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Spatial Dynamics of U.S. Cultural Resource Law

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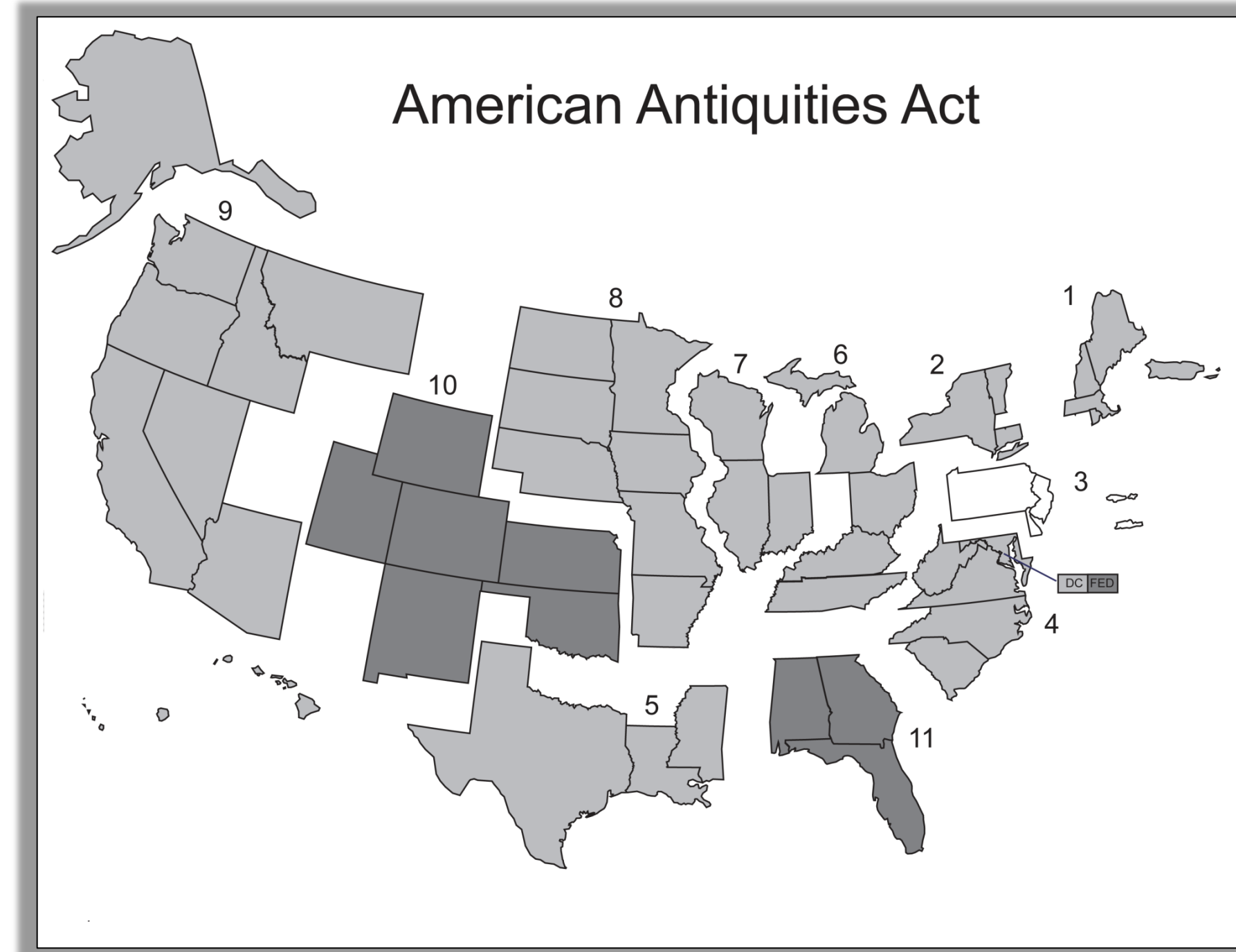
INTRODUCTION

The unequal distribution of cultural resources in the U.S. suggests that some bias should be expected in law applications. The spatial nature of archaeology requires consideration of varying artifact densities across broad cultural landscapes. For example, the archaeological record of the Southeast U.S. encompasses large and complex Mississippian ceremonial sites, mound complexes, and extensive prehistoric mortuaries that differ greatly from the dense distribution of well-preserved farming communities of the American Southwest or the widely dispersed rock shelters associated with hunter-gatherers in the Great Basin. Thus, the character of the cultural resources themselves demands some degree of flexible legal treatment.



