# PUBLICITY RULES FOR PUBLIC TRUSTS♦

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*Abstract*

*That museums are public trusts is a truism in academic discourse and industry discussion. What various commentators mean when they speak about museums as public trusts, however, is less clear. This Article untangles and analyzes the various meanings of "public trust" and how these meanings translate into regulatory systems. I propose that two predominant meanings—the public resource and trust law meanings—jointly constitute the definition of a public trust, and that each meaning has a consequent regulatory framework. These definitional and regulatory frameworks coexist without conflict in most contexts. In the context of deaccessioning, however, they collide.*

*Deaccessioning—the practice of a museum selling art from its collection—is highly contested because it is perceived to be a significant violation of the public trust, in all meanings of the term. Nonetheless, public resource and trust law rules treat deaccessioning quite differently. Public resource rules, exemplified by industry standards and state statutes, strictly prohibit the use of deaccessioning funds for any purposes other than to purchase new art. Trust law rules, on the other hand, work primarily to ensure that the terms of organizational charters, trust instruments, and gift agreements are met. One goal of this Article is to identify and describe the public resource and trust law frameworks. A second goal is to leverage the debate surrounding deaccessioning as a means for discussing how the two frameworks compete and why the trust law framework, enhanced by the*



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*addition of corporate governance principles and grounded in "publicity" values, is preferable.*

Suspicion always attaches to mystery. It thinks it sees a crime where it beholds an affectation of secresy; and it is rarely deceived. . . . The best project prepared in darkness, would excite more alarm than the worst, undertaken under the auspices of publicity.

- Jeremy Bentham, *Of Publicity*[1]

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

- Louis Brandeis, *What Publicity Can Do*[2]

## INTRODUCTION

When the City of Detroit declared bankruptcy on July 18, 2013, creditors immediately targeted the Detroit Institute of Arts—and its outstanding art collection, which was subsequently valued at anywhere between $870 million and $4.6 billion—as a potential source of revenue

[1] Jeremy Bentham, *Chapter II: Of Publicity*, *in* 2 THE WORKS OF JEREMY BENTHAM (1843), http://oll.libertyfund.org/titles/bentham-the-works-of-jeremy-bentham-vol-2/simple#lf0872-02_label_002 (last visited Sept. 27, 2015).

[2] Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10.

to pay city debts, including municipal workers' pensions. Warning of harm from liquidating the artwork to pay creditors, museum officials argued that the museum was a source of "civic pride and an irreplaceable Public institution."[3] Museum officials stated that, "consistent with the public-trust doctrine, the Museum Art Collection is subject 'to the paramount right of the public to enjoy the benefit of the trust.'"[4] Creditors could not treat the art collection like an ordinary asset, so the argument went, because the museum was a public trust.

That museums are public trusts is a truism in academic discourse and industry discussion.[5] What is meant when various commentators speak about museums as public trusts, however, is less clear.[6] This Article untangles the diverse meanings that constitute the notion of a public trust and analyzes when and how various meanings diverge. I suggest in this Article that there are two predominant meanings that jointly constitute the definition of a public trust: the *public resource* and *trust law* meanings, each possessing a related regulatory framework. The public resource notion is exemplified in industry rules and state statutes; predictably, trust law and principles give legal form to the trust law understanding. These regulatory frameworks coexist peaceably in most contexts. That there is slippage and overlap between the two sets of meaning is unproblematic—the indeterminacy of meaning may produce a more resonant understanding of the institution, one rich in layers and complex in definition. In the context of deaccessioning, however, the frameworks collide.

Deaccessioning—the practice of a museum selling art from its collection—is a highly contested practice because it is perceived to be a violation of the public trust, according to both public resource and trust law frameworks.[7] Nonetheless, public resource and trust law rules treat

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[3] Response of the Detroit Institute of Arts to Objections to the City's Amended Plan of Confirmation at 10, *In re* City of Detroit, No. 13-53846 (Bankr. E.D. Mich. May, 27, 2014), http://www.artlawreport.com/files/2014/05/DIA-Response-to-Motion-re-collection.pdf.

[4] *Id.* at 19 (citing Glass v. Goeckel, 703 N.W.2d 58, 65 (2005)).

[5] *See, e.g.*, *Code of Ethics for Museums*, AMERICAN ALLIANCE OF MUSEUMS (2000), http://aam-us.org/resources/ethics-standards-and-best-practices/code-of-ethics ("Museum governance in its various forms is a public trust responsible for the institution's service to society."). *See also* Andrew W. Eklund, *Every Rose Has Its Thorn: a New Approach to Deaccession*, 6 HASTINGS BUS. L.J. 467, 471 (2010) ("Museums are typically considered public trusts.").

[6] In sum, a museum's "public trust" is indeed "nebulous." It appears to be a theoretical mix of the undefined understanding that museums ought to use museum resources for public benefit; the duties placed upon museum directors by their non-profit status, corporate charter, or charitable trust document; fiduciary duties and donor expectations.

*See* Jennifer Anglim Kreder, *The "Public Trust"*, U. PA. J. CONST. L. (forthcoming 2015) (providing an in-depth overview and history of the meaning of "public trust").

[7] The Association of Art Museum Directors (AAMD) defines deaccessioning as "the process by which a work of art or other object (collectively, a "work"), wholly or in part, is permanently removed from a museum's collection." AAMD TASK FORCE ON DEACCESSIONING, AAMD POLICY ON DEACCESSIONING 2 (June 9, 2010), http://0338c93.netsolhost.com/cms/wp-

deaccessioning quite differently. Public resource rules strictly prohibit the use of deaccessioning funds for any purposes other than the purchase of new art.[8] Trust law rules, on the other hand, work primarily to ensure that trust terms and gift conditions are met.[9] One goal of this Article is to identify and describe the public resource and trust law frameworks. A second goal is to use the debate surrounding deaccessioning as a means for discussing how the two frameworks compete and why the trust law framework—enhanced by the addition of corporate governance principles—is preferable.

The public resource understanding of the museum has its roots in the long history of museums as public and educational institutions, charged with the mission to steward both works of art and the public's trust. This theory derives support from tax and resource law. Museums are obligated to confer "public benefit" because they receive the preferential tax treatment accorded to all charitable organizations.[10] In addition, the legal concept of art as a public resource—akin to a natural resource—carries with it similar concepts of stewardship and public access. This understanding is embedded in museum mission statements, industry rules, and certain state statutes that regulate museums as state cultural institutions. For example, New York Rules and Regulations state, "Public trust means the responsibility of institutions to carry out activities and hold their assets in trust for the public benefit."[11]

The trust law understanding, while related, is slightly different. In the trust context, some museums are considered public trusts because their organizational form is that of a charitable trust. More broadly, nonprofit institutions, regardless of organizational form, are governed by trust principles in the management of institutional funds. In addition,

content/uploads/2011/05/Deaccessioning-Policy-AAMD.pdf.

[8] The AAMD states: "Proceeds from a deaccessioned work are used *only* to acquire other works of art—the proceeds are never used as operating funds, to build a general endowment, or for any other expenses." AAMD, ART MUSEUMS AND THE PRACTICE OF DEACCESSIONING 1 (2011), https://aamd.org/sites/default/files/document/PositionPaper Deaccessioning%2011.07.pdf.

[9] Deaccessioning cases can make it into a courtroom in the absence of gift restrictions. *See* Jennifer L. White, *When It's OK To Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041, 1044 (1996) ("Deaccessioning controversies generally come to the attention of courts in one of two ways: through directors seeking court approval prior to deaccessioning or through the state attorney general seeking to prevent such a transaction."). Museum board members or trustees can be charged with breach of fiduciary duty by the state attorney general or uniquely interested beneficiaries. Furthermore, the state attorney general can choose to challenge a particular sale, deploying the power allocated to her on behalf of the people. *See* Derek Fincham, *Deaccession of Art from the Public Trust*, 16 ART ANTIQUITY & L. 1, 16 (2011). Claims of this type are rarely pursued, however, given sparse staffing in any given attorney general's office and the potential bad politics of bringing such suits.

[10] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983) ("Charitable exemptions are justified on the basis that the exempt entity confers a public benefit . . . ").

[11] N.Y. COMP. CODES R. & REGS. tit. 8, § 3.27(a)(18) (2011).

the vast majority of museums acquire a significant number of artworks in the form of charitable donations whose disposition, particularly when the gift is restricted, is governed by trust principles. Accordingly, trust law concerning charitable gifts and fiduciary duty bind the range of permissible actions for museum trustees. Legal obligations to the public exist as well, since the public is the intended beneficiary of the charitable gifts and trusts, but legal duty flows most specifically between the trustee and the institution as well as its assets.

On the subject of deaccessioning, these two legal frameworks present a study in contrast. The public resource rules privilege the principle of art as a unique, public resource and consequently enforce a strict prohibition on certain forms of deaccessioning. From this perspective, there is a sense that "once an object ha[s] entered a museum collection, it should be considered a permanent part of the public patrimony[.]"[12] Deaccessioning is seen as a betrayal of the social meaning of art and museums, of institutional mission and cultural values: "Deaccessions are unromantic (how could a thing of inexplicable value be sold for cash?) and undemocratic (the sale of art out of the public sphere represents a lost opportunity for the greater populace to profit from viewing artwork)."[13] For all these reasons, "*[d]eaccession* has become something of a dirty word in museum circles."[14] Trust law rules, on the other hand, demand compliance with applicable trust terms and gift restrictions. Trust law rules privilege the concept of the trustee's responsibility and fiduciary duty. Trust law rules, therefore, focus less on the unique nature of art as an asset and more on gift compliance as well as asset management.

In this Article, I argue that trust law rules—enhanced with disclosure principles derived from corporate governance in order to provide additional constraints on trustees—are ultimately preferable. Public resource rules are problematic because they both rely on an undifferentiated notion of the public and hamper the ability of trustees and directors to fulfill their fiduciary duties. Trust law rules ensure gift compliance, which is the foremost obligation. These rules also allow trustees and directors more managerial discretion in institutional governance, a grant that is especially important in times of financial difficulty, and privilege process over principle. Furthermore, corporate law principles of disclosure and publicity can be used to modify and enhance trust rules in order to ensure that mechanisms exist for taking into account the public as an important stakeholder and holding trustees and directors of museums accountable for their decision-making.

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12 STEPHEN E. WEIL, RETHINKING THE MUSEUM AND OTHER MEDITATIONS 105 (1990).

13 Jason R. Goldstein, *Deaccession: Not Such a Dirty Word*, 15 CARDOZO ARTS & ENT. L.J. 213, 246 (1997)

14 *Id.* at 216.

Properly regulating museums is an important undertaking because museums are a crucial part of the social fabric. In the United States alone there are approximately 850 million visits each year to American museums.[15] "Every major city either wants an art museum or wants a bigger or better one. Supported by a booming economy, intense civic pride, and local and state governments' growing awareness of the economic benefits of cultural tourism, museums across America have become the defining public institutions of the communities."[16] As the Detroit example underscores, however, numerous factors have led museums into financial distress in the past decades, thereby forcing them to consider deaccessioning artworks from their collection in an attempt to generate revenue. The strict public-resource based prohibition against using funds for operational deficits deprives museums of an increasingly important option when confronted with critical budget shortfalls. Moreover, while museums—as quintessential public trust institutions—are the focus of this Article, an inquiry into what the most appropriate governance rules are for public trusts is also relevant in the context of libraries, public universities, and other historically public institutions. As a former director of the Detroit Institute of Arts remarked, "If you could sell off Detroit's hospitals and its universities, would you do that, too? If you do things like this, you're basically spelling the end of the city as an ongoing entity."[17]

Legal scholars who address deaccessioning generally argue that industry rules concerning deaccessioning should be relaxed in order to allow museums to spend funds raised though deaccessioning on operational needs, especially in times of financial distress.[18] Among museum administrators and industry leaders, however, there is great

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[15] *Museum Facts*, AMERICAN ALLIANCE OF MUSEUMS, http://www.aam-us.org/about-museums/museum-facts (last visited Sept. 27, 2015).

[16] Glenn D. Lowry, *A Deontological Approach to Art Museums and the Public Trust*, *in* WHOSE MUSE? ART MUSEUMS AND THE PUBLIC TRUST 131 (James B. Cuno & Neil MacGregor eds., 2004).

[17] Randy Kennedy & Monica Davies, *Detroit's Creditors Eye Its Art Collection*, N.Y. TIMES, July 19, 2013, at C1.

[18] *See, e.g.*, Sara Tam, *In Museums We Trust: Analyzing the Mission of Museums, Deaccessioning Policies, and the Public Trust*, 39 FORDHAM URB. L.J. 849, 900 (2012) ("While a strict rule on the use of deaccessioning proceeds, currently endorsed by professional organizations, places a well-founded emphasis on protecting the public trust's holding in art, the survival of a museum as a cultural forum for its community warrants equal attention."). *See also* Jorja A. Cirigliana, *Let Them Sell Art: Why a Broader Deaccession Policy Today Could Save Museums Tomorrow*, 20 S. CAL. INTERDISC. L.J. 365, 368 (2011) ("[D]eaccession policies should be broadened to (1) allow museums to deaccession objects based on financial necessity and (2) allow museums to apply deaccession proceeds to operating costs."); Jennifer L. White, *When It's OK To Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041, 1048 (1996) ("[C]ourts should approve a museum director's use of proceeds from the sale of deaccessioned art to meet operating expenses if the director's conduct comports with the duties of trustees under the law of trusts.").

debate about whether the deaccessioning rules are in need of modification. The deaccessioning debate in this realm is highly contentious and the industry rules have strong supporters.[19] Missing in all the conversations is a robust understanding of the multiple and sometimes conflicting legal frameworks that construct and support the notion of a public trust. Also missing is substantive discussion about what theoretical principles should guide public trust regulation. This Article fills those lacunae.

The Article proceeds in three Parts. In the first Part, I identify and describe the differences between the public resource and trust law frameworks. I analyze what values compose each framework and the regulatory system attached to each framework. In the second Part, I evaluate current cases in which museums have considered or put into effect deaccessioning plans. I describe the circumstances surrounding these attempts as well as the resulting public debate, industry sanctions, and legal proceedings. I demonstrate, through these case studies, the limits and shortcomings of the public resource framework. In particular, I analyze how the public resource framework can be counterproductive in serving the public by forcing financially strapped institutions to close or cut public programs rather than use deaccessioning funds for operations. Moreover, I explain how the public resource framework relies on a flawed and incomplete understanding of the public. Finally, I evaluate how the public resource framework may prevent trustees and directors from fulfilling their fiduciary duties to the institution.

In the third Part, I explain how the trust law framework provides the more suitable regulatory apparatus and suggest ways in which that framework can be enhanced in order to focus on the public nature of the charitable institution. More specifically, I propose the expansion of *cy pres*, a trust doctrine used to modify restricted gift terms, to enable increased procedural transparency through judicial intervention. Likewise, I suggest corporate law models for new rules concerning information disclosure, public auction, and special duties in the context of financial insolvency. These solutions to the deaccessioning problem, I argue, help embed publicity values in rules appropriate to a public trust.

## I. PUBLIC TRUST RULES

In order to approach the joint question of deaccessioning and

[19] *See, e.g.*, Lee Rosenbaum, *From Detroit to Delaware: Why We Need Government Deaccession Regulations*, CULTUREGRRL (Nov. 26, 2014, 6:38 PM), http://www.artsjournal.com/culturegrrl/. On the other side of the debate, a strong critic of the deaccessioning rules is Donn Zaretsky. *See* Donn Zaretsky, *AAMD Rules Need to be Deaccessioned*, ART IN AMERICA (Mar. 31, 2009), http://www.artinamericamagazine.com/news-features/news/aamd-rules-need-to-be-deaccessioned.

optimal public trust regulation, it is important to understand what is meant by a public trust and what rules currently apply. Public trust is "[a] multivalent term that implies both a set of responsibilities—to preserve, protect, and enhance property held on behalf of the public—and a code of conduct to ensure that this responsibility is discharged with the highest degree of skill and diligence."[20] I suggest that two primary frameworks exist. Both conceive of the museum as owing a duty to the public while also being stewards of the artwork. Nonetheless, the frameworks are undergirded by different social and legal values.

