
PREVENTING *GROSS* INJURY TO LOCAL CULTURAL PATRIMONY: A PROPOSAL FOR STATE REGULATION OF DEACCESSIONING

I. INTRODUCTION

In 1878, a group of Jefferson Medical College (now Thomas Jefferson University) (“Jefferson”) alumni collectively purchased Thomas Eakins’s masterpiece, *The Gross Clinic*, for \$200 and donated the painting to the university.¹ The work vividly depicted internationally renowned Philadelphia surgeon, Dr. Samuel D. Gross, surgically removing a piece of thigh bone from a patient who suffered from osteomyelitis.² Over the years, *The Gross Clinic* has continued to be displayed for public enjoyment on Jefferson’s campus.³ Today, it is recognized as one of the greatest American paintings of the nineteenth century.⁴

The Gross Clinic, recently determined to be worth \$68 million on the market,⁵ is an extraordinary artistic accomplishment of great historic importance.⁶ Still, there are a number of other factors—elements of “local flavor”—that imbue the painting with a great *intangible* significance and firmly root it within the history and culture of the community.⁷ Although the painting is undoubtedly one of immense national significance, locally it is considered “Philadelphia’s painting,” by a Philadelphia artist, about a Philadelphia professor and surgeon, which reminds the city of its creative and technical excellence.⁸ For these and many other reasons, Jefferson was met with extreme local resistance

1. Kathleen C. Carignan, *A Fine Art: Public Institutions Maneuver the Delicate Work of Deaccessioning Art*, PHILA. LAW., Summer 2007, at 21, 21.

2. See *infra* Part II.A for a more detailed description of the painting and its importance in Philadelphia.

3. Carignan, *supra* note 1, at 21.

4. *91FM News* (WHYY radio broadcast Dec. 8, 2006), available at <http://www.whyy.org/artsandculture/grossclinic.html> (under “From 91FM News” follow first “Listen” hyperlink).

5. In 2006, when Jefferson announced its plans to sell the painting, \$68 million was the high bid it received; the bid was jointly offered by the Crystal Bridges Museum of American Art and the National Gallery of Art. Carignan, *supra* note 1, at 21. See *infra* Part II.B.1 for a discussion of the public’s response to attempted sale of *The Gross Clinic* and the controversy surrounding its deaccession.

6. See *infra* Parts II.A and II.B.2.c for an explanation of *The Gross Clinic*’s historic and artistic importance.

7. See The Annenberg Foundation, Fact Sheet: About *The Gross Clinic*, http://www.annenbergfoundation.org/usr_doc/Gross_Clinic_Background.pdf (last visited Jan. 5, 2009) (discussing *The Gross Clinic*’s many historic and cultural ties to Philadelphia). See *infra* Part II.B.2.c for a discussion of “cultural property.”

8. See *infra* Part II.B.2.c for a discussion of “cultural property” and the implications of having private owners control the destiny of objects to which the community at large feels it has a legitimate claim.

and animosity when it announced that, in order to raise money for an expansion of the university's campus, it would sell *The Gross Clinic* to the Crystal Bridges Museum of American Art in Bentonville, Arkansas and the National Gallery of Art in Washington, D.C.⁹ Technically, Jefferson had no legal obligation to the greater Philadelphia community regarding its handling of *The Gross Clinic*.¹⁰ At any time, Jefferson could sell the painting to whomever it wished—including a private owner—for his exclusive enjoyment.¹¹

This Comment argues that the traditional notions of absolute private property ownership are inadequate in the context of “cultural property” in general and artwork in particular.¹² A state-level legislative scheme should be enacted to protect communal interests in privately owned cultural property.¹³ Part II.A begins by providing a detailed overview of the history behind Thomas Eakins's historic masterpiece, *The Gross Clinic*, and the role that the painting has played in the history and culture of Philadelphia. Part II.B generally illustrates some of the problems commonly associated with the sale, or “deaccessioning,” of artwork and specifically outlines the deaccessioning controversy that emerged in the context of *The Gross Clinic*. This Part focuses in particular on (1) the issues that arise when an institution attempts to sell a piece of art against the original and express intentions of the donor, (2) the difficulties that institutions encounter when attempting to use deaccessioning proceeds to cover operating or administrative costs, and (3) the danger inherent in contemplating valuable and culturally significant objects as mere fungible assets.

Part II.C explores the possibility that some privately owned works of art are so culturally significant that they can become elevated to the status of “cultural property” in which the public at large may have a legitimate property interest in addition to those traditional interests of the private owner. In order to present a complete backdrop for the argument, this Part first analyzes competing theories of property ownership and then briefly discusses the Takings Clause of the Fifth Amendment to the United States Constitution.

Part III.A explains the need for a statutorily mandated system to regulate deaccessioning and briefly evaluates two scholarly proposals for regulation. Finally, Part III.B proposes the implementation of a state-level regulatory scheme that would take into consideration a variety of factors in determining what works should qualify as statutorily protected “cultural property.”

9. See *infra* Part II.B.1 for a discussion of the attempted sale and the public's reaction.

10. See *infra* notes 153–56 and accompanying text for an explanation of why Thomas Jefferson University, a private owner not bound by a restrictive covenant, cannot legally be hindered in its right to sell *The Gross Clinic*.

11. See *infra* notes 153–56 and accompanying text for an explanation of Jefferson's freedom to sell the painting.

12. See *infra* Part II.C for a general analysis of the public's interest in certain privately owned “cultural property.” See *infra* Part II.C.1 for a more detailed discussion of competing property theories.

13. See *infra* Part III.B for an explanation of this Comment's proposed legislative scheme.

II. OVERVIEW

A. *Thomas Eakins and The Gross Clinic*

Heroic myth writ large (Homer) or small (Rocky Balboa, Luke Skywalker) inspires great things in real life, just as Eakins [sic] painting of Gross has inspired countless artists, physicians and patients. It is arguably Philadelphia's David. But Philadelphia is not Florence, and the Jefferson Board no Medici.¹⁴

In 1875, thirty-year-old artist Thomas Eakins began work on the painting he anticipated would eventually bring him international respect and recognition.¹⁵ Although today *The Gross Clinic* is considered one of the greatest American paintings of the nineteenth century,¹⁶ the public's initial reaction to the piece hardly resounded in praise and admiration.¹⁷ Eakins hoped that his painting would be selected for display, along with other renowned masterpieces, at the Centennial Exhibition of 1876.¹⁸ The 1876 Exhibition, set in Philadelphia and intended to celebrate the 100th anniversary of the Declaration of Independence, would be the "first true World's Fair to be held in the United States."¹⁹ The event would be of great local importance, "not only to mark the city's own history, but also to mark Philadelphia as a progressive city of industry and technology, of invention and science."²⁰ The Centennial Jury of Artists, a committee charged with selecting the art that would be displayed at the Exhibition, sought to present work that would "show the best of American life" to the rest of the world.²¹

Unfortunately, the Philadelphia art community of 1876 was not ready to embrace Eakins's work.²² The painting vividly portrayed internationally renowned Philadelphia surgeon, Dr. Samuel D. Gross, removing a piece of bone from the thigh of a patient suffering from osteomyelitis.²³ "Known in his day as

14. Posting of Gregg Chadwick to Speed of Life: Studio Notes from the Contemporary Painter Gregg Chadwick, http://greggchadwick.blogspot.com/2006_11_01_archive.html (Nov. 10, 2006, 21:13 EST) [hereinafter Chadwick, 21:13 EST posting].

15. *Thomas Eakins: Scenes from Modern Life* (WHYY television broadcast June 6, 2002), available at <http://why.org/artsandculture/grossclinic.html> (under "From the WHYY Archives" follow the second "Watch the Video" hyperlink) [hereinafter WHYY, *Scenes from Modern Life Part II*].

16. *91FM News*, *supra* note 4.

17. See WHYY, *Scenes from Modern Life Part II*, *supra* note 15 (describing public's initial reaction to controversial, offensive painting).

18. See *Thomas Eakins: Scenes from Modern Life* (WHYY television broadcast June 6, 2002), available at <http://www.why.org/artsandculture/grossclinic.html> (under "From the WHYY Archives" follow the first "Watch the Video" hyperlink) (acknowledging Eakins had "the greatest hopes" for this painting).

19. *Id.*

20. *Id.*

21. *Id.*

22. See WHYY, *Scenes from Modern Life Part II*, *supra* note 15 (describing public's initial reaction to *The Gross Clinic*).

23. Carol Vogel, *Eakins Masterwork Is to Be Sold to Museums*, N.Y. TIMES, Nov. 11, 2006, at B7. Vogel simply describes osteomyelitis as a "common ailment of the time." *Id.* Osteomyelitis is an acute or chronic bone infection generally caused by bacteria. MedLinePlus Medical Encyclopedia:

‘the emperor of American surgery,’ the 70-year-old Gross is depicted turning from the patient to address his students in the surgical amphitheater at Jefferson Medical College” in Philadelphia.²⁴ Eakins was a strong admirer of Dr. Gross; he attended a number of the doctor’s lectures at Jefferson and even painted a likeness of himself, “attentively taking notes,” into the portrait.²⁵ The painting was raw, realistic, and uncompromising.²⁶ The surgical details, the bloody scalpel, and the seeming vulnerability of the patient made *The Gross Clinic* too much for many people to bear, let alone appreciate.²⁷ One spectator reportedly commented on the painting, “power it has, but very little art,” and argued that Eakins crossed that fine line which separates “the beauty of the nude” from the “indecent of the naked.”²⁸ Unfortunately, the Centennial Jury agreed with the public sentiment; it rejected *The Gross Clinic* and refused to display it in the Fine Arts Gallery because of the “shocking” nature of its content.²⁹ Rather, Eakins’s painting was displayed “on the Centennial grounds at the United States Army Post Hospital, in a ward filled with hospital bedding and furniture.”³⁰ Art critic William Clark realized the injustice of having such a remarkable work obscurely placed in a hospital building.³¹ In defense of Eakins he commented on the hypocrisy of the jury, stating

it is a great pity that the squeamishness of the Selection Committee compelled the artist to find a place in the United States Hospital Building. It is rumored that the blood on Dr. Gross’s fingers made some of the committee members sick, but, judging from the quality of the works exhibited by them we fear that it was not the blood alone that made them sick. Artists have before now been known to sicken at the sight of pictures by younger men which they in their souls were compelled to acknowledge were beyond their emulation.³²

The Gross Clinic marked the beginning of what would become Eakins’s reputation as a controversial artist, an “uncompromising realist,” and a “painter of the new, the modern and the ugly.”³³ Even today, the power and drama of *The*

Osteomyelitis, <http://www.nlm.nih.gov/medlineplus/ency/article/000437.htm> (last visited Jan. 5, 2009). The operation depicted in *The Gross Clinic*, where Dr. Gross is removing dead tissue from the thigh of a patient, was one of the doctor’s particular areas of expertise. The Annenberg Foundation, *supra* note 7.

24. The Annenberg Foundation, *supra* note 7.

25. *Id.*

26. *See, e.g., id.* (“As a modern realist and something of a provocateur, [Eakins] confronts us with a confusing, even shocking scene—as if we are seated in a surgical amphitheatre, facing an oddly foreshortened body ringed by a tangle of intent doctors, some touched with bright blood. . . . Behind [Dr. Gross], the frightened woman, perhaps the mother of the patient, cringes and covers her face.”).

27. *See* WHY, *Scenes from Modern Life Part II*, *supra* note 15 (noting “[p]eople were offended by the blood; they were shocked by the nude figure of the patient”).

