

CONSTRUCTING A LEGAL FRAMEWORK FOR THE EXPANSION PROPOSALS OF COLLECTION MUSEUMS

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ABSTRACT

In 2018, The Frick Collection, a museum featuring the private art collection of Henry Clay Frick and housed in the Frick family's private residence, finally received approval from the New York City Landmarks Preservation Commission to expand its physical footprint to accommodate its growing number of visitors. Official sanctioning of the plan came after years of consternation, however, demonstrating the competing legal principles and conflicting interests that emerge when collection museums seek to expand their physical structures.

Collection museums, like the Frick, are institutions created from individuals' private art collections that were themselves amassed to found and open the museum. Because collection museums possess a defining characteristic—a physical arrangement that integrates artwork, interior design, physical building, and landscape—proposals to alter or expand collection museums threaten to upset their unique aesthetic and experiential natures.

To effectively balance the public's right to express its interests with the collection museum's autonomy to determine its institutional needs, this Note assesses legal frameworks for understanding the complex intersection of interests that are raised by collection museums' proposals to expand. Critical analysis of the trust framework, even when supplemented by nonlegal constraints, reveals its shortcomings. Ultimately, a property-based framework emerges as the preferable framework, capable of enfranchising the public while also maintaining a collection museum's authority to make necessary alterations.

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INTRODUCTION

Housed within one of New York City's last remaining Gilded Age mansions is The Frick Collection ("the Frick"), a collection museum that displays the world-renowned art of industrialist Henry Clay Frick. However, the mansion itself merits the status of a work of art. Its Indiana limestone exterior, neoclassical architectural style, and manicured viewing gardens establish an elegant presence and provide an oasis of contemplative solicitude in the midst of Manhattan. One feels at peace in the Frick's gardens and in its intimate galleries, which remain arranged as they were when Henry Clay Frick and his family resided there. Yet the mansion's very intimacy—its limited size—has been a source of problems for the Frick.¹

In 2014, the Frick first announced plans to construct a new, six-story building in one of the museum's exterior gardens because the existing galleries were unable to accommodate the increased number of visitors, especially during special exhibitions and public lectures.² Though some applauded the expansion as a means of better providing for the public,³ the plan was vehemently opposed by many critics, who represented varied interests: some thought the renovation "would destroy the museum's intimate aesthetic"; others believed that the garden space was "as prized as the art inside" and should not be razed.⁴ In the wake of intense criticism from preservationists, artists, architects, neighbors, and coalitions like "Unite to Save the Frick," the Frick abandoned the expansion plan in 2015.⁵

1. Robin Pogrebin, *Frick's Expansion Is Approved by Landmarks Preservation Board*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/arts/design/frick-collection-expansion-approved.html> [<https://perma.cc/L7FM-KYP5>] [hereinafter Pogrebin, *Frick's Expansion Is Approved*].

2. Robin Pogrebin, *Frick Seeks To Expand Beyond Jewel-Box Spaces*, N.Y. TIMES (June 9, 2014), <https://www.nytimes.com/2014/06/10/arts/design/frick-plans-changes-but-vows-to-stay-the-same.html> [<https://perma.cc/2U22-6SV3>].

3. See Peter Schjeldahl, *Expanding the Frick: Let the Hard Hats Come*, NEW YORKER (June 16, 2014), <https://www.newyorker.com/culture/culture-desk/expanding-the-frick-let-the-hard-hats-come> [<https://perma.cc/7KBE-3ZP3>] (arguing that expansion of the galleries "makes simple sense").

4. Jennifer Smith, *Flak over the Frick Collection's Expansion Plans*, WALL ST. J. (Dec. 11, 2014, 8:35 PM), <http://webreprints.djreprints.com/3550920269999.html> [<https://perma.cc/P87K-98SW>].

5. Pia Catton, *Once Rebuffed, Frick Collection Restarts Its Expansion Push*, WALL ST. J. (Mar. 24, 2016, 4:00 PM), <https://www.wsj.com/articles/once-rebuffed-frick-collection-restarts-its-expansion-push-1458849635> [<https://perma.cc/W9ES-22CY>].

After returning to the drawing board to account for criticisms of the 2014 plan, the Frick announced a new expansion plan in 2018, which preserved and restored the museum's 70th Street garden, repurposed nearly sixty thousand square feet of existing space, and added approximately twenty-seven thousand square feet of new construction.⁶ Despite the formation of a new coalition, "Stop Irresponsible Frick Development," and criticism over the new plan, the Frick—a designated landmark—successfully obtained approval for the plan from the New York City Landmarks Preservation Commission in June 2018, and construction is currently scheduled to begin in mid-to-late 2020.⁷

The Frick serves as a paradigmatic example of a collection museum—an institution created from an individual's private art collection, which was itself amassed to open a museum.⁸ This definition includes both collection museums that are housed in the former private home of the founding collector as well as museums that were designed according to the founding collector's express specifications.⁹ In either situation, a defining characteristic of a collection museum is the collection's physical arrangement. The integrated interaction among the artworks, the interior design, the physical structure or building, and the landscape setting complement one another, not only contextualizing the founding collector's artwork but also generating an aesthetic of intimacy and a distinctive visitor experience.¹⁰ Because the intimate impression generated by a collection museum depends upon, and is irrevocably shaped by, the integrative wholeness of its physical arrangement, a proposal to alter or expand a collection museum threatens to upset its unique aesthetic and experiential nature.

6. *FAQs*, FRICK FUTURE, <https://www.frickfuture.org/faqs> [<https://perma.cc/QD3D-QX2G>].

7. Pogrebin, *Frick's Expansion Is Approved*, *supra* note 1; see also Victoria Stapley-Brown, Nancy Kenney & Helen Stoilas, *Met Plans To Leave Breuer Building, Making Way for the Frick*, ART NEWSPAPER (Sept. 21, 2018, 4:00 PM), <https://www.theartnewspaper.com/news/met-to-leave-breuer-building-making-way-for-the-frick> [<https://perma.cc/6JMM-AAHJ>] (explaining that the Frick will take over space through a "sub-tenancy" with the Met and that construction "is expected to start in mid- to late-2020").

8. For an extensive explanation of collection museums, see generally ANNE HIGONNET, *A MUSEUM OF ONE'S OWN: PRIVATE COLLECTING, PUBLIC GIFT* (2009).

9. *Id.*

10. See *id.* at 17 (categorizing museums as collection museums based on two core qualities: "[T]he personal character of the art collection and its even more personal installation"); *Mission*, GLENSTONE, <https://www.glenstone.org/about/mission> [<https://perma.cc/RCD8-85TE>] (describing Glenstone, a collection museum, as "a place that seamlessly integrates art, architecture, and landscape into a serene and contemplative environment").

The proposal to expand the Frick is illustrative of the competing interests that are implicated when a collection museum seeks to alter or expand its physical structure. The plan galvanized many parties who vocalized competing needs and visions, including museum management, trustees, the founding collector's descendants, artists, preservationists, architects, local governmental institutions, neighbors, and the public. Additionally, the Frick's expansion proposal history underscores the interplay and tension between the competing legal principles of preservation and private property rights. Altering a collection museum raises fundamental questions about the need to balance these two perspectives. In favor of preservation, the public has a genuine concern that changes to the structure might disrupt the collection museum's "unique place" in "culture, art, and architecture."¹¹ At the same time, basic private property rights dictate that the museum's management—the people "who manage the institution [the building] houses, who come to know the building's inadequacies . . . who feel the need to expand"¹²—should be able to alter the structure as necessary. At this confluence of competing legal principles and competing interests, many questions abound: Whose interests and needs should control?¹³ Which iteration of a museum's history should be preserved? How might the law be used to mediate among these often diverging parties? What legal framework should be applied?

This contentious struggle between preservation and change—a struggle that underlies a collection museum's expansion and potentially dictates its defining experiential nature—is further complicated by the hybrid public-private nature of collection museums. Originating as privately owned art collections displayed in private homes or other privately owned property, collection museums like the Frick were subsequently donated to the public as art museums.¹⁴ The public has an interest and important voice in the

11. See JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 50–51 (1999) (quoting Michael Benedict, *Between Beakers and Beatitudes: The Salk Institute's Dual Role of Function and Landmark*, PROGRESSIVE ARCHITECTURE, Oct. 1993, at 52) (observing the competing interests The Salk Institute experienced).

12. See *id.*

13. Of the Frick's expansion, Director Ian Wardropper said: "What I find frustrating sometimes . . . is people seem to brush right by the needs of the museum." Smith, *supra* note 4.

14. See *Buildings*, FRICK COLLECTION, https://www.frick.org/about/buildings_and_galleries [<https://perma.cc/6DEH-XVBC>] (noting it was Henry Clay Frick's intention that his art collection and home be opened as an art museum after his and his wife's death).

dialogue surrounding the expansion of collection museums, as the collection was given for its benefit and must operate with that mission in mind.¹⁵ Some scholars even argue that the public has a *droit patrimoine*: a legal right to see and preserve its cultural inheritance, which could extend to participating in the means by which a museum manages and preserves its collection.¹⁶ Whether or not the public has a legally cognizable right, collection museums nonetheless strive to attain the public's trust, which requires "balancing public expectation with institutional needs."¹⁷ Compounded with institutional mission statements that portray museums as existing to serve the public,¹⁸ the physical expansion of hybrid public-private collection museums complicates the private-public binary of property rights, which has significant implications for the governance of collection museums.

