failed to respond to their letters or to reconsider their decision to repatriate Kennewick Man, "a group of scientists (the Bonnichsen plaintiffs) filed suit seeking a temporary restraining order to halt the repatriation," and also "demanded a detailed scientific study to determine the origins of the man before the Corps decided whether to repatriate the remains."<sup>99</sup>

In their complaint, the *Bonnichsen* plaintiffs argued in part that any repatriation of Kennewick Man would unconstitutionally violate their right of

---

initially saw that the Kennewick Man's skull "had a very large number of Caucasoid features," and that the skeleton was that of a middle-aged male who was about five foot nine, "much taller than most prehistoric Native Americans in the Northwest." Douglas Preston, *A Reporter at Large: The Lost Man*, NEW YORKER, June 16, 1997, at 70. A second forensic archaeologist, Catherine J. MacMillen, concurred with the findings that the Kennewick Man was a Caucasian male. See *id.*; see also Dietrich, *supra* note 57, at A28.

96. The Army Corps of Engineers took custody of Kennewick Man soon after scientists, excavating on federal land under a permit issued pursuant to the Archaeological Resources Protection Act, preliminarily radiocarbon-dated the remains. See *Bonnichsen I*, 969 F. Supp. at 617.

97. See *id.* at 618.

98. See *id.* (quoting the Bonnichsen Complaint). These scientists who wrote letters to the Army Corps of Engineers, but did not receive responses, were: Douglas Owsley, "an expert on Paleo-American remains" and the Division Head for Physical Anthropology at the National Museum of Natural History, Smithsonian Institution; Richard L. Jantz, a biological anthropologist at the University of Tennessee; and Robson Bonnichsen, the director of the Center for the Study of the First Americans, at Oregon State University. See Preston, *supra* note 95, at 72-73.

99. See *Bonnichsen I*, 969 F. Supp. at 618. The Asatru Folk Assembly, described by their Complaint as a church "that represents Asatru, one of the major indigenous, pre-Christian, European religions," *id.*, also filed suit asking the court to compel the Corps of Engineers to allow further scientific testing of the remains in order to determine whether the remains are Native or non-Native. The Asatru contend that if in fact Kennewick Man is non-Native, they request custody of the remains "for study and 'for eventual reinterment in accordance with native European belief.'" *Id.* at 619. (The Asatru and Bonnichsen claims were joined for the purposes of these hearings.) A physical anthropologist, Grover S. Krantz, who examined the Kennewick Man remains prior to being taken into custody by the Army Corps of Army Engineers, reported that the Kennewick Man exhibited characteristics common to both Europeans and Plains Indians, but concluded that "this skeleton cannot be racially or culturally associated with any existing American Indian group," and that "[t]he Native Repatriation Act has no more applicability to this skeleton than it would if an early Chinese expedition had left one of its members there." Preston, *supra* note 95, at 72.

scientific inquiry by foreclosing access to the remains.<sup>100</sup> Magistrate Judge John Jelderks of the United States District Court of Oregon has thus far issued a temporary restraining order to halt immediate repatriation of the remains,<sup>101</sup> and remanded the issue to the Corps of Engineers for further consideration regarding whether to allow additional scientific study before repatriation, or whether to repatriate the Kennewick Man at all.<sup>102</sup> The court did not decide the merits of the claim but suggested that the Corps of Engineers "carefully scrutinizes" this claim because of its potential validity.<sup>103</sup> However, the court twice stated that "[t]he remains shall continue to be stored in a manner that preserves their potential scientific value."<sup>104</sup> Notably lacking in this order, however, was that Magistrate Judge Jelderks did not state that the remains should also be stored in a manner that preserves their dignity.

Yet in May 1998, Judge Jelderks ordered a hearing "to review the adequacy of the present curation protocols" of the facility storing the Kennewick Man.<sup>105</sup> The order came after "[a] succession of incidents and disclosures during the preceding months [that] has raised serious questions concerning both the physical security and scientific integrity of the human remains at issue in this action."<sup>106</sup> Judge Jelderks also wrote:

The security of the skeletal remains and the storage conditions are especially important because it is very likely that some scientific analysis and testing of the remains will be necessary to address the issues that have been raised in this case.<sup>107</sup>

---

100. See *Bonnichsen v. U.S. Dep't of the Army*, 969 F. Supp. 628, 646 (1997) (*Bonnichsen II*). The Umatilla tribe, to whom the Army Corps of Engineers decided should receive custody of the remains, has stated that they support a "reasoned and scientific approach to resolving these issues, including limited scientific nondestructive testing." Thompson & Hill, *supra* note 54, at D07. Thus it is unlikely that the Umatilla would allow the DNA analysis the Bonnichsen plaintiffs are requesting because DNA analysis destroys the bones upon which it is conducted. See *id.*

101. See *Bonnichsen I*, 969 F. Supp. at 619.

102. See *Bonnichsen II*, 969 F. Supp. at 654.

103. The court instead ordered that both the Asatru and the Bonnichsen plaintiffs and the Corps of Engineers "provide the court with "quarterly status reports" regarding the matter, the first one being due on Oct. 1, 1997. *Id.* (stating that this hearing "primarily is a discovery motion").

104. *Id.* at 645, 654.

105. See *Judge Jelderks Demands the Parties Convene*, TRI-CITY HERALD ONLINE (Kennewick, Pasco, Richland, Wash.) (visited Aug. 17, 1998) <<http://www.tricityherald.com/bones/documents/jelderks.html>> (Judge Jelderks' Order of May 13, 1998).

