

# ART AND THE CONSTITUTION: PUBLIC ART, PRIVATE SPACES AND THE FIRST AMENDMENT\*

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## INTRODUCTION

In terms of an introduction, my first thought was that I don't know much about art law but I know what I like. And what I like is the variety, the merging of law and aesthetic values, and the unpredictability.

In terms of unpredictability, some of you may have seen the morning newspaper. The district attorney of Manhattan has now blocked the return to Austria of two paintings suspected of being stolen by the Nazis,<sup>1</sup> a move that many fear might discourage museums around the world from lending art works with murky histories. I have no view about the ultimate merits of the issue, but this contemporary incident reveals a number of issues, all of which are interesting.

One is the enormous dollar value of art. There are great stakes here. Second, there are emotional and sentimental attachments to works of art, especially those that have been in a single family for many years or even generations or, conceivably, centuries. Thirdly, there is the deep sense of injustice and deprivation that takes place when something of that kind is removed from one's possession, or the possession of one's family, and especially at the hands of Nazis in the mid-century. Next, there are the practical elements of the international market that depend on contract law and good faith. Finally, an issue I believe that will emerge in this controversy, is a very narrow, to some people technical, question of choice of law. In Europe, good faith purchasers of art get good title, regardless of whether prior title was valid. In the United

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\* This symposium took place at the 1998 Association of American Law Schools Annual Meeting, held in San Francisco, CA, January 7-10, 1998. In lieu of Sanford Levinson's symposium presentation is an edited version of an earlier paper of his which covers substantially the same territory. The Symposium Commentary by Robert C. Post is not reproduced here.

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<sup>1</sup> See Judith H. Dobrzynski, *District Attorney Enters Dispute Over Artworks*, N.Y. TIMES, Jan. 8, 1998, at B2.

States, *bona fide* purchasers of art do not get good title if the title is invalid. This particular case then, may turn on choice of law.

Marci Hamilton has set out a number of issues she thinks worthy of consideration, including the problem of the public being largely at the mercy of the idiosyncratic tastes of particular individuals, namely people who can suppress the display of art that they own. There are questions about this, as well as questions about the public/private distinction between what an individual can do, and in what circumstances, and what a government agency is.

Yet another question concerns censorship. Censorship is a highly loaded word. Anyone in the law, much less anyone with a history with the American Civil Liberties Union, recoils at the idea of censorship. But, for some, censorship is another word for choice. Some people like certain things and others do not. Especially when government or a private entity is paying the freight, people who are paying often ask, "Why should I subsidize?" or "Why should our entity subsidize things that we find unpalatable, vulgar, obscene or politically objectionable?"

So the questions, among others that can be discussed, are: (i) What is public art? (ii) What are the criteria for government choosing art? (iii) Does privatization leave the marketplace of ideas perilously at risk? and (iv) What is the relationship between judicial and legislative decision-making in this area? There is one further question that I'll add: Are there any limits on the ability of owners to display art, or not to censor art? For example, can the owner of a sculpture in a small, residential, shopping center erect something that is regarded as pornographic, vulgar, or out of sync with the current mores of the community? Are there laws of nuisance that apply? Are there other laws that apply that would restrict the people who want to show art rather than those who want to censor art?

Finally, in the last fifteen to twenty years, we've seen, from a political perspective, a major transformation of those who have become the censors as distinguished from the censors of two generations ago. It was commonplace in the 1950s and 1960s that the censors of speech, including art, were people on the right. McCarthyism has become a metaphor for many different strands of censorship that existed. In recent years, however, more censorship is taking place by the left. There has been a transformation of consciousness as people have had to face the change in the political direction of censorship and First Amendment principles.