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DEACCESSIONING: A PRAGMATIC APPROACH

*Ardis E. Strong**

Art museums are curators of ideas, preservers of culture, and educators on the evolving aesthetics and morals of society. As such, they play an important role in contemporary society and should be accessible to a wide and diverse audience. One important debate in how museums best serve the public interest involves the museum practice of deaccessioning. Historically, policies governing the proceeds museums receive when they deaccession (or remove) work from their collection have strictly limited the use of these funds to the purchase of new art. This policy is based on the idea that museums hold art for the public trust and should therefore keep their collection separate from other museum assets. These ideas are relatively uncontroversial when dealing with financially healthy museums. However, the past decade has seen many museums struggling to keep the doors open and audiences engaged.

The debate over deaccessioning resurfaces each time a museum on the brink of closure breaks industry rules by selling work to pay for museum operations. While recognizing the importance of the museum's role in keeping art in the public trust, this note questions whether the closure of a museum ever serves the public interest. Several prominent art lawyers and art critics have advocated for relaxing the rules governing the use of deaccessioning funds and allowing deaccessioned work to remain accessible to the public. These proposals appear to have little traction among industry regulators who enforce deaccessioning rules largely through sanctions and public condemnation. This note argues that the organizations that regulate museum practices should take a more proactive approach to assisting struggling institutions and a more collective approach to collections management that encourages individual museums to look to the

wider cultural community when making tough decisions on how best to serve the public interest.

INTRODUCTION

In 2008, the National Academy Museum in New York City (the “Academy”) drew stiff sanctions from the Association of Art Museum Directors (“AAMD”)¹ when it sold two works from its collection.² The members of the Academy³ sold the two works—Frederic Edwin Church’s 1854 “Scene on the Magdalene” and Sanford Robinson Gifford’s 1859 “Mount Mansfield, Vermont”—

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¹ The Association of Art Museum Directors is a professional organization of art museum directors whose mission involves “establishing and maintaining the highest standards of professional practice, serving as forum for the exchange of information and ideas, acting as an advocate for its member art museums, and being a leader in shaping public discourse about the arts community and the role of art in society.” *Mission*, ASS’N ART MUSEUM DIRECTORS, <https://aamd.org/about/mission> (last visited Sept. 18, 2015). Violating the AAMD’s code of ethics may result in loss of membership as well as sanctions that prevent the violating museum from receiving loans of artworks or participating in shared exhibitions with other institutions. *Code of Ethics*, ASS’N ART MUSEUM DIRECTORS [hereinafter *AAMD Code of Ethics*], <https://aamd.org/about/code-of-ethics> (last visited Sept. 18, 2015).

² Robin Pogrebin, *Branded a Pariah, the National Academy Is Struggling to Survive*, N.Y. TIMES (Dec. 22, 2008) [hereinafter Pogrebin, *Branded a Pariah*], <http://www.nytimes.com/2008/12/23/arts/design/23acad.html>.

³ The National Academy is an organization founded by artists and architects to foster art and design in America outside of the traditional system of aristocratic patronage. *History*, NAT’L ACAD. MUSEUM, <http://www.nationalacademy.org/about-us/history/> (last visited Sept. 18, 2015). Current members of the Academy, called academicians, elect new members. *Id.* Upon induction into the academy, academicians must contribute a work of art to the National Academy for exhibit and educational purposes. Pogrebin, *Branded a Pariah*, *supra* note 2. The National Academy currently has over 300 members and a collection of over 7,000 artworks. *History*, *supra*. It operates a museum and an art school in New York’s Upper East Side. *Id.*

to an unnamed private foundation for \$13.5 million.⁴ Faced with a growing deficit, a sharply declining endowment, and imminent lay-offs, the Academy needed funds to avoid losing its building on Fifth Avenue's Museum Mile.⁵ Rather than sell the building, the members, themselves artists with work in the Academy's collection, voted to sell the two 19th Century works.⁶ In selling these works to ensure the survival of the institution, the Academy violated one of the major tenets of current museum administration—that the works in a museum's collection are not “fungible asset[s].”⁷

A museum's practice of selling works from its collection is known as “deaccessioning.”⁸ Although deaccessioning is a common practice within the museum industry, it can be extremely controversial. As such, the AAMD's Code of Ethics contains specific guidelines that museums must follow when deaccessioning work from their collections.⁹ One important rule is that museums can only sell work from their collections in order to raise capital for the purchase of new works.¹⁰ The Academy

⁴ Pogrebin, *Branded a Pariah*, *supra* note 2; *see also* Randy Kennedy, *National Academy Sells Two Hudson River School Paintings to Bolster its Finances*, N.Y. TIMES (Dec. 6, 2008), <http://www.nytimes.com/2008/12/06/arts/design/06acad.html> (discussing the sale of the two works).

⁵ *See* Pogrebin, *Branded a Pariah*, *supra* note 2; Kennedy, *supra* note 4.

⁶ Pogrebin, *Branded a Pariah*, *supra* note 2 (“[T]he [member] artists agonized over the proposal to sell the works before voting 183 to 1 in favor.”).

⁷ Robin Pogrebin, *Sanctions Are Ending for Museum*, N.Y. TIMES (Oct. 18, 2010) [hereinafter Pogrebin, *Sanctions Are Ending*], <http://www.nytimes.com/2010/10/19/arts/design/19sanctions.html>.

⁸ Derek Fincham, *Deaccession of Art from the Public Trust*, 16 J. ART, ANTIQUITY & L. 93, 94 (2011).

⁹ The AAMD's Code of Ethics outlines the duties and rules of professional conduct expected of museum directors. *See* ASS'N ART MUSEUM DIRS., PROFESSIONAL PRACTICES IN ART MUSEUMS 17 app. at 17–19 (2011) [hereinafter AAMD, PROFESSIONAL PRACTICES], <https://aamd.org/sites/default/files/document/2011ProfessionalPracticesinArtMuseums.pdf>. It is designed to uphold public trust in museums and avoid conflicts of interest or other questionable legal activities. *Id.* at 17.

¹⁰ *Id.* at 18. One provision of the code of ethics relates directly to the director's role in deaccessioning: “[T]he director must not dispose of accessioned works of art in order to provide funds for purposes other than acquisitions of works of art for the collection.” *Id.*

violated this rule by using the funds from the Church/Gifford sale to replenish its operating budget.¹¹

The AAMD lifted the sanctions against the Academy in 2010, after the museum worked with the AAMD to change its policies and develop more secure financial strategies.¹² However, the 190-year-old institution remained on probation until 2015.¹³ Carmine Branagan, the director of the Academy, described the sanctions as “very, very painful”¹⁴ but noted that they ultimately made the museum stronger.¹⁵ Despite the recognition of the damage caused by these sanctions, the threat of sanctions did not sufficiently deter deaccessioning in the first place.

Financial crises and threats of possible closure will force other museums to similarly weigh their options and decide how best to proceed. For the Academy, it was better to accept the sanctions than risk closure.¹⁶ The rules governing the museum industry, however, make it difficult for a struggling museum to practice this kind of serious introspection.¹⁷ By limiting how a museum may

¹¹ See Robin Pogrebin, *A Chastised Museum Returns to Life*, N.Y. TIMES (Apr. 17, 2011) [hereinafter Pogrebin, *A Chastised Museum*], <http://www.nytimes.com/2011/04/18/arts/design/national-academy-museum-returns-to-life-after-scolding.html>.

¹² See Pogrebin, *Sanctions Are Ending*, *supra* note 7.

¹³ Pogrebin, *A Chastised Museum*, *supra* note 11.

¹⁴ Pogrebin, *Sanctions Are Ending*, *supra* note 7.

¹⁵ *Id.*

¹⁶ Pogrebin, *Branded a Pariah*, *supra* note 2.

¹⁷ The American Alliance of Museums (“AAM”) and the Association of Art Museum Directors (“AAMD”) are the “two most influential museum associations in the United States.” Fincham, *supra* note 8, at 98. The AAM is a 21,000-member organization that supports museums through advocacy, development of best practices, and career and resource development. *About Us*, AM. ALLIANCE OF MUSEUMS, <http://aam-us.org/about-us> (last visited Sept. 18, 2015). The AAM includes art museums, military museums, history museums, zoos, and much more. *Id.* Both organizations have strict policies on deaccessioning that limit how funds from deaccessioning can be used. See *Code of Ethics*, AM. ALLIANCE OF MUSEUMS [hereinafter *AAM Code of Ethics*], <http://www.aam-us.org/resources/ethics-standards-and-best-practices/code-of-ethics> (last visited Sept. 18, 2014); ASS’N OF ART MUSEUM DIRS., AAMD POLICY ON DEACCESSIONING (2010) [hereinafter *AAMD POLICY ON DEACCESSIONING*], <https://aamd.org/sites/default/files/document/AAMD%20Policy%20on%20Deaccessioning%20website.pdf>. Due to the lack of formal legal

allocate the proceeds from deaccessioning, guidelines like the AAMD's intentionally eliminate a major revenue source for an institution.¹⁸ Furthermore, the AAMD's policy creates a dichotomy in which larger, cash-rich museums can regularly deaccession work with little consequence because they can promptly use the money to buy more art,¹⁹ while small, struggling institutions receive heavy sanctions for using deaccessioning to simply remain open.²⁰ If, as the AAMD Code of Ethics states, the purpose of the art museum is truly to "serve and educate the public through collection, research, preservation, exhibition, and the advancement of knowledge about works of art,"²¹ then the rules governing deaccessioning should be flexible enough to ensure that all institutions, regardless of size or level of financial stability, can fulfill that mission to the public when faced with economic crises.

This Note argues that current rules for deaccessioning overly burden smaller institutions and should be changed to embrace a strategy of community-based collections management. Although strict guidelines for deaccessioning provide important protections for museum collections, they do not always further the larger goal of providing public access to great works of art.²² The organizations that regulate museums—the AAMD and the American Alliance of Museums ("AAM")—should allow

oversight, these guidelines act as "powerful norms" within the museum community. See Fincham, *supra* note 8.

¹⁸ See Christopher Knight, *Museum Deaccessioning Done Right*, L.A. TIMES (Mar. 15, 2009), <http://www.latimes.com/entertainment/arts/la-ca-deaccession-15-2009mar15-story.html> ("Professional standards prohibit [the selling of major works to raise operating funds] because museums exist to support art, not the other way around.").

¹⁹ See Donn Zaretsky, *You Say "Ransom," I Say "A More Comfortable Distribution of Resources,"* ART L. BLOG (July 9, 2007, 10:21 PM), <http://theartlawblog.blogspot.com/2007/07/you-say-ransom-i-say-more-comfortable.html>.

²⁰ See Donn Zaretsky, *Some Works Will Be Sold at Christie's Spring Auctions*, ART L. BLOG (Mar. 26, 2009, 11:44 PM), <http://theartlawblog.blogspot.com/2009/03/some-works-will-be-sold-at-christies.html>.

²¹ AAMD *Code of Ethics*, *supra* note 1.

²² See Donn Zaretsky, *I Think They Need Better Talking Points*, ART L. BLOG (Mar. 31, 2009, 3:40 PM), <http://theartlawblog.blogspot.com/2009/03/i-think-they-need-better-talking-points.html>.

financially struggling museums to use deaccessioning funds for purposes other than collections management, provided that these institutions meet certain criteria regarding their long-term financial solubility and their commitments to provide public access to their collections. With the guidance and supervision of the AAMD and the AAM, these museums could work to ensure that the artwork they deaccession stays in the public trust and that deaccessioning does not become a permanent fundraising tool for the institution.²³ By providing assistance and oversight in these difficult matters, the AAMD and the AAM could prevent the closure of regionally important museums and further the larger mission of the museum industry to “serve and educate the public.”²⁴

Part I of this Note provides a background on deaccessioning in the context of American museum practices. Part II looks at recent controversies involving deaccessioning through the lens of industry self-regulation. Part III examines how some restrictions on deaccessioning can help preserve the financial well-being of museums. Part IV analyzes four museums that closed in the past five years due to financial crises and examines the impact these closures have had on the communities in which the museums were located. Part V recommends ways to strengthen deaccessioning policies within both individual museums and across the wider museum community. One recommendation involves improving the

²³ There are many critics of deaccessioning, and one of their major critiques is that works are often sold to private buyers, and thus become unavailable to the public. See Jori Finkel, *Whose Rules Are These Anyway?*, N.Y. TIMES (Dec. 24, 2008), <http://www.nytimes.com/2008/12/28/arts/design/28fink.html?pagewanted=1&r=0> (“[M]useums get tax-deductible donations of art and cash to safeguard art collections for the public. Selling off any holdings for profit would thus betray that trust, they say, not to mention rob a community of art, so no exceptions for financial hardships should be allowed.”). Removing art from the public trust is problematic not only because museums operate for the benefit of the public, but also because donations comprise the majority of museum collections. See Mary Varson Cromer, *Don’t Give Me That!: Tax Valuation of Gifts to Art Museums*, 63 WASH. & LEE L. REV. 777, 780, 795 (2006); Lauren McBrayer, *The Art of Deaccessioning: An Ethical Approach*, SK061 A.L.I.–A.B.A. 339, 344–45 (2005). Many donors expect that museums will protect and display their donated works, not sell their works to raise money for other expenses. See Cromer, *supra*; McBrayer, *supra*.

²⁴ AAMD *Code of Ethics*, *supra* note 1.

incentives for unrestricted donations to museums. A second recommendation suggests the adoption of a community-wide collections management strategy that will further the interests not only of the individual institutions but also of the larger communities they serve. Such an approach would allow museums to deaccession work in order to remain open, while still serving the underpinning goals of current professional guidelines.

