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# REFRAMING “ART” TO ART: Deterring Looters and Injecting Contemporary Native American Art Through Charitable Deductions



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*Winner of the National Native American Law Students Association  
2021 Writing Competition*

## Abstract

American museums adorn their exhibitions with the cultural heritage belongings of Indigenous peoples from around the world. The collectors, not the belongings’ originating communities, typically make these donations and benefit from fair market charitable deductions. All the while contemporary Native American artists wish to share their experiences and stories, yet artists only receive a charitable deduction equivalent to their basis in creating the artworks when donating to museums. This Article demonstrates how potential modifications to the Internal Revenue Service’s Art Advisory Panel may deter looters from desecrating archaeological sites and illustrates how passage of the Artist-Museum Partnership Act would inject contemporary Native American art into American museums.

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Introduction

Museums make headlines with initiatives to diversify collections, yet a 2019 study of eighteen major American museums found 85.4% of the artists to be white and 87.4% of the artists to be male.<sup>1</sup> Female artists comprised only eleven percent of art acquisitions and fourteen percent of art exhibitions at twenty-six American museums between 2008 and 2019.<sup>2</sup> Moreover, the acquirers, not the creators, fill art museums. Private collectors donated nearly ninety percent of American art museum collections held in private trust.<sup>3</sup> The Metropolitan Museum of Art (“Met”), Museum of Fine Arts, Boston (“MFA”), and Art Institute of Chicago (“AIC”) differ not, and continue retaining and displaying sensitive and protected Indigenous cultural heritage belongings. Many of the belongings were never intended for viewers outside of the originating cultures, yet millions of people visit the Met, MFA, and AIC galleries each year.

The Met recently launched an initiative for the increased visibility of Indigenous art.<sup>4</sup> The shift began when rehousing Native American “art” from the Africa, Oceania, and the Americas gallery to an American

<sup>1</sup> Chad M. Topaz et al., *Diversity of Artists in Major U.S. Museums*, 14 PLoS ONE at 1, 8 (2019). See Daniel H. Weiss & Max Hollein, *Our Commitments to Anti-Racism, Diversity, and a Stronger Community*, THE MET (July 6, 2020), <https://www.metmuseum.org/blogs/now-at-the-met/2020/the-mets-plans-for-anti-racism> [hereinafter The Met’s Commitment to Diversity].

<sup>2</sup> Julia Halperin & Charlotte Burns, *Museums Claim They’re Paying More Attention to Female Artists. That’s an Illusion.*, ARTNET NEWS (Sept. 19, 2019), <https://news.artnet.com/womens-place-in-the-art-world/womens-place-art-world-museums-1654714>. ArtNet News and In Other Worlds conducted and published the joint investigation on women in the art world. See *Women’s Place in the Art World*, ARTNET NEWS (Sept. 19, 2019), <https://news.artnet.com/womens-place-in-the-art-world>.

<sup>3</sup> Press Release, Ass’n of Art Museum Directors, *Art Museums, Private Collectors, and the Public Benefit* (Jan. 2007), <https://aamd.org/sites/default/files/document/PrivateCollectors3.pdf>.

<sup>4</sup> Brigit Katz, *The Met Is Hiring Its First Full-Time Curator of Native American Art*, SMITHSONIAN MAGAZINE (Oct. 5, 2019, 2:46 PM), <https://www.smithsonianmag.com/smart-news/met-hiring-its-first-full-time-curator-indigenous-art-180973055>.

wing.<sup>5</sup> The Met, nevertheless, failed to contact tribal governments, and many so-called "artworks" are "sacred ceremonial objects, [objects of] cultural patrimony, and burial objects."<sup>6</sup> Concurrently, museumgoers gawk, awe, and discuss the beauty of the bird, insect, fish, and human imagery adorning Mimbres bowls at the MFA and AIC.<sup>7</sup> The AIC, as recently as April 2019, organized *Worlds Within: Mimbres Pottery of the Ancient Southwest* an exhibition with over seventy Mimbres bowls but ultimately postponed the exhibition after a December 2018 meeting with Native American scholars and community members.<sup>8</sup> Upon closer inspection, visitors may notice that many Mimbres bowls contain small holes.<sup>9</sup> Modern Puebloans of the American Southwest and Mexico understand these holes—known by archaeologists as "kill holes"—as the sacred act of allowing the "breath of the bowl to flow back to the cosmos, as these bowls are believed to be as alive as humans, plants, and animals."<sup>10</sup> Archaeologists and looters removed many of these bowls from burial contexts with minimal sensitivity to their cultural sacredness.<sup>11</sup> Thus, funerary and sacred belongings and belongings of cultural patrimony remain in federally funded institutions and federal agency repositories over thirty years

<sup>5</sup> *Id.*

<sup>6</sup> The exhibit, *Art of Native America: The Charles and Valerie Diker Collection*, contained NAGPRA-protected cultural heritage belongings, yet the Met never contacted tribal government representatives. "The [Met's] exhibition includes items that may be held in violation of state and federal laws." Press Release, Ass'n on Am. Indian Affairs, The Metropolitan Museum of Art Ignores Responsibilities to Indian Tribes (Oct. 29, 2018), [https://www.indian-affairs.org/uploads/8/7/3/8/87380358/2018-10-29\\_met\\_pr.pdf](https://www.indian-affairs.org/uploads/8/7/3/8/87380358/2018-10-29_met_pr.pdf).

