Lifting the Museum's Burden from the Backs of the University: Should the Art Collection Be Treated as Part of the Endowment Symposium: Tax-Exempt Organizations and the State: New Conditions on Exempt Status

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Abstract: A few universities in economic straits have recently attempted to sell artwork to address their financial woes, causing much consternation in the museum community. This Article relates the stories of some institutions’ attempts to deaccession artworks, and explains why universities may suddenly perceive their art collections as important assets to monetize. It contends that the universities and their critics have fundamentally divergent conceptions of the role of the art collection in the university, which explains why they cannot agree on the legal responsibilities of universities vis-à-vis their art. The critics have a strong cultural-property conception that privileges art, while these universities see their collections as similar to other property they use in carrying out their programs. This article advocates a contextual approach for choosing among these conceptions.

The legal regime that governs the responsibilities of university fiduciaries in managing and selling property generally depends on categorization as endowment or program-related property. Unfortunately, there is no clear law determining whether university art collections should be treated as endowment property subject to the statutory rules of investment responsibility, program-related property governed by fiduciary duties, or cultural property subject to its own unique standards. The Article concludes that university art collections are hybrid cultural-instrumental property, and that universities should be subject to a more flexible standard than museums in making deaccessioning decisions. It argues that university trustees would be faced with too great a fiduciary-duty conflict if subject to the stricter museum standard. To accommodate the cultural-property concerns, it proposes that trustees exercise a heightened level of attention when selling art, but retain their discretion to act in the best interests of the university.
INTRODUCTION

Universities seem to be increasingly turning to their art collections as piggy banks. On January 26, 2009, the trustees of Brandeis University announced their decision to close the University’s Rose Art Museum and sell the art collection.\(^1\) Brandeis had suffered a loss in its endowment, and the University’s trustees, who had been particularly hurt by the Madoff fraud, were unable to increase their giving to address the fiscal problems.\(^2\) In the museum world, selling art for operating expenses is an unthinkable transgression.\(^3\) As soon as the decision was announced, protests were staged at the school,\(^4\) newspapers published Op-Ed pieces condemning the

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\(^2\) See Howards, supra note 1; Kennedy & Vogel, supra note 1.

\(^3\) See, e.g., Lee Rosenbaum, *He’s a Museum Leader for These Troubled Times*, *WALL ST. J.*, Jan. 27, 2009, at D7, available at http://online.wsj.com/article/SB123301149409717313.html (showing that Michael Conforti, the President of the Association of Art Museum Directors (AAMD), does not believe that deaccessioning to raise funds is a viable option for struggling museums).

decision, and the presidents of the American Association of Museums, the College Art Association and the Association of College and University Museums and Galleries all issued statements critical of the decision.\(^5\) Shortly thereafter, heirs of donors and museum overseers filed suit to enjoin the closure and sale,\(^6\) and the Attorney General of Massachusetts started an investigation.\(^7\) There is a trial set for July 2010, though it is still unclear whether it will be necessary.\(^8\) The massive outpouring of criticism apparently led the University to reconsider.\(^9\) For now, the sale is on hold, and the Rose is open with an exhibition of its collection.\(^10\) The museum's director has been let go,\(^11\) and Brandeis's President, Jehuda Reinharz, has announced that he will step down.\(^12\)

Fisk University, Nashville's oldest African American university, was established in 1866 to educate newly freed slaves.\(^13\) It boasts an impressive list of alumni and has long been highly respected in the educational community. In 1949, Georgia O'Keeffe, as executor of her husband's estate, gave Fisk the Alfred Stieglitz collection of paintings and photographs by Stieglitz and other artists.\(^14\) She also supplemented Stieglitz's collection with four additional paintings that she owned.\(^15\) The gift came with restrictions against dividing up or selling the collection,\(^16\) modification of which would require a court to determine that it would be impossible or impracticable for the University to comply with the restrictions. In 2005, when the University found itself in fiscal distress,
Fisk filed a *cy pres* petition requesting judicial permission to sell two paintings from the collection in order to “generate funds for the University’s ‘business plan’ to restore its endowment; improve its mathematics, biology, and business administration departments; and build a new science building.” The Georgia O’Keeffe Museum intervened, and the original petition to the court was changed to a request to approve a “settlement” with the O’Keeffe Museum. Under that settlement agreement, the Museum would buy “Radiator Building” from Fisk for $7.5 million. While that motion was pending with the court, the University conducted discussions with another museum that was also interested in acquiring an interest in the collection. As a result, Fisk further modified its request to the court, proposing instead that the court approve a sale of a fifty percent undivided interest in the entire Stieglitz collection for $30 million to the Crystal Bridges Museum of American Art. That museum is currently being built by Alice Walton, the Wal-Mart heiress, in Bentonville, Arkansas. Pursuant to the proposed agreement, Fisk University and Crystal Bridges would each have the right to display the collection at their respective facilities for six months each year.

The trial court refused to grant *cy pres* relief to Fisk, which was necessary for it to enter into one of the proposed agreements, and it seemed that Fisk was required to keep the art, no matter how severe its financial problems might become. But on appeal, the court opened the door to possible *cy pres* relief by deciding first, that the O’Keeffe Museum lacked standing in the case and, second, that the trial court had erred in applying the *cy pres* doctrine in too restrictive a manner. Specifically, it determined that the gift of the Stieglitz collection to Fisk was motivated by a general charitable intent, overturning the trial court’s decision that it was motivated by a specific intent that would have operated to bar *cy pres* relief. The case was remanded back to the trial court with directions to determine the final prong of the *cy pres* analysis: whether “compliance with

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17. *Cy pres* is “[t]he equitable doctrine under which a court reforms a written instrument with a gift to charity as closely to the donor’s intention as possible, so that the gift does not fail.” *Black's Law Dictionary* 444 (9th ed. 2009).
19. *Id.* at *4-5.
20. *Id.* at *5.
23. *See id.*
24. *Id.* at *36 & n.9.
25. *Id.* at *47-48.
the conditions imposed by Ms. O'Keeffe are impossible or impracticable.\textsuperscript{26} The parties are currently hopeful that they will be allowed to proceed with the deal.\textsuperscript{27} 

In 2007, Randolph College, a small college in Lynchburg, Virginia, petitioned the court for approval to sell a small number of the paintings that it had purchased with funds from a trust created by a donor for the purpose of forming "a permanent collection of art."\textsuperscript{28} The college had been put on warning in 2006 by the Southern Association of Colleges and Schools for spending its endowment too quickly, and sale of the paintings was part of a larger strategy to rebuild the endowment and improve the financial condition of the college.\textsuperscript{29} Angry alumnae, who may have been primarily concerned about the decision of the college to become co-educational,\textsuperscript{30} intervened and were granted a temporary injunction against the sale.\textsuperscript{31}

That injunction prevented the college from selling the paintings in the November 2007 auctions, a high point in art values.\textsuperscript{32} The injunction was lifted when the plaintiffs were unable to assemble the necessary $1 million bond to secure the injunction.\textsuperscript{33} In May 2008, the college sold only a single painting, Rufino Tamayo's \textit{Troubadour} for $7,209,000,\textsuperscript{34} determining that it was not advantageous to sell the other works at that time.\textsuperscript{35} The college did not lose its accreditation,\textsuperscript{36} and despite public criticism of its decision to

\textsuperscript{26} Id. at *49.
\textsuperscript{29} Id. at 3-4.
\textsuperscript{30} Dodge v. Trs. of Randolph-Macon Woman's Coll., 661 S.E.2d 801, 802 (Va. 2008).
\textsuperscript{33} See Klein, supra note 31.
\textsuperscript{35} Klein, supra note 31.
\textsuperscript{36} See Randolph College Family Advisory Council, http://www.randolphcollege.edu/x15119.xml (last visited Apr. 15, 2010).
deaccession art for operating funds, the college has indicated that it still intends to sell the three other works when it is profitable to do so.\(^{37}\)

In the spring of 2008, there were big floods in the Midwest, one of which inundated the University of Iowa Museum of Art\(^ {38}\) and caused $16 million in damages to the arts campus.\(^ {39}\) One member of the Iowa Board of Regents, Michael Gartner, thought it would be a good idea to have the University’s painting *Mural* by Jackson Pollock appraised in case the University needed to sell it to finance the repairs.\(^ {40}\) The outpouring of concern and condemnation was overwhelming, coming from the Association of Art Museum Directors, blogging critics, local newspapers, the Wall Street Journal, the Chronicle of Higher Education, and even Iowa’s Lieutenant Governor.\(^ {41}\) Unlike many university museums, the University of Iowa Museum of Art and its director were members of the American Association of Museums and Association of Art Museum Directors at the time, important organizations in the museum community. These organizations adhere to demanding standards for deaccessioning works.\(^ {42}\) In addition, the University had a policy containing procedures for selling art, which also limited the circumstances of any sale.\(^ {43}\) The Iowa Regents requested that the University conduct a study concerning the Pollock.\(^ {44}\) Completed in October 2008, that study estimated that the painting was worth $140 million.\(^ {45}\) It also revealed that 181,575 people visited the University of Iowa Museum of Art over the five years between 2003 and 2008,\(^ {46}\) a miniscule number of visitors compared to major museums.\(^ {47}\) On the receipt of the report, the Board of Regents concluded its

\(^{37}\) See Desrets, *supra* note 34.


