1

The Original American Governments

Babylon, Egypt, and Greece are among the first images conjured by "ancient civilizations." North America is seldom considered; indeed, North America's Indigenous inhabitants were widely considered "uncivilized" until the early twentieth century. However, North America had numerous civilizations prior to European arrival. These Indigenous North American civilizations developed complex governance systems, engaged in extensive social planning, and created long-range commercial networks. This chapter explores early American societies.

1.1 THE FIRST AMERICANS

For hundreds of years, Europeans have wondered how Indians arrived in the Americas. In 1590, Fray José de Acosta hypothesized that early humans followed wild game from Asia into the Americas.[1] David Hopkins transformed the idea. Hopkins' 1967 book, *The Bering Land Bridge*, helped validate the existence of a land bridge linking Asia to North America.[2] Ever since then, the Bering Strait Theory (BST) has been widely accepted. According to the theory, people crossed the land

[1] *History of the Bering Land Bridge Theory*, U.S. Nat'l Park Serv., www.nps.gov/bela/learn/historyculture/the-bering-land-bridge-theory.htm [https://perma.cc/AMZ6-XH4D].

[2] *David M. Hopkins Beringia Award*, U.S. Nat'l Park Serv., www.nps.gov/subjects/beringia/hopkins.htm [https://perma.cc/3VNB-TY9G].

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bridge connecting Russia to Alaska approximately 13,000 years ago.[3] More recent evidence casts serious doubts on the BST.[4]

Settlements in the Americas predate the BST. For example, the Cooper's Ferry site in Idaho is 16,000 years old. The archaeological finds at the site include stone tools and butchered animals. People likely reached Cooper's Ferry by migrating from Asia along the coast then traveling down the Columbia River.[5] Other sites in the present-day United States predate the BST.[6] But the strongest archaeological blow to the BST is Monte Verde. This Chilean site was inhabited by humans between 14,500 and 18,500 years ago.[7] These pre-Clovis sites indicate early humans entered the Americas by tracing the Pacific coast, known as the Kelp Highway Hypothesis.[8] Following the coast is a logical migratory path because early humans had the ability to acquire marine food sources.[9]

Genetics have also undermined the mainstream BST. DNA samples suggest humans entered North America at least 20,000 years ago.[10] Furthermore, DNA indicates three separate human migrations rather than the one-time migration under the BST.[11] Most interestingly, the DNA of Indigenous Amazonians is conclusively linked to the DNA of

[3] Tia Ghose, *Humans May Have Been Stuck on Bering Strait for 10,000 Years*, LiveScience (Feb. 27, 2014), www.livescience.com/43726-bering-strait-populations-lived.html [https://perma.cc/LAQ8-BT9B]; Fen Montaigne, *The Fertile Shore*, Smithsonian Mag. (Jan. 2020), www.smithsonianmag.com/science-nature/how-humans-came-to-americas-180973739/ [https://perma.cc/87YV-MGQT].

[4] Montaigne, *supra* note 3.

[5] Lizzie Wade, *First People in the Americas Came by Sea, Ancient Tools Unearthed by Idaho River Suggest*, Science (Aug. 29, 2019), www.sciencemag.org/news/2019/08/first-people-americas-came-sea-ancient-tools-unearthed-idaho-river-suggest [https://perma.cc/BKX6-EWTJ].

[6] Jason Daley, *People Were Messing Around in Texas at Least 2,500 Years Earlier Than Previously Thought*, Smithsonian Mag. (July 25, 2018), www.smithsonianmag.com/smart-news/people-were-texas-3000-years-earlier-previously-thought-180969743/ [https://perma.cc/VH2E-MTAM]; Montaigne, *supra* note 3.

[7] Ann Gibbons, *Oldest Stone Tools in the Americas Claimed in Chile*, Science (Nov. 18, 2015), www.sciencemag.org/news/2015/11/oldest-stone-tools-americas-claimed-chile [https://perma.cc/HQF7-J4P9].

[8] K. Kris Hirst, *Kelp Highway Hypothesis*, ThoughtCo. (updated July 20, 2019), www.thoughtco.com/kelp-highway-hypothesis-171475 [https://perma.cc/C5E5-FF57].

[9] Montaigne, *supra* note 3.

[10] *Id.*

[11] *Native American Populations Descend from Three Key Migrations*, UCL News (July 12, 2012), www.ucl.ac.uk/news/2012/jul/native-american-populations-descend-three-key-migrations [https://perma.cc/DNM8-XZA4].

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Indigenous Australians and Melanesians.[12] The language of the native inhabitants of Easter Island, off the coast of Chile, is also more closely related to Polynesian language groups than Indigenous South American languages.[13]

Although Australasian DNA and artifacts from Monte Verde proffer the possibility of an ancient oceangoing voyage, most archaeologists reject this idea.[14] Instead, most experts believe humans crossed from northern Asia into the Americas. Proponents of the Kelp Highway Hypothesis, however, do believe watercrafts were used to follow the shoreline – which would have extended much farther into the Pacific Ocean thousands of years ago.[15] According to the hypothesis, people sustained themselves by collecting the ample food resources along the coast. After entering North America, the earliest people on the continent would have been able to avoid group conflicts by simply moving to unclaimed lands.[16] This begs the question: Why did the very first Americans migrate south so rapidly?

