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## Cartouches, Catalogs, & Courtrooms: Using a Recent Legal Challenge in Egyptian Court to Examine Unanswered Questions in Cultural Heritage

Lawrence Keating

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### Cover Page Footnote

J.D. candidate in the Evening Division at Fordham University School of Law, a former staff member of the Fordham Intellectual Property, Media & Entertainment Law Journal, and formerly President of the Fordham Art Law Society. He holds a B.B.A. in Finance and a minor in Art & Art History from the College of William & Mary. Thank you to my family for their unwavering encouragement and patience. Thank you to Professor Martin Flaherty for his guidance and perspective. Thank you to Professor Leila Amineddoleh for inspiring this paper and for generously sharing her time, expertise, and mentorship. Thank you to Sara Mazurek and Nicole Kim, as well as the Fordham Intellectual Property, Media & Entertainment Law Journal staff, for their superb editorializing. A final thanks to my friends, whose occasional distraction from mummies and marbles was a talisman against ennui during an exceedingly unconventional year.

# Cartouches, Catalogs, & Courtrooms: Using a Recent Legal Challenge in Egyptian Court to Examine Unanswered Questions in Cultural Heritage

Lawrence Keating\*

Ancient Egypt is known to the world for its rich culture steeped in arcane mysticism and for the dazzling treasures it left behind, which now populate the world's most prominent cultural institutions. These and other cultural heritage objects, which capture and inspire masses as easily today as they did in their own time, are subject to growing controversy over their protection and utilization. As this debate moves from academic circles to the arena of public discourse, the need to revise legislation controlling cultural heritage objects is becoming increasingly clear. This Note uses a recent lawsuit concerning an international exhibition of artifacts from the tomb of King Tutankhamun as a case study to explore this discussion and draw conclusions about how to best serve the aims of cultural heritage law. This Note then recommends adopting the Egyptian government's approach in amending its patrimony law to provide

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Thank you to my family for their unwavering encouragement and patience. Thank you to Professor Martin Flaherty for his guidance and perspective. Thank you to Professor Leila Amineddoleh for inspiring this paper and for generously sharing her time, expertise, and mentorship. Thank you to Sara Mazurek and Nicole Kim, as well as the *Fordham Intellectual Property, Media & Entertainment Law Journal* staff, for their superb editorializing. A final thanks to my friends, whose occasional distraction from mummies and marbles was a talisman against ennui during an exceedingly unconventional year.

specialists with increased discretion to manage the wealth of cultural heritage objects under its control.

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## INTRODUCTION

In 1978, a twenty-two and a half pound, solid gold funerary mask<sup>1</sup> bearing the face of King Tutankhamun arrived in New York

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<sup>1</sup> Elizabeth Cummins, *Tutankhamun's Tomb (Innermost Coffin and Death Mask)*, KHAN ACAD., <https://www.khanacademy.org/humanities/ap-art-history/ancient-mediterranean-ap/ancient-egypt-ap/a/tutankhamuns-tomb> [https://perma.cc/4RPJ-UAXU]. Although used in many ancient cultures, ancient Egyptians are particularly renowned for their use of funerary masks, also called death masks, which were worn by the deceased to help guide spirits back to their final resting place. See *Mask: Funerary and Commemorative Uses*, BRITANNICA, <https://www.britannica.com/art/mask-face-covering/Funerary-and-commemorative-uses#ref129971> [https://perma.cc/75UU-W9RS]. For an

City, along with fifty-four other items from the Tutankhamun hoard.<sup>2</sup> This marked the final stop of a grand six-location tour across the United States, having just visited some of the nation's most venerable cultural institutions.<sup>3</sup> Organized by the Metropolitan Museum of Art in cooperation with the Egyptian Ministry of Antiquities, the exhibit was heralded as the most magnificent display of cultural artifacts in United States history, capturing the imagination and fascination of millions of Americans.<sup>4</sup> The objects had already spent more than two years on U.S. soil by the time they reached the doors of the Metropolitan, and yet New York City residents gathered in droves to see them.<sup>5</sup> On opening day, admission lines stretched down Fifth Avenue for more than twenty-three city blocks.<sup>6</sup> How did this collection commandeer the attention of so many? What ancient magic still clings to these artifacts after thousands of years? In the past, only a few insular groups sought answers to these questions, but unprecedented interest in—and skepticism of—cultural expression has forced these issues into the forefront of public discourse.

The upheaval of 2020 galvanized social change in many ways, including prompting several nations to reexamine how they display cultural heritage.<sup>7</sup> These movements, which seek to recontextualize historical monuments to better align with modern values, could not

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image of King Tutankhamun's mask, which is likely the most recognizable funerary mask in the world, see *id.*

<sup>2</sup> See generally Emily Swet, *Retro Ad of the Week: King Tut Exhibit at the Met, 1978*, MASCOLA GRP., <https://mascola.com/insights/retro-ad-week-the-met-advertising-1978/> [<https://perma.cc/6MRV-Y8LY>].

<sup>3</sup> See Meredith Hindley, *King Tut: A Classic Blockbuster Museum Exhibition That Began as a Diplomatic Gesture*, HUMANITIES (Sept./Oct. 2015), <https://www.neh.gov/humanities/2015/septemberoctober/feature/king-tut-classic-blockbuster-museum-exhibition-began-diplom> [<https://perma.cc/6VVM-WBR7>].

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> See Swet, *supra* note 2.

<sup>7</sup> See Aimee Ortiz & Johnny Diaz, *George Floyd Protests Reignite Debate Over Confederate Statues*, N.Y. TIMES (Sept. 12, 2020), <https://www.nytimes.com/2020/06/03/us/confederate-statues-george-floyd.html> [<https://perma.cc/6GR8-S9XJ>]; see also Sonia Elks, *Toppling of UK Statue Fuels Debate on Monuments to Slave Traders*, REUTERS (June 8, 2020 1:43 PM), <https://www.reuters.com/article/us-minneapolis-police-protests-britain-s/toppling-of-uk-statue-fuels-debate-on-monuments-to-slave-traders-idUSKBN23F2FD> [<https://perma.cc/4WPC-KRSY>].

have gained momentum without an understanding of the role that cultural expression and symbolism play in society.<sup>8</sup> The term “cultural heritage” is a catchall for culturally significant works handed down from humanity’s ancestors, encompassing all forms of human expression, from decadent symphonies and epic poems, to humble recipes and household objects.<sup>9</sup> These works allow the modern observer to peer into the past and see the world from a lost perspective.<sup>10</sup> Artisanal works in particular—such as those formerly owned by the young pharaoh—reflect not only the views of the creator, but the values of society; it is this principle that allows archeologists to divine the soul of a civilization from everyday objects found thousands of years after their creators have expired.<sup>11</sup> How cultural heritage is displayed, whether placed behind protective glass or atop a plinth in a public space, also reflects modern values.<sup>12</sup> The public’s waxing appreciation for the relationship between past and present has sparked controversy and spurred demands for more nuanced controls over the use and preservation of cultural heritage.

One way that society moderates the use of cultural heritage is through law, and the laws governing cultural heritage—which have historically failed to excite the attention of the masses—are now subject to unprecedented scrutiny. This scrutiny was recently the animus of a legal complaint filed in Egyptian court, alleging that an international exhibition of artifacts from King Tutankhamun’s tomb violates national laws dedicated to preserving Egyptian cultural heritage.<sup>13</sup> The claim asserts that the exhibition, titled *Tutankhamun: Treasures of the Golden Pharaoh*, does not meet the standards set by the Egyptian government to protect these precious objects and

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<sup>8</sup> See Ortiz & Diaz, *supra* note 7.

<sup>9</sup> See PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW: CASES AND MATERIALS 16–17 (3d ed. 2012).

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See Hannah McGivern, *BBC Investigation Uncovers Legal Dispute Over Blockbuster Tutankhamun Exhibition*, ART NEWSPAPER (July 9, 2020), <https://www.theartnewspaper.com/news/bbc-investigation-uncovers-legal-dispute-over-blockbuster-tutankhamun-exhibition> [<https://perma.cc/4CZY-LDEU>]; Sarah Cascone, *Egypt May Have Broken Its Own Antiquities Laws by Lending Dozens of King Tut Artifacts to a Touring Blockbuster Show*, ARTNET (July 9, 2020), <https://news.artnet.com/exhibitions/king-tuts-lucrative-tour-may-illegal-1893303> [<https://perma.cc/B8J5-PNE2>].

preserve their dignity.<sup>14</sup> Before the court reached a decision, the COVID-19 pandemic closed the exhibition's doors, and the items were returned to Egypt years ahead of schedule.<sup>15</sup> While unlikely to reach a conclusion on the merits, the suit raises lingering questions regarding the practicality and purpose of laws governing cultural heritage. By examining such questions in this unique context, it is possible to glean insight into long-standing debates that have vexed academics for decades.

In Part I, this Note will describe the legislative landscape and moral justification for laws controlling the use and protection of cultural heritage objects. It will detail considerations unique to Egyptian cultural heritage and the significance of King Tutankhamun in Egyptian culture. Part II will introduce the relevant legal dispute and identify underlying issues germane to cultural heritage law globally. Finally, Part III will evaluate the lawsuit's claims and consider the impact of the case in Egypt and abroad. Reflecting on the suit, this Note proposes that the policy changes adopted in Egypt should be applied more broadly to resolve tension between competing interests in cultural heritage law.

## I. THE LAW OF LOOTING, GLOBALLY AND IN EGYPT

### A. *National Patrimony Law*

#### 1. Ideological Origins

Cultural heritage objects are distinct from everyday items and modern cultural works in that the public has a direct interest in their preservation.<sup>16</sup> For this reason, they have been accorded special legal protections governing their ownership and use. National patrimony law describes the state-specific policy that a government

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<sup>14</sup> See McGivern, *supra* note 13.

<sup>15</sup> See *id.*; see Thomas Dowson, *Tutankhamun: Treasures of the Golden Pharaoh 2019–2023*, ARCHAEOLOGY TRAVEL (Dec. 26, 2020), <https://archaeology-travel.com/exhibitions/tutankhamun-treasures-of-the-golden-pharaoh/> [<https://perma.cc/XYP7-NAB9>].

