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Cultural Property: “Progressive Property In Action”

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CULTURAL PROPERTY: “PROGRESSIVE PROPERTY IN ACTION”

J. Peter Byrne[†]

Abstract

*Cultural property law fulfills many of the normative and jurisprudential goals of progressive property theory. Cultural property limits the normal prerogatives of owners in order to give legal substance to the interests of the public or of specially protected non-owners. It recognizes that preservation of and access to heritage resources advance public values such as cultural enrichment and community identity. The proliferation of cultural property laws and their acceptance by courts has occurred despite a resurgent property fundamentalism embraced by the Supreme Court. Thus, this Article seeks to explicate the category of cultural property, its fulfillment of progressive theory, and its success in an adverse legal environment. The article originated as part of a symposium responding to Rachael Walsh’s *Property Rights and Social Justice: Progressive Property in Act*.*

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I. INTRODUCTION

Rachael Walsh’s *Property Rights and Social Justice*¹ closely analyzes the extent to which the Supreme Court of Ireland’s constitutional property law jurisprudence embodies the normative and

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1. RACHAEL WALSH, *PROPERTY RIGHTS AND SOCIAL JUSTICE: PROGRESSIVE PROPERTY IN ACTION* 5 (2021).

jurisprudential values of progressive property theory (“PPT”). She offers her analysis as a study of “progressive property in action.”² This is a valuable contribution for several reasons, including that PPT often has operated at a high level of abstraction with few close studies of actual judicial decisions. PPT certainly has made a significant intellectual contribution, which has affected the outlook of a generation or two of property law scholars by elaborating how property law can and sometimes does embody diverse community-regarding norms, not just the supposed rights of owners or a narrow economic notion of efficiency. Yet its influence on the judicial interpretation of property in common law and constitutional interpretation in the United States has seemed meager and may even be declining. Indeed, the judicial decision most often discussed as an example of progressive property interpretation by a U.S. Court, *State v. Shack*,³ likely would be found to violate constitutional property rights by today’s Supreme Court, apparently devoted to constitutionalizing some form of property fundamentalism.⁴

By contrast, Professor Walsh’s careful analysis finds that the Irish Supreme Court has interpreted the property clauses in the Irish Constitution to combine a traditional or liberal idea of property (what Laura Underkuffler terms the “common conception” and Joseph Singer the “ownership model”⁵) with deference to legislative judgments of public needs to limit individual rights. This balancing is facilitated by separate clauses in the Irish Constitution that both protect a pre-political, individual right to private property and also affirm that personal rights need to be regulated to promote social justice.⁶ Professor Walsh finds social and historical context for these

2. The subtitle of Professor Walsh’s book draws on Jon A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739 (2011), which itself is an outstanding example of close analysis of the extent to which an important property initiative partakes of elements of progressive theory.

3. 277 A.2d 369 (N.J. 1971). The focus on *Shack* appears to date back to Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 32–33 (1984).

4. This requires only an easy two-step of *Stop the Beach Renourishment Inc. v. Fla. Dep’t of Env. Prot.*, 560 U.S. 702, 715 (2010) (judicial decisions eliminating established property rights commit a taking) (plurality) with *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2073 (2021) (per se rule that state authorizing entry against the wishes of the owner commits a taking).

5. LAURA UNDERKUFFLER, *THE IDEA OF PROPERTY* 38 (2003); JOSEPH W. SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 3 (2000).

6. *See infra* Part II.

competing values in the painful history of colonialism and dispossession that preceded Irish independence and the constitution's strong commitment to social justice stemming from Catholic social thought.⁷ Her close examination of decisions finds that the judges are neither systematic nor transparent in explaining their reasoning but that their outcomes are largely predictable.⁸ So Irish constitutional property law generates fairly consistent "progressive outcomes" while maintaining a conservative rhetoric of individual property rights, which seems consonant with evolving political priorities in Ireland.⁹

This Article highlights an area of U.S. property law that exemplifies progressive property theory to a remarkable but underappreciated degree. Cultural property consists of things and places that people identify as a reflection and expression of their values, beliefs, knowledge, and traditions. "There are many owned objects in which a larger community has a legitimate stake because they embody ideas, or scientific and historic information, of importance."¹⁰ Often but not always inherited from the past, cultural property can include artworks, religious objects, products of archeological excavations, buildings, sites, and scientific and musical instruments. Although the term cultural property has an uncertain status in U.S. law, it is very familiar in international law. However, as will be shown, U.S. law gives distinct treatment to items of cultural property using other terminology. In particular, cultural property legislation often modifies or abridges the traditional rights of owners of such property in order to protect the interests of a distinct group or the broader public in the safeguarding of their cultural heritage. Safeguarding the places and objects that embody significant elements of culture promotes human flourishing, the most fully articulated goal of progressive property theory.¹¹ As such, cultural property represents an unusually successful domestic manifestation of progressive property theory. This Article explores the character of cultural property and suggests why it has

7. WALSH, *supra* note 1, at 54–61.

8. *Id.* at 235–37.

9. *Id.* at 265–68.

10. JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 9 (1999) [hereinafter PLAYING DARTS WITH A REMBRANDT].

11. On human flourishing as a goal for property law, see, e.g., GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING (2018); GREGORY S. ALEXANDER AND EDUARDO PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 80–101 (2012).

successfully protected the interests of non-owners without stimulating a negative judicial reaction.

This Article proceeds as follows. Section II briefly recalls the main tenets of progressive property theory, then considers Professor Walsh's contribution to understanding how the jurisprudence of the Supreme Court of Ireland can be understood to embody its priorities, and also draws a contrast between the property rights approach of the Irish court with that of the U.S. Supreme Court. Section III defines cultural property and details its many manifestations in U.S. law, generally under different terms, such as historical preservation and cultural patrimony. Section IV analyzes more closely how cultural property fulfills the goals of progressive property and also considers how this has occurred within a U.S. property culture shaped by a strong attachment to traditional property rights.

II. PROGRESSIVE PROPERTY IN THEORY AND IN IRELAND

There is no reason in this symposium to recapitulate the contributions of progressive property theory. Professor Walsh herself provides an insightful summary,¹² and both the originators of the theory and other thoughtful commentators have described its values and approaches. Here we need only recall those elements of PPT that illuminate its relation to cultural property. PPT primarily concerns itself with the "underlying human values that property serves and the social relationships it shapes and reflects."¹³ Rather than giving conclusive precedence to the rights of the private owner, PPT treats property as a social institution that more generally promotes incommensurable human values, which contribute to just relations among people. Among these values are "life, human flourishing, the protection of physical security, the ability to acquire knowledge and make choices, control over one's life, wealth, happiness, . . . and other aspects of individual and social well-being."¹⁴ PPT favors highly contextual analysis of resource conflicts, frankly recognizing the need to choose among incommensurable values. What is distinctive that emerges from this is legal recognition of the interests of non-owners, such as those seeking access to private land for valid purposes—for

12. The literature is extensive, but citation can begin with Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009).

13. *Id.*

14. WALSH, *supra* note 1, at 23 (quoting *Smith*, 94 CORNELL L. REV. 743, 743 (2009)).

example, to provide legal support to migrant workers or to reach public trust resources beyond. The doctrinal emphasis tends to be on common law rulemaking, where judges should articulate standards and balance the traditional right of exclusion with other virtues, such as social justice or human flourishing. To some extent, this focus on common law innovations may reflect the predilections of philosophical property law professors who want to engage and critique ideas in cases. But it also reflects a quest for configuring the inner content of property as a more humane legal institution.

Professor Henry Smith has criticized this preference of PP scholars for adjudication according to value-guided standards.¹⁵ His large body of scholarship argues that a presumptive right of an owner to exclude permits diverse social actors to coordinate their behavior around a few simple rights and duties regarding resources without the need for frequent official clarifications. Professor Smith argues that PP scholars have focused primarily on the social goals to be implemented by property law and slighted the operational difficulties of accomplishing them.¹⁶ The open-endedness of the judicial inquiry into competing incommensurable values means that parties will have difficulty anticipating what their rights and duties will be in many situations—generating what economists term “information costs.” PP and information theory scholars may disagree about the scope of such costs and also whether those costs outweigh a more normatively attractive approach to property law.¹⁷ But their debate is about the fundamental character of property law as a distinct field. This Article will later argue that cultural property laws embody progressive values but are largely immune from information cost objections primarily because they are entirely statutory.

PPT has also provided a critique of an aggressively conservative interpretation of constitutional property rights, which defend the exclusive rights of owners to possession or development against legislative regulation.¹⁸ Progressive scholars argue that a more social understanding of property law itself legitimates an ongoing role for

15. Henry Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 972 (2009).

16. *Id.* at 968–69.

17. See ALEXANDER & PEÑALVER, *supra* note 11, at 135–43.

18. See, e.g., *id.* at 156–82; UNDERKUFFLER, *supra* note 5, at 152–58; Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENV'T. L. REV. 137 (2016); Joseph W. Singer, *Justifying Regulatory Takings*, 41 OHIO N. U. L. REV. 601 (2015).

legislative adjustments of competing interests. Their commentaries on regulatory takings focus more on the nature of “property” than on the meaning and history of the Takings Clause. Laura Underkuffler argues, “If we assume—as *part of property’s very nature* a particular institutional understanding, or a particular (immutable) configuration of individual rights and collective powers, we have, in effect, gone very far toward predetermining the question of how much protection property does or should provide.”¹⁹ Thus, if property at its core concerns itself with social justice or environmental protection, new legislation implementing such values will not be in conflict with a constitutional protection of property. Greg Alexander has described legal regimes with a common conception of property focused on ownership rights but with a broad constitutional latitude for legislation to restrict such rights as “limitational.”²⁰ Professor Walsh summarizes that PPT argues for a more elastic and nuanced understanding of property itself rather than seeking to justify legislative power to reduce traditional property rights to advance public interests. She observes: “[I]deas like social justice, equal respect, and human flourishing should shape the *meaning of*, and *recognition of* property rights, rather than simply operating to justify *limits* on such rights.”²¹

Professor Walsh finds that the Irish Supreme Court has reached outcomes broadly consistent with progressive values while also embracing a traditional ownership notion of property by predictably deferring to legislative adjustments. Article 43 of the Irish Constitution both protects property as a natural right and provides that it can be regulated to promote social justice and the common good.²²

19. Professor Underkuffler develops an alternative model in which both the claims of an owner and the public interests protected by regulations both “are deeply and equally rooted in property-based concerns” so that “neither is favored (as a threshold matter) over the other.” UNDERKUFFLER, *supra* note 5, at 100.

20. GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY – LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 122 (2006).

21. WALSH, *supra* note 1, at 239.

22. *Id.* at 12–13. Article 43.1.1° provides: “The state acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.” Article 43.2.1° provides: “The state recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this article ought, in civil society, to be regulated by the principles of social justice.” Moreover, Article 40.3.2° states: “The state shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.” Walsh helpfully encapsulates these provisions: “[T]he Irish Constitution’s property rights

Thus, for example, the Irish Court has upheld the imposition of stringent land use planning controls by holding that the restrictions on development do not give rise to a right to compensation unless the new regulation could be considered an “unjust attack.”²³ Walsh notes that “the Irish experience shows that progressive property ideas can be given effect through a limitational approach that supports the imposition of a democratically determined constraints on ownership through deferential review.”²⁴ Nonetheless, Walsh expresses some concern that judicial adherence to traditional rhetoric of property rights and a lack of transparency in decision-making leaves the evolution of property law to the political process.²⁵

But such shortcomings pale in comparison to the movement of the U.S. Supreme Court to a reactionary form of property fundamentalism, construing the Takings Clause as a sword to cut back environmental and social legislation of several kinds. Like religious fundamentalists in various faiths, the justices have isolated and elevated selected elements of a complex tradition, insisted on a rigid literalism, and stoutly resisted innovative interpretations as destructive of basic truths.²⁶ Thus, in the *Cedar Point Nursery* case, the Court shamelessly expanded the existing (if poorly justified) per se rule against any legislation authorizing a permanent physical occupation of another’s private property to a rule prohibiting virtually all authorized entry onto private property, undermining established federal labor law.²⁷ The Court’s opinion avoids any discussion of the social or political consequences of its ruling, falling back on a barely articulated formalism, which conveys a contempt for serious legal reasoning.²⁸ A

provisions adopt a qualified progressive approach; they protect property rights against ‘unjust attack’, subject to delimitation by the State to secure ‘the exigencies of the common good’ and ‘the principles of social justice’.” WALSH, *supra* note 1, at 236.

23. *Central Dublin Development Assoc. v. Attorney General*, 109 I.L.T.R. 69 (1975).

24. WALSH, *supra* note 1, at 241.

25. *Id.* at 242–44.

26. See KAREN ARMSTRONG, *THE BATTLE FOR GOD: FUNDAMENTALISM IN JUDAISM, CHRISTIANITY AND ISLAM* x-xi, 172–78, 366 (2004); MARTIN E. MARTY & R. SCOTT APPLEBY, *FUNDAMENTALISM OBSERVED* (1991) (on religious fundamentalism).

27. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2080 (2021).

28. Justice Kavanaugh demonstrated eye-poppingchutzpah in claiming that the Court’s opinion “carefully adheres to constitutional text, history, and precedent.” *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2080 (2021) (concurring).

judicial decision further from the ideal of progressive property theory would be hard to imagine: *Cedar Point* single-mindedly protects the prerogatives of the owner without any frank discussion of competing interests or social context.²⁹ *Cedar Point* is the latest manifestation in a series of cases embracing highly simplified understandings of property law to protect owners against otherwise reasonable social legislation that modifies their powers.³⁰ While the U.S. Constitution does not contain any provision comparable to the Irish article explicitly stating that personal rights are subject to restriction to promote social justice, it also does not contain any statement that individuals have a natural right to property. Moreover, the U.S. Supreme Court has eschewed any reliance in regulatory takings cases on either the language or the original meaning of the Takings Clause,

Kavanaugh went on to falsely equate the administrative balancing of interests approved by the Court in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), with the common law necessity exception. *Id.* at 2080–81.

29. Among other faults, these decisions lack the value of humility and transparency that Tim Mulvaney identifies as essential for progressive property decisions and Rachael Walsh uses to assess the work of the Irish Supreme Court. See Timothy Mulvaney, *Progressive Property Moving Forward*, 5 CALIF. L. REV. ONLINE 239, 258–66 (2014).

30. The most egregious such decision in my opinion is *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), where the Court held that the interest earned on a collective account of lawyer-held client funds too small to justify either individual or pooled accounts must belong to the individual clients even though the positive Texas law was that they could be used by the State to fund legal representation for low income persons. This seems a straightforward elevation of a natural right to exclusive possession over positive law, despite the absence of any harm to the individual owner and the uncontested interest of the legal system to provide representation. The Court eventually neutered *Phillips*, however, holding that no compensation was due owners because no loss was sustained. *Brown v. Legal foundation of Washington*, 538 U.S. 216 (2003). Professor Lee Fennell has argued that some similar fate may befall *Cedar Point*, because the landowner there did not suffer any diminution in the value of its land from the entry of the labor organizers. Lee Anne Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, 17 DUKE J. CONST. L. & PUB. POL’Y 1 (2022).

The Supreme Court, however, has grown cavalier in its awards of compensation (see *Horne v. Dep’t of Ag.*, 576 U.S. 360, 369 (2015)) (rejecting applicability to raisin crop of established rule that compensation for taking a portion of property should be adjusted for the extent to which the taking increased the value of remaining property), and also has gestured toward resurrecting injunctive relief for regulatory takings. See Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630 (2015).

an approach quite inconsistent with much of its professed constitutional jurisprudence.³¹

This brief diatribe about the Supreme Court provides the context for appreciating the remarkable acceptance of a progressive understanding of cultural property in U.S. law. Despite an adherence to the “common conception” or “ownership model” of property prominent in U.S. law, cultural property has evolved to recognize diverse interests of non-owners. The following Section describes several important categories of cultural property that embody progressive property values. The succeeding Section will both analyze in greater detail the progressive elements in cultural property and consider why cultural property has blossomed in the harsh climate of U.S. judicial reaction.

III. VARIETIES OF CULTURAL PROPERTY

“There are many owned objects in which a larger community has a legitimate stake because they embody ideas, or scientific and historic information, of importance.”³² Cultural property is an established legal term in international law, although not consistently used in the United States.³³ Cultural property achieved legal prominence in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.³⁴ This treaty, signed by 133 states, for the first time gave explicit international legal protection to monuments and objects of historic interest.³⁵ The 1954 Hague Convention defined *cultural property* as “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

31. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 10013–14 (1992); see also William Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

32. PLAYING DARTS WITH A REMBRANDT, *supra* note 10, at 9.

33. Professor Joseph Sax noted that cultural property, like heritage and patrimony, is a term with “no very specific meaning.” *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, 88 MICH. L. REV. 1142 (1990) [hereinafter *Abbé Grégoire*].

34. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1, May 14, 1954, 249 U.N.T.S. 242.

35. See SARA C. BRONIN & J. PETER BYRNE, *HISTORIC PRESERVATION LAW* 691 (2d ed. 2021).

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.”³⁶ Documentary evidence and subsequent practice demonstrate that the Hague Convention standard for protected cultural property requires only national or local importance, not global or universal importance.³⁷ The treaty imposes a number of duties on signatories but centrally prohibits the intentional or negligent destruction or looting of cultural property by combatant states, duties that Russia has almost certainly violated numerous times during the current Ukrainian war.³⁸ Intentional destruction of cultural property can lead to criminal prosecution under the Treaty of Rome, which established the International Criminal Court.³⁹ The concept of cultural property has been used as an organizing category for other international agreements, although with varying coverage.⁴⁰ Most generally, cultural property includes any

36. Convention also included within the definition buildings, such as museums and libraries, containing cultural objects and temporary centres created to protect them during warfare. *Id.* at art. 1(b)–(c).

37. See Roger O’Keefe, *The Meaning of “Cultural Property” Under the 1954 Hague Convention*, 46 NETH. INT’L L. REV. 26 (1999).

38. See Bureau of Educational and Cultural Affairs, *Russia’s Threat to Ukraine’s Cultural Heritage Affects Us All*, U.S. DEP’T OF STATE (Mar. 15, 2022) <https://eca.state.gov/highlight/ukraineculturalheritage> [https://perma.cc/U9XE-CXMK]. UNESCO, which oversees the 1954 Hague Convention, has failed so far to condemn Russian destruction because of internal political divisions. See Anna Somers Cocks, *How the War in Ukraine Reveals Heightened Politics of UNESCO*, THE ART NEWSPAPER (Dec. 9, 2022), <https://www.theartnewspaper.com/2022/12/09/how-the-war-in-ukraine-has-highlighted-the-politicisation-of-unesco> [https://perma.cc/JHZ9-6LH9].

39. Article 8(2)(b)(ix) includes within war crimes “Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;” Rome Statute of the International Criminal Court art. 8(2)(b)(ix), July 17, 1998, 2187 U.N.T.S. 95. In 2016, Ahmad Al Faqi Al Mahdi was convicted of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali, and is currently serving a prison sentence. *Prosecutor v. Al Mahdi*, ICC-01/12-01/15, Judgment (Sept. 27, 2016) (pursuant to art. 25(3)(a); art. 25(3)(b); art. 25(3)(c); or art. 25(3)(d) of the ICC Rome Statute).

