

REAFFIRMING MCCLAIN:
THE NATIONAL STOLEN PROPERTY ACT AND THE ABIDING
TRADE IN LOOTED CULTURAL OBJECTS

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The clandestine excavation of “cultural objects” to feed the international art market has become an indisputable problem. However, the scale of the problem—and potential solutions—are hotly contested. In the United States, the debate over how best to protect these objects has come to focus on the relationship between the National Stolen Property Act (NSPA) and the “found-in-the-ground” laws that foreign nations employ to claim them. The NSPA criminalizes trafficking in stolen property; found-in-the-ground laws declare national ownership of cultural objects located within a nation’s territory, forbid their export, or both. Yet because the NSPA criminalizes trafficking in stolen property without defining the term “stolen,” it is not inevitable that U.S. courts should hold that found-in-the-ground laws can provide the basis for a cognizable NSPA claim.

In what is known as “McClain doctrine,” U.S. courts since the 1970s have applied the NSPA to foreign found-in-the-ground claims. However, recent events—in the courts and in the news—indicate that the time has come to reexamine the legitimacy and utility of McClain doctrine. Despite the doctrine’s many critics, this Comment argues that it remains sound as a matter of both law and policy. By giving foreign found-in-the-ground laws a limited domestic impact, McClain doctrine helps to prevent looting internationally without placing an unacceptable burden on the cultural objects trade. Moreover, the doctrine helps to resolve a tension inherent in U.S. law—which provides foreign cultural objects with only limited protections but places greater restrictions on the trade in objects of domestic origin.

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INTRODUCTION

While arguably integral to particular cultural or national identities, cultural objects¹ have a catholic allure. This is nothing new. Objects of cultural, archaeological, ethnological, aesthetic, and historical importance have moved between nations for centuries; efforts to restrict this movement have existed for nearly as long.² Long before Lord Elgin returned to England bearing the marbles infamously taken from the Parthenon,³ the

1. In discussing cultural objects, this Comment focuses on archaeological and ethnological objects, which are a subset of the broader category of objects valued today for their cultural, archaeological, ethnological, aesthetic, and historical importance. See Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 198 (2001) (discussing cultural objects). Archaeological and ethnological objects differ from other cultural objects, such as fine art, in certain respects that raise unique concerns. For example, Kurt G. Siehr distinguishes archaeological objects from fine art in that the original owners of archaeological objects are unknown, states pass legislation to protect archaeological finds as state property of scientific interest, the objects' context may be more important than the objects themselves, and "the 'nationality' of the object can be easily ascertained if the place of discovery is known." Kurt G. Siehr, *Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects*, 38 VAND. J. TRANSNAT'L L. 1067, 1077 (2005). Much scholarly discussion of "cultural objects," "cultural patrimony," "national patrimony," "cultural property," and "antiquities" focuses on the concerns raised by archaeological and ethnological objects. Cf. Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 380 n.14 (1995) (noting the many terms used in the scholarly discussion of cultural objects, and that choice of term often connotes political perspective rather than distinguishable subject matter).

2. See Thomas K. Seligman, *The Murals of Teotihuacán: A Case Study of Negotiated Restitution*, in *THE ETHICS OF COLLECTING CULTURAL PROPERTY* 73, 73 (Phyllis Mauch Messenger ed., 2d ed. 1999) [hereinafter *COLLECTING CULTURAL PROPERTY*] ("The legal and ethical issues concerning the repatriation or restitution of cultural property has been a topic of discussion among nations for centuries."); Peter K. Tompa, *Ancient Coins as Cultural Property: A Cause for Concern?*, 4 J. INT'L LEGAL STUD. 69, 76 (1998) ("The earliest known cultural property regulation dates from 1464 . . .").

3. Thomas Bruce, the 7th Earl of Elgin, was a member of the British House of Lords and a British ambassador to the Ottoman Empire at the turn of the nineteenth century. See John Henry

Assyrians, the Babylonians, the Romans, the Vikings, the Crusaders, the French, and the Spanish—to name only a few—had developed a taste for cultural spoils.⁴ And this link between war and cultural objects remains salient, most recently in the context of the U.S. occupation of Iraq.⁵

Today, however, cultural objects are not valued merely as spoils: They are big business. The post–World War II expansion of wealth and economic power in the West and Japan resulted in an enormous increase of interest in cultural objects as art, which, consequently, produced an explosion in the value of such objects on the international market.⁶ An inflated art market and the increased marketing of art as an “investment opportunity” since the 1970s has only sharpened the international appetite.⁷

As demand continues to balloon, the looting of cultural objects has emerged as a problem of international scale.⁸ Italian *tombolari* pillage tombs

Merryman, *Thinking About the Elgin Marbles*, 88 MICH. L. REV. 1880 (1985), reprinted in JOHN HENRY MERRYMAN, *THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART, AND LAW* 24 (2000). Lord Elgin removed many of the surviving sculptures from the Parthenon between 1800 and 1812, which he later sold to the British Museum. *Id.* Still housed in the British Museum, the marbles remain a point of diplomatic contention between Greece and England. *Id.* at 24–26.

4. The act of plundering cultural objects is “ancient, timeless, and pandemic.” Jeanette Greenfield, *The Spoils of War*, in *THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* 34, 34 (Elizabeth Simpson ed., 1997). War and looting, the “classic” means of acquiring cultural objects, still exist today. See Charles De Visscher, *International Protection of Works of Art and Historic Monuments*, in U.S. DEPT OF ST., DOCUMENTS & STATE PAPERS 821, 823 (June 1949), reprinted in JOHN H. MERRYMAN & ALBERT E. ELSEN, *LAW, ETHICS, AND THE VISUAL ARTS* 1 (4th ed. 2002) (“War has exposed historic monuments and works of art to . . . the practice of taking spoils during or at the close of hostilities.”).

5. See, e.g., Amy E. Miller, Note, *The Looting of Iraqi Art: Occupiers and Collectors Turn Away Leisurely From the Disaster*, 37 CASE W. RES. J. INT’L L. 49 (2005); Zainab Bahrani, *Looting and Conquest*, THE NATION, May 14, 2003, <http://www.thenation.com/doc/20030526/bahrani> (reporting on looting during the U.S. war in Iraq); Robert Fisk, *Library Books, Letters and Priceless Documents Are Set Ablaze in Final Chapter of the Sacking of Baghdad*, INDEPENDENT (U.K.), Apr. 15, 2003, available at <http://news.independent.co.uk/world/fisk/article115214.ece> (same).

6. Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN L. REV. 275, 291–92 (1982).

7. Gerstenblith, *supra* note 1, at 202.

8. The link between the international art market and the looting of cultural objects goes back to Dr. Clemency Coggins, whose seminal 1969 article *Illicit Traffic in Pre-Columbian Antiquities* first brought wide-scale attention to the relationship. See Bator, *supra* note 6, at 280 (crediting Dr. Coggins with bringing attention to the fact that “national treasures, stolen and mutilated, could within a few years find their way into the halls of America’s most sumptuous museums”). Recent empirical studies continue to bolster the link between looting and the international art trade, either by correlating the looting of known archaeological sites with the appearance of objects on the international market, or by illustrating that few objects arrive on the market with any proof of licit origin. See Gerstenblith, *supra* note 1, at 207–09 (citing a 1993 study of Cycladic figurines by Drs. Christopher Chippindale and David Gill; a 1999 study of undocumented South Italian vases by Ricardo Elia of Boston University; and a 1999 study by Elizabeth Gilgan tracing pre-Columbian materials from Belize to the U.S. art market). Of course, it is important to note that taking cultural objects without affirmative permission from the

for classical treasures that can earn millions of dollars on the international market.⁹ *Huaqueros* in Latin America have plundered entire cities clean of their archaeological record.¹⁰ Looters in New Mexico use bulldozers to raze prehistoric pueblos in search of the famous Mimbres pottery.¹¹ In China, thieves blast into ancient tombs using explosives; even in remote provinces they have been caught looting with Sotheby's catalogues in hand.¹²

While few would deny that some problem exists, the scale of the problem is hotly contested. Even as many countries scramble to retain their cultural objects, some prominent scholars insist that the problem of looting is overstated—and that overzealous retention efforts in fact are responsible for the existence of the vigorous black market.¹³ Ultimately, there is much disagreement whether the unregulated flow of cultural objects between countries and individuals represents the problem, or rather, part of the solution. The debate is so heated that some commentators characterize it as the “cultural property wars.”¹⁴

country of origin might not always be characterized as “looting.” However, this Comment uses the term specifically to refer to the clandestine excavation of cultural objects for sale as art.

9. MERRYMAN & ELSEN, *supra* note 4, at 161 (discussing the *tombolari*'s “systemic[] engage[ment] in clandestine excavations”); Gerstenblith, *supra* note 1, at 208 (citing a study done by Professor Ricardo Elia of Boston University, which suggested that “thousands of tombs must have been looted to produce the known corpus of Apulian vases [from Italy]”); Thomas Hoving, *The “Hot Pot” IV—Irrefutable Evidence for a Good Provenance*, ARTNET MAG., July 7, 2001, available at <http://www.artnet.com/magazine/features/hoving/hoving7-10-01.asp> (noting that the Calyx Krater found by Italian tomb raiders subsequently was purchased by the Metropolitan Museum of Art in New York for \$1 million).

10. See Jonathan S. Moore, Note, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466, 466 (1988) (describing the looting of the abandoned Mayan city of Oxhintonk in Mexico's Yucatan Peninsula).

11. Deborah L. Nichols et al., *Ancestral Sites, Shrines, and Graves: Native American Perspectives on the Ethics of Collecting Cultural Properties*, in COLLECTING CULTURAL PROPERTY, *supra* note 2, at 27, 29.

12. Gerstenblith, *supra* note 1, at 204 n.23, 206 n.30. At least one expert has valued the illegal trade in Chinese antiquities at more than \$500 million per year. *Id.* at 204 n.23 (quoting University of Melbourne criminologist Kenneth Polk).

13. See MERRYMAN & ELSEN, *supra* note 4, at 161 (noting that while “popular journalism” reports the illicit trade in cultural objects to rival the international drug trade, others believe that the problem is much smaller in scale, though still significant); John Henry Merryman, *A Licit International Trade in Cultural Objects*, 4 INT'L J. CULTURAL PROP. 13 (1995), reprinted in MERRYMAN, *supra* note 3, at 176, 188 (arguing that denying opportunities for licit export “drive[s] the trade underground, assuring the existence of an active, profitable and corrupting black market”); see also Thomas Hoving, *My Eye*, ARTNET MAG., June 2, 2000, available at <http://www.artnet.com/magazine/features/hoving/hoving6-2-00.asp> (“Yes, you got it right, I am advocating the complete dismantling of all existing obstacles to the free export of fine art”); George Ortiz, *Why It's Time for Collectors of Antiquities to Reassert the Moral and Intellectual Validity of Their Passionate Pursuit*, ART & AUCTION, July 2003, at 43.

14. Alexi Shannon Baker, *Selling the Past: United States v. Frederick Schultz*, ARCHAEOLOGY, Apr. 22, 2002, <http://www.archaeology.org/online/features/schultz/index.html>

The United States is a well-developed marketplace for the cultural objects of other nations.¹⁵ Therefore, the cultural objects debate in this country tends to focus on the relationship between the National Stolen Property Act (NSPA)¹⁶ and foreign found-in-the-ground laws. The NSPA criminalizes the transportation and possession of goods worth at least \$5000 in interstate or foreign commerce, while knowing the goods to be stolen, converted, or taken by fraud.¹⁷ Found-in-the-ground laws—commonly adopted in archaeologically rich nations—require that all cultural objects located within a country stay there and be subject to repatriation if removed without permission.¹⁸ These laws may rely on a theory of constructive possession to claim state ownership of unexcavated objects, objects located on unprotected sites or private lands,¹⁹ and even those in private collections.²⁰

NSPA application is uncontroversial when cultural objects are imported into the United States after being stolen in the conventional sense of that term: from a known possessor with undisputed title.²¹ Yet by

("One of the problems in this debate, which some people call the 'cultural property wars,' is that [the] sides . . . are really polarized." (quoting Ricardo Elia)).

15. Andrea Cuning, *U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property & Destructive Aspects of Retention Schemes*, 26 HOUS. J. INT'L L. 449, 455 (2004).

16. 18 U.S.C. §§ 2314–15 (2000).

17. *Id.* § 2314. A criminal theft conviction under the National Stolen Property Act (NSPA) requires: (1) knowledge that the goods were stolen; (2) that the goods were transported in interstate or foreign commerce; and (3) that the value of the goods meets or exceeds \$5000. See Leo J. Harris, *From the Collector's Perspective: The Legality of Importing Pre-Columbian Art and Artifacts*, in COLLECTING CULTURAL PROPERTY, *supra* note 2, at 155, 161. An NSPA violation may result in fines, imprisonment, or both. 18 U.S.C. §§ 2314–15.

18. See William G. Pearlstein, *Claims for the Repatriation of Cultural Property: Prospects for a Managed Antiquities Market*, 28 LAW & POLY INT'L BUS. 123, 128 (1996); Miller, *supra* note 5, at 59.

19. See Gerstenblith, *supra* note 1, at 228. Gerstenblith writes that a constructive possession theory

is essential because the point of the vesting laws is to prevent looting of unexcavated sites. It is therefore obvious that the antiquities have never been in the actual possession of anyone at least from the time of antiquity, until they are looted by thieves. If the vesting laws are to work to prevent this type of destruction, then they must apply even though the government has never had the objects in its actual possession. . . . [T]hese buried cultural objects may be considered to be in the constructive possession of the government.

Id.