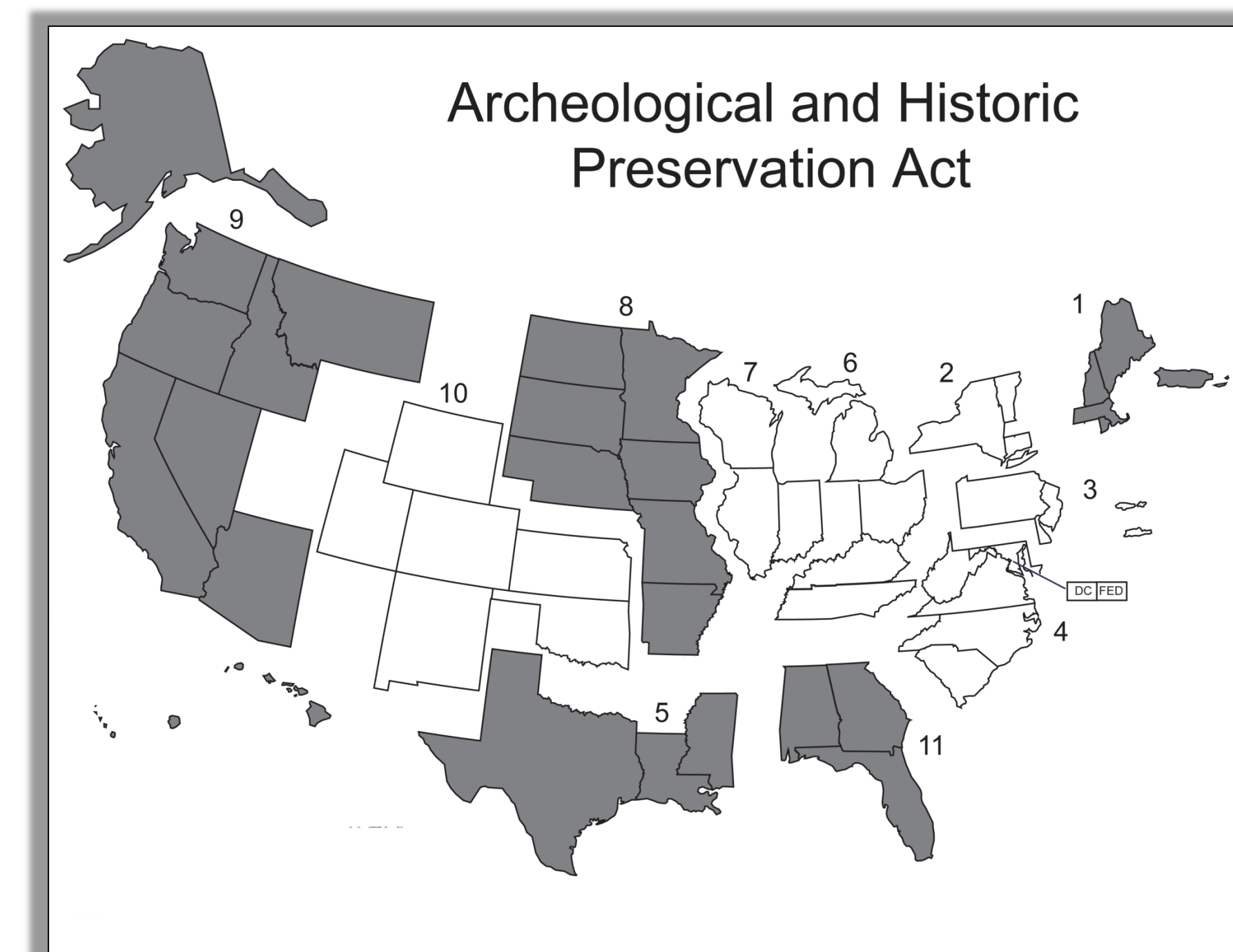
SPATIAL DYNAMICS OF LITIGATION

The distribution of cases by Federal Circuit Court districts was evaluated through contingency table analysis and a chi-square goodness-of-fit test. The results ($\chi^2=544.333$, $df=7$, $p<0.0000001$) show that there is a non-random distribution of court cases by Federal Circuit Court districts. The average number of cases per district is 90.5 and the range varies greatly. In the discussion below, the number of litigated cases is described as greater, lesser, or equal to the national averages as defined by the adjusted residuals. This analysis demonstrates that the western half of the United States has supported the largest case load, with the 2nd Circuit Court and D.C. Circuit Courts close behind.



