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GROUP RIGHTS IN CULTURAL PROPERTY: JUSTIFYING STRICT INALIENABILITY

The Greek historian Polybius must have been a man of great foresight, for it was he who first called for the protection of a culture's art from foreign claim or seizure.¹ True to Polybius's fears, states including his own native Greece have been dispossessed of some of their greatest cultural and artistic patrimony.² Though today the multilateral United Nations Economic, Scientific and Cultural Organization Convention on the Means of Prohibiting and

¹ See Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. & POL. 831, 833 n.9 (1986). The Son of Lycortas, Polybius was a Megalopolitan-born historian who lived from around 210 B.C. to 128 B.C. 4 A. HOLM, HISTORY OF GREECE 514-16 (1898).

² See C. BRACKEN, ANTIQUITIES ACQUIRED (1975) (comprehensively chronicling the spoilation of Greece). One need only think of the Parthenon Marbles held in the British Museum (see *infra* notes 71-94 and accompanying text); the Kanakaria Mosaics, which a United States District Court recently ordered returned to Cyprus (see *Autocephalous Greek-Orthodox Church of Cyprus, et al. v. Goldberg & Feldman Fine Arts, Inc., et al.*, C.A. No. 89-304-C (S.D. Ind. 1989) (memorandum of decision and order)); the Venus de Milo kept at the Louvre; and the altar of Pergamum, now in Berlin, among others.

Those in whose best interests it has been to suggest that the Greeks are, or at least were, incompetent to care for their artistic treasures have argued that retention of plundered art is justified because such art belongs to the "common heritage of mankind." In fact, the 1954 Hague Convention on Cultural Property adopted this universalist approach. See *The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, May 14, 1954, 249 U.N.T.S. 240 (1956). These self-interested retentionists—including art dealers and museums in economically-rich states—justify reluctance to repatriate illicitly acquired art by resort to the rhetoric of cultural universalism: "We deplore all destruction *in situ*, most of it caused by the indifference of the very people whose past is involved." Letter to the Editor, *Bernard V. Bothmer*, *The N.Y. Times*, Oct. 19, 1982, at A30 col. 5; "To rip the Elgin Marbles from the walls of the British Museum is a much greater disaster than the threat of blowing up the Parthenon." C. HITCHENS, *THE ELGIN MARBLES* 98 (1987) (quoting British Museum Director Sir David Wilson); "All Greeks were peasants. They did not deserve such wonderful works of antiquity. . . ." T. VRETTOS, *THE SHADOW OF MAGNITUDE: THE ACQUISITION OF THE ELGIN MARBLES* 82 (1974) (quoting Lord Elgin's response to being told by the British Consul that certain takings of Eleusian statuary were illegal); "[T]he moral order dictates that Britain should keep the Elgin Marbles because Britain is the 'true heir of Pericles' democracy.'" C. HITCHENS, *supra*, at 26 (quoting recent statement of Roger Scranton, publisher of the *Salisbury Review*).

The Greeks, however, have had a rich history of concern for artistic treasures beginning with Polybius and continuing through current efforts to regain possession of the Parthenon Marbles. For example, in 1822 John Coletis, Minister of War in the Greek revolutionary government, requested French philhellènes aiding the revolution to assist in the preservation of antiquities, particularly the Parthenon. *Id.* at 24. At the same time, when the Turkish garrison stationed atop the Acropolis began to break the Parthenon's surviving walls to get at the lead shielding of the clamps and melt it down for bullets, the Greek besiegers offered their opponents bullets if they would leave the Parthenon undamaged. Referring to this offer, distinguished archaeologist A. Rizos Rangavis wrote: "Those who in the old days fed their starving enemies performed an act of

Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("UNESCO Convention")³ nominally protects cultural property,⁴ the modern world has not yet truly heeded Po-

philanthropy, but no nobler action in time of war than this, worthy of highest civilization, can ever be undertaken." *Id.*

Indeed, this concern for the preservation of Greek treasures in general, and the Acropolis in particular, was evidenced by some of the earliest laws of the newly independent state.

[O]ne of the first acts of the nearly independent Greek state, in the 1830s, was restoration of the Acropolis buildings to free them from the accretions of Turkish and Frankish occupation. The law passed in 1834 to protect antiquities and monuments expressed the view 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.'

I. McBryde, *Introduction, in WHO OWNS THE PAST* 5 (I. McBryde ed. 1985).

In addition, at the Greek Archaeological Society's founding, held upon the ruins of the Parthenon in 1837, the society's first president pointed to the crumbling buildings and said: "These stones are more precious than rubies or agates. It is to these stones that we owe our rebirth as a nation." C. HITCHENS, *supra*, at 25.

Finally, General Makriyannis, hero of the Greek Revolution and popular writer, yet virtually illiterate, discovered that some of his soldiers were thinking of selling the statuary to two European travellers at Argos. In Makriyannis words: "I took the soldiers aside and spoke to them: 'even if they give you ten thousand gold coins for these things, do not deign to let them leave our country. This is what we fought for.'" ANDRONICOS, *THE GREEK MUSEUMS* 9 (1975).

For a discussion of the tension between universalist and nationalist, or group-based, claims, see *infra* notes 173-91 and accompanying text.

The plunder of artistic heritage is hardly limited to Greece. Indeed, it has reached unprecedented levels in Latin America. See, e.g., Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94, 94 (1969) ("Not since the sixteenth century has Latin America been so ruthlessly plundered."). See also Note, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466, 468-71 (1988) (authored by Jonathan S. Moore).

³ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 4, 1970, 823 U.N.T.S. 231 (1972), *reprinted in* 10 INT'L LEGAL MATERIALS 289 (1971) [hereinafter UNESCO Convention]. The 1983 Convention on Cultural Property Implementation Act [hereinafter CPIA] implements the UNESCO Convention into American law. 19 U.S.C.A. §§ 2601-2613 (West Supp. 1989).

⁴ The UNESCO Convention defines cultural property as: a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest; b) property relating to history, ranging from the history of science, technology, military, social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; c) products of archaeological excavations or discoveries; d) elements of artistic or historical monuments, or dismembered archaeological sites; e) antiquities more than one hundred years old, such as inscriptions, coins, and engraved seals; f) objects of ethnological interest; g) property of artistic interest, such as (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; and (iv) original artistic assemblages and montages in any material; h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.), singly or in collections; i) postage, revenue or similar stamps, singly or in collections; j) archives, including sound, photographic, and cinematographic archives; k) articles of furniture more than one hundred years old, and old musical instruments. UNESCO Convention at art. 1.

The CPIA protects a narrower subset of materials—only the import of archaeologi-

lybius's call.⁵

cal or ethnological materials, in danger of being lost to pillage, is prohibited if, and when, the President agrees to restrict import of such items pursuant to a formal request by a nation shown to vigorously protect its own items of cultural importance. See USIA, *Curbing Illicit Trade in Cultural Property: U.S. Assistance Under the Convention on Cultural Property Implementation Act 1* (April 1989) [hereinafter *Curbing Illicit Trade*]. Archaeological material must be of cultural significance, at least 250 years old, and normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water. *Id.* at 22. Ethnological materials must be: "the product of a tribal or nonindustrial society; at least 50 years old; and, important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of the people." *Id.*

The import of stolen cultural property (apparently not limited to archaeological or ethnological materials) taken from a museum, church, or secular public monument also is prohibited by the CPIA. *Id.* at 34; see 19 U.S.C.A. § 2607 (West Supp.1989).

⁵ Unfortunately, the political compromises struck during the eleven year period preceding the formulation of enabling legislation for the UNESCO Convention created shortcomings which substantially diminish the CPIA's role in arresting the pillage of cultural patrimony. See, e.g., Hofkin, *The Cultural Property Act: The Art of Compromise*, 12 COLUM.-VLA J.L. & ARTS 423, 442 (1988) (lamenting the overaccommodation of the art lobby's interests in the legislation's final draft); Partington & Sage, *The American Response to the Recovery of Illegally Exported Art: Should the American Courts Look to Civil Law?*, 12 COLUM.-VLA J.L. & ARTS 395, 397 (accusing the United States of failing to implement legislation favorable to art-rich nations' interests in retaining their cultural property, and thereby failing to halt illicit art trafficking). See also J. Moustakas, *The Kanakaria Mosaics and the International Protection of Cultural Property: Shortcomings in the American Implementation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (July 14, 1989) (on file with the Cornell Law Review).

Aside from the inadequacy of the American response to Polybius's ancient heed, other states similarly have failed to assure the protection of cultural property. First, many of the most significant art-importing nations—for example, France, Japan, Switzerland, West Germany, and the United Kingdom—have not signed the UNESCO Convention. See Letter from Somar Wijayadasa, UNESCO official, to John Moustakas (June 20, 1989) (listing the Convention's signatories) (on file with the Cornell Law Review). The failure of such nations to accede to the UNESCO Convention also is significant for its impact on American protection of cultural property. Because the CPIA permits the President to impose import restrictions on foreign cultural property only when such restrictions would be of substantial benefit in deterring pillage, the free commerce in art in the other major art-consuming states often will prevent the President from imposing restrictions because American controls alone may not substantially deter pillage. Second, "a tragic combination of artistic sophistication and an imperialistic attitude," particularly in the West, conspires to encourage the looting of cultural property by creating a voracious appetite for foreign works. See Note, *supra* note 2, at 468. Third, art-rich nations themselves, are under enormous pressures created by the market demand for their art which makes the prevention of looting nearly impossible. Smuggling nationals, particularly in underdeveloped nations, often are willing to sacrifice cultural heritage for an improved standard of living. See L. DUBOFF, *THE DESKBOOK OF ART LAW* 71 (1977). Cf. Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477, 487 (1988) ("The political problem is that citizens in the source nation are likely to oppose implementation of [national ownership] legislation unless unusually generous compensation is provided."). In addition, other domestic priorities in many of these nations simply make it impossible to police all archaeological sites. See Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 289-94 (1982); Note, *supra* note 2, at 470 n.21 and accompanying text. Fourth, given these supply-side difficulties in arresting the illicit trade in art, many art-rich nations have focused on demand-side techniques. The most

Notwithstanding states' reliance on such multilateral provisions establishing rights for the restitution or protection of cultural property, the looting and pillage of cultural heritage continues wholesale.⁶ The thriving black market in art treasures is only surpassed by the illicit international drug trade.⁷ The non-participation in the UNESCO Convention by most art-importing states, and the diluted adherence and implementation of UNESCO in other states both explain this continued crisis.⁸

As states rely on traditional means for seeking the protection of their cultural property, so too does the scholarship in this field focus on traditional and technical issues of compliance with multilateral provisions,⁹ jurisdiction and choice-of-law,¹⁰ and enforcement.¹¹ Comfortable with its old vocabulary, this scholarship continues to struggle to reconcile emerging notions of national cultural identity

popular among these is the umbrella ownership statute, pursuant to which a state declares all antiquities of a specified age, whether above or below the ground, owned by the state, thus making export technically illegal. See generally Note, *supra* note 2 (advocating the enforcement of some umbrella ownership statutes by importing nations). Unfortunately, importing nations generally have refused to enforce such export controls by imposing their own import restrictions. *Id.* at 470 n.24 and accompanying text. See Kenety, *Who Owns the Past? The Need for Legal Reform and Reciprocity in the International Art Trade*, CORNELL INT'L L.J. (forthcoming); Rogers, *The Legal Response to the Illicit Movement of Cultural Property*, 5 LAW & POL'Y INT'L BUS. 932, 934-35 (1973).

⁶ See Hofkin, *supra* note 5, at 426; Partington & Sage, *supra* note 5, 396-97; Note, *supra* note 2, at 468-71.

⁷ Nafziger, *International Penal Aspects of Protecting Cultural Property*, 19 INT'L L. 835 (1985).

⁸ See *supra* note 5.

⁹ See, e.g., Bolla, Keynote Address: The UNESCO Convention on Illicit Traffic of Art, reprinted in 15 N.Y.U.J. INT'L L. & POL. 765 (1983); see also Rogers, *supra* note 5.

¹⁰ See, e.g., Note, *Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece From Losing its Marbles*, 72 GEO. L.J. 1155 (1985) (authored by Ann P. Prunty) [hereinafter *International Tribunal*]. See also Attorney-General v. Ortiz, [1983] 2 W.L.R. 809 (H.L. 1983) (House of Lords) (Great Britain denied jurisdiction over a Maori carving illegally exported from New Zealand), *aff'g.* [1982] Q.B. 349 (C.A.); *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982) (applying New York law, which prevents a thief from passing good title, to hold that priceless Durer paintings, stolen from a German castle during World War II, belonged to an East German museum); *Autocephalous Greek-Orthodox Church of Cyprus, et al. v. Goldberg & Feldman Fine Arts, Inc., et al.*, C.A. No. 89-304-C (S.D. Ind. 1989) (applying Indiana law on good faith purchase); *Recent Developments—Property Law: International Stolen Art*, 23 HARV. INT'L L.J. 466 (1983); Note, *International Law in Domestic Forums: The State of the Art*, 9 BROOKLYN J. INT'L L. 179 (1983) (authored by Helen L. Ostenberg).

¹¹ See, e.g., Note, *The Continuing Development of United States Policy Concerning the International Movement of Cultural Property*, 4 DICK. J. INT'L L. 89, 96-117 (1985) (authored by Lawrence J. Persick) (discussing various methods of protecting cultural heritage including bilateral agreements, civil suits, export and import restrictions); Merryman & Elsen, *Hot Art: Reexamination of the Illegal Trade in Cultural Objects*, 12 J. ARTS MGMT. & L. 15 (1982); Fitzpatrick, *A Wayward Course: The Lawless Customs Policy Toward Cultural Properties*, 15 N.Y.U. J. INT'L L. & POL. 857 (1983); *International Tribunal*, *supra* note 10, at 1158 (proposing "the establishment of an international tribunal to settle disputes arising out of transfers of cultural property").

with rigid and sedentary classifications of property ownership.¹² Instead of reconciliation, the tension between theoretical and political notions of national dignity and consciousness of common group

¹² For example, respected art law professor John Merryman confesses his confusion over the fact that poor countries, whose "development policies normally encourage export trade to earn foreign exchange to pay for imports and to finance domestic growth," treat cultural property as an exception to that rule. Despite a well-funded market for such objects abroad, he believes that export trade in cultural artifacts is severely circumscribed in many of those countries by cultural property retention schemes. See Merryman, *supra* note 5, at 479. Professor Merryman characterizes many of these retention schemes as animated by "an unsophisticated form of market aversion." *Id.* at 481 n.12. Indeed, he holds flatly that cultural property is merely another product in the market, and that economic considerations legitimately should apply to it as they do to fungible goods. *Id.* at 500.

It is from this proposition that this entire Note establishes its critique of the traditional treatment of cultural property, arguing contrarily that the marketplace is a flawed device for the distribution and disposition of some types of cultural property. See *infra* notes 44-59 and accompanying text. Cultural property particularly touching group rights, for example, should often merit special, nonmarket treatment—namely, strict inalienability. See *infra* notes 95-116 and accompanying text. Rejection of the market for the purpose of determining rights in cultural property is based upon several principles: First, a market analysis is necessarily incomplete because the market fails to value the interests of future generations precisely because they have no impact on the market. See *infra* notes 107, 114 & 132-38 and accompanying text. Second, subjecting property so closely associated with a group's identity to market rhetoric and processes demeans both the property and the related identity or group image. See *infra* notes 107-10 and accompanying text. Third, the market is unfair to the extent it subjects lesser developed states, or groups, to the unhappy choice of retaining cultural property in the marketplace at the expense of equally fundamental expenditures on education, health care, housing, and welfare. Cf. *infra* note 164.

Unfortunately, however, our traditional understanding of property rights creates substantial hurdles which threaten such special treatment. First, the scholarship assumes as a first principle the free alienability of cultural property. See *infra* notes 13 & 96 and accompanying text. Cf. Partington & Sage, *supra* note 5, at 397 (one factor explaining the United States' resistance to implementing legislation favorable to art-rich nations seeking to retain their treasures is an "attitude that government control over the alienation of personal property is inimical to a free enterprise system."). Second, the individual, and not the group (especially one whose full membership is perpetually partially unascertained), is ordinarily conceived of as the holder of property rights. At very best, when group rights are recognized, they are generally thought to be derivative of individual rights. See *infra* notes 44-62 and accompanying text. Third, transferability is presumed an essential incident of ownership. See L. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 18 (1977) (notions of full ownership traditionally include the right to possess, use, manage, receive income, retain immunity from expropriation, transmit, and alienate). See also Grey, *The Disintegration of Property*, in PROPERTY: NOMOS XXII 69 (J. Pennock & W. Chapman eds. 1980) ("To own property is to have exclusive control of something—to be able to use it as one wishes, to sell it, to give it away, leave it idle, or destroy it. Legal restraints on the free use of one's property are conceived of as departures from an ideal concept of full ownership."). *But cf.* *Andrus v. Allard*, 444 U.S. 51 (1978) (destruction of one "strand" of "bundle of rights" in property does not constitute a taking).

