

ART OR ASSETS: UNIVERSITY MUSEUMS AND THE FUTURE OF DEACCESSIONING

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I. INTRODUCTION

In the rolling Ozark hills of northwest Arkansas, the next great American art museum is poised to welcome its first visitors. When it opens in 2011,¹ the Crystal Bridges Museum of American Art in the town of Bentonville, Arkansas (population 36,857),² “is expected to house one of the world’s greatest collections of American art.”³

A small Arkansas town may seem an unlikely place for a major art museum were it not for Bentonville’s significance as the home of Wal-Mart Stores, the world’s largest corporation.⁴ While Wal-Mart itself is not directly connected to the museum,⁵ the museum’s driving force is Alice Walton, the daughter of Wal-Mart founder Sam Walton. Alice Walton serves as Chairman of the Board of Crystal Bridges and sits on the Board of the Walton Family Foundation.⁶ Walton has an estimated net worth of \$21.2 billion,⁷ making her the third-richest woman in the world.⁸ In 2009, it was estimated that Walton, her family, and the Walton Family Foundation had contributed an estimated \$317 million to the museum, which had

1. See *Crystal Bridges Museum*, CRYSTAL BRIDGES MUSEUM OF AM. ART, <http://www.crystalbridges.org> (last visited Oct. 12, 2011).

2. U.S. CENSUS BUREAU, <http://www.census.gov> (enter Bentonville, AR in the “Population Finder” on the right banner) (last visited Oct. 12, 2011). The town’s population has nearly doubled since 2000. *Id.* The Author is a native of Fayetteville, Arkansas, which is approximately thirty miles from the new museum.

3. *Wal-Mart Heiress’s Art Museum May Be Delayed*, USA TODAY (Mar. 10, 2009, 5:00 PM), http://www.usatoday.com/travel/destinations/2009-03-10-crystal-bridges-museum_N.htm; see also *Crystal Bridges Announces Opening Date*, CRYSTAL BRIDGES MUSEUM OF AM. ART (Nov. 18, 2010), <http://crystalbridgesmuseum.org/public/2010/11/18/crystal-bridges-announces-opening-date> (announcing that the museum is to open Nov. 11, 2011).

4. *Global 500 2010: Annual Ranking of the World’s Biggest Companies from Fortune Magazine*, CNNMONEY.COM, <http://money.cnn.com/magazines/fortune/global500/2010/> (last visited Oct. 12, 2011).

5. See *FAQ*, CRYSTAL BRIDGES MUSEUM OF AM. ART, <http://www.crystalbridges.org/About/FAQ> (last visited Oct. 12, 2011) (“Walmart Stores, Inc. is in no way connected to the development, construction, or planning of the Museum or the development and ownership of the permanent collection.”).

6. See ALICE WALTON, <http://www.alicewalton.org/> (last visited Oct. 12, 2011).

7. *The World’s Billionaires 2011*, FORBES, <http://www.forbes.com/wealth/billionaires/list> (last visited Oct. 12, 2011).

8. *Id.* She trails only her sister-in-law, Christy Walton, and L’Oreal heiress Liliane Bettencourt. *Id.*

nearly \$500 million in assets at the time.⁹ Just prior to the opening of Crystal Bridges, the Walton Family Foundation contributed another \$800 million to three endowments for the museum,¹⁰ and Wal-Mart Stores awarded a grant of \$20 million to underwrite admission for all visitors.¹¹

Although Alice Walton has been a long-time private art collector, her entry into the world of museums caused great controversy.¹² In 2005, she outbid two museums to buy Asher B. Durand's *Kindred Spirits* from the New York Public Library; at the time, the \$35 million purchase price was the highest ever for an American painting.¹³ As Walton continued to buy American masterpieces, large and small, for the Crystal Bridges Museum, the art world perceived her as both a "savvy, enormously wealthy collector" and a "hovering culture vulture, poised to swoop down and seize tasty masterpieces from weak hands."¹⁴

9. See *Wal-Mart Heiress's Art Museum May Be Delayed*, *supra* note 3.

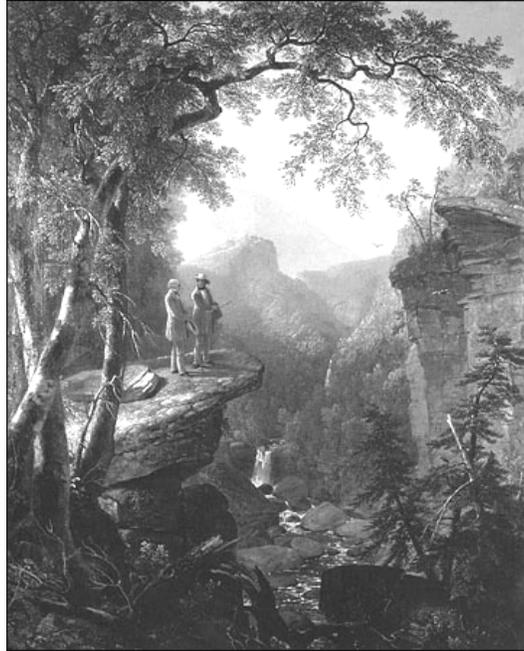
10. Press Release, Crystal Bridges Museum of American Art Announces Endowment Gifts from Walton Family Foundation (May 4, 2011), *available at* <http://www.crystalbridges.org/about/News/News-Details?id=22d24e55-ee4c-4460-a503-fa079b7517de>. The gift is the largest ever cash donation to a U.S. art museum. See Kelly Crow, *Record Gift: \$800 Million: Wal-Mart Family Bankrolls Museum Founded by Alice Walton in Arkansas*, WALL ST. J., May 6, 2011, <http://online.wsj.com/article/SB10001424052748704810504576305561994960474.html>.

11. Press Release, Walmart, Walmart Donates \$20 Million to Crystal Bridges Museum of American Art to Sponsor Admission (July 28, 2011), *available at* <http://walmartstores.com/pressroom/news/10644.aspx>.

12. Lee Rosenbaum, *The Walton Effect: Art World Is Roiled by Wal-Mart Heiress*, WALL ST. J., Oct. 10, 2007, at D11, *available at* <http://online.wsj.com/article/SB119197325280854094-email.html>. For a more recent profile of Walton and her role in Crystal Bridges, see Rebecca Mead, *Alice's Wonderland: A Walmart Heiress Builds a Museum in the Ozarks*, NEW YORKER, June 27, 2011, at 28.

13. *Id.*; see also Carol Vogel, *New York Public Library's Durand Painting Sold to Wal-Mart Heiress*, N.Y. TIMES (May 13, 2005), <http://www.nytimes.com/2005/05/13/nyregion/13painting.html>.

14. Rosenbaum, *supra* note 12. These perceptions may be changing. See Cathleen McGuigan, *Why Does Her Money Scare the Art World?*, NEWSWEEK (June 18, 2007), <http://www.newsweek.com/2007/06/17/why-does-her-money-scare-the-art-world.html> ("Despite the controversies over 'Kindred Spirits' and 'The Gross Clinic,' Walton is earning the respect of a number of museum directors—partly because she's going out of her way to be collegial."); Mead, *supra* note 12 ("Over time, Walton has earned the respect of the museum establishment.").

Figure 1: *Kindred Spirits*, Asher Brown Durand¹⁵

One of the most controversial charges against Walton is that she simply takes advantage of institutions facing severe financial strains.¹⁶ Many art museums are currently coping with extreme financial pressure as a result of the nation's recent economic troubles. The decline in the stock market caused extreme drops in museum endowments. Wealthy donors chose to give to human services rather than the arts, and institutions were forced to reduce hours, cut staff, increase fees, or consider more drastic measures.¹⁷

The 770 accredited university museums that make up fifteen percent of the nation's museums¹⁸ are particularly vulnerable to a recession because charitable giving to universities as well as to museums is declining.¹⁹ In

15. ASHER BROWN DURAND, *KINDRED SPIRITS* (1849).

16. Rosenbaum, *supra* note 12 ("Ms. Walton dangles before financially challenged institutions the enticement of an easy, if ethically dicey, alternative to old-fashioned fund raising.").

17. Andrew Stern, *U.S. Museums Pinched by Recession Cut Hours, Staff*, REUTERS (Jan. 25, 2009, 10:24 AM), <http://www.reuters.com/article/idUSN2532534820090125>.

18. Jon Marcus, *The Art of the Possible*, TIMES HIGHER EDUC. (Dec. 17, 2009), <http://www.timeshighereducation.co.uk/story.asp?storyCode=409548§ioncode=26>.

19. In 2009, giving by individuals to universities decreased by an estimated eighteen percent; university endowments dropped by nineteen percent. See Chris Thompson, *Is College Giving a Bellwether?*, CHRON. OF PHILANTHROPY, Apr. 8,

addition to the magnified financial strain, university museums serve two masters, answering to both museum and university boards. Because a university museum cannot act completely independently, it is more susceptible to closure if its parent university decides that another priority—such as chemistry labs—would better fulfill its educational mission. This is made unmistakably clear by the fundamentally different missions of independent museums and university museums.²⁰ An independent art museum exists solely for itself; in contrast, a university museum exists to serve its more limited university community within the broader educational purposes of its parent university.²¹ In fact, these factors have combined to jeopardize university art museums across the country.²²

The most logical solution to the financial survival of university museums—selling the enormous assets locked up in the art—is also the most problematic. *Deaccessioning* is the process of removing and selling a work of art from a museum's collection.²³ The traditional view, embodied by numerous museum ethical guidelines, is that art can only be sold to purchase other art—never to support a museum's operating or maintenance expenses.²⁴ The problem is that following these guidelines “requires that a

2010, at 5, available at <http://philanthropy.texterity.com/philanthropy/20100408/?pg=5#pg5>; *University Endowments Fall 19 Percent*, PHILANTHROPY J. (Jan. 6, 2010), <http://www.philanthropyjournal.org/news/university-endowments-fall-19-percent-0>.

