

---

Volume 126 | Issue 3


---

Spring 2022

## Bringing History Home: Strategies for the International Repatriation of Native American Cultural Property

Alec Johnson

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlr>

 Part of the [Civil Rights and Discrimination Commons](#), [Cultural Heritage Law Commons](#), [Fourteenth Amendment Commons](#), [Government Contracts Commons](#), [Housing Law Commons](#), [Human Rights Law Commons](#), [Indigenous, Indian, and Aboriginal Law Commons](#), [Land Use Law Commons](#), [Law and Race Commons](#), [Law and Society Commons](#), [President/Executive Department Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Alec Johnson, *Bringing History Home: Strategies for the International Repatriation of Native American Cultural Property*, 126 DICK. L. REV. 859 (2022).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlr/vol126/iss3/7>

This Comment is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact [lja10@psu.edu](mailto:lja10@psu.edu).

# Bringing History Home: Strategies for the International Repatriation of Native American Cultural Property

Alec Johnson\*

## ABSTRACT

The theft of Native American cultural items has been ongoing since Europeans began to colonize the Americas. As a result, millions of Native American artifacts are now located outside the borders of the United States. Native American tribes have long sought international repatriation—the return of these cultural objects to their tribal owners. Unfortunately, many countries have been unsupportive of repatriation attempts and Native Americans seeking the return of their cultural items face nearly insurmountable barriers in foreign courts. The U.S. government has a moral imperative to assist Native American tribes in these repatriation efforts.

The debate over repatriation is defined by two competing philosophies: cultural nationalism and cultural internationalism. Cultural nationalism views cultural property as having a national characteristic and favors repatriation. Cultural internationalism is wary of repatriation, and views cultural property as part of a common human culture, regardless of the country of origin. Over the past 40 years, the tide has turned away from cultural internationalism, and various mechanisms for repatriation have been implemented. These mechanisms include international treaties, potential domestic legislation, and mutually beneficial repatriation agreements (“MBRAs”).

While these mechanisms have strengths and weaknesses, this Comment argues that MBRAs are the best available mechanism to facilitate repatriation of Native American cultural items. This Comment further advocates for the U.S. government to assist Native American tribes in negotiating MBRAs with foreign nations and institutions in possession of Native American cultural items.

---

\* J.D. Candidate, 2022. I would like to thank my mother, Brenda VanLunen, for her unwavering support. I am also grateful to Claire Murtha, Megan Rulli, Mitch Snyder, Zoe Matherne, and Tessa Shurr for their thoughtful edits and suggestions.

TABLE OF CONTENTS

I. INTRODUCTION.....	861	R
II. BACKGROUND .....	862	R
A. <i>Native American Cultural Items Abroad</i> .....	862	R
B. <i>Repatriation</i> .....	863	R
1. <i>The Debate Over Repatriation</i> .....	863	R
C. <i>Barriers to Repatriation</i> .....	864	R
D. <i>Potential Mechanisms for International         Repatriation</i> .....	866	R
1. <i>The Native American Graves Protection and             Repatriation Act</i> .....	866	R
2. <i>The UNESCO Convention on the Means of             Prohibiting and Preventing the Illicit Import,             Export, and Ownership of Cultural Property</i> ..	867	R
3. <i>The UNIDROIT Convention on Stolen or             Illegally Exported Cultural Objects</i> .....	869	R
4. <i>The United Nations Declaration on the Rights             of Indigenous People</i> .....	870	R
5. <i>National Patrimony Laws</i> .....	870	R
6. <i>Mutually Beneficial Repatriation Agreements</i> ..	871	R
a. <i>Peru-Yale Agreement</i> .....	872	R
b. <i>Italy-Met Agreement</i> .....	873	R
c. <i>Australia-Manchester Museum                 Agreement</i> .....	873	R
d. <i>United States-Cambodia Agreement</i> .....	874	R
III. ANALYSIS .....	874	R
A. <i>Native American Cultural Items Should Be         Repatriated with U.S. Government Assistance</i> .....	874	R
B. <i>Cultural Internationalist Critiques of Repatriation         Are Not Applicable to Native American Cultural         Items</i> .....	875	R
C. <i>Current Mechanisms for Repatriation Are Not         Effective</i> .....	876	R
D. <i>MBRAs Are the Most Effective Mechanism for         Repatriation</i> .....	876	R
1. <i>MBRAs Have Advantages Over Current             Mechanisms for Repatriation</i> .....	876	R
2. <i>The Weaknesses of MBRAs May Be Mitigated             .....</i>	878	R
3. <i>MBRAs Facilitated by the U.S. Government             Provide Unique Advantages</i> .....	879	R
IV. CONCLUSION .....	880	R

## I. INTRODUCTION

In 1856, the U.S. government marched the members of dozens of separate Native American tribes hundreds of miles onto the soon-to-be established Grand Ronde Reservation in modern-day Oregon.<sup>1</sup> A few decades later, Reverend Robert W. Summers purchased numerous artifacts from the destitute Grand Ronde tribespeople.<sup>2</sup> Summers, believing that the tribes would soon be extinct, sought to preserve some remnants of their cultures.<sup>3</sup> In 1900, the British Museum came into possession of the Summers Collection.<sup>4</sup> These artifacts were never displayed but rather stored out of sight in the British Museum for over a century.<sup>5</sup> The Confederated Tribes of the Grande Ronde learned of the Summers Collection in the 1980s and worked for decades for the return of these items to the reservation.<sup>6</sup> Finally, in 2017, the British Museum agreed to a one-year loan of 16 items from the Summers Collection to the Confederated Tribes of the Grande Ronde.<sup>7</sup> The Chairwoman of the Confederated Tribes emphasized how significant the return of the Summers Collection was to her community: “In my heart, I felt like ‘those are ours, and we need [to] repatriate—whatever means we can to have those returned here’ . . . . It’s really the spirit within our people that I felt crying out.”<sup>8</sup>

Native Americans have been subjected to the plunder of their cultural items since their earliest contact with European settlers.<sup>9</sup> These items include sacred objects which have a unique cultural significance to Native American tribes.<sup>10</sup> Currently, a vast number of

---

1. *Our Story*, CONFEDERATED TRIBES OF GRANDE RONDE, <https://bit.ly/3rd364I> [<https://perma.cc/7SXD-WQYN>], (last visited Jan. 29, 2021).

2. Gillian Flaccus, *U.S. Tribe Displays Artifacts Loaned from London*, ASSO-CIATED PRESS (June 5, 2018), <https://bit.ly/2MOiA0g>.

3. *Id.*; Bradley W. Parks & Arya Surowidjojo, *Life Outside the Bentwood Box*, OR. PUB. BROAD. (June 3, 2019, 8:00 AM), <https://bit.ly/3oHKOHk> [<https://perma.cc/RCX7-U9NY>].

4. *Id.*

5. *Id.*

6. Flaccus, *supra* note 2.

7. *Id.* The British Museum claimed that British law forbade the museum from permanently transferring the items to the Confederated Tribes of the Grande Ronde without parliamentary approval. *Id.*; *see infra* Section II.C (discussing British legislation affecting repatriation).