This Note seeks to address and to critically assess potential legal frameworks for understanding the complex intersection of interests that are raised by the expansion of collection museums, an area of art law scholarship that has yet to be fully analyzed. It argues that, of the potential legal solutions to be applied to collection museums' expansion proposals, a property-based framework, particularly one manifested through historic preservation laws, is preferable because it most effectively balances the public's right to express its interests with a collection museum's autonomy in deciding how best to operate. Part I outlines the evolution of collection museums as hybrid public-private institutions and uses the Frick's expansion proposal as an illustrative example of the different parties implicated in proposals to expand such museums. Part II discusses the trust legal framework, a private governance model that is currently applied to evaluate the expansion proposals of collection museums. This Part ultimately concludes that the trust framework, even supplemented by nonlegal, private-order

15. *But cf.* Andrew McClellan, *A Brief History of the Art Museum Public*, in *ART AND ITS PUBLICS: MUSEUM STUDIES AT THE MILLENNIUM 1*, 1 (Andrew McClellan ed., 2003) ("[T]here is no one public for art; the public for art is diverse . . .").

16. *See* John Nivala, *Droit Patrimoine: The Barnes Collection, the Public Interest, and Protecting Our Cultural Inheritance*, 55 *RUTGERS L. REV.* 477, 480–81 (2003) (discussing the public's *droit patrimoine* in the context of public access to the renowned Barnes Foundation).

17. Glenn D. Lowry, *A Deontological Approach to Art Museums and the Public Trust*, in *WHOSE MUSE? ART MUSEUMS AND THE PUBLIC TRUST* 129, 145 (James Cuno ed., 2006).

18. For example, the Frick's mission is "[t]o preserve and display for the public the Collection[,] . . . [t]o provide access, understanding, and enjoyment of the Collection to the public[,] . . . [t]o offer a singular and memorable experience for the visiting public[,] . . . [and t]o serve as a center for research and to stimulate scholarship." *About the Frick Collection*, FRICK COLLECTION, <https://www.frick.org/about> [<https://perma.cc/W8QT-9RJG>] (emphasis added).

governance mechanisms, fails to balance the needs of both museum management and the public sufficiently. Part III discusses the public governance alternative, which is grounded in property law, and several property-based legal doctrines for evaluating collection museums' renovation plans, arguing that the property-based legal framework is the preferable model. Specifically, it posits that historic preservation orders provide the most suitable doctrinal solution for addressing the particular challenges raised in the collection museum context. Part IV offers proposals for improving existing historic preservation ordinances and discusses the implications of these proposals for collection museums.

I. OVERVIEW OF COLLECTION MUSEUMS

This Part provides a framework for understanding the distinctive concerns that a collection museum encounters when presenting a proposal to expand and alter the museum's physical and contextual integrity. Specifically, this Part discusses the history of collection museums and their changing nature as private institutions in service of the public. It then details the various stakeholders implicated in proposals to expand collection museums.

A. *Defining a Museum and Origins of the Museum in Service of the Public*

The International Council of Museums ("ICOM") defines a museum as "a non-profit, permanent institution *in the service of society and its development*, open to the public, which acquires, conserves, researches, communicates and exhibits . . . *for the purposes of education, study and enjoyment*."¹⁹ Perhaps the most striking feature of this definition is its emphasis on the museum's service to society or the public more generally.

The concept of a public museum traces its origins to the establishment of the Musée du Louvre in 1793.²⁰ In the United States, the 1870s witnessed the founding of several municipal museums, institutions founded by American local governments that were based upon the public museum model established by the Louvre.²¹ These

19. *ICOM Definition of a Museum*, INT'L COUNCIL MUSEUMS (Oct. 7, 2008), <http://archives.icom.museum/definition.html> [<https://perma.cc/5BED-YTXL>] (emphasis added).

20. See HIGONNET, *supra* note 8, at 5 (describing the establishment of the national public museum as a "radical concept[] of the French Revolution").

21. *Id.*

museums were demonstrably public museums, often built on public land and with public money.²²

In contrast to these public municipal museums, several private individuals founded collection museums in the early twentieth century. These institutions included the Isabella Stewart Gardner Museum, the Frick, The Huntington Library, Art Collections, and Botanical Gardens, and Dumbarton Oaks.²³ Though these privately owned art collections were displayed in the homes of their collectors, these art collections and the buildings that housed them were intended to be intimately linked and to become public museums.²⁴ Collection museums thus seemed to constitute an inherent contradiction as collectors sought to donate to the public for the public use but did so through “[t]he ultimate private property”—their private homes, which housed their private art collections.²⁵ Simultaneously a private home and a public institution, the collection museum occupied a liminal position from its founding, complicating the public–private binary of art museum classification.

Organizationally, art museums may be categorized as public or private. Public museums include federal and state museums, museums created by local governments, and museums affiliated with state universities.²⁶ By contrast, private museums are created by private individuals as charitable trusts, unincorporated associations, or nonprofit corporations.²⁷ As manifestations of private individuals’ donations, collection museums are quintessentially private entities. Yet the public–private museum categorization is not a bright line; many private museums may still receive government support vis-à-vis federal income tax exemptions as § 501(c)(3) organizations.²⁸ Nevertheless, this public–private distinction does have profound

22. *See id.*

23. *Id.* at 13–14, 16.

24. *Id.* at 92.

25. *Id.* at 96.

26. MARILYN E. PHELAN, *MUSEUM LAW: A GUIDE FOR OFFICERS, DIRECTORS, AND COUNSEL* 4 (4th ed. 2014) [hereinafter PHELAN, *MUSEUM LAW: A GUIDE*].

27. Given their educational purpose, private museums are generally exempt from federal income tax under § 501(c)(3) of the Internal Revenue Code. *Id.* at 4, 6.

28. The Internal Revenue Code provides that “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes” are exempt from federal income tax. I.R.C. § 501(c)(3) (2018). Treasury Regulation § 1.501(c)(3)-1(d)(3) lists examples of organizations that are organized and operated exclusively for educational purposes—example 4 specifically lists “[m]useums” as qualifying organizations. Treas. Reg. § 1.501(c)(3)-1(d)(3) (2018).

implications for the governance and regulation of collection museums. Public museums are subject to governmental control and regulation, whereas private museums are principally constrained by their own internal organizational documents, such as mission statements and internal policies that define their organizational structure and museum governance.²⁹

Recent shifts in perception of private museums as institutions in service of the public have only complicated whether a museum's regulatory control lies with the government or with the museum itself.³⁰ During the second half of the twentieth century, art museums shifted their focus from collections and preservation to public service.³¹ In addition, during the 1970s, museum directors and academics began to explore the question: Who owns the museum?³² As a result of art museums' self-reflection and redefinition as institutions in service of the public, many began to demand increased accountability from museums, trustees, and professional staff.³³ Even in the twenty-first century, when art museums continue to be "more popular than ever before," museums, including their trustees and directors, remain "more at risk and are more vulnerable to public criticism than ever before."³⁴ Although museums acknowledge that maintaining the public trust and confidence "implies both a set of responsibilities . . . and a code of conduct[,] . . . there is very little that defines what constitutes acting within the public trust . . . [so] it is up to individual art museums" to self-regulate.³⁵ In other words, despite the "nature and foundation

29. See MARILYN PHELAN, *MUSEUMS AND THE LAW* 1 (1982) [hereinafter PHELAN, *MUSEUMS AND THE LAW*] (discussing governance structures for private museums).

30. See Kenneth Hudson, *The Museum Refuses To Stand Still*, *MUSEUM INT'L*, Jan. 1998, at 43 (observing, in 1998, that "the most fundamental change that has affected museums during the [last] half-century . . . is the now almost universal conviction that they exist in order to serve the public").

31. See Stephen E. Weil, *From Being About Something to Being for Somebody: The Ongoing Transformation of the American Museum*, *DAEDALUS*, Summer 1999, at 236 (referencing the public-service rhetoric of ICOM and the American Alliance of Museums in defining "museum").

32. Peter Temin, *An Economic History of American Art Museums*, in *THE ECONOMICS OF ART MUSEUMS* 179, 184 (Martin Feldstein ed., 1991). For example, Karl E. Meyer argued that a museum—that is, its trustees—does not own the art but rather is the steward of the art; the owner of the art is the public. *Id.*

33. See Hudson, *supra* note 30, at 43 (observing that the public was no longer content to have its leisure time controlled by the elite, and people were "increasingly demanding a say in the planning and organization of what they choose to do").

34. See James Cuno, *Introduction to WHOSE MUSE? ART MUSEUMS AND THE PUBLIC TRUST*, *supra* note 17, at 11.

35. Lowry, *supra* note 17, at 133–35.

of the public purpose of art museums” being well established,³⁶ private museums remain “fundamentally a self-regulated . . . sphere of our society” managed only by internally developed governance structures in which the public may not be involved.³⁷

The resulting mismatch between the public purpose of private museums and their private governance structure raises several practical concerns about the ability of these museums to account for, and respond to, the public’s needs effectively. If private museums aim and exist to serve the public, it stands to reason that the public’s concerns should be sufficiently represented. But can a private governance system be modified to account for the public’s interest? If so, then how can a governance scheme balance a private museum’s autonomy to effectuate its mission and meet its institutional needs with the public’s right to participate in critical museum decisions?

Although scholarship has addressed the competing interests of museum management and the public in the context of deaccessioning art collections,³⁸ little scholarship has addressed the converse problem: when a museum seeks to expand its architectural structure and change its surrounding landscapes.³⁹ Museum architecture “is integral to the museum experience,”⁴⁰ especially for collection museums, where the defining characteristic is the physical and contextual integrity of the

36. See Cuno, *supra* note 34, at 11 (discussing the public’s view of art museums).

37. See James N. Wood, *The Authorities of the American Art Museum*, in WHOSE MUSE? ART MUSEUMS AND THE PUBLIC TRUST, *supra* note 17, at 103, 116 (discussing the internal independence of museums and how that independence may not undermine the public trust).

