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THE MONEY . . . OR THE MONET?:  
ADDRESSING THE MONETIZATION OF  
DETROIT'S ART COLLECTION IN BANKRUPTCY\*

I. INTRODUCTION

On July 18, 2013, the city of Detroit became the largest municipality in the United States ever to file for bankruptcy.<sup>1</sup> Before filing the petition in bankruptcy court, Detroit's emergency manager, Kevyn Orr, orchestrated a detailed accounting of the city's assets to report to creditors.<sup>2</sup> It was immediately clear that the city's most valuable asset was its art collection, which is housed at the Detroit Institute of Art (DIA).<sup>3</sup> Containing a breadth of works by artists like Van Gogh and Rembrandt, experts estimate the collection could bring in over \$4 billion if sold,<sup>4</sup> or a steady stream of income if monetized.<sup>5</sup> Though income from the sale or monetization of the DIA collection would have satisfied a number of creditors, opponents argued that the collection could not be sold.<sup>6</sup> They asserted that the art is held in trust for the public and that it must be kept on display at the DIA.<sup>7</sup>

On November 7, 2014, Judge Stephen W. Rhodes of the U.S. Bankruptcy Court for the Eastern District of Michigan approved a debt adjustment plan that did not involve the sale or monetization of the DIA collection.<sup>8</sup> Instead, the city transferred ownership of the collection to an independent charitable trust in

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1. Monica Davey & Mary Williams Walsh, *Billions in Debt, Detroit Tumbles into Insolvency*, N.Y. TIMES, July 19, 2013, at A1 [hereinafter Davey & Walsh, *Billions in Debt*].

2. *Id.*

3. See, e.g., Mark Stryker & John Gallagher, *Detroit's Treasure Trove Could Be Vulnerable to Sale*, USA TODAY (June 3, 2013, 1:02 PM), <http://www.usatoday.com/story/news/nation/2013/06/03/detroit-asset-sales-financial-woes/2384525/> (pointing out that the DIA collection is among the "most lucrative and easily marketable" assets within the city manager's grasp).

4. Randy Kennedy, *Detroit's Art May Be Worth Billions, Report Says*, N.Y. TIMES, July 10, 2014, at A15.

5. Mark Stryker & John Gallagher, *The Art of the DIA Deal: Orr Must Get Cash Out of the Collection Without Selling It*, DETROIT FREE PRESS, Oct. 14, 2013, at A15 [hereinafter Stryker & Gallagher, *The Art of the DIA Deal*].

6. See Randy Kennedy & Monica Davey, *Detroit's Creditors Eye Its Art Collection*, N.Y. TIMES, July 20, 2013, at C1.

7. *Id.*

8. *A Phoenix Emerges*, ECONOMIST (Nov. 7, 2014, 10:47 PM), <http://www.economist.com/blogs/democracyinamerica/2014/11/detroits-bankruptcy-plan>.

exchange for an \$816 million contribution from the museum.<sup>9</sup> Because the contribution fell short of the collection's full value, the city received less capital to put toward reducing pension liabilities than it could have obtained through sale or monetization.<sup>10</sup> In order to mask deep pension cuts, the city structured payments in reliance upon an expected pension investment return of 6.75%.<sup>11</sup> If actual returns fall short of the expected rate, the city will be required to pay the deficiency.<sup>12</sup> Martha Kopacz, a court-appointed fiscal policy expert, cautioned that the expected rate of return "was too aggressive for a fragile city that could not afford investment losses."<sup>13</sup> In order to spare the DIA from monetization or sale, the distressed city has taken on a significant, controversial risk.<sup>14</sup>

Detroit's bankruptcy rights are shrouded in mystery due to the lack of scholarly attention paid to Chapter 9 of the Bankruptcy Code (Chapter 9).<sup>15</sup> Municipal bankruptcies are rare: since the mid-1950s, just over sixty cities, towns, villages, and counties have filed for bankruptcy under Chapter 9.<sup>16</sup> However, as a growing number of American cities teeter on the brink of insolvency, questions regarding municipal bankruptcy are beginning to arise.<sup>17</sup> Faced with massive debts and limited access to credit markets, city leaders throughout the country are becoming concerned that their ability to provide essential services may soon be severely crippled.<sup>18</sup> The eyes of those leaders are all on Detroit.<sup>19</sup>

This Comment argues that Detroit had the legal authority to monetize its art collection as part of its debt adjustment plan, and asserts that if the city had done so, it would have emerged from bankruptcy in a stronger position. Section II provides an overview of the factual and legal issues related to Detroit's freedom to monetize its art collection in bankruptcy. Part II.A stresses the role cities play in providing essential services to citizens and highlights the financial problems limiting their ability to fulfill this role. Part II.B provides an in-depth examination of municipal bankruptcy proceedings. Though municipal bankruptcy has become a popular topic as of late, there is very little scholarship

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9. *Id.* (discussing Detroit's "grand bargain"); Monica Davey, *Finding \$816 Million, and Fast, to Save Detroit*, N.Y. TIMES, Nov. 8, 2014, at A1 (same); see also Monica Davey & Mary Williams Walsh, *Plan to Exit Bankruptcy Is Approved for Detroit*, N.Y. TIMES, Nov. 8, 2014, at A11 [hereinafter Davey & Walsh, *Plan to Exit Bankruptcy*]. The funds were provided by the state and several charitable foundations. *A Phoenix Emerges*, *supra* note 8.

10. See *A Phoenix Emerges*, *supra* note 8 (indicating that the funds raised to protect the DIA will be used to help pay public workers' pensions).

11. Davey & Walsh, *Plan to Exit Bankruptcy*, *supra* note 9, at A11.

12. *Id.*

13. *Id.*

14. *Id.*

15. Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 425 (1993) (noting the lack of legal literature focused on the subject of municipal bankruptcy).

16. Davey & Walsh, *Billions in Debt*, *supra* note 1, at A1.

17. Sara Behunek, *Three American Cities on the Brink of Broke*, FORTUNE (May 28, 2010, 1:06 PM), [http://archive.fortune.com/2010/05/28/news/economy/american\\_cities\\_broke.fortune/index.htm](http://archive.fortune.com/2010/05/28/news/economy/american_cities_broke.fortune/index.htm).

18. *Id.*

19. Davey & Walsh, *Billions in Debt*, *supra* note 1, at A1.

devoted to the disposition of publicly owned assets as part of a Chapter 9 debt adjustment plan.<sup>20</sup> Part II.C examines Detroit's current financial situation, the city's recently approved restructuring plan, and the alternatives considered. Part II.C then presents the arguments raised for and against monetizing the art in bankruptcy, focusing in particular on public trust objections. Opponents of the sale employed the term "public trust" in two ways.<sup>21</sup> First, they used it in "the legal sense of setting aside property for the benefit of the public."<sup>22</sup> Second, they used it to refer to "the public's trust in art museums" as an ethical consideration.<sup>23</sup> Part II.D explores the public trust doctrine and its application to artwork. Part II.E focuses on the public's trust in museums as an ethical consideration and applies the concept to the sale of art.

Section III argues that Detroit could have and should have monetized the DIA collection as part of its restructuring plan. Part III.A contends that, even though property rights are a state law issue, the decision would ultimately have been up to the U.S. Bankruptcy Court for the Eastern District of Michigan. Part III.B asserts that the bankruptcy court would have rejected any public trust-related objections to the monetization of the art. Part III.C contends that the city does not have to comply with the ethical guidelines imposed on private museums. Part III.D suggests approaches to monetizing the art that would have reduced the risk of public trust objections altogether. Part III.E argues that, from a public policy perspective, sale or monetization of the art would have been a preferable approach.

## II. OVERVIEW

This Section provides an overview of the factual and legal issues surrounding the monetization of the DIA collection as part of Detroit's debt adjustment plan. Part II.A examines the crucial role that cities like Detroit play in furnishing essential services to citizens and discusses the financial issues that have put their ability to render these services in jeopardy. Part II.B provides an overview of municipal bankruptcy proceedings. Though municipal bankruptcy has become a trending topic as of late, there is little scholarship dedicated to the disposition of municipally owned assets as part of a Chapter 9 debt adjustment

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20. In recent years there have been numerous noteworthy articles on municipal bankruptcy. See, e.g., Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373 (2014); Clayton P. Gillette, *Fiscal Federalism, Political Will, and Strategic Use of Municipal Bankruptcy*, 79 U. CHI. L. REV. 281 (2012); Melissa B. Jacoby, *The Detroit Bankruptcy, Pre-Eligibility*, 41 FORDHAM URB. L.J. 849 (2014); Adam J. Levitin, *Bankrupt Politics and the Politics of Bankruptcy*, 97 CORNELL L. REV. 1399 (2012); Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956 (2000).

21. Sara Tam, Comment, *In Museums We Trust: Analyzing the Mission of Museums, Deaccessioning Policies, and the Public Trust*, 39 FORDHAM URB. L.J. 849, 861–62 (2012).

22. *Id.* at 861.

23. *Id.* at 861–62 (quoting Glenn D. Lowry, *A Deontological Approach to Art Museums and the Public Trust*, in WHOSE MUSE?: ART MUSEUMS AND THE PUBLIC TRUST 129, 129 (James Cuno ed., 2004)).

plan.<sup>24</sup> Part II.C highlights Detroit's dire financial situation, the recently approved debt adjustment plan, and the alternatives considered by city leaders. Part II.C then introduces the arguments raised by critics and opponents of the sale, focusing in particular on legal and ethical public trust objections. Part II.D discusses the public trust doctrine and its application to artwork. Part II.E focuses on the public's trust in museums as an ethical consideration and applies the concept to the sale of art.

A. *The State of Major Municipalities Today*

1. The Role of Major Cities in Society

Throughout history, cities have been identified as a chief factor in human progress.<sup>25</sup> Needs arising from crowded conditions in cities have spurred the invention of the systems, processes, and products that define our modern standard of living.<sup>26</sup> To ensure city residents would have access to vital services, state legislatures created government entities charged with administrative and police powers in metropolitan areas.<sup>27</sup> These entities are known today as "municipalities."<sup>28</sup>

A municipality is a self-governing body, and its form, function, and organization are fully determined by the state legislature that establishes it.<sup>29</sup> Municipalities are typically entrusted with administrative supervision and control over local departments, boards, and commissions.<sup>30</sup>

Services provided by municipalities include clean water systems, sewage systems, garbage collection services, and education.<sup>31</sup> Officers elected by the

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24. See *supra* note 20 for a list of recent articles examining municipal bankruptcy.

25. See 1 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 1:4 (3d ed. 2014) (providing that "[t]he chief advance in all lines of human endeavor has been through the nurture and growth of urban life").

26. See *id.* (indicating that growing needs spurred by crowded conditions have "led to the discovery and invention of things that promote health, increase energy and give to life much of its spiritual meaning").

27. See *id.* § 1:16 (detailing the functions of early municipalities).

28. See 62 FRANCIS C. AMENDOLA ET AL., *C.J.S. Municipal Corporations* § 4 (2014) (providing that the term "municipality" is generally used to denote "a unit of local government," but may be used "to include only entities exercising general governmental functions, that is, counties, cities, towns, and villages, or more broadly to include also specialized governmental units"); see also *id.* § 3 (indicating the term "municipal" means "of or pertaining to a town or city or the corporate government thereof").

29. See *id.* § 12 ("[A] municipal corporation represents no sovereignty distinct from the state itself . . ."); 56 GEORGE BLUM ET AL., *AM. JUR. 2D Municipal Corporations, Etc.* § 88 (2014) (explaining that municipalities "derive their existence and powers from legislative enactments and are subject to legislative control and supremacy").

30. See 3 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS*, § 12:68 (3d ed. 2014) (indicating that whether municipalities have the power to "create offices, departments, boards, commissions and similar bodies . . . depends chiefly upon the provisions of its charter and legislative acts"). Areas managed by municipalities include health, sanitary, sewage, drainage, school, park, fire, and road improvement. *Id.*

31. *Id.*

local community supervise and control each municipality.<sup>32</sup> In order to compensate municipal workers, states grant municipalities the authority to pay salaries.<sup>33</sup> Most municipalities also provide public employees with pensions, which vest upon an employee's retirement or in the event of disability leave.<sup>34</sup> The exact details of pension plans are negotiated by unions, which bargain collectively on behalf of all workers.<sup>35</sup> The collective bargaining process allows unions to pressure municipalities into agreeing to favorable terms of employment, because if city leaders disagree, the unions will threaten to cut off the city's primary source of labor.<sup>36</sup> Collective bargaining often results in pension deals that impose massive liabilities on cities.<sup>37</sup>

## 2. Unsuccessful Approaches to Dealing with Financial Crises

Cities across the country are grappling with budget problems brought on by the 2008 financial crisis and the subsequent economic recession.<sup>38</sup> Declining tax bases, decreased state aid, and mounting pension costs are forcing cities to make difficult, painful financial decisions in order to balance their budgets.<sup>39</sup> City leaders in Chicago, New York, and Philadelphia have tried unsuccessfully to solve their respective economic crises through various unique approaches.<sup>40</sup>

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32. *Id.* § 12:22 (describing the regulations and processes of municipal elections).

33. See 56 BLUM ET AL., *supra* note 29, § 221 (asserting that “[t]he power to extend . . . both compensation and benefits is ineluctably essential to the operation of local governmental units”).

