

# “Finders Keepers, Losers Weepers!”: Why the United Kingdom Should Respond to Repatriation Claims and the Lesson the United States Can Teach

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## ABSTRACT

Throughout human history, imperial powers colonized other countries and, subsequently, took much of their cultural property. Today, previously looted countries actively seek the return of their cultural property while former colonial powers face the decision of whether to return appropriated artifacts and remains. The United States and United Kingdom (U.K.) serve as two juxtaposing case studies, highlighting the willingness to and resistance against the repatriation of cultural property.

The United States maintains a large and successful repatriation program. Under the 1990 Native American Graves Protection and Repatriation Act, federally funded museums must inventory and return cultural property with connections to Native American tribes. Conversely, the U.K. enacted two weak laws to govern the return of cultural property: the Human Tissue Act of 2004 and the Holocaust (Return of Cultural Objects) Act of 2009. Because neither U.K. Act mandates the repatriation of relevant cultural property, the Acts leave the decision of whether to repatriate to the museums benefiting from possessing the property.

The British public largely abhors their government’s strong stance of ownership over previously colonized countries’ cultural property—notably the British claim of ownership over the Parthenon Marbles, Benin Bronzes, and Rosetta Stone. Furthermore, international organizations promote repatriation and reproach the U.K.’s resistance toward repatriation. With little to no international or domestic support regarding their retention of such property, the U.K. should reconsider a practical repatriation framework.

This Comment recommends that the U.K. should look to the United States’s successful framework and adopt a similar approach. Nevertheless,

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the Comment also addresses issues with the United States’s framework of dealing with cultural property—principally, the lack of an exception for scientific studies—and presents the U.K. with strategies to mediate such issues. This Comment ultimately proposes legislation that would be amenable to the U.K., with the hope that the legislation balances the public’s desire to repatriate cultural property with the British government’s apparent desire to retain as much cultural property as possible.

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## I. INTRODUCTION

The age-old adage goes: “finders keepers.”<sup>1</sup> Coined by ancient Roman playwright Plautus in 211 B.C.,<sup>2</sup> the phrase acknowledges the idea that a person can keep an item they find and does not have to return it.<sup>3</sup> In modern vernacular, “losers weepers” routinely follows “finders keepers,”<sup>4</sup> signifying a collective dissatisfaction—or, at minimum, frustration—with the adage.<sup>5</sup> Many can relate to feeling displeased by the result of “finders keepers, losers weepers”—from those on the playground to those in the workplace to those in the international community.

The United Kingdom (U.K.) seemingly relied on the phrase “finders keepers” by housing a massive collection of nearly eight million works at the British Museum in London,<sup>6</sup> much of which the British government looted during the age of colonialism.<sup>7</sup> With a national policy such as “finders keepers,” there are inevitably “losers weepers.” Such is the story for many modern countries that had their cultural property stolen by the British Empire.<sup>8</sup> Notably, the U.K. acquired three of the British Museum’s most contested artifacts—the Parthenon Marbles, Benin Bronzes, and Rosetta Stone—under this questionable “finders keepers” philosophy.<sup>9</sup>

The ancient Greeks constructed the Parthenon—a temple dedicated to the Greek goddess Athena and a testament to the strength of Athens—in the fifth century B.C.<sup>10</sup> The Parthenon Marbles, created between 447

1. See Lawrence Estavan, *Roman Law in Plautus*, 18 STAN. L. REV. 873, 892 (1966) (explaining that the phrase “finders keepers” first appeared in Ancient Rome).

2. See *id.*

3. See *Finders keepers (losers weepers)*, MERRIAM-WEBSTER DICTIONARY, <https://perma.cc/J3TD-ES76> (last visited Oct. 22, 2023).

4. See *id.*

5. See generally *id.* (providing that a person who loses an item does not have a right to that item anymore).

6. See Kashif Khan, *John Oliver on India’s Demand to Get the Koh-e-Noor Diamond Back*, YOUTUBE (Feb. 10, 2017) (citing Last Week Tonight), <https://perma.cc/48SZ-3QFT> (stating that the British government’s unofficial motto toward repatriation is “finders keepers . . . cheerio!”); see also James Acaster, *James Acaster on the Absurdity of the British Empire*, YOUTUBE (Nov. 12, 2019), <https://perma.cc/34QQ-LQNL> (stating that the British government’s stance toward repatriation can be summed up as, “finders keepers, shut up!”).

7. See Dalya Alberge, *British Museum is World’s Largest Receiver of Stolen Goods*, *says QC*, GUARDIAN (Nov. 4, 2019) (citing GEOFFREY ROBERTSON, WHO OWNS HISTORY? ELGIN’S LOOT AND THE CASE FOR RETURNING PLUNDERED TREASURE (2019)), <https://perma.cc/FLC2-JK3J> (“The trustees of the British Museum have become the world’s largest receivers of stolen property, and the great majority of their loot is not even on public display.”).

8. See *Contested Objects from the Collection*, BRIT. MUSEUM, <https://perma.cc/B24X-DZZ8> (last visited Oct. 22, 2023).

9. See *id.*

10. See *The Parthenon Sculptures*, BRIT. MUSEUM, <https://perma.cc/F2NV-XAGU> (last visited Oct. 22, 2023).

B.C. and 432 B.C., consist of the decorations once present in the Parthenon.<sup>11</sup> Nearly two thousand years later, in the eighteenth century, the Ottoman Empire occupied and governed Greece.<sup>12</sup> According to Lord Elgin,<sup>13</sup> the British Ambassador to the Ottoman Empire, he received approval from the Ottoman Sultan to remove large portions of the Parthenon Marbles and transport them to the U.K. in the early 1800s.<sup>14</sup> However, although a plethora of contemporaneous Ottoman documents exists within Istanbul's archives, no one ever found the original documentation allegedly permitting Lord Elgin to remove the decorations.<sup>15</sup> Consequently, Greece maintains its ownership of all the Parthenon Marbles and, since its independence from the Ottoman Empire in 1832, continuously requests their return from the U.K. to no avail.<sup>16</sup>

Greece's story is not unique; Nigeria faces a similar loss.<sup>17</sup> Thousands of metal plaques and sculptures, collectively referred to as the Benin Bronzes, once decorated the royal palace and ancestral alters of the

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11. *See id.* The decorations consisted of the following:

a frieze which shows the procession of the Panathenaic festival (the commemoration of the birthday of the goddess Athena); a series of metopes (sculpted relief panels) depicting the battle between Centaurs and Lapiths at the marriage-feast of Pirithous; and figures of the gods and legendary heroes from the temple's pediments.

*Id.*

12. *See id.*

13. *See Elgin Marbles*, BRITANNICA (July 20, 2023), <https://perma.cc/K64L-VYV7>. Accordingly, the Parthenon Marbles are frequently called the Elgin Marbles, *see id.*, or the Parthenon Sculptures. *See The Parthenon Sculptures*, *supra* note 10. For simplicity, this Comment refers to the artifacts as the Parthenon Marbles.

14. *See The Parthenon Sculptures*, *supra* note 10. As of 2023, the British Museum holds 15 metopes, 17 pedimental figures, and 75 meters of the original frieze, which constitute roughly half of the original Parthenon Marbles. *See id.*

15. *See* David Rudenstein, *Did Elgin Cheat at Marbles?*, 270 NATION 30, 33 (2000). Rudenstein casts doubt on the British claim that the U.K. purchased the Parthenon Marbles from the Ottoman Empire. *See id.* Rudenstein stated:

Yet no researcher has ever located this Ottoman document and when I was in Istanbul, I searched in vain for it or any copy of it, or any reference to it in other sorts of documents or a description of its substantive terms in any related official papers. Although a document of some sort may have existed, it seems to have vanished into thin air, despite the fact the Ottoman archives contain an enormous number of similar documents from the period.

*Id.*

16. *See The Modern History of the Acropolis Sculptures (19<sup>th</sup> Century On)*, ACROPOLISOFATHENS.GR, <https://perma.cc/UZ8Y-ERQW> (last visited Oct. 22, 2023). Nonetheless, the country made its first official appeal for the Parthenon Marbles' return in 1983. *See* John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1882 (1985) (“[T]he plea [for repatriation] has been made before, but [this request] appears to be the first official request by the Greek Government for return of the Parthenon sculptures.”).

17. *See Benin Bronzes*, BRIT. MUSEUM, <https://perma.cc/4GMD-29LK> (last visited Oct. 22, 2023) (explaining that the British Museum holds over 900 objects originating from Nigeria).

Kingdom of Benin—now, modern Nigeria.<sup>18</sup> In 1897, after local Benin chiefs attacked a British trading expedition on the way to Benin City,<sup>19</sup> the U.K. launched the infamous Benin Expedition.<sup>20</sup> The British took Benin by force, burned its royal palace, and looted thousands of Benin Bronzes.<sup>21</sup> Currently, more Benin Bronzes decorate the halls of the British Museum than anywhere else in the world.<sup>22</sup> Although several other countries also housed these artifacts, those countries either returned their collections or will return them upon Nigeria’s request.<sup>23</sup>

Much to Egypt’s frustration, the famed Rosetta Stone likewise sits in the British Museum.<sup>24</sup> Engraved in three languages, the ancient Egyptian relic—created in 196 B.C.—heavily contributed to the deciphering and understanding of ancient Egyptian hieroglyphics.<sup>25</sup> During Napoleon’s campaign to conquer Egypt in 1799, French troops uncovered the stone near modern Rashid, Egypt.<sup>26</sup> When British forces defeated the French in 1801, the British confiscated all artifacts discovered by the French in Egypt, including the Rosetta Stone.<sup>27</sup> In 2003, Egypt began campaigning for the artifact’s return, calling the Rosetta Stone an “icon of Egyptian identity.”<sup>28</sup>

Evidently, many countries now request that the British Museum repatriate, or return, the cultural property taken from their borders hundreds of years ago. Yet, the international and domestic debates raised by this topic led to vastly different legal frameworks.<sup>29</sup> For example,

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18. *See id.*; *see also The Raid on Benin, 1897*, SMITHSONIAN NAT’L MUSEUM AFRICAN ART, <https://perma.cc/X5G2-DG4X> (last visited Oct. 22, 2023).

19. *See Benin Bronzes*, *supra* note 17. Seven British delegates and 230 of the expedition’s African carriers died in the attack. *See id.*

20. *See id.*

21. *See id.*

22. *See id.*

23. *See* Alex Marshall, *Germany Begins Return of Benin Bronzes to Nigeria*, N.Y. TIMES (July 1, 2022), <https://perma.cc/V962-KCU6> (stating that Germany began returning Benin Bronzes in 2022 and that France intends to begin returning cultural property to Africa in the near future); *see also US Returns Benin Bronzes Stolen by British Colonial Forces*, AL JAZEERA (Oct. 12, 2022), <https://perma.cc/99WJ-ZEC2> (stating that the United States voluntarily returned its collection of 29 Benin Bronzes to Nigeria on October 11, 2022).