The answer may never be known, but the Americas' earliest arrivals had the same inquisitive minds as contemporary humans. Hence, people may have merely been eager to explore uncharted lands.[17] Whatever the reason, science has made clear that the ancestors of American Indians did not all enter North America simultaneously. What's more, Indians were developing civilizations at similar rates as people in other parts of the world.

1.2 EARLY NORTH AMERICAN CIVILIZATIONS

Ancient civilizations, such as Sumer in Mesopotamia, are well-known. Sumer formed around 4500 BCE.[18] Watson Brake, located in northern Louisiana, has been inhabited since approximately 4000 BCE, and by the

[12] Michael Price, *Earliest South American Migrants Had Indigenous Australian, Melanesian Ancestry*, SCIENCE (Mar. 29, 2021), www.sciencemag.org/news/2021/03/earliest-south-american-migrants-had-australian-melanesian-ancestry [https://perma.cc/A7KF-XCK4].

[13] *Easter Island*, ENCYCLOPEDIA.COM, www.encyclopedia.com/places/australia-and-oceania/pacific-islands-political-geography/easter-island [https://perma.cc/QBQ8-6Y74].

[14] Montaigne, *supra* note 3.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Joshua J. Mark, *Sumer*, WORLD HIST. ENCYC. (Apr. 28, 2011), www.worldhistory.org/sumer/ [https://perma.cc/3PLU-YKS8].

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year 3500 BCE, Watson Brake's inhabitants began constructing mounds. There is evidence of minor agriculture, but Watson Brake's residents subsisted primarily from marine life,[19] as well as deer, turkey, and small mammals.[20] However, no evidence of long-distance trade or other commercial activity has been discovered at Watson Brake.[21]

Around 2000 BCE, Poverty Point became North America's first great trading center. Poverty Point is located in northeastern Louisiana along Macon Ridge. The elevated ridge kept Poverty Point residents dry despite the site's proximity to major waterways. These waterways served as natural infrastructure to facilitate commerce, and Poverty Point was a vibrant commercial hub. Although Louisiana does not contain an abundance of natural stones, more than seventy tons of rocks and minerals were transported to Poverty Point during its existence. These include both stone in its raw form and premanufactured goods such as spear points, soapstone bowls, and jewelry. Items made their way to Poverty Point from as far away as Iowa and the Appalachian Mountains.[22]

The high volume of long-distance trade transformed Poverty Point into North America's first city. While most early Americans were still nomadic, hundreds of people resided at Poverty Point throughout the year. Hundreds of people living together in relative harmony requires a governance structure, so the governance structure at Poverty Point had to be sophisticated. There is no other way to explain the construction of the massive mounds there. The largest mound is 72 feet tall, 710 feet long, and 660 feet wide.[23]

These mounds were constructed solely with Stone Age tools and human muscle – this required moving approximately 15.5 million baskets filled with soil.[24] Constructing each of the mounds at Poverty Point took roughly twenty-five generations. A significant degree of

[19] Rebecca Saunders, *Watson Brake Archaeological Site*, 64 PARISHES (updated Feb. 18, 2022), https://64parishes.org/entry/watson-brake-archaeological-site [https://perma.cc/U798-26RN] ("Fish, mussels, and aquatic snails were the mainstays of the diet.").

[20] Lori Tucker, *Ouachita River Mounds: A Five Millennium Mystery*, FOLKLIFE IN LA., www.louisianafolklife.org/LT/Articles_Essays/ouachita_mds.html [https://perma.cc/GS2Z-M4LK].

[21] Amélie A. Walker, *Earliest Mound Site*, ARCHAEOLOGY MAG. ARCHIVE (Jan.–Feb. 1998), https://archive.archaeology.org/9801/newsbriefs/mounds.html [https://perma.cc/3Z6S-KJVM].

[22] *Poverty Point*, UNESCO, at 5–6, www.crt.state.la.us/dataprojects/archaeology/povertypoint/assets/poverty-point-pdf-1.03.pdf [https://perma.cc/J7Z9-RV6R].

[23] *Id.* at 10.

[24] *Id.*

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planning and social organization is required to orchestrate a project of this magnitude. For example, people cannot simultaneously procure food and build mounds. This means Poverty Point's inhabitants understood the concept of division of labor. Moreover, designing a multigeneration project without written plans requires incredible vision and communication skills.

Commercial reach and its grand earthen mounds made Poverty Point culturally influential.[25] Thus, people visited it for both economic and spiritual reasons. On the economic front, Poverty Point's comparatively large population provided increased opportunities for trade.[26] On the cultural front, people were likely mystified by the sizable mounds and associated this with divine power. The exact nature of spiritual and other cultural influence is difficult to discern due to the absence of written records; nevertheless, Poverty Point was undoubtedly a gathering place. Its great plaza appears to be a large ceremonial site, containing circles more than 200 feet across and postholes over two feet in diameter.[27]

By the year 600 BCE, Poverty Point was no longer a significant city. No Indigenous North American society would match Poverty Point's grandeur for another thousand years. However, this does not mean societies completely vanished from the continent after the decline of Poverty Point. The archaeological record shows multiple cultures continued thriving elsewhere on the continent. For example, Snaketown, near modern-day Phoenix, emerged around 300 BCE but would not reach its peak until approximately 1000 CE. The Hopewellian culture also began to take shape during the year 200 BCE, which would eventually produce several significant cities.[28]

