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The Public Trust in Public Art: Property Law's Case against Private Hoarding of "Public" Art

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Private hoarding of important works of art is a phenomenon that has caused their disappearance from public view. The loss of this art undermines republican values like education, community, and citizenship, and therefore should be resisted. This Article explores various legal tools to prevent this from happening, including doctrines and laws that protect artists' rights in their work, but which offer the public little relief. Turning to two well-known common-law doctrines—public dedication and public trust—to see whether they might provide a solution, the author favors the latter because it is nimbler and better suited to the public nature of important works of art. But she recognizes that making viable use of the public trust doctrine requires enhancement with incentives, such as those offered by listing the art on a register, the tax code, and external norms of social behavior. The Article is a tribute to Professor Joseph L. Sax's public trust scholarship, which has inspired so many of us who follow in his footsteps.

ARTICLE CONTENTS

INTRODUCTION	644
I. WHAT IS “PUBLIC” ART AND WHY DO WE CARE ABOUT IT?	646
A. WHAT MAKES ART “PUBLIC” ART	646
B. THE RELATIONSHIP BETWEEN THE OWNERS OF PUBLIC ART AND PUBLIC ART	649
II. THE ART WORLD	653
III. REPUBLICAN VALUES AND HOW PRIVATELY HOARDING PUBLIC ART UNDERMINES THEM	659
IV. WHY THE DOCTRINE OF MORAL RIGHTS AND LAWS PROTECTING THE RIGHTS OF ARTISTS DO NOT ENSURE PUBLIC ACCESS TO PUBLIC ART	664
A. AN ARTIST’S MORAL RIGHTS	664
B. VISUAL ARTISTS RIGHTS ACT	668
V. HOW PROPERTY DOCTRINES, ESPECIALLY THE PUBLIC TRUST DOCTRINE, MIGHT SECURE PUBLIC ACCESS TO PUBLIC ART	669
A. THE NATURE OF PROPERTY AND THE RELEVANCE OF PROPERTY DOCTRINES TO PUBLIC ART	669
B. PUBLIC DEDICATION	672
C. THE PUBLIC TRUST DOCTRINE	676
VI. USING INCENTIVES TO GAIN ACCESS TO PRIVATELY HELD PUBLIC ART	682
A. CREATION OF A PUBLIC REGISTER FOR IMPORTANT WORKS OF ART	684
B. USE THE TAX CODE TO ENCOURAGE PUBLIC DISPLAY OF PRIVATELY HELD IMPORTANT ART	685
C. ACTIVATE BEHAVIORAL NORMS TO DISCOURAGE PRIVATE HOARDING OF IMPORTANT ART	686
CONCLUSION	693



The Public Trust in Public Art: Property Law's Case against Private Hoarding of "Public" Art

HOPE M. BABCOCK*

INTRODUCTION

Legal change usually lags behind social and cultural change, and our laws have a lot of catching up to do with respect to art.¹ This Article explores the case against private hoarding of art that is of such value to a country's self-identity that one might properly call it public art, even though the art is privately owned. Private hoarding deprives ordinary people of access to works of art of national importance and thus undermines republican values like education, community, and citizenship. Therefore, it should be discouraged. The Article's focus on privately owned public art starkly poses "the conflict between private property rights in that art and the public's interest in preserving its heritage,"² a riff on a familiar conflict in the field of natural resources.

The late Professor Joseph L. Sax's book, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures*,³ explores this conflict. While Professor Sax acknowledges that the state has tools, like condemnation, to acquire important art and dedicate it to the public's use, enjoyment, and education, he focuses on the questions that arise before that moment: "What powers and responsibilities should be recognized in the owners of such objects in the first place."⁴ Although Professor Sax mentions the problem of art being withheld by its owners from public viewing,⁵ his attention is more devoted to preventing these individuals from destroying

* Professor Babcock teaches environmental and natural resources law at Georgetown University Law Center whose generosity has contributed to the writing of this and other articles. She is also grateful for the careful editing by her research assistant, Carly Dooley. In this piece, as in her other work on the public trust doctrine, Professor Babcock owes a deep debt of gratitude to Professor Joseph Sax whose work on the public trust doctrine continues to guide and inspire her own work on the doctrine.

¹ Albert Elsen, *Introduction: Why Do We Care about Art?*, 27 HASTINGS L.J. 951, 955–56 (1976) (quoting John Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1042 (1976)).

² Cathay Y. N. Smith, *Community Rights to Public Art*, 90 ST. JOHN'S L. REV. 369, 371 (2016).

³ JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* (1999). In this book, Professor Sax examines the conflict between the rights of private owners of public art, the creators of that art, and the public's interest in protecting that art.

⁴ *Id.* at 9.

⁵ See *id.* at 8 ("Inaccessibility is an even more pervasive problem than destruction or mutilation During the booming 1980s some of the great impressionist paintings in the world were purchased by corporations and haven't been seen since.").

what is essentially their private property. Surprisingly, for the progenitor of the modern public trust doctrine,⁶ Professor Sax does not discuss the possible role that doctrine might have in addressing both the hoarding and destruction of public art by individuals.

This Article does what Professor Sax did not do: It explores whether the public trust doctrine, historically applied to allow public access to lands and waters of especial public value, might apply to objects with no connection to either. It examines how the doctrine might be used to remedy the problem of private hoarding of public art by analogizing repelling public access to trust-protected natural resources and preventing public access to public art.

Part I sets about these tasks by describing what might qualify as “public” art—a work of such importance that “the larger community has a legitimate stake”⁷ in it. Part II then describes the art world in which such hoarding takes place. This is a world that has changed dramatically in the last half century to democratize the display of art and its valuation by dispersing control over that process to many participants, while still hosting a subset of wealthy art owners who have withdrawn important art from public view. Part III explains why hoarding art of public value undermines important republican values and should be both resisted and remedied.

Part IV identifies two possible approaches to remedying the problem of art hoarding: application of the doctrine of moral rights and laws like the Visual Artists Rights Act.⁸ While these approaches may protect artists and their work from unauthorized replication or physical damage, none of them directly protects the public. Thus, they offer little help against individuals who withhold important artistic work from public view. In Part V, the Article investigates two common-law property doctrines—public dedication and public trust—to see if either might be applied to “public” art. The author finds more bandwidth in the public trust doctrine than public dedication because of commonalities between culturally important art and trust-protected natural resources, as well as more flexibility in that doctrine than public dedication. But the controversial nature of the public trust doctrine makes its application problematic in any circumstance. Therefore, Part VI of the Article examines whether social norms together with the

⁶ See Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970) (explaining the outline of the public trust doctrine and its use for “resource management problems”). Sax’s article is considered by most scholars of the doctrine as seminal in the field and the origin point of the doctrine’s revitalization. See, e.g., Douglas Martin, *Joseph Sax, Who Pioneered Environmental Law, Dies at 78*, N.Y. TIMES (Mar. 10, 2014), <https://www.nytimes.com/2014/03/11/us/joseph-l-sax-who-pioneered-legal-protections-for-natural-resources-dies-at-78.html> [<https://perma.cc/8SZ2-Y977>] (describing Sax’s public trust article as “seminal”).

⁷ SAX, *supra* note 4, at 9.

⁸ 17 U.S.C. § 106A (1994).

availability of financial incentives, like those offered by the tax code, might make the use of that doctrine more viable.

In proposing the use of the public trust doctrine to remedy a problem far removed from the doctrine's traditional base, the author is fully aware that she may be taking the doctrine beyond where Professor Sax thought it ought to go and doing what she warned against in another article she wrote.⁹ But believing that much can be learned about a doctrine from testing its application in surprising settings, and satisfied that she has weighed the risks of stretching the doctrine too far, she sets out on that task here.¹⁰

I. WHAT IS "PUBLIC" ART AND WHY DO WE CARE ABOUT IT?

A society cannot be great without a strong and pluralistic commitment to the arts. The arts help to bring order to our lives. They provide us with a sense of perspective. They enhance our perception of the relations of men and women to each other and to their society. The arts help our people to communicate with each other; they help to provide a record of our society. What are really at stake are new and stronger ways of enchancing [sic] our humanity, our sense of the grand and the good, our reaching for harmony and order and hope.¹¹

This Part attempts to define what makes art "public" art and to understand the relationship between its owners and the art itself. It posits that public art has unique value for the culture that created it, and that community value creates a special relationship between the art and its possessor.

A. *What Makes Art "Public" Art*

Before determining whether the public should be able to view "public" art under any legal theory, one needs to understand what public art is. To Professor Sax, public art carries the "'essence' of the nation."¹² Some examples in this country of what might fit Professor Sax's definition are Emanuel Gottlieb Leutze's "Washington Crossing the Delaware," Gilbert Stuart's "George Washington," Andrew Wyeth's "Christina's World,"

⁹ Hope M. Babcock, *What Can Be Done, If Anything, About the Dangerous Penchant of Public Trust Scholars to Overextend Joseph Sax's Original Conception: Have We Produced a Bridge Too Far?*, 23 N.Y.U. ENVTL. L.J. 390, 433 (2015).

¹⁰ *Id.*

¹¹ Monroe E. Price, *State Arts Councils: Some Items for a New Agenda*, 27 HASTINGS L.J. 1183, 1205 (1976).

¹² Joseph L. Sax, *Is Anyone Minding Stonehenge? The Origins of Cultural Preservation in England*, 78 CAL. L. REV. 1543, 1558 (1990); see also Smith, *supra* note 2, at 371 (defining public art differently, describing it as "any media intended and displayed in the public domain, usually outside or in public buildings and accessible to all persons").

Edward Hopper's "Night Hawks," and Winslow Homer's "The Veteran in a New Field," to name just a few.¹³ Each is an iconic painting in which the artist attempted to impart a lesson about what the artist believed to be of enduring civic value. Professor Sax calls these objects "heirlooms," the essential quality of which is a generational passage over time and the value of which is distinct from any use they might have.¹⁴ "Though an individual may own the heirloom in a full legal sense, the heirloom can equally be thought of as 'belonging' to a family, whose essential identity is generational."¹⁵ In this way, public art, the value of which is generational, is like a communal heirloom, which is something of value to a community¹⁶—a community that can be national, even international in scope, or as small as a neighborhood.¹⁷

Besides being a form of communal heirloom, public art reflects and belongs to a specific culture.¹⁸ In that sense, public art provides the "basis of cultural memory,"¹⁹ and its preservation is considered "essential" to preserving the "knowledge and wisdom" of that culture.²⁰ Cultural treasures, like great works of art, are "things of unique value to mankind for future generations to pass on down through the ages."²¹ Art's cultural nexus enhances its value beyond that of "a mere chattel."²² Cultural treasures also

¹³ See *The 50 Greatest American Paintings*, COMPLEX (May 1, 2012), www.complex.com/style/2012/05/the-50-greatest-american-paintings (listing these among other "great American paintings").

¹⁴ See Sax, *supra* note 12, at 1560 ("There are two elements in an edifice, its utility and its beauty. Its utility belongs to its owner, its beauty to everyone. Thus to destroy it is to exceed the right of ownership.").

¹⁵ *Id.* at 1564.

¹⁶ See Smith, *supra* note 2, at 371 (defining community as "the people with common interests living in a particular area").

¹⁷ But see Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1142 (1990) ("As uncontroversial as heritage preservation may appear when one thinks of historic monuments and artistic masterworks, the idea of an officially designated culture seems greatly at odds with modern sensibilities.").

¹⁸ See Francesco Francioni, *Public and Private in the International Protection of Global Cultural Goods*, 23 EURO. J. INT'L L. 719, 720 (2012) ("Art itself, as a medium essentially devoted to giving form to cultural expression, always transcends its economic value as a mere object and reflects the pluralism and diversity of tastes and inclinations of the societies that have produced it.").

¹⁹ John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 347 (1989); see also *id.* at 349 ("The need for cultural identity, for a sense of significance, for reassurance about one's place in the scheme of things, for a 'legible' past, for answers to the great existential questions about our nature and our fate—for all these things, cultural objects provide partial answers.").

²⁰ Elsen, *supra* note 1, at 952.

²¹ Judy Gechman, *Rescuing Cultural Treasures: The Need for an Incentive Generating Doctrine*, 24 Hous. L. REV. 577, 601 (1987); see also Merryman, *supra* note 19, at 348 ("Life may be short, but art is long. The object that endures is humanity's mark on eternity.").

²² See Elsen, *supra* note 1, at 952 ("A French jurist recognized 'the superior interest of the human genius' that creates art. Art's uniqueness in terms of irreplaceability and its capacity so often to survive its maker, his society, and the ages account for its being valued more than as a mere chattel.").

support a sense of participation in a “shared enterprise.”²³ Thus, public art “nourish[es] a sense of community, of participation in a common human enterprise.”²⁴ Public art can also exemplify and express a community’s “moral attitudes.”²⁵

The communal value of public art makes it more in the nature of “‘communal property’ or public patrimony, which is essential to the sentiment of belonging to a collective social body and to the transmission of this sentiment to future generations.”²⁶ What makes a preservation regime that protects a society’s heritage novel is that that heritage is being protected not as a thing with its own “intrinsic value”—be that value “aesthetic, historical, archaeological”—but “rather because of its association with a social structure of a cultural community which sees the safeguarding of its living culture as part of its human rights claim to maintain and develop its identity as a social body beyond the biological life of its members.”²⁷ Thus, most people feel a “racial, ethnic or even national affinity” toward property of cultural value²⁸ and “care in special ways about objects that evoke or embody or express their own and other people’s cultures.”²⁹ Professor Smith explained that:

[w]hen a piece of public art comes to embody a community’s identity and culture, when it becomes a landmark or identifying symbol of a community, when it comes to define a community’s social relationships, sustain the community’s social rules, or strengthen the community’s social values, it transcends being just a piece of art and becomes part of a community’s heritage.³⁰

²³ Sax, *supra* note 17, at 1142.

²⁴ Merryman, *supra* note 19, at 349; *see also* Smith, *supra* note 2, at 381 (“[W]orks of art are elaborate mechanisms for defining social relationships, sustaining social rules, and strengthening social values.”).

²⁵ Merryman, *supra* note 19, at 346; *see also id.* at 347 (“The maker [of art] chooses whether to settle for something that is ‘good enough’ or strive for something better. Every such choice embodies a moral decision, and that morality is communicated, more or less perfectly, to the viewer who confronts or the scholar who studies the object. ‘[T]he morality of art consists in the perfect use of an imperfect medium.’”).

²⁶ Francioni, *supra* note 18, at 722. Francioni goes on to say “[i]n this sense, cultural heritage becomes an important dimension of human rights, in as much as it reflects the spiritual, religious, and cultural specificity of minorities and groups.” *Id.*

²⁷ *Id.* at 726.

²⁸ Gechman, *supra* note 21, at 601–02; *see also* Merryman, *supra* note 19, at 341 (providing a broader definition of “cultural property,” and saying “[b]y ‘cultural property’ I mean objects that embody the culture—principally archaeological, ethnographical and historical objects, works of art, and architecture; but the category can be expanded to include almost anything made or changed by man”).

²⁹ Merryman, *supra* note 19, at 343.

³⁰ Smith, *supra* note 2, at 383.

In these ways, public art, which embraces a community's identity and culture, transcends the artist's time.³¹ Its cultural importance gives this form of art public significance beyond its creation for individual enjoyment.³²

Great works of art often are "an ageless testimony to beauty" in that culture,³³ a supposition supported by substantial empirical evidence in the form of the "thousands of museums, tens of thousands of dealers, hundreds of thousands of collectors, millions of museum visitors; [and] brisk markets in art and antiquities"³⁴ Moral rights laws³⁵ in some countries and the art preservation laws of states like California and Massachusetts also show the public's interest in great works of cultural art.³⁶ Additionally, "[a] great deal of public, corporate, and individual time, effort, and money are spent in making, finding, acquiring, preserving, studying, exhibiting, interpreting, and enjoying cultural objects."³⁷

B. *The Relationship Between the Owners of Public Art and Public Art*

Given the national importance of public art, it seems oxymoronic to consider it to be a fungible good that someone owns.³⁸ Rather, public art is better seen as "patrimonial property that in some respects 'belongs' to the nation and to posterity."³⁹ Owners of public art act more like transitory

³¹ Elsen, *supra* note 1, at 952 ("A work of art can also exist out of time for an artist and connoisseur.").

³² Sax, *supra* note 12, at 1566 ("[T]he standard is national importance." (quoting Ancient Monuments and Archaeological Areas Act, ch. 46, § 1(3), 32 HALSBURY STATUTES OF ENGLAND AND WALES 308 (4th ed. 1987))).

³³ Elsen, *supra* note 1, at 952; *see also id.* ("On a more mystical level, in the past a great work of art was thought at times to contain the *mana* of its royal owner. From Nero to Napoleon, rulers would plunder art to capture the soul or mystical identity of its royal or urban owner. That magical *mana* or life spirit contained in art is now seen as belonging to a nation.").

³⁴ Merryman, *supra* note 19, at 343.

³⁵ *See infra* Part IV.A (discussing moral rights laws).

³⁶ Merryman, *supra* note 19, at 343; *see also infra* Part IV.A (discussing moral-rights laws in California and Massachusetts).

³⁷ Merryman, *supra* note 19, at 344; *see also id.* at 345 (stating that "[i]t is abundantly clear that people care a great deal about cultural property" (internal citation omitted)); Gechman, *supra* note 21, at 597 ("The 1954 Hague Convention forcefully addressed the importance of cultural preservation in these words: 'Damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind since each person makes a contribution to the culture of the world.' There is, thus, national and international public policy favoring the preservation of cultural treasures." (internal citation omitted)).

³⁸ Charles Patrick Desmond Cronin, *Von Saher v. Norton Simon Museum: Ethical Quandaries of Art Restitution Claims Against Public Collections* 25 n.166 (2017), <http://ssrn.com/abstract=2915276> [<https://perma.cc/3NFD-WTZV>] ("[T]here's a monumental issue at stake here that the film scarcely acknowledges: Does (or should) anyone really own art?").

