

WHO OWNS THE PAST IN U.S. MUSEUMS? AN ECONOMIC ANALYSIS OF CULTURAL PATRIMONY OWNERSHIP

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Throughout history, works of art have been separated from the cultures that created them. Whether through sale, barter, salvage, war, or outright thievery, the artifacts that tell us so much about a culture often lose their cultural attachment and become subject to the whims of private owners.

Yet, most cultural artifacts carry a high subjective value—that attributed to the artifact as part of a cultural patrimony—which reflects the artifact’s worth in defining a society or culture. As a result, preserving these artifacts, maintaining their integrity, and ensuring access and distribution are paramount goals.

In this note, Sean Odendahl examines current U.S. law regarding vested rights in cultural artifacts. Characterizing the U.S. view of cultural patrimony rights as a traditional, nationalist approach, he highlights the problems inherent in such an approach. Mr. Odendahl then suggests that an international approach makes more sense, both economically and legally.

Applying the international approach to cultural patrimony law, this note introduces a three-tiered system for determining ownership rights while minimizing costs. Indeed, such an approach is not only efficient, but also satisfies the end-goals of cultural patrimony law: preservation, integrity, and distribution of cultural artifacts. In the end, the nation that most values the artifact gains ownership, provided that it has the means to achieve these goals.

“Works of art are the property of mankind and ownership carries with it the obligation to preserve them. He who neglects this duty . . . will be punished with the contempt of all educated people, now and in future ages.”

— *Attributed to J.W. von Goethe*¹

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1. JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT 35 (1999).

I. INTRODUCTION

Who owns the past? Many relics of mankind's common heritage make their way into U.S. museum collections. Museums preserve and protect these artifacts and make them accessible to the public—the inheritors of the cultural past—these artifacts. Some of these artifacts and artworks are significant in defining a past era or culture, for they are part of the cultural patrimony of that era or culture. A nation's cultural patrimony consists of those artifacts and artworks that are “in fact prized and collected, whether or not they were originally designed to be useful, and whether or not they possess ‘scientific’ as well as aesthetic value.”² Cultural patrimony plays an important part in the cumulative creative and scientific process.³ These processes are aggregating in that the artifacts serve as the building blocks or foundations for future creations and discoveries.⁴

The importance of cultural patrimony far exceeds arbitrary national boundaries. Mankind recognizes cultural patrimony as a link to its common past. Moreover, cultural patrimony transcends private or national ownership.⁵ National ownership may be asserted by both possessor nations and source nations, which are literally those nations that claim an artifact as part of their cultural patrimony.⁶ Usually the artifact was either created in the source nation or soon found its way there through standard commerce before being woven into the fabric of the source nation's culture.⁷ So, with possession being a practical necessity, what do we do to efficiently preserve the world's entitlement to cultural patrimony and settle the claims of source nations against museums for the repatriation of cultural patrimony?

Since the early 1960s, legal scholars have turned to economics to answer this possessory-right question.⁸ The economic analysis of the law observes that the “law is an obligation backed by a state sanction.”⁹ It prompts legal scholars to ask, “How will a sanction affect behavior?”¹⁰ To help answer this question, economics provides the law with a scien-

2. Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 285 (1982).

3. See SAX, *supra* note 1, at 2.

4. See *id.* at 2–3.

5. See JOHN H. MERRYMAN & ALBERT E. ELSÉN, *LAW, ETHICS AND THE VISUAL ARTS* 71 (3d ed. 1998) (noting that the “cultural internationalis[t]” viewpoint concentrates on “humanity's common interest in its past” and suggests that “cultural objects should be relatively free to circulate for ‘scientific, cultural and educational purposes’”).

6. See John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 845 (1986) [hereinafter Merryman, *Two Ways*].

7. See *id.*

8. See ROBERT D. COOTER & THOMAS S. ULEN, *LAW AND ECONOMICS* 2 (3d ed. 2000) (observing that the economic analysis of the law has gained a pervasiveness throughout legal scholarship as suggested by the presence of at least one economist on the faculty of each top law school).

9. *Id.* at 3 (recounting a “classical definition of the law”).

10. *Id.* (“For example, if punitive damages are imposed upon the maker of a defective product, what will happen to the safety and price of the product in the future?”).

tific theory that predicts “the effects of legal sanctions on behavior.”¹¹ Economists equate sanctions to prices and presume rational people will respond to these sanctions in much the same way they respond to prices.¹² Simply put, higher prices cause people to consume less of a good, and they decrease a good’s utility; whereas, lower prices increase demand and consumption. To apply the analogous argument to the law arena, an increase in state sanctions will presumably cause a decrease in the sanctioned behavior. Likewise, an easing of state sanctions encourages the targeted behavior.¹³ Because rational decision makers seek to *maximize* their utility,¹⁴ the imposition of sanctions causes them to recalculate their maximized utility to include the state sanction and choose an alternative.¹⁵ Thus, the sanction brings the individual’s utility into alignment with the socially desired end.¹⁶

This interaction between rational decision makers and state sanctions reaches a pattern that “persists unless disturbed by outside forces.”¹⁷ This pattern of behavior tends toward an equilibrium point.¹⁸ This point represents the amount of any given activity that will be consumed, i.e., seen as a benefit (or a “risk worth taking”) up to a perfectly balanced given cost.¹⁹ One increases or lessens sanctions (costs) to shift the activity consumed to the most efficient allocation of resources, re-establishing the equilibrium point at a socially efficient position. The most efficient allocation of our resources is that allocation at which “it is not possible to produce the same amount of output using a lower-cost combination of inputs, or it is not possible to produce *more* output using the same combination of inputs.”²⁰ In other words, one encourages or discourages an activity until it reaches the aforementioned point, also known as the point of diminishing return.

The costs associated with any activity can be categorized into two classes: (1) those costs internalized by the actor and (2) those costs externalized by the actor, that is, incurred by society.²¹ Taken as a whole, these costs are known as transaction costs. In an efficient system, the ra-

11. *Id.* (“Economics has mathematically precise theories (price theory and game theory) and empirically sound methods (statistics and econometrics) of analyzing the effects of prices on behavior.”).

12. *See id.*

13. *See id.*

14. *See id.* at 10 (recognizing the concept of a “rational decision maker” at the basis of economic theory).

15. *See id.* at 11.

16. *See id.* at 3, 11.

17. *Id.* at 11 (recognizing the natural gravitation towards “equilibrium” as a second fundamental concept in economic theory, the first being the inclination to “maximize”).

18. *See id.*

19. *See id.*

20. *Id.* at 12.

21. *See id.* at 40–41.

tional decision maker should internalize all transaction costs.²² This avoids imposing a burden on an involuntary third party (society) as a result of the activity.²³ However, from a cultural internationalist viewpoint, society is always a “party” to a transaction involving cultural patrimony, although frequently an involuntary party.²⁴ When, for example, collecting artifacts interferes with society’s interest in preserving and accessing artifacts, “the law must decide whether one party has the right to interfere or whether the other party has the right to be free from interference. Efficiency requires allocating the right to the party who values it the most.”²⁵ The State may impose a sanction to effectively raise the cost to one party of carrying out an activity, thus lowering the value of that activity. Ultimately, when one awards the right to carry out an activity to the party who values it the most, one maximizes the socially optimal sum value.

Economic efficiency explains that a transaction concerning ownership rights of cultural patrimony ought to assign those rights to the party that values them the most.²⁶ For example, Greece attaches a value to the Elgin Marbles that is subjective and separate from the objective value that the world attaches to them.²⁷ However, Britain has assimilated the Marbles into its culture during the two hundred years they have possessed the Parthenon sculptures and have, likewise, gained a subjective appreciation of them.²⁸ The subjective values and mankind’s objective values need to be considered in a light that will illuminate the issues at stake and account for those values when deciding the fate of disputed cultural property. Thus, the question that remains is, what is cultural patrimony and who has inherited past cultures? To what extent should we repatriate that which another country or culture claims as their own? In short, who “owns” the past and why do they own it?

This note focuses on foreign claims against property held in U.S. private and museum collections.²⁹ U.S. courts should resolve these

22. *See id.* For example, we may levy a tax upon a certain activity that is only incurred by those who participate in that activity, such as using a toll road.

23. *See id.*

24. *See Merryman, Two Ways, supra* note 6, at 836–37.

25. COOTER & ULEN, *supra* note 8, at 84.

26. *See id.* at 94 (noting that “efficiency” is the third fundamental concept in economics).