<sup>16</sup> For more background on cultural property, see generally John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339 (1989).

establishes to regulate property originating within its borders.<sup>17</sup> Patrimony laws function by providing legal ownership of found or excavated objects, creating strict controls over their exportation, and establishing civil and/or criminal liability for violations.<sup>18</sup> Many patrimony laws vest ownership of found objects in the national government and disallow private ownership without express authority from the sovereign.<sup>19</sup> State ownership has become something of a standard in patrimony law, but its popularity should not be confused with universal acceptance; critics argue the practice is merely a convenient solution to practical problems, relying on imperfect legal and moral justifications.

Scholars have advanced several competing theories to legitimize state ownership. The “lineage argument” suggests that a nation’s inhabitants share a unique bond with objects pulled from their land, and this connection takes precedence over foreign interests.<sup>20</sup> Critics of this theory argue that national and cultural borders are subject to dramatic change over time, and there may be few, if any, connections between a nation’s current and former residents.<sup>21</sup> For example, objects from the Roman Empire can be found across the Mediterranean—and far beyond—raising difficult questions regarding who their worthy inheritors should be.<sup>22</sup> Alternatively, the “historical context argument” compensates for this criticism by suggesting that the manner in which an object came to its resting place is part of its cultural identity, granting moral authority for its most recent host to take possession.<sup>23</sup> However, this argument provides little guidance as to what constitutes valid cultural movement and might be seen to endorse millennia of looting by ancient and more recent peoples.

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<sup>17</sup> See Leila Amineddoleh, *The Politicizing of Cultural Heritage*, 45 N.C. J. INT’L L. 333, 342–43 (2020).

<sup>18</sup> *See id.*

<sup>19</sup> *See id.* at 343.

<sup>20</sup> *See id.*

<sup>21</sup> *See id.* at 343–44.

<sup>22</sup> *See id.*

<sup>23</sup> *See id.* at 344.

## 2. Translation into National Legislation

Whatever the moral implications, patrimony laws and state ownership have become necessary to ward off looters and prevent intentional destruction of cultural heritage. Following centuries of indelicate pilfering, nations recognized the need to take action and provide protection for culturally significant sites.<sup>24</sup> When untrained opportunists attempt excavation, they damage objects either unintentionally or as part of rendering the works more salable.<sup>25</sup> Critically, they erase the context in which the objects were found, forever depriving the world from learning more about the culture which produced them. Under more dire circumstances, national governments may be required to protect cultural sites from intentional destruction by those attempting to commit cultural erasure.<sup>26</sup> Lastly, nations are often in the best position, through dedicated agencies or ministries, to promote their cultural heritage both domestically and abroad, providing the broadest level of access to the public.<sup>27</sup> For these reasons, patrimony laws have the effect of providing the greatest benefit for their nations and the world, despite any misgivings about their origins.<sup>28</sup>

It is also important to consider that patrimony law is a relatively modern response to a problem that predates antiquity. Cicero conducted the world's first prosecution for illicit seizure of another nation's cultural property against Gaius Verres in the first century B.C. following his garishly corrupt management of Sicily.<sup>29</sup> The Greeks and Romans largely exempted religious works from legitimate booty under the law of war, a practice which extended to cultural property more generally over time so that by the sixteenth and eighteenth centuries, legal scholars were evenly divided as to whether such property could be legitimately seized as an act of war.<sup>30</sup>

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<sup>24</sup> See *id.* at 342, 344–45, 352.

<sup>25</sup> See *id.* at 345.

<sup>26</sup> See, e.g., Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, NAT'L GEOGRAPHIC (Sept. 1, 2015), <https://www.nationalgeographic.com/history/article/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology> [<https://perma.cc/KT9M-C8P6>].

<sup>27</sup> See Amineddoleh, *supra* note 17, at 342, 345–46.

<sup>28</sup> See *id.* at 345–46.

<sup>29</sup> See GERSTENBLITH, *supra* note 9, at 537.

<sup>30</sup> See *id.* at 539.

Cultural looting then soared to new heights in the nineteenth century during the Napoleonic wars: seeking to create a “new Rome,” Napoleon filled the museums and galleries of France with contemporary masterworks and priceless antiquities sourced from his conquest of Europe.<sup>31</sup> Napoleon did not suppose that he was entitled to these objects simply because of his military successes; he fabricated moral authority for seizing the works, and in doing so, first articulated the value that cultural heritage has come to possess on the global stage.<sup>32</sup> A 1796 petition to Napoleon, signed by many of France’s greatest artists, attested that bringing such works to France would elevate French culture, inspire its artists, and serve as a symbol of French cultural and intellectual superiority.<sup>33</sup> Adopting this petition as state policy, France declared it was also acting out of altruism and that the French alone were capable of preserving these works for the world’s benefit.<sup>34</sup> Of course, the world disagreed and with Napoleon’s defeat, France was obligated to return the works—but the ideas surrounding the seizure and display of cultural works had already entered the global consciousness and have echoed throughout history from World War II, to conflicts in Cyprus, Cambodia, and Afghanistan, among many more.<sup>35</sup>

It is in this context that modern patrimony law developed, not only for the sake of the objects themselves, but in concert with global powers vying for international prestige.<sup>36</sup> It may be unsurprising, therefore, that the first nations to develop formal laws were those whose cultural heritage was most sought after, and consequently most vulnerable: Italy, Greece, and Egypt. Italy, which sees itself as the cultural inheritor to the Roman empire, has some of the earliest patrimony laws on record, even predating the formation of

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<sup>31</sup> *See id.* at 537–38.

<sup>32</sup> *See id.* at 538.

<sup>33</sup> *See id.*

<sup>34</sup> *See id.*

<sup>35</sup> *See id.* at 538–39.

<sup>36</sup> For the purposes of this Note, it will only be necessary to discuss domestic patrimony law, however significant efforts have been made to adopt protections for cultural heritage through international law, tracing back to the Lieber Code adopted during the United States Civil War. For more information, see generally John Henry Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. INT’L L. & POL. 1 (1998).

the Italian Republic.<sup>37</sup> In 1462, Pope Pius II was the first in the world to enact formal legislation protecting cultural heritage by restricting exports of antiquities from the Papal States.<sup>38</sup> Today, Italy leads the world as one of the most aggressive enforcers of patrimony law, pursuing the return of illegally sourced Italian artifacts around the world.<sup>39</sup> Greece, whose cultural heritage was frequently targeted by the Romans,<sup>40</sup> enacted its first national patrimony law in 1834, providing that “all objects of antiquity in Greece, as the productions of the ancestors of the Hellenic people, are regarded as the common national possession of all Hellenes.”<sup>41</sup> These early laws shaped the standard for domestic protection of cultural heritage that other nations would follow in the centuries to come.

### 3. Modern Patrimony Law

All nations experience looting of culturally significant sites, yet many nations only recently enacted patrimony laws. For example, although its cultural heritage was popular with collectors for many decades, Mexico enacted its first patrimony law in 1972.<sup>42</sup> However, recent enactment should not be confused with disinterest in protecting cultural heritage. Despite its late arrival, Mexico’s patrimony law is highly ambitious: in addition to vesting ownership of any unregistered artifacts in the state, exportation of cultural heritage is heavily restricted, except as donations or with express authorization from the President.<sup>43</sup> Critics argue such strict limits on export fuel demand for a black market, however Mexico has enjoyed great success in both reducing illegally exported items and recovering illicitly acquired antiquities.<sup>44</sup> In 1982, China adopted its own patrimony law establishing state ownership over all cultural artifacts, requiring

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<sup>37</sup> Leila Amineddoleh, *Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions*, 24 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 729, 751 (2014).

<sup>38</sup> Lindsay E. Willis, *Looting in Ancient Mesopotamia: A Legislation Scheme for the Protection of Iraq’s Cultural Heritage*, 34 *GA. J. INT’L & COMPAR. L.* 221, 235 (2005).

<sup>39</sup> See Amineddoleh, *supra* note 37, at 751–53.

<sup>40</sup> See John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 *ENVIRONS ENV’T. L. & POL’Y J.* 1, 17 (2004).

<sup>41</sup> See *id.* at 52.

<sup>42</sup> See Willis, *supra* note 38, at 236.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

government approval for all excavations (placing foreign excavations under heightened scrutiny), and notably providing for “spiritual or material reward for those who have contributed to the preservation of the cultural heritage.”<sup>45</sup> Mexico and China are among several countries that have either recently enacted or begun to enforce patrimony laws, and while these nations’ efforts should surely be applauded, they lead one to question: why now, after centuries of silence?

Renewed interest in patrimony law undoubtedly draws from many sources. It is beyond the ambit of this Note to draw exhaustive conclusions about this phenomenon, the reasons for which must also vary from country to country. It can be said, at least, that several high-profile restitutions of cultural works enabled by patrimony laws have encouraged countries to be proactive. These laws enable the recovery of illegally held antiquities either directly, by providing a cause of action in a domestic court, or indirectly, by casting the shadow of litigation over cultural institutions which must work tirelessly to remain in the public’s good graces.<sup>46</sup> Even the most venerated organizations, such as the Metropolitan Museum of Art, are not immune to pressure generated by the law and public. In 2008, the Euphronios krater, a 2,500-year-old vase decorated by one of ancient Greece’s most renowned artists,<sup>47</sup> was returned to Italy by the Metropolitan after having purchased it for the highest price paid for an antiquity at auction a few decades prior.<sup>48</sup> In 2013, the Metropolitan returned the *Kneeling Attendants* to Cambodia, a pair of monumental, millennium-old statues, which had similarly arrived in the United States under suspicious circumstances.<sup>49</sup> In 2019, the

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<sup>45</sup> *Id.* (internal quotations omitted).

<sup>46</sup> See generally, Howard N. Spiegler & Yael Weitz, *The Ancient World Meets the Modern World: A Primer on the Restitution of Looted Antiquities*, ART & ADVOC. (Herrick, Feinstein LLP, New York, N.Y.), Spring/Summer 2010.

<sup>47</sup> Elisabetta Povoledo, *Ancient Vase Comes Home to a Hero’s Welcome*, N.Y. TIMES (Jan. 19, 2008), <https://www.nytimes.com/2008/01/19/arts/design/19bowl.html> [<https://perma.cc/B567-QU9A>].

