

The Gallerist's Gambit: Financial Innovation, Tax Law, and the Making of the Contemporary Art Market

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INTRODUCTION

This essay presents an account of an important moment in the emergence of the market for Pop art that was facilitated in part by a distinctly accommodating legal environment. Although Abstract Expressionism is commonly credited with causing American art's ascendance onto the world stage immediately after World War II, its international acclaim belied a precarious institutional and financial infrastructure for living American painters. It was only with the following generation of Pop and Minimalist artists that the United States developed a self-sustaining market for the work of contemporary American artists. A significant but largely overlooked factor

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in that continued success was the ability of art dealers to take advantage of the unique legal and regulatory environment of the 1960s. This essay focuses on the efforts of an enterprising art gallerist, Leo Castelli, to aggressively promote his stable of Pop artists through the development of several financial structures, including some designed to leverage the relatively generous income tax deductions and anemic enforcement regime of the time. In doing so, Castelli not only seeded the ground for the international ascendance of American visual art, but also engineered financial arrangements that fostered the development of a lucrative and resilient art market that endures to this day.

With the aim to provide insights into both the legal-political and the art historical registers, this essay describes a tax law framework that provides a key piece missing from the art historical puzzle. While historians have treated the explosion of the market for American contemporary art as a natural consequence of postwar American economic ascendance,¹ insufficient attention has been paid to how this economic energy was channeled into the art market in the first place. Stated differently, Americans were newly flush with cash, but why did they start buying art with it?

To answer this question, Part I of this essay examines how Castelli engineered an array of new financial mechanisms designed to drive up the value of living artists' work through branding, controlling markets, and streamlining supply from his stable of artists. Part II then describes the tax regime during the emergence of American Pop Art, and details how the potential for significant charitable contribution deductions provided an incentive for art purchasers, appraisers, and dealers, including Castelli, to overvalue works of art in order to lower tax liabilities. Part III provides examples of notable transactions detailed in Castelli's archives, and Part IV reviews the lasting impact of Castelli's innovations on the American art market and the enduring law and policy considerations raised by Castelli's business model.

For art historians, a look into the underpinnings of Castelli's gallery reveals a financial imperative for producing multiples, a signature Pop modality. Art historians have typically emphasized how Jasper Johns and Andy Warhol used their art to make a statement about the reigning dogma of Abstract Expressionism. However, their art also provided an opportunity to benefit from the financial advantages generated by Castelli's tactics.

For legal scholars, this case provides a striking example of the opportunities for manipulation that can arise when market conditions underlying tax policy assumptions change rapidly. It also highlights the tensions inherent in a tax regime that relies on providing incentives for wealthy individuals to support institutions that benefit the public at large. Castelli's efforts illustrate the perhaps surprising intersections of law, the creative arts, and institutions that deal in artists' works. To explain how Castelli became positioned to profoundly influence the direction of art production, we first describe the gallerist's rise in the New York art world.

1. See, e.g., CAROLINE A. JONES, *MACHINE IN THE STUDIO* 218 (1998); SUZAN BOETTGER, *EARTHWORKS: ART AND THE LANDSCAPE OF THE SIXTIES* 215 (2002).

I. CASTELLI MAKES A MARKET

The American attraction to art as an investment has much to do with the efforts of Leo Castelli, arguably the most significant dealer in the history of modern and contemporary art. An Italian-Jewish émigré with an academic background in economic history, Castelli returned from fighting in the United States Army in World War II determined to create a venue through which history's next great artists would establish their reputation.² He spent the better part of the 1950s attempting to insert himself—with varying degrees of success—into the orbit of the already entrenched Abstract Expressionists.³ But he was cognizant that his new gallery would need to launch an artistic movement capable of supplanting these reigning giants.⁴ Castelli sensed that he had found the right artists for the task when, in his words, he “stumbled upon [Robert] Rauschenberg [and] [Jasper] Johns.”⁵

Castelli had known Rauschenberg since 1951, but his encounter with Johns was much more fortuitous. He had been impressed by Johns's *Green Target*, which he had seen in a 1957 exhibition at the Jewish Museum, and was pleasantly surprised to learn, during a studio visit with Rauschenberg, that Johns maintained a studio in the same building. He interrupted his ongoing visit with Rauschenberg and insisted on seeing Johns's studio firsthand. His level of enthusiasm evidently unabated, Castelli offered Johns an opportunity to join his coalescing stable on the spot.⁶

A. CULTIVATING CRITICAL RECEPTION AND DEMAND

Castelli first displayed Johns and Rauschenberg together in the 1957 “New Work” exhibition. Although press reaction to their new object-collage idiom was lukewarm, the show received one review of note. The young academic critic Robert Rosenblum, who had earned his Ph.D. the preceding year from N.Y.U., penned in *Arts* magazine a short, highly positive review that opened with praise of Johns's *Flag* (1954–55).⁷ Most significantly, the review introduced into the scholarly lexicon the term “Neo-Dada,” which Castelli deftly fed to the ostensibly independent critics and historians writing in response to the works on view in his gallery.⁸

2. Peter Schjeldahl, *Leo the Lion: How the Castelli Gallery Changed the Art World*, *NEW YORKER* (May 31, 2010).

3. ANNIE COHEN-SOLAL, *LEO AND HIS CIRCLE: THE LIFE OF LEO CASTELLI 181–94*, 203–17 (Mark Polizzotti trans., Alfred A. Knopf 2010).

4. Interview by Barbara Rose, Archives of Am. Art., Smithsonian Inst., with Leo Castelli, in N.Y.C., N.Y. (July 1969), <https://perma.cc/TNQ2-7V7R>.

5. COHEN-SOLAL, *supra* note 3, at 250 (addition of “and” in original).

6. *Id.* at 243–44.

7. Robert Rosenblum, “Castelli Group”, *ARTS*, May 1957, at 53.

8. Archival evidence suggests that Castelli invented this term, or at the very least encouraged Rosenblum to use it. Johns worked without any explicit recognition of European Dada. See Roni Feinstein, *New Thoughts for Jasper Johns' Sculpture*, *ARTS*, Apr. 1980, at 142. Moreover, the term became an anchor for future academic-critical writing on Johns. Most importantly, the term plays an important role in Leo Steinberg's “Jasper Johns: The First Seven Years of His Art,” an essay well known as the beginning of the academically serious Johns literature. See LEO STEINBERG, *Jasper Johns: The*

In contrast to his largely overlooked group debut, Johns's first solo exhibition "hit the art world like a meteor,"⁹ and also showcased Castelli's extraordinary ability to manage the commercial enterprise. Castelli engineered Johns's appearance on the cover of *Art News* and sold all but two of his works to collectors, including David Rockefeller, Alfred Barr, and Burton Tremaine.¹⁰ By this time, it was evident that Castelli had quickly mastered the art of "placing work" in the hands of specific collectors who could do the most to advance the gallery and its artists.¹¹ Such strategic sales had the effect of increasing Castelli's control over the economic fate of the artists that he represented; no one collector could lose interest and thereby crater the market, and Castelli could create an additional layer of scarcity by refusing to sell certain pieces on the grounds that they were already promised to more established collectors. This manufactured scarcity, which Castelli periodically relieved, created an environment in which patrons were forced to work *with* Castelli, rather than simply buying art *from* him. Castelli did not invent this system—similar practices had been in place since the Gilded Age—but he was able to play individual and institutional collectors off one another to an extent unprecedented in the market for the work of living American artists.¹²

The patron who did the most to advance Johns's commercial viability was Robert Scull, a New York City taxi magnate and emergent collector of American contemporary art. Scull was unusual in the latter regard; while most important collectors had typically already amassed sizable holdings in Old Masters or Antiquities, the newly wealthy Scull immediately focused his attention on contemporary works. Though Scull did not purchase directly from the blockbuster solo show, gallery records reveal a brisk back and forth between Scull and Castelli—buying, selling, and trading close to \$40,000 worth of Johns's work between 1959 and 1962.¹³ One particularly notable transaction, which included both a sale and a trade, involved Scull acquiring \$17,000 worth of Johns's work, the rough equivalent of \$150,000 in today's dollars.¹⁴ Through this combination of maneuvers, Castelli

First Seven Years of His Art, in OTHER CRITERIA: CONFRONTATIONS WITH TWENTIETH-CENTURY ART 17, 23–31 (1972). Less well known is the fact that Castelli directly paid for Steinberg's essay—a striking departure from critical norms. Interview by Paul Cummings, Archives of Am. Art, Smithsonian Inst., with Leo Castelli (May 14, 1969), <https://perma.cc/RH8P-F9LY>. Moreover, additional archival research reveals that Castelli placed valuable work with Rosenblum, possibly even from this first exhibition. Appraisals, Leo Castelli Gallery Records (on file with Archives of American Art, Smithsonian Institution).