³⁹ Sax, *supra* note 12, at 1545.

trustees because public art does “not fully belong to them”⁴⁰ any more than an owner of historic property or an ancient monument owns that property.⁴¹

This attitude is reflected in the original British legislation to preserve the country’s heritage property, the Ancient Monuments Act, which, in effect, redefined individual property rights to include the concept of the “responsible owner.”⁴² Implicit in the legislation was the idea that the owner of nationally valued property possessed the property’s “economic value or use value” and could be compensated if those values were taken away. However, this property also had historic and scientific value, which the country owned, and, therefore, no compensation was owed should its economic or use value be lessened or lost.⁴³ The fact that the history of England might be “embedded in a physical structure,”⁴⁴ like a piece of art, meant that the object did not belong to an individual, and in preventing the destruction of that artwork, the nation was “preventing the destruction of its history.”⁴⁵ In other words, the nation was “not taking something away from the owner, but was safeguarding something of its own.”⁴⁶ The Ancient Monuments Act thus reflected a “dual conception” of property in which conventional ownership is “overlaid with a responsibility of care and preservation for the benefit of the nation in the ages to come.”⁴⁷

Professor Sax finds the idea of the “responsible owner,” whose use of property is limited “by public sentiment,” an “intriguing” concept that implies “a dimension of proprietary entitlement (and its limits) that hardly ever appears in contemporary discourse about property.”⁴⁸ This view of responsible ownership in British preservation law, according to Professor

⁴⁰ *Id.*; see also Smith, *supra* note 2, at 383 (“It becomes ‘the property of mankind and ownership carries with it the obligation to preserve [it].’ Even though the art may be privately owned, such ownership is in the nature of a trust for the community’s benefit, and its *de jure* owner should not be able to destroy it without legal scrutiny.”); Joseph L. Sax, *Imaginatively Public: The English Experience of Art as Heritage Property*, 38 VAND. J. TRANSNAT’L L. 1097, 1105 n.35 (2005) (noting that the idea of an owner acting “as a guardian for posterity” existed in ancient Rome “where collecting avidity was rampant, in Cicero’s condemnation of Verres”).

⁴¹ Sax, *supra* note 12, at 1553.

⁴² *Id.*

⁴³ *Id.* at 1554.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 1557.

⁴⁸ Sax, *supra* note 40, at 1101; see also Smith, *supra* note 2, at 379 (“[E]ven though an individual may be the *de jure* owner of a piece of cultural heritage, her ownership is qualified. She takes on the role of steward, retaining the property for the benefit of the public; she can use her property for personal enjoyment, but she should not be able to deprive the public, a community, or future generations of their cultural heritage.”); Nicole B. Wilkes, *Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute*, 24 COLUM.-VLA J.L. & ARTS 177, 183 (2001) (“We are thus left with the idea of ‘preservation as a state responsibility; cultural property as ‘belonging’ to the nation regardless of formal; and creative achievement as a national asset.”); Merryman, *supra* note 19, at 341 (discussing cultural property and how it includes objects that embody the culture).

Sax, reflects a shift “away from the individual who unqualifiedly owns a space on the Earth and whatever things happen to sit in that space, to a community existing in time, nourished by those achievements of centuries of art and science that are often embodied in physical artifacts.”⁴⁹ The result of this evolution in thinking about cultural properties is “the idea of ‘preservation’ as a state responsibility; cultural property as ‘belonging’ to the nation regardless of formal ownership; and creative achievement as a ‘national asset.’”⁵⁰

Resonating with the tenets of the public trust doctrine,⁵¹ Professor Sax recognized that “[w]hether the claim [against the cultural property owner] was put in proprietary terms, as something ‘belonging’ to the nation, or in some less legalistic form, the concept was the same: The nation as a collectivity had a preexisting interest in many objects that had always been considered entirely private,”⁵² if only to assure their preservation and appreciation.⁵³ This idea of a “collective obligation to identify and protect cultural artifacts” is relatively recent,⁵⁴ as is the thought that individual owners of cultural art could not be assumed to fulfill that duty.⁵⁵ Despite these ideas, British law and other preservation laws leave unanswered the question of whether the state could forcibly obtain important works of public art from private collections for display in a public institution.⁵⁶

⁴⁹ Sax, *supra* note 12, at 1545; *see also id.* at 1549 (viewing the late 19th Century Antiquities Monuments Act as an embodiment of the principle that “the protection of cultural property was a governmental duty, and that public ownership and control should be brought to bear on unwilling proprietors,” commenting that that bill “shifted the line between public and private authority a considerable distance for that time”).

⁵⁰ Wilkes, *supra* note 48, at 183 (citing Sax, *supra* note 17, at 1168–69); *see also id.* at 201 (comparing an art preservation regime to the preservation of endangered species because like them, vulnerable art is subject to extinction if not properly protected).

⁵¹ *See infra* pp. 35–41 (discussing the public-trust doctrine).

⁵² Sax, *supra* note 12, at 1554.

⁵³ *See id.* at 1556 (quoting 14 April 1875, Parl Deb HC (3d ser.) (1875) col. 911 (UK)) (“No person . . . certainly would propose any undue interference with the rights of private property; but their ancient monuments, *while in a certain sense private property*, were at the same time subjects of public interest . . . [and thus could not simply be left to] the possession of persons who were totally incapable of appreciating their value, and totally regardless of their preservation.”).

⁵⁴ Sax, *supra* note 17, at 1143. Professor Sax traces those thoughts to the French Revolution, which began the process of “recasting . . . a wide range of artistic, scientific, and historical artifacts as secular icons with both instrumental and symbolic content for the new republican nation.” *Id.* at 1151.

⁵⁵ *See* Sax, *supra* note 12, at 1549–50 (responding to resistance to the Ancient Monuments bill by stating: “It was not necessary to take such a harsh view to recognize that Lubbock’s bill raised a profound and novel question. What was this communal imperative that could not safely be left to individual owners acting independently and autonomously, and that promised a much enlarged role for government?”).

⁵⁶ *See id.* at 1552 n.28 (finding no instances in which a country condemned art in private collections to enrich a national museum); *see also* Gechman, *supra* note 21, at 602–03 (advocating recognition of the importance of preserving objects of “unique cultural value” through incentivizing people to take risks to protect them); Wilkes, *supra* note 48, at 202 (“In the same way that the state can intervene to protect children, the government could potentially regulate to safeguard objects of national (or international) significance.”).

While property owners can destroy their own property with impunity, some property is so vested with communal rights, be it the rights of a culture or nation, that it is conceivable to think that “the community’s right to preserve its heritage may trump a property owner’s right to destroy [it].”⁵⁷ The same thinking should apply to public art that has been withdrawn from public view. The preservation of culturally important pieces of art is an essential part of any cultural-property policy, as if such a piece of art disappears or is destroyed, it cannot be studied or appreciated.⁵⁸ Merryman describes the consequences of such loss as follows: “[E]very loss of cultural property through erosion, destruction, careless removal, or improper conservation measures impairs the quest for cultural truth. Every lost opportunity for further discovery and study of cultural objects retards the growth of knowledge about ourselves.”⁵⁹ Inferentially then, these objects must be available for scholars to study and for the public to enjoy.⁶⁰

Accordingly, as Merryman urges, it should follow that “when a piece of public art transforms from being merely a piece of property to become a community’s cultural heritage, community rights may trump those of the individual property owner”⁶¹ This concept is applicable whether resources are natural or manmade; where a community sought to enjoin destruction of a house, one court held: “A well-ordered society cannot tolerate the waste and destruction of resources when such acts directly affect

⁵⁷ Smith, *supra* note 2, at 370. Given the importance of preservation, Professor Joseph Sax finds it “curious” that despite the existence of policies protecting historic, natural, and cultural objects, there is nothing that “resembles a *theory* of public preservation policy.” Sax, *supra* note 12, at 1544.

⁵⁸ See Merryman, *supra* note 19, at 355 (“The essential ingredient of any cultural property policy is that the object itself be physically preserved. The point is too obvious to need elaboration; if it is lost or destroyed, the Etruscan sarcophagus or the Peruvian textile or the Chinese pot cannot be studied, enjoyed, or used.”); see also Elsen, *supra* note 1, at 952 (“The inspirational power of art of the past and present is crucial in newer countries, such as Poland, that call for the development of a national culture and give to their citizens a constitutionally guaranteed right to culture.”). But see Francioni, *supra* note 18, at 727 (describing the European Court of Human Rights’ refusal to create such a policy as leaving “the public interest in the conservation of a collective cultural patrimony or of the public value of a cultural landscape . . . in the shadow of the law”). Preservation of objects of cultural importance institutionalizes what Sax calls “the long view,” and uses preservation

not as a glorification of the past but as a promise to the future that the present will not impoverish it. In selecting the artifacts it wishes to pass on, preservation policy goes beyond simply saving certain objects and becomes a symbolic shaping of the national agenda. It serves as a banner announcing what the nation represents, or at least what it aspires to represent.

Sax, *supra* note 12, at 1544.

⁵⁹ Merryman, *supra* note 19, at 359.

⁶⁰ *Id.* at 360; see also *id.* at 349 (“The painting was made to be seen, the lamp and the pot to be used, by others.”).

⁶¹ Smith, *supra* note 2, at 383.

important interests of other members of that society.”⁶² In other words, while traditional property law doctrines empower property owners to do whatever they want with their property—within the limits of nuisance law—“some values are so important to society that the law develops new doctrines to protect them.”⁶³ This Article argues that the public trust doctrine is one of those doctrines; although the doctrine is not new, its application to privately held works of public art is new.⁶⁴

Before the Article shifts to a discussion of the public trust doctrine, there is more ground to cover. Accordingly, the next Part describes the current art world and the practice of hoarding public art.

II. THE ART WORLD

Works of art are among the least fungible forms of moveable property. Artworks’ uniqueness generates greater emotional bonds between them and their individual or collective owners than those that exist between owners and fungible assets like cash or insurance policies.⁶⁵

The art world today is substantially different from what it was during the eighteenth century when the first impulse to open art to public view arose.⁶⁶ It is a world inhabited by “[v]isual artists, dealers, galleries, collectors, museums, auction houses, art critics, art historians, and the art press [who] cohere in a dense pattern of complex relationships that gives the visual art world a distinct identity.”⁶⁷ At the same time that that world has become more democratic by opening up the display of art to the broader public⁶⁸ and by allowing the public to influence the valuation of art through auction houses and private sales, it has become more exclusive by concentrating ownership of art in the hands of a few.

⁶² *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 211, 217 (Mo. Ct. App. 1975); see also Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1028 (2009) (“[S]ome cultural resources are so sacred and intimately connected to a people’s collective identity and experience that they deserve special consideration as a form of cultural property.”).

⁶³ See Gechman, *supra* note 21, at 594 (using *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), as an example of the government overriding old doctrines in favor of new ones to protect important interests).

⁶⁴ See *infra* Part V.C.

⁶⁵ Cronin, *supra* note 38, at 28.

⁶⁶ Sax, *supra* note 40, at 1098.

⁶⁷ John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1045–46 (1976).

⁶⁸ Elsen, *supra* note 1, at 952 (“The secularization and democratization of art itself in recent times has been accompanied by growing sophistication on the part of the public about its own interest in culture.”).

Museums occupy a place in this new world and both affect it and are affected by it⁶⁹—often as competitors for public art,⁷⁰ but more recently selling off parts of their collections to get money to make capital improvements to their facilities or to acquire new works of art.⁷¹ This process is called deaccession: the permanent removal or disposal of an object from the collection of the museum by virtue of its sale, exchange, donation, or transfer by any means to any person.⁷² The recent downturn in financial markets and a general decrease in funding of the arts have increasingly propelled museums to deaccession their collections.⁷³ Deaccession is very controversial.⁷⁴ However, this Article does not get into that controversy and

⁶⁹ There are 35,000 public and private museums in the United States, many of which “struggle to stay open and fulfill their missions.” Paul Sullivan, *A Collector’s Dream: Creating Your Own Museum as a Legacy*, N.Y. TIMES, Sept. 30, 2017, at B5.

⁷⁰ See Seth Tipton, *Connoisseurship Corrected: Protecting the Artist, the Public and the Role of Art Museums Through the Amendment of VARA*, 62 RUTGERS L. REV. 269, 301 (2009) (“Although perhaps less dangerous to art scholarship, connoisseurship’s subjectivity has helped fuel exponential growth in art prices, as well as serve as the basis for astronomically expensive museum acquisitions.”).

⁷¹ Many millions of dollars are paid for art that has been identified by favored art critics and their wealthy patrons as the art to own. See *id.* at 281–82 n.91 (citing 1 RALPH E. LERNER & JUDITH BRESSLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS at 321–22 (3d ed. 2005), to “explain[] the upward growth in the art auction market, and not[e] that Christie’s and Sotheby’s now each report gross sales over \$1 billion per year”).

⁷² Derek Fincham, *Deaccession of Art from the Public Trust*, 16 ART ANTIQUITY & L. 1, 2 (2011); Sara Tam, *In Museums We Trust: Analyzing the Mission of Museums, Deaccessioning Policies, and the Public Trust*, 39 FORDHAM URB. L.J. 849, 859 (2012) (“Museum curators, directors, and boards of trustees typically decide to deaccession an artwork because the artwork no longer fits the museum’s mission, the artwork is of poor or deteriorating quality, or for legal reasons. A museum then disposes of a work by sale, auction, exchange, or grant to an individual or another institution.”).

⁷³ Fincham, *supra* note 72, at 3; see also *id.* at 17 (“In 2009, the Getty Museum, one of the wealthiest museums in the world, was forced to cut its annual budget by 24% and make 97 members of staff redundant. The Art Institute of Chicago lost nearly 24% of its endowment in 2009.”).

⁷⁴ See Cronin, *supra* note 38, at 28 (“When an artwork enters the collection of a public museum, its prestige and financial worth increase because the public values not only the work itself, but also the museum’s imprimatur of connoisseurship. Because the public generates value, it also, over time, develops an affinity with the work and thereby acquires interest akin to ownership of it. This is why museums’ attempts to de-accession works to generate funds, even to survive, are typically met with vociferous opposition.”). Indeed, some consider that the process has created a “crisis” for American museums. Fincham, *supra* note 72, at 1 (citing as examples of the problems deaccession creates “the loss of works from the public trust, the closure of museums and unnecessary legal disputes”). But see Gechman, *supra* note 21, at 600 n.164 (“The fact that cultural items can be sold has given them the chance to survive. Museums can then acquire them by purchase. It is a means, therefore, of preserving, not destroying, cultural treasures. . . . The private sale of important cultural items has saved many of these items.”). An example of a recent controversy generated by the Berkshire Museum’s auction of forty works of art, including two Norman Rockwell paintings that the artist had given to the museum. A group that included three of Rockwell’s children unsuccessfully sued in a Massachusetts state court to stop the sale arguing that the sale breached the museum’s fiduciary duties. Matt Stevens, *Rockwell Family Files Suit*, N.Y. TIMES, Oct. 23, 2017, at C4. Deaccession is not only a United States phenomenon. France recently declared a Marquis de Sade manuscript a “national treasure” and blocked its sale at a public auction for thirty months with a goal of raising sufficient funds to keep it in the country. Kimiko de Freytas-Tamura, *Salacious, Shocking and Sordid, And Now a National Treasure*, N.Y. TIMES, Dec. 20, 2017, at A9.

concerns itself only with what happens to deaccessioned art after it is sold and disappears from public view.

A recent example of deaccession was the scheduled sale at auction of the entire permanent collection of the Fresno Metropolitan Museum of Art and Science—some 3,000 objects of art.⁷⁵ Should the Fresno Art Museum close as well, the sale would mean that there would be “no contemporary art between Los Angeles and San Francisco.”⁷⁶ To get an idea of the scope of the process, “[n]early a third of the art sold at Christie’s May 2009 sale . . . were works of art deaccessioned from US museums.”⁷⁷ “Many of these sales take place behind closed doors.”⁷⁸ Deaccession can benefit wealthy private collectors who buy that art. For example, in 2009 the Orange County Museum of Art sold eighteen California Impressionist paintings to a private collector—“a move which another museum director called an erosion of ‘civic behavior and collegiality.’”⁷⁹

Museums enabled art collections, which had previously been housed in private homes of the very rich, to move into a space that was both fixed and publicly accessible.⁸⁰ Because great works of art are now available for viewing at museums, museums exercise an important public educational role⁸¹ through public exhibitions, in which they produce and share cultural knowledge.⁸² Modern museums help form “a community’s identity” by promoting “civic pride, cultural understanding, and scholarship”⁸³ and act as

⁷⁵ See Fincham, *supra* note 72, at 3; see also *id.* at 17 (“In 2009, the Getty Museum, one of the wealthiest museums in the world, was forced to cut its annual budget by 24% and make 97 members of staff redundant. The Art Institute of Chicago lost nearly 24% of its endowment in 2009.”).

⁷⁶ *Id.* at 2.

⁷⁷ *Id.* at 2–3. Fincham reports that in 2009, the Orange County Museum of Art sold eighteen California impressionist paintings to a private collector. *Id.* at 3.

⁷⁸ *Id.* at 3

⁷⁹ *Id.*

⁸⁰ See Sax, *supra* note 40, at 1136 (“Whereas the venue for seeing art had previously, and necessarily, been on the collector’s own premises or episodically in a temporary exhibition, it had now moved into a permanent, publicly-accessible art museum.”).

⁸¹ Tam, *supra* note 72, at 854–55; see also *id.*, at 857 (“Through exhibitions, museums offer their visitors an opportunity to exercise critical faculties and develop new perspectives; this is the lifelong learning that museums provide.”); G. HAMILTON, Education and Scholarship in the American Museum, in ON UNDERSTANDING ART MUSEUMS (1975), reprinted in 2 J. MERRYMAN & A. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 7-2, 7-3 (1979) (“Since 1870, no museum has been founded in the United States ‘without formally recognizing its obligation toward public education’” (quoting Note, *Protecting the Public Interest in Art*, 91 YALE L.J. 121, 132 n.60 (1981))).