<sup>48</sup> Tom Mashberg, *Ancient Vase Seized from Met Museum on Suspicion It Was Looted*, N.Y. TIMES (July 31, 2017), <https://www.nytimes.com/2017/07/31/arts/design/ancient-vase-seized-from-met-museum-on-suspicion-it-was-looted.html> [<https://perma.cc/6URR-3FJ6>].

<sup>49</sup> Abby Seiff, *How Countries Are Successfully Using the Law to Get Looted Cultural Treasures Back*, A.B.A. J. (July 1, 2014, 10:40 AM), <https://www.abajournal.com/>

Metropolitan was obliged to return a four-million dollar, gold sarcophagus after a criminal investigation revealed the work was sold with false ownership history.<sup>50</sup> This most recent repatriation is a potent example of the Metropolitan transmuting the threat of negative press into something mutually beneficial: it hosted an elaborate ceremony during which it turned possession of the sarcophagus over to Egyptian officials, recasting the museum's image as a liberator of looted art, rather than its purchaser.<sup>51</sup> The Metropolitan is not alone in demonstrating how growing media attention and public scrutiny over the possession and application of cultural works compels powerful organizations to part with millions in notable antiquities.<sup>52</sup>

Though not universally successful,<sup>53</sup> nation-backed reparation efforts have been encouraged by new avenues of judicial recovery and the potency of public pressure on institutions to return illicitly-sourced works. In some nations, the government does not work alone. For example, Chinese private collectors animated by nationalistic pride have paid record prices to see Chinese antiquities return to their homeland after decades (or even centuries) of foreign possession.<sup>54</sup> Even without the threat of judicially-enforced repatriation, public pressure can compel an institution in open possession of

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magazine/article/how\_countries\_are\_successfully\_using\_the\_law\_to\_get\_looted\_cultural\_treasure [https://perma.cc/5E94-N2CH].

<sup>50</sup> See Eileen Kinsella, *Last Year the Met Spent \$4 Million on a Golden Sarcophagus. It Turned Out to Be Looted. Now They Had to Send It Back*, ARTNET (Sept. 26, 2019), <https://news.artnet.com/art-world/new-york-returns-ancient-4m-mummy-1661824> [https://perma.cc/WGJ3-GFJK].

<sup>51</sup> See *id.*

<sup>52</sup> See Robin Scher, *Better Safe Than Sorry: American Museums Take Measures Mindful of Repatriation of African Art*, ARTNEWS (June 11, 2019, 11:45 AM), <https://www.artnews.com/artnews/news/african-art-repatriation-american-museums-12750/> [https://perma.cc/X8JP-FXLT].

<sup>53</sup> Not all cultural institutions are as cooperative as the Metropolitan. For example, the Getty Museum in San Francisco has famously refused to return a bronze sculpture the Italian government fervently believes to be looted, spurring a decades-long lawsuit and unending academic debate. See Elisabetta Povoledo, *Italy Still Wants the Getty Bronze, and Perhaps More*, N.Y. TIMES (May 24, 2019), <https://www.nytimes.com/2019/05/24/arts/getty-museum-italy-artifacts-bronze.html> [https://perma.cc/9EJY-H3FL].

<sup>54</sup> See Matthew Keegan, *Wealthy Collectors Bring China's Lost and Stolen Artwork Back Home*, CULTURE TRIP (Aug. 9, 2017), <https://theculturetrip.com/asia/china/articles/wealthy-collectors-bring-chinas-lost-and-stolen-artwork-back-home/> [https://perma.cc/8HJP-TKSG].

a looted artwork to see the light—an art world development that would have been unimaginable a few decades ago.<sup>55</sup> These shifts in public and private behavior make clear that the landscape of patrimony law has changed. Nations are taking more dramatic actions to protect their cultural heritage, and their interest in protecting and returning cultural heritage is echoed in the public, forcing the discussion regarding cultural heritage from academic circles to center stage.

### B. *The Elgin Marbles*

Recent developments in patrimony law have drawn public attention to cultural heritage issues and brought change to an entrenched industry. However, neither patrimony law nor public pressure have offered a resolution to the most open and notorious controversy in the field of cultural heritage: the Elgin Marbles (“the Marbles”).<sup>56</sup> The debate over the Marbles places the core considerations of cultural heritage law in competition with each other and has left academics and government officials in a stalemate of moral authority. This stagnation set passions ablaze,<sup>57</sup> and left difficult, seemingly unanswerable questions at the feet of nations and cultural institutions. The Marbles’ story is relevant to this Note because it anticipates many of the considerations at issue in the more recent Egyptian

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<sup>55</sup> For example, an Austrian auction house recently withdrew a painting from an upcoming sale after enduring considerable public scorn when evidence arose suggesting the work had been looted by Nazis. See Nina Siegal, *Owner Withdraws Nazi-Looted Painting from Auction in Austria*, N.Y. TIMES (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/arts/design/owner-withdraws-nazi-looted-painting-from-auction-in-austria.html> [https://perma.cc/F3AH-AE4A]. Under Austrian law, a good-faith purchaser can acquire valid title of stolen property under certain conditions. However, whatever the state of his title, the owner buckled under public outcry and asked to have the lot withdrawn. See *id.* This recent occurrence goes against a perception that auction houses are notoriously insensitive to works with questionable ownership history. See, e.g., Scott Reyburn, *Disputed African Artifacts Sell at Auction*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/2020/06/29/arts/design/christies-african-art-auction.html> [https://perma.cc/8H3N-SMXS].

<sup>56</sup> The title “Elgin Marbles” is itself controversial and might be seen to indicate the author’s own conclusions about the debate; this Note does not attempt to reach a conclusion about the marbles and merely uses what has been historically their most popular name.

<sup>57</sup> The debate has even been committed to prose by Lord Byron. See LORD BYRON, CHILDE HAROLD’S PILGRIMAGE Canto the Second, Stanza XIII (1812), <http://www.gutenberg.org/files/5131/5131-h/5131-h.htm> [https://perma.cc/QY4H-XZJN].

dispute. Similarities between the two demonstrate that certain considerations in cultural property disputes are universal. For this reason, the Egyptian case is not subject solely to Egyptian law; it must respond to a global precedent governing how these objects are treated. This Note will make clear that although the Egyptian dispute may never reach judicial resolution, it can nevertheless help guide international precedent in the best interest of cultural objects and the appreciating public.

### 1. The Travels and Trials of Lord Elgin

At the start of the nineteenth century, Thomas Bruce, seventh Earl of Elgin, was ambassador to the Sublime Porte of the Ottoman Empire.<sup>58</sup> By his own account, he was concerned that the great artworks of antiquity held in temples across Greece, then occupied by the Ottomans, would suffer under Turkish indifference.<sup>59</sup> Lord Elgin requested permission to have artists measure and sketch important sculptures and architectural details for posterity—a request which was granted along with permission “to take away any pieces of stone with old inscriptions or figures thereon.”<sup>60</sup> Seizing this opportunity, he traveled Greece for the next eleven years, pruning friezes, sculptures, and architectural elements from cultural sites in Athens, Attica, and beyond, all shipped to his personal residence in Great Britain.<sup>61</sup> Infamously, Lord Elgin began his tour on July 31, 1801, by instructing sailors and laborers to scale the walls of the Parthenon and remove a sculptured block from the temple’s face.<sup>62</sup>

The importance of the Parthenon to Hellenic culture cannot be overstated: Athena’s temple, perched at the top of the Athenian Acropolis, is one of Greece’s most sacred and recognizable cultural sites, as precious to modern Greece as it was to the ancient people who worshiped there.<sup>63</sup> For over two-thousand years, the Parthenon

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<sup>58</sup> See John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1882 (1985).

<sup>59</sup> See *Elgin Marbles*, BRITANNICA, <https://www.britannica.com/topic/Elgin-Marbles> [<https://perma.cc/53A4-ZXH6>].

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*

<sup>62</sup> See Derek Fincham, *The Parthenon Sculptures and Cultural Justice*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 943, 946 (2013).

<sup>63</sup> See Merryman, *supra* note 59, at 1883.

was adorned by some of the best sculptures surviving antiquity, emblematic of Hellenism itself—until Lord Elgin removed more than half for his collection.<sup>64</sup> This group of sculptures was popularly known as the Elgin Marbles and became the focal point of one of the art world’s most enduring controversies.

Upon returning to Britain, the press harshly admonished Lord Elgin for his plundering and dishonesty, most famously by Lord Byron who satirized Lord Elgin’s personal life, suggesting that Lord Elgin’s scandalous divorce in the years following his return was divine punishment issued by the gods he defaced.<sup>65</sup> A parliamentary commission was established to address the Marbles, and in 1816, the crown acquired the entire collection for £35,000—half what Lord Elgin paid for their removal.<sup>66</sup> After their acquisition, ownership of the Marbles transferred to the trustees of the British Museum in London, where they have remained on display for the last 200 years, presented as “The Elgin Collection.”<sup>67</sup> Today, the British Museum has eschewed this contestable title, which was mandated in the Act transferring ownership from the government, and lists them publicly as “The Parthenon Marbles,” perhaps attempting to promote their Greek origin or obscure their lurid past.<sup>68</sup>

## 2. The Fate of the Elgin Marbles

Whatever their title, the Marbles have been the subject of unending debate since they left Greece, enduring constant pleas for their return. Requests for the Marbles’ return are no less impassioned today as they were in Lord Elgin’s time. In 1983, the Greek government’s first formal request for the Marbles’ return was made by the Minister of Culture, celebrated actress, Melina Mercouri, who called the Marbles “the symbol and the blood and the soul of the Greek

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<sup>64</sup> See Fincham, *supra* note 63, at 946.

<sup>65</sup> See Dean Kalimniou, *Lord Byron vs Lord Elgin, A Tale of Two Peers*, NEOS KOSMOS (July 16, 2019, 10:46 AM), <https://neoskosmos.com/en/2019/07/16/dialogue/opinion/lord-byron-vs-lord-elgin/> [<https://perma.cc/XHP2-P7N3>].

