

To Have and To Hold ... Or Not? Deaccessioning Policies, Practices, and the Question of the Public's Interest

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Abstract: Shockwaves echoed through the media and the arts community when the Delaware Art Museum chose to deaccession pieces from its collection and when the public learned that the Detroit Institute of Arts might be forced to do the same. Further concern arose when financial troubles compelled the Corcoran Gallery of Art to merge with the National Gallery of Art and George Washington University. An examination of the climate and legal battles surrounding these events shows how these institutions chose to cope with the financial adversity that put their collections at risk and illustrates the precarious position of works in a museum's collection when that museum experiences financial distress. This article explores the ethical, judicial, and legislative frameworks currently governing deaccessioning and ultimately advocates for new legislative solutions to guide the deaccession process in order to provide the opportunity to maintain these works in the public sphere.

INTRODUCTION

The museum as an American institution is at a crossroads. A large number of major US art institutions are facing financial difficulties, caused by the lasting effects of the 2008 stock market crash and subsequent economic decline. The

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ACKNOWLEDGMENTS: This article was written in conjunction with the author's studies at Stanford Law School. The author would like to thank her parents, family, and friends for their love and tremendous support. Special thanks to Adine Varah and Stacey Jessiman de Nanteuil for their guidance, advice, and tireless encouragement during the writing of this article and to the museum professionals who participated in interviews on this topic. The author is eternally grateful to the late Professor John Henry Merryman for sharing the world of art and cultural property law through his mentorship and his Stolen Art course and for encouraging her to explore the topic of deaccessioning.

economic downturn continues to negatively affect museum endowments and limit new donations and funding from private individuals, corporations, and government entities. In such a climate, the option to deaccession¹ pieces from a museum's collection as part of a 'corporate restructuring' in order to enable the institution's survival is becoming increasingly attractive from an economic point of view. Museums hold tremendous financial resources in the form of their collections. From a purely corporate and economic standpoint, the first step to save a floundering institution is to trim the non-essential elements in order to sustain the principal of the corporation. In the case of art institutions and museums, such practice amounts to trimming pieces from the collection or deaccessioning them.

Recent events in the United States demonstrate that twenty-first-century museums must be prepared to confront the legality and ethical complexities of deaccessioning. Over the past few years, three arts institutions captivated the public's attention as they grappled with this concept. The City of Detroit's financial difficulties, and the accompanying possibility of mass deaccessions from the Detroit Institute of Arts (DIA) to provide funds to sustain the city, was followed by an outpouring of public indignation at the mere suggestion of such a sale. Similar censure followed the Delaware Art Museum's (DeAM) deaccession of paintings to raise funds for operating costs. The Corcoran Gallery of Art (Corcoran) in Washington, DC, faced its own set of economic challenges, with its trustees initially considering deaccessioning works from the collection to raise funds and hopefully reestablish a sustainable path for the institution. Ultimately, however, the trustees approved a complex set of arrangements with the National Gallery of Art and George Washington University, thereby avoiding the criticism that would follow deaccessioning masterpieces for purely monetary reasons.

But what about next time? What will happen the next time a US arts institution finds itself in a hopeless financial situation? Will it simply sell off its masterpieces one by one? These three case studies, chosen both because they are recent examples of arts institutions that considered or faced deaccessioning in times of extreme financial distress and because these situations fascinated the public as the institutions grappled with the complexities of deaccessioning, illuminate the unregulated nature of current deaccessioning practices. Legally enforceable governance rarely exists in this area. Most often, nothing but public sentiment and guidelines from various overarching institutions stand in the way of a museum selling pieces from its collection to confront economic hardships and thereby possibly eliminating public access to such pieces. Museum art collections in the United States are thus in a precarious and arguably unprotected state today. When the next "Corcoran" situation arises, what will prevent the trustees of that institution from parceling out and selling off irreplaceable parts of the collection, thus likely removing the works from public view?

¹For the purposes of this article, the term "deaccession[ing, ed]" will be taken to mean both the act of deaccessioning, or formally removing an accessioned piece from a museum's permanent collection, and the subsequent sale of the piece.

Considering this troubling question and the serious possibility that the economic challenges facing museums may worsen, this article explores the question of whether binding rules should be enacted to guard against the maximum commoditization of an institution's collection, if it would occur at the expense of the public's access to that collection. This question is examined in the context of information gathered through interviews and discussions with five prominent museum professionals. Evaluation of the ethical and judicial mechanisms currently in place to govern deaccessioning highlights the risk of privatization that museum collections face, as these mechanisms do not always effectively control the practice. Legislation already governs aspects of the art field and the "fringe" of deaccession practices. This article argues that new legislation will be the most effective way to govern the US deaccessioning process.

This article also calls for consideration of the principles to be codified. Current deaccessioning practice guidelines, perpetuated by many museum professionals and professional organizations, generally focus on the deaccessioning institution. These guidelines govern the reasons for deaccessioning and how the proceeds can be utilized. There is, however, another aspect of deaccession practice that should be considered: the purchaser. In keeping with the idea that museums serve the public trust—a basic tenet of the conceptualization of the US museum²—this article considers the importance of the nature of the purchaser or purchasing institution. New legislation, while remaining mindful of museum autonomy regarding decisions to deaccession, should be enacted to provide an increased opportunity for works of museum quality or that are otherwise suitable for public display to remain in the public sphere and accessible to the public.

While the case studies and suggestions put forth in this article relate primarily to American museums, these general considerations may prove useful for other jurisdictions. The risk of privatization facing museum collections in the United States today, as shown through the lens of the DIA, the DeAM, and the Corcoran, will be most effectively countered through legislation designed to help retain museum treasures in the public sphere.

A BRIEF BACKGROUND ON THE ISSUE

While European museums are often owned, financed, and administered by national governments, "[t]he typical American museum ... is a largely autonomous institution loosely tied to other similarly autonomous museums through

²While the concept of the public trust and the accompanying principles of preservation of, and public access to, works that are of museum quality or that are otherwise suitable for public display are central tenets of Western museums, this is not the case for all museums. Ethnographic and tribal museums, for example, do not necessarily hold all objects on behalf of the general public and may take different approaches to preservation, display, deaccession, and repatriation of works in their collections. See Stacey Jessiman de Nanteuil, Lecturer, Department of Art and Art History, Stanford University, telephone interview, 4 December 2016. This article exclusively explores the possibility of legislation as a means to serve the public trust and help preserve works in the public sphere in the case of American museums.

membership in service organizations such as the Association of Art Museum Directors and the American [Alliance] of Museums (both of which are also private, non-profit organizations).³ There is tremendous variety in the structure of American museums,⁴ with governance afforded by cities, government, universities, and internal regulations inherent in private nonprofit institutions, to name a few. The overarching governing organizations of the Association of Art Museum Directors (AAMD) and the American Alliance of Museums (AAM) “lack formal authority.”⁵ Since membership is purely voluntary,⁶ the AAMD and the AAM possess no legal power of enforcement over their member museums.

Deaccessioning is a term that refers to the process by which a museum removes a piece (which had already been accessioned or accepted into the museum’s permanent collection) from its collection.⁷ The museum then can transfer the piece in a multitude of ways, including by sale, exchange, grant, and disposal.⁸ Deaccessioning is not illegal in the United States, provided that any conditions or restrictions imposed by the donor (and any other legal obligations) are respected.⁹ A number of reasons for deaccessioning have proven uncontroversial. Examples include deaccessions to transfer duplicates;¹⁰ redundant works that are not necessary for educational or research purposes;¹¹ dangerous or hazardous items, forgeries, or works of questionable authenticity;¹² stolen items;¹³ severely damaged objects;¹⁴ and works outside the scope of the museum’s collections.¹⁵ Deaccessioning is

³Merryman, Elsen, and Urice 2007, 1166; see American Alliance of Museums (AAM), “About Us,” <http://www.aam-us.org/about-us> (accessed 20 November 2016), which illustrates through its Constitution, Bylaws, and website that the former American Association of Museums is now the American Alliance of Museums.

⁴See Malaro 1997, 40.

⁵Merryman, Elsen, and Urice 2007, 1166.

⁶See Association of Art Museum Directors (AAMD), “Membership,” <https://aamd.org/about/membership> (accessed 26 November 2016), which provides information about the voluntary process of joining the AAMD; see also AAM, “About Us,” which indicates that joining the AAM is voluntary.

⁷E.g., Merryman, Elsen, and Urice 2007, 1272; see Malaro 1997, 39; see also AAMD, “Professional Practices in Art Museums,” 2011, 19, <https://aamd.org/sites/default/files/document/2011ProfessionalPracticesinArtMuseums.pdf> (accessed 20 November 2016).

⁸E.g., AAMD, “Art Museums and the Practice of Deaccessioning,” 1 November 2007, <https://aamd.org/sites/default/files/document/PositionPaperDeaccessioning%2011.07.pdf> (accessed 20 November 2016).

⁹See Finkel 2010, 724; Lewis 1997, 114; Malaro 1997, 40; see also Stephen W. Clark, Vice President, Secretary, and General Counsel, J. Paul Getty Museum, telephone interview, 20 May 2014.

¹⁰Walter G. Lehmann, Managing Partner, Lehmann-Strobel PC, telephone interview, 21 May 2014, during which the Walters Art Museum’s uncontroversial sale of duplicate Chinese vases was discussed.

¹¹Adine Varah, former Deputy City Attorney (Arts and Cultural Institutions), City and County of San Francisco, telephone interview, 4 May 2014.

¹²Adine Varah, telephone interview.

¹³Stephen Clark, telephone interview, during which he explained that most museums, including the Getty, have no difficulty deaccessioning stolen work.

¹⁴See Conforti 1997, 76.

¹⁵Adine Varah, General Counsel, San Francisco Museum of Modern Art, San Francisco, California, interview, 12 December 2016.

also usually viewed as “an appropriate way of improving the quality of [a museum’s] permanent collection.”¹⁶ Additionally, museums deaccession with differing frequency. Veteran museum general counsel Stephen Clark, previously the deputy general counsel at the Museum of Modern Art (MoMA) in New York City and currently the general counsel at the J. Paul Getty Museum (Getty), noted that the Getty does not deaccession pieces regularly, partially because it maintains a limited collection and holds little in storage.¹⁷ MoMA, on the other hand, deaccessions frequently; as Clark noted, MoMA’s founding director Alfred H. Barr, Jr., believed MoMA should be like a “torpedo moving through time,”¹⁸ collecting and releasing pieces along the way.¹⁹

Although the majority of deaccessions are uncontroversial, disagreement arises regarding a specific type of transaction: the deaccession of works via sale (collectively referred to as a “deaccession” throughout this article) and the subsequent use of the generated proceeds. Figure 1 illustrates the spectrum of differing opinions on the use of proceeds from deaccessioning. On one side of the spectrum is the belief that pieces of art can be sold and the proceeds from that sale used for any museum need.²⁰ The DeAM ostensibly subscribed to this principle, and numerous articles have been written supporting the unrestricted use of deaccession proceeds.²¹ Some may find this approach to be particularly compelling when the piece would otherwise remain in storage indefinitely, since while the piece is in storage it is inaccessible to the public.²²

Moving along the spectrum, there is a belief in increasingly strict regulations on the use of proceeds from deaccessioned works. Some experts, for example, believe in selling a piece and using the proceeds for any museum need only when there is an emergency or serious financial crisis, such as a choice between selling a piece and thereby raising the money to keep the museum’s doors open versus closing the museum forever.²³

¹⁶Merryman, Elsen, and Urice 2007, 1271; see also Weil 1997, 3.

¹⁷Stephen Clark, telephone interview.

¹⁸“A Torpedo Moving Through Time”: The Museum of Modern Art in Berlin,” *ArtMag by Deutsche Bank*, <http://db-artmag.de/archiv/2004/e/1/4/179.html> (accessed 26 November 2016).

¹⁹Stephen Clark, telephone interview.

²⁰See, e.g., Finkel 2010, 724: “[One expert saw] no reason for strict rules about deaccessioning, other than telling the truth to the public and not selling to international trafficking mafias.”

²¹See, e.g., White 1996, 1048, 1059–60; Fincham 2011, 1, 32; Tam 2012, 894, 897–98.

²²See, e.g., Conforti 1997, 75: “Storage is often considered ‘dead inventory,’ visible to few, an institutional asset waiting to be struck from the debit side of the ledger and turned into cash.”

²³See, e.g., Finkel 2010, 724: “[Another expert] said her position had softened over the years. ‘If it’s really a life-or-death situation, if it’s a choice between selling a Rauschenberg and keeping the museum doors open, I think there’s some justification for selling the painting’”; Donn Zaretsky, “Please, Sir, May I Have Another?,” *The Art Law Blog*, 20 October 2010, <http://theartlawblog.blogspot.com/2010/10/please-sir-may-i-have-another.html> (accessed 26 November 2016), which quotes another commentator as saying “there ought to be a process through which museums in true danger of closing, which have exhausted all other possibilities, might petition a state attorney general or an AAMD-sanctioned arbiter or some other adjudicator for permission to deaccession some works to raise money to remain open” (internal quotation marks omitted).

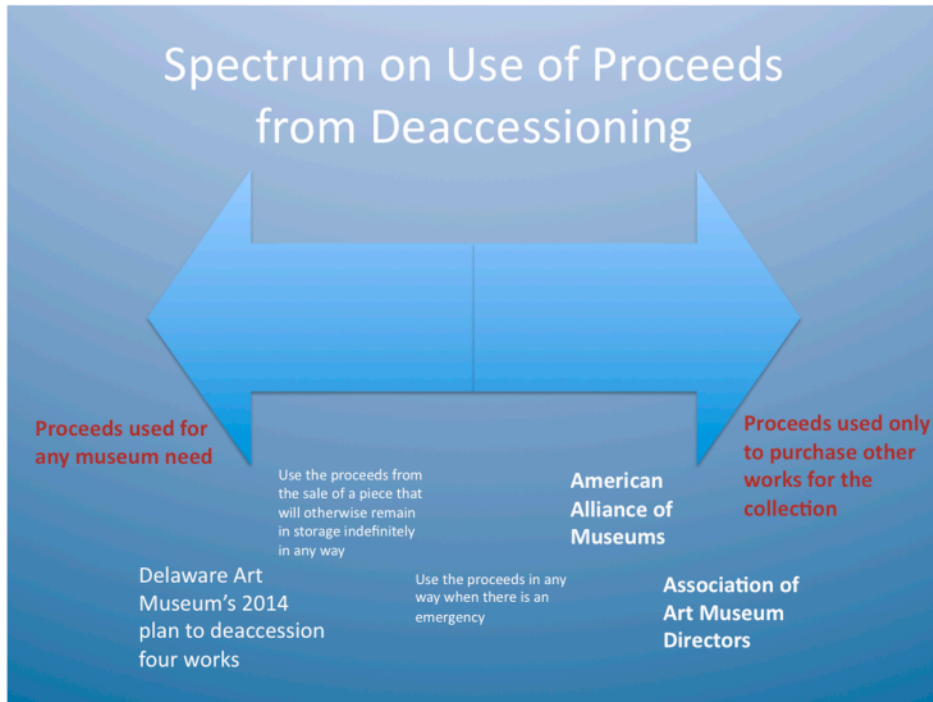


FIGURE 1. Spectrum on the use of proceeds from deaccessioning

The other end of the spectrum embraces the strict principle accepted by a large portion of the professional field, namely that proceeds from the sale of a work from a museum's permanent collection "should never be used to pay for operating expenses, additions to the physical plant, or building repairs but instead, should be used only to acquire other works."²⁴ This principle applies even when the institution is experiencing profound economic hardships. The AAMD,²⁵ the AAM (with slight variation),²⁶ and museums whose collections policies or deaccession

²⁴Merryman, Elsen, and Urice 2007, 1271.

²⁵The membership of the AAMD, as of November 2016, consists of 242 directors of art museums throughout the United States, Canada, and Mexico, including the Detroit Institute of Arts, the Whitney Museum of American Art, and the J. Paul Getty Museum. Membership is contingent upon the qualifications of both the individual director and the art museum. Under AAMD deaccessioning policies, proceeds from a sale are to be used only to acquire other works of art. For further information, see AAMD, "Membership"; AAMD, "Professional Practices in Art Museums," 21; and AAMD, "Standards and Practices," <https://aamd.org/standards-and-practices> (accessed 1 November 2016).

²⁶The AAM, which is not limited to art museums as is the AAMD, reported 1,056 accredited museums out of the nation's estimated 35,000 museums in July 2016. As of November 2016, the AAM includes the Detroit Institute of Arts and the National Gallery of Art; prior to its closing, the Corcoran Gallery of Art was also a member. AAM deaccessioning standards allow for proceeds from deaccessioning activities to be used for either future acquisitions for the collection or for direct care of the collection, thus permitting slightly less regimented use of proceeds than the AAMD. For this and

policies adhere to the guidelines put forth by these governing institutions stringently conform to this principle. Museums that deviate from these deaccession principles typically find themselves subject to censure and condemnation, sanctions, suspension, or expulsion/loss of accreditation from the AAMD and the AAM.²⁷ As a result of the divergence between the vigorously held ethical positions on this spectrum, none of which are independently legally binding, the deaccession of works and the subsequent use of the generated proceeds often prove enormously controversial.

