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COMMENT

In Lieu of an Equitable Charitable Deduction: Artists, Tax Law, and the Donation Of Art

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Introduction

An artist donates her work to a museum. A collector of the artist's work also donates one of the artist's works to the museum. The collector may receive a meaningful tax benefit; the artist will not.¹

When a taxpayer donates artwork to a charitable organization, such as a museum, she may take a federal income tax deduction under Internal Revenue Code ("I.R.C." or "the Code") section 170 equal to the fair market value of the artwork.² If the work is valued at \$100,000, the collector may take a deduction of \$100,000 on her tax return. In contrast, artists may take a deduction only for the cost of the material they used to create the artwork. The cost of art materials is typically a trivial portion of an artwork's overall fair market value (i.e., the price of paint and canvas is far less than the price of a painting).³ The work of artist El Anatsui provides a particularly extreme example of how small material costs can be compared to fair market value. El Anatsui is best known for making large-scale installations with recycled aluminum bottle caps.⁴ In 2023, El Anatsui's *Prophet* sold for \$2,228,000.⁵ El Anatsui's material costs may well be zero, and, if so, had the artist donated *Prophet* to a museum rather than selling it, he would not be entitled to take a deduction for United States federal income tax purposes. However, if the collector who purchased *Prophet* decided to donate it to a museum, she would be entitled to a deduction of more than two million dollars. Moreover, because a "professional"⁶ artist like El Anatsui will deduct any material costs as

¹ Hannah Tager, *Art Donations 101: A Guide for Artists, Collectors, and Nonprofits*, CTR. FOR ART L. (Sept. 18, 2019), <https://perma.cc/AK45-FKK8>.

² See I.R.C. §§ 170(e)(1), 1221(a)(1), 1221(a)(3).

³ Artist Amy Sherald's *Welfare Queen*, painted in oil on canvas recently sold at auction for \$3.9 million. See Phillips auction house: Amy Sherald's *Welfare Queen*, Lot 15, PHILLIPS, <https://perma.cc/STD5-AD6Y>. Assume the highest-end materials: pigments (\$1,719), linseed oil (\$44), linen (\$34), and aluminum reinforced stretcher bars (\$73). See *Set: Assortment of Kremer-Made Pigments*, KREMER PIGMENTE, <https://perma.cc/JGX5-6C8X> (pigments); *Gamblin Refined Linseed Oil—33.8 Oz. Bottle*, BLICK, <https://perma.cc/3K6J-S5JY> (linseed oil); *Blick Studio Unprimed Linen Canvas Rolls and Blankets*, BLICK, <https://perma.cc/2DTG-2HPF> (linen); *MUSEO ALU-Frame Aluminum Stretcher Bars and Parts—Cross Brace, 72"*, BLICK, <https://perma.cc/3LMN-CKAP> (stretcher bars). Sherald would be entitled to a charitable deduction of \$1,870 for donating her painting, but the collector who bought the painting would be entitled to a deduction of \$3.9 million once they donated it to a museum (limited to 30% of the collector's adjusted gross income). MARGOT L. CRANDALL-HOLLICK & MOLLY F. SHERLOCK, CONG. RSCH. SERV., IF 11022, THE CHARITABLE DEDUCTION FOR INDIVIDUALS 1 (2020) (describing limits to charitable deductions based on the donor's income).

⁴ See Julian Lucas, *How El Anatsui Broke the Seal on Contemporary Art*, NEW YORKER (Jan. 11, 2021), <https://perma.cc/J44J-QZLK>.

⁵ See *El Anatsui (B. 1944): Prophet*, CHRISTIE'S, <https://perma.cc/5FUD-LKAE> (auction listing for *Prophet*).

⁶ Whether an artist is a professional who may deduct business expenses (versus a hobbyist who cannot) is a heavily fact-based inquiry, turning on whether the artist's activities are "engaged in for profit." I.R.C. § 183(a); see also Daniel Grant, *Tax Time and the Art World: Here's What Artists and*

business-related expenses, rules against “double-dipping” prohibit the professional artist from also deducting the materials for a donated work.⁷ In short, the IRS effectively bars artists from taking income tax deductions for donations of their own work.⁸

Prior to the Tax Reform Act of 1969 (“the 1969 Act”), artists could deduct the fair market value of their work if it was properly donated to a qualifying charitable organization such as a museum.⁹ Then and now, the charitable deduction can be characterized as indirect government support of art institutions via “tax expenditures”—taxes that the government does not collect due to deductions, credits, and exemptions.¹⁰ In other words, the charitable deduction is classified as a tax expenditure because it treats income that would otherwise be taxed differently based on how it is used.¹¹ Pre-1969, artists and collectors alike could take a deduction based on the fair market value of the donated object, and museums added to their collections.¹² However, this system was open to abuse, most prominently by politicians like President Richard M. Nixon who donated materials from their time in office to escape all tax liability.¹³ Congress became concerned that the existing system was inefficient because it created the potential for donors to gain more in tax savings via charitable deductions than could be gained by selling the work.¹⁴

The 1969 Act attempted to correct the problems associated with charitable contributions primarily with the addition of I.R.C. section 170(e)(1)(A). Section 170(e)(1)(A) directs that when a taxpayer donates self-created art, property which would produce ordinary income if sold, the allowable deduction is “reduced by . . . the amount of gain [to the artist] . . . if the property contributed had been sold by the taxpayer at its fair market value (determined at the time of such contribution).”¹⁵ This amount does not include the value of the donor-artist’s labor or the artwork’s appreciation over time.¹⁶ Thus, the deduction amount for

Collectors Can Deduct, OBSERVER (Feb. 11, 2025, 2:49 PM), <https://perma.cc/F33D-P9KV> (summarizing different types of deductions); Hannah Cole, *An Audit Nightmare Turned Artist Victory: An Interview with Susan Crile*, SUNLIGHT TAX (Aug. 31, 2021), <https://perma.cc/59FF-MMRU> (discussing the artist Susan Crile’s eight year tax court dispute).

⁷ See Tager, *supra* note 1.

⁸ *Id.*

⁹ Sean Conley, *Paint a New Picture: The Artist-Museum Partnership Act and the Opening of New Markets for Charitable Giving*, 20 DEPAUL J. ART, TECH. & INTELL. PROP. L. 89, 91 (2009).

¹⁰ See ALAN L. FELD, MICHAEL O’HARE & J. MARK DAVIDSON SCHUSTER, PATRONS DESPITE THEMSELVES: TAXPAYERS AND ARTS POLICY 24 (1983).

¹¹ See William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 312 (1972).

¹² Conley, *supra* note 9, at 91.

¹³ *Id.* at 92.

¹⁴ *Id.*; Douglas J. Bell, Note, *Changing I.R.C. § 170(e)(1)(A): For Art’s Sake*, 37 CASE W. RESV. L. REV. 536, 542 (1987).

¹⁵ I.R.C. § 170(e)(1)(A); see also FELD ET AL., *supra* note 10, at 13.

¹⁶ See I.R.C. § 170(e)(1)(A); FELD ET AL., *supra* note 10, at 14.

donations of an artist's self-created work cannot be more than the value of the materials used to make the piece, also called the cost basis.¹⁷

While scholars have criticized section 170(e)(1)(A) since its enactment, the debate has centered on repeal, reform, and proposals for new rules.¹⁸ Given that legislative solutions have repeatedly failed,¹⁹ this Comment evaluates alternative tax planning strategies under the current regulations. These strategies allow artists to donate their work to museums and other charitable art institutions without resulting in negative financial consequences to the artist or her estate, as compared to the financial costs of artist donations under I.R.C. section 170(e)(1)(A).²⁰ It is worth noting at the outset that these strategies fall short of a satisfactory solution.²¹ The purpose here is, in part, descriptive: while I.R.C. section 170(e)(1)(A) has remained unchanged for more than fifty years, there remains no tax or financial reason for artists to donate their work during life.²²

Part I of this Comment begins with foundational tax terminology necessary to frame this discussion and then provides an overview of the charitable deduction as a tax benefit for individual charitable donations of art. Part II examines the practical consequences of the present rules for artists who want to donate their work to charity. Part III discusses trusts and foundations as vehicles for artists to make charitable distributions. Part IV argues that while trusts and foundations provide charitable tax planning strategies for artists to mitigate the negative effects of the current deduction rules, these strategies fail to adequately resolve the inequity inherent in the charitable deduction and hamper museums' ability to develop their collections.

I. Background on the Charitable Deduction and Art Donations

A. Terminology

This discussion of the tax implications associated with donating self-created art requires familiarity with several tax law terms. The following terms are framed specifically for the purposes of this Comment and serve to provide a foundation for the generalist reader:

¹⁷ I.R.C. § 170(e)(1)(A). The gain to the artist is ordinary income under I.R.C. Section 1221(1) and (3); see FELDT ET AL., *supra* note 10, at 244 n.2.

¹⁸ See Conley, *supra* note 9, at 104–06.

¹⁹ See Anna Regnier, Comment, *Picasso's Three Musicians—Priceless Masterpiece, or \$39.95 Worth of Paint and Canvas?: How Current Tax Law on the Donation of Art Continues to Stifle Artists' Donations*, 69 ARK. L. REV. 609, 615–16 (2016) (discussing four failed bills to resolve the inequity between collectors and creators since 2000).

²⁰ See *infra* pp. 35–37.

²¹ See *infra* pp. 19–20, 35–37.

²² See I.R.C. § 63(c)(7); *infra* notes 123–145 and accompanying text.