<sup>66</sup> See *Elgin Marbles*, *supra* note 60.

<sup>67</sup> See Fincham, *supra* note 63, at 943, 953–54.

<sup>68</sup> See *id.*; see also *The Parthenon Sculptures*, BRIT. MUSEUM, <https://www.britishmuseum.org/about-us/british-museum-story/objects-news/parthenon-sculptures> [<https://perma.cc/KCC2-R2VX>]; *Elgin Marbles*, *supra* note 60.

people.”<sup>69</sup> Prominent cultural heritage academic, John Henry Merryman, describes the argument for the Marbles’ return in its most reduced form as either (1) Lord Elgin never acquired proper title for the Marbles, which are being held illegally in Britain; or (2) Lord Elgin did acquire valid title, however continued possession by the British government is amoral.<sup>70</sup> Professor Merryman finds that returning the Marbles is not justified in either instance by separating the Marbles from the controversial deeds of their namesake and instead considering what justice demands today.<sup>71</sup> He begins his analysis with the principle of repose, that an existing situation should continue unless there is sufficient reason for change.<sup>72</sup> For cultural heritage generally, this principle most often favors a work’s country of origin.<sup>73</sup> In this context, however, it benefits the British Museum and other organizations with large collections of foreign antiquities.<sup>74</sup> He goes on to explain why the reasons supporting the Marbles’ return are unavailing.

The argument for British retention of the Marbles must begin by challenging the instinct that national people are entitled to a superior, intrinsic right to their cultural heritage over all other peoples.<sup>75</sup> Central to this idea is a belief that native people are the most incentivized, and therefore best equipped, to ensure cultural works’ preservation.<sup>76</sup> However, the Marbles’ tale suggests this is not necessarily true. The Parthenon Marbles that remained in Greece may not have experienced the outright destruction that Lord Elgin feared, but they did suffer continued exposure to harsh elements, including Athens’ smog, while Lord Elgin’s captive Marbles were preserved under the best possible conditions.<sup>77</sup> Moreover, during this time, the

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<sup>69</sup> See Merryman, *supra* note 59, at 1882–83.

<sup>70</sup> See *id.* at 1895–96.

<sup>71</sup> See *id.* at 1909–10. Professor Merryman also criticizes the one-dimensional depiction of Lord Elgin as plunderer, noting that Elgin was an early advocate for Greek art in England, who ran himself into considerable debt to have the works exported purportedly for their preservation. See *id.* at 1908–09.

<sup>72</sup> See *id.* at 1911.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See *id.* at 1911–13

<sup>76</sup> See *id.* at 1913.

<sup>77</sup> See *id.* at 1917.

Marbles were always properly attributed to Greece, and their presence in London led to a surging interest in Greek sculpture, rapidly advancing academic efforts dedicated to understanding Hellenic culture.<sup>78</sup> Indeed, in response to Napoleon's "new Rome," England sought to refashion itself as a "new Athens," helping to disseminate ancient Greek principles and philosophies throughout Europe.<sup>79</sup>

Professor Merryman also rejects the notion that native people are entitled to a superior right to derive economic benefits from their cultural heritage.<sup>80</sup> He characterizes economic rights as a legal, not a moral, consideration best expressed through property law.<sup>81</sup> Accordingly, if the Marbles are the British Museum's legal property, which Professor Merryman believes to be the case, then the Museum enjoys the exclusive right to profit from the Marbles.<sup>82</sup>

Finally, Professor Merryman contends that base nationalistic pride is an insufficient reason for return when balanced against the works' preservation.<sup>83</sup> He warns that arguments based in "sentiment and mysticism" can be applied in any direction: for example, it can be argued that the two centuries the Marbles have steeped in British culture might legitimize their continued possession.<sup>84</sup> Professor Merryman would subordinate these murky considerations to a singular, preeminent aim of cultural heritage: preservation of antiquities for the benefit of all mankind.<sup>85</sup> He posits that return of the Marbles for moral, not legal reasons, would set a dangerous precedent supporting the return of all cultural heritage works to their country of origin, whether sourced ethically or not, and fears that humanity would suffer for loss of access to foreign cultures.<sup>86</sup>

Others point out that simple refusal to return the Marbles cannot be the solution, if only because Greece will never stop demanding

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<sup>78</sup> *See id.* at 1913.

<sup>79</sup> *See* GERSTENBLITH, *supra* note 9, at 538.

<sup>80</sup> *See* Merryman, *supra* note 59, at 1914–16.

<sup>81</sup> *See id.*

<sup>82</sup> *See id.* at 1914.

<sup>83</sup> *See id.* at 1915.

<sup>84</sup> *Id.* at 1916.

<sup>85</sup> *See id.* at 1916–17.

<sup>86</sup> *See id.* at 1919–21.

their return.<sup>87</sup> Moreover, as the public becomes more sensitive to issues in cultural heritage, the balance of justice shifts to demand a more elegant resolution.<sup>88</sup> The context in which a work is presented affects the way it is perceived. Presenting the Marbles in London as the spoils of Lord Elgin, as opposed to in their national home of Greece, deprives the audience from an essential aspect of the intended artistic expression.<sup>89</sup> However, until parties devise a more creative solution that satisfies all, or at least a compelling majority of interests, the debate remains at a standstill. In the meantime, the Marbles will continue their extended sojourn in London, while reproduction plaster casts can be viewed in the New Acropolis Museum in Athens, which was created to meticulously replicate the context in which the originals were displayed.<sup>90</sup> Much like the debate over the Marbles themselves, the argument over which experience is more authentic is likely to vex classrooms and dinner parties for years to come.

### C. *Egyptian Cultural Heritage*

Ancient Egypt occupies a special place in the world's collective imagination. With a rich and mystic history that captured the fascination of the first historian Herodotus, a contemporary of the Parthenon Marbles, it is no surprise ancient Egypt produced some of the most distinct and captivating works of cultural heritage still accessible to the modern world.<sup>91</sup> However, ancient Egyptian works have not always been accorded with protection commensurate to this position. To fully understand the cultural heritage considerations unique to ancient Egyptian works, it is essential to explore how these objects rose to their position atop a plinth of world culture.

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<sup>87</sup> See Fincham, *supra* note 63, at 946.

<sup>88</sup> See *id.* at 947–48.

<sup>89</sup> See *id.* at 986–87.

<sup>90</sup> See *id.* at 1013–14.

<sup>91</sup> See Bob Brier, *Egyptomania! What Accounts for our Intoxication with Things Egyptian?*, *ARCHAEOLOGY*, Jan./Feb. 2004, at 16.

### 1. The Rape of Egypt

Even in their own time, ancient Egyptian cultural works were not safe from looting, often by Egyptians themselves.<sup>92</sup> The wealthy of ancient Egypt were entombed with their most extravagant possessions—objects that were easy prey for the hands carrying out the entombing.<sup>93</sup> The allure of hidden caches of treasure has since fueled the ambition of looters, a practice that sadly continues today, making Egypt one of the most plundered nations in history.<sup>94</sup>

The bounty of Egypt's past also drew the eye of Napoleon following successful military campaigns in Italy, Germany, and Russia.<sup>95</sup> Furthering his efforts to funnel culturally significant works to the Louvre Museum, Napoleon coerced these nations into surrendering scores of important artworks as part of treaty agreements, including the famed bronze horses and winged lion of St. Mark's Basilica in Venice, and hundreds of Vatican manuscripts.<sup>96</sup> Napoleon's mission to Egypt was purportedly more humanitarian in nature: to free the Egyptian people from centuries of Ottoman subjugation and establish self-rule (of course it was merely incidental that British trade access to India would be extinguished).<sup>97</sup> In 1798, Napoleon decisively expelled the Ottomans and installed a military government that imposed a form of indirect rule.<sup>98</sup> With the aid of 165 French scientists, scholars, and artists, Napoleon established the Institut d'Égypte to centralize higher education in Egypt, including the study of its antiquities.<sup>99</sup> It was here that the Rosetta Stone began to unravel the mysteries of Egyptian hieroglyphics when it was discovered in 1799.<sup>100</sup> However, it was not long before the Institut issued a proposal recommending certain artifacts be selected for exportation and preservation in France.<sup>101</sup> Employing the same moral justification as Lord Elgin, massive quantities of Egyptian antiquities

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<sup>92</sup> See Cohan, *supra* note 40, at 13–14.

<sup>93</sup> See *id.* at 14.

<sup>94</sup> See *id.* at 13.

<sup>95</sup> See *id.* at 16.

<sup>96</sup> See *id.*

<sup>97</sup> See *id.* at 15.

<sup>98</sup> See *id.*

<sup>99</sup> See *id.* at 15–16.

<sup>100</sup> See *id.* at 17–18.

<sup>101</sup> See *id.* at 16.

were exported to France for fear of continued waste in their home country.<sup>102</sup> Gorged on stolen art, the Louvre was renamed the “Musée Napoléon” in 1803 and would become Europe’s largest repository of cultural property.<sup>103</sup>

Napoleon’s fortune soon changed. General Nelson famously sank the Napoleonic fleet at the Battle of the Nile, leading to France’s withdrawal from Egypt.<sup>104</sup> As part of the negotiated peace agreement, France forfeited its archeological plunder to Britain, which directed the vast collection of antiquities to its own national museum.<sup>105</sup> Later, Napoleon suffered defeat at Waterloo, and after several rounds of negotiations, the Congress of Vienna of 1815 obligated France to return all the cultural works it seized as spoils of war.<sup>106</sup> Conspicuously, Egyptian antiquities already ceded to Britain were not included under the treaty’s terms, many of which still reside in England and other western nations.<sup>107</sup> The Rosetta Stone, for example, which could serve as a symbol of cross cultural harmony and understanding, remains on display under the same roof as the Elgin Marbles, at the British Museum.<sup>108</sup>

## 2. Egyptomania

An indirect consequence of Napoleon’s Egyptian campaign was that a great wealth of Egyptian antiquities lay scattered throughout Europe, leading to the advancement of Egyptology,<sup>109</sup> and the

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<sup>102</sup> *See id.* at 17.

<sup>103</sup> *See id.* at 16.

<sup>104</sup> *See id.* at 18.

