DO "ELITIST" ART MUSEUMS DESERVE TAX-EXEMPTION?: TOWARD AN AFFIRMATIVE ACTION PLAN FROM CRITICAL RACE AND SYSTEMS THEORIES PERSPECTIVES

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ABSTRACT

Currently, visitors to nonprofit art museums are not diverse; rather, they represent a small portion of the community—thus the museums are providing benefits to a narrow group. Continuing the practices that result in homogenous visitorship may not be aligned with the congressional intent of 501(c)(3) in terms of failing to provide public benefits and uphold public policy by "denying" access to museums based on socioeconomic and racial backgrounds as well as being seen as providing "private benefits" to a select few. By using legal (critical race theory) and organizational theories (open systems theory), this article presents a legal argument for greater diversity and inclusivity in museum practices, providing a more concrete and compulsory rationale for museums to strive toward increasing diversity and inclusivity in recruiting board members and staff and in serving diverse communities. Critical race theory is used to establish the issue of museums' practice of exclusion and the need to provide more public access. A legal analysis of two nonprofit tax law provisions—the no substantial private benefit provision and the public policy doctrine—provides compulsory rationale for requiring museums to change and be more inclusive. Open systems theory provides a framework for transformation and a rationale for stronger and enforceable legal standards for nonprofit art museums to merit tax benefits. In comparing 501(c)(3) museum practices to nonprofit hospitals, this paper further suggests community benefit standards for museums as an affirmative action plan which can help move museums toward more inclusive and equitable practices, thereby justifying tax benefits that come with being 501(c)(3) nonprofits in the United States.

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I. INTRODUCTION

Art museum visitors are more homogeneous than the general population of the United States (U.S.).[1] While there has been a discussion around more inclusive museum practices in the last two decades or so to attract more diverse groups of people to museums,[2] the demographics of museum-goers largely remain the same. According to the most recent arts participation study published by the National Endowment for the Arts,[3] about 27% of white adults in the U.S. visited an art museum or gallery while only 17% of black adults visited the same.[4] In an eight-year, close account observation of an art museum in the Midwestern U.S., Jung found that its visitors were nearly 90% white (compared to the general population in the region being 75% white), over 60% of museum visitors made more than $70,000 in annual household income (compared to the median household income of $55,000), and more than 80% of visitors had at least a four-year college degree (compared to only 20% of the community having a four-year college degree).[5] These discrepancies are clear characteristics of this museum and many others like it in small metropolitan U.S. cities, that only benefit a narrow subsection of the surrounding communities. Many other sources document this clear link between museum participation and higher socioeconomic status as well.[6]

Museums have tried to be more inclusive by offering more exhibitions and programs that target people of color and otherwise underrepresented groups, yet an obvious change in museum-goer

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1. Alexandra Olivares & Jaclyn Piatak, *Exhibiting Inclusion: An Examination of Race, Ethnicity, and Museum Participation*, 33 VOLUNTAS 121-133 (2022); FRANCIE OSTROWER, TRUSTEES OF CULTURE: POWER, WEALTH, AND STATUS ON ELITE ARTS BOARDS 121 (2002).

There are numerous studies that consistently report the lack of diversity in museum visitorship. For some of these references, see generally Rose Paquet Kinsley, *Inclusion in Museums: A Matter of Social Justice*, 31 MUS. MANAG. CURATORSHIP 474 (2016); Wendy Ng, Syrus Marcus Ware & Alyssa Greenberg, *Activating Diversity and Inclusion: A Blueprint for Museum Educators as Allies and Change Makers*, 42 J. MUS. EDUC. 142 (2017); YUHA JUNG, TRANSFORMING MUSEUM MANAGEMENT: EVIDENCE-BASED CHANGE THROUGH OPEN SYSTEMS THEORY 79-81 (2022); BETTY FARRELL & MARIA MEDVEDEVA, DEMOGRAPHIC TRANSFORMATION AND THE FUTURE OF MUSEUMS 12-14 (2010).

2. AMERICAN ALLIANCE OF MUSEUMS, FACING CHANGE: INSIGHTS FROM THE AMERICAN ALLIANCE OF MUSEUMS' DIVERSITY, EQUITY, ACCESSIBILITY, AND INCLUSION WORKING GROUP 8 (2018), https://www.aam-us.org/wp-content/uploads/2018/04/AAM-DEAI-Working-Group-Full-Report-2018.pdf; Brian Boucher, *People are Calling for Museums to be Abolished, Can Whitewashed American History be Rewritten?*, CNN (July 12, 2020), https://www.cnn.com/style/article/natural-history-museum-whitewashing-monuments-statues-trnd/index.html.

3. NATIONAL ENDOWMENT FOR THE ARTS, U.S. PATTERNS OF ARTS PARTICIPATION: A FULL REPORT FROM THE 2017 SURVEY OF PUBLIC PARTICIPATION IN THE ARTS 36 (2019), https://www.arts.gov/sites/default/files/US_Patterns_of_Arts_ParticipationRevised.pdf.

4. *See generally id.* Notice that this accounts for visits to art museums or galleries, which includes for-profit galleries.

5. JUNG, *supra* note 1, at 81.

6. NATIONAL ENDOWMENT FOR THE ARTS, *supra* note 3, at 36; Catherine D. D. Bowman, et al., *Differences in Visitor Characteristics and Experiences on Episodic Free Admission Days*, 35 MUS. MGMT. CURATORSHIP 264, 265 (2019); FARRELL & MEDVEDEVA, *supra* note 1, at 14.

demographics has not been seen.[7] Some of these efforts may work for the short term by bringing certain groups of people to culturally specific exhibitions and programs. However, without more structural changes, they will just come for those special exhibitions and programs and will not come back for others that they deem are irrelevant to them. While one may argue that art museums are not actively excluding certain groups of people on purpose, the outcome of current practices is the exclusion of certain groups of people from accessing the services and programs of most art museums. While museums are not violating laws and policies per se, by conceptually and ideologically benefiting only a small portion of the wider population (i.e., white, wealthy, and better educated) museums are not aligned with the greater public policy of inclusiveness and equitable access to education through the arts and culture in art museums. These exclusive practices have been closely related to those who have been managing and funding museums over centuries, leading to a structural issue.[8] In other words, even if a museum implements diverse programming and strategies to invite as diverse audiences as possible, without structural changes (e.g., how programs are produced, diversity of board membership[9] and staff

7. *See* JUNG, *supra* note 1, at 81-83.

8. David Fleming, *Positioning the Museum for Social Inclusion, in* MUSEUMS, SOCIETY, INEQUALITY 213, 213 (Richard Sandell ed., 2002); Richard Sandell, *Museums as Agents of Social Inclusion*, 17 MUS. MGMT. CURATORSHIP 401, 401 (1998).

There have been many academic and professional discussions around structural issues of museums, mainly the lack of diversity in museum staff, board members, and donors. For recent discussions of these issues generally, see Max Anderson, *Art Museums in the Pandemic,* ART LAW PODCAST (May 11, 2020), http://artlawpodcast.com/2020/05/11/art-museums-in-the-pandemic/.; Boucher, *supra* note 2.

For lack of diversity in donors, see Yuha Jung, *Diversity Matters: Theoretical Understanding of and Suggestions for the Current Fundraising Practices of Nonprofit Art Museums*, 45 J. ARTS MGMT. L. SOC'Y 255 (2015).

There has been more scrutiny toward museums' exclusive practice due to people calling for profound and urgent changes during the new internment of the civil rights movement in the U.S. which was triggered by the COVID-19 pandemic in 2020. *See* Taylor Dafoe & Caroline Goldstein, *The George Floyd Protests Spurred Museums to Promise Change. Here's What They've Actually Done So Far*, ARTNET NEWS (Aug. 14, 2020), https://news.artnet.com/art-world/museums-diversity-equity-commitments-1901564.

9. For lack of diversity in board members, see FARRELL & MEDVEDEVA, *supra* note 1, stating that board members and staff in the leadership positions are predominantly white, upper-middle class, and well educated. *See also* AMERICAN ALLIANCE OF MUSEUMS, *supra* note 2.

composition,[10] and lack of program and performance evaluations[11]), there is no change in visitorship. When the problem is rooted in the origin, history, and structure of museums, which are required to serve diverse populations of this country due to their status as 501(c)(3) nonprofits, it requires a critical examination of current practice and intentional inclusivity toward various voices and groups in decision-making processes. Sandell,[12] a prominent museum scholar in the United Kingdom, said, "the museum that fails to tell the stories of minority groups not only denies access to its services for that group but also exacerbates their position of exclusion by broadcasting an exclusive image reinforcing the prejudices and discriminatory practices of museum users and the wider society."[13] Museums need more affirmative internal and structural inclusive practices to ensure diverse museum employees and funding sources come from diverse people and entities. Without the structural changes implemented—for example, through legal tools, policy tools, or both being similarly grounded in the idea of providing wider public access and benefit—actual change would prove to be very unlikely. Though museums must strive to implement a conscious and visible approach to inclusion that is at the core of each institution,[14] legislatures and governing bodies must set clear expectations for such changes.

The necessity for change is especially timely given the Supreme Court's recent decision (June 2023) in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*[15] that essentially ended universities' adoption of affirmative action policies for student

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10. For lack of diversity in staff, see Mariët Westermann et al., *Art Museum Staff Demographic Survey 2018*, ANDREW W. MELLON FOUND. (2019), https://mellon.org/media/filer_public/b1/21/b1211ce7-5478-4a06-92df-3c88fa472446/sr-mellon-report-art-museum-staff-demographic-survey-01282019.pdf; Martha Lufkin, *Representation and Diversity: America is Changing, But Are its Art Museums?*, ART NEWSPAPER (June 30, 2009), https://www.theartnewspaper.com/archive/america-is-changing-but-are-its-art-museums.

Many scholars have noted the tendency of museum staff to be homogeneous culturally, socioeconomically, and educationally. *See* FARRELL & MEDVEDEVA, *supra* note 1; Fleming, *supra* note 8; Andrew McClellan, *A Brief History of Art Museum Public, in* ART AND ITS PUBLICS: MUSEUM STUDIES AT THE MILLENNIUM 1 (Andrew McClellan ed., 2003).

11. For an explanation of the correlation between museums with fewer evaluation practices and the lack of time and resources available in already distressed public and nonprofit institutions see Briana Casas et al., *Evaluating the Evaluators: Investigating Museum Survey and Research Practices*, MUSEUMNEXT (June 03, 2024), https://www.museumnext.com/article/investigating-museum-survey-and-research-practices/.

12. Dr. Richard Sandell's work has been pivotal in framing the museum field as exclusive and inaccessible to many as well as bringing attention to this issue by addressing it through a critical and structural approach. To learn more about his work, see RICHARD SANDELL, MUSEUMS, PREJUDICE AND THE REFRAMING OF DIFFERENCE (2007); and RICHARD SANDELL, MUSEUMS, MORALITIES AND HUMAN RIGHTS (2017).