\(^{41}\) See Iowa’s Pollock, *supra* note 40; REPORT, *supra* note 40, at 4, 6, 9.

\(^{42}\) See infra notes 147-151 and accompanying text.

\(^{43}\) See generally REPORT, *supra* note 40, at 8.

\(^{44}\) Id. at 1.

\(^{45}\) Id. at 4.

\(^{46}\) Id. at 7.

\(^{47}\) Posting of MoMA Monster Refuses to Shrink: NY City Council Committee Hearing
inquiry into the matter, and no further steps have since been taken to sell the painting.48

For $200 in 1878, Thomas Jefferson Medical College purchased a painting by Thomas Eakins depicting Dr. Samuel D. Gross, a Jefferson Medical College professor, lecturing a group of students.49 About 500 people a year would go to see it in a medical college building.50 On November 10, 2006, the Thomas Jefferson University Board voted to sell the painting for $68 million to the National Gallery of Art in Washington and the Crystal Bridges Museum of American Art.51 Philadelphia Mayor John Street immediately nominated the painting "for protection under the city's historic preservation ordinance, noting the painting's deep historical and cultural resonance throughout Philadelphia."52 A designation under that ordinance would allow the city to prevent it from being moved.53 The city never had to go through with that process because the deal the University struck with the intended purchasers gave local museums and government institutions forty-five days to match the offer.54 After a citywide fundraising effort and the sale of two paintings and two drawings, the Philadelphia Museum of Art and the Pennsylvania Academy of the Fine Arts managed to raise the $68 million needed to keep The Gross Clinic in Philadelphia.55

48. See Jaschik, supra note 38.
50. See id.
51. See id.
53. Vogel, supra note 49.
55. Id.
I. Understanding the Deaccessioning Conflict

A. Practical Explanations for the University Deaccessioning Trend

Why are universities suddenly deaccessioning art works, many of which they have held for decades? The first explanation is that art has become very valuable, and universities own a substantial amount of it. Universities generally own the art in their university museums. The Rose Art Museum does not own the art that it displays; Brandeis University does. If the museums within colleges and universities independently controlled their art collections, their singular focus on art and familiarity with museum norms would make them significantly less likely to turn to their collections for financial support. Compared to a diversified portfolio over time, art has been a surprisingly good investment. As of year-end 2009, compound annual returns for art were 5.5% (ten year average annual return) and 3.3% (five year average annual return), substantially exceeding the returns on stocks of -1.3% and -0.1% respectively. The years at issue in each story described above were bonanza years for the art market. From 2002 to 2007, annual growth in the value of art averaged almost twenty percent. Over longer terms, art has not performed quite as well as stocks, but it has not been a bad investment.

At the same time that art values were soaring, financial pressures on universities were increasing, prompting widespread searching for resources. Endowments have declined, state funding has declined, and universities have responded aggressively to financial conditions by cutting staff and programs and halting expansion projects. According to the most recent study by the National Association of College and University Business Officers, university endowments have declined by an average of 18.7% for the latest fiscal year (July 2008–June 2009), a devastating loss in

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58. See MEI & MOSES, supra note 32.
59. Id. at 2.
60. Id.
61. See id. at 4 fig.1 “Stocks outperformed art over the last twenty five years with a compound annual return ("CAR") of 10.4 percent compared to 6.5 percent for art. However, for the last fifty years the returns were very close with art achieving a CAR of 8.9% compared to the 9.4% for equities.” Id. at 2.
value. Universities have responded with cuts to all sorts of programs and have resisted privileging any single facet of their institutions. The formulas that universities use to determine their endowment spending will result in significantly less money over the next few years on account of these losses.

The search for value in university art collections is consistent with the latest public debate about university endowments. Until the market collapse in late 2008, the big question about endowments was whether universities were hoarding their resources. Universities came to lawmakers' attention for failing to provide current value from their considerable wealth, and it seemed possible that they would become subject to a mandatory payout rule. Under current law, only private foundations are required to pay out an annual fixed percentage of their endowments. Identifying the untapped value in university art collections is related to the pre-recession pressure on universities to extract current value from long-term investments because they are both about realizing current value from stores of wealth. While calls for compelling payouts died down as the wealthiest universities enhanced their financial aid programs with greater spending from their endowments, and endowment values declined, the idea of looking for untapped sources of revenue is even more important as the financial problems facing universities worsen.

The issue of deaccessioning art by universities in financial straits deserves attention because there are a huge number of art museums and

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68. See Conti-Brown, supra note 65, at 2-3.


galleries associated with universities, and the law is unclear. Because so many universities have museums, they are an important repository of art and objects, and it is important that the status of those collections and the universities’ responsibilities with respect to them be clear. There is enough art owned by universities to consider that the legal obligations might be defined uniquely for university-owned collections. The motto of the Association of College and University Museums and Galleries is: “Great Universities and Colleges Have Great Museums.” While it seems the motto is true, in at least some cases, it is not self-evident why it is and whether it should be.

The current pattern is predictable, though clearly undesirable: an educational institution decides to sell art, it gets pilloried in the media, people who may or may not have legal standing go to court, and everyone spends a lot of money on lawyers. Unfortunately, there is precious little law produced by this process to guide the behavior of university trustees and their challengers. Settlements can reduce costs for the parties, but the charitable community is then deprived of the benefit of clarification in the law. There are not even norms recognizing that universities have a special role in the art-deaccessioning debate. The public debate about deaccessioning assumes that it is a conflict concerning only museums.

While emotions may run too high when a deaccessioning issue arises, the problem seems to be a legal one: a university cannot be sure that its decision to sell some (or all) of the university’s art collection will withstand legal challenge. The university cannot even predict who will be allowed to oppose its decision, and there is no reason to believe that courts will settle this issue any time soon. Courts will be involved where there are restrictions attached to particular pieces of art and cy pres proceedings are required, but even there, institutions cannot be confident that unknown challengers will not intervene on a motion to the court. While courts might be the best institutional choice for resolving the issue, they have little

71. There are over 2000 participants in the Association of College & University Museums & Galleries (ACUMG) listserv. See David Robertson, Association of College & University Museums & Galeries, A Case for Membership, http://www.acumg.org/memberopps.html (last visited Apr. 15, 2010).


73. Strict application of standing rules could be the most important mechanism for controlling anti-deaccessioning litigation. Unfortunately, legal proceedings can consume significant resources even if they are ultimately dismissed for lack of standing.

74. The attempt to protect The Gross Clinic under Philadelphia’s historic-preservation statute can only be explained by too much excitement.

opportunity to comprehensively address it. Consequently, legislation may be necessary to create the proper standard for deaccessioning decisions, without resort to litigation in every case. There must be a better procedure for determining whether the Rose may close than slogging it out in court for the next decade.

B. Theoretical Source of the Struggle over University Art Collections

The practical explanations for the university-deaccessioning trend do not reach the source of the problem, and focusing on the market value of art and the financial troubles of universities will not produce lasting solutions. The problem can only be addressed by grappling with the underlying conflict, which is one of inconsistent conceptualization. The universities that have turned to their art collections as resources, and the critics who have attacked them for it, lack a common understanding of the nature of the public interest in those art collections and the role of the collections in the charitable mission of educational institutions. On account of those inconsistent perspectives, they disagree about the obligations of the trustees who oversee those institutions. The critics of university deaccessioning fail to distinguish museums from other institutions that own art—but are not primarily museums—because their approach to the issue is defined by the fact that it concerns art. To the contrary, universities attempting to sell art approach the issue from the perspective of their complex educational responsibilities. While art remains the subject of every deaccessioning case, this Article argues that is not the determinative legal factor. Because the question is one of mission implementation, the differences among institutions may justify different obligations with respect to the same subject. The public interest carried out by universities on the one hand, and museums on the other, diverge enough to justify one perspective on art collections for museums and another for universities. Those differing perspectives should justify different deaccessioning standards for museums and universities. This contextual approach to art collections is consistent with the private property approach, which imposes no obligation to protect, display, or lend to museums or private owners of art, simply because they are private owners rather than public or charitable institutions.

There are two distinct ways to conceptualize the art that institutions hold. Both are legitimate and both can apply at the same time to the same art. The first concept is art as "cultural property." In the cultural property conceptualization, there is something important about art to society that

76. See John Nivala, Droit Patrimoine: The Barnes Collection, the Public Interest, and Protecting Our Cultural Inheritance, 55 Rutgers L. Rev. 477, 479-81 (2003) (arguing that the Barnes Collection is cultural property).
imbues it with a common interest, whether it is owned by the government, private institutions, or even individuals. The key aspect of conceptualizing art as cultural property for purposes of thinking about the obligations of art-holding institutions is that the art is valuable in itself, regardless of its instrumental value, and that holding the art is itself fulfillment of charitable purposes. All works of art are held in a kind of public trust.