⁸² Tam, *supra* note 72, at 856 (“[W]hat museums have in common is the desire to provide educational experiences by offering public access to curated and intellectually stimulating exhibitions.”).

⁸³ *Id.* at 857–58.

“creative and expressive cultural institutions.”⁸⁴ One definition of public art is art housed in a public institution like a museum.⁸⁵

However, the educational role of a museum as a repository of public art is diminishing as museums are increasingly priced out of the art market should they want to add to or diversify their collections.⁸⁶ Because the wealthy can acquire art at higher prices than museums,⁸⁷ museums cannot add new works to their collections, and their collections become static.⁸⁸ This depreciates the educational value of museums and lessens their attraction to the public, decreasing attendance and revenues.⁸⁹

There are also private museums,⁹⁰ which wealthy individuals with large collections of important art establish as tax-exempt organizations to which

⁸⁴ *Id.*; see also Fincham, *supra* note 72, at 19 (“They preserve and display works of art for scholars, the public and future generations.”). But see *id.* at 20 (“The overwhelming majority of works of art held by most museums will never be displayed publicly” in part due to space constraints and costs).

⁸⁵ The artist González-Torres has another view that “what makes a work public is not its location, but its relationship with the audience. This is a more profound sense of *public* art, for it injects a dimension that is not commonly associated with art, even public art, as commonly defined—democracy, in a participatory sense. The artist is removed from the pedestal as the sole creative genius behind the work. Instead, the audience participates in the work’s ongoing process of creative destruction and reproduction.” Gregory S. Alexander, *Objects of Art; Objects of Property*, 26 CORNELL J.L. & PUB. POL’Y, 461, 466–67 (2017).

⁸⁶ See Wilkes, *supra* note 48, at 196 (“The San Francisco Museum of Modern Art (the ‘SFMOMA’) filed suit against the heirs of Madeleine Haas Russell for breach of an oral contract, stemming from the failure of the museum and the Russell heirs to reach an agreement with respect to the sale of a Picasso painting owned by Madeleine Haas Russell since 1969. Although the SFMOMA offered to purchase Picasso’s 1932 “Nu au fauteuil noir” for \$44 million, the painting was sold at Christie’s for a hammer price of \$41 million to a private collector.”); see also Sax, *supra* note 40, at 1137 (“A great deal of superlative art nevertheless resides in private collections and museums avidly seek many of these works. Indeed, when important works come up for sale, the richest collectors can and commonly do outbid museums, whose acquisitions budgets are quite limited.”).

⁸⁷ An example of art going to private collectors at astronomical prices is the recent sale of a painting of “disputed quality” attributed to Leonardo da Vinci, *Salvator Mundi*, at Christie’s for \$450.3 million dollars, a price that “no museum could possibly afford.” Robin Pogrebin, *After Leonardo Sale, Art World Wonders: Is the Sky the Limit?* N.Y. TIMES, Nov. 17, 2017, at A24.

⁸⁸ But see Gechman, *supra* note 21, at 598 (“The other argument against burdening private collecting is that doing so may work against the goal of preservation. We want people to have an incentive to preserve items with cultural significance. The high monetary value of good title in the market place is an encouragement to preservation.”).

⁸⁹ The current financial condition of museums is already tenuous. See Fincham, *supra* note 72, at 17 (“The current financial outlook for museums is likely to be one of the most difficult in decades. In 2009, the Getty Museum, one of the wealthiest museums in the world, was forced to cut its annual budget by 24% and make 97 members of staff redundant.”). The Art Institute of Chicago lost nearly 24 percent of its endowment in 2009. Museums are raising admissions fees, laying off staff, dropping exhibitions and even imposing furloughs. One hundred universities from all over the country have been forced to cut arts budgets. *Id.*

⁹⁰ Michael Shnayerson, *Inside the Private Museums of Billionaire Art Collectors*, TOWN & COUNTRY, Jan. 16, 2017, <http://www.townandcountrymag.com/leisure/arts-and-culture/a9124/private-museums-of-billionaires/> [https://perma.cc/RVY3-34EC] (“For the world’s 1,810 billionaires . . . private museums are the *ne plus ultra*: rooms of utterly impractical beauty that only the wealthiest can afford.”).

they then donate their private art collections, providing a nice tax break.⁹¹ Private museums are a recent phenomenon.⁹² Private museums do not have to open their doors to the public and many do not.⁹³ Often the art found in private museums is acquired through a public museum's deaccession of its collection. Private museums also offer collectors power and control over their art,⁹⁴ and having a private museum can give a collector the prestige and visibility to get access to the hottest artists' work, which may enable them to acquire art at a lower price.⁹⁵ In this way, private museums help inflate the price of art well beyond the purchase capacity of most public museums.⁹⁶

Public museums are mostly funded by the government and are managed by trustees with the public interest in mind.⁹⁷ Private collectors, however, do not operate under a public-interest mandate and are under no obligation to make their art available to the public, even art that they acquired from a public museum.⁹⁸ There are no norms or laws regulating the deaccession process to ensure that works of art remain available to the public.⁹⁹ Sometimes, the purchased art is taken out of the public museum's immediate jurisdiction, making its removal from public viewing more complete.¹⁰⁰

Some scholars contend that private ownership is not necessarily bad because the art "still exists"—it has not been destroyed and thus can be

⁹¹ See *id.* But see Sullivan, *supra* note 69, at B5 (noting that founders of private museums are "under extreme scrutiny by the I.R.S. and the public," the tax break can be offset by the costs of building and maintaining a museum, and some business entrepreneurs have "trouble making the mental leap involved in giving their collections to the public").

⁹² Shnayerson, *supra* note 90 ("Of the 236 private contemporary art museums totted up globally in the BMW Art Guide by Independent Collectors, more than 80 percent have arisen since 2000. The United States has 43 of them, second only to South Korea."); see also Sullivan, *supra* note 69, at B5 ("Private museums aren't new, but they've grown significantly in terms of the numbers in the last 10 years or so." (internal quotation marks omitted)).

⁹³ Shnayerson, *supra* note 90 ("If you lend art on a rotating basis to other institutions as one of your [private foundation's] purposes then you don't have to open your private museum to the public." (quoting Ralph Lerner, co-author of *Art Law*, a "classic" textbook)). But see Gechman, *supra* note 21, at 598 (stating that "[a]llowing private collections will diversify the kinds of things that are preserved," and "[p]art of the reason we would lose something is that private collections often become public eventually, and many private collections are currently open to the public").

⁹⁴ Shnayerson, *supra* note 90 ("If he gives a painting to the Museum of Modern Art . . . he'll never have control over it again. He'll never be able to say what type of light bulb to shine on it. Or when it should be pulled up from the basement and displayed.").

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *id.* ("By definition a public museum is funded mostly by the public—which is to say government at one level or another—and is steered by trustees who do what's best for the public not what's best for a wealthy donor.").

⁹⁸ See Tam, *supra* note 72, at 882 ("The uproar in reaction to the Metropolitan Museum's decision to deaccession in 1973 highlights a fear of art returning to private hands where it would be, presumably, forever inaccessible to the public.").

⁹⁹ Fincham, *supra* note 72, at 19.

¹⁰⁰ See Tam, *supra* note 72, at 878 ("The State Attorney General is frequently concerned with retaining the collection within the city or state in which the museum is located.").

resold to other collectors or loaned to museums.¹⁰¹ Indeed, “[m]any American collectors describe themselves as ‘merely the temporary custodian[s]’ of their collections and are dedicated to donating, lending, and otherwise sharing their collections with museums and the public.”¹⁰² But the evidence shows that this is not the behavioral norm among private collectors, and even if it were, the worry remains that there are no rules or norms preventing privately held art from disappearing from public view permanently or for a very long time into private homes, offshore bank vaults, and other inaccessible places.¹⁰³ Indeed, this worry prompted the Irish arts minister to give \$763,000 to the National Museum of Ireland and the National Library of Ireland to buy back “significant elements” of W. B. Yeats’s collection of culturally significant items, which Sotheby’s in London had auctioned off for approximately \$2.7 million.¹⁰⁴ The government only intervened “after high-profile Irish literary, artistic and academic figures decried the sale as a great loss to the country’s cultural heritage.”¹⁰⁵

While destruction of public art in private hands is always a worry, like what Professor Sax wrote about in *Playing Darts with a Rembrandt*, the concern that animates this Article is the loss of that art to public view.¹⁰⁶ But,

¹⁰¹ See Wilkes, *supra* note 48, at 210 n.249 (stating that “private collections will diversify the type of cultural property that is preserved . . . Private collecting injects private tastes and preferences into the public realm, thereby avoiding the specter of government censorship and ‘idea regulation,’” and citing as an example of this “the controversy surrounding the collection of Dr. Albert C. Barnes, who acquired an extensive collection of French Impressionist and post-Impressionist paintings at a time when the art community was highly critical of such work”).

¹⁰² Tam, *supra* note 72, at 898; see also Sax, *supra* note 40, at 1136 (“[T]he collector community worldwide today evinces an admirable willingness to provide benefactions in the form of gifts of art to museums.”).

¹⁰³ Cronin, *supra* note 38, at 22 (“However, many, if not most, of the works that have been turned over by museums and governments to these claimants have been subsequently sold to the highest bidder, and the works disappear from museum collections into the hands of private collectors. Most likely some then migrate to storage vaults in Switzerland or the Cayman Islands where they are seen by no one, like precious metals stored in darkness by owners anticipating appreciation over time.”); see also *id.* at 22 n.151 (“Discussing how claimants who successfully obtained Matisse’s *Odalisque* from the Seattle Art Museum immediately sold it to casino mogul Steve Wynn who then sold it to a company in the Grand Cayman Islands, whence it was ultimately shipped to Switzerland for an unknown buyer.” (citing MICHAEL BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS 224–25 (2003))); Sax, *supra* note 17, at 1142 (“Though it is customary to say that no one has a right to destroy those things comprising our heritage, many such items, especially works of art, are held and enjoyed as ordinary private goods without public access or regulation of any kind.”).

¹⁰⁴ Anna Codrea-Rado, *Irish Government Buys Yeats Items After Outcry*, N.Y. TIMES, Sept. 28, 2017, at C3; see also Cronin, *supra* note 38, at 23 (“Unwarranted ‘buy backs,’ however, siphon resources from, and thereby debilitate, public museums, particularly those with relatively modest financial reserves, whose primary assets are works of art often acquired by bequest.”).

¹⁰⁵ Codrea-Rado, *supra* note 104.

¹⁰⁶ Wilkes, *supra* note 48, at 187 (“In the case of art collectors, the problems associated with ownership of historically significant works most often involve (lack of) access, rather than destruction.”); see also *id.* (“The problem of the ‘pharocic owner’ was highlighted recently when Van Gogh’s ‘Portrait

why should someone who pays a substantial amount of money for a piece of art be unable to enjoy it in privacy?¹⁰⁷ After all, the traditional view of property is that “‘ownership of physical things’ is ‘private and unqualified.’”¹⁰⁸ Should it matter that the exercise of this prerogative causes a “loss to scholarship or art history?”¹⁰⁹ This Article argues that it does matter, and that owners of public art have some “obligation to the community or the public at large” that cabins their unfettered right to enjoy public art privately and requires that they make their collections open to the public.¹¹⁰ This Article finds the source of that obligation in the republican values of citizenship and education. Accordingly, the next Part turns to a discussion of those values and how hoarding public art undermines them.

III. REPUBLICAN VALUES AND HOW PRIVATELY HOARDING PUBLIC ART UNDERMINES THEM

Culture exists to be shared and to inhabit a culture is to contribute to it.¹¹¹

Making public art available for viewing by the public is consistent with republican values.¹¹² High among these values are the importance of community and education, both of which are essential to creating good citizens. Public art performs a communal educative function to the extent it

of Dr. Gachet” was unable to be located for display in a traveling exhibition. In the spring of 1990, Ryoei Saito, owner of the Daishowa Paper Manufacturing Company in Japan, paid \$82.5 million at auction for Van Gogh’s “Portrait of Dr. Gachet,” the highest price ever paid for a painting. Saito indicated that he would consider cremating the painting with his body to avoid taxes. After Saito died in 1996, both the Philadelphia Art Museum and the Metropolitan Museum of Art attempted to secure the painting for exhibitions they were organizing. In June of 1999, it was reported that the painting had dropped out of sight. The painting was last known to be stored in a warehouse in Tokyo.”).

¹⁰⁷ Cronin, *supra* note 38, at 24 (“Works of art are among the least fungible forms of moveable property. Artworks’ uniqueness generates greater emotional bonds between them and their individual or collective owners than those that exist between owners and fungible assets like cash or insurance policies.”).

¹⁰⁸ Wilkes, *supra* note 48, at 178–79 (quoting SAX, *supra* note 4, at 3).

¹⁰⁹ *Id.* at 178.

¹¹⁰ *Id.*

¹¹¹ See Lea Shaver, *The Right to Science and Culture*, 2010 WIS. L. REV. 121, 171 (2010) (“Participation, as well as consumption, is the essence of the right to science and culture. ‘Access’ therefore should be understood in terms of access to scientific and cultural materials, tools, and information; access to opportunities to create as well as to consume; and to share in the senses of both taking and giving.”).

¹¹² The republican concept of citizens acting out of and in furtherance of the public good is remarkably like a social norm despite the fact that republicanism requires government intervention in developing good citizens and norm development is independent from government intervention. Each depends on idea as an obligation of citizenship (pursuit of and conformance to the common good) and each is aspirational to the extent that they reflect a desired “community standard” and show people how “they *should* behave.” Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California’s Carpool Lanes*, 75 IND. L.J. 1231, 1234 n.11 (2000).

imparts important civic values and pride in local heritage and thus contributes to the formation of good citizens.

Citizens imbued with civic virtue who are motivated by a concern for the community and who have an inclination to promote the common good reflect republican values.¹¹³ Communities nourish good citizens and allow them to practice the art of good citizenship.¹¹⁴ Communities offer the “shared historical, cultural, political, and, ultimately, normative context,” in which political discussions can take place and decisions can be made affecting the community’s common good.¹¹⁵

In republican thought, the acquisition of information is critical to helping citizens act responsibly in their community.¹¹⁶ To the extent that public art creates and nourishes a sense of community, withholding it from public view diminishes the chance that people will acquire the information about their own communities and culture they need to become good citizens.¹¹⁷

“[E]ducation is vital to citizenship in a democratic republic.”¹¹⁸ Key elements of a republican education are the creation of moral character¹¹⁹ and what Suzanna Sherry calls “cultural literacy”—“knowledge of and attachment to” one’s own culture.¹²⁰

Cultivating such an attachment to one’s nation depends on both knowledge and assimilation: to feel that she is an *American*, a child must learn about America’s cultural and political heritage and accept it as her own. In other words, to produce American citizens we must cultivate an American

¹¹³ MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 117 (1996); see also Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 161 (1995) (“Republican virtue is not easy. . . . In fact, attaining ‘natural’ republican virtue takes work.”).

¹¹⁴ Hope M. Babcock, *A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 523 (2005).

¹¹⁵ Kathryn Abrams, Comment, *Law’s Republicanism*, 97 YALE L.J. 1591, 1593 (1988).

¹¹⁶ See Sherry, *supra* note 113, at 131 (“The United States Supreme Court has long recognized what none of us can doubt: education is vital to citizenship in a democratic republic.”); see also *id.* at 132 (“[O]ne can reconcile rights and republicanism only by suggesting that a republican citizen needs an education that will enable her to exercise both the rights and the responsibilities of citizenship.”).

¹¹⁷ See *id.* at 156–62 (discussing the role of public education in the formation of citizenship).

¹¹⁸ *Id.* at 131.

¹¹⁹ See *id.* at 177 (“[T]hat moral character includes the inclination to act in accordance with cultural norms is, of course, intimately related to my discussion of cultural literacy”); see also *id.* at 176 (“[T]he inclination to act responsibly and in accord with basic cultural norms is part of the moral character conducive to republican citizenship.”).

¹²⁰ *Id.* at 157.

“civic identity.” A shared cultural identity makes possible “a shared future” and “forge[s] a nation.”¹²¹

Common cultural identity is “crucial to republican citizenship.”¹²² Public art contributes to cultural identity and can be a source of cultural norms. It offers citizens a form of literacy in their own culture.

The antithesis of republicanism is individualism, by which people subordinate the good of the community to their own individual goals¹²³ and live lives isolated from each other. To the extent that people feed their own appetites, they ignore the needs of the greater community.¹²⁴ To Professor Anthony Kronman, many Americans are individuals who, through “narcotized consumerism,” have drawn “the boundaries of the world to coincide with those of our bodily needs,” leaving “each of us wrapped in a separate cocoon, rocking back and forth between appetite and satisfaction, uninterested in connecting to anything beyond the magic circle of the self.”¹²⁵ Professor Holly Doremus worries that “[l]egitimizing actions based entirely on self-interest is not likely ever to encourage the development of an ethic of self-restraint.”¹²⁶

Individuals who hoard public art are driven by their personal ambition and interests, and have isolated themselves and their art from the greater community. They are clearly not acting in the interest of achieving the republican goal of a broader-based public good. Given the monetary lengths these individuals are willing to go to acquire art, they are equally clearly not practicing self-restraint. By depriving the public of an opportunity to educate itself through exposure to public art, these individuals are also impeding the creation of civic-minded citizens who will contribute to their

¹²¹ *Id.* at 162–63.

¹²² *Id.* at 163; *see also id.* at 168 (“In the specific context of education, the National Commission on Excellence in Education concluded that ‘[a] high level of shared education is essential to a free, democratic society and to the fostering of a common culture, especially in a country that prides itself on pluralism and individual freedom.’” (citation omitted)).

¹²³ *See* Anthony Kronman, *Civility*, 26 CUMB. L. REV. 727, 730 (1996) (discussing the difference between being motivated by individual interests and communal interests).

¹²⁴ *See* Sherry, *supra* note 113, at 161–62 (“[John] Adams suggested that ‘[m]en must be ready, they must pride themselves, and be happy to sacrifice their private pleasures, passions, and interests, nay, their private friendships and dearest connections, when they stand in competition with the rights of society.’”).