I. HISTORY OF DEACCESSIONING IN AMERICAN MUSEUMS

A. The Issue of Art Ownership in American Museums

The Metropolitan Museum of Art (the “Met”) pushed the practice of deaccessioning into the public light in 1972 when it sold works donated by prominent collector Adelaide Milton de Groot.²⁵ De Groot died in 1967 and bequeathed her collection of European Old Masters and Post-Impressionists to the Met with the stipulation that the Met:

[is] not to sell any of said works of art, but to keep such of said works of art as it desires to retain for itself, and to give the balance to such one or more important Museums as said Metropolitan Museum of Art shall select, giving preference, first, to Museums situated in the Borough of Manhattan, City of New York, second to Museums situated elsewhere in the State of New York, and third, to Museums situated in the State of Connecticut.²⁶

Five years later, the Met “quietly sold” a number of works from the de Groot collection in order to replenish funds which were used to purchase Diego Velazquez’s *Portrait of Juan de Pareja*.²⁷

²⁵ Harry Weintraub, *Museums With Walls: Public Regulation of Deaccessioning and Disposal*, ART & L., Fall 1975, at 1, 1–5.

²⁶ *Id.*

²⁷ See Fincham, *supra* note 8, at 113. Diego Velazquez’s *Portrait of Juan de Pareja* cost the Met a record breaking \$5.6 million dollars. See *id.* The Met also likely used funds from deaccessioning the de Groot paintings to acquire the *Euphronios Krater*, a masterwork of Greek Antiquity that authorities later proved was illegally excavated from an Etruscan tomb. See *id.* While there is no direct link between the purchase of the *Euphronios Krater* and the sale of the de

According to the Met, de Groot's request was not legally binding²⁸ and the works were of inferior quality compared with others in the collection.²⁹ This sale drew criticism from donors, the public, and the New York State Legislature.³⁰ The New York Attorney General investigated the sale but ultimately cleared the Met of any wrongdoing.³¹ While the Met demonstrated questionable ethics in deaccessioning works against the donor's intent, its efforts were relatively customary.³² The Met used the funds from the deaccessioned work to refine and expand its collection thus enhancing its cultural influence.³³ The Met's reasons for deaccessioning and its use of the funds from the sale meet today's

Groot Collection, the fact that these transactions and the Velazquez purchase occurred during the same year, 1972, is telling. The *N.Y. Times* reported, in February 1973, that the Met raised the funds needed to buy the Krater by selling ancient coins worth \$1.2 million, but all museum curators were under pressure at the time to deaccession work because the museum "was in dire need of funds." Nicholas Gage, *How the Metropolitan Acquired "The Finest Greek Vase There Is,"* N.Y. TIMES (Feb. 19, 1973), <http://graphics8.nytimes.com/packages/pdf/arts/Metacquired.pdf>). From its initial acquisition of the *Krater*, the Met faced questions about the origins of the vase. *See id.* In 2006, the Met reached an agreement with Italian authorities in which the Met would return the *Krater* illegally excavated from Italian soil in exchange for "long-term loans of objects from Italian collections of equivalent importance and beauty." Elisabetta Povoledo, *Met to Sign Accord in Italy to Return Vase and Artifacts*, N.Y. TIMES (Feb. 21, 2006), <http://www.nytimes.com/2006/02/21/arts/design/21anti.html>.

²⁸ Weintraub, *supra* note 25, at 5.

²⁹ *See* Fincham, *supra* note 8, at 113. Today there are specific guidelines for why a museum can deaccession a work in its collection. *See* AAMD POLICY ON DEACCESSIONING, *supra* note 17, at § 1(B). Although these rules were not in place in 1972, the museum industry generally accepts "poor quality" as a reason to deaccession art. *See id.* at § 2(A). Whether these works were truly of poor quality is a matter of opinion. The collection included works by van Gogh, Renoir, Henri Rousseau and other prominent artists from that era. Fincham, *supra* note 8, at 113.

³⁰ *See* Fincham, *supra* note 8, at 113–14.

³¹ *Id.* at 114; Weintraub, *supra* note 25, at 6–7; John L. Hess, *Lefkowitz Opens Inquiry Into Art Sales by the Met*, N.Y. TIMES, Jan. 29, 1973, at 1.

³² *See* Weintraub, *supra* note 25, at 5–6.

³³ *See id.* (describing the various reasons for deaccessioning and disposal, including "opportunities to acquire finer examples of the same kind of object, an attempt to bring a greater balance to the collection, or a curatorial judgment as to the lessening of an object's aesthetic and/or historical worth").

professional standards.³⁴ Barring any wrongdoing concerning donor intent, the Met would likely avoid sanctions if a similar sale happened today.

Much of the controversy surrounding deaccessioning involves the deeper question of who owns the art in museums. In the case above, the Met operated as the owner of the work from the de Groot collection and exercised full dominion and control of the works just as a private collector might.³⁵ However, if the museum is considered a “public trust,” a view common in Europe and also supported by many in the United States,³⁶ then it is the public, not the museum, who actually “owns” the work.³⁷ The Met expressly ignored the wishes of donor Adelaide de Groot, who clearly intended her gift to remain in the public domain even if the work

³⁴ See AAMD POLICY ON DEACCESSIONING, *supra* note 17, at § 1(B) (discussing that funds received from the disposal of a deaccessioned work “may be used only for the acquisition of works in a manner consistent with the museum’s policy on the use of restricted acquisition funds”).

³⁵ In fact, many proponents of deaccessioning, as well as many museum directors, view museums as the owners of the art in their collection. While they recognize the duty of the museum to provide public access, they do not believe the public owns the art, but rather view the art as a fluid aspect of the museum’s larger mission. See Donn Zaretsky, *More on Deaccessioning*, ART L. BLOG (Dec. 17, 2008, 10:39 AM) <http://theartlawblog.blogspot.com/2008/12/more-on-deaccessioning.html> (“It seems such a phony metaphor, this notion that everything owned by every art museum actually ‘belongs’ to the public Stuff is owned by museums for the benefit of the public, but stuff isn’t owned directly by the public And maybe we should be thankful it’s not owned outright by the public, who may have sold out long ago to pay for sports stadiums or to balance city budgets or whatever.”); see also Carol Vogel, *Museums Set to Sell Art, and Some Experts Cringe*, N.Y. TIMES (Oct. 26, 2015), <http://www.nytimes.com/2005/10/26/arts/design/museums-set-to-sell-art-and-some-experts-criinge.html> (“When the collection was initially developed, Conger Goodyear, the museum’s first president, said it would have the same permanence as a river—we know what direction it is going in, but it has to be fluid. That’s how we operate.”).

³⁶ See Heather Hope Stephens, *All in a Day’s Work: How Museums May Approach Deaccessioning as a Necessary Collections Management Tool*, 22 DEPAUL J. ART, TECH. & INTELL. PROP. L. 119, 122–23 (2011); see also James Panero, *What’s a Museum?*, NEW CRITERION, Mar. 2012, at 4, 6–8 (explaining the history and role of museums in Europe).

³⁷ See Stephens, *supra* note 36, at 122–23.

was not housed at the Met.³⁸ From a public policy viewpoint, one could argue that de Groot actually bequeathed her collection to the people of New York and that the Met simply served as the protector and trustee of the work.³⁹ This perspective casts doubt on whether the public benefitted from the exchange of the Velazquez painting and the stolen Greek vase for the de Groot paintings.⁴⁰

The National Academy Museum case further complicates this picture of ownership. The Academy does not purchase artwork; instead, artists who serve as members of the Academy donated the 7,000 works of American art in its collection.⁴¹ In fact, the Academy requires members to make such donations in order to become members.⁴² Thus, the Academy would never have the opportunity to use deaccessioning funds in accordance with the current AAMD guidelines.⁴³ The Academy, whose mission is to educate and support American artists and architects,⁴⁴ is arguably more responsible to its artist-members than to the larger public. The Academy is not a public institution and does not answer to the New York Board of Regents, which oversees other cultural and educational institutions in the state, because it was founded prior to the establishment of the Board of Regents.⁴⁵ However, the current rules regarding deaccessioning treat the Academy in the same way as they would a museum that regularly uses deaccessioning to expand and maintain its collections.⁴⁶

These scenarios reveal the complicated lines of ownership that plague the management of collections for museums. If the museum

³⁸ Weintraub, *supra* note 25, at 5. De Groot's will stipulates that if the Met did not retain the work it would be given to other *museums* in the region with a focus on Manhattan and then the people of New York and Connecticut. She did give the Met permission to sell the work to private collectors. *Id.*

³⁹ *See id.*

⁴⁰ *See id.* at 1, 5.

⁴¹ Pogrebin, *Branded a Pariah*, *supra* note 2.

⁴² *Id.*

⁴³ *See id.*; AAMD POLICY ON DEACCESSIONING, *supra* note 17, at § 1(B).

⁴⁴ *See History*, *supra* note 3.

⁴⁵ *See id.*; Fincham, *supra* note 8, at 121.

⁴⁶ There is no exception in the AAMD's deaccessioning guidelines for museums that do not acquire new work through purchases. *See* AAMD POLICY ON DEACCESSIONING, *supra* note 17, at § 1(B).

owns the work, the museum board should be able to use or sell the work to further the best interests of the museum.⁴⁷ If the public owns the work, on the other hand, then the museum board should use the work in ways that prioritize the best interests of the public, which are based on the museum's broad mission of collecting and preserving works and educating and enriching the community.⁴⁸ Finally, if donors can retain some control of their gifts, as is the case with the National Academy, then they should also be able to control the use of funds generated by the subsequent sale of their gifts.⁴⁹ All of these assumptions, however, potentially run counter to the current guidelines that regulate deaccessioning. Deaccessioning guidelines should therefore change so as to fall in line with a reality that serves a variety of ownership interests.

B. History of Deaccessioning as a Legal Issue

Until the de Groot scandal at the Met, few people knew about or understood museum deaccessioning practices.⁵⁰ However, this

⁴⁷ See Fincham, *supra* note 8, at 96. This is generally the stance taken by a corporate law approach to the governing of nonprofit organizations such as museums. See *id.* at 97–98. Courts that take this approach are reluctant to overturn decisions made by the museum board unless there are signs of gross negligence or illegality on the part of board members. *Id.*

⁴⁸ See *id.* at 112. This argument stems largely from the public trust doctrine that has its roots in Environmental Law and land rights. *Id.* at 114–115. If art is part of the public trust, the same way rivers and parklands are, then preserving art for the enjoyment and benefit of future generations should be the first priority of museums. If this is the case, then is deaccessioning ever an acceptable option? See generally *id.* at 114–16 (discussing the public trust doctrine in the context of property and environmental law and how owners of property which falls under the public trust must preserve the public's right to access and use).

⁴⁹ In fact, the Academy objected to the AAMD sanctions arguing that because the Academy did not purchase any art, it should not be held to the same standards governing the use of funds from deaccessioning. See *id.* at 121.

⁵⁰ See Stephen K. Urice, *Deaccessioning: A Few Observations*, SR005 A.L.I.–A.B.A. 207, 209 (2010); see also Weintraub, *supra* note 25, at 1 (explaining that the public was largely unaware of museum deaccessioning practices until the New York Times uncovered the practices that became the de Groot scandal in 1972); see also Fincham, *supra* note 8, at 120 (footnote omitted) (“Given the controversy which often surrounds deaccessioning,

case, combined with scandals at the Brooklyn Museum of Art and the Museum of the American Indian,⁵¹ prompted the New York Attorney General to call for greater restrictions and a clearer museum policy regarding deaccessioning by New York institutions.⁵² Today, a museum's decision to deaccession work garners more public scrutiny than it would have forty years ago, meaning museums have greater incentive to uphold a high standard of ethics in their deaccessioning practices.⁵³ The governing bodies of the museum industry, the AAM and the AAMD, have strict ethical guidelines for collections management.⁵⁴ While these guidelines are not legally binding, violating the code of ethics of either organization draws significant punitive punishments.⁵⁵ The fear of bad press and the threat of sanctions by the museum

museums often attempt to make deaccessions as quickly and quietly as possible. In fact, in the early 1970s museums often attempted to avoid any publicity—a troubling trend which continues today.”).

⁵¹ See William Twaddle, *Museum Activities: Acquisition and Disposition of Art Objects*, 4 ART & L. 67, 67–69 (1979) (explaining the controversy at the Brooklyn Museum of Art in which the curator of primitive art, Michael Kan, was charged with selling American Indian artifacts from the museum's collection to a well-known dealer in exchange for items for his personal art collection); see also Weintraub, *supra* note 25, at 1 (detailing the scandals at the Met and the Museum of the American Indian).

⁵² See Chris Burgess & Rachel Shane, *Deaccessioning: A Policy Perspective*, 41 J. ARTS MGMT., L. & SOC'Y 170, 172 (2011).

⁵³ Fincham, *supra* note 8, at 114.

⁵⁴ *Id.* at 125; see also AAM *Code of Ethics*, *supra* note 17; AAMD POLICY ON DEACCESSIONING, *supra* note 17.

⁵⁵ AAMD POLICY ON DEACCESSIONING, *supra* note 17, at § VIII (explaining that members who violate these policies “may be subject to censure, suspension, and/or expulsion”); see also Press Release, Dewey Blanton, Am. All. of Museums, Statement on the Deaccessioning by the Delaware Art Museum and the Action taken by the AAM Accreditation Commission <http://www.aam-us.org/about-us/media-room/2014/delaware-accreditation-status> (last visited Sept. 18, 2015) (“On June 17, 2014, the AAM Accreditation Commission unanimously voted to remove the Delaware Art Museum's accredited status in response to the board's decision of March 26, 2014, to deaccession and to sell works from the collections for purposes other than acquisitions or direct care of collections.”).

industry largely encourage compliance with ethical guidelines by museums.⁵⁶

1. American Museums versus European Museums

Deaccessioning is rare in Europe and is subject to strict guidelines.⁵⁷ This is, in part, because the European public views its great museums as cultural repositories that seek to preserve a national identity.⁵⁸ The government owns and operates many of these museums and government leaders appoint museum boards.⁵⁹ The artwork in European museums takes on a nationalistic quality tied to memories of past heroes or conquests.⁶⁰ Selling the artwork

⁵⁶ See Pogrebin, *Sanctions Are Ending*, *supra* note 7 (“You’re completely incapable of designing exhibition programming going forward because you can’t loan and you can’t get loans, and sanctions also affect funding. Sanctions were very, very painful.”).