THE THREAT OF DEACCESSIONING

Given the fiscal and economic strain of recent years, an increased number of museums in the United States are facing financial challenges.²⁸ Three dramatic

further information, see AAM, “The Alliance Announces Five Newly Accredited Museums and Ten Museums Re-Accredited,” press release, 18 July 2016, <http://aam-us.org/about-us/media-room/the-alliance-announces-five-newly-accredited-museums-and-ten-museums-re-accredited> (accessed 26 November 2016); AAM, “AAM Statement on Delaware Art Museum,” press release, 27 March 2014, <http://www.aam-us.org/about-us/media-room/2014/delaware-art-museum> (accessed 20 November 2016); and AAM, “Find a Member Museum,” <http://www.aam-us.org/about-museums/find-a-museum> (accessed 26 November 2016).

²⁷See AAM, “AAM Statement on Delaware Art Museum”; AAM, “Statement on the Deaccessioning by the Delaware Art Museum and the Action Taken by the AAM Accreditation Commission,” press release, 17 June 2014, <http://www.aam-us.org/about-us/media-room/2014/delaware-accreditation-status> (accessed 20 November 2016); AAMD, “Code of Ethics,” <https://aamd.org/about/code-of-ethics> (accessed 26 November 2016).

²⁸See discussion later in this article; see also Cirigliana 2011, 368–70; White 1996, 1041, n.3: “Many factors have contributed to this condition, for example, a decrease in patronage from various sources, including individuals, foundations, and corporations, and a decline in supportive governmental policy for the arts, manifested in part by the budget cuts suffered by the National Endowment for the Arts.”; Lee Rosenbaum (CultureGrrl), “Delaware Art Museum’s Deaccession Debacle: My Q&A with Its Former Director, Danielle Rice,” *ArtsJournalBlogs*, 2 April 2014, <http://www.artsjournal.com/culturegrrl/2014/04/delaware-art-museums-deaccession-debacle-my-qa-with-its-former-director-danielle-rice.html> (accessed 26 November 2016): “[T]he philanthropy never reached the levels of before [the recession].” For acknowledgement of the financial strain facing museums from a former AAMD president, see Timothy Rub, “A Dereliction of Duty,” *Wall Street Journal*, 11 June 2014, <http://online.wsj.com/articles/art-for-sale-a-dereliction-of-duty-1402521067> (accessed 26 November 2016): “With many art museums still suffering from the residual effects of the recent economic recession. . . .” For an additional example of an affected museum, consider Brandeis University’s Rose Art Museum, which generated controversy by considering selling items to cover operations costs, though they ultimately did not do so. See, e.g., International Foundation for Art Research 2014, 48; Robin Pogrebin, “The Permanent Collection May Not Be So Permanent,” *New York Times*, 26 January 2011, http://www.nytimes.com/2011/01/27/arts/design/27sell.html?_r=0 (accessed 26 November 2016); Connie Wolf, former John and Jill Freidenrich Director, Cantor Arts Center at Stanford University, telephone interview, 6 May 2014, who noted that the Rose Art Museum ultimately did not sell its works to fix its financial difficulties because of peer pressure. The National Academy in New York also came under intense scrutiny and was roundly criticized for its sale of two works and has come back under scrutiny for the recent “deaccession” of its staff. See, e.g., Lee Rosenbaum (CultureGrrl),

situations involving deaccessioning as a possible solution to financial hardship have caught the public eye over the past few years: that of the DIA, the DeAM, and the Corcoran. The DIA is relevant both because of its part in the larger issue of the City of Detroit's bankruptcy and because of the enormity of the risk posed to its large, iconic collection.²⁹ The DeAM's significance hinges on the fact that it actually sold pieces of its collection. The Corcoran's importance lies in its original consideration of deaccessioning to raise funds, which was ultimately rejected in favor of an acquisition of sorts by two other institutions.

Detroit Institute of Arts

Faced with insurmountable financial problems and a debt measured between \$15 and \$17 billion, the City of Detroit filed for bankruptcy protection in July 2013.³⁰ This event, startling in and of itself, was even more salient to various communities (local, state, national, and artistic) because it placed the DIA's art collection, which was owned by the city, at potential risk.³¹ In 1919, the City of Detroit and the Founders Society of the DIA had merged.³² At that time, the Founders Society ceded the existing collection to the city, a transfer that was the source of the argument that the art collection was city property.³³ A 1997 operating agreement explained that the Founders Society managed the museum, although the City of Detroit maintained legal title to the art collection.³⁴

"News Flash: Financially Challenged National Academy Restructures and 'Streamlines' Its Staff," *ArtsJournalBlogs*, 2 June 2014, <http://www.artsjournal.com/culturegrrl/2014/06/news-flash-financially-challenged-national-academy-restructures-and-streamlines-its-staff.html> (accessed 26 November 2016); Lee Rosenbaum (CultureGrrl), "Q&A with Carmine Branagan: National Academy Resurrected after Near-Death Experience, Director Unrepentant," *ArtsJournalBlogs*, 26 September 2011, http://www.artsjournal.com/culturegrrl/2011/09/national_academy_resurrected_a.html (accessed 26 November 2016). Consider, finally, the classic example of the Albright-Knox Art Gallery in Buffalo. See, e.g., Nafziger, Paterson, and Renteln 2010, 714. With respect to the Albright-Knox Gallery, Stephen Clark noted that in times of economic crisis, a museum just cannot afford to be all things to all people. Stephen Clark, telephone interview.

²⁹Adine Varah, telephone interview, who noted that the Detroit Institute of Arts collection could never be replaced or reconstituted if sold and dispersed.

³⁰E.g., Graham Bowley, "Michigan Attorney General Says Detroit Museum Could Not Sell Art," *New York Times*, 14 June 2014, http://artsbeat.blogs.nytimes.com/2013/06/14/michigan-attorney-general-says-detroit-museum-could-not-sell-art/?_php=true&_type=blogs&_r=0 (accessed 26 November 2016); Matthew Dolan, "Record Bankruptcy for Detroit," *Wall Street Journal*, 19 July 2013, <http://www.wsj.com/articles/SB10001424127887323993804578614144173709204> (accessed 26 November 2016).

³¹See International Foundation for Art Research 2014, 36.

³²International Foundation for Art Research 2014, 38.

³³See International Foundation for Art Research 2014, 38; see also Michigan Attorney General, Opinion no. 7272, Detroit Institute of Arts: Conveyance or Transfer of Detroit Institute of Arts Collection, 2013, 6: "[T]he museum, in its corporate capacity as the Detroit Museum of Art, conveyed its buildings and art collection to the City in 1919."

³⁴E.g., Michigan Attorney General, Opinion no. 7272, 2013, 7; Detroit Institute of Arts, "Just the Facts," <http://www.dia.org/about/facts.aspx> (accessed 19 June 2014).

In the financial crises of the 1930s and 1970s, there was no mention of selling the DIA's art.³⁵ With this most recent financial disaster, however, nothing was off limits. Faced with the city's impending bankruptcy and the accompanying consequences of receiving pennies back on their dollars, the City of Detroit's creditors insisted that the city put all of its assets on the table,³⁶ including the DIA's lucrative art collection. Kevyn Orr, Detroit's emergency financial manager tasked with addressing Detroit's financial problems,³⁷ hired Christie's to evaluate the DIA's collection and provide recommendations for alternative options to realize value from the collection without liquidation.³⁸ According to Christie's, the fair market value of the city-owned portion of the DIA's collection totaled between \$452 and \$866 million.³⁹

When the possibility of selling the art was first mentioned, the future of the DIA and its collection became the subject of intense speculation. The AAMD often reacts vocally when museums embark on a path that will conflict with the AAMD's accepted policies and tenets of practice. This was no exception; the AAMD issued a letter to the governor of Michigan regarding Orr's question as to whether the collection of the DIA (whose director was a member of the AAMD⁴⁰) could be sold to pay for the city's operating expenses and debt obligations.⁴¹ The letter explained that such a step would "violate fundamental principles long recognized by the museum community ... as well as constitute a breach of trust with the generations of donors ... to the DIA."⁴² It argued that because a museum's service to its community is centered on the "fundamental responsibility museums have for the stewardship of the cultural assets they hold in trust for present and future generations," "it is a fundamental professional principle" that deaccession proceeds be used only to enhance the museum's collection.⁴³ The AAMD's letter stated in no uncertain terms that the proposed sale would be a violation of the AAMD standards and "nationally accepted professional principles."⁴⁴ A sale to

³⁵See, e.g., International Foundation for Art Research 2014, 42.

³⁶See International Foundation for Art Research 2014, 41.

³⁷See AAMD, "AAMD Letter to Michigan Governor Rick Snyder," press release, 4 June 2013, <https://aamd.org/for-the-media/press-release/aamd-letter-to-michigan-governor-rick-snyder> (accessed 26 November 2016).

³⁸See, e.g., International Foundation for Art Research 2014, 37.

³⁹See Brief in Opposition to Motion of Creditors for Entry of an Order Pursuant to Section 105(a) of the Bankruptcy Code Appointing and Directing the Debtor to Cooperate with a Committee of Creditors and Interested Persons to Assess the Art Collection of the Detroit Institute of Arts Based on Arms-Length Market Transactions to Establish a Benchmark Valuation, *In re City of Detroit, Mich.*, No. 13-53846 (Bankr. E.D. Mich., 12 December 2013), 19 (*hereafter* Brief in Opposition, *In re City of Detroit* 2013).

⁴⁰AAMD, "Membership."

⁴¹See AAMD, "AAMD Letter to Michigan Governor Rick Snyder."

⁴²AAMD, "AAMD Letter to Michigan Governor Rick Snyder."

⁴³AAMD, "AAMD Letter to Michigan Governor Rick Snyder."

⁴⁴AAMD, "AAMD Letter to Michigan Governor Rick Snyder."

provide funds to aid in remedying the city's financial problems would also "represent a breach of the City of Detroit's responsibility to maintain and protect an invaluable cultural resource that has been entrusted to its care for the benefit of the public."⁴⁵

Michigan Attorney General Bill Schuette articulated similar sentiments on the importance of this cultural resource in his detailed formal opinion dated 13 June 2013, in addition to discussing his conception of the sale proposal's legality and advocating that the DIA's collection could not be sold by the City of Detroit to settle its debt because the collection was held in charitable trust for the people of Michigan.⁴⁶

The Grand Bargain

Though for many months Detroit's bankruptcy situation seemed hopeless, a plan known as the Grand Bargain emerged in the summer of 2014. Under the Grand Bargain, a group consisting of nonprofit foundations, the State of Michigan, and the DIA (through donors) would pay the City of Detroit \$816 million over the next 20 years to reduce cuts to the city workers' pensions and to allow the transfer of the DIA's collection and building from the city to the museum's own nonprofit corporation.⁴⁷

The State of Michigan endorsed the Grand Bargain on 3 June 2014, approving its contribution of \$195 million toward aid for Detroit pensioners and "long-term oversight of city finances."⁴⁸ Pension beneficiaries voted over the summer of 2014, approving the Grand Bargain by an overwhelming margin: "More than 82 percent of those eligible for a police or fire pension who voted supported the plan while 73 percent of the voters eligible to receive benefits from the other pension fund supported the plan."⁴⁹ Then came the need for court approval.

⁴⁵AAMD, "AAMD Letter to Michigan Governor Rick Snyder."

⁴⁶See Brief in Opposition, *In re City of Detroit* 2013, 3, 21; Michigan Attorney General, Opinion no. 7272, 2013, 18–22: "[T]he citizens of this State recognize that abandoning or selling the public's artwork would damage not only the City's but the State's cultural commonwealth. In Michigan, we not only appreciate our cultural treasures, we guard them zealously in charitable trust for all state residents, present and future."; Bowley, "Michigan Attorney General."

⁴⁷*In re City of Detroit*, No. 13-53846-swr (Bankr. E.D. Mich., 7 November 2014), 4, 12, <https://www.mied.uscourts.gov/PDFFiles/DBOralOpinion.pdf> (accessed 26 November 2016) (*hereafter* *In re City of Detroit* 2014); Lee Rosenbaum, "After Detroit's Close Call," *Wall Street Journal*, 19 November 2014, <http://www.wsj.com/articles/after-detroits-close-call-on-the-dia-and-bankruptcy-1416438355> (accessed 26 November 2016).

⁴⁸Chad Livengood, "Detroit's 'Grand Bargain' Sweeps Ahead," *Detroit News*, 3 June 2014, <http://www.detroitnews.com/article/20140603/POLITICS02/306030065> (accessed 26 November 2016) [no longer available].

⁴⁹Michael A. Fletcher, "Detroit's Record Bankruptcy Is Likely to Hit Investors Much Harder than Pensioners," *Washington Post*, 22 July 2014, <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/07/22/detroits-record-bankruptcy-is-likely-to-hit-investors-much-harder-than-pensioners> (accessed 26 November 2016); see also *In re City of Detroit* 2014, 5.

Federal Bankruptcy Court

Federal bankruptcy Judge Steven W. Rhodes approved the Grand Bargain on 7 November 2014.⁵⁰ In a portion of his oral opinion, Judge Rhodes detailed “[t]he DIA Settlement.”⁵¹ In conjunction with the DIA’s responsibility to arrange payment of \$100 million over the next 20 years to the General Retirement System and the Police and Fire Retirement System through donor contributions, “[t]he City will transfer the art to the DIA Corp., which will hold the art in a perpetual charitable trust for the benefit of the people of the City and the State.”⁵² He specifically mentioned the “nationally accepted standards for museums [that] prohibit the de-acquisition of art to pay debt.”⁵³ He concluded his discussion of the DIA settlement by noting that it was “a most reasonable and favorable settlement for the City and its pension creditors” and that “[t]he Court readily approves all aspects of the grand bargain.”⁵⁴

When discussing the best interests of the creditors, Judge Rhodes departed from a discussion purely of the law to elaborate on the art at stake. He stated that, legally speaking, the city’s decision “not to sell or monetize the DIA art in the art market” is “off-limits to the Court.”⁵⁵ However, even if the court had legal authority, Judge Rhodes adamantly stated that it would not have interfered with the city’s decision, as it was “the only appropriate decision” to be made.⁵⁶ He emphasized that “the DIA stands at the center of the City as an invaluable beacon of culture. ... To sell the DIA art would only deepen Detroit’s fiscal, economic and social problems. To sell the DIA art would be to forfeit Detroit’s future. The City made the right decision.”⁵⁷

Raising the Money

In early 2015, the DIA announced that it had raised its \$100 million portion of the Grand Bargain (the present value equivalent of its promise to raise \$100 million over the next 20 years).⁵⁸ Large donors included the Detroit Three automakers and their charitable foundations, with \$10 million each from General Motors and Ford

⁵⁰See *In re City of Detroit* 2014, 44; Judith H. Dobrzynski (Real Clear Arts), “Detroit: Time to Put Artists On the Spot?,” *ArtsJournalBlogs*, 13 November 2014, http://www.artsjournal.com/realcleararts/2014/11/detroit-time-to-put-artists-on-the-spot.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+artsjournal%2FVtsJ+%28Real+Clear+Arts%29 (accessed 26 November 2016).

⁵¹*In re City of Detroit* 2014, 12.

⁵²*In re City of Detroit* 2014, 12.

⁵³*In re City of Detroit* 2014, 13.

⁵⁴*In re City of Detroit* 2014, 13.

⁵⁵*In re City of Detroit* 2014, 23.

⁵⁶*In re City of Detroit* 2014, 23.

⁵⁷*In re City of Detroit* 2014, 23–24.

⁵⁸Mark Stryker, “DIA Hits Its Grand Bargain Goal,” *Detroit Free Press*, 5 January 2015, <http://www.freep.com/story/entertainment/arts/2015/01/05/dia-grand-bargain-payments/21306891> (accessed 26 November 2016).

and \$6 million from Chrysler.⁵⁹ In addition, the Andrew W. Mellon Foundation pledged a maximum of \$10 million, and the J. Paul Getty Trust promised \$3 million.⁶⁰ Donations from these national organizations, based in New York and Los Angeles respectively, illustrate the magnitude and importance of the DIA's collection—it is not just a city's museum but also a “national treasure.”⁶¹ Thanks to the Grand Bargain and the outpouring of financial support, the DIA's collection is free from ties to the City of Detroit and its financial troubles.

Delaware Art Museum

On 26 March 2014, the DeAM's Board of Trustees announced its decision to deaccession up to four works of art from the museum's permanent collection.⁶² The subsequent sales were predicted to generate approximately \$30 million, which would both repay the museum's \$19.8 million bond debt and replenish the museum's endowment.⁶³ Mike Miller, the DeAM's chief executive officer at the time, explained that after extensive consideration of all possible options, the only two choices before the trustees were to sell works of art or to close the museum's doors.⁶⁴ He noted that, “[w]hile [this] decision is certainly hard to bear, the closure of this 100-year-old museum would be, by comparison, unbearable.”⁶⁵

One day later, on 27 March 2014, the AAMD issued a rapid response to the DeAM's decision.⁶⁶ Similar to the sentiments it expressed in its letter addressing the DIA's situation, the AAMD stated that “[s]elling works of art held in the public trust and using the proceeds [to retire debt and pay for operating expenses] would represent a direct and serious violation of AAMD's Code of Ethics and the professional standards of the museum field.”⁶⁷ The AAMD explained that their policy prohibiting the use of funds acquired through deaccession practices for any purpose beyond the acquisition of works of art was itself “developed to protect museums from pressure to monetize their collections to support operations.”⁶⁸

⁵⁹Stryker, “DIA Hits Its Grand Bargain Goal.”