¹²⁵ Kronman, *supra* note 123, at 749.

¹²⁶ Holly Doremus, *Biodiversity and the Challenge of Saving the Ordinary*, 38 IDAHO L. REV. 325, 351 (2002); *see also* Sherry, *supra* note 113, at 177 (“‘[T]o have a good character means at least two things: empathy and self-control. Empathy refers to a willingness to take importantly into account the rights, needs, and feelings of others. Self-control refers to a willingness to take importantly into account the more distant consequences of present actions; to be in short somewhat more future oriented rather than wholly present oriented.’” (quoting James Q. Wilson)).

communities.¹²⁷ Uninformed and uneducated individuals cannot actively engage in the life of their communities and are thus denied an opportunity to develop good moral character. “[M]oral character includes the inclination to act in accordance with cultural norms”¹²⁸—norms, which this Article contends, can be found in public art. According to Suzanna Sherry, the best way to teach moral character is by example,¹²⁹ which is what public art can do.

This Article has argued that there is “an identifiable public or community-centered interest in certain objects,”¹³⁰ particularly art of cultural importance. Professor Price echoes that sentiment and explains that the constraint on ownership of a masterpiece, which prevents it from being defaced, is not inherent in the art itself, but “might be found in the relationship of the work to the community. The object is part of the body of society’s cultural wealth.”¹³¹ He contends further that “it might . . . be possible to say that there is a public right to share reasonably in the aesthetic value of a work of art,” and “that the public should possess ‘a carefully controlled power to ensure that works are not totally or arbitrarily withheld from public view.’”¹³² Owners of public art who refuse to share it with the public, therefore, are inappropriately claiming an exclusive right in art that often is of importance to the greater community.¹³³ He even infers that there could be a state requirement that art produced under a state subsidy should

¹²⁷ Kronman, *supra* note 123 (“Judgments of the second sort imply a willingness to subordinate or sacrifice our private welfare to that of the community as a whole, and only when we form our judgments on this basis are we practicing the art of civil government, as classical republicanism conceived it.”).

¹²⁸ Sherry, *supra* note 113, at 177.

¹²⁹ *Id.* at 178.

¹³⁰ Wilkes, *supra* note 48, at 179; *see also* John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1203–04 (1989) (arguing that cultural objects qualifying as ‘property for grouphood’ should be recognized as a new classification of property rights enforced through a regime of strict inalienability that is “an absolute ban on transferability”); Sax, *supra* note 40, at 1140 (“[S]ome things imaginatively belong to the public as part of a national or cultural heritage, even though they legally belong to a private individual.”).

¹³¹ *See* Price, *supra* note 11, at 1188; *see also id.* (“[I]t might in turn be possible to say that there is a public right to share reasonably in the aesthetic value of a work of art.”).

¹³² Wilkes, *supra* note 48, at 181.

¹³³ *See* Price, *supra* note 11, at 1188 (arguing that public art’s communal importance deprives its owner, who is only a temporary custodian of it, of any right to harm or destroy it or withhold it from public view). In support of his comments about public access, Professor Price explains that it makes no sense to constrain the export of publicly important art, as some propose, but then withhold it from public view, because the restriction on exporting public works of art is related to the right to exhibit it. Both constraining the view of public art and its exportation to another country relate to protecting a country’s cultural patrimony. To Professor Price “[a] right to access for exhibition seems much more responsive to the people’s needs” than a ban on exporting public art, as exists in Great Britain. *See* Sax, *supra* note 12, at 1551 (“The government of England does provide for the preservation of medieval structures, restrict the exportation of famous paintings, and preserve forests.”).

be available to the public.”¹³⁴ Much of what Professor Price argues finds support in this Article and in republican thinking.

Others who advocate for public access to important works of art articulate reasons that also sound in republican thought. Professor Judy Gechman notes that “[i]mplicit in the high value that society places on preservation of art and culture is the notion that the public should have access to its heritage.”¹³⁵ Professor Nicole Wilkes says that there is a distinct public interest in supporting both the preservation of cultural property and access to it because it is not only “an aspect of our present culture and our history; it helps tell us who we are and where we came from.”¹³⁶ She calls the withholding of public art a “crime of omission.”¹³⁷

Despite these arguments in favor of opening important works of art to public view because of their importance to making “good citizens,” wealthy owners still keep these works to themselves. Professor Sax bemoans that there is “no one in America today who . . . would be credible and effective in saying to reluctant owners that it is their ‘duty, at certain risk and inconvenience, to send their choicest treasures’ to be seen by the public.”¹³⁸ He laments that “[a] sense of responsibility to the public has been replaced by a sort of philanthropic hauteur”¹³⁹ or selfishness—not civic pride—which is the antithesis of republican behavior.

This Part of the Article has identified two of the key tenets of republican thought—(1) a love of community, and (2) the importance of education—and how they combine to make a good citizen with good moral character. It has shown how hoarding art, which is a highly individualistic venture, undermines those values. Part IV of this Article explores various doctrines and statutory tools that might open privately held important works of art to public view and fulfill the republican values of community and education. For, as Professor Sax writes, “to withhold for several generations

¹³⁴ Price, *supra* note 11, at 1187. Professor Price adds that mandating that privately held art be regularly exhibited at museums would free museum staff from focusing on acquiring new works and would lessen financial pressures on museums to do that. *Id.* at 1189–90. *But see* Wilkes, *supra* note 48, at 210 (“Before mandating public access and preservation, the government should therefore establish an incentive structure to encourage collectors to act in a manner that comports with (and even advances) the public interest in cultural property.”).

¹³⁵ Gechman, *supra* note 21, at 596.

¹³⁶ Wilkes, *supra* note 48, at 188.

¹³⁷ *See id.* at 178 (“A related problem exists with respect to ‘crimes of omission’ committed by owners of historically significant objects who choose to withhold their treasures from the general public.”).

¹³⁸ *See* Sax, *supra* note 40, at 1138; *see also id.* (“It is not simply the absence of a royal personage and the social hierarchy a monarchy embodies that prevents such a statement. Rather, in modern times, it is rare to hear respected writers or connoisseurs charge those who keep their treasures secreted away with being churlish or to hear such critics assert that hoarders should, and will, be ‘denounced by opinion.’”).

¹³⁹ *Id.* at 1139.

something that is the gift of another's genius, and that the entire world treasures, is a matter that calls out for redress."¹⁴⁰

IV. WHY THE DOCTRINE OF MORAL RIGHTS AND LAWS PROTECTING THE RIGHTS OF ARTISTS DO NOT ENSURE PUBLIC ACCESS TO PUBLIC ART

A survey of European moral rights and its philosophical underpinnings make it clear that the United States' moral rights regime is inadequate. Congressional stubbornness in implementing a [sic] meaningful moral rights legislation has left a plethora of invaluable works without any protection. The result is that those works' owners are free to do whatever they wish with those works; whether it be misattributing those works or even destroying them.¹⁴¹

Before turning to the common-law doctrines of public dedication and public trust, there are two other possible lines of attack for securing public rights in public art. The first of these is the concept of moral rights, *droit moral*, which protects the integrity of a piece of art and with it the artist's reputation. The doctrine is more common in Europe than the United States, even though the concept has been adopted in some state legislation. The second is an enforcement action under the Visual Artists Rights Act, a federal law that protects the integrity of an artist's work product. However, because each approach focuses on the artist and the artist's rights in his or her creation, the public only benefits indirectly. Nonetheless, this Part of the Article examines these two approaches because, although flawed, each restricts the ownership rights of those who possess art.

A. *An Artist's Moral Rights*

Professor Merryman explains that the moral right of an artist is essentially a "composite right," one component of which is "the right of integrity (of the work of art), also sometimes called the right to respect of the work."¹⁴² The idea behind the concept is that a work of art expresses an

¹⁴⁰ *Id.* at 1140.

¹⁴¹ Tipton, *supra* note 70, at 302.

¹⁴² Merryman, *supra* note 67, at 1027; *see also* Tipton, *supra* note 70, at 285 ("[M]oral rights emerged in European law to recognize and shield art, as it represented the 'embodi[ment of] the creative personality of the author,' and the 'extension of the author's personhood.' Moral rights are broadly grouped into several categories. The right of attribution protects the artist's right to have her name correctly associated with a work, to correct misattribution, or conversely, to have her work left anonymous. The right of integrity protects the work itself, allowing the artist to control any subsequent modification or mutilation. The right of disclosure allows the artist alone to deem a work finished. Finally, the right of withdrawal allows an artist to withdraw a work from public display at his choosing.").

artist's personality.¹⁴³ Any unauthorized change to that work, including damaging or misrepresenting it, affects the artist's "identity, personality, and honor, and thus impairs a legally protected personality interest."¹⁴⁴ Perversely, the complete destruction or mutilation of a piece of art that obscures the artist's identity completely does not violate the artist's moral rights, as "there is no danger that such destruction will misrepresent the artist or invade his privacy by subjecting him to excessive criticism or ridicule."¹⁴⁵

Moral rights prevent the owner of a piece of art from claiming a right to modify it to make the art more to his or her liking. They thus restrict that owner's rights in that piece of art, since the rights in the art belong to the artist.¹⁴⁶ However, moral rights do little to advance the interests of the public in that art, including seeing that art.¹⁴⁷ And while an artist's moral rights are "perpetual,"¹⁴⁸ they protect only the artist's personality and have nothing to do with "patrimonial or property rights."¹⁴⁹ Yet, the fact that moral rights restrict what an owner can do with his or her "private" property lest it

¹⁴³ Elsen, *supra* note 1, at 955 ("[T]he modern artist's work, grounded in the self, becomes a tangible manifestation of his personality.").

¹⁴⁴ Merryman, *supra* note 67, at 1027; *see also id.* at 1041 ("Art is an aspect of our present culture and our history; it helps tell us who we are and where we came from. To revise, censor, or improve the work of art is to falsify a piece of the culture. We are interested in protecting the work of art for public reasons, and the moral right of the artist is in part a method of providing for private enforcement of this public interest.").

¹⁴⁵ Note, *Protecting the Public Interest in Art*, 91 YALE L. J. 121, 126 (1981). The other moral rights in a piece of art—the "right of paternity" that the work be associated with the artist's name, the right to withhold the work if the artist does not think that its finished, which "gives the artist an absolute right to decide when (and whether) a work of art is complete and when (and whether) to show it to the public," and the "right to repent or retake" a work of art from its owner—are less relevant for purposes of this article. Merryman, *supra* note 67, at 1027–28.

¹⁴⁶ *Id.* at 1047.

¹⁴⁷ *See* Smith, *supra* note 2, at 407 ("Moral rights are rights that belong to the artist, so they do not protect the public's interest in the art. They act more as an antidefamation law to help to protect the artist's reputation."); *see also* *Protecting the Public Interest in Art*, *supra* note 145, at 125 ("They [moral rights] focus primarily on protecting the artist's rights in his work, rather than on protecting the much broader public interest in the artwork itself.").

¹⁴⁸ Merryman, *supra* note 67, at 1042. Merryman calls this statement a "truism." *Id.*; *see also* Tipton, *supra* note 70, at 286 ("Like other moral rights, the original concept of the right of attribution did not evaporate with the transfer of the physical work to a buyer of a piece but remained with the artist to enforce against any subsequent owners. As such, the rights are considered 'perpetual . . . lasting . . . [and] theoretically forever.'").

¹⁴⁹ Merryman, *supra* note 67, at 1025 (contrasting copyright, which protects an artist's economic interest in their work, with "[t]he moral right, [which] is one of a small group of rights intended to recognize and protect the individual's personality. Rights of personality include the rights to one's identity, to a name, to one's reputation, one's occupation or profession, to the integrity of one's person, and to privacy"); *see also* Elsen, *supra* note 1, at 955 ("[T]he moral right of the artist, which in civil law doctrine is classified as a right of personality, as distinguished from patrimonial or property rights.").

interferes with the artist's rights¹⁵⁰ indicates some weakness of private property rights in important works of art.¹⁵¹

Although generally considered a common-law right, several European civil law countries, like France, have incorporated the concept of an artist's moral rights into their codes, and the concept is consistently included in international conventions dealing with copyright of the rights of artists.¹⁵² European countries, which have codified the moral rights of artists, have extended those rights from the artist to his or her heirs and, if there be no heirs, to the community. In this way, codified moral rights become powerful cultural-preservation laws by expanding on who can invoke an artist's moral rights—essentially providing for private enforcement of the public interest in those rights.¹⁵³ In the United States, there is no doctrine that protects the moral rights of an artist, and our laws, primarily copyright, do not distinguish “rights of personality from patrimonial rights.”¹⁵⁴ Federal law provides no remedy for the artists whose work has been destroyed or misrepresented in some way, and accordingly, there is no protection of the public interest in art preservation.¹⁵⁵

While a community might try to enforce an artist's moral rights under the common law because of the public interest in art preservation, there is

¹⁵⁰ See Tipton, *supra* note 70, at 295 (“Thus, enforcing moral rights may implicate the property rights of the owner of such a work, but only to disallow any enjoyment of that property that would harm another's rights.”).

¹⁵¹ See *id.* (“The archetypal ‘orthodoxy’ of *droits moraux* provides that moral rights are ‘perpetual, inalienable, non-seizable, and universal.’ When the author dies his rights pass to his heirs and to the community, and what once was an intensely personal right becomes one of the community vis-à-vis art preservation. It is this fundamentally ‘ephemeral’ nature of moral rights that brings them into conflict with concepts of property law, which rely on the owners’ ability to do what they wish with the property they validly own.”).

¹⁵² See Merryman, *supra* note 67, at 1026 (explaining that the moral right was judicially created and is now supported by statute); see also Tipton, *supra* note 70, at 288 (discussing the Berne Convention for the Protection of Literary and Artistic Works, art.6*bis*(1), July 14, 1967, 25 U.S.T. 1341, 828 U.N.T.S.221, which codifies the moral rights of attribution and integrity, and provides that: “Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.” (citations omitted)).

¹⁵³ Tipton, *supra* note 70, at 296.

¹⁵⁴ See Merryman, *supra* note 67, at 1042 (explaining why the laws in the United States are considered undeveloped); see also *id.* at 1039 (“At the bottom of it all is the significant fact that where the artist claims a violation of a personality interest, rather than a patrimonial interest, the civil law responds and our law does not. That is the real difference.”); *Protecting the Public Interest in Art*, *supra* note 145, at 122–23 (“In America, however, attempts by artists to prevent the destruction or mutilation of their creations through the *droit moral* have failed. In some cases, the foreign terminology and the absence of domestic precedent have led courts to reject the doctrine; in others, courts have disapproved of the basic concept of allowing the artist perpetual control over his artwork.”).

¹⁵⁵ Merryman, *supra* note 67, at 1042.

no statutory basis for such an action,¹⁵⁶ except in California. California has a law protecting the artist's moral rights, which explicitly protects the "public interest in preserving the integrity of cultural and artistic creations."¹⁵⁷ California's recognition of the public's interest in and benefit from the accurate attribution of art to its creator and in the prevention of damage to a work of art after the death of its creator provides a basis for the law giving the public a right to enforce an artist's rights.¹⁵⁸ California recognizes that it is the public's interest in preserving the integrity of "cultural and artistic creations" that empowers the public to act.¹⁵⁹ California law allows an organization that learns of a potential violation of an artist's moral rights, even of a deceased artist's moral rights, to sue to enjoin the defendant's behavior.¹⁶⁰

The United States' "moral rights regime" is inferior to its European counterparts. "Only the moral right of civil law countries guarantees to the artist that the work will remain as she last saw it and not be altered or transformed by others."¹⁶¹ Except for California, there is no publicly enforceable moral-rights regime in the United States, as those rights, to the extent they exist, can only be enforced by the artist.¹⁶² In the United States, invaluable works of art are left without adequate protection from destruction, alteration, and faulty attribution—often done by the private owners of that art.¹⁶³ Even in California, which recognizes the public's strong interest in important works of art, these rights do not include a public right of access to see what may have been preserved. If the public has no right to see the

¹⁵⁶ But see Tipton, *supra* note 70, at 297 ("Creating perpetual moral rights for artists implicitly requires granting standing to others to enforce those rights."); *id.* ("Indeed, community standing is almost implicit in the preservationist goal of moral rights: e.g., when an author dies, the personal right turns into the public's interest of art preservation.").

¹⁵⁷ *Id.* at 298.

¹⁵⁸ *Id.*

¹⁵⁹ See *id.* ("The public's interest is, much like the artist's interest, one of moral value, not economic value."). But see Francioni, *supra* note 18, at 721–22 ("Cultural property may be seen as moveable artifacts susceptible to economic evaluation, and for this reason subject to exchange in domestic and international commerce; but it may also be seen as objects endowed with intrinsic value as expressions of human creativity and as part of a unique or very special tradition of human skills and craftwork, which today we call 'intangible cultural heritage.' Masterpieces of painting, sculpture, mosaics, inlaid wood, musical instruments, and oral heritage displayed today in museums, exhibitions, and shops owe their existence to social structures and traditions that have nurtured and maintained the human knowledge and skills necessary to produce them.").

¹⁶⁰ Tipton, *supra* note 70, at 298.

¹⁶¹ Elsen, *supra* note 1, at 954.

¹⁶² See Tipton, *supra* note 70, at 294 ("Despite the stated goals of many 'preservation statutes,' which claim that the recognition of moral rights benefits the entire community, only the artist is allowed to vindicate those moral rights. Consequently, although the public shares and benefits from the recognition of moral rights, they are completely powerless when the rights of dead artists are infringed. Indeed, this standing limitation has the de facto result of limiting moral rights to the life of the person with standing to enforce them.").

¹⁶³ *Id.* at 302.

protected art, the public benefit under any moral-rights regime, including California's, is only an abstract one.

B. *Visual Artists Rights Act*

Congress attempted to codify artists' moral rights in their visual creations in the Visual Artists Rights Act ("VARA"). The presumption behind the legislation was that "an author injects her spirit into art she creates and, therefore, her personality, integrity, and reputation in the art should be protected."¹⁶⁴ However, not only is VARA limited in its scope and effectiveness, but, like the moral-rights-of-artists doctrine, VARA also does nothing to advance the cause of opening privately held important art to public view.