106. *Id.* Among the incidents that prompted the hearing was the allegation that "some remains believed to be part of the same individual were kept in a box with animal bones and unrelated human remains; and . . . some of the remains at issue are now unaccounted for or were taken from defendants' custody and buried . . ." *Id.*

107. *Id.*

### *B. Analysis of the Alleged Constitutional Right to Scientific Inquiry*

In 1976, Professor Thomas Emerson, a First Amendment expert, warned that the constitutionality of governmental regulation and restrictions of scientific research were "hard problems . . . now looming on the horizon" of First Amendment law,<sup>108</sup> but that "[t]here could be no doubt that the First Amendment provides extensive protection to freedom of scientific research."<sup>109</sup> Although neither the Constitution nor the Supreme Court have explicitly spoken on the matter, many legal scholars have argued that the First Amendment provides a degree of protection for scientific research, or a "right of scientific inquiry."<sup>110</sup> The Supreme Court has stated that the First Amendment is "broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."<sup>111</sup> But even the explicit constitutional protection of speech, or expression, may be governmentally regulated as long as the restrictions are "rationally related to a legitimate governmental interest."<sup>112</sup>

Thus, if courts should find that the First Amendment protects scientific inquiry, NAGPRA could still survive a constitutional challenge by representing a compelling and legitimate governmental interest and therefore any restrictions NAGPRA may incidentally impose on scientific inquiry may constitute permissible and legitimate governmental regulation. This comment will examine three potential manifestations of the right to scientific inquiry argument: first, the claim that the Framers of the constitution recognized the value of scientific thought and implicitly protected scientific inquiry in the First Amendment; second, the claim that scientific inquiry is inherently expressive and thus falls under First Amendment protection; and lastly, that the First Amendment protection of expression encompasses scientific inquiry because it is a necessary precursor to scientific speech.

#### *1. A Historical Perspective of the Alleged Right of Scientific Inquiry*

Legal scholars argue that the Framers of the Constitution, writing during the Enlightenment era's emphatic support of science, undoubtedly recognized

---

108. See Natasha C. Lisman, *Freedom of Scientific Research: A Frontier Issue in First Amendment Law*, BOSTON B.J., Nov./Dec. 1991, at 4, 4 (Emerson made this comment with reference to the legislature's efforts to regulate recombinant DNA research); cf. Gary L. Francione, *Experimentation and the Marketplace Theory of the First Amendment*, 136 U. PA. L. REV. 417, 420 (1987).

109. See *Science Policy Implications of DNA Recombinant Molecule Research: Hearings Before the Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology*, 95th Cong. 875 (1977); see also Francione, *supra* note 108, at 420.

110. See Francione, *supra* note 108, at 418-19.

111. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

112. See Francione, *supra* note 108, at 423.

the importance of a constitutional right of scientific inquiry and intended the First Amendment's freedom of expression to include scientific research and experimentation.<sup>113</sup> Many legal scholars have relied upon the "marketplace of ideas" analysis to conclude that because "scientific research generates epistemologically superior input into the marketplace of ideas," the Framers of the Constitution intended to include scientific inquiry as protected expression.<sup>114</sup> Thomas Emerson argued that because the Framers accepted that free expression is "vital to the process of discovering truth, through exposure to all the facts," and that this free expression "developed in conjunction with, and as an integral part of, the growth of the scientific method," that the right of scientific inquiry is predicated on marketplace theory.<sup>115</sup> Similarly, Gary Francione, analyzing this right of scientific inquiry under a marketplace theory, wrote that:

although much constitutional history may be vague, history indicates clearly that the founders were unequivocally enthusiastic about scientific inquiry, and that this enthusiasm influenced the formation of constitutional concepts, including the first amendment.<sup>116</sup>

Another legal scholar wrote that Thomas Jefferson regarded "the worlds of science and public welfare [as] evidently one," each was a "self-nourishing marketplace."<sup>117</sup> Thus, Jefferson believed that "[i]f passing legislation would help one [marketplace], it would help the other."<sup>118</sup> Accordingly then, passing legislation which impairs the science marketplace will necessarily impair the public welfare marketplace.<sup>119</sup>

---

113. See Lisman, *supra* note 108, at 4-5; see also Francione, *supra* note 108, at 422.

114. See Francione, *supra* note 108, at 422 (citing James R. Ferguson, *Scientific Inquiry and the First Amendment*, 64 CORNELL L. REV. 639, 647 (1979) (claiming unregulated scientific expression promotes the discovery of scientific truth); John A. Robertson, *The Scientist's Right to Research: A Constitutional Analysis*, 51 S. CAL. L. REV. 1203, 1251 (1977) (arguing the utility of scientific inquiry is to be decided within the marketplace of ideas); Richard Delgado & David R. Millen, *God, Galileo, and the Government: Toward Constitutional Protection for Scientific Inquiry*, 53 WASH. L. REV. 349, 361-71 (1978); THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION 6-7* (1970); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22-27* (1948); Thomas Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 741 (1977) [hereinafter Emerson, *Colonial Intentions*]). Francione notes that although Ferguson, Robertson, and Delgado and Millin do accept marketplace theory, they do not rest their argument solely on marketplace analysis. *Id.*

115. See Emerson, *Colonial Intentions*, *supra* note 114, at 740-41.

116. See Francione, *supra* note 108, at 428 (citing IRA H. CARMEN, *CLONING AND THE CONSTITUTION 3-12* (1985)); Delgado & Millen, *supra* note 114, at 354-61; Steven Goldberg, *The Constitutional Status of American Science*, 1979 U. ILL. L. F. 1, 2-7).

117. See Francione, *supra* note 108, at 428 (quoting CARMEN, *supra* note 116, at 10)

118. See *id.*

119. And in fact, in 1793 Thomas Jefferson became the first famous American to endorse burial excavation by "virtue of a higher order called science" when he systematically excavated

However, even if the historical context suggests that the Framers intended the First Amendment to protect free scientific inquiry, one cannot reasonably argue that this includes an absolute right of scientific inquiry, free from acceptable governmental regulation on research and experimentation.<sup>120</sup> For example, even though the Framers explicitly protected the right to patent one's inventions,<sup>121</sup> the Supreme Court has held that this right is not absolute.<sup>122</sup> And the Supreme Court has long held that "incidental infringement on the freedom of speech" is acceptable where the government can provide a "sufficiently compelling governmental interest."<sup>123</sup>

The determination that there is a constitutional right of scientific inquiry, however, "does not dispose of the issue."<sup>124</sup> The implicit right of scientific inquiry could not absolutely protect any type of inquiry, regardless of its specific or global impact. Scientific research and experimentation are both currently subject to limitations. For example, in the medical context, research may be restricted based on the perceived good of the particular subject involved or society as a whole.<sup>125</sup> Dignity and respect for human life dictate

