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## Decommodifying Cultural Heritage: A Linguistic Unpacking of "Cultural Property"

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# NOTES

## DECOMMODIFYING CULTURAL HERITAGE: A LINGUISTIC UNPACKING OF “CULTURAL PROPERTY”

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## INTRODUCTION

“When people see the famous portrait, they see a masterpiece by one of Austria’s finest artists. But I see a picture of my aunt.”<sup>1</sup> Esteemed actress Helen Mirren spoke these lines as Maria Altmann in *Woman in Gold*, the 2015 film based on a true story about Altmann’s claim for a Gustav Klimt painting of her aunt, Adele Bloch-Bauer, which the Nazis looted from Altmann’s family during the Second World War.<sup>2</sup> Austria had subsequently enacted a law rendering all Nazi ideology-motivated transactions (such as this one) void, but a different law provided that people seeking to recover artwork deemed important to the country’s “cultural heritage” must petition the Austrian Federal Monument Agency.<sup>3</sup>

Altmann was ultimately successful in her fight for the painting, but what happens when there is no perfect storm of factors to tip the scales in favor of a claimant?<sup>4</sup> When a sovereign state attempts to repatriate an object, contrary to what Maria Altmann’s case might suggest, the state may face various hurdles that materialized long before the object was removed from the country in the first place.<sup>5</sup> These hurdles are not primarily legal, but linguistic: the phrase “cultural property” has dominated the relevant body of legislation for decades, but what does it mean?<sup>6</sup>

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1. WOMAN IN GOLD (BBC Films and Origin Pictures 2015). This quote, while fictional, illustrates the tension between individual ownership and shared heritage that makes choosing words in cultural property legislation difficult.

2. See *Republic of Austria v. Altmann*, 541 U.S. 677, 682 (2004).

3. *Id.* at 682-83.

4. Factors in Maria Altmann’s favor included powerful moral considerations (the Jewish Altmann family’s painting was stolen by the Nazis), the value and uniqueness of the object in question (a painting by famed artist Gustav Klimt, which Altmann later sold for \$135 million), Altmann’s personal connection to the painting of her aunt, and extensive media coverage surrounding the case. Marjorie Perloff, *The Legal, the Ethical, and the Aesthetic: The Case of Gustav Klimt’s Woman in Gold*, 12 F. WORLD LITERATURE STUD. 189, 190 (2020).

5. See *Altmann*, 541 U.S. at 684-86 (describing the Austrian government’s apparent efforts to bar and later delay Altmann’s restitution claim).

6. Compare *infra* Part I (describing the history of cultural property legislation), with *infra* Part II (discussing historic and contemporary understandings of cultural property).

The term “cultural property” may draw to mind images of statues, artifacts, and artwork that museums collect.<sup>7</sup> At the same time, it could refer to architecture and even fossils.<sup>8</sup> The legal definition of cultural property is surprisingly ambiguous. In certain pieces of legislation, it covers broad categories, while in others, cultural property is carefully described with respect to material type and year of creation.<sup>9</sup> Colloquially, however, “cultural property” is harder to pinpoint. Recognizing that theft and trafficking of cultural property can harm the economy and historic integrity of developing countries, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 1970 (the 1970 UNESCO Convention).<sup>10</sup>

The complex history of cultural property regulation in the United States, discussed below, suggests a lack of consensus regarding the definition of the legislation’s target. However, as this Note argues, it is futile to attempt crafting a precise definition of the objects qualifying for protection under such legislation without first addressing the dueling interests inherent in the operative words. An examination of the various aims of cultural property legislation reveals two competing goals. On one side exists the desire to protect cultural heritage for the world’s enrichment, and on the other is the desire to protect private ownership rights.<sup>11</sup> These interests are embodied

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7. See generally THE ROUTLEDGE COMPANION TO CULTURAL PROPERTY (Jane Anderson & Haidy Geismar eds., 2017).

8. See *Black Hills Inst. of Geological Rsch. v. U.S. Dep’t of Just.*, 967 F.2d 1237, 1241 (8th Cir. 1992).

9. Compare Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter *1970 UNESCO Convention*] (“cultural property” means property which ... is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science”), with Import Restrictions Imposed on Archaeological Material from Chile, 85 Fed. Reg. 64020, 64020-24 (codified as amended at 19 C.F.R. § 12.104(g)) (providing detailed categories of Chilean cultural property including area of origin, year of origin, and physical descriptions of various types of artifacts).

10. *1970 UNESCO Convention*, *supra* note 9.

11. See Lyndel V. Prott & Patrick J. O’Keefe, ‘Cultural Heritage’ or ‘Cultural Property’?, 1 INT’L J. CULTURAL PROP. 307, 309 (1992). For examples of this concept in practice, compare Convention for the Protection of Cultural Property in the Event of Armed Conflict pmbl., May 14, 1954, 249 U.N.T.S. 240 [hereinafter *1954 Hague Convention*] (“[c]onsidering that the preservation of the cultural heritage is of great importance for all peoples of the world”), with

in the inherent tension between, and within, the words corresponding to these respective goals—“heritage” and “property”—and their interactions with what are arguably more straightforward supporting words, such as “objects” and “antiquities.”<sup>12</sup> This Note argues that colloquial word associations with “property” contribute to the difficulties legislators and courts face in regulating and prosecuting cultural property trafficking. Due to these connotations, the international conventions using these terms have laid an insufficient foundation for American federal legislation aiming to regulate cultural property because the use of the word “property” characterizes cultural heritage as a commodity, rather than as something of value for entire communities.

In the academic realm, some cultural property or heritage scholars support the use of the term “property,” while others advocate for “heritage”; “objects” occurs in the discourse and various conventions as a compromise.<sup>13</sup> This Note argues that legislation should avoid using the word “property” without a qualifying antecedent. Instead, it should use the term “cultural heritage” as a modifier for further terms. In practice, this would entail more specific designations such as “cultural heritage property,” “cultural heritage site,” and so forth. This suggestion, which may appear inaccessible and overly technical at first blush, comes not from a detached art historical lens, however. Rather, this conclusion follows from examining the words in the context of the colloquial connotations of the word “property.” This is essential, as those purchasing stolen and illicitly trafficked cultural objects—usually in good faith—are typically relatively unsophisticated individuals.<sup>14</sup> “Property” carries with it a long

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19 U.S.C. § 2611 (“The provisions of this chapter shall not apply to ... any ... article of cultural property ... if ... the claimant establishes that it purchased the material or article for value without knowledge or reason to believe it was imported in violation of the law.”).

12. See Alexander A. Bauer, *(Re)Introducing the International Journal of Cultural Property*, 12 INT’L J. CULTURAL PROP. 6, 6 (2005). See generally Prott & O’Keefe, *supra* note 11, at 307.