13. Sandell, *supra* note 8, at 408.

14. *See* Olivares & Piatak, *supra* note 1, at 131.

15. *See* Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023).

admissions. The court in this case concluded that the Fourteenth Amendment is colorblind, and therefore, race should not be considered in making admission decisions.[16] The court's decision implies that we no longer need affirmative action policies for university admissions and diversity as an essential element of effective education is no longer a compelling interest. While this case is specific to university settings, the weight of the decision rendered by the highest court in the country could have a chilling effect on diversity issues in other areas such as the museum industry.

As discussed in the Critical Race Theory below, legal systems are rarely neutral, instead reflecting the values of people in power who influence, create, and revise them. As Justice Sotomayor shared in her dissenting opinion, "The majority's vision of race neutrality will entrench racial segregation in higher education because racial inequality will persist so long as it is ignored."[17] Although nonprofit museums are distinct from higher education institutions in many ways, there are many parallels between the two. For instance, nonprofit museums are educational and are part of the nonprofit sector, as are the majority of universities. Similarly, as higher education continuously needs to promote diversity and not ignore the importance of equity and inclusion, museums also need to actively advocate for more diversity and inclusion in their practices. This paper asserts that race, ethnicity, and other similar types of socioeconomic factors should be considered when ascertaining how to address elitist art museum practices.

For clarity, it is important to define several terms in the article. The meaning of exclusivity or exclusive practices needs to be distinguished from the meaning of exclusivity of tax-exempt purpose activities as explained in Section 501(c)(3) of the Internal Revenue Code,[18] which limits nonprofits' activities to be *exclusively* about tax-exempt purposes. Here, the paper uses exclusion in both ways: (1) as in *social exclusion*, a broad term explaining that some are "prevented from fully participating in the different systems of society"[19] and (2) as in operating *exclusively* for tax-exempt purposes. Diversity has many meanings but here it is used rather narrowly, referring to diversity in race, ethnicity, gender, sexual orientation, socioeconomic status, educational levels, and other identity-based qualities that are often immutable or rooted in one's culture and upbringing. Equity is "the fair and just treatment of all members of a community," and accessibility is "giving equitable access to everyone along the continuum of human ability and experience."[20]

16. *Id.* at 234-36, 242.
17. *Id.* at 383-84.
18. I.R.C. § 501(c)(3).
19. Sandell, *supra* note 8, at 404.
20. AMERICAN ALLIANCE OF MUSEUMS, *supra* note 2, at 8.

Inclusion represents the intentional efforts to invite diverse voices and perspectives to be fully heard and incorporated in every level and decision-making process of an entity.[21]

The scope of the paper is mainstream art museums, an arts sub-industry, while the analysis and arguments overall can also be applicable to other arts and cultural nonprofits. The article has four parts. Part I presents background and information regarding the context of the museum field. Part II presents critical race theory (CRT). CRT is used to explain and critique the systematic and exclusive current practices of museums. Part III lays out two important legal doctrines of 501(c)(3). First, Section A of Part III discusses the *no substantial private benefits* provision of 501(c)(3) organizations as articulated in Treasury Regulation § 1.501(c)(3)-1(d)(1)(ii) and demonstrates how art museums may be violating this provision by serving one narrow group of people, thus acting more like a social club. Section B of Part III covers the public policy doctrine regarding discrimination applied to nonprofit organizations as discussed in *Bob Jones University v. United States*. One such public policy is to not discriminate by limiting people's accessibility to nonprofit services based on race and ethnicity. Part IV introduces open systems theory to justify how more structural and external pressures can lead to systematic and sustainable changes in the museum field. Open systems theory is presented as a paradigm-shifting framework. This part describes "feedback functions" that open systems utilize to stay stagnant (maintaining the status quo through a negative feedback function) or instill changes (renew and transform through a positive feedback function). Part V compares museums to nonprofit hospitals and discusses the benefits (and drawbacks) of the community benefit standard hospitals use as an effective way to beget internal changes utilizing more positive feedback functions, which if applied, a system or museum can change to be more relevant to external needs and interests. This section presents the community benefit standard for museums as an affirmative action plan that can help transform museums to be more consistent with the no substantial private benefit provision and the public policy doctrine with a plan for enforceability, making museums truly deserving of current tax benefits.

II. BACKGROUND AND CONTEXT

While museums are primarily funded by public monies in many locations (e.g., most European and Asian countries), the predominant U.S. model[22] is that museums are private nonprofits. More specifically,

21. *See id.*

22. This prominent nonprofit structure for art museums in the U.S. is a unique feature of U.S. cultural policy in that it funds arts and cultural organizations, including museums, through de facto tax subsidies that are indirectly given to these organizations by a form of tax exemptions for

while there are a handful of museums that are entirely public (e.g., Smithsonian museums) and for-profit (e.g., the Museum of Sex and International Spy Museum), most museums in the U.S.—especially art museums, which are the focus of this article—are nonprofit organizations with 501(c)(3) status.[23]

Today's mainstream art museums and cultural organizations still maintain some of the original purposes and practices of early arts organizations in serving elitist culture and "showing it off," so to speak, to people who are not part of that culture. For example, the Louvre was one of the first museums that opened its doors to the general public in 1793.[24] While it was created with the idea that royal collections should be accessible to the general public, it was the nation's way to display its power and wealth to people who were deemed to be unable to understand the sophisticated cultures of the elite, rather than providing equal access to them.[25] As DiMaggio points out, "[t]hese institutions were to provide a framework . . . for the definition of high art, for its segregation from popular forms."[26] By establishing cultural institutions that are "open" to the public, social elites created, presented, and preserved their status quo.

This elitist model has been perpetuated and maintained in museum practices in a structural and systemic way; in other words, museums have excluded certain groups of people from using their services by design.[27] For example, museums have served a small fraction of the overall population—those who are white, wealthy, older, and well-educated.[28] Additionally, people who govern and work in museums have been largely homogeneous culturally, socioeconomically, and educationally.[29] Forty-six percent of museum boards were reportedly all white, meaning about half of all museum

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organizations and deductions for donors who give to these nonprofit arts and cultural organizations. Most other countries use the public funding model where most of the funding for nations' arts and cultural organizations is funded by tax dollars directly with some private funding, although more and more countries are adopting the private funding model than ever before. *See generally* OECD, *Public and Private Funding for Cultural and Creative Sectors, in* THE CULTURE FIX CREATIVE PEOPLE, PLACES AND INDUSTRIES (2022).

23. ROLAND KUSHNER & RANDY COHEN, NATIONAL ARTS INDEX 2016: AN ANNUAL MEASURE OF THE VITALITY OF ARTS AND CULTURE IN THE UNITED STATES: 2002-2013 at 43 (2016), https://www.americansforthearts.org/sites/default/files/NAI%202016%20Final%20Web%20Res.042216.pdf.

24. McClellan, *supra* note 10, at 5.

25. *Id.*

26. Paul DiMaggio, *Cultural Entrepreneurship in Nineteenth-Century Boston: The Creation of an Organizational Base for High Culture in America*, *in* 4 MEDIA CULT. SOC. 33, 40 (1982).

27. *See* Fleming, *supra* note 8.

28. *See* FARRELL & MEDVEDEVA, supra note 1; *see* Fleming, *supra* note 8; *see* NATIONAL ENDOWMENT FOR THE ARTS, *supra* note 3.

29. *See* FARRELL & MEDVEDEVA, *supra* note 1; *see* Fleming, supra note 8; *see* McClellan, *supra* note 10.

boards do not include one single person of color.[30] Board members and upper-level administrators working in museums are also predominantly white and socioeconomically affluent.[31] This homogeneity has been reduced in recent years with an increasing number of female directors and diverse staff members being hired, yet males still occupy most upper-level leadership positions.[32]

This exclusive nature of arts consumption, as reflected in visitor composition, and linked issues of management composition in museum settings, has been intensified and scrutinized during the time of financial and societal crises as seen in the recession caused by the COVID-19 pandemic. For example, many museums eliminated lower-level positions to cope with the financial challenges rather than distributing the burden throughout all ranks, which often disproportionately affected people of color.[33] The public outcry for changing traditional museum structure, culture, and practices has been getting louder in recent years,[34] to the point that museum workers started to organize into unions, despite museums historically being the least unionized compared to other arts and cultural subsectors.[35] They demanded more transparency (like sharing salary information publicly in a shared spreadsheet)[36] and advocated for collective efforts for radical change within the museum field and its practice.[37]

III. CRITICAL RACE THEORY: WHY MUSEUMS HAVE BECOME EXCLUSIVE AND ELITIST

CRT can explain why museums have been serving the privileged few by emphasizing the systemic and ingrained nature of exclusive practice in the industry (i.e., inaccessible by most people). CRT is a body of legal scholarship that is committed to radical examination of systematic racism institutionalized in and by law[38] toward redemption, not deconstruction.[39] CRT problematizes the notion that laws and

30. *See* AMERICAN ALLIANCE OF MUSEUMS, *supra* note 2.

31. *See* FARRELL & MEDVEDEVA, *supra* note 1.

32. *See* Westermann et al., *supra* note 10, at 7.

33. Anderson, *supra* note 8.

34. Dafoe & Goldstein, *supra* note 8.

35. Tom Seymour, *State of the Unions: Why US Museum Workers are Mobilising Against Their Employers*, ART NEWSPAPER (Feb. 2, 2022), https://www.theartnewspaper.com/2022/02/02/state-of-the-unions-a-new-renaissance-at-us-museums.

36. Alex Greenberger, *'It's Helpful to Know All Scales': Online Spreadsheet Discloses Museum Workers' Salaries*, ARTNEWS (Feb. 2, 2022), https://www.artnews.com/art-news/news/google-spreadsheet-museum-workers-disclose-salaries-12670.

37. DEATH TO MUSEUMS, https://deathtomuseums.com (last visited November 9, 2020).

38. Derrick A. Bell, *Who's Afraid of Critical Race Theory*, 1995 U. ILL. L. REV. 893, 898 (1995).

39. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 743 (1994).

policies can be written from a neutral perspective.[40] It seeks to criticize and attack an ostensibly neutral legal system that systematically "disempowers people of color."[41] "From the perspective of CRT, some positions have historically been oppressed, distorted, ignored, silenced, destroyed, appropriated, commodified, and marginalized—and not accidentally,"[42] perpetuating racial subordination systematically.[43] Because CRT recognizes how racialization is linked to sustaining a power structure that benefits one group over others,[44] it can be applicable to other types of oppression based on gender, socioeconomic class, sexual orientation, physical and mental abilities, age, and more. Realizing this power structure and the systemic nature of it is the first step in trying to move "toward advantageous perspective building and concrete advocacy on behalf of those oppressed by race and other interlocking factors of gender, economic class, and sexual orientation."[45]

A society's laws and policies, therefore, are not neutral and reflect the preference and benefits of the dominant group in an effort to maintain and protect their power while marginalizing groups with less power and representation.[46] This setup is played out in the museum industry, where arts, culture, and stories of minoritized groups are left out, resulting in lesser participation of consuming, producing, and managing goods and services through museums. Museums, like many other institutions, have long represented white and upper-class values, privileging the dominant group and perpetuating the system of social and racial exclusion.[47] While more equitable cultural and arts organizations[48] have been established in recent decades, most mainstream art museums still preserve the arts and culture of the dominant group. For example, 85% of artists represented in major U.S. art museums were white and 87% were male, demonstrating how a majority of art museum collections continue to reflect prevailing racial

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40. Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle,* 65 S. CAL. L. REV. 2231, 2282-83 (1992); *see* Bell, *supra* note 38, at 901.

