

# Michigan Journal of Environmental & Administrative Law

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Volume 12 | Issue 1

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2022

## Cultural Resources, Conquest, and Courts: How State Court Approaches to Statutory Interpretation Diminish Indigenous Cultural Resources Protections in California, Hawai'i, and Washington

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### Recommended Citation

Lauren A. Week, *Cultural Resources, Conquest, and Courts: How State Court Approaches to Statutory Interpretation Diminish Indigenous Cultural Resources Protections in California, Hawai'i, and Washington*, 12 MICH. J. ENVTL. & ADMIN. L. 103 (2022).

Available at: <https://repository.law.umich.edu/mjeal/vol12/iss1/4>

<https://doi.org/10.36640/mjeal.12.1.cultural>

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# CULTURAL RESOURCES, CONQUEST, AND COURTS: HOW STATE COURT APPROACHES TO STATUTORY INTERPRETATION DIMINISH INDIGENOUS CULTURAL RESOURCES PROTECTIONS IN CALIFORNIA, HAWAI'I, AND WASHINGTON

*Lauren Ashley Week<sup>†</sup>*

*Critical Race Theory identifies two of the United States' original sins: slavery and conquest; yet, while the former is well known, the latter is simultaneously obvious and unknown, creating a disconnect between the history of violent conquest to the disparities that continue to afflict indigenous communities today. This lack of understanding and acknowledgement also permeates the federal courts—an issue extensively documented by Critical Race Theory and federal Indian law academics. Yet, limited scholarship has interrogated if and how state judicial systems may parallel the failures of federal benches. This Note examines the “hidden,” yet enduring impact of conquest by applying Critical Race Theory perspectives to cultural resources protection, as safeguarded (or hindered) by state court interpretations of both historic preservation laws and environmental review processes. Specifically, this research focuses on the state judicial systems of California, Hawai'i, and Washington—predominantly liberal and social justice-oriented political arenas with large indigenous populations—to investigate if and how state court approaches to statutory interpretation affect the protection, preservation, and tangible and intangible rights to land of Native Americans, Alaskans, Hawaiians, and other Pacific Islanders. As the Western United States' “liberal sisters,” do California, Hawai'i, and Washington's politics foster judicial interpretations favorable to indigenous communities? Or, conversely, do liberal legislative and popular appeals to civil rights and environmental protection fail to facilitate judicial respect for Native knowledge and sovereignty? By applying a Critical Race Theory lens, this Note reveals that even in liberal enclaves, state courts uphold interpretations rooted in white supremacy and settler colonialism that diminish indigenous cultural resources protections and thereby perpetuate modern day conquest.*

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<sup>†</sup> University of Michigan Law School and Taubman College of Architecture and Urban Planning, Juris Doctor and Master of Urban and Regional Planning Candidate, 2023. This Note started as an assignment for my Critical Race Theory class with Professor Juan Perea; the decolonial perspectives advanced in that course influenced my research and writing. The opportunity to teach alongside Professor Scott Larson as a Graduate Student Instructor for Race and Freedom in the American Culture Department also inspired this topic. Lastly, I am thankful to Professor Matthew L.M. Fletcher for sharing his expertise of federal Indian law and the Wyss Foundation for their financial support and advocacy for Western land resources.

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## INTRODUCTION

In 1999 two University of Colorado professors, Patricia Nelson Limerick and William Riebsame, endeavored to answer the question “what should every westerner know?”<sup>1</sup> Using a combination of online surveys and focus group meetings with communities across the Western United States,<sup>2</sup> Limerick and Riebsame encountered a common narrative: a desire by non-indigenous westerners to acknowledge “that the Indians were here first.”<sup>3</sup> However, the researchers also experienced shared disappointment in the boundaries established with this response. From Bend, Oregon to Sedona, Arizona, although focus group members recognized Native Americans as the original peoples of the land, not a single non-indigenous participant suggested that any action beyond mere acknowledgement was warranted

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1. Center of the American West, *University of Colorado Seeks to Answer: What Should Every Westerner Know?*, CU BOULDER TODAY (July 12, 1999), <https://www.colorado.edu/today/1999/07/12/university-colorado-seeks-answer-what-should-every-westerner-know>.

2. *Id.*

3. Patricia Nelson Limerick, *Foreword* to WALTER R. ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED*, at xi, xii (2012).

or required.<sup>4</sup> Instead, Limerick and Riebsame documented a widely held but deficient conviction that “any injury done to Indian people was an episode of sorrow long past any opportunity for corrective action.”<sup>5</sup>

Since its inception in the 1980s, Critical Race Theory has documented the United States’ two original sins: slavery and conquest; yet, scholars have also recognized that while the former is well known, the latter is simultaneously “obvious and unknown.”<sup>6</sup> Explanations for the inattention given to the colonization and enduring exploitation of Native communities include the relatively small percentage of indigenous people that make up the modern United States populace,<sup>7</sup> the cultural persistence of the “myth of vanishing,”<sup>8</sup> American exceptionalism,<sup>9</sup> and a misguided belief that indigenous genocide happened so long ago it has “receded into the background of history.”<sup>10</sup> Regardless, these realities and misconceptions seem to have shaped responses to Limerick and Riebsame’s questions in 1999.

Despite Critical Race Theory’s newfound national attention,<sup>11</sup> public discourse has still not widely acknowledged the histories of colonialism and conquest

4. *Id.*

5. *Id.* (emphasis added).

6. Juan F. Perea, *Denying the Violence: The Missing Constitutional Law of Conquest 1* (unpublished manuscript) (on file with author).

7. The United States Census Bureau’s 2020 American Community Survey calculates (based on five-year estimates) that as of 2020 only 2.2% of the United States population identifies as American Indian, Alaska Native, Native Hawaiian, or Other Pacific Islander. U.S. CENSUS BUREAU, <https://data.census.gov/table?tid=ACSDP5Y2020.DP05> (last visited Dec. 2, 2022) [hereinafter “2020 American Community Survey”]. I calculated the above percentage using table DP05 of the 2020 American Community Survey. To be fully inclusive of bi- and multi-racial identities, I found the total number of individuals identifying as either “American Indian and Alaska Native” (e.g., 5,779,818) or “Native Hawaiian and Other Pacific Islander” (e.g., 1,441,525) under the “race alone or in combination with one or more other races” section of the table. *Id.* I then divided the sum of both of these categories by the total United States population (i.e., 326,569,308). *Id.* I follow this methodology whenever calculating demographic statistics throughout this Note, the only difference being the geographic scope of the estimate.

8. The “myth of vanishing” denotes a white supremacist ideology that “subtly . . . assert[s] [white European] cultural superiority by both assuming and asserting that Indians either must assimilate or blend into the American ‘melting-pot’ and perish as a distinctive people or must gradually die off as their culture and skills fail to cope with the changes imposed on them by the advance of an allegedly superior white civilization.” Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 79 (1993).

9. American exceptionalism can be understood as the United States’ cultural “preoccupation with its positive self-image.” *Id.* at 80. With regard to Native American rights and sovereignty, the impact of American exceptionalism on indigenous populations is best described by the Turner thesis, which focuses on and “celebrates the westward push of Euro-American settlement” because it spread the ideals and values of democracy, liberty, and individualism. *Id.* However, many modern western historians reject this thesis of American history as it fails to acknowledge the “patterns of interactive cultural exchange and exploitation that occurred as the indigenous civilizations of the Americas and the Euro-American settlers contended with each other over resources, culture, and power.” *Id.* at 80–81.

10. *Id.* at 81.

11. For an explanation of how Critical Race Theory—once an almost exclusively academic worldview mostly researched, taught, and discussed at the graduate education level—popularized into a commonly known (and widely debated) theory, see Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/article/what-is-critical-race-theory.html>.

and how the “discovery,”<sup>12</sup> founding, and westward expansion of the United States continues to affect indigenous populations. As Critical Race Theory scholar Juan F. Perea states, “[t]he failure to engage with the conquest promotes ignorance of the real, devastating harms done to Native people by whites, who continue to benefit from their dispossession of Indian lands.”<sup>13</sup> Thus, America’s incapacity to address systemic colonization explains why Limerick and Riebsame’s non-indigenous focus group participants repudiated the next steps after acknowledgement: first, asking “is there anything we can do” for the Native communities displaced by settler ancestors, and second, accepting responsibility for reparations for Native land dispossession.<sup>14</sup>

The failure to engage with the original sin of conquest also permeates the American judicial system. Scholars of federal Indian law have underscored that “every time the courts construe a statute regulating Indian affairs[,] they must in some way come to terms with the manner in which Congress acquired power over the continent and its indigenous peoples.”<sup>15</sup> Throughout the nineteenth and early twentieth centuries, federal courts legitimized the United States’ authority and guardianship over Native land and populations by asserting the inherent power and protective duties of the conquering sovereign and/or claiming racial and cultural superiority.<sup>16</sup> As American cultural norms have progressed and developed through the late twentieth and early twenty-first centuries, a majority of society no longer deems appeals to conquest or supremacy appropriate or acceptable.<sup>17</sup> Yet, federal courts continue to either take the United States’ sovereign authority for granted or purposely avoid the question of its legitimacy—leaving the basis of congressional power over Native lands and communities “unexplored and unarticulated.”<sup>18</sup> While modern courts have occasionally acknowledged the violent and oppressive origins of congressional power in Indian affairs,<sup>19</sup> the federal court system has still not

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12. See *infra* Part III.B and accompanying notes.

