

3-2023

His Ship Has Sailed—Expelling Columbus from Cultural Heritage Law

Emily Behzadi

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Recommended Citation

Emily Behzadi, His Ship Has Sailed—Expelling Columbus from Cultural Heritage Law, 56 *Vanderbilt Law Review* 315 (2023)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol56/iss1/1>

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His Ship Has Sailed—Expelling Columbus from Cultural Heritage Law

Emily Behzadi*

ABSTRACT

Latin America is a region rich with cultural heritage that existed for centuries before its antiquities were looted, trafficked, and sold on the international market. The language used to classify these objects of cultural heritage has been a tool of oppression and erasure. In reference to those objects of historical importance, auction houses, dealers, museums, and even looters themselves consistently use the term “Pre-Columbian.” “Pre-Columbian,” which means “before Columbus,” defines the historical period prior to the establishment of the Spanish culture in the national territories of Mexico, Central America, South America, and the Caribbean islands. In fact, this definition is the basis of the 1972 Pre-Columbian Act in the United States, which addresses trafficking of Latin American sculptures, murals, and architectural elements. This Article examines the use of “Pre-Columbian” in American cultural heritage law in the context of linguistic settler colonialism, which results in the oppression and continued trauma of cultures through the use of harmful language. This Article argues that any

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reference to Columbus in the laws impacting Latin American cultural heritage contributes to the erasure of Indigenous peoples. Its use advances the fallacy that these peoples were “primitive,” “tribal,” or even “uncivilized.” It also perpetuates the belief that these groups only exist through their connection to Europe. Through a comprehensive examination of the term “Pre-Columbian” and its detrimental impacts on Indigenous cultures, this Article begins the process of removing problematic language from cultural heritage law.

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I. INTRODUCTION

In the summer of 2020, a crowd of protestors, led by Bad River Anishinaabe activist Mike Forcia, swarmed a statue of Christopher Columbus in Saint Paul, Minnesota.¹ The protestors looped a large lasso around the statue and forcefully pulled it to the ground.² The crumbling of the statue was followed by singing, drumming, and joyous chants. This dethronement was symbolic—a cathartic destruction of the man that launched the mass persecution of Indigenous peoples in the Americas. Many Indigenous activists see this destruction of the bronzed Columbus as a visceral contestation of the erasure of Indigenous history and oppression.³ While physically tearing down a statue of Columbus does not eradicate his existence from history books, or undo the harm of colonization, its abrogation demonstrates a paradigmatic shift in the once-myopic view of the so-called discoverer of the New World.

Since at least the mid-nineteenth century, Columbus has been canonized as “America’s first great hero.”⁴ Columbus Day is a recognized national holiday in “commemoration of Christopher Columbus’s historic voyage.”⁵ American history books celebrate Columbus as the courageous “discoverer” of America. Around 2.7 million Americans live in communities named after the legacy of Columbus.⁶ A prestigious ivy league university is named after him.⁷ Columbus has even been compared to Jesus Christ, as historians use him to divide the past into periods, identifying the Americas before 1492 as “pre-Columbian.”⁸ This culture of “Columbianism” is associated with misleading ideals of American patriotism.⁹

1. Jessie Van Berkel, *Protesters Topple Columbus Statue on Minnesota Capitol Grounds*, STAR TRIB. (June 11, 2020), <https://www.startribune.com/protesters-topple-columbus-statue-on-state-capitol-grounds/571171432/> [https://perma.cc/9MV7-FWK7] (archived Dec. 29, 2022).

2. *Id.*

3. See Sam Hitchmough, *Columbus Statues Are Coming Down – Why He Is So Offensive To Native Americans*, THE CONVERSATION (July 9, 2020), <https://theconversation.com/columbus-statues-are-coming-down-why-he-is-so-offensive-to-native-americans-141144> [https://perma.cc/6KD6-L8CG] (archived Dec. 29, 2022).

4. JAMES LOEWEN, LIES MY TEACHER TOLD ME 49 (2007).

5. Proclamation No. 10281, 86 Fed. Reg. 57,007 (Oct. 8, 2021).

6. G. Scott Thomas, *54 U.S. Communities Carry Columbus’ Legacy in Their Names*, THE BUS. JS. (Oct. 10, 2011), <https://www.bizjournals.com/bizjournals/on-numbers/scott-thomas/2011/10/54-us-communities-carry-columbuss.html> [https://perma.cc/DSN2-KVBR] (archived Dec. 29, 2022).

7. Columbia University was formerly known as King’s College. After the American Revolution the college reopened with the name “Columbia” to embody “patriotic fervor that had inspired the nation’s quest for independence.” *The History of Columbia University*, COLUM. UNIV., <https://www.columbia.edu/content/history-columbia-university> (last visited Dec. 29, 2022) [https://perma.cc/73EY-NVVC] (archived Dec. 29, 2022).

8. LOEWEN, *supra* note 4, at 49.

9. See *infra* Part II.A–B.

However, since the twentieth century, historians have revealed the undeniable atrocities committed by Columbus against Indigenous people.¹⁰ Columbus and his crew violently expropriated Indigenous land, introduced enslavement, mandated conversion to Christianity, and committed genocide and rape.¹¹ If Columbus encountered resistance during his conquest and conversion, he responded with hangings, mutilations, and the act of releasing vicious dogs on the Indigenous people.¹² Christopher Columbus and his successors virtually eradicated entire civilizations, which led to the deaths of approximately 100 million Indigenous people by 1800.¹³ Columbus's legacy continues until this day, as Indigenous populations are still facing serious human rights abuses, including "marginalization, dispossession of land, forced removal or relocation, denial of land rights, impacts of large-scale development, and abuses by military forces" during armed conflict.¹⁴

As part of the systematic colonization of the Americas, the colonial powers sought to subjugate Indigenous cultures. From the central and northern Andes to Mesoamerica and the Caribbean, Latin America is rich with Indigenous cultural heritage reflecting complex cultures and structures of the past. Columbus and his successors collected valuable Indigenous cultural objects and sent them to Europe. These objects were fetishized by Europeans for their "primitiveness"¹⁵ and served to reinforce hierarchal cultural structures in the New World. Eventually, these objects came to be known under the blanket term of pre-Columbian, even though their origins are from different Indigenous populations with distinct cultures, temporality, and geography. At the turn of the twentieth century, pre-Columbian artifacts gained prevalence within the art market as objects of immense worth and rarity.

Due to this fixation on the collection of "primitiveness," these objects have been widely looted, trafficked, and sold on the international market. This pervasiveness prompted the United States to enact laws to combat these illicit activities. The art market, scholarship, and laws

10. In the diary of Christopher Columbus, he wrote: "They were very well-built, with good bodies and handsome features . . . They do not bear arms, and do not know them . . . They would make fine servants." Andy Gutierrez, *Codifying the Past, Erasing the Future: NAFTA and the Zapatista Uprising of 1994*, 14 HASTINGS W.N.W. J. ENV'T L. & POL'Y 883, 918 (2008).

11. See William Bigelow, *Once Upon a Genocide: Christopher Columbus in Children's Literature*, 69 LANGUAGE ARTS 112, 116 (1992).

12. See Maurice Ries, *America Discovers Columbus*, 32 SW. REV. 306, 314 (1947).

13. See Larry Sager, *Rediscovering America: Recognizing the Sovereignty of Native American Indian Nations*, 76 UNIV. DETROIT MERCY L. REV. 745, 759 (1999).

14. *Human Rights*, UNITED NATIONS DEPT OF ECON. & SOC. AFFS., INDIGENOUS PEOPLES, <https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/human-rights.html> (last visited Dec. 29, 2022) [<https://perma.cc/TTB6-6NMF>] (archived Dec. 29, 2022).

15. This is a racist term that was artificially applied to Non-western art and artifacts. See Pál Kelemen, *Pre-Columbian Art and Art History*, 11 AM. ANTIQUITY 145, 145 (1946).

related to the protections of these artifacts have used the term “Pre-Columbian” synonymously with all Indigenous objects of Latin America before the Europeans’ arrival. While these laws aim to protect the artifacts of Latin America, and in turn Indigenous communities themselves, the continued use of this problematic term is antithetical to these stated purposes. Referring to Columbus in the laws impacting Latin American cultural heritage contributes to the disenfranchisement of Indigenous people and erroneously attributes the existence of Indigenous peoples through their connection with the European conquest.

Language is powerful. This is the meaning of the term “the pen is mightier than the sword” in American lexicon.¹⁶ The language used to categorize types of cultural heritage can be used as a tool of oppression and erasure. This Article seeks to initiate a deeper examination of words used to characterize the objects the law seeks to protect. By examining the words used, this Article offers the first case study of the term “Pre-Columbian.” The use of problematic terminology, such as “Pre-Columbian,” is what this author coins as “linguistic settler colonialism.” This practice results in the othering of Indigenous cultures in the Americas and further exacerbates cultural trauma of the present day.

Part II of this Article examines the origins of the term “Pre-Columbian” in the field of art and art history in the United States. Part II also provides a historiographical account of the evolving revisionist literature on Christopher Columbus in order to provide context of the underlying meaning of the term. Part III explores the legal schemes using “Pre-Columbian” from both national and international frameworks. Through the lens of settler colonialism theory,¹⁷ Part IV provides a critical look at “Pre-Columbian.” Part V concludes by arguing that the term should be erased from cultural heritage law in the United States. No longer should cultural heritage be defined by the region’s European “settlers,” but rather by its Indigenous peoples and their rich histories.

II. PRE-COLUMBIA AND THE MYTH OF THE “DISCOVERER” OF AMERICA

“Pre-Columbian” references the period of history “before Columbus,” in which the Indigenous peoples of the Americas governed themselves autonomously, without interference from any other imperial power. In the context of cultural heritage, the term embraces all

16. Edward Bulwer-Lytton coined this phrase in the play *Richelieu; Or the Conspiracy*. EDWARD BULWER-LYTTON, *RICHELIEU; OR THE CONSPIRACY* act 2, sc. 2, l. 308.

17. See generally Francisco Valdes, *Legal Reform and Social Justice: An Introduction to LatCrit Theory, Praxis and Community*, 14 GRIFFITH L. REV. 148 (2005) (providing an overview of Latina/o Critical Theory background and developmental projects).

Indigenous artifacts of the Americas including the cultures of Mesoamerica (Mexico and Guatemala), the Central Andes (Peru and Bolivia), the Northern Andes (Ecuador and Colombia), Central America, and the Caribbean from roughly 1200 BCE to after the Spanish conquest around AD 1500.¹⁸ Currently, this term can be widely found through newspaper articles,¹⁹ books,²⁰ graduate classes,²¹ and even grant proposals.²² “Pre-Columbian” is not a term that has been within Western vocabulary since the Spanish conquest. Indeed, this word has a rich history that only started in the nineteenth century with the onset of studies in the art of Central America, South America, and the Caribbean.²³

A. *Origins of “Pre-Columbian” in Art and Art History*

Ancient Indigenous cultures of Latin America were comprised of complex hierarchal systems. Having limited systems of writing, artworks were the most important and common method of communication.²⁴ In the sixteenth century, during the period of violent colonial expansion, the conquistadors greatly admired the architecture of the Americas.²⁵ In particular, the temples of the Aztec and Inca elicited

18. See BARBARA BRAUN, PRE-COLUMBIAN ART AND THE POST-COLUMBIAN WORLD 11 (1939).

19. See, e.g., Tessa Solomon, *Smuggled Pre-Columbian Sculptures Are Returned to Dominican Republic*, ARTNEWS (Mar. 2, 2022), <https://www.artnews.com/art-news/news/pre-columbian-sculptures-returned-dominican-republic-1234620670/> [<https://perma.cc/5ZUM-LCDD>] (archived Dec. 29, 2022).

20. See, e.g., ESTHER PASZTORY, PRE-COLUMBIAN ART (1998).

21. See, e.g., HAA 19Z – *Introduction to the Arts of Pre-Columbian America*, HARV. UNIV. (2020), <https://haa.fas.harvard.edu/classes/haa-19z-introduction-arts-pre-columbian-america> (last visited Dec. 29, 2022) [<https://perma.cc/R43H-GEC3>] (archived Dec. 29, 2022).

22. See, e.g., *Call for Proposals: The H. and T. King Grant for Precolumbian Archaeology*, SOC’Y FOR AM. ARCHEOLOGY (Sept. 10, 2019), <https://www.saa.org/quick-nav/saa-media-room/saa-news/2019/09/10/call-for-proposals-the-h.-and-t.-king-grant-for-precolumbian-archaeology> [<https://perma.cc/ZMA5-EG9N>] (archived Dec. 29, 2022).

23. See Cecelia F. Klein, *Not Like Us and All the Same: Pre-Columbian Art History and the Construction of the Nonwest*, 42 RES: ANTHROPOLOGY & AESTHETICS 131, 132 (2002) (pushing for the creation and preservation of an academic field of pre-Columbian art history to help consolidate the fiction of Nonwest).

24. See Esther Pasztory, *Aesthetics and Pre-Columbian Art*, 29/30 RES: ANTHROPOLOGY & AESTHETICS 318, 322 (1996); see, e.g., Terence Grieder, *Moche Art of Peru: Pre-Columbian Symbolic Communication by Christopher B. Donnan*, 12 AFR. ARTS 90, 90–91 (1979) (reviewing CHRISTOPHER B. DONNAN, *MOCHE ART OF PERU: PRE-COLUMBIA SYMBOLIC COMMUNICATION* (1978) (providing an overview of the history, archaeology, and ethnology of Moche art)).

25. See Pasztory, *supra* note 24, at 320. In the writings of Bernal Díaz, a foot soldier who published an account of the conquest, he exclaimed the greatness of the Indigenous architecture: “We could compare it to nothing but the enchanted scenes we had read of in Amadis de Gaul, from the great towers and temples, and other edifices of lime and stone which seemed to rise out of the water. Many of us were not sure whether we were asleep or awake.” Thomas J. Brinkerhoff, *Reexamining the Lore of the*

great favor from the Europeans.²⁶ However, many movable works of art were rejected, as they were seen as sacrilegious. Many of these objects were destroyed or merely discounted as “quaint curiosities.”²⁷ Many of the gold and silver works were melted down for their value.²⁸ During the Enlightenment, many Europeans condemned Indigenous cultures as “uncivilized,” while followers of the philosopher Jean-Jacques Rousseau praised them “for their naturalness and romanticized them as Noble savages.”²⁹ As artifacts were brought back to Europe, Western responses oscillated between curiosity and contempt. Europeans beheld these objects as part of a pictorial comparison between “civilized and uncivilized cultures.”³⁰ These objects were identified as *antigüedades*, or antiquities.³¹

As interest in these objects blossomed, the figure of Columbus simultaneously emerged in nationalist discourses over the construction of the nation state of the Americas. The US representation of Columbus reiterated the imperialist belief in the right of expansion and colonialization. Massachusetts Chief Justice Samuel Sewall, who is credited with the first usage of “Columbia,” used the term as a synonym for the “New World.”³² By the 1760s, “Columbia” became popularized in early American culture through poetry, magazines, songs, and political cartoons.³³ By 1792, as the colonies were being formed, reference to Columbus became a symbolic denouncement of England and a “glorification of America.”³⁴ At the same time the use of the term “Columbian” was a quotidian declaration of “public allegiance to the country’s cultural pursuits and civic virtue.”³⁵ In the visual arts,

“Archetypal Conquistador”: *Hernán Cortés and the Spanish Conquest of the Aztec Empire, 1519-1521*, 49(2) THE HIST. TCHR. 169, 175 (2016).

26. See Brinkerhoff, *supra* note 25, at 175. Hernan Cortes extolled Mexican buildings: “It cannot be believed that any princes of this world, of whom we know, possess any things of such high quality . . . they are so well constructed . . . that there can be none better.” BRAUN, *supra* note 18, at 21.

27. Pasztory, *supra* note 24, at 320.

28. See Forrest D. Colburn, *From Pre-Columbian Artifact to Pre-Columbian Art*, 64 REC. ART MUSEUM, 36, 36–37 (2005) (providing an overview of how Pre-Columbian objects came to be housed at the Princeton University Art Museum).

29. BRAUN, *supra* note 18, at 23.

30. *Id.*

31. Stephanie Gänger, *A Thing of the Past: Representation, Material Culture, and Indigeneity in Post Conquest Meso- and Andean South America*, in TRANSNATIONAL PERSPECTIVES ON THE CONQUEST AND COLONIALIZATION OF LATIN AMERICA 116 (Jerry Mander et al. eds., 2020) (providing an overview of Spanish American antiquities and how and why it became central and how they gained recognition).

32. Thomas J. Schlereth, *Columbia, Columbus, and Columbianism*, 79 J. AM. HIST. 937, 939 (1992).

33. See generally, e.g., Philip Freneau, *The Rising Glory of America*, in POEMS OF PHILIP FRENEAU 49 (1902); Philip Freneau, *The Pictures of Columbus, The Genoese*, in POEMS OF PHILIP FRENEAU 89 (1902); JOEL BARLOW, THE VISION OF COLUMBUS (1787).

34. Schlereth, *supra* note 32, at 939. It is for this reason that King’s College, which was named after George III, became Columbia in 1784. *Id.*

35. *Id.* at 940.

Columbia became an iconographical figure of patriotism represented by a classical female figure.³⁶

At the end of the nineteenth century, a culture of “Columbiana” emerged in American painting, sculpture, monuments, and national coins.³⁷ The terms “Columbia” and “Columbianism” became part of the “civil [and] public religion of the United States.”³⁸ As travel became easier in the mid-nineteenth century, visitors from around the world began to travel to countries in Latin America, which they deemed “exotic.”³⁹ Artists such as Paul Gauguin, Henry Matisse, Pablo Picasso, and Henry Moore showed an innate appreciation of historical Indigenous objects.⁴⁰ Nonetheless, research on the art history of “Pre-Columbia” developed sparingly, as most of it was destroyed upon conquest, leaving “only the most tenuous of living threads.”⁴¹ Galleries and museums were also slow to develop exhibitions dedicated to this art within this region.