41. *See* Bell, *supra* note 38, at 900.

42. *Id.* at 901.

43. Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243 (2017).

44. *Id*.

45. *See* Bell, *supra* note 38, at 902.

46. *See* Lawrence, *supra* note 40; *see* Bell, *supra* note 38.

47. *See* Harris, *supra* note 39.

48. For example, Cincinnati, Ohio is a home to the National Underground Railroad Freedom Center, whose mission is to "pursue inclusive freedom by promoting social justice for all, building on the principles of the Underground Railroad." *Our History*, FREEDOM CENTER (last visited Feb. 4, 2023), https://freedomcenter.org/about/history. Another example, more specific to art is the Leslie-Lohman Museum of Gay and Lesbian Art whose mission is to provide "a platform for artistic exploration through multi-faceted queer perspectives. We embrace the power of the arts to inspire, explore, and foster understanding of the rich diversity of LGBTQIA+ experiences." *About Us*, LESLIE-LOHMAN MUSEUM OF GAY AND LESBIAN ART (last visited Feb. 4, 2023), https://www.leslielohman.org/about-us.

and gender hierarchies.[49] The 85% white and 87% male demographics represented in art museums differs from the overall visual artists demographics of 73% white and 45% male.[50] Although it may not be fair to compare current artist demographics to those of artists represented in mainstream art museums—most of whom died a long time ago—it shows how much museums have not caught up to demographic shifts and have instead relied on general museum cultural inertia for collection decisions rather than deliberate and inclusive acquisitions.

As seen in the example of arts and cultural organization origin[51] as well as the dominant representation of white and male art in mainstream U.S. art museums, museums were built by people of power and their ideology of arts and culture defined what is valuable, which results in its continuous reproduction in institutional structures (e.g., arts and cultural practices and policies).[52] The idea of social reproduction is a powerful one. While social structures created by people and their systems should be mutable, doing so proves to be extremely difficult.[53] Sandell echoed this point, arguing that museums play a large role in safeguarding dominant values, arts, and cultures.[54] To break this perpetual cycle, one must critically examine the pattern and system of exclusivity and ask critical questions that can help dismantle the exclusive practices. Then, we can start to find ways to address the root problems rather than dealing with the surface-level symptoms, and step toward re-integrating the excluded.[55]

While art museums do not purposefully block out people of color or low socioeconomic status from using their services, the end results are just that. This stems from many sources, such as visitors not feeling welcome, feeling judged or looked down on by staff or other patrons, or there being little or no art or programming that represents their art interests, lives, or cultures. As explained above, most mainstream art museums in the U.S. collect and display works from white artists, male

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49. Chad M. Topaz et al., *Diversity of Artists in Major US Museums*, 14 PLOS ONE 1, 7-9 (2019).

50. *Fine Artist Demographics and Statistics in the US*, ZIPPIA (Dec. 14, 2021), https://www.zippia.com/fine-artist-jobs/demographics/.

51. *See* DiMaggio, *supra* note 26, at 40.

52. Pierre Bourdieu, *Cultural Reproduction and Social Reproduction*, *in* CLASSIC READINGS IN RACE, CLASS, AND GENDER INEQUALITY 257, 267-68 (David B. Grusky & Szonja Szelenyi eds., 2006).

53. A great text examining this phenomenon is JAY MACLEOD, AIN'T NO MAKIN' IT: ASPIRATIONS AND ATTAINMENT IN A LOW-INCOME NEIGHBORHOOD (2009). This book illustrates how difficult it is to break out of one's social structure and status because of the stubbornness and injustice reflected in our larger, societal structure that is reproduced from generation to generation. MacLeod demonstrates how social inequity and immobility based on race and poverty play out in real people's lives over a life-time and how difficult it is to break out of the "status quo" that keeps people disadvantaged and out of reach for opportunities for social mobility.

54. *See* Sandell, *supra* note 8.

55. *Id.*

artists[56], and works collected and donated by wealthy white families.[57] While museums play an important role in promoting the arts and cultural education through the use, preservation, and research of their collections—contributing public value to society—this service is mostly used by a small segment of the population that is remarkably homogeneous.

Considering this reality, the question of whether these nonprofits deserve the tax-exempt status currently afforded to them becomes a critical one. Looking at the requirements for tax-exempt status, one wonders whether nonprofit art museums might be violating the prohibition of conferring substantial private benefits by serving a narrowly defined group. Put another way, are these entities perpetuating practices and business models against the spirit of the public policy doctrine of the U.S. tax law? This article concludes that the current approach taken by nonprofit art museums violates the spirit, if not the letter, of U.S. tax law. The section below discusses how museums may be violating two nonprofit legal doctrines: *no substantial private benefits* and *public policy doctrine*.

IV. NO PRIVATE BENEFITS RULE AND PUBLIC POLICY DOCTRINE

The arts at nonprofit arts organizations must be accessible by diverse people because they belong to the community and are funded with a variety of sources, not just public or private sources. Because most U.S. museums have a 501(c) tax-exempt organization status as public-benefiting organizations, [58] nonprofit museums receive full tax benefits afforded under both § 501(c)(3) for tax-exemption and § 170(c) for donor tax deduction.[59] To deserve these tax benefits, they must provide public benefiting services and abide by public policy, such as encouraging equal access to all people regardless of their backgrounds.

A. No Substantial Private Benefit Rule: Providing Public Benefiting Services

Section 501(c)(3) provides that entities "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or . . . for the prevention of cruelty to children or animals" are entitled to tax exemption.[60] Section 170(c) allows the tax deduction on charitable contribution that are donated to

56. *See* Topaz et al., *supra* note 49, at 11.
57. *See* Jung, *supra* note 8, at 258.
58. *See* KUSHNER & COHEN, *supra* note 23, at 43.
59. I.R.C. § 170(c)(2)(B).
60. I.R.C. § 501(c)(1)-(3).

organizations described under § 501(c)(3).[61] For a contrasting example, 501(c)(7) social clubs are not qualified for donor tax deduction because they do not fall under §170(c).[62] As social clubs serve only its members for a narrow purpose, "the tax code treats social clubs least favorably of all mutual benefit organizations."[63] Despite these differences, the practice of many museums has been more like a social club where a certain group of people feel comfortable visiting. For example, an organization that is membership-based, such as a country club and other types of clubs and civic leagues, benefits its members only. According to Cornes and Sandler, "a club is a voluntary group deriving mutual benefit from sharing one or more of the following: production costs, the members' characteristics . . . , or a good characterized by excludable benefits."[64] Club goods are either excludable to nonmembers or priced higher to those who do not belong to the club.[65] This built-in exclusiveness distinguishes clubs from public benefit organizations that are open to the public. In demonstrating the difference between the two types of nonprofits, when they are dissolved, the assets of public benefit nonprofits may go to other similar nonprofits while those of social clubs are distributed among the members of the club.[66]

The resemblance of museums to social clubs is further found in the fact that most board members are users of the museums' services, which is not the case in other nonprofits such as a homeless shelter where the donors and users of the organizational services do not overlap. Ostrower illustrated the elitist and self-serving intention of being on museum boards; some board members donate money or works of art in exchange for opportunities to network with "prestigious institutions with members of their class."[67] Additionally, while museums memberships are generally considered contributed income, a closer look at most museums' membership structures reveals that members enjoy benefits such as free admission, discounts at museum stores, and access to exclusive tours and pre-openings of exhibitions, whereas nonmembers pay the regular higher prices and do not have access to member-only events.[68] Social clubs restrict access to paying members, and serving nonmembers is usually discouraged; any income from

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61. I.R.C. § 170(c).

62. *Id.*

63. DAVID BRENNEN, DARRYLL JONES, BEVERLY MORAN & STEVEN WILLIS, THE TAX LAW OF CHARITIES AND OTHER EXEMPT ORGANIZATIONS 653 (4th ed. 2021).

64. RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS 33–34 (1986).

65. Roland Kushner & Arthur E. King, *Performing Arts as a Club Good: Evidence from a Nonprofit Organization,* 18 J. CULT. ECON. 15, 16 (1994).

66. Treas. Reg. § 1.501(c)(3)-1(b)(4).

67. *See* Olivares & Piatak, *supra* note 1, at 122; *see* OSTROWER, *supra* note 1.

68. *Membership Levels and Benefits*, MUSEUM OF FINE ARTS, HOUSTON, (2024), https://www.mfah.org/membership/levels.

nonmembers is subject to unrelated business income tax.[69] Most museums' membership programs share this characteristic of a 501(c)(7) club, yet their dues are tax exempt.[70]

Art museums, by their legal status of tax exemption, should not act like social clubs by only providing services to its members. In fact, they are prohibited from doing so by the *no substantial private benefit* provision of § 501(c)(3) and Treasury Regulation § 1.501(c)(3)-1(d)(1)(ii). While this provision is not explicitly mentioned under § 501(c)(3),[71] Treasury Regulation § 1.501(c)(3)-1(d)(1)(ii) clearly prohibits an organization from operating "for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests."[72] This provision applies to anyone who is deemed to have received private benefits from 501(c)(3) organizations, not just people directly involved with the organization, such as board members, employees, and their families.[73] Additionally, the benefits do not have to be pecuniary.[74] Just lacking a public purpose and benefiting a small group of people could violate this provision.[75] While nonprofit museums in general may not be specifically violating this provision, they are dangerously close to benefiting one narrowly defined population (i.e., white, wealthier, and better educated) much more than any other population of this country. This is an alarming issue, especially when the country is moving toward a minority-majority state.[76]

In *American Campaign Academy v. Commissioner*, the Internal Revenue Service (IRS) challenged the petitioner (taxpayer) to prove that the Academy was operating exclusively for its exempt purposes. The Academy was a school the petitioner operated, designed to train career campaign managers and other political campaign professionals.[77] Its

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69. *Id.*; *Social Clubs*, INTERNAL REVENUE SERVICE (Aug. 18, 2021), https://www.irs.gov/charities-non-profits/other-non-profits/social-clubs.

Even tax-exempt organizations pay income tax on revenue that is earned from unrelated activities that fall outside of exempt purposes. In which case, they must pay unrelated business taxable income (UBTI) on those revenues. An activity is unrelated business when (1) it is a trade or business, (2) regularly carried on, and (3) not substantially related to furthering the except purpose of the entity although there are several exclusions and exceptions. *Unrelated Business Income Defined*, INTERNAL REVENUE SERVICE (Jan. 05, 2023), https://www.irs.gov/charities-non-profits/unrelated-business-income-defined.