In addition, the view that art is legitimately the common heritage of all mankind creates another hurdle to affording particular groups special rights in cultural property. Once again, this hurdle is described by the dialectic between cultural universalism and cultural nationalism. See *supra* note 2 and *infra* notes 173-91 and accompanying text.

past, both of which are linked to the retention of cultural objects for the purpose of nation-building, and practical conceptions of property ownership, promise an inevitable collision.

Both scholarship and cultural property retention schemes aware of these tensions fail to avert the imminent collision between theory and practice because they unquestioningly defer to outmoded conceptions of ownership.¹³ Even the UNESCO approach, for all its lofty references to cultural property as "one of the basic elements of civilization and national culture,"¹⁴ impliedly adopts this unimaginative vision of property rights. By purporting to prohibit "illicit" transfers of cultural property, the Convention implies the existence of "licit" transfers beyond UNESCO's grasp. Presumably, given UNESCO's thematic emphasis against the evils of involuntary dispossession of cultural property, all voluntary transfers, sanctioned by some authority, would pass muster as "licit" transfers.

This Note argues that neither UNESCO's emphasis on "illicit" transfers, nor national laws' self-imposed restraints on the alienability of cultural property¹⁵ should imply the contrary power—that some authority always exists empowered to direct the dispossession of a state's cultural heritage. To the contrary, this Note argues that protecting certain types of cultural property ought to be mandatory, transcending the authority of national law to do otherwise.

Because "cultural objects nourish a sense of community, of participation in a common human enterprise,"¹⁶ this Note focuses on the propinquity of cultural property to group, culture, or nation. The nexus between a cultural object and a group is the essential measurement for determining whether group rights in cultural property will be effectuated to the fullest extent possible—by holding such objects strictly inalienable from the group. Clearly, such potent protection should not apply to fungible property, but only to that property bearing substantial earmarks of relatedness to the relevant group. Objects bearing such earmarks are "property for grouphood." An object qualifies as property for grouphood when (1) it is substantially "bound up" with group identity, and (2) its retention does not constitute "bad object relations."¹⁷ Such a test

¹³ See Merryman, *supra* note 5, at 482 n.14. See also *supra* note 12.

¹⁴ See UNESCO Convention, *supra* note 3, at preamble.

¹⁵ "Whatever the motivation for a national law attempting to prevent the export of cultural objects may be, however unreasonable such a retention may seem, it is undeniably within the power of the nation to enact and attempt to enforce such laws." Merryman, *International Art Law: From Cultural Nationalism to a Common Cultural Heritage*, 15 N.Y.U. J. INT'L L. & POL. 757 (1983).

¹⁶ Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 349 (1989) (citations omitted).

¹⁷ This test is analogized from Professor Radin's "property for personhood" test. See *infra* notes 36-43 and accompanying text. These factors are more fully explained

could be useful for deciding which export restrictions promulgated by foreign nations should be respected. Thus, while all foreign "national ownership" claims need not be accepted, those applying to property for grouphood should be respected by the imposition of reciprocal import restrictions.

By distinguishing fungible goods from property for grouphood, this Note demonstrates that the latter category warrants broader protection. The notion that groups have intrinsic rights to exist, develop, flourish, and perpetuate themselves, and that these rights often are intertwined with groups' relations to history and objects, justifies both creating a category of property which promotes grouphood and distinguishing between that property and merely fungible property. By recognizing that groups have rights in some cultural property, the Note argues that a law and economics perspective¹⁸ risks offending group identities by its willingness to compromise constitutive incidents of "grouphood" in the market under the guise of "mov[ing cultural objects] to the locus of highest probable protection"¹⁹ just as such a perspective offends the concept of personhood when it calls for complete commodification.²⁰ Nonetheless, this Note even argues that economic efficiency, too, should often require recognizing the special nature of property for grouphood.

Once cultural property is found to constitute property for grouphood, special protections should automatically apply. These special protections would come in the form of restraints on the alienability of property for grouphood. Restraining the alienability of property for grouphood both promotes proper group development and elevates, as a defense against the charge of paternalism, the concept of "communal flourishing" as an important justification for holding such property inalienable.²¹ To the extent that this vi-

there. Where the term property for personhood might describe property so closely bound up with our individual identities that its loss "causes pain that cannot be relieved by the object's replacement." Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982), property for grouphood expresses something about the entire group's relationship to certain property. Some property can be essential to the preservation of group identity and group self-esteem.

¹⁸ See generally A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983).

¹⁹ Merryman, *supra* note 1, at 847. See also Note, *supra* note 11, at 95 ("[Art dealers] generally believe that associating a dollar value with a work will enhance that work's position in the eyes of society, insuring that it will be preserved.") (citation omitted).

²⁰ See Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1859-70 (1987).

²¹ Group development is analogized from personhood development. On personhood theory, see Radin, *supra* note 17. From personhood emerges the concept of "human flourishing." Objects which fulfill the requirements for categorization as property for personhood do so because they promote human flourishing. See Radin, *supra* note 20, at 1937. "To flourish is to lead the sort of life it is good to lead, by which is meant the sort of life you want your children to lead, as well as the sort of life you want

sion of property for grouphood is developed by analogy from personhood scholarship, this Note visits those personhood analogues to grouphood rights.²²

Protecting those essential rights embodied in property for grouphood, however, requires a regime of strict inalienability, rather than one of mere market inalienability.²³ Because deciding whether cultural property meets the criteria of property for grouphood requires a case-by-case examination, this Note offers no universally applicable test. Instead, it suggests useful factors for measuring whether an object constitutes property for grouphood. As a primary vehicle for exploring the contours of a theory of group rights in cultural property, and for determining which property qualifies as such, this Note considers a celebrated example of alienated cultural property—the Parthenon Marbles.²⁴

In section I, this Note finds independent group rights inhering in certain cultural property. Qualifying property is classified as property for grouphood. Section II concludes that the Note's specific case study—the Parthenon Marbles—is an example of property for grouphood. This section also asks whether the Greeks, themselves, could voluntarily have given the Marbles away. Because of their intrinsic link to Greek grouphood, section II concludes that the Marbles could not have been so transferred consistent with this theory of property for grouphood. Therefore, section II urges the adoption of strict inalienability rules to protect property for grouphood. Where early sections of the Note address traditional property concepts' intolerance of group ownership claims, section

to lead yourself." Harman, *Human Flourishing, Ethics, and Liberty*, 12 PHIL. & PUB. AFFS. 306, 311 (1983). Likewise, from group development, this Note draws the concept of "communal flourishing" as the group analogue to human flourishing. Communal flourishing represents the hoped-for outcome from a group's relationship to property for grouphood. See *infra* note 106.

²² See *infra* notes 26-43 and accompanying text.

²³ Market inalienability means that the object subject to such a regime cannot be transferred through the market. Simply put, an object held market-inalienable is non-salable. A holder under such a regime may give away her entitlement, but is prohibited from selling it. See Radin, *supra* note 20, at 1853. Strict inalienability, on the other hand, is a regime of complete nontransferability. Under such a regime a holder can neither give away nor sell her entitlement. See *infra* notes 97-116 and accompanying text for reasons why a regime of market inalienability is inadequate to protect cultural property for grouphood.

²⁴ See *infra* notes 71-94 and accompanying text. Although many of the sources continue to refer to them as the "Elgin Marbles," the Note calls them the "Parthenon Marbles." Calling them by the former name implicitly assumes what the British conclude: that the Marbles rightfully belong in the British Museum. Although it is beyond the scope of this Note to explore the particularities of the Marbles' taking, it is far more controversial than the British thus far have conceded. For a thorough discussion of the history and legitimacy of the taking generally, see C. HITCHENS, *supra* note 2; Kenety, *supra* note 5. For the Marbles' history, see *infra* note 82.

III finally confronts the remaining tension at the heart of the way we think about cultural property. It attempts to accommodate the fundamental tensions between cultural universalism's assumption that the world's most important works of art constitute the "common heritage of mankind"²⁵ and property for grouphood's requirement that such works remain "at home."

I

PROPERTY FOR GROUHOOD—GROUP RIGHTS INHERING IN CULTURAL PROPERTY

A. A Brief Excursus on Property for Personhood

Because recognizing group rights is essential to this Note's ultimate conclusion—that property for grouphood should be held strictly inalienable—a vibrant conception of group rights is needed to decide specific disputes among rival group claimants.²⁶ In the absence of a well-developed group rights theory, analogy from the richer area of personhood theory helps to establish the bounds of a grouphood theory.

A personhood theory justifies special rules for the treatment of property based upon the relationship of persons to objects.²⁷ Individuals need to have some control over resources in their environment to achieve proper self-development.²⁸ Property rights guarantee the necessary assurances of control to protect resources instrumental to that goal.²⁹ Typically, rights for the protection of property entitlements can be characterized as either liability rules, property rules, or inalienability rules.³⁰ For much personal prop-

²⁵ See generally Merryman, *supra* note 1.

²⁶ A personhood perspective of property "can help decide specific disputes between rival claimants." Radin, *supra* note 17, at 958. Similarly, a grouphood perspective of property will ultimately do the same among rival group claimants.

²⁷ See generally Radin, *supra* note 17. See also Grey, *supra* note 12, at 77.

The idealist 'personality' theory rests on the . . . idea that human beings naturally come to regard some objects as extensions of themselves in some important sense. This idea gains its intuitive force from the way most people regard their homes, their immediate personal effects, and other material things that play a double role as part of their most immediate environmental in daily life and at the same time as expressions of their personalities.

²⁸ Radin, *supra* note 17, at 957.

²⁹ *Id.*

³⁰ Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller. . . . Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule. . . . An entitle-

erty, a property rule sufficiently protects our interest in control over resources essential to self-constitution and self-development.³¹ Such a rule prevents forced transfers,³² but allows voluntary alienation. Sometimes, however, inalienability rules are necessary to ensure adequate control over property.³³

Personhood theory posits a continuum between intimately personal and completely fungible property. It creates a hierarchy of entitlements whose strength depends on the closeness of the entitlement or resource to personhood.³⁴ Property near the personal end of this continuum "is important precisely because its holder could not be the particular person she is without it."³⁵ Protecting those things on the personal end of the continuum is the dominant concern of personhood theory. To constitute property for personhood, an object must fulfill two criteria.³⁶ First, the property must be sufficiently "bound up" with the holder's identity or personhood. This criterion evaluates an object's propinquity to the goal of self-constitution. Second, even if the property is vital to self-constitution, it is not personhood property if its retention promotes "bad object relations."³⁷ Property for personhood must pass both tests.

While self-identification through objects is relative, Radin suggests that "an object is closely related to one's personhood if its loss

ment is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller.

Id. at 1092.

³¹ Radin, *supra* note 17, at 988. For personal property, Radin would assure that, if essentially linked to personality, it would not be taken from us against our will.

³² Calabresi and Melamed's liability rules avoid holdout problems and transaction costs by allowing forced entitlement shifts upon the payment of market-determined compensation. See Calabresi & Melamed, *supra* note 30, at 1106-10. Such a rule also is known as a "forced sale." See W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS § 15, at 90 (5th ed. 1984).

³³ "Distinguishing 'inalienability rules' from 'property rules' . . . implicates the nature of contract . . . [T]he issue is when the law ought to disallow or void someone's attempt to relinquish an item voluntarily . . ." Radin, *supra* note 17, at 986 n.101. Radin is concerned in the personhood context that inalienability might attach to interests "too close to personhood to think of as property," such as agreeing to commit suicide. *Id.* Nonetheless, beyond these interests, she appears willing to support the prohibition of specific transactions for the traditional reasons supporting inalienability. For discussion of those traditional reasons, see notes 117-65 and accompanying text. For further discussion of inalienability rules, see Calabresi & Melamed, *supra* note 30, at 1111-15 nn.42-51 and accompanying text.

³⁴ Radin, *supra* note 17, at 986. For the grouphood analogue, see *infra* note 59 and accompanying text.

³⁵ *Id.* at 972.

³⁶ *Id.* at 968-69.

³⁷ This second criterion operates as a "sufficiently objective criteri[on] to identify close object relations that should be excluded from recognition as personal property because the particular nature of the relationship works to hinder rather than to support healthy self-constitution." *Id.* See *infra* note 41 and accompanying text for an explanation of bad object relations.

causes pain that cannot be relieved by the object's replacement."³⁸ Radin concludes that "[a] person cannot be fully a person without a sense of continuity of self over time."³⁹ Ongoing relationships between ourselves and both "things" and other people maintain that sense of continuity.⁴⁰

Once property is deemed to be "bound up" with its holder's personhood, it must meet the test's second criterion: its retention must not promote "bad object relations." In order to make this determination, personhood theory requires an examination of the distinction between good and bad object relations. Despite a claim that some property is bound up with a person's identity, it should not receive personhood property treatment when an objective moral consensus would agree that being bound up with it is incompatible with personhood. Here, Radin leaves us with the largely intuitive definition that good object relations are those that are healthy.⁴¹ By implication, bad object relations are fetishistic. Property, therefore, must qualify by proving that its retention promotes good object relations or, at least, does not constitute bad object relations to meet the second prong of the test for property for personhood.

One consequence of the personhood property characterization is that qualifying property has a stronger moral claim than other property. The consequence of denying personhood status to property that fails one or both prongs is to treat that property as fungi-

³⁸ See Radin, *supra* note 17, at 959. For example, this view would argue that an exact replica of the original Declaration of Independence could not compensate Americans for the hypothetical loss of the original, actually penned by the Founders. "Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world." *Id.* This Note argues that the same is true of certain cultural property. See *infra* notes 56-59, 64-70, 83, 84 & 87.

³⁹ *Id.* at 1004.

⁴⁰ *Id.*

⁴¹ *Id.* at 968. Bad object relations are fetishistic, good object relations are not. Society should discourage bad object relations because "becoming too enthralled with property takes away time and energy needed to develop other faculties constitutive of personhood." *Id.*

In the grouphood context, retention of an object merely to prevent others from possessing it is fetishistic. For example, retention of art already represented in abundance in a source nation is fetishistic. See *infra* section III. Thus, in the example of restrained cultural property, when objects are used to promote cultural intolerance or unbridled ethnocentricity, or have that effect, their retention is likely to be fetishistic. See Dummett, *The Ethics of Cultural Property*, ATHENA, at 318, Oct. 1986 (arguing that anyone who relishes cultural diversity should find local patriotism endearing and its affects admirable; "as with other loyalties, it would become malign only if it were to engender contempt for or hatred of other localities.").

Good object relations, on the other hand, are not fetishistic. They occur when the retainers use the property to foster important values including pride, learning, and community. See *infra* notes 59 & 63-70 and accompanying text.

ble.⁴² Property that is merely fungible does not receive any special protections.⁴³

B. Analogizing Grouphood Rights in Property from Personhood Rights in Property

As discussed above, some property aids personhood to the extent that it promotes self-development; personal property is important precisely because its holder could not be the particular person she is without it. Whether property similarly can aid grouphood depends upon the intrinsic existence of group rights. Finding independent group rights is important because, if merely derivative of individual or societal rights, the protection of those group rights would be constrained. If derivative, group rights would remain subordinated to individual or societal rights in clashes with those rights. If group rights exist independently, however, they merit the protections and powers afforded individuals, including in some cases, the right to control property.

1. *The Intrinsic Existence of Grouphood Rights*

Despite the lack of a fully developed group rights dialogue, a significant body of current scholarship supports a theory of independent or intrinsic group rights.⁴⁴ Criticizing existing derivative value theories for group rights (*i.e.*, that group rights derive from either individual, or from both individual and sociality rights), one scholar has developed an intrinsic value theory for group rights.⁴⁵ Two United States Supreme Court cases demonstrate the recogni-

⁴² Radin, *supra* note 17, at 970.

⁴³ Indeed, a liability rule might be the only protection for some fungible property. Under such a rule one can be dispossessed of the object and receive merely cash replacement rather than restoration of the object. For example, most contract rights are only enforced by liability rules.

⁴⁴ See, e.g., Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1001-02 (1983) ("[T]here is an intrinsic value in groups. . . . To rob existence of communality, of the communal celebratory process which forms the substance of much of our experience, would be to deny one ethical constituent of our humanity."); Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach*, 59 S. CAL. L. REV. 1, 19 (1985) (discussing the value of community as surviving the lives of individuals); Van Dyke, *Justice as Fairness: For Groups?*, 69 AM. POL. SCI. REV. 607, 614 (1975) ("it is arbitrary to assume that justice is only for individuals and states"). Cf. R. NISBET, *COMMUNITY AND POWER* 25-26 (1962) ("In many areas of contemporary thought lie evidences of a positive regard for community . . . that contrasts sharply with the general emphasis upon release and individuation . . . ; plainly, the aspiration toward moral certainty and social community . . . gives relevance to so much of the theoretical and imaginative work of the age.")