An alternative to the cultural property conceptualization is what I will call the “instrumental property” perspective. Unlike art as cultural property, this conceptualization resists treating art as a unique asset. Instead, the art is related to the mission of the organization because it enables the organization to carry out its charitable purpose. Instrumental property has a meaningful legal status only because it is held by a nonprofit organization. Compared to cultural property, there is nothing inherently worthy of legal protection in instrumental assets. Rather, their legal importance derives from their context. All the conventional assets that charities own are generally instrumental property, whether those assets are part of the institution’s endowment or part of the program assets used in operating the charitable activities. Nevertheless, charitable trustees have obligations with respect to both endowment assets and program assets.

C. The Consequences of Conceptualization as Cultural Property or Instrumental Property

The legal consequences that flow from the cultural property/instrumental property conceptualizations may conflict, with cultural property demanding greater protection than instrumental property. In disputes over deaccessioning, the two models might explain the divergent positions because anti-deaccessionists elevate continued public access to art above all other interests, in keeping with the common

77. See id. at 487 (arguing that because the Barnes Collection was public art “there is a legitimate public interest in its management and preservation which, in turn, justifies public intervention when that management goes bad or that preservation is threatened”).

78. Id. at 480 (“The Barnes Collection as an ensemble has a public value that transcends the value of its constituent parts.”).

79. See INT’L COUNCIL OF MUSEUMS, ICOM CODE OF ETHICS FOR MUSEUMS 2.0, at 3 (2006), available at http://icom.museum/ethics.html (“Museums have the duty to acquire, preserve and promote their collections as a contribution to safeguarding the natural, cultural and scientific heritage.”).

80. Id.

patrimony perspective of cultural property. Adherents to an instrumental property approach can tolerate greater uncertainty regarding public access in deaccessioned works in order to carry out other charitable purposes that they perceive as equally compelling, for which there is no room in the cultural property approach. If understood as cultural property, art is unique among the assets that institutions own. Cultural property classification reflects an inherent public interest in the objects themselves, and the government is justified in regulating and protecting them. This is the model underlying laws that treat antiquities as government property.

The cultural property perspective as applied to art implies a particular basis for tax exemption: furthering that public trust by protecting and maintaining cultural property should constitute a sufficient public benefit to qualify the organization as charitable under Code § 501(c)(3). This is not the approach generally taken by institutions that hold art, even museums. Under current practice, museums are generally exempt as educational organizations. Educational charities serve people, rather than objects, and the regulations define “educational” as “instruction of the public on subjects useful to the individual and beneficial to the community.” Adoption of the cultural property conceptualization of art means that museums could be “charitable” even if they serve no educational function. Museums do not need to be educational to qualify for tax exemption because the regulations define “charitable” to include “maintenance of public buildings, monuments or works.” Art as cultural property seems to fit nicely within that definition. It would not be unreasonable for museums to conceptualize art this way and for them to define their missions in terms of the stewardship of the cultural property they hold.

82. See Hector Feliciano, Owen Pell & Nick Goodman, Nazi Gold and Other Assets of the Holocaust: The Search for Justice, 20 WHITTIER L. REV. 67, 72 (1998) (“Art is unique and can often be distinguished from other assets.”).
83. See Nivala, supra note 76, at 542 (“We have come to recognize that government should act to preserve our cultural inheritance while acknowledging that such action requires explicit protection of both the private owner’s and the public’s interests.”).
84. See Christopher D. Cutting, Comment, Protecting Cultural Property Through Provenance, 32 SEATTLE U. L. REV. 943, 950 (2009) (“The United States’ first law aimed at the protection of cultural property was the Antiquities Act of 1906.”).
85. See A COMPANION TO MUSEUM STUDIES 443 (Sharon Macdonald ed., 2006) (“The tax code requires that charitable organizations serve a public purpose. In the case of museums this is an educational . . . purpose.”).
87. Id. § 1.501(c)(3)-1(d)(2).
The most vocal opponents of deaccessioning seem to adopt this cultural property conception and therefore fail to distinguish among types of institutions. Lee Rosenbaum argues that art is placed in museums for “the collective cultural patrimony of the people who live in this country. They are not fungible assets.” Others claim that “[t]he institution is there to safeguard the art. The art is not there to support the institution.” In New York, a bill was introduced in the legislature last year that would restrict the circumstances under which any museum (and some other non-museum nonprofit institutions) may sell their art. This reflects a strong notion of art as cultural property, very far on the spectrum towards public control and away from the private discretion that flows from the law of private property.

The demands that cultural property characterization places on holders of that property are unusual in the legal regime. Generally, the law in this country does not reflect strong notions of public rights in art owned privately—either by individuals, for-profit, or nonprofit institutions. Private property rights predominate. Some states, like California, have passed legislation that protects non-owner rights in art, and the federal government has adopted the Visual Artists Rights Act (VARA). But the legislation in this country seems to be more about the rights of artists than creating public rights in the art. Compared to European countries, the recognized “moral rights” in art are quite limited in the United States.

We can imagine a spectrum of regulation relating to art from strictly protecting it as cultural property at one end, to the other extreme of not

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92. See JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT 21 (1999) (“Until quite recently, it would have been correct to assume a total absence of restriction on owners [of art], at least in America.”).
93. CAL. CIV. CODE § 986 (West 2007).
95. SAX, supra note 92, at 22 (“[T]he law was protecting the art, even if only in the name of protecting the artist.”).
96. Id. at 21 (“While . . . France took the view that artists have an interest in works they create, known as droit moral, the United States had resolutely rejected even that limitation on owner autonomy.”).
recognizing anything special about art at all. While the cultural property model resonates, it ultimately fails to define the way people generally understand art. Therefore it is unsurprising that the law has failed to develop robust rights for either artists or the community vis-à-vis owners of art. Even though the public might recognize a shared loss in the destruction of a great work of art, the American culture of private property resists substantial legal demands on anyone who owns art. For art owned by private individuals (and business corporations), rejection of the cultural property perspective correspondingly strengthens ownership claims.

The uproar over decisions by universities reflects greater public interest in the nonprofit sector than the private sector even though charitable institutions are private organizations, albeit ones with public-oriented goals. The issue of categorization and its consequences for nonprofit organizations maps onto the more familiar debate about the public versus private nature of such institutions. An organization may have a public function that supports cultural property characterization for the property it holds. But charities are not homogeneous, and they are essentially private organizations with public missions, so the private property model is an appropriate starting point for analyzing them. However, for art owned by nonprofit organizations, rejection of the strict cultural property perspective is just a first step toward defining obligations. If art is an instrumental asset to an institution, then it still needs to be further categorized within the conventional taxonomy for assets owned by nonprofits—endowment assets and program assets. Characterization as an endowment or program asset will determine the content of the governing board’s obligations with respect to the property.

II. Context Should Determine Category.

A. Cultural Property Is for Museums.

The roles of art collections in the charitable missions of different institutions need not be, and should not be, uniform. The cultural property perspective and its focus on objects is only appropriate for institutions that have missions directly related to art preservation and stewardship, i.e. museums. This is because the nature of the institution and its mission—rather than the nature of the property—should determine the proper conceptualization along the spectrum from cultural property to instrumental property. As a consequence, the obligations of different institutions should

appropriately vary according to their places on that spectrum. Because universities have wide-ranging purposes beyond art preservation and stewardship, universities need to conceptualize their art as largely instrumental to their charitable missions and not primarily as cultural property.

Finding the right balance on the spectrum is complex for institutions that are not museums. The mission of museums is relatively narrow compared to the mission of universities. Because of their sharper focus, it makes sense for museums to conceptualize their collections more in terms of cultural property than instrumental property and self-select into demanding requirements for preservation and presentation. Members of the American Association of Museums (AAM) and the Association of Art Museum Directors (AAMD) seem to have done this by accepting strict deaccessioning standards as conditions of membership. Consider the following reflection of a cultural property approach from the AAM Code of Ethics:

The distinctive character of museum ethics derives from the ownership, care, and use of objects, specimens, and living collections representing the world's natural and cultural common wealth. This stewardship of collections entails the highest public trust and carries with it the presumption of rightful ownership, permanence, care, documentation, accessibility, and responsible disposal. 98

The AAMD, a more exclusive club 99 than the AAM with just 193 members, 100 has the strictest deaccessioning policy: "Proceeds from a deaccessioned work are used only to acquire other works of art—the proceeds are never used as operating funds, to build a general endowment, or for any other expenses." 101 This policy is consistent with a strong cultural property perspective because rules against deaccessioning resist treating art as a fungible asset. If the object's preservation is the objective

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99. Association of Art Museum Directors, About AAMD, http://www.aamd.org/about/ (last visited Apr. 15, 2010) [hereinafter About AAMD]. Only large institutions are eligible for membership in the AAMD because of its budget requirements, which require a professional staff and an annual operating budget equivalent to or exceeding $2 million for two consecutive years. Id.

100. Id.

of the institution, the object can never be sold to achieve another purpose. This is the burden of great museums.