24. *See Everything You Ever Wanted to Know About the Rosetta Stone*, BRIT. MUSEUM, <https://perma.cc/NH42-NWPJ> (last visited Oct. 22, 2023).

25. *See id.*

26. *See id.*

27. *See id.*

28. Charlotte Edwards & Catherine Miller, *Egypt Demands Return of the Rosetta Stone*, TELEGRAPH (July 20, 2003, 12:01 AM), <https://perma.cc/F65V-W7A7>.

29. *Compare* Holocaust (Return of Cultural Objects) Act 2009, c. 16 § 2(1) (U.K.) (allowing—but not mandating—repatriation of property lost due to the Holocaust), *with* Native American Graves Protection and Repatriation Act, Pub. L. No. 101–601, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C. §§ 3001–3013) (mandating repatriation of Native American and Hawaiian property).

unlike the U.K., the United States showcases a deep willingness to repatriate cultural property.<sup>30</sup> The United States enacted legislation requiring the return of Native American and Hawaiian remains and artifacts,<sup>31</sup> passed further legislation to force repatriation when caselaw fell short,<sup>32</sup> and willingly returned cultural property to its country of origin, such as returning Benin Bronzes to Nigeria.<sup>33</sup>

To decide whether the U.K. should similarly adopt repatriation legislation, Part II of this Comment begins by distinguishing several characterizations of “cultural property,” pulling from international treaties and domestic law.<sup>34</sup> Then, Part II identifies the moral and legal arguments that pervade the debate on repatriation.<sup>35</sup> After exploring the immense public support for repatriation and the applicable international frameworks,<sup>36</sup> Part II illustrates how the United States and U.K. hold highly divergent views on returning cultural property, despite both countries holding titles as “finders keepers.”<sup>37</sup>

Part III begins by discrediting the argument frequently put forth by the U.K. to declare that repatriation is impossible and subsequently concludes that the U.K. can repatriate cultural property held within the British Museum.<sup>38</sup> Next, this Comment acknowledges the successes of the United States’s repatriation legislation while noting the law’s pitfalls, such as a lack of focus on scientific progress.<sup>39</sup> Because of the U.K.’s well-documented desire to maintain its collection and the United States’s omission of a strong scientific studies exception, Part III reasons that the U.K. should adopt a repatriation framework like the United States’s but with specific deviations to follow a more balanced approach.<sup>40</sup> After presenting amenable legislation,<sup>41</sup> this Comment concludes by analyzing how the proposed legislation would affect British ownership of the Parthenon Marbles, Benin Bronzes, and Rosetta Stone.<sup>42</sup>

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30. See National Museum of the American Indian Act, Pub. L. No. 101–185, 103 Stat. 1336 (1989) (codified as amended at 20 U.S.C. §§ 80q–80q-15); see generally 25 U.S.C. §§ 3001–3013.

31. See 20 U.S.C. § 80q–9a(b); see also 25 U.S.C. § 3005(a).

32. See Water Infrastructure Improvement for the Nation Act, Pub. L. No. 114–322, § 1152, 130 Stat. 1628 (2016).

33. See *US Returns Benin Bronzes Stolen by British Colonial Forces*, supra note 23 (stating that the United States voluntarily returned its collection of 29 Benin Bronzes on October 11, 2022).

34. See *infra* Section II.A.

35. See *infra* Section II.B.

36. See *infra* Sections II.C–D.

37. See *infra* Sections II.E–F.

38. See *infra* Section III.A.

39. See *infra* Section III.B.

40. See *infra* Section III.C.

41. See *infra* Section III.C.

42. See *infra* Section III.D.

## II. BACKGROUND

“Repatriation” is the process of returning cultural property to its country of origin.<sup>43</sup> Thousands of years ago, while coining the phrase “finders keepers,” the ancient Romans simultaneously laid the groundwork for the concept of repatriation.<sup>44</sup> Although known for conquering and looting,<sup>45</sup> the ancient Romans strongly believed in the value of art and enacted subsequent restrictions on their ability to take such works.<sup>46</sup> Moreover, ancient Roman statesman Cicero denounced the theft of artwork,<sup>47</sup> which renowned French archeologist Quatremère de Quincy would later use to condemn Napoleon’s looting.<sup>48</sup>

Cicero’s speeches marked a new line of thinking, which diverged from the ancient rule of war—“[t]o the victor belong the spoils”<sup>49</sup>—and toward a newfound principle of limiting plunder and leaving artwork at its place of origin.<sup>50</sup> Hence, repatriation is not a novel concept but a proposed legal obligation on conquerors that many politicians and scholars supported for centuries.<sup>51</sup> Nevertheless, repatriation outgrew its ancient Roman origins and, today, not only limits the taking of art but of “cultural property” in general.<sup>52</sup>

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43. See Carol A. Roehrenbeck, *Repatriation of Cultural Property—Who Owns the Past? An Introduction to Approaches and to Selected Statutory Instruments*, 38 INT’L J. LEGAL INFO. 185, 186 (2010) (defining “repatriate” as “to return again to one’s native country” (quoting THE OXFORD ENGLISH DICTIONARY (Vol. VIII 460 1933))).

44. See *id.* at 191 n.26 (citing MARGARET MILES, ART AS PLUNDER: THE ANCIENT ORIGINS OF DEBATE ABOUT CULTURAL PROPERTY (2008)).

45. See *id.* at 191 (“The Romans glorified plunder and systematically carried off works of art belonging to subjugated peoples.”).

46. See Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 677, 678–79 (2009). Ancient Romans adopted principles to govern “the behavior of a conquering army, the size of booty that could be taken, and what should be done with it.” *Id.* In particular, “ancient Romans believed in restrictions on plunder of some public art and all religious art after the defeat of the enemy.” Roehrenbeck, *supra* note 43, at 191 n.26 (citing MILES, *supra* note 44).

47. See Roehrenbeck, *supra* note 43, at 191 n.26. Ancient Roman statesman Cicero wrote speeches to prosecute the former governor of Sicily, Verres. See *id.* In his speeches, Cicero noted the many crimes Verres committed but focused on—and condemned—how Verres confiscated foreign art during his rule. See *id.*

48. See Gerstenblith, *supra* note 46, at 679 n.14 (“Relying on the ideas of . . . Cicero, Quatremère posited that the ‘best’ art should be held *in* its original context, which was ‘necessary for its full understanding and appreciation.’” (quoting MILES, *supra* note 44)).

49. See Roehrenbeck, *supra* note 43, at 191 (quoting LEONARD D. DUBOFF ET AL., ART LAW: CASES AND MATERIALS 533 (2d ed. 2010)).

50. See *id.* at 191 n.26 (“Cicero’s speeches and anecdotes served to influence later generations in developing philosophies on plunder during war and repatriation.”).

51. See Lyndel V. Prott, *Repatriation of Cultural Property*, 1995 U.B.C. L. REV. 229, 229 (1995).

52. Compare Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, ch. I, art. 2, May 14, 1954, 249 U.N.T.S. 215 [hereinafter 1954 Hague Convention] (drafting provisions for the protection of “cultural property” generally), *with*

A. *What is “Cultural Property”?*

Initially, the 1954 Hague Convention provided a wide-ranging definition for cultural property: “the term ‘cultural property’ shall cover, irrespective of origin or ownership . . . movable or immovable property of great importance to the cultural heritage of every people.”<sup>53</sup> Subsequently, the 1970 United Nations Educational, Scientific and Cultural Organization (“UNESCO”) Convention and the International Institute for the Unification of Private Law (“UNIDROIT”) Convention on Stolen or Illegally Exported Cultural Objects adopted the same definition for cultural property: cultural property means “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to [specific] categories.”<sup>54</sup> These comprehensive enumerated categories likewise include wide-ranging descriptions, such as “property relating to history.”<sup>55</sup>

Although the Conventions’ definition of cultural property does not mention human life forms,<sup>56</sup> the United States’s Native American Graves Protection and Repatriation Act (“NAGPRA”), enacted in 1990, explicitly includes “human remains.”<sup>57</sup> Therefore, this Comment will define

Roehrenbeck, *supra* note 43, at 191 n.26 (specifying that ancient Romans only protected art).

53. 1954 Hague Convention, *supra* note 52, ch. I, art. I. The Hague Convention states that property of great importance includes “monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections . . .” *Id.*

54. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 art. 1, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention]; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, ch. I, art. 2, June 24, 1995, 2421 U.N.T.S. 457 [hereinafter UNIDROIT Convention].

55. See 1970 UNESCO Convention, *supra* note 54, art. 1(b). Other categories provide similar wide-ranging descriptions, such as “[p]roducts of archeological excavations,” “[a]ntiquities more than one hundred years old,” “[o]bjects of ethnological interest,” and “[p]roperty of artistic interest.” *Id.* art. 1(c), (e)–(g).

56. See *id.* art. 1 (not including human remains within the definition of “cultural property”); see also UNIDROIT Convention, *supra* note 54, ch. I, art. 2. *But see* 1970 UNESCO Convention, *supra* note 54, art. 1(a) (classifying specimens of “fauna, flora, minerals and anatomy” as cultural property). The inclusion of certain life forms as cultural property under the 1970 UNESCO Convention art. 1(a) represented a growing desire to include life under the umbrella of cultural property. See Roehrenbeck, *supra* note 43, at 190.

57. See 25 U.S.C. § 3001(3)(A). The Act also includes associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony. See *id.* §§ 3001(3)(B)–(D).



“cultural property” as historic objects of great importance to a specific culture, including human remains.<sup>58</sup>

### B. Repatriation Philosophies

Two leading philosophies provide arguments for and against repatriation: cultural internationalism and cultural nationalism.<sup>59</sup> The U.K. adopted a cultural internationalist standpoint, defending its retention of cultural property.<sup>60</sup> In contrast, the United States adopted a cultural nationalist perspective, assuming a responsibility to repatriate.<sup>61</sup>

#### 1. Cultural Internationalism: An Argument Against Repatriation

Cultural internationalism represents the idea that “cultural property belongs to the global community, and the country with the better resources to care for another country’s cultural property should retain possession.”<sup>62</sup> Museums, thus, play the role of an “agent of culture” by spreading cultural knowledge among the wide audience of their patrons.<sup>63</sup> Under this philosophy, pieces like the Parthenon Marbles, Benin Bronzes, and Rosetta Stone should remain at the British Museum because the museum can allegedly provide the artifacts with the best protection, care, and exposure.<sup>64</sup>

Supporters of cultural internationalism give several arguments for the philosophy. First, foreign-led excavation teams unearthed cultural property that likely would still be undiscovered to this day without their labor; thus, their countries have a right to benefit from the property.<sup>65</sup>

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58. See Roehrenbeck, *supra* note 43, at 190. This Comment includes human remains in its definition of cultural property due to the international desire to include life forms. See *id.* In addition, human remains in the United States and U.K. sparked repatriation debates, which helped inform each country’s current repatriation framework. See *infra* Sections II.E.3., II.F.2.