13. See Lyndel V. Prott, *The International Movement of Cultural Objects*, 12 INT’L J. CULTURAL PROP. 225, 226 (2005); see, e.g., 1954 *Hague Convention*, *supra* note 11, at art. 1; 1970 *UNESCO Convention*, *supra* note 9, at art. 1; Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322-24.

14. MATTHEW SARGENT, JAMES V. MARRONE, ALEXANDRA EVANS, BILYANA LILLY, ERIK NEMETH & STEPHEN DALZELL, *TRACKING AND DISRUPTING THE ILLICIT ANTIQUITIES TRADE WITH OPEN-SOURCE DATA* 27 (2020) (ebook). This assertion is not without exceptions—namely sophisticated arts and antiquities dealers—which this Note does not address.

jurisprudential history anchored in the common law tradition which echoes the Latin colloquial roots of “property”: “one’s own.”<sup>15</sup>

This Note proceeds in four Parts. Part I provides an overview of relevant cultural property legislation spanning from the Hague Conventions of 1899 and 1907 to the Convention on Cultural Property Implementation Act of 1983. Part II explores the impact of connotations associated with the word “property” by analyzing observable usage as it exists in academic literature and case law. To add quantitative strength to the anecdotal observations, Part III introduces a corpus linguistics study which analyzes corpora, bodies of text consisting of a large number of sources, for common words and patterns.<sup>16</sup> Part IV contextualizes the results of this corpus linguistics study within the relevant case law, showing how the phrase “cultural property” is unavailing in such disputes, and proposes new terminology as a solution.

## I. OVERVIEW OF CULTURAL PROPERTY LEGISLATION

The term “cultural property” has enjoyed longstanding historical use—it can be traced back to the International Peace Conferences, also known as the Hague Conventions, of 1899 and 1907, which addressed protection of cultural property in times of armed conflict.<sup>17</sup> The resulting Hague regulations did not give an explicit definition of cultural property; however, its articles described types of property deserving protection, such as “buildings dedicated to religion, art, [or] science.”<sup>18</sup>

Around the same time across the Atlantic, American President Theodore Roosevelt signed the American Antiquities Act of 1906.<sup>19</sup> Similar to the Hague regulations, this Act is devoid of any explicit

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15. See Prott & O’Keefe, *supra* note 11, at 309-10 (discussing property’s common law tradition); see also HAROLD J. BERMAN, LAW AND LANGUAGE: EFFECTIVE SYMBOLS OF COMMUNITY 88 (John Witte, Jr., ed. 2013) (noting the Latin roots of the word “property”).

16. For further reading about corpus linguistics, see generally CHARLES F. MEYER, ENGLISH CORPUS LINGUISTICS: AN INTRODUCTION (2002).

17. See Ivan Ryška, *Shift from Cultural Property to Cultural Heritage and Its Possible Consequences for International Criminal Law*, 10 POLISH REV. INT’L & EUR. L. 37, 38 (2021).

18. Convention (IV) Respecting the Laws and Customs of War on Land art. 27, Oct. 18, 1907, 36 Stat. 2277, 2303.

19. 16 U.S.C. §§ 431-33 (1935); *American Antiquities Act of 1906*, NAT’L PARK SERVS., <https://www.nps.gov/articles/lee-story-appa.htm> [<https://perma.cc/KP4Y-5883>].

mention of cultural property, instead providing authority to fine and/or imprison upon conviction those who “appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity” on federally owned lands without “permission [from] the Secretary of the Department of the Government [which had] jurisdiction over the lands.”<sup>20</sup>

In contrast, the 1954 Hague Convention,<sup>21</sup> which was the ideological successor to the earlier conferences, uses the term “cultural property” from the outset and continues on to define the term, “irrespective of origin or ownership,” as

(a) movable or immovable property of great importance to the cultural heritage of every people, such as 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 and important collections of books or archives or of reproductions of the property defined above.<sup>22</sup>

The 1954 Hague Convention uses both “cultural heritage” and “cultural property” in its text, marking the beginning of the terminology overlap at the heart of this Note’s linguistic study.<sup>23</sup> The Convention’s language ties the terms together in a way to be echoed by future legislation: its preamble states “damage to cultural property belonging to any people ... means damage to the cultural heritage of all mankind.”<sup>24</sup>

This hint at the developing interest in human rights protection through cultural property regulation signaled by the 1954 Hague

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20. 16 U.S.C. § 433.

21. The United States did not ratify the 1954 Hague Convention until 2009. For further reading, see S. EXEC. REP. DOC. NO. 110-26 (Sept. 16, 2008), <https://www.govinfo.gov/content/pkg/CRPT-110erpt26/html/CRPT-110erpt26.htm> [<https://perma.cc/AE3P-PUWZ>] and Corine Wegener, *The 1954 Hague Convention and Preserving Cultural Heritage*, ARCHAEOLOGICAL INST. OF AM. (Oct. 29, 2020) <https://www.archaeological.org/the-1954-hague-convention-and-preserving-cultural-heritage/> [<https://perma.cc/G6FF-N9U2>].

22. *1954 Hague Convention*, *supra* note 11, at art. 1(a).

23. *Id.*

24. *Id.* at pmb1.



Convention's preamble did not manifest immediately; rather, ensuing agreements emphasized property over heritage concerns. The next major step occurred in 1970, when the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.<sup>25</sup> The 1970 UNESCO Convention describes guidelines for conduct of the signatory countries regarding cultural heritage and cultural property.<sup>26</sup> It focuses primarily on cultural property, defined in relevant part as movable objects of significance, religious or secular, to the communities of origin.<sup>27</sup> It goes on to list eleven categories of cultural property, each with varying levels of specificity.<sup>28</sup>

The 1970 Convention arose during a time in which rampant looting of developing countries, notably many Latin American countries, presented roadblocks in terms of their economic growth and raised humanitarian concerns regarding power imbalances between states that were looted and states that purchased the objects.<sup>29</sup> Pioneering cultural property law scholar John Henry Merryman described countries in terms of "source nations" and "market nations," which provides a crucial theoretical framework to contextualize the 1970 UNESCO Convention's call to action.<sup>30</sup> According to this theory, "source nations" are those in which the supply of cultural property exceeds domestic demand.<sup>31</sup> Source nations tend to be developing countries, such as India and Mexico.<sup>32</sup> In contrast, "market nations" are countries in which the demand for such cultural property eclipses the internal supply; the United

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25. 1970 UNESCO Convention, *supra* note 9.

26. *Id.*

27. This is in contrast to immovable property such as buildings and certain statues. *See id.* at art. 1.

28. Both "objects of ethnological interest" and "rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections" are enumerated categories, demonstrating the variability in specificity. *See id.* at art. 1(f), (h).