8. Flaccus, *supra* note 2.

9. *See* Honor Keeler, *Indigenous International Repatriation*, 44 ARIZ. ST. L.J. 703, 713–30 (2012) (detailing the centuries-long history of the European theft of Native American cultural items).

10. *Resolution in Support of International Repatriation*, NAT’L CONGRESS OF AM. INDIANS, <https://bit.ly/2JvFyHM> [<https://perma.cc/G42N-DKQ6>], (last visited Mar. 20, 2022).

Native American cultural items are in the possession of foreign holders.<sup>11</sup>

In the latter half of the 20th century, a movement for the return of culturally and historically significant items to their nation of origin emerged.<sup>12</sup> Despite this trend, Native Americans have struggled to reclaim their cultural heritage from abroad.<sup>13</sup>

## II. BACKGROUND

### A. *Native American Cultural Items Abroad*

Between one and two million Native American cultural items are held internationally by museums and private collectors.<sup>14</sup> The items include human remains, funerary objects, sacred objects, and objects “having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself.”<sup>15</sup> Many of these artifacts were looted, stolen, or obtained without the informed consent of their tribes by European settlers, the American government, and researchers.<sup>16</sup> Even if an item was acquired in good faith, many Native Americans believe that their cultural items belong to a tribal culture rather than any single individual.<sup>17</sup> Accordingly, many Native Americans believe that such items simply may not be legitimately bought or sold.<sup>18</sup> International repatriation of these items to their respective tribes is an important issue to many Native Americans.<sup>19</sup> Unfortunately, efforts by Native American tribes to repatriate these artifacts has been met with limited success.<sup>20</sup>

---

11. *Id.*

12. Samantha Anderson, Note, *Do As I Say, Not As I Do: Inconsistencies in International Cultural Property Repatriation*, 24 *CARDOZO J. INT’L & COMP. L.* 315, 321–22 (2016).

13. *Resolution in Support of International Repatriation*, *supra* note 10.

14. *Id.*

15. *Id.*

16. Keeler, *supra* note 9, at 731–35.

17. *Id.*

18. *Id.*

19. See generally DEPT. OF INTERIOR, INTERNATIONAL REPATRIATION LISTENING SESSIONS AND CONSULTATIONS SUMMARY (2016), <https://on.doi.gov/3IN2VGF> [<https://perma.cc/FF45-ANXF>] (summarizing the results of consultations with Native American tribes regarding international repatriation and concluding that a majority of those consulted desired greater support for international repatriation efforts).

20. *Resolution in Support of International Repatriation*, *supra* note 10.

## B. Repatriation

### 1. *The Debate Over Repatriation*

Repatriation is the “return of cultural objects to nations of origin.”<sup>21</sup> There are two competing philosophies regarding the repatriation of cultural property: cultural nationalism and cultural internationalism.<sup>22</sup> Cultural nationalists tend to favor repatriation.<sup>23</sup> They view cultural property as having a national characteristic that gives nations a special interest in retention and repatriation.<sup>24</sup> Cultural nationalists also tend to believe that cultural items must be “returned to their place of origin [to put] them in the correct geographic and sociological context to better interpret their meaning and significance.”<sup>25</sup> Cultural nationalists support repatriating stolen cultural items to their place of origin so that the process of recontextualization may occur.<sup>26</sup>

Cultural internationalists, in contrast, believe that cultural objects are “components of a common human culture,” regardless of how or where the objects are created.<sup>27</sup> Cultural internationalists fear that repatriation will lead to the warehousing of cultural objects by overly retentive source nations. This warehousing will, in turn, result in fewer opportunities for the public to experience the art of foreign cultures.<sup>28</sup> Cultural internationalists argue that repatriated cultural objects will rarely be properly recontextualized.<sup>29</sup>

Support for cultural internationalism has waned in recent years, while support for cultural nationalism and preserving indige-

---

21. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 845 (1986).

22. *Id.* at 831–32.

23. *Id.*

24. *Id.* at 832.

25. Michael J. Kelly, *Conflicting Trends in the Flourishing International Trade of Art and Antiquities: Restitutio in Integrum and Possessio Ferundi/Lucrandi*, 14 DICK. J. INT'L L. 31, 46 (1995) (discussing the support for the recontextualization of cultural items among cultural nationalists).

26. *Id.*

27. Merryman, *supra* note 21, at 831.

28. *See id.* at 847 (discussing the cultural internationalist view that overly retentive nations “contribute to the cultural impoverishment of people in other parts of the world.”).

29. *See* Stacey Falkoff, Comment, *Mutually-Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL'Y 265, 279 (2007) (“[A]nti-repatriationists contend that such recontextualization rarely actually occurs, but rather, that repatriated cultural property tends simply to be transferred from a museum in the market nation to one in the source nation.”).

nous cultures has grown.<sup>30</sup> Nevertheless, repatriation advocates will have to address the concerns of cultural nationalism in order to establish a broad base of support for a large-scale return of Native American cultural objects to their tribes of origin.

### C. Barriers to Repatriation

Native American cultural items held in Europe are primarily located in France, the United Kingdom, and Germany.<sup>31</sup> Repatriation efforts in these nations have proven difficult.

French courts have been an impediment to the repatriation efforts of Native Americans.<sup>32</sup> For example, in 2014, the Hopi Nation—a Native American tribe primarily residing in Arizona—brought an action in France seeking the repatriation of Hopi cultural artifacts that were being sold at a French private auction.<sup>33</sup> The French court rejected the Hopi Nation's claim.<sup>34</sup> Despite the U.S. government's recognition of the Hopi tribe, the French court found that the Hopi Nation lacked legal standing and allowed the sale to proceed.<sup>35</sup>

French export restrictions prevent museums from removing anything in their collections without permission from the French government.<sup>36</sup> For this reason, repatriation from French museums is extremely difficult.<sup>37</sup>

Germany does not have any federal laws restricting museums from repatriating cultural artifacts.<sup>38</sup> However, some German states do require government approval prior to repatriation.<sup>39</sup> In recent years, some German museums have become more willing to honor the repatriation requests of Native American tribes—particularly

---

30. Merryman, *supra* note 21, at 850 (arguing that since the 1970s “the voice of cultural internationalism is seldom heard and less often heeded in the arenas in which cultural policy is made.”).

31. HONOR KEELER, A GUIDE TO INTERNATIONAL REPATRIATIONS: STARTING AN INITIATIVE IN YOUR COMMUNITY 9 <https://bit.ly/3mAtBPM> [<https://perma.cc/CGX5-T6MV>] (last visited Mar. 20, 2022).

32. Tom Mashberg, *Despite Legal Challenges, Sale of Hopi Religious Artifacts Continues in France*, N.Y. TIMES (June 29, 2014), <https://nyti.ms/3uZNjZK> [<https://perma.cc/HB3M-WVJQ>].

33. *Id.*

34. *Id.*

35. *Id.*

36. Paige Goodwin, Comment, *Mapping the Limits of Repatriable Cultural Heritage: A Case Study of Stolen Flemish Art in French Museums*, 157 U. Pa. L. Rev. 673, 697 (2008).