⁵⁷ For example, “[t]he British Museum Act of 1963 allows works to be deaccessioned from the collection only if they are duplicates of other works or are so damaged as to be ‘useless.’” Henry Lydiate, *Deaccessioning Public Collections*, ART MONTHLY, July 2011, at 348, 348. In France, rules against deaccessioning have existed since the 16th century: “any work that enters a French national museum collection has been considered legally ‘inalienable’—meaning it can only be sold or given away after a lengthy procedure to delist it.” Lee Rosenbaum, *Cultural Patrimony Alerts: Italian Pollution Risks, French Deaccession Discussions*, ARTS J. BLOG (Oct. 25, 2007, 12:00 AM), http://www.artsjournal.com/culturegrll/2007/10/cultural_patrimony_alerts_ital.html.

⁵⁸ See Panero, *supra* note 36, at 6. For example, Britain’s National Gallery was founded by the House of Commons “on behalf of the British people by their lawful representatives.” *Id.* at 6. During World War II, Churchill refused to allow the collection to leave England, signaling the importance of the collection “to the identity of the nation.” *Id.* at 5. The Louvre was founded to display the spoils of the French Revolution, exhibiting the nationalized treasures seized from the monarchy in a former Bourbon Palace just blocks away from the square where the members of the ruling aristocracy met the guillotine. *Id.* at 7.

⁵⁹ *Id.* at 7.

⁶⁰ See generally NOAH CHARNEY, *STEALING OF THE MYSTIC LAMB: THE TRUE STORY OF THE WORLD’S MOST COVETED MASTERPIECE* 79–102 (2010) (outlining how Napoleon further cemented the Louvre’s importance by harnessing the “symbolic power in the capture and display of the cultural treasures of fallen nations”).

for any reason may result in loss of government funding (the primary source of revenue) for an offending institution.⁶¹

In America, private individuals seeking to promote personal ideals generally founded and supported museums.⁶² Lack of government control and private support is part of American museum culture.⁶³ The idea of “private wealth transferred to the public trust”⁶⁴ was seen as a manifestation of American virtue based on the belief that “a virtuous people with a passion for the public good might create institutions in the public interest that could one day rival or even exceed the great museums of Europe, all without the compulsion of the government.”⁶⁵ Such reliance on private philanthropy has, however, prevented many museums from reaping the benefits of the stable funding source that museums in many European countries enjoy and has forced American museums to take a more pragmatic approach to deaccessioning than their European counterparts.⁶⁶

2. The Structure of American Museums

Most museums in the United States operate as either nonprofit corporations or as charitable trusts.⁶⁷ Although the structure has little effect on the mission and day-to-day operations, it can have

⁶¹ See Jillian Steinhauer, *Deaccessioning Crisis Has UK Museums Group Contemplating Stricter Guidelines*, HYPERALLERGIC (Dec. 29, 2014), <http://hyperallergic.com/171802/deaccessioning-crisis-has-uk-museums-group-contemplating-stricter-guidelines/> (describing how the Northampton Museum and Art Gallery in England sold an Egyptian sculpture in the summer of 2014 for £15.8 million, causing the Northampton Museum to lose its accreditation, and thus, funding from the Heritage Lottery Fund).

⁶² Panero, *supra* note 36, at 7.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 8.

⁶⁶ *Id.* at 7; see also Knight, *supra* note 18 (“It’s called the permanent collection, but permanent doesn’t mean dead. Unlike in Europe, where many art museums are government treasure houses and nothing is sold, American museum collections are living organisms. They take shape over time.”).

⁶⁷ Virginia D. Ryan, *Balancing Donor Intent with Museum Needs: Proposed Deaccession Planning Strategies for Art Bequeathed to Museums*, 101 KY. L.J. 863, 864 (2013).

significant legal implications with regards to the deaccessioning of its collection.⁶⁸ Trust law generally applies a much higher fiduciary standard on the actions of museum trustees than corporate law does on the actions of boards-of-directors of nonprofit corporations.⁶⁹ Museums that are nonprofit corporations or part of institutions of higher learning may more easily survive legal challenges to deaccessioning because of the business judgment rule, which “permits directors to use their own judgment and excuses simple errors.”⁷⁰ Thus, museum boards that operate under the laws of nonprofit corporations generally have more freedom to make decisions about the institutions’ missions and finances.⁷¹

Even if the museum is a nonprofit corporation that benefits from the flexibility of the business judgment rule, the board, like trustees of a charitable trust, must operate for the benefit of the public.⁷² Because of the special tax status the government grants to both entities, all significant decisions must be made with the public’s interest in mind.⁷³ State attorneys general are tasked with challenging questionable museum practices.⁷⁴ However, many attorneys general are reluctant to challenge the legality of a

⁶⁸ See Jennifer L. White, *When it’s OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning Decisions of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041, 1048 (1996).

⁶⁹ *Id.* (“The directors of for-profit corporations, while fulfilling duties similar to those of trustees, generally are held to a lower standard of care.”).

⁷⁰ *Id.* at 1053. For an example of the business judgment rule applied to the decisions of museum boards, see the case of the Albright-Knox Gallery in Buffalo, NY. *Dennis v. Buffalo Fine Arts Academy*, 836 N.Y.S.2d 498 (Sup. Ct. 2007).

⁷¹ See Jorja Ackers Cirigliana, *Let Them Sell Art: Why a Broader Deaccession Policy Today Could Save Museums Tomorrow*, 20 S. CAL. INTERDISC. L. J. 365, 372 (2010); White, *supra* note 68, at 1048.

⁷² White, *supra* note 68, at 1049.

⁷³ *Id.* at 1049–50.

⁷⁴ See *id.* at 1051; see also Burgess & Shane, *supra* note 52, at 178 (“State attorney generals [sic] have legal authority over nonprofits, and it is part of their responsibility to engage in the policy debates and issues affecting the nonprofit community.”).

museum's deaccessioning practice.⁷⁵ More often, other members of the community bring forth such challenges.⁷⁶ Attorneys general have primarily taken a hands-off approach, allowing the museums and professional organizations to create policies and guidelines aimed at self-regulation.⁷⁷

3. Self-Regulation in American Museum Culture

The original intent of the founders of American museums, namely that private philanthropy should support the creation of public institutions, has fostered the assumption that museums operate as a public trust no matter their form of organization.⁷⁸ This ideal places enormous pressure on museum trustees to make decisions in the best interests of the public.⁷⁹ When institutions are faced with the option of deaccessioning or closure, opponents of deaccessioning often blame the museum trustees for breaching their fiduciary duties to the public.⁸⁰ These critics argue that a museum board that breaches its fiduciary duty to the public should be shut down to allow other museums, with better management, to prosper.⁸¹ Others claim that preventing boards from using

⁷⁵ See Burgess & Shane, *supra* note 52, at 182 (“[T]he focus has been on self-regulation with little government actor influence.”); see also Fincham, *supra* note 8, at 102–03.

⁷⁶ See, e.g., *Dennis v. Buffalo Fine Arts Academy*, 836 N.Y.S.2d. 498 (Sup. Ct. 2007). For more information about the *Fisk University* case, see *infra* Part II, section A.

⁷⁷ See Burgess & Shane, *supra* note 52, at 183.

⁷⁸ See Stephens, *supra* note 36, at 122, n.7.

⁷⁹ White, *supra* note 68, at 1052 (“The trustee standard of loyalty requires the trustee to ‘administer the trust solely in the interest of the beneficiaries,’ which is the general public in the case of a charitable trust. The trustee must display complete loyalty to the interests of the public.” (footnote omitted) (quoting Restatement (Third) of Trusts § 170 (1990))).

⁸⁰ See Urice, *supra* note 50, at 213; see also White, *supra* note 68, at 1051–54 (discussing the fiduciary duties of trustees and directors).

⁸¹ Tyler Green, *Failure Is An Option*, MODERN ART NOTES, (Jan. 5, 2009, 11:06 AM), <http://blogs.artinfo.com/modernartnotes/2009/01/failure-is-an-option/>; see also Urice, *supra* note 50, at 213 (“[R]enegade museums that flout best practices and ethical norms for the application of proceeds from deaccessioning pose a considerable risk to the wider museum community.”). Art lawyer Donn Zaretsky describes this position as a “moral hazard” argument. Donn Zaretsky,

deaccessioning to fund operations serves as a “discipline device over managers.”⁸² Strict rules prevent boards from using their collections as a “safety net” to cover poor decision-making.⁸³ These attitudes have fostered a culture of self-regulation in the American museum industry and have given significant power to the organizations that regulate museum behavior.⁸⁴

The Professional Codes of Ethics that both the AAMD and the AAM have developed reflect each organization’s desire for a self-regulated industry.⁸⁵ These guidelines include provisions outlining the conditions during which deaccessioning is appropriate and the methods through which museums may allocate the profits collected from such deaccessioning.⁸⁶ Both organizations require that deaccessioning be practiced only in furtherance of the museum’s

Fresno Museum Closes its Doors Through Lack of Finances, ART L. BLOG (Jan. 6, 2010, 9:33 PM), <http://www.mcclatchydc.com/news/nation-world/national/economy/article24569599.html>.

⁸² Michael Rushton, *Economics of Deaccessioning (a Bit Theoretical)*, FOR WHAT IT’S WORTH (Mar. 12, 2014), <http://www.artsjournal.com/worth/2014/03/economics-of-deaccessioning-a-bit-theoretical/>; see also Andrej Srakar, *Deaccessioning and Agency Costs or Free Cash Flow in Manager’s Hands: A Formal Model*, 16 ECON. & BUS. REV. 225, 226 (2015) (explaining that strict limitations on the use of funds from deaccessioning can reduce agency costs).

⁸³ Rushton, *supra* note 82 (explaining how the rules on deaccessioning parallel financial corporations that carry larger debt than necessary in order to encourage better oversight by managers or risk bankruptcy).

⁸⁴ See *id.* (“By creating a culture against deaccessioning-for-operating-funds, by having strong sanctions against any museum that acts against the rules, museum trustees are able to constrain management (‘don’t think you can sell art if you run into financial troubles – it cannot be done’) and satisfy donors (‘we couldn’t sell your work for operating funds even if we wanted to, the penalties are too great’).”).

⁸⁵ See *AAM Code of Ethics*, *supra* note 17 (discussing how museums are responsible for more than compliance with laws and that they “must take affirmative steps to maintain their integrity so as to warrant public confidence”); see also *AAMD POLICY ON DEACCESSIONING*, *supra* note 17, at § A (illustrating how the AAMD encourages self-regulated industry by requiring the museums to develop clear policies).

⁸⁶ See *AAM Code of Ethics*, *supra* note 17; *AAMD POLICY ON DEACCESSIONING*, *supra* note 17, at § II.

mission.⁸⁷ Specifically, the AAM prohibits a museum from using funds from the disposal of deaccessioned work for any purpose “other than acquisition or direct care of collections,” and the AAMD permits such funds to “be used only for the acquisition of works in a manner consistent with the museum’s policy on the use of restricted acquisition funds.”⁸⁸ The AAMD policy on deaccessioning states specific criteria for deaccessioning a work, such as: (1) the quality of work is poor and cannot be used for exhibit or study; (2) the work is duplicative; (3) the work is stolen or acquired by other illegal means; (4) the work is a forgery; (5) the work is damaged beyond repair; (6) the work is inconsistent with the museum’s mission or collection goals; and (7) the museum lacks the capacity to properly care for the work.⁸⁹

The New York State Board of Regents, the government agency that charters and oversees museums in New York, amended its guidelines in 2011.⁹⁰ In addition to encompassing criteria similar to the AAMD guidelines, the New York State Board of Regents included other notable criteria, such as:⁹¹ (1) the item is a hazard to people or other items in the collection; (2) the item has failed to retain its identity; or (3) the item is being returned to the donor, or the donor’s heirs or assigns.⁹² Although many of the 2,000 museums in New York answer to the Board of Regents,⁹³ this

⁸⁷ AAM *Code of Ethics*, *supra* note 17; AAMD POLICY ON DEACCESSIONING, *supra* note 17, at § I(A).

⁸⁸ AAM *Code of Ethics*, *supra* note 17; AAMD POLICY ON DEACCESSIONING, *supra* note 17, at § I(B).

⁸⁹ AAMD POLICY ON DEACCESSIONING, *supra* note 17, at § II.

⁹⁰ Amy Goldrich, *Museum Deaccessioning in NY State*, THE ENT., ARTS & SPORTS L. BLOG (May 20, 2011, 11:16 AM), http://nysbar.com/blogs/EASL/2011/05/test_post.html.