* *Federal Income Tax* in the United States is a direct tax on individual citizens' personal income.²³

* *Fair Market Value* is the price that property would sell for on the market and is a measure used to calculate the amount of the charitable deduction available for donated property in some circumstances.²⁴

* *Deductions* reduce the amount of a taxpayer's taxable income, thus generally reducing a taxpayer's tax bill.²⁵

* *Federal Estate Tax* in the United States is a tax on individual citizens' right to transfer property at death.²⁶ The estate tax is levied on an accounting of the fair market value of the contents of the decedent's estate at the date of death, including liquid assets, real property, trusts, and tangible personal property like art.²⁷ Certain deductions from the decedent's taxable estate are allowed, including for property that passes to surviving spouses and qualified charities.²⁸ However, many estates are not subject to estate tax liability as the federal estate tax exemption, or the amount excluded from estate tax, applies to individuals' estates valued at less than \$13,610,000 in 2024.²⁹

* *Long-Term Capital Gain Property* is property held by the taxpayer for more than a year, but does not include "a copyright, a literary, musical, or artistic composition . . . or similar property, held by a taxpayer whose personal efforts created such property."

* *Ordinary Income* is income earned by an individual taxable at marginal tax rates, including wages, salaries, and income from property that if sold for its fair market value at the time of the gift, would not have been treated as a long-term capital gain.³⁰ The ordinary income category includes inventories and stock-in-trade held primarily for sale to customers in the ordinary course of business; a note or account receivable acquired in the ordinary course of business; depreciable personal property and real property used in a business; and property created by the taxpayer-donor (or such property in the hands of a donee), including copyrighted

²³ *Glossary*, IRS, <https://perma.cc/AC9N-NVD3>.

²⁴ See I.R.S., PUBL'N 561, DETERMINING THE VALUE OF DONATED PROPERTY 2 (Dec. 2024), <https://perma.cc/9FX4-8WJJ>.

²⁵ *Deductions for Individuals: What They Mean and the Difference Between Standard and Itemized Deductions*, IRS (Apr. 2023), <https://perma.cc/4GU4-EPPY>.

²⁶ *Estate Tax*, IRS (Oct. 29, 2024), <https://perma.cc/4SRS-HCU3>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ I.R.C. §§ 64, 1221.

works like literary, musical, and artistic compositions.³¹ If held by the taxpayer for less than one year, property that would otherwise be categorized as capital gain property is treated as ordinary income property and taxed at ordinary income rates.³²

* *Capital Gains Income* is taxable income from the profit made on capital assets such as stock shares, real estate, a business, or a work of art.³³ Income from capital gains is generally taxed at a lower rate than ordinary income.³⁴

* *Gross Income* includes all the money a taxpayer earns and is the starting point for determining the taxpayer's taxable income.³⁵

* *Tax Basis* is the amount of a taxpayer's investment in property for tax purposes and is used to calculate gain or loss on the sale or disposition of property.³⁶

B. *Overview of the Charitable Deduction and Tax-Deductible Donations of Art*

I. Before the Tax Reform Act of 1969

Since the enactment of the War Revenue Act of 1917, the United States has supported charitable giving to the arts by providing an incentive in the form of a tax deduction for taxpayers' gifts to museums and related cultural arts institutions: the charitable contribution deduction.³⁷ The statutory language of the original charitable deduction provided:

Contributions or gifts actually made within the year to corporations or associations organized and operated exclusively for religious, charitable, scientific, or educational purposes . . . no part of the net income of which inures to benefit of any private stockholder or individual, to an amount not in excess of fifteen per centum of the taxpayer's taxable net income Such contributions or gifts shall be allowable as

³¹ I.R.C. § 1221(a)(1)–(4).

³² See I.R.C. § 1222; Victoria Osorio & Maddison Erbabian, *How Are Capital Gains and Dividends Taxed?*, PENN WHARTON UNIV. PA. BUDGET MODEL (Oct. 20, 2020), <https://perma.cc/12JX-VBPF>.

³³ *How are Capital Gains Taxed?*, TAX POL'Y CTR. (JAN. 2024), <https://perma.cc/5CL8-4DMZ>.

³⁴ *Id.*

³⁵ See I.R.C. § 61 (defining gross income).

³⁶ *Topic no. 703, Basis of Assets*, IRS (June 25, 2025), <https://perma.cc/6QCM-AKWH>.

³⁷ The charitable contribution deduction applied to taxpayer contributions to a wide range of private charities, not just to contributions made in support of the arts. See MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV., R46178, *THE CHARITABLE DEDUCTION FOR INDIVIDUALS: A BRIEF LEGISLATIVE HISTORY 3–4* (2020); FELD ET AL., *supra* note 10, at 25–27.

deductions only if verified under rules and regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.³⁸

Modern philanthropy predated the modern income tax, and Congress viewed philanthropists as providing public benefits that needed protection in light of substantial new taxes on incomes and estates. Otherwise, the government would face pressure to fund programs previously paid for voluntarily by rich industrialists.³⁹ Accordingly, the charitable deduction was bound up with arguments over social value, limited government, and fairness.⁴⁰

First, the charitable deduction stood for the idea that tax policy should support private charities because they add social value by providing better, more efficient public services than the government.⁴¹ Second, the enactment of the charitable deduction was bound up with the idea that limited government is better government, and tax policy should support private charity to keep the government from expanding to cover the benefits that philanthropists supported before the new income and estate taxes existed.⁴² Third, the charitable deduction served to prevent a “penalty upon generosity” because the amount of a taxpayer’s charitable contributions “directly affect[s]” his ability to pay taxes.⁴³ More broadly, lawmakers and advocates believed that the charitable deduction reflected America’s national character and was “necessary to defend the distinctive American tradition of private philanthropy.”⁴⁴

Between 1917 and 1969, Congress made limited, generally liberalizing changes to the charitable deduction. Congress effectively increased the allowable deduction by changing the provision to allow deductions up to 15% of “adjusted gross income,” a more inclusive measure than the original “net taxable income,” which translated to a larger maximum deductible amount.⁴⁵ Congress also increased the amount that taxpayers could deduct to 30%.⁴⁶ In addition, Congress defined “contribution[s] or gift[s]” eligible for the charitable deduction as payments “made with no

³⁸ War Income Tax Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330.

³⁹ Nicolas J. Duquette, *Founders’ Fortunes and Philanthropy: A History of the U.S. Charitable-Contribution Deduction*, 93 BUS. HIST. REV. 553, 556 (2019).

⁴⁰ See JOSEPH J. THORNDIKE, MAKING THE WORLD SAFE FOR PHILANTHROPY: THE WARTIME ORIGINS AND PEACETIME DEVELOPMENT OF THE TAX DEDUCTION FOR CHARITABLE GIVING 5 (2013).

⁴¹ See *id.* (“Charities provide essential services, often more effectively than government ever could.”).

⁴² *Id.* at 5, 8.

⁴³ *Id.* at 6, 8.

⁴⁴ See *id.* at 9; William A. Drennan, *Charitable Donations of Intellectual Property: The Case for Retaining the Fair Market Value Tax Deduction*, 2004 UTAH L. REV. 1045, 1055 (“The charitable deduction has been praised for encouraging pluralism . . . [and] grants citizens the power to control the use of funds . . .”).

⁴⁵ Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 NEB. L. REV. 1056, 1062 (2003).

⁴⁶ See CRANDALL-HOLLICK & SHERLOCK, *supra* note 3, at 1.

expectation of a financial return commensurate with the amount of the gift.”⁴⁷

In sum, the pre-1969 charitable deduction rule allowed an income tax deduction for the fair market value of contributions of appreciated property from adjusted gross income.⁴⁸ Under the fair market rule, it was possible to take a charitable deduction for contributing property, which would have produced ordinary income or capital gain if the donor had instead sold the property.⁴⁹ The fair market rule allowed for “double counting”; appreciation on donated property was not included in the taxpayer’s gross income, yet the taxpayer could also subtract the untaxed appreciation from gross income.⁵⁰

The following hypothetical illustrates an example of how the double counting could play out pre-1969:

Imagine . . . that a very successful artist is contemplating the sale of the last three paintings she has created in, say, 1965. She knows that she can sell each for about \$100,000. But she knows also that she is already in the top marginal tax bracket of 70%, so that selling all three paintings for \$300,000 total will net only \$90,000 after application of the 70% rate. She will do better, however, if she sells just two and gives the third to charity, so long as she can deduct the value of the donated painting. Her marginal income will be \$200,000 from the sale of two of the paintings, but she will qualify (by assumption of this hypothetical) for a contributions deduction of \$100,000, leaving her at the margin with additional taxable income from the last three paintings of only \$100,000 and a tax bill with respect to that income of only \$70,000. But recall that she collected a full \$200,000 for the two paintings she sold; she thus has \$130,000 remaining after tax from the disposition of the three paintings. . . . [T]he artist can earn greater after-tax income if she gives away some of her work than if she sells it all.⁵¹

Though it treated artists and collectors the same,⁵² this charitable deduction scheme privileged the wealthiest taxpayers. These taxpayers could utilize tax-planning to ‘earn’ more after-tax income and were most likely to have the means to give the kind of goods that lawmakers had in mind.⁵³ But this scenario could not occur in today’s tax system. The ability for a donor to end up with greater after-tax income via the kind of tax-planning illustrated above depended on the high tax rate in 1969; consequently, taxpayers in today’s top marginal tax bracket of 37% would

⁴⁷ Kristin Balding Gutting, *Relighting the Charitable Deduction: A Proposed Public Benefit Exception*, 12 FL. TAX REV. 453, 500–01 (2012).