---

and removed the remains of over 1000 known Native American graves on his plantation. See Riding In, *supra* note 6, at 19 (quoting JOHN C. GREENE, *AMERICAN SCIENCE IN THE AGE OF JEFFERSON* xiii (1984)). Under common law, "protected cemeteries were only those burial grounds found within the church yard," and, therefore, scientists were virtually free to excavate Native American graves without any legal accountability. Harding, *supra* note 29, at 762. Thus, Jefferson and other scientists, legitimated the practice and paved the road for future "scientific" studies utilizing Native American remains to prove their moral and intellectual inferiority. See Winski, *supra* note 60, at 191; see also discussion *supra* Part II.A.2 (discussing the use of Native American remains in scientific examinations to prove their, and other non-Anglos, inferiority). But this practice also implicated the civil rights of Native Americans by summarily disinterring only non-Anglo graves for the purposes of "scientific" studies or to display the grave goods and remains as objects of curiosity in museums. Cf. Winski, *supra* note 60, at 192 (stating that the museums were only interested in the burial goods but that human remains were inevitably "incidentally" excavated).

120. See *Roth v. United States*, 354 U.S. 476, 482 (1957) ("The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance.").

121. See U.S. CONST. art. I, § 8, cl. 8 (designating the legislative branch powers "[t]o promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

122. See *Diamond v. Chakrabarty*, 447 U.S. 303 (holding that not every discovery falls under patent protection; for example, one cannot patent naturally occurring phenomenon or organisms).

123. See June Coleman, Comment, *Playing God or Playing Scientist: A Constitutional Analysis of State Laws Banning Embryological Procedures*, 27 PAC. L.J. 1331, 1390 (1996); see, e.g., *Roth v. United States*, 354 U.S. 476 (1957) (no absolute constitutional protection of pornography); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (no constitutional protection for inciting speech); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (no absolute constitutional protection for libelous speech).

124. See *Lisman*, *supra* note 108, at 5 (stating that "scientific inquiry must be protected to some degree, but the question remains as to the scope of the protection," in particular, which processes or stages of scientific experimentation are covered).

125. See *Smith*, *supra* note 5, at 167.

there could not be a First Amendment right of free expression to sever the limbs of children as part of a scientific experiment studying the psychological and physiological effects of pain. Similarly, Congress passed NAGPRA as a means of according dignity and respect for deceased and living Native Americans where it mandated that scientists wishing to utilize skeletal remains and other cultural items held by federally funded institutions, or uncovered on federal or tribal land, must first seek the consent of the tribe culturally affiliated with those items.<sup>126</sup> In sum, standing alone this "marketplace of ideas" theory is insufficient justification upon which to ground a right to scientific inquiry which is free of governmental restrictions.<sup>127</sup>

## *2. Scientific Inquiry as Inherently Expressive Conduct and Therefore Encompassed Within the First Amendment*

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . ."<sup>128</sup> Therefore, many legal scholars have argued that if scientific inquiry is inherently expressive conduct, it is necessarily encompassed within the right of free speech "and there is no need for any special first amendment protection."<sup>129</sup> And indeed, scientific inquiry would fall within the scope of the First Amendment where it "involves nonverbal conduct but that such nonverbal conduct is nonetheless expressive."<sup>130</sup> But it is arguable that all scientific research is inherently expressive, and therefore further analysis is warranted.

The Supreme Court has held that some symbolic, nonverbal expression falls within the scope of the First Amendment protection of free expression,<sup>131</sup> leading some legal scholars to analogize that like symbolic

---

126. See discussion *supra* Part II.A.1. Because Native Americans feel that the dead have active psychic lives, they feel that scientific research on skeletal remains disturbs active spirits and thus brings global misfortune. Recognizing this belief of the status of "dead" Native Americans, Congress deemed it appropriate for scientists wishing to use these remains to obtain the consent of living tribal members to research utilizing these remains, thereby alleviating the concern that Native American burial sites and bodies were not accorded the same measure of dignity and protection afforded non-Native graves. And one could not argue that the history of craniological and phrenological "scientific" studies motivated to prove Native Americans were biologically morally and intellectually inferior could be considered research which preserves the dignity of living Native Americans by today's standards. Thus, Congress allowed a subjective determination of the sorts of research Native American remains and cultural items would be utilized in. This means that they enacted NAGPRA to give culturally affiliated tribes the ability to withhold consent for research they deemed not warranting the continued disinterment of their dead. See 25 U.S.C. § 3005(b) (1994 & Supp. IV 1998).

127. Also, as Francione pointed out, "using marketplace theory to protect experimentation" raises other problems, such as "problematic interpretations of 'expression' or [that] require content discrimination in the guise of an appeal to 'true' or 'valid' science." Francione, *supra* note 108, at 423.

128. See U.S. CONST. amend. I.

129. See Francione, *supra* note 108, at 423.

130. See *id.* at 431.

131. See, e.g., *Spence v. Washington*, 418 U.S. 405 (1974) (constitutional free expression

speech, scientific research is an expressive activity "like demonstrating, and conduct (experimentation or marching) that facilitates or is functional with respect to the ultimate expression (research or demonstration) is itself speech *plus* protected by the first amendment."<sup>132</sup> But the Supreme Court has also rejected the notion that a "limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."<sup>133</sup> In *Clark v. Community for Non-Violence*, the Supreme Court rejected the idea that "all conduct is presumptively expressive,"<sup>134</sup> and held instead that "it is the obligation of the person desiring to engage in allegedly expressive conduct to demonstrate that the First Amendment even applies."<sup>135</sup> Thus, according to Gary Francione, "many instances of experimentation would, even after *Clark*, be accorded at least *prima facie*" constitutional protection where the research is solely communicative.<sup>136</sup>

Alternatively, however, *Clark* also means that if a particular experiment or project "lacks independently communicative aspects, then there is nothing inherent . . . that makes conduct expressive merely because it is facilitative;"<sup>137</sup> and therefore "purely facilitative conduct, not itself communicative, would not be protected."<sup>138</sup> Thus, Francione wrote that "if the state were to regulate purely facilitative conduct for nonspeech reasons, such as the protection of animal subjects from cruel treatment — a traditional concern of both state and federal legislation — then the first amendment would not even be implicated."<sup>139</sup>

And where research "does not involve communication and if government regulation of nonexpressive experimental activity is not intended to suppress the dissemination of information, then . . . restrictions on experimentation need only be rationally related to a legitimate government interest."<sup>140</sup> If this is the case, if scientific inquiry is subject to the rational basis test of minimal judicial scrutiny, then restrictions and regulations on research "may be found

---

includes affixing a peace symbol to the flag); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (constitutional free expression includes marching); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (constitutional free expression includes wearing armbands); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (constitutional free expression includes nonviolent demonstrations).