⁴⁵ Garet, *supra* note 44, at 1001. A derivative theory of group rights assumes that any rights conferred upon groups exist as a result of group members' individual rights or society's rights. Under such a theory, group rights merely collectively express rights of individuals. Garet's intrinsic value theory, however, holds that groups *qua* groups

tion and operation of an intrinsic value theory of group rights. A derivative value theory of group rights cannot explain these cases because the Court protects group rights in both cases at the expense of both individual and societal rights. The elevation of group rights as the *ratio decidendi* in these cases destroys the myth of derivative group rights and installs in their place a system of symmetrical individual, communal (group), and societal rights.

In *Wisconsin v. Yoder*,⁴⁶ the Supreme Court exempted children in traditional Amish and Mennonite communities from state compulsory schooling after the age of fourteen. The Court reasoned that formal schooling beyond that age would deprive the children of their "free exercise" rights by potentially weakening those communities. *Yoder* is about a community striving to protect its groupness.⁴⁷ As the Amish respondents contended in their Supreme Court brief:

There exists no Amish religion apart from the concept of the Amish community. A person cannot take up the Amish religion and practice it individually. The community subsists spiritually upon the bond of a common, lived faith sustained by common traditions and ideals which have been revered by the whole community from generation to generation.⁴⁸

The Court's holding cannot be justified by reliance upon a derivative value theory because individual rights and societal rights clashed with group rights; yet, group rights prevailed at the others' expense.⁴⁹

Similarly, in *Santa Clara Pueblo v. Martinez*,⁵⁰ the Supreme Court preferred group rights by deciding that the Indian Civil Rights Act of 1968 did not give the federal courts jurisdiction to decide whether a gender-discriminatory tribal membership rule deprived an Indian woman and her children of equal protection.⁵¹ The discriminatory internal group controls at issue in *Santa Clara* sought to

have rights. Garett recognizes a "triple value schema" consisting of symmetrical and independent individual, group, and societal rights. *Id.* at 1017.

⁴⁶ 406 U.S. 205 (1972).

⁴⁷ Garett, *supra* note 44, at 1034.

⁴⁸ Cover, *The Supreme Court—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 29 (1983) (quoting Brief for the Respondent at 21, *Yoder v. Wisconsin*, 406 U.S. 205 (1972) (No. 70-110)).

⁴⁹ "The confinement of *Yoder* to individual rights is troubled by the fact that the model of individual free exercise rights does not accommodate the control *over* individuals that must result from the grant of the exemption." Garett, *supra* note 44, at 1031 (emphasis in original). Nor can the result in *Yoder* be justified by social welfare considerations, or by a societal right. *See id.* at 1034. This is because the social interest in compulsory education and citizenship skills suffers at the hands of the *Yoder* outcome.

⁵⁰ 436 U.S. 49 (1978).

⁵¹ The rule granted tribal membership to children of male tribe members married to female nonmembers but denied membership to children of female members married

halt tribal dilution and mongrelization. By discriminatorily defining tribal membership, however, the rule offended sociality by denying a member of society the full fruits of liberty as guaranteed by the federal constitution. Likewise, the express denial of a federal forum to the equal protection claimants offended individual rights. A decision concerned with individual rights would have heard and upheld the equal protection claim at issue here on the ground that the Equal Protection Clause was meant to protect an individual's right to be treated like those similarly situated. As in *Yoder*, a derivative value theory could not justify the result in *Santa Clara*.⁵²

Among other things, *Santa Clara* also illustrates that federal Indian law generally recognizes group rights. Some of those rights may obtain in a group's relationship to property. American Indian law has long distinguished individual from communal property.⁵³ *Journeycake v. Cherokee Nation*⁵⁴ emphasizes the nature of communal rights:

The distinctive characteristic of [tribal] property is that every member of the community is an owner of it as such. He does not take as an heir, or purchaser, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property in the lands, as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners.⁵⁵

2. Group Rights in Cultural Property

Having made out a prima facie case for the existence of independent group rights, we next ask whether the goal of proper group development adequately justifies group control over certain resources, just as the goal of proper self-development justified similar controls under personhood theory.⁵⁶ American Indian law appears willing to validate this goal by recognizing group rights in

to male nonmembers. Upon tribal membership hinged property distribution rights and other entitlements.

⁵² "[B]ecause there are certain things only groups, and not individuals, can have—such as socialization processes (*Yoder*) and kinship structures (*Santa Clara*)—there are a fortiori certain things that only a group can hold a right to have." Garet, *supra* note 44, at 1038 (emphasis in original).

⁵³ See generally F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, ch. 9 (1982). See also Echo-Hawk, *Museum Rights v. Indian Rights: Guidelines for Assessing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437, 442 (1986) (claiming that in federal Indian law, courts long have distinguished individual Indian property from communal Indian property in which individual tribal members have no title).

⁵⁴ 28 Ct. Cl. 281 (1893), *aff'd*, 155 U.S. 196 (1894), *quoted in* Echo-Hawk, *supra* note 53, at 442.

⁵⁵ *Journeycake*, 28 Ct. Cl. 281, 302 (1893), *aff'd*, 155 U.S. 196 (1894).

⁵⁶ Cf. *supra* text accompanying note 28.

property. In addition, historic preservation law is essentially communitarian to the extent that it, too, recognizes group interests in property for the purposes of developing a sense of community.⁵⁷ Thus, the law on many occasions acknowledges that groups have legitimate rights to “foster, strengthen, and enrich their members’ sense of community” by preserving and providing access to a common cultural heritage.⁵⁸

Moreover, if one accepts the notion of independent group rights, Radin’s personhood theory allows an analogy from personhood rights in personal property to group rights in uniquely collective property. Thus, by analogy, an object could qualify as property for grouphood if it is bound up with group identity and its retention does not constitute bad object relations. Again, if both prongs are met, the group should retain special rights in the property for purposes of group development, constitution, sense of community, and identity.⁵⁹

a. *Defining group scope.*

This Note must offer a definition of group scope because grouphood is the source of rights under this theory. A group is more than a mere collection of individuals. Groups have been characterized as both entities that have “a distinct existence apart from [their] members,” and ones recognized by a condition of interdependence where the “identity and well-being of the members and the group are linked.”⁶⁰ “Members of the group identify them-

⁵⁷ Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 534 (1981). According to Rose, the Supreme Court’s decision in *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668 (1896) (finding that condemnation of the Gettysburg battlefield fulfilled the public purpose requirement because “[i]t would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days.”), strikingly illustrates two critical elements. First, it illustrates that preservation can have the political purpose of fostering a sense of community. Second, that a “place can convey this sense of community, or more generally, that visual surroundings work a political effect on our consciousness.” (emphasis in original). Rose, *supra*, at 483. Compare the Court’s quoted language above with Pericles’ funeral oration, cited *infra* note 89.

⁵⁸ Bator, *supra* note 5, at 305.

⁵⁹ Like property near the personal end of the personhood continuum, see *supra* note 34 and accompanying text, property near the grouphood end of the analogous continuum would be equally essential because a group could not be what it is without the particular property. See, e.g., Smith, *Art Object and Historic Usage*, in WHO OWNS THE PAST?, *supra* note 2, at 87 (“The ways in which people view their past are to a considerable extent reflected in those objects they choose to preserve as reminders of themselves.”); Note, *supra* note 11, at 92 (“Certain objects tell people who they are and what they have in common; a cultural heritage helps to develop and satisfy a people’s need for identity.”).

⁶⁰ Fiss, *Groups and The Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 148 (1976).

selves—explain who they are—by reference to their membership in the group; and their well-being or status is in part determined by the well-being or status of the group.”⁶¹

Groupness is relative because it depends upon comparison to the entity of which it is a subset. For example, Christians might comprise a group within the universe of all people, while Methodists are a group within the universe of Christians. Due to the relativity of groupness, in this example Christians can be both a group and a defining universe (or society).

Likewise, while Greeks clearly comprise a society themselves, no doubt composed of smaller groups, they are still very much a group in the world society. Because the restitution, disposition, and distribution of cultural property is an issue of international scope, the contours of the group right merit choosing the world society as the relevant universe from which to extrapolate Greek groupness.⁶² Greeks, then, merely comprise one group in a world society of rival claimants seeking to enforce, or at least discuss, rights and aims related to cultural property.

Group scope eludes precise definition, even in a specific case. Attempts to pinpoint entire group membership invariably raise questions. Does the community determine its members?; or, does the individual's belief or intent determine his group membership? The unavoidable flexibility of group boundaries, however, should not dissuade discussion of grouphood. In our case, it is difficult to argue that today's Greeks are not sufficiently related to the Greeks

⁶¹ *Id.*

⁶² More technically, the Greeks were merely one group within the multiethnic Ottoman Empire when the Marbles were removed. Not only are today's Greeks a group, but they share group membership with Pericles (strategos of Athens from 443-429 B.C., famous for his remarkable public works which included the Parthenon) and Phidias (among Athens's greatest artists, he designed and supervised the construction of the Parthenon Marbles).

Although still resurrected from time to time, the “Fallmerayer theory” (arguing that today's Greeks are not the biological descendants of the ancient Greeks) is criticized nowadays. See, e.g., S. SALAMONE, HELLENIC NATIONALISM AND GRAECO-TURKISH HISTORIOGRAPHY: TOWARDS A THEORY OF CULTURAL SCHISMO-GENESIS 24-31 (1981) (describing Fallmerayer's theory as an “outdated racist approach to the problem of legitimate cultural continuity.”). See also Dummett, *supra* note 41, at 319 (“Greek culture has naturally undergone much transformation in the course of its long history, and many influences have borne upon it; but it has been a continuous process, in which the Greek people has retained its identity, unlike many ancient peoples which have long vanished.”). Linguistic continuity is an earmark of group continuity, as is historic continuity: “The Greeks . . . have an intense sense of heritage, of historical continuity from the Mycenaean past to the present.” McBryde, *supra* note 2, at 4; see also A. TOYNBEE, THE GREEKS AND THEIR HERITAGES 273 (1981) (“There has been no break in literacy in subsequent Greek history since the Hellenic Greeks' adoption of the Phoenician alphabet.”).

of classical antiquity to possess rights to any cultural property in which the ancients had claim.

b. *Art as cultural property.*

While the term "cultural property" is susceptible of many meanings, this Note focuses on art as the predominant genre of cultural property. Art can define groupness particularly well. It is uniquely capable of being bound up with one's personhood.⁶³ Likewise, groups can have equally important relations to art.⁶⁴ Because "[a]rt speaks directly to the inner consciousness within which we resolve whether we do really feel a sense of belonging to a group or community,"⁶⁵ it links group members to their ancestors and heirs, thereby both satisfying a basic need for identity and symbolizing shared values. What some groups see as a cultural artifact, other groups see as a living thing which enables them to achieve confidence in themselves and, thus, able to imagine their future.⁶⁶ Preventing groups from controlling those resources necessary for

⁶³ This notion is by no means new—it long has guided the doctrine of moral rights inhering in an artist's works. Such an approach, in contradistinction to the approach of this Note, elevates individual rights as the primary basis for protecting artistic integrity. For a full discussion of the moral rights doctrine, see Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940). See also Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, (1968).

An interesting question beyond this Note's scope is whether a moral rights analysis could compel the Parthenon Marbles' return to Greece on the basis of an artist's rights in the integrity of his work, *i.e.*, his right to prevent dismemberment (see discussion of the Bernard Buffet case *infra* note 94). See Geller, *Comments on Possible U.S. Compliance with Article 6bis of the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 665, 669 n.19 (1986) (arguing that such an "integrity right may be invoked in the public interest even centuries after an [artist's] death; 'this by parties who are in no way his heirs but who merely possess standing to speak in the names of [a particular] culture and the integrity of its works.'").

Under an American approach toward moral rights protection, use of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1982), to permit standing for parties other than the artist to sue for misdesignation or distortion of artistic or intellectual property, has met less certain results. See Geller, *supra*, at 679-80 n.67. For further discussion of the American approach, see Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171 (1989).

⁶⁴ While it is through memory that we possess direct access to a personal past, "traditions are normally perceived as corporate and integrated structures, so that claims on a traditional past are rarely made by individuals." Smith, *supra* note 59, at 79.

⁶⁵ Bator, *supra* note 5, at 305. "The existence and awareness of a common artistic heritage can make a powerful contribution to the consciousness of the relationship between self and community." *Id.*

⁶⁶ J. MERRYMAN & A. ELSÉN, *LAW, ETHICS AND THE VISUAL ARTS* 54 (1987). This view parallels the relativity of attitudes towards particular property that Radin describes in her personhood discussion. "The same claim can change from fungible to personal depending on who holds it. The wedding ring is fungible to the artisan who made it and now holds it for exchange . . ."; yet, it becomes personal to the bride thereafter. Radin, *supra* note 17, at 987.

group constitution threatens group existence.⁶⁷

The absence of works representing an "irreplaceable cultural heritage" is psychologically intolerable.⁶⁸ Just as the destruction of the Statue of Liberty would diminish the bond between immigrants who shared the same first glimpse of the United States, or the toppling of Jerusalem's Wailing Wall would wound the spirit of world Jewry, Lord Elgin's removal of the Parthenon Marbles injures Greek groupness by having emasculated the greatest of all Greek art—the Parthenon. By destroying the Greeks' mana,⁶⁹ the embodiment of their highest humanistic hopes and a measure of their existence, Lord Elgin harmed Greek grouphood by irreparably diminishing an integral part of the celebration⁷⁰ of "being Greek."

C. Weighing the Factors that Qualify the Parthenon Marbles as Property for Grouphood

Once again, cultural objects qualify as property for grouphood (1) if they are bound up with a group's identity, and (2) if their retention does not constitute bad object relations. Any determination of whether property rises to the level of property for grouphood must necessarily be reached case-by-case. Both whether property is sufficiently bound up with holder identity and whether its retention is fetishistic depend upon the surrounding circumstances. This Note suggests that the Parthenon Marbles qualify as property for grouphood and uses that example to illustrate the relevant factors for making such a determination.

⁶⁷ The fate of Alfred Rosenberg illustrates the seriousness with which the world views violations against groups and their cultural property. As head of Nazi Germany's Center for Nationalist Socialist Ideological and Educational Research, Rosenberg was found responsible for a system of "organized plunder of both private and public property throughout the invaded countries of Europe." As of July 14, 1944, more than 21,903 art objects had been seized by his organization. For these offenses against cultural property, the International Military Tribunal at Nuremberg sentenced Rosenberg to death. See Merryman, *supra* note 1, at 835-36 (citing 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 539 (1948)).

⁶⁸ Browning, *The Case for the Return of the Parthenon Marbles*, 36 MUSEUM 38 (1984) (quoting the Director-General of UNESCO), reprinted in J. MERRYMAN & A. ELSEN, *supra* note 66, at 135.

⁶⁹ [I]f art gives an aura of prestige to a city or a dynasty, rival cities or rival dynasties, which set out to conquer and humble them, will seek also to destroy their "myth" by depriving them of this aura and appropriating it to themselves, like cannibals who, by devouring parts of their enemies, think to acquire their mana, the intangible source of their strength.

H. TREVOR-ROPER, *THE PLUNDER OF THE ARTS IN THE SEVENTEENTH CENTURY* 7-8 (1970), reprinted in J. MERRYMAN & A. ELSEN, *supra* note 66, at 3-4.

⁷⁰ Garet uses the term "communality" instead of grouphood. He views communal-ity (my grouphood) as an intrinsic structure of existence along with individuality and sociality. Garet, *supra* note 44, at 1015. With each of these structures he associates a characterizing emotion: for individuality, dread; for sociality, hope; and for communal-ity, celebration. *Id.* at 1072.

The Marbles which Elgin removed actually comprise three distinct categories of incorporated art of the Parthenon: the metopes, the frieze, and the pedimental sculpture.⁷¹ Most of the reasons which justify finding that the Marbles are bound up in Greek grouphood also support a claim of good object relations. While the factors enumerated below should aid any determination of whether an object meets property for grouphood requirements, this list is by no means exhaustive. Indeed, in other cases other factors may be more relevant. These factors merely suggest the contours of a theory whose precise application is particularly fact-sensitive.

1. *Length of Time of Ownership*

Our connections to things ordinarily increase over time. The longer we possess an object, the more precious and irreplaceable it becomes, and the greater its possibility of becoming bound up with our identity. The Parthenon Marbles stood as a tribute to the ingenuity, creativity, and virtue, first of Athenians, then of all Greeks, for well over two thousand years before their removal by Lord Elgin. During this period, both outsiders and the Greeks themselves came to identify the Parthenon as the Greeks' single most important artistic contribution to Western art. Given those circumstances, it is not surprising that after two thousand years the Greeks should see the Parthenon and its Marbles as a monument to their cultural identity.⁷²

2. *Historic Factors*

Historic factors invariably play a special role in the Greeks' relationship to the Parthenon and its Marbles.⁷³ As an historic monument to humanism and to glorify Athens upon its victory over Persian forces, Pericles commissioned one of the greatest public works known to mankind. Built upon the ruins of an earlier acropolis destroyed in the first Persian War, the Parthenon crowned this new Acropolis.⁷⁴ As part of an aggressive public works plan initially meant to glorify Greece's victory over barbarism, and ultimately aimed at expressing Athens's new status in Greece as exemplar of a

⁷¹ For a comprehensive photographic and explanatory catalog of the Parthenon's friezes, see 1-2 F. BROMMER, *DER PARTHENOFRIES* (1977). For a detailed description and discussion of the Parthenon's east pediment, see E. BERGER, *DIE GEBURT DER ATHENA IM OSTGIEBEL DES PARTHENON* (1974).

