The Relationship between Tax Deductions and the Market for Unprovenanced Antiquities

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INTRODUCTION

This Note examines the relation between the market for unprovenanced antiquities and Congress’ allowance of tax deductions for donations of in-kind gifts to nonprofit organizations. Part I lays out the current rules on charitable deductions. Part II surveys the antiquities market, arguing that the majority of unprovenanced antiquities sold in the American market during the last few decades were looted and illegally exported from their countries of origin in order to feed this market. Part III begins with a discussion of several cases of donated antiquities and then moves to a general suggestion that the current charitable deduction rules, at best, fail to reduce looting and, at worst, encourage the purchase of looted antiquities. The Note concludes with a proposal for conditioning the availability of a deduction on the presence of satisfactory provenance information and a discussion of the impact this reduction in the availability of deductions might have on the market for antiquities, scholarship and the fate of antiquities themselves.

I. CURRENT RULES FOR CHARITABLE DONATIONS

Congress has allowed tax deductions for donations to charitable, religious, educational and similar nonprofit organizations since 1917. A 1938 report of the House Committee on Ways and Means explained that the loss of tax revenue caused by charitable deductions is compensated by the “relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.”

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1. The term “antiquity” is used in this paper according to the accepted international definition of artifacts over 100 years old (Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, Art. 1(e) [hereinafter 1970 UNESCO Convention]), but also in accordance with the layperson’s use of the term, in that the majority of the artifacts I will discuss were produced before 0 C.E. For an explanation of my use of the term “unprovenanced,” see discussion infra Part II.
The Committee on Ways and Means was correct in stating that the benefits of charitable deductions need to be balanced against the burdens, since these deductions have a significant impact on tax revenue. In 1999, approximately $125.8 billion was deducted for charitable gifts on approximately 35.5 million individual returns, with deductions for non-cash gifts accounting for approximately $38.3 billion of that total. In 2004, 6.6 million individual returns claimed non-cash gifts amounting to $37.2 billion.

Given their large impact on tax revenue, the advisability of charitable deductions has often been evaluated in terms of effectiveness, scope and potential for abuse. These discussions have led to many modifications of the statute and regulations governing charitable deductions. Accordingly, a charitable transfer must now satisfy a complex set of rules in order to result in a deduction. These rules are grouped into three general requirements: the transfer must (1) go to a qualified recipient, (2) exhibit the proper donative intent (i.e., not be in exchange for goods or services) and (3) consist of cash or qualified property. It is the third requirement which is, broadly speaking, addressed in this paper.

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4. Janette Wilson & Michael Strudler, Individual Noncash Contributions, 2004, 26 STAT. INCOME BULL. 77 (2007). The most common non-cash gifts were corporate stock ($15.1 billion), clothing ($6.3 billion), and household items ($3.5 billion). Id. at 78–79.
7. 1 R.C. § 170(c) (2006).
8. Id. See generally James Colliton, The Meaning of “Contribution or Gift” for Charitable Contribution Deduction Purposes, 41 OHIO ST. L.J. 973 (1990); Richard D. Hobbet, Charitable Contributions—How Charitable Must They Be?, 11 SETON HALL L. REV. 1 (1980); Joseph V. Sliskovich, Charitable Contributions or Gifts: A Contemporaneous Look Back to the Future, 57 UMKC L. REV. 437 (1989). Note that a donation may result in a deduction even if the donor’s intent is that the donation will result in benefits to the donor’s reputation: Rev. Rul. 68-658, 1968-2 C.B. 119 (Situation 2) (allowing deduction for an art gallery’s donation of artworks to a museum, made for the purpose of adding to the gallery’s prestige and enhancing the value of works by the same artists, whom the gallery represented); see also Rev. Rul. 79-9, 1979-1 C.B. 126 (revoxing Rev. Rul. 68-658, but making no reference to this holding); McLennan v. United States, 24 Cl. Ct. 102, 91-2 USTC ¶ 50, 447 (1991), aff’d, 994 F.2d 839 (Fed. Cir. 1993) (allowing deduction for a landowner’s donation of scenic easement, made in order to protect value of property and generate deduction).
9. 1 R.C. § 170(e)(3) (2006). Note that charitable transfers, even if they satisfy all requirements, are deductible only to the extent they do not exceed a specified percentage of the taxpayer’s income in the year of payment (carryover being allowed in some cases). This paper will assume that this deductible amount does not enter into the donor’s considerations. For percentage limitations on deductions, see BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 35.3; I.R.C. §§ 170(b)(1)(A)-(B) (percentage limitations for individuals) and (b)(2)(A), (C).
A. SPECIAL CONSIDERATIONS FOR THE DONATION OF ART

While even gifts of cash or easily valued assets such as stock are governed by a complex set of rules, much more intricate rules govern deductions for donations of art or artifacts. I will discuss two such areas of rule-making concerning gifts of art: valuation and the related use rule.

1. Valuation

Since donors of artwork have often been criticized for attempting to increase their deduction by overvaluing their donations, the IRS has a number of rules and procedures to control the valuation of donated art. In general, the IRS allows a donor to deduct an amount equal to the donated property's fair market value at the time of the gift. However, the application of the concept of "fair market value" is difficult for rare or unique artifacts such as antiques.

Fair market value is not the property's cost, rather, in the classic and oft-repeated formulation, it is "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having a reasonable knowledge of relevant facts." The market for this imagined transaction is the market "in which such item is most commonly sold to the public." As for the "reasonable knowledge of relevant facts" standard, an IRS ruling has attempted to clarify that:

(percentage limitations for corporations).

13. Treas. Reg. § 1.170A-1(c)(1). There is an important exception which limits the deduction amount for dealers and some collectors. If the taxpayer would have generated ordinary income or short-term capital gain if he or she had sold the property for its fair market value instead of donating it, the otherwise deductible amount is reduced by the amount of this income or gain. I.R.C. § 170(c)(1)(A). That is, the deduction in these cases is limited to the taxpayer's adjusted basis in the property. See Treas. Reg. § 1.170A-4(d) Ex. 1 (ordinary-income property). The rule applies to gifts of capital assets held for less than one year and to art in a donating dealer's inventory (or otherwise held for sale to customers in the ordinary course of business). See Lindsley v. Comm'r, 47 T.C.M. (CCH) 540 (1983). Collectors can easily escape this limitation by holding the to-be-donated object for more than one year, thus making it a long-term capital asset whose full fair market value may be deducted. I.R.C. § 1221; Feld supra note 12, at 626 (a "work of art in the hands of a collector will usually meet the capital asset definition without difficulty").
16. Goldstein v. Comm'r, 89 T.C. 355, 544 (1988) (quoting from Treas. Reg. § 25.2512-1). See also Leibowitz v. Comm'r, 73 T.C.M. (CCH) 2858, 2868 (1997) ("Fair market value is determined in the market most commonly used by the ultimate consumer, which may or may not be the most expensive, since ultimate consumers may simultaneously participate in multiple markets with different
A prospective seller would inform a prospective buyer of all favorable facts in an effort to obtain the best possible price, and a prospective buyer would elicit all the negative information in order to obtain the lowest possible price. In this arm's length negotiation, all relevant factors available to either buyer or seller, known to both, provide a basis on which the buyer and seller make a decision to buy or sell and come to an agreement on the price.  