20. Compare METRO. MUSEUM OF ART, ANNUAL REPORT FOR THE YEAR 2008–2009, at 9 (2009), http://www.metmuseum.org/about/pdf/annual_report/Entire_2009_Annual_Report.pdf (“The mission of The Metropolitan Museum of Art is to collect, preserve, study, exhibit, and stimulate appreciation for and advance knowledge of works of art that collectively represent the broadest spectrum of human achievement at the highest level of quality, *all in the service of the public* and in accordance with the highest professional standards.” (emphasis added)), with *Mission*, HARVARD ART MUSEUMS (2009), <http://www.harvardartmuseums.org/about/mission.dot> (last visited Oct. 12, 2011) (“The mission of the Harvard Art Museums is to preserve, document, present, interpret, and strengthen the collections and resources in their care, and *in keeping with the larger purposes of Harvard University*, to advance the knowledge and appreciation of art and art museums through research, teaching, professional training, and public education.” (emphasis added)).

21. See METRO. MUSEUM OF ART, *supra* note 20; see also *Mission*, *supra* note 20.

22. See *infra* Parts III–IV.

23. WEBSTER'S COLLEGE DICTIONARY 317 (Random House 2005).

24. See, e.g., ASS'N OF ART MUSEUM DIRS., ART MUSEUMS AND THE PRACTICE OF DEACCESSIONING (Nov. 2007), <http://www.aamd.org/papers/documents/FINALPositionPaperDeaccessioning.doc> (“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,

museum close its doors rather than use the proceeds from a deaccessioning to survive. . . . That harsh punishment may be imposed on the museum by its peers, but it is ultimately a sentence served on the public.”²⁵ As a result, few museums ever contemplate such a sale; those that do, however, often face public outcry and legal controversy.²⁶

One of the most recent examples of a controversial sale involves Fisk University, a historically black college in Nashville, Tennessee. In December 2005, needing to take extreme measures to keep the university financially solvent, Fisk announced plans to sell two of its signature paintings to raise an estimated \$20 million.²⁷ The university planned to use the proceeds to finance the construction of a new science building, establish three endowed professorships, increase the college’s endowment, and enhance security and improve preservation at its art gallery.²⁸ Recognizing that these purposes were at odds with traditional deaccessioning guidelines and potentially could violate the terms of the donor’s gift, the school asked for a court order to affirm its ability to sell the paintings.²⁹ After five years of litigation, a Tennessee court approved the proposed sale in late 2010, allowing Fisk and Crystal Bridges to share the artwork equally.³⁰

Despite the resolution of the *Fisk* case, the issue of whether a university museum should be able to sell its artwork for operating expenses is alive and well. Part II of this Article will briefly outline the legal standards for evaluating art museum deaccessioning. Part III will return in depth to *Fisk*, and Part IV will offer comparisons of other recent

or for any other expenses.”). To put it more plainly, ““You can’t sell off “The Bulls and the Bears in the Market””—an 1879 painting by William Holbrook Beard—“to pay for your air-conditioning”” Robin Pogrebin, *Institutions Try to Slow Bill to Curb Sales of Art*, N.Y. TIMES, June 23, 2009, at C1, available at <http://www.nytimes.com/2009/06/23/arts/design/23deaccess.html> (quoting New York legislator Richard Brodsky).

25. Mark S. Gold, *Nothing Ethical About It*, AM. ASS’N MUSEUMS, <http://www.aam-us.org/pubs/mn/nothingethicalaboutit.cfm> (last visited Oct. 12, 2011).

26. For a full discussion of the philosophies underlying the conflict, see Linda Sugin, *Lifting the Museum’s Burden from the Backs of the University: Should the Art Collection Be Treated as Part of the Endowment?*, 44 NEW ENG. L. REV. 541, 548–58 (2010), which compares the theories of cultural property and instrumental property and argues that art in the university setting shares aspects of both.

27. Alan Bostick, *Fisk to Sell Celebrated O’Keeffe Painting*, TENNESSEAN, Dec. 7, 2005, at A1.

28. *Id.*

29. *Id.*

30. *See infra* Part III.

deaccessioning controversies. Part V will conclude by analyzing future responses and schemes after *Fisk*.

II. LEGAL STANDARDS

Nonprofit organizations, such as university art museums, can be evaluated under two differing standards—trust law and corporate law.³¹ Courts regularly apply both bodies of law to university art museums,³² often depending on whether the museum is organized as a trust or as a nonprofit corporation.³³ As a result, a brief discussion of each is necessary to set the background for *Fisk* and other recent cases.

A. Trust Law

A traditional trust has three primary interests—settlor, trustee, and beneficiary—which, in the museum setting, are analogous to the donor, museum, and public.³⁴

The donor's interest is typically expressed in a donor agreement that accompanies a gift of artwork to a museum. A court evaluating deaccessioning under trust principles must first analyze the donor agreement to ascertain whether that sale would violate the terms of the gift and whether the donor retained any future interests in the art.³⁵ If, for

31. A third possibility—contract law—is rarely, if ever, applied. This theory is that the written agreement between donor and museum is a contract and that the sale of the artwork explicitly or implicitly breaches that contract. However, the general rule is that charitable gifts are just that—gifts—and they do not revert to the donor unless specifically provided for in the deed or contract. *See, e.g.,* *Strong v. Doty*, 32 Wis. 381, 386 (1873). *Strong* held that land given for a church site that was later used to house a blacksmith shop did not revert to the grantee: “There is no provision in the deed, that if the premises be abandoned as a place of worship the title shall return to and become vested in the donors.” *Id.* A more detailed donor agreement, supported by consideration, is more likely to be an enforceable contract and presumably could be decided on contract principles; however, cursory LexisNexis and Westlaw searches turn up no examples of contract-based decisions involving art museum deaccessioning.

32. *See infra* Parts III–IV.

33. *See* Jennifer L. White, Note, *When It's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041, 1051 (1996).

34. Trust law arguably provides a better balance of these interests than does corporate law. *See id.* at 1055–56 (arguing that the “societal interest” in museums requires “a more demanding fiduciary standard”).

35. For example, the donor may retain a possibility of reverter or right of entry, which may allow the donor to take possession of the art if the museum violates one

example, the art was donated subject to a no-sale condition, deaccessioning would be impossible, and the painting would instead be returned to the donor. However, most donors do not retain any interest in their donated art,³⁶ so in most cases, ethical guidelines or museum policies are the only constraints on deaccessioning.

The museum and, in particular, its directors are considered the trustees with fiduciary duties of loyalty and care on behalf of the beneficiary.³⁷ This brings a higher level of accountability for museum personnel than that of corporate directors because their decisions must be made on behalf of the donor's intent to benefit the beneficiary.³⁸

The trust's beneficiary is the public as a whole because museums are typically considered charitable trusts established for a community-wide purpose such as the advancement of education.³⁹ At common law, charitable trusts are enforceable by the state attorney general as a representative of the public;⁴⁰ as a result, the attorney general is a party to most lawsuits involving university art museums.⁴¹ A common enforcement remedy sought by the attorney general is the cy pres doctrine, which allows a court to reform the trust to more closely meet the donor's intent.⁴²

B. Corporate Principles

Since the seminal Sibley Hospital case, courts have increasingly held directors of nonprofits to corporate-law standards.⁴³ Under corporate law, a

of the gift's terms. *See, e.g.*, 31 C.J.S. *Estates* § 136 (2009); *see also infra* Part III (discussing that the *Fisk* court must determine whether the donor retained an interest in the art in question, and if so, whether a sale would violate the terms of the gift).

36. Telephone Interview with John Coffey, Deputy Dir. for Art, N.C. Museum of Art (Mar. 19, 2010).

37. White, *supra* note 33, at 1052.

38. *See id.* University museums may be responsible to both museum and university boards, each with differing visions and responsibilities. *Id.*

39. RESTATEMENT (THIRD) OF TRUSTS § 28 (2003).

40. *Id.* at cmt. c; *see, e.g.*, N.C. GEN. STAT. § 36C-4-405.1 (2006) (“[T]he Attorney General . . . may maintain a proceeding to enforce a charitable trust . . .”); *see also, Charities*, CAL. DEP’T OF JUST., OFF. OF THE ATT’Y GEN., <http://oag.ca.gov/charities> (last visited Oct. 12, 2011) (providing an example of state oversight).

41. *See infra* Part III–IV.

42. *See infra* notes 69–72 and accompanying text.

43. *See Stern v. Lucy Webb Hayes Nat’l Training Sch. for Deaconesses & Missionaries*, 381 F. Supp. 1003, 1013 (D.D.C. 1974) (“[T]he modern trend is to apply corporate rather than trust principles in determining the liability of the

director must have committed gross negligence in order to be held liable.⁴⁴ The Business Judgment Rule, a corollary that is especially applicable to museums, states that courts should be reluctant to interfere in business or governing decisions made by a board of directors.⁴⁵ For example, if a university is considered a corporation, its decision to sell art from its museum is a business determination that will receive deference from a court and will likely not be overturned.⁴⁶ As a result, deaccessioning decisions reviewed by corporate-law standards should be more likely to be upheld than those reviewed by trust-law standards.⁴⁷

III. A DEACCESSIONING CASE STUDY: *O'KEEFFE FOUNDATION V. FISK UNIVERSITY*

A. Background

The most recent deaccessioning case to work its way through the courts is *Georgia O'Keeffe Foundation v. Fisk University*.⁴⁸ Fisk University is the oldest university in Nashville and was “founded in 1866 . . . to educate newly freed slaves.”⁴⁹ The first predominantly black institution in the South to gain accreditation, Fisk became world famous for its Fisk Jubilee Singers and its student involvement in civil-rights campaigns across the South.⁵⁰

In 2005, however, with its finances in trouble, Fisk announced that it would sell two of the 101 paintings in its Stieglitz Collection (including its most famous painting, Georgia O'Keeffe's *Radiator Building–Night, New York*) to fund “construction, endowed teaching positions, and security enhancements” at its museum.⁵¹ Fisk's president, Hazel O'Leary, acknowledged the “difficult decision” but noted that the school was “strapped for cash every month” and that student quality was more

directors of charitable corporations, because their functions are virtually indistinguishable from those of their ‘pure’ corporate counterparts.”)

