Volume 123 | Issue 1 Article 1

12-17-2020

Toxic Bones: The Burdens of Discovering Human Remains in West Virginia's Abandoned and Unmarked Graves

J. William St. Clair
Marshall University

Robert Deal
Marshall University

TOXIC BONES: THE BURDENS OF DISCOVERING HUMAN REMAINS IN WEST VIRGINIA'S ABANDONED AND UNMARKED GRAVES

J. William St. Clair[1] *& Robert Deal*[2]

I. INTRODUCTION

This article pulls up and highlights a land use restriction, or financial burden, imposed upon West Virginia private real estate owners who inadvertently uncover human skeletal remains in unmarked graves on their property. In this state, those coming across human bones that historians and archaeologists eventually deem have no historical or archeological significance have a choice—pay the costs to have the bones removed and reinterred or cover the bones and use the property only as a cemetery in perpetuity.[3] This burden becomes more acute when comparing West Virginia's law to those of other states that require government officials, at public expense, to remove and re-bury discovered bones in a state cemetery set aside for that purpose. This leads one to consider whether West Virginia's law, as implemented, constitutes a Fifth Amendment "taking" of private property for public use without just compensation, that is, whther the state is imposing upon private property owners a de facto cemetery for the remains of unknown and insignificant persons.

It may be helpful to point out what this Article is not about. This Article does not address bones located in marked and designated burial sites, such as established cemeteries. It also does not take up the uncovering of Native

---

[1] Graduate Student, Marshall University. B.A., University of Virginia; J.D., Campbell University; M.Div., Vanderbilt University.

[2] Associate Professor of History, Marshall University. B.A., Syracuse University, 1980; M.A., Syracuse University, 1985; J.D., Villanova University, 1987; Ph.D., Temple University, 2010.

[3] W. VA. CODE ANN. §§ 29-1-8a, 37-13-1, -1a, -6 (West 2020).

American remains, or for that matter, any other remains that the scientific and cultural communities ultimately determine are historically or archeologically significant.[4]

Rather, this Article focuses on the inadvertent discovery of the bones of people who, through the passage of time, have been forgotten or abandoned, and who historians and archaeologists deem unremarkable.

II. WEST VIRGINIA LAW

On March 9, 1991, House Bill 2951 was passed by the West Virginia Legislature making it a crime to disturb human remains found in unmarked graves without a state-issued permit.[5] The law requires all persons finding any human skeletal remains on public or private property to immediately cease all activity, protect the area, and then contact the county sheriff, who, in turn, notifies the State Director of Historic Preservation.[6] If the Director eventually determines the site has no archeological or historical significance, then any removal of the discovered bones becomes subject to another law, that being a statute enacted in 1963 granting to the circuit courts of West Virginia jurisdiction to permit the removal, transfer, and reinterment of remains in graves located upon private property.[7] The nuts and bolts of the earlier law require property owners to hire lawyers to file lawsuits asking courts to approve the move and notify any next of kin to determine whether they have any objection.[8] If a court approves a request, then the owner may be required to hire a funeral director to disinter and reinter the bones in cemetery plots to be purchased by the private property owner, which would cost between $5,000 and $7,500 per body.[9] This

---

[4] Articles and court decisions addressing the discovery of human remains in unmarked graves focus on historically and archeologically significant bones, with special emphasis on Native American remains. After reviewing many journals and court reporters, it appears there are no reported instances of the potential difficulty raised in this Article. This may be due to economic considerations, such as property owners not being able to pay or justify the legal fees to litigate the matters. Another possibility is that owners ignore the law by overlooking bones that are discovered.

[5] W. VA. CODE ANN. § 29-1-8a(c) (West 2020). The statute defines an "unmarked grave" as any location where a human body has been buried for at least 50 years and the grave is not in a publicly or privately maintained cemetery. *Id.* § 29-1-8a(b)(2). Curiously, the statute does not specify what happens if it is determined that the remains have been buried for less than 50 years. *Id.*

[6] W. VA. CODE § 29-1-8a(d) has been discussed in three West Virginia Supreme Court decisions: *In re West*, 801 S.E.2d 237 (W. Va. 2017); *Hairston v. Gen. Pipeline Constr. Inc.*, 704 S.E.2d 663 (2010) (Hairston I); and *Gen. Pipeline Constr., Inc. v. Hairston*, 765 S.E.2d 163 (2014) (Hairston II). The provisions of the law were determined to be inapplicable to the facts of the three cases, all involving human remains located in marked cemeteries.

