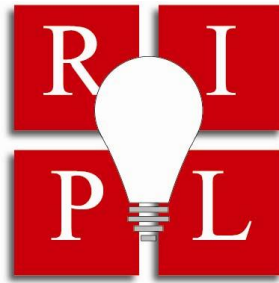


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



ILLUSORY BORDERS: THE MYTH OF THE MODERN NATION-STATE AND ITS IMPACT ON THE
REPATRIATION OF CULTURAL ARTIFACTS

LUBNA S. EL-GENDI

ABSTRACT

While the current world order of independent nation-states may seem like a natural state that has existed for centuries, in reality, it is a relatively new development that was forged after the demise of imperial rule. Yet, the nation-state is the foundational entity of our current international political and legal framework. International treaties and relations are structured around the nation-state, which is recognized as the core entity in which rights are vested and on which obligations are imposed. This prioritization of the nation-state leads to issues when we consider the repatriation of cultural heritage, particularly in light of the history of many of the nation-states in existence today. Many of the nation-states we see on maps today were political creations whose borders were drawn arbitrarily, with complete disregard for the cultural, ethnic, political, religious, and social divides that already existed among indigenous and native peoples. As such, there is a discongruence between the peoples of the world and many of the national borders demarcated by maps today. This article examines this history, highlighting some of the arbitrary and politically-driven ways in which our world of nation-states came about. It also discusses some of the issues that arise when the nation-state is prioritized over peoples with respect to rights to cultural heritage. Finally, this article suggests that the framework for the repatriation of cultural heritage must evolve away from a system in which the default rightholder is the nation-state. Instead, where feasible and just, peoples should be recognized as having superior rights to cultural heritage. Such a model would give indigenous and marginalized peoples greater control over the fate of their cultural heritage and align more with the goals of repatriation.

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ILLUSORY BORDERS: THE MYTH OF THE MODERN NATION-STATE AND ITS IMPACT ON THE
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LUBNA S. EL-GENDI*

I. INTRODUCTION

It is hard to imagine a time before the world was governed by nation-states. National and individual identities are both bound, at least to a certain extent, to the nation-state.¹ Yet in the millennia-long history of the world, the tenure of the nation-state, which is impelled by the belief that “each ethno-national group should govern itself, and the government in turn should be representative of the ethno-national makeup of the population[,]”² represents only a tiny sliver. Most of our ancestors “have lived in political units that did not pretend to represent a single people.”³ Rather, pluralistic empires, with a power hierarchy structured around a culturally and ethnically diverse periphery ruled over by a core region,⁴ dominated global governance for a significant portion of history and their legacies still influence today’s global order.⁵ The international political order eventually transitioned from peoples governed under imperial rule to peoples governed by nation-states,⁶ but in doing so, it resulted in a disparity between the borders of nation-states and the borders of the peoples of the world. Many of the nation-states in existence today were fashioned by political agreements between the great imperial and colonial powers of the past, their borders and very existence shaped by these agreements and not by actual realized divisions between peoples. As such, while the very idea of a

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¹ The almost unconscious association of individuals with countries is not accepted by all. Novelist Taiye Selasi, in asking “[h]ow can a human being come from a concept,” stated: “To me, a country—this thing that could be born, die, expand, contract—hardly seemed the basis for understanding a human being.” Taiye Selasi, *Don’t Ask Me Where I’m From, Ask Me Where I’m a Local*, TED Talks (October 20, 2015), <https://www.youtube.com/watch?v=LYCKzpXEW6E>.

² Andreas Wimmer and Brian Min, *From Empire to Nation-State: Explaining Wars in the Modern World, 1816-2001*, AMERICAN SOCIOLOGICAL REVIEW, Vol. 71, No. 6 (Dec. 2006), at 867-897.

³ JANE BURBANK AND FREDERICK COOPER, EMPIRES IN WORLD HISTORY: POWER AND THE POLITICS OF DIFFERENCE 1 (Princeton University Press 2010). As used throughout this article, people(s) refers to “a body of persons that are united by a common culture, tradition, or sense of kinship, that typically have common language, institutions, and beliefs, and that often constitute a politically organized group.” Merriam-Webster Dictionary.

⁴ Wimmer and Min, *supra* note 2, at 870.

⁵ BURBANK AND COOPER, *supra* note 3, at 2 (“Despite efforts in words and wars to put national unity at the center of political imagination, imperial politics, imperial practices, and imperial cultures have shaped the world we live in.”).

⁶ This article uses the terms nation-state, state, and country interchangeably. This is distinct from the term “nation” which is used interchangeably with people, as that term is defined *supra* note 3. However, where a quoted source uses the term nation to refer to a country, this article leaves that original language. National borders as used in this article will always refer to the borders of nation-states.

nation-state grew out of the belief that each unified ethno-national group should be self-governed, many, if not most, of today's nation-states do not fit the image of a nation-state that its founding doctrine envisions.

The arbitrary politically-driven inception of states and their national borders, and the disconnect between peoples and nation-states have significant ramifications with respect to ownership of, and claims to, cultural heritage. The debate over the repatriation of cultural property⁷ shows no signs of abatement. Countries such as Turkey, Italy, Greece, China, Peru, and others with rich cultural pasts, sometimes referred to as source countries, "have pushed to reclaim prized artifacts from collections around the world."⁸ This continued effort to reclaim cultural artifacts has shone a new spotlight on the claim that the current repatriation model, which privileges the nation-state over the nation, does not make sense in light of the arbitrary nature of most of today's national borders.

Presently, the country of origin is generally defined as the state within whose borders an artifact was found or unearthed (i.e., the country where the artifact originated). Yet, as mentioned, modern-day nation-states and their borders often do not accurately reflect the history of the lands they both enclose and exclude, and the peoples that inhabit those lands. As a result, we find situations where one distinct culture or people is divided by the borders of a modern-day nation-state, with some members left outside the borders of the nation-state and some remaining as a minority within the nation-state. We also find situations where people are stateless, belonging to no nation-state. Grounding the return of cultural property on the default premise that an artifact "belongs to" the country of origin, defined by today's national borders, leads to situations where artifacts are returned to nation-states instead of to the more relevant nation.⁹ Given the history of discrimination still ongoing in many places, faced by indigenous and minority populations at the hands of nation-states,¹⁰ this default prioritization of the nation-state over the nation can be detrimental and contrary to the goals of repatriation.

This article examines the origins of the nation-states and national borders we see on maps today and the issues that arise when we presume that artifacts, if they are to be repatriated, should be repatriated to the nation-states delineated by these

⁷ Under the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), "cultural property" is defined as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, literature, art or science." Objects encompassed within this definition, which typically refers to tangible objects, include: paintings, sculptures, books and manuscripts, coins, ethnological objects, archaeological artifacts and others. This article uses the term cultural property, interchangeably with cultural artifacts and cultural heritage, to refer primarily to archaeological and ethnographic antiquities.

⁸ Drake Bennett, *Finders Keepers*, THE BOSTON GLOBE, (February 10, 2008), http://www.boston.com/bostonglobe/ideas/articles/2008/02/10/finders_keepers/?page=full.

⁹ In arguing for a default of nonintervention in intranational cultural heritage disputes, one scholar proclaimed that "the sovereign state is not always the basic unit of 'culture' in cultural property, and disputes over patrimony do not always begin as international affairs." Joseph P. Fishman, *Locating the International Interest in Intranational Cultural Property Disputes*, 35 YALE J. INT'L L. 347, 349 (2010).

¹⁰ ANA FILIPA VRDOLJAK, INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS 3 (2008) (discussing the "recognition of the harm and violence that a State can perpetrate on its own nationals, occupied peoples and their cultures").

borders. Part II briefly discusses the legal framework currently in place with regard to cultural property, including the laws and treaties that govern claims for the return of artifacts. Part III examines the history of nation-states and national borders, while Part IV examines the impact that history can have on the repatriation of cultural artifacts. Part V argues for a move to an alternative framework for the repatriation of cultural artifacts, one that gives priority to the nation over the nation-state. Finally, Part VI concludes, discussing the need to evolve beyond the current nation-state centric framework for the repatriation of cultural property.

II. AN OVERVIEW OF THE CURRENT LEGAL AND IDEOLOGICAL FRAMEWORK CONCERNING CULTURAL HERITAGE

The status and treatment of cultural heritage is governed by a myriad web of international treaties and national laws. Many countries with rich archaeological and cultural histories, sites, and artifacts—often referred to as source countries or countries of origin—have enacted what are commonly referred to as national ownership or patrimony laws. These laws, some of which trace back to the nineteenth century, generally vest ownership in the state of all cultural heritage found within the borders of that state.¹¹ Such laws extend to artifacts that have yet to be discovered and are still buried in the ground. The removal of any previously undiscovered artifacts without the proper authority of the state constitutes theft of that artifact.

For example, Afghanistan's national ownership law, as newly enacted in 2004,¹² declares that "the historical and cultural properties of Afghanistan belong to the people of Afghanistan and are the manifestation of their participation in the evolution of the cultural heritage of mankind. It is the duty of the State and the people of Afghanistan to protect the historical and cultural properties."¹³ Cultural properties are defined under the law as "any product of mankind, movable or immovable, which has an outstanding historical, scientific, artistic and cultural value and is at least 100 years old" or objects which are less than 100 years old but are recognized as "worthy of being protected" due to their "scientific, artistic and cultural

¹¹ See PATTY GERSTENBLITH, *ART, CULTURAL HERITAGE, AND THE LAW* 644 (2d ed 2008). Distinct from national ownership laws, most countries in the world have enacted laws that place restrictions on the export of cultural property. Lyndel V. Prott and Patrick J. O'Keefe, *UNESCO Handbook of national regulations concerning the export of cultural property*, (September 1988), <http://unesdoc.unesco.org/images/0011/001191/119126eo.pdf>. The terms of these laws vary widely: some of these laws merely require that an export permit be obtained before cultural artifacts may leave the country; others prohibit, for a certain period of time, the export of cultural objects deemed significant to the history of that country; while still others permit only temporary exports of cultural objects and prohibit such objects from permanently leaving the country. *Id.*; see also GERSTENBLITH at 635.

¹² The 2004 law abolished Afghanistan's previous 1980 Law on the Protection of the Historical and Cultural Heritage. Islamic State of Afghanistan, Ministry of Justice, Law on the Protection of Historical and Cultural Properties, Article 85, (May 21, 2004) (unofficial translation), http://www.unesco.org/culture/natlaws/media/pdf/afghanistan/afghanistan_law_preservation_heritage_2004_engtno.pdf.

¹³ *Id.*, Article 2.

value.”¹⁴ Article 8 explicitly makes such objects the “property of the State” whether such objects are “discovered or hidden in the earth.”¹⁵ This article applies even if such cultural artifacts are found on privately owned land.¹⁶

While these laws cannot be enforced extraterritorially, national ownership laws have been used to establish the ownership status of artifacts that end up in other countries. In *United States v. Schultz*, the national ownership law of Egypt was given effect in the United States for purposes of establishing that the cultural artifacts at issue were properly considered stolen property under the U.S. National Stolen Property Act (“NSPA”), 18 U.S.C. § 2315.¹⁷ In *Schultz*, defendant art dealer Frederick Schultz moved to dismiss his indictment on one count of conspiring to receive stolen Egyptian artifacts on the grounds that the antiquities “were not owned by anyone and therefore could not be stolen.”¹⁸ Schultz dismissed the relevance of Law 117, the Egyptian patrimony law “which declared all antiquities found in Egypt after 1983 to be the property of the Egyptian government.”¹⁹ The Second Circuit upheld the district court’s finding that the Egyptian patrimony law was a “real” ownership law that operated to “vest absolute and true ownership of all antiquities found in Egypt after 1983 in the Egyptian government[.]”²⁰ It held that Egypt made “a clear declaration of national ownership through” its patrimony law,²¹ and further held that the “NSPA applies to property that is stolen in violation of a foreign patrimony law.”²² Thus the court recognized and validated ownership in the state.

While the U.S. does not have a national ownership law, a complicated patchwork of federal laws and regulations, executive orders, and state laws act to regulate and protect cultural heritage in the U.S.²³ Relevant federal laws include: Monuments, Ruins, Sites, and Objects of Antiquity, under Title 54: National Park Service and Related Programs, which gives the President the ability to “declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.”²⁴; the National Historic Preservation Act, 16 U.S.C.A. § 470 *et seq.*, passed in 1966; the Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470aa-mm; and the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3003-3013, discussed in detail *infra*, among others. Many U.S. states have enacted their own versions of these laws, to regulate and protect cultural heritage on the state and local level.