⁶⁰Stryker, “DIA Hits Its Grand Bargain Goal.”

⁶¹Dobrzynski, “Detroit.”

⁶²See Delaware Art Museum, “Delaware Art Museum Board of Trustees Vote to Retire Debt,” press release, 26 March 2014, <http://www.delart.org/wordpress/wp-content/uploads/2013/11/Press-Statement.pdf> (accessed 26 November 2016).

⁶³See Delaware Art Museum, “Delaware Art Museum Board of Trustees Vote.”

⁶⁴See Delaware Art Museum, “Delaware Art Museum Board of Trustees Vote”; see also Rub, “A Dereliction of Duty.”

⁶⁵Delaware Art Museum, “Delaware Art Museum Board of Trustees Vote” (internal quotation marks omitted).

⁶⁶AAMD, “Association of Art Museum Directors' Statement on Delaware Art Museum Board Vote to Deaccession for Operating Funds,” press release, 27 March 2014, <https://aamd.org/for-the-media/press-release/association-of-art-museum-directors-statement-on-delaware-art-museum> (accessed 26 November 2016).

⁶⁷AAMD, “Statement on Delaware Art Museum Board Vote.”

⁶⁸AAMD, “Statement on Delaware Art Museum Board Vote.”

A practice of deaccessioning with unconstrained use of proceeds could encourage museums to liquidate their collections as a first resort whenever they need funds.⁶⁹ As Tim Rub, then president of the AAMD, explained, “[o]ne can imagine instances where a collection would be cannibalized.”⁷⁰

Further, the statement again emphasized that deaccessioning not in accordance with the established principles regarding the use of proceeds “represents a violation of the public trust.”⁷¹ The AAMD argued that such action can seriously discourage donors from supporting art museums.⁷² The organization then issued a thinly veiled warning that, if the DeAM pursued such sales, the AAMD would have no choice but to take the “strongest possible response to this action, including the censure and, if necessary, the sanctioning of the Museum.”⁷³ The statement concluded with the admonition that the sales would be a great loss to the community.⁷⁴

It is important to remember that the AAMD has no legal power of enforcement. It can only sanction, suspend, or expel members and sanction non-members who act in a manner contrary to the ethical standards and best practices established and embraced by the organization.⁷⁵ Sanctions consist of the AAMD encouraging its members not to loan works to, or participate in, exhibitions with the sanctioned museum,⁷⁶ which can have a great effect on the sanctioned museum. The DeAM was not a member of the AAMD at this time;⁷⁷ as such, the AAMD could only censure or sanction it but had no other (legal or otherwise) means of recourse.

While not a member of the AAMD, the DeAM was a member of the AAM.⁷⁸ On the same day that the AAMD issued its statement, the AAM also denounced the DeAM’s plan, calling such action “a flagrant violation of the AAM standard

⁶⁹See, e.g., Shirley Min, “Stewardship and the Delaware Art Museum,” *Newsworks*, 25 April 2014, <http://www.newsworks.org/index.php/local/delaware/67287-stewardship-and-the-delaware-art-museum-video> (accessed 26 November 2016).

⁷⁰Min, “Stewardship and the Delaware Art Museum” (internal quotation marks omitted).

⁷¹AAMD, “Statement on Delaware Art Museum Board Vote.”

⁷²See AAMD, “Statement on Delaware Art Museum Board Vote.”

⁷³AAMD, “Statement on Delaware Art Museum Board Vote.”

⁷⁴AAMD, “Statement on Delaware Art Museum Board Vote.” See generally Lee Rosenbaum (CultureGrrl), “AAMD Condemns Delaware Art Museum’s Deaccessions,” *ArtsJournalBlogs*, 27 March 2014, <http://www.artsjournal.com/culturegrrl/2014/03/aamd-condemns-delaware-art-museums-deaccessions.html> (accessed 26 November 2016).

⁷⁵See, e.g., AAMD, “Code of Ethics.”

⁷⁶See, e.g., Min, “Stewardship and the Delaware Art Museum”; AAMD, “AAMD Policy on Deaccessioning,” 9 June 2010, part VIII, <https://aamd.org/standards-and-practices> (accessed 26 November 2016); AAMD, “Code of Ethics.”

⁷⁷See Lee Rosenbaum (CultureGrrl), “Damning DAM: AAMD Sanctimoniously Sanctions the Delaware Art Museum,” *ArtsJournalBlogs*, June 18, 2014, http://www.artsjournal.com/culturegrrl/2014/06/damning-dam-aamd-sanctimoniously-sanctions-the-delaware-art-museum.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+artsjournal%2FXHaF+%28CultureGrrl%29 (accessed 26 November 2016); see also AAMD, “Members,” <https://aamd.org/our-members/members> (accessed 26 November 2016).

⁷⁸See AAM, “Statement on the Deaccessioning by the Delaware Art Museum.”

for US museums, succinctly embodied in this enduring principle of our field: the museum is there to save the collection; the collection is not there to save the museum.”⁷⁹ The statement ended with a firm condemnation of the DeAM’s intentions⁸⁰ but stopped short of expelling the DeAM from the AAM.⁸¹

Miller stated that the museum was prepared to accept the possible consequence of loss of its AAM accreditation, but he emphasized that when a museum is facing financial distress that could result in its closure, exceptions to strictly enforced ethical principles should be made.⁸²

The AAMD issued another letter on 14 April 2014, reiterating its opposition to, and displeasure with, the DeAM’s proposed deaccessions.⁸³ The AAMD explained that it believes strongly that such sales are the quintessential type of transaction that “will violate the trust in which the works of art in [art museums’] collections are held.”⁸⁴

Art Sales

Censure by the AAMD and the AAM ultimately had no lasting preventative effect as the DeAM moved forward with its plan. The DeAM deaccessioned its first piece, William Holman Hunt’s *Isabella and the Pot of Basil* (1868), in March 2014.⁸⁵ This piece carried a presale estimate of between \$8.4 and \$13.4 million but was expected by some to earn much more.⁸⁶ The museum had purchased it using general art acquisition funds, thus conforming to the promise in its press statement on 26 March 2014 that no works of art acquired through gift or bequest would be sold.⁸⁷ Still, Rub continued to decry the “dangerous precedent” the sale would set.⁸⁸

On 17 June 2014, *Isabella and the Pot of Basil* sold to an anonymous buyer for just \$4.24 million.⁸⁹ This shockingly low price ignited a flurry of speculation that the

⁷⁹AAM, “AAM Statement on Delaware Art Museum.”

⁸⁰AAM, “AAM Statement on Delaware Art Museum.”

⁸¹See AAM, “AAM Statement on Delaware Art Museum.” See generally Lee Rosenbaum (CultureGrrl), “AAM Condemns Delaware Art Museum’s Deaccessions,” *ArtsJournalBlogs*, 27 March 2014, <http://www.artsjournal.com/culturegrrl/2014/03/aam-condemns-delaware-art-museums-deaccessions.html> (accessed 26 November 2016).

⁸²See Min, “Stewardship and the Delaware Art Museum.”

⁸³AAMD, “AAMD Letter to Delaware Officials In Responses to Announcement by Delaware Art Museum,” press release, 14 April 2014, <https://aamd.org/for-the-media/press-release/aamd-letter-to-delaware-officials-in-responses-to-announcement-by> (accessed 26 November 2016).

⁸⁴AAMD, “AAMD Letter to Delaware Officials.”

⁸⁵Delaware Art Museum, “Delaware Art Museum Announces First Work of Art to be Sold,” press release, 6 May 2014, <http://www.delart.org/about/press-room/#current> (accessed 26 November 2016) [no longer available].

⁸⁶Rub, “A Dereliction of Duty.”

⁸⁷Delaware Art Museum, “First Work to be Sold.”

⁸⁸Rub, “A Dereliction of Duty.”

⁸⁹See, e.g., Judith H. Dobrzynski (Real Clear Arts), “What’s Left Unsaid About the Delaware Deaccession,” *ArtsJournalBlogs*, 17 June 2014, http://www.artsjournal.com/realcleararts/2014/06/whats-left-unsaid-about-the-delaware-deaccession.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+artsjournal%2FVtsj+%28Real+Clear+Arts%29 (accessed 26 November 2016).

museum would have difficulty raising the desired \$30 million from the sale of just four works.⁹⁰ That same day, the AAM “unanimously voted to remove the [DeAM’s] accredited status.”⁹¹ Although the DeAM had not been a member of the AAMD since the departure of its previous director in August 2013,⁹² the AAMD instituted sanctions against the museum, thus “damaging [the DeAM’s] national exposure.”⁹³

The DeAM refused to let the responses of the AAMD and AAM affect its deaccession plans moving forward. It officially removed Winslow Homer’s *Milking Time* (1875) and Alexander Calder’s *Black Crescent* (1959) from its collection.⁹⁴ Neither piece was a gift or bequest to the museum,⁹⁵ thus eliminating the potential of a lawsuit from donors or their heirs. The DeAM sold the Calder piece in a September 2014 private sale for an undisclosed amount⁹⁶ (estimated \$10.6 million).⁹⁷ *Milking Time* and a fourth piece, Andrew Wyeth’s *Arthur Cleveland* (1946), were both sold privately in 2015 for undisclosed amounts.⁹⁸

Retiring the Debt

The DeAM reported in 2015 that it had fully repaid its \$19.8 million bond debt using the proceeds from these four completed sales and “without ‘significantly depleting its endowment.’”⁹⁹ When the DeAM first announced its plan to deaccession and sell up to four works, it projected that these sales would generate \$30 million, which would be used to repay the full balance of the bond debt and replenish its endowment.¹⁰⁰ However, after the conclusion of these four sales, news sources reported that the works had sold for less than \$19 million in total, instead

⁹⁰Dobrzynski, “What’s Left Unsaid.”

⁹¹AAM, “Statement on Deaccessioning by Delaware Art Museum”; see Rosenbaum, “Damning DAM.”

⁹²See Rosenbaum, “Damning DAM.”

⁹³Margie Fishman, “Delaware Art Museum Loses Accreditation,” *News Journal*, 19 June 2014, <http://www.delawareonline.com/story/life/2014/06/18/museum-directors-sanction-delaware-art-museum/10757111> (accessed 26 November 2016).

⁹⁴Delaware Art Museum, “Museum Announces Additional Works to Be Sold,” press release, 7 August 2014, <http://www.delart.org/press-room/press-statement> (accessed 26 November 2016) [no longer available].

⁹⁵Delaware Art Museum, “Museum Announces Additional Works to Be Sold.”

⁹⁶Delaware Art Museum, “Public Q&A,” press release, 24 September 2014, <http://www.delart.org/press-room/press-statement-delaware-art-museum-retires-debt> (accessed 26 November 2016) [no longer available].

⁹⁷Margie Fishman, “Delaware Art Museum Uses Reserve Fund to Repay Mortgage,” *News Journal*, 24 September 2014, <http://www.delawareonline.com/story/news/local/2014/09/24/delaware-art-museum-uses-reserve-fund-fully-repay-mortgage/16183103> (accessed 26 November 2016).

⁹⁸See, e.g., Margie Fishman, “Delaware Art Museum sells Wyeth, Homer paintings,” *News Journal*, 30 June 2015, <http://www.delawareonline.com/story/life/2015/06/29/delaware-art-museum-andrew-wyeth-winslow-homer-paintings/29490799> (accessed 26 November 2016).

⁹⁹Randy Kennedy, “Delaware Art Museum Completes Sale of Artworks to Repay Debt,” *New York Times*, 30 June 2015, <http://artsbeat.blogs.nytimes.com/2015/06/30/delaware-art-museum-completes-sale-of-artworks-to-repay-debt> (accessed 26 November 2016).

¹⁰⁰Delaware Art Museum, “Delaware Art Museum Board of Trustees Vote.”

of the projected \$30 million.¹⁰¹ Not only did this sum not replenish the DeAM's endowment as the museum had hoped when it began its deaccessioning process, but almost \$1 million of the endowment's funds also had to be used to fully repay the bond debt.¹⁰²

Regardless, the museum announced that it had "close[d] one of the most difficult chapters in the story of the" museum.¹⁰³ Miller emphasized that the DeAM would never "resort to selling art again."¹⁰⁴ And though the DeAM appointed a new executive director and chief executive officer, effective 1 July 2016,¹⁰⁵ there has been no indication that further deaccessions for monetary purposes are in the works at the DeAM.

Corcoran Gallery of Art

One of the most recent institutions to face severe financial strain is the Corcoran in Washington, DC. On 10 May 1869, William W. Corcoran deeded the building and grounds in Washington, DC, and his private collection to a newly created and self-perpetuating Board of Trustees.¹⁰⁶ The next year, the institution known as the Corcoran Gallery of Art was chartered and exempted from taxes by an Act of Congress.¹⁰⁷ The Corcoran faced a series of controversies over the years, especially in the last 25 years of its existence as an independent institution. Perhaps the most significant was the Corcoran's decision to cancel a Mapplethorpe exhibition in 1989 due to the political controversy surrounding the homoerotic and violent nature of the works, which raised issues around the intersection of art and the First Amendment.¹⁰⁸ The Corcoran suffered another embarrassment in the form of its failed 2005 fundraising effort to create a wing designed by Frank Gehry (which

¹⁰¹Margie Fishman, "Delaware Art Museum pushes ahead after selling works," *News Journal*, 15 July 2015, <http://www.delawareonline.com/story/life/2015/07/03/selling-art-delaware-art-museum-pushes-ahead/29669631> (accessed 26 November 2016).

¹⁰²Fishman, "Delaware Art Museum pushes ahead after selling works."

¹⁰³Fishman, "Delaware Art Museum sells Wyeth."

¹⁰⁴Fishman, "Delaware Art Museum pushes ahead after selling works."

¹⁰⁵Delaware Art Museum, "Delaware Art Museum Welcomes Sam Sweet as New Executive Director and Chief Executive Officer," press release, 27 April 2016, <http://www.delart.org/press-room/samsweet> (accessed 26 November 2016).

¹⁰⁶See *Trs. of the Corcoran Gallery of Art v. District of Columbia*, 2014 DC Super. Lexis 17, *8–9 (DC Super. Ct., 18 August 2014); *Deed of the Corcoran Gallery of Art*, 18 May 1869 (on file with author); see also District of Columbia Code, § 47-1016 (Lexis Advance through 7 October 2016) referencing this deed.

¹⁰⁷District of Columbia Code, § 47-1016; Federal Charter of the Corcoran Gallery of Art, 24 May 1870 (on file with author).

¹⁰⁸*Trs. Corcoran Gallery v. District of Columbia*, *12 n.5; David S. Julyan, General Counsel, Corcoran Gallery of Art, telephone interview, 30 April 2014. See generally Merryman 2009, 10–11, providing further information about the Mapplethorpe debacle in which the Corcoran's director got cold feet and cancelled the show in an "ill-considered act of self-censorship."

coincided with an economic recession).¹⁰⁹ These two controversial negative events, in conjunction with serious management problems and the impact of the 2008 recession, left the Corcoran extremely vulnerable. As an article in the *Washington Post* aptly stated, “[t]he loss of morale, prestige, goodwill and money was disastrous.”¹¹⁰

This somewhat controversial history, coupled with recognition of the significant and increasingly urgent building maintenance costs of approximately \$100 million, which had been deferred for decades,¹¹¹ presented a stark economic reality to the Corcoran’s Board of Trustees several years ago. The combination of the building maintenance costs, the institution’s vulnerability due to failed endeavors in the past, difficulties with management, and the nature of being a museum with a ticket price in a geographic area inundated with free-to-the-public museums¹¹² led to a consensus amongst the trustees, in approximately 2010, that the Corcoran was headed down a dramatically unsustainable path.¹¹³ The question became what would be the next step forward.

The trustees considered a number of alternatives, including the possible solution of deaccessioning to raise operating funds early in the process.¹¹⁴ The Corcoran, like most museums, has an immensely valuable asset—its collection.¹¹⁵ Most museums hold a huge percentage of their collection in archives.¹¹⁶ Thus, pieces could be sold to account for the economic realities and challenges of the time without pulling pieces directly off of the museum walls.¹¹⁷ The value of the Corcoran’s collection was estimated at between \$1 and \$2 billion.¹¹⁸ When a corporation or business faces financial difficulties, one of the first steps is to evaluate the assets, identify those that are not critical, and determine what can be sold to provide the resources necessary to sustain the corpus.¹¹⁹ The Corcoran considered this

¹⁰⁹Trs. Corcoran Gallery v. District of Columbia, *12 n.5; David Julyan, telephone interview.

¹¹⁰Philip Kennicott, “The Corcoran Gallery is Going Away Just as its Mission is More Important Than Ever,” *Washington Post*, 25 February 2014, http://www.washingtonpost.com/entertainment/museums/the-corcoran-gallery-is-going-away-just-as-its-mission-is-more-important-than-ever/2014/02/25/85969c64-9e41-11e3-b8d8-94577ff66b28_story.html (accessed 26 November 2016).

