

SELLING CEZANNE: ADDRESSING LEGAL GAPS IN MUSEUM DEACCESSIONING

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ABSTRACT

Deaccessioning cases in the United States indicate that aside from strictly worded donor restrictions, museum boards have significant legal freedom over the objects in their collections. There are no federal statutes to regulate museum governance, and New York is the only state that has codified museum collection-management practices. The only limitations come from ethical guidelines and industry pressure. By examining the governance structure of museums, the fiduciary duties of nonprofit boards, and controversial deaccessioning cases in the United States, as well as comparing these structures with policies in place in the United Kingdom, this Note proposes that museums in the United States would benefit from implementing regulations to ease the tension of deaccessions. Instituting an independent reviewing committee with academics and industry professionals, a charity commission, and legislation for general low-value deaccessions would alleviate the pressure on state attorneys general, museum boards, local communities, and judges.

INTRODUCTION

In May 2022, Paul Cézanne's *Clairière (The Glade)* was sold at auction for \$42 million by the Toledo Museum of Art.¹ More recently, the Art Institute of Chicago's *La Patience* by Balthus sold for \$14.7 million in

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1. @Sothebys, X (May 17, 2022, at 17:01 PT), <https://x.com/Sothebys/status/1526714436496539648> [<https://perma.cc/4T7B-5APH>].

November 2023.² Such high-profile sales became increasingly common as the art market continued to reach new heights—Art Basel and UBS estimated that the art market had sales of \$67.8 billion in 2022.³ While sales slowed in 2023 to \$65 billion, it still remains higher than the 2019 pre-pandemic value of \$64.4 billion.⁴ For museums in challenging financial situations, the siren’s call of the art market has been difficult to resist. In industry surveys, 60% of responding museums in 2021 indicated they had budgets of less than \$1 million,⁵ overall attendance declined by 20% between 2002 and 2015,⁶ and endowments and donations fluctuate with the markets and the overall economic outlook.⁷ Selling an object from the collection that could realize millions at auction seems like an immediate solution to a museum’s financial woes, but as upset local communities and subsequent litigation indicate, selling a museum object is rarely straightforward—there are often moral and legal objections.

Formally removing an object from a museum’s collection, or “deaccessioning,” is a common process in museums.⁸ Once an object has been deaccessioned, it can be “disposed” of via methods including transfer, exchange, restitution, sale, and even destruction.⁹ Not every object acquired by a museum is accessioned (“made a part of the museum’s collection”); some are merely on loan and thus, cannot be deaccessioned.¹⁰ The ethical and legal controversies surrounding deaccessioning mostly focus on the reasons for removal. On ethical grounds, members of the public and many in the art and museum communities find it distasteful that artwork in the

2. @Sothebys, X (Nov. 13, 2023, at 16:33 PT), <https://x.com/Sothebys/status/1724223928954916878> [<https://perma.cc/3SJ7-Y2XR>].

3. CLARE MCANDREW, ARTS ECON., THE ART MARKET 2023: A REPORT BY ART BASEL & UBS 20 (2023), <https://cdn.sanity.io/files/lvzckgdl/production/b38c4229b16a9dcab552366527c8bf3c042af3bf.pdf> [<https://perma.cc/D39D-3K95>].

4. CLARE MCANDREW, ARTS ECON., THE ART BASEL & UBS ART MARKET REPORT 2024 17 (2024), <https://theartmarket.artbasel.com/download/The-Art-Basel-and-UBS-Art-Market-Report-2024.pdf> [<https://perma.cc/59C6-PEDE>].

5. Press Release, American Alliance of Museums, Museum Field Experiencing Compounding Financial Losses, New Survey Reveals (Feb. 8, 2022), <https://www.aam-us.org/2022/02/08/museum-field-experiencing-compounding-financial-losses-new-survey-reveals> [<https://perma.cc/Y9NZ-W9VH>].

6. Seph Rodney, *Is Art Museum Attendance Declining Across the US?*, HYPERALLERGIC (Jan. 18, 2018), <https://hyperallergic.com/421968/is-art-museum-attendance-declining-across-the-us> [<https://perma.cc/Y3RH-SZ3C>].

7. Zachary Small, *Once-Promising Attendance Figures at U.S. Museums Have Plateaued, Revealing the Pandemic’s Enduring Grip on the Cultural Economy*, ARTNET NEWS (July 6, 2022), <https://news.artnet.com/art-world/us-museum-attendance-figures-2142562> [<https://perma.cc/VCN6-999U>].

8. INT’L COUNCIL MUSEUMS, GUIDELINES ON DEACCESSIONING OF THE INTERNATIONAL COUNCIL OF MUSEUMS (Sep. 2019), <https://icom.museum/wp-content/uploads/2019/10/Guidelines-on-Deaccessioning-of-the-International-Council-of-Museums.pdf> [<https://perma.cc/H9MU-BER9>].

9. *Id.*

10. Stephen K. Urice, *Deaccessioning: Legal Parameters*, in LEGAL ISSUES IN MUSEUM ADMINISTRATION 904, 906 (2019).

collections can be seen as commodities that could be sold for cash whenever the museum desires.¹¹ Other objections to deaccessions include disagreements over the artistic merit of the artworks selected and the erosion of public confidence and donor goodwill.¹²

“Deaccessioning” first came to prominence in a 1972 *New York Times* op-ed by John Canaday, which described the secretive sales of artworks by the Metropolitan Museum of Art (“the Met”) and the Museum of Modern Art (“MoMA”) as “unethical policy” and “short-sighted.”¹³ In writing that “[a]rt museums are neither merchandise marts nor esthetic stock exchanges,” but are instead “repositories of precious records,” Canaday unleashed public furor over deaccessioning over the next fifty years that continues to this day.¹⁴ The media attention¹⁵ over the Met’s sales from the collection of Adelaide de Groot in 1972 to fund the purchase of Velázquez’s *Juan de Pareja* was partly due to an impassioned response to Canaday’s article by the Met’s then director Thomas Hoving, who wrote his own version of events in a separate op-ed.¹⁶ The incident caused the New York Attorney General at the time, Louis J. Lefkowitz, to launch an investigation and collaborate with the museum to issue a revised deaccessioning policy, including provisions for notifying the state attorney general for sales valued at more than \$5,000 and a ban on disposals of works valued at \$10,000 or more within twenty-five years of receipt if the donor or heirs object.¹⁷

11. John Canaday, *Very Quiet and Very Dangerous*, N.Y. TIMES (Feb. 27, 1972), <https://www.nytimes.com/1972/02/27/archives/very-quiet-and-very-dangerous.html> [<https://perma.cc/MHN2-UJC7>].

12. For insight into the arguments against deaccessioning by museum professionals, see Martin Gammon, ‘Uniquely Egregious’: *The Disturbing Precedent of the Baltimore Museum of Art’s Deaccessioning Plan*, ART NEWSPAPER (Oct. 7, 2020), <https://www.theartnewspaper.com/2020/10/07/uniquely-egregious-the-disturbing-precedent-of-the-baltimore-museum-of-arts-deaccessioning-plan> [<https://perma.cc/D8S8-BPUC>]; Kabir Jhala, ‘Duplicative’ or Discarded? *Whitney’s Sale of More Hopper Works from Historic Bequest Comes Under Scrutiny*, ART NEWSPAPER (Apr. 27, 2023), <https://www.theartnewspaper.com/2023/04/27/duplicative-or-discarded-whitneys-sale-of-more-hopper-works-from-historic-bequest-comes-under-scrutiny> [<https://perma.cc/7FFG-MDZR>]; Andrew Russeth, *Vision Quest: The Berkshire Museum Will Stop at Nothing to Sell Its Art, Including a Masterpiece by Norman Rockwell*, ARTNEWS (Nov. 20, 2017, at 14:44 PT), <https://www.artnews.com/art-news/news/vision-quest-berkshire-museum-will-stop-nothing-sell-art-including-masterpiece-norman-rockwell-9356> [<https://perma.cc/R3NL-NT8J>].

13. Canaday, *supra* note 11.

14. *Id.*

15. Letters of support and concern poured in from prominent art historians and museum directors, including from the Paul Mellon Center at Yale, the Guggenheim, and MoMA. The Met’s sales were written about over a two-year period and described using phrases such as “most serious menace” and “worst catastrophe.” See James T. Flexner, *Masterpieces—Lost Forever?*, N.Y. TIMES (Apr. 8, 1973), <https://www.nytimes.com/1973/04/08/archives/masterpieceslost-forever.html> [<https://perma.cc/893J-SBD9>].

16. Thomas Hoving, ‘*Very Inaccurate and Very Dangerous*,’ N.Y. TIMES (Mar. 5, 1972), <https://www.nytimes.com/1972/03/05/archives/very-inaccurate-and-very-dangerous-thomas-hoving.html> [<https://perma.cc/KP45-EHJU>].

17. Lawrence Van Gelder, *1971–73 Deals Studied*, N.Y. TIMES (June 27, 1973), <https://www.nytimes.com/1973/06/27/archives/197173-deals-studied-metropolitan-museum-will-lease-its-secret-ony.html> [<https://perma.cc/5RN3-C4J7>]. For a more detailed discussion of the “Hoving affair” and the

If the work has a traceable provenance (history of ownership) and the museum has established clear title, the legal issues for deaccessioning usually involve donor restrictions and intent,¹⁸ tax implications of maintaining tax-exempt status under 26 U.S.C. § 501(c)(3),¹⁹ and fiduciary duties of museum governing boards to the public. Donor restrictions on gifts usually center on whether the language is legally enforceable or merely precatory,²⁰ and the controversy surrounding donor intent is often resolved by courts choosing whether or not to use the *cy pres* doctrine (when circumstances do not allow for the original intention of the testator to be carried out, the court decides whether another action was close enough to the original to be suitably similar).²¹ The accounting and tax implications of charitable giving of nonprofit museums monetizing their collections are issues beyond the scope of this Note.

This Note limits the discussion of legal issues to cases involving museum governance and fiduciary duties because they lack regulatory authorities and a cohesive, binding doctrine. The governing structure of museums has implications for the standard of fiduciary duty and liability museum boards are subject to. Aside from strictly worded donor restrictions and regulations codified by New York State,²² museum boards have significant legal freedom to deaccession objects from their collections, with only interpretations of the standard of fiduciary duties and ethical guidelines from professional organizations as guardrails.²³ At the time of writing, there is no federal statute that regulates the deaccessioning rights of the museum board, and no state besides New York has regulations on the collection-

surrounding context, see MARTIN GAMMON, DEACCESSIONING AND ITS DISCONTENTS: A CRITICAL HISTORY 209–30 (2018). The Met deaccessioning policy has since been revised many times. For the most recent policy, see THE METROPOLITAN MUSEUM OF ART, COLLECTIONS MANAGEMENT POLICY 11–12 (Oct. 3, 2023), <https://cdn.sanity.io/files/cctd4ker/production/000f5c7763ee42ddeb9f349d97282a8a528f4951.pdf> [<https://perma.cc/X543-NPCL>].