The Hopewell culture gave rise to the largest and most significant precontact North American site, Cahokia, located just across the Mississippi River from present-day St. Louis, Missouri. Cahokia formed around the year 700 CE. Its population was likely around 1,000 people at this time, but by 1000 CE, Cahokia's population exceeded 40,000 people. This means Cahokia was larger than most European cities of the era, including London and Paris. This large population was extremely cosmopolitan as DNA evidence reveals approximately one-third of Cahokia's

[25] *Id.* at 2.
[26] *Id.* at 9.
[27] *Id.* at 8.
[28] Timothy R. Pauketat & Kenneth E. Sassaman, The Archaeology of Ancient North America 427 (2020).

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inhabitants were from places as far away as the Gulf of Mexico, the Rocky Mountains, and the Great Lakes.

Cahokia's large population was well-organized. Proof of social organization comes from the city's size. The city covered six square miles and was filled with massive earthworks. Cahokia's largest earthwork, the largest precontact structure in the continental United States, is known as Monks Mound. Monks Mound is larger than the Great Pyramid at Cheops.[29] It rises 100 feet above the ground, is nearly 800 feet wide, and is over 1,000 feet long.[30] More than 100 smaller mounds lie within Cahokia's borders. Tools were stone; plus, there were no beasts of burden. Accordingly, constructing even the smallest of these mounds required a considerable labor force working nonstop for a decade.[31] In addition to the earthworks, Cahokia contained large buildings such as the capitol building atop Monks Mound, which was 100 feet long, 50 feet wide, and 50 feet tall.[32] Some mounds were also encircled by defensive palisades consisting of approximately 20,000 logs.[33] At Monks Mound, guard towers sat atop the palisade.[34]

Cahokian society was likely highly stratified. Monks Mound was probably where the Cahokian elite lived, and Cahokian leaders clearly had the power to decree death sentences as there are mass graves that suggest human sacrifice.[35] The planning and logistics necessary for Cahokia's sizable construction projects seem impossible without centralized government. Indeed, Cahokia had zoned neighborhoods.[36] Moreover, the Cahokian government likely provided subsidies to laborers.[37] These

[29] Adam Crepelle & Walter E. Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 WASH. & LEE J. CIV. RTS. & SOC. JUST. 315, 341 (2017).

[30] *Mound 38 – Monks Mound*, CAHOKIA MOUNDS MUSEUM SOC'Y (Oct. 22, 2015), https://cahokiamounds.org/mound/mound-38-monks-mound/#:~:text=gave%20an%20approximate%20north%2Dsouth,much%20of%20eastern%20North%20America [https://perma.cc/7VSE-44VW].

[31] Joshua J. Mark, *Cahokia*, WORLD HIST. ENCYC. (Apr. 27, 2021), www.worldhistory.org/cahokia/ [https://perma.cc/GF7D-GQAY].

[32] William I. Woods, *Cahokia Mounds*, BRITANNICA (updated Feb. 9, 2016), www.britannica.com/place/Cahokia-Mounds [https://perma.cc/H5SZ-V2X8].

[33] Joseph A. Tainter, *Cahokia: Urbanization, Metabolism, and Collapse*, FRONTIERS IN SUSTAINABLE CITIES, Dec. 2019, at 2, www.frontiersin.org/articles/10.3389/frsc.2019.00006/full [https://perma.cc/2PF3-L6AX].

[34] Kathy Weiser, *Cahokia Mounds, Illinois – Largest Archaeological Site in North America*, LEGENDS OF AM. (updated Apr. 2020), www.legendsofamerica.com/il-cahokia/ [https://perma.cc/G3M9-RL5S].

[35] Tainter, *supra* note 33, at 11.

[36] *Id.* at 2.

[37] *Id.* at 13.

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subsidies may have contributed to Cahokia's large immigrant population. After all, life in a small, ancient society can be fraught with uncertainty over meeting life's basic needs. Trading labor for a meal would have been a rational decision.

The lower classes of Cahokia presumably worked hard; however, Cahokia provided many benefits outside of a steady meal. Cahokia's large population offered individuals the opportunity to specialize in a particular occupation,[38] and specialization leads to higher quality goods and services. The large population also meant there were substantial market opportunities. In fact, goods from as far west as the Pacific Ocean,[39] as far east as the Atlantic Ocean, as far south as the Gulf of Mexico, and at least as far north as the Great Lakes,[40] reached Cahokia. In addition to commercial benefits, Cahokia's social life was vibrant.

Cahokia's social and spiritual magnetism may have been more enticing than the city's economic opportunities,[41] as there appears to have been no permanent marketplace within the city.[42] Some contemporary researchers think ancient religions believed water was a bridge between the living and the dead; thus, Cahokia's watery geography could have been theologically significant.[43] If Cahokia's leaders were thought to be divinely imbued, this would have justified their authority over the populace. Beyond religion, there were tremendous social events, including athletic contests, at Cahokia's Grand Plaza, which could hold more than 10,000 people at once. There is evidence of 2,000 deer being consumed at a single event, and considering the deer were not farmed, this is a herculean logistical feat.[44]

Cahokians ate well, too, as evidence shows their diet was diverse. Fish was the primary source of protein for Cahokians, but they also

[38] *Id.* at 7–8.