Among the hypothetical facts the appraiser is to take into consideration are events which are "reasonably foreseeable at the date of valuation."  

Such formulations of a valuation principle are flexible and leave room for a donor to argue for higher valuations. The IRS controls this impulse of art donors through two mechanisms: various substantiation requirements, including an appraisal, and audits through the IRS Art Advisory Panel.

The first, and most important, way in which the IRS controls valuation is through substantiation requirements. A charitable gift must be verified before the donor can claim a deduction. When the claimed value of the gift is $250 or more, this substantiation must include a contemporaneous written acknowledgment by the donee organization. For a gift worth $500 or more, the donor must include a description of the property and any other information required by the IRS with the tax return in which the donation is claimed. For a gift of property other than money, publicly traded securities or inventory, worth more than $5,000, the donor must obtain an appraisal.

The IRS has promulgated a detailed set of rules about these appraisals. They must be carried out by "a qualified appraiser in accordance with generally accepted appraisal standards." A qualified appraiser must be certified by a recognized professional appraiser organization or meet minimum Treasury or IRS education and experience requirements and must regularly perform compensated appraisals.

The appraisal itself is subject to another set of regulations, including a requirement that it must be made no earlier than two months before the gift and no

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24. This figure is calculated by looking at all similar gifts of a donor: I.R.C. § 170(f)(11)(F).
25. See Notice 2006-2 C.B. 902, § 3.04(1) (regulations continue to apply, except where inconsistent with statutes).
later than the due date of the return on which the deduction is claimed.\(^{30}\) The
appraisal must state, among other information, the description and physical
condition of the property along with its fair market value, accompanied by an
explanation of the valuation method used to determine that value and a statement of
the facts used in applying the valuation method.\(^{31}\)

The second important mechanism of controlling donor’s valuations of art is the
IRS Art Advisory Panel, established in 1968, which periodically reviews property
appraisals submitted by taxpayers who are claiming charitable deductions or paying
gift or estate tax when these cases are selected for audit and concern works of art
with a claimed value of $20,000 or more.\(^{32}\) The panel is composed of twenty-five
uncompensated art experts who review cases anonymously, without knowing
whether a higher valuation would be favorable or not to the taxpayer. The panel
works from appraisals and photographs submitted by the taxpayer.

In 2007, the panel met for five days and reviewed 1,002 items.\(^{33}\) The panel’s
recommended adjustments lowered the value of items in charitable contribution
cases by 47% and raised the value of estate and gift appraisals by 58%,\(^{34}\) accepting
only 36% of the submitted appraisals without change.\(^{35}\) For the charitable
contribution cases, these adjustments resulted in a lowering of claimed value by
nearly $7 million.\(^{36}\)

2. The Related Use Rule

The second major area of concern for donors of antiquities is the related use
rule. Congress created the current version of this rule in 2006. It retroactively
reduces a donor’s deduction for a charitable gift of tangible personal property if the
donor’s gift and (2) does not file a certification that its use of the property was
related to its exempt purposes or functions.\(^{37}\) The rule’s relation to valuation is
clear, if somewhat indirect: the value of a work which does not continue to provide
value to the donee institution is lowered, since it is the charitable value which is of
concern to the IRS.

The related use rule takes into account the intent of both the donor and the
donee. The donor’s intent is of interest since the rule applies to gifts of tangible
personal property which the donee has “identified . . . as related to the purpose or

\(^{30}\) Treas. Reg. § 1.170A-13(c)(3)(i).

\(^{31}\) Id. § 1.170A-13(c)(3)(ii).


\(^{33}\) THE ART ADVISORY PANEL OF THE COMMISSIONER OF INTERNAL REVENUE, ANNUAL

\(^{34}\) Id. at 4. Taxpayers often undervalue items in estates or gifts in order to avoid estate and gift
taxes, which apply when the total value of an estate or the cumulative value of gifts exceed a certain
amount.

\(^{35}\) Id.

\(^{36}\) Id. at 5.

function constituting the basis of" the donee's federal tax exemption. The taxpayer who claims that his or her donated property has a use related to the donee's exempt purpose or function while "know[ing] that such property is not intended for such a use" may be fined $10,000 in addition to being subject to other criminal penalties. However, the IRS will presume that a donation is related to the museum's exempt purposes if the donation is the type of object that the museum normally retains; for example, a painting to a fine arts museum or a fossil to a natural history museum.

The donee's intent is relevant for the certification requirement. This written document, "signed under penalty of perjury by an officer of the donee organization," allows the donor to retain the full fair market value of his or her donation if the donee certifies that either (1) that the donee's use (and transfer) of the property is related to its exempt purpose or function or (2) that the "intended use of the property by the donee at the time of the contribution" later became "impossible or infeasible to implement." If the donee transfers the property without making this certification, the value of the donor's deduction is reduced to either his or her adjusted basis for the property (if the donee transfers the property before the end of the taxable year during which the donor made the gift) or to an amount between the fair market value and the adjusted basis (if the donee transfers the property after the end of the taxable year of the donation but within three years after the gift). The three year period of the related use rule is consistent with the general three year statute of limitations for the IRS to assess a tax, audit a tax return or begin a tax-related court proceeding.

II. THE ANTIQUITIES SITUATION

Having described the general framework of regulations for the charitable deduction of art in general, I will now describe some aspects of the contemporary market for antiquities and show there is a scholarly consensus that the majority of unprovenanced antiquities sold to private collectors in the U.S. in the last 50 years were looted from their countries of origin.

I will use the term "looting" to describe any set of acts by which an antiquity is obtained and illegally removed from its country of origin. The looseness of this term is necessary because antiquities can be obtained in a number of ways: deliberately dug up from archaeological sites, accidentally uncovered during construction projects, stolen from museums, etc. The illegality requirement means that the country of origin must prohibit the export of the type of antiquity in

38. I.R.C. §§ 170(e)(7)(C), 6050L(a)(2)(A). The related use rule also applies only when the claimed deduction exceeds both $5,000 and the donor's adjusted basis for the property. Id.
42. I.R.C. § 170(c)(1)(B)(II).
43. I.R.C. § 170(c)(7)(B).
44. I.R.C. § 6501(a); Treas. Reg. § 301.16501(a)-1(a)–(b).
question. There are a variety of methods by which countries regulate the export of antiquities, from merely requiring proper export documentation to imposing national ownership laws that make all antiquities the property of the state. It is the latter situation with which this paper is concerned.