⁷² See *infra* note 157 and accompanying text.

⁷³ See, e.g., Q&A: Melina Mercouri: Greece's Claim to the Elgin Marbles, N.Y. Times, Mar. 4, 1984, at E9, col. 1 ("[W]hen we are born, they talk to us about all this great history that makes Greekness.")

⁷⁴ C. HITCHENS, *supra* note 2, at 16.

balanced and just society,⁷⁵ the Marbles epitomize an historic moment.⁷⁶ As specifically commemorative of a specific war effort and general era, the Parthenon has told Greeks about their glorious achievements in the history of the world.

Moreover, the quality of the art, itself, has significant cultural and historic implications. The balance and symmetry of the Marbles' triad of metopes, pedimental sculpture, and the frieze, and their relationship to the Parthenon's architectural design are unparalleled.⁷⁷ The masterwork of Phidias⁷⁸ and his fellow artisans won acclaim for the Marbles as the crowning jewel of the Parthenon, and indeed, the entire Acropolis.⁷⁹ Quite simply, Greek art and architecture culminated in the Parthenon.⁸⁰ Historically, it became the standard by which not only later Greek and Roman art, but most later Western art (either in a spirit of emulation or rebellion) measured itself.⁸¹ The Marbles' turbulent history further attests to their historic importance.⁸²

⁷⁵ See J. POLLITT, *ART AND EXPERIENCE IN CLASSICAL GREECE* 66 (1982).

⁷⁶ Hitchens suggests the parallelism between Pericles' depiction of Athenian society with godlike qualities and the Parthenon frieze, where the visual and spiritual gap between men and gods vanishes.

⁷⁷ For a thorough examination of the Parthenon and its constitutive elements, see J. POLLITT, *supra* note 75, at 71-93. Pollitt stresses: "The sculptures of the Parthenon were integrally bound up with the building's form and meaning and are inseparable, in form and execution, from its architecture." *Id.* at 79.

⁷⁸ Phidias

was one of the greatest Athenian artists, famous especially as a sculptor, but also as an architect and painter. He contributed, under his friend Pericles, to the adornment of Athens He perhaps designed and certainly supervised the construction of the frieze of the Parthenon.

THE OXFORD COMPANION TO CLASSICAL LITERATURE 321 (P. Harvey 1974).

⁷⁹ In 1380, King Pedro IV of Aragon, then titular Duke of Athens, described the Acropolis as "the richest jewel in the world." C. HITCHENS, *supra* note 2, at 21.

⁸⁰ Even a Roman, Plutarch, said, "[a]ll the public buildings and temples raised in Rome from the founding of the city to the age of the caesars cannot be put in competition with the edifices erected on the Acropolis Hill during the brief administration of Pericles." T. VRETTOS, *supra* note 2, at 75.

In a memo solicited by Parliament, the British Museum, though denying the authenticity of the Marbles (an authenticity accepted by all today), "acknowledged that the Acropolis ha[d] remained the most outstanding national monument of Greece." *Id.*

⁸¹ J. POLLITT, *supra* note 75, at 80.

⁸² In 1803, Lord Elgin, a British diplomat, sought and obtained a permit to examine the Parthenon and its art. At that time, Greeks still constituted an ethnic minority within the Ottoman Empire, under which they had been politically subjugated for nearly four hundred years. Notwithstanding the permit's limited authorization, which has been hotly debated, Elgin removed much of the Parthenon's sculpture. Ultimately, after a temporary detention in Pireaus harbor by the Turks, elicited by the French who sought the Marbles for themselves, Elgin sailed to England with the handsome booty in his ship's hold. Subsequently, the British Parliament, by a 83-30 vote, purchased the sculptures from Elgin. Thirty dissenters questioned the propriety of Elgin's actions and sought an amendment to hold the Marbles in trust for later return to the Greeks. The history of the Marbles is vividly laid out in several very good sources. See C. HITCHENS,

3. *Group Identity and Continuity*

The universal admiration for the Parthenon engenders reverence and pride which are instrumental to Greek communal flourishing.⁸³ The Parthenon unifies current Greeks with their ancestors and additionally binds them to future, unborn Greeks.⁸⁴ The sculp-

supra note 2; Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985); W. ST. CLAIR, *LORD ELGIN AND THE MARBLES* (1983); and T. VRETTOS, *supra* note 2.

Since the achievement of Greek independence in 1821, many have called for the restitution of the Marbles. The Greek minister in London in 1898, Ioannes Gennadios, asked that the fragments be returned. Merryman, *supra*, at 1882 n.6. Lord Byron captured the public imagination with his depiction of Elgin as a "crude despoiler of Greece" in his poetry. In *Childe Harold's Pilgrimage*, Byron wrote:

But most the modern Pict's ignoble boast,
To rive what Goth, and Turk, and Time hath spared:
Cold as Crag's upon his native coast,
His mind as barren and his heart as hard,
Is he whose head conceived, whose hand prepared,
Aught to displace Athena's poor remains:
Her sons, too weak the sacred shrine to guard,
Yet felt some portion of their mother's pains,
And never knew, till then, the weight of Despot's chains.

THE POETICAL WORKS OF LORD BYRON 27 (1859).

During the Second World War, Greek heroism in turning back the armies of Mussolini prompted a steady stream of letters in the British press suggesting the return of the Marbles as a sign of gratitude.

That we are the grateful admirers of our Greek ally has been said many times during these past few weeks. Cannot we do something to prove our admiration and gratitude? I suggest we can. [Return the Marbles] . . . unquestionably, they belong there. The Greeks feel the loss of them and every one who looks at the Parthenon intelligently regrets their absence.

Letter to the Editor from Hamilton Fyfe, *The Times*, Dec. 12, 1940, at 5. Also supporting the plea by Hamilton Fyfe is the great-grandson of William Richard Hamilton, whose great-grandfather, as Elgin's agent, fetched the Marbles to England. He wrote: "Thus, Hamilton rescued the Greek Marbles for future generations [and] . . . [h]is descendant now suggests that at the conclusion of a victorious peace we return to Greece, as a reward, the Elgin Marbles." Letter to the Editor, *The Times*, Dec. 19, 1940, at 5. *But see* Letter to the Editor from Charles Wheeler, *The Times*, Dec. 16, 1940, at 5 (claiming the Marbles as the common heritage of mankind).

Finally, under the aggressive leadership of internationally-known actress and then-Minister of Culture and Education, Melina Mercouri, in 1983 the Greek government formally requested that England return the Marbles to Greece. *See* 50 Parl. Deb., H.C. (6th ser.) 379 (1983) (Written Answers). The British officially declined the request in 1984. *See* 58 Parl. Deb., H.C. (6th ser.) 188 (1984) (Written Answers).

⁸³ Former Minister Mercouri perhaps put it most passionately: "The Marbles are part of a monument to Greek identity, part of our deepest consciousness of the Greek people: our roots, our continuity, our soul. The Parthenon is our flag." *Sunday Times* [London], May 22, 1983, at 15, col. 1.

⁸⁴ "[Society] is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead and those who are to be born." *Cf.* Golding, *Obligations to Future Generations*, in *RESPONSIBILITIES TO FUTURE GENERATIONS*, 61, 69 (E. Partridge ed. 1981) (quoting E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 93-94 (1910)).

tures' memorialization of ancient artistic themes holds special meaning today because it tells how the ancient Greeks viewed themselves and the world around them. These themes reflect the "deep-seated Greek will to define the emergence of order out of chaos."⁸⁵ By so doing, these themes remind today's Greeks what their ancestors were like, which might affect their own future.

"The Parthenon has been, and is, for almost all Greeks the symbol *par excellence* of their national identity, of their links with the past, and of the contribution that they and their forefathers have made to the civilization that we all share."⁸⁶ If the Greeks' *mana* (a force which embodies a group's intangible source of strength and character) exists anywhere, it must surely exist on the Acropolis Hill, emanating from the gaping holes left in the Parthenon by the Marbles' removal.

Because new visions of the past may serve social and political ends, the loss of objects affecting such visions risks alienating a people from their past.⁸⁷ Such a risk has particularly political connotations to the extent it threatens nation-building and fosters cultural amnesia.⁸⁸ One can hardly think of property more bound up with a group's identity than the Parthenon Marbles are to Greek identity. Moreover, reliance upon the Parthenon Marbles as a source for group awareness and continuity does not evince bad object relations. Rather, by promoting pride, understanding, group-actualization, constitution, and historical continuity, the Marbles would yield a positive social outcome to Greeks.

4. *Intention to Dedicate as Grouphood Property*

The artist's intention can also be instructive in determining whether particular art is property for grouphood. The art and architecture commissioned by Pericles was quintessentially public. It was solely intended to be created by and dedicated for the people.⁸⁹ Pericles, as commissioner of the works, and Phidias, as chief de-

⁸⁵ For example, much of the sculpture depicts Centauromachys and Amazonomachys. "These themes become general archetypes, generic expressions, of specific events. . . . [F]ew Greeks would have missed an allusion to the triumph over the Persians." J. POLLITT, *supra* note 75, at 81-82.

⁸⁶ C. HITCHENS, *supra* note 2, at 25. The Marbles are essential to Greek identity because they "tell [Greeks] who [they] are and where [they] came from." See Elsen, *Introduction: Why Do We Care About Art?*, 27 HASTINGS L.J. 951, 952 (1976).

⁸⁷ McBryde, *supra* note 2, at 8.

⁸⁸ Cf. J. STEINBECK, *THE GRAPES OF WRATH* 114 (Penguin Books ed. 1976) ("How will we know it's us without our past?").

⁸⁹ See THUCYDIDES, *THE PELOPONNESIAN WAR* 148 (Penguin ed. 1954) ("Mighty indeed are the marks and monuments of our empire which we have left. Future ages will wonder at us, as the present age wonders at us now.") (quoting Pericles' funeral oration). See also *supra* notes 74-76 and accompanying text.

signer, meant to create an enduring monument to their people, a tribute to the ability of man, through order, to subjugate chaos and barbarism.⁹⁰

Furthermore, the scale and unity of all the Acropolis' monuments corroborate an intent to dedicate art as an enduring site-specific memorial. Not only were the Marbles and the buildings conceived and executed as a unified whole, but they also never were conceived to "pass into the possession of a patron or to be bought and sold on the art market."⁹¹ Thus, the Parthenon is undeniably public art.

The public character of this property serves to distinguish between art that should be freely alienable and that which might legitimately be held under a regime of strict inalienability. Western art enthusiasts have little cause for alarm that such definition of property for grouphood sounds the bell of repatriation of all foreign art. The case for repatriation of detached objects such as paintings, not intended to be site-specific, and often profit-motivated, is a much weaker case.⁹²

5. *Summing Up*

The unique place in both Greek political and artistic history that the Parthenon holds, its contribution to group awareness and pride, its longstanding association with the Greek people, and its intention to be publicly dedicated, all support a claim that the Marbles are bound up with Greek grouphood. They are irreplaceable; their absence has caused pain among Greeks.

Further, making the claim that Greek identity is bound up with the Marbles is not an expression of bad object relations. This claim is not fueled by an impulse to hoard, nor is it unduly materialistic. Here, claims to special rights in property would not be fetishistic because retention is sought to promote the salutary aims that property for grouphood intends to encourage. Such art would not be restrained merely to prevent others from possessing it.⁹³ Greeks would seek to retain such art because it fosters pride and remembrance of past glory, creates linkages, and allows for celebration of Greek community. Claiming that the Marbles constitute property for grouphood is consistent with the aim of promoting group devel-

⁹⁰ See, e.g., J. POLLITT, *supra* note 75, at 66 (describing the Periclean building program as a monument to the victory over barbarism).

⁹¹ Browning, *supra* note 68, at 135.

⁹² See Dummett, *supra* note 41, at 319 n.9 ("Plainly, the case for the return of detached objects such as easel paintings, not intended for any specific location, is in itself less strong than for those that were never meant to be removed.").

⁹³ "Objects of art constitute evidence of things other than themselves." Niec, *Legislative Models of Protection of Cultural Property*, 27 HAST. L.J. 1089 (1976).

opment and identity which underlie the property for grouphood characterization.⁹⁴

II

GRANTING GROUP CONTROLS OVER EXTERNAL RESOURCES—A REGIME OF STRICT INALIENABILITY RULES TO PROTECT PROPERTY FOR GROUHOOD

Responding to an article advocating the return of the Parthenon Marbles to Greece, the editor of a nineteenth century magazine

⁹⁴ This Note avoids the technical complexities of returning the Marbles, though by defining them as meeting the criteria for property for grouphood the Note would argue that they belong in Greece. Length of time of ownership, historic factors, group awareness and continuity, and intention to dedicate as grouphood property make the Marbles property for grouphood. While not arguments for classifying the Marbles as property for grouphood, two other factors deserve mention to the extent they favor restitution of the Marbles by demonstrating the superiority of a Greek moral claim to the Marbles.

First, the Marbles would stimulate and promote cultural flourishing in two ways. They would advance scholarship and also stimulate derivative and responsive art. The presence of such consequential art makes life "morally serious" and "aesthetically delightful." See Bator, *supra* note 5, at 294 & 305. The Marbles' presence in Athens also would create beneficial artistic results. Historian Adolph Holm admitted the Marbles' power to spark creativity when he wrote: "when [the Marbles] had become better known through their removal to London, they excited general admiration even among the best artists, and they have effected a complete revolution in our conception of ancient art. It is they which taught us what Greek art really was." 2 A. HOLM, *supra* note 1, at 266. The superiority of a Greek claim over a universal claim based on the art's importance to mankind, see *infra* section III, should be founded on its status as property for grouphood which creates a morally superior claim.

Second, interests in artistic integrity favor restitution of the Marbles to Greece. Its designers conceived and executed the Parthenon as part of a common plan. See C. HITCHENS, *supra* note 2, at 68. Hence, their removal has caused an aesthetic revulsion by debasing the values of compensation, tension, integration, and exaggeration achieved by the Parthenon's celebrated application of optics and mechanics. See J. POLLITT, *supra* note 75, at 71-95.

A strong impulse against dismemberment of art also supports reunification of the pieces. See J. MERRYMAN & A. ELSÉN, *supra* note 66, at 54; Bator, *supra* note 5, at 295-99. Even without a superior moral claim created by the Marbles' qualification as property for grouphood, the Marbles ought to be returned to Greece to make a dismembered work whole again. The value of artistic integrity was upheld in the celebrated case of Bernard Buffet's refrigerator. See Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976) (panel-by-panel disposition by purchaser of Buffet's decorated refrigerator enjoined by the French courts as a violation of rights in the work's integrity).

Furthermore, the Acropolis effects a perfect integration of indigenous elements. "The international community . . . has come to accept historic monuments as an integral part of the environment in which they were created." United Nations General Assembly, 42nd session, Provisional Record of the Forty-Seventh Meeting, held at headquarters, New York, 22 October 1987, at 26 (comments by Mr. Al-Amin, Iraqi delegate). Because the sculpture can be better understood and appreciated at its original site with the ability of moving between the temples and sculptures, the Marbles' removal detracts from both archaeological meaning and viewer appreciation. See Bator, *supra* note 5, at 305-06. Removal heightens the risk of losing historical evidence and disturbs viewer appreciation in terms of both context and convenience. See *id.* at 301-02.

hypothesized that if England returned the Marbles, the Greek government might "yield to an offer of a million sterling from Berlin, or two million sterling from New York."⁹⁵ After learning how essential the Marbles are to Greek groupness, one might discount such a prophecy.

Notwithstanding the Marbles' importance to Greek grouphood, the traditional scholarship would uphold a voluntary transfer of the Marbles by Greek authorities, even though an involuntary one might create grounds for rescission. The traditional scholarship responds to the evil of involuntary dispossession—*theft and smuggling*—in violation of protective national and international laws, but never contemplates the possibility of complete inalienability.⁹⁶ In the absence of involuntary dispossession, a full examination of the boundaries of grouphood rights forces us to confront the question: "Could the Greeks, themselves, voluntarily sell or give away the Marbles?" This Note concludes they could not. Grouphood rights in group constitution, identity, continuity, and development already advanced in this Note justify this need for control over grouphood property in the form of inalienability rules.

