



THEORY | PRACTICE

MUSEUM FUTURES: SHIFTING TECHNOLOGY, CULTURE, AND POLITICS

A Publication from the National Emerging Museum
Professional Network and The Museum Scholar.

Volume 1, 2018

The Deaccession Dilemma: Themes in the American Debate about Art Museum Deaccessions

WENDY DICKIESON, J.D.

University of Pennsylvania Law School

Theory and Practice: The Emerging Museum Professionals Journal

Rogers Publishing Corporation NFP
5558 S. Kimbark Ave, Suite 2, Chicago, IL 60637
www.rogerspublishing.org

©2018 The National Emerging Museum Professionals Network
The Museum Scholar

Theory and Practice is a peer reviewed Open Access Gold journal, permitting free online access to all articles, multi-media material, and scholarly research. This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License.



The Deaccession Dilemma: Themes in the American Debate about Art Museum Deaccessions

WENDY DICKIESON, J.D.
University of Pennsylvania Law School

Keywords Deaccession; Public trust; Art market; Collection management; Museums

Abstract There are three schools of thought on museum deaccessioning. First, conservatives think art in a collection should never be removed because doing so violates the museum's duty as a steward of the public trust. Second, the moderate view recognizes the value of deaccessioning as a collections management tool but stipulates proceeds from sales must only be used to buy art. Third, those on the liberal side point out this "sale-of-one-work-to-buy-another" approach acknowledges the size of the collection is to be measured in money and believe museums could achieve maximum efficiency through a free-market deaccession policy. The aim of this article is to determine how economists could provide a concrete measurement of the value museums lose when they deaccession. A data-driven valuation method for deaccession practices would create conformity within the museum community and help better allocate the scarce resources of artistic treasures and monetary funding around the country.

About the Author Wendy Dickieson holds a law degree from the University of Pennsylvania and a bachelor's degree from Wellesley College. She can be contacted at: wendy.dickieson@gmail.com.

This article was published on June 19, 2018 at www.themuseumscholar.org

A leading scholar on museums contends collections are at the heart of art museums and form "their life-blood and *raison d'être*."¹ This statement implies collections are dynamic, vigorous embodiments of a museum's intellectual history.² Others see museums as artworks' final destinations, with collections that are stagnant and inanimate assemblages. To them, museums are "mausoleums where objects that once had a life now [sit] embalmed for display, [and] come off as precious, enshrined, drained of their juice."³ These dueling concepts are just one facet of the ongoing debate among American museum professionals and the public about the ethics, legality, and economic value of deaccessioning works from art museum collections.

There are three schools of thought on how museums should regard the practice of deaccessioning. First, conservatives think art brought into a museum collection should never be removed because by transferring an item and making it less accessible to the public, the museum is violating its commitment to preservation and display, as well as its ethically and legally assigned duty to be a steward of the public trust.⁴ Second, the moderate view, espoused by museum professional organizations, recognizes the value of systematic reassessment as a collections management tool; a deaccession strategy, if applied thoughtfully, can help a museum refine the scope of its collection in order to better serve its mission and community. But the proceeds from the sale of any artwork must only be used to

buy other art. Finally, those on the liberal end of the spectrum point out this “sale of one work to buy another” approach implicitly acknowledges the size of the collection as a whole is to be measured in money. They believe art museums could achieve maximum efficiency through a free-market deaccession policy, in which the proceeds from the sale of artworks could fund the museum’s other operating costs.

This review identifies and evaluates the themes that arise in American discussions about deaccessioning to determine if and how economists might be able to contribute to those discussions by providing a concrete measurement of the value museums lose, aside from that of the work “disposed” of, when they deaccession pieces in their collection. Museum directors, curators, and boards deserve to have the maximum amount of information regarding how a deaccession might affect the institution’s financials. Museums considering deaccessions because of overflowing storage spaces and shrinking endowments are temporarily blinded to the fact that objects of artistic and cultural heritage are a scarce and finite good. A data-driven valuation method for deaccession practices, and particularly an econometric validation of the so-called “Ellis Rule,” would help to create conformity within the American museum community and help to better allocate the scarce resources of artistic treasures and monetary funding around the country.

Deaccession in the Public Eye

The practice of deaccessioning first came to the public’s attention in the early 1970s, when the Metropolitan Museum of Art purchased a Velázquez portrait using funds from the sale of deaccessioned works.⁵ While the sales had initially been done out of the public eye, the *N.Y. Times* uncovered the transactions, leading to fierce criticism of the Metropolitan and its director, plus a seven-month investigation by the state attorney general.

In response to the controversy, John Michael Montias, an economist and art historian, wrote the seminal paper on the issue of deaccessioning, asking whether a rule *barring* the sale of works would cause museums to accomplish their mission with better cost-benefit outcomes.⁶ With the escalating costs of running a museum and the consequent need for steady funding, often in excess of what donors and local governments can provide, museums can hardly be blamed for considering deaccessioning to shore up finances. But it is a risky endeavor, as one 1970s commentator wrote: museums are aware “the public tend[s] to react emotionally to the disclosure of sales and [...] potential donors would be less likely to make generous gifts if they suspected that their treasures might be treated as negotiable securities.”⁷

Museums and the Public Trust

The public trust doctrine states the sovereign holds some resources in trust for public use, regardless of private property ownership. Over the centuries its basic tenet of providing access has been applied to resources that should be protected and stewarded for the general public and future generations.⁸ The Association of Art Museum Directors (“AAMD”) was the first to apply the idea of the public trust to art museums. The AAMD asserted that while non-profit museums in the U.S. own the artworks in their collections, they truly only hold those works as an act of public stewardship, and thus incur legal, social, and ethical obligations to provide proper care for the collections.⁹ As part of this responsibility, the AAMD instructs museums

that proceeds from deaccessioned works should only be used to acquire other works of art—never as operating funds or to build the endowment. If a museum cannot meet its operating expenses except by deaccessioning, the AAMD says the institution should close, and make its collection available to museums that can meet their expenses in the way the AAMD says is proper.¹⁰