38. Deaccessioning is a process “by which a work of art or other object . . . , wholly or in part, is permanently removed from a museum’s collection.” ASS’N OF ART MUSEUM DIRS., AAMD POLICY ON DEACCESSIONING 1 (2015), https://aamd.org/sites/default/files/document/AAMD%20Policy%20on%20Deaccessioning%20website_0.pdf [<https://perma.cc/3LZF-6GMQ>] [hereinafter AAMD POLICY]. For scholarship addressing the competing interests in deaccessioning, see generally Sue Chen, *Art Deaccessions and the Limits of Fiduciary Duty*, 14 ART ANTIQUITY & L. 103, 104 & nn.3–9 (2009) (collecting recent examples of scholarship on art-deaccessioning policies).

39. In some manner, the renovation of collection museums presents the flip side of the deaccessioning problem—the museum wants to expand, rather than contract or substitute, its collection and facilities. Yet in a different sense, the expansion of a collection museum manifests as the ultimate act of deaccessioning: the museum may compromise the integrity of its building structure—an integral aspect of collection museum experience—to facilitate the museum’s expansion, just as a museum might sell one work of art in order to purchase a different work of art. Moreover, if one perceives the collection museum’s building as a work of art in its own right, the proposal to expand or alter the original structure further resembles an act of deaccessioning.

40. Susanna Sirefman, *Formed and Forming: Contemporary Museum Architecture*, DAEDALUS, Summer 1999, at 297, 318.

artwork, interior design, building, and setting.⁴¹ Furthermore, for many collection museums, the building itself could be perceived as a work of art in its own right. Examples abound of criticism and backlash in response to a collection museum's announcement to alter or expand its architecture.⁴² For collection museums, the stakes of altering the physical structure may be even higher. In particular, a collection museum's management might be more constrained than their public museum colleagues due to the collection museum's distinctive experience, which derives from the integrative nature of the museum's artwork, interior spaces, physical building, and surrounding landscape, all of which, to some extent, were personally curated by the founder. Furthermore, the collection museum's architecture and landscape contextualize the founder's art collection and may be "the primary artifacts preserved, maintained, and interpreted for the public."⁴³ Thus, any proposal to alter a collection museum's architecture or physical surroundings inevitably implicates this experiential quality of collection museums, which, in turn, precipitates responses from varied parties.

B. Stakeholders Involved in Collection Museums

Because the expansion of a collection museum raises concerns for varied parties, it is productive to identify some of these stakeholders, which, in turn, highlights the larger public-private tensions surrounding a museum's proposal. As discussed above, the Frick's recent expansion proposal serves as a paradigmatic example of the

41. See *id.* at 297 (arguing that a museum's architecture represents its "public image, defines the [museum's] relationship to its setting, and constructs the framework of the visitors' experience").

42. For examples of expansion proposals by museums other than collection museums, see Sarah Cascone, *Tennis Legend Billie Jean King Is Leading a Rally To Protest the American Museum of Natural History's Expansion*, ARTNET NEWS (Feb. 1, 2019), <https://news.artnet.com/art-world/american-museum-natural-history-expansion-protest-1454854> [<https://perma.cc/36EL-UJ4H>] (discussing the dispute between the American Museum of Natural History in New York and a coalition, "Community United to Protect Theodore Roosevelt Park," over the museum's 2016 plan to construct on a city park) and Corey Levitan, *Architects Challenge Expansion of Museum of Contemporary Art San Diego's La Jolla Campus*, SAN DIEGO UNION-TRIB. (Aug. 12, 2018, 6:00 AM), <https://www.sandiegouniontribune.com/entertainment/visual-arts/sd-et-visual-museum-protest-20180807-story.html> [<https://perma.cc/PD7S-4QQB>] (discussing the 2018 petition signed by architects to forestall the expansion of the Museum of Contemporary Art San Diego, even after the plan had been approved by the City of San Diego Planning Commission).

43. Thompson M. Mayes, *When Buildings and Landscapes Are the Collection* (ALI-ABA Continuing Legal Education, Apr. 2016), SX006 ALI-ABA 191 (describing the importance of architecture and landscape in the context of historic house museums and historic sites).

many stakeholders involved in an expansion proposal as well as the competing interests implicated by such a proposal.

One key stakeholder is the collection museum's management, such as the director and board of trustees, who are principally responsible for determining if and when a collection museum should expand, for selecting the plan's architect, and for obtaining the necessary building permits and approvals. In the case of the Frick, its trustees and director were heavily involved in the process: initiating the expansion plan in 2014; withdrawing the plan in 2015; submitting a new plan in 2018; and obtaining approval from the New York City Landmarks Preservation Commission.⁴⁴

Another key stakeholder is the founding collector. Although collectors amassed their collections with the intention of creating public museums, adjustments were inevitably required to transform a private home into a forum that could accommodate public visitors. Some founding collectors personally undertook this transition,⁴⁵ while others left wills⁴⁶ specifying their wishes, which were then carried out by their descendants and trustees, many of whom were also descendants of the founding collector. Although Henry Clay Frick, the founder of the Frick, died in 1919, his descendants have played a key role throughout the Frick's history by serving as trustees. These descendants also vocalized their concerns about the proposed expansion plans for the Frick at public hearings and participated in coalitions organized to stop the Frick's expansion, which they viewed as threatening the Frick's unique experiential nature by "turn[ing the Frick] into another commercial New York art museum."⁴⁷

Preservationists, artists, and architects represent a third type of stakeholder in collection museum's expansion. These individuals may be particularly invested in articulating concerns about proposals that

44. See *supra* notes 2–7 and accompanying text.

45. See, e.g., *History: America's First Museum of Modern Art*, THE PHILLIPS COLLECTION, <https://www.phillipscollection.org/about/history> [<https://perma.cc/XP3Y-7PRD>] (discussing how Duncan Phillips, founder of The Phillips Collection, served as museum director from 1921 to his death in 1966 and was responsible for adding a modernist wing to the collection in 1960).

46. See, e.g., Anne Hawley & Alexander Wood, *A Sketch of the Life of Isabella Stewart Gardner*, in *ISABELLA STEWART GARDNER MUSEUM: DARING BY DESIGN* 1, 53 (Anne Hawley, Robert Campbell & Alexander Wood eds., 2004) (describing Isabella Stewart Gardner's will, which left her art collection and assets to The Isabella Stewart Gardner Museum and specified that the installation of her art collection could never be changed).

47. Martha Frick Symington Sanger, *Don't Let The Frick Disappear*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/opinion/dont-let-the-frick-disappear.html> [<https://perma.cc/R9NR-26VD>].

alter a collection museum's architecture and landscape, both of which may be of historical and aesthetic significance. Indeed, immense criticism for the 2014 Frick proposal came from such stakeholders, who were particularly critical of the proposal to build a six-story building because it would have eliminated one of the Frick's prized viewing gardens and mitigated the Frick's architectural aesthetic by embedding the museum "in a continuous street wall."⁴⁸

A fourth category of stakeholder consists of neighboring private property owners, who may have an interest in the expansion if it impacts their property values and enjoyment of their property. In the case of the Frick's 2014 proposal, local neighbors objected because they would lose their views of the Frick's garden; their criticisms also centered on the aesthetic appeal of the Frick and the historical character it contributed to the neighborhood.⁴⁹

A fifth stakeholder is local government, which through zoning boards or historic preservation boards may be involved in the process by requiring approval or permits for an expansion. Certainly the New York City Landmarks Preservation Commission played an instrumental role in the Frick's expansion process because it had to vote to approve the plan.⁵⁰ Last, but not least, the public for whose benefit a collection museum was founded certainly has a stake in the expansion of collection museums. In response to the Frick's expansion proposals, members of the public organized into coalitions and groups, such as "Unite to Save the Frick" and "Stop Irresponsible Frick Development," to vocalize their interests in curbing the expansion of the museum.

Many stakeholders may be involved in the collection museum's expansion proposal and may exert varying degrees of influence on the process. Although the Frick's museum management possessed a large measure of exclusive autonomy in the expansion proposal process, it was committed to addressing stakeholders' criticisms. For example, between the announcement of its plan in April 2018 and the

48. Smith, *supra* note 4. One landscape conservator expressed that "it would be a very, very great shame" to destroy the Frick's viewing garden. *Id.* (quoting Elizabeth Barlow Rogers, president of the Foundation for Landscape Studies and founder of the Central Park Conservancy).

49. *See id.* (stating that the garden can be viewed by the public from 70th Street and that critics thought the new gallery space would not compensate for the loss).

50. *See* Pogrebin, *Frick's Expansion Is Approved*, *supra* note 1 (describing how the New York City Landmarks Preservation Commission approved the plan by a vote of six to one after denying a previous plan).

Landmarks Preservation Commission’s review of the plan in May 2018, the Frick met with around seventy-five community organizations and others to present the project and receive feedback.⁵¹ As Director Ian Wardropper stated, “The public process can be painful, but we listened and I think the [Frick’s expansion] project is better because of that.”⁵² Thus, the Frick’s expansion history highlights not only the many parties implicated in expansion proposals to collection museums but also demonstrates the value derived from collaboration between museum management and outside stakeholders. Moreover, the Frick’s expansion history demonstrates the significant role that local government may play in facilitating opportunities for the public to express their concerns, such as through public hearings. Additionally, through zoning commissions and preservation boards, local government can provide an effective institutional check on collection museums.

More generally, the law can—and should—function as a means of mediating among the multivalent needs and critiques that a collection museum may encounter in the wake of a proposal to expand. An effective legal framework should facilitate conversations and decisions that balance museum management’s authority to discern its needs and implement plans to effectuate its mission with the public’s interest in, and enjoyment of, a collection museum.