29. *See* PATRICK J. O'KEEFE, PROTECTING CULTURAL OBJECTS: BEFORE AND AFTER 1970 16-18 (2017).

30. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986).

31. *Id.*

32. *Id.*



States is a prime example of a market nation, and it is the main market nation that this Note will discuss.<sup>33</sup> As source nations are often less wealthy than market nations, this dynamic sets the stage for opportunists to exploit the cultural property of source nations for a profit.<sup>34</sup> An especially relevant example is the antiquities trafficking history between Latin America and the United States, given the close geographic proximity and historically overlapping claims to the land now comprising the American Southwest.<sup>35</sup>

The 1970 UNESCO Convention states that “cultural property constitutes one of the basic elements of civilization and national culture.”<sup>36</sup> As a majority of countries have adopted such an unequivocal statement, it seems natural to assume that most state actions to protect cultural property as described in the agreement are decided in favor of the state.<sup>37</sup> If the majority of countries in the world have agreed to protect cultural property, is there a near-universal presumption that citizens of states party to the Convention understand this goal? A brief examination of the relevant case law indicates there is no such presumption, despite such a strongly worded international convention that in fact urges parties to educate their citizens on the Convention’s provisions.<sup>38</sup> Unfortunately, the 1970 UNESCO Convention may as well be a toothless recommendation.<sup>39</sup>

The United States did not pass legislation to implement the 1970 UNESCO Convention domestically for over a decade, and the final agreement was significantly weaker than what the 1970 Convention

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33. *Id.* Other cited market nations include Japan, France, Germany, and Switzerland. *Id.*

34. *Id.*

35. See generally Donna Yates, *Illicit Cultural Property from Latin America: Looting, Trafficking, and Sale*, in COUNTERING ILLICIT TRAFFIC IN CULTURAL GOODS: THE GLOBAL CHALLENGE OF PROTECTING THE WORLD’S HERITAGE (France Desmarais ed., 2015).

36. See 1970 UNESCO Convention, *supra* note 9, at pmb1.

37. For a list of all signatory parties (143 at the time of this Note’s writing), see UNESCO, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, <https://www.unesco.org/en/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and-transfer-ownership-cultural#item-2> [<https://perma.cc/9HWP-4YX2>]; Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT’L L. 213, 220, 227 (2007).

38. See 1970 UNESCO Convention, *supra* note 9, at art. 5(f); see also *infra* notes 46-47 and accompanying text.

39. See Posner, *supra* note 37, at 218-20.

envisioned.<sup>40</sup> The Convention on Cultural Property Implementation Act of 1983 did not authorize the United States to take initiative and act on behalf of other countries as the 1970 UNESCO Convention imagined.<sup>41</sup> Rather, it provided for a system setting up several hoops that countries desiring assistance must jump through to prove their cultural property was jeopardized before seeking aid from the United States.<sup>42</sup> This system stands in contrast to the many other signatories to the 1970 UNESCO Convention, which enacted outright bans on suspicious imports;<sup>43</sup> the legislation enacted in the United States reflects the influence of politically powerful art dealers and collectors who were concerned for the freedom of the art and antiquities market in general, and the United States' position as a major player in particular.<sup>44</sup> In fact, similar concerns led the United States to propose more directed import controls in negotiations for the 1970 UNESCO Convention, rather than the initially proposed blanket ban on cultural property trade.<sup>45</sup> It should come as no surprise, then, that legal disputes between signatory countries and American defendants evince this preoccupation with cultural property's place in the art and antiquities market, demonstrating the need for updated terminology.

In practice, courts often declare cultural property laws providing for sovereign state patrimony unclear when states attempt to claim ownership of cultural property exported to the United States. This happened in *United States v. McClain*, in which the Fifth Circuit found that a federal decree declaring state ownership of all pre-Columbian artifacts was too vague to bind American citizens.<sup>46</sup> In other cases, plaintiff states face a nearly insurmountable burden to overcome evidence of good faith purchases of cultural property. In these cases, courts focus on procedural technicalities and minor

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40. Nikita Lalwani, *State of the Art: How Cultural Property Became a National-Security Priority*, YALE L.J. F. 78, 81 (2020).

41. *See id.*; 19 U.S.C. § 2602(a)(1)(A)-(D).

42. 19 U.S.C. § 2602(a)(1)(A)-(D); Lalwani, *supra* note 40, at 81, 84, 88-89.

43. Lalwani, *supra* note 40, at 81.

44. *Id.* at 80.

45. Mark B. Feldman, *Mark B. Feldman: Reform of U.S. Cultural Property Policy*, CULTURAL PROP. NEWS (Apr. 10, 2014), <https://culturalpropertynews.org/mark-b-feldman-reform-of-u-s-cultural-property-policy> [<https://perma.cc/F8NA-9WM4>].

46. 593 F.2d 658, 670 (5th Cir. 1979) (finding the defendant purchased the objects at issue in good faith and that the objects may have been from a different country of origin).

scientific uncertainties, as seen in *Government of Peru v. Johnson*.<sup>47</sup> This Note's proposal of different terminology for cultural property cases ultimately aims to clarify the definition of cultural property for laypersons in an attempt to decrease the incidence of defendants relying on the defense of failure to understand the scope of cultural property.

## II. ANECDOTAL EVIDENCE OF CONFLICTING CONNOTATIONS OF "PROPERTY"

This Part will discuss the anecdotal evidence supporting the proposition that "property" carries a colloquial meaning of personal ownership that frustrates the aims of agreements and legislation concerning cultural property protection. There are a variety of sources that support this proposition, found both within the general legal traditions associated with "property" and within the more specialized field of legal academia concerning cultural heritage.<sup>48</sup>

### *A. Property Law: Historic Origins*

As exclusivity is the essence of property,<sup>49</sup> cultural heritage laws should not rely so strongly on the phrase "cultural property." The exclusivity and resultant right to exploit implied with "property" is the antithesis of the concept of heritage as something to be shared amongst a large group of people, or even the world.<sup>50</sup> This Section examines the historical underpinnings of "property" and how its conceptualization as an individual, all-encompassing right contributes to notions of exclusivity and commodification in terms of cultural heritage.

Modern property law has evolved far from its roots in relatively inflexible eighteenth-century Anglo-American ideals entailing complete ownership and control over property. This antiquated idea of property is at odds with the contemporary emphasis on property

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47. 720 F. Supp. 810, 812 (C.D. Cal. 1989).