The use of “Pre-Columbia” paralleled the World’s Columbian Exposition in 1893, which celebrated the 400th anniversary of Christopher Columbus’s arrival to the New World.⁴² The exposition, and its importance to the arts in the United States at the time, served as an early influence for the use of “Pre-Columbian” in art. However, the exhibition was also met with controversy, as evident in one newspaper’s account: “The exhibit of Indian life now given at the fair is an exhibit of savagery in its most repulsive form.”⁴³ Notwithstanding these dis-

36. See *id.* at 941. Frequently depicted with an American flag and shield, Columbia was represented as Caucasian female, modestly dressed, in contrast to personifications of Indian princesses, who were often barefooted and nude. See, e.g., *American Woman? Amérique, Columbia, and Lady Liberty*, N.Y. HIST. SOC’Y MUSEUM & LIBR. (Oct. 23, 2018), <https://www.nyhistory.org/blogs/american-woman-amerique-columbia-and-lady-liberty> [<https://perma.cc/89R2-7GTP>] (archived Dec. 29, 2022).

37. Schlereth, *supra* note 32, at 938 (providing a historical overview of the history of Columbus through the development of Columbianism). The culture of “Columbiana” is the aestheticization of Columbus in popular culture. *Id.*

38. *Id.* at 963.

39. See Kelemen, *supra* note 16, at 145. The term “exotic” became more widely used as artists like Gauguin began exploring French Polynesia and painting pictures of Indigenous cultures they deemed “primitive.” *Id.*; see also Joanne Pillsbury & Miriam Doutriaux, *Incidents of Travel, in PRE-COLUMBIAN ART AT DUMBARTON OAKS* (2012) (describing the creation of the Maya collection at Dumbarton Oaks through a series of trips to Mexico, Guatemala, and Honduras).

40. See, e.g., ‘It’s Simply Mesmerising’ — a Teotihuacán Stone Mask Owned by Pierre Matisse, CHRISTIE’S (Jan. 15, 2021) https://www.christies.com/features/A-Teotihuacan-mask-owned-by-Pierre-Matisse-11470-1.aspx?sc_lang=en [<https://perma.cc/2QYK-2YED>] (archived Dec. 29, 2022). Gauguin, in particular, focused on ancient Peruvian ceramics while Moore was inspired by monumental stone sculpture of Mesoamerica. See BRAUN, *supra* note 18, at 13.

41. Kelemen, *supra* note 16, at 146. The term “research” is considered one of the “dirtiest” words in the vocabulary of Indigenous peoples because it remains a powerful memory of colonization and imperialism. See LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLE 1* (2012).

42. See Joanna Pillsbury, *Pre-Columbian: Perspectives and Prospects*, 1 *LAT. AM. & LATINX VISUAL CULTURE* 121, 121 (2019).

43. Schlereth, *supra* note 32, at 965.

senting voices, interest in Indigenous artifacts continued to proliferate. Indeed, after the World's Columbian Exposition subsequent exhibitions in San Diego and Brooklyn produced larger and more impressive displays of Latin American premodern art.⁴⁴

The first artifacts of Latin Amerindian ancestry were first accessioned into collections in the United States shortly after the World's Columbian Exposition.⁴⁵ The American Museum of Natural History was the first museum to accession and exhibit artifacts entitled "Pre-Columbian artifacts."⁴⁶ The flourishing movement of modern Mexican art from 1910–1920 further stimulated an interest in these objects, as prominent artists and collectors publicly collected and displayed these objects in their collections.⁴⁷ Even prominent Mexican artists, such as Diego Rivera, incorporated historical narratives of the Pre-Columbian past into their art.⁴⁸ In the 1920s and 1930s, Mexico revitalized interest in these objects as a way to "reclaim" its past and showcase national pride.⁴⁹ As such, the art market for these objects steadily flourished in the United States and Mexico. Nelson Rockefeller became one of the earliest high-end collectors of art of this period after Diego Rivera and Miguel Covarrubias introduced him to the genre.⁵⁰

The widespread use of "Pre-Columbian" arose in the United States and Mexico in academic scholarship, most of which concerned medical issues,⁵¹ archaeology,⁵² writing and inscriptions, or manuscripts.⁵³ The use of the term expanded in the 1920s, in titles of works of literature, architecture, and the visual arts.⁵⁴ US museums, in particular, presented these artifacts in carefully contextualized exhibitions in

44. See Diane Fane, *Reproducing the Pre-Columbian Past*, in COLLECTING THE PRE-COLUMBIAN PAST 162–64 (Jerry Mander et al. eds., 2011).

45. See Colburn, *supra* note 28, at 36–37.

46. *Id.*

47. *See id.*

48. *See id.*; see, e.g., Diego Rivera's fresco painting *From the Conquest to 1930*, in the Palacio Nacional in Mexico City, Mexico. For more information on this piece, see generally Leonard Folgarait, *Revolution as Ritual: Diego Rivera's National Palace Mural*, 14 OXFORD ART J. 18 (1991).

49. See Holly Barnet-Sánchez, *The Necessity of Pre-Columbian Art: U.S. Museums and the Role of Foreign Policy in the Appropriation and Transformation of Mexican Heritage 1933–1944* 2 (1993) (Ph.D. dissertation, University of California, Los Angeles).

50. *See id.* at 248.

51. See, e.g., Truman Michelson, *The Anthropological Society of Washington*, 33 SCI. 1007, 1008 (1911) (describing a study of skeletal material from "pre-Columbian inhabitants" in Peru for rachitis)

52. See, e.g., *Archeological Survey*, 116 SCI. AM. 523 (1917).

53. See Klein, *supra* note 23, at 132.

54. *Id.*; see, e.g., DONALD A. MACKENZIE, MYTHS OF PRE-COLUMBIAN AMERICA (1920); Ruth Anne Phillips & R. Sarah Richardson, *Stone, Water, and Mortarless Constructions: Frank Lloyd Wright and the Pre-Columbian Inca*, 57(4) THE LATIN AMERICANIST 97 (2013); Cyril G. E. Bunt, *American Art at the Burlington Fine Arts Club*, 37 BURLINGTON MAG. FOR CONNOISSEURS 40 (1920).

order to promote hemispheric relations.⁵⁵ It was important for these objects to be understood and valued as part of greater foreign and cultural diplomacy initiatives of the United States.⁵⁶

In 1933, the Museum of Modern Art organized the first major exhibition of objects of this kind, entitled “American Sources of Modern Art.”⁵⁷ Holly Barnet-Sanchez characterizes this exhibition as “the beginning of a broad-based and long-lasting attempt to represent the cultural remains of ancient and fundamentally foreign civilizations . . . not only as works of fine art, but also as a small but very significant portion of the US patrimony.”⁵⁸ Some of the earliest larger art exhibitions using “Pre-Columbian” occurred in 1940, both entitled “Pre-Columbian Art” at the Fogg Museum of Art at Harvard University and the Los Angeles County Museum of Art.⁵⁹ The Fogg Museum’s catalogue even provided a definition of “Pre-Columbian Art”:

Pre-Columbian Art is meant [as] the indigenous art of the Americas before the discovery of the New World by Columbus. But the terminal date is usually associated with the coming of the Spaniards under Cortes in 1519. For the purposes of this exhibition we have arbitrarily chosen objects from south of the Rio Grande River because they have a definite artistic unity.⁶⁰

By the 1960s, the term began to permeate the art industry. Academics began to use the term with “long-felt enthusiasm” in prominent art history publications.⁶¹ Cecilia Klein asserts that much of this scholarship had a “revisionist tendency” to rewrite history about Latin America to “assume the priority of Spanish over Indian interests and to minimize the oppressive and repressive aspects of Spanish rule.”⁶² Likewise, these attitudes allude to “the rise of a proimperialist climate of opinion, and more particularly the fact that the United States,

55. See Barnet-Sánchez, *supra* note 49, at 4.

56. See *id.* at 5.

57. *Id.* at 8.

58. *Id.* at 62–63.

59. PEABODY MUSEUM OF ARCHAEOLOGY AND ETHNOLOGY, AND FOGG ART MUSEUM, AN EXHIBITION OF PRE-COLUMBIAN ART (1940). The exhibition filled four interconnect galleries with more than 250 objects, most of which were from Mexico and Central America. See MARION G. HOLLENBACH, PRE-COLUMBIAN ART (1940).

60. Barnet-Sánchez, *supra* note 49, at 233.

61. Klein, *supra* note 23, at 132. Cecilia Klein evidences this inclined interested by the works of George Kubier, an American art historian. He used the term “Pre-Columbian” merely once before 1967, and after that, he published two studies that incorporated “Pre-Columbian” it in their titles. *Id.* However, it should be noted that these scholars have received criticism for their treatment of pre-Columbian objects above that of colonial works. See *id.* at 133–34.

62. Klein, *supra* note 23, at 133 (internal quotation marks omitted) (quoting Richard Kagan, *Prescott’s Paradigm*, in *THE WORD MADE IMAGE: RELIGION, ART, AND ARCHITECTURE IN SPAIN AND SPANISH AMERICA, 1500-1600* 16 (Jonathan Brown ed., 1998)).

having launched its own colonial career, could regard Spain's colonial record with greater sympathy.”⁶³

It is worth noting that these artifacts were not always viewed as “art.”⁶⁴ Between 1930 to 1980, these objects were seen as “innocuous goods to be freely traded and exhibited.”⁶⁵ As the significance of these objects changed in the eyes of art market stakeholders, the term became more widely used. The period between 1970 and 1980 saw the largest upsurge in use of the term as interest in ancient American art peaked with academic audiences.⁶⁶ The term steadily declined slightly after the 1980s, as curatorial decisions for exhibitions on the arts of Americas began to specify individual civilizations (such as the Maya or the Inca).⁶⁷ In 1990, the Metropolitan Museum of Art put on the first major exhibition of objects from Mexico’s history, entitled “Mexico: Splendors of Thirty Centuries.”⁶⁸ The advertising for this exhibition characterized it as “an historic show of the pre-Columbian sculpture of Mesoamerica.”⁶⁹ Today, while exhibition titles tend to point to the individual country of origin, the objects are still described as “Pre-Columbian.”⁷⁰ Auction houses, such as Christie’s and Sotheby’s, similarly still use the term to denote the pre-colonial past of all Latin Americans, making no distinction among them.⁷¹ Because the term has permeated the art industry and market, it is not surprising that the law has likewise followed suit.

63. Benjamin Keen, *Main Currents in the United States Writings on Colonial Spanish America, 1884-1984*, 65 *HISP. AM. HIST. REV.* 657, 661 (1985).

64. Colburn, *supra* note 28, at 36.

65. *Id.*

66. See Pillsbury, *supra* note 42, at 122.

67. See *id.*; Luis M. Castañeda, *Doubling Time*, 51 *GREY ROOM* 12, 13–14 (2013).

68. See John Phillip Santos, *3000 Years of Mexican Art: Landmark Exhibit of Works Ranging from Pre-Columbian to Mid-20th Century Opens Next Week at New York’s Metropolitan Museum and Comes to L.A. in 1991*, *L.A. TIMES* (Sept. 30, 1990), <https://www.latimes.com/archives/la-xpm-1990-09-30-ca-2404-story.html> [<https://perma.cc/QHD2-MPBU>] (archived Dec. 21, 2022).

69. *Id.*

70. For example, a temporary exhibition at the Kranner Art Museum was entitled “The Social Context of Violence in Ancient Peruvian Art.” Yet the exhibition was described as an “Exhibition of Pre-Columbian Objects at Krannert Art Museum.” See Helaine Silverman, *Subverting the Venue: A Critical Exhibition of Pre-Columbian Objects at Krannert Art Museum*, 106 *AM. ANTHROPOLOGIST* 732, 732 (2004) (reviewing Kranner Art Museum Works XVI: The Social Context of Violence in Ancient Peruvian Art (2004)).

71. See, e.g., *Pre-Columbian Art*, CHRISTIE’S, <https://www.christies.com/departments/Pre-Columbian-Art-91-1.aspx> (last visited Dec. 26, 2020) [<https://perma.cc/H9KU-J7MJ>] (archived Dec. 26, 2022); *Pre-Columbian Art Overview*, SOTHEBY’S, <https://www.sothebys.com/en/departments/pre-columbian-art/> (last visited Dec. 26, 2022) [<https://perma.cc/2N3Y-2GM9>] (archived Dec. 26, 2022).

B. *Rediscovering Columbus through Historiographical Revisionism*

The controversy behind “Pre-Columbian” originates from its namesake—Christopher Columbus. More than five hundred years after the colonialization of the “New World,” Columbus’s name is still axiomatic with the “discovery” of the territory now known as the Americas. Once a venerated figurehead in American history, the name Columbus also now serves as an unforgettable memory of the ruthless impact of colonialization. Perceptions of Columbus vacillate from “someone worthy of sainthood” to the “arch-villain of the modern era.”⁷² The mythology of Columbus as the “discoverer” of the Americas derives, in part, from the notion of European exceptionalism.⁷³

Before the nineteenth century, very little criticism about Columbus existed. In 1571, his son Ferdinand Columbus wrote the first biography on Columbus in Spanish, Italian, Latin, and English.⁷⁴ In this biography, Ferdinand hails his father as a “hero” and a “discoverer.”⁷⁵ This text is considered one of the first to shape the erroneous ideology of Columbus as a “hero” and the singular “discoverer” of the Americas.⁷⁶ Bartolomé de las Casas, who is regarded as one of the main primary sources of Columbus’s trans-Atlantic expedition after Ferdinand, regarded Columbus as “the most outstanding sailor in the world, versed like no other in the art of navigation, for which divine Providence chose him to accomplish the most outstanding feat ever accomplished in the world until now.”⁷⁷ Although de las Casas was an ardent critic of colonialization, he characterized Columbus as the “most worthy man . . . [for] . . . the cause, second to God but first in the eyes of men, being the discoverer and only worthy first admiral of the vast territory already known as the New World.”⁷⁸

72. Jack Shreve, *Christopher Columbus: A Bibliographic Voyage*, 29 CHOICE 703, 703 (1991); ILAN STAVANS, *IMAGINING COLUMBUS: THE LITERARY VOYAGE XVII 9–10*, 13 (2001).

73. See BENJAMIN KEEN, *THE LIFE OF THE ADMIRAL CHRISTOPHER COLUMBUS: BY HIS SON FERDINAND xxii–xxiv* (Rutgers Univ. Press 1992).

74. For a translated version of the text, see generally *id.* There is controversy around the authorship of this book. It is opined that Ferdinand might not have written the biography. See ALEJANDRO CIORANESEU, *PRIMERA BIOGRAFÍA DE C. COLÓN: FERNANDO COLÓN Y BARTOLOMÉ DE LAS CASAS [THE FIRST BIOGRAPHY OF C. COLUMBUS: FERNANDO COLON AND BARTOLOME DE LAS CASAS]* (1960) (Spain).

75. See KEEN, *supra* note 73, at v–vi. The book was not published until much later when it was translated by Benjamin Keen. The hesitancy to release the original manuscript by his son is said to be a result of litigation between the family of Columbus and the Spanish Crown. See generally OTTO SCHOENRICH, *THE LEGACY OF CHRISTOPHER COLUMBUS: THE HISTORIC LITIGATIONS INVOLVING HIS DISCOVERIES, HIS WILL, HIS FAMILY, AND HIS DESCENDANTS* (1949-1950).

76. See Heike Paul, *Christopher Columbus and the Myth of ‘Discovery’*, in *THE MYTHS THAT MADE AMERICA* 43, 51 (2014) (examining the study of myths that have become a foundational part of US-American identities).

77. See BARTOLOMÉ DE LAS CASAS, *HISTORY OF THE INDIES BOOK I 17* (André M. Collard ed., trans., 2018).

78. *Id.* at 37.

During the American Revolution, Columbus was seen as a historical national figure who represented independence and, more potently, American virtues.⁷⁹ Indeed, contemporaries desired to name the country “Columbia” instead of “America.”⁸⁰ His importance was on par with that of George Washington as one of the foundational figureheads of the United States.⁸¹ For this reason, the US capital was named “Washington” and the governmental district the “District of Columbia.”⁸² The characterization of Columbus as an “American hero” continued into the nineteenth century with the publication of Washington Irving’s *Life and Voyages of Christopher Columbus*.⁸³ Washington Irving, known as the first true Columbus scholar, characterized Columbus as a “heroic character” and provided a romantic image of Columbus as a self-made man who, through adversity, discovered the “New World.”⁸⁴ This romanticized version of trans-Atlantic expedition became a bestseller in the United States and further created this idyllic image of Columbus.⁸⁵ William F. Prescott epitomized this image by proclaiming that it would be “difficult to point to a single blemish in [Columbus's] moral character.”⁸⁶ This image of Columbus percolated to the visual arts, most notably in early American paintings such as David Edwin’s *The Landing of Christopher Columbus* and John Vanderlyn’s *The Landing of Columbus on San Salvador*.⁸⁷ Cities and towns across the United States celebrated his accomplishments with commemorative symbols of Columbus erected in public spaces.⁸⁸

79. See generally WILLIAM ROBERTSON, *THE HISTORY OF AMERICA* (1778) (describing in detail the history of America through the lens of Columbus’ expeditions around the time of the American Revolution).

80. See Terence Martin, *Literature: Columbus in American Literature*, in *THE CHRISTOPHER COLUMBUS ENCYCLOPEDIA* 433, 433 (Silvio A. Bedini ed., Simon & Schuster 1992).