20. MERRYMAN & ELSEN, *supra* note 4, at 180–81; see also *United States v. McClain (McClain I)*, 545 F.2d 988, 994 (5th Cir. 1977). In *McClain I*, the Mexican government claimed national ownership of certain pre-Columbian artifacts despite "the probability or possibility" that the defendants had acquired the objects from private individuals or found them on private property in Mexico. *Id.*

21. See ART LAW HANDBOOK 410 (Roy S. Kaufman ed., 2000) (stating that there is no "debate that the NSPA applies to property stolen in the traditional sense of the word," referring to cases in which property is wrongfully removed from the true owner's possession); see also John Henry Merryman, *The Nation and the Object*, 3 INT'L J. CULTURAL PROP. 61 (1994), reprinted in MERRYMAN, *supra* note 3, at 158, 160 (referring to possession as "empirical indicia of ownership").

some estimates, such conventional theft constitutes only about 10 percent of the illicit art trade; the majority consists of objects taken directly from the ground in contravention of foreign found-in-the-ground laws.²² To much criticism, courts since the 1970s also have applied the NSPA to this second type of trafficking claim. This application, based on two of the early cases,²³ is known as McClain doctrine.

Whether U.S. courts should apply the NSPA to cultural objects taken in violation of a foreign found-in-the-ground law poses a difficult question. The difficulty arises, in large part, from the fact that the NSPA forbids trafficking in "stolen" property without defining the term. The crucial inquiry therefore is whether objects claimed by virtue of found-in-the-ground laws are "owned" in any sense cognizable under U.S. law. Some scholars assert that equating these laws with physical possession is necessary to staunch the illegal looting that exists on a massive, international scale.²⁴ Others suggest that McClain doctrine improperly compels U.S. courts to enforce foreign law, circumvents important common law and constitutional principles, and violates U.S. policy regarding the free trade in cultural objects.²⁵

This Comment argues that McClain doctrine provides a legitimate means to protect cultural objects against the demand generated by the international art market. Part I describes the evolution of the doctrine and the events that have renewed its salience. Part II summarizes the legal critiques commonly levied against McClain doctrine, but asserts that the doctrine is sound as a matter of law. Legal soundness, however, does not remove law from the criticism that it is bad policy. Part III thus analyzes U.S. policy concerning cultural objects and concludes that McClain doctrine is particularly well-suited to the evolving state of that policy. The United States traditionally has not restricted the free trade in cultural objects, but

22. Jennifer Sultan, *Combating the Illicit Art Trade in the European Union: Europol's Role in Recovering Stolen Artwork*, 18 NW. J. INT'L L. & BUS. 759, 765 (1998) ("In terms of value, [conventional] art theft is estimated to constitute more than ten percent of all art stolen, while theft of antiquities, pillaging and looting account for the majority of thefts." (citing JOHN E. CONKLIN, ART CRIME 119 (1994))).

23. See *United States v. McClain (McClain II)*, 593 F.2d 658 (5th Cir. 1979); *McClain I*, 545 F.2d 988.

24. Gerstenblith, *supra* note 1, at 228–34.

25. See ART LAW HANDBOOK, *supra* note 21, at 415 ("One could argue that the U.S. government should not be in the business of upholding foreign patrimony laws that offend our sense of the right to own, sell or export private property or property found on privately owned land."); MERRYMAN & ELSEN, *supra* note 4, at 214 (arguing that applying the NSPA to foreign national ownership claims converts "a crime against the people of Mexico or Guatemala into a crime against the people of the United States, arguably contrary to the settled principle of private international law that one nation will not enforce the criminal laws of another").

protections now offered to objects of domestic origin indicate an awareness that the abiding trade in looted objects does, in fact, warrant a legal response. McClain doctrine—which helps to lessen the demand for looted objects without unduly burdening the art market—offers a balanced solution.

I. CULTURAL OBJECTS AND THE NATIONAL STOLEN PROPERTY ACT

Conventional stolen art claims involve theories of conversion, replevin, or the common law rule that “even a *bona fide* purchaser cannot acquire good title to property as against the rightful owner.”²⁶ Such claims are significant, and recently have garnered publicity in the context of art stolen from Jews during World War II.²⁷ The majority of black market art is not fine art stolen in the conventional sense, however, but consists of cultural objects taken in violation of foreign found-in-the-ground laws.²⁸ Most archeologically rich countries have adopted these laws. They restrict individuals’ ability to obtain, possess, and trade in cultural objects, and thus have potentially broad implications for the international art market.

Found-in-the-ground laws “are intended both to protect archeological sites from looting and to prevent the outflow of cultural property to consumers in wealthy market nations, with the ultimate goal of preserving the source nation’s cultural heritage as embodied in the items of cultural property that define that heritage”²⁹ Generally, these laws consist of two elements: (1) export restrictions and (2) national ownership declarations.³⁰ Export restrictions forbid the unauthorized removal of cultural objects from a nation; alternatively, national ownership declarations vest ownership in the state of all cultural objects located within its territory.³¹

26. Pearlstein, *supra* note 18, at 127–28.

27. See, e.g., *Austria v. Altmann*, 541 U.S. 677 (2004) (involving a claim to recover Gustav Klimt paintings seized by the Nazis from Jewish sugar magnate Ferdinand Bloch-Bauer).

28. See *supra* note 22 and accompanying text.

29. Pearlstein, *supra* note 18, at 128 (citations omitted).

30. For example, El Salvador, Greece, Italy, and Turkey all employ both export restrictions and national ownership declarations in the protection of cultural objects located within their territories. See Baker, *supra* note 14.

31. For example, Mexico’s Federal Law on Archaeological, Artistic and Historic Monuments provides that moveable and immovable archaeological monuments “are the inalienable and imprescriptible property of the Nation.” *McClain I*, 545 F.2d 988, 1000 (5th Cir. 1977); see also Gerstenblith, *supra* note 1, at 212–13; Nina Teicholz, ODYSSEY MAG., Mar.–Apr. 2001, reprinted in MERRYMAN & ELSEN, *supra* note 4, at 167–68; *United States v. Schultz*, 333 F.3d 393, 396 (2d Cir. 2003) (noting that Egyptian “Law 117” declares “all antiquities found in Egypt after 1983 to be the property of the Egyptian government”).

The first found-in-the-ground law dates back to the fifteenth century: Pope Pius II required landowners in the Papal States to report finds of historical interest and retained a right of first refusal.³² However, few nations enacted or consistently enforced found-in-the-ground laws until the twentieth century. Mexico, for example, made some attempts to nationalize its cultural objects as early as 1897 but did not fully establish national ownership until 1972.³³ Greece claimed state ownership of all cultural objects and maritime finds in 1932.³⁴ Egypt provides that all antiquities found in that country after 1983 are the property of the Egyptian government, and it maintains an “antiquities police” to ensure enforcement.³⁵ Algeria, Argentina, Belize, Bolivia, Brazil, Chile, Costa Rica, El Salvador, Guatemala, Haiti, Italy, Jordan, Kuwait, Lebanon, Liberia, Mauritania, Nicaragua, Nigeria, Panama, Tanzania, Tunisia, Turkey, and Venezuela provide still other examples of nations that now employ found-in-the-ground laws.³⁶

Found-in-the-ground laws may aid in the protection of cultural objects within the enacting nation, but they do not have an inevitably profound international effect. This result stems from a foundational tenet of international law: that the courts of one nation will not enforce claims based on the criminal law of another.³⁷ The United States, for example, generally does not criminalize the import and possession of objects even when another nation has criminalized their export.³⁸ In other words, one legally may bring a French painting into the United States although it was illegal

32. Tompa, *supra* note 2, at 76.

33. See *McClain I*, 545 F.2d at 998–1001 (analyzing Mexican cultural patrimony laws from 1897, 1930, 1934, and 1972, and holding that Mexican law did not “unequivocally establish[]” national ownership of pre-Columbian artifacts until 1972).

34. Baker, *supra* note 14.

35. See *Schultz*, 333 F.3d at 402–05.

36. Pearlstein, *supra* note 18, at 124 n.5.

37. John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477 (1988), reprinted in MERRYMAN, *supra* note 3, at 122, 129; see also Gerstenblith, *supra* note 1, at 235 (noting that different nations and legal traditions draw different boundaries between private property and public law).

38. See *McClain I*, 545 F.2d at 996 (“[I]t is not a violation of law to import simply because an item has been illegally exported from another country.” (quoting Paul M. Bator, *International Trade in National Art Treasures: Regulation and Deregulation*, in LEONARD DUBOFF, ART LAW, DOMESTIC AND INTERNATIONAL 295, 300 (1975))); ART LAW HANDBOOK, *supra* note 21, at 411; Bator, *supra* note 6, at 287. This general rule may be qualified by statute or treaty. *McClain I*, 545 F.2d at 996. The United States has concluded bilateral treaties prohibiting the import of certain types of cultural objects with several countries, including Bolivia, Cambodia, Canada, Cyprus, El Salvador, Guatemala, Honduras, Italy, Mali, Nicaragua, and Peru. See Siehr, *supra* note 1, at 1077 (listing countries with which the United States has entered into such treaties).

to remove the painting from France under French export law.³⁹ Therefore, absent facts allowing for a claim of conversion or replevin, a foreign nation has few options available when seeking to recover cultural objects from within the United States.

The NSPA offers an alternative means for countries to recover allegedly stolen cultural objects. Passed in 1939, the Act was designed to “prevent criminals from moving stolen property across state lines in attempts to evade the jurisdiction of state and local law enforcement officials.”⁴⁰ Yet as already noted, the NSPA criminalizes the transport and possession of stolen property but does not define what “stolen” means. The crucial question for purposes of this Comment, therefore, is whether taking cultural objects in contravention of a foreign found-in-the-ground law creates a cognizable NSPA claim. This question is particularly difficult when a contested object was never possessed physically by the state asserting ownership.

A. McClain Doctrine

U.S. courts did not have occasion to consider whether the NSPA should protect cultural objects “owned” by virtue of foreign found-in-the-ground laws until the 1970s. In *United States v. Hollinshead*,⁴¹ the court considered the case of a U.S. art dealer who found a rare Mayan stele in the Guatemalan jungle, sawed it to pieces, and imported the pieces into the United States.⁴² An American expert recognized the stele and notified Guatemalan officials, who sought to repatriate it.⁴³ Guatemalan law purported to establish state ownership of all pre-Columbian artifacts located in the country, and a jury eventually convicted the *Hollinshead* defendants

39. See Merryman, *supra* note 37, at 127–30 & 127 n.15 (discussing the removal of a Poussin painting from France in violation of French export law). Even if the United States were not reluctant to enforce foreign law, Merryman argues that enforcing foreign export restrictions would raise concerns about the proper remedy. Because the penalty for violating foreign export control laws often is state confiscation, Merryman suggests that “[t]he ‘return’ of an illegally exported work is truly a return only in the geographical sense; in practical terms it is a transfer of ownership to the foreign state.” *Id.* at 129–30 & 129 n.21.

40. Spencer Simon, *The Economic Espionage Act of 1996*, 13 BERKELEY TECH. L.J. 305, 306 (1998) (explaining the origins of the NSPA in the context of intellectual property theft).

41. 495 F.2d 1154 (9th Cir. 1974).

42. *Id.* at 1155.

43. *Id.* (“Under [Guatemalan] law, all such artifacts are the property of the Republic, and may not be removed without permission of the government.”).

of transporting and conspiring to transport stolen property under the NSPA.⁴⁴ The Ninth Circuit Court of Appeals affirmed with little analysis.⁴⁵

Foreign found-in-the-ground laws received a more extensive treatment in the *United States v. McClain* cases (*McClain I* and *McClain II*).⁴⁶ The *McClain* cases, two related decisions by the Fifth Circuit Court of Appeals, involved U.S. defendants who excavated pre-Columbian artifacts in Mexico and exported them without license or permit into the United States.⁴⁷ Mexico claimed ownership of the items by virtue of several found-in-the-ground laws, and the defendants were charged under the NSPA with trafficking in stolen property.⁴⁸

Convicted by a jury of conspiring to transport and receive stolen goods,⁴⁹ the *McClain* defendants appealed on two grounds. First, they argued that “stolen” as used in the NSPA connotes only the wrongful deprivation of physical possession.⁵⁰ Mexico had never alleged such deprivation, and the defendants insisted they had engaged only in unauthorized export (conduct not penalized under U.S. law).⁵¹ Additionally, the defendants contested the lower court’s determination that Mexican law had established state ownership of all pre-Columbian artifacts at the time the relevant objects were removed from Mexico.⁵²

The Fifth Circuit undertook an analysis of the NSPA’s use of “stolen” in *McClain I*. The court found that stolen—with no accepted common law meaning in the United States, and not being a term of art—should be interpreted broadly to comport with the NSPA’s purpose of protecting the

44. *Id.*

45. The *Hollinshead* court placed little emphasis on the issue of national ownership. *Id.*; see also Gerstenblith, *supra* note 1, at 214 (noting that the *Hollinshead* court reached its holding “with little discussion” on the issue of national ownership). On appeal, the only “arguable contention” was whether the defendants knew that Guatemalan law characterized removal of the stele as theft. *Hollinshead*, 495 F.2d at 1155. Despite some confusion regarding jury instructions, the Ninth Circuit found “overwhelming evidence” that the defendants knew Guatemalan law characterized the stele as stolen. *Id.* at 1155–56.

46. *McClain II*, 593 F.2d 658 (5th Cir. 1979); *McClain I*, 545 F.2d 988 (5th Cir. 1977).

47. *McClain I*, 545 F.2d at 992. The defendants had five squads working various Mexican archaeological zones. *McClain II*, 593 F.2d at 660. Discovered objects were given forged or backdated documents, trucked in disguise through the Mexican border, and distributed in cities throughout the United States. *Id.* at 661.

48. *McClain I*, 545 F.2d at 992.

49. *Id.* at 988.

50. *Id.* at 994 (“[The defendants] argue that the word ‘stolen’ cannot include the pre-Columbian artifacts seized in this case, for there was no evidence showing that the artifacts had been taken without consent from private individuals or that the artifacts had been in the possession of the Republic of Mexico.”).

51. *Id.* (describing the defendants’ contention that applying the NSPA to “cases of mere illegal exportation constitute[d] unwarranted federal enforcement of foreign law”); see also *supra* notes 38–39.

