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THE EXPORT OF CULTURAL PROPERTY AND UNITED STATES POLICY

*Craig M. Bargher**

I. INTRODUCTION

The United States, unlike most nations, has almost no restrictions on the export of cultural property, and imposes no duty on cultural property imports.¹ Legislation protects archeological sites and national monuments in the United States,² and restricts the sale and alteration of significant cultural property created by U.S. artists and artisans, which is owned by the federal government.³ Despite its own lack of protectionist legislation, the United States respects other nations' cultural property laws, and cooperates with other nations seeking the return of illegally removed cultural property.⁴ This lack of cultural property export controls arguably drains the United States of objects and works which are an important part of its cultural heritage and identity. This Article addresses the issue whether legislation should be adopted in the United States restricting the export of its cultural property.

Part II of this Article first discusses various definitions of cultural property and adopts a very broad definition. This broad definition recognizes that art and cultural objects consist not merely of paintings and sculptures, but of virtually all manifestations of creativity. Part II also examines two contrasting perspectives on cultural property and human existence: cultural internationalism and cultural

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1. See, e.g., Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 314 (1982) ("Today, almost every country in the world restricts and regulates the export of cultural property; the outstanding exception is the United States of America."). Other countries lacking cultural property export laws and regulation include Denmark, Uganda, Singapore, and Togo. *Id.* at 314 n.71; see also FRANKLIN FELDMAN & STEPHEN E. WEIL *ART WORKS: LAW, POLICY, PRACTICE* 527 (1974) ("The United States has followed a *laissez faire* policy with respect to the importation and exportation of works of art.").

2. Lisa Marie Rafanelli, Comment, *A Comparative Study of Cultural Property Import Regulation: The United States, the United Kingdom and Canada*, 15 COLUM.-VLA J.L. & ARTS 543, 553 (1991) (citing 16 U.S.C. §§ 431-450, 461-468, 470 (1988) (providing protection for national monuments and giving the President the discretion to proclaim certain entities as national monuments)).

3. James J. Fishman & Susan Metzger, *Protecting America's Cultural and Historical Patrimony*, 4 SYRACUSE J. INT'L L. & COM. 57, 65 (1976) (citing Exec. Order No. 11,593, 3 C.F.R. 154, 155-56 (1971)).

4. See John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477, 480 (1988) (stating that the United States has had the most generous response of a market nations to source nations' efforts to protect their cultural property).

nationalism. In addition, it considers two fundamental goals in cultural property policy: the property's retention and its preservation. Part II next discusses the United States' general export laws and policies. A brief study of U.S. export laws shows that Congress intends to encourage free exports and free trade, and that traditional export controls arose from a desire to protect the United States' global power. In addition, Part II examines existing schemes in the United States to protect its cultural property. Finally, Part II explores the advantages and disadvantages of limiting cultural property exports. Part III analyzes the concept of an American cultural heritage, and argues that any plan to restrict the export of cultural property in this country must be flexible.

II. BACKGROUND

A. DEFINITIONS OF "CULTURAL PROPERTY"

Any discussion about regulating the trade of cultural property must begin with a definition. Commentators and international conventions present a broad continuum of what "cultural property" entails, ranging from paintings and sculptures to folklore. A comprehensive analysis of the definitional approaches is beyond the scope of this Article. What follows is a brief exploration of the various definitions, to provide a foundation for an analysis of the United States' policy on the subject.

The definition of cultural property the United Nations Educational, Scientific and Cultural Organization Convention of 1970 ("UNESCO") provided has been called one of the most universally accepted approaches.⁵ It is broad, including rare collections of fauna, flora, minerals, and anatomy; property relating to history; artifacts from archaeological excavations; antiquities; rare manuscripts; post-age; archives; furniture; and musical instruments.⁶ Thus, the definition encom-

5. See C. Franklin Sayre, Comment, *Cultural Property Laws in India and Japan*, 33 UCLA L. REV. 851, 851 n.1 (1986) (providing the UNESCO definition) (citing Article 1 of the UNESCO Convention on the Means of Prohibiting the Illicit Import, Export, and Transfer of Ownership of Cultural Property, UNESCO Doc. SHC/MD/5 (1970) [hereinafter cited as UNESCO], reprinted in S. Williams, THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY, A COMPARATIVE STUDY 224 (1978)).

6. Article 1 of UNESCO states:

For the purposes of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as:

passes not only human-made objects and manifestations of human creativity, but also objects found in nature which humans have collected and classified.

At least one commentator has argued for the inclusion of something less tangible than objects and artifacts in the definition; such as folklore.⁷ That commentator suggests an expanded definition, one giving "more weight to tribal, ethnic, and regional groups, their informal, intangible expressions as well as concrete creations and their own culturally-defined approach to enshrining and exploiting nature and cultural values thereof."⁸ However, the inclusion of folklore in the definition of cultural property is more valuable to discussing the awareness of different types of human expression as cultural property than it is to discussing export policies.

A few countries, such as Japan and India, enacted specific legislation to protect their cultural property. Japan's definition is much broader and more detailed than UNESCO's definition, dividing cultural property into four main groups: tangible property, intangible property, folk culture, and monuments.⁹ Although Japan's Cultural Property Protection Law (CPPL) wields an almost all-encompassing definition, an object must meet strict requirements before it is considered valuable enough to be protected under the law.¹⁰ Only a select group of works satisfies the criteria.¹¹ Comparatively, India's cultural property legislation provides a broad, less detailed description of cultural property than the CPPL's description. India's legislation divides cultural property into two main groups:

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- (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statutory art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material;
 - (h) rare manuscripts and incunabula ["[W]ork[s] of art or human industry of an early epoch." 1146 WEBSTER'S THIRD NEW INT'L DICT. (1981)], old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; (i) postage, revenue and similar stamps, singly or in collections; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments.