<sup>105</sup> *See id.*

<sup>106</sup> *See id.* at 19–20. The proposal to return cultural property was fiercely opposed by the French when it was first introduced during negotiations for the Treaty of Paris in 1815. *Id.* at 20. The French delegate to the negotiations accused the British delegate of hypocrisy, and of surreptitiously undermining the Louvre in favor of the British Museum. *Id.* at 19–20. The British delegate, William Hamilton, had formerly served as Lord Elgin’s secretary and personally oversaw the removal of the Parthenon Marbles. *See id.* at 20.

<sup>107</sup> *See id.* at 20–21.

<sup>108</sup> *See Explore: the Rosetta Stone*, BRITISH MUSEUM, <https://www.britishmuseum.org/collection/egypt/explore-rosetta-stone> [<https://perma.cc/HE85-R9TC>]. The British Museum’s description of the Rosetta Stone includes its discovery by Napoleonic troops, but conspicuously omits how it arrived in the museum’s collection.

<sup>109</sup> Egyptology is the academic study of Ancient Egypt. *See* Eleanor Dobson & Nichola Tonks, *Introduction: Ancient Egypt in Nineteenth-Century Culture*, 40 NINETEENTH-CENTURY CONTEXTS 311, 311 (2018).

sudden arrival of Egyptomania, a popular fascination with Egyptian history, ideas, and iconography.<sup>110</sup> Throughout the nineteenth century, synergy developed between these distinct yet related ideologies, where promotion of one would benefit the other.<sup>111</sup> The Rosetta Stone was partially deciphered in 1822, rendering the many artifacts and archeological sites bearing hieroglyphics legible for the first time in centuries.<sup>112</sup> Egyptology gained traction as a respectable academic doctrine, and at the same time, ancient Egyptian imagery seeped into popular culture.<sup>113</sup> The world's first story featuring a re-animated mummy debuted in 1827.<sup>114</sup> Both disciplines surged again as Egypt became more accessible to Europeans via the opening of the Suez Canal in 1869 and the British occupation of Egypt in 1882.<sup>115</sup>

### 3. King Tut: Excavation to Exhibition

Perhaps the most galvanizing event in both Egyptology and Egyptomania was just around the corner: the discovery of King Tutankhamun's tomb. British archeologist Howard Carter discovered the tomb in 1922,<sup>116</sup> the same year Egypt declared its independence.<sup>117</sup> It was the best preserved of all discovered tombs, providing Egyptologists unparalleled access to over 5,000 objects, spanning gold statues, jewelry, and decorated boxes, to everyday items such as linen shirts, loaves of bread, and garlands of flowers.<sup>118</sup> However, it was not just the tomb's contents that caught the public's attention. The world was singularly primed for a spectacle: media outlets were eager to take advantage of the radio's recent invention, allowing news to travel at unprecedented speeds and reach broader audiences.<sup>119</sup> An art photographer from the Metropolitan was brought in

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<sup>110</sup> *See id.*

<sup>111</sup> *See id.* at 313.

<sup>112</sup> *See id.* at 311–12.

<sup>113</sup> *See id.* at 313.

<sup>114</sup> *See id.* at 311–12.

<sup>115</sup> *See id.* at 312.

<sup>116</sup> *See* Patricia Clavin, *King Tutankhamun: How a Tomb Cast a Spell on the World*, BBC (Oct. 29, 2019), <https://www.bbc.com/culture/article/20191029-king-tutankhamun-the-tragic-cause-of-the-pharaohs-cult> [<https://perma.cc/2V97-EEGF>].

<sup>117</sup> Dobson & Tonks, *supra* note 110, at 312.

<sup>118</sup> *See* Clavin, *supra* note 117.

<sup>119</sup> *See id.*

to photograph the excavation, and using newly developed lighting and staging techniques from Hollywood, captured the dig from bold, dramatic angles.<sup>120</sup> The excavation was partially financed by *The Times* in exchange for exclusive coverage, which kept the excavation in the public eye as *The Times* sought to recoup its investment over nearly ten years of digging.<sup>121</sup> The pharaoh himself piqued imaginations once archeologists discovered that King Tutankamun died between the ages of seventeen and nineteen, having suffered multiple injuries.<sup>122</sup> The surprising circumstances of his death renewed speculation over ancient curses tracing back to the untimely death of the project's chief financier only a few weeks after the tomb's opening.<sup>123</sup> The rise of consumerism in the 1920s also reflected the public's interest in Tutankhamun, as Egyptian motifs appeared in advertisements and fashion trends.<sup>124</sup> King Tutankhamun became the focal point of the world's fascination with ancient Egypt, serving as an ambassador to the world for Egyptian culture and enchanting the masses with the luxury and mystery of a lost kingdom.

This is how King Tutankhamun achieved fame 3,200 years after his death, rising from near obscurity to one of the most famous figures in Egyptian history, as recognizable as Ramses II or Cleopatra, despite having ruled for only a few short years.<sup>125</sup> It should seem odd that, in contrast to these monumental figures (literally), King Tutankhamun is often first in people's minds to represent Egyptian culture; his gold burial mask is the face of Egypt—at least more so than artifacts from Ramses II or Cleopatra.<sup>126</sup> This context helps illustrate that the love shown for King Tutankhamun is not exactly reverence for a historical figure, but a reflection of the fascination the world has for his culture. Perhaps it was for this reason that the newly formed Egyptian government, despite a quickly earned

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<sup>120</sup> *See id.*

<sup>121</sup> *See id.*

<sup>122</sup> *See id.*

<sup>123</sup> *See id.*

<sup>124</sup> *See id.*

<sup>125</sup> *See Tutankhamun's First Tour and Its Influence on Popular Culture*, KING TUT EXHIBITION, <https://kingtutexhibition.com/news/tutankhamuns-first-tour-and-its-influence-on-popular-culture/> [https://perma.cc/XR89-6PMB].

<sup>126</sup> *See id.*

reputation for closely guarding its cultural treasures,<sup>127</sup> consented to a series of worldwide exhibitions of select artifacts from King Tutankhamun's tomb in the 1960s and 1970s.<sup>128</sup>

Negotiations to bring the tour to the United States originated from an unlikely source: Richard Nixon.<sup>129</sup> Nixon hoped to present the United States' most recent ally to the electorate in a favorable light and negotiated a cultural exchange as part of a bilateral agreement with the President of Egypt, Anwar Sadat.<sup>130</sup> Egypt agreed to supply pieces for an exhibition of King Tutankhamun's artifacts in exchange for help rebuilding Cairo's opera house.<sup>131</sup> Heralded as the world's first "blockbuster exhibit," the exhibition was designed to be the most extravagant display of cultural heritage objects the United States had ever seen.<sup>132</sup> *The Treasures of Tutankhamun* was scheduled to have a four-month residency in six cities: Washington, D.C., Chicago, New Orleans, Los Angeles, Seattle, and finishing at the Metropolitan Museum of Art in New York City.<sup>133</sup> The selected objects were so valuable that in order to afford the insurance, the tour became the first in world history to be indemnified by a government act: the December 1975 Arts and Artifacts Indemnity Act.<sup>134</sup> The tour was a critical and commercial success, shattering records everywhere it went.<sup>135</sup> Over 835,000 people visited Tutankhamun during his first stop at the nation's capital, more than the

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<sup>127</sup> See Clavin, *supra* note 117.

<sup>128</sup> See Hindley, *supra* note 3.

<sup>129</sup> See *id.*

<sup>130</sup> See *id.*

<sup>131</sup> See *id.*

<sup>132</sup> See *id.* Although the Metropolitan Museum eventually beat out the National Gallery of Art in Washington, D.C. in an intense bidding process to organize the exhibit, the Metropolitan was initially disinterested in the project. See *id.* Allegedly, Secretary of State Henry Kissinger threatened to have the director of the Metropolitan's taxes audited if the museum failed to get involved. See *id.*; see also Rebecca Carlsson, *Go Big or Go Home: How Blockbuster Exhibitions Are Saving Museums*, MUSEUM NEXT (Jan. 26, 2020), <https://www.museumnext.com/article/go-big-or-go-home-how-blockbuster-exhibitions-are-saving-museums/> [<https://perma.cc/W3M8-9GQU>].

<sup>133</sup> See Hindley, *supra* note 3. Even the number of cities was strategically chosen; Nixon wanted six cities to beat out Tutankhamun's three-city tour in Russia a few years earlier. See *id.*

<sup>134</sup> See *id.*

<sup>135</sup> *Id.*

total population of Washington, D.C.<sup>136</sup> In Louisiana, monthly museum subscriptions quadrupled during Tutankhamun's visit.<sup>137</sup> In New York City, tourists traveling to view the young pharaoh poured \$110 million into the local economy; litigation was even levied against a New Jersey business attempting to scalp tickets.<sup>138</sup> The exhibition made Tutankhamun a household name, even inspiring a popular *Saturday Night Live* sketch featuring Steve Martin in gift-shop quality pharaoh's garb, singing an original composition about the tour.<sup>139</sup> King Tutankhamun shared a pharaoh's wealth wherever he went, not only with museums, but with entire communities, and in doing so, established a high mark in the exhibition world.

## II. CAIRO CAN SET A GLOBAL PRECEDENT

After centuries of looting by individuals and nations alike, Egypt is now one of the most ambitious countries in protecting its cultural heritage, having successfully repatriated several high-profile artifacts in recent years alone. Mentioned earlier,<sup>140</sup> Egyptian authorities worked with the Manhattan District Attorney's office to investigate and ultimately return a prized sarcophagus, now on display in Egypt.<sup>141</sup> That same year, Egypt announced plans to sue the new owner of a stone head resembling King Tutankhamun, which sold at Christie's Auction House in Britain for \$5.97 million.<sup>142</sup> After showing such consideration for Egyptian antiquities in others'

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<sup>136</sup> *See id.*

<sup>137</sup> *See id.*

<sup>138</sup> *See id.*

<sup>139</sup> *See id.*; *see also* Saturday Night Live, *King Tut – SNL*, YOUTUBE (Sep. 10, 2013), <https://www.youtube.com/watch?v=FYbavuReVF4> [https://perma.cc/LH6E-NCD8] (singing of the Pharaoh, Martin aptly remarks, "he gave his life for tourism," followed shortly by two dancers releasing a saxophonist in gold face paint from a sarcophagus).