9. CALVIN TOMKINS, OFF THE WALL: A PORTRAIT OF ROBERT RAUSCHENBERG 131 (Picador 2005) (1980).

10. Letter from Leo Castelli to Jasper Johns (Sept. 1, 1959), Jasper Johns Correspondence, Leo Castelli Gallery Files (on file with Archives of American Art, Smithsonian Institution).

11. See, e.g., MARTIN S. ACKERMAN, SMART MONEY AND ART: INVESTING IN FINE ART 99 (1986).

12. COHEN-SOLAL, *supra* note 3, at 324.

13. Robert Scull Correspondence, Leo Castelli Gallery files (on file with Archives of American Art, Smithsonian Institution).

14. Undated Inventory List, page 4, Robert Scull Correspondence, Leo Castelli Gallery Files (on file with Archives of American Art, Smithsonian Institution). The weight of Scull's early financial backing of both Johns and Castelli merits a brief re-examination of the now iconic story of Johns's meteoric rise to commercial success through Castelli's ingenuity. The Abstract Expressionist painter Willem de Kooning, with whom Castelli had always had an uneven relationship, and who was bitter about

strategically cultivated the critical reception of his artists and situated their work relative to established schools, while at the same time driving demand, and thus increasing the price, for his artists' works.

B. SUSTAINING A STABLE OF ARTISTS

Castelli's innovation was not limited to sales and marketing of the end product; he also found ways to provide steady financial support for his artists and thus created a loyal network of artists who were better positioned to follow their creative instincts instead of chasing quicker or larger sales. Indeed, one of the most important shifts in Castelli's gallery operations was to pay exhibiting artists a regular stipend, rather than providing them only a commission from (often irregular) sales.¹⁵ Such regular support had been a consistent feature of European cultural patronage for centuries but was highly unusual in the market-driven United States, and it occasioned profound gratitude from the artists who felt themselves the beneficiaries of unprecedented generosity.¹⁶

The ramifications of the stipend practice were significant, and indeed, the system of regular payments may go some distance in explaining the nature of the break between the circle of Castelli's artists and the prior generation of New York School painters. With few exceptions, these earlier painters had worked on commission, receiving between sixty and seventy percent of a work's sale price.¹⁷ However, gallerists typically maintained only a small circle of wealthy clientele, and the sales generated in this ecosystem were often painfully sporadic.¹⁸ Demand from such patrons was largely inelastic: Collectors pursuing unique prestige objects would

the seemingly easy success enjoyed by the subsequent generation, caustically remarked at a party, "You could give that son of a bitch [Castelli] two beer cans and he could sell them." Johns was inspired to turn the concept into a sculpture, and his *Painted Bronze* (1962) was promptly sold to Robert Scull. See CALVIN TOMKINS, *LIVES OF THE ARTISTS: PORTRAITS OF TEN ARTISTS WHOSE WORK AND LIFESTYLES EMBODY THE FUTURE OF CONTEMPORARY ART* 178 (2008); ERIKA DOSS, *TWENTIETH CENTURY AMERICAN ART* 155 (2002). Much has been made of this episode, which has been read both as a humorous anecdote confirming Castelli's singular salesmanship and as serious evidence foregrounding Johns's relationship with the found object tradition of Marcel Duchamp. Nevertheless, it is important to bear in mind the degree to which the piece is a monument to Scull, and a kind of metonym for the art historical changes that can be effected when the monetary interests of an ascendant tycoon such as Scull aligned with the stratagems of a gallerist such as Castelli. See MARTHA BUSKIRK, *THE CONTINGENT OBJECT OF CONTEMPORARY ART* 65 (2005).

15. COSMOPOLITAN CANVASES: THE GLOBALIZATION OF MARKETS FOR CONTEMPORARY ART 65–66 (Olav Velthuis & Stefano Baia Curion eds., 2015).

16. For more on the history of gallery stipends, see *id.*; see also Titia Hulst, *The Leo Castelli Gallery*, ARCHIVES OF AM. ART J. 14, 23 (2007).

17. Alan Jones, Interview with Leo Castelli, Leo Castelli Gallery Files (on file with Archives of American Art, Smithsonian Institution). Elayne Varian, Interview with Betty Parsons, Exhibition Records of Contemporary Wing of Finch College Museum of Art (on file with Archives of American Art, Smithsonian Institution).

18. For more on the impecunious status of Abstract Expressionist painters and Castelli's role in revolutionizing gallery financing, see Titia Hulst, *The Leo Castelli Gallery*, ARCHIVES OF AM. ART J. 14, 16–27 (2007). See also A. Deirdre Robson, *The Market for Abstract Expressionism: The Time Lag Between Critical and Commercial Acceptance*, in POLLOCK AND AFTER: THE CRITICAL DEBATE 288, 290 (Francis Frascina ed., Routledge 2000) (1985).

have been unlikely to buy additional works if the price were to be lowered. Therefore, a financial incentive impelled the earlier New York School artists to maximize each sale by making their work as expensive as possible, with the high price often justified by the size and singularity of the object under consideration.

Under Castelli's system, artists knew that they would receive their consistent stipend irrespective of the highs and lows of the market. With a heterogeneous roster of patrons providing a hedge for each individual member, Castelli's artists were comparatively free to make a motley assortment of works, both readily salable and not. The market conditions around the New York School reinscribed its essential aesthetic and ideological characteristics—the emphasis on rugged individuality played out on heroically scaled canvases. In much the same way, the financial infrastructure underlying Castelli's "neo-Dadaists" supported the inherently variegated approach of producing a mix of paintings, sculptures, and object-collages.

This shift from a commissioned to a salaried model might have remained a kind of curious quirk were it not for a confluence of circumstances that magnified its impact on postwar art history. The first, comparatively well-documented factor was the contemporaneous explosion of popular interest in the market for living American artists. Between December 1955 and January 1956, *Fortune* magazine ran a two-part article detailing the investment possibilities in the international art world, noting that the prices of "the 'hottest' Moderns" had gone up by a factor of ten over the preceding decade and that, for every Impressionist canvas for sale between \$50,000 and \$100,000, there might be more than "one hundred eager customers waiting."¹⁹

Fortune's "The Great International Art Market" feature was followed by a profusion of popular literature that focused on lowering the barrier of entry for new collectors. The *New York Times*, *Cosmopolitan*, and other periodicals featured lifestyle pieces that centered on integrating art collections into livable domestic spaces.²⁰ The effect of the growth of "amateur" collecting was amplified by a concomitant increase in corporate collecting, then an emergent practice.²¹ It was this fevered moment in the mid-1960s art market that led the artist Allan Kaprow to caustically deliver one of his most famous lines: "[I]f artists were in hell in 1946, now they are in business."²²

This acceleration was fully underway in 1957, the year that Castelli officially opened the doors of his gallery. Just two weeks before his premier exhibition, the *New York Times* declared the existence of "a boom of unparalleled dimensions,

19. Eric Hodgins & Parker Lesley, *The Great International Art Market*, FORTUNE, Dec. 1955, at 118, 119–20.

20. See, e.g., Rita Reff, *A Tour of Offbeat Rooms for Art*, N.Y. TIMES, Mar. 25, 1966, at 46; T. F. James, *How Fine Art Affects Your Life*, COSMOPOLITAN, Feb. 1959, at 28, 34. The emergence of this type of new collector can be seen in Henry Miller's attempts to interrogate his interviewer in Merle Armitage, *The Man Behind the Smile: Doing Business with Henry Miller*, TEXAS Q., Winter 1961, at 154, 156.

21. See, e.g., *Our Newest Patron of the Arts*, READER'S DIGEST, May 1960, at 192–98; Henry Seldis, *Business Buys Art*, 52 ART IN AM. 131, 131–34 (1964); Charlotte Willard, *The Corporation as Art Collector*, LOOK, March 23, 1965, at 67, 67–68, 72.

22. ALLAN KAPROW, *The Artist as Man of the World*, in *ESSAYS ON THE BLURRING OF ART AND LIFE* 46, 47 (Jeff Kelley, ed., 2d ed. 2003).

steadily building up for several years,” that had “come to the art galleries of New York.”²³ The *Times* piece noted two facets of this rising tide which are significant for the present discussion. The first, in keeping with the above-mentioned literature, was what one gallery owner described as “a ‘descendency’ in caste.”²⁴ The new collecting boom was fueled not by the gentlemanly connoisseurs of a prior generation, but by a new class of buyer—including young professionals and their spouses—with monthly installments available as low as ten dollars for etchings. The second prong noted by the *Times* was that some of the new buying interest stemmed from “business men with whom tax considerations may weigh as heavily as esthetic gratification.”²⁵ These tax benefits for art purchasers have received much less scholarly attention in the literature on the period, but the potential for creative use and exploitation of tax benefits provided a significant incentive likely touted by Castelli and other gallerists of the time. The next section explores the legal and regulatory environment that provided the tax incentives to purchase art and thus amplified the moves Castelli made on the financial side of his gallery.