Beyond domestic laws, cultural heritage is also governed by several international treaties, including the 1970 UNESCO Convention on the Means of Preventing and Prohibiting the Illicit Import, Export and Transfer of Ownership of

¹⁴ *Id.*, Article 3.

¹⁵ *Id.*, Article 8.

¹⁶ *Id.*, Article 9.

¹⁷ *United States v. Schultz*, 333 F.3d 393, 399 (2d Cir. 2003).

¹⁸ *Id.* at 395-396.

¹⁹ *Id.* at 396.

²⁰ *Id.* at 401.

²¹ *Id.* at 404.

²² *Id.* at 410.

²³ For an extensive list of relevant laws, regulations, and executive orders, *see* the National Park Service website, <https://www.nps.gov/history/Laws.htm>.

²⁴ 54 U.S.C. § 320301. This power was originally given to the President under the Antiquities Act of 1906, 16 U.S.C. § 431, which was later repealed and replaced with 54 U.S.C. § 320301.

Cultural Property (the “1970 Convention” or “Convention”), the “most influential cultural property treaty currently in force.”²⁵ Currently, 131 Member States of UNESCO have ratified the 1970 Convention, including the United States.²⁶ State parties to the 1970 Convention “agree to oppose the impoverishment of the cultural heritage of a nation²⁷ through illicit import, export, and transfer of ownership of cultural property, agree that trade in cultural objects exported contrary to the law of the nation of origin is illicit and agree to prevent the importation of such objects and facilitate their return to source nations.”²⁸ The Convention also imposes obligations on state parties to enact measures to protect the cultural heritage within their own borders.

While the U.S. ratified the 1970 Convention in 1972, it viewed the Convention as a non-self-executing treaty, meaning that the terms of the Convention would not be implemented into U.S. domestic law until Congress passed implementing legislation. The 1970 Convention was implemented into U.S. law through the Convention on Cultural Property Implementation Act (“CPIA”), 19 U.S.C. § 2601-13, which was enacted in 1982 and signed into law in 1983, more than ten years after the U.S. first signed the 1970 Convention.²⁹ The CPIA implemented only Article 7(b) and Article 9 of the 1970 Convention and is part of the customs statute, prohibiting the import into the U.S. of cultural property stolen from public institutions of State Parties to the 1970 Convention, and also providing a mechanism through which State Parties can request a bilateral agreement with the U.S. to restrict import of certain cultural property into the U.S. for a set period of time.³⁰

Discussion of the laws governing cultural heritage also raises two philosophies regarding cultural heritage, cultural internationalism and cultural nationalism. John Henry Merryman, one of the leading scholars in this field, laid out the contours of the two philosophies in his seminal essay, *Two Ways of Thinking About Cultural Property*:

One way of thinking about cultural property [cultural internationalism]—i.e., objects of artistic, archaeological, ethnological or historical interest is as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction Another way of thinking about cultural property [cultural nationalism] is as part of a national cultural heritage. This gives nations a special interest, implies the attribution of national character to objects, independently of their

²⁵ Fishman, *supra* note 9, at 357. Another international convention that is relevant is the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which calls for the return, in most cases, of stolen and illegally exported cultural objects to be returned to the original owner or nation of origin. However, the influence of the 1995 UNIDROIT Convention is limited, as very few states have ratified it.

²⁶ States Parties, UNESCO, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/states-parties>.

²⁷ As used in the 1970 Convention, nation refers to a state.

²⁸ UNESCO Convention.

²⁹ GERSTENBLITH, *supra* note 11, at 618, 623.

³⁰ *Id.* at 622-626, 629-633.

location or ownership, and legitimizes national export controls and demands for “repatriation” of cultural property.³¹

The Vice-Admiralty Court of Halifax, a British Court sitting in Canada, seemingly adhered to the cultural internationalist view in *The Marquis de Somerueles*, the first reported legal case “to address the question of whether cultural and artistic works should be treated differently from other types of property during time of war.”³² In deciding this case, which involved the removal from an American ship of several paintings and prints that were on their way from Italy to Philadelphia, the court stated that the “arts and sciences . . . are considered not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species.”³³

Cultural nationalism, in contrast, is predicated on the idea that while it may be appreciated by all, cultural heritage rightly belongs to the nation-state within which it was found—its true patria. Central to this viewpoint of cultural heritage is the belief that “particular peoples have particular interests in particular properties.”³⁴ Cultural nationalism is tied to the idea that people need a connection to the artifacts from their history to fully develop and maintain a sense of national and cultural identity.³⁵

Both ideologies have their detractors. The renewed justification of encyclopedic museums espoused by cultural internationalism has been described as an “attempt at rebranding” national museums, notably of the historic Western Powers, that played an inexpungible role in nation building and imperialism.³⁶ This article, however, focuses on issues raised by the oft-lobbed critique at cultural nationalism: that the countries of today claim to be the rightful, sole owners of artifacts that were “made long before there were nations.”³⁷ This claim highlights the potential disconnect between cultures and states; an analysis of the issues it raises requires an examination of the history of modern nation-states.

³¹ John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 831-32 (1986).

³² GERSTENBLITH, *supra* note 11, at 526.

³³ *The Marquis de Somerueles*, Vice-Admiralty Court of Halifax, 1813, Nova Scotia Stewart’s Vice-Admiralty Reports 482.

³⁴ Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CANADIAN J. L. & JURIS. 249, 260 (1993).

³⁵ See Nicole Klug, *Protecting Antiquities and Saving the Universal Museum: A Necessary Compromise Between the Conflicting Ideologies of Cultural Property*, 42 CASE W. RE. J. INT’L L. 711, 717 (2010).

³⁶ Clare Harris and Michael O’Hanlon, *The future of the ethnographic museum*, ANTHROPOLOGY TODAY, Vol. 29 No. 1, 9, (February 2013).

³⁷ James Cuno, WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE 124 (2008). See also Fiona Rose-Greenland, *The Parthenon Marbles as icons of nationalism in nineteenth-century Britain, Nations and Nationalism*, NATIONS AND NATIONALISM (2013), 1-20, 13 (“The Parthenon Marbles were produced prior to nation-states.”).

III. THE NATION-STATE AND THE SHADOW OF EMPIRES

While today the independent nation-state is the most familiar entity in global politics, the ubiquity of the nation-state in international governance is a recent phenomenon. Many of the world's currently recognized states are young countries whose borders were drawn only relatively recently, conjured out of the remnants of vast global empires. In fact, "the world of nation-states we take for granted is scarcely sixty years old."³⁸ The move to an international political system structured around the nation-state as the prime political entity came about through a long, messy shift in global governance that is ongoing even now in many regions of the world. One need only read a current newspaper to see that "conflicts over what a nation is and who belongs within it"³⁹ still rage today.

A. *The Reign of Empires*

The world's earliest civilizations evolved out of more primitive forms of community and collective governance. "Modern humans had arrived in China and South-east Asia by around 75,000 years ago" and the "earliest organized settlements date to around 27,000 years ago."⁴⁰ As humans advanced from hunting and gathering to farming, these settlements grew into farming communities which for the most part "consisted of a few hundred—in some cases, a few thousand—individuals, living in villages" and were "essentially independent and self-sufficient" although they may have traded and communicated with neighboring communities.⁴¹ As these communities continued to grow, they became more complex and eventually developed into chiefdoms, "hierarchical communities of up to 20,000 people."⁴² The first such communities appeared in Mesopotamia in 4500 BCE, then spread to Egypt, Crete, and the Indus Valley, in India and China; by 2500 BCE farming communities across Western Europe and Central America were transforming into chiefdoms.⁴³ The chiefdoms that were established in fertile regions that could support increasing populations—in the tens of thousands—such as Mesopotamia, Egypt, and the Indus Valley, eventually "turned into city-states, and the first civilizations arose."⁴⁴

The world's first empire developed from the first great civilization, Sumer, which can be traced back to around 4300 BCE, when farmers settled in the area that is now Iraq but was once known as Mesopotamia.⁴⁵ By 3000 BCE, Sumer had developed into a number of city-states, which were "independent states consisting of a city and

³⁸ BURBANK AND COOPER, *supra* note 3, at 1; *see also* John Agnew, *No Borders, No Nations: Making Greece in Macedonia*, *Annals of the Association of American Geographers*, 97(2), 2007, pp. 398-422, 401 (stating that state borders "have not been around for time immemorial").

³⁹ BURBANK AND COOPER, *supra* note 3, at 1; *see also* Wimmer and Min, *supra* note 2, at 894.

⁴⁰ ALEX WOOLF, *A SHORT HISTORY OF THE WORLD: THE STORY OF MANKIND FROM PREHISTORY TO THE MODERN DAY* 12 (2008).

⁴¹ *Id.* at 17.

⁴² *Id.* at 18.

⁴³ *Id.*

⁴⁴ *Id.* at 19.

⁴⁵ Woolf, *supra* note 40, at 22.

its surrounding territory.”⁴⁶ In approximately 2334 BCE, the Sumerian city-states were united under Sargon, king of an ancient kingdom north of Sumer known as Akkad, to create the first great Sumerian Empire, which extended from Syria to the Persian Gulf, covering parts of modern-day Iran and Turkey.⁴⁷ The world’s first empire ruled for over 100 years, before it collapsed in 2193 BCE, with the region reverting to battles for dominance by individual city-states.⁴⁸

Since the Sumerian Empire, the world has seen numerous legendary empires: the Persian Empire; the Roman Empire and its Eastern offshoot, the Byzantine Empire; the Arab Empire (also referred to as the Umayyad Caliphate); the Mongol Empire; the Ottoman Empire, and many others. Empires are characterized by several distinct attributes:

centralized bureaucratic forms of government, the domination of a core region over peripheries, an ethnically or culturally defined hierarchy between rulers and [ruled, and claims to universal legitimacy—whether referring to a revolutionary ideology (e.g., the Soviet Union), a *mission civilisatrice* (e.g., colonial empires), or religious conversion (e.g., the Spanish empire).⁴⁹

This form of rule dominated for the better part of human history. In the early 1800s, over half of the earth’s land surface was governed by empires as imperial or colonial dependencies; only a tiny fraction was governed as autonomous nation-states.⁵⁰ Structured as a central core ruling over peripheries comprised of diverse populations, empires did not draw their legitimacy from “a nationally defined people” and thus knew “no natural borders.”⁵¹ Driven to continually expand their realm, the center-periphery structure of empires allowed for “easy incorporation of newly conquered populations,” simply adding fresh conquests as “new pieces to the ethno-national mosaic” of the empire’s dominion.⁵²

While the earliest empires were unstable and short-lived, the empire proved to be “a remarkably durable form of state”⁵³ and the world has been governed under, and influenced by, empires longer than it has lived under any other political structure:

The Ottoman Empire endured six hundred years; for over two thousand years a succession of Chinese dynasties claimed the mantle

⁴⁶ *Id.*

⁴⁷ *Id.* at 24.

⁴⁸ *Id.*

⁴⁹ Wimmer and Min, *supra* note 2.

⁵⁰ *Id.* This is based on data compiled by sociologists that show that only a very small percentage, approximately less than 10%, of the land surface of the earth was governed by autonomous nation-states in the early 1800s. However, only about 60% of the remaining surface area can be said to have been governed by empires at the time, as the remaining land surface was governed by other institutions that do not quite meet the definition of an empire. These other institutions include absolutist kingdoms, tribal confederacies, city-states, and informal empires. *Id.* at 870-871.

⁵¹ Wimmer and Min, *supra* note 2.

