University of Kentucky
UKnowledge

Law Faculty Scholarly Articles | Law Faculty Publications

2020

Against Deaccessioning Rules

Brian L. Frye
University of Kentucky, brianlfrye@uky.edu

Follow this and additional works at: https://uknowledge.uky.edu/law_facpub

Part of the Other Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Repository Citation
Frye, Brian L., "Against Deaccessioning Rules" (2020). *Law Faculty Scholarly Articles*. 741.
https://uknowledge.uky.edu/law_facpub/741

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Against Deaccessioning Rules

Notes/Citation Information
Brian L. Frye, Against Deaccessioning Rules, 53 Creighton L. Rev. 461 (2020).

This article is available at UKnowledge: https://uknowledge.uky.edu/law_facpub/741

AGAINST DEACCESSIONING RULES

BRIAN L. FRYE†

If we want things to stay as they are, things will have to change.[1]

Art museums are the aristocrats of the charitable sector, with all the virtues and vices of the aristocracy. In their prime, they are glorious exemplars of the finest in cultural expression. But in their dotage, they are weak and vulnerable, constitutionally incapable of avoiding financial ruin. Some art museums have even gone bankrupt and dissolved, despite owning large collections of extremely valuable objects.

What explains this paradox? Deaccessioning rules: professional rules governing art museums and art museum directors that prohibit the sale of works of art for the purpose of generating capital. When art museums find themselves in financial distress, deaccessioning rules can effectively prevent them from saving themselves. For want of a sale, an institution is lost.

I find it tragic and tragically unnecessary. I question the enforceability, justification, and legitimacy of deaccessioning rules. But even if you think such rules reflect best practices for museum collection management, they should not require the unnecessary sacrifice of a museum. When faced with the decision of either violating deaccessioning rules or dissolving a museum, directors should almost always choose the former.

Ironically, as I was editing this article, the "deaccessioning police" seem to have reached the same conclusion, albeit with considerable reluctance. On April 16, 2020, in response to the coronavirus pandemic, the Association of Art Museum Directors announced that it was temporarily relaxing its deaccessioning rules. Specifically, it provided that for the next two years, member museums can use deaccessioning proceeds for the "direct care of collections," a "substantial shift" from its standard policy prohibiting the use of deaccessioning

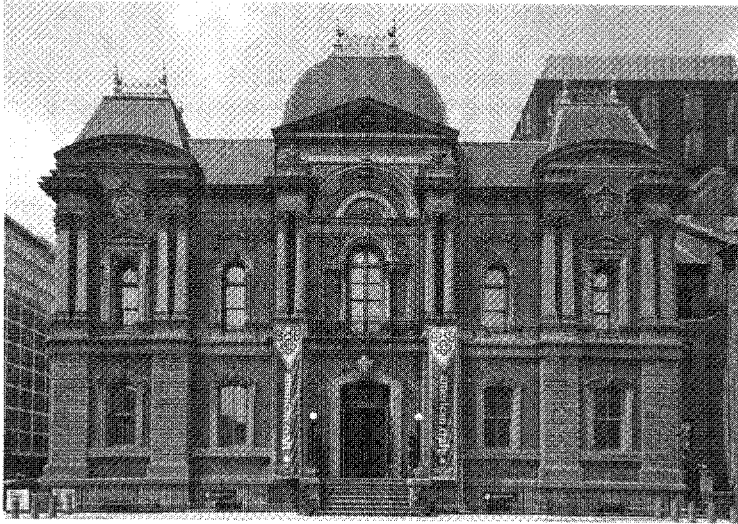
† Associate Professor of Law, University of Kentucky College of Law. I would like to thank the University of Kentucky College of Law for supporting this research with a summer research grant. I would also like to thank Guy Rub, Peter Karol, and the participants in the Art Law Works in Progress Colloquium for their helpful comments on this article. I offer special thanks to Mark S. Gold for his many helpful comments and suggestions over the years, including on this article. Finally, I must observe that this article was inspired primarily by Donn Zaretsky's indefagitable criticism of deaccessioning rules. If I am the Deaccessioning Hall of Fame's Scholar-in-Residence, he is surely its Executive Director.

1. GIUSEPPE TOMASI DI LAMPEDUSA, THE LEOPARD (1958).

proceeds for the purpose of anything other than purchasing artwork.[2] Perhaps things are finally about to change, no matter how much the AAMD and its beneficiaries want them to remain the same.[3]

I. THE BIRTH & UNTIMELY DEATH OF A MUSEUM & SCHOOL

The Corcoran Gallery of Art was founded in 1869 by William Wilson Corcoran, an American banker, philanthropist, and art collector. Initially, it was housed in a building located at 17th Street and Pennsylvania Avenue in Washington, D.C.[4] In 1877, the American painter Eliphalet Frazer Andrews began teaching art classes at the gallery. The classes were popular, so in 1878 Corcoran donated money to create an art school associated with the gallery, and the Corcoran School of Art opened in 1890 in an adjacent building.



The Renwick Gallery
17th Street and Pennsylvania Avenue, Washington, D.C.

---

2. See Andrew Russeth, *In Substantial Shift, Museum Industry Group Pushes Directors to Break the Rules to Survive*, ARTNEWS (Apr. 16, 2020), https://www.artnews.com/art-news/news/aamd-guidelines-coronavirus-1202684140/; Mark S. Gold & Stefanie S. Jandl, *Why the Association of Art Museum Directors's Move on Deaccessioning Matters so Much*, ART NEWSPAPER (May 18, 2020), https://www.theartnewspaper.com/comment/why-the-aamd-s-move-on-deaccessioning-matters-so-much.

3. *See* Donn Zaretsky, *So You Mean It's Not so Repulsive After All?*, ART LAW BLOG (Apr. 16, 2020), http://theartlawblog.blogspot.com/; *When It's a Matter of Survival, LetMmuseums Sell Art*, BOSTON GLOBE (May 18, 2020), https://www.bostonglobe.com/2020/05/18/opinion/when-its-matter-survival-let-museums-sell-art/.

4. This building now houses the Renwick Gallery.

The Corcoran Gallery of Art & Corcoran College of Art + Design
New York Avenue and 17th Street, Washington, D.C.