34. Of the nearly ninety thousand state and local governments in the United States, most offer pension plans to their employees. Jeffrey B. Ellman & Daniel J. Merrett, *Pensions and Chapter 9: Can Municipalities Use Bankruptcy to Solve Their Pension Woes?*, 27 EMORY BANKR. DEV. J. 365, 372–73 (2011). In order to fund pension benefits, municipalities typically contribute to and manage their own pension funds to create large pools of money, which are invested in stocks, bonds, and other financial instruments. *Id.* at 375.

35. See *id.* at 373 (noting that the terms of many pension plans are the result of collective bargaining agreements).

36. See Howard Foster, *Collective Bargaining Is Price Fixing*, HUFFINGTON POST (Dec. 13, 2012, 12:25 PM), [http://www.huffingtonpost.com/howard-foster/collective-bargaining-is-\\_b\\_2293210.html](http://www.huffingtonpost.com/howard-foster/collective-bargaining-is-_b_2293210.html) (asserting that when a group of workers authorize a labor union to bargain collectively with its employer over pay, the workers are “fixing the price for their labor”).

37. See *id.* (indicating that collective bargaining ultimately drives up wages for city workers).

38. CLAIRE SHUBIK, LAURA HORWITZ & THOMAS GINSBERG, PHILADELPHIA RESEARCH INITIATIVE, TOUGH DECISIONS AND LIMITED OPTIONS: HOW PHILADELPHIA AND OTHER CITIES ARE BALANCING BUDGETS IN A TIME OF RECESSION 1 (2009), available at [http://www.pewtrusts.org/-/media/Assets/2009/05/18/FINAL\\_Budget-Brief.pdf](http://www.pewtrusts.org/-/media/Assets/2009/05/18/FINAL_Budget-Brief.pdf).

39. See, e.g., Reid Wilson, *How Parking Meters Killed Privatization of Midway Airport*, WASH. POST: GOVBEAT (Sept. 13, 2013), <http://www.washingtonpost.com/blogs/govbeat/wp/2013/09/13/how-parking-meters-killed-privatization-of-midway-airport/> (indicating that Chicago privatized its parking meters in order to raise desperately needed funds).

40. See Nick Barrickman, *Philadelphia Public School System Begins Classes Amid Massive Budget Crisis*, WORLD SOCIALIST WEB SITE (Sept. 11, 2013), <http://www.wsws.org/en/articles/2013/09/11/phil-s11.html> (indicating Pennsylvania cannot sustain the Philadelphia education budget that the city was forced to pass off to alleviate budget concerns); Hal Dardick & John Byrne, *Emanuel Warns of Looming City Pension Crisis in Budget Speech*, CHI. TRIB.: CLOUT ST. (Oct. 23, 2013), [http://articles.chicagotribune.com/2013-10-23/news/chi-emanuel-warns-of-looming-city-pension-crisis-in-budget-speech-20131023\\_1\\_city-pension-crisis-budget-speech-city-hall](http://articles.chicagotribune.com/2013-10-23/news/chi-emanuel-warns-of-looming-city-pension-crisis-in-budget-speech-20131023_1_city-pension-crisis-budget-speech-city-hall) (indicating that the creative

Their failures shed light on the pressing need for a more effective method of long-term relief, such as municipal bankruptcy.<sup>41</sup> According to bankruptcy lawyer Karol K. Denniston, “If you end up with precedent that allows the restructuring of . . . benefits in bankruptcy court, that will make it an attractive option for cities.”<sup>42</sup> If Detroit emerges from bankruptcy having successfully negotiated viable adjustments to its liabilities, other cities will be tempted to follow suit.<sup>43</sup>

### B. *An Examination of the Municipal Bankruptcy Process*

To date, there has been a surprising lack of scholarship focusing on the disposition of publicly owned assets in municipal bankruptcy.<sup>44</sup> This Part highlights the municipal bankruptcy process. First, it describes how courts determine eligibility for municipal bankruptcy. Then, it explains the procedural structure of Chapter 9 bankruptcy proceedings. Finally, it touches upon the laws governing the disposition of assets and details how courts handle unsettled areas of state law.

The rationale behind municipal bankruptcy is that a troubled city can serve its citizens better once it is freed from the burden of debt.<sup>45</sup> Thus, the goal is to reduce a city’s liabilities while keeping revenue sources intact.<sup>46</sup>

#### 1. Determining Eligibility for Municipal Bankruptcy

Cities are eligible to file for bankruptcy under Chapter 9 of the Bankruptcy Code.<sup>47</sup> Before a city can enter bankruptcy, it must meet fundamental eligibility requirements.<sup>48</sup>

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accounting tactics adopted by city leaders in Chicago have not produced sustainable results); Tina Moore, Rich Schapiro & Jonathan Lemire, *Hell to Pay: Next Mayor Looking at \$7.8 Billion Crisis*, N.Y. DAILY NEWS (May 27, 2013, 10:13 PM), <http://www.nydailynews.com/new-york/hell-pay-mayor-7-8-billion-crisis-article-1.1356019> (indicating New York City’s mayor has unsuccessfully attempted to negotiate with unions over rising pensions in an effort to alleviate budget concerns).

41. See Ellman & Merrett, *supra* note 34, at 412 (asserting that Chapter 9 of the Bankruptcy Code “offers tools to municipalities wishing to pursue a fundamental restructuring of [their] pension obligations”).

42. Davey & Walsh, *Billions in Debt*, *supra* note 1, at A1.

43. *Id.*

44. See McConnell & Picker, *supra* note 15, at 425.

45. See *id.* at 469–70 (“The theory of Chapter 9 is that the burden of debt service, if sufficiently high, will affect the taxpayers of a city as it would a debt-ridden individual: it will sap initiative and depress money-generating activity.”).

46. See *id.* at 470 (indicating “the law presumes that the [municipal] debtor will survive bankruptcy in essentially the same [structural] form that it went in”).

47. *Id.* at 455 (explaining that Chapter 9 covers municipalities).

48. See 11 U.S.C. §§ 109(c), 921(c) (2012). Though there are actually six requirements, this Comment only focuses on the most disputed requirements. The six requirements are (1) the entity must be a municipality; (2) the municipality must be “specifically authorized, in its capacity as a municipality or by name, to be a debtor under [Chapter 9] by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter”; (3) the municipality must be insolvent; (4) the municipality must desire to “effect a plan to adjust [the]

First, a city must prove that it falls within the Bankruptcy Code's definition of a "municipality."<sup>49</sup> Section 101(40) of the Bankruptcy Code defines "municipality" as a "political subdivision or public agency or instrumentality of a State."<sup>50</sup> Bankruptcy courts have struggled with this definition, indicating that the Code gives little guidance as to which entities are permitted to file under Chapter 9.<sup>51</sup> In *In re Las Vegas Monorail Co.*,<sup>52</sup> the Bankruptcy Court for the District of Nevada laid out the typical analysis for determining whether an entity qualifies as a municipality under Chapter 9.<sup>53</sup> The court indicated that if an entity engages in governmental functions, serves a public purpose, or is characterized by the state as a municipality, it usually qualifies.<sup>54</sup>

Next, the city must show that it has specific authorization from the state to be a debtor under Chapter 9.<sup>55</sup> Twelve states have expressly authorized their municipalities to file for Chapter 9 relief by way of statute.<sup>56</sup> Georgia is the only state to statutorily bar its municipalities from Chapter 9.<sup>57</sup> Municipalities in all other states must seek specific authorization in order to file for bankruptcy.<sup>58</sup>

A city must also meet the insolvency requirement, which has often been referred to as the "gatekeeper" provision of Chapter 9.<sup>59</sup> Section 101(32) of the Bankruptcy Code says that a municipality is considered "insolvent" when it is "(i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or (ii) [it is] unable to pay its debts as they become

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debts" it is generally not paying or unable to pay; (5) the municipality must satisfy a creditor negotiation requirement, through one of four enumerated alternatives; and (6) the petition must have been filed in good faith. *Id.*

49. See *In re Connector 2000 Ass'n, Inc.*, 447 B.R. 752, 758–59 (Bankr. D. S.C. 2011) (deciding first whether the debtor was a "municipality" for the purposes of the Bankruptcy Code); *In re New York City Off-Track Betting Corp.*, 427 B.R. 256, 265–66 (Bankr. S.D.N.Y. 2010) (same).

50. 11 U.S.C. § 101(40).

51. See, e.g., *In re New York City Off-Track Betting Corp.*, 427 B.R. at 265 (indicating that both the Bankruptcy Code and the legislative history offer no assistance in determining the scope of the term "municipality").

52. 429 B.R. 770 (Bankr. D. Nev. 2010).

53. *In re Las Vegas Monorail Co.*, 429 B.R. at 788–89.

54. See *id.* at 784–89 (summarizing a number of municipal bankruptcy cases, and delineating the criteria that appear to hold the most weight in determining whether an entity qualifies as a "municipality").

55. NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 988 (1997). Cities did not always have to get specific authorization from states in order to file for bankruptcy. Until the Bankruptcy Reform Act of 1994, municipalities were permitted to file for bankruptcy as long as they were not violating state law. *In re New York City Off-Track Betting*, 427 B.R. at 266.

56. Those states are Alabama, Arizona, Arkansas, California, Colorado, Florida, Idaho, Kentucky, Montana, Oklahoma, South Carolina, and Texas. NAT'L BANKR. REVIEW COMM'N, *supra* note 58, at 988 n.2431.

57. *Id.*; see, e.g., GA. CODE ANN. § 36-80-5 (West 2014) (barring municipalities from filing for Chapter 9 bankruptcy).

58. See *In re New York City Off-Track Betting*, 427 B.R. at 266 (noting that section 109(c)(2) of the Bankruptcy Code requires specific state authorization before an entity can file for municipal bankruptcy).

59. See, e.g., McConnell & Picker, *supra* note 15, at 455–56.

due.”<sup>60</sup> While the first test under § 101(32)(C)(i) looks to current, general nonpayment, the second test looks to future inability to pay.<sup>61</sup>

Finally, a debtor must seriously desire to effect a debt adjustment plan and must have negotiated in good faith concerning the proposed plan.<sup>62</sup> These requirements, which are laid out in § 109(c)(5), are “intended to promote pre-petition negotiations between a municipality and its creditors concerning a plan of adjustment.”<sup>63</sup> Section 109(c)(5)(C) contains an impracticability provision.<sup>64</sup> This provision was intended as an alternative for larger municipalities.<sup>65</sup> It provides relief in situations where a debtor has such a large number of creditors that it is impracticable to negotiate.<sup>66</sup> It also provides relief where pausing to negotiate with creditors before filing would put the provision of essential services at risk.<sup>67</sup>

## 2. Municipal Bankruptcy Proceedings

“The filing of [a municipal bankruptcy] petition acts as an automatic stay, blocking the commencement or continuation” of debt collection proceedings against the municipality.<sup>68</sup> The debtor must give notice of the bankruptcy filing to all known creditors, and it must provide a list of creditors to the court.<sup>69</sup> Though creditors may petition for relief from the stay, they will only succeed if the municipality is unable to propose a meaningful debt adjustment plan.<sup>70</sup>

The heart of Chapter 9 is the debtor’s plan to adjust its debts.<sup>71</sup> In contrast to other types of bankruptcy, Chapter 9 allows the debtor to control the debt

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60. 11 U.S.C. § 101(32)(C)(i)–(ii) (2012).

61. See *In re New York City Off-Track Betting*, 427 B.R. at 271 (explaining the respective purposes of the two tests of insolvency under Chapter 9 of the Bankruptcy Code).

62. *In re Cottonwood Water & Sanitation Dist.*, Douglas Cnty., Colo., 138 B.R. 973, 975 (Bankr. D. Colo. 1992). The provision indicates that a municipality filing for bankruptcy must (1) have “obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan”; (2) have “negotiated in good faith with creditors and ha[ve] failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan”; (3) have shown that it “is unable to negotiate with creditors because such negotiation is impracticable”; or (4) have a reasonable belief “that a creditor may attempt to obtain preference transfer that is avoidable under . . . this title.” 11 U.S.C. § 109(c)(5).

63. *In re Valley Health Sys.*, 383 B.R. 156, 161 (Bankr. C.D. Cal. 2008).

64. 11 U.S.C. § 109(c)(5)(C) (“An entity may be a debtor under chapter 9 of this title if and only if such entity . . . is unable to negotiate with creditors because such negotiation is impracticable . . .”).

65. See *In Re City of Vallejo*, 408 B.R. 280, 297 (B.A.P. 9th Cir. 2009) (stating that § 109(c)(5)(C) was intended to serve as an alternative to § 109(c)(5)(B)).

66. See *id.* at 298 (indicating that a city can prove impracticability in a number of ways, including by demonstrating it has too many creditors or that it must act quickly to protect its citizens from harm).

67. *Id.*

68. Leonard Kopelman, *Municipal Bankruptcy: The Worst-Case Scenario*, BOSTON B.J., Sept.–Oct. 1990, at 9, 9–10 (1990).

69. *Id.* at 10.

70. *Id.* at 9–10.