### A. *The Public Resource Framework*

This Part provides a brief overview of how museums came to be widely considered as exemplary public institutions and explains how the conception of the museum as a public institution has informed institutional mission statements, industry rules, and state statutes. I also describe the legal doctrines, drawn from both tax and public resource law, which support this public resource framework.

#### 1. Mission Statements and Industry Rules

Historically speaking, the museum is "primarily a creation of the Enlightenment."[21] Born of the era that gave rise to modern notions of the public sphere, "the museum was construed to be fundamentally educational, a venue for the systematic organization and presentation of artistic, natural, and scientific phenomena. Inherent in this is the idea of the museum as a public space."[22] The first large American museums—such as the Metropolitan Museum of Art and the Boston Museum of Fine Arts—were built according to this Enlightenment model.[23] These large-scale museums were thought to possess "the capacity to elevate the taste and purify the morals of its visitors"[24] and to "cultivate[] good citizens who would then share in the general prosperity of a properly

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[20] Lowry, *supra* note 16, at 134.

[21] *Id.* at 139–40. Lowry adds that "the idea of the museum derives from Plato's academy and the Alexandria of the Ptolemies in particular." *Id.*

[22] *Id.*

> [T]he museum ought to emphasize the fact that it has traditionally been and still remains one of the few public spaces in which people of every background can gather together for peaceful exchange in a secure surrounding. In that mode, the museum might be understood as a contemporary descendent of such earlier public gathering places as the Roman bath, the medieval cathedral and the New England village green.

Stephen Weil, *The Museum and the Public*, 16 MUSEUM MGMT. & CURATORSHIP 257, 266 (1997).

[23] *Id*. at 140 ("The great museums of the United States founded in the late nineteenth and early twentieth centuries . . .were founded on the enlightenment model.").

[24] Weil, *supra* note 22, at 267.

functioning democracy."[25] While museums were conceived as part of a democratic sphere, and seen as emblematic public institutions, in practice they were strongly associated with elite culture. Neil Harris has remarked that American museums "up through the early 1960s might be said to have constituted a self-enclosed world, clearly defined by hierarchies of prestige and privilege, visited by largely traditional audiences, and promulgating an ideal of self-restraint in their display of art, history, science, and culture."[26]

By the 1960s and 1970s, however, cultural shifts and political upheaval shook museums loose from their position as staid institutions of cultural authority. In an era of war, political turbulence, and a blossoming counter-culture, "[a] pervasive sense existed that museum governance, attendance, collecting and exhibition policies reflected racial, gender, religious, and class dominance."[27] The museum ceased to occupy a wholly "transcendent" role and became instead "implicated in the distribution of wealth, power, knowledge and taste shaped by the larger social order."[28] Taking seriously the critique of elitism, museums endeavored to transform from "temple to forum," in the words of Stephen Weil, in order to "create an equality of cultural opportunity."[29]

Consequently, museums engaged in an increasing amount of public outreach and education—including to new demographics and populations. The result has been that museums are now "active suitors of new audiences, they partner with a variety of civic and cultural organizations . . . they tackle themes that are socially relevant and court controversy."[30] This renewed focus on the public has also confirmed the importance of the public trust idea. Glenn Lowry, director of the Museum of Modern Art, describing the duty of museums to the public, has remarked that museums must "act in a way that ensures the public

[25] Michael Kimmelman, *Museums in a Quandary: Where Are the Ideals?*, N.Y. TIMES, Aug. 26, 2001, § 2, at 26.

[26] Neil Harris, *The Divided House of the American Art Museum*, 128 DAEDALUS AM. MUSEUMS 33, 38 (1999).

[27] *Id.* at 43.

[28] Weil, *supra* note 22, at 262 (citing a Neal Harris 1986 address). These accusations leveled against museums by a new generation of art activists were bolstered, as time passed, by the theoretical interventions of cultural critics who "unmask[ed] the structures, rituals, and procedures by which the relations between objects, bodies of knowledge, and processes of ideological persuasion are enacted." Daniel Sherman & Irit Rogoff, *Introduction*, *in* MUSEUM CULTURE: HISTORIES, DISCOURSES, SPECTACLES x (Daniel Sherman & Irit Rogoff, eds. 1994). *See also* Harris, *supra* note 26, at 48–51; Kimmelman, *supra* note 25 ("Cultural theorists like Pierre Bourdieu and Michel Foucault . . . cast[] doubts on the benevolence of a range of institutions previously viewed as benign and progressive: hospitals, universities and libraries as well as museums. These institutions came to be viewed as disciplinary enforcers in class and race wars.").

[29] Duncan F. Cameron, *The Museum, A Temple or the Forum*, *in* REINVENTING THE MUSEUM: THE EVOLVING CONVERSATION ON THE PARADIGM SHIFT 59 (Gail Anderson ed., 2012) (citing Stephen Weil).

[30] Harris, *supra* note 26, at 38.

retains faith or confidence—that is, trust—in their activities. To do so, they must act with integrity and justice."[31]

This new—or revived—sense of public orientation and accountability is reflected in updated institutional mission statements. For example, the Glenbow Museum's mission is the following: "To be a place where people find meaning and value, and delight in exploring the diversity of the human experience."[32] Industry standards demonstrate the same public focus. In its *Code of Ethics*, the American Alliance of Museums (AAM) states: "Museums in the United States are grounded in the tradition of public service. They are organized as public trusts, holding their collections and information as a benefit for those they were established to serve. . . . Loyalty to the mission of the museum and to the public it serves is the essence of museum work."[33] The AAM further states, in its *Standards Regarding Public Trust and Accountability*, that:

- The museum is a good steward of its resources held in the public trust.
- The museum identifies the communities it serves and makes appropriate decisions in how it serves them.
- The museum asserts its public service role and places education at the center of that role.[34]

Museums are stewards not just of works of art, but also of public mission and interest.

Because of this understanding that the public is the paramount constituent of the museum, institutional action that is perceived to be contrary to the public interest—like deaccessioning—is penalized. Subject to limitation, deaccessioning is—in theory—an accepted part of collection management. The AAMD states in its report on the AAMD Policy of Deaccessioning (the "Report"): "Deaccessioning is a legitimate part of the formation and care of collections, and, if practiced,

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[31] Lowry, *supra* note 16, at 134. Lowry has stated: "For insofar as public trust means retaining the confidence of the public, museums must be perceived to be acting both responsibly and for the coming good. This requires that art museums—at a minimum—inspire confidence in the public that they have made considered judgments about what works of art to collect or to borrow, about how those objects should be displayed and for what purpose, and about what exhibitions and programs to present." *Id.*

[32] Weil, *supra* note 22, at 269. The Glenbow is in Calgary, Canada.

[33] *Code of Ethics for Museums*, AMERICAN ALLIANCE OF MUSEUMS (2000), http://aam-us.org/resources/ethics-standards-and-best-practices/code-of-ethics. The non-profit International Council of Museums states, "[a] museum is a non-profit, permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment." 3 INT'L COUNCIL OF MUSEUMS STATUTES § 1 (2007), http://archives.icom.museum/hist_def_eng.html (last visited Sept. 27, 2015).

[34] *Standards Regarding Public Trust and Accountability*, AMERICAN ALLIANCE OF MUSEUMS, http://www.aam-us.org/resources/ethics-standards-and-best-practices/public-trust (last visited July 22, 2015).

should be done in order to refine and improve the quality and appropriateness of the collections, the better to serve the museum's mission."[35] There is, however, an important caveat. The most debated provision in the Report states: "Funds received from the disposal of a deaccessioned work shall not be used for operations or capital expenses. Such funds, including any earnings and appreciation thereon, may be used only for the acquisition of works."[36] Furthermore, the Report warns that, in the case of a violation, an institution could face sanctions including de-accreditation. This deaccessioning prohibition stems from the notion that art is a unique public resource and that subsequently any action that commodifies art—and potentially takes it out of the public realm—without public consent is illegitimate.

### 2. State Rules and the Codification of Mission

Like most mission statements and the rules set by industry leaders, state rules and regulations governing museums also deploy the term public trust in a very broad and encompassing sense. In New York—home to both a wealth of museums and of controversy—the Board of Regents oversees the majority of museums.[37] Regent rules govern deaccessioning and are set forth in the local rules section entitled *Chartering and registration of museums and historical societies with collections*.[38] The Regent rules present an almost mirror image of The

[35] AAMD TASK FORCE ON DEACCESSIONING, AAMD POLICY ON DEACCESSIONING 4 (June 9, 2010), http://0338c93.netsolhost.com/cms/wp-content/uploads/2011/05/Deaccessioning-Policy-AAMD.pdf. The Report, accordingly, lists eight primary reasons for which an institution might choose to deaccession a piece, also including restitution obligations, the disposal of fraudulent art, and the physical condition of a work. The Report also clarifies the procedures to be followed, such as the notification of any living artist or donor, and preferred methods of disposal. *Id.* at 5–6.

[36] *Id.* at 4.

[37] The Board of Regents oversees museums that are chartered with the state:

> In New York State, education corporations are created by the Board of Regents of The University of the State of New York . . . Nonprofit organizations and institutions with educational purposes, such as schools and cultural agencies, seeking to incorporate, must do so under Education Law § 216, subject to the authority of the Regents . . . A museum or historical society that wishes to organize as a nonprofit education corporation must do so by petitioning the Board of Regents for the issuance of a charter. A charter is granted by the Board of Regents as an instrument of incorporation to museums and historical societies that satisfy Regents standards of organizational and educational quality. These standards are consistent with professionally accepted principles and practices as adopted by the American Association of Museums and the American Association for State and Local History.

*Chartering*, NEW YORK STATE MUSEUM, http://www.nysm.nysed.gov/charter/ (last visited Sept. 27, 2015).

[38] N.Y. COMP. CODES R. & REGS. tit. 8, § 3.27. The section defines a museum as

> an organized not-for-profit institution, including but not limited to halls of fame, zoos, aquariums, botanical gardens and arboretums, that is essentially educational or aesthetic in purpose, with professional staff, which ordinarily owns, exhibits, maintains, and/or utilizes artifacts, art, and/or specimens, including non-tangible electronic, video, digital and similar art, cares for them, and exhibits them to the public on some regular schedule.

Association of Art Museum Directors (AAMD) rules. The Regent rules present a museum's legal obligations as flowing from its status as a *public trust* institution, and define public trust accordingly: "Public trust means the responsibility of institutions to carry out activities and hold their assets in trust for the public benefit."[39] Based on this understanding, the rules allow museums to deaccession works in a limited set of circumstances, including when the item is redundant, inauthentic, or being repatriated.[40] The regulations also place a strict prohibition on the use of deaccessioning funds for certain purposes, including general operations. The regulations state:

> [P]roceeds derived from the deaccessioning of any property from the institution's collection be restricted in a separate fund to be used only 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.[41]

Other states have similar deaccessioning laws on the books.[42] An Indiana statute sets forth a set of nine criteria that render deaccessioning acceptable.[43] A New Mexico statute requires that funds generated from deaccessioning be placed in a separate account within the state treasury and that the funds be expended "for the sole purpose of acquiring objects for that museum's collection."[44] Louisiana has a statute regulating the "Sale and deaccession of university museum collection

*Id.*

[39] N.Y. COMP. CODES R. & REGS. tit. 8, § 3.27(a)(18).

[40] *See* N.Y. COMP. CODES R. & REGS. tit. 8, § 3.27. Appropriate reasons for deaccessioning are (i) the item is inconsistent with the mission of the institution as set forth in its mission statement; (ii) the item has failed to retain its identity; (iii) the item is redundant; (iv) the item's preservation and conservation needs are beyond the capacity of the institution to provide; (v) the item is deaccessioned to accomplish refinement of collections; (vi) it has been established that the item is inauthentic; (vii) the institution is repatriating the item or returning the item to its rightful owner; (viii) the institution is returning the item to the donor, or the donor's heirs or assigns, to fulfill donor restrictions relating to the item which the institution is no longer able to meet; (ix) the item presents a hazard to people or other collection items; and/or (x) the item has been lost or stolen and has not been recovered.

*Id.*

[41] N.Y. COMP. CODES R. & REGS. tit. 8, § 3.27

[42] Nine states have some form of regulation concerning deaccessioning. Those states, in addition to New York and New Mexico, are Alaska, Georgia, Indiana, Louisiana, Maine, Pennsylvania, and Vermont. The Tribal Little River Band of Ottawa also addresses deaccessioning in its Collection Policy Ordinance.

[43] *See* 313 IND. ADMIN. CODE 3-1-6.

[44] N.M. STAT. ANN. § 9-4A-20 (West) ("To comply with national museum ethical guidelines, each museum may have a subaccount in the museum collections fund into which the proceeds of the deaccessioning of its collection items and income from investment of the proceeds are credited.").

items,"[45] which provides that "[n]o object may be sold or deaccessioned less than two years after its acquisition by the museum" and lists five acceptable modes of disposal.[46] Some states, in addition to New York, also require that all donors be provided with notice of a museum's deaccessioning policy.[47] For example, Vermont requires that museums provide "a donor or prospective donor with a written copy of its mission statement and collections policy, which shall include policies and procedures of the museum related to deaccessioning."[48] Other local laws may apply as well. For example, the Little River Band of Ottawa Indians has a Collection Policy Ordinance, ensuring that "deaccession does not conflict with the established tribal collection goals[.]"[49] In all these cases, state statutes, generally found in titles governing cultural facilities or historic preservation, focus on both restricting the use of deaccessioning funds and aligning state rules with industry standards.

### 3. Artwork as a Public Resource

Supporting local and industry rules that govern museums are two legal doctrines—one from public resource law and the other from tax law. Public resource doctrine "originated in the Roman concept of public property, which stipulated that certain parts of the environment—the air, rivers and the sea, for example, were not subject to private ownership. Rather, they were dedicated for public use."[50] This notion subsequently appeared in European civil law and English common law in similar contexts, and the idea was extended to artworks (although less frequently). Accordingly, "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."[51] Art also occupies a unique position as a public resource because it is often thought to be reflective of national and local cultures and therefore perceived to constitute part of a nation's cultural heritage.

Because "the public trust doctrine would treat art as an abstract

45 LA. REV. STAT. ANN. § 25:1101.

46 *Id.*

47 N.Y. PARKS REC. & HIST. PRESERV. LAW § 19.28 (McKinney) ("Prior to the acquisition of property by gift, the office shall provide the donor with a written copy of the appropriate facility collections policy, which shall include policies and procedures of the office relating to deaccessioning.").

48 27 VT. STAT. ANN. § 1155 (West).

49 Native American Rights Fund, *Collection Policy* (Aug. 30, 2006), http://www.narf.org/nill/codes/little_river_band/code_04_07_12/500/500_06.pdf.

50 Fincham, *supra* note 9, at 24. For an examination of the historical origins of the environmental public trust doctrine, *see* Kreder, *supra* note 6 (manuscript at 19) ("certain environmental resources are held in a modern day 'public trust,' but the doctrine concerning natural resources has ancient roots").

