The Charitable Deduction and Looting of Antiquities: A Comparative Approach

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Introduction

In 1969, the archaeologist Clemency Coggins traced the provenance of a large number of pre-Columbian antiquities—many of which were held by prominent museums—to looted archaeological sites in Central America.[1] Thereafter, the illicit looting of antiquities gained prominence within aca-

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1. *See* Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94, 94 (1969).

demic spheres. This issue was particularly pertinent to archaeologists because looters cause significant damage to the archaeological record. Looters frequently destroy archaeological sites, deface artifacts, and melt down coins—all of which is extremely detrimental not only to studying a site, but also to recovering items that are looted.[2] Looting activities derive from economic incentives for looters; without a market for looted antiquities, looters would not be conducting such activities.[3]

At first glance, tax incentives for charitable giving do not appear to impact the looting of archaeological sites; rather, these incentives are seen as having a positive impact on society. These incentives can be seen as a cost-effective method for governments to encourage charitable giving.[4] Further, the average person would likely say that we should reward giving to charity.[5] However, in creating these tax incentives for charitable giving, the unhappy truth is that these incentive structures often create repercussions. In the art and antiquities world, the U.S. charitable deduction is often credited with contributing to the looting of archaeological sites and encouraging the sale and purchase of unprovenanced antiquities.

Here, an antiquity refers to an item that is over a hundred years old. This definition is based upon the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter "UNESCO Convention on Cultural Property").[6] Provenance in this context refers to the documented history of an item.[7] This history includes documentation of the item's origins, publication history, exhibition history, and ownership history.[8] Provenance is particularly important in that it aims to track the rightful owner of the item and also because an item that is unprovenanced is very likely to have been looted or acquired through other unsavory means.

A key tenet of archaeological ethics is that of stewardship: archaeologists have an ethical duty to preserve artifacts.[9] This preservation of artifacts in turn provides archaeologists with the ability to derive information about the past. Archaeologists depend on the context of an item in order to derive academic value, so the very act of looting itself destroys much of the

2. *See* Lisa J. Borodkin, Note, *Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 383 (1995).

3. *See* Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Present*, 8 CHI. J. INT'L L. 169, 173–74 (2007).

4. *See* David G. Duff, *The Tax Treatment of Charitable Contributions in a Personal Income Tax: Lessons from Theory and the Canadian Experience*, *in* NOT-FOR-PROFIT LAW: THEORETICAL AND COMPARATIVE PERSPECTIVES 199, 210–13 (Matthew Harding, Ann O'Connell & Miranda Steward, eds., 2014) [hereinafter Duff, *Personal Income Tax*].

5. The concept of charity, after all, largely developed from Judeo-Christian belief systems. *See* Thomas Kelley, *Rediscovering Vulgar Charity: A Historical Analysis of America's Tangled Nonprofit Law*, 72 FORDHAM L. REV. 2437, 2441–42 (2005).

6. Nov. 14, 1970, 823 U.N.T.S. 231, Art. 1(e) [hereinafter "UNESCO Convention on Cultural Property"].

7. *See* Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M.L. REV. 123, 125 (2010).

8. *See id.*

9. *See* Alison Wylie, *Science, Conservation, and Stewardship: Evolving Codes of Conduct in Archaeology*, 5 SCI. & ENGINEERING ETHICS 319, 330–31 (1999).

academic value an archaeologist might derive from any given item. This is at least in part because looters are disinclined to document the process by which they remove items and also frequently destroy the archaeological record surrounding the item. Archaeologists conduct excavations through stratigraphical examinations. They examine each layer, or stratum, to reconstruct the past.[10] Take, for example, a letter in the form of a cuneiform tablet: although we might know that the tablet is a letter, we would be unable to discern who had sent it, if the letter had arrived at its destination, whether the letter had been sent in the first place (perhaps it was simply a draft), or whether the letter was of any significance (for example, if the tablet was stored with other important letters, or if it was simply left in a rubbish pit). These are but a few of the questions that would necessarily remain unanswered if a tablet was unprovenanced.

This Note aims to examine how tax systems incentivize charitable giving and how these systems could be structured in a way that may lessen secondary repercussion of providing a market for looted antiquities.

Part I discusses the rationale and policies for the repatriation of cultural property. Part II discusses how tax systems provide incentives for charitable giving, and how those systems can impact the market for looted antiquities. Part II also examines nonprofit structures and how these might impact the relationship between donor and donee. Part III discusses the effectiveness of tax incentives for charitable giving. Part IV discusses other proposed solutions for reducing looting of archaeological sites, including criminal penalties for knowingly purchasing looted antiquities, as well as other proposed solutions within the tax system. Part V proposes a possibility for incentivizing charitable giving in the United States without simultaneously aiding the market for looted antiquities.

I. Cultural Property

A. Defining Cultural Property

The United Nations Educational, Scientific, and Cultural Organization (hereinafter "UNESCO") defines culture as "the set of distinctive spiritual, material, intellectual and emotional features of society or a social group."[11] UNESCO further defines cultural property as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science."[12] The Hague, however, predicated its definition of cultural property on "movable or immovable property of great importance to the cultural heritage of every people," and also included buildings such as museums

10. *See* Gerstenblith, *supra* note 3, at 171–72.

11. UNESCO, Universal Declaration on Cultural Diversity, 31st Session, General Conference of UNESCO, Paris (Nov. 2, 2001), http://unesdoc.unesco.org/images/0012/001271/127162e.pdf [https://perma.cc/V6S9-N8NK].

12. UNESCO Convention on Cultural Property, *supra* note 6, at Art. 1.

and libraries, as well as "centres containing monuments."[13] In general, there are two schools of thought on the subject of cultural property: cultural internationalism and cultural nationalism.[14] Cultural internationalism proponents believe that cultural property belongs to the world, while cultural nationalism proponents believe that cultural property belongs to the source nation.[15] In terms of definitions of cultural property provided by the Hague and UNESCO, the former's is based on internationalism, and the latter's is based on nationalism.

Cultural internationalism and nationalism also largely fall into two schools based on whether the country is a source country, meaning it is rich in antiquities, or a market country, meaning its demand for antiquities is greater than its supply.[16] Source countries generally espouse cultural nationalism, while market countries generally espouse cultural internationalism.[17] The two schools are further delineated by whether the primary avenue of preservation for an item should require the item's return to its source country (nationalism), or should instead place the item's physical integrity as paramount, regardless of whether the item is in its source country (internationalism).[18] In general, market countries are wealthier than source countries and thus have more resources available to preserve the items themselves.[19] Preservation, though, should not be limited to just preservation of the item itself. Preservation of the item's context or preservation of the culture from which the item derived are both important aspects of the item beyond its physical integrity.[20] Further, creation of a market for unprovenanced antiquities also results in destruction of archaeological sites by looters; this destruction can damage not only the items' context, but the items themselves.[21]

The delineation between the two schools of thought, though, is not absolute. In practice, there is often overlap between cultural property internationalism and cultural property nationalism. The UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage[22]

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13. The Hague, Convention for the Protection of Cultural Property in the Event of Armed Conflict, Art. 1, May 14, 1954.

14. *See* Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT'L L.J. 690, 694 (2007). The two schools were defined by John Henry Merryman in *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 833–45 (1986).