28. *Id.*

29. The Annenberg Foundation, *supra* note 7.

30. *Id.*

31. *Id.*

32. *Id.* (quoting Marc Simpson, *The 1870s*, in THOMAS EAKINS 27, 33 (Darrel Sewell ed., 2001)).

33. WHY, *Scenes from Modern Life Part II*, *supra* note 15.

Gross Clinic is undeniable. An art critic for the New York Tribune referred to the painting as “one of the most powerful, horrible yet fascinating pictures that has been painted anywhere in this century.”³⁴ There is no longer any question that Eakins’s masterpiece is a cultural and artistic treasure, as well as one of America’s most historically influential paintings.³⁵

B. *Deaccessioning of Artwork*

1. The Recent *Gross Clinic* Controversy

In 1878, a group of Jefferson alumni pooled resources, purchased *The Gross Clinic* for \$200, and gave the masterpiece as a gift to the university.³⁶ For years, the painting was displayed at Jefferson, where it is estimated that approximately 500 people per year would come to see it.³⁷ In 1982, the university established the Eakins Gallery in Alumni Hall, where *The Gross Clinic* was prominently displayed along with two other Eakins portraits, both of Jefferson physicians and professors.³⁸ Over the years, *The Gross Clinic* has become a “pilgrimage painting” for alumni and other visitors,³⁹ as well as “one of the most often reproduced, discussed, and celebrated paintings in American art history.”⁴⁰

In early November 2006, Thomas Jefferson University announced its plan to sell *The Gross Clinic*.⁴¹ An immediate public outcry followed.⁴² “Art and cultural institutions, city politicians and Jefferson alumni” all took a stand in opposition to the sale.⁴³ Employees and faculty of the university voiced disapproval and disappointment that they were not consulted during the decision-making process.⁴⁴ Although the news of the sale was undoubtedly shocking enough, making matters worse was the fact that the painting was scheduled to be sold jointly to the National Gallery in Washington, D.C. and the

34. The Annenberg Foundation, *supra* note 7.

35. *See, e.g.*, Pennsylvania Academy of the Fine Arts, *The Gross Clinic*, <http://pafa.org/Museum/Research-Archives/Thomas-Eakins/The-Gross-Clinic/80/> (last visited Jan. 5, 2009) (describing *The Gross Clinic* as “one of the greatest American paintings ever created”).

36. Carignan, *supra* note 1, at 21.

37. *Id.*

38. Thomas Jefferson University, The Jefferson Art Tradition, <http://www.jefferson.edu/eakins/> (last visited Jan. 5, 2009) [hereinafter Jefferson University].

39. The Annenberg Foundation, *supra* note 7.

40. *Id.*

41. Tom Infield, *Montco Coalition’s Outcry Likens Barnes Move to ‘Gross’ Injustice*, PHILA. INQUIRER, July 6, 2007, at B8.

42. *Id.* (describing local reaction as one of “shock and outrage”).

43. Carignan, *supra* note 1, at 21.

44. Anonymous posting to Speed of Life: Studio Notes from the Contemporary Painter Gregg Chadwick, <http://greggchadwick.blogspot.com/2006/11/keep-eakins-gross-clinic-in.html> (Nov. 10, 2006, 08:05 EST) [hereinafter Anonymous, 08:05 EST posting].

anticipated Crystal Bridges Museum of American Art in Bentonville, Arkansas, for \$68 million.⁴⁵

A general sentiment of disgust permeated the national art and local Philadelphia communities in the days and weeks following the announcement.⁴⁶ It is possible that part of the resentment over the sale was because the painting would spend half of each year in the seemingly rural Bentonville, Arkansas;⁴⁷ or perhaps it had something to do with the fact that Wal-Mart heiress Alice Walton financially backed the Crystal Bridges Museum.⁴⁸ Regardless of the reasons behind the public discontent, it was clear that Philadelphia was not ready to lose its beloved *Gross Clinic*.⁴⁹ One contemporary artist argued against the sale on his blog; angered citizens commented on the blog to vent their frustrations over the sale.⁵⁰ He argued that *The Gross Clinic* was a part of the city's "cultural heritage" and that Philadelphia had to do what was necessary to prevent its sale.⁵¹

Fortunately for Philadelphia, Jefferson seemed to have anticipated a public outcry of this sort and had taken steps in advance to alleviate any local tensions.⁵² The university's sales agreement was unique in that it included a provision giving local Philadelphia cultural institutions a forty-five day window in which to match the \$68 million sale price.⁵³ It is unclear exactly what prompted Jefferson to include the matching clause.⁵⁴ It could be because Philadelphia had already experienced similar deaccessioning difficulties in 1999.⁵⁵ Alternatively, Jefferson may have simply included the clause to protect

45. WHYY Arts and Culture, Thomas Eakins *The Gross Clinic*, <http://www.whyy.org/artsandculture/grossclinic.html> (last visited Jan. 5, 2009) [hereinafter WHYY.org].

46. See *infra* notes 60–66 and accompanying text for a discussion of the public's reaction to the announcement that *The Gross Clinic* would be sold. Specifically, see *infra* note 61 and accompanying text for a discussion of the actions that were subsequently taken to keep the painting in Philadelphia.

47. See, e.g., Anonymous, 08:05 EST posting, *supra* note 44 (arguing that fewer people will see painting if housed in Bentonville because of Bentonville's lower population).

48. Carignan, *supra* note 1, at 21; *9IFM News*, *supra* note 4.

49. See *infra* note 61 and accompanying text for a discussion of public sentiment regarding the proposed sale of *The Gross Clinic*.

50. Chadwick, 21:13 EST posting, *supra* note 14.

51. See *id.* (quoting TBFKAP*, <http://phillyville.blogspot.com/2006/11/absolutely-not.html> (Nov. 11, 2006)). The blog TBFKAP* noted further, "If we sell it, we are selling . . . Philadelphia's future. Would we allow the Liberty Bell to be bought? . . . This is no different." TBFKAP*, *supra*.

52. See *infra* notes 55–59 and accompanying text for an explanation of the local tensions and political pressure that stemmed from prior deaccessioning controversies in Philadelphia and New York. Arguably, events such as these prompted Jefferson and Christie's of New York to include a matching clause in their agreement to sell *The Gross Clinic*.

53. *9IFM News*, *supra* note 4.

54. See *infra* notes 55–59 and accompanying text for possible explanations of why Jefferson included the matching clause in its contract. See Vogel, *supra* note 23 (discussing university's concern for residents' objections as one reason for matching clause).

55. Gresham Riley, *Public Art, Private Ownership, or: The Unintended Consequences of Virtuous Acts*, BROAD STREET REV., Nov. 22, 2006, http://www.broadstreetreview.com/index.php/main/article/Public_art_private_ownership1. In 1999 the estate of the late Jack Merriam attempted to sell *Dream Garden*, "the Maxfield Parrish-Louis Tiffany glass mosaic" that had for years occupied

its reputation and alleviate any future blame that might have been placed on the university if the painting were sent out of state.⁵⁶

Some believe that the matching clause was the work of Marc Porter, from Christie's in New York, who was asked to broker the sale.⁵⁷ At the time, New York was certainly still shaken from an all-too-similar deaccessioning controversy that occurred when Alice Walton purchased Asher B. Durand's famous *Kindred Spirits* from the New York Public Library.⁵⁸ Marc Porter was well aware of the uproar that followed the sale in New York and may not have wanted the same thing to happen in Philadelphia.⁵⁹

Regardless of the motivation, the public outcry anticipated by Jefferson transpired.⁶⁰ Immediately following announcement of the sale, local art communities, political groups, lobbyists, and angry Philadelphians began campaigning together to raise the support and funds necessary to keep *The Gross Clinic* in Philadelphia.⁶¹ Even the mayor's office became involved and searched for ways to "block the sale on legal grounds."⁶² Mayor John Street publicly commented, "Eakins' iconic painting, *The Gross Clinic*, is by a Philadelphian, about Philadelphians, and set in Philadelphia . . . It belongs in Philadelphia, just as much as the Liberty Bell and our sports teams."⁶³ Mayor

approximately "49 feet of wall space in the lobby of the former Curtis Publishing building at Sixth and Walnut Streets." *Id.* Luckily, in that case, the Pew Charitable Trusts rescued the mosaic by purchasing it from the Merriam estate for \$3.5 million and donating it to the Pennsylvania Academy of Fine Arts. *Id.* The historic masterpiece was able to remain in Philadelphia where many believed it was intended to stay. *Id.* One Philadelphian commented that it was his belief *Dream Garden* should remain in the city because "[o]ur forefathers wanted this right here and it belongs here and should stay." *Id.*

56. See, e.g., Chadwick, 21:13 EST posting, *supra* note 14 (stating belief that Crystal Bridges Museum of American Art in Arkansas wanted to "pry away" artwork from its Philadelphia home); see also Anonymous, 08:05 EST posting, *supra* note 44 (expressing anger that "local" artwork will "live" in Arkansas where fewer people will ever see it).

57. Vogel, *supra* note 23.

58. Carignan, *supra* note 1, at 21.

59. Vogel, *supra* note 23. One local news broadcast referred to the sale of *Kindred Spirits* as a "hijacking [of] one of the state's cultural treasures." *91FM News*, *supra* note 4.

60. See *infra* note 61 for examples of Philadelphia's reaction to the sale and the massive fundraising campaign that ensued to keep *The Gross Clinic* in the city.

61. See Patricia M. Annino, *Commentary: Art of Giving Has Some Donors Crying Foul*, 35 MASS. LAW. WKLY., 2285, 2285 (2007) (stating that Pennsylvania Attorney General stepped in, insisting local museums should be given first opportunity to bid on painting); Carignan, *supra* note 1, at 22 (reporting Mayor Street's December 21, 2006 announcement that fundraising drive raised approximately \$30 million); Anonymous Posting to Speed of Life: Studio Notes from the Contemporary Painter Gregg Chadwick, <http://greggchadwick.blogspot.com/2006/11/keep-eakins-gross-clinic-in.html> (Nov. 10, 2006, 14:09 EST) [hereinafter Anonymous, 14:09 EST posting] (encouraging support and donations through "mass-based drive" which would hopefully "send a powerful message about public concern to stop this kind of plundering of American art"); Laura Kujawski, *The Gross Clinic Will Remain in Philadelphia*, PNNONLINE, Jan. 2, 2007, <http://pnnonline.org/article.php?sid=7182> (stating painting was eventually saved thanks to "nationwide grassroots effort" and unity of Philadelphia's philanthropic community, which "galvanized people across the region" (quoting Hugh Long, CEO of Wachovia's MidAtlantic Banking group)).