II. THE TAX INCENTIVE

In addition to commissioning reviews, placing art in the hands of influential collectors, and providing artists with a steady stream of income, evidence suggests that Castelli and other gallerists of his time employed the elusive and rapidly changing value of their artists’ work to create tax benefits for purchasers willing to buy works of art and then donate them to charitable organizations like museums. This section first describes the incentives for wealthy individuals to make such contributions. It then lays out the legal structure that historically left charitable contribution deductions vulnerable to exploitation. Finally, this section explains how such maneuvers run counter to the aims of the favorable tax treatment of charities and their supporters.

A. AN INCENTIVE FOR THE WEALTHY

Despite the increase in accessibility of art collecting in the 1950s, acquisitions of original works of art have necessarily remained largely in the domain of very wealthy individuals and institutions. The affluent individuals who are likely to be purchasers of art are also the most affected by high income tax rates at the top of the marginal brackets. As a result, they have the keenest motivation to reduce their tax liability by all available measures.

The incentive to minimize taxable income was most evident in the mid-twentieth

23. Clarence Dean, *Peak Demand for Pictures: East Tenth Street, as Well as East 57th Street, Is Experiencing an Unparalleled Boom in Art Collecting*, N.Y. TIMES, Feb. 25, 1957, at 1; see also ALICE GOLDFARB-MARQUIS, *THE POP! REVOLUTION: HOW AN UNLIKELY CONCATENATION OF ARTISTS, AFICIONADOS, BUSINESSMEN, CRITICS, CURATORS, COLLECTORS, DEALERS, AND HANGERS-ON RADICALLY TRANSFORMED THE ART WORLD* 45 (2010).

24. Dean, *supra* note 23, at 1.

25. *Id.*

century, when federal income tax rates regularly reached near confiscatory levels on portions of the income of the highest earners.²⁶ Indeed, top marginal rates reached ninety-four percent during World War II,²⁷ and remained in excess of ninety percent for two decades thereafter. While the Tax Reform Act of 1964 lowered rates across income brackets, including down to seventy percent for the highest earners,²⁸ it was not until the Reagan administration that top rates decreased to fifty percent (after the Economic Recovery Tax Act of 1981) and ultimately fell below forty percent (following the Tax Reform Act of 1986), where they have since remained.²⁹ Thus, from the 1940s through the 1970s, high earners faced remitting well over half of each additional dollar earned once their income pushed into the highest bracket for the year. They were accordingly highly motivated to reduce their income subject to tax, and the charitable contribution deduction was often a natural fit. Indeed, the charitable contribution deduction has been a perennial favorite of those seeking to lower their earnings subject to tax,³⁰ and the following section gives a brief overview of that tradition.

B. THE TAX TREATMENT OF CHARITIES AND THEIR SUPPORTERS

Charitable organizations have enjoyed exemption from both federal and state taxes since 1894, meaning that the earnings of the institutions themselves (for example, from admissions charges or fees for services) are typically not subject to taxation.³¹ Those supporting charities with contributions of money or property were able to deduct the value of those donations beginning in 1917.³² Since that time, the

26. Initially, top marginal rates on high earners stood at a modest assessment of no more than seven percent. However, for the vast majority of the following twentieth century, federal income taxes reached more than two-thirds of the income of the highest earners. During the First World War, income taxes became the primary funding mechanism for the national government, and rates climbed swiftly, topping out at seventy-seven percent on the highest incomes in 1918. See Tracey M. Roberts, *Brackets: A Historical Perspective*, 108 NW. U. L. REV. 925, 933–34 (2014); see also ROBERT M. WILLAN, *INCOME TAXES: CONCISE HISTORY AND PRIMER* 5 (1994); JOHN F. WITTE, *THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX* 76 (1985). After a gradual decline throughout the 1920s (with top rates resting at twenty-five percent between 1924 to 1931), rates once again climbed during the New Deal and then World War II. Tracey M. Roberts, *Brackets: A Historical Perspective*, 108 NW. U. L. REV. 925, 935 (2014) (citing Individual Income Tax Act of 1944, Pub. L. No. 315, 3–4, § 11–12, 58 Stat. 231, 231–32).

27. Roberts, *supra* note 26, at 935 (citing Individual Income Tax Act of 1944, Pub. L. No. 315, 3–4, § 11–12, 58 Stat. 231, 231–32).

28. WITTE, *supra* note 26, at 161–63. Historically, the highest rates applied to very few taxpayers. See *Percentage of Returns by the Highest Applicable Statutory Marginal Tax Rate, 1958–2009*, TAX POL'Y CTR. (Nov. 15, 2011), <https://perma.cc/8BZF-LDF5>.

29. Roberts, *supra* note 26, at 937–39.

30. See *Itemized Charitable Contributions (nominal), 1917–2009*, TAX POL'Y CTR. (Dec. 12, 2001), <https://perma.cc/K57E-BWXU>.

31. Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505, 512 (2010).

32. *Id.* at 512. The tax benefits for charitable contributions, however, have been capped from the outset. The deduction was initially limited to fifteen percent of the taxpayer's net taxable income and then to fifteen percent of the adjusted gross income ("AGI," a potentially larger figure). Individual Income Tax Act of 1944, Pub. L. No. 78-315, § 8(b), 58 Stat. 231; Vada Waters Lindsey, *The Charitable*

charitable contribution deduction currently codified in § 170 of the Internal Revenue Code has enabled individuals to lower their taxable income (and thereby reduce their tax liability) by donating money or property to qualified charitable organizations.³³ The federal income tax had only been enacted four years earlier, and Congress intended to “ensure that the income tax would not suppress giving to charity.”³⁴

Under the justification that public charities provide benefits to society as a whole and relieve burdens that might otherwise fall to the government, such organizations traditionally have received indirect support from federal, state, and local governments in various forms. Such support includes exemptions from income and property taxes and—even more significantly—income tax deductions for their contributors.³⁵ Granting tax benefits to public charities and those who provide their financial support furthers the objectives of the institutions themselves, including providing relief to the poor, but also “furthering public health, [and] supporting the arts”³⁶ Art museums ostensibly provide both educational and redistributive benefits to the public, and even to individuals who never visit them, because of the art’s availability to scholars and because “these institutions are intermediaries for redistributive gifts—such as the gift of a large private collection of important paintings to the public at large.”³⁷

Contribution Deduction: A Historical Review and a Look to the Future, 81 NEB. L. REV. 1056, 1062–63 (2003). In 1952, Congress raised the maximum benefit to twenty percent of AGI and, in 1954, to thirty percent for contributions to certain institutions (churches, educational institutions, and hospitals). This thirty percent cap was extended to most publicly-supported charities in 1964, and a new five-year carryover rule allowed taxpayers with contributions exceeding the thirty percent cap to make use of the charitable deduction in future tax years. Revenue Act of 1964, Pub. L. No. 88-272, § 209, 78 Stat. 43. For a brief five-year period from 1964–1969, the charitable contribution deduction was unlimited for (ostensibly) extraordinarily generous taxpayers—those individuals who contributed to charities an amount exceeding ninety percent of their taxable income in that current tax year and in eight of the previous ten taxable years. The unlimited deduction was phased out by the Tax Reform Act of 1969 which increased the cap on charitable deductions from thirty percent to fifty percent of the individual’s contribution base (a concept similar to AGI), in an attempt to curb abuses associated with non-cash contributions. “Prior to the Tax Reform Act of 1969, much of the taxpayer abuse occurred where the taxpayer contributed appreciated property and claimed a deduction.” Lindsey, *supra*, at 1064–65. “Seventy percent of the charitable contribution deductions [in 1966] arose from contributions of property, and the majority of that property was untaxed appreciated property.” *Id.* at 1065 n.56 (citing H.R. Rep. No. 91-413 (1969), reprinted in 1969 U.S.C.C.A.N. 1645, 1654).

33. War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300; MERTENS, *THE LAW OF FEDERAL INCOME TAXATION: 1961–1964 REGULATIONS* 289–92 (Phillip Zimet ed., 1965); Lindsey, *supra* note 32, at 1057, 1061; Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, STATS. INCOME BULL., Winter 2008, at 105, 106–07, <https://perma.cc/FQN9-H5CJ>.

34. Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1396 (1988).