<sup>140</sup> *See supra* Part I.A.iii.

<sup>141</sup> *See* Lauren Monsen, *U.S. Sends Stolen Ancient Gold Coffin Back to Egypt*, SHAREAMERICA (Oct. 23, 2019), <https://share.america.gov/u-s-sends-stolen-ancient-gold-coffin-back-to-egypt/> [https://perma.cc/MXK8-Q3UW].

<sup>142</sup> Amy Woodyatt, *Egypt Will Sue Following Sale of \$5.97 Million Tutankhamun Statue*, CNN (July 10, 2019), <https://www.cnn.com/style/article/egypt-lawsuit-statue-intl-scli-gbr/index.html> [https://perma.cc/DMM7-8NNQ]. It should be noted that Christie's offered the piece at auction over protests from Cairo that the piece had been stolen, suggesting litigation was soon to follow. *See id.*

possession, it likely came as a shock to be accused of misusing the antiquities under its own control.<sup>143</sup>

Seeking to recapture the same zeitgeist as the twentieth century exhibitions, the Egyptian Ministry of Antiquities announced its partnership with a private exhibitions company, Exhibitions International, to launch another worldwide tour of King Tutankhamun's artifacts.<sup>144</sup> To celebrate 100 years since the tomb's discovery, *Tutankhamun: Treasures of the Golden Pharaoh* would be the most elaborate and extensive exhibit to date; it nearly tripled the number of objects displayed during the six-city tour, to nearly one hundred fifty objects—sixty of which had never before left Egypt.<sup>145</sup> From 2018 to 2024, Tutankhamun's relics were expected to visit ten cities, including Los Angeles, Paris, and London.<sup>146</sup> Excitement mounted further when Ministry officials announced that once these objects returned home at the end of the tour, they would never again leave Egypt.<sup>147</sup> Instead, the objects would arrive at the newly appointed Grand Egyptian Museum, slated for completion in 2021, a state-of-the-art facility designed to preserve the objects indefinitely.<sup>148</sup> Funding for the new museum is dependent on revenue generated by the exhibition, which has already brought in more than \$20 million for the Egyptian government.<sup>149</sup> The museum's development has already suffered multiple delays, but once complete, is expected to provide the highest level of protection for the objects within and

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<sup>143</sup> See McGivern, *supra* note 13.

<sup>144</sup> See *id.*; see also Kabir Jhala, *King Tutankhamun's Treasures Come to London's Saatchi Gallery Before Returning to Egypt Forever*, ART NEWSPAPER (Feb. 21, 2019), <https://www.theartnewspaper.com/news/largest-collection-of-king-tutankhamun-s-treasures-come-to-saatchi-gallery-before-returning-to-egypt-forever> [https://perma.cc/BS8Y-ALM8].

<sup>145</sup> See Jhala, *supra* note 145; see also Eileen Kinsella, *King Tut's Treasures Are Traveling the World for the Last Time*, ARTNET NEWS (Feb. 22, 2019), <https://news.artnet.com/exhibitions/king-tut-treasures-coming-to-saatchi-gallery-1472509> [https://perma.cc/ZK4A-WVU2].

<sup>146</sup> See Kinsella, *supra* note 146; see also Dowson, *supra* note 15; Cascone, *supra* note 13.

<sup>147</sup> See Kinsella, *supra* note 146.

<sup>148</sup> See Cascone, *supra* note 13.

<sup>149</sup> See *id.*

would be managed by an international committee of specialists rather than the Egyptian government.<sup>150</sup>

After the objects embarked on their final world tour, a BBC documentary revealed a legal challenge levied against the exhibition on the grounds that it violated Egyptian national patrimony law.<sup>151</sup> Egyptian lawyer Sayed Said filed a claim against the Ministry of Antiquities in his individual capacity, alleging the exhibition violated an earlier version of the patrimony law's prohibition against (1) loaning Egyptian antiquities to private institutions, as opposed to educational and research organizations; and (2) allowing "unique" artifacts to leave Egypt.<sup>152</sup> Tellingly, Egypt's patrimony law has since been amended to omit these prohibitions.<sup>153</sup> However, Said argues that because the controlling contract was signed prior to the law's amendment, the earlier version is applicable.<sup>154</sup> The current law does not impose any limitation on the types of objects available for loan or to whom they can be loaned.<sup>155</sup> It merely mandates that the Cabinet and the Supreme Council of Antiquities approve international exhibitions.<sup>156</sup> Both of the tour's organizers have vehemently denied the allegations; IMG, Exhibitions International's parent company, told reporters that the objects are not unique and are part of a larger series.<sup>157</sup> The former Minister of Antiquities who

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<sup>150</sup> See Henri Neuendorf, *Grand Egyptian Museum Won't Be Managed by the State*, ARTNET (Aug. 26, 2015), <https://news.artnet.com/art-world/grand-egyptian-museum-management-327871> [<https://perma.cc/DN2L-QDSM>]. Independent management of a cultural institution helps to insulate the objects within from dramatic political movements; a similar system was set in place to govern the Bibliotheca Alexandria, a re-imagining of the Library of Alexandria of antiquity completed in 2002. *See id.*

<sup>151</sup> BBC News, *Behind the Mask: Tutankhamun's Last Tour*, YOUTUBE (July 7, 2020), <https://www.youtube.com/watch?v=wQWVpskwQH8&list=PL439F79F627C5A421&index=3> [<https://perma.cc/7DXA-3XV5>]; *see also* McGivern, *supra* note 13; Tessa Solomon, *Blockbuster Tutankhamun Show at London's Saatchi Gallery May Violate Egyptian Antiquity Laws: Report*, ARTNEWS (July 9, 2020, 11:28 AM), <https://www.artnews.com/art-news/news/tutankhamun-saatchi-gallery-exhibition-lawsuit-egyptian-laws-1202693750> [<https://perma.cc/F9HR-WEJ4>].

<sup>152</sup> McGivern, *supra* note 13.

<sup>153</sup> *See id.*

<sup>154</sup> *See id.*

<sup>155</sup> *See id.*

<sup>156</sup> *See id.*

<sup>157</sup> *See* Cascone, *supra* note 13. IMG is also responsible for the renowned international art show, the Frieze Art Fair. *See id.*

orchestrated the deal, Zahi Hawass, a notable—and notorious<sup>158</sup>—Egyptologist, was quoted, “these touring artifacts aren’t of any importance,” in direct contradiction to earlier press statements in which he stated, “each object is unique.”<sup>159</sup> Mr. Hawass occupies a controversial position in the field of archeology. His pageantry and grandiose persona helped revive tourism in Egypt (he even starred in a reality television show for the History Channel), but Hawass came under harsh criticism during the 2011 Egyptian revolution for his close proximity to President Mubarak.<sup>160</sup> Allegations of corruption and mismanagement compelled his resignation years later.<sup>161</sup>

Said’s complaint mirrors a similar lawsuit decided in 2012 against the Ministry for coordinating an international exhibition of artifacts associated with Cleopatra.<sup>162</sup> Another joint venture between then-Minister Hawass and Exhibitions International, the tour was successfully challenged under the same patrimony law, leading a Cairo court to order the exhibit’s closure only two years into its three-year schedule.<sup>163</sup>

Egyptian court records are not publicly available, and with the global pandemic causing congestion in the courts, the case’s status is unclear. Moreover, the exhibition was indefinitely postponed after arriving at the Saatchi Gallery in London.<sup>164</sup> By that time, the exhibit already attracted over 1.4 million visitors in Paris and 580,000 in London, a number that would have surely climbed much higher had the exhibit continued.<sup>165</sup> Tutankhamun’s treasures have since returned to Egypt, temporarily displayed or in storage across Egypt’s museums.<sup>166</sup> What lies ahead for these objects, as well as the lawsuit they inspired, is unclear.

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<sup>158</sup> See generally Joshua Hammer, *The Rise and Fall and Rise of Zahi Hawass*, SMITHSONIAN MAG. (June 2013), <https://www.smithsonianmag.com/history/the-rise-and-fall-and-rise-of-zahi-hawass-72874123> [<https://perma.cc/BSU9-VTAN>].

<sup>159</sup> Cascone, *supra* note 13.

<sup>160</sup> See Hammer, *supra* note 159.

<sup>161</sup> See *id.*

<sup>162</sup> See McGivern, *supra* note 13.

<sup>163</sup> See *id.*

<sup>164</sup> See Dowson, *supra* note 15.

<sup>165</sup> See Cascone, *supra* note 13.

<sup>166</sup> See Dowson, *supra* note 15.

The suit in Cairo represents a larger problem. The public's newfound appreciation for cultural heritage exposed faults in the infrastructure governing its use. This interest is accompanied by heightened expectations for the use of cultural property, and the public is eager to voice disapproval when its standards are not met. While academics and industry actors once went unchecked (except by each other), they now contend with special interest groups, social media, and quite possibly literal mobs of unsatisfied community members.<sup>167</sup> This new force in the world of cultural heritage is undoubtedly disruptive, but it also represents an opportunity for beneficial, and in some instances, desperately needed reform. The forces that prompted Said's lawsuit are not unique to Egypt. As other nations undergo similar changes, Egypt's approach instructs how to strike a balance, appeasing the masses without sacrificing the traditional aims of cultural heritage.<sup>168</sup>

The dispute may not reach a judicial resolution, but this does not limit its precedential effect. The claims implicate questions regarding to what ends a government should apply cultural heritage and who should have discretion to balance competing interests in matters involving a nation's heritage. Given the works' significance to both Egypt and the world, finding a resolution to these questions is essential. Indeed, the works' high profile and the dispute's dramatic nature only heightens its precedential potential. The legal field would be remiss to leave the Egyptian government's choices unexplored and should distill universal lessons for nations beginning to recognize the need for more adept controls over cultural heritage.

### III. AFFIRMING THE EGYPTIAN APPROACH AND RECOMMENDING GLOBAL APPLICATION

The Elgin Marbles provide one of the best—or at least one of the longest enduring—case studies for examining how different considerations of patrimony law and protection of cultural heritage interact. It also highlights that no matter how hard academics and government officials work to generate a moral resolution, any proposal

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<sup>167</sup> See *supra* Part I.A.iii; see also *supra* Part II.