Faced with the economic downturn and severe cuts in government funding,¹¹ a number of American museums have recently defied AAMD policy, reasoning the public good is better served by them selling a fraction of their collection in order to keep from closing. Lee Rosenbaum, a culture journalist, is a fierce critic of art museums flouting the AAMD rules and “monetizing” their collections to defray capital costs, operating expenses, or debts.¹² She contends museums are charged with properly protecting their collections for future generations and must not diminish the core of works available to the public.¹³

The Berkshire Museum was recently at the center of the deaccession debate. In July 2017, the Board of Directors, facing a \$10 million-dollar expense to renovate the museum and a significant reduction in their endowment, announced a plan to sell 40 works at auction, including two important Norman Rockwell paintings.¹⁴ The AAMD and the American Alliance of Museums (“AAM”) denounced the plan and threatened sanctions if the museum followed through on the sales.¹⁵

With sanctions, the AAMD believes it sends the message that the actions of one museum deaccessioning art is contrary to the long-term interests of every art museum.¹⁶ While such sanctions do not have the force of law, they serve to make the censured institution a pariah in the art world, with the effect of further enhancing the woes that caused the museum to deaccession art in the first place.¹⁷ Being removed from the leading professional organization of its peers imposes significant hardships in terms of loss of reputation and collegial fellowship, as well as a decline in financial support from funders repelled by the deaccessions.¹⁸ Following a deaccession-related sanction, the director of the National Academy Museum in New York said the withdrawal of loans was “a death knell,” and added, “[w]hat the AAMD have done is basically shoot us while we’re wounded.”¹⁹ Critics say that by heeding the instruction to isolate the rule-breaking institution, all other members are “shooting themselves in the foot.”²⁰

Even Rosenbaum opposes quarantines like the one the AAMD imposes on delinquent institutions, saying they can be viewed as an assault on academic freedom.²¹ Not only are AAMD members withdrawing promised loans from future exhibitions at the sanctioned institution that have important public and scholarly value, but other museums that were planning to partner with the museum must scramble to change their plans so as not to incur the disapproval of their colleagues. Rosenbaum writes, “[e]veryone, not just the [sanctioned museum], is the poorer if not only its staff but also its art becomes untouchable.”²² She continues, “Barring the exchange of art and scholarly knowledge among colleagues is not something that AAMD should be party to, even if it’s with the best of intentions.” Other commentators characterize such sanctions as “too little, too late” and question what the sanctions ultimately achieve.²³ The AAMD lifted the sanctions on the National Academy after two years, but the museum is still in fragile condition and the deaccessioned paintings have disappeared from the public realm.

Rosenbaum claims museum world rules create the wrong kind of punishment and are not enough to stop financially desperate museums lacking strong professional governance. Instead, the AAMD should support national legislation preventing museums from dipping into their collections to cover operating budgets.²⁴ But opponents of such measures argue that legislating the particular criteria a museum must consider in determining whether to deaccession an item in its collection serves to stifle academic freedom in the same way that the AAMD and AAM sanctions do. There must be a better path forward.

One simple and elegant solution has become known as the “Ellis Rule.” The concept was developed in 2004 by Adrian Ellis, a cultural strategy consultant in New York.²⁵ The idea is that deaccessioning should be allowed as long as the deaccessioning museum ensures the institution or individual to whom it sells commits in some binding form to equal or higher conservational standards and equal or higher public access.²⁶

When a museum succeeds in following the tenets of the Ellis Rule, the public is generally happy about the results, as is neatly illustrated by the saga of just one of the Berkshire Museum’s 40 deaccessioned artworks: Rockwell’s painting entitled “Shuffleton’s Barbershop.” After a seven-month investigation into the museum’s proposed deaccession plan, the state attorney general’s office agreed to allow the museum to move forward with the plan to sell 40 works. The agreement required court approval, which was granted in April 2018.²⁷

At the time of the court decision, the Berkshire Museum had already worked out a deal, coordinated with the help of the attorney general’s office, to sell “Shuffleton’s Barbershop” for an undisclosed price to the newly founded Lucas Museum of Narrative Art, set to open in Los Angeles in 2022.²⁸ In the meantime, the Lucas Museum is loaning the painting to the Norman Rockwell Museum in Stockbridge, Massachusetts, after which it might travel to other museums in Massachusetts before being installed in its new home in California.²⁹ The conclusion represents a single positive turn in the Berkshire saga, with critics and the public alike applauding the successful outcome of continued public access for the Rockwell masterpiece.

But not every aspect of the Berkshire controversy has been wrapped up so neatly. In May 2018, the AAMD announced its sanction on the Berkshire Museum, calling on the organization’s 243 members to neither lend nor borrow artworks from the Berkshire and to abstain from any collaborative projects with the museum.³⁰ The same month, auction sales of the other 39 works in the deaccession plan, when combined with the sale of “Shuffleton’s Barbershop,” generated roughly \$42 million in net proceeds, falling short of the board’s expected goal by close to \$13 million. Thus, the museum is still in need of funds as it strives to meet its charitable purpose of aiding in the study of art and cultural history.³¹ The most perfect realization of that goal seems even more elusive at this juncture.

Legal Duties³²

In 2011, the New York Board of Regents passed regulations on the use of proceeds from deaccessions.³³ The Regents’ rules are stricter than the AAMD’s discretionary ethical

guidance and have the force of law: museums that fail to obey them could lose their charter.³⁴ But the AAMD is reticent to lobby other states to pass similar laws. The AAMD president points out museums are already governed by an intricate web of non-profit laws. “Where an issue as complex and specific as deaccessioning is concerned, our view is that the professional standards of the art museum field are best established and reinforced by those working in the field.”³⁵

This view that art professionals should determine the validity of practices within their own field is strikingly similar to the one espoused in the 1903 Supreme Court decision of *Bleistein v. Donaldson Lithographing Co.*³⁶ In the decision granting copyright protection to pictorial advertisements, Justice Holmes said courts were “ill-equipped” to address artistic questions and thus should avoid making judgments related to aesthetic controversy.³⁷ Despite Holmes’ warning, courts have not been afraid to produce judgments on museum deaccessions.