B. University Art Collections Are Hybrid Cultural and Instrumental Property.

Universities have a harder task than museums in conceptualizing their art collections because they must determine what role the art plays in an institution’s mission where, by definition, it is not the central focus. Universities must weigh science labs against athletic facilities against financial aid. The cuts in programs and personnel that universities have suffered highlights the problem of incommensurable trade-offs that universities face. The art collection should not be immune from compromises, unless the art itself is unique or the art is functionally indispensable to the organization. Universities focused on their educational missions might decide that art education requires museum stewardship, but it would be a mistake to assume that universities need to own art in order for students to have access to art and art education.

A hybrid model that incorporates the perspectives of both cultural property and instrumental property, with a greater emphasis on the instrumental, best reflects the charitable mission for universities. University purposes are varied and complex; trustees need to exercise a high degree of judgment and compromise among competing objectives is unavoidable. University trustees need to understand the role that art plays in their educational mission and behave responsibly within that constraint. Sometimes that will mean sacrificing other interests for maintenance and preservation of an art collection, but in some cases, particularly for schools with severe financial troubles, deaccessioning may be a responsible decision.

Consider the case of the New York Public Library. Although it is not a university, like universities, it is an institution with a core mission, which an art collection is clearly related to, but is not central to. It has long owned some high-quality art. During the period that the universities described at the beginning of this Article thought it would be advantageous to sell artwork, the Library came to the same judgment about an Asher Durand painting that it owned. Despite media attacks, it sold Kindred Spirits to the Crystal Bridges Museum for $35 million. It had decided that, as a library, rather than keep the painting, it would be better to devote the money it could raise from its sale to create an endowment to acquire library research

102. See Responses to the Downturn: A Survey of Colleges, supra note 64, at A14.
Its trustees determined that the institution was not primarily a museum and that it was more important to devote its resources to core library collections. The Library's behavior reflects a hybrid property approach because the trustees recognized that the painting was a special object requiring extra careful consideration in its disposition. Respecting the cultural property aspects, the purchaser was a museum that will continue to provide access to the public and protection of the object. Reflecting the instrumental property aspects, the trustees treated the painting as a valuable commodity worth selling to enable the organization to invest in other assets that the trustees considered more relevant.

C. Legal Ramifications of Classification as Instrumental Assets

In addition to adopting elements of the cultural property model, the hybrid model incorporates the multi-faceted nature of instrumental property. Thus, decisions about art collections owned by universities must reflect both the special nature of art and the specific function of the collection within the university's set of resources. The category of instrumental assets encompasses a variety of resources that are not always clearly distinguished from one another. When art collections function as instrumental assets, they need to be divided into three further classes—endowment assets, program-related assets, and liabilities—in order to investigate the legal regime that should control the obligations with respect to the collections.

Charitable organizations are generally aware of the difference between their endowment assets and their program-related operating assets. Endowments are committed to investments that provide income to fund current expenses. They also represent a store of wealth that an organization might partially liquidate in challenging financial periods, but are generally considered permanent. Program-related assets are property that an organization uses to carry out its charitable activities. They can be valuable and long-lived assets, like buildings in which the organization runs its programs, but they are program-related because they are used in operations and not because they constitute financial resources. Program assets are different from endowments; they are used, rather than preserved. Institutions do not always think of their valuable assets as possible liabilities as well, but they are well aware of the continuing costs incurred in maintaining more assets, whether endowment or program-related. For example, program-related buildings demand a steady stream of funds for


105. See id.
upkeep, imposing substantial increased costs on institutions that expand their physical plant, even when the construction has been fully funded.

When owned by universities, art collections resemble all three of these categories, often simultaneously. They resemble portfolio endowments because they constitute valuable assets owned by an organization that are not used up in the course of operations over time. Art collections also need to be protected from loss and waste, just like financial endowments. Pursuant to state statutes governing endowment assets, institutions are obligated to manage endowments with a view towards preservation for permanent duration,\textsuperscript{106} which is how art needs to be maintained. At the same time, art collections resemble endowment assets because of their potential liquidity.\textsuperscript{107} Unlike the buildings in which a university operates its educational program, its art collection is movable and composed of multiple pieces that can be sold individually. Like the market for portfolio investments, there is a relatively liquid market in art; auction houses and private dealers make the sale of valuable art easy and efficient. Finally, the prices of art in the market as a whole have exceeded any reasonable range for consumer assets; on account of their extremely high values, art collections must be understood as investment assets, regardless of who owns them. Despite the stories at the beginning of this Article, art collections, similar to endowments, constitute a stock of wealth that organizations generally do not liquidate.\textsuperscript{108} The issue is as contentious as it is because deaccessioning for operating funds is rare, and the announcement that Brandeis made concerning the Rose Museum is unprecedented. These cases are important because they are a departure from the norm and therefore challenge the assumptions people have about art collections owned by universities.

Art collections resemble program assets because they are used in carrying out the mission of the organization.\textsuperscript{109} For universities, they are one among many assets that promote educational purposes—they are an important tool for students learning about art and a great resource for

\textsuperscript{106} See UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 4 (1972).

\textsuperscript{107} Auction houses exist for this precise purpose. They even have special departments for museums interested in buying and selling. See, e.g., Christie’s Museum Services, http://www.christies.com/services/museum (last visited Apr. 15, 2010).

\textsuperscript{108} See White, supra note 81, at 1041 (“Art museums present the paradox of being simultaneously very rich, because of the value of the assets they hold, and very poor, due to the illiquidity of those assets . . . .”).

\textsuperscript{109} See, e.g., Rose Art Museum, Mission Statement, http://www.brandeis.edu/rose/aboutus/mission.html (last visited April 15, 2010) (“The programs of the Rose adhere to the overall mission of the University, embracing its values of academic excellence, social justice, and freedom of expression.”).
Like other program assets, they cannot be outsourced to financial managers but must be managed by charitable trustees and the officers and employees whom they supervise. Unlike pure investments, and more like special property devoted to operations, the individual items in a collection are not fungible like financial assets.

Finally, art is also a liability. Compared to financial endowments, art is expensive to conserve, store and insure. In its petition for cy pres relief, Fisk University represented that it would need $560,000 to restore the gallery in which the Stieglitz Collection is displayed. Restrictions that require organizations to keep their art mandate that funds come from elsewhere for these kinds of expenses. In this way, art resembles capital improvements in operating assets, which permanently increase operating costs. But unlike those improvements, these costs for art collections may rival the benefits of those collections in the educational mission.

These three categories are important because they form the foundation for the regulatory scheme. Each of these categories demands different behavior from trustees, and the law governing behavior is somewhat clearer once we get to the level of these categories. The problem with university deaccessioning decisions stems from a lack of conceptualization of art collections in charitable institutions, and the consequent inability to map onto this set of rules. The law governing trustee behavior assumes that we know which category a particular asset falls, and the category determines the obligation. In this section, I consider how classification of university art collections as endowment assets, program-related assets, and liabilities might affect the legal rules applicable to trustee decisions and the consequences for deaccessioning.

1. Endowment

If the art collection is characterized as an endowment asset, it must be administered pursuant to the standards of "investment responsibility." Treating art collections as endowment assets would provide considerably more...
certainty than categorizing them as program assets, liabilities, or cultural property because endowments are subject to relatively specific statutory rules about management, liquidation, and modification. Versions of the uniform laws concerning management of institutional funds, Uniform Management of Institutional Funds Act (UMIFA) and Uniform Prudent Management of Institutional Funds Act (UPMIFA),\(^\text{114}\) have been adopted across the country.\(^\text{115}\) The statutory rules are based on managerial “prudence” that seeks to preserve value for the institution.\(^\text{116}\) As a practical consequence of applying these statutory standards, art collections subject to the rules for endowments would not be easy to sell, but they would not be impossible to sell either. Because of their conservative approach, applying the endowment rules to art collections would not be a bad solution for modulating the debate.

The rules for managing endowments under the uniform acts would permit universities to invest in art as part of a diversified portfolio. UPMIFA requires managers to consider total return from investments including income and appreciation,\(^\text{117}\) suggesting that art, primarily on account of its record as a good long-term investment, is a prudent endowment asset. In addition, managers must consider an asset’s special relationship to the charitable purpose of the institution in making decisions regarding endowment funds.\(^\text{118}\) That language suggests more permissive investment in items like art that are useful in the charitable mission.

Appropriation from an endowment for expenditure—i.e., selling the art—is also subject to a standard of prudence. For financial assets, the standard suggests moderation, which is not immediately translatable to investments in art. For works of art, there is no separable income to withdraw for current use, and the appreciation cannot be extracted separately from the capital. In this way, art collections fail to resemble some, but not all, endowment assets. Even for some strictly financial assets, holders cannot sell a part of an investment that has appreciated in value.

114. See generally UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT; UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT (2006).


116. See UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note ("The prudence standards in UMIFA have provided useful guidance, but prudence norms evolve over time. The new Act [,UPMIFA,] provides modern articulations of the prudence standards for the management and investment of charitable funds and for endowment spending.").

117. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3(e)(1)(E).

118. Id.
Thus, the question under the legal standard becomes how to liquidate the return consistent with the required prudence.