40. For example, Article 1 of the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property provides:

tangible thing that has been identified as important for giving meaning to the experiences and expressions of people without regard to their ownership rights.⁴¹ As we shall see, some legal instruments also use

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 paleontological 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 artist 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:
 - (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 statuary 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, 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.

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art.1(a)–(k), Nov. 14, 1970, 823 U.N.T.S. 234, 236.

41. A succinct and useful definition of cultural property is given in the Faro Convention, Council of Europe Framework Convention on the Value of Cultural Heritage for Society art. 2(b), 2005, CETS No. 199 (“a group of resources inherited from the past which people identify, independently of ownership, as a reflection and

the broader term *cultural heritage* to give legal protections to intangible cultural expressions that may not fit into established understandings of property.⁴²

Domestic law in nearly every nation provides extensive legal protections to cultural property, whether they use that term or not.⁴³ The United States has an elaborate array of cultural property laws that employ labels such as historic preservation, “cultural items,”⁴⁴ “cultural patrimony,”⁴⁵ “artwork or other property,”⁴⁶ and even cultural property.⁴⁷ Some scholars who have focused on the term *cultural property* in domestic law have tended to restrict it to things having constitutive significance to groups of indigenous people and understood by them not to be susceptible to individual ownership.⁴⁸ While that work has important value, it narrows cultural property more than is justified by established usage in international law.⁴⁹ Such a

expression of their constantly evolving values, beliefs, knowledge and traditions”) [hereinafter Faro Convention].

42. See *infra* Convention for the Safeguarding of the Intangible Cultural Heritage, note 102.

43. See generally Ancient Monuments Protection Act, 1882 (Eng.) (English law for example extends legal protections to, among others, Ancient Monuments, Listed Buildings, and Conservations Areas.).

44. 25 U.S.C. § 3001(3).

45. *Id.* at § 3001(3)(D); 43 C.F.R. § 10.2(d)(4).

46. Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, § 4(2), 130 Stat. 1524, 1526 (2016).

47. The Convention on Cultural Property Implementation Act, 19 U.S.C. § 2601, actually addresses a narrower category of “archaeological or ethnological material.” See *id.* at § 2601(2).

48. Professor Gerstenblith, in a path breaking article, wrote: “As used in this Article, ‘cultural property’ refers to those objects that are the product of a particular group or community and embody some expression of the group’s identity, regardless of whether the object has achieved some universal recognition of its value beyond the group.” Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 569–70 (1995). She argued that “because the identity of the group is bound up in the object ... the group acquires ownership rights over that object.” *Id.* at 570; see also Kristin A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1025 (2009) (describing cultural property as a “distinct area of law that focuses on land, traditional knowledge, and other interests often associated with the cultural heritage of indigenous groups.”) Such work reflects the distinctive subordination of indigenous people in colonized nations.

49. Professor Joe Sax’s path breaking work on the origins of justifications for preservation law in the US and elsewhere focused primarily on buildings and ancient structures on land in France and England. See Joseph L. Sax, *Heritage Preservation*

restrictive definition also risks implying that non-indigenous people lack legally significant connections to places and objects, which would be inconsistent with the substance of our laws and experience. Carol Rose has argued that historic preservation laws can help constitute cultural identity for diverse urban communities when available processes allow them to discuss what sites give their neighborhood character.⁵⁰

The United States has an elaborate array of historic preservation laws at the federal, state, and local levels.⁵¹ Virtually all the resources protected by historic preservation laws would qualify as cultural property. For example, the National Register of Historic Places, established by the National Historic Preservation Act (“NHPA”), lists “districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering and culture.”⁵² Thus, virtually any type of immoveable thing protected under the 1954 Hague Convention could be listed on the National Register.⁵³ As the National Register criteria suggest, listing is justified

as a Public Duty: The Abbé Grégoire and the Origins of an Idea, 88 MICH. L. REV. 1142, 1142–43 (1990); Joseph L. Sax, *Anyone Minding Stonehenge – The Origins of Cultural Property Protection in England*, 78 CALIF. L. REV. 1543, 1544 (1990) [hereinafter *Anyone Minding Stonehenge*]. Professor Merryman, whose primary concern was the relation between international and domestic cultural property law consistently uses the broader definition familiar from international law. *See, e.g.*, John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 341 (1989) (embracing the 1970 UNESCO convention definition); *see also* UNDERKUFFLER, *supra* note 5, at 110–11.

50. Carol Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 492, 494, 517 (1981).

51. BRONIN & BYRNE, *supra* note 35.

52. *See* 36 C.F.R. § 60.4 (implementing 54 U.S.C. §302101): “National Register criteria for evaluation. The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or (b) that are associated with the lives of persons significant in our past; or (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) that have yielded, or may be likely to yield, information important in prehistory or history.”

53. *1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, <https://en.unesco.org/protecting-heritage/convention-and->

by the importance such resources have for national, state, and local cultural heritage.

Most historic preservation laws restrict the private property rights of owners directly or indirectly. For example, the local laws of Washington, D.C., require an owner of a designated landmark or building contributing to the character of a historic district to obtain permission from an expert historic preservation commission before demolishing or altering the property;⁵⁴ this plays a central role in the real estate in the District because approximately twenty percent of its properties are protected by the preservation law.⁵⁵ Nearly every city in the United States (including Houston!)⁵⁶ has analogous laws, even if of varying strictness. Recent research by Sara Bronin and Leslie Irwin identified more than 3,500 local governments that regulate historic properties.⁵⁷ Historic preservation laws enacted at the local level, regulating the external appearance of subject buildings, have been pervasive now for more than forty years. They do so to safeguard the public interest in that “the historical and cultural foundations of the Nation should be preserved as a living part of community life and development in order to give a sense of orientation to the American people.”⁵⁸ Thus, historic preservation laws give legal effect to interests of non-owners in order to enhance their happiness and flourishing.

Section 106 of the NHPA does not directly regulate private property but does require every federal agency to consider whether its “undertakings”—that is, its own actions or the licensing or funding of activities by private individuals or state and local governments—may have an adverse effect on historic resources.⁵⁹ Imposing these duties on federal agencies has a massive indirect impact on those who interact with the federal government and with their private property. Most obviously, those who require a federal subsidy or permit (e.g., a

protocols/1954-convention [https://perma.cc/FNF4-6MYD]. The 1954 Hague Convention also includes within cultural property protected centers where moveable objects have been collected for safekeeping.

54. D.C. CODE § 6-1108(b) (2023).

55. GOV'T OF D.C., 2025 DISTRICT OF COLUMBIA HISTORIC PRESERVATION PLAN 53 (2022).

56. See *Powell v. City of Houston*, 628 S.W.3d 838, 841 (Tex. 2021).

57. Sara C. Bronin & Leslie R. Irwin, *Regulating History*, 108 MINN. L. REV. (forthcoming 2023).

58. National Historic Preservation Act, Pub. L. No. 89-665, § 1(b)(2).

59. 54 U.S.C. § 306108.

Clean Water Act discharge permit) to develop private property will need to wait and cooperate with analysis and consultation required of the agency. Although the NHPA requires the agency only to consider the effects of its undertakings on historic properties and ultimately does not prohibit harming or even destroying them, the procedures built into section 106 and specified in its regulations provide significant incentives for agencies and private entities working with them to avoid adverse effects on historic properties.⁶⁰ Moreover, the NHPA applies to a great quantity of historic resources nationwide and even requires federal agencies to search for historic resources that may be affected by the proposed undertaking. Taken in whole, historic preservation laws significantly restrict private property rights to advance the public interest in safeguarding historical and cultural resources. Other nations also have large-scale historic preservation laws restrictive of private property rights.⁶¹

Local historic preservation laws imposing significant economic constraints on owners famously were upheld against a determined takings challenge in the iconic *Penn Central* case.⁶² The Court there endorsed a lenient and highly contextual standard for considering takings claims against restrictions on development while broadly endorsing the legitimacy of preservation regulations, even of individual landmarks. In retrospect, *Penn Central* created the legal landscape in which historic preservation regulations became ubiquitous throughout the country.⁶³ While it seems clear that later Supreme Court majorities would not have decided the case the same way,⁶⁴ *Penn Central* has endured to this day as the default standard

60. Regulations specifying the steps federal agencies must take to comply with Section 106 have been established by the federal Advisory Council on Historic Preservation and are found at 36 C.F.R. § 800.

61. See, e.g., RICHARD HARWOOD, *HISTORIC ENVIRONMENT LAW: PLANNING, LISTED BUILDINGS, MONUMENTS, CONSERVATION AREAS, AND OBJECTS* (2012) (England).

62. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978).

63. See J. Peter Byrne, *Penn Central in Retrospect: The Past and Future of Historic Preservation Regulation*, 33 *GEO. ENV'T L. REV.* 399, 399 (2021).

64. See *id.* at 401. That the current, more conservative Court likely would not accept landmark regulation as an initial matter does not mean that *Penn Central* is anomalous. Courts in the rest of the world have accepted extensive regulation protecting cultural property against the wishes of owners. Illustrative is the decision of the European Court of Human Rights finding that state's cultural patrimony law did not violate the property rights protected by Article 1 of Protocol No. 1 of the European Convention on Human Rights. *Beyeler v. Italy*, 33202/96 Eur. Ct. H.R. at

for constitutional property challenges to land use regulations.⁶⁵ Moreover, there have been virtually no successful takings claims against preservation laws.⁶⁶

Historic preservation law contributes to human flourishing by preserving properties that convey the accomplishments and values of people in the past as means for current and future understanding and development. Professor Alexander included *Penn Central* in his elaboration of the “social obligation norm” that lies at the heart of his approach to progressive property theory.