[7] W. VA. CODE ANN. §§ 29-1-8a(d), 37-13-1 (West 2020).

[8] *Id.* § 37-13-2.

[9] *Id.* § 37-13-5, -6. This estimate was provided on March 11, 2020 by the Executive Director of the West Virginia Funeral Directors and Crematory Operators Association, Robert C. Kimes, CFSP, CCO.

expense may seem manageable if the remains of only one person are found. However, if an abandoned cemetery is uncovered containing a number of skeletons, the costs can be exorbitant. For example, in 2015, workers at the University of Georgia uncovered the remains 105 people, most of whom were of African descent, presumably slaves.[10] The University removed the skeletons and moved them to a cemetery near campus.[11] A state institution may be able to absorb the costs of between $525,000 and $787,500 to make such a mass reburial.Private property owners probably do not have the same means, as the expense in some instances could exceed the value of the real estate.

Skelatal remains deemed insignificant do not have to be removed. Private property owners may elect to avoid the costs of removal by covering over the insignificant skeletal remains. However, in so doing, the owners would thereafter be required to treat the discovered burial sites as cemeteries, thereby limiting the use of those sites for that purpose alone.[12] As a consolation prize, the West Virginia statute provides that owners may apply to have the area where the unmarked graves are located deemed exempt from assessment for real property taxes.[13]

Because West Virginians are potentially burdened by accidental discovery of insignificant human remains on their property, one may ask: Why was the law enacted in the first place? The Legislature articulated its reasons in the opening paragraph of the 1991 statute wherein lawmakers declared that there was a real and growing threat to the safety and sanctity of unmarked human graves in West Virginia and that existing laws did not provide equal or adequate protection for all such graves. The Legislature further determined there was an immediate need to protect the graves of earlier West Virginians from desecration that had apparently been occurring with some frequency in the State.[14] No specific incidents of grave desecration are described in the statute, and no transcripts of legislative hearings exist wherein these infamous acts were discussed.[15]

---

[10] Brad Schrade, *After Missteps and Criticism, UGA to Honor Memory of Slaves on Campus*, ATLANTA J.-CONST. (Sept. 9, 2018), https://www.ajc.com/news/state—regional/after-missteps-and-criticism-uga-honor-memory-slaves-campus/dja1Kp61WyTrzzr7BNsRkI/.

[11] *Id.*

[12] W. VA. CODE ANN. § 37-13-1a.

[13] *Id.* § 29-1-8a(f).

[14] *Id.* § 29-1-8a(a).

[15] About the time the legislation was being considered, a rather controversial and contentious archeological excavation of an Adena Indian mound located in Mingo County, West Virginia, was being undertaken in the path of a state road construction project. Known as the Cotiga Mound, the project was marred by lawsuits filed by West Virginia archeologists who complained about the conditions impressed upon them by Native Americans who claimed ancestral lineage to those buried in the mound. The excavation ultimately operated under a Memorandum of Understanding with the West Virginia Division of Culture and History. *See* Council for W. Va. Archaeology v. W. Va. Division of Culture, No. 91-MISC-430 (Kanawha Cty. Cir. Ct. 1991) (Zakaib, J). See also Clement W. Meighan, *Some Scholars' Views on Reburial*, 57 AM. ANTIQUITY 704 (1992).

III. NOT ALL BONES ARE CREATED EQUAL

The West Virginia Legislature was apparently trying to be even-handed by intending to provide equal protection for all human remains, both those laid to rest in marked cemeteries as well as those buried in forgotten places of repose. Yet, this declaration of equality is inconsistent within the law itself, which treats significant bones differently than insignificant bones.[16] If the Director determines a burial site has historical and archaeological significance, then the Director has the power to protect the site by convening an *ad hoc* committee of experts and other interested persons to make a plan to remove, handle, study, and then either re-bury or curate the remains.[17] If, on the other hand, the Director deems the bones insignificant, then no experts are consulted.[18] Instead, the site is branded a cemetery, with the Director reporting to county officials the location of the site. It is then up to the private property owner to deal with the insignificant bones.[19]

Although the West Virginia legislature failed to live up to its stated intention of treating all human remains in an equal fashion, the resulting statutory distinction between significant and insignificant bones is in line with Western historical treatment of human remains. One may travel the world to see magnificent monuments marking the interment places of monarchs, military commanders, religious leaders, and intellectuals, such as the Great Pyramid of Giza, the Taj Mahal, Grant's Tomb, the Church of the Holy Seplechure, and le Tombe de Jim Morrison in the Cimetiére du Père Lachaise.