UNESCO, *supra* note 6. Each nation who signed the terms of the convention had the power to restrict the definition's scope. Sayre, Comment, *supra* note 6, at 851-52 n.1.

7. *Communications and Culture: Should the United States Protect Cultural Resources?* 80 (Oct. 28, 1991) (unpublished transcript of a forum cosponsored by the National Endowment for the Arts and the Annenberg Washington Program, on file with the Annenberg Washington Program, Northwestern University) (discussion including Nicholas R. Spitzer, Folklorist and Research Associate, Smithsonian Institution).

8. *Id.* at 81-82.

9. Sayre, Comment, *supra* note 5, at 862 & n.38 (citing *Bunkazai Hogo Ho (Cultural Property Protection Law)* No. 214 of May 30, 1950 (revised 1954 and 1975) [hereinafter cited as CPPL]). The definition is too lengthy to be reproduced in this Comment. For a discussion of the CPPL, see Sayre, Comment, *supra* note 5, at 862-68.

10. Sayre, Comment, *supra* note 5, at 863; see Bator, *supra* note 1, at 321 ("In Japan highly important cultural property is 'designated' (i.e., registered) and, once so designated, may not be exported. The total number of designated objects and monuments was recently estimated to be under 10,000.").

11. Sayre, Comment, *supra* note 5, at 863.

ancient monuments and antiquities.¹²

Thus, numerous definitions exist, and different nations choose descriptions of cultural property which reflect the types of objects and works they wish to protect. While the various combinations of definitions may be inherently interesting and deserving of a more rigorous discussion, this Article will focus mainly on why the United States treats the export of cultural property the way it does, and how that treatment reflects the United States' role in the global market.

B. PERSPECTIVES ON CULTURAL PROPERTY AND HUMAN EXPERIENCE

One commentator described two distinct approaches to thinking about cultural property.¹³ These approaches are basically two points of view for evaluating ownership rights and trade regulations of cultural property.

1. Global Human Experience and Cultural Internationalism

Cultural property can be part of global human experience, regardless of its origin or current ownership, "independent of property rights or national jurisdiction."¹⁴ The Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954 (Hague 1954) embodied this concept of cultural internationalism.¹⁵ Hague 1954 stated a rationale for the international protection of cultural property:

'Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection'¹⁶

Hague 1954 derived from the Lieber Code, written by a Columbia professor to establish a code of conduct during the American Civil War.¹⁷ Article 35 of the Lieber Code states that cultural property shall be protected from all avoidable injury, even during military attack.

In a different but related argument, one commentator has suggested abolishing the concept of cultural property altogether.¹⁸ By labeling cultural objects as

12. See Sayre, Comment, *supra* note 5, at 871-79 (discussing the Ancient Monuments and Archaeological Sites and Remains Act (No. 24 of 1958) [hereinafter cited as AMASR] and AMASR's failure).

13. For purposes of discussion, this Comment will adopt UNESCO's broad definition of cultural property.

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

15. *Id.* at 832 (citing 249 U.N.T.S. 240).

16. *Id.* at 836-37.

17. General Order No. 100, April 24, 1863.

18. Communications and Culture, *supra* note 7, at 73-79 (statement from Clemency Chase Coggins, Adjunct Professor, Department of Archaeology, Boston University).

Should the United States protect the cultural resources it is pleased to consider its prop-

property they become commodities, subject to the market, which is where that commentator believes cultural objects do not belong.¹⁹

2. Cultural Nationalism

In contrast, cultural property may be viewed as a part of a nation's cultural heritage.²⁰ This perspective allows national ownership and protection of objects considered cultural property, and therefore sanctions the use of cultural property export controls.²¹ For purposes of analyzing the nationalistic perspective, one commentator suggests two categories: source nations and market nations. A source nations' supply of marketable cultural property exceeds the internal demand for it.²² These nations have more cultural objects and works of art than they can sell locally. Countries such as Mexico, Egypt, Greece, and India are source nations.²³ In contrast, in market nations the demand for cultural property exceeds the supply.²⁴ Market nations include France, Germany, Japan, the Scandinavian nations, Switzerland, and the United States.²⁵ Usually, a market nations' market demands encourage source nations to export cultural property.²⁶ However, most source nations place strict regulations on the export of cultural property.²⁷

Strict regulation of the export of cultural property often reflects what has been labeled "cultural nationalism"²⁸ or "cultural heritage."²⁹ Some countries prohibit the export of cultural property because it is part of the country's national heritage or identity. National heritage includes all cultural property within a country's borders that is subject to the country's jurisdiction or power.³⁰ However, countries do not always limit the definition of their national heritage to cultural property produced by that country's citizens or found within that

erty? No. It should formulate policy that will strive before all to maintain cultural integrity, ancient and modern. Then the United States should think about how to prevent this cultural tapestry from becoming a separable cultural resource.

Communications and Culture, *supra* note 7, at 76 (Clemency Chase Coggins).

19. See John Moustakas, Comment, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1184 (1989) ("The nexus between a cultural object and a group is the essential measurement for determining whether group rights in cultural property will be effectuated to the fullest extent possible - by holding such objects strictly inalienable from the group.").

20. Merryman, *supra* note 14, at 832.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. E.g., Merryman, *supra* note 4, at 489.