48. See, e.g., YAËLL EMERICH, CONCEPTUALISING PROPERTY LAW: INTEGRATING COMMON LAW AND CIVIL LAW TRADITIONS 98 (2018).

49. *Id.*

50. See Prott & O'Keefe, *supra* note 11, at 310-11.

rights' potential for disaggregation between titleholders and non-titleholders.<sup>51</sup> Notwithstanding these changes, the core assumption still remains: property belongs to someone, which creates a relationship of exclusivity concerning others.<sup>52</sup>

Most academic literature regarding the history of property rights focuses on real property, and although this Note focuses on moveable property, the history may be extended by analogy to moveable and tangible personal property due in part to similarities in motivation behind seisin (de facto possession) and the law of finds, discussed below. Furthermore, many objects considered cultural property are excavated from land and thus are subject to real property ownership considerations, complicating their status as personal property.<sup>53</sup> Common law does not make a significant distinction between the right of ownership and the fact of possession,<sup>54</sup> despite the fact that the concept of ownership did not come about until recently.<sup>55</sup> However, in medieval England, de facto possession (historically called seisin), which entailed effective physical control without legal ownership, was the dominant way in which people held rights regarding land.<sup>56</sup> The inequitable feudal system's role in this relationship may have contributed to the preference for complete dominion and control at the heart of modern property rights.<sup>57</sup> This is supported by the enduring classical-era Roman legal concept *possessio rei* (possession of "corporeal things"), which signified "complete and exclusive enjoyment" of an object, as opposed to the *quasi-possession* of rights regarding real property, which allowed right-holders to live on land owned by others.<sup>58</sup>

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51. Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *Clarifying Cultural Property*, 17 INT'L J. CULTURAL PROP. 581, 585 (2010).

52. See EMERICH, *supra* note 48, at 98.

53. See Prott & O'Keefe, *supra* note 11, at 317.

54. See EMERICH, *supra* note 48, at 47-48.

55. *Id.* at 58.

56. Seisin refers to "[t]he fact of being in possession as a feudal tenant." *Id.* (quoting JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 263 (3d ed. 1990)).

57. See HERBERT HOOVER, AMERICAN INDIVIDUALISM 5,7 (2016) ("The partisans of some ... other brands of social schemes challenge us ... [t]hey insist that ... like feudalism and autocracy America's plan has served its purpose ... we keep the social solution free from frozen strata of classes.").

58. See EMERICH, *supra* note 48, at 62.

Because ownership under common law is not as absolute as ownership under civil law, private property emerged as the closest approximation.<sup>59</sup> A discussion of private property law would be incomplete without acknowledging its relationship to colonialism.<sup>60</sup> Modern property laws developed alongside colonialism (such as the formal ownership system in common law, which the United Kingdom implemented in its colonies decades before it did so at home),<sup>61</sup> often due to the belief that the indigenous inhabitants were uncivilized and thus the land was open to appropriation.<sup>62</sup> Because the United States began as a British colony, which appropriated Native American land according to the aforementioned principles, this colonialist undertone has lurked in American property law for centuries.<sup>63</sup> America's individualistic history is premised on equality of opportunity, and it provides a cultural backdrop that may influence buyers and traders of cultural property.<sup>64</sup> Its history as a British colony, combined with Manifest Destiny, westward migration, and aspiration for upward social mobility, contributed to a collective attitude that encouraged citizens to do all they could to succeed on their own account.<sup>65</sup> America is one of the most prominent market nations, and as the demand for cultural objects exceeds the supply, collectors seek to purchase objects from less developed places, which by analogy mirrors the earlier colonization of the Americas.<sup>66</sup> This dynamic was (and arguably still is) present domestically with regard to the illicit excavation and sale of Native American artifacts, leading to the Native American Graves Protection

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59. *See id.* at 89-90.

60. This theme of colonialism, while integral to a discussion on cultural property, is not a topic this Note will explore in depth, although it has recently entered news headlines regarding several U.S. museums' repatriation of Benin Bronzes; for further reading, see Hannah McGivern, *Trove of Benin Bronzes in U.S. Museum Collections Repatriated to Nigeria*, THE ART NEWSPAPER (Oct. 11, 2022), <https://www.theartnewspaper.com/2022/10/11/benin-bronzes-us-museum-collections-repatriated-nigeria> [<https://perma.cc/VSD6-RWX2>].

61. BRENNA BHANDAR, COLONIAL LIVES OF PROPERTY: LAW, LAND, AND RACIAL REGIMES OF OWNERSHIP 3 (2018).

62. *See id.* at 3-4.

63. *See id.*

64. HOOVER, *supra* note 57, at 7.

65. *See id.* at 7-9.

66. *See* Merryman, *supra* note 30, at 832; BHANDAR, *supra* note 61, at 4.

and Repatriation Act's enactment in 1990.<sup>67</sup> The longstanding and widespread trade of Native American artifacts and the popular use of Native American imagery in school mascots<sup>68</sup> have pushed this connotation of property as something to be taken and exploited to the forefront of the popular imagination and provide a concrete example of the need for decolonization in property. One way to move toward decolonizing property law would be lessening reliance on the phrase "cultural property" in legislation.

The theme of American individualism is further bolstered by the common law of finds, which encourages supposed efficiency in usage of resources by rewarding those who take possession of personal property on a first come, first serve basis.<sup>69</sup> The law of finds requires the property to be abandoned before the finder may attempt to claim ownership.<sup>70</sup> This abandonment aspect takes on a more significant dimension when the concept of abandonment is considered in conjunction with the mindset of colonists who viewed indigenous peoples not as civilized inhabitants, but rather as nonentities, thus leaving the ostensibly unsettled land "ripe for appropriation."<sup>71</sup> As the United States was settled according to the same mindset—most notably with regard to Manifest Destiny—the influence of such a deeply entrenched historical tradition, combined with the longstanding common law of finds, may contribute to a tendency to view cultural property originating from other cultures along the same lines as American settlers from centuries past: goods to be claimed for personal enjoyment rather than embodiments of heritage.<sup>72</sup>

### *B. Legal Academic Literature*

Words that carry certain connotations can bias discourse toward a particular viewpoint, and in the cultural property law world,

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67. Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 25 U.S.C. § 3002 (1990).

68. See Laurel R. Davis-Delano, *Eliminating Native American Mascots: Ingredients for Success*, 31 J. SPORT & SOC. ISSUES 340, 340-41 (2007).