27. *See MERRYMAN & ELSEN, supra* note 5, at 226.

28. *See id.*

29. The case of “The Teotihuacán Murals: Joint Custody” raises a very interesting and significant obstacle to repatriation of public museum property. *See id.* at 219. It seems that ownership takes extraordinary significance in the case of museum property. If a public museum is determined to be the actual “owner” of the requested property within the limits of U.S. law, then it is prevented from fully repatriating the property to the source country by U.S. law. *See id.* at 220. Essentially, public museums are prohibited from giving away public property! This means that once title is vested in the public institution, the institution must be motivated by other than altruism and moral right to return cultural patrimony. In the case of the Teotihuacán Murals, the San Francisco public museum agreed to exchange a portion of the murals, for permanent display in Mexico City, in consideration of Mexican preservation experts. *See id.* at 221. The restoration of the murals was successfully incorporated as part of the public display of the murals in San Francisco. *See id.* at 222. This unique solution added to

claims³⁰ keeping in mind the goals of protecting the property (preservation), maintaining its integrity, ensuring distribution (access), and deterring illegal exports. Given the limitations of international law—mainly its enforceability—and the importance of preservation, cultural respect, world enculturation, and financial resources, an international paradigm may best solve the dilemma.³¹

Part II frames the background surrounding the debate between the international and national perspectives that assign ownership of cultural patrimony. The three goals of a common world agenda focus on the preservation, integrity, and distribution of artifacts. The rise of an international perspective fostered these goals; however, political and social forces have moved the prevailing viewpoint toward a national perspective. In part III, this note analyzes which perspective better serves the common agenda by examining the microeconomics of cultural patrimony transactions. Part IV recommends an international perspective with a notion of stewardship as the most efficient way of allocating these valuable resources. This note concludes by suggesting that in adopting a cultural internationalist view, U.S. courts will be better able to account for the transaction costs associated with cultural property and settle ownership in an economically efficient manner that assigns ownership to the party that values the artifact the most.

II. BACKGROUND

A. *Cultural Patrimony*

Cultural patrimony is any man-made artifact of a past era that society attributes to a historical, source culture. The source culture is literally the modern culture's *pater* or "father," and from the artifacts of that source culture, the modern culture draws some of its identity.³² This sense of identity is a critical bond between a people and their culture. It

the value of both the Mexican and U.S. collection while, perhaps most importantly, raising awareness of Pre-Columbian Art and restoration efforts needed to preserve these beautiful artifacts for posterity. *See id.* at 219–22.

30. "Cultural property regulation, like the tango, takes two: a claimant nation from whom the cultural property is stolen or exported—albeit unlawfully—and a recipient nation." JESSICA L. DARRABY, *ART, ARTIFACT & ARCHITECTURE LAW* § 6.03, at 6-45 (1995).

31. Professor Merryman notes how critical this issue is to world culture:

The stakes are high. The world is full of undiscovered, unexplored sites. Uncounted millions of artifacts await discovery. Other millions, already discovered, lead a precarious existence while they wait to be properly preserved, studied, and displayed. We need them to tell us who we are and where we came from, to nourish creativity and enrich our lives, to discredit myths of racial and national superiority in cultural achievement, to demonstrate our common humanity. That, in the end, is what the law and politics of cultural property is about: the cultural heritage of *all* mankind.

MERRYMAN & ELSEN, *supra* note 5, at 229.

32. Cultural property is both a larger and smaller set of art generally. It is larger in the sense that it "covers" more than visual art, yet it is smaller because of the narrow application of the term to certain categories of approved material. *See* DARRABY, *supra* note 30, § 6.03, at 6-44.

is a generally accepted notion that people need exposure to cultural patrimony in order to develop as a “people,” that is, a “culture.”³³ A culture is defined by its past, and cultural patrimony provides a point-of-reference and a link to that past.³⁴ “[A]rt [is] the carrier[] of humanity’s hopes and fears . . . [; it] has given tangible and aesthetic form to the most cherished values of civilizations and has often provided their only surviving record.”³⁵ Without this link, people may be bereft of their past and, as a result, lost in a cultural void. The United Nations Educational, Scientific, and Cultural Organization (UNESCO) established a 1970 Convention for the purpose of prohibiting and preventing illicit transactions in cultural property.³⁶ UNESCO defined cultural patrimony as

property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, pre-history, history, literature, art or science and which belongs to the following categories: (a) Rare collections and specimens of fauna . . . ; (b) property relating to history . . . ; (c) products of archaeological excavations (including regular and clandestine) . . . ; (d) antiquities more than one hundred years old . . . ; (e) objects of ethnological interest . . . ; (f) postage, revenue and similar stamps . . . ; (g) articles of furniture more than one hundred years old and old musical instruments.³⁷

This definition of cultural property is extremely broad and leaves each Member State the ultimate discretion to designate what property

33. See MERRYMAN & ELSÉN, *supra* note 5, at 199. The objective of cultural patrimony laws is to repatriate the objects to the “owner” nation claiming them. See also *id.* at xix (quoting JOHN STEINBECK, *THE GRAPES OF WRATH* 77 (Bantam Books, Inc. 1966) (1939) (“How will we know it’s us without our past?”)); DARRABY, *supra* note 30, § 6.03, at 6-44.

34. See MERRYMAN & ELSÉN, *supra* note 5, at xix.

35. *Id.*

36. See *id.* at 131.

37. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, art. I, 96 Stat. 2350, 2351, 823 U.N.T.S. 231, 234-36 [hereinafter 1970 UNESCO Convention]. The United States signed the UNESCO Convention and adopted the official text of the Convention in the Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2351 (1983) (codified as amended at 19 U.S.C. §§ 2601-2613 (1994)). Section 2601 defines cultural property as:

For purposes of this chapter—(1) The term “agreement” includes any amendment to, or extension of, any agreement under this chapter that enters into force with respect to the United States.

(2) The term “archaeological or ethnological material of the State Party” means—(A) any object of archaeological interest; (B) any object of ethnological interest; or (C) any fragment or part of any object referred to in subparagraph (A) or (B); which was first discovered within, and is subject to export control by, the State Party. For purposes of this paragraph—(i) no object may be considered to be an object of archaeological interest unless such object—(I) is of cultural significance; (II) is at least two hundred and fifty years old; and (III) was normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water; and (ii) no object may be considered to be an object of ethnological interest unless such object is—(I) the product of a tribal or nonindustrial society, and (II) important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people.

19 U.S.C. § 2601(1)–(2) (1994).

falls into this gamut of culturally significant artifacts.³⁸ Thus, according to the terms of the Convention, Member States must recognize the purely subjective view of each nation insofar as it pertains to that nation's cultural patrimony.³⁹ What if the objective international view differs? The perspective adopted, either nationalist or internationalist, determines what criteria courts will consider in accommodating parties' subjective valuations of cultural patrimony.⁴⁰ Thus, the differences between the national subjective view and the international objective view must be examined.

B. *Nationalist Versus Internationalist Perspective*

Cultural property can be viewed from an international or national perspective. These perspectives generally have the same ends in sight, but approach the issue of cultural heritage from opposite points of view.

1. *Cultural Nationalism*

Cultural nationalism views art and archaeological objects originating, *in situs*, from a cultural well-spring.⁴¹ These objects are the products of a geographically limited "culture" and as such, belong to the present occupiers of that same geographical location, that is, the national inheritors.⁴²

Taking this nationalist view has certain implicit consequences. The nationalist view, embraced by the United Nations, "legitimizes national export controls and demands for the 'repatriation' of cultural property."⁴³ It seems that while source nations generally encourage *other* forms of export trade, they "vigorously oppose the export of cultural objects."⁴⁴ A cultural nationalist would claim that the Elgin Marbles, discussed previously, belong to Greece because modern Greece occupies the same territory from which the collection of sculptures came — the Parthenon on the Acropolis in Athens.⁴⁵

38. See 1970 UNESCO Convention, *supra* note 37, art. I, 96 Stat. at 2351, 823 U.N.T.S. at 234–36.

39. See *id.* art. II–III, 96 Stat. at 2351, 823 U.N.T.S. at 236.

40. Economics explains that, in terms of efficiency, courts should grant the right to possess the artifact to whichever party values the artifact the most. See COOTER & ULEN, *supra* note 8, at 94.