<sup>7</sup> Gerald W.R. Ward, *Native American Art at the Museum of Fine Arts, Boston*, ANTIQUITIES & FINE ART MAGAZINE (Dec. 14, 2012, 4:47 PM), <http://www.afanews.com/articles/item/1458-native-american-art-at-the-museum-of-fine-arts-boston#.XcLQRDNKiUl>. The MFA removed the Mimbres bowls from viewing during the COVID-19 museum closure; nevertheless, the Mimbres bowls were publicly viewable as of October 5, 2021, via the MFA and the Art Institute of Chicago's online databases. Web links are not provided given the cultural sensitivity and sacredness of the Mimbres bowls.

<sup>8</sup> Steve Johnson, *Art Institute Postpones Major Native American Pottery Exhibit Over Cultural Insensitivity Concerns at the Last Minute*, CHI. TRIBUNE (Apr. 1, 2019), <https://www.chicagotribune.com/entertainment/museums/ct-ent-art-institute-postpones-native-american-pottery-exhibition-0402-story.html>.

<sup>9</sup> See *supra* note 7 regarding the decision to exclude the hyperlinks for the Mimbres bowls at the MFA and AIC.

<sup>10</sup> See Rachel Vang, *Mimbres Painted Pottery: Art, Artifact, or Ancestor?: Conversations Concerning Repatriation, Treatment, and Considerations for Contested Collections in Museums* (2019) (Master's thesis, Minnesota State University, Mankato) 16 (citing J.J. BRODY & RINA SWENTZELL, *TO TOUCH THE PAST: THE PAINTED POTTERY OF THE MIMBRES PEOPLE* (1996); Patricia A. Gilman, *Social Organization and Classic Mimbres Period Burials in the SW United States*, 17 J. FIELD ARCHAEOLOGY 457 (1990); Michelle Hegmon et al., *Experiencing Social Change: Life During the Mimbres Classic Transformation*, 27 ARCHAEOLOGICAL PAPERS AM. ANTHRO. ASS'N 54 (2016)).

<sup>11</sup> *Id.* at 20.

after Congressional enactment of the Native American Graves Protection and Repatriation Act (“NAGPRA”).<sup>12</sup>

Federally funded institutions continuously fail to contact tribal government representatives, often leading to violations of state, federal, and tribal law when retaining and displaying immutable cultural heritage belongings.<sup>13</sup> While the Met recently hired Patricia Marroquin Norby (Purépecha) as the inaugural Associate Curator of Native American Art, the Association on American Indian Affairs (“AAIA”) stresses the importance of involving tribal government representatives throughout the entirety of these processes.<sup>14</sup> Retaining and displaying NAGPRA-protected cultural heritage belongings not only goes against the law and the wishes of many Indigenous peoples but also commodifies cultural heritage belongings in the minds of the looters and private collectors largely responsible for their acquisition. Consequently, the commodification rationalizes the public’s belief of trading, selling, purchasing, and viewing Indigenous cultural heritage belongings as acceptable behaviors.

The unethical and sometimes outright illegal acquisition of cultural heritage belongings dates to the early days of globalization, colonialization, and the systematic disenfranchisement of Indigenous peoples throughout the world.<sup>15</sup> From Italy’s claim for *Victorious Youth* to the Met repatriating two Koh Ker statues to Cambodia, the unethical and illegal acquisition of cultural heritage belongings does not stop within American borders.<sup>16</sup>

<sup>12</sup> Enacted in 1990, NAGPRA (25 U.S.C. §§ 3001–3013) protects Native American and Native Hawaiian ancestral remains and cultural heritage belongings “excavated or discovered on [f]ederal or tribal lands,” and repatriates those remains and objects held by museums and federal agencies. 25 U.S.C. §§ 3002, 3005. Cultural heritage belongings include associated and unassociated funerary belongings, sacred belongings, and belongings of cultural patrimony. 25 U.S.C. §§ 3001(2), 3004. An additional component, 18 U.S.C. § 1170, criminalizes the trafficking of Native American ancestral remains and cultural heritage belongings.

<sup>13</sup> Press Release, Ass’n on Am. Indian Affairs, *supra* note 6.

<sup>14</sup> *Id.*; Press Release, The Metropolitan Museum of Art, Patricia Marroquin Norby Named Associate Curator of Native American Art at The Metropolitan Museum of Art (Sept. 8, 2020), <https://www.metmuseum.org/press/news/2020/patricia-marroquin-norby>.