44. *Id.*

45. *See, e.g.*, *Shlensky v. Wrigley*, 237 N.E.2d 776, 781 (Ill. App. Ct. 1968) (declining to review Chicago Cubs' refusal to install lights at Wrigley Field).

46. *See infra* Part IV.B (discussing application of corporate-law principles to Randolph College's proposed deaccessioning).

47. *But see* *Georgia O'Keeffe Found. v. Fisk Univ.*, 312 S.W.3d 1 (Tenn. Ct. App. 2009) (upholding proposed deaccessioning by using trust principles).

48. *Id.*

49. *In re Fisk Univ.*, No. 05-2994-III, 2008 WL 5347750 (Tenn. Ch. Ct. Feb. 8, 2008), *vacated by*, *Georgia O'Keeffe Found. v. Fisk Univ.*, 312 S.W.3d 1 (Tenn. Ct. App. 2009).

50. *Id.*

51. Bostick, *supra* note 27, at A1.

important than even this distinctive asset.⁵² To be assured that the sale could go forward, Fisk filed for a declaratory judgment before placing the paintings up for auction.⁵³

Figure 2: *Radiator Building–Night, New York*, Georgia O’Keeffe⁵⁴



B. Trial Court

Fisk was opposed by the Georgia O’Keeffe Foundation, a Santa Fe, New Mexico institution that claimed an interest in the artwork as O’Keeffe’s successor-in-interest.⁵⁵ Additionally, the Tennessee Attorney General intervened in the case, arguing that the cy pres doctrine would

52. *Id.* at A2.

53. *Id.*

54. *See* GEORGIA O’KEEFFE, *RADIATOR BUILDING–NIGHT, NEW YORK* (1927).

55. *Georgia O’Keeffe Found. v. Fisk Univ.*, 312 S.W.3d 1 (Tenn. Ct. App. 2009). The paintings were originally owned by famed photographer Alfred Stieglitz. *Id.* at 4. When he died in 1946, his will gave his wife, painter Georgia O’Keeffe, a life estate with power of disposition in the collection, and she transferred the paintings to Fisk. *Id.* After her death in 1986, the Georgia O’Keeffe Foundation (which operates the O’Keeffe Museum) received all residuary rights in her estate after a probate settlement. *Id.* at 7.

necessitate a more conservative solution.⁵⁶ In June 2007, the trial court granted the Museum's motion for summary judgment and issued an injunction to stop Fisk from selling the art.⁵⁷ After a lengthy review of the record concerning O'Keeffe's intent when giving the art to Fisk, the court determined that the collection had an identity as a whole and that dividing and selling pieces of the collection would destroy its identity and its charitable purpose—to promote art education.⁵⁸ Selling the art, rather than simply relocating it within Nashville, was a violation of O'Keeffe's intent.⁵⁹ In a later ruling, the court denied Fisk's motion for partial summary judgment, finding that the O'Keeffe Museum had demonstrated standing (via O'Keeffe's reversionary interest) and injury.⁶⁰

In February 2008, the case again went before the court. In the intervening months, Fisk had reached an agreement with the Crystal Bridges Museum to share the collection equally; Crystal Bridges would pay \$30 million for an undivided fifty-percent interest in the collection, allowing the paintings to remain at Fisk for six months per year.⁶¹ The O'Keeffe Museum asked the court to block the compromise sale, claiming that it still violated the donor agreement and did not meet the requirements of the *cy pres* doctrine.⁶² The trial court agreed, finding again that O'Keeffe's intention was to: (1) donate the art to Fisk as a unitary whole; (2) promote the study of art; (3) make a social statement with a gift to an African-American university; and (4) retain control of the art.⁶³ By selling some of the paintings, Fisk would violate the terms of the gift because, for example, the gift would not remain wholly intact and would not remain at this historically black college.⁶⁴ Because it was still possible for Fisk to comply with O'Keeffe's intent, the court ruled in favor of the O'Keeffe Museum.⁶⁵ Even though the sale breached the conditions of the gift, the

56. *In re Fisk Univ.*, No. NF05-2994-III, 2007 WL 4913166 (Tenn. Ch. Ct. June 12, 2007), *vacated by*, *Georgia O'Keeffe Found. v. Fisk Univ.*, 312 S.W.3d 1 (Tenn. Ct. App. 2009).

57. *Id.*

58. *Id.*

59. *Id.*

60. *In re Fisk Univ.*, No. 05-2994-III, 2007 WL 5877148 (Tenn. Ch. Ct. Dec. 12, 2007), *vacated by*, *Georgia O'Keeffe Found. v. Fisk Univ.*, 312 S.W.3d 1 (Tenn. Ct. App. 2009).

61. *In re Fisk Univ.*, No. 05-2994-III, 2008 WL 5347750 (Tenn. Ch. Ct. Feb. 8, 2008), *vacated by*, *Georgia O'Keeffe Found. v. Fisk Univ.*, 312 S.W.3d 1 (Tenn. Ct. App. 2009).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

court was unwilling to confiscate the art and transfer ownership to the O’Keeffe Museum, deciding that a permanent injunction requiring Fisk to display and care for the art was more appropriate than a forfeiture of all property rights.⁶⁶

C. Appeals Court

In July 2009, however, the Tennessee Court of Appeals found O’Keeffe’s intent to be completely different. Rather than retaining an interest in the artwork, her correspondence with Fisk demonstrated that she expected the university to care for and exhibit the collection but had gifted the paintings to Fisk without conditions.⁶⁷ As a result, no interest remained with her estate, and the O’Keeffe Museum did not have standing; the only remaining parties were Fisk and the Attorney General.⁶⁸

Because the donor had no remaining interest in the artwork, the court next turned to the cy pres doctrine to determine whether the court should “allow a donee to deviate from the conditions attached to a charitable gift.”⁶⁹ If “circumstances have so changed” since the gift was made “to render impracticable or impossible a literal compliance” with the gift’s terms, the court can order that the gift be administered so as to “most effectively accomplish its general purposes.”⁷⁰ Cy pres relief is only available if: (1) the gift was charitable in nature; (2) it was given with general charitable intent; and (3) circumstances have changed to make compliance with the gift’s terms impracticable or impossible.⁷¹

The court quickly determined that the first prong of the cy pres doctrine was satisfied; the gift of the paintings to Fisk was clearly charitable.⁷² The second prong was also met because the appeals court found a general, rather than a specific, charitable intent.⁷³ Correspondence between O’Keeffe and Fisk proved that the charitable intent “was to make the Collection available to the public in *Nashville* and *the South* for the benefit of those who did not have access to comparable collections to promote the

66. *In re Fisk Univ.*, No. 05-2994-III, 2008 WL 5361639 (Tenn. Ch. Ct. Mar. 6, 2008), *vacated by*, *Georgia O’Keeffe Found. v. Fisk Univ.*, 312 S.W.3d 1 (Tenn. Ct. App. 2009).

67. *Fisk*, 312 S.W.3d 1, 12.

68. *Id.* at 13.

69. *Id.* at 16 (citing RONALD CHESTER ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 431 (3d. ed. 2005)).

70. *Id.*

71. *Id.*

72. *Id.* at 17.

73. *Id.* at 19.

general study of art.”⁷⁴ The additional fact that O’Keeffe made other charitable gifts at the same time supported the conclusion that the gift was given with a general charitable intent rather than for a specific charitable purpose.⁷⁵ The final prong of the cy pres analysis—whether circumstances have significantly changed since the gift was made, and if so, what cy pres relief most closely approximates the charitable intent—was given to the trial court to determine on remand.⁷⁶

D. Trial Court on Remand

At the conclusion of the trial court’s evidentiary proceedings in 2010, Attorney General Bob Cooper proposed that a public–private partnership temporarily display the art at Nashville’s Frist Center for the Visual Arts until Fisk’s financial problems were resolved.⁷⁷ The court, however, found this short-term solution to be insufficient: “The parties have been in court over the Collection long enough. Finality and certainty is needed.”⁷⁸

As a result, the only remaining option was to modify the proposed agreement with Crystal Bridges to fit with O’Keeffe’s intent.⁷⁹ The court found that O’Keeffe did not intend the art to be kept in Nashville apart from Fisk; rather, “[W]ithout Fisk, Nashville would never have been the beneficiary of the Collection.”⁸⁰ Thus, an agreement that allowed Fisk to retain an interest in the art was required.

It would not be in keeping, then, with the donor’s intent to keep the Collection in Nashville at the cost of sacrificing the existence of Fisk University. . . . [T]he circumstances have changed with Fisk’s current financial failure. . . . [Sharing the Collection] is not a perfect solution but it does

74. *Id.* at 17.

75. *Id.* at 18.

76. *Id.* at 20. After the court’s ruling, the Tennessee Supreme Court refused to hear the O’Keeffe Museum’s appeal. See Travis Loller, *Tenn. Supreme Court Will Not Hear Case on Fisk Art*, AUCTION CENTRAL NEWS (Feb. 24, 2010, 4:28 PM), <http://acn.liveauctioneers.com/index.php/features/crime-and-litigation/2109-tenn-supreme-court-will-not-hear-case-on-frisk-art>.

77. Press Release, Attorney Gen. Robert E. Cooper, Jr., Office of the Attorney Gen., Attorney Gen. Files for Temp. Stieglitz Collection Display Arrangement (Sept. 10, 2010), *available at* <http://www.state.tn.us/attorneygeneral/press/2010/story/pr10-33.pdf>.

78. Memorandum and Order at 2, *In re Fisk Univ.*, No. 05-2994-III (Tenn. Ch. Ct. Sept. 14, 2010), *available at* <http://www.tennessean.com/assets/pdf/DN164021914.PDF>.