69. See EMERICH, *supra* note 48, at 67.

70. See Jessica Victoria Hidalgo, *A Study in Salvage*, 18 LOY. MAR. L.J. 49, 60 (2019).

71. See BHANDAR, *supra* note 61, at 3-4.

72. See MARK S. JOY, AMERICAN EXPANSIONISM, 1783-1860: A MANIFEST DESTINY? 2 (2003).



scholars have engaged in spirited debate regarding the appropriateness of using the term “property” to refer to cultural objects.<sup>73</sup> In discussions regarding the drafting of the International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects 1995,<sup>74</sup> scholar John Henry Merryman argued for the use of “property,” whereas his contemporary, Lyndel Prott, preferred the use of the word “heritage,” with its “associations of handing on and guardianship.”<sup>75</sup>

Cultural property discourse began to shift in favor of using “cultural heritage” thirty years ago, yet the term “cultural property” still appears in the controlling legislation.<sup>76</sup> Academics in the field are divided on whether “cultural property” should be retired entirely despite its enduring use.<sup>77</sup>

As cultural heritage scholar Lyndel Prott notes, the inevitability of differing interpretations for words such as “property” and “heritage” between scholars requires each to define their preferred terms, and through this explanation it is possible to glean certain implications clinging to the terms.<sup>78</sup> Using corpus linguistics research methods, this Note aims to uncover these implications and provide concrete insights backed by numeric data regarding connotations words like “property” and “heritage” hold. The resulting data support a linguistic solution for mitigating the presumption that “cultural property” should be lumped in with other, more specific types of property, and consequently viewed primarily as alienable and excludable, rather than shared.

### III. CORPUS LINGUISTICS RESEARCH

This Part will test the hypothesis presented in Part I by discussing the results of a corpus linguistics genre variation study that

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73. See, e.g., Prott, *supra* note 13, at 226.

74. UNIDROIT is abbreviated according to the French *Institut international pour l'unification du droit privé*. About UNIDROIT, UNIDROIT (2021), <https://www.unidroit.org/about-unidroit/> [<https://perma.cc/78DP-EJXH>]. An independent intergovernmental organization, it aims to modernize, harmonize, and coordinate private and commercial law between countries. See *id.*

75. See Prott, *supra* note 13, at 226.

76. See Prott & O'Keefe, *supra* note 11, at 318.

77. See Bauer, *supra* note 12, at 6.

78. See Prott, *supra* note 13, at 226-27. In this Note's study, the corpus is digital.



illustrates the differences in meaning between “property” and “heritage.” A corpus is a large aggregation of textual sources. This corpus is then processed by software to reveal patterns in word usage across the sources.<sup>79</sup> The study presented in this Note uses several computational linguistic techniques, namely word frequency, collocation,<sup>80</sup> and concordance.<sup>81</sup> Each of these allows for a closer investigation of patterns of language appearing in a given aggregation of sources. A genre variation study such as this examines different types of media and speakers to compare meaning in different contexts and compare speech patterns.<sup>82</sup> For purposes of this Note, the self-sourced corpora are smaller than those used in typical linguistic studies due to constraints presented by this particular topic: this Note examines only a narrow area of law and only a few types of media.<sup>83</sup> Nonetheless, this study provides insights commensurate with a preliminary investigation into the subject which may be expanded upon for greater accuracy.

#### *A. Colloquial Associations with “Property” and “Heritage”*

This section tests the hypothesis that the general public associates property with personal and money-related concepts, which in turn influences people to think about cultural property less in terms of stewardship of heritage and more as an opportunity for personally owning and selling a financially valuable good. The results below were found using the Corpus of Contemporary American English (COCA), which contains over one billion words sourced from 1990 to 2019.<sup>84</sup> These words are balanced approximately equally

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79. See MCGRAW CENTER FOR TEACHING AND LEARNING, QUICKSTART GUIDE TO ANTCONC 1-2, <https://mcgrawect.princeton.edu/guides/Quickstart-Guide-AntConc.pdf> [<https://perma.cc/K652-NYTN>].

80. Collocation analysis demonstrates the tendency of given words to appear close to the search term; these results are then sorted by frequency. *See id.* at 3.

81. A concordance lists the terms that are in a corpus and orders the list by the frequency that the words are used and the context in which the terms appear. *See id.* at 2.

82. *See generally* MEYER, *supra* note 16, at 102.

83. This Note examines primarily scholarly articles, commercially available media, Early Modern English texts, and judicial opinions, in reference to property, cultural property, and heritage.

84. CORPUS OF CONTEMP. AM. ENG., <https://www.english-corpora.org/coca/> [<https://perma.cc/ZLW4-UZX7>].

among several genres: spoken, fiction, magazines, newspapers, academic, web, and television/movies.<sup>85</sup> The table below shows words that appeared within two words of “property” and “heritage,” respectively, in this corpus.<sup>86</sup>

Table 1. “Property” Collocates

Noun	Frequency	Adjective	Frequency	Verb	Frequency
tax	6052	intellectual	3907	own	1951
right	4961	private	3793	buy	1594
owner	3302	personal	1216	sell	1479
value	2991	public	992	protect	1022
damage	1096	physical	880	steal	730
rental	716	commercial	600	purchase	537
interest	698	residential	528	acquire	494
material	638	stolen	487	destroy	448
liberty	614	individual	327	seize	400
ownership	575	cultural	319	damage	271

Table 2. “Heritage” Collocates

Noun	Frequency	Adjective	Frequency	Verb	Frequency
foundation	1434	cultural	1652	preserve	195
world	777	national	410	celebrate	147
site	595	proud	235	share	119
culture	393	common	223	protect	84
museum	308	ethnic	215	maintain	62
history	282	natural	202	embrace	62
language	208	native	184	honor	58
nation	162	religious	177	reclaim	54

85. See generally *Topics and Collocates*, CORPUS OF CONTEMPORARY AMERICAN ENGLISH, <https://www.english-corpora.org/help/topics-and-collocates.pdf>. [<https://perma.cc/WQ4M-CLRF>].

86. Words occurring near target words in a corpus are known as “collocates.” *Id.*

For purposes of this Note, it is significant that so many of the collocate nouns for “property” are tied to concrete consequences of owning property (tax, value, damage, rental) and justifications for owning (right, owner, interest, liberty, ownership).<sup>87</sup> The latter category affirms the anecdotal association discussed in Part II regarding the historical development of property as a prized individual right in the face of institutions such as feudal fiefdoms.<sup>88</sup> The adjectives reveal that “private” appeared about three times more than “public,” despite both words being among the most frequently occurring in the corpus.<sup>89</sup> Likewise, “commercial” appears about two times more than “cultural,”<sup>90</sup> which confirms the anecdotal association that cultural property has with commerce.<sup>91</sup> Contrasted with “property,” “heritage” is associated with more conceptual terms: “world” evokes the 1954 Hague Convention’s preamble,<sup>92</sup> while “common” and “share” stand in stark contrast to the individual ownership themes of “property.”<sup>93</sup> “Preserve” and “reclaim” mark heritage as signaling such initiatives; using “heritage” in cultural property legislation may therefore trigger this association and discourage theft and illicit dealing of cultural objects.<sup>94</sup>

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87. See *supra* Table 1.