A. Distinguishing Market-Inalienability from Strict Inalienability

This section further develops the already-existing parallel between property for personhood and property for grouphood by arguing that protecting the former enhances human flourishing, while protecting the latter analogously enhances communal flourishing. To the extent that varying degrees of restraints on alienation are needed to secure the goal of flourishing under each regime, this section explains the divergence between these parallel theories. The section concludes that while mere market-inalienability sufficiently removes any impediments to human flourishing, for communal

⁹⁵ See C. HITCHENS, *supra* note 2, at 68.

⁹⁶ See, e.g., Note, *supra* note 11, at 97 (based on a system of import and export restrictions, the UNESCO Convention, *see supra* note 2, protects cultural property only to the extent that an individual nation creates such restrictions). But even those countries that have nationalized their cultural property and claim any export violates their national law have met with uncertain results. "International legal authorities consider these laws complicated and ambiguous, causing problems not only for the governments that enacted them but also for those nations in which the importation of art is 'big business.'" *Id.* "The developed nations have been reluctant to assist in enforcing such bans because of what they perceive as clearly legitimate interests in the free international flow of art . . ." Rogers, *supra* note 5, at 934-35. Moreover, critics argue that such bars create and perpetuate the black market, ultimately undermining protection. *Id.* Merryman & Elsen, *supra* note 11, at 6 (delineating, among other things, "the elements of an interest-sensitive and enforceable international policy toward art smuggling and theft . . .").

flourishing to obtain, an absolute ban on transferability is required. Such an absolute ban is a strict inalienability rule.

Advocating inalienability usually sparks controversy because property universally is presumed fully alienable.⁹⁷ While much of this presumption stems from the elevation of the marketplace as the final arbiter of economic rights, the popular emphasis on negative, as opposed to positive, liberty goes far toward explaining the presumption of full alienability.⁹⁸ Traditionally, this emphasis has made the protection of cultural property difficult⁹⁹ because negative liberty eschews inalienability by defining freedom as "doing (or not doing) whatever [one], as an individual, prefer[s] at the moment, as long as [one does] not harm[] others."¹⁰⁰ A negative liberty approach assumes that inalienability is both paternalistic¹⁰¹ and a free-

⁹⁷ Radin, *supra* note 20, at 1851. See also L. BECKER, *supra* note 12, at 20 ("[The right to capital] is the most fundamental . . . of the elements, if only because it includes the right to destroy, consume, and alienate.").

But according to Grey, "discourse about property has fragmented into a set of discontinuous usages." Grey, *supra* note 12, at 72. Hence, the notion of a bundle of rights in property explains the modern view of property in which both the traditional notion of ownership has dissolved, and the necessary connection between property rights and things has been eliminated. *Id.* at 69.

Andrus v. Allard, 444 U.S. 51 (1978), is consistent with this approach. *Andrus* upheld a prohibition against the sale of bird parts lawfully taken before the effective date of federal protection pursuant to the Eagle Protection Act. The prohibition did not effect a taking because

the regulations challenged . . . do not compel surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.

Id. at 65-66 (citations omitted).

⁹⁸ See Radin *supra* note 20, at 1898-1903.

⁹⁹ See, e.g., Tay, *Law and the Cultural Heritage*, in WHO OWNS THE PAST?, *supra* note 2, at 107 ("[T]he primary problem in liberal democracies has been and is to preserve and protect antiquities in a society that readily permits them to pass into or remain in private ownership and that recognizes the great complexities that surround just and equitable interference with ownership.").

¹⁰⁰ Radin, *supra* note 20, at 1899. "'Negative liberty' means roughly the freedom of the individual to be let alone to do whatever she chooses so long as others are not harmed." *Id.* at 1898 n.186.

Typical of this view is Mill's declaration that "'included in the idea of private property' is a right of each person 'to the exclusive disposal of what he or she have produced by their own exertions, or received either by gift or by fair agreement without force or fraud, from those who produced it.'" Mill, however, also argued for inalienabilities where the laws of property "have made property of things which ought not to be property . . ." *Id.* at 1889 (quoting J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY bk. II, ch. ii. at 218 (W. Ashley ed. 1909)).

¹⁰¹ Radin, *supra* note 20, at 1898. See also Calabresi & Melamed, *supra* note 30, at 1113 (arguing that two "efficiency reasons for forbidding the sale of entitlements under certain circumstances" are self-paternalism and true paternalism). A negative liberty approach finds inalienability paternalistic because it prevents some willing buyers and

dom-diminishing affront to autonomy.¹⁰²

Adopting a positive view of liberty that includes proper self-development as a requirement for freedom may, however, yield a different result.¹⁰³ In the personhood context, a positive liberty analysis replaces the concept of paternalism with that of human flourishing. Restrictions are not just "for our own good," but instead enhance our ability for self-actualization. A positive liberty approach sees market-inalienability as eliminating all obstacles to the achievement of human flourishing by preventing monetization of those items essential to personhood.¹⁰⁴ Constitutive elements of personhood are not treated as fungible. Thereby, human dignity commands deserved respect.

In the context of group rights, however, even a hypothetical scenario most offensive to universal commodifiers¹⁰⁵—strict inalienability of the Parthenon Marbles despite unanimous accord to transfer them among the Greek people—could be justified by reference to the concepts of communal flourishing¹⁰⁶ and intergenerational justice¹⁰⁷ without lapsing into paternalism. Therefore, a positive

sellers from agreeing upon an entitlement shift. By curtailing individual freedom in this way, paternalism assumes buyers and sellers are incapable, in some instances, of assessing their own best interests.

¹⁰² *But see* J. RAWLS, A THEORY OF JUSTICE 249 (1971) ("It is also rational for [the parties] to protect themselves against their own irrational inclinations by consenting to a scheme of penalties that may give them a sufficient motive to undo foolish actions and by accepting certain impositions designed to undo the unfortunate consequences of their imprudent behavior."); Husak, *Paternalism and Autonomy*, 10 PHIL. & PUB. AFFS. 27, 29 (1980) ("Some instances of paternalism do not diminish, but actually 'preserve a wider range of freedom for the individual' . . ."). And who could say that Odysseus' binding himself to the ship's mast to avoid the Sirens' deadly lure was an invidious infringement on autonomy. Indeed, his example illustrates the possibility of paternalistic acts maximizing, rather than diminishing, autonomy. *See* HOMER, THE ODYSSEY, bk. XXII, lines 64-68 (R. Fitzgerald trans. Anchor Books ed. 1963).

¹⁰³ *See, e.g.*, Radin, *supra* note 20, at 1899 (arguing that under a positive view of liberty the "inalienabilities needed to foster [proper] development will be seen as freedom-enhancing rather than as impositions of unwanted restraints on our desires . . ."). I assume in this Note that the individual goal of self-development fully translates into an analogous grouphood goal.

¹⁰⁴ *Id.* at 1885.

¹⁰⁵ Universal commodifiers would support a system under which everything commands a price, and can be sold in the marketplace.

¹⁰⁶ Communal flourishing is simply an analogue to the concept of human flourishing already developed. *See supra* note 21. If individuals can experience flourishing as a result of their relationships with objects, presumably a group can similarly flourish given the proper object-relation. Like human flourishing, communal flourishing is the hoped-for outcome of our relationships with objects. Objects can promote communal flourishing when they are bound up with grouphood and when their retention is not fetishistic.

¹⁰⁷ The concept of intergenerational justice envisions certain obligations running through time to distant past or succeeding future generations, or both. A commitment to intergenerational concern is usually expressed by sensitivity to distributive fairness between generations. *See* Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 634 n.86 (1985) (While treating intergenera-

liberty analysis views inalienability of property for grouphood as freedom-enhancing because it provides the necessary control over those objects which facilitate group development in both the present and the future. Strict inalienability thereby contributes to communal flourishing.

Conceiving of personhood or grouphood in market rhetoric by commodifying objects and attributes so essential to personal or group being—treating them as monetizable and alienable from the self or the group—violates both our deepest understanding of what it is to be either human or a community. Radin prescribes a regime of market-inalienability as consistent with the goal of promoting property for personhood. In seeking to prevent the evil of commodification, market-inalienability prohibits only sales, not gifts.

Three reasons support responding to potential personhood violations by prohibiting sales. First, many sales which appear to violate personhood arouse suspicion of coercion. Banning these sales seeks to ensure free choice by the best possible coercion-avoidance device. Second, market rhetoric creates and fosters an inferior conception of human flourishing.¹⁰⁸ Third, a slippery slope threatens to effect market domination. This third justification assumes that sometimes commodified and noncommodified versions of certain interactions or things cannot coexist; and, in those cases, the noncommodified versions are morally preferable.¹⁰⁹

tion justice as a fairness issue the author concedes that “[i]ntergenerational fairness could reasonably be treated as an efficiency problem in itself.”). For example, “justice between generations may be better achieved by intervening in microeconomic transactions that are likely to have an impact on future generations, even if the intervention does not maximize current surplus.” *Id.* at 636. See generally E. PARTRIDGE, RESPONSIBILITIES TO FUTURE GENERATIONS (E. Partridge ed. 1981) (chronicling several essays on the subject of duties to posterity); Baier, *For the Sake of Future Generations*, in *EARTHBOUND: NEW INTRODUCTORY ESSAYS IN ENVIRONMENTAL ETHICS* 214 (J. Regan ed. 1984). See also *infra* note 133 and accompanying text.

¹⁰⁸ Radin describes the response to this problem as an assimilation to prohibition. Radin, *supra* note 20, at 1912 (“Something might be prohibited in its market form because it both creates and exposes wealth- and class-based contingencies for obtaining things that are critical to life itself . . . and thus undermines a commitment to the sanctity of life [Furthermore,] for example, we accept an inferior conception of personhood . . . if we suppose people may freely choose to commodify themselves.”) (footnote omitted). *Cf. id.* at 1926-27 (“Conceiving of any child in market rhetoric wrongs personhood. . . . In the worst case, market rhetoric could create a commodified self-conception in everyone, as a result of commodifying every attribute that differentiates us.”).

Similarly, conceiving of property for grouphood in market terms harms grouphood. See Merryman, *supra* note 5, at 482 n.12 (quoting Thomas, *Goya Portrait to Go Back to Spain*, *N.Y. Times*, Apr. 11, 1986, at C30, col. 4 (“We could not allow something which we consider part of our historical heritage . . . to become the object of common trade”)).

¹⁰⁹ Radin refers to this justification as the domino theory. Radin, *supra* note 20 at 1912-13. “Under this theory, the existence of some commodified sexual interactions [,

Market-inalienability still permits gratuitous transfers as not violative of human flourishing. For example, while baby-selling, prostitution, and the sale of body parts might be restrained, adoption, consensual, nonmonetized sexual intercourse, and organ gifts would surely be permitted under a regime of market-inalienability.¹¹⁰ Such gratuitous transfers do not violate human flourishing because sharing is an ideal which contributes to human flourishing. Hence, donating organs, engaging in noncommodified sexual relations, and adoption all enhance human flourishing because the donor is uplifted by his voluntary gift without being irreparably disadvantaged. In addition, the donee is made better off by accepting the gift. To the extent that we must not assimilate our conception of personhood to the market, but can still gratuitously transfer consistent with the established view of human flourishing, market-inalienabilities are justified.¹¹¹

While personhood and grouphood rights remain parallel thus far, they diverge over the requisite degree of inalienability needed to protect each. Market-inalienabilities sufficiently guarantee personhood rights in property because gratuitous transfers are not inconsistent with human flourishing but rather may often encourage and create it. On the other hand, market-inalienability fails to guard group rights in property because all transfers, both monetized and gratuitous, must be prohibited to effectuate communal flourishing. Only a strict inalienability rule can prevent the grouphood evil of dispossession, by prohibiting *all* transfers—gratuitous or not.

At least three reasons explain why grouphood property de-

for example,] will contaminate or infiltrate everyone's sexuality so that all sexual relationships will become commodified. If it is morally required that noncommodified sex be possible, market-inalienability would be justified." *Id.* at 1913.

A similar analysis could well apply to commodification of babies or any other preferably noncommodified subjects. *Id.* at 1922.

¹¹⁰ For a discussion of commodified versus noncommodified sexuality, see Radin, *supra* note 20, at 1921-25; reproductive capacity, see *id.* at 1925-36; and body parts, see Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 948-49 (1985). *Cf.* National Organ Transplant Act, 42 U.S.C.A. § 274(e) (Supp. V. 1987) (banning organ sales in interstate commerce); UNIFORM ANATOMICAL GIFT ACT § 10, 8A U.L.A. (West Supp. 1989).

In the grouphood context, intercultural exchanges, including visiting museum exhibitions from source nations, could mitigate conflicting interests by promoting intercultural flourishing without undermining communal flourishing because indefeasible ownership would still be retained by the source nation. See Merryman, *supra* note 1, at 849 (proposing that instead of selling pieces of national cultural heritage, important subjects might be traded among museums on loan to enrich the ability of host nations to expose its people to other cultures). See also *Was This Statue Stolen?*, The Nat'l L.J., Nov. 14, 1988, at 33 ("The answer, most agree, lies in an imaginative, cooperative approach Several museums have returned illegally exported works of art—but in exchange for loans, or exhibitions from the countries of origin.").

¹¹¹ See Radin, *supra* note 20, at 1927.

mands absolute restraints on alienation. Turning to the Parthenon Marbles again illustrates these reasons. First, all the factors supporting the Marbles' importance to the Greek community depend upon actual possession of the very thing itself. A market-inalienability rule cannot protect the grouphood interest because, by allowing the gratuitous transfer of grouphood property, the essential possessory interest would be forfeited. Only a strict inalienability rule completely protects the grouphood interest in property by prohibiting all transfers and thereby averting the grouphood evil of dispossession. In the personhood context developed above, dispossession is not the evil prevented, only the use of market rhetoric to describe particularly personal "things" is.

Second, unlike some of Radin's examples, the Marbles are nonreplenishable resources. Perhaps the evil of dispossession is not so acute in the personhood context precisely because such sharing is not a zero-sum game.¹¹² The interests of the transferee and transferor need not be antagonistic. The transferor can give up the thing without also surrendering her capacity to give up another "thing" or retain another "thing" in the future. For example, by offering her child for adoption, the transferor has not ordinarily surrendered her capacity to bear additional children. Even the example of organ donation supports this view. Organs are available for donation only when their loss will not imperil the donor. Regulation of organ donation strictly prohibits the lifetime transfer of necessary, nonreplenishable organs.¹¹³

Third, intergenerational justice demands the prohibition of any transfers.¹¹⁴ Because the Greek community's membership is always partially unascertained,¹¹⁵ a transfer of grouphood property by cur-

¹¹² A zero-sum game "is one in which the payoffs to the players in any outcome add up to zero; what one player gains, the other[s] must necessarily lose." A. COLMAN, *GAME THEORY AND EXPERIMENTAL GAMES* 47 (1982). Unlike those games, here, there are "prospects for mutually profitable collaboration." *Id.*

¹¹³ See UNIF. ANATOMICAL GIFT ACT § 2(a), 8A U.L.A. (West 1983).

¹¹⁴ See *supra* note 107. Intuitively, it is not difficult to understand that there might be differences in this context between the way groups are treated and the way individuals are treated. We are less concerned about property transfers of individuals because they alone must assume the consequences of a bad transfer. The law will still intervene, however, to prevent an individual from effecting certain transfers—*e.g.*, the implied warranty of habitability, see, *e.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 81-82 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); prohibition against selling oneself into slavery, see *infra* note 143; inalienability of the right to life, see, *e.g.*, *Feinberg, Voluntary Euthanasia and the Inalienable Right to Life*, 7 *PHIL. & PUB. AFFS.* 93 (1978). However, in a group setting the law's focus should change. Here, the consequences of a bad transfer invariably fall on the shoulders of blameless future members.

¹¹⁵ Fiss's theory of groups would allow for reference to groups by their unascertained members. Cf. Fiss, *supra* note 60, at 148 ("You can talk about the group without reference to the particular individuals who happen to be its members at any one moment.").

rently ascertained members necessarily alienates the unascertained members from their own identity. Any transfer fundamentally violates the communal flourishing goal of grouphood property by divesting part of the group's experience and existence. Hence, rather than a regime of market-inalienability, only a regime of strict inalienability can sufficiently protect group rights in property.¹¹⁶

B. Traditional Justifications for Imposing Strict Inalienability

Despite prevalent assumptions of property's full alienability, strict inalienability maintains some intuitive appeal.¹¹⁷ These intuitive rationales translate broadly into either one of two traditional categories for justifying the imposition of strict inalienability: concerns for economic efficiency or distributional goals.¹¹⁸ But the

¹¹⁶ Professor Rose-Ackerman refers to strict inalienability as pure inalienability. She envisions a matrix of four quadrants: in quadrant A, termed pure property, both sales and gifts are permitted; in quadrant B, modified property, sales are permitted while gifts are prohibited (e.g., bankruptcy rules condemn as fraudulent conveyances those gifts made before a declaration of bankruptcy but uphold sales of assets as legal so long as reasonable equivalent value is received); in quadrant C, modified inalienability, gifts are permitted, but sales are forbidden (this corresponds to Radin's market-inalienability); and, in quadrant D, pure inalienability, both gifts and sales are prohibited. Rose-Ackerman, *supra* note 110, at 950.