71. McConnell & Picker, *supra* note 15, at 463.



adjustment plan, and gives the debtor the exclusive right to file it.<sup>72</sup> “[U]nless the debtor consents or the plan so provides,” section 904 prohibits the court from interfering with (1) the political or governmental powers of the debtor, (2) the debtor’s revenues, or (3) the debtor’s use of any income-producing property.<sup>73</sup> Through its adjustment plan, a municipal debtor is permitted to sell any and all property that it owns.<sup>74</sup> The debtor’s only limitations are those imposed by state law.<sup>75</sup>

The process of confirming a debt adjustment plan by way of creditor approval is complex and time-consuming.<sup>76</sup> However, a bankruptcy court may approve a plan over creditors’ objections if it determines that it is “feasible” and “in the best interests of creditors.”<sup>77</sup> Thus, while the municipal debtor is relatively autonomous, court approval is often its only hope of getting its restructuring plan passed.<sup>78</sup>

### 3. Disposition of Assets in Bankruptcy

In *Butner v. United States*,<sup>79</sup> the Supreme Court held that the property rights of parties involved in a bankruptcy proceeding should be determined in accordance with state law.<sup>80</sup> Absent an overriding policy concern, “a bankruptcy court’s interpretation of rights originating in state law should mirror a state court’s interpretation of such rights as closely as possible.”<sup>81</sup>

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72. See 11 U.S.C. § 941 (2012) (indicating that the debtor shall file its own readjustment plan, and if a plan is not filed within the bankruptcy petition, it will simply be filed at a later time fixed by the court); Thomas M. Horan & Ericka Fredricks Johnson, *The Debtor Has No Estate, and Other Tales: Why Chapter 9 Looks Different from Chapter 11*, AM. BANKR. INST. J., Nov. 2013, at 22, 72 (2013) (noting that under the limitations of the Bankruptcy Act, the court is only authorized to determine (1) whether the debtor is insolvent, (2) whether the restructuring proposal is acceptable, and (3) whether the plan is equitable and in the best interests of creditors).

73. 11 U.S.C. § 904.

74. See *id.* § 1123(a)(5)(D) (establishing that a debtor may sell any and all property of the estate); *id.* § 902(1) (defining “property of the estate” as “property of the debtor” for the purposes of Chapter 9); Paul R. Glassman, *A Practical Guide to Chapter 9 Municipal Bankruptcy*, ASPATORE (Oct. 2011), 2011 WL 5053642, at \*10 (“There is no property of the estate in Chapter 9, so a municipal debtor does not need to obtain court approval to use, sell, or lease property outside the ordinary course of business.”).

75. See 11 U.S.C. § 903 (“This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality . . .”).

76. *Id.* § 1129 (a)(2)–(a)(10), (b)(1)(a), (b)(2)(a)–(b) (outlining the stringent requirements for court confirmation of a debt adjustment plan).

77. *Id.* § 943(b)(7).

78. See McConnell & Picker, *supra* note 15, at 474 (asserting that while the court may not have the authority to order the sale of property, renegotiate contracts, or increase taxes, it can refuse to accept a city’s debt adjustment plan).

79. 440 U.S. 48 (1979).

80. See *Butner*, 440 U.S. at 54–55 (indicating that through the Bankruptcy Act, Congress has generally left the determination of property rights in the assets of a bankrupt’s estate to state law”).

81. John T. Cross, *State Choice of Law Rules in Bankruptcy*, 42 OKLA. L. REV. 531, 535 (1989).

The best option for a bankruptcy court facing the difficult task of interpreting an unsettled area of state law is to certify the question to the highest court in the state.<sup>82</sup> Certification is a procedure available to federal courts to prompt the highest state court to answer an unresolved question of state law.<sup>83</sup> The Supreme Court acknowledged the value of certifying a question in *Lehman Brothers v. Schein*.<sup>84</sup> In *Lehman Brothers*, the Court indicated that certification “save[s] time, energy, and resources and helps build a cooperative judicial federalism.”<sup>85</sup> The authority to address certified questions is rooted in the state statutes, court rules, and state constitutional provisions that define the jurisdiction of the highest state court.<sup>86</sup> If a state court has been granted such authority, it is in its best interests to answer any certified questions presented because it gives the court the last word on how state law rights are to be interpreted.<sup>87</sup>

### C. *The Detroit Bankruptcy*

Detroit’s road to bankruptcy began on March 1, 2013, when the state of Michigan declared the city to be in a “financial emergency.”<sup>88</sup> On March 14, 2013, Kevyn Orr, a prominent bankruptcy attorney from Jones Day, was appointed as the city’s emergency manager.<sup>89</sup> On July 18, 2013, Detroit officially filed for bankruptcy.<sup>90</sup> As of October 2013, the city owed approximately \$18 billion in debt.<sup>91</sup> In the late 1970s and early 1980s, Detroit’s thriving automotive industry made it a bustling metropolis.<sup>92</sup> However, with the automation of assembly lines and increased competition from foreign automakers, the city’s

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82. See Verity Winship, *Certification of State-Law Questions by Bankruptcy Courts*, 87 AM. BANKR. L.J. 483, 509 (2013) (recommending that courts certify questions of unsettled state law to the highest state court).

83. *Id.* at 485–86.

84. 416 U.S. 386 (1974); see also Winship, *supra* note 82, at 487 (indicating that the Supreme Court praised the use of certification procedures in *Lehman Brothers v. Schein*).

85. *Lehman Bros.*, 416 U.S. at 391; Winship, *supra* note 82, at 487.

86. Winship, *supra* note 82, at 490. Only four states currently have statutes explicitly permitting their highest state courts to hear questions from bankruptcy courts. *Id.* at 497. However, as of December 31, 2012, thirty-nine states had statutes containing language that could support certification requests directly from bankruptcy courts. *Id.* at 495.

87. See *id.* at 490 (indicating that certification gives a state court the last word on the interpretation of state law).

88. Mark Brush, *Facts About the Detroit Bankruptcy*, MICH. RADIO (Oct. 28, 2013), <http://michiganradio.org/post/facts-about-detroit-bankruptcy>.

89. *Who Is Kevyn Orr?*, FOX DETROIT (Mar. 14, 2013, 6:58 AM), <http://www.myfoxdetroit.com/story/21638382/who-is-kevyn-orr>.

90. Davey & Walsh, *Billions in Debt*, *supra* note 1, at A1.

91. Brush, *supra* note 88. The city’s debt is owed to government bondholders, the Detroit Water and Sewerage Department, unfunded city employee pension liabilities, and unfunded retiree health care funds, among others. *Id.*

92. Mike Patton, *Detroit Files for Bankruptcy Protection: The Facts, the Figures, and the Fallout*, FORBES (July 22, 2013, 4:45 PM), <http://www.forbes.com/sites/mikepatton/2013/07/22/detroit-files-for-bankruptcy-protection-the-facts-the-figures-and-the-fallout/>.

automotive industry began to decline rapidly.<sup>93</sup> Other societal factors have also contributed to the city's decline, including emigration to the suburbs.<sup>94</sup>

A key problem for the city is that it does not have a steady foundation for tax revenues.<sup>95</sup> Emigration over the course of the last half century caused the population to steadily decrease from two million people to 680,000.<sup>96</sup> To make matters worse, Detroit's citizens owe the city over \$130 million in uncollected taxes.<sup>97</sup> Detroit residents currently pay the highest tax rates in Michigan and receive the lowest quality of services.<sup>98</sup>

Detroit's bankruptcy filing was not a snap decision.<sup>99</sup> In November 2011, the mayor warned that the city could run out of money within the subsequent five months.<sup>100</sup> In January 2013, a citywide audit revealed a \$327 million deficit.<sup>101</sup> The AFL-CIO agreed to debt concessions with regard to pensions, but they simply were not enough.<sup>102</sup>

When Detroit filed for bankruptcy, the city did not have many valuable assets it could sell to satisfy its creditors as part of a debt adjustment plan.<sup>103</sup> It owned the Detroit Water and Sewerage Department, which provides water services to about four million people, and the Detroit Zoo, a 125-acre plot of land that is home to more than 3,300 animals.<sup>104</sup> The city also owned a 982-acre park in the Detroit River, and Fort Wayne, a historic site on the river that houses a fort built in 1848.<sup>105</sup> Unfortunately, none of these assets are worth much, and liquidating them would not have raised nearly as much capital as selling the DIA art collection.<sup>106</sup>

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93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*; see also Carl Bialik, *Detroit Police Response Times No Guide to Effectiveness*, WALL ST. J. (Aug. 2, 2013, 7:26 PM), <http://online.wsj.com/news/articles/SB10001424127887323997004578642250518125898> (describing Detroit's police response times as exponentially longer than police response times in other states). Moreover, only between ten and fourteen of the city's thirty-six ambulances are currently running. *Id.* Studies suggest that if a Detroit citizen needs police assistance to deal with an emergency, he or she has to wait almost an hour, as opposed to the national average of eleven minutes. *Id.*

99. Patton, *supra* note 92.

100. *Id.*

101. *Id.*

102. *Id.*

103. See David Benoit, *Detroit's Assets: What Could Be Sold*, WALL ST. J. (July 19, 2013, 1:11 PM), <http://blogs.wsj.com/moneybeat/2013/07/19/detroits-assets-what-could-be-sold/> (providing the list of assets available to the city to dispose of in bankruptcy).

104. *Id.*

105. *Id.*

106. See *id.* (stating that in 2004 the DIA art collection was appraised at \$1 billion); *DIA's Art Collection at Risk Amid Detroit's Financial Woes*, MYFOXDETROIT.COM (May 24, 2013, 6:58 AM), <http://www.myfoxdetroit.com/story/22413980/dias-art-collection-at-risk-amid-detroits-financial-woes> (stating that a city report from 2004 valued the art collection at more than \$1 billion); *Should Bankrupt Detroit Sell Off Its World-Famous \$2.5 Billion Art Collection to Pay Its Creditors?*, DAILY MAIL REP.

### 1. The Detroit Institute of Art

The only municipal asset that had the potential to raise a significant amount of money if sold was the DIA collection.<sup>107</sup> The DIA collection contains over sixty thousand works,<sup>108</sup> including Vincent van Gogh's *Self-Portrait* and August Rodin's *The Thinker*.<sup>109</sup> The museum touts its collection as one of the top six art collections in the nation.<sup>110</sup> Experts estimate that selling the collection outright could have brought in over \$4 billion.<sup>111</sup>

The DIA was founded in 1885 as a private, nonprofit organization.<sup>112</sup> The museum experienced funding problems almost immediately and began receiving subsidies from the city in 1893.<sup>113</sup> Three decades after the museum's opening, it became clear that private donations and subsidies were not going to be enough to keep it in business.<sup>114</sup> In July 1919, the museum's leaders traded financial and managerial independence for the promise of annual funding from the city.<sup>115</sup> In accordance with the deal, the museum would draw operating funds from the same pool of money that supported parks, police, and other public services.<sup>116</sup> The new DIA was to be governed by an arts commission appointed by the mayor.<sup>117</sup> The deal effectively made the DIA a city department.<sup>118</sup> The institution's funding became "irrevocably linked . . . to the boom-and-bust cycles of Detroit's economy and ever-shifting political winds."<sup>119</sup>

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(July 22, 2013, 1:08 PM), <http://www.dailymail.co.uk/news/article-2373140/Should-bankrupt-Detroit-sell-world-famous-2-5BILLION-art-collection-pay-creditors.html> (providing that collectors now estimate that the DIA art collection could be worth up to \$2.5 billion).

107. See Benoit, *supra* note 103 ("According to the Detroit Free Press the van Gogh is worth \$60 million, an Andy Warhol self-portrait would be . . . [worth] \$80 million and Henri Matisse's 'The Window' would be worth \$150 million.").

108. Chelsea Coatney, *Detroit Institute of Arts Says Bankruptcy Appraisals Would Harm 'Irreplaceable' Art*, PBS NEWSHOUR (May 13, 2014, 4:39 PM), <http://www.pbs.org/newshour/rundown/detroit-institute-arts-says-bankruptcy-appraisals-harm-irreplaceable-art/>.

109. Benoit, *supra* note 103.

110. *About the DIA*, DETROIT INST. ARTS, <http://www.dia.org/about/history.aspx> (last visited May 15, 2015) (contending that the DIA collection is among the top six in the nation).

111. Kennedy, *supra* note 4, at A15.

112. Mark Stryker, *DIA in Peril: A Look at the Museum's Long, Tangled Relationship with Detroit Politics and Finances*, DETROIT FREE PRESS, Sept. 8, 2013, at E1.