15. *See* Raechel Anglin, Note, *The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide*, 20 YALE J.L. & HUMAN. 241, 242 (2008).

16. *See* Tanya Evelyn George, Note, *Using Customary International Law to Identify "Fetishistic" Claims to Cultural Property*, 80 N.Y.U. L. REV. 1207, 1215 (2005).

17. *See id.* at 1215–16.

18. *See id.* at 1216.

19. *See* Claudia Caruthers, Comment, *International Cultural Property: Another Tragedy of the Commons*, 7 PAC. RIM L. & POL'Y J. 143, 155–56 (1998).

20. *See* Bauer, *supra* note 14, at 706–09.

21. *See id.*

22. UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226 [hereinafter "World Heritage Convention"], available at http://unesdoc.unesco.org/images/0013/001333/133369e.pdf [https://perma.cc/M4WL-EDW2].

(hereinafter "World Heritage Convention"), specifically espouses a cultural property internationalism view, though in function many aspects of the Convention operate on a view that one might consider to be cultural property nationalism.[23] The World Heritage Convention entails the development of the World Heritage List,[24] which allows countries to obtain more global awareness about their cultural property and thereby generate more tourism and further economic development, while simultaneously allowing countries to apply for additional funding for the care of the sites.[25] The state parties of the World Heritage Convention in turn nominate sites within their own countries to the World Heritage List.[26] The nomination process for the World Heritage List is necessarily indicative of cultural property nationalism.

B. Problems with the International Framework for Cultural Property

UNESCO's reach is necessarily limited, though, because it deals with nation states. Many countries naturally include ethnic, religious, and cultural minorities, and national governments often do not take these minority interests into account sufficiently. In addition, some ethnic groups inhabit multiple countries; which country, then, should be representative of their interests?[27] In some cases, the national government has taken steps to provide for domestic repatriation and cultural property rights. For example, the U.S. Native American Graves Protection and Repatriation Act of 1990 provides an avenue for the return of cultural items from federal agencies and museums,[28] criminal penalties for "trafficking in Native American human remains and cultural items,"[29] and prohibits intentional excavation on federal and tribal lands.[30] In New Zealand, the Protected Objects Amendment Act 2006 functions as an amendment to the Antiquities Act 1975.[31] These acts, though, are imperfect. For example, the Native American Graves Protection and Repatriation Act does not impose any export restrictions.[32]

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23. *See* Anglin, *supra* note 15, at 270–71.

24. World Heritage Convention, *supra* note 22, at art. 11, para. 2.

25. *See* Anglin, *supra* note 15, at 247–48.

26. *See id.* at 248–49.

27. For example, the area that was historical Mongolia now spans the Mongolian People's Republic and China's Inner Mongolia Autonomous Region. *See* Enze Han, *The Dog that Hasn't Barked: Assimilation and Resistance in Inner Mongolia, China*, 12 ASIAN ETHNICITY 55, 56–57 (2011).

28. 25 U.S.C. § 3002(a) (1990).

29. 18 U.S.C. § 1170 (1990).

30. 25 U.S.C. § 3002(c) (1990).

31. *See* Piers Davies & Paul Myburgh, *The Protected Objects Act in New Zealand: Too Little, Too Late?*, 15 INT'L J. CULTURAL PROP. 321, 327–28 (2008).

32. *See* Elizabeth M. Koehler, Note, *Repatriation of Cultural Objects to Indigenous Peoples: A Comparative Analysis of U.S. and Canadian Law*, 41 INT'L LAWYER 103, 120 (2007). The Act included a carve-out for the Smithsonian with regard to the return of cultural items, but this exemption had effectively been remedied by the National Museum of the American Indian Act (1989) when the Native American Graves Protection and Repatriation Act was passed. *See id.* at 113.

In contrast to the case of domestic repatriation of tribal objects and remains in the Native American Graves Protection and Repatriation Act, some countries contain antiquities from cultures that are not their own. For example, because of its geographical location between Europe and Asia, Turkey contains antiquities from a large variety of cultures, including the Hittites, Lydians, Lycians, Urartians, and Myceneans.[33] Turkey also rigorously pursues repatriation claims for its antiquities through refusing to loan artifacts, delaying licenses for archaeological excavations, and public shaming.[34] Nevertheless, Turkey's repatriation rationale might be best predicated upon a melting pot argument, wherein cultural memory derives not from language or ethnicity, but place.[35]

C. United States Museums and Cultural Property

As of 2014, the United States contained approximately 35,000 museums.[36] In contrast, the United Kingdom has approximately 2,500 museums.[37] Ultimately, the United Kingdom has approximately 7% of the museums that the United States does; in comparison, the United Kingdom has approximately 20% of the population of the United States.[38]

Prior to 1970 and the UNESCO Convention on Cultural Property, many U.S. museums were known for acquiring antiquities with questionable provenance.[39] Even after 1970, and the later 1995 UNIDROIT Convention, the mandates were binding only on federally-funded museums, which constitute a small percentage of the museums in the U.S.[40] This was likely in part because U.S. museums were at a sort of disadvantage compared to their European counterparts. European museums such as the British Museum, the Louvre, and the Pergamon acquired their collections in the 1700s and 1800s when archaeology was in its infancy; these museums' collections were acquired from archaeological sites when the norm was for

33. *See* Sharon Waxman, Loot: The Battle over the Stolen Treasures of the Ancient World 141 (2008). Further, many of the civilizations straddled areas beyond Turkey's borders. For example, the Hittite Empire occupied parts of modern-day Syria and the Levant at various points in time. *See* Trevor Bryce, The Kingdom of the Hittites 53, 186–87 (2005).

34. *See* Kelvin D. Collado, *A Step Back for Turkey, Two Steps Forward in the Repatriation Efforts of its Cultural Property*, 5 J.L., Tech., & Internet 1, 2; Dan Bilefsky, *Seeking Return of Art, Turkey Jolts Museums*, N.Y. Times (Sept. 30, 2012), http://www.nytimes.com/2012/10/01/arts/design/turkeys-efforts-to-repatriate-art-alarm-museums.html [https://perma.cc/7ZK6-CEVW].

35. *See* S.M. Can Bilsel, *Zeus in Exile: Archaeological Restitution as Politics of Memory* 9–10 (Princeton University Center for Arts and Cultural Policy Studies Working Paper No. 13, Fall 2000).

36. *See* Institute of Museum and Library Services, Government Doubles Official Estimate: There Are 35,000 Active Museums in the U.S., press release, May 19, 2014.

37. *See* FAQs, Museums Association, https://www.museumsassociation.org/about/frequently-asked-questions, accessed Dec. 1, 2017 [https://perma.cc/KPH8-4SP7].

38. Population numbers calculated based on data from World Bank Group, Population, Total, https://data.worldbank.org/indicator/SP.POP.TOTL, 2017 (U.S. Population at 323,127,510 and UK population at 65,637,240) [https://perma.cc/LTX7-ZZEY].

39. *See* Caruthers, *supra* note 19, at 151.