81. See Paul, *supra* note 76, at 54.

82. See *id.*

83. See generally WASHINGTON IRVING, *THE LIFE AND VOYAGES OF CHRISTOPHER COLUMBUS* (1896).

84. For example, in the section entitled “Observation of the Character of Columbus,” Irving writes that Columbus “was a man of great and inventive genius . . . His ambition was lofty and noble, inspiring him with high thoughts and an anxiety to distinguish himself by great achievements . . . His conduct was characterized by the grandeur of his views and the magnanimity of his spirit.” *Id.* at 348–49.

85. See ELISE BARTOSIK-VÉLEZ, *THE LEGACY OF CHRISTOPHER COLUMBUS IN THE AMERICAS* 50, 84 (2014)

86. WILLIAM HICKLING PRESCOTT, *HISTORY OF THE CONQUEST OF MEXICO* 245 (1873).

87. *Prints and Drawings*, YALE UNIV. ART GALLERY, <https://artgallery.yale.edu/collections/objects/51246> (last visited Dec. 29, 2022) [<https://perma.cc/V2CJ-AQQ2>] (archived Dec. 29, 2022); *Landing of Columbus*, ARCHITECT OF THE CAPITOL, <https://www.aoc.gov/explore-capitol-campus/art/landing-columbus> (last visited Dec. 29, 2022) [<https://perma.cc/H2C4-5SGW>] (archived Dec. 29, 2022).

88. See Youjin Shin, Nick Kirkpatrick, Catherine D’Ignazio & Wonyoung So, *Columbus Monuments are Coming Down, But He’s Still Honored in 6,000 Places Across the U.S. Here’s Where.*, WASH. POST (Oct. 11, 2021), <https://www.washingtonpost.com>.

In the 1840s and 1850s, the United States saw an influx of immigrants from Ireland and Italy. Around this same time, Italian Americans claimed patronage over Christopher Columbus, and by 1869, the festivities of “Discovery Day” had gained enormous popularity.⁸⁹ However, the influx of immigration was also met with feelings of nativism and animosity towards anyone deemed “non-American.”⁹⁰ This onslaught of malice towards Italians was the impetus for leading American scholars to question the heroism of Columbus. In Aaron Goodrich’s *A History and Character of the Achievements of the So-Called Christopher Columbus*, Columbus is characterized as a “nameless pirate,”⁹¹ a slave trader,⁹² and someone who had a “history of piracy and crime.”⁹³ Historian Justin Winsor, in *Christopher Columbus and How He Received and Imparted the Spirit of Discovery*, considered Columbus’s “discovery” a “blunder,” associated with his shortcoming as an Italian.⁹⁴ His negative characterization of Columbus was also due to his cruelty exhibited towards Indigenous peoples, claiming “[Columbus] had no pity for the misery of others . . . to consign them to the slave-mart, just as if the first step to Christianize was the step which unmans.”⁹⁵ In 1874, Rasmus Björn Anderson, a Norwegian American scholar, published *America Not Discovered By Columbus*, which argued that the Vikings were actually the first Europeans to reach the Americas.⁹⁶ While these new intellectual criticisms of Columbus were purportedly based on nativist sentiments,⁹⁷ they were

com/history/interactive/2021/christopher-columbus-monuments-america-map/ [https://perma.cc/RVZ9-5XTD] (archived Dec. 29, 2022).

89. See Schlereth, *supra* note 32, at 955–56.

90. See Paul, *supra* note 76, at 61.

91. AARON GOODRICH, *A HISTORY OF THE CHARACTER AND ACHIEVEMENTS OF THE SO-CALLED CHRISTOPHER COLUMBUS* 160 (1874).

92. See *id.* at 150. He recounts in detail the harshness of Columbus against the Indigenous tribes, writing:

The peace which Columbus bore the hapless Indians was the peace of the grave; his olive-branch the scourge, the cruel tortures which drove them to that bourn; while the souls thus rescued from the hands of the devil were the descendants of countless generations of souls which, according to the miserable logic of Fernando, a beneficent God had left wholly in the power of the arch-enemy of man.

Id. at 155.

93. *Id.* at 129.

94. See JUSTIN WINSOR, *CHRISTOPHER COLUMBUS AND HOW HE RECEIVED AND IMPARTED THE SPIRIT OF DISCOVERY* 512 (1891) (“His discovery was a blunder; his blunder was a new world . . . Its discoverer might have been its father; he proved to be is despoiler . . . he left it a legacy of devastation and crime.”).

95. *Id.* at 505–06.

96. See RASMUS BJORN ANDERSON, *AMERICA NOT DISCOVERED BY COLUMBUS* 9 (1874) (“Columbus must have had knowledge of this discovery by the Norsemen before he started to find America.”). Anderson explained that the Norsemen were “the first pale-faced men who planted their feet on this gem of the ocean.” *Id.* at 11.

97. See Paul, *supra* note 76, at 62.

significant in beginning to question the, up until then, uncontroverted opinion of Columbus.

Major works of revisionist history of Columbus were not published until the twentieth century. In 1954, Pulitzer Prize-winning author Samuel Eliot Morison published *Christopher Columbus, Mariner*, a biography of Columbus.⁹⁸ While Morison's book continues to praise Columbus as a "master mariner," he also presents stories of Columbus's mistreatment of the Indigenous people during his many voyages, writing, "[t]he cruel policy initiated by Columbus and pursued by his successors resulted in complete genocide."⁹⁹ In 1972, geographer-historian Alfred Crosby, in his seminal book *The Columbian Exchange*, detailed the ecological ramifications of Columbus's conquest.¹⁰⁰ Crosby credits Columbus and subsequent European colonization with the diseases brought to the New World.¹⁰¹ In 1975, Francis Jennings published the first major critical historiographical account of the early settler colonialism in his book *The Invasion of America*.¹⁰² The most widely read critical vilification of Columbus emerged in Howard Zinn's 1980 book *A People's History of United States*. Zinn emphasizes the dichotomy arising in scholarship, stating,

[t]o emphasize the heroism of Columbus and his successors as navigators and discoverers, and to deemphasize their genocide, is not a technical necessity but an ideological choice. It serves—unwittingly—to justify what was done. My point is not that we must, in telling history, accuse, judge, condemn Columbus in absentia. It is too late for that; it would be a useless scholarly exercise in morality The treatment of heroes (Columbus) and their victims (the Arawaks)—the quiet acceptance of conquest and murder in the name of progress—is only one aspect of a certain approach to history, in which the past is told from the point of view of governments, conquerors, diplomats, leaders.¹⁰³

98. See generally SAMUEL ELIOT MORISON, *CHRISTOPHER COLUMBUS, MARINER* (1955).

99. *Id.* at 129.

100. See generally ALFRED CROSBY, *THE COLUMBIAN EXCHANGE: BIOLOGICAL AND CULTURAL CONSEQUENCES OF 1492* (1972).

101. See *id.* at 31. ("When the isolation of the New World was broken, when Columbus brought the two halves of this planet together, the American Indian met for the first time his most hideous enemy: not the white man nor his black servant, but the invisible killers which those men brought in their blood and breath.")

102. See generally FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* (1975).

103. HOWARD ZINN, *A PEOPLE'S HISTORY OF UNITED STATES 10* (Harper Perennial 2005) (1980). According to the author's website, the book as sold over 2 million copies. Howard Zinn, *A People's History of the United States: 1492 – Present*, HOWARDZINN.ORG, <https://www.howardzinn.org/collection/peoples-history/> (last visited Dec. 29, 2022) [<https://perma.cc/BE64-52KG>] (archived Dec. 29, 2022). The New York Times emphasized the importance of this book, writing: "To describe it as a revisionist account is to risk understatement. A conventional historical account held no allure; he concentrated on what he saw as the genocidal depredations of Christopher Columbus Such stories are more often recounted in textbooks today; they were not

In 1990, Kirkpatrick Sale further added to the work of Zinn in his book *The Conquest of Paradise*.¹⁰⁴ From an environmentalist point of view, Sale criticizes the notion of Columbus as a “master mariner” and instead credits him with the destruction of Indigenous peoples and their American landscape.¹⁰⁵

These significant writings condemning Columbus for his atrocities led to a vast outcry in public opinion. In the 1990s, the Quincentenary of Columbus’s voyage was met with mass protests nationwide.¹⁰⁶ Thousands of Indigenous Americans and Indigenous rights groups protested the “Columbus Day” festivities and the celebration of Columbus’s polemic legacy.¹⁰⁷ The protests employed epigrams such as “Discover Columbus’s Legacy: 500 Years of Racism, Oppression & Stolen Land,” “Wanted for Genocide: Christopher Columbus,” and “Columbus: Savage.”¹⁰⁸ In July 1990, representatives from 120 Indigenous nations met in Quito, Ecuador to establish the “First Continental Gathering of Indigenous Peoples.”¹⁰⁹ During this gathering, the organizations denounced the celebration of the Quincentenary and emphasized the struggle of Indigenous nations, writing,

[t]he Indians of America have never abandoned our constant struggle against the conditions of oppression, discrimination and exploitation which were imposed upon us as a result of the European invasion of our ancestral territories . . . From this point in our general strategy of struggle, we consider it to be a priority that we demand complete structural change; change which recognizes the Inherent right to self-determination through Indian own governments and through the control of our territories.¹¹⁰

Since the beginning of colonial expansion, Indigenous peoples have always rightfully equated Columbus’s arrival with genocide, rape,

at the time.” Michael Powell, *Howard Zinn, Historian, Dies at 87*, N.Y. TIMES (Jan. 27, 2010), <https://www.nytimes.com/2010/01/28/us/28zinn.html> [<https://perma.cc/KC9W-J73L>] (archived Dec. 29, 2022).

104. See generally KIRKPATRICK SALE, *THE CONQUEST OF PARADISE: CHRISTOPHER COLUMBUS AND THE COLUMBIAN LEGACY* (1990).

105. See *id.* at 97, 209–10 (“Colón knew nothing about these people he encountered and considered enslaving, and he was hardly trained to find out very much, even if he was moved to care. But they were in fact members of an extensive, populous, and successful people”).

106. See Paul, *supra* note 76, at 72–73.

107. See *id.*

108. *Id.* at 73. In 1992, on Columbus Day, around 4,000 protesters interrupted the parade, chanting “no to slavery and genocide.” Russell Contreras, *AP Explains: Columbus, Once Immigrant Hero, Now Heel To Some*, ABC NEWS (Oct. 11, 2019), <https://abcnews.go.com/US/wireStory/ap-explains-columbus-immigrant-hero-now-heel-66220952> [<https://perma.cc/X8V9-6VLQ>] (archived Dec. 28, 2022).

109. See Indigenous Alliance of the Americas on 500 Years of Resistance, *Declaration of the Organizing Committee of the III Continental Summit of Indigenous Pueblos and Nations of Abya Yala* (Ecuador 1990), <http://www.cumbrecontinentalindigena.org/quito90.php> [<https://perma.cc/VH4S-YV4B>] (archived Dec. 29, 2022).

110. *Id.*

slavery, expropriation, and displacement.¹¹¹ Since the Quincentenary, countless works of scholarship have confronted the mythology about Columbus and detailed the atrocities committed against Indigenous peoples throughout Latin America.¹¹² On October 6, 2004, the University of California, Los Angeles published the final volume of the compendium of 5,323 Columbus-era documents.¹¹³ Geoffrey Symcox, the general editor of the project, stated,

[t]he fact that Columbus brought slavery, enormous exploitation or devastating diseases to the Americas used to be seen as a minor detail - if it was recognized at all - in light of his role as the great bringer of white man's civilization to the benighted idolatrous American continent. But to historians today this information is very important. It changes our whole view of the enterprise.¹¹⁴

Since then, a new generation of activists have pushed to debunk the centuries-long mythology of Columbus as the venerated “discoverer” of the Americas and, instead, to recast him as what he was—a thief, a murderer, a torturer, and a rapist. This push gave rise to a plethora of changes regarding the once idolism surrounding Columbus. As a result of this advocacy, many states have chosen to forgo observing the holiday in favor of Indigenous Peoples’ Day.¹¹⁵ In that same vein, activists have called for the removal of Columbus and other conquistadores’ imagery from public spaces.¹¹⁶ At least thirty-six monuments dedicated to Columbus have been removed since the 1970s.¹¹⁷ While many Americans are still split over the continued

111. See Paul, *supra* note 76, at 69.

112. See, e.g., DAVID E. STANNARD, AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD (1993); JOHN HENRIK CLARKE, CHRISTOPHER COLUMBUS AND THE AFRIKAN HOLOCAUST: SLAVERY AND THE RISE OF EUROPEAN CAPITALISM (2011); LOEWEN, *supra* note 4.

113. Meg Sullivan, ‘*Repertorium Columbianum*’ Makes Landfall, UC NEWSROOM (Oct. 6, 2004), <https://web.archive.org/web/20130116163703/http://www.universityofcalifornia.edu/news/article/6664> [https://perma.cc/BP8Q-CMCV] (archived Dec. 29, 2022).

114. *Id.*

115. The following states officially celebrate Indigenous Peoples’ Day: Alaska (2017); Maine (2019); New Mexico (2019); Oregon (2017); South Dakota (1990); Vermont (2019). States that observe Indigenous Peoples Day via proclamations: Iowa (2018); Louisiana (2019); Michigan (2019); Minnesota (2019); Virginia (2020); Wisconsin (2019); and Washington D.C. (2019). See Scottie Andrew & AJ Willingham, *These States Are Ditching Columbus Day To Observe Indigenous Peoples’ Day Instead*, CNN (Oct. 12, 2020), <https://www.cnn.com/2020/10/12/us/indigenous-peoples-day-2020-states-trnd/index.html> [https://perma.cc/QA9T-7KQU] (archived Dec. 29, 2022).

116. See Shin, Kirkpatrick, D’Ignazio & So, *supra* note 88.

117. Kriston Capps, *Why There Are Still 149 Statues of Christopher Columbus in the U.S.*, BLOOMBERG (Oct. 9, 2021), <https://www.bloomberg.com/news/articles/2021-10-09/how-many-statues-of-christopher-columbus-are-left> [https://perma.cc/4UWC-TYC6] (archived Dec. 29, 2022).

eneration of Columbus,¹¹⁸ a recent poll indicated that more Americans see Columbus as a villain instead of a hero.¹¹⁹ No longer is there a legacy of the “master mariner.” Instead, Columbus’s legacy is one of historical Indigenous dispossession, exploitation, and genocide.

III. THE LAWS OF “PRE-COLUMBIAN” ARTIFACTS

In the mid-1800s, antiquities from Latin America became commodified and marketed as collectibles. These objects emerged as valued and prized collectibles throughout Europe and across the Americas. The high value of these objects increased the demand for such items. For this reason, these objects have been the victims of pillaging, trafficking, and sales on the black market. Both source and market nations have established treaties to curtail the over-exploitation of these objects. However, due to the growth of online sale platforms, it has become increasingly difficult to monitor the illicit sale and trade of these objects. The amount of damage has never been quantified.

The laws that attempt to curtail the pillaging, trafficking, and sale are significant in preventing the ultimate destruction of Latin American cultural heritage. However, the legal scheme in the United States and abroad that aims to lend assistance to source nations still references the very individual who not only caused their disenfranchisement, but also the expropriation of many of these objects in the first place. Both US and international laws use “Pre-Columbian” to indicate the Indigenous cultures of Latin America. These laws’ use of the term is antithetical to the very purpose for which they were enacted.

A. A National Legal Scheme Related to “Pre-Columbian” Objects

The United States is one of the largest import market nations in the world for Indigenous objects from Latin America.¹²⁰ The United States currently has an interest in halting the continued trafficking of

118. Ariel Edwards-Levy, *Americans Are Split Over Whether Columbus Deserves a Holiday*, HUFFINGTON POST (Oct. 12, 2015), https://www.huffpost.com/entry/columbus-day-poll_n_561c12f2e4b0e66ad4c8daec [<https://perma.cc/HZ22-P8A4>] (archived Jan. 11, 2023).

119. Jamie Ballard, *Americans See Christopher Columbus As More Of A Villain Than A Hero*, YOUNGOV (Oct. 12, 2020), <https://today.yougov.com/topics/politics/articles-reports/2020/10/12/christopher-columbus-hero-villain-poll-data> [<https://perma.cc/ZY6H-FLZX>] (archived Jan. 11, 2023).

120. A market nation is a nation rich with financial resources that has a high demand of antiquities. See Ryan D. Phelps, *Protecting North America’s Past: The Current (and Ineffective) Laws Preventing the Illicit Trade of Mexican Pre-Columbian Antiquities and How We Can Improve Them*, 94 TEX. L. REV. 785, 785 (2016); see also Donna Yates, *Illicit Cultural Property from Latin America: Looting, Trafficking, and Sale*, in COUNTERING ILLICIT TRAFFIC IN CULTURAL GOODS: THE GLOBAL CHALLENGE OF PROTECTING THE WORLD’S HERITAGE 33, 42 (France Desmarais ed., 2015).

these objects.¹²¹ This interest stems from international treaties,¹²² as well as its own pecuniary interests protected within its territory. Since the early 2000s, Congress has been concerned about cultural property trafficking as a national security issue linked to money laundering, sanctions evasion, and terrorist financing.¹²³ Congress is also concerned with the loss of cultural heritage. The harm caused by illicit trafficking is seen not only as a regional issue but as the potential loss of cultural heritage, which would be detrimental to all nations, including the United States.¹²⁴ Because of this innate interest, the United States has enacted various laws aimed to target trafficking of antiquities, including “Pre-Columbian” objects.

1. The 1972 Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act

The first piece of national legislation using “Pre-Columbian” is the 1972 Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act.¹²⁵ This act was Congress’s way to discourage illicit looting and trafficking in artifacts from Central and South America.¹²⁶ This legislation was proposed by the Department of State to assist with the preservation of archeological sites in Latin American countries and to prevent the importation of a “narrow class of valuable . . . archeological objects exported contrary to the laws of the respective countries of origin.”¹²⁷ The act specifically provides that

121. For example, the State Department of the United States created the Cultural Antiquities Task Force (CATF), which is “designed to enhance the ability of law enforcement to combat theft, looting, and trafficking of historically and culturally significant objects.” *Cultural Antiquities Task Force*, BUREAU OF EDUC. & CULTURAL AFFS., <https://eca.state.gov/cultural-heritage-center/cultural-antiquities-task-force> (last visited Jan. 17, 2023) [<https://perma.cc/ZGR9-J372>] (archived Jan. 17, 2023).