⁹¹ The latest rules on deaccessioning by the New York Board of Regents went into effect June 8, 2011 and “apply to all museums and historic societies chartered by the Board of Regents.” *Id.*

⁹² *Id.* These rules are largely seen as broader than AAM and AAMD guidelines, but narrower than proposed legislation in the New York State Assembly. *Id.*

⁹³ See *Join and Support*, MUSEUM ASS’N OF N.Y., <http://manyonline.org/join-and-support> (last visited Sept. 18, 2015); see also Burgess & Shane, *supra* note 52, at 180 (“The New York State Board of Regents . . . charters nearly all museums statewide.”).

group represents only a small portion of the 35,000 museums located across the United States.⁹⁴ A few states have similar regulations governing the management of state-owned museums,⁹⁵ however, most of the regulations to which museums adhere are self-imposed. Some legislative proposals have made headway in recent years⁹⁶ but these have been met with stringent opposition from the museum community and professional organizations.⁹⁷ The longstanding trend of American museums to operate independently of the government continues today.⁹⁸

⁹⁴ Christopher Ingraham, *There Are More Museums in the U.S. Than There Are Starbucks and McDonalds – Combined*, WASH. POST: WONKBLOG (June 13, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/06/13/there-a-re-more-museums-in-the-us-than-there-are-starbucks-and-mcdonalds-combined/>.

⁹⁵ Louisiana and North Carolina both adopted guidelines for deaccessioning at state operated museums. See LA. STAT. ANN. § 25:345 (2014) (regulating deaccessioning at the Louisiana State Museum); LA. STAT. ANN. § 25:1101 (2014) (regulating deaccessioning practices at state university art museums); N.C. GEN. STAT. ANN. § 140-5.14 (West 2015) (outlining the duties and powers of the Board of Trustees of the North Carolina Museum of Art, including policy regarding deaccessioning work).

⁹⁶ The Brodsky Bill in New York is one such example of a legislative response to deaccessioning that was met with a cool response from the museum community. See Robin Pogrebin, *Museums and Lawmakers Mull Sales of Art*, N.Y. TIMES (Jan. 14, 2010) [hereinafter Pogrebin, *Museums and Lawmakers*], <http://www.nytimes.com/2010/01/15/arts/design/15deaccession.html>. The Brodsky Bill would have created strict rules for deaccessioning and prohibited museums from selling work to cover operating costs. See Burgess & Shane, *supra* note 52, at 180.

⁹⁷ See Burgess & Shane, *supra* note 52, at 180 (“The announcement set off a firestorm of media attention as well as condemnation by professional associations and museum professionals.”); Robin Pogrebin, *Institutions Try to Slow Bill to Curb Sales of Art*, N.Y. TIMES (June 23, 2009) [hereinafter Pogrebin, *Institutions Try to Slow Bill*], <http://www.nytimes.com/2009/06/23/arts/design/23deaccess.html>. The legislators involved with the Brodsky Bill withdrew the bill in August 2010 in the face of sharp criticism from the arts community, including prominent museums like the Met and the Whitney as well as the Art Law Committee of the New York Bar. See Cirigliana, *supra* note 71, at 380–82; Fincham, *supra* note 8, at 105.

⁹⁸ See Carolina A. Miranda, *Museums Behaving Badly: Are Sanctions Too Little, Too Late?*, L.A. TIMES (June 21, 2014), <http://www.latimes.com/entertainment/arts/miranda/la-et-cam-museums-behaving-20140619-column.html> (“Nonprofits such as museums are already governed by many laws, at both

II. RECENT CONTROVERSIES INVOLVING DEACCESSIONING

This section examines three recent controversies involving deaccessioning which highlight the legal complications involved with deaccessioning and illustrate how the industry enforces professional guidelines through self-regulation. The first example, involving a body of work that Georgia O’Keeffe donated to Fisk University, shows how courts approach deaccessioning controversies through the application of *cy pres*.⁹⁹ The second example looks at the Detroit Institute of Art’s battle to avoid deaccessioning in the face of the city of Detroit’s bankruptcy and the public outcry that supported the use of the collection to fund pensions.¹⁰⁰ The final example examines industry self-regulation through a series of recent sales by the Delaware Art Museum that have drawn sanctions from the AAMD and AAM.¹⁰¹ All of these examples reveal an institution’s underlying mission and the larger goal of bringing art to the public. In each case, the institution suffered some form of financial crisis and proponents regarded deaccessioning as a possible solution. The different outcomes are

the state and federal level. Where an issue as complex and specific as deaccessioning is concerned, our view is that the professional standards of the art museum field are best established and reinforced by those working in the field.”).

⁹⁹ See *In re Fisk Univ.*, 392 S.W.3d 582, 585 (Tenn. Ct. App. 2011). The *cy pres* doctrine allows a court to “‘reform[] a written instrument with a gift to charity as closely to the donor’s intention as possible, so that the gift does not fail.’ Further, ‘[c]ourts use *cy pres* especially in construing charitable gifts when the donor’s original charitable purpose cannot be fulfilled.’” Ryan, *supra* note 67, at 872–73.

¹⁰⁰ See Randy Kennedy, ‘Grand Bargain’ Saves the Detroit Institute of Arts, N.Y. TIMES (Nov. 7, 2014) [hereinafter Kennedy, *Grand Bargain*], <http://www.nytimes.com/2014/11/08/arts/design/grand-bargain-saves-the-detroit-institute-of-arts.html>; Nathan Bomey, *Judge Rhodes Questions Orr: Why Not Monetize the Art?*, DETROIT FREE PRESS (Oct. 3, 2014, 6:07 PM), <http://www.freep.com/story/news/local/michigan/detroit/2014/10/03/detroit-bankruptcy-dia/16638995/>.

¹⁰¹ See Margie Fishman, “Outlier” Delaware Art Museum Shunned by Art Groups, WILMINGTON (DEL.) NEWS J. (June 19, 2014, 2:57 PM) [hereinafter Fishman, *Outlier*], <http://www.usatoday.com/story/news/nation/2014/06/19/delaware-art-museum-accreditation/10888703/>.

distinct and lead to continued questions about the problem of ownership and control of the works in a museum.

A. Fisk University's O'Keeffe Collection

In the late 1940's, prominent American artist Georgia O'Keeffe donated 101 works of art to Fisk University, a historically black college in Nashville, Tennessee.¹⁰² Most of the art was the property of her late husband, noted photographer Alfred Stieglitz.¹⁰³ O'Keeffe wanted to make a social statement by donating such a large gift to an African-American institution,¹⁰⁴ and therefore imposed two restrictions on her donation: (1) "the university [could] not sell the artwork" and (2) "Fisk [must] display the works as one collection in [its] gallery."¹⁰⁵ In 2005, however, the university faced financial difficulties forcing it to cut programs, reduce faculty salaries, and mortgage some of its real estate.¹⁰⁶ In order to strengthen the endowment and increase funding to the math, biology, and business departments, the university proposed to sell two of the works from the collection, O'Keeffe's *Radiator Building—Night, New York* and a Marsden Hartley painting.¹⁰⁷ Knowing that the proposed sale would violate O'Keeffe's restrictions, Fisk University filed an *ex parte* declaratory judgment before the works entered auction.¹⁰⁸ The collection was valued to be worth upwards of \$60 million at the

¹⁰² Ryan, *supra* note 67, at 871; Christian H. Brill, *Art or Assets: University Museums and the Future of Deaccessioning*, 28 T.M. COOLEY L. REV. 62, 66 (2011).

¹⁰³ Ryan, *supra* note 67, at 871; Georgia O'Keeffe Found. (Museum) v. Fisk Univ., 312 S.W.3d 1, 5 (Tenn. Ct. App. 2009).

¹⁰⁴ Brill, *supra* note 102, at 71.

¹⁰⁵ Ryan, *supra* note 67, at 872.

¹⁰⁶ *In re Fisk Univ.*, 392 S.W.3d 582, 588 (Tenn. Ct. App. 2011); see Ryan, *supra* note 67, at 873 (discussing how the \$131,000.00 annual cost to maintain and display the collection "was not compatible with Fisk's financial situation").

¹⁰⁷ Fincham, *supra* note 8, at 103; Erik Schelzig, *Fisk University Hopes to Sell O'Keeffe Art*, WASH. POST (Oct. 24, 2007), <http://www.washingtonpost.com/wpdyn/content/article/2007/10/23/AR2007102302757.html>.

¹⁰⁸ *Georgia O'Keeffe Found. (Museum)*, 312 S.W.3d at 7; see also Brill, *supra* note 102, at 70–71.

time.¹⁰⁹ The Georgia O’Keeffe Foundation intervened in the suit as a representative of O’Keeffe’s estate, and the Tennessee Attorney General also interceded as a representative of the public interest.¹¹⁰ The O’Keeffe Foundation argued that the sale of the two works violated O’Keeffe’s original intent and, in 2007, the court agreed.¹¹¹

Faced with the closure of the Fisk University Art Gallery, Fisk entered into an agreement with the Crystal Bridges Museum of American Art in Bentonville, Arkansas, to share the collection for a \$30 million dollar interest.¹¹² The O’Keeffe Museum, which had taken over control of the estate from the O’Keeffe Foundation, challenged this sale.¹¹³ Finding itself in court again, Fisk argued that this arrangement should be permitted under the *cy pres* doctrine, which affords institutions some flexibility to interpret and use charitable gifts when compliance with the donor’s original intent is no longer practical.¹¹⁴ In July 2009, the Tennessee Court of Appeals found that, based on O’Keeffe’s correspondence with the University, her intent “was to make the collection available to the public in *Nashville* and *the South* for the benefit of those who did not have access to comparable collections to promote the general study of art.”¹¹⁵ The court permitted the agreement between Crystal Bridges and Fisk University to move forward and

¹⁰⁹ Fincham, *supra* note 8, at 103.

¹¹⁰ *Georgia O’Keeffe Found. (Museum)*, 312 S.W.3d at 7; Fincham, *supra* note 8, at 103. The state attorney general often is involved in litigation regarding changes to a charitable trust. *Id.* at 101–03. As representative of the people of the state, the attorney general has standing to challenge decisions made by the museum trustees that are out of line with the public interest. *Id.*

¹¹¹ See *Georgia O’Keeffe Found. (Museum)*, 312 S.W.3d at 8; see also Brill, *supra* note 102, at 70–71 (discussing the case and the trial courts granting of the Museum’s motion for summary judgment in June 2007).

¹¹² *In re Fisk Univ.*, 392 S.W.3d 582, 584 (Tenn. Ct. App. 2011).

¹¹³ See *Georgia O’Keeffe Found. (Museum)*, 312 S.W.3d at 8–9 (discussing how the O’Keeffe Foundation assigned its interest in the civil action to the O’Keeffe Museum).

¹¹⁴ *In re Fisk Univ.*, 392 S.W.3d at 584–85; see Ryan, *supra* note 67, at 872–73.

¹¹⁵ Brill, *supra* note 102, at 72–73.

removed the trial court's limitations on how the university could use the funds.¹¹⁶

The agreement between Fisk University and Crystal Bridges is a creative solution that preserves an exceptional body of work and prevents the closure of not only an art museum but also a culturally important educational institution. Critics of this decision argue that it weakens museums' relationships with their donors by inciting donors' fears that their intents will not be realized.¹¹⁷ However, the agreement actually honored O'Keeffe's intent and arguably expanded her purpose even further.¹¹⁸ Instead of the collection being sold to private collectors or sitting in storage for years,¹¹⁹ a

¹¹⁶ *In re Fisk Univ.*, 392 S.W.3d at 586. The trial court ordered Fisk University to use \$20 million to establish an endowment that would support the management of the collection, and the remaining \$10 million was available at the University's discretion. *Id.* In the final deal negotiated between Fisk University and Crystal Bridges, Alice Walton pledged an additional \$1 million to improve the University's gallery and the University pledged \$3.9 million towards an endowment for future maintenance of the collection. *Fisk University Sells 50 Percent Stake in Stieglitz Collection to Crystal Bridges Museum*, PHILANTHROPY NEWS DIG. (Aug. 7, 2012), <http://philanthropynewsdigest.org/news/fisk-university-sells-50-percent-stake-in-stieglitz-collection-to-crystal-bridges-museum>.

¹¹⁷ See Ryan, *supra* note 67, at 873–74.

¹¹⁸ O'Keeffe's original charitable intent "was to make the Collection available to the public in *Nashville* and *the South* for the benefit of those who did not have access to comparable collections." *Georgia O'Keeffe Found. (Museum)*, 312 S.W.3d at 17. In its inaugural year, attendance at the Crystal Bridges Museum, in Bentonville, Arkansas, far exceeded expectations, with more than 650,000 visitors in 2012. *Crystal Bridges to Welcome its One-Millionth Visitor*, CRYSTAL BRIDGES MUSEUM OF AM. ART (Aug. 12, 2013), <http://crystalbridges.org/press-releases/crystal-bridges-to-welcome-its-one-millionth-visitor/>. Fisk University, on the other hand, estimates that less than 10,000 people per year visit its art collections. Alan L. Feld, *Who are the Beneficiaries of Fisk University's Stieglitz Collection?*, 91 B.U. L. REV. 873, 892 n.161 (2011). Displaying the collection at both Fisk University and Crystal Bridges accomplishes O'Keeffe's goal and will likely serve a much larger audience than display at either location alone.

¹¹⁹ See *In re Fisk Univ.*, No. 05-2994-III, 2008 WL 5361639 (Tenn. Ch. Ct. March 6, 2008) (discussing whether the storage and non-display of the Collection since November 2005 constituted a breach of O'Keeffe's original gift conditions). The high cost of maintaining the artworks for public display would have likely resulted in the closing of the university gallery. Ryan, *supra* note 67,

much wider audience will enjoy the works. The partnership with Crystal Bridges expands the Collection's geographical reach while continuing O'Keeffe's desire to support Fisk University.¹²⁰ In many ways, the outcome was a victory for both sides.