¹¹¹Trs. Corcoran Gallery v. District of Columbia, *15; David Julyan, telephone interview.

¹¹²David Julyan, telephone interview.

¹¹³David Julyan, telephone interview.

¹¹⁴Trs. Corcoran Gallery v. District of Columbia, *17–22; David Julyan, telephone interview.

¹¹⁵David Julyan, telephone interview.

¹¹⁶David Julyan, telephone interview; see Merryman, Elsen, and Urice 2007, 874: “[M]any museums have wall space for perhaps as little as 5 percent of their collection. . . .”; John Henry Merryman, Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law, Emeritus, Stanford Law School, Stanford, California, interview, 1 May 2014, who discussed that museums do have special shows or traveling exhibitions or lend out works in their archives; some pieces are heavily utilized and some are not.

¹¹⁷David Julyan, telephone interview. But see Rewald 1997, 26: “The museum finds itself in a grotesque position, totally contrary to the attitude of anyone who wants to *sell* something: Instead of boosting the work and saying how exceptional it is, the museum must appease its trustees and the press by declaring that it is a rather insignificant product, not good enough to grace its walls.”

¹¹⁸David S. Julyan, General Counsel, Corcoran Gallery of Art, email to author, 1 December 2016.

¹¹⁹David Julyan, telephone interview.

business-like approach, in terms of selling works of art to sustain the museum as a whole.¹²⁰

From a purely financial perspective, the Corcoran could, in fact, have raised enough money to care for the building and create an endowment to sustain the operations of both the Corcoran College of Art + Design (Corcoran College) and the museum by selling pieces of its collection.¹²¹ Such a sale would have been in direct conflict, however, with the Corcoran's own comprehensive deaccessioning policy, which was in line with the standards advanced by the AAMD: "Sale proceeds of all deaccessions will be restricted to the acquisition of works of art that support the mission of the Corcoran."¹²² The Corcoran policy was thus tailored even more narrowly than the AAM policy, which allows the use of funds for direct care of the museum's collection.¹²³

Although the financial benefits from a hypothetical sale of art must have been attractive, the Corcoran's trustees ultimately did not want to violate the standards of the field's overarching organizations.¹²⁴ Instead of selling works to keep its doors open, and instead of allowing its doors to close without a fight, the Corcoran pursued a collaborative arrangement with the National Gallery of Art (NGA) and George Washington University (GW) in an effort to keep the Corcoran's collection in the public sphere.

The Collaboration

On 15 May 2014, leaders of the Corcoran and Corcoran College, the NGA, and GW signed the final agreements for their "historic collaboration," which was first announced in February 2014.¹²⁵ Pursuant to the agreements, most of the assets of the Corcoran and Corcoran College would be distributed between the NGA and GW. Corcoran College, its assets, and the real estate consisting of the Corcoran building in Washington, DC, and the Fillmore building in Georgetown would be transferred to GW.¹²⁶ GW would incorporate Corcoran College within its university structure and assume responsibility for the renovation of the Corcoran building.¹²⁷ In addition, GW planned to sell the Fillmore building.¹²⁸

The NGA would take custodial possession of the Corcoran collection at the closing of the agreements and decide which pieces to accession into the NGA's collection over

¹²⁰David Julyan, telephone interview.

¹²¹David Julyan, telephone interview.

¹²²See, e.g., Corcoran Gallery of Art, "Policy for Deaccession and Disposal of Works of Art," 23 June 2008 (on file with author).

¹²³See, e.g., AAM, "AAM Statement on Delaware Art Museum."

¹²⁴David Julyan, telephone interview.

¹²⁵See National Gallery of Art, "The Corcoran, the National Gallery of Art and the George Washington University Sign the Final Agreements for their Historic Collaboration," press release, 15 May 2014, <http://www.nga.gov/content/ngaweb/press/2014/collaboration1.html> (accessed 26 November 2016).

¹²⁶See National Gallery of Art, "The Corcoran, the National Gallery of Art."

¹²⁷National Gallery of Art, "The Corcoran, the National Gallery of Art."

¹²⁸National Gallery of Art, "The Corcoran, the National Gallery of Art."

the following months.¹²⁹ These chosen pieces would feature the identifying credit line “Corcoran Collection” as well as the historic donor credit line.¹³⁰ Any items that the NGA chose not to accession would be distributed to museums and other appropriate venues, primarily, but not exclusively, in Washington, DC, and its environs.¹³¹ No works of art were to be sold.¹³² The NGA intended to accession a significant number of the Corcoran’s works into its own collection.¹³³ Under the agreements, the Corcoran entity would continue to pursue its original mission statement, “Dedicated to Art and Encouraging American Genius,” through consulting and advising on programs and activities in the Corcoran building and promoting contemporary art and artists.¹³⁴

The hope of the Corcoran with this arrangement was twofold. First, the college, the collection, and the building would all be placed on sustainable paths for the future.¹³⁵ Second, through displays in the NGA and in the Corcoran building (such as the Corcoran Contemporary National Gallery of Art and the Legacy Gallery) as well as the distribution policy for works not accessioned into the NGA, more of the Corcoran’s collection would be available to the public than was possible in the past, and the Corcoran legacy would be preserved.¹³⁶

The AAMD and the AAM Take a Stance

The AAMD and the AAM both issued statements approving the Corcoran’s plans. On 15 May 2014, the AAMD termed the Corcoran’s arrangement “an orderly solution that preserves the Corcoran’s collections and is in the best interests of arts audiences and current and future students.”¹³⁷ The AAMD noted that the Corcoran had been a member of the AAMD for decades and, though saddened that the Corcoran had arrived at this “juncture,” expressed appreciation that this solution that continues to support the public interest proved to be achievable.¹³⁸

The AAM issued its statement on 20 February 2014, immediately after the initial announcement of the collaboration between the Corcoran and Corcoran College,

¹²⁹See National Gallery of Art, “The Corcoran, the National Gallery of Art.”

¹³⁰National Gallery of Art, “The Corcoran, the National Gallery of Art.”

¹³¹See National Gallery of Art, “The Corcoran, the National Gallery of Art.”

¹³²National Gallery of Art, “The Corcoran, the National Gallery of Art.”

¹³³National Gallery of Art, “The Corcoran, the National Gallery of Art.”

¹³⁴See National Gallery of Art, “The Corcoran, the National Gallery of Art.”

¹³⁵David Julyan, telephone interview.

¹³⁶David Julyan, telephone interview; David Julyan, email to author. This desire was echoed by Harry Hopper, the Corcoran’s chairman, on behalf of the Corcoran’s trustees. National Gallery of Art, “National Gallery of Art Announces Second Round of Acquisitions from the Collection of the Corcoran Gallery of Art in Washington, DC; Fifty-Eight Works from the Corcoran Collection are on View,” press release, 16 October 2015, <http://www.nga.gov/content/ngaweb/press/2015/corcoran-acquisitions-10-15-15.html> (accessed 26 November 2016).

¹³⁷AAMD, “Association of Art Museum Directors’ Statement on Corcoran Gallery of Art,” press release, 15 May 2014, <https://aamd.org/for-the-media/press-release/association-of-art-museum-directors-statement-on-corcoran-gallery-of-art> (accessed 26 November 2016).

¹³⁸AAMD, “Association of Art Museum Directors’ Statement on Corcoran Gallery of Art.”

the NGA, and GW.¹³⁹ Although it was presented before additional developments regarding the merger between these institutions, this letter offered enthusiastic praise for the arrangement and appreciation that the collection would avoid the auction block.¹⁴⁰ The AAM emphasized that such a trip to auction would “violate every museum standard and the public service mandate of all museums,” providing Randolph College’s sale of George Bellows’s *Men of the Docks* (1912) as an example of such violation.¹⁴¹ The AAM was careful to not advertise this solution as perfect but considered it “a win for art, [and] for ethics.”¹⁴²

An Effort to “Save the Corcoran” and the Subsequent *Cy Pres* Proceeding

Although the Corcoran, the NGA, and GW mutually agreed to the terms of the collaboration, there was one final hurdle. This collaboration did not technically follow the original intent and purpose set forth in the Corcoran’s deed (which “was to create a gallery of fine art, along with a college of art and design, located in the District of Columbia, and to encourage the production and preservation of fine art through both the gallery and the college”).¹⁴³ Courts may, under the *cy pres* doctrine, “modify a trust when a charitable purpose of the trust becomes impossible or impracticable to achieve,” as long as the court modifies the trust “in a manner that is as near as possible to the trustor’s original intent.”¹⁴⁴ Thus, in order to move forward with the collaboration, the institutions needed the court to grant the Corcoran trustees’ *cy pres* motion.¹⁴⁵

The Attorney General, tasked with “defending the public interest and the charitable intent of donors,”¹⁴⁶ agreed with the Corcoran’s collaborative plan

¹³⁹AAM, “Statement About the Corcoran from Alliance President Ford Bell,” press release, 19 February 2014, <http://www.aam-us.org/about-us/media-room/2014/corcoran-statement> (accessed 26 November 2016).

¹⁴⁰AAM, “Statement About the Corcoran from Alliance President Ford Bell.”

¹⁴¹AAM, “Statement About the Corcoran from Alliance President Ford Bell”; see also AAM, “Statement On Deaccessioning of ‘Men of the Docks’ by Maier Museum of Art at Randolph College,” press release, 11 February 2014, <http://www.aam-us.org/about-us/media-room/2014/statement-on-deaccessioning-of-men-of-the-docks> (accessed 26 November 2016).

¹⁴²AAM, “Statement About the Corcoran from Alliance President Ford Bell.”

¹⁴³Trs. Corcoran Gallery v. District of Columbia, *68.

¹⁴⁴Trs. Corcoran Gallery v. District of Columbia, *35.

¹⁴⁵For another example of court involvement in the execution of a will or gift, see generally the Avery Brundage Collection (granting a petition to allow the deaccession of certain works that were gifted to the city and county of San Francisco for its Asian Art Museum, consistent with the museum’s collection management policy, as the deaccession was ultimately in keeping with the donor’s original intent to provide the best available examples of Asian art in the collection). Adine Varah, telephone interview.

¹⁴⁶Lee Rosenbaum, “Isn’t There a Better Way,” *Wall Street Journal*, 4 August 2014, <http://www.wsj.com/articles/a-possible-dismantling-1407191181> (accessed 26 November 2016); see also Trs. Corcoran Gallery v. District of Columbia, 85: “[T]he Office of the Attorney General ... has statutory oversight over charitable trusts in the District of Columbia.”; Tam 2012, 876: “State Attorneys General are responsible for overseeing institutions that are set up for the public benefit. As such, they have standing to bring a case against a museum (or any charitable trust) for failing to achieve the museum’s charitable purpose.”; White 1996, 1045: “Traditionally, the attorney general has been designated to protect the public’s interest in the administration of charitable organizations, an interest that most likely would [otherwise] go unprotected. . . .”

and supported the *cy pres* motion.¹⁴⁷ However, the situation became increasingly complicated when a group called Save the Corcoran opposed the Corcoran's dissolution.¹⁴⁸ The battle over the legal standing of this group to participate in the court proceeding—standing that the court ultimately denied¹⁴⁹—and the subsequent trial filled the news during the summer of 2014.

The Corcoran's legal battles concluded on 18 August 2014, when Judge Robert Okun of the District of Columbia Superior Court granted the trustees' *cy pres* petition.¹⁵⁰ Judge Okun held that it was impracticable for the Corcoran to continue under the existing deed of trust, citing the fact that the Corcoran had been operating at a deficit for the majority of the last 13 years, needed at least \$71 million to renovate the Flagg Building (a part of the Corcoran building), and did not have sufficient funds available.¹⁵¹ Judge Okun also agreed that the proposal was the closest substitute for the original intent of William Corcoran, as "the Flagg Building will be renovated, the school will continue and be strengthened by its partnership with a financially sound university, both the school and a significant portion of the collection will remain in the Flagg Building, and a gallery, although smaller, will remain open to the public" in the Flagg Building, all results that "are consistent with Mr. Corcoran's intent."¹⁵² The court recognized the argument that selling an institution's artwork to improve its financial situation is unacceptable, a central point of the Corcoran's case and an argument that mirrors the rules advanced by the AAMD and the AAM.¹⁵³ The collaboration first announced in February 2014 could now move forward.

The Months Following the *Cy Pres* Decision

Following the granting of the Corcoran's *cy pres* motion, the Corcoran's art collection was transferred to the NGA, whose curators began working tirelessly to evaluate the Corcoran's holdings.¹⁵⁴ The depth and breadth of the Corcoran collection

¹⁴⁷Trs. Corcoran Gallery v. District of Columbia, *85.

¹⁴⁸Trs. Corcoran Gallery v. District of Columbia, *2–3; Randy Kennedy, "Corcoran Gallery Art Transforms National Gallery," *New York Times*, 5 February 2015, <http://www.nytimes.com/2015/02/06/arts/design/corcoran-gallery-art-transforms-national-gallery.html> (accessed 26 November 2016).

¹⁴⁹Trs. Corcoran Gallery v. District of Columbia, *4, which explains that the Court "allow[ed] nine [then] current students, faculty, and staff ... to intervene in the proceedings [but] den[ied] the request as to Save the Corcoran, donors to the Corcoran, and former students, faculty, and staff."

¹⁵⁰Trs. Corcoran Gallery v. District of Columbia, *85–86; see also Nicholas O'Donnell, "Corcoran Merger Approved, *Cy Pres* Ruling Treats Deaccession as Non-Starter in Concluding that Status Quo is Untenable," *The Art Law Report*, 19 August 2014, <http://www.artlawreport.com/2014/08/19/corcoran-merger-approved-cy-pres-ruling-treats-deaccession-as-non-starter-in-concluding-that-status-quo-is-untenable> (accessed 26 November 2016).

¹⁵¹Trs. Corcoran Gallery v. District of Columbia, *48–53.

¹⁵²Trs. Corcoran Gallery v. District of Columbia, *70–73.

¹⁵³See Trs. Corcoran Gallery v. District of Columbia, *19–20, *54–56; O'Donnell, "Corcoran Merger Approved."

¹⁵⁴National Gallery of Art, "Corcoran Gallery of Art, the George Washington University and National Gallery of Art Complete Agreements," press release, 21 August 2014, <http://www.nga.gov/content/ngaweb/press/2014/corcoran04.html> (accessed 26 November 2016).

became fully apparent, with the NGA receiving custody of over 17,000 Corcoran works.¹⁵⁵ On 5 February 2015, the NGA announced that 6,430 works of art from the Corcoran had been selected thus far to join the NGA's collection of European and American art.¹⁵⁶ The pieces included a de Kooning, a Rothko, and a Warhol.¹⁵⁷ The selection was "based on criteria such as aesthetic considerations, art historical importance, and relevance to the areas in which [the NGA] collect[s]."¹⁵⁸

The NGA's Board of Trustees approved the acquisition of an additional 1,541 works from the Corcoran on 1 October 2015, bringing the total number of accessioned works to nearly 8,000 of the approximately 17,000 total works from the Corcoran's collection.¹⁵⁹ Following this acquisition, the NGA planned to begin making recommendations to the Corcoran trustees in 2016 for the distribution of the remaining Corcoran works in the NGA's custody to other museums and cultural venues in the Washington, DC, area.¹⁶⁰ The Corcoran has received requests from Washington, DC, museums and universities for these remaining works and proposals for how these institutions would preserve the Corcoran legacy through related curatorial support, exhibitions, and programming.¹⁶¹ Final decisions on distribution are scheduled for 2017.¹⁶²

In the meantime, the Corcoran entity continues to engage with the Washington, DC, community. The Corcoran sponsors the William Wilson Corcoran Visiting Professor in Community Engagement, a teaching position at the Corcoran School of the Arts and Design at GW (Corcoran School at GW).¹⁶³ Artist Mel Chin received the inaugural appointment to this position from the Corcoran School at GW in 2016.¹⁶⁴ The Corcoran is also exploring the support of art education

¹⁵⁵National Gallery of Art, "National Gallery of Art Announces Historic Acquisition of More Than 6,000 Works of Art from the Corcoran Gallery of Art in Washington, DC; Plus Upcoming Installations at the Gallery and the Corcoran," press release, 5 February 2015, <http://www.nga.gov/content/ngaweb/press/2015/nga-corcoran-announcements.html> (accessed 26 November 2016).

¹⁵⁶National Gallery of Art, "Historic Acquisition." For a full list of the acquisitions from the collection of the Corcoran Gallery of Art as of 30 January 2015, see National Gallery of Art, "List of Acquisitions from the Collection of the Corcoran Gallery of Art as of January 30, 2015," 5 February 2015, <http://www.nga.gov/content/ngaweb/press/2015/nga-corcoran-announcements.html> (accessed 26 November 2016).

¹⁵⁷See National Gallery of Art, "Historic Acquisition"; see also Holland Cotter, "Dusting Off Gems from the Attic: A Partial Look at the Corcoran Collection," *New York Times*, 5 February 2015, http://www.nytimes.com/2015/02/06/arts/design/a-partial-look-at-the-corcoran-collection.html?rref=arts/design&module=Ribbon&version=context®ion=Header&action=click&contentCollection=Art%20%26%20Design&pgtype=article&_r=0 (accessed 26 November 2016).