⁵² *Id.*

⁵³ BURBANK AND COOPER, *supra* note 3.

of imperial predecessors. The Roman Empire exercised power for six hundred years in the western Mediterranean area, and its eastern offshoot, the Byzantine Empire, lasted another millennium. Rome was evoked as a model of splendor and order into the twentieth century and beyond. Russia has for centuries sustained imperial ways of ruling over distinctive populations For most of human history empires and their interactions shaped the context in which people gauged their political possibilities, pursued their ambitions, and envisioned their societies.⁵⁴

Notwithstanding its enduring influence, however, the empire would soon give way to a world order dominated by nation-states, driven by the growing influence of the nationalist doctrine which advanced the idea that “states should be governed in the name of a nationally defined community of equal citizens.”⁵⁵ While the Nineteenth Century saw the expansion of empires and the colonization of the world, and by 1900 still more than half of the world’s surface was not governed by independent nation-states,⁵⁶ the Twentieth Century saw the accelerated spread of nation-states across the globe.⁵⁷ By 2001, “almost the entire globe was controlled by modern nation-states,” with empires having completely disappeared and only a “handful of states” governed as absolutist kingdoms remaining.⁵⁸

The global shift to a political order of nation-states was not easily implemented. In the 1490s, “national borders [in Europe] remained fluid, and the idea of the nation-state was still very new.”⁵⁹ The shift to “modern sovereign statehood” was “spurred [on] by the break-up of European colonialism.”⁶⁰ In fact, two sociologists have identified that the spread of nation-states occurred in six waves, “each triggered by the crisis of a major empire and its eventual dissolution”:

The first wave followed the collapse of the Spanish Empire. The second wave occurred after World War I with the breakup of the Ottoman and Hapsburg empires, and the third after World War II, when the Middle East as well as South and Southeast Asia were decolonized. The fourth wave followed about 1960, when the British and French colonial empires broke apart, and the fifth occurred when the oldest colonial empire, the Portuguese, finally dissolved. The sixth wave rolled over the Soviet empire during the early 1990s.⁶¹

As the world’s formidable empires collapsed, newly independent nation-states emerged.

⁵⁴ BURBANK AND COOPER, *supra* note 3, at 2-4.

⁵⁵ Wimmer and Min, *supra* note 2, at 870.

⁵⁶ *Id.* at 869.

⁵⁷ *Id.* at 868, 869, 871.

⁵⁸ *Id.* at 871.

⁵⁹ William E. Scheuerman, *Realists Against the Nation-State*, 20 *TRANSNAT’L L. & CONTEMP. PROBS.* 67, 72 (2011).

⁶⁰ *Id.*

⁶¹ *Id.*

B. Political Ambitions, Imperialism, and the Rise of the Nation-State

While the new states that emerged as empires were dismantled had broken free of imperial rule and the shackles of colonialism, they were not free of the impact of imperialism⁶² and the consequences of recently-ended colonial practices. The continuing reverberations that colonialism and imperialism had can be seen in the very creation of these new nation-states and the demarcation of their national borders. While the concept of the nation-state grew out of the nationalistic ideology, the borders that delineated these new states were too often not rooted in inherent divisions, whether geographical, cultural, social, religious, or political. Rather, the borders that emerged out of the shadows of the world's great empires often ignored these pre-existing divisions amongst unified peoples and were instead based on the whims and political aspirations of Western powers, kings, Church leaders, and powerful men.⁶³

1. The Myth of the Pristine Land and its Role in Nation-State Creation

The states in power during the Age of Exploration often divided the “new” lands they “discovered” based on entirely arbitrary measures, driven by economic and political ambitions, in ways that would have an impact on the borders of the states that would be created out of these lands during future partitions. The complete arbitrariness in how the great powers of the past divided the world is exemplified in the 1493 papal bull “*Inter caetera divinae*” issued by Pope Alexander VI, who hoped to “settle the territorial disputes of the two major exploratory powers of the day, the Portuguese and the Spanish.”⁶⁴ During these exploratory times, “Lisbon had spent decades seeking routes around Africa into the Indian Ocean, but was also more than willing to jockey with Madrid for new territories on the far side of the Atlantic Before long, Spain would claim Argentina, the Yucatan, Mexico, and Panama . . .”⁶⁵ The Pope, “[i]n anticipation of the competing claims on all these areas . . . chose not to make a detailed survey of the terrain features of cultural divisions among the natives; instead, from thousands of miles away, he simply took a straight-edge to the map, drawing a north-south line lying 100 leagues to the west of the Azores and Cape Verde Islands.”⁶⁶ Based on this politically strategic, but geographically and culturally arbitrary partition drawn by the Pope, “[a] number of as-yet-undiscovered lands were thus assigned to the two kingdoms, with the Spanish . . . [getting] the

⁶² The terms colonialism and imperialism are often used interchangeably and there is confusion over the meanings of the terms and the difference between them. See Margaret Kohn, “Colonialism”, *The Stanford Encyclopedia of Philosophy* (Spring 2014), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/spr2014/entries/colonialism>. As used in this article, colonialism refers to the *practice* of subjugating one people to another and imperialism refers to the *ideology* driving the practice.

⁶³ See, e.g., PETER CASHWELL, *ALONG THOSE LINES: THE BOUNDARIES THAT CREATE OUR WORLD* 27, (Paul Dry Books 2014) (“The earliest [American] colonies were granted by the king as royal charters: gifts of lands to his favorites.”) (quotation marks omitted).

⁶⁴ *Id.* at 24.

⁶⁵ *Id.*

⁶⁶ *Id.*

right to all non-Christian lands west of the line [and] Portugal . . . granted the non-Christian lands to the east.”⁶⁷

This practice of ignoring natural, terrain-based borders and the already existing divisions among indigenous populations⁶⁸ is also evident in the modern borders of U.S. states:

America . . . was divided up by explorers and entrepreneurs, men who put property ahead of geography, particularly when it came to turning the natives’ geography into their own property. When a king or a soldier or a businessman claimed a bit of New World territory, it was usually territory where few white people yet lived. Existing nations didn’t especially care whether their new territories’ borders made geographic sense, since no sensible person would want to live in such an intractable wilderness. What mattered was the presence of exploitable resources within those borders. As a result, the simplicity of the straight line, often extending from a coastal point into the infinity of the interior, became a popular choice for colonial borders.⁶⁹

Such practices expose the myth of the “pristine land” underlying these practices. From the beginning, colonialism, imperialism, and the Age of Exploration acted to erase indigenous nations.⁷⁰ This is epitomized in the American national mythology, as expressed by leading scholar Patty Gerstenblith:

The idea of the United States as a “new” nation founded upon pristine land, a new experiment in liberty and democracy, is perhaps the most central notion in our political consciousness and our understanding of our own history. The fact that the ancestors of few of us who now inhabit the United States were present at this birthing detracts but little from the majoritarian national pride in this shared understanding of our origins. Fundamental to this myth is the belief that the European explorers and colonists and their descendants who formed the “founding fathers” instituted their great experiment in democracy on a blank slate—a virgin territory that offered land of great promise and opportunity, unsullied by the failings, intolerance,

⁶⁷ *Id.* at 24-25. The dividing line was shifted in 1494 pursuant to the Treaty of Tordesillas. However, even in its original demarcation, this line was not recognized or given effect by the other European powers competing for territories in the New World. *Id.* at 26-27.

⁶⁸ While there are different definitions of indigenous peoples, as used in this article indigenous peoples (used interchangeably with indigenous communities and indigenous nations) refers to “peoples traditionally regarded, and self-defined, as descendants of the original inhabitants of lands with which they share a strong, often spiritual bond.” See GERSTENBLITH, *supra* note 11, at 839 (quoting Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 115 (1999) (quotation marks omitted); see also Hannibal Travis, *The Cultural and Intellectual Property Interests of the Indigenous Peoples of Turkey and Iraq*, 15 TEX. WESLEYAN L. REV. 415, 423-24 (2009).

⁶⁹ CASHWELL, *supra* note 63, at 24 (emphasis in original). Cashwell has also noted that “Every one of the forty-nine mainland [U.S.] states has at least one straight border.” *Id.* at 23.

⁷⁰ “[T]he displacement of most indigenous communities in the past was a large-scale systematic force with long-term consequences.”

and internecine and interreligious fighting that plagued European history and that the colonists sought to escape by coming to the New World.⁷¹

While the presence of indigenous peoples was nominally acknowledged, the legitimacy of their claims of sovereignty over the lands they occupied before European discovery was not.

The Great Powers vying for control of the “new” North American continent—Britain, France, Spain, and Portugal—each claimed “sovereignty of the soil” as the “discoverer” of the land.⁷² This right, which was universally recognized (at least among the European powers), gave the “discoverer” of a land absolute rights over that land, empowering the discovering sovereign with the right to possess, grant, sell, and convey these lands.⁷³ However, as these lands in the “new” American continent that were being claimed as sovereign lands by the European powers were already occupied by the Native Americans, this absolute right given to the discovering sovereign was recognized as subject to a right of occupancy held by the indigenous peoples already present on those lands.⁷⁴

In describing the rights recognized by the European states, and later the U.S. upon its creation,⁷⁵ one scholar of the time stated:

The European nations which, respectively, established colonies in America, assumed the ultimate dominion to be in themselves, and claimed the exclusive right to grant a title to the soil, subject only to the Indian right of occupancy. The natives were admitted to be the rightful occupants of the soil, with a *legal* as well as just claim to retain possession of it, and to use it according to their own discretion, though not to dispose of the soil at their own will, except to the government claiming the right of pre-emption The United States adopted the same principle; and their exclusive right to extinguish the Indian title by purchase or conquest, and to grant the soil and exercise such a degree of sovereignty as circumstances required, has never been judicially questioned.⁷⁶

⁷¹ Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 560 (1995).

⁷² See HELEN HUNT JACKSON, *A CENTURY OF DISHONOR: THE CLASSIC EXPOSÉ OF THE PLIGHT OF THE NATIVE AMERICANS* 9-10 (Dover ed. 2003).

⁷³ *Id.* at 10.

⁷⁴ *Id.* at 10-11. Hunt Jackson, an American poet who became a staunch advocate for Native American rights, realized the tension in calling the right claimed by the discovering powers an “absolute” right while also recognizing it as subject to a right of occupancy, *id.* at 11-13, noting: “A title which is pronounced to be “subject to” anything or anybody cannot be said to be absolute till that subjection is removed.” *Id.* at 13.

⁷⁵ Upon its creation, the United States became the successor to the territorial rights and claims of Great Britain in North America, pursuant to the Treaty of Paris of 1783, which ended the American Revolutionary War and recognized the U.S. as an independent nation. See HUNT JACKSON, *supra* note 72, at 11.

⁷⁶ *Id.* at 16, 17 (emphasis in original) (citation and quotation marks omitted).

Despite the recognition of this legal right of occupancy, the indigenous peoples were never considered civilized enough⁷⁷ to wield true sovereign control over the land they occupied and this recognized right of occupancy was a “lesser right” that could be extinguished, through purchase or conquest, by the sovereign holding the greater right.⁷⁸

The European powers, and later the new state of America, thus embarked on a civilizing mission that “entailed the buying, stealing, trading, and outright expropriation of land.”⁷⁹ U.S. policy towards the Native Americans started with “removing” Native Americans from the lands within the newly formed American state, and later turned to ushering them to and settling them on reservations that were created starting after the Civil War.⁸⁰ Land in the “new” world was a valuable commodity: “North Carolina and Virginia, to a great extent, paid their officers and soldiers of the Revolutionary War by . . . grants [made for lands within the “Indian hunting-grounds”], and extinguished the arrears due the army by similar means.”⁸¹ Consequently, even though the U.S. recognized the possessory right held by the Native Americans, and also agreed to rights in the treaties it (and the other European powers) entered into with individual tribes,⁸² the U.S. only nominally respected and protected the rights held by the indigenous nations. Instead, the treaties the U.S. entered into with the Native Americans were “broken as fast as concluded.”⁸³ As one scholar stated, the “overriding motive [of “official dealings with native people”] had always been to open more of the continent to Euro-American settlement” and, as expressed by Georgia Governor George R. Gilmer during the “removal era,” the treaties the U.S. concluded with tribes “were merely ‘expedients by which ignorant, intractable, and savage people were induced without bloodshed to yield up what civilized people had the right to possess.’”⁸⁴ Hence, in reality the rights the Europeans and Americans recognized in the Native Americans were perfunctory at best and did not vest the indigenous peoples with any genuine rights over their lands;⁸⁵ “ultimate sovereignty” and control over the “unclaimed” land of the Americas “belonged to the civilized discoverer.”⁸⁶

⁷⁷ In discussing Native Americans, President John Quincy Adams once stated: “as brethren of the human race, rude and ignorant, we endeavored to bring them to the knowledge of religion and letters.” HUNT JACKSON, *supra* note 72 at 16 (citation omitted).

⁷⁸ HUNT JACKSON, *supra* note 72, at 10. In colonizing Australia, Britain abandoned the principle of indigenous nations holding even a right of occupancy in the lands they inhabited and instead Britain explicitly adopted the doctrine of *terra nullius*, “land belonging to no one.” Under this doctrine, the aboriginal peoples of Australia were viewed as too primitive to hold any genuine sovereign rights over the territory they resided in, thus making the British the first true owners of the land.

⁷⁹ John Borneman, *American Anthropology as Foreign Policy*, *American Anthropologist*, AMERICAN ANTHROPOLOGIST Vol. 97, No. 4 (Dec. 1995), 666.