B. The Detroit Institute of Art

In the case of the Detroit Institute of Art, the pressure to deaccession work came from an outside source—a bankruptcy filing by the city of Detroit. The Detroit Museum of Art was founded in 1885 using donations from wealthy members of Detroit society, including James E. and George H. Scripps.¹²¹ James Scripps, who in 1889 donated his sizable art collection to the museum, said, “[f]or several years it has been a favorite idea of mine that Detroit might be made the art center of the West, just as Cincinnati is the acknowledged musical center, and just as Florence is the art and Milan the music center of Italy.”¹²²

In 1919, as the population of Detroit boomed after the success of the automobile industry, the Museum's directors ceded control to the municipal government of Detroit and rebranded the Museum as the Detroit Institute of Art (DIA).¹²³ The astonishing industrial success of Detroit in the early 20th Century did not last, however, and the fate of the DIA has been precariously linked to local politics for the past 95 years.¹²⁴ Despite its turbulent history, and

at 871. Even had an arrangement been made with another Nashville institution to display the Steiglitz Collection, O'Keeffe's original intent to display the work for the benefit of the students at Fisk would have been disrupted. See Brill, *supra* note 102, at 73–74.

¹²⁰ Given O'Keeffe's desire to contribute to the art education of minorities in the South, this compromise is likely the closest Fisk University could come to honoring O'Keeffe's original intent. See Brill, *supra* note 102, at 73.

¹²¹ Dan Austin, *Detroit Museum of Art*, HISTORIC DETROIT, <http://www.historicdetroit.org/building/detroit-museum-of-art/> (last visited Sept. 18, 2015).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See generally Mark Stryker, *DIA in Peril: A look at the Museum's Long, Tangled Relationship with Detroit Politics and Finances*, DETROIT FREE PRESS (Sept. 8, 2013, 12:05 AM), <http://archive.freep.com/interactive/article/20130908/ENT05/130905007/DIA-in-peril-museum-s-relationship-Detroit-politics->

largely without the help of the city—which ended funding for new acquisitions in 1955,¹²⁵ the DIA’s collection grew to be ranked among the top six art collections in the United States.¹²⁶

In 2013, the City of Detroit filed for Chapter 9 Bankruptcy after amassing more than \$18 billion in debt.¹²⁷ At the time, the City’s creditors pushed the DIA to auction one of the City’s most valuable assets—the \$4.6 billion art collection.¹²⁸ A group of large foundations with ties to Detroit met to work out a compromise that would help retirees keep their pensions and prevent the DIA from deaccessioning its world-class collection.¹²⁹ On November 7, 2014, Judge Steven Rhodes of the Federal Bankruptcy Court for the Eastern District of Michigan accepted the conditions of this “grand bargain” and the City of Detroit emerged from bankruptcy with its art collection intact.¹³⁰

In this case, the push to deaccession came from an outside source, the city’s creditors, rather than the director and trustees of the museum.¹³¹ In fact, during the period of the bankruptcy, the DIA waged a difficult battle to prevent any deaccessioning by poring over archives for evidence of donor intent that would result in protracted litigation, fighting requests to have the entire

finances (discussing the extensive history of the Detroit Institute of Arts’ relationship with local political and financial turmoil).

¹²⁵ Kennedy, *Grand Bargain*, *supra* note 100.

¹²⁶ *A Brief History*, DETROIT INST. ART, <http://www.dia.org/about/history.aspx> (last visited Sept. 18, 2015).

¹²⁷ *In re City of Detroit*, Mich., 504 B.R. 97, 113, 128 (Bankr. E.D. Mich. 2013) (“The City estimates its debt to be \$18,000,000,000. This consists of \$11,900,000,000 in unsecured debt and \$6,400,000,000 in secured debt. It has more than 100,000 creditors.”).

¹²⁸ Jordan Weissmann, *Detroit Exits Bankruptcy, Thanks to Its Art Museum*, SLATE: MONEYBOX (Nov. 7, 2014, 5:15 PM), http://www.slate.com/blogs/moneybox/2014/11/07/detroit_exits_bankruptcy_city_s_pensions_saved_in_part_thanks_to_detroit.html.

¹²⁹ Randy Kennedy et al., *Foundations Aims to Save Pensions in Detroit Crisis*, N.Y. TIMES (Jan. 13, 2014) [hereinafter Kennedy, *Foundations*], <http://www.nytimes.com/2014/01/14/us/300-million-pledged-to-save-detroits-art-collection.html>.

¹³⁰ Kennedy, *Grand Bargain*, *supra* note 100.

¹³¹ See *In re City of Detroit*, Mich., No. 13-53846, slip op. at 1 (Bankr. E.D. Mich. Jan. 22, 2014).

collection appraised by auction houses, and working with foundations and donors to raise over \$800 million.¹³² This case provides a strong argument for why strict rules against deaccessioning are beneficial. If the foundations that made up the grand bargain had not stepped in, the city may have been forced to sell the artwork to raise money for pensions—public outcry might have demanded it.¹³³ The existence of such strict deaccessioning guidelines prevented the museum from using its collection as capital, allowing the DIA to delay deaccessioning at least through this budget crisis.

Other institutions struggling for survival in the face of financial crisis may not receive the “grand bargain” that saved Detroit.¹³⁴ As

¹³² Kennedy, *Grand Bargain*, *supra* note 100; *see also In re City of Detroit*, slip op. at 1 (denying motion to direct debtor to cooperate with a committee of creditors and appraisers to assess the art collection of the Detroit Institute of Arts).

¹³³ Weissmann, *supra* note 128 (“In April 2013, the city’s governor-appointed emergency manager, Kevyn Orr, informed the DIA that it would have to contribute at least \$500 million to paying off Detroit’s debts, even if meant selling off paintings at auction.”). The public at large was not entirely sympathetic to the plight of the DIA, despite the fact that the DIA operated almost entirely without the support of the city and had been doing so for years. *See Kennedy, Grand Bargain, supra* note 100 (discussing how the city demonstrated a lack of support when it stopped providing funds to the museum for acquisitions in 1955).

¹³⁴ The grand bargain that saved Detroit and the \$30 million bailout received by the Los Angeles Museum of Contemporary Art in 2008 from billionaire Eli Broad are likely the exceptions. *See Finkel, supra* note 23. With approximately twenty-six museums closing in 2009, it is evident that the level of financial assistance demonstrated in Detroit and Los Angeles is rare. Judith Dobrzynski, *RIP: Museum Closures In 2009 — Not a Huge Toll, Actually — UPDATED*, REAL CLEAR ARTS (Dec. 17, 2009, 4:26 PM), http://www.artsjournal.com/realcleararts/2009/12/museum_closures.html; *see also* Allison Meier, *Resting in Pieces: The Scattered Fate of Closed Museums*, HYPERALLERGIC (Sept. 20, 2013), <http://hyperallergic.com/84447/resting-in-pieces-the-scattered-fate-of-closed-museums/> (discussing the aftermath of museum closures due to shifts in interests and dwindling funding); Sandy English, *Economic Crisis Devastates Museums Across the US*, WORLD SOCIALIST WEB SITE (Sept. 2009), <https://www.wsws.org/en/articles/2009/09/muse-s12.html> (discussing the impact of the economic crisis on art and museums in the United States). For more detailed examples, see Section C,

a part of this deal, the DIA will no longer be an entity of city government.¹³⁵ Rather, it will return to the control of a private trust, cutting its ties to the financial fate of the City of Detroit.¹³⁶ This means that the DIA must rely more heavily on private donors, many of whom have already pledged significant capital to assist the troubled institution.¹³⁷ For its own part in the grand bargain, the DIA must contribute almost \$100 million to the City of Detroit.¹³⁸ This significant debt could potentially raise the issue of deaccessioning again if the museum fails to raise the funds. However, having fought stringently against deaccessioning, the DIA likely could not attempt to sell art to pay its debt without upsetting many constituents. These supporters not only include the foundations that saved it in the grand bargain, but also the pensioners of Detroit who took losses to protect the collection, and the larger public who was led to believe that art should never be used to pay the bills.¹³⁹

C. The Delaware Art Museum

The Delaware Art Museum (“DMA”) became the latest recipient of AAMD sanctions in June 2014, after it sold a Pre-Raphaelite painting by William Holman Hunt—*Isabella and the Pot of Basil*—for \$4.25 million in order to pay a construction bond.¹⁴⁰ Earlier that year, the museum “announced it would sell as many as four works to raise \$30 million to repay construction debt [from its 2005 renovation] . . . and replenish the endowment.”¹⁴¹

infra, on the struggles of the Delaware Art Museum and Part VI, *infra*, discussing four museums that closed after 2009.

¹³⁵ Kennedy, *Grand Bargain*, *supra* note 100.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See, e.g., *Judge Rejects Detroit Pensioners’ Bankruptcy Appeal*, THE DETROIT NEWS (Oct. 2, 2015, 6:51 PM), <http://www.detroitnews.com/story/news/local/detroit-city/2015/10/02/detroit-pensioners-lose-appeal-bankruptcy-cuts/73212550/> (discussing how some Detroit retiree groups, angry about reductions to their pensions, are still challenging the Detroit bankruptcy plan, including the Grand Bargain, in court).

¹⁴⁰ Fishman, *Outlier*, *supra* note 101.

¹⁴¹ *Id.*

Unlike Fisk University or the DIA, the DMA did not have a creative solution to avoid deaccessioning. Its decision to deaccession work in order to pay debts and regain solid financial footing “violated one of the most basic and important of AAMD’s principles” which is that “works can only be deaccessioned to provide funds to acquire . . . art and enhance a museum’s collection.”¹⁴²

In a June 18, 2014 statement, the AAMD admonished the DMA for not vigorously pursuing other alternatives to deaccession:

With this sale, the museum is treating works from its collection as disposable assets, rather than irreplaceable cultural heritage that it holds in trust for people now and in the future. It is also sending a clear signal to its audiences that private support is unnecessary, since it can always sell additional items from its collection to cover its costs.¹⁴³

However, museum CEO Mike Miller was optimistic: “We take comfort in knowing that the museum will remain open and continue to serve our community.”¹⁴⁴

The DMA’s decision to deaccession work followed a stream of museum closures after the financial crisis of 2008.¹⁴⁵ In choosing deaccessioning over closure, the museum drew the ire of the professional community,¹⁴⁶ though it still receives support from local sources of funding.¹⁴⁷ Following the announcement of AAMD sanctions, Delaware Division of the Arts Director Paul Weagraff said in a statement that, “what [is] most important in our funding consideration is that the organization . . . continues to

¹⁴² Press Release, Ass’n of Art Museum Dirs., Association of Art Museum Directors Sanctions Delaware Art Museum (June 18, 2014) [hereinafter AAMD Press Release], <https://aamd.org/for-the-media/press-release/association-of-art-museum-directors-sanctions-delaware-art-museum>.

¹⁴³ *Id.*

¹⁴⁴ Fishman, *Outlier*, *supra* note 101.

¹⁴⁵ Cirigliana, *supra* note 71, at 368, 369 & n.34.

¹⁴⁶ See AAMD Press Release, *supra* note 142.

¹⁴⁷ Fishman, *Outlier*, *supra* note 101.

provide quality arts programming that serves Delawareans and visitors alike.”¹⁴⁸

In September 2014, the DMA announced that it had successfully retired its \$19.8 million bond debt from the proceeds of the sale of the Hunt painting and an Alexander Calder sculpture titled *Black Crescent*, as well as from its investment portfolio funds.¹⁴⁹ In June 2015, the museum announced that, following the sale of two additional works, Winslow Homer’s *Milking Time* and Andrew Wyeth’s *Arthur Cleveland*, it had completed its planned sale of artwork and successfully avoided closure.¹⁵⁰ Despite the AAMD sanctions, the museum has maintained a busy exhibition schedule fueled largely by the museum’s own extensive collection of 12,500 works and the support of the local artistic community.¹⁵¹ The DMA has also expanded community access in the year following sanctions by adding extended hours on Thursdays and Sundays during which admission is free.¹⁵²

III. THE PERILS OF DEACCESSIONING

For museums like the DMA, the choice between deaccessioning to fulfill financial obligations and permanently

¹⁴⁸ *Id.*

¹⁴⁹ Press Release, Delaware Museum of Art, Delaware Art Museum Retires Debt (Sept. 24, 2015), <http://www.delart.org/press-room/press-statement-delaware-art-museum-retires-debt/>.

¹⁵⁰ Press Release, Delaware Museum of Art, Sale of Art Complete (June 29, 2015), <http://www.delart.org/press-room/press-statement-2/>.

¹⁵¹ See Margie Fishman, *Delaware Art Museum Pushes Ahead After Selling Works*, DELAWAREONLINE (July 15, 2015, 1:11 PM) [hereinafter Fishman, *Delaware Art Museum Pushes*], <http://www.delawareonline.com/story/life/2015/07/03/selling-art-delaware-art-museum-pushes-ahead/29669631/>. Specific examples of exhibits from the collection include exhibitions on John Sloan, art nouveau illustrations, and Wilmington artists of the 1970s-80s. See *Past Exhibitions*, DEL. ART MUSEUM, <http://www.delart.org/exhibitions/past-exhibitions/> (last visited Sept. 18, 2015).

¹⁵² Press Release, Delaware Museum of Art, Delaware Art Museum Extends its Hours: Free Thursday Evenings and Free Sundays (Jan. 8, 2015), <http://www.delart.org/press-room/delaware-art-museum-extends-its-hours-in-2015-free-thursday-evenings-and-free-sundays/>.

closing the doors seems simple: of course “sell art!”¹⁵³ However, the larger implications of this decision reveal the reasons why many museums choose to uphold the AAMD guidelines rather than follow the path of the DMA, even if avoiding deaccessioning results in the museum’s closure.¹⁵⁴

A. Capitalization of Museum Collections

In 1993, the Federal Accounting Standards Board (“FASB”) issued regulations that allowed museums to avoid capitalizing their collections for the purpose of financial reporting: “[c]ontributions of works of art, historical treasures, and similar assets need not be recognized as revenues and capitalized if the donated items are added to collections held for public exhibition, education, or research in furtherance of public service rather than financial gain.”¹⁵⁵ Forcing a museum to monetize the collection and record its value would cause several problems.¹⁵⁶ For example, some museums may not be able to reliably calculate valuations of their works.¹⁵⁷ Even if museums can make an accurate accounting of a work’s extrinsic value at a given time, values may change due to forces like changes in taste and trends.¹⁵⁸ Further, the intrinsic value of a work to a museum, such as its educational value or source of regional pride, is difficult to measure but also very important.¹⁵⁹

Monetizing a collection advances the idea that the collection is comprised of fungible assets whose sale will support a museum’s

¹⁵³ Judith H. Dobrzynski, Opinion, *The Art of the Deal*, N.Y. TIMES (Jan. 1, 2010), <http://www.nytimes.com/2010/01/02/opinion/02dobrzynski.html>.

