

Law and Bones: Religion, Science, and the Discourse of Empire

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The fight for the control of human remains in the New World is portrayed by many scientists and even a few American Indians as a clash between religion (primitive religion at that) and science. From the Indian point of view, this fight is an anti-imperial enterprise, the latest defensive battle in a European war on the ideas that constitute Indian identities in North America. Early on, the attack came under the banner of religion,¹ whether from the *Requerimiento* of 1513 or the more peaceful blandishments of missionaries that Indian epistemology was ill suited to resist.² In the twenty-first century, science has taken the lead, but it is the same war,³ and a major front in that war is archaeology.⁴

The Pawnee historian James Riding In calls it “imperial archaeology,”⁵ the European proposition that the European “discovery” of the Americas conferred the right not only to the soil but also to the bodies of the people buried in that soil. This attitude toward Indian graves manifested itself early on, famously in the grave-robbing excursion from the *Mayflower* and the supposedly scientific excavation of an Indian burial mound by Thomas Jefferson.⁶ The origin of this disrespect for the Native American dead can only be understood by Indians as incidental to empire because the disrespect did not extend to the European dead. Like the land and the people, the dead had apparently become an imperial asset.

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For the Spanish in the desert Southwest during their colonial adventure, cemeteries were *campo santo*, holy ground for the final repose of Christians, but the United States inherited most of its legal traditions from the English common law. William Blackstone, the great compiler of the common law, addressed the status of burials to note that “the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried.”⁷ In a discussion of the crime of larceny, Blackstone used burials to demonstrate the requirement that there be a property interest before there can be a theft: “This the case of stealing a shroud [*sic*] out of a grave; which is the property of those, whoever they were, that buried the deceased: but stealing the corpse itself, which has no owner, (though a matter of great indecency) is no felony, unless some of the gravecloths be stolen with it.”⁸

As Blackstone noted, human remains were clearly not considered property in English common law, but graves were not entirely without protection.⁹ Blackstone’s parson had the power and the duty to keep the sanctity of the place where most people were buried—the churchyard—and the ecclesiastical courts would provide a remedy against disturbers of the dead.¹⁰

Most places in the United States have never had ecclesiastical courts with secular authority, and the practice of burying the dead outside of churchyards was not confined to Indians. Small community cemeteries, slave cemeteries, and family cemeteries are found down many rural roads, and the markings of these cemeteries have often failed to survive the community, the institution of slavery, or the family as an economic enterprise. Even some churchyards probably became unmarked cemeteries when Spanish missions failed and the missionaries were recalled to what is now Mexico.

Common law in the United States, because of burial practices so different from those in England, came to vest responsibilities toward the dead in next of kin rather than with the guardian of the churchyard. American common law is in complete agreement with English common law in recognizing no property interest in a corpse, but with no ecclesiastical authority over burial places, American courts looked to families to protect the repose of the dead.¹¹ Responsibilities toward the dead became connected to what the American cases call a “quasi property right” in the next of kin.¹²

These rights are far from absolute, and in any clash between the interests of the dead (regardless of who may be asserting those interests) and the interests of the living, presently extant persons prevail. The dead may be disturbed, for example, by the government’s exercise of the power of eminent domain,¹³ or by the necessity to exhumate a body to determine facts that affect the rights of the living.¹⁴ Still, repose of the dead is an important value that can only be overcome by some specific and weighty countervailing interest proved in the process of securing a court order

for disinterment.¹⁵ Judge (later Justice) Benjamin Cardozo stated the long-standing American rule in 1926: “The dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose.”¹⁶

If there is a continuum of reasons for allowing the disturbance of the dead, it appears to begin with the immediate needs of living persons (forensic disinterment and eminent-domain cases) and then to proceed to more abstract needs (medical education and research) but to stop well short of idle curiosity or personal profit.¹⁷ This respectful treatment of the colonial dead belies the characterization of this controversy over the Indian dead as religion versus science. Europeans, too, understand interment of human remains as permanent, “earth to earth, ashes to ashes, dust to dust.”¹⁸ This traditional burial service is based on the words of God to Adam in the Abrahamic creation story: “In the sweat of your face you shall eat bread till you return to the ground, for out of it you were taken; for dust you are, and to dust you shall return.”¹⁹ God makes this remark in the context of the faux pas with the forbidden fruit, the original sin that is virtually unknown to American Indian traditions.²⁰ However, what Indians do believe is, in practice, exactly the same thing that Europeans believe. Indians believe the dead should rest in peace.