88. See *supra* Part II.

89. See *supra* Table 1.

90. See *supra* Table 1.

91. See *supra* Part II.

92. See 1954 *Hague Convention*, *supra* note 11 and accompanying text.

93. See *supra* Part II.

94. For an example of a law that emphasizes the significance of public education in cultural heritage, see Ley Federal Sobre Monumentos y Zonas Arqueológicas, Artísticas e Históricas [LMZAA], Diario Oficial de la Federación [DOF] 06-05-1972, últimas reformas DOF 28-01-2015, 1972 (Mex.), translated in *Collection of Legislative Texts Concerning the Protection of Movable Cultural Property: Mexico* 1, UNESCO (1987), <https://unesdoc.unesco.org/ark:/48223/pf0000073274> [<https://perma.cc/N8GB-TS5T>] (vesting ownership in the Mexican Government of all Mexican pre-Columbian antiquities, defined as those created before introduction of Hispanic culture to the region, regardless of discovery status, and providing for education to the Mexican public regarding the importance of pre-Columbian antiquities to Mexican culture).

*B. “Property” in Early Modern English*

Due to the abundance of references to Roman law’s influence on the common law<sup>95</sup> and English ownership ideals in discussions on cultural property,<sup>96</sup> an investigation into the Corpus of Early Modern English will shed light on the extent of this influence.<sup>97</sup>

Table 3. Early Modern English Collocates for “Property”

Collocate	Frequency
liberty	2,581
right	1,454
own	1,270
private	1,229
one	1,145

“Liberty” is the most frequently occurring collocate in the Corpus of Early Modern English.<sup>98</sup> Although this corpus predates the United States, in a contemporary context, this word may evoke sentiments synonymous with American history and freedom regarding property ownership.<sup>99</sup>

“Own” can mean either one’s own, or to own in an ownership sense.<sup>100</sup> The occurrence of “private” confirms the anecdotal focus on private property that arose out of common law due to the potential for the disaggregation of rights and the subsequent desire to exert control over land.<sup>101</sup> “One” evokes the unitary nature of property in several regards. First, it emphasizes the fact that property can have a singular owner—that is, one’s own property—which harkens back

95. See, e.g., BERMAN, *supra* note 15, at 115 (discussing Roman law’s influence on American law).

96. See *supra* Part II.A.

97. Corpus of Early Modern English, B.Y.U., <https://lawcorpus.byu.edu/byucoeme/concordances> [<https://perma.cc/4MYM-WFXL>]. This corpus includes approximately 40,300 texts, containing 1.1 billion words, from the years 1475-1800. *Id.*

98. See *supra* Table 3.

99. See generally BHANDAR, *supra* note 61, at 20-21.

100. *Own*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/own> [<https://perma.cc/S2H7-PQQT>].

101. See *supra* Part II.A.

to the Latin *proprietas* (“one’s own”).<sup>102</sup> Second, using “one” suggests this type of singular, exclusive ownership may be favored, in contrast to other adjacent property rights such as right of possession, servitudes, or state ownership of property.<sup>103</sup> Taken together, these deeply-rooted associations are fundamentally at odds with the goals of modern cultural property laws, necessitating a shift in operative terminology.

### C. “Property” and “Heritage” in the Legal Academic Sphere

For this portion of the study, all articles were found by keyword searching “cultural property” in HeinOnline.<sup>104</sup> This keyword search technique ensures that terminology coexisting with “cultural property” is present in the documents to form comparisons with this phrase for purposes of proposing alternative suggestions. The table below contains the most common words across the articles ranked by frequency.<sup>105</sup> As in the other charts, irrelevant words such as prepositions and articles have been omitted, as they have no bearing on the meanings of the concepts at issue in this study; the omission of these words accounts for the nonconsecutive rankings seen below.<sup>106</sup> The figure in the “range” column indicates the number of articles, out of sixty-one, in which the word appeared. All data in this Section was generated by AntConc, a free concordance software application.<sup>107</sup>

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102. See BERMAN, *supra* note 15, at 88.

103. See EMERICH, *supra* note 48, at 57-58.

104. *HeinOnline* is a commercial internet database service that provides access to historical and academic sources. See HEINONLINE, [https://heinonline.org/HOL/Index?collection=journals&set\\_as\\_cursor=clear](https://heinonline.org/HOL/Index?collection=journals&set_as_cursor=clear) [<https://perma.cc/T9XX-UKVJ>].

105. See *infra* Table 4.

106. See *infra* Tables 4-6.

107. Laurence Anthony, *AntConc Homepage*, LAURENCE ANTHONY’S WEBSITE, <https://www.laurenceanthony.net/software/antconcl/> [<https://perma.cc/6NHS-UQJ6>]. This software is free to use and download; this Note uses version 4.1.4, which was updated in 2022. These results were achieved by downloading PDFs of relevant articles found from the search process described in *supra* note 91 and uploading the articles to the software before selecting different data analysis options. The corpus is on file with the author.

Table 4. Words Ranked by Frequency in Academic Articles

Word	Rank	Frequency	Range
cultural	8	6366	61
property	13	3933	61
heritage	26	2370	55
antiquities	33	1676	37
objects	38	1459	57
market	49	1127	42

Table 5. Concordance for “Property” in Academic Articles

Collocate	Rank	Frequency Left and Right <sup>108</sup>	Range
cultural	1	3027	61
protection	2	384	37
destruction	8	112	15
ownership	10	100	32
movable	18	42	17

Table 6. N-Gram Results in Academic Articles

Phrase	Frequency	Range
cultural property	6288	40
cultural heritage	1305	32
cultural objects	382	39
cultural goods	141	11
cultural artifacts	1676	19
cultural antiquities	1237	15

From these results, several observations work together to clarify the associations legal academics have with words appearing in articles regarding cultural property. This is significant as many such scholars participated in the drafting of international cultural property conventions which in turn influence American legislation

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108. This denotes the frequency at which the particular collocate appears to the left and to the right of the word “property.”

enacted to implement the conventions, but these same scholars regularly debate the proper terminology—“property” and “heritage” are the most commonly used terms.<sup>109</sup>

In this corpus, “heritage” is not used as often as “property,” but it appears in most of the articles.<sup>110</sup> This suggests a slight reluctance on the part of academics to use “heritage” if “property” is also used in the same article, even though “property” does not encompass the same concepts as “heritage,” namely stewardship and passing on.<sup>111</sup> “Antiquities” is only used in about half the articles,<sup>112</sup> implying that it may be a polarizing term. The sparing use of this term tentatively corroborates scholarly perceptions of antiquities as distant and removed from contemporary considerations (although they are simultaneously property of humankind as a whole)<sup>113</sup> and therefore more easily conceptually separable from existing nation states or cultures, making them desirable on the international market. Due to these complex associations, “antiquities” is not an ideal word to utilize in cultural property legislation in place of “property.” However, “objects” appeared in a greater range of articles than “antiquities” and “heritage,”<sup>114</sup> suggesting that it is a viable compromise, as posited by scholar Lyndel Prott.<sup>115</sup> This study thus supports the neutrality of the term “object” in the cultural property landscape.