62. WHYY.org, *supra* note 45.

63. Kujawski, *supra* note 61.

Street also talked about the possibility of having the painting designated a “historic object.”⁶⁴ This “seldom used category of the city’s preservation ordinance” would allow “the Philadelphia Historical Commission to block the sale or alteration of any object so designated.”⁶⁵ All of the commotion that came about in an effort to keep *The Gross Clinic* in Philadelphia may lead one to wonder: What makes Philadelphians believe that they should have any say in what happens to this painting?⁶⁶

There is no question that *The Gross Clinic* has strong historic ties to Philadelphia. The Annenberg Foundation, in its *Fact Sheet: About The Gross Clinic*, included a section titled “Ten Reasons to Keep *The Gross Clinic* in Philadelphia” in which it explored the painting’s many cultural ties to the region.⁶⁷ The article highlights that Thomas Eakins was born and died in Philadelphia; indeed, the subject matter of many of his finest works was inspired by Philadelphia citizens and the local landscape.⁶⁸ Additionally, Dr. Samuel Gross was one of Jefferson Medical College’s first graduates and went on to become “a charismatic professor and an internationally renowned authority on surgery.”⁶⁹ Furthermore, the painting was made specifically for the Centennial Exhibition of 1876, during which Philadelphia hoped to make an international name for itself and “bring honor to the city.”⁷⁰ None of these local connections, however, placed a legal obligation on Thomas Jefferson University to keep *The Gross Clinic* in Philadelphia.⁷¹

2. Deaccessioning Policies and Controversies

Generally speaking, deaccessioning refers to the removal of an object from a museum collection by sale or other transfer.⁷² There is no question that deaccessioning is a legitimate, legal practice that is, at many times, a “vital concern for museums.”⁷³ There are a number of justifiable reasons for a museum to deaccession certain pieces or portions of a collection. For instance, as museums’ collections develop and grow over time, certain works may lose relevance or become too “isolated.”⁷⁴ On the other hand, a museum may simply

64. Riley, *supra* note 55.

65. *Id.*

66. *See, e.g.*, Anonymous, 08:05 EST posting, *supra* note 44 (lamenting fact that Jefferson employees and faculty were not made aware of sale or consulted prior to sale negotiations).

67. The Annenberg Foundation, *supra* note 7.

68. *Id.*

69. *Id.*

70. *Id.* (noting also that “Eakins’ pride in his professor and his colleagues . . . inspired a painting that is about the glory of modern Philadelphia and its heroes of science and education”).

71. *See infra* notes 153–56 for a discussion of why Thomas Jefferson University, a private owner not bound by a restrictive covenant, cannot legally be hindered in its right to sell *The Gross Clinic*.

72. David R. Gabor, Comment, *Deaccessioning Fine Art Works: A Proposal for Heightened Scrutiny*, 36 UCLA L. REV. 1005, 1005 (1989).

73. *Id.*

74. *See id.* at 1018 (explaining museums often sell works that no longer have any relation to rest of collection); Carignan, *supra* note 1, at 21–22 (discussing Albright-Knox Art Gallery’s

acquire too many of a certain type or style of artwork and decide to sell off a portion of a collection to avoid redundancy.⁷⁵ Yet despite its legality, and oftentimes necessity, deaccessioning is still considered by many to be a controversial action for a museum to take.⁷⁶ For this reason, museums tend to act more prudently and secretly when contemplating the deaccessioning, rather than the acquiring, of art.⁷⁷ Controversy over deaccessioning may arise in a number of contexts. Three prime examples are (1) when a museum sells a donated piece of art against the express wishes of the donor;⁷⁸ (2) when the proceeds from deaccessioning are put toward administrative or other operating costs;⁷⁹ and (3) when there are attempts to sell a piece of art that has either been publicly displayed in the same community for a considerable period of time, or that has some historic or cultural significance within a particular community.⁸⁰ All three of these tensions are in some way implicated in the story of *The Gross Clinic* and the problems that surrounded its attempted sale.

a. Donor Intent

A common argument often used to counter deaccessioning plans is that selling the piece would violate the donor's intent.⁸¹ Ultimately, this discourages other philanthropists from making contributions to charitable organizations out of fear that their covenants will not be honored after their deaths.⁸² Some authors wrote about the importance of donor intent within the context of *The*

deaccessioning of approximately "200 antiquities" because they no longer fit stated mission to "acquire, exhibit, and preserve both modern and contemporary art").

75. Gabor, *supra* note 72, at 1019.

76. Jennifer L. White, Note, *When it's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041, 1042 (1996) (noting many people have difficulty "contemplating each work of art in a museum collection as a fungible asset").

77. See Gabor, *supra* note 72, at 1011–13 (explaining why museums handle deaccessioning very discreetly).

78. See, e.g., Carignan, *supra* note 1, at 23–24 (relating story of Fisk University's attempts to sell portions of collection that Georgia O'Keeffe donated under condition that collection would remain intact and be used for "teaching and the edification of the community").

79. See, e.g., White, *supra* note 76, at 1045 (noting that many museum professional associations disallow using deaccessioning profits for museum).

80. See, e.g., Riley, *supra* note 55 (explaining deaccessioning difficulties Philadelphia encountered involving Merriam estate's plan to sell *Dream Garden* because public display had engendered sense of ownership).

81. For a discussion of the importance of respecting donor intent within the context of charitable trusts see Ilana H. Eisenstein, Comment, *Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case for Consideration of Public Interest in Administration of Charitable Trusts*, 151 U. PA. L. REV. 1747, 1754–59 (2003). A Pennsylvania case notes that "it is one of our most fundamental legal principles that an individual has the right to dispose of his own property by gift or will as he sees fit." *In re Girard's Estate*, 127 A.2d 287, 290–91 (Pa. 1956). Generally, a donor's wishes "will be enforced even though contrary to the general views of society." *Id.*

82. See, e.g., Gabor, *supra* note 72, at 1011–13 (explaining some reasons why museums handle deaccessioning discreetly, including fear of scaring away potential donors, offending donors' heirs, or inviting lawsuits stemming from breach of restrictive covenant).

Gross Clinic saga.⁸³ An article in *The Philadelphia Lawyer* explained that the “impact of donor intent” is a key concern raised by deaccessioning.⁸⁴ The article stated that current Jefferson alumni were some of those most disturbed by the potential sale of *The Gross Clinic*, insinuating that the alumni felt betrayed by the university’s willingness to disregard the wishes of their predecessors.⁸⁵ Similarly, another article criticized Jefferson, arguing that when it accepted the painting over 100 years ago it accepted certain “imposed conditions” as well.⁸⁶ The author argued that if Jefferson did not want to be bound by such conditions, it should have rejected the gift.⁸⁷ The article goes on to question why the university waited so long before trying to derive revenue from the painting in less drastic ways.⁸⁸

Any discussion of the Jefferson alumni’s “intent,” however, is misinformed; *The Gross Clinic* was donated to Jefferson in 1878 without any restrictive covenant attached.⁸⁹ It certainly would not be difficult to *infer* that Jefferson alumni bought and donated the portrait of their beloved professor so that it might be proudly displayed on campus to inspire medical students and professionals for generations to come; still, only *express* intent carries with it legal ramifications.⁹⁰ For this reason, “respect for donor intent” is probably the weakest argument for why the public should have had input in the deaccessioning of *The Gross Clinic*.⁹¹

b. Operating and Other Administrative Costs

Another controversial deaccessioning topic that the attempted sale of *The Gross Clinic* raised was the issue of how Thomas Jefferson University would

83. See Annino, *supra* note 61, at 2285 (arguing *The Gross Clinic* controversy is another example of organization receiving donation and attempting to go against donor’s original intent); Carignan, *supra* note 1, at 23 (arguing museums and cultural institutions “need to balance donor intent with the future of the institution” and recognizing some of “harshes critics of the deaccessioning of *The Gross Clinic* were alumni [of Jefferson] whose predecessors originally donated the work”).

84. Carignan, *supra* note 1, at 21.

85. *Id.* at 23.

86. Annino, *supra* note 61, at 2285.

87. *Id.*

88. See *id.* (discussing Fisk University’s O’Keeffe collection and suggesting university could attempt to broadly exhibit paintings to attract visitors).

89. Gresham Riley, *Art Wars: Dr. Barnes and Dr. Gross*, BROAD STREET REV., Dec. 16, 2006, http://www.broadstreetreview.com/index.php/main/article/Eakins_vs_Barnes.

90. See 15 AM. JUR. 2D *Charities* § 76 (2000) (explaining donor may specify that gift be used for particular purpose; departure from conditions may be allowed for illegality, impracticability, or impossibility).

91. Although not the primary focus of this Comment, and not present in *The Gross Clinic* controversy, the topic of donor intent for gifts to charitable organizations raises a number of interesting legal questions. This topic has come to light most recently within the context of the Barnes Foundation and the extensive litigation that has spawned from attempts to change the “location, management, trusteeship, and access policies of the Foundation in return for a multimillion-dollar gift.” Eisenstein, *supra* note 81, at 1751–54. See generally *id.* at 1749–54 for a discussion of background information about the Barnes Foundation and proposed changes to its structure contrary to original donor intent.

spend the proceeds it earned from the sale.⁹² In this case, Jefferson planned to use the money to further develop its thirteen-acre campus in Philadelphia.⁹³ Jefferson sought to both maximize its gain on *The Gross Clinic* and place the painting with a museum that could provide the requisite care.⁹⁴ It has been argued that deaccessioning museum pieces “to generate funds to pay for maintenance costs and museum upkeep” is one of the most troublesome uses of deaccessioning proceeds.⁹⁵ Both the American Association of Museums (“AAM”) and the Association of Art Museum Directors’ (“AAMD”) ethical guidelines “prohibit the use of deaccessioning proceeds for anything other than improvement of the collection.”⁹⁶ Although the AAM and AAMD directives appear unambiguous, it has yet to be determined whether and when these prohibitions would ever be judicially enforced.⁹⁷ Indeed, “in the last decade numerous deaccessions have quietly been made in order to raise money for institutional support or facilities maintenance.”⁹⁸

As White notes, “[a]rt museums present the paradox of being simultaneously very rich, because of the value of the assets they hold, and very poor, due to the illiquidity of those assets and high operation costs.”⁹⁹ Many times, museums must choose between deaccessioning and closing their doors entirely.¹⁰⁰ Even then, museums owe heightened fiduciary duties to consider the best interests of the public and to “exercise . . . care and diligence in managing the trust or corporation.”¹⁰¹ David R. Gabor illustrates a number of the

92. See, e.g., Annino, *supra* note 61 (arguing organization cannot ignore greater responsibilities to public good by “cashing out the gift . . . and turning the money over to a failing university”).

93. Vogel, *supra* note 23; see also Carignan, *supra* note 1, at 25 (stating Jefferson plans to use proceeds to fund “10-year strategic plan” that includes construction of school and medical facilities).

94. Vogel, *supra* note 23.

95. Gabor, *supra* note 72, at 1019.

96. Lauren McBrayer & John J. Steele, *The Art of Deaccession: An Ethical Perspective*, SK061 A.L.I.-A.B.A. 339, 347 (2005).

97. White, *supra* note 76, at 1045–46.

98. McBrayer & Steele, *supra* note 96, at 347 (quoting Daniel Range, Comment, *Deaccessioning and Its Costs in the Holocaust Art Context: The United States and Great Britain*, 39 TEX. INT’L L.J. 655, 660–61 (2004)).

99. White, *supra* note 76, at 1041 (footnote omitted).

100. See McBrayer & Steele, *supra* note 96, at 347 (explaining that museums are faced with increasing financial pressures and often must choose to “sell or sink”). For example, the New York Historical Society was forced to close in 1993 because of financial difficulties and was only capable of reopening when a court allowed it to sell \$16 million worth of art and put the proceeds toward operating expenses. *Id.* at 347 n.34 (citing Bob Morris, *The Night; The Dress: Black Tie and Goggles*, N.Y. TIMES, Oct. 15, 1995, § 1, at 43).