70. *See* Kushner & King, *supra* note 65, at 16–17.

71. *See* BRENNEN ET AL., *supra* note 63, at 331.

72. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 2024).

73. I.R.C. § 501(c)(3).

74. *Id.*

75. Easter House v. U.S., 12 CI. Ct. 476, 482 (1987).

76. Justin Gest, *What the 'Majority Minority' Shift Really Means for America*, N.Y. TIMES: OPINION (Aug. 24, 2021), https://www.nytimes.com/2021/08/24/opinion/us-census-majority-minority.html.

77. Am. Campaign Acad. v. Comm'r, 92 T.C. 1053 (1989) at 1054–55 (1989).

precursor program was established by the National Republican Congressional Committee (NRCC), "an unincorporated association comprised of Republican members of the United States House of Representatives," that trained its own campaign professionals.[78] The petitioner even stated that the purpose of the school was to solve the "outgrowth" problem of the program run by the NRCC.[79] The National Republic Congressional Trust (NRCT), "an organization that collects political contributions and uses such funds for purposes approved by the Federal Election Commission," exclusively funded the Academy.[80] In the petitioner's response to the inquiry by the IRS, it stated that "the predominant party affiliation of the candidates for whom Academy graduates are working in 1986 is Republican, but the Academy has no exact numbers."[81] The Revenue sent a final ruling letter to the petitioner stating, "[y]ou benefit Republican Party entities and candidates more than incidentally. Also, your activities serve the private interests of Republic Party entities rather than public interest exclusively."[82]

Section 501(a) grants tax exemptions to organizations that meet criteria laid out in § 501(c).[83] To be exempt under § 501(c)(3),[84] an entity must meet the following criteria: (1) it must be organized and operated exclusively for specified exempt purposes; (2) no part of its net earnings may inure to the benefit of insiders (private shareholder or individual); (3) no part of its activities may constitute partaking in any political campaign on behalf of specific candidates for public office; and (4) no substantial part of its activities may consist of political or lobbying activities.[85] Here, the issue lies with the first provision of operating exclusively for exempt purposes.[86] The operational test is used to determine if an organization is using its resources and activities to further exempt purposes, looking beyond the four corners of the organization's mission to determine the actual motivation behind the organization's activities.[87] When an organization provides services for the benefit of private interests, the organization does not, by definition, operate exclusively for exempt purposes.[88]

This raises two critical questions: (1) whether an organization deemed a nonprofit, tax-exempt organization is serving private

78. *Id.* at 1056.
79. *Id.*
80. *Id.* at 1061.
81. *Id.*
82. *Id.* at 1063.
83. I.R.C. § 501(a).
84. I.R.C. § 501(c)(3).
85. *Am. Campaign Acad.*, 92 T.C. at 1062.
86. *Id.* at 1063.
87. *Id.* at 1064.
88. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 2017).

interests, rather than public interests, even when the parties receiving the benefit do not have a private interest in the organization's activities[89] and (2) whether the benefit conferred to a specific group is substantial, not merely incidental.[90] The court in *American Campaign Academy* found that benefits for private interest conferred to even disinterested parties can be seen as evidence of the organization not operating exclusively for exempt purposes.[91] In other words, nonprofits not only violate the no private benefits provision when they confer benefits to shareholders or individuals having a personal interest in the organization but also when benefits are conferred to any other specific groups not specifically connected to the organization (such as a third party who is simply using the nonprofit's service). The court also determined that there was an overwhelming amount of evidence to support that the benefits to private parties were substantial, with the program being an outgrowth of the previous NRCC program,[92] exclusively funded by the NRCT,[93] two of three initial directors of the program being significantly tied to the Republican party,[94] and the majority of its graduates working for the Republican candidates and party entities.[95] Based on these points, the court ultimately concluded "that petitioner operated to advance Republican interests."[96]

Therefore, the court in *American Campaign Academy*[97] found that there was a violation of the no substantial private benefits provision when the taxpayer primarily served one political party and did not show sufficient evidence of making an effort to serve both political parties.[96] The court said, "[t]he administrative record and the partisan affiliation of the candidates served fail to establish that petitioner broadly distributed its secondary benefits[98] among political entities and candidates in a nonselect manner."[99] Put another way, a taxpayer can jeopardize its exemption status even when providing private benefits indirectly and unintentionally.[100]

There is a parallel that can be drawn from the *American Campaign Academy* case to current museum practices. Nonprofit art museums appear to be operating contrary to their exempt mission when they do

89. *Am. Campaign Acad.*, 92 T.C. at 1067.
90. *Id.* at 1069.
91. *Id.* at 1069–70.
92. *Id.* at 1070.
93. *Id.*
94. *Id.*
95. *Id.* at 1071.
96. *Id.* at 1072.
97. *Id.*
98. *Id.* at 1073–74 (explaining that the primary benefit is learning by the students and the secondary benefit is conferred on the employers).
99. *Id.* at 1077.
100. I.R.S. G.C.M. 39,862, WL 776308, at *10–13 (Nov. 22, 1991).

not broaden who benefits from their services. While museum users certainly overlap with their own board members and donors, the group that benefits most from museum services are disinterested parties who share the same characteristics with museum boards and management. While most museum services, exhibitions, and programs are geared toward this specific group, the benefits would be considered substantial, not merely incidental, and can be seen as evidence of the organization not operating exclusively for exempt purposes.[101] Museums have not shown sufficient evidence of making an effort to serve all people and are instead providing private benefits to a select group. There may be enough evidence to support that museums' benefits to private parties are substantial, with their exhibitions and programs valuing a certain type and class of art, being funded by white and wealthy donors, and educating the homogeneous group. Like the petitioner in *American Campaign Academy*, museums can jeopardize their exemption status when they are providing private benefits to a select group indirectly and unintentionally. Museums that primarily serve the interests of white, wealthy, and highly educated groups may be violating the "no substantial private benefits" provision even though the violation may not be entirely intentional.[102]

B. Public Policy Doctrine: Art Museums and de Facto Discrimination

Museums qualify as exempt because their exclusive purpose is educational (the term *exclusivity* is used here as operating almost exclusively for exempt purposes as per section 501(c)(3) of the Internal Revenue Code).[103] While they fulfill that purpose through the use, preservation, and research of important artistic, cultural, and historical objects and stories, museums predominantly only educate those who share the cultural capital of "high art and culture." This is contrary to the public policy of this country, and "[a]ll charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy."[104] One of the public policies of this country is to not discriminate based on race and ethnicity (other identity-based characteristics could be implicated here as well).[105] In other words, for entities to be eligible for 501(c)(3), they not only have to provide some sort of public benefit, but that benefit should

101. *Am. Campaign Acad.*, 92 T.C. at 1069–70.

102. Yuha Jung, *Differentiating 501(c)(3) Public Benefiting Art Museums from 501(c)(7) Social Clubs*, CTR. FOR ART LAW (March 22, 2023), https://itsartlaw.org/2023/03/22/differentiating-501c3-public-benefiting-art-museums-from-501c7-social-clubs.

103. I.R.C. § 501(c)(3).

104. Rev. Rul. 71-447, 1971-2 C.B. 230, 2.

105. Bob Jones Univ. v. U.S., 461 U.S. 574, 592–93 (1983).

be open to the public, not limited to certain people based on their race or other protected characteristics.

Bob Jones University v. United States provides a justification on how nonprofit organizations should be equitable in providing access to their services. In *Bob Jones*, the university (taxpayer) did not allow admission of students who were engaged in interracial relationships.[106] It had explicitly discriminatory admission policies based on race. Some of these policies included: "there is to be no interracial dating"; "students who are partners in an interracial marriage will be expelled"; and "students who date outside of their own race will be expelled."[107] The Internal Revenue Service notified the university that it would revoke the university's tax-exempt status.[108] The court stated that it is clear that being qualified as an exempt organization requires that "its activity is not contrary to settled public policy."[109] This decision embraces "the common law 'charity' concept,"[110] which is implied in Revenue Ruling 71-447[111] that first announced § 170 and § 501(c)(3). Here, charity is broadly defined as "an institution seeking tax-exempt status [that] must serve a public purpose and not be contrary to established public policy."[112] The court further explained that Congress intended to provide tax benefits to private organizations as an incentive to "serve a useful public purpose or supplement or take the place of public institutions of the same kind."[113] Therefore, if this organization is not charitable, not serving the public, and going against the established public policy, it cannot be exempt.

The court ruled that the taxpayer was not charitable and therefore not eligible for the exemption status because it was engaging in activities that are discriminatory and against the public policy of this country.[114] The court added:

> [D]eterminations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not "charitable" should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer

106. *Id.* at 580–81.
107. *Id.*
108. *Id.* at 581.
109. *Id.* at 585.
110. *Id.*
111. Rev. Rul. 71-447, 1971-2 C.B. 230.
112. *Bob Jones Univ.*, 461 U.S. at 586.
113. *Id.* at 587–88.
114. *Id.* at 598–99.

> be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice.[115]

Section 501(c)(3) museums are exempt from federal income tax and most state tax (income, property, and other excise taxes) obligations; they can receive tax deductible gifts from their donors.[116] These benefits act like built-in government subsidies mandating arts and cultural organizations to provide goods and services that are beneficial to the wider communities they are part of.[117] In other words, if museums do not provide services to all, they do not deserve to receive tax exemptions and their donors should not enjoy the deduction of their income tax. If we look at the tax exemption as federal financial assistance (FFA), this argument becomes stronger, mandating museums to be inclusive of all types of people as their audiences. Title VI of the Civil Rights Act of 1964 stipulates that organizations receiving FFA must agree not to discriminate following the rules of the civil rights laws (no discrimination based on race, gender, disability, age, or sexual orientation).[118] Nonprofit organizations receive public funding (not only literal government funding through grants, but also from tax exemption which is the equivalent of a government subsidy), requiring them to follow the federal public policy and anti-discrimination laws.[119]

Scholars disagree on whether tax exemption should be considered FFA, and courts have presented mixed views as well.[120] Under Title VI of the Civil Rights Act of 1964, FFA is narrowly defined, sometimes only to be constituted as government grants or loans.[121] However, courts have not been clear about what constitutes FFA: some have stipulated tax exemptions as such and others have not.[122] For example, the federal district court in *McGlotten v. Connally* reached a conclusion that some federal tax benefits are considered FFA for the purposes of Title VI of the Civil Rights Act of 1964.[123] The Court in *McGlotten* said:

> [T]he exemption provided fraternal orders by § 501(c)(8) is of wider scope, shielding from taxation not only member-generated

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115. *Id.* at 592.

116. I.R.C. § 170(a)(1).

117. Yuha Jung & Neville Vakharia, *Open Systems Theory for Arts and Cultural Organizations: Linking Structure and Performance*, 4 J. ARTS MANAG. LAW SOC. 257, 261 (2019); *see also*, Yuha Jung, *Economic Discussion of Conflict between Public Education Policies and Common Good Arts in the United States*, 48 J. ARTS MANAG. LAW SOC. 98, 99 (2018).