⁸⁰ *See id.* at 668.

⁸¹ HUNT JACKSON, *supra* note 72, at 16 (citation and quotation marks omitted). Hunt Jackson further noted that land “was one of the great resources which sustained the [Revolutionary] war.” *Id.*

⁸² *Id.* at 14-15.

⁸³ *Id.* at 26; *see also id.* at 24 (discussing the “United States Government’s repeated disregard of its treaties with the Indians.”).

⁸⁴ James Wilson, *THE EARTH SHALL WEEP: A HISTORY OF NATIVE AMERICA* 290 (1998).

⁸⁵ HUNT JACKSON, *supra* note 72 at 10-17.

⁸⁶ *Id.* at 10.

“The robbery, the cruelty which were done under the cloak of this hundred years of treaty-making and treaty-breaking, are greater than can be told. Neither mountains nor deserts stayed them; it took two seas to set their bounds.”⁸⁷ This course of conduct is demonstrative of the quasi-sovereign status to which the Native Americans were relegated. From the time of the “discovery” of their lands by the Great Powers, through their forced displacement and marginalization, the indigenous nations of North America were viewed through a shifting lens of foreignness. The indigenous nations were clearly considered to be foreign states in certain circumstances, as evidenced by the fact that they were recognized as holding some rights in the land they inhabited, and that until 1849, “Indian affairs” were under the purview of the War Department.⁸⁸ However, “[b]y the mid-19th century, the European concept of a “polity” organized by a sovereign, territorial state was juxtaposed to the Indian’s lack of territorial organization, which in turn made Indians, in the words of Chief Justice Marshall in 1831, into a ‘domestic dependent nation’ as opposed to a ‘foreign state’ . . . Indians were thus sovereign in some respects, wards of state in others.”⁸⁹

Relegating Native Americans to such a status also made it easier to impose “superior” Western constructs on the “primitive” internal foreigners. The tribal structure itself, based on Western notions of statehood, as well as concepts regarding property ownership were imposed on the indigenous peoples of North America by European settlers and later America. The Dawes Act of 1887, which imposed Western land ownership structures on Native Americans by dividing tribal land into allotments for individual tribal members,

assumed that by making Indians owners of private property they would be forced to become farmers, to acquire an education, and to accept Christianity The means employed to accomplish this end included the following: allocating land to individuals instead of tribes, replacing communal with private property schemes, expanding schools and compulsory education, making Indian Americans citizens, encouraging self-determination and democratization, and, from 1947 to 1973, terminating reservation status.⁹⁰

In addition to having a tribal state structure imposed on them, the very means used to define Native American identity was also imposed on the Native Americans. “Indian policy relegated Native Americans’ own alternative definitions of Indianness

⁸⁷ *Id.* at 27.

⁸⁸ Borneman, *supra* note 79, at 666. The Bureau of Indian Affairs (BIA) was created in 1824 as part of the War Department and is still extant today, although it moved to the Department of the Interior in 1849. *Id.* at 668. As one scholar noted, the role of the BIA “depended on how the foreign and the native were defined and demarcated” and, as such, the BIA “functioned alternately as a military body for aggression and defense, an international trust, a property development agency, a social welfare agency, and a nationalizing agency.” *Id.* at 667 (citation omitted).

⁸⁹ *Id.* at 666 (citation omitted). In 1871, Congress officially made all Native Americans wards of the federal government with the passage of the 1871 Indian Appropriations Bill. This Act significantly eased the means by which the U.S. government obtained the lands of Native Americans, by decreeing that “no Indian tribe should hereafter be considered as a foreign nation with whom the United States might contract by treaty.” HUNT JACKSON, *supra* note 72, at 27.

⁹⁰ Borneman, *supra* note 79, at 668 (citations omitted).

to secondary statuses and instituted a ‘blood quantum mechanism’ or ‘degree of Indian blood’ standard for Indian identity.”⁹¹ Even the names by which we know Native American tribes today were foisted on the indigenous nations by the American settlers. For example, the Delawares were originally known as the Lenni Lenape. The name Delawares was given to the Lenni Lenape by settlers, who named the tribe after Lord De la Warre, “a great English brave.”⁹²

These practices have “utterly transformed the world in which native people live. A modern map of ‘Indian Country’ . . . bears almost no relation to the pattern of peoples and cultures in 1492.”⁹³

2. *Political Agreements Shape the Nation-State*

The nation-states of today were shaped not only by the myth of pristine land, but also by political agreements and rivalries between the leading imperial powers of the time. The borders of today’s Middle East, which came out of the collapse of the Ottoman Empire, are strikingly illustrative of the geopolitical machinations behind many of the world’s current national borders. The British and French, through secret political agreements with each other and other parties, essentially created the Middle East we know today, artificially imposing a “veneer of statehood” on the region.⁹⁴ In the midst of plotting to bring about the fall of the Ottoman Empire at the end of World War I, in 1916 Britain and France secretly entered into the Sykes-Picot Agreement, drafted by British diplomat Sir Mark Sykes and French lawyer and diplomat François Georges-Picot.⁹⁵ The Sykes-Picot Agreement, which “divide[d] the Ottoman Empire’s vast land mass [in the Middle East] into British and French spheres of influence[,] . . . launched a nine-year process—and other deals, declarations, and treaties—that created the modern Middle East states out of the Ottoman carcass.”⁹⁶ The “colonial carve-up” under Sykes-Picot created a “map [that] ignored local identities and political preferences” and instead determined borders “with a ruler—arbitrarily.”⁹⁷ As one author noted, “[a]t a briefing for Britain’s Prime Minister H. H. Asquith, in 1915, Sykes famously explained, ‘I should like to draw a line from the ‘E’ in Acre to the last ‘K’ in Kirkuk.’”⁹⁸ While ultimately the borders drawn up under the original Sykes-Picot Agreement were not given effect, the

⁹¹ *Id.* at 667 (citation omitted).

⁹² HUNT JACKSON, *supra* note 72, at 33. Similarly, many of the names by which we know tribes today were the, often derogatory, names that other tribes used in describing them to the European and American settlers. See Wilson, *supra* note 89.

⁹³ Wilson, *supra* note 89, at xxv.

⁹⁴ Robin Wright, *How the Curse of Sykes-Picot Still Haunts the Middle East*, THE NEW YORKER, (April 30, 2016), <http://www.newyorker.com/news/news-desk/how-the-curse-of-sykes-picot-still-haunts-the-middle-east>.

⁹⁵ *Id.*

⁹⁶ *Id.* At the same time that Britain entered into the Sykes-Picot Agreement with France, it reached two other, arguably conflicting, agreements concerning the political future of the Middle East: (1) the 1917 Balfour Declaration which publicly supported Zionism and expressed support for the creation of a Jewish State in Palestine; and (2) an agreement with Sharif Hussein promising him control over Arab lands if he helped lead an Arab revolt against the Ottomans.

⁹⁷ *Id.*

⁹⁸ *Id.*

original agreement was “superceded by another which established a mandate system of French and British control, sanctioned by the League of Nations.”⁹⁹ Accordingly, at the end of the war, the League of Nations turned the former colonies of Germany and the Ottoman Empire into mandates, under the “protection” of the victorious Allied Powers. The borders that we see on a map of the region today grew out of how the region was divided under British and French control in the mandate system. Rather than being driven by nationalism and pre-existing cultural divides, “the modern boundaries of the Middle East emerged from [WWI] . . . [as] did “modern Arab nationalist movements”¹⁰⁰ themselves.

European power politics similarly shaped Africa. Between 1884 and 1914, European states rushed to lay claim to Africa in what became known as the “Scramble for Africa,” taking “territory and power from existing African states and peoples.”¹⁰¹ The race to colonize Africa led to “mounting animosities among European nations over territorial disputes,”¹⁰² and in 1884 the colonizing powers came together at the Berlin Conference to decide amongst themselves what “the rules of African colonisation” would be.¹⁰³ The Berlin Conference resulted in each European state being granted a “sphere of influence,” giving each state control over the geographical areas within its sphere.

With the Berlin Conference rules and agreements in place, the great powers of Europe set about gaining control of Africa. The British in particular sought to gain control of the region ruled by the Kingdom of Benin, what is now the Edo state in present day Nigeria.¹⁰⁴ The British, who had established a dominating presence in West Africa, were unhappy with the trading conditions the oba¹⁰⁵ had established in their prior dealings with Portuguese traders in the sixteenth century.¹⁰⁶ Accordingly, in their quest to gain control over all trade in the region, the British set about to secure their rule over the region. This was done through the deposition of rulers of other kingdoms surrounding Benin, undermining the sovereignty of the Oba through treaties and eventually a violent overthrow of the Oba and the establishment of the region as a “protectorate.”¹⁰⁷ With control over the region achieved, the British declared that the Oba “is no longer the king of this country; the white man is the only man who is king in this country, and to him only service is due.”¹⁰⁸

⁹⁹ Mike Shuster, *The Middle East and the West: WWI and Beyond*, NPR, (August 20, 2004), <http://www.npr.org/templates/story/story.php?storyId=3860950>.

¹⁰⁰ *Id.*

¹⁰¹ The Scramble for Africa, ST. JOHN’S COLLEGE UNIVERSITY OF CAMBRIDGE, http://www.joh.cam.ac.uk/library/library_exhibitions/schoolresources/exploration/scramble_for_africa/.

¹⁰² Salome Kiwara-Wilson, *Restituting Colonial Plunder: The Case for the Benin Bronzes and Ivories*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 375, 379 (2013).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 377.

¹⁰⁵ The kingdom of Benin was led by an oba, a king who was a “holder of a hereditary title who was believed to be divine.” *Id.* at 377. As used here, “Oba” refers to the particular king who ruled during the events discussed here, while “oba” refers to the position of king generally. See *id.*, n. 6.

¹⁰⁶ Kiwara-Wilson, *supra* note 102 at 379.

¹⁰⁷ *Id.* at 379-385.

¹⁰⁸ *Id.* at 386 (quoting Ralph Moor, the British vice counsel in the Benin region at the time) (citation and quotation marks omitted).

As the native peoples across Africa were colonized, their kings forced out, and their pre-existing power structures demolished, the Europeans created new divisions. In the partition of Africa, “[t]he divisions were arbitrarily decided by the colonising countries. They were not based on existing tribal or geographic boundaries. Some of the new boundaries split tribes in half. Others made huge territories that were difficult to control.”¹⁰⁹ As the African peoples did not have industrial towns or the technologies present in Europe at the time, the hallmarks of civilization in Europe’s eyes, the peoples of Africa were considered uncivilized, allowing Europeans to “ignore the established African tribes and kingdoms with their rich histories and cultures”¹¹⁰ and instead impose divisive arbitrary borders on all of Africa, mirroring the treatment of indigenous nations in other regions of the world.

Even Europe itself was not spared from arbitrary, politically motivated borders. As a general matter, the borders of European states were subject to a much lower degree of arbitrariness than the Europeans imposed on other peoples of the world. As one author noted:

The nations of Old Europe, by contrast, do not use rulers to mark their home territory [comparing it to the straight borders that are found in the U.S.]. Instead, they rely on rivers, mountain ranges, or meandering poplar-lined drives in order to divide the French from the Spanish, the Austrian from the Italian, the German from the Swiss. Europeans lived in Europe long before the rise of nation-states, so they were content, once the nation-building urge had come upon them, to let their physical geography determine their political landscape. Granted, once the boundaries were drawn, there was ample conflict over which irregularly shaped bit of land ought to be included on which side of the irregular line¹¹¹

Some arbitrariness was introduced to the European national borders via the peace treaties that concluded the many wars of Europe. One example, the Congress of Vienna in 1814-15, essentially “reorganized” Europe at the conclusion of the Napoleonic Wars.¹¹² The European states at the assembly swapped various pieces of European states between each other, exchanging lands and colonies and rearranging the borders of Europe to reflect their political desires and agreements.¹¹³ Similar land swaps can be seen even earlier in European history, such as with the 1648 Peace of Westphalia, under which France gained Alsace and Lorraine, and Sweden gained control over Western Pomerania, Bremen, and Verden.¹¹⁴ Moreover, not only were territories swapped in the aftermath of war, but millions of people also found themselves with new “homelands.” “The post-World War I settlements, though ostensibly based on the principle of national self-determination, in fact assigned tens of millions of people to nation-states other than “their own” at the same time that

¹⁰⁹ See, Kiwara-Wilson, *supra* note 102.