51 Fincham, *supra* note 9, at 27.

trust held by public institutions as a public resource,"[52] museums hold the twin duties of stewarding the art and providing public access. The idea of an "abstract trust" gives rise to notions of legal responsibility, in particular duties of trusteeship for museum leaders. Museum leaders therefore routinely define themselves as caretakers of public resources and "good steward[s] of [the] resources held in the public trust."[53] This idea of an "abstract trust" also emphasizes the public's role as beneficiary. Unlike with a private trust, "[t]he trustees of an art museum, those entrusted to care for and maintain a particular community's patrimony, do not owe a fiduciary duty to a particular person but to the public as a whole."[54] This duty entails ensuring public access to the art,[55] which has implications for deaccessioning because "once an object is put into the public domain in the form of a charitable gift or trust, the object cannot later be returned to private hands."[56] Elaborating on both public access and the sale of art, one scholar states: "There are three general restrictions on governmental authority which are imposed by the public trust: the property must be available for the general public; the property may not be sold; and the property must be maintained for traditional uses."[57]

Consequently, the Detroit Institute of Arts, objecting to the plan for generating revenue by selling art, invoked the public resource doctrine: "Under the public-trust doctrine, governmental entities have a duty to preserve and protect resources held in trust for the public."[58] The Institute observed that, "[although] no Michigan court has addressed whether the public-trust doctrine applies to cultural property such as art held for public exhibition, strong consideration should be given to expanding the scope of the doctrine to other public resources."[59] Moreover, the Institute argued that, in conjunction with the public-trust doctrine, the collection was protected by an implied trust:

> More compelling than any formal trust agreement, the Museum itself is the evidence of the DIA Charitable Trust. It has served for more

[52] Tam, *supra* note 18, at 861.
[53] American Alliance of Museums, *supra* note 34.
[54] Goldstein, *supra* note 13, at 214.
[55] Heather Hope Stephens, *All in a Day's Work: How Museums May Approach Deaccessioning as a Necessary Collections Management Tool*, 22 DEPAUL J. ART TECH. & INTELL. PROP. L. 119, 122 (2012) (because "[a] museum's collection can be viewed as a cultural property belonging to the public . . . it is important to keep the works of art available to that public.").
[56] Patty Gerstenblith, *The Fiduciary Duties of Museum Trustees*, 8 COLUM. J. ART & L. 175, 192 (1983–1984).
[57] Fincham, *supra* note 9, at 27. *See also* JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 31 (1999).
[58] Response of the Detroit Institute of Arts to Objections to the City's Amended Plan of Confirmation at 19, *In re* City of Detroit, No. 13-53846 (Bankr. E.D. Mich. May, 27, 2014), http://www.artlawreport.com/files/2014/05/DIA-Response-to-Motion-re-collection.pdf.
[59] *Id.*

> than a century as a vessel into which thousands of donors, both public and private, have poured their goods and goodwill to advance the "knowledge and enjoyment of art."[60]

### 4. Tax Exemption and the Public as "Vicarious Donors"

Tax law concepts, in particular the concept of the public as a vicarious donor, help give legal substance to the public resource framework. This idea of the public as a collective donor stems from the preferential tax treatment that charitable organizations receive. Charitable organizations are exempt from paying federal income tax;[61] they are likewise often exempt from paying most state taxes, including income tax, sales tax, and property tax.[62] In addition, gifts made to museums are tax-deductible, subject to certain limitations.[63] Because of these tax exemptions, characterized by some as subsidies,[64] courts have conceptualized the public as having a kind of proprietary interest in charitable organizations.

In *Bob Jones University v. United States*, the Court reinforced this idea after analyzing the legislative history of the tax exemption for charitable organizations:

> When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious "donors." Charitable exemptions are justified on the basis that the exempt entity confers a public benefit.[65]

The public is key because its members are indirect donors to the institution through their tax dollars. Because of this indirect subvention, "the trustees of a charitable or nonprofit institution have a duty of loyalty to the public, based upon the concepts of . . . the public as supporter of the institution through the grant of special tax treatment."[66]

This concept dovetails in many ways with the trust law framework, because it focuses on charitable gifts and their treatment. The idea of the

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[60] The Museum labeled itself as the "DIA Charitable Trust" not on the basis of an explicit trust having been created but rather on the basis of its activity. The Museum argued that the institution's articles of incorporation and subsequent operating agreement indicated an intention for the museum to operate as a charitable organization and trust repository for gifts of artwork. *See id.* at 18.

[61] Federal tax-exempt status for organizations is codified at 26 U.S.C. § 501(c).

[62] State exemptions from tax payments vary according to state. *See, e.g.*, N.Y. STATE DEP'T OF TAXATION AND FIN., A GUIDE TO SALES TAX IN NEW YORK STATE FOR EXEMPT ORGANIZATIONS, PUBLICATION 843 (2009).

[63] The deduction is codified at 26 U.S.C. § 170. 26 U.S.C. § 170(c)(2) defines entities to which deductible contributions may be made. Congress first adopted this deduction in 1917.

[64] For a discussion of the deductions as subsidies, *see* Daniel I. Halperin, *Is Income Tax Exemption for Charities a Subsidy?*, 64 TAX L. REV. 283 (2011).

[65] Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983).

[66] Gerstenblith, *supra* note 56, at 182.

public as a set of vicarious donors lacks, however, the specificity needed for trust rules to govern. That is to say, no direct gift is made nor are any concrete restrictions placed on the "gift." There is no trust instrument or gift agreement for trust law to enforce. Like the public resource doctrine, this tax concept focuses on an abstract notion of the public, and creates indeterminate duties based upon a triangulated relationship between the government, the institution, and the public.

### B. *The Trust Law Framework*

Where the public resource framework places primary focus on the role and rights of the public as well the public nature of the artwork, the trust law framework places focus on institutional governance, the use and disposition of charitable gifts, and the trustee's fiduciary duties. Trust law regulation of deaccessioning is more concerned with the concrete terms of trust instruments and gift agreements, and turns on questions of legal compliance rather than public access.

#### 1. Trust as Organizational Form

From inception, some museums have trust obligations that derive from their organizational form. As charitable organizations, museums must be constituted as either corporations or trusts before applying for tax-exempt status from the Internal Revenue Service. A number of major museums, including the Getty Museum in Los Angeles, are constituted therefore as charitable trusts. One of the defining characteristics of charitable trusts—in contrast to private trusts—is that they have no ascertainable beneficiaries. Rather, the trust must possess a charitable purpose: "A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community."[67] The charitable purpose is set forth in the trust agreement, or instrument. In the case of most charitable trusts, the public at large is the beneficiary; in other words, the "trustee has only the legal ownership of the trust assets, while, in the case of a museum, the beneficial ownership of the museum collection and other assets belongs to the public."[68]

The charitable trust form grants limited rights to the public as beneficiary. The majority of trust rules, however, center on the trustee. Generally, the duties of a trustee are set forth in Article 8 of the Uniform Trust Code, although the rules may vary by state. Trustees are primarily bound by fiduciary duties that include the duties of care and

[67] UNIF. TRUST CODE § 405(a) (2005).
[68] Gerstenblith, *supra* note 56, at 181.

loyalty; some commentators also identify a duty of obedience.[69] These duties are owed to the trust assets as well as the beneficiary.[70] The duty of care requires trustees to "exercise reasonable care and diligence in the management of the museum's assets. . . . The duty of care includes the duty to take possession of and to protect investment, and, in some circumstances, to sell trust assets to render the trust more profitable."[71] The duty of care also helps to define asset management and investment strategies, requiring a portfolio theory of investment, and setting forth the prudent investor standard.[72] The Uniform Prudent Management of Institutional Funds Act addresses questions concerning the proper investment of institutional funds and accounting procedures.[73]

The duty of loyalty requires that the trustee remain loyal to the purposes for which the trust was created in executing the trust terms. As stated in the Uniform Trust Code: "The duty of loyalty [is], perhaps the most fundamental duty of the trustee. . . . A trustee owes a duty of loyalty to the beneficiaries, a principle which is sometimes expressed as the obligation of the trustee not to place the trustee's own interests over those of the beneficiaries."[74] In the case of a charitable trust, the duty of loyalty applies "even though the beneficiaries of charitable trusts are indefinite. In the case of a charitable trust, the trustee must administer the trust solely in the interests of effectuating the trust's charitable purposes."[75]

The vast majority of charitable organizations are not, however, charitable trusts. Rather, the lion's share of the over 600,000 public charities in the United States are formed as non-profit corporations. Non-profit corporations are nonetheless subject to many of the same trust principles and rules that charitable trusts are, particularly with respect to gift administration. Furthermore, directors of non-profit corporations are similarly bound by the same fiduciary duties.[76] One

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[69] PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 253 (3d ed. 2012). For a discussion of the nature and complexities of fiduciary duty, *see* Deborah DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879.

[70] *See* White, *supra* note 9, at 1051 ("Furthermore, both trustees and directors fulfill these duties in light of a fiduciary relationship with the public . . . ").

[71] GERSTENBLITH, *supra* note 69, at 287.

[72] UNIF. TRUST CODE § 804. Prudent Administration. A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

[73] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT (UPMIFA) (2006), http://www.uniformlaws.org/shared/docs/prudent%20mgt%20of%20institutional%20funds/upmifa_final_06.pdf. For more on UPMIFA, see Susan Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 GA. L. REV. 1277 (2006–2007).

[74] UNIF. TRUST CODE § 802. Duty of Loyalty.

[75] *Id.*

[76] *See, e.g.*, Gerstenblith, *supra* note 56, at 177; White, *supra* note 9, at 1041.

major difference is that directors, unlike trustees, are protected by the business judgment rule, which requires that corporate directors act in good faith. Directors therefore may have more discretion than trustees to manage the internal operations of the institution and may be more immune to claims of breach of fiduciary duty. Also, unlike trustees, directors are not subject to a complete prohibition on self-dealing.[77] Directors can engage in interested transactions with prior board approval, as long as they can demonstrate that the transaction was fair to all parties and executed in good faith.

A small number of differences exist between the fiduciary standards for trustees and directors, but what gap there is between the two is increasingly small. The initial reason for the difference in standards turned on "a recognition of the fact that corporate directors have many areas of responsibility, while the traditional trustee is often charged only with the management of the trust funds and can therefore be expected to devote more time and expertise to that task."[78] Subsequently, however, scholars have observed that "the distinction between trustees and business corporation directors has diminished . . . because the legal rules applicable to the conduct of trustees and directors in this context have tended to move closer to each other in recent years."[79] The trend, consequently, "is to hold the trustees and directors to the business judgment rule in managing the financial affairs of the trust but to hold them to the stricter fiduciary standard in evaluating their fulfillment of the duty of loyalty."[80] These fiduciary duties help to ensure that the terms set forth in governing documents are complied with and that the mission and needs of the institution are paramount, regardless of the organizational form of the charitable institution.

### 2. Charitable Gifts and Trust Terms

Trust rules factor strongly into museum regulation because they govern the administration of restricted charitable gifts. Gift restrictions

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[77] White, *supra* note 9, at 1052. "Merryman and Elsen articulate an absolute prohibition against self-dealing and insider advantage that is based on two interdependent rationales. One is that a trustee must not engage in any transaction with the museum that directly or indirectly benefits the trustee. The second is that even innocuous transactions must be prohibited in order to prevent the harmful ones." Gerstenblith, *supra* note 56, at 196 n.80.

[78] Stern v. Lucy Webb Hayes Nat'l Training Sch. for Deaconesses & Missionaries, 381 F. Supp. 1003, 1013 (D.D.C. 1974).

[79] Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT'L & COMP. L. 409, 419 (2004). See, for example, debate concerning the "no further inquiry" rule and John Langbein's proposal that the rule be eliminated in favor of a best-interest rule. *See* John Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929 (2005); and for a response, *see also* Melanie Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 WM. & MARY L. REV. 541 (2005).

[80] GERSTENBLITH, *supra* note 69, at 254.

place parameters on institutional spending and limit what trustees can do with artwork. Specifically, trust principles govern charitable gift modification.[81] When a museum seeks to deaccession gifted artwork with restrictions (or use a restricted gift fund for purposes other than those set out in the gift agreement), the trustees or directors must seek either donor consent or, in the absence of a living donor, judicial approval in the form of cy pres. The Uniform Prudent Management of Institutional Funds Act (UPMIFA) clarifies that cy pres procedures are also applicable to restricted funds held by non-profit corporations as well as charitable trusts.[82] Most institutions allow donors to place gift restrictions primarily on major gifts—however that level is institutionally defined—since restrictions on smaller gifts are generally considered to be too administratively burdensome. For larger gifts, most institutions have template gift agreements that set forth the rights of both parties and allow donors to fill in the terms of the specific gift in order to ensure clarity. Museums and other charitable organizations also have internal gift acceptance policies that mirror trust rules.[83]

Rules governing gift administration are particularly important for museums because donated art constitutes a significant part of most collections. William H. Luers, former president of the Metropolitan Museum of Art, has estimated that "85 percent of most museum collections are made up of donated works."[84] One economist has likewise observed:

> The importance of these gifts to art museums cannot be overemphasized: between 1965 and 1975, over 85 per cent of the 15,000 works of art added to the collection of the Metropolitan

[81] *See* UNIF. TRUST CODE § 413 (2005). The Uniform Trust Code § 413 states in relevant part,

> [I]f a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful: (1) the trust does not fail, in whole or in part; (2) the trust property does not revert to the settlor or the settlor's successors in interest; and (3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

*Id.* The comment further explains: "This section does not control dispositions made in nontrust form. However, in formulating rules for such dispositions, the courts often refer to the principles governing charitable trusts, which would include this Code." *Id.*

[82] *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *supra* note 73, at 4 ("UPMIFA clarifies that the doctrines of cy pres and deviation apply to funds held by nonprofit corporations as well as to funds held by charitable trusts. Courts have applied trust law rules to nonprofit corporations in the past, but the Drafting Committee believed that statutory authority for applying these principles to nonprofit corporations would be helpful.").

[83] *See, e.g.*, *Gift Acceptance Guidelines*, THE METROPOLITAN MUSEUM OF ART (Jan. 14, 2012), http://www.metmuseum.org/give-and-join/gift-acceptance-guidelines; THE MUSEUM OF MODERN ART, GIFT ACCEPTANCE POLICIES AND GUIDELINES https://www.moma.org/momaorg/shared/pdfs/docs/about/MoMAGiftAcceptancePolicy.pdf.

[84] Susan Rasky, *Senate Panel Adopts Tax Change On Gifts of Art and Manuscripts*, N.Y. TIMES, Oct. 16, 1990, at B8.

> Museum of Art in New York came from gifts or bequests and this situation is replicated throughout the museum world in the United States.[85]

This pattern of acquisition has not diminished in recent years. A 2014 study published by the AAMD reported: "In 2013, museums received nearly six times as many gifts of works of art as they purchased. These contributions mirror the private financial support that is also essential to the health and success of art museums."[86] The report does not mention what percentage of these gifts came with restrictions, and certainly not all donated art comes with restrictions. Nonetheless, when gifts are restricted, museums have become increasingly careful to confirm what each party is offering and expecting in order to avoid misunderstandings and legal conflict.

Conflicting understandings of the terms in a bequest were, in fact, the source of one of the first public deaccessioning scandals. Adelaide Milton de Groot, in a bequest of artwork to the Metropolitan Museum of Art, stated that "without limiting in any way the absolute nature of this bequest" she nonetheless did not want the museum to sell any of the paintings.[87] De Groot preferred that the Met give any unwanted paintings to other museums rather than sell them at auction.[88] Museum trustees read the bequest language as precatory, and paintings were sold in order to purchase other works.

John Canaday broke the story in *The New York Times*,[89] using the word "deaccessioning" for the first time in popular media, and reported that the Met had recently deaccessioned—"the polite term for 'sold'"[90]—the De Groot paintings and others at auction. Canaday offered a strong critique of the practice, stating that deaccessioning violated the museum's fiduciary duty to the public. Thomas Hoving, the Met's director at the time, quickly published a response,[91] as did the

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[85] John W. O'Hagan, *Art Museums: Collections, Deaccessioning and Donations*, 22 J. CULTURAL ECON. 197, 204 (1998). O'Hagan adds, "[T]his figure would be much higher if gifts of cash specifically tied to the purchase of paintings were included." *Id.*

[86] ASSOCIATION OF ART MUSEUM DIRECTORS, ART MUSEUMS BY THE NUMBERS (2014), https://aamd.org/sites/default/files/document/Art%20Museums%20By%20The%20Numbers%202014_0.pdf.