The remains of the less celebrated, even those considered significant enough to be buried in established and maintained cemeteries, have in past centuries often been later removed and tossed aside to make way for the more recently departed. British common and ecclesial law, upon which West Virginia common law is founded, viewed a body, with the passage of time and the process of decomposition, as becoming part of the land itself with no claim to the space it occupied.[20] It was routine in English churchyards to dig up and carry away the bones of those buried years before in order to reuse the plot for another burial.[21] This practice had the practical effect of avoiding the need to expand church cemeteries as the years went on. The practice was discussed in the case of *Gilbert*

---

16 W. VA. CODE ANN. § 29-1-8a(d) (West 2020).

17 *Id.* § 29-1-8a(e).

18 *Id.* § 29-1-8a(d).

19 *Id.* One could argue that this statutory scheme violates due process of law by being unconstitutionally vague in not defining nor describing what is meant by "archaeological significance." This suggestion is predicated on the decision in *United States v Diaz*, 499 F.2d 113 (9th Cir. 1974), wherein the Court found that the federal Antiquities Act, 16 U.S.C. § 433, was unconstitutionally vague because terms like "antiquity" were undefined.

20 C. Allen Shaffer, *The Standing of the Dead: Solving the Problem of Abandoned Graveyards*, 32 Cap. U. L. Rev. 479, 486 (2003).

21 *Id.*

v. Buzzard,[22] an 1821 decision wherein an English Court held that the right of burial extends in time no further than the period needed for complete dissolution of the dead body.[23] That case arose out of a husband's desire to bury his beloved deceased wife in an iron coffin so as to thwart notorious dissectionists of the time from body-snatching her for scientific purposes.[24] The parish church in charge of the cemetery objected because iron coffins slowed the "dissolution" of the human remains in the soil, thereby delaying the use of the plot for future burials.[25] The court was Solomon-like in its decision: The metal casket could be used, so long as the husband paid more for the plot because it could not be reused for a longer period of time.[26]

One may speculate that the 1991 Legislature's expressed desire to protect the graves of earlier West Virginians was born from an imagined communal sentiment of respect for the dearly departed. Such nostalgia was expressed with a flourish in a 1912 Supreme Court of Appeals of West Virginia decision:

> Always the human heart has rebelled against the invasion of the cemetery precincts; always has the human mind contemplated the grave as the last and enduring resting place after the struggles and sorrows of this world. When the patriarch Jacob was dying in Egypt, he spake unto the Israelites, and said: "I am to be gathered unto my people; bury me with my fathers in the cave that is in the field of Ephron, the Hittite, in the cave that is in the field of Machpelah, which is before Mamre, in the land of Canaan, which Abraham bought with the field of Ephron the Hittite for a possession of a burying place. There they buried Abraham and Sarah, his wife; there they buried Isaac and Rebekah, his wife; and there I buried Leah." Genesis [49]:29. Jacob regarded the grave as the never-ending resting place of his kindred. Ever since those distant days so has felt the human heart. Everything else has changed, but that sentiment remains steadfast [today].[27]

This proclamation of perpetual and eternal respect for the dead is exemplified in the Court's opinion, which honors the burial sites of important patriarchs and matriarchs of Judaism, Christianity, and Islam. To this day, one may travel to Hebron, located in the West Bank of Southern Israel, to visit the Tomb of the Patriarchs wherein the designated graves of Abraham, Isaac, and

---

22 161 Eng. Reports 761 (1821).

23 *Id.* at 768.

24 *Id.* at 763, 767.

25 *Id.* at 762.

26 *Id.* at 769.

27 Ritter v. Couch, 76 S.E. 428, 430 (W. Va. 1912).

Jacob, with their wives, Sarah, Rebekah, and Leah, are located.[28] In contrast, the burial sites of slaves serving these prominent people are not designated, instead being abandoned, forgotten, and now lost in the sands of time. This differentiation in treatment reveals that public leaders, such as jurists, may want to harken back to an imagined past of communal respect accorded to all who passed before. However, the down-in-the ground communal sentiment was that the remains of insignificant people, as well as significant people later forgotten and removed to make way for others, were never actually held in high esteem.