18. Two of the most well-known museum donor restrictions are the Isabella Stewart Gardner Museum (the will stipulated that nothing in the galleries be changed and no items be acquired or sold from the collection), *Isabella Stewart Gardner: An Unconventional Life*, ISABELLA STEWART GARDNER MUSEUM, <https://www.gardnermuseum.org/about/isabella-stewart-gardner> [<https://perma.cc/2AYF-KULQ>], and the Barnes Foundation (Dr. Albert C. Barnes's mission was to have art for education, and his particular arrangement of the collection is still on view), *Our Mission and History*, BARNES FOUND., <https://www.barnesfoundation.org/about/history> [<https://perma.cc/E2LK-N66C>].

19. 26 U.S.C. § 501(c)(3) (2019); 26 C.F.R. §§ 1.501(c)(3)–1(d)(3)(i)(b) (2017).

20. The investigation into the Met's sale of Adelaide de Groot's collection and the language in her will was determined to be precatory rather than legally binding. For an example of a case on the use of donor restricted gifts to satisfy creditor claims, see *In re Friends for Long Island's Heritage*, 911 N.Y.S.2d 412, 420 (2010) (holding that in New York, donor restrictions on gifts donated for a specific purpose had greater weight than claims of creditors).

21. *Cy Pres*, BLACK'S LAW DICTIONARY (12th ed. 2024). See, e.g., *Georgia O'Keeffe Found. (Museum) v. Fisk Univ.*, 312 S.W.3d 1, 4 (Tenn. Ct. App. 2009) (holding that the plaintiff lacked standing and, upon examination of donor intent, that defendant's application of *cy pres* doctrine was valid).

22. See discussion *infra* Section II.C.

23. MARIE C. MALARO, MUSEUM GOVERNANCE: MISSION, ETHICS, POLICY 52 (1994).

management practices of museums.²⁴ The discontent of some museum professionals and of the local community over museum board decisions to deaccession certain works can therefore lead to litigation. In litigating, however, it becomes difficult for interested parties to have standing to sue a museum incorporated as a nonprofit without the involvement of the state attorney general.

Therefore, the question of whether courts should determine the legality of deaccessioning artworks harkens back to Justice Holmes's opinion in *Bleistein v. Donaldson Lithographing Co.*, in which he states that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”²⁵ Although *Bleistein* was a copyright case, the same principle also applies here to deaccessioning cases, in which judges ultimately have the authority to decide on a case-by-case basis whether an artwork should remain in a museum.

Legal writing on deaccessioning in the United States has largely focused on general overviews of the subject and legal guidebooks for museum professionals.²⁶ While all legal literature on the topic points out a noticeable gap in the U.S. legal system for the regulation of museum boards and nonprofits more generally, solutions include comparisons to European policies,²⁷ proposals calling for the adoption of the stricter trustee standard for all charitable organizations,²⁸ the implementation of broad legislation,²⁹ and expanding standing.³⁰

By looking at controversial deaccessioning cases in the United States and examining charity and deaccessioning laws in the United Kingdom, this Note suggests that the current mechanisms in place are insufficient. Beyond the solutions recommended in existing literature—use of the trustee standard, legislation, and expanding standing—this Note proposes establishing an independent charity commission to monitor charitable organizations and a reviewing committee to oversee especially valuable deaccessions. The addition of a charity commission and a reviewing

24. Deandra Rose Mann, Note, *To Have and To Hold . . . Or Not? Deaccessioning Policies, Practices, and the Question of the Public's Interest*, 24 INT'L. J. CULTURAL PROP. 113, 138 (2017).

25. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

26. See generally Urice, *supra* note 10 (example); JOHN HENRY MERRYMAN & ALBERT E. ELSÉN, LAW, ETHICS AND THE VISUAL ARTS (4th ed. 2002) (same); MARILYN E. PHELAN, MUSEUM LAW: A GUIDE FOR OFFICERS, DIRECTORS, AND COUNSEL (4th ed. 2014) (same); MALARO, *supra* note 23 (same).

27. See generally Jenny Lyubomudrova, Note, *From Museum to the Auction Block: Regulating the Deaccessioning of Art*, 42 CARDOZO L. REV. 2065 (2021) (example); Mann, *supra* note 24 (same).

28. See generally Jennifer L. White, Note, *When It's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041 (1996) (example).

29. See Mann, *supra* note 24.

30. See generally Lyubomudrova, *supra* note 27 (example).

committee, or similar bodies, would help prevent costly, time-consuming litigation and free a state's attorney general from direct involvement. A reviewing committee comprised of independent art professionals and academics can evaluate works on agreed-upon criteria and, in certain situations, allow local cultural institutions a chance to "pre-empt" private sales and public auctions, giving the local institutions an opportunity to purchase works at a reasonable fair market value. A professional opinion independent of the museum and the local community would help ensure the museum board fulfills its fiduciary duties to the public without having to interfere with governance standards of nonprofit boards and continue the benefits of having the business judgment rule.³¹ Such a committee would be used to balance the needs of the museum with the needs of the community. With expertise in art and culture, the committee would also relieve Justice Holmes's concern that a court would be the ultimate arbiter of art.

Part I explores the evolving nature and purpose of museums, the importance of collections management, and recent changes to deaccessioning policies. It delves into the structure of museum governance and the difference between charitable trusts and nonprofit corporations—the two common legal structures of museums. Part II examines the legal and ethical issues involved in deaccessions. Ethics matter precisely because there are no legal guidelines in place. Museum boards outside of New York must look to their own museum charters and the codes of ethics of professional organizations to determine their deaccession policies or risk being sanctioned by their peers. Part II also analyzes the lack of judicial guidance on deaccession cases, looking at the fiduciary duties and standard of conduct that the boards of charitable organizations are subject to, and discusses the issue of reliance on state attorneys general and standing. Part II then ends with a discussion of four deaccession cases in four different states and their rulings. Part III surveys the attitudes and restrictions on deaccessioning and disposal in the United Kingdom and the effects of the Charities Act 2022. Finally, Part IV uses the Charity Commission of England and Wales and the Reviewing Committee of the United Kingdom as the basis for more tailored solutions to the absence of legislation, the self-regulation of museum boards, and public discontent around museum deaccessions.

I. BACKGROUND

To understand deaccessioning and the role it plays in museums, it is necessary to know why museums were created in the United States, how they differ from their European counterparts, and why the changing purpose of a

31. MARILYN E. PHELAN, 1 *NONPROFIT ORGANIZATIONS: LAW AND TAXATION* § 4:8 (2d), Westlaw (database updated Oct. 2023).

museum matters. Without federal regulations or binding case law, cases are determined on their individual facts by the courts, and any deaccession of significant works of art by a museum generates heated debates by industry professionals, media attention, resignations, and even protests.³² However, deaccessions need not be controversial.

A. HISTORY OF THE MUSEUM IN EUROPE AND THE UNITED STATES

The word “museum” comes from the ancient Greek word for a temple dedicated to the Muses—a *mouseion*; ancient Greeks used such temples as philosophical academies, centers of scientific research, and collections of paintings and statues.³³ Romans used the word to refer to temples to the Muses and places for study and philosophy, while also expanding the collection of art to their villas for their private enjoyment.³⁴

The precursor of the modern museum was the Renaissance *Kunstammer*, or “cabinet of curiosities,” filled with antiquities as well as natural history.³⁵ The desire for knowledge of the world around them led humanists, those who valued classical antiquity and the human experience, to create encyclopedic collections that served as reference points for the knowledge they gleaned from their readings.³⁶ By the seventeenth century, these rooms turned into galleries, which could be visited by the public, but the first modern museum fully open to the public was the Ashmolean Museum at the University of Oxford, which opened in 1683.³⁷ The Enlightenment interest in aesthetic theory and questions of taste and beauty proved to be fertile ground for the growth of art museums and curation of displays.³⁸ Late nineteenth-century public art museums came to be seen as transformative experiences that could “enlighten and improve [] visitors morally, socially, and politically.”³⁹

32. Protests over the Berkshire Museum’s deaccessions lasted for over a year, during which the protestors paid for a billboard and decamped to New York to picket in front of Sotheby’s (where the works were auctioned), and the Berkshire Museum’s executive director resigned, though the sales still went ahead. See *Activists Continue to Protest Berkshire Museum Art Sales*, ARTFORUM (July 3, 2018, at 14:39 PT), <https://www.artforum.com/news/activists-continue-to-protest-berkshire-museum-art-sales-239692> [<https://perma.cc/KJ45-DNYB>]; Caroline Goldstein, *Activists Gather for a Gloomy Vigil Outside of Sotheby’s to Protest First Sale of Berkshire Museum Works*, ARTNET NEWS (May 15, 2018), <https://news.artnet.com/market/Berkshire-museum-protests-and-sales-results-sothebys-imp-mod-1285625> [<http://perma.cc/TMF7-HW2R>].

33. JOHN HENRY MERRYMAN, STEPHEN K. URICE & SIMON J. FRANKEL, *LAW, ETHICS AND THE VISUAL ARTS* 875 (6th ed. 2025).

34. *Id.*

35. GAMMON, *supra* note 17, at 14.

36. Paula Findlen, *The Museum: Its Classical Etymology and Renaissance Genealogy*, 1 J. HIST. COLLECTIONS 59, 65 (1989).

37. *Id.* at 71.

38. CAROL DUNCAN, *CIVILIZING RITUALS: INSIDE PUBLIC ART MUSEUMS* 14 (1995).

39. *Id.* at 16.

Not to be outdone by Europe, American philanthropists decided to create museums that could rival the Louvre, starting a museum-building boom in U.S. cities that lasted through the late nineteenth century.⁴⁰ However, unlike in Europe where most museums continue to be owned, operated, and funded by the government, the vast majority of American museums are privately endowed, nonprofit institutions independent from the government, with decision-making power solely in the hands of museum boards and donors.⁴¹

B. THE EVOLVING PURPOSE OF THE MUSEUM

While early modern museums were dedicated to the collection of objects, modern museums in the United States were increasingly concerned with visitors and involvement in their local communities.⁴² The nineteenth-century art museum was intended to educate the visitor on the origins and development of the schools of art, using displays to create a history of art that would enable visitors to witness the progress of civilization as they walked through the galleries.⁴³ Since most museums in the United States are chartered within a particular state as tax-exempt to carry out a charitable (educational) purpose,⁴⁴ it is unsurprising that museums have taken on a more active educational approach with visitors, particularly as visitor numbers decline and museums seek more engagement.