101. White, *supra* note 76, at 1052–53. There is a question as to whether the directors of museums that are organized as nonprofit corporations are held to the same heightened duties of care and loyalty as the trustees of museums that take the form of charitable trusts. *Id.* at 1057–58. The deaccessioning of artwork must still be handled with great care regardless of the institutional form that the museum takes. *Id.* at 1048. White points out that “[b]ecause a museum formed as a nonprofit corporation usually is maintained by public donations of artwork and funds, courts have considered these assets to be held in trust Under this approach, the directors are subject to the fiduciary duties required of a trustee.” *Id.* at 1055–56 (footnote omitted). In recent litigation, a court held that trustees have a duty

problems that arise when a museum attempts to sell off valuable artwork and asserts the need for a statutorily mandated policy to regulate the deaccessioning practices of museums.¹⁰² He argues that because most museums receive heavy government subsidies by the government and exist solely for the public benefit, their collections should technically be considered “publicly owned.”¹⁰³ Items that are deemed to be in the “public domain” should not be removed from the public by private sale.¹⁰⁴

Although this area of the law remains unsettled, it is even more unclear what standard a nonprofit corporation such as Thomas Jefferson University—whose primary mission is not associated with the collection, preservation, and display of art—should be held to regarding the deaccessioning of donated art.¹⁰⁵ Deaccessioning is generally an “unpalatable concept, as it involves contemplating . . . work[s] of art . . . as . . . fungible asset[s].”¹⁰⁶ Clearly, the uneasiness of the concept is not diminished simply because the art is displayed in a university hospital rather than a museum.¹⁰⁷

to “see that the public interest is not harmed by an act of a trustee that may otherwise be lawful.” *In re Milton Hershey Sch. Trust*, 807 A.2d 324, 334 (Pa. Commw. Ct. 2002).

102. Gabor, *supra* note 72, at 1006–07.

103. *Id.* at 1007–08. The government directly subsidizes museums through a number of programs such as the National Endowment for the Humanities and the Institute for Museum Services; it indirectly subsidizes museums through the allowance of tax-deductible gifts, bequests, and endowments. *Id.* at 1007–08 n.11. Additionally, the government provides a number of tax credit programs, all under the theory that the museums “add[] significant cultural benefits to a city.” *Id.* These tax exemptions are available as long as the museums comply with certain state guidelines. *Id.* at 1008 n.13.

104. Gabor, *supra* note 72, at 1008. Gabor points out that, because museums are tax-exempt institutions, their objects are held in public trust and are intended for the benefit of the public. *Id.* at 1038.

105. For example, Jennifer L. White advocates holding directors of nonprofit corporations to the same fiduciary duties as trustees under the law of charitable trusts because the greater responsibilities owed to the public make the distinctions between organizational forms irrelevant. White, *supra* note 76, at 1048. White’s article, however, focuses solely on the laws governing museums that have been formed as either nonprofit corporations or charitable trusts; there is no discussion of the law that should govern nonprofit corporations outside of the museum context. *Id.*

106. *Id.* at 1042.

107. See *supra* Part II.B.1 for a discussion of the controversy that stemmed from the attempted sale of *The Gross Clinic*, a painting that had been owned and displayed for years in a wing of Thomas Jefferson University Hospital. Additionally, see *supra* note 55 and accompanying text for a discussion of the problems encountered when the Jack Merriam estate attempted to remove a glass mosaic from its “home” in the lobby of a publishing building.

c. *Cultural Property*¹⁰⁸

The most difficult concept to grapple with—and indeed, one that presents itself time and time again in the context of deaccessioning—is the harsh reality that a piece of art, that has over the years become deeply embedded in the history and culture of a community, could one day be ripped from its “home” by a private owner.¹⁰⁹ It is not easy to accept the fact that an individual has the power to liquidate a valuable cultural object in the same way that a company can sell a warehouse or a piece of machinery in a time of financial difficulty.¹¹⁰ It is hard to believe that one person can determine the fate of a local treasure and the public can do nothing about it.¹¹¹ Ultimately, *The Gross Clinic* was saved; the Pennsylvania Academy of the Fine Arts and the Philadelphia Museum of Art raised enough money to jointly purchase the painting.¹¹² An enormous amount of political pressure, grassroots activism, and fundraising efforts eventually put an end to the saga.¹¹³ Still, one is left to wonder: what will happen next time? Surely, an issue of such great cultural import should not have to depend on a potentially unreliable political system for its resolution.

Much of the public’s skepticism regarding deaccessioning stems from the commonly held notion that “works of art have an intrinsic value to them which is

108. Nicole B. Wilkes uses the term “cultural property” to denote significant artwork that implicates the collective cultural heritage of a people. Nicole B. Wilkes, *Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute*, 24 COLUM.-VLA J.L. & ARTS 177, 179 (2001). The 1970 UNESCO Convention defined cultural property to include, inter alia, “property relating to history, including the history of science and technology and military and social history . . . elements of artistic or historical monuments . . . antiquities more than one hundred years old . . . [and] property of artistic interest.” Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 96 Stat. 2329, 823 U.N.T.S. 231, available at http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html.

109. Joseph L. Sax points out that although typically an “object” is only of interest to the person who owns it, that is not true for all property. JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 1 (1999). Some objects are of value to the community at large regardless of who owns them. *Id.* Sax notes that if a great work of art is destroyed or public access to that work is prevented, there will “undoubtedly be a profound sense of loss” to the community even though the community does not technically have an ownership interest in the piece. *Id.* at 2. Sax argues that there are a number of explanations for this sense of communal loss: there is an actual lost opportunity when the public is prevented from having access to the work; in the case of vandalism, there is a symbolic loss that stems from the “triumph of ignorance over genius;” furthermore, there is a loss in the sense that the “pursuit of a common agenda” has been undermined. *Id.*

110. See, e.g., White, *supra* note 76, at 1042–43 (noting that art embodies unique intrinsic value not associated with its market value).

111. See, e.g., SAX, *supra* note 109, at 1 (arguing private owner’s decision to destroy or hide significant artwork deprives public of resource for communal betterment).

112. Kujawski, *supra* note 61 (noting Annenberg Foundation donated \$10 million, two Aramark corporate officers and Pew Charitable Trusts each donated \$3 million, and Wachovia Bank agreed to finance purchase); Pennsylvania Academy of the Fine Arts, *supra* note 35 (stating that “[m]ore than 3,400 donors participated in a massive local and national appeal to keep the painting in Philadelphia”).

113. See *supra* note 61 for a discussion of some of these efforts.

completely distinct from their pecuniary value on the market.”¹¹⁴ There is some intangible element that separates art from other forms of property.¹¹⁵ As a general proposition, no one would suggest that the public at large should have a property interest or decision-making authority with regard to another individual’s privately owned assets.¹¹⁶ Nevertheless, that seems to be what the people of Philadelphia thought; one citizen argued that although *The Gross Clinic* may be privately owned by Jefferson, “its unique historical associations create a sense among many that the City of Philadelphia has legitimate claims on it.”¹¹⁷ Although the painting is privately owned, “in reality it belongs to the public. Such is the power of art.”¹¹⁸

Nicole B. Wilkes provides a “host of empirical evidence” establishing that the “general public is concerned about art and cultural heritage.”¹¹⁹ This cultural interest is so profound because of the unique qualities and attributes that stem from artistic works and separate them from other property interests.¹²⁰ For example, art and other “cultural objects have a unique ability to survive, to evoke emotion, to foster a sense of cultural identity, and to illustrate community/commonality among people.”¹²¹ This “sense of cultural identity” was certainly a compelling factor that drove the people of Philadelphia to champion the preservation of *The Gross Clinic* in Philadelphia.¹²² They believed that a painting of such cultural, historic, and artistic value, which was created in

114. White, *supra* note 76, at 1042–43.

115. John H. Merryman has attempted to pin down exactly why the public has such a strong interest in “cultural property.” John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 345–49 (1989). He specifically includes “works of art” in his explanation of what constitutes “cultural property.” *Id.* at 341. Merryman argues that cultural property is different from other forms of property because of its authenticity, truth, and certainty, its embodiment of moral attitudes, its representation of the basis of our “cultural memory,” its ability to evoke emotion and a sense of nostalgia, and its ability to remind people of “who [they] are and where [they] came from.” *Id.* at 345–49 (quoting Albert Elsen, *Introduction: Why Do We Care About Art?*, 27 HASTINGS L.J. 951, 952 (1976)).

116. See U.S. CONST. amend. V (stating no person shall be deprived of property without due process; private property may not be taken for public use without just compensation). A property owner “cannot be deprived of any of the essential attributes which belong to the right of property.” 16B AM. JUR. 2D *Constitutional Law* § 587 (1998) (footnotes omitted). “Included within the right of property . . . are the rights to acquire, hold, enjoy, possess, manage, insure, defend and protect, and improve property, and the right to devote property to any legitimate use.” *Id.* (footnotes omitted). Additionally, one of the most important incidents of ownership is the right to dispose of the property. *Id.*

117. Riley, *supra* note 55.

118. *Id.*

119. Wilkes, *supra* note 108, at 180 (asserting that government policies and programs such as National Endowment for the Arts, National Foundation on Arts and Humanities, and Visual Artists Rights Act of 1990 indicate public interest and concern).

120. See *supra* note 115 for John H. Merryman’s explanation of what makes cultural property, such as artwork, different from other forms of property.

121. Wilkes, *supra* note 108, at 180–81 (citing Merryman, *supra* note 115, at 348–49).

122. See *supra* notes 67–70 and accompanying text for a discussion of *The Gross Clinic*’s many cultural and historic ties to Philadelphia. See Riley, *supra* note 55 (supplying several “compelling reasons” for why *The Gross Clinic* should remain in Philadelphia).

Philadelphia and had been publicly displayed there ever since, “define[d] who [they] [were] as a people.”¹²³ Simultaneously, *The Gross Clinic* “capture[d] much of Philadelphia’s historic greatness: its Jeffersonian belief in education as a precondition for a working democracy; its pioneering work in both the practice and the teaching of medicine; and its leadership in defining and nurturing the visual arts in a new republic.”¹²⁴ Many believed that moving *The Gross Clinic* to Arkansas would inflict great damage on the city’s cultural patrimony.¹²⁵

In order to protect the greater public’s cultural heritage and identity, Wilkes advocates the creation of a “legal regime specifically targeted at [the] preservation of art objects.”¹²⁶ According to Wilkes, the public should have a right to access and ensure the preservation of artwork that has been deemed “cultural property.”¹²⁷ Under her proposal, federal statutory protection would be granted to “those works of art [that] embody a substantial public interest” as determined according to criteria laid out by the National Endowment for the Arts (“NEA”).¹²⁸ Wilkes emphasizes that the public’s right to access and preservation of cultural art objects does not stem from the fact that museums hold those objects in public trust, but rather from the inherent nature of the works and “[t]he concept of a shared cultural heritage for all humanity.”¹²⁹

C. Public Interest in Privately Owned Cultural Property

1. Competing Theories of Property Ownership

“The poorest man in his cottage may bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter it; but *the King of England cannot enter it!* All his power dares not cross the threshold of that ruined tenement!”

—William Pitt¹³⁰

John J. Costonis examines two popular, opposing conceptions of property ownership and analogizes them to differing theories of light.¹³¹ He refers to these

123. Riley, *supra* note 55.

124. *Id.*

125. Riley, *supra* note 89. The term “cultural patrimony” generally refers to objects that have an “ongoing historical, traditional, or cultural importance” within a certain group or culture; such objects “cannot be alienated, appropriated, or conveyed by any individual.” See Antiquas Glossary, <http://www.antiquas.org/3.html> (last visited Jan. 5, 2009) (dealing primarily with concept of cultural patrimony within Native American cultures).

126. Wilkes, *supra* note 108, at 198.

127. *Id.* at 198, 205.

128. *Id.* at 205–06.

129. *Id.* at 179, 184.

130. John J. Costonis, *Casting Light on Cultural Property*, 98 MICH. L. REV. 1837, 1839 (2000) (reviewing SAX, *supra* note 109) (citing CHAUNCEY A. GOODRICH, SELECT BRITISH ELOQUENCE 65 (1870)).