52. *Id.*

owners of stolen property.⁵³ Moreover, the court recognized national ownership declarations as an attribute of sovereignty, finding no legal distinction between property claimed by foreign found-in-the-ground law and property possessed in the more conventional sense.⁵⁴ The NSPA could proscribe trafficking in cultural objects removed from their source country because, ultimately, unauthorized removal was no different from wrongful deprivation of the true owner's rights in its property.⁵⁵ Nevertheless, the Fifth Circuit determined that Mexican law did not assert clear national ownership of its pre-Columbian artifacts until 1972 and remanded to determine when the appellants had removed the contested objects from Mexico.⁵⁶

Convicted again on remand, the *McClain* defendants appealed on grounds similar to those raised in *McClain I*.⁵⁷ However, in *McClain II* the Fifth Circuit gave credence to only one of the defendants' contentions: that NSPA claims based on vague or incomprehensible found-in-the-ground laws give rise to due process concerns.⁵⁸ The court agreed, and so it added a due process safeguard to its prior holding.⁵⁹ Property claimed by virtue of a foreign found-in-the-ground law, the court held, cannot be considered stolen under the NSPA unless the relevant ownership declaration is clear enough for U.S. citizens to understand.⁶⁰

53. *Id.* at 994–95 (citing *United States v. Turley*, 352 U.S. 407, 411 (1957)); *see also id.* at 1001.

54. *Id.* at 1002–03 (“The state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner; the declaration is an attribute of sovereignty.”) (citation omitted).

55. *Id.* The *McClain I* court rejected the defendants' assertion that applying the NSPA to foreign ownership claims represented federal enforcement of Mexican export law. While the defendants exported the artifacts from Mexico illegally, unauthorized exportation merely provided the means by which they deprived Mexico of ownership. This deprivation of possession—not the unauthorized export—constituted theft under the NSPA. *Id.* at 1003 n.33.

56. *Id.* at 998–1001. Mexico has several laws designating cultural objects as state property, including statutes from 1897, 1930, 1934, and 1972. *Id.* at 997–1000. Dr. Alejandro Gertz, a deputy attorney general of Mexico, testified for the government that Mexico fully established national ownership of its pre-Columbian cultural objects in 1897. *Id.* at 993. The trial judge relied on this testimony in instructing the jury on Mexican law, *see id.* at 994, but the *McClain I* court found that Mexico did not nationalize these objects unequivocally until 1972. *Id.* at 1000.

57. Gerstenblith, *supra* note 1, at 216.

58. *McClain II*, 593 F.2d 658, 665–66 (5th Cir. 1979).

59. *Id.*

60. *Id.* at 670. Finding Mexican ownership laws “too vague to be a predicate for criminal liability,” the court reversed the substantive count against the defendants but allowed a conspiracy conviction to stand. *Id.* at 670–72. However, a defendant's knowledge of foreign law is relevant only in the sense that it bears upon the knowledge of a nation's claim of national ownership. *See United States v. Schultz*, 333 F.3d 393, 411 (2d Cir. 2003) (“[I]f a jury finds that a defendant knew all of the relevant facts, the defendant cannot then escape liability by contending that he did not know the law.”); *United States v. Hollinshead*, 495 F.2d 1154, 1155–56 (9th Cir. 1974) (“Appellants' knowledge of Guatemalan law is relevant only to the extent that it bears upon the issue of their knowledge that the stele was stolen.”).

Taken together, *McClain I* and *McClain II* establish the core of McClain doctrine.⁶¹ The main principle of the doctrine is that taking possession of cultural objects in violation of foreign found-in-the-ground laws can give rise to criminal liability under the NSPA.⁶² However, this principle is subject to certain limitations. First, an NSPA violation requires scienter: The defendant must know that objects are claimed by a foreign state before they can be considered stolen.⁶³ Additionally, the “[m]ere violation of export restrictions does not make possession of the illegally exported property a violation of the NSPA.”⁶⁴ Foreign found-in-the-ground laws, in other words, are unenforceable in the United States unless they establish national ownership. Finally, found-in-the-ground laws that claim national ownership of cultural objects also must be clear enough to provide adequate notice of their effect;⁶⁵ contested cultural objects must originate from the territory of the nation claiming ownership;⁶⁶ and any alleged theft must have occurred after the effective date of the relevant found-in-the-ground law.⁶⁷

B. Renewed Interest in McClain Doctrine

Courts had little occasion to reconsider McClain doctrine for a long time after its initial formulation. A few exceptions existed. In *United States v. Pre-Columbian Artifacts*,⁶⁸ a federal district court in Illinois held that a Guatemalan found-in-the-ground law could provide the basis for an NSPA claim—even though the law did not vest national ownership until objects

61. See Cuning, *supra* note 15, at 486–87 (noting that *McClain I* “has given rise to what is known as the ‘McClain Doctrine’”); Gerstenblith, *supra* note 1, at 216–17.

62. See Gerstenblith, *supra* note 1, at 216–17.

63. *McClain II*, 593 F.2d at 671 (“The evidence is massive that appellants knew and deliberately ignored Mexico’s . . . ownership claims.”).

64. *McClain I*, 545 F.2d 988, 996, 1002 (5th Cir. 1977) (distinguishing between ownership and a state’s “police power” to restrict exports). The distinction between ownership declaration and export restriction is significant because, as noted earlier, the general rule in the United States today is that one does not violate U.S. law by importing an object in violation of another country’s export laws. See *supra* notes 38–39 and accompanying text.

65. *McClain II*, 593 F.2d at 670–71; *Schultz*, 333 F.3d at 402 (finding the relevant Egyptian law to be “clear and unambiguous” in its declaration of national ownership).

66. *McClain I*, 545 F.2d at 1002–03 (noting that national ownership declaration is a right of sovereignty that extends only “over property within the borders of a state”).

67. *Id.* at 1000–01 (“We hold that a declaration of national ownership is necessary before illegal exportation of an article can be considered theft . . . within the meaning of the National Stolen Property Act.”); *Schultz*, 333 F.3d at 402 (finding that the defendant took antiquities after the 1983 vesting date of the relevant Egyptian ownership declaration).

68. 845 F. Supp. 544 (N.D. Ill. 1993).

were exported illegally.⁶⁹ In *Peru v. Johnson*,⁷⁰ the district court denied Peru recovery of pre-Columbian artifacts seized by U.S. customs agents from a U.S. art dealer.⁷¹ Though a civil case, the court found McClain doctrine relevant to its determination that Peru could not recover the objects. Holding that Peru failed to establish the objects' Peruvian origin, the court also found that Peru's found-in-the-ground law was too vague to vest national ownership.⁷² Because the law had virtually no domestic effect, it served merely as a de facto export restriction and did not establish ownership cognizable under the NSPA.⁷³

Pre-Columbian Artifacts and *Johnson* to the contrary, U.S. courts have seen little of McClain doctrine over the past thirty years.⁷⁴ Thus, it perhaps came as a surprise in 2003 when Frederick Schultz, a prominent New York City art dealer and former president of the National Association of Dealers in Ancient, Oriental, and Primitive Art, was convicted under the NSPA of transporting and conspiring to receive stolen Egyptian antiquities.⁷⁵ In

69. *Id.* at 547 (holding that a stele removed illegally from Guatemala became state property under Guatemalan law the moment that it left the country, and thus that the stele became a stolen article traveling in foreign commerce in violation of the NSPA).

70. 720 F. Supp. 810 (C.D. Cal. 1989), *aff'd by unpublished order sub. nom.* Gov't of Peru v. Wendt, 933 F.2d 1013 (9th Cir. 1991).

71. *Id.* at 811.

72. *Id.* at 812. Peruvian pre-Columbian culture spanned beyond modern Peru into areas within the borders of modern Bolivia and Ecuador. *Id.* Though an expert identified the contested artifacts with excavation sites in modern Peru, he admitted the articles could have come from Bolivia or Ecuador. *Id.*

73. *Id.* at 814–15 (noting that Peruvian law declared national ownership but nevertheless allowed private individuals in Peru to possess regulated artifacts, allowed such objects to be transferred by gift, bequest, or intestate succession, and never sought to exercise national ownership rights so long as the artifacts were not removed from the country). *Johnson* thus is “consistent with [McClain doctrine] insofar as [it] reiterat[es] that U.S. courts will not enforce the return of cultural property that has merely been illegally exported.” Pearlstein, *supra* note 18, at 134.

74. McClain doctrine also received limited treatment in *Turkey v. OKS Partners*, 797 F. Supp. 64 (D. Mass. 1992), and *United States v. An Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997), *aff'd*, 184 F.3d 131 (2d Cir. 1999). *OKS Partners* was a civil case not involving the NSPA, but the court relied on McClain doctrine in holding that Turkish found-in-the-ground law provided Turkey with standing to sue for the recovery of allegedly looted antique coins. *OKS Partners*, 797 F. Supp. at 66. In *Antique Platter of Gold*, the district court upheld the forfeiture of an antique gold phiale based on both customs violations and the NSPA. *Antique Platter of Gold*, 991 F. Supp. at 228–30, 231–32. On appeal, the Second Circuit Court of Appeals affirmed the first ground for forfeiture and did not reach the McClain doctrine issue. *Antique Platter of Gold*, 184 F.3d at 135.

75. *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003). Undoubtedly, the impact of the Schultz conviction stemmed from the position that Schultz occupied in the art world. See Cynthia Ericson, Note, *United States of America v. Frederick Schultz: The National Stolen Property Act Revives the Curse of the Pharaohs*, 12 TUL. J. INT'L & COMP. L. 509, 521 (2004) (noting that before his indictment, Schultz had been the president of the National Association of Dealers in Ancient, Oriental, and Primitive Art, and also had served as the president of the International Association of Dealers in Ancient Art).

Schultz was convicted of conspiring with an agent to smuggle antiquities from Egypt into America for resale, despite Egyptian law providing that all antiquities found in that country after

United States v. Schultz,⁷⁶ Schultz urged the Second Circuit Court of Appeals to reject McClain doctrine. He argued on several grounds that the antiquities were never stolen in any sense cognizable under U.S. law, but the Second Circuit rejected these claims.⁷⁷ The court held that the “plain language of the NSPA” suggested its applicability to cultural objects taken in violation of foreign found-in-the-ground laws.⁷⁸

The NSPA conviction of Frederick Schultz revived the cultural objects debate. McClain doctrine always had received criticism from the art market and museum communities,⁷⁹ but it had appeared so infrequently in the almost thirty years between the *McClain* cases and *Schultz* that perhaps these communities were uncertain whether the doctrine would have any practical impact on their trade.⁸⁰ After *Schultz*, this was no longer the case.

1983 belong to the state. *Schultz*, 333 F.3d at 396–98. The defendants had acquired Egyptian antiquities from private parties and even members of the Egyptian antiquities police, who provided state-held antiquities in exchange for the repayment of personal debts. *Id.* at 397. These items were smuggled out of Egypt disguised as cheap souvenirs, assigned false provenances, restored, and offered for sale. *Id.* at 396.

76. 333 F.3d 393 (2d Cir. 2003).

77. Specifically, Schultz contended that the Egyptian antiquities were not “stolen” in the commonly used sense of the word” but merely were taken in violation of Egypt’s found-in-the-ground laws. *Schultz*, 333 F.3d at 399. He also argued that the applicable Egyptian found-in-the-ground law was not a “real” national ownership declaration but was an unenforceable export restriction. *Id.* at 401. Finally, Schultz attacked his conviction by claiming that the Cultural Property Implementation Act (CPIA), 19 U.S.C. §§ 2601–13 (2000), which implements U.S. obligations under the United Nations Education, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention], should preempt the NSPA. *Schultz*, 333 F.3d at 408. The CPIA argument against McClain doctrine is addressed further in Part II.C, *infra*.

78. *Schultz*, 333 F.3d at 410. In *Schultz*, the Second Circuit declined to adopt McClain doctrine expressly. *Id.* However, the court discussed the doctrine approvingly and engaged in an analysis almost indistinguishable from that of McClain doctrine. *See id.* at 404 (finding that the Fifth Circuit reached the “proper” holding in *McClain I*). Compare *id.* at 409–10 (citing *United States v. Turley*, 352 U.S. 407 (1957), for the proposition that “stolen” has no common law meaning and thus choosing to interpret the term broadly under the NSPA) with *McClain I*, 545 F.2d 988, 994–96 (5th Cir. 1977) (same).

79. Gerstenblith, *supra* note 1, at 218 & n.92. The National Association of Dealers in Ancient, Oriental, and Primitive Art filed an amicus brief in the *McClain I* litigation, claiming that the livelihood of its members depended on a reversal of the convictions for theft under the NSPA. *Id.* (citing *McClain I*, 545 F.2d at 991 n.1). More recently, a coalition of museum organizations filed an amicus brief in *Antique Platter of Gold*, 184 F.3d 131, claiming that McClain doctrine places the collections of many U.S. museums at risk of forfeiture actions. *Id.*; see also Ortiz, *supra* note 13 (arguing that a free market “encourages the building of private collections, which traditionally are at the genesis of art museums and continue to improve their holdings”).

80. See, e.g., Bator, *supra* note 6, at 351 (“What will be the impact of *McClain* in controlling the import of looted antiquities?”); Pearlstein, *supra* note 18, at 135–36 (noting that “[o]ther than in *McClain* and *Hollinshead*, in no case to date” had any defendant come close to receiving an NSPA conviction under McClain doctrine).

If *Schultz* made McClain doctrine seem relevant again, then recent efforts by Italy and Peru to recover antiquities from U.S. museums have only added urgency to calls for reexamining U.S. law.⁸¹ Both the Metropolitan Museum of Art in New York and the J. Paul Getty Museum in Los Angeles have been embroiled in talks with Italian officials about the provenance of objects in their collections.⁸² In 2006, the Met reversed a position held for thirty years and pledged to return to Italy the “Euphronios Krater” (a 2500 year-old vase purchased in 1972 for \$1 million) and other allegedly looted items.⁸³ Marion True, a former curator at the Getty and a prominent U.S. antiquities expert, is now facing criminal trial in Italy on charges of trafficking in illegally obtained cultural objects.⁸⁴ Meanwhile, Peru has threatened to sue Yale University to recover artifacts taken by an American from Machu Picchu in 1911 and later donated to the university’s Peabody Museum of Natural History.⁸⁵

These recent incidents—in the courts and in the news—suggest that the time has come to reexamine the legitimacy and utility of McClain doctrine.⁸⁶ That prominent U.S. collectors, dealers, and museums seem to be active participants in the looted objects trade raises troubling

81. See, e.g., Michael Kimmelman, *Regarding Antiquities, Some Changes Please*, N.Y. TIMES, Dec. 8, 2005, at E1 (arguing that “[t]he United States has to get its legal act together”). But see Colin Gleadell, *Market News: Antiquities and a Victorian Resurgence*, DAILY TELEGRAPH (U.K.), Dec. 20, 2005, at 27 (“The antiquities market appears to be thriving in spite of adverse publicity from the trial in Rome of Marion True, the former curator for antiquities at the Getty Museum in California.”).