¹¹⁰ See, Kiwara-Wilson, *supra* note 102.

¹¹¹ CASHWELL, *supra* note 63, at 23.

¹¹² Congress of Vienna, European history, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/event/Congress-of-Vienna>.

¹¹³ *Id.*

¹¹⁴ WOOLF, *supra* note 40, at 159.

they focused unprecedented attention on the national or putatively national quality of both persons and territories.”¹¹⁵

3. *The Role Nationalism Played in Nation-Building*

Some scholars have pushed back against this history of arbitrary borders, asserting that today’s national boundaries- were not created by Europe and the other Great Powers of the time but rather reflected pre-existing divisions and power dynamics. As one scholar noted with respect to the Middle East, “both Middle Eastern history and cartography existed long before 1916.”¹¹⁶ Looking specifically at Syria and Iraq, this scholar contends that “Syria and Iraq were distinct entities, not only in the pre-WWI Ottoman era, but also before and after the rise of Islam in the seventh century.”¹¹⁷ However, while Syria and Iraq may have been distinct entities prior to European interference in the region, “the exact borders were not always clear or in their present-day form”¹¹⁸ and the fact remains that it was outside powers that decided where Iraq ended and Syria began, with no input from those in the region and no respect for the actual boundaries of any pre-existing divisions. “[I]n the 1914-22 period, Europeans and Americans were the only ones seated around the table when the decisions were made.”¹¹⁹ While British officials sought “to pretend that they had entered the Middle East as patrons of Arab independence[,]” this was “a cause in which they did not in fact believe . . . Moreover, the Arab Revolt that formed the centerpiece of their narrative occurred not so much in reality as in the wonderful imagination of T.E. Lawrence, a teller of fantastic tales whom . . . [was] transformed into ‘Lawrence of Arabia.’”¹²⁰

Rather than the emergence of borders based on the preexisting divisions and political power structures, this was an era

in which Middle Eastern countries and frontiers were fabricated in Europe. Iraq and what we now call Jordan . . . were British inventions, lines drawn on an empty map by British politicians after the First World War; while the boundaries of Saudi Arabia, Kuwait, and Iraq were established by a British civil servant in 1922, and the frontiers between [Muslims] and Christians were drawn by France in Syria-Lebanon and by Russia on the borders of Armenia and Soviet Azerbaijan.¹²¹

¹¹⁵ Roger Brubaker, NATIONALISM REFRAMED: NATIONHOOD AND THE NATIONAL QUESTION IN THE NEW EUROPE, 6.

¹¹⁶ Jennifer Thea Gordon, *ISIS’s Desire to Erase Sykes-Picot is Rooted in Fiction, Not History*, THE NATIONAL INTEREST, (Sept. 17, 2014), <http://nationalinterest.org/feature/isis%E2%80%99-desire-erase-sykes-picot-rooted-fiction-not-history-11293>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ DAVID FROMKIN, A PEACE TO END ALL PEACE: THE FALL OF THE OTTOMAN EMPIRE AND THE CREATION OF THE MODERN MIDDLE EAST 17 (2009).

¹²⁰ *Id.* at 15.

¹²¹ *Id.* at 17.

As one historian further noted in discussing European influence in molding Asia, “The European powers at that time believed they could change . . . [Muslim] Asia in the very fundamentals of its political existence, and in their attempt to do so introduced an artificial state system into the Middle East that has made it into a region of countries that have not become nations even today.”¹²²

This highlights the incredibly murky origins behind many of the nation-states and borders we see on maps today. While the spread of nationalism, the idea that each distinct ethno-national group should be governed by its own nation-state as discussed above, contributed to the demise of the empire, the nation-states that emerged out of the nineteenth century were only partly defined by nationalism. The nation-state framework (of the international legal system) itself was “introduced and enforced by Western powers,”¹²³ often in ways that eviscerated the longstanding political structures, and rights, of native peoples.

IV. THE IMPACT OF THE POLITICALLY FORGED NATION-STATE ON CULTURAL HERITAGE

This history of global governance and the birth of nation-states lends credence to the assertion that “[h]istory was real, cultures were real, but countries were invented.”¹²⁴ The reverberations from this history, while evident in today’s conflict zones, also has an impact on cultural property. The shift to nation-states brought with it a need to make “state conform with nation,” a phenomenon that was “neither fully carried out nor universally desired.”¹²⁵ However, despite the imperfect conformity between nation-state and nation that was achieved, the current legal framework concerning repatriation is premised on the idea that the nation-state is the germane entity. This presumption, in connection with the oft-seen incongruence between national borders and the history of the Earth’s lands and peoples, can lead to significant complications when repatriation is at issue.

A. Nations Dissected by the Borders of Nation-States

As the previous section illustrated, national borders, rather than following pre-existing cultural divisions, were mapped along the “contours of colonialism,”¹²⁶ and as such, too often the nation-states of today do not conform to the nations present on the lands on which those national borders are imposed. Accordingly, difficulties arise when repatriation is based on a default presumption that the country of origin, according to the borders of today’s nation-states, is the proper right-holder to cultural heritage as “[e]xperience has shown that indigenous peoples and minorities within and across States cannot necessarily rely on national

¹²² FROMKIN, *supra* note 119, at 17; *see also* BURBANK AND COOPER, *supra* note 3, at 1 (“In the Middle East, Sunnis, Shi’ites, Kurds, Palestinians, Jews, and many others have fought over state boundaries for more than eighty years since the end of the Ottoman Empire.”).

¹²³ Brittany Lauren Wheeler, *The Foreign Policy of the Museum: Repatriation, Forced Migration, and Native North America* (working paper), at 140 (citation omitted).

¹²⁴ Selasi, *supra* note 1.

¹²⁵ BURBANK AND COOPER, *supra* note 3, at 1.

¹²⁶ Harris and O’Hanlon, *supra* note 36, at 12.

governments to protect or return their cultural heritage.”¹²⁷ One particular issue that arises is when the borders of a nation-state cut across a preexistent indigenous people. As one scholar stated in discussing former colonized states in Africa, these states “emerged from colonial rule with even their territorial borders predetermined by the colonial masters, often splitting traditionally cohesive groups of people into different countries.”¹²⁸ The people that is dissected by the borders of the nation-state ends up being splintered, with co-nationalists on either side of the borders. The difficulties emanating from the division of one people by the borders of a nation-state thus manifest in two distinct scenarios: (1) when co-nationalists are an unprotected minority residing within the borders of the nation-state; and (2) when co-nationalists who end up outside of the state’s borders are left with no rights to their cultural heritage that is still within the borders of the nation-state.

1. The rights of minorities residing within the borders of the nation-state

In examining the first scenario, it is compelling to note that the institutional structure of the nation-state itself “introduces incentives for political elites to privilege members of the national majority over ethnic minorities.”¹²⁹ The foundational principle of nation-states, that “states should be governed in the name of a nationally defined community,”¹³⁰ results in the privileging of the dominant ethno-national group around which the nation-state was established, with “equality before the law, protection from arbitrary violence, and political participation . . . confined to members of the dominant ethnic group.”¹³¹ This is apparent in the national mythologies espoused by numerous nation-states. The American national mythology discussed above, for instance, with its prioritization of its European roots and its firm hold on the idea of pristine land,¹³² has always operated to exclude certain groups from the American national identity.¹³³ “After the Civil War, Americans became increasingly conscious of their ethnic and racial heterogeneity, of what were identified as its ‘foreign elements’: aboriginal peoples, immigrants, and former slaves.”¹³⁴

¹²⁷ VRDOLJAK, *supra* note 10, at 3.

¹²⁸ Kiwara-Wilson, *supra* note 102, at 395 (citation omitted); *see also* Wimmer and Min, *supra* note 2, at 874 (stating that co-nationals living across a state border is “a legacy of the patchwork settlement pattern of empires”).

¹²⁹ Wimmer and Min, *supra* note 2.

¹³⁰ *Id.* at 874.

¹³¹ *Id.*

¹³² Gerstenblith, *supra* note 71, at 560.

¹³³ *See* BURBANK AND COOPER, *supra* note 3, at 221 (“American patriots proclaimed an “Empire of Liberty”—although they did not mean for all people in the empire to enjoy its liberty.”). Similarly, in discussing how the Parthenon Marbles helped build British national identity, Fiona Rose-Greenland stated: “British pretensions to universal culture had a limit, and they were entrenched by Elgin’s time: Africans and other persons of non-epitomised physiognomy were excluded from the supranational classical family. The Elgin Marbles helped define British masculinity, but they also served to exclude despised categories of people from national membership.” Rose-Greenland, *supra* note 37, at 13.

¹³⁴ Borneman, *supra* note 79, at 667.

Viewed as “both the first natives and the ultimate foreigners,”¹³⁵ Native Americans, for instance, were never incorporated into the “American” national identity, but rather faced evolving forms of violence and discrimination. For example, Native Americans in the U.S. were not collectively granted U.S. citizenship until 1924¹³⁶ and indigenous peoples in the U.S. and Canada were not afforded full voting rights until the 1960s.¹³⁷ Cultural heritage played an integral part in this discriminatory othering of indigenous peoples and ethnic minorities within the nation-state. In the early 1900s, “applied anthropology” studies were carried out in the U.S., seeking to “study” the biological differences between the different peoples in the U.S.¹³⁸ In reality, these studies sought to lend scientific legitimacy to racist notions about the inferiority of Native Americans.¹³⁹ In discussing a 1904 proposal by the Bureau of American Ethnology¹⁴⁰ for a study titled *Biological Study of the People of the United States*, Professor of Anthropology John Borneman stated:

The model for conceptualizing radical alterity was the American Indian, initially constituted by use of the concept of culture and the documentation of “culture traits”—especially, at the Smithsonian and elsewhere, documenting Indian languages and material artifacts. Such a project in “culture” made possible the transformation of the aborigine from historical actor to aesthetic object. Native Americans became an artistic abstraction that served to deflect a painful history of violence and injustice.¹⁴¹

Indigenous cultural heritage also faced similar discriminatory treatment, even as it was used to erase indigenous peoples from the very fabric of American-ness. During the so-called “golden age of American Anthropology,” which spanned from 1880 to 1920, a majority of professionals in the field were “concerned with salvage operations within the United States and Canada: recovering Indian culture assumed to be on the verge of extinction.”¹⁴² This thinking has continued into today, with indigenous cultures and religions too often viewed as being only of historical interest; their continuing, extant nature completely overlooked. Through such treatment,

Native Americans have inarguably lost numerous aspects of their heritage within what became the United States—material culture . . . in addition to land and rights—in conflicts that included

¹³⁵ *Id.* at 667-668.

¹³⁶ *See id.* at 666. Before then, Native Americans became U.S. citizens “through marriage to whites, military service, or treaties.” *Id.*

¹³⁷ Travis, *supra* note 68, at 427-28.

¹³⁸ Borneman, *supra* note 79, at 667; *see also* GERSTENBLITH, *supra* note 11, at 864.

¹³⁹ *See* GERSTENBLITH, *supra* note 11, at 864 (discussing the history of craniometric studies performed on Native American skulls which “were used to prove that Native Americans were inferior to Europeans”).

¹⁴⁰ The Bureau of American Ethnology was created by Congress in 1879 but was eliminated as a standalone entity in 1965, when it merged with the Smithsonian Institution’s Department of Anthropology. *See* Department of Anthropology, A History of the Department, 1897-1997, SMITHSONIAN, <http://anthropology.si.edu/outreach/depthist.html>.

¹⁴¹ Borneman, *supra* note 79, at 667 (citation and internal quotation marks omitted).