13. Perea, *supra* note 6, at 59 (emphasis added).

14. Limerick, *supra* note 3, at xi–xiii.

15. David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 403 (1994).

16. See, e.g., *United States v. Kagama*, 118 U.S. 375, 384–85 (1886) (“The power of the General Government over these remnants of a race,” i.e., Indians, “once powerful, now weak and diminished in numbers, is necessary to their protection . . .”); *United States v. Sandoval*, 231 U.S. 28, 39 (1913) (“The people of the pueblos . . . are nevertheless Indians in race, customs, and domestic government. . . . adhering to *primitive* modes of life . . . and chiefly governed according to the *crude* customs inherited from their ancestors, they are essentially a simple, uninformed, and *inferior* people. . . regarded and treated by the United States as requiring special consideration and protection.”) (emphasis added); see also Nancy Carol Carter, *Race and Power Politics as Aspects of Federal Guardianship over American Indians: Land-Related Cases, 1887–1924*, 4 AM. INDIAN L. REV. 197, 199 (1976).

17. Williams, *supra* note 15, at 404.

18. *Id.* at 404. For further discussion on why “the [c]ourt is unwilling or unable to deny” congressional authority over indigenous populations and territory, see *id.* at 416–429.

19. See, e.g., *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2505 (2022) (Gorsuch, J., dissenting). While a majority of Democrats and liberals decried the nomination of Neil Gorsuch to the United States Supreme Court, many tribes endorsed him, citing his judicial track record on federal Indian law and intimate understanding of tribal law as a Westerner (Justice Gorsuch grew up in Colorado and served as

meaningfully reckoned with the persistence of settler colonialism in cases implicating indigenous sovereignty and rights.<sup>20</sup> Critical Race Theory critiques this failure of the judicial system and in doing so overtly recognizes that “the United States acquired sovereignty on [the North American] continent by violent conquest.”<sup>21</sup> Moreover, Critical Race Theory scholars depict how the majority of white European settlers defended “the subjugation of indigenous cultures by claiming racial and cultural superiority.”<sup>22</sup> By failing to acknowledge the history of conquest, the federal judicial system continues to perpetuate a subjugation premised on white supremacy and the foundational violence of settler colonialism.<sup>23</sup>

Only limited scholarship has interrogated if and how the state court system may parallel the failures of the federal benches.<sup>24</sup> This Note aims to understand how state courts—specifically in California, Hawai‘i, and Washington—either ameliorate or perpetuate modern forms of conquest through their approaches to statutory interpretation. Moreover, this Note focuses on the specialized subject matter of cultural resources protection and considers how both historic preservation laws and environmental review processes safeguard or fail to protect indigenous cultural resources.

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a federal judge there before joining the Supreme Court). Kelsey Vlamis, *Justice Neil Gorsuch’s Background Primed Him to Break from the Other Conservatives on Native Law and Defend Tribal Sovereignty*, INSIDER (July 31, 2022, 2:43 PM), <https://www.businessinsider.com/why-neil-gorsuch-clashes-conservative-justices-native-law-tribal-sovereignty-2022-7>. The confirmation of Justice Gorsuch in 2017 “has changed the climate in the [United States] Supreme Court’s federal Indian law jurisprudence in ways not imaginable . . . .” Peter d’Errico, *Gorsuch Pushes the US Federal Indian Law Envelope . . . Up to a Point*, UNIVERSITY OF MASSACHUSETTS: PETER D’ERRICO’S BLOG (July 18, 2020), <https://blogs.umass.edu/derrico/2020/07/18/gorsuch-pushes-the-us-federal-indian-law-envelope-up-to-a-point/>.

20. d’Errico, *supra* note 19 (“The fact that Justice Gorsuch has emerged as a serious scholar of Treaties and Treaty history is important. But it is not sufficient to remake [United States] federal Indian law in the way it needs to be re-made. His opinions in *Cougar Den* and *McGirt*, and his joining the four ‘liberal’ justices to affirm Crow Nation hunting rights in *Herrera v. Wyoming* (2019) are indeed significant legal victories for the Yakama, Creek, and Crow nations. But none of those decisions reached and overturned the fundamental federal Indian law doctrine of [United States] domination over [i]ndigenous lands and peoples—the doctrine of ‘Christian discovery.’”).

21. Williams, *supra* note 15, at 404.

22. *See id.*

23. *See* Elizabeth Loeb, *As “Every Schoolboy Knows”: Gender, Land, and Native Title in the United States*, 32 N.Y.U. REV. L. & SOC. CHANGE 253, 253–54 (2008) (“[T]he U.S. state has historically produced itself as sovereign over a specific territorial mass through the violent conquest and continuing occupation of lands to which Native Americans also lay and have laid sovereign claim . . .” and the “law legitimates and maintains this foundational violence within its own texts.”).

24. *See, e.g.*, Patricia Thompson, *Recognizing Sovereignty in Alaska Native Villages after the Passage of ANCSA*, 68 WASH. L. REV. 373 (1993) (examining both federal and Alaska state courts’ treatment of Alaska Native Village sovereignty); Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585 (1994) (critiquing the concurrent jurisdiction provision of the Indian Child Welfare Act which privileges state court, i.e., white American, understandings of Indian familial culture); Carey Austin Holliday, *Denying Sovereignty: The Louisiana Supreme Court’s Rejection of the Tribal Exhaustion Doctrine*, 71 LA. L. REV. 1339 (2011) (analyzing the Louisiana Supreme Court’s decision to not follow the Tribal Exhaustion Doctrine).

This emphasis connects the analysis to current manifestations of physical conquest as perpetuated by the limitations of cultural resources protection laws in preserving the sovereignty and remaining rights of Native Americans to tangible land.<sup>25</sup> This Note further explores how state court interpretations may, at best, inadvertently and, at worst, covertly perpetuate the racist and supremacist arguments of earlier courts. Since cultural resources protection laws aim to safeguard the intangible spiritual, political, and cultural values associated with land in Native communities,<sup>26</sup> legal reasoning that prioritizes white European ideas about appropriate (and often extractive, economically-driven)<sup>27</sup> land uses at the expense of indigenous understandings and practices creates a cultural hierarchy rooted in white supremacy and colonial thinking.<sup>28</sup>

Due to the interpretation of such statutes by state courts, how effective are state protections of indigenous cultural resources and property rights? As the Western United States' "liberal sisters," do California, Hawai'i, and Washington's politics create state court systems more committed to favorable interpretation for indigenous communities? Or do liberal appeals to social justice and environmental protection fail to facilitate judicial respect for Native knowledge and sovereignty?

Part I of this Note introduces the states used as case studies and interrogates how even states with liberal politics and large indigenous populations ultimately fail to respect Native sovereignty, making them ideal cases studies for the persistence of settler colonialism in state court jurisprudence. Part II broadly defines cultural resources and outlines the protections provided for such resources under the applicable state statutes of California, Hawai'i, and Washington. Part III briefly introduces the "discovery" doctrine and critiques it from the lens of Critical Race Theory and the specialized sub-branch of Tribal Critical Race Theory ("TribalCrit"). Finally, Part IV analyzes how state court approaches to statutory interpretation fail to incorporate important Critical Race Theory context, diminish indigenous cultural resources protections, and thereby perpetuate modern day conquest.

### *Note on Terminology*

Throughout this Note, the terms Native and indigenous are interchangeably used when broadly describing Native American people. For population calculations, this Note relies on data from the 2020 American Community Survey, which groups mainland indigenous populations with Native Alaskans in the

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25. For a definition and explanation of what constitutes "cultural resources," and their relation to indigenous sovereignty and property rights, see Zellmer, *infra* note 78 and accompanying text. As further noted by Zellmer, "land has represented an unparalleled bulwark against the otherwise inevitable effects of colonization—tribal eradication and assimilation." Zellmer, *infra* note 78, at 414.