113. *Id.*

114. See *id.* ("By the second decade of the [twentieth century], private donations were not enough to keep the museum afloat or accommodate its burgeoning collection."). "The museum's endowment in 1915 was only \$50,000, compared with \$1 million at the Art Institute of Chicago." *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

Since the deal went into effect, the museum's annual funding has been dependent on the state of the city's economy.<sup>120</sup> In the summer of 2012, drastic budget cuts threatened the museum's very existence.<sup>121</sup> In order to save the institution, taxpayers approved an annual property tax increase to provide \$22 million to the museum each year for the next decade.<sup>122</sup> In 2013, county leaders indicated the tax would be rescinded if the collection were sold or if tax money was rerouted to cover the city's debt.<sup>123</sup>

2. The DIA Collection, the Debt Adjustment Plan, and the "Grand Bargain"

On November 7, 2014, Judge Rhodes approved a debt adjustment plan proposed by the city's emergency manager, Kevyn Orr.<sup>124</sup> The plan will allow the city to cut \$7 billion of unsecured liabilities from its \$18 billion "debt mountain."<sup>125</sup> Under the arrangement, pensioners will take a significant hit.<sup>126</sup> The pensions of retirees will be cut by 4.5%, and the majority of pensioners will not receive annual cost-of-living adjustments.<sup>127</sup> In addition, healthcare benefits for retirees will be reduced by ninety percent.<sup>128</sup> Bondholders will recover the debts owed by the city at a relatively low rate.<sup>129</sup> Syncora, a major bond insurer and one of the city's most vocal creditors,<sup>130</sup> has agreed to accept fourteen cents on the dollar in repayment.<sup>131</sup> Financial Guaranty, a bondholder with a \$1 billion claim, has agreed to similar concessions.<sup>132</sup>

Notably, the debt adjustment plan does not call for the sale or monetization of the DIA collection.<sup>133</sup> Rather than putting the art up for auction and selling it to the highest bidder, Orr struck a deal with the museum.<sup>134</sup> Orr indicated that if the museum could raise \$500 million to contribute toward paying off the city's

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120. *See id.* ("For most of its 128-year lifespan the DIA has been entangled within the broad narrative of Detroit's rise and fall as an economic power and the city's complex dynamics when it comes to race, class, labor and city-suburbs divide.")

121. *Id.*

122. *Id.*

123. *Id.*

124. *A Phoenix Emerges*, *supra* note 8.

125. *Id.*

126. *Id.*

127. *Id.* Cost-of-living adjustments for retirees from the police force and the fire brigade will not be eliminated, but they will be reduced from 2.25% to 1% annually. *Id.*

128. *Id.*

129. Davey & Walsh, *Plan to Exit Bankruptcy*, *supra* note 9, at A11.

130. Nathan Bomey, *Creditors Warn of Fight over Art*, DETROIT FREE PRESS, Mar. 1, 2014, at A1.

131. Davey & Walsh, *Plan to Exit Bankruptcy*, *supra* note 9, at A11.

132. *A Phoenix Emerges*, *supra* note 8.

133. *Id.*

134. Jordan Weissmann, *Detroit Exits Bankruptcy, Thanks to Its Art Museum*, SLATE (Nov. 7, 2014, 5:15 PM), [http://www.slate.com/blogs/moneybox/2014/11/07/detroit\\_exits\\_bankruptcy\\_city\\_pensions\\_saved\\_in\\_part\\_thanks\\_to\\_detroit.html](http://www.slate.com/blogs/moneybox/2014/11/07/detroit_exits_bankruptcy_city_pensions_saved_in_part_thanks_to_detroit.html).

debts, the art collection would not be sold or monetized.<sup>135</sup> Instead, the collection would be transferred into the control of an independent charitable trust,<sup>136</sup> which would have permanent, “bankruptcy-proof ownership” of the collection.<sup>137</sup> In response, the museum launched an ambitious fundraising drive, through which it managed to raise more than \$800 million, effectively ensuring that the collection would not be utilized as part of the debt adjustment plan.<sup>138</sup> Of the funds raised, \$330 million came from philanthropic organizations and \$200 million came from the state of Michigan.<sup>139</sup> Though the fundraiser brought in a larger infusion of capital than Orr had requested, it did not come anywhere close to matching the \$4.6 billion that experts indicate the collection could have brought in if it were put up for auction.<sup>140</sup>

In order to convince pensioners to accept the terms of the adjustment plan, the city’s negotiators limited pension cuts, basing the city’s contribution to pension plans on an expected rate of return of 6.75% on pension investments.<sup>141</sup> If actual returns turn out to be less than 6.75%, the city will have to make up the difference.<sup>142</sup> Martha Kopacz, the fiscal policy expert appointed by the court, has expressed concerns about the level of risk associated with the assumed rate.<sup>143</sup> According to Kopacz, an exit strategy that rests “on an assumption that pension investments would earn average annual returns of 6.75 percent . . . [is] too aggressive for a fragile city that could not afford investment losses.”<sup>144</sup> Under questioning by Judge Rhodes, Kopacz indicated that she “would make it 5 percent if [she] ruled the world.”<sup>145</sup> According to hedge fund manager Andy Kessler, a realistic expected rate of return on pension investments is around 3%.<sup>146</sup>

Under the plan, the city also set aside \$1.7 billion to invest in public infrastructure and basic services.<sup>147</sup> The adjustment plan indicates that the funds are intended to provide basic services for nine years.<sup>148</sup> However, because the city has failed to address deficiencies in basic services for so long, and the need

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135. *Id.*

136. *Id.*

137. Davey & Walsh, *Plan to Exit Bankruptcy*, *supra* note 9, at A11.

138. Weissmann, *supra* note 134. Though this Comment does not address the issue, in the aftermath of the deal, prominent bankruptcy professor David Skeel argued that the grand bargain violates bankruptcy law on the grounds that it excludes certain classes of creditors. David Skeel, *Detroit’s Clever and Likely Illegal Art-for-Pensions Deal*, WASH. POST (May 9, 2014), [http://www.washingtonpost.com/opinions/detroits-clever-and-likely-illegal-art-for-pensions-deal/2014/05/09/e3f93e84-cf1e-11e3-a6b1-45c4dff85a6\\_story.html](http://www.washingtonpost.com/opinions/detroits-clever-and-likely-illegal-art-for-pensions-deal/2014/05/09/e3f93e84-cf1e-11e3-a6b1-45c4dff85a6_story.html).

139. *Id.*

140. Kennedy, *supra* note 4, at A15.

141. Davey & Walsh, *Plan to Exit Bankruptcy*, *supra* note 9, at A11.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. Andy Kessler, *The Pension Rate-of-Return Fantasy*, WALL ST. J., Apr. 10, 2013, at A13.

147. Davey & Walsh, *Plan to Exit Bankruptcy*, *supra* note 9, at A11.

148. *A Phoenix Emerges*, *supra* note 8.

for improvements to public infrastructure is so great, the funding pool could run out in as little as five years.<sup>149</sup> If the money set aside were to run out at any point within the nine-year period, the city would have to look elsewhere for the capital necessary to fund public services.

### 3. Alternatives to the “Grand Bargain” Considered by City Leaders

City leaders reportedly considered several alternatives to the “grand bargain,” which included using the art as collateral to secure a bank loan and leasing it.<sup>150</sup> If the museum had decided to lease the art, it could have made a portion of its collection available for rent as a way of securing a steady stream of revenue.<sup>151</sup> In the early stages of the bankruptcy proceedings, the DIA supported a plan through which the museum would run statewide travelling exhibitions and educational programs for profit using pieces from its collection.<sup>152</sup> Other museums, including the Museum of Fine Arts in Boston, have profited greatly from similar arrangements in the past.<sup>153</sup> In 2004, the Massachusetts-based museum loaned twenty-one Monet paintings to a private gallery in a Las Vegas casino for \$1 million dollars.<sup>154</sup>

Those opposed to the sale or monetization of the artwork asserted that it is held in the public trust.<sup>155</sup> They argued that once the museum put the art on display for the benefit of the public, it assumed a duty to keep it on display at the DIA.<sup>156</sup> In an opinion meant to discourage the sale, Michigan Attorney General Bill Shuette asserted that the collection should be considered a charitable trust, shielded from sale in bankruptcy proceedings by state law.<sup>157</sup> Museum leaders insisted that the sale of artwork would violate the museum’s operating agreement and the exacting ethical standards required by the public trust.<sup>158</sup> The

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149. *Id.* The state of basic services in Detroit is in disarray: “public schools are failing the pupils who bother to turn up; ambulances break down; thousands of households don’t have water and there are 84,000 blighted and vacant parcels of property,” which the city must demolish at a cost of \$8,000 each. *Id.*

150. Stryker & Gallagher, *The Art of the DIA Deal*, *supra* note 5, at A15. The “grand bargain” refers to the plan to save the DIA collection from sale. Randy Kennedy, *Detroit Bankruptcy Deal Ends Threat to Museum*, N.Y. TIMES, Nov. 8, 2014, at C1.

151. Stryker & Gallagher, *The Art of the DIA Deal*, *supra* note 5, at A15.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. See Detroit Institute of Arts: Conveyance or Transfer of Detroit Institute of Arts Collection, Op. Mich. Att’y Gen. No. 7272 (June 13, 2013), available at [http://media.mlive.com/news/detroit\\_impact/other/AGO%207272.pdf](http://media.mlive.com/news/detroit_impact/other/AGO%207272.pdf) (indicating that because the museum’s sole intention has always been to collect and exhibit art for the public, its collection should be shielded from bankruptcy as a trust).

158. John Gallagher & Mark Stryker, *DIA Says Art Collection a Public Trust, Not for Sale*, DETROIT FREE PRESS (May 24, 2013, 1:46 PM), <http://www.freep.com/article/20130524/BUSINESS06/305240065/> (indicating that the museum would view any attempt to sell its assets as a violation of its operating agreement and the public trust).

museum indicated that the city could not monetize art for any purposes other than to generate funds or enhance the collection.<sup>159</sup>

Opponents of the sale employed the term “public trust” in two ways.<sup>160</sup> First, they used it in “the legal sense of setting aside property for the benefit of the public.”<sup>161</sup> Second, they used it to refer to “the public’s trust in art museums” as an ethical consideration.<sup>162</sup> In order to fully address the legal and ethical implications of the public trust concept, this Comment explores these topics separately.

#### D. *Legal Considerations: The Public Trust Doctrine*

There has been little scholarly discussion of the implications of the public trust doctrine as applied to art.<sup>163</sup> This Part traces the public trust doctrine from its roots to present day. It concludes with a discussion of the public trust doctrine’s potential application to art.

##### 1. Foundations of the Public Trust Doctrine

The public trust doctrine is a common law doctrine that traces its roots to the Roman Institutes of Justinian, composed in 528 A.D.<sup>164</sup> The Roman Institutes of Justinian employed the doctrine to recognize the public’s right of use to certain common properties.<sup>165</sup> In its earliest form, the doctrine protected commercially viable waterways and public roads because they were *res publicae*, meant for the benefit of all.<sup>166</sup> The public trust doctrine was adopted into early English common law and later into early nineteenth-century American common law.<sup>167</sup>

The most prominent public trust case in American jurisprudence is *Illinois Central Railroad Co. v. Illinois*.<sup>168</sup> In 1869, the Illinois legislature enacted the

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159. See Randy Kennedy, *The Agony of Suspense in Detroit*, N.Y. TIMES, Oct. 3, 2013, at C1 (quoting the president of the American Alliance of Museums, who stated that “no one would ever give works to museums” if a city, such as Detroit, claimed its museum’s artworks as an asset that the city could sell).

160. Tam, *supra* note 21, at 861–62.

161. *Id.* at 861.

162. *Id.* at 861–62 (quoting Lowry, *supra* note 23, at 129).

163. See Derek Fincham, *Deaccession of Art from the Public Trust*, J. ART, ANTIQUITY & L., July 2011, at 1, 22 (2011) (stating that there has not been a large amount of scholarly discussion relating to the idea of extending the public trust doctrine to protect art).

164. Ivan Kaplan, Comment, *Does the Privatization of Publicly Owned Infrastructure Implicate the Public Trust Doctrine? Illinois Central and the Chicago Parking Meter Concession Agreement*, 7 NW. J. L. & SOC. POL’Y 136, 148 (2012); see also Jordan M. Ellis, Comment, *The Sky’s the Limit: Applying the Public Trust Doctrine to the Atmosphere*, 86 TEMP. L. REV. 807, 811–26 (2014) (providing an in-depth examination of the public trust doctrine).

165. Kaplan, *supra* note 164, at 148.

166. *Id.*

167. See Kaplan, *supra* note 164, at 148–54 (providing a detailed account of judicial acceptance of the public trust doctrine throughout history).

168. 146 U.S. 387 (1892); see Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799, 800



Lake Front Act, which awarded the Illinois Central Railroad Company lands in the Chicago Harbor for \$800,000.<sup>169</sup> The Act provided that the Railroad Company could neither impair the public right of navigation nor raise toll rates without state approval.<sup>170</sup>

The citizens of Chicago opposed the Act, asserting the legislature was handing over invaluable public property to a Wall Street corporation.<sup>171</sup> Newspapers reported that the harbor was worth over \$2 million, which was \$1.2 million more than the price for which it was actually sold.<sup>172</sup> Despite the public controversy surrounding the legislation, the version that ultimately passed was veiled in secrecy.<sup>173</sup> Dissatisfaction over the bill peaked when charges of corruption in connection with the legislation's passage were made public.<sup>174</sup> The Act was repealed four years after its passage, and litigation surrounding the repeal eventually made its way to the Supreme Court.<sup>175</sup>

The Supreme Court upheld the repeal of the Lake Front Act, concluding that the state's title to the Chicago Harbor was inalienable.<sup>176</sup> The Court indicated that certain property "in which the whole people are interested" must be maintained and controlled by the state.<sup>177</sup> The Court found that the Chicago Harbor was property in which the public was interested.<sup>178</sup> The Court also determined that the Act undermined the state's ability to manage and control the property in accordance with public necessity, safety, and welfare.<sup>179</sup>

Following an influential law review article written by Joseph Sax, courts have consistently applied the public trust doctrine to natural resource law.<sup>180</sup> The

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(2004) (providing that, "[a]lthough proponents and detractors of the public trust doctrine dispute much, all agree that the leading case establishing the doctrine in the United States . . . is the United States Supreme Court's 1892 decision in *Illinois Central Railroad*"); Ellis, *supra* note 164, at 811, 816 (discussing the Supreme Court's decision in *Illinois Central Railroad*).