¹⁵⁴ See *infra*, Part IV.

¹⁵⁵ *Summary of Statement No. 116*, FIN. ACCT. STANDARDS BOARD, <http://www.fasb.org/summary/stsum116.shtml> (last visited Sept. 18, 2015); see also AAMD POLICY ON DEACCESSIONING, *supra* note 17, at 3 (“Member museums should not capitalize or collateralize collections or recognize as revenue the value of donated works.”).

¹⁵⁶ See Urice, *supra* note 50, at 213.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; see also Weintraub, *supra* note 25, at 7.

¹⁵⁹ See Weintraub, *supra* note 25, at 1 (discussing the educational and scholarly functions of a work as important toward gratifying the interested members of the public).

operation.¹⁶⁰ For struggling museums, monetizing the collection would likely distort the financial well-being of the institution, giving an illusion of wealth when none exists.¹⁶¹ It could also hurt fundraising efforts by distorting the true needs of the museum.¹⁶² For these reasons, museums should not be required to capitalize their collections. However, every time a museum uses its art as capital, it tests the exceptions regarding the valuation of collections that the FASB has carved for the museum industry by weakening the premise that the art is different than other forms of income.¹⁶³ It is quite possible that the FASB regulations protected the DIA from having to capitalize its collection in the face of creditor demands.¹⁶⁴ If the FASB were to change the rules, museums facing creditors or even bankruptcy in the future might not be able to protect their collections in the same manner as the DIA.

B. Restricted Gifts and Donor Trust

Another consequence of deaccessioning is the erosion of trust from donors who fund and contribute to a museum's collection. This issue arose in the *Fisk University* case, and it has regularly surfaced in controversial decisions to deaccession work.¹⁶⁵ Donations that have legally binding conditions for their use are called "restricted gifts."¹⁶⁶ Generally, once a museum has accepted a gift with a legal restriction, it cannot waive the restriction without the donor's consent.¹⁶⁷ After the death of the donor, museums can

¹⁶⁰ Urice, *supra* note 50, at 213.

¹⁶¹ *Id.*

¹⁶² *See id.*

¹⁶³ *See id.*

¹⁶⁴ *See* Report or Affidavit of Bill Schuette, Esq., *In re* City of Detroit, Mich., 2014 WL 1388375, (Bankr. E.D. Mich. Jan. 22, 2014), (No. 13-53846), 2013 WL 9638129.

¹⁶⁵ *See supra* Part I (discussing the Metropolitan Museum of Art's controversial decision to deaccession a collection donated by Adelaide De Groot); *see supra* Part II (explaining how Fisk University's decision to sell two works donated by Georgia O'Keeffe resulted in a protracted legal battle between the university and trustees of the O'Keeffe estate).

¹⁶⁶ Marie C. Malaro, *Legal Problems of Museum Administration*, C379 A.L.I.-A.B.A. 355, 357 (1989).

¹⁶⁷ *Id.* at 365.

apply to the courts for relief from the restriction using either the *cy pres* doctrine or equitable deviation.¹⁶⁸ Both of these actions allow the museum to modify the gift as long as the modifications conform to the donor's intentions.¹⁶⁹

In the *Fisk University* case, the application of the *cy pres* doctrine allowed the university to modify a restricted gift by dividing the rights to the O'Keeffe collection with another museum.¹⁷⁰ This allowed Fisk University to remove the collection from storage¹⁷¹ while raising funds to establish an endowment to protect the collection's future.¹⁷² Despite violating the original wishes of the donor, this decision will likely bring long-term benefits to the collection by making the works available to a new generation.¹⁷³ However, museums take a great risk when they dispose of work against the original intent of the donor. It communicates to other donors that the museum does not value donor wishes and that, when faced with a difficult choice, the museum may no longer protect donated work.¹⁷⁴ Even if a restriction does not have the binding effect of law, the museum may lose in the court of public opinion since backlash against a museum can be just as detrimental as legal sanctions, as was the case in the Met's de Groot controversy.¹⁷⁵

One possible solution is to limit gifts that have restrictions or require a museum to hold a work in perpetuity. Some museums, such as the Museum of Modern Art, already refuse to accept

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See *In re Fisk Univ.*, 392 S.W.3d 582, 592–93 (Tenn. Ct. App. 2011).

¹⁷¹ See Brill, *supra* note 102, at 71–73, 85; see also *supra* Part II.A (discussing the intent of donor Georgia O'Keeffe).

¹⁷² *Fisk University Sells 50 Percent Stake*, *supra* note 116.

¹⁷³ Had this agreement not been reached, Fisk University may have closed the art gallery and the works in the O'Keeffe collection might have remained in storage. See Ryan, *supra* note 67, at 873 (stating that continued maintenance of the collection was impracticable); see also Brill, *supra* note 102, at 85 (“In the case of *Fisk*, the paintings at issue are currently in storage.”). Moreover, the agreement brings the collection to new audiences who patronize the Crystal Bridges Museum. See *Crystal Bridges to Welcome its One-Millionth Visitor*, *supra* note 118.

¹⁷⁴ McBrayer, *supra* note 23, at 344–45.

¹⁷⁵ *Id.*

restricted gifts.¹⁷⁶ However, smaller museums may not have the luxury of being so selective with their donors. In these situations, the donor and the museum are best served through clear communication that resolves conflicts in advance and articulates the shared goals of serving the public interest.¹⁷⁷ Unfortunately, many museums do not have well-articulated policies for dealing with accessions of restricted gifts.¹⁷⁸ Solid accessioning policies can help avoid subsequent challenges to deaccessioning.¹⁷⁹

IV. THE TENUOUS LIFE OF AN AMERICAN MUSEUM

While AAMD deaccessioning sanctions can be severe, they may be preferable to museum closure. The following section will look at the fate of four museums that have closed since 2009 to determine the practical consequences of upholding the AAM and AAMD codes of ethics.

A. *The Gulf Coast Museum of Art*

In 2009, the Gulf Coast Museum of Art in Largo, Florida closed its doors after 73 years of service to Pinellas County.¹⁸⁰ The museum, located in county-owned Pinewood Cultural Park, hoped for a bailout that the county could not afford.¹⁸¹ The Museum eventually decided to give its collection, which focused on contemporary art and fine crafts by Florida artists, to St. Petersburg

¹⁷⁶ THE MUSEUM OF MODERN ART, COLLECTIONS MANAGEMENT POLICY 2 (2010), https://www.moma.org/momaorg/shared/pdfs/docs/explore/CollectionsMgmtPolicyMoMA_Oct10.pdf.

¹⁷⁷ Malaro, *supra* note 166, at 357.

¹⁷⁸ *Id. passim*.

¹⁷⁹ Stephens, *supra* note 36, at 124 (“The best deaccession policy is a good accession policy.” (quoting NAT’L PARK SERV., MUSEUM HANDBOOK PART II § 6.1 (2000), <http://www.nps.gov/museum/publications/MHII/mh2ch6.pdf>)).

¹⁸⁰ Mike Brassfield, *Gulf Coast Museum of Art Closes; Collection to Be Dispersed*, TAMPA BAY TIMES (Jan 26, 2009, 8:03 PM), <http://www.tampabay.com/news/humaninterest/gulf-coast-museum-of-art-closes-collection-to-be-dispersed/970743>.

¹⁸¹ *Id.*

College (“SPC”).¹⁸² The collection was initially housed at the Florida International Museum at SPC in downtown St. Petersburg, but it too closed in December 2010.¹⁸³ Despite this closure, the College continues to store and exhibit the work at other campus locations across the County, including the Leepa-Rattner Museum of Art in Tarpon Springs.¹⁸⁴ Carl Kuttler, president of SPC, told the Tampa Bay Times, “[i]n any case, it will be exhibited and cared for. We never take a project on that we can’t complete.”¹⁸⁵

In the short term, the closing of the Gulf Coast Museum of Art has had relatively small impact on the community’s access to the art in the collection. A local institution was able to absorb the collection in its entirety and ensure its maintenance and exhibition.¹⁸⁶ This is one of the best outcomes for a community that experiences the loss of a museum—it loses the building, *not* the art.

B. *The Bead Museum*

The Bead Museum in Glendale, Arizona, with a collection of over 100,000 beads from all over the world, closed its doors in 2011.¹⁸⁷ The museum had no endowment fund and was operating at a \$7,000 deficit each month.¹⁸⁸ The Bead Museum donated its entire collection, including its extensive library, to the Mingei

¹⁸² Lennie Bennett, *St. Petersburg College to Acquire, Exhibit All Art From Largo Gulf Coast Museum*, TAMPA BAY TIMES (Feb. 17, 2009, 9:14 PM), [hereinafter Bennett, *St. Petersburg College to Acquire*] <http://www.tampabay.com/features/visualarts/st-petersburg-college-to-acquire-exhibit-all-art-from-largo-gulf-coast/976835>.

¹⁸³ Lennie Bennett, *Florida International Museum Shutting Down After 54 Exhibitions in Downtown St. Petersburg*, TAMPA BAY TIMES (Nov. 3, 2010, 9:56 AM), <http://www.tampabay.com/features/visualarts/florida-international-museum-shutting-after-54-exhibitions-in-downtown-st/1131814>.

¹⁸⁴ *Id.*

¹⁸⁵ Bennett, *St Petersburg College to Acquire*, *supra* note 182.

¹⁸⁶ *Id.*

¹⁸⁷ Cecilia Chan, *Glendale Bead Museum to Close: Repository Unable to Weather Economy, Secure Funding*, ARIZ. REPUBLIC (Feb. 25, 2011, 12:00 AM), <http://www.azcentral.com/community/glendale/articles/2011/02/25/20110225glendale-bead-museum-closing.html>.

¹⁸⁸ *Id.*

International Museum in San Diego, California, enabling it to keep the collection intact.¹⁸⁹ Bead Museum Executive Director Kelly Norton announced the transfer of the collection, and said, “[I]ike the Bead Museum, Mingei International showcases useful, handmade objects of timeless beauty that are satisfying to the human spirit. Our missions are symbiotic, and we are now confident that the Bead Museum collection will live on.”¹⁹⁰

Niche museums like the Bead Museum often struggle to attract a wide enough audience.¹⁹¹ The museum built itself around a single collection that had steadily grown for 25 years despite having no endowment to ensure its protection and maintenance.¹⁹² Finding an institution willing to accept the collection intact was a best-case-scenario for such a collection. Sadly, the receiving institution is approximately a five and one-half hour drive from Glendale,¹⁹³ so the local community lost a resource. However, due to Glendale’s proximity to Phoenix, its residents have other cultural resources at their disposal.¹⁹⁴

C. Claremont Museum of Art

The Claremont Museum of Art closed its doors in 2009 after only three years of existence.¹⁹⁵ Unlike the other museums

¹⁸⁹ *Closure of an Arizona Jewel*, ARIZ. COMMISSION ON THE ARTS (Mar. 11, 2011), <http://azarts.gov/news/closure-of-an-arizona-jewel-5/>.

¹⁹⁰ *Id.*

¹⁹¹ Chan, *supra* note 187.

¹⁹² *Id.*

¹⁹³ Driving Directions from Glendale, AZ to San Diego, CA, GOOGLE MAPS, <http://maps.google.com> (follow “Directions” hyperlink; then search starting point field for “Glendale, AZ” and search destination field for “San Diego, CA”).

¹⁹⁴ Other cultural institutions in the area include the Phoenix Museum of Art, the Heard Museum, which showcases the art and history of the Southwest, and the Desert Botanical Garden, which regularly incorporates art into its exhibits. *See generally Arts & Culture in Phoenix*, VISIT PHOENIX, <http://www.visitphoenix.com/things-to-do/arts-and-culture/index.aspx> (last visited Sept. 18, 2015) (discussing the museums, art galleries, and theaters in the Greater Phoenix area).

¹⁹⁵ David Ng, *Claremont Museum of Art to Close Doors on Dec. 27*, L.A. TIMES: CULTURE MONSTER (Dec. 22, 2009, 3:46 PM),

discussed in this section, the Claremont did not cease to exist, but rather shuttered its physical space and placed its collection of about 100 works in storage.¹⁹⁶ In recognizing the opportunity to “fill an important role in providing art education to Claremont youth,” the Museum continues to operate educational programs in the Claremont schools.¹⁹⁷ In addition, the Museum curates “pop-up” exhibits throughout the community—a model the museum’s director refers to as a “museum without walls.”¹⁹⁸ This Museum, without its physical location, is finding new ways to conduct audience outreach and is expanding art offerings in the area.¹⁹⁹ Instead of selling work or donating it to a larger institution, the Claremont Museum of Art reinvented itself. This creative solution avoids the deaccessioning controversy without resulting in the closure of the museum. The Claremont Museum survived because it did not attach sentimental value to its location, nor did it maintain any large debts.²⁰⁰ For museums whose debts are

<http://latimesblogs.latimes.com/culturemonster/2009/12/claremont-museum-to-close-doors-on-dec-27.html>.