⁴⁸ See Harry K. Mansfield & Ronald L. Groves, *Legal Aspects of Charitable Contributions of Appreciated Property to Public Charities*, in IV RSCH. PAPERS SPONSORED BY THE COMM’N ON PRIV. PHILANTHROPY & PUB. NEEDS 2251, 2251–52 (1977). Appreciated property means that the property’s value has increased in the period of time that the taxpayer has possessed it.

⁴⁹ See *id.* at 2251.

⁵⁰ See Richard Schmalbeck, *Gifts and the Income Tax—An Enduring Puzzle*, 73 L. & CONTEMP. PROBS. 63, 89–90 (2010); William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 372 (1972).

⁵¹ Schmalbeck, *supra* note 50, at 90–91.

⁵² Conley, *supra* note 9, at 91.

⁵³ *Id.*

be better off selling all three paintings.⁵⁴ If the taxpayer in our hypothetical were a collector in the top tax bracket who acquired the paintings in 1965 and could sell each for \$100,000, the outcome would be the same.⁵⁵ However, Congress believed that too many high-income taxpayers engaged in transactions solely for tax purposes (as in our hypothetical) and used the charitable deduction to avoid paying their share of taxes.⁵⁶

2. The Tax Reform Act of 1969

Congress responded to the perceived tax abuse with the 1969 Act.⁵⁷ The 1969 Act modified the charitable deduction by creating certain limitations on donations of appreciated property. This modification restricted the deduction available to artists who donated their work to charity—but not to collectors.⁵⁸ The change stemmed primarily from how section 170(e)(1)(A) of the 1969 Act distinguished between two types of appreciated property contributions: long-term capital gain property and ordinary income property.⁵⁹

a. *Art as Collectors' Long-term Capital Gain Property and the Fair Market Value Charitable Deduction After 1969*

Section 170(e)(1)(A) reduces the charitable deduction's amount by any gain that would have been ordinary income if the donor had sold the property instead.⁶⁰ No reduction applies for donations of capital gain property.⁶¹ Thus, under the new charitable deduction rules, the donor could deduct the fair market value of the donated art for income tax purposes, up to 30% of adjusted gross income.⁶² But the donor must contribute art qualifying as long-term capital gain property.⁶³ Because long-term capital gain property excludes “artistic composition[s] . . . or similar property, held by a taxpayer whose personal efforts created such

⁵⁴ If the entire \$300,000 income were taxed at the highest marginal income tax rate of 37%, the taxpayer would have \$189,000 in after-tax income. If the taxpayer were taxed on \$200,000 after donating a painting and taking a charitable deduction, she would have only \$126,000. See Rev. Proc. 2024-40, 2024-45 I.R.B. 1100, 1102.

⁵⁵ Note that the hypothetical assumes \$0 basis for both artist and collector. See Schmalbeck, *supra* note 50, at 90–91.

⁵⁶ Lindsey, *supra* note 45, at 1064–65.

⁵⁷ *Id.*

⁵⁸ See I.R.C. § 170(e)(1)(A); Conley, *supra* note 9, at 92–94.

⁵⁹ See I.R.C. § 170(e)(1)(A).

⁶⁰ *Id.*

⁶¹ See *id.*

⁶² I.R.C. § 170(b)(1)(B)–(C); see CRANDALL-HOLLICK & SHERLOCK, *supra* note 3, at 1; Richard M. Horwood, *The Art Collector Meets the Tax Collector*, 29 J. TAX'N INVS. 33, 41–42 (2012).

⁶³ See I.R.C. § 170(e)(1)(A).

property,⁶⁴ the post-1969 charitable deduction retains the fair market rule for collectors, but it excludes artists who donate their own art.⁶⁵

The only substantive check placed on collectors' tax-deductible donations by the 1969 Act was the related use rule, which requires the donee charitable organization to use the donated property in a manner related to its tax-exempt purpose.⁶⁶ Regulations promulgating the 1969 Act provide an example:

[I]f a painting contributed to an educational institution is used by that organization for educational purposes by being placed in its library for display and study by art students, the use is not an unrelated use; but if the painting is sold and the proceeds used by the organization for educational purposes, the use of the property is an unrelated use.⁶⁷

Congress designed the related use rule to ensure that the charitable contribution actually serves a charitable purpose and does more than provide a financial benefit to the donor.⁶⁸ The related use rule also served to discourage recipient charitable organizations from turning around and selling the donation so that charitable organizations would maintain the donated property for public benefit.⁶⁹

For collectors since 1969,⁷⁰ the charitable deduction rules under section 170 have allowed a deduction that includes untaxed appreciation in the donated property.⁷¹ This runs counter to the "most general concept of tax deductions: the only allowable deduction is one involving expenditure of previously taxed income."⁷² A portion of a collector's donation will be previously taxed income because she will have paid taxes on the income she used to purchase the art.⁷³ However, any increase in the art's value (its appreciation)—which would have been taxed as long-term capital gain if the collector had sold the art—turns into a deduction under section 170.⁷⁴

This tax benefit increases with donor income because as marginal rates increase, the price to a donor of giving a dollar decreases (i.e., the

⁶⁴ I.R.C. § 1221(a)(3).

⁶⁵ See Joel S. Newman, *Sales and Donations of Self-Created Art, Literature, and Music*, 12 *PITT. TAX REV.* 57, 62–64 (2015).

⁶⁶ I.R.C. § 170(e)(1)(B)(i); see Newman, *supra* note 65, 77–78.

⁶⁷ Treas. Reg. § 1.170A-4(b)(3)(i).

⁶⁸ Emily Lanza, Comment, *Breaking Up Is Hard To Do: The Sale of a Charitable Art Donation*, 66 *TAX L.* 483, 485 (2013).

⁶⁹ *Id.*

⁷⁰ While the charitable deduction rules have been revised in the years since 1969, the fair market valuation afforded to collectors who donate appreciated tangible personal property (including art) has remained constant.

⁷¹ FELD ET AL., *supra* note 10, at 14–15.

⁷² *Id.* at 14.

⁷³ *Id.* at 14–15.

⁷⁴ *Id.*

“tax price” of giving corresponds inversely with a donor’s tax rate).⁷⁵ The price of charitable contributions is $(1 - t)$, where t is the taxpayer’s tax rate at which contributions are deducted. This formula means that a taxpayer in a higher tax bracket has a lower price of giving than a taxpayer in a lower tax bracket.⁷⁶

For example, assume a collector in the highest tax bracket (currently 37%) donates a work of art worth \$100,000 to a museum.⁷⁷ Because she purchased the art for \$50,000, the work’s value has appreciated by 50%.⁷⁸ The charitable deduction offsets \$100,000 of unrelated income, leaving the taxpayer with \$37,000 that would otherwise have been paid in tax.⁷⁹ If the collector had instead sold the art and kept the proceeds, the amount after taxes would be \$80,000 (\$100,000 minus \$20,000 in tax) if the sale yielded capital gain taxed at 20%.⁸⁰ The net cost of the gift to the collector is only \$43,000 (\$80,000 minus \$37,000).⁸¹ However, the cost to the government is \$57,000 (\$20,000 revenue gain on the sale plus \$37,000 revenue loss on donation).⁸² The government’s cost here can also be called its tax expenditure.⁸³ The \$57,000 tax expenditure is in effect paid for by the public, as if a portion of other taxpayers’ dollars goes toward the museum of the collector’s choosing in proportion to their income tax bills.⁸⁴ As a consequence of their marginal tax rate, high bracket donors of art enjoy both a tax advantage and increased decision-making power over the allocation of public funds.⁸⁵ Thus, a donor in a lower tax bracket will have a higher price per dollar of giving, which translates to lower government cost or tax expenditure per dollar.⁸⁶ While donors who pay higher marginal tax rates enjoy more influence per dollar of value of their donation, the opposite is true for donors who pay lower marginal tax rates.⁸⁷ Because the charitable deduction is only available to

⁷⁵ *Id.* at 29–30; see also JANE G. GRAVELLE, DONALD J. MARPLES & MOLLY F. SHERLOCK, CONG. RSCH. SERV., R45922, TAX ISSUES RELATING TO CHARITABLE CONTRIBUTIONS & ORGANIZATIONS 22 (2020).

⁷⁶ GRAVELLE ET AL., *supra* note 75, at 22.

⁷⁷ See Michael O’Hare & Alan L. Feld, *Indirect Aid to the Arts*, 471 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 134 (1984); Rev. Proc. 2024-40, 2024-45 I.R.B. 1100, 1102.

⁷⁸ See O’Hare & Feld, *supra* note 77, at 134.

⁷⁹ See, e.g., BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 35.2.1 (2025), Westlaw FTXIEG.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ See O’Hare & Feld *supra* note 77, at 134.

⁸⁴ *Id.*; FELD ET AL., *supra* note 10, at 89 (assuming that the federal government makes up the tax expenditure amounts through proportional increases in income taxes).

⁸⁵ FELD ET AL., *supra* note 10, at 30.

⁸⁶ O’Hare & Feld, *supra* note 77, at 135.