29. E.g., Brian A. Yapko, Comment, *Evolution of American Attitudes and Laws Regarding Ethnic Art and Artifacts: From Cultural Imperialism to Cultural Pluralism*, 9 LOY. L.A. INT'L & COMP. L.J. 621, 623 (1987).

30. Bator, *supra* note 1, at 303.

country's borders.³¹ A famous example of one nation's claiming to absorb the cultural property of another nation is the case of the Elgin Marbles. Removed from Greece by Lord Elgin of England, these Parthenon sculptures became, in England's opinion, part of England's national heritage.³² Greece, of course, disputes the idea and consistently attempts to reclaim the Elgin Marbles as part of its own cultural heritage.

For proponents of cultural nationalism, the removal of the cultural property is tantamount to a crime against history. In fact, cultural nationalism can reach the level of pathos; "symbolically ris[ing] to the level of a crime against history, against knowledge and against civilization itself."³³ John Henry Merryman, the dominant commentator in the field of cultural property, explained that the origin of cultural nationalism derived mainly from what he calls Byronism.³⁴ The English romantic poet George Gordon, Lord Byron, denounced Lord Elgin's removal of the Greek Parthenon sculptures, the "Elgin Marbles," from Greece. Byron attacked Lord Elgin in his poem *The Curse of Minerva*, and sought to protect England from the blame, insisting Lord Elgin was Scottish, not English.³⁵ The poem's premise, that the marbles were Greek and belonged in Greece, reflects cultural nationalism, which has gained a solid foundation in Western attitudes.³⁶

Cultural nationalism, at its extreme, exudes a belief that a cultural object's presence in the country is necessary to maintain the nation's welfare and identity.³⁷ In the case of the Afo-A-Kom statue which belonged to a tribe in Cameroon and appeared on the New York art market, the importance of cultural property importance transcends nationalism. According to the tribe, the statue's

31. *Id.*

32. *E.g., Id.* Greece, of course, still claims the Elgin marbles as its property. 'They are the symbol and the blood and the soul of the Greek people We have fought and died for the Parthenon and the Acropolis' John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 349-50 (1989) (quoting Melina Mercouri, Greek Minister of Culture, speaking of the Elgin Marbles).

33. *Id.* Nazism, of course, provides one of the clearest examples of extreme nationalism. '[W]e believe and we know that the German everywhere is a German - whether he lives in the *Reich*, or in Japan, in France or in China, or anywhere else in the world. Not countries or continents, not climate or the environment, but blood and race determine the world of ideas of the German.' Merryman, *supra* note 4, at 491 (quoting Rudolph Hess).

34. *E.g., Merryman, supra* note 4, at 493.

35. He wrote:

Frown not on England; England owns him not;
Athena, no! thy plunderer was a Scot.
And well I know within that bastard land
Hath Wisdom's goddess never held command;
A barren soil, where Nature's germs, confined
To stern sterility, can stint the mind;
A land of meanness, sophistry and mist.
Each breeze from foggy mount and marshy plain
Dilutes with drivel every drizzly brain

Merryman, *supra* note 4, at 493-94 n.52 (quoting Lord Byron, *The Curse of Minerva*).

36. Merryman, *supra* note 4, at 493.

37. See Merryman, *supra* note 4, at 496.

physical presence in Cameroon is "necessary to the religious, ceremonial, and communal life of the Kom" tribe.³⁸ Merryman distinguished the religious argument from nationalistic ones. He suggested that two criteria apply to whether an object's presence in its original place is absolutely required. First, the group or culture which created the object must still exist.³⁹ Second, the object must be used actively for the religious or commercial purposes which were intended.⁴⁰

The difference between the religious stance and a purely nationalistic stance pivots on when the cultural object is considered truly lost. If a non-religious sculpture by an American artist, universally labelled as significant to American culture, is removed from the United States, it is "lost." It is lost because it was removed from its place of origin. However, it is not completely lost because it exists in another place. Americans still know that it is an American object and, at the very least, they can see it and study it in photographs.

However, the concept of loss can be different in the religious context. An important religious object removed from its place of origin is lost in one of the same ways that the American sculpture was lost in that it is physically removed, but the religious object's removal also may be considered tantamount to its destruction, because it may be necessary for the religion's practice.

C. RETENTION AND PRESERVATION OF CULTURAL PROPERTY

Two fundamental goals in cultural property policy are retention and preservation. While the former may lead to the latter, that is not always the case. As this section discusses, the two goals are best understood as separate and distinct concepts. If a nation retains objects it considers part of its national heritage, those objects are not guaranteed preservation.

1. Retention

Most countries attempt to retain their cultural property.⁴¹ They employ several different retention plans, including expropriation laws which declare that certain cultural objects are state property; embargo laws which prohibit the export of cultural property; and preemption laws which give the country a preemptive right to buy cultural property offered for export.⁴² Some nations require licenses before allowing the export of cultural property.⁴³ Some of the legislation mixes the varying approaches, strictly forbidding the export of some property, while allowing the export of others with almost no regulation.⁴⁴ All of the laws, despite their degree of severity, are forms of export control and have been labelled

38. *Id.*

39. *Id.* at 497.

40. *Id.* at 477.

41. The United States is among the few countries that do not.

42. *Id.* at 477-78.