The deaccessioning debates are ultimately rooted in differing understandings of the purpose of museums. Advocates for less restrictive deaccessioning policies see museums as having to change with the times, and deaccessioning to generate finances allows the board to fulfill their fiduciary duties and serve the community by having the funds to update a dated institution. On the other hand, advocates for more restrictive policies claim that deaccessioning deprives the collections of work they may never have the chance to acquire again, thereby breaking the board members' fiduciary duty to the collection and the "public trust."⁴⁵

40. *Id.* at 48.

41. MERRYMAN & ELSEN, *supra* note 26, at 1057. The obvious exceptions include the Smithsonian and the National Gallery of Art.

42. Stephen E. Weil, *From Being About Something to Being for Somebody: The Ongoing Transformation of the American Museum*, in MAKING MUSEUMS MATTER 28–30 (2002), reprinted in MERRYMAN ET AL., *supra* note 33, at 886–88.

43. DUNCAN, *supra* note 38, at 49.

44. MERRYMAN ET AL., *supra* note 33, at 880.

45. See, e.g., James Christen Steward, *Director's Letter Summer 2014*, PRINCETON UNIV. ART MUSEUM, <https://artmuseum.princeton.edu/story/directors-letter-summer-2014> [<https://perma.cc/3BZR-M23N>].

C. “PUBLIC TRUST”

The American Alliance of Museums (“AAM”), an organization representing the entire museum community, states in its Code of Ethics for Museums that because museums are “grounded in the tradition of public service,” they hold “their collections and information as a benefit for those they were established to serve,” and as a result, they are “public trusts.”⁴⁶ The public trust doctrine has typically been applied to waterways, with *Martin v. Lessee of Waddell* recognizing waterways and the land under them not as private property, but rather as an inheritance from the British Crown held for the benefit of the public.⁴⁷ Since then, states have expanded the public trust doctrine to apply to other natural resources, but have been less clear on its application to cultural property.⁴⁸

The New York Board of Regents provides its own definition, stating that “[p]ublic trust means the responsibility of institutions to carry out activities and hold their assets in trust for the public benefit.”⁴⁹ Despite the unsettled doctrine, the AAM continues in the belief that “the public owns the collections, and they should be kept available so the public can study them, enjoy them, and learn from them.”⁵⁰ Those arguing for stricter deaccessioning policies rely on this AAM interpretation of the public trust, but when it comes to art and cultural property, the public trust doctrine is dependent on the state.

D. DEACCESSIONING AS COLLECTIONS MANAGEMENT

Deaccessioning, for the most part, is a normal process in museums and other collecting institutions, and most deaccessions for the sake of collections management are uncontroversial.⁵¹ As museums gain more objects through acquisition and donations over the years, it becomes necessary for space and conservation purposes to remove certain objects from the collections.⁵²

As such, the International Council of Museums (“ICOM”) permits deaccessioning an object for the following reasons: poor condition and restoration is impracticable; threat to health and safety; the museum is unable

46. *Public Trust and Accountability Standards*, AM. ALL. MUSEUMS, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/public-trust-and-accountability-standards> [https://perma.cc/ZF3L-2883].

47. *Martin v. Lessee of Waddell*, 41 U.S. 367, 416 (1842).

48. Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 649–51 (1995).

49. N.Y. COMP. CODES R. & REGS. tit. 8, § 3.30(a)(11) (2024).

50. AM. ALL. MUSEUMS, *supra* note 46.

51. GAMMON, *supra* note 17, at 46.

52. INT’L COUNCIL MUSEUMS, *supra* note 8.

to provide adequate care because of specific conservation or storage needs; it is a duplicate; it is in poor quality and lacks aesthetic or historical value; fraud (in which case it should not be sold on the market); it is inconsistent with ethical and legal principles (it was stolen or otherwise has restitution claims); another museum can better care for and provide access to it; it is no longer consistent with the mission of the museum; or it is sold to renew and improve the collection.⁵³

In September 2022, members of the Association of Art Museum Directors (“AAMD”), a prestigious professional organization with 227 current members,⁵⁴ narrowly voted to allow art museums and galleries to sell the art in their collections to finance the “direct care of works of art.”⁵⁵ This landmark decision by the AAMD marked a sharp break from the pre-pandemic restriction that allowed funds from sales of art to be used only for the acquisition of new works.⁵⁶ In April 2020, the COVID-19 pandemic started to seriously affect museum revenue, with financial uncertainty in the stock market affecting donations and decreased attendance affecting ticket sales. The AAMD decided the situation was dire enough to warrant giving art institutions greater freedom in the use of their funds from sales of artwork, choosing to loosely define “direct care” as also including staff salaries and operating costs.⁵⁷ However, as COVID-19 restrictions lifted in late 2022, the AAMD redefined “direct care” much more narrowly as “the direct costs associated with the storage or preservation of works of art” including conservation and restoration, frames, mounts, acid-free paper, and digital media migration for storage.⁵⁸ “Direct care” thus no longer includes any funds used for operations and does not include staff salaries or costs incurred for temporary exhibition displays.⁵⁹ This rule now aligns the AAMD with the rules set by the AAM and the Financial Accounting Standards Board (“FASB”).⁶⁰

53. *Id.*

54. *Membership*, ASS’N ART MUSEUM DIRS., <https://aamd.org/about/membership> [<https://perma.cc/XF7U-GG7Y>].

55. Julia Jacobs, *Museums Vote to Allow the Sale of Art to Care for Collections*, N.Y. TIMES (Sep. 30, 2022), <https://www.nytimes.com/2022/09/30/arts/design/museum-leaders-vote-deaccessioning.html> [<https://perma.cc/A3W7-EKX3>].

56. *Id.*

57. Caroline Goldstein, *In a Major Shift, Museums Can Now Use the Proceeds from Deaccessioning for More than Just Buying Art*, ARTNET NEWS (Oct. 3, 2022), <https://news.artnet.com/art-world/aamd-museum-deaccession-rules-2185274> [<https://perma.cc/PX8R-UUSB>].

58. Press Release, Ass’n of Art Museum Dirs., Membership of AAMD Approves Change to Deaccessioning Rule, Bringing Policy in Line with American Alliance of Museums (AAM) and Financial Accounting Standards Board (FASB) (Sep. 30, 2022), <https://aamd.org/for-the-media/press-release/membership-of-aamd-approves-change-to-deaccessioning-rule-bringing> [<https://perma.cc/48LG-KFUT>].

59. *Id.*

60. *Id.*

II. LAW AND ETHICS

To understand deaccessioning controversies, this Note looks at the two main types of museum governance structures—charitable trusts and nonprofit corporations—before moving on to discuss the ethical implications of the AAM and AAMD Codes of Ethics and finally addressing four instances where discontent over museum board decisions were litigated in state courts.

A. CHARITABLE TRUSTS

A trust is usually created either *inter vivos*⁶¹ or by will, and it creates “a fiduciary relationship with respect to property, . . . subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.”⁶² The trustees hold title to the property for the benefit of the beneficiaries of the trust. The central characteristic of a fiduciary relationship is the duty of the trustee to act for the benefit of the beneficiary on matters within the scope of the relationship.⁶³ The specific nature of fiduciary duties will be discussed in greater depth in Section D.

A charitable trust, one of several types of trust, is defined by its purpose.⁶⁴ If established as a trust, museums will be categorized as a charitable trust, under the purpose of “the advancement of knowledge or education.”⁶⁵ A trust’s purpose is determined to be charitable “if its accomplishment is of such social interest or benefit to the community as to justify permitting the property to be devoted to the purpose in perpetuity and to justify the various other special privileges that are typically allowed.”⁶⁶ The other major difference between a charitable trust and a private trust, aside from the purpose of creation, is in the character of its beneficiaries; while a private trust has clearly defined beneficiaries, a charitable trust’s beneficiaries—such as the general public—are indefinite.⁶⁷ Trustees have full responsibility for the management of the trust and may be personally liable; however, the benefit of a trust is that it does not need to report to the state and is therefore afforded more privacy.⁶⁸ The J. Paul Getty Trust, which

61. An *inter vivos* trust is created by the settlor during his lifetime. RESTATEMENT (THIRD) OF TRS. § 10 (AM. L. INST. 2003).

62. *Id.* § 2.

63. *Id.* § 2 cmt. b.

64. *Id.* § 28.

65. *Id.* § 28 cmt. h. The other listed purposes include: the relief of poverty; the advancement of religion; the promotion of health; governmental or municipal purposes; and other purposes that are beneficial to the community. *Id.* § 28.

66. *Id.* § 28 cmt. a. Special benefits include tax benefits, such as tax-exemption status.

67. PHELAN, *supra* note 26, at 7.

68. *Id.* at 8.

operates the Getty Center and the Getty Villa, is an example of a charitable trust dedicated to the arts.⁶⁹

B. THE NONPROFIT CORPORATION

Most private museums are incorporated in their states as nonprofits because the nonprofit corporation provides more flexibility for museum operations than trusts.⁷⁰ While trusts are managed by trustees, nonprofit corporations, like their for-profit counterparts, are managed by an elected board of directors.⁷¹ In the museum industry, “board of trustees” is the term more commonly used for the governing body of the institution, regardless of its legal structure, which is distinguished from the role of the museum’s “director,” the officer who heads the museum staff and oversees the museum’s daily operations.⁷² For clarity, unless otherwise noted, this Note will continue to use “trustee” in its legal sense as an administrator of trusts, “director” to mean a member of the board of directors for nonprofit corporations, and “museum board” or “board” to mean the museum’s governing body.

The nonprofit corporation is much like the for-profit corporation, with the key difference being their purposes. While for-profit corporations are organized to produce profit that maximizes the benefit to the corporation’s shareholders, nonprofit corporations serve charitable purposes whereby profits are not distributed to members or the board of directors and are not used in any way for private benefit.⁷³ Another major difference is in the oversight of the nonprofit’s operations. For-profits have shareholders who have the power to elect the board and oversee governance restrictions and duties; in contrast, the state attorney general fulfills the role of the shareholders for the nonprofit.⁷⁴ While for-profit corporations are governed by the laws of the states in which they are incorporated under the internal affairs doctrine (state laws apply to matters pertaining to relationships among or between the corporation and its officers, directors, and shareholders), the

69. *About, GETTY*, <https://www.getty.edu/about> [<https://perma.cc/TU78-673K>].