In these cases, the court must evaluate whether the board has met its fiduciary duty in its decision to deaccession artwork.³⁸ The New York Supreme Court recently reviewed the actions of the board of the Albright-Knox Art Gallery.³⁹ Petitioners claimed the museum would be violating the state’s not-for-profit corporation law by selling works from its antiquities collection in order to purchase more contemporary works in accordance with the museum’s mission.⁴⁰ The petitioners also argued the museum would be violating its own bylaws with the deaccessions and some of the sales would disobey bequests that brought pieces into the collection.⁴¹

The board defended its plans by saying it had used its business and artistic judgment to conclude it was no longer feasible to collect across all periods and it would be better to use the museum’s limited funds to improve the quality of a collection with a narrower focus.⁴² After examining the board’s decision-making procedures, the court concluded the actions were taken in good faith and were within legitimate corporate purposes. Thus, the board was entitled to business judgment rule review, and the court would not forbid the museum’s sale plan.⁴³

The case exemplifies the fact that courts can only block what they view as a breach of *procedural* safeguards of museum deaccession practice and have no analytic framework for evaluating deaccessions on their merits. If viewed through the *Bleistein* lens, this would seem the right result – Holmes said courts are ill-equipped to address aesthetic questions, after all. Critics who are dissatisfied with the substantive aspects of a museum’s deaccession plans must turn to other facets of the legal system for remedy.

The Albright-Knox case was filed by a group of self-proclaimed “art keepers” within the museum, but most deaccession issues involve state attorneys general who have the duty of overseeing non-profit organizations as part of their *parens patriae* authority.⁴⁴ Because a non-profit corporation’s beneficiaries are the public at large, and members of the public have no direct financial interest in non-profit corporations, they have no standing to sue. Instead, the attorney general may prosecute non-profit directors on the public’s behalf for breaches of fiduciary duty or violation of a trust document attached to a donated work of art.⁴⁵

But there is a debate about the proper scope of the role of attorneys general in monitoring museums. Laissez-faire commentators, wary of government intrusion on the prerogatives of museum directors, criticize efforts by state attorneys to invoke the public interest in attempting to halt sales of valuable artifacts.⁴⁶ These critics question the appropriateness of an attorney-politician prying into the good-faith deaccession decisions of curators and museum boards and decry laws establishing attorneys general as necessary parties to actions concerning the construction of trust instruments through which museums receive many of their holdings. This group views museum directors as business professionals whose decision-making authority should suffer minimal intrusion from public regulation.⁴⁷

These libertarians see any scrutiny of deaccessions by the attorney general as inapposite with the American system of free enterprise that permits corporations to make their own decisions. What's more, they say deaccession plans are probably *required* by the board's legal duties to the museum. But there is an intellectual inconsistency to the libertarian viewpoint: if they are against "government intrusion," they should be opposed to any and all tax exemptions and other government subsidies of museums and cultural institutions – a view they do not espouse. The granting of 501(c)(3) status to these institutions arguably provides the government with an automatic and necessary interest in how their money is used.

Interventionists emphasize that museum boards should not use the collection as an ATM to compensate for deficient fiscal leadership. Rather, boards are responsible for raising funds sufficient to ensure the preservation and display of the collection. Pointing to a pattern of board failures, with self-dealing and conflicts of interest in relation to deaccession practices among them,⁴⁸ they argue the role of state attorneys should be expanded to better monitor museum operations.⁴⁹ In their view, the attorney general is the logical guarantor of the public's interest and the oversight is a fair price for museums to pay for access to public funding and tax breaks.⁵⁰

Interventionists call for attorneys general to review *in advance* a museum's proposed sale of any artifact valued at over \$5,000.⁵¹ Such advance review could help balance the information asymmetry that exists between academically-minded museum curators and commercial dealers who are knowledgeable of what the art market can hold. Armed with the results of such a review, the attorney general could more accurately assess whether to seek a judicial injunction to halt a suspicious sale before it happens. These interventionists also support the creation of a council of artists, curators, dealers, and other professionals to whom the attorney general could delegate authority to consider deaccessions for approval. Indeed, the IRS already has an Art Advisory Panel to evaluate appraisals submitted by taxpayers in support of the fair market value claimed for works of art.⁵² This panel could also evaluate the transactions of non-profit museums.⁵³

Museum Art as Financial Asset

In 1990, the Financial Accounting Standards Board proposed museums recognize collection items as assets and current-period art contributions as revenue or gain in the institution's main operating budget.⁵⁴ But the museum community forcefully opposed mandatory recognition, arguing, among other things, that museum collections are not for sale.⁵⁵ But the fact is museums *are* monetizing their collections, whether for the sanctioned purpose of

buying more art, or to make up for budget shortfalls. Pro-deaccessionists say the practice can be a panacea to financial problems of museums in crisis. It is also the natural result in a competitive marketplace: when a firm faces a liquidity crisis, it sells some of its assets to right itself. For a museum, those assets are the art in its collection. Indeed, art museums are rich in terms of the increasing asset value of their stocks, but they are considerably poor as acquisition budgets decrease in relative terms and other parts of the operating budget have to suffer.

A rational, pragmatic accountant looking at the overall financial picture of a museum would invariably recommend selling some of the works in storage in order to generate liquidity.⁵⁶ After all, museums only show a small fraction of the artworks in their collection – the so-called “Prado-effect,” named after a study of the Madrid museum’s collection.⁵⁷ The revenue generated by selling an artwork could be put to good use in other activities or projects of the museum. Not selling would mean a large flow of income forgone. And because the market value of art is rising, these opportunity costs are rising as well.⁵⁸ Holding on to reserves in storage is inefficient, as restrictions on deaccessioning impede the efficient reallocation of collections over time.

Accepting the premise that museum collections are financial assets, whether or not they are recognized on balance sheets, Michael O’Hare examined art collections’ ability to channel future economic benefits to the museum enterprise.⁵⁹ He conducted a hypothetical analysis of a museum-purchased artwork’s return on investment – the value created per year by the museum, per unit of artwork entrusted to it. O’Hare posits that overall use of art resources would approach Pareto optimality – which in this scenario would mean the museum could make its budget better off (i.e. more balanced), without making the overall state of its collection any worse off – if a museum were permitted to sell a small portion of its holdings and use the proceeds to double or triple its annual operating budget, and thus increase funds for education, exhibitions, and interpretation. O’Hare writes, “such a trade-off would likely generate a large net increase in art engagement value,” but he uses the assumption that the deaccessioned art is going to another public institution that would be able to use the artistic resources more efficiently, rather than moving into the hands of a private collector, which is often the case.