43. Bator, *supra* note 1, at 286.

44. Merryman, *supra* note 4, at 478.

as retention schemes.⁴⁵

Often, the most restrictive retention schemes arise in source nations - those containing large amounts of cultural property.⁴⁶ Such nations are usually poor and in need of foreign trade.⁴⁷ There is a high demand in the art market for source nations' cultural property, yet they employ extensive export control policies on such property.⁴⁸ In contrast, source nations usually encourage exports of other goods, to stimulate their economic growth. While extensive retention schemes may appear counterintuitive, cultural property is a different type of commodity than coffee or steel; it often engenders a nation's identity and stimulates artistic and intellectual growth.⁴⁹

One argument in favor of retention schemes is that source nations who use them do so because they care about the cultural property and therefore will preserve the objects. Unfortunately, however, many art-rich countries simply cannot afford to take care of all of their cultural property.⁵⁰ Thus, retention does not guarantee preservation.

2. Preservation

One commentator has noted that the values of integrity and visibility are involved in the preservation of cultural objects.⁵¹ The trade of cultural objects can contribute to their destruction or mutilation and thus ruin the object's integrity.⁵² Mutilation and the ruin of an object's integrity can occur when pieces of an object are removed (sometimes stolen) and sold on the market. This happens most often with statues and monuments.⁵³ A famous case involving mosaics which were removed from a Greek-Orthodox church in Cyprus and ultimately ended up in the art market exemplifies the tragedy that can occur when cultural objects are sold on the art market.⁵⁴ The mosaics were made of tiles of colored glass, and "depicted Jesus Christ as a young boy in the lap of his mother, the Virgin Mary, who was seated on a throne. Jesus and Mary were attended by two archangels and surrounded by a frieze depicting the twelve apostles."⁵⁵ Not only were the mosaics stolen from their original context, but curved tiles were flattened for easier display.⁵⁶ This flattening permanently altered the original effect

45. *Id.* "Scheme" is not used in the pejorative sense.

46. *Id.* at 479. See *supra* notes 21-35 and accompanying text (discussing source nations and cultural nationalism).

47. *Id.* at 832.

48. *Id.* at 479.

49. See *infra* notes 76-81 and accompanying text (discussing cultural heritage).

50. Bator, *supra* note 1, at 298.

51. *Id.* at 295.

52. *Id.* at 296.

53. *Id.*

54. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990).

55. *Autocephalous Greek-Orthodox Church*, 917 F.2d at 279.

56. Presentation by Cap Sease, curator at the Field Museum of Natural History, Chicago, Illinois, Feb. 8, 1993.

that light had on the tiles, thus destroying their integrity.⁵⁷

The aesthetic value of a cultural object, however, may be destroyed without actual physical mutilation.⁵⁸ Sometimes separating the individual components of a series of cultural objects is as destructive as physical alteration.

Leaving an object in its context may be essential to academic study as well.⁵⁹ In the field of archeology, documentation of an object's context is vital. If an artifact's origin is unknown, it cannot be studied.⁶⁰

The cultural property goals of accessibility and visibility are closely related to preservation as well.⁶¹ Preservation of the cultural object is essential to these goals, but does not guarantee them. Public display of cultural objects for the sake of public accessibility and visibility, may, ironically, harm them. An example is illuminated manuscripts, which are damaged by prolonged exposure to light.⁶²

D. UNITED STATES EXPORT CONTROL LAWS AND POLICIES

Before moving on to a discussion of export regulation of cultural property, a basic understanding of the United States' export control laws is essential. There is no general right to export in the United States.⁶³ Most commodities originating in the United States cannot be exported unless the exporter obtains a license from the Department of Commerce's Office of Export Licensing of the Bureau of Export Administration (BXA).⁶⁴ Other agencies control other export products.⁶⁵

The Commerce Clause allows Congress to regulate exports.⁶⁶ Congress created the most significant export legislation in response to the Soviet Union's increased power after World War II.⁶⁷ Before World War II, the Neutrality Laws of 1935⁶⁸ provided for export controls, but only on weapons.⁶⁹ After World

57. *Id.*

58. Bator, *supra* note 1, at 298.

59. *Id.*

60. *Id.* at 301.

61. *Id.* at 299.

62. Bator, *supra* note 1, at 300.

63. Dineen Ann Riviezzo, Note, *An Iron Curtain to Free Trade: An Evaluation of H.R. 4653, the Export Administration Act Amendments*, 22 LAW & POL'Y INT'L BUS. 857, 859 (1991). The Supreme Court in *Butterfield v. Stranahan* upheld an import statute, but found that 'no individual has a right to trade with foreign nations.' *Id.* at 859 n.6 (citing BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME 63, 64 n.5 (1988) (citing *Butterfield v. Stranahan*, 192 U.S. 470, 493 (1904))).

64. CARTER, *supra* note 63 at 64 n.5. The licensing requirements are pursuant to the Export Administration Regulations, 15 C.F.R. §§ 768-99 (1990).

65. For example the Food and Drug Administration regulates the export of pharmaceutical products, while the Department of State controls the export of arms, aircraft, munitions and naval equipment through the Office of Defense Trade Controls.

66. U.S. CONST. art. I, § 8 ("The Congress shall have the power . . . [t]o regulate Commerce with foreign Nations.").

67. E.g., Peter S. Malloy, Note, *Controls on the Export of Militarily Sensitive Technology: National Security Imperative or U.S. Industry Impediment?* 18 RUTGERS COMPUTER & TECH. L.J. 841, 841 (1992).