132. See Francione, *supra* note 108, at 433 (internal quotations omitted) (emphasis added).

133. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

134. See *Clark v. Community for Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

135. See *id.* This means that a person seeking expressive conduct protection must satisfy the *Spence* test which states that the person engaging in First Amendment protected expressive conduct must intend that actual or potential observers of the activity understand the message the person is trying to convey. See *Spence*, 418 U.S. at 410.

136. See Francione, *supra* note 108, at 441-42.

137. See *id.*

138. See *id.* at 438-49.

139. See *id.* at 471.

140. See *id.* at 423.

to be permissible even though the government interest advanced is thought to be 'trivial' in comparison to the loss of knowledge produced by such research."<sup>141</sup>

Similarly, NAGPRA is a federal regulation of purely facilitative conduct for nonspeech reasons: it is the regulation of the disinterment of human remains and other burial objects on federal or tribal land to ensure these remains are accorded the same dignity as non-Native American remains. These governmental interests are surely not trivial. And NAGPRA is not a prohibition against scientific research utilizing these remains or the prohibition of the dissemination of information gleaned from such research; NAGPRA simply requires tribal consent for research utilizing skeletal remains identifiably culturally affiliated with that tribe and which are held by institutions receiving federal funding or uncovered on federal or tribal land.<sup>142</sup> Additionally, NAGPRA does not speak to the ability of disseminating information gleaned through the use of Native American skeletal remains whatsoever.<sup>143</sup> Arguably then, the First Amendment would not even be implicated and NAGPRA "need only be rationally related to a legitimate governmental interest."<sup>144</sup>

In the event that courts decide NAGPRA is merely regulation of nonexpressive scientific activity and therefore the free speech protection is not implicated, NAGPRA could withstand the rational basis standard of permissible statutory infringement on scientific inquiry. It is likely that just this governmental interest, prohibiting discriminatory treatment of Native American remains and cultural items, pitted against the alleged loss of some scientific data resulting from repatriation under NAGPRA could meet the minimal judicial scrutiny test. However, as discussed *infra*, numerous other compelling and legitimate governmental interests are enforced through NAGPRA and, taken aggregately, these governmental interests are clearly sufficient to warrant restrictions on the collection of research "specimens" — particularly skeletal human remains.

---

141. *Id.* at 424.

142. One could not argue that NAGPRA is a prohibition against skeletal research because scientists are still free, subject to state law, to research using remains unearthed on private and state lands or on remains held by non-federally funded institutions. Additionally, scientists may utilize remains covered by NAGPRA as long as they obtain tribal consent.

143. However, scientists now sometimes argue that their ability to publish is severely affected by NAGPRA because their ability to gather data for research has been undermined because tribes are now generally able under NAGPRA to prohibit skeletal remains and other cultural items from being used in research they find inappropriate. Thus, these scientists argue that the tribes are in effect quashing their ability to publish. See discussion *supra* Part II.B.3.

144. See Francione, *supra* note 108, at 423.



*3. Research as a Necessary Precursor to Scientific Speech and Therefore Protected by the First Amendment*

Other scholars argue not that the alleged right of scientific inquiry is inherently expressive and thus protected by the First Amendment, but that because research is a necessary precursor to "the dissemination of scientific expression," scientific research deserves First Amendment protection as well.<sup>145</sup> These scholars argue that because the information-gathering stage that "is a precondition to news-reporting" is oftentimes protected, similarly "experimentation [which] is a precondition to scientific expression" warrants First Amendment protection.<sup>146</sup>

John A. Robertson argues that because scientific experimentation and research is "an essential step in the process of dissemination of ideas and information, research should have the same constitutional status as dissemination itself."<sup>147</sup> The linchpin of his argument is that because the publication of scientific data is protected by the First Amendment, conducting research necessary to obtain this data should also be protected.<sup>148</sup> In fact, "the Supreme Court has included many precursors to speech in the broad protection of the First Amendment."<sup>149</sup>

For example, in *Buckley v. Valeo*<sup>150</sup> and *First National Bank of Boston v. Belotti*,<sup>151</sup> the Supreme Court granted First Amendment protection to the financing of speech because this speech was a necessary precursor to ultimate political speech. The Court in *Buckley* stated that the distinction between what is constitutionally protected precursive action versus speech should not be formalistically applied, but:

rather with sensitivity to the relationship between the conduct in question and the First Amendment values. When conduct serves as an important vehicle for a protected activity, or constitutes a form of such activity itself, it falls within the scope of the First Amendment.<sup>152</sup>

---

145. See *id.* at 459.

146. See *id.* at 461.

147. See Robertson, *supra* note 114, at 1225 n.89. Robertson stated that "much acquisition research [such as the social sciences] involves activities traditionally protected by the first amendment, such as speaking, talking, writing, and publishing. . . . Similarly, scientific publications would ordinarily be protected by first amendment rights to publish." *Id.*

148. See *id.* at 1251-53.

149. See Coleman, *supra* note 123, at 1389.

150. 424 U.S. 1, 16 (1976).

151. 435 U.S. 765, 788-92 (1978) (holding that the First Amendment protections extended to commercial speech).

152. See Lisman, *supra* note 108, at 5.

Additionally, in *Sweezy v. New Hampshire*, the Supreme Court held that the First Amendment not only protects a teacher's or a student's ultimate speech, but also the learning process, including the right "to inquire, to study and to evaluate," which is the precursor to their ultimate speech.<sup>153</sup>

Other scholars draw on the theory that scientific data is a precursor to scientific speech and argue by analogy that just as information-gathering is sometimes protected in the news reporting context, information-gathering in the scientific context should also receive constitutional protection.<sup>154</sup> The theory then, writes Francione, is that because the Supreme Court "has refused to treat the public differently than the press, and . . . scientists, as members of the public,"<sup>155</sup> should be granted a "presumption of first amendment protection for all experimental activity on the ground that it is indispensable information-gathering."<sup>156</sup> Indeed the Supreme Court has held that information-gathering for news reporting may be encompassed within the First Amendment protection of free speech.