122. International laws will be discussed *infra* Part.III.B.

123. See KATARINA C. O’REGAN, CONG. RSCH. SERV. IF11776, TRANSNATIONAL CRIME ISSUES: ARTS AND ANTIQUITIES TRAFFICKING (2021).

124. See Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT’L L. 169, 169 (2007) (examining the legal scheme of the international market of antiquities and the negative externalities associated with trafficking); John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 832 (1986) (“[T]he source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property.”).

125. 19 U.S.C. § 2095 (1972) [hereinafter Pre-Columbian Act of 1972].

126. See Kevin Jowers, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico*, 38 TEX. INT’L L.J. 145, 166 (2003) (“[T]he U.S. legislature took its first unilateral action to protect the cultural property of other nations by enacting a statute to prohibit the importation of pre-Columbian monumental and architectural sculpture and murals illegally exported from the country of origin.”).

127. S. REP. NO. 92-1221, at 2 (1972). In more detail, the report states:

no pre-Columbian monumental or architectural sculpture or mural . . . may be imported into the United States unless the government of the country of origin of such sculpture or mural issues a certificate . . . which certifies that such exportation was not in violation of the laws of that country.¹²⁸

It empowers the Secretary of the Treasury, in consultation with the Secretary of State, to create a list of artifacts to restrict from importation.¹²⁹

The act defines “pre-Columbian monumental or architectural sculpture,” in pertinent part, as “any stone carving or wall art which . . . is the product of a pre-Columbian Indian culture of Mexico, Central America, South America, or the Caribbean Islands.”¹³⁰ It does not provide a date range or any other characterizing factors. The significance of this definition is twofold. First, it protects only monumental or architectural sculptures from all regions of Latin America. Second, it combines “Pre-Columbian” with “Indian.” In effect, this combination regards objects of Indigenous descent as the same as those considered Pre-Columbian. The legislative history reveals that there were no discussions as to the value of the term “Pre-Columbian.” Indeed, the Senate *Congressional Record* identifies the section as “Pre-Columbian Art” with no justification for this nomenclature.¹³¹

Notably, the Pre-Columbian Act of 1972 is rarely litigated.¹³² However, the precedential case of *United States v. McClain*, which involved trafficking of Latin America antiquities, discusses the Pre-Columbian Act of 1972.¹³³ In *McClain*, five defendants were charged and convicted under the National Stolen Property Act (NSPA) for receiving and concealing artifacts illegally exported from Mexico.¹³⁴ The primary issue in *McClain* turned on whether the artifacts were knowingly “stolen” within the meaning of the NSPA.¹³⁵ In order to classify these objects, the court analyzed both American and Mexican laws

H.R. 9463 was proposed by the Department of State to assist countries in Latin America which are experiencing serious depredation of archeological sites of the pre-Columbian era. The committee is informed that the ceremonial centers and architectural complex of the ancient civilizations of Latin America are being pillaged and mutilated in order to meet the demands of a flourishing international market of pre-Columbian art objects.

Id.

128. 19 U.S.C. § 2092(a).

129. *See* 19 U.S.C. § 2091.

130. 19 U.S.C. § 2095(3)(A)(i).

131. *See* S. REP. NO. 92-1221, at 2 (1972).

132. *See* Michael Dearman, *Intractable Problems and Modest Solutions: The Illicit Antiquities Trade Between the United States and Mexico*, 41 HOUS. J. INT'L L. 413, 430 (2019) (providing an overview of cultural property law in the United States and how the United States can help suppress the illicit antiquities trade between the United States and Mexico).

133. 545 F.2d 988 (5th Cir. 1977).

134. *See id.* at 991–92.

135. *See id.* at 992.

to determine ownership rights over the objects.¹³⁶ In holding that the NSPA protects foreign-owned objects exported into the United States in violation of foreign national patrimony laws, the court determined that exportation restrictions do not themselves create national ownership in artifacts.¹³⁷

Instead, national ownership arises only when the law of the country of origin enacts legislation claiming such ownership.¹³⁸ The court relies on the Pre-Columbian Act of 1972 to support this holding, stating, “[t]he Act to Prevent Importation of Pre-Columbian Sculpture and Murals . . . suggest[s] Congressional awareness of this distinction.”¹³⁹ On appeal for the second time, the defendants further claimed the NSPA is superseded by the Pre-Columbian Act of 1972.¹⁴⁰ The Fifth Circuit held that the Pre-Columbian Act of 1972 does not narrow the application of the NSPA.¹⁴¹ *United States v. McClain* is one of the most significant cases related to art and antiquities trafficking in the United States. Its precedential value is imperative in considering the impacts of the Pre-Columbian Act of 1972 on antiquities law in the United States.

2. The Cultural Property Implementation Act

Outside of the Pre-Columbian Act of 1972, “Pre-Columbian” appears most often in forfeiture cases related to the Cultural Property Implementation Act (CPIA). The CPIA is the domestic law implementing the 1970 United Nations Educational Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the UNESCO Convention).¹⁴² This complex legislation empowers the executive branch to (1) impose import restrictions on designed materials belonging to a state party of the 1970 UNESCO Convention,¹⁴³ and (2) enter into bilateral agreements or memoranda

136. *See id.* at 1003. In particular, the court looked at Mexican patrimony laws, which declares all “pre-Columbian artifacts” within its nation’s borders to be owned by the Republic of Mexico. Therefore, any unauthorized export of these artifacts is equated to “stealing” under US law. *See id.*

137. *See id.*

138. *See id.*

139. *Id.* at 1002 n.32.

140. *See United States v. McClain*, 593 F.2d 658, 663 (5th Cir. 1979).

141. *See id.* at 664.

142. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention]. This is first international agreement to find a solution to the problem of illicitly traded antiquities and it shed light on the problem on a global stage.

143. *See* 19 U.S.C. § 2607. This provision states:

of understandings to restrict importation of requested cultural property.¹⁴⁴ Currently, the United States has bilateral agreements with eight Latin American countries to restrict the importation of antiquities.¹⁴⁵ When stolen or illegally exported works are found in the United States, the CPIA authorizes the government to restore them to the rightful owners through forfeiture proceedings.¹⁴⁶ The CPIA does not use “pre-Columbian,” but rather designates for protection objects of certain archeological or ethnological interest with a specific time period.

In forfeiture proceedings, which are typically *in rem*,¹⁴⁷ the property is often personified as the defendant.¹⁴⁸ As a result, in the proceedings to forfeit artifacts from Latin America, the defendant is often labeled as “Pre-Columbian Artifacts.”¹⁴⁹ For example, in *United States v. Twenty-Nine Pre-Columbian and Colonial Artifacts from Peru*, the government filed a civil forfeiture proceeding under the CPIA to recover illegally exported artifacts that “constituted part of the

No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States.

Id.

144. 19 U.S.C. § 2603(b) (“[I]f the President determines that an emergency condition applies with respect to any archaeological or ethnological material of any State Party, the President may apply the import restrictions set forth in section 2606 of this title with respect to such material.”).

145. Those countries include Belize, Bolivia, Colombia, El Salvador, Guatemala, Honduras, Nicaragua, and Peru. *Current Agreements and Import Restrictions*, BUREAU OF EDUC. AND CULTURAL AFFS., <https://eca.state.gov/cultural-heritage-center/cultural-property/current-agreements-and-import-restrictions> (last visited Jan. 11, 2023) [<https://perma.cc/CM36-GKPK>] (archived Jan. 11, 2023) [hereinafter *Current Agreements and Import Restrictions*]. The United States also has a separate bilateral agreement with Mexico to restrict antiquities from Mexico. This bilateral agreement was entered into before the ratification of the CPIA. Treaty Of Cooperation Between The United States Of America And The United Mexican States Providing For The Recovery And Return Of Stolen Archaeological, Historical And Cultural Properties, Mex.-U.S., July 17, 1970, T.I.A.S. 7088.

146. See Stefan D. Cassella, *Recovering Stolen Art and Antiquities Under the Forfeiture Laws: Who is Entitled to Property When there are Conflicting Claims*, 45 N.C. J. INT’L L. 393, 394 (2020) (providing an overview of criminal and civil forfeiture proceedings for stolen cultural property).

147. *In rem* jurisdiction extends only to assets physically located within the territorial reach of the court, not to the possessor of the property. See *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 964–66 (4th Cir. 1999) (examining *in rem* jurisdiction’s extension to only those assets within US borders).

148. See Courtney J. Linn, *International Asset Forfeiture and the Constitution: The Limits of Forfeiture Jurisdiction Over Foreign Assets Under 28 U.S.C. 1355(b)(2)*, 31 AM. J. CRIM. L. 251, 259 (2003) (examining US forfeiture jurisdiction for foreign assets).

149. See, e.g., *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544 (N.D. Ill. 1993).

Peruvian cultural heritage.”¹⁵⁰ In naming the “defendants,” the government used the term “Pre-Columbian and Colonial Artifacts.”¹⁵¹ The Southern District of Florida entered a judgment of forfeiture in favor of the government.¹⁵² However, in a separate forfeiture proceeding for the same object, the government did not use “Pre-Columbian.” Instead, the government named the defendant “Artifacts Constituting Cultural Property from Peru.”¹⁵³ The only distinction between these two proceedings is that the “Pre-Columbian Artifacts” were subject to forfeiture under the CPIA, while the “Artifacts Constituting Cultural Property from Peru” only to forfeiture under §19 U.S.C. 1595 for aiding unlawful importation.¹⁵⁴ The consequences of the cases were entirely the same—civil forfeiture. However, the denotations of the names convey varying personifications of the artifacts at issue. The naming of an object denotes a certain meaning to it. By categorizing an object as a “Pre-Columbian” artifact, a presumption arises that the object falls under the specific considerations of CPIA and that it is subject to the action, while naming the artifact more broadly (as in “archeological material”) does not in itself create the presumption that it falls under the CPIA. Within this context, the use of a vaguer term is seemingly beneficial to the overall understanding of the objects themselves.

3. The Preservation of Cultural Heritage in the United States

Throughout the United States, municipalities enact multifaceted and comprehensive ordinances aimed at preserving the respective communities’ historic resources.¹⁵⁵ Through the creation of such comprehensive preservation programs, municipalities may garner access to federal and state funding.¹⁵⁶ “Pre-Columbian,” in this context, is used widely to denote the archeological preservation of Indigenous ruins, as well as artifacts. Given the state’s strong Spanish influence, numerous municipalities in Florida, particularly, carve out specific restrictions using the term. For example, in New Smyrna Beach, Florida, Municipal Code 50-13, the municipality imposes strict prohibitions of excavation on “historical and archaeological areas of international,

150. *United States v. Twenty-Nine Pre-Columbian and Colonial Artifacts from Peru*, 2014 WL 12861856, at *2 (S.D. Fla. Nov. 13, 2014).

151. *See id.* at *3.

152. *See id.*

153. *United States v. Three Artifacts Constituting Cultural Property from Peru*, No. 13-22585-JAL, ECF No. 1, at *4 (S.D. Fla. July 18, 2013).

154. *United States v. Twenty-Nine Pre-Columbian and Colonial Artifacts from Peru*, 2014 WL 12861856, at *2.

155. *See Drafting Effective Historic Preservation Ordinances: A Manual for California’s Local Governments*, Office Of Historic Preservation State Of California Department Of Parks And Recreation 1 (June 2005).

156. *See id.*

national, and local importance, from all periods of history, including pre-Columbian Indian villages.”¹⁵⁷

While local ordinances use “Pre-Columbian,” it is interesting to note that federal preservation statutes do not follow suit. The National Historic Preservation Act, the most comprehensive federal law relating to historic preservation, does not use “Pre-Columbian” to denote artifacts of historical importance derived from Indigenous tribes.¹⁵⁸ Instead, the act refers to such objects as “[p]roperty of traditional religious and cultural importance to an Indian tribe or Native Hawaii organization.”¹⁵⁹ The Antiquities Act, the first act in the United States to encourage historic preservation, refers to any ruin, monument, or antiquity as “historic” or “prehistoric.”¹⁶⁰ The act bifurcates time between when history was recorded and the time preceding the commencement of authentic writing.¹⁶¹ Subsequent preservation acts, including the Historic Sites Act¹⁶² and the Archeological and Historic Preservation Act,¹⁶³ use “prehistorical” and “historical” to denote time periods. The reason for this is unclear. Perhaps it is because federal laws include Hawaiian artifacts, where Columbus is less relevant. On

157. NEW SMYRA BEACH, FL., CODE ORDINANCES ch. 60, art. 1, § 50-13(a) (2007); see also KEY WEST, FL. ORDINANCES ch. 110, art. II, § 110-26 (1997) (“It is the finding of the city commission that the city contains many areas of historical and archaeological importance to the United States and to the citizens of the city, from all periods of its history, including pre-Columbian Indian villages.”); ST. AUGUSTINE, FL. ORDINANCES ch. 6, § 6-2 (1964) (“. . . St. Augustine, as the oldest permanent European settlement within the United States of America, contains many areas that are historically and archaeologically important to the citizens of this city and the United States, . . . including pre-Columbian Indian villages, the original Spanish settlements on the mainland.”).

158. See National Historic Preservation Act of 1966, Pub. L. No. 89-665, § 106, 80 Stat. 915, 917 (codified as amended at 16 U.S.C. § 470f (2012)).

159. 36 C.F.R. § 800.2(e)(2).

160. 18 U.S.C. § 1866(b) (“A person that appropriates, excavates, injures, or destroys any historic or prehistoric ruin or monument or any object of antiquity that is situated on land owned or controlled by the Federal Government without the permission of the head of the Federal agency having jurisdiction over the land on which the object is situated, shall be imprisoned for not more than 90 days, fined under this title, or both.”).

161. See Kent G. Lightfoot, *Culture Contact Studies: Redefining the Relationship between Prehistoric and Historical Archaeology*, 60 AM. ANTIQUITY 199 (1995) (examining the implications of using temporal separations in archeology).

162. 16 U.S.C. § 462(f) (“[The Secretary of the Interior] shall restore, reconstruct, rehabilitate, preserve, and maintain historic or prehistoric sites, buildings, objects, and property of national historical or archaeological significance and where deemed desirable establish and maintain museums in connection therewith.”).

163. 54 U.S.C. § 312502(A)(1). This provision states:

When any Federal agency finds, or is notified, in writing, by an appropriate historical or archeological authority, that its activities in connection with any Federal construction project or federally licensed project, activity, or program may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data, the agency shall notify the Secretary, in writing, and shall provide the Secretary with appropriate information concerning the project, program, or activity.

Id.

the other hand, Congress could have purposefully created broader categories in order to protect a broader range of objects. Nonetheless, the federal preservation scheme has arguably functioned without the use of “Pre-Columbian” in its legislation. Thus, the protection of objects of historical and cultural importance can be effectuated using broader descriptive terms.

B. *The International Legal Scheme on Pre-Columbian Objects*

Many international laws consider the legality of looting and trafficking Latin American antiquities in a manner similar to that of national laws. These international instruments are intended to establish norms for the protection of Latin American antiquities, as well as to establish import/export restrictions on state party countries. State patrimony laws are exceedingly important for regulating antiquities within the source country’s border. However, when the object leaves the boundaries of the source nation, international agreements become imperative in dictating how the objects are treated by the market nation. These antiquities are protected by regional agreements, international conventions, and bilateral treaties. The import of the terminology used in each of these instruments is emphasized by the time, nature, and veracity of the instrument itself.

1. Regional Agreements

Prior to 1970, there was no international convention that addressed the problem of illicit trafficking in antiquities—Latin American or otherwise. In an effort to protect their own antiquities, countries in Latin America ratified regional agreements to protect against trafficking within the region. There is very little scholarship that addresses these regional agreements in Latin America. However, they serve an important purpose. First, they are the second line of defense outside of national laws to protect Latin American cultural heritage. Second, these regional agreements aid in the understanding of obligations to protect cultural heritage within national borders as well as outside the borders. The use of certain vernacular within these regional agreements is, thus, important to consider in evaluating their effectiveness.

The first of those agreements was known as the Treaty on the Protection of Movable Property of Historic Value.¹⁶⁴ That first Pan-American effort attempted to protect and preserve cultural property

164. Tratado Sobre La Proteccion de Muebles de Valor Historico, OEA 28 (April 15, 1935).

within the region from illicit trafficking.¹⁶⁵ Within the first article, the treaty defines “moveable monuments” to include those objects from the “Pre-Columbian Period.”¹⁶⁶ The treaty requires state parties to confiscate and return to the country of origin objects considered “pre-Columbian” under Article 1.¹⁶⁷ Article 4 provides such that “the signatory countries understand that those who have objects declared to be movable monuments, can only enjoy the usufruct, which is transferable only within the same country, and undertake to legislate that effort.”¹⁶⁸ Thus, the obligations are reciprocal; the source country must maintain export restrictions protecting their own objects, while market nations must make efforts to return trafficked artifacts. The enforcement of this regional agreement is weak, as only nine countries (all source nations) in Latin America are parties to the treaty, only five ratified it, and no market nation is a party.¹⁶⁹

During the time period between World War I and World War II, the Pan-American Union also made efforts to protect cultural property within the region from destruction during times of armed conflict. These efforts resulted in the creation and ratification of the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (the Roerich Pact).¹⁷⁰ The Roerich Pact is the first treaty

165. *Id.* p.mbl. (“Las altas pares contratantes, deseosas de procurar a todos los países signatarios el conocimiento, la protección y conservación de los monumentos muebles precolombinos [The high Contracting Parties, desirous of securing, by means of cooperation, for all the signatory States, the knowledge, protection, and preservation of movable monument of the pre-Columbian].”).