[87] EDWARD PORTER ALEXANDER & MARY ALEXANDER, MUSEUMS IN MOTION: AN INTRODUCTION TO THE HISTORY AND FUNCTIONS OF MUSEUMS 207 (2d ed. 2008).

[88] *Id*. *See also* KARL E. MEYER, THE PLUNDERED PAST 50–54 (1977).

[89] John Canaday, *Very Quiet and Very Dangerous*, N.Y. TIMES, Feb. 27, 1972, at D21.

[90] *Id.*

[91] Thomas Hoving, *Very Inaccurate and Very Dangerous*, N.Y. TIMES, Mar. 5, 1972. In this Article, Hoving stated that "[p]ublic sales, exchanges and disposal by private transaction are not new to the Metropolitan Museum." *Id.* Hoving estimated that 15,000 works of art had been sold by the museum in the preceding twenty years and stated that not only were the all disposals "carefully considered" but also that the process was "quite open." *Id.* Hoving also mentioned that the money generated from art sales was never used for operations but rather to acquire "the finest works of art possible." *Id.*

president of the Met's Board of Directors, further clarifying the Met's procedures and confirming that "an elaborate system of checks, balances and reviews is in force."[92] Despite these efforts, "the decision to dispose of such a large number of works by famous artists drew sharp criticism and much negative publicity."[93] Moreover, the state attorney general pursued an investigation into the art sales "that resulted in the museum agreeing to notify the Attorney General of any deaccessions worth more than $5,000."[94] This controversy highlighted the negative consequences of deaccessioning—both in terms of legal implications and public perception—and set the terms of the debate for future conflict.

## II. THE PROBLEM WITH DEACCESSIONING

Deaccessioning rules reveal how public resource and trust law frameworks approach institutional rights and responsibilities differently. Deaccessioning rules also demonstrate the different approach that each framework takes toward public responsibilities and private agreements. In a perfect world, the prohibition on spending deaccessioning funds on operational needs—the crux of the controversy—would not be onerous and the divergence between the two frameworks would not be relevant. However, bad economies, financial uncertainties, institutional mismanagement, and budget crises have made the prohibition deeply relevant.

In rendering relevant the deaccessioning prohibition, financial difficulties have also rendered more problematic the contrast between the two frameworks and more obvious the flaws in the public resource framework. Privileging art as a unique resource, public resource rules require a museum to discontinue programs, make staffing cuts, or even close its doors rather than use deaccessioning funds for operations—to the detriment of the public. More fundamentally, the definition of the public is vague and insufficiently differentiated. Finally, by removing

[92] Douglas Dillon, *The Metropolitan "Sets the Record Straight"*, N.Y. TIMES, Oct. 22, 1972, at D2. Dillon explained how any recommendation for deaccessioning was subject to discussion and approval by the curatorial staff, the Vice Director and Curator in Chief, the Director, and the Acquisitions Committee of the Board of Trustees. The Met also adopted and published its deaccessioning guidelines, including these five rules: (1) That there be 15 days notice for the sale of works over $5,000; (2) Any deviation from mandatory restrictions will take place after due process of law; (3) Any work valued over $10,000 will not be disposed of within 25 years of its receipt; (4) Any work that is worth more than $25,000 and that has been on exhibition in the last ten years will not be disposed of without 45 days public notice; and (5) All future sales of works valued in excess of $5,000 will be at public auction. JOHN HENRY MERRYMAN ET AL., LAW, ETHICS AND THE VISUAL ARTS 1275–76 (2007).

[93] JULIANNA SHUBINSKI, FROM EXCEPTION TO NORM: DEACCESSIONING IN LATE TWENTIETH CENTURY ART MUSEUMS 18 (2007), http://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1465&context=gradschool_theses (M.A. thesis, University of Kentucky).

[94] Sue Chen, *Art Deaccessions and the Limits of Fiduciary Duty*, 14 ART ANTIQUITY & L. 104 (2009).

discretionary latitude, the public resource rules may also prevent trustees and directors from fulfilling their fiduciary responsibilities. In this Part of the Article, I demonstrate these shortcomings through an analysis of recent legal disputes regarding deaccessioning.

### A. *Bad Economies and Multiple Publics*

Writing in 1971 about the "Multiple Crises in Our Museums," Stephen Weil stated: "In terms of operating funds, [museums] are—for the most part—broke. That is a secret kept largely within the museum world."[95] Weil observed that while museums appeared to be "the very symbols of wealth" with their "magnificent holdings and palatial buildings," the reality of the situation was that "[a]n art museum simply cannot support itself through admissions, membership, and other activities."[96] Before the 1960s, "the ideal of economic independence secured by an adequate endowment and reliable sources of annual support from trustees and members was a model that bore a substantial relationship to reality."[97] In the late 1960s, however, a sea change in economic conditions reshaped the museum industry and gave rise to "the relentless and intertwined pressures to expand physically and cover an increasing proportion of the mushrooming operating budget through earned income."[98]

Moreover, the financial problems that began to plague museums in the 1960s were not temporary setbacks. By the 1970s, "inflation had begun to erode the power of endowments."[99] Skyrocketing costs for building maintenance and art acquisition also consumed an increasingly larger percentage of museum budgets. In the 1980s, changes in tax law (that were subsequently repealed) had a negative impact on charitable giving with respect to artwork because the tax benefit from the charitable donation of an object was based on the piece's original value when it was purchased, not on its appreciated value.[100] In addition, donors began giving fractional gifts, which deprived museums of the full benefit of the artwork while still giving donors tax benefits. More recently, museums have been impacted by the 2008 economic crisis and endowments have once again plummeted.[101] This depressed economic

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95 Weil, *supra* note 22, at 5.

96 *Id.*

97 Lowry, *supra* note 16, at 125.

98 *Id.*

99 Harris, *supra* note 26, at 39.

100 One museum director observed that, at the time, "[V]irtually every art museum in the country has been affected negatively by the impact of the 1986 tax law on donors, who have chosen more often than not to sell rather than giving to a museum." Rasky, *supra* note 84, at B8. *See also* Don Fullerton, *Tax Policy Toward Art Museums*, *in* THE ECONOMICS OF ART MUSEUMS 197 (Martin Feldstein ed., 1991) ("[T]he reduction of rates in the 1986 Tax Reform Act may depress gifts to art museums by as much as 24 percent.").

101 Christian H. Brill, *Art or Assets, University Museums and the Future of Deaccessioning*, 28

climate produced a corresponding impact on donor wealth and consequently has made recent fundraising efforts more difficult.

At the same time, expenses have increased. Art prices have climbed steeply and the cost of acquisitions has increased exponentially, as has insurance for the artwork. Buildings constructed at the turn of the last century are crumbling and in need of maintenance as well as repair. These buildings "can be preserved only at increasingly heavy expense," without even taking into account "heavy costs in bringing . . . buildings up to national safety standards."[102] More generally, operational costs for stocking gift shops and staffing museums have ballooned in alignment with expansion efforts. Consequently, "art museums . . . are continually burdened by financial crises"[103]

This is not to say that all museums are on the verge of financial failure. Museum attendance has been growing in recent years and in 2012, the American Alliance of Museums reported survey findings that "the museum sector demonstrated a slow, uneven but notable improvement in economic conditions."[104] Nonetheless, the same study found: "More than 67% of museums reported economic stress at their institutions in 2012, ranging from moderate (44%) to severe (15%) to very severe (9%)."[105] Moreover, an AAMD study from 2014 found that revenue generated from each visitor only covers 15% of the total expense for that individual.[106] On average, the study found that an art museum spends $53.17 per visitor and that each visitor spends approximately $8, including admission, gift shop purchases, and food.[107] Museums therefore depend heavily on gifts to bridge the gap in funding and have invested heavily in development efforts and infrastructure. And, in difficult fundraising climates, museums have sold art to make ends meet.

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THOMAS COOLEY L. REV. 61, 64 (2011) ("The decline in the stock market caused extreme drops in museum endowments. Wealthy donors chose to give to human services rather than the arts, and institutions were forced to reduce hours, cut staff, increase fees, or consider more drastic measures."). For example, the New York Metropolitan Museum of Art's endowment shrank twenty-four percent from 2008 to 2009. Meanwhile, the operating deficit increased from $1.9 million to $8.4 million from fiscal 2008 to fiscal 2009. *See* METROPOLITAN MUSEUM OF ART, ONE HUNDRED THIRTY-NINTH ANNUAL REPORT OF THE TRUSTEES FOR THE FISCAL YEAR JULY 1, 2008 THROUGH JUNE 30, 2009 50, http://www.metmuseum.org/~/media/Files/About/Annual%20Reports/2008_2009/Entire_2009_Annual_Report.pdf.

[102] Rosemary Clarke, *Government Policy and Art Museums in the United Kingdom*, *in* THE ECONOMICS OF ART MUSEUMS 304 (Martin Feldstein ed., 1991). While the chapter discusses the costs of building maintenance in the United Kingdom, the same can be said of American museums.

[103] White, *supra* note 9, at 1041.

[104] American Alliance of Museums, *America's Museums Reflect Slow Economic Recovery in 2012* 1 (April 2013), http://www.aam-us.org/docs/research/acme-2013-final.pdf?sfvrsn=2.

[105] *Id.* at 2.

[106] ASSOCIATION OF ART MUSEUM DIRECTORS, *supra* note 86, at 4.

[107] *Id.* at 2.

### 1. Selling Art to Save Museums

Because of the financial crises afflicting many museums, numerous deaccessioning cases have appeared on court dockets just as stories have appeared in the news media about museums facing insolvency and trying to sell art in order to meet their financial obligations.[108] In 2006, for example, Thomas Jefferson University in Philadelphia announced plans to sell Thomas Eakins' *The Gross Clinic* to the Crystal Bridges Museum and the National Gallery of Art for $68 million to raise money for the school's operating budget, although no art was ever sold because of timely community intervention.[109] In 2009, despite donor restrictions to the contrary,[110] Brandeis University announced that it planned to close the Rose Art Museum and sell all the paintings in order to compensate for a substantial downturn in the value of the University's endowment, in part because of investments made with Bernie Madoff.[111] Museum donors and board members, including a Rose family member, objected immediately and filed a complaint seeking a preliminary injunction to prohibit the University from selling any paintings.

Other museums have gone through with the sale of art to raise much-needed revenue and cover budget shortfalls. In 2008, the National Academy Museum, on Manhattan's Upper East Side, sold two Hudson River School paintings in order to pay for operating expenses. The museum was immediately sanctioned by the AAMD, and thereby banned from either borrowing artwork or engaging in collaborations

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[108] This phenomenon is not limited to the United States. "With government subsidies to public institutions being cut back, museums in countries like Britain, the Netherlands and Germany need the income from art sales to close budget gaps, make repairs or finance expansions." Doreen Carvajal, *Seeing a Cash Cow in Museums' Precious Art*, N.Y. TIMES, Apr. 4, 2015, at A1. In Ireland, controversy has erupted over the proposed sale of nine works of art by Russborough House, a Dublin-area house museum "as a way to shore up the crumbling finances of the house." Lorne Manly, *Sale of Old Masters Sets Off an Outcry in Ireland*, N.Y. TIMES, June 2, 2015, at C1. The paintings in question have not been exhibited for twenty years because of security concerns, nonetheless "the sale is also provoking an outcry among cultural-world denizens in Ireland and some members of the foundation's board who believe the public should not lose access to the art." *Id.*

[109] Brill, *supra* note 101, at 75. Public outcry and private action kept the art in place at Thomas Jefferson and Brandeis before court proceedings could even take place. *The Gross Clinic* is shared between the Philadelphia Museum of Art and the Philadelphia Academy of the Fine Arts. *See id.* at 76.

[110] In the case of Brandeis University, Edward and Bertha Rose made lifetime gifts and left bequests to the university with the understanding that the money was to establish and maintain the Rose Art Museum. Edward's will further specified that "the Rose Art Museum will be maintained in perpetuity as the only art museum at Brandeis." Exhibit A (Will of Edward Rose) to Complaint for Declaratory Judgment Concerning the Rose Art Museum, Rose v. Brandeis University (Mass. Sup. Ct. July 27, 2009), http://thebrandeishoot.com/Rose_Complaint.pdf (last visited Sept. 27, 2015).

[111] *Id*. at Exhibit E. In an email to the community, Brandeis president Jehuda Reinharz lamented: "The decision was difficult and was reached after a painstaking assessment of the University's need to mobilize for the future and initiate a strategy to replenish our financial assets." *Id*.

with member museums.[112] The Delaware Art Museum, owing "$19.8 million in bond debt from a 2005 expansion and renovation project" and suffering from "a significant decline [in] its endowment linked to the financial crisis," planned to sell four paintings that would bring in an estimated $30 million.[113] The Museum sold the first painting on July 17, 2014, and the next day the AAMD released a statement condemning the action and issuing sanctions.[114] Another deaccessioning involved the Maier Museum of Art, housed within Randolph College. Randolph College's board approved the sale of four paintings with the hopes of raising "at least $32 million over all to shore up its endowment and reduce a steep operating deficit."[115] When the College sold the one of the paintings to the National Gallery of Britain for $25.5 million,[116] The AAMD issued immediate sanctions, declaring,

> AAMD continues to decry Randolph College's sale of works from the Maier Museum of Art for operating funds and urges the College to stop this practice, which not only erodes the credibility and good standing of the Maier Museum, but also affects all art museums and the trust that the public has placed in them.[117]

In all these cases, in addition to sanctions, the museums could have been (but were not) the subject of investigation by the attorneys general of their respective states.

Fisk University, like these other institutions, sought to sell art in order to raise revenue. Fisk, however, went to court because the

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112 Robin Pogrebin, *Sanctions Are Ending For Museum*, N.Y. TIMES, Oct. 18, 2010, at C1. *See also* Marlon Bishop, *Art Deaccessioning: Right or Wrong?*, WNYC (Oct. 10, 2010), http://www.wnyc.org/story/98823-deaccessioning-right-or-wrong.

113 Sarah Cascone, *Indebted Delaware Art Museum Forced to Sell Four Paintings*, ARTNET NEWS (Mar. 26, 2014), http://news.artnet.com/in-brief/indebted-delaware-art-museum-forced-to-sell-four-paintings-7514.

114 Sarah Cascone, *Delaware Art Museum's Deaccessioned Masterpiece Bombs at Auction*, ARTNET NEWS (June 18, 2014), http://news.artnet.com/market/delaware-art-museums-deaccessioned-masterpiece-bombs-at-auction-updated-43036. For the AAMD's response, *see* Association of Art Museum Directors, *Association of Art Museum Directors Sanctions Delaware Art Museum*, ASSOCIATION OF ART MUSEUM DIRECTORS (June 18, 2014), https://aamd.org/for-the-media/press-release/association-of-art-museum-directors-sanctions-delaware-art-museum.

115 Carol Vogel, *A Southern College to Sell Prized Paintings*, N.Y. TIMES (Oct. 2, 2007), http://www.nytimes.com/2007/10/02/arts/design/02gallery.html?_r=0.

116 Scott Jaschik, *Art vs. Endowment*, INSIDE HIGHER ED (Feb. 10, 2014), https://www.insidehighered.com/news/2014/02/10/college-sells-painting-25-million-build-endowment.