169. Kaplan, *supra* note 164, at 142.

170. *Ill. Cent. R.R. Co.*, 146 U.S. at 450–51. These provisions were included in the Lake Front Act in order to protect the public's interest in the waterway. *Id.* at 453–55. The Court also noted that the harbor of Chicago is of significant value to the city of Chicago and state of Illinois. *Id.* at 454.

171. Kearney & Merrill, *supra* note 168, at 861.

172. *Id.* at 873.

173. *See id.* at 863 n.286 (indicating that the final bill was "prepared in great secrecy").

174. *See Ill. Cent. R.R. Co.*, 146 U.S. at 451 (discussing the criticism the legislature faced when it changed the purpose of the Lake Front Act without any signal to the public).

175. *See* Kearney & Merrill, *supra* note 168, at 801 ("For this and other reasons the legal dispute continued, leading to the litigation that eventually worked its way to the Supreme Court in 1892.").

176. *See Ill. Cent. R.R. Co.*, 146 U.S. at 454–56 (indicating that the federal government had complete control over navigation in the harbor, and thus the interests of *all other property rights* in the lakebed were subordinate to those of the federal government).

177. *Id.* at 453, 455.

178. *Id.* at 455–56.

179. *See* Kaplan, *supra* note 164, at 144 ("In *Illinois Central Railroad*, the Supreme Court refused to recognize the legitimacy of the Lake Front Act. First, the Court found that the state's title to the Chicago Harbor was not absolute; rather, the state held such special lands in public trust.").

180. *Id.* at 137–38. In Sax's article, which was published in 1970, he argued that the public trust doctrine has the "breadth and substantive content" that would make it a powerful tool for dealing with

doctrine currently encompasses “commercially insignificant, nonnavigable waterways, and environmental, scenic, and recreational interests” once held open to the public.<sup>181</sup>

## 2. The Public Trust Doctrine’s Application to Artwork

Many critics argue that the public trust doctrine should be extended to art.<sup>182</sup> These critics indicate that once a work of art enters a museum collection, the museum holds that work in the public trust for future generations.<sup>183</sup>

In 1993, the Utah Supreme Court took a significant step toward recognizing a public interest in property based on its noneconomic (i.e., cultural) value.<sup>184</sup> In *National Parks and Conservation Ass’n v. Board of State Lands*,<sup>185</sup> the court held that a cultural association had standing to oppose the sale of land containing archaeological sites.<sup>186</sup> In finding the association had standing, the court cited the public trust doctrine.<sup>187</sup> The court indicated that because the public has an interest in preserving the land’s cultural value, a public interest group could challenge an attempt to cede control of it.<sup>188</sup> In dicta, the court stated that the failure to preserve and protect land with unique value to humanity would be unconscionable.<sup>189</sup> To that end, the court indicated that it might be necessary for

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natural resource problems. *Id.*; see Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970).

181. See Kaplan, *supra* note 164, at 138 (“Whereas *Illinois Central* sought to protect a navigable, commercially vital, municipal harbor from corporate monopolization, courts have since expanded the doctrine to encompass commercially insignificant, nonnavigable waterways, and environmental, scenic, and recreational interests.”).

182. See Fincham, *supra* note 163, at 22 (stating that one of the typical arguments made against museums selling works of art is that such works are held by museums in the public trust); Tam, *supra* note 21, at 863 (stating that deaccessioning is controversial because artwork that is part of a museum’s collection is protected).

183. See Fincham, *supra* note 163, at 27 (“It is often said that once a work of art enters a museum collection, that museum holds those works in the public trust for future generations in much the same way that the public may enjoy navigation on public waterways.”); Patty Gerstenblith, *The Fiduciary Duties of Museum Trustees*, 8 COLUM.-VLA J.L. & ARTS 175, 192–93 (1983) (arguing that objects which have entered museum collections cannot later be returned to private ownership).

184. See Fincham, *supra* note 163, at 25 (indicating that “[t]he value of an archaeological resource, similar in nature to a work of art, conferred standing in a case before the Utah Supreme Court”).

185. 869 P.2d 909 (Utah 1993).

186. See *National Parks*, 869 P.2d at 913–14 (“[A] plaintiff may maintain a suit against governmental action in those limited circumstances in which a case raises issues that are so ‘unique and of such great importance that they ought to be decided in furtherance of the public interest.’”) (quoting *Terracor v. Utah Bd. of State Lands & Forestry*, 716 P.2d 796, 799 (Utah 1986)).

187. See *id.* at 914 (finding that the conservation group had standing because it “raise[d] issues of significant public importance”).

188. See *id.* at 913–14 (holding that the conservation group had standing because the issue was important to “public schools and others who [were] interested in preserving the unique scenic, recreational, archaeological, and paleontological values that exist in some of the state school lands”).

189. See *id.* at 921 (indicating that the state “should recognize that some . . . lands have unique scenic, paleontological, and archeological values that would have little economic value on the open

the state to purchase land with archaeological value to ensure it is preserved and protected.<sup>190</sup>

In a subsequent decision, the Utah Supreme Court imposed significant limitations on the *National Parks* holding. In *Utah Chapter of the Sierra Club v. Utah Air Quality Board*,<sup>191</sup> the court stressed that the inference to be drawn from *National Parks* is that if a plaintiff's claim is based on a public interest, it will only have standing if there is no other "potential plaintiff[] with a more direct interest in [a] particular question."<sup>192</sup> The court indicated that the "public importance" test is only a secondary, alternative test for standing.<sup>193</sup> The court's holding shows that despite the progress it made in recognizing the public's noneconomic interest in property, it was comfortable acknowledging that interest only in the absence of a more direct claim.<sup>194</sup>

In the only known case in which a party sought to apply the public trust doctrine directly to art, the request was denied.<sup>195</sup> In *Hardman v. Feinstein*,<sup>196</sup> a California court refused to grant taxpayers' request to invoke the public trust doctrine to sue the trustees of the Fine Arts Museums of San Francisco for mismanagement of assets.<sup>197</sup> The taxpayers argued that the public trust doctrine gave them standing to bring a claim because the trustees' behavior harmed the "public trust."<sup>198</sup> The court disagreed, indicating that the public trust doctrine pertains to "abstract trusts, such as tidelands and waterways," rather than structural trusts like museums.<sup>199</sup>

These cases reveal that there has been progress toward judicial recognition of a public interest in an asset's cultural value. That being said, the cases also show that a court would be reluctant to apply the public trust doctrine to a purely cultural asset without imposing limits.

#### *E. Deaccessioning: Ethical Considerations of the Public Trust*

The dilemma faced by city leaders who sought to sell or monetize the DIA collection was not unlike the problem faced by a private museum trying to deaccession without violating the public trust. When a museum removes an object from its collection with the intent to sell it, the action is referred to as

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market," and that "[i]n some cases, it would be unconscionable not to preserve and protect those values").

190. *Id.*

191. 148 P.3d 960 (Utah 2006).

192. *Utah Chapter of Sierra Club*, 148 P.3d at 973 (quoting *Jenkins v. Swan*, 675 P.2d 1145, 1151 (Utah 1983)).

193. *Id.* at 973–74.

194. *Id.*

195. Tam, *supra* note 21, at 861 n.78.

196. 195 Cal. App. 3d 157 (1987).

197. *Hardman*, 195 Cal. App. 3d at 160.

198. *Id.* at 161 n.3.

199. *Id.*

“deaccessioning.”<sup>200</sup> Typically, the art community permits deaccessioning provided that proceeds from sales are used to fund future acquisitions that will upgrade a museum’s collection.<sup>201</sup> The controversy arises when museums deaccession in order to meet financial obligations.<sup>202</sup>

Museums are generally nonprofit organizations subject to state common law, trust and corporate law, and the tax code.<sup>203</sup> According to museum professionals, the public has an interest in the protection and preservation of culturally significant works of art.<sup>204</sup> The public entrusts museum leaders with the responsibility to collect, preserve, and display these culturally significant works.<sup>205</sup> When museum leaders employ the term “public trust,” they are referring to the “trust and confidence that the public has given to . . . museum[s]” to provide these services.<sup>206</sup> They argue that museums owe fiduciary duties to the public to protect and preserve culturally significant works of art for posterity.<sup>207</sup> Any breach of these fiduciary duties amounts to an ethical violation of the public’s trust.<sup>208</sup>

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200. See Jennifer L. White, *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 that deaccessioning consists of “the removal of an object from a museum collection with the intent to sell it”); David R. Gabor, Comment, *Deaccessioning Fine Art Works: A Proposal for Heightened Scrutiny*, 36 UCLA L. REV. 1005, 1005 (1989) (defining deaccessioning as “the removal of objects from an existing art collection by sale or transfer”).

201. Gresham Riley, *To Sell Art or Not to Sell: A Modest Solution for Struggling Museums*, BROAD ST. REV. (Feb. 1, 2011), [http://www.broadstreetreview.com/art-architecture/when\\_museums\\_sell\\_art\\_a\\_better\\_way](http://www.broadstreetreview.com/art-architecture/when_museums_sell_art_a_better_way).

202. Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligation of Museums to the Public*, 11 CARDOZO J. INT’L & COMP. L. 409, 422–23 (2003).

203. *Id.* at 416. Private museums are typically organized as either charitable trusts or nonprofit corporations because the museum’s educational purpose entitles the organization to tax exemptions. Tam, *supra* note 21, at 855–56.

204. Tam, *supra* note 21, at 861–62.

205. *Id.*; see also Victoria D. Alexander, *Pictures at an Exhibition: Conflicting Pressures in Museums and the Display of Art*, 101 AM. J. SOC. 797, 798–99 (1996) (indicating that in fulfilling the role they serve to the community, museum curators “are actors, not just reactors, and they strive to maintain their autonomy [and] their normative visions”).

206. Tam, *supra* note 21, at 862.

207. See Gerstenblith, *supra* note 202, at 414 (detailing the evolving role of museums since the post-World War II era, from buildings that salvage and store historical works of art to public institutions that present and preserve art). Trustees of museums have duties of loyalty and care that are implicated in the sale of artwork. *Id.* at 416–17. These duties require that a trustee remains true to his or her organization’s purpose and works to preserve its physical assets. *Id.* Critics insist that these duties should be imposed upon museum managers because it has always been the sole intention of museums “to collect and exhibit art for the benefit of the public.” Tam, *supra* note 21, at 853; see also *id.* at 863 (stating that deaccessioning is controversial because artwork that is part of a museum’s collection is protected).

208. See Gerstenblith, *supra* note 202, at 424 (“In addition to direct legal constraints, professional codes of ethics also play a role in evaluating the conduct of museum fiduciaries and professional staff in evaluating deaccessioning decisions.”).

Museum leaders contend that the sale of artwork for the sole purpose of institutional gain amounts to a breach of the public trust.<sup>209</sup> As a result, art museum guidelines strictly limit the use of deaccessioning proceeds to acquiring new works for museum collections.<sup>210</sup> Though museums tend to adhere to these guidelines, there have been occasions on which litigation has ensued.<sup>211</sup>

To date, no court has ever held a museum liable for violating ethical guidelines by selling artwork to satisfy debt obligations.<sup>212</sup> Rather, courts have granted fiduciaries the authority to manage assets as they see fit, provided their actions are consistent with the museum's founding purpose.<sup>213</sup> Courts have even allowed fiduciaries to sell art that had been donated with the intention that it would remain on display in a particular museum.<sup>214</sup>

In one of the most notable deaccessioning cases, *In re Fisk University*,<sup>215</sup> the Tennessee Court of Appeals allowed a financially distressed museum to sell a partial interest in its collection to repay its debt obligations.<sup>216</sup> The case involved the museum at Fisk University, which was attempting to sell one-half of its interest in an art collection donated by Georgia O'Keeffe.<sup>217</sup> O'Keeffe had conditioned her donation on the restriction that the art would remain in the school's gallery.<sup>218</sup> At the time of the attempted sale, Fisk was in a desperate financial situation and could no longer afford to care for the collection.<sup>219</sup> The potential buyer was an art museum in Arkansas.<sup>220</sup> The agreement called for the institutions to "share the expenses of maintaining the collection and alternatively exhibit" the art.<sup>221</sup> Because the agreement violated the strict condition of

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209. *Id.* at 423–24. Though selling the art is controversial, it is crucial to note that art museums often store property without displaying it all the time and do not run into an issue. Fincham, *supra* note 163, at 4. In fact, the majority of the collections of some museums are not put on display for the public. *See id.* (pointing out that a BBC freedom of information request found that both the British Museum and the National History Museum stored over ninety-five percent of their collections).