This does raise both the mission issue and the cost issue squarely, however. The board of directors must preserve the institution and manage it efficiently. Avoidance of costs is part of that – hence the cost of storage, conservation, etc., must be considered. Anti-deaccession proponents rarely wrestle with these issues and their arguments seem to suggest that museums should keep everything forever. The anti-deaccessionists focus on only one aspect of the museum’s mission: as custodian of works of art in the public trust. But this is not the sole mission of museums. They are also meant to promote education, social capital, and provide a catalyst for tourism. Viewing the mission of museums as solely repositories and galleries for works of art ignores the reality of the broad role of museums in our society, a role which does not have clearly defined limits. If necessary should museums stop accepting new gifts and “shut down” collecting if they can’t afford more storage? Is the mission to preserve the collection they have, or to keep expanding it?

The AAM holds fast to its argument that “museums have faced constant change over the last two centuries and have been remarkably responsive and adaptive to new technologies, changing audience interests, and economic downturns without having to resort to selling collections to balance the budget.”⁶⁰ If museums were allowed to sell their collections to balance the budget, commentators say they would essentially be relinquishing their role as cultural custodians and transforming into art dealers with non-profit status. Martin Feldstein notes a “move from a basement rack or shelf [in a museum] to a Park Avenue apartment might be a step up, as the buyer who pays a good price is likely to care well for the purchase.”⁶¹ As such, the museum would be assigned a new function: not simply to be the custodian of art in perpetuity, but also to educate and counsel private preservers of art. Thus, the obligations of the board of trustees would change if the mission so changes, and so would the standard a state attorney general would be required to apply when evaluating the actions of museums.

It is also likely that these Park Avenue-adopted works would end up back in a museum in the future, as most of these collectors see art as currency, both in the pecuniary sense and the social sense. Subsequently, in their wills, they will gift the works back to museums in the public domain in order to re-transform them into financial assets. Collectors can donate artworks to institutions for tax deductions equal to the works’ appraisable value, and thus collectors have a lot to gain from museum donations. This truth highlights the weakness of the argument that potential donors who see museums selling art will “nearly die from the crassness of their ‘donated works’ being treated [as] disposable financial asset[s].”⁶² Commentators argue that struggling museums with deaccession plans are simply responding rationally to similar incentives as tax-savvy collectors, and thus museum associations should relax their penalties. If only wealthy private citizens and corporations are allowed to freely capitalize on the art-exchange rate, policymakers are reinforcing the polarization of the art industry and the larger economy.⁶³

But Andrej Srakar argues that pro-deaccession policies create incentives for museum managers to excessively use the deaccessioning funds and become demotivated to raise revenues.⁶⁴ In other words, allowing deaccessioning to substitute for museum revenues leads to excess agency costs. Such free cash flow in the hands of the managers very often leads to poor management decisions, thus leading to non-optimal behavior and efficacy. Srakar utilizes econometrics to show access to deaccession funds has negative marginal effects on revenues of the museum because the managers have less motivation to work for the benefit of the museum, being more tempted to simply rely on deaccessioning funds and leave the work for the benefit of the museum to somebody else. He concludes that the more we allow deaccessioning possibilities to cover the possible deficit of the museum, the lower will be the expected revenues.

Indeed, this contention that allowing museums to liberally use deaccession funds would cause reduced donations is widely mentioned even among non-economists. Museum experts emphasize that any deaccession will damage the selling museum’s ability to sustain itself in the future by having a chilling effect on future donations.⁶⁵ Deaccessioning sends a message to existing and prospective donors that museums can raise funds by selling parts of their collection, thereby discouraging not only financial supporters, who may feel their support isn’t needed, but also donors of artworks, who may fear their cherished objects could be sold at any time to make up for a museum’s budget shortfalls.

The counterpoint is that if donors were willing to give to the museum, the institution would not be in the financial muddle in the first place. The issue with this logic is that donors do not often have equal amounts of art and cash to give to a museum. When deciding whether and what to donate, an art collector will need to evaluate the real economic value of donating his different types of his assets. Often times the collectors giving their artworks to museums have been collecting over decades, and the value of the potential pieces to be donated have increased in value.⁶⁶ Thus, they will receive a large tax benefit from donating their artwork, because the tax code allows them to take a charitable deduction in the amount of the current market value of the artwork.⁶⁷ For savvy collectors, this current market value of an artwork will likely be higher than the value of more liquid assets (i.e. cash) they have on hand and could donate to a museum in a given year, for which they could only take a tax deduction for the exact donated amount.

Di Gaetano and Mazza examined whether this perceived chilling effect on museum donations actually occurs by developing a dynamic game between donors and museums in the context of donors' uncertainty about the museum's deaccession strategy.⁶⁸ The results indicated that allowing deaccessions causes a "hold-up problem." This means the museum and potential donor may be able to work most efficiently by cooperating, but refrain from doing so because of concerns they may give the other party increased bargaining power. This leads to economic costs and reduced donations.

Rosenbaum also makes use of hard data in her *anti*-deaccession arguments. She points to examples of museums⁶⁹ that were facing insolvency and proposing to sell works from their collections, but then, met with public outcry, a court decision, or both, managed to do what they had initially said was impossible: raise the money needed to keep functioning without the art-sale proceeds.⁷⁰ Thus, Rosenbaum calls the "deaccession-or-die" argument self-serving and hollow.

Yet Rosenbaum seems to be overlooking the reality that it is often the publicity associated with the threatened deaccessioning that enables the museum to raise funds. Consider the case of Thomas Eakins' 1875 painting "The Gross Clinic": the painting had been owned and displayed by Thomas Jefferson University in Philadelphia since 1876. In November 2006, the Jefferson University Board voted to sell the painting for \$68 million jointly to the National Gallery of Art in Washington and the Crystal Bridges Museum of American Art, then under construction in Arkansas.⁷¹ The proposed sale was reported in the *N.Y. Times*, and fundraising efforts began immediately to keep the painting in Philadelphia. In a matter of weeks, the fund raised \$30 million, and Wachovia Bank agreed to loan the difference until the rest of the money has been raised, keeping the painting in town at the Philadelphia Museum of Art and the Pennsylvania Academy of Fine Arts.⁷² The episode is an example of the common phenomenon that a so-called "museum emergency" can help with fundraising. Thus, Rosenbaum's presumption that a museum's ex-ante fundraising capacity is identical to the ex-post is not realistic.