41. See MERRYMAN & ELSEN, *supra* note 5, at 71.

42. See *id.*

43. Merryman, *Two Ways*, *supra* note 6, at 832.

44. *Id.*

45. Cultural nationalism is premised on the belief that "cultural property belongs at the place, or among the descendants of the culture, of its origin." MERRYMAN & ELSEN, *supra* note 5, at 199. However, cultural nationalism suffers from inevitable drawbacks, namely, "cultural nationalism is a form of nationalism and for that reason is subject to all the usual concerns: the tendency to become invidious, to breed rivalry, misunderstanding and conflict, and to divide rather than unite." *Id.*

Our current legislation, both domestic and international, adheres to the cultural nationalist point of view.⁴⁶ At the base of this prevailing view is, not ironically, Lord Byron, who with his poetic attack on Lord Elgin secured the romantic view of cultural nationalism as the remedy to right the wronged.⁴⁷

2. *Cultural Internationalism*

An alternative perspective is that of cultural internationalism. The international view identifies the cultural inheritors of the past not by geographical location, but by “cultural debt.” Cultural debt is that which society owes to past cultures that have invariably and in innumerable ways influenced present culture.⁴⁸ This view holds cultural property “as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction.”⁴⁹

There are three primary considerations from the cultural internationalist point of view: preservation, integrity, and distribution.⁵⁰ The most pressing concern is preservation.⁵¹ If circumstances destroy an artifact, the destruction deprives society of an important part of its cultural heritage.⁵² “Damage short of destruction—whether through inadequate care, the action of the elements, or the hazards of war, terrorism, or vandalism—threatens the same values.”⁵³

The second consideration—integrity—concerns restoring the parts of “dismembered masterpieces.”⁵⁴ If one envisions a masterpiece, such as the Parthenon, “as an integrated work of art, so that the parts together have more beauty and significance than the sum of the dismembered pieces, then it makes sense to argue that the [masterpiece] should be [re-united].”⁵⁵ It is possible to imagine a situation, such as that presented by the Parthenon, where integration of dismembered pieces is so impossible due to destruction that the situation warrants leaving the masterpiece asunder. Moreover, it is also possible to conclude that viewing the Par-

46. See *id.*; Merryman, *Two Ways*, *supra* note 6, at 845–46.

47. See MERRYMAN & ELSEN, *supra* note 5, at 200. “Byronism” owes its namesake to Lord Byron and his poems *Childe Harold* and *The Curse of Minerva*. See *id.*

48. If art begets art, the natural question is, “will an international view bring us—as a world civilization—closer together, based on the mutual influence of our artistry?” *Id.*

49. Merryman, *Two Ways*, *supra* note 6, at 831. This is the view adopted by the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, 240, reprinted in MERRYMAN & ELSEN, *supra* note 5, at 49 [hereinafter 1954 Hague Convention]; see also MERRYMAN & ELSEN, *supra* note 5, at 832.

50. See MERRYMAN & ELSEN, *supra* note 5, at 226–27.

51. See *id.* at 227.

52. See *id.*

53. *Id.*

54. *Id.* (quoting Patricia Failing, *The Case of the Dismembered Masterpieces*, ARTNEWS, Sept. 1980, at 68).

55. *Id.*

then on sculptures in isolation allows an experience that exceeds the overwhelming effect of the pieces reunited.

The final consideration is distribution. This is “a concern for an appropriate international distribution of the common cultural heritage, so that all of mankind has a reasonable opportunity for access to its own and other people’s cultural achievements.”⁵⁶ The internationalist perspective concerns itself with “the accessibility of cultural property.”⁵⁷ The policy of distributing artifacts, rather than concentrating them in one place, advances that concern.⁵⁸

For example, a cultural internationalist would not claim the Elgin Marbles for modern Greece, but for the common world culture. When asked if they should be returned to Greece, the cultural internationalist would look to the three considerations and likely respond by asking: Why should one take the marbles from one museum and put them in another? Their historical removal damaged the Parthenon, so they cannot be returned.⁵⁹ Moreover, does Greece have the capability to preserve the delicate marbles in the thick Athenian smog? Thus, the integrity of the original sculpture cannot be restored,⁶⁰ and its safety cannot be guaranteed. Furthermore, the cultural internationalist might question whether the Marbles are now part of the British cultural heritage.⁶¹ From the international viewpoint, it follows that “people who are not Greek or British have an interest in their preservation, integrity and availability for enjoyment and study.”⁶² Additionally, Greece still possesses many artifacts of Ancient Greek culture. Thus, it is in no way “impoverished” without the artifacts, meaning that advancing the distributive consideration does not leave Greece bereft of her cultural mantle.⁶³

3. *Political and Social Consideration*

The decision of whether to adopt a nationalist or internationalist view runs counter to the problem of financial disparity between source nations and market nations.⁶⁴ Generally speaking, source nations tend to be poorer and have difficulties stemming the flow of artifacts and/or pre-

56. *Id.* at 228.

57. *Id.*

58. *See id.*

59. *See id.* at 224.

60. From strictly an integrity point of view, one would favor the Greek position so long as the pieces could actually be reintegrated—which appears unlikely. *See id.* at 227.

61. *See id.* at 226. An additional consideration of possession is tourism, because possession is necessary to garner tourism. *See id.*

62. Merryman, *Two Ways*, *supra* note 6, at 837.

63. *See* MERRYMAN & ELSEN, *supra* note 5, at 228.

64. *See generally* Merryman, *Two Ways*, *supra* note 6 (discussing the problems of the nationalist view).

serving those that they do control.⁶⁵ The market nations tend to be the richer Western countries.

In source nations, the supply of desirable cultural property exceeds the internal demand. Nations like Mexico, Egypt, Greece and India are obvious examples. They are rich in cultural artifacts beyond any conceivable local use. In market nations, the demand exceeds the supply. France, Germany, Japan, the Scandinavian nations, Switzerland and the United States are examples. Demand in the market nation encourages export from source nations. When, as is often (but not always) the case, the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property.⁶⁶

To some extent, this sounds of the uncomfortable echo of past colonial imperialism.⁶⁷ Wealthy market countries exacerbate the problem if, in refusing to repatriate cultural property, they use unfounded cultural internationalism as a justification.⁶⁸ This is especially true because, at first glance, the international perspective favors dispersal of cultural goods to encourage the growth of a common human culture.⁶⁹ In contradistinction to a cultural internationalist view, most signatories of the UNESCO convention were poor source countries who favored a nationalist point of view.⁷⁰ Many of these same source nations did not have the resources to acquire an international array of cultural artifacts and face the frustrating prospect of being bled dry of their own cultural past by the high demand of market nations.⁷¹

The regulation of free trade appears as an additional specter in the social and political arenas. For poorer source nations, trade in cultural artifacts is a viable source of income.⁷² Naturally, for the nation to maximize its benefits from trade in cultural patrimony, it is necessary to ensure legal trade. The nation could legislatively claim ownership of undiscovered artifacts, reduce them to possessions, and sell them on the open market with all proceeds going to the state. Likewise, the nation could tax transactions in cultural patrimony. In either case, a nation would presumably recover some of the money spent on enforcing trade restrictions in cultural patrimony. However, without a legal market the source nation loses all of these possibilities.

These same socio-political considerations can be found analogously in the historical disparity between the military victor and the van-

65. *See id.* at 832.

66. *Id.*

67. *See* Bator, *supra* note 2, at 303.

68. *See id.* at 299–300.

69. *See* MERRYMAN & ELSEN, *supra* note 5, at 71.

70. *See* Merryman, *Two Ways*, *supra* note 6, at 843.

71. *See* Bator, *supra* note 2, at 303.

72. *See generally* Merryman, *Two Ways*, *supra* note 6 (discussing the effects of smuggled and stolen cultural objects).

quished.⁷³ This disparity gave rise to the cultural internationalist perspective⁷⁴ and is rooted in the concern for cultural property in war time. This perspective addresses not only the spoils of war, but also the needless destruction that tragically accompanies military conflict.

C. *Rise of Cultural Internationalism*

Historically, conquering nations have looted from their victims the “spoils of war,” that inevitably included artifacts of significant monetary and cultural value.⁷⁵ This plunder, until relatively recent times, has been acceptable as a “trophy to the victor.”⁷⁶ According to Roman tradition, art objects ranked first amongst the trophies and spoils they plundered from their vanquished foes.⁷⁷ This practice was renewed with vigor during the Renaissance,⁷⁸ and the Italian wars “gave Charles VIII and Louis XII a pretext for confiscating great numbers of manuscripts, statues, tapestries, and paintings from captured towns.”⁷⁹ The victorious army would then establish treaties “stipulating the transfer of those collections” that were used to quench the thirst for artistic and literary treasures.⁸⁰

Claims demanding the return of cultural patrimony have existed for nearly two centuries. The first concerned the cultural looting Napoleon conducted in the countries he conquered.⁸¹ After the fall of his empire, demands were made for the return of art works that Napoleon’s army pillaged from across Europe, which were in many cases returned.⁸² Formerly, these had been the rewards of the victor, the proverbial spoils of war. The turning of the tide continued across the Atlantic.