The intent of VARA is to protect "the right of authorship and the right of integrity" of certain visual artists and their creations.¹⁶⁵ VARA specifically protects two moral rights: (1) "the right of attribution" and (2) "the right of integrity."¹⁶⁶ VARA additionally provides a private right of action against anyone who violates its terms,¹⁶⁷ and thus is an improvement over the common-law doctrine, which does not allow this.

However, VARA's scope is limited to art of "recognized stature,"¹⁶⁸ and only protects works of visual art like paintings, drawings, or sculptures.¹⁶⁹ VARA has no retroactive effect, so it does not protect any visual work of art by an artist who predeceased VARA.¹⁷⁰ A dead artist is seen as having no moral rights, leaving the owner of that art free to do with it as he or she may like, even destroying or mutilating it.¹⁷¹ Additionally, VARA does not protect the artist from anything short of the complete destruction of their work or from other harms, like wrongful attribution or premature public display, or authorize the artist to take his or her work back from an owner, which the common-law doctrine does. Like the common-law doctrine, VARA does not address the problem of owners of visual art withholding it from public view.¹⁷²

¹⁶⁴ Smith, *supra* note 2, at 405; *see also* Wilkes, *supra* note 48, at 187–88 ("The current statutory regime dealing with moral rights in the United States protects the artist's interest as an individual. Moral rights are only protected for the life of the artist The public is thereby cut out of the rights calculation inherent in the American conception of the *droit moral*.").

¹⁶⁵ Tipton, *supra* note 70, at 292.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *See* Wilkes, *supra* note 48, at 192 n.125 ("VARA § 106A (a)(3)(B) seeks to 'prevent any destruction of a work of recognized stature.'").

¹⁶⁹ Tipton, *supra* note 70, at 293.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 293–94.

¹⁷² A recent trial in Long Island City, Queens, New York promises to test the protective effect of VARA with respect to street art. The case involves a lawsuit filed by several graffiti artists against a real estate developer who destroyed a building, which had been the site of graffiti art for over twenty years.

Although the moral-rights concept and specific laws like VARA or California's law restrict the rights of the owner of public art in some way, neither addresses the problem of public access to important works of art. Part V of the Article looks at two common-law property doctrines: (1) the doctrine of public dedication and (2) the doctrine of public trust, to see if they might do better. But before it does, Part V discusses the nature of property and why real-property concepts might be relevant to personal property like art.

V. HOW PROPERTY DOCTRINES, ESPECIALLY THE PUBLIC TRUST DOCTRINE, MIGHT SECURE PUBLIC ACCESS TO PUBLIC ART

Mandler offers the provocative notion of a conception in the public mind of these places [heritage places like monuments] as “imaginatively public,” though not public property in any legal sense.¹⁷³

Before launching into a discussion of how property-law doctrines might be applied to affirm the public's right to view great works of art, a case must be made that art is a form of property, like land, to which these doctrines might apply. Accordingly, this Part opens by identifying key features of what is commonly considered property and showing their relevance to public art before it advances to a discussion of two common-law property doctrines.

A. *The Nature of Property and the Relevance of Property Doctrines to Public Art*

For something to be classified as property, it must be “tangible, stable, and durable.”¹⁷⁴ Art has all these characteristics,¹⁷⁵ and, like land, art can be

At issue in the case is whether the “ephemeral” work the artists did on the building constitutes “art of recognized stature,” within the meaning of VARA, entitling them to financial damages for its destruction. The lawyer for the developer planned to argue, among other things, that VARA protects art, not buildings, and that the artists themselves over the years had destroyed more graffiti than the developer did by whitewashing over their work and then destroying the building. Commenting on the novelty of the matter, the judge noted that he and the jury would be “working with a clean slate” while they explored the “broad questions of aesthetics, property rights, and the relationship between the arts and gentrification” raised in the case and decide whose property had greater value—the artists’ or the developer’s. Alan Feuer, *At Graffiti Trial, Real Estate Does Battle with Street Art*, N.Y. TIMES, Oct. 18, 2017, at A22.

¹⁷³ Sax, *supra* note 40, at 1124–25.

¹⁷⁴ See Alexander, *supra* note 84, at 461 (“Notably, property law’s interaction with art depends upon art’s assumption of its own thing-ness, for property law itself traditionally has depended upon certain assumptions regarding the nature of property—what can be property. It has assumed that art is a tangible, stable, and durable object.”).

¹⁷⁵ But see *id.* at 463 (quoting the artist, Felix González-Torres answering the question whether a particular work of art of his is a “thing” by him saying: “This piece requires the participation of the public in order to exist. It’s a non-static sculpture, it’s always changing, it can disappear, yet at the same time,

damaged, even destroyed. Possession is a key concept in property law¹⁷⁶—“[t]he common law gives preference to those who convince the world that they have caught the fish and hold it fast.”¹⁷⁷ Professor Rose calls this a “quintessentially individualistic act: the claim that one has, by ‘possession,’ separated for oneself property from the great commons of unowned things.”¹⁷⁸

Although property owners are generally free to do with their property as they wish,¹⁷⁹ “property is not solely a matter of unrestricted rights.”¹⁸⁰ Possessing property “is also a matter of responsibilities or obligations that the owner owes to other members of the various communities to which he or she belongs.”¹⁸¹ A myriad of federal, state, and even local requirements restrict property rights, including the property owner’s right to prevent the public from entering or using his or her property.¹⁸² The extent to which the rights of an owner of public art include the unrestricted right to exclude the public from viewing that art is central to this Article.

Moreover, there are affinities between cultural objects, such as public art, and natural resources, such as landscapes. Conservation is important to each, and much of their appeal lies in their “expressive values.”¹⁸³ Additionally, when a public good, like public art or public land, is privatized, individuals no longer receive a benefit from that public good, and overall

it’s indestructible because it can always be reprinted. It’s an attempt at creating a more democratic artwork. A public piece.”).

¹⁷⁶ Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI L. REV. 73, 74 (1985) (“For the common law, possession or ‘occupancy’ is the origin of property.”); see also John A. Humbach, *Property as Prophecy: Legal Realism and the Indeterminacy of Ownership*, 49 CASE W. RES. J. INT’L L. 211, 211 (2017) (“Property is a fundamental and pervasive social practice. In everyday interactions, people recognize, respect, and reaffirm ‘ownership’ in a myriad of different ways.”).

¹⁷⁷ Rose, *supra* note 176, at 88.

¹⁷⁸ *Id.*; but see Sax, *supra* note 17, at 1157 n.76 (“The legal notion of things belonging to no one, or belonging to everyone, or sacred and unavailable for purchase and sale, appears in Roman law.”).

¹⁷⁹ See Humbach, *supra* note 176, at 211 (“There are many similarities between the law of property and the social practice. In both, for example, owners are viewed as having a variety of special advantages or benefits, including, most prominently, the right to have or possess the things they own; the right to exclude others from them; and, generally, the right to deal with them more or less as they please.”).

¹⁸⁰ See Alexander, *supra* note 84, at 462 (“‘Legal Realists’ attacked the then-prevailing conception of property as thing. They set out to show that property is nothing more than a bundle of rights and other legal relations existing between persons with respect to interests. This bundle of rights conception of property quickly caught on and is now the prevailing view in the United States (although not elsewhere in the world). Lately, a group of legal scholars has launched a revanchist critique of this conception, arguing that property is the stuff of things.”).

¹⁸¹ *Id.* at 466. But see *id.* (“The sense that property exists to create propriety, or the common good, is simply lacking.”).

¹⁸² *Id.* at 467.

¹⁸³ Merryman, *supra* note 19, at 341–42. But see *id.* at 342 (“The differences, however, are substantial . . . the cultural object is an approach to the study of humanity, of ourselves; the environment is a separate part of reality, something outside of ourselves.”).

social welfare is reduced.¹⁸⁴ Art, like beaches or parks, must be physically available to be enjoyed.¹⁸⁵ And while art can be copied, unlike land or other natural resources, it cannot be copied without its commercial value decreasing.¹⁸⁶

Although not necessarily tangible, stable, or durable, information and knowledge are forms of property, as exemplified by the existence of copyright law.¹⁸⁷ Modern legal and economic literature recognizes information as a public good.¹⁸⁸ Unlike housing or food, which can only be enjoyed by a finite number of people, information is also nonrivalrous, because its value is not decreased by increasing the number of people who have access to it.¹⁸⁹ Indeed, its value may be enhanced by increased access.¹⁹⁰ Information is also “non-excludable”; no one should be excluded from sharing something that is a public good, like information or knowledge.¹⁹¹ Excluding the public from knowledge reduces overall public welfare, among other harms.¹⁹² Hence, privatization of information “comes at a cost.”¹⁹³ Since public art conveys information or knowledge to the general public, it conveys a public good that no one should be excluded from enjoying, especially considering that the more people have access to it, the more the art’s value will increase.

¹⁸⁴ See Shaver, *supra* note 111, at 158 (“This privatization, however, comes at a cost. At least three new inefficiencies are introduced. First, some individuals who could have benefited from the resource will be priced out of access, reducing overall social welfare.”).

¹⁸⁵ See *id.* at 170–71 (“The requisite access is only satisfied when the good is physically accessible to all (geographic availability and accommodations of disability), affordable, of acceptable quality, culturally appropriate, and adaptable to the particular needs of the community and individual.”).

¹⁸⁶ See, e.g., Tipton, *supra* note 70, at 300 (demonstrating that art markets generally assign lower value to art known to be copied). This is one reason that the disparities between the rich and the poor with respect to physical goods, like land and art, can be great.

¹⁸⁷ Copyright law codifies those property rights. Merryman, *supra* note 68, at 1025 (“Copyright, for example, which is available to artists in civil law countries as well as in the United States and other common law countries, is a patrimonial or property right which protects the artist’s pecuniary interest in the work of art.”).

¹⁸⁸ Shaver, *supra* note 111, at 154–55 (“[T]he right to science and culture should be understood as a call for knowledge to be treated as a shared public resource, with international collaboration and universal access as touchstone commitments.”); see also *id.* at 156 (“Article 27 [of the Universal Declaration] of Human Rights] conceives of science, culture, and the arts—in short, the myriad expressions of human knowledge—as global public goods.”).

¹⁸⁹ See *id.* at 157–58 (“The economic term ‘nonrivalrous consumption’ eventually emerged to describe these goods. Rival goods, such as housing or food, can be enjoyed only by a limited number of persons without being used up. In contrast, the availability of nonrivalrous public goods is not diminished as greater numbers of people enjoy access to them.”).

¹⁹⁰ See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 776 (1986) (“[L]ike the dancers on the green, the more members of the community that are engaged in commerce, the better—not only for the sake of greater productivity, but also for the sake of socialization and the inculcation of habits of considering others.”).

¹⁹¹ Shaver, *supra* note 111, at 158.

¹⁹² *Id.*

¹⁹³ *Id.*

Many of the themes in art, such as “question[ing] the public/private distinction, the democratizing of the personal, and the importance of community,” are found in property law and its related legal scholarship.¹⁹⁴ The “blurring of lines between public and private and what public means” is something that property law and art have in common.¹⁹⁵ This is not to say that the distinctions between real and personal property should be abolished—they should not.¹⁹⁶ This Article merely proposes that there are sufficient similarities between public art and land to warrant the application of property-law doctrines to both, and suggests that “the law of property must be appropriately modified in order to deal properly with the special considerations that are raised by works of art.”¹⁹⁷

The Part now turns to two common-law property doctrines, public dedication and public trust, to examine the extent to which they might be applied to address the problem of excluding the public from viewing important works of art. Part VI discusses what modifications might be made to the latter doctrine to make its application more likely.

B. *Public Dedication*

“The common law doctrine of public dedication enables the public to acquire rights in property” that promotes the public’s welfare, even though the public has no other legal interest in that property.¹⁹⁸ The doctrine is based on combined principles of “gift and contract law”;¹⁹⁹ its basic components are offer and acceptance.²⁰⁰ An invitation by a landowner to the public to use her property qualifies as an offer; even acquiescence in public use of private property over a sufficient period of time can constitute an offer for purposes of applying the public-dedication doctrine.²⁰¹

¹⁹⁴ Alexander, *supra* note 84, at 462.

¹⁹⁵ *Id.* at 467.

¹⁹⁶ See *Protecting the Public Interest in Art*, *supra* note 145, at 131 (“Real property doctrines may be applied to personalty in order to further public policy as long as disorder or injustice does not result. Applying the law of public dedication to certain types of personal property would not result in disorder or injustice and would be in accord with the modern trend to diminish the impact of arbitrary legal distinctions between real and personal property.”).

¹⁹⁷ See Merryman, *supra* note 67, at 1037 (“The basic position in the United States can be summarized in this form: A work of art is like any other object of property for legal purposes, except as modified by the copyright law, and the copyright law protects only property rights. The position in France and other civil law countries is, on the contrary, that a work of art is different for some legal purposes from other objects of property, so that the law of property must be appropriately modified in order to deal properly with the special considerations that are raised by works of art.”).

¹⁹⁸ Wilkes, *supra* note 48, at 196.

¹⁹⁹ *Id.* at 196.

²⁰⁰ *Id.*

²⁰¹ See *Protecting the Public Interest in Art*, *supra* note 145, at 127 (“For example, an express invitation to the public to use property constitutes an offer; so can a grant of property to a public body. Even mere acquiescence by the owner in public use of property for a period of time can constitute an

“If an owner offers a use of her property to the public, and if the public accepts that offer, the property will be considered dedicated” to that use,²⁰² even though no payment or any other form of consideration has been made.²⁰³ Once property has been dedicated to a public use, its owner, and even a future owner, cannot overcome or obstruct the public’s use of that property for its dedicated purposes.²⁰⁴

The owner of dedicated property holds that property in trust for the public, even though there are no formal trust instruments.²⁰⁵ This makes the owner of dedicated property comparable to a fiduciary of the public with respect to any dedicated use of the property.²⁰⁶ The owner of dedicated property cannot convert his or her property to any use that is inconsistent with the public’s use of that property.²⁰⁷ These principles apply regardless of whether the owner is a private person or a public entity, like a municipality or a state agency.²⁰⁸

Public dedication might be a useful concept to apply to public art as a way of declaring a continuing protected public interest in that art. The doctrine offers a “well-established method of asserting public rights in private property” and, when applied to art, would add public-welfare considerations to any dispute between the rights of an individual artist and the rights of the owner of that artist’s work.²⁰⁹ Although the doctrine is commonly applied to land to protect the public’s recreational interest in that property, it might be expanded to account for the public’s cultural interest in art objects.²¹⁰ Courts have been generous with their interpretation of the offer

offer. In short, when a particular piece of property serves an important public use, courts are eager to construe circumstances to infer the existence of the required offer and acceptance.”).

²⁰² *Id.* at 126; see also Wilkes, *supra* note 48, at 196 (“The dedication process operates in the following manner: ‘If an owner offers a use of his property to the public, and if the public accepts that offer, the property will be considered dedicated. A public interest in it will be established although no consideration has passed.’”).

²⁰³ Wilkes, *supra* note 48, at 196.

²⁰⁴ *Protecting the Public Interest in Art*, *supra* note 145, at 127; see also Wilkes, *supra* note 48, at 196–97 (2012) (“If public dedication can be found, ‘no owner of the property—present or future—will be permitted to defeat or interfere with the public right to use it for its dedicated purposes.’”).

²⁰⁵ *Protecting the Public Interest in Art*, *supra* note 145, at 127–28; see also Wilkes, *supra* note 48, at 197 (“The property is deemed to be held in trust for the public even though an actual trust instrument was never filed. The owner is considered a fiduciary of the public as regards the dedicated use of the property, and therefore, she may not divert the property to a use that is inconsistent with that of the public.”).

²⁰⁶ Wilkes, *supra* note 48, at 197.

²⁰⁷ *Protecting the Public Interest in Art*, *supra* note 145, at 128.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 126.

²¹⁰ Wilkes, *supra* note 48 at 197; see also Smith, *supra* note 2, at 398 (“Furthermore, even though public dedication has never been applied to works of art or personal property, ‘American courts and legislatures are not constrained to obey historically based distinctions between real and personal property when such distinctions are not useful or relevant,’ and ‘[t]he extension of public dedication doctrine to certain important works of art would continue trends in both public dedication and real property law.’ A

and acceptance elements of public dedication “to accommodate situations where a particular piece of property serves an important public use.”²¹¹ Therefore, it is not beyond the realm of possibility that the willingness of courts to expand public-dedication law in the real property context, in response to “modern public interests,” might encourage them to develop “a theory of public rights in important works of art.”²¹²

For example, public dedication could easily be applied to public museum-curated collections. “Art museums collect and display artwork for purposes of scholarship and cultural education.”²¹³ An individual who “donates, sells, or loans” a piece of art he or she owns to a museum “impliedly offers his property to the public for educational uses.”²¹⁴ In the terminology of public-dedication law, the donor is “‘throwing open’ his property to the public for its evident public use,” creating an “inference . . . that [he or she] intends to dedicate the property for those cultural and educational purposes.”²¹⁵ As public museums are considered cultural representatives of the public, a museum’s acquisition of art, in effect accepting the offer to dedicate that art permanently to the public, establishes a permanent public interest in that art.²¹⁶ However, for the doctrine to attach to a piece of art, the art must be of sufficient public importance.²¹⁷ This requirement could be met by the fact that a museum acquired it,²¹⁸ but this means “that the public interest will attach only to a limited amount of art of recognized quality”;²¹⁹ by definition, those pieces housed in a museum and not necessarily in a private collection.²²⁰

A museum’s acquisition of a donated piece of art indicates that the public acting through a public institution has accepted “an owner’s implied offer to dedicate a work of art.”²²¹ This formulation does not apply in the case of privately owned art, even if of great public value, because no public institution is involved. Even if art is loaned to a museum, “a public right” in that art “could be created through the same offer and acceptance mechanisms

community should explore the viability of a common law public dedication claim if it is faced with the potential destruction of its heritage.”).