METHODS

Relevant cultural resource management laws were identified⁴, and then a listing of individual cases was created through the use of LexisNexis Academic and Westlaw. Data fields include case name, date, disposition of the resource (i.e., archaeology, architecture, landscape, and other), reason for legal action (i.e., compliance, taking, and other), State, case summary and holdings, U.S. Circuit Court district, and final ruling⁵. This database comprises the foundation of the resulting analysis. Temporal distributions for each statute were plotted alongside the total number of cases. The contingency table was created utilizing the numerical distribution of case law organized by statute and Federal Circuit Court district.

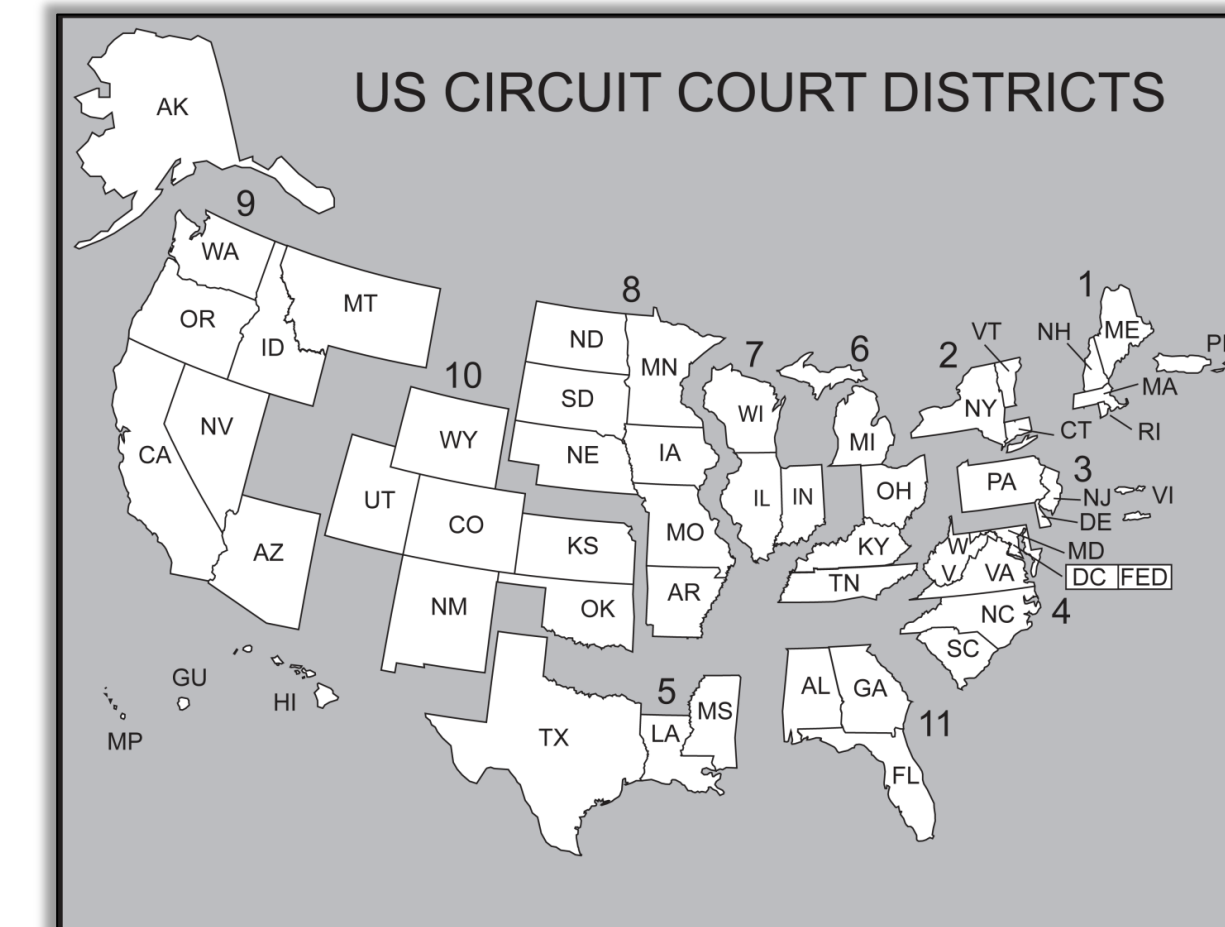


LITIGATION OF CULTURAL RESOURCES

In reviewing the history of litigation, resource-specific trends illustrate the highly variable use of these eight statutes. Legislation was correlated using the highest frequency of challenges by resource (Archaeology, Architecture, Landscape, Shipwreck, and Other) to demonstrate the resource most frequently protected by each statute. In sum, two statutes were found to correlate with archaeology (ARPA and NAGPRA), three with architecture (HSA, AHPA, and NHPA), one with landscapes (AAA), one with shipwrecks (ASA), and one with other (AIRFA). In the case of the AIRFA, other is most frequently correlated with religion.

ABSTRACT

The American Antiquities Act, Historic Sites Act, Archeological and Historic Preservation Act, National Historic Preservation Act, American Indian Religious Freedom Act, Archeological Resources Protection Act, Abandoned Shipwreck Act, and the Native American Graves Protection and Repatriation Act comprise the basis of our exploration of cultural resource legislation in the United States. Since the passage of the American Antiquities Act in 1906, 1086 cases have challenged these statutes in U.S. courts. We investigate temporal and regional patterns of the case law to establish whether these laws are uniformly prosecuted throughout the U.S. Our findings suggest that case law is complex and controlled by many factors, including unequal application.