¹⁴² Borneman, *supra* note 79, at 665.

outright war, and under the duress of such things as the re-location of their children or the impossibility of continuing their livelihoods.¹⁴³

This has carried over into the protection, or lack thereof, afforded to indigenous cultural artifacts. In the U.S., Native American ancestral remains and cultural artifacts are affected by a hodgepodge of federal and state laws and regulations, further complicated by the fact that Native American sites, ancestral remains, and cultural artifacts can be located on privately owned land, which is not always subject to these laws and regulations.¹⁴⁴ Of the applicable federal laws, the Native American Graves Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. § 3001 *et seq.*, is a key statute. Passed in 1990, NAGPRA vests “ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990” with the lineal descendants of the deceased Native American, in the case of human remains and associated funerary objects.¹⁴⁵ With respect to unassociated funerary objects, sacred objects, and objects of cultural patrimony, NAGPRA vests ownership or control in Native American tribes, based on a hierarchical prioritization of proof of cultural association.¹⁴⁶

While NAGPRA, the “first comprehensive approach to treating the Native American cultures as living cultures,”¹⁴⁷ has “produced significant psychological and cultural effects” with the “ultimate result . . . [of] returning to Native American groups the ability to control their own identity, their history and their heritage (religious, spiritual and mythic) which is so crucial to the formation of their identity[,]”¹⁴⁸ it is not without its flaws. Under the language of NAGPRA, and the case law interpreting its provisions, the scope of NAGPRA, with respect to ancestral remains, seems to be “limited to more recent remains for which a cultural relationship to presently existing tribes can be demonstrated.”¹⁴⁹ Further, NAGPRA fails to adequately take into account the historic relationship and course of conduct between the U.S. government and indigenous nations. “[A] tribe that has established a claim to its ancestral, aboriginal lands will have an easier time of recovering human remains [under NAGPRA] because it will not be necessary to establish cultural affiliation” in such cases.¹⁵⁰ This ignores the fact that “the history of the relationship between the United States government and the tribes is one of continual dispossession from Native lands and forced removal to remote parts of the North American continent.”¹⁵¹ Thus, even with laws such as NAGPRA, indigenous nations are still denied control over all of their cultural heritage.¹⁵²

¹⁴³ Lauren Wheeler, *supra* note 123, at 139.

¹⁴⁴ Federal laws concerning cultural heritage typically apply only to public lands held by the federal government and not all U.S. states have enacted analogous statutes to protect Native American burial sites and cultural heritage; of those states that do, only some include privately owned land under the purview of the state law(s). See GERSTENBLITH, *supra* note 11, at 849.

¹⁴⁵ 25 U.S.C. § 3002 (a)(1).

¹⁴⁶ 25 U.S.C. § 3002(a)(2).

¹⁴⁷ GERSTENBLITH, *supra* note 11, at 849.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 862.

¹⁵⁰ *Id.* at 863.

¹⁵¹ *Id.*

¹⁵² While this article does not focus on intangible cultural heritage, indigenous peoples face similar denials of control over and rights to their intangible cultural heritage under a legal regime

2. *The foreclosure of the rights of co-nationalists outside the nation-state borders*

While indigenous peoples and other minorities within a nation-state often have little control over their own cultural heritage, their co-nationalists outside of the nation-state borders have even fewer rights to their cultural heritage. NAGPRA, for example, only applies to federally recognized U.S. tribes.¹⁵³ Even for tribes that still maintain a presence in the U.S., obtaining federal recognition can be a “long and contentious” process, which in some circumstances “has required a denial of the conflict that many tribes confront between retaining their traditional identities and their attempt to live successfully in the modern world.”¹⁵⁴ This requirement under NAGPRA, however, creates more serious obstacles for indigenous peoples who currently reside outside of the U.S. The history of the forced removal of the native peoples of America has resulted in tribes that are today considered Canadian tribes, but whose ancestral land is within the borders of the U.S. Under NAGPRA, however, such tribes would have no right to make a claim for the return of their cultural heritage, even though “tribal lands do not coincide with modern political boundaries.”¹⁵⁵ Such laws effectively foreclose any chance of co-nationalists who are beyond the current borders of the state to claim any ownership over their ancestral remains and cultural heritage.

B. The Rights of Stateless Peoples

The rights of stateless peoples are also often unprotected, if not outright suppressed, by the nation-state, or states, within which they reside. This is best illustrated through an examination of the treatment of the Kurds, and their cultural heritage. The Kurds are a people indigenous to a region of Mesopotamia that is now part of Turkey, Syria, Iran, Iraq and Armenia.¹⁵⁶ While Kurds “make up the fourth-largest ethnic group in the Middle East . . . they have never obtained a permanent nation state.”¹⁵⁷ In fact, “[a]t around 40-million strong, the Kurds are the largest stateless ethnic group in the world.”¹⁵⁸ While Kurds face discrimination in all of the nation-states they are present in,¹⁵⁹ relations between Turkey and its Kurdish population, comprising 15-20% of the Turkish population, have been highly contentious for many generations, with a long-running movement for Kurdish

structured on Western notions of ownership. “[I]n Canada and the United States, the copyright laws still do not provide much help to indigenous peoples because they require individual or entity ownership and fixation, and do not protect ancient works.” Travis, *supra* note 68, at 427.

¹⁵³ *See id.* at 864.

¹⁵⁴ GERSTENBLITH, *supra* note 11, at 864.

¹⁵⁵ *Id.*

¹⁵⁶ Who are the Kurds?, BBC NEWS, (Oct. 21, 2014), <http://www.bbc.com/news/world-middle-east-29702440>.

¹⁵⁷ *Id.*

¹⁵⁸ Lauren Bohn, *All of Our Young People Have Gone to the Mountains*, THE ATLANTIC, (Aug. 18, 2015), <http://www.theatlantic.com/international/archive/2015/08/turkey-kurds-pkk-syria/401624/>. While the collapse of the “multiethnic Ottoman Empire” led to the creation of multiple new nation-states, as discussed in part III above, no Kurdish state emerged out of the ruins of the Ottoman Empire. *Id.*

¹⁵⁹ *Id.*; BBC NEWS, *supra* note 156.

autonomy clashing against what is often viewed as violent, authoritarian, discriminatory measures by the Turkish government.¹⁶⁰ While there have been various peace efforts, broken ceasefires and the complicated tensions stemming from the growth of ISIS in the region have resulted in continuing flare-ups of violence.¹⁶¹

The Turkish government has also been accused of denying the Kurds control over their own cultural heritage.¹⁶² “In response to uprisings in the 1920s and 1930s, many Kurds were resettled, Kurdish names and costumes were banned, the use of the Kurdish language was restricted and even the existence of a Kurdish ethnic identity was denied, with people designated “Mountain Turks.”¹⁶³ Given this history, some have alleged that Turkey’s claims of ownership over ancient Kurdish artifacts found within Turkey’s borders is detached from any alleged kinship with that civilization and is instead purely politically motivated, asserted to prevent the Kurdish population from utilizing those artifacts in their struggle for autonomy.¹⁶⁴

V. SHIFTING THE FOCUS OF REPATRIATION FROM NATION-STATES TO NATIONS

Given the history of nation-states and their national borders, one may question whether the goal of repatriation is served by “returning” cultural property based on a construct as imperfect as the country of origin. Yet, the nation-state is the cornerstone of the current framework regulating ownership of cultural heritage. The “international scheme for protection of cultural property in particular accords the state a sacrosanct position.”¹⁶⁵ International treaties such as the 1970 UNESCO Convention impose obligations on state parties while defining cultural property based on the state,¹⁶⁶ national ownership laws enacted in numerous countries vest rights in cultural heritage in the state, and it is the nation-state that is generally recognized as the entity that would be the claimant in a demand for the repatriation of antiquities. As one scholar put it, “The principles of State succession, most international instruments sanctioning restitution of cultural objects, and various peace treaties since the First World War, all nominate the State as the subject.”¹⁶⁷ While this may stem from the simple fact that “the international legal system is based on the nation-state as the essential, recognized entity”¹⁶⁸ in international politics, the fact remains that current thinking about the ownership of cultural heritage is structured around the centrality of the nation-state. “The characteristic design of repatriation agreements and export controls is to give complete control over cultural objects to the national government.”¹⁶⁹

¹⁶⁰ BBC NEWS, *supra* note 156; *see also* Ceylan Yeginsu, *Turkey’s Campaign Against Kurdish Militants Takes Toll on Civilians*, THE NEW YORK TIMES, (Dec. 30, 2015), http://www.nytimes.com/2015/12/31/world/europe/turkey-kurds-pkk.html?_r=0.

¹⁶¹ *See* Bohn, *supra* note 158.

¹⁶² Eakin, *supra* note **Error! Bookmark not defined.**

¹⁶³ BBC NEWS, *supra* note 156; *see also* Bohn, *supra* note 158.

¹⁶⁴ *See* Bennett, *supra* note 8.

¹⁶⁵ Fishman, *supra* note 9, at 357.

¹⁶⁶ *See id.* at 357-58 (stating that the language of the 1970 Convention “allows individual states to act as the final arbiters of what will be deemed their cultural property”).

¹⁶⁷ VRDOLJAK, *supra* note 10, at 3.

¹⁶⁸ GERSTENBLITH, *supra* note 11, at 611.

¹⁶⁹ Fishman, *supra* note 9, at 352.

And yet, the nation-state in many cases may not be the most appropriate or rightful claimant of rights to cultural property. As the previous sections have elucidated, due to the political machinations and erasure of indigenous peoples underlying the creation of the nation-states we see today, there is an incongruence between the peoples inhabiting, or who once inhabited, land and the borders of the nation-states governing that land. Nation-states, when not engaging in discriminatory measures themselves, have not always proven themselves to be ardent protectors of the rights of indigenous peoples or other minorities within their borders, in ways that extend to the treatment of the cultural heritage of such groups, as discussed above. Further, scholars, noting the longevity of empires, have thrown doubt on the “notion that the nation-state is natural, necessary, and inevitable.”¹⁷⁰ This doubt regarding the inviolability of nation-states should extend to the cultural heritage realm as well, where the better measure of a unified culture with legitimate claims to the past may very well be nations, not nation-states.

A. Considering Repatriation in the Context of the History of Nation-States and the Historical Treatment of Peoples

Structuring the framework for the repatriation of cultural property around the nation, as opposed to the nation-state would more adequately account for the history of the origins of many of the currently extant nation-states and the treatment, and often forceless legal rights, of indigenous and minority populations. As one scholar noted, the “state-centric power structure [concerning repatriation] has prompted the observation that local communities may be among the least empowered players in the cultural property world currently in place.”¹⁷¹ This builds upon a long history of the subjugation of, and denial of rights to, indigenous peoples at the hands of nation-states. In the nineteenth century, there was a concerted effort to “exclude colonized peoples from the protections afforded by international law.”¹⁷² As one scholar explained:

International law replaced the Law of Nations, under which some Europeans argued for the inclusion and protection of non-European people. As such, there was a move from a separation of the world’s population from “civilized” and “differently civilized” peoples to “civilized” and “uncivilized” peoples. As these changes were incorporated into international law and the law became more favorable to European nations, indigenous people became “objects of international law,” and could therefore not seek relief under it.

¹⁷⁰ BURBANK AND COOPER, *supra* note 3, at 3.

¹⁷¹ Fishman, *supra* note 9, at 352 (citation and quotation marks omitted).

¹⁷² Kiwara-Wilson, *supra* note 102, at 391 (citation omitted).

Therefore, in the nineteenth century, customary international law was not generally applicable to colonized peoples.¹⁷³

Furthermore, “[w]ith the incorporation of indigenous groups into larger states, indigenous people were only recognized as part of those states, and any applications of international law bent to State sovereignty . . . Essentially, this meant that for a colonized people, the only rights they ha[d] were those given by the colonizer.”¹⁷⁴ Giving the nation-state a superior right to cultural heritage over peoples in a sense continues this history of denying rights to indigenous populations. As examined above, control over cultural heritage was often used as a means to subjugate people, erasing their histories and disrupting their ability to express their identities and way of life. Elevating the nation above the nation-state with respect to power over cultural heritage would restore agency to indigenous peoples and minorities, allowing them to reclaim control over and the narrative to their identities.

Shifting from nation-states as the bedrock entity for repatriation to nations will especially have a significant positive impact on the rights of indigenous nations, who are often left powerless with respect to their cultural heritage that is outside the borders of the nation-state they inhabit today.¹⁷⁵

Indigenous peoples worldwide have discovered that the necessity for repatriation extends beyond the borders of their current nation-state or nation-states. The culture of exchange among museums, vast expeditions conducted in Indigenous aboriginal lands, and archaeological digs, as well as looting, have brought ancestors and cultural items beyond current borders that Indigenous peoples live within, and thus, beyond the jurisdiction of domestic repatriation laws. This has led to an international human right crisis surrounding international repatriation involving free, prior and informed consent.¹⁷⁶

Not only did the cultural heritage of indigenous nations travel far abroad,¹⁷⁷ but indigenous peoples in particular are more likely to be bifurcated by borders, or

¹⁷³ *Id.* at 390-91 (citing VRDOLJAK, *supra* note 10, at 50). This view of indigenous peoples is also evident in the origins of the field of anthropology, which at its start, focused on “primitive society.” See Borneman, *supra* note 79, at 665-667.