[39] *Intertribal Trade*, TrailTribes.org, https://trailtribes.org/kniferiver/intertribal-trade.htm [https://perma.cc/XWY2-QCJJ].

[40] *Mississippian Economy Trade*, Ill. St. Museum, www.museum.state.il.us/muslink/nat_amer/pre/htmls/m_trade.html [https://perma.cc/N7GN-5WB].

[41] Matthew Wills, *The Mysterious Pre-Columbian Settlement of Cahokia*, JSTOR Daily (Aug. 15, 2017), https://daily.jstor.org/the-mysterious-pre-columbian-settlement-of-cahokia/ [https://perma.cc/CZX4-FAWH].

[42] Jen Rose Smith, *The US' Lost, Ancient Megacity*, BBC Travel (Apr. 13, 2021), www.bbc.com/travel/article/20210412-the-us-lost-ancient-megacity [https://perma.cc/2HMJ-2N3U].

[43] *Id.*

[44] *Id.*

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consumed deer, small mammals, birds, and reptiles.[45] Cahokians grew a variety of plants, and diversity offers nutritional benefits. But perhaps more importantly, variety provides food security because multiple different crops are unlikely to fail simultaneously.[46] Although maize eventually became the predominant crop,[47] Cahokians continued gathering wild plants too,[48] but even wild crops were aided by human intervention such as controlled burnings, which help rid the land of undesirable vegetation and pests.[49] Trade was another source of food. For example, Cahokians consumed large quantities of yaupon beverages for ceremonial purposes. Yaupon is North America's only indigenous source of caffeine, and the plant primarily grows in what is today the southeastern United States.[50]

Cahokia's influence began to fade around the year 1300. One possible explanation is climate change. Cahokia's population boomed during a period when the climate was particularly good for agriculture. The pendulum swung to floods and droughts during the 1300s. As a result, supplying a large population with food became increasingly difficult. Similarly, the sizable population strained local resources. There is evidence, though it is debated, that Cahokia's demand for timber diminished forests and triggered natural consequences, including soil erosion and depleted wild game. Another possibility is war. After all, Cahokians would not have built fortifications if there was no external threat.[51] Whatever the causes, Cahokia was largely abandoned by the year 1400, although people began repopulating the area by the year 1500.[52]

Around the same time Cahokia flourished in the American heartland, Chaco Canyon bloomed in the American Southwest. Though

[45] Tainter, *supra* note 33, at 9; *Mississippian Economy Food*, Ill. St. Museum, www.museum.state.il.us/muslink/nat_amer/pre/htmls/m_food.html [https://perma.cc/9S7Z-JKRN].

[46] Tainter, *supra* note 33, at 9.

[47] *Id.*; *Mississippian Economy Food*, *supra* note 45.

[48] *Mississippian Economy Food*, *supra* note 45.

[49] Tainter, *supra* note 33, at 9–11; Jane Braxton Little, *Fire and Agroforestry Revive California Indigenous Groups' Traditions*, Mongabay (Oct. 11, 2018), https://news.mongabay.com/2018/10/fire-and-agroforestry-revive-california-indigenous-groups-traditions/ [https://perma.cc/N565-UUUH].

[50] *Yaupon, Plant Fact Sheet*, U.S. Dep't of Agriculture, https://plants.usda.gov/DocumentLibrary/factsheet/pdf/fs_ilvo.pdf [https://perma.cc/75Z8-ZN9Q].

[51] Woods, *supra* note 32.

[52] Yasmin Anwar, *New Study Debunks Myth of Cahokia's Native American Lost Civilization*, Berkeley News (Jan. 27, 2020), https://news.berkeley.edu/2020/01/27/new-study-debunks-myth-of-cahokias-native-american-lost-civilization/ [https://perma.cc/54DM-7Z8A].

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people have lived in the Four Corners region since at least 300 BCE,[53] the population surged in approximately 875 CE. Monumental construction projects began a century later.[54] The buildings at Chaco Canyon were among the largest in North America until the late 1800s.[55] Some of the buildings were five stories tall and had up to 700 rooms.[56] In fact, Pueblo Bonito was the world's largest apartment building until 1882.[57] Constructing these buildings required importing more than 200,000 trees from over 50 miles away – with no horses, vehicles, or major waterway.[58] Moreover, the structures at Chaco Canyon are largely stone, which required tremendous effort to move by human muscle alone. Aside from its scale, the buildings are perfectly aligned with the cardinal directions and tracked astrological events, including solstices and the nearly twenty-year cycle of the moon.[59]

Logistical challenges did not end with construction. Chaco Canyon was located in the middle of a high desert climate. Scorching hot days combined with bone-chillingly cool nights are suboptimal conditions for human habitation.[60] Modern research suggests only about 100 acres of land at Chaco Canyon were farmable, and even with wild game, the local resources would barely have been able to sustain a population of

[53] Winston Hurst & Jonathan Till, *The Ancestral Puebloan Period: The Ancestral Puebloan Period in Utah*, UTAH HISTORY TO GO, https://historytogo.utah.gov/anasazi/ [https://perma.cc/7V5U-X67A].