37. *See id.* (arguing that French law is likely to lead French courts to bar repatriation).

38. Keeler *supra* note 9, at 785.

39. KEELER *supra* note 31.

when the items requested are human remains.<sup>40</sup> In 2020, a German “Wild West” museum agreed to repatriate a Native American scalp after six years of negotiations.<sup>41</sup>

In the United Kingdom, the British Museum Act<sup>42</sup> has limited the effectiveness of repatriation efforts.<sup>43</sup> The Act prohibits the trustees of national museums from disposing of an object in their collection except when “the object is unfit to be retained” by the museum and may be disposed of “without detriment to the interests of students.”<sup>44</sup> The meaning of “unfit” in the language of the Act remains ambiguous. Arguably, many Native American cultural items could be classified as “unfit”—particularly those that were obtained unlawfully.<sup>45</sup> In practice, Native American cultural items are seldom classified as “unfit”, and trustees often cite the British Museum Act to justify their refusal to repatriate these items.<sup>46</sup> The British Museum Act provides museums with statutory cover to reject repatriation efforts.<sup>47</sup>

Human remains have been the major exception to the rejection of repatriation efforts in the United Kingdom. Parliament enacted the Human Tissues Act<sup>48</sup> in 2004, requiring museum trustees to return human remains dating from after 1904.<sup>49</sup> Repatriation of earlier human remains is discretionary, but the Human Tissues Act prevents museums from using the British Museum Act to deny repatriation, as had often been done in the past.<sup>50</sup>

The repatriation has recently been the topic of debate in France, Germany, and the United Kingdom.<sup>51</sup> The French govern-

---

40. See Ben Knight, *German ‘Wild West’ Museum to Repatriate Native American Scalp*, DEUTSCHE WELLE (Nov. 24, 2020), <https://bit.ly/3cbYTrZ> [<https://perma.cc/CC9S-872Q>] (quoting the director of a German “Wild West” museum director as saying “[i]f you have a so-called ‘Indian’ museum then it only works if you work together with indigenous people.”).

41. *Id.* The museum reversed course and agreed to repatriate the scalp to the Chippewa tribe after refusing the tribe’s repatriation request for six years. *Id.*

42. British Museum Act 1963, c. 24, § 5 (UK).

43. Keeler, *supra* note 9, at 756 (stating that British museums often cite the British Museum Act when rejecting repatriation requests).

44. British Museum Act 1963, c. 24, § 5 (UK).

45. Keeler, *supra* note 9, at 756 (arguing that the British Museum Act allows museums to classify Native American cultural items as “unfit” given “the nature in which they were obtained and because the indigenous communities wish to repatriate.”).

46. *Id.*

47. *Id.*

48. Human Tissues Act 2004, c. 30 (UK)

49. *Id.*

50. *Id.*

51. See KEELER *supra* note 31, (detailing recent developments in France, Germany and the United Kingdom around repatriation); Keeler *supra* note 9, at



ment published a report in 2018 that concluded that French museums should repatriate looted African artifacts.<sup>52</sup> In March 2019, culture ministers from all 16 German states agreed to help German museums develop repatriation procedures for cultural items stolen during the colonial era from Africa, Asia, Australia and the Pacific.<sup>53</sup> In contrast, the United Kingdom's culture secretary Jeremy Wright espoused cultural internationalism.<sup>54</sup> In April 2019 he argued that it was better to display artifacts from different cultures in one single location rather than return the items to their countries of origin.<sup>55</sup> Wright claimed that repatriation would lead to a world in which there are “no single points where people can see multiple things.”<sup>56</sup>

#### *D. Potential Mechanisms for International Repatriation*

##### *1. The Native American Graves Protection and Repatriation Act*

In the United States, the Native American Graves Protection and Repatriation Act (“NAGPRA”),<sup>57</sup> enacted in 1990, requires federally funded institutions to aid in the repatriation of Native American cultural artifacts and remains.<sup>58</sup> Since its enactment, Native American cultural items and remains have been successfully repatriated from American institutions using NAGPRA.<sup>59</sup> However, NAGPRA's reach does not extend beyond the borders of the

---

745–60 (providing a history of the international repatriation debate in the modern era).

52. Geraldine Kendal Adams, *Macron Report Advocates Permanent Return of Colonial-Era African Objects*, MUSEUMS ASS'N (Nov. 28, 2018), <https://bit.ly/3v3jc3O> [<https://perma.cc/43P9-ZHCY>].

53. Catherine Hickley, *Culture Ministers from 16 German States Agree to Repatriate Artefacts Looted in Colonial Era*, ART NEWSPAPER (Mar. 14, 2019), <https://bit.ly/3sYKaI0> [<https://perma.cc/RCM8-LC8V>].

54. David Sanderson, *Minister Rules Out Return of Treasures*, SUNDAY TIMES (Apr. 22, 2019, 12:01 AM), <https://bit.ly/3v5Dmu2> [<https://perma.cc/2N2P-C8H7>].

55. *Id.*

56. *Id.*

57. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3005.

58. *Id.*

59. *See, e.g.*, Notice of Intent to Repatriate a Cultural Item: New York State Museum, Albany, NY, 69 Fed. Reg. 42,773-01 (July 16, 2004) (repatriating a culturally significant, 18th century belt from the New York State Museum to the Mohawk Indians of New York); Notice of Inventory Completion for Native American Human Remains from Sand Creek, CO in the possession of the Colorado Historical Society, Denver, CO, 63 Fed. Reg. 39,292-04 (July 22, 1998) (repatriating human remains taken from the Sand Creek Massacre site from the Colorado Historical Society to the Cheyenne-Arapaho tribes).

United States.<sup>60</sup> In an attempt to mitigate this issue, U.S. Senator Martin Heinrich proposed the Safeguard Tribal Objects of Patrimony Act (“STOP Act”).<sup>61</sup> The STOP Act, introduced in 2016, was passed in the U.S. House of Representatives and awaits review by the U.S. Senate.<sup>62</sup> The STOP Act implements an export restriction on Native American artifacts and increases the criminal penalties for trafficking these artifacts.<sup>63</sup> While the proposed act might deter future export and trafficking of Native American artifacts, the STOP Act can do nothing to repatriate items already removed from the United States.<sup>64</sup>

2. *The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Ownership of Cultural Property*

UNESCO is the United Nation’s educational, scientific, and cultural organization, and works to promote and protect cultural heritage.<sup>65</sup> The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Ownership of Cultural Property (“UNESCO Convention”) requires state parties to the convention to take “appropriate steps” to return items that other parties to the convention have designated as objects of cultural significance.<sup>66</sup> The U.S. Congress implemented the UNESCO Convention via the Cultural Property Implementation Act (“CPIA”) in 1983.<sup>67</sup>

Unfortunately, the UNESCO Convention has several weaknesses as a mechanism for the repatriation of Native American cul-

---

60. See Keeler, *supra* note 9, (noting that NAGPRA is domestic legislation that has no effect internationally).

61. S. 2165, 116th Cong. (2020).

62. Carol A. Clark, *Heinrich Bill Safeguarding Tribal Items Passes Senate*, LOS ALAMOS DAILY POST (Dec. 18, 2020, 8:01 AM), <https://bit.ly/2MYgfQM> [<https://perma.cc/CW3L-G5XX>].