II. THE CURRENT APPROACH: THE TRUST LEGAL FRAMEWORK

Collection museums can be governed by a number of possible legal frameworks. This Part discusses the current regime of private museum and collection museum governance: the trust framework. As this Part will explain, despite its current application to collection museums, the trust framework is complicated by corporate law and possesses shortcomings that fail to balance the competing interests and needs of museum management and the public successfully. Even if the trust framework were supplemented by a museum’s own nonlegal, self-imposed constraints, this Note argues that the current trust-based governance regime insufficiently accounts for the public’s interests, which indicates a need to impose a new legal framework.

51. Robin Pogrebin, *Frick Collection, with Fourth Expansion Plan, Crosses Its Fingers Again*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/arts/design/frick-collection-expansion-selldorf.html> [<https://perma.cc/XY6R-X8QP>].

52. Pogrebin, *Frick’s Expansion Is Approved*, *supra* note 1.

A. *The Shortcomings of the Trust Framework of Care in the Collection Museum Context*

Collection museums, like most private museums, are nonprofit charitable corporations.⁵³ Despite collection museums' corporate status, their governance is vested in a board of trustees, who must act in the public interest.⁵⁴ Trustees are fiduciaries and thus owe certain duties to the beneficiary, which, in the case of a collection museum, is the public that the museum serves.⁵⁵ Fiduciaries may be held liable for negligence in the performance of their duties.⁵⁶ If a collection museum's trustees and management propose an expansion that breaches their fiduciary duties to the public, the trustees and management could be held liable. However, the standard of care that subjects trustees to liability may vary, depending upon whether courts apply the corporate law standard—the business judgment rule—or the trust law standard—the trust standard of care.

As a result, an initial complication is whether corporate law or trust law governs a collection museum. A charitable trust will be subject to the trust standard, which holds a trustee liable for *ordinary* negligence, whereas a nonprofit corporation that is not charitable in nature will be subject to the corporate standard, which holds a trustee liable only for *gross* negligence.⁵⁷ Since most collection museums are charitable nonprofit corporations, these museums do not squarely fall under either the charitable trust or corporate category, providing a court with discretion to select the standard to be applied to trustees.⁵⁸

53. PHELAN, MUSEUM LAW: A GUIDE, *supra* note 26, at 9; *see also* MARIE C. MALARO, MUSEUM GOVERNANCE: MISSION, ETHICS, POLICY 3 (1994) [hereinafter MALARO, MUSEUM GOVERNANCE] (“Most cultural organizations are nonprofit entities chartered within a particular state to carry out a charitable (that is, educational) purpose.”).

54. MALARO, MUSEUM GOVERNANCE, *supra* note 53, at 3. For example, the Frick is a not-for-profit corporation organized under the laws of New York with a board of trustees.

55. *See* PHELAN, MUSEUMS AND THE LAW, *supra* note 29, at 154 (stating that trustees of charitable organizations owe duties “to the public at large”). Trustees owe a duty of loyalty, a duty of care, a “duty not to delegate to others the administration of the trust or the performance of acts in the administration of the trust,” and a duty “to keep clear and accurate accounts.” *Id.* at 155–56.

56. PHELAN, MUSEUM LAW: A GUIDE, *supra* note 26, at 20.

57. *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (holding that the standard of care under the business judgment rule is gross negligence).

58. *See* PHELAN, MUSEUM LAW: A GUIDE, *supra* note 26, at 20 (explaining the uncertainty regarding the fiduciary standards that can be applied to a nonprofit charitable organization).

Currently, courts tend to apply the business judgment rule to determine the liability of trustees and directors of private museums.⁵⁹ Under the business judgment rule, the court presumes that the director acted with due care; even if the presumption is rebutted, the director will only be held liable for gross negligence.⁶⁰ From the perspective of museum management, the business judgment rule appears preferable because judicial review leaves the substantive concerns of a collection museum's expansion within the judgment of museum professionals and trustees, who are far more knowledgeable on the matter than the courts. Problematically, however, this standard endows the board with expansive authority and minimal accountability, and it provides a measure of immunity to directors and trustees.⁶¹

In the context of a collection museum's expansion proposal, application of the business judgment rule proves an ineffective check for many reasons. First, many collection museums are nonprofit corporations: their "shareholders"—the public—"have neither voting power nor standing to sue" the museum's director or board on the basis of an uninformed business decision.⁶² Second, since the rule presumes prudent decision-making by directors and boards, a contestant's evidence of breach of the duty of care only rebuts the presumption. By not subjecting the director and board to automatic liability, the business judgment rule proves to be an impotent check on officer and director discretion. Third, the rule ensures compliance with the decision-making process, but it does not normally question the substantive merits of a decision.⁶³ In other words, the court focuses on the *means* of the decision rather than the substantive *ends* and content of that decision, which is the chief concern for proposed alterations and expansions to collection museums. Finally, application of a corporate standard to collection museums threatens their public credibility: "The

59. *Id.* at 20–21.

60. *See Aronson*, 473 A.2d at 812 ("It is a presumption that in making a business decision the directors [and board members] of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.").

61. *See* Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 WM. & MARY BUS. L. REV. 521, 574 (2013) (concluding that because the business judgment rule has the same policy foundations, procedures, and effects as an immunity rule, it stands to reason that the business judgment rule is itself a form of immunity).

62. Chen, *supra* note 38, at 119.

63. The business judgment rule requires courts "to focus on *procedural* due care"—the means by which the director reached the decision—rather than *substantive* due care—the merits of the director's decision. Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, 14 N.Y.U. J.L. & BUS. 27, 53 (2017) (emphasis added).

more art museums look like multinational corporations and the more their directors sound like corporate CEOs, the more they risk being cast by the public in the same light.”⁶⁴

Arguably, courts reviewing the actions of museum trustees and directors for alleged breaches of fiduciary duties to the public could instead apply the trust standard of care—a more meaningful standard that holds management liable for ordinary, and not just gross, negligence. Yet even the trust standard of care may prove insufficient because the law limits the enforcement of fiduciary obligations through standing doctrines. Specifically, the public and donors do not have standing to sue a charitable trust or nonprofit charitable corporation for breach of their fiduciary duties.⁶⁵ Instead, the state attorney general has primary responsibility for enforcing charitable trusts and overseeing their trustees.⁶⁶

State attorneys general present a pragmatic enforcement solution for charitable trusts. Although the public possesses “a substantial interest in the enforcement of a charitable trust” as the beneficiary of the trust, “it would be impractical to expect individual members of the public to police trust activity.”⁶⁷ Furthermore, limiting enforcement to the state attorney general affords museum management the autonomy to act in the institution’s best interest without being constantly bombarded by the public’s demands while simultaneously maintaining a sufficient level of oversight by the attorney general.⁶⁸ Finally, state attorneys general have effectively monitored collection museums previously.⁶⁹

64. Cuno, *supra* note 34, at 16.

65. PHELAN, MUSEUM LAW: A GUIDE, *supra* note 26, at 28–30.

66. *Id.* at 30 (stating that the attorney general “generally” represents the public in ensuring that trustees properly perform their duties and that in “most states,” only the attorney general can bring a suit to enforce charitable trusts); *see also* RESTATEMENT (SECOND) OF TRUSTS § 391 (AM. LAW. INST. 1959) (giving the attorney general, among others, the power to maintain a suit “for the enforcement of a charitable trust”).

67. MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 20 (1985) [hereinafter MALARO, A LEGAL PRIMER].

68. *See id.* (quoting at length from *Dickey v. Volker*, 11 S.W.2d 278, 281 (Mo. 1928) (en banc), and *People ex rel. Ellert v. Cogswell*, 45 P. 270, 271 (Cal. 1896), as expressions of the rule that attorneys general are the representatives of the public that oversee how public charities and trusts are managed).

69. *See, e.g.*, *Commonwealth v. Barnes Found.*, 159 A.2d 500, 505–06 (Pa. 1960) (finding the Barnes Foundation’s trustees had violated the indenture between Dr. Barnes and the Foundation and ordering the public to receive access to the Foundation with continued oversight by the attorney general); *see also* SAX, *supra* note 11, at 76 (discussing the Barnes Foundation case and its implications for public rights to art collections).

Despite the merits of limiting enforcement to the state attorney general, there is a “gap between the attorney general’s theoretical and practical powers of enforcement.”⁷⁰ For instance, although centralizing oversight of charitable trusts in a single entity appears to be an efficient solution, an attorney general may not realistically have the time or resources to monitor and enforce trust standards, which may result in “little effective legal regulation of museum trustees.”⁷¹ As a result, trustees may “exercise the rights of ownership with little interference from the public.”⁷² By extension, the current enforcement mechanism divests the ordinary individuals of any oversight authority, essentially leaving the public with “almost no power to control activities of nonprofit directors.”⁷³

Although imposing the trust standard of care on a museum’s director and board members would be preferable to the current trend of imposing the more lax business judgment rule, the trust standard of care itself possesses a problematic enforcement mechanism, rendering the public powerless to enforce the fiduciary obligations of a museum’s director and board members.

B. Problems with Fixing the Trust Standard of Care

Although the current trust framework does not adequately account for the public’s interest in proposed expansions to a collection museum, the current framework could be redressed through legal and nonlegal proposals. Even so, this Section details how these proposals nevertheless fail to redress fully the shortcomings of the trust framework.