79. *Id.*

80. *Id.* at 5.

keep Fisk afloat, thereby maintaining and holding true to the law's recognition of the donor's deliberate selection of Fisk for the art.⁸¹

In response, Fisk proposed three major changes to the original agreement with the Crystal Bridges Museum. The university suggested that: (1) the art be rotated every two years between Fisk and Crystal Bridges; (2) the court oversee any future disputes; and (3) Crystal Bridges sell its share only to another public museum and only with court approval.⁸²

The court's final ruling struck a compromise. Although Fisk was permitted to sell a fifty-percent share of the artwork to Crystal Bridges, the university would not be given full discretionary control of the \$30 million proceeds.⁸³ Fisk could keep \$10 million to use as it pleased, but \$20 million would be used to create an independent endowment for the collection to ensure that the collection remains in Nashville.⁸⁴ Given the changed circumstances of Fisk's financial footing, the cy pres doctrine necessitated that the gift be modified to meet the donor's original intent to both give Nashville access to the collection and place the collection at Fisk; this plan was the best way to carry out O'Keeffe's wishes.⁸⁵ The trial court's final ruling, therefore, attempted to balance the competing interests in the case to keep Fisk afloat, provide audiences access to the art, and ensure that the collection remained a permanent presence in Nashville.

81. *Id.*

82. See Supplemental Brief of Fisk University with Regard to Proposals to Preserve and Exhibit the Alfred Stieglitz Art Collection at 7, *In re Fisk Univ.* No. 05-2994-III (Tenn. Ch. Ct. Oct. 8, 2010), available at www.scribd.com/doc/39058372/Fisk-s-Revised-30-Million-Collection-Sharing-Plan; see also Press Release, Fisk Univ., Statement from Fisk Univ. Regarding the Litig. Concerning the Proposed Sharing Agreement with Crystal Bridges Museum (Oct. 10, 2008), available at http://www.fisk.edu/newsandevents/news/10-10-08/Statement_From_Fisk_University_Regarding_the_Litigation_Concerning_the_Proposed_Sharing_Agreement_With_Crystal_Bridges_Museum.aspx.

83. Memorandum and Order at 25, *In re Fisk Univ.*, No. 05-2994-III (Tenn. Ch. Ct. Nov. 3, 2010), available at <http://www.scribd.com/doc/41027206/New-Fisk-Crystal-Bridges-Decision>.

84. *Id.* at 29–30.

85. Memorandum and Order, *supra* note 83, at 17; see also *id.* at 35 (“[T]he best way to achieve Ms. O’Keeffe’s purposes is approval of the sharing agreement with the Crystal Bridges Museum conditioned on the bulk of the proceeds, \$20 million, being removed from Fisk and used to endow a Nashville connection to the Collection, and the remaining \$10 million being paid to Fisk for its viability.”).

E. Appeals Court: Part II

After six years of litigation, it should not be surprising that both parties would object to the trial court's ruling on remand. In 2011, Fisk and the State of Tennessee again argued before the Tennessee Court of Appeals.⁸⁶ The state's argument was much the same: the trial court abused its discretion when applying the *cy pres* doctrine, because the art-sharing agreement did not approximate the donor's intent for the art to remain in Nashville.⁸⁷ Fisk, on the other hand, contested the trial court's creation of an endowment for the paintings, arguing that the university should be able to use a greater portion of the sale proceeds for educational purposes.⁸⁸ As of late 2011, the court had not yet issued a ruling.

IV. OTHER RECENT DEACCESSIONING CONTROVERSIES

Fisk is not the only university to consider deaccessioning valuable art from its museum to raise needed funds. Since 2006, at least four other universities have gained notoriety—or infamy—in the art world for their proposals.

A. Thomas Jefferson University

In 2006, Thomas Jefferson University in Philadelphia announced plans to sell Thomas Eakins's *The Gross Clinic* to the Crystal Bridges Museum and the National Gallery of Art for \$68 million to raise money for construction projects, research, and education.⁸⁹ Considered one of the most important pieces of American art, the painting had hung at Jefferson Medical College (part of the university) since 1878, but it was only visited by a few hundred people annually.⁹⁰ It also has important historical ties to Philadelphia—Eakins was a native of the city, and the subject of the

86. See Brandon Gee, *Accreditors Visit as Fisk University's Rolls Shrink*, TENNESSEAN, Sept. 9, 2011, <http://www.tennessean.com/article/20110909/NEWS04/309090073/Accreditors-visit-Fisk-University-s-rolls-shrink>

87. Brief of Intervenor–Appellee Attorney General and Reporter at 21–24, *In re Fisk Univ. Appeal No. M2010-02615-COA-R3-CV* (Tenn. Ct. App. May. 9, 2011), available at <http://www.tn.gov/attorneygeneral/cases/fisk/fisksecondappellatebrief.pdf>.

88. Brief of Appellant at 18–20, *In re Fisk Univ. Appeal No. M2010-02615-COA-R3-CV* (Tenn. Ct. App. Apr. 9, 2011), available at <http://www.tn.gov/attorneygeneral/cases/fisk/fiskappellatebrief.pdf>.

89. Carol Vogel, *A Fight to Keep an Eakins Is Waged on Two Fronts: Money and Civic Pride*, N.Y. TIMES, Dec. 15, 2006, at E43, available at <http://query.nytimes.com/gst/fullpage.html?res=9803E2DF1231F936A25751C1A9609C8B63>.

90. *Id.*

painting is set at Jefferson Medical College itself.⁹¹ Public outcry ensued over the potential loss of one of the city's cultural treasures, so the university gave the public an opportunity to match the sale price.⁹² "Philadelphians, their pride challenged, rallied" to raise the money, and the painting is now shared between the Philadelphia Museum of Art and the Philadelphia Academy of the Fine Arts.⁹³

Figure 3: *The Gross Clinic*, Thomas Eakins⁹⁴



B. Randolph College

In 2007, after more than 100 years as a single-sex institution, Randolph–Macon Women's College in Lynchburg, Virginia, admitted its first male student.⁹⁵ The dramatic change was prompted by years of declining enrollment and enormous financial pressures.⁹⁶ To help the

91. *Id.*

92. *Id.*

93. Michael Kimmelman, *In the Company of Eakins*, N.Y. TIMES, Jan. 12, 2007, at E39, available at <http://query.nytimes.com/gst/fullpage.html?res=9A07E3D61230F931A25752C0A9619C8B63&pagewanted=all>.

94. THOMAS EAKINS, *THE GROSS CLINIC* (1875).

95. Neely Tucker, *A Small College, Painted into a Corner*, WASH. POST, Sept. 19, 2007, at C1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/18/AR2007091802132.html>.

96. *Id.* In 2007, the school expected forty percent of its operating expenses to come from its endowment. *Id.*

institution (now known as Randolph College) regain its financial footing, finance needed improvements to the now-coeducational institution, and keep its accreditation, the college proposed to sell part of its \$100 million Maier Museum of Art collection, including the collection's centerpiece, George Bellows's *Men of the Docks*.⁹⁷

Figure 4: *Men of the Docks*, George Bellows⁹⁸



As was perhaps to be expected, this proposal met with opposition by students and alumni. At first, the opposition's success seemed imminent when a court issued an injunction to halt the November 2007 auction of four paintings.⁹⁹ However, the injunction was lifted when opponents could not come up with the required \$1 million bond.¹⁰⁰

A second suit was also filed by a group of alumni and students, alleging that "the College plan[ned] to sell assets, including its valuable art collection, to finance physical changes at the campus that [would] enable the College to educate both men and women."¹⁰¹ Based on trust law, the plaintiffs charged that Randolph's nature as a nonstock charitable corporation required any art given without donor instructions to be used consistent with the college's charitable purpose when the gift was

97. *Id.* The museum is housed in a Cold War-era building intended to house the National Gallery of Art's collection in the event of a Soviet nuclear attack on Washington, D.C. *Id.*

98. GEORGE BELLOWS, *MEN OF THE DOCKS* (1912).

99. Carrie J. Sidener, *Bond Issue Settled in Randolph College Art Sale*, NEWS & ADVANCE, Dec. 19, 2009, http://www2.newsadvance.com/news/2009/dec/19/bond_issue_settled_in_randolph_college_art_sale-ar-217906/.

100. *Id.*

101. *Dodge v. Trs. of Randolph-Macon Woman's Coll.*, 661 S.E.2d 805, 807 (Va. 2008).

accepted—thus, to operate the college for women.¹⁰² Because Randolph planned to use the donation instead to support the operation of the college for women *and* men, the sale would violate the donor’s intent.¹⁰³

Unlike in *Fisk*, however, the Virginia court decided to apply corporate rather than trust principles to the university. Rather than “transform all charitable Virginia nonstock corporations into charitable trusts” and “make such a drastic change in Virginia’s established law,” the court found that the proper standard for charitable nonstock corporations was corporate law.¹⁰⁴ The college was organized as a corporation, not a trust; as a result, corporate law provided the necessary standards, and the board’s decision to sell the art would not be overturned.¹⁰⁵ Although the university won court approval to sell its art, only one painting has actually been sold.¹⁰⁶ Randolph currently has delayed the sale of the other paintings, including *Men of the Docks*, hoping that the art market will improve so that the paintings will bring a higher price at auction.¹⁰⁷

C. University of Iowa

In 2008, record flooding along the Iowa River caused an estimated \$232 million in damage to the University of Iowa campus, making the art museum unsuitable for future use.¹⁰⁸ As a result, a member of the University Board of Regents proposed that the university consider selling Jackson Pollock’s 1943 painting *Mural* from its collection.¹⁰⁹ After studying the issue, the university determined that selling the painting could bring as much as \$140 million but would likely result in the revocation of the museum’s accreditation.¹¹⁰

102. *Id.* at 808.

103. *Id.*

104. *Id.*

105. *Id.* at 809.

106. Mike Allen, *Debate Rages On Over College Art Collection*, ROANOKE TIMES, July 10, 2011, <http://www.roanoke.com/extra/arts/wb/292378>.

107. Sidener, *supra* note 99; see also Liz Barry, *Randolph Artworks Remain in Storage, Awaiting Sale*, THE NEWS & ADVANCE (Lynchburg, Va.) (Feb. 10, 2011), <http://www2.newsadvance.com/news/2011/feb/10/randolph-artworks-remain-storage-awaiting-sale-ar-835301/>.