166. *Id.* art. 1(a). This Article defines pre-Columbian movable monuments as

[L]as armas de guerra o utensilios de labor, las obras de alfarería, los tejidos, las joyas y amuletos, los grabados, diseños y códices, los quipos, los trajes, los adornos de toda índole, y en general todo objeto mueble que por su naturaleza o su procedencia muestren que provienen de algún inmueble que auténticamente pertenece a aquella época histórica. [The arms of war and utensils of labor, pottery, woven fabrics, jewels and amulets, engravings, drawings, and codices, quipus, costumes, adornments of all sorts, and in general all movable objects which by their nature or origin show that they are separate from some immovable monument which belongs authentically to that period of history.]

Id.

167. *See id.* art. 5.

168. *Id.* art. 4.

169. The countries that are party to the agreement include Chile, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Uruguay, and Venezuela. Only Chile, El Salvador, Guatemala, Mexico, and Nicaragua ratified the treaty. *Tratado Sobre La Proteccion De Muebles De Valor Historico*, DEPARTAMENTO DE DERECHO INTERNACIONAL, OEA, <http://www.oas.org/juridico/spanish/firmas/c-4.html> (last visited Feb. 10, 2023) [<https://perma.cc/W55F-XJ2Y>] (archived Jan. 19, 2023).

170. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 167 L.N.T.S. 290. The treaty is named after Nicholas Roerich, a Russian born artist who initiated cultural property protection efforts in the United States. *Roerich Pact Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments*, U.S. COMM. OF THE BLUE SHIELD, <https://uscbs.org/1935-roerich-pact.html#:~:text=The%20Roerich%20Pact%20stipulated%20that,actors%20in%20time>

dedicated exclusively to the protection of cultural property in times of war.¹⁷¹ The treaty is only in effect across North, Central, and South America. Ratified by both market and source nations,¹⁷² the treaty establishes that “treasures of culture be respected and protected in time of war and in peace.”¹⁷³ The language of the treaty does not define “treasures of culture” but rather aims to protect “historic monuments, museums, scientific, artistic, educational and cultural institutions in time of peace as well as in war.”¹⁷⁴ Presumably, antiquities from Latin America fall within these broad categories, without the treaty using or defining them as “Pre-Columbian.”

The last significant, solely Pan-American initiative to curtail trafficking of antiquities was the Convention on the Protection of Archeological, Historical and Artistic Heritage of the American Nations (the Convention of San Salvador).¹⁷⁵ This convention encourages states to establish records and inventories of cultural property,¹⁷⁶ refuse importation of cultural property without proper export authorization,¹⁷⁷ utilize effective measures to prevent unlawful exportation, importation, and removal, and take “necessary” measures to return protected objects.¹⁷⁸ The United States and Canada are parties to this convention, demonstrating an interest by both market and source na-

s%20of%20war (last visited Jan. 19, 2023) [<https://perma.cc/L5AY-Z6TU>] (archived Jan. 19, 2023).

171. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, *supra* note 170.

172. Brazil, Chile, Columbia, Cuba, Dominican Republic, El Salvador, Guatemala, Mexico, Venezuela, and the United States have ratified the treaty. *See id.*

173. *Id.* pmbl.

174. *Id.* art. 1.

175. Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations, June 16, 1976, OAS 47 [hereinafter Convention of San Salvador]. The convention’s purpose is to “safeguard the property making up the cultural heritage of the American nations in order . . . to promote cooperation among the American states for mutual awareness and appreciation of their cultural property.” *Id.* art. 1.

176. *See id.* art. 8 (“Each state is responsible for identifying, registering, protecting, preserving, and safeguarding its cultural heritage; in fulfillment of these functions each state undertakes to encourage . . . Establishment and maintenance of an inventory and record of cultural property, to make it possible to identify and locate it.”).

177. *See id.* art. 3 (“The cultural property included in the above article shall receive maximum protection at the international level, and its exportation and importation shall be considered unlawful, except when the state owning it authorizes its exportation for purposes of promoting knowledge of national cultures.”).

178. *See id.* art. 10 (“Each State Party to this Convention undertakes to take whatever measures it may consider effective to prevent and curb the unlawful exportation, importation, and removal of cultural property, as well as those necessary for the return of such property to the state to which it belongs in the event of its removal.”).

tions.¹⁷⁹ Most notably, the Convention of San Salvador does not use “Pre-Columbian.” Instead, it defines objects of this period as “[m]onuments, objects, fragments of ruined buildings, and archeological materials belonging to American cultures existing prior to contact with European culture, as well as remains of human beings, fauna, and flora related to such cultures.”¹⁸⁰ While the Convention of San Salvador still associates objects of Indigenous Latin America with colonial settlement, its broad language exemplifies the possibility of using different vernacular in identifying these objects for protection.

2. The 1970 UNESCO Convention

From the early to mid-twentieth century, the high demand for antiquities around the world created an incentive for and ultimately an environment of looting and trafficking of Latin American antiquities. Source nations, who were the main victims of these activities, need help in protecting and preserving their cultural treasures.¹⁸¹ While antiquities were looted around the world, the first countries to petition for a creation of an international legal scheme were from Latin America.¹⁸² Mexico and Peru petitioned the UNESCO General Conference to create international protective measures to thwart looting and trafficking of antiquities.¹⁸³ UNESCO responded to this petition by authorizing a special committee to draft a convention to advance these efforts.¹⁸⁴ This petition ultimately led to UNESCO creating and adopting the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.¹⁸⁵

The 1970 UNESCO Convention was the first worldwide agreement to address the illicit trafficking of cultural property.¹⁸⁶ This

179. The parties to this convention are Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, the Bahamas, Trinidad and Tobago, the United States, Uruguay, and Venezuela. *Signatories And Ratifications, Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations*, DEPT OF INT’L L., OAS, <https://www.oas.org/juridico/english/signs/c-16.html> (last visited Feb. 10, 2023) [<https://perma.cc/Z4S4-A26X>] (archived Jan. 1, 2023).

180. Convention of San Salvador, *supra* note 171, art. 2(a).

181. See Phelps, *supra* note 120, at 789.

182. See *id.*

183. See Jowers, *supra* note 126, at 149.

184. See *id.*

185. See 1970 UNESCO Convention, *supra* note 142, pmb. For more information on the creation and codification of the final instrument, see PATRICK J. O’KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC 5 (2007).

186. See Katherine Vitale, *The War on Antiquities: United States Law And Foreign Cultural Property*, 84 NOTRE DAME L. REV. 1835, 1840 (2009) (“[I]llicit trade in cultural

agreement was an essential step in fostering the type of international cooperation necessary to combat the illicit trade.¹⁸⁷ Under Article 3, any “import, export, or transfer of ownership of cultural property effected contrary to the provisions adopted under this convention by the States Parties thereto, shall be illicit.”¹⁸⁸ This obliges a state party to prohibit the exportation of its own cultural property,¹⁸⁹ while simultaneously imposing obligations on market nations to facilitate recovery of any illicitly imported cultural property within their territory.¹⁹⁰

The UNESCO Convention’s language is overtly inclusive of all types of “cultural property.”¹⁹¹ The convention defines cultural property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science.”¹⁹² Within this broader definition, the convention language also provides specific examples of the type of property that would qualify. For example, the convention provides that “antiquities more than one hundred years old” are considered “cultural property.”¹⁹³ Notably, the convention does not divide antiquities by historical time periods. Instead, the convention merely provides protections for those objects that are “more than a hundred years old.”¹⁹⁴

3. State Treaties

One of the major measures to come out of the 1970 UNESCO Convention is the encouragement of bilateral treaties amongst nations to protect cultural property within their borders.¹⁹⁵ The CPIA codifies

property stemmed from the unequal power dynamic between market countries, where demand for art and antiquities tacitly encouraged worldwide export of cultural and archaeological objects, and source countries, which are rich in such objects but economically poor relative to market countries.”).

187. See Phelps, *supra* note 120, at 789.

188. 1970 UNESCO Convention, *supra* note 142, art. 3.

189. See *id.* art. 6.

190. See *id.* art. 13(d).

191. *Id.*

192. *Id.* art. 1.

193. *Id.* art. 2(e).

194. *Id.* art. 1(e), (k).

195. *Id.* art. 9. In full, this Article states:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

Id.

Article 9 of the 1970 UNESCO Convention and empowers the executive branch to enter into bilateral agreements with countries that petition the United States to put into place import restrictions as a measure to protect their cultural patrimony.¹⁹⁶ As stated above, the United States has entered bilateral agreements or memoranda of understandings (MOUs) with eight Latin American countries.¹⁹⁷ In addition to the bilateral agreement, each country also has a “Designated List” in the *Federal Register*, which delineates specific objects that are forbidden from being imported into the country.¹⁹⁸

The first bilateral agreement the United States entered into was with Peru. In 1990, the parties entered into a memorandum of understanding, “The Imposition of Import Restrictions on Archeological Material from the Pre-Hispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru.”¹⁹⁹ In addressing the restricted material, the Peru MOU delineates “archaeological materials ranging in date from approximately 12,000 B.C. to A.D. 1532.”²⁰⁰ As an example, the agreement includes “objects directly related to the pre-Columbian past.”²⁰¹ Thus, while Peru uses “Pre-Hispanic” in the title of the agreement, it backtracks to “Pre-Columbian” in its examples of restricted material. As Peru is one of the Latin American countries with the most trafficked antiquities in the United States,²⁰² the language is important in distinguishing the type of material restricted for import in the United States.

In 1997, the United States and Guatemala entered into a bilateral agreement, “Concerning the Imposition of Import Restrictions on Archaeological Objects and Material from the Pre-Columbian Cultures

196. See 19 U.S.C. § 2602(a)(2)(A). This provision states:

[T]he President may enter into a bilateral agreement with the State Party to apply the import restrictions set forth in section 2606 of this title to the archaeological or ethnological material of the State Party the pillage of which is creating the jeopardy to the cultural patrimony of the State Party found to exist under paragraph (1)(A).

Id.

197. See *Current Agreements and Import Restrictions*, *supra* note 145.

198. See 19 C.F.R. § 12.104g(a).

199. Memorandum of Understanding, *The Imposition of Import Restrictions on Archeological Material from the Pre-Hispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru*, Peru-U.S. (2017). The agreement was extended in 2002, 2007, 2012, and changed and extended in 2017.

200. *Id.* art. 1A

201. *Id.*

202. See Irene Hartmann, *Argentina: At the forefront of restitution*, 4 UNESCO COURIER 28, 29 (Nov. 2020); see also INT’L COUNCIL OF MUSEUMS, RED LIST OF PERUVIAN ANTIQUITIES AT RISK 3 (2007), <https://icom.museum/wp-content/uploads/2019/03/Red-List-Peru-English.pdf> (last visited Mar. 2, 2023) [<https://perma.cc/5EPG-UVUS>] (archived Mar. 2, 2023).

of Guatemala.”²⁰³ While the Guatemala MOU specifically names “Pre-Columbian” objects in its title, the text of the agreement does not. Instead, it states the purpose of the agreement is to “reduce the incentive for pillage of irreplaceable archaeological objects and materials representing the pre-Hispanic cultures of Guatemala: the Maya of the Peten Lowlands and the cultures of the Highlands and the Southern Coast.”²⁰⁴ Therefore, although the term is still used to denote the difference between preconquest and postconquest eras, the actual temporal categories created by the MOU do not refer to Columbus himself.

In 2001, the United States entered into a memorandum of understanding with Bolivia, “Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Columbian Cultures and Certain Ethnological Material from the Colonial and Republican periods of Bolivia.”²⁰⁵ The purpose stated within the MOU was to “reduce the incentive of certain categories of irreplaceable archeological material representing the Pre-Columbian cultures of Bolivia.”²⁰⁶ Therefore, the parties agreed to restrict the importation of “certain categories of Pre-Columbian material from the archaic period through the Inka Empire.”²⁰⁷

In 2004, the United States entered into a memorandum of understanding with Honduras, “Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Columbian Cultures of Honduras.”²⁰⁸ The purpose of the agreement is “to reduce the incentive for pillage of irreplaceable archaeological objects representing the Pre-Columbian cultures of Honduras.”²⁰⁹ The Honduras MOU simply prevents the importation of “irreplaceable archeological

203. Memorandum of Understanding Between the Government of the United States of America and The Government of the Republic of Guatemala Concerning the Imposition of Import Restrictions on Archaeological Objects and Material from the Pre-Columbian Cultures of Guatemala, Guat.-U.S., Sept. 29, 1997, T.I.A.S. No.97-929 [hereinafter Guatemala MOU].

204. *Id.* pmb1.

205. Memorandum of Understanding Between the Government of the United States of America and The Government of the Republic of Bolivia Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Columbian Cultures and Certain Ethnological Material From the Colonial and Republican Periods of Bolivia, Bol.-U.S., Dec. 4, 2001, T.I.A.S. No. 01-1204 [hereinafter Bolivia MOU]. Prior to entrance of the Bolivia MOU, Bolivia requested emergency assistance from the United States to prohibit import of these designated objects. From March 14, 1989, until May 20, 1996, import restrictions on “certain categories of ethnological material” were in effect. They were implemented on an emergency basis. *See Current Agreements and Import Restrictions, supra* note 145.

206. Bolivia MOU, *supra* note 205, pmb1.

207. *Id.* art. 1(A).

208. Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Honduras Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Columbian Cultures of Honduras, Hond.-U.S., Mar. 12, 2004, T.I.A.S. No. 04-312 [hereinafter Honduras MOU].

209. *Id.* pmb1.

objects representing Pre-Columbian cultures of Honduras.”²¹⁰ In the designated list of the restricted material, the *Federal Register* includes “Pre-Columbian archeological material (dating from approximately 1200 BC to 1500 AD.”²¹¹

Then in 2006, the United States and Colombia entered into a bilateral agreement, “Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Columbian Cultures and Certain Ecclesiastical Ethnological Material from the Colonial Period of Colombia.”²¹² The Colombia MOU imposed import restrictions on certain categories of archaeological and ethnological material originating in Colombia.²¹³ These certain categories are more detailed than other MOUs entered into force by the United States. They include “Pre-Columbian archaeological material, ranging in date from approximately 1500 B.C. to A.D. 1530, including, but not limited to, objects generally associated with the Tairona, Sinu, Uraba, Quimbaya, Muisca, Calima, Malagana, Tolima, Tierradentro, Cauca, San Agustin, Tumaco, and Narifio cultures.”²¹⁴ Colombia is one of the Latin American countries with the most trafficked antiquities.²¹⁵ The language imposed by the MOU demonstrates the country’s inherent interest in protecting its own Indigenous cultures.

In 2013, the United States ratified the memorandum of understanding with Belize, “Concerning the Imposition of Import Restriction on Categories of Archeological Material of Belize.”²¹⁶ Pursuant to Article 1 of the Belize MOU, the United States promises to restrict the importation of archeological material that is at least 250 years old.²¹⁷ Within that restriction, the language includes objects from “Post-Classic Periods of the Pre-Columbian era.”²¹⁸

210. *Id.* art. 1(A).

211. Extension of Import Restrictions on Archaeological and Ecclesiastical Ethnological Materials from Honduras, 79 Fed. Reg. 13873, 13874 (Mar. 12, 2014) (to be codified at 19 C.F.R. pt. 12)

212. Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Colombia Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Columbian Cultures And Certain Ecclesiastical Ethnological Material from the Colonial Period of Colombia, Colom.-U.S., Mar. 15, 2006, T.I.A.S. No. 06-315 [hereinafter Colombia MOU].

213. *See id.* art. 1(A).

214. *Id.*

215. *See* INT’L COUNCIL OF MUSEUMS, RED LIST OF COLOMBIAN CULTURAL OBJECTS AT RISK 3 (2010), https://icom.museum/wp-content/uploads/2018/05/RL_COL_ENGLISH.pdf (last visited Feb. 11, 2023) [<https://perma.cc/4MM5-NECW>] (archived Jan. 1 2023).

216. Memorandum of Understanding Between the Government of the United States of America and the Government of Belize Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Cultural Heritage of Belize from the Pre-Ceramic (Approximately 9000 B.C.), Pre-Classic, Classic and Post Classic Periods of the Pre-Columbian Era Through the Early and Late Colonial Periods, Belize-U.S., Feb. 27, 2013, T.I.A.S. No.13-227 [hereinafter Belize MOU].

217. *See id.* art. 1.

218. *Id.* These objects include, for example, sculpture, vessels, and other objects made of materials such as stone, metal, ceramic, bone, shell, wood, and glass.

However, not all of the bilateral agreements with Latin American countries use “Pre-Columbian.” In fact, four of the eight countries do not include the term in the agreements.²¹⁹ The most recent bilateral agreement occurred between the United States and Costa Rica on January 15, 2021.²²⁰ The agreement concerns “the imposition of import restrictions on categories of archeological material of Costa Rica.”²²¹ The Costa Rica MOU does not use “Pre-Columbian.” Instead, to designate this time period, the agreement restricts archeological material “ranging in date from 12,000 B.C. to the time of the establishment of Hispanic culture in Costa Rica (approximately A.D. 1550).”²²² Additionally, within its designated list, the periodization of the archeological objects is denoted by period numbers. The list identifies those materials deriving after the conquest as “European contact and Colonial period (A.D. 1500–1821).”²²³ This most recent categorization seemingly showcases a trend to move away from the traditional “pre-Columbian language” in favor of narrower definitions of applicable cultural property.