Under UMIFA, endowment funds can be withdrawn to the extent that the fund currently exceeds its “historic dollar value” (HDV), which is defined as the value of contributions to the fund.\textsuperscript{119} If art was acquired by an institution a long time ago, the HDV is likely to be significantly below the current fair market value, suggesting discretion for trustees to appropriate some amount for expenditure. However, the inseparable nature of art objects pose a problem depending on whether all of a university’s art is considered a single fund, or whether each individual artwork constitutes its own fund. If each work of art is a separate fund, then no sale is possible under UMIFA because every sale will, by definition, eat into the HDV. But if the entire collection of art is treated as a fund, or the fund consists of art and other assets, then the HDV limitation is unlikely to restrict sales. While the shortcomings of the HDV benchmark are widely acknowledged,\textsuperscript{120} its application to an art collection in these two alternative ways suggests a particularly arbitrary determination of prudence.

Most states no longer use HDV because they have adopted the revised version of the uniform law, which rejects the HDV concept. Under UPMIFA, prudence in appropriation for expenditure depends on a more contextual analysis in place of HDV, so trustees must consider the factors listed in the statute in any individual sale, but there are no bright-line limits.\textsuperscript{121} The core premise is that trustees must approach spending decisions with a view towards preserving the endowment; consideration of the duration and preservation of the fund is the first factor, among many, to be considered in appropriation decisions.\textsuperscript{122}

Art collections present an interesting case for the “preservation” imperative because preservation of art differs from preservation of other assets. Preserving financial endowments is about preventing losses in value suffered by the institution, but preserving art can concern the objects themselves in addition to their value to the institution holding them. Some institutions have trouble preventing the art objects in their care from deteriorating, which reflects a preservation problem in both respects. This was true in Fisk’s stewardship of the Stieglitz Collection.\textsuperscript{123} During her

\begin{enumerate}
\item \textsuperscript{119} \textit{Unif. Mgmt. of Institutional Funds Act} § 2 (1972).
\item \textsuperscript{120} See \textit{Unif. Prudent Mgmt. of Institutional Funds Act} prefatory note, Endowment Spending (“UPMIFA improves the endowment spending rule by eliminating the concept of historic dollar value . . . .”).
\item \textsuperscript{121} See \textit{Unif. Prudent Mgmt. of Institutional Funds Act} §§ 4(a)(1)-(7).
\item \textsuperscript{122} \textit{Id.}
lifetime, O'Keeffe expressed concern with the conditions under which the works were housed at the University.\textsuperscript{124} She offered to find them a better home, in spite of the fact that she had no right to take the works back because the gifts were complete.\textsuperscript{125} A claim of imprudence under UPMIFA might be compelling where an institution is unable to properly maintain its collection because it then wastes the value of its assets. In such a circumstance, it might be required, as the prudent course of action, for the institution to divest itself of the collection and replace it with something (like financial assets) that it is better able to preserve.

The objective of endowment preservation distinguishes situations in which universities sell art to pay the bills, and situations in which they sell art to bolster their endowment of financial assets. Institutions like Randolph and Fisk that plan to devote the proceeds of their art sales to their endowments\textsuperscript{126} should easily satisfy the UPMIFA prudence standard because they were not, in fact, appropriating for expenditure but were rather changing the composition of the assets in their endowment portfolio. Finally, another factor for trustees to consider in deciding what is prudent to appropriate for expenditure is “the purposes of the institution and the endowment fund.”\textsuperscript{127} The distinction between museums and universities might make a significant difference under this factor.

In addition to the rules for managing and appropriating from endowments, the investment responsibility rules include standards governing modifications of restrictions contained in gift instruments. Application of these rules to art collections could provide some needed clarity. Under the rules for endowments, the intent of the donor expressed in the gift instrument is a limitation on the fund, and institutions must seek court approval for any modifications to the terms of the gift.\textsuperscript{128} Court proceedings are necessary for institutions to sell art when the gift instrument restricts sales. Both Fisk University and Randolph College initiated court proceedings because the works they wanted to sell were gifts subject to restrictions (which may have affected their ability to sell).\textsuperscript{129} If

\begin{itemize}
\item \textsuperscript{124} Id. at *31-34.
\item \textsuperscript{125} Id. at *32-33.
\item \textsuperscript{126} See supra Part I.
\item \textsuperscript{127} See UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 4(a)(2).
\item \textsuperscript{128} Id. § 6(b).
\item \textsuperscript{129} In Randolph College, the art itself was not gifted, but the fund from which the art was purchased was a restricted fund. Depending on interpretation, the sale of the works may not have been restricted under the terms of the gift. See Complaint, supra note 28, at 2 (providing the will of a trustee which directed that the money she gave to Randolph was only to be used “to form a permanent collection of art”).
\end{itemize}
the endowment statutes were clearly applicable in those cases, courts might be more amenable to the institutions attempting to sell art because UPMIFA has more generous modification provisions than its predecessor or the common law: it allows *cy pres* modifications for wasteful restrictions, in addition to unlawful, impracticable, and impossible purposes. Fisk argued that maintenance of the collection was a drain on its other resources and that a sale of some of the collection would finance renovation of the gallery in which it was displayed. Application of the endowment rules might have led the trial court in *Fisk* to weigh the interests before it differently, with greater attention to the financial demands that the collection imposed on the school. It could have ruled for the University on the grounds that the restrictions in the gift operated to waste the University's other assets because the collection was not sufficiently endowed with money to support itself over time.

Applying the endowment rules to university art collections would have efficiency advantages because those rules would then provide a default against which donors and institutions could contract. A UPMIFA default might also give institutions some sorely needed leverage in their negotiations with donors because it contemplates modifications on wastefulness, which might encourage greater underwriting of restricted gifts. Under current law, there is no clear benchmark against which institutions and donors can begin negotiating gift restrictions. Consequently, restricted-gift contracts are more cumbersome to draft and to litigate than they might otherwise be.

The most important consequence of applying the endowment modification rules to art collections is that the regime would make clear that there is no need for court approval where there are no restrictions. Heirs of donors and other opponents of deaccessioning would like to see courts impose restrictions on art sales even where there is no restriction in the gift instrument. Treatment under the endowment rules would clarify when a modification is necessary at all. For example, the art involved in the Rose Museum dispute was generally not subject to donor-imposed restrictions, and Brandeis did not initiate a court proceeding prior to announcing its decision to deaccession. Nevertheless, others hauled the University into court as though the default rule prohibited Brandeis's

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130. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(c). UMIFA, however, only allows the governing board to go around donor restrictions "if written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification." UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(b).

131. See supra text accompanying notes 13-27.

132. See Daniel Grant, The Brandeis Bombshell: Is the University's Museum Just a Rose to Be Plucked?, WALL ST. J., Feb. 3, 2009, at D7 ("Restrictions on gifts to the Rose Art Museum tend to be very few . . . ").
Because Massachusetts's version of UPMIFA (adopted after the trustees announced the decision, but before any art was actually sold) is not clearly the governing law in this situation, the standard that will be applied to Brandeis, if it pursues the sale and the suit continues, is unclear. Much of the art owned by universities is not subject to restrictions, and where that is the case, if the investment-responsibility rules control, the trustees would be governed by the prudence standard—rather than the more demanding modification rules—in deciding how to manage and whether to spend from the fund.

2. Program-Related Assets

If art collections are classified as program-related assets, the applicable legal rules consist of the fiduciary duties of charitable directors: care, loyalty, and obedience. These rules are characterized by significant discretion for trustees and protection of the best-judgment rule for decisions concerning operation of the organization's program. The best-judgment rule protects trustees from challenges to their decision, as long as those decisions were made with sufficient inquiry and without conflicts of interest. In this category, we should have less court involvement than in decisions regarding endowments on account of the room trustees have for exercising directorial judgment. The investment responsibility rules applicable to endowments create obligations that can be enforced in court, but in this category, courts refrain from acting as super-trustees in cases in which they are called upon to second-guess the wisdom of trustee decisions.

133. See Abramson, supra note 6.

134. MASS. GEN. LAWS ch. 180A, § 11 (1975) (current version at MASS. GEN. LAWS ch. 180A, § 1 (2009)).

135. See Howards, supra note 1, at 11 (“Most artworks are given as unrestricted gifts . . .”).

136. This is a variant of the business judgment rule. See Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (“The business judgment rule . . . is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”).