Eventually, the gallery and art school outgrew their respective buildings, and in 1897, they both moved into a beaux arts building designed by Ernest Flagg at New York Avenue and 17th Street. They both continued to grow throughout the twentieth century. The gallery eventually accumulated a collection consisting of more than 17,000 objects, including works by Rembrandt Peale, Eugène Delacroix, Edgar Degas, Thomas Gainsborough, John Singer Sargent, Claude Monet, Pablo Picasso, Edward Hopper, Willem de Kooning, Joan Mitchell, and many others. The art school was accredited in the mid-1970s, and changed its name to The Corcoran College of Art and Design in 1999. By the end of the twentieth century, the gallery and art school had about 140 employees, an operating budget of about $24 million, and an endowment of about $30 million.

The twenty-first century began auspiciously for the Corcoran, with a $30 million gift from AOL executives Robert W. Pittman and Barry Schuler in 2001. But it soon fell on hard times, primarily because of the mismanagement and neglect of its board of trustees. Visitors to the gallery declined by sixty percent and fundraising declined by fifty percent. Ten years later, the building was in disrepair, the school was in disarray, and the endowment was depleted. The Corcoran was broke and on the verge of bankruptcy.

The Corcoran's board of trustees proposed dissolution, and in 2014, the Superior Court of the District of Columbia approved their proposal.[5] The trustees gave the Corcoran's building, valued at about $200 million, to George Washington University, and gave most of its

5. Trs. of the Corcoran Gallery v. District of Columbia, No. 2014 CA 003745 B, 2014 WL 5080058 (D.C. Super. Ct. Aug. 18, 2014).

art collection, valued at about $2 billion, to the National Gallery of Art. The art school became the Corcoran School of the Arts and Design in George Washington University's Columbian College of Arts and Sciences. In addition, the art collection expanded the National Gallery's already substantial holdings.

The trustees could easily have saved the Corcoran by selling a few works of art. The museum's collection focused on 19th century American painting. Surely, it could have sold a selection of works from other places or periods, without seriously compromising the quality of its collection. So, why did the trustees choose to dissolve an iconic and venerable institution? Because the court held that deaccessioning rules prohibited the museum from selling art for the purpose of raising money. Or rather, the court accepted the trustees' contention that they could not sell any of the art. But was it right? I think not.

Yes, various deaccessioning rules prohibit art museums from selling artworks for the purpose of raising capital, but deaccessioning rules are just private rules promulgated by professional organizations—they do not have the force of law. While those organizations strongly disapprove of deaccessioning for the purpose of raising capital and consequently sanction museums that violate their rules, no legal restriction prevents a museum from selling works for any reason consistent with the museum's purpose. Surely, saving a museum is consistent with its purpose?

Moreover, the trustees of a charity have a fiduciary duty to the charity that must trump any professional rules. The duty of loyalty compels them to be loyal to the charity above all else, and the duty of care compels them to make decisions in the best interests of the charity to the best of their ability. It is hard to see how dissolving the charity could be in its best interests, when the means of preserving it clearly existed.

If selling some art could have saved the Corcoran, the trustees could and should have sold some art—criticism be damned. Indeed, I believe the trustees would have a fiduciary duty to sell some art, irrespective of deaccessioning rules prohibiting it. The Corcoran would have been sanctioned, but punishment is preferable to dissolution.

Instead, the Corcoran's trustees ignored their fiduciary duties, with the inexplicable blessing of the court, and simply walked away. I find it disturbing that they largely avoided responsibility for their mismanagement of the Corcoran, rather than doing the hard and embarrassing work of rebuilding it. Furthermore, I object to their invocation of deaccessioning rules in order to pretend their hands were tied. Adherence to deaccessioning rules in the face of dissolution is not principle, but cowardice.

II. A POTTED HISTORY OF DEACCESSIONING

"Accessioning" is the process of adding an item to a museum's collection, and "deaccessioning" is the process of removing an item from the collection. As long as museums have existed, they have accessioned and deaccessioned items from their collections. Indeed, the practices go hand-in-hand. Museums build their collections by accessioning items, but they inevitably must also deaccession items for many different reasons. For example, museums may deaccession items because they are damaged, destroyed, lost, redundant, irrelevant, or uninteresting. Museums necessarily have limited storage and display space. Accessioning an item may prevent a museum from accessioning an different item, and deaccessioning an item may enable a museum to accession a new item.

Until quite recently, deaccessioning was unremarkable and uncontroversial. Museums deaccessioned items at the discretion of curators overseen by directors or trustees. When curators deemed certain items superfluous or undesirable, they designated those items for deaccessioning and usually encountered little objection. Curators were assumed to have the best interests of the museum in mind, and their decisions received considerable deference.

Diego Rodríguez de Silva y Velázquez,
Portrait of Juan de Pareja (c. 1650).

A. The Metropolitan Museum of Art

Everything changed in 1970, when the Metropolitan Museum of Art purchased Diego Rodríguez de Silva y Velázquez's painting *Portrait of Juan de Pareja* (c. 1650) for about $5.5 million, a new record price for a single work of art.[6] Initially, the purchase was lauded as a triumph, albeit with some reservations about the extraordinary price. As the New York Times observed:

> It is virtually impossible to think of the Metropolitan Museum's new Velázquez without thinking of its price tag. This is a shame because the association deforms great work of art. . . . All secondary considerations aside, the Metropolitan's acquisition of this superb painting enhances the quality of its great collection and permanently enriches the life of the city.[7]

This praise was muted when John Canaday accused the Metropolitan Museum and other museums of selling canonical works of modern art on the sly.[8] And it ended when the New York Times revealed that the Metropolitan Museum had financed the Velázquez purchase by quietly selling works from a collection of modern art bequeathed to the museum by the late Adelaide Milton de Groot.[9] In total, the Metropolitan Museum sold fifty paintings from the de Groot collection and used the proceeds to purchase several works, including the Velázquez.

Attorney General Louis J. Lefkowitz immediately launched an investigation of the Metropolitan Museum and its director, Thomas P.F. Hoving.[10] Ultimately, Lefkowitz found no mismanagement or impropriety. While the de Groot bequest asked the Metropolitan Museum not to sell any of the donated works and to give any unwanted works to other museums, the bequest included the phrase "without limiting in any way the absolute nature of this bequest," which made the re-

6. Velázquez (1599-1660) was a Spanish painter in the court of King Philip IV. He is considered one of the most important painters of the Spanish Golden Age, and his work inspired many realist and impressionist painters. *Portrait of Juan de Pareja* is one of Velázquez's best-known paintings. It depicts Juan de Pareja, who was Velázquez's slave and assistant. It is the earliest known portrait of a Spanish man of African descent. Pareja was born into slavery and inherited by Velázquez. In about 1631, Pareja became an assistant in Velázquez's studio. In 1650, Velázquez signed a contract of manumission that freed Pareja in 1654. When Velázquez died in 1660, Pareja became an assistant to the painter Juan del Mazo, as well as a notable painter in his own right. The Metropolitan Museum paid $5,592,000 for *Portrait of Juan de Pareja*. Lawrence Van Gelder, *1971-73 Deals Studied: Metropolitan Museum Will Ease Its Secrecy on Removal*, N.Y. Times, June 27, 1973, at 1.