¹⁹⁶ See *id.*; Associated Press, *Claremont Museum of Art Closes Due to Economy*, SAN DIEGO UNION TRIB., (Dec. 28, 2009, 8:15 AM), <http://www.sandiegouniontribune.com/news/2009/dec/28/claremont-museum-of-art-closes-due-to-economy/>.

¹⁹⁷ See *Education Programs*, CLAREMONT MUSEUM ART, <http://claremontmuseum.org/education-programs/> (last visited Sept. 18, 2015) (discussing Claremont Museum’s three education programs: Project ARTstART, ARTpix, and Family Art Activities).

¹⁹⁸ See *About*, CLAREMONT MUSEUM ART, <http://claremontmuseum.org/about/> (last visited Sept. 18, 2015); Ng, *supra* note 195.

¹⁹⁹ In addition to running several education programs in local schools, the Museum currently co-hosts regular exhibits with other arts organizations including the Rancho Santa Ana Botanic Garden, the Padua Hills Art Fiesta, the American Museum of Ceramic Art, and local artists’ studios. See *Events*, CLAREMONT MUSEUM ART, <http://claremontmuseum.org/events/> (last visited Sept. 18, 2015).

²⁰⁰ See Ng, *supra* note 195. When the Claremont museum closed in 2009, it had about \$70,000 in debt and had raised about \$28,500 earmarked for debt payment. *Id.* This amount is low compared to the almost \$20 million debt of the DMA. See *Press Release*, *supra* note 149.

connected to construction projects, however, abandoning the building may not be an option.²⁰¹

D. Fresno Metropolitan Museum of Art

The Fresno Metropolitan Museum of Art and Science (the “Fresno Met”) closure and deaccession is the most disturbing outcome in this study of recent museum closings. When the Fresno Met closed in January of 2010 it had over \$4 million in debt and was operating at a loss of almost \$100,000 per month.²⁰² In an effort to close with “dignity and grace,” the museum assigned assets to a local lawyer and art collector who helped to prepare the collection for auction.²⁰³ The auctions raised over \$2 million, and, with the exception of the City of Fresno, the museum was able to pay off its creditors.²⁰⁴ The liquidation of the collection resulted in a single lawsuit: Ansel Adams’ son sued to prevent the sale of his father’s prints.²⁰⁵ The Adams family eventually settled with the museum, agreeing to exchange the photos in the Fresno Met’s collection with others of similar value.²⁰⁶

²⁰¹ See *supra* Part II.C (discussing the Delaware Art Museum). But see Timothy Rub, *A Dereliction of Duty*, WALL ST. J. (June 11, 2014, 5:11 P.M.), <http://www.wsj.com/articles/art-for-sale-a-dereliction-of-duty-1402521067> (discussing how the American Folk Art Museum, which sold its notable building to MoMA to pay construction bonds, was able to continue to operate out of a smaller location and keep its collection intact).

²⁰² Robin Pogrebin, *The Death of a Museum: Fresno Met’s Closing Could Hold a Lesson for Detroit*, N.Y. TIMES (July 23, 2013) [hereinafter Pogrebin, *The Death of a Museum*], <http://www.nytimes.com/2013/07/24/arts/design/fresno-mets-closing-could-hold-a-lesson-for-detroit.html>.

²⁰³ *Id.*

²⁰⁴ See Donald Munro, *The Debacle Winds Down*, FRESNOBEEHIVE.COM (Jan. 7, 2011), <http://fresnobeehive.com/?s=the+debacle+winds+down> (last visited Sept 18, 2015); see also, Pogrebin, *The Death of a Museum*, *supra* note 202 (“Sotheby’s handled the sale of the most valuable art works, which brought about \$2 million; other auction houses sold the rest. The unsecured creditors received 80 cents on the dollar.”).

²⁰⁵ Pogrebin, *The Death of a Museum*, *supra* note 202; Robert Kahn, *Ansel Adams’ Son Sues Museum for Prints*, COURTHOUSE NEWS SERV. (Mar. 5, 2010, 10:57 AM), <http://www.courthousenews.com/2010/03/05/25298.htm>.

²⁰⁶ Pogrebin, *Death of a Museum*, *supra* note 202.

Although some of the Fresno Met's exhibits did make their way to other museums, much of the collection fell into private hands.²⁰⁷ The City of Fresno backed a \$15 million dollar loan to help renovate the Fresno Met and ended up the owner of an empty building.²⁰⁸ Fresno, which regularly ranks near the bottom in livability surveys of American cities,²⁰⁹ also lost an important cultural institution.²¹⁰ Additionally, the Fresno Art Museum, the sole remaining art museum in the region,²¹¹ suffered when the Fresno Met shut its doors.²¹² Donations dropped sharply and the operating budget fell from \$1.2 million per year in 2009 to \$750,000 in 2015.²¹³

These four studies demonstrate that art museums are incredibly diverse and serve a wide variety of interests. Sometimes, financial crises can provide museums with opportunities to become innovators, finding new and creative methods to serve their

²⁰⁷ Mark S. Gold, *What Happens When a Museum Closes?* NEW ENGLAND MUSEUMS NOW, May–June 2013, at 25, 25–27.

²⁰⁸ Pogrebin, *Death of a Museum*, *supra* note 202.

²⁰⁹ Reed Johnson, *The Fresno Metropolitan Museum of Art & Science Closes its Doors*, L.A. TIMES (Jan. 12, 2010), <http://articles.latimes.com/print/2010/jan/12/entertainment/la-et-fresno-museum12-2010jan12>.

²¹⁰ *See id.*; Munro, *supra* note 204; Pogrebin, *The Death of a Museum*, *supra* note 202; *see also Entertainment and Events*, CITY OF FRESNO, <http://www.fresno.gov/DiscoverFresno/EntertainmentandEvents/default.htm> (last visited Sept. 18, 2015) (demonstrating a lack of similar cultural institutions in Fresno).

²¹¹ *See Entertainment and Events*, CITY OF FRESNO, <http://www.fresno.gov/DiscoverFresno/EntertainmentandEvents/default.htm> (last visited Sept. 18, 2015).

²¹² Donald Munro, *Cuts Leave Museum Facing Challenges*, FRESNO BEE (Jan. 17, 2010), <http://www.fresnobee.com/entertainment/performing-arts/donald-munro/article19502823.html>; *see also Shelly Banjo, Hit by the Downturn, Museums Seek Bailouts*, WALL ST. J. (May 20, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703691804575254321564633624>.

²¹³ Donald Munro, *Fresno Art Museum Names New Executive Director*, FRESNO BEE (Feb. 13, 2015), <http://www.fresnobee.com/entertainment/performing-arts/article19535079.html>.

communities.²¹⁴ Museums should not overlook the importance of creative problem solving when considering whether to deaccession work; deaccessioning should not become an easy solution to financial difficulties. However, if deaccessioning is the best way to save a museum, the museum industry should provide a pathway to make that decision less controversial and more beneficial to the industry as a whole. Providing more flexible guidance to struggling museums and encouraging deaccessioned work to remain in the public trust could also help the larger community when a museum closes. The best scenario allows the main core of a museum's collection to remain in the public trust of the city/region, as was the case for the Gulf Coast Museum of Art. By providing a framework that helps museums deaccession work locally or regionally, the AAMD and AAM could facilitate agreements between regional institutions when one museum is forced to close and essentially deaccession all of its work. If there had been a way to keep more of the Fresno Met's collection in the Central Valley region of California, it may have decreased public hostility regarding the closure and preserved cultural resources for the public.

V. RETHINKING DEACCESSIONING IN THE AFTERMATH OF THE GREAT RECESSION

Good governance is the best way to ensure a museum fulfills its public duties and the following section examines ways that museums can better manage acquisitions so that deaccessioning, when it does occur, is less controversial. Changes in the tax code and direct funding can also allow the federal government to actively support museums in financial trouble. However, if governance fails and financial crisis follows, there needs to be a mechanism to assist museums that are on the brink of closure in order to preserve the work for the good of the public. Looking at museums not as silos of ownership over their individual collections but rather as part of a community-wide collection of public work

²¹⁴ See, e.g., *supra* Part IV (discussing the Claremont Museum of Art's rebirth after closing its doors in 2009); Ng, *supra* note 195 ("We want to remain alive as kind of a virtual museum, or if you like, a museum without walls.").

could prevent closures and ensure that deaccessioned work remains in the public trust.

A. Adopting Clear Accessioning Policies

An important aspect of deaccessioning is the adoption of strong accessioning policies.²¹⁵ Accessioning is the formal process by which art enters into the museum's collection.²¹⁶ There are two parts to accessioning: (1) receiving objects and (2) cataloguing objects.²¹⁷ Museums often struggle handling restricted gifts.²¹⁸ While large institutions can use their prestige as leverage against restrictions on gifts or reject donations that are too restrictive, smaller institutions may struggle to attract donors if they impose strict limitations on donations.²¹⁹

One method by which the tax system could help smaller institutions overcome this inconsistency would be to impose rules that reduce deductions for gifts with restrictions.²²⁰ Currently, donors can deduct the fair market value of the gift at the time of the donation.²²¹ However, a work with numerous restrictions may not be worth the fair market value to the museum if it includes costly storage or continuous display.²²² If the fair market valuation was decreased when limitations are imposed on a gift, it could

²¹⁵ See McBrayer, *supra* note 23.

²¹⁶ Stephens, *supra* note 36, at 125.

²¹⁷ *Id.*

²¹⁸ See *supra* Part II (discussing the problems that Fisk University faced when it attempted to sell donated work). For further examples of controversies involving restricted gifts, see Heinrich Schweizer, *Settlor's Intent vs. Trustee's Will: The Barnes Foundation Case*, 29 COLUM. J. L. & ARTS 63 (2005) (discussing the litigation related to the relocation of the Barnes Collection in Philadelphia); Andrew W. Eklund, *Every Rose Has Its Thorn: A New Approach to Deaccessioning*, 6 HASTINGS BUS. L. J. 467 (2010) (discussing the many challenges to Brandeis University's proposal to close its Rose Gallery of Art and sell the collection).

²¹⁹ Cromer, *supra* note 23, at 802–03 (suggesting that some museum trustees may be compelled to accept a donor's restrictions if a gift is particularly attractive, despite its potential burdens on the institution).

²²⁰ *Id.* at 781.

²²¹ *Id.*

²²² *Id.* at 780–81.

encourage donors to reevaluate their restrictions.²²³ At the very least, it would encourage the museum and the donor to have a clear conversation about both the donor's intent and the collection management policy of museum.²²⁴

Accession policies also impact deaccessioning policy because museums spend tremendous amounts of their budget on the preservation, storage, and conservation of their collections.²²⁵ These costs often diminish endowment funds, strain relationships with donors, and lead to situations, like the one at Fisk University, where the museum is no longer able to keep the work on display or provide high-quality storage.²²⁶

B. Changing the Tax Code to Promote Museum Donations

One obvious policy solution to help financially unstable museums is to increase public funding so that they would not be forced to make difficult choices regarding deaccessioning.²²⁷ The National Endowment for the Arts ("NEA") helped fund over 3,000 visual arts exhibits and handed out over \$145 million in grant funding in 2014, a \$7.6 million increase from 2013.²²⁸ However, most grants are competitive²²⁹ and, according to data collected by the AAM, only a small percentage of museums receive any federal

²²³ *Id.* at 781.

²²⁴ *Id.* at 804.

²²⁵ Cirigliana, *supra* note 71, at 386 ("Collections in storage require storage space, storage material, security, staff, and documentation Some objects require conservation and all objects require preservation. Museums spend about 60 percent of their budget on stored collections.").

²²⁶ *See* Ryan, *supra* note 67, at 873.

²²⁷ Securing public funding presents its own difficulties, as evidenced by the Gulf Coast Museum of Art for which public funding never materialized. *See supra* Part IV. Museums attempting to secure public funds may face opposition from legislators, who encourage the museum to sell work rather than provide additional public funding. *See, e.g.,* Pogrebin, *Museums and Lawmakers*, *supra* note 96 (explaining that when directors of the Suffolk County Vanderbilt Museum asked the county for money, the legislature's response was "[s]ell the mummy . . . [i]t's not like you're going to go to jail").

²²⁸ NATIONAL ENDOWMENT FOR THE ARTS, 2014 ANNUAL REPORT (2014), <http://arts.gov/about/annual-reports>.

²²⁹ *See id.*

government funding at all.²³⁰ Relying on federal funding is not a realistic option for any museum, especially those facing financial stress.

Congress could also use the Tax Code to indirectly support museums by repealing the portion of the 2006 Pension Protection Act (“PPA”) that effectively ended fractional giving.²³¹ Critics of fractional giving who helped pass the 2006 PPA argued that it produced an unfair tax break for wealthy taxpayers and was plagued with abuses.²³² However, fractional giving helped museums attract donors²³³ and build relationships with wealthy art collectors.²³⁴ It also encouraged donations to museums in a way that allowed the museum to prepare for more difficult pieces over a period of years.²³⁵ Since these laws have changed, many museums have seen a sharp decline in donated work.²³⁶ Reopening the fractional giving tax break would provide an indirect subsidy to

²³⁰ *Museum Facts*, AM. ALLIANCE OF MUSEUMS, <http://www.aam-us.org/about-museums/museum-facts> (last visited Sept. 18, 2015). The longer-term trend also reflects a decrease in government funding of museums. See AM. ALLIANCE OF MUSEUMS, *AMERICA’S MUSEUMS REFLECT SLOW ECONOMIC RECOVERY IN 2012*, at 2 (April 2013), <http://www.aam-us.org/docs/research/acme-2013-final.pdf?sfvrsn=2>.