35. Charles O. Morgan, Jr., Comment, *Charitable Contributions Under the Revenue Act of 1964*, 19 U. MIAMI L. REV. 283, 284 (1964); Lindsey, *supra* note 32, at 1057, 1072–73; Douglas J. Bell, Note, *Changing I.R.C. § 170(e)(1)(a): For Art’s Sake*, 37 CASE W. RES. L. REV. 536, 537 (1987) (noting that Congress, in creating the National Endowment of the Arts, stated that “it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent”).

36. Fleischer, *supra* note 31, at 512–513; see also 26 U.S.C.A. § 501(c)(3) (West 2019).

37. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 839 n.73 (1980); see

Although the educational benefits of contributions to charitable organizations run to the public as a whole, the tax benefits of donations to such organizations are reaped disproportionately by individuals with higher incomes.³⁸ This disparity occurs not only because the wealthy have more disposable resources or because they have more income to offset, but also because the charitable contribution deduction has been an itemized deduction since 1944. This means it can be used only by taxpayers who do not elect the standard deduction.³⁹ Indeed, the majority of Americans opt for the standard deduction instead of itemizing and, accordingly, are not able to reduce their tax liability by the amount of their charitable contributions.

Historically, the percentage of itemizers (who can take charitable contribution deductions) has ranged from below twenty percent to over thirty-five percent of taxpayers.⁴⁰ However, that number is predicted to decrease dramatically following the 2018 Tax Cuts and Jobs Act, which nearly doubled the standard deduction.⁴¹ The Joint Committee on Taxation estimated that the number of itemizers will drop from forty six and a half million in 2017 to around eighteen million in 2018.⁴² That decline means that beginning in 2018, only slightly more than ten percent of taxpayers are projected to claim the charitable contribution deduction. Not surprisingly, itemizers generally have much higher incomes and more complicated tax situations than nonitemizers.⁴³

Essentially, the structure of the charitable contribution deduction provides only those individuals who itemize with the direct benefit of offsetting the financial impact of donations against tax liability, while the community as a whole experiences the secondary benefits of the charitable contribution deduction.⁴⁴ Because those tax

also Gergen, *supra* note 34, at 1398.

38. For example, in 2014, the deduction for charitable gifts was claimed by thirty-seven percent of tax filers with an AGI between \$50,000 and \$100,000; sixty-eight percent of tax filers with an AGI between \$100,000 and \$200,000; and more than eighty-six percent of tax filers in each of the income ranges over \$200,000. SEAN LOWRY, CONG. RESEARCH SERV., R43012, ITEMIZED TAX DEDUCTIONS FOR INDIVIDUALS: DATA ANALYSIS 5 tbl.2 (2017), <https://perma.cc/BME5-VXVY>.

39. See generally Joseph J. Thorndike, *Tax History: The Love-Hate Relationship with the Standard Deduction*, TAX ANALYSTS (Mar. 27, 2014), <https://perma.cc/W37V-5FHH>.

40. See *id.* (“In 1945 just under 17 percent of filers chose to itemize. That number declined somewhat in subsequent years, but the standard deduction generally performed as advertised, simplifying tax returns for a great many filers.”); Chenxi Lu, *The Rise and Fall of Itemized Deductions*, TAX POL’Y CENTER (Aug. 10, 2016), <https://perma.cc/37QJ-H2F9> (indicating that the percentage of itemizers peaked in 2005 at 36 percent).

41. See Erica York, *Nearly 90 Percent of Taxpayers Are Projected to Take the TCJA’s Expanded Standard Deduction*, TAX FOUND. (Sept. 26, 2018), <https://perma.cc/8G8T-3MA7>.

42. STAFF OF THE JOINT COMM. ON TAXATION, JCX-32R-18, RELATED TO THE FEDERAL TAX SYSTEM AS IN EFFECT FROM 2017 THROUGH 2026 6 tbl.5 (2018), <https://perma.cc/JE8V-Q6FZ>.

43. In 2014, “[f]or taxpayers with an AGI greater than \$200,000, the share that itemized ranged from 91% to 93% and the average sum of itemized deductions claimed per itemizer ranged from \$43,131 to \$424,864. In contrast, 77% of tax filers with an AGI between \$100,000 and \$200,000 chose to itemize their deductions in 2014, with an average of \$25,598 in deductions claimed. Five percent of tax filers with an AGI less than \$20,000 chose to itemize their deductions in 2014, with an average of \$15,857 in deductions claimed.” LOWRY, *supra* note 38, at 2–3.

44. Gergen, *supra* note 34, at 1396; Ellen P. Aprill, *Reforming the Charitable Contribution Substantiation Rules*, 14 FLA. TAX REV. 275, 279–80 (2013).

advantages inure primarily to the benefit of wealthy individuals, the redistributive goals of the tax exemption and deduction regime are arguably undercut.⁴⁵ There persists a sharp contrast with the lack of a “private benefit to the poor themselves,” who instead partake only of the “collective benefit to society at large.”⁴⁶

C. THE VALUATION GAME

Unlike cash donations, contributions of property are often difficult to value, which creates a challenge for the IRS and an opportunity for donors.⁴⁷ Within the broader category of property donations, works of art present a rather acute test, as consensus on value can elude even experts in the field.⁴⁸ This challenge is particularly daunting in the case of contemporary art. For instance, in the 1960s, it would have been considerably easier to establish the value of a painting by a Dutch master like Vermeer, whose works had been known and sold for centuries, than it would be to divine the proper value for a new Warhol painting, which could be said to be worth almost anything.

Not surprisingly, then, properly valuing contributed works of art has for decades been particularly contentious between the IRS and taxpayers.⁴⁹ At times, the IRS was ill equipped to challenge appraisals provided by taxpayers to support their claimed deductions. Thus, art dealers like Castelli were well positioned to provide aggressive (if not outright inflated) appraisals that were unlikely to be successfully challenged. Such high appraisals allowed Castelli and others to promote their artists' work as a vehicle to offset the taxable income of clients willing to donate the purchased art to a museum or other public charity.⁵⁰

45. Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 857, 868 (2001); Harvey P. Dale & Roger Colinvaux, *The Charitable Contributions Deduction: Federal Tax Rules*, 68 TAX LAW. 331, 346 (2015).

For tax year 2011, for example, 21.7% of the amount of charitable contributions were by individuals earning \$1 million or more of adjusted gross income, representing just .747% of total returns. In addition, a high percentage of gifts are not in cash. In 2011, for example, about 24% of charitable contributions were of noncash property. Of these contributions, 41% were made by individuals earning \$1 million or more of adjusted gross income[.]

Dale & Colinvaux, *supra*, at 359.

46. Gergen, *supra* note 34, at 1397–99; Fleischer, *supra* note 31, at 512–13 (noting “in other cases, no benefit for the poor is required (for example, education, the arts, and many health services)” for an organization to qualify for tax exemption as a charitable organization).

47. Sarah M. Johnson, *Art is Long, Life is Short: Estate Planning for the Artist and Art Collector*, A.B.A. SECTION OF TAXATION—2013 MID-YEAR MEETING (Jan. 25, 2013); Mark A. Reutter, *Artists, Galleries, and the Market: Historical, Economic and Legal Aspects of Artist-Dealer Relationships*, 8 VILL. SPORTS & ENT. L.J. 99, 112–13 (2001); Bell, *supra* note 35, at 544.

48. JOHNSON, *supra* note 47.

49. Ildiko P. DeAngelis & Lela Hersh, *Appraisals of Collection Objects: Issues for Museums*, A.L.I.—A.B.A. CONTINUING LEGAL EDUC. MATERIALS: LEGAL PROBS. OF MUSEUM ADMIN. 149, 168–69 (Mar. 30, 2000); William M. Speiller, *The Favored Tax Treatment of Purchasers of Art*, 80 COLUM. L. REV. 214, 226–27 (1980).