¹⁵⁸National Gallery of Art, "Historic Acquisition."

¹⁵⁹National Gallery of Art, "Second Round of Acquisitions."

¹⁶⁰See National Gallery of Art, "Second Round of Acquisitions."

¹⁶¹David Julian, email to author.

¹⁶²David Julian, email to author.

¹⁶³David Julian, email to author; see also "Inaugural William Wilson Corcoran Visiting Professor Announced," *GW Today*, 15 May 2016, <https://gwtoday.gwu.edu/inaugural-william-wilson-corcoran-visiting-professor-announced> (accessed 26 November 2016).

¹⁶⁴"Inaugural William Wilson Corcoran Visiting Professor Announced."

projects throughout the Washington, DC, area and additional projects related to the Corcoran School at GW, and it remains committed to serving the Corcoran's original mission.¹⁶⁵

A New Era

The Corcoran exemplifies what might be the beginning of a new era for museums and museum management and administration, in that, when faced with insurmountable financial obstacles and questionable long-term viability as an independent institution, the Corcoran chose neither of the two relatively known options: sell a few pieces from its collection in order to survive, or simply close its doors. Instead, the Corcoran instituted a merger of sorts, an acquisition by the NGA and GW, with the goal of keeping the Corcoran's collection in the public sphere.

The Corcoran transaction presents interesting options for ensuring museum sustainability and inspiring future collaborations. In fact, soon after the Corcoran/NGA/GW arrangement became final, the University of Maryland (UMD) and the Phillips Collection (located in Washington, DC) announced a collaboration of their own.¹⁶⁶ These partners plan to reach new audiences and increase access to the museum's collection through a new gallery and open storage facility that they will create in Prince George's County, Maryland, free museum admission and research access for UMD affiliates, and internships for UMD students.¹⁶⁷ UMD will also be the primary presenter in the Phillips's series of contemporary art exhibitions.¹⁶⁸ There is no indication that either institution was struggling financially prior to the partnership, and UMD will invest \$3 million in this partnership over the next six years.¹⁶⁹

Another partnership was forged in March 2016, with the Massachusetts Museum of Contemporary Art (MASS MoCA) and the Crystal Bridges Museum joining forces to develop arts programming at a decommissioned Kraft Foods plant in downtown Bentonville, Arkansas, which is expected to open in 2018.¹⁷⁰ In this case, unlike the UMD/Phillips partnership, one of the players "sometimes skates on thin ice" financially, as MASS MoCA has occasionally found itself facing

¹⁶⁵David Julyan, email to author.

¹⁶⁶Phillips Collection, "The Phillips Collection and University of Maryland Form Dynamic Partnership To Transform Scholarship and Innovation In The Arts," press release, 5 October 2015, <http://www.phillipscollection.org/press/press-materials> (accessed 26 November 2016).

¹⁶⁷See Phillips Collection, "Form Dynamic Partnership."

¹⁶⁸Phillips Collection, "Form Dynamic Partnership."

¹⁶⁹Phillips Collection, "The Phillips Collection and University of Maryland partnership—FAQs," press release, 5 October 2015, <http://www.phillipscollection.org/press/press-materials> (accessed 26 November 2016).

¹⁷⁰Crystal Bridges, "Crystal Bridges Museum of American Art Announces Development of Innovative Arts Venue," press release, 30 March 2016, <http://crystalbridges.org/blog/crystal-bridges-museum-of-american-art-announces-development-of-innovative-arts-venue> (accessed 26 November 2016).

economic challenges, while Crystal Bridges is very well resourced.¹⁷¹ However, the point of this collaboration is the development of new programming rather than the provision of economic support. Time will show if museums will embrace the option of merger and collaboration as they continue to confront their financial challenges.

BUT WHAT ABOUT NEXT TIME?

As the three case studies in this article illustrate, US museums in the twenty-first century are at risk, facing daunting financial challenges that affect their ability to maintain and sustain their existence and finance their daily operations.¹⁷² The 2008 recession and subsequent economic decline fundamentally affected the museum community, with about 70 percent of museums that responded to the AAM's surveys reporting moderate to very severe economic stress from 2009 to 2012.¹⁷³ During this period, museums experienced substantial decreases in funding from a number of sources, including government support, private individual donations, private corporate donations, and investment income.¹⁷⁴ These decreases led to compounding decreases in museum total revenue over the years.¹⁷⁵ For example, 53 percent of responding museums reported a decrease in 2010 total revenue, and nearly 40 percent of responding museums reported a decrease in 2011 total revenue, which indicates that many museums have experienced compounded years of decreased total revenue since the start of the economic downturn in 2008.¹⁷⁶

There is more competition for the limited funds that remain available due to the expanding number of museums and other nonprofits.¹⁷⁷ Museums in 2010 also noted a shift in philanthropic focus "from history [and culture in general] towards social services, environment and other causes."¹⁷⁸ Millennial donors are part of "a larger trend towards 'strategic' or 'outcome-oriented' philanthropy," meaning that donors will increasingly demand to see proof of effectiveness and

¹⁷¹Lee Rosenbaum (CultureGrrl), "Art Museum Days' Odd Couples: Corcoran/GWU, Mass MoCA/Crystal Bridges, Smithsonian/Hebrew University," *ArtsJournalBlogs*, 18 May 2016, <http://www.artsjournal.com/culturegrrl/2016/05/art-museum-days-odd-couples-corcorangwu-mass-mocacrystal-bridges-smithsonianhebrew-university.html> (accessed 26 November 2016).

¹⁷²See note 28 above.

¹⁷³See AAM, "America's Museums Reflect Slow Economic Recovery in 2012," April 2013, 8, fig. 4, <https://www.aam-us.org/docs/research/acme-2013-final.pdf?sfvrsn=2> (accessed 26 November 2016).

¹⁷⁴AAM, "America's Museums Reflect Slow Economic Recovery," 9, fig. 5.

¹⁷⁵AAM, "America's Museums Reflect Slow Economic Recovery," 9, fig. 5.

¹⁷⁶AAM, "Museums and the American Economy in 2011," April 2012, 1, <http://www.aam-us.org/docs/research/acme12-final.pdf> (accessed 26 November 2016).

¹⁷⁷See Elizabeth E. Merritt and Philip M. Katz, "TrendsWatch 2013: Back to the Future," 2013, 8, <http://aam-us.org/docs/center-for-the-future-of-museums/trendswatch2013.pdf> (accessed 26 November 2016); see also AAM, "America's Museums Reflect Slow Economic Recovery," 3.

¹⁷⁸AAM, "U.S. Museums Continue to Serve Despite Stress," April 2011, 3, <http://www.aam-us.org/docs/research/acme-2011.pdf?sfvrsn=2> (accessed 26 November 2016).

impact before donating.¹⁷⁹ These concepts are not inherently easy to measure in a museum context, and a desire for these metrics places museum funding further in jeopardy.

The elevated market prices for certain works of art have created the tempting option for museums to raise funds to combat these financial challenges relatively quickly by selling pieces from their collection, despite objections to sales driven purely by market value¹⁸⁰ and in conflict with the ethical standards of the field. As Frank Robinson, an esteemed retired art museum director,¹⁸¹ noted in the context of the DIA, when an institution is faced with such daunting and overwhelming financial challenges, “[t]here is always the temptation to cash in your assets.”¹⁸² Sometimes potentially devastating financial situations can be resolved without the sale of art, as exemplified by San Francisco’s complex agreement to renegotiate the Asian Art Museum Foundation’s bond in 2011 to combat the existing \$120 million debt.¹⁸³

The sales from the DeAM and the threat of deaccessions from the DIA, however, illustrate the troubling possibility that museums may respond to the economic challenges of this time by selling their masterpieces to the highest bidder to finance their day-to-day operations, thereby removing art from the public sphere. As reported by the AAM, the DeAM is not the only museum to have met economic stress by deaccessioning items from its collection.¹⁸⁴ Further, the situation surrounding the Corcoran could have ended much differently, with one of Washington, DC’s finest collections marching to the auction block to be dispersed throughout the world and vanishing from public view. These cases thus leave a lingering question: how can the uncertainty surrounding the future of museum collections best be addressed and the public’s continued access to the works in these collections best be ensured?

¹⁷⁹See Merritt and Katz, “TrendsWatch 2013: Back to the Future,” 9.

¹⁸⁰See Nafziger, Paterson, and Renteln 2010, 714; Miller 1997b, 55; Rub, “A Dereliction of Duty”: “[With] the market continuing to push the price of works of art to stratospheric levels, ... [h]ow tempting might it be for [art museums still suffering from the residual effects of the recent economic recession] to contemplate selling one or two masterworks to retire debt, bolster an operating endowment or renovate a building rather than undertake the slow and always difficult work of persuading donors to invest more in our cultural institutions?”

¹⁸¹Frank Robinson is the retired director of the Johnson Museum of Art, Cornell University; the Rhode Island School of Design; and the Williams College Museum of Art.

¹⁸²International Foundation for Art Research 2014, 48; see also Connie Wolf, telephone interview, who discussed the relative appeal of this type of deaccessioning and how many museums have been taunted by this option.

¹⁸³See, e.g., Reyhan Harmanci, “Bankruptcy,” *Bay Citizen*, 6 January 2011, <https://www.baycitizen.org/blogs/pulse-of-the-bay/asian-art-museum-avoids-bankruptcy> (accessed 26 November 2016) [no longer available]; Reyhan Harmanci, “City Attorney Blames Asian Art Museum’s Crisis on Bank, Insurer,” *Bay Citizen*, 1 December 2010, <https://www.baycitizen.org/news/museums/city-attorney-blames-asian-art-museums> (accessed 26 November 2016) [no longer available].

¹⁸⁴See AAM, “America’s Museums Reflect Slow Economic Recovery,” 11, table 1.

Existing Methods Governing Deaccession Practices

No methodology or organization currently exists with the power to legally enforce guidelines or requirements to govern museum deaccession practices. Deaccession practices have generally been addressed in nonbinding codes of ethics, as “judges have been reluctant to second-guess the decisions of museum trustees.”¹⁸⁵ As John Henry Merryman explained, ethics serve as a “body of nascent law,” “fill[ing] the gap” and governing the art world in which the law is still relatively undeveloped.¹⁸⁶ And while deaccession practices occasionally receive judicial review, the resulting decisions are binding only on the parties involved in that specific case.

Self-Enforcement and Existing Organizations

As discussed above, the overarching “governing” museum bodies that currently advance certain ethical principles are consent based—in other words, the museums and their directors must volunteer to join and affirmatively consent to follow the policies espoused by the various organizations. Thus, these existing organizations, including the AAMD and the AAM, are legally powerless to enforce guidelines, resulting in an arguably unregulated and unprotected environment. The most these organizations can do is to censure or condemn the offending institution, issue sanctions, suspend or expel the member institution, or revoke accreditation; they have no way to force museums to comply with their ethical standards.

Sanctions imposed by the AAMD and the AAM do affect the penalized museum in terms of its “ability to secure loans [of other works] for exhibitions as well as funding,” as illustrated by the sanctions against the National Academy Museum from 2008 (when it sold two Hudson River School paintings and utilized the proceeds for operating expenses) until 2010 (when the sanctions were lifted).¹⁸⁷ Sanctions also prohibit collaboration on exhibitions and programs with the offending institution.¹⁸⁸ Although such sanctions are potent,¹⁸⁹ they do not always prevent museums from violating the ethical principles espoused by these voluntary groups.¹⁹⁰

¹⁸⁵Nafziger, Paterson, and Renteln 2010, 715.

¹⁸⁶Merryman 2009, 2–3; see also Garfield 1997, 19.

¹⁸⁷Charles Danziger and Thomas Danziger, “Opportunity Knocks: Brothers in Law on Deaccessioning,” *BlouinArtInfo*, 4 June 2014, <http://www.blouinartinfo.com/news/story/1021209/opportunity-knocks-brothers-in-law-on-deaccessioning> (accessed 26 November 2016).

¹⁸⁸AAMD, “Association of Art Museum Directors’ Statement on Randolph College and Maier Museum of Art,” press release, 12 March 2014, <https://www.aamd.org/for-the-media> (accessed 26 November 2016).

¹⁸⁹Danziger and Danziger, “Opportunity Knocks”: “The penalties are no joke.”

¹⁹⁰See, e.g., Lee Rosenbaum (CultureGrrl), “Delaware Art Museum’s Deaccession Debacle: The Impotence of AAMD,” *ArtsJournalBlogs*, 7 April 2014, <http://www.artsjournal.com/culturegrrl/2014/04/delaware-art-museums-deaccession-debacle-the-impotence-of-aamd.html> (accessed 26 November 2016): “The recent examples of the sale of art from Randolph College’s Maier Museum and planned sales from the Delaware Art Museum demonstrate, once again, that censures and sanctions from the Association of Art Museum Directors are powerless to prevent deplorable deaccessions of

Randolph College's Maier Museum of Art, for example, sold Rufino Tamayo's painting *Trovador* (1945) in 2008 and was subsequently censured by the AAMD in order to discourage the college from further sales to support its operations; the college responded by selling another work, George Bellows's *Men of the Docks* (1912), in 2014.¹⁹¹ The AAMD then sanctioned the Maier Museum (a more stringent step than censure), encouraging AAMD member institutions to suspend any loans to, and collaboration on exhibitions or programs with, the museum.¹⁹² And yet the Maier Museum of Art then sold two more works to raise funds for the college's operating endowment.¹⁹³

Self-policing may not work, as there is arguably no lasting, catastrophic effect on museums that fall into disfavor—they can limp along for a few years, then rejoin the organization¹⁹⁴ or have the sanctions lifted.¹⁹⁵ Danielle Rice, former director of the DeAM, noted that museums that disobey the ethical standards promulgated by the AAMD (or like organizations) “endure ‘the usual brouhaha and sanctions, and ... get over it ... in the end, as with the National Academy, you’ve got the money in the bank.’”¹⁹⁶ Further, professionals in positions of power in many state, city, and municipal museums remain uninterested in changing their museum's governance structure to prevent the chance that the government entity's possible future fiscal instability could affect the art collections through forced deaccessions.¹⁹⁷ They explain that their locality is financially stable and receives positive support from government officials and the public.¹⁹⁸ But this is a precarious position. Those in charge of the DIA likely had similar thoughts, until it was almost too late to save the DIA's collection. Thus, the self-enforcement of ethical principles and the status quo leaves museum collections without legally enforceable governance with respect to deaccessioning.

museum-quality artworks that are held in the public trust.”; see also Rosenbaum, “Q&A with Carmine Branagan,” expressing a museum director's opinion that, when faced with such a difficult decision, it was acceptable to choose to sell works rather than close the museum's doors.

¹⁹¹AAMD, “AAMD Statement on Randolph College.”

¹⁹²AAMD, “AAMD Statement on Randolph College.”

¹⁹³Randolph College, “Randolph Announces Return of ‘Through the Arroyo’ and Establishment of Endowment to Fund a Director of Education at the Maier Museum of Art at Randolph College,” press release, 2 April 2015, <http://www.randolphcollege.edu/news/2015/04/randolph-announces-return-of-through-the-arroyo-and-establishment-of-endowment-to-fund-a-director-of-education-at-the-maier-museum-of-art-at-randolph-college> (accessed 26 November 2016) explains that these were the remaining two works chosen to be sold in 2007, along with *Trovador* and *Men of the Docks*.

¹⁹⁴See, e.g., AAM, “Announces Five Newly Accredited Museums,” announcing that ten museums earned re-accreditation; AAMD, “Membership.”

¹⁹⁵See, e.g., Zaretsky, “Please, Sir, May I Have Another?”: “National Academy Museum, having been duly punished, and having publicly repented for its sins (‘Never again,’ says the museum's director), has had the sanctions against it lifted by the AAMD.”

¹⁹⁶Rosenbaum, “Deaccession Debacle: The Impotence.”

¹⁹⁷Rosenbaum, “After Detroit's Close Call.”

¹⁹⁸Rosenbaum, “After Detroit's Close Call.”

Judicial Involvement

Two of the three case studies highlighted in this article received judicial determination. The bankruptcy judge in Detroit fortunately agreed to the Grand Bargain and, thus, the salvation of the DIA and its collection.¹⁹⁹ His opinion spoke compellingly to the importance of the art, both in the sense that it must be held in the public trust for future generations and that it would prove invaluable to the preservation and improvement of Detroit's future.²⁰⁰ But the happy ending in the DIA's tale by no means guarantees the safety of other art collections owned in whole or in part by cities or municipalities. The next time a city declares bankruptcy, if there is an art collection at stake, it might not receive the same outpouring of financial support as did the DIA. Alternatively, the presiding judge may not feel that a proposed arrangement (like the DIA's settlement) is fair to creditors, or he might not see a legal way to save the art, in which case the art collection could be marched to the auction block and lost to the public forever.