40. *See id.* at 152.

archaeologists to cart the results of their excavations to their home countries.[41] In contrast, museums in the U.S necessarily had to acquire their collections in a time when the norm is for source countries to retain archaeological objects.[42] Consequently, U.S. museums have significantly larger acquisition budgets than their European counterparts.[43] Further, U.S. museums rely on donations from private collectors in order to grow their collections—donations which necessarily have tax implications.[44] Notably, 90% of art collections in U.S. museums were donated by private collectors.[45]

II. Tax Systems, Incentives for Charitable Giving, and Unprovenanced Antiquities

A. United States

1. United States Charitable Deduction Structure Prior to 2018

In the United States, the charitable deduction was introduced in the War Revenue Act of 1917.[46] A charitable deduction provides a tax benefit by essentially not taxing the portion of an individual's income that is donated to charity. When an individual donates property to a nonprofit organization such as a museum, the amount of the deduction that the individual can take is based upon the fair market value of the property.[47] Additionally, if the donor wants to take a charitable deduction at the full fair market value, then the donee must put the donated property to a "related use," meaning that such a use furthers the donee's charitable purpose.[48] For example, if a museum puts a donated piece of art on display, that would be considered a related use. If the recipient does not put the donated property to a related use, though, then the donor may only take a deduction up to the donor's cost.[49]

However, the charitable deduction is available only to those who itemize their deductions,[50] and individuals with higher incomes are significantly more likely to itemize deductions.[51] This generally means

41. *See* Alan Riding, *Why 'Antiquities Trials' Focus on America*, N.Y. Times (Nov 25, 2005), http://www.nytimes.com/2005/11/25/arts/design/why-antiquities-trials-focus-on-america.html [https://perma.cc/RVF6-Q835].

42. Christine L. Green, *Antiquities Trafficking in Modern Times: How Italian Skullduggery Will Affect United States Museums*, 14 Vill. Sports & Ent. L.J. 35, 36 (2007).

43. *See* Riding, *supra* note 41.

44. *See id.*

45. *See* Association of Art Museum Directors, Art Museums, Private Collectors, and the Public Benefit, 1, January 2007, https://aamd.org/sites/default/files/document/PrivateCollectors3.pdf [https://perma.cc/UXK8-4ZTU].

46. War Revenue Act of 1917, Pub. L. No. 65-50, 40 Stat. 300 (1917).

47. I.R.C. § 170(b)(1)(D).

48. I.R.C. § 170(e)(1)(B)(i).

49. I.R.C. §§ 170(e)(1)(A), 1221(a)(3).

50. I.R.C. § 170.

51. *See* Scott Greenberg, "Who Itemizes Deductions?", Tax Foundation (Feb. 22, 2016), https://taxfoundation.org/who-itemizes-deductions/ [https://perma.cc/Q6M2-EJBG]. Generally speaking, those with lower incomes typically take the standard deduction because the standard deduction is higher than the sum of their itemized deductions.

individuals who derive a tax incentive from donating property such as antiquities to museums are likely to be wealthy donors. This of course leads to the question: If we choose to incentivize charitable giving through the tax system, should we provide these incentivizes to all income brackets? If we choose to reward charitable giving through the tax system, it seems that we should allow these rewards for those of all incomes. A $50 donation could be a significant percentage of a low-income taxpayer's income, but might be negligible for a high-income taxpayer. Further, the nonprofit sector is often seen as pluralistic and diverse precisely because it draws support from a wide variety of sources.[52] Indeed, one of the tests that a public charity can meet in order to avoid being designated as a private foundation and thus allow its donors a greater deduction requires broad public support.[53] To reward and thus allow for greater support from a specific type of source, i.e., wealthy donors, would undoubtedly impinge upon the idea that the nonprofit sector ought to represent a wide variety of interests and views.

U.S. charitable deductions can incentivize the purchase of unprovenanced antiquities. Although a donor may have purchased an unprovenanced item, that donor will nevertheless receive the same deduction as a donor who diligently purchased only items with proper provenance. This is because works of art are notoriously difficult to value; the House Ways and Means Committee even noted that such works are in some cases overvalued for the purpose of taking a greater charitable deduction.[54] Although the deduction is based on fair market value, antiquities by their nature are often unique; there is no similar item on the open market to compare a given item's value to.[55] Additionally, even though an item might have been sold within an auction house, many of these sales are in and of themselves to dealers, and thus may not be at all indicative of the item's actual retail price.[56] Although an antiquity might have been repatriated after a donor gifted it to a museum, the donor might still be able to take the full fair market value deduction. This, of course, might seem odd, since one might think that an item that would need to be repatriated if it was purchased would have a lower market value. It is unclear whether this reflects reality, though, since donors are not required to disclose the terms of a repatriation agreement to the IRS.[57]

52. *See* Debra Morris, *Recent Developments in Charity Taxation in the United Kingdom: The Law Gives and The Law Takes Away*, *in* NOT-FOR-PROFIT LAW: THEORETICAL AND COMPARATIVE PERSPECTIVES 254, 268 (Matthew Harding, Ann O'Connell & Miranda Steward, eds., 2014).

53. *See* I.R.C. §§ 509(a)(1)-(2), 170(b)(1)(A)(vi).

54. H.R. Rep. No. 91-413, at 55 (1969).

55. *See* Emily C. Ehl, Case Comment, *The Settlement of Greece v. Ward: Who Loses?*, 78 B.U. L. REV. 661, 677 (1998).

56. *See* William M. Speiller, *The Favored Tax Treatment of Purchasers of Art*, 80 COLUM. L. REV. 214, 229 (1980).

57. *See* Erin Thompson, *The Relationship between Tax Deductions and the Market for Unprovenanced Antiquities*, 33 COLUM. J.L. & ARTS 241, 258–59 (2010) [hereinafter Thompson, *Tax Deductions*].

Indeed, the charitable deduction structure allows collectors to donate items of dubious provenance to charitable organizations and take a deduction that in some cases might completely cover the cost of acquisition.[58] In *Greece v. Ward*, the Ward Gallery displayed and offered Mycenean artifacts about two decades after they had been looted from an archaeological site.[59] When Greece demanded the return of the artifacts, the Ward Gallery refused, leading to Greece filing suit against the Gallery in 1993.[60] Ultimately, the two parties settled, with the Gallery donating the items to the nonprofit Society for the Preservation of the Greek Heritage, which then returned the items to Greece.[61] By doing so, the Gallery was ultimately able to claim a charitable deduction that likely covered the cost of acquisition.[62] Additionally, collectors who suspect that they hold an unprovenanced artifact may be inclined to donate the item because the item may undergo less scrutiny—a prospective buyer may be more concerned with the origins and authenticity of the item, particularly since it affects the cost.[63]

The structure of the donee non-profit organization also affects the amount that the donor can take as a charitable deduction. For donations of capital gain property,[64] if the recipient is a private nonoperating foundation, then the donor's deduction is the cost of acquisition.[65] Capital gain property for the purpose of deductions is property which would have produced a long-term capital gain for the donor if the donor had sold the property instead of donated it.[66] A private nonoperating foundation often has close ties to one key founder or founding family, and as such is more strictly regulated than other forms of nonprofits. If, on the other hand, the property is donated to a public charity, then the donor can choose to take a deduction that is limited either by 50% of the donor's contribution base, based upon the cost of acquisition, or by 30% of the donor's contribution base, based upon the fair market value of the donated property.[67] The donor's contribution base is typically equal to the donor's adjusted gross income.[68] Considering the structure of tax incentives, a donor would prefer to donate to a public charity in order to take a larger deduction.