During the American Civil War, Francis Lieber prepared guidelines for the conduct of conquering armies with respect to cultural institutions

73. See generally MERRYMAN & ELSEN, *supra* note 5, at 1–68 (addressing this history specifically in Chapter 1: *Plunder, Reparations and Destruction*).

74. See *infra* Part II.

75. See MERRYMAN & ELSEN, *supra* note 5, at 1–2.

76. See *id.*

77. See *id.* at 2.

78. See *id.*

79. *Id.*

80. *Id.* For much of the eighteenth century, this cultural looting did not occur until the armies of France, under Emperor Napoleon, again sacked Europe to fill the coffers and museums of Paris. See *id.* (explaining why Paris became a center of learning and arts for the nineteenth and much of the twentieth century). Likewise, Britain acquired the Elgin marbles at the end of the eighteenth century from Thomas Bruce, the Seventh Earl of Elgin. See *id.* at 13–14. Lord Elgin had received permission to remove the pieces from the Turkish occupiers of Greece, which had at that point been part of the Turkish Empire for nearly four hundred years. See John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1897–99 (1985).

81. See MERRYMAN & ELSEN, *supra* note 5, at 3.

82. See *id.* When Napoleon abdicated in 1814, the tide turned against the great French collections and, beginning with the archives of the Pope, France was forced to return plundered property to Holland (as the newly created state of the Netherlands), Belgium, Austria, and Prussia. See *id.* at 6.

and products.⁸³ Eventually, similar guidelines were established that were used by modern armies during World War I.⁸⁴ After World War II, Greece again demanded the return of the Elgin Marbles in 1983, and many countries enacted nationalistic laws limiting or denying the export of cultural property.⁸⁵ Not to be stopped by formal permission requirements, the black market in antiquities flourished. This illegal market led to stronger containment policies, which in turn increased black market sales and further strengthened containment policies.⁸⁶ The Hague Convention of 1954 officially adopted an international view respecting the manifestations of culture.⁸⁷ This view was particularly rooted in an international perspective because it established guidelines on how to treat cultural patrimony under the premise that man respects and wants to preserve cultural patrimony because all nations have inherited its bounty.⁸⁸ Thus, the world has a stake in transactions concerning cultural patrimony, especially illicit transactions.

These illicit transactions in cultural patrimony occur in several forms.⁸⁹ Generally, these include theft from private individuals, theft from public institutions, and illegal export. The law sometimes views illegal export as theft from nations, if the nation has made an "ownership" claim⁹⁰ as opposed to merely limiting export. Problems also arise concerning current collections with questionable provenance that predate the enactment of protective statutes and are in circulation either privately or publicly.⁹¹ This was the case in *United States v. McClain*,⁹² where the Fifth Circuit refused to apply the National Stolen Property Act⁹³ to illegally exported artifacts because they were not necessarily "stolen" under the Supreme Court's interpretation of the Act in *United*

83. See Merryman, *Two Ways*, *supra* note 6, at 833. These (the Instructions for the Governance of Armies of the United States in the Field or Lieber Code) were promulgated by Union command as General Orders No. 100 on April 24, 1863. See *id.*

84. See *id.* at 834-35. The guidelines were from The Convention on Laws and Customs of War on Land, Hague IV, 1907, and related conventions. See *id.*

85. See MERRYMAN & ELSEN, *supra* note 5, at 24, 70.

86. See Merryman, *Two Ways*, *supra* note 6, at 848.

87. See *id.* at 836. The language of the Preamble to the Hague 1954 provides: "Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world . . ." *Id.* (quoting the Preamble to the 1954 Hague Convention, *supra* note 49).

88. See Merryman, *Two Ways*, *supra* note 6, at 836.

89. See MERRYMAN & ELSEN, *supra* note 5, at 76.

90. The U.S. Customs Service has created a de facto embargo authority to prevent importation into the United States of ancient art from countries asserting legislative claims of ownership. See *id.* at 182. This legislative assertion is distinct from one merely limiting export but not claiming ownership. Courts have not stretched the meaning of "stolen" to include merely illegally exported property. See *id.* at 176. Furthermore, there is some controversy as to whether a country can claim ownership without reducing the property in question to a physical possession. See *id.* at 189. This raises the question: when does a seizure by Customs constitute a taking?

91. See *id.* at 176-77.

92. 545 F.2d 988 (5th Cir. 1977).

93. 18 U.S.C. § 2314 (1994).

States v. Turley.⁹⁴ In *Turley*,⁹⁵ the Supreme Court determined the meaning of “stolen” as it was used in the Motor Vehicle Theft Act.⁹⁶ The Court indicated that there is not an “accepted common-law meaning” and it “is not a term of art.”⁹⁷ Furthermore, it “does not refer exclusively to larcenously taken automobiles; instead, a vehicle that had been rightfully acquired but wrongfully converted by a bailee was held to be ‘stolen’ within the meaning of the Act.”⁹⁸ The Court employed a broad definition of “stolen” and “observed that ‘stealing’ is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another and deprives the owner of the rights and benefits of ownership.”⁹⁹ However, illegally exported property is of a special nature. It is capable of being government owned but privately possessed. In *McClain*, the Court did not find dispositive evidence of a Mexican governmental declaration of ownership prior to the export.¹⁰⁰

The United States has historically repatriated property even if there is no regulatory mechanism in place.¹⁰¹ Lately, in response to pressures from foreign governments, such as Mexico, American courts have increasingly enforced foreign export laws on property illegally exported, but legally imported into the United States so long as the foreign country owns the property.¹⁰² There is at least one advantage to the de facto policy that has been adopted by U.S. Customs that limits legal import of illegally exported cultural property; a mere challenge by Customs has caused several dealers to return challenged property to the source country absent any determination of legal status by an American court.¹⁰³

94. See *McClain*, 545 F.2d at 994.

95. 352 U.S. 407 (1957).

96. See *id.* at 411.

97. *Id.* at 411–12.

98. *McClain*, 545 F.2d at 995 (citing *United States v. Turley*, 352 U.S. 407 (1957)).

99. *Id.* (citing *Crabb v. Zerbst*, 99 F.2d 562 (5th Cir. 1939)).

100. See *id.* at 1000.

101. See DARRABY, *supra* note 30, § 6.03, at 6–45. Museums have likewise historically repatriated cultural property. See *id.*

102. See MERRYMAN & ELSEN, *supra* note 5, at 177. U.S. Customs issued an advisory memorandum on November 15, 1977, which suggests that Customs may consider an importation that is “contrary to law”—any law—as a violation of 18 U.S.C. § 545 and therefore within the gambit of the criminal court system. See *id.* at 182–83. This would include property that is merely illegally exported under a protectionist rather than possessory legislative declaration by a foreign country. Customs may seize the material and determine whether the foreign country is asserting ownership. See *id.* at 184. If the country asserts ownership, Customs may repatriate the property. See *id.* This policy is in opposition to the congressional policy in the Convention on Cultural Property Implementation Act, 19 U.S.C. § 2601 (1994). See MERRYMAN & ELSEN, *supra* note 5, at 177. The congressional policy mandates an investigation into the facts surrounding the importation and an inquiry as to whether repatriation will discourage serious pillaging, under § 2602(a)(1). See MERRYMAN & ELSEN, *supra* note 5, at 177.

103. The United States enforces these foreign export laws, in contravention of private international law, through an application of the National Stolen Properties Act (NSPA), 18 U.S.C. § 2314 (1994). In essence, the U.S. government considers the illegally exported property “stolen” if owned, as opposed to protected, by the foreign government, and sues the erroneous owner for return of stolen property. See MERRYMAN & ELSEN, *supra* note 5, at 182–84. The 1970 UNESCO Convention limits application of foreign law to stolen museum and similar institutional property. See *id.* at 181. As men-

This “voluntary” repatriation is particularly attractive to American courts that may have difficulties “enforcing” foreign patrimony laws because the United States lacks similar export restrictions. The United States has few laws prohibiting the export of legal art.¹⁰⁴ These challenges by Customs have a valuable deterrent effect and a low transaction cost, because only the threat of, and not necessarily the legal capability to enforce, an embargo accomplishes the aim of deterring illegal export.¹⁰⁵

The analysis that follows focuses on cultural property in American museums and private collections. U.S. courts have operated under a traditional regime of property and international law that favors a nationalist point of view. The nationalist perspective in U.S. legislation forces parties to incur unnecessary transaction costs assuming an ultimate goal of cultural dissemination as part of a common cultural agenda. Abandoning a nationalist perspective and adopting an internationalist perspective to decide the fate of disputed cultural patrimony may more effectively account for the highly subjective valuations attributed to nationalist sentiment and account for market imperfections that create transaction costs, which prevent the efficient distribution of cultural patrimony.