118. David A. Brennen, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 BYU L. REV. 167, 170, 192 (2001).

119. *Id.* at 170.

120. *Id.* at 172.

121. *Id.* at 170, 192.

122. *Id.* at 194.

123. McGlotten v. Connally, 338 F. Supp. 448, 462 (D.D.C. 1972).

> funds but passive investment income as well. . . . Since it is available only to particular groups, it operates in fact as a subsidy in favor of the particular activities these groups are pursuing. It thus falls within the coverage of the Civil Rights Act.[124]

If the *McGlotten* court determined that the exemption for 501(c)(8) fraternal beneficiary societies is considered FFA, it would presumably also conclude that the exemption for 501(c)(3), with the most favorable tax treatment among all nonprofit categories, is FFA.

However, another federal district court in *Bachman v. American Society of Clinical Pathologists* concluded that tax-exemption alone is not FFA as required by § 504 of the Rehabilitation Act of 1973.[125] Brennen argues that there are sound grounds for treating tax exemption status as equivalent to receiving FFA.[126] Congress has not expressed that FFA does not include tax benefits,[127] and the court in *Grove City College v. Bell* concluded that FFA includes both direct and indirect subsidies.[128]

Even if tax exemption is not considered FFA, many museums receive government funding (federal, state, and local) via grants, making them subject to civil rights laws. While the "de facto" discrimination of museums discussed earlier is different from the intentional discrimination prohibited in *Bob Jones* and, therefore, may not be seen as actively opposing public policy, its effect could be hurtful and widespread: if museums truly deserve the tax exemptions and tax deductions enjoyed by their donors, they must be inclusive and provide relevant education to a more diverse public.[129]

However, as Salamon highlights in the concept of *philanthropic particularism*, nonprofit organizations can serve a particular subgroup of the population rather than the broader public interests.[130] While this is somewhat contrary to the tax-exempt status of nonprofit arts organizations that have an obligation to closely align their activities with public policy interests,[131] what Salamon is emphasizing is that some people can value the arts and fund them while others can fund sports and enjoy them. What requires caution is valuing the arts of one

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124. *Id.*

125. Bachman v. Am. Soc'y of Clinical Pathologists, 577 F. Supp. 1257, 1265 (D.N.J. 1983).

126. *See* Brennen, *supra* note 118.

127. *Id.* at 226.

128. Grove City Coll. v. Bell, 465 U.S. 569–70 (1984).

129. *See* Jung, *supra* note 8; Bob Jones Univ. v. U.S., 461 U.S. 574, 575, 604–05 (1983).

130. Lester M. Salamon, *The Resilient Sector: The Future of Nonprofit America*, *in* THE STATE OF NONPROFIT AMERICA 3, 10 (Lester M. Salamon ed., 2010).

131. Helmut K. Anheier & Stefan Toepler, *Policy Neglect: The True Challenge to the Nonprofit Sector*, 10 NONPROFIT POL'Y F. 1, 1 (2019); Lori A. McMillan, *Noncharitable Nonprofit Organizations and Tax Policy: Working toward a Public Benefit Theory*, 59 WASHBURN L. J. 301, 320 (2020); Young-Joo Lee, *Nonprofit Arts Organizations' Pursuit of Public Interests: The Role of Board Diversity*, 12 NONPROFIT POL'Y F. 563, 565 (2021).

group and educating the associated narrow group of privileged people,[132] while not providing the same opportunities to diverse populations who also enjoy the arts. Instead of abandoning the nonprofit model of most art museums, we can improve it by adopting a policy that can lead to more affirmative action. This suggestion is also aligned with critical race theory that seeks to acknowledge and critique the power structure and systemic injustice toward redemption and transformation, and not the deconstruction or destruction of existing systems.[133] To transform museums to be more inclusive and diverse and not dismantle them all together, the author sees having a set of standards that is enforceable as a first step toward broader and systemic change. The section below presents open systems theory as an approach that can lay a foundation for why such standards are necessary for a structural and transformational change in the nonprofit art museum sector.

V. OPEN SYSTEMS THEORY FOR TRANSFORMATION

In addressing structural issues leading to transformational, field-wide, and sustainable changes, a leverage point can affect the system in the most profound way. Using leverage points stems from open systems theory which views the environment as a necessary part of organizational success, and should never be ignored.[134] In other words, systems theory explains how an organization (e.g., museums), entity (e.g., state or municipality), or subsystem (e.g., criminal legal system) is part of a larger social ecosystem, and for it to thrive, it must work with its interconnected parts in relation to the external environment. The organization and its environment maintain a symbiotic relationship

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132. Pierre Bourdieu, the infamous French sociologist, coined the idea of social and cultural capital. Social capital refers to a person's social network and relationships with others who hold power and status in society. Having proximity to such a network provides more social and professional opportunities to those who belong in that social group or class. Cultural capital refers to intangible assets a group of people possesses, such as skills and knowledge in certain art forms. While social and cultural capital go hand in hand, when it comes to museum culture, cultural capital tends to be more important. For example, a person exposed to more educational opportunities and fine arts as a child tends to have the knowledge and language to appreciate those art forms and culture (e.g., museum culture).

According to Bourdieu, cultural capital is something often inherited from family members during the earliest days of life. Therefore, people who do not possess certain social and, especially, cultural capital may not feel comfortable entering certain cultural spaces (e.g., museums). Due to the nature of cultural capital transferred within familiar and close social structures, it tends to be maintained in that social group or class making it very difficult to be shared with others out of that social circle.

For more understanding of social and cultural capital, see PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE 22–23, 65, 81–84, 112–15, 122 (Richard Nice trans., 8th prtg.1996).

133. *See* Harris, *supra* note 39, at 743.

134. *See* Lynn M. LoPucki, *Systems Approach to Law*, 82 CORNELL L. REV. 479, 483, 498, 522 n.89 (1997).

where one cannot exist without the other, and both influence one another in order to achieve a goal or mission.[135]

This theory is especially fitting as one looks at the law as part of the complex "law-related" system.[136] Formal law plays a part in these law-related systems—for example, the criminal justice system or the banking system.[137] Systems, including biological ones, operate with specific goals in mind.[138] For instance, biological systems aim to survive, adapt, and thrive within their environments, while other systems, like social or organizational ones, might focus on addressing societal issues or achieving particular objectives.[139] Because of this layered and interconnected nature of complex systems, solving a problem or meeting a goal is not always about formal law (e.g., resolving issues at courts); "formal law is not what structures society."[140]

More practical and fitting ways to design a law-related system, like nonprofit laws and regulations, are to look at them as part of concrete and complex systems to operationalize their goals rather than treating them as something abstract.[141] Seeing a law-related system as something concrete, physical, and empirical helps a system analyst or designer to identify any malfunction in the system against the goals of the system, limiting unintended consequences and improving the system over time.[142] "Once the analyst determines what functions law performs in the law-related system, the analyst can more easily imagine physical systems that might substitute for law."[143] Having blueprints that connect goals to intended empirical results can help identify where malfunctions arise and where to leverage to rectify the malfunctions in the systems.[144]

Museums as nonprofit organizations are parts of larger systems and are governed by nonprofit laws and regulations, forming a law-related system. They are also social systems where rules, policies, museum actors, and other environmental elements interact with each other in fulfilling their goals or mission. By classifying them as such, we can see them as more concrete, physical, and empirical entities that exist as parts of the large law-related system trying to fulfill their specific goals. Museums have traditionally been in a compartmentalized and

135. *Id.* at 487, 496–97.
136. *Id.* at 488.
137. *Id.*
138. *Id.* at 485.
139. *Id.*
140. *Id.* at 489.
141. *See id.*, at 488-89.
142. *See id.* at 502.
143. *Id.* at 513.
144. *Id.* at 522.

hierarchical organizational structure,[145] insular and inward-focused, and have not necessarily embraced their large systems and environment. In 1942, Low criticized this top-down hierarchical and compartmentalized museum model and identified it as an obstacle to museums becoming organizations that are inclusive to the community (as becoming a part of the larger community embraces its interconnection to the larger environment).[146] Unfortunately, this same criticism is found in today's museum discourse.[147]

Because of museums' closed nature, both among departments and from the external community, ideas from different departments and their patrons are not part of making important decisions within the museums.[148] While museums have increasingly embraced collaboration and a people-focused approach, their structures often remain mechanistic. Their structures—compartmentalized and somewhat detached from broader communities—are influenced by humanistic organizational theories and management movements.[149] Given that nonprofit art museums' mission is to benefit the public due to their nonprofit status as part of a law-related system, the most fitting structure would be an open system that "embraces the human relations approach yet develops it further to be more inclusive of different parts of the community, or the complex external environment."[150]

The most critical characteristic of open systems pertinent to the discussion of this paper is its feedback function, which is a networked structure of a hierarchy coupled with flexibility and adaptability. This feedback structure allows open systems to take in information from external sources and adjust inner workings based on that external input. This process of adjusting is called the feedback loop function.[151] This is critical in maintaining or killing an organism— or in this case, organizations. The hypothalamus, a part of the brain which regulates human body temperature by checking the body temperature influenced by external temperature and adjusting it to the equilibrium temperature of 37 degrees Celsius, is an example of the feedback function working in

145. The separation between the curatorial and educational roles/departments was prominent in museums in the 1940s and is still prevalent in today's museum structures. *See* THEODORE L. LOW, THE MUSEUM AS A SOCIAL INSTRUMENT, 22-23, 37-39 (1942) (noting the differences between educational staff and curatorial staff).

146. *Id.*, at 29, 32, 65.

147. *See generally* ROBERT R. JANES & RICHARD SANDELL, MUSEUM ACTIVISM (2019); JUNG, *supra* note 1, at 82-83.

148. JUNG, *supra* note 1, at 17.

149. *Id.* at 17–18.

150. *Id.* at 18.

151. JOANNA MACY, MUTUAL CAUSALITY IN BUDDHISM AND GENERAL SYSTEMS THEORY: THE DHARMA OF NATURAL SYSTEMS 75 (1991).

an organism.[152] If the hypothalamus fails to adjust the elevated body temperature, it can be fatal.

In a social system or organization, the system or organization receives inputs from external sources, uses them in its throughputs (internal system or structure), and generates outputs that can be useful for its environment. A social system that does nothing in response to external changes may result in mere survival or, in extreme cases, permanent closure. These social systems or organizations (e.g., museums) may maintain the status quo by not changing and serving the same group of people over and over, failing to transform with the changes happening in the external environment. Conversely, it can adapt to external inputs to remain strong and highly functional. Thus, "[t]his interplay of feedback functions of an open system is essential in transforming a system over time."[153]

There are two processes of feedback functions: (1) negative or self-stabilizing feedback process and (2) positive or self-organizing process. Negative feedback function helps maintain the status quo by adjusting its output to match the internal values.[154] In other words, in a negative feedback loop, mental precepts of inputs match internal goals, leading the system to conclude that there is no need for a change or only a small adjustment is needed.[155] While it is called a negative function, it is an open system's essential part in stabilizing itself.[156] However, if it continues to process input through a negative feedback function, it becomes stagnated and irrelevant.