68. Ch. 837, 49 Stat. 1081, repealed by the Neutrality Act of 1939, ch. 2, § 1, 54 Stat. 4.

War II, Congress passed the Export Administration Act of 1949 (1949 EAA)⁷⁰, which reflected the United States' new found international power and rejection of its own isolationism. The Act formed the U.S. export regulation system's basic structure, which endures today.⁷¹ Congress gave the President unchecked power under the 1949 EAA. It believed that the executive branch "could best create a 'liberal international economic order' by channeling exports to Western Europe while containing communism to the Soviet Union and Eastern Europe by denying vital goods and technologies from entering that region."⁷² The President could forbid the export of not just weapons, but any commodities, to communist countries that posed a threat to U.S. 'strategic, technological, and military superiority and domestic stability.'⁷³

Thus, general U.S. export legislation arose from the narrow purpose of protecting American global power and preventing the spread of Communism. Since the 1949 EAA Congress has repeatedly, through amendatory legislation, attempted to limit the President's power over export control, and to encourage free trade.⁷⁴ However, the Executive branch has frequently disregarded the increasingly stringent standards Congress has placed on it.⁷⁵ The Carter Administration, for example, used export controls to implement human rights foreign policy.⁷⁶

The next section discusses existing legislation which protects American cultural property, without preventing its export.

69. Gernot Stenger, *The Development of American Export Control Legislation After World War II*, 6 WIS. INT'L L.J. 1, 2 (1987).

70. Export Control Act of 1949, ch. 11, 63 Stat. 7, at 50 U.S.C. App. §§2021 *et seq.* (1991).

71. Riviezzo, Note, *supra* note 63, at 863.

72. *Id.* at 862-63. Congress gave the President unfettered power under the Act because it believed the United States held nearly invincible economic and military power after World War II. Stenger, *supra* note 69, at 6.

73. Riviezzo, Note, *supra* note 63, at 863; Stenger, *supra* note 69, at 3.

74. Export Administration Act of 1969, 50 U.S.C. App. §§ 2401 *et seq.* (1991) (limits the President's discretion in preventing exports to communist nations); Equal Export Opportunity Act of 1972, 50 U.S.C. §§ 2401 *et seq.* (1991) (requires the President to consider the effectiveness of export bans and possible damage incurred by American competitors because of ineffective bans); Export Administration Amendments of 1974, 88 Stat. 1552 (1974); Export Administration Amendments of 1977, § 106, 91 Stat. 235 (1977) (President may control exports only upon demonstration that the absence of controls would harm national security interests; legislative veto created for agricultural exports); Export Administration Act of 1979, 50 U.S.C. App. §§ 2401-2420 (1991) (regulates the export of "dual use" items, items which have both commercial and military application; regulates the export of technology and know how related to dual use items); Export Administration Act of 1981, 50 U.S.C. App. §§ 2401 *et seq.* (1991); Export Administration Act of 1985, 50 U.S.C. App. §§ 2401 *et seq.* (1991) (extends the 1979 Act while placing more limitations on the President's power in four areas: agricultural embargoes, foreign policy, contract sanctity, and extraterritoriality); Omnibus Trade and Competitiveness Act of 1988, 50 U.S.C. App. §§ 2401 *et seq.* (1991), (further frees manufacturers from the constraints of overly restrictive export laws).

75. Riviezzo, Note, *supra* note 63, at 864.

76. Carter, *supra* note 64; Clyde H. Farnsworth, *Issue and Debate: U.S. Grain and the Russians*, N.Y. Times, Feb. 5, 1981, at D1. In 1980 President Carter instituted an agricultural embargo against the Soviet Union in reaction to the Soviet Union's military intervention in Afghanistan.

E. PROTECTION OF THE UNITED STATES' CULTURAL HERITAGE AND IDENTITY

1. The United States' Cultural Heritage and Identity

Before legislation protecting the United States' cultural property could be enacted, the nation's cultural heritage had to be identified. Identifying a nation's cultural heritage is important for several reasons.⁷⁷ Cultural heritage provides economic benefits by creating tourism, stimulating scholarship, and building upon a nation's intellectual discourse.⁷⁸ What belongs to a nation as a part of its cultural heritage is a subjective question, and this subjectivity spawns conflict among nations competing for ownership of cultural objects.⁷⁹ "Historically, art-producing and art-amassing nations have given attention to maintaining or recovering the artistic products of their own cultures as well as the imported aesthetic treasures residing in domestic collections, primarily during wartime."⁸⁰ Although many nations focus on retaining cultural heritage, at the same time much of cultural property is a commodity subject to market competition.⁸¹ Because of the conflicts resulting from subjective definitions and cultural property market behavior, arguably the protection of a nation's cultural heritage (however defined) depends on the nation's socio-economic conditions and its international political power.⁸²

The evolution of American concepts of the United States' cultural heritage and subsequent legislative attempts to protect it must be understood in the context of American ethnocentrism.⁸³ To colonial America, the origin of the American Indians was unknown.⁸⁴ Attempts to explain it began with the Bible. Christian Americans 'knew' that the Indian had to be descended from Noah and his sons, because the rest of humankind had been drowned in the Flood.⁸⁵ But, the first explorers of America could not establish a connection between the two, and therefore hypothesized that the Indian was not human.⁸⁶ Other theories explained that the American Indians originated with the Lost Ten Tribes of Israel, wayward Vikings, or Atlantis.⁸⁷ Considering this mindset, Colonial America had

77. Some argue against the notion that art or cultural property belongs to any particular nation, but rather that such property belongs to everyone. For a discussion of cultural internationalism, see *supra* notes 14-19 and accompanying text.

78. Fishman & Metzger, *supra* note 3, at 58-59.

79. Mary McKenna, Comment, *Problematic Provenance: Toward a Coherent United States Policy on the International Trade in Cultural Property*, 12 U. PA. J. INT'L BUS. L. 83, 92 (1991).

80. *Id.* (citing Nafziger, International Penal Aspects of Protecting Cultural Property, 19 INT'L LAW 835, 838-40 (1985)).