The social-obligation theory recognizes that because individuals can develop as free and fully rational moral agents only within a particular type of culture, all individuals owe their communities an obligation to support in appropriate ways the institutions and infrastructure that are part of the foundation of that culture. This support may sometimes involve sacrificing personal preference-maximizing uses of property . . . The Court’s decision sustaining the uncompensated rejection of the owner’s plans to develop that building in ways that would have done just that was a judicial enforcement of a democratically sanctioned scheme of use-sacrifices required of all private owners of New York City buildings whose aesthetic and historic integrity the Commission has determined to be vital to the continuing well-being of the city’s culture.⁶⁷

¶¶ 112–13 (2000) (holding that “In the instant case the Court considers that the control by the State of the market in works of art is a legitimate aim for the purposes of protecting a country’s cultural and artistic heritage. The Court points out in this respect that the national authorities enjoy a certain margin of appreciation in determining what is in the general interest of the community.... [T]he Court recognizes that, in relation to works of art lawfully on its territory and belonging to the cultural heritage of all nations, it is legitimate for a State to take measures designed to facilitate in the most effective way wide public access to them, in the general interest of universal culture.”).

65. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005).

66. See Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After Penn Central*, 15 FORDHAM ENV’T L. REV. 313, 316 (2004).

67. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 795 (2009). Alexander is surely right to reject Hanoch Dagan’s economic reciprocity explanation for *Penn Central* in favor of viewing the case as a recognition of the cultural significance within urban fabric. *Id.* at 794 (discussing Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 771 (1999)).

We will explore more how historic preservation fits into progressive property theory in a subsequent section.

In addition to the public federal, state, and local preservation laws discussed above, states have also changed their private law to facilitate the creation of enforceable interests in cultural property. With remarkable unanimity, states have authorized non-profit and government entities to obtain non-possessory interests in land and buildings in order to preserve cultural and environmental resources for the public.⁶⁸ Such private conservation and preservation easements would have been invalid under the common law but were authorized through a model Conservation Easement Act, adopted in various forms in nearly every state.⁶⁹ Donations of such easements by property owners are subsidized by a wide range of federal and state tax benefits. This system has generated land conservation at a scale that exceeds the national park system in acreage. While land can be placed under easements for purely ecological values, it is also often restricted explicitly to protect historic values and often to preserve the cultural or aesthetic value of a community.

The United States has a mixed approach to the protection of archaeological sites and the ownership of cultural objects extracted from them. Professor Sax noted: “America is virtually alone among the nations of the world in treating objects found on private lands as none of its business.”⁷⁰ This is true for cultural objects found on private land, where the hunt and dig is largely unregulated, and the ownership of cultural objects excavated is usually governed by common law rules about finders and landowners. Federal law does protect archeological resources on public lands. The Antiquities Act of 1906 was the first federal land conservation statute and was enacted to prohibit looting of archaeological artifacts and to protect “historic landmarks, historic and prehistoric structures, and other objects of

68. See BRONIN AND BYRNE, *supra* note 35, at 539–53.

69. UNIF. CONSERVATION EASEMENT ACT § 1(1) (UNIF. L. COMM’N 2007) defines a conservation easement as “a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or *preserving the historical, architectural, archaeological, or cultural aspects of real property.*”

70. PLAYING DARTS WITH A REMBRANDT, *supra* note 10, at 179.

historic or scientific interest” on federal land.⁷¹ The Archeological Resources Protection Act provides criminal penalties for those who “sell, purchase, exchange, transport, [or] receive” archeological resources, the excavation or removal of which violates federal state or local law, thus extending legal protection to a core type of moveable cultural property.⁷² The Abandoned Shipwreck Act displaces the common law of finders and the maritime law of salvage regarding the sunken vessels to which it attaches in order to protect this important form of cultural property from inappropriate exploitation.⁷³

Federal law also gives extraordinary protection to the cultural property of Native Americans. The Native American Graves Protection and Repatriation Act (“NAGPRA”) creates a comprehensive program by which “museums” receiving federal support must inventory “cultural items” associated with Native American groups and repatriate any such items when requested to the relevant organization or a lineal descendant of a previous Native American owner.⁷⁴ A separate federal statute criminalizes trafficking

71. 54 U.S.C. § 320301.

72. 16 U.S.C. § 470ee. The act defines archeological resources as “any material remains of past human life or activities which are of archaeological interest.” *Id.* at § 470bb(1). While the act looks to regulations to elaborate this definition, it specifies that the definition must include but need not be limited to “pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items.” *Id.* ARPA does cover the removal of archeological resources from private land when removed in violation of state law and trafficked in interstate commerce. *United States v. Gerber*, 999 F.2d 1112, 1114, 1116 (7th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994).

73. *See* 43 U.S.C. §§ 2101–06.

74. 25 U.S.C. §§ 3001(3), (8). “Cultural items” is defined to include human remains, funerary objects, sacred objects, and cultural patrimony. *Id.* at § 3001(3). “Cultural patrimony is defined as “an object having ongoing historical, traditional, or cultural importance to the Native American group or culture itself.” *Id.* at § 3001(3)(D). Significantly, the definition of cultural patrimony is a near equivalent of cultural property; however, the item must also be considered inalienable by the Native group at the time it was alienated from the group. *Id.* “[T]hus, tribal law or custom is determinative of the legal question of alienability at the time the item was transferred.” *See* Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 66 (1992). Human remains are not cultural property; indeed, they are not property at all, but are repatriated for internment. “Museum” is defined to include any institution, including universities, that receives federal funds and has possession of Native American cultural items. 25 U.S.C. § 3001(8). Repatriation is

in Native American cultural items in violation of NAGPRA.⁷⁵ These measures protect the human rights and cultural interests of indigenous communities without regard to the once-normal property interests of individual buyers and collectors outside indigenous groups. As such, they represent a striking instance of how law creates or recognizes the enforceable interests of persons other than private owners in cultural property.⁷⁶ Moreover, NAGPRA creates rights of ownership for tribes that have “the closest cultural affiliation with such . . . objects,” even if they cannot show that the existing tribe ever had ownership of the object or stood in a line of descent from one that did.⁷⁷ NAGPRA “clearly establishes tribal property interests in cultural patrimony.”⁷⁸ The Act thus gives federal recognition to tribal ownership and confirms the inalienability of items considered inalienable under tribal norms.⁷⁹ “NAGPRA in effect substitutes tribal property institutions

governed by *id.* at §§3005.

75. 18 U.S.C. § 1170.

76. One authority argues that NAGPRA does not create any new property rights for Native Americans, but this seems overstated. *See* SHERRY HUTT ET AL., CULTURAL PROPERTY LAW: A PRACTITIONER’S GUIDE TO THE MANAGEMENT, PROTECTION, AND PRESERVATION OF HERITAGE RESOURCES 34-35 (2d ed. 2017). While it is generally clear that no one can obtain property rights in human remains, it is too simple to claim that no person can obtain property rights in other cultural items that may have been considered inalienable under tribal law or custom. The problem for Native claimants before NAGPRA was that so many indigenous cultural items came to be possessed by non-Native individuals and institutions. Accordingly, Native groups had to prevail under ordinary state property law, which proved far too difficult given the ambiguous circumstances under which the items were transferred and the passage of time. *See* Trope & Echo-Hawk, *supra* note 74, at 43–45.

77. 25 U.S.C. § 3002(a)(2)(B). This overcomes the basis on which a group of tribes lost a claim for recovery of wampum belts (presumably cultural patrimony under NAGPRA) because of the court’s finding that any active, legally cognizable link between the claiming tribes the wampum had ceased to exist. *Onondaga Nation v. Thacher*, 61 N.Y.S. 1027, 1033 (N.Y. Sup. Ct. 1899).

78. Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 740 (1997). Professor Harding also observed, “[I]t is safe to assume that if the object is important to the affiliated Indian tribe, the uncertainties of ownership and the circumstances of alienation will be overlooked. In other words, a recognition of the importance of an object will likely be both prior to and determinative of a finding of tribal ownership; the importance of an object may in fact by itself be sufficient to categorize property as cultural patrimony.” *Id.* at 724–25.

79. For cultural patrimony found in the future on federal or tribal land, NAGPRA gives preference for “ownership or control” to the tribe or Native group. 25 U.S.C. § 3002(a).

for Anglo-American property institutions.”⁸⁰ Congress has recently expanded the protection given Native American cultural items by, *inter alia*, prohibiting the export of cultural items as defined in NAGPRA without the permission of the relevant tribe or group.⁸¹ This has been described as the first U.S. law prohibiting the export of any artwork.⁸²

Courts have been largely supportive of NAGPRA’s enhancement of protection for cultural items. In the leading case *United States v. Corrow*, the court upheld the conviction of a recognized dealer in Navajo art for purchasing Yei B’Chei, Navajo ceremonial masks, from the widow of a Navajo ceremonial singer.⁸³ These masks fell within the definition of “cultural patrimony” (a subcategory of “cultural item”) as “having ongoing historical traditional, or cultural importance” to the relevant tribe, which considered them incapable of individual ownership.⁸⁴ The defendant argued that the category was unconstitutionally vague, but the court held that the defendant must have known that “the Yei B’Chei were cultural items which could not be purchased for a quick \$40,000 turn of profit.” From a property law perspective, the court gave effect to tribal norms of inalienability effectuated by a federal statute, which displaced the state law, which previously would probably have upheld the sale. *Corrow* thus exemplifies judicial effectuation of a special legislative treatment of cultural property.⁸⁵

80. Harding, *supra* note 78, at 726.

81. Safeguard Tribal Objects of Patrimony (STOP) Act, H.R. 2930, 117th Cong., Pub. L. No. 117-258, 136 Stat. 2372 (2022).