Rosenbaum does think that museum associations should allow museums to sell art to other museums. Then, struggling museums could not only shore up their finances but improve the public good by selling pieces in storage to smaller, more specialized museums. Since the sale

of art is done to bring other art into the museum, in effect, there is no net loss, and in terms of usefulness of the collections, a probable net gain.⁷³ In the end, a free market in art would most likely produce a net increase in public welfare, just as free markets do in nearly every other area.⁷⁴ While this clearly seems like the most sensible solution, more cynical scholars maintain that deaccession policies will not change because the current standards are consistent with the interests of museum professionals. This pessimistic viewpoint would confirm the hypothesis that the museum professionals are, whether they realize it or not, engaged in detrimental rent-seeking behavior: hoping to increase their museum's share of the nation's artistic wealth, while imposing regulations on other institutions, and thus inhibiting those institutions' ability to thrive.⁷⁵

Approaches for the Future

With museums becoming increasingly aware their legitimacy is contingent on public confidence, the specter of public disapproval encourages museums to practice self-restraint and caution in deaccessions. The Museum of Modern Art's director explained that to retain the public's confidence, "museums must be perceived to be acting both responsibly and for the common good...that art museums – at a minimum – inspire confidence in the public that they have made considered judgments" about the contents of the collection.⁷⁶ Consequently, museums may be reluctant to deaccession for fear of a public backlash undermining their own legitimacy.

The Indianapolis Museum of Art has nimbly navigated this public relations minefield by developing one of the most transparent deaccession processes in the country.⁷⁷ In 2009, the museum launched a searchable online database of recently deaccessioned artworks. In some cases, the site links newly acquired artworks to the sold objects that enabled their purchase. Then-director Maxwell Anderson explained how important he believed this type of transparency to be for the museum to maintain legitimacy, "without doing all of those steps, museums expose themselves to ridicule and risk unnecessarily. There is nothing devious going on. They are just not handling it in a way that is candid and explained."⁷⁸ Anderson also explained he preferred to deaccession works through public auctions rather than private sales because it "puts the act of deaccessioning in the public eye. The public trust issue is more important than the small gain that might be made in selling another way."⁷⁹

Further econometric studies are needed to determine whether there is an economic cost or benefit to museum deaccession schemes. Yet we must also be wary of the output of econometricians: they can only analyze what they are able to get data for, and often assume away issues which are impossible to measure objectively, such as the quality of museum management. There are too many variables to analyze the deaccession problem with metrics alone.

One particular theme that needs more examination is the effect of tax expenditures on donations. If further government regulation is determined necessary, there should be sound economic studies to back up policies that, ideally, would internalize the externalities caused by museum deaccessioning.

But by far the greatest aid that economists could provide would be a data-driven endorsement of the Ellis Rule. The rule states that a museum selling a work should ensure the institution or individual to which or whom the work is sold commit in some binding form to equal or higher conservational standards and equal or higher public access to the work in question.⁸⁰ If these two conditions are met, the deaccessioning museum should be able to exercise appropriate discretion with respect to how it spends or invests the proceeds of the sale, and should not be required to use it solely for the acquisition or conservation of art.

Such exchanges would no doubt create a net improvement for both the seller and buyer, while simultaneously acknowledging the reality that the art world is a global ecosystem in which the stewardship of artistic patrimony is the responsibility of society at large and should not be foisted on individual and isolated museums whose economic health will inevitably fluctuate over the decades and centuries.

Taking such a global, collaborative view will help us to leave behind what is an often unfair and unnecessary binary choice between being a good steward of the museum institution and being a good steward of the museum's collection. To truly move forward and promote the protection of artistic patrimony, economists, museum experts, and legislators should focus on the more pressing question of increasing museum and arts funding as a whole.

Notes

¹ Tristram Besterman, *Disposals from museum collections, ethics and practicalities*. 11 MUSEUM MGMT. & CURATORSHIP 29-44 (1992).

² See Peter Cannon-Brookes, *Cultural-Economic Analyses of Art Museums: A British Curator's Viewpoint*, in ECONOMICS OF THE ARTS 264 (V.A. Ginsburgh & P.-M. Menger, eds., 1996).

³ Cate McQuaid, *Seeing art through artists' eyes at Boston's ICA*, BOSTON GLOBE (Dec. 7, 2016), <https://www.bostonglobe.com/arts/art/2016/12/06/seeing-art-through-artists-eyes/KV0oZFRIw8PUhJ14X306cL/story.html>.

⁴ See Marilena Veccoa & Michele Piazzai, *Deaccessioning of museum collections: What do we know and where do we stand in Europe?* J. OF CULT. HERITAGE (2014).

⁵ See Lawrence Van Gelder, *Metropolitan Will Ease Secrecy on Sales from Art Collections*, N.Y. TIMES (June 27, 1973), A1. See also John Canady, *Very Quiet and Very Dangerous*, N.Y. TIMES, Feb. 27, 1972 at 21; Thomas Hoving, *Very Inaccurate and Very Dangerous*, N.Y. TIMES, Mar. 5, 1971 at 21.

⁶ See John Michael Montias, *Are Museum's Betraying the Public's Trust?* MUSEUM NEWS (May 1973). See generally, A DEACCESSION READER (Stephen Weil, ed.) (2000).

⁷ Karl E. Meyer, *THE ART MUSEUM: POWER, MONEY, ETHICS* 208 (1979).

⁸ *Public Trust*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining a public trust as "a purpose trust [...] created to promote public welfare and not for the needs of any single individual").

⁹ See ASSOCIATION OF ART MUSEUM DIRECTORS, CODE OF ETHICS, <https://aamd.org/about/code-of-ethics>.

¹⁰ See William Grampp, *A Colloquy about Art Museums: Economics Engages Museology*, in ECONOMICS OF THE ARTS 227 (V.A. Ginsburgh & P.-M. Menger, eds., 1996).