81. Fishman & Metzger, *supra* note 3, at 59. "More objects from more cultures attract the attention of collectors and museums; the numbers of collectors and museums grow; their acquisition funds increase; market price levels rise." Merryman, *supra* note 32, at 354-55.

82. Sayre, *supra* note 5, at 857.

83. Yapko, Comment, *supra* note 29, at 643.

84. *Id.* at 642.

85. *Id.*

86. *Id.*

87. *Id.*

no intention, or legislation, to protect the tribal property of American Indians.⁸⁸

One commentator traced the path from Colonial American ethnocentrism to what he called an enlightened cultural pluralism: the recognition of inherent aesthetic value in non-white cultural property.⁸⁹ Thus, a self-educating process ensued as a function of archaeology and intellectual dialogue. As anthropology and archeology emerged as scientific disciplines, preservation of non-European based culture increased.⁹⁰

2. Protective Legislation

Congress has enacted legislation which protects and preserves cultural property in the United States.⁹¹ This legislation includes the American Antiquities Preservation Act of 1982,⁹² the Archaeological Resources Protection Act of 1979,⁹³ the National Environmental Policy Act of 1969,⁹⁴ the National Historic Preservation Act of 1966,⁹⁵ the Historic Sites Act of 1936,⁹⁶ and the Lieber Code of 1863.⁹⁷ The protection of most of this legislation extends only to objects and structures of historic, architectural, or archaeological importance, existing on lands which the Government owns or controls, or objects and structures which the Government has bought or received as gifts.⁹⁸ In addition, the statutes only protect objects created by American artists or related to American topics, which the Government controls.⁹⁹ Thus, examples of protected structures and objects include the Statue of Liberty, presidential residences, and objects owned by the Smithsonian Institution.¹⁰⁰ The statutes' purposes are to conserve the United State's national heritage, and to guarantee that the spirit and direction of

88. *Id.* at 643.

89. *Id.* at 638-56.

90. *Id.* at 640-41.

91. Fishman & Metzger, *supra* note 3, at 64.

92. 16 U.S.C. § 433 (1982). The act originated in 1906: 34 Stat. 225 (1906).

93. 16 U.S.C. §§ 470aa-470ee (1982). This act limited the freedom of cultural property export for the first time in the United States. It attempts to prohibit the export of objects illegally removed from 'public lands or Indian lands,' lands under federal ownership or protective jurisdiction. Merryman, *supra* note 4, at 479 n.4 (citing 16 U.S.C. § 470ee).

94. 42 U.S.C. § 4321 *et seq.*, (1970).

95. 16 U.S.C. §§ 470, 470(b), 470(c)-470(n) (1970).

96. 16 U.S.C. § 461 *et seq.*, (1988).

97. Instructions for the Government of Armies of the United States in the Field, General Order No. 100, Adjutant General's Office, Dept. of the Army, Apr. 24, 1863. The Lieber Code stated that 'by the modern usage of nations, which has now acquired the force of law, temples of religion, public edifices devoted to civil purposes only, monuments of art, and repositories of science, are exempted from the general operations of war.' Yapko, Comment, *supra* note 29, at 649.

98. Fishman & Metzger, *supra* note 3, at 64-65. An executive order called for an inventory system cataloging protected cultural property, and prohibiting the sale, alteration, or transfer of such property without the Advisory Council on Historic Preservation's consent. Fishman & Metzger, *supra* note 3, at 65 (citing Exec. Order No. 11,593, 3 C.F.R. 154, 155-56 (1971)).

99. Fishman & Metzger, *supra* note 3, at 65.

100. Fishman & Metzger, *supra* note 3, at 65.

the Nation are founded upon and reflected in its historical past.¹⁰¹ The legislation attempts to give a sense of orientation to the American people.¹⁰²

In a related effort to preserve American cultural heritage, Congress created the Institute of Museum Services (IMS) in 1976.¹⁰³ The IMS serves as an agency within the National Foundation for the Arts and Humanities, providing financial assistance to American museums, for the conservation of their objects.¹⁰⁴ In a 1976 report, the National Conservation Advisory Council stated that a significant amount of American cultural property receives almost no care for its preservation.¹⁰⁵ "This condition exists partly because of the large number of holdings relative to limited curatorial staff, partly because of a lack of awareness of the seriousness of the problem, and partly because of the lack of adequately trained conservators."¹⁰⁶ One commentator stated that the IMS has had a positive, but limited impact on preservation.¹⁰⁷ The commentator argued that successful preservation of America's cultural heritage requires more efforts from the museum community, as well as from the public.¹⁰⁸ Additional funding could come from a privately funded national endowment, available to all museums.¹⁰⁹ In addition, museums could focus some of their efforts on the preservation of their collections, as opposed to searching out new acquisitions.¹¹⁰

Despite its various protective statutes, the United States still does not prohibit the export of significant cultural property owned by art dealers, museums, or private collectors.¹¹¹

F. ADVANTAGES AND DISADVANTAGES OF REGULATION OF CULTURAL PROPERTY EXPORTS

I. Advantages

Proponents of export regulation assert that it is desirable because it does not exacerbate the economic inequalities between rich art market nations and poor art source nations.¹¹² Thus, source nations with export controls can retain their cul-

101. *Id.* (citing National Historic Preservation Act of 1966, 16 U.S.C. § 470(a) (1970)).

102. *Id.* (citing 16 U.S.C. § 470(b) (1970)).

103. Theodore Sky, *The Institute of Museum Services and the Conservation of America's Heritage*, 93 DICK. L. REV. 659, 659 (1989). The IMS was created under the Museum Services Act, 20 U.S.C. §§ 961-68 (1982 & Supp. V 1987).