50. DeAngelis & Hersh, *supra* note 49, at 168–76; Bell, *supra* note 35, at 542–44.

1. The Allure of Overvaluation

In the context of art, there is an inherent conflict between the subjective analysis of valuing unique works and the IRS's need for objective justification for allowed deductions.⁵¹ The tax deduction for donors who contribute property to charitable organizations is typically the property's fair market value at contribution rather than the cost basis—or original purchase price—of the donor.⁵² In determining that fair market value, works of art present a distinct challenge because traditional valuation methods, such as relying on recent comparable sales, are often not available or not truly analogous.⁵³ Further, in contrast to arms-length transactions where the parties are bargaining with each other for finite gains, there is no incentive for charitable institutions to dispute claimed valuations by donors. Indeed, nonprofit organizations that rely primarily on contributions to support their operations have ample motivation to keep their donors happy. Consequently, there is a unique potential for abuse through the manipulation of appraisals used to value donated artworks for tax purposes.⁵⁴

As such, charitable donations of property like artwork became a popular mechanism for lowering taxable income through deductions.⁵⁵ Unsurprisingly, wealthy taxpayers in the seventy percent to ninety-one percent tax bracket during the 1950s and 1960s stood to benefit the most from the structured donation of artwork.⁵⁶ In time, high income individuals began acquiring art with the intent to then donate it to a museum or other charitable organization.⁵⁷

In his comprehensive 1980 article, *The Favored Tax Treatment of Purchasers of Art*, Professor William M. Speiller detailed how, “prior to the Tax Reform Act of

51. JOHNSON, *supra* note 47, at 16–18; Bell, *supra* note 35, at 544–45.

52. Treas. Reg. § 1.170-1(c) (2018) (“The fair market value 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 reasonable *knowledge* of relevant facts.”).

53. Reutter, *supra* note 47, at 113; Bell, *supra* note 35, at 544–46; DeAngelis & Hersh, *supra* note 49, at 175.

54. DeAngelis & Hersh, *supra* note 49, at 168–69; Renato Beghe, *The Artist, the Art Market and the Income*, 29 TAX L. REV. 491, 514–15 (1974); Bell, *supra* note 35, at 546.

55. See Speiller, *supra* note 49, at 215 (“The favored tax treatment referred to stems from two unique characteristics of art objects. First, it is extremely difficult to value an art object for tax purposes. This permits the purchaser to overvalue items donated to charity (thereby receiving excessive income tax deductions), and to undervalue gifts to family members (thereby avoiding transfer taxes). Second, it can be difficult to determine why an art object was acquired. The status of the purchaser for tax purposes depends on whether the object was acquired for personal enjoyment, as an investment, as business inventory, or for display in a trade or business. Since such status is not easily determined, the purchaser can claim a status that assures him the most favorable tax treatment.”) (citations omitted); see also 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, 613 (2016).

56. Roberts, *supra* note 26, at 928–31; Beghe, *supra* note 54, at 514–15; Morgan, Jr., *supra* note 35, at 292; see also Alfred P. Koch, *The Treasury's Bargain Counter: Contributions*, 33 TAXES 249 (2015).

57. Bell, *supra* note 35, at 542; DeAngelis & Hersh, *supra* note 49, at 166; Lindsey, *supra* note 32, at 1065.

1969, it was possible to profit handsomely by giving rather than selling appreciated property, if the donor was in a high tax bracket and if the sale would produce ordinary income.⁵⁸ Taking as an example a simplified version of a scenario described in Professor Speiller's article, it is easy to see how, if a generous appraisal could be obtained, it was even more beneficial to donate than to sell works of art:

The year is 1960. *X* is a married taxpayer who will file a joint return and will have an impressive \$120,000 of taxable income for the year.⁵⁹ *X* owns a painting worth \$10,000 for which *X* paid \$5,000 three years ago, and *X* is considering either selling the painting or donating it to a museum for a tax deduction.⁶⁰

If *X* sells the painting for \$10,000, the sale would generate \$5,000 of capital gains and \$1,250 of capital gains tax (at the then-current 25 percent rate).⁶¹ In this scenario, *X* would net \$3,750 by way of sale.⁶²

If instead *X* donates the painting to a tax-exempt charitable entity such as a museum, the contribution would generate a charitable deduction of \$10,000. That \$10,000 deduction would reduce *X*'s taxable income from \$120,000 to \$110,000. *X*'s marginal tax rate for that eliminated income would have been 75 percent, so *X* would save approximately \$7,500 in federal income tax.⁶³ In this scenario, *X* would net \$2,500 by way of donation.⁶⁴ So *X* has a benefit from the deduction, but would not be better off than if the painting were sold.

Now, suppose *X* is less scrupulous and was able to obtain an appraisal of \$20,000 for the painting. If the museum accepts the donation and the valuation, *X* would double the deduction from \$10,000 to \$20,000, and thus reduce *X*'s taxable income from \$120,000

58. Speiller, *supra* note 49, at 217; *see also* Beghe, *supra* note 54, at 514–15. Congress amended the Code to address the potential exploitation by dealers in such property who would have realized ordinary income on sales. *See* DeAngelis & Hersh, *supra* note 49, at 168. But in doing so, Congress simultaneously created new opportunities for those who held art and other personal property for personal enjoyment or investment (subject to capital gains tax instead of ordinary income tax). Speiller, *supra* note 49, at 217–18 (citations omitted). The increase of capital gains rates in the same legislation intensified the incentives to purchase and donate art.

59. This would be over \$1,000,000 in today's dollars. BUREAU OF LABOR STATISTICS, CPI INFLATION CALCULATOR, <https://perma.cc/2NPF-XE29> (last visited Mar. 22, 2019).

60. In 1960, the personal exemptions allowed were \$600 for a single taxpayer and \$1,200 for a married couple. A married couple filing jointly would be subject to a federal income tax rate of seventy-five percent on income in the \$100,000–\$120,000 range. *Federal Individual Income Tax Rates History 1913–2013*, TAX FOUND., <https://perma.cc/KR7R-UJ99>. The capital gains rate at the time was twenty-five percent and the charitable contribution cap was thirty percent of adjusted gross income. *Historical Capital Gains and Taxes*, TAX POL'Y CENTER (May 4, 2017), <https://perma.cc/GC24-AFVN>.

61. Take the amount realized (sales price), \$10,000, and subtract the original purchase price of \$5,000 (basis) in order to reach the \$5,000 of capital gains. The capital gains, \$5,000, is then multiplied by the capital gains rate of 25 percent, resulting in \$1,250 in capital gains tax.

62. Take the \$10,000 sales price and subtract both the original purchase price of \$5,000 and the capital gains tax of \$1,250 to reach the net income of \$3,750. Note that this calculation omits any auction fee or sales commission on the sales price (likely at least twenty percent of the sales price).

63. This figure comes from multiplying the \$10,000 by the seventy-five percent marginal tax rate.

64. Take the amount of the tax benefit of \$7,500 and subtract the original purchase price of \$5,000 in order to reach the net of \$2,500.

to \$100,000. Under this scenario, *X* saves up to \$15,000 in federal income tax.⁶⁵ *X* would net \$10,000,⁶⁶ substantially more than if the painting were sold.⁶⁷

As these scenarios demonstrate, overvaluation could provide an art donor with an “undeserved tax reduction,” even if the donation resulted in a personal loss.⁶⁸ Indeed, with overvaluation, individuals in a wide range of income levels could benefit from donating rather than selling artwork. Profitable giving was not reserved to taxpayers in the very highest brackets, to cases in which the property had only a nominal basis, or to cases where overvaluation was extreme.⁶⁹

Clearly, valuation and supporting appraisals were critical to maximizing the financial and tax benefits of purchasing art. Moreover, the possibility of tax-incentivized giving to a museum not only made an investment in art more liquid—easier to convert to back to cash—but it also made it more secure and provided a hedge against depreciation.⁷⁰ For most kinds of assets, a decline in price would leave a buyer stuck with a loss. However, through the 1960s, little prevented a collector from donating a depreciating piece to a museum and claiming a deduction sufficient to make the collector whole. In this way, the tax regime of the early and mid-1960s provided both a potential for a significant discount on tax liabilities as well as an investment backstop to collectors of contemporary American art.

2. Attempts to Ensure Independent Valuation

Historically, the IRS had limited success assessing deficiencies in cases where proper valuation was elusive.⁷¹ Indeed, the IRS was largely at a disadvantage in these cases, as the taxpayers often had well supported appraisals from expert dealers and were equipped to contradict the witnesses proffered by the IRS.⁷² This was especially so because museums frequently provided appraisals directly, offering this as a service to both appease donors and trustees and facilitate the donations of (highly valued) works to their own collections.⁷³ Cost, auction prices, intrinsic value,

65. This figure comes from multiplying the \$20,000 by the seventy-five percent marginal tax rate.

66. Take the amount of the tax benefit of \$15,000 and subtract the original purchase price of \$5,000 in order to reach the net of \$10,000.

67. Speiller, *supra* note 49, at 220–21.

68. *Id.* at 221 (citations omitted). Once a sales commission (roughly twenty percent) is included in these calculations, the profit is even greater.