For example, the Supreme Court held in *Richmond Newspapers v. Virginia* that the public right of access to criminal trials included a newspaper reporter acting in an information-gathering capacity.<sup>157</sup> The Court drew on *dicta* in *Zemel v. Rusk*<sup>158</sup> and *Branzburg v. Hayes*<sup>159</sup> and held that physical access to information for the purposes of news reporting is sometimes protected by the First Amendment, particularly if the sole reason for denying or restricting access to the information is a measure of inhibiting the ultimate dissemination of that information.<sup>160</sup> The Supreme Court recognized in *Branzburg* that "[t]he informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists,

---

153. See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

154. See Francione, *supra* note 108, at 466-73. This argument builds on the analogy that because courts have sometimes recognized First Amendment protection for information-gathering in the news-reporting context, courts should also recognize protection for information-gathering in the scientific context. See *id.*

155. See *id.* at 466.

156. See *id.* at 471. However, as Francione points out, "such a presumption is not justified by existing case law, which suggests that information-gathering, divorced from the actual processes of communication" is not absolutely protected. See *id.*

157. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980).

158. 381 U.S. 1, 16-17 (1965) (holding that the denial of a passport in order for travel to Cuba for information-gathering purposes did not unconstitutionally violate the plaintiff's First Amendment right of free speech).

159. 408 U.S. 665, 667 (1972) (holding that the requirement that newsmen testify before state or federal grand juries does not abridge the right to free speech).

160. Justice Stevens, concurring in *Richmond Newspapers*, stated that "never before [had the Court] squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever," but that the Court had only concerned itself with restrictions on information-gathering where such restrictions prohibited the ultimate dissemination of the information. *Richmond Newspapers*, 448 U.S. at 582 (Stevens, J., concurring).

academic researchers, and dramatists."<sup>161</sup> Thus, scholars argue that the Court implicitly acknowledged the necessity of scientific inquiry as an information-gathering stage and that if restrictions on physical access to potential scientific data are in place solely to restrict the ultimate dissemination of scientific speech, such restrictions unconstitutionally abridge the right of free speech.<sup>162</sup>

Yet, Justice Brennan, concurring in *Richmond Newspapers*, stated "the stretch of this protection is theoretically endless," and that "[a]n assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded."<sup>163</sup> Similarly, Francione persuasively argues, even if a prima facie right to precursive action or information-gathering which would encompass the right to scientific inquiry could be asserted, "there simply is no reason why the first amendment should accord greater protection to the preconditions of scientific speech than to the preconditions of other speech."<sup>164</sup> Thus, just as constitutionally protected verbal speech may be permissibly governmentally regulated in certain instances, so would the implicit right of scientific inquiry.<sup>165</sup>

*C. Assuming There Is a First Amendment Right of Scientific Inquiry, NAGPRA Represents a Constitutionally Permissible Infringement on This Right*

Assuming, *arguendo*, courts find that the First Amendment definitely protects precursive speech or protects information-gathering in the scientific context, NAGPRA represents compelling governmental interests and is a constitutional infringement on this right to research.<sup>166</sup> In *United States v. O'Brien*, the Supreme Court set forth a balancing test to analyze whether governmental regulations of conduct impermissibly violated the right to free expression:

---

161. See *Branzburg*, 408 U.S. at 705.

162. See Francione, *supra* note 108, at 471-73.

163. See *Richmond Newspapers*, 448 U.S. at 588 (Brennan, J., concurring) (remarking further that "[t]he judicial task is as much a matter of sensitivity to practical necessities as it is of abstract reasoning").

164. See Francione, *supra* note 108, at 465.

165. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (holding that a sufficiently compelling governmental interest can constitutionally restrict speech where "speech" and "nonspeech" are bound together); *Pell v. Procunier*, 417 U.S. 817, 835 (1974) (holding that slight infringements on freedom of the press acceptable where a state's interest in security was at stake).

166. The Supreme Court has recognized a myriad of balancing tests to determine whether governmental regulations of speech and expression unconstitutionally infringe on the First Amendment, but the cornerstone of these cases is that governmental regulations which do unduly restrict communication or symbolic conduct, or that are enacted solely to prevent the ultimate dissemination of information, are constitutional. See Delgado & Millen, *supra* note 114, at 390-91.

[G]overnment regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial Governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>167</sup>

In sum, under the *O'Brien* test, even if there were a prima facie right to scientific inquiry, a First Amendment challenge to NAGPRA would be unsuccessful because: first, the government has a compelling interest in restricting the use of skeletal remains and other burial goods in scientific research; and secondly, NAGPRA is narrowly tailored to those ends.

*1. NAGPRA Is a Legitimate Exercise of Governmental Restrictions of the Alleged Right of Scientific Inquiry*

Where there is a sufficiently compelling governmental interest, restrictions which incidentally infringe on constitutionally protected free speech are acceptable.<sup>168</sup> In the area of regulating research and experimentation, "protection of the dignity and welfare" of society "surely constitute compelling justifications for the imposition of safeguards."<sup>169</sup> NAGPRA undoubtedly permissibly infringes on any right of scientific inquiry because it represents at least three compelling governmental interests: first, assigning Native American remains burial rights equal to non-Native graves; second, according Native Americans the same sort of quasi-property rights in their ancestral remains granted to all others; and third, granting Native Americans control of their image after death.

*a) Respecting the Integrity of Native American Burial Sites Is a Compelling Governmental Interest*

The most obvious governmental interest reflected through NAGPRA is the goal of ending discriminatory treatment of Native American burial sites and skeletal remains, "undoing an injustice that began so long ago."<sup>170</sup> NAGPRA

---

167. See *O'Brien*, 391 U.S. at 377.

168. See *id.* at 376 (holding that a sufficiently compelling governmental interest can constitutionally restrict speech where "speech" and "nonspeech" are bound together); *Pell*, 417 U.S. at 835 (holding that slight infringements on freedom of the press acceptable where a state's interest in security was at stake).