7. *The Velazquez*, N.Y. Times, May 18, 1971, at 38.

8. John Canaday, *Very Quiet and Very Dangerous*, N.Y. Times, Feb. 27, 1972, at D21.

9. John L. Hess, *Metropolitan Listing Discloses Sale of Five More Major Paintings*, N.Y. Times, Jan. 25, 1973, at 1.

10. John L. Hess, *Lefkowitz Opens Inquiry into Art Sales by the Met*, N.Y. Times, Jan. 26, 1973, at 1.

quest unenforceable.[11] However, the Metropolitan Museum agreed to provide more public disclosure and accountability in relation to future deaccessioning.[12]

The investigation of the Metropolitan Museum was the beginning of a new era in deaccessioning.[13] While many museums resisted external oversight of their deaccessioning practices, public and private pressure soon forced them to change their tune. The art market was booming, desirable works were rapidly increasing in value, and donors wanted to ensure that museums did not simply flip donated collections for a profit. In addition, some observers alleged that museums, including the Metropolitan Museum, were selling deaccessioned works to insiders for less than their market value.

B. The Museum of the American Indian

The scandal at the Metropolitan Museum was only the beginning. In 1974, Lefkowitz launched an investigation of the Museum of the American Indian based on allegations of mismanagement and self-dealing levied by board member Edmund Carpenter.[14] Among other things, Carpenter alleged that the museum had improperly deaccessioned objects and sold them to private dealers or board members at below-market prices. Ultimately, Lefkowitz filed an action against Frederick J. Dockstader, the director of the museum, and the museum's board of directors, requesting their removal.[15] The court agreed, and placed the museum in receivership for a period of time.

While the deaccessioning scandals of the 1970s largely reflected lax governance standards and attendant self-dealing, later deaccessioning disputes reflected more fundamental disagreements about whether museums in financial distress can and should deaccession in order to improve the financial health of the institution. Obviously, the tenor of the debate had changed. No longer was the dispute over the appropriateness of particular deaccessioning decisions. Rather, objectors disputed the legitimacy of deaccessioning itself, and the right of a museum to dispose of the objects in its collection in the way it saw fit.

---

11. Thomas Hoving, Making the Mummies Dance: Inside the Metropolitan Museum of Art 291 (1993).

12. Van Gelder, *supra* note 6, at 1.

13. David R. Gabor, *Deaccessioning Fine Art Works: A Proposal for Heightened Scrutiny*, 36 UCLA L. Rev. 1005, 1006 (1989).

14. Fred Ferretti, *State Investigates American Indian Museum*, N.Y. Times, Oct. 3, 1974, at 1.

15. C. Gerald Fraser, *Court Acts on Indian Museum*, N.Y. Times, June 28, 1975, at 29.

III. THE CREATION OF DEACCESSIONING RULES

Many different organizations represent various kinds of museums and museum professionals, and many of those organizations have adopted deaccessioning rules. The primary deaccessioning rules affecting art museums are the rules adopted by the American Alliance of Museums ("AAM") and the Association of Art Museum Directors ("AAMD").

A. The AAM Deaccessioning Rules

The AAM is a charitable organization that represents American museums. It was founded in 1906 as the American Association of Museums, incorporated in the District of Columbia in 1920, and recognized as a charitable organization by the IRS in 1937.[16] It currently has more than 35,000 members, including museums, individuals, charitable organizations, and businesses. The AAM represents a wide range of different kinds of museums, museum professionals, and others. However, art museums and art museum professionals have a strong voice in the AAM.

The AAM Code of Ethics for Museums adopts a set of ethical rules for AAM members, including a set of deaccessioning rules. The AAM Code recognizes that "[a]cting ethically is different from acting lawfully," and defines "acting ethically" as "adopting behaviors that, if universally accepted, would lead to the best possible outcomes for the largest possible number of people."[17] The AAM describes the AAM Code as a "formal statement of the ethical principles museums and museum professionals are expected to observe," that "should be incorporated into each museum's own institutional code of ethics."[18]

The AAM Code explicitly acknowledges that the ethical standards it describes exceed the legal obligations of its members:

> Museums and those responsible for them must do more than avoid legal liability, they must take affirmative steps to maintain their integrity so as to warrant public confidence. They must act not only legally but also ethically. This Code of Ethics for Museums, therefore, outlines ethical standards that frequently exceed legal minimums.[19]

---

16. The legal name of the AAM is still the American Association of Museums.
17. *Ethics, Standards, and Professional Practices: Ethics*, Am. All. of Museums, http://www.aam-us.org/resources/ethics-standards-and-best-practices/ethics (last visited Mar. 27, 2020).
18. *What Are Ethics?*, Am. All. of Museums, http://ww2.aam-us.org/resources/ethics-standards-and-best-practices/ethics (last visited Mar. 27, 2020).
19. AAM Code of Ethics for Museums, Am. All. of Museums, http://www.aam-us.org/resources/ethics-standards-and-best-practices/code-of-ethics (last visited Apr. 19, 2020).

Among other things, the AAM Code establishes deaccessioning rules, which provide that AAM member museums may deaccession items only for the purposes of acquisition and "direct care of collections." It claims that museums "are organized as public trusts, holding their collections and information as a benefit for those they were established to serve," and that "[m]useum governance in its various forms is a public trust responsible for the institution's service to society."[20] Accordingly, "governing authority ensures that . . . the museum's collections . . . are protected, maintained and developed in support of the museum's mission."[21]

The AAM Code also observes that the "stewardship of collections entails the highest public trust and carries with it the presumption of rightful ownership, permanence, care, documentation, accessibility and responsible disposal."[22] Accordingly, the museum ensures that:

> [D]isposal of collections through sale, trade or research activities is solely for the advancement of the museum's mission. Proceeds from the sale of nonliving collections are to be used consistent with the established standards of the museum's discipline, but in no event shall they be used for anything other than acquisition or direct care of collections.[23]

The AAM Curators Committee has adopted "A Code of Ethics for Curators," which expresses similar principles:

> Curators periodically review collection objects to assess the continued relevance of each object to the museum's mission. They refine the collection through judicious disposal of objects in accordance with the deaccession policy of their institution.
>
> Deaccessioning is undertaken solely for the advancement of the museum's mission. Curators offer professional guidance and expertise to their museum's board of trustees or other governing authority to ensure that the museum does not suffer in any way as a result of the deaccessioning process. Deaccessioned objects are preferably offered for transfer to another cultural institution or for sale at a well-publicized public auction. Proceeds from the sale of collections may not be used for anything other than acquisition or direct care of collections. Any other use may create the appearance that the collection, which is held in public trust, is being sold to finance the operations of the museum.