Rather than reflecting, in the wake of rampant grave desecration, a renewal of the sentiment expressed in *Ritter*, the more likely impetus for the 1991 legislation was the federal enactment the previous year of the Native American Grave Protection Act ("NAGPRA"), which seeks to prevent desecration and removal of Native American skeletal and funerary remains found under federal and tribal lands.[29] It appears there was a concerted effort to extend the effect of NAGPRA beyond the confines of federal and territorial lands because West Virginia was one of many states enacting laws to protect skeletal remains found in unmarked graves in the immediate wake of NAGPRA.[30] Although the public interest in these new laws was directed at protecting Native American remains, some states' statutory schemes, like West Virginia's, went further by protecting all skeletal remains, Native American and otherwise. From a practical standpoint, the claim of equality supports the law's requirement to cease and report any bones that are unearthed, thereby allowing for their examination. The origin and identity of discovered human bones cannot be determined unless and until they are studied by experts. The detailed state protocols addressing the removal and disposition of Native American and other historically and archeologically significant discoveries are the focus of the statutory scheme. How to deal with bones that experts eventually consider average, dull, and uninteresting seems to be a secondary issue to which not much thought was given. While the West Virginia legislature required that all bones be protected, in practice the law also effectively divided skelatal remains between those worthy of study and the expenditure of state resources and those bones allowed to remain in obscurity as a burden on the unfortunate private land owner upon whose property they were discovered.

IV. OTHER STATE LAWS

The lack of uniformity among the states in addressing discovered human remains following NAGPRA is perplexing when one considers that a

---

[28] The burials are designated as being located in the Cave of Machpelah, al-Haram al-Ibrahimi. *Tombs of the Patriarchs, Hebron*, SACRED DESTINATIONS, www.sacred-destinations.com/israel/hebron-tombs-of-the-patriarchs (last visited Dec. 14, 2020).

[29] 25 U.S.C.A. § 3002 (West 2020).

[30] *See State Burial Law Project*, AM. U. WASH. U. CO. L., www.wcl.american.edu/burial (last visited Nov. 30, 2020).

commission has been working for over 100 years to bring uniformity to state laws addressing common issues. The Uniform Law Commission was organized in 1892 to provide states with non-partisan legislation that seeks to bring clarity and stability to critical areas of state statutory law. The Commission has proposed laws affecting human remains, one being the Uniform Anatomical Gift Act in 2006, which almost all states have adopted.[31] Yet, the Commission has not proposed, much less have the states adopted, a uniform law concerning disposition of found human remains.[32]

As a consequence, an awkward patchwork of laws has developed, varying remarkably, in dealing with the discovery of insignificant human remains on private property. On one end of the spectrum is Connecticut, Oklahoma, and Illinois, which shift all responsibility to the state to handle all discovered bones, both significant and insignificant, with public funds being used to remove and re-bury them in a state-owned cemetery dedicated for that purpose. The Connecticut statute states explicitly,

> The provisions of this section shall not be construed to require the owner of private lands on which human skeletal remains are found to pay the costs of excavation, removal, analysis or reburial of such remains.[33]

On the other end of the spectrum are states like West Virginia and Indiana, which foist the costs of removal and reinterment of insignificant remains squarely on the backs of private property owners, who may, in the alternative, be burdened with maintaining their land as cemeteries for unknown persons.[34]

V. FIFTH AMENDMENT "TAKING"

One can sense the frustration experienced by West Virginia property owners learning the extent of the responsibilities heaped upon them by the state when insignificant human bones are discovered on their property. They did not know the burials were hidden under the land when they acquired the real estate, have no connection with the deceased, and yet, are responsible for the remains merely because the state determined in 1991 that all bones unearthed from

---

[31] West Virginia adopted the Revised Anatomical Gift Act in 2008, W. VA. CODE ANN. § 16-19-1 (West 2020), to facilitate donations of all or part of a human body, after the donor's death, for the purpose of transplantation, therapy, research, or education.

[32] Law review articles urging states to adopt model legislation have not gained much traction. This may be due in part to no model law being proposed for consideration. *See* Patty Gerstenblith, *Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings Doctrine After* Lucas, 13 ST. THOMAS L. REV. 65, 108 (2000); Gabrielle Paschall, *Protecting Our Past: The Need for Uniform Regulation To Protect Archaeological Resources*, 27 T.M. COOLEY L. REV. 353, 366 (2010).

[33] CONN. GEN. STAT. ANN. § 10-388(e) (West 2020); *see also* OKLA. STAT. ANN. tit. 21, § 1168.5 (2020); ILL. ADMIN. CODE tit. 17, § 4170.400 (2020).