82. See, e.g., Kate Fitz Gibbon, *STOP Act Passes: First Law Restricting Export of American Art*, CULTURAL PROP. NEWS (Dec. 1, 2022), <https://culturalpropertynews.org/stop-act-passes-first-law-restricting-art-export-in-u-s-history/> [<https://perma.cc/YR49-6SJ7>].

83. 119 F.3d 796, 796 (10th Cir. 1997), *cert. denied*, 522 U.S. 1133 (1998).

84. 25 U.S.C. § 3001(3)(D); 43 C.F.R § 10.2(d)(4).

85. Native American tribes and groups have not succeeded in all their claims under NAGPRA, of course, but controversies about the meaning or effect of cultural property laws do not mean that such controversies are resolved under the “common conception” of property. See generally, Ron McCoy, *Is NAGPRA Irretrievably Broken?*, CULTURAL PROP. NEWS (Dec. 19, 2018), <https://culturalpropertynews.org/is-nagpra-irretrievably-broken/> [<https://perma.cc/2R4Q-VYL5>]; Christopher Zheng, *31 Years of NAGPRA: Evaluating the Restitution of Native American Ancestral Remains and Belongings*, CTR. FOR ART LAW (May 18, 2021), <https://itsartlaw.org/2021/05/18/31-years-of-nagpra-evaluating-the-restitution-of-native-american-ancestral-remains-and->

The Holocaust Expropriated Art Recovery (“HEAR”) Act suspends normal statutes of limitations for actions to recover possession of “artwork or other property” lost due to Nazi persecution.⁸⁶ This bipartisan legislation allows actions to go forward now that otherwise would be barred by the passage of time. It protects claims for cultural property but not for other forms of property, although the Nazis expropriated and extorted all kinds of property from victims.⁸⁷ Significantly, the HEAR Act displaces state statutes of limitation for state claims of replevin without providing a federal cause of action, stimulating concerns that it violates the Tenth Amendment.⁸⁸ Although the HEAR Act has failed so far to provide a legal vehicle for a successful judgment recovering Nazi-looted art,⁸⁹ soft law

belongings/ [https://perma.cc/ATL5-PB8K].

86. The Holocaust Expropriated Art Recovery (“HEAR”) Act of 2016, Pub. L. No. 114-318, 130 Stat. 1524 § 5(a) (2016), provides: “IN GENERAL.— Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of— (1) the identity and location of the artwork or other property; and (2) a possessory interest of the claimant in the artwork or other property.”

87. The HEAR Act broadly defines “art and other property” to include: “(A) pictures, paintings, and drawings; (B) statuary art and sculpture; (C) engravings, prints, lithographs, and works of graphic art; (D) applied art and original artistic assemblages and montages; (E) books, archives, musical objects and manuscripts (including musical manuscripts and sheets), and sound, photographic, and cinematographic archives and mediums; and (F) sacred and ceremonial objects and Judaica.” *Id.* at § 4(2).

88. See William L. Charron, *The Problem of Purely Procedural Preemption Presented by the Federal HEAR Act*, 2018 PEPP. L. REV. 19, 25 (2018). In *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S. Ct. 1502, 1506 (2022) In *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S. Ct. 1502 (2022), the Supreme Court ruled on a choice of law issue in a case allowed to proceed under the HEAR Act suspension of the statute of limitations but did not address any aspect of the Act. The Ninth Circuit had held that claimants’ action was timely because of the HEAR Act. 862 F.3d 951 (9th Cir. 2017).

89. Among other barriers, the Second Circuit has held that claims for the recovery of such art can still be barred by the equitable doctrine of laches. *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 189 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 1269 (2020). *But see Reif v. Nagy*, 80 N.Y.S.3d 629, 633-34 (N.Y. Sup. Ct. 2018) (rejecting laches defense as inconsistent with the HEAR Act’s purpose); see also Simon J. Frankel, *The HEAR Act and Laches After Three Years*, 45 N.C. J.

instruments promoted by the United States and adopted internationally have succeeded in discovering and returning significant artworks to descendants of victims of Nazi persecution.⁹⁰ This conspicuous phenomenon extends to addressing the vast number of claims for recovery of cultural property taken by colonial powers from indigenous people globally. Assessments of claims for return of Nazi-looted art often employ formally constituted decision-making bodies, established fact-finding procedures, and published criteria for judgment.⁹¹ The decisions may even be enforceable in courts, at least when parties have pre-committed to abide by subsequent judgments. Indeed, the employment of moral suasion and voluntary agreements constitutes a distinctive characteristic of cultural property, not limited to cases of Nazi injustice, as institutional owners have acceded to a remarkable degree to claims by the descendants of claimants who lack formal legal rights.⁹² This conspicuous phenomenon of moral force displacing traditional property claims extends to addressing the vast number of claims for recovery of cultural property taken by colonial powers from indigenous people globally.

The United States has also responded by various legal means to international calls to bar the import of cultural property illicitly exported from source countries. The Cultural Property Implementation Act was enacted in 1983 to implement aspects of the

INT'L L. 441, 443 (2020).

90. The Washington Conference on Holocaust Era Assets resulted in the unanimous adoption of a series of non-binding principles to resolve issues relating to Nazi-looted art. These “Washington Principles” advise states to address such claims expeditiously and informally to achieve a “just and fair solution” rather than on the basis of the normal rules of property. U.S. DEP’T OF STATE & U.S. HOLOCAUST MEM’L MUSEUM, PROCEEDINGS OF THE WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS, app. G., at 971–72 (1998).

91. See, e.g., Evelien Campfens, *Bridging the Gap Between Ethics and Law: The Dutch Framework for Nazi-Looted Art*, 25 ART, ANTIQUITY & L. 1, 17–21 (2020).

92. See, e.g., Charly Wilder, *When a Visit to the Museum Becomes an Ethical Dilemma*, N.Y. TIMES (Feb. 14, 2023), <https://www.nytimes.com/2023/02/14/travel/museums-stolen-art.html> [https://perma.cc/PJW7-QFNB]; see, e.g., Alex Marshall, *After 220 Years, the Fate of the Parthenon Marbles Rests in Secret Talks*, N.Y. TIMES (Jan. 18, 2023), <https://www.nytimes.com/2023/01/17/arts/design/parthenon-sculptures-elgin-marbles-negotiations.html> [https://perma.cc/6P3Y-2WMT]; Matt Stevens, *Smithsonian To Return Most of its Benin Bronze Collection to Nigeria*, N.Y. TIMES (Mar. 8, 2022), <https://www.nytimes.com/2022/03/08/arts/design/smithsonian-benin-bronze-nigeria.html> [https://perma.cc/K8V4-BUVT].

1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.⁹³ The Act provides that the President (in practice, the State Department) may enter into bilateral agreements with other nations that are parties to the Convention to bar the importation of some category of cultural property that the requesting nation contends is subject to pillage without a license for the requesting nation. These agreements cover archaeological and ethnographical materials, the excavation or trading of which can result in the loss of cultural patrimony of the source country or of indigenous communities and valuable information about the past.⁹⁴ As of this writing, the United States has such agreements with 29 foreign nations. For example, pursuant to an agreement with Egypt, the U.S. is implementing import restrictions until 2026 on certain archaeological material representing Egypt's cultural heritage dating from before 1750.⁹⁵ These agreements and restrictions constitute exceptions from the United States' general policy of free trade in art.⁹⁶

More dramatic from the perspective of property theory has been judicial construction of the federal Stolen Property Act to criminalize private possession and conveyance by putative owners of cultural property where the source country has asserted a superior claim of ownership based on its cultural patrimony laws.⁹⁷ Such patrimony laws assert state ownership *ab initio* over antiquities found by private parties within the state after the date of the legislation regardless of any lack of possession by the state.⁹⁸ Even though no such patrimonial ownership is recognized in U.S. domestic law, U.S. courts have

93. 19 U.S.C. § 2601.

94. 127 CONG. REC. S1091-92 (daily ed. Feb. 5, 1981) (statement of Sen. Spark Matsunaga & Sen. Max Baucus); *Cultural Property Treaty Legislation: Hearing Before the Subcomm. on Trade of the Comm. on Ways and Means*, 96th Cong. 3-6 (1979) (statement of Mark B. Feldman, Deputy Legal Adviser, Dep't of State).

95. *Memorandum of Understanding Concerning the Imposition of Import Restrictions on Categories of Cultural Property of Egypt*, Egypt-U.S., Nov. 30, 2021, T.I.A.S. No. 21-1130.

96. See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986) (arguing for a policy of free trade in cultural property with limited exceptions).