59. See *infra* Section II.B.

60. See Martin Bailey, *Shifting the Blame*, FORBES (Jan. 21, 2003, 12:01 AM), <https://perma.cc/54EX-UFX8>.

61. See 25 U.S.C. § 3005.

62. Roehrenbeck, *supra* note 43, at 190 (citing John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 836 (1986)).

63. See DECLARATION OF THE IMPORTANCE AND VALUE OF UNIVERSAL MUSEUMS (2002), <https://perma.cc/5BQZ-CNLX>; see also Christine K. Knox, *They’ve Lost Their Marbles: 2002 Universal Museum’s Declaration, The Elgin Marbles and the Future of the Repatriation Movement*, 29 SUFFOLK TRANSNAT’L L. REV. 315, 336 (2006).

64. See Roehrenbeck, *supra* note 43, at 190 (“In this view [of cultural internationalism], treasures such as . . . the [Parthenon] Marbles in the British Museum should remain in those respective museums since they are allegedly in a location where they are protected, cared for and available for all the world to see.”).

65. See Christopher B. Donnan et al., *Archeology and Looting: Preserving the Record*, 251 SCIENCE 498, 498–99 (1991).

Second, because much of the property at stake is thousands of years old, many countries requesting repatriation maintain little connection to the cultures or ethnicities of the ancient peoples who produced the works.<sup>66</sup> Third, cultural property may be safer in the relatively impervious West.<sup>67</sup> Fourth, Western cities contain the world's biggest museums and experience large bouts of tourism; therefore, Western cities provide a prime location for increasing exposure to cultural property.<sup>68</sup>

The British Museum adopted a cultural internationalist stance to defend its retention of other countries' cultural property, as evidenced in the Museum's 2003 joint statement with the Louvre in Paris and the Pergamon Museum in Berlin.<sup>69</sup> In the statement, the Museums declared that "objects acquired in earlier times must be viewed in the light of different sensitivities and values reflective of that earlier era" and that "museums serve not just the citizens of one nation but the people of every nation."<sup>70</sup>

## 2. Cultural Nationalism: An Argument for Repatriation

By contrast, cultural nationalism recognizes cultural property as belonging to its nation of origin.<sup>71</sup> The philosophy emphasizes cultural definition and recognizes that artifacts can provide comfort, community, and identity to their country of origin.<sup>72</sup> The 1970 UNESCO Convention prominently adopted a cultural nationalist outlook by asserting that "the illicit import, export, and transfer of ownership of cultural property is one

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66. See JAMES B. CUNO, WHO OWNS ANTIQUITY?: MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE 140 (2008) (arguing that cultural nationalists "perpetuate the falsehood that living cultures necessarily derive from ancient cultures").

67. See Roehrenbeck, *supra* note 43, at 189–90 ("In many instances source countries lack the resources to adequately protect their borders against invading countries or individual looters."); see also Nicole Klug, *Protecting Antiquities and Saving the Universal Museum: A Necessary Compromise Between Conflicting Ideologies of Cultural Property*, 42 CASE W. RES. J. INT'L L. 711, 719 n.41 (2010) ("[Cuno] argues that antiquities clearly cannot be best preserved in their presumed countries of origin, citing the situations in Afghanistan and Iraq as prime examples supporting this contention." (citing CUNO, *supra* note 66, at 13)).

68. See Klug, *supra* note 67, at 720; see also Edwards & Miller, *supra* note 28 (stating that the annual number of viewers would drop from 5.5 million to roughly 2.5 million if the British Museum repatriated the Rosetta Stone to the Cairo Museum).

69. See Bailey, *supra* note 60.

70. *Id.*

71. See *id.* (stating that cultural nationalism represents the idea that "a nation's cultural property belongs within the borders of the nation where it was created").

72. See Raechel Anglin, Note, *The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide*, 20 YALE J.L. & HUMANS. 241, 242 (2008); see also Roehrenbeck, *supra* note 43, at 191 (citing SHARON WAXMAN, LOOT: THE BATTLE OVER THE STOLEN TREASURES OF THE ANCIENT WORLD (2008)) ("[Repatriation is] a conflict over identity, and the right to reclaim the objects that are tangible symbols of that identity.").

of the main causes of the impoverishment of the cultural heritage of the countries of origin . . . .”<sup>73</sup> Subsequent international treaties and domestic law similarly adopted this philosophy, as seen in the UNIDROIT Convention pushing for repatriation and the United States’s NAGPRA pioneering mandatory domestic repatriation legislation.<sup>74</sup>

Cultural nationalists rebut two main arguments put forth by cultural internationalists.<sup>75</sup> First, adherents assert that the foreign-led excavation argument justifies colonialism and its abuses.<sup>76</sup> Colonial powers needed to physically control countries to extract their cultural property and then justified this extraction as a means to understand the people that they colonized.<sup>77</sup> Even further, the creation of large national museums frequently coincides with colonialism, exemplified by the British Museum’s founding in 1753.<sup>78</sup>

Second, cultural nationalists argue that host countries should help countries of origin improve their preservation facilities instead of inappropriately focusing on whether cultural property is safer in the Western world.<sup>79</sup> Furthermore, cultural property may not be automatically safer in Western hands.<sup>80</sup> For instance, Western colonial powers took most

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73. 1970 UNESCO Convention, *supra* note 54, art. 2(1).

74. See UNIDROIT Convention, *supra* note 54, ch. II, art. 3; see also 25 U.S.C. §§ 3001–3013.

75. See Donnan et al., *supra* note 65, at 498–99 (describing the cultural internationalist argument that unearthed cultural property should go to the country that led the excavation); see also Roehrenbeck, *supra* note 43, at 189–90 (describing the cultural internationalist argument that cultural property is safer in Western museums).

76. See 1970 UNESCO Convention, *supra* note 54, art. 10(b); see also FELWINE SARR & BÉNÉDICTE SAVOY, THE RESTITUTION OF AFRICAN CULTURAL HERITAGE: TOWARD A NEW RELATIONAL ETHICS, MINISTÈRE DE LA CULTURE 12 (2018). (“Politically, it is of first importance that our governing officials . . . have thorough knowledge of native races subject to them—and this is the knowledge that anthropology can give them—for such knowledge can teach what forms of taxation are suitable to particular tribes, or to the stage of civilization . . .”).

77. See SARR & SAVOY, *supra* note 76, at 18–20 (“We could multiply the number of examples such as this one that prove that the acquisition of cultural objects and resources and their transfer to the capital of Europe were in fact at the heart of—and not at the margins—of the colonial enterprise.”).

78. See *The British Museum Story*, BRIT. MUSEUM, <https://perma.cc/K9SQ-Y2PQ> (last visited Oct. 22, 2023); see also CUNO, *supra* note 66, at 140 (positing that colonizers established museums within their borders to serve as repositories for looted work and remain geographically out of reach to the cultures that created the works).

79. See John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 362 (1989).

80. See generally *Napried Exploration*, NAPRIED, <https://perma.cc/B6GG-DNV2> (last visited Oct. 22, 2023) (describing how an Italian art collector lost thousands of Cyprian artifacts at sea); see also Helena Smith, *British Damage to Elgin Marbles ‘Irreparable’*, GUARDIAN (Nov. 12, 1999, 1:10 PM), <https://perma.cc/2J9G-VLAP> (explaining how the British Museum permanently damaged the Parthenon Marbles).

cultural property in question by force,<sup>81</sup> lost or damaged much of the property in transport,<sup>82</sup> and often damaged the property during preservation processes.<sup>83</sup> The British Museum itself caused “irreparable damage” to the Parthenon Marbles while attempting to clean the decorations in the 1930s.<sup>84</sup> Although that incident took place decades ago, the British Museum is under scrutiny today for the crumbling infrastructure of the block that houses the decorations and for a roof leak in the adjacent gallery.<sup>85</sup>

Additionally, while adherents concede that the number of people who get to view an artifact will likely decrease if the host museum repatriates the artifact,<sup>86</sup> the cultural property’s country of origin will see boosts to its economy.<sup>87</sup> Nigeria, specifically, hopes that the return of Benin Bronzes from countries around the world will catalyze its burgeoning tourism industry.<sup>88</sup>

### C. Increase in Public Support for Repatriation

Cultural nationalism became the dominating repatriation theory in recent years as support for cultural internationalism dwindled both internationally and domestically.<sup>89</sup> After World War II, international

81. See *Benin Bronzes*, *supra* note 17 (describing how British forces looted the Benin Bronzes during their attack on Benin City).

82. See *Napried Exploration*, *supra* note 80. An Italian American art collector looted over 35,000 artifacts from Cyprus. See *id.* Later the ship carrying the artifacts, the *Napried*, set sail from Beirut to the United States, where it sunk, losing roughly 5,000 ancient pieces to the sea. See *id.*

83. See Smith, *supra* note 80.

84. See *id.*

85. See Cristina Ruiz, *Britain’s Major Messaging Failure on Parthenon Marbles*, ART NEWSPAPER (May 25, 2022), <https://perma.cc/TYR5-T4VA>. Ruiz reported the following:

In 2018, Greek television . . . recorded leaks in the Assyrian and Greek section of the museum multiple times. Last August [2021], when the Parthenon display was closed, we photographed a large fan positioned in front of the ancient frieze in gallery 18, again, presumably to increase air circulation in the gallery. Last October [2021], we photographed an ancient Assyrian frieze in gallery seven that was covered in plastic because of a faulty actuator on the nearby window.

*Id.*

86. See Edwards & Miller, *supra* note 28.

87. See *How the Return of the Benin Bronzes Could Spark Growth in Nigerian Tourism*, NIGERIAN OBSERVER (Sept. 21, 2022), <https://perma.cc/5QQX-UENP> (stating that “[m]useums are well known for bringing tourists to governments”).

88. See *id.* (“In particular, those in tourism, travel, and services that work with tourists and international visitors are set to see the biggest impact [economically from the return of Benin Bronzes] . . .”).

89. See Merryman, *supra* note 62, at 850 (“[T]he voice of cultural internationalism is seldom heard and less often heeded in the arenas in which cultural policy is made [since the 1970s.]”); see also Carlie Porterfield, *Europe’s Museums, Collectors Are Returning*

treaties and agencies began to disapprove vehemently of the retention of cultural property.<sup>90</sup> Since the 1954 Hague Convention, international treaties trended toward cultural nationalism, pushing for repatriation and recognizing the importance of the cultural identity embodied in the property.<sup>91</sup> More so, UNESCO, a specialized agency within the United Nations (U.N.), remonstrated with the U.K. “to reconsider its stand [of not repatriating the Parthenon Marbles] and proceed to a bona fide dialogue with Greece on the matter.”<sup>92</sup> Yet, the U.K. pushed UNESCO’s advice aside, citing how UNESCO works with governments and not museum boards.<sup>93</sup>

Domestically, the U.K. garners little support in its retention of other countries’ cultural property.<sup>94</sup> To illustrate, 78% of British citizens support the Greek claim to the Parthenon Marbles.<sup>95</sup> Further, about 85% of Brits believe museums in general are not responding well to the growing pressure to repatriate.<sup>96</sup>

Nevertheless, other museums in the U.K. echo public opinion and respond affirmatively to repatriation requests.<sup>97</sup> Oxford University

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*Artifacts to Countries of Origin Amid Fresh Scrutiny*, FORBES (Oct. 27, 2021, 12:00 PM), <https://perma.cc/7VT7-CXUM>. Porterfield states:

The push for repatriation of [cultural property] with questionable histories has become more widespread in recent years, which experts attribute to advances in research techniques, a rise in interest in art looted by Nazis during World War II and a renewed focus on the issue of racism and colonialism in the art world after worldwide Black Lives Matter protests kicked off [in 2020].