Many Indians assert that disinterment stops the spiritual journey of the dead, causing the affected spirits to wander in limbo. These affected spirits can wreak havoc among the living, bringing sickness, emotional distress, and even death. Many tribes such as the Navajo, the Apache, and the Pawnee believe that anyone who disrupts a grave is an evil, profane, and demented individual who plans to use the dead as a means of harming the living. Reburial within Mother Earth enables the disturbed spirits to resume their journey.²¹

We Indians do not ask Europeans to believe what we believe, but we ask that our dead be treated the same way European dead are treated, regardless of our reasons for thinking that this treatment is appropriate. Different tribes have different ceremonies to begin the spirit journey represented by death.²² This writer has attended a number of reburial ceremonies, and they are undertaken with great solemnity, but in all honesty, they are not “traditional.” After all, it is not traditional for Indians to dig up dead people,²³ and we did not have much opportunity to rebury them before 1990.

In the 1990 Native American Graves Protection and Repatriation Act (NAGPRA),²⁴ Congress placed archaeology and physical anthropology on a part of the continuum of justifications that does not justify disturbing the dead if the disturbance would offend certain living persons. The living persons who have standing under NAGPRA to claim control of human remains and funerary objects are, in order of priority, lineal descendants of the deceased, the tribe on whose lands the deceased was discovered, the tribe that has the closest cultural affiliation with the deceased, or the tribe that has been recognized as aboriginally occupying the area

in which the deceased was discovered by a final judgment of the Indian Claims Commission or the United States Court of Claims.

Some observations are in order regarding this last congressional priority, the tribe aboriginally occupying the area in which “the deceased” (note the human being language) was discovered. First, substantial parts of the United States have never been recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as Indian land. This is an accident of legal history, not a reflection that North America was to any degree *terra nullus*. On my office wall, there hangs a U.S. map with all the “judicially established” Indian land claims colored in. Half of the map is pristine white, including the entire east coast excepting Florida.

Second, this is exactly what the Ninth Circuit Court of Appeals later scorned as “a tenuous, unknown, and unproven connection, asserted solely because of the geographical location of *the find*” (the emphasis is added to call attention to the *non*–human being language).²⁵ In imperial terms, all of those white spots on my map are Indian land claims “unproven” unless most of the woodlands on the eastern seaboard, not to mention the coastline with plentiful (in the sixteenth century) seafood, were places the indigenous people of North America did not choose to inhabit.

Finally, this direction from Congress to allow repatriation by geographical connection alone is some indication that repatriation was intended to proceed in virtually all cases. Otherwise, why not stop with “closest cultural affiliation?” Proving the “culture” of skeletal remains in the absence of associated grave goods is a fool’s errand. Proving aboriginal occupancy is somewhat easier, and the references to the Indian Claims Commission and the United States Court of Claims make it very easy by making those findings conclusive.

Trafficking in human remains and in funerary objects from Indian graves is a federal crime according to NAGPRA.²⁶ This was a major step forward. I have often wondered what white people think when they see a powwow poster or flyer admonishing vendors to offer “no grave goods.” No necklaces of finger bones. No skulls. In Texas, where I had my first career as a judge, there are as we speak people who lease land to “prospect” for Indian graves on private land. This history is as outrageous as the history of the futile attempts to criminalize Indian grave robbing under state law,²⁷ attempts in which I personally participated for eight of the twelve years Indians spent begging the Texas legislature for protection. While NAGPRA has pushed most commerce in grave goods underground, it can only stop the purposeful disturbance of the Indian dead on tribal or federal land.²⁸ The second closest brush Texas Indians had with getting legal protection of Indian graves fell apart in disputes with the state archaeologist over repatriation.²⁹

The discussion of protecting burials in the ground slips seamlessly into a discussion of repatriation because the two cannot logically be separated. If a looter

is prosecuted for desecrating a grave, human remains and funerary artifacts will usually come into the possession of agents of the government. At some point, when the lawsuit is over, some disposition will have to be made, referring to some stated or unstated standard of when reburial is appropriate. The same is true for salvage archaeology. After a careful documentation of inadvertently discovered human remains, the reburial question arises.