The Corcoran court proceedings were similar to the deviation proceedings of the Barnes Foundation²⁰¹ and the *cy pres* proceedings of the Fisk University Galleries,²⁰² in that the court granted the Corcoran's *cy pres* motion to deviate from the written instructions of the collection's donor. These cases, while not binding over the United States as a whole, illustrate that courts are willing (in some situations) to liberally interpret donor intent.²⁰³ Further, as shown in the Corcoran decision, there is "no case law in [the District of Columbia], or elsewhere, that explicitly establishes a particular standard for reviewing a trustee's *cy pres* proposal."²⁰⁴ This trend of liberal interpretation of donor intent, coupled with a lack of firm judicial standards, will likely concern donors since it may affect the future of their donations.

Even though most controversial deaccessions, such as those of the DeAM, often intentionally involve only pieces purchased with museum funds and not donations or bequests, this trend of liberal interpretation indicates the possibility that in the future a similar motion could be brought for a specific piece, ultimately resulting in a court finding that it is impossible or impracticable to conform with the donor's original instructions and allowing the sale of the piece.²⁰⁵

¹⁹⁹See discussion earlier in this article.

²⁰⁰See discussion earlier in this article.

²⁰¹Lee Rosenbaum (CultureGrrl), "Do You Know the Way to Cy Pres? What's Wrong with Judge Okun's Corcoran Opinion," *ArtsJournalBlogs*, 19 August 2014, <http://www.artsjournal.com/culturegrrl/2014/08/do-you-know-the-way-to-cy-pres-whats-wrong-with-judge-okuns-corcoran-opinion.html> (accessed 26 November 2016).

²⁰²Lee Rosenbaum (CultureGrrl), "News Flash: Court Order to Send Fisk's Stieglitz Collection to Crystal Bridges in Fall 2013," *ArtsJournalBlogs*, 2 August 2012, http://www.artsjournal.com/culturegrrl/2012/08/court_order_sends_fisks_stiegl.html (accessed 26 November 2016).

²⁰³Rosenbaum, "Do You Know the Way to Cy Pres?"; see also discussion earlier in this article.

²⁰⁴Trs. Corcoran Gallery v. District of Columbia, *40.

²⁰⁵See, e.g., Fincham 2011, 14.

The overarching theme of judicial involvement in this area is that it produces uncertainty. On the whole, judicial analysis currently lacks a cohesive approach, as “[c]ourts have used different standards and legal doctrines to examine deaccessioning decisions and the use of deaccessioning proceeds, including donor intent, *cy pres* and fiduciary duty standards.”²⁰⁶ Although the courts in the DIA and the Corcoran cases both recognized the importance of art and the institutions, there is no guarantee that future judicial action will shield art from a city’s creditors, consistently evaluate *cy pres* motions, or maintain art in the public sphere.

Contract Law

Traditional principles of contract law will not be implicated in all controversial deaccessions. Museums could deaccession pieces purchased with museum funds and without restrictions rather than pieces donated or bequeathed to the institution that may have gift restrictions, as done by the DeAM in 2014.²⁰⁷ Alternatively, museums could deaccession donated or bequeathed works unencumbered by donor restrictions.²⁰⁸ These categories of unrestricted works render a discussion of general contract law as a means of enforcing restrictions on proposed sales unnecessary, as no restrictive contract provisions would pertain to such pieces.

Proposal of Legislation

In light of the continued (and perhaps even increasing) economic threat museums face²⁰⁹ and the risks accompanying both a “peer pressure”-based system of ethical standards, as is currently in place, and individual judicial determination, firm guidance and codified requirements should be considered for the benefits they could provide. Legislation could create a uniform methodology for museum deaccessions, provide an enforcement mechanism for these guidelines,²¹⁰ and help to preserve masterpieces in the public sphere. At a time of increased ethical scrutiny directed at nonprofit organizations and a profound demand for transparency

²⁰⁶Tam 2012, 890–91.

²⁰⁷See discussions earlier in this article.

²⁰⁸See, e.g., Randy Kennedy, “National Academy Sells Two Hudson River School Paintings to Bolster Its Finances,” *New York Times*, 5 December 2008, <http://www.nytimes.com/2008/12/06/arts/design/06acad.html> (accessed 26 November 2016), which notes that the National Academy successfully sold two paintings that were donated by a painter in 1865.

²⁰⁹See notes 28 and 172–79 above as well as accompanying text.

²¹⁰See, e.g., John Henry Merryman, “Are Museum Trustees and the Law Out of Step?,” *ARTnews*, November 1975, 24, reprinted in Merryman 2009, 561, which provides several examples to illustrate “how ineffectual reliance on the present forms of legal regulation and ethical standards can occasionally be.” This article notes Merryman’s belief that “the abuses [he has] described seem to cry out for more rigorous enforcement of the legal and ethical obligations of boards of trustees.” While this call does not pertain specifically to deaccessioning practices, it captures the essence of the idea that ethical standards do not always do the job—sometimes more than guiding principles are needed.

and accountability driven by the Internet, social media, and online public participation,²¹¹ legislation would also offer guidance to, and protection for, museums and museum officials and trustees making the decision to deaccession and would help ensure that the deaccession is in the best interest of the public. In fact, this protection was likely the driving force behind San Francisco's decision to codify guidelines for deaccessioning by the city-run museums.²¹² As the three case studies detailed earlier in this article show, museum collections are facing an unprecedented level of risk. Because of both the continued state of the museum economy and the fact that museums are deviating from their own self-enforced standards, legislation offers a compelling option to provide structure, protect the masterpieces housed in museums, and prevent the next "Corcoran" from following a dramatically different path.

Existing Models of Legislation

Legally binding governing rules are not foreign to this arena of museum art sales. Certain aspects of such sales and collection management practices are currently regulated by legislation or government oversight. These regulations include: (1) "found in collections" laws; (2) New York's Board of Regents' Rules; (3) other laws relating generally to the field of art; and (4) San Francisco's rules for its city-run museums.

"Found in Collections" Laws

More than 30 states have "museum-specific laws to assist in the acquisition and disposition of old loans and undocumented objects."²¹³ New York law, for example, provides clear rules for state museums to declare ownership of pieces in their collection that are either unclaimed property ("property held with a loan agreement which has either expired or was loaned for an indefinite term (often called 'permanent loans')") or undocumented property ("property for which the museum cannot determine the lender, donor or owner after making a good faith

²¹¹See Elizabeth E. Merritt, "TrendsWatch 2015," Center for the Future of Museums, 2015, 18, 21, <http://www.aam-us.org/resources/center-for-the-future-of-museums/projects-and-reports/trendswatch/trendswatch2015> (accessed 26 November 2016): "The fact that, in this Internet age, we could research and vet the entire life cycle of a product or service, creates an expectation that we should. And this, in turn, leads to increased demand for transparency and accountability in behavior, sourcing and production. United and empowered by the Internet and by social media, today's consumers wield unprecedented power, and woe betides any company that crosses the invisible ethical line. And nonprofits, traditionally assumed to be on the side of angels, don't get a free pass in this era of soul-searching."; see also David Julyan, email to author, which references Save the Corcoran's use of social media throughout its existence and the Corcoran's *cy pres* court proceeding.

²¹²Adine Varah, General Counsel, San Francisco Museum of Modern Art, San Francisco, California, interview, 27 September 2016.

²¹³See "Found in Collections," <http://www.foundincollections.com> (accessed 6 November 2016).

search to find the owner (this property is often deemed ‘found in collections’).²¹⁴ This law alludes to the ability of New York museums to then sell the work since “[a]ny person who purchases or otherwise acquires property from the museum acquires good title to such property if the museum has acquired title in accordance with this [legislation].”²¹⁵ The rules are clear and provide specific procedures the museums must follow in order to acquire ownership, such as repeated attempts to notify the lender and specific time periods that must be observed.²¹⁶

New York law also provides similar provisions for other (non-state) museums to acquire ownership of property.²¹⁷ In addition, these provisions specify that “[p]roceeds derived from the sale of any property title to which was acquired by a museum pursuant to this section shall be used only for the acquisition of property” for the collection “or for the preservation, protection, and care of the collection and shall not be used to defray ongoing expenses of the museum.”²¹⁸ New York has thus already codified the ethical principles advanced by the AAM in terms of collection practices and the use of proceeds from this narrow section of sales.

California enacted a similar law to allow museums to address works left in their possession.²¹⁹ This law was adopted noting that “the public’s interest in the intangible values of unclaimed property loaned to museums can best be realized if title is transferred to the museums holding the property” and that “[t]he public interest is served by ... vesting title to unclaimed property on loan to museums in the museums which have custody of the property.”²²⁰ Similar to New York law, “[a] lender shall be deemed to have donated loaned property to a museum if the lender fails to file an action to recover the property on loan to the museum within the periods specified.”²²¹ Thus, the museum acquires ownership of the property. Further, the museum may sell the piece and the purchaser will acquire good title to the property if the rules set forth in this legislation are followed.²²² The California statutes, however, did not codify ethical principles addressing the acceptable use of proceeds from such sales.

²¹⁴Museum Association of New York, “New York’s New Museum Property Law: Section 233-AA of New York State Education Law,” <http://manyonline.org/2010/01/new-yorks-new-museum-property-law-section-233-aa-of-new-york-state-education-law> (accessed 26 November 2016); see also New York Education Law, § 233-a (Consol., Lexis Advance through 2016 released chaps. 1–442).

²¹⁵New York Education Law, § 233-a(10).

²¹⁶See New York Education Law, § 233-a(7)–(10).

²¹⁷See New York Education Law, § 233-aa.

²¹⁸New York Education Law, § 233-aa(5).

²¹⁹See California Civil Code, § 1899–1899.11 (Deering, Lexis Advance through ch. 893 of the 2016 Regular Session, ch. 8 of the 2015–16 2nd Ex. Session, and ballot measures approved at the 7 June and 8 November 2016 elections).

²²⁰California Civil Code, § 1899(c), (i).

²²¹California Civil Code, § 1899.10(c).

²²²California Civil Code, § 1899.10(d).

New York Board of Regents Rules

The New York Board of Regents amended its rules designed to govern the deaccession practices of all of the museums and historical societies chartered by the New York State Board of Regents, effective as of 8 June 2011.²²³ These rules codified existing ethical policies, going further than the professional ethical standards of the AAMD and the AAM because they are, by their very nature, legally binding.²²⁴ These rules “[e]numerate ten specific criteria under which an institution may deaccession an item or material in its collection” and “[r]equire that all museums report annually a list of all deaccessions.”²²⁵ The rules mandate that proceeds from deaccession practices may only be used for “the acquisition of collections, or the preservation, conservation or direct care of collections. In no event shall proceeds derived from the deaccessioning of any property from the collection be used for operating expenses or for any [other] purposes.”²²⁶ This mirrors the policies of the AAM, which are less stringent than those of the AAMD.

As of 2014, New York was the only state with a statewide deaccessioning policy, as set by the Board of Regents.²²⁷ If a museum violates these rules, it risks losing its charter.²²⁸ The rules explain that “[i]n the current financial downturn, museums face deficits that threaten the ownership or integrity of their collections” and specify that “[e]ven if a museum fails, [the Regents] want to keep collections in the public trust and not lose them to debt or insolvency.”²²⁹ These rules are “meant to provide museums with the discretion to refine their collections over time, while at the same time ensuring that museums’ collections are preserved for the public.”²³⁰

²²³See New York Compilation of Codes, Rules and Regulations, title 8, § 3.27 (Lexis Advance through 28 October 2016); see also Lee Rosenbaum (CultureGrrl), “News Flash: NYS Regents Pass Stringent Deaccession Regulations (finally!),” *ArtsJournalBlogs*, 17 May 2011, http://www.artsjournal.com/culturegrrl/2011/05/nys_regents_pass_stringent_dea.html (accessed 26 November 2016); Lee Rosenbaum (CultureGrrl), “NY State’s New Deaccession Rules: Ambivalent Response from AAM, AAMD,” *ArtsJournalBlogs*, 20 May 2011, http://www.artsjournal.com/culturegrrl/2011/05/ny_states_new_deaccession_rule.html (accessed 26 November 2016), emphasizing that these rules provide governmental oversight but are not state legislation. Please note that, in this subpart, the term “deaccession[ing, ed]” refers only to the act of formally removing an accessioned piece from a museum’s permanent collection.

²²⁴Rosenbaum, “News Flash,” arguing these rules go farther than the professional guidelines of the AAMD, which suggest criteria that museums might consider rather than dictating criteria to consider as the new rules do; see also Danziger and Danziger, “Opportunity Knocks.”

²²⁵Jeffrey W. Cannell, “Amendment of Regents Rule § 3.27, Relating to Museum Collections Management Policies,” memo to the Board of Regents, 5 May 2011, <http://www.regents.nysed.gov/meetings/2011Meetings/May2011/511brca3revised.pdf> (accessed 26 November 2016).

²²⁶New York Compilation of Codes, Rules and Regulations, title 8, § 3.27(c)(6)(vii).

²²⁷See, e.g., Danziger and Danziger, “Opportunity Knocks.”

²²⁸See, e.g., Jared Lenow and John Sare, “New York Board of Regents Adopts New Deaccessioning Rules,” *Association of Corporate Counsel*, 28 August 2012, <http://www.lexology.com/library/detail.aspx?g=569f91f1-5f52-4f6e-9025-539f1809f2d8> (accessed 26 November 2016).

²²⁹Cannell, “Amendment of Regents Rule § 3.27.”

²³⁰Lenow and Sare, “New York Board of Regents.”

Other Laws Relating to the Field of Art

A variety of other legislation also affects museum practices. There is US legislation on the importation of certain objects.²³¹ The Visual Artists Rights Act of 1990, the first federal copyright legislation granting protection of an author's moral rights, provides additional rights to artists whose works meet certain requirements.²³² These rights include the right to attribution and the right to disclaim works that have been modified or disfigured, regardless of who owns the physical work or copyright in the work.²³³ Several states, beginning with California and, as of 2007, including Connecticut, Illinois, Louisiana, Maine, Massachusetts, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island, had enacted moral rights legislation.²³⁴ California had also enacted a resale proceeds right law.²³⁵

San Francisco Municipal Code: Arts and Culture

Article 5 of the San Francisco Charter establishes the Fine Arts Museums of San Francisco and the Asian Art Museum of San Francisco as “charitable trust departments” with “exclusive charge of the trusts and all other assets under their jurisdiction,” however acquired.²³⁶ The San Francisco Administrative Code, in turn, outlines the process by which these municipal museums may sell, exchange, or transfer works of art from the museums' collections.²³⁷ Authorized sales methods include public auction and private sale, subject to certain conditions.²³⁸ All funds received from the sale of any work of art belonging to the museums will be used for the purchase of other works of art,²³⁹ a policy that tracks that of the AAMD and is more stringent than that of the AAM.

With respect to objects that are of “scientific, social, cultural or historic value, but of little monetary value and therefore not appropriate for sale or exchange,” the San Francisco Administrative Code encourages transfer to “other public and

²³¹See, e.g., Merryman, Elsen, and Urice 2007, 320.

²³²Visual Artists Rights Act, 17 U.S.C.S. § 106A(a)(1)–(2) (LexisNexis, Lexis Advance through PL 114–244, approved 14 October 2016).

²³³Visual Artists Rights Act, 17 U.S.C.S. § 106A(a)(1)–(2); Merryman, Elsen, and Urice 2007, 448.

²³⁴Merryman, Elsen, and Urice 2007, 444.

²³⁵See, e.g., Merryman, Elsen, and Urice 2007, 586. However, a Ninth Circuit en banc panel confirmed that the California Resale Royalty Act's regulation of sales outside of California violated the dormant Commerce Clause of the United States Constitution. *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323–26 (9th Cir., 2015) (en banc). Further, a district court held that the California Resale Royalty Act is pre-empted under the Copyright Act of 1976 and under the express preemption clause of 17 U.S.C. § 301(a). *Estate of Graham v. Sotheby's, Inc.*, No. CV-11-08604-MWF-FFM, 2016 US Dist. Lexis 53079 (CD Cal., 11 April 2016).

²³⁶San Francisco Charter, Art. 5, § 5.101 (1996).

²³⁷San Francisco Administrative Code, Art. 8, § 2A.155.4 (1964) (amended 2000); see also San Francisco Administrative Code, Art. 8, § 2A.155.11 (1998) (amended 2000).

²³⁸San Francisco Administrative Code, Art. 8, § 2A.155.6-7 (1964) (amended 2000); Admin. Code § 2A.155.11.

²³⁹San Francisco Administrative Code, Art. 8, § 2A.155.9 (1964) (amended 2000); Admin. Code § 2A.155.11.

nonprofit institutions for preservation, study and display.”²⁴⁰ The Code also stipulates that the Board of Trustees may transfer title of a work in the collection “to another public or nonprofit institution when the transfer is in the public interest.”²⁴¹ A transfer is in the public interest when the board finds that “[t]he object is no longer appropriate to the [museums’] collections,” that “[t]he scientific, social, cultural and/or historical value of the object outweighs its monetary value,” and that “[t]he object is more likely to be preserved, studied and available to the public if it is transferred to the recipient institution than if it remains with the [museum] or is sold.”²⁴²

Response to Legislation Attempts

Generally speaking, museums prefer “self-policing to government intervention”²⁴³ or “the force of law.”²⁴⁴ Renowned museums responded unfavorably to the New York State Assembly’s consideration of the Brodsky Bill, designed to codify, regulate, and govern deaccession practices for the museums chartered by the state legislature and thus not already subject to the rules on deaccessioning promulgated by the New York Board of Regents.²⁴⁵ This Bill failed “in the face of opposition from major cultural institutions like the Metropolitan Museum of Art” (Met), which termed the legislation “impractical, unworkable and unneeded.”²⁴⁶ Further, the Whitney Museum of American Art (Whitney) opposed temporary regulations from the New York State Board of Regents that imposed stricter guidelines in 2008 governing deaccessioning, arguing that these regulations impeded their freedom to refine their collection and to improve its quality.²⁴⁷ Interestingly, major

²⁴⁰San Francisco Administrative Code, Art. 8, § 2A.155.10(a) (1989) (amended 2000); Admin. Code § 2A.155.11.