108. Erin Jordan, *U of I to Restore Flood-Hit Art Facility*, DES MOINES REGISTER, Nov. 5, 2008, at B1.

109. IOWA BD. OF REGENTS, REPORT ON QUESTIONS RELATED TO SALE OF JACKSON POLLOCK’S 1943 PAINTING MURAL 1, available at <http://www.regents.iowa.gov/news/Pollockquestions1008.pdf>.

110. *Id.* at 4, 9.

Although the idea of a sale never progressed further due to public opposition, the idea has not gone away. In February 2009, a state legislator suggested that a sale would prevent tuition increases, and the state's continued economic crisis made the idea appealing enough for some opinion makers to keep it on the table.¹¹¹ A similar proposal was introduced in the 2011 legislative session,¹¹² but it was removed from the legislative agenda before any action was taken.¹¹³

Figure 5: *Mural*, Jackson Pollock¹¹⁴



D. Brandeis University

Perhaps the most controversial recent example of deaccessioning comes from Massachusetts's Brandeis University. In contrast to other museums' plans to sell only selected artifacts, Brandeis decided in 2009 to

111. Op-Ed, *Our View—What Price Would Be an Offer UI Can't Refuse?*, IOWA CITY PRESS-CITIZEN, Feb. 7, 2009, at A15, ("Maybe the economic situation has reached the point that the painting should be put up for sale with a secret, extremely high reserve price. If a collector were to go over the top, then UI should take the money.").

112. H. Study B. 84, 84th Gen. Assemb. (Iowa 2011). Proceeds from the painting's sale would fund scholarships for University of Iowa students majoring in art. *Id.*

113. James Q. Lynch and Diane Heldt, *Legislators Drop Idea of Selling Pollock Art*, QUAD-CITY TIMES, Feb. 21, 2011, http://qctimes.com/news/local/government-and-politics/article_706c4e04-3e38-11e0-8cb4-001cc4c002e0.html. Even Governor Terry Branstad weighed in on the bill, warning of the proposal's "unintended consequences" of chilling private donations to the university. See Tom Beaumont, *Branstad: Pollock Mural Sale Would Chill Donations to U of I*, DES MOINES REGISTER, Feb. 21, 2011, <http://blogs.desmoinesregister.com/dmr/index.php/2011/02/21/branstad-pollock-mural-sale-would-chill-donations-to-u-of-i/>.

114. See *University of Iowa Museum of Art Digital Collection*, UNIV. IOWA LIBRARY, <http://digital.lib.uiowa.edu/uima> (last visited Mar. 25, 2011).

completely close its renowned Rose Art Museum and sell its entire collection to address the university's financial problems.¹¹⁵ Because the museum would no longer exist, the plan did not run afoul of ethical deaccessioning guidelines.¹¹⁶ The drastic decision was based on what officials saw as the university's core mission: Brandeis is "'a university that has a museum, not a museum that has a university,'" and "[t]he bottom line is that the students, the faculty and the core academic mission come first. (Trustees) had to look at the college's assets and came to a decision to maintain that fundamental commitment to teaching."¹¹⁷ Despite objections from the art world, members of the public,¹¹⁸ and the museum's director, Brandeis proceeded with its plan and terminated the majority of the museum staff (including the director).¹¹⁹

In July 2009, three overseers of, and donors to, the museum filed suit because of "the need for an expeditious final determination of whether Brandeis has the right to close the Rose as a museum, confiscate its endowment funds, and sell its artwork for the general fiscal purposes of the university."¹²⁰ The plaintiffs sought court orders to stop the closure of the museum as well as a declaration "that Brandeis may not sell any artwork of the Rose Art Museum except in its normal course of the museum's operation and pursuant to American museum ethical codes and guidelines—that is, for the purpose of purchasing new artwork."¹²¹ In addition to the court challenge, the Massachusetts Attorney General began

115. Chris Bergeron, *Brandeis to Close Rose Art Museum*, DAILY NEWS TRIB. (Jan. 27, 2009, 11:27 AM), <http://www.wickedlocal.com/waltham/fun/entertainment/arts/x185288097/Brandeis-to-close-Rose-Art-Museum>.

116. See Complaint for Declaratory Judgment Concerning the Rose Art Museum at para. 2, *Rose v. Brandeis Univ.*, No. SJ-2009-409, 2009 WL 2428713 (Mass. Dist. Ct. July 27, 2009).

117. Bergeron, *supra* note 115.

118. Interestingly, in addition to traditional forms of public pressure, opposition to deaccessioning is also visible online. For example, the social-networking website Facebook boasts over 7,000 members of an online community to "Save the Rose Art Museum," a Facebook group. See *Save the Rose Art Museum*, FACEBOOK, <http://www.facebook.com/group.php?gid=51104717530> (last visited June 2, 2011). Five-hundred members have joined groups to "Save the Jackson Pollack! [sic]"; thirty are supporters of "Keep Thomas Eakins' 'The Gross Clinic' at Home in Philadelphia!"; and ten people are advocating to "Sell the [Pollock] Mural!" See FACEBOOK, <http://www.facebook.com> (search by group name) (last visited Mar. 17, 2011). However, the power of these internet-only protests is somewhat dubious.

119. Complaint for Declaratory Judgment, *supra* note 116, at paras. 3, 6.

120. *Id.* at paras. 15, 17.

121. *Id.* at paras. B–D.

reviewing all gifts to the Rose Art Museum to determine whether donor agreements would be violated by the museum's potential closure.¹²²

After almost two years,¹²³ the case was settled in June 2011 when Brandeis, under the leadership of a new president, agreed to keep the Rose Art Museum open and refrain from selling its collection.¹²⁴ According to the settlement reached by the parties, "Brandeis has no aim, plan, design, strategy or intention to sell any artwork donated to or purchased by the University on behalf of the Museum."¹²⁵ The settlement agreement also affirmed the museum's standing within the university: "The Rose is and will remain an active and valued part of Brandeis, contributing to its broader educational mission."¹²⁶ While Brandeis did not promise that it would never sell any art—only that it had no intention to do so—the donor-plaintiffs were "confident that [university officials] understand and cherish the collection" and would keep the museum as an important part of Brandeis for years to come.¹²⁷

V. EVALUATION OF DEACCESSIONING AFTER *FISK*

Post *Fisk*, there are three general categories of potential deaccessioning guidelines that could be applied to university museums. The first is the traditional rule restricting deaccessioning for operating expenses; the second is the lack of any guidelines whatsoever; and the third is the use of deaccessioning for operating expenses in some circumstances.

122. Randy Kennedy & Carol Vogel, *Outcry Over a Plan to Sell Museum's Holdings*, N.Y. TIMES, Jan. 28, 2009, at C5, available at <http://www.nytimes.com/2009/01/28/arts/design/28rose.html>.

123. The museum remained open during the litigation. See Ariel Wittenberg, *Two Years After the Rose: Where Are We Now?*, BRANDEIS HOOT, Feb. 11, 2011, at 17, available at <http://www.thebrandeishoot.com/articles/9619> ("Though selling Rose Art is not completely off the table, [despite] legal battles, staff changes and exhibition alterations, The Rose remains open.").

124. *Brandeis, Plaintiffs Settle Rose Art Museum Lawsuit*, BRANDEIS NOW, June 30, 2011, <http://www.brandeis.edu/now/2011/june/rose.html>. The Massachusetts Attorney General also terminated the state's review of Brandeis. *Id.*

125. Settlement Agreement at 2, *Rose v. Brandeis Univ.*, No. SJ-2009-409, 2009 WL 2428713 (Mass. Dist. Ct. June 13, 2011), available at <http://www.scribd.com/doc/59064917/Rose-Art-Museum-Settlement-Agreement>.

126. *Id.*

127. Geoff Edgers, *Brandeis Settles Art Museum Suit*, BOSTON GLOBE, July 1, 2011, http://articles.boston.com/2011-07-01/ae/29727052_1_rose-art-museum-brandeis-university-jehuda-reinharz.

A. Traditional Rule

After the *Fisk* decision, the traditional rule governing deaccessioning of art has not changed—art can only be sold to raise funds for art acquisition, not for operating expenses. This rule is most vividly found in ethical standards of organizations such as the American Association of Museum Directors, which states that “[p]roceeds 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.”¹²⁸ The American Association of Museums similarly requires that “in no event shall [proceeds from the sale of nonliving collections] be used for anything other than acquisition or direct care of collections.”¹²⁹

Individual museums typically develop specific policies to implement these guidelines. For example, the University of North Carolina’s Ackland Art Museum¹³⁰ has a fairly standard deaccessioning policy that specifically notes that the purpose “is not to generate revenue but to enhance the quality, integrity, and identity of the Museum Collection.”¹³¹ “All funds raised by deaccessioning may be used only for the improvement of the permanent collection through the purchase of works of art.”¹³² The deaccessioning process is long, involving input from the museum’s curator, museum staff, outside experts, the National Advisory Board, and the University Chancellor or Ackland Trust.¹³³ Deaccessioning is viewed as

128. ASS’N OF ART MUSEUM DIRS., *supra* note 24; *see also* Letter from Kaywin Feldman, President, Ass’n of Art Museum Dirs., to Hazel O’Leary, President, Fisk Univ. (Oct. 4, 2010), *available at* <http://aamd.org/newsroom/documents/KFtoOleary100410.pdf>.

129. AM. ASS’N OF MUSEUMS, CODE OF ETHICS FOR MUSEUMS (2000), *available at* <http://www.aam-us.org/museumresources/ethics/upload/Code-of-Ethics-for-Museums.pdf>; *see also* ASS’N OF COLL. & UNIV. MUSEUMS & GALLERIES, ACUMG RESPONDS TO DEACCESSION ISSUES (2008), *available at* <http://www.acumg.org/files/ACUMGRespondstoDeaccessionIssues.pdf>.