The next step is to investigate the most common expressions, known in corpus linguistics as n-grams, to ensure that the collocates are not examined in isolation without regard to natural writing patterns; this term signifies “n”-sized clusters of words in the corpus.<sup>116</sup> A search for n-grams composed of two words yielded results generally aligning with the anecdotal predictions: “cultural property” was the most commonly occurring, whereas “cultural heritage”

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109. See *supra* notes 73-75 and accompanying text.

110. See *supra* Table 4.

111. See Prott & O’Keefe, *supra* note 11, at 311 (“Heritage creates a perception of something handed down; something to be cared for and cherished.”).

112. See *supra* Table 4.

113. See generally JAMES CUNO, WHO OWNS ANTIQUITY? (2008).

114. See *supra* Table 4.

115. See Prott, *supra* note 13, at 226.

116. LAURENCE ANTHONY, ANTCONC HELP 3, <https://www.laurenceanthony.net/software/antconc/releases/AntConc424/help.pdf> [<https://perma.cc/BCA6-SGXL>]. For example, an n-gram with an “n” value of two means a two-word phrase.



appeared significantly less often.<sup>117</sup> Perhaps surprisingly, “cultural objects” appeared significantly farther down the list, with only 382 occurrences.<sup>118</sup> This data point suggests that this expression is not currently in common use among academics, and thus carries less conceptual baggage than “cultural property,” likely due to its relative novelty.<sup>119</sup>

#### *D. “Property” in Cultural Property Case Law*

To examine the effects of legislation such as the Convention on Cultural Property Implementation Act on domestic case law, this Note will next discuss a corpus of federal cases regarding cultural property disputes.

Table 7. N-Gram Results for Forty-Six Judicial Opinions

Phrase	Frequency	Range
international law	260	14
commercial activity	210	9
possession of	148	33
stolen property	145	21
cultural property	133	24

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117. “Cultural heritage” appeared 1,305 times, as compared to “cultural property,” which appeared 6,288 times. *See supra* Table 6.

118. *Supra* Table 6.

119. *See* Prott, *supra* note 13, at 226 (discussing implications of the phrase “cultural property”).

Table 8. Commonly Appearing Words in Judicial Opinions by Frequency

Word	Frequency	Range
property	1546	44
stolen	692	31
art	681	38
painting	577	18
ownership	391	35
commercial	358	28
possession	354	35
national	310	32
cultural	307	36
artifacts	219	26
antiquities	210	16

Significantly, “cultural property” only appears in about half of the opinions.<sup>120</sup> This is important because (1) judges are using different terminology than scholars, the latter of whom influenced and created the terminology in international conventions that served as the framework for American cultural property legislation, and (2) rather than focusing on the distinction between “property” and “heritage,” it may be appropriate over all else to ensure that “cultural” is emphasized in the controlling legislation.<sup>121</sup>

Given that it was not among the most commonly appearing words in this corpus, the emotional power of “heritage” may be difficult to harness in the courtroom.<sup>122</sup> In *Government of Peru v. Johnson*, the judge detailed his sympathy for the Peruvian government in its attempt to repatriate eighty-nine artifacts seized from the defendant before continuing on to explain how Peru had not met its heavy

120. See *supra* Table 7. “Cultural property” appeared in twenty-four out of forty-six opinions. *Id.*

121. See *supra* note 75 and accompanying text (discussing cultural property scholars’ debate over using “property” and “heritage,” respectfully, in the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995).

122. See *supra* Part III.A.

burden to disprove the defendant's good faith purchase.<sup>123</sup> Furthermore, it may be more difficult to paint a sovereign state party as a sympathetic plaintiff as opposed to an individual because it is easier to establish injury with particularity to an individual than it is to establish injury to a country, whether it be rooted in economic, educational, or cultural injury.<sup>124</sup>

#### IV. A LINGUISTIC SOLUTION TO A LEGAL PRESUMPTION

This Part will further discuss the significance of the above results and explore alternatives and supplements to usage of the word "property" in cultural property laws. To dilute the effects of property's personal ownership and pecuniary value connotations, this Part argues that words such as "object" and "heritage" should be used together rather than as competing alternatives. These words, when used in the same phrase, will come closer to capturing the intent first enunciated in the 1954 Hague Convention—*protecting* cultural property—without allowing "property's" inherent associations with complete dominion and excludability to outshine the shared ownership associations of "heritage."<sup>125</sup>

Instead of using "cultural property" as a standalone compound phrase, "cultural heritage" should be used as a modifier for other, more specific, categories. This combines a legal term of art, such as "property" with an emotional word ("heritage").<sup>126</sup> It simultaneously satisfies jurisdictional concerns by following the UNIDROIT Convention's model by analogy (UNIDROIT's "cultural objects" becomes more specific when "heritage" is included as an additional modifier) and imbues the concept of cultural property as it is currently understood in a more commodified sense with a shared, communal aspect.<sup>127</sup> Rather than debate the nuances of cultural property and

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123. 720 F. Supp. 810, 811 (C.D. Cal. 1989).

124. See, e.g., *Menzel v. List*, 267 N.Y.S.2d 804, 807 (Sup. Ct. 1966) (exemplifying a case in which the plaintiff made a replevin claim for a painting that Nazis illegally looted from her former residence); *Republic of Austria v. Altmann*, 541 U.S. 677, 682-83 (2004).