²³¹ See Alicia C. Beyer, *Gone but Not Forgotten: The End of Fractional Giving and the Search for Alternatives*, 36 COLUM. J. L. & ARTS 459 *passim* (2013); Jeremy Kahn, *Museums Fear Tax Law Changes on Some Donations*, N.Y. TIMES (Sept. 13, 2006) [hereinafter Kahn, *Museums Fear Tax Law Changes*], http://www.nytimes.com/2006/09/13/arts/design/13gift.html?pagewanted=all&_r=0; Sean Conley, *Paint a New Picture: The Artist-Museum Partnership Act and the opening of New Markets for Charitable Giving*, 20 DEPAUL J. OF ART, TECH. & INTELL. PROP. L. 89, 95–96 (2009).

²³² See Kahn, *Museums Fear Tax Law Changes*, *supra* note 231 (“It isn’t right for a donor to get a big tax break for supposedly donating a painting that hangs in his living room, not the museum, all year. A painting in a private living room doesn’t benefit the public.”).

²³³ *Id.* (“About 80 percent of new acquisitions at American museums now come through donations.”); Beyer, *supra* note 231, at 459.

²³⁴ Kahn, *Museums Fear Tax Law Changes*, *supra* note 231.

²³⁵ Conley, *supra* note 231, at 95.

²³⁶ Beyer, *supra* note 231, at 468; see also 110 CONG. REC. 27,554 (2007) (statement of Sen. Udall) (explaining how museums in his state lost significant donations after the passage of the 2006 PPA).

museums and may be a more politically feasible source of public funding than direct federal grants.²³⁷

C. Deaccessioning for a Dynamic Future

The question of whether museums should ever deaccession work is no longer a controversial topic among American museum administrators. There is widespread agreement that deaccessioning should be allowed as a reliable tool in a sound collections management policy.²³⁸ Today, the real controversy revolves around how to spend the funds generated through deaccessioning.²³⁹ Limiting deaccessioning funds to the purchase of more art does not always serve the best needs of the institution or the public. Allowing deaccessioning funds to be used for broader purposes in limited situations could strengthen the museum community by introducing work to new audiences, bolstering the financial security of regional museums, and strengthening protections on work that is already in the collection.²⁴⁰ This is not a proposal for the complete abandonment of rules guiding museums' deaccessioning practices. The Detroit bankruptcy case shows that strict guidelines can serve as a protection for keeping art separate from other museum assets, which, in turn, protects the work from potential creditors.²⁴¹

²³⁷ In the past nine years, several efforts were made to amend the tax code and restore the benefits of fractional giving. See Beyer, *supra* note 231, at 471–77. These efforts include the Promotion of Artistic Giving Act of 2007, sponsored by Tom Udall of New Mexico, Senate Bill 1605 (2009), sponsored by Charles Schumer of New York, and Senate Bill 931 (2011), also sponsored by Schumer. See *id.* Despite lobbying campaigns by various high-profile museums and the AAMD, all efforts failed to pass. *Id.*

²³⁸ See AAM *Code of Ethics*, *supra* note 17; see also AAMD POLICY ON DEACCESSIONING, *supra* note 17.

²³⁹ See Knight, *supra* note 18.

²⁴⁰ This was largely the result of the Fisk University partnership with Crystal Bridges. See discussion *supra* Part III. See also Pogrebin, *A Chastised Museum*, *supra* note 11 (discussing how the National Academy Museum was able to rebound and reopen with a newly renovated complex, despite its sanctions).

²⁴¹ See *supra* Part II.B (discussing the DIA's successful avoidance of deaccessioning during the Detroit bankruptcy filing).

Rather, the following section examines policies that would encourage the work to stay in the public trust while simultaneously forcing struggling institutions to secure better financing and institute stronger governance, thus mitigating many of the potential risks associated with broader deaccessioning policies.

1. The “Kimmelman” and “Ellis” Rules

Michael Kimmelman of the New York Times proposed a rule following the deaccession of Asher B. Durand’s *Kindred Spirits* by the New York Public Library in 2005.²⁴² Alice Walton, an art enthusiast and Wal-Mart heiress, purchased *Kindred Spirits*, an important regional work, and moved it from the northeast to Arkansas.²⁴³ Kimmelman proposed that the museum community establish a system by which local museums would have the first opportunity to purchase deaccessioned work.²⁴⁴ According to Kimmelman, “whenever art is sold by a public institution—which, receiving tax breaks, can be expected to make some sacrifice toward the public good—local museums should be given a reasonable period of time to match the sale price.”²⁴⁵

Adrian Ellis, founder of AEA Consulting, offered an expanded version of this rule. His consequentialist perspective focuses on the need to provide public access to art:

[Y]ou can deaccession and spend the money on whatever you want—a new roof, working capital, education programs, or even a boffo night out with your chums on the board—provided that you ensure that the institution or individual to whom you sell commits in some binding form to equal or higher

²⁴² See Donn Zaretsky, *The Morning After*, ART L. BLOG (Dec. 22, 2006, 11:31 PM) [hereinafter Zaretsky, *The Morning After*], <http://theartlawblog.blogspot.com/2006/12/morning-after.html>.

²⁴³ Michael Kimmelman, *A City’s Heart Misses A Beat*, N.Y. TIMES (May 16, 2005), <http://www.nytimes.com/2005/05/16/arts/design/16kimm.html>.

²⁴⁴ See *id.*

²⁴⁵ Zaretsky, *The Morning After*, *supra* note 242.

conservational standards and equal or higher public access.²⁴⁶

Ellis believes that all art owners, whether a nonprofit museum, a private collector, or a corporation, have the responsibility to conserve art works and ensure the widest possible public access.²⁴⁷ If the selling institution could use the funds from these sales for any purpose, as long as the art sold remains accessible to the public, then the goal of keeping the work in the public trust would be accomplished and the struggling museum would have funds that it could apply to its most pressing needs.

While expanding the use of deaccessioning proceeds to operating costs opens institutions to significant risk, these dangers could be minimized through clear policies that limit the availability of this option. One major concern about using the work from the collection to fund operations and repay debt is that it turns the collection into a fungible asset that can be too easily accessed as the need arises.²⁴⁸ Critics contend that allowing this practice will leave museums without art.²⁴⁹ Furthermore, if selling artwork is an option, museum management may lack incentive to conduct fundraising.²⁵⁰ However, these concerns could be alleviated by requiring museums who want to use funds from deaccessioning for wider purposes to open their books to an oversight committee, preferably under theegis of the AAMD or AAM as these

²⁴⁶ Donn Zaretsky, *The Current Strictures Around Deaccessioning Do Not Encourage Either Intelligent, Vigilant Conservation or Wider Public Access*, ART L. BLOG (Jan. 5, 2009, 12:06 PM) [hereinafter Zaretsky, *Current Strictures*], <http://theartlawblog.blogspot.com/2009/01/current-strictures-around.html>.

²⁴⁷ *Id.*

²⁴⁸ See Pogrebin, *Sanctions Are Ending*, *supra* note 7.

²⁴⁹ See McBrayer, *supra* note 23, at 348; see also Donn Zaretsky, “*We’re a History Museum, Not an Art Museum. It’s a Picture of a Fish*,” ART L. BLOG (Dec. 6, 2010, 11:33 PM), <http://theartlawblog.blogspot.com/2010/12/were-history-museum-not-art-museum-its.html> (“[I]t ‘rapidly’ becomes a slippery slope: ‘if we go down this road, we end up paying our gas, electric and water bills – classic operations costs – with deaccessioning proceeds.’”).

²⁵⁰ See Rushton, *supra* note 82 (“[P]rohibition on sales of art acts as a useful constraint on management. It lets the director know that should she fail to prudently manage the organization’s finance, she cannot rely on the museum’s collection as a safety net.”).

organizations have the best resources and institutional knowledge to provide support. This kind of oversight committee could be charged with not only helping financially struggling museums become more stable, but also with working to keep art in the public trust when deaccessioning does occur.

2. Moving Towards Community-wide Collections Management

The solutions posed by Kimmelman and Ellis require a broader view of the “public trust” than current museum practice allows.²⁵¹ Without donor restrictions, the transfer of a work from one museum to another should be able to satisfy the ethical standards, even if the funds are used for purposes other than collections management. Much like current loan practices between museums, the proceeds from which are largely unrestricted, selling work within the museum community could be part of a community-wide collections management plan.²⁵² Such a plan would view all of the work in a larger community as part of one public collection, rather than treating the work as the “asset” of any individual museum.²⁵³

²⁵¹ See Zaretsky, *The Morning After*, *supra* note 242 (discussing Kimmelman’s proposal regarding the sale of art by a public institution); Zaretsky, *Current Strictures*, *supra* note 246 (discussing Ellis’ alteration to the rule, which allows funds from deaccession to be used on whatever you want, provided that you ensure that the purchaser commits to conservational standards and public access).

²⁵² While the market for artwork deaccessioned in this manner may eventually need to include some private collectors and corporations to remain solvent, this type of solution could likely be limited to museums in the beginning. Allowing for a community collections practice would permit wealthier museums to take advantage of a relatively closed market to the benefit of the smaller museums that need the quick injection of revenue. See Zaretsky, *Current Strictures*, *supra* note 246 (“It may be that such a circumscribed market would in effect be so illiquid as to be of little help. But I suspect this is not the case—that there are still enough cash rich institutions (or boards) around to make it reasonably liquid.”).

²⁵³ Derek Fincham proposes a solution in which the art held in museums is treated similarly to natural resources and waterways under the public trust doctrine. Fincham, *supra* note 8, at 27. According to this doctrine, once a work enters the “public trust” it could not be sold to a private buyer. *Id.* In order to be removed from the public trust, the sale would undergo scrutiny similar to that of

This does not mean individual museums would lose control over their work, or no longer have the responsibility of protecting and exhibiting the work in their collection. Rather, when it comes to deaccessioning work from one museum, other institutions in the community would have a stake in how that transaction occurs, including the option to purchase the work before it goes to auction.²⁵⁴

One challenge to a community-wide collections management plan would be defining the *community*.²⁵⁵ Kimmelman suggested that priority should be given to local museums.²⁵⁶ This, perhaps, overlooks the need for public access to artwork in areas of the country less culturally wealthy than New York. Derek Fincham has suggested a public trust model that would require an understanding of the work's historical, aesthetic and educational importance before allowing the work's sale.²⁵⁷ Museums could also ask these questions before transferring work to museums in other regions. Under a community-based collections management approach, the Delaware Art Museum's *Isabella and the Pot of Basil*, which Christie's sold to a private collector in London,²⁵⁸ may have at least remained in an American museum and perhaps even one on the East Coast.

Given the dangers of relaxing limitations on deaccessioning,²⁵⁹ an added layer of oversight would ensure that museums that need to deaccession work to raise capital are doing so responsibly and as a last resort. This oversight could take the form of many of the

the United Kingdom's export conditions, which examines the cultural and regional significance of a work for sale. *Id.* at 33–35. Fincham suggests that this type of regulation should come from state or federal legislation, or from the courts. *Id.* at 33. This Note argues that the museum industry would be better served by immediate reforms enacted by the private organizations that currently regulate the museum practices.

²⁵⁴ See Zaretsky, *The Morning After*, *supra* note 242.

²⁵⁵ See Fincham, *supra* note 8, at 126–27 (“Experts may disagree about whether the work belonged in New York, but at the very least a panel of experts should be given the opportunity to take up the question . . .”).

²⁵⁶ Zaretsky, *The Morning After*, *supra* note 242.

²⁵⁷ Fincham, *supra* note 8, at 125.

²⁵⁸ Fishman, *Outlier*, *supra* note 101.

²⁵⁹ See Donn Zaretsky, *It's Really Not So Slippery*, ART L. BLOG (Dec. 8, 2010, 8:59 PM), <http://theartlawblog.blogspot.com/search?q=deaccessioning>.

requirements that museums must show after AAMD and AAM sanctions and/or loss of accreditation, such as providing evidence of financial solubility and a commitment to avoiding using artwork as income in the future. Struggling museums could then be acting with the support of their professional organizations rather than their condemnation. Expanding deaccessioning with the help, rather than hindrance, of the AAMD and AAM may provide a more pragmatic solution to the problems that many museums are currently facing. For example, if the members of the Academy who voted to sell member work to strengthen the financial future of their organization could have done so with the help of the AAMD, rather than sanctions, those valuable works might still be available to the public. Furthermore, in a scenario like the Fresno Met, where closure seemed the only option, the facilitation of the deaccessioning of the entire collection by a committee of trusted members of the museum community could have helped to ensure that more of the work remained in the region.

CONCLUSION

Deaccessioning is a complex problem that raises questions of ownership, museum governance, and public trust. The current system does not allow enough flexibility to address the variety of needs that museums face when dealing with financial crisis and uncertainty. It is clear that deaccessioning is not always a realistic solution to the financial problems that plague museums; sometimes, closing the physical doors can in fact create a fresh opportunity to reach target audiences. But when selling the art is the obvious answer, finding ways to mitigate the harms while saving the museum is clearly the best policy for protecting the public trust. If these answers could be facilitated by the professional organizations that currently regulate the museum community, rather than through legislation or court opinions, it would strengthen the American museum industry and continue the long tradition of self-regulation that makes American museums so unique.

Moving towards a community-based collections model, in which collections from many museums are viewed as one larger public entity, could open new opportunities for communication and

partnership between institutions. These partnerships, assisted by the AAMD and the AAM, could ensure that when a museum deaccessions work that the work remains accessible to the public. Supporting a community-wide approach would also allow more interaction between museums and professional organizations, potentially allowing for earlier intervention when an institution faces financial difficulties, before there is a possibility of closure. This, along with greater oversight of museum governance and some changes to the federal tax code, could ensure that more museums stay healthy and more people have access to great cultural resources. Because museums cannot serve and educate the public if they are closed, preventing closure should be a priority of the professional organizations that regulate them.