<sup>168</sup> See *supra* Introduction; see also *supra* Part I.A.iii.

must overcome the practical incentives perpetuating the status quo—the British Museum has little reason to change its position so long as it can claim legal ownership of the Marbles.<sup>169</sup> The proliferation of public interest in cultural heritage issues has upset this balance and already influenced many cultural institutions' decision-making.<sup>170</sup> Change may be on the horizon, but it is not yet clear exactly where that change is leading. Demanding immediate solutions to questions that have persisted for decades risks forcing the hand of institutional actors to reach for blunt, inelegant solutions. Professor Merryman ends his article concerning the Marbles by asking readers not to assume that national patrimony laws always create the best environment for cultural heritage objects, but to question what ends deserve the highest priority.<sup>171</sup> The issues and questions raised in this debate are larger than the Marbles alone and inhibit the study and conservation of cultural heritage.

The dispute in Egypt is composed of the same considerations as in the Eglin Marbles debate, only shuffled into a new context. Critically, this dispute involves a nation's control over its own cultural property, and whether that control has been used to serve legitimate interests. The absence of competing international interests eliminates the nationalistic impulse to find a moral victor and presents relevant policy considerations in their most essential form. From this vantage, it is possible to more efficiently search for answers regarding how cultural heritage is utilized, and what limits a government should impose on itself concerning its heritage.

#### A. *Partnership with a Private Institution*

*Tutankhamun: Treasures of the Golden Pharaoh* violates the earlier version of Egypt's patrimony law because it partnered with Exhibitions International, a private institution. The decision

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<sup>169</sup> See Amineddoleh, *supra* note 17, at 345–46, 379.

<sup>170</sup> Public debate over controversial monuments intensified in the wake of global Black Lives Matter protests, and in some cases, activists were willing to take matters into their own hands: anti-racism protesters tore down a statue of Edward Colson, philanthropist and slave trader, disposing of it in the Bristol Bay. See Nora McGreevy, *Toppled Statue of British Slave Trader Goes on View at Bristol Museum*, SMITHSONIAN MAG. (June 7, 2021), <https://www.smithsonianmag.com/smart-news/protesters-throw-slavers-statue-bristol-harbor-make-waves-across-britain-180975060> [<https://perma.cc/AJZ7-LURG>].

<sup>171</sup> See Merryman, *supra* note 59, at 1922.

regarding the Cleopatra exhibit, which BBC referred to as a “base-line” for this claim, eliminates any doubt that the exhibition was prohibited under the law.<sup>172</sup> That neither the Ministry nor IMG chose to respond to this assertion in its statements to the press further suggests that there is simply no retort against the allegation.<sup>173</sup> The law’s subsequent amendment, which was proposed by the Ministry, might also indicate that the Ministry came to the realization its behavior was unlawful and attempted to retroactively ratify its actions.<sup>174</sup> Ultimately more interesting than the question of legality is whether the prohibition against partnership with private institutions for international exhibitions better serves the interests of cultural heritage than the amended version.

A restriction limiting partnership to academic and research organizations resonates easily with intuitions about the use of cultural heritage but should not be accepted at face value. The distinction between such institutions and for-profit entities implies a judgment concerning who should be able to benefit from cultural objects and for what purposes. As Professor Merryman points out, people have strong opinions about *who* is able to exploit cultural heritage for economic gain, but what about *how*?<sup>175</sup> Professor Merryman subordinates the issue of economic rights to property law but does not discuss whether such rights should be subject to limitation.<sup>176</sup> A conventional approach suggests that a property holder has unrestrained use of his or her property, however cultural heritage objects are distinct from ordinary objects in that the public has an interest in their preservation and display.<sup>177</sup>

The Second Circuit Court of Appeals recently affirmed this notion in a decision, ruling that a government’s use of cultural heritage did not fall within “commercial-activity” under the Foreign

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<sup>172</sup> See McGivern, *supra* note 13.

<sup>173</sup> See *c.f.* Cascone, *supra* note 13 (“IMG . . . told the BBC that the artifacts in the King Tut show were not unique, but part of a series. Hawass says that ‘these touring artifacts aren’t of any importance,’ a claim that directly contradicts a promotional quote he offered for the show in 2017, in which he claimed that ‘each object is unique.’”).

<sup>174</sup> See *id.*

<sup>175</sup> See *supra* Part I.B.ii.

<sup>176</sup> See *supra* Part I.B.ii.

<sup>177</sup> See *supra* Part I.A.i.

Sovereign Immunities Act.<sup>178</sup> Even though a nation mimics commercial activity when it manages the export of cultural heritage, including allowing property to be included in commercial exhibitions, this behavior is “distinctly sovereign” because of the unique relationship between cultural heritage, its government, and its people.<sup>179</sup> This distinction suggests that a government’s use of cultural heritage can be legitimately restricted to align with public interest. However, history informs that defining topics of public interest in the context of cultural heritage is rarely straightforward.<sup>180</sup> Following Professor Merryman’s example, it is easier to put aside moral questions about the ethical implications of private companies benefiting from government property, which are unlikely to yield consistent results, in favor of more practical considerations.

Again, instinct favors disallowing loaning cultural heritage objects to private institutions. The public is likely more comfortable placing its inherited antiquities in the hands of scholars and researchers over those who seek profit. Private institutions might be more willing than their academic equivalents to take risks with cultural heritage in pursuit of the bottom line, placing the objects in jeopardy. Academic institutions are also more likely to employ highly-trained staff who can provide particularly vulnerable artifacts with the requisite care. However, preservation must be balanced against access.<sup>181</sup> Few institutions have resources on par with the Metropolitan, which leaves a relatively small pool of institutions capable of facilitating a powerhouse exhibition such as the ones bearing King Tutankhamun’s artifacts.<sup>182</sup> In the 1970s, even the Metropolitan needed an act of Congress to make its tour of only fifty-five

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<sup>178</sup> See *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*, 961 F.3d 193, 202–03 (2d Cir. 2020).

<sup>179</sup> See *id.* at 201.

<sup>180</sup> See *supra* Part I.B.ii.

<sup>181</sup> See *supra* Part I.B.ii; see also *supra* Part I.A.i.

<sup>182</sup> See *Cultural Institutions in the U.S. Ranked by Size of Endowments in 2011*, STATISTA RSCH. DEP’T (Feb. 22, 2013), <https://www.statista.com/statistics/258355/cultural-institutions-in-the-us-ranked-by-size-of-endowments/> [https://perma.cc/9VKM-K3YE] (showing that as of 2011, the Metropolitan’s endowment of 2.7 billion dollars far exceeded the endowment of any other cultural institution in the United States, and more than doubles the size of the next largest endowment).

objects feasible.<sup>183</sup> Moreover, the Metropolitan did not shoulder the burden alone: experts from Egypt accompanied Tutankhamun's artifacts to ensure proper safety procedures were observed at every step of the tour.<sup>184</sup> Today, there is nothing preventing similar arrangements with private organizations. Because nations have near-monopolistic control over their national patrimony, they have considerable bargaining power to demand such protection for their antiquities. Through partnerships with private companies, important cultural objects can travel to locations that would otherwise never be able to support a blockbuster exhibit, and allow millions more to experience the relics of the past.

In the case of *Tutankhamun: Treasures of the Golden Pharaoh*, it is even more difficult to balance preservation against access when one comes at the cost of the other. Allowing objects to travel with a private company enabled Egypt to fund its Grand Egyptian Museum, where the objects would receive the highest level of protection for the indefinite future.<sup>185</sup> With the exhibition closed, and millions of dollars left unearned, that future is now in jeopardy.<sup>186</sup> Perhaps all this dilemma demonstrates definitively is that unforeseeable circumstances may always arise. It follows then that the government agency tasked with pursuing the objects' best interests should have the greatest degree of flexibility in striking the balance between preservation and access. For this reason, the Ministry of Antiquities was correct to amend its law and eliminate the prohibition on loaning artifacts to private companies. But in doing so, the Ministry has taken on additional responsibility to ensure its actions are in the best interest of both the public and the objects themselves. While this may, in theory, allow self-interested parties to exploit that flexibility at the expense of cultural heritage, amoral actors must contend with a new force: the public. Close public scrutiny, the kind that the art world has been subject to in the last year,<sup>187</sup> may incentivize good behavior. As Mr. Hawass personally can attest,<sup>188</sup> the public has the

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<sup>183</sup> See Hindley, *supra* note 3; see also *supra* Part I.C.iii.

<sup>184</sup> See Hindley, *supra* note 3.

<sup>185</sup> See Dowson, *supra* note 15; see Cascone, *supra* note 13.

<sup>186</sup> See Dowson, *supra* note 15.

<sup>187</sup> See *supra* Introduction.

<sup>188</sup> See generally Hammer, *supra* note 159.

power to affect change at the institutional level and deliver some assurance that those charged with protecting cultural heritage execute the role faithfully.

*B. Allowing Unique Objects to Leave Egypt*

In contrast, the answer to whether the Ministry of Antiquities violated Egypt's patrimony law by allowing "unique" artifacts to leave the country is much more elusive. The law itself does not define the term and given the rare opportunity for courts to make such a determination, case law is unlikely to inform the court's decision.<sup>189</sup> Rather, the court must look to the purpose of the law to decide whether these objects are "unique" or "part of a series," as the Ministry suggests.<sup>190</sup>

A logical starting point is the plain meaning of "unique." This suggests that numerosity and distinctiveness are key factors. However, application under real world circumstances reveals these are ultimately unhelpful in resolving this dispute. Applying the word literally would mean that many, if not all, of the 5,000 artifacts from King Tutankhamun's tomb are unique.<sup>191</sup> Such a broad interpretation would render most antiquities immovable across international borders and would dramatically inhibit the public's ability to observe and benefit from ancient Egyptian culture. If the Egyptian legislature intended some degree of subjective evaluation regarding *how* unique an object must be to be restricted, it did so without elaboration, and critically, without designating the entity entitled to make that determination.<sup>192</sup> The Ministry of Antiquities makes a good candidate; however, its former minister, Mr. Hawass, responded to the complaint, saying the objects were unimportant and part of a series, implying something is being evaluated other than

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<sup>189</sup> See Law No. 117 of 1983 (Promulgating the Antiquities' Protection Law), *al-Jarīdah al-Rasmīyah*, art. 10, 14 Feb. 2010, pp. 15–16 (Egypt) (an English version provided by the United Nations Educational, Scientific and Cultural Organization is available at [https://en.unesco.org/sites/default/files/egypt\\_law3\\_2010\\_entof.pdf](https://en.unesco.org/sites/default/files/egypt_law3_2010_entof.pdf) [<https://perma.cc/VY33-4X2K>]).