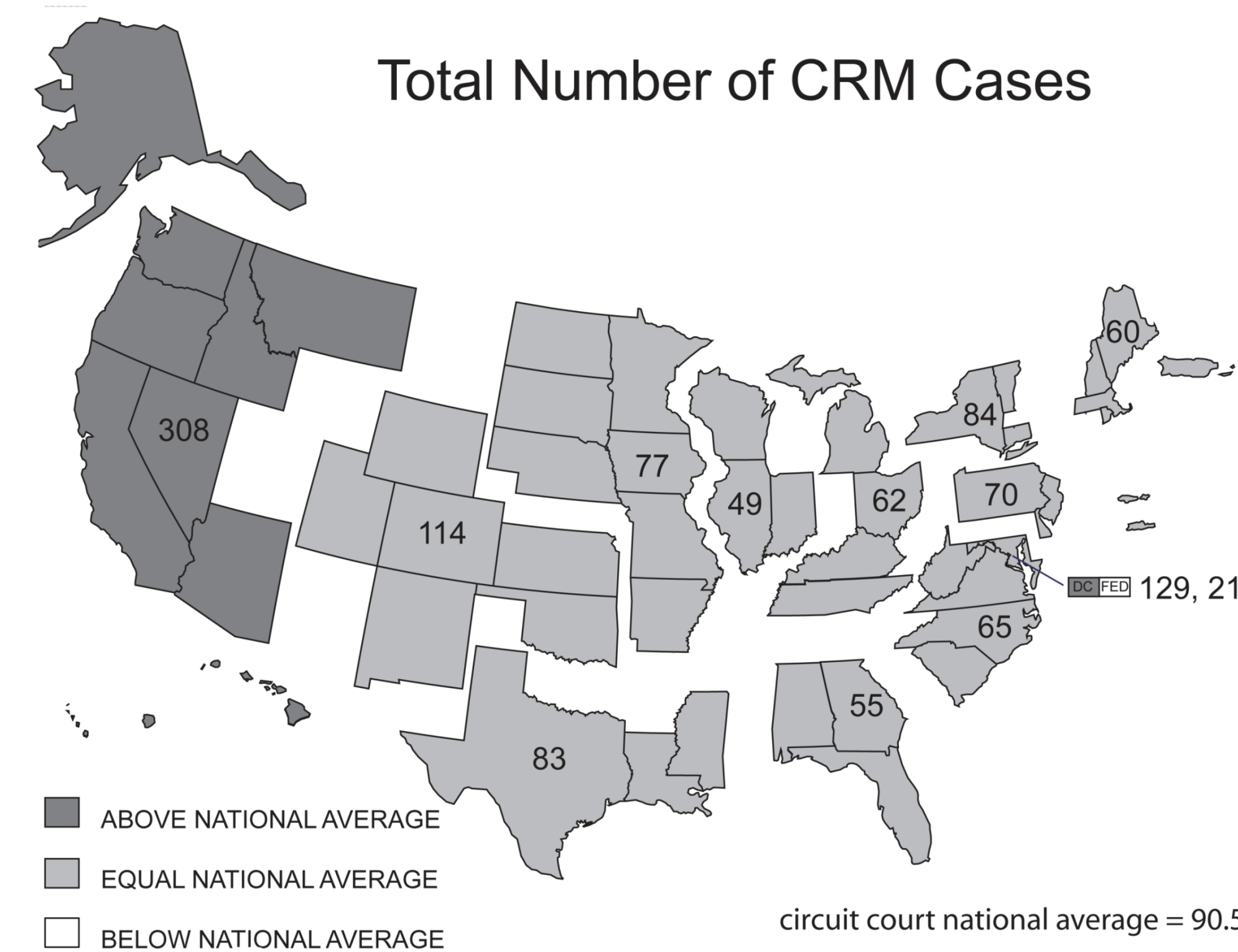


Contingency table of number of litigated cases by regions and statute. Observed values /adjusted residuals presented in each cell with row and column totals and percents. Adjusted residuals = (O-E)/E*sqrt(Var for cell). Where O is observed value in cell i, E is expected value in cell i and Var is variance for cell i. Expected values (Ei) = column total x row total / grand total. Variance = (1-(row total/grand total)) x (1-(column total/grand total)).