97. National Stolen Property Act, 18 U.S.C. §§ 2314-2315.

98. See PATTY GERSTENBLITH, *Theft and Illegal Excavation: Legal Principles for the Protection of the Archeological Heritage*, in OXFORD HANDBOOK OF INTERNATIONAL CULTURAL HERITAGE LAW 206-11 (Francesco Francioni & Ana Filipa Vrdoljak eds., 2020).

strongly enforced the cultural patrimony laws of foreign nations. This development is well-illustrated by *United States v. Schultz*,⁹⁹ where the Second Circuit upheld the conviction under the Stolen Property Act of a well-known New York art dealer for receipt of an ancient statue of Amenhotep III that was covered by a 1983 Egyptian “patrimony law,” which declared all antiquities discovered after the enactment of the statute to be the property of the Egyptian government. The defendant argued that the Stolen Property Act did not cover claims based on patrimony laws because the foreign state never had a recognizable ownership and never possessed the statue. Such laws, he argued, were merely export controls. The court, however, deferred to determination of ownership under foreign law, at least when it was convinced that the foreign nation would apply that law to its own nationals on the same terms as to foreign traders. Given the importance of the United States as a market for antiquities, *Schultz* and other cases reaching the same result broadly criminalize trade in cultural property covered by a source nation’s patrimony laws.¹⁰⁰

International conventions in recent decades have preferred to use the concept of cultural heritage rather than cultural property.¹⁰¹ The term cultural heritage is intended to reach tangible objects or sites that could not be subject to ownership, such as sacred sites or animals, and intangible expressions of culture, such as languages and rituals.¹⁰² Professors Vrdoljak and Francioni have observed that the movement in emphasis from cultural property to cultural heritage “reflects the movement of numerical dominance [in UNESCO] away from Western countries—where cultural manifestations are often conceptualized in domestic law in terms of property law—to States in Africa, Asia, and the Global South where it is viewed in less transactional terms, with an emphasis on custodianship in communal and intergenerational terms.”¹⁰³ The use of cultural heritage emphasizes that culture is

99. 333 F.3d 393, 398–99 (2d Cir. 2003).

100. See also *United States v. McClain*, 545 F.2d 988, 1000 (5th Cir. 1977).

101. Lyndel V. Prott & Patrick J. O’Keefe, ‘Cultural Heritage’ or ‘Cultural Property’?, 1 INT’L J. CULTURAL PROP. 307, 318 (1992).

102. See Convention for the Safeguarding of the Intangible Cultural Heritage, art. 2, Oct. 17, 2003, 2368 U.N.T.S. 36; Convention on the Protection and Promotion of the Diversity of Cultural Expressions, art. 4, Oct. 20, 2005, 2440 U.N.T.S. 311. U.S. law has no category of intangible cultural heritage.

103. Ana Filipa Vrdoljak & Francesco Francioni, *Introduction*, in OXFORD HANDBOOK OF INTERNATIONAL CULTURAL HERITAGE LAW 4 (Francesco Francioni & Ana Filipa Vrdoljak eds., 2020).

inseparable from human beings, who attribute significance to buildings and objects and inherit, express, and pass on cultural practices.¹⁰⁴ Participation in culture has indeed been recognized as a human right,¹⁰⁵ and organized destruction of the cultural heritage of a people has come to be viewed as genocide.¹⁰⁶ For the purposes of this Article, these developments in the international sphere demonstrate the growing weight of the claims to cultural property that constrain standard ownership rights.

Cultural property thus emerges as a general category of legal relations that bears out in practice some of the theoretical values of progressive property scholars. The owner of a historic house may not demolish or alter the exterior of their house without permission; a collector of Native American ritual objects may not be able to purchase or sell items to which there is ostensible good title; institutions accept recommendations based on ethical precepts to return art objects to which they have good title. These laws give effect to a community interest in the preservation, conservation, retention, or repatriation of specific items of private property based on their importance for culture. Accordingly, the classic liberal property rights of possession, exclusion, use, and disposition are qualified in varying ways to protect a public interest in enhancing meaning for groups and individuals. In the following Section, this Article will further consider how cultural property illustrates progressive property in practice and

104. The 2003 Intangible Cultural Heritage Convention in its definition states: ‘intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature, their history, and provides them with a sense of identity and continuity.’ Convention for the Safeguarding of the Intangible Cultural Heritage, *supra* note 102, at art. 2(1).

105. Article 27 of the Universal Declaration of Human Rights, adopted in 1966 provides in part: “Everyone has the right freely to participate in the cultural life of the community”. Professor Yvonne Donders summarizes the growth of instruments viewing cultural heritage as a human right: “Several human rights, including the right to take part in cultural life, the right to enjoy culture, and the right to freedom of expression and assembly, confirm that the protection and promotion of cultural heritage is part of human rights and can be considered a precondition for the employment of several human rights norms.” Yvonne Donders, *Cultural Heritage and Human Rights*, in OXFORD HANDBOOK OF INTERNATIONAL CULTURAL HERITAGE LAW 405 (Francesco Francioni & Ana Filipa Vrdoljak eds., 2020).

106. ELISA NOVIC, THE CONCEPT OF CULTURAL GENOCIDE: AN INTERNATIONAL LAW PERSPECTIVE 6–8 (2016).

also why courts and legislatures have created this progressive branch of property.

IV. CULTURAL PROPERTY AS PROGRESSIVE PROPERTY

This Section looks more closely at the ways cultural property embodies the goals of progressive property theory. In doing so, it benefits from Professor Walsh's findings about the extent to which the constitutional property decisions of the Irish Supreme Court do or do not put progressive property ideas into action. This Section also addresses why cultural property stands closer to progressive ideals than most U.S. property law.

A. Cultural Property Protects the Interests of Those Without Established Claims of Ownership

The largely legislative character of cultural property interests of non-owners corroborates a central point in Professor Walsh's study. She shows that the Irish Supreme Court, while maintaining a traditional understanding of the dimensions of property rights, has deferred broadly to a wide range of statutory restrictions on owners for the benefit of the public, reflecting the traditions of Catholic social thought embodied in the Irish Constitution. She notes that this stance is at some tension with "a broader theme of progressive property: that ideas like social justice, equal respect, and human flourishing should shape the meaning of property rights, rather than simply operating to justify limits on such rights."¹⁰⁷ She continues, "[T]he Irish experience shows that progressive property ideas can be given effect through a 'limitational' approach that supports the imposition of democratically determined constraints on ownership through deferential review."¹⁰⁸

At a high level, cultural property fulfills the progressive normative goals of recognizing and giving effect to the significant interests of non-owners while modifying the rights of owners. The argument for recognizing cultural property interests limiting traditional ownership turns on the consequences of recognizing or denying cultural claims. Cultural property contributes crucially to human flourishing. This is perhaps most obvious for claims by indigenous groups, the denial of which may destroy the group's religion or identity. But the benefits of

107. WALSH, *supra* note 1, at 239.

108. *Id.* at 241.

cultural property are enjoyed by many people at the national, community, and affinity group levels.

It is difficult to say whether cultural property laws change property rights internally or act as a limitation of ownership rights. Local historic preservation laws abridge the normal rights of owners to demolish or alter the exteriors of their buildings to secure the cultural identity and aesthetic interests of community members. At a rhetorical level, it can be said that preservation laws recognize a property interest in the public in the culturally important aspects of a designated resource while making the owner something of a fiduciary regarding the significant elements of the resource.¹⁰⁹ Moreover, one can discern the rudiments of a future interest in the goal of passing the designated resource intact on to future generations. Professor Sax says of modern preservation, “we see an historic mansion or an ancient redwood as not just a commodity owned by a proprietor, but as patrimonial property that in some respects ‘belongs’ to the nation and to posterity.”¹¹⁰ However, community members do not have directly enforceable property interests in historic resources such as easements. Preservation regulatory laws mediate community interests through public regulation: an expert body advises on designation and issues permits to owners for works consistent with the historic character of their property. Members of the public can seek designation and oppose the grant of permits in administrative proceedings, but the decision

109. Professor Underkuffler argued: “The core values that underlie cultural property claims – the state of affairs that they seek to protect, and the reasons for that protection – are as rooted in traditional property notions as are the core values that underlie the opposing individual claims.... In each case, the idea of the protection of property and the reasons for the protection of property speak powerfully for both private and public claims.” UNDERKUFFLER, *supra* note 5, at 116. While this is a valuable insight, it seems incomplete, because many arguments for cultural property are unhinged from any claims of ownership by public entities advocating them. Similarly, while arguments for protecting historic districts partake of arguments about reciprocity of advantage, familiar from zoning law, arguments for protecting individual landmarks do not reflect any identifiable ownership benefit to anyone. *Id.* at 114.

110. *Anyone Minding Stonehenge*, *supra* note 49, at 1545. Sax notes that these ideas were introduced into English discourse by the great art theorist and social critic, John Ruskin. “[I]t is again no question of expediency or feeling whether we shall preserve the buildings of past times or not. We have no right to touch them. They are not ours. They belong partly to those who built them and partly to all the generations of mankind who are to follow us.” JOHN RUSKIN, *THE SEVEN LAMPS OF ARCHITECTURE* 168 (John Wiley eds., 1849).

rests with the commission and is subject to judicial review. Of course, this is how much of modern property law, indeed virtually all of land use law, actually works, in which public law provides solutions or strikes balances difficult to realize in strictly private law.¹¹¹ Whether this community legal interest should be considered “internal” to property law, as many progressive property scholars prefer, or an external “limitation” may seem somewhat metaphysical. Yet the designation of an object or building as historic or cultural reflects something intrinsic about the resource itself and the public’s intimate connection to it rather than something more external or consequential to its use.¹¹²

Historic preservation through the consensual transfer of historic easements provides an illuminating comparison. There, the holder of the restriction on demolition or alteration can be described readily within the language of ordinary property law (even if the holder’s interest is a novel creation of statute): the owner as a grantor and the holder has an easement, servitude, or restriction, as state law dictates. The positions of the grantor and holder are familiar from the common law of servitudes: the holder possesses a servitude in gross, which it can enforce in court. But the holder acts as a mediator of the interests of the public rather than for its own benefit; it must be a government agency or non-profit with relevant expertise to play the role,¹¹³ and

111. “[S]tatutes adjusting the terms of ownership should be considered to be part of property law just as fully as are common law rules.” J. Peter Byrne, *The Public Nature of Property Rights and Property Nature of Public Law*, in *THE PUBLIC NATURE OF PRIVATE PROPERTY* 1, 1 (Robin Paul Malloy & Michael Diamond eds., 2011). Jeremy Waldron writes: “[P]eople nowadays identify their property in a way that takes net account of actual and sometimes likely restrictions on use and development. Every owner of property in a historic town center is familiar this and it is not at all clear why we should have to work with an intuitive notion of property that stands aloof from this awareness.” JEREMY WALDRON, *THE RULE OF LAW AND THE MEASURE OF PROPERTY* 69 (2012).