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58. *See* Ehl, *supra* note 55, at 682.

59. *See* Ricardo J. Elia, *Greece v. Ward: The Return of Mycenean Artifacts*, 4 INT'L J. CULTURAL PROP. 119, 120 (1995).

60. *See* Ehl, *supra* note 55, at 674–75.

61. *See id.* at 675.

62. *See id.*

63. *See* Speiller, *supra* note 56, at 229.

64. Capital gain property is property held for investment or personal use. *See* David G. Duff, *Tax Treatment of Charitable Contributions in Canada: Theory, Practice, and Reform*, 42 OSGOODE HALL L.J. 1, 44 (2004) [hereinafter Duff, *Charitable Contributions in Canada*].

65. I.R.C. § 170(e)(1)(B)(ii).

66. I.R.C. § 170(b)(1)(C)(iv).

67. I.R.C. § 170(b)(1)(D).

68. I.R.C. § 170(b)(1)(F).

2. *Impact of Tax Cuts and Jobs Act*

On December 22, 2017, the Tax Cuts and Jobs Act was signed into law.[69] The new law eliminates or limits a variety of deductions, though it does not eliminate the charitable deduction. However, the changes in other deductions that must be itemized nevertheless impact the effectiveness of the charitable deduction as an incentive for charitable giving.[70] Because the charitable deduction is an itemized deduction, an individual typically only utilizes the charitable deduction if the sum of the individual's itemized deduction is greater than the standard deduction.[71]

Notably, the new tax bill limits the state and local tax deduction (hereinafter SALT deduction) to $10,000.[72] The SALT deduction is one of the most popular itemized deductions, with almost 30% of tax units utilizing the deduction.[73] Notably, more than half of the total amount deducted through the SALT deduction in 2015 was deducted by taxpayers with adjusted gross incomes under $200,000.[74] For many middle-class individuals in states with high state taxes, the SALT deduction makes it more advantageous for them to itemize, and thereby utilize the charitable deduction.[75]

Additionally, the new tax bill roughly doubles the amount of the standard deduction from $6,530 to $12,200 for individuals, and from $12,700 to $24,400 for married individuals filing a joint return.[76] Consequently, middle class individuals who previously itemized their deductions are more likely to take the standard deduction in the future. For example, if a

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69. Tax Cuts and Jobs Act, Pub. L. No. 115-97 (2017).

70. *See e.g.*, Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 1204 (repeals education-related deductions and expenses, such as deductions on education loan interest, qualified tuition and expenses, and qualified tuition reductions), § 1302 (limits deduction on home mortgage interest), § 1303 (limits deduction on state and local taxes), § 1308 (repeals deduction on unreimbursed medical expenses), § 1309 (repeals deduction on alimony), § 1310 (repeals deduction on moving expenses) (2017).

71. *See supra* p. 9 and note 51.

72. Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 1303 (2017). Previous iterations of the tax bill intended to eliminate the SALT deduction completely. Such an elimination would have had an even more severe impact on the efficacy of the charitable deduction as an incentive. Even under the final version of the bill, several states have sufficiently high state taxes that a limitation of $10,000 for the deduction will impact middle class taxpayers. For example, based on 2015 IRS data, in New York, the average SALT deduction, which is utilized by 35% of the state's population, was $22,169. Government Finance Officers Association, The Impact of Eliminating the State and Local Tax Deduction 9, Figure 7 (2017). In California, the average SALT deduction, utilized by 34% of the state's population, was $18,437. *Id.* Based on 2015 IRS data, 20 states had average SALT deductions greater than $10,000. *Id.*

73. Government Finance Officers Association, The Impact of Eliminating the State and Local Tax Deduction 4 (2017).

74. *Id.* at 3.

75. *See* Todd C. Frankel, *Charities Fear Tax Bill Could Turn Philanthropy into a Pursuit Only for the Rich*, Wash. Post (Dec. 23, 2017), https://www.washingtonpost.com/business/economy/charities-fear-tax-bill-could-turn-philanthropy-into-a-pursuit-only-for-the-rich/2017/12/23/38b65eb6-e69a-11e7-9ec2-518810e7d44d_story.html [https://perma.cc/54WJ-FRCG].

76. Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 1002 (2017).

couple in New York previously took a SALT deduction at the average within the state, $22,169,[77] and had donated $10,000 to charity, the total of $32,169 would be well over the previous standard deduction of $12,700 (married filing jointly). However, under the new tax bill, if the couple continued to donate $10,000 to charity, but their SALT deduction was limited to $10,000, assuming that the couple's other itemized deductions were negligible, the total of their itemized deductions would only be $20,000. Conversely, the new standard deduction is $24,400 (married filing jointly). The couple thus has no tax incentive to donate to charity. Perhaps the couple might choose to donate more in order to pass the $24,400 threshold, but the couple might also choose to donate less because they will receive a greater deduction regardless of if they donate to charity or not.

Because of these changes, charities in the United States are concerned that the new tax bill will negatively impact charitable giving.[78] These concerns revolve around not only the amount of the donations, but also the timing. For example, in order to take advantage of the charitable deduction, the couple in our previous example might choose to donate $20,000 in one year, thereby pushing their itemized deductions over $24,400. Then, in the next year, the couple could simply not donate and take the standard deduction. Although this strategy of charitable giving would be financially advantageous for the couple, many non-profits, particularly those that provide services year-round, could potentially find it difficult to plan around such patterns of giving.

B. The European Union

In *Persche v. Finanzamt Lüdenscheid*, a 2006 European Court of Justice case, German tax authorities denied a German taxpayer a charitable deduction because the donation had been made to a Portuguese charity.[79] Under *Persche*, in order for an individual to receive a charitable deduction, the recipient must be formed such that (1) the recipient's country recognizes it as a charity and (2) the donor's country would recognize it as a charity if the recipient was formed in the donor's country.[80] After 2006, many European Union member states began to conform to the decision, though not all member states chose to do so.[81]

77. *See supra* note 72.

78. *See* Marion Hart, *How Will the New Tax Law Affect Your Charitable Donations?* FORBES (Dec. 22, 2017), https://www.forbes.com/sites/unicefusa/2017/12/22/how-will-the-new-tax-law-affect-your-charitable-donations/#81ce5b762893 [https://perma.cc/G3PF-SQMV]; Bryan McQueeney, Editorial, *The GOP Tax Reform Will Devastate Charitable Giving*, L.A. TIMES (Dec. 27, 2017), http://www.latimes.com/opinion/op-ed/la-oe-mcqueeney-charitable-giving-under-new-tax-law-20171227-story.html [https://perma.cc/E2WE-ZFVJ].

79. *See* Case C-318/07, 2009 E.C.R. I-359; Khrista Johnson, *The Charitable Deduction Games: Are the Laws in Your Favor?* 5 COLUM. J. TAX L. 69, 86 (2013–14).

80. *Id.* at 87–88.

81. *See id.* at 86.