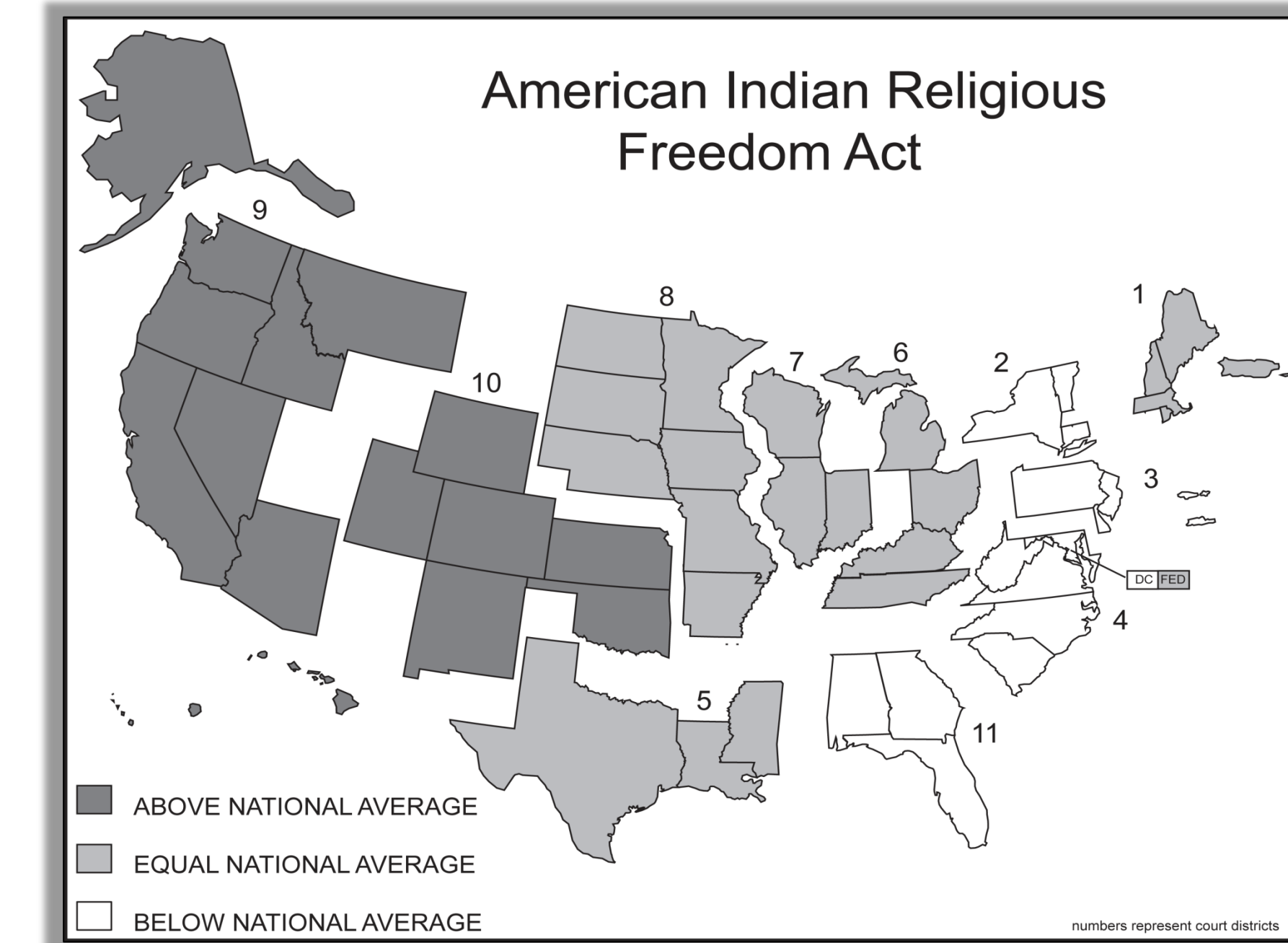
CONCLUSION

The trends in major cultural resource laws indicate disparate application of legislation associated with cultural resources. While a single piece of legislation—the ASA—appears to offer protection to a single type of cultural resource, the remaining seven statutes have been employed within each of the resource categories, indicating the multifaceted nature of legal challenges. The flexible nature of these statutes and endless attempts by lawyers to apply them to widely ranging problems regarding cultural resources provides unique litigation-based signatures for each of the U.S. Circuit Courts. This study demonstrates the diverse practical application of these eight statutes.

Knowing that these laws exist to protect the past is not enough. Only by following the evolutionary progression revealed in part by this study may we begin to truly comprehend the current impact of cultural resource laws upon the practice of archaeology. This analysis ends not only with a plea for additional analyses, but for the education of our legal counterparts regarding legislation that protects cultural resources, and the consistent prosecution and enforcement of cultural resource laws since, to a large degree, the nature of research focused upon cultural resources in the United States is influenced by the enforcement of these statutes.