I use “provenance” in the art historical sense of the record of where an object has been, and who has owned it, since its creation. Many antiquities excavated by archeologists have relatively complete provenances. For example, the bust of Nefertiti was carved sometime during this Egyptian queen’s lifetime (c. 1370–1330 B.C.E) and was abandoned in a sculptor’s workshop in Tell el-Amarna until it was excavated on December 6, 1912 by a German archeological team.45 After a brief period of possession by a German sponsor of the excavation, it was donated to the Berlin Egyptian Museum, where it has remained since.

By contrast, the great majority of antiquities sold to private collectors in the last fifty years have no provenance. A tradition of privacy allows dealers and auction-houses to omit information about the previous owners of the artifacts. Instead, antiquities are described with vague geographical locators (for example, “said to be from Apulia”), which are based on connoisseurship rather than actual knowledge of the find-spot or country of origin. A survey of Sotheby’s and Christie’s auctions of antiquities in London from World War II through 2000 showed that around 95 percent of the objects had no indication of a find-spot, and 89 percent had no historical information listed whatsoever.46 Similarly, less than one percent of Mayan objects auctioned between 1971 and 1999 by Sotheby’s were listed with any indication of find-spot.47 There are similar studies of lack of provenance for other categories of antiquities.48

If an antiquity is unprovenanced—i.e., if it is not accompanied by documentation of its find-spot and ownership history—it is difficult to ascertain whether it was legally exported from its country of origin. Legal export means that

an antiquity either left its country of origin before the passage of national ownership laws or other bars to its export, or that it was accompanied by proper export permissions after the passage of these laws. The large amount of antiquities that began to enter the market in the last fifty years is too great to be accounted for by a history of legal collecting.\textsuperscript{49} For example, as a U.S. court has recognized, Italy declared in 1939 that all antiquities in Italy belonged to the national government and could not be alienated or exported.\textsuperscript{50} Archeologists are unwilling to believe that the thousands of Italian antiquities which passed through the antiquities market post-1939 left Italy before that date, remaining unknown to scholarship until they emerged in contemporary sales.

Archeologists instead propose that the source of the majority of unprovenanced antiquities in the current market is looting. Scholars have extensively documented the existence of ravaged archeological sites from many cultures, including Mesopotamia,\textsuperscript{51} Pre-Columbian cultures,\textsuperscript{52} ancient Greece and Rome,\textsuperscript{53} various African sites\textsuperscript{54} and even Native American sites in the United States.\textsuperscript{55} Careful

\textsuperscript{49} E.g., Kathryn Walker Tubb & Neil Brodie, From Museum to Mantelpiece: The Antiquities Trade in the United Kingdom, in DESTRUCTION AND CONSERVATION OF CULTURAL PROPERTY 102, 105–07 (Robert Layton, Peter G. Stone & Julian Thomas eds., 2001) (discussing the “supermarket approach” to selling of small, inexpensive antiquities—thousands of which were available from British antiquities shops and mail-order catalogues, and arguing that the “sale and collection of these unprovenanced artifacts are the ultimate causes of the looting”).


\textsuperscript{55} See, e.g., Ann M. Early, Profiteers and Public Archaeology: Antiquities Trafficking in
studies, such as Kirkpatrick’s *Lords of Sipan*, describe tenacious looters who use everything from shovels to bulldozers and dynamite to extract saleable artifacts from sites—in the process, destroying fragile but archeologically valuable materials such as animal or plant remains, wood, cloth, architectural structures or less profitable objects such as pottery vessels.\(^{56}\) Other works document the networks of middlemen who connect looters to dealers and ultimately to buyers—networks so sophisticated that Italy has begun to combat them by using the same techniques it uses against the Mafia.\(^{57}\)

The amount of scholarship documenting looting is extensive,\(^{58}\) and the problem shows no signs of abating. News reports continue to confirm incidents of looting and of illicit export; in the last twelve months, thousands of looted and illegally exported antiquities have been reported in Africa;\(^{59}\) Asia;\(^{60}\) the Near and Middle

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\(^{57}\) PETER WATSON, SOtheby’s: INSIDE STORY (1997); WATSON & TODESCHINI, supra note 53.


East; Greece and Macedonia; Italy; other areas of Europe; North America and South America.


Archeologists have concluded that the artifacts taken from the looted sites are sold as unprovenanced antiquities.67

One logical way to decrease the incidences of looting and smuggling of antiquities is to reduce the demand for these artifacts. As the Director for the International Foundation for Art Research has made clear, looting “is motivated by money,” and if collectors and dealers became more reluctant to buy artifacts without a solid provenance, “then the market will begin to dry up.”68 Every unprovenanced work sold, even if it itself was not looted, is an encouragement for looters and middlemen who can hope to sell the antiquities they uncover without having to provide a provenance.69

A. U.S. RESPONSES TO ILLEGAL TRADE IN ANTIQUITIES

Although the U.S. has few laws regulating its own cultural property,70 it has increasingly paid attention to means of decreasing the flow of illicit antiquities over


68. Morning Edition: Metropolitan Museum Returns Artefacts to Turkey (NPR radio broadcast, Sept. 24, 1993). See also Mark J. Lynott, Ethical Principles and Archaeological Practice: Development of an Ethics Policy, 64 AM. ANTIQUITY 589, 590 (1997) (citing S.P.M. Harrington, The Looting of Arkansas, ARCHAEOLOGY, MAY–JUNE 1991, at 22 (“[T]he increasing commercial value of archeological objects within the art market has led to a significant expansion in the market and the looting of archeological sites.”)); David Pendergast, And the Loot Goes On: Winning Some Battles, but Not the War, 18 J. FIELD ARCHAEOLOGY 89 (1991); Hugue de Varine, The Rape and Plunder of Cultures, 35 MUSEUM 152, 157 (1983) (the “fundamental responsibility” of antiquities-buying individuals and countries is to refrain from purchasing illicit cultural property). This idea of the interaction of the market and looting is also closely tied to archeologists’ disapproval of private ownership of antiquities, as is made clear in the official position on commercialization of the Society for American Archeology: “[T]he buying and selling of objects out of archaeological context is contributing to the destruction of the archaeological record in the American continents and around the world. The commercialization of archaeological objects—their use as commodities to be exploited for personal enjoyment or profit—results in the destruction of archaeological sites and of contextual information that is essential to understanding the archaeological record.” “Third Ethical Principle” of the Society for American Archeology, quoted and discussed in M.J. Lynott, Ethical Principles and Archaeological Practice: Development of an Ethics Policy, 62 AMERICAN ANTIQUITY 589, 592 (1997). See also L. E. Murphy et al., Commercialization: Beyond the Law or Above it? Ethics and the Selling of the Archaeological Record, in ETHICS IN AM. ARCHAEOLOGY: CHALLENGES FOR THE 1990s 45 (Mark Lynott and Alison Wylie eds., 1995).