112. Sax writes: “Whether the claim was put in proprietary terms as something, as something ‘belonging’ to the nation, or in some less legalistic form, the concept was the same: The nation as a collectivity had a preexisting interest in many objects that had always been considered entirely private.” *Anyone Minding Stonehenge*, *supra* note 49, at 1554.

113. UNIF. CONSERVATION EASEMENT ACT § 1(2) (NAT’L CONF. COMM’RS UNIF. STATE L. 2007). “This novel limitation on the entities that can hold this particular type of servitude was intended to provide some guarantee of the public value of easements.” Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated*

modification of the terms of the easement requires judicial oversight.¹¹⁴ Both public historic preservation regulations and preservation easements combine restrictions on owners' discretion and protect the public cultural interest. Preservation regulations may be described as "limitational" because public legislation empowers a public regulatory agency to grant permits and enforce prohibitions. By contrast, the preservation easements might be considered more internal because the owner has conveyed various powers to a holder with an interest that gives it the power and duty to enforce the restrictions. Although public regulations are subject to constitutional review and the grant of easements is not, both limit the owner's discretion in favor of the public interest. While the two approaches have different advantages and problems, these seem internal to historic preservation law rather than raising a fundamental jurisprudential issue.

Cultural property tracks onto another norm within progressive property thinking: it provides special protection to groups relegated to the margins of legal and economic status. Several progressive scholars have urged that property law weigh the effects of decisions on those disempowered by historic property law understandings.¹¹⁵ Cultural property legislation has provided special protections to Native American cultural items to address both past collecting of human remains, funerary objects, and cultural patrimony by institutions and ongoing trafficking in the marketplace. These are "differential" property rules, treating claims to Native American cultural items quite differently from those to the cultural objects of any other ethnic or religious group.¹¹⁶ There are complex reasons for this

Mosaic of Law, 1 J.L. PROP. & SOC'Y 107, 140 (2015).

114. Although Section 3 of the UCEA states that conservation easements can be amended like any private interest, the comments to the comments to section 3 provide: "[B]ecause conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose—i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes—the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements." Cheever & McLaughlin *supra* note 111, at 145.

115. Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 CALIF. L. REV. CIR. 349, 366–69 (2014); *see generally* Nestor M. Davidson, *Property and Identity: Vulnerability and Insecurity in the Housing Crisis*, 47 HARV. CIV. RTS. - CIV. LIBERTIES. L. REV. 119 (2012). *See generally* A.J. VAN DER WALT, PROPERTY IN THE MARGINS (2008).

116. *See* Carpenter et al., *supra* note 48, at 1088.

special protection, but at the head of them stands that historic appropriation of Native American lands and the efforts to suppress and destroy their religion and culture.¹¹⁷ Without prejudice to the claims that other groups might advance, Native American claims to repatriation and ongoing protection can draw on their historic legal and practical powerlessness against deprivation and dehumanization.

While historic preservation laws embody the ethical values of progressive property theory, they largely avoid the “information cost” complaints that have been brought against PPT.¹¹⁸ Cultural property law has grown almost entirely by statute; no significant instances of cultural property interest are recognized as a matter of common law.¹¹⁹ The implementation of historic preservation by statute gives effective ex-ante notice to owners and community members about the standards and procedures the laws provide, and the essential designation process identifies which sites are subject to the preservation regulations and which are not.¹²⁰ Courts have generally supported protecting the integrity of the designation process against gaming by property owners.¹²¹ Information theorists have emphasized that changes to property law by legislation greatly reduce the problem of information costs in the evolution of property law.¹²² The basic complaint that

117. Trope & Echo-Hawk, *supra* note 74, at 36–38.

118. *See* notes 15–16, *supra*.

119. Arguably, judicial decisions giving effect to custom may recognize cultural property without using the name when they protect long-standing patterns of human behavior regarding specific places or objects. *See Oregon ex rel Thornton v. Hay*, 462 P.2d 671 (Or. 1969). Other judicial invocations of custom relate to general types of property, such as decisions enforcing the custom that hunters may enter unimproved, unposted land in pursuit of game, can be seen as safeguarding intangible heritage. *See, e.g., McConico v. Singleton*, 9 S.C.L. 244 (1 Mill. 1818). Judicial decisions struggling with how to measure limitations periods for claims to recover artwork might also be thought of judge-made law for cultural property. *See, e.g., Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991).

120. Section 106 of the NHPA requires federal agencies to identify properties *eligible* for inclusion on the National Register that may be affected by proposed federal undertakings. 36 C.F.R. § 800.4(C)(2), § 800.16(1) (2023). This is an instance where properties not previously listed or formally designated are protected. However, this is a prerequisite for an official federal action, a form of fact-finding that is part of a highly regulated administrative process, rather than a determination that a private entity must make in dealing with another private entity. Thus, it does not seem to be a significant affront to the concerns of information theorists.

121. *See, e.g., Dist. Intown Props. Ltd. P’ship v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999), *cert. denied*, 531 U.S. 812 (2000).

122. *See, e.g., Thomas W. Merrill & Henry E. Smith, Optimal Standardization in*

Professor Smith levels against progressive property theory—that it requires large-scale ex-post judicial policymaking, requiring parties to frequently seek official judgments—is avoided.¹²³

Other forms of cultural property also have been recognized by statute, minimizing information costs. NAGPRA seeks to give effect to Native American understandings of cultural items but does so through detailed statutory provisions and implementing regulations.¹²⁴ The Cultural Property Implementation Act even requires the State Department to negotiate bilateral treaties with other countries specifying the types of cultural property that cannot be imported into the United States.¹²⁵ Cultural property laws have consistently provided ex-ante notice to private actors about which kinds of property are subject to the interests of non-owners. Cultural property is consistent with the values espoused by progressive property theorists without significantly aggravating the concerns of information theorists.

B. Cultural Property's Success

The question remains why cultural property has secured this progressive niche within a legal culture that, at least outside academia,

the Law of Property: The Numerus Clausus Principle, 110 YALE L.J. 1, 60–68 (2000).

123. See Smith, *supra* note 15, at 965.

124. By contrast, the Supreme Court's rejection of a First Amendment free exercise claim by an Indian organization and individual Indians against a Forest Service permit of a paved road through an area sacred to several tribes was justified in part by the wide and uncertain breach in the government's property ownership that would result from a ruling in favor of the Indians. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988). The Court seemed open to accommodation of Indian concerns through statute or regulation. *See id.* at 454.

125. Thus, for example, a 2020 treaty between the US and Italy provides: "The Government of the United States of America shall, in accordance with its legislation, including the Convention on Cultural Property Implementation Act, continue to restrict the importation into the United States of certain archaeological material ranging in date from approximately the 9th century B.C. to the 4th century A.D., which may include categories of stone, metal, ceramic, glass, and painting, identified in the list promulgated by the Government of the United States of America (hereinafter referred to as the Designated List), unless the Government of the Italian Republic issues a license which certifies that such exportation was not in violation of its laws." Memorandum of Understanding Concerning the Imposition of Import Restrictions on Categories of Archaeological Material of Italy, It.-U.S., art. I(1), Oct. 29, 2020, T.I.A.S. No. 21-112.

seems committed at least to the common conception of property, and, in recent Supreme Court decisions, a form of property fundamentalism. Unlike Ireland, the United States has no constitutional provision explicitly stating that legislation that advances social justice can modify personal rights. Justice Alito acknowledged that land use regulations can address externalities created by a specific property use, but that is a relatively narrow basis for justifying restrictions on owners' powers.¹²⁶ The acceptance of cultural property by courts and legislatures seems anomalous.

The reasons offered must remain speculative. First, conservation of cultural heritage has grown in popular esteem.¹²⁷ Although the origins of cultural heritage protection go back at least to the nineteenth century,¹²⁸ at least since the 1960s there has been a widespread turn to culture as an indispensable resource for human flourishing both in the U.S. and globally.¹²⁹ "ALL AT ONCE HERITAGE IS EVERYWHERE."¹³⁰ Positive reasons for this include greater

126. *Koontz v. St. John's River Water Mgmt. Dist.*, 570 U.S. 595, 605 (2013).

127. John Henry Merryman wrote: "The empirical evidence that people care about cultural objects is imposing: The existence of thousands of museums, tens of thousands of dealers, hundreds of thousands of collectors, millions of museum visitors; brisk markets in art and antiquities; university departments of art, archaeology, and ethnology; historic preservation laws; elaborate legislative schemes controlling cultural property in Italy, France, and most other source nations; public agencies with substantial budgets, like the National Endowment for the Arts in the United States and arts ministries in other nations; laws controlling archaeological excavations; laws limiting the export of cultural property; international conventions controlling the traffic in cultural property and protecting cultural property in war, all demonstrate that people care about cultural property." John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 343 (1989).

128. See ASTRID SWENSON, *THE RISE OF HERITAGE: PRESERVING THE PAST IN FRANCE, GERMANY, AND ENGLAND, 1789-1914* (2013); CHARLES B. HOSMER, *PRESENCE OF THE PAST: A HISTORY OF THE PRESERVATION MOVEMENT IN THE UNITED STATES BEFORE WILLIAMSBURG* (1965); *Abbé Grégoire*, *supra* note 33; *Anyone Minding Stonehenge*, *supra* note 49.