⁸⁷ *Id.*

those who itemize their deductions,⁸⁸ this tax benefit and the influence it represents are not available to non-itemizers.⁸⁹

A consequence of this tax expenditure is that the collector's choice controls which museum receives the donation as well as what and how much the museum receives.⁹⁰ The charitable deduction functions as a form of indirect government aid, which places the power to allocate charitable funds in individual taxpayers as opposed to direct aid where public charitable funds are dispersed by centralized governmental means (e.g., grants).⁹¹ In addition to the power to exercise discretion over the distribution of the charitable deduction tax expenditure, taxpayers in the highest tax brackets tend to contribute more to arts institutions than do those in lower tax brackets and have more resources to contribute.⁹² Thus, the charitable deduction after the 1969 Act has awarded collector-donors in the highest tax-brackets with outsized influence over funding of arts institutions.⁹³

b. *Art as Artists' Ordinary Income Property and the Charitable Deduction for Self-Created Art After 1969*

In contrast to its treatment of long-term capital gain property, the 1969 Act provided that where a donor contributes art that qualifies as ordinary income property, only its cost basis (the value of the materials the artist used to make it) may be deducted.⁹⁴ Ordinary income property included art held by the artist who created it.⁹⁵ Again, the primary impetus for changing the charitable deduction in 1969 was to prevent taxpayers from 'earning' more after-tax income by donating appreciated property rather than selling it.⁹⁶ As illustrated in the hypothetical above where the artist has three paintings to sell, the opportunity for a taxpayer to realize greater after-tax income was a function of the high income tax rates at the time.⁹⁷ Because the tax rate on the sale of long-term capital gain property (e.g. art held by a collector for more than year) was much lower than the highest ordinary income tax rate of 70%, donations of ordinary income

⁸⁸ I.R.S., PUBL'N 526, CHARITABLE CONTRIBUTIONS 2 (Feb. 26, 2025).

⁸⁹ FELD ET AL., *supra* note 10, at 26.

⁹⁰ *See id.* at 30.

⁹¹ *Id.* at 104–05.

⁹² O'Hare & Feld, *supra* note 77, at 135.

⁹³ *See id.*

⁹⁴ I.R.C. § 170(e)(1)(A). I.R.C. § 1221(a)(3) excludes art held by the artist from capital asset treatment and instead characterizes self-created art as ordinary income property. *See also* FELD ET AL., *supra* note 10, at 13.

⁹⁵ I.R.C. § 1221(a)(3); *see* FELD ET AL., *supra* note 10, at 13–14.

⁹⁶ *See supra* Section I.B.2.a. for a discussion of a hypothetical artist; *see* Schmalbeck, *supra* note 50, at 90–91.

⁹⁷ *See supra* Section I.B.2.a. for a discussion of a hypothetical artist.

property posed more of a risk of resulting in net positive after-tax income to the donor.⁹⁸

In theory, the rule under I.R.C. section 170(e)(1)(A) follows logically from the principle that deductions are only allowed for previously taxed gain.⁹⁹ Thus, any taxpayer—including an artist, now and since 1969—who contributes cash to a charitable organization may deduct the full amount of the contribution because she already paid taxes on the income that was contributed.¹⁰⁰ But, artists who donate self-created work have not paid tax on the labor that created the work.¹⁰¹ Because the value an artist adds to a work of art is untaxed, only the materials an artist uses are eligible for the charitable deduction.¹⁰²

But, section 170(e)(1)(A) inconsistently applies the disallowance of deductions for untaxed appreciation principle.¹⁰³ Recall that the fair market rule for collectors allows charitable deductions inclusive of the untaxed appreciation in the art's value.¹⁰⁴ Today, the skewed incentive to donate rather than sell no longer affects the analysis due to much lower current income tax rates.¹⁰⁵ So section 170(e)(1)(A)'s differential treatment of artists and collectors derives solely from its classification of art held by the artist as ordinary income property and its classification of art held by a collector for more than one year as long-term capital gain property.¹⁰⁶ As a result, while collectors enjoy tax benefits from an artwork's appreciation, artists only incur additional tax liability as the price of their work increases.¹⁰⁷

This outcome rests on an assumption that the entirety of the untaxed appreciation in donations of self-created art is ordinary income.¹⁰⁸ Indeed, until 1950, the definition of "capital asset" did not exclude artworks held by the artist who made them.¹⁰⁹ Because capital gains were taxed favorably

⁹⁸ The capital gains tax rate in 1969 was 25%. Newman, *supra* note 65, at 64 n.31.

⁹⁹ FELDE ET AL., *supra* note 10, at 14.

¹⁰⁰ *Id.*

¹⁰¹ This is the general rule that donation of services is not eligible for a charitable deduction. *Id.* (comparing artist donations to physicians who cannot take charitable deductions for services donated to a clinic).

¹⁰² *Id.*

¹⁰³ *Id.* at 14–15.

¹⁰⁴ *Id.*

¹⁰⁵ Generally, the opportunity for a donor to gain more from a donation of ordinary income property than from a sale only results where the marginal tax rate is higher than 50%. Daniel Halperin, *A Charitable Contribution of Appreciated Property and the Realization of Built-In Gains*, 56 TAX L. REV. 1, 14 n.52 (2002).

¹⁰⁶ See FELDE ET AL., *supra* note 10, at 221–22.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.* at 16.

¹⁰⁹ Compare I.R.C. § 117(a)(1) (1940) (excluding "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" from the definition of capital asset), with I.R.C. § 1221(a)(3)–(a)(3)(A) (defining "capital asset" as "property held by the taxpayer (whether or not

(maximum rate of 25%) in comparison to ordinary income (maximum rate 91%),¹¹⁰ taxpayers—politicians in particular—were using this provision to claim capital gain treatment and tremendous tax savings on the sale of self-created work.¹¹¹ Congress responded with I.R.C. § 1221(a)(3) under which transfers of an artist’s self-created work result in ordinary income to the artist.¹¹²

However, ordinary income treatment is not necessarily the correct rule for transfers other than sale.¹¹³ The current charitable deduction rule treats the entirety of an artist’s art as the product of her untaxed services, regardless of how long she has held the work.¹¹⁴ Yet, if an artist opts not to sell her own work after creating it and holds it for a year or more, she could be treated as an “investor” in her own work.¹¹⁵ Treating the artist as investor in self-created work would require separating income that an artwork represents into ordinary income property and long-term capital gain property.¹¹⁶ An artist could divide the value of her artwork into two parts: untaxed personal services and appreciation.¹¹⁷ Accordingly, the artist could elect to include the appraised value of the completed piece as ordinary income, pay tax on that amount, and then hold the art as an investment for a year or more.¹¹⁸ At that point, selling the work would generate long-term capital gain or loss, or—for our purposes—donating the work would result in a fair market charitable deduction.¹¹⁹

The experience of artist Amy Sherald illustrates how improper income characterization inequitably allows collectors to benefit and prevents artists from doing the same. A collector sold Sherald’s *Welfare Queen* for \$3.9 million in 2021.¹²⁰ The collector purchased the work from Sherald in 2012, likely for less than \$25,000.¹²¹ In tax terms, the collector would have

connected with his trade or business), but does not include . . . [an] artistic composition . . . or similar property, held by . . . a taxpayer whose personal efforts created such property”).

¹¹⁰ Joe Nocera, *How a 91% Rate Sparked the Golden Age of Tax Avoidance in 1950s Hollywood*, L.A. TIMES (Jan. 30, 2019, 6:00 AM), <https://perma.cc/XEE6-MM24>.

¹¹¹ Warren S. Shine, *Some Tax Problems of Authors and Artists*, 13 TAX L. REV. 439, 441 (1958) (describing President Eisenhower’s use of the loophole to claim capital gain treatment on one million dollars from the sale of his war memoirs).

¹¹² See I.R.C. § 1221(a)(3)(A).

¹¹³ See FELDE ET AL., *supra* note 10, at 15, 221–22.

¹¹⁴ See *id.* at 221.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 222.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See FELDE ET AL., *supra* note 10, at 222.

¹²⁰ Cheryl Finley, Lauren van Haften-Schick, Christian Reeder & Amy Whitaker, *The Recent Sale of Amy Sherald’s ‘Welfare Queen’ Symbolizes the Urgent Need for Resale Royalties and Economic Equity for Artists*, ARTNET (Nov. 21, 2021), <https://perma.cc/6TPT-USJD>.

¹²¹ Sherald’s prices ranged from \$15,000–\$25,000 before she painted First Lady Michelle Obama’s official portrait in 2017. See Robin Pogrebin, *After a Late Start, an Artist’s Big Break: Michelle Obama’s Official Portrait*, N.Y. TIMES (Oct. 23, 2017), <https://perma.cc/J5SE-926B>.

treated the sale as capital gain, and if she had donated the work, she would have been entitled to a fair market value deduction up to \$3.9 million. There are no circumstances under current law that permit Sherald to share an analogous benefit from the appreciation of her own work.¹²² If Sherald had held *Welfare Queen* over the same nine-year period, she would have had the choice either to sell the painting and pay ordinary income tax on \$3.9 million in sale proceeds, or she could have donated the painting to a museum and taken a deduction for the paint and canvas.

In contrast to collectors who have enjoyed continued influence over allocation of government funds to the arts after 1969, the influence of artists via art donations to museums has shrunk.¹²³ After the passage of the 1969 Act, the number of charitable contributions by artists to museums and cultural institutions fell dramatically.¹²⁴ In the three-year period before 1969, the Metropolitan Museum of Art received a total of 321 artist-donated works.¹²⁵ In the three years after 1969, the Met received only 28 artist-donated works.¹²⁶ Donations by living artists to museums have never recovered.¹²⁷ In reaction to the 1969 Act's changes, one artist challenged section 170(e)(1)(A) on constitutional grounds, claiming that it unfairly discriminated against artists.¹²⁸ The court disagreed, upholding the changes because deductions are a matter of legislative grace.¹²⁹ Regardless of the court's ruling, the drastic reduction of artist donations reflects how the 1969 Act fundamentally reduced artists' charitable donations of their own work to museums.¹³⁰

¹²² Rebecca Singerman, Note, *Do Artists Deserve to Retire? Methods to Remedy Disadvantages Artists Face in Saving for Retirement*, 32 ELDER L.J. 273, 288 (2024). This situation has prompted some to advocate for artist resale royalties and others to privately contract to return a portion of resale proceeds to the artist. See Finley et al., *supra* note 120.