69. Dealers, who consider their own practices to be highly ethical, often feel insulted by archeologists’ boycotts. James Ede, The Antiquities Trade: Towards a More Balanced View, in ANTIQUITIES: TRADE OR BETRAYED: LEGAL, ETHICAL, AND CONSERVATION ISSUES 211, 211 (Kathryn Walker Tubb ed., 1995). It is easier to understand archeologists’ refusal to recognize even ethical dealers if one understands the reasons for their condemnation of the trade as a whole.

70. The Archaeological Resources Protection Act of 1979 (16 U.S.C. § 470aa-470mm); the
its borders, at least in part because of concerns over the connections of antiquities smugglers to drug smuggling\(^\text{71}\) and terrorism.\(^\text{72}\)

There are many mechanisms used in the U.S. to combat the illegal trade in cultural property.\(^\text{73}\) They include the domestic implementation of pertinent international treaties;\(^\text{74}\) the formation of bilateral agreements which impose import restrictions for other countries' endangered artifacts;\(^\text{75}\) and application of domestic law, especially the use of the National Stolen Property Act.\(^\text{76}\) Two of these mechanisms are discussed in this paper: (1) bilateral agreements, since they reverse the burden of proof of showing lawful export and (2) the use of the National Stolen Property Act, since this requires possessors of antiquities to have good title.

In the \textit{McClain} case, U.S. prosecutors used the National Stolen Property Act to return Pre-Columbian antiquities to Mexico.\(^\text{77}\) The prosecution had evidence that the antiquities in question had been removed from Mexico well after the passage of the relevant Mexican law declaring national ownership. Since the antiquities were

\begin{itemize}
  \item 71. See, e.g., \textit{UK MINISTERIAL ADVISORY PANEL ON THE ILLICIT TRADE IN CULTURAL OBJECTS} (2000), available at http://www.culture.gov.uk/PDF/Report%20of%20Advisory%20Panel%20on%20Illicit%20Trade.pdf (evidence of links between the illicit antiquities trade and other illegal activities is persuasive). For example, in 2000, an eastern European national was arrested at Gatwick airport, en route to the U.S.; he was carrying substantial quantities of a banned class C drug, and around 9,750 ancient coins. \textit{Id.} at 47–48.
  \item On international legal efforts to protect antiquities, see, e.g., \textit{LEGAL ASPECTS OF INTERNATIONAL TRADE IN ART—LES ASPECTS JURIDIQUES DU COMMERCE INTERNATIONAL DE L’ART} (Martine Briat & Judith A. Freedberg eds., 1996); \textit{PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW} (2004); \textit{ART CULTURAL HERITAGE: LAW, POLICY & PRACTICE} (Barbara Hoffman ed., 2006); \textit{JOHN HENRY MERRIMAN, THINKING ABOUT THE ELGIN MARBLE: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW} (2000); \textit{LYNDEL V. PROTT, COMMENTARY ON THE UNIDROIT CONVENTION ON STOLEN AND ILLEGALLY EXPORTED CULTURAL OBJECTS} 1995 (1997).
  \item 76. 18 U.S.C. § 2314-2315 (2006).
  \item 77. United States v. McClain, 545 F.2d 988 (5th Cir. 1977), \textit{reh’g denied}, 551 F.2d 52 (5th Cir. 1977). \textit{See also} United States v. McClain, 593 F.2d 658 (5th Cir. 1979), \textit{cert. denied}, 444 U.S. 918 (1979).
owned by the Mexican government, the court treated them as stolen property and found the defendants guilty of transporting them across U.S. state borders. Although this logic has been criticized as simply a covert enforcement of other country’s export laws,\textsuperscript{78} it has been used in a number of subsequent cases,\textsuperscript{79} and U.S. courts have recognized the national ownership laws of Italy,\textsuperscript{80} Egypt,\textsuperscript{81} Turkey,\textsuperscript{82} Cyprus\textsuperscript{83} and Peru.\textsuperscript{84}

In a different approach, the U.S. has officially recognized the gravity of the prevalence of illicit export in a number of countries. The U.S. became a party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 1983.\textsuperscript{85} Article nine of this Convention allows state parties “whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials” to call upon other state parties, who must endeavor to “determine and to carry out the necessary concrete measures, including the control of exports and imports” of the endangered materials. In order to fulfill this obligation, Congress passed the Convention on Cultural Property Implementation Act (CPIA).\textsuperscript{86} Under the CPIA, other state parties to the 1970 UNESCO Convention may request that the U.S. restrict the import of designated archaeological or ethnological material\textsuperscript{87} from the requesting state into the U.S.\textsuperscript{88} Congress is advised on these requests by the Cultural Property


\textsuperscript{79} For a detailed discussion of the use of the McClain precedent to reclaim a group of antiquities, see Lawrence Kaye & Carla Main, The Saga of the Lydian Hoard, in ANTIQUITIES: TRADE OR BETRAYED: LEGAL, ETHICAL, AND CONSERVATION ISSUES (Kathryn Walker Tubb ed., 1995).


\textsuperscript{83} Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 280–81 (7th Cir. 1990) (Republic of Cyprus and Cyprus-based Church brought suit to recover stolen mosaics).


\textsuperscript{87} The definition of these terms in the Act are as follows: “Archaeological material” is any object, fragment, or part of any object of archaeological interest which was first discovered within, and is subject to export control by, a State Party to the 1970 UNESCO Convention. The object must be of cultural significance and be at least 250 years old. 19 U.S.C. § 2601(2). “Ethnological material” is any object, fragment, or part of any object of ethnological interest which was first discovered within, and is subject to export control by, a State Party to the 1970 UNESCO Convention. The object must be the product of a tribal or nonindustrial society, and be important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people. Id.

\textsuperscript{88} The Act also prohibits the import of articles of cultural property (not limited to archaeological or ethnological material) documented within an inventory of a museum or religious or secular public
Advisory Committee (CPAC), which is composed of representatives of various interests such as scholars, museum officials, dealers and the general public.