104. *Id.* at 659.

105. *Id.* at 660.

106. *Id.* (citing the NATIONAL CONSERVATION ADVISORY COUNCIL, CONSERVATION OF CULTURAL PROPERTY IN THE UNITED STATES vii (1976)).

107. *Id.* at 683 ("The dollars that IMS can devote to conservation can in no way meet the aggregate treatment and other conservation needs of the Nation. Nor were they intended to.").

108. *Id.* at 683-84.

109. *Id.* at 684.

110. *Id.*

111. Fishman & Metzger, *supra* note 3, at 66.

112. Rafanelli, Comment, *supra* note 2, at 545; see *supra* notes 22-27 and accompanying text (discussing market and source nations).

tural property and enjoy the resulting benefits, such as “a strengthened national identity, richer museums, an increase in tourism and profits from legitimate art sales”¹¹³

Although the United States has been traditionally considered an art market nation, some commentators argue that it needs to regulate the export of its cultural patrimony. They argue that the United States has lost some of its cultural patrimony, and is in danger of losing more. An example of such a loss is the sale to a European buyer of a white marble bust of Benjamin Franklin, sculpted by a French artist, and which had been in the United States since 1785.¹¹⁴

2. *Disadvantages*

The major argument against restricting the export of cultural property, often held by artists and other professionals in the art and museum community, is that culture and art belong to all of humanity and should be freely available to those who value them most.¹¹⁵ Under this view, export regulation impairs the free exchange of cultural property, which promotes the “preservation, care, study, exhibition, and use for the education of the greatest number of people.”¹¹⁶

Another disadvantage is the development of black markets in response to export controls on cultural property for which there is a high demand. One commentator argues that black markets occur for two reasons. First, embargoes provide no trade alternatives for buyers or sellers, and therefore embargoes encourage illegal trade.¹¹⁷ Sellers can obtain high prices for the otherwise unavailable objects, and buyers’ demands intensify as it becomes more difficult to obtain certain objects legally. Second, broad export controls are administratively unenforceable because as restrictions become stricter it becomes more difficult to enforce export regulations.¹¹⁸ The process of interdicting smuggling is expensive, cumbersome, and inefficient.¹¹⁹ The administration of restrictions is also vulnerable to corruption.¹²⁰

III. ANALYSIS

This section first considers the concept of the American national heritage, which is important to designing a cultural property export control scheme for the United States. This Comment argues that any such scheme must be flexible in order to conform with the United States’ general free trade stance and to avoid adverse results, such as a black market.

113. Rafanelli, Comment, *supra* note 2, at 545.

114. Fishman & Metzger, *supra* note 3, at 57.

115. Rafanelli, Comment, *supra* note 2, at 544; see *supra* notes 15-20 and accompanying text (discussing cultural internationalism).

116. Rafanelli, Comment, *supra* note 2, at 544.

117. Bator, *supra* note 1, at 318.

118. *Id.*

119. *Id.* at 319.

A. NATIONAL CULTURAL HERITAGE

An important question is, when does a cultural object become part of a country's cultural heritage. Several factors, often in combination, determine whether an object is significant enough to warrant strict protection as a piece of a country's heritage or identity. The factors include the period of time the country has possessed the object; the size of a collection of objects; who owns the cultural property; the property's accessibility to the public; and the property's historical significance.

A clear example of a piece of the United States' cultural heritage is the Statue of Liberty. Although it did not originate in America, it was a gift from the French, and has been in the United States for over two hundred years. It is historically important, serving as the symbol for our ethnically diverse society. The sale and export of the statue would be unthinkable to most, if not all, Americans.

A more nebulous example is the collection of Impressionism at the Art Institute in Chicago. It is considered one of the most important collections of impressionist art in the world, yet most of the pieces are by European painters. Arguably, the collection, because it is identified with a well-known, oft-visited American museum, is part of the American cultural heritage.

The concept of American cultural heritage may appear as somewhat of an oxymoron. Because the United States is a composite of other cultures, how could America have it's own cultural identity? Other than jazz and blues music, for example, few artistic forms are "purely" American. But, the "melting pot" phenomenon creates a cultural heritage. The unique mixture of cultures, religions, and languages (setting aside the problems of racism and cultural conflicts) is precisely what identifies the United States. Therefore, cultural heritage does not necessarily require cultural homogeneity. The problem with the "melting pot" argument is that, taken to its logical extreme, the United States should prohibit the export of almost all cultural property, since all of the pieces of American cultural property would be needed to complete the cultural puzzle.

There are few objects as clearly part of the American cultural heritage as the Statue of Liberty, or the Constitution. Rather, the grayer areas, exemplified by the Art Institute example, pervade. Therefore, any proposal for cultural property export control in the United States must consider American attitudes toward cultural property in the United States. Thus, the scheme should recognize that various cultures contribute to our cultural heritage, while at the same time it should focus on saving only the most important cultural property.

One commentator has argued for the removal of cultural property from the discourse of commodities, and for each piece's deposit with the groups from which the property originated.¹²¹ However, it is too late to discuss that idea as a practical or realistic alternative. First, the cultural property market is entrenched with cultural property. Second, because the protection of individual property rights is ingrained in our national psyche, owner's of confiscated prop-

121. See *supra* notes 18-19 and accompanying text (discussing Clemency Coggins' idea).

erty would feel their property rights had been violated.

B. CULTURAL PROPERTY EXPORT CONTROL SCHEME

Any cultural property export control scheme in the United States must recognize the existing free trade stance, exemplified in the EAA.