<sup>15</sup> See Vang, *supra* note 10, at 8 (citing KATHLEEN S. FINE-DARE, GRAVE INJUSTICE: THE AMERICAN INDIAN REPATRIATION MOVEMENT AND NAGPRA (2002); AMY LONETREE, DECOLONIZING MUSEUMS: REPRESENTING NATIVE AMERICA IN NATIONAL AND TRIBAL MUSEUMS (2012)).

<sup>16</sup> *Victorious Youth*, often referred to as the “Getty Bronze,” dates to 300–100 B.C. Greece, although Italian courts ruled that the statue should be repatriated to Italy. Sarah E. Bond, *Should the Getty Return Its Famed “Victorious Youth” Statue?*, HYPERALLERGIC (July 5, 2018), <https://hyperallergic.com/449866/should-the-getty-return-its-famed-victorious-youth-statue>. Controversy arises from the origin of the bronze, which likely originated in Greece. *Id.* City-states often commissioned bronze statues of winning athletes to be erected at the competition site and the athletes’ home cities. *Id.* Sawed off feet provide ample evidence that looters removed *Victorious Youth* from its original location and either lost or dumped the statue in the Adriatic Sea. *Id.* This is where, in 1964, an Italian fishing vessel recovered the statue. *Id.* The chain

Federally funded institutions such as the Met, MFA, and AIC are designated § 501(c)(3) organizations, and thus their donors receive fair market value charitable deductions for donating artworks and cultural heritage belongings. Finding ways to deter the looting of cultural heritage belongings may be aided through modifications of the federal tax code and charitable giving. Although the repatriation of Native American cultural heritage belongings remains a separate issue, the facilitation of such processes might also be assisted by the modifications. At the end of the day, some Native American artists hope to replace museum collections of Native American "art" with contemporary Native American art.

Before the Tax Reform Act of 1969, artists, composers, and writers received a tax deduction equivalent to the fair market value of their donated works to museums, libraries, and archives.<sup>17</sup> The Act eliminated the charitable deduction that artists received from directly donating their original works.<sup>18</sup> A reinstitution of the artist charitable deduction may create an influx of contemporary Native American art in museums throughout the country—letting the artists tell their stories.

So how might slight changes to the Internal Revenue Code contribute to equitable representation within art and museum institutions and allow artists to receive full fair market deductions for their contributions? Drawing upon the inequitable representation of Black,

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of acquisition becomes clouded, but J. Paul Getty acquired the statue in 1977 from Groupe Artémis. *Id.* Italy provided evidence that the art dealer falsified provenance papers for cultural heritage trafficking. *Id.* The Koh Ker statues were displayed at the Met as the "Kneeling Attendants," and were donated separately between the late 1980s to early 1990s. Press Release, The Metropolitan Museum of Art, Metropolitan Museum of Art to Return Two Khmer Sculptures to Cambodia (May 3, 2013), <https://www.metmuseum.org/press/news/2013/cambodian-returns>. In fact, the statues were donated in four separate pieces with each head and torso donated separately—often a clear indication of unethical acquisition. *Id.* Met officials convened with Cambodian government officials after receiving information on the statues' illicit acquisition. *Id.* The then-director of the Met, Thomas P. Campbell, made an official statement on the Met's decision to repatriate the two looted statues.

The Museum is committed to applying rigorous provenance standards not only to new acquisitions, but to the study of works long in its collections in an ongoing effort to learn as much as possible about ownership history. This is a case in which additional information regarding the Kneeling Attendants has led the Museum to consider facts that were not known at the time of the acquisition and to take the action we are announcing today. In returning the statues, the Museum is acting to strengthen the good relationship it has long maintained with scholarly institutions and colleagues in Cambodia and to foster and celebrate continued cooperation and dialogue between us.

*Id.*

<sup>17</sup> See Statement from Sen. Patrick Leahy Regarding the Introduction of the Artist-Museum Partnership Act of 2007 (Feb. 12, 2007) (archived at <https://web.archive.org/web/20080829110315/http://leahy.senate.gov/press/200702/021207.html>).

<sup>18</sup> See *id.*; Daniel Grant, *This Tax Law Created to Reprimand Nixon Has Been Cheating Artists for Decades*, OBSERVER (Mar. 15, 2018, 9:30 AM), <https://observer.com/2018/03/a-tax-law-from-the-nixon-era-means-artists-cant-write-off-donations>.

Indigenous, People of Color, and female representation in art museums and highlighting the work of contemporary Native American artists, this Article proposes ways in which the Internal Revenue Code (“IRC”) can reduce museums’ acquisition of unethical cultural heritage belongings and increase the introduction of contemporary Native American art. Part I analyzes how the modification of the charitable deduction may be an effective method of deterring the looting of cultural heritage belongings around the world. Part II discusses how the current museum and film industries influence the “vanishing Indian” misnomer, and how Native American artists voice their stories through the creation of contemporary art. Part III proposes how a modification of the charitable deduction, through the Artist-Museum Partnership Act, allows for the increased infusion of contemporary Native American art into the art world.