²¹¹ Wilkes, *supra* note 48, at 196.

²¹² *Protecting the Public Interest in Art*, *supra* note 145, at 129.

²¹³ *Id.* at 132.

²¹⁴ *Id.*; see also *id.* at 133 (“Even a loan arrangement represents recognition by the offeree and the offeror of the permanent educational characteristics of the work. The existence of that implied mutual understanding constitutes an irrevocable dedication of the work to the public for educational uses.”).

²¹⁵ *Id.* at 132 (contrasting *Village of Villa Park v. Wanderer’s Rest Cemetery Co.*, 147 N.E. 104, 105 (Ill. 1925)).

²¹⁶ *Id.*

²¹⁷ *Id.* at 134.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See *id.* at 134 n.72 (providing definitions of a museum).

²²¹ *Id.* at 134.

that operate in the context of real property dedication.”²²² This implied mutual understanding between the museum and the owner of donated, loaned, or sold art “constitutes an irrevocable dedication of the work to the public for educational uses.”²²³ This dedication arguably continues in effect even if the art is temporarily or permanently removed from the museum’s collection;²²⁴ for example, if the lender of an important piece of art seeks the art’s return.

For art, the doctrine permanently protects the use of dedicated property, which would be the public viewing. Consequently, the doctrine could even compel the showing of deaccessioned art, even though it is now in a private collection. At minimum, “[s]ince the purpose of public dedication of art is to educate the public through exposure to the visual characteristics of the work, a reservation that in effect allowed the dedicator or his successors to impair those characteristics,” for example by withdrawing loaned art from a museum for her own use or for sale or export, would conflict with the initial public dedication and be voidable.²²⁵ If the loan of art to a museum creates an irrevocable dedication, then the doctrine’s use in this context would create a serious problem because it would discourage private owners of important works of art from ever loaning that art to a museum, as they would lose all future control over it.

While using the public-dedication doctrine to protect the public’s interest in art could be “a step in the right direction,” the concept ignores privately held art that has never been in a public institution, as it requires the complete removal of objects from the private realm before the art can embody the necessary public interest to qualify for the doctrine’s use.²²⁶ Additionally, while public dedication preserves the public’s interest in culturally important works of art, it is hard to see how its application could compel private owners to relinquish their hold on important public art that has always been in private hands. The doctrine’s restrictive scope also contradicts the otherwise-useful view that “certain objects are imbued with an ‘inherently public’ quality such that public obligations attach even when these objects are in the possession of a private entity.”²²⁷

²²² *Id.* at 131.

²²³ *Id.* at 133.

²²⁴ *Protecting the Public Interest in Art*, *supra* note 145, at 135; *see also id.* at 134 n.69 (“The sales price of the work will not be adversely affected. Future owners will be largely indifferent to the imposition of the trust because they generally intend to treat the work with care whether or not the trust is imposed.”).

²²⁵ *Id.* at 133.

²²⁶ Wilkes, *supra* note 48, at 197.

²²⁷ *Id.* at 197–98; *see also* Rose, *supra* note 190, at 774 (“For this public to claim property, two elements were essential: first, the property had to be physically capable of monopolization by private persons—or would have been without doctrines securing public access against such threats. Second, the public’s claim had to be superior to that of the private owner, because the properties themselves were most valuable when used by indefinite and unlimited numbers of persons—by the public at large.”).

The common-law property doctrine of public dedication's focus on public access, particularly to property that has been dedicated to a public use, raises some interesting possibilities depending on the willingness of a court to be persuaded of the fit. One might argue that access to the art is important to assure that the public experience the art's educational properties, like the ability to recreate on land that has been dedicated to the public for that purpose. In this way, public dedication might assure that the public has a right to view art in a museum collection.

However, this formulation does not apply in the case of privately owned art, even if it is of great public value, because no public institution is involved. The fact that the doctrine only applies to property that is publicly owned makes it difficult to see how it might be applied to gain public access to art in a private collection that has not yet been given to a museum or ever been part of a museum collection.²²⁸

On the other hand, public art given to and housed in a public institution like a museum should be covered by the doctrine, as in all likelihood the art has been offered to the museum for the purpose of exhibiting the art and educating the museum's patrons. The doctrine's application might inhibit the museum from selling that art to a private individual or exporting it out of state. But the art requires a nexus with a public institution to be covered by the doctrine, making it difficult to see how the doctrine could be extended to privately held art with no connection to a public institution like a museum. Therefore, the major weakness of the doctrine in all likelihood remains—that it does not apply to private owners of important art who hold that art behind closed doors and who are the target of this Article.

The next Section looks at whether the public trust doctrine might have the useful features of public dedication, without its problems.

C. *The Public Trust Doctrine*

"The public trust doctrine is rooted in the precept that some resources are so central to the well-being of the community that they must be protected by distinctive, judge-made principles."²²⁹ To the extent the doctrine is created by judges, not by legislatures, it reflects "the deeply held convictions of our society."²³⁰ The basis of the doctrine is "that the sovereign holds

²²⁸ *Protecting the Public Interest in Art*, *supra* note 145, at 136 ("As a prerequisite to enforcement of the public's interest in the integrity of artwork, the owner of the work must have adequate notice that his property is subject to a public trust. Although some owners of dedicated artwork—such as the museum that acquires the work, the owner of a work on loan, or the first purchaser of a deaccessioned work of art—would have actual notice of the public use and therefore of the public interest in the artwork, subsequent owners might not have such notice.").

²²⁹ Charles E. Wilkinson, *The Public Trust Doctrine in Public Lands Law*, 14 U.C. DAVIS L. REV. 269, 315 (1980).

²³⁰ *Id.*

certain common properties in trust in perpetuity for the free and unimpeded use of the general public.”²³¹ As a trustee of these resources, the government must protect resources covered by the doctrine from damage, and assure that those resources are used for a public purpose and are available for public use.²³² Importantly, for purposes of this Article, the public trust doctrine protects public access to trust resources; preventing access to those resources violates the doctrine.²³³

The government’s duty to protect these resources for the benefit and enjoyment of the general public is affirmative and ongoing.²³⁴ Whoever holds property protected by the doctrine must maintain it for trust-protected uses, which include public education.²³⁵ Public rights of enjoyment in trust-protected property are protected in perpetuity²³⁶ as they are in lands covered by the public-dedication doctrine. Thus, the public trust doctrine, like the public-dedication doctrine, is intended to benefit not only present members of the public but also future generations.²³⁷

Since the management of public trust resources should be for the public’s benefit and not for private gain,²³⁸ neither the government nor private individuals can alienate or adversely affect those rights unless it is for an equivalent public purpose.²³⁹ While public trust property can be alienated by the legislature, it can only be for a commensurable public purpose.²⁴⁰ Indeed, according to Professor Sax, “a court will look with

²³¹ Hope M. Babcock, *Using the Federal Public Trust Doctrine to Fill Gaps in the Legal Systems Protecting Migrating Wildlife from the Effects of Climate Change*, 95 NEB. L. REV. 649, 674 (2017).

²³² *Id.* at 675.

²³³ See *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 358 (N.J. 1984) (Establishing that the public-trust doctrine can compel private associations to open membership to the public when they are nonprofit corporations with activities paralleling those of municipalities. The public in this case had a right to gain access in order to bathe, swim, and do other shore activities.)

²³⁴ Babcock, *supra* note 232, at 675; see also Jennifer Anglim Kreder, *The “Public Trust,”* U. PA. J. CONST. L. 1425, 1476 (2016) (“First, in the environmental law arena, the term [public trust] has been used to describe property administered by the government for public benefit, not routine use as any private entity could use property.”).

²³⁵ See *Marks v. Whitney*, 491 P.2d 374, 379 (Cal. 1971) (applying the public-trust doctrine to collection of scientific information and aesthetics); see also Kreder, *supra* note 235, at 1461 (“It seems firm, however, that part of this public trust concept concerns educating the public.”).

²³⁶ See generally, Hope M. Babcock, *Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-O-Links, and Other Things that Go Bump in the Night*, 85 IOWA L. REV. 849, 888–98 (2000) [hereinafter *Where the Wild Things Are*] (summarizing these and other aspects of the public trust doctrine); see also Hope M. Babcock, *Is Using the Public Trust Doctrine to Protect Public Parkland from Visual Pollution Justifiable Doctrinal Creep?*, 42 ECOLOGY L.Q. 1 (2015) (describing the origins of the public-trust doctrine and its various uses).

²³⁷ Babcock, *supra* note 232, at 675–76.

²³⁸ *Id.* at 676.

²³⁹ See *Where the Wild Things Are*, *supra* note 237, at 888–98 (summarizing these and other aspects of the public-trust doctrine).

²⁴⁰ See *Paepcke v. Pub. Bldg. Comm’n of Chi.*, 263 N.E.2d 11, 21 (Ill. 1970) (allowing the state legislature to divert trust property, in this case a public park, to a new and different, but comparable use, a school).

considerable skepticism upon any governmental conduct which is calculated either to relocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.”²⁴¹ The extent to which the doctrine restrains the use of private property makes it very controversial.²⁴²

Legal scholars and litigants have proposed the doctrine’s use “to preserve cultural heritage, including heritage owned by private individuals.”²⁴³ For example, the Detroit Institute of Art used the public trust doctrine to block the demand by the city’s financial creditors that the museum sell its collection.²⁴⁴ Although a case of first impression with respect to the application of the doctrine to the city’s “cultural heritage,” the museum argued it was indisputable that the doctrine could and should be expanded “to encompass public resources such as art.”²⁴⁵ Under the public trust doctrine, the museum argued, its art collection “is subject ‘to the paramount right of the public to enjoy the benefit of the trust,’” even though Detroit retained legal title to the collection.²⁴⁶ Although the bankruptcy court agreed that the state held the art in trust for the benefit of the citizens of

²⁴¹ Sax, *supra* note 6, at 490.

²⁴² See Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W.L. REV. 239, 275 (1992) (“[T]he notion of an evolving unbounded set of communal rights—whether they are constitutional or common law, procedural or substantive, in all public and private property strips clarity, certainty, and predictability from the very core of the public trust doctrine.”); James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL’Y F. 1 (2007) (generally criticizing the public-trust doctrine); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633 (1986) (“By continuing to resist a legal system that is otherwise being abandoned, the public trust doctrine obscures analysis and renders more difficult the important process of reworking natural resources law.”); see also generally Rose, *supra* note 190, at 722 (“Despite its popularity, the modern public trust doctrine is notoriously vague as to its own subject matter; cases and academic commentaries normally fall back on the generality that the content of the public trust is ‘flexible’ in response to ‘changing public needs.’”). But see Fincham, *supra* note 72, at 23–24 (saying that the public trust doctrine “has even reinvigorated the environmental movement by promoting ‘guardianship, responsibility and community’ in public spaces” (citing Erin Ryan, *Public Trust and Distrust: Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 ENVTL. L. 477, 479–80 (2001))); David Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public’s Interest in Environmentally Critical Resources*, HARV. ENVTL. L. REV. 311 (1988); Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L. Q. 351 (1998).

²⁴³ Smith, *supra* note 2, at 402; see also *id.* at 403 (“The discussion of the rationale for group ownership of cultural property demonstrates that the public trust doctrine inheres in title to all cultural property.” (quoting Patty Gerstemblieth, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 670 (1995)). But see, Michael P. Vandenberg, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 512, 520 (2004) (noting when regulators have tried “to impose restrictions on individual behavior . . . the restrictions have been unpopular and have provoked a public backlash”).

²⁴⁴ Smith, *supra* note 2, at 403.

²⁴⁵ *Id.*; see also Fincham, *supra* note 72, at 24 (finding parallels between the evolution of the public trust doctrine from its common law origins to statutes and saying “[s]uch is also the case in many other nations with respect to cultural heritage, art and antiquities; which are often the subject of national ownership declarations and other restrictions”).

²⁴⁶ Smith, *supra* note 2, at 403.

Michigan and denied the financial creditors' request, it did not directly decide the issue as to whether the public trust doctrine applied to the collection.²⁴⁷

This use of the doctrine in the context of public art is not that surprising given that the doctrine has at its core the concept that some property, even if owned by an individual, is vested with such communal interest and importance to the community that the community becomes a dominant stakeholder in it²⁴⁸—its owner, a permanent trustee of it. The fact that the public trust doctrine is used to protect “inalienable rights inhering in the community as a collectivity,” that the doctrine imports the notion of an owner who functions as trustee of that property, and that rights under the doctrine are “vindicated by ordinary claims of physical access and use,”²⁴⁹ makes the doctrine's use to require access to important art that has been withdrawn from public view promising.

The public trust doctrine is more “nimble” than the doctrine of public dedication and has a greater capacity to evolve to keep pace with changing societal needs.²⁵⁰ This plasticity is reflected in the expansion over time in the doctrine's geographic scope as well as in the range of activities that are considered protectable uses of trust resources.²⁵¹ But applying the doctrine to *privately* held art presents new challenges. Although one might “imagine the environmental public trust doctrine expanding over many years beyond its environmental roots to other legal fields encompassing delegated public benefits administration,”²⁵² it has not yet done so, and certainly not yet to a

²⁴⁷ *Id.*

²⁴⁸ Sax, *supra* note 12, at 1558 (“Theories of nonexclusive ownership have seen extensive elaboration in other contexts, primarily where ordinary use value—rather than iconic value—is at issue. The public right of passage on navigable rivers and the public trust right in the ocean shore, for example, are settings in which some sort of distributive justice, usually in the form of general access to the bounty of nature, seems the central concern”); *see also id.* (“The commons and public trust properties reflect profoundly important traditions, sharing both the notion of inalienable rights inhering in the community as a collectivity, and the concept of owner as trustee.”).

²⁴⁹ Wilkes, *supra* note 48, at 195 (“Public trust property reflects important traditions, including ‘the notion of inalienable rights inhering in the community as a collectivity, and the concept of owner as trustee.’ The public right in property held in the public trust ‘is vindicated by ordinary claims of physical access and use.’ The public trust doctrine has previously been used to promote environmental protection and could be extended to safeguard art objects that are subjected to extensive public use.” (quoting Sax, *supra* note 12, at 1558)).

²⁵⁰ Babcock, *supra* note 232, at 678.

²⁵¹ *See* Kreder, *supra* note 235, at 1447 (“Indeed, Professor Sax argued that the public trust doctrine is useful ‘whenever governmental regulation comes into question,’ and, although historically the public trust doctrine was focused on waterways, the modern doctrine is an efficient tool for managing air pollution, pesticides, strip mining, and wetland filling, among others.” (quoting Sax, *supra* note 6, at 556–57)); *see also* Fincham, *supra* note 72, at 24 (“However, it is not limited to navigation or commerce—the doctrine applies broadly to the public’s use of resources.”).

²⁵² Kreder, *supra* note 235, at 1450; *see also* Smith, *supra* note 2, at 404 (“Courts have not yet considered whether the public trust doctrine could apply to cultural heritage or significant works of art. Even though the public trust doctrine originally only applied to navigable waterways, the doctrine is a

privately administered public-benefits system like a museum.²⁵³ No state has applied the public trust doctrine to chattel property, let alone to works of art.²⁵⁴ Indeed, Professor Brian Frye maintains that the application of the public trust doctrine to prevent a museum from selling off portions of its collection is “ridiculous.”²⁵⁵ Professor Frye argues that museums can and do frequently sell works of art from their collections to private parties.²⁵⁶ But, that does not mean that those actions are consistent with the public trust doctrine, should it apply. Nor does Professor Wilkes explain or support his position that the doctrine could not apply to cultural works of art “that are completely private in their ordinary use,”²⁵⁷ which seems to contradict the doctrine’s use to open up private resources, like beaches, to public use.²⁵⁸ Additionally, like private land that becomes impressed with the public trust doctrine and thus gains some public features, art which enters a museum as private property becomes part of a public collection held by the museum for the benefit of the viewing public, and thus gains some degree of publicness.²⁵⁹ “[O]nce an object enters a museum collection, it becomes part of the public trust, and a museum’s directors and trustees have a duty to protect and maintain the object for the benefit of the public.”²⁶⁰

living doctrine and is ‘not . . . ‘fixed or static,’ but one to ‘be molded and extended to meet changing conditions and needs of the public it was created to benefit.’”).

²⁵³ But see Wilkes, *supra* note 48, at 196 (“The public trust doctrine has never been extended to protect the public interest in works of art, but [the removal of a Picasso from the San Francisco Museum of Modern Art] seems to highlight the necessity for more extensive regulation to safeguard public expectations in objects that have become part of a local cultural heritage.”).

²⁵⁴ Brian L. Frye, *Art and the “Public Trust” in Municipal Bankruptcy*, 93 U. DET. MERCY L. REV. 627, 657 (2014); see also *id.* at 656 (“The City did not and could not own the DIA [Detroit Institute of Art] subject to the ‘public trust’ because the ‘public trust’ doctrine only applies to natural resources like navigable waters and parks, and does not apply to chattel property like works of art.”).

²⁵⁵ See *id.* at 664–65 (“However, the argument that art museums own the artworks in their collections subject to the ‘public trust’ is obviously false and borders on ridiculous. As observed above, the ‘public trust’ doctrine only applies to natural resources like navigable waters and parks, not chattel property like artworks.”). But see Fincham, *supra* note 72, at 27 (“It is often said that once a work of art enters a museum collection, that museum holds those works in the public trust for future generations in much the same way that the public may enjoy navigation on public waterways.”).

²⁵⁶ See Frye, *supra* note 255, at 658 (“It is in fact quite conceivable: *most* works of art are privately owned.’ Indeed, most art museums are nonprofit corporations that privately own works of art which they may freely sell.” (footnote omitted) (quoting Donn Zaretsky, *There’s No Such Thing as the Public Trust, and It’s a Good Thing, Too*, in THE LEGAL GUIDE FOR MUSEUM PROFESSIONALS 151, 153 (Julia Courtney, ed. 2015)).

²⁵⁷ Wilkes, *supra* note 48, at 195 n.156.