125. See *1954 Hague Convention*, *supra* note 11, at pmb1. (emphasis added).

126. Compare *supra* Table 1, with *supra* Table 2.

127. See *supra* Table 2 for words implying emotional associations with "heritage."

cultural heritage, this change would allow the issue of the effects of differing connotations to work in favor of the laws.<sup>128</sup>

As evidenced by the corpus linguistic analyses in Part II, more particular diction is needed. While academics and seasoned practitioners can use “property” as a form of intellectual and jurisprudential shorthand due to their experience with cultural heritage literature, laypeople who, in actual or ostensible good faith, purchase illicitly trafficked items as outlined in the legislation may find “property” simultaneously too vague and too specific, due to the deeply rooted colloquial connotations described above.<sup>129</sup> Thus, using “cultural heritage property” in statutes such as the Convention on Cultural Property Implementation Act may shift attention away from the nebulous “cultural” and “property,” and more toward “heritage,” which has a commonly understood meaning uncomplicated by legal terms of art.<sup>130</sup>

This shift toward usage of the term “heritage” would mitigate the harmful presumption that using “property” creates. Due to the long history of ownership rights as conceptualized by Roman and Anglo-American tradition,<sup>131</sup> as well as the view endorsed by the United States in the Convention on Cultural Property Implementation Act (other countries must make a convincing case for how their cultural property is in jeopardy before seeking to enter into bilateral agreement with the United States),<sup>132</sup> the phrase “cultural property” is deeply entrenched in notions of individual ownership and alienation rather than stewardship.<sup>133</sup> Ensuring cultural property gains these associations is essential, considering that many cultural property trafficking cases arise in connection with the National Stolen Property Act (NSPA).<sup>134</sup> However, the NSPA does not mention cultural

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128. See generally Prott & O’Keefe, *supra* note 11.

129. See *supra* Part III.

130. See *supra* Part III.

131. Carpenter et al., *supra* note 51, at 585; Ryška, *supra* note 17, at 41.

132. See 19 U.S.C. § 2602(a)(1)(A)-(D).

133. Prott & O’Keefe, *supra* note 11, at 311.

134. See, e.g., *Republic of Turk. v. OKS Partners*, 797 F. Supp. 64, 67 (D. Mass. 1992) (denial of defendant’s motion to dismiss Turkey’s Racketeer Influenced and Corrupt Organizations (RICO) Act claim based on a predicate act violating the NSPA); *United States v. An Antique Platter of Gold*, 184 F.3d 131, 133 (2d Cir. 1999) (claimant-importer’s false statements on customs entry forms regarding an Italian platter were in violation of the NSPA and thus material); *United States v. McClain*, 593 F.2d 658, 671 (5th Cir. 1979) (defendants’

property or any of its closely associated words like “antiquities” or “art”; rather, it prohibits the transport in interstate or foreign commerce of “any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud.”<sup>135</sup>

The NSPA is relatively efficacious in yielding convictions in cultural property cases despite its short, broad list of prohibited transactions.<sup>136</sup> This suggests that long, detailed lists of items protected under cultural property statutes may lead to an interpretation of *expressio unius est exclusio alterius* (the expression of one thing indicates the exclusion of the other) and attempts by traffickers to exploit loopholes.<sup>137</sup>

However, it must be noted that the NSPA has significant weaknesses regarding its suitability for cultural property disputes relating to the language currently used in reference to cultural property. First, it covers transactions that involve “goods.”<sup>138</sup> This term emphasizes fungibility, which is at odds with the emotional nature of “heritage.”<sup>139</sup> Second, it is limited to coverage of transactions

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purchase and import of Mexican pre-Columbian antiquities did not fall under the NSPA’s purview because the items were considered stolen solely under the unclear Mexican federal declaration described in the text accompanying *supra* note 46); *United States v. 10th Century Cambodian Sandstone Sculpture*, 2013 U.S. Dist. LEXIS 45903, at \*21, 24 (S.D.N.Y. 2013) (because Cambodian laws declared the statue to be State property, the court could consider the sculpture stolen property under the NSPA); *Hobby Lobby Stores v. Christies, Inc.*, 535 F. Supp. 3d 113 (E.D.N.Y. 2021) (cuneiform tablet was stolen property under the NSPA as its provenance was not verifiable).

135. National Stolen Property Act, 18 U.S.C. § 2314.

136. *See, e.g.*, *United States v. Schultz*, 333 F.3d 393, 395 (2003). However, the NSPA does not always yield a conviction. For an instance in which the defendants’ convictions under the NSPA were reversed, but the NSPA was not declared void for vagueness, *see McClain*, 593 F.2d at 671. The NSPA’s short yet vague list of prohibited transactions stands in contrast with Import Restrictions Imposed on Archaeological Material from Chile, 85 Fed. Reg. 64020, 64020-24 (codified as amended at 19 C.F.R. § 12.104(g)), which enumerates several categories of archaeological material, each containing detailed descriptions of specific prohibited objects.

137. *See* WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY, JOSH CHAFETZ, PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 606 (6th ed. 2020) (defining the *expressio unius* statutory construction principle); *cf. Prott, supra* note 13, at 227 (noting that UNIDROIT’s definition of “cultural objects” is broad because a narrower definition could allow some countries to protect objects that are important to them, but not recognized as culturally significant in other countries).

138. 18 U.S.C. § 2314.

139. *See supra* Table 2.

involving property valued at \$5,000 or more, which discounts the subjective value of cultural heritage objects which may not reach that monetary value.<sup>140</sup> Despite these incompatibilities, the NSPA provides a promising starting point for cultural property law reform. Given the specialized terms sometimes used to delineate descriptions of types of protected objects, it is unlikely that a highly detailed statute would clear the hurdle of sufficient notice for due process purposes.<sup>141</sup> Therefore, using “cultural heritage” to modify specific categories of objects within the framework of an easy to understand statute like the NSPA may lead to more efficient prosecution of cultural property theft.

### CONCLUSION

The Convention on Cultural Property Implementation Act, passed in 1983 to implement the 1970 UNESCO Convention into American legislation, aimed to achieve improved international cooperation towards “preserving cultural treasures” that are of importance not only to their nations of origin, but to the “greater international understanding of our common heritage.”<sup>142</sup> However, current legislation does little to attain that goal due to its usage of the term “cultural property” in place of more appropriate phrases, such as “cultural heritage objects.” The use of the term “cultural heritage objects” would more accurately encapsulate the desire to protect and share items of common significance for generations to come rather than allow individuals to exploit the objects as they please, which is encouraged by classical notions of private property.<sup>143</sup>

Implementing updated terminology may lead to more efficacious enforcement because the public will be influenced to interpret the relevant legislation as protective of heritage rather than protective of the property rights to commercially valuable goods, which comes closer to carrying out the 1970 UNESCO Convention’s mission.<sup>144</sup> As

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140. *See supra* Table 2.

141. Concluding otherwise suggests that members of the general public must apprise themselves of a rich body of cultural anthropological scholarship. *See 1970 UNESCO Convention, supra* note 9.

142. S. Rep. No. 97-564, at 21-22 (1982).

143. *See id.*

144. *Id.*

this corpus linguistics study demonstrates, words associated with property are very different than those associated with heritage. Therefore, this Note argues for the use of different phrasing: “cultural heritage” should always be included in relevant legislation as a modifier for other categories understood to fall beneath the cultural property umbrella, including property, objects, and sites. Otherwise, what the law aims to protect and what the general public understands that the law protects may be different, which ultimately reduces effectiveness of the law.

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