*Id.*

90. See Merryman, *supra* note 62, at 850.

91. See 1970 UNESCO Convention, *supra* note 54, art. 2(1) (“[Convention parties] recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property . . . .”); see also UNIDROIT Convention, *supra* note 54, ch. II, art. 2–3 (identifying what qualifies as cultural property and mandating the return of such property to its country of origin).

92. U.N. Secretariat, *Follow-up to the Recommendations and Decisions Adopted During the Twenty-Second Session*, ¶ 23, Intergov’t Comm. for Promoting the Return of Cultural Prop. to its Countries of Origin or its Restitution in Case of Illicit Appropriation, U.N. Doc. ICPRCP/22/23.COM/5.Rev (2022).

93. See *The Parthenon Sculptures: The Trustees’ Statement*, BRIT. MUSEUM, <https://perma.cc/ZDQ7-BDQK> (last visited Oct. 22, 2023).

94. See Paula Tsoni, *Parthenon Sculptures Should Be Repatriated*, *Sunday Times Readers Say*, GREEK REP. (Aug. 8, 2022), <https://perma.cc/6QY2-7ABB>.

95. See *id.* But see Blair Rejects Elgin Marbles Return, CNN (Mar. 24, 2001, 2:05 PM), <https://perma.cc/897Q-9V8S> (quoting former British Prime Minister Tony Blair as saying, “[t]he [Parthenon Marbles] belong to the British Museum . . . which does not intend to return any part of the collection to its country of origin”).

96. See Geraldine Kendall Adams, *Are Museums Responding Well to the Growing Public Discourse on Repatriation?*, MUSEUMS ASS’N (Feb. 12, 2019), <https://perma.cc/YQF3-SK6W>.

97. See *Oxford University May Return Items Looted from Nigeria by Britain in 1897*, GUARDIAN (July 20, 2022, 4:37 AM), <https://perma.cc/CB7Y-KBM5>; see also Tomisin

received a request from a Nigerian government agency to return 97 Benin Bronzes taken during the Benin Expedition of 1897.<sup>98</sup> The University officially supported the Nigerian claim on June 20, 2022, and submitted the case to the Charity Commission for England and Wales,<sup>99</sup> recommending a transfer of the Benin Bronzes' legal title to the Nigerian agency.<sup>100</sup> Along with other institutions in the U.K.,<sup>101</sup> Cambridge University followed Oxford's lead by recommending the transfer of 116 Benin Bronzes housed in the University back to Nigeria.<sup>102</sup> Therefore, other institutions in the U.K. support repatriation claims and, in cases that necessitate approval from the Charity Commission, present a British government agency with opportunities to allow repatriation.<sup>103</sup>

#### *D. Lack of an International Repatriation Framework*

Although international agencies attempt to guide repatriation efforts, no mandatory international framework exists.<sup>104</sup> Nevertheless, the 1970 UNESCO Convention provides the most recent applicable international framework governing the repatriation of cultural property.<sup>105</sup>

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Awosika, *The UK's Largest Benin Bronzes Repatriation*, REPUBLIC (Aug. 4, 2022), <https://perma.cc/4DZ9-Y7US>.

98. See *Oxford University May Return Items Looted from Nigeria by Britain in 1897*, *supra* note 97.

99. See *id.* The Charity Commission regulates charities in England and Wales to ensure confidence in the public's donations. See *The Charity Commission*, GOV.UK, <https://perma.cc/3W9F-J9XN> (last visited Oct. 22, 2023).

100. See Awosika, *supra* note 97. The Charity Commission did not publish a timeline on when it expects to review the University's recommendation. See *id.*

101. See *US Returns Benin Bronzes Stolen by British Colonial Forces*, *supra* note 23. In August 2022, the Horniman Museum and Gardens announced that it will repatriate its collection of 72 Benin Bronzes to Nigeria. See *id.* The Glasgow City Council in Scotland agreed to return 17 Benin Bronzes to Nigeria on April 14, 2022. See Tomisin Awosika, *Scotland Has Agreed to Return 17 Benin Bronzes to Nigeria*, REPUBLIC (Apr. 19, 2022), <https://perma.cc/6V2K-S99P>. Likewise, the Great North Museum: Hancock, U.K., pledged to return an artifact taken from Nigeria described as "a brass stave with bird—used as a musical instrument during ceremonies." Awosika, *supra* note 97.

102. See Awosika, *supra* note 97. If the Charity Commission approves of the recommendations from Oxford and Cambridge, then the Universities' repatriation of Benin Bronzes would serve as the largest restitution ever made by the U.K. to an African country. See *id.*

103. See *id.*; see also Awosika, *supra* note 101; see also *Oxford University May Return Items Looted from Nigeria by Britain in 1897*, *supra* note 97; see also *The Charity Commission*, *supra* note 99.

104. See 1970 UNESCO Convention, *supra* note 54, art. 19 (stating that a country must ratify the Convention); see also UNIDROIT Convention, *supra* note 54, ch. V, art. 15 (stating that a country is only bound to the Convention after it decides to ratify the Convention).

105. See Roehrenbeck, *supra* note 43, at 193. But see UNIDROIT Convention, *supra* note 54, pmbl. (clarifying the 1970 UNESCO Convention by supplementing uniform rules for repatriation claims). Although a country does not need to implement the UNIDROIT Convention into domestic law, the Convention only applies from the date of ratification.

Groundbreaking at its inception, the 1970 UNESCO Convention requires signatories to “take necessary measures . . . to prevent museums . . . from acquiring cultural property originating in another State which has been illegally exported after entry into force of this convention . . . .”<sup>106</sup> The United States ratified and implemented the Convention in the 1980s.<sup>107</sup> Remarkably, the U.K. also ratified the Convention and implemented corresponding legislation,<sup>108</sup> even though the Convention uses language reminiscent of cultural nationalism.<sup>109</sup>

Once a country signs the 1970 UNESCO Convention, the country must make a good-faith effort to prevent illicit trading within its borders.<sup>110</sup> However, the Convention only applies to cultural property acquired after the Convention’s creation in 1970.<sup>111</sup> Therefore, even as signatories, the United States and U.K. have no obligation to return artifacts acquired before 1970.<sup>112</sup> Resultingly, countries of origin to much cultural property housed in the British Museum have no legal recourse under the Convention because the U.K. acquired the artifacts well before 1970.<sup>113</sup> Without a more applicable international framework, domestic legislation thus mandates whether a country must repatriate cultural property and, if so, how.

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*See id.* ch. V, art. 15. Neither the United States nor the U.K. ratified the Convention. *See State Parties: UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995)*, UNIDROIT, <https://perma.cc/8BTN-A2HX> (last visited Oct. 22, 2023). Therefore, even if ratified by the U.K., the Convention would not provide legal recourse for long-lost cultural property, such as the highly contested artifacts at the British Museum, because the British acquired the artifacts in the 1800s. *See supra* Part I.

106. 1970 UNESCO Convention, *supra* note 54, art. 7(a). The prospective law must be implemented by corresponding domestic legislation. *See id.*

107. *See State Parties List in Alphabetical Order*, UNESCO, <https://perma.cc/HY6X-484D> (last visited Oct. 22, 2023). The United States accepted the treaty on September 2, 1983, *see id.*, and implemented the 1970 UNESCO Convention through legislation on December 22, 1987. *See* 19 U.S.C. §§ 2604–2607.

108. *See State Parties List in Alphabetical Order*, *supra* note 107. The U.K. accepted the treaty on January 8, 2002, *see id.*, and implemented a similar law in 2003. *See Dealing in Cultural Objects (Offences) Act 2003*, c. 27 (U.K.).

109. *See* 1970 UNESCO Convention, *supra* note 54, art. 2(1) (“[T]he export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin.”).

110. *See id.*

111. *See id.*

112. *See id.*

113. *See supra* Part I (describing how the British took the Parthenon Marbles, Benin Bronzes, and the Rosetta Stone during the 1800s).

*E. The United States and Repatriation*

Born out of the British Empire and its Thirteen Colonies, the United States began as an extension of the British conquest of western lands.<sup>114</sup> Initially settling on eastern shores, colonists moved inward onto lands historically occupied by Native American tribes, pushing the tribes further west.<sup>115</sup> As the United States expanded beyond the 48 contiguous states, the country similarly acquired lands inhabited by Native Hawaiian organizations.<sup>116</sup> Thus, the United States includes sites of Native American and Hawaiian cultures and, resultantly, an abundance of cultural property belonging to these groups.<sup>117</sup>

The United States not only discovered Native cultural property but actively perpetuated its removal.<sup>118</sup> In particular, in 1868, the Surgeon General ordered all Army field officers to excavate and send him Native American remains.<sup>119</sup> The Surgeon General gave this order “so that studies could be performed to determine whether the Indian was inferior to the white man due to the size of the Indian’s cranium.”<sup>120</sup>

Given the government’s long-standing condonation of disturbing graves, removing the contents of Native gravesites became a common practice.<sup>121</sup> In due course, the government acquired hundreds of thousands of Native American human remains and funerary objects.<sup>122</sup> The government subsequently housed the cultural property in museums, including, notably, the Smithsonian Institution (the “Smithsonian”).<sup>123</sup>

After decades of Native Americans pleading for the return of their ancestors’ cultural property, the Senate Select Committee on Indian Affairs held a hearing to discuss the viability of federal repatriation

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114. *See Britain in the New World*, U.S. HIST., <https://perma.cc/EQ9H-CM7N> (last visited Oct. 22, 2023).

115. *See* STATE HIST. SOC’Y IOWA, IOWA DEP’T CULTURAL AFFS., AMERICAN INDIANS AND WESTWARD EXPANSION (2004), <https://perma.cc/YQ32-S3F5>.

116. *See Annexation of Hawaii, 1898*, U.S. DEP’T STATE, <https://perma.cc/SM23-QWWA> (last visited Oct. 22, 2023).

117. *See generally* STATE HIST. SOC’Y IOWA, *supra* note 115 (indicating that the United States is made up of land formerly occupied by Native tribes and organizations).

118. *See* H.R. REP. NO. 101-877, at 9 (1990).