IV. A CRITICAL APPROACH TO LANGUAGE OF PRE-COLUMBIA

Scholars have opined that the periodization of “Pre-Columbian” studies, by its own nomenclature, “has helped consolidate the fiction of the Non-west.”²²⁴ This “mythic divide” aids in the fictional divide between the notion of “the civilized” and “the primitive.”²²⁵ The paradox

219. Chile describes illicit imports as “objects in ceramic, stone, metal, and organic tissue, ranging in date from approximately 31,000 B.C. to 250 years ago.” Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Chile Concerning the Imposition of Import Restrictions on Categories of Archaeological Material of Chile art. 1(1), Chile-U.S., Sept. 30, 2020, T.I.A.S. No. 20-930. Ecuador describes these objects as “certain archaeological material into the United States of America, which includes objects in ceramic, stone, metal, and organic tissue, ranging in date from about 12,000 B.C. to 250 years ago and certain ethnological material, which may include categories of Colonial period ecclesiastical material and Colonial period secular paintings, documents, and manuscripts, dating between A.O. 1532 and A.O. 1822.” Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Ecuador Concerning the Imposition of Import Restrictions on Categories of Archaeological and Ethnological Material of Ecuador art. 1(1), Ecuador-U.S., Feb. 11, 2020, T.I.A.S. No. 20-211. El Salvador does not provide a definition of protected materials. See Memorandum of Understanding, Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological Material From the Pre-Hispanic Cultures Of The Republic of El Salvador, El Sal.-U.S. (1995).

220. Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Costa Rica Concerning the Imposition of Import Restrictions on Categories of Archaeological Material of Costa Rica, Costa Rica-U.S., Jan. 15, 2021, T.I.A.S. No. 21-115.

221. *Id.* at I(1).

222. *Id.*

223. 86 C.F.R. § 17055 (2021).

224. Klein, *supra* note 23, at 131.

225. *Id.*

between the “civilized West” and the “primitive Non-West” aids in the erasure of the history of violence, aggression, and colonization against Indigenous peoples.²²⁶ When understood through a framework of settler colonialism,²²⁷ the use of colonial linguistics encourages this ongoing “structure of invasion” through quotidian society.²²⁸ As historian Patrick Wolfe explains, the practice of settler colonialism by Europeans “employed the organizing grammar of race.”²²⁹ The practice of what this author terms “linguistic settler colonialism” results in the othering of Indigenous cultures in the Americas and further exacerbates cultural trauma of the present day. Through this critical analysis, it is evident that the use of “pre-Columbian” is a form of linguistic subjugation and exploitation of Indigenous communities and, thus, must be eliminated from legal vernacular.

A. *Othering through Language*

Creation of the “Other” and “Otherness” is a sociological process by which identities are formed.²³⁰ The action of “othering” typically has a negative connotation. It is a way in which society may objectify, differentiate, or “exotify” a particular group of people.²³¹ Othering creates typically negative perceptions of a group, usually by focusing on racial, geographic, linguistic, ethnic, economic, or ideological identities.²³² Othering “operates across multiple dimensions to reinforce a

226. *Id.*

227. Settler colonialism is different from colonialism in that its purpose is to replace Indigenous populations with their own settler society. Through settler colonialism, a hierarchy is built and, over time, the colonial society creates their own identity and sovereignty. See Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U. L. REV. 1, 21–22 (2014) (discussing the term racial realism and the purpose and role it plays in society to overcome the injustices that are deeply rooted in society).

228. Monika Batra Kashyap, *U.S. Settler Colonialism, White Supremacy, and the Racially Disparate Impacts of COVID-19*, 11 CALIF. L. REV. ONLINE 517, 518 (2020) (examining the disproportionate effects of COVID-19 in the United States through settler colonialism).

229. Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 388, 390 (2006) (discussing the term racial realism and the purpose and role it plays in society to overcome the injustices that are deeply rooted in society).

230. Hegel is the first philosopher to introduce the concept of the Other in his work *Phenomenology of Mind*. G. W. F. HEGEL, *PHILOSOPHY OF MIND* (W. Wallace trans., Oxford: Clarendon Press, 1971) (1817); see also Frances Berenson, *Hegel on Others and the Self*, 57 PHIL. 77 (1982) (providing an inquiry into the insight of Hegel and his view on what is essentially human).

231. See Sthephanny Moncada Linares, *Othering: Towards A Critical Cultural Awareness In The Language Classroom*, 23 HOW 129, 131 (2016) (“The ‘Other’ as an epistemological concept intertwines with the notion of *Othering*, denoting the ways in which an individual or a particular group of people is objectified, differentiated, simplified, exotified, or created in position to the *Self*.”) (emphases in original).

232. *See id.*

conception of a virtuous ‘Self’ and a lesser ‘Other.’”²³³ The result of othering is usually “alienation and perpetuation of group stereotyping, discrimination, prejudice, and injustice.”²³⁴ The Other is created through hegemonic power structures, which oppress particular groups of people, including Indigenous communities. According to Professor Kimberlé Crenshaw, “when non-stigmatized people” create the Other, they create a “collective bond of identity,” which they then use to oppress the Other.²³⁵

Postcolonial scholar Edward Said has discussed the concept of othering through the discourse of historical marginalization.²³⁶ Said, in his seminal piece *Orientalism*, opined that Europe has continued the process of othering through the creation of the “Orient.”²³⁷ According to Said, the reinforced perceptions by Western countries of the “Non-West” have created a schism between “us” and “them.” He explains that “Orientalism was ultimately a political vision of reality whose structure promoted the difference between the familiar (Europe, the West, “us”) and the strange (the Orient, the East, “them”) . . . men have always divided the world up into regions having either real or imagined distinction from each other.”²³⁸ In the creation of the “Orient,” those outside of the westernized world become the “Other.”²³⁹ The Eurocentric dualism of the East and West, thus, creates a false perception of “Western superiority and Oriental inferiority.”²⁴⁰

Language may be an important mechanism to effectuate othering. Alistair Pennycook establishes that “language plays a central role in how we understand ourselves and the world and thus all questions of language control and standardization have major implications for so-

233. Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 607 (2009) (examining how othering is interrelated to laws of human trafficking).

234. *Id.*

235. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1372 (1988) (examining the continuing role of racism in the subordination of Black Americans. In this piece, Professor Crenshaw examines how Blacks have been relegated to a subordinated “other.”).

236. Edward Said is a post-colonial theorist and is considered one of the “the great critic of Western narratives.” See Pankaj Mishra, *The Reorientations of Edward Said*, NEW YORKER (Apr. 19, 2021), <https://www.newyorker.com/magazine/2021/04/26/the-reorientations-of-edward-said> [<https://perma.cc/6CC4-7Y8W>] (archived Jan. 1 2023).

237. EDWARD SAID, *ORIENTALISM* 50 (1979). Within the book, the Orient is deemed as part of the Arab world. Said examined the way the Western world perceived the non-western world. See William Lafi Youmans, *Edward Said and Legal Scholarship*, 3 UCLA J. ISLAMIC & NEAR E.L. 107, 109 (2003) (providing an overview of Edward Said’s work and how it has influenced legal fields like immigration, Islamic, and international law through legal scholarship).

238. SAID, *supra* note 237, at 39, 43.

239. *See id.*

240. *Id.* at 42.

cial relations and distributions of power.”²⁴¹ Language may be used at times to divide “others” with what people may consider to be “ourselves.”²⁴² Language can impose a binary of “us” and “them,” which positions the speaker and the object of speech in different hierarchies.²⁴³ Once an us-them distinction is created, “undesirable characteristics” are associated with those considered “not us.”²⁴⁴ As a result, the choice of certain words to describe representations, experiences, or histories of Indigenous people can serve as a tool of alienation.

The reinforcement of colonial discourses, as well as settler colonialism in general, can occur through the use of certain words or idioms. The use of colonial language may “ignore or otherwise discount the overlapping experience of Westerners and Orientals, the interdependence of cultural terrains in which colonizer and colonized co-existed and battled each other . . . [and] miss what is essential about the world in the past century.”²⁴⁵ It is through language that certain identities can be perceived as Other, aiding in oppressive and continued pro-colonialist perceptions. The construction of “otherness” through language is harmful not only from a societal outlook, but also in terms of policies and regulations that manifest in daily lives.²⁴⁶

The term “Pre-Columbian” reinforces the paradoxical nature of the so-called West and Non-West. This historic periodization, in association with colonial factions, aids in the othering of Indigenous communities. The dichotomy between objects created by peoples “preconquest” and “postconquest” creates the separation between the West (us) and Non-West (them). It further bolsters the erroneous stereotype that preconquest peoples were uncivilized. The celebration of Columbus through such temporal delineations further completes the process of othering through myth-propagating ideas of Eurocentric

241. Alistair Pennycook, *English in the world/The world in English*, in POWER & INEQUALITY IN LANGUAGE EDUCATION 34, 50 (James W. Tollefson ed., 1995).

242. *See id.*

243. *See* Colleen McGloin & Bronwyn Carlson, *Indigenous Studies and the Politics of Language*, 10 J. UNIV. TEACHING & LEARNING PRAC. 1, 3 (2013) (providing insight on the importance of the political impact of naming to help students be mindful on the political nature in the Indigenous context of naming).

244. Susan J. Stabile, *Othering and the Law*, 12 UNIV. ST. THOMAS L.J. 381, 382 (2016) (defining othering as “a process by which individuals and society view and label people who are different in a way that devalues them.”); *see also* Kimberly Cogdell Grainger, *Political Rhetoric And Minority Health: Introducing The Rhetoric-Policy-Health Paradigm*, 12 ST. LOUIS UNIV. J. HEALTH L. & POL’Y 121, 140 (analyzing othering of minority groups through the perspective of health care policy).

245. EDWARD W. SAID, CULTURE AND IMPERIALISM xx (1993).

246. *See* Steven Arrigg Koh, *Othering Across Borders*, 70 DUKE L.J. ONLINE 161, 172 (2021) (arguing that the Trump administration’s rhetoric engaged in othering of women and people of color); *see also* Angélica Guevara, *The Need to Reimagine Disability Rights Law Because The Medical Model Of Disability Fails Us All*, 2021 WIS. L. REV. 269, 291 (2021) (arguing that the vague language of the ADA others people with disabilities).

supremacy.²⁴⁷ The false narrative of the “discovery” of America results in the dehumanization of Indigenous peoples. The perpetuation of such misrepresentations is harmful and exposes Indigenous peoples “to externally imposed derogatory labeling, that results in self-denigration, and ultimately, lifelong victimization.”²⁴⁸ For this reason, the United Nations Declaration on the Rights of Indigenous Peoples obligates party states to prohibit “[a]ny form of propaganda designed to promote or incite racial or ethnic discrimination directed against” Indigenous peoples.²⁴⁹ The ability to produce counter narratives, through linguistic changes, begins the process of reversing centuries-long othering.

B. *Historical Trauma and Memory*

As language can be a tool to facilitate othering, it also can contribute to “historical trauma.”²⁵⁰ The use of “Pre-Columbian” can be linked to present day historical trauma of Indigenous cultures. Historical trauma is defined as “cumulative emotional and psychological wounding over the lifespan and across generations, emanating from massive group trauma.”²⁵¹ Jeffrey Alexander, a scholar of cultural trauma, explains that trauma “is not something naturally existing; it is something constructed by society.”²⁵² The process of remembering is not a single experience by individuals but, rather, one that “members of particular ‘mnemonic communities,’ such as families, religious groups, and nations,” undergo together.²⁵³ Those memories are organized with

247. See Angelique Townsend EagleWoman, *The Ongoing Traumatic Experience of Genocide for American Indians and Alaska Natives in the United States: The Call to Recognize Full Human Rights as Set Forth in the UN Declaration on the Rights of Indigenous Peoples*, 3 AM. INDIAN L.J. 424, 426 (2015) (“In addition, this United States celebration and myth-propagation is grounded in the ideals of European supremacy, rights of conquest over foreign peoples, and greed for others’ natural resources, particularly gold.”).

248. *Id.* at 424.

249. G.A. Res. 61/295 (Sept. 13, 2007). This Declaration was signed by 148 member nations, including the United States. The declaration commits to the protection of individual and collective rights of Indigenous peoples. See *United National Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> (last visited Jan. 25, 2023) [<https://perma.cc/ZG4R-74GC>] (archived Jan. 25, 2023).

250. Maria Yellow Horse Brave Heart, *The Historical Trauma Response Among Natives and Its Relationship to Substance Abuse: A Lakota Illustration*, in HEALING AND MENTAL HEALTH FOR NATIVE AMERICANS 7 (Ethan Nebelkopf & Mary Phillips eds., 2004). Dr. Maria Yellow Horse Braveheart, Ph.D., coined the term historical trauma in the 1980s. This conceptualization was a way to articulate and foster a critical understanding of the everyday lives of Indigenous peoples in the United States. See *id.*

251. *Id.*

252. JEFFREY C. ALEXANDER, *TRAUMA: A SOCIAL THEORY* 7 (2012).

253. Eviatar Zerubavel, *Language and Memory: “Pre-Columbian” America and the Social Logic of Periodization*, 65 SOC. RSCH. 315, 315 (1998) (focusing on the history as a system of classification and the role plays within American history).

certain “mnemonic traditions,” which form as part of socialization within those communities.²⁵⁴ Trauma is thus experienced through the process of communal remembering. Language is not passive within the experience of trauma. Language performs methodically to “organize our knowledge of ourselves and our world in ways that can be variously traumatizing.”²⁵⁵ Language, in relation to historical events, can become “an identity marker to justify exclusion and persecution.”²⁵⁶ Exposure to hate speech or “linguistic ostracism” can also be a source of trauma.²⁵⁷

Trauma scholar Cathy Caruth argues that, through looking at trauma, “we can understand that a rethinking of reference is aimed not at eliminating history, but at resituating it in our understanding.”²⁵⁸ In recontextualizing the memory and subsequent trauma of colonization, society should be compelled to question monolithic discourses about American history. For example, considering Columbus as the official “discoverer” of the Americas suppresses the memory of the millions of Indigenous peoples who were already living in the territory.²⁵⁹ Thus, recognizing the historical trauma and memory of Indigenous peoples aids in the deconstruction of the “discoverer” mythology.

It is well documented that Indigenous communities have endured significant historical trauma through expropriation of their population, land, and culture. Indigenous cultures have been victims of historical trauma since colonization.²⁶⁰ Indeed, according to Dr. Maria Yellow Horse Brave Heart, the scholar to coin the term “historical

254. See *id.* Mnemonic tradition “includes not only what we come to remember as members of a particular thought community but also how we remember it . . . what we seem to “remember” is actually filtered (and often inevitably distorted) through a process of subsequent interpretation, which affects not only actual facts we recall but also the particular light in which we happen to recall them.” Jamie Mullaney, *Social Mindscales and The Self: The Case for Social Pattern Analysis*, in THE OXFORD HANDBOOK OF COGNITIVE SOCIOLOGY 388, 389 (Wayne Brekhus & Gabe Ignatow eds., 2019).

255. Deborah Lea Madsen, *On Subjectivity and Survivance: Re-reading Trauma through The Heirs of Columbus and The Crown of Columbus*, in SURVIVANCE: NARRATIVES OF NATIVE PRESENCE 6 (Gerald Vizenor ed., 2008) (providing an overview of the Western theories on trauma through Native subjectivity and how it emerges in relation to American multiculturalism).

256. Brigitta Busch & Tim McNamara, *Language and Trauma: An Introduction*, 41 APPLIED LINGUISTICS 323, 328 (2020) (providing an overview on the study of linguistics of trauma can be understood from individuals experience to recount and recover from psychological trauma).

257. *Id.*

258. Cathy Caruth, *Unclaimed Experience: Trauma and the Possibility of History*, 79 YALE FRENCH STUD. 181, 182 (1991).

259. See EVIATAR ZERUBAVEL, SOCIAL MINDSCAPES: AN INVITATION TO COGNITIVE SOCIOLOGY 86 (1997).

260. See Genevieve Frances Steel, *Constructing The Trident Of The Reasonable Person: Enough Is Enough! It's Time for The Reasonable Indian Standard*, 12 ELON L. REV. 62, 71 (2020) (exploring the historical trauma through American Indians and the differences caused by epigenetic transfer to show how American Indians are affected during specific and their response).

trauma,” the primary contributor to historical trauma is the genocide associated with colonization.²⁶¹ The infliction of European dominance has left, according to Dr. Brave Heart, “a legacy of chronic trauma and unresolved grief across generations.”²⁶² Accordingly the trauma is deemed as “epigenic,” in that trauma experienced by earlier generations influences the trauma of later generations. Anishinaabe scholar Lawrence W. Gross, in his essay “The Comic Vision of Anishinaabe Culture and Religion,” distinguishes the historical trauma experienced by Indigenous peoples:

First, the stress is society-wide in nature. The stress does not simply involve a small segment of the population, as might be the case with combat veterans experiencing post-traumatic stress disorder. Instead, everyone in the culture is affected to one degree or another. Second, the stress strikes at both the personal and institutional levels. As such, some features are expressed in the lives of individual people . . . Anishinaabe culture is recovering in the wake of what I call “Post Apocalypse Stress Syndrome.” Along with many other Native American peoples, the Anishinaabe have seen the end of our world, which has created tremendous social stresses.²⁶³

As a result of such trauma, Indigenous communities have high rates of post-traumatic stress, depression, substance abuse, and suicide.²⁶⁴

Exposure to dehumanizing terms, symbols, or messages subjects Indigenous communities to continued trauma.²⁶⁵ The celebration of Columbus through his inclusion in legal and quotidian vernacular reinforces negative stereotypes of Indigenous peoples as wild and uncivilized. These negative stereotypes are often used to justify legal actions taken against Indigenous populations. This was most evident in the violent and aggressive treatment of Indigenous protestors during the “Standing Rock” protests of the Dakota Access Pipeline.²⁶⁶ A report from the American Psychological Association credited the “Christopher Columbus narrative” with these negative stereotypes which “are leveraged, more broadly, to justify harm against [Indigenous]

261. See *id.* (citing Maria Yellow Horse Brave Heart, Wakiksuyapi: Carrying the Historical Trauma of the Lakota, 246–47 (2000) (unpublished manuscript) (on file with Tulane University School of Social Work)).