[54] Owen Jarus, *Chaco Culture: Pueblo Builders of the Southwest*, LIVESCIENCE (May 22, 2017), www.livescience.com/59218-chaco-culture.html [https://perma.cc/39S5-NLY2].

[55] Kathy Weiser-Alexander, *Chaco Canyon, New Mexico – Home of Ancestral Puebloans*, LEGENDS OF AM. (updated July 2021), www.legendsofamerica.com/nm-chacocanyon/ [https://perma.cc/8FSR-XTL8].

[56] Anna Sofaer, *The Primary Architecture of the Chacoan Culture: A Cosmological Expression*, *in* ARCHITECTURE OF CHACO CANYON, NEW MEXICO 225 (Stephen H. Lekson ed., 2007); *Chaco Canyon*, EXPLORATORIUM, www.exploratorium.edu/chaco/HTML/canyon.html [https://perma.cc/GY5B-T2CC].

[57] John W. Ragsdale, Jr., *The Rise and Fall of the Chacoan State*, 64 UMKC L. REV. 485, 495 (1996).

[58] Sofaer, *supra* note 56, at 227.

[59] *Id.* at 230–44; Anna P. Sofaer & Rolf M. Sinclair, *Astronomical Markings at Three Sites on Fajada Butte*, SOLSTICE PROJECT RSCH., https://solsticeproject.org/wp-content/uploads/2021/12/21-astrofajada2028198329.pdf [https://perma.cc/89PN-5474]; Benjamin Oswald, *Chaco Canyon*, WORLD HIST. ENCYC. (June 9, 2018), www.worldhistory.org/Chaco_Canyon/ [https://perma.cc/2NTP-DQMQ].

[60] *Weather in Chaco Canyon*, U.S. NAT'L PARK SERV., http://npshistory.com/brochures/chcu/weather-2006.pdf [https://perma.cc/FH7A-AZCT].

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2,000 people.[61] Nevertheless, 2,000 people is the lowest estimate for Chaco Canyon's population. The maximum estimate was 6,000 people.[62] Thus, extensive trade was necessary for Chacoans to comfortably survive, and there is abundant evidence of Chacoan trade. Items such as macaw feathers and cacao beans from more than a 1,000 miles away were present in the ancient city.[63]

The food supply is only one of Chaco Canyon's mysteries. At the most fundamental level, how were Chacoans able to produce such monumental structures? Chacoans were preliterate, and erecting the buildings in the middle of the desert required an extreme amount of intergenerational logistics.[64] There is also the question of why people with such sophisticated engineering skills would choose to build in the middle of the desert. Chaco Canyon's purpose is also unclear. Some believe it served as the seat of a military empire. Others think it was primarily a commercial hub. Yet others theorize Chaco Canyon was a ceremonial site that was hardly ever populated. Regardless of the answers to these questions, Chaco Canyon was abandoned by the year 1250.

Cahokia and Chaco Canyon are the best-known precontact North American cities, but there were others. Spiro, in eastern Oklahoma, was one of those cities. The inhabitants of Spiro engaged in a tremendous amount of commerce, collecting goods from the Gulf of California, South Florida, the Great Lakes, and the Atlantic coast.[65] Etowa, in Northern Georgia, was another large, precontact North American society that archaeologists know engaged in extensive trade and possessed a complex governance structure.[66] Located in southern Colorado, the Anasazi thrived and built stone structures at Mesa Verde that rivaled the Giza

[61] Daniel Strain, *Food May Have Been Scarce in Chaco Canyon*, CU Boulder Today (July 10, 2019), www.colorado.edu/today/2019/07/10/food-may-have-been-scarce-chaco-canyon [https://perma.cc/7V52-RMS2].

[62] Cody Cottier, *Cahokia and Chaco Canyon: The Ancient Cities That Flourished in North America*, Discover Mag. (Mar. 10, 2021), www.discovermagazine.com/planet-earth/cahokia-and-chaco-canyon-the-ancient-cities-that-flourished-in-north-america [https://perma.cc/Y57Z-RWNS].

[63] Jarus, *supra* note 54.

[64] Sofaer, *supra* note 56, at 227.

[65] *Oklahoma's Ancient City*, ExploreSouthernHistory.com – Spiro Mounds Archaeological Center, Okla. (2011), www.exploresouthernhistory.com/SpiroMounds1.html [https://perma.cc/C6UF-GJ9K]; *Spiro Mounds Archaeological Center*, Okla. Hist. Soc'y, www.okhistory.org/sites/spiromounds [https://perma.cc/AG4B-F5L4].

[66] Joshua J. Mark, *Etowah Mounds*, World Hist. Encyc. (May 10, 2021), www.worldhistory.org/Etowah_Mounds/ [https://perma.cc/A2FL-XXRD].

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Pyramids in sophistication.[67] The Anasazi successfully engaged in agriculture in the desert climate, developed extensive trade networks, and even domesticated turkeys.[68] Several other early North American sites exist.[69]

But like in the contemporary United States, most North Americans resided in small towns. Residents of these Indigenous towns lived in a variety of immobile dwelling structures including longhouses in the northeastern United States. Longhouses were made of wood, and some were more than 300 feet long.[70] Tribes along the Gulf of Mexico made huts of palmetto. The Mandan, Hidatsa, and Arikara lived in partially subterranean earth lodges, engineered to keep those inside warm during frosty Great Plains winters.[71] Pueblo Indians in the southwest built homes of stone and brick that have stood for centuries.[72] Some of these sedentary societies made seasonal migrations to capitalize on seasonal changes, much as modern-day New Englanders flock to Arizona in the winter.