¹²³ See O'Hare & Feld, *supra* note 77, at 134.

¹²⁴ Michael Rips, *Painters Deserve Their Deduction*, N.Y. TIMES (April 21, 2017), <https://perma.cc/ZV3L-PND3>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Conley, *supra* note 9, at 109.

¹²⁸ See *Maniscalco v. Comm'r*, 632 F.2d 6, 8 (6th Cir. 1980).

¹²⁹ The opinion states:

Finally, we find no merit to taxpayer's contention that 26 U.S.C. § 170(e) is unconstitutional. The issue here is, of course, the allowability of an income tax deduction. As was said in *Commissioner v. Sullivan*, 356 U.S. 27, 28 ... (1958), "Deductions are a matter of grace and Congress can, of course, disallow them as it chooses." The argument that this section discriminates against artists is equally without merit. The limitation on deductions contained in this section is not restricted to artists. This section operates to reduce the charitable contribution allowance for the value of any contributed property which is not a capital asset held for more than six months. The section is applicable not only with respect to works of art created by the donor, but with respect to any type of property held by the donor primarily for sale to customers in the ordinary course of business.

Maniscalco v. Comm'r, 632 F.2d 6, 8 (6th Cir. 1980).

¹³⁰ See Regnier, *supra* note 19, at 610–11.

More broadly, the exclusion of artist-donors as a result of I.R.C. § 170(e)(1)(A) undermines a widely-cited advantage of the charitable deduction in the arts context: fostering a maximal variety of viewpoints in place of centralized government funding.¹³¹ The Association of Art Museum Directors estimates that more than 90% of art collections in American museums were donated by private collectors.¹³² In 2023, private collector giving to the arts amounted to more than \$25.26 billion dollars.¹³³ Although it is difficult to know the value of donated art as a percentage of the overall contributions to the arts, the number illustrates the significance of the tax expenditure at stake. However, the amount of resources contributed to the arts does not mean that museum collections reflect viewpoint diversity.¹³⁴ In a 2019 study of eighteen major American museums and their collections, 85.4% of artists were white and 87.4% of artists were male.¹³⁵ And, between 2008 and 2019, only 11% of art acquisitions were by female artists.¹³⁶ Many factors affect these statistics and complicate the picture, but the overall pattern seems to be that the charitable deduction in the context of art donations fosters more viewpoints than centralized government arts funding but not necessarily a variety.¹³⁷

As discussed, the benefits of the charitable deduction for donations of appreciated property, including art, run to the wealthy.¹³⁸ From this observation alone, many commenters have concluded that the current charitable deduction regime is unfair.¹³⁹ Professor Halperin sums up the argument neatly:

¹³¹ See Micah J. Burch, *National Funding for the Arts and Internal Revenue Code § 501(c)(3)*, 37 FLA. ST. U. L. REV. 303, 321–22 (detailing how the charitable deduction encourages viewpoint variety). The virtue of “pluralism over publicness” applies as a rationale for the tax-exempt status of non-profits and the charitable deduction generally. Linda Sugin, *Rhetoric and Reality in the Tax Law of Charity*, 84 FORDHAM L. REV. 2607, 2629 (2016) (noting Justice Powell’s argument in *Bob Jones Univ. v. United States*, 461 U.S. 574, 609 (1983) (Powell, J., concurring), as an example of the pluralism argument: “[P]rivate, non-profit groups receive tax exemptions because each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.”).

¹³² Tyler R. E. Heneghan, *Reframing “Art” to Art: Deterring Looters and Injecting Contemporary Native American Art Through Charitable Deductions*, 7 INDIGENOUS PEOPLES’ J. L. CULTURE & RESISTANCE 353, 354 (2022).

¹³³ *Giving USA: U.S. Charitable Giving Totaled \$557.16 Billion in 2023*, GIVING USA (June 25, 2024, 1:23 PM), <https://perma.cc/VU5J-25XN>.

¹³⁴ See Heneghan, *supra* note 132, at 354.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ But see Chad M. Topaz et al., *Diversity of Artists in Major U.S. Museums*, PLOS ONE (Mar. 20, 2019), <https://perma.cc/AJR4-R9RD>; *Art Market Update: A New Era of Uncertainty*, MERRILL PRIV. WEALTH MGMT. (2025), <https://perma.cc/3C8K-CNU8> (commenting on the rise of female collectors).

¹³⁸ See, e.g., Halperin, *supra* note 105, at 11 (“the treatment of appreciated property further tilts the benefits of the charitable deduction towards the wealthy”).

¹³⁹ See, e.g., *id.*

The idea of pluralism suggests that we are better off when all individuals help select the beneficiaries of government funds rather than leaving it to the political process. It is inconsistent with this idea to leave so much of the choice to the rich and to allow them to make this selection at so little pain to themselves.¹⁴⁰

In the context of arts funding, the failure of pluralism is even more acute. The charitable deduction since 1969 has benefited and incentivized wealthy collectors, and it has offered artists—no matter their wealth and success—pretty much nothing.

II. The Charitable Deduction and the Artist Under the Current Rules

The charitable deduction results in the inequitable treatment of the artist as a taxpayer.¹⁴¹ The inequities manifest across three areas of law: (1) income tax law, (2) estate tax law, and (3) copyright law.¹⁴²

A. *Income Tax Law*

First, as discussed in Part I, the amendment of I.R.C. § 170(e)(1)(A) by the 1969 Act applies unevenly to artists and collectors, leaving artists disadvantaged and the collector virtually unaffected.¹⁴³ Since 1969, collectors may take a fair market value deduction, but artists may only take a material cost deduction.¹⁴⁴ Though the Act aimed to prevent taxpayers from misusing the charitable deduction system, the changes affected artists with full force, but collectors hardly at all.¹⁴⁵

B. *Estate Tax Law*

Second, the charitable deduction available to artists based on material cost for income tax purposes is inconsistent with the valuation procedure that applies to artists' work for estate tax purposes.¹⁴⁶ At death, the works of art in an artist's estate will not be valued at material cost and taxed accordingly.¹⁴⁷ Rather, the basis in the artist's work is "stepped-up" to fair market value, meaning that the works of art that remain in the artist's

¹⁴⁰ *Id.* at 14.

¹⁴¹ Bell, *supra* note 14, at 537.

¹⁴² Hanna K. Feldman, Note, *Preserving the Artistic Afterlife: The Challenges in Fulfilling Testator Wishes in Art-Rich, Cash-Poor Estates*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 223, 225–26 (estate tax law); Lee-ford Tritt, *The Curious Case of the James Brown Estate*, 92 GEO. WASH. L. REV. 753, 799 (2024).

¹⁴³ Bell, *supra* note 14, at 557–58.

¹⁴⁴ *Id.* at 558.

¹⁴⁵ *Id.* at 557.

¹⁴⁶ *Id.* at 540–41.

¹⁴⁷ Ralph E. Lerner, *An Introduction to Estate Planning for the Artist*, ART J., Spring 1994, at 79, 79–80.

estate at the time of her death are assessed at fair market value.¹⁴⁸ The federal estate tax provisions allow full fair market value deductions from an artist's estate for gifts to qualified charitable organizations, if the use of the art by the donee organization relates to the purpose or function constituting the basis for the donee organization's exempt status.¹⁴⁹ However, the irregularities in the income tax and estate tax laws incentivize artists to hold on to work that they intend to donate until their death.¹⁵⁰ Unlike the typical lock-in effect where a taxpayer holds assets (especially highly appreciated assets) until death to avoid realization of gain,¹⁵¹ here, an artist would defer donation to avoid the inequitable lifetime donation rules.¹⁵² In practice, the incentive to wait means that artists will face complex and expensive estate planning to reduce the size of their estate, in a manner that collectors may avoid via charitable income tax planning.¹⁵³ For museums and the public, deferred artist donations limit access to art for no good (non-tax) reason.¹⁵⁴

The more significant hardship for artists as a result of the disjunction between the income and estate tax provisions lies in the uncertainty of the valuation of works that become part of the estate.¹⁵⁵ During life, an unsold work of art has no tax liability, but at death, the estate will include the value of art that the artist retained during her life.¹⁵⁶ Because artists are constantly making new work, appraisals for planning purposes provide only a moving target; estate tax will require the value at the date of death.¹⁵⁷ Artist estates are also "art-rich and cash-poor."¹⁵⁸ That is, an artist's taxable assets at death typically contain hard-to-sell (illiquid) artworks and little cash for estate taxes and administration.¹⁵⁹ Unless family members or an artist's estate have separate, liquid resources to pay estate taxes on the fair market value of the work in an artist's estate, works of art

¹⁴⁸ See I.R.C. §§ 2055(e)(3)(C), 2522(c)(2)(B); see also I.R.C. § 2031(a) ("The value of the gross estate of the decedent shall be determined by including . . . the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated."); Michael Duffy, *Lifetime Donations by Artists: Why Donations Tend to Occur After the Paint Has Dried*, PROB. & PROP., July/Aug. 2019, at 10, 14.

¹⁴⁹ I.R.C. § 2055(e)(4)(C); Tritt, *supra* note 142, at 801.

¹⁵⁰ Duffy, *supra* note 148, at 14.

¹⁵¹ See Grace Enda & William G. Gale, *How Could Changing Capital Gains Taxes Raise More Revenue?*, BROOKINGS (Jan. 14, 2020) <https://perma.cc/AV4Q-QNFG> (describing how the lock-in effect encourages investors to "retain their assets").

¹⁵² Bell, *supra* note 14, at 541.