210. Gerstenblith, *supra* note 202, at 424; Tam, *supra* note 21, at 864.

211. *See* White, *supra* note 200, at 1045 (addressing the outcomes of litigation challenging the guidelines of museum deaccessioning).

212. *See id.* ("Unfortunately for museum directors and attorneys general, courts have not decided when deaccessioning for the purpose of raising operating revenue is subject to legal challenge.")

213. *See* Tam, *supra* note 21, at 866–68 (examining various court decisions that illustrate the lack of judicial clarity regarding challenges to museum deaccessions).

214. *See, e.g., In re Wilstach's Estate*, 1 Pa. D. & C.2d 197, 206–07 (1954) (finding that the trustees of a museum had the right to do whatever they found to be in the interests of the museum with regard to a donated piece of art).

215. 392 S.W.3d 582 (Tenn. Ct. App. 2011).

216. Tam, *supra* note 21, at 866–67; *see In re Fisk Univ.*, 392 S.W.3d at 593, 597.

217. *In re Fisk Univ.*, 392 S.W.3d at 597.

218. *Id.* at 587–88.

219. *Georgia O'Keeffe Found. v. Fisk Univ.*, 312 S.W.3d 1, 4 (Tenn. Ct. App. 2009). Because the fact pattern provided in the *In Re Fisk University* opinion is somewhat difficult to follow, this Comment cites to the appellate court's earlier opinion in *Georgia O'Keeffe Foundation v. Fisk University*, which more clearly outlines the facts of the case.

220. *Id.*

221. Tam, *supra* note 21, at 867; *see In re Fisk Univ.*, 392 S.W.3d at 584.

O’Keeffe’s donation, Fisk feared it would be invalidated.<sup>222</sup> To ensure the agreement would be upheld in the event of a challenge, Fisk petitioned the court for approval of the sale.<sup>223</sup>

The court held that the sale was valid.<sup>224</sup> It indicated that the school could not care for the collection in light of its financial situation.<sup>225</sup> The court reasoned that O’Keeffe’s primary intention was that the collection be properly cared for, and asserted that selling a partial interest to a museum willing to care for the collection was consistent with O’Keeffe’s intentions.<sup>226</sup> In addition, the court allowed Fisk to use the proceeds from the sale to repay its debt obligations.<sup>227</sup>

Other courts have also granted broad discretion to museum trustees in making decisions regarding the sale of art.<sup>228</sup> In *Dennis v. Buffalo Fine Arts Academy*,<sup>229</sup> the court approved the authority of a museum’s board of directors to make decisions regarding the museum’s direction.<sup>230</sup> On November 6, 2006, the Board of Directors of the Buffalo Fine Arts Academy voted unanimously to sell art in order to promote the academy’s focus on “maintaining a world-renowned modern and contemporary art museum.”<sup>231</sup> After ex officio directors brought a claim protesting the board’s decision, the court granted the board the authority to sell the art and use the proceeds to refocus the gallery.<sup>232</sup>

As evidenced by *In re Fisk*, courts are likely to allow the terms of a donation to bend in light of circumstances that may arise.<sup>233</sup> In *In re Wilstach’s Estate*,<sup>234</sup> a Pennsylvania Orphans’ Court indicated that the Philadelphia Museum of Art has a right as trustee to sell objects from its collection even if they were donated.<sup>235</sup> Similarly, a California court indicated that the Pasadena Art Museum has broad discretion in managing its own affairs.<sup>236</sup> The existing

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222. *Georgia O’Keeffe Found.*, 312 S.W.3d at 5.

223. *Id.* The stated purpose of the sale was “to generate funds for the University’s ‘business plan’ to restore its endowment, improve its mathematics, biology, and business administration departments, and build a new science building.” *Id.*

224. *In re Fisk Univ.*, 392 S.W.3d at 597.

225. *Id.* at 588.

226. *Id.* at 593.

227. *Id.* at 597.

228. See Tam, *supra* note 21, at 867–88 (indicating that courts “have also applied the business judgment rule, or another similar standard, in cases challenging a museum’s decision to sell items from its collection”).

229. No. 2007–2220, 2007 WL 840996 (N.Y. Sup. Ct. Mar. 21, 2007).

230. *Dennis*, 2007 WL 840996, at \*3.

231. *Id.* at \*1.

232. *Id.* at \*3–4.

233. See *supra* notes 215–27 and accompanying text for a brief analysis of *In re Fisk*.

234. 1 Pa. D. & C.2d 197 (1954).

235. Tam, *supra* note 21, at 868; see *In re Wilstach’s Estate*, 1 Pa. D. & C.2d at 206 (“In the absence of any restrictive provision in the instrument creating the gift, the trustees would appear to have the absolute right to sell or otherwise dispose of these paintings or other art objects, if they believe that such sale or disposition would be serve the interests of the collection as a whole.”).

236. Tam, *supra* note 21, at 868; see John Henry Merryman, Stephen K. Urice & Albert E. Elsen, *LAW, ETHICS, AND THE VISUAL ARTS* 1282–86 (5th ed. 2007) (reprinting the unpublished

case law suggests that given Detroit's dire financial situation, a court would have most likely allowed city leaders to sell pieces from the DIA's collection in order to satisfy the city's debt obligations.

In order to emerge from bankruptcy in a position of strength, Detroit needed a viable restructuring plan. As a municipal debtor, the city had a great deal of discretion in crafting its restructuring plan.<sup>237</sup> At the time of the bankruptcy filing, the city's most valuable asset was its publicly owned art collection.<sup>238</sup> Despite arguments that the art was protected by the public trust, not a single court has extended the public trust doctrine to art, nor has a single court ever found a museum liable for a public trust violation as a result of deaccessioning.<sup>239</sup> Though the DIA collection could be worth an estimated \$4.6 billion, Detroit opted to exclude the art from its debt restructuring plan; instead it transferred ownership rights in exchange for a mere \$816 million.<sup>240</sup> Despite the bankruptcy court's approval, a court-appointed expert expressed concerns about the risks associated with certain aspects of the restructuring plan.<sup>241</sup> Further, economists fear that the funds set aside for investment in public infrastructure may run out long before the date anticipated by the city, putting its future financial stability in jeopardy.<sup>242</sup>

### III. DISCUSSION

Though filing for bankruptcy provided Detroit with a variety of options for reducing its liabilities, the DIA collection was its only asset with significant value.<sup>243</sup> By failing to sell or monetize the DIA collection as part of its debt adjustment plan, the city opted to forego a capital infusion that would have provided larger pension payments to retirees and more funds to invest in essential services. Moreover, by taking on substantial investment risk in order to spare the DIA collection, the distressed city has called its future financial stability into question.<sup>244</sup> In order to ensure a viable, successful future for the

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opinion from *Rowan v. Pasadena Art Museum*, No. C 322817 (Cal. Super. Ct. Sept. 22, 1981)). The broad discretion granted to a museum's trustees encompasses decisions regarding what art to sell, as long as the trustees act in good faith and exercise reasonable care. *Id.* at 1285.

237. See *supra* notes 72–75 and accompanying text for a discussion of a municipal debtor's autonomy in bankruptcy.

238. See *supra* notes 103–06 and accompanying text for a delineation of Detroit's assets at the time of the bankruptcy filing.

239. See *supra* notes 215–36 and accompanying text for an analysis of *In re Fisk, Dennis, In re Wilstach's Estate*, and *Rowan*.

240. See *supra* notes 124–49 and accompanying text for an overview of the “grand bargain.”

241. See *supra* notes 143–46 and accompanying text for statements made by economists regarding the pension investment plan adopted by Detroit through its debt adjustment plan.

242. See *supra* notes 147–49 and accompanying text for an analysis of the concerns surrounding the sufficiency of funds allocated to public infrastructure and services under the debt adjustment plan.

243. See *supra* notes 103–06 and accompanying text for an overview of Detroit's assets at the time of the bankruptcy filing.

244. See *supra* notes 141–46 and accompanying text for a review of the pension plan agreed upon by city leaders and pensioners, which relies on an unrealistic expected average annual return.

city, Detroit's leaders should have monetized or sold the art collection as part of its debt adjustment plan.

Though the disposition of assets in bankruptcy is a state law issue, the bankruptcy court would have had to resolve any disputes regarding the sale or monetization of the DIA with little guidance from the Michigan Supreme Court.<sup>245</sup> If Detroit had decided to monetize the DIA collection, the bankruptcy court would have most likely rejected public trust arguments raised by critics. The consequences of applying the public trust doctrine to art are simply too problematic: judicial administration of the doctrine would be nearly impossible, and it would severely constrain museum curators' freedom to select the art they display. Further, there are significant distinctions between property that has traditionally been protected by the public trust doctrine and art.<sup>246</sup> As a result of its unique characteristics, art does not need the type of protection contemplated by the public trust doctrine.<sup>247</sup>

Moreover, if Detroit had decided to monetize the collection, the court would have most likely found that the DIA is not subject to the same ethical limitations imposed on private museums with regard to deaccessioning.<sup>248</sup> To support its conclusion, the court would have pointed to the agreement city leaders made with the museum in 1919. That agreement, which put the government in control of museum operations, effectively freed the DIA from the public trust constraints imposed by ethical guidelines.

City leaders could have easily taken steps to minimize public trust controversy if they had chosen to monetize the art collection. Such action would have streamlined the bankruptcy process and facilitated larger payoffs for creditors.<sup>249</sup> City leaders could have considered prominent public trust and deaccessioning cases in crafting a process for achieving such an outcome, using the lessons learned to ensure that Detroit avoids similar issues.<sup>250</sup>

Undoubtedly, Detroit's best option would have been to sell or monetize the art. Though undesirable in the realm of public opinion, a sale would have allowed for larger payouts to pensioners and would have provided increased funding for public infrastructure and services.<sup>251</sup> Moreover, monetization of the

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245. See *supra* notes 82–87 and accompanying text for an overview of the process by which bankruptcy courts may certify questions to state courts.

246. See *supra* Part II.D.1 for a discussion of the types of property that have been protected under the public trust doctrine.

247. See *supra* Part II.D.2 for a discussion of attempts to apply the public trust doctrine to noneconomic interests in property, including art.

248. See *supra* notes 209–11 and accompanying text for a brief discussion of the ethical limitations imposed on art museums with regard to deaccessioning.

249. If the art had been sold, more funds would have been available for contribution to the pension plans, thereby satisfying creditors. Such action would have made it more likely that creditors would have agreed to a debt adjustment plan sooner.

250. See *supra* notes 168–232 and accompanying text for a discussion of the prominent public trust doctrine and deaccessioning cases.

251. See *supra* Part II.C.2 for an outline of Detroit's debt adjustment plan, which includes pension cuts and limited funding for public infrastructure and essential services.



collection would have ensured a steady stream of revenue for the city as it emerged from bankruptcy, increasing the likelihood of financial success in the future.<sup>252</sup>

This Section argues that Detroit could have and should have monetized the DIA collection as part of its restructuring plan. Part III.A contends that the ultimate decision regarding disposition of the art collection would have been up to the bankruptcy court. Part III.B asserts that the bankruptcy court would have rejected any public trust–related objections to the monetization of the art. Part III.C contends that the bankruptcy court would have found that city leaders are free to operate outside of the ethical guidelines imposed within the art community. Part III.D presents a number of approaches to monetizing the art that would have reduced the risk of public trust objections altogether. Part III.E argues that sale or monetization of the art would have been preferable to the approach taken by the city.

A. *The Bankruptcy Court Would Have Ultimately Made the “Disposition Decision”*

Though the disposition of assets is a state law issue, the United States Bankruptcy Court for the Eastern District of Michigan would have been tasked with deciding whether the city is free to dispose of its assets in bankruptcy.<sup>253</sup> Bankruptcy court judges have the right to certify state law questions to the Michigan Supreme Court, but the court may refuse to answer certified questions.<sup>254</sup> Moreover, the Michigan Supreme Court has a long history of refusing to consider the certified questions it receives.<sup>255</sup> In the likely event that the Michigan Supreme Court would have refused to answer a certified question regarding the boundaries of the public trust doctrine, the bankruptcy court would have had to determine how the doctrine applies to property within the state. Thus, while it should be up to the state to decide whether its assets are protected, the federal bankruptcy court likely would have been tasked with making the ultimate decision regarding the disposition of the DIA collection.

B. *The Bankruptcy Court Would Not Have Extended the Public Trust Doctrine to Art*

Had Detroit proposed a plan that called for the sale or monetization of the DIA collection, the bankruptcy court would have refused to extend the public trust doctrine to protect the art. Judicial administration of the doctrine would be

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252. See *supra* notes 150–54 and accompanying text for an overview of the alternatives to the “grand bargain” considered by city leaders, which included leasing the art.

253. See *supra* notes 82–87 and accompanying text for a brief discussion regarding the certification of state law questions by bankruptcy courts.

254. See *Winship*, *supra* note 82, at 495–98 (stating that thirty-nine states, including Michigan, have statutes containing language that could support certification of questions directly from bankruptcy courts).