119. *See id.*

120. *Id.* The House Report noted testimony that discussed the disparity in treatment between Native and non-Native burial disturbance. *See id.* “[N]on-Indian remains tend to be quickly studied and reburied while so many Indian remains are sent to museums and curated.” *Id.* at 13. Thus, based on racial discrimination, grave digging disproportionately affects Native American remains. *See id.*

121. *See id.*

122. *See id.*

123. *See id.* at 9–10.



legislation in 1988.<sup>124</sup> Ultimately, the panel agreed on the necessity of legislation and that “[r]espect for Native human rights is the *paramount* principle that should govern resolution when a claim [for repatriation] is made . . . .”<sup>125</sup>

### 1. National Museum of the American Indian Act

Shortly after the 1988 Senate hearing, and heavily influenced by the testimony of Native American representatives at the hearing, President George H.W. Bush signed the first repatriation legislation into law on November 29, 1989.<sup>126</sup> Along with establishing the National Museum of the American Indian within the Smithsonian, the National Museum of the American Indian Act (the “NMAI Act”) requires the Smithsonian’s Secretary to maintain an inventory of all “the Indian human remains and Indian funerary objects in the possession or control of the Smithsonian . . . .”<sup>127</sup>

Moreover, the Smithsonian must identify the origin of all cultural property and notify any corresponding federally recognized tribe.<sup>128</sup> Upon request by a corresponding tribe, the Smithsonian must return the cultural property expeditiously.<sup>129</sup> Since 1990, the Smithsonian repatriated or made repatriation available upon request to more than 6,000 human remains, 250,000 funerary objects, and 1,400 objects of cultural patrimony.<sup>130</sup>

### 2. Native American Graves Protection and Repatriation Act

After the NMAI Act’s implementation, other museums questioned whether they had an obligation to repatriate.<sup>131</sup> Although the NMAI Act only explicitly applied to the Smithsonian, the Native community pressured museums in general to repatriate their cultural property.<sup>132</sup> In 1989, as a response to this confusion and tension, Congress drew from the previous Senate hearing’s findings and decided “that a process was needed by which Native Americans could gain access to collections housed in [all] museums and Federal agencies.”<sup>133</sup>

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124. *See id.* at 9. The meeting consisted of legislators, “[s]everal museum professionals, college professors (including archeologists and anthropologists), and Indian representatives (including tribal and religious leaders).” *Id.*

125. *Id.* (emphasis added).

126. *See id.*

127. 20 U.S.C. § 80q-9(a)(1)(A).

128. *See id.* §§ 80q-9(a)(2), (b).

129. *See id.* §§ 80q-9(c)–(d).

130. *See* SMITHSONIAN INST., ANNUAL REPORT OF REPATRIATION ACTIVITIES OF THE SMITHSONIAN INSTITUTION 1 (2019), <https://perma.cc/7AMF-937D>.

131. *See* H.R. REP. NO. 101-877, at 13 (1990).

132. *See id.*

133. *Id.*

One year later, the United States enacted NAGPRA, an extension to the NMAI Act.<sup>134</sup> The Senate cited museum resistance to repatriation as necessitating further legislation.<sup>135</sup> Unlike the NMAI Act, NAGPRA applies to all federal agencies and museums that receive federal funding and to any persons, agencies, or institutions that discover Native remains or cultural property on federal lands.<sup>136</sup> The Act has a broad reach, evidenced by the fact that federal agencies and museums, including the Smithsonian, repatriated 91.5% of culturally affiliated Native American remains in their collections as of 2021.<sup>137</sup>

Through NAGPRA, the United States limited its codified duty to repatriate specifically to Native tribes and organizations.<sup>138</sup> “[NAGPRA] reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.”<sup>139</sup>

NAGPRA developed a straightforward process for determining Native American and Hawaiians’ rights to their ancestors’ remains, funerary objects, sacred objects, and objects of cultural patrimony.<sup>140</sup> Section 3003(a) requires federal agencies and museums to maintain an inventory of all Native cultural property in their possession and its geographical origin.<sup>141</sup> After acquisition, the agency or museum must determine the remains’ or objects’ cultural affiliation and record that information in its inventory.<sup>142</sup> If the remains or objects are culturally affiliated with a Native American tribe or Native Hawaiian organization,

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134. See 25 U.S.C. §§ 3001–3013. The purpose remains the same as that of the NMAI Act. See H.R. REP. NO. 101-877, at 10 (1990) (stating that the panel, which would later influence the creation of the NMAI Act, believed the “paramount principle” to govern repatriation is respect for Native human rights). The legislators intended to “respect . . . Native human rights” and show dignity and respect for human remains. S. REP. NO. 101-473, at 2 (1990).

135. See S. REP. NO. 101-473, at 2 (1990).

136. See 25 U.S.C. § 3001(7)(a). Therefore, the legislation maintains a broader reach than the NMAI Act because everyday citizens may become subject to NAGPRA’s requirements. Compare 20 U.S.C. § 80q-9a(b) (focusing on the relationship between Native Americans and the Smithsonian and requiring repatriation from the Smithsonian specifically), with 25 U.S.C. §§ 3002(a), 3005(a)(1) (requiring repatriation from all federal agencies and museums and individuals who find Native cultural property on federal land).

137. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-22-105685, NATIVE AMERICAN ISSUES: FEDERAL AGENCY EFFORTS AND CHALLENGES REPATRIATING CULTURAL ITEMS 2 (2022). Yet, “more than 116,000 Native American human remains [are] still in collections, of which 95 percent have not been culturally affiliated.” *Id.*

138. See 25 U.S.C. § 3010.

139. *Id.*

140. See *id.* §§ 3001(3)(A)–(D).

141. See *id.* § 3003(a).

142. See *id.*

then the agency or museum must notify the affected group within six months.<sup>143</sup>

As referenced, Native tribes and organizations hold rights to cultural property if they are culturally affiliated with the property.<sup>144</sup> Under NAGRPA, cultural affiliation means “shared group identity which can be reasonably traced historically or prehistorically.”<sup>145</sup> Given the difficulty of showing prehistoric connections, cultural affiliation employs a totality of the circumstances test to fill gaps in the historical record and trace cultural origins.<sup>146</sup> If the agency or museum cannot determine cultural affiliation, then Native tribes and organizations may prove their cultural affiliation to the remains or objects by a preponderance of the evidence.<sup>147</sup>

If the culturally affiliated tribe or organization requests a property’s return, then the agency or museum “shall expeditiously return” the property.<sup>148</sup> Section 3008 states that the federal government *may* create grants to fund the transport of cultural property back to tribes and organizations but is not required to do so.<sup>149</sup> Importantly, in 2011, tribe officials noted that the lack of available funding prevented them from seeking repatriation.<sup>150</sup>

Additionally, NAGPRA addressed the concern that repatriation undermines scientific research by including an exception to the

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143. *See id.* § 3003(d).

144. *See id.* § 3005(a)(2).

145. *Id.* § 3001(2).

146. *See* S. REP. NO. 101-473, at 14 (1990). The Senate stated the following:

Where human remains and associated funerary objects are concerned, the committee is aware that it may be extremely difficult, in many instances, for claimants to trace an item from modern Indian tribes to prehistoric remains without some reasonable gaps in the historic or prehistoric record. In such instances, a finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.

*Id.*

147. *See* 25 U.S.C. § 3005(a)(4) (“[P]reponderance of evidence [can be] based upon geographical, kinship, biological, archeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.”).

148. *See id.* § 3005(a).

149. *See id.* § 3008(a). The Act specifies that Native groups may receive grants to assist with funding transport and reburial; museums may receive grants to help them conduct inventory and identification processes. *See id.* §§ 3008(a)–(b). However, the Act fails to prescribe how funding is apportioned or how groups and museums may obtain funding. *See id.*

150. *See Finding Our Way Home: Achieving the Policy Goals of NAGPRA: Hearing Before the S. Comm. on Indian Affs.*, 112th Cong. 21 (2011) [hereinafter *Finding Our Way Home*].

presumption of returning cultural property.<sup>151</sup> Specifically, section 3005(b) establishes that agencies and museums must return eligible cultural property unless the “items are indispensable for completion of a specific scientific study, the outcome of which would be a major benefit to the United States.”<sup>152</sup> Nevertheless, at the end of the study, the agency or museum must return the cultural property within 90 days.<sup>153</sup>

### 3. The Kennewick Man

The United States tested NAGPRA’s scope when an ancient skeleton incited tension between the scientific community and Native American tribes.<sup>154</sup> In 1996, teenagers stumbled upon a skeleton in Kennewick, Washington.<sup>155</sup> As the location of the remains was on federal property, the U.S. Army Corps of Engineers removed the remains and gave them to anthropologists to examine.<sup>156</sup> Quickly, the skeleton’s ethnicity became a subject of contention.<sup>157</sup>

At first, the shape of the bones and the items found nearby<sup>158</sup> indicated that the remains belonged to an early European settler.<sup>159</sup> After further study, the anthropologists found a stone projectile point—an object that predates the arrival of Europeans in the Americas—embedded in one of the bones.<sup>160</sup> Eventually, the anthropologists determined that the bone structure differed from that of both Native Americans *and* early European settlers in the Americas.<sup>161</sup> The anthropologists subsequently dated the remains to between 8,340 to 9,200 years of age.<sup>162</sup>

The remains gained notoriety in the scientific community because “[h]uman skeletons this old are extremely rare in the Western Hemisphere

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151. See H.R. REP. NO. 101-877, at 9–10 (1990); see also 25 U.S.C. §§ 3005(b)–(c) (providing that agencies and museums must return objects upon determining a property’s cultural affiliation unless they can disprove the affiliation and prove their legal right to possession).

152. 25 U.S.C. § 3005(b). However, agencies and museums cannot initiate new scientific studies of cultural property to stall requested repatriation. See *id.* § 3003(b)(2).

153. See *id.* § 3005(b).

154. See *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1116 (D. Ore. 2002) (discussing scientists suing the Secretary of the Interior after NAGPRA mandated the repatriation of ancient remains); see also *Bonnichsen v. United States*, 367 F.3d 864, 864 (9th Cir. 2004) (reviewing, on appeal, the decision to grant custody of the ancient remains to the scientists).

155. See *Bonnichsen*, 367 F.3d at 869.

156. See *Bonnichsen*, 217 F. Supp. 2d at 1120.

157. See *id.* at 1120–21.

158. See *id.* at 1120. Later, anthropologists determined the items and the skeleton unconnected. See *id.* at 1120 n.4.

159. See *id.* at 1120.

160. See *id.*

161. See *id.*

162. See *id.*

...”<sup>163</sup> Named the “Kennewick Man,” the skeleton attracted scientists because it potentially answered questions regarding the evolution of humans in the Americas.<sup>164</sup>

On the other hand, Native American tribes in the region opposed further scientific study and demanded the remains’ return for immediate burial under NAGPRA.<sup>165</sup> When the Secretary of the Interior honored this request, numerous scientists and the Smithsonian sued the Secretary and the protesting tribes.<sup>166</sup> The claimants argued that NAGPRA does not apply to the remains because the bone structure did not resemble that of a *modern* Native American from any federally recognized tribe.<sup>167</sup>

In turn, the Defendant Secretary argued that the remains *are* Native American within the meaning of NAGPRA because of the remains’ age and discovered location.<sup>168</sup> Nevertheless, the Court of Appeals for the Ninth Circuit held that a preponderance of the evidence must prove the human remains’ connection to a *modern* tribe to be consistent with NAGPRA.<sup>169</sup> Thus, the court overrode the Secretary’s classification and awarded the remains to the claimants for scientific study.<sup>170</sup>

Congress responded negatively to the case’s outcome, showcasing its support for Native American tribes.<sup>171</sup> In 2010, Congress relaxed the standard for “cultural affiliation” under NAGPRA.<sup>172</sup> Instead of requiring a preponderance of the evidence to prove cultural affiliation, NAGPRA now provides that unaffiliated cultural property simply belongs to tribes

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163. *Id.*

164. *See id.* at 1121.