1.3 INDIGENOUS INSTITUTIONS

Sedentary societies meant most tribes invested their energy into developing local resources. Hence, most Indians consumed diets that were predominantly plant-based prior to European arrival, and Indians were highly skilled farmers.[73] Although Indigenous technology may have been

[67] Owen Jarus, *Mesa Verde: Cliff Dwellings of the Anasazi*, LiveScience (June 14, 2017), www.livescience.com/27360-mesa-verde.html [https://perma.cc/4EM2-T5DU].

[68] *Id.*; Krista Langlois, *Indigenous Knowledge Helps Untangle the Mystery of Mesa Verde*, High Country News (Oct. 2, 2017), www.hcn.org/issues/49.17/features-archaeology-indigenous-knowledge-untangles-the-mystery-of-mesa-verde [https://perma.cc/6MVY-PLJM].

[69] Pauketat & Sassaman, *supra* note 28, at 407 (discussing Moundville); *id.* at 389 (describing Aztalan); *Mounds of the Macon Plateau*, ExploreSouthernHistory.com – Ocmulgee Nat'l Monument, Ga., www.exploresouthernhistory.com/ocmulgeemounds1.html [https://perma.cc/YH86-SD4M]; *Tallahassee's Ancient City*, ExploreSouthernHistory.com – Lake Jackson Mounds, Fla., www.exploresouthernhistory.com/lakejackson1.html [https://perma.cc/7XP6-ZCK2]; *Indian Temple Mound Museum*, ExploreSouthernHistory.com – Fort Walton Temple Mound, Fla., www.exploresouthernhistory.com/fortwaltonmound.html [https://perma.cc/DGF8-6CZP].

[70] René R. Gadacz, *Longhouse*, Canadian Encyc. (updated Jan. 8, 2019), www.thecanadianencyclopedia.ca/en/article/longhouse [https://perma.cc/UQ9B-VBBN].

[71] *Earth Lodge*, New World Encyc., www.newworldencyclopedia.org/entry/Earth_lodge [https://perma.cc/5G7G-KMWU].

[72] *Pueblo Architecture*, Britannica (updated Mar. 4, 2022), www.britannica.com/technology/pueblo-architecture [https://perma.cc/BH9N-E539].

[73] Adam Crepelle, *The Time Trap: Addressing the Stereotypes That Undermine Tribal Sovereignty*, 53 Colum. Hum. Rts. L. Rev. 189, 225 (2021).

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simple by today's standards, Indians had a thorough understanding of agricultural science. For example, Indians carefully selected the seeds they planted, and this enabled Indians to develop diversity within a single species. As a result, Indians would select particular lakes and ponds to grow different varieties of "wild" rice.[74] Indians also took measures to ensure seeds had a fertile environment to grow, such as building irrigation systems,[75] as well as strategically burning land to enrich the soil.[76] Likewise, the Indigenous three-sister crops of corn, beans, and squash were grown together not merely as a matter of mythology but for efficient crop production. Science now shows the three-sisters system provides optimum growing conditions for the plants and also sustains the land.[77] Scientists have recently discovered that many of the plants growing "wild" in North America's forests are actually the product of deliberate Indian action.[78]

Indians were willing to make deliberative efforts to improve the land because tribes respected property rights. Property is a complex topic, but fundamentally, property refers to those who can assert authority over a thing. All tribes had territories they recognized as their own. Tribes would take measures to delineate borders, like the Houma, who used a red stick to mark their boundary with the Bayougoula at the site of present-day Baton Rouge – French for "red stick." Even nomadic tribes recognized territorial rights. For example, a particular tract belonged to the Dakota when it was buffalo season while the same tract was under Chippewa control during deer season.[79] A natural derivative of this was tribes would charge tolls to cross their land.[80]

[74] Jack Weatherford, Indian Givers: How Native Americans Transformed the World 99–101 (2010).

[75] *Id.* at 96.

[76] Dave Roos, *Native Americans Used Fire to Protect and Cultivate Land*, Hist. (updated July 30, 2021), www.history.com/news/native-american-wildfires [https://perma.cc/E4HU-X2K3].

[77] Weatherford, *supra* note 74, at 107.

[78] K. E. D. Coan, *Indigenous Forest Gardens Remain Productive and Diverse for Over a Century*, Ars Technica (May 18, 2021), https://arstechnica.com/science/2021/05/indigenous-forest-gardens-remain-productive-and-diverse-for-over-a-century/ [https://perma.cc/WN4B-KN89]; Brian Maffly, *Ancient Native Americans May Have Cultivated Medicinal Plants in Bears Ears, Study Finds*, Salt Lake Tribune (May 17, 2021), www.sltrib.com/news/environment/2021/05/17/ancient-native-americans/ [https://perma.cc/WRN7-T4YE].

[79] Adam Crepelle, *Tribal Law: It's Not That Scary*, 72 Buff. L. Rev. 547, 556–57 (2024).