131. *Id.* at 1837. Costonis explains that theorists of light have historically debated whether light is better described as a photon or a wave. *Id.* Wave theorists focus on light as a “phenomena [of]

two analytical approaches as the “property as a . . . photon” and the “property as a wave” theories.¹³² Each theory occupies an opposite end of the great “spectrum” of potential ways to approach private property ownership.¹³³ On one end are the photon theorists, who support a “self-contained” idea of property; on the other end are those who view private property ownership as a wave—“incorporating[] the tensions and values of the social ether through which the wave moves.”¹³⁴

American jurisprudence has historically tended to lean toward the “property as a photon” model rather than the more socially conscious wave theory.¹³⁵ For example, the Fifth Amendment to the United States Constitution prevents the government from depriving an individual of his property without due process of law, compelling just compensation whenever government takes private property for public use.¹³⁶ Many Americans consider the freedom to own property without governmental intrusion a fundamental right that makes individual liberty and economic prosperity possible.¹³⁷

Costonis compares the American view of private property as exemplified in the United States Constitution with that demonstrated by Italy’s Constitution.¹³⁸ It is clear that the Italian conception of private property embraces the “wave theory.”¹³⁹ The Italian Constitution encourages government oversight to restrain private dominion over property and ensure that individual rights do not infringe upon greater societal interests.¹⁴⁰

2. The Takings Clause

Any time that government action inhibits or adversely affects any one of an individual’s “bundle” of property rights, the Takings Clause of the Fifth

frequencies and diffraction patterns” whereas photon theorists emphasize the importance and interaction of the individual “succession of particles.” *Id.*

132. *Id.*

133. Costonis, *supra* note 130, at 1837.

134. *Id.*

135. *See id.* (stating photon theory is foundation for many Supreme Court opinions dealing with *per se* takings); Susan Darden Henwood, Comment, *Private Property Rights Under the Takings Clause: Use Them or Lose Them*, 35 GONZ. L. REV. 265, 266 (2000) (stating U.S. Supreme Court has emphasized just compensation is necessary to place burden of taking on public as whole rather than individuals).

136. U.S. CONST. amend. V.

137. *See Wilkes, supra* note 108, at 178–79 (“Traditional conceptions of property rights dictate that ‘ownership of physical things’ is ‘private and unqualified.’”(quoting SAX, *supra* note 109, at 3)); Pacific Legal Foundation, Property Owners Rights, <http://www.pacificlegal.org> (under “Issues & Cases” heading follow “Key Issues” hyperlink) (last visited Jan. 5, 2009) (“The right to private property is the fundamental basis for prospering economically and living secure and healthy lives.”).

138. Costonis, *supra* note 130, at 1841. Article 42(2) of the Italian Constitution states that “[p]rivate property is recognized and guaranteed by law, which determines the ways it is acquired, enjoyed and its limits in order to ensure its social function and to make it accessible to all.” COSTITUZIONE [Constitution] art. 42(2) (Italy).

139. Costonis, *supra* note 130, at 1841–42.

140. *Id.*

Amendment may potentially be implicated.¹⁴¹ This clause provides that the government cannot take private property for public use without just compensation.¹⁴² It is well established that a taking can occur without an actual appropriation of private property; rather, any governmental action that deprives an individual of the use of his property can amount to a taking under the Fifth Amendment and warrant payment of just compensation to the owner.¹⁴³ However, legitimate exercises of a state's police power that negatively impact a property owner's rights or result in a diminution of property value will not always amount to a taking.¹⁴⁴ Legitimate state regulation of private property is only considered a taking when it goes too far and has "very nearly the same effect for constitutional purposes as appropriating or destroying it."¹⁴⁵

In 1980, the Supreme Court announced a two-part test for determining whether a government regulation amounts to a taking.¹⁴⁶ Under this test, a regulation would effect a taking if it did not "substantially advance legitimate state interests" or if the regulation "denie[d] an owner economically viable use of his land."¹⁴⁷ This is certainly not a clear-cut analysis—neither of the prongs aid in supplying a succinct formula for regulatory takings.¹⁴⁸ Rather, the Supreme Court has supplemented these two categories of regulatory takings with additional factors to consider when determining whether or not governmental action amounts to a regulatory taking.¹⁴⁹ These factors include the regulation's impact on the property owner, the extent to which the owner's investment-backed expectations are affected, and the character of the governmental

141. See Gerald R. Barber, *Bundle of Rights Approach to Value*, PRIVATE LANDOWNER NETWORK, <http://www.privatelandownernetwork.org/plnlo/bundleofrights.asp> (explaining bundle of rights protected under United States Constitution). The "bundle of rights" analogy is commonly used in reference to the rights that stem from property ownership. *Id.* If an individual owns the entire "bundle," his or her property interest is a fee simple absolute. *Id.* Examples of some of the rights that make up this theoretical bundle are the right to sell or otherwise dispose of, the right to occupy and use, and the right to bequeath. *Id.* The Supreme Court has also used the "bundle of rights" analogy as a tool for conceptualizing property ownership. *United States v. Craft*, 535 U.S. 274, 283 (2002); *Fresh Pond Shopping Ctr., Inc. v. Callahan*, 464 U.S. 875, 878 (1983) (Rehnquist, J., dissenting).

142. U.S. CONST. amend. V.

143. *Henwood*, *supra* note 135, at 268 (citing *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177 (1871)).

144. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414–15 (1922).

145. *Id.* at 414; see also 26 AM. JUR. 2D *Eminent Domain* § 125 (2004) (discussing regulatory actions that can constitute takings of property).

146. *Henwood*, *supra* note 135, at 269.

147. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *abrogated by* *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 532 (2005); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (applying second prong and concluding regulations which either force owner to sustain physical occupation of property or deny owner all economically beneficial or productive use of land will be considered takings); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (applying first prong and concluding there must be sufficient nexus between legitimate government purpose and regulation).

148. *Henwood*, *supra* note 135, at 272 (noting Court's failure to pronounce clearly defined formula for regulatory taking has led to inconsistencies).

149. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–25 (1978).

regulation.¹⁵⁰ What is clear, however, is that governments have some freedom to regulate private property for the public benefit without having to compensate the owners whose rights have been adversely affected.¹⁵¹ Generally, as long as the regulation serves a legitimate purpose within the state's police powers and does not amount to a complete divestiture of title to private property (or the economic equivalent), the Takings Clause will not be implicated.¹⁵²

III. DISCUSSION

Despite *The Gross Clinic's* significant local ties to Philadelphia's cultural heritage and history, one must acknowledge the difficult fact that Jefferson is a nonprofit educational institution and hospital whose mission is to "educate doctors and health professionals"¹⁵³ and not to collect and preserve art or promote art education.¹⁵⁴ Technically, there are no legal restrictions that bind the university or affect its right to dispose of the painting as it sees fit "since it doesn't hold the object in the public trust and since its possession doesn't contribute directly to the institution's primary mission as a not-for-profit organization."¹⁵⁵ When a donor gives an asset to a charitable corporation and the corporation accepts the gift, a charitable trust is established, but only "for the

150. Ann K. Wooster, Annotation, *What Constitutes Taking of Property Requiring Compensation Under Takings Clause of Fifth Amendment to United States Constitution—Supreme Court Cases*, 10 A.L.R. FED. 2D 231, 260–62 (2006).

151. There are numerous examples of government regulations that in some way impact the property rights of individuals. For instance, the Worker Adjustment and Retraining Notification Act ("WARN") requires certain employers to give a sixty-day advance notification to employees before the employer is permitted to close down its plant. 29 U.S.C. §§ 2102–09 (2006). Another example can be found in *Heart of Atlanta Motel, Inc. v. United States*, in which the Supreme Court found no unconstitutional taking under the Civil Rights Act of 1964, which requires private owners of public accommodations to maintain equal access facilities and prohibits them from segregating or discriminating against classes of individuals. 379 U.S. 241, 258–59 (1964). An example more directly related to the scope of this Comment can be found in Philadelphia's historic "preservation ordinance that allows the Philadelphia Historical Commission to block the sale or alteration of" property that has been designated a "historic object." Riley, *supra* note 55; *see also* Philadelphia Historical Commission – Designation, <http://www.phila.gov/historical/textonly/designation.html> (last visited Jan. 6, 2009) (stating protection from alteration or destruction as benefits of designation). In each of these cases, some measure of government intrusion into a private owner's "bundle of rights" was considered justifiable in light of the overall benefits to society. *See* Wooster, *supra* note 150, at 272, 275, 291–94, 301 (listing instances in which Supreme Court has determined that government regulations did not amount to per se taking).

152. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 522–23 (1992) (finding regulation of property only constitutes taking where it appears owner has been unfairly singled out to bear burden that public as a whole should bear); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (determining value taken from property must be weighed against value remaining in property to determine regulatory taking).

153. Vogel, *supra* note 23.

154. *See* Chadwick 21:13 EST posting, *supra* note 14 (quoting Bob Barchi, Jefferson President, as saying "[w]e're not a museum. We're not in the business of art education.").

155. Riley, *supra* note 89; *see also* Jefferson University, *supra* note 38 (reporting Jefferson sold one of its other Eakins paintings, portrait of Benjamin H. Rand, in April 2007).

declared purposes of the corporation.”¹⁵⁶ So why does Philadelphia think that it has some “right” to tell Jefferson how it must handle its privately owned property? More importantly, should the public have such a right?

A. *The Need for Public Regulation of Deaccessioning*

“Perhaps . . . standard property rights do not apply to unique works of art with aesthetic, historical, or documentary interest, because these come to have an intrinsic quality that no one can buy.”¹⁵⁷

There is undoubtedly some intangible element that makes the ownership of art a unique type of property interest.¹⁵⁸ Although traditional ideas of ownership lend themselves toward notions of autonomy, absolutism, and individual dominion,¹⁵⁹ these attitudes do not adequately take into account the fact that many privately owned pieces of art have become imbued with great cultural significance.¹⁶⁰ There are a number of different contexts in which the government has justifiably regulated or limited the private ownership rights of individuals in order to promote social welfare.¹⁶¹ Unfortunately, the preservation of art and other culturally significant objects has not been one of those strongly regulated areas.¹⁶² Taking into account the importance of cultural property, state

156. 15 AM. JUR. 2D *Charities* § 76 (2000) (emphasis added).

157. Wilkes, *supra* note 108, at 178 n.3 (quoting Avis Berman, *Art Destroyed: Sixteen Shocking Case Histories*, CONNOISSEUR, July 1989, at 74).

158. See *supra* notes 109–18 and accompanying text for a discussion of artwork as a unique form of property.

159. See *supra* notes 135–37 and accompanying text for a discussion of the traditional American attitude toward property rights.

160. See, e.g., Riley, *supra* note 55 (explaining Philadelphia community felt as though *Gross Clinic* “in reality . . . belong[ed] to the public” because of “unique historical associations”); see also The Annenberg Foundation, *supra* note 7 (arguing in reference to *Gross Clinic* controversy that Philadelphia must “defend [its] identity”).

161. See *supra* note 151 and the accompanying text for a discussion of government regulation of private property and individual autonomy.