¹¹⁷ This intuitive appeal follows from the belief that "we have no right to destroy or suppress what happens, just for the present, to be in our power, for past, present, and future all have rights in the surviving monuments of human endeavour." McBryde, *supra* note 2, at 7 (citation omitted). Such an appeal permeated General Makriyannis's statements to his soldiers urging them never to sell Greek artwork to foreigners, reprinted *supra* note 2. That war hero of the Greek Revolution admonished two would-be antiquity-peddlers against the alienation of those things for which they fought the war of independence. Responding to Makriyannis's wisdom, Nobel Laureate George Seferis wrote: "There is more weight in [that] sentence of a simple man than in the effusions of fifteen gilded academics, because it is only in feelings like this that the culture of a nation can be rooted—in real feelings, and not in abstractions about the beauty of our former ancestors or in hearts that have become dried up from a cataleptic fear of the common people." C. HITCHENS, *supra* note 2, at 66.

¹¹⁸ Boiled down from the variously individuated rationales advanced by prominent scholars, the justifications for strict inalienability are: (1) "the practical control of externalities," Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985) (arguing that "rules restraining alienability are best accounted for, both positively and normatively, by the need to control problems of external harm and the common pool"). *Id.* at 990; (2) "economic efficiency itself," Rose-Ackerman, *supra* note 110, at 932 (arguing that "economic efficiency itself may require restrictions . . . [even] beyond the . . . problems of externality control to include imperfect information, 'prisoner's dilemmas,' free rider problems, and the cost of administering alternative policies"). *Id.* See also Calabresi & Melamed, *supra* note 30, at 1093-98 (finding that efficiency objectives justify inalienability in the case of externalities, difficulty of calculation of external costs (moralisms), self-paternalism (which is still fully consistent with Pareto-efficiency criteria because the individual chooses what is best in the long run rather than in the short run), and true paternalism); (3) "specialized distributive goals," Rose-Ackerman, *supra* note 110, at 933 (reasoning that certain "distributive goals can only be achieved through some kind of inalienability rule [because normal] program[s] of taxes and transfers may be inadequate"). See B. ACKERMAN, ECONOMIC FOUNDATIONS OF PROPERTY LAW 237 (1975)

lines distinguishing these categories often blur.¹¹⁹ For example, a robust conception of intergenerational justice necessarily supposes the creation of externalities, thereby fueling the efficiency argument behind our unarticulated intuition that current group members should be prevented from alienating certain cultural property.¹²⁰ Yet, the concern for fairness to future generations likewise constitutes a justification for imposing strict inalienability over property for grouphood.

1. *Economic Efficiency*

Three main justifications for inalienability flow from economic efficiency. First, some things are either so plentiful or unbounded that the costs of privatizing any such resources outweigh the benefits of privatization. Such goods command a regime of inalienability.¹²¹ Air is a good example.

Second, market failure typically justifies intervention in the form of restraints upon alienation. Although the term market failure generally signifies the problem of externalities, it has independent meaning too. For example, monopolistic behavior resulting in market failure might not implicate externalities concerns. Furthermore, markets often work poorly because information is both

("[A]n economically sophisticated commitment to a private property regime does not necessarily compel a commitment to *laissez-faire*. Even when the problem of monopoly and oligopoly is put aside, there exist a broad range of situations in which—depending on one's theory of distributive justice—a broad range of affirmative governmental initiatives may seem plausible."). See also Calabresi & Melamed, *supra* note 30, at 1114-15; (4) market control, Rose-Ackerman, *supra* note 110, at 933 (arguing that "unfettered market processes may be incompatible with the responsible functioning of a democratic state"); (5) when "the difficulty of privatization outweighs the gains in careful resource management," Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 717 (1986) (reasoning that some "things are either so plentiful or so unbounded that it is not worth the effort to create a system of resource management for them"). *Id.*; (6) "compensation for market failure," *id.* at 719; (7) "inherently public property," *id.* at 720 (finding that such property, owned by society at large, gives each member of some 'public' [or group] a bundle of rights, neither entirely alienable by the state or other collective action).

¹¹⁹ This Note recognizes this taxonomic messiness and perhaps contributes to it. To the extent that the question of intergenerational justice implicates the creation of externalities, it is treated as an efficiency-based justification for imposing strict inalienability over property for grouphood. But, to the extent distributive justice and fairness norms require present generations to treat their successors with care, these notions are advanced instead of efficiency reasons to justify strict inalienability.

¹²⁰ Cf. Sterk, *supra* note 107, at 634 n.86 ("And because those seeking to create a servitude cannot obtain the consent of the unborn, any effects the servitude has on the unborn are properly considered externalities."). Externalities exist when X makes a decision about how to use resources without accounting for the effects of that decision upon others. Typically, X will ignore such effects precisely because they fall on others. They are external to him. See J. DUKEMINIER & J. KRIER, *PROPERTY* 52-57 (1981).

¹²¹ See Rose, *supra* note 118, at 717.

imperfect and asymmetrical.¹²²

Third, and most importantly, "the practical control of externalities" often warrants imposing strict inalienability.¹²³ Externalities play a central role in justifying restraints on the alienability of the Parthenon Marbles. Because membership in the Greek community is not voluntary, but rather ascribed, there are always unascertained members of the group.¹²⁴ Without knowing the exact persons that will enter the group, we do know with fair certainty that new members will invariably come to exist. For this reason, difficulties arise when present generations seek to alienate property for grouphood.

Ascertained group members simply cannot account for the preferences of unascertained members. American law deals with an analogous problem in the trust setting.¹²⁵ Prohibiting the alienation of the trust res by the beneficial owners squarely raises the conflict between intergenerational justice and the interests of presently existing class members.¹²⁶ Trust law's resolution is the *Claffin* doctrine.¹²⁷ This doctrine protects future group members' interests in the res by allowing trust termination or modification only where all of the beneficiaries unanimously consent and the termination or modification would not defeat the settlor's material purpose in creating the trust.

Consent of all beneficiaries includes all potential beneficiaries: born or unborn, ascertained or unascertained, no matter how contingent their interests may seem. The practical effect, then, of leaving a remainder to a class of descendants is to create an indefinite class of beneficiaries whose consent simply cannot be obtained. Thus, in such settings the trust res remains outside of the control of

¹²² Rose-Ackerman, *supra* note 110, at 938.

¹²³ Epstein considers this to be the only sound justification for inalienability. See Epstein, *supra* note 118, at 990; Calabresi & Melamed, *supra* note 30, at 1111; Rose-Ackerman, *supra* note 110, at 932. See also Radin, *supra* note 20, at 1867 n.60 and accompanying text.

¹²⁴ Membership in ascriptive groups is imputed instead of chosen in any ordinary sense.

¹²⁵ The trust analogy is particularly helpful in the context of the Parthenon Marbles. A nineteenth century philhellene quoted by Hitchens regarding his travel in Greece said, "[y]et I cannot forbear mentioning a singular speech of a learned Greek of Ioanina, who said to me, 'You English are carrying off all the works of the Greeks, our forefathers; preserve them well, Greeks will come to redemand them.'" C. HITCHENS, *supra* note 2, at 65. Additionally, during the Parliamentary debates concerning the "purchase of" the Marbles from Elgin, one Member of Parliament proposed an amendment to the decree that Britain hold the Marbles in trust until Greek independence. *Id.*

¹²⁶ While many scholars agree that the present generation must consider the interests of future generations, see *infra* notes 144-55 and accompanying text, others resolutely object to the subordination of present generations' preferences to the interests of future generations. See Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1360 (1982).

¹²⁷ *Claffin v. Claffin*, 20 N.E. 454 (Mass. 1889).

the beneficial owners.¹²⁸

Were vicarious representation of unascertained interests to be considered a satisfactory resolution of the intergenerational justice problem, consistent application of the Claffin analogy would still prohibit the divestiture of the Parthenon Marbles because a hypothetical present generation's desire to transfer the Marbles would defeat a material purpose of the trust. Assuming an intention to publicly dedicate the Parthenon,¹²⁹ alienation of the Marbles would violate the hypothetical trust by undermining Pericles' material purpose of facilitating future Greeks' understanding of their identity, heritage, art, and history. This is particularly important to Greek grouphood because its cultural integrity and continuity has been the subject of attack.¹³⁰

Speculation about or attempts to infer a trust settlor's purpose are perfectly permissible. This construction of Pericles' purpose is wholly reasonable given both contemporaneous accounts¹³¹ and the scale and site-specificity of the Acropolis project. Applied to the Marbles, the analytic underpinnings of the Claffin doctrine favor a strict inalienability rule.

Many who argue against Claffin's deference to future beneficiaries would likely contend that efficiency demands granting the present generation full hegemony over property because it, as a group of rational interest-maximizers, will put the property to its most efficient use. The externalities argument answers that any interest calculus would be necessarily incomplete for its inability to evaluate the preferences of future generations.¹³² They simply cannot influence the market. Often the calculations of the present generation's best interest will, in fact, clash with the interest of future generations.¹³³ In response, the law freezes the ascertained benefi-

¹²⁸ Some American jurisdictions, however, have allowed for the possibility of vicarious consent by permitting a guardian *ad litem* to represent unborn or unascertained persons. See, e.g., *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966).

¹²⁹ See *supra* notes 89-91 and accompanying text.

¹³⁰ Theories such as Fallmerayer's, see *supra* note 62, persist in some circles suggesting that the Greeks are not really Greek. For an excellent discussion of the cultural continuity and 'karma' of the Greeks through four distinct epochs—Mycenaean, Classical, Byzantine, and Modern—see generally A. TOYNBEE, *supra* note 62. A most prominent historian, Professor Toynbee, recanted much of his earlier work by concluding that Greek cultural continuity is unshakably clear.

¹³¹ See Thucydides, *supra* note 89.

¹³² The "[i]nability to obtain the consent of unborn individuals is, in some sense, the ultimate transaction cost. And because those seeking to create a servitude cannot obtain the consent of the unborn, any effects the servitude has on the unborn are properly considered externalities." Sterk, *supra* note 107, at 634 n.86.

¹³³ This clash is squarely focused, for example, in the environmental area. Present generations' interests often correspond with maximization of use which invariably diminishes future values and imposes severe costs on future generations for which they

ciaries' freedom to alienate the property.

But why, one might ask, should we prefer the interests of those yet to exist when those now living all agree upon a transfer?¹³⁴ Moreover, what gives us confidence that future generations' preferences will diverge sharply from the preferences of the current generation?¹³⁵ The concept of "use" answers both of these questions. In our example, any generation deciding to alienate the Marbles would have already appreciated the Marbles' "use." It would have identified itself as a group, understood its link to past greatness, known the artistic spirit of its forefathers. In short, it would have "used" the Marbles for all of those purposes for which property for grouphood exists. The current generation would have depleted the resource, or at least its marginal utility, for itself. To it, the attendant costs of alienation would be diminished. This distinction based on the notion of "use" necessarily guarantees that future generations' preferences will be hostile to a present preference for transfer. While a current generation of Greeks might favor alienation of its cultural patrimony, such as by transfer of the Parthenon Marbles, future Greeks would disfavor alienation precisely because they will not have enjoyed property for grouphood and its attendant impact on and benefit to group rights.¹³⁶

receive no concomitant benefit, creating a "tragedy of the commons." For a comprehensive examination of this problem, see Demsetz, *Towards a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

A well-developed conception of intergenerational justice expects that present generations, even if empowered to do so, should not disadvantage future generations currently unrepresented. See *supra* note 107 and accompanying text. Cf. Sterk, *supra* note 107, at 634-35 ("Protecting future generations from dead hand control has been a pervasive theme in property law. The rule against perpetuities, prohibitions against novel estates, and more modern regulations of the environment and of historical landmarks are all designed at least in part to prevent one generation from controlling the destiny of its successors.").

¹³⁴ A plausible answer in trust law is the preservation and preference of the settlor's autonomy. The ascertained remaindermen see the decision not to let anyone decide the Marbles' fate as itself a decision favoring future generations. They wonder at the paradox of the law's response which frustrates their wishes with no corresponding guarantee of at least fulfilling the wishes of their heirs. See, e.g., DeGeorge, *The Environment, Rights, and Future Generations*, in RESPONSIBILITIES TO FUTURE GENERATIONS 157, 161 (E. Partridge ed. 1981) ("To ascribe present rights to future generations is to fall into the trap of [improperly sacrificing] the present to the future, on grounds that there will possibly . . . be so innumerable many future generations, each of which has a presently equal right to what is now available, as to dwarf the rights of present people to existing goods."). However, this argument ignores that future generations will be similarly restrained when they come into possession of the restrained resource.

¹³⁵ Some commentators are convinced that proving a divergence among the preferences of present and future generations is difficult. See Sagoff, *We Have Met the Enemy and He is Us or Conflict and Contradiction in Environmental Law*, 12 ENVTL. L. 283, 297 (1982) ("There are few decisions favorable to our wishes that cannot be justified by a likely story about future preferences.").

¹³⁶ See *supra* note 133.

Issues of intergenerational justice in this area are quite different from the issues implicated when property is burdened by some servitude or restriction.¹³⁷ In the latter setting, focus is placed upon the transaction costs and externalities imposed upon future third-party takers who obtain the property subject to restriction. Because the original takers may be able to account for these costs to future third parties, those externalities may never be passed on. Instead, they are internalized by the initial bargain.¹³⁸ By contrast, our present generation sellers, unlike the original buyers of burdened property who calculate future difficulties in disposing of the restricted land by demanding a compensating discount, need never account for the concerns of future generations who "lost" the "use" of the now-alienated property. Unlike future buyers, our "future losers" have no influence on the market; externalities imposed upon them are never internalized.

Finally, even the most simple articulation of the externalities argument favors retention of property for grouphood. For example, if an art treasure satisfying the requirements of grouphood property is sold, all generations bear the cost, while only the current one receives the benefit. Thus, even though the cost per generation of such dispossession is outweighed, the aggregate cost through time, from generation to generation, would undoubtedly exceed any purchase price commanded in the present market.

2. *Specialized Distributional Goals: Other Policies Supporting Strict Inalienability*

Totally leaving behind the economic rationale, property for grouphood merits strict inalienability protection as an exercise in distributive justice.¹³⁹ For those unmoved by economic arguments accounting heavily for future generational interests, the notion that

¹³⁷ Although beyond this Note's scope, the responsibility of present generations to retain important cultural property could be cast in the form of a negative servitude. The analogy to the law of servitudes, particularly relevant on the question of intergenerational justice, has been examined in several fine sources. See, e.g., Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883 (1988); Epstein, *supra* note 126; Sterk, *Foresight and the Law of Servitudes*, 73 CORNELL L. REV. 956 (1988); Sterk, *supra* note 107.

¹³⁸ See Epstein, *supra* note 126, at 1360 ("If a seller insists that a personal covenant bind the land even though it works to the disadvantage of the immediate or even future purchasers, then the seller will have to accept a reduction in the purchase price to make good his sentiments.").

¹³⁹ "The concept of distributive justice centers on the fairness of . . . the distribution of conditions and goods . . ." M. DEUTSCH, *DISTRIBUTIVE JUSTICE* 1 (1985). "If the economist is concerned with making markets efficient, the philosopher is concerned with making markets fair. Particular distributive justice issues on which philosophers have written include obligations toward future generations . . ." Sagoff, *supra* note 135, at 293 n.36.

"unfettered market processes may be incompatible with the responsible functioning of a democratic state" should provide a second, entirely distinct, series of rationales for restraining the alienability of property for grouphood.¹⁴⁰

Distributive aims presuppose that states or groups have some duties to assure fair distribution and, when necessary, fair redistribution. Here, this Note assumes policymakers legitimately may benefit a particular group as an exercise in fairness. Intergenerational justice, first discussed as an efficiency-based justification for holding property for grouphood strictly inalienable, also animates the fairness inquiry.

By building a strong case for the importance of property for grouphood, the necessity of strict inalienability to protect those rights was implied: future Greeks deserve to derive the same benefits from the Marbles that earlier generations did. By transferring that property which defines it, the group would be alienating its own *raison d'être*, its identity. Without adequate protections of its heritage, a future generation might lose that important sense of being part of something bigger than itself.¹⁴¹ Indeed, Burke wrote in a celebrated line that society "is a partnership of the dead, the living, and the unborn."¹⁴² This notion of partnership implies obligations to both past and future generations. A transfer of cultural property, like the Marbles, so vital to grouphood could effect an abdication of future liberty without which the group would lapse from existence.¹⁴³

Most commentators agree that the present generation must, at very least, account for the interests of future generations.¹⁴⁴ Fair-

¹⁴⁰ Rose-Ackerman, *supra* note 110, at 933. See also Ackerman, *supra* note 118, at 237.