117 Association of Art Museum Directors, *Association of Art Museum Directors' Statement on Randolph College and Maier Museum of Art*, ASSOCIATION OF ART MUSEUM DIRECTORS (March 12, 2014), https://aamd.org/for-the-media/press-release/association-of-art-museum-directors-statement-on-randolph-college-and. *See also* Randy Kennedy, *College Art Museum Hit With Sanction After Sale of Bellows Work*, N.Y. TIMES (Mar. 13, 2014 11:16 AM), http://artsbeat.blogs.nytimes.com/2014/03/13/college-art-museum-hit-with-sanction-after-sale-of-bellows-work/.

University filed a cy pres request. Fisk University, a historically black university founded in 1866, was the recipient of 101 paintings that were donated by Georgia O'Keeffe to the school in the late 1940s and early 1950s. Four of the paintings were the property of Georgia O'Keeffe, and the rest O'Keeffe gave to the school from the Alfred Stieglitz collection, in her capacity as executrix of the estate.[118] "All 101 pieces were charitable, conditional gifts that were subject to several restrictions, two of which are at issue here; the pieces could not be sold and the various pieces of art were to be displayed at Fisk University as one collection."[119]

In 2005, in an attempt to keep the university financially afloat, the University filed an *ex parte* Complaint for Declaratory Judgment and sought permission to sell two valuable paintings from the Alfred Stieglitz Collection: *Radiator Building—Night, New York* by Georgia O'Keeffe and *Painting No. 3* by Marsden Hartley. As stated in the complaint, the "purpose of the proposed sale was to generate funds for the University's 'business plan' to restore its endowment, improve its mathematics, biology, and business administration departments, and build a new science building."[120] While the case was pending, the University's request for relief "morphed" into a request for approval of a settlement agreement with the Crystal Bridges Museum of American Art, Inc., "whereby the University would sell a 50% undivided interest in the entire Collection for $30 million. . . . [and] the University and Crystal Bridges would each have the right to display the Collection at their respective facilities six months of each year."[121]

In its amended request, the University sought relief from the conditions placed on the gifted painting pursuant to the cy pres doctrine. The University contended that its "bleak financial circumstance"[122] rendered it "'impractical to comply with the literal terms of the gifts,"[123] as did "other material changes in circumstances that have occurred in the more than fifty years since the conditional gifts were made."[124] The trial court denied the University's request, concluding that, because the terms of the gift clearly prohibited the sale of any of the paintings, cy

118 Georgia O'Keeffe Found. v. Fisk Univ., 312 S.W.3d 1, 4 (Tenn. Ct. App. 2009).
119 *Id*.
120 *Georgia O'Keeffe Found.*, 312 S.W.3d at 4 *See also* Brill, *supra* note 101, at 65 ("[U]niversity museums serve two masters, answering to both museum and university boards. Because a university museum cannot act completely independently, it is more susceptible to closure if its parent university decides that another priority— such as chemistry labs—would better fulfill its educational mission. This is made unmistakably clear by the fundamentally different missions of independent museums and university museums.").
121 *Georgia O'Keeffe Found.*, 312 S.W.3d at 5.
122 *Id*. at 15.
123 *Id*.
124 *Id.*

pres was not appropriate.[125] The Court of Appeals, however, disagreed and remanded the case to the trial court to determine whether or not the University's financial straits rendered compliance with the gift terms impractical or impossible.

On remand, the trial court concluded that financial necessity did indeed render compliance impossible, based on the uncontradicted testimony of Fisk's president, Hazel O'Leary. O'Leary discussed Fisk's budget cuts and financial statements, while also demonstrating that that the annual cost to maintain and display the Collection was $131,000.[126] Subsequently, the court evaluated three proposals for revision to the terms of the gift—two put forth by the attorney general and the one put forth by the university.[127] The trial court rejected the two proposals put forth by the attorney general on the grounds that they did nothing to improve Fisk's financial situation and did not "adhere to Ms. O'Keeffe's full dispositional design."[128] Furthermore, a key element in the proposal that prevailed was "the superior resources of the Crystal Bridges Museum to provide this important Collection excellent support and access to the public."[129] The Court of Appeals subsequently affirmed the trial court's holding that it was impossible for Fisk to fulfill the terms of the agreement because of financial distress.[130] Financial need triggered the impossibility standard and allowed the museum to proceed with the cy pres request.

In *Fisk*, as in other deaccessioning cases, a critical question remains: "How is the public interest served when an institution is unable to afford to pay its staff, or remain open or keep admission prices low?"[131] Sanctioning museums that have sold art to pay for operational expenses and rendering them open to lawsuits from the attorney general is unlikely to serve the public interest. The decision to forgo deaccessioning means finding funds elsewhere in the budget to cover shortfalls, ultimately creating a greater likelihood that services and programs will be cut. Programming cuts, shortened hours, and other cutbacks significantly interfere with the public's enjoyment of and benefit from a museum. Furthermore, the public interest is completely extinguished if a museum is forced to close on account of financial difficulty. As one commentator has remarked: "If the choice is between allowing a museum to fail (or make crippling cutbacks) and selling

125 *Id*. at 5.
126 *In re* Fisk Univ., 392 S.W.3d 582, 588 (Tenn. Ct. App. 2011).
127 *Id*. at 591.
128 *Id*. at 591–92.
129 *Id*. at 591.
130 *Id*. at 597.
131 Fincham, *supra* note 9, at 5. "And though museums fulfill a valuable public service by acquiring and preserving works of art, they must keep their doors open and the lights on for those works to be made available." *Id*. at 20

some art, what's the big deal? Sell art!"[132]

2. Which Public Benefits?

Beyond the practical difficulties of fulfilling a duty of access to the public in the face of looming budget cuts, another question arises about public benefit—which public? One critic has observed: "[T]here is no one public for art; the public for art is diverse and divided by interests and levels of knowledge, confidence and class, not to mention race, ethnicity, and gender. Yet this diversity stands in marked contrast to the fictive oneness posited by mission statements issuing from museums themselves."[133] Which slice, if any, of the public is benefitting from museum services and collection management is a question that destabilizes and potentially undermines any robust public resources notion of the public trust.[134]

In *Fisk*, the court addressed this question of the relevant public in a very literal way, through the lens of geography. The appellate court in the *Fisk* case remarked that numerous documents—Alfred Stieglitz's will, Georgia O'Keeffe's 1948 Petition filed in the surrogate's court, and O'Keeffe's letters to the then-president of Fisk—made clear that "the charitable intent motivating the gifts of the Stieglitz Collection and Ms. O'Keeffe's four pieces to the University was to make the Collection available to the public in Nashville and the South for the benefit of those who did not have access to comparable collections to promote the general study of art."[135] At trial, the director of Fisk's Art Gallery further explained:

> [P]art of the reasoning, as it was explained to me by older hands here, for O'Keeffe's gift to Fisk was that by giving this collection to an historically African American institution, it would assure that everyone would have access to it. And she was determined to establish a kind of niche for modernism in the south. If she were to give it to a majority institute in the south, African Americans would have been denied access to it. Fisk already had a well-established reputation as a place where races met, in Nashville.[136]

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132 Judith Dobrzynski, Op-Ed: '*The Art of the Deal'*, N.Y. TIMES, Jan. 1, 2010, at A21.

133 *See* Andrew McClellan, *A Brief History of the Art Museum Public*, *in* ART AND ITS PUBLICS 1 (Andrew McClellan ed., 2003).

134 Some critics and museum directors would say that, practically speaking, no real group is affected by deaccessioning. "Nobody—or almost nobody—gets hurt when [a museum] sells off works that it never exhibits or intends to exhibit. A second-rate Gerome or Rosa Bonheur, no matter what happens to the future popularity of these now somewhat neglected 19th century artists, can surely be dispensed with." J. Michael Montias, *Are Museums Betraying the Public's Trust?*, 51 MUSEUM NEWS, May 1973, at 25, 27 (1973).

135 Georgia O'Keeffe Found.v. Fisk Univ., 312 S.W.3d 1, 17 (Tenn. Ct. App. 2009).

136 Brief of Intervenor-Appellee Attorney General and Reporter at 42, *In re* Fisk Univ. (Tenn. Ct. App. 2011) (No. M2010-02615-COA-R3-CV), 2011 WL 2006328, at *45.

The geography associated with the gift mattered.

When Fisk subsequently sought judicial approval of the Crystal Bridges proposal, the attorney general objected on the grounds that moving the paintings to Bentonville, Arkansas, where the Crystal Bridges museum is located, would undermine O'Keeffe's intent to have the art be housed in the South. At trial, the attorney general brought in two expert witnesses trained in demography and population studies to "testify concerning the demographic profiles and characteristics of Bentonville, Arkansas, the home of the Crystal Bridges Museum, compared to Nashville and the South[.]"[137] Based on a comparison of multiple factors—including racial composition, educational levels, and household incomes—one of the expert witnesses testified that "Nashville more closely resembled the South" than Bentonville.[138] In terms of accessibility, the expert witness observed that "the driving distance between Nashville and Bentonville is approximately 555 miles; in comparison, the cities of Milwaukee, Wisconsin, and Pittsburgh, Pennsylvania, are approximately the same driving distance from Nashville, while Detroit, Michigan, and Cleveland, Ohio, are actually closer to Nashville."[139]

The university pointed out that, surprisingly, the attorney general seemed to be arguing that "Arkansas is not in the South."[140] The answer, the university pointed out, was: "Of course, Arkansas is in the South."[141] More broadly, however, the attorney general's argument about geography brought up questions about what communities were stakeholders and what defined the public in the context of the O'Keeffe's gift.[142] In *Fisk*, "[b]oth the Court of Appeals and the Chancery Court emphasized the importance of the collection for Nashville and the South,"[143] transforming it into a "governing rubric."[144]

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137 *Id.* at *2.

138 *Id.* at *9–10. The attorney general's brief noted these statistics: "Racial composition - Nashville population is approximately 65% white and 28% black; the South approximately 72% white and 19% black, and Bentonville 85% white and 3% black. Household income - Nashville has a median household income of $46,000; the South has a median household income of $48,000; and Bentonville has a median household income of $52,584. Education - 84% of the Nashville population has obtained a high school degree or higher; 83% of the South has obtained a high school degree or higher; and 89% of the Bentonville population has obtained a high school degree or higher." *Id.*

139 *Id.* at *9–10.

140 The University remarked: "This argument of the Attorney General is illogical. The Attorney General is arguing that either [1] Arkansas is not in the South or [2] the Collection must always be in Nashville to comply with the 'in Nashville and the South' requirement. The first alternative is obviously wrong." *Id.* at *16.

141 *Id.*

142 As one scholar has pointedly asked: "Who Are the Beneficiaries of Fisk University's Stieglitz Collection?" *See* Alan Feld, *Who Are the Beneficiaries of Fisk University's Stieglitz Collection?*, 91 B.U. L. REV. 872 (2011).

143 *Id.* at 890.

Nonetheless, what stake Nashville had in the collection and how the location of the collection aligned with the purposes of the gift's geographic restrictions remained open questions.

Which public, then, had a predominating interest? Many answers were possible: members of the Fisk community, since O'Keeffe had selected Fisk as the home for the works; the Nashville public, even those who never visited the museum but may have taken pride in its presence in Nashville;[145] the South, broadly defined, giving preference to regional concerns; or—taking seriously O'Keeffe's intention—underserved and racially diverse communities wherever they were located in the South. Each of these answers was correct within the terms of the gift, and the fact that each constituency had a claim to the paintings made clear the problem of assuming an undifferentiated and uniform public interest.

Furthermore, as the case of the Detroit Institute of Art (DIA) demonstrated, the public is not only differentiated through geographic and demographic boundaries but also through social role selection and affiliation. When Detroit declared bankruptcy in December 2013, the largest U.S. municipality to do so to date, debate quickly turned to the value of the city's assets, including the art in the DIA. The DIA released a statement, even before the city was even ruled eligible for bankruptcy, declaring: "The DIA art collection is a cultural resource of the people of Detroit, the tri-county area and the entire State of Michigan. The museum's collection is the result of more than a century of public and private charitable contributions for the benefit of the public."[146] The Institute declaimed any attempts to monetize "the museum art collection to satisfy municipal obligations."[147]

The question quickly arose as to what course of action would most benefit the public. The decision was "cast as a choice between measurable benefits, like city pensions, which could be cut to satisfy creditors, and the much harder-to-measure benefits of cultural assets."[148] Which public was to benefit—the public as city pensioners or the public

144 *Id.* at 896.

145 *Id.* at 890 ("The presence of the collection at Fisk enables local citizens to view it and appreciate the educational and aesthetic experience it provides. But even if they never visit the collection, members of the Nashville public may take pride in the presence of the Stieglitz Collection in their city. They may expect Fisk to maintain the collection in Nashville and may perceive the collection's removal as diminishing their city.").

146 *Detroit Institute of Arts Statement Regarding City of Detroit's Eligibility to File for Bankruptcy*, DETROIT INSTITUTE OF ARTS (Dec. 3, 2013), http://www.dia.org/user_area/uploads/DIA%20Statement%20re%20December%203%202013%20decision.pdf.

147 *Id.*

148 Randy Kennedy & Monica Davies, *Detroit's Creditors Eye Its Art Collection*, N.Y. TIMES (July 19, 2013), http://www.nytimes.com/2013/07/20/arts/design/detroits-creditors-eye-its-art-collection.html?_r=0.

as art-goers? The choice was subsequently presented as one between "fixed income" pensioners and the more elite "patrons" of the DIA.[149] Left out of the conversation was the possibility that these publics potentially overlapped. Pensioners could also be museumgoers. They would, however, be asked to choose which social role to inhabit and prioritize in a situation of financial distress. The Detroit problem likewise underscored the fact that the public interest was far from simple or neatly divisible. Whereas *Fisk* emphasized the spatial complexities of the public—and suggested the presence of multiple communities within the public—the Detroit case revealed the possibility that multiple publics could exist within the same community. Both *Fisk* and the Detroit bankruptcy case therefore call into question the utility and accuracy of the public resource framework by highlighting its weak and incomplete understanding of the public.

### B. *The Infringement of Fiduciary Duty*

Another significant problem with the public resource framework is that it unduly limits the fiduciary power vested in trustees and directors by trust and non-profit law to prudently govern the institution. Public resource rules infringe on the powers granted to trustees and directors to manage institutional affairs and interfere with the ability of institutional leadership to use all available legal options to generate revenue for managing operating expenses. These problems are even more acute when the museum or gallery is an embedded institution, and the trustees or directors have a dual fiduciary duty.

#### 1. Managerial Authority and Prudent Investment

Trustees and directors of a museum are charged with overseeing the institution's financial affairs, creating strategic plans, reviewing budgetary priorities, and managing the museum's administrative leadership. Part of a trustee or director's responsibility is also to discharge these duties while upholding her fiduciary duties of care and loyalty. In terms of managing institutional funds, trustees and directors are held to the same standard pursuant to UPMIFA, which has been enacted in 49 states as well as the District of Columbia and the U.S. Virgin Islands.[150] UPMIFA requires "a charity and those who manage

[149] *Id.* ("It's hard to go to a pensioner on a fixed income and say 'We're going to cut 20 percent of your income or 30 percent or whatever the number is, but art is eternal,' " Mr. Nowling said. "For people, that's a hard distinction. I think it's a distinction that some of the patrons of the D.I.A. have a hard time understanding. We're talking about real people here with real decisions that have real impact on their lives.").

[150] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT (UPMIFA) (2006), http://www.uniformlaws.org/shared/docs/prudent%20mgt%20of%20institutional%20funds/upmifa_final_06.pdf. Pennsylvania and Puerto Rico had not enacted UPMIFA as of 2014; for

and invest its funds"[151] to "[g]ive primary consideration to donor intent as expressed in a gift instrument,"[152] as well as "[a]ct in good faith, with the care an ordinarily prudent person would exercise,"[153] and "[m]ake decisions about each asset in the context of the portfolio of investments, as part of an overall investment strategy."[154]

Despite these grants of managerial control and decision-making latitude, especially with respect to the financial health of the institution, a trustee's power is limited by public resource rules. Industry standards and state statutes, the fear of de-accreditation, and the possibility of inquiry by the attorney general may prevent trustees from exercising their full financial authority. On several occasions, trustees—looking to raise revenue—have even been sued for breach of fiduciary duty in connection with deaccessioning attempts. These attempts to hold trustees legally accountable for deaccessioning have had little success to date; nonetheless, state statutes that mirror industry rules have the potential to give weight to these arguments of breach of fiduciary duty.