69. *Id.* at 220–23 (illustrations omitted) (citations omitted). “In the case of property with a nominal basis, a 70% bracket taxpayer profits even without overvaluing his gift, and a 50% bracket taxpayer need only overvalue his gift by more than 28% in order to profit. Similarly, in the case of property whose basis is 50% of its fair market value, the 70% bracket taxpayer still profits by making a gift overvalued by only 3%, and the 50% bracket taxpayer profits if he overvalues his gift by more than 48%.” *Id.*

70. On the tax incentives for charitable giving, see Aprill, *supra* note 44, at 279. On how this practice could help to secure investments in art, see E. Alex Kirk, *The Billionaire’s Treasure Trove: A Call to Reform Private Art Museums and the Private Benefit Doctrine*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 869, 883 (2017); Bell, *supra* note 35, at 540.

71. Regnier, *supra* note 55, at 612.

72. Speiller, *supra* note 49, at 238.

73. “[P]rior to the mid 1980s museum staff members were free under then existing law to provide

discounts, premiums, quality, art expert testimony, geographic art markets, and market fluctuations were among the myriad complex and dynamic factors considered by the Tax Court in determining the fair market value of artwork donated from 1954 to 1969.⁷⁴ During the 1950s and 1960s, the IRS was unable to adequately audit the large volume of tax returns claiming charitable deductions for donations of works of art. This was largely because the agency lacked the internal expertise needed to scrutinize valuations of such unique items.⁷⁵

In 1963, the Treasury proposed regulations aimed at reducing abuses of charitable deductions by strengthening the requirements for substantiating the value of charitable contributions.⁷⁶ The purpose of this change was to curb deduction abuses by requiring more independence, and more documentation, from appraisers valuing donated property.⁷⁷

During the “notice and comment” period of regulatory review, a window in which industry groups most likely to be affected by the proposed change were invited to provide feedback to the regulatory agency, the details of the changes were circulated among the members of the Art Dealers Association (“ADA”). The ADA, an organization for commercial galleries mostly based in New York City (of which

appraisals for donors’ tax purposes and indeed museums were under pressure to make their staff available for such purposes.” DeAngelis & Hersh, *supra* note 49, at 151–52. “Due to perceived abuses with valuation of charitable deductions, Congress in the Tax Reform Act of 1984 . . . disqualified donee organizations (such as museums) . . . from providing appraisals for a donor’s tax deduction for any object or group of similar objects over \$5,000 in value.” *Id.* at 151–52.

74. Silverman v. Comm’r, 27 T.C.M. (CCH) 1066 (1968) (entering judgment applying government figures of \$30,500 for the charitable contribution of 148 paintings rather than the inflated taxpayer appraisal of \$100,525); Mauldin v. Comm’r, 60 T.C. 749, 749–57 (1973) (deferring to figures of \$15,000 and \$5,000 compiled by expert appraisers of the Smithsonian Institution and Library of Congress for donated cartoon drawings and original manuscripts by a famous cartoonist); Mathias v. Comm’r, 50 T.C. 994, 998 (1968) (entering judgment applying government figures of \$500 and \$8,000 for the charitable contribution of two oil paintings rather than the inflated taxpayer appraisal of \$12,750 and \$25,000); *Id.*, *action on dec.*, *In re Mathias*, 1969 WL 20641 (Feb. 4, 1969), and *acq.*, *IRS Announcement Relating to: Mathias*, 1969-2 C.B. 23 (Dec. 31, 1969); May v. Comm’r, 24 T.C.M. (CCH) 205 (1965) (entering judgment applying government figures of \$6,500 for the charitable contribution of fifty-one architectural illustrations rather than the inflated taxpayer appraisal of \$15,300); Farber v. Comm’r, 33 T.C.M. (CCH) 673 (1974) (entering judgment applying the government figure of \$10,000 for a single painting instead of the \$150,000 taxpayer figure), *action on dec.*, *In re Farber & Farber*, 1974 WL 36289 (Oct. 21, 1974) (recommending acquiescence), and *aff’d*, 535 F.2d 1241 (2d Cir. 1975); Gordon v. Comm’r, 35 T.C.M. (CCH) 1227 (1976) (entering judgment applying the government figure of \$12,500 for a single painting instead of the \$115,000 taxpayer figure).

75. Speiller, *supra* note 49, at 232–35. It was not until 1968 that the IRS announced the creation of the Art Advisory Panel, *see* I.R.S. News Release, 7 Stand. Fed. Tax Rep. (CCH) § 6573 (Feb. 1, 1968), composed of “art experts from major segments of the art world—museums, universities, and dealers—and its purpose . . . to determine the accuracy of privately obtained appraisals.” Bell, *supra* note 35, at 545; 1969 COMM’R INTERNAL REVENUE ANN. REP. 21, 65, <https://perma.cc/T98W-K68P>. The impact of this new apparatus for scrutinizing claimed valuation was immediate. In 1969, the Artist Advisory Panel “reviewed 396 works of art valued for tax purposes at \$13.9 million . . . [recommending] that claimed values of 167 of the art items be reduced by an aggregate of \$2.7 million.” 1969 COMM’R INTERNAL REVENUE ANN. REP. 21, <https://perma.cc/5MV6-BSFT>.

76. Treas. Reg. § 1.170-1 (2018), MERTENS, *supra* note 33, at 290–96.

77. DeAngelis & Hersh, *supra* note 49, at 158; Bell, *supra* note 35, at 545–46.

Castelli was a founding member), found “nothing in the proposed regulations that would be objectionable to our members or to their collector-customers.”⁷⁸ In fact, the change turned out to be an enormous boon for the ADA, which seems to have largely attempted to comply with the requirement that multiple, independent opinions be solicited to value the worth of a donated object. The ADA began to charge fees for its appraisal services, and between the years of 1962 and 1964, the revenue collected from the fees more than quadrupled, accounting for seventy percent of the organization’s operating budget.⁷⁹ But it proved to be enormously difficult to ensure “independence” in a realm as insular and opaque as the elite contemporary art world.⁸⁰

In response to rampant appraisal abuse, the IRS created the Art Advisory Panel in 1968. That panel today consists of up to twenty-five art experts who meet twice a year in Washington, D.C., and assist the IRS in reviewing art appraisals and making recommendations to the Art Appraisal Services unit of the IRS Office of Appeals.⁸¹ Any appraisal submitted to the IRS claiming a value of \$20,000 or more for a single work of art will be referred to the panel for review.⁸² The panel regularly suggests adjustments to a large percentage of the appraisals it reviews, resulting in tens of millions of dollars in recovered tax revenue annually.⁸³ The IRS also now allows taxpayers claiming charitable contributions over \$50,000 to seek a Statement of Value, backed by a qualified appraisal, an appraisal summary, and a fee of \$2,500, which must be filed before the tax return reporting the charitable contribution.⁸⁴ Despite these measures, overvaluations are still “difficult to identify, substantiate and litigate,” and the same charitable institutions that benefit from the contributions lack any incentive to participate in correcting valuations.⁸⁵ Congress has since made a number of reform efforts, though none have proven to eliminate the loopholes so

78. Memorandum to the Members (Apr. 25, 1963), Art Dealers Association Correspondence, Leo Castelli Gallery Files (on file with Archives of American Art, Smithsonian Institution).

79. Member Letter from Ralph Colin (Oct. 26, 1964), Leo Castelli Gallery Files (on file with Archives of American Art, Smithsonian Institution).

80. Speiller, *supra* note 49, at 236 n.88 (quoting ARTNEWSLETTER, June 27, 1978, at 4 (in which the Chief of the Service’s Art Valuation Group states, “in a perfect world, we would get appraisals from people who were both knowledgeable and isolated. I don’t know how to find these people.”)).

81. Aprill, *supra* note 44, at 310.

82. Theodore Peyser, *BNA Transfer Pricing Report: The Commissioner’s Art Advisory Panel: A Long-Running Success* (Oct. 22, 2010), <https://perma.cc/9VXP-AS2G>.

83. In November 1986, the *Los Angeles Times* provided the following insights into the workings of the panel: “Today there are 25 experts on four different panels: Far Eastern and Asian Art, African and Pre-Columbian, Old Masters and Modern Art. Together, they save the government about \$20 million each year in potentially lost tax revenues. Twice a year, the art experts come to IRS headquarters in Washington. Cloistered inside a small conference room, they appraise works like old Dutch masterpieces, pre-Columbian fertility goddesses, 20th-Century sculpture, antique guns and airplanes and Colonial furniture and artifacts. They sift through ownership records, sale histories and color photographs of artworks with an average claimed value of \$168,000. [In 1985], the panels reviewed 1,538 items worth a claimed \$70 million and recommended adjustments on 74% of them.” Denise Hamilton, *Panel Gets Millions for IRS by Deflating Donated Art*, L.A. TIMES, Nov. 28, 1986, at B9.