As shared above, museums collect certain works of art, hire certain groups of people, and serve and receive money from even smaller yet homogeneous groups of people. Instead of taking in new input by hiring people with different backgrounds, inviting new people as visitors, and asking what the community wants to see and experience, they keep repeating the negative feedback function—stabilizing and stagnating rather than renewing and transforming.[157]

A positive feedback function is self-organizing, changing, and renewing. In this process, a system notices that inputs from the external environment do not match internal values and goals.[158] To deal with this discrepancy, the system transforms its internal structure to be able to adapt to and process these new inputs, which can lead to learning and

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152. *How is Body Temperature Regulated and What is Fever?,* INST. FOR QUALITY AND EFFICIENCY IN HEALTH CARE (Nov. 17, 2016), https://www.ncbi.nlm.nih.gov/books/NBK279457/.

153. JUNG, *supra* note 1, at 21.

154. MACY, *supra* note 151, at 96.

155. *Id.*

156. *Id.*

157. JUNG, *supra* note 1, at 23-24.

158. MACY, *supra* note 151, at 97-98.

transformation.[159] One way to look at this process is that the system is pressured to the point that it would deviate from its status quo to minimize the mismatch between the percepts of inputs and their internal value or goals, rather than accepting what confirms the internal value and rejecting or ignoring contradicting information.[160] A positive feedback function fully embraces the contradicting information and changes its internal percepts to make sense of the new inputs. This also means that the system becomes vulnerable and is subject to disorganization, yet with a greater flexibility and responsiveness to process external changes.[161]

When museums embrace a positive feedback function, they can pay more attention to what is happening externally and to the needs of their communities, having established clear blueprints toward a functioning, thriving system. For example, some museums have adopted more positive feedback functions to transform their practices, such as diversifying their permanent collections after input from the community or through external pressures (e.g., protest toward museum culture).[162] In addition, some museums have been appealing to new, younger, and less traditional donors after noticing that their traditional donor pool is shrinking,[163] perhaps because they die or leave to support some other causes. In doing so, museums can identify their malfunctions and find leverage points to address them.

By emphasizing the importance of the larger environment and museums' integral position as part of their communities, open systems theory can help transform museums to become more relevant and impactful organizations.[164] One way of pressuring the system to change, broadly and sustainably, is through making the external needs more noticeable, therefore stimulating and aiding the internal changes. For museums, due to their maladaptive structures and values, the needed pressure must be enforceable so they can no longer ignore their communities or justify stagnation with only small and temporary internal adjustments. In an effort to suggest a new model and a stronger valid legal justification for systematic and sustainable transformation for museums, the next section compares the museum sector to the

159. *Id.*

160. *Id.*

161. *Id.*

162. For example, the Baltimore Museum of Art acquired about 30 pieces of art to diversify its collection in areas of European, Asian, and African art. *Baltimore Museum of Art Announces Diverse Array of Acquisitions Across Museum Departments*, BALTIMORE MUSEUM OF ART (June 30, 2022), https://artbma.org/about/press/release/bma-announces-diverse-array-of-acquisitions-across-museum-departments.

163. Jessica Jacolbe, *Are Museums' Young Patron Groups Meeting Calls for Diversity?* ARTNEWS (Nov. 16, 2021), https://www.artnews.com/art-news/news/state-of-museum-young-patron-groups-diversity-1234610239.

164. JUNG, *supra* note 1, at 28.

nonprofit hospital sector and considers the suitability of the community benefit standard of hospitals for museums.

VI. COMPARING MUSEUMS AND HOSPITALS: COMMUNITY BENEFIT STANDARD

To present a workable model, this section turns to another adjacent nonprofit sector, hospitals, to learn from a model that already exists in a similar sector while acknowledging foreseeable limitations. The model is an illustration of a system that has attempted to use a positive feedback function.

A. Comparison between Nonprofit Hospitals and Museums

The roles of hospitals over the years have changed. In the past, they provided care for indigent people because wealthy people received their healthcare at their own homes.[165] With time, hospitals became more professionalized and technologically advanced and their roles have shifted to providing healthcare for all.[166] Hospitals became institutions that no longer were only for those who could not afford private home care but for everyone who needed healthcare, wealthy or not. Unlike hospitals whose patrons changed from the indigent to all, museums did not have to change whom they served. They almost always have served the society's elite and people that are more privileged in the economic and societal sense.[167]

Due to the change in their primary patrons, hospitals' tax exemption purposes have changed from providing healthcare for the poor to providing healthcare to all, which made it difficult to distinguish nonprofit hospitals from their for-profit counterparts. In a way, nonprofit hospitals had to provide something more or different than what their for-profit counterparts offer, either serving more people in need, educating community members on general health hygiene, or prevention of more serious health issues. To be deserving of the public dollars given in the forms of tax exemption and deduction, nonprofit hospitals needed to do something more. This led to the development of the community benefit standard which imposed more responsibilities and rules that only applied to the nonprofit hospitals.

For museums, the purposes for exemption—educational purposes—have not changed. While their purpose of educating the public through the arts and culture was not a problem, musuems' initial patrons were upper-class, and therefore, the exclusivity was preserved, valued, taught, and remains in full force in today's mainstream art

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165. Mark C. Westenberger, *Tax-Exempt Hospitals and the Community Benefit Standard: A Flawed Standard and a Way Forward*, 17 FLA. TAX REV. 407, 419 (2015).

166. *Id.*

167. AMERICAN ALLIANCE OF MUSEUMS, *supra* note 2, at 9.

museums. This calls for changes in museums' exempt purposes, making their purpose much more explicit about serving and educating all people, not just the select few. This leads to suggesting a more structural and explicit requirement for museums to follow by borrowing from the example of nonprofit hospitals.

B. Community Benefit Standard for Hospitals

To distinguish nonprofit hospitals from their for-profit counterparts in serving the public interest, one of the first requirements for nonprofit hospitals was to show that they provided a substantial charity care program for people that could not pay because "if a hospital lacked a substantial charity care program, auditing agents almost always recommended denial or revocation of exempt status."[168] Revenue Ruling 56-185 of 1956 clearly specified this point by saying a nonprofit hospital "must be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay. . . [i]t may furnish services at reduced rates which are below cost, and therefore render charity in that manner."[169] This ruling did not, however, provide clear guidelines on how much indigent care nonprofit hospitals had to provide.[170]

Despite the lack of a clear threshold for how much indigent care nonprofit hospitals had to provide, Revenue Ruling 69-545 in 1969 modified this narrow guideline for what qualified as a nonprofit hospital.[171] While the IRS still encourages nonprofit hospitals to provide services to people who cannot afford them at no cost or below cost,[172] Revenue Ruling 69-545 effectively replaced Revenue Ruling 56-185,and its indigent care or charity care standard, with what is known as the community benefit standard.[173] This ruling stated that the purpose of exempting hospitals is to promote health, not just to provide indigent care.[174] The community benefit standard, that essentially remains the same today, includes: (1) operating an emergency room open to all persons regardless of ability to pay; (2) maintaining a board of directors drawn from the community; (3) maintaining an open medical staff

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168. John D. Colombo, *Federal and State Tax Exemption Policy, Medical Debt and Healthcare for the Poor*, 51 ST. LOUIS UNIV. L. J. 433, 437 (2007).

169. Rev. Rul. 56-185, 1956-1 C.B. 202.

170. Westenberger, *supra* note 165 at 421.

171. *Id.*

172. *Charitable Hospitals - General Requirements for Tax-Exemption Under Section 501(c)(3)*, INTERNAL REVENUE SERVICE (Aug. 3, 2021), https://www.irs.gov/charities-non-profits/charitable-hospitals-general-requirements-for-tax-exemption-under-section-501c3 [hereinafter Charitable Hospitals].

173. Westenberger, *supra* note 165, at 409; *see generally* John M. Quirk, *Turning Back the Clock on the Health Care Organization Standard for Federal Tax Exemption*, 43 WILLAMETTE L. REV. 69, 74 (2007); Robert S. Bromberg, *The Charitable Hospital*, 20 CATH. UNIV. L. REV. 237, 237 (1970).

174. Rev. Rul. 69-545, 1969-2 C.B. 117; *Charitable Hospitals*, *supra* note 172.

policy, (4) providing care to all persons able to pay directly or through insurance and other public programs such as Medicaid and Medicare.; and (5) using surplus revenues to improve the quality of care, facilities, medical training, education, and research. These requirements essentially require a nonprofit hospital to serve the public interest.[175] Therefore, the community benefit standard should help demonstrate that nonprofit hospitals provide benefits to a class of persons that is broad enough to benefit the community and operate to serve a public, rather than a private, interest.[176]

Subsequent interpretations of Revenue Ruling 69-545 have not been consistent, although the ruling is still considered to be in full effect and the IRS never revoked it.[177] Meaningful change to the original rules of 69-545 started with the case *IHC Health Plans v. Commissioner*, where the petitioner challenged the IRS Commissioner's decision that IHC Health Plans could be exempt because they do not primarily operate to promote health for the benefit of the community.[178] The court held that the petitioner did not exclusively operate for exemption purposes because it provided "virtually no free or below-cost health-care services."[179] This more rigorous public-benefit standard established in *IHC Health Plans* came to be known as the "health care plus" standard.[180]

In *IHC Health Plans*, *Inc.*, the court stated "an organization cannot satisfy the community-benefit requirement based solely on the fact that it offers health-care services to all in the community in exchange for a fee. Although providing health-care products or services to all in the community is necessary . . . the organization must provide some additional 'plus.'"[181] Citing *Bob Jones,* the court characterized the "plus" as "a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues."[182] Additionally, it should "be sufficient to give rise to a strong inference that the organization operates primarily for the purpose of benefiting the community."[183] What is implied is that although Revenue Ruling 69-545 does not require nonprofit hospitals to provide charity or indigent care

175. Westenberger, *supra* note 165 at 422.
176. *Charitable Hospitals*, *supra* note 172.
177. Westenberger, *supra* note 165, at 424-25.
178. IHC Health Plans, Inc. v. Comm'r, 325 F.3d 1188, 1199 (10th Cir. 2003).
179. *Id.* at 1200.
180. Colombo, *supra* note 168, at 36-37.
181. *IHC Health Plans, Inc.*, 325 F.3d at 1197.
182. *Id.* at 1197 (citing Bob Jones Univ. v. U.S., 461 U.S. 574 (1983)).
183. *Id.* at 1198 (emphasis omitted) (citing Geisinger Health Plan v. C.I.R., 985 F.2d 1210, 1219).

services, case law rulings suggest that hospitals must provide some amount of public care to be qualified for their tax-exempt status.[184]

In addition to the confusion around the community benefit standard created by case law, the largest criticism of the community benefit standard seems to be that it is difficult to enforce. With no "teeth" to this policy, "nonprofit hospitals today enjoy virtually per se federal exemption."[185] Recent studies said that, in fact, nonprofit and for-profit hospitals are not that different in terms of their outputs in the areas that are deemed to be for the public.[186] For example, for-profit hospitals spent more money on charity care than nonprofits; for-profit hospitals spent $3.80 of every $100 spent, while nonprofit counterparts spent $2.30 of every $100 spent.[187] Given the criticism over the community benefit standard, the movement to revise, change, or repeal the standard is pertinent.[188]

Despite the confusion around the community benefit standard, establishing it to distinguish nonprofit hospitals from their for-profit counterparts is an example of the use of a positive feedback function. There was a need for a differentiation between the two sectors of hospitals, and the Revenue Ruling provides an external pressure point where nonprofit hospitals had to shift to adopt this standard in an effort to serve the public interest. However, because of the lack of an enforcement mechanism, the system of nonprofit hospitals became stagnant (as reflected in the criticism that they are not that different from for-profit hospitals), perpetuating a negative feedback function. Continued absence of enforcement and resultant per se exemption did not maintain the pressured environment needed for nonprofit hospitals to continually renew themselves to be different and public serving.