26. Zellmer, *infra* note 78, at 414–15.

27. Zellmer, *infra* note 78, at 429.

28. Chandran Nair, *White Privilege and Global Capitalism Have Roots in Private Property Rights*, OPENDEMOCRACY (Feb. 4, 2022, 8:00 AM), <https://www.opendemocracy.net/en/oureconomy/dismantle-white-privilege-we-must-tackle-private-property-rights-capitalism/>.

category “American Indian or Alaska Native” and estimates “Native Hawaiian” populations jointly with “Other Pacific Islanders.”<sup>29</sup> Since this Note includes Hawai‘i as a case study state, Native Hawaiians and Pacific Islanders are also encompassed whenever the terms Native, indigenous, and/or Native American are used generally.<sup>30</sup> Whenever possible or appropriate, indigenous communities are identified by their tribal name. Further, when discussing specific populations, the terminology collectively preferred by members of that community is employed. Native Americans are sparingly referred to as “Indians.” Such terminology has been limited to (1) quotations containing the original (usually culturally outdated) language of other research papers authored during the early years of Critical Race Theory; and, (2) references to the overall federal statutory framework or specific acts pertaining to “Indian tribes,” as that is the language used by the law itself.<sup>31</sup> Additionally, the modifier ‘tribal’ is used when discussing the indigenous branch of Critical Race Theory and to denote land under Native American ownership and control as designated under federal and state law.<sup>32</sup>

These conventions abide by the terminology guides curated and provided by the Native Governance Center and the Smithsonian’s National Museum of the American Indian.<sup>33</sup> However, as emphasized by the National Governance Center, it is important to recognize that terminology and language are everchanging, highly personal, and sacred, and that a comprehensive, all-inclusive guide for appropriate or preferred conventions does not exist.<sup>34</sup> Thus, as recommended by the National

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29. See 2020 American Community Survey, *supra* note 7 and accompanying text.

30. The Native American Cultural Center at Yale University notes that the term “Native American” includes “peoples indigenous only to the mainland United States,” and excludes Pacific Islanders and even Native Alaskans and Hawaiians. Haylee Kushi, *Are Pacific Islanders Indigenous?*, DOWN MAG. (Sept. 10, 2016), <https://downat Yale.com/are-pacific-islanders-indigenous/#:~:text=This%20raises%20the%20puzzling%20question,both%20Alaska%20Natives%20and%20Hawaiians>. However, due to the Census Bureau’s groupings of Native Americans (or “American Indians”) with Alaska Natives and Native Hawaiians with Pacific Islanders, I have included all four racial identities under the indigenous and/or Native label. See 2020 American Community Survey, *supra* note 7. Yale’s Native American Cultural Center acknowledges a “cultural connection between [traditionally-defined] Native Americans and Pacific Islanders,” including Native Hawaiians. Haylee Kushi, *Are Pacific Islanders Indigenous?*, DOWN MAG. (Sept. 10, 2016), <https://downat Yale.com/are-pacific-islanders-indigenous/#:~:text=This%20raises%20the%20puzzling%20question,both%20Alaska%20Natives%20and%20Hawaiians>. This connection also informs my decision to use the terms indigenous, Native, and/or Native American to describe Native Hawaiians and Pacific Islanders. Under a Critical Race Theory lens, all of these communities have a “common tie” in regard to their “political relationships . . . as sovereign nations with the United States . . .” *Id.*

31. See, e.g., National Historic Preservation Act, 54 U.S.C. §§ 300101–307101 (2014).

32. For example, the National Historic Preservation Act refers to Indian reservations and “dependent Indian communities” as “tribal land.” *Id.* § 300319.

33. See Dr. Twyla Baker, Wizipan Little Elk, Bryan Pollard & Margaret Yellow Bird, *How to Talk About Native Nations: A Guide*, NATIVE GOVERNANCE CTR., <https://nativegov.org/news/how-to-talk-about-native-nations-a-guide/> (last visited May 9, 2022); Smithsonian, *Teaching & Learning about Native Americans: Terminology*, NAT’L MUSEUM OF THE AM INDIAN, <https://americanindian.si.edu/nk360/faq/did-you-know#:~:text=What%20is%20the%20correct%20terminology,by%20their%20specific%20tribal%20name>. (last visited May 9, 2022).

34. Baker, *supra* note 33.



Governance Center, other resources have been consulted which have been created by Native-led organizations throughout the research and writing of this Note.

## I. CASE STUDY STATES

### A. Introduction to the American West

Almost all federally recognized tribal land lies in the western half of the United States.<sup>35</sup> Moreover, government agencies are responsible for proactively managing a majority of the American West's land, of which almost fifty percent has been designated by the federal government as public and under its ownership and care.<sup>36</sup> Parallel state entities own an average of roughly seven percent of each western state's land area as well.<sup>37</sup> Considering the Native demographics of the Western United States and the magnitude of public lands subject to cultural resources protections in the region, this Note focuses its analysis on the American West.<sup>38</sup>

The real and imaginary boundaries of the American West remain contested, and heavily dependent on which discipline contextualizes its definition.<sup>39</sup> Historians, sociologists, environmentalists, and government agencies all diverge in their characterization of the Western United States. For example, the Bill Lane Center for the American West, a multidisciplinary research institute rooted in the humanities and social sciences at Stanford University, geographically delineates any region between the Pacific Ocean and the hundredth meridian as the American West.<sup>40</sup> However, the Bill Lane Center also recognizes the “complexities of [the region's] history, culture, climate, institutions, politics, demography[,] and economy” and how these contending characteristics “amount to a regional identity that is so much more than physical place.”<sup>41</sup>

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35. See *U.S. Domestic Sovereign Nations: Land Areas of Federally-Recognized Tribes*, U.S. BUREAU OF INDIAN AFFS., <https://biamaps.doi.gov/indianlands/> (last visited May 9, 2022).

36. CONG. RSCH. SERV., *FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA* (2020).

37. Percentage of state land ownership in the Western United States ranges from 0.18 percent in Nevada to 28.98 percent in Alaska. See *Public Land Ownership by State*, NAT. RES. COUNCIL OF ME., <https://www.nrcm.org/documents/publiclandownership.pdf> (last visited Sept. 8, 2022).

38. Given this focus, this Note does not analyze the state court systems of left-leaning states in other parts of the country. Further research should explore the judicial track records of other liberal states to understand how approaches to statutory interpretation may contribute to or further hinder indigenous cultural resources protections.

39. See The Bill Lane Ctr. for the Am. West, *What is the “West”?*, STANFORD UNIV., SCH. OF HUMANITIES & SCIS., <https://west.stanford.edu/about/what-west> (last visited May 9, 2022) (“So multi-dimensional is this great region that no matter how you approach it—through its history and culture, its economy and public policy, or its environment and natural resources—the American [W]est offers up a richness that encourages deep and ongoing exploration.”).

40. *Id.*

41. *Id.*

Conversely, the United States Census Bureau provides a classification fixed by strict state lines.<sup>42</sup> According to the Census Regions map, the American West includes Alaska, Arizona, California, Colorado, Hawai'i, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.<sup>43</sup> Environmental nonprofit organizations such as the Wyss Foundation—a private philanthropy group that aims to support conservation efforts that provide “innovative, lasting solutions [to] improve lives, empower communities, and strengthen connections to the land”<sup>44</sup>—also embrace many of the same states within a geographic definition of the American West. The Wyss Foundation’s definition excludes, however, the non-contiguous states, Hawai'i and Alaska.<sup>45</sup>

The fluidity of western regional identity recognized by the Bill Lane Center and reinforced by geographic boundaries that sometimes include or exclude certain states also results in competing policy prioritizations. Economists and demographers emphasize the American West’s capacity for technological innovation, its historic and current immigration and migration patterns, and related residential and commercial development.<sup>46</sup> The concerns of climatologists revolve around the region’s aridity and worsening water shortages.<sup>47</sup> Most relevant to this Note, the American West must also prioritize management of its vast public lands.<sup>48</sup>

### B. *The “Liberal Sisters” of the American West*

Yet, regardless of how American society seeks to broadly define the American West and its regional priorities, the reality of rigid political affiliations undeniably shapes and impacts the region’s cultural boundaries. Of the thirteen states categorized into the Census Bureau’s western districts, only four feature a voter base that predominantly identifies as liberal: Washington, California, Oregon, and Hawai'i.<sup>49</sup> Such politics influence how the governments of these states interact with Native American populations living within their colonially prescribed boundaries.<sup>50</sup>

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42. Geography Div., *Census Regions and Divisions of the United States*, U.S. CENSUS BUREAU, [https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us\\_regdiv.pdf](https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf) (last visited May 9, 2022).

43. *Id.*

44. *About the Wyss Foundation*, WYSS FOUND., <https://www.wyssfoundation.org/about> (last visited May 9, 2022).

45. Sch. for Env't & Sustainability, *The Wyss Scholars Program for the Conservation of the American West Cohort #14 – 2020–2022*, UNIV. OF MICH. (unpublished announcement) (on file with author).

46. *See, e.g.*, The Bill Lane Ct. for the Am. West, *supra* note 39.

47. *Id.*

48. *See* CONG. RSCH. SERV., *supra* notes 36 and accompanying text.

49. *Most Liberal States 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/most-liberal-states> (last visited May 9, 2022).