84. Aprill, *supra* note 44, at 283.

85. *Id.* at 310 (quoting IRS Comm’r Mark. W. Everson’s statements at a Senate hearing in 2005).

readily exploited.⁸⁶ To the extent that further reform is implemented, it will need to address these vulnerabilities in the system in addition to “administrability, from the point of view of both the government and the taxpayer, [and consider] the potential for gaming of the system, cheating, and the burdens of compliance.”⁸⁷

III. EVIDENCE FROM CASTELLI'S ARCHIVES

Records of the Leo Castelli Gallery, housed at the Smithsonian's Archives of American Art, provide a detailed account of the gallerist's operations and methods. Castelli's correspondence and other files reveal a devoted individual motivated primarily by a genuine drive to achieve the best possible results for his artists. But the records also show Castelli to be a shrewd businessman whose appraisal practices and dealings at times strayed beyond ethical standards and the law. The Castelli gallery files are replete with apparent conflicts of interest, and even instances of likely deliberate inflation.

To choose one purposefully above-board example, in 1963, the collector Burton Tremaine wrote to the Art Dealers Association (“ADA”) to ask for an independent appraisal of a large Jackson Pollock painting that he owned.⁸⁸ The ADA appointed Castelli to the panel that would offer the appraisal. Castelli, as a former secondary dealer of Pollock's who was uninvolved with the Tremaine sale, was as close to an ideal candidate as the ADA was likely to find. Castelli promptly responded to the secretary's request with a reasonable valuation, \$60,000, justifying his figure by reference to a similar work that had recently sold at auction in London. (Most of Castelli's subsequent appraisals lack such evidence-based justification.) Shortly thereafter, the work was purchased by—not donated to—the Museum of Fine Arts, Houston.⁸⁹ The difficulty here lies in the fact that Tremaine was one of Castelli's most enthusiastic clients, actively involved in acquisitions of works by both Johns and Rauschenberg. Thus, while the appraisal figure was likely sound in this particular case, Castelli had a financial incentive to increase the appraisal value of the Pollock in order to generate greater potential sales for himself and his gallery.

At the more opportunistic end of his dealings are Castelli's interactions with art collector Robert Scull, which demonstrate the jaw-dropping potential for economic gain when a gallerist and dealer work in tandem. Scull became interested in Jasper Johns when he encountered his work at the Rive Droite gallery in Paris in the spring of 1960. In the immediate wake of Scull's purchase of *Grey Alphabets* (1956), gallery records indicate that a rapid and frequent trade between Castelli and Scull took off, with the latter buying, selling, and trading more than a dozen Johns canvases in the

86. See, e.g., *id.* at 283–96.

87. Aprill, *supra* note 45, at 859–60.

88. Art Dealers Ass'n Correspondence (Feb. 7, 1963), Leo Castelli Gallery Files (on file with Archives of American Art, Smithsonian Institution). Appraisal (Feb. 13, 1963), Leo Castelli Gallery Files (on file with Archives of American Art, Smithsonian Institution).

89. Art Dealers Ass'n Correspondence, *supra* note 8888.

next several years.⁹⁰ Then, in the summer of 1962, a highly unusual event took place. In addition to his role as a customer, Scull became a financial backer of the gallery, lending Castelli the considerable sum of \$20,000. Against this loan, Castelli provided two Johns and one Rauschenberg work as collateral.⁹¹ In June of 1963—mere months after the ADA became aware of the proposed Treasury regulations that would require substantiated valuations—gallery records show a single, bidirectional transaction between Castelli and Scull for a total of \$35,000: a \$20,000 loan repayment and a \$15,000 purchase of Johns's *Map* (1961).

Johns's *Map* is a particularly significant example because it is one of the few of these sorts of transactions about which Castelli has spoken publicly. According to Castelli's recollections, the piece had actually occasioned a bidding war between Scull and Tremaine, with questions about right of first selection and highest price catalyzing a back and forth between the collectors.⁹² Per Castelli, the impasse was resolved only by Johns's insistence that the piece ultimately be donated to a museum.⁹³ Scull ultimately won the day, agreeing to donate it to the Museum of Modern Art in New York City. Donation appraisals through the ADA were of course required, and it is worth quoting Castelli at length about what happened next:

As a matter of fact, the Art Dealers Association, which does this evaluation as you know, asked me to give them a value, and they had asked also Ivan [Karp, Castelli's gallery manager]. So Ivan phoned me and said what do you think we should value it at? So, I said, "Well, I think that it should be \$150,000." Ivan said, "Yes. I feel that, too." And that's what we said. Then, this was discussed at the meeting of the Board of Directors of the Art Dealers Association (of which I'm a member, by the way) and they said don't you think it's a little bit high under the circumstances So they did not feel safe about this estimate. Let's consult some independent sources, maybe the German dealers who handle him and perhaps a Swiss dealer, who has a real sense of value, is well informed. So, we did that, and we got replies back. One said 120 and another said 140. So, we decided to have it registered at 130.⁹⁴

Several aspects of this passage are remarkable. Most importantly, the final appraisal figure is wildly out of proportion with anything actually commanded by Johns on the commercial market. According to gallery files, Johns's large paintings were typically priced in the \$10,000 range, making the original sale price of \$15,000 on the generous side of reasonable for the early 1960s.⁹⁵ Castelli's attempt to inflate this figure tenfold within weeks after its sale was a rather brazen move designed to benefit Scull, who at that point was both Castelli's client and recent financier. As

90. *See supra* note 13.

91. *Id.*; Undated Inventory List 6 (Feb. 2, 1963–June 21, 1963).

92. Archives of Am. Art Oral History Project, Interview by Paul Cummings with Leo Castelli (May 14, 1969–June 8, 1973).

93. *Id.*

94. *Id.*

95. Letter from Leo Castelli to Jasper Johns (Sept. 1, 1959), Jasper Johns Correspondence, Leo Castelli Gallery Records (on file with Archives of American Art, Smithsonian Institution); Robert & Ethel Scull Accounts NYC, doc. 4 (Aug. 15, 1962) (on file with Archives of American Art, Smithsonian Institution).

Castelli was pleased to tell his interviewer, “you can see what a nice deduction he got there.”⁹⁶ Though the exact amount by which this donation offset Scull’s tax burden remains inaccessible without personal tax returns, it very likely was an extraordinary tax windfall.

The gross exaggeration necessary to claim a \$150,000 valuation for a \$15,000 painting points to the importance, but also the difficulty, in attaining a truly independent appraisal. In the case of Johns, a young, ascendant talent under the almost monopolistic control of a single dealer, the ostensible independence of the European dealers referenced in the exchange is hard to countenance. Castelli purposefully allowed satellite exhibitions of his artists, especially in overseas venues through which they could acquire European prestige; however, all of these foreign projects would have been organized directly through the Castelli Gallery. In the discussion, Castelli is probably alluding to Rudolph Zwirner, a Cologne-based Pop art dealer with whom Castelli shared the business of German megacollector Peter Ludwig. As Zwirner depended on Castelli for his relationship with Johns and other American Pop artists, he could not have been “disinterested” in the sense intended by the ADA. This inherent imbrication of financial motives is indeed attested to by Castelli, whose first-person plural “we decided” on the final appraisal value tips his hand to direct involvement.

While the *Map* transaction comprises a particularly blatant and singularly well-documented example, evidence for these kinds of irregularities recurs throughout Castelli’s gallery records.⁹⁷ Given the opacity that characterizes the buying and selling of contemporary art, such transactions likely only skim the surface of the ways in which Castelli put the particularities of the financial landscape to work for his artists, his collectors, and himself. Indeed, in an unpublished interview Castelli granted in 1970, he credits these kinds of maneuvers for differentiating his gallery and its program from the growing competition. Other galleries, Castelli explained, “did not succeed in solving the financial problem, while I, well, had perhaps more imagination in that area than they.”⁹⁸ And one need only consider the breadth and depth of Castelli’s stable—which, by the end of the decade, would include Johns, Rauschenberg, Warhol, Frank Stella, Robert Morris, Bruce Nauman, and Richard Serra—to grasp the impact of Castelli’s “imagination”: a system in which museum donation established both a source of liquidity and insurance against depreciation. In this easier-to-win, harder-to-lose scenario, it is not difficult to see why the smart money would have been betting on Castelli.

96. Cummings, *supra* note 92.

97. For example, in preparing the loan forms for Johns’s exhibition at the Jewish Museum in January 1964, Castelli valued Johns’s *White Flag* (1955) at \$50,000, a value out of proportion with the \$1,440 for which Castelli had agreed to sell the piece to Scull two years prior. Appraisal (July 12, 1961), Robert Scull Correspondence, Leo Castelli Gallery Files (on file with Archives of American Art, Smithsonian Institution). Venice Biennale Exhibition Correspondence, Leo Castelli Gallery Files (on file with Archives of American Art, Smithsonian Institution). Insurance Appraisal Jumps for Scull, St. Paul Fire & Marine, Claim Report, issued June 8, 1965.