255. *Id.* at 498. Closer examination reveals that the Michigan Supreme Court’s reluctance stems from confusion regarding its constitutional authority to respond to certified questions. *Id.*

impossible, and extension of the doctrine to cover art would unfairly restrict the independence of museum curators. Further, art is a unique asset that does not require the same type of protection that has been afforded other types of property under the public trust doctrine.<sup>256</sup>

If the public trust doctrine were extended to art, there would be no way to distinguish between works that are worthy of protection and those that are not. The premise of the public trust doctrine is that property “in which the whole people are interested” must be maintained and controlled by the state.<sup>257</sup> Critics of the proposed DIA sale contended that the city owes the public a duty to protect and preserve culturally significant works of art for posterity.<sup>258</sup> If the court were to adopt the Utah Supreme Court’s reasoning in *National Parks* and find that critics have standing to block the sale of the DIA’s collection based on its value to future generations, it would create precedent that, construed liberally, could empower public interest groups to interfere with the sale of culturally significant art on behalf of the state.<sup>259</sup> This would be problematic because some of the greatest masterworks of the Impressionist, Modern, and Contemporary movements are owned by private collectors.<sup>260</sup> If Detroit’s art collection must be held in trust for the public, why can private collectors trade these masterworks freely? Arguably, these privately owned pieces will be just as valuable to future generations as works from the same artistic movements that hang in museums.

If the court opted to apply the public trust doctrine to culturally significant works of art, it would be required to develop an objective mechanism for determining which works are worthy of protection. Otherwise, it would run the risk of exposing private art collectors to property seizure.<sup>261</sup> Developing an

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256. See *supra* notes 177–79 and accompanying text for an analysis of the public trust doctrine, as articulated by the Supreme Court in *Illinois Central Railroad*. See also Kearney & Merrill, *supra* note 168, at 805 (indicating that the Supreme Court invoked the public trust doctrine to ensure that powerful private parties did not have the opportunity to “extract wealth from the diffuse and unrepresented public”).

257. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453, 456 (1892). See *supra* notes 171–79 and accompanying text for a discussion of the Supreme Court’s decision in *Illinois Central Railroad*.

258. See *supra* notes 182–83 and 206–11 and accompanying text for an overview of the arguments raised by the proponents of applying the public trust doctrine to art in order to preserve and protect it for future generations.

259. See Nat’l Parks & Conservation Ass’n v. Bd. of State Lands, 869 P.2d 909, 921 (Utah 1993) (asserting the state should recognize that some “lands have unique, scenic, paleontological, and archeological values [and] . . . [i]n some cases, it would be unconscionable not to preserve and protect those values”).

260. G. Fernandez, *Most Valuable Paintings in Private Hands*, THEARTWOLF.COM, <http://www.theartwolf.com/articles/most-valuable-private-art.htm> (last updated May 2015). According to the ArtWolf.com, an online art magazine, some of the greatest masterworks are owned by private collectors. *Id.* The magazine calls the practice of collecting private art “one of the most expensive and exclusive ‘hobbies,’ reserved only to billionaires.” *Id.*

261. See Arthur J. Harrington, *The “Invisible Lien”: Public Trust Doctrine Impact on Real Estate Development in Wisconsin*, WIS. LAW., May 1996, at 10, 14 (indicating that courts have “authorized a ‘takings’ claim where the state has improperly asserted paramount interests under the Public Trust Doctrine”).

objective standard for measuring the cultural significance of a work of art on an ad hoc basis would be nearly impossible given the fact that our society constitutes a diverse body of individuals with differing levels of education, background, and expectations.<sup>262</sup> Any objective mechanism would have to quantify and account for society's constantly evolving tastes and interests.<sup>263</sup> Any test that a court adopts for determining which works qualify for protection would likely be difficult to administer. Further, courts in different jurisdictions would be unlikely to agree on one particular method for determining whether a piece of art deserves protection, creating a great deal of confusion and uncertainty among private art collectors and museums.

Moreover, extending the public trust doctrine to art would put unreasonable constraints on museums and museum curators. Museum curators, who typically have extensive educational backgrounds in art, pick and choose the art that is put on display for the public.<sup>264</sup> Museums rely on curators to select new and interesting exhibits that capture the public's interest and secure revenue for operations.<sup>265</sup> According to studies, only a small percentage of an entire museum collection is on display at any given time.<sup>266</sup> If the public trust doctrine were extended to art, museum curators would be required to display all art that is deemed culturally significant.<sup>267</sup> Undoubtedly, this would constrain their ability to pick and choose the art that is put on display. It would also mean that curators would have less space and less funding to dedicate to new exhibits, which might result in a decrease in annual revenue.<sup>268</sup> Further, extension of the doctrine would likely require that museums receive state approval before making any art-related decisions.<sup>269</sup>

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262. Fincham, *supra* note 163, at 20.

263. *Id.*

264. See *supra* notes 203–08 and accompanying text for a description of the responsibilities museum curators maintain with regard to collecting, preserving, and displaying artwork.

265. See Alexander, *supra* note 205, at 798–99 (providing that “[a]rt museums face an uncertain budget every year and must work constantly to raise funds”).

266. See *supra* note 209, which notes that museums often keep a majority of their collections in storage areas that are inaccessible to the general public.

267. Application of the public trust doctrine to navigable waterways requires that the public have access to the protected property. See Ellis, *supra* note 164, at 809–11 (indicating that the public trust doctrine encompasses “access to and use of” protected water). Because the public trust doctrine protects the public's right of access to protected property, it would be reasonable to assume that the doctrine's extension to art would encompass the public's right to access, or view, the protected works of art. Further, when a museum receives a donated piece of art with the intention that it will remain on permanent display for the public, removing that object from display amounts to a breach of loyalty. Gerstenblith, *supra* note 183, at 186. As such, if a court finds that a work of art is protected by the public trust doctrine, which is meant to ensure that it will be available for public viewing, it follows that any effort to interfere with the court's intentions to protect the art could be deemed an actionable breach of loyalty.

268. Jim Zarroli, *Museums Exhibit Signs of Economic Distress*, NAT'L PUB. RADIO (Jan. 5, 2009, 3:08 PM), <http://www.npr.org/templates/story/story.php?storyId=99017732>.

269. See *supra* notes 177–79 and accompanying text for the Supreme Court's conclusion that property protected by the public trust must be maintained or controlled by the state to ensure that such property is available to the public.

In addition, art is quite different from the types of property that have been afforded protection under the public trust doctrine.<sup>270</sup> The public trust doctrine was originally developed to protect commercially valuable natural resources.<sup>271</sup> When the Supreme Court first recognized the public trust doctrine in *Illinois Central Railroad*, it indicated that the doctrine was intended to proscribe “what today would be called rent-seeking behavior: a small, well-organized private interest procur[ing] legislation that gave it monopoly privileges in order to extract wealth from the diffuse and unrepresented public.”<sup>272</sup> According to the Court, the individual that controls the economic channels effectively controls the economic destiny of every individual in the region.<sup>273</sup> Unlike natural waterways, artwork is created by individuals with enforceable private rights.<sup>274</sup> Holding art to be a part of the “public trust” would interfere with the fundamental private rights of artists—including the right to withhold a creation from the public.<sup>275</sup>

Moreover, artwork is unique because its economic value is inextricably linked to its cultural value. Any individual who purchases art would be unlikely to damage it because doing so would drastically decrease the value of his or her investment.<sup>276</sup> To that end, the Utah Supreme Court’s decision in *National Parks* is inapplicable to the sale of artwork.<sup>277</sup> Unlike an archaeological site, artwork does not need to be protected from destructive commercial use.<sup>278</sup> In *National Parks*, the court indicated that it could interfere with a government transaction if that transaction would endanger culturally valuable property, which must be protected for its value to future generations.<sup>279</sup> The circumstances surrounding

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270. See *supra* notes 180–81 and accompanying text for the assertion that the public trust doctrine currently encompasses waterways and environmental, scenic, and recreational interests once held open to the public.

271. See *supra* notes 164–67 and accompanying text for an overview of the origins of the public trust doctrine.

272. Kearney & Merrill, *supra* note 168, at 805.

273. See Kaplan *supra* note 164, at 108 (indicating that the Court interpreted the control of economic channels as determinative of the economic fate of all individuals in the region).

274. See Peter E. Berlowe, Laura J. Berlowe-Heinisch & Peter A. Koziol, *In This Digital Age, Are We Protecting Tomorrow’s “Masterpieces”?* *Protection of the Moral Rights of the Digital Graphic Artist*, FLA. B.J., Oct. 2007, at 30, 31 (providing that an artist maintains the right to create a work, to display a work to the public in the form of his or her choosing, and to demand respect as the creator of that work).

275. See *id.* (indicating that among the rights of an artist is to withhold his or her work from the public).

276. See Debra B. Homer, *Fine Art Appraisers: The Art, the Craft, and the Legal Design*, 8 COLUM.-VLA J.L. & ARTS 457, 458–59 (1983) (detailing the various reasons an individual might purchase art, none of which include its destruction).

277. *Nat’l Parks & Conservation Ass’n v. Bd. of State Lands*, 869 P.2d 909, 916 (Utah 1993).

278. See Homer, *supra* note 276, at 458–59.

279. See *supra* notes 184–90 and accompanying text for an overview of Utah Supreme Court’s recognition of the importance of protecting property of cultural value in *National Parks*.

the sale of artwork are different because artwork does not have commercial value aside from its cultural value.<sup>280</sup>

While an individual might purchase land with archaeological sites because it is a desirable place to build a mall, one would only buy a piece of art to admire it or to exploit its cultural value.<sup>281</sup> Anyone who might obtain the DIA collection is unlikely to do anything to endanger it, because such an investment loses its value if the art is damaged. Thus, the protection afforded by the court in *National Parks* is unnecessary for works of art.

In short, had the DIA proposed a plan to monetize the DIA collection, the bankruptcy court would most likely have refused to employ the public trust doctrine to protect the art. Given the difficulty associated with developing an objective mechanism for determining which works of art would be worthy of protection, judicial administration of the doctrine would be impossible. Moreover, extending the public trust doctrine to art would put unreasonable constraints on museum curators. Finally, art does not require the same type of protection that has been afforded to other types of property under the doctrine.

*C. Detroit's Leaders Are Not Required to Comply with the Ethical Limitations Imposed on Traditional Museums*

Had the city chosen to monetize the art collection, the bankruptcy court would have found that city leaders are not required to comply with the ethical standards imposed upon traditional art museums.<sup>282</sup> Restrictions on the sale of art are guided mainly by professional codes of ethics rather than strict legal rules.<sup>283</sup> These ethical rules are authoritative only because they act as norms within the art community.<sup>284</sup> While these rules heavily influence the practices of traditional art museums, they probably do not carry much weight at the DIA, because city leaders rather than a wholly independent board of directors control the institution.<sup>285</sup>

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280. See Homer, *supra* note 276, at 458 (discussing the art appraisal process, including the bases upon which art is valued); see also White, *supra* note 200, at 1043 (indicating that the cultural value of a work of art often “translates into high dollar value”).

281. *Id.*

282. The term “traditional art museums,” when used in this Comment, refers to art museums organized as either nonprofit corporations or charitable trusts that have independent board of directors exclusively concerned with their interests. White, *supra* note 200, at 1048 (indicating that “[m]useums traditionally have been formed as either nonprofit corporations or charitable trusts”). That stands in contrast with the DIA, which is heavily influenced by Detroit.

283. See *supra* notes 204–11 and accompanying text for a discussion of the ethical implications surrounding the deaccession of artwork by private museums.

284. Fincham, *supra* note 163, at 6. See *supra* notes 212–14 and accompanying text highlighting that no court has ever held a museum liable for violating ethical guidelines by selling artwork to satisfy debt obligations.

285. See *supra* notes 114–19 and accompanying text for an overview of Detroit’s deal with the DIA, which gave the city ownership rights and exclusive control over the DIA collection.

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In 1919, the DIA traded its independence for funding when it made the deal that transferred ownership of its collection to the city of Detroit.<sup>286</sup> The museum's trustees knew they were putting the DIA in direct competition for funding with parks, police, and other public services when they approved the deal. Essentially, the museum's leaders consented to a plan whereby the institution would be treated in the same manner as any other public entity. Rather than a private museum owing duties primarily to the public, the DIA became a department of the city. The museum's operations were now at the discretion of the mayor, who would govern the museum through an art commission.

When museum leaders handed the keys of the DIA's front door to the city, they placed the museum's fate in the city's hands. If the city of Detroit needed to monetize the museum's assets in order to recover financially, the court would have recognized that the museum leaders' fiduciary duties were vacated years ago, and as such, monetization is the consequence. The DIA collection should have been treated in the same manner as any other asset in bankruptcy: it should have been sold or monetized in a manner deemed most beneficial for the city.

*D. Guidelines for a Sale that Does Not Violate the Public Trust*

If Detroit had decided to monetize the DIA collection, it could have taken steps to minimize public trust controversy and ensure the plan's approval. Such action would have likely appeased critics of the monetization, thereby streamlining bankruptcy proceedings and facilitating larger payoffs for creditors and pensioners. In preparing a plan to avoid public trust objections, the city could have considered prominent public trust and deaccessioning cases, using the lessons learned to ensure that it avoids similar mistakes.