70. PHELAN, *supra* note 26, at 9.

71. White, *supra* note 28, at 1050.

72. MERRYMAN ET AL., *supra* note 33, at 904.

73. PHELAN, *supra* note 26, at 10.

74. Peter Molk & D. Daniel Sokol, *The Challenges of Nonprofit Governance*, 62 B.C. L. REV. 1497, 1509–10 (2021).

application of this doctrine is mixed across different jurisdictions for nonprofits, with thirty-seven of fifty-one jurisdictions expressly applying this doctrine, while New York and California do not.⁷⁵

As a nonprofit corporation, museum boards of directors are “free from personal liability for contracts entered into on behalf of the corporation, tort actions against the corporation, and actions involving corporate property, because the corporation is a legal entity separate from its members.”⁷⁶ This lower standard of liability is in contrast to trustees who may be personally liable for such contract, tort, and property actions, with some exceptions.⁷⁷ Because museums structured as nonprofits serve the public and do not have shareholders to exert supervision, they are instead only policed by the state’s attorney general under the doctrine of *parens patriae* (“father of the country,” and are therefore a representative of the public’s interest).⁷⁸

C. WHY ETHICS MATTER

The codes of ethics set by professional organizations, such as the AAM, AAMD, and ICOM, flesh out the vague legal responsibilities of museum boards.⁷⁹ Without federal statutes and case law to govern the deaccessioning decisions of museum boards, the decisions fall to individual state laws. However, despite repeated proposals in other states, New York remains the only state to have legally binding rules for deaccessioning policies.⁸⁰

In 1996, New York began enacting laws that defined and specified purposes for deaccessioning.⁸¹ The New York State Legislature began with regulations for the New York State Museum in Albany; it defined deaccessioning and required any proceeds from the sale of deaccessioned artwork by the State Museum to be only used for new acquisitions or for the “preservation, protection and care of the collection,” and specified that proceeds “shall not be used to defray ongoing operating expenses of the museum.”⁸² In 2008, the New York Board of Regents, which governs all education-related institutions chartered with the state after 1889, such as museums, issued an emergency amendment that allowed deaccession proceeds to only be used for the purchase of other art and four other defined circumstances; although the strictness of this law caused it to expire in 2010,

75. Peter Molk, *Where Nonprofits Incorporate and Why It Matters*, 108 IOWA L. REV. 1781, 1793–94 (2023).

76. Boards of directors are still liable for breaches of the fiduciary relationship with the organization. White, *supra* note 28, at 1050.

77. White, *supra* note 28, at n.46.

78. MERRYMAN, *supra* note 33, at 904.

79. MALARO, *supra* note 23, at 17–18.

80. Lyubomudrova, *supra* note 27, at 2086.

81. S.N. 5747, Reg. Sess. (N.Y. 1996).

82. *Id.*

it led to further debate.⁸³ In a 2011 amendment, the Board of Regents codified the ethics codes of the AAMD and AAM, limiting deaccessions to one of ten enumerated criteria.⁸⁴ The New York State Legislature has since also enacted a new section that governs the collections of other museums beyond the State Museum; the deaccessioning policies therein are stricter than those of the Regents and specify that proceeds from a sale “shall be used only for the acquisition of property for the museum’s collection or for the preservation, protection, and care of the collection and shall not be used to defray ongoing operating expenses of the museum.”⁸⁵

For museums in states without the codification of acceptable deaccessioning policies, the codes of ethics set by professional organizations are invaluable to museum professionals navigating the best course of action in determining their fiduciary duties.⁸⁶ Without the codes, which guide museum professionals to the best practices in the industry, museum boards would have little guidance for writing their museum bylaws, especially with regard to a contentious issue such as deaccessioning.

Codes of ethics can also affect a court’s interpretation of the legal standard.⁸⁷ The codes act as appropriate evidence to determine if a person acted in good faith in performing their professional responsibilities and should serve as a way for the court to know how a reasonable person in the profession would handle a situation.⁸⁸ For example, the AAMD, which has the highest standards for museum management in the Americas, requires each of their member institutions to draft their own deaccessioning policy in

83. John Sare, *New York Board of Regents Adopts New Deaccessioning Rules*, LEXOLOGY (Aug. 28, 2012), <https://www.lexology.com/library/detail.aspx?g=569f91f1-5f52-4f6e-9025-539f1809f2d8> [<https://perma.cc/XB38-GN75>].

84. N.Y. COMP. CODES R. & REGS. tit. 8, § 3.27(c)(7) (2024). The criteria are as follows: the item is inconsistent with the mission of the institution as set forth in its mission statement; the item has failed to retain its identity (for example, too damaged); the item is redundant; the item needs preservation and care beyond the capacity of the institution; to refine the collection (a curatorial decision); repatriation or return to rightful owner; return to donor or their heirs to fulfill donor restrictions the institution is unable to meet; the item is a hazard; the item is lost or stolen. *Id.*

85. N.Y. EDUC. LAW § 233-aa(5) (McKinney 2022). The most recent amendment to this law was in 2022, which added a provision for prominently labelling Nazi-era looted art, acknowledging its provenance. *Id.*

86. MALARO, *supra* note 23, at 18.

87. *Id.* at 19.

88. *Id.*

line with those laid out by the organization.⁸⁹ Therefore, for the museum board, the various codes of ethics from the AAM, AAMD, and ICOM serve as guardrails for decision-making.

The AAM, AAMD, and ICOM have clearly enumerated criteria for when a museum is *not* prohibited from deaccessioning and how funds realized from such deaccessions are allowed to be used—limited to uses benefiting the museum’s collection, including acquisitions and care. All three professional organizations explicitly disallow the use of such funds for regular operations and maintenance of museums.⁹⁰ Prior to the pandemic, the AAMD’s strict policy was that art museums could only deaccession for curatorial reasons and use the funds from deaccessions for acquisitions.⁹¹ Further, ICOM states that “[i]n no event should the potential monetary value of an object be considered as part of the motive for determining whether or not to deaccession.”⁹² Despite such plainly stated language, the repercussions for museums who fail to follow these codes of ethics only consist of sanctions that limit the museum’s ability to loan and receive artworks, share exhibitions, and reputational damage because these codes are only ethical standards and not legal rules.⁹³

However, the threat of these professional repercussions can, in rare situations, be substantial enough to effectively prevent deaccessions by prestigious museums, such as the Baltimore Museum of Art (“BMA”) in 2020. The BMA was going to sell paintings by Andy Warhol, Clyfford Still, and Brice Marden at Sotheby’s to generate an expected \$65 million for its diversity initiative in the fall of 2020, but was persuaded by the AAMD to call off the sale.⁹⁴ Although the sale would have been in line with the loosened deaccessioning guidelines in 2020, fifteen former presidents of the AAMD, including the current president of the Getty Trust, and directors of

89. Nicholas Michael, *Dynamic Policies of Deaccessioning and Disposal in American Museums*, *CTR. FOR ART L.* (June 20, 2022), <https://itsartlaw.org/2022/06/20/dynamic-policies-of-deaccessioning-and-disposal-in-american-museums-3> [<https://perma.cc/T4WJ-PY9R>].

90. See INT’L COUNCIL OF MUSEUMS, *supra* note 8; AM. ALL. OF MUSEUMS, *DIRECT CARE OF COLLECTIONS: ETHICS, GUIDELINES AND RECOMMENDATIONS 10* (2019), https://www.aam-us.org/wp-content/uploads/2018/01/Direct-Care-of-Collections_March-2019.pdf [<https://perma.cc/DY33-YJCC>]; Ass’n of Art Museum Dirs., *supra* note 58.

91. Michael, *supra* note 89.

92. INT’L COUNCIL OF MUSEUMS, *supra* note 8.

93. The AAMD has the strictest policy and has a history of being most likely to sanction. The Code of Ethics states, “AAMD members who violate 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.” *Code of Ethics*, ASS’N ART MUSEUM DIRS., <https://aamd.org/about/code-of-ethics> [<https://perma.cc/B3A2-9BCR>].

94. Nancy Kenney, *Baltimore Museum of Art Calls Off Sale of Warhol, Still and Marden After Outcry*, *ART NEWSPAPER* (Oct. 28, 2020), <https://www.theartnewspaper.com/2020/10/28/baltimore-museum-of-art-calls-off-sale-of-warhol-still-and-marden-after-outcry> [<https://perma.cc/EV9Z-HZGM>].

the Museum of Fine Arts Boston and the Philadelphia Museum of Art, signed a “terse letter” urging the BMA board to reconsider.⁹⁵ This last attempt to halt the sale came after over two hundred supporters and former members of the board submitted a letter to try and block the sale; in any event, the peer pressure from other prestigious AAMD institutions and a conversation with the AAMD leadership succeeded in stopping the sale mere hours before it was due to take place.⁹⁶

D. ABSENCE OF JUDICIAL GUIDANCE FOR BREACH OF FIDUCIARY DUTIES

With a lack of legally enforceable standards governing museums’ deaccessioning practices, members of the public who wish to act on their discontent with a museum board’s deaccession decisions will usually bring an action under breach of fiduciary duties if the deaccession does not violate a specific donor agreement. However, such litigation rarely results in the plaintiffs’ favor.⁹⁷

In discussing fiduciary duties, it is necessary to return to the two governing structures of museums—charitable trusts and nonprofit corporations. Both trustees and directors have fiduciary duties of loyalty and care and must fulfill them as part of being in a fiduciary relationship with the public.⁹⁸ Unlike for-profit corporations, nonprofit corporations do not distribute net profits, but the fiduciary duties of nonprofits still mirror those of their for-profit counterparts.⁹⁹ While both trustees and directors are liable for negligent mismanagement, the degree of care required usually differs. A trustee is held liable for simple negligence, while a director is held to a “gross negligence” standard.¹⁰⁰

Examining the formulation of the duty of care for a trustee indicates that a “trustee has a duty to administer the trust as a prudent person would,” requiring “the exercise of reasonable care, skill, and caution.”¹⁰¹ In contrast, the Restatement of the Law for Charitable Nonprofit Organizations points to the Principles of Corporate Governance for the formulation of the business judgment rule, using the same general rule for corporations, which states the duty of care for directors of a corporation requires performing the functions of the role “in good faith, in a manner that he or she reasonably believes to be in the best interest of the corporation, and with the care that an ordinarily

95. *Id.*

96. *Id.*

97. *See generally infra* Section II.E (discussing how plaintiffs in specific deaccession disputes lost their cases).