Despite challenges with enforcing the community benefit standard for nonprofit hospitals, the idea of having a set of standards for community benefit is an attractive one. Museums as a sector have never had such a standard as a matter of federal policy linked to the 501(c)(3) provisions. While art museums are entirely different types of organizations, they are nonprofits and expected to benefit the community. Museums can benefit from some sort of standard that

184. Westenberger, *supra* note 165, at 425.

185. M. Gregg Bloche, *Health Policy Below the Waterline: Medical Care and the Charitable Exemption*, 80 MINN. L. REV. 299, 300–01 (1995).

186. Sunjay Letchuman, Leonard L. Berry, Michael K. Hole & Ge Bai, *Revise the IRS's Nonprofit Hospital Community Benefit Reporting Standard*, HEALTH AFFAIRS FOREFRONT (Apr. 15, 2022), https://www.healthaffairs.org/do/10.1377/forefront.20220413.829370.

187. Ge Bai, Hossein Zare, Matthew D. Eisenberg, Daniel Polsky & Gerard F. Anderson, *Analysis Suggests Government and Nonprofit Hospitals' Charity Care Is Not Aligned With Their Favorable Tax Treatment*, 40 HEALTH AFFAIRS 629 (2021).

188. Letchuman et al., *supra* note 186; Judith Garber, *How We Could Change the Community Benefit Standard for the Better*, LOWN INSTITUTE (April 18, 2022), https://lowninstitute.org/how-we-could-change-the-community-benefit-standard-for-the-better.

ensures they provide public benefits that are widely defined and accessible by the general public, rather than something that looks like private benefits to a handful of people. Museums can provide "human care"[189] by supporting humanity through the preservation, appreciation, and education of arts and culture.[190]

However, this is only the first step in triggering a positive feedback function for museums. Without an enforcement mechanism, this step could end up contributing to continued stagnation because museums are not likely to take them seriously. Jung sees having a set of standards (such as a Revenue Ruling) as a first step toward broader and systemic change while recognizing the pitfalls as seen in the nonprofit hospital sector.

VII. NEW LEGAL FRAMEWORK FOR MUSEUM PRACTICE: TOWARD AFFIRMATIVE ACTIONS

Based on discussions above, this section suggests the community benefit standard for museums as a move toward affirmative action with suggestions for enforcing such a standard. However, this new model is only the beginning of this discussion. While it is developed based on ideas from another nonprofit subfield, this model has not been experimentally or empirically tested. It only provides a conceptual model and possible enforcement strategies, which will need to be tested and applied in a phased implementation when utilized in real life.

The model standard is designed to combat structural problems that have led to the inaccessibility of the art museum sector and would allow it to be more consistent with the no substantial private benefit provision and the public policy doctrine. It focuses on providing broad and sustainable benefits to the community as a whole, rather than only offering specific services that might reach only a small segment of the community or running special programs that aren't consistently available. Additionally, it suggests a mechanism for enforcement by adapting the community benefit standard used by the nonprofit hospital sector to alleviate any pitfalls.[191]

The general principle of the museum community benefit standard is that nonprofit museums should demonstrate that they provide benefits to broader classes of people and operate to serve a public, rather than a private, interest. While noble, without specific actions that

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189. The idea of "human care" afforded from participating in arts consumption and appreciation came from the author's conversation with Professor David Brennen. Afterall, the healing power of arts and cultural interventions is a critical value of the arts and culture and to the society in general. *See* GEOFFREY CROSSICK & PATRYCJA KASZYNSKA, UNDERSTANDING THE VALUE OF ARTS & CULTURE: THE AHRC CULTURAL VALUE PROJECT 104-106 (2016).

190. *See* Jung, *supra* note 102.

191. *Id.*

can lead to this goal, it could end up being something that museums continue to ignore, as seen in the nonprofit hospital sector. Unlike what the nonprofit hospital field is experiencing—continuous negative feedback function due to the standard being almost unenforceable—workable enforcement strategies can make museum community benefit standards provide an environment where museums are required to utilize a positive feedback function (integration of realistic environmental inputs) more frequently. What follows below are specific objectives that museums should achieve based on measurable and enforceable indicators for success.

Objective One: Maintain a board of directors drawn from the community[192] that is representative of the community's broader demographics to bring diverse perspectives to governing structure, policies, and strategies. The board composition of museums is more homogeneous than other types of nonprofits with nearly 90% of board members being white.[193] This dearth of diversity could be related to and exacerbated by the fact that most museums set a minimum annual contribution amount for board members to donate to their museums, excluding potential board members from joining due to lack of financial means. Not only do a variety of groups of professionals, communities, and policy makers agree on the importance of diversifying nonprofit boards,[194] but there is also a positive correlation between diversity of nonprofit arts boards and their public service activities.[195] Board diversity can be measured by race, ethnicity, gender, education, region, profession, etc., against those of the community metrics. For example, if a community has a 20%Hispanic population, roughly 20%of board members should be Hispanic so that the community's perspective and interest can be equitably represented. While this could be seen as a checking the boxes approach, this is only a baseline. With this minimum legal requirement of board diversity, museums can implement policies and structures that can give voice and power to diverse board members. Simply having diverse membership alone does not automatically impact museum practice in a positive way unless diverse members are actually

192. Defining community can be a tricky concept. It would depend on the mission, scope, and size of the museum in determining what is considered (regional or otherwise delimitator) as community. For example, if it is a small museum in a rural area whose adjacent communities have no museums, its reach may expand to fill the needs of larger areas. While museums may be strategic about drawing particular communities' boundaries they want to serve, it has to include the museum itself in its geographic delimitator. *See id.*

193. Yaling Jiang, *What It Takes to Make Museum Boards More Diverse*, ARTSY (Sept. 29, 2020), https://www.artsy.net/article/artsy-editorial-takes-museum-boards-diverse.

194. *Diversity on Nonprofit Boards,* NAT'L COUNCIL NONPROFITS, https://www.councilofnonprofits.org/tools-resources/diversity-nonprofit-boards (last visited Sep. 9, 2022); Smithsonian Institution, Office of Policy and Analysis, *Fundraising at Art Museums*, https://soar.si.edu/sites/default/files/reports/01.10.fundraisingart.final.pdf (last visited Sept. 11, 2024).

195. *See* Lee*, supra* note 131.

given an opportunity to participate on an equal footing.[196] Diversifying boards is an effective initial leverage point that can influence wider, long-lasting changes to museum governance, and therefore changing who they attract as users and employees.

Objective Two: Maintain staff who reflect the community population to bring diverse perspectives in administrative, programming, and evaluation efforts. Very much like the first action, this action can require museums to hire diverse staff members that look like their communities. The same measurement can be used in comparing the diversity of the staff against that of the community. While achieving precision in representation is not the goal in and of itself, having balanced staff members who reflect the make-up of their community is one key to understanding a specific community's needs and interests. Museums will also need to rethink their hiring processes as well to attract more diverse applicants.[197]

Objective Three: Establish free membership and admission options at all times for those who are unable to pay, not just on special days or certain days or times of the week. While some museums have adopted free admission models,[198] most U.S. nonprofit museums require admission fees. Some museums have special rates for children, students, and older adults or a day or two of free admission days per month. While these various free admission options are better than none, museums must have a way to provide free services to those who cannot afford the visit on a more regular basis. Establishing a free membership program based on income level is needed, so there is an option to use the museum freely for those who cannot pay. Success in this action could be measured by looking at the percentage of the museum's total expenses dedicated to providing free memberships and admissions.

Objective Four: Devote resources to further diversify collections and programming efforts, and research more equitable ways to present plural arts and cultural values. Often museum collections were gifted by art collectors and those gifts were not questioned because they were

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196. Kathleen Buse, Ruth Sessler Bernstein & Diana Bilimoria, *The Influence of Board Diversity, Board Diversity Policies and Practices, and Board Inclusion Behaviors on Nonprofit Governance Practices*, 133 J. BUS. ETHICS 179, 188 (2016).

197. Lack of diversity in museum professionals is closely related to homogeneous student groups found in training programs, such as curatorial studies, museum studies, or art history. While the museum field is aware of this pipeline issue, requiring museums to hire representative staff can cause a ripple effect in reforming museum training programs as well. Haitham Eid, *Connecting The Dots: The Impact Of Diversity In The Museum Workforce On Innovation, Relevance, And Audience Engagement*, MW18 (2018), https://mw18.mwconf.org/paper/connecting-the-dots-the-impact-of-diversity-in-the-museum-workforce-on-innovation-relevance-and-audience-engagement/index.html.

198. Among many examples, the Menil Collection, in Houston, TX, offers completely free admission. Its website says, "Free admission, always" on its "Visit" page. The Menil Collection is a nonprofit museum, which should be distinguished from the public free museums like the Smithsonian. *Visit*, MENIL COLLECTION, https://www.menil.org/visit.

donated to the museum over a long period of time. Perhaps, due to this passive and uncritical attention to museum collections, artists composition, and donor composition, some mainstream museums have collected artworks made by predominantly white male artists.[199] Recently, museums started paying more attention to who they have in their collections and have taken steps to diversify their collections.[200]

Museums should report who is represented in their collections and how much they are spending on programming and research to collect more diverse art and provide diverse programming that focuses more on the needs and interests of plural communities. This action would be measured in both quantitative and qualitative means. For example, the statistics of who is represented in a collection can be presented in numbers and percentages[201] as well as spending figures on acquiring art from more diverse artists or offering such programs. Then, since the definition of what is diverse and community-focused would be different from community to community, museums can contextualize what their programming efforts are to demonstrate how they are indeed doing their part to make their collection and services as diverse and relevant as possible to their communities.[202]

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199. Topaz et al., *supra* note 49.