130. ACKLAND ART MUSEUM, www.ackland.org (last visited Mar. 22, 2011). The museum’s mission is another typical example of the ultimate purpose of a university museum; *see Mission, ACKLAND ART MUSEUM*, <http://www.ackland.org/About/mission/index.htm> (last visited Mar. 22, 2011) (“As an academic unit of the University of North Carolina at Chapel Hill, the Museum acquires, preserves, exhibits, and interprets works of art to fulfill the university’s mission to provide teaching, research, and public service to the people of North Carolina.”).

131. ACKLAND ART MUSEUM, GUIDELINES at VI (2010) (on file with author) [hereinafter GUIDELINES].

132. *Id.* at VI.B(10).

133. *See* GUIDELINES *supra* note 131, at VI. *See also* Coffey, *supra* note 36.

“collection maintenance” and allows museums to convert art currently in storage into art that can be enjoyed by the public.¹³⁴

The combination of ethical guidelines, internal policies, the threat of lost accreditation,¹³⁵ and the occasional state statute¹³⁶ ensure that deaccessioning is rarely used by most museums. As a result, most museums never consider the sale of art to boost their endowment or meet operating expenses.

B. Market-Based Rule

The opposite extreme to the current deaccessioning policy is a market-based policy that would allow the sale of artwork for any reason whatsoever. Ignoring any responsibilities to donors or patrons, museums could freely buy and sell art on the open market, regardless of whether the buyer was North Korean leader Kim Jong Il, who planned to hang it for his own private enjoyment, or the National Gallery of Art, which wanted to display it for free to all comers. The only bounds would be the price that the free market could support.

However, this type of approach to the university sale of artwork is extremely unlikely. First, long-standing policies at many institutions¹³⁷ and ethical guidelines at nationwide associations of museums¹³⁸ have long frowned on or outright prohibited the sale of art for operating expenses.¹³⁹ Second, the donor agreements themselves may explicitly forbid a sale of

134. Coffey, *supra* note 36; *see also* Robin Pogrebin, *The Permanent Collection May Not Be So Permanent*, N.Y. TIMES, Jan. 27, 2011, at C1, *available at* <http://www.nytimes.com/2011/01/27/arts/design/27sell.html> (describing routine deaccessioning by museums).

135. *See, e.g.*, AM. ASS'N OF MUSEUMS, CONSIDERATIONS FOR AAM ACCREDITED MUSEUMS FACING RETRENCHMENT OR DOWNSIZING app. A (2008), *available at* <http://www.aam-us.org/museumresources/accred/upload/Considerations-Retrenchment-11-08-reissue.doc>. A museum's accredited status may be affected by “[a]ctions that are inconsistent with standards and best practices in the field, [including] . . . [b]reaches of ethical and professional standards and practices” *Id.* For smaller unaccredited museums that may still own valuable art, this threat is less important.

136. *See infra* notes 157–66 and accompanying text.

137. *See* GUIDELINES, *supra* note 131.

138. *See supra* notes 128–34 and accompanying text.

139. *See, e.g.*, Letter from Dan Monroe, President, Ass'n of Art Museum Dirs., to John E. Klein, President, Randolph College (June 22, 2011) (censuring Randolph College museum for sale of artwork), *available at* http://aamd.org/newsroom/documents/061911AAMDLDMDraftFinalRandolphCollege_3_.pdf.

the art for operating expenses.¹⁴⁰ Third, the public is likely to loudly protest any sale of treasured art, particularly if the work has a long-standing tie to the museum or the area.¹⁴¹ Finally, for larger museums, there is the pressure of accreditation requirements—violation of these guidelines could jeopardize the institution’s accreditation.¹⁴² As a result of these considerations, a pure market-based approach to the sale of art is unlikely to ever take hold.

C. A Third Way Forward

These two extremes are not satisfactory because they do not provide an adequate balance between ethical standards and university museums’ need for capital. In the unique setting of a university museum, the preferred middle ground lies in between, where the current guidelines should be modified to allow deaccessioning of art for operating expenses under some limited circumstances.¹⁴³ The remainder of this Article will seek to define those circumstances and propose an implementation scheme for those guidelines.

1. When Should Deaccessioning Be Allowed?

If university museums should only be allowed to sell art for operating expenses in limited circumstances, those instances must first be defined. Three factors outlined by the *Fisk* appeals court (and applied by the trial court) should provide the applicable threshold.

First, the donor must have given the artifact to the museum with general intent, rather than donating it with specific intent.¹⁴⁴ At the most basic level, this means that the donor must not have placed any restrictions

140. See *supra* notes 35–38 and accompanying text. *But see* Georgia O’Keeffe Found. v. Fisk Univ., 312 S.W.3d 1 (Tenn. Ct. App. 2009) (interpreting donor correspondence to determine intent in the absence of a formal agreement); Dodge v. Trs. of Randolph–Macon Woman’s Coll., 661 S.E.2d 805 (Va. 2008) (showing no record of donor intent).

141. See, e.g., Part IV.A (discussing public outcry to the proposed sale of *The Gross Clinic*).

142. See AM. ASS’N OF MUSEUMS, *supra* note 129.

143. Other scholars have called for similar compromises. See Sugin, *supra* note 26, at 577 (arguing that the hybrid nature of university museums calls for a heightened standard of review “to make it a little bit harder for a university to sell art than securities, but not impossible”). The museum world sees it differently. See Letter from Dan Monroe, *supra* note 139 (“[O]nce a college or university creates a museum, it must manage that museum according to the standards of the museum world.”).

144. See *Fisk*, 312 S.W.3d at 16.

on the museum's use of the painting or reserved any interest in the painting in the event that one of the gift's conditions was violated. The first step, therefore, requires a careful consideration of donor intent as expressed in donor agreements or other documents.¹⁴⁵

Second, the *Fisk* decisions suggest that a sale may be justified to maximize the public access to or study of the art in question. "[W]e have concluded that the clear intent for giving the Collection to the University was to enable the public—in Nashville and the South—to have the opportunity to study the Collection in order to promote the general study of art."¹⁴⁶ In the case of *Fisk*, the paintings at issue are currently in storage.¹⁴⁷ Therefore, because O'Keeffe donated the art to Fisk to allow the public to enjoy it, a sale is more justified because it would allow the art to be enjoyed by more people.¹⁴⁸ By extension, *Fisk* emphasizes the importance of sharing unique artistic treasures with the world at large.¹⁴⁹

Finally, the concurring opinion in *Fisk* suggests that the economic pressures of a museum, particularly a university museum, are appropriate to consider when examining a proposed sale.¹⁵⁰ "[T]here is a significant public interest in keeping and expanding educational opportunities and service even in difficult times. . . . I think it is appropriate . . . that the primary mission of Fisk as an educational institution be weighed"¹⁵¹ This does not mean that art must necessarily be sold if a university is facing financial

145. See, e.g., *supra* notes 35–38 and accompanying text.

146. *Fisk*, 312 S.W.3d at 18.

147. Evie Blad, *Museum's Appeal Doesn't Get Heard: Fisk, Crystal Bridges Deal Step Closer*, ARK. DEMOCRAT-GAZETTE, Feb. 24, 2010.

148. See *id.* (“Sharing this great resource will allow the collection to become more widely accessible to diverse audiences in Tennessee, Arkansas and the nation and will ensure that the collection remains intact for generations to come.” (quoting Crystal Bridges Director Don Bacigalupi)). Of course, if a donor gave art with a different intent, the importance of public access to art may have less weight; however, it should still be relevant.

149. The concept of sharing exceptional gifts fits well within American tradition. See, e.g., John Winthrop, *A Model of Christian Charity* (1630), available at <http://religiousfreedom.lib.virginia.edu/sacred/charity.html> (“For we must consider that we shall be as a city upon a hill.”).

150. *Fisk*, 312 S.W.3d at 20–22 (Dinkins, J., concurring). Of course, if a court evaluates a sale based on corporate principles, financial pressures may never even be considered. See *Dodge v. Trs. of Randolph–Macon Woman's Coll.*, 661 S.E.2d 805, 808 (Va. 2008) (applying the Business Judgment Rule and granting complete deference to the decision of the university's board).

151. *Fisk*, 312 S.W.3d at 22.

difficulties;¹⁵² displaying the art—rather than selling it—may also support the university’s mission of education.¹⁵³ Instead, however, the unique nature of the university museum, which is beholden to its parent university, requires that the mission of the greater educational institution be paramount.

These three criteria will provide sufficiently limited circumstances to allow university museums to deaccession for operating expenses. The donor’s intent will still take priority; the public’s benefit will be maximized; and sales will only be justified if the university’s survival is in jeopardy.

2. Who Should Evaluate Deaccessioning?

Even if these circumstances provide deaccessioning guidelines, some entity must still evaluate a proposed sale to determine if it meets these limited criteria. The first potential way to evaluate these sales is through self-regulation. This is what is currently done; museums simply police themselves in light of existing ethical guidelines. Even if university museums were allowed to sell art to pay for their operating expenses, self-regulation could continue in light of new, loosened guidelines.¹⁵⁴ For example, in addition to the threshold issues discussed above, a museum might revise its internal policies to allow deaccessioning of art for operating expenses if it “has a legitimate and urgent need for the funds,” “has considered other alternatives,” and “considers [the piece’s] value in the context of the overall collection.”¹⁵⁵ Perhaps artifacts could only be sold to certain museums or deaccessioning revenue could be only used to support the museum’s long-term future.¹⁵⁶

152. If deaccessioning should be allowed when a university is in financial trouble, the sale may no longer be appropriate if the university’s financial situation improves. Tennessee Attorney General Robert Cooper argued as much in February 2010: “Given Fisk’s recent reaccreditation by the Southern Association of Colleges and Schools . . . the university can no longer argue that the sale of the Collection is necessary to its financial survival.” Loller, *supra* note 76.

153. *Fisk*, 312 S.W.3d at 22 (“[T]he extent and manner to which the Stieglitz collection may serve to attract revenue or donors to the university is not an impermissible area of inquiry in addition to issues related to modifying the conditions of maintenance and display of the art in light of the advances in technology . . .”).

154. *See* Gold, *supra* note 25 (arguing that museums should be able to “weigh priorities and make difficult choices without fear of condemnation and ostracism”).