82. See, e.g., Hugh Eakin, *Italy Goes on the Offensive With Antiquities; Seeks Deals With Museums Over Disputed Objects*, N.Y. TIMES, Dec. 26, 2005, at E1; Ralph Frammolino & Jason Felch, *A Web of Deals*, L.A. TIMES, Dec. 28, 2005, at A1 (noting that Italian officials “say they have traced more than a hundred looted artifacts . . . to the Getty, the Metropolitan Museum of Art in New York and a dozen other major museums and private collections in the U.S., Europe and Asia”).

83. Randy Kennedy & Hugh Eakin, *Met Agrees Tentatively to Return Vase in '08*, N.Y. TIMES, Feb. 4, 2006, at B7 [hereinafter *Met Agrees to Return Vase*] (noting that “the crown jewel of the Metropolitan Museum of Art’s Greek galleries” and other items likely will be returned to Italy in 2008). In return, “the Met would accept no liability for acquiring objects determined to have been looted, maintaining that it bought them in good faith.” Randy Kennedy & Hugh Eakin, *The Met, Ending 30-Year Stance, Is Set to Yield Prized Vase to Italy*, N.Y. TIMES, Feb. 3, 2006, at A1 [hereinafter *Ending 30-Year Stance*].

84. Frammolino & Felch, *supra* note 82 (“Italian prosecutors allege that True conspired . . . to acquire illegally excavated artifacts for the Getty. . . . True’s attorneys maintain she is innocent, but say some of the art she acquired may have been looted, without her knowing.”).

85. Jane Gordon, *NOTICED; A Dispute Over Peruvian Artifacts at Yale*, N.Y. TIMES, Dec. 18, 2005, at 2.

86. See *Ending 30-Year Stance*, *supra* note 83 (arguing that we may have reached a “watershed moment for American museums facing newly aggressive claims from source countries for the return of cultural property”).

concerns.⁸⁷ However, it does not follow necessarily that McClain doctrine offers a helpful response. For example, some scholars hold overzealous retention efforts responsible for the abiding black market in looted objects.⁸⁸ They assert, moreover, that McClain doctrine is unsound both as law and as policy. This Comment turns next to an analysis of these claims.

II. MCCLAIN AS LAW

Many scholars and commentators dislike McClain doctrine.⁸⁹ Their assessment of the doctrine consists of concrete legal critiques and broader policy critiques; this Comment first addresses the legal critiques, which can be reduced to four primary arguments. These are that: (1) found-in-the-ground laws are merely disguised export restrictions that should not be enforced; (2) McClain doctrine constitutes the unwarranted enforcement of foreign law; (3) McClain doctrine does not accord with important common law and constitutional principles; and (4) the Cultural Property Implementation Act (CPIA),⁹⁰ which implements U.S. obligations under the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO),⁹¹ should preempt McClain doctrine. Each argument is addressed below.

87. See, e.g., Kimmelman, *supra* note 81. Michael Kimmelman, the chief art critic for the *New York Times*, writes:

The latest [museum] troubles should cause Americans to ask questions about our ethics and practices. Do [museums] . . . have claims to the world's art, claims that legitimately compete with the nationalist goals of countries that cannot always provide the same care and access?

Isn't it better for an ancient pot dug out of some farm in Sicily to end up at a museum like the Met, where it can be studied, widely seen and cared for . . . ?

At the same time, does encouraging the movement of artifacts into museums stimulate looting and, in the process, impede the circulation of critical information about the provenance, or history, of these objects?

The answer to all three questions is yes.

Id.

88. See *supra* note 13 and accompanying text.

89. See, e.g., ART LAW HANDBOOK, *supra* note 21, at 411 ("There are fundamental concerns about the government applying the NSPA to cultural property claims."); MERRYMAN & ELSEN, *supra* note 4, at 214–15 (discussing several legal problems associated with McClain doctrine); Cunning, *supra* note 15, at 483–89 (arguing for the invalidation of McClain doctrine); Hoving, *supra* note 13; Ortiz, *supra* note 13 (arguing for "an open but regulated market").

90. Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2350 (1983) (codified as amended at 19 U.S.C. §§ 2601–13 (2000)).

91. 1970 UNESCO Convention, *supra* note 77.

A. The Enforcement of “Disguised” Export Controls

The first argument against McClain doctrine is that foreign found-in-the-ground laws are really export restrictions disguised as claims of national ownership.⁹² This argument is rooted in the fact that the United States generally does not enforce foreign export controls.⁹³ But while every defendant in McClain doctrine cases has raised this argument, none has persuaded a court of its correctness.⁹⁴ This has occurred because, while most found-in-the-ground laws do incorporate export restrictions, they also tend to declare national ownership of cultural objects.

What is the difference between export controls and national ownership declarations? As noted by the court in *McClain I*, export controls are a form of police power that cannot extend beyond a country’s sovereignty.⁹⁵ Conversely, declaring national ownership is a right of sovereignty recognized by the United States: Ownership achieved under this right is legally indistinguishable from “the general manner by which private persons come to own property.”⁹⁶ Once a nation claims ownership of cultural objects through a found-in-the-ground law, depriving the state of possession constitutes the offending act. Unauthorized export thus is incidental to the true offense—wrongful deprivation of possession—cognizable under the NSPA.

Courts generally have not had difficulty distinguishing export controls from national ownership declarations. Yet these separate elements of foreign found-in-the-ground laws may merge beyond meaningful distinction in some cases. *United States v. Pre-Columbian Artifacts* offers such an example. In that case, the court recognized Guatemala’s national ownership claim of a Mayan stele although the claim vested only on unauthorized export.⁹⁷

It is questionable that any legitimate distinction exists between export controls and national ownership claims that vest only on unauthorized export. If U.S. law recognizes national ownership as a right of sovereignty, moreover, then it makes little sense to recognize national ownership claims made on export because a nation’s sovereignty presumably does not extend

92. See, e.g., ART LAW HANDBOOK, *supra* note 21, at 411 (characterizing national ownership claims as “claims based in essence on export control laws”).

93. See *supra* notes 38–39 and accompanying text.

94. See, e.g., *McClain I*, 545 F.2d 988, 1002 (5th Cir. 1977) (distinguishing between national ownership laws and export controls); *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 547 (N.D. Ill. 1993) (same).

95. *McClain I*, 545 F.2d at 1002 (classifying export restrictions as a “type[] of governmental control over property *within* the borders of a state”) (emphasis added).

96. *Id.* at 1002–03.

97. *Pre-Columbian Artifacts*, 845 F. Supp. at 547.

beyond its borders. For example, a nation cannot expropriate personal property owned by individuals in other countries. Thus, although established ownership claims remain valid when claimed objects are exported, states should not have the power to claim objects only after they have left the country.

Pre-Columbian Artifacts suggests that courts may miss the critical distinction between export controls and national ownership claims. Still, *Schultz* and *Johnson* indicate that McClain doctrine is evolving to address this concern. The Second Circuit in *Schultz* found that Egypt's Law 117 established a genuine national ownership claim over Egyptian cultural objects, in part because the law was enforced strictly within Egypt itself.⁹⁸ The court in *Johnson*, to the contrary, found that Peru's found-in-the-ground laws could not establish national ownership because they had such little domestic effect as to constitute de facto export restrictions.⁹⁹

By requiring real evidence of domestic enforcement, a court ensures that foreign nations cannot simply change a few words in a statute—editing “export control” to “ownership declaration”—in order to receive the protection of U.S. law. Domestic enforcement gives courts a means to distinguish between found-in-the-ground laws establishing national ownership and those that create mere export controls: National ownership is not established when countries nationalize cultural objects possessed by foreigners but leave domestic ownership rights undisturbed. Ultimately, then, the argument that McClain doctrine results in the enforcement of foreign export controls is weak. A ready distinction exists between export controls and national ownership claims, and McClain doctrine does not effect a blurring of this distinction.

B. The Enforcement of Foreign Law

The second argument against McClain doctrine is that it requires U.S. courts to enforce foreign law.¹⁰⁰ This argument has two prongs. First, it is suggested that applying the NSPA to foreign found-in-the-ground laws causes courts to criminalize as “theft” acts otherwise not cognizable as such under U.S. law. In what is known as the “blank check objection,”¹⁰¹ critics question

98. *United States v. Schultz*, 333 F.3d 393, 400–02 (2d Cir. 2003).

99. *Peru v. Johnson*, 720 F. Supp. 810, 814 (C.D. Cal. 1989).

100. See generally William J. Hughes, *United States v. Hollinshead: A New Leap in Extraterritorial Application of Criminal Laws*, 1 HASTINGS INT'L & COMP. L. REV. 149 (1977). See also ART LAW HANDBOOK, *supra* note 21, at 411–12 (writing that McClain doctrine principles put the United States in a position of enforcing foreign laws that are poorly understood or not enforced by the government involved).

101. See MERRYMAN & ELSEN, *supra* note 4, at 215.

why U.S. courts should give foreign nations a blank check to enforce—in this country—the violation of foreign laws committed in foreign countries against non-U.S. citizens.¹⁰² Second, critics suggest that found-in-the-ground laws seldom provide for the procedural safeguards and compensation generally thought to be necessary conditions of just expropriation under U.S. law. Therefore, these foreign laws arguably violate important common law and constitutional principles.

1. The Blank Check Objection

The blank check objection suggests that McClain doctrine in essence gives foreign nations a blank check to enforce their laws in the United States. It is not immediately clear, however, why the taking of cultural objects in violation of a foreign nation's found-in-the-ground law cannot be theft under U.S. law. Stealing is not a term of art in the United States, and there is no generally accepted common law definition of the term used in criminal law.¹⁰³ Therefore, the assertion that U.S. law cannot recognize theft absent actual or physical possession has little basis.

More importantly, the argument that McClain doctrine results in the unwarranted enforcement of foreign law confuses foreign found-in-the-ground laws with the ownership claims implicit within them. As noted in *McClain I*, U.S. law criminalizes trafficking in stolen property regardless of whether the property was stolen in the United States or abroad. It does so because it is good policy “to penalize those who trade in stolen merchandise.”¹⁰⁴ Ultimately, the fact that a foreign country regards the unauthorized taking of cultural objects as theft is irrelevant. It is only once U.S. law recognizes a foreign government as the true owner of an object that the object can be considered stolen for purposes of the NSPA. Thus, the blank check objection fails first because McClain doctrine does not allow foreign nations to dictate how the United States conceives of theft.

But the blank check objection also fails on a second ground. The objection suggests that McClain doctrine lets foreign nations shift the

102. See, e.g., *id.* at 214 (arguing that McClain doctrine can “be used to convert a crime against the people of Mexico or Guatemala into a crime against the people of the United States”); Hughes, *supra* note 100, at 164 (describing the notion that the *Hollinshead* defendants committed a crime under U.S. law as a “fiction”).

103. See *United States v. Turley*, 352 U.S. 407, 411–12 (1957).

104. *McClain I*, 545 F.2d 988, 996, 1002 (5th Cir. 1977).

enforcement costs of their cultural objects laws to the United States.¹⁰⁵ Enacting a found-in-the-ground law costs little, the argument goes. When significant pieces surface in the United States, a foreign nation simply can invoke the NSPA and force U.S. courts and law enforcement to spend their resources recovering the objects. Therefore, McClain doctrine arguably provides foreign nations with a U.S.-subsidized alternative to a domestic program of cultural objects protection.

It is true that McClain doctrine requires the expenditure of U.S. resources. However, this is not charity. The United States criminalizes the trade in property stolen from abroad because it accords with U.S. law and the policy of protecting the owners of stolen property rather than those who trade in it.¹⁰⁶ Foreign nations also are unlikely to expect that all objects taken from their territories will arrive in the United States—and therefore that U.S. law can supplant local enforcement. More significantly, McClain doctrine does not allow foreign nations to shift all of the costs of cultural objects protection to the United States. Because of the doctrine's domestic enforcement requirement, an NSPA claim must be predicated on a *domestically enforced* found-in-the-ground law. Foreign nations cannot avoid the costs of enforcing their own protection laws because, without real domestic enforcement, McClain doctrine is inapplicable.

2. Common Law and Constitutional Principles

Critics of McClain doctrine also suggest that foreign found-in-the-ground laws conflict with the respect traditionally accorded by the United States to private property rights and free trade.¹⁰⁷ Both common law and constitutional principles, the critics assert, militate against using the NSPA to enforce foreign national ownership claims. In particular, they note that

105. Cf. Neil Brodie, *Historical and Social Perspectives on the Regulation of the International Trade in Archaeological Objects: The Examples of Greece and India*, 38 VAND. J. TRANSNAT'L L. 1051, 1065 (2005) (arguing that the "inequitable division of costs and benefits" incurred in the cultural objects trade "could be remedied in part by shifting the cost of law enforcement off the already overloaded shoulders of poor governments and onto those of the U.S. taxpayers, who are, after all, the trade's beneficiaries").

106. See *McClain I*, 545 F.2d at 1001 n.29 (noting that the "laws of the United States, and presumably the laws of most states, prohibit the theft and the receipt and transportation of stolen property"). Again, Brodie suggests that cost shifting—to the extent that it does occur—is equitable because the United States benefits from the cultural objects trade more than the poor nations that supply the bulk of the objects. See Brodie, *supra* note 105.