---

20. AM. ALL. OF MUSEUMS, *supra* note 18.
21. *Id.*
22. *Id.*
23. *Id.*

> In some cases, deaccessioned objects may be destroyed if the objects have deteriorated to the point that their research, interpretive, historical, or other value is compromised beyond reclamation; if they are slated for deaccessioning and no other repositories wish to acquire them; or if they contain toxins or other volatile components that place patrons, staff, or other collection objects at risk.[24]

B. The AAMD Deaccessioning Rules

The AAMD is a charitable organization that represents the directors of American art museums. It was founded in 1916 by the directors of twelve United States art museums and incorporated in the District of Columbia in 1969. It currently has 242 members, limited to the directors of art museums located in the United States, Canada, and Mexico. The AAMD defines an "art museum" as "a legally organized, not-for-profit institution or component of a not-for-profit institution or government entity with a mission to study, care for, interpret, and exhibit works of art."[25] AAMD defines a "director" as the "officer who has ultimate responsibility for the works of art owned by or lent to the museum, including jurisdiction over their acquisition, exhibition, preservation, study, and interpretation."[26] Accordingly, only one "director" may represent each "art museum."[27]

The AAMD retains considerable discretion in determining who qualifies for membership. An "art museum" must satisfy eligibility requirements established by the AAMD Trustees, which include purpose, size, and standards of operation, among other things. A "director" must also satisfy eligibility requirements, which include museum experience, demonstrated ability, and adherence to the Code of Ethics of the Association, among other things.[28]

The AAMD Code of Ethics provides a set of ethical rules for AAMD members, including deaccessioning rules. Under the AAMD Code, "AAMD's members hold their collections in public trust," and may deaccession works of art only for the purpose of acquisition.[29] The AAMD Code also provides for sanctions: "AAMD members who violate

---

24. Am. All. of Museums Curators Comm., A Code of Ethics for Curators 6 (2009), https://www.aam-us.org/wp-content/uploads/2018/01/curcomethics.pdf.

25. *Membership*, Ass'n of Art Museum Dir., at https://www.aamd.org/about/membership (last accessed Mar. 27, 2020).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Code of Ethics*, Ass'n of Art Museum Dir., https://www.aamd.org/about/code-of-ethics (last visited Mar. 27, 2020) (amended most recently in 2011) ("A museum director shall not dispose of accessioned works of art in order to provide funds for purposes other than acquisitions of works of art for the collection.").

this code of ethics will be subject to discipline by reprimand, suspension, or expulsion from the Association. Infractions by any art museum may expose that institution to sanctions, such as suspension of loans and shared exhibitions by AAMD members."[30]

The AAMD Code incorporates portions of the AAMD Professional Practices in Art Museums, which provides additional commentary on the AAMD deaccessioning rules:

> 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 of art in a manner consistent with the museum's policy on the use of restricted acquisition funds. In order to account properly for their use, the AAMD recommends that such funds, including any earnings and appreciation, be tracked separately from other acquisition funds.[31]

The AAMD has also adopted the AAMD Policy on Deaccessioning, which explains its deaccessioning rules in greater detail.[32] The AAMD Policy explicitly permits deaccessioning:

> Deaccessioning is a legitimate part of the formation and care of collections and, if practiced, should be done in order to refine and improve the quality and appropriateness of the collections, the better to serve the museum's mission.[33]

However, it prohibits the use of the proceeds of deaccessioning for any purpose other than acquisition, specifically prohibiting the use of those proceeds to cover operating or capital expenses.[34]

The AAMD Policy explicitly provides that member museums may deaccession works that are:

- Poor quality
- Duplicative
- Stolen or illegally imported
- Inauthentic, misattributed, or forged
- Damaged
- Outside the scope of the collection
- Sold to "refine and improve" the collection

---

30. *Id.*

31. ASS'N OF ART MUSEUM DIRS., PROFESSIONAL PRACTICES IN ART MUSEUMS 9 (2011), https://aamd.org/sites/default/files/document/2011ProfessionalPracitiesinArtMuseums.pdf.

32. ASS'N OF ART MUSEUM DIRS., AAMD POLICY ON DEACCESSIONING (2015), https://aamd.org/sites/default/files/document/AAMD%20Policy%20on%20Deaccessioning%20website_0.pdf. *See* also ASS'N OF ART MUSEUM DIRS., ART MUSEUMS AND THE PRACTICE OF DEACCESSIONING (2011), https://www.aamd.org/sites/default/files/document/PositionPaperDeaccessioning%2011.07.pdf.

33. AAMD POLICY ON DEACCESSIONING, *supra* note 33.

34. *Id.*

- Impossible for the museum to properly store or display

While the AAMD Policy recognizes that these reasons for deaccessioning works are non-exclusive, it refers to them as the "primary" reasons, suggesting that other reasons are disfavored.[35]

The AAMD Policy also imposes a set of procedural limits on deaccessioning, providing that the "process of deaccessioning and disposal" of a work "must be initiated by the appropriate professional staff," who must present a proposal to the museum director for review. If the director concludes that deaccessioning is appropriate, then the director should present the proposal to the museum's governing body which must make the final decision. The AAMD Policy specifically requires the director to rely on "authoritative expertise" when making deaccessioning decisions, permits the director to consider "third-party review and appraisal" of particularly valuable works, and recognizes that "special considerations" may apply to the work of living artists. The AAMD Policy also prohibits anyone associated with the museum from acquiring deaccessioned works, unless they are already a co-owner of the work.[36] Additionally, the AAMD Policy provides that museums should notify donors, their heirs, and living artists of any planned deaccessioning.[37]

The AAMD Policy requires the AAMD to impose sanctions on any member museum that deaccessions a work of art in violation of the Policy, which may include censure, suspension, or expulsion, as determined by the Board of Trustees of the AAMD. However, the AAMD Policy requires the Board to provide accused member museums the right to be heard, and that if the Board decides to sanction a museum for deaccessioning a work of art, it must also explain how the violation can be cured and the sanction reversed.