50. For an example of how liberal versus conservative viewpoints affect American understandings of, empathy for, and advocacy of indigenous communities and causes, *see* Melanie Benson Taylor, *The Convenient Indian: How Activists Get Native Americans Wrong*, L.A. REV. OF BOOKS (Apr. 9, 2017), <https://lareviewofbooks.org/article/the-convenient-indian-how-liberals-get-native-americans-wrong/> (describing liberal and conservative reactions to protests against the Dakota Access Pipeline led by the

As the American West's "liberal sisters," California, Hawai'i, Washington, and Oregon have each sought to support indigenous communities in recent years by proposing programs and passing legislation that prioritize tribal sovereignty and respect Native culture.<sup>51</sup>

In addition to limiting the scope of this research to the American West, this Note further focuses its analysis on the western "liberal sisters." However, for the reasons described in Part I.C below, this research investigates only three of the four liberal-aligned western territories as its case studies: California, Hawai'i, and Washington. These liberal states' relatively harmonious modern-day relationships with Native American communities and recent state-level attempts to begin repairing past harms create an interesting paradigm. Despite efforts at reconciliation, disparities continue to afflict indigenous populations living within the boundaries of each case study state.<sup>52</sup> This continued marginalization, despite the social justice-oriented policies of the "liberal sisters," makes it necessary to more fully address the long-term implications of colonization and westward expansion and the role of the courts in perpetuating such injustices.

### C. Native Demographics of Case Study States

Western states, especially those discussed here, are in many ways defined by their uniquely rich demographic diversity. As a whole, the region boasts the most ethnically and racially diverse population in the country.<sup>53</sup> Due to the history of

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Standing Rock Sioux: "While liberals have understandably partnered with the indigenous cause at Standing Rock, conservative pundits leaped at the chance to condemn Native Americans for their inveterate decision to stand as outsiders of polite society."). Note this essay also importantly critiques white liberal America for its appropriation and exploitation of indigenous communities as "ciphers for anti-establishment and anti-capitalist idealism." *Id.*

51. See, e.g., *Governor Newsom Proposes \$100 Million to Support Tribal-Led Initiatives that Advance Shared Climate and Conservation Goals*, OFF. OF GOVERNOR GAVIN NEWSOM (Mar. 18, 2022), <https://www.gov.ca.gov/2022/03/18/governor-newsom-proposes-100-million-to-support-tribal-led-initiatives-that-advance-shared-climate-and-conservation-goals/> (announcing California Governor Gavin Newsom's proposal for \$100 million in state funding to strengthen indigenous conservation goals); H.B. 2024, 31st Leg., Reg. Sess. (Haw. 2022) (Hawai'i legislature passing a bill to create a stewardship authority for the protection of Mauna Kea volcano, which has cultural and genealogical importance for Native Hawaiians); Mike Benner, *WA State Legislature Passes Bill Banning Native American Mascots at Public Schools*, KGW8 (Apr. 20, 2021, 12:07 AM), <https://www.kgw.com/article/news/local/wa-state-legislature-passes-bill-banning-native-american-mascots-at-public-schools/283-adcf8c98-632a-49aa-9076-2cb2508fbad2> (reporting the Washington state legislature's outlawing of Native American mascots at public schools); H.B. 2052, 81st Leg., Reg. Sess. (Or. 2021) (Oregon law introduced at request of Governor Kate Brown seeking to require public schools to remove dress codes that prohibit Native students from wearing items of cultural and religious significance at graduation ceremonies).

52. In California, for example, Native American life expectancy lags three years behind the life expectancy of white and Asian Californians. Jesse Bedayn, *California's Racial Inequality: What Can State Do with \$31 Billion?*, CALMATTERS (Dec. 24, 2021), <https://calmatters.org/california-divide/2021/12/california-racial-inequality-budget/>.

53. The Bill Lane Ctr. for the Am. West, *supra* note 39.

removal and forced migration promoted throughout United States history,<sup>54</sup> the vast majority of the nation's Native American population calls the American West home.<sup>55</sup> Moreover, the Hawaiian Islands remain the ancestral lands and current home of Native Hawaiians despite the United States government's unlawful annexation of Hawai'i under both international and domestic law.<sup>56</sup> Illustratively, a list identifying the five states with the most indigenous reservations and tribal areas<sup>57</sup> includes four from the census-designated western region: Alaska, California, Hawai'i, and Washington.<sup>58</sup> Of these states, three intersect with the political identity of the western "liberal sisters."

California has 107 areas designated as tribal land and a Native populace (that lives both within and outside reservations) of 1,141,587.<sup>59</sup> Hawai'i encompasses seventy-five tribal land areas<sup>60</sup> and features a statewide indigenous population of 407,394.<sup>61</sup> Lastly, twenty-nine tribal areas fall within the state boundaries of Washington,<sup>62</sup> and residents that identify with one of the census-defined indigenous categories account for 318,261 total persons within the state.<sup>63</sup> Comparatively, Oregon has only nine areas considered tribal territory and a comparatively small Native population—according to the 2020 American Community Survey,

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54. See Lizzie Wade, *Native Tribes Have Lost 99% of Their Land in the United States*, SCIENCE (Oct. 28, 2021, 3:00 PM), <https://www.science.org/content/article/native-tribes-have-lost-99-their-land-united-states>.

55. The Bill Lane Ctr. for the Am. West, *supra* note 39.

56. David Keanu Sai, *The American Occupation of the Hawaiian Kingdom: Beginning the Transition from Occupied to Restored State 144–46* (Dec. 2008) (Ph.D. dissertation, University of Hawai'i) (on file with hawaiiiankingdom.org).

57. Reservations constitute federally recognized land areas that have been preserved and protected for Native American tribes and communities via treaty, executive order, congressional act, or federal administrative action. Tana Fitzpatrick, CONG. RSCH. SERV., IF11944, *Tribal Lands: An Overview* 1 (2021). Tribal areas can include trust, restricted fee, fee or fee simple, and allotted lands. *Id.*

58. Cheyenne Buckingham, *States with the Most Indian Reservations and Tribal Areas*, 24/7 WALL ST. (Nov. 20, 2018, 5:45 PM), <https://247wallst.com/special-report/2018/11/20/states-with-the-most-indian-reservations-and-tribal-areas/>.

59. *Id.*; 2020 American Community Survey, *supra* note 7.

60. No federally recognized reservation exists in Hawai'i. Buckingham, *supra* note 58. While the federal government formally recognizes Native American tribes within the continental United States as sovereigns and purports to maintain a government-to-government relationship with each tribe, *see Indian Tribes & Native Hawaiians Overview*, ADVISORY COUNCIL ON HIST. PRES., <https://www.achp.gov/indian-tribes-and-native-hawaiians> (last visited Oct. 25, 2022), no such federal recognition or relationship exists with Native Hawaiians. Cecily Hilleary, *Native Hawaiians Divided on Federal Recognition*, VOA NEWS (Feb. 7, 2019, 8:43 AM), <https://www.voanews.com/a/native-hawaiians-divided-on-federal-recognition/4775275.html>. The existence of designated "tribal land areas" in Hawai'i represents an extreme manifestation of American colonialism and conquest. As "citizens of an internationally recognized sovereign," Native Hawaiians should control *all* of the Hawaiian Islands. Sai, *supra* note 56, at iii. However, as a conquered and illegally occupied state, less than three percent of Hawai'i's land mass has been placed in trust and protected for Native Hawaiians. *United States' History with the Native Hawaiian Community*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/hawaiian/united-states-history-native-hawaiian-community> (last visited Oct. 25, 2022).

61. Buckingham, *supra* note 58; 2020 American Community Survey, *supra* note 7.

62. Buckingham, *supra* note 58.

63. 2020 American Community Survey, *supra* note 7.

approximately 166,473 Native Americans, Alaskans, Hawaiians, and Pacific Islanders live within the state.<sup>64</sup> Given these demographics, and to further limit the scope of this research, this Note focuses on the three “liberal sisters” with sizeable Native land areas and populations: California, Hawai‘i, and Washington.<sup>65</sup>

## II. PROTECTING CULTURAL RESOURCES

### A. Why Cultural Resources

An analysis of state court interpretations of cultural resources protection laws offers one means of attempting to resolve the paradox between the reparative goals of the social justice-oriented policies often embraced by the “liberal sisters” and the reality, as evidenced by the disparate outcomes afflicting indigenous populations,<sup>66</sup> within those states. If the state courts of the western “liberal sisters” fail to respect Native cultural resources—which are deeply linked to land and in many indigenous traditions form the “lifeblood of spiritual integrity . . . community identity[,] and political sovereignty,”—they also fail to respect Native self-determination and welfare.<sup>67</sup> Researchers have found a correlation between the “violent physical and spiritual separation of [i]ndigenous people from their lands” that occurred under settler colonialism and “the deep disparities in all measures of health and well-being that impact [i]ndigenous peoples . . .” into the present.<sup>68</sup> Moreover, public health experts advise that reclamation of Native values, beliefs, customs, and knowledge—i.e., the intangible elements of cultural resources—not only fosters physical and mental healing for indigenous community members but also helps ensure collective environmental benefits in the wake of human-induced climate change.<sup>69</sup> Thus, courts’ protection of cultural resources via tools of statutory interpretation correlates to the overarching goals of promoting social and environmental justice.