137. See PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS, supra note 111, § 365.


139. See Fleck v. Cent. Steel & Wire Co., No. 92-C-7988, 1993 U.S. Dist. LEXIS 5951, at *8 (N.D. Ill. Apr. 30, 1993) (“This Court does not sit as a super-administrator or a super-Trustee . . . rather the role of this Court is limited to determining the rationality of the Trustees’ decision and the absence of bad faith on their part.”).
Best-judgment rule protection does not imply unlimited power.\textsuperscript{140} Under the fiduciary-duty standard, trustee discretion is limited by gross negligence (or simple negligence, if organized as a trust) and conflict of interest rules.\textsuperscript{141} Thus, applying the fiduciary standards to university trustees making deaccessioning decisions allows exercise of judgment regarding the best interests of the institution but not unreviewable freedom. In fact, the duty of care demands careful consideration of a decision to sell an artwork long associated with the institution. Closing a university's museum and selling all the art demands careful study. Massachusetts's Attorney General was justified in getting involved in the Rose Museum transaction, and the Brandeis decision may have been deficient under a straightforward fiduciary-duty analysis. Consider the following excerpt from a letter to the Brandeis community from its own Department of Fine Arts:

Late Monday afternoon (January 26) the Department of Fine Arts was notified that the University Board of Trustees resolved to disband the Rose Art Museum and sell the collection at auction to raise funds for the university. In addition to despairing at the Trustees' action, we wish to make clear that at no point in the decision making process was the Department of Fine Arts faculty consulted. Neither was there any communication regarding the decision with the Rose Board of Overseers on which a member of the faculty sits. Nor was any reference made to the museum at the university-wide faculty meeting last Thursday (January 22) when strategies to confront the current fiscal crisis were discussed.\textsuperscript{142}

How would an attorney general analyze the trustees' action if this were the description of how the university handled the sale of some very valuable scientific equipment, for example, instead of the Rose Museum collection? Governance questions would arise, even though the sale concerned wholly program-related assets without any special status under the law. If the trustees determined that the university already owned enough of that type of equipment, or if the only faculty member who knew how to use the equipment retired, or if there were not enough students...
interested in the field of study that made the equipment necessary, the trustees might have decided that it was not worth keeping, insuring and maintaining. Some people would be upset, of course, because a major might be discontinued, or a lab might have to close, and it might have been shortsighted for the trustees to sell. But under the best-judgment rule, even foolish decisions are protected from challenge in court if they are made after proper deliberation with sufficient information and no conflict of interest.\textsuperscript{143} Given the precipitous dip in the art market that occurred at the time that Brandeis announced its decision, a sale at that moment might have seemed foolish, but mere foolishness is not a fiduciary-duty violation.\textsuperscript{144}

The problem that the Fine Arts Department’s letter raises about the Rose decision was that the trustees apparently made it without a full and fair consideration of the costs and benefits of deciding to close the museum. Without the views of the fine arts faculty and the Rose Board of Overseers, the trustees may have underestimated the important contributions of the Rose to the Brandeis mission. How could the trustees decide whether the museum was an important part of the mission without consulting the people who knew what the role of the museum was in both the educational program (the fine arts faculty) and in the University’s fundraising (the Rose board)? Even without any special limitation on the sale of art by institutions, the trustees’ actions may have been grossly negligent and in violation of the duty of care.\textsuperscript{145} In this case, it is appropriate for the Attorney General to prevent the sale, but that does not imply that it is always a violation of fiduciary duty to deaccession art holdings.

The solution to this problem is process, which is the solution of choice in questions of care. In the Sibley Hospital case, the leading case on the duty of care in nonprofit corporation law, the court imposed policies


\textsuperscript{144} See Gagliardi v. Trifoods Int’l, Inc., 683 A.2d 1049, 1052-53 (Del. Ch. 1996) (“[The business judgment rule] provides that where a director is independent and disinterested, there can be no liability for corporate loss, unless the facts are such that no person could possibly authorize such a transaction if he or she were attempting in good faith to meet their duty.”).

\textsuperscript{145} “The duty of care requires each governing-board member—(a) to become appropriately informed about issues requiring consideration, and to devote appropriate attention to oversight; and (b) to act with the care that an ordinarily prudent person would reasonably exercise in a like position and under similar circumstances.” \textit{PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS}, \textit{supra} note 111, \S 315.
and procedures on the organization to ensure that sufficient investigation and deliberation would take place.\textsuperscript{146} Where art is concerned, sufficient process is particularly important because it can guarantee that the cultural property aspect of the property receives some consideration in the decision. The best way to accommodate both the cultural property concerns and the program objectives of an organization is through enhanced process, which is in keeping with the direction of nonprofit fiduciary duty law generally.

The problem with deaccessioning decisions where art collections are program-related assets goes beyond fiduciary duties. Public criticism of the Brandeis trustees' decision was not based on the trustees' failure to exercise care, but on the University's failure to adhere to museum expectations of behavior. Industry standards may apply when program assets are at issue, and the AAMD and AAM both have demanding standards for deaccessioning.\textsuperscript{147} For member museums, selling art for operating funds is cause for loss of accreditation and censure by the industry organizations.\textsuperscript{148} In a position paper published by the AAMD, the standard is unequivocal: "Proceeds from a deaccessioned work are used only to acquire other works of art—the proceeds are never used as operating funds, to build a general endowment, or for any other expenses."\textsuperscript{149} In a similar vein, AAM's Code of Ethics for Museums requires that "[p]roceeds from the sale of nonliving collections are to be used consistent with the established standards of the museum's discipline, but in no event shall they be used for anything other than acquisition or direct care of collection."\textsuperscript{150} Director members of the AAMD and museums that are members of the AAM have represented to the world that they intend to abide by the deaccession policies of the associations by dint of their membership.

However, it would be a mistake to impose industry standards as the legal benchmark, particularly to institutions that are not primarily participants in the industry. The Rose was not a member of these organizations, so they had no jurisdiction over it.\textsuperscript{151} Nevertheless, Ford W.

\textsuperscript{146} See Stern, 381 F. Supp. at 1018.

\textsuperscript{147} See DEACCESSIONING, supra note 101.

\textsuperscript{148} See Press Release, Association of Art Museum Directors, AAMD San Diego Meeting Featured Lively Discussion of Current Issues Affecting America's Art Museums (Feb. 2, 2009), http://www.aamd.org/newsroom/documents/2009PostSanDiegoMeetingPressRelease_FINAL.pdf ("When AAMD was informed that the National Academy had violated the Association's prohibition against using funds from deaccessioning for operations, AAMD censured and imposed sanctions on the National Academy.").

\textsuperscript{149} DEACCESSIONING, supra note 101 (emphasis added).

\textsuperscript{150} AAM, Code of Ethics, supra note 98.

\textsuperscript{151} For the Rose Art Museum, and many other university-affiliated museums, the standards of the AAM are not binding because university museums often fail to become
Bell, President of AAM issued a statement condemning Brandeis for its decision to close the Rose, claiming that “Brandeis University is in fundamental violation of the public trust responsibilities it accepted the day it founded the Rose Museum.” The statement is most interesting for the following final paragraph:

If it cannot afford to maintain and exhibit its collection, we urge Brandeis University to seek another steward of it. There are many fine museums in the region capable of caring for these works, even on a temporary basis, while the university explores other options. In choosing an alternate solution to the sale and irrevocable loss of the collection that was entrusted to its care, the university would serve as a role model for its students, faculty and community.153

This statement reveals the conflict that museum industry standards can create for universities. Bell suggests that it would have been more ethical for Brandeis to relocate the art to another museum in the area without accounting for the interests of the University’s educational program in such a relocation. While the statement is not precise about what it means to find another steward for the art, if the suggestion is that Brandeis transfer the art to a Boston-area museum, the ethical demands of the museum association undermine the fiduciary obligations of the University trustees. Brandeis’s trustees’ central obligation is to the educational mission of the University. If having the art on campus is a necessary component of that mission, as some have argued,154 then moving it to the Museum of Fine Arts in Boston, for example, would not serve that objective.

Bell’s perspective, predictably, is the cultural property perspective of museums, and not the more nuanced hybrid perspective that universities need to have. As fiduciaries to a university, the central question for the

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153. Id.

154. See Letter from Annette DiMeo Carlozzi, Curator of Am. & Contemporary Art and Dir. of Curatorial Affairs, Blanton Museum of Art, Univ. of Tex. at Austin, to Brandeis Univ., http://www.brandeis.edu/rose/letters.html (“An art museum is absolutely central to the teaching mission of a liberal arts university.”) (last visited Apr. 15, 2010).
trustees is whether they have an obligation, in seeking another steward for the art, to realize maximum value for the university in the process. Some commentators have argued for a compromise in the deaccessioning debate that would favor museum acquisition over private acquisition of deaccessioned works.155 While that compromise acknowledges the public interest in access to art, it ignores the obligations that the selling institution's trustees have to stewardship of that institution's resources. One of the lessons of the lengthy litigation in the Fisk case is that museums will try to acquire art at a discount from financially strapped universities. The proposed settlement, under which Fisk would have sold Radiator Building to the O'Keeffe Museum for $7 million, was rejected by the Tennessee Attorney General because Fisk received other offers of up to $25 million for the painting.156 A rule that favors museum purchasers over sales to the highest bidder will operate as a wealth transfer from universities to museums. Without a compelling reason why museums deserve that transfer from universities, it seems to be a dubious rule. In fiduciary-duty terms, it might be a waste of university assets for the collection to be “cared for” by another institution or sold for significantly less than its fair market value, when it could be a source of significant revenue for the school. Waste of corporate assets is the one foolish action that is not protected by the business judgment rule in the standard corporate law context.157

Rather than imposing industry standards on institutions that have not chosen to be in the industry associations, it is better policy to have a variety of standards for deaccessioning decisions. A different—lower—standard for universities allows them to better serve their charitable purposes, but it is also better for donors because it gives donors more specific choices. If the rules are clear, then donors can select the standard they want. The

155. See Dobrzynski, supra note 12 (suggesting that museums be allowed to deaccession works for operating funds, subject to the review of an impartial arbitrator, and only if the work were offered to museums before going to public auction); see also White, supra note 81, at 1063-64 (“Courts should encourage directors to use their best efforts to facilitate a sale that is profitable and keeps the artwork available for public observation.”).