## **I. Deterring Looting through the Charitable Deduction**

The charitable deduction incentivizes American taxpayers to donate cultural heritage belongings and artworks to § 501(c)(3) museums. The federal government provides charitable deductions as a cost-effective method to encourage charitable giving by omitting taxes on the taxpayer’s income donated to charity.<sup>19</sup> Taxpayers welcome charitable deductions for the tax relief and social prestige associated with donating, and museums welcome donations to fill their collections. There simultaneously remains a dark side to the transactions—looting of archaeological sites around the world and the commodification of unethically and illicitly acquired cultural heritage belongings.

### **A. Charitable Deduction under the Internal Revenue Code**

A taxpayer donating to a § 501(c)(3) nonprofit organization receives a charitable deduction from their income taxes based on the donation’s fair market value when the taxpayer itemizes their deductions.<sup>20</sup> The taxpayer’s deduction amount depends on the donee’s use of the donation. The donation’s use must be related to the donee’s mission for a full fair market value charitable deduction.<sup>21</sup> Tax and art advisors commonly refer to the distinction as the “related-use rule.”<sup>22</sup> Donated cultural heritage belongings and artworks fall within a museum’s “related use,”

<sup>19</sup> Sabrina Y. Hsieh, Note, *The Charitable Deduction and Looting of Antiquities: A Comparative Approach*, 51 CORNELL INT’L L.J. 471, 472 (2018) (citing David G. Duff, *The Tax Treatment of Charitable Contributions in a Personal Income Tax: Lessons from Theory and the 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)).

<sup>20</sup> I.R.C. § 170.

<sup>21</sup> 26 C.F.R. § 1.170A-4A(b)(2)(i).

<sup>22</sup> See, e.g., Vicki R. Carney, *Charitable Contributions of Artwork: An Important Primer*, THE TAX ADVISOR (Apr. 1, 2016), <https://www.thetaxadviser.com/issues/2016/apr/charitable-contributions-of-artwork-primer.html>; Beth Smith, *The Art of Donating Art*, MORGAN STANLEY (Jul. 19, 2019), <https://www.morganstanley.com/articles/art-of-donating-art>.



and accordingly taxpayers receive deductions equivalent to the full fair market value of the donations.<sup>23</sup> However, donations not falling within "related use" net the taxpayer a deduction up to the donor's cost.<sup>24</sup> Therefore, the tax code incentivizes the collectors of cultural heritage belongings and art to donate to § 501(c)(3)-designated museums.

The IRC's current structuring fails to disincentivize looting through the indistinction between provenanced and unprovenanced cultural heritage belongings and artworks. Donors receive identical charitable deductions regardless of known provenance. Additionally, the uniqueness of cultural heritage belongings and artworks leads to difficulties in ascribing fair market value and fraudulent overvaluations.<sup>25</sup> Cultural heritage belongings and artworks typically shift hands between collectors and auction houses, and these transactions never quite indicate a fair market value.<sup>26</sup>

Moreover, cultural heritage belongings and artworks acquired by a museum that need to be repatriated by federal law, such as NAGPRA, may provide the taxpayer with the full fair market value charitable deduction.<sup>27</sup> Taxpayers need not disclose repatriation agreements with the Internal Revenue Service ("IRS"), and thus the terms of these agreements remain unknown.<sup>28</sup> Current structuring of the charitable deduction allows unethical collectors donating illicitly acquired cultural heritage belongings and artworks to recoup all or more of the acquisition costs.<sup>29</sup> Previous instances of repatriation claims settled outside of court suggest that unethical collectors still received charitable deductions for "donating" stolen and looted cultural heritage belongings to nonprofits which in turn repatriate the belongings to the originating community.<sup>30</sup>

### **B. *Disincentivizing the Acquisition of Looted Cultural Heritage Belongings***

The IRS oversees the Art Advisory Panel ("Panel") tasked with lowering the charitable deduction for forged artworks and cultural heritage belongings, yet the Panel does not conduct investigations into illicitly

<sup>23</sup> I.R.C. § 170(e)(1, 3); 26 C.F.R. § 1.170A-4A(b)(2)(i).

<sup>24</sup> I.R.C. § 170(e)(1, 3); 26 C.F.R. § 1.170A-4A(b)(2)(i).

<sup>25</sup> Hsieh, *supra* note 19, at 478 (citing H.R. Rep. No. 91-413, at 55 (1969)).

<sup>26</sup> *Id.* (citing William M. Speiller, *The Favored Tax Treatment of Purchasers of Art*, 80 COLUM. L. REV. 214, 229 (1980)).

<sup>27</sup> *Id.*

<sup>28</sup> Erin Thompson, *The Relationship between Tax Deductions and the Market for Unprovenanced Antiquities*, 33 COLUM. J.L. & ARTS 241, 258-59 (2010).