1. *United Kingdom*

Since 1990, the primary tax relief for charitable donations in the United Kingdom has been through the Gift Aid program.[82] In 2000, Gift Aid was expanded to remove the minimum and maximums required for donations to qualify for Gift Aid.[83] Gift Aid functions as a sort of rebate system for charities. In order for a donation to qualify for Gift Aid, the donation must be made in cash.[84] For donations made by basic-rate taxpayers, the charity can claim an additional 25 percent on top of the original donation—an amount equivalent to the 20 percent tax that would have been paid by the donor.[85] Thus, if a basic-rate taxpayer wished to donate 100 pounds, the taxpayer could instead donate 80 pounds, and the charity could claim an additional 20 pounds through Gift Aid (25% of 80 pounds). For donations made by higher-rate taxpayers, the charity can claim the same additional 25 percent on top of the donation from Gift Aid, and the taxpayer can also claim 20 percent of the total amount received by the charity; these two claims equal the higher rate of tax, which is 40 percent.[86] Thus, if a higher-rate taxpayer wished to donate 100 pounds, the taxpayer could donate 80 pounds, the charity could claim an additional 20 pounds (25% of 80 pounds) through Gift Aid, and the taxpayer could also claim an additional 20 pounds (20% of 100 pounds); the net cost to the taxpayer would then be 60 pounds.

In 2010, the United Kingdom implemented a policy initiative called the Big Society, which included a policy aimed at promoting philanthropic activity.[87] In a 2010 survey, only 18% of individuals with a high net worth in the U.K. responded that charitable giving was one of their top three spending priorities, compared to 41% in the United States.[88] In order to encourage philanthropic activity, the U.K. government expanded the Gift Aid system by creating an online filing system and adding an additional payment for small charities.[89] Small charities, in particular, often lack the administrative capacity to process a large number of small donations and submit their claims for Gift Aid.[90] Notably, a 2010 report by the Charities Aid Foundation found that approximately 750 million pounds of Gift Aid went unclaimed each year.[91]

In regards to antiquities, as of 2009, the United Kingdom tax system did not provide any tax relief for charitable gifts of art and antiquities.[92]

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82. *See* Morris, *supra* note 52, at 258.
83. Finance Act 2000, c. 17 (U.K.).
84. *See* Johnson, *supra* note 79, at 93.
85. *See* Morris, *supra* note 52, at 258.
86. *See id.* at 258–59.
87. *See* Cabinet Office (UK), Building the Big Society 2 (2010).
88. Barclays Wealth & Ledbury Research, Global Giving: The Culture of Philanthropy 3–4 (2010).
89. *See* Morris, *supra* note 52, at 260.
90. *See id.*
91. Charities Aid Foundation & National Council for Voluntary Organisations, UK Giving 2010: An Overview of Charitable Giving in the UK, 2009/2010, 24 (2010).
92. *See* Morris, *supra* note 52, at 272.

There are provisions that allow for tax relief for donations of land, buildings, shares, and securities, though.[93] Because museums in the United Kingdom acquired their collections in the 18th and 19th centuries, these museums necessarily required less use of funding to acquire collections from scratch than U.S. museums did.[94] This likely explains, at least in part, why the United Kingdom does not have a tax incentive for donations of art and antiquities; such an incentive was simply not necessary for the museums in the United Kingdom to develop their collections.

2. *Germany*

In Germany, individuals can deduct monetary charitable donations as special personal expenses.[95] The amount of the deduction is limited to 20% of the individual's annual income.[96] In previous years, this limitation was more restrictive— with a limit of 5% of an individual's annual income and perhaps 10% for purposes considered more meritorious by the government.[97] However, for donations of property, the situation in Germany is a bit different from the United States. Because Germany does not typically tax private capital gains, donations of property do not encounter the issue of taxing appreciation.[98] Moreover, although there is a provision that allows individuals in Germany to deduct the tax cost of an asset without recognizing gain, because this gain may not have been taxed in the first place,[99] the overall tax scheme does not seem to preference donations of property like the U.S. system does.

C. Canada

Similar to the United States, the 1917 Canadian Income Tax Act introduced a deduction for some types of charitable giving.[100] This deduction was then expanded to all monetary charitable donations in 1930, and the deduction was eventually converted to a credit in 1988.[101] The credit is two-tiered: annual aggregate charitable donations up to $200 are creditable at the lowest marginal rate, while annual aggregate charitable donations over $200 are creditable at the highest marginal rate.[102] This system effectively allowed for the greatest increase in tax benefit for low-income taxpayers, while largely maintaining the status quo for middle- and high-income taxpayers; the new credit amounted to roughly the same dollar amount as a

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93. *See* Johnson, *supra* note 79, at 93.
94. *See* Riding, *supra* note 41.
95. *See* HUGH J. AULT, COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS 287 (2010).
96. *See id.*
97. *See* HUGH J. AULT, COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS 234 (2004).
98. *See id.*
99. *See id.*
100. *See* Income War Tax Act, S.C. 1917, c 28, s 3(1)(c) (Can.).
101. *See* Duff, *Personal Income Tax*, *supra* note 4, at 218.
102. Income Tax Act, 118.1(3) (Can.); An Act to Amend the Income Tax Act and the Income Tax Application Rules, S.C. 1995, c 3, s 34 (Can.). The previous threshold was $250. *See* Duff, *Personal Income Tax*, *supra* note 4, at 219.

deduction would have provided.[103]

In regards to donations of appreciated property, in 1972, the Income Tax Act allowed a donor of property to take a deduction, but also required that the same donor pay the capital gains tax on the donated property.[104] To determine the value of the property for both the deduction and the tax, the donor was allowed to elect any amount between the cost of the property to the donor and the fair market value.[105] In 1977, though, gifts of qualifying cultural property, as determined by the Canadian Cultural Property Export Review Board, to cultural property institutions, as certified under the Cultural Property and Export and Import Act, became exempt from capital gains tax and fully deductible, with the deduction based upon the fair market value of the property.[106] Notably, this amendment was passed in large part on the recommendation of private museums in order to compete with U.S. museums for donations.[107]

III. Effectiveness of Tax Incentives

Tax systems throughout the world are used to incentivize charitable giving. Generally, recognition of charitable giving in income tax systems is rationalized either as a base measurement (base-defining) or as a subsidy.[108] In terms of a base measurement, a deduction for charitable contributions is seen either as an involuntary obligation that affects the amount of income a taxpayer might have at his or her disposal; alternatively, a charitable contribution might be seen as an amount of income that the taxpayer does not personally consume, and thus such an amount should be deducted.[109] In terms of a subsidy, a tax incentive for charitable giving is seen as the government providing a subsidy through foregone tax revenue in order to encourage taxpayers to give to charity.[110] Further, using tax incentives might be seen as a better type of subsidy than direct grants or similar mechanisms because (1) the nonprofit sector is seen as providing goods that would not otherwise be produced by the market; (2) providing tax incentives encourages individuals to give to charity, a value most would consider to be a social good; and (3) providing tax incentives allows individual donors the opportunity to decide where government subsidies are directed.[111]

These two rationales for incentivizing charitable giving through the tax system are not without their problems, though. For base measurement, it is questionable whether a charitable donation is truly an involuntary

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103. *See* Duff, *Personal Income Tax*, *supra* note 4, at 220–21.
104. *See id.* at 224.
105. *See id.*
106. *See* Duff, *Charitable Contributions in Canada*, *supra* note 64, at 44–45; Duff, *Personal Income Tax*, *supra* note 4, at 224–25.
107. *See id.* at 224.
108. *See* Roger Colinvaux, *Charitable Contributions on Property: A Broken System Reimagined*, 60 Harv. J. on Legis. 263, 267–68 (2013).
109. *See* Duff, *Personal Income Tax*, *supra* note 4, at 201–03.
110. *See id.* at 204–05.
111. See Colinvaux, *supra* note 108, at 267–68.