169. See *Lisman*, *supra* note 108, at 7 (stating also that the preservation of public health and the environment also constitute compelling governmental interests warranting restrictions on scientific inquiry); see also *Coleman*, *supra* note 123, at 1392 (arguing that "society's collective conscience or morality" could not solely justify restrictions on scientific inquiry, nor could the state justify restrictions based on a desire to prohibit new knowledge).

170. See 136 CONG. REC. S17,173-02, S17,174 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye). Senator Inouye then described how the United States government itself was responsible for legitimizing "robbing graves" of the Native Americans, particularly under the orders of the

is hailed as "civil rights" legislation, a measure to assure that Native American graves and skeletal remains receive respect and dignity equal to non-Native graves and remains.<sup>171</sup> Members of Congress characterized the practice of unquestioningly disinterring Native American graves as "flagrantly violat[ing]" the "civil rights of America's first citizens"<sup>172</sup> and not only undermining the dignity of Native Americans, but the rest of the American people as well.<sup>173</sup> Accordingly, Congress recognized that there is a compelling governmental interest in protecting all burial sites and remains from unconsented to excavation.<sup>174</sup>

But morality and value judgments alone insufficiently justify restrictions on the right of free speech. So if scientific inquiry is accorded First Amendment protection, whether Congress considered scientific research on Native American skeletal remains immoral is unimportant. For example, the Supreme Court held that "[a]ll ideas having even the slightest redeeming social importance . . . have the full protection of the [First Amendment] guarantees." Thus, according to the Court, the morality or value judgments of some cannot override others' rights of free expression.<sup>175</sup> But the arbitrary and discriminatory protection of a minority's burial rights is not a mere issue of morality; it is an issue of equality.<sup>176</sup> The Supreme Court and our

Army Surgeon General in the nineteenth century. *Id.*

171. *See id.* (statement of Sen. Inouye) (stating that the intent of Native American Graves Protection and Repatriation Act is to protect the "civil rights of America's first citizens"); *see also* Livesay, *supra* note 1, at 296 (contending that "[r]epatriation is an issue of civil rights for Native Americans and, by extension, for all of us").

172. *See* 136 CONG. REC. at S17,174. Senator Inouye stated:

When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent lying in glass cases. It is the Indian remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.

*Id.*

173. Rep. Morris K. Udall (D.-Ariz.), who introduced NAGPRA to the House, wrote that this legislation

does not simply address the return of native American remains to their rightful resting place, or the matter of protection of Indian graves in the future. It goes far beyond that. It addresses our civility, and our common decency . . . In the larger scope of history, this is a very small thing. In the smaller scope of conscience, it may be the biggest thing we have ever done.

136 CONG. REC. E3484-01, E3484-01 (extension of daily ed. Oct. 27, 1990).

174. Senator Inouye, who introduced NAGPRA to the Senate, stated that "the bill represents a major step in correcting an injustice that started over 100 years ago. It is appropriate that Congress take an active role in helping to restore these rights to native Americans . . ." 136 CONG. REC. at S17175.

175. *Roth v. United States*, 354 U.S. 47, 484 (1957). And Justice Brandies stated that the First Amendment protects expression reflecting ideas "which a vast majority of . . . citizens believe[] to be false and fraught with evil consequence[s]." *Whitney v. California*, 274 U.S. 357, 374 (1927) (concurring opinion in which Holmes, J., joined).

176. Walter Echo-Hawk, a Pawnee and attorney for the Native American Rights Fund,

American ethos recognizes that failing to protect the rights of a minority is not only a national embarrassment, but contrary to the values upon which this nation was founded: that all people are created equal. In sum, NAGPRA is not grounded solely upon the morality or value judgements of Congress, but grounded upon principles of equality and dignity for all people, clearly both of which are compelling governmental interests.

*b) The Compelling Governmental Interest in According All People Equal Quasi-property Rights*

There is a compelling governmental interest in allowing Native Americans, and non-Native Americans, the power to decide how one's own or familial remains are disposed of, including whether remains should be used in scientific research.<sup>177</sup> NAGPRA clearly reflects this interest. Our legal system invests people with a quasi-property right in the remains of their family members. Consequently, family members historically decide how to dispose of a family member's remains, including whether to donate the organs of a loved one, whether to cremate or bury the body, and who should retain custody of a person's ashes.<sup>178</sup> Congress recognized that Native Americans were not allowed the same right regarding the disposition of their ancestral remains because legislation had deemed these remains federal property.<sup>179</sup> Thus, Congress intended to rectify this disparate treatment through NAGPRA which requires that tribal members are granted quasi-property rights in their culturally affiliated burial items and therefore should be allowed to make decisions regarding who properly retains custody of these remains.<sup>180</sup>

---

argues that the main issue underlying the repatriation movement is that Native American burial sites must be accorded the same protection as all other burial sites. He claims that "Indians, as members of the human race and the United States, should receive the same burial protection taken for granted by every other racial and ethnic group. Thus, ending legal discrimination forms a cornerstone of tribal opposition to unsolicited archaeological inquiry." Riding In, *supra* note 6, at 23 (citations omitted).

177. Native Americans reject the notion that their remains are federal property and argue that their ancestors "expected to receive eternal rest and never consented to become anyone else's property." Riding In, *supra* note 6, at 26.

178. At common law, there is no property interest in a dead body. *See* 22A AM. JUR. 2D Dead Bodies §§ 23-24 (1988); *see also* 25A C.J.S. *Dead Bodies* §§ 1-2 (1996). However, a quasi-property interest is recognized for burial purposes, but it is unclear that ancient skeletal remains fall within common law definition of a "dead body" so it "appears" that an institution could not have a property right in skeletal remains. *See id.* Regardless, since 1906 the federal government converted all ancient skeletal remains and grave goods into "federal property," and thereby supported the notion that these items belonged in the custody of scientific institutions and museums. Arguably, however, if any institution or person is granted a property or quasi-property interest in Native American skeletal remains, it should be the ancestrally related tribe. *See* discussion *supra* Part I.A.1.-4.

179. *See* discussion *supra* Part I.A.1.-2.; *see also* 16 U.S.C. §§ 431-433, 470(d)(d) (1994); Gerstenblith, *supra* note 10, at 577-79.