165. *See id.* The Native American tribes, when faced with arguments about the importance of scientific studies, responded as follows: “[w]e already know our history. It is passed on to us through our elders and through our religious practices.” *Id.*

166. *See Bonnichsen*, 217 F. Supp. at 1122.

167. *See id.*

168. *See Bonnichsen v. United States*, 367 F.3d 864, 871–72 (9th Cir. 2004). In simple terms, the Secretary concluded that the remains are extremely likely to be indigenous to the United States considering their determined age. *See id.*

169. *See Bonnichsen*, 217 F. Supp. at 1156. The Ninth Circuit Court of Appeals subsequently upheld the holding. *See Bonnichsen*, 367 F.3d at 880.

170. *See Bonnichsen*, 217 F. Supp. at 1167.

171. *See Oversight Hearing on Amendment to the Native American Graves Protection and Repatriation Act: Hearing Before the S. Comm. on Indian Affs.*, 109th Cong. 1 (2005). During the hearing, late Senator John McCain introduced an amendment to NAGPRA, which would have expanded the definition of Native American to include “[that which] is *or was* indigenous to the United States.” *Id.* (statement of Sen. John McCain, Chairman, S. Comm. on Indian Affs.) (emphasis added). Under this proposed definition, NAGPRA would consider any remains predating European arrival in the Americas Native American regardless of any definitive DNA ties to modern-day tribes. *See id.* Nevertheless, the hearing concluded without discussion of the amendment. *See id.*

172. *See* Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12378, 12379 (Mar. 15, 2020) (to be codified at 43 C.F.R. pt 10).

that hold historical ties to the land where the remains or objects laid.<sup>173</sup> Further, in 2016, the House and Senate passed legislation requiring the Kennewick Man's repatriation to the protesting tribes, effectively nullifying the Ninth Circuit's ruling.<sup>174</sup>

#### F. *The United Kingdom and Repatriation*

Across the Atlantic Ocean, many countries likewise request that the U.K. repatriate their cultural property.<sup>175</sup> History recognizes the U.K., and its former British Empire, as a massive and often unrivaled colonial power.<sup>176</sup> Consequently, the British invaded 90% of the world's modern countries, with only 22 countries evading the grasp of the British Empire.<sup>177</sup> As previously discussed,<sup>178</sup> the British took advantage of this unique position, collecting cultural property from around the world and depositing it in the British Museum.<sup>179</sup>

##### 1. British Museum Act of 1963

The national British Museum finds itself at the center of the repatriation discussion in the U.K.<sup>180</sup> However, the British Museum's Board of Trustees largely prevents the return of cultural property.<sup>181</sup> The Trustees' history dates back to 1753.<sup>182</sup> That year, Sir Hans Sloane, a physician who amassed a conglomeration of artifacts from around the world, offered his immense collection to King George II.<sup>183</sup> Sloane

173. *See id.* Hence, under this definition, the remains would belong to the tribes that requested the Kennewick's Man repatriation because they had a documented historical relationship with the land upon which the remains laid. *See id.*; *see also* *Bonnichsen*, 217 F. Supp. at 1121 (identifying the tribes as "local" Native tribes).

174. *See* Water Infrastructure Improvement for the Nation Act, Pub. L. No. 114-322 § 1152, 130 Stat. 1628 (2016). President Barack Obama similarly showcased his support for the Kennewick Man's repatriation by signing the Act into law. *See id.*

175. *See Human Remains: Claims on Human Remains at the Museum*, BRIT. MUSEUM, <https://perma.cc/FD67-7BCJ> (last visited Oct. 22, 2023).

176. *See The British Empire*, BRIT. EMPIRE, <https://perma.cc/YGN9-YT9T> (last visited Oct. 22, 2023).

177. *See* Rachel Nuwer, *Brits Have Invaded Nine Out of Ten Countries*, SMITHSONIAN MAG. (Nov. 5, 2012), <https://perma.cc/HF9D-2272>.

178. *See supra* Part I.

179. *See supra* Part I (indicating notable instances of contested property at the British Museum).

180. *See generally Contested Objects from the Collection*, *supra* note 8 (listing cultural property within the British Museum that countries of origin petition the U.K. to return).

181. *See* British Museum Act 1963, c. 24 §§ 3(1), 5(1), 5(2) (U.K.).

182. *See Sir Hans Sloane*, BRIT. MUSEUM, <https://perma.cc/NG4V-GB8N> (last visited Oct. 22, 2023).

183. *See id.* (stating that "his collection included . . . 32,000 coins and medals . . . 50,000 books, prints and manuscripts . . . a[n] herbarium of 334 volumes of dried plants from around the world . . . [and] 1,125 'things relating to the customs of ancient times

conditioned his historic offer on King George creating a Board of Trustees to monitor the collection.<sup>184</sup> Parliament accepted the offer and passed the British Museum Act of 1753, which codified the creation of the British Museum and its Board of Trustees.<sup>185</sup>

Over 200 years later, Parliament enacted the British Museum Act of 1963 to clarify the Board of Trustees' composition, duties, and powers.<sup>186</sup> Under the Act, the Board of Trustees is legally bound by a fiduciary duty to preserve the Museum's collection.<sup>187</sup> Further, the Act provides little flexibility to "sell, exchange, give away or otherwise dispose" of property.<sup>188</sup> Namely, the Board of Trustees may only dispose of an object if the object is a duplicate,<sup>189</sup> a photograph made after 1850,<sup>190</sup> or, according to the Trustees, useless for the Museum's purposes.<sup>191</sup> Thus, true to Sir Hans Sloane's dying wish,<sup>192</sup> the Board of Trustees must maintain the British Museum's collection with only a few narrow exceptions.<sup>193</sup>

## 2. Human Tissue Act of 2004

The Human Tissue Act of 2004 ("HTA") serves as an exception to the British Museum's retention of cultural property.<sup>194</sup> Enacted as a response to public outcry regarding the Alder Hey organs scandal,<sup>195</sup> the HTA regulates the removal, storage, and use of human tissue for

..."); *see also* Sir Hans Sloane, *Authentic Copies of the Codicils Belonging to the Last Will and Testament of Sir Hans Sloane, Bart. Deceased, Which Relate to His Collection of Books and Curiosities* 12 (published by order of executors) (1753), <https://perma.cc/DDR8-EWBQ> (last visited Oct. 22, 2023).

184. *See* Sir Hans Sloane, *supra* note 183, at 12. Sir Hans Sloane insisted that the Board of Trustees ensure that the public could freely access the collection. *See id.* Sloane intended to open educational opportunities for the average person so that they may spur their own intellectual curiosity. *See id.* at 19 (stating that Sloane desired for the collection to "[be used] towards [s]atisfying the de[s]ires of the curious, as for the improvement of knowledge and information of all per[s]ons").

185. *See Sir Hans Sloane, supra* note 182.

186. *See* British Museum Act 1963, c. 24. §§ 1–13 (U.K.).

187. *See id.* § 3(1).

188. *Id.* §§ 5(1)–(2).

189. *See id.* § 5(1)(a).

190. *See id.* § 5(1)(b).

191. *See id.* § 5(2).

192. *See Sir Hans Sloane, supra* note 183.

193. *See id.*

194. *See* Human Tissue Act 2004, c. 30 § 3(47) (U.K.).

195. *See Alder Hey Pathologist 'Stockpiled Children's Organs'*, *GUARDIAN* (June 6, 2005), <https://perma.cc/53WV-WZA4> (reporting that pathologist Alder Hey secretly harvested the organs of approximately 850 babies without obtaining consent from the parents or keeping records of the removals); *see also* Howard Bauchner & Robert Vinci, *What Have We Learnt from the Alder Hey Affair?*, *NAT'L LIBR. MED.* (Feb. 10, 2001), <https://perma.cc/J3CC-KFP7> (recommending that the U.K. amend the Human Tissue Act of 1961 considering the Alder Hey atrocity).

enumerated activities, including research and display.<sup>196</sup> The regulation requires explicit consent for the use or display of human remains.<sup>197</sup> Nevertheless, the HTA is limited in scope because it only applies to human remains that were less than 100 years old at the time of the Act's enactment in 2004.<sup>198</sup>

Regardless, section 47 of the HTA provides guidance for repatriating property over 100 years old.<sup>199</sup> This provision explicitly overrides the British Museum Act of 1963 and allows the British Museum to return human remains upon an affirmative vote by the Board of Trustees.<sup>200</sup> The provision is similarly limited in scope and only applies to human remains that are between 100 and 1,000 years old.<sup>201</sup> Consequently, many human remains located in the British Museum, such as mummies and other ancient peoples,<sup>202</sup> do not qualify for repatriation consideration under the Act.<sup>203</sup> Nonetheless, the Museum can no longer use the British Museum Act of 1963 as a reason not to *consider* the repatriation of many human remains in its possession.<sup>204</sup>

Even though people may now request the repatriation of human remains, the British Museum's policy on human remains—which echoes and implements the HTA into the Museum's governance—lists a multitude of criteria that the request must meet.<sup>205</sup> Notably, groups requesting repatriation must have their government's approval,<sup>206</sup> demonstrate cultural continuity with the remains, and show the remains' cultural importance to their group.<sup>207</sup> After satisfying those requirements,

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196. See Human Tissue Act 2004, c. 30 § 1 (U.K.).

197. See *id.*

198. See *id.* §§ 1(5)(b), (6)(c). Thus, the HTA only applies to deaths that occurred on or after November 15, 1904, and mandates the return of remains where no consent was given. See *id.* §§ 1(1), 1(5)(b), 1(6)(c).

199. See *id.* § 3(47).

200. See *id.*

201. See *id.* The British Museum implemented a policy on Human Remains in the Collection to comply with the HTA. See BRIT. MUSEUM, BRITISH MUSEUM POLICY: HUMAN REMAINS IN THE COLLECTION 1, ¶ 2.2 (2018), <https://perma.cc/NQ8J-VT63>. The policy acknowledges that the Museum must repatriate human remains under 100 years old. See *id.* ¶ 4.4. However, the Trustees simultaneously have discretion to return human remains between 100 and 1,000 years old. See *id.* ¶ 4.1.

202. See generally *Egyptian Mummies: Exploring Ancient Lives*, BRIT. MUSEUM, <https://perma.cc/M3BE-B4XM> (last visited Oct. 22, 2023) (featuring six Egyptian mummies cited as living between 3,000 and 1,800 years ago).