[80] Mitchell v. Canada, Case 12.435, Inter-Am. Comm'n H.R., Report No. 61/08 (July 25, 2008); Robert J. Miller, Reservation "Capitalism": Economic Development in Indian Country 21 (2012).

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As with any people, boundary disputes arose among tribes. Border conflicts could be resolved through war;[81] hence, many Indian villages were surrounded by palisades.[82] Tribes also built moats around villages to slow enemy advances.[83] In addition to war, tribes resolved territorial disputes through war proxies. Many tribes on the Great Plains considered counting coup the highest military honor. Counting coup was accomplished by merely touching or disarming one's enemy then letting them go. Counting coup may seem odd to western sensibilities; however, it is a rational territory marker. Survivors can return to their tribes and tell their comrades that another tribe claims the tract of land. Furthermore, a warrior with the capacity to successfully count coup will likely prevail if the combatants meet in another round of fighting.[84] Tribes located in the eastern portion of the contemporary United States referred to stickball, a game much like modern-day lacrosse, as "the little brother of war." Stickball was a very physical and violent sport. Participants usually did not die; nevertheless, stickball prowess would have been a strong indicator of military aptitude.[85] Thus, stickball and counting coup were efficient, nonlethal means of resolving intertribal disputes.

Within tribes, individual Indians held property rights to land and other items. Agricultural tribes recognized individual ownership interests in specific tracts of farmland; hence, the Cherokee used rocks to mark the boundaries of their personal property.[86] Algonquian tribes recognized

[81] George Milner, *Warfare in Prehistoric and Early Historic Eastern North America*, 7 J. Archaeological Rsch. 105, 108 (1999).

[82] *A Mohawk Iroquois Village*, N.Y. St. Museum, https://exhibitions.nysm.nysed.gov/iroquoisvillage/villagetwo.html [https://perma.cc/5HGV-DUE9]; *Frontier Forts in Virginia*, Va. Places, www.virginiaplaces.org/military/frontierforts.html [https://perma.cc/CP67-539G; *Section 1: The Mandans*, N.D. Stud., www.ndstudies.gov/gr8/content/unit-ii-time-transformation-1201-1860/lesson-3-building-communities/topic-1-mandans/section-1-mandans [https://perma.cc/HDA4-HMJU].

[83] Guy Gugliotta, *In N.D., Uncovering a Tribe's Defensive Savvy*, Wash. Post (June 16, 2003), www.washingtonpost.com/archive/politics/2003/06/16/in-nd-uncovering-a-tribes-defensive-savvy/8517fb1f-835c-4e28-a4d9-9aa65fec5df3/ [https://perma.cc/T4RH-LFVQ]; *Native American*, Etowah Valley Hist. Soc'y, https://evhsonline.org/native-american [https://perma.cc/S7JW-Z8AA].

[84] Jonathan Lear, Radical Hope: Ethics in the Face of Cultural Devastation 13 (David J. Wishart ed., 2008); *Counting Coup*, Encyc. of the Great Plains, http://plainshumanities.unl.edu/encyclopedia/doc/egp.war.013 [https://perma.cc/AWJ4-9YRY].

[85] *Little Brother of War*, Smithsonian Mag. (Dec. 1, 1997), www.smithsonianmag.com/history/little-brother-of-war-147315888/ [https://perma.cc/KT5L-8GLZ].

[86] Eric Alston, Adam Crepelle, Wilson Law, & Ilia Murtazashvili, *The Chronic Uncertainty of American Indian Property Rights*, 17 J. Inst. Econ. 473 (2021).

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private property rights in hunting territories.[87] Tribes in the Pacific Northwest recognized private property rights in fishing territories.[88] Individual Ottawa families privately owned trade routes.[89] The nomadic tribes of the Great Plains generally did not recognize private property rights in land because the tribes were constantly moving. Nevertheless, these tribes did recognize individual rights to cultivated land.[90] Private property rights usually entailed some degree of alienability, including the ability to sell land. Similarly, Indians privately owned improvements made to their land such as crop storehouses, clam gardens, and fishing platforms. All of an Indian's personal property was privately owned, and Indians also privately owned intellectual property in songs, stories, and crafts.[91]

Property was only one of the areas governed by Indigenous law. Tribes recognized tort actions. For example, a property owner would owe damages to persons who slipped and fell if the Indian owner was found negligent.[92] Tribes recognized contract rights. To facilitate commerce, Indian merchants would allow items to be purchased on credit, charge interest, and offer warranties on goods – even healers were expected to reimburse patients if their proposed cure failed.[93] Tribes developed secured transactions mechanisms including intermarriage, the calumet ceremony, and pledges.[94] These laws would have been enforced through private actions. Some matters would be resolved through public judicial process, and sometimes through a process much like present-day arbitration.[95]

[87] Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 Vand. L. Rev. 1559, 1575 (2001).

[88] *Id.* at 1590; Russel Lawrence Barsh, *Coast Salish Property Law: An Alternative Paradigm for Environmental Relationships*, 12 Hastings W. Nw. J. Envtl. L. & Pol'y 1, 15–16 (2006).

[89] David H. Getches et al., Cases and Materials on Federal Indian Law 468 (7th ed. 2016).

[90] Bobroff, *supra* note 87, at 1592–93.