98. White, *supra* note 28, at 1051.

99. Molk & Sokol, *supra* note 74, at 1508.

100. *Stern v. Lucy Webb Hayes Nat’l Training Sch. for Deaconesses and Missionaries*, 381 F. Supp. 1003, 1013 (D.D.C. 1974).

101. RESTATEMENT (THIRD) OF TRS. § 77 (AM. L. INST. 2007).

prudent person would reasonably be expected to exercise . . . under similar circumstances,” and subject to the business judgment rule.¹⁰² Thus, a director “who makes a business judgment in good faith fulfills the duty [of care] if the director . . . (1) is not interested . . . in the subject of the business judgment; (2) is informed with respect to the subject of the business judgment to the extent the director . . . reasonably believes to be appropriate . . . ; and (3) rationally believes that the business judgment is in the best interests of the corporation.”¹⁰³ In having the business judgment rule for corporations, including nonprofits, a director only needs “good faith” while the person challenging the director has the burden of proving the director breached the duty of care.¹⁰⁴

For the duty of loyalty, the Restatement (Third) of Trusts Section 78 is particularly “strict” and contains the fundamental principle of undivided loyalty, stating that “[e]xcept as otherwise provided in the terms of the trust, a trustee has a duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose.”¹⁰⁵ However, for directors of nonprofits, the duty of loyalty, like that of care, is also one of “good faith,” requiring the director to “act in good faith and in a manner the fiduciary reasonably believes to be in the best interests of the charity in light of its purposes” as a threshold requirement and seek court application of *cy pres* where appropriate.¹⁰⁶ Additionally, because there are “no identifiable beneficiaries to enforce fiduciary duties,” these “duties are owed to the charity [nonprofit]’s purposes rather than to a specific person or persons.”¹⁰⁷ Therefore, for museums structured as nonprofits, the duty of loyalty is owed not to the public, as they could be for a charitable trust in which the ultimate beneficiary is the public, but rather the duty is owed to the museum’s mission and purpose.

Because museums are governed by their states’ laws, judicial opinions are also specific to each case; there are no decisions in the federal courts to guide subsequent cases. With enough media attention, state attorneys general, as the authorities responsible for supervising charities, may conduct an investigation and find a way to intervene.¹⁰⁸ However, the consensus “has

102. PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS & RECOMMENDATIONS § 4.01(a) (AM. L. INST. 1994).

103. *Id.* § 4.01(c).

104. *Id.* § 4.01(d).

105. RESTATEMENT (THIRD) OF TRS. § 78(1), gen. cmt. a (AM. L. INST. 2007).

106. RESTATEMENT CHARITABLE NONPROFIT ORGS. § 2.02 (AM. L. INST. 2021).

107. *Id.* § 2.02 cmt. a.

108. See the investigation into the deaccessioning by the Met in 1972 by New York Attorney General Lefkowitz in Van Gelder, *supra* note 17, and the New-York Historical Society’s 1995 sale, where the attorney general stipulated that certain museums and libraries may buy a work for a discount below the hammer price at auction, Michael Kimmelman, *Art View: Should Old Masters Be Fund-Raisers?*, N.Y. TIMES (Jan. 8, 1995), <https://www.nytimes.com/1995/01/08/arts/art-view-should-old-masters-be>

long been that state attorneys general in practice serve as poor monitors” of nonprofit governance.¹⁰⁹ In most situations, state attorneys general are “inadequately staffed,” so their “intervention is too infrequent and adventitious to provide a credible threat of imminent, informed legal action.”¹¹⁰ Furthermore, attorneys general are often unmotivated to use their limited resources to sue museum boards, which tend to consist of wealthy and influential members of the community.¹¹¹ Without the intervention of state attorneys general, having standing to sue becomes a serious concern for parties wanting to bring a challenge to the deaccession decisions in court.

For members of the community discontented with their local museum’s deaccessions and hoping for injunctive relief, the lack of standing therefore becomes a central issue in cases based on fiduciary duty. Attorneys general, as *parens patriae*, have standing and are allowed to bring a cause of action, but they rarely do.¹¹² While most states allow an interested person, having first obtained the attorney general’s consent, to sue in the name of the attorney general as “relator,” the attorney general does not have to give consent.¹¹³ Dissenting members of the museum board may have standing to sue to question possible board member misconduct; however, this action is rare since most board members would rather resign in protest than litigate against their peers.¹¹⁴ Thus, without the intervention or consent of the state attorney general, it becomes difficult for interested parties, such as members of the local community, to have standing to sue charities. Although standing requirements depend on the state, under Article III of the Constitution, to prove standing, generally the injured party must demonstrate that they have suffered a (1) concrete and particularized injury that is (2) traceable to the challenged action and (3) can be redressed by the court’s decision.¹¹⁵

E. DEACCESSIONING AND THE COURTS

The following cases are deaccessions that have been through the judicial process and were decided on the bases of fiduciary duties and standing. However, each case has been decided individually across different jurisdictions, and the judicial opinions have been cursory. In all four cases, the defendants—the museums and their boards—were successful. In the first three—the Norton Simon in California, the Albright-Knox in New York, and the Berkshire Museum in Massachusetts—the museum boards proceeded

fund-raisers.html [https://perma.cc/34RA-3EBG].

109. Molk & Sokol, *supra* note 74, at 1523.

110. MERRYMAN & ELSEN, *supra* note 26, at 1111.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. U.S. CONST. art. III, § 2, cl. 1.

with their deaccessions. In the most recent case concerning the Brauer Museum at Valparaiso University in Indiana, the paintings have been put into storage while the university decided to close the entire museum as of November 2024.¹¹⁶ These cases illustrate the difficulties faced by members of the community who disagreed with decisions to deaccession and wanted museum boards to be held accountable for what were seen as violations of a fundamental duty to the community. Although these cases were litigated in the courts, many instances of controversial deaccessions never reach the courts and do not even have the *possibility* of remedying perceived harms, instead relying on the media to garner any attention to impending deaccessions.

1. Taking Over the Pasadena (Norton Simon) Art Museum (1981)

In 1981, three former members of the board of directors of the Pasadena Art Museum sued the renamed Norton Simon Museum for violating fiduciary duties by deaccessioning most of the original work in the museum and replacing it with Norton Simon's own collection.¹¹⁷ Although the former directors had standing to sue in this case, their hope for the court to delineate the fiduciary duties of the museum was not granted.¹¹⁸ The court decided that a "liberal interpretation of defendant corporation's charitable purposes permits the board of trustees (directors) to use its informed discretion in making these choices" to establish and maintain a museum.¹¹⁹ This case is the first of many in which courts defer deaccession decisions, seen as within the realm of museum governance and treated as a business decision, to the museum boards.

2. Curatorial Decisions: Buffalo's Albright-Knox Gallery (2007)

The board of the Albright-Knox Art Gallery in Buffalo, New York, decided to change the mission of the 144-year-old institution to focus on modern and contemporary art.¹²⁰ The court opinion curtly dispenses with the claims of the petitioners, who claimed the Gallery violated nonprofit corporate law by auctioning off over two hundred artworks at Sotheby's.¹²¹

116. Jarod Borem, *Brauer Museum Closes, Director Terminated*, THE TORCH (Sep. 3, 2024), https://www.valpotorch.com/news/article_d303160a-6689-11ef-82b7-4f8f1b3c0a21.html [<https://perma.cc/9YWG-M2D3>].

117. *Rowan v. Pasadena Art Museum*, C 322817 (Cal. Sup. Ct. L.A. Cnty. 1981), as reprinted in MERRYMAN & ELSEY, *supra* note 26, at 1147.

118. MERRYMAN & ELSEY, *supra* note 26, at 1149.

119. *Id.*

120. Jason Edward Kaufman, *Albright-Knox Sells the Old to Pay for the New*, ART NEWSPAPER (Jan. 31, 2007), <https://www.theartnewspaper.com/2007/02/01/albright-knox-sells-the-old-to-pay-for-the-new> [<https://perma.cc/X52T-LFK5>].

121. See generally *Dennis v. Buffalo Fine Arts Acad.*, 836 N.Y.S.2d 498 (Sup. Ct. 2007) (no page numbers in original).

Firstly, the court determined that the petitioners lacked standing: even if the petitioners could show that they would be irreparably harmed by the deaccession, they failed to show how their claims would succeed on the merits.¹²² Then, the court reasoned that “[t]he business judgment rule applies to both profit and non-profit corporations,” and the museum board has the authority to manage the Gallery as a corporation “as it sees fit.”¹²³ In determining the actions of the board, the court decided that the board “did not act in bad faith in deciding to sell the items” and did not violate donors’ intent.¹²⁴ Further, because the board “reasonably and honestly exercised their judgment” to determine that it was necessary to deaccession for the continued survival of the Gallery, their decision is unreviewable by the court under the business judgment rule.¹²⁵ This case points out the difficulty for petitioners, even as ex officio board members, to have standing to sue a museum over deaccession decisions and the ability of the business judgment rule to shield its nonprofit board from claims by petitioners.

In this case, though members of the local community were displeased, the Gallery’s decision to deaccession was less controversial within the museum industry because the funds generated for the sale went toward new acquisitions and came from a desire to rebrand that was not in conflict with donor restrictions or the purpose of the museum. After four years of renovations and over 500 new acquisitions,¹²⁶ the renamed Buffalo AKG finally opened in June 2023 to much excitement in the art world.¹²⁷ Despite selling much of its Renaissance art in 2007 after successfully defending the decision to deaccession, the Gallery retains art from the eighteenth and nineteenth centuries, including its first ever acquisition, an 1859 Albert Bierstadt, in addition to its new contemporary acquisitions.¹²⁸

3. A Reluctant Attorney General: The Berkshire Museum (2017)

The most controversial deaccessioning case over the last two decades has been that of the Berkshire Museum in Pittsfield, Massachusetts in 2017. The museum wanted to sell forty artworks, including two notable Norman Rockwell paintings widely considered to be American masterpieces, from its

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Benjamin Sutton, *The Buffalo AKG Art Museum’s \$230m Transformation Privileges Its Public and Permanent Collection*, ART NEWSPAPER (July 21, 2023), <https://www.theartnewspaper.com/2023/07/21/buffalo-akg-art-museum-expansion-architecture-exhibitions-shohei-shigematsu> [<https://perma.cc/68P8-EUAW>].

127. Alex Greenberger, *A Haven for Modern Art in Buffalo Returns, Doubling in Size and Ambition*, ARTNEWS (June 12, 2023, at 10:58 PT), <https://www.artnews.com/art-news/reviews/buffalo-akg-art-museum-expansion-review-1234670948> [<https://perma.cc/7TT4-DNU3>].