In one such case, *Dennis v. Buffalo Fine Arts Academy*, the conflict turned on the proposed deaccessioning of over 200 sculptures and artworks by the Buffalo Fine Arts Academy.[155] The petitioners, members of the Academy trying to obtain an injunction against the sale, argued that "the deaccession violate[d] the stated purpose of maintaining a collection of painting, sculpture and other works of art and encouraging the advancement of education and cultivation of art."[156] Furthermore, the petitioners claimed that the proposed deaccessioning violated the museum's strategic plan—as well as donor restrictions on several of the contemplated sale pieces—and constituted a waste of corporate assets. The petitioner claims were brought pursuant

additional information on the Act, *see id.*

151 *Id.* at 2.

152 *Id.*

153 *Id.*

154 *Id.* In "managing and investing an institutional fund," trustees and directors are therefore held to a prudence standard. The drafters comment that:

> Since the decision in *Stern v. Lucy Webb Hayes National Training School for Deaconesses*, 381 F. Supp. 1003 (1974), the trend has been to hold directors of nonprofit corporations to a standard nominally similar to the corporate standard but with the recognition that the facts and circumstances considered include the fact that the entity is a charity and not a business corporation.
>
> The language of the prudence standard adopted in UPMIFA is derived from the RMNCA and from the prudent investor rule of UPIA. The standard is consistent with the business judgment standard under corporate law, as applied to charitable institutions. That is, a manager operating a charitable organization under the business judgment rule would look to the same factors as those identified by the prudent investor rule.

*Id.* at 13.

155 Dennis v. Buffalo Fine Arts Acad., 836 N.Y.S.2d 498 (N.Y. Sup. Ct. 2007).

156 *Id.*

to New York's Not-for-Profit Corporation Law (N-PCL).[157]

Ruling in favor of the Academy, the court concluded that the "Board believed that deaccession of these works was necessary to promote the Academy's focus on maintaining a world-renowned modern and contemporary art museum at the Albright–Knox Art Gallery."[158] The court added that the proposed deaccession accounted for only a small portion of the museum's assets, and "in no way constitutes a departure, or an ultra vires act, in violation of its corporate purposes."[159] In support of this ruling, the court invoked the business judgment rule, stating:

> The Board's authority to manage as it sees fit is supported by the N–PCL and the business judgment rule. The business judgment rule . . . states that those actions taken by a board of directors in good faith in the exercise of honest judgment and within legitimate corporate purposes cannot be overturned by a court.[160]

Moreover, in the absence of any evidence that donor restrictions had been disregarded, the court also concluded that the Academy had not violated any gift restrictions. The court agreed with a determination by the attorney general "that the will needed to contain an explicit perpetual limit on the right to sell the item in order for the Board to have violated the donor's intent."[161] The Board was therefore "empowered . . . to sell property which was donated or bequeathed to the corporation."[162] In a show of support for the right of the directors to manage institutional affairs, absent a showing of bad faith, the court dismissed the petition.

Even invoking a higher standard than the business judgment rule, courts have similarly concluded that trustees have a right to latitude in institutional management. In a California Superior Court case, *Rowan v. Pasadena Art Museum*,[163] the trustees of the museum were charged with a breach of fiduciary duty for making allegedly improper changes to the museum's focus and, in order to do so, improperly deaccessioning certain items from the collection.[164] The standard of care set forth in the relevant California statute was a business standard, but the court stated: "Members of the board of directors of the corporation are undoubtedly fiduciaries, and as such are required to act in the

157 *Id.*
158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.*
162 *Id.*
163 Rowan v. Pasadena Art Museum, No. C 322817 (Cal. Sup. Ct. Sept. 22, 1981).
164 *Id.*

highest good faith toward the beneficiary, i.e., the public."[165] Even applying this standard of "the highest good faith," the court concluded that the trustees had acted in accordance with the museum's mission. The trustees, according to the court, "had in place prudent collection management policies and they carefully followed these policies regarding the disputed deaccessioning."[166]

Because in both cases the trustees demonstrated that good faith, proper procedure, and due deliberation had been present, the court determined that they correctly exercised their power to govern and manage the museum. And, as the courts in both of these cases concluded, nothing in non-profit law or the trust law framework prevents trustees and directors from using their authority to engage in strategic planning, deaccession works, or direct new expenditures. In neither case, however, did the trustees attempt to spend the funds raised from deaccessioning on operational needs; instead they chose to follow industry rules and spend the proceeds on new acquisitions.

Faced with financial distress, as in the *Fisk* case, trustees do not have the ability to deaccession art and use the proceeds to supplement the operating budget. In the recent *Trustees of the Corcoran Gallery of Art v. District of Columbia* case, in which the court approved a proposal for the Corcoran's assets and operations to be taken over by the George Washington University and the National Gallery of Art, the court granted the cy pres request in part because of its finding that selling art to save the Corcoran was impracticable. The court observed: "Intervenors have argued that the Corcoran can address this shortfall of funds both by selling some of the more than 17,000 pieces in the Corcoran's collection . . . . [However it] is undisputed that the AAM and the AAMD can impose, and have imposed, sanctions on museums that have sold art to pay for operating expenses."[167]

This limitation exists despite the fact that UPMIFA grants trustees broad discretion in asset management. UPMIFA states that, in managing institutional assets, trustees may consider "an asset's special relationship or special value, if any, to the charitable purposes of the institution,"[168] "general economic conditions,"[169] "other resources of the institution,"[170] and "the needs of the institution and the fund to make distributions and to preserve capital."[171] Spending deaccessioning funds

165 *Id*.
166 MARIE C. MALARO, COLLECTION CARE AND ACCOUNTABILITY: LEGAL AND ETHICAL STANDARDS (Mar. 20, 1989), C379 ALI-ABA 379, 388.
167 Trustees of the Corcoran Gallery of Art v. District of Columbia (Sup. Ct. D.C. Aug. 18, 2014) (No. 2014 CA 003745 B), http://pdfserver.amlaw.com/nlj/8-18-14%20Corcoran%20ruling.pdf.
168 UPMIFA, § 3(1)(h).
169 UPMIFA, § 3(1)(a).
170 UPMIFA, § 3(1)(f).
171 UPMIFA, § 3(1)(g).

on operations, although it may be a violation of public resource rules, is within the discretion of trustees according to trust law rules. In situations of possible insolvency, where there is a need to meet certain basic financial obligations such as payroll or insurance premiums, trustees who spend deaccessioning funds on operations may in fact be fulfilling their fiduciary duty to the museum.

Borrowing from corporate law principles, a bankrupt institution may have shifting fiduciary duties in the context of insolvency. In such cases, fiduciary duties may run not just to the traditional stakeholders—in the case of charitable trusts, the public and the institution—but also to institutional creditors. The Delaware Chancery Court first recognized this "fiduciary duty quandary"[172] in a footnote to the *Credit Lyonnais* case.[173] The court concluded that when a company was in the zone of insolvency the board had a fiduciary responsibility toward the company's creditors—"the community of interest that sustained the corporation"—as well as to shareholders.[174] Similarly, trustees and directors of museums facing insolvency may have a fiduciary duty toward museum creditors that supersedes the more undefined and problematic duty to the public. Prohibitions on spending deaccessioning funds on operations, therefore, may limit trustee power in inappropriate ways that prevent the fulfillment of various facets of fiduciary duty.

### 2. The Embedded Institution

The question of fiduciary responsibility becomes even more acute when the museum is embedded within a larger institution and the trustees have a double fiduciary duty—both to the museum and the parent organization.[175] This double fiduciary duty was relevant in the Detroit case, just as it is in the cases of university galleries and museums.[176] In Detroit, the crux of the problem was that the museum and its artwork had been owned by the city of Detroit since 1918, an arrangement uncommon among city art museums. At that time, because of financial concerns with respect to the museum, the city of Detroit

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172 *Director and Officer Fiduciary Duties in the Context of Insolvency*, HAYNES BOONE (July 30, 2009), https://www.haynesboone.com/files/Publication/4b255e28-4ea0-4c9f-85b8-628afad07d31/Presentation/PublicationAttachment/59469d10-24b3-4f44-b1e9-67adc70f7317/DO_Fiduciary_Duties_Insolvency.pdf.

173 *See* Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp., 1991 WL 277613 (Del. Ch. Dec. 30, 1991).

174 *Id.* at 34.

175 Universities and colleges have also been criticized for selling rare books that were bequeathed to them. Gordon College created a conflict when college leadership decided to sell rare Shakespeare folios, donated with the provision that the collection remain intact. "Administrators said selling a portion of the collection—which some faculty use for research—is the only way to afford to preserve of the rest of the books." *See* Laura Krantz, *Gordon College's Bid to Auction Books Creates Uproar*, BOSTON GLOBE, Feb. 26, 2015.

176 For more discussion of the Detroit situation, *see* Kreder, *supra* note 6 (manuscript at 50–56).

gained "authority to 'take and hold' charitable gifts for art purposes and the obligations to 'acquire, collect, own and exhibit' Museum quality objects and works and to build and operate a museum for the Public's benefit."[177] That arrangement continued for almost a century, at which point the city declared bankruptcy and the question arose whether or not the artwork in the DIA could be sold and the proceeds used to help satisfy municipal debts.[178]

In the bankruptcy proceedings, the judge determined that Detroit owed $18 billion to more than 100,000 creditors.[179] Of that debt, $5.7 billion was owed as part of the Health and Life Insurance Benefit Plan and the Supplemental Death Benefit Plan for retirees, while $3.5 billion was in unfunded pension obligations.[180] Controversy then arose about the valuation of city assets. The DIA, arguing that the museum and its artwork were held in trust for the people of Detroit, firmly opposed any attempts to monetize the collection for inclusion in any calculation of city assets. If the court considered the artwork as restricted gifts, according to bankruptcy law it did not form part of the bankruptcy estate and could not be distributed to creditors. Instead, "the disposition of the restricted gift is left to the relevant state court, applying cy pres law."[181] If, however, the art was not shielded by trust restrictions, it could be included as part of a bankruptcy estate.

After the bankruptcy proceedings were completed and the City began restructuring its debt, museum officials remained "hopeful that the Emergency Manager [would] recognize the City's fiduciary duty to protect the museum art collection for future generations and that he [would] abide by the Michigan Attorney General's opinion that the City holds the art collection in trust and cannot use it to satisfy City obligations."[182] While DIA officials declared that the City held a fiduciary duty to the museum and its patrons, it was equally clear however that City leaders also possessed fiduciary duties to the city of Detroit itself and Detroit's citizens. This pressure to satisfy multiple parties led to the "grand bargain," designed to save the museum and its assets. According to the terms of this agreement, the City relinquished

177 Response of the Detroit Institute of Arts, *supra* note 3, at 5.

178 Randy Kennedy, *Detroit Art Museum Offers Plan to Avoid Sale of Art*, N.Y. TIMES, Jan. 29, 2014, at A18 (stating the museum's "world-class collection has been targeted as a potential source of cash to help dig Detroit out of federal bankruptcy").

179 *In re* City of Detroit, 504 B.R. 97, 113 (Bankr. E.D. Mich. 2013).

180 *Id.*

181 Robert Cooper, Deaccessioning and Donor Intent: Lessons Learned From Fisk's Stieglitz Collection, 2013 Columbia Law School Charities Regulation and Oversight Project Policy Conference on "The Future of State Charities Regulation" (Feb. 7, 2013).

182 *Detroit Institute of Arts Statement Regarding City of Detroit's Eligibility to File for Bankruptcy*, DETROIT INSTITUTE OF ARTS (Dec. 3, 2013), http://www.dia.org /user_area/uploads/DIA%20Statement%20re%20December%203%202013%20decision.pdf.

control of the museum[183]—and the DIA agreed to help raise $100 million to satisfy the City's pension and other financial obligations.[184]

Focusing on the DIA's role of institutional citizen and public service provider, museum officials released a statement announcing the museum's participation:

> As an anchor and investor in Detroit's Midtown neighborhood, an educational resource for students and residents of Detroit, the tri-county area and all of Michigan and a provider of creative programs for numerous social service and community organizations in the City of Detroit and beyond, the Detroit Institute of Arts (DIA) is pleased to confirm its participation in the plan . . . to help bring an end to the City's bankruptcy, expand support for Detroit's pensioners and protect the museum's collection for the public in perpetuity.[185]

The museum emphasized its role as a public trust institution. Museum officials also implicitly acknowledged that the City had fiduciary duties that ran in several directions and that the museum had a civic responsibility to help preserve pensions along with art.

This same dual duty is also present in the cases of university museums and galleries. Universities or other parent organizations always have the option of presenting an art collection as a museum—and seeking the relevant accreditation—or declining to hold the collection out as such. Some institutions that collect and display art, from airports[186] to courthouses,[187] do not characterize their collections as museums, thereby avoiding the collections management standards superimposed by the museum industry. Accordingly, institutions opt

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183 Kennedy, *supra* note 178, at A18 ("As part of the deal, the city would relinquish ownership of the museum, and it would be owned by a nonprofit organization, as most large public museums across the country are. This would relieve the city of any future financial responsibility for the institute while also shielding the institute from future municipal threats.").

184 *Detroit Institute of Arts to Raise $100 Million Toward Detroit's Revitalization*, DETROIT INSTITUTE OF ARTS (Jan. 29, 2014), http://www.dia.org/user_area/uploads/Detroit%20Institute%20of%20Arts%20to%20raise%20100%20Million%20toward%20Detroits%20Revitalization.pdf ("Today, the DIA's Board of Directors approved a commitment by the DIA to raise $100 million from corporate and individual donors toward these efforts. The DIA joins the foundation community ($370 million) and the State of Michigan ($350 million) in support of Chief Judge Rosen's plan to benefit the people of Detroit and the State.").

185 *Id.* ("None of the funds raised by the DIA will directly benefit the DIA. The funds will be directed to a third party, which will disburse the funds for pension payments.").

186 *See, e.g.*, *Permanent Collection*, DENVER INTERNATIONAL AIRPORT, http://www.flydenver.com/about/art_culture/permanent (last visited Sept. 27, 2015).

187 *See, e.g.*, *Art in Architecture & Fine Arts*, U.S. GENERAL SERVICES ADMINISTRATION, http://www.gsa.gov/portal/category/103331 (last visited Sept. 27, 2015) ("The Fine Arts Program provides national leadership and expertise in fine art care and policy for GSA's Fine Arts Collection. The program seeks to manage the Fine Arts Collection at the highest ethical and stewardship standards and to contribute to creating high-quality federal buildings for federal employees and the public they serve.").

into the industry standards and rules when they choose to characterize their collections as museums. However, once an institution opts into the museum form and related governance rules, it cannot easily change structure and deaccessioning rules stick. Consequently, university and organizational governing boards are faced with the task of governing multiple institutional units and reconciling competing fiduciary duties.