<sup>190</sup> Cascone, *supra* note 13.

<sup>191</sup> See *supra* Part I.C.iii.

<sup>192</sup> Law No. 117 of 1983 (Promulgating the Antiquities' Protection Law), *al-Jarīdah al-Rasmīyah*, 14 Feb. 2010 (Egypt).

literal uniqueness.<sup>193</sup> Lastly, the term's ineffectiveness is further demonstrated by its eventual removal from the law, signaling faltering confidence in its use.<sup>194</sup>

Applying the labels “unique” and “part of a series” to another group of antiquities helps illustrate their ineffectiveness. The Elgin Marbles are a group of statues, each depicting a separate subject, yet taken together, represent a single artistic work.<sup>195</sup> They are simultaneously individually unique and unquestionably part of a series. To find one term more accurate than the other is arbitrary and, more importantly, neither designation informs how deserving the Marbles are of protection. Searching for a different meaning, it appears that “unique” was a misnomer and that the legislature intended to restrict particularly *important* antiquities. The marbles should be given every protection possible, not because of how distinctive they are, but because they are singularly important to Greek and world culture. Substituting “unique” for “importance,” the question then becomes whether Tutankhamun's artifacts were too *important* to leave Egypt.

Understandably, courts have expressed reticence about wading into evaluations concerning the subjective qualities of art.<sup>196</sup> However, courts are not helplessness in the face of such determinations. The Second Circuit recently affirmed a landmark decision that held graffiti art located at the infamous *5Pointz*, described as a mecca for graffiti artists, achieved the “recognized stature” necessary for protection under the Visual Artists Rights Act.<sup>197</sup> Defining what exactly makes an artwork or antiquity important proves a challenging

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<sup>193</sup> See Cascone, *supra* note 13.

<sup>194</sup> See McGivern, *supra* note 13.

<sup>195</sup> Fincham, *supra* note 63, at 986–87.

<sup>196</sup> Leila Amineddoleh, *Are You Faux Real? An Examination of Art Forgery and the Legal Tools Protecting Art Collectors*, 34 CARDOZO ARTS & ENT. L.J. 59, 72 (2016); see also Stéphanie Giry, *An Odd Bird*, LEGAL AFFS. (Sept.–Oct. 2002), [https://www.legalaffairs.org/issues/September-October-2002/story\\_giry\\_sepoct2002.msp](https://www.legalaffairs.org/issues/September-October-2002/story_giry_sepoct2002.msp) [https://perma.cc/7MDS-U2CE].

<sup>197</sup> *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 163, 170 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020). An artwork is determined to be of “recognized stature” when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community. See *id.* at 166. Accordingly, the court does not make its own evaluation about the status of an artwork but looks for the existence of a community that holds the work in high esteem.

endeavor, and without statutory guidance, may yield unpredictable results. One benefit of a dedicated antiquities agency is that the Egyptian courts can turn to the expertise of their own Ministry for assistance.

Prior to the complaint, the exhibition was touted as the most significant display of Tutankhamun's treasures outside of Egypt to date.<sup>198</sup> The works were described as "masterpieces" by Dr. Mostafa Waziry, secretary general of the Ministry, in a press statement.<sup>199</sup> Ministry officials may be forgiven for some degree of puffery, but they cannot minimize the magnitude, in scope or quality, of the exhibition retroactively. Considering the preeminent place that King Tutankhamun occupies in Egyptian culture, if his artifacts are not entitled to the highest level of protection available, what other objects could be more deserving? For the second time, the Ministry violated Egyptian law by sending its artifacts on a world tour. It is questionable, however, whether such a restriction was in the best interest of promoting Egypt's cultural heritage.

Egypt is one of many nations that prohibits or restricts certain works from traveling internationally.<sup>200</sup> For example, the world's most famous painting, the *Mona Lisa*, may never leave its home again.<sup>201</sup> The Louvre announced the *Mona Lisa* is now too fragile to travel, and that even under the best possible conditions, the risk to such a culturally significant work is not justified.<sup>202</sup> Italy, which jealously guards its own da Vinci works, enacted national legislation prohibiting the international loan of works considered "integral to museums and galleries' collections," as well as works deemed

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<sup>198</sup> See McGivern, *supra* note 13.

<sup>199</sup> Jhala, *supra* note 145.

<sup>200</sup> See generally INT'L BAR ASS'N ART, CULTURAL INSTS. & HERITAGE L. COMM., ART LAW: RESTRICTIONS ON THE EXPORT OF CULTURAL PROPERTY AND ARTWORK (2020), <https://www.ibanet.org/MediaHandler?id=d67cb566-b6d4-4ea4-94e5-04d0ac6c7681> [<https://perma.cc/43D5-6F4M>] (collecting fourteen different countries' policies on cultural exports).

<sup>201</sup> See Henri Neuendorf, *The Mona Lisa Will Not Be Going on Tour After All, the Louvre Says*, ARTNET (Mar. 27, 2018), <https://news.artnet.com/art-world/mona-lisa-not-leaving-louvre-1254302> [<https://perma.cc/9ZYD-VVBD>].

<sup>202</sup> See *id.* The *Mona Lisa* has not left the Louvre in over forty-four years; it last traveled to the Metropolitan Museum in 1974, where it was subjected to the perils of a rogue sprinkler system overnight, splashing water over its case for hours. *Id.* Miraculously, the painting was undamaged. *Id.*

vulnerable to damage while traveling or on display in poor conditions.<sup>203</sup> A cultural heritage advocacy group recently challenged an international loan agreement between Italy and France under these laws, objecting to the loan of one of da Vinci's most famous drawings, the *Vitruvian Man*.<sup>204</sup> The court ultimately ruled for the government, trusting that the Italian Ministry of Culture properly balanced pertinent risks and benefits.<sup>205</sup> These examples illustrate that institutional actors can reach differing conclusions about whether important works are suited for international travel, but this variability must be embraced rather than eliminated through statute.

Deciding whether a cultural heritage object should be permitted to travel internationally will always require experts to make fact-intensive evaluations concerning the risks and rewards. A work's importance is just one of many considerations that support such a determination, including the work's fragility and the resources available to transport and display the work safely. Moreover, using static characterizations to classify antiquities fails to account for developments in technology or political circumstances that might bear on the appropriateness of a loan. Applying simplistic labels, such as "unique" or "important," risks being wildly overinclusive or underinclusive, depending on how they are interpreted. In the suit concerning the *Vitruvian Man*, the court was right not to apply the law strictly, trusting that the government's dedicated agency was in a better position to measure risks and benefits than the judiciary. Those with training and experience to make qualified assessments should make these decisions—in the present case, the Ministry of Antiquities. Therefore, the Egyptian legislature was right to amend its law to allow the Ministry's approval of important works in international exhibitions.

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<sup>203</sup> Charlotte Dunn, *Da Vinci Show Opens at the Louvre After Latest Loan Issue Resolved*, INST. OF ART & L. (Oct. 25, 2019), <https://ial.uk.com/da-vinci-show-opens-at-the-louvre-after-latest-loan-issue-resolved/> [<https://perma.cc/P665-75GM>].

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* The loan agreement has since continued to receive criticism for placing decision power with politicians, motivated to secure a positive headline, rather than with technical experts. See Elisabetta Povoledo, *'Vitruvian Man' Will Be in the Louvre's Leonardo Show, After All*, N.Y. TIMES (Oct. 16, 2019), <https://www.nytimes.com/2019/10/16/arts/vitruvian-man-louvre-leonardo.html> [<https://perma.cc/KH8J-LLPV>].

Granting government agencies additional discretion over cultural heritage raises legitimate concerns; however, in the place of dated statutes, there is a new force moderating institutional action: the public. Whether the public raises objections in court, as in Italy, or in a courtyard, as in Egypt, dedicated agencies, cultural institutions, and organizations are increasingly sensitive to public opinion. One can argue this is merely a reactionary measure against improper decision-making and risks placing cultural heritage in the path of danger. This is a valid concern and should motivate the public to be vigilant for those who would employ cultural heritage for improper purposes. However, preservation is not the only consideration relevant to cultural heritage, and to overly restrict the movement or display of antiquities would deny the public their benefit. Cultural heritage should be deployed safely and effectively, enabled by government agencies with the flexibility to craft bespoke exhibitions, yet which are beholden to a public ready to vocalize dissent when necessary.

#### CONCLUSION

Cultural heritage objects are treasured for their beauty, craftsmanship, and ability to reflect the world as it was seen in another time. The power of these artifacts lies in more than just their aesthetics; from Napoleon to Nixon, many have recognized the greater potential for these objects to move nations, sway hearts, and nourish the imagination of the contemporary public. The use of such power is something that must be overseen, and critics are right to keep a wary eye toward governments wielding this power, often predated by the objects they seek to utilize.

The Egyptian Ministry of Antiquities violated its own law by loaning artifacts from the tomb of King Tutankhamun to a private company. However, this law did not reflect the optimal balance between competing aims in patrimony law. The world's cultural heritage must be protected so it can continue to enrich and inspire the future, as it has done in the past. On the other hand, leaving the world's store of antiquities locked away risks underutilizing their capacity to improve lives. Frustrating as it may be, there is no way to resolve the tension between these two principles. Accordingly,

conflict over the use of cultural property is inevitable. As the public gains an appreciation for this phenomenon, there is newfound demand for laws providing for more sophisticated and flexible controls over cultural property. Nations must take note and begin the process of revising their national patrimony laws or risk the disapproval of the public.