If granted, import restrictions have a five-year effective period and may be renewed in five-year increments after review by CPAC. The U.S. may also choose to impose emergency import restrictions for a limited period of time, not to exceed eight years; the effect is the same as the five-year restrictions. The U.S. Customs Service must publish in the Federal Register a descriptive list designating the categories of archaeological or ethnological material subject to import restrictions. So far, thirteen states have successfully concluded agreements with the U.S. under the CPIA: Bolivia, Colombia; Honduras; Cambodia; Cyprus; Peru; Italy; El Salvador; Nicaragua; Guatemala; Mali; Canada; and China.

monument or similar institution in any State Party to the 1970 UNESCO Convention and which are stolen from such institutions. 19 U.S.C. § 308 (2006).


If a request is granted, any designated artifact which enters the U.S. without either an export permit issued by the state of origin or documentation showing that the artifact was out of the state of origin at the time the restrictions became effective will be confiscated by the U.S. Customs Service and returned to the state of origin.

Thus, the establishment of a CPIA agreement reverses the usual U.S. practice of not enforcing other countries’ export laws. A CPIA agreement also imposes a burden of proof on importers, who must show that their imports are not covered under the agreement. This requirement operates as an official U.S. recognition that unprovenanced antiquities are looted until proven innocent.

III. THE FAILURE OF THE CURR ENTIAL RULES TO REDUCE LOOTING

It is clear that rules governing tax deductions for donations of art can have an effect on taxpayer’s decisions about whether to purchase art in general. Furthermore, several cases demonstrate that tax considerations have an impact on taxpayers’ decisions about whether to purchase antiquities and what to do with antiquities subject to repatriation claims.

A. RECENT CASES OF MANIPULATIONS OF THE DEDUCTION RULES

One of the most recent cases demonstrating the relation between deductions and antiquities purchases came to public attention in early 2008, when federal agents raided the Los Angeles County Museum of Art, the Pacific Asia Museum, the Bowers Museum, the Mingei International Museum and various homes and storage sites in the Los Angeles area. They seized more than 10,000 artifacts from the Ban Chiang culture (c. 2100 B.C.E.–200 C.E.) from what is now northeastern

Thailand. The donated artifacts in question were most probably looted from archaeological sites, and Thailand prohibits their export. The objects (labeled as reproductions) were smuggled out of Thailand, Myanmar and China by one conspirator and sold to U.S. taxpayers by another pair of conspirators, the owners of a Los Angeles gallery. The gallery owners provided buyers with inflated appraisals, and the objects were donated to the museums, resulting in tax deductions for the buyers who fraudulently declared a low basis and period of possession of more than one year.

In this case, Thailand's archeological sites were looted for the sake of fraudulent tax deductions. In other cases, donors do not commit knowing fraud, but also act in a way which links looting to tax deductions. These are the cases in which taxpayers, notified that a country has a persuasive repatriation claim on artifacts they possess, arrange to donate them to a non-profit organization with the understanding that this organization will eventually repatriate the artifacts to their country of origin.

Thus, the 1993 settlement of Greece v. Ward resulted in a tax deduction for the return of a collection of ancient Mycenaean artifacts (c. 3500 B.C.E.) to Greece. The New York-based Michael Ward Gallery possessed the artifacts, which were recognized by American scholars as stylistically identical with other Mycenaean artifacts from a group of tombs at Aidonia, a site in southern Greece which had been looted in the late 1970s. Greece was notified and filed suit in the U.S. District Court for the Southern District of New York to recover the illegally exported artifacts. In late 1993, during pre-trial discovery, Greece and the Ward Gallery agreed on an out-of-court settlement by which the Gallery donated the artifacts to the Society for the Preservation of the Greek Heritage, a Greek-American cultural exchange organization, which then returned them to Greece. The Gallery received a tax deduction for this donation. The exact amount of the deduction is not confirmed, but several reports describe it as equal to the Gallery's basis in the artifacts, e.g., the price it paid for them (allegedly $150,000).

103. Wald, supra note 102 (Dr. Joyce C. White, of the University of Pennsylvania Museum of Archaeology and Anthropology, identifies the objects as looted). See also Wyatt, supra note 102 (undercover agent's affidavit describes ancient beads in the gallery which "were filled with dirt and had obviously just been dug up").

104. The federal investigators claimed that staff members at the Pacific Asia Museum and the Bowers Museum worked with the gallery owners, accepting the donations even though they had inadequate provenances, and that Los Angeles County Museum of Art officials had signed backdated donation forms (in order for the objects be categorized as long-term capital property).


106. The owner of the gallery insisted that the artifacts were purchased in good faith and that there was no conclusive proof that they had been looted from the Aidonia site. Michael Ward, Editorial, Gallery Acted in Good Faith on Greek Artifacts, N.Y. TIMES, Feb. 10, 1996, at 22.

Reactions to this settlement were mixed. Some observers celebrated it as a novel solution to ownership disputes, while others criticized it for reducing the risks for dealers of purchasing potential stolen property and, most pointedly, for granting a deduction which effectively passed to U.S. taxpayers the costs of repatriating artifacts. At least one analysis of the Ward Gallery settlement has asserted that the ability to obtain a tax deduction for the donation of works subject to a repatriation claim serves as an incentive for collectors and dealers to purchase works without full provenances.

The Ward Gallery made its donation under a version of the tax code that did not include the current version of the related use rule. Under the old related use rule, there was no three-year period during which the donee could not transfer the donated object. All that the Ward Gallery needed to show was that the donee, the Society for the Preservation of the Greek Heritage, would put the donated artifacts to a use related to its exempt functions. Since the Society was established to cultivate Greek-American relations, the repatriation was a related use—despite its transfer of the property. And, of course, the related use rule did not impact the Ward Gallery, since as a dealer it could deduct only its basis, not the fair market value.

By contrast, a private collector recently devised a way to defeat the current version of the related use rule. In January 2008, the University of Virginia announced that it was repatriating two ancient Greek statues (c. 525 B.C.) to Italy. The statues had been donated to the University in 2002, with the approval of Italian authorities, since the terms of the gift required that the statues be repatriated to Italy after five years. Italy began to make repatriation requests for the statues in 1988, operating on a deposition of a tomb robber who said that they had been looted from a sanctuary near Morgantina, Sicily, in the late 1970s. However, Italy never instituted a suit, recognizing the cost and possibility that an American court would not accept its evidence.