²⁵⁸ See *Matthews v. Bay Head Improvement Ass’n*, 95 N.J. 306, 326 (N.J. 1984) (holding that “the public must be given both access to and use of privately-owned dry sand areas” to protect the public’s right of access to trust-protected property).

²⁵⁹ See Tam, *supra* note 72, at 861 (“Before entering a museum collection, art is private property with no public interest. Thus, the public trust doctrine, as applied to museums, connotes the idea that art owned by museums is part of the public domain for the public benefit. In this regard, the public trust doctrine would treat art as an abstract trust held by public institutions as a public resource.” (footnotes omitted)).

²⁶⁰ *Id.* at 864 (footnote omitted).

Although the trust that guides museums in their management of their collections, which binds museums to use their property for identified charitable purposes,²⁶¹ is different from and narrower than the trust envisioned in the public trust doctrine,²⁶² there are interesting overlaps between the narrower charitable trust doctrine and the broader public trust doctrine.²⁶³ For example, under both doctrines the trustee has a “responsibility to serve and hold assets in trust for the public benefit.”²⁶⁴ Questions about the geographic reach of the public trust doctrine and the inclusiveness of triggering activities under it are not so dissimilar from questions about whether the word “public,” which defines a museum’s charitable trust obligations with respect to the management of its collections, refers to a national, regional, state, or local public, or even the community where the museum is located.²⁶⁵ And behind both the narrow museum charitable trust doctrine and the broader public trust doctrine is the desire to prevent commodification of public resources and their transformation into a private ones.²⁶⁶ Critics of deaccession argue that deaccession violates the museum’s charitable trust obligation to keep art for future generations, and that the practice commodifies art by putting art onto the market.²⁶⁷ Just like

²⁶¹ See *id.* at 860 (“A public, or charitable, trust is a trust designed to benefit the public. A museum organized as a public trust has the fiduciary duties to use trust property for designated charitable purposes.” (footnotes omitted)).

²⁶² See *id.* (“[M]useums hold their collections in a public trust . . . A public trust is distinguishable from the public trust doctrine.”); see also *id.* at 861 (“[E]very side of the deaccessioning debate refers to museums as a public trust to reference the duties museums owe to the public with respect to their operations and collections management.”). But see Kreder, *supra* note 235, at 1460 (“In the museum world . . . the term [public trust] is a ‘nebulous concept.’”).

²⁶³ See Tam, *supra* note 72, at 861–62 (“[L]eaders in the museum field have put their own twist on the term ‘public trust,’ and they employ the term not only in the legal sense of setting aside property for the benefit of the public, but also to refer to ‘the public’s trust in art museums’ as a moral issue.”).

²⁶⁴ *Id.* at 861; see also *id.* at 862 (“The public’s trust refers to the trust and confidence that the public has given to the museum to collect, preserve, and make available works of art. This view contends that the public has entrusted museums with the authority and responsibility to develop and manage a collection of art and provide public enjoyment of art through exhibitions.” (footnotes omitted)).

²⁶⁵ See *id.* at 862 (noting that the scope of the public trust is important).

²⁶⁶ The fact that a museum’s operation might be governed by two versions of trust doctrines, its own and the broader public-trust doctrine, does not preclude the latter’s application to art in its collections, any more than the application of the public-trust doctrine is blocked by the application of other common-law doctrines, like the wildlife trust. See generally *Where the Wild Things Are*, *supra* note 237, at 849 (discussing the wildlife trust).

²⁶⁷ E.g., Tam, *supra* note 72, at 886–87 (“[P]roponents of a broader deaccessioning policy argue that the limitation on the use of deaccessioning sales proceeds to future acquisitions contradicts the insistence on keeping art in the public trust for future generations. To illustrate, the Brodsky Bill concludes that monetization of selected objects from a collection undermines the existence of museums; however, a deaccession and disposition by sale requires, no matter the use of the sales proceeds, that art should be considered a commodity. Even when deaccessioning sales proceeds are used for future acquisitions, that sale itself puts the artwork in the market, makes it a commodity, and removes it from the public trust. Sometimes, even a transfer of artwork to another museum could violate the public trust by taking the artwork away from the public to which it was given in trust.” (footnotes omitted)).

advocates who use the public trust doctrine to prevent privatization of natural resources, those who oppose museums selling off their public collections to private individuals argue that “art has an intrinsic value that cannot be monetized.”²⁶⁸

While the use of the public trust doctrine to gain public access to public art in private hands is “uncertain,”²⁶⁹ this Part has tried to develop credible arguments that it could. To support this thesis, the Article has pointed towards commonalities between public art and public trust-protected resources, especially the communal importance and educative purpose of both, and the overlap between doctrines that govern a museum’s trust obligations towards its collections and the strictures of the more general public trust doctrine. Additionally, both doctrines seek to prevent commodification of the trust res and its transfer into private hands, both employ the concept of a trustee, and public access to trust property can fulfill the purpose of both doctrines. The public trust doctrine’s essential communal nature and the educative purpose of public art, the doctrine’s nimbleness and capacity to expand in response to new problems, and the comfortable fit between the trust concepts that guide the management of public museums and those which protect natural resources make the public trust doctrine a better vehicle than public dedication as a means to gain public access to privately held important works.

Any application of the doctrine to gain public access to art of national importance, while theoretically possible, may generate negative consequences given the doctrine’s capacity to provoke controversy. This could weaken the doctrine and harden resistance to opening up private art to public view.²⁷⁰ Therefore, the final Part of the Article searches for ways to encourage the opening of privately held art to public view prior to the doctrine’s application, thus softening its use.

VI. USING INCENTIVES TO GAIN ACCESS TO PRIVATELY HELD PUBLIC ART

If government values cultural treasures, then it may need to change existing doctrines in order to provide incentives for their preservation.²⁷¹

²⁶⁸ *Id.* at 883.

²⁶⁹ See Smith, *supra* note 2, at 404–05 (“Whether a court would find the public trust doctrine to apply to public art, especially public art that is that is privately owned, but of great public interest, is uncertain.”).

²⁷⁰ See SAX, *supra* note 3, at 66 (“[I]t would be self-defeating to do anything that would encourage emigration of major collections out of this country to what might be considered more hospitable venues . . .”).

²⁷¹ Gechman, *supra* note 21, at 594.

Anyone can bring an action in court to enforce the public trust against someone violating its tenets and seek an injunction to stop the injurious activity. The injurious action in the case of public art would be preventing access to it. One way to blunt anticipated resistance to such an undertaking is to employ ancillary incentives to encourage positive behavior before the doctrine is resorted to, thus possibly avoiding its application in the first place.²⁷² This Part discusses three possible incentives which might inspire private hoarders of important art to release it for public viewing: (1) listing the art on a national or statewide public register of culturally important art; (2) using the tax code to encourage the release of privately held art and discourage its withholding; and (3) providing a system of rewards and punishments, like shame or guilt, to activate a norm of positive social behavior. Any one or combination of these, when accompanied by the well-founded threat of litigation under the public trust doctrine, might induce private owners of important art to invite the public into their homes or open their private museums on a limited basis, or to make periodic loans to public museums or universities where the art could be viewed by the public and scholars.²⁷³

However, any right of public access, such as that proposed here and above, “would have to be reasonable; it could not overly inconvenience the owner’s enjoyment of the work or force additional costs upon him.”²⁷⁴ Any right of access should not be “random”; but rather the right should be “carefully controlled . . . to ensure that works are not totally or arbitrarily withheld from public view.”²⁷⁵

²⁷² This Article stops short of recommending the enactment of national legislation that might provide public incentives encouraging private owners to open their collections to public viewing or encouraging their loan to a public institution like a museum. See Wilkes, *supra* note 48, at 187 (“The goal of a comprehensive art preservation law would be to provide public incentives for private owners to open their collections to the public, subject to certain (time, place and manner) restrictions.”). A concern is that such a regime might implicate the takings doctrine under the Fifth Amendment. See *id.* at 193 (“A preservation law directed at the protection and maintenance of art objects, justified in terms of the public interest, would be limited by the Takings Clause, with the public interest in art preservation weighed against the burden on the individual who seeks to use his property in a way that is contrary to that interest. A regulatory scheme does not constitute a taking so long as it advances a legitimate state (public) interest and does not deny the (private) owner an ‘economically viable use of his property.’” (citation omitted)).

²⁷³ See, e.g., Elsen, *supra* note 1, at 970 (“The [Polish] Law of 1962 places restrictions on private ownership that in civil law are called impoverishment of owners’ rights. When a given object or book is registered, the owner ‘is obligated to offer it for sale to national museums or national libraries.’” (quoting Halina Nieć, *Legislative Models of Protection of Cultural Property*, 27 HASTINGS L.J. 1089, 1094 (1976)).

²⁷⁴ Price, *supra* note 11, at 1188–89. Professor Price adds additional constraints, such as that the museum displaying the private art would be liable for any damage to them, and that no single piece of art could be borrowed by a museum more than once every five years. *Id.* at 1189.

²⁷⁵ *Id.* at 1188. Professor Price acknowledges that implementing this right would “involve enormous practical problems, such as deciding what is reasonable, who is to make the relevant determinations, and which museums are eligible,” but he believes that state art councils can overcome them. *Id.*

A. *Creation of a Public Register for Important Works of Art*

Listing art on a state or federal register of important art might encourage its owners to preserve it and to view the listing “as an honor, driving interest, prestige, and popularity to the art and its owner.”²⁷⁶ Placement on a register of important art could also enhance its resale value.²⁷⁷ In exchange for the positive attention such a listing would give to collectors, they might be encouraged, even required as a condition of listing, to loan their art to a museum.²⁷⁸

Every state has an agency whose mission is to promote and support the arts.²⁷⁹ Each state agency could draw up and manage a list of important public art within its jurisdiction and administer any program designed to make that art publicly available. State arts councils or the National Endowment for the Arts could keep lists of qualified art to put owners of public art on notice of their vulnerability to short-term requisitions for public showing.²⁸⁰ The National Endowment could secure the public’s interest in art supported by the Endowment “by asserting a qualified proprietary interest in them.”²⁸¹ To assure that important public art is maintained in its original condition, its owner would be under a perpetual obligation to protect that art, similar to the obligation of owners of publicly dedicated land to maintain that land in its original condition.²⁸²

The concept of a registry of nationally important art is based on the National Register of Historic Places, authorized by the National Historic Preservation Act.²⁸³ This register contains a list of places deemed “worthy of preservation.”²⁸⁴ “The principles underlying historic preservation of buildings and sites, particularly the emphasis on maintaining structures of

²⁷⁶ Smith, *supra* note 2, at 385.

²⁷⁷ An unrelated side benefit, a register of nationally important art might also “heighten public awareness of the importance of maintaining our cultural heritage.” Wilkes, *supra* note 48, at 204–05.

²⁷⁸ *Id.* at 205. On the ability of federally funded programs to require public access as a condition of receiving money, see *Protecting the Public Interest in Art*, *supra* note 145, at 142 (“Because NEA-supported projects can usually be possessed by only one individual at a time, the NEA cannot, like other agencies, secure the public interest by guaranteeing the public access to the work it funds.”). By way of contrast, “[t]he National Science Foundation . . . [can require inventors it funds] to disclose accurate information about their Foundation-supported activities for other public purposes. Although the NEA does retain a non-exclusive license to reproduce publishable results of Endowment-supported activities in furtherance of Endowment purposes, the dissemination of reproductions of works of visual art cannot satisfactorily take the place of public exposure to the original.” *Id.* at 142 n.113 (citations omitted).

²⁷⁹ *Protecting the Public Interest in Art*, *supra* note 145, at 130.

²⁸⁰ *Id.* at 136–37.

²⁸¹ *Id.* at 142.

²⁸² *Id.* at 139.

²⁸³ National Historic Preservation Act, 54 U.S.C. § 302101 (formerly 16 U.S.C. § 470a).

²⁸⁴ *National Register of Historic Places*, NAT’L PARK SERV., <https://www.nps.gov/nr/> [<https://perma.cc/G2ZL-ACBN>] (last visited Jan. 26, 2018).

architectural significance, translate quite easily into a framework for the preservation of art.”²⁸⁵

While the mere listing of art on some type of public register by itself places no obligations on the art owners and does not restrict their “use, treatment, transfer, or disposition” of it,²⁸⁶ there exists a possibility that it might. Courts have upheld local ordinances allowing the designation of private property to be of historical value without the owner’s approval, sometimes even over the owner’s objection.²⁸⁷ The most common use of these ordinances is to protect “cultural and artistic creations” from destruction or alteration.²⁸⁸ So there is some potential for the art register to be used to open up privately held art for public view as a condition of listing and for courts to sustain those conditions.

B. *Use the Tax Code to Encourage Public Display of Privately Held Important Art*

Another source of possible incentives is the tax code. It could be used to encourage the loan of privately held public art to museums or other public institutions, or to encourage private owners of such art to make it publicly available on the owner’s premises.²⁸⁹ For art owners who have private

²⁸⁵ Wilkes, *supra* note 48, at 199.

²⁸⁶ Smith, *supra* note 2, at 385.

²⁸⁷ *Id.* at 389 (discussing the Supreme Court decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 115 (1978)); *see also id.* at 387 (“For instance, similar to other landmark ordinances, Chicago’s Landmarks Ordinance states that its purpose is to ‘safeguard . . . historic and cultural heritage, as embodied and reflected in such areas, districts, places, buildings, structures, works of art, and other objects’ and to ‘identify, preserve, protect, enhance, and encourage continued utilization and the rehabilitation of such . . . works of art . . . having a special historical, community, architectural, or aesthetic interest or value to the City . . . and its citizens.’”).

²⁸⁸ *Id.* at 391.

In 1982, California enacted the California Art Preservation Act (‘CAPA’). CAPA was the first of its kind in the U.S. to acknowledge ‘a public interest in preserving the integrity of cultural and artistic creations’ independent of the interest of the artist. Specifically, CAPA permits an arts organization ‘acting in the public interest’ to seek an injunction preventing ‘a work of fine art’ from ‘physical defacement, mutilation, alteration, or destruction.’ The Act defines ‘fine art’ as an ‘original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality and of substantial public interest.’ It looks to opinions of ‘artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art’ to determine whether a piece of art is of recognized quality and substantial public interest.

Id. (footnotes omitted); *see also* Wilkes, *supra* note 48, at 205 (“An art preservation regime should apply only to those works of art deemed to embody a substantial public interest.”).

²⁸⁹ Wilkes, *supra* note 48, at 187; *see also id.* at 204 (“[T]he government could provide tax credits for loan-related expenses directly to the owners of works of art to be placed on display or incorporated into a traveling exhibition. This system would provide stronger incentives to the wealthy owners of these works, who are consistently seeking mechanisms by which to offset their tax liability.”).

museums and count on the largess of the tax code to shelter the value of the art they donate to those museums when they die, any tax benefit accruing to these private institutions could be conditioned on opening them to the public on a regular basis. Like a national or state register of important public art, using tax credits to encourage owners of such art to loan their art to a public museum or make it publicly available on site might increase the donation value of the art and enhance the donor's prestige in addition to providing a welcome deduction from an owner's annual tax.²⁹⁰ However, modifying the tax code requires congressional or regulatory action, both of which may be problematic.

Access incentives through a loan-donation program to a public museum require a willing museum. Professor Sax, in his book *Playing Darts with a Rembrandt*, mentions a summer loan program that the Metropolitan Museum of Art in New York City administers as an example of such a program in which the museum invites collectors of important works of art to lend them to the museum for temporary exhibition during vacation months.²⁹¹ He even suggests that such a loan donation program might be made obligatory,²⁹² which might be viable if the donor receives any type of tax credit as a result of the loan. Other museums might adopt this program as a relatively costless way of temporarily augmenting their collections.

C. *Activate Behavioral Norms to Discourage Private Hoarding of Important Art*

Well-publicized incentives and clear norms of expected behavior can foster desirable behavior. Norms, which are neither created nor enforced by

²⁹⁰ *Id.* at 203 ("The most logical step would be to provide tax breaks to private owners who loan their works to public institutions for public display. This type of arrangement would have dual benefits for owner-collectors, since the sale price and donation value increase when artwork is placed on loan."); see also Price, *supra* note 11, at 1190 ("The administration of such a tax might include an exemption for works loaned to public museums for exhibition. In the United States prior to 1969 some courts implied that the owner of a painting could take a charitable deduction for the value of the work for the period of exhibition. One could conceive of a regime which extended the rationale for this implication to require that the owner of a work could avoid exhibition only by the payment of a tax." (footnote omitted)).

²⁹¹ SAX, *supra* note 3, at 66.

²⁹² *Id.* at 67; see also Wilkes, *supra* note 48, at 209 ("Where incentive structures (or the 'carrot' method) fail to satisfy the public interest in particular works of art, a more stringent approach would be to implement 'a system of obligatory, expense-compensated loans to public institutions.' Under this system, owners would be obligated to loan previously unavailable works in which there is a strong public or scholarly interest to a major museum or other public institution." (footnote omitted)). Professor Sax proposes using a committee of experts to identify important artists and/or works of art of sufficient importance to be on a "national loan list" that have not been publicly exhibited recently. The requisitioned art could then be exhibited at a museum in the United States for a limited period of time, not to exceed three months, and would be free from a repeat requirement for at least ten years. *Id.* at 209. Wilkes believes implementing Sax's proposal would be difficult, but within "the realm of practicability." *Id.*

the government,²⁹³ offer a low-keyed way to influence personal behavior. They are informal rules that reflect society's view of what is correct behavior and can carry some persuasive power with respect to individual actions.²⁹⁴ This Section examines whether there is an external social norm that might induce private owners of public art to make that art available for public viewing, or if one does not exist, whether circumstances exist that might activate such a norm.

Social norms can be "internalized (and enforced through guilt) or . . . may arise without internalization (and be enforced through external non-legal sanctions such as stigma or ostracism)."²⁹⁵ Non-internalized (or external) norms reflect a broad public consensus about social obligations which may result in external social sanctions if they are not complied with.²⁹⁶ External norms reflect "a social consensus regarding what behaviors are esteem-worthy. They are enforced by the consensus through a process of surveillance of others, and they are externally imposed on the norm-violator by others through the withholding of esteem."²⁹⁷ An example of an external norm in this situation would be one that disapproved of keeping from public view privately held important works of art. But it is not clear that there is a social norm against hoarding of public art, though there may be one against its destruction, alteration, or misappropriation.