180. *See* 25 U.S.C. § 3002 (1994).

*c) Allowing One to Preserve His or Her Image After Death Is a Compelling Governmental Interest*

Just as there is a compelling governmental interest in granting people an interest in controlling the disposition of their family members' remains, Congress has a compelling interest in granting people the ability to determine how their own remains will be disposed of after death. In 1997, Justice Stevens, concurring in *Washington v. Glucksberg*, stated in *dicta* that an individual has an interest, "even older than the common law," in controlling one's image after death.<sup>181</sup> He stated that one's liberty interest in bodily integrity "embraces . . . her interest in dignity, and in determining the character of the memories that will survive long after her death."<sup>182</sup> Therefore, clearly the government's interest in preserving one's liberty interest is compelling and reflected through NAGPRA where it requires that burial sites cannot be excavated, or remains used for scientific research or display, without the consent of tribally affiliated members.

NAGPRA not only mandates that the deceased will be treated with dignity, but it assuages the fear of living Native Americans, and non-Native Americans, that their remains might also be excavated some day in the name of science.<sup>183</sup> As evidenced by inheritance, estate, and organ donation laws, in addition to laws regarding the repatriation of American bodies from other countries, people obtain psychological satisfaction from feeling as though they have a measure of control over their possessions, and bodies, from beyond the grave.<sup>184</sup> Similarly, people receive psychological satisfaction from knowing

181. See *Washington v. Glucksberg*, 117 S. Ct. 2302, 2306-07 (1997) (Justice Stevens, J., concurring) (holding that there is no constitutional right to assisted suicide).

182. See *Glucksberg*, 117 S. Ct. at 2306. Justice Stevens further stated:

[N]either the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society . . . But it is not the source of liberty, and surely not the exclusive source. I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.

*Id.* at 2307 n.10 (citing *Meachum v. Fano*, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting)).

183. See Gerstenblith, *supra* note 10, at 564, 578.

184. This fact was brought up in the legislative history of NAGPRA, where Rep. Ben Nighthorse Campbell (R.-Colo.) stated:

[I]n the past several years the United States Government has done much to retrieve the human remains of our brave service men and women who died during the Vietnam war. Sparing little so that the remains of these fine people can be brought home to the ones who loved them, buried with full military honors and by the wishes of their families. We now have the opportunity to continue and extend this stance to native Americans so that their ancestors can finally be put to rest.

136 CONG. REC. H10,985-01, H10,989 (daily ed. Oct. 22, 1996).

they will not unconsentingly end up as material for scientific research or an "object of curiosity" displayed in a museum.<sup>185</sup> NAGPRA reflects a compelling governmental interest because it seeks to protect Native Americans' liberty interests by requiring consent before their own remains, or those of the ancestors, can be used as research material at all, particularly in research disrespectful of or destructive to the remains.<sup>186</sup>

### *2. NAGPRA Is Narrowly Tailored to Serve Compelling Governmental Interests*

NAGPRA is narrowly tailored to suit these compelling governmental interests and thus will likely withstand a constitutional challenge even if courts determine scientific inquiry is prima facie First Amendment protected.<sup>187</sup> The Supreme Court has long held that First Amendment protected expression may be restricted as long as these restrictions are narrowly tailored to meet legitimate legislative purposes.<sup>188</sup> NAGPRA is narrowly tailored to serve compelling governmental interests: first, because it does not utterly foreclose scientific research utilizing skeletal remains but merely restricts how these remains are obtained; and second, the legislative history of NAGPRA proves the scientific community found it specific enough to adequately represent their interests and the interests of repatriation supporters.

### *3. NAGPRA Regulates, Not Forecloses, Scientific Research*

NAGPRA is narrowly tailored legislation which suits legitimate governmental ends. For example, NAGPRA's reach does not include those items recovered on state or privately held land, nor does it reach items held by bona fide purchasers.<sup>189</sup> Only items recovered on federal or tribal land and held by

---

185. See Stern & Slade, *supra* note 9, at 160.

186. For instance, many Native Americans consent to archaeological and anthropologic studies utilizing remains after they are told what the research entails. These groups then repatriate only after these studies are finished. However, most Native American tribes refuse to allow ancestral remains to be used in research using analysis because of the necessary destruction to the remains such analysis causes, thereby leaving little of the remains to be repatriated. See Riding In, *supra* note 6, at 23; see also Thompson & Hill, *supra* note 54, at D07.

187. Again a constitutional argument against NAGPRA based on the right of scientific inquiry must overcome the *O'Brien* test. *O'Brien* stands for the proposition that only regulations intended to prohibit the ultimate dissemination of data or ideas gleaned from an experiment would violate the First Amendment right to free expression; NAGPRA is not an example of such a regulation and therefore only subject to the minimal protections of due process guarantees. See Lisman, *supra* note 108, at 5.

188. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

189. Congress carefully constructed NAGPRA to avoid potential problems, such as repatriation of remains from non-federally funded institutions thereby constituting a Fifth Amendment violation. See 136 CONG. REC. S17,173-02, S17,176 (daily ed. Oct. 22, 1990) (comments of Sen. McCain).



federally funded institutions are legislatively subject to repatriation.<sup>190</sup> Additionally, NAGPRA does not demand widescale repatriation of these items,<sup>191</sup> but only requires that culturally affiliated tribes are made aware these items are stored in institutions and are available for repatriation where appropriate,<sup>192</sup> and that scientists seek tribal consent before conducting studies on these remains.<sup>193</sup> Thus, NAGPRA is a constitutional restriction on the alleged right of scientific inquiry because it is not intended to prohibit the use of skeletal remains in research, or to prohibit the dissemination of data arising out of this research,<sup>194</sup> but carefully and fairly restricts how this data is obtained.<sup>195</sup>

#### 4. NAGPRA Is Narrowly Structured Compromise Legislation

Congress also carefully constructed NAGPRA so that it would grant Native Americans custody of ancestral remains where appropriate, while still allowing scientists and others access to remains where no culturally affiliated tribe requests repatriation. Whereas, as pointed out by two legal scholars, all previous federal legislation dealing with the custody of Native American burial items focused on the "protection of the irreplaceable scientific and cultural data and knowledge embodied" therein, NAGPRA seeks to include and protect

---

190. 25 U.S.C. §§ 3001(4), 3002 (1994).