128. *Id.*

collection to raise money for renovations and boost endowment; these purposes were not allowed under AAMD guidelines.¹²⁹ The court claimed that the original plaintiffs had no standing, despite some of them being descendants of the donor (and painter) Norman Rockwell, so the Massachusetts Attorney General joined as a plaintiff.¹³⁰ However, the court determined that the Attorney General was a “reluctant warrior” since she only had “concerns” about the case, which are not legal claims or standards.¹³¹ In determining whether the board members should be held to a heightened standard as the board of a nonprofit, the court ruled that the business judgment rule for deciding fiduciary duties was adequate, and thus, reasonable care was enough.¹³² Further, it acknowledged that although there was “public and professional dissatisfaction . . . , that is not enough to render the decision unreasonable” since there was no support for “the proposition that, to be reasonable, corporate board decisions must follow the professional ethics of the field.”¹³³ Therefore, the court decided against an injunction and allowed the sales to proceed.¹³⁴ The artworks went to auction and generated \$53 million at Sotheby’s, with one Rockwell acquired by George Lucas for his planned Lucas Museum of Narrative Art, and the other going into a private collection.¹³⁵ The purposes of the sale incurred the wrath of the AAMD and AAM and resulted in sanctions for the museum.¹³⁶

The Berkshire Museum case illustrates valid concerns of the local community—when artworks are sold to private buyers and across the country, they become inaccessible to local residents, many of whom may never see their favorite paintings again. Yet, an emotional response is faced with the also legitimate concerns of museum boards, who, in trying times, must somehow find ways to keep a museum operational—maintaining the facility, paying employees, and covering insurance costs.

129. Lyubomudrova, *supra* note 27, at 2082. The two paintings are *Shuffleton’s Barbershop* and *Blacksmith’s Boy—Heel and Toe (Shafisbury Blacksmith Shop)*.

130. *Rockwell v. Trs. Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, at *1, *13 (Mass. Super. Ct. Nov. 7, 2017).

131. *Id.* at *22.

132. *Id.* at *26–33.

133. *Id.* at *29.

134. *Id.* at *53–54.

135. Andrew Russeth, *Berkshire Museum Completes Controversial, Contested Art Sales, Netting \$53.3m*, ARTNEWS (Nov. 27, 2018, at 17:39 PT), <https://www.artnews.com/art-news/news/berkshire-museum-completes-controversial-contested-art-sales-netting-53-3-m-11407> [<https://perma.cc/G6C5-Z2G7>].

136. Press Release, Am. All. Museums, Statement on the Berkshire Museum Proposal to Deaccession Works of Art for Its Endowment, Operations, and to Fund Capital Investments (July 25, 2017), <https://www.aam-us.org/2017/07/25/statement-on-the-berkshire-museum-proposal-to-deaccession-works-of-art-for-its-endowment-operations-and-to-fund-capital-investments> [<https://perma.cc/STVF-9V6Q>].

4. Museums and Universities: The Brauer Museum of Art at Valparaiso University (2023)

Over the past three years, the Brauer Museum at Valparaiso University was involved in a deaccessioning controversy over whether to sell three paintings at auction—*Rust Red Hills* by Georgia O’Keeffe, *Mountain Landscape* by Frederic E. Church, and *The Silver Veil and the Golden Gate* by Childe Hassam—for funds to renovate the university dormitories.¹³⁷ The estimated value of the paintings was upwards of \$10 million.¹³⁸ Petitions were sent around by members of the local community, students, faculty, and staff, culminating in a lawsuit brought by the museum’s founding director, Richard Brauer, for whom the building and the museum are named.¹³⁹ However, the court found that the plaintiffs lacked standing and granted the defendants’ motion to dismiss.¹⁴⁰ Unlike the Massachusetts Attorney General in *Rockwell v. Trustees of the Berkshire Museum*, here, the Indiana Attorney General Scott Rokita was a defendant and did not join as a plaintiff in the complaint, causing the case to be dismissed.¹⁴¹ Despite widespread community discontent and the case being brought by the very person the museum was named after, the community was not able to prevent the sale without the cooperation of the Indiana Attorney General.

This was not the first time a university museum has deaccessioned art from its collection to bolster its overall finances. Universities such as Rockford College in Rockford, Illinois, Randolph-Macon Women’s College in Lynchburg, Virginia, and Fisk University in Nashville, Tennessee, all proceeded with their deaccessions, generating millions of dollars at auction.¹⁴² Notably, after facing severe public backlash, a lawsuit, and a potential investigation by the Massachusetts Attorney General, Brandeis University refrained from proceeding with the deaccession of its whole collection and the planned closure of the museum, choosing instead to settle the lawsuit with the plaintiffs, who included long-time donors.¹⁴³ Brandeis’s settlement is unusual, but the quality of the six-thousand-piece collection (containing works by Robert Rauschenberg, Jasper Johns, Andy Warhol, and

137. Kalia Richardson, *Its Georgia O’Keeffe Is Worth Millions. And Its Dorms Need Updating.*, N.Y. TIMES: ART & DESIGN (Mar. 10, 2023), <https://www.nytimes.com/2023/03/10/arts/design/valparaiso-museum-paintings-sale-okeeffe.html> [<https://perma.cc/B2XC-XG7L>].

138. *Id.*

139. *Id.*

140. Brockington v. Padilla, No. 64D02-2304-PL-003616 (Ind. Super. Ct. Oct. 26, 2023).

141. *Id.*

142. Daniel Grant, *Former University Museum Director Drops Lawsuit Seeking to Block Sale of Works to Fund Dormitory Repairs*, ART NEWSPAPER (Aug. 30, 2024), <https://www.theartnewspaper.com/2024/08/30/valparaiso-university-brauer-museum-art-deaccessioning-georgia-okeeffe-dormitory-repairs> [<https://perma.cc/YM68-NCLD>].

143. *Brandeis, Plaintiffs Settle Rose Art Museum Lawsuit*, BRANDEISNOW (June 30, 2011), <https://www.brandeis.edu/now/2011/june/rose.html> [<https://perma.cc/3JGG-KQXT>].

Roy Lichtenstein) worth over \$350 million and the drastic measure of closing the entire museum undoubtedly had significant negative impacts on the reputation of the university; these factors, combined with a review of donation agreements, were detrimental to donors' desire to continue giving to the university as a whole, resulting in Brandeis finding other solutions to their financial problems besides closing their museum.¹⁴⁴

For deaccessions that are not restricted by explicit donor agreements, there is little besides a fear of reputational damage that can stand in the way of the museum board's decisions, to which the courts have historically deferred.

III. THE BRITISH MODEL: TREATMENT OF DEACCESSIONS IN THE UNITED KINGDOM

To better understand the peculiarities of the American treatment of deaccessions, comparison with a similar system is helpful in determining whether there are alternative methods to balance the tension between the local community and the cash-strapped museum.

A. THE STRUCTURE OF BRITISH MUSEUMS AND THEIR DEACCESSIONING PROCESS

In contrast to museums in the United States that are mostly privately established and funded and, therefore, independent from the government, most museums in the United Kingdom are charities established with funding from a governmental body. National museums are created by statute. Notably, the British Museum Act 1963 established the current iteration of the British Museum and outlined the duties of its trustees.¹⁴⁵ The National Heritage Act 1983 established boards of trustees for the Victoria and Albert Museum, the Science Museum, the Armouries, and the Royal Botanic Gardens, Kew.¹⁴⁶ The Museums and Galleries Act 1992 established boards of trustees for the National Gallery, the Tate Gallery, the National Portrait Gallery, and the Wallace Collection.¹⁴⁷ As a result of devolution, national museums, such as the aforementioned, are funded directly by the central

144. Randy Kennedy & Carol Vogel, *Outcry Over a Plan to Sell Museum's Holdings*, N.Y. TIMES: ART & DESIGN (Jan. 27, 2009), <https://www.nytimes.com/2009/01/28/arts/design/28rose.html> [<https://perma.cc/UEG3-4GGU>].

145. British Museum Act 1963, c. 24 (UK), https://www.legislation.gov.uk/ukpga/1963/24/pdfs/ukpga_19630024_en.pdf [<https://perma.cc/6BJZ-MCE2>]. The British Museum had originally been established by the British Museum Act 1753, and this 1963 Act separated the Natural History collection (now, the Natural History Museum) from the British Museum, creating two collections.

146. National Heritage Act 1983, c. 47 (UK), https://www.legislation.gov.uk/ukpga/1983/47/pdfs/ukpga_19830047_en.pdf [<https://perma.cc/7MQR-42SP>].

147. Museums and Galleries Act 1992, c. 44 (UK), https://www.legislation.gov.uk/ukpga/1992/44/pdfs/ukpga_19920044_en.pdf [<https://perma.cc/2JWJ-2LCV>].

government of each U.K. nation—England, Wales, Scotland, and Northern Ireland.¹⁴⁸ Devolution allows the individual nations within the United Kingdom to remain part of the United Kingdom while having the ability to make decisions on certain local issues without requiring approval from Parliament in Westminster.¹⁴⁹ Local museums, meanwhile, are governed by town, parish, borough, city, or county councils or other local authorities.¹⁵⁰ All museums are supported by the governing bodies of each nation through investment and funding, advice, and advocacy.¹⁵¹ These governing bodies also have the power to strip museums of their accreditation; for example, in 2014, Arts Council England stripped Northampton Museums Service, managed by the Northampton Borough Council, of its accreditation for non-compliance by selling an ancient Egyptian statue at auction.¹⁵²

These governmental bodies work closely with the Museums Association, the United Kingdom’s professional organization for museum professionals, which acts much like the United States’ AAM and AAMD. In 2023, the Museums Association updated its Disposal Toolkit to guide museum professionals through the deaccessioning and disposal process.¹⁵³ The Toolkit specifies that if the museums face difficult decisions, especially those financially motivated, or concerns about contravening Code of Ethics or Accreditation standards, the “Museums Association’s ethics committee and the national Accreditations Bodies [of the four nations] are there to

148. *FAQs: About Museums: What Different Types of Museums Are There?*, MUSEUMS ASS’N, <https://www.museumsassociation.org/about/faqs> [<https://perma.cc/HH3X-TU9N>]. In England, the Department for Digital, Culture, Media and Sport (“DCMS”) sponsors fifteen museums (including the British Museum, the National Gallery, the National Portrait Gallery, the Natural History Museum, the Tate Gallery Group, the Victoria and Albert Museum, and the Wallace Collection) and the British Library. DEP’T FOR CULTURE, MEDIA & SPORT, DCMS-SPONSORED MUSEUMS AND GALLERIES ANNUAL PERFORMANCE INDICATORS 2022/23: HEADLINE RELEASE (Mar. 14, 2024), <https://www.gov.uk/government/statistics/dcms-sponsored-museums-and-galleries-annual-performance-indicators-202223/dcms-sponsored-museums-and-galleries-annual-performance-indicators-202223-headline-release> [<https://perma.cc/J6J2-L9EQ>].