obligation. Morally, we might think that donating to charity is an obligation, but ultimately, individuals are not obligated to donate to charity in the same way that they might feel obligated to purchase food for subsistence.[112] As for the consumption aspect, because a charitable donation is not an involuntary obligation, it is not considered personal consumption; rather, it is a discretionary expenditure, though an admirable one.[113] As for the subsidy aspect, if charitable giving is a moral obligation, to say that pecuniary incentives are necessary in order to encourage charitable giving seems a bit counterintuitive.[114] Rather, the need to reward such behavior might be seen as corrupting the altruistic nature of the donation—why should one be rewarded financially for doing something that is a moral obligation?[115]

The base measurement and subsidy rationales also run into additional problems when we begin to differentiate between cash donations and donations of property. Under the base measurement rationale, an individual taking a charitable deduction for property is essentially discounting the amount of tax paid on income that would not otherwise have been taxed at that time (i.e., appreciation of the donated property) and simultaneously avoiding paying tax on the appreciation that the individual would have had to pay later on.[116] Under the subsidy rationale, some donations of property might help nonprofit organizations provide services absent in the market, promote charitable giving, and allow individuals to choose where to direct government subsidies.[117] Property, though, is ultimately less flexible than cash.[118] For example, in the event of a natural disaster, cash donations are strongly preferred over donations of goods because the cash can be used at the locale where the disaster occurred.[119] Assuming the goods were useful for helping those affected by the disaster, the goods would then need to be collected, sorted, packaged, and transported—all of which could significantly raise the cost of disaster relief efforts.[120] Further, although the recipient non-profit may prefer cash donations over donations of property, the donor receives a greater tax incentive for donating property.[121] As mentioned above, a donor who donated property would be able to deduct unrealized income (appreciation of the donated

112. *See* Duff, *Personal Income Tax*, *supra* note 4, at 203–04.

113. *See id.* at 204.

114. *See id.* at 207–08.

115. *See e.g.*, E. Blake Bromley, *Charity, Philanthropy and Stewardship: A Philosophical Perspective on Tax Reform*, 7 PHILANTHROPIST 4, 12 (1988).

116. *See* Colinvaux, *supra* note 108, at 268–69.

117. *See id.* at 269–70.

118. *See id.*

119. Julia Brooks, *Want to help after a disaster? Give your cash, not your clothing*, THE GUARDIAN (Sept. 25, 2017), https://www.theguardian.com/society/2017/sep/25/disaster-aid-cash-not-clothing-relief-hurricane-harvey [https://perma.cc/76QK-57LK]. Although it is very unlikely that those providing small in-kind donations are likely to itemize deductions, I have provided this example simply to illustrate the differences between property and cash donations. In the museum context, one might consider, for example, how useful a museum of natural history might find a Rothko painting.

120. S*ee id.*

121. *See* Colinvaux, *supra* note 108, at 270.

property) against other realized income, as opposed to a donor who donated cash, who would be deducting realized income against realized income.[122]

Overall, the relationship between tax incentives and the amount of charitable donations in a given period is not particularly clear. For example, Europe has a variety of systems to incentivize charitable giving with mixed results. Sweden provides no tax incentives, while France offers a tax credit that ranges from 66% to 75% of the donation.[123] Despite France's tax credit, the total amount of charitable donations in 2012 relative to France's gross domestic product was less than that of other countries such as the Netherlands and Germany, which provide fewer tax incentives for charitable donations.[124]

One of the prime flaws of incentivizing charitable giving through a deduction is that such an approach is extremely regressive: it strongly favors wealthy taxpayers over low-income taxpayers.[125] Prior to 1988, the Canadian government had resisted changing the charitable deduction into a credit because the government feared that such an approach would stifle charitable giving by wealthy individuals and families.[126] With the 1988 changes to the Income Tax Act, the average donation of taxpayers whose income ranged from $1 to $50,000 increased, though the average donation from taxpayers whose income was above $50,000 decreased.[127] The aggregate amount of charitable donations claimed by taxpayers between 1987 and 1988 nevertheless rose from $2.27 billion to $2.64 billion.[128] The aggregate amount of charitable donations and the average donation continued to trend upward from 1987 to 1996, but the percentage of taxpayers who donated decreased amongst all groups except those with an income of over $250,000.[129]

IV. Some Solutions Proposed Previously

A. Criminal Penalties

One possible solution to the effect of charitable deductions on the looting of antiquities is criminal penalties for knowingly purchasing unprovenanced antiquities. Some argue for the decriminalization of trade in looted antiquities since criminalizing their sale creates a black market

122. *See id.*
123. Peter Davy, *The Power of Perks; European governments want to encourage donations to charity. But how much do tax breaks actually spur generosity?*, WALL ST. J. (Mar. 1 2010), https://www.wsj.com/articles/SB10001424052748703787304575075400171203026 [https://perma.cc/P254-UZK6].
124. *See id. See also* CHARITIES AID FOUNDATION, WORLD GIVING INDEX 2012 52–53 (2012).
125. *See* Duff, *Personal Income Tax*, *supra* note 4, at 218.
126. 3 PRIVY COUNCIL OFFICE, REPORT OF THE ROYAL COMMISSION ON TAXATION 222 (1966) (Can.).
127. *See* Duff, *Personal Income Tax*, *supra* note 4, at 221–23.
128. *See id.*
129. *See id.* at 222–23 tbls. 9.3 & 9.4.

that is naturally more difficult to regulate.[130] However, regulation of the market would not ultimately prevent looting of archaeological sites.[131] Sources for artifacts span a large number of countries, and some of these archaeological sites are in remote, difficult-to-reach locations, which would make enforcement of any sort of regulations difficult.

Within the United States, the National Stolen Property Act (hereinafter "NSPA") provides an avenue for source countries to demand the return of their artifacts. An object which was illegally exported from its source nation but legally imported into the United States does not create a cause of action for the object's return; thus, U.S. prosecutors have instead turned to the NSPA to designate an item as stolen.[132] The NSPA was originally intended to prevent criminals from escaping a given state's jurisdiction by moving stolen property across state lines.[133] In order for an object to be considered stolen under the NSPA, the facts must meet the requirements set out in *United States v. Schultz*.[134] Per *Schultz*, an object is stolen if (1) the source nation enacted a vesting statute; (2) the source nation asserts actual ownership; and (3) the object was illegally exported.[135] Previously, courts could designate objects as stolen without the source nation asserting ownership.[136] In the context of antiquities, a foreign vesting statute often takes the form of a patrimony statute or a found-in-the-ground law.[137] The crux of these laws is that ownership of the artifacts, including artifacts which have not yet been excavated, lies with the source nation.[138]

The *McClain* and subsequent *McClain-Schulz* doctrines are not without their critics, though. Some commentators see the use of the NSPA to enforce foreign vesting statutes as an unwarranted enforcement of foreign law.[139] Further, some see the vesting statutes as disguised export restrictions, which would mean that, under this view, enforcing the NSPA with regard to foreign antiquities effectively enforces a foreign country's export restrictions, and is thus contrary to a basic tenet of international law.[140] Further, as mentioned above, the repatriation of the artifacts in question does not necessarily deter looting. Rather, collectors might be more inclined to take the risk of purchasing unprovenanced artifacts precisely

130. *See* John Henry Merryman, *Cultural Property Internationalism*, 12 INT'L J. CULTURAL PROP. 11, 23 (2005).