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64. *Land Acknowledgements*, OR. STATE UNIV., <https://guides.library.oregonstate.edu/land-acknowledgments/oregon#s-lg-box-22587155> (last visited May 10, 2022); 2020 American Community Survey, *supra* note 7.

65. Although this Note does not explore the Oregon state court system’s approach to indigenous cultural resources protection, recent controversies have come before Oregon courts, which fortunately held in favor of indigenous rights. *See, e.g., Oregon Court Affirms Klamath Tribes’ Water Rights*, NATIVE AM. RTS. FUND (Feb. 25, 2021), <https://www.narf.org/klamath-tribes-water-rights/>.

66. *See* Bedayn, *supra* note 52 and accompanying text.

67. Zellmer, *infra* note 78, at 429, 459 (describing how the Cheyenne River Sioux Tribe’s “traditional, cultural[,] and spiritual use of [land and its associated cultural resources] is vital to the health of [the tribal] nation and [their] self-determination”).

68. Margo Greenwood & Nicole Marie Lindsay, *A Commentary on Land, Health, and Indigenous Knowledge(s)*, 26 GLOB. HEALTH PROMOTION 82, 82 (2019).

69. *Id.* at 83–84.

### B. Defining Cultural Resources

While federal law offers definitions for concepts similar to “cultural resources,”<sup>70</sup> nothing at the federal level currently defines the term exactly.<sup>71</sup> At the state-level, the California Environmental Quality Act provides more direction; specifically, the California Environmental Quality Act defines “tribal cultural resources” as “[s]ites, features, places, cultural landscapes, sacred places, and objects with cultural value . . . .”<sup>72</sup> While Hawai‘i state laws do not contain a definition, the state’s regulatory guidelines for implementation of the Hawaii Environmental Policy Act do.<sup>73</sup> Such guidelines note that “cultural resources” include “traditional cultural properties or other types of historic sites . . . .”<sup>74</sup> Lastly, neither Washington’s laws nor regulations offer a definition.<sup>75</sup>

Limited federal guidance and the variety of definitions offered at the state-level create competing interpretations. These diverse definitions can be problematic when federal policies recommend using the term as it is “commonly understood.”<sup>76</sup> However, even well-established attorneys admit they do not know the intended meaning of “cultural resources.”<sup>77</sup> Legal scholarship has attempted to resolve this interpretive gap. The most cited article offers the following explanation: “cultural resources” include “historic structures and artifacts as well as natural landscapes, physical features, and objects with spiritual or other intangible human associations .

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70. See, e.g., 16 U.S.C. § 470bb(1) (1988) (“archaeological resource”); 25 U.S.C. § 3001(3) (1990) (“cultural items”).

71. Dean B. Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth’s Caretakers*, 10 AM. INDIAN L. REV. 1, 15 (1982); see also *What are “Cultural Resources”?*, NAT’L PRES. INST., <https://www.npi.org/what-are-cultural-resources> (last visited May 11, 2022). Recently proposed legislation does include a direct definition: the Native American Burial Sites and Cultural Resources Protection Act of 2022 designates human remains and funeral or other ceremonial objects as “cultural resources.” H.R. 6716 § 1(a)(4), 117th Cong. (2022). Yet, this definition does not prove very useful for this Note’s analysis due to its narrow interpretation and applicability; regardless, the meaning presented by the proposed act has limited value until enacted into law.

72. CAL. PUB. RES. CODE § 21074(a)(1) (2015).

73. HAW. REV. STAT. § 6E-2 (2009) (definition section for the state’s historic preservation program); HAW. REV. STAT. § 343-2 (2010) (definition section related to the state process for environmental impact statements).

74. OFF. OF ENV’T QUALITY CONTROL, STATE OF HAW., GUIDE TO THE IMPLEMENTATION AND PRACTICE OF THE HAWAII ENVIRONMENTAL PROTECTION ACT 12 (2012).

75. WASH. REV. CODE §§ 27.34.010–27.34.916, 68.60.010–68.60.080 (2022) (subsections outlining the state’s relevant historic preservation laws); WASH. REV. CODE §§ 43.21C.010–43.21C.914 (2022) (subsections codifying the State Environmental Policy Act); WASH. ADMIN. CODE § 25-12-020 (2019) (regulation related to the state’s Advisory Council on Historic Preservation); WASH. ADMIN. CODE §§ 197-11-700 to 197-11-799 (2019) (subsections outlining definitions for the State Environmental Policy Act’s administrative rules).

76. Anne Senters, *A Common Understanding of “Cultural Resources”?*, AM. BAR ASS’N (May 1, 2015), [https://www.americanbar.org/groups/environment\\_energy\\_resources/publications/trends/2014-2015/may-june-2015/a\\_common\\_understanding\\_cultural\\_resources/](https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2014-2015/may-june-2015/a_common_understanding_cultural_resources/).

77. *Id.*

. . .”<sup>78</sup> The term “structure” can embrace “buildings” and “ruins.”<sup>79</sup> “Natural landscapes” often refers to sites of cultural or historical importance; such spaces do not require a structure to be deemed worthy of protection.<sup>80</sup> Additional scholarly definitions include references to “archeological sites and collections,”<sup>81</sup> “intangible elements of . . . cultural heritage,”<sup>82</sup> “museum objects,”<sup>83</sup> and “human remains.”<sup>84</sup> This Note adopts a broad definition to better advocate and promote allyship for Native American cultural resources.<sup>85</sup>

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78. Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 414 (2002).

79. Suagee, *supra* note 71, at 16.

80. See Lawrence R. Kueter & Christopher S. Jensen, *Conservation Easements: An Underdeveloped Tool to Protect Cultural Resources*, 83 DENV. U. L. REV. 1057, 1057 (2006).

81. Francis P. McManamom, *Cultural Resources and Protection Under United States Law*, 16 CONN. J. INT'L L. 247, 247 (2001).

82. Suagee, *supra* note 71, at 16.

83. McManamom, *supra* note 81, at 247.

84. Suagee, *supra* note 71, at 16.

85. See *id.* at 6 (underscoring the importance of allies and advocates in the interpretation of historic preservation and cultural resources management law).

### C. Relevant State Protections

The below tables summarize state approaches to cultural resources protection from both a historic preservation and environmental impact standpoint.<sup>86</sup>

State	Law	Admin	Regs
California	Miscellaneous Code Sections <sup>87</sup>	Office of Historic Preservation <sup>88</sup>	California Register of Historical Resources <sup>89</sup>
Hawai'i	Chapter 6E <sup>90</sup>	State Historic Preservation Division <sup>91</sup>	Miscellaneous Rules <sup>92</sup>
Washington	Miscellaneous Code Sections <sup>93</sup>	Department of Archaeology and Historic Preservation <sup>94</sup>	Miscellaneous Rules <sup>95</sup>

86. Experts identify the federal National Historic Preservation Act as the “basic charter” of cultural resources protection. Dean B. Suagee & Karen J. Funk, *Cultural Resources Conservation in Indian Country*, 7 NAT. RES. & ENV'T 30, 30 (1993). Similarly, the National Environmental Policy Act stands as “an integral part of” management and works in conjunction with the former. Sandra B. Zellmer, *The Protection of Cultural Resources on Public Lands: Federal Statutes and Regulations*, 31 ENV'T L. REP. NEWS & ANALYSIS 10689, 10689 (2001). Thus, this Note looks at their state counterparts.

87. The relevant code sections dealing with historic preservation in California include: CAL. PUB. RES. CODE §§ 5020–5029 (historical resources), 5031–5033 (state landmarks), 5079–5079.65 (heritage fund), 5097–5097.6 (archaeological sites), 5097.9–5097.991 (Native American heritage); CAL. HEALTH & SAFETY CODE §§ 7050.5 (human remains), 18950–18961 (state historic buildings); and CAL. PENAL CODE § 6221/2 (destruction of historical properties). CAL. OFF. OF HIST. PRES., CALIFORNIA STATE LAW & HISTORIC PRESERVATION (2005).

88. See *Mission and Responsibilities*, OFF. OF HIST. PRES., [https://ohp.parks.ca.gov/?page\\_id=1066](https://ohp.parks.ca.gov/?page_id=1066) (last visited May 11, 2022).

89. CAL. CODE REGS. tit. 14, §§ 4850–4858 (2022).

90. HAW. REV. STAT. §§ 6E-1 to 6E-83 (2022).

91. See HAW. DEP'T OF LAND & NAT. RES., *HAW. STATE HIST. PRES. DIV.*, <https://dlnr.hawaii.gov/shpd/faq> (last visited Nov. 5, 2022).

92. The relevant regulatory sections dealing with historic preservation in Hawai'i include: HAW. CODE R. §§ 13-197-1 to 13-197-24 (historic places review board), 13-198-1 to 13-198-13 (register of historic places program), 13-275-1 to 13-275-14 (historic preservation review), 13-276-1 to 13-276-9 (archaeological inventory surveys and reports), 13-277-1 to 13-277-8 (archaeological site preservation and development), 13-278-1 to 13-278-6 (archaeological data recovery), 13-279-1 to 13-279-7 (archaeological monitoring studies), 13-280-1 to 13-280-5 (procedures for inadvertent discoveries), 13-282-1 to 13-282-5 (archaeological work), 13-283-1 to 13-283-6 (osteological analysis of human skeletal remains), 13-300-1 to 13-300-70 (burial sites and human remains). See HAW. DEP'T OF LAND & NAT. RES., *HAW. STATE HIST. PRES. DIV., Administrative Rules Pertaining to Historic Preservation in Hawai'i*, <https://dlnr.hawaii.gov/shpd/rules/> (last visited May 11, 2022).