203. See Human Tissue Act 2004, c. 30 § 3(47) (U.K.); see also BRIT. MUSEUM, *supra* note 202, ¶ 4.1.

204. See Human Tissue Act 2004, c. 30 § 3(47) (U.K.); see also BRIT. MUSEUM, *supra* note 202, ¶ 4.1.

205. See BRIT. MUSEUM, *supra* note 202, ¶¶ 5.12–5.18.

206. See *id.* ¶ 5.13.1.

207. See *id.* ¶ 5.15.2. “Cultural continuity” requires a demonstration of continued “religious/spiritual belief . . . and or cultural customs and practices between applicants and the community from which the human remains originate.” *Id.* ¶ 5.15.3. “Cultural



the Trustees will apply the Public Benefit Test.<sup>208</sup> This test considers whether the benefit of repatriation to the applicants outweighs the benefit to the worldwide community if the remains stay on display.<sup>209</sup> Generally, the Trustees strongly favor retention of remains over 300 years old and very strongly favor retention of remains over 500 years old.<sup>210</sup> Relying on the above test, the Trustees deny many repatriation requests.<sup>211</sup>

### 3. Holocaust (Return of Cultural Objects) Act of 2009

The Holocaust (Return of Cultural Objects) Act of 2009 provides a second exception to the Board of Trustees' duty to retain cultural property.<sup>212</sup> In 2005, the British judiciary struck down the Board of Trustees' decision to repatriate artwork stolen from a Jewish family during the Nazi regime.<sup>213</sup> Although the Trustees wanted to return the property,<sup>214</sup> the Court of Chancery rejected the Trustees' ability to disregard their fiduciary duty and return the artwork.<sup>215</sup> The Court explicitly held that moral considerations do not override the Trustees' fiduciary duty under the British Museum Act of 1963.<sup>216</sup>

In response, Parliament passed the Holocaust (Return of Cultural Objects) Act to codify the Trustees' ability to repatriate such property without violating the British Museum Act of 1963.<sup>217</sup> The Act granted the Trustees a provisional ten-year power to repatriate cultural property on

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importance" requires a demonstration of how the human remains have particular significance to the applicants and how the British Museum's current retention "perpetuates strong feelings within the applicants' community." *Id.* ¶¶ 5.15.4(a)–(b).

208. *See id.* ¶ 5.17.

209. *See id.* ¶ 5.17.2.

210. *See id.* ¶¶ 5.16.1–2. "This [policy favoring the retention of older remains] is because archeological and historical studies show that in the vast majority of cases it is very difficult to demonstrate *cultural continuity* and *cultural importance* far into the past." *Id.* ¶ 5.16.2 n.7.

211. *See* David Shariatmadari, 'They're Not Property': The People Who Want Their Ancestors Back from British Museums, *GUARDIAN* (Apr. 23, 2019, 1:00 AM), <https://perma.cc/FQ3M-43L9> (stating that the British Museum "refused to hand over seven preserved Māori tattooed heads" not currently on display); *see also Request for Repatriation of Human Remains to the Torres Strait Islands, Australia*, *BRIT. MUSEUM*, <https://perma.cc/TX8V-36ET> (last visited Oct. 22, 2023) (stating that the British Museum denied the Torres Strait Islanders' request for the repatriation of two skulls because based on "the balance of probabilities it was not clear to them that the process of mortuary disposal of the skulls had been interrupted").

212. *See* Holocaust (Return of Cultural Objects) Act 2009, c. 16 § 2(1) (U.K.).

213. *See* Attorney General v. British Museum Trustees [2005] EWHC 1089 (Ch), (Eng.). The case follows a Jewish family in Czechoslovakia whom the Gestapo looted in 1939. *See id.* at [2]–[6]. The British Museum subsequently purchased their looted artwork in 1946. *See id.* at [2].

214. *See id.* at [8].

215. *See id.* at [29].

216. *See id.* at [47].

217. *See* Holocaust (Return of Cultural Objects) Act 2009, c. 16 § 2(1) (U.K.).

grounds “relat[ing] to events occurring during the Nazi era.”<sup>218</sup> Overall, the Act allowed repatriation—but did not oblige repatriation—if the original owner lost the work due to the Holocaust.<sup>219</sup>

Therefore, although the Board of Trustees is relatively bound by their fiduciary duty to preserve the collection, recent legislation showcases the government’s ability to negate this duty.<sup>220</sup> With Parliament’s clear ability to allow repatriation,<sup>221</sup> the U.K. should look to the United States’s established repatriation framework.<sup>222</sup> Nonetheless, the U.K. should deviate from NAGPRA—to better balance repatriating and retaining property—due to tension in the United States caused by scientific losses and the U.K.’s indicated desire to retain cultural property.<sup>223</sup>

### III. ANALYSIS

In sum, international and British public opinion disfavor the U.K.’s current repatriation framework—or lack thereof—because the framework allows the U.K. to retain stolen cultural property.<sup>224</sup> Resultingly, the U.K. should assess the feasibility of a framework like NAGPRA because the Act embodies cultural nationalism, the predominant philosophy that promotes repatriation.<sup>225</sup> This Comment addresses why the Board of Trustees’ fiduciary duty does not prevent repatriation at the British Museum, explains shortcomings in the United States’s approach, and proposes a novel repatriation framework for the U.K.<sup>226</sup> The Comment concludes by examining how the proposed framework would impact notable artifacts held in the British Museum.<sup>227</sup>

#### A. *The British Museum’s Fiduciary Duty Argument Fails*

While the British Museum is correct in arguing that the Board of Trustees’ fiduciary duty binds them to preserve the collection,<sup>228</sup> the analysis does not end there. Parliament wrote the Trustees’ fiduciary duty into law with the British Museum Act of 1963, and Parliament can similarly unwrite their fiduciary duty through amending the Act or passing

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218. *Id.* §§ 3(2)(b), 4(b). *But see* Holocaust (Return of Cultural Objects) Act 2019, c. 20 § 1(b) (U.K.) (repealing the sunset provision and creating within the Board of Trustees a permanent power to return cultural property lost due to the Nazi regime).

219. *See id.* § 2(1).

220. *See infra* Section III.A.

221. *See infra* Section III.A.

222. *See infra* Section III.B.

223. *See infra* Section III.C.

224. *See supra* Sections II.C., II.F.

225. *See supra* Sections II.B.2., II.E.2.

226. *See infra* Sections III.A–C.

227. *See infra* Section III.D.

228. *See* British Museum Act 1963, c. 24 §§ 3(1), 5(1), 5(2) (U.K.).

a new one explicitly negating the duty.<sup>229</sup> For example, the HTA and the Holocaust (Return of Cultural Objects) Act of 2009 evince how Parliament has the authority to diminish<sup>230</sup>—or even override<sup>231</sup>—the restraint of the Trustees’ fiduciary duty.<sup>232</sup>

Because Parliament can unwrite the Trustees’ fiduciary duty through legislation,<sup>233</sup> repatriation becomes a political question. With U.K. citizens voting for Parliament members,<sup>234</sup> the pro-repatriation British public can drive the future of repatriation by electing members who echo their views.<sup>235</sup> Due to the fact that Parliament *can* allow repatriation and U.K. citizens could elect members who would *mandate* repatriation, Parliament should consider drafting legislation that balances the public’s desire to return cultural property with Parliament’s desire to maintain the British Museum’s massive collection expediently.

### *B. Issues Raised by Repatriation Legislation in the United States*

Although the United States pioneered domestic repatriation frameworks with the NMAI Act and NAGPRA, the implementation of these Acts created issues, some of which continue to exist today.<sup>236</sup> For instance, the NMAI Act, which solely required the Smithsonian to repatriate Native cultural property,<sup>237</sup> confused other museums.<sup>238</sup> The government clearly supported repatriation,<sup>239</sup> and Native tribes and organizations clearly desired the return of their property.<sup>240</sup> Regardless of the pressure from Native groups to repatriate, these museums did not know

229. See Human Tissue Act 2004, c. 30 § 3(47) (U.K.); see also Holocaust (Return of Cultural Objects) Act 2009, c. 16 § 2(1) (U.K.).

230. See Human Tissue Act 2004, c. 30 § 3(47) (U.K.) (allowing the repatriation of remains between 100 and 1,000 years old); see also Holocaust (Return of Cultural Objects) Act 2009, c. 16 § 2(1) (U.K.) (allowing the repatriation of property taken due to the Nazi era).

231. See Human Tissue Act 2004, c. 30 §§ 1(2), (5)(b), (6)(c) (U.K.) (requiring the deaccession of human remains if the remains are less than 100 years old).

232. See British Museum Act 1963, c. 24 §§ 3, 5(1)–(2) (U.K.).

233. See Human Tissue Act 2004, c. 30 § 3(47) (U.K.); see also Holocaust (Return of Cultural Objects) Act 2009, c. 16 § 2(1) (U.K.).

234. See *How MPs are Elected*, UK PARLIAMENT, <https://perma.cc/S4UM-L5LJ> (last visited Oct. 22, 2023) (stating that every eligible voter in the U.K. can select one candidate to be their constituency’s member of Parliament, and the candidate with the most votes becomes the area’s representative).

235. See *id.* (stating that the U.K. is a democracy in which constituents vote for who will represent them); see also *supra* Section II.C. (describing how British public opinion consistently showcases support for repatriation).

236. See *supra* Section II.E.

237. See 20 U.S.C. §§ 80q-9(a)–(d).

238. See H.R. REP. NO. 101-877, at 13 (1990).

239. See 20 U.S.C. §§ 80q-9(a)–(d).

240. See H.R. REP. NO. 101-877, at 13 (1990).

whether they legally *needed* to repatriate.<sup>241</sup> In response, the government passed NAGPRA, requiring all federal agencies and museums to return applicable cultural property.<sup>242</sup>

However, the financial logistics of repatriation under NAGPRA remain unclear.<sup>243</sup> Because NAGPRA does not indicate who should pay for the transport of cultural property, the responsibility typically lies with the tribe requesting repatriation.<sup>244</sup> Moreover, tribes and organizations often fail to request the return of their property, citing their lack of monetary resources as the reason.<sup>245</sup> Thus, although NAGPRA intends to rectify funding issues through grants from the federal government,<sup>246</sup> the Act fails to provide enough funding to Native groups.<sup>247</sup>

Lastly, controversy arose, and continues to exist, regarding scientific losses associated with repatriation.<sup>248</sup> NAGPRA provides little room for scientific inquiry because federal agencies and museums must “expeditiously return [applicable cultural property] unless such items are *indispensable* for completion of a specific scientific study, the outcome of which would be a *major benefit* to the United States.”<sup>249</sup> However, NAGPRA remains silent on definitions for “indispensable” and “major benefit.”<sup>250</sup> Due to the lack of definitions, the high standard associated with the plain language of these terms, and the broad nature of NAGPRA, courts would likely require the repatriation of human remains, even if scientists fought for the scientific studies exception’s application.<sup>251</sup>

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241. *See id.*

242. *See* 25 U.S.C. §§ 3005(a)(1)–(2); *see also* H.R. REP. NO. 101-877, at 13 (1990); *see also* S. REP. NO. 101-473, at 2 (1990).