¹¹ See generally, Jorja A. Cirigliana, *Let Them Sell Art: Why a Broader Deaccession Policy Today Could Save Museums Tomorrow*, 20 S. CAL. INTERDISC. L. J. 365-394 (2011).

¹² See generally, Lee Rosenbaum, CULTUREGRRRL BLOG, <http://www.artsjournal.com/culturegrrrl/>.

¹³ See e.g., Lee Rosenbaum, *Museums can't compete*, L.A. TIMES (Sept. 4, 2007), <http://www.latimes.com/opinion/la-oe-rosenbaum4sep04-story.html>.

¹⁴ See Lee Rosenbaum, *"Public Trust" Bust: Berkshire Museum to Jettison 40 Works (including 2 artist-donated Rockwells)* UPDATED, CULTUREGRRRL BLOG (July 21, 2017), <http://www.artsjournal.com/culturegrrrl/2017/07/public-trust-bust-berkshire-museum-to-jettison-40-works-including-2-artist-donated-rockwells.html>

-
- ¹⁵ See Colin Moynihan, *Berkshire Museum's Planned Sale of Art Draws Opposition*, N.Y. TIMES (July 25, 2017), <https://www.nytimes.com/2017/07/25/arts/design/berkshire-museum-art-auction-criticized.html>.
- ¹⁶ In the last ten years, the AAMD has sanctioned the National Academy Museum in New York, the Maier Museum of Art at Randolph College in Virginia, and the Delaware Museum of Art, all for selling artworks in their collections to support operations, and, in case of the Delaware Museum, retire its debt. See Margie Fishman, *Museums Face Backlash When Selling Precious Art*, LOHUD (Mar. 29, 2014), <http://www.lohud.com/story/news/local/2014/03/29/museums-face-backlash-selling-precious-art/7071135/>.
- ¹⁷ See Robin Pogrebin, *Branded a Pariah, The National Academy is Struggling to Survive*, N.Y. TIMES (Dec. 22, 2008), <http://www.nytimes.com/2008/12/23/arts/design/23acad.html>.
- ¹⁸ See Derek Fincham, *Deaccession of Art from the Public Trust*, ART AND ANTIQUITY LAW, July 2011, at 29.
- ¹⁹ Moynihan, *Berkshire Museum's Planned Sale*, *supra* note 15.
- ²⁰ *The Deaccession Dilemma: How Can We Support Standards AND Museums in Crisis?* NEW ENGLAND MUSEUM ASS'N PROC. Oct. 27, 2017, <https://nemanet.org/nemn/fallwinter-2017/deaccessioning-dilemma/>.
- ²¹ See Lee Rosenbaum, *Deaccession Aggression: One Decision that AAMD Should Rescind*, CULTUREGRRRL BLOG (Jan. 28, 2009), http://www.artsjournal.com/culturegrrl/2009/01/deaccession_aggression_one_dec.html.
- ²² *Id.*
- ²³ See Carolina A. Miranda, *Museums behaving badly: Are sanctions too little, too late?* L.A. TIMES (June 21, 2014), <http://www.latimes.com/entertainment/arts/miranda/la-et-cam-museums-behaving-20140619-column.html>.
- ²⁴ See Lee Rosenbaum, *Deaccession Legislation Showdown: Brodsky Blasts Metropolitan Museum*, CULTUREGRRRL BLOG (June 25, 2009), https://www.artsjournal.com/culturegrrl/2009/06/deaccession_showdown_brodsky_b.html.
- ²⁵ See Adrian Ellis, *Should a Museum Be Allowed to Cash In on Its Art? Yes, But on Two Conditions*, ARTNET NEWS (Jan. 18, 2018), <https://news.artnet.com/opinion/deaccessioning-adrian-ellis-ellis-rule-1202147>.
- ²⁶ See Donn Zaretsky, *"The current strictures around deaccessioning do not encourage either intelligent, vigilant conservation or wider public access"*, ART LAW BLOG (Jan. 5, 2009), <http://theartlawblog.blogspot.com/2009/01/current-strictures-around.html>.
- ²⁷ See Colin Moynihan, *Judge Allows Berkshire Museum to Sell Rockwell Painting and Other Works*, N.Y. TIMES (April 5, 2018), <https://www.nytimes.com/2018/04/05/arts/berkshire-museum-norman-rockwell.html>.
- ²⁸ Auction block estimates for the work were between \$20 and \$30 million. The other Rockwell painting at the center of the controversy, "Blacksmith's Boy – Heel and Toe," was sold by Sotheby's in New York in May 2018 for \$8.1 million (including fees), a price within the pre-sale estimates. See Associated Press, *Rockwell Work at Center of Controversy Gets \$8M at Auction*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/aponline/2018/05/24/us/ap-us-norman-rockwell-blowback.html>.
- ²⁹ See Helen Stoilas, *George Lucas gives Rockwell fans new hope with acquisition of Shuffleton's Barbershop*, ART NEWSPAPER (April 11, 2018), <https://www.theartnewspaper.com/news/george-lucas-gives-rockwell-fans-a-new-hope-with-acquisition-of-shuffleton-s-barbershop>.
- ³⁰ See Malcolm Gay, *Museum Group Sanctions Berkshire Museum*, BOSTON GLOBE (May 25, 2018), <https://www.bostonglobe.com/arts/art/2018/05/25/museum-group-sanctions-berkshire-museum/zD3DnT3HUMlg7hhyvthmGK/story.html>.
- ³¹ See Moynihan, *Judge Allows Berkshire Museum to Sell*, *supra* note 27.
- ³² See generally, Deandra Rose Mann, *To Have and To Hold ... Or Not? Deaccessioning Policies, Practices, and the Question of the Public's Interest*, 24 INT'L J. OF CULTURAL PROPERTY 113-159 (2017).
- ³³ See New York Compilation of Codes, Rules and Regulations, title 8, § 3.27 (Westlaw, current as of Dec. 13, 2017).
- ³⁴ AAMD TASK FORCE ON DEACCESSIONING, AAMD POLICY ON DEACCESSIONING 4 (2010), available at <http://www.aamd.org/papers/documents/FINALDEACCESSIONINGREPORT060910.pdf> ("Funds received from the disposal of a deaccessioned work [...] may be used only for the acquisition of works in a manner consistent with the museum's policy on the use of restricted acquisition funds."); ASS'N OF ART MUSEUM DIRS., ART MUSEUMS AND THE PRACTICE OF DEACCESSIONING (2007), available at <http://www.aamd.org/papers/> (approving deaccessioning when "[p]roceeds from a deaccessioned work are used only to acquire other works of art").
- ³⁵ Miranda, *supra* note 23.
- ³⁶ 188 U.S. 239 (1903).
- ³⁷ *Id.* at 251 ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations").