III. ANALYSIS

A. *The Microeconomics of Cultural Patrimony Transactions*

Both the national and international points of view agree that cultural patrimony is a common concern of mankind and, to some degrees, belongs to the world as a whole. Yet, they differ in protection strategies.¹⁰⁶ The problem is that adopting a nationalist point of view runs counter to the basic premise of a common cultural heritage. Under the nationalist view, the source nation is solely responsible for declaring what artifacts qualify as cultural patrimony and thus are protected by specific international laws.¹⁰⁷ This source nation exercises a monopoly over “its” cultural heritage, a right resting on geography rather than on resources, oversight, and the ability to disseminate knowledge.¹⁰⁸

tioned above, Customs adopted a policy (within the Cultural Property Act) of investigating the facts and determining import restrictions that, in conjunction with restrictions of other countries, will “be of substantial benefit in deterring a serious situation of pillage.” *Id.* at 184. However, the actual Customs practice rests on a mere assertion of legislative ownership that is inconsistent with the aim of UNESCO and Congress, because this practice leaves U.S. courts enforcing foreign laws. *See id.* at 184.

104. *See* DARRABY, *supra* note 30, § 6.02, at 6-39 to 6-40. One exception is the Archaeological Resources Protection Act (ARPA). *See id.* § 6.02, at 6-40. The ARPA was codified in 16 U.S.C. § 470aa (1994).

105. *See* MERRYMAN & ELSEN, *supra* note 5, at 183-84.

106. For the international view, see generally 1954 Hague Convention, *supra* note 49. For the national view, see generally 1970 UNESCO Convention, *supra* note 37.

107. *See* 1970 UNESCO Convention, *supra* note 37, art. I, 96 Stat. at 2351, 823 U.N.T.S. at 234-36.

108. *See id.* art. IV-V, 96 Stat. at 2351, 823 U.N.T.S. at 236-38.

The nationalist view establishes an absolute right of ownership in the source nation.¹⁰⁹ However, this right exists primarily because of sentiment.¹¹⁰ This sentiment finds support in romantic notions of cultural integrity, the prevention of “racism” or cultural imperialism from the frequently more powerful market nation, and the sovereignty of source countries.¹¹¹ The strength of the nationalist view, especially in the 1970 UNESCO convention, is understandable considering that the majority of the voting members are source nations, many of them from the Third World.¹¹² Because preservation is a primary concern of cultural-patrimony disputes, a nationalist view leaves the importing nations responsible for discouraging illegal excavation of artifacts by requiring an export permit from the source nation.¹¹³ “Although based on their professional concern for objects and contexts, this position supports retentionism and allies these professionals [archaeologists, ethnographers, and museum personnel] with the nationalists.”¹¹⁴ These justifications, which are valid concerns, do not necessarily follow from the distribution of cultural patrimony, and focusing on these justifications may be counterproductive to fostering the common agenda—or socially optimal behavior—of a world cultural heritage. That is, protecting the context of excavation sites is a separate issue from the dissemination of cultural property. Moreover, much of the property in circulation has forever lost its context, and unnecessarily restricting the trade in cultural patrimony will create a market vacuum that encourages more illicit excavation.

Economic laws create sanctions to encourage socially optimal behavior. This “sanctioning” approach provides optimal results because sanctions are in effect a “price,” to which people will respond in a predictable way.¹¹⁵ Rational actors consider the price involved in their actions and compare this to the benefit they receive. If laws or circumstances raise the price of a certain activity, then the beneficial margin is thinned or eliminated. The ultimate negative sanction (as opposed to a positive encouragement or reward) should inflict the maximum punishment bearable.¹¹⁶ The question that must be asked is: What incentives does the law need to create in order to push the transaction toward economically—socially optimal—efficient levels? If society, through law or circumstance, creates a sanction that divests an owner or possessor of artifacts with questionable provenance, then presumably parties will take

109. See generally *id.*, 96 Stat. at 2351, 823 U.N.T.S. at 234–36 (delineating those categories of property that a source nation may designate as cultural property).

110. See MERRYMAN & ELSEN, *supra* note 5, at 71, 200.

111. See *id.* at 199–210.

112. See *id.* at 71.

113. See *id.* at 72.

114. *Id.*

115. See COOTER & ULEN, *supra* note 8, at 3.

116. See *id.* at 5. If the maximum punishment is “unbearable,” one reaches a point of diminishing return, because every unit of “punishment” beyond the bearable amount will go “unpaid” and one will waste effort trying to collect this. See *id.*

greater care and practice due diligence¹¹⁷ to establish legitimate provenance prior to acquiring an artifact. Thus, the aim of protecting the integrity of artifacts and archaeological sites is furthered through creating a controlled cost that a party must internalize as part of its valuation of an artifact.

Based on economics, one must assume that possession of cultural patrimony ought to reside in the party that values it the most. If, for example, country *X* claims that an urn in an American museum is culturally significant enough to be considered part of *X*'s cultural heritage, country *X* ought to gain possession of the urn; provided, country *X* "values" the urn more than the American museum values it. Accounting for the obligations and costs that cultural patrimony imposes on a possessor, country *X* ought to gain possession of the property through an economically efficient transaction that is socially optimal. In considering obligation costs, it is important that society adopts an objective standard for defining material qualifying as cultural patrimony and thereby entitled to cultural patrimony's special treatment.

According to economic theory, society should achieve this socially optimal policy at the lowest possible cost. First, the parties need to internalize the cost of the transaction; this minimizes the cost to society and raises the awareness of the parties to the actual costs of the transaction.¹¹⁸ These are costs such as provenance research, social-esteem value, and good title, all of which will be discussed below. Furthermore, economics suggests that the party able to bear each cost and risk, such as risk-of-loss-to-title and risk-of-destruction, most inexpensively ought to carry the burden of internalizing that portion of the transaction.¹¹⁹ Because one party may be able to absorb the costs more inexpensively than the other, that party will likely realize greater benefit in comparison and should value the artifact more.¹²⁰ For example, a nation without a well-developed museum system will incur greater operating and obligation costs than will most U.S. museums, which tend to have sophisticated preservation, display, and protection measures in place.

Significant among the various transaction costs is provenance research.¹²¹ Due diligence ensures the provenance of an artifact. Provenance affects value because it "instills confidence that (1) the object is authentic, and (2) ownership is, and has been, unimpaired, and certain prior owners may effectively enhance value by providing the artworks with a cachet."¹²² However, there is no uniform rule on how to establish

117. See DARRABY, *supra* note 30, § 2.13, at 2-55 (noting due diligence is the "persistent and continuous inquir[y] through multiple channels").

118. See COOTER & ULEN, *supra* note 8, at 3.

119. See *id.* at 6.

120. See *id.* at 10-11.

121. See DARRABY, *supra* note 30, § 2.11, at 2-49.

122. *Id.*

provenance.¹²³ Furthermore, provenance research is costly—an additional facet of a provenance “transaction cost.”¹²⁴ Ironically, the art world generally warrants authenticity regardless of ownership or provenance issues.¹²⁵ Naturally, authenticity is a principal concern of buyers. They need to know what they are purchasing and its value. However, it is important to note that provenance is internalized in the concept of the bona fide purchaser for value (BFP). BFPs lose the protective mantle of a good-faith purchase when they acquire property that they suspect, but do not investigate, is of questionable provenance. Traditionally, to maintain the protection afforded a BFP, the purchaser must incur the “cost of acquiring additional information about title . . . [even when the cost] would be prohibitively high.”¹²⁶ This is efficient because the probability that the provenance is false is likewise high.¹²⁷ Economics raises the question: Who is in the better position to research provenance?