Among other things, the AAMD Policy provides that member museums must not treat their collections as financial assets, even for accounting purposes: "Member museums should not capitalize or collateralize collections or recognize as revenue the value of donated works."[38] Specifically, the policy observes that a Financial Accounting Standards Board ("FASB") Statement provides:

> [C]ontributions of works of art, historical treasures, and similar assets need not be recognized as revenue or capitalized if the donated items are added to collections that are (a) held for public exhibition, education, or research in furtherance of public service; (b) protected, kept unencumbered, cared for and preserved; and (c) subject to an organizational policy that

35. *Id.*
36. *Id.*
37. AAMD POLICY ON DEACCESSIONING, *supra* note 33.
38. *Id.*

> requires the proceeds from sales of collection items to be used to acquire other items for the collection.[39]

Apparently, the AAM and AAMD at least initially adopted their deaccessioning rules as part of an agreement with FASB, intended to permit museums not to include the value of their collections in their financial statements.[40] FASB accepted the AAM and AAMD position that if museums could not deaccession for the purpose of generating revenue, then their collections were not assets that needed to be included.

IV. JUSTIFYING DEACCESSIONING RULES

Opponents of deaccessioning offer several different justifications for deaccessioning rules, some formal and some practical. As a formal matter, some states have enacted deaccessioning statutes that limit the ability of art museums to deaccession works from their collections. But most opponents claim that the "public trust" doctrine also limits deaccessioning, and that deaccessioning is "unethical." As a practical matter, opponents argue that deaccessioning discourages donations of artwork to museums and creates bad incentives for museum trustees.

I find none of these arguments compelling. State laws limiting deaccessioning simply codify the Association of American Museum Directors ("AAMD") Policy. The public trust doctrine simply does not and should not affect deaccessioning, and in any case, the American Alliance of Museums ("AAM") and AAMD deaccessioning rules are inconsistent with the public trust doctrine. While deaccessioning may discourage donations of artwork, there is no reason to believe deaccessioning for the purpose of generating capital discourages donations more than deaccessioning for the purpose of collection management. Furthermore, it is unclear how preventing trustees from deaccessioning works in order to save a museum provides an incentive for them to mismanage the museum. In other words, opponents of deaccessioning have failed to articulate any coherent arguments in support of deaccessioning rules.

A. DEACCESSIONING LAWS

At least in some cases, state law may regulate deaccessioning. For example, in 2011, the New York State Education Department Board of Regents adopted deaccessioning rules governing the New

39. *Id.* (referencing FASB Statement No. 116 (1993)).

40. *See, e.g.*, Letter from Lori Fogarty, President, AAMD Board of Trustees, and Laura L. Lott, President and CEO, American Alliance of Museums, to Elizabeth McGraw, President of the Board of Directors, Berkshire Museums (Aug. 23, 2017).

York museums it regulates.[41] The New York Regents's rule is modeled on the AAM Rules and AAMD Policy, and specifically prohibits deaccessioning for the purpose of generating revenue.[42]

The New York Regents's rule is probably a valid exercise of state authority, because it only regulates certain New York nonprofit corporations. The rule reduces the value of assets in museum collections, which is arguably a Fifth Amendment taking.[43] However, it is hard to imagine any court finding a Fifth Amendment violation, and even harder to imagine a museum challenging the rule.

In any case, such laws are both valid and foolish. Apparently, the New York Board of Regents simply codified the AAMD Policy, without considering its justification or consequences. If the AAMD Policy is unjustified, so is the New York Regents's rule.

B. The Public Trust

Opponents of deaccessioning typically argue that museums cannot deaccession artworks, because they hold those works in the "public trust." The AAM and AAMD deaccessioning rules explicitly claim that museums cannot deaccession works for the purpose of generating revenue, because they hold their collections in the "public trust." The fiercest critics of deaccessioning inevitably characterize it as a betrayal of the public trust.

But the "public trust" is a legal doctrine with a specific meaning and application that is irrelevant to artworks. No court has ever applied the public trust doctrine to artwork. Indeed, personal property like artwork falls entirely outside the scope of the purpose of the public trust doctrine. Nor is the public trust doctrine consistent with the actual practices of museums. Applying the public trust doctrine would prohibit most or all deaccessioning, including deaccessioning permitted by the AAM and AAMD.

1. The Public Trust Doctrine

The "public trust doctrine" is a judicial gloss on the ancient public law principle of the "public trust," which provides that the state must

---

41. N.Y. Comp. Codes R. & Regs. tit. 8, § 3.27 (2020). This rule only applies to New York museums chartered by the New York Board of Regents, and does not apply to museums chartered by the State of New York.

42. *Id.* § 3.27(c)(6)(vii) (stating that "[i]n no event shall proceeds derived from the deaccessioning of any property from the collection be used for operating expenses or for any purposes other than the acquisition, preservation, conservation or direct care of collections").

43. *Cf.* Gregory Dolin & Irina D. Manta, *Taking Patents*, 73 Wash. & Lee L. Rev. 719 (2016) (arguing that the America Invents Act was a Fifth Amendment taking because it reduced the value of patents).

hold certain natural resources in trust for the people.[44] The concept of the "public trust" was first explicitly articulated in the Institutes of Justinian, which held that "by natural law, these things are common property of all: air, running water, the sea, and with it the shores of the sea."[45] The civil law typically incorporated the Roman concept of the public trust. For example, 11th century French law held that "the public highways and byways, running water and springs, meadows, pastures, forests, heaths and rocks are not to be held by lords, nor are they to be maintained in any other way than that their people may always be able to use them."[46] Bracton introduced the concept of the public trust into the common law in the 13th century, stating that the seashore was "common to all" and inalienable by the government.[47]

As a legal doctrine, the medieval concept of the "public trust" was largely aspirational, and enforced almost entirely in the breach. The state routinely conveyed rights in natural resources to private parties, and invoked the "public trust" only when it wished to reclaim them. In other words, "public trust" resources ultimately belonged to the state, not to the people.