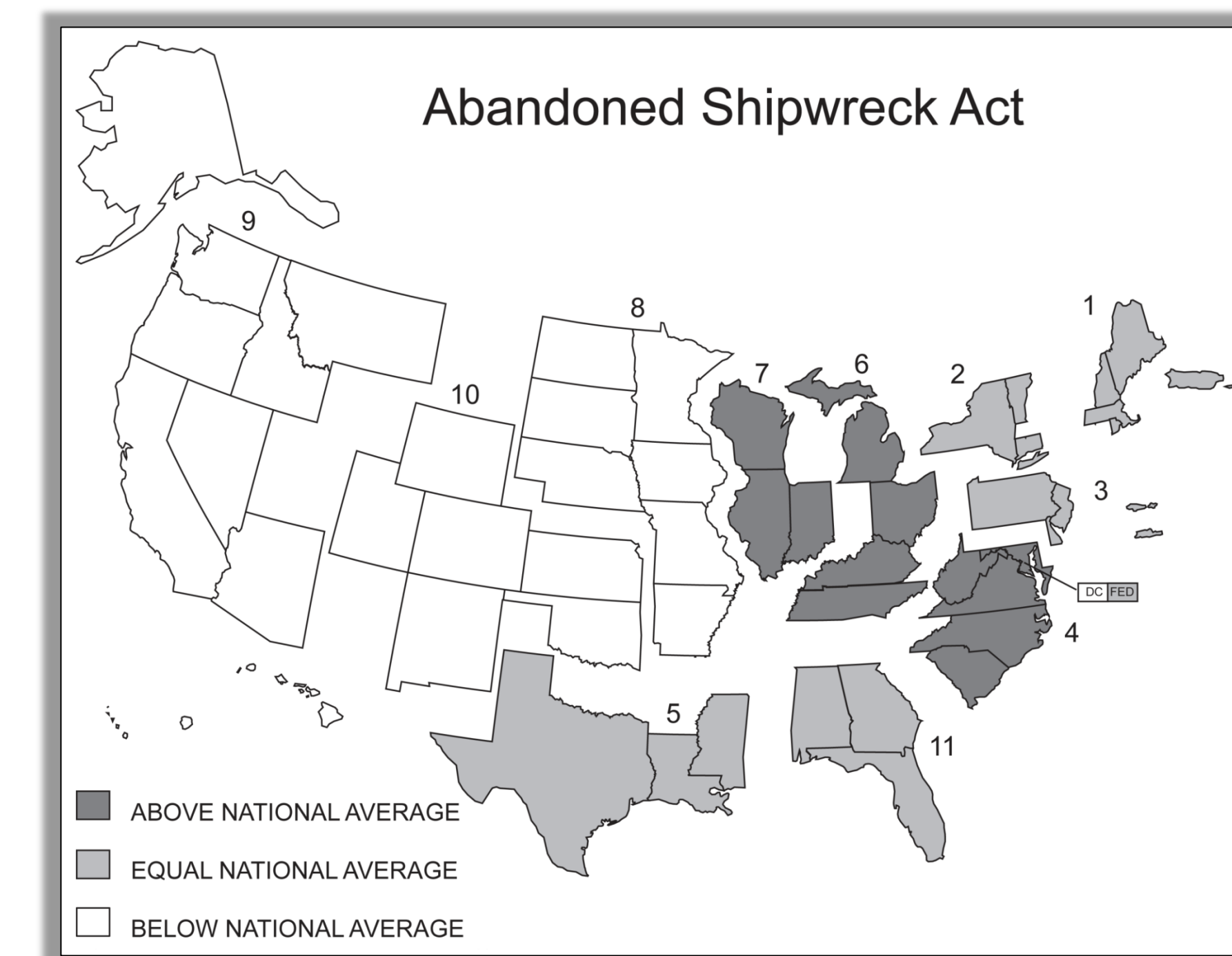


*References available upon request.



ARCHITECTURE

It was not unexpected that architecture and landscape would be the primary recipient of legal protections under the NHPA, and that compliance-based litigation comprised the bulk of the case law. For the NHPA, the other category contains three Supreme Court cases that include the suspension of deportation, recovery of attorney's fees, and recovery of hospital fees related to Medicaid reimbursement. The other category of the HSA contains cases ranging from the appealed conviction of traffic regulations within a national seashore to a sheriff's department employee seeking judicial review of her termination based upon misconduct involving pay vouchers.