²⁴¹San Francisco Administrative Code, Art. 8, § 2A.155.10(b); Admin. Code § 2A.155.11.

²⁴²San Francisco Administrative Code, Art. 8, § 2A.155.10(b)(1–3); Admin Code. § 2A.155.11.

²⁴³Rosenbaum, “Deaccession Debacle: The Impotence”; see also Tam 2012, 890.

²⁴⁴Lenow and Sare, “New York Board of Regents”; see also Malaro 1997, 46; Rosenbaum, “Delaware Art Museum’s Deaccession Debacle,” which discusses how Danielle Rice, former director of the Delaware Art Museum, observed “that [museum directors] don’t want to be legislated”; Rosenbaum, “Q&A with Carmine Branagan.”

²⁴⁵See, e.g., Lee Rosenbaum (CultureGrrl), “Deaccession Diversion: CultureGrrl Infiltrates NY Times’ Pogrebin Piece Updated Twice,” *ArtsJournalBlogs*, 10 August 2010, http://www.artsjournal.com/culturegrrl/2010/08/deaccession_diversion_culturegrrl.html (accessed 26 November 2016); Lee Rosenbaum (CultureGrrl), “Deaccession Legislation Showdown: Brodsky Blasts Metropolitan Museum,” *ArtsJournalBlogs*, 25 June 2014, http://www.artsjournal.com/culturegrrl/2009/06/deaccession_showdown_brodsky_b.html (accessed 26 November 2016). Please note that, in this subpart of the article, the term ‘deaccession[ing, ed]’ refers only to the act of formally removing an accessioned piece from a museum’s permanent collection.

²⁴⁶Robin Pogrebin, “Bill to Halt Certain Sales of Artwork May Be Dead,” *New York Times*, 10 August 2010, <http://www.nytimes.com/2010/08/11/arts/design/11selloff.html?ref=design&r=0> (accessed 26 November 2016) (internal quotation marks omitted).

²⁴⁷Pogrebin, “The Permanent Collection May Not Be So Permanent.”

museums including the Met and the Whitney also opposed the passage of moral rights legislation in New York.²⁴⁸ Their distaste for state intervention is thus not purely relegated to oversight governing deaccessioning principles. Following the New York Board of Regents' acceptance of its new rules, "[b]oth the AAM and the AAMD issued tepid statements stating that they would prefer that deaccessioning standards be left to museum professionals rather than government regulators, but endorsing the principles behind the new rules."²⁴⁹

MOVING FORWARD: THE NEED FOR LEGISLATION

Despite the fact that US museums and their governing organizations generally prefer self-governance, difficult decisions and moral conflicts created and driven by difficult financial times are not likely to disappear any time soon. Relying on ethical standards advanced by governing institutions, voluntary in nature and unsupported by any legal means, does not appear to enable the art world to control deaccessioning practices as well as the overarching community of professionals would like.²⁵⁰ It is unrealistic to believe that all museums will conform to deaccessioning principles without further enforcement mechanisms.

Legal action also falls short of an effective protection mechanism. Court involvement does guarantee individualized review of the specific instance of deaccessioning, which allows for consideration of the museum, its purpose, and the situation.²⁵¹ However, judicial review usually requires considerable time, effort, and monetary investment, which may not always be feasible.²⁵² Further, the current legal "standards are unclear, the evaluation is after the fact, and few parties have standing or means to sue."²⁵³ Judicial review is thus rendered an impractical solution.

Given the recent events in the museum world, it is time to embrace legislation as a means of providing legally binding structure to the practice of deaccessioning, both to protect the process as a tool used to carefully cultivate and shape a collection and to guard against the risk of the decimation of an institution's collection, which is held in trust for the public. Legislation can provide clarity to those making

²⁴⁸Merryman, Elsen, and Urice 2007, 450.

²⁴⁹Lenow and Sare, "New York Board of Regents"; see also Rosenbaum, "NY State's New Deaccession Rules": "Both the [AAM] and the Association of Art Museum Directors ... express[ed] their shared ambivalence," as the "AAM wholeheartedly endorse[s] the principles embodied in the regents' decision ... [but] ... would prefer these important standards be enforced by the professionals in the field" and the "AAMD believe[s] that such issues are best handled through professional associations like AAMD or AAM, rather than through legislation ... [but] ... [is] glad to have an endorsement of [their] principle."

²⁵⁰See notes 185–96 above and accompanying text.

²⁵¹See, e.g., Tam 2012, 875.

²⁵²See, e.g., Fincham 2011, 14.

²⁵³Tam 2012, 878.

decisions,²⁵⁴ a characteristic lacking in the current deaccessioning equation with the dichotomy between legal restrictions, strict ethical restrictions,²⁵⁵ and more lax ethical restrictions.²⁵⁶ It can shield nonprofit organizations from the glaring light of ethical scrutiny that consumers are shining on all organizations.²⁵⁷ And at a time when news travels at lightening speed through society, and it takes only the blink of an eye for a museum to commit an ethical faux pas, museums and museum professionals would benefit from codified protection surrounding deaccessioning. Legislation would provide guidance to museums seeking to deaccession works and to museum professionals responsible for deaccession decisions. In fact, when considering the proposed amendment of § 3.27 of the Rules of the Board of Regents, the New York Board of Regents noted that their “[m]useum constituents ha[d] asked for specific criteria and guidance” on deaccessioning.²⁵⁸ Legislation would also allow for an impartial check on the deaccession process to diminish “the wave of harmful criticism which greets any museum contemplating a deaccession,” thereby protecting the reputation of the museum.²⁵⁹

Legislation is daunting, given that “one size doesn’t fit all” in the museum world.²⁶⁰ Each museum is a separate and distinct organism comprised of visitors, supporters, donors, artists, scholars, trustees, staff, and federal, state, and local government, all serving distinct communities and following different missions, and each possessing a distinct identity.²⁶¹ Subject to such a delicate balance, museums argue that they are best suited for self-regulation.²⁶² Effectively drafting legislation would be a complex undertaking. Further, legal obligations present the minimum standards that must be met, while professional ethical standards prescribe the highest standards toward which one should strive,²⁶³ thus enabling the standard to be set higher.

²⁵⁴See, e.g., Lenow and Sare, “New York Board of Regents.” See generally Rosenbaum, “Deaccession Debacle: The Impotence,” which provides support of legislation in this field, as “[t]he time has come for the passage of legislation to bar museums from monetizing important collection objects that are in the public domain and should stay there.”

²⁵⁵See notes 25–26 above.

²⁵⁶Lax ethical opinions take on a variety of forms: “[One expert saw] no reason for strict rules about deaccessioning, other than telling the truth to the public and not selling to international trafficking mafias ... [Another expert] said her position had softened over the years. ‘If it’s really a life-or-death situation, if it’s a choice between selling a Rauschenberg and keeping the museum doors open, I think there’s some justification for selling the painting,’ she said. But several directors drew a much harder line, noting that museums 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... It’s a classic slippery slope, this thinking goes: Letting one museum sell off two paintings paves the way for dozens of museums to sell off thousands of artworks, perhaps routinely.” Finkel 2010, 724.

²⁵⁷See note 211 above and accompanying text.

²⁵⁸Cannell, “Amendment of Regents Rule § 3.27.”

²⁵⁹Fincham 2011, 5.

²⁶⁰See Tam 2012, 880.

²⁶¹See Tam 2012, 880, 890; see also Ulph 2013, 232.

²⁶²See discussion earlier in this article; see also Tam 2012, 890.

²⁶³See Tam 2012, 880.

However, if deaccessioning remains ungoverned by legislation or an effective enforcement mechanism, museums may soon experience either a decrease in donations²⁶⁴ or an increase in donor demand for restrictions allowing donor heirs to reclaim donations.²⁶⁵ Donors to the Museum of Contemporary Art in Miami, for example, began to make their opinions regarding the art they had donated known in 2014 (after the situation in Detroit began to unfold), emphasizing that they had given to the museum and not to the city.²⁶⁶ Laws regulating deaccession procedures would reassure donors and provide them with a renewed sense of security that accompanies a regulated process. Such legislation would help to prevent the public's confidence in, and trust of, museums being undermined.²⁶⁷ It would also help to guard against the stain of misunderstanding and suspicion that often surrounds the practice of deaccessioning, a regrettable result of the general public's first experience with the practice under this terminology.²⁶⁸

Further, some concern around legislating deaccessioning could be combated through careful consideration of what policies to legislate. The subject of deaccessioning is emotionally charged and varied: some believe in selling for any purpose,²⁶⁹ some believe in selling a piece that will otherwise remain in storage indefinitely,²⁷⁰

²⁶⁴See, e.g., Gresham Riley, "To Sell Art or Not To Sell: A Modest Solution for Struggling Museums," *Broad Street Review*, 1 February 2011, http://www.broadstreetreview.com/art-architecture/when_museums_sell_art_a_better_way (accessed 26 November 2016): "In the first place, the current guidelines fail to accomplish their intended purposes—namely, to protect the public interest and to encourage prospective donors to donate art works to museums." Riley continues to discuss that, without firm deaccession guidelines, donors will lack confidence to donate, though he frames the discussion in terms of museums keeping what is given to them. See also note 72 above and accompanying text.

²⁶⁵Walter Lehmann, telephone interview, discussing the general concept of donation incentive.

²⁶⁶Hannah Sampson, "MOCA Donors: We Gave to Museum, Not City of North Miami," *Miami Herald*, 4 June 2014, <http://www.miamiherald.com/2014/06/04/4158417/moca-donors-we-gave-to-museum.html> (accessed 26 November 2016): "A handful of art collectors who have donated to the Museum of Contemporary Art in North Miami are seeking to clear up any confusion: They say they gave their art to the museum, not the city."

²⁶⁷Tam 2012, 861–63.

²⁶⁸Urice 2010, 209–10 recounts the public's first experience with the term "deaccessioning" in 1972, in which the Met sold paintings bequeathed by Adelaide Milton de Groot, contrary to her wishes, and then denied the whole incident.

²⁶⁹See, e.g., Finkel 2010, 724: "[One expert saw] no reason for strict rules about deaccessioning, other than telling the truth to the public and not selling to international trafficking mafias."

²⁷⁰See Conforti 1997, 75: "Storage is often considered 'dead inventory,' visible to few, an institutional asset waiting to be struck from the debit side of the ledger and turned into cash"; see also Walter Lehmann, telephone interview, who pondered if it is best to sell a piece from storage if it will go to a place that would be able to display it. This is surely a controversial premise, as it might violate ethical principles—but also might not, depending on the use to which the proceeds are put. But the focal point is that the piece remains available to the public. As Walt Lehmann queried, is there a point to having such collections when a museum cannot pay its bills?; Adine Varah, telephone interview, explained that there is generally no public interest in holding pieces in storage indefinitely, assuming they are not suitable for public display and serve no educational or research purposes.

some believe in selling when there is an emergency,²⁷¹ some believe in selling and using funds according to the AAM's standards, some believe in following the AAMD's standards, and some believe in further restricting proceeds so that they are only used to purchase a piece of art that is the same type as the piece sold.²⁷²

Rather than striving to reconcile these conflicting opinions on the use of proceeds, which is an ethical question to be governed by voluntary commitment to community standards, it is imperative to consider the location in which the deaccessioned piece will ultimately reside after sale, assuming it remains of museum quality or otherwise suitable for public display. The purchaser or purchasing institution is fundamentally important; while the privatization of works in order to achieve maximum profits for museums may enable museums to purchase new works, the withdrawal of museum-quality works from the public sphere seems counterintuitive to the notion of the public trust and does not represent the optimal result for the public. A solution should ultimately be codified into law in order to increase the likelihood of maintaining the works of US museums within the public sphere.

A NEW INTERPRETATION OF AN OLD GUIDING PRINCIPLE: THE PUBLIC TRUST AND THE PURCHASER

The trumpet sounded over and over by those who argue against deaccessioning to fund operating costs (and argue in favor of using sale proceeds to purchase new pieces or to care for the existing collection) is that such unrestricted use violates the public trust.²⁷³ Although technically legal title to a museum's collection and the works housed in the museum usually resides with the museum's trustees, there is a "general overriding condition to their ownership. The condition is to the effect that every act of ... disposition of works in the collection must be in the public interest."²⁷⁴ This is based on a founding tenet of US museums—that the protection of an invaluable cultural resource has been entrusted to the museum's care for the

²⁷¹See, e.g., Finkel 2010, 724: "[Another expert] said her position had softened over the years. 'If it's really a life-or-death situation, if it's a choice between selling a Rauschenberg and keeping the museum doors open, I think there's some justification for selling the painting,' she said"; Zaretsky, "Please, Sir, May I Have Another?," quoting another commentator as saying "there ought to be a process through which museums in true danger of closing, which have exhausted all other possibilities, might petition a state attorney general or an AAMD-sanctioned arbiter or some other adjudicator for permission to deaccession some works to raise money to remain open."

²⁷²Stephen W. Clark, Vice President, Secretary and General Counsel, J. Paul Getty Museum, email to author, 21 May 2014: "Art museums [such as MoMA] often try to use deaccession proceeds to acquire an object related in some way to what was deaccessioned."

²⁷³See notes 45, 67, 71–72, 84, 136, 138, 141 above and accompanying text.

²⁷⁴Merryman, Elsen, and Urice 2007, 1201; see, e.g., Merryman, "Are Museum Trustees and the Law Out of Step?"; Miller 1997a, 94.

benefit of the public. Museums serve as stewards of these cultural resources and make them accessible to the public.²⁷⁵

The public trust doctrine was initially a tool in property and environmental law, used to avoid the exploitation and privatization of natural resources such as waterways.²⁷⁶ However, scholars believe “it is not limited to navigation or commerce” but, rather, “applies broadly to the public’s use of resources.”²⁷⁷ It is widely believed in the museum arena that “once a work of art enters a museum collection, that museum holds those works in the public trust for future generations in much the same way that the public may enjoy navigation on public waterways.”²⁷⁸ The New York State Board of Regents codified the definition of the public trust as the “responsibility of institutions to carry out activities and hold their assets in trust for the public benefit.”²⁷⁹ In broad strokes, the public trust concept refers to the duty museums owe to the public with respect to their methods of operation and the care they exert over their collections.²⁸⁰ Proponents of deaccessioning principles in line with those of the AAMD and the AAM argue that unrestricted use of the proceeds from deaccessioning violates the public trust.²⁸¹ Much of the controversy surrounding deaccessioning by museums “arise[s] from the perception that [museums] are public institutions impressed with the role of protecting and preserving their collections intact for future generations.”²⁸²

But current guidelines may not fully protect or advance the public interest,²⁸³ as they are primarily concerned with the use of proceeds generated from a sale and

²⁷⁵See, e.g., Fincham 2011, 4; Ulph 2013, 218, discussing museums’ “role of engaging with current members of the public whilst acting as stewards of their collections for the benefit of future generations”; AAM, “Code of Ethics for Museums,” 1991 (amended 2000), <http://www.aam-us.org/resources/ethics-standards-and-best-practices/code-of-ethics> (accessed 26 November 2016): “[Museums’] missions include collecting and preserving, as well as exhibiting and educating.”; AAMD, “Professional Practices in Art Museums,” 7: “The collection exists for the benefit of present and future generations. It should be made as accessible as is prudent for the protection of each object.” Please note that the discussion of the public trust and continued public access to works in this part of the article is not designed to ignore arguments for return, repatriation, or restitution of works or objects obtained through crimes against humanity or in violation of human rights. See generally Paterson 2006, 155; Stacey Jessiman de Nanteuil, telephone interview. Instead, this part suggests legislative principles to support the public trust tenet generally and to exist in conjunction with, rather than in isolation from, other principles of the museum field. Further, as noted earlier, this part refers to works that remain of museum quality or that are otherwise suitable for public display.

²⁷⁶See, e.g., Fincham 2011, 23–24; Tam 2012, 860: “The public trust doctrine holds that the public has a right to the use of navigable waters, a right that the state is responsible for protecting” (citing *Black’s Law Dictionary* 2009, 9th ed., 1352). For a more detailed history of the public trust, see Fincham 2011.

²⁷⁷Fincham 2011, 24.

²⁷⁸Fincham 2011, 27.

²⁷⁹New York Compilation of Codes, Rules and Regulations, title 8, § 3.27(a)(18).

²⁸⁰See, e.g., Tam 2012, 861.

²⁸¹See notes 71 and 138 above and accompanying text.

²⁸²Nafziger, Paterson, and Renteln 2010, 714.