¹⁷⁴ Kiwara-Wilson, *supra* note 102, at 391, n. 125 (citation omitted); see also GERSTENBLITH, *supra* note 11, at 610 (“nationalism obliterates the concerns of individual cultural groups, particularly indigenous groups, located within larger nation-states”).

¹⁷⁵ In recent years, for example, Native American tribes in the U.S. have been unsuccessful in stopping repeated auctions of sacred artifacts held in Paris. See ICTMN Staff, *Selling the Sacred, Again: Another Auction of Hopi Katsinam Takes Place in Paris* (June 1, 2015), <http://indiancountrytodaymedianetwork.com/2015/06/01/selling-sacred-again-another-auction-hopi-katsinam-takes-place-paris-160568>.

¹⁷⁶ Honor Keeler, *Tradition and Testimony: Protecting Indigenous Ancestral Remains and Cultural Items* (Jan. 5, 2015) (description of presentation of a paper at the 129th Annual Meeting of the American Historical Association), <https://aha.confex.com/aha/2015/webprogram/Paper17464.html>.

¹⁷⁷ In discussing Aboriginal Tasmanian human remains that were acquired by the Field Museum of Natural History in 1958 “as part of a collection of artifacts gathered in the late 19th

alienated geographically from their ancestral lands. This was in no small part due to the theft of native lands by the governments of the nation-states that were created on these lands. Recognizing that they should have the right to claim their cultural objects, sacred artifacts, and ancestral remains, regardless of state borders, would acknowledge the past treatment of indigenous peoples and accept the right of indigenous communities to define and control their own cultural heritage, part of a living culture.

Moreover, shifting the framework for repatriation to align with the nation instead of the nation-state would better serve the underlying goals of repatriation. One scholar identified three rationales for the restitution of cultural objects: “First rationale: sacred property—the principle of territoriality and the link between people, land and cultural objects. Second rationale: righting international wrongs—the reversal or amelioration of discriminatory and genocidal practices. Third rationale: self-determination and reconciliation—amalgamation of the preceding rationales to enable self-determination and reconciliation.”¹⁷⁸ These rationales would seem to be more in line with repatriation centered on peoples as opposed to states.

B. Considering the Role of Cultural Heritage in Formulating Statehood

Moving away from a repatriation model centered on the nation-state to one centered on the nation also recognizes that, at its core, the question of repatriation is primarily about recognizing certain groups with shared heritage as the best stewards and heirs of a particular cultural heritage. But this concept more accurately equates with a sense of *statehood* than it does with *states*. Nationhood, a shared sense of identity, does not always conform to the political entity of the nation-state. As the preceding sections have demonstrated, there is often a vast disconnect between cultural groups and nation-states, and equating nationhood with statehood ignores the reality that a cultural group “may be coterminous with a particular nation-state, is often smaller than a nation and may perhaps extend over more than one nation.”¹⁷⁹ Giving priority to the nation-state over the nation with respect to repatriation of cultural property not only disregards this disconnect, it also further marginalizes indigenous peoples, who “are, and desire to be, culturally, socially and/or

century from the island state off the coast of Australia,” one author noted “an international trend [that emerged] following the colonization of Tasmania in the mid- to late-1800s” in which “[c]eremonial burial grounds and graveyards were ransacked en masse during that era to feed demand for Aboriginal body parts and artifacts that were later sold to museums around the world.” Lizzie Schiffman Tufano, *Field Museum Returns Human Remains to Their Descendants After Decades*, DNAINFO, (June 23, 2014), <https://www.dnainfo.com/chicago/20140623/south-loop/field-museum-returns-human-remains-their-descendants-after-decades> (the Aboriginal Tasmanian human remains were eventually repatriated, as mentioned *infra*). Indigenous and colonized peoples around the world were subjected to similar “trends.”

¹⁷⁸ VRDOLJAK, *supra* note 10, at 2 (citation omitted).

¹⁷⁹ GERSTENBLITH, *supra* note 11, at 615. In critiquing John Henry Merryman’s “denigrat[ion]” of cultural nationalism, scholar Rosemary J. Coombe noted that “[i]t would appear that Merryman equates nationhood with statehood and is not prepared to recognize the existence of more than one nation within a sovereign state. Hence he finds demands for the repatriation of objects from cultural groups rather than nations to be ‘awkward’ and ‘embarrassing’ events.” Coombe, *supra* note 34, at 260.

economically distinct from the dominant groups in society, at the hands of which they have suffered, in past or present, a pervasive pattern of subjugation, marginalization, dispossession, exclusion and discrimination.”¹⁸⁰ Ignoring the views and wishes of indigenous peoples by subsuming the indigenous nation, and its cultural heritage, within the nation-state, only serves to silence the voices of indigenous peoples, in what amounts to a new form of subjugation and erasure.

The grounding of repatriation in the nation-state additionally ignores the fluctuating nature and evolution of nation-states and national identities. As the novelist Taiye Selasi stated in discussing the question of where an individual is from:

I had learned to speak of countries as if they were eternal, singular, naturally occurring things, but I wondered: to say that I came from a country suggested that the country was an absolute, some fixed point in place in time, a constant thing, but was it? In my lifetime, countries had disappeared—Czechoslovakia; appeared—Timor-Leste; failed—Somalia. My parents came from countries that didn’t exist when they were born . . . What we call countries are actually various expressions of sovereign statehood, an idea that came into fashion only 400 years ago.¹⁸¹

The nation-state is forever in flux, its national identity evolving to include or exclude different peoples with new regimes and shifting political climates.¹⁸² These chimeras of a singular, unified national people governed by the nation-state are forcibly created by politically motivated national mythologies and are buttressed through the use of cultural heritage, which has long been used as an integral tool in both building and destroying national identities.

For instance, “[i]n the 1990s the world witnessed attempts by political leaders to turn the state into an expression of ‘their’ nationality: in Yugoslavia—a country put together after World War I on terrain wrested out from the Ottoman and Hapsburg empires—and in Rwanda, a former Belgian colony.”¹⁸³ Cultural heritage was strategically used in “[t]hese efforts to create homogenous nations [which] led to the slaughter of hundreds of thousands of people who had lived side by side.”¹⁸⁴ During the conflicts in the former Socialist Federal Republic of Yugoslavia in the 1990s, for example, there was rampant intentional destruction of cultural property, with one notable example being the complete destruction of the Mostar Bridge, Stari Most,

¹⁸⁰ GERSTENBLITH, *supra* note 11, at 839 (quoting Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 115 (1)).

¹⁸¹ Selasi, *supra* note 1; *see also* Wimmer and Min, *supra* note 2, at 872 (noting that between 1415 and 2006 at least 26 sovereign states “disappeared from the political map”).

¹⁸² *See* Elif Batuman, *The Big Dig: Istanbul’s city planners have a problem: too much history*, THE NEW YORKER, (Aug. 31, 2015), <http://www.newyorker.com/magazine/2015/08/31/the-big-dig> (discussing the different visions of Turkey held by the founding president Ataturk and the current president Recep Tayyip Erdoğan).

¹⁸³ BURBANK AND COOPER, *supra* note 3, at 1.

¹⁸⁴ *Id.*

located in Bosnia and Herzegovina, on November 9, 1993.¹⁸⁵ Before ethnic tensions led to wars in the 1990s, Yugoslavia was “one of the largest, most developed and diverse countries in the Balkans” comprised of six ethnically and religiously diverse republics—Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia—plus two autonomous provinces, Kosovo and Vojvodina, within the Republic of Serbia.¹⁸⁶ However, the collapse of communism plus the rise of “militant nationalism” led to political and economic turmoil which fueled multiple movements for independence, inflamed by political leaders who “used nationalist rhetoric to erode a common Yugoslav identity and fuel fear and mistrust among different ethnic groups.”¹⁸⁷

The destruction of the Mostar Bridge, which dated back to the Ottoman Empire, is illustrative of the way cultural heritage was utilized in the efforts to erode a common identity and connection between the different ethnic and religious groups that had lived together in the former Yugoslavia. The Mostar Bridge “was well known to all of the population in the region, whether Serbian, Croatian, or Muslim” and “was a symbol of Bosnia and Herzegovina: spanning the gap between the Muslim and Croat communities, it embodied the links which united these peoples in spite of their religious differences and the circumstances of the present war.”¹⁸⁸ The initial attack on the bridge was aimed at discouraging people from using the bridge, but the bridge was later deliberately completely destroyed by shelling.¹⁸⁹ The destruction of the bridge was an act which was “devoid of any military significance”¹⁹⁰ and instead was motivated solely by the desire to destroy the bridge, which connected the Muslim and Croat regions of Mostar, based on its symbolic representation of the region’s multicultural history, in the violence-fueled quest to create a new national identity.

Not only can the national identity of a nation-state lead to the destruction of cultural heritage, it more broadly influences how a state views, treats, and prioritizes the cultural heritage within its borders. As we see in the U.S., the subjugation, erasure and forced Westernization of indigenous nations, driven by the American national origin mythology,¹⁹¹ led to a concurrent devaluing of native culture:

¹⁸⁵ M. Kéba M'Baye, FINAL REPORT OF THE UNITED NATIONS COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO SECURITY COUNCIL RESOLUTIONS, 780 (1992), 9, <http://mcherifbassiouni.com/wp-content/uploads/2015/08/Yugoslavia-Report-Vol-5-Annex-XI.pdf>.

¹⁸⁶ *The Conflicts*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about/what-former-yugoslavia/conflicts>.

¹⁸⁷ *Id.* While the view that a genuine common Yugoslav identity never existed and the wars of the 1990s were a result of “ancient hatreds” amongst the different ethnic groups is prevalent amongst political analysts and others, this theory has been repeatedly discredited as “an imagined narrative that has been projected onto the region.” Benjamin Denison and Jasmin Mujanović, *Syria isn't Bosnia. And no, the problem isn't 'ancient hatreds.'*, THE WASHINGTON POST, (Nov. 17, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/11/17/syria-isnt-bosnia-and-no-the-problem-isnt-ancient-hatreds/> (further noting that scholars have pointed out that the “Balkans have actually experienced fewer wars throughout history than any other region of Europe”).

¹⁸⁸ M'Baye, *supra* note 185, at 9.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See Borneman, *supra* note 79, at 665 (“The formidable cognitive and emotional task for white Americans was to (re)create oneself as and to occupy the category ‘American,’ though fully ‘foreign’ oneself, through the expropriation of native lands and the liquidation of those natives.”).

The new society that was established on [the American] shore owed its entire cultural history—language, religion, art, science, literature, and history itself—to Europe and the Mediterranean world. It was a long time before the thought took root that there was any culture of value that grew autochthonously from this soil; it was even longer before this new society recognized that there had been a culture of value in the New World that predated the advent of Europeanism. This yearning for a European and Mediterranean-based past led to a desire for and valuing of the cultural objects that symbolize that past, while re[s]pect for artifacts representing the native cultural heritage has lagged significantly.¹⁹²

While national origin stories can thus act to erase indigenous peoples and other minorities, and diminish their control over, and the value of, their cultural heritage, national mythologies can conversely be used to envelop seemingly unrelated cultures into a nation-state's history. After the creation of the modern state of the Republic of Turkey in 1923, Mustafa Kemal, the founding father of the Republic of Turkey,¹⁹³ created a committee to “establish an ethnohistorical basis for a Turkish state in Anatolia.”¹⁹⁴ The committee's work resulted in a four-volume “Turkish-history thesis” which held that:

The Turks were descended from an ancient people who lived around an inland sea in Central Asia, where they basically started civilization all by themselves. At the end of the Ice Age, the sea dried up, propelling waves of Turks to China, India, Mesopotamia, Greece, and Italy, where they intermingled with the native populations and spread their knowledge of metalworking and of domesticated animals. In 5000 B.C., a core group of Turks settled in Anatolia: their second homeland. In a recent article, the historian Clive Foss enumerated other colorful tenets of the theory. In Mesopotamia, “Sumerian Turks” drained swamps and developed a written language; Turkish Thracians founded Troy. Turkish Lydians migrated to Italy, became Etruscans, and so more or less established Rome. The Minoans of Crete, having come from Anatolia, were basically Turks. The Buddha was a Turk; so was the third-century Roman emperor Maximinus.¹⁹⁵

The manufactured mythology of the history of Turkey, driven by highly political motivations, set forth logic by which “all prehistoric Anatolian civilizations of unknown origin were determined to be Turkish.”¹⁹⁶

¹⁹² Gerstenblith, *supra* note 71, at 560.