¹⁴¹ Cf. Derr, *The Obligation to the Future*, in RESPONSIBILITIES TO FUTURE GENERATIONS 37, 39 (E. Partridge ed. 1981) ("Seeking a way to overcome the threat of death, a man may identify himself with his group, which will outlive him. So he has a real interest in its future well-being . . .").

¹⁴² See R. NISBET, *supra* note 44, at 25. "Mutilate the roots of society and tradition, and the result must inevitably be the isolation of a generation from its heritage, the isolation of individuals from their fellow men, and the creation of the sprawling faceless masses." *Id.*

¹⁴³ Cf. Radin, *supra* note 20, at 1902 n.201 and accompanying text (quoting from J.S. MILL, ON LIBERTY, in THREE ESSAYS 126 (1975)):

[B]y selling himself for a slave, [a person] abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom.

¹⁴⁴ See, e.g., the essays collected in RESPONSIBILITIES TO FUTURE GENERATIONS (E. Partridge ed. 1981). See also Hubin, *Justice and Future Generations*, 6 PHIL. & PUB. AFFS. 70, 72 (1976) (describing Rawls's answer to protecting future generations as extending a

ness ought to require an ethic that each generation pass on its resources in at least no worse shape than it found them.¹⁴⁵ We may choose to benefit future generations because our children are members of the succeeding generation,¹⁴⁶ because of our own yearning for immortality through group perpetuation,¹⁴⁷ or because protecting resources is not merely showing concern or respect to future generations but also is an exercise in self-respect.¹⁴⁸ Or we may do so because we see ourselves as members of a cross-generational community belonging to enduring families, cultures, nations, and traditions,¹⁴⁹ because we feel obliged to preserve our community and transmit our cultural heritage,¹⁵⁰ or because, by worrying about our own immediate future, we incidentally ensure that the lot of future generations is better.¹⁵¹ Regardless, the result is the same: we act on our recognition of our kinship with those who have gone before us and those yet to come.¹⁵²

Among the greatest of obligations the present has to the future is the duty to transmit a heritage and memory.¹⁵³ Any present generation of Greeks possessed of the Marbles could not, without

veil of ignorance to the agents' knowledge of the generation to which they belong so that each would be motivated to treat future generations of which they may be members fairly); Kant, *Idea for a Universal History with Cosmopolitan Purpose*, Eighth Proposition, in KANT'S POLITICAL WRITINGS 50 (H. Reiss ed. 1970) ("[H]uman nature is such that it cannot be indifferent even to the most remote epoch which may eventually affect our species, so long as this epoch can be expected with certainty.") *But see* Passmore, *Conservation*, in RESPONSIBILITIES TO FUTURE GENERATIONS 45, 51 (E. Partridge ed. 1981) ("The uncertainty of the harms [to future generations] we are hoping to prevent would, in general, entitle us to ignore them . . ."); Schwartz, *Obligations to Posterity*, in OBLIGATIONS TO FUTURE GENERATIONS (R.I. Sikora & B. Barry eds. 1978) (arguing that "we've no obligation extending indefinitely or even terribly far into the future to provide any widespread, continuing benefits to our descendants.").

¹⁴⁵ "In so far as such inherited public goods as constitutions, civil liberties, universities, parks, and uncontaminated water come to us by the deliberate intention of past generations, we inherit them not as sole beneficiaries but as persons able to share and pass on such goods to an indefinite run of future generations." Baier, *supra* note 107, at 173.

¹⁴⁶ See generally Wald, *A Better World for the Children*, in ENVIRONMENTAL ETHICS 173 (D. Scoby ed. 1971).

¹⁴⁷ See *supra* note 141.

¹⁴⁸ See Sagoff, *supra* note 135, at 302.

¹⁴⁹ See Baier, *supra* note 107, at 177.

¹⁵⁰ See Golding, *Obligations to Future Generations*, in RESPONSIBILITIES TO FUTURE GENERATIONS 61, 63-66 (E. Partridge ed. 1981).

¹⁵¹ Sterk, *supra* note 107, at 635.

¹⁵² See *supra* note 142 and accompanying text. Cf. Callahan, *What Obligations Do We Have to Future Generations?*, in RESPONSIBILITIES TO FUTURE GENERATIONS 74 (E. Partridge ed. 1981) ("Just as we can trace the roots of our culture back at least 3,000 years, future generations will be able to trace theirs. To proceed as if there will be no relationship between the now and the then would be, at the very least, silly . . .").

¹⁵³ Our obligation requires that we provide future group members with "a heritage, natural and cultural, that can be valued and enjoyed without absurdity." Sagoff, *supra* note 135, at 300. Cf. Delattre, *Rights, Responsibilities, and Future Persons*, 82 ETHICS 254,

breaching ancient and sacred obligations, fail to preserve them for future Greeks to learn from and take pride in. One commentator expressed these duties frankly:

If we leave an environment to [future generations] that is fit for pigs they will be like pigs; their tastes will adapt to their conditions Suppose we destroyed all of our literary, artistic, and musical heritage; suppose we left to future generations only pot-boiler romances, fluorescent velvet paintings, and disco songs. We would then surely ensure a race of uncultured near-illiterates.¹⁵⁴

Because identification with the past is significantly strengthened by continued exposure to enduring artifacts,¹⁵⁵ objects as important as the Marbles (those justifiably considered property for grouphood) must be retained for the transmission of cultural memory.

Another justification for strict inalienability lies when an item can be properly characterized as "inherently public property." Analyzing beachfront property cases, one commentator discussing this justificatory theory found that judges relied on three theoretical bases for decisions: public dedication, custom, and public trust. Public dedication deals with the familiar concepts of offer and acceptance.¹⁵⁶ Once an owner "offers" a use for the property which a public "accepts," the property is dedicated. The offer and acceptance transform the owner into a fiduciary of the public with respect to either the dedicated use or the specific portion of the property so dedicated. Thereafter he may not divert the property to any inconsistent uses. A public dedication theory could justify a prohibition against alienation of the Marbles were they in Greek possession.

Customary rights inhere in property because they predate any memory to the contrary. According to this theory, communities develop strong emotional attachments to places and things over

256 (1972) ("The meaning of the present depends on the vision of the future as well as the remembrance of the past.")

¹⁵⁴ Sagoff, *supra* note 135, at 300.

¹⁵⁵ See Hardin, *Who Cares for Posterity*, in RESPONSIBILITIES TO FUTURE GENERATIONS 229 (E. Partridge ed. 1981) ("There is considerable anecdotal evidence to show that a person's identification with the past is significantly strengthened by exposure during childhood to the sight of enduring artifacts: family portraits, a stable dwelling place, even unique trees."); Smith, *supra* note 59, at 87 ("The ways in which people view their past are to a considerable extent reflected in those objects that they choose to preserve as reminders of themselves."); *cf. supra* note 88.

¹⁵⁶ See Note, *Protecting the Public Interest in Art*, 91 YALE L.J. 121 (1981) (authored by Ellen R. Porges) (seeking to apply public dedication theory to the protection of art and artistic integrity). Hence, unlike a theory of moral rights, *see supra* note 63, public dedication of art focuses on protecting the public interest in the artwork itself instead of the artist's limited rights in the work. While this Note will not focus primarily on this justificatory theory, its applicability, as an alternative theory, is nonetheless plausible particularly because a dedication, once founded, cannot be defeated. *Id.* at 127.

time.¹⁵⁷ The location of customary public activities matters a great deal not because the community could not possibly relocate, but because to do so would spoil the continuity of the community's experience and diminish the value of the activity itself.¹⁵⁸ The long and continuous use of the Acropolis, and particularly the Parthenon, as a site of religious practice and pilgrimage, first as pagan temple, then as church of the Virgin Mary, and finally as an historic monument, should vest in it customary rights justifying a strict inalienability rule.

The public trust theory, however, forms the most important theoretical basis for advocating a regime of strict inalienability.¹⁵⁹ Following basic trust law themes, public trust theory views vested legal ownership in the unorganized public for the use of the public at large.¹⁶⁰ The debate over ownership of public lands, and the inalienability of them, is one facet of a larger debate concerning the legitimacy of collective values—especially those in conflict with individualistic values.¹⁶¹ Perhaps most significant in the evolution and application of this theory is that both the sovereign and the legislature have been held powerless to alienate public trust property.¹⁶² The status of the entire Acropolis building project as a public work is wholly consistent with finding a trust reserved in the public.¹⁶³ As suggested earlier, despite unanimous accord of current Greeks, alienation of the Marbles would necessarily be beyond legislative control.

¹⁵⁷ See Rose, *supra* note 118, at 759.

¹⁵⁸ See *id.* Such activities "may have value precisely because they reinforce the solidarity and fellow-feeling of the whole community; thus the more members of the community who participate, even if only as observers [to a particular activity], the better for all." *Id.* at 767-68.

¹⁵⁹ See Sax, *Liberating the Public Trust Doctrine From Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980) (derived from the Roman law idea of *res communis*, public trust doctrine limits alienation of certain properties, thereby preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title).

¹⁶⁰ See Rose, *supra* note 118, at 721.

¹⁶¹ Cf. *supra* notes 44-55 and accompanying text.

¹⁶² For a discussion of such property beyond sovereign control, see, for example, *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 318, 471 A.2d 355, 361 (1984) (quoting *Aruold v. Mundy*, 6 N.J.L. 1, 87-88 (2d ed. 1875) ("So neither can the king intrude upon the common property, thus understood, and appropriate to himself, or to the fiscal purposes of the nation, the enjoyment of it is a natural right which cannot be infringed or taken away."), *cert. denied*, 469 U.S. 821 (1984)).

For a discussion of property beyond legislative control, see Rose, *supra* note 118, at 736 ("but even . . . [the legislature] could not grant away trust lands so as to 'divest[] . . . all the citizens of their common right.'" The other side of this theory necessarily assumes that ownership is vested in the people, not the government. Thus, the return of the Crown of St. Stephen to the Hungarian people, not to its Communist government, respected the notions of "inherently public property" described above. Cf. *Dole v. Carter*, 569 F.2d 1109 (10th Cir. 1977).

¹⁶³ See *supra* notes 74, 89-92 & 156 and accompanying text.

A final justification based on fairness grounds remains. Some foreign museums are so well-endowed that they may outpace culturally rich, yet economically poor, states bidding on the open market merely to retain their own cultural patrimony. While a state may subjectively value certain indigenous cultural property, economic disproportions and domestic realities could conceivably prevent the retention of property vital to its grouphood.¹⁶⁴ This scenario may seem to justify a strict inalienability rule rooted in economic efficiency. Economists, however, technically determine "highest-value use" objectively. Thus, whoever will pay the most for an item is that item's highest-value user.¹⁶⁵ Fairness clearly requires a calculus that measures highest-value use by accounting for ability to pay.

3. *Some Historical Examples Consistent with a Theory of Property for Grouphood*

Several historical examples that advocate strict inalienability appear to rely on either notions of public trust or obligations to future generations. These examples' intuitive mediation of intergenerational justice concerns finds legal expression in something akin to a perpetually indefeasible life interest with a duty not to commit waste. A prohibition against transfers which dispossess future remaindermen avoids the commission of waste.

In one example, a British diplomat in Paris wrote about the activities of Mr. Hamilton, one of Lord Elgin's secretaries who was primarily responsible for the Marbles' removal:

Mr. Hamilton who is intimate with Canova, the celebrated artist, expressly sent [to Paris] by the Pope, with a letter to the King, to reclaim what was taken from Rome [by Napoleon], dis-

¹⁶⁴ Cf. Crossette, *Thais Accuse U.S. in Loss of Temple Art*, N.Y. Times, Feb. 10, 1988, at A9, col. 1. Recent controversy over lost Thai art, see also *infra* note 173, illustrates the dilemma for many third world nations. The UNESCO Convention, *supra* note 3, Art. 7(b)(ii) at 291, allows for the return of cultural property upon payment of just compensation. A Thai spokesman said that his country had not signed the Convention "because it could not agree—and could not afford—to pay for art objects it believed were rightfully Thai." *Id.* Cf. *Pennsylvania Cent. Transp. Co. v. City of New York*, 42 N.Y.2d 324, 337, 366 N.E.2d 1271, 1278, 397 N.Y.S.2d 914 (1977) (city's landmark preservation regulation prohibiting construction of office building atop terminal is constitutional), *aff'd*, 438 U.S. 104 (1978): "In times of easy affluence, preservation of historic landmarks through use of the eminent domain power might be desirable, or even required. But when a less expensive alternative is available, especially when a city is in financial distress, it should not be forced to choose between witnessing the demolition of its glorious past and mortgaging its hopes for the future." *Id.* at 922.

¹⁶⁵ This sort of counterintuitive treatment by the law and economics school has engendered some criticism. See, e.g., Ungar, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 574-78 (1983) (suggesting that the law and economics literature frequently fails to recognize that economic analyses often depend on the nature of the existing institutional structure, and thus do not have universal validity).

tinctly ascertained from [Canova] that the Pope, if successful [in his attempt to retake the papal art], neither could nor would as Pope sell any of the *chefs d'oeuvres* that belonged to the See, and in which he has, in fact, only a life interest.¹⁶⁶

The next example also acknowledges the intuitive appeal of the life interest model. It also identifies with the concept of intergenerational ownership. While constructing the Panama Canal, a high official sought to purchase nearby sand, to use in construction. The reigning Indian cacique replied: " 'He who made this sand made it for the Cuna Cuna who live no longer, for those who are here today and also for those to come. So it is not ours only, and we could not sell it.' " ¹⁶⁷

In addition, application of the Roman law *usufruct*, which essentially gives one the right to use and take the fruits and profits of another's property without altering its character, is instructive.¹⁶⁸ This very notion implicitly underlies many early conventions on the acquisition of property during wartime. The Lieber Code, which set the ground rules of property appropriation during the American Civil War, first relied on usufructuary principles.¹⁶⁹ The Brussels Draft of 1874, which heralded both the 1899 and 1907 Hagne Conventions on cultural property relied heavily on Lieber, and consequently on the usufructuary principle.¹⁷⁰ Each of these conventions established, as its leading achievement, that an occupying state had only a usufructuary interest in the property of the conquered state by right of the occupancy.

This same reasoning apparently underlies section two of the American Indian Religious Freedom Act of 1978.¹⁷¹ Through this Act, the government asserted its authority to preserve traditional Indian religions by assuring at least the use and possession of sacred objects. The Act's guidelines, therefore, actually provide that sacred objects alienated from tribes, contrary to tribal standards, be returned upon request when needed for use.¹⁷²

¹⁶⁶ C. HITCHENS, *supra* note 2, at 56. "[Hamilton] seemed quite unaware of the hypocrisy implicit in his view, . . . 'that these works are considered so sacred a property, that no direct or indirect means are to be allowed for their being conveyed elsewhere than where they came from.' " *Id.*

Thus, Hitchens implies that Hamilton never considered that the Marbles might be as sacred to the Greeks as the papal art was to Catholics.

¹⁶⁷ S. MORISON, *ADMIRAL OF THE OCEAN SEA: A LIFE OF CHRISTOPHER COLUMBUS* 635 (1942).

¹⁶⁸ B. NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 144 (1962).

¹⁶⁹ Tay, *supra* note 99, at 121.

¹⁷⁰ *Id.* at 122.

¹⁷¹ Partially codified at 42 U.S.C. § 1996 (1982). See Echo-Hawk, *supra* note 53, at 439.

¹⁷² See Echo-Hawk, *supra* note 53, at 452 (quoting *Journeycake v. Cherokee*, 28 Ct. Cl. 281 (1893), *aff'd*, 155 U.S. 196 (1894)).

These examples are at least consistent, in spirit, with the protection of grouphood property advocated in this Note. They each appear to understand that the propinquity between object and culture is worth protecting. Moreover, they also appear to acknowledge that the only adequate means of protecting future generations' rights as prospective group members is by the imposition of absolute restraints on alienability.