As a legal matter, the class who has standing to sue a collection museum for breach of its fiduciary duties to the public could be expanded in scope.⁷⁴ In the museum context, litigants have already lobbied courts to recognize the standing of historical societies and

70. STEPHEN E. WEIL, *Breaches of Trust, Remedies, and Standards in the American Private Art Museum*, in *BEAUTY AND THE BEASTS: ON MUSEUMS, ART, THE LAW, AND THE MARKET* 160, 166–67 (1983).

71. John Henry Merryman, *Are Museum Trustees and the Law out of Step?*, *ARTNEWS*, Nov. 1975, at 24, 26.

72. Temin, *supra* note 32, at 184.

73. PHELAN, *MUSEUM LAW: A GUIDE*, *supra* note 26, at 28.

74. See MALARO, *A LEGAL PRIMER*, *supra* note 67, at 22–29 (describing efforts to expand the concept of standing to sue nonprofit organizations and museum cases involving standing issues).

former trustees seeking to enjoin a museum's deaccessioning efforts.⁷⁵ Yet this legal solution proves untenable for several reasons. First, conferring standing on additional persons generates difficult line-drawing questions and policy judgments about whose interests matter most.⁷⁶ Second, further line-drawing questions arise in deciding which types of decisions by trustees and directors could and should be open to challenge. At the extreme, any member of the public could sue a collection museum for any decision, large or small, thereby thwarting the efficiency of a collection museum in meeting its goals as well as deterring individuals from becoming trustees.

As an additional legal-based proposal to rectify the trust framework's shortcomings, the United States could create an independent government agency that exclusively supervises American charities, based upon international models. For example, the Charity Commission for England and Wales, an independent agency accountable to Parliament, supervises charities.⁷⁷ Creating an independent government agency to supervise American charities could not only redress the current gap between a state attorney general's theoretical and practical enforcement powers but also would provide more specialized expertise on the particular demands and needs of charitable organizations and collection museums. Nonetheless, this proposal seems unlikely, as it would require a massive bureaucratic undertaking and could generate additional pragmatic and financial burdens.

A more promising and politically viable proposal to address the shortcomings of the current trust framework could come from nonlegal, private-ordering mechanisms that are developed and promulgated by museums. Examples of such mechanisms include professional ethics codes and standards developed by museum associations, self-regulation by collection museums through policies and mission statements, and public opinion.

75. See *id.* at 25–28 (discussing cases such as *Rowan v. Pasadena Art Museum*, No. C 322817 (Cal. Super. Ct. Sept. 22, 1981), which denied standing to former trustees).

76. It is unclear exactly to whom should standing be extended: Should donors and their heirs, neighboring private property owners, taxpayers, or merely any museum visitor be allowed to bring suit? See, e.g., Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 163 (2011) (noting that some scholars “complain that standing exacerbates existing inequalities in politics and society more broadly”).

77. *About Us*, CHARITY COMMISSION FOR ENG. & WALES, <https://www.gov.uk/government/organisations/charity-commission/about> [<https://perma.cc/FXU6-52J4>].

Professional ethical standards can—and often do—set higher standards than those required by law.⁷⁸ Organizations like the Association of Art Museum Directors (“AAMD”) and the Alliance of American Museums (“AAM”) currently provide standards and ethical codes for member museums.⁷⁹ Such standards and codes could be revised to include more robust recommendations and policies for museum modification as well as for collection-museum-specific expansion proposals. However, professional ethics code revisions alone are insufficient because they are not legally binding on collection museums and their effectiveness depends on self-regulation.⁸⁰

In addition, collection museums, and museums generally, could develop policies for expansion of their physical buildings and alterations to their surrounding landscapes through nonlegal, private governance models. The AAMD and AAM currently have such policies for instances such as deaccessioning.⁸¹ These policies could be expanded to include a collection museum’s physical building and landscape setting.⁸² Though collection museum policies regarding

78. *Id.*

79. For example, AAMD’s *Professional Practices in Art Museums* recognizes that a museum’s “physical plant is among the assets of the museum for which the board assumes ultimate responsibility” and recommends that directors should submit facilities plans, development concepts, designs, and other documents to the board for review and approval. ASS’N OF ART MUSEUM DIRS., PROFESSIONAL PRACTICES IN ART MUSEUMS 13 (2011), <https://aamd.org/sites/default/files/document/2011ProfessionalPracticesinArtMuseums.pdf> [<https://perma.cc/E2H9-KE8N>]. This provision could be expanded to specifically include the public’s input for expansion proposals, such as through mandated public hearings.

80. See MALARO, MUSEUM GOVERNANCE, *supra* note 53, at 17 (arguing that ethical codes have no enforcement mechanism and instead “depend on self-education, self-motivation, and peer pressure for their promulgation” and “cannot be effective without a consistent and voluntary commitment from a sizable portion of the profession”).

81. Press Release, Am. All. of Museums, Statement on the Deaccessioning by the Delaware Art Museum and the Action Taken by the AAM Accreditation Commission (June 18, 2014), <https://www.aam-us.org/2014/06/18/statement-on-the-deaccessioning-by-the-delaware-art-museum-and-the-action-taken-by-the-aam-accreditation-commission> [<https://perma.cc/RR3Y-79W6>] [hereinafter AAM Press Release] (announcing a unanimous vote to remove the Delaware Art Museum’s accredited status after its board decided to deaccession and sell works from its collection for impermissible purposes under the AAM Code of Ethics for Museums).

82. For example, the Preamble to the AAMD Policy on Deaccessioning specifically underscores that “[e]xpressions of donor intent should always be respected in deaccession decisions and the interests of the public, for whose benefit collections are maintained, must always be foremost in making deaccession decisions.” AAMD POLICY, *supra* note 38. These concerns—honoring the founding collector’s intentions for his or her museum and serving the public—should also be foremost when a collection museum decides to expand or alter its physical building or surroundings, a strong argument for expanding this policy to address collection-museum-specific issues.

physical modification would present an ideal solution, this strategy has a few shortcomings. First, these policies would still need to be developed and devised; in the interim, one must rely upon the trust framework or other nonlegal frameworks for ensuring that collection museum management renders decisions that benefit the public. Second, these policies may lack practical enforcement mechanisms. Although enforcement of the policies may cause a museum to lose its accreditation status, it will not allow a contestant to veto a sale of a work of art or to block an expansion of a collection museum.⁸³ Though application of a trust standard of care, along with enhanced nonlegal constraints, might serve as a check on museum management's decisions with regards to collection museum expansion, the decisions ultimately remain the museum's and the museum's alone—under the trust standard of care, the public remains powerless and voiceless. Even with these proposed fixes to the trust system, the public would remain woefully uninvolved in important decisions regarding the alteration of collection museums. A new legal framework is required.

III. THE PREFERABLE APPROACH: THE PROPERTY LEGAL FRAMEWORK

Part II has proven that the trust-based legal framework is inadequate to satisfy all of the competing interests in a collection museum. However, the question remains: What is the appropriate framework for these institutions? As previously mentioned, collection museums occupy a liminal position in the public–private property binary, beginning as private property of the collector but subsequently evolving into institutions in service of the public. As an alternative to adhering to the current trust-based legal system, property law emerges as a preferable governance regime for collection museums. This framework provides a more appropriate balance between private and public interests, maintaining management's authority to make necessary alterations to the institution while simultaneously enfranchising the public and enabling it to participate in any proposed expansion in a timely manner.

This Part explores the different considerations of a property-based legal regime. Section A begins by analyzing collection museums through the lens of public property doctrines, including the public trust

83. Cf. AAM Press Release, *supra* note 81 (explaining that AAM had authority to remove the museum's accreditation status but that the impermissible deaccessioning had already occurred).

doctrine and the public dedication doctrine. However, it determines that these public property doctrines prove an imperfect fit for the specific concerns implicated when collection museums seek to expand. Section B then argues that collection museums should be understood as “qualified property” that are subject to historic preservation ordinances, contending that these regulations provide the most suitable mechanism for balancing museum management’s and the public’s needs in the context of a collection museum’s expansion proposal.

A. *Collection Museums Through the Lens of Public Property Doctrines: The Public Trust Doctrine and the Public Dedication Doctrine*

Because collection museums exist to serve the public, they could arguably be conceived of as public property. However, when public property doctrines, specifically the public trust doctrine and the public dedication doctrine, are applied to collection museums, it becomes evident that these doctrines fail to fit the specific needs and concerns raised by collection museums.

1. *The Public Trust Doctrine.* In its original conception, the public trust doctrine embodied the principle that “navigable waters are preserved for the public use, and that the state is responsible for protecting the public’s right to the use.”⁸⁴ At first blush, the public trust doctrine would seem a viable option for collection museums since art is perceived as being held in the public trust⁸⁵—a perception that is confirmed by museum professionals.⁸⁶ If one views a museum’s building and landscape setting as works of art in their own right, then one could extend the public trust concept to the museum’s building and landscape setting.

84. *Public-Trust Doctrine*, BLACK’S LAW DICTIONARY (10th ed. 2014). This doctrine is often confused with charitable trusts, which are trusts “created to benefit a specific charity, specific charities, or the general public rather than a private individual or entity.” *Charitable Trust*, BLACK’S LAW DICTIONARY (10th ed. 2014).

85. For example, the New York Board of Regents defines public trust as “the responsibility of [museums and historical societies with collections] to carry out activities and hold their assets in trust for the public benefit.” N.Y. COMP. CODES R. & REGS. tit. 8 § 3.27(a)(18) (2018).

86. See Ford W. Bell, Opinion, *Museum Art, Held in Trust*, N.Y. TIMES (Mar. 30, 2009), <https://www.nytimes.com/2009/03/31/opinion/lweb31museums.html> [https://perma.cc/77LP-K9WB] (expressing the view of the president of AAM that “once an object falls under the aegis of a museum, it is held in the public trust, to be accessible to present and future generations”).