The second cost is that of social-esteem value. There is a value associated with owning a work of art. This is a value the owner derives from the social-esteem society places upon the owner.¹²⁸ Simply put, society respects the patrons of the arts and affords them a socially superior role, i.e., respect.¹²⁹ However, when provenance is questionable, the patron is discouraged from displaying the artwork for fear that the authorities will seize it.¹³⁰ The purchaser-patron recognizes the social-esteem value to be gained from public acknowledgment of ownership and patronage in the arts.¹³¹ Therefore, economics suggests that the purchaser’s subjective value will increase, and the purchaser will thus be able to absorb additional costs, e.g., provenance research, and still value the property enough to gain it over a possessor whose subjective value is less.

The third cost, verifying a good, clear title, is really a function of due diligence research into provenance ensuring ownership and possessory

123. See *id.* § 2.11[2], at 2-50.

124. See *id.* § 2.11[3], at 2-51. The two facets of provenance transaction cost include: first, the simple presence or absence of provenance, which adds or diminishes value if the rule of law demands authenticated provenance; and second, the research costs in establishing provenance must be incurred at some point. See William M. Landes & Richard A. Posner, *The Economics of Legal Disputes over the Ownership of Works of Art and Other Collectibles*, in *ESSAYS ON THE ECONOMICS OF THE ARTS* 186 (Victor Ginsburgh & Pierre-Michel Menger eds., 1996). A complicating factor is that ambiguous provenance is preferable to negative-established provenance because of potential liability. See *id.* at 185–89. If it is determined through provenance research that the artifact in question is stolen or wrongfully exported or imported, then liability for the repatriation of the artifact could naturally flow to the current possessor—now fully informed of the artifact’s provenance. See *id.* Conversely, ignorance may be blissful and not raise any sticky questions as to an artifact’s authenticity or provenance. See *id.*

125. Landes & Posner, *supra* note 124, at 187.

126. *Id.* at 190–97.

127. See *id.*

128. See *id.* at 181.

129. See *id.*

130. See *id.* at 186.

131. See *id.* at 181.

interests while yielding the beneficial social-esteem value. Good title is a cost closely aligned with provenance. The risk of losing good title lessens with the investment in provenance research.

The total cost of the transaction, the “social cost,” is the sum of the private internalized cost realized by the parties and the additional cost involuntarily imposed on third parties as an “external cost.”¹³² This external cost is one cause for market failure, that is, general equilibrium is not achieved and society is forced to endure societal-marginal costs and benefits that are not equal.¹³³ The mis-distribution of cultural patrimony exacts an enormous external cost on the public by denying open access, failing to preserve and protect artifacts, and inflicting an opportunity cost. These costs to society represent a significant interest society has as a party—even an involuntary one—to the transaction. The law has looked at third-party (society) interests of this broad nature in the context of intellectual property.

B. *Ownership of Cultural Patrimony*

The existence of a common cultural heritage and our collective dependence on it creates a resource analogous to intellectual property. Therefore, it is useful to consider whether the operation of cultural patrimony laws should be roughly analogous to the operation of intellectual property law. In patent law, those with a new and useful idea only get temporary control over that idea.¹³⁴ Society values that knowledge, or rather open access to knowledge, to such an extent that the knowledge eventually moves into the common domain.¹³⁵ Likewise, the efforts of source nations to control the dissemination of cultural patrimony are counter to the interests of society in moving that property to the common domain.¹³⁶ Unfortunately, cultural nationalism comports with an American sense of private property and the laws that govern exclusive ownership of a resource or artifact. However, society may deem those artifacts qualifying as cultural patrimony as public property despite often being in private hands.

132. See COOTER & ULEN, *supra* note 8, at 41.

133. See *id.* at 40.

134. See *id.* at 133–34.

135. See SAX, *supra* note 1, at 3.

136. Cultural patrimony is property significant to world culture, inclusive of the significance it serves for a source country. See MERRYMAN & ELSEN, *supra* note 5, at 229; see also DARRABY, *supra* note 30, § 6.03[1], at 6-44 to 6-45. The national product that the world has a legitimate stake in ought to be disseminated and protected for the world community, e.g., penicillin should be part of the world domain; whereas, the Liberty Bell or the Wailing Wall in Jerusalem should remain part of the nation's contemporary culture because of the current role each plays with no detriment to world culture as a result. There is no detriment because they are protected, have situational integrity, and are accessible. See generally SAX, *supra* note 1 (discussing the inherent interest the public has in certain significant artifacts and discoveries that pushes “private” property into the public sphere).

Society recognizes common ownership in some resources, such as the sea and public institutions;¹³⁷ it recognizes private ownership in most goods, such as houses and cars. Thus, under our current legal regime man feels most comfortable declaring ownership either wholly private or public. However, society does impose public obligations on some private ownership; for instance, the public takes a stake in the fact that a factory cannot wantonly pollute—even on its own land. The current legal regime deals with the repatriation of cultural property in essentially four ways with respect to the common notion of property in American courts: (1) self-help; (2) purchase on the open market; (3) repatriation through bilateral agreement; and (4) litigation or negotiation.¹³⁸

C. *Repatriation of Cultural Property*

Four methods are currently used to secure the repatriation of cultural property. First, the party demanding the return of the property can use self-help; they can “steal” it back from the current possessors.¹³⁹ Because there is no legal remedy, stealing may be convenient. However, it “is the antithesis of [the] law.”¹⁴⁰ One example of self-help is the case of a “patriotic Mexican (a lawyer!) [who] stole a rare Aztec Codex (only four are known to exist; the rest were burned by zealous Spanish priests in Cortez’s wake) from the Bibliothèque Nationale in Paris and ‘repatriated’ it to Mexico.”¹⁴¹ This hardly seems a viable solution upon which to base repatriation policy. Furthermore, condoning self-help will not solve the problem of actual ownership. It only addresses possession.

Second, as an alternative to self-help, the claimant may seek to purchase the property on the open market or through a privately arranged transaction if the cultural property is important enough and purchase proves to be the most cost-effective way of securing its return.¹⁴² This ensures an accurate market-based price; however, governments may afford cultural patrimony a lower priority than other pressing issues, such as feeding their citizens.¹⁴³ In these cases, a valid right to cultural patrimony

137. See SAX, *supra* note 1, at 6.

138. See MERRYMAN & ELSEN, *supra* note 5, at 197.

139. See *id.*

140. *Id.*

141. *Id.*

142. See *id.* This may seem an excellent way of avoiding litigation, which is invariably expensive and frequently drawn out. However, other factors tend to limit the effectiveness of this option (other than the principle of paying for that which one believes one is entitled). Namely, most cultural patrimony is in museums and not for sale. The cultural product may be expensive on the open market, and the claimant would have to compete with other interested parties. Moreover, the purchase of cultural patrimony tends to be a low priority in art-supplying states where financial resources may be severely limited and other priorities, such as national defense, demand greater financial attention. See *id.*

143. See *id.* Additionally, there is an incremental problem with purchasing (and recognizing comparative value between bids). That is, the last dollar is worth less to a rich purchaser than to a poor one. In fact, the poor purchaser may have a greater *subjective* valuation, but the poor purchaser’s bid will still be significantly less than the rich purchaser’s bid, which is only of greater *objective* value. This greater objective value may represent a lower subjective value.

may never hold a position on the national agenda because of competing survival expenses. This really only ensures that wealthy nations can reclaim an interest in property at the expense of contending interests in poorer nations.

Third, the claimant may seek repatriation through a bilateral agreement, such as Mexico and the United States have regarding the return of Pre-Columbian artifacts.¹⁴⁴ This arrangement takes advantage of established diplomatic channels and may ensure lower transaction costs through predictability of outcome and known parties. This arrangement moves cultural patrimony disputes into the international sphere. Thus, the outcomes of many potential disputes can be prearranged and negotiated by experienced parties with a diminished element of emotionalism.

Last, the claimant and the possessor may enter litigation or may opt to negotiate a settlement¹⁴⁵ so as to avoid litigation, lowering transaction costs and capturing as much of a cooperative surplus as is possible. Irrespective of legal ownership, U.S. governmental entities could use the power of eminent domain to ensure that the common world agenda is advanced.