63. S. 2165, 116th Cong. § 2 (2020).

64. See Aaron Haines, Note, *Will the Stop Act Stop Anything? The Safeguard Tribal Objects of Patrimony Act and Recovering Native American Artifacts from Abroad*, 39 CARDOZO L. REV. 1091, 1113 (2018) (arguing that “the STOP Act would be effective in only those few countries that recognize foreign cultural property export restrictions.”).

65. *UNESCO in Brief*, UNESCO, <https://bit.ly/38kHIU9> [<https://perma.cc/Y5Q3-SXKD>] (last visited Feb. 27, 2021).

66. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 10 I.L.M. 289 [hereinafter UNESCO Convention].

67. 19 U.S.C. § 2602.

tural items.<sup>68</sup> First, the UNESCO Convention does not apply to non-party states, and thus does not aid Native American efforts to repatriate cultural items held by non-party states.<sup>69</sup> Second, the UNESCO Convention does not prohibit export of cultural property itself.<sup>70</sup> Instead, it requires party states to implement the Convention using appropriate legislation.<sup>71</sup> Certain nations have implemented the Convention in such a way that it robs the Convention of its potency.<sup>72</sup>

As an example, Japan claims to have implemented the UNESCO Convention, yet Japan has adopted into its domestic law only the portions of the Convention that require the repatriation of items *stolen from a museum*.<sup>73</sup> Thus, if a Native American tribe sought the repatriation of a cultural item stolen from a grave, the UNESCO Convention as adopted would provide no remedy, despite Japan being party to the Convention.<sup>74</sup>

Third, the UNESCO Convention is non-retroactive and cannot be used to repatriate cultural items that were obtained before a party state implemented the Convention through domestic legislation.<sup>75</sup> The non-retroactivity of the UNESCO Convention is particularly problematic for the repatriation of Native American cultural items, as many such objects were stolen centuries before the Convention was enacted.<sup>76</sup>

---

68. See Nina R. Lezner, Comment, *The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?*, 15 U. PA. J. INT'L BUS. L. 469, 478 (1994) (“[T]he UNESCO Convention is viewed as a weak piece of legislation without the ‘teeth’ to prevent the widespread plundering and looting of valuable works of art.”).

69. *Id.*

70. UNESCO Convention, *supra* note 66, at art. 7.

71. *Id.*

72. See William Kuzma, *Potentiating Loopholes: How Erratic and Piecemeal Implementation of the 1970 UNESCO Convention has Failed to Protect Cultural Antiquities*, 42 COLUM. J.L. & ARTS 501, 513 (2019).

73. *Id.*

74. See *id.* (explaining that Japan’s adoption of the UNESCO Convention “comes with the major caveat that for any piece of cultural heritage to be protected under Japanese law, the piece must have been specially designated in an institution’s inventories before any attempt to prevent its sale.”).

75. Katherine D. Vitale, Note, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 NOTRE DAME L. REV. 1835, 1842 (2009).

76. Keeler, *supra* note 9, at 716 (noting that the theft of Native American cultural items may be traced back to the earliest European settlement of the Americas).

### 3. *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*

The International Institute for the Unification of Private Law (“UNIDROIT”) is an independent intergovernmental organization dedicated to coordinating private and commercial law between states and groups of states.<sup>77</sup> The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (“UNIDROIT Convention”) is an international treaty creating a mechanism for the return of stolen cultural property among its 48 party states.<sup>78</sup> The UNIDROIT Convention creates a private cause of action for the repatriation of stolen cultural items and requires the possessors of such items to return them.<sup>79</sup> Other aspects of the Convention, however, make it an unappealing method of repatriation. The UNIDROIT Convention requires that claimants fairly compensate a possessor for the return of a cultural item—provided that the possessor exercised due diligence in the acquisition of the item.<sup>80</sup> This requirement creates a substantial financial barrier to many repatriation claims, particularly Native American tribes—who may lack sufficient resources to compensate for repatriation.<sup>81</sup> As with the UNESCO Convention, the UNIDROIT Convention also lacks retroactivity.<sup>82</sup> The UNIDROIT Convention’s lack of retroactivity means that the Convention is unavailable as a repatriation mechanism for many Native American cultural items, most of which were obtained prior to the Convention’s enactment.<sup>83</sup> Most critically, many nations have not signed the UNIDROIT Convention, including the United States and the United Kingdom.<sup>84</sup> Native American

---

77. Overview, UNIDROIT, <https://bit.ly/38jPqho> [<https://perma.cc/KR8K-WJ87>] (last visited Mar.6, 2022).

78. UNIDROIT Convention on Stolen or Illegally Exported Objects art. 3, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention].

79. *Id.* at art 4.

80. *Id.*

81. Algonon Austin, *Native Americans and Jobs: The Challenge and the Promise*, ECON. POL’Y INST. (Dec. 17, 2013), <https://bit.ly/3oy5hhC> [<https://perma.cc/D8VS-H5Y3>] (noting that “[i]n 2000, Native Americans’ median wealth was equal to only 8.7% of the median wealth among all Americans.”).

82. David N. Chang, Comment, *Stealing Beauty: Stopping the Madness of Illicit Art Trafficking*, 28 HOUS. J. INT’L. L. 829, 859 (2006).

83. See Keeler *supra* note 9, at 716 (discussing the fact that Native American cultural items have been stolen long before the enactment of the UNIDROIT Convention).

84. *Id.* at 780.

tribes will be unable to use the UNIDROIT Convention to repatriate items held in these nations.<sup>85</sup>

#### 4. *The United Nations Declaration on the Rights of Indigenous People*

In 2007, the United Nations passed the Declaration on the Rights of Indigenous People (“UNDRIP”).<sup>86</sup> UNDRIP requires that signing states create “effective mechanisms” to repatriate the cultural property of indigenous peoples.<sup>87</sup> UNDRIP is non-binding, however, and does not commit any state to actually repatriate indigenous cultural items.<sup>88</sup> Even states that voted to pass UNDRIP have been reticent to honor the repatriation claims of indigenous peoples.<sup>89</sup> France, for example, is a signatory to UNDRIP.<sup>90</sup> However, when the Hopi Nation sought an injunction against a French auction house prior to the planned sale of several Hopi cultural items, the French court rejected the injunction and allowed the auction to proceed.<sup>91</sup>

#### 5. *National Patrimony Laws*

Seeking to protect their cultural heritage, some nations have enacted national patrimony laws vesting the title of a country’s cultural artifacts with the state.<sup>92</sup> This allows states to claim ownership of the artifacts in foreign courts.<sup>93</sup> The effectiveness of a national patrimony law is largely dependent on the willingness of foreign courts to honor a state’s claim of ownership.<sup>94</sup> National patrimony

---

85. Vienna Convention on the Law of Treaties, art. 34 May 23, 1969, 1155 U.N.T.S. 331 (stating that “[a] treaty does not create either obligations or rights for a third State without its consent.”).