262. Maria Yellow Horse Brave Heart & Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RSCH., 60, 60 (1998).

263. Lawrence W. Gross, *The Comic Vision of Anishinaabe Culture and Religion*, 26 AM. INDIAN Q. 436, 437, 450 (2002).

264. See Mary Annette Pember, *Trauma May Be Woven into DNA of Native Americans*, INDIAN COUNTRY TODAY (Oct. 3, 2017), <https://newsmaven.io/indiancountrytoday/archive/trauma-may-be-woven-into-dna-of-native-americans-CbiAxpzar0WkMALhjrcGVQ/> [https://perma.cc/P5JT-KVDB] (archived Dec. 27, 2022) (stating “populations affected by historical trauma show [] physical and psychological symptoms in response to the trauma”).

265. See Marcos Aguilar, Testimony Before the Rules Committee of the Los Angeles City Council (Dec. 20, 2016).

266. See Ariadne S. Montare, *Standing Rock: A Case Study in Civil Disobedience*, 35 GPSOLO MAG. 30, 31 (2018).

people.”²⁶⁷ The report concluded that to combat this false narrative, it is necessary to “construct[] a new narrative and infus[e] it within every facet of American society.”²⁶⁸ Through the elimination of words used to celebrate Columbus, the historical trauma associated with settler colonialism can be acknowledged and reconstructed. This etymological reformation, while not directly remedial, may counter false narratives and prevent the erasure of Indigenous voices and experiences.

C. *Periodization and Power*

“Periodization” involves the grouping of different historical events that occurred apart from one another into homogenous periods of time.²⁶⁹ Language facilitates the process of periodization through assigning a set of objects with a single classification.²⁷⁰ These objects are, in turn, perceived homogeneously. Simultaneously, periodization distances classified blocks of time as if they were separate with no overlapping.²⁷¹ The result of this process is an erroneous inflation of temporal separateness between classified periods.²⁷² In order to maintain this artificial division, special efforts must be made “to mentally distance everything that happened prior to a given historical turning point from everything that has happened since.”²⁷³ The by-product of these efforts is a profound impact on “mental discontinuities” that substantiate cultural, moral, and political heterogeneities.²⁷⁴

In his discussion on the functionality of discourses, Michel Foucault criticizes a “totalitarian periodization” of moments in time.²⁷⁵ Foucault explains concepts of power and hierarchies in temporal categorizations:

[A]rchaeology describes a level of enunciative homogeneity that has its own temporal articulations, and which does not carry with it all the other forms of identity and difference that are to be found in language; and at this level, it

267. Arianne E. Eason, Terrence Pope, Kendra Becenti & Stephanie A. Fryberg, *Sanitizing History: National Identification, Negative Stereotypes, and Support for Eliminating Columbus Day and Adopting Indigenous Peoples Day*, AM. PSYCH. ASS’N L. 4 (2021).

268. *Id.*

269. Zerubavel, *supra* note 253, at 316.

270. *See id.* at 317.

271. For example, the “Middle Ages” of Europe encompasses the time period between the fifth and fifteenth centuries. *See* Henry Osborn Taylor, *Placing the Middle Ages*, 11 SPECULUM J. MEDIEVAL STUD. 437, 437 (1936).

272. *See* Zerubavel, *supra* note 253, at 317.

273. *Id.* at 317.

274. *Id.* at 318.

275. Discourses are essentially statements which purport to denote knowledge and meaning. According to Foucault, discourses produce “practices that systematically form the objects of which they speak.” MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE* 49 (A.M. Sheridan Smith trans., 1972); *see also* Michel Foucault, *The Order of Discourse*, in *UNTYING THE TEXT: A POST-STRUCTURALIST READER* 48, 48 (Robert Young ed., 1981).

establishes an order, hierarchies, a whole burgeoning that excludes a massive, amorphous synchrony, given totally once and for all.²⁷⁶

According to Foucault, there is a close associative relationship between language and power.²⁷⁷ Foucault believes that discourses have the power to restrict objects of discussion.²⁷⁸ From a Foucauldian perspective, language is an element of discourse, which can be examined through the lens of cultural perspectives on historical events.²⁷⁹ Thus, when periodizing objects within colonial discourse, it is a demonstration of power.

The dynamics of power and periodization are evident in the notion of history beginning with the “discovery” of the Americas. This mnemonic bifurcation between pre- and post discovery effectively removes from history what should be officially remembered versus what should not be. The notion of discovery as the inception of history relegates the pre-European past to obscurity, in favor of the suppression of Indigenous memories.²⁸⁰ The use of the prefix “pre” to describe history before 1492 implies that anything that happened before this period is insignificant and perhaps not even considered part of American history.²⁸¹ This Eurocentric view of history arbitrarily divides the time periods between 1491 and 1493 into essentially a cultural transition from “Indigenous” to “European.” This distinction aids in the association of Columbus’s 1492 journey with the foundation of the Americas. For many Indigenous populations, this period denotes the end of history, instead of the beginning.

The semiotic logic underlying the arbitrary periodization of the history of the Americas is evident through the social construction of the term “Pre-Columbian.”²⁸² The term groups together all of the events that occurred prior to the arrival of Columbus as one homoge-

276. FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE*, *supra* note 275, at 148.

277. *See id.* at 219 (“I believe that this will to knowledge, thus reliant upon institutional support and distribution, tends to exercise a sort of pressure, a power of constraint upon other forms of discourse.”). *See generally* HUBERT L. DREYFUS & PAUL RABINOW, *MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS* (1982).

278. *See* DREYFUS & RABINOW, *supra* note 277, at 234 (“The genealogical side of discourse, by way of contrast, deals with series of effective formation of discourse: it attempts to grasp it in its power of affirmation, by which I do not mean a power opposed to that of negation, but the power of constituting domains of objects, in relation to which one can affirm or deny true or false propositions.”); *see also* MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 93 (Robert Hurley trans., 1990) (“Power is everywhere; not because it embraces everything, but because it comes from everywhere.”); Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 *GEO. L.J.* 1719, 1737 (1989) (discussing Foucault from the perspective of post-structuralism); Isaak Dore, *Foucault On Power*, 78 *UMKC L. REV.* 737, 739 (2010).

279. *See* McGloin & Carlson, *supra* note 243, at 5.

280. *See* Zerubavel, *supra* note 253, at 319–20.

281. *See id.*

282. *See id.*

nous time period.²⁸³ It further fuses noncontiguous cultures, none of whom are related geographically, temporally, linguistically, or culturally. For example, “Pre-Columbian” encompasses both the Aztec and Olmec cultures, which existed two thousand years apart.²⁸⁴ The conflation of these cultures is akin to conflating modern day Greeks with the Greeks of antiquity. “Pre-Columbian” also encompasses the Mayan and Chibcha cultures, which flourished in the Yucatan region of Mexico and Colombia, respectively.²⁸⁵ This geographical difference is akin to comparing the cultures of China and India, which are similarly physically distant.

The periodization of pre-Colombia and post-Columbia parallels the Western designation of “BC” and “AD,” which signify before and after Christ.²⁸⁶ This parallel nomenclature seemingly glorifies Columbus as a god-like figure, which highlights the wide mental fallacy between the so-called civilized European America and that of uncivilized Indigenous America.²⁸⁷ It further advances the preconceived notion of Indigenous peoples as “culturally uniform and static.”²⁸⁸ Anthropologist Michael Rowlands criticized the role of the hierarchal historical narratives that differentiate between societies deemed “simple” and those deemed “complex.”²⁸⁹ He states that these mythical constructs “exclude[ed] into a homogenous . . . world all elements which are considered by us ‘moderns’ as inimical to or the antithesis of dynamism, action, and progress.”²⁹⁰ The homogenous identification of objects as pre-Columbian furthers the deceptive social construction and reduces Indigenous cultures of the Americas as indistinguishable. This serves not only as a symbol of power, but also constitutes a whitewashing of history in favor of the Eurocentric definition of the “New World.”

V. LINGUISTIC CHANGES TO THE LAW: REMOVAL OF THE TERM PRE-COLUMBIAN

As global consciousness around issues of power and privilege pervades everyday life, so does the necessity for laws to evolve. As

283. *See id.*

284. *See* Emily UMBERGER, *Antiques, Revivals, and References to the past in Aztec Art*, 13 RES: ANTHROPOLOGY & AESTHETICS 62, 63–65 (1987) (providing an overview on historical background and purpose behind the revival of antiquarianism).

285. *See* MUSEUM OF MOD. ART, AMERICAN SOURCES OF MODERN ART, MAY 10 TO JUNE 30, 1933 (1933), https://www.moma.org/documents/moma_catalogue_2932_300061865.pdf (last visited Jan. 25, 2023) [<https://perma.cc/HUX3-GZR9>] (archived Jan. 25, 2023).

286. *See* Indira Das-Gupta, *AD and BC become CE/BCE*, EVENING STANDARD (Apr. 12, 2012), <https://www.standard.co.uk/hp/front/ad-and-bc-become-ce-bce-6330342.html> [<https://perma.cc/AY9F-8PWQ>] (archived Dec. 28, 2022).

287. *See* Zerubavel, *supra* note 253, at 325.

288. Klein, *supra* note 23, at 131.

289. *Id.* at 131.

290. *Id.* at 131–32.

Noam Chomsky said, “[l]anguage etches the grooves through which your thoughts must flow.”²⁹¹ Historical marginalization has occurred through “semiotic practices of [oppressive] naming.”²⁹² As a result, offensive terms that once were accepted have progressively been erased from legal texts. “Pre-Columbian” is a problematic term which should be eliminated from legal nomenclature. As maintained above, references to “Columbus” in the cultural heritage laws commemorates a slave trader, a thief, and a murderer. This gross veneration contributes to the erasure of Indigenous people and falsely equates Indigenous peoples with outdated notions of “primitiveness.” Linguistic amendments to the laws governing cultural heritage are possible and, in fact, necessary to rebut racist and oppressive presumptions regarding Indigenous peoples. A thorough assessment of the practice of linguistic amendments in outdated laws evidences that “Pre-Columbian” can be eliminated from cultural heritage law. In its stead, there should not be one singular term for the objects whose origins are from civilizations existing prior to the Columbus expedition.

A. *Linguistic Amendments to Outdated Laws*

A word is a powerful instrument that “may evoke evil spirits, make bad things happen, sexually arouse, and instigate to violence and revolution and numerous other activities.”²⁹³ There is a strong connection between language and the way that the public perceives a targeted community.²⁹⁴ Labels may create false perceptions of the people or objects they seek to define, and “the imposition of a label is an exercise of authority that determines who is outside the norm.”²⁹⁵ Didactics expert Sam Dowd theorizes that “language is the primary filter through which we perceive the world . . . it’s obvious that [language] affects how we relate to and make judgments about one another.”²⁹⁶ He further opines that “any attempt to create a society in which all people—regardless of gender, sexuality, or race—have equal opportunities and

291. Heidi K. Brown, *Get with the Pronoun*, 17 LEGAL COMM’N & RHETORIC: J. AWLD 61, 65 (2020) (providing an explanation on how legal writers should use the word they when referring to a person whose gender is unknown, non-binary or anonymized to educate).

292. Zerubavel, *supra* note 253, at 327.

293. Edna Andrews, *Cultural Sensitivity and Political Correctness: The Linguistic Problem of Naming*, 71 AM. SPEECH 389, 394 (1996) (addressing the highly sensitive issues of linguistic concepts of cultural sensitivity or political correctness by English speakers).

294. *See id.* at 393.

295. Meg E. Ziegler, *Disabling Language: Why Legal Terminology Should Comport With A Social Model Of Disability*, 61 B.C. L. REV. 1183, 1185 (2020).

296. Suzannah Weiss, *7 Gender-Neutral Terms We Should All be Using*, BUSTLE (July 6, 2018), <https://www.bustle.com/p/7-gender-neutral-terms-we-should-all-be-using-9565996> [<https://perma.cc/M8VK-5H4G>] (archived Feb. 11, 2023).

freedoms is to use language that no longer excludes certain groups or creates unconscious bias.”²⁹⁷

Language will always be an indispensable tool in dealing with all aspects of the law. Statutes, case law, and contracts are all memorialized in words. Attorneys must persuade decisionmakers with their words. In his book, *Eloquence and Reason: Creating a First Amendment Culture*, Professor Robert Tsai describes how over time, rhetoric among judges, political officials, and the citizenry facilitates the manner in which laws function.²⁹⁸ The way that words are interpreted within legal frameworks impacts the actions and perceptions of judges, elites, and citizens.²⁹⁹ According to Tsai, “linguistic transformation” must consider “the impact of social movements and cultural upheavals that have nevertheless shaped the public consciousness.”³⁰⁰ Linguistic transformations occur in the corrections of laws with language that appears outdated or offensive.

Until recently, the laws embodied in our history have primarily been written by white men. Historically, the practice of naming could be, at its most extreme, a strategy of “cultural genocide” that “has the effect of destroying historical consciousness.”³⁰¹ Language within laws has the power to aid in the objectification of people of color.³⁰² Certain laws, which were by-products of slavery and colonization, serve to expound the nativist idea that “white people are good, and people of color are bad.”³⁰³ Certain words invoking color or race may be used as “a rhetorical device to mystify differences in power, class, and honor, making them harder to overcome.”³⁰⁴

For African slaves, linguistic forms of objectification were manifested through the utilization of terms separating colors. For example, the term “negro,” meaning black in Spanish, was once an acceptable term before the 1960s. The word was used in court cases denying Black people citizenship,³⁰⁵ as well as laws denying the right of white and black people to marry.³⁰⁶ The term is now recognized as

297. *Id.*

298. See ROBERT L. TSAI, *ELOQUENCE AND REASON: CREATING A FIRST AMENDMENT CULTURE* ix (2008).

299. *See id.*

300. *Id.* at 72.

301. SpearIt, *Enslaved By Words: Legalities & Limitations Of “Post-Racial” Language*, 2011 MICH. ST. L. REV. 705, 731 (2011) (providing an overview of the long history of racism and racial oppression, as well as the abandonment of race through racial blindsight).

302. *See id.*

303. *Id.* at 732.

304. James A. Aho, *White Man as a Social Construct*, 4 THE EUR. LEGACY 62, 70 (1999).

305. *See generally* *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (holding that a slave of African descent was not permitted citizenship).

306. For example, Maryland prohibited “all marriages between a white person and a negro, or between a white person and a person of negro descent, to the third generation.” MD. CODE ANN. § 365 (1935) (repealed 1967).

racist, derogatory, and a blatant attempt to marginalize Black people through language.³⁰⁷ Because of the condemnation of the term, in 2016 Barack Obama signed a law to modernize the 1970s-era laws by replacing “Negro” with “African American.”³⁰⁸

States have now begun to pass laws to facilitate the removal of offensive place names. For example, throughout the United States, there are numerous geographic features and place names that include the term “squaw,” which has historically been used as an offensive ethnic, racial, and sexist slur, particularly used against Indigenous women.³⁰⁹ Popularized by French and British colonizers, the term accompanied the forced conscription of Indigenous women as slave laborers as early as 1600s.³¹⁰ The Secretary of the Interior, Deb Haaland, formally declared “squaw” to be a derogatory term and created a task force to replace the names of federal sites that use the word squaw.³¹¹ Since then, states such as California and Utah have proposed laws to remove “squaw” from their state parks.³¹²

It is notable that some terms are acceptable depending on how they are used. Most recently, the term “Indian country” has been a source of debate.³¹³ In 2019, after signing three bills supporting tribal

307. See *When Did the Word Negro Become Socially Unacceptable?—October 2010*, FERRIS STATE UNIV., <https://www.ferris.edu/HTMLS/news/jimcrow/question/2010/october.htm> (last visited Dec. 22, 2022) [<https://perma.cc/6MAK-DKC4>] (archived Dec. 22, 2022).

308. See Hansi Lo Wang, *‘Negro’ Not Allowed on Federal Forms? White House to Decide*, NPR (Dec. 13, 2017), <https://www.npr.org/2017/12/13/568317026/negro-not-allowed-on-federal-forms-white-house-to-decide> [<https://perma.cc/JNY4-MAZ7>] (archived Dec. 22, 2022).

309. See Neil Vigdor & Christine Hauser, *660 U.S. Place Names Include a Slur for Native Women. Change Is Coming*, N.Y. TIMES (Mar. 10, 2022), <https://www.nytimes.com/2022/03/10/us/squaw-new-name.html> [<https://perma.cc/F6GD-3F7Z>] (archived Dec. 22, 2022).

310. See Lila Seidman, *California Bill Would Ban the Racist Term ‘Squaw’ in Location Names*, L.A. TIMES (Mar. 4, 2022), <https://www.latimes.com/california/story/2022-03-04/california-bill-would-ban-squaw-from-california-place-name> [<https://perma.cc/8MYJ-JF4U>] (archived Dec. 23, 2022).

311. See Bill Chappell, *Interior Secretary Deb Haaland Moves to Ban the Word ‘Squaw’ from Federal Lands*, NPR (Nov. 19, 2021), <https://www.npr.org/2021/11/19/1057367325/interior-secretary-deb-haaland-moves-to-ban-the-word-squaw-from-federal-lands> [<https://perma.cc/CGK7-LUBR>] (archived Dec. 23, 2022).