D. Eminent Domain

The Fifth Amendment of the U.S. Constitution guarantees due process of the law and just compensation for property taken for public use.¹⁴⁶ The federal government may employ the power of eminent domain “when it is necessary and proper to the effectuation of one of the federal government’s enumerated powers.”¹⁴⁷ The government may turn to Article I, Section 8, “the Commerce Clause,” to support the exercise of eminent domain.¹⁴⁸ The application of this power to real property is already familiar.¹⁴⁹ For example, the government has the power to regu-

144. *See id.* The U.S.-Mexico Treaty of Cooperation of March 24, 1971, established procedures for the recovery and return of stolen cultural patrimony. *See* The 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, July 17, 1970, U.S.-Mex., 22 U.S.T. 494. These bilateral agreements may also be hammered out between institution officials and the source nation. *See* MERRYMAN & ELSEN, *supra* note 5, at 125, 219. For example, the source nation may agree to replace certain returned items with comparable artifacts or ones that will complement another part of the institution’s collection. *See id.* at 197.

145. *See* MERRYMAN & ELSEN, *supra* note 5, at 197. For example, the source nation may agree to drop a pending or threatened law suit, rotate collections, or make loans of culturally significant artifacts in return for the repatriation of specific pieces. *See generally id.* (discussing art law and the arrangements made to effectuate repatriation). There is a natural advantage to letting the interested and informed parties negotiate a settlement rather than pulling in the comparatively uninformed courts, which will then face not only ownership issues, but also valuation considerations they are ill-equipped to make. *See* COOTER & ULEN, *supra* note 8, at 82.

146. *See* U.S. CONST. amend. V.

147. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 437 (5th ed. 1995) (citing PHILIP NICHOLS, THE POWER OF EMINENT DOMAIN 23 (1909)).

148. *See* U.S. CONST. art. I, § 8, cl. 3.

149. *E.g.*, *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926) (stating that a land-use regulatory ordinance was a valid exercise of police power because there was a sufficient public interest).

late interstate commerce, and it may take real property through the exercise of eminent domain to ensure the building of roads and railways. Moreover, the Constitution leaves open the possibility for takings of personal property for public use by the plain meaning of the language in Section 8 and the Fifth Amendment:

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;¹⁵⁰ . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.¹⁵¹ . . . No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.¹⁵²

There is no distinction between taking real as compared to personal property for public use. “[A] taking may occur as to an intangible property interest where the owner had a reasonable expectation that such property would not be used by the government and such expectation was impaired.”¹⁵³ Thus, the power of the federal government to regulate ownership of cultural patrimony by relying on their enumerated power to regulate commerce, including international trade, creates the possibility of efficiently shifting ownership of cultural patrimony.

IV. RECOMMENDATION: WHO OWNS THE PAST? ESTABLISHING “OWNERSHIP”

It is a fundamental of economics that a resource should go to the party who values it the most.¹⁵⁴ Essentially, laws should encourage the party most capable of protecting, preserving the integrity of, and distributing cultural patrimony to “value” it the most. The party who internalizes these necessary transaction costs prevents them from being thrust upon society as an external cost to the transaction. Therefore, in deciding a dispute between a source country and an American museum, courts should consider not only the ownership status of an artifact qualifying as cultural patrimony, but should also consider the above mentioned transaction costs. Notions of stewardship, framed in a cultural internationalist perspective, may prove valuable in efficiently assigning ownership rights to cultural patrimony.

150. U.S. CONST. art. I, § 8, cl. 3.

151. *Id.* art. I, § 8, cl. 18.

152. *Id.* amend. V.

153. NOWAK & ROTUNDA, *supra* note 147, at 439.

154. *See* COOTER & ULEN, *supra* note 8, at 94.

A. *Stewardship and the Internationalist Perspective: Basis for Assigning Ownership Rights*

Society could structure the law to impose legal obligation on the ownership of cultural patrimony that serves the public good, while still allowing private ownership—a sort of “stewardship.” Stewardship ensures the preservation, protection, and distribution of cultural patrimony.¹⁵⁵ For example, society could require a museum or private owner to make cultural artifacts available for study and display. A very minimal restraint on the owner’s freedom to completely exclude others and dispose of cultural patrimony as they see fit only slightly hinders their reasonable private enjoyment. Should the owner fail to observe certain minimums, then the state ought to seize the artifact and compensate the owner. Stewardship is important once the court assigns the ownership right; however, to properly assign that right while concurrently recognizing society’s external interests in cultural patrimony, courts ought to approach their decisions from an international viewpoint.

The 1970 UNESCO Convention forces courts to recognize the declaration by a Member State that certain property constitutes cultural patrimony. Additionally, the common-law precedent clearly states that a thief cannot pass good title; thus, the courts again are forced to assign ownership irrespective of sheer economic efficiency and socially optimal results. However, the courts do have room to exercise discretion over property that is illegally exported but legally imported under the holding in *McClain*. Furthermore, the courts have considerable discretion in assigning ownership in cases of ambiguous provenance and in upholding exercises of eminent domain.

If U.S. courts adopt an international viewpoint, American common law will more readily comport with the premise of a common cultural heritage. It is mankind who “declares” an artifact significant to the common culture through uniform standards.¹⁵⁶ The world culture ought to have a say in the designation of and access to cultural patrimony. This is especially important if the common culture deems something significant¹⁵⁷ that the source country does not deem so or is unable to protect due to financial priorities and limited resources.¹⁵⁸ The world culture

155. See SAX, *supra* note 1, at 68–72.

156. A nation still ought to be able to protect culturally significant property that falls outside those uniform standards that it—subjectively—believes warrants heightened protection.

157. “To the extent that artifacts contain ideas, knowledge, and inspiration upon which further work relies, and insofar as they are amenable to private ownership and disposal (as they generally are), the fate of such objects concerns the community as a whole.” SAX, *supra* note 1, at 2.

158. See *id.* at 1–2. Sax notes that under American law, one could entertain one’s friends on a Saturday evening by throwing darts at a privately owned Rembrandt. See *id.* Although there is no legal recourse, society would certainly feel a loss. See *id.* It has not been directly harmed because it does not own the Rembrandt, nor does it presumptively have access to it; however, there is the long-term view that even though the Rembrandt is temporarily privately owned, in the future it may be accessible. See *id.* at 68. Society, in effect, has suffered an opportunity cost at the hands of a missile-lobbying eccentric.

creates a common agenda that trumps the rights of any one party involved.

The international view accommodates this common agenda. This agenda exists because societies generally value scientific endeavor, artistic creations, and scholarly achievement.¹⁵⁹ The loss of “objects—a rare fossil, or an archive of unique historical material—containing ideas and information upon which those activities build and rely affects the community at large because it impedes that common agenda.”¹⁶⁰ This results because the achievements of each generation “rel[y] on the accomplishments of those who went before, genius and the work it produces are a sort of common pool in which we all have an interest.”¹⁶¹ With these interests in mind, courts need to assign ownership rights.

B. Proposal for Ownership Status

First, considering ownership status, cultural patrimony can be separated into three categories: property with established provenance that is legally owned; property that has a questionable provenance though “legally owned”; and those artifacts that are clearly stolen from a source country.¹⁶² The property that is held with valid title ought to remain in the hands of its current owner, subject to condemnation and compensation powers of the federal government. The artifacts with questionable provenance should be repatriated to the source country under a rebuttable presumption of ownership. Those artifacts that have been clearly stolen ought to be returned to the source nation at its own expense.

1. Property with Valid Title

If a museum possesses valid title, one supported by established provenance, it should retain ownership of the cultural good. This serves a two-fold process. First, it creates a reliance on established provenance and encourages museums to acquire only property that has been investigated with due diligence as to its provenance and ownership history. Second, so long as the museum preserves the artifact and, at least occasionally, displays it, two of the principle aims of cultural patrimony are served—namely, distribution (or accessibility) and preservation. The third aim, “integrity,” will rarely be significant because most artifacts are possessed in their entirety, and the original context is usually irretrievably lost.

Once ownership is established, a nation’s claim for the repatriation of cultural patrimony should be considered on a government-to-

159. *See id.* at 2–3.

160. *Id.* at 2.