86. G.A. Res. 67/67 (Sept. 13, 2007).

87. *Id.* at art. 11.

88. See Haines, *supra* note 64, at 1100 (explaining that UNDRIP “is best characterized as a set of ideals and goals that the member States commit to work towards.”).

89. See, e.g., Mashberg, *supra* note 32 (noting that, despite signing UNDRIP, France rejected the Hopi Nation’s repatriation claims).

90. Keeler, *supra* note 9 at 708.

91. See *supra* Section II.C (discussing the Hopi Nation’s attempt to stop the auctions of several Hopi cultural items in France).

92. 1 ALEXANDRA DARRABY, DARRABY ON ART LAW § 6:122

93. *Id.*

94. Compare *United States v. Schultz*, 333 F.3d 393, 410 (2d Cir. 2003) (holding that an Egyptian law that vested ownership of all antiquities discovered after 1983 to be sufficient for the repatriation of several Egyptian artifacts), with *United States v. McClain*, 545 F.2d 988, 1001 (5th Cir. 1977) (holding that a Mexican law merely prohibited the export of pre-Columbian artifacts and did not vest ownership of the items with the Mexican government).

laws are thus dependent on the outcome of expensive and time-consuming overseas litigation.<sup>95</sup>

As an illustration, suppose that Congress passed a national patrimony law giving the federal government title to all cultural artifacts within its boundaries.<sup>96</sup> In the event that an artifact was exported, the U.S. government could then attempt to sue for its repatriation in foreign courts.<sup>97</sup> This strategy would be reliant on the interpretation of the hypothetical U.S. national patrimony law by foreign courts.<sup>98</sup>

### 6. *Mutually Beneficial Repatriation Agreements*

Mutually beneficial repatriation agreements (“MBRAs”) are agreements between a nation and a possessor of a cultural artifact—usually another state or a museum—for the return of the artifact.<sup>99</sup> The receiving party compensates the returning party in some fashion, often with the loan of other artifacts and a waiver of any civil or criminal liability for the acquisition of the returned artifact.<sup>100</sup> MBRAs can resolve repatriation disputes without the need for sweeping legislation or costly, uncertain litigation.<sup>101</sup> They are highly flexible, and as such, may appeal to both cultural nationalists and internationalists.<sup>102</sup> For example, when repatriating an artifact, MBRAs may ensure that the repatriating party has continued access to similar items.<sup>103</sup> In this manner, MBRAs can encourage ongoing collaborations between the parties.<sup>104</sup>

---

95. Falkoff, *supra* note 29, at 285 (arguing that MBRAs “allow parties to avoid the time, costs, and risks associated with civil litigation.”).

96. DARRABY, *supra* note 92.

97. *Id.*

98. *See id.* (discussing the factors courts will consider when choosing whether to give force to the national patrimony law of a foreign nation).

99. Joshua S. Wolkoff, Note, *Transcending Cultural Nationalist and Internationalist Tendencies: The Case for Mutually Beneficial Repatriation Agreements*, 11 CARDOZO J. CONFLICT RESOL. 709, 725 (2010).

100. *Id.*

101. *See* Falkoff, *supra* note 29, at 284–87 (arguing that MBRAs foster good relations between the negotiating parties, allow parties to avoid the expenses and risks of litigation, and encourage source nations to avoid enacting overzealous export restrictions).

102. *See* Wolkoff, *supra* note 99, at 725 (arguing that “MBRAs offer an alternative to the strict repatriation scheme, which historically advocated for the unconditional return of works at the demands of claimants.”).

103. *See id.* at 736 (noting that MBRA’s frequently require the party receiving the repatriated property to compensate the returning party with long term loans of other cultural items, thereby making repatriation more appealing to the returning party).

104. *Id.* at 725 (“[t]he flexibility of MBRAs make them highly promising for creating long-term collaborations.”).

Despite their benefits, MBRAs are not free from criticism.<sup>105</sup> If poorly crafted, MBRAs may serve to perpetuate the black market for cultural artifacts by limiting the liability for dealing with stolen artifacts.<sup>106</sup> MBRAs, by avoiding litigation, may also inhibit the development of the legal precedent necessary to repatriate cultural artifacts when an amicable resolution is impracticable.<sup>107</sup>

a. Peru-Yale Agreement

In 1912, Yale University history professor Hiram Bingham excavated several artifacts from the ancient Incan city of Machu Picchu and brought them back to the university.<sup>108</sup> In 2010, Yale and Peru entered into an agreement for the return of the artifacts.<sup>109</sup> The agreement established a partnership between Yale and the Universidad Nacional de San Antonio Abad del Cusco in Peru.<sup>110</sup> Yale was compensated by loans of artifacts for display in the Yale-Peabody Museum.<sup>111</sup> Although Peru sued Yale for the return of the items in 2008, the case against Yale would likely have been unsuccessful, due to the fact that Yale had acquired the objects through legitimate means many years before the United States implemented the UNESCO Convention.<sup>112</sup> An MBRA was therefore likely the only realistic method of repatriation available to Peru.<sup>113</sup>

---

105. *Id.*

106. *See id.* at 289–90 (arguing that despite their benefits, MBRAs are ultimately harmful because, by limiting the liability of possessors of illicit cultural items, MBRAs reward institutions who acquire objects of questionable provenance with good publicity and long-term loans).

107. *See id.* at 293–95 (arguing that MBRAs that, by resolving cultural property conflicts prior to litigations, MBRAs slow the development of a comprehensive body of international cultural property jurisprudence).

108. *Yale and UNSAAC Create Center to Promote Study of Machu Picchu and Inca Culture*, YALENEWS (Feb. 11, 2011), <https://bit.ly/3ltx69o> [<https://perma.cc/FGJ6-SNLG>].

109. *Id.*

110. *Id.*

111. *Id.*

112. Anderson, *supra* note 12, at 330; First Amended Complaint at 1, Republic of Peru v. Yale Univ., No. 1:08-cv-2109, 2009 WL 6928272 (D. Con. Apr. 20, 2009). If the UNESCO Convention had applied, the U.S. State Department would have had the authority to seize the artifacts and return them to Peru under the CPIA. *See* Anderson, *supra* note 12 at 325 (detailing the State Department's enforcement of the CPIA).

113. Anderson, *supra* note 12, at 329–30 (“Peru had no legal support for their insistence that the objects be returned either through the CPIA or UNESCO Convention, their argument was regarded as having merit purely because it seemed to be the ‘right thing.’”).