149. Devolved matters include education, elections to local government, tourism, the justice system, sports, and the arts. Reserved matters (which are deferred to the Parliament of the United Kingdom) include currency, defense and national security, elections to U.K. Parliament, and foreign affairs. *Devolved and Reserved Powers*, THE SCOT. PARLIAMENT, <https://www.parliament.scot/about/how-parliament-works/devolved-and-reserved-powers> [<https://perma.cc/C622-4CLM>].

150. *FAQs: About Museums: What Different Types of Museums Are There?*, *supra* note 148.

151. These bodies are Arts Council England, Llywodraeth Cymru Welsh Government, Museums Galleries Scotland, and Northern Ireland Museums Council. *See, e.g., Supporting Museums*, ARTS COUNCIL ENG., <https://www.artscouncil.org.uk/supporting-arts-museums-and-libraries/supporting-museums> [<https://perma.cc/42HJ-EYJZ>]; *About Us*, MUSEUMS GALLERIES SCOT., <https://www.museums.galleriesscotland.org.uk/about-mgs> [<https://perma.cc/L5V9-R9F8>].

152. Geraldine Kendall Adams, *ACE Strips Northampton Museums Service of Accreditation*, MUSEUMS ASS’N (Aug. 1, 2014), <https://www.museumsassociation.org/museums-journal/news/2014/08/01082014-ace-strips-northampton-accreditation> [<https://perma.cc/779G-TKNG>].

153. MUSEUMS ASS’N, *OFF THE SHELF: A TOOLKIT FOR ETHICAL TRANSFER, REUSE AND DISPOSAL 4* (2023), <https://www.musemsgalleriesscotland.org.uk/wp-content/uploads/2023/07/Off-the-Shelf-toolkit-2023-3.pdf> [<https://perma.cc/STF5-JDLK>].

support [the museum].”¹⁵⁴ Specifically, the decision to sell objects in the collection to buyers outside the public domain (such as private collections) “should only be undertaken after [the museum has] established in a transparent way that no institution/organisation within the public domain is able to take the item.”¹⁵⁵ For “objects identified with low cultural or financial value,” the museum “should first advertise the availability of the item on the . . . web listing service” in order to minimize the risk to the reputation of the individual museum and to public trust in the museum sector overall.¹⁵⁶ However, if the objects are of high cultural or financial value, “sale outside of the public domain should be undertaken with additional support and guidance from the [Museums Association] and in consultation with sector bodies [of each nation].”¹⁵⁷ Further, the Museums Association highlights the need for “transparency and openness with the public, colleagues and stakeholders when [museums] undertake deaccessioning of collections.”¹⁵⁸

For objects sold to foreign collections such that the object will permanently leave the country, the United Kingdom has a Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest (“Reviewing Committee”) that determines whether export licenses should be granted.¹⁵⁹ The decisions are made based on three criteria (“the Waverley criteria”): history, aesthetics, and scholarship.¹⁶⁰ The Reviewing Committee, consisting of eight permanent members (a judge, an art dealer, and academics and curators in art and history),¹⁶¹ is advised on every case by three independent experts in the relevant field, and when the Committee determines that the object meets at least one of the Waverley criteria, it will recommend that the export license be deferred for a specific time period.¹⁶² If the secretary of state agrees, the object becomes a national treasure and institutions in the United Kingdom are given a final opportunity to raise the money to purchase it for the U.K. public to enjoy.¹⁶³

154. *Id.* at 9.

155. *Id.* at 26.

156. *Id.*

157. *Id.*

158. *Id.* at 29.

159. *Reviewing Committee*, ARTS COUNCIL ENG., <https://www.artscouncil.org.uk/supporting-arts-museums-and-libraries/supporting-collections-and-cultural-property/reviewing-committee-0> [<https://perma.cc/59LT-6R24>].

160. The Waverley criteria look at the following questions: “Is [the object] closely connected with [the United Kingdom’s] history and national life? Is [the object] of outstanding aesthetic importance? Is [the object] of outstanding significance for the study of some particular branch of art, learning or history?” *Id.*

161. Currently, the members are Andrew Hochhauser KC, Christopher Baker, Professor Mark Hallett, Dr. Helen Jacobsen, Stuart Lochhead, Tim Pestell, Dr. Caroline Shenton, and Pippa Shirley. *Reviewing Committee Members*, ARTS COUNCIL ENG., <https://www.artscouncil.org.uk/reviewing-committee-members> [<https://perma.cc/4V9C-87GX>].

162. *Reviewing Committee*, *supra* note 159.

163. *Id.*

B. CHARITIES ACT 2022 AND ITS IMPACT ON MUSEUMS

Since most museums in the United Kingdom are charities, they are subject to charity law that impacts the duties and powers of museum trustees.¹⁶⁴ In England and Wales, charities are regulated by the Charity Commission, a government department accountable to Parliament.¹⁶⁵ The Charities Act 2022, which amends the Charities Act 2011, includes changes that affect the disposal policies of charities, including museum collections.¹⁶⁶ Most significantly for museums, the Act allows charities to dispose of low-valued property as *ex gratia* payments (transfers motivated by a moral obligation) without going through the lengthy process of requiring approval from the Charity Commission, attorney general, or the court.¹⁶⁷ Museums can thus deaccession and dispose of objects in their collection if the value is below the threshold amount and if the decision to do so was out of moral obligation (such as repatriating looted objects). For property valued over the threshold amounts, if the charity has a moral obligation to dispose of the property, the Charity Commission, attorney general, or the court may grant authorization to dispose of it.¹⁶⁸ The Horniman Museum and Gardens in London successfully applied this amendment to its decision to return its collection of Benin bronzes, acquired through looting in Benin City by the British military in 1897, to the Nigerian government.¹⁶⁹ The Charity Commission endorsed this decision.¹⁷⁰

While these two amendments mostly affect the ability of museums to repatriate and restitute objects in their collection, it illustrates the power of the Charity Commission in England and Wales to determine whether the

164. Alexander Herman, *Museums, Restitution and the New Charities Act*, 27 ART ANTIQUITY & L. 193, 193 (2022).

165. *About Us*, CHARITY COMM'N FOR ENG. & WALES, <https://www.gov.uk/government/organisations/charity-commission/about> [<https://perma.cc/5H6Z-E98V>].

166. Herman, *supra* note 164, at 200–01.

167. The threshold amount for what is considered a “small” payment is outlined in § 15 (331A(6)) and is scaled based on the charity’s gross income in the last financial year. For example, if the charity’s gross income “did not exceed £25,000, the relevant threshold is £1,000” going up to the highest category, where if the gross income “exceeded £1 million, the relevant threshold is £20,000.” Charities Act 2022, c. 6, § 15 (UK), <https://www.legislation.gov.uk/ukpga/2022/6/section/15> [<https://perma.cc/VZD6-AAKW>].

168. Charities Act 2022, c. 6, § 16 (UK), <https://www.legislation.gov.uk/ukpga/2022/6/section/16/enacted> [<https://perma.cc/SJ9W-G8CQ>].

169. After external consultation with academics, professionals, visitors, community members (of south London), schoolchildren, and artists, the Board of Trustees of the Horniman considered differing views as well as the provenance (the history) of the object to decide whether return was appropriate. Benin bronzes refer to decorative brass and bronze objects from Benin City and the royal palace that are widely regarded as exemplars of art from the Kingdom of Benin (now in the Federal Republic of Nigeria). Press Release, Horniman Team, *Horniman to Return Ownership of Benin Bronzes to Nigeria* (Aug. 7, 2022), <https://www.horniman.ac.uk/story/horniman-to-return-ownership-of-benin-bronzes-to-nigeria> [<https://perma.cc/J6QP-X2ZG>].

170. *Id.*

decisions made by museum boards are in breach of their duties. Because museum boards must make decisions that are in the best interest of the charity, much like the fiduciary duties of nonprofits in the United States, museums must have a clear reason to depart from maintaining their collections—the increased autonomy for ex gratia payments is predicated on moral obligation.¹⁷¹ The Charity Commission can investigate apparent misconduct or mismanagement and refer matters to “the Tribunal,” which has jurisdiction to determine such matters and hear appeals.¹⁷²

Although the autonomy seemingly granted by the Act was reined in as the government pondered the best application of the sections, it has fully come into effect as of December 2025. A January 2024 letter from Lord Parkinson of Whitley Bay (at the time the Minister for Arts and Heritage under Prime Minister Sunak’s Conservative government) to the Chairman of the Charity Commission clarified the application of the Charities Act 2022, sections 15 and 16 (mentioned above); the sections enable charities to authorize small ex gratia payments without the need for Charity Commission approval, but do not apply to the national museums in the United Kingdom created by statute (such as the British Museum, the Victoria and Albert Museum, and the National Gallery).¹⁷³ These national museums must, therefore, still abide by their founding statutes and the policies therein on deaccessioning and disposal.¹⁷⁴ Lord Parkinson wrote that his officials continued to work on whether ex gratia payments under the two sections to recipients outside the United Kingdom will require, as they have done in the past, Charity Commission approval, as opposed to the seemingly increased independence granted by the Act.¹⁷⁵ With the Labour Party winning the General Election in July 2024, new ministers have been appointed who have a different approach to the arts, so it remains to be seen how policies will differ under this Labour government.¹⁷⁶ Sections 15 and 16 relating to ex gratia payments without needing Charity Commission authority are no longer paused and have come into effect as of December 2025, giving charities more autonomy over payments, including deaccessions, provided

171. Herman, *supra* note 164, at 209.

172. Charities Act 2011, c. 25, §§ 15, 316 (UK), <https://www.legislation.gov.uk/ukpga/2011/25/contents> [<https://perma.cc/K3GQ-3NGV>].

173. Letter from Lord Parkinson of Whitley Bay, Minister for Arts & Heritage, to Orlando Fraser KC, Chair of the Charity Comm’n (Jan. 31, 2024), https://assets.publishing.service.gov.uk/media/65bb826acc6fd6000d5dbe32/31.01.2024_Letter_from_Lord_Parkinson_to_Orlando_Fraser_-_s15-16-accessible.pdf [<https://perma.cc/M9FA-9FK9>].