²⁸³See, e.g., Riley, “To Sell Art or Not To Sell.”

do not take into account the other side of the equation when a piece of art is sold: the purchaser.²⁸⁴ In one sense, arguments made about maintaining a certain piece in the public trust disappear when the museum wishes to sell that piece and use the proceeds to purchase a new piece.²⁸⁵ The public would benefit from that sale in that the museum would provide access to the newly purchased piece. Still, however, the purchasing institution remains an important component of the selling process and public trust as well. When a piece is deaccessioned (even in accordance with the principles accepted and promulgated by the AAMD and the AAM) and sold outside of the public sphere to a private collector, it is potentially permanently removed from the public sphere. Works of art sold to the highest bidder can be lost to the public forever.²⁸⁶

Museums should still retain the discretion to determine which pieces to keep and which to deaccession, and they should receive the proceeds from any sale. But it is also possible to simultaneously consider the purchaser in a deaccession. If the idea of serving the public trust is to be considered paramount, it seems reasonable to ensure that a museum's deaccessioned work (suitable for exhibition) first have the opportunity to move to another museum or public arts institution or even to a private institution if it were accessible to the public (collectively referred to as a "public institution"). This would enable the piece to remain in the public realm in keeping with the public trust concept. Such a policy is favored by other types of museums, with history museums being more concerned with finding "an appropriate new home for a piece" and placing little emphasis on the use of proceeds, and anthropology museums and natural science museums typically allowing only exchanges with other collecting organizations.²⁸⁷

New York's Brodsky Bill originally required museums to "make a good faith effort to sell or transfer such [deaccessioned] item to another museum in New York State. If such sale or transfer cannot be accomplished, a museum must make a

²⁸⁴See, e.g., Riley, "To Sell Art or Not To Sell"; David Julyan, telephone interview, discussing that the focus should not be that works are in a museum but should be on how to get these works to the public.

²⁸⁵Donn Zaretsky summarized his opinion on the instances in which the public trust is an important part of the argument on deaccessioning: "[A]lthough it may *seem* that museums own the works of art in their collections, the works are actually 'held in trust' for the public and so cannot be sold under any circumstances. Never never never. Unless of course the museum wants to use the proceeds to acquire other, different works of art, or even just put them in an account labeled *Acquisition Fund* and let them sit there, in which case the discarded works are somehow no longer held in the public trust – go mind your own damn business, public! – and can be freely sold." Zaretsky, "Please, Sir, May I Have Another?"

²⁸⁶Garfield 1997, 12; Miller 1997b, 53–54; Rosenbaum, "Q&A with Carmine Branagan," which notes that the two pieces sold by the National Academy have not surfaced.

²⁸⁷Malaro 1997, 43; see also Stephen Clark, telephone interview, who notes that the focus should be on keeping the art within the public sphere; Walter Lehmann, telephone interview, noting that art institutions typically do not transfer to different institutions, as natural history museums do, because of the value of the art and the impact such value has on fiduciary duty.

good faith effort to sell or transfer such item to another public museum.”²⁸⁸ Existing San Francisco law provides for a transfer of works to another public or non-profit institution when the transfer is in the public interest.²⁸⁹ The AAMD’s Policy on Deaccessioning (amended in October 2015) also addresses the recipient of a deaccessioned work, noting in Part IV.C that “museums may give consideration to keeping a deaccessioned work in the public domain.”²⁹⁰ Further, the International Council of Museums notes that there will be a “strong presumption that a deaccessioned item should first be offered to another museum.”²⁹¹

The desire to keep deaccessioned works in the public domain, however, may conflict with the concept of fiduciary duty. Museums and museum trustees have a fiduciary obligation to act in the museum’s best interest.²⁹² As Stephen Clark of the Getty notes, these fiduciary obligations include a responsibility to maximize the value the museum earns and to obtain the highest price for a work.²⁹³ Tensions thus develop between this idea of maximizing earnings and ensuring the public’s continued access to works.²⁹⁴

The possibility of restricting the sale of an American museum’s deaccessioned works of art to other museums is appealing in terms of keeping the works within the public sphere. Under this approach, the concept of fiduciary duty would be subjugated to, and interpreted in terms of, the principle of the public trust. This means that a piece should go to the public institution willing to pay the most for it—therefore, the trustees would still fulfill their (modified) fiduciary duty but with new requirements in place regarding the purchaser. This approach is in line with the concept of museums as institutions designed to serve the public, not as money-making machines. As noted by David Julyan, one of the most important considerations is making the works available to the public.²⁹⁵ The fiduciary duty of the selling institution (and the accompanying drive to receive the highest price for the piece) would be of secondary importance; primary importance would be placed on the piece going to another public institution,²⁹⁶ albeit the one willing to pay the most for it.

²⁸⁸Lee Rosenbaum (CultureGrrl), “Channeling Max Anderson: NY State’s Deaccession Bill Rewritten,” *ArtsJournalBlogs*, 23 June 2009, http://www.artsjournal.com/culturegrrl/2009/06/ny_states_deaccession_bill_rew.html (internal quotation marks omitted).

²⁸⁹San Francisco Administrative Code, Art. 8, § 2A.155.10(b); see also discussion earlier in this article.

²⁹⁰AAMD, “AAMD Policy on Deaccessioning,” part IV.C.

²⁹¹Merryman, Elsen, and Urice 2007, 1245. For more information, see International Council of Museums, <http://icom.museum/the-organisation/icom-in-brief> (accessed 26 November 2016).

²⁹²See, e.g., AAMD, “AAMD Policy on Deaccessioning,” part IV.C; see also Stephen Clark, telephone interview.

²⁹³Stephen Clark, telephone interview; see also Danziger and Danziger, “Opportunity Knocks.”

²⁹⁴See, e.g., White 1996, 1063.

²⁹⁵David Julyan, telephone interview.

²⁹⁶See text accompanying note 287 above.

The problem with this approach, however, is the degree to which it could dampen,²⁹⁷ or limit, the market for these pieces and also fail the museum trustee's traditional fiduciary duty. With the current state of the economy, practically giving away pieces to other museums for low prices is not feasible for most institutions; if there were no way for an institution to maximize its profits or at least earn substantial revenue from its sales, it is likely that museums would simply stop selling pieces.²⁹⁸ And that would be a tragedy for the museum community, which uses deaccessioning to shape its collections with purpose.²⁹⁹ Thus, restricting sales to other museums, while beneficial in terms of public access to works, is unfeasible when examined from an economic and fiduciary duty perspective.

The rules of the New York Board of Regents indicate a preference that a museum close rather than sell its pieces and allow these works to leave the public sphere. The Corcoran resolution seems to offer a better solution—and perhaps marks the start of a trend of museums choosing a merger option in order to distribute their works to other arts institutions, creating a reign of “super museums.” Or perhaps there is another way to allow the selling institution to earn money but still preserve the art in the public sphere after the sale.

The simplest fix, in theory, would be a law stating that selling institutions must first offer their deaccessioned pieces to other arts institutions for fair market value before selling to a private purchaser; thus, museums would have a first right of refusal, an option to keep the piece in the public sphere. This is, however, idealistic at best if the overall goal is to maintain these pieces in the public sphere. Museums inherently possess limited funds; they simply cannot afford to pay fair market value for every piece of museum art that comes on the market. They also likely would not have the funds available for immediate use. Further, determining fair market value would be a difficult, if not impossible, endeavor.

A more plausible option is one of pre-emption, under which public institutions would be given an opportunity to match an existing private offer within a specified period of time. If such an institution could match the private offer, that institution (and therefore the public) would receive the piece.³⁰⁰ If not, the piece would go to the private purchaser. This system emphasizes a fair balance between income to the selling museum and the public's continued access to the work. Such a pre-emption policy, though temporary in nature, operated successfully following the 2006 announcement that Thomas Jefferson University in Philadelphia would sell

²⁹⁷International Foundation for Art Research 2014, 53.

²⁹⁸Unless we switched to a system purely free of economic restraints, in which museums simply shared pieces back and forth with one another. But this is unlikely, as art is inherently commoditized, and museum collections often serve as attractions that drive local economies. Art institutions typically do not transfer works to different institutions, as natural history museums do, because of the value of the art and the impact such value has on fiduciary duty. See Stephen Clark, telephone interview.

²⁹⁹Stephen Clark, telephone interview, who discussed MoMA's purposeful shaping of its collection; see also AAMD, “AAMD Policy on Deaccessioning,” part I.A.

³⁰⁰See, e.g., White 1996, 1064.

Thomas Eakins's *The Gross Clinic* (1875) to Alice Walton (for Crystal Bridges) for \$68 million.³⁰¹ The Philadelphia Museum of Art and the Pennsylvania Academy of Fine Arts were given 45 days to match this price—and they succeeded!³⁰² These two Pennsylvania institutions refused to let such an iconic piece of Philadelphia history leave their state. Similarly, when the New York Historical Society sold 183 Old Master paintings in order to try to maintain its operations, the New York Attorney General allowed qualified institutions to pre-empt a sale.³⁰³ Such institutions were even able to purchase works below hammer price.³⁰⁴ The Met purchased *Triumph of Fame* (1449) by Lo Scheggia in 1995 through this pre-emption process.³⁰⁵

The United Kingdom also has a similar system, effectuated through its export restrictions. Essentially, a review committee examines if a work proposed for export satisfies any of the Waverley criteria.³⁰⁶ If it does, the committee recommends that the secretary of state institute a deferral period “to allow time for an offer to purchase to be made at [or above] the fair market price to keep an object in the UK. In most cases, such offers are likely to come from public sources (museums, galleries or other heritage bodies such as the National Trust).”³⁰⁷ The committee recommends the fair market price as well as the length of the deferral period (which is normally between two and six months).³⁰⁸ These restrictions give British museums and cultural institutions the opportunity to keep iconic works in the country.³⁰⁹

A benefit of a system of pre-emption over one of first opportunity to buy is that it provides an opportunity to determine the highest price the piece could fetch, instead of asking a museum to make an offer without seeing what the market would support. Once the market determines the price, institutions would be given a reasonable time period to evaluate the situation. Private buyers are much more “nimble than their institutional counterparts,” as they do not have to navigate boards and ethical duties³¹⁰ and thus could make their offers much more quickly.

³⁰¹See Fincham 2011, 31; Carol Vogel, “Philadelphia Raises Enough Money to Retain a Masterpiece by Eakins,” *New York Times*, 24 April 2008, http://www.nytimes.com/2008/04/24/arts/design/24gros.html?_r=0 (accessed 26 November 2016).

³⁰²See Fincham 2011, 31–32; Vogel, “Philadelphia Raises Enough Money.”

³⁰³Fincham 2011, 33–34.

³⁰⁴Fincham 2011, 33–34.

³⁰⁵Fincham 2011, 33–34.

³⁰⁶Arts Council England, “UK Export Licensing for Cultural Goods,” 2016, 12, 14–15, <http://www.artscouncil.org.uk/advice-and-guidance> (accessed 26 November 2016): “The Reviewing Committee will designate an object as a ‘national treasure’ if it considers that its departure from the UK would be a misfortune on one or more of the following three grounds: History: Is it closely connected with our history and national life? (Waverley 1); Aesthetics: Is it of outstanding aesthetic importance? (Waverley 2); Scholarship: Is it of outstanding significance for the study of some particular branch of art, learning or history? (Waverley 3).”

³⁰⁷Arts Council England, “UK Export Licensing for Cultural Goods,” 15.

³⁰⁸Arts Council England, “UK Export Licensing for Cultural Goods,” 14.

³⁰⁹See, e.g., Fincham 2011, 35.

³¹⁰Fincham 2011, 35.

A system of pre-emption would ensure that public institutions are given both a definitive price and the time to try to raise funds and work within their governing structures, while ensuring that the selling institution would still receive a price that satisfies its fiduciary duty.

However, a system of pre-emption is not without its challenges. The requirement to offer public institutions time to raise the funds would translate into a longer period the selling institution would have to wait in order to receive the proceeds, regardless of whether the private purchaser or a public purchaser ultimately bought the piece. This system would require more administration and oversight than a regular sale, as public institutions would have to be notified and time would have to be monitored. This system could result in fewer private offers, if private purchasers became disenchanted with a system under which they could lose a piece they thought they had purchased to a public institution. And, ultimately, the piece might still be removed from public view, if no public institution was interested in purchasing the work or was able to raise the funds!

Despite these challenges, a system of pre-emption strikes the best balance between the fiduciary duty of the selling institution's trustees and the public's interest in the work remaining accessible to them. The delay in time before the selling institution would receive the purchase price would be combated shortly, as museums could make deaccession decisions further in advance due to this prescribed delay. It is unlikely that private purchasers would become so disenchanted that they would stop engaging in the purchasing process, as shown in the above examples. Public institutions would receive a fair chance to maintain a work in public view, while the selling institution would still receive fair market value for the piece.

Even with more time for hopeful purchasing institutions to raise funds, however, limited funds remain available to most public institutions.³¹¹ If a museum desperately wanted a piece, there is no guarantee they could raise the funds to match the highest private offer. The question thus becomes under what circumstances should museums be willing to forgo a higher sale price so that the piece can be pre-empted and remain in the public sphere?

The most conservative option from a fiduciary duty perspective is that the selling institution should never discount its works for purchase by another public institution; the purchasing public institution would either match the private offer or the piece would go to the private purchaser. This methodology reflects the difficult financial situations facing museums today and takes into account that the selling museum would benefit from obtaining the highest price possible. However, this methodology is driven purely by fiduciary duty and allows no financial offset for the benefit inured to the public by keeping the work accessible to the public.

³¹¹See notes 28 and 172–79 above and accompanying text; see also White 1996, 1063: “Public non-profit organizations often lack the financial resources to compete with private buyers for the purchase of works of art.”

Another option is that the selling institution would offer a discount to other public institutions for certain pieces. This would enable the most iconic and important pieces to have a higher likelihood of going to public institutions and thus remaining accessible to the public. The benefits of this option, however, are vastly outweighed by the administrative and oversight issues it presents: who would determine which pieces would be discounted due to their importance? Would there be different discounts based on relative levels of importance? These questions make such a variable discount system impractical.

A more feasible solution involves a standard discount for public institutions, thus interpreting the concepts of fiduciary duty and the public trust in relation to one another. A trustee's fiduciary duty could serve as a policing or regulating mechanism, in that the piece would be sold to a public institution only if the public institution were able to pay the selling institution a certain high percentage of the piece's private sale price, perhaps along the lines of 95 percent. Alternatively, a graduated discount could be applied. For example, if the private sale price is \$25,000 or less, the purchasing public institution would receive a 10 percent discount; if the price is more than \$25,000 but less than or equal to \$100,000, the discount would be 5 percent; and if the price is over \$100,000, the discount would be 3 percent. This exact graduated discount system was previously utilized in 1995 by the New York Historical Society, Sotheby's, and the New York State Attorney General and allowed institutions including the Met, Vassar College, and the Corning Museum of Glass to purchase works that otherwise would have gone to private purchasers.³¹² Either system would increase the likelihood that museums would be able to purchase iconic and legendary pieces that should remain in the public sphere. Such a system would also prevent institutions from scooping up another museum's treasures for mere pennies, which might occur if sales were limited to other museums. While both the amount saved by paying only a certain percentage and the amount of the graduated discount might appear minimal, such savings could be just enough to help a purchasing public institution afford the piece in question. This methodology would slightly reduce the amount received by the selling institution, but the discount is worth the benefit to the public of retaining access to these pieces. It re-emphasizes the priority and central museum tenet of making works accessible to the public.

A pre-emption provision, incorporating either a certain percentage or graduated discount model, should be enacted into legislation in order to both ensure that the trustees of the selling institution fulfill their fiduciary duties and guarantee that there is a fair opportunity for deaccessioned works of museum quality or that are otherwise suitable for public display to remain in the public sphere.

³¹²White 1996, 1064 and n.111.

CONCLUSION

Considering the risks to individual works and museum collections illustrated by the recent events involving the DIA, the DeAM, and the Corcoran, it is clear that US museums in the twenty-first century need to consider how they will cope with serious financial challenges. As these case studies demonstrate, internal museum policies and ethical standards on deaccessioning may not provide sufficient safeguards moving forward. Legislation is needed to protect the principles that museums hold art in the public trust and that maintaining art in the public sphere, wherever possible, is of the utmost importance. In the absence of a binding framework, collections may remain one financial disaster away from being “cannibalized,” sold to the highest bidder, and removed from the public sphere.

Regardless of the perspective one takes on the use of proceeds from deaccessioning, museums’ inherent responsibility to the public interest is best served by presenting a fair chance to keep the art accessible to the public and within the public sphere. Legislation can be crafted to provide an opportunity for deaccessioned works of museum quality or that are otherwise suitable for public display to be offered to other museums, while remaining respectful of the rights of museums to carefully shape their collections as they see fit and to receive optimal proceeds from the sale of works. This will produce a net gain for the public, in that the selling institution will receive a price the market supports, or perhaps a slightly discounted price, for the deaccessioned work, and other publicly accessible institutions will have an opportunity to purchase the work and continue to provide the public with access to it. With such a carefully crafted and nuanced legislative policy in place, we can increase the likelihood that museums will be able to retain the art that is currently displayed in collections, and even held in archives, in the public sphere and thus satisfy the fundamental premise of American museums—they exist to benefit the public.

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