The American Indian repatriation movement is about civil rights, and NAGPRA is its fruit.³⁰ For North American tribal peoples, NAGPRA has become “a symbol of nationalist ideologies and practices,”³¹ an official admission to the human race and the family of nations. Reburial should occur, Indians claim, because that is generally what the dominant culture does with human remains. To except Indian remains is to except Indians from common humanity. Dead human bodies have historically been used to accomplish the political ends of the living,³² and the political end here is that Indians be afforded, in Ronald Dworkin’s words, “equal concern and respect in the design and administration of the political institutions that govern them.”³³

The stipulations of NAGPRA simply accommodate cultural reality in allowing Indian tribes to claim the same next-of-kin status that Catholics might claim if a Spanish mission cemetery were disturbed or that African Americans might claim if a slave cemetery were disturbed, a cultural reality that has been hidden behind archaeology’s scientific pretensions. European burials in this country are not disturbed without permission of next of kin or a court order. If they are disturbed by accident, they are documented (or not) and reinterred.

The history of archeological imperialism is well known to many readers of this journal and need not be repeated here except to note that history as the political impetus behind NAGPRA.³⁴ Opposition to NAGPRA comes in the classic guise of imperial science—we know what is best for you because we as scientists represent all of humanity—and in the slightly different claim that scientific (credentialed) grave robbing is superior to recreational (uncredentialed) grave robbing and that therefore Indians should join with the credentialed to thwart the uncredentialed.³⁵ To the occupants of the robbed graves, or their next of kin, this distinction is elusive.

Whether the dead have “rights” is more a question of moral philosophy than of law.³⁶ However, the Anglo-American legal tradition teaches “a widely shared belief that there are ethical constraints on actions that involve the dead.”³⁷ It is part of our social contract that “if some action would result in harm or benefit for a now-dead person, then this is one of the normatively relevant considerations that needs to be taken into account.”³⁸ Historically, there have been ethical constraints on actions that involve the dead except for dead Indians, and harm to a dead person is a normatively relevant consideration unless the dead person was Indian. The purpose of NAGPRA was to change all that by redefining dead Indians from “archaeologi-

cal resources” in the Archaeological Resources Protection Act (ARPA) to deceased human beings.³⁹

Once dead Indians are legally considered to be people, the issue becomes who has standing to represent their human interests. Formulations in NAGPRA use the unfortunate language of ownership, making Indians the only human beings in which American law recognizes a property interest since the ratification of the Thirteenth Amendment, which legally abolished chattel slavery.⁴⁰ Gerald Vizenor has suggested that the thorny issue of repatriation might be easier to work out among living persons if bones—like the rivers and trees of Justice Douglas’ famous dissent in *Sierra Club v. Morton*—had standing to sue.⁴¹ Vizenor has reached the spirit of the issue, but he may be too optimistic about the ability of courts to follow his discourse.

The response of the anti-NAGPRA forces in congressional debates and now in the courts has been to introduce age as a proxy for race. Dead Indians from the archaic and paleo-Indian periods, the argument goes, are both more interesting to study and less likely to be somebody’s grandparents. This substitution did not succeed in the drafting of NAGPRA, but it has succeeded in the so-called Kennewick Man case, *Bonnichsen v. U.S.*⁴² In the first paragraph of the opinion, the dead Indian at issue is framed as scientific data, “one of the most important American anthropological and archaeological discoveries of the late twentieth century.”⁴³ A reporter who covered the case from the beginning set the stage:

In the media, the saga of Kennewick Man and Dr. James C. Chatters has played out as a rerun of the battles between Charles Darwin and Bishop Wilberforce following the publication of *The Origin of Species*, between Clarence Darrow and William Jennings Bryan for the hearts and minds of the jurors assembled to settle the fate of John Thomas Scopes, and as a straightforward confrontation between science and superstition, the individual’s right to pursue knowledge freely blocked by bureaucracy in service of a reactionary religious agenda.⁴⁴

Even though the scientists were the plaintiffs,⁴⁵ the Indians appeared to have the burden of proof because “in the absence of a conclusive determination of cultural affiliation, the (Indians) cannot establish that permitting Plaintiffs-scientists to study the Kennewick Man’s remains offends their religious views or customs.”⁴⁶ “NAGPRA,” admitted the court, “was enacted with two main goals: to respect the burial traditions of modern-day Indians and to protect the dignity of the human body after death.”⁴⁷ The latter goal is conspicuously missing from the opinion. The standing of the scientists, unlike the standing of the Indians, did not significantly trouble the Circuit Court of Appeals or the trial court.

“Studies” are an open sesame for graves, at least when the graves contain Indians:

Although the results of these studies might be of interest to the general public, plaintiffs are not asserting a mere general grievance or interest that is shared by the world at large. The plaintiffs have asserted a personal interest in this controversy. They propose to personally conduct tests on the remains, and to analyze the results of those tests. This [*sic*] data will then be used to further their ongoing research. That is sufficient nexus to confer standing. In addition, I note that the results of plaintiffs' research likely will be published in various scientific journals and could advance their professional careers.⁴⁸

Echoing the characterization of Indians as book burners in the repatriation debates, the trial court opined:

Plaintiffs' contention is that to the trained eye the skeletal remains *are* analogous to a book that they can read, a history written in bone instead of on paper, just as the history of a region may be "read" by observing layers of rock or ice, or the rings of a tree. Plaintiffs are not asking the government to conduct the tests and publish the results. Plaintiffs simply want the government to step aside and permit them to "read that book" by conducting their own tests.⁴⁹

What is lacking in these opinions, trial and appellate, is any scintilla of humanity. It is as if NAGPRA never happened, as the judges frame the inquiry the way in which the scientific community wants it framed. Dean Rennard Strickland was too optimistic when he wrote that "the enactment of NAGPRA brought to an end almost five hundred years of conflict about culture."⁵⁰ Age is back as a proxy for race, and one reading of the appellate opinion is that any remains lacking cultural context that antedate the founding of the United States in 1789 are now back to the status of archaeological resources rather than that of human beings.⁵¹ These opinions are of a piece with what I have called in another context "the jurisprudence of colonialism,"⁵² a jurisprudence of disrespect for the dead that the United States has in common with other colonial societies.⁵³

But, wait, were not those U.S. judges merely following The Law?

Well, no. Since I am a judge myself, I perhaps have more license than other scholars to give short shrift to such nonsense. Judge Jerome Frank described the decisional process as well as anyone:

The process of judging, so the psychologists tell us, seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. If he cannot, to his satisfaction, find proper arguments to link up his conclusion with premises which he finds acceptable, he will, unless he is arbitrary or mad, reject the conclusion and seek another.⁵⁴

This is so partially because, as Justice Cardozo has pointed out, “we may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.”⁵⁵ I have some idea of the judges’ attitudes about the privileging of science because my education is similar to theirs, and I note that one of the appellate judges in *Bonnichsen* literally wrote the contemporary book on legal thinking.⁵⁶

Imperial scientific discourse is privileged in describing the bones at issue in *Bonnichsen* and also *sub silentio* in the absence of any critical examination of what sketchy plans for study the scientists put forward. Indians must justify themselves; science is self-justifying. The court construed NAGPRA with discourse from the days prior to NAGPRA: “It seems to be tacitly assumed that archaeologists have the right to do almost anything in the name of scholarship.”⁵⁷

The opinions not only privilege science but also recirculate colonial race narratives: Indians are standing in the way of human progress, motivated by archaic ideas and mysticism.⁵⁸ The Indians’ tribal stories “are just not specific enough or reliable enough or relevant enough” and “the record as a whole does not show where historical fact ends and mythic tale begins.”⁵⁹ The racism is certainly unconscious,⁶⁰ but apparent to any Indian who has been patronized or called “Chief.”