<sup>29</sup> See Emily C. Ehl, Case Comment, *The Settlement of Greece v. Ward: Who Loses?*, 78 B.U. L. REV. 661, 682 (1998).

<sup>30</sup> In *Greece v. Ward*, the Ward Gallery displayed and offered Mycenaean artifacts about two decades after they had been looted from an archaeological site. When Greece demanded the return of the artifacts, the Ward Gallery refused, leading to Greece filing suit against the Gallery in 1993. 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. *Id.* at 674-75. Hsieh, *supra* note 19, at 479 (citing Ehl, *supra* note 29, at 674-75).



and unethically acquired cultural heritage belongings.<sup>31</sup> The elimination of the donor's charitable deduction for unprovenanced cultural heritage belongings would not be out of line with the current duties of the Panel, and the elimination disincentivizes the looting of cultural heritage belongings. As part of the § 170(f) "[d]isallowable of deduction in certain cases and special rules" requirements, a substantiation requirement could be added to provide detailed provenance information to the IRS before a donor receives a charitable deduction.<sup>32</sup> Unprovenanced cultural heritage belongings should be disallowed for the charitable deduction or at the very least significantly decreased.<sup>33</sup> With many collectors looking to make a profit on unethically and illicitly acquired cultural heritage belongings, they might be disincentivized from acquiring unprovenanced materials. Therefore, the changes may incentivize collectors to increase their due diligence prior to purchasing or trading cultural heritage belongings by knowing that donated unprovenanced cultural heritage belongings would not receive a charitable deduction or severely reduce the deduction.

## II. Native Voice through Contemporary Art

Many Indigenous peoples devote their lives to the visual arts, yet their representation is often overshadowed by cultural appropriation, misrepresentation, and miscommunication between the Indigenous artists and the museums housing their artworks and cultural heritage belongings. Some Native American artists continue creative expressions through traditional media such as basketry, *katsinam*, ceramics, and jewelry.<sup>34</sup> Others, such as Gerald Clarke Jr., Mercedes Dorame, and Gail Tremblay, supplement traditional media with a contemporary envisioning of tribal identity and diversity.<sup>35</sup>

<sup>31</sup> Hsieh, *supra* note 19, at 488 (citing I.R.S. IRM 4.48.2.1.1 (Oct. 10, 2012)).

<sup>32</sup> See I.R.C. § 170(f).

<sup>33</sup> The possibility of merely reducing the charitable deduction for unprovenanced cultural heritage belongings irks me to suggest, but convincing Congress to completely disallow deductions on unprovenanced cultural heritage belongings would likely prove difficult. Providing reduced deductions may facilitate repatriation and reduce looting. See Hsieh, *supra* note 19, at 492 (advocating for disallowing tax incentives for donors who knew that the object was unprovenanced prior to purchasing).

<sup>34</sup> Cecil Calnimpewa, Jr. (Hopi) is one of the most prominent contemporary *katsinam* carvers. See Cecil Calnimpewa, Jr., THE EDDIE BASHA COLLECTION, <http://eddiebashacollection.com/collection/cecil-calnimpewa> (last visited Apr. 12, 2021).

<sup>35</sup> See Sarah Lin, *These Native American Artists Want You to Know They Are 'Still Here'*, KCET: ARTBOUND (Oct. 16, 2016), <https://www.kcet.org/shows/artbound/were-still-here-contemporary-native-american-artists-on-identity>; Gordon Lee Johnson, *Gerald Clarke Jr.: The Contemporary Indian Experience Through Art*, KCET: ARTBOUND (Sept. 23, 2012), <https://www.kcet.org/shows/artbound/gerald-clarke-jr-the-contemporary-indian-experience-through-art>. See generally GERALD CLARKE JR., <https://www.geraldclarke.net> (last visited Apr. 12, 2021); MERCEDES DORAME, <https://www.mercedesdorame.com> (last visited Apr. 12, 2021); Gail Tremblay, Froelick Gallery, <https://froelickgallery.com/artists/53-gail-tremblay/overview> (last visited Apr. 12, 2021).

Gerald Clarke Jr., a citizen of the Cahuilla Band of Cahuilla Indians of the Cahuilla Reservation, never personally identified with the "subservient happy slave" from textbooks nor the proud warrior or savage-depicted Native American stereotypes.<sup>36</sup> Instead, Clarke used crushed and coiled aluminum soda and beer cans to create *Continuum Basket: Flora* (2016), celebrating Cahuilla basket-weaving traditions as well as highlighting issues some tribal members face today—namely diabetes and alcoholism.<sup>37</sup> He finds the artistic stereotypes equally troubling, with the public associating Native American art with materials like beads, clay, and leather, whereas contemporary Native American art emphasizes "outlook[s] on life" over materials or formats.<sup>38</sup>