191. In fact, there have been many instances where tribes allow these institutions to retain custody of these items and merely guide them on the appropriate manner in which they should be stored. See 25 U.S.C. § 3002(e) (1994) (allowing Native Americans to relinquish control of their cultural items rather than choosing repatriation).

192. For instance, a tribe must prove by a preponderance of the evidence that they are culturally affiliated with the remains and that the items were not legally purchased from the tribe. See 25 U.S.C. § 3005 (1994) (establishing the standard of proof necessary to prove burial goods are culturally affiliated with an existing tribe).

193. Foreclosing scientific access to remains could not be said to further any compelling governmental interest because scientific inquiry has long been regarded both an important and necessary activity. However, as discussed *supra* Part III.B.1., scientific inquiry is an area properly regulated by the government.

194. Congress acknowledged the scientific value inherent in these items covered by NAGPRA, and thus did not intend to foreclose research using skeletal remains. For example, Representative Campbell stated that

[t]his bill takes into account that many of these items may be of considerable scientific value and allows for current studies to continue with repatriation occurring after the completion of such a study. It further acknowledges that repatriation is not the only alternative and I encourage all sides to try to work out agreeable compromises where all interested parties can benefit from access to some of the items.

136 CONG. REC. at H10989.

195. Senator Inouye stated: "As enlightened people, we welcome scientific inquiry and the opportunity to know more about ourselves. Accordingly, we welcome the preservation and scientific purposes that museums fulfill . . . This legislation is designed to facilitate a more open and cooperative relationship between native Americans and museums." 136 CONG. REC. at S17,174.

Native American interests.<sup>196</sup> Two years prior to NAGPRA's passage, the Senate Committee on Indian Affairs appointed "representatives of the museum community, including archaeologists and anthropologists, [to meet] with tribal representatives to discuss the repatriation of human remains" in order to determine what legislation would appropriately reflect all these interests.<sup>197</sup> These meetings resulted in NAGPRA, which Senator McCain said "represents a true compromise."<sup>198</sup> In the House, Representative Rhodes said NAGPRA "reflect[s] a consensus among the constituency groups most affected by the policy in the bill — museums, scientists, and Native Americans."<sup>199</sup> In sum, NAGPRA grants "native Americans greater ability to negotiate" when seeking repatriation of federally stored remains.<sup>200</sup> Thus, NAGPRA proves that "the disposition and treatment of native American human remains and cultural items can be achieved in a manner that reflects respect for the human rights of native Americans, and for the values of science and public education."<sup>201</sup>

196. See Raymond Cross & Elizabeth Brenneman, *Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century*, 18 PUB. LAND & RESOURCES L. REV. 5, 13 (1997), available in Westlaw, 18 PUBLRLR 5. Additionally, this author notes that the reason Native American goods were historically deemed federal property is because "none of the earlier Native American cultural preservation statutes provided for Native American participation in the planning or administration of federal programs or projects that have significant impact on protected Native American cultural resources." *Id.* at 14.

197. 136 CONG. REC. at S17,173 (comments of Sen. McCain).

198. *Id.* at S17,173, S17,177 (comments of Sen. McCain). Senator McCain further stated that "[m]any parties interested in this legislation did not receive everything they wanted . . . . In the end, each party had to give a little in order to strike a true balance and to resolve these very difficult and emotional issues." *Id.* Representative Campbell stated that

[t]his bill comes after many, many, long hours of negotiations among interested parties. Among the participants in these negotiations were representatives of the museum community, the scientific community and the Indian community. They met on several occasions to reach agreement and what is currently before the house conforms to those agreements.

136 CONG. REC. at H10,988.

199. *Id.* at H10,989 (comments of Rep. Rhodes).

200. 136 CONG. REC. at S17,175 (comments of Sen. Inouye). Senator Inouye further stated that

[e]ven today, when supposedly great strides have been made to recognize the rights of Indians to recover the skeletal remains of their ancestors and to repossess items of sacred value and cultural patrimony, the wishes of native Americans have often been ignored by the scientific community. In cases where native Americans have attempted to regain items that were inappropriately alienated from the tribe, they have often met with resistance from museums and have not had the legal ability or financial resources to pursue the return of the good. It is virtually only in instances where a museum has agreed for moral or political reasons to return the goods that tribes have had success in retrieving property.

*Id.* at S17,174. Thus, Congress passed NAGPRA as a means to level the playing field between tribes, museums and scientific institutions.

201. 136 CONG. REC. at H10,989 (comments of Rep. Rhodes).

#### IV. Conclusion

Science has been under fire in recent years in part because of the alarming rate at which it is progressing. For example, many feel as though humanity is unprepared for scientific and technological breakthroughs such as human cloning, genetic manipulation, and "nuclear, bacteriological and chemical warfare."<sup>202</sup> Although scientific research and experimentation can benefit humanity, science must respect fundamental human rights and cannot progress without restrictions aimed at ensuring these rights. The fields of archaeology and anthropology have demonstrated that ancient skeletal remains and burial goods inherently contain information which adds to the body of knowledge regarding not only the evolution of Native Americans, but the rest of humanity. In certain instances, however, this research has had discriminatory motives, and thus can no longer be absolutely and unquestionably permitted.

Regardless of whether courts determine that the First Amendment implicitly protects a right of scientific inquiry, NAGPRA can withstand a constitutional challenge because it permissibly restricts the right of scientific inquiry. NAGPRA furthers at least three compelling governmental interests: first, it ends the discriminatory protection of Native American grave sites; second, it grants Native Americans quasi-property rights equal to those granted to non-Native Americans; and third, it allows Native Americans to exercise control of their image after death. Additionally, NAGPRA is narrowly structured so that it does not utterly foreclose the use of Native American skeletal remains and also reflects a compromise between the scientific community and repatriation supporters. NAGPRA clearly has not ended the debate between the scientific community who seeks access to Native American remains and repatriation supporters who believe that the excavation of remains has serious psychological, and potentially physical, consequences. However, under NAGPRA both sides of the issue are playing on a level field and are forced to listen, rather than merely hear, each other.

---

202. See Smith, *supra* note 5, at 167.