157. See Fogelson v. Am. Woolen Co., 170 F.2d 660, 662 (2d Cir. 1948) (“Courts are properly reluctant to interfere with the business judgment of corporate directors; they do so only if there has been so clear an abuse of discretion as to amount to legal waste.”).
possibility that a university museum may more easily sell paintings forces donors to focus sharply on the nature of their charitable intent and decide whether they are primarily interested in presenting the work in a particular place or primarily interested in supporting the recipient institution.

Consider the Fisk dispute through this lens. If Georgia O'Keeffe were alive, she probably would not oppose Fisk's decision to sell a partial interest in the Stieglitz Collection to the Crystal Bridges Museum. O'Keeffe's correspondence with Fisk indicated that she was concerned that the collection receive proper care,\textsuperscript{158} and Crystal Bridges will clearly satisfy that interest, with state of the art facilities, programs, and conservation.\textsuperscript{159} As a cultural property, the collection will likely be seen and studied by more people if the proposed sharing with Crystal Bridges is approved since the museum will be a major cultural destination and an active participant in inter-museum loans (it has already loaned its artworks to major museums).\textsuperscript{160} More importantly, O'Keeffe gave the collection to Fisk because she cared about Fisk succeeding. Her intent was to improve Fisk's position. Consider the trial court's finding about why O'Keeffe gave the Stieglitz Collection to Fisk:

As to her reasons for gifting the Collection to Fisk, O'Keeffe wrote "because I think it a good thing to do at this time and that it would please Stieglitz."... Given the circumstances of this time, O'Keeffe's statement makes clear that giving the gift to Fisk was a "good thing" because it would send a message to America that African Americans had much to offer and contribute to society, just as whites did. This statement and gesture about race, the Court finds, is Ms. O'Keeffe's motivation for giving the donation to Fisk.\textsuperscript{161}

It was clear that O'Keeffe knew how to donate her works for maximum preservation and exposure—the rest of the collection mostly went to major museums.\textsuperscript{162} If a donor has valuable art to donate, she can...
decide to donate it to a university with a broad mission, or to a museum that is a member of the AAM whose director is a member of the AAMD. If the donor knows that the university is subject to a lower standard than the museum for selling the painting for operating funds, she must decide if her primary interest is enriching the university and improving its programs, or preserving the painting permanently for educational purposes. This is not such a bad choice to impose on donors, but it is important that the choice be clear.

Under current law, gifts of art are privileged, and tax law has encouraged donors to give artworks even where their primary motivation is support of the university and not stewardship of the art. This is on account of the fair market value deduction allowed for gifts of art that are connected to the charitable mission of the recipient organization, a standard that easily applies to museums and universities that have any art-education programs. The donor may have been just as willing to give the university cash, but the charitable deduction for a donation of art is likely to be much more advantageous to the donor than a contribution of the art's value in cash. Although the consequences are substantial for individual institutions involved, the public interest is served, albeit in different ways, as long as one of the institutions receives the gift. If the public interest in access to art is more important than education, the museum gift should be favored compared to the university gift. But tax law reflects neutrality between charitable purposes of universities and charitable purposes of museums. If that is a desirable policy stance, then the cultural property model must be rejected for universities, and art stewardship should not be


164. See Carolyn M. Osteen, Special Issues for Cultural Nonprofits, in 2 Mass. Nonprofit Orgs. § 18.5.1 (MCLE, Inc. rev. ed. 2004) ("A gift to a public charity of tangible personal property... is deductible to the extent of the full fair market value of the contributed property, only if it is 'reasonable to anticipate' that the charity will use the property for some... exempt purpose.") (citing I.R.C. § 170(e)(1)(B)(i) (2006); Treas. Reg. § 1.170A-4(b)(3)(ii) (2009)).

165. See Berus, supra note 163, at 31-32 ("Donated property that is appreciated long-term... can be deducted at its full fair market value. On the other hand, the amount your client can deduct for a contribution of ordinary income property is generally only the client's basis in the property... not the full fair market value.").
privileged compared to other charitable functions. The contextual approach to deaccessioning is consistent with tax law's neutrality among charitable purposes.

3. Liabilities

The final category—liabilities—is the least recognized with respect to art, for good reason. Even when collections impose significant costs on the institutions that own them, art remains primarily an asset, not a liability, so the rules for endowments and program-related assets should control decisions about art collections owned by universities. But if the law recognized the liability aspect of art collections, we might have better rules to accommodate that feature and reduce the burden of maintaining an art collection. In this regard, there is mostly a blank slate on which to create law. So here are a couple of suggestions that might prevent deaccessioning problems from arising.

First, the tax law might recognize the liability problem and encourage gifts that underwrite the costs of upkeeping art by increasing the charitable contribution deduction available for those gifts, at least to the level necessary so that gifts of art do not create greater donor benefits than gifts that underwrite the maintenance of that art. This suggestion attempts to even out the incentive for gift-giving that is currently skewed in favor of gifts of art compared to gifts of money. Second, the state law rules governing cy pres or deviation might address the burden that collections place on institutions. As described in the context of the Fisk case above, where gifts of art are subject to restrictions, a court determination is necessary to release the restrictions, except where the donor is willing and able to agree to the modification. The reviewing court must determine that it is impossible or impracticable (or wasteful, in some states) for the organization to comply with the restrictions in order to release them. The kinds of restrictions that attach to gifts of art can be particularly expensive. For example, a gift instrument might require that the collection always be displayed to the public, or that it always be shown intact, or that no work

166. See supra notes 163-165 and accompanying text.
167. Black's Law Dictionary defines “deviation doctrine” as “[a] principle allowing variation from a term of a will or trust to avoid defeating the document's purpose.” Id. at 516.
168. See Unif. Mgmt. of Institutional Funds Act § 7(b) (1972) (“If the court finds that the restriction is obsolete, inappropriate, or impracticable, it may by order release the restriction in whole or in part.”).
169. See Unif. Prudent Mgmt. of Institutional Funds Act § 6(b) (2006) (“The court . . . may modify a restriction contained in a gift instrument . . . if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if . . . a modification of a restriction will further the purposes of the fund.”).
may be sold.\textsuperscript{170} The limitations imposed on the Barnes collection were all very costly because they limited the admission price, travel of the collection, and the number of visitors allowed.\textsuperscript{171} The law could recognize the liability aspect of art collections by considering these restrictions, along with the ongoing costs and the supporting endowments in \textit{cy pres} and deviation proceedings. Where a donor has given sufficient funds to maintain the works, a court might be more strict in upholding restrictions. But where the art primarily constitutes a liability for the institution, rather than an asset, courts should be more willing to modify donor restrictions.

Another issue connected to the liability aspect of art collections is disclosure. The current treatment of these collections lacks transparency. While disclosure is relevant to the asset side also, the current practice concerning art collections seems to over count the liability and ignore the asset value. The Metropolitan Museum of Art included the following note in its latest financial statement:

The collections are maintained for public exhibition, education, and research in furtherance of public service, rather than for financial gain. In conformity with accounting policies generally followed by art museums, the value of the Museum's collections has been excluded from the Balance Sheet, and gifts of art objects are excluded from revenue in the Statement of Activities. Purchases of art objects by the Museum are recorded as decreases in net assets in the Statement of Activities. Pursuant to state law and Museum policy, proceeds from the sale of art and related insurance settlements are recorded as temporarily restricted net assets for the acquisition of art.\textsuperscript{172}

This practice means that the art collection does not show up as an asset at all on the museum's financial statements, and at least some universities with art collections have apparently followed this example.\textsuperscript{173} Nevertheless, "gifts and grants" are included in museum revenue,\textsuperscript{174} creating an apparent inconsistency between gifts of art and other gifts to the

\textsuperscript{170} The Barnes Collection is a good example of a donor putting expensive restrictions on art. \textit{See} Nivala, \textit{supra} note 76, at 485-86 ("He [Barnes] displayed... works in a novel, intermingled manner... he ordered that his arrangement be maintained without change.").

\textsuperscript{171} \textit{See id.} at 494-95.


\textsuperscript{173} The Metropolitan Museum of Art's financial statements do not list their art collections as assets. \textit{See generally id.}

\textsuperscript{174} \textit{See id.} at 52 (showing twenty-eight percent of The Metropolitan Museum of Art's revenue to come from gifts and grants).
museums. The maintenance costs are also reflected in the financial statements. The Internal Revenue Service’s new Form 990, which tax-exempt organizations must file, includes a section that organizations with art collections must complete. However, the disclosure required is derivative of the financial statement reporting of the organization, so fails to provide additional transparency.