107. See, e.g., ART LAW HANDBOOK, *supra* note 21, at 412 (arguing that McClain doctrine principles "are often fundamentally inconsistent with American concepts of private property rights and ownership").

found-in-the-ground laws vest ownership of cultural objects in the state even without actual or physical ownership.¹⁰⁸ Such ownership claims arise from the theory that constructive possession is a right of national sovereignty; however, critics argue that constructive possession claims are inherently problematic under common law and constitutional protections granted to private property rights.¹⁰⁹

Yet, U.S. common law and constitutional principles are more consistent with McClain doctrine than admitted by its critics. The common law of finds, for example, generally covers property found embedded in the soil and dictates that such property will belong to the landowner rather than the finder.¹¹⁰ The landowner ultimately need not possess the property (or even know of its existence) because the law recognizes “the real property owner’s constructive possession of everything contained on and below the surface of the land.”¹¹¹

In the case of cultural objects located on state-owned lands (including protected archaeological sites or monuments), the law of finds would vest true ownership in the state under a theory of constructive possession.¹¹² Additionally, in the United States, federal statutes have “eliminate[d] the necessity of determining how to characterize the objects within the common law classifications of finds, thus considerably clarifying and furthering the goals of archaeological preservation.”¹¹³ For example, the Antiquities

108. For example, Merryman and Elsen write:

The most interesting question . . . concerns the proper effect to be given the declaration of a foreign state that works in undiscovered or unprotected sites and works in private collections are state property. Where such a declaration is made . . . it clearly is part of the law of the foreign state. But . . . if the protected site remains unknown, if the unprotected site remains unprotected, if objects in private collections are left there, if no expropriation proceedings are brought and no compensation is paid or promised, has anything [legally] significant happened?

MERRYMAN & ELSEN, *supra* note 4, at 215.

109. Gerstenblith, *supra* note 1, at 228 (“[The] idea that the recognition of constructive possession as the basis for ownership is inimical to the property law of the United States is . . . without basis.”).

110. *Id.* at 229–30; see also JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 97 (3d ed. 2002) (“If personal property is found *embedded* in the soil, courts ordinarily award it to the landowner rather than the finder . . .”).

111. Gerstenblith, *supra* note 1, at 229–30. Anglo-American common law contained an exception for “treasure trove,” or “gold and silver objects intentionally hidden by the original owner who was prevented from returning to reclaim it.” *Id.* at 230. Because a relatively small percentage of cultural objects will fit this definition, this Comment does not consider the treasure trove exception’s impact on the common law of finds.

112. *Id.* at 230. However, “[t]he common law of finds still remains relevant to those objects” that do fall under federal statutory protection. *Id.* at 231.

113. *Id.*

Act of 1906¹¹⁴ established the first step toward federal protection of domestic cultural objects: The Act criminalizes the appropriation, excavation, injuring, or destruction of any historic or prehistoric “ruin,” “monument,” or “object of antiquity” found on federal lands without permission of the federal government.¹¹⁵ The Archaeological Resources Protection Act of 1979 (ARPA),¹¹⁶ which “refines and largely supersedes” the Antiquities Act,¹¹⁷ further prohibits the sale, purchase, transport, exchange, or receipt of any archaeological resources removed without permission from public or Native American land.¹¹⁸

The analysis grows more complicated if a state claims cultural objects located on private property or in private collections. The objects would belong to the landowner or collector in such instances, and the Takings Clause of the Fifth Amendment places restrictions on the ability of states and the federal government to claim possession.¹¹⁹ Yet despite the law of finds and the Takings Clause, states and the federal government have implemented “a variety of means . . . to protect cultural resources on private property.”¹²⁰ At the federal level, the Native American Graves Protection

114. 16 U.S.C. §§ 431–33 (2000).

115. *Id.* § 433. The Act is limited in scope, authorizes only minimal penalties, and at least one federal court of appeals has found the terms “ruin,” “monument,” and “object of antiquity” as used in the Act to be unconstitutionally vague. *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974) (reversing conviction for the appropriation of face masks dating from 1969 or 1970 and used by the Apache Indians in religious ceremonies); James A. R. Nafziger, *The Underlying Constitutionalism of the Law Governing Archaeological and Other Cultural Heritage*, 30 WILLAMETTE L. REV. 581, 582–83 (1994) (discussing the limited scope of the Act). *But see* *United States v. Smyer*, 596 F.2d 939, 941 (10th Cir. 1979), *cert. denied*, 444 U.S. 843 (1979) (distinguishing *Diaz* and holding that a person of ordinary intelligence should know that 800 to 900 year-old artifacts fall under Antiquities Act protection).

116. 16 U.S.C. §§ 470aa–70mm.

117. Nafziger, *supra* note 115, at 583.

118. *See* 16 U.S.C. §§ 470aa–70mm. The Archaeological Resources Protection Act of 1979 (ARPA) defines “archaeological resource” as “any material remains of past human life or activities which are of archaeological interest” and at least 100 years old. *Id.* § 470bb. Archaeological resources protected under the Act include, but are not 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 the foregoing items.” *Id.* Museums may be liable for purchasing or receiving such objects. Marilyn Phelan, A *Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 75 (1993).

119. U.S. CONST. amend. V; *see also* Constance M. Callahan, *Warp and Weft: Weaving a Blanket of Protection for Cultural Resources on Private Property*, 23 ENVTL. L. 1323, 1324–25 (1993) (writing that “[f]ederal laws fail to address many aspects of [domestic cultural objects protection] due to [Fifth Amendment] constraints”). The Fifth Amendment’s Takings Clause is made applicable to the states through the Fourteenth Amendment. *See, e.g., Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

120. Callahan, *supra* note 119, at 1326.

Act of 1990 (NAGPRA)¹²¹ “prohibits the trafficking for profit of Native American human remains or ‘cultural items’ unless the remains were obtained with the knowledge and consent of the next of kin or an official cultural organization.”¹²² Almost any removal and sale of material from Native American burial sites—even those located on private lands—will result in a NAGPRA violation.¹²³ And ARPA, though aimed primarily at objects located on federal lands, also allows federal prosecution for the looting of sites located on private property.¹²⁴

State laws go even further than NAGPRA and ARPA in protecting cultural objects. States generally offer protections for cemeteries, human remains, and Native American objects—even if located on private lands.¹²⁵ For example, Louisiana prohibits finders from taking good title to Native American burial objects found on private property.¹²⁶ In Indiana, “any disturbance of a burial ground in the course of an archaeological investigation” is a Class D felony, even if done on private property, unless “approved by the State Division of Historical and Archaeological Preservation.”¹²⁷ Washington State protects all unmarked burial sites and Native American rock art.¹²⁸ Alabama has a broad found-in-the-ground statute that asserts

121. 25 U.S.C. §§ 3001–13 (2000).

122. Callahan, *supra* note 119, at 1329. In addition to its trafficking provisions, the Native American Graves Protection Act of 1990 (NAGPRA) affirms the rights of lineal descendants, Native American tribes, and Native Hawaiian organizations to custody of certain cultural objects in the control of federal agencies or federally funded museums. C. Timothy McKeown et al., *Ethical and Legal Issues: Complying With NAGPRA*, in AM. ASS'N OF MUSEUMS, *NEW MUSEUM REGISTRATION METHODS* 311 (1998).

123. Callahan, *supra* note 119, at 1329. Despite NAGPRA's protections, some scholars consider it to be underinclusive. See, e.g., Kristin Ann Mattiske, *Recognition of Indigenous Heritage in the Modern World: U.S. Legal Protection in Light of International Custom*, 27 *BROOK. J. INT'L L.* 1105, 1131 (2002); McKeown et al., *supra* note 122, at 312 (“Private individuals and museums that do not receive federal funds . . . are not required to comply with provisions of the act.”); Suzanne Milchan, Note, *Whose Rights Are These Anyway?—A Rethinking of Our Society's Intellectual Property Laws in Order to Better Protect Native American Religious Property*, 28 *AM. INDIAN L. REV.* 157, 169 (2003) (“[NAGPRA] does not, and possibly cannot, cover all those institutions—auctions, dealers, and collectors that contain some form of Native American religious property.”).

124. Callahan, *supra* note 119, at 1332–33. ARPA allows federal prosecution if: (1) “the archaeological material [is] obtained ‘in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law’”; and (2) the object is sold, purchased, exchanged, transported, received, or offered for sale, purchase, or exchange in interstate or foreign commerce. *Id.*

125. Nafziger, *supra* note 115, at 585. More than half of the states now have laws criminalizing the desecration of unmarked burial sites. Callahan, *supra* note 119, at 1330 & n.37.

126. *Charrier v. Bell*, 496 So. 2d 601, 604–05 (La. Ct. App. 1986) (holding that under Louisiana law, the burial of Tunica Indian cultural objects along with the deceased did not relinquish ownership even to a finder on private land).

127. Callahan, *supra* note 119, at 1330.

128. *Id.*

state ownership of all objects excavated from “all aboriginal mounds and other antiquities, earthworks, ancient or historical forts and burial sites within the state”¹²⁹

With the notable exception of Alabama’s found-in-the-ground law—which declares state ownership of cultural objects—most state and federal laws protecting domestic cultural objects differ from their foreign counterparts in two ways. First, the majority of U.S. protections attach to burial objects, and this protection arguably stems from a respect for the objects’ sanctity rather than their cultural value. Second, unlike many foreign found-in-the-ground laws, most laws in the United States restrict individual rights to obtain, possess, or trade in cultural objects but do not declare state ownership to achieve this end.

These distinctions are worth noting, but they do not strengthen the argument that McClain doctrine compromises the common law and constitutional privileging of private property rights. In particular, U.S. law commonly denies good title to individuals who obtain objects illegally.¹³⁰ The scenario in which a U.S. art dealer obtains cultural objects looted from abroad is no different, then, from one in which she obtains Native American burial objects excavated with landowner permission from private property in the United States. In both cases, the law denies good title because such title can be obtained only with government permission.¹³¹ Absent permission, U.S. law restricts the individual’s ability to own, sell, or transport the Native American objects. And one cannot argue convincingly that identical results achieved under McClain doctrine are offensive to the U.S. legal tradition.¹³²

The private property concerns discussed above lead to another Takings Clause argument against McClain doctrine. Imagine, for example, that a foreign country nationalizes all property owned by women. A female national flees to the United States and smuggles her possessions with her. However, her home country files an NSPA action in the United States to recover its “stolen” property. Do U.S. courts really wish to recognize this type of foreign ownership claim?

The Takings Clause does not apply to the acts of foreign governments, but some critics argue nonetheless that McClain doctrine should not betray

129. ALA. CODE § 41-3-1 (1991).

130. Thus, two men convicted of excavating prehistoric ruins and removing Native American objects from federal lands in New Mexico received criminal sentences under the Antiquities Act. *United States v. Smyer*, 596 F.2d 939, 941 (10th Cir. 1979).

131. See 25 U.S.C. §§ 3001–13 (2000); *Charrier*, 496 So. 2d 601.

132. See *supra* note 109.

Takings Clause principles by enabling foreign states to claim cultural objects without providing for the procedural safeguards and compensation requirements generally found under U.S. law.¹³³ This argument has strong emotional appeal, and moreover, the hypothetical case discussed above is not so far-fetched as it might seem. During World War II, German law enabled the Nazi government to seize and nationalize Jewish property, including fine art.¹³⁴ Because these “national ownership” laws might have met the McClain doctrine criteria of clarity and domestic enforcement, it appears that Jews who smuggled their possessions from Germany in violation of German law could have been criminally liable under the NSPA. This hardly seems an appropriate result.

Defending McClain doctrine against this Takings Clause argument, some legal scholars suggest that U.S. courts have no business passing judgment on foreign expropriation laws.¹³⁵ Specifically, they look to the Act of State doctrine—which suggests that U.S. courts “will not judge the validity of a foreign government’s official acts within its own territory.”¹³⁶ In *Stroganoff-Scherbatoff v. Weldon*,¹³⁷ for example, the court held that the Act of State doctrine precluded it from returning to the plaintiff artworks allegedly taken from his family and nationalized by the Soviet Union after the 1917 revolution.¹³⁸

133. See ART LAW HANDBOOK, *supra* note 21, at 412; Teicholz, *supra* note 31, at 167.

134. See Owen C. Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 DEPAUL-LCA J. ART & ENT. L. 27, 32–33 (1999) (discussing the “Ordinance for Attachment of the Property of the Peoples’ and State’s Enemies” and the “Ordinance for the Employment of Jewish Property”).

135. See, e.g., Gerstenblith, *supra* note 1, at 235. Gerstenblith writes:

There is no doubt that different nations and different legal traditions have chosen to draw [the boundaries of proper state expropriation] in different places. However, within the framework of international and national legal systems, those lines dividing public and private property are recognized by other nations, as a result of comity and of respect for the inherent authority of sovereign nations

Id.

136. *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp.*, 493 U.S. 400, 404 (1990).

137. 420 F. Supp. 18 (S.D.N.Y. 1976).

138. *Id.* at 20. The court held that the Act of State doctrine requires courts of this country to refrain from independent examination of the validity of a taking of property by a sovereign state where 1) the foreign government is recognized by the United States at the time of the lawsuit, and 2) the taking of the property by the foreign sovereign occurred within its own territorial boundaries.

Id.; see also *Austria v. Altmann*, 541 U.S. 677 (2004); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1963). *But see* *Menzel v. List*, 279 N.Y.S.2d 608 (Sup. Ct. App. Div. 1967) (holding that the Act of State doctrine did not apply when the taking at issue was carried out by an organ of the Nazi party rather than a recognized foreign sovereign, and when the taking did not occur within the territorial limits of that sovereign).

Does the Act of State doctrine immunize foreign found-in-the-ground laws from the judgment of U.S. courts?¹³⁹ The appeal of this argument is its simplicity. However, the Act of State doctrine does not provide so simple an answer. In fact, “the doctrine is something of a house divided against itself” and “has become encrusted with multiple exceptions and limitations.”¹⁴⁰

These exceptions are complicated and ambiguous, and their full explanation is beyond the scope of this Comment.¹⁴¹ However, it is sufficient to note that the Act of State doctrine will not necessarily remove foreign found-in-the-ground laws from judicial scrutiny. Judging the acts of foreign sovereigns has political ramifications, of course, that could make a court unwilling to forego the Act of State doctrine. But because of its many exceptions and limitations, the doctrine itself will not inexorably prevent U.S. courts from weighing in.