Clear and easy cases do exist, so it is fair to ask if the hegemonic narrative adopted by these judges was the only rational one available to them. Not only were there robust competing narratives but there is plenty of reason to think that the Congress that passed NAGPRA would have preferred a different result.⁶¹ Judge Sherry Hutt, who filed an amicus brief on the side of the Indians, reminds us that “the unanimous support for [NAGPRA] in Congress reflects an acknowledgement that the Constitution and all prior property laws, the common law and legislation, were not being afforded to tribes and Native American individuals. NAGPRA does not create any new rights for tribes or Native Americans. Rather, it applies the common law of property, enjoyed by all others in the United States, and extends those rights to disenfranchised tribes and Native Americans, Native Hawaiians and members of Alaska Village corporations.”⁶² It is fair to say that there is no shortage of intellectually respectable paths to a different result in *Bonnichsen*.⁶³

The appellate opinion in *Bonnichsen* construes the NAGPRA definition of Native American—“of, or referring to, a tribe, people, or culture that is indigenous to the United States”—to mean a *presently existing* tribe, “presently” meaning since 1789. Under that narrow definition of Native American, it is not entirely clear how any individual set of human remains found without artifacts can be Native American and therefore subject to NAGPRA—regardless of age. Bones without associated artifacts cannot be connected to a particular tribe except by geography and oral traditions.

The Ninth Circuit Court seemed to have some inkling of the absurdity it

had unleashed when they hedged the precedential value of *Bonnichsen*: “We do not foreclose the possibility that, in any other statute, Congress’s use of the present tense, in the context of a different statute, with different statutory language, structure, and purposes, could implicate a time period other than the present.”⁶⁴ This sounds like the mother of all result-oriented decisions, *Bush v. Gore*, in which the Supreme Court warned that “our consideration is limited to the present circumstances.”⁶⁵

While the *Bonnichsen* court has given fair notice that their opinion should not be taken too literally, it does contain alarming implications for NAGPRA in general, not just for the disposition of Indians who are both dead and ancient. Scientists who want to slice and dice have legal standing and Indians who want to rebury may not. We Indians are still the done-to rather than the doers. We have no control over the discourse about us, legal or scientific,⁶⁶ in spite of the fact that so far all the scientific enterprise has gained by its imperial disregard of common decency is a self-serving farrago of anachronistic fictional narrative and speculation and a lionization of the perpetrators.⁶⁷

The passage of NAGPRA was for Indians an emotional high like the destruction of the Death Star in the original *Star Wars* movie. Another reason for good feelings is that Indians are no longer entirely alone, as some non-Indian archaeologists have come to realize that they can do science with human dignity.⁶⁸ However, in spite of the splendid victory that is NAGPRA and the growing influence of dissenters within the imperial ranks, the Kennewick litigation is a forceful reminder of what Suzan Shown Harjo calls our “unfinished agenda.”⁶⁹ The empire has struck back, and for Indians the issue is not whether empire comes in the robes of religion or the white lab coat of science. The issue for us is the empire’s esurient nature that demands not just our material assets but our humanity as represented by the remains of our dead.