93. The relevant code sections dealing with historic preservation in Washington include: WASH. REV. CODE §§ 19.27.120 (buildings and structures with special historical or architectural significance), 27.34.010–27.34.916 (state historical societies), 27.44.020–27.44.901 (Indian graves and records), 27.53.010–27.53.150 (archaeological sites and resources), 68.60.010–68.60.080 (abandoned and historic cemeteries and graves). See *Preservation Laws*, DEP'T OF ARCHAEOLOGY & HIST. PRES., <https://dahp.wa.gov/project-review/preservation-laws> (last visited May 11, 2022).

94. See DEP'T OF ARCHAEOLOGY & HIST. PRES., <https://dahp.wa.gov/> (last visited May 11, 2022).

95. The relevant regulatory sections dealing with historic preservation in Washington include: WASH. ADMIN. CODE §§ 25-12-010 to 25-12-070 (advisory council on historic preservation), 25-48-010 to 25-49-140 (archaeological excavation and removal permits). See *Preservation Laws*, *supra* note 93.



Table 2. State Environmental Policy Laws, Administrative Bodies, and Regulations			
State	Law	Admin	Regs
California	California Environmental Quality Act <sup>96</sup>	Office of Planning and Research and California Natural Resources Agency <sup>97</sup>	California Environmental Quality Act Guidelines <sup>98</sup>
Hawai'i	Hawaii Environmental Policy Act <sup>99</sup>	Environmental Review Program <sup>100</sup>	Guide to the Implementation and Practice of the Hawaii Environmental Policy Act <sup>101</sup>
Washington	State Environmental Policy Act <sup>102</sup>	Department of Ecology <sup>103</sup>	State Environmental Policy Act Handbook <sup>104</sup>

Hawai'i also affords constitutional protections for cultural resources, such as outlined in Article IX, Section 9 of the state constitution which proclaims that “the State shall have the power to preserve and develop the cultural, creative[,] and traditional arts of its various ethnic groups,” including those of Native Hawaiians and Pacific Islanders.<sup>105</sup> Neither the California nor Washington state constitutions offer such guarantees.<sup>106</sup>

### III. TRIBALCRIT, THE “DISCOVERY” DOCTRINE, AND CONQUEST

#### A. Tenets of TribalCrit

TribalCrit is a branch within Critical Race Theory that aims to “more completely address the issues of [i]ndigenous Peoples in the United States.”<sup>107</sup> Arizona State University professor and director of the Center for Indian Education Bryan McKinley Jones Brayboy first introduced the indigenous-focused theoretical framework in 2005.<sup>108</sup> Through its nine tenets, some of which are described below,

96. CAL. PUB. RES. CODE §§ 21000–21189.70.10 (2022).

97. CAL. PUB. RES. CODE § 21083 (2022); *see also* OFF. OF PLAN. & RSRCH., <https://opr.ca.gov/> (last visited May 11, 2022); *Who We Are*, CAL. NAT. RES. AGENCY, <https://resources.ca.gov/About-Us/Who-We-Are> (last visited Nov. 8, 2022).

98. *See* ASS'N OF ENV'T PRO., CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) STATUTE AND GUIDELINES (2022).

99. HAW. REV. STAT. §§ 342-1 to 343-8 (2022).

100. *See* STATE OF HAW. OFF. OF PLAN. & SUSTAINABLE DEV., *ENV'T REV. PROGRAM*, <https://planning.hawaii.gov/erp/> (last visited May 11, 2022).

101. *See* OFF. OF ENV'T QUALITY CONTROL, *supra* note 74.

102. WASH. REV. CODE §§ 43.21C.010–43.21C.914 (2022).

103. *See* DEP'T OF ECOLOGY, <https://ecology.wa.gov/> (last visited May 11, 2022).

104. *See* DEP'T OF ECOLOGY, STATE ENVIRONMENTAL POLICY ACT HANDBOOK (2018).

105. HAW. CONST. art. IX, § 9.

106. *See* CAL. CONST.; WASH. CONST.

107. Bryan McKinley Jones Brayboy, *Toward a Tribal Critical Race Theory in Education*, 37 URB. REV. 425, 425 (2005).

108. *Id.*

Brayboy hopes TribalCrit will “address the complicated relationship between American Indians and the . . . federal government . . . to make sense of American Indians’ liminality as both racial and legal/political groups and individuals.”<sup>109</sup> Since the subdiscipline’s introduction, specialized TribalCrit scholarship focused on the particularized harms endured by Native Hawaiians under colonialism and white supremacist ideology has also developed.<sup>110</sup>

The first tenet of TribalCrit reframes the traditional focus of Critical Race Theory; while scholars such as Derrick Bell and Kimberlé Crenshaw led the development of the discipline as a theoretical means to explore and critique institutional racism, Brayboy introduced TribalCrit to focus on colonization’s endemic and enduring impact.<sup>111</sup> Accompanying this emphasis, within its second tenet, TribalCrit also acknowledges how American law and institutions “are rooted in imperialism, [w]hite supremacy, and a desire for material gain.” With this understanding, TribalCrit scholars examine how such principles provided a means for white European settlers to “rationalize and legitimize their decisions” to seize property rights and steal land from indigenous communities.<sup>112</sup> A powerful example of this rationalization occurs in the 1823 United States Supreme Court case *Johnson v. McIntosh*.<sup>113</sup>

### B. The “Discovery” Doctrine and Conquest

*Johnson v. McIntosh* ratified the “discovery” doctrine into American constitutional law.<sup>114</sup> This doctrine advances and affirms an enduring, yet mythological version of history in which white European settlers “discovered” the “New World” and thereby deserved exclusive property rights over the continent.<sup>115</sup> According to Chief Justice Marshall, “discovery gave title to the government . . . by whose authority, it was made, against all other *European* governments.”<sup>116</sup> Thus, only settler colonial nations, more specifically white Europeans, had the right to property in North America, whether “by purchase or by *conquest*.”<sup>117</sup> Such a legal rule—one completely read into domestic American property law via judicial interpretation—validated a racial hierarchy of white European power over Native peoples and their

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109. *Id.*

110. See, e.g., Nik Cristobal, *Kanaka ‘Ōiwi Critical Race Theory: Historical and Educational Context*, 7 CONTEMPORANEITY 27, 28 (2018).

111. Brayboy, *supra* note 107, at 429; see also Fortin, *supra* note 11, at 2.

112. Brayboy, *supra* note 107, at 431.

113. *Johnson v. McIntosh*, 21 U.S. 543, 574 (1823).

114. *Id.*; see also Perea, *supra* note 6, at 2.

115. Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power*, 20 N. Y. U. REV. L. & SOC. CHANGE 303, 306–07 (1992).

116. *Johnson*, 21 U.S. at 573 (emphasis added).

117. *Id.* at 587 (emphasis added).

land.<sup>118</sup> It established—as United States Supreme Court precedent—a worldview that celebrates conquest and white cultural dominance at the expense of indigenous sovereignty.<sup>119</sup>

Critical Race Theory rejects this reading of history and constitutional law. Scholars of the discipline expose that Chief Justice Marshall “did not engage in a full legal, much less normative, defense of the theory of discovery and conquest.”<sup>120</sup> They call for efforts to decolonize federal Indian law and urge courts to embrace canons of statutory interpretation “far more protective of the sovereignty of Indian tribes.”<sup>121</sup> Unfortunately, even at the state level, courts continue to uphold the “discovery” doctrine and perpetuate modern conquest via canons of statutory interpretation, as will be shown in Part IV.

#### IV. HOW STATE COURT APPROACHES TO STATUTORY INTERPRETATION DIMINISH INDIGENOUS CULTURAL RESOURCES PROTECTIONS

Even though the “liberal sisters” have attempted to relieve some of the damage caused by colonization and conquest via legislative protections for cultural resources,<sup>122</sup> such statutes are vulnerable to colonially rooted state court interpretations that undermine their effectiveness. In several prominent instances, state courts have directly imported white Anglo-American concepts and modes of thinking that have rendered the statutory purpose and language of safeguarding indigenous cultural resources meaningless.<sup>123</sup> In another instance, a state court seemingly protected Native land but in doing so further advanced Marshall’s myth of discovery.<sup>124</sup> Lastly, other examples illustrate how state courts have used facially neutral but prohibitively narrow interpretations of resources protection statutes that prevent them from achieving their decolonial purpose.<sup>125</sup> This section provides examples of all three types of cases and thereby shows that, despite legislative

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118. See Clinton, *supra* note 8, at 78, 93.