³⁸ The law imposes the same standard of care on non-profit boards as their for-profit colleagues. Like the boards of for-profit companies, museum boards are subject to three legal duties:

- (1) duty of loyalty, both to the museum by serving a public purpose and rendering a public benefit, and to the terms of the trust instrument, requiring the conditions of the trust be obeyed or court approval sought through the application of *cy pres* deviation to vary the trust's terms;
- (2) duty of due care in the management of trust assets; and
- (3) duty to act in good faith and to avoid conflicts between trustees' interests and those of the beneficiaries.

See Patty Gerstenblith, *The Fiduciary Duties of Museum Trustees*, 8 COLUM.-VLA ART & L. 175 (1983).

A reading of the cases suggests that there is a tendency on the part of both state attorneys general and judges to expect more of non-profit boards. See e.g., *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*, 381 F. Supp. 1003 (D.D.C. 1974); *Lefkowitz v. Museum of the American Indian, Heye Foundation*, Index No. 41416/75 (N.Y. Sup. Ct., N.Y. Cty., June 27, 1975); *Rowan v. Pasadena Art Museum*, Case No. C 322817 (Cal. Sup. Ct., L.A. Cty., Sept. 22, 1981). See generally, Marie C. Malaro, MUSEUM GOVERNANCE: MISSION, ETHICS, POLICY (1994).

³⁹ See Nicolas L. Ostness, *Ethical Deaccessioning And The Albright-Knox Case* (June 1, 2016) (unpublished M.A. thesis, University at Buffalo, State University of New York) (on file with author).

⁴⁰ *Dennis v. Buffalo Fine Arts Acad.*, 836 N.Y.S.2d 498 (Sup. Ct. 2007).

⁴¹ *Id.*

⁴² Such "focusing" of museum collecting is one of the major developments in museum management over the past half century, as museums are moving away from the aim of having a broad survey of all of art history. See, e.g. Malaro, *supra* note 38, at 55; THE ECONOMICS OF MUSEUMS 14 (Martin Feldstein, ed. 1991).

⁴³ *Dennis*, 836 N.Y.S.2d at 498.

⁴⁴ *Parens patriae* can be invoked by the state to create its standing to sue - the state declares itself to be suing on behalf of its people.

⁴⁵ See Meyer, *supra* note 7, at 211.

⁴⁶ See generally, Craig R. Bucki, *The Attorney General's Role in Supervising Museums: The Current State of the Law and Proposals for Reform* (Jan. 5, 2005) (unpublished seminar paper, Columbia Law School) (on file with author).

⁴⁷ See Jason R. Goldstein, Note, *Deaccession: Not Such a Dirty Word*, 15 CARDOZO ARTS & ENT. L.J. 213, 245 (1997).

⁴⁸ See, e.g., Charles Mount, *State Settles Legal Dispute Over Harding Museum Assets*, CHICAGO TRIBUNE (Aug. 3, 1989), http://articles.chicagotribune.com/1989-08-03/news/8901010826_1_art-institute-collection-armor.

⁴⁹ See, e.g., William Grimes, *The Indian Museum's Last Stand*, N.Y. TIMES (Nov. 27, 1988), <http://www.nytimes.com/1988/11/27/magazine/the-indian-museum-s-last-stand.html?pagewanted=all>.

⁵⁰ See David R. Gabor, Comment, *Deaccessioning Fine Art Works: A Proposal for Heightened Scrutiny*, 36 UCLA L. REV. 1005, 1005-06 (1989).

⁵¹ See THE ECONOMICS OF MUSEUMS, *supra* note 42, at 110.

⁵² INTERNAL REVENUE SERVICE, ART APPRAISAL SERVICES, <https://www.irs.gov/compliance/appeals/art-appraisal-services> (last visited Dec. 19, 2017). There are already some safeguards regarding museum sales of art within the Internal Revenue Code. For instance, the sale of a donated work within three years of the gift could have negative tax implications for the original donor: the museum is required to notify the IRS of the deaccession because the museum could be viewed as putting the donation to a use unrelated to its exempt purpose. See FORM 8282.

⁵³ The advisory panel should also address the tax implications of a museum selling its art. It could be argued that deaccessions cause the public to pay for the same object twice: when someone donates a work of art to a public institution, that person receives a tax deduction for that year (with the tax deduction, a plausible argument could be made that the public is "buying" the work of art donated – yet another reason these works of art should be considered public property and part of the public trust). The lost tax funds from the tax exemption given to the donor must be made up from other public sources. If the public institution deaccessions the donated work and sells it to a private buyer, who then donates that work again to another public institution, the public loses those tax funds twice for the same work. See Megan Elizabeth Kociscak, *Art Museum Deaccessioning: Conflict Between Museum Professionals, Donor Intent, the Public, and Living Artists* (May 2013) (unpublished M.A. thesis, University of Louisville) (on file with author).

⁵⁴ See Alan S. Glazer, *Art and historical treasures: a solution to the museum collection controversy*, CPA JOURNAL, March 1992, <http://archives.cpajournal.com/old/12097362.htm>.

⁵⁵ Museum professionals have also pointed out it would be extremely costly to reliably valorize their collections, and even if museums could make an accurate accounting of a collection's extrinsic value at a given time, values may change due to changes in taste. Further, the intrinsic value of a work to a museum, such as its educational value or source of regional pride, is difficult to measure but also very important. Additionally, art's status as a "positional good" means that an artwork's monetary value owes to its rarity and the social prestige of ownership, with the end result being that an artwork can never be assigned an objectively verifiable, intrinsic value. It's worth can only ever be estimated in relation to other, similar objects of the same type.