155. *Id.*

156. *See* Memorandum and Order at 30, *In re Fisk Univ.*, No. 05-2994-III (Tenn. Ch. Ct. Nov. 3, 2010), *available at* <http://www.scribd.com/doc/41027206/New->

There is a second option for evaluating deaccessioning—judicial interpretation by the courts. Whether applying trust law or corporate law, courts could continue to rely on precedent to help interpret donor agreements in light of revised ethical standards. *Fisk's* recognition of the university's larger educational mission and use of the *cy pres* doctrine allows courts the flexibility to allow universities to sell art under extenuating circumstances to support its broader missions.

A third possibility would be for the legislature to evaluate deaccessioning by statute. In fact, a handful of states already regulate deaccessioning by specific state-operated historical sites or museums. For example, a North Carolina law requires that “[a]ny proceeds realized through the deaccession and sale of artifacts and furnishings [from Tryon Palace] shall be placed in a collections fund administered by the Tryon Palace Commission.”¹⁵⁷ New York requires that “[t]he deaccessioning of property by the museum [of the State University of New York] . . . be consistent with the mission of the museum.”¹⁵⁸ Proceeds “shall be used only for the acquisition of property for the collection or for the preservation, protection and care of the collection and shall not be used to defray ongoing operating expenses of the museum.”¹⁵⁹ Louisiana specifically allows state university museums to deaccession or sell artifacts “only if they have lost their physical integrity, usefulness, authenticity, or relationship to the museum’s purposes, or if their sale would distinctly improve the quality of the museum’s collection.”¹⁶⁰ Although the university’s board of supervisors must approve the sale by majority vote, there is no specific prohibition on why the art may be sold.¹⁶¹

For a broader deaccessioning framework to be effective, however, it must extend to more than just state-operated museums. For example, New

Fisk-Crystal-Bridges-Decision (noting that the proceeds of an artwork sale were to be used to fund university endowment). *See generally* Supplemental Brief, *supra* note 82, at 3–7 (proposing that the future sales of artwork to be limited to public museums).

157. N.C. GEN. STAT. § 121–20 (2009). Built between 1767 and 1770, Tryon Palace in New Bern, North Carolina, was the colony’s first permanent capitol. *See Governor’s Palace*, TRYON PALACE, <http://www.tryonpalace.org/palace.html> (last visited Mar. 30, 2011).

158. N.Y. EDUC. LAW § 233-a(2) (Consol. 2009).

159. *Id.* § 233-a(5).

160. LA. REV. STAT. ANN. § 25:1101(B) (2009); *see also* LA. REV. STAT. ANN. § 25:345(B) (2009) (allowing the Louisiana State Museum board to “establish policies and procedures necessary to carry out this [deaccessioning] authority in an orderly manner consistent with the standards established by the American Association of Museums”).

161. LA. REV. STAT. ANN. § 25:1101(B) (2009).

York recently considered a bill that would extend the general rule prohibiting deaccessioning for operating expenses to all museums:

Proceeds from the disposal of an item or items . . . may be used for the acquisition of another item or items for the collection and/or for the preservation, protection[,] . . . or care of an item or items in the collection. In no event, however, shall proceeds derived from the disposal of an item or items from a . . . collection be used for traditional and customary operating expenses.¹⁶²

Referring to attempts across the country to deaccession art for operating expenses, the state's legislature cited the need to "protect the cultural, artistic, historical, [and] scientific heritage of the state, and the public interest" and comply with "long-standing professional standards."¹⁶³ The bill drew powerful backers, including the New York State Board of Regents and the Museum Association of New York.¹⁶⁴ Opposition, however, was strong; some museums argued for an exception while others took issue with the bill's requirement for every item in a museum's collection to be listed on a state registry.¹⁶⁵ In the end, the existing self-governance policy supported by institutions like the Metropolitan Museum of Art won out, and the legislative proposal stalled.¹⁶⁶

A fourth option proposed by some scholars is for a new agency or regulatory scheme to evaluate proposed sales. For example, one proposal would construct a state regulatory scheme modeled after historic-preservation legislation.¹⁶⁷ A state or local commission of experts would protect artifacts that were "deeply enmeshed in local history and culture" as privately owned cultural property; once designated, additional statutes might require that the art be publicly displayed or that local governments be notified of potential sales of artwork.¹⁶⁸ These types of panels could also

162. S.B. S4584A § 5, 2009–10 Assemb., Reg. Sess. (N.Y. 2009).

163. S. MEMO NO. S4584A-2009 (N.Y. 2009).

164. Robin Pogrebin, *Museums and Lawmakers Mull Sales of Art*, N.Y. TIMES, Jan. 15, 2010, at C31, available at <http://www.nytimes.com/2010/01/15/arts/design/15deaccession.html>.

165. *Id.*

166. See Robin Pogrebin, *Bill to Halt Certain Sales of Artwork May Be Dead*, N.Y. TIMES, Aug. 11, 2010, at C1, available at <http://www.nytimes.com/2010/08/11/arts/design/11selloff.html> (stating that the proposal is unlikely to reemerge in future legislative sessions).

167. Michelle Orloski, Comment, *Preventing Gross Injury to Local Cultural Patrimony: A Proposal for State Regulation of Deaccessioning*, 81 TEMP. L. REV. 605, 628–34 (2008).

168. *Id.* at 631–32.

come from the museum community itself, such as the newly created New York State Board of Regents' advisory group, which will evaluate deaccessioning by its museums.¹⁶⁹ Another expert, arguing that “[de]accessioning shouldn’t be impossible—just nearly so,” has proposed that knowledgeable, impartial arbitrators evaluate proposed sales by examining the museum’s finances, the collection as a whole, and donor agreements.¹⁷⁰ If a sale was permitted, the museum would have to first offer the work to other museums before a public auction was approved—thus helping the Crystal Bridges of the world, as well as allowing the public to still enjoy the art.¹⁷¹

The best long-term regulatory solution would be a combination of these factors. First, ethical guidelines should be modified to allow university museums to deaccession art for operating expenses in the limited circumstances outlined above. Once guidelines are modified at the museum-association level, individual university museums will, in turn, be able to rewrite their internal deaccessioning policies. As part of this process, a more vigorous public-input portion would help ensure that the voices of those who benefit the most from the art would be heard.¹⁷² These new guidelines would recognize the unique dual purpose of these institutions by promoting the study of art without threatening the university’s overall educational opportunities for all students.

Once ethical guidelines and individual museum policies are changed, proposed sales should be evaluated at the association level.¹⁷³ Because there is no single regulatory body for museums, a new joint commission would need to be established. Due to the unique setting of university museums, representatives from both the museum world (such as the Association of College and University Museum & Art Galleries and the Association of Art Museum Directors) and the university world (such as the Association of American Universities and the National Association of Independent Colleges and Universities) should be included. This committee would scrutinize each proposed sale of art to evaluate the Fisk factors of donor intent, public access, and true financial crisis. An independent third party

169. See Robin Pogrebin, *Panel To Advise Regents on Sales by Museums*, N.Y. TIMES, Jan. 7, 2011, at C2, available at http://www.nytimes.com/2011/01/07/arts/design/07arts-PANELTOADVISE_BRF.html.

170. Judith H. Dobrzynski, *The Art of the Deal*, N.Y. TIMES, Jan. 2, 2010, at A21, available at <http://www.nytimes.com/2010/01/02/opinion/02dobrzynski.html>.

171. *Id.*

172. A good example is the University of Iowa Board of Regents, which publicly posted its findings regarding the potential sale of Jackson Pollock’s *Mural* on its website. See IOWA BD. OF REGENTS, *supra* note 109.

173. See Dobrzynski, *supra* note 170.

or arbitrator could be retained in the event of intractable differences.¹⁷⁴ This ad-hoc committee would have enough expertise to examine the issues closely but also have enough flexibility to balance the needs of universities and museums.

Third, legislative action can be taken to solidify the *Fisk* factors, particularly for state-operated university museums. Admittedly, most of the universities grappling with these sales—Fisk, Randolph, Brandeis, and Thomas Jefferson—are private institutions.¹⁷⁵ However, by specifically adding these criteria to existing statutes that govern state museums, public museums would be covered, and private universities would be encouraged to adopt the same criteria in their internal policies. Just as importantly, additional funding should be designated for the charitable-enforcement divisions of state departments of justice. This would provide much needed resources and personnel to encourage an attorney general to enforce the prohibition on deaccessioning if it failed to meet the criteria above.¹⁷⁶

If self-regulation, association evaluation, and statutory guidance fail to determine whether the sale should be allowed, courts will still need to be the option of last resort. If a deaccessioning controversy has reached this point, it clearly is a difficult case, and a court will likely need an additional framework to recognize this unique situation. For example, one scholar suggests courts evaluate deaccessioning based on whether the museum has a legitimate need for proceeds, whether less drastic alternatives to sales are

174. *Id.*

175. A larger statutory regulatory scheme, as proposed by S.B. S4584A § 5, 2009–10 Assemb., Reg. Sess. (N.Y. 2009), while appealing for its simplicity, is not ideal because its one-size-fits-all approach lacks the needed flexibility to govern university museums. For example, the drastic change from existing museum self-regulation to complete government regulation (including a state registry of all museum holdings) would impose excessive burdens on smaller university museums which have much fewer resources than an institution like the Metropolitan Museum of Art. *See supra* notes 162–66 and accompanying text.

176. *See* Carter G. Bishop, *The Deontological Significance of Nonprofit Corporate Governance Standards: A Fiduciary Duty of Care Without a Remedy*, 57 CATH. U. L. REV. 701, 710 (2008) (“Functionally, only state attorney general charitable divisions, which are often understaffed and underfunded, have jurisdiction to challenge [nonprofit malfeasance] and are generally more interested in policing solicitation behavior than other board conduct.”). Scholars have been calling for increased state scrutiny of nonprofits for at least fifty years. *See* Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433 (1960); *see also* Kennedy & Vogel, *supra* note 122 (stating that the state attorney general’s review of gifts to Brandeis was expected to be a lengthy process).

available, and who the intended buyer is.¹⁷⁷ In connection with the *cy pres* doctrine, this type of scheme would further increase a court's flexibility to balance the museum's needs and the university's larger mission.