131. *See* Urice, *supra* note 7, at 128 (noting the minimal effect of statutes in reducing illicit trafficking).

132. *Id.* at 127–28.

133. *See* Adam Goldberg, Comment, *Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, 53 UCLA L. REV. 1032, 1039 (2006).

134. 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 393 (2d Cir. 2003).

135. Urice, *supra* note 7, at 131.

136. This would be the analysis under the *McClain* doctrine prior to *Schultz*. *See id.*; Goldberg, *supra* note 133, at 1042.

137. *Cf.* Urice, *supra* note 7, at 128–29 (patrimony statutes); Goldberg, *supra* note 133, at 1038–39 (found-in-the-ground laws).

138. *See* Urice, *supra* note 7, at 128; Goldberg, *supra* note 133, at 1037.

139. *See* Goldberg, *supra* note 133, at 1046.

140. *See id.*

because they know that donating the artifact and taking a charitable deduction might very well recoup the cost of acquisition altogether.[141]

B. Valuation

One possible solution for removing the incentive for donating unprovenanced antiquities is for the IRS to require a showing of provenance before allowing a taxpayer to take a charitable deduction for an antiquity.[142] Historically, the IRS has had little issue with adjusting the valuation of an item when the Service deems the valuation to be inaccurate, and many courts have been accepting of the IRS's re-valuation of antiquities.[143] The IRS already has an Art Advisory Panel, which can lower the value of a piece of art that it deems to be a forgery.[144] To adjust the value of antiquities would not be far from the bounds of what the IRS has already been doing with art valuations, and to adjust the value for lack of provenance would also be within the United States' public policy, as indicated by its bilateral agreements with artifact-rich countries, ratification of the 1970 UNESCO Convention, and enactment of legislation implementing the Convention on Cultural Property Implementation Act of 1983.[145]

C. Self-Regulation by Museums

Museums have promulgated thorough best practices on how museums ought to avoid purchasing unprovenanced items that may be subject to repatriation.[146] Guidelines were first promulgated as a response to Nazi-looted art, but later additional guidelines were issued regarding antiquities in general.[147] Notably, the guidelines for antiquities in general only direct museums to examine planned acquisitions, rather than examining their existing collection in addition to planned acquisitions.[148] Specifically, the

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141. *See supra* pp. 10–11.

142. *See* Thompson, *Tax Deductions*, *supra* note 57, at 259.

143. *See id.* at 259–60.

144. *See* I.R.S. IRM 4.48.2.1.1 (Oct. 10, 2012) (summarizing the responsibilities of the Art Advisory Panel). *See e.g.*, Doherty v. Commissioner, 63 T.C.M. (CCH) 2112 (1992), *aff'd*, Doherty v. Commissioner, 16 F.3d 338 (9th Cir. 1994).

145. *See* Urice, *supra* note 7, 151–52 (2010) (discussing examples of U.S. policies aimed at protecting the global archaeological record); Thompson, *Tax Deductions, supra* note 57, 260–61 (2010). Of course, the United States has recently announced its intention to withdraw from UNESCO, so whether this will continue to be the public policy remains to be seen. The reason given for withdrawing, though, was UNESCO's alleged anti-Israel bias and not any particular protestation against UNESCO's anti-looting policies. *See* U.S. DEP'T OF STATE, THE UNITED STATES WITHDRAWS FROM UNESCO, Press Statement (Oct. 12, 2017) https://www.state.gov/r/pa/prs/ps/2017/10/274748.htm [https://perma.cc/XKY3-DUFS].

146. *See, e.g.*, *Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era*, AM. ALL. MUSEUMS, http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era (last visited Aug. 8, 2018) [https://perma.cc/BHM5-ZNW4].

147. *See* Erin Thompson, *Successes and Failures of Self-Regulatory Regimes Governing Museum Holdings of Nazi-Looted Antiquities*, 37 COLUM. J.L. & ARTS 379, 381–82, 390–91 (2014) [hereinafter Thompson, *Self-Regulatory Regimes*].

148. *See id.* at 392–93.

guidelines point to items with provenance prior to the 1970 adoption of the UNESCO Convention on Cultural Property, and items with provenance after 1970.[149] Items with questionable provenance dating to pre-1970 are unlikely to result in a repatriation claim, while items with questionable provenance dating from 1970 onwards should be avoided.[150] Turkey, though, has demanded repatriation of several items with complete post-1970 provenance.[151] Turkey has based these claims on a 1906 law from the Ottoman Empire that prohibited the export of artifacts.[152]

One likely reason for the difference between the guidelines for Nazi-era art and antiquities in general is the sheer cost of implementation.[153] Additionally, museums must rely on public support within the meaning of the public support test outlined in Part II in order to maintain their non-profit status as public charities.[154] In order to secure sufficient funding, museums must maintain positive relationships with their donors even if the donor wishes to donate a piece of art with questionable provenance.[155]

Further, there is some friction between archaeologists and museums. This returns in part to the dichotomy between cultural internationalism and nationalism discussed in Part I. Archaeologists are generally concerned with preservation beyond that of the object's physical integrity,[156] while museums in market countries are generally proponents of cultural internationalism.[157] Archaeologists largely focus on the academic value that a given item can provide, but museums must also consider their donors when they choose what to display, when to accept donations, and which donations to accept. Further, several countries have delayed licenses for archaeological excavations when museums refuse to repatriate items.[158]

D. State Auctions

Another possible solution suggested in the literature is for source countries to hold auctions for antiquities.[159] One major concern with such a solution is that existing laws concerning repatriation already favor wealthy market countries.[160]

In 1992, the Chinese government auctioned off a number of antiquities.[161] However, Western dealers criticized the auction for not including

149. *See id.* at 391–92.
150. *See id.*
151. Bilefsky, *supra* note 34.
152. *See id.*
153. *See* Thompson, *Self-Regulatory Regimes*, *supra* note 147, at 399.
154. *See* Ralph Blumenthal & Tom Mashberg, *Collectors Cursed by Dubious Artifacts*, N.Y. TIMES, July 15, 2012, at AR1.
155. *See id.*
156. *See* Bauer, *supra* note 14, at 706–09 (discussing preservation of the archaeological context and preservation of an object's culture).
157. *See* Caruthers, *supra* note 19, at 155.
158. *See, e.g.*, Bilefsky, *supra* note 34.
159. *See* Borodkin, *supra* note 2, at 411–16.
160. *See supra* pp. 21–23.
161. *See* Caruthers, *supra* note 19, at 160.

sufficiently rare items.[162] Lisa Borodkin suggests that source countries should sell artifacts to create a market in which collectors could purchase antiquities with proper provenance; this would benefit the source countries economically while simultaneously recognizing the source countries' ownership rights.[163] Borodkin's model suggests that source countries would better be able to choose what artifacts to retain and which to sell, but would a developing country be able to resist the necessities of their economic situation? Further, why should a developing country be obligated to sell its cultural heritage in order to be able to preserve it? The rationale for state auctions appears to be largely predicated on cultural property internationalism: the end goal here seems to be to put antiquities in museums, regardless of which museum that might be.