174. *Id.*

175. *Id.*

176. Pippa Crerar, *Lisa Nandy: Tories’ ‘Violent Indifference’ to the Arts Damaged Access to Culture*, THE GUARDIAN (Sep. 24, 2024), <https://www.theguardian.com/culture/2024/sep/24/lisa-nandy-tories-violent-indifference-to-the-arts-gave-poor-access-to-culture> [<https://perma.cc/88CW-B34T>].

the value is below a set threshold and the museum is not one of the sixteen statutory (national) museums.¹⁷⁷

IV. PROPOSAL

When museums are in dire financial circumstances, museum boards face difficult choices that can alienate both their community and their colleagues in the industry. Although an alternative to inadequate storage facilities could be to loan pieces to other institutions,¹⁷⁸ immediate cash may be necessary and deaccessions via sales inevitable. This Note proposes that rather than letting local courts be the final arbiters of artwork and the heightened emotions surrounding them, an independent charity commission and a reviewing committee would resolve the tensions around high-profile deaccessions in ways that just expanding standing or drafting broad legislation would not be able to accomplish.

A. REASONS FOR REGULATION

Without requisite regulations and an independent, respected third party to oversee deaccessions, museum boards end up on the receiving end of criticism from both their peers in the industry and from their local community, and in well-publicized cases, even from the general public, leading to costly and time-consuming litigation. Recent cases such as *Rockwell v. Trustees of the Berkshire Museum* and *Brockington v. Padilla* (about the Brauer Museum at Valparaiso University) are indicative of the uproar that can occur when there are insufficient regulations for museum deaccessioning practices and the local community feels there is inadequate oversight of museum board decisions.¹⁷⁹ At a time when museums are struggling financially and perhaps choosing to deaccession for monetary reasons, drawn-out, expensive litigation putting them at odds with their community should be the last resort.

Litigation, for those plaintiffs who have the means to pursue it, likely ends poorly for the plaintiffs, as seen in the four cases discussed in Section II.E. Litigation is not a satisfying recourse for those wishing to challenge the deaccession because most plaintiffs lack standing when the defendant is a nonprofit museum. Since nonprofits do not have shareholders, the state attorneys general, as representatives of the people, are one of the few

177. *How Charities Can Make a Moral, or 'Ex Gratia', Payment (CC7)*, GOV.UK (Nov. 27, 2025), <https://www.gov.uk/government/publications/ex-gratia-payments-by-charities-cc7/ex-gratia-payments-by-charities-cc7#s1> [<https://perma.cc/AU8A-85MS>].

178. GAMMON, *supra* note 17, at xii.

179. See *supra* notes 32 and 130 and accompanying text for protests over the Berkshire Museum. See *supra* Section II.E(4) and accompanying notes for public outcry over Valparaiso University's decision on the Brauer Museum.

plaintiffs sure to be granted standing as an interested party.¹⁸⁰ However, these attorneys general are neither required to join as plaintiff (as was the case in *Brockington v. Padilla*),¹⁸¹ nor have the resources to devote to a seemingly “trivial” issue.

While sanctions and guidelines from the AAM and AAMD are helpful in providing best practices and a code of ethics for member institutions to follow, they are not always enough to deter museum boards from proceeding with their decisions. The Berkshire Museum, for example, continued to sell the Rockwell paintings at auction and willingly faced the subsequent sanctions from the AAM and AAMD,¹⁸² perhaps deciding that money generated from the sales was more valuable than their reputation in the industry and their relationships with donors and the local community.

Whether going through litigation or being pilloried by the press, like the Met in the 1970s,¹⁸³ the reputation of a museum can suffer as a result of deaccessions. Given the close relationship between a museum and its local community, the perceived harm of selling treasured pieces from the collection can erode the community’s goodwill and trust, which can have implications for the overall museum industry.¹⁸⁴ Museums in general may lose credibility if a museum sells objects from its collection for financial reasons; if their collection was seen to have monetary value and could generate income, their nonprofit status could be at risk, leading to serious accounting and tax implications.¹⁸⁵

Having some independent oversight or legally binding rules over deaccessions means both museum boards choosing to deaccession and their critics would feel less unmoored knowing that there are protections in place for them. Boards would have certainty that their decisions to deaccession specific works are valid exercises of their power and should not be subject to litigation and intense scrutiny; critics would feel certain that boards are not neglecting their duties to the public and that priceless works integral to the local community are not sold without considering alternatives and remedies.

180. *See supra* Section II.D.

181. *See discussion supra* Section II.E(4).

182. *See supra* Section II.E(3) and accompanying notes 138, 139.

183. *See supra* Introduction and accompanying notes 13–16.

184. *Questions and Answers About Selling Objects from the Collection*, AM. ALL. OF MUSEUMS, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/questions-and-answers-about-selling-objects-from-the-collection> [<https://perma.cc/T5HK-GBRH>].

185. *Id.*

B. PROPOSED SOLUTION

With the lack of legislation and judicial guidance from higher courts, along with the reluctance of attorneys general to prosecute or even join as plaintiffs to grant standing, states should, at a minimum, enact their own legislation to reduce litigation and controversy over deaccessioning. However, even with state legislation, it may not be enough, because without the state attorney general's involvement, standing remains an issue if the discontent of the community goes as far as litigation. Additionally, with the scarce resources available to attorneys general and the financial, cultural, and political power museum board members have in their communities, it is little wonder that attorneys general rarely choose to be involved in these controversies.¹⁸⁶ Without their decision to conduct investigations into possible misconduct and breaches of fiduciary duties, state laws would still need enforcement mechanisms.

Expanding standing at the state level is another potential solution. While some states, including California, have moved toward expanding standing away from the historical common law doctrine of only allowing attorneys general to be involved to allowing certain individuals to also have standing, the expansion of standing has wide-ranging repercussions beyond the museum sector.¹⁸⁷ Such a broad remedy to public discontent over deaccessioning needs careful refinement and would have significant hurdles in any state legislature.

The creation of a governmental body similar to the Charity Commission in the United Kingdom that is independent from the attorneys general and provides regulation and oversight of the nonprofit sector would help the public feel more at ease knowing that any concerns they have about possible wrongdoing could still be investigated, and the attorneys general would not need to dedicate their resources to fielding complaints and investigations at a preliminary stage. Furthermore, given the strict standing requirements in states such as Massachusetts,¹⁸⁸ if a Charity Commission is created, there would be no need to rely only on attorneys general to bring a cause of action.

For the majority of deaccessions, blanket legislation could be helpful in creating a framework for museum boards to follow. Threshold amounts can be akin to the amounts outlined for ex gratia transfers in the Charities Act 2022 for England and Wales that give charities a certain amount (dependent

186. MERRYMAN & ELSEN, *supra* note 26, at 1111; MARY GRACE BLASKO, CURT S. CROSSLEY & DAVID LLOYD, TOPICS IN PHILANTHROPY: STANDING TO SUE IN THE CHARITABLE SECTOR 26 (1993), <https://ncpl.law.nyu.edu/wp-content/uploads/pdfs/Monograph/Monograph1993StandingtoSue.pdf> [<https://perma.cc/2DN2-VJFE>].

187. See BLASKO ET AL., *supra* note 186.

188. See *Rockwell v. Trs. of Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, at *12–19 (Mass. Super. Ct. Nov. 7, 2017), for a discussion of Massachusetts standing requirements.

on the charity's gross income in a year) over which they have autonomy.¹⁸⁹ For these smaller-value deaccessions, the legislation could make it applicable to all deaccessions rather than only for *ex gratia* (moral) transfers, such that all items below a certain value could be more easily deaccessioned.

Additionally, a committee at the state or federal level should be created to look over high-value (both monetarily and culturally significant) deaccessions and allow the works to have a chance of remaining in public collections and continue a museum's purpose of benefiting the public. This reviewing committee, like the Reviewing Committee in the United Kingdom, should be independent and comprised of respected academics and specialists in the industry, using similar criteria of history, aesthetics, and scholarship to advise on whether the selected objects should be sold at auction, potentially to private collectors (thus, removing them from public access), or whether local public institutions should have a chance to bid at a fair (but slightly lower) price.¹⁹⁰

This type of review has some precedent in the New-York Historical Society deaccessions in the 1990s. The New-York Historical Society, New York's first museum, suffered from decades of financial difficulties; by the 1990s, it was nearly insolvent.¹⁹¹ This crisis led the society to deaccession over 150 works in its large collection in return for an immediate loan from Sotheby's for \$1.5 million.¹⁹² Unlike in the 1970s with the Met, this time, the New York Attorney General had a plan in place—he allowed the sales to proceed but with the provision that other New York State museums and cultural institutions had the right to “preempt” the winning bid for a price of up to ten percent less and with up to eight years to pay.¹⁹³ This provision allowed thirty-four works to stay in the state, with institutions including the Met, Vassar College, and the Brooklyn Museum buying rare Old Masters at bargain prices.¹⁹⁴ After assessing the objects, a reviewing committee of experts, rather than the state attorney general, could set a reasonable price for preemption to try and keep certain objects in a public collection. Allowing preemption by other public institutions gives the public a chance

189. See *supra* note 167 and accompanying text.

190. See *supra* discussion in Section III.A for the United Kingdom's Reviewing Committee.

191. GAMMON, *supra* note 17, at 264.

192. *Id.*

193. Lee Rosenbaum, *New-York Historical Society Sells New York Heritage*, WALL ST. J., Jan. 19, 1995, at A16.

194. GAMMON, *supra* note 17, at 265.

to keep the object accessible while still providing the deaccessioning museum with a way to obtain necessary funds. Such an independent reviewing committee with the authority to make decisions on the artwork relieves the tension of museum boards having to balance their relationships with local communities with making financially prudent judgments.

CONCLUSION

Museums face intense criticism and scrutiny both amongst their peers and from the public in the media when they deaccession treasured works from their collection for financial reasons. While deaccessions that are not the result of curatorial decisions via public and private sales can be seen by critics as commodifying collections, these decisions are often a last resort for museum boards. In analyzing the governance structure of museums, the fiduciary duties of nonprofit boards, and case law, and by comparing U.S. policies to the policies and structures in place in the United Kingdom, it is clear that museums in the United States would benefit from the implementation of certain regulatory structures that would ease the discontent of both museum boards and their critics. Rather than having judges, who likely have little training in the arts, be the final authority on art historical value, solutions should involve independent art professionals who have the requisite academic background and knowledge of the industry. Instituting a reviewing committee, a charity commission, and legislation for low-value deaccessions alleviates pressure on state attorneys general and allows both museum boards to feel protected from intense criticism and the public to feel their local museum boards are being held accountable for their decisions to deaccession.