However, the appeal of applying the public trust doctrine in the art museum context is not coterminous with the legal conception of the public trust. The public trust doctrine has been invoked in the environmental context, such as cases involving navigable waters⁸⁷ and other natural resources.⁸⁸ To be sure, the public trust doctrine possesses the advantage of conferring standing to sue upon the state or any citizen of the state to enforce the public trust,⁸⁹ enabling more stakeholders to challenge an expansion proposal in the collection museum context.⁹⁰ However, the doctrine's availability in the collection museum context is contingent upon the substantive expansion in the scope of the public trust doctrine beyond the environmental context to include cultural institutions, cultural property, and works of art.⁹¹ Such an extension, however, is highly unlikely, as application of the doctrine beyond the environmental context has gained little traction and has even been rejected by some courts.⁹² Moreover, the museum world employs the term "public trust" not only in the legal sense but also in a moral sense as a shorthand for

87. The Supreme Court first invoked the public trust doctrine in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), which struck down the Illinois legislature's effort to cede title over Lake Michigan to a private railroad on the ground that the waters and land were "held in trust for the people." *Id.* at 452.

88. Professor Joseph Sax's pivotal article argued that the doctrine could serve as a legal tool "for citizens seeking to develop a comprehensive legal approach to resource management problems" regarding the environment. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970). Since Professor Sax's article, the doctrine has successfully been invoked in numerous environmental challenges. *See, e.g.*, Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 727 (Cal. 1983) (holding that the public trust doctrine applies to flowing waters and water rights); Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 55 (N.J. 1972) (citing Professor Sax's article to hold that the public trust doctrine may be called upon to protect recreational use of trust resources, including coastal beaches).

89. Under the public trust doctrine, a citizen's standing to sue empowers any person "to invoke the doctrine, and effectively confers enforcement authority on nonprofit advocacy groups." Joseph D. Kearney & Thomas W. Merrill, *Private Rights in Public Lands: The Chicago Lakefront, Montgomery Ward, and the Public Dedication Doctrine*, 105 NW. U. L. REV. 1417, 1420 (2011).

90. For example, advocacy groups, such as preservationists, artists, architects, and neighbors, could challenge a collection museum's expansion under the doctrine.

91. *See* Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 647 (1995) [hereinafter Gerstenblith, *Identity and Cultural Property*] ("The public trust doctrine is the most appropriate legal doctrine for explaining the public interest and for protecting the rights of a cultural group in its cultural property.").

92. *See, e.g.*, Cathedral Church of St. John the Divine v. Dormitory Auth., 645 N.Y.S.2d 637, 642-43 (App. Div. 1996) (rejecting extension of public trust doctrine to include a neighborhood green space).

“the trust and confidence that the public has given to the museum to collect, preserve, and make available works of art.”⁹³ The appeal to the public trust doctrine in the collection museum context may be “mere incantation” – “[m]useum collections simply are not held in the public trust” in the legal, doctrinal sense.⁹⁴

2. *The Public Dedication Doctrine.* Although the public trust doctrine remains an unavailing option for the public to challenge a collection museum’s proposal for expansion, the public dedication doctrine presents another viable option to challenge such expansion. The doctrine of public dedication was developed by American courts in the nineteenth century to provide equitable relief to private property owners who could seek injunctive relief before any public land that abutted their property was changed.⁹⁵ To qualify for this relief, the land subject to change had to have been dedicated to the public, and certain individuals have to demonstrate their reliance interests.⁹⁶ Applying the doctrine in the case of collection museums, the founding collector’s decision to open her home or privately owned property as a museum for the public may be viewed as an offer to dedicate her property to the public use, and the public’s visitation of the museum would qualify as acceptance of this public dedication.⁹⁷ Because a collection museum is often the founding collector’s home, situated within a neighborhood, private property owners in the neighborhood may possess reliance interests that the collection museum would not substantially alter the neighborhood’s aesthetic.

Although both doctrines function as means of preserving spaces intended for public uses, the doctrines differ in important respects.⁹⁸

93. Sara Tam, Note, *In Museums We Trust: Analyzing the Mission of Museums, Deaccessioning Policies, and the Public Trust*, 39 *FORDHAM URB. L.J.* 849, 860–63 (2012) (discussing public trust theories in the museum context).

94. See Donn Zaretsky, *There’s No Such Thing as the Public Trust, and It’s a Good Thing, Too*, in *THE LEGAL GUIDE FOR MUSEUM PROFESSIONALS* 151, 153 (Julia Courtney ed., 2015) (discussing the public trust doctrine in the deaccessioning context).

95. Kearney & Merrill, *supra* note 89, at 1418, 1449.

96. *Id.*

97. The public dedication doctrine drew upon contract law, requiring an offer by the owner of his property to the public and acceptance by the public. *Id.* at 1449 (noting that offer and acceptance may be through words or inferred from the course of conduct of either the grantor or the public).

98. See *id.* at 1419–20 (noting that “[t]he public trust doctrine seeks to preserve public spaces by positing that certain resources are held in a restricted title that disables any transfer of these resources into the hands of private owners,” whereas the public dedication doctrine confers the

Though the public trust doctrine has been limited in scope to navigable waters and environmental subjects, it broadly confers standing upon either the state or any interested person. Contrarily, the public dedication doctrine covers a potentially broader range of public spaces but limits standing to a smaller subset of the public: neighboring landowners who can demonstrate reliance interests.⁹⁹ The wider scope of the public dedication doctrine appears to make it a more effective legal tool for certain members of the public to challenge a collection museum's expansion. As discussed below, however, certain drawbacks disable the doctrine from doing substantive work in the collection museum context.

Though the public dedication doctrine's scope is larger than that of the public trust doctrine, it still seems insufficient to cover collection museums because the public dedication doctrine is typically invoked with regard to parks or other public spaces.¹⁰⁰ It would be difficult to broaden the doctrine's scope to include collection museums, even if the expansion is on a park or green space, because the expansions are on private property. Furthermore, by limiting standing to a finite number of private property owners, the public dedication doctrine has additional disadvantages. First, the doctrine can function as "a unanimous consent mechanism": if the private property owners who have standing to sue instead consent to the collection museum's expansion, the expansion proceeds without challenge.¹⁰¹ Conversely, if the private property owners abuse their standing, they might effectively exercise a veto and stymie the collection museum's legitimate expansion. Second, not all neighbors will have the same stake or interest in the public land, and the doctrine depends on some owners having "unusually large stakes" to function as an effective enforcement mechanism.¹⁰² Third, the preferences of abutting

right upon "a select group of landowners uniquely affected by public spaces to sue in equity to prevent departures from the dedicated use").

99. See *id.* at 1420 (naming "a much wider range" of resources to which the doctrine could be applied and describing neighbors as "individuals who have a strong interest in maintaining the public nature of the resource").

100. See, e.g., *President of Cincinnati v. Lessee of White*, 31 U.S. (6 Pet.) 431 (1832) (involving the dedication of a tract of land along the Ohio River).

101. See *Kearney & Merrill*, *supra* note 89, at 1512 (discussing this consent mechanism of the public dedication doctrine).

102. *Id.* at 1525. For example, contiguous property owners or owners whose views would be blocked by expansion may have a greater interest in obtaining equitable relief and therefore would be more willing to pursue a legal remedy. On the other hand, if all neighboring owners

landowners and of the general public may diverge.¹⁰³ In the collection museum context, while the general public might prefer more exhibition space for activities and programming events, neighboring property owners may disfavor expansion that would disrupt their peace and quiet. Conversely, neighbors might prefer an expansion that would increase their own property values, even if the general public might prefer preservation of the museum's original building and landscape setting. These conflicting views indicate how a public dedication doctrine that relies on the immediate neighboring property owners challenging the expansion might not always serve the interests of the general public.

* * *

In sum, application of the public property doctrines to collection museums appears to be too strained of an exercise. Flatly, these doctrines are insufficient legal frameworks for collection museums, and this Section has indicated that collection museums cannot viably be analyzed under a pure public property framework.

B. Collection Museums as “Qualified Property”: Preservation Restrictions and Historic Preservation Ordinances

Since the expansion of collection museums cannot effectively be regulated through a public property framework, one must turn to the mechanisms, laws, and doctrines applicable to private property. Although collection museums cannot be viewed as public property, as discussed above, should one analyze collection museums as private property? To begin, the founding collectors did not consider themselves purely private owners: many perceived themselves as stewards of their collections with duties to preserve them and provide access for the public.¹⁰⁴ Therefore, the founding collectors did not consider themselves as purely private owners who possessed “all the rights of exclusivity that go with conventional ownership.”¹⁰⁵ Collection museums, as an outgrowth of founding collectors' efforts, are hybrid properties—private in origin but public in mission—and do not fall cleanly under either a private property or public property framework.

have relatively equal and small stakes, it may prove challenging to form a coalition of owners, who could share litigation costs. *Id.* at 1525–26.

103. *See id.* at 1526 (observing that private owners and the public are likely to agree on “whether to maintain a public space or permit it to be privatized” but otherwise likely to diverge in their interests).

104. *See SAX, supra* note 11, at 68–69; Temin, *supra* note 32, at 184.

105. *SAX, supra* note 11, at 68.

More generally, cultural property blurs the distinction between public and private property, undermining a public–private binary conception of property rights.¹⁰⁶ Because “[c]onventional notions of ownership and dominion are unable to provide adequately for public access, openness, and preservation,” collection museums may require a reconceptualization of the public–private property rights dichotomy.¹⁰⁷ Instead of subscribing to the public–private binary structure, if one conceives of property rights of both collectors and collection museums as functioning along a continuum, collection museums may appear to constitute “a species of qualified ownership founded on the recognition that some objects [including art collections as well as their buildings and surroundings] . . . are constituent of a community, and that ordinary private dominion over them insufficiently accounts for the community’s rightful stake in them.”¹⁰⁸ In this continuum, collection museums should be understood as “qualified property,” neither wholly public nor wholly private.