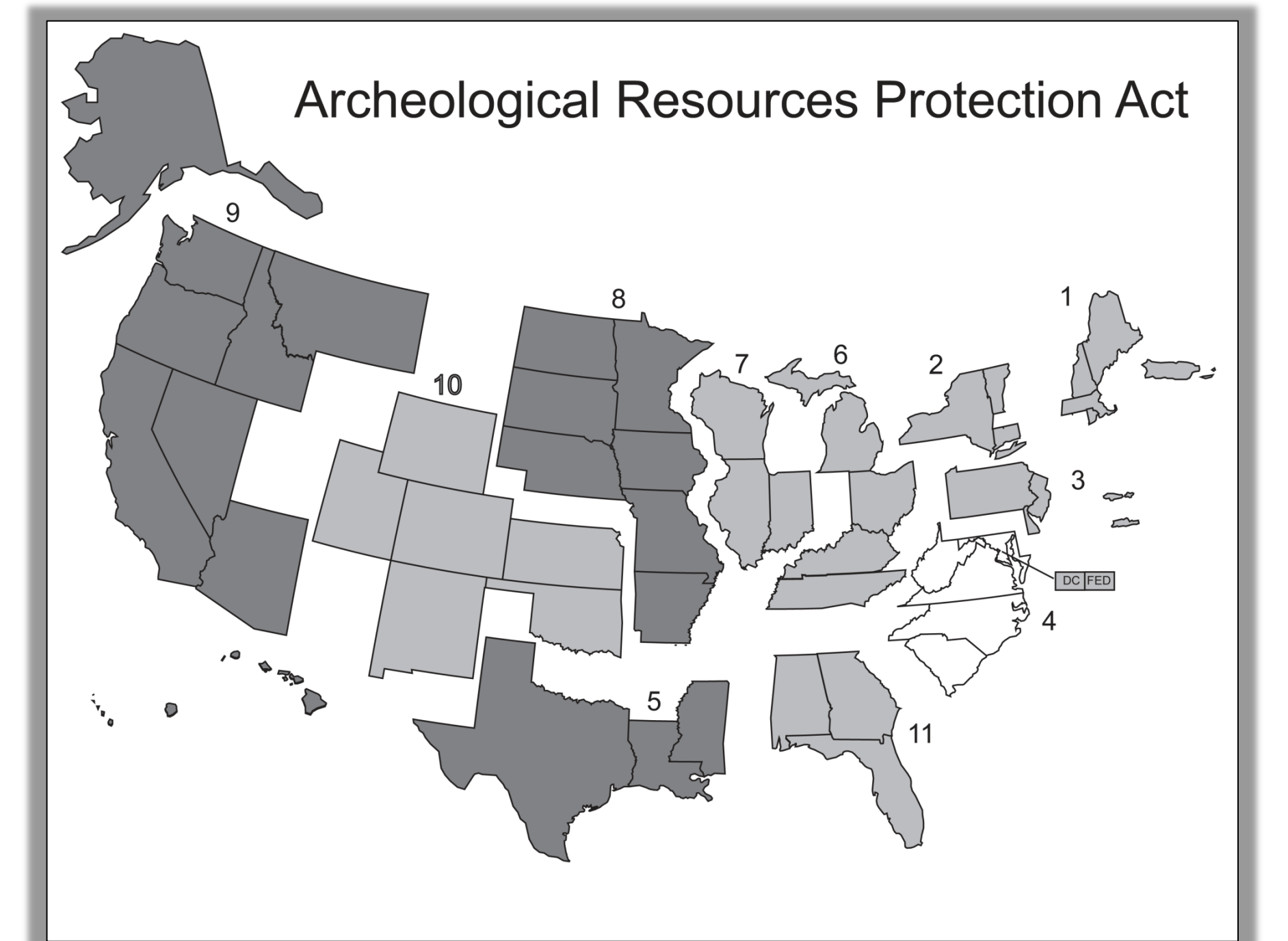


DISCUSSION (CONT'D)

Statistically, it was expected that compliance would be the principal motivator for these statutes, an expectation that was later confirmed during analysis. In general, the amount of litigation within the category of Other was also expected due to the high variability of legal challenges coupled with the ingenuity of litigation strategies. However, it was not predicted that the AHPA would be dominated by litigation focused upon architectural resources or that the AAA and ARPA would have been employed within the framework of shipwreck-based litigation.

ARCHAEOLOGY

The application of ARPA and NAGPRA correlates well with archaeology and landscape, but the number of cases in the category of other was unexpected. For ARPA, this category is comprised of litigation ranging in use from wrongful termination of mineral leases and illegal fishing activities to importation of ozone-depleting substances. For NAGPRA, the same category ranged from a Supreme Court case focused upon voter qualification for trustees at the Office of Hawaiian Affairs to a challenge by a non-native Hawaiian minor alleging that the admissions policy of a private school violated civil rights law.



DISCUSSION

Those states that joined the union after the signing of the Antiquities Act were Arizona (1912), Alaska (1959), Hawaii (1959), New Mexico (1912), and Oklahoma (1907), all five of which were—and still are—host to large populations of Native Americans. In Arizona, Alaska, Hawaii and New Mexico, Native American populations remain within or close to their traditional cultural landscapes, while Oklahoma represents a large number of displaced tribes due mostly to Andrew Jackson's Indian Removal Act of 1838, and in part by the forced removal of Native Texans from Texas in 1839 by Mirabou B. Lamar, the President of the Republic of Texas at that time.