Even at its best, however, this Takings Clause argument against McClain doctrine is limited. First, there is no constitutional takings problem when the law restricts the ability of individuals to obtain good title in certain objects, because no taking can occur prior to possession. Additionally, the Takings Clause does not prevent states and the federal government from barring trade even in objects that individuals have obtained legally.¹⁴² Most illicit objects are looted from the ground or purchased in countries that do not allow their sale,¹⁴³ and restricting the trade in such objects does not offend constitutional principles. McClain doctrine thus is not problematic in most situations; unjust expropriation could work unpalatable results under it, but this concern is too narrow and speculative to inhibit the doctrine’s general application.¹⁴⁴

139. See Gerstenblith, *supra* note 1, at 235 (arguing that it does).

140. RALPH G. STEINHARDT, INTERNATIONAL CIVIL LITIGATION 508 (2002); *Kirkpatrick*, 493 U.S. at 404–05 (noting that “commercial transactions” and “cases in which the Executive Branch has represented that it has no objection to denying validity to the foreign sovereign act” might present “possible exceptions to the application of the [Act of State] doctrine”).

141. STEINHARDT, *supra* note 140, at 508 (“[E]ach [exception and limitation] offers opportunities for advocacy and each . . . suggests that the courts both need and avoid a doctrine that rules certain issues out-of-bounds.”).

142. *Andrus v. Allard*, 444 U.S. 51 (1979) (holding that the Takings Clause did not preclude the government from banning the sale of Native American artifacts containing the feathers of birds protected under the Bald Eagle Protection Act § 1, 16 U.S.C. § 668(a) (2000), and the Migratory Bird Treaty, as amended at 16 U.S.C. § 703, even when the artifacts were lawfully obtained before the enactment of those statutes). In *Allard*, the Court held that the government could bar the trade of legally possessed objects because “the denial of one traditional property right does not always amount to a taking.” *Allard*, 444 U.S. at 65.

143. See *supra* note 22 and accompanying text.

144. A U.S. court also could avoid the application of McClain doctrine by finding that an offensive foreign expropriation statute fails to vest ownership in the enacting state. A court could

C. The Cultural Property Implementation Act

A final legal argument against McClain doctrine suggests that the CPIA should provide the sole mechanism by which the U.S. government deals with cultural objects imported into the United States. This argument was rejected by the Second Circuit in *Schultz*, but the full extent of its significance cannot be understood without a brief overview of the 1970 UNESCO Convention, to which the United States is a party.¹⁴⁵

UNESCO contemplates that signatory nations will enter into agreements to enforce each other's cultural objects laws, and it enables aggrieved nations to pursue claims in foreign jurisdictions by permitting the enforcement of cultural patrimony laws in the courts of other signatories.¹⁴⁶ The CPIA implements U.S. obligations under the UNESCO Convention,¹⁴⁷ but the statute provides a mechanism for the U.S. government to establish import restrictions on behalf of foreign nations only under limited circumstances.¹⁴⁸ Nations party to the Convention "may request the United States to impose import restrictions on designated categories of archaeological and ethnological materials."¹⁴⁹ Notably, however, the CPIA allows action only on a showing that pillaging has placed the requesting nation's "cultural patrimony" in jeopardy, the requesting nation has taken measures to protect its cultural patrimony, import restrictions are necessary and would be effective in dealing with the problem, and the restrictions are in the general interest of the international community.¹⁵⁰ Without such a showing, the CPIA

do so on domestic enforcement grounds: Limited and arbitrary expropriation arguably is insufficient to survive the domestic enforcement requirement established in *Schultz* and *Johnson*.

145. "Dissatisfaction with the results achieved by the 1970 UNESCO Convention eventually led UNESCO to ask the International Institute for the Unification of Private Law (UNIDROIT)" to codify international substantive law governing antiquities. MERRYMAN & ELSEN, *supra* note 4, at 262. The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330 [hereinafter UNIDROIT Convention], was promulgated in 1995, but few nations have adopted the Convention, and the United States has shown "no interest" in adhering to its principles. *Id.*

146. See Tompa, *supra* note 2, at 77.

147. See *supra* note 90 and accompanying text.

148. *United States v. Schultz*, 333 F.3d 393, 408 (2d Cir. 2003); see also Tompa, *supra* note 2, at 81–82.

149. Patty Gerstenblith, *The McClain/Schultz Doctrine: Another Step Against Trade in Stolen Antiquities*, CULTURE WITHOUT CONTEXT (Illicit Antiquities Research Ctr., Cambridge, U.K.) Autumn 2003, at <http://www.mcdonald.cam.ac.uk/IARC/cwoc/issue13/mcclain-schultz.htm> (last visited Feb. 2, 2006).

150. See *Schultz*, 333 F.3d at 408 (citing 19 U.S.C. § 2602(a)(1)(A)–(D) (2000)). Additionally, the president may impose import restrictions under "emergency conditions" without reference to concerted international action. Tompa, *supra* note 2, at 81.

does not bar the import of cultural objects unless they are documented as the inventory of a party nation museum or other public institution.¹⁵¹

In *Schultz*, the defendant claimed that the CPIA preempted the NSPA and McClain doctrine. He argued that Congress intended the CPIA to provide the sole means by which the United States restricts the import of cultural property.¹⁵² Because the CPIA imposes import restrictions only under limited circumstances, the NSPA allegedly could not criminalize a broader range of cultural-objects-related activities.¹⁵³

This preemption argument continues to sway critics of McClain doctrine,¹⁵⁴ but it has several strikes against it. First, the language of the statute in no way indicates preemption of the NSPA. To the contrary, the CPIA's legislative history indicates expressly that Congress never intended the Act to preempt or modify any existing federal law.¹⁵⁵ Additionally, senators who believed that the CPIA should replace McClain doctrine as the sole expression of American cultural objects policy tried twice after the CPIA's passage, without success, to introduce new legislation mandating preemption.¹⁵⁶ Even those parties who desired preemption did not imagine that the CPIA could preempt McClain doctrine without further legislation.¹⁵⁷ And finally, the CPIA is an import law and not a criminal law like the NSPA. The laws' "potential overlap . . . is no reason to limit the reach of the [latter statute]."¹⁵⁸ As noted by the court in *Schultz*, the CPIA surely would not preempt an NSPA claim if an object covered by the CPIA were stolen from a private home in a signatory nation and imported into the United States.¹⁵⁹

151. MERRYMAN & ELSEN, *supra* note 4, at 258.

152. *Schultz*, 333 F.3d at 408.

153. *Id.*

154. See, e.g., James F. Fitzpatrick, *A Wayward Course: The Lawless Customs Policy Toward Cultural Properties*, 15 N.Y.U. J. INT'L L. & POL. 857, 862-64 (1983); Gerstenblith, *supra* note 1, at 220-21.

155. The Senate Report on the CPIA states that the it "neither pre-empts state law in any way, nor modifies any Federal or State remedies that may pertain to articles to which [CPIA] provisions . . . apply." *Schultz*, 333 F.3d at 408 (quoting S. REP. NO. 97-564, at 22 (1982), reprinted in 1982 U.S.C.A.N. 4078, 4099). Significantly, the Senate Report also states that the CPIA "affects neither existing remedies available in state or federal courts nor laws prohibiting the theft and the knowing receipt and transportation of stolen property in interstate and foreign commerce . . ." *Id.* (emphasis added). The NSPA is just such a law.

156. Fitzpatrick, *supra* note 154, at 864. Senator Dole introduced a bill effectively to overturn the *McClain* cases in the Ninety-Seventh Congress, but it failed to pass despite bipartisan support. *Id.* A subsequent bill also failed to pass when reintroduced by Senators Dole and Moynihan during the Ninety-Eighth Congress. *Id.* at 864 & n.27. Fitzpatrick suggests that an agreement to later adopt legislation preempting McClain doctrine was a "linchpin" in the legislative compromise resulting in the CPIA's enactment. *Id.* at 864.

157. Gerstenblith, *supra* note 1, at 220-22.

158. *Schultz*, 333 F.3d at 409.

159. *Id.* at 408-09 ("[S]urely the thief could be prosecuted for transporting stolen goods in violation of the NSPA.").

For all these reasons, critics of McClain doctrine argue that U.S. courts should not apply the NSPA to foreign cultural objects. Absent conventional theft, they assert, use of the doctrine restricts the valid trade in cultural objects while improperly enforcing foreign law. However, as illustrated above, the legal arguments against applying the NSPA to foreign found-in-the-ground laws are weak. Because McClain doctrine is sound as a matter of law, this Comment turns next to the question of whether it also makes sense as a matter of policy.

III. MCCLAIN AS POLICY

The fact that McClain doctrine stands on solid legal ground does not remove it from the criticism that it is bad policy. As already noted, there is much controversy about how best to protect and appreciate cultural objects. Everyone presumably wants to see these objects preserved and appreciated, but not all agree on how best to achieve this end. In the face of evidence linking looting and the international art trade, some critics suggest that foreign found-in-the-ground laws are the problem and not the solution; that they are overbroad; and that they stem from financial rather than cultural concerns.¹⁶⁰ These policy critiques of McClain doctrine have substance. In order to assess them, we must begin with the philosophical underpinnings of the cultural objects debate.

A. The Philosophical Divide

The booming international trade in cultural objects tends to flow from archaeologically rich “source” nations to “market” nations rich in the more traditional sense.¹⁶¹ A difficult question therefore arises. Who may “own”

160. Brodie, *supra* note 105, at 1052–53. Brodie writes that in 2000, for example, the American Association of Museums (AAM) claimed that “blind enforcement of restrictive patrimony laws is not the answer” to archaeological looting, because “experience shows that given the unabated demand for antiquities, restrictive cultural property regimes merely promote a black market, shifting the trade from legitimate to illegitimate channels and increasing the risks posed by clandestine looting by driving all trade underground.”

Id. However, Brodie suggests that little evidence supports such assertions. *Id.* at 1052.

161. See Bator, *supra* note 6, at 292 (“A large proportion of looted material is smuggled out of the country of origin and finds its way into art-collecting countries such as the United States, Japan, Switzerland, Germany, England, and France.”).

the past!¹⁶² Today, there are three primary answers to this question. They are “cultural nationalism,” “cultural internationalism,” and “contextualism.”¹⁶³

1. Cultural Nationalism

Cultural nationalism emphasizes the relationship between cultural objects and national identity, repudiating ownership claims that would locate cultural objects outside the country of origin. According to this view, a nation’s culture is manifest in the cultural objects found within its national territories.¹⁶⁴ Cultural objects form an integral part of a nation’s “national patrimony,” which should remain intact.¹⁶⁵ This concept also may comprise part of the broader economic notion that “a country’s wealth not be dissipated.”¹⁶⁶ Thus, the international art trade is problematic because “it does not return a fair price to the country of origin.”¹⁶⁷ For

162. See, e.g., MERRYMAN & ELSEEN, *supra* note 4, at 161; Karen Olsen Bruhns, *Networks: www.plunderedpast.com*, 18 SAA BULLETIN (Society for Am. Archaeology, Santa Barbara, Cal.), Mar. 2000, available at <http://www.saa.org/publications/saabulletin/18-2/saa11.html> (arguing that “the past is not made up of disparate ‘things’ that are to be owned by individuals”); see also Karen J. Warren, *A Philosophical Perspective on the Ethics and Resolution of Cultural Property Issues*, in COLLECTING CULTURAL PROPERTY, *supra* note 2, at 1, 15 (asserting that the impulse to classify cultural objects as property subject to ownership stems from “an oppressive, Western, and patriarchal conceptual framework”).

163. “Cultural nationalism” and “cultural internationalism” are commonly used terms in the cultural objects debate. See, e.g., MERRYMAN & ELSEEN, *supra* note 4, at 87–88. However, commentators do not identify the third philosophical position consistently. For example, Warren refers to the “Scholarly and Aesthetic Integrity Argument,” see Warren, *supra* note 162, at 9, while Merryman refers to the “object/context view,” see MERRYMAN & ELSEEN, *supra* note 4, at 88. The term “contextualism” is no more accurate than other identifying terms. However, it concisely identifies the philosophy’s paramount goal of preserving the aesthetic and scholarly context of cultural objects for purposes of scientific study.

164. Bator, *supra* note 6, at 304.

165. Warren, *supra* note 162, at 8. Warren defines national patrimony as those “aspects of a country which are of special historical, ethnic, religious, or other cultural significance and which are unique in exemplifying and transmitting a country’s culture.” *Id.*; see also Merryman, *supra* note 21, at 162 (attributing to cultural nationalism the argument that “the Elgin Marbles belong in Greece, Italian Renaissance paintings belong in Italy, Aztec codices belong in Mexico, and so on”).

166. Bator, *supra* note 6, at 303; see also Cuning, *supra* note 15, at 462 (arguing that cultural nationalism may “have more to do with economic incentives than the protection of national cultural heritage”).