⁵⁶ Martin Gammon's recent editorial in the *Art Newspaper* masterfully extinguishes any argument that this strategy would yield positive financial results. *The mirage of riches in museums' vaults*, ART NEWSPAPER (March 9, 2018), <https://www.theartnewspaper.com/comment/the-mirage-of-riches-in-museums-vaults>.

⁵⁷ See Ruth Towse, *The Cultural Economy of Heritage*, in *THE ECONOMICS OF HERITAGE: A STUDY IN THE POLITICAL ECONOMY OF CULTURE IN SICILY* 3-19 (Ilde Rizzo & Ruth Towse, eds. 2002).

⁵⁸ See Bruno S. Frey, *ARTS & ECONOMICS: ANALYSIS & CULTURAL POLICY* (2003).

⁵⁹ See Michael O'Hare, *Capitalizing Art Museum Collections: Awkward for Museums But Good for Art and for Society*, ASS'N FOR PUB. POLICY ANALYSIS AND MGMT., Research Conference (Nov. 2005).

⁶⁰ AMERICAN ALLIANCE OF MUSEUMS, *Questions and Answers about Selling Objects from the Collection*, <http://www.aam-us.org/resources/ethics-standards-and-best-practices/questions-and-answers-about-selling-objects-from-the-collection> (last visited Dec. 19, 2017).

⁶¹ *THE ECONOMICS OF MUSEUMS*, *supra* note 42, at 21.

⁶² See Tim Schneider, *The Gray Market: Why We Shouldn't Punish Small Museums for Deaccessioning (and Other Insights)*, ARTNET (July 31, 2017), <https://news.artnet.com/opinion/the-gray-market-small-museums-deaccessioning-1037453>.

⁶³ *Id.*

⁶⁴ See Andrej Srakar, *Economic Analysis of Deaccessioning in American Museums*, ASS'N FOR CULTURAL ECON. INT'L, Kyoto conference (June 2012).

⁶⁵ Laurie Norton Moffatt, *Inviting a Pause on Sales of Art*, BERKSHIRE EAGLE (July 20, 2017), <http://www.berkshireeagle.com/stories/laurie-norton-moffatt-inviting-a-pause-on-sales-of-art.514244>.

⁶⁶ Indeed, the tax code requires that to qualify for a tax deduction, art donated to a museum must be considered long-term capital property, and thus must have been owned for at least one year. I.R.C. §§ 170, 1221. See also, IRS Publication 561, "Determining the Value of Donated Property," <https://www.irs.gov/pub/irs-pdf/p561.pdf>.

⁶⁷ *Id.*

⁶⁸ Luigi Di Gaetano & Isidoro Mazza, "Better an egg today than a hen tomorrow": on the implications of deaccess policies for donations to museums, 41 J. CULT. ECON. 237-258 (2017).

⁶⁹ See, e.g., Fort Ticonderoga and Fisk University, Lee Rosenbaum, *National Academy Lessons: The Fallacy of Deaccession-or-Die UPDATED*, CULTUREGRRL BLOG, https://www.artsjournal.com/culturegrrl/2008/12/national_academy_lesson_the_fa.html.

⁷⁰ *Id.*

⁷¹ Carol Vogel, *Eakins Masterwork Is to Be Sold to Museums*, N.Y. TIMES (Nov. 11, 2006), <https://www.nytimes.com/2006/11/11/arts/design/11pain.html>.

⁷² It must be noted that fundraising pledges alone were not enough to cover the \$68 million purchase price. PAFA was forced to deaccession Eakins' "The Cello Player" to an unidentified private buyer; and the PMA deaccessioned Eakins' "Cowboy Singing," along with two Eakins' oil sketches to the Anschutz collection and the Denver Art Museum. See Carol Vogel, *Philadelphia Raises Enough Money to Retain a Masterpiece by Eakins*, N.Y. TIMES (April 24, 2008), <https://www.nytimes.com/2008/04/24/arts/design/24gros.html>.

⁷³ See *THE ECONOMICS OF MUSEUMS*, *supra* note 42, at 21.

⁷⁴ See Kevin Drum, *Art Museums Should Be Allowed to Participate in Both Sides of the Free Market*, MOTHER JONES (Apr. 22, 2016), <http://www.motherjones.com/kevin-drum/2016/04/art-museums-should-be-allowed-participate-both-sides-free-market/>.

⁷⁵ Indeed, rent-seeking has been shown to result in reduced economic efficiency through poor allocation of resources, reduced actual wealth-creation, lost government revenue, increased income inequality, and even national decline. See Era Dabla-Norris and Paul Wade, *Rent Seeking and Endogenous Income Inequality* (I.M.F., Working Paper, Feb. 2001).

⁷⁶ Sue Chen, *Art Deaccessions and the Limits of Fiduciary Duty*, 14 ART AND ANTIQUITY LAW 137 (2009).

⁷⁷ INDIANAPOLIS MUSEUM OF ART, *Deaccessioned Artworks*, <http://collection.imamuseum.org/browse/deaccessioned-artworks/> (last visited Dec. 19, 2017).

⁷⁸ Robin Pogrebin, *The Permanent Collection May Not Be So Permanent*, N.Y. TIMES (Jan. 26, 2011), <http://www.nytimes.com/2011/01/27/arts/design/27sell.html>.

⁷⁹ Daniel Grant, *Is the University's Museum Just a Rose to be Plucked?* WALL ST. J., Feb. 3, 2009, at D7. Arts commentators were overwhelmingly positive in their praise for this new database, with Judith Dobrzynski writing "I hope others follow [Anderson's] lead. If museums are going to clean house from time to time – and they are – let them at least do it in public, giving advance word." *Deaccession in Public*, REAL CLEAR ARTS BLOG (Mar. 17, 2009), http://www.artsjournal.com/realcleararts/2009/03/deaccessioning_in_public.html. Lee Rosenbaum calls the database "Deaccession Heaven" and proclaims it the "new gold standard for deaccession transparency." Rosenbaum is especially delighted with the database's capacity to engage the public with "concerned museumgoers [being able] to register their reactions (or objections) online." *Deaccession Heaven: Indianapolis Museum Does It Right*, CULTUREGRRL BLOG (Mar. 17, 2009), https://www.artsjournal.com/culturegrrl/2009/03/deaccession_database_indianapo.html.

⁸⁰ See Ellis, *supra* note 25.