Notes

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13. *Ibid.*, 4.
14. *Gray v. State*, 114 S.W. 635 (Tex. Crim. App. 1908).
15. Leming, “Dead Bodies,” sections 50, 51; Surette, “Dead Bodies,” sections 7, 9.
16. *Yome v. Gorman*, 152 N.E. 126, 129 (N.Y. Ct. App. 1926).
17. Bruce A. Iverson, “Bodies for Science,” *Death Studies* 14 (1990): 577–87.
18. “Burial of the Dead: Rite One,” in *The Book of Common Prayer* (Oakwood, GA: St. Gabriel's Episcopal Church, 1979), 469.
19. Gen. 3:19.
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21. Riding In, “Without Ethics and Morality,” 13.
22. Thomas G. Mooney, ed., *The Swimmer Manuscript: Cherokee Sacred Formulas and Medical Prescriptions* (1932; Oklahoma City: Noksi, 2005), 134–40; Dennis Tedlock and Barbara Tedlock, eds., *Teachings from the American Earth: Indian Religion and Philosophy* (New York: Liveright, 1992), 248–71.
23. Winona LaDuke, *Recovering the Sacred: The Power of Naming and Claiming* (Cambridge, MA: South End, 2005), 86.
24. 25 United States Code Annotated (U.S.C.A.). § 3001–3013, 2001.
25. *Bonnichsen v. U.S.*, 357 F.3d 962, 977 (9th Cir. 2004).
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 34. Robert E. Bieder, "The Collecting of Bones for Anthropological Narratives," *American Indian Culture and Research Journal* 16 (1992): 21–35; Kathleen S. Fine-Dare, *Grave Injustice: The American Indian Repatriation Movement and NAGPRA* (Lincoln: University of Nebraska Press, 2002), 47–114; David Hurst Thomas, *Skull Wars: Kennewick Man, Archaeology, and the Battle for Native American Identity* (New York: Basic Books, 2000); Thornton, *Who Owns Our Past*; Jack F. Trope and Walter R. Echo-Hawk, "The Native American Graves Protection and Repatriation Act: Background and Legislative History," *Arizona State Law Journal* 24 (1992): 35–77; 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., 2d sess., 1990; Native American Grave and Burial Protection Act: Hearing on S.1021 and S.1980 before the Senate Select Committee on Indian Affairs, 101st Cong., 2d sess., 1990.
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 37. Josie Fisher, "Harming and Benefiting the Dead," *Death Studies* 25 (2001): 558.
 38. *Ibid.*, 567.
 39. 16 U.S.C. § 470bb (1), 2001.
 40. 25 U.S.C. § 3002, 2001.
 41. Gerald Vizenor, "Bone Courts: The Rights and Narrative Representation of Tribal Bones," *American Indian Quarterly* 10 (1986): 319–31. *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972).
 42. *Bonnichsen v. U.S.*, 357 F.3d 962, 977 (9th Cir. 2004).
 43. *Ibid.* 357 F.3d 966.
 44. Roger Downey, *Riddle of the Bones: Politics, Science, Race, and the Story of Kennewick Man* (New York: Copernicus, 2000), x.
 45. It is axiomatic in Anglo-American law that the plaintiff has the burden of proof. In this case, the plaintiffs were Robson Bonnichsen (the director of the Center for the Study of the First Americans at Oregon State University), C. Loring Brace (the curator of biological anthropology at the University of Michigan Museum of Anthropology), George W. Gill (an anthropology professor), C. Vance Haynes Jr. (an anthropology professor), Richard L. Jantz (an anthropology professor), Douglas W. Owsley (the head of physical anthropology at the Smithsonian Institution's National Museum of Natural History), Dennis J. Stanford (the

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46. *Bonnichsen v. U.S.*, 357 F.3d 968, note 8 (9th Cir. 2004).
 47. *Bonnichsen*, 357 F.3d at 973.
 48. *Bonnichsen*, 357 F.3d at 634–35, citations omitted.
 49. *Bonnichsen v. U.S.*, 969 F.Supp. 628, 646 (D.C. Oregon 1997); emphasis original.
 50. Strickland, *Implementing the National Policy*, 176.
 51. *Bonnichsen*, 357 F.3d at 976, contrasting “indigenous to the United States” with “in the area that now constitutes the State of Hawaii” and drawing the conclusion that therefore ancient Hawaiians are protected by the plain language of NAGPRA while ancient Indians are not. While the Ninth Circuit Court opined that remains relating to tribes not extant in 1789 are not “Native American” within the meaning of NAGPRA, it would be more consistent with the purposes of the law to hold that remains prior to 1492 *are* Native American within the meaning of NAGPRA, a position stated by an amicus brief in an apparent “parade of horrors” argument against the Indians. *Ibid.* 357 F.3d 977, note 21.
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