United States courts adopted the historical concept of the "public trust" as a principle of constitutional law. In *Gibbons v. Ogden*,[48] the United States Supreme Court held that the states could not restrict the use of navigable waterways.[49] The Supreme Court further held in *Martin v. Lessee of Waddell*[50] that the states owned the beds of navigable waterways in their sovereign capacity.[51] It was not until *Illinois Central Railroad v. Illinois*[52] that the Supreme Court effectively recognized the public trust doctrine as a constitutional principle preventing states from alienating natural resources held in the public trust.[53] Of course, the Supreme Court never actually used the term

44. *See generally* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 635 (1986); Allison Anna Tait, *Publicity Rules for Public Trusts*, 33 CARDOZO ARTS & ENT. L.J. 421 (2015). *See also* Jennifer Anglim Kreder, *The "Public Trust"*, 18 U. PA. J. CONST. L. 1425 (2016) (exploring the historical meaning of the phrase "the public Trust" in Article VI, cl. 3 of the United States Constitution).

45. J. INST. 2.1.1.

46. See JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 189 (1971) (quoting M. BLOCH, FRENCH RURAL HISTORY 183 (1966)) (edited for clarity).

47. HENRY OF BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND (c. 1260).

48. 22 U.S. 1 (1824).

49. Gibbons v. Ogden, 22 U.S. 1 (1824).

50. 41 U.S. 367 (1842).

51. Martin v. Lessee of Waddell, 41 U.S. 367 (1842).

52. 146 U.S. 387 (1892).

53. Ill. Cent. R. Co. v. Illinois, 146 U.S. 387 (1892).

"public trust," and later claimed to have relied on Illinois law.[54] According to the Court, while the states hold title to navigable waterways, it is a title "held in trust for the people of the state," which cannot be alienated.[55]

The Supreme Court's *Illinois Central* opinion was the lodestar for the creation of the modern "public trust doctrine." State courts relied on it to justify reviewing and rejecting legislative attempts to alienate public property, especially navigable waterways, but also including wildlife and public infrastructure.[56] Nevertheless, the "public trust doctrine" long remained a stepchild of constitutional law, invoked when convenient, but otherwise ignored.

Then, in 1970, Joseph Sax published a law review article in which he argued that courts could use the public trust doctrine to protect the environment by invalidating the alienation of natural resources.[57] Many courts found Sax's thesis compelling, and began using it to enable both private parties and state governments to prevent the abuse of natural resources—especially water resources, but also including marine life, beaches, parklands, and historic sites.[58] However, courts have resisted the application of the public trust doctrine to anything other than natural resources, and have never applied it to personal property or artwork.[59]

2. *Art Museums & the Public Trust*

The deaccessioning police typically argue that museums cannot sell artworks for the purpose of generating revenue, because they hold artwork in the public trust. This argument fails not only because the public trust doctrine does not and should not apply to artworks, but also because almost any deaccessioning would be inconsistent with the public trust doctrine.

The public trust doctrine provides that the government holds certain kinds of natural resources in trust for the public, and therefore, cannot sell those resources to private parties. None of that is relevant to deaccessioning. Art museums are typically private charitable corporations, not government entities, so the public trust doctrine simply does not apply to them.[60] Art museums own artworks, which are per-

---

54. *Ill. Cent. R. Co.*, 146 U.S. 387. *But see* Appleby v. City of New York, 271 U.S. 364, 395 (1926).

55. *Ill. Cent. R. Co.*, 146 U.S. at 452.

56. *See* Geer v. Connecticut, 161 U.S. 519 (1896).

57. Sax, *supra* note 45.

58. See Lazarus, supra note 42, at 649.

59. *See* Kreder, *supra* note 45. *See generally* Lazarus, supra note 45; Tait, supra note 4.

60. Some charitable art museums are organized as charitable trusts or charitable unincorporated associations, and some private art museums are also organized as busi-

sonal property—not public resources subject to the public trust doctrine, and private parties routinely own artworks. Indeed, artists use dealers to sell artworks to collectors, and we call it the "art market."

Still, the deaccessioning police insist that art museums own artworks in the public trust. They are just wrong. No court has ever applied the public trust doctrine to an art museum; no court has ever found that an art museum owned a work in the public trust; and, no court has ever held that the sale of an artwork violated the public trust. No wonder there is no basis in the law for any of these claims.

Moreover, the AAM and AAMD deaccessioning rules are inconsistent with the public trust doctrine, because they allow museums to sell artworks for some purposes. Under the AAM and AAMD deaccessioning rules, art museums cannot deaccession artworks from their collections for the purpose of covering operating expenses or raising capital, but they can deaccession artwork for the purpose of acquiring different artwork.

This is fundamentally incompatible with the public trust doctrine, which is an absolute rule. If the government owns an asset in the public trust, it cannot sell that asset for any reason. Likewise, if museums owned artworks in the public trust, they could not sell those artworks for any purpose. But museums routinely deaccession artworks, with the blessing—or at least tolerance—of the deaccessioning police. Either museums hold artwork in the public trust, or they do not. If museums can deaccession artworks for any reason, then they do not own those artworks in the public trust.

Of course, when the deaccessioning police invoke the public trust, they aren't really referring to the public trust doctrine at all. Instead, they are relying on the belief that culturally significant works of authorship "belong" to everyone, not just the owner of the physical copy of the work in question.

In a limited sense, they are right. After all, the concept of the "public domain" provides that when the copyright term of a work of authorship ends, the work is available for anyone to use in any way they like.[61]

But in the relevant sense, they are wrong. While intangible works of authorship inevitably fall into the public domain, particular copies of works of authorship do not, even if they are "unique copies."

Many people find this confusing, because they find it difficult to distinguish intangible works of authorship from their physical copies. I find their confusion forgivable, as the distinction is metaphysically

---

ness corporations, limited liability companies, partnerships, or sole proprietorships. A small minority of art museums are owned by government entitles.

61. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).

fraught. After all, what's the difference between the work of authorship fixed in a painting and the painting itself? A reproduction of the work is always only a reproduction of the painting.[62] If the public has an interest in the work, why doesn't the public have an interest in the painting?

This intuition provided the basis for Sax's later argument that courts should extend the public trust doctrine to "cultural treasures."[63] Specifically, he argued that a version of the public trust doctrine should limit the property rights of anyone who owns a cultural treasure, and encourages courts to view them as a "fortunate, if provisional, trustee, having no rights to deprive others who value the objects as much as they do themselves."[64] In other words, the law should limit what the owner of a cultural treasure can do with it. Maybe the law could even prevent the owner of a cultural treasure from selling it. Except, of course, for the purpose of purchasing a different cultural treasure. We wouldn't want to go too far, after all.