In the *Fisk* case, for example, university officials sought to modify the gift restrictions on the O'Keeffe gift as part of a strategic plan meant to bring the university to improved financial health. University leaders testified: "The stated purpose of the proposed sale was to generate funds for the University's 'business plan' to restore its endowment, improve its mathematics, biology, and business administration departments, and build a new science building."[188] University board members were caught between conflicting duties to keep the university as a whole financially solvent or keep the artwork in question as a part of the University gallery collection. Likewise, when Randolph College deaccessioned art and used the proceeds for operational funds—despite being subsequently sanctioned by the AAMD for doing so—the president of the college stated: "I have to say that the primary fiduciary responsibility of the college's Board of Trustees is to provide the highest quality liberal education available. . . . The college has to be financially sustainable."[189]

Fiduciary duties in the context of non-profit institutions with multiple component parts create multiple obligations. One commentator has remarked: "When a university rather than a museum owns artwork, . . . the institutional calculus becomes more complex. The university appropriately considers the educational value of the artworks, their relationship to the core educational mission, and the university's capacity to derive maximum educational utility from continued ownership of the work."[190] Trustees, in these cases, have a fiduciary duty to the parent institution as well as the museum and it is difficult to say that trustees are fulfilling their fiduciary duties when they allow a parent institution to suffer financially rather than sell art to keep the institution solvent.

## III. PRIVILEGING PUBLIC PROCESS OVER PRINCIPLE

The public resource framework and rules misunderstand the multiple forms of both the public and public benefit while also undervaluing the importance of fiduciary duty. Public resource rules privilege the principle of art as a public resource to the detriment of

188 Georgia O'Keeffe Found. v. Fisk Univ., 312 S.W.3d 1, 4 (Tenn. Ct. App. 2009).

189 *Id.*

190 Feld, *supra* note 142, at 879. *See also* Emily Lanza, *Breaking up is Hard to Do: The Sale of Charitable Art Donations*, 66 THE TAX LAWYER 483 (2013).

institutional flexibility and asset management.[191] The trust law framework is, consequently, preferable. Trust law rules privilege process and work to ensure not only that trust and gift terms are complied with but also that trustees and directors fulfill their fiduciary duties. Process is critical, because "[r]easons for deaccessioning can be sound, stupid or nebulous, and a critical review of an institution's activities in this area will reveal how seriously it pursues its stewardship duties."[192] Retaining the trust law framework as it currently exists may not, however, be sufficient.

A very real and legitimate concern is that without threat of the industry rules and sanctions, trustees have no constraints that prohibit them ex ante from treating art as a fungible commodity. In an environment defined by weak legal regulation and few accountability measures, deaccessioning prohibitions and industry rules may play an important role in shaping trustee behavior.[193] Deaccessioning prohibitions may moderate risk-taking on the part of the trustees and help reinforce the unique mission of stewarding art. There may, however, be other ways to provide accountability measures and restrain trustees from insulated and unchecked decisionmaking. If, as Deborah DeMott suggests trustees and nonprofit directors "make decisions in a less transparent environment and information about their decisions is not regularly exposed to the scrutiny of a broad audience,"[194] then an increase in publicity could serve a beneficial function by enabling greater transparency and inclusivity in nonprofit governance.

Because the museum is a public trust, its regulation should be explicitly grounded in the notions of publicity and transparency. In this Part of the Article, I propose an approach to enhancing current trust law rules by borrowing from corporate law and crafting new rules around the normative values we wish to see reflected in public trust institutions. I propose that rules for public trusts should focus primarily on the principle of *publicity* and, more specifically, on procedural transparency and information disclosure. Procedural transparency is important because "an examination of how museums actually accomplish their deaccessioning [is telling],"[195] and because it gives the public a role in

191 *See* Kreder, *supra* note 6 (manuscript at 57) ("In sum, despite use of the term 'public trust' in recent litigation, in the museum context it amounts to an ethical ideal, not a legal standard.").

192 Steven Miller, *Deaccessioning: Sales or transfers?*, 10 MUSEUM MGMT. & CURATORSHIP 245, 248 (1991).

193 *See* Deborah A. DeMott, *Self-Dealing Transactions in Nonprofit Corporations*, 59 BROOK. L. REV. 131, 139 (1993); Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms*, 23 J. CORP. L. 631, 641 (1998) ("[A]most all evidence suggests that nonprofit directors provide less oversight, less effective participation in decisionmaking, and in general, less effective governance than their peers in comparable for-profit corporations.").

194 DeMott, *supra* note 193, at 139.

195 Miller, *supra* note 192, at 248.

institutional oversight. In addition, these publicity rules serve as constraints on trustees, obliging them to be able accountable to various public groups and institutional constituents.

As John Stuart Mill remarked: "To be under the eyes of others—to have to defend oneself to others—is never more important than to those who act in opposition to the opinion of others, for it obliges them to have sure ground of their own."[196] Procedural transparency and public visibility serve a checking function, which is why AAMD guidelines state that it is "important that a museum's deaccessioning process be publicly transparent" in order to safeguard against breaches of fiduciary duty and public trust. Disclosure of information is equally important because it also gives the public the opportunity to enter into dialogue with an institution and can "help to demystify deaccessions."[197] In the sections that follow, I propose increasing the publicity value of the deaccessioning process through the strategic use of cy pres and deviation, required reporting and disclosure, and public auctions. Using these legal tools, museums will be better able to fulfill their distinctive obligations as public trusts.

### A. *Cy Pres, Deviation, and Judicial Imprimatur*

Cy pres petitions and requests for administrative deviations are important trust doctrines that can increase the public dimension of deaccessioning practices. Speculating about deaccessioning processes, one critic has remarked:

> What if a museum had to argue its case for de-accessioning art before an impartial arbitrator? . . . [T]he museum would need to open its financial books completely, so that the arbitrator could see that all other reasonable avenues of fund-raising, as well as cutbacks, had already been exhausted. And it would need to open its cataloguing records and storerooms, to show that the departure of the works in question would not irreparably damage the collection and that no donor agreements would be violated.[198]

Cy pres and deviation requests accomplish precisely these goals.

The cy pres doctrine, a doctrine of obscure historical roots,[199] was

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196 John Stuart Mill, *Considerations on Representative Government*, *in* ON LIBERTY AND OTHER ESSAYS 203, 360–61 (1861, 1998).

197 Goldstein, *supra* note 13, at 224.

198 Dobrzynski, *supra* note 132.

199 "The doctrine of cy pres . . . was known and used in Rome before Constantine. . . . A Case applying the cy pres principle appears in the *Digest of Justinian*." EDITH L. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES 3 (Matthew Bender & Co., 1950). "So far as can be ascertained, [the term] cy-près first appears in Littleton's Tenures (c. 1481)." L.A. SHERIDAN & V.T.H. DELANEY, THE CY-PRÈS DOCTRINE 5 (1959).

designed to allow courts to modify the terms of an outdated or excessively narrow trust agreement and to remedy value-impairing conditions. "The words 'cy pres' are Norman French for 'as near.' The phrase when expanded to its full implication was 'cy pres comme possible,' and meant 'as near as possible.'"[200] Accordingly, the doctrine allows courts to modify trust and gift terms in order to approximate donor intent or institutional mission as nearly as possible. The doctrine has been adopted in the Restatement of Trusts and the Uniform Trust Code, both of which allow a court to modify the terms of a gift if the charitable purpose "becomes unlawful, impracticable, impossible to achieve, or wasteful."[201] Similarly, UPMIFA has adopted the cy pres doctrine, and provides for its use in the context of both charitable trusts and non-profit corporations.[202]

The process begins when the trustees or directors determine that the terms of the trust, gift, or fund have become impossible or impracticable to fulfill, and they file a cy pres petition seeking to modify the conditions. Once the petition is filed, courts apply a three-

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[200] "The fairly common usage, 'si pray,' seems to be a mixture of French and English pronunciation. Roughly speaking, it is the doctrine that equity will, when a charity is originally or later becomes impossible or impracticable of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible." BOGERT'S TRUSTS AND TRUSTEES, THE LAW OF TRUSTS AND TRUSTEES ch. 22, § 431 (2013).

[201] The Uniform Trust Code § 413 states in relevant part:

> [I]f a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful: (1) the trust does not fail, in whole or in part; (2) the trust property does not revert to the settlor or the settlor's successors in interest; and (3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

UNIF. TRUST CODE § 413 (West 2005). The comment to this section further states that,

> The doctrine of cy pres is applied not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations. This section does not control dispositions made in nontrust form. However, in formulating rules for such dispositions, the courts often refer to the principles governing charitable trusts, which would include this Code.

*Id*.

[202] THE LAW OF TRUSTS AND TRUSTEES § 433. UPMIFA drafters remark:

> UPMIFA clarifies that the doctrines of cy pres and deviation apply to funds held by nonprofit corporations as well as to funds held by charitable trusts. Courts have applied trust law rules to nonprofit corporations in the past, but the Drafting Committee believed that statutory authority for applying these principles to nonprofit corporations would be helpful. UMIFA permitted release of restrictions but left the application of cy pres uncertain. Under UPMIFA, as under trust law, the court will determine whether and how to apply cy pres or deviation and the attorney general will receive notice and have the opportunity to participate in the proceeding. The one addition to existing law is that UPMIFA gives a charity the authority to modify a restriction on a fund that is both old and small.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT (UPMIFA) 4 (2006), http://www.uniformlaws.org/shared/docs/prudent%20mgt%20of%20institutional%20funds/upmifa_final_06.pdf.

part test in order to evaluate whether cy pres is appropriate. In the absence of contravening language in the governing document, cy pres "requires the presence of three criteria: (1) a charitable trust; (2) a specific trust purpose that is illegal, impractical, or impossible; and (3) a general charitable intention by the donor."[203] If these conditions are met, the court will modify the terms of the trust such that they are as near as possible to those of the original gift.[204]

Courts have progressively relaxed all three of these requirements, and some scholars suggest that "policy considerations and concern for furthering the public welfare [have become] of increasing importance in delimiting and defining the degree and type of impracticality necessary to call the cy pres doctrine into operation."[205] Furthermore, in the wake of recent reforms to the Uniform Trust Code, the cy pres doctrinal framework has been updated to provide for more efficient cy pres regulation.[206] In 2003, the Uniform Trust Code, following modifications to the Restatement (Third) of Trusts in 2001, modified the cy pres doctrine to include a presumption of general charitable intent.[207] States that have adopted the Uniform Trust Code also allow courts to modify trust restrictions if those restrictions produce "wasteful" results.[208] This shift is also present in the Restatement, which includes the previously absent term "wasteful" and states that cy pres may be appropriate when it "becomes wasteful to apply all of the property to the designated purpose."[209] Finally, the doctrine of deviation, applicable to both charitable and private trusts, was another major change brought about by the Restatement (Second) § 167, and subsequently incorporated in

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203 Kolb v. City of Storm Lake, 736 N.W.2d 546, 555 (Iowa 2007).

204 "Finally, in applying cy pres, courts must generally seek a purpose that conforms to the donor's objective 'as nearly as possible.'" *In re* Elizabeth J.K.L. Lucas Charitable Gift, 125 Haw. 351, 360 (Ct. App. 2011) (citing Am. Jur.2d § 157). A comment to § 67 of the Restatement (Third) of Trusts states that the modified purpose "need not be the *nearest possible* but one reasonably similar or close to the settlor's designated purpose[.]" RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. d (2003).

205 FISCH, *supra* note 199, at 143.

206 *See* Allison Tait, *The Secret Economy of Charitable Giving*, 95 B.U. L. REV. __ (forthcoming 2015).

207 UNIF. TRUST CODE § 413(a) (2010); RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

208 As of 2014, the Uniform Trust Code had been adopted by thirty states and had been introduced in New Jersey. *Legislative Fact Sheet—Trust Code*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code (last visited Sept. 27, 2015) (listing the states that have adopted the Uniform Trust Code: Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming).

209 RESTATEMENT (THIRD) OF TRUSTS § 67 (2003). In a comment to this section, the Reporter described "wasteful" as meaning that the funds far exceed what is necessary, rendering it imprudent not to expand the purposes for which the funds can be applied. *See id.* § 67 cmt. c (1) ("The term 'wasteful' is used here neither in the sense of common-law waste nor to suggest that a lesser standard of merely 'better use' will suffice.").

the Uniform Trust Code as well. The current version of the Code states: "[t]he court may modify the administrative or *dispositive* terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust."[210]

Institutions can, therefore, use cy pres requests to change gift conditions, such as the restriction on selling a piece of art or alternately on a charitable trust that provides specifically designated institutional funding. As the *Fisk* case demonstrates, cy pres petitions can not only successfully allow a museum to deaccession art in contravention of bequest terms but also to obtain approval for other arrangements, such as art sharing. Looking forward, cy pres could also be expanded for use as a mechanism for approving the use of deaccessioning funds for purposes other than acquisitions. In such situations, cy pres petitions would require judicial inquiry into the institution's financial health, as well as judicial approval of any proposed spending of the funds that deviated from traditionally authorized uses. This type of safeguard would provide museums with the ability to use funds for daily operations but would also put into place a mechanism for ensuring that deaccessioning was not used repeatedly as a method for financing operations but rather as an emergency measure. This type of judicial inquiry would therefore ensure that trustees were taking such steps in order to fulfill—rather than sidestep—fiduciary duty to the institution.

The deviation doctrine is a similarly useful tool for institutions seeking to modify terms. Deviation is distinct from cy pres in that deviation applies to administrative terms and cy pres relates to substantive terms. The main operational difference between the two doctrines is that deviation is considered to be a more flexible tool in reforming charitable trust terms.[211] Accordingly, "[c]ourts appear to apply the deviation doctrine in situations short of impossibility, particularly when 'effective philanthropy' or the public interest is paramount."[212] One of the most well known judicial applications of the doctrine of deviation occurred with the Barnes Trust and the relocation of the museum to Philadelphia from Lower Merion. In that case, the doctrine of deviation allowed the court to modify trust terms in order to permit changes to the size of the Foundation Board, changes in operating hours, the use of the facility for fundraising purposes, and an

[210] UNIF. TRUST CODE § 412(a) (emphasis added) (adding that "[t]o the extent practicable, the modification must be made in accordance with the settlor's probable intention"). In the comment to this section, the drafters added: "[t]he purpose of the 'equitable deviation' authorized by subsection (a) is not to disregard the settlor's intent but to modify inopportune details to effectuate better the settlor's broader purposes." *Id.*

[211] Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 354, 354 (1999).

[212] *Id.*

increase in admission fees. The most highly contested change, brought about through deviation as well, was the modification of trust terms stipulating that the artwork not be moved from its original location.[213] These changes demonstrate the extent to which courts can use deviation to modify terms governing the operation of an institution.

Judicial willingness to give effect to general charitable purpose has made cy pres and deviation twin tools for the modification of trust terms. In the case of public trusts, cy pres and deviation are particularly important tools because they require judicial intervention and public process. These judicial procedures increase the transparency of the deaccessioning process by providing a public forum for information discovery and questioning of the parties. These procedures, moreover, involve soliciting the participation of the attorney general, acting on behalf of the public interest, and allow both parties—the institution and the attorney general—to propose solutions that best match both institutional need and public interest. Furthermore, cy pres and deviation requests lend legitimacy by involving courts and thereby providing impartial arbiters to evaluate the evidence as well as the proposed solutions. Taking these questions to court has drawbacks, no doubt, including cost and time.[214] Nevertheless, the benefits of a public forum, forced information sharing, dual party proposals, and impartial judicial analysis outweigh the drawbacks. Consequently, museums can use cy pres petitions and deviation requests to realize these benefits, receive the imprimatur of judicial process, and create positive externalities with respect to the public.

### B. *Disclosure, Reporting, and Public Auctions*

While trust law provides a solution to increase procedural transparency in the form of cy pres and deviation requests, corporate law also provides solutions in the form of disclosure, reporting, and notice requirements. Disclosure, a widely recognized means of enabling corporate transparency, has been perceived as an effective mechanism for increasing not only informational equity but also "the accuracy of

[213] In 2003, in response to financial circumstances, the trustees filed a petition to restructure the Foundation Board and relocate the collection from Lower Merion to Philadelphia in conjunction with the acceptance of a proposal from the Pew Charitable Trusts and the Lenfest Foundation. Pew and Lenfest offered $150 million to "ensure the Foundation's long-term financial health," conditioned on the collection's move into Philadelphia. *See* Second Amended Petition of the Barnes Foundation to Amend Its Charter and Bylaws at 5, *In re* The Barnes Foundation (Ct. C.P. Pa. Oct. 21, 2003) (No. 58,788), http://www.barnesfriends.org/downlload/2nd_amended_petition_barnes.pdf.