At the time of the repatriation requests, the statues were owned by New York collector Maurice Tempelsman, who had paid a reported one million dollars for them in 1980. Tempelsman’s arrangement neatly accounts for the three-year

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110. See Ehl, supra note 105.


related-use rule, and the Italian government was likely to be content to wait instead of engaging in costly and perhaps unsuccessful litigation. The possibility that collectors will look for similar a way to subsidize repatriation is growing as countries begin to successfully demand the return of antiquities from private collectors, not just museums.\textsuperscript{113}

Repatriation demands for antiquities are increasingly likely. In 2005, an Italian court convicted Giacomo Medici, an Italian citizen, of dealing in illicitly excavated antiquities.\textsuperscript{114} The long investigations preceding this conviction resulted in the seizure of hundreds of looted antiquities and, more importantly, of the meticulous records kept by Medici and his accomplices. Among these records were, for example, a series of Polaroid photographs showing antiquities fresh from the ground, with dirt still clinging to them, and then under restoration, and then—in a few cases—in a museum display case with Medici himself posing next to them. These records showed the illegal export of the antiquities in question long after they became government property through Italy's national ownership laws, allowing Italy to successfully demanded the return of certain antiquities from the collections of American collectors and museums, including the Getty Museum,\textsuperscript{115} the Boston Museum of Fine Arts,\textsuperscript{116} the Cleveland Museum of Art\textsuperscript{117} and the Metropolitan Museum of Art.\textsuperscript{118} These museums have negotiated agreements with Italy instead of facing McClain-type lawsuits. Italy's investigation is ongoing. The Medici records show that as the trade in smuggled antiquities has become more pervasive, it has also become more organized and thus more likely to produce records which can aid in repatriation claims.

A donor facing a repatriation claim who makes an arrangement similar to Tempelsman's will not be able to deduct the full fair market value of the donated antiquity if he honestly reports the agreement to the IRS, since the valuation will be reduced to the limited value to the charity during the time it possesses the antiquity (similar to the reduction in deductions for partial gifts). However, even this reduced value offers some compensation to a repatriating donor. In addition, given the large-scale tax fraud in the Thai antiquities cases, there is little reason to expect that donors will always be so honest as to report their repatriation agreements to the

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\textsuperscript{113} E.g., Greece Gets Antiquities Back from U.S. Collector, REUTERs, Sept. 3, 2008, available at http://www.reuters.com/article/artsNews/idUSL340449420080903 (prominent collector Shelby White surrenders a bronze vase and the upper part of a marble tombstone to Greece).

\textsuperscript{114} Italy's investigation into Medici and his associates is detailed in WATSON & TODESCHINI, supra note 53, at 283. See also Christine L. Green, Antiquities Trafficking in Modern Times: How Italian Skulduggery Will Affect United States Museums, 14 VA. SPORTS & ENT. L.J. 35 (2007).

\textsuperscript{115} Catherine Elsworth, Getty Museum to return antiquities to Italy, TELEGRAPH, Aug. 2, 2007 (Getty agrees to return forty objects to Italy because of Medici links).

\textsuperscript{116} Elisabetta Povoledo, Boston Museum Returns 13 Ancient Works to Italy, N.Y. TIMES, Sept. 29, 2006, at E27.

\textsuperscript{117} Steven Litt, Cleveland Museum of Art strikes deal with Italy to return 14 ancient artworks, CLEVELAND PLAIN DEALER, Nov. 19, 2008, at 1.

IRS. For example, a donor in Tempelsman's situation could have received both the full fair market value of his donation and the moral satisfaction of repatriation if he had kept the repatriation agreement secret. For instance, the country of origin and the museum could have agreed to re-open repatriation negotiations after three years.

B. WHAT REFORMS ARE NEEDED?

Although there have been many suggestions for reforms of the charitable deduction allowance in general, there have been few suggestions for the reform of the statute's functioning with reference to donated antiquities. Atwood seems to have been the first to connect looting and the Tax Code, proposing in his 2004 book that the IRS create a committee of experts to assess the provenance status of donated antiquities before allowing deductions.119

In 2006, the IRS, concerned with inflated appraisals for donated artworks in general, considered screening incoming returns for these deductions, but concluded that this would not be cost effective, since many of the largest of these donations were already flagged for review by the Art Advisory Panel, and donations of art were under 4% of all charitable contributions in their sample year (2002).120 Since antiquities are a small percentage of this small percentage, it is unlikely that the IRS will establish a new screening procedure requiring action for all antiquities donations.

However, there are ways in which the problems of donated antiquities could be addressed without an unnecessary burden on the IRS. I propose that the appraisal of a donated antiquity must include a showing of satisfactory provenance before any deduction is allowed.

C. HOW SHOULD THE IRS VALUE DONATED ANTIQUITIES?

Lowering or completely eliminating the value of unprovenanced antiquities would sit well within the history of the IRS' valuation of art. In general, courts have held that the tax valuation of an art collection is "inherently imprecise and capable of resolution only by a Solomon-like pronouncement."121 Courts have

119. ROGER ATWOOD, supra note 53, at 245.


generally been amenable to the IRS' re-valuations of art objects. Thus, Karlen surveyed two dozen litigated cases of taxpayers seeking deductions for donations of art and found that the tax court rejected the taxpayer's appraised value in the majority of the cases.

That the IRS does not need to prove the correctness of the reasons why its valuation is lower than the donor's was established by the Ninth Circuit in Doherty v. Commissioner. There, the taxpayer donated a painting which his appraisal valued at $200,000. The Art Advisory Panel valued the painting at $100, holding that it was a forgery. The court declined to decide whether the painting was authentic or not, but held that its value was $30,000, explaining that one factor in this decision was that a dispute over the authenticity of a painting acts as a depressant on its value.

Just as the Art Advisory Panel can lower the value of a presumed forgery, so too can the IRS lower the value of unprovenanced antiquities. This lowering of value can be explained in policy terms, as an adjunct to the general U.S. policy to lessen looting. Public policy considerations have an important role in deciding the proper form of tax rules, and such considerations have resulted in the disallowance of certain charitable deductions. Moreover, Bonbright's classic functional explanation of the divergent methods of valuation for the purposes of taxation is that valuation cannot take place "without reference to the purpose for which the valuation is desired." In particular, Bonbright suggests that valuation should be motivated by the policy rationales underlying particular tax provisions. The

often echo and sometimes explicitly incorporate by reference the estate tax valuation rules. For estate tax valuation rules, see Treas. Reg. § 20.2031-1–20.2031-10 and the similar gift tax valuation rules in Treas. Reg. § 25.2512-1–25.2512-9. However, even the estate tax valuation rules are almost silent on how the value of property is to be determined. To answer this question, one must have recourse to case law and administrative rulings. Rulings on valuation issues are generally used interchangeably, regardless of whether the original dispute concerned valuation for the purposes of estate tax, gift tax, charitable deductions, etc. See, e.g., Anselmo v. Comm'r, 80 T.C. 872, 881 (1983), aff'd, 757 F.2d 1208 (11th Cir. 1985) (applying estate and gift tax tests to determine deduction for charitable gifts).

For example, a court has rejected a donor's valuation of a painting in favor of the IRS' lower valuation, whose amount was justified by its consideration of the painting's poor physical condition and lesser artistic quality than other works of the artist. See Furstenberg v. United States, No. 306-74, 1978 U.S. Ct. Cl. LEXIS 663 (Ct. Cl. March 2, 1978).