129. For example, the World Heritage Convention, opened for signatures in 1972, has a remarkable 193 States Parties. BRONIN & BYRNE, *supra* note 35, at 693.

130. So begins DAVID LOWENTHAL, *THE HERITAGE CRUSADE AND THE SPOILS OF HISTORY* (1998). "No longer an esoteric area of law devoted to the protection of antiquities and their proper provenance, the concept of cultural property today is used to refer to intangibles as well as tangibles from folklore to foodstuffs as well as the lifeways and landscapes from which they spring. From seeds to seascapes, the world of things bearing cultural significance and the struggle over ownership rights

economic security, higher levels of education, and vastly enhanced communications, which afford many more people the leisure and knowledge that facilitates valuing both creations of “outstanding universal value” and the unique contributions of diverse people.¹³¹

Negative reasons arise from these same forces, as economic development, globalization, and mass and social media seem to threaten distinctive patterns of life and to destroy or debase the symbols by which people have made sense of their lives. In this context, conserving historic and culturally significant buildings and objects seems essential to maintaining the foundation for full lives. The preservation of Grand Central Terminal and the successful defense of its protection in the *Penn Central* litigation seems attributable to the popular preservation campaign publicly championed by Jacqueline Kennedy.¹³² But culture extends beyond outstanding masterpieces. Anthropologists have taught us to view culture broadly as any “historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by which [people] communicate, perpetuate, and develop their knowledge about and attitudes toward life.”¹³³ This anthropological perspective, along with the rise of human rights and decolonization, have contributed to a much broader legal honoring of indigenous cultures.

Second, the efforts to safeguard cultural property have reflected a distrust of established legal institutions and expert or official decision-making. Historic preservation arose in grassroots opposition to large-scale planning and development that demolished countless buildings and destroyed entire neighborhoods in the name of economic growth, often assisted by federally funded eminent domain. The National Historic Preservation Act passed on findings by Congress that “historic properties significant to the Nation’s heritage are being lost or substantially altered . . . with increasing frequency” and a warning about “the ever-increasing extensions of urban centers, highways, and

apportioned to and appropriate to their significance have increased dramatically in scope and complexity.” Rosemary J. Coombe, *The Expanding Purview of Cultural Properties and Their Politics*, 5 ANN. REV. L. & SOC. SCI. 393, 394 (2009).

131. The UNESCO conventions include both protections of cultural heritage based both on the appreciation of “outstanding universal value” and on respect for the particularities of distinct cultural communities. See Prutt & O’Keefe, *supra* note 101, at x-xi.

132. Byrne, *supra* note 63, at 410

133. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 89 (1973).

residential, commercial, and industrial developments.” Local preservation commissions often were established outside the control of local planning agencies, which were blamed for excessive demolitions and insensitive and racist redevelopment projects. Historic and conservation easements empower property owners to restrict or entirely prevent new development permanently with no government oversight. NAGPRA targets museums, universities, and government agencies, which have collected Native American cultural items with insufficient regard for the cultural and spiritual needs of indigenous people. Other claims for repatriation of ethnological culture also critique the museums of former colonial powers. David Lowenthal has seen in the upsurge of passion for cultural heritage a loss of belief in progress and the institutions that promised to achieve it.¹³⁴ In staking such claims, critics may be seen to be signaling the inadequacies of liberal property law itself insofar as it adheres to the “ownership model.”

Third, another explanation for the political and judicial acceptance of cultural property must be the sympathy extended to groups specially protected by some of the laws, most specifically indigenous tribal members and families whose ancestors suffered from Nazi persecution. Any assessment of the propriety of legislation extending extraordinary protection to the cultural items of Native Americans must heavily weigh the dispossession and treachery they have suffered at the hands of settlers and their governments. Similarly, the steps taken to facilitate the return of Nazi-looted art cannot be understood apart from the horrors of the Holocaust. While sympathetic statements about the harms visited on such groups feature in judicial and legislative explanations, they seem not to be explicitly put into a balance with the common conception of property or the interests of those outside the protected class, thus failing to achieve the transparency also sought by progressive scholars and by Professor Walsh herself.

A fourth reason for recognizing limitations on the individual owners of cultural property may be that culture itself is inherently a commons. The language, images, symbols, and information that any person must

134. “Heritage is also nurtured by technophobia: an idealized past replaces a discredited future. The horrors of fascism, the failure of Marxism, the threat of nuclear and biological catastrophe, and the rise of factional animus have put to paid the ideology of progress. . . . Heritage growth thus reflects traumas of loss and change and fears of a menacing future.” LOWENTHAL, *supra* note 128, at 10–11. More succinctly, “As hopes of progress fade, heritage consoles with tradition.” *Id.* at xiii.

use to think or express anything meaningful are drawn from a pool created by the community within which they live. In the Western tradition, outstanding expressions emerging from any cultural community create possibilities for new ideas so that the destruction of important art or archive impedes the progress of knowledge or the arts.¹³⁵ The preservation of and access to these cultural manifestations does not require possession by each participant, who can benefit from seeing or studying cultural ideas or expressions.¹³⁶ To this extent, participation in cultural heritage is non-rivalrous, like the public domain that exists outside of copyright limitations.¹³⁷ In other traditions, the preservation of essential cultural objects maintains community identity. Thus, NAGPRA seeks to return cultural patrimony to Native American tribes. Although such claims for physical possession are rivalrous because museums holding them must give them up, the objects are understood to be owned by the tribe, not any individual, and their cultural benefit is extended to all within the tribe. Thus, the power associated with cultural property will be shared in either an open or closed commons, which justifies limits on the individual owner, based on familiar property law principles.

Despite the popular energy surrounding cultural property, it remains a niche within property law. The recognition of the cultural interests of non-owners does not threaten central organs of power in society,

135. PLAYING DARTS WITH A REMBRANDT, *supra* note 10, at 2, 58.

136. See Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004 (2007). Professor Mezey worries that recognition of cultural property rights in Native American groups rest on a “sanitized” understanding of culture and may thwart cultural evolution by preventing the creation of “hybrids,” which marry indigenous forms with contemporary adaptations. *Id.* at 2004–2005. But her concern is far more with “the popular logic of cultural property” than with strictly legal prohibitions, like NAGPRA, which do not restrain the creativity of persons outside Native American groups. *Id.* at 2024.

137. Intellectual property laws do not give exclusive rights to the ideas expressed through cultural property, even when copyright does restrict the use of an actual fixed expression. The use of such ideas is non-rivalrous in the usual sense that any person’s use of such ideas does not preclude use by another person. Most aspects of cultural heritage fall outside of intellectual property entirely, because they are not the new creations of individuals but they reflect community practices inherited from the past. See SUSAN SCAFIDI, WHO OWNS CULTURE? 17–22, 28–30 (2005). See also MIRA BURI, *Cultural Heritage and Intellectual Property*, in OXFORD HANDBOOK OF INTERNATIONAL CULTURAL HERITAGE LAW 459–82 (Francesco Francioni & Ana Filipa Vrdoljak eds., 2020).

like banks, corporations, and wealthy individuals.¹³⁸ People and entities that do not want to engage with cultural property can avoid them. Historic preservation laws have affected the patterns of urban development but have not frustrated most real estate investments. As I have argued elsewhere, historic preservation laws support the type of development favored for a post-industrial economy dependent on brain workers with technical and other forms of advanced knowledge.¹³⁹ While NAGPRA and other laws pertaining to the cultural items of Native Americans express respect for indigenous people, they do not seriously remedy the extent to which they have been deprived of vast stretches of ancestral land and suffered other historic injuries. Efforts to address Nazi appropriation of art or to cooperate with source countries' assertions of cultural patrimony remain largely within the traditional contours of property law. It would be too much to describe cultural heritage laws as merely symbolic because they have real consequences for valuable physical objects and places, but they express aspirational values that exist alongside the familiar patterns of market transactions facilitated by property law.

V. CONCLUSION

This Article has had the modest aim to highlight the extent to which cultural property is a legal category that fulfills the normative goals of progressive property theory. Cultural property laws give legal effect to the interests of those without standard ownership rights in resources that provide the materials for meaning-making. Historic buildings, sacred objects, art treasures, archaeological finds—these are among the “resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions,” as the Faro Convention puts it.¹⁴⁰ Cultural property law has evolved in the U.S. to limit the power of owners in order to safeguard the cultural interests of specially concerned groups and the general public. It has

138. Corporations can find sponsorship of cultural heritage advantageous for marketing. See Ragnar Lund & Stephen A. Greyser, *Corporate Sponsorship in Culture—A Case of Collaborative Marketing by a Global Bank and a Major Art Museum*, 11 J. OF BUS. & POL. RES. 156 (2016). Conservation easements have been criticized for the tax benefits obtainable for little sacrifice of the amenity value of land. See also Chris Gaarder, *No Time to Ease Up on Easements*, GEO. ENV'T L. REV. ONLINE (2023).

139. Byrne, *supra* note 63, at 435–40.

140. See Faro Convention, *supra* note 41.

fulfilled the goals of progressive property scholars through legislation that is not merely limitational but is effecting changes based on the nature of the resource. Such reliance on legislation also meets the concerns of institutional theorists by reducing information costs through ex-ante rules.

The extent to which cultural property fulfills the ambitions of progressive property theorists ironically highlights the many other categories of U.S. property law where the ownership model still prevails. This is most obvious in the recent regulatory takings decisions of the Supreme Court—wooden formalism asserting the exclusive possession and broad discretion of owners despite democratically sanctioned legislation seeking to achieve otherwise legitimate social goals. Professor Walsh’s study leaves a U.S. law professor wishing for a constitutional principle like Ireland’s that authorizes legislative restrictions on property rights that advance social justice.