The ability of United States citizens to engage in international commerce is a fundamental concern of United States policy. Exports contribute significantly to the economic well-being of the United States The restriction of exports from the United States can have serious adverse effects on the balance of payments and on domestic employment¹²²

Thus, an export control scheme should not be overly restrictive, and should attempt to avoid adverse consequences, such as black markets.¹²³

1. Licensing

A cultural property export regulation scheme begins with an export licensing requirement, as is found under the Export Administration Act.¹²⁴ The UNESCO definition of cultural property would provide a useful, broad base from which to start.¹²⁵ Items falling within the definition could then be screened through a minimum value standard. Two authors have suggested an arbitrary minimum of fifty thousand dollars.¹²⁶ However, the amount should reflect some debate among knowledgeable people in the cultural property field.

2. Administration

a. Art Export Advisory Council

An administrative body would evaluate license applications. Two commentators have suggested an Art Export Advisory Council (AEAC), modeled after the existing Export Administration Review Board under the EAA.¹²⁷ The AEAC would consist of art experts, historians, museum directors and curators, and non-professionals. Procedurally, the President would give the National Endowment for the Arts (NEA) controlling power over the AEAC.¹²⁸

The following criteria have been suggested for the evaluation of export licenses:

"1. Is the object so closely connected with American history, literature, art, science, or cultural life that its departure would be a significant loss to the nation's

122. 50 U.S.C. app. § 2401(1)-(2) (Supp. 1991).

123. See *supra* notes 114-19 and accompanying text (discussing the disadvantages of restrictive export regulations).

124. Fishman & Metzger, *supra* note 3, at 72.

125. *Supra*, note 6.

126. Fishman & Metzger, *supra* note 3, at 72.

127. *Id.* at 72-73.

128. *Id.* at 73.

cultural heritage?2. Is the object of outstanding aesthetic importance to the understanding of a period of American art or to the work of an American artist?3. Is the object particularly significant for the study of a particular branch of American learning, art, or history?"¹²⁹

"The decision whether or not to refuse an export license on grounds of national importance [would] depend] on how high the object stands in one or more of [the] categories and on whether a reasonable offer to purchase can be made to ensure its retention in this country."¹³⁰ The export licensing decision must also consider the likelihood that the object will be well-preserved, and whether it will be accessible to the public.¹³¹

The question of accessibility must involve considerations of modern technology. For example, art in European museums could be viewed live via satellite in the United States. Given the state of video technology, must the object be seen in person to be appreciated? Although a live transmission is of course more vivid than photographs, and is a better alternative to no access at all, it is not a desirable alternative. Despite the visual clarity the transmission could provide, an object can be truly experienced only in person. For example, someone can look at a picture of Seurat's *La Grande Jatte* and be able to generally describe it to someone else and to have a mental image of it. But only by looking at the real painting in person, only feet or inches away, could that individual see the nuances that each brushstroke created, and the actual texture on the canvas. Thus, the difference between seeing an object live and seeing a representation of it, combined with the other factors already discussed, may require the denial of an export license.

b. Limiting Exports

One possible tool for narrowing the number of objects which are denied licenses is a priority list. Japan has used this system, creating a list of cultural items which are too important to leave the country.¹³² This may be too impractical because of the sheer amount of possible objects to evaluate.

Another concept, borrowed from the English export regulation system and similar to a right of first refusal, is to allow the Government to purchase objects for which people have applied for licenses.¹³³ The Government could initiate an endowment to facilitate such purchases. Thus, the Smithsonian could, subject to the endowment's amount, purchase objects it considered essential to the national heritage. The endowment could also provide low-interest loans to museums for the same purpose.¹³⁴

129. Fishman & Metzger, *supra* note 3, at 73; see also FELDMAN & WEIL, *supra* note 1, at 577 (providing the English Notice to Exporters).

130. FELDMAN & WEIL, *supra* note 1, at 577 (providing the English Notice to Exporters).

131. See *supra* notes 51-62 and accompanying text (discussing preservation of cultural property).

132. See *supra* notes 9-12 and accompanying text (discussing cultural property export regulation in Japan).

133. Fishman & Metzger, *supra* note 3, at 73.

134. *Id.*

The endowment would not serve as a panacea, as the British experience shows. In 1977-1978, of the twenty licenses denied in England, the country eventually issued eight because no one offered to purchase the pieces in England.¹³⁵ There simply is not enough money to guarantee the retention of every desired piece.

c. Living Artists

A collateral but important issue is whether the export scheme should restrict the export of living artists' work which they still own. Extending the above ideas to the logical extreme, the export legislation would subject living artists' work to the same criteria. However, this Comment argues against such an invasion into that area of private ownership. In fact, it could constitute a violation of the takings clause of the Fifth Amendment.¹³⁶

IV. CONCLUSION

Currently, the United States places no restrictions on the export of its cultural property. This lack of export control arguably could drain the United States of its cultural patrimony. An examination of the United States' general export policies shows that they originated in response to threats to the national security posed by communist nations. Since the 1949 Export Administration Act, which gave the President broad powers to control exports, Congress has attempted to restrict the President's power in that area. Thus, Congress has espoused a free trade stance, which would be inconsistent with any attempts to severely restrict cultural property exports. Any cultural property export regulations must recognize that political stance, and be narrowly tailored to protect only the most significant cultural property.

135. Bator, *supra* note 1, at 320. "Major works have been retained: El Greco's *Dream of Phillip II*; Rubens's *The Holy Family*; Titian's *The Death of Actaeon* (purchased by the National Gallery) . . . " Bator, *supra* note 1, at 320.

136. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.