Peter H. Karlen, Appraiser's Responsibility for Determining Fair Market Value: A Question of Economics, Aesthetics and Ethics, 13 COLUM.-VLA J.L. & ARTS, 185, 219–220 (1989). By contrast, when a lower appraisal would be in the taxpayer's interest, as for estate taxes, the IRS usually raises the appraisal by an average of 101%. See Jessica L. Furey, Painting a Dark Picture: The Need for Reform of IRS Practices and Procedures Relating to Fine Art Appraisals, CARDOZO ARTS & ENT. L.J., 177, 178 n.7 (1990). Thus, for example, the IRS has successfully demanded that estate taxes be based on the prices the works of art actually sold at rather than the lower pre-existing evaluations. Scull v. Comm'r, 67 T.C.M. (CCH) 2953 (1994).

Doherty v. Comm'r, 63 T.C.M. (CCH) 2112 (1992), aff'd Doherty v. Comm'r, 16 F.3d 338 (9th Cir. 1994).


James Bonbright, 1 The Valuation of Property 7 (1st ed. 1937).

Id.
U.S. has clearly recognized the importance of stopping looting, as signaled by the various CPIA agreements and its signature of the 1970 UNESCO Convention, whose preamble notes that "cultural property constitutes one of the basic elements of civilization and national culture, and . . . its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting." Tax donations which directly encourage looting or which act as a form of insurance against repatriation claims do not follow this public policy. Instead, such donations force the taxpayer to pay for looting—for activities directly contrary to that public welfare which is the very reason for the allowance of charitable deductions.

Alternately, the IRS could offer non-policy-based explanations for why the actual value of unprovenanced antiquities is low. One such explanation is that the possibility of repatriation claims depresses the value of all unprovenanced antiquities. Fair market value is a question of fact to be determined from an examination of the entire record. As I have argued in Part II, the existence of looting combined with the lack of other, legitimate sources for the unprovenanced antiquities now on the market means that part of the "entire record" to be considered when valuing an unprovenanced antiquity is the likelihood of its illegal export from another country and thus of a future repatriation claim by this country.

The IRS need not consider the actual prices paid for antiquities when determining their value, since the probative value of actual sales is not always fully persuasive to the courts. For example, courts have sometimes refused to accept as the fair market value of corporate stock the inflated prices actually paid by "unskilled and unreasoning buyers and sellers" since these "unsophisticated investors" were making purchases "without regard to the underlying financial structure." Similarly, collectors who purchased antiquities in willful ignorance of the law of the country of origin overpaid for their purchases.

It is important for my argument that the donated antiquity be recognized by the IRS as having a low value at the moment of donation rather than plummeting in value only when it is subject to a repatriation claim. Valuation is measured at the time of donation, "not what a court at a later time may think a purchaser would have been wise to give," and cannot take account of inherent but hidden value. The Seventh Circuit offered an apposite metaphor to illustrate this concept:

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128. 1970 UNESCO Convention, supra note 1, preamble.
130. Lio v. Comm'r, 85 T.C. 56, 66 (1985), aff'd sub nom; Orth v. Comm'r, 813 F.2d 837 (7th Cir. 1987); see also Treas. Reg. § 1.1001-1(a).
131. Downer v. Comm'r, 48 T.C. 86, 94 (1967) ("unsophisticated investors"); Rogers v. Strong, 4 USTC ¶ 1330 (D.N.J. 1933) (not officially reported), aff'd, 72 F.2d 455 (3d Cir.), cert. denied, 293 US 621 (1934) ("unskilled and unreasoning buyers and sellers"). See also Dees v. Comm'r, 21 T.C.M. (CCH) 833 (1962) (prices paid for stock was not equal to fair market value because of high pressure sales tactics). But compare Freshman v. Comm'r, 33 B.T.A. 394, 403 (1935) (holding that 1929 securities market prices were fair market value, not reflections of "a hysterical state of mind on the part of the speculative public").
It is apparent that an asset always has some theoretical, underlying value which is revealed or made apparent by subsequent events. For example, an unsigned painting by Botticelli languishing in a second hand art shop with a minimal price tag always had the same inherent value which it acquires when the creator of the painting is later discovered. In a second sense, however, value is a practical process, always changing in accord with the price that it will yield on the market at a given time. In this sense, the undiscovered Botticelli has a value far less than its "inherent" value. The Code and the Regulations clearly enshrine this second sense of value.\footnote{133}

However, no matter what the price tag an unprovenanced antiquity might wear at the moment of donation, the IRS may consider that its value takes into account its lack of provenance. This lack is an obvious fact, not a hidden inherent value such as the attribution to Botticelli is in the example above.

Under the precedent established by the McClain case, artifacts illegally exported from a country where they were subject to national ownership laws are treated as stolen property in the U.S.\footnote{134} In the U.S., a good-faith purchaser of stolen goods cannot acquire good title from a thief.\footnote{135} A donor who exports an antiquity, or purchases it from someone who has exported it contrary to the laws of a country which has national ownership before the time of the export, does not have good title. Thus, the donation of such a work should not result in a deduction, since the IRS has denied deductions in cases of other objects of which the taxpayer could not prove himself the legal owner.\footnote{136} Additionally, I argue that the value of any unprovenanced antiquity is decreased by the possibility that the donor does not have good title.

In some donations, the possibility of repatriation claims is more visible than in others. For example, the collectors Leon Levy and Shelby White acquired the upper half of an ancient Roman statue of the "Weary Herakles" type in 1981.\footnote{137} The lower half of the statue is in the Antalya Museum, in Turkey; plaster casts taken in 1992 demonstrated their perfect alignment. The Antalya half was found in 1980 during archeological excavations at Perge, Turkey, a site which had been subject to looting. The upper half has been on long-term loan to the Boston Museum of Fine Art.\footnote{138} If it is eventually donated to the Boston Museum, as

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133. Am. Nat'l Bank & Trust Co. v. United States, 594 F.2d 1141, 1144 n.2 (7th Cir. 1979).

134. United States v. McClain, 545 F.2d 988 (5th Cir. 1977).

135. U.C.C. § 2-403 (2006) ("A purchaser of goods acquires all title which his transferor had or has power to transfer."). A thief or a good-faith purchaser of stolen goods can gain title through adverse possession. However, many states apply a statute of limitations rule to stolen art which is not favorable to the good-faith purchaser. New York, for example, has established a "demand and refusal" rule, holding that the statute of limitations for replevin cases when the object in question is a work of art begins to run when the claimant has discovered the current possessor of the work, has demanded its return, and has been refused. Menzel v. List, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966).