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RECONCILING CULTURAL INTERNATIONALISM WITH PROPERTY FOR GROUHOOD

Over the past several decades, two major conventions have aimed at protecting cultural property: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. While the Hague Convention's emphasis on cultural universalism has been nominally replaced by the UNESCO Convention's focus on group or nation rights, a dichotomy still persists in thinking about cultural property.¹⁷³

Many justifications for retaining improperly alienated cultural property find expression in facially reasonable epithets referring to certain property as belonging to the "common heritage of mankind." Many of the nations responsible for works claimed to be of global import are artistically rich, yet economically impoverished. As a result, universalist claims often conspire with economic reali-

¹⁷³ For a detailed discussion of these two approaches to cultural property, see Merlyman, *supra* note 1, at 845-49. Evidence of this dichotomy has emerged recently in the form of an open letter concerning lost Thai art. Appearing in prominent Thai newspapers the sponsors wrote: "The American Government facilitated the robbery of cultural treasures in this region through the use of special rights [during the Vietnam years]." See Crossette, *supra* note 164, at A9, col. 1. The letter ends with an appeal "to our friends, the American people, to bring pressure to bear so that this cultural treasure [10th-13th century stone lintel carved with an image entitled 'Vishnu Sleeping on the Water' displayed at the Art Institute of Chicago] may be returned to us." *Id.* Confusion about the status of such property is manifest in the statement of a Thai official heading the movement for the lintel's return: "I want to make the point that this art does not belong only to the Thai people but to all the world. . . . But it should go where it belongs." *Id.* Under this Note's analysis, if the art sought by the Thais fulfilled the requirements for grouphood property, the Thais should have sole claim to it; then, the spokesman's characterization of the lintel as globally-owned becomes mere hyperbole. If, however, the lintel failed a grouphood property test, then the Thais would have no claim if the art was voluntarily transferred. Their rights would have been adequately protected by a mere "property rule" instead of an "inalienability rule." Of course, if the art were stolen, some remedies might still exist. See UNESCO Convention, *supra* note 3 at 290; CPIA, *supra* note 3. See also National Stolen Property Act, 18 U.S.C. §§ 2314-2315 (1982); 66 AM. JUR. 2D *Replevin* § 2 (1973) (replevin action allows for recovery of specific chattel detained or taken).

ties to deprive such nations of their special wealth.¹⁷⁴ These nations, as heirs to cultural patrimony, have strong equitable claims to their ancestral property for the reasons given throughout this Note.

Yet, when the international community—usually in the form of economically powerful nations and museums—retains alienated art, it may do so in the hope of promoting intercultural understanding. For example, some of these museums often can provide optimal exposure for such art.¹⁷⁵ Reconciling the opposing interests of ancestral heirs to cultural property with those universalist interests of the international community is an unhappy chore. Each reconciliation should be made according to its own facts, guided by the few neutral principles developed below. Once again, this Note will examine these principles as hypothetically applied to the Parthenon Marbles.

One commentator has set out three conditions which might justify foreign possessors retaining alienated cultural property.¹⁷⁶ First, retention might be permissible where the group that created the art no longer survives as a people.¹⁷⁷ However, the rejection of the Fallmerayer theory and the continuity of the Greek community moot this justification in the case of the Parthenon Marbles.¹⁷⁸ Second, retention may be warranted if present descendants carelessly preserve antiquities of international importance.¹⁷⁹ The sophistication of Greek archaeological and preservation techniques, however, defeats this rationalization.¹⁸⁰ Third, the existence of particular

¹⁷⁴ "Art historians, archaeologists, anthropologists and others who make universalist claims can and do destroy the traditions of technologically weaker societies. The traditional history of one society is thus absorbed into the universal heritage of the more powerful society." Smith, *Art Objects and Historical Usage*, in *WHO OWNS THE PAST*, *supra* note 59, at 83.

¹⁷⁵ Cf. Holm, *supra* note 94 (describing the Marbles' arrival in London as effecting a "complete revolution in [the British] conception of ancient art.").

¹⁷⁶ See C. HITCHENS, *supra* note 2, at 80 (quoting Colin MacInnes, a writer who in the 1960's concerned himself with the Marbles).

¹⁷⁷ The Babylonians are an example.

¹⁷⁸ See *supra* note 62 for a rejection of the Fallmerayer theory.

¹⁷⁹ Whether or not this justification is strong enough to trump concerns for intergenerational justice must be resolved according to the facts of each case. While the group rights of unascertained remaindermen seem unassailable, especially egregious neglect by groups of their cultural property could warrant limited intervention, well-tailored to minimize any potential affront to grouphood. If property were to be taken under such circumstances, it should be held in trust until the group could adequately care for the property. Cf. *supra* note 82 (parliamentary dissenters from the purchase of the Marbles from Elgin suggested as an amendment that the Marbles be held in trust for an independent Greece).

¹⁸⁰ M. ANDRONICOS, *supra* note 2, at 9 ("The Greeks of today watch over these unearthed treasures with the greatest of care, not only for their own benefit, but for all those who travel from every country to contemplate the beauty of an art that once filled this small corner of the world with a unique radiance."). The Greeks built a nitrogen air-conditioning hall in Athens where other Greek art receives shelter from corrosive elements. Many other steps have been undertaken to assure the Marbles' safety if they

items of cultural property in profusion in the source nation may merit foreign retention.¹⁸¹ Indeed, a source nation seeking to hoard art that is fully replicated in its own collections might violate property for grouphood's prohibition against bad object relations, in which case an inalienability rule should no longer apply.

Some clever retentionists argue that Greece can scarcely be considered culturally impoverished.¹⁸² This, however, confuses the issue. This Note's analysis is not concerned with the aggregate amount of art possessed by a source group; rather, it is concerned with the amount of a specific type of art possessed by the group. Because the Marbles are irreplaceable pieces belonging to a larger structural entity, their absence arouses universal feelings of alienation among Greeks precisely because they are bound up in Greek grouphood.¹⁸³ As the Marbles are an unreplicated, unique example of the apex of classical sculpture and stonework, strict inalienability of the Marbles does not constitute bad object relations.

Most would agree that hoarding is fetishistic and that it constitutes bad object relations. A source nation's retention of works already adequately restrained and protected from alienation constitutes hoarding.¹⁸⁴ While such practices may not harm the

are returned. See E. VRANOPOULOS, *THE PARTHENON AND THE ELGIN MARBLES* 31 (1985). Additionally, to preserve the monuments from the effects of pollution, the government has implemented an alternative-day driving rule in Athens. It has also taken care to route all air traffic patterns away from the Acropolis. *Id.*

¹⁸¹ See *supra* note 41.

¹⁸² See Merryman, *supra* note 1, at 832. See also Merryman, *supra* note 82, at 1920-21 ("If all the works of the great artists of classical Athens were returned to and kept there, the rest of the world would be culturally impoverished.").

¹⁸³ Indeed, Nobel Laureate Odysseus Elytis confirmed this when he said: "When I saw the Marbles at the British Museum, although without fanatical nationalist sentiment, I had a feeling of desolation . . . as if one saw someone in exile." See C. HITCHENS, *supra* note 2, at 82; *supra* notes 26-82 and accompanying text.

¹⁸⁴ In a press report, Professor Merryman emphasized that the importance of art to the international community should be considered before an importing nation accedes to enforcing restrictive local export laws. He asked rhetorically, "why should the rest of the world honor [a state's] policy of hoarding artifacts? Only objects central to a culture, like the Liberty Bell, should have constraints on their sale." Gerson, *Who Owns Artifacts? International Art Trade Spurs Legal Discussions*, NAT'L L. J., Dec. 27, 1987, at 9, col. 1. This Note does not quarrel with this latter position. Indeed, Merryman seems intuitively to reach similar conclusions as this Note by using the example of the Liberty Bell, which would assuredly, like the Parthenon Marbles, qualify as grouphood property.

Merryman develops his own test in later writing, however, which may not be reconcilable with his current characterization of the Liberty Bell as justifiably restrainable. See Merryman, *supra* note 5, at 497. In this test, Merryman would allow a strict inalienability approach only if (1) the creating culture were still alive; and (2) if the object were actively employed in religious, ceremonial, or communal activities. Under his test the Afo-A-Kom, Cameroonian tribal art repatriated because of its propinquity to the Kom people, was properly returned. See F. FERRETTI, *AFO-A-KOM: SACRED ART OF CAMEROON* (1975); J. MERRYMAN & A. ELSÉN, *LAW*, *supra* note 66, at 56-58. The resolution of the Afo-A-Kom controversy is remarkably consistent with this Note's group rights analysis.

work itself, they ignore the role of cultural property as an ambassador.¹⁸⁵ The hoarding impulse may breed a racial and ethnic intolerance that is inimical to the promotion of intercultural flourishing.¹⁸⁶ That is precisely why this Note's analysis would refuse to accord special protections to an object whose retention constitutes bad object relations.

Sharing art can produce artistic and intellectual cross-fertilization and stimulation that will promote human, communal, and intercultural flourishing. It can enrich the intellectual and artistic life of another state.¹⁸⁷ Hoarding interferes with these desirable out-

The government of Cameroon, which was interested in diluting tribal loyalties in competition with its national authority, insisted upon the return of the statue to it. Instead, however, the Afo-A-Kom was ultimately restored at the Kom royal palace in the highlands of Cameroon, much to Merryman's approval.

Yet according to Merryman, who has made similar Greek requests for repatriation of the Parthenon Marbles a subject of his academic career, Greek attempts are steeped in what he derides as "Byronism." Merryman's Byronism is primarily an appeal to the emotions and, as such it "divert[s] attention from the facts and discourage[s] reasoned discussion of the issues." Merryman, *supra* note 5, at 495. It is the "romantic attribution of national character to cultural objects, with the corollary that they belong in national territory." *Id.* On one hand, Merryman finds former Minister Mercouri's characterization of the Marbles as a "monument to Greek identity, part of our deepest consciousness of the Greek people: our roots, our continuity, our soul," *see supra* note 83, to exemplify Byronism and, implicitly, thus not to justify repatriation. Yet, in response to a Cameroonian diplomat's similar description of the Afo-A-Kom statue as "the heart of the Kom, what unifies the tribe, the spirit of the nation, what holds us together," *see* 1 J. MERRYMAN & A. ELSÉN, *LAW, ETHICS AND THE VISUAL ARTS* 2-2 (1979), Merryman lauds this plea as a compelling and eloquent justification for the statue's return to the Kom people. Only result-oriented reasoning could justify the Afo-A-Kom's repatriation, yet condemn the Marbles' repatriation.

Nonetheless, even Merryman's own test would justify the repatriation of the Marbles. They would be employed precisely in the communal fashion Pericles intended in dedicating them: to impel Greeks to greater achievements and to foster national pride. *Cf.* Thucydides, *supra* note 89, at 148.

Merryman's preoccupation with "invidious nationalism," "covetous neglect," and "destructive retention" is addressed by the second prong of this Note's property for grouphood test which would refuse to protect articles whose retention constitutes bad object relations. Further, this Note's analysis answers Merryman's concern for measuring an object's propinquity by assuring that property for grouphood be bound up with group identity. Hence, just as the Afo-A-Kom's absence "left a cultural lacuna that could only be filled by its return," *see* Merryman, *supra* note 5, at 497, the removal of the Parthenon Marbles must have likewise left a void in Greek cultural identity. Any analysis that purports to distinguish between these cases can only be grounded upon risky substantive judgments about the value of an object to one culture as opposed to the value of another object to a different culture.

¹⁸⁵ Bator, *supra* note 5, at 306. "Countries that allow their art to spread abroad derive both obvious and subtle advantages. Art is a good ambassador. It stimulates interest in, understanding of, and sympathy and admiration for that country." *Id.*

¹⁸⁶ Intercultural flourishing is plainly an analogue to both human and communal flourishing. Intercultural flourishing envisions cooperation, sharing, and understanding among nations.

¹⁸⁷ *See supra* notes 94, 171-81 and accompanying text.

comes. Nonetheless, absent a showing of bad object relations, such goals, must not trump the aims of property for grouphood.

Once again, in the personhood setting, a regime of mere market-inalienability applies to property for personhood. Gifts are allowed as consistent with the goals of human flourishing. While market-inalienability inadequately protects property for grouphood because it allows for dispossession, sharing with other nations or groups cultural property that does not fall within the narrow scope of property for grouphood is consistent with intercultural flourishing, and thus, should be encouraged.

Three recurring assumptions about property for grouphood persist, however, and must be accounted for before striking an effective reconciliation between the impulses of cultural universalism and cultural nationalism (group rights). First, many believe that cultural property belongs to everyone. Second, many have argued that the sharing of art promotes international understanding and tolerance. Third, despite universalist sentiments, there is an "assumption that any [group] may be placed at a disadvantage if its cultural property has been dispersed, so that it is unable to promote its own cultural identity through [the art's] exhibition."¹⁸⁸ Thus, national identity is still desirable and must be fostered.¹⁸⁹

Reconciliation of the contraposed values of cultural universalism and group rights should be forged in a category of property which promotes universalist goals without disadvantaging the grouphood aims of communal flourishing. Art that would fail the second prong of the property for grouphood test because its retention is fetishistic fits such a category. As explained, it is unduly fetishistic to retain duplicates of objects already adequately restrained. Many great works—those existing in profusion—do not deserve the level of protection afforded by a strict inalienability rule. Moreover, when such pieces exist in profusion, their marginal utility is diminished.¹⁹⁰ The 3001st Etruscan vase, for example, will play a negligible role in achieving the ends to which property for grouphood aspires.

Even objects whose retention would be permissible under a

¹⁸⁸ Mulvaney, *A Question of Values: Museums and Cultural Property*, in WHO OWNS THE PAST?, *supra* note 2, at 90.

¹⁸⁹ Compare Merryman, *supra* note 5, at 510 ("It is clearly right for a nation to retain important works of *indigenous cultures*") (emphasis supplied), with Mulvaney, *supra* note 188, at 96 (finding much of the retention impulse steeped in "invidious nationalism" and "xenophobia.").

¹⁹⁰ UNESCO Recommendation Concerning the International Exchange of Cultural Property, UNESCO Doc. IV.B.8. (Nov. 26, 1976) (sanctioning the release of works of minor or secondary importance, "because of their plurality, as "valuable accessions" by other countries).

strict property for grouphood analysis may sometimes promote the aims of cultural universalism without unduly disadvantaging grouphood and its corresponding aim of communal flourishing. This could be achieved by vesting and maintaining ownership of the object in the source nation, yet encouraging the possessor to lend out the work on short term bases through international exhibitions.¹⁹¹

The unique stature of the Parthenon Marbles as the pinnacle of the most renowned period of Greek artistic genius, their aesthetic inseparability from the rest of the Parthenon, and their psychic importance to Greeks, make the Marbles an exceptional example of property for grouphood. The Marbles cannot be duplicated, just as the original Declaration of Independence, Liberty Bell, or Statue of Liberty cannot be duplicated. That the Greeks possess other works created by the artisans who labored on the Acropolis project is no rejoinder. This suggestion misconceives what qualifies as a duplicate. The determination of what constitutes hoarding will surely turn on the existence of similar art in abundance and will be a vexing issue in many cases. In this Note's example, however, such a determination is easily made. Because they are bound up with Greek identity and because their retention would not constitute bad object relations, the Parthenon Marbles are property for grouphood.

CONCLUSION

Property for grouphood should be recognized as a new classification of property rights enforced through a regime of strict inalienability. Accepting that groups have rights, and that those rights are not subservient to, but equal to individual rights, such rights may logically inhere in cultural property. Thus, when property is bound up with the holder's identity, and its retention does not represent bad object relations, it qualifies as property for grouphood.

Only a strict inalienability rule sufficiently protects rights in grouphood property. Market-inalienability—the mere prohibition of sales but not gifts—incompletely protects the grouphood right in property, despite its adequate protection of analogous personhood rights in property. While market-inalienability seeks merely to pre-

¹⁹¹ This, of course, depends upon the gratuity of the source nations. In a world of private ordering, it should not be difficult to effect such goals. The frequency of international art exhibitions attests to this. I do emphasize, however, the short-term nature of these loans. Otherwise, the same concerns about dispossession loom largely. For example, a loan of property for grouphood to a foreign museum for an excessive term may unduly deprive a generation of group members of their inalienable interests. Thus, however powerful private ordering is on either side, it must always fall short of overturning a determination of strict inalienability.

vent the use of market rhetoric to describe personhood property, in the grouphood context all transfers must be prohibited to prevent dispossession.

Both efficiency and distributional concerns support imposition of a strict inalienability regime to protect group rights. As well, concern for intergenerational justice plays a decisive role in this Note's treatment of the Parthenon Marbles. Because all members of the Greek group—past, present, and future—have rights to their common heritage, no present generation should be permitted to commit future members to an artistically-barren existence by alienating the group's cultural memory.

While some writers have undertaken to discuss more technical issues relating to the Parthenon Marbles, this Note has used the Marbles as a paradigmatic case of cultural property which, by fulfilling grouphood property criteria, warrants inalienability. This Note does not explicitly advocate the return of the Marbles; instead, it discovers a collision course, plotted long ago, respecting two very different ways of thinking about cultural property. It adapts from old usages a notion of property for grouphood which can be used both to reconcile these opposing tensions and to help decide among rival claimants their entitlements to cultural property. Hence, this Note merely posits an alternative vision of rights in cultural property in general, rather than establishing specific mechanisms for adjudicating claims. This Note finds strong theoretical and practical reasons for removing property for grouphood from the bustle of the marketplace. Our most vibrant conception of communal flourishing, and how best to effectuate it, rather than notions of moving cultural property to the locus of highest-value use, should instead guide our consciences in making decisions about the disposition of culture and identity inherent in any transfer of property for grouphood.

John Moustakas