Another issue with state auctions is whether such a strategy would ultimately prevent looting. In advocating for a state auction, the source country would still need to obtain the artifacts. Although some source countries are well able to fund archaeological excavations, some countries might not be in that position; how, then, ought those countries generate sufficient capital to fund an excavation?

V. Proposed Solution

The United States tax incentives for charitable giving essentially exist as two deductions: the charitable deduction for monetary donations and the charitable deduction for donations of property. Although they exist as two separate schemes, at least in some sense, the average American citizen likely thinks of the two deductions as one concept: if you donate to charity, you will reap some sort of tax benefit.

A. Monetary Donations

If our aim is to encourage charitable giving through tax incentives, and if the rationale behind doing so is in part motivated by having a diverse, pluralistic nonprofit sector, it seems natural that we should encourage charitable giving from a broad range of individuals. Indeed, one conception of the system of tax incentives for charitable giving is that it allow individuals to direct what is essentially a government subsidy in the form of foregone tax revenue.[164] As such, a tax credit would be preferable to a deduction, since tax deductions disproportionately benefit wealthy taxpayers.[165] Such a tax credit should be refundable so that individuals whose income is so low that they do not pay tax on it can still benefit from the incentive.[166]

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162. *See id.*

163. See Borodkin, *supra* note 2, at 411–17.

164. *See* Richard Krever, *Tax Deductions for Charitable Donations: A Tax Expenditure Analysis*, *in* Charities and Philanthropic Institutions: Reforming the Tax Subsidy and Regulatory Regimes 11–13 (Richard Krever & Gretchen Kewley eds., 1991).

165. *See* Duff, *Charitable Contributions in Canada*, *supra* note 64, at 68–69.

166. *See id.* Although a refundable tax credit would likely decrease tax revenues, if our primary aim is pluralism, we should extend the tax incentive to all income ranges.

Another reason to target a broader tax base to benefit from tax incentives for charitable giving is existing donation patterns for households with different incomes. Households with an income under $100,000 typically donate to religious organizations and organizations that help meet basic needs.[167] Households with an income greater than $200,000 typically donate to arts and education organizations.[168] Providing tax incentives for different income groups allows for a broader spectrum of charitable organizations to benefit from charitable giving.

Of course, the concern with increasing the availability of tax incentives is that the government's tax revenue will be lowered. Interestingly, though, the Congressional Budget Office estimated that converting the existing deduction system into a 25% nonrefundable credit with a floor for eligible donations ($500 for individuals and $1,000 for joint filers) would not only increase the total amount of contributions, but would also reduce the amount that the government forewent in tax revenues.[169] The Office also estimated that a similar credit without a floor would increase contributions by 1.3% but would also result in a 17.4% increase in foregone tax revenues.[170] Although a nonrefundable tax credit would likely result in loss of revenue for the government, it is unclear how the increase in charitable contributions might also affect the need for government spending. Notably, the charitable sector also exists in part to ameliorate government failures, and a specific charitable purpose is to lessen the burdens on the government.

Further, it is difficult to determine the extent to which tax incentives actually impact charitable giving.[171] Perhaps one of the problems with the existing tax incentive structure is simply the assumption that those who give large gifts to charity ought to be rewarded through the tax system. Notably, with Gift Aid in the United Kingdom, many of the higher-rate taxpayers did not claim their tax relief through the program despite qualifying for the return of 20% of their donation.[172] Additionally, the fact that some taxpayers who do not itemize deductions, and thus reap no tax benefits from the charitable deduction, nevertheless donate to charity implies

167. CENTER ON PHILANTHROPY AT INDIANA UNIVERSITY, PATTERNS OF HOUSEHOLD CHARITABLE GIVING BY INCOME GROUP, 2005 15 (2007). The report defines basic needs as necessities such as food and shelter.

168. *Id.* Interestingly, though, the data also indicates that households with income over $1 million, though they still contribute significantly to arts and education organizations, are also responsible for 59% of charitable giving to health organizations. *Id.* Additionally, of the donations to educational organizations, only 15.7% are specifically for scholarships. *Id.* at 24. Specifically, one concern with focusing tax incentives on high-income taxpayers is that these taxpayers do not necessarily donate to organizations which might benefit a broader group of people. For example, although many arts organizations have programs such as reduced admission or traveling exhibits to benefit low-income communities, it is unclear what amount of donations to these organizations is specifically focused on these programs. *See id.* at 25.

169. CONGRESSIONAL BUDGET OFFICE, OPTIONS FOR CHANGING THE TAX TREATMENT OF CHARITABLE GIVING 10 tbl.3 (2011).

170. *Id.*

171. *See* Duff, *Charitable Giving in Canada*, *supra* note 64, at 92.

172. *See* Morris, *supra* note 52, at 258–59.

that even absent tax incentives, charitable giving will still occur;[173] rather, the question is the extent to which charitable giving will occur.

B. In-Kind Donations

A tax incentive structure that includes incentives for donations of property should take into account the impact on antiquities looting. Money is fungible, but that is not always the case with property. For types of property that are not fungible, the tax system should take such a characteristic into account. For example, one might be less concerned with donations of publicly traded stock.

Specifically, the tax system should disallow tax incentives for donations of art and antiquities if the donor knew that the object was unprovenanced before purchasing it. In some sense, this returns us to our discussion of the NSPA. Public policy indicates that we should protect bona fide purchasers, but an individual who knowingly purchases stolen art should not also reap a tax benefit from such an act. Further, the amount of the charitable deduction for donations of antiquities should take into account the presence or lack of provenance, as suggested by Erin Thompson.[174] Such a policy would be aimed to prevent situations such as that in *Greece v. Ward* from occurring.[175] Knowing that lack of provenance could impact the amount of the charitable deduction could incentivize purchasers to more thoroughly investigate the provenance of items on the market.

Another consideration would be whether the tax system should continue to exempt donated property from the capital gains tax. Unfortunately, there is little data on the period in which Canada provided for a charitable deduction for capital gains and a capital gains tax on donated property at the same time. Further research could aid policymakers in determining whether such a system might impact the antiquities market.

Conclusion

The tax incentive structure for charitable giving in the United States, as in many other countries, is imperfect. The structure over-incentivizes donations from wealthy individuals, whether those donations are made up of cash or of property. This structure has negative impacts not only domestically, but abroad as well.

By providing an incentive for donations of antiquities to museums—an incentive that was perhaps largely necessitated by the state of American museums in the 19th century—the charitable deduction has not only created a market for antiquities of questionable provenance, but has also created what is potentially a get-out-of-jail free card for those who knowingly purchase antiquities of questionable provenance or fail to conduct their due diligence in determining whether an antiquity's provenance is genuine.

173. *See* Congressional Budget Office, *supra* note 169, at viii n.3.
174. *See* Thompson, *Tax Deductions, supra* note 57, at 259.
175. *See supra* pp. 10–12.

The international community has largely condemned the looting of archaeological sites and the sale of unprovenanced antiquities. Regardless of whether one subscribes to cultural property nationalism or internationalism, incentivizing the looting of these sites through the tax system is a problem that must be remedied.