Norms, or correct social behavior, can be taught, but they can also arise in an "unplanned fashion out of ongoing interaction."²⁹⁸ A "[m]oral order" can be "an interactional phenomenon,"²⁹⁹ in which one party's actions show the other the right thing to do. In some situations, behavioral norms arise when enough individuals indicate a desire to cooperate in some positive behavior, through what Eric Posner calls "signaling,"³⁰⁰ which, in turn, makes the correct behavior seem ordinary.³⁰¹ Thus, there is a possibility that a norm in favor of public viewing of important art could arise among private

²⁹³ Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT'L. REV. L. & ECON. 369, 369 (1999).

²⁹⁴ See *id.* at 369–70 (noting that norms are a form of social control that can be independent of laws).

²⁹⁵ Michael P. Vandenbergh, *The Social Meaning of Environmental Command and Control*, 20 VA. ENVTL. L.J. 191, 200 (2001).

²⁹⁶ Michael P. Vandenbergh, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55, 69 (2003).

²⁹⁷ Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 TUL. L. REV. 605, 621 (2004) (footnote omitted).

²⁹⁸ Karp also notes that these repeated interactions can create habits and become expected behavior by the individual in the minds of others, constraining the actor to avoid disappointment if the expectation is not lived up to. David R. Karp, *The New Debate About Shame in Criminal Justice: An Interactionist Account*, 21 JUST. SYS. J. 301, 313 (2000) (quoting DENNIS HUME WRONG, *THE PROBLEM OF ORDER: WHAT UNITES AND DIVIDES SOCIETY* 48 (1994)).

²⁹⁹ *Id.*

³⁰⁰ ERIC A. POSNER, *LAW AND SOCIAL NORMS* 25–26 (2000).

³⁰¹ Ann E. Carlson, *Recycling Norms*, 89 CAL. L. REV. 1231, 1241 (2001).

collectors, if enough of them conceived this as the correct behavior and acted accordingly.

However, to activate a behavioral norm, the targeted individuals must be aware of the consequences of their action on the public welfare or the welfare of others and must understand their personal responsibility for those actions.³⁰² These feelings will generate a sense of internal obligation to comply with the norm and a feeling of guilt, if they violate it.³⁰³ Once a behavioral norm is activated, an intention is formed in the mind of the actor to behave in a particular way if barriers to that behavior are not created—like additional costs, increased effort, or social costs, for example, rejection by one's social or professional group.³⁰⁴

Obeing the dictates of a norm can generate monetary costs, lost opportunities, inconvenience, or additional effort.³⁰⁵ For example, conforming to a norm supporting the public interest in viewing important art requires effort, such as opening private homes or museums to the public or loaning art to a museum, and may generate costs, like additional insurance, private guards, and transportation fees, if the art is being loaned to a museum. On the other hand, opening privately held art to public view can generate “praise, esteem, promotion, and preferential dealings” from like-minded individuals who ascribe to the same norm, and avoids the risk of social sanctions for doing the reverse.³⁰⁶ The government can help an individual internalize positive social behavior, here opening privately held art to public view, by honoring that individual in some way—such as listing that art on a public register, giving the owner an award, or even publicly praising the owner—or by doing the opposite, for example by withdrawing or constraining tax benefits.³⁰⁷

³⁰² Vandenbergh, *supra* note 298, at 73 (2003); *see also* Vandenbergh, *Order Without Social Norms: How Personal Norm Activation Can Protect the Environment*, 99 NW. U.L. REV. 1101, 1120 (2005) (“To activate a concrete norm, an individual must hold two types of beliefs. First, she must be aware of the consequences of her act regarding the objects of the abstract norm Second, she must take personal responsibility for causing those consequences.”).

³⁰³ Vandenbergh, *supra* note 298, at 73.

³⁰⁴ Vandenbergh, *supra* note 304, at 1121–22.

³⁰⁵ On the importance of effort and its obverse convenience, Professor Carlson concludes, based on empirical data on successful recycling programs, that the force of social norms is fairly limited.

Instead, reducing the effort required to engage in the desired behavior can have far greater success in increasing the numbers of people who will cooperate over a long period of time than efforts to intensify social norms. In fact, increasing convenience is so effective that individual commitment toward the desired behavior bears little relationship to whether someone will engage in it.

Carlson, *supra* note 303, at 1236.

³⁰⁶ Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 7–8 (2000).

³⁰⁷ *Id.* at 19.

Although people can be encouraged to adopt and adhere to desired “normative frameworks,” the targeted individual must justify these frameworks cognitively if they are going to positively motivate the individual’s behavior.³⁰⁸ Therefore, for an external norm to work that discourages private hoarding of public art, the art owner must appreciate the art’s value to the public. An individual who possesses an important piece of art probably is aware of that art’s public value or the individual would not have acquired it in the first place, although he or she may be less aware of its broader public educational value. Owners might also reason that it is to their advantage to conform to a norm of making important art available to public view to avoid public shame for withholding art that the public wants to see.

Guilt and shame are effective informal motivators and enforcers of socially desirable behavior.³⁰⁹ The typical circumstances in which guilt can be neutralized, such as legal complexity, the absence of an identifiable victim, necessity, and denial of responsibility,³¹⁰ would not be relevant in the case of an individual hoarding public art. The public is an identifiable victim, there is no legal complexity involved, there is no need to hoard art other than personal gratification, and there is no way to avoid responsibility, as there is also no one else to blame.

A feeling of guilt can be brought about because of the person’s education and upbringing regardless of the external effects of his or her action.³¹¹ Thus, an individual might be unmoved by the negative effects on the public weal of the withdrawal of art from public view but, because of his or her privileged background, might feel guilt. However, wealthy individuals like art hoarders, even in “closeknit societies,” are among the most likely to ignore or contravene social norms and “risk shaming sanctions” because their wealth insulates them.³¹²

The most effective ways to increase individual compliance with a social norm are face-to-face contact with the norm violator and personal feedback.³¹³ The reasons these two techniques are effective is that they increase “opportunities to signal or gather esteem, while simultaneously

³⁰⁸ Christopher Deabler, *The Normative and Legal Deficiencies of “Public Morality,”* 19 J.L. & POL’Y 23, 34 (2003); see also *id.* at 34–35. (“This framework must consist of a justification of norms generally and the justification of their societal implementation.”).

³⁰⁹ Vandenberg, *supra* note 298, at 83. But see POSNER, *supra* note 302, at 43 (“[N]o well-developed theory of guilt allows us to make predictions about when it will be influential or ‘what kind of people feel guilt and what kinds of people do not. So . . . we cannot rely on a theory of guilt for an explanation.’”).

³¹⁰ Vandenberg, *supra* note 298, at 83.

³¹¹ Eric B. Rasmusen & Richard A. Posner, *Creating and Enforcing Norms, With Special Reference to Sanctions* 371 (Coase-Sandor Instit. for L. & Econ., Working Paper No. 96, 2000).

³¹² Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1916–17 (1991).

³¹³ Carlson, *supra* note 303, at 1299.

increasing attitudes in favor of the behavior.”³¹⁴ However, neither personal contact nor feedback is likely in the case of an individual who is hoarding public art in his or her private residence or on-site museum. In those circumstances, the individual’s actions are not observable by anyone or do not occur in an amorphous group setting. This shortcoming can make the use of behavioral norms and personal sanctions problematic. Additionally, when there is a risk that compliance with a social norm will have a negative payoff, such as loss of esteem among one’s peers—here, other private collectors of important art—and the individual is not part of a close-knit group like a neighborhood or family, an individual can externalize the harms caused by his or her actions with the result that the costs of behavioral change may exceed its benefits.³¹⁵

When an individual’s actions conform to an internal norm’s dictates, he or she generally feels a sense of pride and increased self-esteem; “enhanced reputation or the esteem of others” are the “reward” of conforming to an external norm.”³¹⁶ When external expectations are violated, they become violations of obligations and may subject the violator to social sanctions.³¹⁷ Social sanctions in the case of a breached external norm include “gossip, stigma, shaming or ostracism,” any one of which can be unpleasant and all of which are easy to enforce because they do not involve high transaction costs.³¹⁸ One caveat to the effectiveness of shaming or gossip as a norm enforcement tool is if privacy is viewed as a superior good. If so, then their enforcement effectiveness may be reduced.³¹⁹ Among wealthy hoarders of important art, it is not unreasonable to assume that privacy is highly regarded, thus diminishing the value of any public “outing” of any negative behavior.

On the other hand, an owner of important art is like a competitive consumer, who desires to own something that will create envy in his or her community because he or she possesses something that is “an observable

³¹⁴ *Id.* at 1300.

³¹⁵ Vandenberg, *supra* note 304, at 1105.

³¹⁶ Vandenberg, *supra* note 298, at 70.

³¹⁷ David R. Karp, *The New Debate About Shame in Criminal Justice: An Interactionist Account*, 21 JUST. SYS. J. 301, 314 (2000).

³¹⁸ Vandenberg, *supra* note 298, at 70. Another reason that shaming can be effective is that it prevents the offender from profiting from their offending action. See Karp, *supra* note 300, at 304 (“The essence of debasement penalties is status diminution through embarrassment and humiliation. The negative feelings about the offender’s behavior are communicated through imposed negative experience. This captures the practical function of retribution by disallowing the offender the opportunity to profit from the offending act.”).

³¹⁹ Posner & Rasmusen, *supra* note 295, at 381; see also Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 J. LEGAL STUD. 553, 558 (1998) (“[T]he legal protection of privacy undermines regulation by social norms because such regulation depends on the detectability of violations by ordinary citizens; the ostracizers (norm enforcers).”).

symbol” of “success under prevailing social norms.”³²⁰ The same public esteem that the collector seeks for himself or herself as an owner of important art can make that individual susceptible to negative feedback about his or her behavior.³²¹ In most situations, people want to be seen as socially responsible individuals.³²²

Business leaders, who may also be public art hoarders, “may be especially susceptible to shaming rituals.” This is because they are likely to be sensitive to public appearances and “vulnerable to moralistic or judgmental social groups.”³²³ Shaming can ruin an offender’s good reputation, which could adversely affect their business dealings.³²⁴ The effectiveness of shame depends on the community in which negative action took place. One reason shaming may not work in this situation is that art hoarders may not be members of a discrete group, like a religious or ethnic community, so the shame may not compromise their social standing in any group. To the extent the offender’s group is other private art collectors or dealers, they may not shun him or her as they share the offender’s values.³²⁵ Moreover, in atomized communities, such as the highly competitive community of wealthy art consumers where “social life is so thin,” shame is unlikely to be an effective deterrent.³²⁶

³²⁰ Douglas A. Kyser, *Law, Environment, and Vision*, 97 NW. U.L. REV. 675, 723 (2003).

³²¹ See Carlson, *supra* note 303, at 1290 (“The evidence suggests that esteem matters; many individuals care what others think of them. Cooperative behavior typically increases when opportunities to communicate esteem (or lack of it) increase such as the block leader intervention.”).

³²² Vandenberg, *supra* note 298, at 93 n.120.

³²³ Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 968 (1999); see also *id.* at 969 (“The result is what one commentator has called a ‘reputational rub-off’ effect.”); Daniel M. Kahan & Eric A. Posner, *Shaming White Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 379 (1999) (“[S]haming penalties . . . and reputational losses that no doubt resulted, interfere with the process of rationalization by interposing a communal ‘no,’ forcing the offender who wants to believe himself a good person to revise his evaluation of this actions.”).

³²⁴ Drew Feeley, *Personality, Environment, and the Causes of White Collar Crime*, 30 L. & PSYCHOL. REV. 201, 211 (2006).

³²⁵ See Massaro, *supra* note 314, at 1883 (“[S]haming practices are most effective and meaningful when five conditions are satisfied. First, the potential offenders must be members of an identifiable group, such as a close-knit religious or ethnic community. Second, the legal sanctions must actually compromise potential offenders’ group social standing. That is, the affected group must concur with the legal decision maker’s estimation of what is, or should be, humiliating to group members. Third, the shaming must be communicated to the group, and the group must withdraw from the offender—shun her—physically, emotionally, financially, or otherwise. Fourth, the shamed person must fear withdrawal by the group. Finally, the shamed person must be afforded some means of regaining community esteem, unless the misdeed is so grave that the offender must be permanently exiled or demoted.”); see also Stephen P. Garvey, *Can Shaming Punishments Educate*, 65 U. CHI. L. REV. 733, 748–49 (1998) (“[A]n offender has to care about what others think about him; otherwise, shame can get not grip on him. The broader and deeper the attachments, the greater will be his shame. If he lacks the requisite attachments, however, he will be ‘shameless,’ and subjecting him to a shaming penalty will have little retributive bite.”).

³²⁶ Garvey, *supra* note 327, at 753.

Shaming can “backfire, if the person being shamed does not accept the legitimacy of the punishment,” and can destroy the effectiveness of the sanction.³²⁷ Thus, the effectiveness of any form of social ostracism, including shame, is not assured in the case of a private art hoarder, even though in many other situations it can be an effective sanction.³²⁸ All else being equal, shaming penalties are likely to be more effective in Kenosha than they are in Manhattan. It is more likely that art hoarders live in or close to major urban areas like New York City than in Kenosha, Wisconsin, with a population of less than 100,000.³²⁹ “This is not to say they will be wholly ineffective in Manhattan, only that we should expect less.”³³⁰

In sum, an external behavioral norm to discourage private hoarding of public art may be difficult to activate and enforce, although not impossible if conditions are conducive to its emergence. To the extent private owners of public art benefit from public approval of their behavior and are harmed when their actions are condemned, the external norms may be effective. Publication of good and bad behavior in widely read print or online journals can arm the public with information that can be used to pressure improved social behavior by targeted art hoarders; public honors or awards recognizing art owners who make their art publicly available could make their esteem rise in the eyes of the public.

The goal of this Part has been to identify extralegal inducements to encourage hoarders of public art to make that art available for public viewing. Because application of the public trust doctrine to achieve this goal might be too incendiary to invite its use, this Part has suggested a mix of incentives and disincentives to complement the doctrine’s application. Each one by itself or in tandem with any of the others, backed up by the threat of public trust litigation, might pry the art out of the hoarder’s grasp for public view. For example, conditioning listing art on a prestigious register of important art on its public availability or using the tax code to encourage art owners to open their private museums to the public might achieve that result. Activated norms might also promote more public-spirited social behavior by private art collectors where the benefit of opening their collections is greater

³²⁷ Deni Smith Garcia, *Three Worlds Collide: A Novel Approach to the Law, Literature, and Psychology of Shame*, 6 TEX. WESLEYAN L. REV. 105, 119 (1999); see also *id.* (“This unpredictable reaction underlies a major drawback to public shaming, namely, the sheer unpredictability surrounding shaming from every participant in the shame process — the public, the offender, and related third-parties.”).

³²⁸ Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 TUL. L. REV. 605, 608 (2004); see also, *id.* at 605 (“[N]orms, or behavioral rules supported by a pattern of informal sanctions, can serve both as a source of law and a tool for effective behavioral change.”).

³²⁹ *Kenosha Wisconsin Population*, GOOGLE SEARCH, https://www.google.com/search?rlz=1C1GGRV_enUS759US759&q=kenosha+wi+population&sa=X&ved=0ahUKEwi-ktSvnuLXAhVp5oMKHVMcAn4Q1QIiQEoBQ&biw=1536&bih=724 (last visited February 12, 2017).

³³⁰ Garvey, *supra* note 327, at 753 (footnote omitted).

than its costs, and thus may also be a viable way to cushion the use of the public trust doctrine.³³¹

CONCLUSION

A legal regime mandating preservation of art objects could be constructed to account for this delicate balance between the public interest in the maintenance of cultural heritage and the economic expectations of collectors/purchasers of art objects.³³²

What this Article has done is identify a problem (the hoarding of nationally important art by private individuals) and propose a solution (the application of an “enhanced” public trust doctrine, triggered only if other measures fail to compel public access to that art). In doing this, the Article defines a category of art to be of such importance to the education and good citizenship practices of a country’s citizenry that to withhold it from public appreciation is to diminish both and thus weaken important republican values. It identifies and critiques ways to persuade hoarders of this art to open it to public view, specifically the doctrine of moral rights and laws like the Visual Artists Rights Act, but finds them wanting as they only protect the art from physical destruction and give enforcement rights to the artist, not to the public. The Article also examines the common-law doctrines of public dedication and public trust, finding that of the two, the latter’s flexibility and better fit with public art makes it the more attractive doctrine for these purposes.

However, applying the public trust doctrine stretches it well beyond its traditional comfort zone, and even its traditional application generates significant controversy. Therefore, the Article recommends what it calls an enhanced public trust doctrine, one augmented by personal and financial incentives or by external social norms designed to persuade owners of important public art to allow access to it by opening their own residences or private museums to the public or loaning this art to a public institution like a museum. In such a scenario, the public trust doctrine would wait in the wings, a stick held aloft, but not descended unless incentives and sanctions failed to induce the correct behavior.

In writing this piece, the author has drawn on the contribution of many others, principally Professor Joseph Sax who remains an inspiration for many of us.³³³ She has borrowed ideas from him and others and tried to

³³¹ See Carlson, *supra* note 303, at 1233 (“The viability of norms management as a regulatory approach depends, however, on the nature of the social problem, the context in which it arises, and the availability of other regulatory tools.”).

³³² Wilkes, *supra* note 48, at 194.

³³³ “Secularized today, the term ‘inspiration’ goes back to the Greeks and means the breath of the gods.” Elsen, *supra* note 1, at 954.

weave them together to tell a compelling story about a private wrong with an adverse public effect. If she has succeeded, she is in their debt, but her failure is hers alone. She can only hope that others more imaginative than she will find a way to reintroduce this art to the public who supported its creation and now deserves to have it available to enjoy.