¹⁵³ See generally E.E. Whiting, *Painter Mel Leipzig Navigates the Art of Estate Planning*, PRINCETONINFO (Apr. 14, 2015), <https://perma.cc/YGQ3-73EV> (describing the estate planning process for an individual artist).

¹⁵⁴ See Conley, *supra* note 9, at 124–25.

¹⁵⁵ See Whiting, *supra* note 153.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Feldman, *supra* note 142, at 224.

¹⁵⁹ *Id.* at 224–25.

will require sale to pay the tax bill.¹⁶⁰ Further, sales will require careful planning to avoid numerous pitfalls. For example, large commissions may decrease the return on a sale, or a sale at the wrong time in estate administration may lock-in the fair market value for tax liability.¹⁶¹ Sales can also depress the market for an artist's work, perversely making it more difficult for the estate to raise the cash needed to meet expenses.¹⁶² Although tax courts sometimes permit a "blockage discount" from the total retail value of art in the estate as an equitable solution to account for the fact that the art market cannot absorb a large number of works at once without reducing their price, the law is complex and involves extremely fact-based (and thus expensive) analysis.¹⁶³ Even if a blockage discount applies to reduce estate tax liability, the "solution" risks long-term reputational problems associated with bulk-selling an artist's estate.¹⁶⁴ One American artist responded to the prospect of his estate's future tax bill by burning his entire collection because "[his] heirs [would] have to pay taxes for which there is no money."¹⁶⁵

C. Copyright Law

Third, the treatment of an artist's self-created work by the charitable deduction is also inconsistent with copyright law.¹⁶⁶ Self-created copyrights are excluded from capital gains treatment under the tax code. Instead, they are treated as ordinary income. But copyrights that are not self-created may constitute a capital asset, unless excluded by another statutory subsection (e.g., inventory).¹⁶⁷ By contrast, copyright law does not distinguish between self-created copyrights and other copyrights.¹⁶⁸ Moreover, copyrights are not treated the same for income tax and estate tax purposes.¹⁶⁹ The physical work of art and its copyright are treated as

¹⁶⁰ Whiting, *supra* note 153 ("The last thing a bereaved family needs is the anxiety that comes from having a large tax bill and no liquid assets to pay it.").

¹⁶¹ *Id.*

¹⁶² Feldman, *supra* note 142, at 248.

¹⁶³ See John G. Steinkamp, *Fair Market Value, Blockage, and the Valuation of Art*, 71 DENV. U. L. REV. 335, 335-37 (1994); see, e.g., David Hansen, *De Kooning Estate Shaves Nearly \$60M Off Tax Bill*, LAW360 TAX AUTH. (Sept. 27, 2019, 8:27 PM), <https://perma.cc/YU7C-EVSD> (demonstrating a recent example of an estate with value art assets where the IRS refused to apply blockage discounts, resulting in eight years of litigation before settlement).

¹⁶⁴ Whiting, *supra* note 153.

¹⁶⁵ Artist "Ted" Ettore DeGrazia burned 100 paintings valued at \$1.5 million as a statement against federal estate tax laws. *Ettore DeGrazia, 73, Burned Paintings to Protest Taxes*, N.Y. TIMES, Sept. 18, 1982, at 29, <https://perma.cc/6D2S-GWYE>.

¹⁶⁶ See Rodney P. Mock & Jeffrey Tolin, *I Should Have Been a Rockstar: Deconstructing Section 1221(a)(3)*, 65 TAX L. 47, 64-66 (2011).

¹⁶⁷ See I.R.C. § 1221(a)(3).

¹⁶⁸ See Mock & Tolin, *supra* note 166, at 65.

¹⁶⁹ Whiting, *supra* note 153.

two interests in the same property under income tax law.¹⁷⁰ The consequence under I.R.C. § 170(f)(3) is that an artist who wishes to donate her work to a charitable organization during life (despite the negligible material cost deduction) must also donate all her copyright interests in the work, otherwise the donation will not qualify for any income tax charitable deduction.¹⁷¹ On the other hand, estate tax law, in some circumstances, treats the work of art and the copyright as wholly separate property interests such that the artist can donate the physical work by bequest to a charitable organization and leave the copyright to another heir.¹⁷²

The current law leaves us with two takeaways: (1) there is little to no income tax deduction benefit for artists' lifetime donation of their work to charity; and (2) a complex system of often inconsistent rules applies to artists as taxpayers, which means that many tax and estate planning strategies are not available to artists.¹⁷³ A few examples of alternative options that are unavailable to artists illustrate the situation.¹⁷⁴ First, artists may not avoid I.R.C. § 170(e) by converting ordinary income property into capital gain property via transfer to a separate entity to hold and then donate the property under I.R.C. § 1(h)(5)(B) and *Ford v. Commissioner*.¹⁷⁵ Likewise, artists cannot avoid I.R.C. § 170(e) in order to realize a fair market value deduction by gifting a work of art to another person and having that person donate the work because I.R.C. § 1121(a)(3)(C) stipulates that gifted art retains its ordinary income character.¹⁷⁶ The art only sheds its ordinary income status when the artist dies and it passes through the estate under I.R.C. § 1014.¹⁷⁷

Although there is little to no income tax deduction benefit, artists can still donate their works during their lifetime to qualifying charitable institutions for altruistic reasons or for exposure.¹⁷⁸ While some have argued that donating an artist's own work helps her exposure regardless of the tax consequences,¹⁷⁹ donation in some circumstances can risk devaluing the artist's work in exchange for an uncertain measure of market exposure.¹⁸⁰

¹⁷⁰ *Id.*

¹⁷¹ Duffy, *supra* note 148, at 12.

¹⁷² Whiting, *supra* note 153.

¹⁷³ See Duffy, *supra* note 148, at 12–14.

¹⁷⁴ See *id.* at 13–14.

¹⁷⁵ *Id.*; *Ford v. Commissioner*, 52 T.C.M. (P-H) 2260, 2263 (1983).

¹⁷⁶ Duffy, *supra* note 148, at 14.

¹⁷⁷ *Id.*

¹⁷⁸ Whiting, *supra* note 153.

¹⁷⁹ *Id.*

¹⁸⁰ See, e.g., Marion Maneker, *An Artist Warns Other Artists About the Broader Economic Implications of Donating Art to Charity Auctions*, ART MKT. MONITOR (Mar. 17 2014), <https://perma.cc/4XUU-379R> (discussing the downsides of donating artwork for charity auctions,

III. Trusts and Foundations: Vehicles for Artists' Charitable Distributions

While scholarship on the charitable deduction tends to focus on proposals for changing the rule,¹⁸¹ legislative attempts to restore artists' ability to claim a deduction for the fair market value of a donated work have repeatedly failed.¹⁸² Given the stability of I.R.C. § 170(e)(1)(A) in the Code for more than fifty years,¹⁸³ this Comment addresses trusts and foundations as alternative tax planning strategies for artists seeking to donate their work. Both trusts and foundations are private sector organizations that can provide funds to help charitable endeavors.¹⁸⁴ These vehicles are defined here at a general level for the purpose of demonstrating their utility for artists in tax and estate planning.¹⁸⁵

A. Charitable Remainder Trusts

A charitable remainder trust is a type of tax-exempt split interest trust designed to include one or more charitable organizations as beneficiaries, with at least one non-charitable beneficiary.¹⁸⁶ In general, a split interest trust means that the interest in any asset transferred to the trust is split (i.e., divided) into some percentage other than the ownership of the entire asset.¹⁸⁷ In the case of a charitable remainder trust, ownership of the donated asset is divided between an income interest and a remainder interest.¹⁸⁸ The income interest provides cash flow to the non-charitable beneficiary or beneficiaries of the trust (the artist or family members) either for life or for a term of years not to exceed twenty years.¹⁸⁹ At the

including the reality that donated work will typically be purchased at a discounted rate and risks depressing the value of the artist's other work).

¹⁸¹ See Bell, *supra* note 14, at 551–66; Conley, *supra* note 9, at 104–24.

¹⁸² See Regnier, *supra* note 19, at 615–16 (discussing four failed bills to resolve the inequity between collectors and creators since 2000).

¹⁸³ *Id.*

¹⁸⁴ See Whiting, *supra* note 153.

¹⁸⁵ Charitable trusts and private foundations represent complex bodies of law, many nuances of which are beyond the scope of this Comment. See generally M. CARR FERGUSON & MARK L. ASCHER, FEDERAL INCOME TAXATION OF ESTATES, TRUSTS & BENEFICIARIES (4th ed. 2024) (providing more in depth discussion of the laws governing the taxation of charitable trusts); SHANE T. HAMILTON & BRUCE R. HOPKINS, THE TAX LAW OF PRIVATE FOUNDATIONS (6th ed. 2024) (detailing the laws governing private foundations and their tax treatment).

¹⁸⁶ Michael Campbell, Comment, *Art and Antique Estates: A Guide to Planning For Life and Death*, 6 EST. PLAN. & CMTY. PROP. L.J. 83, 102 (2013); see also Treas. Reg. § 1.664-1(a)(1)(i) (as amended in 2018).

¹⁸⁷ See John H. Martin, *A Primer on the Deduction, Valuation, and Substantiation of Charitable Contributions*, 5 EST. PLAN. & CMTY. PROP. L.J. 371, 389 (2013).

¹⁸⁸ *Id.* at 389–90.