[34] 312 IND. ADMIN. CODE 22-3-9(e) (West 2020).

unmarked graves during development are entitled to protection equal to those buried in established cemeteries. It seems, then, that this possibility resembles property owners discovering toxic waste dumps on their property. In those instances, owners are responsible to abate, by removal or encapsulation, the hazardous materials even though the owners did not dump the waste and had no actual knowledge the toxins were present when they acquired the real estate.[35] It is easy to see the public interest in requiring unwitting property owners to clean up hazardous waste threatening the environment and public health.[36] In contrast, discovered skeletal remains do not pose a similar threat to public health or the surroundings. Yet the "clean up" requirements for insignificant, found bones treat the remains as if they are essentially an environmental hazard—like toxic bones.[37]

But human bones are not, in fact, toxic, but rather, are inert mineralized material that pose no environmental threat. This distinction is important in determining that West Virginia's laws regarding insignificant human remains, as applied, constitute a regulatory taking of real property, entitling owners to compensation from the state.

Both the Constitution of the United States and of West Virginia provide that private property shall not be taken or damaged for public use without just compensation.[38] A taking claim based on the government's imposition of burial sites on private property is not a farfetched idea following a recent decision rendered by the Supreme Court of the United States in *Knick v. Township of Scott*.[39] In that decision, the Court examined an ordinance requiring all cemeteries within a township, both on public and private property, to be kept open and accessible to the general public.[40] Additionally, the ordinance permitted township officers to enter private property to determine whether graves are located thereon. In April 2013, a township officer entered Knick's property without an administrative warrant and identified certain stones as grave markers, thereafter citing Knick for violating the ordinance.[41] Knick disputed that a cemetery existed on her property and filed a lawsuit to challenge the ordinance on various grounds, one of which was a Fifth Amendment taking claim.[42]

---

35 For example, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C.A. § 9607 (West 2020), is the primary federal statute that imposes strict liability for the clean-up of hazardous substances upon a current owner of property.

36 Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

37 Prospective buyers of commercial real estate routinely perform Phase I Environmental Site Assessments in order to avoid strict liability under CERCLA and because many lenders require a Phase I Assessment. Archaeological site assessments are also performed, but generally only on federally or state funded projects, like new road construction projects.

38 U.S. CONST. amend. V; W. VA. CONST. art. III, § 9.

39 139 S. Ct. 2162 (2019).

40 *Id.* at 2164.

41 *Id.*

42 *Id.* at 2168.

Although the decision primarily addressed a procedural question,[43] it appears the Court is willing to scrutinize governmental burdens foisted upon private property owners to be responsible for unmarked graves on their lands.

The Fifth Amendment guarantee that private property shall not be taken for a public purpose without just compensation is designed to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[44] The Supreme Court identified three factors to consider in determining whether a particular set of regulations affect an unfair shift of a public interest to be borne by a private property owner: (1) whether the regulations serve a legitimate government purpose and whether the means chosen are rationally or substantially related to the purpose; (2) the extent to which the regulations interfere with a reasonable and distinct investment-backed expectation of the owner; and (3) the extent to which the regulations deprive the owner of the value or the economically viable use of the land.[45]

The 1991 West Virginia statutory scheme provides a methodology to decide on an *ad hoc* and case-by-case basis the specific human remains the government deems it has a legitimate interest in protecting. The State Director of Historic Preservation is the government determiner who, after considering the advice of historical and archaeological professionals, decides and sorts the significant bones from the insignificant.[46] Therefore, the Director ultimately decides that certain remains are a matter of public interest. Such bones may be those located in Native American burial mounds, as well as old bones, such as those more than 500 years old. These are examples of rare and invaluable finds worthy of public protection because they can provide insight into ancient civilizations, thereby allowing us to reconstruct the past.

But can the same be said for the remains of, say, an unknown person who happened to die while passing through rural West Virginia 150 years ago? Fellow travelers may have buried their deceased companion in a shallow grave some distance from the trail, erected a crude wooden cross, and then moved on. If a present-day private landowner unearths those remains while developing the property, then the Director has an interest in investigating the remains on site to determine whether such remains are significant. If, however, experts later conclude the discovered bones are unremarkable and insignificant, then the public interest in those bones, as decided by the State's authorized representative,

---

43 The Court's decision in *Knick* overruled its prior decision in *Williamson County Regional Planning Commissio'n v. Hamilton Bank*, 473 U.S. 172 (1985), which held that property owners must seek just compensation under state law in state court before bringing a federal takings claim under 42 U.S.C. § 1983. The *Knick* decision removed that requirement so that private property owners no longer need to exhaust state remedies before filing a federal claim for violation of their constitutional rights under 42 U.S.C. § 1983. *Knick*, 139 S. Ct. at 2178.