312. See CAL. GOV’T CODE § 8899.93(a) (West 2022); see also 2022 Cal. Legis. Serv. Ch. 479 (West).

313. See 18 U.S.C. § 1151. This provision states:

[T]he term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

sovereignty and native culture, President Trump tweeted thanks to “Indian Country.”³¹⁴ This sparked outrage as many accused him of being racist, while others said the term is very common among Native Americans.³¹⁵ Professor Donald A. Grinde opined that the term “Indian Country” advanced a conquest ideology that those Indigenous peoples were not the actual owners of their land, but given the land by the United States.³¹⁶ He stated that the word is attributed as “a short hand legal term that summarizes an amorphous body of legal definitions in history that the dominant society and its courts have agreed upon.”³¹⁷ However, the National Congress of American Indians sees the word as having a positive connotation, stating “as a general description of Native spaces and places within the United States, and it is inclusive of the hundreds of tribal nations that occupy these spaces.”³¹⁸

The way that the term is framed distinguishes the nature of the term as offensive. It is thus important to consider various interpretations of words and how they are used in everyday vernacular. It is further important to consider how the target community interprets the word and who is saying the words. For example, there is now an ongoing trend of the use of “noncitizen” as opposed to “alien” to define an immigrant to the United States.³¹⁹ The use of “alien” reinforces the othering of immigrants by dehumanizing them. Judges are divided on whether they should use “alien” or “noncitizen.”³²⁰ The term they choose almost always reflects their politics. President Biden’s

Id.; see also Marin J. Sonosky, *State Jurisdiction over Indians in Indian Country*, 48 N.D. L. REV. 551 (1972).

314. See James Crowley, *Is ‘Indian Country’ an Offensive Term? Trump Sparks Debate After Tweet Thanking ‘Indian Country’*, NEWSWEEK (Dec. 27, 2019), <https://www.newsweek.com/indian-country-slur-trump-1479399> [<https://perma.cc/65PY-RA6K>] (archived Dec. 23, 2022).

315. See *id.*

316. See, e.g., *Johnson v. McIntosh*, 21 U.S. 543, 561 (1823) (holding that Native Americans do not have the right to transfer tribal lands to any transferee other than the federal government).

317. Donald A. Grinde, “Indian Country” as a Legal Term and Reactions to its Racist Implications in U.S. Society Over Time, DEBATE CENTRAL (Jan. 30, 2002), <https://debate.uvm.edu/grinde.html> [<https://perma.cc/W87B-FPX>] (archived Jan. 19, 2023).

318. *NCAI Response to Usage of the Term, “Indian Country”*, NAT’L CONG. OF AM. INDIANS (Dec. 27, 2019), <https://www.ncai.org/news/articles/2019/12/27/ncai-response-to-usage-of-the-term-indian-country> [<https://perma.cc/8HQZ-VWRK>] (archived Dec. 23, 2022).

319. See Kevin Johnson, *From ‘Aliens’ to ‘Noncitizens’—the Biden Administration is Proposing to Change a Legal Term to Recognize the Humanity of non-Americans*, THE CONVERSATION (Feb. 23, 2021), <https://theconversation.com/from-aliens-to-noncitizens-the-biden-administration-is-proposing-to-change-a-legal-term-to-recognize-the-humanity-of-non-americans-155693> [<https://perma.cc/KZ9K-Z3ZF>] (archived Dec. 23, 2022).

320. See, e.g., Editorial Board, *An Immigrant Judge Defends the Use of ‘Alien’*, WALL ST. J. (Sept. 19, 2022), <https://www.wsj.com/articles/an-immigrant-judge-defends-the-use-of-alien-noncitizen-sotomayor-bea-language-11663510850> [<https://perma.cc/Q5R6-DNGG>] (archived Mar. 3, 2023).

Executive Order 14012 encourages a halt of the use of “alien” or “illegal” to describe migrants.³²¹ Yet this terminology remains a polarizing political issue based on how it is used and who is the speaker of the terms.³²² The Biden Administration managed to accomplish this symbolic victory through a relatively easy fix.

The American Anthropological Association has noted “preserving outdated terms for the sake of questionable continuity is a disservice to the nation and the American people.”³²³ The American Psychological Association also emphasizes that some outdated words “foster[] discrimination that ultimately influences legal decisions.”³²⁴ As such, removing outdated terms from laws is not just a mere symbolic gesture. The removal of marginalizing language from law may impact respective societal structures. As laws change, so does society itself. The process of creating new laws may also create new values for society and in the process change our social milieu.³²⁵ Societal discourses around outdated language drive market forces to recalibrate approaches to descriptions or labels associated with objects. Thus, amendments to the law are just the first step in modernizing the rhetoric of industry practice.

B. *Eliminating “Pre-Columbian” from Legal Vernacular*

Before the 1492 expedition by Columbus, Indigenous nations enjoyed full sovereignty, with all the rights and liberties of any other sovereign state.³²⁶ Columbus’s expedition commenced the systematic oppression of Indigenous peoples throughout the Americas through the

321. See Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 Fed. Reg. 8277 (Feb. 2, 2021).

322. See Daniel Hernandez, *From ‘Alien’ to ‘Noncitizen’: Why the Biden Word Change Matters in the Immigration Debate*, L.A. TIMES (Feb. 18, 2021), <https://www.latimes.com/entertainment-arts/story/2021-02-18/immigration-alien-noncitizen-language-politics-undocumented> [<https://perma.cc/R9N7-39LU>] (archived Dec. 23, 2022).

323. AM. ANTHROPOLOGICAL ASS’N, AMERICAN ANTHROPOLOGY ASSOCIATION RESPONSE TO OMB DIRECTIVE 15: RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING (Sept. 1997), http://s3.amazonaws.com/rdcms-aaa/files/production/public/FileDownloads/pdfs/cmtes/minority/upload/AAA_Response_OMB1997.pdf (last visited Jan. 25, 2023) [<https://perma.cc/NE78-BBY6>] (archived Jan. 25, 2023).

324. Kathryn A. LaFortune, *Eliminating Offensive Legal Language*, 49(5) MONITOR ON PSYCH. 29 (2018). This assertion is in relation to outdated and derogatory terms within the field of psychology and psychiatry such as “idiot,” “lunatic,” and “mentally defective.”

325. See Frank V. Williams III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591, 633 (2007).

326. See, e.g., *Johnson v. McIntosh*, 21 U.S. 543, 545 (1823) (“North America . . . was held, occupied, and possessed, in full sovereignty, by various independent tribes or nations of Indians, who were the sovereigns of their respective portions of the territory, and the absolute owners and proprietors of the soil.”).

destruction of their lands, the loss of their important resources, and the decimation of their populations.³²⁷ The imperial conquests have established a dominant-subordinate paradigm between Colonial nations and Indigenous populations in the Americas.³²⁸ The resulting impact of imperial hegemony over the Americas has forcefully cast Indigenous communities into poverty, exploitation, and oppression.

Subordinating culture through colonial labeling is an illustration of a type of oppression, coined by Iris Marion Young as “cultural imperialism.” Cultural imperialism “involves the universalization of a dominant group’s experience and culture, and its establishment as the norm.”³²⁹ A culture is considered dominated when the culture is defined by the prevailing societal discourse and placed in a network of meanings determined by that discourse.³³⁰ A distinctive facet of cultural imperialism is that the “terms of the discourse are determined by those in power, who construct a ‘privileged language’ of explanation.”³³¹ The dominant discourse surrounding Indigenous cultural objects of Latin America was facilitated by the imperialist “normative gaze.”³³² The impetus of “Columbia” as part of nativist rhetoric to describe Indigenous cultures reinforces the hierarchal power structures advanced by colonization. The privileged language of “Pre-Columbian” purports to explain the difference between Indigenous culture before and after colonization. Instead, this term manifests Western ideals of supremacy through the commemoration of the historic legacy of colonization.

In her book *Decolonizing Methodologies*, Indigenous scholar Linda Tuhiwai Smith sheds light on the Indigenous experience as it relates to research and history.³³³ The consequences of imperialism, to Indigenous peoples, “still hurts, still destroys and is reforming itself constantly.”³³⁴ Tuhiwai Smith expounds that the collective memory of imperialism is accomplished through the manner in which knowledge about Indigenous peoples has been collected, classified, and then represented by the West.³³⁵ Within the imperialistic framework, Tuhiwai Smith classifies Christopher Columbus as the one figure that continues to provoke feelings of acrimony. She writes,

327. See Sager, *supra* note 13, at 747.

328. See JOSÉ LUIS MORÍN, *LATINO/A RIGHTS AND JUSTICE IN THE UNITED STATES* 45 (2009).

329. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 59 (1990).

330. See *id.*

331. Judith Koons, *Making Peace with Difference: A Hermeneutic of Inclusive Conversation*, 12 *TEX. J. WOMEN & L.* 1, 8 (2002).

332. CORNEL WEST, *PROPHECY DELIVERANCE!* 53 (1982).

333. See LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* (2d ed. 2012). Linda Tuhiwai Smith is a Professor of Education and Maori Development and Pro-Vice Chancellor Maori at the University of Waikato in Hamilton, New Zealand.

334. *Id.* at 20.

335. See *id.* at 1.

[t]here is one particular figure whose name looms large, and whose specter lingers, in indigenous discussions of encounters with the west; Christopher Columbus. It is not simply that Columbus is identified as the one who started it all, but rather that he has come to represent a huge legacy of suffering and destruction. Columbus ‘names’ that legacy more than any other individual. He sets its modern time frame (500 years) and defines the outer limits of that legacy, that is, total destruction.³³⁶

The continued link to Columbus, thus, invalidates the history of suffering by Indigenous peoples.

Columbus’s legacy is inextricably tied to “legalized forms of racial discrimination used to justify the privileges of power and aggression of the superiorly-regarded colonizing race of people to deny rights of self-determination to the inferiorly-regarded tribal race of peoples occupying territories and resources desired by Europeans.”³³⁷ Columbus, and the colonial powers which supported him, unequivocally subscribed to the belief that Christian European culture was superior in every way to those of Indigenous peoples.³³⁸ Columbus, in particular, was “obsessed with naming” as a form of domination over culture.³³⁹ For example, upon his arrival, Columbus renamed the population residing on the island as “Indian.”³⁴⁰ He disregarded and eliminated any of the Indigenous names and instead replaced such names with those of Spanish descent. Columbus’s descriptions of the New World facilitated the othering of Indigenous peoples through creation of the us-them dichotomy. Both groups were described as fundamentally different from one another. The act of renaming was part of the process of “discovery,” conquest, and ultimately colonization. The result of this naming practice is not only the total erasure of Indigenous culture and knowledge but the legitimization of the fallacy that the Americas were uninhabited and, thus, in need of naming.³⁴¹

The fact that Columbus was “obsessed with naming” further drives home the importance of eliminating his name from laws dealing with cultural heritage of Indigenous peoples. The categorization of objects of Indigenous origins as “Pre-Columbian” erases the complex governmental and societal structures of these communities. The presumption that Indigenous people were so “uncivilized” and “primitive” as to suggest that Columbus’s arrival marked their modernization only serves to advance the political, economic, legal, and social domination

336. *Id.* at 21.

337. Robert A. Williams, *Columbus’s Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples’ Rights of Self-Determination*, 8 ARIZ. J. INT’L & COMPAR. L. 51, 55 (1991).

338. *See id.*

339. Paul, *supra* note 76, at 47.

340. *See id.*

341. Indigenous populations had their own complex and unique ways of writing and naming. *See* ELIZABETH HILL BOONE & WALTER D. MIGNOLO, *WRITING WITHOUT WORDS* (1994) (undergoing an analysis of the recording and communication systems of America before European contact).

over such peoples.³⁴² It further rationalizes the forced assimilation, discrimination, and genocide faced by the Indigenous populations. This is yet another illustration of how the labeling of culture heritage is a byproduct of the complete erasure of Indigenous cultures.

C. Replacing “Pre-Columbian” in Legal Vernacular

The question that naturally flows from the elimination of the term within legal vernacular is “what term should be used in its place?” This Article does not advance one particular name to replace “Pre-Columbian.” Instead, the answer is nuanced and depends on the law that is at issue. Scholars have recognized the problematic nature of the term.³⁴³ Donna Yates, a notable scholar on trafficking of Latin American cultural property, often uses “pre-Conquest” to classify objects of civilizations existing prior to the Columbus exhibition.³⁴⁴ Terms such as “pre-Conquest” or “precolonization” are also problematic as they again relate those objects of one civilization to the colonization of Indigenous peoples. Therefore, the replacement term must carefully recognize the geographic, temporal, and cultural distinctions amongst cultures in the Americas.

This Article sets forth the proposal that there should not be one singular term for the objects whose origins are from civilizations existing prior to the Columbus expedition. The term should be governed by the laws being utilized. When the law necessitates a narrow definition of an object then the object should reflect the exact name of the culture represented. For example, “Pre-Columbian” is used throughout case law to evaluate Latin American antiquities for sale. This is particularly relevant in matters of tax law, specifically issues of deductible charitable donations of these objects.³⁴⁵ In order to receive deductions for donations, it is important to describe with sufficient specificity the articles that were donated. Without such specificity, the donor may be subject to tax liability. In *Biagiotti v. Commissioner*, the tax court references the petitioner’s donation of “pre-Columbian or Mayan art objects.”³⁴⁶ In the footnote, however, the tax court explains “[t]echnically ‘Mayan art’ and ‘pre-Columbian art’ are not synonymous terms. Mayan art is part of Pre-Columbian art. The word pre-Columbian is used for the art of the Indians of Mexico and Central and South America before the Spanish Conquest.”³⁴⁷ This distinction is im-

342. See Sager, *supra* note 13, at 754.

343. See, e.g., Yates, *supra* note 119, at 33 (stating that “[t]he term ‘precolonian’ is not without its own serious issues”)

344. See *id.*

345. See, e.g., *Ferrari v. Commissioner*, No. 90-2042, 1991 U.S. App. LEXIS 7068, at *1 (4th Cir. Apr. 23, 1991) (determining whether the appraisal of objects donated by the taxpayers were appropriate in a deficiency action).

346. *Biagiotti v. Commissioner*, Docket No. 12217-83., 1986 Tax Ct. Memo LEXIS 142, at *2 (T.C. Sep. 22, 1986).

347. *Id.* at *3 n.5.

portant, according to the court, because “Mayan art is the most highly prized pre-Columbian art among collectors.”³⁴⁸ Within the tax law context, a narrower characterization of the object is seemingly more significant, and perhaps even preferable, for valuation purposes.

On the other hand, it is frequently difficult to assign a narrower name for the object. For example, the origins of the term may be unknown, or the object might be from two different geographic places. In that case, terms such as “Latin American Antiquity” or “Cultural Heritage of Latin America” suffice. First, “antiquity” recalls a certain period of time that is old or ancient.³⁴⁹ The term is widely used for Greek art, known as the ideal or peak of art history. The term can also be used for Indigenous objects from Latin America of a similar time period. Latin American art, like Greek art, reflects its own complexity, nuance, and aesthetics. Second, while it is preferable not to group together disparate cultures, it cannot be disputed that sometimes it is not preferable in cases of judicial economy. For example, naming each object in a case name would be impossible if there are more than ten objects. It is for this reason that “et al.” is used to denote multiple plaintiffs and defendants. In this case, a broader term such as Latin American antiquity remedies that problem.

The manner in which the legal system assigns labels or terms to cultural objects has meaning not only within the law itself, but also within the impacted culture and identity. The physical manifestation of a culture’s skills, knowledge, religion, experiences, and identity is encompassed in its cultural heritage, which also serves as an expression of a collective memory of a group of people. Cultural heritage serves as a link between the past and the present. The invariable link between the history and cultures of the Indigenous past with those of the present has been ignored for centuries. Recognizing the differences between these distinct, but nevertheless complex, cultures is significant in remedying their erasure.

VI. CONCLUSION

During the eighteenth century, historians debated how to write the history of the New World and its peoples. Recorded history was semiotically created to advance the imperialist perception of power. This debate is ongoing, as scholars continue to question the consciously distorted account of the invasion and colonization of the Americas. Parochial limitations of a Eurocentric view of history have left little reflexivity on the part of the colonizer civilizations. The process of colonization “has left Indigenous peoples defeated and relegated to minor

348. *Id.*

349. The author recognizes the problematic nature of the term “Latin America” as well—it is a term rooted in colonialism for those countries whose language comes from Latin. However, the term will nevertheless be used for purposes of this article.

spaces and reservations, mere breadcrumbs of the land conceded by the dominant society.”³⁵⁰ As articulated by Haitian anthropologist Michel-Rolph Trouillot, “[h]istory is messy for the people who must live it.”³⁵¹

The exercise of colonial power has led to the subjugation of Indigenous cultures, histories, and knowledge. Columbus serves as the symbol of the invasion, conquest, and occupation of the occupied lands of the Americas. In *Orientalism*, Said advocates for historical agency beyond the scope of the dominating power structures.³⁵² The reclamation of Indigenous culture may occur through the articulation of a counter-discourse. This counter-discourse is manifested through the writing, interpretation, and execution of laws impacting Indigenous cultural heritage. The recognition of the indelible mark that conquest and colonization has left on the identity of Latin America, and its Indigenous communities, is one step towards deconstructing the imperial hegemony of colonial discourse.

Columbus continues to be an inextricable part of American society. While he was once a revered figure in the history of Americas, it has been long due to alter the monolithic narrative of the “discoverer.” Through the elimination of “Pre-Columbian” in legal vernacular, the traditional Eurocentric assumptions about the history of the Indigenous peoples of Latin America can be challenged and result in the proliferation of counternarratives. The continued celebration of Columbus through utilization of the term “Pre-Columbian” facilitates the othering of Indigenous populations. It exacerbates centuries of historical trauma catalyzed by the events unfolded by Columbus. The term emphasizes artificial hierarchal structures imposed by colonial powers on Indigenous peoples. Recognition of the artistic, historical, and cultural value of Indigenous peoples requires removing the dominant Western rewriting of cultural heritage.

350. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 58 (1999).

351. Jenny Mander, *Introduction* to TRANSNATIONAL PERSPECTIVES ON THE CONQUEST AND COLONIZATION OF LATIN AMERICA 1, 1 (Jenny Mander, David Midgley & Christine D. Beaulé eds., 2020) (quoting Michel-Rolph Trouillot).

352. See generally SAID, *supra* note 231.