167. Bator, *supra* note 6, at 303. While one might debate the cause, the fact that source countries receive little of the windfall produced by cultural objects on the international market is uncontroversial. See, e.g., Gabriella Coslovich, *Aboriginal Works and Artful Dodgers*, THE AGE, Sept. 20, 2003, available at <http://www.theage.com.au/articles/2003/09/19/1063625217241.htm> (reporting that while Australian aboriginal art generates about AU \$200 million per year internationally, only about AU \$50 million goes back to indigenous artists); Hoving, *supra* note 9 (noting that Italian tomb raiders received \$8500 for the Calyx Krater subsequently purchased by the Metropolitan Museum of Art in New York for \$1 million).

this reason, some proponents of cultural nationalism link the international art trade to charges of exploitation and colonialism.¹⁶⁸

Cultural nationalists urge source countries to adopt policies favoring the retention and repatriation of cultural objects.¹⁶⁹ “Retention schemes” may include “expropriation laws” that designate cultural objects as state property, “embargo laws” that limit or proscribe their export, and “preemption laws” that give state or domestic institutions a preemptive right to buy objects offered for export.¹⁷⁰ Repatriation, which involves returning objects that stray from a nation’s territory, may be voluntary or compelled by international treaty.¹⁷¹

2. Cultural Internationalism

While cultural nationalists argue that cultural objects belong to the nation of origin or situs, cultural internationalists are highly critical of retentionism and repatriation.¹⁷² This second view refutes the notion that maintaining a rich national patrimony justifies retentionist policies,¹⁷³ and it insists that “[e]very country has an interest in giving its citizens knowledge not only of its own culture, but also that of other nations and peoples.”¹⁷⁴ Cultural internationalism thus encourages broad circulation of cultural objects on the ground that they represent “the cultural heritage of human society” as a whole.¹⁷⁵ Because such objects reflect a fundamental humanity, they cannot belong to one nation in particular.¹⁷⁶ As a result, cultural

168. See, e.g., Kareem Faheem, *The Whistle Blower at the Art Party*, VILLAGE VOICE, Aug. 6–12, 2003, available at <http://www.villagevoice.com/news/0332,fahim,46047,1.html> (writing that the idea that cultural objects are “better off in Western museums and cultural institutions” is centuries old and “a pillar of colonialism”).

169. *Id.*

170. Merryman, *supra* note 37, at 122–23.

171. See 1970 UNESCO Convention, *supra* note 77, art. 7(b)(ii) (mandating the repatriation of cultural objects under certain circumstances); UNIDROIT Convention, *supra* note 145, art. 3(1) (“The possessor of a cultural object which has been stolen shall return it.”); THE INT’L COUNCIL OF MUSEUMS, ICOM CODE OF PROFESSIONAL ETHICS § 6.3 (2004) (suggesting that museums should take “prompt and responsible steps” to repatriate cultural objects if doing would accord with the 1970 UNESCO and UNIDROIT Conventions).

172. See MERRYMAN & ELSEN, *supra* note 4, at 88; Cuning, *supra* note 15, at 463–65.

173. Bator, *supra* note 6, at 323 (“I do not believe that every beautiful piece of period British furniture and every interesting British portrait should stay in England.”); see also Merryman, *supra* note 37, at 154 (arguing that Mexico should “sell, trade, or lend some of its reputedly large hoard of unused Chac-Mools, pots, and other warehoused objects” rather than request assistance in “suppressing the ‘illicit’ trade in those objects”).

174. Bator, *supra* note 6, at 307.

175. Warren, *supra* note 162, at 5.

176. *Id.*

internationalists promote the trade in cultural objects and equate cultural nationalism with hoarding and even fascism.¹⁷⁷

Occasionally, cultural internationalists also offer a “rescue” argument in support of their position.¹⁷⁸ Rescue posits that archaeologically rich nations have a surfeit of cultural objects that “cannot or will not be adequately conserved at home.”¹⁷⁹ Such objects purportedly are rescued when distributed on the international art market to foreign individuals or foreign countries with the skills and resources to preserve them.¹⁸⁰ While some critics equate the rescue argument with colonialism,¹⁸¹ proponents cite recent events—such as the Taliban’s destruction of the Bamiyan Buddhas in Afghanistan—as evidence that the argument is still valid in a postcolonial world.¹⁸² Even legitimate rescue, however, may not provide the rescuer with a valid claim to the rescued object once the source nation is willing and able to repatriate rescued objects.¹⁸³ For this reason, many cultural internationalists have moved away from rescue as a claim to ownership.¹⁸⁴

Finally, cultural internationalists provide a market-based critique of cultural nationalism. This argument suggests that retention and repatriation

177. Cuning, *supra* note 15, at 463 (referring to the “desire to keep important or valuable objects from leaving the national territory even though they have no significant relation to the nation’s history or culture” as “hoarding”); Merryman, *supra* note 37, at 135 (finding the root of cultural nationalism in the European merger of romanticism and nationalism, which “was to become the core of Nazism”).

178. Warren, *supra* note 162, at 3–4.

179. Bator, *supra* note 6, at 298. Bator writes: “Italian archaeologists laugh hollowly when newspapers report the theft of some ‘unique, priceless’ Etruscan vase. They know, but the public does not, how many thousands of these ‘unique, priceless’ vases they already have in storage and quite literally don’t know what to do with.” *Id.* (quoting Gordon Gaskill, *They Smuggle History*, ILLUSTRATED LONDON NEWS, June 14, 1969, at 28).

180. Warren, *supra* note 162, at 3; see also Ariella Budick, *The Chill From the Friezes*, NEWSDAY, Jan. 12, 2003, at D23 (writing that it “is pretty much beyond dispute” that the British took better care of the Elgin Marbles “than the Greeks could possibly have afforded to do”). *But see* Rossella Lorenzi, *Elgin Marbles Dispute Takes New Twist*, DISCOVERY NEWS, Dec. 6, 2004, available at http://www.abc.net.au/science/news/ancient/AncientRepublish_1258736.htm (quoting Cambridge scholar Anthony Snodgrass as saying that the Elgin marbles “would have been just fine if Lord Elgin had left them in Athens”).

181. See *supra* note 168 and accompanying text.

182. See, e.g., Cuning, *supra* note 15, at 495–500 (arguing that the Taliban’s destruction of the Bamiyan Buddhas and other objects in Afghanistan suggests that cultural nationalism may be “destructive to cultural property”).

183. Warren, *supra* note 162, at 3–4.

184. See Budick, *supra* note 180 (noting that the British Museum has moved away from the “efficient paternalism” it has relied on for nearly 200 years to support its claim to the Elgin Marbles). Many museums, including the British Museum, now emphasize a “universal context” argument: that cultural objects are best understood “in direct proximity to products of other great civilizations.” DECLARATION ON THE IMPORTANCE AND VALUE OF UNIVERSAL MUSEUMS (Dec. 2002), available at <http://icom.museum/pdf/E-news2004/p4-2004-1.pdf>.

do not protect cultural objects, but rather serve to foment a vigorous black market.¹⁸⁵ Pointing to a “lively trade” in illicitly obtained objects, cultural internationalists suggest that retentionist policies simply do not work.¹⁸⁶ Rather, the indiscriminate breadth of found-in-the-ground laws denies opportunities for licit export and dictates that the inevitable trade will be clandestine, unregulated, untaxed, undocumented, and performed by “unsupervised amateurs, rather than qualified professionals.”¹⁸⁷ The only way to protect cultural objects is to create a regulated, licit international trade.¹⁸⁸

3. Contextualism

In contrast with cultural nationalism and cultural internationalism, contextualism offers the argument that cultural objects are valuable only if interpreted and understood in light of their proper archaeological and anthropological context.¹⁸⁹ Because looting removes cultural objects from their physical context without proper scientific documentation, contextualism is primarily an anti-looting position.¹⁹⁰ One might argue that such a position has no inherent alignment with cultural nationalism or cultural internationalism: Once archaeologists properly extract and document an object, it should not matter to them whether the object stays in or strays from the source nation. However, contextualists view the international art market as the primary cause of archaeological looting.¹⁹¹ Thus, they often argue that the nexus between looting and trade justifies the retentionist practices of cultural nationalism.¹⁹²

185. Bator, *supra* note 6, at 317–19; Cunning, *supra* note 15, at 452 (“[R]epatriation of cultural property is not synonymous with the protection of cultural property.”); Merryman, *supra* note 13, at 188 (arguing that denying opportunities for licit export “assur[es] the existence of an active, profitable and corrupting black market”).

186. Merryman, *supra* note 13, at 188.

187. *Id.* at 188–89.

188. *Id.* at 181–85; Hoving, *supra* note 13; Brodie, *supra* note 105.

189. Gerstenblith, *supra* note 1, at 199. Gerstenblith writes that only “[c]areful excavation allows the archaeologist to place a found object in its proper chronological sequence and context.” *Id.*; see also Christopher Chippindale & David W.J. Gill, *Material Consequences of Contemporary Classical Collecting*, 104 *AM. J. ARCHAEOLOGY* 463, 500 (2000) (“The problem of lost contexts is clearly a hindrance to understanding [cultural] objects.”).

190. See, e.g., Gerstenblith, *supra* note 1, at 199 (contrasting scientific excavation with the “looting of objects and the destruction of sites”).

191. Brodie, *supra* note 105, at 1051 (“It is a well-established fact that the international antiquities market is responsible for the destruction and vandalism of archaeological and cultural sites worldwide.”).

192. Warren, *supra* note 162, at 9–10. *But see* Bator, *supra* note 6, at 301 (arguing that just because “excavation of archaeological sites should proceed with care and expertise” does not mean “that antiquities should stay at home permanently” or that “nations are entitled to keep their own

In addition, contextualists are critical of the arguments put forth on behalf of cultural internationalism.¹⁹³ They suggest that empirical evidence supports the use of found-in-the-ground laws to control looting; conversely, no evidence indicates that looting would abate if controls were relaxed.¹⁹⁴ When cultural internationalists contend that the market will find public and private collectors best suited to care for cultural objects, contextualists respond that the market does not ensure the protection even of valuable objects.¹⁹⁵ Moreover, they argue that the market's "one-way flow" from source nations to private collections in a few wealthy cities—New York, London, Paris, Zurich, Tokyo—hardly fulfills cultural internationalism's promise of celebrating the common humanity represented in cultural objects.¹⁹⁶

B. U.S. Cultural Objects Policy

With the cultural objects debate explained more fully, we are in a better position to understand the critics' argument that McClain doctrine takes the wrong side in that debate: the side of cultural nationalism. The United States is a market nation and therefore must be cultural internationalist, the argument goes. For this reason, the cultural nationalism manifest in foreign found-in-the-ground laws is inconsistent with U.S. priorities.¹⁹⁷ By giving these laws some effect in the United States, McClain doctrine arguably forces cultural nationalism on a country otherwise loath to adopt that position.

art"); Christopher Chippindale & David W.J. Gill, *Material Consequences of Contemporary Classical Collecting*, 104 AM. J. ARCHAEOLOGY 463, 463, 505 (concluding that the "dismaying" lack of historical documentation previously established for Cycladic figurines "applies to classical objects across the board," but nonetheless *rejecting* cultural nationalism as a response to the issues raised in their empirical studies).

193. Gerstenblith, *supra* note 1, at 200–01 ("The notion that cultural objects belong to all humanity and not to a single nation is used today often as an excuse for reliance on market-based principles and as an apologetic for the wide-scale looting of archaeological sites.").

194. See, e.g., Brodie, *supra* note 105 (arguing that cultural internationalists rely on "microeconomic and psychological reasons why strong regulation should fail, but give[] no hard evidence").

195. Gerstenblith, *supra* note 1, at 205–06 ("For example, tomb robbers and site looters often inadvertently or intentionally destroy objects, either in order to make them transportable or simply out of ignorance.").

196. *Id.* at 206. Cultural internationalists respond that private collections ensure that public officials do not make all decisions about what is worth collecting. See Bator, *supra* note 6, at 300 ("Foreign collectors have often recognized as beautiful and valuable art which is 'officially' ignored at home; allowing private collecting to flourish can, in the long run, educate and reeducate us in what *are* national treasures.").

197. Cuning, *supra* note 15, at 455 ("[T]he United States is generally considered a market nation for cultural objects due to its highly-developed marketplace and high demand for cultural objects."); Seligman, *supra* note 2, at 73 (noting that the United States is widely known as perhaps the "most villainous" market nation).

The identification of the United States with cultural internationalism stems, in part, from the fact that this country generally does not enforce foreign export controls and allows the import of objects removed from foreign nations in violation of their export laws.¹⁹⁸ But it also results from an oversimplification inherent in the cultural objects debate. This debate tends to assign nations or groups to a single ideological position based on their relation to the international art trade.¹⁹⁹ According to this theory, the supply of cultural objects in source nations generally exceeds demand, while demand exceeds supply in market nations.²⁰⁰ If left unregulated, this situation naturally results in the net export of cultural objects from source to market nations. Source nations thus adopt cultural nationalism to retain their indigenous objects, while market nations adopt cultural internationalism to protect their markets.²⁰¹ Archaeologists and anthropologists, meanwhile, adopt contextualism because of its primary emphasis on the academic value of cultural objects.²⁰² The United States is perhaps the archetypal market nation, and is generally assigned to cultural internationalism under this view.²⁰³

The United States does exhibit a “highly-developed marketplace” for foreign cultural objects, but it also is object-rich in terms of Native American materials.²⁰⁴ The looting of indigenous relics predates the founding of the United States, and the destruction continues today.²⁰⁵ Interest in Native American art among collectors in Japan and Western Europe is

198. See *supra* notes 37–39 and accompanying text. The limited participation of the United States in the 1970 UNESCO Convention, as reflected in the CPIA, is probably also a factor. See *supra* note 145 and accompanying text.

199. Cf. Cunning, *supra* note 15, at 454–56 (noting that the United States is “in some ways” rich in domestic cultural objects but nevertheless classifying the country as a “market nation for cultural property”).

200. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831 (1986), reprinted in MERRYMAN, *supra* note 3, at 66, 67. In particular, cultural internationalists tend to identify cultural nationalism with Third World countries. See Merryman, *supra* note 13, at 178 (stating that cultural nationalism has come to dominate the international cultural objects debate, in part due to the influence of Third World nations in drafting the 1970 UNESCO Convention).

201. MERRYMAN & ELSEN, *supra* note 4, at 87–88.

202. *Id.*

203. See *supra* note 197 and accompanying text.

204. Cunning, *supra* note 15, at 455.

205. Ann M. Early, *Profiteers and Public Archaeology: Antiquities Trafficking in Arkansas*, in COLLECTING CULTURAL PROPERTY, *supra* note 2, at 39, 45 (stating that selective looting of late prehistoric sites in Eastern Arkansas is likely to erase “a large part of the prehistoric data base”); Nichols et al., *supra* note 11, at 28 (noting that Pilgrims dug up Indian grave sites soon after landing on Cape Cod in 1620); *Id.* at 29 (“The threat to Native American sites posed by looters has never been greater than it is in the United States today because of a tremendous rise in the commercial value of antiquities, especially ‘Indian’ artifacts, over the past fifteen years.”).

increasing,²⁰⁶ and a well-financed subculture exists here for gravediggers, hobbyists, treasure hunters, antiquities dealers, and collectors.²⁰⁷ In their quest for cultural objects, looters already have caused irreversible damage to sites throughout the country.²⁰⁸ Therefore, it seems reasonable that the United States would undertake efforts to protect its domestic cultural property from destruction.