A new structure of this type is clearly a long-term solution for evaluating deaccessioning by university art museums. However, it would better keep open the doors of these museums (and their parent universities) while ensuring that art of extraordinary significance could continue to be shared with the world.

VI. CONCLUSION

A. Impact on University Art Museums

Given the recentness of *Fisk* and *Brandeis*, case law on university-art-museum deaccessioning is still relatively nascent, and a large-scale revision of deaccessioning is most likely far off. However, in the interim, university art museums are likely to make at least three major changes in response to recent developments.

First, university museums will increasingly seek to clarify their donor agreements, particularly if museums begin to sell art more routinely.¹⁷⁸ Most art is donated without strings or explicit constraints on sales (other than the ethical guidelines).¹⁷⁹ However, as *Fisk* and *Randolph* illustrate, the lack of donor clarity in a donor agreement can cause headaches, lawsuits, and controversy.¹⁸⁰ A clearly written document would ensure that the donor's wishes are known and that the museum will abide by those wishes. For example, agreements may explicitly say that a particular piece may never be sold or may never be sold for operating expenses of the university.¹⁸¹ The reverse should also be true: museums should be required to notify donors of their deaccessioning policies. Language from the 2009 New York legislative proposal could be a model for museum best practices nationwide: "Prior to the acquisition of property by gift, the museum shall

177. White, *supra* note 33, at 1058–65.

178. For example, the Nasher Museum of Art at Duke University is in the process of revising its donor agreements to balance the need for clarity with ensuring that the gift remains tax deductible. Telephone Interview with Kimberly Rorschach, Dir., Nasher Museum of Art at Duke Univ. (Apr. 5, 2010).

179. See Coffey, *supra* note 36.

180. See Kennedy & Vogel, *supra* note 122 (stating that agreements between Brandeis University and donors are under review by the Massachusetts Attorney General).

181. Language of this type would also forestall the potential chilling effect feared by some commentators. See Dwight Lewis, Op-Ed., *People May Think Twice Before Giving to Fisk*, TENNESSEAN, Sept. 16, 2010, at A13.

provide the donor with . . . policies and procedures of the museum relating to deaccessioning.”¹⁸² Now that courts seem more likely to allow such sales, it is advisable to include these types of discussions in written donor agreements, rather than leaving them unspoken and trusting in traditional guidelines to prohibit the art’s sale.

Second, once the university museum has a piece of art in hand, the museum will seek to strengthen its ties with the parent institution. Museums must show that they provide value to the larger university community; an isolated museum is more susceptible to parent deaccessioning.¹⁸³ By educating the university board as well as the public about the sale of art for operating expenses, museums can better make the case that “these assets [of art] should not be viewed as assets.”¹⁸⁴ Museums will also have to show that they are well-run, accountable, and thus, should receive continued university support.¹⁸⁵

Third, although a university may be more likely to consider deaccessioning given recent court decisions, it will only embark on the project after a more formal public-input process. While the deaccessioning process at most institutions is already extensive, in most cases it does not involve a public-input portion; citizens can only express support or opposition after the university board decides to sell the art.¹⁸⁶ As courts such as *Fisk* and *Randolph* continue to allow the sale of art for operating expenses, universities will continue to explore the prospect of deaccessioning, particularly when buyers such as Alice Walton are ready and willing to pay top dollar for the art.¹⁸⁷ However, due to the enormous public outcry that often occurs when the sale of treasured art is proposed,¹⁸⁸ universities would be wise to involve more than simply museum staff and university boards of trustees before making such a drastic decision. At the very least, the deaccessioning process should involve more public notice

182. S.B. S4584A § 5, 2009–10 Assemb., Reg. Sess. (N.Y. 2009).

183. Rorschach, *supra* note 178; *see also* Laura R. Katzman & Karol A. Lawson, *The (Im)permanent Collection: Lessons from a Deaccession*, AM. ASS’N OF MUSEUMS, <http://www.aam-us.org/pubs/mn/deaccession.cfm> (last visited May 17, 2011) (arguing that academic museums should have written deaccessioning policies in place, consistently meet ethical standards, and cultivate good relationships with the university board).

184. Rorschach, *supra* note 178.

185. *See generally* Joel L. Fleishman, Professor of Law and Pub. Policy at Duke Univ., Lecture at Duke University on Philanthropic Accountability (Apr. 7, 2010) (“Good organizations can no longer just do good—they must do good well.”).

186. *See* GUIDELINES, *supra* note 131; *see also* Coffey, *supra* note 36.

187. *See* Rosenbaum, *supra* note 12.

188. *See supra* Part IV (providing examples of public opposition to university deaccessioning).

than it does today.¹⁸⁹ Although the ultimate deaccessioning decision may not change, allowing the public voice to be heard in a more formal way will be an important improvement to the process.

B. Impact on Crystal Bridges

What do decisions like *Fisk* mean for Crystal Bridges or other new art museums that may be on the horizon? Most immediately, Crystal Bridges is almost certain to acquire an interest in the O’Keeffe paintings. The *Fisk* trial court’s final order signaled that the sale is likely to go forward, the ongoing appeals notwithstanding.¹⁹⁰ Adding these renowned paintings to *Kindred Spirits* and the others in Crystal Bridges’s collection will further Alice Walton’s goal of creating a world-class museum in Arkansas.¹⁹¹

More broadly, the *Fisk* decision is a boost to other individuals or institutions that hope to launch a world-class museum. The free flow of art will be encouraged if museums in financial trouble are more able to deaccession art, particularly if they can sell to other museums rather than to individuals. Start-up museums, thus, can acquire art from other museums rather than using traditional methods such as collecting from private collectors; they can build their collections much more quickly and efficiently. In turn, the public can better study and enjoy that art at its new home, rather than have the art hidden in storage and inaccessible to patrons.¹⁹²

Finally, the likely impact of *Fisk*—allowing these paintings to be displayed at Crystal Bridges for six months every year—means improved access to art for new audiences.¹⁹³ The sad reality is that many of the

189. See, e.g., IOWA BD. OF REGENTS, *supra* note 109 (making results from deaccessioning studies publicly available).

190. See Memorandum and Order, *supra* note 83.

191. See Don Bacigalupi, Op-Ed., *Art Work: Building a Great Museum in the 21st Century*, ARK. DEMOCRAT-GAZETTE, Feb. 21, 2010 (“[W]e have the unique opportunity to create a new museum from scratch. . . . We believe in the power of art (and museums) to transform individuals and communities. . . . [W]e hope to build awareness of what Crystal Bridges is to be, namely one of the great American museums anywhere.”). Bacigalupi is the director of the Crystal Bridges Museum of American Art. *Id.*

192. See Sugin, *supra* note 26, at 579 (“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.”).

193. See Memorandum and Order, *supra* note 83, at 26 (“[T]he sharing agreement with Crystal Bridges greatly enhances Ms. O’Keeffe’s purpose that the public be given access to the Collection to promote the study of art.”); see also Statement From Fisk

paintings at issue in these cases are in storage because the universities cannot afford to maintain or display them.¹⁹⁴ Despite this fact, much of the resistance to the Crystal Bridges plans is the underlying belief that art is being moved from the country's traditional cultural centers, like New York and Philadelphia, to a small town in Arkansas.¹⁹⁵ Influential art is too often confined to these cultural centers, away from new audiences who do not regularly have the opportunity to appreciate it. *Fisk* recognizes that actual access to art is more important than potential access to art in a particular location, and this is a positive development for culture, more generally, because it allows that art to diffuse across the country to the public.

For donors and artists like O'Keeffe, who give paintings to promote the study of art, museums are meaningless if the public is unable to appreciate that art. By allowing more people to enjoy these great works, a revised deaccessioning policy structure for university museums would do just that.

University, *supra* note 82 (“[B]ecause of the sharing arrangement, more people in the South can enjoy and study The Stieglitz Collection which was the donor’s intent.”) (quoting Fisk President Hazel O’Leary)). Of course, moving the collection means that other audiences have decreased access to the art. *See* Op-Ed, *Door Opened to Fisk Art Sale*, TENNESSEAN, Sept. 14, 2010 (“[O]pening the door to allowing Fisk to sell the prized art collection is a sad day for the university and the city of Nashville. . . . [W]hat does the university sell next after it spends the \$30 million it could get in an art-sharing deal . . . ? Does it sell its soul?”).

194. *See* Blad, *supra* note 147 (explaining that the Fisk paintings are in storage); Vogel, *supra* note 89 (explaining that *The Gross Clinic* was rarely viewed while on display at Jefferson Medical College); Op-Ed, *Arts-ansas Alice Walton Does It Again*, ARK. DEMOCRAT-GAZETTE, Nov. 9, 2008 (explaining that *Kindred Spirits* “was just gathering dust on a wall in the New York Public Library when Alice Walton saved it from oblivion.”); Barry, *supra* note 107 (explaining that Randolph College paintings in storage are awaiting future sale).

195. *See, e.g.*, Kimmelman, *supra* note 93 (referring to “[s]nobs who argued that Arkansas was itself a travesty as the destination for great art”); *Arts-ansas Alice Walton Does It Again, supra* note 194 (“[J]ust ask the snoberati in New York City, who are still seething over the idea of some Southerner absconding with *Kindred Spirits*—and taking it to, where was it again? Arkansas? That state even the Clintons left?”). *See also* Vogel, *supra* note 89. The sale of *The Gross Clinic* “to the fledgling Arkansas museum also seem[ed] to irk some Philadelphians. ‘I wouldn’t call it snobbishness as much as an inferiority complex,’ Mr. [Phil] Goldsmith [(the city’s former chief financial officer)] said. ‘People keep saying, ‘How can this be sent to the Ozarks?,’ meaning Arkansas.’” *Id.* In actuality, Bentonville and northwest Arkansas are surprisingly cosmopolitan. *See, e.g.*, THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 130 (2005) (describing the author’s astonishment to find “multiple Japanese restaurants in Bentonville”).