161. *Id.*

162. *See supra* notes 89–100 and accompanying text.

government level. If the source country is able to convince the U.S. government that it values the artifact more than the current possessor and will comply with preservation and distribution standards, then the U.S. or state government can exercise its power of eminent domain and seize the cultural patrimony (that should be considered ultimately “public property” even if privately possessed).¹⁶³ The government will exercise this power only if the source country compensates the legal owner to a point of reasonable indifference while also providing for preservation and display standards.¹⁶⁴

The internationalist view, as opposed to a nationalist view creating an ultimate ownership right in the source country, is economically efficient. The “nation-to-nation transaction”¹⁶⁵ avoids the transaction costs involved in bringing the original parties together because of the diplomatic structure already in place. Furthermore, if the owner has an unreasonable subjective value in the artifact, this will not prevent a socially optimal transaction from occurring because presumably the negotiants will bargain from an objective standard that accommodates reasonable subjective values. This lowers the transaction costs and allows the parties to achieve the economically efficient end.¹⁶⁶

The source country only needs to pay the value reasonably necessary to make a rational owner indifferent. Because the party that values the artifact the most (excepting unreasonable subjective value) ulti-

163. The doctrine of eminent domain is well established in real property law. It is fundamental that one of the sovereign powers of a government is its ability to take privately held property if it renders adequate compensation to the owner. See NOWAK & ROTUNDA, *supra* note 147, at 434 (citing 1 JAMES BRADLEY THAYER, *CASES ON CONSTITUTIONAL LAW* 952–53 (1895)); see also U.S. CONST. amend. V. The exercise of eminent domain must not only render adequate compensation, but also must be incidental to one of the federal government’s enumerated powers; however, state governments are not required under federal law to justify the exercise of eminent domain incidental to an enumerated power. See NOWAK & ROTUNDA, *supra* note 147, at 437.

164. The question remains, what if the source country ultimately does not comply with some sort of international preservation and display standard? Presumably the government would not seize the artifact until the source country has paid the owner just compensation because the government itself is ultimately responsible for just compensation. That compensation would have to leave the owner at least indifferent as to retaining the artifact or surrendering it for compensation. Likewise, the government should only pursue this exercise of power under reasonable assurances from reputable institutions that the artifact will be properly preserved and displayed. It is interesting to note that this exercise of government power could justifiably be at the behest of one other than the source country. For example, if country *X* had a dearth of French-Impressionist works, then it could perhaps make a case for acquiring one from an institution or collector. This furthers the aim of cultural patrimony laws in that the common culture is made more accessible to another corner of the world. The owners are no worse off, less unreasonable subjective value, because they are compensated to the point of reasonable indifference rather than merely receiving “just compensation.” In essence, the government lowers the transaction costs of the two parties who perhaps otherwise would not have the incentive to negotiate.

165. This transaction is “Coasean” in the sense that if transaction costs were zero, the parties would reach an agreement assigning the right to the party that values it the most. See *infra* note 166 and accompanying text.

166. The Coase theorem simply states that when transaction costs are zero, the parties will reach an efficient use of resources from private bargaining. See COOTER & ULEN, *supra* note 8, at 85 (discussing Nobel Prize winner, Professor R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)).

mately acquires it, the transaction is Pareto-efficient. (Pareto efficiency provides that at least one party is better off and no one is worse off as a result of a transaction, that is, the gainers compensate the losers to the point of indifference as to the transaction.¹⁶⁷) Furthermore, because of preservation and display standards imposed on the acquirer, society is at least as well off, if not better off.

2. *Property with Questionable Provenance*

For property with questionable provenance, the law should create a rebuttable presumption of ownership in the source nation. Essentially this theory creates a rebuttable presumption that the property was stolen, which the possessor may rebut in two ways. First, the museum/owner can bear the burden of proving ownership through legitimate provenance. This would require a due diligence investigation into previous ownership and origin akin to a title search on property. The museum, as an innocent purchaser or BFP, would always bear the risk (cost) of provenance in that they would be subject to lose title should the property prove to be stolen.¹⁶⁸ This promotes due diligence in researching provenance.¹⁶⁹ It is pragmatic to create a statutorily defined time span within which to trace back title. A statute could provide the museum/owner with the indicia of legitimate ownership over a substantial time period, curing any defect in title.¹⁷⁰ Second, the museum/owner can make a case for ownership based on the social value of its services—preservation and distribution—the strength of the provenance to the extent it exists, and cash or property compensation it offers to the source country. Naturally, if the source country can provide socially optimal preservation and distribution, and the provenance is just as likely to be legitimate as illegitimate, then all other things being equal, the source nation should acquire ownership in the interest of discouraging looting.

As in the case where ownership and title are absolutely legitimate and vest in the museum, the federal or state government can exercise its power of eminent domain if the government ensures adequate compensation. Again, the source nation should provide that compensation¹⁷¹ to

167. See COOTER & ULEN, *supra* note 8, at 44. Note that, from the perspective of those with unreasonable subjective valuations, this transaction at best is Kaldor-Hicks efficient. That is, the “gainers gain more than the losers lose.” *Id.*

168. See Landes & Posner, *supra* note 124, at 186–87.

169. “This will often be the case with recently discovered antiquities, a class of works in which the documenting of previous ownership can be highly uncertain.” *Id.* at 191.

170. This period of time could be analogous to common-law property notions of adverse possession for those works held in a classically adverse manner, i.e., open, continuous, exclusive, adverse, and notorious. This would create a twenty-year span, after which title vests in the adverse possessor.

171. In this case, compensation should be “just” as opposed to an amount calculated to make a rational person with a reasonable valuation indifferent. The difference is justified by the questionable ownership and lack of due diligence on the part of the museum/owner. This makes a curative period especially important because of the problems of tracing provenance beyond a certain point, regardless

the museum/owner. The rebuttable presumption serves an efficient international view because the museum/owner can most inexpensively bear the burden of proving due diligence in investigating provenance. Furthermore, the museum/owner can rebut the presumptive repatriation by showing how it alone can best preserve, protect, and distribute the cultural patrimony.

3. *Stolen Patrimony*

A corollary consideration to the preservation and dissemination of cultural patrimony is the preservation of *in situ* artifacts and the deterrence of outright theft. The law should discourage looting and the market for looted goods in order to preserve the archaeological context of artifacts. It must create a deterrence for crime because illegal transactions in cultural patrimony obviously run counter to the socially optimal transaction.

Therefore, those artifacts that are clearly stolen ought to be returned to the source nation. This compensates the source nation for a harm it has suffered at the hands of the museum or private owner who is directly responsible for creating the harm to the extent the owner failed to exercise proper due diligence in researching provenance. The strict enforcement of this repatriation will strongly encourage both the seller and buyer to investigate and establish the provenance of an artifact prior to a transaction. The seller will have a limited legitimate market if the seller does not carry the burden of investigation because buyers will certainly consider the risk of losing their purchase if its provenance is questionable.¹⁷²

Buyers will have an incentive to only deal with reputable sellers because they must rely on the seller's opinion as to provenance. Naturally, this may drive some artifacts underground. However, it may not be economically efficient to flush out every private owner of questionable artifacts. Museums hold much of this disputed property, and, logically, the "owner" must be known before a dispute can arise. Despite the fact that most American museums are technically private, there is little risk that these essentially public institutions will hide their collections or move them onto the black market. Because museums are also frequently nonprofit organizations, the federal government could mandate collection disclosure to prevent disputed property from going underground. Any institution that does not disclose its entire collection, including relevant provenance, would lose the valuable nonprofit tax treatment. Addition-

of due diligence. If due diligence can be proved by the museum/owner, then they should be entitled to the greater level of compensation accorded to a legal owner.

172. Although beyond the scope of this note, it makes practical sense to establish some sort of chain-of-title limitation, as in real estate transactions. Perhaps state or federal government could enact a curative statute that would establish title in the hands of an owner able to trace legitimate provenance back to some statutorily established period.

ally, disclosure ensures that scholars will know the whereabouts of certain artifacts, promoting the distribution of knowledge, a central goal of cultural patrimony law.¹⁷³

V. CONCLUSION

Cultural patrimony carries indicia of public property despite its frequent private ownership. Actual ownership of culturally significant property ought to take on an obligation to preserve, protect, and distribute the inherent value therein. This inherent value is important to world culture, and our resolution of issues concerning ownership, or “stewardship,” should be settled with this goal in mind. By adopting a cultural internationalist view, U.S. courts will be better able to account for the transaction costs associated with cultural property and settle ownership in an economically efficient manner that assigns ownership to the party who values the artifact the most. This valuation necessarily must comport with the internalization of costs associated with preserving the artifact for the benefit of world culture while avoiding the externalization of preservation costs. Thus, a socially optimal distribution may be reached. No one can truly own the past, and workable policies addressing world culture must start with an international perspective.

173. A concern remains — what if the source country is unable to protect, preserve, and distribute the cultural patrimony? One possible solution is to hold the property in trust for the source country. The museum or even private owner could continue to possess the artifact so long as they conformed with stewardship requirements that would mandate preservation measures and, at a minimum, ensure limited public access to the artifact. For example, a private possessor may have to provide the artifact for display a few weeks at a time, several times a year. The expenses of preservation and display could be charged as a lien against the ultimate legal interest the source country has in the artifact.