119. See Limerick, *supra* note 3, at xiii; Clinton, *supra* note 8, at 121–23 (arguing that “[t]he exercise of plenary power” through programs of forced detribalization “by the federal government . . . often had deleterious cultural and political effects on Indian tribes”).

120. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 386 (1993).

121. Clinton, *supra* note 8, at 121.

122. See *supra* Part II.C.

123. See *Wana the Bear v. Cmty. Constr., Inc.*, 128 Cal. App. 3d 536 (1982); *Ruegg & Ellsworth v. City of Berkeley*, 63 Cal. App. 5th 277, 301 (2021); *Klickitat Cnty. Citizens Against Imported Waste v. Klickitat Cnty.*, 122 Wash. 2d 619 (1993).

124. See *Kepto’o v. Watson*, 87 Haw. 91, 94 (1998).

125. See *Hui Malama I Na Kupuna O Nei v. Wal-Mart*, 122 Haw. 171 (2009); *Roskelley v. Wash. State Parks and Recreation Comm’n*, No. 48423-4-II, 2017 Wash. App. LEXIS 747 (Ct. App. Mar. 28, 2017).

intentions, liberal state lawmakers are often unable to overcome their courts' systemic inability to vindicate the project of decolonization.

### A. California

In the 1982 case *Wana the Bear v. Community Construction*, the California Court of Appeals held that Miwok burial grounds did not meet the definition of a “cemetery” under California state statutes regulating burial sites and the historic preservation of human remains.<sup>126</sup> Such an interpretation allowed developers to dig up Miwok graves and proceed with the construction of a housing project on top of sacred indigenous grounds.<sup>127</sup> To reach this result, the court relied on a white “ethnocentric construction” of what constitutes a cemetery.<sup>128</sup> Moreover, the court disregarded the history of conquest and land dispossession in their attempt to uphold the statutory definition of “cemetery.”<sup>129</sup>

In response to this case the California state legislature enacted additional express protections for Native burial sites.<sup>130</sup> While some courts have honored this clear expression of a legislative intent to safeguard indigenous cultural resources,<sup>131</sup> more recent decisions have circumvented cultural resources protections to the detriment of California’s Native communities. In this way, both older and more recent California cases have exposed the “failure of lawmakers and the courts . . . to address, incorporate, take into account, and protect indigenous” cultural resources.<sup>132</sup>

As noted above, another California case decided recently replicates the damaging holding of *Wana the Bear*. In *Ruegg & Ellsworth v. City of Berkeley*, the California Court of Appeals required the City of Berkeley to approve a real estate developer’s application for an affordable housing project despite community protests surrounding its impact on an indigenous shellmound.<sup>133</sup> California state law necessitates a ministerial review process for affordable housing development applications as long as the proposed project meets specific conditions.<sup>134</sup> One such condition is that the development cannot demolish a historic “structure.”<sup>135</sup>

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126. *Wana the Bear*, 128 Cal. App. 3d at 541.

127. Walter R. Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* 237 (2012) (eBook).

128. *Id.* at 237–38.

129. *Id.* at 237 (“The ruling that Miwoks failed to use the burial ground for the prescribed period failed to take into the account the fact that they had been driven away by the whites, and their cessation of use was involuntary, because the Indians fled from the barrels of gold-miner guns.”).

130. Joseph William Singer, Bethany R. Berger, Nestor M. Davidson & Eduardo Moisés Peñalver, *Property Law: Rules, Policies, and Practices* 243, n.1 (7th ed. 2017).

131. *Id.*; see also *People v. Van Horn*, 267 Cal. Rptr. 804 (Cal. Ct. App. 1990).

132. Echo-Hawk, *supra* note 127 at 238.

133. *Ruegg & Ellsworth v. City of Berkeley*, 277 Cal. Rptr. 3d 649 666 (Cal Ct. App. 2021).

134. *Id.* at 658.

135. *Id.*

Based on a draft environmental impact report prepared under the California Environmental Quality Act, as well as other studies and extensive public testimony, the City of Berkeley determined that Ruegg & Ellsworth's development could potentially impact the shellmound.<sup>136</sup> The court disregarded this consequence.<sup>137</sup> Using text-based canons of statutory interpretation, it determined that the shellmound did not constitute a "structure" and thereby was not protected.<sup>138</sup> To reach this conclusion, the court considered evidence related to the unknown location of the original shellmound and the fact that nothing currently exists above ground; it did not reflect on the history of land dispossession nor incorporate indigenous understandings of what constitutes a "structure," allowing for the continued conquest of indigenous cultural resources.<sup>139</sup>

### B. Hawai'i

Despite constitutional safeguards for Native Hawaiian cultural resources,<sup>140</sup> Hawai'i state courts also reproduce modern forms of conquest. The first relevant case, *Kepo 'o v. Watson*, involved a proposal to build a power plant on Hawaiian home lands—ancestral land managed under a trust for the purpose of improving Native Hawaiian livelihood and protecting indigenous resources.<sup>141</sup> The 1998 case specifically revolved around environmental consultation under the Hawaii Environmental Policy Act.<sup>142</sup> The developer proposing to build the power plant argued that environmental protections did not apply to the project since it would be built on home lands and such property did not meet the definition of "state lands" under Hawai'i cultural resources protection laws.<sup>143</sup>

Ultimately, the Hawai'i Supreme Court ruled in favor of the indigenous plaintiff, i.e., the court found that Native Hawaiian home lands qualify as "state lands."<sup>144</sup> On the surface, the *Kepo 'o* holding appears to favor Native sovereignty by enforcing the Hawaii Environmental Policy Act's protections for cultural and environmental resources; however, its legal reasoning reveals a state judiciary subject to settler colonial ideology. To reach its conclusion, the state Supreme Court interpreted the words "state lands" to include Hawaiian home lands because "the

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136. *Id.* at 654–58.

137. *See id.* at 666–70.

138. *Id.*

139. *See id.*

140. *See* HAW. CONST., *supra* note 105 and accompanying text.

141. *Kepo'o v. Watson*, 87 Haw. 91, 93 (1998); *see also About the Department of Hawaiian Home Lands*, DEP'T OF HAWAIIAN HOME LANDS, <https://dhhl.hawaii.gov/dhhl/> (last visited May 12, 2022).

142. *Kepo'o*, 87 Haw. at 94; *see also* HAW. REV. STAT. § 343 (1993) (environmental impact statement requirements).

143. *Id.* at 93–94.

144. *Id.* at 97–98.

state acquired title to [such ancestral property] upon entry into the Union.”<sup>145</sup> This interpretation illustrates an approach to statutory interpretation rooted in colonialism. It perpetuates the doctrine of Chief Justice Marshall by placing the claims of white settlers and their governments above indigenous rights to property and associated cultural resources.<sup>146</sup> Thus, even in a case where the indigenous party succeeds, the court’s overarching legal interpretations still implicate the legacies of conquest.

*Hui Malama I Na Kupuna O Nei v. Wal-Mart* serves as another illustrative case.<sup>147</sup> In 2009, the Hawai‘i State Intermediate Court of Appeals held in favor of Wal-Mart, ascertaining that the multinational retailer did not violate the state’s historic preservation laws—often referred to by their statutory chapter number, 6E—when it received approval from the City of Honolulu to build its store on an allegedly vacant piece of property.<sup>148</sup> Prior to the approval, a series of environmental, archaeological, and historic preservation assessments were conducted; the City of Honolulu ultimately approved development because “none of these assessments indicated that significant burial or historic sites *may* exist on the [p]roperty.”<sup>149</sup> However, once Wal-Mart began development of the retail project, construction workers discovered forty-two sets of Native Hawaiian remains.<sup>150</sup> Indigenous plaintiffs thus challenged the project under 6E, which requires consultation with Hawai‘i’s administrative historic preservation body when approval of a project *may* affect a burial site.<sup>151</sup>

Reading into the “plain language” of the applicable state statutory protections, the court determined that 6E did not apply to the circumstances at hand—all because of the preservation law’s use of the word “may.”<sup>152</sup> Using text-based canons of statutory interpretation, the court found “may” to imply that actual knowledge is required.<sup>153</sup> Since the initial assessments surrounding cultural resources did not lead the City of Honolulu to affirmatively know of the existence of Native remains, 6E did not require consultation with the state administrative historic preservation body.<sup>154</sup>

Thus, statutory interpretation practices resulted in the approval of Walmart building a discount chain retail store at the expense of Native Hawaiian cultural

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145. *Id.* at 97.

146. *See Johnson*, 21 U.S. at 574; Newcomb, *supra* note 115; Clinton, *supra* note 8, at 78, 93, 121–23; Limerick, *supra* note 3, at xiii.

147. *Hui Malama I Na Kupuna O Nei v. Wal-Mart*, 122 Haw. 171 (2009).

148. *Id.* at 173.

149. *Id.* (emphasis added).

150. *Id.* at 175.

151. *Id.* at 173, 176; *see also* HAW. REV. STAT. § 6E-42(a) (1996).