200. The Metropolitan Museum of Art announced that it would raise $10 million endowment to acquire more artworks from BIPOC artists. Naomi Rea & Eileen Kinsella, *As Museums Desperately Try to Diversify Their Collections, They Now Face Another Problem: How to Pay for It in a Financial Crisis*, ARTNET News (Feb. 11, 2021), https://news.artnet.com/art-world/art-museum-diversity-collections-1942997.

201. This can be an arduous process. Therefore, an alternative would be to collect statistics on new acquisitions since the adoption of the community benefit standard.

202. One related action that can accompany Objective 5 is to make it explicit that proceeds from deaccession—the process of removing items from the larger collection—can be used in purchasing works of art by more diverse artists. While it is a positive trend for the museum sector to try to diversify their collections, acquiring works of art can be cost prohibitive. The use of deaccession proceeds to purchase other works of art has been a well-established practice. With the recent change to deaccession policy from the Association of Art Museum Directors toward more flexible spending and the concept of "direct care" of collections, the use of such funds for diversification of existing collections would provide encouragement and solutions to acquiring works of art.

Museums have many works of art that are in their storage, some of which have never been displayed. Museums can certainly trade their less popular and less pedagogy-relevant works of art to acquire that which is more relevant. There is a stigma of deaccessioning works of art in the museum field and museum associations often have restrictive deaccession guidelines. While they do not have legal enforceability, the peer pressure, threat to membership and threat to accreditation are powerful, ensuring museums that violate the rules around deaccessions feel consequences such as being unable to borrow works from other museums, or being ineligible for grants and funding. If museums' professional associations make it clear that it is permissible for museums to deaccession to diversity their collections in an explicit way, we can accelerate the effect of Objective 5. *See* Press Release, Ass'n of Art Museum Dir.'s, Membership of AAMD Approves Change to Deaccessioning Rule Bringing Policy in Line with American Alliance of Museums (AAM) and Financial Accounting Standards Board (FASB) (Sept. 22, 2022), https://aamd.org/for-the-media/press-release/membership-of-aamd-approves-change-to-deaccessioning-rule-bringing.

Objective Five: Offer more educational services to diverse communities, including school-aged children who will grow up to be future museum users, donors, staff, and board members. This action is closely related to increasing the future pipeline of diverse visitors, staff, donors, and board members. After all, museums' tax-exempt purposes are educational, and most of the services museums offer are pedagogical (educating the public about and through the arts). This is one area where many museums are successful, particularly in serving young children.[203] However, museums can be more intentional about what kind of children they serve. Are they from all school districts of the community or only one part of the community? Some indicators in this action would be the percentage of the budget dedicated to educational programs, number of children served in comparison to total number of children in the community, and demographic information of the children served.

Objective Six: Conduct program and performance evaluations (including fundraising programs) to monitor and measure the outputs of effectiveness of services against the target. To make sure changes are made, continuous evaluations are key. Doing evaluations is a time-consuming process and can be an expensive venture for some. Therefore, this requirement should be as simple as possible. One area on which museums should report is the number and demographic information of their visitors to make sure they are actually serving diverse community members. Fundraising effectiveness is another output that can be measured by tracking, not only monetary values, but where that money comes from. Museums can also get demographic information of their individual donors which could lead to more efforts toward cultivating a more diverse donor pool. When overly complicated measures and processes are used in evaluation, especially for a small museum with limited resources, evaluation by itself can be too burdensome. Frankly, this is the most difficult action to measure as evaluation can be done both quantitatively and qualitatively and the depth of evaluation can vary significantly depending on the resources of museums.

To overcome the enforceability pitfall of the nonprofit hospital sector and provide an environment where museums can maintain their dynamic equilibrium while proactively responding to external needs and interests, reporting can be part of the 990[204] submission with a new

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203. "Museums spend over $2 billion each year on education activities; the typical museum devotes three-quarters of its education budget to K-12 students." *Museum Facts and Data*, AM. ALL. OF MUSEUMS, https://www.aam-us.org/programs/about-museums/museum-facts-data (last visited Feb. 6, 2023) (citing ELIZABETH E. MERRITT & PHILIP M. KATZ, MUSEUM FINANCIAL INFORMATION (2009)).

204. "Form 990 is the IRS' primary tool for gathering information about tax-exempt organizations, educating organizations about tax law requirements and promoting compliance.

schedule that is required to be filled by all art museums. To make the implementation and enforcement more flexible, there could be a scoring or other evaluation system that would allow museums to focus on one action that would be most impactful for their museums while scoring lower on others that are deemed less relevant to those specific museums. While measurable indicators for success and enforcement are important, flexibility and options would be critical in sustaining the implementation of the standard. Therefore, museums can be more strategic about what they want to focus on while Objectives one, two, and three would be mandatory.

The overall score or evaluation results can be used to make sure museums meet the requirements of the community benefit standard. After an adjustment and implementation phase, museums that do not meet the requirement or minimum threshold can be put on probation for a period of time (e.g., 3 years) before they lose their nonprofit status if their course remains unchanged. If they do not meet the public benefit standard and the no substantial private interest provision, then they no longer qualify for those tax exemptions and deductions. Without this consequence, enforcing such a standard would prove very difficult and would essentially make the standard toothless.

Substantive, long-lasting changes are difficult to achieve without internal cultural, structural change and external pressure, such as policy and legal changes.[205] For the standard to be successful, diverse members of museum professionals, communities, and policymakers must participate in creating, implementing, and evaluating the impact of the standard. Additionally, the standard must be based on empirical research proving effectiveness. "We might think creatively about how to employ the current structure in a way most beneficial to the community, since, after all, community benefit is the purpose of providing tax exemptions."[206]

In addition to the fact that this standard is neither perfect nor complete, some of the foreseeable limitations would include the strong resistance that may come from museum boards and leadership, who will need to do more work to prove they are worthy of meeting the tax-exempt status. While a healthy dose of pressure and resistance in reaction are good indicators of positive feedback function being triggered, too much resistance may lead to chaotic situations.

Organizations also use the Form 990 to share information with the public about their programs. Additionally, most states rely on the Form 990 to perform charitable and other regulatory oversight and to satisfy state income tax filing requirements for organizations claiming exemption from state income tax." *Form 990 Resources and Tools*, INTERNAL REVENUE SERVICE (July 27, 2022), https://www.irs.gov/charities-non-profits/form-990-resources-and-tools.

205. *See* JUNG, *supra* note 1, at 98-99.

206. Jessica Berg, *Putting the Community Back into the Community Benefit Standard*, 44 GA. L. REV. 375, 430 (2010).

Another limitation is that the actions and their measurements may seem like exercises in checking boxes and therefore not meaningful. The intention is to make sure museums meet the minimum requirement so that change can follow. Measuring the implementation of standards and evaluating the effectiveness will be a challenging and costly endeavor for both museums and the regulating body (i.e., the IRS)[207] to enforce standards and apply penalties administratively. Therefore, some additional governmental support (federal, state, or local) in the form of grants and subsidies may be necessary, especially in the initial phase.

Lastly, there could be loss of income or donations due to forgone entrance fees or long-time donors leaving because they are unhappy about the changes. However, the approaching majority-minority nation, decreased government funding, and increased competition for private donations necessitates the reworking of the financial structure of museums for survival, and forcing them to adopt these practices could work in their favor, increasing the odds that they survive the demographic shift.

These changes are only the beginning of adopting this type of standard and there should be more thoughtful planning consisting of research and development before establishing such standards for nonprofit art museums. Despite the challenges and limitations, the hope is to help museums be in a state of dynamic equilibrium where they are ready to make changes in relation to external pressures (i.e., the community benefit standard) and avoid stagnating in the stale equilibrium by maintaining the status quo. This model can push museums to exercise a positive feedback function as open systems that are inseparable from their environment achieving their indented mission and goal of serving their communities in an equitable way.

VIII. CONCLUSION

Museums' current practice of serving a small subset of their wider and diverse communities is problematic at best and may be violating the congressional intent of § 501(3)(c) at worst. Critical race theory provides a critical lens to view museum practice as something embedded in the broader societal structure, perpetuating the preservation of dominant arts and culture in mainstream art museums while marginalized arts and cultures are less valued. By analyzing how current practices of museums may be violating the "no substantial private benefits" provision and not aligned with the spirit of the public policy of non-discrimination based on skin color and socioeconomic

207. This may be why museums have been under the radar of the IRS, because it has larger and more pressing priorities, such as nonprofit hospitals and educational institutions that dominate the nonprofit sector.

background, this paper presents a concrete legal rationale for museums to serve more diverse people regardless of their backgrounds. Failure to act not only perpetuates the issue, but also will amplify the disparities as national demographics continue to shift. This mandates a measured and timely response. Nonprofit art museums must adopt a more affirmative position to promote inclusion, diversity, equity, and access in their practices. For example, having diverse board and staff members, serving equally diverse communities, and many other affirmative action steps will ensure that certain groups of people are not systematically being left out based on their racial, ethnic, and socioeconomic backgrounds. Museums will need to be mindful of serving diverse ranks of community to ensure they merit the generous tax benefits they currently enjoy that are not available to other nonprofits such as 501(c)(7) social clubs. "Diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow. The pursuit of racial diversity will go on."[208]

Museums have been stuck in the negative feedback loop for far too long. They react to external changes too slowly to catch up to the changing needs and climate of their communities. What is needed is a stronger leverage point that can trigger and accelerate the positive feedback function of museums. In other words, museums need a new paradigm that can help rethink their traditional practices. Paradigm shift happens when an issue or problem can no longer be addressed in the existing system.[209] Organizations can avoid this shift when they justify and slightly change their internal system by ignoring the actual issue; the response many museums have held over the years. While the process of change requires multiple actors working together, stronger external pressures can help accelerate the shift. This is where external legal changes come into play.

The vast majority of U.S. art museums have always been 501(c)(3) nonprofits who had a clear legal obligation of providing public benefits to their communities and upholding the public policy of this country of nondiscrimination. However, not all museums have been paying attention to these provisions and instead, have maintained their status quo. A stronger pressure to the system would be to present stronger guidelines that are legally enforceable which would push them out of stagnation. When confronted with a set of unmet legal guidelines because of their existing goals and values, the museums will need to question their existing internal structure and strive for a change. This way we can generate a situation where museum internal practices no

208. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 384 (2023).

209. MACY, *supra* note 151, at 8; *see generally*, THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

longer ignore external needs, and acknowledge legal pressures as valid and necessary, accelerating positive feedback function and eventually shifting the field to become more diverse, public serving and inclusive.

By comparing the museum field to the nonprofit hospital sector, the author borrowed the idea of the community benefit standard, albeit cognizant of the difficulty in its enforcement. The positive feedback function of open systems, or self-organizing and transformational processes, can be triggered by an important leverage point, enhanced emphasis of legal and policy requirements. This new suggested community benefit standard for museums, along with a clear set of actions, can create external pressure for museums to change, accompanied by measurements to gauge success with associated consequences. The hope is to keep museums in the state of dynamic equilibrium where they can stay nimble to pivot in relation to external pressures, thereby providing access and services equitably to all.