Mercedes Dorame, an artist and Tongva tribal member, found herself and her tribe feeling vanished when she opened up a book asserting that disease wiped out the Gabrielino-Tongva tribe.<sup>39</sup> Being from a non-federally recognized tribe, Dorame lacks the tribal community offered by reservations; yet she finds solace through "document[ing], challeng[ing], and contextualiz[ing] cultural construction" through her art.<sup>40</sup> Dorame's *Prayer in Three Parts* (2010) encapsulates "the layers of knowledge and experience and culture" through the image of a "tattered, rain-soaked prayer for a re-burial ceremony tied to a chain-link fence."<sup>41</sup> Engaging her viewers through invoking imagery, Dorame's message is clear. She captures moments that beg the audience to ask, "Hey, what did happen? Who were these people?"<sup>42</sup> The ball is in the viewer's court, and the viewer must learn the different Native American visual languages. "Just like it's up to them to figure out the stories of Renaissance Italian art. You need to learn history. You need to learn content. You need to study stuff."<sup>43</sup>

Gail Tremblay, a Mi'kmaq and Onondaga tribal member, mixed media artist, writer, and poet, weaves baskets out of film mediums that "originated or propagated stereotypes of Indigenous people in order to create 'traditional' baskets that critique those same stereotypes."<sup>44</sup> Tremblay encourages the viewers of contemporary Native American art to

<sup>36</sup> Lin, *supra* note 35.

<sup>37</sup> Johnson, *supra* note 35. See Gerald Clarke Jr., *Continuum Basket Series*, GERALD CLARKE JR., <https://www.geraldclarke.net/post/a-basket-made-with-soda-and-beer-cans> (last visited Apr. 12, 2021) (image).

<sup>38</sup> Lin, *supra* note 35.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (image).

<sup>42</sup> *Id.*

<sup>43</sup> Victoria Hutter, *Outside the Box: Finding Contemporary Native-American Art*, NEA ARTS MAGAZINE, no.2, 2016, at 10, 11. This quote comes from Merritt Johnson (Blackfoot and Mohawk), who feels that audiences cannot fully appreciate contemporary Native American art without a willingness to educate themselves on tribal "history, stories, and symbols." *Id.*

<sup>44</sup> Gail Tremblay | *Biography*, VISIONS W. CONTEMP., <https://www.visionswestcontemporary.com/artist-biography/gail-tremblay.html> (last visited Apr. 12, 2021).

challenge their previous notions and thoughts of Native American cultures.<sup>45</sup> Through self-education, viewers will see the vastly different art, communities, cultures, and expressions associated with tribal nations across the country.<sup>46</sup> Contemporary Native American artists want “to connect . . . [their] tribe to the rest of the world,” because although “[children] go to school because [they] need to be educated . . . , sometimes [Native Americans] need to do the education [them]selves.”<sup>47</sup>

The artists are here and more than willing to fill the void left by museums and galleries repatriating cultural heritage belongings displayed as art. Moreover, institutions like the Heard Museum in Phoenix, the Museum of Contemporary Native Arts in Santa Fe, and the Eiteljorg Museum of American Indians and Western Art in Indianapolis progressively seek contemporary Native American artists to fill their museums.<sup>48</sup> Established in 1999 through annual grants by Lilly Endowment Inc., the Eiteljorg Contemporary Art Fellowship funds Native American and First Nations artists working with contemporary media and ideas.<sup>49</sup>

Many of the previously discussed issues of displaying cultural heritage belongings as art arise from differences in Euro-American and Native American philosophies of the meaning of art and its access to the world community. There is a long history of distinguishing “fine art,” which is aesthetically appreciated, from “functional art,” which is typically valued less.<sup>50</sup> What museums seemingly fail to recognize is the flourishing contemporary Native American art community that should fill the void left behind after cultural heritage belongings are appropriately removed as art and repatriated.

Today, we should follow in the footsteps of the Heard Museum in Phoenix, which avoids the acquisition of sensitive cultural heritage belongings, focusing instead on contemporary Native American art.<sup>51</sup> The Heard Museum displays contemporary artworks through creating separate spaces for Native American art and separating works by individual tribes with great involvement from the artists themselves.<sup>52</sup> These

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<sup>45</sup> See Hutter, *supra* note 43, at 11. Gail Tremblay’s *On the Rez, What is Picture Perfect?* (2016) is a basket made from recycled 35mm footage from the film *Picture Perfect*. See *id.* (photo by Kevin McConnell, courtesy of the Froelick Gallery) (image).

<sup>46</sup> *Id.* at 12.

<sup>47</sup> Votan Henriquez, a Los Angeles street artist with Mayan and Nahua roots, consoled his son after a teacher called Aztecs barbarians by telling his son that sometimes it is on him to educate. Lin, *supra* note 35.