98. Elayne Varian, Interview with Betty Parsons, Exhibition Records of Contemporary Wing of Finch College Museum of Art (on file with Archives of American Art, Smithsonian Institution).

IV. CASTELLI'S ENDURING SIGNIFICANCE FOR ART AND LAW

A. CASTELLI'S LASTING INFLUENCE ON THE BUSINESS OF ART

The overarching shape of the work produced by Castelli's stable of artists must be understood as a response to a set of legal and financial, as well as art historical, imperatives. This is not to suggest that any specific set of choices made by Johns or Rauschenberg should be thought of as reducible to market forces. Rather, the landscape created by Castelli impacted several interrelated components of the art world: the consumers/clients, the development of the artists within Castelli's stable, and the financial advantages available to all participants in the art market at the time.

First, the economic momentum of the postwar moment generated an ideal set of opportunities for the makers of formerly elite objects to reach new consumers. For example, while a limited number of elite patrons—and relevant, contemporary-focused museum collections—could absorb the production of large, expensive paintings and object-sculptures, a wider base of collectors could be enticed by more-affordable editioned prints. Indeed, Castelli's circle made unprecedented use of multiples, first produced by Universal Limited Art Editions and then, beginning in 1969, by an in-house graphics studio run by the dealer's second wife, Toiny.⁹⁹

This broadening of the collecting class not only reflected new patrons driving the expansion of the gallery circuit, but also demonstrated broader social trends. As business writer Karen Raugust has noted, the post-World War II economy generated a situation in which “money descended on whole new classes of consumers faster than they could cultivate the good taste” required to make sophisticated choices.¹⁰⁰ Indeed, this new good taste was often communicated and cultivated through the medium of advertising, which frequently drew upon the history of avant-garde visual art to communicate a message of urbanity and up-to-date sophistication.¹⁰¹ In this appropriation, by which the visual arts were used to both inculcate and demarcate the bounds of refinement, Raugust sees a microcosm of the larger history of consumer capitalism, which moves forward by bringing the status symbols and luxury items of the formerly elite aristocracy into wider circulation for the upper and middle classes. One might even argue that Castelli's gallery took these developments through an additional, reflexive step: making the means of circulation and exchange into both the context around and the contents within Pop.¹⁰²

Second, and relatedly, a major achievement of Castelli lies in the manner in which he was able to take a new spate of artistic directions—things that would be called “neo-Dada,” “Pop,” “Minimalism,” and eventually, “Process art” and “video art”—and position them as heirs to the reigning orthodoxy of New York School painting.

99. ROBERT PINCUS-WITTEN & BRUNO BISCHOFBERGER, LEO CASTELLI, GENTLE SNAPSHOTS: AN EXHIBITION IN HONOR OF THE 25TH ANNIVERSARY OF THE LEO CASTELLI GALLERY 47 (Galerie Bischofberger Ed. 1982).

100. Karen Raugust, *Design and Designers*, in THE ADVERTISING AGE ENCYCLOPEDIA OF ADVERTISING 469–475, 474 (John McDonough & Karen Egolf eds., Routledge 2015).

101. *Id.*

102. For more on Pop and advertising, see JAMES MEYER, MINIMALISM: ART AND POLEMICS 28 (Yale Univ. Press 2004).

This positioning was multi-pronged and self-reinforcing. Flattering comparisons to European art and commissioned academic essays granted the work under consideration an aura of respectability, while Castelli's farsighted approach to matters ranging from artist stipends, museum acquisitions, and collector placement, not to mention aggressive use of tax law, created an academic and financial footing for the artists in his stable.

Finally, the success of this model is legible in the now canonical status of the artists who comprised his early rosters, the network of galleries that sprang up around Castelli, and the financial benefits achieved for all parties. Most importantly, the repercussions of Castelli's new business model can be seen in the dizzying scope of the contemporary art resale market, which also traces its origins back to the interactions between Castelli and Scull. Almost exactly ten years to the day after the *Map* sale, Scull decided to put fifty works from his growing collection up for auction.¹⁰³ The resulting "Scull Sale," as it has come to be known, shattered many longstanding records. The most dramatic moment of the night came from a momentarily contentious exchange between Scull and Rauschenberg, after the latter's *Thaw* (1958) sold for \$85,000, almost a ninety-fold increase. But the banner sale of the night—and the highest price ever paid for a living American artist—went to Jasper Johns's *Double White Map*, which sold for the eye-popping price of \$240,000.¹⁰⁴ As Noah Horowitz has recently observed, "in the aftermath of the Scull sale, a more financially shrewd era in the art market seemingly emerged."¹⁰⁵ Dealers, artists, and collectors became more status- and investment-conscious, both the scale and ambition of works grew ever larger, and prices were set more aggressively. While scholars, including Horowitz, concede that the impact of the sale has occurred primarily at the level of lore—as the origin point for the contemporary state of the market—the sale has nevertheless cemented itself into the collective financial imaginary of the art world.¹⁰⁶

B. ENDURING LESSONS FOR TAX LAW AND POLICY

The transactions documented in Castelli's archives and Castelli's description of his own cavalier and collusive methods of generating generous art appraisals provide a stark example of the importance of truly independent scrutiny of financial arrangements that have significant tax implications. Although the IRS, in the decades since the notable abuses of 1960s, has developed a bevy of mechanisms to detect and discourage inflated appraisals of donated property, its enforcement abilities have diminished in recent years as it has faced repeated deep budget cuts.¹⁰⁷

103. See Baruch D. Kirschenbaum, *The Scull Auction and the Scull Film*, 39 ART J. 50, 50–54 (1979). Tim Schneider, *A Toast to the End Times*, GRAY MARKET, May 13, 2016, <https://perma.cc/4AX5-BKQC>.

104. *Id.*

105. NOAH HOROWITZ, *ART OF THE DEAL: CONTEMPORARY ART IN A GLOBAL FINANCIAL MARKET* (Princeton Univ. Press 2014).

106. *Id.* at 10.

107. "Starting in 2011, Republicans in Congress repeatedly cut the I.R.S.'s budget, forcing the

Even with today's historically low federal income tax rates, which make the need to avoid taxable income less acute, individuals with significant incomes still have ample incentive to generate tax deductions. For those who itemize, each additional dollar's worth of property contributed to a qualified charity generates some (although less than a dollar of) tax benefit. Accordingly, even in its diminished capacity, the IRS must continue to devote considerable enforcement resources to guard against an erosion of the tax base through aggressive appraisals of donated property.

More broadly, the tax-advantaged maneuvers of Castelli and his colleagues reinforce concerns that purportedly public charities are the personal playthings of the affluent. Castelli's archives provide a small window into the historically privileged and interconnected world of art collectors and dealers. With a few phone calls and supporting slips of paper, that group had the ability to shift tens of thousands of dollars from the tax coffers to individuals who were willing to donate art to museums and other public institutions. While the public undoubtedly benefits directly and indirectly from access to art, those benefits come at a very real cost to tax revenues. Because only those who itemize their deductions can offset their taxes with charitable contributions, the direct financial benefit of such donations is limited to a relatively small group of typically high-income taxpayers. Beginning this year, that disparity is likely to be exacerbated by a dramatically augmented standard deduction, which will reduce the number of itemizers (and thus those who benefit from the charitable contribution deduction) to perhaps one in ten taxpayers. A charitable contribution deduction with extremely limited availability, overseen by a severely underfunded enforcement agency, threatens to undercut the altruistic objectives underlying the favored tax treatment of charities and their supporters.

V. CONCLUSION

Although conventional thinking attributes the explosion of the American contemporary art market to the vast economic expansion after World War II, Leo Castelli's pioneering promotional schemes and financial arrangements were integral to the success of his artists and the development of a self-sustaining American art market. Castelli shaped the manner in which art dealers, collectors, and artists collaborated, and leveraged the legal and regulatory environment of the time to his and his clients' advantage. Indeed, the relatively underdeveloped enforcement regime of the 1950s and 1960s provided an opportunity for savvy dealers and market makers like Castelli to influence the aesthetic of, demand for, and ability to acquire American artwork. Castelli's legacy lies not only in his influence on the business dealings of artists and gallerists, but also in the cautionary tale his cunning maneuvers leave for regulators and lawmakers.

agency to reduce its enforcement staff by a third." Jesse Eisinger & Paul Kiel, *I.R.S. Tax Fraud Cases Plummet After Budget Cuts*, N.Y. TIMES (Oct. 1, 2018), <https://perma.cc/2CSY-JFRC>.