Of course, reconceptualizing property rights as a continuum complicates the difficulty of identifying substitutes for the prevailing public–private property rules, which have the virtue of clarity. Despite this difficulty, the law can—and should—provide means by which the public can voice its interests, while still ensuring that collection museums’ private property rights are not completely subrogated to the public’s interest.¹⁰⁹ As such, this Section examines currently available methods for private property to account for public concern—preservation restrictions and preservation ordinances—ultimately arguing that preservation ordinances achieve the best balance between the public’s needs and the collection museum’s autonomy.

1. *Preservation Restrictions.* Preservation restrictions, which are created by state statute, resemble common law servitudes and

106. See Nivala, *supra* note 16, at 531 (pointing to statutes that protect “historic buildings, antiquities, and artist’s moral rights” as evidence of a “collective public heritage” in cultural property (quoting Nicole B. Wilkes, *Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute*, 24 COLUM.-VLA J.L. & ARTS 177, 179 (2001))).

107. SAX, *supra* note 11, at 197. Sax argues that private art owners should not have a “right of destruction as against the public” and that private art collectors have an affirmative duty to provide access to their art. *Id.* at 68.

108. See *id.* at 197 (calling for recognition of the concept of qualified ownership).

109. For example, Professor Patty Gerstenblith argues that the architect’s rights in the building are impeded when a building is landmarked. Patty Gerstenblith, *Architect as Artist: Artists’ Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L.J. 431, 462 (1994).

easements.¹¹⁰ Specifically, a private property owner voluntarily places restrictions on the development of, or changes to, his or her property and then transfers those restrictions to a nonprofit organization or government agency in exchange for certain benefits, such as federal and state tax deductions or credits.¹¹¹ In the collection museum context, preservation restrictions would allow museum management to preserve a greater measure of autonomy because these restrictions are voluntary. Management would control which property rights it would transfer to the local government, such as exterior modifications, thereby enabling the museum to meet its institutional goals and needs, specifically through interior maintenance and minor modifications. Preservation restrictions could also check a collection museum's expansion efforts by requiring judicial or legislative oversight and approval.

However, preservation restrictions ultimately do not accomplish the goal of balancing the needs of museum management and the public. First, the voluntary nature of preservation restrictions provides little incentive for museums to buy into the process. Because collection museums already receive tax benefits as nonprofit organizations,¹¹² the likelihood that these museums would voluntarily cede property rights without acquiring some additional benefit is questionable. Moreover, the fact that preservation restrictions exist in perpetuity¹¹³ also mitigates their appeal to a collection museum that may want the option of expanding in the future. To combat these shortcomings, local governments could be more forceful, such as by conditioning future tax benefits on a collection museum's compliance with preservation restrictions. Such a condition, however, may be unconstitutionally coercive.¹¹⁴ Even if protective restrictions were adopted and provided

110. See SARA C. BRONIN & RYAN ROWBERRY, HISTORIC PRESERVATION LAW IN A NUTSHELL 412 (2014) (noting that “[r]estrictions are sometimes known by the common law terms of ‘servitudes,’ ‘easements,’ or ‘covenants,’ which are often used interchangeably”).

111. *Id.* at 411. However, restrictions can also be imposed on property owners through exactions. *Id.* at 416.

112. See *supra* note 28 and accompanying text.

113. See Gerald Korngold, Semida Munteanu & Lauren Elizabeth Smith, *An Empirical Study of Modification and Termination of Conservation Easements: What the Data Suggest About Appropriate Legal Rules*, 24 N.Y.U. ENVTL. L.J. 1, 18 (2016) (discussing the perpetuity requirement for conservation easements and the possibility of modifying conservation easements).

114. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 575–89 (2012) (concluding that Medicaid expansion in Affordable Care Act violated the Spending Clause by coercing the states into accepting its terms).

a meaningful check on a museum's expansion, such restrictions still would not permit public involvement: the museum would only be checked by the legislature and the courts. Thus, although a protective restriction does endow the collection museum with a greater measure of autonomy, the likelihood that a museum would voluntarily impose preservation restrictions upon itself, coupled with the inability of the public to participate in fashioning and oversight of these restrictions, renders them an ineffective solution.

2. *Preservation Ordinances.* Unlike the voluntary nature of preservation restrictions, preservation ordinances seek to regulate land through legislation that is promulgated and enforced by governments, thereby subjecting collection museums to public governance.¹¹⁵ Preservation legislation may consist of registration of landmarks, which is often modeled upon the National Register of Historic Places, or enabling legislation, which confers the state's police power on local governments to regulate the preservation of historic private property by establishing landmark commissions and promulgating preservation ordinances.¹¹⁶ Because preservation ordinances focus on property aesthetics, they serve a protective function to prevent "destruction, inappropriate alteration, and neglect" of significant historic resources.¹¹⁷ Though preservation ordinances may substantively restrict private property rights, these ordinances also establish mechanisms and processes through which private property owners and the public can resolve issues relating to the particular property.¹¹⁸ Thus, in the case of collection museums, preservation ordinances provide the most efficacious means for balancing the collection museum's interests with those of the public. The remainder of this Part will discuss the mechanics of these ordinances and their application in the collection museum context.

115. See BRONIN & ROWBERRY, *supra* note 110, at 191–92 (discussing preservation ordinances and localities' authority to impose them as derived from state statutes). Zoning ordinances also regulate land. Whereas zoning ordinances focus on building uses by categorizing land into different zones and thereby separating incompatible uses, historic preservation ordinances focus on property aesthetics. *Id.* at 208–09.

116. Scott H. Rothstein, Comment, *Takings Jurisprudence Comes In from the Cold: Preserving Interiors Through Landmark Designation*, 26 CONN. L. REV. 1105, 1108–09 (1994).

117. BRONIN & ROWBERRY, *supra* note 110, at 1.

118. *Id.* For example, preservation ordinances may balance historic preservation with other values such as "individual property rights, architectural design innovations, free speech, cultural identity, access for persons with disabilities, and economic development." *Id.*

a. *The Mechanics of Historic Preservation Ordinances.* Though the content regulated by historic preservation ordinances varies jurisdiction to jurisdiction, their procedural processes are remarkably similar. To designate a resource as a historic site, the resource must be nominated and then evaluated by the relevant governing council to determine if it meets the jurisdiction's applicable criteria.¹¹⁹ After a resource has been designated, it will be subject to the locality's historic preservation ordinances, which generally can limit or delay demolition of all or part of historic properties, restrict new construction within historic districts, or prevent alterations to historic properties.¹²⁰ When a property owner files for a building permit to alter an aspect of the designated property, this filing triggers review by the local government, who must determine whether the proposed alterations are compatible with the historic aspects of the property before issuing a certificate of appropriateness.¹²¹ During this process, the local government will typically hold a public meeting and apply its criteria for appropriateness before voting on the application.¹²² If the local government issues a certificate of appropriateness, the property owner is then able to obtain the building permit.¹²³

b. *Historic Preservation Ordinances and Collection Museums.* In considering whether to apply historic preservation ordinances to expansion proposals for collection museums, Chief Justice¹²⁴ Rehnquist's dissenting opinion in *Penn Central Transportation Co. v. New York City*,¹²⁵ a Supreme Court case that upheld the

119. See BRONIN & ROWBERRY, *supra* note 110, at 202–03 (discussing the nomination and evaluation process); see also 36 C.F.R. § 60.4 (2019) (providing criteria for federal designation on the National Register of Historic Places).

120. See *id.* at 192–207 (discussing these three types of restrictions).

121. *Id.* at 200–02.

122. *Id.* at 202–03.

123. *Id.* at 199.

124. At the time of the opinion, Rehnquist was then an Associate Justice.

125. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). This case involved the application of New York City's Landmarks Preservation Law to Grand Central Terminal, a designated landmark. After the New York City Landmarks Preservation Commission (“the Commission”) denied plans to build a multistory office building in the airspace above the Terminal, the owners challenged the Commission's decision, alleging that its application of the Landmarks Preservation Law constituted an unlawful taking of their property. *Id.* at 119. In addition to holding that there was no regulatory taking, the Court also rejected the owners' argument that landmark laws were discriminatory, “reverse spot” zoning that “arbitrarily single[d] out a particular parcel for different, less favorable treatment than the neighboring ones.” *Id.* at 130–32. Instead, the preservation law at issue “embodie[d] a comprehensive plan to preserve

constitutionality of historic preservation ordinances, provides an important consideration: historic preservation ordinances might disproportionately fall on certain property owners.¹²⁶ According to Professor Joseph Sax, Rehnquist's opinion observed that a property owner of "something deemed especially valuable to the community, by virtue of that fact, and his previous gift of the benefit of that boon to the neighboring community, has somehow incurred an obligation to protect or preserve the object for the benefit of the community."¹²⁷ A property owner of a designated historical property has "an affirmative duty to preserve"—a more intrusive obligation than a negative duty to refrain from doing harm.¹²⁸ Were a collection museum to be designated a historical venue, it could potentially face this affirmative duty to preserve its collection and its physical structure.