<sup>48</sup> See *About the Heard Museum*, HEARD MUSEUM, <https://heard.org/about> (last visited Apr. 12, 2021); *Mission and History*, IAIA MUSEUM OF CONTEMP. NATIVE ARTS, <https://iaia.edu/about/mission> (last visited Apr. 12, 2021); *Our Story*, EITELJORG MUSEUM OF AM. INDIAN & W. ART, <https://eiteljorg.org/our-story> (last visited Apr. 12, 2021).

<sup>49</sup> *The Future of Native Contemporary Art*, LILLY ENDOWMENT INC., <https://lilly-endowment.org/stories/eiteljorg-gathers-artists-explore-future-native-american-contemporary-art> (last visited Apr. 12, 2021).

<sup>50</sup> See Hutter, *supra* note 43, at 11.

<sup>51</sup> *Id.* at 13.

<sup>52</sup> *Id.*

distinctions allow for the realization that Native American tribes are separate entities with vastly different art, community, culture, and expressions. The message is clear—Native American culture, community, and art is flourishing, and contemporary Native American artists wish to share their experiences and messages. Perhaps reinstating the charitable deduction for artists more greatly facilitates the introduction of contemporary Native American art into museums, and therefore in front of the eyes of museumgoers in America.

### III. The Charitable Deduction and the Artist-Museum Partnership Act

Before the Tax Reform Act of 1969 ("the Act"), artists, composers, and writers received a charitable deduction equivalent to the fair market value of their donated works to museums, libraries, and archives.<sup>53</sup> The Act reduced the charitable deduction that artists received from directly donating their original works, replacing full fair market value charitable deductions with deductions for the creator's tax basis (e.g. cost of materials).<sup>54</sup> A reinstitution of the artist charitable deduction would create an influx of contemporary art in museums throughout the country—letting the artists tell their stories directly.

Congress eliminated the deduction artists, musicians, and authors receive for original works, not because of the artists, composers, and literary and poetry writers but due to the deduction's continued exploitation by presidents.<sup>55</sup> President Nixon provided the last straw by deducting \$576,000 for donating vice-presidential papers to the National Archives from the prior Eisenhower administration, although the practice dates back to President Truman.<sup>56</sup> Never legally required of outgoing administrations, charitable deductions enticed presidents to donate papers to the National Archives as opposed to collectors.<sup>57</sup> Presidents often sought the advice of appraisers to select the most valuable papers.<sup>58</sup> After President Nixon approved the appraisers' choices, his attorneys executed a legal document transferring the selected materials to the federal government.<sup>59</sup> The donation to the National Archives met all three requirements—"clear

<sup>53</sup> See Statement from Sen. Patrick Leahy Regarding the Introduction of the Artist-Museum Partnership Act of 2007 (Feb. 12, 2007) (archived at <https://web.archive.org/web/20080829110315/http://leahy.senate.gov/press/200702/021207.html>). See generally Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (1969).

<sup>54</sup> See Statement from Sen. Leahy Regarding Introduction of A-MPA, *supra* note 53; Grant, *supra* note 18.

<sup>55</sup> Grant, *supra* note 18. See Tax Reform Act § 514. See also S. Rep. No. 91-552, at 198-99 (1969) (outlining need to designate sales of artistic creations held by the creating artist as ordinary income as opposed to capital gains).

<sup>56</sup> Grant, *supra* note 18.

<sup>57</sup> Matthew G. Brown, *The First Nixon Papers Controversy: Richard Nixon's 1969 Presidential Papers Tax Deduction*, 26 ARCHIVAL ISSUES 9, 10 (2001).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

intent to give; delivery and relinquishment of dominion over the gift by the donor; and acceptance of the gift by the donee”—making President Nixon eligible for the full fair market value deduction of up to thirty percent of his adjusted gross income.<sup>60</sup>

The Tax Reform Act of 1969 brought sweeping changes to the legal foundation of charitable deductions. The Act eliminated the originator of documents from receiving the documents’ fair market value as a charitable deduction to their adjusted gross income.<sup>61</sup> In the years since, “the tax deduction value for income tax purposes of any such document, speech or item of correspondence would be worth only the inconsequential value of the piece of paper it was written on, not the appreciated value that a collector might pay for the manuscript.”<sup>62</sup>

Artists abruptly felt the effects of these changes, now only receiving charitable deductions for their labor and materials as opposed to their rightful deduction for the value of their creative work. Prior to 1969, the Museum of Modern Art received 321 donations directly from artists.<sup>63</sup> Donations dropped by ninety-one percent after the Act’s enactment.<sup>64</sup> Similarly, the Library of Congress received fifteen to twenty large donations in the years leading up to the Act’s enactment and only one donation afterwards.<sup>65</sup> In a time when museums want to diversify their collections and the artists in those collections,<sup>66</sup> the current structuring of the tax code inhibits the museum’s ability to provide artists with the full fair market value charitable deduction. Artists would greatly benefit from a direct avenue to donating their artworks and receiving fair and just charitable deduction compensation.