[214] For a sample of the critiques leveled against cy pres judicial analysis, *see* Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1114 (1993); C. Ronald Chester, *Cy Pres: A Promise Unfulfilled*, 54 IND. L. J. 407, 414 (1979); John K. Eason, *Motive, Duty, and the Management of Restricted Charitable Gifts*, 45 WAKE FOREST L. REV. 123, 125–26 (2010).

decisionmaking."[215] For these reasons, certain affirmative disclosure rules in the corporate setting have been made mandatory in the hope of creating public and investor trust in markets, preventing fraud, and eroding informational advantages held by the corporation.[216] These same benefits obtain in the non-profit setting. Furthermore, corporate law offers a model for selling art at auction that brings to bear both public benefit and institutional need.

1. Disclosure and Reporting Requirements

Currently, museums and other non-profit organizations are required to file an annual 990 report in order to maintain tax-exempt status, along with an annual financial report and a copy of an annual audit.[217] Many museums make these documents publicly available on their institutional websites.[218] To the extent that museums are already making these reports readily available to the public as a standard practice, disclosure is already present. However, all institutions should be obliged to make these reports publicly available in some manner. In these reports, museums do and should list any works that were deaccessioned during the reporting year. In the Metropolitan Museum of Art's 2013 Annual Report, there is a listing of the members of the Acquisitions Committee as well as a list of "Objects Sold or Exchanged" during that fiscal year for over $50,000 and the total revenue generated from art sales (approximately $5.5 million).[219] The Met's deaccessioning policies are also accessible on the website.[220] This

[215] A.D.E. Lewis, *Bentham's View of the Right to Silence*, *in* 3 JEREMY BENTHAM: CRITICAL ASSESSMENTS 360 (Bhikhu C. Parekh ed., 1993) ("Bentham's principal aim was to achieve the fullest possible disclosure of relevant information consistent with the minimum of unnecessary inconvenience.").

[216] For a discussion of corporate reporting requirements, *see* JESSE CHOPPER, JOHN COFFEE & RONALD GILSON, CASES AND MATERIALS ON CORPORATIONS 291–300 (2013).

[217] For an overview of the New York State requirements, *see New York Registration and Reporting Requirements for Nonprofit Organizations*, NONPROFIT COORDINATING COMMITTEE OF NEW YORK, INC., http://www.npccny.org/info/gti5.htm (last visited Sept. 27, 2015). Corporations are subject to similar requirements and must file annual reports along with other forms pursuant to the Securities Exchange Act of 1934. *See* 15 U.S.C. § 78m (2012).

[218] *See, e.g.*, *Annual Reports for the Metropolitan Museum of Art*, THE METROPOLITAN MUSEUM OF ART http://www.metmuseum.org/en/about-the-museum/annual-reports/reports (last visited Sept. 27, 2015); PRICEWATERHOUSECOOPERS LLP, THE MUSEUM OF MODERN ART CONSOLIDATED FINANCIAL STATEMENTS JUNE 30, 2013 AND 2012 (Oct. 2, 2013), https://www.moma.org/pdfs/docs/about/MoMAFY13.pdf; MUSEUM OF THE CITY OF NEW YORK, BIENNIAL REPORT FY 2011 & FY2012, http://www.mcny.org/sites/default/files/Biennial%20Report%202011-12.pdf (last visited Sept. 27, 2015).

[219] METROPOLITAN MUSEUM OF ART, ONE HUNDRED FORTY-THIRD ANNUAL REPORT OF THE TRUSTEES FOR THE FISCAL YEAR JULY 1, 2012 THROUGH JUNE 30, 2013 48, http://www.metmuseum.org/about-the-museum/annual-reports/~/media/Files/About/Annual%20Reports/2012_2013/Annual%20Report%202013.pdf.

[220] *See Collections Management Policy*, THE METROPOLITAN MUSEUM OF ART, http://www.metmuseum.org/about-the-museum/collections-management-policy#deaccessioning (last visited Sept. 27, 2015) ("The Board of Trustees approved detailed Procedures for

level of disclosure and availability should be standard for museums, such that anyone can easily access the reports and learn what pieces have been deaccessioned and at what price.[221]

There is more, however, that museums can do to disclose and publicize information about proposed deaccessioning. Disclosure rules could mandate that any proposed sales be disclosed on institutional websites or in other public communications, and that these disclosures satisfy specified periods of public notice.[222] The policies instituted by the Met after the attorney general's investigation incorporated these concepts of public notice and a waiting period. In particular, the Met's policies provided that the museum would give fifteen days' notice for the sale of any work valued at over $5,000 and forty-five days' notice for any work that had been on exhibition in the previous ten years and was valued at or above $25,000. Museum directors have objected to the imposition of such requirements on the grounds that advance notice "would seriously inhibit the flexibility and confidentiality necessary to achieve the best prices in sales."[223] It is possible, however, that public notice could increase the price of a work by increasing the number of potential buyers and increasing the efficiency of the art market. In either case, the gains in publicity and benefit to public trust incurred by this type of notice outweigh speculative, potential harm to the final sale price.[224]

More importantly, along with the public notice of sale, the publicity approach would require museums to state the institutional reasons for the deaccessioning, how the sale would fit into a larger collections management strategy, and where the revenue would go. If the proceeds were intended to supplement the general operating budget, a museum would be required to make public the case for such spending. Like a cy pres request detailing the estimated revenue as well as the intended use of that incoming revenue, the museum would be required to state all these facts as well as the institutional strategy behind the proposed sale in a document to which the public had access. Taking this approach, the transgression would not be the use of deaccessioning funds to support operations. Rather, the violation would consist of the

Deaccessioning and Disposing of Works of Art at a Special Meeting held on June 20, 1973. The Procedures were updated in February 2005 and are available upon request from the Counsel's Office.").

221 Stephens recommends this type of public disclosure in her proposed deaccessioning policies. *See* Stephens, *supra* note 55, at 180.

222 The corporate analogue might be the requirements mandated by the Williams Act for disclosure at various points during takeover bids.

223 William Rubin, Museum of Modern Art, Public Hearings, Attorney General's Conference of Museum Representatives, Oct. 19, 1973, at 68.

224 *See* David R. Gabor, *Deaccessioning Fine Art: A Proposal for Heightened Scrutiny*, 36 UCLA L. REV. 1005, 1042 (1988-1989) (recommending this type of forty-five day waiting period for museums proposing to deaccession artwork).

failure to disclose sufficient public information.

Finally, in specific circumstances, disclosure concerning deaccessioning plans might also take a more interactive and consultative approach. At the 1973 hearings convened by the attorney general in the wake of the Met's deaccessioning scandal, the director of the Everson Museum of Art, a small upstate museum, spoke of the relationship between his institution and the local community. He noted that the museum shared resources with local community groups, such as the historical society, and remarked that in a sale situation "[m]ost of the objects we would have for sale would essentially be of local interest . . . local artists and in other cases, material that has local historical value."[225] Sale objects might have particular resonance for a local community or constituency as part of a unique cultural heritage.[226] In these cases, required consultation with the local constituencies is an appropriate rule. Scholars have suggested that museums have, at the very least, "an ethical duty . . . to consult with the representatives designated by the people whose cultures and environments are represented . . . . Such an ethical duty might require consultation with designated representatives as to accession, . . . and deaccession of collections."[227] Deaccession plans, from this perspective, would entail not just passive disclosure but an active engagement with community members in order to approve of art sales and create safe harbors for any such transactions.[228]

2. Public Auctions and Desperation Deaccessioning

In addition to concerns over disclosure and the circulation of adequate information to the public, another concern with respect to deaccessioning is who buys the art. Deaccessioning art sales are considered to be a particular violation of the public trust when the artwork is sold at private auction or returns to private hands through public auction.[229] A number of commentators have proposed a rule

225 James Harithas, Everson Museum of Art, Public Hearings, at 50.

226 In Germany, "legislation [has been] proposed by the German government to monitor and limit art exported for sale." Doreen Carvajal, *As Germany Tries to Hold On to Its Art, Some Works Drop From View*, N.Y. TIMES, Jul. 18, 2015, at A9. Regional authorities would have the power to grant or deny export licenses for works of art over 50 years old and worth more than 150,000 euros. "The controls are meant to slow or block the movement of art to other countries for auctions, private sales, exhibitions or art fairs." *Id.*

227 Willard L. Boyd, *Museums as Centers of Controversy*, 128 DAEDALUS AM. MUSEUMS 185, 197 (1999). *See also* Brill, *supra* note 101, at 89 ("As part of this process, a more vigorous public-input portion would help ensure that the voices of those who benefit the most from the art would be heard.").

228 Corporate law analogues are relevant as corporations can "cleanse" transactions that may involve self-dealing or other breaches of fiduciary duty through shareholder ratification.

229 *See* Carvajal, *supra* note 108, at A1 ("[A]rt sales . . . [have] led to fears that masterpieces will disappear from public view to adorn the living room walls of a Saudi prince or hedge-fund billionaire.").

stating that deaccessioned artwork always be sold at public auction. The Met, since the creation of its internal policies on regulation, has stated that all artworks valued at over $5,000 will be sold at public auction. This requirement, like the disclosure requirements, ensures at the very least that art sales are not secret events, held in private and closed to the public. Critics of this policy, like the critics of disclosure, invoke the need for confidentiality and flexibility in obtaining the highest price.[230] However, while flexibility is important, it is even more important to signal public participation and public trust values by keeping art sales open to the general public.

Other commentators have gone further and suggested that museums should always be given first opportunity to purchase the art, or that the museum selling the art attempt to broker trades or sharing agreements with colleague institutions before considering other options. Michael Kimmelman has proposed the following rule: "[W]henever art is sold by a public institution . . . local museums should be given a reasonable period of time to match the sale price . . . . a shot at preserving the public's heritage for the public."[231] Likewise, Adrian Ellis has suggested that we "embrace more readily active trades within the museum community" and that it is important "for the museum community to see itself more as just that—a community—and allow for a more comfortable distribution of resources between cash poor asset rich institutions and asset poor cash rich ones, allowing them to trade to mutual advantage."[232] A museum could therefore accept sale offers from other museums or craft alternative arrangements while carrying out its mission of maximizing benefit to the public.

The problem with the public auction and the right of first refusal going to museums is that "[p]ublic nonprofit organizations often lack the financial resources to compete with private buyers. As a result, trustees may be forced to forego the maximum sale price in order to keep the work accessible to the public."[233] Here again, corporate principles may provide a solution. In the context of corporate takeovers

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230 William Rubin, Museum of Modern Art, Public Hearings, *supra* note 223, at 71.

231 Michael Kimmelman, *A City's Heart Misses A Beat*, N.Y. TIMES (May 16, 2005), http://www.nytimes.com/2005/05/16/arts/design/a-citys-heart-misses-a-beat.html. *See also* Dobrzynski, *supra* note 132, at A21 ("Most important, as part of any deal permitting the sale of art, the de-accessioning museum would have to offer the works to other museums first. If it received no offers, it could sell the pieces via a public auction—and any American museum would then have the opportunity to match a winning bid if it promised to keep the work in a public collection.").

232 Adrian Ellis, *A New Approach to the Deaccessioning Issue*, THE ART NEWSPAPER (Mar. 2004), http://aeaconsulting.com/idea/a_new_approach_to_the_deaccessioning_rule. Donn Zaretsky supports and discusses the "Kimmelman and Ellis rules for deaccessioning." *See* Donn Zaretsky, *Where were we (again)? (UPDATED)*, THE ART LAW BLOG (Jan. 4, 2010), http://theartlawblog.blogspot.com/2010/01/where-were-we-again.html.

233 White, *supra* note 9, at 1063.

and reorganization, when a company is clearly and inescapably the target of a takeover, the board has a duty to command the highest possible price for the company—a board's *Revlon* duty.[234] Nonprofit institutions could similarly be allowed to pursue the highest bid in cases of extreme need. That is to say, in cases of severe financial distress, when either insolvency or reorganization appears unavoidable, museums could be allowed to sell to the highest bidder, even if that bidder is a private one.[235] The New York Board of Regents considered a rule similar to this one in 2008. That rule, called the "desperation deaccession" rule would have permitted museums

> with the approval of the Board of Regents, to sell or transfer items or material in its collections to another museum or historical society for purposes of obtaining funds to pay outstanding debt, and thereby provide an alternative to the institution's bankruptcy or dissolution, and the possible loss or liquidation of a collection because of debt.[236]

The proposal, however, was heavily criticized as being too far out of alignment with industry rules and quickly abandoned.[237]

Respecting the role of mission as well as the needs of stakeholders, deaccessioning sales should take place at public auctions and trustees should give purchasing priority to other public institutions, actively seeking out partner organizations and resource exchanges. Nevertheless, in cases of institutional insolvency, trustees should have increased latitude to sell art to the highest bidder, if only in order to fulfill their fiduciary duties to the institution, creditors, and other economic stakeholders. In all these cases, rules about notice and public auction would apply; museums could however consider bids from private buyers. Sarah Tam has remarked, "Museums have the power to demonstrate to the public that deaccession is not a breach of the trust that the public has given to museums."[238] It is only with policies and legal practices that incorporate publicity values and mechanisms that museums will make visible their commitment to the public and to their missions of providing public benefit.

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[234] *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986). Gabor endorses this approach. *See* Gabor, *supra* note 224, at 1038 ("[A] museum should be free simply to accept the highest bid. The public will be served, because all revenue must be directed back toward the purchase of other art works."); White, *supra* note 9, at 1064 ("Accordingly, courts should require museums to sell to public buyers, unless the potential income of a private sale is significantly higher.").

[235] As discussed in Part II.B., this may in fact be part of a trustees' fiduciary duty.

[236] *See* Jared Lenow & John Sare, *New York Board of Regents Adopts New Deaccessioning Rules*, LEXOLOGY (Aug. 28, 2012), http://www.lexology.com/library/detail.aspx?g=569f91f1-5f52-4f6e-9025-539f1809f2d8.

[237] *Id.*

[238] Tam, *supra* note 18, at 900.

## CONCLUSION

The public trust is an evocative and robust cultural notion that is supported by two overlapping and sometimes conflicting legal frameworks: the public resource and trust law frameworks. The public resource framework places high priority on the principle of art as a public resource, substantiating this cultural claim with principles adopted from natural resource and tax law. The trust law framework focuses, instead, on compliance with governing documents, donor stipulations, and the fiduciary duty of trustees and directors. For the most part, these two frameworks offer slightly different but complementary analytics. In the case of deaccessioning rules, however, the two conflict. Public resource rules—instantiated in industry and local governance rules—prohibit the spending of deaccessioning funds on operational needs. Trust rules require only that any sale and spending be in alignment with the institutional charter and any applicable trust or gift conditions.

Consequently, the debate over deaccessioning not only provides us with a better view of how each framework operates but also reveals the weaknesses in the public resource framework. Because the public resource framework assumes a weak and incomplete understanding of "the public" and limits the ability of trustees to fully satisfy their fiduciary duties, the trust law framework is preferable. Because of the special nature of the public trust, however, the trust law framework should be enhanced so that all regulation is grounded in *publicity values*. Trust law doctrines, including cy pres and deviation, can be used to increase publicity through judicial intervention. In addition, corporate law principles such as information disclosure, public notice, and public processes can also increase publicity. Approaching regulation from this perspective will help resolve conflicting accounts of what legal framework is best suited to museum regulation and help museums not only maximize institutional flexibility but also dispatch their unique obligations as public trusts.