162. The section of Wilkes’s article dedicated to “provid[ing] an overview of the current legal landscape with respect to the protection of works of art” is aptly titled “The Current (Lack of) Law.” Wilkes, *supra* note 108, at 179, 187. She explains that preservation laws in the United States focus on protecting the “moral rights” of the artist (albeit only for the duration of the artist’s life) and tend to ignore the public interest in the art. *Id.* at 187–88. Such legislation, known as *droit moral*, operates under the assumption that “artists retain a continuing interest in their work, even after it has been sold, sufficient to protect the integrity of the artist’s reputation.” SAX, *supra* note 109, at 21. Although a detailed explanation of *droit moral* laws is beyond the scope of this Comment, it is important to recognize that such legislation does exist, although it is more prevalent in Europe than in the United States. See *id.* (commenting that until recently, “the United States had resolutely rejected [such a] limitation on owner autonomy”). Sax emphasizes that, traditionally, *droit moral* rights have belonged solely to the artist and were in no way intended to protect a greater societal interest in the preservation of art. *Id.* at 22. There is, however, one noteworthy exception to this general rule:

When American legislatures finally began to consider enacting *droit moral* statutes, the question understandably arose, why not protect the art, which is the ultimate product of the artist’s work and the gift of creative genius to the world, as well as his or her reputation? While most jurisdictions followed the [traditional] model, a few states departed from the narrow reputational view of moral rights. . . . Two jurisdictions, California and

and local governments should actively seek to protect communal interests in privately owned cultural property. There are a number of factors that make art a unique form of cultural property and justify the community's interest in art's preservation, protection, and public display.¹⁶³ Traditional notions of absolute private property ownership will not adequately protect the greater societal interest in such objects.¹⁶⁴

Both the "wave" and the "photon" property theories discussed by Costonis are heavily implicated in *The Gross Clinic* scenario.¹⁶⁵ For instance, it is clear that Jefferson had every right to dispose of the painting as it wished.¹⁶⁶ Proponents of the photon property theory can logically argue that, as an owner of valuable private property, Jefferson was not required to consult with anyone before deciding to sell the piece and put its proceeds to good use.¹⁶⁷ Although this is clearly the easier response, it fails to address the equally valid concerns of Costonis's wave theorists.¹⁶⁸ The removal of *The Gross Clinic* from Philadelphia would undoubtedly have had great social and cultural implications.¹⁶⁹ A more communitarian view of property ownership would emphasize the importance of these considerations and advocate state intervention in the sale.

Massachusetts (which borrowed California's approach) . . . used the occasion to graft onto [their] law[s] a dramatically new element that expressly recognize[d] society's interest in protection of the art. Those states alone expressly command private owners to preserve works of art for the benefit of the public.

Id. (citation omitted). California's legislation is significant in that, in addition to its conventional *droit moral* provision, it also permits "established nonprofit arts organizations to go to court for an injunction against defacement, mutilation, alteration, or destruction of a work of fine art." *Id.* at 23–24 (discussing Cal. Civ. Code, §§ 987(h), 989(e) (West 2007)); see also Cal. Civ. Code § 989(a) ("The Legislature hereby finds and declares that there is a public interest in preserving the integrity of cultural and artistic creations."). Although this legislation is undoubtedly impressive in that it recognizes the importance of promoting society's "interest in preserving important artistic creations . . . [in order to] preserve [a community's] heritage," it falls short in that: (1) it does not prohibit the "knowing or purposeful neglect" of artwork; (2) it imposes no obligation on private owners to publicly display culturally significant pieces; (3) to this point, the law has only been invoked by artists seeking to preserve their work. SAX, *supra* note 109, at 20, 24, 26.

163. SAX, *supra* note 109, at 9 (stating community has interest in many privately owned objects because of important ideas or information they contain).

164. *Id.* at 9–10.

165. See *supra* notes 131–34 and accompanying text for Costonis's discussion of these popular theories of property ownership.

166. See *supra* notes 153–56 for explanation of why Jefferson technically has a right, as a private property owner, to dispense with *The Gross Clinic* as it sees fit. See generally *supra* Part II.C.1 for a discussion of competing theories of property ownership.

167. See *supra* note 141 and accompanying text for a brief explanation of the "bundle" of rights inherent in property ownership.

168. See *supra* Part II.C.1 for a discussion of the competing theories of property ownership—the wave theory and the photon theory—and the implications of each.

169. See *supra* Part II.B.2.c for a discussion of "cultural property," the public's interest in artwork and cultural heritage, and the negative ramifications of granting individuals unqualified ownership over culturally significant objects. Specifically, see *supra* note 51 for one angered citizen's comment that selling *The Gross Clinic* would amount to "selling Philadelphia's future." Also, see *supra* note 63 and accompanying text for Mayor Street's observation that *The Gross Clinic* was just as much a part of Philadelphia's culture and heritage as "the Liberty Bell and our sports teams."

State-level regulation of the deaccessioning of artwork is necessary in order to protect the interests of the public in its cultural property.¹⁷⁰ Protection of the community's interest in culturally significant, historic, local art is a legitimate state interest that could easily be advanced through state or local legislation without implicating the Fifth Amendment's Takings Clause.¹⁷¹

1. Gabor's Proposal: Museums Must Be Regulated

Although David Gabor has effectively highlighted the need for a statutorily mandated deaccessioning policy to protect the public's interest in art, his proposal for heightened scrutiny over the process would not have adequately protected Philadelphians' interest in *The Gross Clinic*.¹⁷² Gabor's article focuses exclusively on proposing legislation to regulate the deaccessioning policies of museums.¹⁷³ He argues that such regulation is necessary to hedge against the ever-increasing presence of corporate buyers who acquire valuable artwork primarily for "speculative purposes."¹⁷⁴ Gabor argues that the inherent nature of museums—government-subsidized entities operating solely for the public good—warrants more careful state regulation of their valuation procedures and deaccessioning practices.¹⁷⁵ As is evident in the case of *The Gross Clinic*, a piece of artwork need not be displayed in a museum to become deeply embedded in the culture of a community.¹⁷⁶ Furthermore, the fact that *The Gross Clinic* resided for over 100 years in a university hospital did not diminish Philadelphians' feelings of communal ownership in regard to the piece.¹⁷⁷ A proposal for state regulation of deaccessioning practices should focus less on the

170. See, e.g., Gabor, *supra* note 72, at 1006–07 (advocating heightened level of state scrutiny over deaccessioning policies to be mandated through state legislation and implemented by museums); Wilkes, *supra* note 108, at 205 (advocating implementation of legislative scheme for protection of cultural property at national level).

171. See *supra* Part II.C.2 for a discussion of Takings Clause jurisprudence.

172. See *infra* notes 173–78 and accompanying text for an explanation of why *The Gross Clinic* would not have been protected from deaccessioning under Gabor's proposal.

173. Similarly, Jennifer L. White argues that the same fiduciary duties of loyalty and care to which charitable trusts are held to when contemplating deaccessioning should be applied to nonprofit corporations. White, *supra* note 76, at 1048. She points out that museums are usually formed as either charitable trusts or nonprofit corporations and limits her proposal for regulation to the museum context. *Id.*

174. Gabor, *supra* note 72, at 1009–10. Gabor argues that "art buying . . . [is] open 'to the very wealthy and to those few museums with generous endowment funds.'" *Id.* (quoting STEPHEN E. WEIL, BEAUTY AND THE BEASTS: ON MUSEUMS, ART, THE LAW, AND THE MARKET 3 (1983)). Many corporations purchase art as a means to "hedge against inflation and fluctuating economic markets." *Id.* at 1010.

175. *Id.* at 1007–08; see also *id.* at 1034–48 (proposing sample guidelines for deaccessioning).

176. Since it was donated to Thomas Jefferson University in 1878, *The Gross Clinic* has been displayed on the campus, most recently in Alumni Hall. Jefferson University, *supra* note 38. See *supra* Part II.B.1 for a discussion of the community's reaction to the possibility of losing *The Gross Clinic* as evidence of the city's emotional attachment to the painting.

177. See, e.g., Riley, *supra* note 55 (reasoning that public may develop feelings of ownership arising from art's history or location).

nature of the institution that houses the art and more on the cultural property itself.¹⁷⁸

2. Wilkes's Proposal: Preservation on a National Level

Unlike Gabor's proposal, which focuses on the nature of the cultural institution and the responsibilities it owes to the public when contemplating the deaccessioning of art, Wilkes's proposal emphasizes the nature of the object in question and the notion that the public should have a right to access and ensure the preservation of certain items deemed "cultural property."¹⁷⁹ This is the proper framework in which to develop a plan for deaccessioning regulation. Under this analysis, *The Gross Clinic*, a world-renowned, valuable, American painting from the nineteenth century, would undoubtedly qualify as a "cultural object" deserving of government protection and oversight. Still, Wilkes's proposal falls short in another respect: although *The Gross Clinic* itself would be protected, Philadelphia's interest in the painting would not.¹⁸⁰

Wilkes focuses on the need for regulation at the federal level in order to "assert a national public interest in cultural property."¹⁸¹ Wilkes argues that a "state-specific preservation regime with respect to movable property might impose an economic burden on the states that choose to engage in such regulation."¹⁸² Under her proposal, the NEA would be charged with the duty to develop criteria for determining which works should be deemed "cultural property" and therefore worthy of federal statutory protection.¹⁸³ Such regulation would not have quelled the controversy that stemmed from the attempted sale of *The Gross Clinic* to the National Gallery of Art in Washington, D.C., and the Crystal Bridges Museum of American Art in Bentonville, Arkansas.¹⁸⁴ On the contrary, a federal preservation and public access statute such as that which Wilkes proposes would more likely have *encouraged* the sale of *The Gross Clinic*.¹⁸⁵ Arguably, under Wilkes's theory, Eakins's painting would

178. See Wilkes, *supra* note 108, at 204–05 (arguing legislation should focus on protection of works that have been designated as "cultural property").

179. *Id.* at 198, 205.

180. See *infra* notes 182–89 and accompanying text for a discussion of why Wilkes's proposal for a federal legislative regime would be inadequate to protect the local interest in a piece such as *The Gross Clinic*.

181. Wilkes, *supra* note 108, at 208.

182. *Id.*

183. *Id.* at 205–06.

184. The controversy surrounding the attempted sale of *The Gross Clinic* stemmed in large part from the fact that Philadelphians did not believe "their painting" belonged in Bentonville, Arkansas. See *supra* notes 46–48 and accompanying text for a discussion of Philadelphians' sentiments regarding the sale of *The Gross Clinic* to a museum in Arkansas. The national legislative scheme that Wilkes proposed encourages the free movement of artwork across state lines so that collectors might be able to move their collections to "more hospitable locales." Wilkes, *supra* note 108, at 208.

185. Wilkes is a proponent of the public's right to access cultural property; her proposed legislation establishes an "incentive structure" that encourages private owners to donate significant pieces to museums, or at least loan their artwork to cultural institutions for designated periods of time. *Id.* at 203–04. Arguably, Wilkes's nationally geared legislation would prefer to house a painting like

better serve the American public if located in a museum in the nation's capital and another in the American heartland.¹⁸⁶

Furthermore, Wilkes proposes adopting a definition of "cultural property" drawn from the criteria laid out by the United States International Trade Commission ("USITC") in its tariff schedule.¹⁸⁷ These categories of valuable cultural and artistic works would then be analyzed under a framework similar to that used by the National Register of Historic Places for determining historic landmark eligibility.¹⁸⁸ This approach to determining what works should be considered "cultural property" is inadequate because it fails to take into consideration *local* cultural patrimony.¹⁸⁹

B. Proposal: State Regulation of Deaccessioning of Cultural Property

"[A]n eccentric American collector who, for a Saturday evening's amusement, invited his friends to play darts using his Rembrandt portrait as the target would neither violate any public law nor be subject to any private restraint."¹⁹⁰

The only way to avoid problems like those which Philadelphia faced in *The Gross Clinic* controversy is to implement a regulatory scheme on either the state or local level.¹⁹¹ At this level, officials are more familiar with the unique circumstances that may arise in specific communities.¹⁹² Although national

The Gross Clinic in a museum of American art located in the nation's heartland (or the National Gallery of Art located in the nation's capital) rather than in private hands in a relatively obscure hospital wing where "[i]n recent years . . . it received only about 500 visitors a year." Carignan, *supra* note 1, at 21. It has been estimated that, in the National Gallery alone, approximately 4.5 million people could view *The Gross Clinic*. Vogel, *supra* note 23.