1. Avoiding Roadblocks Imposed by Legal Doctrine

City leaders could have taken action to avoid the missteps made by the Illinois legislature in *Illinois Central Railroad*.<sup>287</sup> Specifically, city leaders could have sought out monetization plans that kept the art at least partially under municipal control and on display for the public in Detroit. Further, they could have been transparent with regard to their monetization plans and clearly communicated their intent to preserve and protect the art for the public.<sup>288</sup>

First and foremost, city leaders also could have avoided public trust controversy by requiring that the art remain, at least to some extent, under the city's control.<sup>289</sup> The Supreme Court took issue with the Lake Front Act because

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286. See *supra* notes 115–23 for a discussion of how the deal between the DIA and the city of Detroit effectively turned the DIA into a city department.

287. See *supra* notes 168–79 and accompanying text for a brief overview of the passage of the Lake Front Act, its subsequent repeal, and the Supreme Court's opinion in *Illinois Central Railroad*.

288. See *supra* notes 150–54 and accompanying text for a discussion of the monetization approaches considered by Detroit's leaders.

289. Public outrage over the Lake Front Act can be partially attributed to the fact that the deal was shrouded in secrecy. Kearney & Merrill, *supra* note 168, at 863 n.286. Additionally, the Act

the deal undermined the state's ability to manage and control the property in accordance with public welfare.<sup>290</sup> City leaders could have taken the opposite approach, conveying to interested parties that it insists on maintaining a certain level of control over the collection.

Moreover, city leaders could have avoided public trust controversy by negotiating a lease that would have kept a substantial portion of the DIA collection in Detroit. It could have included a clause in the lease agreement that would require the museum to keep its current admission price, which is eight dollars.<sup>291</sup> Further, the city could have leased some of its art for travelling exhibitions so that a greater portion of the public would have been able to access it.<sup>292</sup> Travelling exhibitions would have given the city the opportunity to collect revenue using the DIA's name and collection, which could have gone a long way toward satisfying creditors in its debt adjustment plan. As an example, the Museum of Fine Arts in Boston has profited greatly from leasing its art.<sup>293</sup> In 2004, the city loaned twenty-one Monet paintings to a private gallery in a Las Vegas casino for \$1 million.<sup>294</sup>

Finally, city leaders could have avoided public trust controversy by being transparent with regard to the city's monetization plans.<sup>295</sup> Leaders could have fully disclosed the official value of the art. Further, they could have disclosed any plans under consideration for monetizing the art and provided the identities of parties with whom they were negotiating. They could have engaged in public outreach so that both the art community and the citizens of Detroit would understand the necessity of monetizing the collection. This would have been a sharp contrast to the approach taken by Illinois legislators in *Illinois Central Railroad*.<sup>296</sup> Rather than ensuring that the public understood the deal they were making, Illinois legislators kept the details of the harbor sale a secret.<sup>297</sup> The secrecy led the citizens of Chicago to question the integrity of the deal, which

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disturbed many members of the public who felt the legislature handed over invaluable public property to Wall Street at a price that was much too low. *Id.* at 861. If Detroit were open and honest with its citizens, misconceptions like this one would be prevented.

290. See Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453–456 (1892); Kaplan *supra* note 164, at 144.

291. *Museum Info*, DETROIT INST. OF ARTS, <http://www.dia.org/about/> (last visited May 15, 2015); see also Kearney & Merrill, *supra* note 168, at 912 (indicating the public resented the Illinois Railroad Company because of the notoriously high rates the company charged for access to its property and services).

292. See *supra* notes 150–54 and accompanying text for a discussion of the leasing options available to the museum.

293. Stryker & Gallagher, *The Art of the DIA Deal*, *supra* note 5, at A15.

294. *Id.*

295. See *supra* notes 171–75 and accompanying text for an example of how a municipality's lack of transparency regarding the sale of public property resulted in public outrage in *Illinois Central Railroad*.

296. See Kearney & Merrill, *supra* note 168, at 861, 873, 912 (highlighting instances of the Illinois legislature's lack of transparency).

297. *Id.* at 863 n.286.

resulted in sharp public outcry.<sup>298</sup> Once the public turned against the deal, it became clear that the dispute would continue until the legislation was repealed.<sup>299</sup>

## 2. Working Within the Ethical Guidelines Imposed on Private Museums

In order to avoid public trust objections relating to ethics violations, city leaders could have framed the sale or monetization of the DIA collection as a course of action that falls within the bounds of the city's authority.<sup>300</sup> Relying on the holding of the Tennessee Court of Appeals in *In re Fisk*, city leaders could have argued that because the city could not afford to take care of the art, it should be sold to a party with the means to accept the responsibility.<sup>301</sup> Relying on the New York Supreme Court's holding in *Dennis*, the city could also have characterized the sale or monetization as an attempt to refocus the museum's collection.<sup>302</sup>

Relying on *In re Fisk*, the city could have argued that, because it could not adequately care for the DIA collection, it would be best for the art to go to a party who could afford to take on the responsibility. In *In re Fisk*, as a result of Fisk's desperate financial situation, the school was deemed incapable of properly caring for its art collection and was permitted by a state court to sell part of its interest in the collection.<sup>303</sup> City leaders accordingly could have sold the city's interest in the DIA collection on the grounds that the city cannot afford to care for it as a result of the bankruptcy.<sup>304</sup> Detroit's leaders could have further argued that selling at least a partial interest in the collection might be the only way to keep the DIA open.<sup>305</sup> The city has obviously been having a difficult time providing funding for the institution, so it might have been more sensible in the long run to decrease the scale of museum operations anyway.

Despite the argument that art donated by a benefactor cannot be sold, the *In re Fisk* court provided a persuasive rationale for the deaccessioning of donated art if a museum is in a dire financial situation. The court indicated that selling a piece of art when it cannot be properly cared for is consistent with the

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298. See Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 451 (1892) (acknowledging that the "circumstances attending the passage of the act" resulted in "much criticism" from the public); Kearney & Merrill, *supra* note 168, at 911–12 (discussing the public's dissatisfaction with the perceived corruption surrounding the passage of the Lake Front Act).

299. See Kearney & Merrill, *supra* note 168, at 905–12 (noting the persistence of those advocating for the repeal the Lake Front Act).

300. See *supra* notes 204–11 and accompanying text for a discussion of the limitations placed on museums with regard to deaccessioning.

301. See *supra* notes 215–27 and accompanying text for an analysis of *In re Fisk*.

302. See *supra* notes 229–32 and accompanying text for an overview of *Dennis v. Buffalo Fine Arts Academy*.

303. *In re Fisk Univ.*, 392 S.W.3d 582, 592–97 (Tenn. Ct. App. 2011).

304. See *id.* at 587–88 (reasoning that strict compliance with the conditions imposed by the gift would be unreasonable given the university's poor financial situation).

305. Fisk University was able to successfully argue that one of the only ways the university could remain open was by selling a portion of its interest in the art. *Id.* at 597.



donor's intent, because the donor's most basic intention was for the art to be preserved and displayed for the public.<sup>306</sup> City leaders could have asserted that the DIA collection was in jeopardy because the city could not afford to adequately maintain the art. The city then could have argued that donors would have wanted the art to be sold or monetized if it were the only way to ensure it would be adequately preserved. Further, city leaders could have insisted that, as long as its restructuring plan ensures that donated art would be protected and available for public viewing, the disposition is still consistent with donor intent.<sup>307</sup>

Moreover, the city could have characterized the sale of certain pieces of art as an attempt to refocus the museum's collection. In *Dennis*, a New York court allowed the Board of Directors of the Buffalo Fine Arts Academy to sell artwork and use the proceeds to refocus the type of art exhibited in the gallery.<sup>308</sup> In reaching its conclusion, the court indicated that the decision to refocus the gallery should be made by the board, which has the authority to make all decisions relating to the museum's direction.<sup>309</sup> Relying on *Dennis*, Detroit could have argued that it planned on shifting the focus of the DIA, perhaps consolidating its operations to center around a smaller, more exclusive collection of art.

*E. Incorporating the DIA into a Debt Adjustment Plan: A Policy Decision*

Ultimately, city leaders' failure to monetize the DIA collection has weakened the city's prospects of emerging from bankruptcy as an attractive, economically viable city. By transferring ownership of the art collection for a fraction of its value, city leaders refused to use the city's most valuable asset to its advantage and stripped the city of its most powerful tool for relieving future financial hardship.<sup>310</sup> Moreover, by negotiating a pension plan that relies on an unrealistic expected rate of return, city leaders took on an unnecessary risk that jeopardizes the city's future financial stability.<sup>311</sup> Finally, had the city captured the collection's true value, it could have used some of the capital to increase the pool of funds set aside for investment in basic services, thereby attracting businesses and individuals to the city.<sup>312</sup>

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306. *Id.* at 593.

307. *Id.* at 590 (adopting a similar argument when the donor's intent regarding her art collection was to further the "purpose that the public be given access to the Collection").

308. *Dennis v. Buffalo Fine Arts Acad.*, No. 2007-2220, 2007 WL 840996, at \*3-4 (N.Y. Sup. Ct. Mar. 21, 2007). See *supra* notes 229-32 and accompanying text for a brief discussion of *Dennis*.

309. *Id.* at \*3.

310. Kennedy, *supra* note 4, at A15 (examining the potential market value of the DIA collection).

311. See *supra* notes 141-46 and accompanying text for an overview of the pension plan agreed upon by city leaders and pensioners, which relies on an unrealistic expected average annual return.

312. See *supra* notes 147-49 and accompanying text for a discussion of the funds set aside for public infrastructure and basic services under the debt adjustment plan, which experts fear will run out quickly.

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By transferring ownership of the art collection for a fraction of its value, city leaders refused to use the city's most valuable asset to its advantage and stripped the city of its most powerful tool for relieving future financial hardship. In the Detroit bankruptcy proceedings, selling or monetizing the DIA collection was the city's best option. Rather than settling for the recovery of a fraction of the collection's worth, the city should have exploited the asset in the free market to capture its true value. The ownership transfer means that the DIA collection is now "bankruptcy proof."<sup>313</sup> Leveraging the artwork as collateral or leasing it to produce income when the city is strapped for cash are no longer options. Without the DIA, the city has few valuable assets. In the absence of a valuable asset to reinsure investors and business partners that the city will be able to fulfill future debt obligations, Detroit is going to have a hard time achieving financial stability.

Moreover, by negotiating a pension plan that relies on an idealistic expected rate of return, city leaders took on an unnecessary risk that jeopardized the city's future financial stability. Proponents of the transfer contend that the museum's \$816 million contribution created a "win-win" situation, because it saved the art and reduced pension cuts for city employees.<sup>314</sup> This argument ignores the fact that if the city recovered the true value of the art, and the proceeds were used to pay off pension liabilities, pension cuts might not have even been necessary. In an effort to win pensioners' support for a plan that does not include monetization of the art, city leaders adopted a payment plan based on an unrealistic expected rate of return. If the actual return is less than the expected return, the city will be responsible for making up the difference. A court-appointed fiscal policy expert cautioned that this was too great of a risk for such a fragile city.<sup>315</sup>

Finally, had the city recovered the true value of the DIA art collection, it could have significantly increased the pool of funds set aside for investment in infrastructure and basic services. Though the city set aside a substantial amount of investment funds, the debt adjustment plan assumes the capital will sustain the city for nine years.<sup>316</sup> Because the city's public infrastructure is in such dire need of an upgrade, economists fear that investment funds will run out sooner, leaving the city with few options for securing capital to continue operations. The ever-present risk that the city might once again be unable to provide basic services makes the city less attractive to businesses and to individuals, and will keep the city from growing the solid tax base it so desperately needs in order to become an economically viable city. If the city had been able to invest more capital in

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313. Davey & Walsh, *Plan to Exit Bankruptcy*, *supra* note 9, at A11.

314. Weissmann, *supra* note 134.

315. See *supra* notes 143–45 and accompanying text for a review of the comments made by the court-appointed fiscal policy expert.

316. See *supra* notes 147–49 and accompanying text for a brief discussion of the funds allotted to public infrastructure and basic services under the debt adjustment plan, which experts fear will run out quickly.

redevelopment and the provision of essential services, it would have shown the world that it is committed to improving the quality of life of its inhabitants.

#### IV. CONCLUSION

Undoubtedly, both the preservation and display of art are crucial to our progress as a civilization. This Comment does not seek to undermine the important role that art plays in society. Its goal is to encourage discourse concerning the repercussions of Detroit's decision not to monetize the DIA collection. Opponents of monetization sought to invoke the "public trust" as a quick and easy way to protect the art. Their arguments took into account the art's cultural value but failed to address the realities of the Detroit bankruptcy. They failed to consider that the art collection is the city's only asset that has any significant value. They showed little concern for the city's massive debt, most of which is made up of employee pensions. The best offer the museum could make in exchange for saving a collection worth an estimated \$4.6 billion was a mere \$816 million contribution to the reduction of pension liabilities. The museum's offer did not even come close to matching the value of the art.

Art critics failed to consider that the ethical guidelines proscribing the sale of art cannot prevent city leaders from monetizing the DIA collection. These critics also failed to consider the impact that invoking the public trust doctrine to save the DIA might have outside of the Detroit bankruptcy. Crafting a mechanism for administering the doctrine would be nearly impossible. Moreover, it would impose serious constraints on museums and museum leaders. Ultimately, though monetizing or selling the art would not have been ideal, it would have been a bold step toward empowering the city to emerge from bankruptcy in a position of strength, ready to resume its role as one of America's greatest cities.