[91] Adam Crepelle, *Tribal Law's Indian Law Problem, How Supreme Court Jurisprudence Undermines the Development of Tribal Law and Tribal Economies*, 29 Va. J. Soc. Pol'y & L. 93, 97 (2022).

[92] *Id.* at 97–98.

[93] Barsh, *supra* note 88, at 25 ("By the same logic, if a cure fails, payment already made should be returned by the healer.").

[94] Crepelle, *Tribal Law's Indian Law Problem*, *supra* note 91, at 98; Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 Or. L. Rev. 757, 792 (2001).

[95] Bruce L. Benson, *An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary Indian Law*, 5 Rev. Austrian Econ. 41, 52 (1991).

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To facilitate commerce, tribes did more than develop legal institutions. Tribes used currencies including wampum, dentalia, and feathers. Like currencies throughout the world, some Indigenous currencies appear to have suffered from inflation. Tribes may also have developed systems analogous to fractional reserve banking.[96] Uniform systems of measure were used by Indigenous merchants, too. The magnitude of commerce with diverse peoples led to the emergence of Indigenous trade languages, like Chinook in the northwest and Mobilian in the southeast. Additionally, a pan-Indian sign language enabled communication across almost all of North America's numerous and diverse precontact cultures.[97]

Tribes built physical infrastructure to facilitate travel and trade. Many roads in the contemporary United States trace these Indigenous roads. However, waterways served as Indians' major commercial transportation. Waterways were so valuable to tribes that they dug canals to connect natural waterways to expedite travel. Indians also designed a wide variety of boats, some capable of carrying several tons of goods across treacherous waters. Seaworthy watercraft enabled Indians on present-day Vancouver Island to make trade expeditions up to Alaska and Siberia.[98]

Tribes also developed methods of punishing crimes. Some tribes, like the Sioux and Yurok,[99] focused on restorative justice. Accordingly, crimes – including murder – were not dealt with through retribution. In a restorative justice model, families of the perpetrator would offer compensation in money or property for the crime.[100] Payment constituted complete settlement of the matter.[101] But the compensation was not "blood money," payment in lieu of revenge. Rather, the indemnity was an act of contrition to restore tribal harmony. Consequently, families often granted clemency while refusing remuneration.[102]

Some tribes had more punitive justice systems. Among the Cherokee, clans were responsible for punishing their members who harmed people

[96] D. Bruce Johnsen, *The Potlatch as Fractional Reserve Banking*, *in* Unlocking the Wealth of Indian Nations 61, 61–83 (Terry L. Anderson ed., 2016).

[97] Cecily Hilleary, *Native American Hand Talkers Fight to Keep Sign Language Alive*, VOA (Apr. 3, 2017), www.voanews.com/arts-culture/native-american-hand-talkers-fight-keep-sign-language-alive [https://perma.cc/9TKY-83WR].

[98] Crepelle, *The Time Trap*, *supra* note 73, at 232.

[99] A. L. Kroeber, Handbook of the Indians of California 20 (2012); Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 Am. Indian L. Rev. 191, 199 (1988).

[100] Kroeber, *supra* note 99, at 20, 49.

[101] *Id.* at 20.

[102] Harring, *supra* note 99, at 237.

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from other clans. A clan's failure to discipline the wrongdoer authorized the victim's clan to avenge crime against any member of the perpetrator's clan. Therefore, clans had an incentive to prevent malfeasance and punish their members.[103] Possible punishments from Indigenous justice systems included floggings, banishment, facial scarring to notify the world of the wrongdoer's crime, and execution.[104]

✦✦✦

The archaeological record is replete with examples of well-established, sophisticated, Indigenous societies in North America prior to Columbus' arrival. Early Americans were well aware of these facts too, but they refused to believe Indians could have created these civilizations. For example, the five-story castle carved into a limestone cliff near Phoenix, Arizona is called Castle Montezuma because non-Indians refused to believe the United States' Indigenous inhabitants could construct a structure so complex – thus, it must have been the Aztecs.[105] Similarly, the remnants of an ancient city in Wisconsin were named Aztalan because non-Indians believed the Aztecs were responsible for the constructions rather than the local Indigenous population.[106] And in the 1880s, Congress appropriated money to study Indian mounds in hopes of proving the mounds were constructed by people other than Indians; however, the study determined Indians built the mounds.[107] To this day, people still have a hard time believing ancient pre-Columbian Indians developed governments, constructed buildings, and engaged in trade. The simple Indian prototype is no accident.

[103] Getches et al., *supra* note 89, at 467.

[104] Angelique Townsend Eaglewoman & Stacy L. Leeds, Mastering American Indian Law 40 (2013).

[105] *Montezuma Castle*, Hist. (updated Aug. 21, 2018), www.history.com/topics/landmarks/montezuma-castle [https://perma.cc/STA5-DJDS].

[106] *Aztalan Site History*, Milwaukee Pub. Museum, www.mpm.edu/research-collections/anthropology/online-collections-research/aztalan-collection/site-history [https://perma.cc/X93F-RBQE]; *Exploring the History of Aztalan*, Wis. Hist. Soc'y, www.wisconsinhistory.org/Records/Article/CS4051 [https://perma.cc/6ZCC-T8C8].

[107] David G. Anderson & Kenneth E. Sassaman, Recent Developments in Southeastern Archaeology: From Colonization to Complexity 15–15 (2012).

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