152. *Id.* at 177.

153. *Id.*

154. *Id.*

resources.<sup>155</sup> Although there is no intrinsically indigenous nor intrinsically white Anglo-American meaning of the word “may,” and therefore the court’s interpretation appears neutral, the Hawai’i state court has identified in other cases that such permissive language vests the court with discretion to impose or not impose conditions mandated by statute.<sup>156</sup> Despite this discretionary authority, in this instance, the court actively chose to not require environmental consultation and thereby further perpetuated the enduring impacts of conquest in physical form.

### C. Washington

Lastly, two cases from Washington further illustrate this Note’s hypothesis. *Klickitat County Citizens Against Imported Waste v. Klickitat County*<sup>157</sup> and *Roskelley v. Washington State Parks and Recreation Commission*<sup>158</sup> both involved environmental and cultural resources management plans. Both cases also resulted in holdings favorable to the state defendants.<sup>159</sup> In the former 1993 case, the Yakama Indian Nation<sup>160</sup> challenged the Klickitat County’s solid waste management plan update for failing to comply with the State Environmental Policy Act.<sup>161</sup> The Yakama Indian Nation’s challenge centered around the community’s concern that the management plan inadequately addressed the impacts of a county landfill on Native cultural resources.<sup>162</sup>

In reaching a conclusion favorable to Klickitat County, the court applied the “rule of reason.”<sup>163</sup> This rule promotes a law and economics approach to statutory interpretation by prioritizing cost-benefit analysis,<sup>164</sup> an interpretive strategy which often works to hinder progressive policy goals.<sup>165</sup> Law and Political Economy scholars have also shown cost-benefit analysis to cement and perpetuate inequity due to the legal framework’s focus on economic “efficiency” and its indifference to the human

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155. *Id.*

156. *State v. Kahawai*, 83 P.3d 725, 728 (Haw. 2004).

157. *Klickitat Cnty. Citizens Against Imported Waste v. Klickitat Cnty.*, 122 Wash. 2d 619 (1993).

158. *Roskelley v. Wash. State Parks & Recreation Comm’n*, No. 48423-4-II, 2017 Wash. App. LEXIS 747 (Ct. App. Mar. 28, 2017).

159. *Klickitat*, 122 Wash. 2d at 622; *Roskelley* at \*2.

160. In the text of the opinion the court refers to the tribe as the Yakima Indian Nation; however, the nation renamed itself to Yakama in the mid-1990s to better reflect a pronunciation more similar to the one found in the nation’s native tongue. The Yakima or Yakama Nation, CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, <https://www.yakama.com/about/#:~:text=In%20the%20mid%2D1990s%20the,which%20is%20now%20spelled%20Yakama>.

161. *Klickitat*, 122 Wash. 2d at 622.

162. *Id.* at 631–32.

163. *Id.* at 633.

164. *Id.* (“The rule of reason is ‘in large part a broad, flexible *cost-effectiveness* standard.’”) (emphasis added).

165. Elizabeth Popp Berman, *Let’s Politicize Cost-Benefit Analysis*, LPE PROJECT (Oct. 5, 2021), <https://lpeproject.org/blog/lets-politicize-cost-benefit-analysis/>.

beings and social issues involved in legal disputes.<sup>166</sup> These characteristics reveal an approach to interpretation that prioritizes Anglo-American conceptions of commodifiable and “efficient” land use, i.e., settler colonial power and supremacy, at the expense of the environment and Native people.<sup>167</sup> In addition, as emphasized by the statutory canon’s name, the “rule of reason” frames dominant understandings of meaning as “reasonable” and in contrast portrays Native knowledge and concerns as “crude,” further perpetuating the court’s legitimization of racial hierarchies.<sup>168</sup>

Finally, *Roskelley v. Washington State Parks and Recreation Commission* centered around the interpretation of two words: “should be.”<sup>169</sup> Policies adopted by the Washington State Parks and Recreation Commission for the management of Mount Spokane—a registered “Traditional Cultural Property” under the state’s cultural resources protection statutes due to its importance to Native American communities<sup>170</sup>—advised that “areas of a park containing natural resources of regional or statewide significance ‘*should be*’ classified restrictively to allow only low-intensity uses and minor facilities.”<sup>171</sup> Thus, when the Commission adopted a management plan that allowed for high intensity recreation on the protected land,<sup>172</sup> the Spokane Tribe challenged the classification as “arbitrary and capricious.”<sup>173</sup>

The Washington Court of Appeals disagreed with the characterization offered by the tribe.<sup>174</sup> Applying text-based canons that prioritize “plain language,” the court held that “should be” indicates permissive language; thus, the court deferred to the agency’s land classification and allowed state control of Mount Spokane regardless of whether it threatened Native cultural resources.<sup>175</sup> This follows the legal reasoning of the “courts of the conqueror.”<sup>176</sup> Chief Justice Marshall used the power of judicial interpretation to rationalize settlers’ rights to dominate land.<sup>177</sup> Today, the Washington state court relies on facially neutral, permissive language to further rationalize settlers’ ideas of what constitutes the best use of land even if such use infringes on Native sovereignty and directly counters statutes embedded with legislative purposes aimed at protecting indigenous cultural resources.

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166. *See id.*; *see also* Zachary Liscow, *Equity in Regulatory Cost-Benefit Analysis*, LPE PROJECT (Oct. 4, 2021), <https://lpeproject.org/blog/equity-in-regulatory-cost-benefit-analysis/>.

167. *See Klickitat*, 122 Wash. 2d at 625; *see also supra* notes 27–28 and accompanying text.

168. *See Limerick, supra* note 3, at xiii.

169. *Roskelley* at \*17–18.

170. *Id.* at \*38 (Bjorgen, J., dissenting).

171. *Id.* at \*17–18 (emphasis added).

172. *Id.* at \*14.

173. *Id.* at \*24.

174. *See id.* at \*16.

175. *Id.*

176. *Johnson v. McIntosh*, 21 U.S. 543, 588 (1823).

177. *Williams, supra* note 15, at 483.



## CONCLUSION

Even in the “liberal sisters” of the American West—a region home to vast tribal land and large indigenous populations—courts favor canons of statutory interpretation that embrace problematic legacies while devaluing Native sovereignty. By analyzing state court opinions as tools of modern conquest, this Note reveals the work and advocacy still needed to decolonize the United States’ judicial systems at all levels. In cases interpreting state cultural resources protections, state courts can and should embrace an interpretive strategy rooted in indigenous cultural understandings and knowledge. Such a refocusing would recognize and respect one of the key tenets of TribalCrit: “The concepts of culture, knowledge, and power take on new meaning when examined through an [i]ndigenous lens.”<sup>178</sup>

Moreover, state courts can and should acknowledge state legislative purposes aimed at promoting Native sovereignty and reparative justice. This reframing would not only legitimize the court as a venue that upholds the will of the people as encapsulated through representative democracy (at least in the “liberal sisters”)<sup>179</sup> but also furthers the tenets of TribalCrit and the will of Native communities. Lastly, state courts can and should abandon any interpretation rooted in the concept of “discovery.” In March 2023 the Vatican disavowed the doctrine, and with it “the mindset of cultural or racial superiority which allowed for [the] objectification or subjection of people . . . .”<sup>180</sup> Chief Justice Marshall relied on European colonial history and its deep interconnections with the Christian faith to justify and support the American adaptation of “discovery.”<sup>181</sup> Although Critical Race Theory scholars and indigenous activists have long brought the doctrine into question,<sup>182</sup> the Vatican’s repudiation further supports state court rejection of the federal precedent.

As powerfully highlighted by Brayboy, “[i]ndigenous peoples have a desire to obtain and forge tribal sovereignty, tribal autonomy, self-determination, and self-identification.”<sup>183</sup> Approaches to statutory interpretation that incorporate indigenous knowledge, honor legislative purposes that promote Native sovereignty, and disavow the doctrine of “discovery” offer a solution to the question “is there anything we can do?” As a strategy, such approaches recognize past harms and accept responsibility for reparation and the future protection of indigenous cultural resources as already

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178. Brayboy, *supra* note 107, at 429.

179. See *supra* note 51 and accompanying text.

180. Bill Chappell, *The Vatican Repudiates ‘Doctrine of Discovery,’ Which Was Used to Justify Colonialism*, NPR (Mar. 30, 2023, 1:38 PM), <https://www.npr.org/2023/03/30/1167056438/vatican-doctrine-of-discovery-colonialism-indigenous>.

181. *Johnson v. McIntosh*, 21 U.S. at 574–579.

182. See, e.g., Frickey, *supra* note 120 and accompanying text; Mark Gollom, *Why Pope Francis May Be Hesitant to Rescind the Doctrine of Discovery*, CBC (July 30, 2022, 4:00 AM), <https://www.cbc.ca/news/canada/pope-francis-doctrine-discovery-indigenous-1.6536174>.

183. Brayboy, *supra* note 107, at 429.

advocated for by existing historic preservation and environmental review state statutory frameworks in California, Hawai'i, and Washington.