¹⁸⁹ See I.R.C. § 664(d)(1)(A); Whiting, *supra* note 153, at 55.

end of the term, the remainder interest (i.e., the remaining trust assets) is distributed to the designated charitable beneficiary or beneficiaries.¹⁹⁰

A charitable remainder trust can be structured as a charitable remainder annuity trust or a charitable remainder unitrust.¹⁹¹ A charitable remainder annuity trust annually pays the non-charitable beneficiary a flat percentage based on the value of the assets in the trust at funding.¹⁹² The amount of the payments must be at least 5% and no more than 50% of the value of the total property in the trust at funding.¹⁹³ A charitable remainder unitrust annually pays the non-charitable beneficiary a fixed percentage of the fair market value of the trust which is determined each year.¹⁹⁴ The payments must be between 5% and 50% of the fair market value of the trust's assets and are valued annually.¹⁹⁵

The artist-donor receives a charitable income tax deduction for creating the trust, but this remains a deduction based on material cost not fair market value.¹⁹⁶ In addition, a charitable remainder trust functions to remove assets from the artist's estate because, once funded, the trust owns any art and other assets transferred to it.¹⁹⁷

Funding a charitable remainder trust with art requires careful planning because art is not a liquid or income-producing asset.¹⁹⁸ The charitable remainder trust's annual payments to its non-charitable beneficiaries are mandatory, so the trust must have enough liquid assets to ensure available cash to fund the payments.¹⁹⁹ Accordingly, a charitable remainder trust must be funded with assets in addition to the art in order to meet the annual cash needs.²⁰⁰ If the trust is structured to sell the art and donate the proceeds to charity, the artist does not incur income for tax purposes because the art is owned by the trust.²⁰¹ The trust is treated as a charitable organization and is not taxed on gains from the sale of its

¹⁹⁰ Whiting, *supra* note 153, at 55.

¹⁹¹ EDWARD SPURGEON & JOHN PESCHEL, FEDERAL TAXATION OF TRUSTS, GRANTORS & BENEFICIARIES ¶ 12.03[2] (July 2024), Westlaw FTTGB WGL.

¹⁹² Whiting, *supra* note 153, at 55.

¹⁹³ *Charitable Remainder Trusts*, IRS (June 29, 2025), <https://perma.cc/A7A2-DHSR>.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See I.R.C. § 170(e)(1)(A); *Charitable Remainder Trusts*, *supra* note 193 ("The trust's basis in the transferred assets is carryover basis, which is the same basis that it would be in the hands of the donor . . .").

¹⁹⁷ Whiting, *supra* note 153.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

assets.²⁰² However, “payments to a non-charitable beneficiary are taxed as distributions of the trust’s income and gains.”²⁰³

B. *Private Foundations*

For purposes of the Code, a private foundation is any organization described in I.R.C. § 501(c)(3) that is exclusively charitable, educational, scientific, or religious and does not meet any of the statutory standards to be a “public charity.”²⁰⁴ In contrast to a public charity, an entity supported by the general public, a private foundation is created and supported by private sources—an individual, family, or corporation.²⁰⁵ The research on an artist’s private foundations refers to “artist-endowed foundations,” which are private foundations created by the artist, her family members, or other beneficiaries to own the artist’s creative works, copyrights, and other assets for use in furthering educational and charitable activities serving a public benefit.²⁰⁶ The number of artist-endowed foundations has grown substantially, a trend some see as linked to the increasing number of artists enjoying commercial success as a result of the art market’s growth.²⁰⁷ Artist-endowed foundations are created under state law in various legal forms, including as nonprofit corporations or as charitable trusts.²⁰⁸ Due to the options available for its legal structure, an artist-foundation is not necessarily subject to termination at a given date (unlike a charitable remainder trust) and may exist in perpetuity.²⁰⁹ To achieve and maintain tax-exempt status an artist-endowed foundation must satisfy precise requirements under the Code.²¹⁰

²⁰² See I.R.C. § 664(c) (providing that the charitable remainder trust is tax exempt, so that undistributed ordinary income and capital gains realized on the sale of appreciated assets do not incur income tax at the entitle level); SPURGEON & PESCHEL, *supra* note 191, ¶ 12.03[1].

²⁰³ See *Charitable Remainder Trusts*, *supra* note 193.

²⁰⁴ See I.R.C. § 509(a)(1)–(2).

²⁰⁵ See Christine J. Vincent, *Artist-Endowed Foundations: Mapping the Field*, BROOK. RAIL (Dec./Jan. 2018–2019), <https://perma.cc/3YUU-Z5VV> (describing charitable tax-exempt entities generally as well as the distinction between public charities and private foundations).

²⁰⁶ *Id.* See generally THE ARTIST AS PHILANTHROPIST: STRENGTHENING THE NEXT GENERATION OF ARTIST-ENDOWED FOUNDATIONS (2010, Supp. 2013 & Supp. 2018) (summarizing the research on artist-endowed foundations and describing the increasing number of artist-endowed foundations in the last twenty years).

²⁰⁷ See, e.g., Eileen Kinsella, *Foundations Established by US Artists Have Become a \$7 Billion Philanthropic Force*, ARTNET (Feb. 12, 2019), <https://perma.cc/6CHG-P8HA>.

²⁰⁸ Stephen K. Urice, *Creativity and Generosity: Considerations in Establishing an Artist-Endowed Foundation*, in 2 THE ARTIST AS PHILANTHROPIST: STRENGTHENING THE NEXT GENERATION OF ARTIST-ENDOWED FOUNDATIONS 271, 276–78 (2010).

²⁰⁹ See *id.* at 277, 288 n.35.

²¹⁰ *Id.* at 276.

1. Applicable State and Federal Laws

An artist's foundation, its board members, and staff must comply with multiple state and federal laws.²¹¹ State laws control issues related to the artist's foundation establishment, operation, and structure.²¹² State law generally requires foundations to submit annual reports to the state's attorney general in the state in which the foundation is established.²¹³ State and local laws also dictate the extent to which the foundation is exempt from state and local-level income, sales, and property taxes.²¹⁴ Federal law controls the following aspects of an artist's foundation: (1) whether the foundation is exempt from federal income taxation; (2) whether the foundation is eligible to receive deductible donations for federal income, gift, or estate taxes; and (3) the kinds of activities permissible for the foundation.²¹⁵

2. Tax-Exempt Status

Artists' foundations are subject to 501(c)(3) provisions, which apply to all tax-exempt organizations, as well as to the private foundation rules in Chapter 42 of the Code, which govern the conduct of foundations in particular.²¹⁶ To qualify for tax exemption under I.R.C. § 501(c)(3), a foundation must serve the public benefit exclusively.²¹⁷ The requirement is satisfied by a foundation whose purpose is exclusively charitable, defined as including "relief of the poor and distressed or of the underprivileged; . . . *advancement of education*; . . . lessening of the burdens of Government; and promotion of social welfare . . ."²¹⁸ A foundation whose purpose is exclusively educational, defined to include "the instruction of the public on subjects useful to the individual and beneficial to the community," also satisfies this requirement.²¹⁹ Artist-endowed foundations generally meet the public benefit requirement under the definition of either "charitable" or "educational."²²⁰

²¹¹ *Id.*

²¹² *Id.* See generally Marion R. Fremont-Smith, *Federal and State Laws Regulating Conflict of Interest and Their Application to Artist-Endowed Foundations*, in 2 THE ARTIST AS PHILANTHROPIST: STRENGTHENING THE NEXT GENERATION OF ARTIST-ENDOWED FOUNDATIONS 311 (2010) (summarizing state laws controlling charitable foundations).

²¹³ See Fremont-Smith, *supra* note 212, at 311, 333.

²¹⁴ Urice, *supra* note 208, at 276.

²¹⁵ *Id.* at 276.

²¹⁶ *Id.*

²¹⁷ I.R.C. § 501(c)(3) (providing that a charitable tax-exempt organization must be "organized and operated exclusively for religious, charitable, scientific, . . . literary, or educational purposes, . . . no part of the net earnings of which inures to the benefit of any private . . . individual").

²¹⁸ Urice, *supra* note 208, at 279.

²¹⁹ *Id.*

²²⁰ *Id.*

Section 501(c)(3) also sets organizational and operational tests that restrict the purposes of the foundation as stated in its governing documents and limit a foundation's activities to public service and prohibit private benefit.²²¹ To qualify for and maintain tax-exempt status, these tests must remain satisfied throughout the existence of the foundation.²²²

Artists' foundations are also subject to the private foundation rules in Chapter 42 of the Code.²²³ Given the structure of private foundations as supported by small, private sources (as compared to private charities supported by the general public), the rules governing private foundations reflect Congress's concern for potential abuses associated with the private funding and the typically close relationship between founders and governing boards.²²⁴ For artists' foundations, the rules related to minimum expenditures and self-dealing are very consequential.²²⁵ First, the Code requires private foundations to submit minimum annual expenditures or distributions.²²⁶ Second, I.R.C. § 4941 prohibits self-dealing: transactions between a private foundation and disqualified persons, including the foundation's trustees and officers, the foundation's donors (the artist), and family members of these persons.²²⁷ Self-dealing transactions for a private foundation include sales, exchanges, or leases of property; loans; provisions of goods or services; and payments for compensation or reimbursement.²²⁸ The self-dealing rules are extremely difficult to navigate and require "extreme caution."²²⁹ And failure to comply with them risks severe penalties, including punitive excise taxes and loss of tax-exempt status.²³⁰

3. Types of Private Foundations for Artists and Their Estates

Private foundations are established as either operating or nonoperating foundations.²³¹ A foundation with nonoperating tax status generally has an endowment and fulfills its charitable purpose by making grants to public charities.²³² If an artist donates her collection of work and archives to a nonoperating private foundation, the property is removed

²²¹ *Id.* at 279–80.

²²² *Id.* at 279.

²²³ *See id.* at 281.

²²⁴ Urice, *supra* note 208, at 281.