¹⁹³ Kemal later took on the surname Atatürk, meaning Father Turk. See Batuman, *supra* note 182.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* The Turkish national mythology, similarly to the American mythology, is also used to exclude peoples and cultures, notably the Kurds, who, while indigenous to the region encompassing parts of the modern Republic of Turkey, were not enveloped within the history of Turkey. See Bohn,

In order to get citizens to buy-into such national mythologies, nation-states often rely on cultural heritage as an integral part of nation-building, or “national self-fashioning.”¹⁹⁷ As one scholar noted in discussing the Parthenon Marbles and British nationalism, “The Parthenon Marbles arrived in London at a time when the arts were a key expression of a distinctive national character to help bind peoples to the emerging nation-states . . . Music, literature, drama, painting, sculpture, and architecture: all of these configured in the sense of collective belonging to the national body.”¹⁹⁸ Accordingly, cultural heritage can act as evidence of the national mythology and the claimed unified national identity, thus giving legitimacy to the nation-state.¹⁹⁹ The national museum itself developed as a “nation-state project.”²⁰⁰ In fact, the world’s first national public museum, the British Museum, established by an Act of Parliament in 1753 and opened to the public in 1759,²⁰¹ was “the first public institution [in Britain] to be called ‘British.’”²⁰²

As such, claims over cultural heritage, and the destruction and prioritization of specific cultural property, are often driven by the desire of the nation-state, or a particular regime, to tie the people of that state to a particular vision of the state and its national character and history. To value this political view and use of cultural heritage over the needs and wishes of peoples who have a stronger cultural connection to the cultural property does not act to protect cultural heritage. Nor does it recognize that, at least with respect to indigenous peoples, cultural heritage often plays an active, essential role in the continued existence of such peoples and giving control to the political entity of the nation-state over the cultural heritage of such peoples creates an existential threat to indigenous nations and minority societies. Instead, such a framework acts to prioritize the political and the aesthetic value of cultural heritage over its cultural and human elements. Structuring repatriation around the nation rather than the nation-state would ameliorate these problematic policies.

Repatriation to nations as opposed to nation-states is already being adopted by some institutions in certain circumstances, at least with respect to the cultural heritage of indigenous peoples. In fact, one scholar has identified “three preliminary models” that have emerged with respect to international repatriation programs that go beyond the borders of nation-states: “Government-supported programs, Proactive Museum programs, and Indigenous Community programs.”²⁰³ The Field Museum of Natural History in Chicago, Illinois has demonstrated a willingness to carry out repatriations of indigenous ancestral remains to indigenous nations that are not

supra note 158 (noting how the newly formed Turkish republic “embarked on a nationalist agenda of ‘Turkification’ that eschewed pluralism”).

¹⁹⁷ Rose-Greenland, *supra* note 37 at 1. For an interesting examination of the role the field of anthropology plays (and should play) in “modeling foreign policy” and “constituting international order,” see Borneman, *supra* note 79.

¹⁹⁸ Rose-Greenland, *supra* note 37, at 3 (citation and internal quotation marks omitted).

¹⁹⁹ *See id.* at 3-4 (noting the acceptance of the idea that “a broad range of material culture helps to construct nationness” and the “emergence in the nineteenth century of the idea that the measure of a nation’s seriousness lay in its cultural stock”).

²⁰⁰ Rose-Greenland, *supra* note 37, at 7.

²⁰¹ *History of the British Museum*, THE BRITISH MUSEUM, http://www.britishmuseum.org/about_us/the_museums_story/general_history.aspx.

²⁰² Rose-Greenland, *supra* note 37, at 7 (citation omitted).

²⁰³ Keeler, *supra* note 176.

located in the U.S., repatriations that fall outside of the scope and requirements of NAGPRA. For instance, in 2010, the Field Museum agreed to repatriate the remains of twenty-two people to an Inuit community in Canada.²⁰⁴ More recently, in June of 2014, the Field Museum repatriated the crania of three Tasmanian Indigenous Australians to the Tasmanian Aboriginal Centre.²⁰⁵

This is in-line with the shift away from the immutability of the centrality of the nation-state that has crystallized in international law and politics over the last several years. In discussing intranational disputes over cultural heritage, one scholar identified that “developments in the law concerning intentional destruction have challenged the totality of the state monopoly over its own cultural property,” with “nonstate actors emerging as rights holders in cultural property on the international stage.”²⁰⁶ As one example, the statute of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), established by the U.N. Security Council in 1993 in response to the ethnic cleansing committed during the Balkan wars, “lists several crimes against property, including . . . seizure or destruction of cultural property.”²⁰⁷ These charges addressed attacks such as that on the Mostar Bridge, discussed *supra*, and led to several convictions.²⁰⁸

Of note, however, is that in these cases concerning the destruction of cultural property, the ICTY “asserted the need for protection of cultural property based on its importance to nonstate groups.”²⁰⁹ In determining that the targeting of mosques in Bosnia and Herzegovina were crimes against humanity for instance, the ICTY trial chamber explained that such attacks amount to “an attack on the very religious identity of a *people*.”²¹⁰ In its findings in the cases concerning the destruction of cultural property, the ICTY thus “reject[ed] a state-centric definition of cultural property,” holding instead that “[i]t was the identity of a people, not necessarily coterminous with the identity of a state, that elevated protection of such property to the status of a fundamental right.”²¹¹ These holdings “implicitly recognized subnational actors as primary benefactors of the international law of cultural property” and reiterate “the link increasingly being recognized by international law between cultural heritage and the enjoyment by a group or community of their

²⁰⁴ William Mullen, *Field Museum to return Inuit remains*, THE CHICAGO TRIBUNE, (July 19, 2010), http://articles.chicagotribune.com/2010-07-19/news/ct-met-inuit-remains-repatriated-20100719_1_inuit-field-anthropologist-field-museum.

²⁰⁵ Claire Todd, *Aboriginal remains returned from Chicago museum to Launceston*, ABC NEWS, (July 1, 2014), <http://www.abc.net.au/news/2014-06-27/aboriginal-remains-return-to-launceston/5556366>; see also Schiffman Tufano, *supra* note 177. Similarly, in September 2007, the Field Museum repatriated Maori ancestral remains to New Zealand. Although the repatriation was to the New Zealand National Museum, a government agency, it is still significant in that it was the “first repatriation of Maori ancestral remains from a mainland museum in the USA.” *Repatriation of Maori Human Remains*, PACIFIC ANTHROPOLOGY AT THE FIELD MUSEUM, available at <https://sites.google.com/a/fieldmuseum.org/pacific-web/Home/partnerships/repatriation>.

²⁰⁶ Fishman, *supra* note 9, at 359.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 359-60.

²⁰⁹ *Id.* at 360.

²¹⁰ *Id.* (citation and quotation marks omitted) (emphasis added).

²¹¹ *Id.*

human rights.”²¹² Such recognition and reasoning should extend to the repatriation realm as well.

VI. CONCLUSION

Realigning the repatriation model with the nation as opposed to the nation-state may not fully address the issues with repatriation based on the nation-state as the default claimant, or even be feasible in certain scenarios. A model based on nations is vulnerable to competing claims from different peoples. Such claims will be difficult to resolve, as they raise the question of what, if any, entity, group, or government should have the authority to determine which peoples have a superior claim to cultural heritage. Moreover, with respect to cultural property that is within a state’s borders, giving rights to that property to a nation within the state over the nation-state can potentially be seen as an infringement on a state’s territorial sovereignty, a fundamental concept of international law and relations. “International law operates from a baseline presumption that the state holds sovereign authority over property within its own territory.”²¹³ Instituting an international framework for repatriation that would give rights to nations over nation-states can be seen as violating this integral right of states, and as an intrusion into the internal affairs of sovereign states.

However, while these are real concerns, the fact that a repatriation framework based on the nation may have its own deficiencies does not undermine the argument that the default right holder with respect to repatriation should not be the nation-state. What we should take away from the history of nation-states is an imperativeness to reexamine our current repatriation model, and the way we think about repatriation. In order to truly accomplish the goals of repatriation, we must move away from the centrality of the nation-state when history and specific circumstances demand it, and instead look to the nation when thinking about repatriation. As one scholar has noted, there is a “tendency to take the nation-state for granted and to conceive of the social world as an assemblage of nation-state societies without asking how this came about and what the consequences of this particular form of political organization might be.” An understanding of the history of the nation-state and the issues that can arise when grounding the ownership of cultural heritage in modern-day nation-states, as discussed above, supports a move away from repatriation to the country of origin as the default. As the United Nations Special Rapporteur in the field of cultural rights, Karima Benounne, stated, “It is impossible to separate a people’s cultural heritage from the people itself and their rights.”²¹⁴ As this statement reflects, cultural heritage is properly thought of as belonging first to peoples, not to nation-states, and the framework for repatriation should shift to reflect this truer understanding of cultural heritage. As discussed

²¹² Fishman, *supra* note 9, at 360 (citation and quotation marks omitted).

²¹³ *Id.* at 353.

²¹⁴ *The Destruction of Cultural Heritage is a Violation of Human Rights - UN Special Rapporteur*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, (March 4, 2016), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17151&LangID=E>.

above, cultural heritage is instrumental in building identities, and the right to do so should not be limited to nation-states.

When repatriation is centered on the nation-state, relevant voices are left out of the conversation. As one scholar stated, in discussing lessons from the field of forced migration that can be applied to repatriation,

A nation-state, a museum, a person or group displaced, or a tribe may have very good reasons for attempting to effectuate repatriation, but objectifying the terms under which it does so may well be misguided, looking for facts for closure when facts do not exist outside the world of interpretation. The main problem here . . . is that this interpretation does not include the parties that it should, especially when those who have been displaced make recommendations that run counter to an objectified view of repatriation measures as the best response. What objectivism tends to do . . . is substitute the subjective perceptions of the State authorities for the experience of the refugee and refugees are then only considered “rational actors” when they want one expected outcome (return).²¹⁵

Under this framework, “the institution [museum] or the state determines the best course for that which is out of place.”²¹⁶ This hampers the discussion, which should be aimed at ensuring artifacts are repatriated to the most appropriate party, whether that be a nation-state or a nation. Focusing on the nation-state also ignores the history of how states came to be, and the systematic displacement of indigenous populations that accompanied nation-state formation. As discussed above, historically prejudicial views towards indigenous peoples and ethnic minorities, simultaneously influencing and influenced by nationalism and national mythologies, left such groups marginalized within the nation-state. While this history continues to resonate today, with these populations facing continued discrimination and diminishment of their rights, the laws and policies in place often fail to account for the ongoing consequences of the historical treatment of such groups. Native Americans, for example, can be further disenfranchised “when they attempt to speak to museums about the past while up against certain objective (or subjective) assumptions,”²¹⁷ thus subjecting them to an “extreme form of injustice in which the injury suffered by the victim is accompanied by a deprivation of the means to prove it.”²¹⁸

Moreover, increased globalization and integration have led to national borders becoming increasingly irrelevant in our world.²¹⁹ In a way, this is reverting the world back to the days of diverse, cosmopolitan empires that didn’t purport to

²¹⁵ Lauren Wheeler, *supra* note 123, at 139-140 (citation and internal quotation marks omitted).

²¹⁶ *Id.* at 140; *see also* Fishman, *supra* note 9 at 359 (“international law has historically granted the state a monopoly of authority over how and when to invoke cultural property rights on behalf of its own nationals.”).

²¹⁷ Lauren Wheeler, *supra* note 123, at 140.

²¹⁸ *Id.* (citations and quotation marks omitted).

²¹⁹ For a counter-argument to the claim that national borders, and nation-states themselves, are increasingly losing their importance, *see* Alasdair Roberts, *The Nation-State: Not Dead Yet*, *The Wilson Quarterly* (Summer 2015), available at <http://wilsonquarterly.com/quarterly/summer-2015-an-age-of-connectivity/the-nation-state-not-dead-yet/>.

represent one united people. Our understanding of repatriation should adapt to this reality and seek to live up to the meaning of the word “repatriate.” Moving away from a default of repatriation to the country of origin based on modern-day borders may end up being not just the most equitable approach to ownership of cultural heritage, but also the most durable. After all, “the nation-state appears as a blip on the historical horizon, a state form that emerged recently from under imperial skies and whose hold on the world’s political imagination may well prove partial or transitory.”²²⁰

²²⁰ BURBANK AND COOPER, *supra* note 3, at 3; *see also* Wimmer and Min, *supra* note 2, at 868 (Existing independent states are “treated as continuous and comparatively stable entities once they enter the international community of states. This overlooks the fact that their institutional shape and territorial extension may change dramatically over time, not least as a consequence of war.”).