### b. Italy-Met Agreement

Italy's repatriation efforts have been more successful than perhaps those of any other state.<sup>114</sup> In 2006, Italy and the Metropolitan Museum of Art (the Met) entered into an agreement for the return of the Euphronios Krater ("Krater"), a renowned Ancient-Greek terra cotta bowl.<sup>115</sup> In exchange, Italy agreed to loan other artifacts to the Met as well as waive the Met's civil liability in its role in the acquisition of the Krater.<sup>116</sup> Because the Met had rightfully purchased the Krater, Italy would have had little chance of success in an action for replevin in a U.S. court.<sup>117</sup>

### c. Australia-Manchester Museum Agreement

Native tribes need not negotiate MBRAs on their own.<sup>118</sup> Australia's Aboriginal and Torres Strait Islander Heritage Protection Act allows aboriginal communities to request that the Australian government negotiate on their behalf for the return of internationally held cultural items.<sup>119</sup> In 2019, the Manchester Museum agreed to return a collection of stolen cultural items to Indigenous Australians.<sup>120</sup> This return was one of the first successful repatriations of non-remains from a national British museum.<sup>121</sup>

---

114. Lauren Fae Silver, *Recapturing Art: A Comprehensive Assessment of the Italian Model for Cultural Property Protection*, 23 N.Y. INT'L L. REV. 1, 3 (2010) (noting that Italy has "achieved thousands of cultural objects from abroad" using a "combination of national legal strategies, international strategies, and nonlegal strategies.").

115. *Id.* at 46.

116. *Id.*

117. *See id.* at 45 (arguing that any case against the Met would hinge "on whether . . . the object was stolen").

118. *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* pt 2 div 1 (Austl.).

119. *Id.*

120. Josh Halliday, *Manchester Museum Returns Stolen Sacred Artefacts to Australians*, GUARDIAN (Nov. 20, 2019), <https://bit.ly/3pFQ2EK> [<https://perma.cc/RNN6-3V5D>] (noting that the director of the Manchester Museum indicated that she hoped that other British museums would take similar measures).

121. *Id.* Notably, the Australia-Manchester Museum permanently returned cultural items to Indigenous Australian; the British Museum agreed only to temporarily loan the Confederated Tribes of the Grande Ronde their own cultural items. *See supra* Part I (detailing the agreement between the Confederated Tribes of the Grande Ronde and the British Museum).



#### d. United States-Cambodia Agreement

MBRAs may also be used in negotiations between states.<sup>122</sup> In 2003, the United States and Cambodia signed a Memorandum of Understanding (“MOU”).<sup>123</sup> In the MOU, the United States agreed to implement, through the Cultural Property Implementation Act (“CPIA”), an import restriction on certain Khmer archeological items and to return any such items in possession of the United States.<sup>124</sup> In exchange, Cambodia agreed to permit the exchange of artifacts in a manner that “does not jeopardize its cultural patrimony.”<sup>125</sup> Cambodia also agreed to strengthen its protection of archaeological sites—ensuring that the burden of protecting Cambodia’s cultural property would not fall solely on the U.S. government.<sup>126</sup>

### III. ANALYSIS

#### A. *Native American Cultural Items Should Be Repatriated with U.S. Government Assistance*

The repatriation of Native American cultural items from abroad is necessary, and the U.S. government should take an active role in repatriation efforts. Native American cultural items represent the history and traditions of the first peoples to live on the land that now constitutes the United States.<sup>127</sup> The repatriation of these items should be given the same priority as the preservation of objects connected to the Founding. Just as the Constitution and Declaration of Independence are preserved and protected in the National Archives Museum, Native American artifacts should be preserved and protected and, if necessary, repatriated.<sup>128</sup>

The U.S. government has been responsible for the loss of many Native American cultural items, with the most sensitive items being human remains.<sup>129</sup> Aiding in the repatriation of lost cultural items

---

122. Memorandum of Understanding Concerning the Import Restrictions on Khmer Archaeological Material, Cambodia-U.S. Sept. 19, 2003, T.I.A.S. No. 03-919

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. See Keeler, *supra* note 9, at 716 (explaining that the earliest European settlers of the Americas frequently stole Native American cultural items).

128. *Founding Documents in the Rotunda for the Charters of Freedom*, NAT. ARCHIVES MUSEUM, <https://bit.ly/3ruowuH> [<https://perma.cc/EN5P-LDXP>] (last visited Mar. 20, 2022).

129. See, e.g., ROBERT E. BIEDER, A BRIEF HISTORICAL SURVEY OF THE EX-PROPRIATION OF AMERICAN INDIAN REMAINS 36–37 (1990) (noting that Thomas

is a necessary step in the process of making amends for the U.S. government's mistreatment of Native Americans, and could foster a closer relationship between the U.S. government and Native American tribes.

*B. Cultural Internationalist Critiques of Repatriation Are Not Applicable to Native American Cultural Items*

Cultural internationalists often voice concerns that widespread repatriation would deplete museum archives of foreign artifacts. Cultural items would only be housed in their nation of origin, and cultural exchange would be limited.<sup>130</sup> Native American cultural objects, however, are not merely museum pieces or works of art to be enjoyed in foreign museums. Rather, Native American cultural objects have immense religious and cultural significance for the tribes that created them.<sup>131</sup> Furthermore, for many Native American cultural items in foreign collections, this concern is inapplicable, as these items are rarely displayed publicly.<sup>132</sup> If museums do wish to display Native American cultural items, they ought to negotiate with Native American tribes as the proper custodians of these items, and the tribes themselves can determine which items are suitable for display.

Cultural internationalists also fear that repatriated objects will not be properly recontextualized.<sup>133</sup> This fear is inapplicable to the repatriation of Native American cultural items. Native American tribes have a deep relationship with their cultural items.<sup>134</sup> While complete recontextualization may or may not be attainable, Native

---

Jefferson exhumed a Native American gravesite and that, in 1866, the U.S. Surgeon General ordered that Army medical officers to plunder Native American gravesites for skulls).

130. See Merryman, *supra* note 21, at 847 (claiming that cultural internationalists desire cultural items to “be made available by sale exchange or loan” so that “the achievements of the earlier cultures of the sources could be exhibited to a wider audience” and “the interest of foreigners in seeing and studying such works . . . could be accommodated.”).

131. *Resolution in Support of International Repatriation*, *supra* note 10.

132. See, eg., Parks & Surowidjojo, *supra* note 3 (stating that the Summers collection, was not on public display in the British Museum but rather was kept in the museum's archives for nearly a century).

133. See Falkoff, *supra* note 29, at 279 (discussing that many cultural internationalists are skeptical of the idea that repatriated objects will ever be recontextualized).

134. See Keeler, *supra* note 9, at 794 (arguing that “[i]nternational museums often interpret cultural objects with no connection to the originating indigenous community knowledgeable about its history, its use, its spiritual characteristics, or its identity with in the community” and that “[c]ultural objects have different meanings in indigenous communities and often encompass much for than a simplistic aesthetically-oriented reinterpretation of the cultural object as art.”).

American tribes alone have the knowledge and traditions necessary to determine the proper context for their cultural items.