243. *See* 25 U.S.C. § 3008(a).

244. *See id.*; *see also* *Frequently Asked Questions – Native American Graves Protection and Repatriation Act*, NAT’L PARK SERV., <https://perma.cc/9WD8-FD2C> (last visited Oct. 22, 2023) (stating that, in practice, museums pay for the identification process, but tribes and organizations fund the property’s transport and burial).

245. *See* *Finding Our Way Home*, *supra* note 150, at 21.

246. *See* 25 U.S.C. § 3008(a).

247. *See* *Finding Our Way Home*, *supra* note 150, at 21 (stating that the amount of money tribes request is more than double the amount that the tribes actually receive).

248. *See* H.R. REP. NO. 101-877, at 9 (1990); *see generally* *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1119 (D. Ore. 2002) (describing how scientists are suing the Secretary of the Interior and several Native American tribes for custody of repatriated ancient remains).

249. 25 U.S.C. § 3005(b) (emphasis added).

250. *See generally* 25 U.S.C. §§ 3001–3013 (not including definitions for the terms “indispensable” or “major benefit”).

251. *See* *Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains*, 75 Fed. Reg. 12378, 12403 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10); *see also* *Bonnichsen*, 217 F. Supp. at 1121 (suggesting that studying on one of the most complete ancient skeletons found in North America was not enough to meet NAGPRA’s scientific studies exception).

### C. Proposed Repatriation Legislation for the United Kingdom

The U.K. should adopt a repatriation framework like NAGPRA but should also consider and address the issues raised by the Act and its predecessor, the NMAI Act.<sup>252</sup> In particular, the NMAI Act showed the United States how an act geared toward one museum, even the national museum, did not suffice.<sup>253</sup> Hence, the U.K. should adopt legislation that applies to all federally funded agencies and museums.

Although NAGPRA emphasizes the repatriation of human remains, the Act likewise encompasses associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony.<sup>254</sup> The U.K. should similarly include both human remains and general objects under its definition of cultural property, as artifacts such as the Benin Bronzes, Parthenon Marbles, and Rosetta Stone encouraged the push for repatriation.<sup>255</sup> Accordingly, any limitation regarding the type of artifact—human remains versus objects—would run contrary to the public’s view on why repatriation in the U.K. matters.

While the U.K. should use NAGPRA as a guide, the country should consider five specific deviations to limit the scope of repatriation. First, the U.K. should create a strong scientific studies exception to promote studies and limit repatriation. NAGPRA contends that cultural property must be returned unless it serves as an indispensable part of a scientific study of major importance to the country.<sup>256</sup> To preempt backlash from the scientific community, the U.K. should expunge the terms “indispensable” and “major” from their scientific studies exception. Without these broad terms, relatively any research project stalls the return of cultural property, and the property only becomes eligible for a claim of repatriation after the study’s completion.

Second, the U.K. should modify NAGPRA’s inventory section to depict how the U.K. came into possession of the object.<sup>257</sup> Specifically, the inventory should echo a current factor often weighed while applying the British Museum’s Public Benefit Test: whether the U.K. interrupted mortuary disposal.<sup>258</sup> Applying the factor more broadly—not solely

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252. See *supra* Section III.B.

253. See *supra* Section III.B.

254. See 25 U.S.C. §§ 3001(3)(A)–(D).

255. See Tsoni, *supra* note 94 (stating that 78% of British citizens support the Greek claim to the Parthenon Marbles); see generally *Contested Objects from the Collection*, *supra* note 8 (listing the Benin Bronzes and Parthenon Marbles as notable artifacts, along with numerous other works, with highly contested ownership).

256. See 25 U.S.C. § 3005(b).

257. See *id.* § 3003(a). Section (a) requires each museum to create an inventory documenting the cultural property held there and its geographical origin. See *id.*

258. See *Request for Repatriation of Human Remains to the Torres Strait Islands, Australia*, *supra* note 211 (stating that the Trustees denied the Torres Strait Islanders’

toward disturbing human remains but toward appropriating objects—the factor could expand to enumerate how the British acquired the property: through conquest, purchase, or donation. For example, if the U.K. acquired cultural property through conquest, then the museum shall return the property. However, if the U.K. acquired cultural property through seemingly equitable means, such as donation or purchase, then the museum may retain the property.

Third, the U.K. should eliminate NAGPRA’s requirement that the agency or museum holding cultural property notify affected groups.<sup>259</sup> Without notification, the country of origin will face the burden of recognizing its cultural property and pursuing its return. Elimination of this requirement would allow the U.K. to retain more property, in line with its strong stance to ownership, simply due to countries of origin not recognizing their property or deciding not to pursue its return.

Fourth, the U.K. should expunge NAGPRA’s provision that allows the federal government to make and offer grants to Native tribes and organizations.<sup>260</sup> Due to the economic concerns of repatriation, Parliament may wish to minimize its financial burden and discourage countries from requesting the return of their cultural property unless the countries are financially capable. Therefore, the U.K. should echo what the United States does in practice, but not clearly in law,<sup>261</sup> and place the price of transport and reburial explicitly on the country of origin.

Fifth, and finally, like NAGPRA limits its scope to Native tribes and organizations,<sup>262</sup> the U.K. should unambiguously restrict its repatriation duties to those countries with which the U.K. holds unique relationships. For instance, the U.K. could create repatriation relationships solely with its former colonies, dominions, protectorates, and mandates. Although the U.K. undoubtedly has a significant number of historical relationships, this restraint would limit the country’s repatriation efforts, thus, appeasing the British government’s desire to retain cultural property.<sup>263</sup>

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request for the repatriation of two skulls because “the balance of probabilities it was not clear to them that the process of mortuary disposal of the skulls had been interrupted”).

259. See 25 U.S.C. § 3003(d).

260. See *id.* § 3008(a).

261. See *id.*; see also *Frequently Asked Questions – Native American Graves Protection and Repatriation Act*, *supra* note 244 (providing that, although not explicitly stated in NAGPRA, Native tribes and organizations fund the return of cultural property).

262. See 25 U.S.C. § 3010.

263. See Nuwer, *supra* note 177 (stating that the U.K. invaded 90% of the world’s territory). However, for example, the U.K. does not hold any colonial ties to Guatemala. See *Entering and Exiting the British Empire*, BRIT. EMPIRE, <https://perma.cc/AV6J-6JG7> (last visited Oct. 22, 2023). Yet, the British Museum contains 1,323 Guatemalan artifacts. See *Guatemala*, BRIT. MUSEUM, <https://perma.cc/V3VK-ZZ2M> (last visited Oct. 22, 2023).

*D. Application of the Proposed Legislation on Notable Contested Cultural Property*

As discussed, the Parthenon Marbles, Benin Bronzes, and Rosetta Stone are three notable artifacts with disputed ownership currently possessed by the British Museum.<sup>264</sup> If Parliament passed the proposed legislation, then the British Museum would need to reconsider its ownership of each artifact.<sup>265</sup> Under the proposed legislation, the U.K. would not need to return the Parthenon Marbles but would need to return the Benin Bronzes and Rosetta Stone.

The British Museum would not need to return the Parthenon Marbles because the U.K. never controlled Greece in any fashion.<sup>266</sup> Because the two countries do not have colonial ties, no special relationship between the two countries exists for the purposes of the proposed legislation.<sup>267</sup> Thus, the U.K. would not have a duty to consider any repatriation requests from Greece, including a request for the Parthenon Marbles.<sup>268</sup>

Conversely, the Benin Bronzes would qualify for repatriation.<sup>269</sup> The British colonized Nigeria, and then designated the country a British protectorate, before the country's eventual independence in 1960.<sup>270</sup> In addition, history shows how the British clearly took the artifacts by force during the Benin Expedition of 1897.<sup>271</sup> Nevertheless, Nigeria would need to request the Benin Bronzes' return and fund the artifacts' voyage back home.<sup>272</sup>

Lastly, the legislation would likely make the Rosetta Stone eligible for repatriation. The U.K. held Egypt as a colony, protectorate, and dominion.<sup>273</sup> However, the means of acquisition may provide a source of contention. Although the British did not excavate the Rosetta Stone themselves, the British Empire won the stone through conquest over the French and transported the artifact by way of British hands from Egypt to

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264. *See supra* Part I.

265. *See supra* Section III.C.

266. *See Entering and Exiting the British Empire, supra* note 263. The British government does not list Greece as a current or former colony, protectorate, dominion, or mandate. *See id.*

267. *See supra* Section III.C.

268. *See supra* Section III.C.

269. *See supra* Section III.C. Likewise, the Benin Bronzes under repatriation consideration from Oxford University and Cambridge University would qualify for repatriation. *See supra* Section II.C. The legislation would apply to both Universities and their museums because they are public institutions. *See Top Public Universities in the United Kingdom*, UNIRANK, <https://perma.cc/4LN8-KR95> (last visited Oct. 22, 2023).

270. *See Entering and Exiting the British Empire, supra* note 263.

271. *See Benin Bronzes, supra* note 17.

272. *See supra* Section III.C.

273. *See Entering and Exiting the British Empire, supra* note 263.

the British Museum in London.<sup>274</sup> Even so, Egypt would need to request and fund the Rosetta Stone's return.<sup>275</sup>

#### IV. CONCLUSION

Since Roman times, the concept of repatriation pervaded academic and political discussions.<sup>276</sup> Today, however, the international and domestic discussion favors cultural nationalism, professing the need to respect previously looted countries and return cultural property to its country of origin.<sup>277</sup> Nevertheless, with no international framework, individual countries hold the power to enact their own repatriation legislation.<sup>278</sup> The United States decided to enact a comprehensive repatriation framework.<sup>279</sup> On the other side of the Atlantic, the U.K. imposed weak repatriation legislation, which left much deference to the British Museum's Board of Trustees.<sup>280</sup>

The British public and the international community disapprove of the U.K.'s custodianship of stolen cultural property within the British Museum.<sup>281</sup> Yet, even with mass disapproval, the U.K. remains undeterred in its intent to retain these artifacts.<sup>282</sup> To address the two vastly conflicting stances within the country, a modification of the United States's approach to repatriation could offer a compromise. Although the American repatriation framework represents a credible starting point, the U.K. should make deviations to account for the issues within the NMAI Act and NAGPRA and for the U.K.'s desire to maintain its collection.<sup>283</sup>

The U.K. indisputably embodies "finders keepers."<sup>284</sup> Unfortunately, when a "finders keepers" exists, a "losers weepers" likely follows. The country stands in a unique position, with the inherent ability and public support, to rectify the losses faced by many of its subsequent "losers weepers." The U.K. *can* repatriate cultural property, but *will* it?

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274. See *Everything You Ever Wanted to Know About the Rosetta Stone*, *supra* note 24.

275. See *supra* Section III.C.

276. See *supra* Part II.

277. See *supra* Sections II.B.2., II.C.

278. See *supra* Section II.D.

279. See *supra* Section II.E.

280. See *supra* Section II.F.

281. See *supra* Section II.C.

282. See *supra* Section II.F.

283. See *supra* Section III.B.

284. See *supra* Part I.