186. See *supra* note 185 and accompanying text for an explanation of why Wilkes's proposed legislation would, in the case of *The Gross Clinic*, more likely have encouraged the sale to the Crystal Bridges Museum.

187. Wilkes, *supra* note 108, at 205 (citing USITC Investigation 332-338 – Draft Harmonized Tariff Schedule of the United States (2004)). The USITC provides an exhaustive list of items which fall under the heading "Works of Art, Collectors' Pieces and Antiques" and includes everything from objects of "zoological . . . interest" to postage stamps to silverware that exceeds 100 years in age. *Id.*

188. *Id.* at 206. Property can be registered as a historic landmark if it (1) is associated with influential historic events; (2) is associated with historically significant individuals; (3) embodies certain characteristics which bear on the "type, period, or method of construction" or is of high artistic value; or (4) has provided, or is likely to provide, important historical information. *Id.* (citing 36 C.F.R. § 60.4 (2000)).

189. See *supra* note 125 and accompanying text for a definition of "cultural patrimony."

190. SAX, *supra* note 109, at 1 (quoting FRANKLIN FELDMAN & STEPHEN E. WEIL, ART LAW §5.11, at 434 (1986)).

191. See *supra* note 189 and accompanying text for a discussion of why it is preferable to enact legislation protecting cultural property at the state or local level rather than at the federal level.

192. Much of the controversy surrounding the attempted sale of *The Gross Clinic* stemmed from the fact that the painting had deep historical and cultural ties to Philadelphia. For an explanation of these "cultural ties," see The Annenberg Foundation, *supra* note 7. Gabor explained: "[i]n the words of the *Wilstach Estate* case, museums 'serve the cultural and educational needs of the community.' The community, therefore, has an interest in protecting its needs." Gabor, *supra* note 72, at 1008 (quoting *In re Wilstach's Estate*, 1 Pa. D. & C.2d 197, 207 (1954)). This analysis translates easily into the context

preservation laws such as those advocated by Wilkes could potentially complement—and even lend credence to—local legislation, they alone would not sufficiently protect individual communities’ interests in keeping historically and culturally valuable treasures in local hands.

1. Framework

A comprehensive framework for state regulation of culturally significant artwork would work most effectively if modeled after current historic preservation legislation.¹⁹³ Although the designation of historic objects usually occurs on the local level, “[m]ost historic preservation in the United States is accomplished . . . in cooperation with the federal government.”¹⁹⁴ The City of Philadelphia Historic Commission, for instance, considers a number of relevant factors in determining whether or not to grant a building, site, object, or district “historic” status.¹⁹⁵ Not only do these factors consider the *national* importance of each historic building, place, or object, but they also evaluate *local* elements, such as the object’s connection to the heritage or cultural characteristics of the city, its association with an important event in the history of the city, and whether or not the designer, architect, or engineer was an individual whose work has significantly impacted the city.¹⁹⁶ When determining whether or not a work of art should be granted cultural property status and therefore be subject to regulation, state and local governments should have the ability to consider the many local aspects of the work. These are the characteristics that elevate an object to the status of cultural patrimony.¹⁹⁷

Any time that a state or city designates a building, district, or object historic, there is a possibility for negative repercussions.¹⁹⁸ Any designation that restricts an owner’s autonomy and decision-making authority with regard to an object can potentially make the object far more difficult to sell (or donate),¹⁹⁹ decrease its market value,²⁰⁰ and saddle the owner with unanticipated financial liabilities.²⁰¹ Any proposal for state-mandated deaccessioning regulation should aim to avoid

of nonprofit organizations that, through charitable donations, have chosen to take on museum-like functions.

193. See, e.g., Philadelphia Historical Commission – Designation, *supra* note 151 (describing the criteria for and process and benefits of designating property as historical for purposes of preservation).

194. Wilkes, *supra* note 108, at 198.

195. Philadelphia Historical Commission – Designation, *supra* note 151. Although buildings, sites, and districts are frequently deemed “historic” and listed on the Philadelphia Register, it is far less common for cultural objects to be designated as such. See Riley, *supra* note 55 (referring to term “historic object” as “seldom used category of the city’s preservation ordinance”).

196. Philadelphia Historical Commission – Designation, *supra* note 151.

197. See *supra* note 125 and accompanying text for a discussion of “cultural patrimony.”

198. Riley, *supra* note 55 (examining flaws in Philadelphia’s preservation statute).

199. *Id.* (explaining that stringent guidelines for divesting cultural objects attach once object is designated historic).

200. *Id.* (arguing designation poses “powerful disincentive” for private developers to buy or commission works).

201. *Id.* (explaining historic objects are generally more expensive to maintain, insure, and conserve).

negative economic repercussions that would act as a disincentive to collecting and dramatically infringe on the property rights of the owner. This goal is easily attainable; legislation need not be draconian in order to adequately protect the public's right to cultural property that has become deeply enmeshed in the community. Joseph L. Sax emphasizes this point by recognizing that it is not practical or desirable to strip the private owner of cultural property of all of his ownership rights.²⁰² Rather, he advocates a system whereby traditional notions of complete autonomy stemming from property ownership would be "qualified," and a more holistic, societal approach would be taken.²⁰³ His proposed qualifications are rooted in the recognition that "some objects . . . are constituent of a community, and . . . ordinary private dominion over them insufficiently accounts for the community's rightful stake in them."²⁰⁴ Ownership should only be qualified to the extent necessary to draw the appropriate balance between public and private interests in the property.²⁰⁵ Additionally, it is essential that this balance between private and public rights be maintained in order to prevent implicating the Fifth Amendment's Takings Clause.²⁰⁶

2. Legislation

A necessary preliminary step in creating a legislative framework geared toward protecting cultural patrimony would be to establish a state or local board or commission with the authority and duty to define and designate items of "cultural property."²⁰⁷ This board should consist of both field experts, such as historians, artists, and curators, as well as interested, nonexpert members of the local community.²⁰⁸ Statutory protection should only be granted to those works

202. SAX, *supra* note 109, at 9 (arguing it is "highly desirable that private individuals collect art according to their own tastes and have the enjoyment of it").

203. The "qualifications" that Sax proposes are a bar on the destruction of culturally significant property, public access requirements, and a general presumption against exclusive grants of access to certain individuals. *Id.* at 10.

204. *Id.* at 197.

205. *Id.* at 196. Sax argues that the "object as a possession" needs to be separated from its intrinsic cultural worth and the "knowledge it contains." *Id.* In other words, the physical enjoyment of the object—which the private owner rightfully deserves—needs to be intellectually separate from the intangible aspects of the object which the public has a right to benefit from as well. SAX, *supra* note 109, at 196.

206. See *supra* Part II.C.2 for a discussion of Takings Clause jurisprudence. See *infra* notes 227–30 and accompanying text for a discussion of why this proposal for the regulation of privately owned cultural property would be unlikely to amount to an unconstitutional taking under the Fifth Amendment to the Constitution.

207. Wilkes also advocates establishing a "designation committee" composed of "art historians, artists, expert dealers, curators, museum directors, and arts administrators" to determine which art works "embody a substantial public interest" and are therefore entitled to statutory protection. Wilkes, *supra* note 108, at 205–06. Contrary to this Comment's proposal, however, she believes that such a committee would be best suited to the federal level. *Id.*

208. *Id.* at 206. Under Wilkes's proposal, either a committee of experts would be selected by a federal agency, or the NEA would establish committees, which would include nonexpert members of the general public, on the state or local level. *Id.* The latter is a more desirable approach because the committees would be better equipped to consider and accommodate "community-based interests" in

of art that are so deeply embedded in the fabric of local history and culture that the community at large feels as though it has a stake in the future of the piece.²⁰⁹ In determining which works to designate as cultural property, the board should have discretion to consider both privately owned pieces, as well as those currently displayed in museums and held in public trust.²¹⁰ Heightened attention should be paid to works, such as *The Gross Clinic*, that are of immense cultural significance, are privately owned, and are not burdened with any restrictive covenants; valuable pieces of cultural property such as these are at a high risk of being sold on a whim, allowed to fall into disrepair, or permanently removed from public view.²¹¹

In determining which art works are publicly significant enough to warrant statutory protection, a number of factors should be considered. Generally, the committee should take into account: (1) the historic and artistic value of the piece; (2) the place where the work was made; (3) the background of the artist; (4) the subject matter of the work; (5) any specific purpose or unique story behind its creation; (6) whether the work has been exhibited publicly, and if so, the length of time and location of its display; and (7) any public sentiment or expectations that may be present.²¹² This list of criteria is certainly not

certain artwork. *Id.* Wilkes points out that a state or local level committee would also prevent the “entrenchment (i.e. narrowness of viewpoint and unfair practices) that can occur on a panel composed solely of experts.” Wilkes, *supra* note 108, at 206. Wilkes argues, however, that the committee should largely be “expert-dominated” with only a “small number of public representatives to serve as a check on the selection process” because the “average citizen” is likely incapable of “mak[ing] determinations of artistic quality.” *Id.*

209. See *supra* notes 108 and 125 for definitions of “cultural property” and “cultural patrimony,” respectively. See Wilkes, *supra* note 108, at 205 (discussing view that “[a]n art preservation regime should apply only to those works of art deemed to embody a substantial public interest”).

210. See *supra* notes 176–78 and accompanying text for an explanation of why, when creating deaccessioning regulation, it is more important to focus on the nature of the work itself; the institution that owns the work should be largely irrelevant.

211. See SAX, *supra* note 109, at 1 (lamenting fact that many great “artifacts of our civilization can be owned by anyone who has the money to buy them . . . and their owners can then treat the objects however their fancy or their eccentricity dictates”).

212. Wilkes also advocates the use of a designation committee in order to determine which objects should be designated cultural property and thus subject to regulation. Wilkes, *supra* note 108, at 206. The criteria that she developed are far more specific than anything that this Comment will propose. For instance she believes that, “[a]s a threshold matter,” statutory protection should only be granted to artwork that is “at least fifty years old” and that has “a fair market value in the top twenty percent of works in that particular medium.” *Id.* at 205–06. Wilkes does believe, however, that the criteria for cultural property designations should somewhat mirror those typically used for determining historic landmark eligibility:

[A] property may be registered if: (a) it is “associated with events that have made a significant contribution to the broad patterns of our history;” or (b) it is “associated with the lives of persons significant in our past;” or (c) it “[embodies] the distinctive characteristics of a type, period, or method of construction . . . or (d) it “[has] yielded, or may be likely to yield, information important in our history or prehistory.”