*C. Current Mechanisms for Repatriation Are Not Effective*

Current methods of international repatriation have proven to be ineffective. The UNESCO and UNIDROIT Conventions are not binding on non-party states.<sup>135</sup> Relying on these conventions makes repatriation impossible when a cultural item resides in a non-party state.<sup>136</sup> Even nations that are party to the Conventions may choose not to implement the full force of the Conventions into domestic law.<sup>137</sup> The Conventions also lack retroactivity.<sup>138</sup> These conventions may not be used to repatriate an item that was acquired before a party state implemented the relevant convention.<sup>139</sup> In practice, this means that only Native American cultural items that were taken after the party-state adopted the conventions and which currently reside in the party state can be repatriated.<sup>140</sup>

A potential national patrimony law also has significant weaknesses. Assuming such a law was enacted in the United States, its utility would be dependent on its interpretation by foreign courts.<sup>141</sup> Enforcing such a law would also require extensive overseas litigation.<sup>142</sup>

*D. MBRAs Are the Most Effective Mechanism for Repatriation*

*1. MBRAs Have Advantages Over Current Mechanisms for Repatriation*

MBRAs avoid many of the downsides of the other mechanisms for international repatriation. A major limitation of the UNESCO

---

135. Haines, *supra* note 64, at 113; UNIDROIT Convention, *supra* note 78, at art. 7.

136. Haines, *supra* note 64, at 113; UNIDROIT Convention, *supra* note 78, at art. 7.

137. *See supra* Section II.D.2 (discussing Japan's inadequate implementation of the UNESCO Convention).

138. *See Vitale, supra* note 75, at 1842 (noting that the UNESCO Convention is non-retroactive); Chang, *supra* note 82, at 859 (noting that the UNIDROIT Convention is non-retroactive).

139. *See Vitale, supra* note 75, at 1842; Chang, *supra* note 82, at 859 (explaining that the Conventions' lack of retroactivity forecloses on claims for the repatriation of cultural items taken prior to the enactment of domestic legislation implementing the Conventions in the nation where the item resides).

140. Haines, *supra* note 64, at 113; UNIDROIT Convention, *supra* note 78, at art. 7; Vitale, *supra* note 75, at 1842; Chang, *supra* note 82, at 859.

141. *See supra* Section II.D.5 (discussing the limitations of a hypothetical national patrimony law).

142. DARRABY, *supra* note 93.

and UNADROIT Conventions is their lack of retroactivity.<sup>143</sup> MBRAs do not share this limitation because they may be applied retroactively.<sup>144</sup> The Peru-Yale agreement, for instance, successfully repatriated items that were taken in 1912—before either of the conventions were created—and despite the fact that the United States is not a party to the UNIDROIT Convention.<sup>145</sup>

National patrimony laws are dependent on the outcome of expensive and time-consuming overseas litigation.<sup>146</sup> MBRAs, meanwhile, bypass the litigation process altogether.<sup>147</sup>

MBRAs have the advantage of being flexible and narrowly applicable.<sup>148</sup> Some foreign museums have acquired high-profile items in their collections through dubious means.<sup>149</sup> Many of these objects have been the subject of considerable controversy.<sup>150</sup> Foreign governments may be reluctant to pass legislation or sign treaties that require repatriation out of fear of losing these exhibits.<sup>151</sup> Likewise, foreign courts may be reluctant to rule in a manner that would create precedent for repatriation. MBRAs would have no impact on the legal status of other objects belonging to a foreign government or museum because they are simply agreements between two parties.<sup>152</sup> For these reasons, MBRAs may satisfy the concerns of both cultural nationalists and internationalists.<sup>153</sup> They can foster

---

143. See Vitale, *supra* note 75, at 1842 (noting that the UNESCO Convention is non-retroactive); Chang, *supra* note 82, at 859 (noting that the UNIDROIT Convention is also non-retroactive).

144. See Falkoff *supra* note 29, at 284–87.

145. *Id.*

146. *Id.* at 285 (arguing that MBRAs “allow parties to avoid the costs, time, and risks associated with civil litigation.”).

147. *Id.*

148. See Wolkoff, *supra* note 99, at 725 (“MBRAs offer an alternative to the strict repatriation scheme, which historically advocated for the unconditional return of works at the demands of claimants.”).

149. See, e.g., John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1882 (1985) (detailing how the British Museum acquired the Elgin Marbles, a set of ancient Greek sculptures and one of the museum’s high-profile exhibits, from Thomas Bruce, a British ambassador who removed them from the Parthenon, causing considerable architectural damage).

150. See Helena Smith, “Product of Theft: Greece Urges UK to Return Parthenon Marbles,” GUARDIAN (Jun. 20, 2020), <https://bit.ly/3sHtBTr> [<https://perma.cc/35UC-8UWM>] (detailing the Greek government’s ongoing efforts to repatriate the Elgin Marbles, as well as the continued opposition of the British Museum and the United Kingdom).

151. See, e.g., Sanderson *supra* note 54 (detailing the British governments’ ongoing hostility towards repatriation).

152. See Wolkoff, *supra* note 99, at 725.

153. See Falkoff, *supra* note 29, at 286 (arguing that MBRAs can reconcile cultural nationalism and cultural internationalism).

ongoing collaboration between parties, through loans of cultural items.

## 2. *The Weaknesses of MBRAs May Be Mitigated*

MBRAs have been criticized as inhibiting the formation of effective international legal mechanisms for repatriation.<sup>154</sup> This criticism has some merit. The routine use of extralegal agreements to achieve repatriation may result in insufficient demand to address the flaws in the existing international cultural property conventions or to create new, more effective conventions.<sup>155</sup> When evaluating this concern, however, one must keep in mind the unique characteristics of Native American cultural items. These objects are intimately linked to the cultural and spiritual identity of the peoples who created them and have often been claimed through violence, fraud, and intimidation.<sup>156</sup> Native American tribes have maintained a deep ongoing connection to their cultural past. The repatriation of Native American cultural items should not be put on hold while more robust legal mechanisms are developed. While MBRAs may not lead to the creation of new legal mechanisms for repatriation, they may persuade foreign institutions and governments to consider repatriation, or to enter into future agreements with other parties.<sup>157</sup>

Critics also argue that MBRAs actually reward institutions for acquiring cultural objects of questionable provenance because those institutions may be offered long-term loans of other objects and waivers of liability in exchange for repatriation.<sup>158</sup> The United States should pursue a policy that avoids creating such a perverse incentive structure. To do so, the United States should refuse to offer long-term loans or liability disclaimers in exchange for the repatriation of recently acquired cultural objects of questionable provenance. These measures would send a message to foreign insti-

---

154. *Id.* at 304 (arguing that the use of MBRAs will inhibit the formation of the necessary legal precedent to achieve repatriation under the UNESCO and UNIDROIT Conventions).

155. *See id.* (arguing that until a sufficient body of case law has been developed around repatriation of cultural property under the UNESCO and UNIDROIT Conventions that “MBRAs will detract from the formation of such precedent, leaving claimant nations in pursuit of a legal remedy with burdens that are simultaneously intimidating and unclear.”).

156. Keeler, *supra* note 9, at 731–35.

157. *See* Wolkoff, *supra* note 99, at 729 (hypothesizing that the Met-Italy agreement for the return of the Euphronios Krater may encourage other museums to enter into similar MBRAs).