Despite the potential burden, preservation ordinances nonetheless offer the most suitable vehicle for involving the public in the collection-museum-expansion dialogue. As Professor Carol Rose noted, historic preservation law functions as a "process of community self-definition" that "brings neighbors together in mutual education and mutual aid, helping to prevent a paralyzing sense of individual powerlessness."¹²⁹ Indeed, procedural requirements for alterations of designated landmarks and historically protected structures require a review-and-recommendation process; the release of such a report should strive to "encourage public discourse and debate."¹³⁰ Given collection museums' self-professed desire to serve the public, a governance regime like historic preservation ordinances facilitates a dialogue between collection museum management and the public, giving the latter a voice without completely abrogating the former's autonomy.

structures of historic or aesthetic interest." *Id.* at 132. The Court's decision reaffirmed that state and local governments "may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city [or community]." *Id.* at 129. As a result, "*Penn Central* has served to effectively insulate historic preservation from regulatory takings challenges," thereby ensuring that these ordinances are viable methods of regulating collection museums. See J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After Penn Central*, 15 FORDHAM ENVTL. L. REV. 313, 316 (2004).

126. *Penn Cent.*, 438 U.S. at 140 (Rehnquist, J., dissenting).

127. SAX, *supra* note 11, at 57.

128. *Id.*

129. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 494 (1981).

130. SAX, *supra* note 11, at 52.

IV. PROPOSALS FOR HISTORIC PRESERVATION ORDINANCES OF COLLECTION MUSEUMS AND IMPLICATIONS FOR THE FUTURE

Though historic preservation ordinances strike the best balance of all the proposed governance regimes, they could be modified to better balance the competing needs of the museum management and the public in the context of a collection museum's proposal to expand. This Part first discusses potential modifications to historic preservation ordinances and ultimately concludes that enforcement through delay is the most suitable proposal.

First, collection museums should be brought within the regulatory scope of local zoning and preservation commissions, if they are not already subject to the locality's preservation ordinances. Preferably, collection museums would consent to designation as a landmark or property subject to preservation laws, but a collection museum need not consent in order for such ordinances to apply.¹³¹ Additionally, if a collection museum does not consent to designation as a landmark, local ordinances could be expanded in scope to apply not only to registered properties but also to nominated properties. Since local and state governments permit a broad range of individuals to nominate properties for historic preservation protection,¹³² individuals could nominate collection museums and, in turn, attempt to bring them under the ordinance's scope.

A natural corollary to this proposal is to consider the scope of the landmark designation: whether it should regulate the collection museum's exterior, interior, or both. Though historical preservation of building exteriors is more common than preservation of building interiors, courts have held that interiors may be designated as

131. See Gerstenblith, *Identity and Cultural Property*, *supra* note 91, at 655–56 (listing due process as one potential challenge that could be brought against protective legislation like historic preservation ordinances); *United Artists' Theater Circuit, Inc. v. Philadelphia*, 635 A.2d 612, 614 (holding that, under Pennsylvania's constitution, "designation of a building as historic without the consent of the owner is not a 'taking' that requires just compensation"), *vacating* *United Artists' Theater Circuit, Inc. v. Philadelphia*, 595 A.2d 6, 26–27 (1991) (holding that provisions of the Philadelphia Code, "which authorize the historic designation of private property . . . without the consent of the owner, are unfair, unjust and amount to an unconstitutional taking without just compensation").

132. BRONIN & ROWBERRY, *supra* note 110, at 64–65 (noting that nomination on the state and local level may be submitted by any person, thereby rendering the process more open to direct engagement and citizen participation); *cf.* 36 C.F.R. § 60.4 (2019) (providing that a state or tribal historic preservation officer, a federal preservation officer, or the Keeper of the National Register must make the nomination for federal designation on the National Register of Historic Places).

landmarks without constituting a taking of property.¹³³ Indeed, “cultural and historic landmarks [like collection museums] are often more significant for their interiors than for their exteriors.”¹³⁴ Although one could propose landmark designation of collection museum interiors as a means of further limiting museum management’s discretion, such a proposal raises practical issues because interior spaces are functionally used and often need to be renovated.¹³⁵ Additionally, in the case of efforts to renovate landmarked interiors, compliance with regulations can be both time consuming and expensive.¹³⁶ Thus, necessary—even minimal—renovations to a landmarked interior would often be extremely burdensome if management had to seek approval every time from the governing preservation commission.

Instead, the most efficacious proposals for revisions to current preservation ordinances would involve procedural rather than substantive changes. Rather than proposing a uniform set of criteria for local ordinance commissions dealing with collection museums, which would not account for the jurisdictional variation, this Note proposes that preservation ordinances should implement procedures that delay a collection museum’s approval for expansion plans for a specified period of time—a method known as “enforcement through delay.” In addition to serving as a strategic tactic, the power of delay facilitates dialogue between the collection museum and the community. For example, Professor Rose argues that a preservation ordinance can be “community conscious” and “might better be

133. See Nicholas Caros, Note, *Interior Landmarks Preservation and Public Access*, 116 COLUM. L. REV. 1773, 1783–86 (2016) (chronicling the legal challenges to interior landmarking, such as *Teachers Ins. & Annuity Ass’n of America v. City of New York*, 586 N.Y.S.2d 262 (App. Div. 1992), which upheld the designation of interior architectural features as a landmark under New York City’s Landmarks Preservation Law).

134. Rothstein, *supra* note 116, at 1130.

135. For example, the lobby floors of the former New York Central Railroad headquarters, a landmarked interior since 1987, require monthly cleaning and polishing—a level of care that is “not an inexpensive venture”—in order to comply with interior landmark requirements. C. J. Hughes, *The Tricky Task of Renovating a Building Without Altering Its Landmark Insides*, N.Y. TIMES (Nov. 22, 2011), <https://www.nytimes.com/2011/11/23/realestate/commercial/the-tricky-task-of-renovating-a-buildings-landmark-interior.html> [<https://perma.cc/AH5K-FXKG>] (quoting Brian Robin, chief operating officer of one of the buildings). According to Robert B. Tierney, then-chairman of the New York City Landmarks Preservation Commission, interior designations “are more carefully conferred” than exterior landmark designations. *Id.*

136. For example, the modernization of the Empire State Building’s lobby, a landmarked interior, required two years and \$20 million as well as approval for the addition of security cameras, turnstiles, and an information desk. *Id.*

enforced through a delay of the owner's proposed changes than through absolute prohibition of demolition or alteration."¹³⁷ As Professor Rose notes, enforcement through delay would transform landmark preservation into a "function of community education and community pressure"¹³⁸ that gives "all sides an opportunity to publicize their positions and to hear the positions of others . . . [and] the opportunity to educate the other and to educate the public about the community values at stake in the preservation of old structures or in their replacement by other structures."¹³⁹

Enforcement-through-delay procedures should also provide additional opportunities for community influence, such as through public hearings and notice-and-comment procedures. Such opportunities for community dialogue are invaluable: members of the immediate community or neighborhood may have a better sense of the worth of the neighborhood, and these opportunities "can strengthen the neighborhood, encourage self-definition, and give leverage with the larger community."¹⁴⁰

Granted, delaying a collection museum's proposed changes imposes time and monetary costs. Additionally, delaying a collection museum's expansion might generate collateral consequences, such as impacting its operations and program offerings. For example, if a collection museum is seeking expansion because its facilities cannot physically accommodate a high number of visitors, the museum might have to limit the number of participants in educational programs or use timed-ticket admission procedures to limit the number of visitors in the museum. Such drawbacks undercut the collection museum's purpose and existence in service of the public. To mitigate some of these concerns, the composition of the local historical board could be modified to better account for the collection museum's institutional needs; a museum professional, in addition to architects, real estate developers, and other professionals, could serve on the commission's board to provide additional perspectives and generate creative solutions to such collateral consequences. Furthermore, the commission could provide a provision that would allow a "landmark owner to argue that other pressing community needs outweigh the

137. Rose, *supra* note 129, at 503.

138. *Id.* at 504.

139. *Id.* at 503–04.

140. *Id.* at 534.

need for exact retention of an older structure,”¹⁴¹ thereby providing a collection museum with a means of expediting decision-making by the commission in certain circumstances.

Despite the potential costs, enforcement through delay brings the collection museum’s management and interested members of the public “into contact so that they may refine and publicize public purposes at stake in a project, weigh considerations of the physical environment against competing social goals, and perhaps devise an accommodation.”¹⁴² Though neither the museum management nor the public acts as the final decision-maker under this framework, the enforcement-through-delay methodology ensures that the ultimate decision-maker—the commission—hears both the museum’s and public’s concerns and bears these in mind in rendering a decision.¹⁴³

CONCLUSION

As private museums in service of the public, collection museums occupy a liminal position, falling outside of both the public and private museum governance systems. As a result, any decision to alter or modify the collection museum or its structure has profound implications for both private and public stakeholders. The legal framework that governs how these institutions operate should take into account their unique public–private nature. In determining whether a purely private governance system, derived from trust law, or a public governance system, grounded in historic preservation ordinances, provides a more efficacious framework, one must strive to preserve the museum management’s autonomy to effectuate its institutional mission while also providing an opportunity for the public to exercise its *droit patrimoine*—a right to participate in its cultural inheritance.¹⁴⁴ Ultimately, historic preservation laws, coupled with an enforcement-through-delay procedural strategy, strike the appropriate balance, providing both time and opportunity for the public to be heard without letting the tyranny of the majority hamper a collection museum’s efficient operation.

141. *Id.* at 503.

142. *Id.* at 533.

143. Rose argues that “just as important as the point ‘where the buck stops,’ however, is the route that the buck takes. A route through neighborhood and community groups is in keeping with preservation’s emerging communitarian purpose. Such a route substantially aids the ultimate decisionmaker and helps to strengthen pluralistic government.” *Id.* at 534.

144. See Nivala, *supra* note 16, at 481 (defining the goals of *droit patrimoine* as “preserving the authenticity of and protecting access to our cultural inheritance”).