44 Armstrong v. United States, 364 U.S. 40, 49 (1960).

45 Penn Centr. Trans. Co. v. City of New York, 438 U.S. 104, 124 (1978).

46 W. VA. CODE ANN. §29-1-8a(d) (West 2020).

comes to an end. After such a decision, the responsibility for the insignificant bones shifts from public authorities to private landowners. Yet, because the 1991 Legislature expressed a nostalgic sentiment that all human burials be accorded equal treatment and respect, private landowners are burdened with the responsibility to either remove or care for the insignificant bones, which the government has declared have no significant public interest.

The law of the land has long recognized that land-use regulations do not effect a taking if they substantially advance legitimate state interests and do not deny owners economically viable use of their lands.[47] The Court has not elaborated on the standards for determining what constitutes a "legitimate state interest" or on the nexus between the regulation and the interest to satisfy the requirement that the former "substantially advance" the latter. The Supreme Court has suggested that a range of governmental purposes and regulations satisfy this requirement, with classic grounds for using such government power including the protection of the environment, public health, safety or morals, and the economic welfare of our society.[48]

However, there is a limit to the extent that government regulations serve "a legitimate state interest." The Supreme Court of the United States has held that the Fifth Amendment "is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking."[49] A regulatory taking cannot survive a challenge if it is "so arbitrary or irrational" that it "fails to serve any legitimate governmental objective."[50] Therefore, if a government action is determined to be impermissible, for instance, because it fails to meet the "public use" requirement, then in such instances the inquiry is ended. No amount of compensation can authorize such governmental action.[51]

It is clear that West Virginia's law addressing discovered human skeletal remains is a land use regulation, beginning with the requirement that all work cease in the area where bones are unearthed. This initial requirement seems to fall within the ambit of legitimate government interests because the significance of a set of bones cannot be determined until after they are examined in place by experts. After this examination, the government's continuing legitimate interest in the discovered skeletal remains turns on whether the Director deems them significant or insignificant. As shown before, some bones are simply more equal than others. Significant skeletal remains are a public

---

47 Agins v. Tiburon, 447 U.S. 255, 260 (1980).

48 *See, e.g.*, *id.*, 447 U.S. at 260–62 (scenic zoning); *Penn Centr. Trans. Co.*, 438 U.S. at 142 (landmark preservation); Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (residential zoning). *See also* Jan G. Laitos & Richard A. Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV. ENV'T L. REV. 1, 66 (1987).

49 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (2005).

50 *Id.*

51 Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275, 288 (4th Cir. 1998).

interest, while insignificant bones are now, and have been, historically of no public concern. Therefore, if the West Virginia government was brought before a court, its lawyers would be hard pressed to make a credible showing that the state has a legitimate interest in protecting insignificant human bones, much less being able to show that burdening individual private property owners is the appropriate means to substantially advance that interest, especially when other states do not impose a similar burden on their citizens.[52]

VI. CONCLUSION

Digging up a skull, femur, or humerus while installing a new water line on one's property would be a horrific experience to many owners. But that experience will be only the beginning of a much longer, protracted, and costly nightmare, especially if the bones are deemed insignificant. An ethically suspect suggestion to landowners wanting to avoid the prospect of inadvertently discovered bones later being determined inconsequential is to keep a stash of authentic Native American funerary objects on hand, which may be tossed discreetly into the burial site, hoping that experts will then consider the area archaeologically significant, triggering the state's obligation to remove the bones. An alternative suggestion that avoids such chicanery is to engage an attorney to pursue a claim challenging the state's right to impose upon private landowners the public responsibility to deal with and manage insignificant bones.

---

[52] Private property owners prescient enough to buy an owner's title insurance policy could also make an additional claim under that policy, alleging that the insurance company must pay the costs, or pay the loss, caused by the discovery of insignificant human remains on their property. For example, First American Title Owners Title (ATLA WV 06-17-2006) includes within covered risks the following: "Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without knowledge." West Virginia's law imposing a burden on unknowing property owners could be construed as a taking by a governmental body. Therefore, in addition to asserting a claim against the state for violation of constitutional rights, owners with such title policies could also assert a similar claim against their insurer.