158. *Id.* at 725.

tutions that they will not be rewarded by the United States for acquiring stolen cultural items.

### 3. *MBRAs Facilitated by the U.S. Government Provide Unique Advantages*

One weakness of MBRAs is that they rely on the strength of the repatriating party's bargaining position.<sup>159</sup> Native American tribes may lack the resources to carry out overseas negotiations and the bargaining power necessary to achieve a favorable agreement.<sup>160</sup> These attempts have a much greater chance of success with the support of the federal government.<sup>161</sup> MBRAs often rely on long-term loans of other cultural objects in exchange for repatriation.<sup>162</sup> Native American tribes may be apprehensive about such loans given the religious significance of their cultural items, and the abuse and deception tribes have endured in the past.<sup>163</sup> In these instances, the United States—possessing a vast supply of art and antiquities—should be prepared to offer other items in its possession for long-term loans in exchange for the repatriation of Native American artifacts.<sup>164</sup>

MBRAs facilitated by the U.S. government would have the additional benefit of creating a closer relationship between the government and Native American tribes. Native American tribes have indicated that international repatriation is an important issue to them, and many Native Americans have been frustrated by a perceived lack of support by the U.S. government.<sup>165</sup> By taking an active role in facilitating international repatriations, the federal

---

159. See Aaron Kyle Briggs, Comment, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 646 (2007) (arguing that Italy's successful use of MBRA is due, in part, to Italy's ability to threaten to bar access to its substantial holdings of art and antiquities and that nations without Italy's resources may be unable to replicate its results).

160. *Id.* at 293

161. See Keeler, *supra* note 9, at 791 ("The State is a long-established party negotiator in international law, as opposed to indigenous peoples who are only just being recognized as participants once more.").

162. Wolkoff, *supra* note 99, at 725.

163. See BIEDER, *supra* note 129, at 36–37 (discussing how Native American cultural items have been stolen and looted throughout history).

164. *Smithsonian Collections*, SMITHSONIAN (Aug. 1, 2018) <https://s.si.edu/3lGVJQ5> [<https://perma.cc/92C6-EB2A>] (stating that the Smithsonian Collection contains over 145.8 million items).

165. INTERNATIONAL REPATRIATION LISTENING SESSIONS AND CONSULTATIONS SUMMARY, *supra* note 19 at 2 (noting that "a significant amount of comment centered on the need for the United States to provide Tribes with more support and technical assistance regarding international repatriation" and that "many commenters requested that financial assistance or specific grants be made available for use in carrying out international repatriation.").

government could show that it is responsive to the concerns of Native Americans.

The U.S. government could combat other logistical and financial impediments to repatriation. Some foreign holders of Native American cultural items are hesitant to repatriate collections because they are concerned Native American tribes lack the facilities to safely hold and display antiquities.<sup>166</sup> The British Museum, for example, refused to loan Grande Ronde tribal items to the Confederated Tribes of the Grande Ronde until the Confederated Tribes built a small museum on the reservation complete with a security vault.<sup>167</sup> Funding and constructing adequate facilities may be particularly difficult for small Native American tribes whose members are often impoverished.<sup>168</sup> Congress ought to appropriate funds to Native American tribes for construction of adequate facilities to house repatriated cultural items. Doing so would help to allay the justifiable concerns of foreign institutions that repatriated items would be held in inadequate facilities and would also facilitate MBRAs between Native American tribes and foreign museums. Additionally, funding tribal museums would have the ancillary benefit of promoting goodwill and cooperation between the U.S. government and Native American tribes.

#### IV. CONCLUSION

Contrary to Reverend Summers' expectations, the native peoples of North America did not go extinct—they persevered and now struggle to preserve their cultures and traditions.<sup>169</sup> When 16 out of over 200 items from the Summers Collection were temporarily loaned to the Confederated Tribes of the Grand Ronde, tribal members spent a year studying the objects.<sup>170</sup> They used photogrammetry and 3-D scanning to make virtual copies of the objects.<sup>171</sup> An estimated 10,000 people visited the exhibit.<sup>172</sup> The temporary loan of these cultural items had deep significance for the

---

166. Flaccus, *supra* note 2.

167. *Id.*

168. *See, e.g., id.* (noting that the Confederated Tribes of the Grande Ronde, who have just over 5,000 members, lacked the funds to construct a facility that met the British Museum's requirements until a casino was established on the Grande Ronde Reservation); *see* Austin, *supra* note 81 (discussing the relative lack of wealth of Native Americans as compared to the general American population).

169. Parks & Surowidjojo, *supra* note 3.

170. Danielle Frost, *Summers Artifacts Returning to British Museum*, SMOKE SIGNALS (May 15, 2019), <https://bit.ly/3qtd410> [<https://perma.cc/PT2Z-5Z5N>].

171. Parks & Surowidjojo, *supra* note 3.

172. *Id.*

tribal members.<sup>173</sup> These same items had been stored out of sight in the British Museum for over a century.<sup>174</sup> The Summers Collection, so significant to the Grand Ronde tribes, was just a drop in the vast ocean of the British Museum's collection.<sup>175</sup>

The one-year loan of these 16 items, while significant, does not constitute a successful repatriation story. There was no repatriation. The 16 items have since been returned to the British museum, where they will again be stored in a warehouse.<sup>176</sup> Instead, the story of the Summers Collection serves to underscore the need for an effective and timely mechanism for international repatriation of Native American cultural items. While there are several potential mechanisms for international repatriation, most have significant shortcomings.<sup>177</sup> The UNESCO and UNIDROIT Conventions are non-retroactive and bind only state parties to the Conventions.<sup>178</sup> UNDRIP is non-binding.<sup>179</sup> The proposed STOP Act and a hypothetical U.S. national patrimony law would both be hamstrung by uneven enforcement in different nations.<sup>180</sup> Furthermore, each of these methods would require Native American tribes to engage in costly international litigation.<sup>181</sup> MBRAs, when negotiated with the assistance of the U.S. government, would allow Native American tribes to repatriate their cultural items from foreign holders, regardless of the nation the items reside in or when the items were acquired.<sup>182</sup> MBRAs have the best potential to bring Native American history home to its rightful owners.

---

173. *Id.*

174. *Id.*

175. *260 Years-The British Museum in Numbers*, BRITISH MUSEUM (Jan. 15, 2019), <https://bit.ly/2MUb44b> [<https://perma.cc/4XLG-72WD>] (stating that the British Museum collection contains over eight million items).

176. Frost, *supra* note 170.

177. *See supra* Part II (discussing the weaknesses of various potential repatriation methods).

178. UNESCO Convention, *supra* note 66; UNIDROIT Convention, *supra* note 78.

179. G.A. Res. 67/67, *supra* note 87.

180. *See supra* Section II.D.1 (discussing the limitations of the STOP Act); *supra* Section II.D.5 (discussing the drawbacks of national patrimony laws).

181. Falkoff, *supra* note 29, at 285.

182. *See supra* Section III.A (discussing the need for the United States to assist Native American tribes in negotiating MBRAs).



\*\*\*