²²⁵ *See id.* at 281–82.

²²⁶ *See id.* at 281; *see also* I.R.C. § 4942(a). Private operating foundations are not subject to the tax on undistributed income. *Id.*

²²⁷ *See* I.R.C. §§ 4941(a)–(b), 4946(a)(1); *see also* Urice, *supra* note 208, at 282.

²²⁸ Urice, *supra* note 208, at 282.

²²⁹ Duffy, *supra* note 148, at 14.

²³⁰ *Id.*

²³¹ Urice, *supra* note 208, at 282.

²³² *Id.*

from her taxable estate, and the foundation will either distribute the collection as donations to museums and other related public charities, or it may sell the collection.²³³ The foundation may also choose some combination of distributions and sales.²³⁴ Proceeds from any sales will be held by the foundation as an endowment fund, which may also hold the donor-artist's other assets.²³⁵ Endowment income is distributed over time for the foundation's charitable purposes and is not taxable as part of the artist's estate.²³⁶ Nonoperating foundations must spend approximately 5% of the fair market value of their noncharitable-use assets annually for their charitable purposes.²³⁷

An operating private foundation generally fulfills its charitable purposes by directly operating charitable programs itself, rather than making grants to public charities.²³⁸ An operating foundation must submit annual documentation that proves its active involvement in charitable activities under various tests set out in the Code.²³⁹ For an artist-endowed foundation, an operating foundation would directly educate the public using the foundation's resources, including the artist's work and archives.²⁴⁰ The activities of artist-endowed operating foundations also include producing exhibition programs or publications and operating as a private museum open to public access.²⁴¹

IV. Tax-Favorable Donations of Art by Artists: Mitigating the Effects of the Inequitable Charitable Deduction

Charitable remainder trusts and artist-endowed private foundations represent two options for alternative tax planning strategies under the current regulations that allow artists to donate their work to museums and other charitable art institutions without resulting in negative financial consequences to the artist or their estate, as compared to financial costs of artist donations under I.R.C. § 170(e)(1)(A).²⁴² While both options succeed in facilitating charitable gifts from the artist to museums and in reducing estate tax liability, neither vehicle offers efficiency or equity to the artist as a taxpayer.

²³³ *Id.* at 283.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *See id.*

²³⁷ Urice, *supra* note 208, at 283.

²³⁸ *See id.*

²³⁹ *See id.* (summarizing the tests that apply to the activities of operating foundations).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *See Bell, supra* note 14, at 536.

A. *The Benefits of Charitable Remainder Trusts for Artists*

Charitable remainder trusts do not transform an artist's donation of her self-created art into capital asset property eligible for a fair market value charitable deduction.²⁴³ Yet, charitable remainder trusts can successfully provide a benefit to an artist named as the trust's non-charitable beneficiary, who will receive the trust's income interest as cash flow.²⁴⁴ The charitable remainder trust also functions to reduce the size of the grantor-artist's taxable estate, reducing estate-tax liability and the likelihood that beneficiaries will need to resort to a fire sale of the artist's collection to cover the estate tax bill.²⁴⁵ Thus, in addition to facilitating the transfer of an artist's work to a charitable organization, the charitable remainder trust also offers the benefit of potential tax savings, as well as a form of insurance against the depreciation of her life's work by forced sale.

B. *The Benefits of Artist-Endowed Private Foundations*

Like a charitable remainder trust, due to its tax-exempt status, an artist-endowed private foundation can reduce the size of a grantor-artist's taxable estate, which reduces or eliminates estate tax liability.²⁴⁶ Further, an artist-endowed foundation can serve as a vehicle for the long-term stewardship of the artist's work and intellectual property.²⁴⁷

C. *The Limitations of Charitable Remainder Trusts and Artist-Endowed Foundations*

However, charitable remainder trusts and artist-endowed foundations both fail to provide any tax incentives for artists to make lifetime donations of their work and remedy the equity concerns associated with the charitable deduction.

First, charitable remainder trusts and foundations fail to provide tax incentives to make lifetime donations because they are expensive, highly technical, and complicated to administer.²⁴⁸ Both options are inefficient in economic terms as they require time and resources spent with attorneys, and they incur costs to function properly.²⁴⁹ These charitable vehicles also require substantial funding assets beyond the contribution

²⁴³ See David M. Desmarais, *How to Turn a Tax Liability Into a Win-Win: The Power of a Charitable Remainder Trust*, KLR (Apr. 14, 2025), <https://perma.cc/4E86-FBDL>.

²⁴⁴ See *id.*

²⁴⁵ See *id.*

²⁴⁶ See Urice, *supra* note 208, at 273.

²⁴⁷ *Id.* at 272.

²⁴⁸ See *id.* at 274–75; see also Desmarais, *supra* note 243.

²⁴⁹ See Urice, *supra* note 208, at 272; see also Desmarais, *supra* note 243.

of art in order to succeed.²⁵⁰ Private foundations in particular are difficult to navigate and come with the added risk of tax penalties if the artist, family members, or foundation personnel run afoul of the Code's requirements.²⁵¹ For these reasons, charitable remainder trusts and artist-endowed foundations are available and desirable to relatively few artists. The increasingly high estate tax exemption also suggests that fewer artists will be motivated by estate tax considerations to utilize charitable remainder trusts or private foundations over retaining the collections in their estates or making outright bequests.²⁵²

In addition to the practical limitations of charitable remainder trusts and artist-endowed foundations, these options offer no reduction in the inequity that results as a function of the charitable deduction under I.R.C. § 170(e)(1)(A). Charitable remainder trusts and private foundations are options equally available to collectors.²⁵³ These options represent alternatives for collectors to maximize their charitable deductions during life *and* after death.²⁵⁴ In contrast, trusts and foundations offer few benefits to artists during life, and at death, these options look the same for artists as for collectors. In other words, charitable remainder trusts and private foundations do not improve the asymmetrical treatment of artists and collectors under I.R.C. § 170(e)(1)(A). Artists still miss out on the major tax incentive that applies to collector-donors: an income tax deduction for each taxable year in which a work of art is gifted to a museum.²⁵⁵

Further, the growth of the art market, which has fueled the rise of more artists who may benefit from these options,²⁵⁶ also suggests heightened inequity concerns associated with I.R.C. § 170(e)(1)(A). The growth of the art market, in terms of overall sales and increasingly high prices, has affected both artists and collectors.²⁵⁷ With increasing art prices, collectors are likely to receive increasingly high fair market valuations for their donations. While high prices benefit artists' income stream, artists see no income tax advantages from the appreciation of their work. Instead, artists face increased tax liability associated with the growth of the art market, corresponding with the increase in their income streams and the overall size of their estates.

Charitable remainder trusts and artist-endowed private foundations also fall short of a satisfactory solution because they fail to meaningfully

²⁵⁰ See Urice, *supra* note 208, at 272; see also Desmarais, *supra* note 243.

²⁵¹ See 2 THE ARTIST AS PHILANTHROPIST: STRENGTHENING THE NEXT GENERATION OF ARTIST-ENDOWED FOUNDATIONS 80 (2010).

²⁵² Richard Yam, *Tax and Estate Planning for Artists and Art Collectors*, WEALTHSPIRE ADVISORS (Apr. 15, 2025), <https://perma.cc/LE4M-M3QK>.

²⁵³ See Singerman, *supra* note 122, at 287; see also Svetlana Zagorina, *Use of a Charitable Remainder Trust in Managing an Art Collection*, SMITH GAMBRELL RUSSELL, <https://perma.cc/NQ86-3A4N>.

²⁵⁴ See Bell, *supra* note 14, at 537.

²⁵⁵ See *id.* at 558.

²⁵⁶ See Urice, *supra* note 208, at 284.

²⁵⁷ See Bell, *supra* note 14, at 548–49.

counteract the effect of I.R.C. § 170(e)(1)(A) on the United States' art museums and cultural institutions. As only a small subset of commercially successful (or otherwise wealthy) artists will benefit from the use of these vehicles,²⁵⁸ charitable remainder trusts and artist-endowed private foundations can do little to improve the number of artists who are financially equipped to make gifts of their art to museums.

Conclusion

Tax planning for artists is complex, and there is little incentive beyond altruism for artists to donate their work to charitable organizations.²⁵⁹ While charitable remainder trusts and artist-endowed private foundations offer limited benefits for artists seeking to distribute their work to museums, these vehicles for income and estate tax planning fall far short of an incentive comparable to the fair market value deduction available for collectors' donations.²⁶⁰ The current rule treats artists unfairly and can result in the inefficient use of their resources to mitigate harsh consequences for their beneficiaries and the potential depreciation of their work.²⁶¹ Moreover, the consequences of I.R.C. § 170(e)(1)(A) extend to United States museums, cultural institutions, and the public as the growth of art collections remains disproportionately with a small group of wealthy collectors.²⁶²

²⁵⁸ See 2 THE ARTIST AS PHILANTHROPIST: STRENGTHENING THE NEXT GENERATION OF ARTIST-ENDOWED FOUNDATIONS 265 (2010).

²⁵⁹ See Stephens Gillers, *Enter the Lawyers: Choosing and Working with Estate and Foundation Counsel to Secure an Artistic and Philanthropic Legacy*, in 2 THE ARTIST AS PHILANTHROPIST: STRENGTHENING THE NEXT GENERATION OF ARTIST-ENDOWED FOUNDATIONS 293, 293 (2010).

²⁶⁰ See Urice, *supra* note 208, at 284; see also Desmarais, *supra* note 243.

²⁶¹ See Urice, *supra* note 208, at 284.

²⁶² See *supra* notes 106, 258 and accompanying text.