Historically, the United States adopted an “apathetic posture” toward the protection of domestic cultural objects.²⁰⁹ Such a posture was essentially cultural internationalist, encouraging free trade and placing few controls on indigenous cultural property.²¹⁰ However, as discussed in Part II.B.2 *supra*, Congress and state legislatures have exhibited increased cultural nationalism and contextualism in their protection of the United States’ domestic cultural heritage. These protections extend mainly to historic sites and monuments, cultural objects located on public lands, and Native American remains and tribal culture.²¹¹ They are cultural nationalist in the sense that they recognize a cultural heritage uniquely important to the United States; they are contextualist in criminalizing conduct in order to protect against the damage caused by looting.

206. Bator, *supra* note 6, at 294. For example, a Mimbres pot from New Mexico can sell in Europe for as much as \$400,000. Borodkin, *supra* note 1, at 378 n.10 (citing John Neary, *Project Sting*, *ARCHAEOLOGY*, Sept.–Oct. 1993, at 59).

207. Early, *supra* note 205, at 40–45 (depicting the “distinct subculture” responsible for looting Native American sites in Arkansas). While Early focuses on Arkansas, she states that the looting problem exists throughout the South and extends through the southeastern and southwestern United States. *Id.* at 39, 44–45. The problem also exists in the Northeast. Nichols et al., *supra* note 11, at 34–35 (discussing the looting of Abenaki artifacts in Vermont and New Hampshire).

208. Nichols et al., *supra* note 11, at 29 (“[E]ntire prehistoric pueblos have been leveled with bulldozers to acquire the famous Mimbres pottery from prehistoric burials, and the problem is not restricted to the Southwest.”); see also *Indian Cave Looter Hit With \$2.5 Million Penalty*, *ASSOCIATED PRESS*, Dec. 14, 2002, available at <http://archives.cnn.com/2002/us/west/12/14/indian.cave.ap> (reporting that looters “destroyed what could have been one of the five most important archaeological cave sites in the Great Basin,” an area covering most of Nevada and Utah).

209. Phelan, *supra* note 118, at 64.

210. Gerstenblith, *supra* note 1, at 225–26.

211. In addition to the federal and state laws discussed in Part II.B.2 *supra*, other federal statutes containing some element of cultural objects protection include the Historic Sites, Buildings and Antiquities Act, ch. 593, 49 Stat. 666 (1935) (codified as amended at 16 U.S.C. §§ 461–67 (2000)); the Reservoir Salvage Act of 1960, Pub. L. No. 86-523, 74 Stat. 220 (codified as amended at 16 U.S.C. §§ 469–69c-1) (providing for the preservation of historical and archaeological data that might otherwise be lost or destroyed as a result of certain federal construction projects or federally licensed activities or programs); and the National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470–70x-6 (2000 & Supp. 2004)) (providing for the maintenance of a National Register of districts, sites, buildings, structures, and objects significant to American history, architecture, archaeology, and culture).

One could infer from the limited scope of these categories that the United States—in allegiance to the principles of cultural internationalism—has chosen to employ only limited protections of its domestic cultural property.²¹² However, the archaeological heritage of the United States (as a relatively young nation) does not extend much beyond these protected categories, and it seems natural that this country would not need to adopt broad categories of protection. Furthermore, that the United States has not declared national ownership of domestic cultural objects does not change the fact that it does place restrictions on these objects' possession, trade, and export.²¹³ These domestic restrictions, just like foreign found-in-the-ground laws under McClain doctrine, may result in criminal liability if ignored.

Other indications also suggest that the United States values the protection of domestic cultural objects. Effective November 1, 2002, the United States Sentencing Commission amended the Federal Sentencing Guidelines to enhance guideline penalties for crimes involving "cultural heritage resources" (essentially cultural objects of domestic origin).²¹⁴ In giving notice of the proposed amendment prior to its adoption, the Commission stated:

Cultural heritage resource crimes are fundamentally different than general property crimes because, unlike other property crimes where the primary harm is pecuniary, the effect of cultural heritage resource crimes is in great part non-pecuniary in nature. Punishment of these crimes should reflect these intrinsic differences.

....

.... Therefore, a separate guideline is proposed that takes into account the *transcendent and irreplaceable* . . . value of cultural heritage resources.²¹⁵

Additionally, members of both the House and the Senate recently have attempted to pass legislation designed to increase the criminal penalties

212. See, e.g., Nafziger, *supra* note 115, at 587 (arguing that the United States is culturally internationalist and offers domestic cultural objects only limited protections).

213. See Part II.B.2 *supra*.

214. U.S. SENTENCING COMM'N, OFFICE OF EDUC. & SENTENCING PRACTICE, AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES: HIGHLIGHTS OF KEY POINTS 2 (May 24, 2002), available at <http://www.ussc.gov/2002guid/highlights2002.PDF>. "Cultural heritage resources" are defined as "national memorials, landmarks, parks, archaeological and other historic and cultural resources," and "incorporate[.] . . . a broad range of existing federal statutory definitions for various historical, cultural, and archaeological items." *Id.*

215. U.S. Sentencing Comm'n, Notice of Proposed Amendments to Sentencing Guidelines (emphasis added), at <http://www.ussc.gov/FEDREG/fedreg1101.htm> (last visited March 14, 2006).

for the illegal trafficking of archaeological resources and Native American remains and cultural items.²¹⁶

Few would argue that sentencing guideline amendments or proposed legislation place this country squarely in the camp of cultural nationalism. Yet this is beside the point. Rather, these developments (along with the state and federal laws protecting cultural objects of domestic origin) suggest that the United States cannot be defined solely in terms of cultural internationalism. At least for objects of domestic origin, there is an awareness that such objects have significant, noneconomic aspects that distinguish them from other types of property. Thus, while U.S. policy may trend toward cultural internationalism when it comes to other nations' objects, its policy regarding domestic objects is better characterized as containing elements of cultural nationalism and contextualism.

Ultimately, one might ask why the United States should recognize "the importance of identifying and preserving [its own] cultural heritage"²¹⁷ but balk when other countries wish to do the same. However, this Comment does not seek to answer the question of whether U.S. policy should move more exclusively toward any position in the cultural objects debate. It also does not suggest that any position is best suited to protect cultural objects. Instead, it seeks to illustrate that U.S. policy has evolved toward a middle ground between the sparring factions of cultural nationalism, cultural internationalism, and contextualism. McClain doctrine, significantly, also occupies this middle ground.

C. Reaffirming McClain

Many scholars and collectors continue to believe that McClain doctrine is bad policy. Some argue that the doctrine goes too far. It purportedly delegitimizes the cultural objects trade, drives the trade underground and renders it corrupt, and prevents the circulation of finds with little

216. See Enhanced Protection of Our Cultural Heritage Act, H.R. 4527, 108th Cong. (2004); Enhanced Protection of Our Cultural Heritage Act of 2003, S. 1271, 108th Cong. (2003). The House bill, in relevant part, would increase potential criminal fines for first-time violations of ARPA, 16 U.S.C. § 470ee(d) (2000), from \$10,000 to \$100,000, and would increase available prison terms from one year to ten years. H.R. 4527, § 2(a). The bill also would increase fines and prison terms for violations of NAGPRA, 25 U.S.C. §§ 3001–13 (2000), by as much as tenfold. *Id.* § 2(c). The proposed Senate bill would implement similar increases in available prison sentences under both ARPA and NAGPRA, but offers less stringent penalties under ARPA when "the sum of the commercial and archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources does not exceed \$500." S. 1271, § 2(b)(2).

217. See Phelan, *supra* note 118, at 64–66 (citing various legal protections offered to domestic cultural objects).

archaeological value but significant aesthetic or educational worth.²¹⁸ At the other side of the ideological spectrum, it is suggested that McClain doctrine does not go far enough. Patty Gerstenblith, for example, has called for a moratorium on all cultural objects collecting.²¹⁹

Yet McClain doctrine is good policy precisely because its flexibility and narrow application allow U.S. courts to offer cultural objects some protection without precluding their trade entirely. In the end, this compromise between the precepts of cultural nationalism, cultural internationalism, and contextualism accords perfectly with U.S. policy. On the one hand, McClain doctrine gives teeth domestically to foreign found-in-the-ground laws. These laws often prevent individuals from obtaining, possessing, and trading a wide array of cultural objects, which might seem to conflict with U.S. policy considered in light of the generally narrow U.S. import restrictions. On the other hand, as illustrated by the protection of its domestic cultural objects, the United States also exhibits the awareness that cultural objects may have a “transcendent and irreplaceable” value²²⁰ that merits legal protection. Individual restraint, in the end, has proved insufficient to protect this value against the destructive impact of looting.

The problem is not merely one of individual restraint. It also is one of incentives. Critics of McClain doctrine argue that only a licit, regulated market in cultural objects will deter looting. But so long as collectors in the United States are free to trade in cultural objects—even if possibly looted—there is little incentive for them to seek out objects of licit provenance. This is well-illustrated by the recent travails of the Met and the Getty, which indicate that even the United States’ most prominent museums may not be deterred from obtaining objects of dubious origin. As Neil Brodie writes in the context of found-in-the-ground laws: “One compelling reason for the retention of strong regulation . . . is that law-abiding citizens and museums will think twice before acquiring an object of possibly illegal origin. If strong regulation is relaxed or abandoned, the moral restraint is removed.”²²¹ McClain doctrine likewise imposes an important moral restraint.

McClain doctrine provides more than moral censure, and NSPA criminal sanctions reportedly have cooled the U.S. market for illicitly

218. See Brodie, *supra* note 105, at 1055 (summarizing policy arguments raised by opponents against the enforcement of found-in-the-ground laws).

219. Gerstenblith *supra* note 1, at 244 (calling for a “moratorium on the acquisition of antiquities”).

220. U.S. Sentencing Comm’n, *supra* note 215.

221. Brodie, *supra* note 105, at 1065.

obtained objects.²²² However, in accordance with principles of cultural internationalism, the doctrine does not place broad restrictions on the cultural objects trade. The doctrine's limitations stem from its internal requirements: scienter; a clear declaration of national ownership; domestic enforcement; that contested objects must be proven to originate from the nation claiming ownership; and that the alleged theft must be proven to occur after the effective date of the relevant vesting law.²²³ Ultimately, McClain doctrine places a heavy burden on nations that seek to recover cultural objects.

Given its limitations, McClain doctrine does not place an unacceptable burden on the cultural objects trade. It cannot be a coincidence that the doctrine has appeared in only a handful of cases over thirty years. It also seems unlikely that, by chance, *all* of the convictions under the doctrine—*Hollinshead*, *McClain*, and *Schultz*—have involved conduct that most laymen would find reprehensible.²²⁴ These facts suggest that McClain doctrine is hardly overbroad in its application. It does not restrict the trade in cultural objects severely; rather, it sets a low moral bar below which we should not allow collectors to tread. Yet the importance of this moral bar should not be discounted. Looting will continue so long as demand exists for the fruits of clandestine excavation. Only by stigmatizing the trade in looted cultural objects can we hope to pressure collectors and museums away from participation in the market. Stigma can lessen demand.

Congress, certainly, is free to recalibrate the balance of U.S. cultural objects policy if it wishes. By enacting new legislation, the United States could move more expressly toward cultural nationalism, cultural internationalism, or contextualism. But judges should not be wary of McClain doctrine in the meantime. The doctrine is sound legally, and it aptly suits the tensions inherent in U.S. law—which provides foreign cultural objects

222. Souren Melikian, *Above Suspicion*, ART & AUCTION, June 2001, at 44, 46, 48 (reporting that criminal liability imposed for trafficking in looted antiquities has cooled the market for such objects).

223. See *supra* notes 62–67, 98–100 and accompanying text.

224. In *Hollinshead*, the defendant took a rare monument despite “overwhelming evidence” that it was stolen, sawed it into pieces and “thinned” it to facilitate transport and sale, bribed Guatemalan officials to export the items, and imported them into the United States in boxes marked “personal effects.” *United States v. Hollinshead*, 495 F.2d 1154, 1154 (9th Cir. 1974). The defendants in *McClain II* had five squads of workers looting Mexican archaeological sites, forged or backdated documents for the looted objects, and smuggled the items into the United States in disguised trucks. *McClain II*, 593 F.2d 658, 660–61 (5th Cir. 1979). In *Schultz*, the defendant acquired state-held antiquities by repaying the personal debts of Egyptian officials, coated valuable antiquities in plastic to disguise them as cheap souvenirs, smuggled the objects from Egypt, assigned them false provenances so as to defraud purchasers, and continued to arrange for new acquisitions even after his agent was arrested and charged with dealing in stolen antiquities. *United States v. Schultz*, 333 F.3d 393, 396–97 (2d Cir. 2003).

with only limited protection while restricting the free trade in objects of domestic origin. By providing foreign cultural objects with protection analogous to that already in place for domestic objects, McClain doctrine helps to prevent looting internationally without betraying important U.S. legal principles.

CONCLUSION

Little doubt remains that the international art market is responsible, in some part, for the worldwide looting of cultural objects. By placing limited restrictions on the U.S. market in accordance with U.S. policy, McClain doctrine offers an important tool for cooling the demand for these objects. Despite the doctrine's critics, this Comment argues that McClain doctrine is sound. U.S. cultural objects policy has evolved: Increased protections for domestic cultural objects indicate a growing recognition in the United States that free trade cannot, by itself, provide sufficient protection against the demand for these objects as art. McClain doctrine extends this insight to foreign cultural objects, which are different in situs but not in kind.