Id. (citing 36 C.F.R. § 60.4 (2000)). Although this Comment draws on those same criteria, it additionally attempts to take into consideration “local” factors that were problematic in the case of *The Gross Clinic*. The fact that the painting had been publicly displayed for so many years aided in fostering a public sense of entitlement and communal stake in *The Gross Clinic*. The concept of

exhaustive, nor should any factor alone be determinative of whether a piece of art is bestowed with a cultural property designation. Rather, all relevant factors should be utilized in coming to a conclusion regarding the local, cultural, historic, and artistic significance of a certain piece. The key inquiry, however, should be the extent to which the work in question is representative of the community of which it is a part.²¹³ In order to be deemed worthy of local statutory protection, the piece should be one that, like *The Gross Clinic*, has become deeply enmeshed in local history and culture.²¹⁴

State and local governments should enact legislation that will assist in protecting and preserving objects officially designated items of cultural property.²¹⁵ For instance, local legislation could mandate public access requirements to ensure that privately held art is publicly displayed on an annual basis for a requisite period of time.²¹⁶ In order to accomplish this goal, Wilkes endorsed a “federal indemnification program” that would encourage private owners to make their cultural objects available to the public by guaranteeing that government would bear the cost of insuring valuable traveling works.²¹⁷ As long as the works are being loaned to institutions that would make the work available for public enjoyment and education, Wilkes argues that the private owners should not have to bear the costs.²¹⁸ The establishment of state-sponsored lending programs would help facilitate public access to noteworthy cultural works without overly infringing on the private property rights of owners.²¹⁹ Furthermore, legislation should require owners to follow specific government

cultural patrimony is drawn from the belief that some objects can come to play such a significant role within a group or culture that they can no longer be considered *absolutely*, privately owned. See *Antiquas Glossary*, *supra* note 125. Prior, long-standing, public access to an object certainly plays a role in transforming that property into a piece of cultural patrimony. Considerations of past public access or display, as well as any heightened public expectations, should play a central role in the determination of whether something constitutes cultural property.

213. See *supra* note 212 for a discussion of the importance that cultural patrimony should play in the determination of what property should be designated cultural property.

214. See The Annenberg Foundation, *supra* note 7 (listing reasons why *Gross Clinic* should remain in Philadelphia, drawing heavily upon local cultural and historic ties).

215. Jennifer L. White discusses the need for regulation of deaccessioning practices in order to protect the public’s interest in art and ensure public access to significant pieces. White, *supra* note 76, at 1059–60. Although her article deals solely with the deaccessioning practices of museums, much of her analytical framework is useful in considering deaccessioning outside of the museum context as well.

216. Wilkes argues that in order to ensure public access to works, incentives should be put into place that would encourage private owners to share their cultural property with the public. Wilkes, *supra* note 108, at 203.

217. *Id.*

218. *Id.*

219. White argues, for example, that courts should encourage museums to seek out alternatives to sale. White, *supra* note 76, at 1060–61. Although she focuses on a judicially mandated rather than a statutory solution to the problems of deaccessioning, her article accurately notes that lending and sharing practices among cultural institutions could become an “economically sound means of allocating resources” that would deter impulse sales of valuable cultural property in order to save financially strained museums. *Id.* at 1062. Additionally, such practices would preserve society’s interest by ensuring that art was publicly accessible. *Id.*

notification procedures prior to contemplating any relocation, restoration, alteration, or, most importantly, sale of the cultural art work.²²⁰

This local commission should be made aware of plans to sell the cultural property, as well as the owner's initial asking price, before any public announcement of the sale, attempts to secure a purchaser, or private negotiations have begun. The city should, at all times, have the first opportunity to negotiate a reasonable price and purchase the artwork.²²¹ If, however, an agreement cannot be reached, or the owner is unsatisfied with the city's offer, the owner will be able to entertain outside offers. Of course, this stage of the process could be subject to additional regulations. For instance, the owner could be required, for a set period of time, to make the art work solely available to museums and other cultural institutions in the business of collecting and preserving art, thus maximizing the opportunity for public access and adequate preservation.²²² Once a purchaser is obtained, legislation could provide that the city still has the right to purchase the piece, if it wishes to do so, within a reasonable window of time (perhaps sixty to ninety days).²²³ If necessary, legislation could go further to benefit the local government by permitting the city to undercut the selling price by a marginal rate, such as two to five percent.

Although this measure may seem extreme at first, when one considers today's market for art and the exorbitant prices that are often paid for considerable works, it is evident that a two to five percent loss would be relatively insignificant.²²⁴ In the case of *The Gross Clinic*, for example, legislation such as this would have allowed the city of Philadelphia to undercut the Crystal Bridges Museum's offering price and secure the painting for anywhere between \$64.6 and \$66.64 million rather than \$68 million.²²⁵ Although it is unlikely that

220. Similar regulation has been advocated by Wilkes as well, although she focuses on the need for uniform, national "strong-form" legislation coupled with federal preservation incentives. Wilkes, *supra* note 108, at 204, 208–10. Wilkes believes that federal tax incentives should be put in place that would provide deductions for individuals who have their works "curated, registered, or catalogued." *Id.* at 204. Her proposal for federal protective legislation focuses on "criminaliz[ing] cases of physical abuse and neglect of nationally designated art objects" and making public access to certain works obligatory. *Id.* at 208–09. However, her proposal does not discuss obligatory notification requirements prior to deaccessioning.

221. White also advocates the use of "preemption agreements" that she argues would "guarantee . . . a fair balance between [the owner's] income and public access." White, *supra* note 76, at 1064.

222. Ultimately, the matching clause in Jefferson's sales contract helped to "save" *The Gross Clinic* and keep it in Philadelphia. See *supra* Part II.B.1 for a discussion of the attempted sale and the matching clause, which gave Philadelphia cultural institutions forty-five days to match the \$68 million anticipated sales price. It is clear that such a measure can go a long way toward preservation of a local community's interest in a piece of cultural property. For this reason, inclusion of such a clause should be statutorily required and not left merely to the discretion of a private owner.

223. *Id.*

224. See *supra* note 174 and accompanying text for a discussion of the increasingly "speculative" nature of corporate art acquisitions and deaccessions. Gabor notes that "the upward price spiral of fine art is seemingly endless. It is now unsurprising for an outstanding art work to sell for well over ten million dollars." Gabor, *supra* note 72, at 1008 (citation omitted).

225. Gabor recognizes the problem that many museums today are being "priced out of the market." Gabor, *supra* note 72, at 1008–09. Allowing local museums to undercut private offers by a

this small difference would greatly impact an owner's fortune, it could potentially go a long way toward preventing cities and local communities from losing pieces of their cultural patrimony.²²⁶ It is unlikely that legislation such as this would amount to an unconstitutional governmental taking.²²⁷ Clearly, the protection and preservation of a community's cultural heritage is a legitimate state interest; the proposed legislation is directly related to this goal.²²⁸ Furthermore, the owner would at no time be divested of all economic benefit of his property.²²⁹ If anything, this legislation would potentially encourage competition in the market while simultaneously ensuring that local communities obtained ample opportunity to secure the piece.²³⁰

In return, the legislation could provide a number of incentives to owners of cultural property as well. For instance, private owners could receive tax benefits or government subsidies to aid in the maintenance of the piece.²³¹ Or, the legislation could guarantee the owner that the city would negotiate and purchase the piece in the event of a sale. Not only would these provisions protect the private property owner's rights, but they would also ensure that the committee did not recklessly designate objects as cultural property.²³² Rather, the committee would take care to only designate objects that were of such local, cultural, and historic significance that it would be willing and eager to financially

marginal amount would help more museums afford acquisitions of cultural property. This would go a long way toward ensuring continued preservation of the works as well as public access to cultural property.

226. *Id.*

227. See *supra* Part II.C.2 for a discussion of governmental takings under the Fifth Amendment to the Constitution. See 26 AM. JUR. 2D *Eminent Domain* § 125 (2004) ("Acts done in the proper exercise of governmental powers which do not directly encroach upon private property . . . generally do not amount to a taking of such property within the meaning of the ordinary constitutional provision [G]overnmental regulation of private property *may* constitute a taking when it denies *all economically beneficial or productive use of the property.*" (emphasis added)).

228. See *supra* Part II.C.2 for a discussion of governmental takings. In analyzing Fifth Amendment Takings Clause cases, the Supreme Court first must determine whether the regulation in question "substantially advances a legitimate state interest." Henwood, *supra* note 135, at 270 (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828, 834 (1987)).

229. Once the court has determined whether the regulation substantially advances a legitimate state interest, it must then determine whether or not the regulation has "deprived the property owner of all economically viable use of his property." Henwood, *supra* note 135, at 271 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

230. To deny private owners all economic benefits and rights of enjoyment derived from their ownership would only deter private acquisition and collection of art. See, e.g., SAX, *supra* note 109, at 196 (emphasizing there is value to encouraging "private searchers and collectors"). Wilkes too believes that there are public benefits that stem from the private collection of art. Wilkes, *supra* note 108, at 210. For instance, private collection diversifies the type of art that is preserved and "injects private tastes and preferences into the public realm." *Id.*

231. See *supra* notes 216–218 and accompanying text for suggested government incentives to private owners.

232. See Wilkes, *supra* note 108, at 205 (stating statutory art protection should be selectively applied to only those works with "a substantial public interest").

sustain and potentially purchase them down the road.²³³

IV. CONCLUSION

The attempted sale of *The Gross Clinic* and the public uproar that followed highlight many of the problems inherent in the deaccessioning of culturally significant and historic works.²³⁴ Although deaccessioning is a legitimate and oftentimes necessary practice for museums and other cultural institutions, it is controversial because it tends to cause institutions to consider cultural property merely fungible assets to be bought and sold when necessary in accordance with the financial realities of the institution.²³⁵ Many times, the best interest of a private owner is in direct conflict with the larger societal interests of a community that has emotional and other cultural ties to the property.²³⁶ Because art is such a unique form of property, with an intrinsic value separate and distinct from its economic value, a state regulatory system is necessary to protect the interests of the public in access to and preservation of cultural property.²³⁷ It is not only possible, but also *desirable*, to have a comprehensive legal framework in place to ensure that society's identity, heritage, and future education are not completely disregarded in favor of the absolute, unqualified property rights of private owners.²³⁸ At the same time, regulation can encourage public accessibility to cultural property and ensure the continued preservation of such works without overly infringing on the rights of the private owner or implicating the Takings Clause.²³⁹ Such regulation would serve the dual functions of protecting the rights and investments of private owners while at the same time ensuring a greater level of protection of a community's right to continued enjoyment of a piece of art that has, over time, become deeply embedded in the history and culture of the people.

*Michelle Orloski**

233. See *supra* Part III.B.1 for a useful framework and suggested criteria for designating objects as cultural property.

234. See *supra* Part II.A for a discussion of the history behind Eakins's *The Gross Clinic*. See *supra* Part II.B.1 for a discussion of the reasons its attempted sale became so controversial.

235. See *supra* Part II.B.2 for a general discussion of deaccessioning practices.

236. See *supra* Part II.B.2.c for a discussion of cultural property and the public's concern with preservation of its cultural identity and heritage.

237. See *supra* Part II.B.2.c for a discussion of cultural property and *supra* Part II.C for an overview of the public's interest in cultural property.

238. See *supra* Part II.C.1 for a discussion of competing theories of property ownership. See *supra* notes 161–64 and accompanying text for an explanation of why traditional notions of property ownership are inadequate in the context of cultural property.

239. See *supra* Part II.C.2 for an overview of the Takings Clause and traditional rights of private property owners.

* Many thanks to Professor Nancy Knauer for her guidance and suggestions, and to the Temple Law Review editors and staff for their dedication and assistance throughout the writing process. I would like to thank Professor James Strazzella, whose guidance throughout law school has been invaluable. My love of art, history, and local culture—all of which are reflected in this paper—was deepened and strengthened through my conversations with “Straz.” Finally, I thank my mother and father for their unwavering love and support, and my cousin Katie for putting up with my late nights and the endless stacks of paper that litter our apartment.