136. Hyde v. Comm'r, 81 T.C.M. (CCH) 1853 (1973) (taxpayer not entitled to deduct the casualty loss from the demolition of a vehicle because he had not shown that he was the owner of that vehicle).

137. For the statue, see Mark Rose & Ogzen Acar, Turkey's War on the Illicit Antiquities Trade, GUIDE TO THE W. MEDITERRANEAN ARCHAEOLOGY, 45, 49 (Mar./Apr. 1995).

138. The Museum has gone to impressive lengths to hypothesize on the legality of the statue,
seems likely, should its valuation be affected by the possibility that judicially admissible evidence will come to light of its looting, and thus show that the collectors never had good title?

One difficulty in the way of my proposal is that the IRS has previously considered the issue of the value of stolen art in a Private Letter Ruling, holding that "the nature of ownership that is required for inclusion of property in a decedent's gross estate . . . [is] based upon a decedent's possession of the economic equivalent of ownership, rather than upon the decedent's possession of a technical legal title." 139 Thus, the IRS concluded that the fair market value of the stolen objects (here, medieval German church treasures stolen by a U.S. serviceman in the aftermath of World War II) was "the highest price that would have been paid at [the time of the decedent's death] whether in the discreet retail market or in the legitimate art market." 140 By "discreet retail market" the IRS presumably means the black market. However, it should be noted that this decision was in the context of an estate tax case, where the IRS desired a higher valuation and the decedent's family a lower one.

However, it is not necessary that an item have the same tax valuation for the purposes of charitable deductions and estate tax. For example, the value of illegal drugs can be included in an estate under this Private Letter Ruling's logic, but there is no question that the IRS would not allow a taxpayer to take a charitable deduction for the fair market value of donated drugs. Similarly, the tax valuation of unprovenanced antiquities need not be symmetrical; they can have value as part of an estate but no value when offered as donations.

1. What Impact on the Market for Antiquities?

The goal of my proposal is to reduce incentives for the purchase of unprovenanced antiquities. Fewer buyers will want to purchase unprovenanced antiquities if they know that no charitable deduction will be available for that antiquity. Of course, this is a question of effects at the margin, since there are many other factors—aesthetics, price, availability—impacting a decision to purchase an antiquity besides the thought of a future donation. However, even small reductions in the market for unprovenanced antiquities are valuable. Additionally, a tax rule separating provenanced from unprovenanced antiquities might serve the important purpose of educating the public about provenance. Thus, the valuation rule might convince a buyer to purchase a provenanced antiquity, or not to purchase an antiquity at all, rather than buy an unprovenanced antiquity.

proposing for example that the break was ancient and that the upper half was removed from Turkey before the relevant laws were passed. Id.

140. Id.
2. What Impact on Scholarship?

A reduction in the market for unprovenanced antiquities would mean that fewer antiquities would be uncovered and made available to scholars. However, this would not lead to a decrease in scholarship, since the majority of archeologists and other scholars of antiquities refuse to work with unprovenanced objects. In addition to possibly encouraging looting, such objects offer little to scholarship. For example, archeologists learn about the past more from “context” than individual objects—“context,” meaning the totality of information available from an excavated site. One archeologist has explained the importance of context by describing her excavation of flakes of obsidian, less than five millimeters in diameter, in the Paleolithic stratification of a trash heap in an archeological site on a Greek island. This obsidian had to be imported, and the position of the flakes in the context of the Paleolithic layer, rather than a higher one, showed that those islanders and their trading partners had the sea-going capacities necessary to import obsidian millennia before scholars had previously thought. Here, it was the exact placement of the chips that provided the information; the chips themselves, sold to an archeologist on the market, could not have revealed their importance. To an archeologist, an unprovenanced antiquity is worthless, not only because it lacks context but also because it is impossible to be sure that it is not a forgery.

3. What Impact on the Unprovenanced Antiquities Themselves?

Many buyers of unprovenanced antiquities justify their purchases on the basis of the preservation of the individual object. Unless they assume ownership, the object may be destroyed in the uncaring possession of a salesman. This worry is certainly

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141. For example, the Society for American Archeology discourages its members from studying works on the antiquities market. SOCIETY FOR AMERICAN ARCHEOLOGY, PRINCIPLES OF ARCHAEOLOGICAL ETHICS (1996), http://www.saa.org/AbouttheSociety/PrinciplesofArchaeologicalEthics/tabid/203/Default.aspx (Third Ethical Principle). See also Larry Murphy et al., Commercialization: Beyond the Law or Above it? Ethics and the Selling of the Archaeological Record, in ETHICS IN AMERICAN ARCHEOLOGY: CHALLENGES FOR THE 1990S 45, 47 (Mark Lynott and Alison Wylie, eds., 2000) (explaining the authors’ decisions not to study works on the antiquities market because “it is better to lose some information than actively to participate in destruction of the archeological record”).


143. For example, the Director of the Dumbarton Oaks Museum stated that “[o]bjects outside their context . . . are almost without scholarly value.” Giles Constable, The Looting of Ancient Sites and the Illicit Trade in Works of Art, 10 J. FIELD ARCHAEOLOGY 482, 484 (1983). Again, Vitelli claims that unprovenanced objects for sale on the antiquities market “are NOT . . . the results of archeology. If archeology is the study of past peoples through careful recovery and documentation of their material remains—all the material remains, the fullest possible context—then these objects without context are not just the result of bad archaeology, but represent the antithesis of archeology . . . . They have lost their archeological value . . . . They are without specific context, the only information that can guarantee their authenticity and that can give them value for archaeological interpretation.” Karen D. Vitelli, The Antiquities Market, 6 J. FIELD ARCHAEOLOGY 75, 76 (1980).
justified, since the continued preservation of antiquities, which can be vulnerable to light, temperature, humidity and handling, is an expensive proposition.

Thus, it is possible that my proposed tax treatment of unprovenanced antiquities may lead to the “stranding” of a number of antiquities. First, a reduction in demand for antiquities would not immediately be communicated to the looters who supply the market, leading to a period of “overproduction.” Second, a reduction in the incentive to donate might mean that current possessors of unprovenanced antiquities would be less likely to give their antiquities to museums, leading to a general decrease in preservation, as museums are better able to preserve antiquities than are private collectors. However, the price of decreasing the preservation level of the antiquities currently above ground is the necessary cost of preserving the much greater value of the in-context, buried antiquities—those which will be looted if the market continues to demand antiquities regardless of provenance.

IV. CONCLUSION

The current rules governing the charitable donation of antiquities, complex as they are, fail to meet the crucial policy goal of reducing the demand for looted antiquities. Changing these tax rules to have an impact on this demand is only one of the many governmental and private actions that need to occur to ensure that the short-sighted present does not completely destroy the value of the past.