For better or worse, Sax's second foray into the public trust was considerably less successful than his first. No court has adopted his proposal and extended the public trust doctrine to works of art. And more to the point, no court has held that the public trust doctrine can or should prohibit art museums from deaccessioning works of art for the purpose of generating revenue.

It is all rather unsurprising. Sax argues that people shouldn't destroy or prevent access to important works of authorship. But we don't need the public trust doctrine to accomplish that goal, and more importantly, it has nothing to do with deaccessioning rules. When a museum deaccessions a work of art, the object simply passes to a new owner. If the work is in the public domain, it remains in the public domain. Anyone can use the work in any way they like. The only thing that changes is the ownership of the physical object. And if the public wants to own that physical object, it can just buy it.

So, why shouldn't the public trust doctrine apply to works of art? Because even the people making the argument don't really mean it. If they really thought museums owned works of art in the public trust, they would object to museums selling works of art, ever. But they don't. They just object to museums selling works of art for the wrong reasons. That is not an objection that sounds in the public trust. It is an objection that sounds in personal preference.

---

62. *See, e.g.*, WALTER BENJAMIN, THE WORK OF ART IN THE AGE OF MECHANICAL REPRODUCTION (1935).

63. JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES (2001).

64. *Id.*

C. Charitable Purposes & Fiduciary Duties

More sophisticated critics of deaccessioning artworks for the purpose of generating revenue ground their objections in the charitable purposes of art museums and the fiduciary duties of museum directors and trustees. In a nutshell, they argue that museums should not sell artworks for the purpose of generating revenue, because it is inconsistent with the charitable purpose of an art museum. They observe that directors and trustees have fiduciary duties to provide careful stewardship of the museum and maintain fealty to its charitable purpose that are inconsistent with selling artworks for revenue. These critics further claim that allowing museums to sell artwork for revenue would create undesirable incentives for directors and trustees by enabling them to avoid culpability for mismanagement.

While I find these objections considerably more compelling, I am not convinced that they should preclude museums from selling artworks for revenue, when there is no other choice. I agree that museums should avoid selling artworks for revenue, and I agree that directors and trustees have a fiduciary duty to ensure that museums are never required to sell artworks for revenue. Nevertheless, I believe directors and trustees also have a fiduciary duty to sell artworks for revenue, if it is necessary in order to preserve the museum. After all, their fiduciary duty runs to the organization, not the artwork. Allowing directors and trustees to sidestep the embarrassing decision to sell and preserve the organization does nothing to hold them accountable; moreover, in any case, why should the organization suffer dissolution in order to punish their fecklessness?

1. *Charitable Organizations*

The overwhelming majority of museums are organized as charitable corporations or charitable trusts. Accordingly, they are created under a state nonprofit corporation law or trust law and request recognition as charitable organizations exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. They are governed by a board of directors or trustees, subject to the charitable purpose of the organization and the nondistribution constraint. In addition, they are regulated by the state attorney general and IRS.

2. *The Fiduciary Duties of Directors and Trustees*

The directors and trustees of a museum organized as a charitable corporation or trust have certain fiduciary duties to the organization that may affect their decisions about deaccessioning. Specifically, they have duties of loyalty, care, and obedience.

a. The Duty of Loyalty

The duty of loyalty provides that directors and trustees must make decisions that benefit the museum rather than themselves. Under the duty of loyalty, self-dealing is obviously prohibited, so directors and trustees generally cannot sell artworks to themselves or their friends, but they can certainly decide to sell artwork in order to benefit the organization so long as they do not personally benefit.

Indeed, the duty of loyalty arguably obliges directors and trustees to sell artwork for the purpose of generating revenue if the organization needs the revenue in order to survive. Violating deaccessioning rules by selling artworks for revenue may embarrass directors and trustees. It may also negatively impact their own financial interests if they participate in the art market. However, the duty of loyalty obliges directors and trustees to act in the interests of the organization, even when it is inconsistent with their own.

Specifically, the duty of loyalty obliges directors and trustees to ignore deaccessioning rules if those rules are inconsistent with the interests of the organization. Directors and trustees have a fiduciary duty of loyalty to the organization they represent, not the AAM and AAMD. Accordingly, they must act in the best interests of the organization, irrespective of what the AAM and AAMD deaccessioning rules provide. In some cases, that might mean complying with AAM and AAMD rules in order to avoid sanctions, but in other cases, it might not.

b. The Duty of Care

The fiduciary duty of care provides that the directors and trustees of a charitable organization must exercise reasonable care under the circumstances to make decisions in the best interests of the organization. Accordingly, directors and trustees should decide to sell artworks for revenue only if they reasonably believe that it is in the best interests of the museum. Sometimes, selling artwork is the wrong decision, yet other times it is the right one.

Selling artwork for revenue in order to save a museum is often the right decision. Sometimes, charitable organizations outlive their purpose and should be dissolved, but directors and trustees should be reluctant to dissolve organizations with any remaining vitality, especially when those organizations own assets they can sell and use the revenue to reorganize.

Sadly, directors and trustees occasionally violate their fiduciary duty of care by allowing a museum to slide into penury, but why should we punish the organization for their dereliction of duty? If we

want to punish mismanagement, we should do it when it is happening, not when it is too late.

c. The Duty of Obedience

The duty of obedience provides that the directors and trustees of a charitable organization must ensure that it pursues its charitable purpose. Some scholars have argued that deaccessioning rules might be justified as a way of imposing board discipline. For example, Michael Rushton has argued that deaccessioning rules could force museum boards to look for sources of revenue other than the museum collection.[65] If directors and trustees knew that they could always rely on the collection as a reservoir of value, then they might get lazy.

It is true that deaccessioning rules impose some degree of discipline on museum boards. If boards know or believe that they cannot rely on the collection as an asset, then they will have an additional incentive to look elsewhere for funds. But, it seems like an indirect and ineffective tool for board discipline. After all, why should boards care? Effective boards will already be looking elsewhere for funding, and ineffective boards can always simply walk away.

The problem with the board accountability theory of deaccessioning norms is that it also enables the board to insulate itself from liability and even criticism. If the board cannot deaccession in order to save the institution, then it can also sidestep that difficult question—even when it would be in the best interests of the organization. In other words, a board that runs a museum into the ground can take the moral "high ground" by refusing to deaccession and confront its own failings, and instead let the institution collapse.