In addition, institutions occasionally buy and sell art, and then the costs/proceeds of those sales do appear in the financial statements. Before the Rose Art Museum debacle, Brandeis had quietly sold artwork, the gains from which it reported on its 2007 Form 990—over $5 million. In The Metropolitan Museum of Art’s annual report, the cash proceeds from deaccessioning appear in the income statement as revenue from “non-operating assets.” Because museums do not treat their art collections as endowment assets in the numbers that they report, though occasionally the artwork does turn into money, it appears as if the proceeds materialize from thin air. Until it is sold, the art is invisible to the public perusing an institution’s disclosures (and sometimes literally because hardly anyone visits it before a deaccessioning battle, as in the case of The Gross Clinic). When financial information about a work is disclosed on account of a sale or purchase, it can consequently give a misleading picture of the institution’s financial condition and management.

CONCLUSION: PROPOSALS TO CLARIFY THE TREATMENT OF UNIVERSITY ART COLLECTIONS

The major contribution of this Article is the taxonomy that it describes to explain the current confusion over university deaccessioning and its argument for a contextual analysis of institutional obligations in the law of nonprofit governance. Nevertheless, it may be helpful to map out the practical consequences of the analysis and how the law might reflect the multi-functional role of art in the lives of organizations other than museums. As I have argued, for universities, the legal standards need to reflect the hybrid nature of art as both cultural property and instrumental

175. See id. at 53 (showing seventeen percent of The Museum of Metropolitan Art’s operating costs are for maintenance and operating services).


178. See ANNUAL REPORT, supra note 172, at 59, 61 (identifying “changes in net assets pertaining to acquisition and deaccession of collection items” as being part of non-operating assets).
property within the university’s mission.\textsuperscript{179} Within the instrumental, we also need to acknowledge the complex role of the art collection in the life of the institution and its nature as endowment, program asset, and liability.\textsuperscript{180} The dominant character of a collection will ebb and flow over time, and vary from one institution to another. Trustees are in the best position to weigh these competing concerns.

To reflect both the cultural property and instrumental property aspects, it would be appropriate for the law to impose some heightened standard for decisions respecting deaccessioning from university art collections for purposes outside the strict museum standards, without privileging art collections too much compared to other assets owned by universities. I would propose that nonprofit law loosely borrow from the jurisprudence of takeover defenses in the business law area and apply an \textit{enhanced} best-judgment rule to decisions to sell art.\textsuperscript{181} Applying an enhanced standard to deaccessioning decisions serves to make clear that art collections are special, and trustees should recognize their exceptional nature at every decision they make concerning them.

Enhanced deliberation should apply to acquisitions of art, as well as dispositions, so that gifts of art are accepted by universities with extra care. Universities should consider whether they can afford to maintain and display the art they acquire. They should adopt parameters for endowing the upkeep of their collections, and attempt to raise maintenance funds alongside gifts of art, particularly when the gifts are restricted. The proposal for equalizing the tax treatment of art and cash for underwriting gifts of art suggested above\textsuperscript{182} would make it easier for institutions to maintain collections that they own. Universities or other organizations concerned with university-owned collections could design templates for gifts and policies for underwriting art so that universities know what their responsibilities will be in maintaining collections. Without guidance, it may be difficult for institutions to make a realistic assessment of what it takes to keep a university museum operating in perpetuity.

Decisions about deaccessioning should likewise be governed by a rule of enhanced deliberation, without courts usurping the discretion of trustees. Both the endowment rules and the program asset rules, as well as the

\textsuperscript{179} See discussion \textit{supra} Parts I.B-II.B.

\textsuperscript{180} See discussion \textit{supra} Part II.C.

\textsuperscript{181} In \textit{Unocal Corp. v. Mesa Petroleum}, 493 A.2d 946, 954 (Del. 1985), the Delaware Supreme Court recognized an “enhanced duty” of directors responding to takeover threats, and imposed a requirement that their defensive actions be reasonable in relation to the threat to the corporation. This proposal loosely borrows that approach by requiring extra attention to a particular issue that would be reviewable by a court, but then protecting trustee decisions under the best-judgment rule where procedures were sufficient.

\textsuperscript{182} See discussion \textit{supra} Part II.C.3.
business-law cases, vest ultimate decisionmaking authority in the governing body, though the contours differ somewhat. The law generally recognizes that it's a good idea to let the professionals do their work, and this is good policy for nonprofit organizations as well as business organizations. Unfortunately, the challengers to university deaccessioning decisions misunderstand the law and the obligations that university trustees have to their educational mission. To correct this misconception, courts need to strictly apply standing rules to prevent unwarranted injunctions against sales decisions, such as the one temporarily imposed on Randolph College.

Courts also need to make clear that the American Association of Museums' and the Association of Art Museum Directors' policies are not legal rules enforceable against all institutions that hold art collections. An enhanced best-judgment rule for deaccessioning decisions would impose a higher standard of investigation and transparency to reflect the importance of art to the public interest, but remain procedural, in keeping with the dominant approach of nonprofit governance law. The purpose and effect of enhanced deliberation would be to make it a little bit harder for a university to sell art than securities, but not impossible. Universities with art collections should have deaccessioning policies, along with the other policies that have become standard for good nonprofit governance. We should expect that university deaccessioning policies will differ from museum policies and reflect a greater willingness to deaccession. The key function of such a policy is that it creates necessary frictions to slow down the institutional response and prevent panic-induced selling. Going a step further than simply allowing universities to design their own policies, states may want to require that institutions follow prescribed procedures in reaching decisions about deaccessioning. But in no case should university trustees lose the power to assess the role of the art collection in their charitable mission.

Brandeis should have collected sufficient information, consulted interested parties, and notified the Massachusetts Attorney General's Office when it decided to close its museum and sell $350 million worth of art. Better examples of sufficient deliberation include the University of Iowa and the New York Public Library. After the flood, Iowa's process minimized legal action and kept the Pollock at the University: the state regents requested a report, the University prepared it in consultation with a

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183. See discussion supra Part II.C.1-2.
184. See supra notes 28-37 and accompanying text.
185. The new Form 990, which exempt organizations must file with the Internal Revenue Service, requires that organizations state whether they have conflict of interest policies and whistleblower policies, among others. See IRS Form 990, Part VI, Section B.
186. See supra notes 1-10 and accompanying text.
variety of people, and the regents dropped the subject. The University also has procedures for sales that it would have followed if it determined to sell the Pollock. While good process will often slow things down, encourage fundraising, and prevent sales, it also might support a decision to sell. The New York Public Library’s sale of *Kindred Spirits* is also an example of thorough process leading to sale. The library had convened an art committee chaired by trustee Neil Rudenstine, a former Harvard University President, which prepared an exhaustive internal report and deliberated for two years in reaching its decision to sell the painting. The Charities Bureau of the New York Attorney General’s Office approved the sale. An enhanced deliberative process should serve as a defense against any legal challenge, and a model for good nonprofit governance.

On the transparency issue, states might want to mandate more clear disclosure concerning art collections than the Form 990 requires so that interested parties are at least aware of how an institution is conceptualizing its art collection, pursuant to the taxonomy described in this Article. The financial statements should not allow universities to create value from nothing, as seems to occur under the current standards. States might also mandate that institutions make public decisions of what they deaccession for operating funds so that donors and others can assess whether an institution is shifting its focus, addressing financial challenges appropriately, or acting recklessly. The Indianapolis Museum of Art offers a model of a searchable database of deaccessioned works on its website. Transparency accompanied by clear trustee power is far preferable to the current regime of little transparency and ambiguous legal standards.

In another project, I will explore more fully the nature of the public’s interest that should inform the legal standards for art collections. There is a legitimate fear about art leaving the charitable sector and falling into private hands, never to be seen by the public again. However, the art at issue in the cases of university deaccessioning discussed here have not generally presented that problem. Trustees deciding whether to sell need to consider the effect their decision will have on protection and accessibility
of the art at issue, but their fiduciary obligations run to the university. Sale to a museum is generally desirable because museums are good at preservation and presentation of art—better than universities. Fisk's proposed arrangement with Crystal Bridges, which would allow each of them to show the collection for half the year, seems to lose virtually nothing for the Fisk art students and the people of Tennessee, while gaining quite a bit for the people of Arkansas and for the preservation of the collection. Fisk's other educational programs also benefit from the arrangement. Attorneys general should be careful to consider the broader public interest in art and contain their parochial instincts when consulting with universities over their deaccessioning decisions.

Finally, university deaccessioning is a misguided focus for those who fear that the public's access to art may be diminished. Legal encouragement for charitable gifts is a much better approach for maximizing public access to art than a campaign of publicly shaming universities in financial distress. Those who are really concerned about the public's loss of access to art should redirect their energies toward reenactment of the estate tax, which is repealed at the moment.194 A robust estate tax, with its deduction for gifts to charities, is much more crucial to protecting the public interest in art than a rule that would require that universities go bankrupt before they can sell their art collections.