Congressmembers have continuously introduced the Artist-Museum Partnership Act legislation (“A-MPA” or “Bill”) in every Congressional session since 1970, which would allow artists to receive a charitable deduction equivalent to the fair market value of the donation much like a collector.<sup>67</sup> The late Representative John Lewis (D-GA) along with eleven co-sponsors introduced the most recent version of the A-MPA in the 116th Congress as House of Representatives Bill 1793 on March 14, 2019.<sup>68</sup> Senator Patrick Leahy (D-VT) repeatedly introduces the A-MPA in the Senate each session, and it passed as an amendment in numerous Senate bills.<sup>69</sup> In each instance, Congress removed the A-MPA

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<sup>60</sup> *Id.* at 11–12.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 12.

<sup>63</sup> Betsy Mead, *Artist-Museum Partnership Act*, N.Y. ARTISTS EQUITY ASS’N, INC., <https://www.nyartistsequity.org/artistmuseum-partnership-act> (last visited Feb. 12, 2021).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See THE MET’S COMMITMENT TO DIVERSITY, *supra* note 1.

<sup>67</sup> Grant, *supra* note 18.

<sup>68</sup> H.R. 1793, 116th Cong. (1<sup>st</sup> Sess. 2019).

<sup>69</sup> 155 Cong. Rec. 2081 (2009) (Statement of Senator Leahy).

portion of each bill prior to enactment.<sup>70</sup> Senator Leahy believes the reinstitution of the charitable deduction will incentivize artists to donate their artworks to museums.<sup>71</sup> Furthermore, he believes Congress must work to "keep cherished artworks in the United States and . . . preserve them in our public institutions."<sup>72</sup>

The Bill summary states:

This bill allows taxpayers who create literary, musical, artistic, scholarly compositions, or similar property a fair market value (determined at the time of contribution) tax deduction for contributions of such properties, the copyrights thereon, or both, to certain tax-exempt organizations, if such properties are properly appraised and are donated no less than [eighteen] months after their creation.<sup>73</sup>

The proposed Bill amends IRC § 170(e) by creating an additional section for the "qualified artistic charitable contribution" and setting that amount to the fair market value of the artworks.<sup>74</sup> The donor must receive "a qualified appraisal of the fair market value of such property" and certification in writing by the museum that they will put the artwork to a "related use" before the charitable deduction may be attributed.<sup>75</sup>

Over the years, the A-MPA accumulated support among numerous local, state, and national organizations, including the American Association of Museums and Association of Art Museum Directors ("AAMD").<sup>76</sup> AAMD's Executive Director, Christine Anagnos, emphasized that "[m]useums rely on donations to build their collections on behalf of the public, and current law greatly impedes their ability to attract gifts from living artists."<sup>77</sup> Furthermore, Senator Leahy stressed that:

Anyone who has contemplated a painting in a museum or examined an original manuscript or composition, gaining a greater understanding of both the artist and the subject, knows the tremendous value of these works. This reform would preserve cherished art works [sic] for generations by encouraging donations directly from artists. Tax law currently discriminates against . . . artists and undermines the ability of public and cultural institutions . . . to collect and conserve our nation's cultural heritage.<sup>78</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> H.R. 1793, 116th Cong. (2019) (Summary).

<sup>74</sup> H.R. 1793 § 2(a).

<sup>75</sup> *Id.* See *supra* text accompanying notes 20–24.

<sup>76</sup> Press Release, Sen. Patrick Leahy, Leahy Introduces Legislation to Encourage Museum Donations (May 18, 2017), <https://www.leahy.senate.gov/press/leahy-introduces-legislation-to-encourage-museum-donations#:~:text=Leahy%20Introduces%20Legislation%20To%20Encourage%20Museum%20Donations&text=Under%20current%20law%2C%20artists%20are,bill%20would%20eliminate%20that%20discrepancy.>

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

If enacted, the A-MPA allows for a quicker introduction of artworks into the museum while also cutting out the intermediary art dealers and collectors. Artists should be the beneficiaries of their artwork donations and deserve charitable deductions for the entirety of their creative work, not just their labor.

### **Conclusion**

The antiquities market is alive and thriving, and Indigenous communities feel the ill effects of museums acquiring and displaying Indigenous cultural heritage belongings. All the while, the acquirers—looters and art collectors and dealers—benefit by way of the charitable deduction when donating the cultural heritage belongings originating from communities other than their own. We can begin to right the wrongs that plague the art world by amending the tax code to require donors to present provenance papers and reinstate full fair market donations to artists. One example of the benefits includes Native American artists receiving charitable deductions for their self-donated artworks and allowing museumgoers to see that Native Americans are neither vanishing nor collapsing into the stereotypes that Hollywood may have you believe. Instead, we can hear the artists' stories firsthand through their contemporary art expressions. This is the way museums and art ought to be experienced, and slight amendments to the IRC brings this vision one step closer to reality. With the 117th Congress underway, the time for A-MPA's passage was yesterday. We will see where the session takes us tomorrow.