Perhaps it would be better for the board to forthrightly confront and implement the best decision for the institution. Sometimes it will be a sale in order to raise money, other times it will not.[66]

3. *Gift Restrictions*

Opponents of deaccessioning often argue that museums hold artworks subject to gift restrictions that prevent the sale of those artworks. Of course, it is true that art museums sometimes own artwork subject to gift restrictions, and if museums hold artwork subject

65. *See, e.g.*, Michael Rushton, *Is There an Ethical Case Against Deaccessioning by Museums?*, FOR WHAT IT'S WORTH (Mar. 20, 2018), https://www.artsjournal.com/worth/2018/03/is-there-an-ethical-case-against-deaccessioning-by-museums/.

66. *See generally* MARK S. GOLD, MONETIZING THE COLLECTION: THE INTERSECTION OF LAW, ETHICS, AND TRUSTEE PREROGATIVE, IN IS IT OK TO SELL THE MONET?: THE AGE OF DEACCESSIONING IN MUSEUMS (Julia Courtney, ed. 2018) (arguing that museum trustees have fiduciary duty to act in the best interests of the museum, which may include deaccessioning for the purpose of generating revenue).

to gift restrictions, then those restrictions are binding, subject to the equitable principles of *cy-près* and deviation.

However, the overwhelming majority of artworks owned by art museums are not subject to any gift restrictions. The law disfavors restrictions, so they will be found only when explicitly created. Many museums will not accept artworks subject to gift restrictions. Donors also have a strong incentive not to insist on gift restrictions as they reduce the value of the gift, and thus, the amount that can be deducted.

There is no reason to impute gift restrictions when not explicitly created, and in fact, it would be against public policy to do so.

F. The Ethics of Deaccessioning

In sum, the professional rules governing deaccessioning have no legal force or authority. Professional organizations can tell their members how to behave and sanction them for misbehaving, but they cannot force or prevent any actions beyond their own internal sanctions.

The most vocal critics of deaccessioning, primarily arts journalists, argue that it is improper because it is "unethical." The gravamen of their argument is that once an artwork finds its way into the collection of a museum, it cannot and should not be sold for any reason. According to their position, it is "unethical" to sell an artwork and use the proceeds for any purpose other than purchasing other artworks.

One certainly gets the impression that these critics do not think that selling artwork for the purpose of buying artwork is particularly desirable either, but they accept it on the ground that museums occasionally find themselves the custodians of artworks that are undesirable or inappropriate for their collections. One wonders how these critics would address a museum that decided to sell an artwork widely considered important in order to purchase an artwork widely considered trivial. For example, what if the Berkshire Museum had decided to transform itself into a museum showcasing the works of Thomas Kinkade? It would be within the scope of deaccessioning rules for the museum to sell paintings by Norman Rockwell in order to purchase paintings by Thomas Kinkade, but I suspect that deaccessioning critics would still disapprove.

G. The Ellis Rule

Adrian Ellis and others have proposed a compromise rule under which museums may deaccession objects only if they ensure that the

recipient of the objects ensures public access to them.[67] In some ways, this is an appealing compromise. It enables museums to sell works when necessary, but ensures public access to the works in question.

However, there are problems with this rule. For one, it may limit the sale price of a work and thereby limit the museum's access to capital. For another, it may limit flexibility. Who determines what qualifies as similar access? Most importantly, it binds the board of directors to a course of action that may or may not be in the best interests of the organization. A board should be reluctant to adopt a binding set of principles that could prevent it from acting in the best interests of the organization in the future.

V. AGAINST DEACCESSIONING RULES

Deaccessioning rules are nothing but hot air and social sanction. The American Alliance of Museums ("AAM") and the Association of Art Museum Directors ("AAMD") deaccessioning rules are purely aspirational and have no legal authority. Likewise, the deaccessioning police have no ability to enforce them other than loudly complaining and shunning defectors. The toothlessness of deaccessioning rules is amply illustrated by the lack of meaningful consequences for those who violate them. It is embarrassing and awkward, but that's all.

Of course, museum directors are reluctant to violate deaccessioning rules, because they fear the social sanctions associated with disapproval. The art world is surprisingly small, and ostracism stings deeply. The people actually making the decision have every incentive to comply with the AAM and AAMD deaccessioning rules, irrespective of their impact on their institution. After all, everyone looks out for number one.

The real problem with deaccessioning rules is that they benefit private collectors at the expense of charitable organizations. The art market is the paradigmatic market for luxury goods. It depends on prestige and scarcity. Collectors pay extraordinary prices for works of art, because so few of them exist and because it increases their social standing. Of course, there are also potential investment and tax benefits.

Deaccessioning rules ensure that only private collectors can internalize capital gains in artwork. Effectively, deaccessioning rules provide that museums can trade artworks for other artworks, but only private collectors can take capital out of the art market. A cynic might observe that deaccessioning rules are a way of ensuring that museum

---

67. Adrian Ellis, *Should a Museum Be Allowed to Cash In on Its Art? Yes, but on Two Conditions*, ArtNet (Jan. 18, 2018), https://news.artnet.com/opinion/deaccessioning-adrian-ellis-ellis-rule-1202147.

donors are able to pump their profits as much as possible, without competition from museums. They benefit museums with access to the wealthiest and most connected art collectors who are willing to contribute to the museum at the expense of smaller and more regional museums without such access, which might nevertheless own desirable works.

Moreover, private collectors can use museums to mitigate risk. If a work is unlikely to sell, a private collector can donate it to an museum and take a charitable contribution deduction for the "fair market value" of the work, which may not necessarily be what it would actually recover.

Accordingly, courts should ignore deaccessioning rules when determining whether art museums can deaccession particular artworks for particular reasons. Courts should consider only the legal duties of the board of directors of the art museum in determining whether deaccessioning is appropriate. If the board observed its legal duties and made the decision that it believed was in the best interests of the organization, then courts should not intervene—indeed courts lack the legal authority to intervene.

Deaccessioning rules limit the ability of museum directors and trustees to act in what they believe to be the best interests of the organization, but that is their job and legal obligation. Museum directors and trustees obviously have a legal duty to act responsibly and in the best interests of the museum. Third parties have a right to question their decisions and to request review. Ultimately, however, that review is and must be deferential. The board is charged with making decisions, and if it makes decisions based on the evidence, then those decisions should stand unless there is some basis to believe they reflect a violation of the duty of loyalty, care, or obedience.

Thankfully, even the AAMD seems to be capitulating to reality. Museums urgently need capital, and some of them are sitting on a lot of it. It is ridiculous to insist anything should be off the table. If selling works of art is the only way to keep a museum afloat, selling works of art is the right choice. Anyone who would suggest otherwise is sorely mistaken.