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NOTE

THE VISUAL ARTISTS' RIGHTS ACT OF 1990: WHY MORAL RIGHTS CANNOT BE PROTECTED UNDER THE UNITED STATES CONSTITUTION

I. INTRODUCTION

Imagine that you have just purchased a building and you are about to redecorate in anticipation of starting a new business. The first thing you want to do is get rid of a huge, ugly sculpture in the lobby. Since the sculpture is permanently attached to the walls of the lobby, removing it will mean its destruction. Just as your workers are about to get started, the lobby is invaded by lawyers screaming “Stop!” One of them hands you a court order prohibiting you from damaging the sculpture. Bewildered that a federal court would take such an interest in your interior decorating, you ask one of the lawyers what is happening. The lawyer explains that the sculpture is a work of “stature” and that taking it down will damage the reputation and honor of the artist. Your first thought is that leaving it up will damage the reputation and honor of the artist. “But wait,” you say to yourself, “can the federal government tell me what I can do with my sculpture in my lobby?” Under the Visual Artists’ Rights Act of 1990, it can.1

1. The pertinent sections of the Visual Artists’ Rights Act provide:

§ 101. Definitions

A “work of visual art” is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, [or] in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or

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§ 106A. Rights of certain authors to attribution and integrity

(a) RIGHTS OF ATTRIBUTION AND INTEGRITY.—

(T)he author of a work of visual art—

(1) shall have the right—

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) . . . shall have the right—

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

(b) SCOPE AND EXERCISE OF RIGHTS.—Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner....

(c) EXCEPTIONS.—(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).

(3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of “work of visual art” in section 101.

(d) DURATION OF RIGHTS.—(1) With respect to works of visual art created on or after the effective date . . . of the Visual Arts Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.

(e) TRANSFER AND WAIVER.—(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified . . . .

(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work.

§ 113. Scope of exclusive rights in pictorial, graphic, and sculptural works [removal of...
The events described above are essentially what happened in *Carter v. Helmsley-Spear*, the first case to interpret the Visual Artists' Rights Act of 1990 ("VARA"). VARA was passed as part of the federal copyright law to protect the "moral rights" of visual artists. Moral rights under VARA are the "right" of attribution (the right of the author to claim authorship of the work) and the "right" of integrity (the right of the author to prevent any intentional alteration or destruction of the work that might be prejudicial to the author's reputation or honor). Under VARA, if a piece of art has "stature" in the community, the moral rights in the work belong to the artist even after the work has been sold. In *Carter*, the court enjoined the building owner from removing the sculpture.

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(d)(1) In a case which—

(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and

(B) the author consented to the installation of the work in the building either before the effective date of the Act... or in a written instrument waiving his or her rights pursuant to section 106A(e).... then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.

(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), the author's rights under paragraphs (2) and (3) of section 106A(a) shall apply unless—

(A) the owner has made a diligent, good faith attempt without success to notify the author... or

(B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.


2. 861 F. Supp. 303 (S.D.N.Y. 1994), aff'd in part, rev'd in part, vacated in part, 71 F.3d 77 (2d Cir. 1995), cert. denied, 116 S. Ct. 1824 (1996). It is not my intention to discuss *Carter* directly, but I will refer to it throughout this Note to illustrate various propositions.

3. VARA potentially covers all visual art, including art that is removable. This Note focuses on a *Carter*-type situation, where the art cannot be removed without its destruction, because it is in this situation that the constitutional issues are most clear. VARA has a special section addressing artwork in buildings but, remarkably, it does not address a situation where the art cannot be removed without its destruction and when no waiver was signed by the artist. See 17 U.S.C. § 113(d)(1), (2).


because under VARA, only the artist has the right to alter or destroy his work.7

The theory of moral rights, which is much more expansive than what is protected under VARA, is derived from French law.8 Innocent-sounding French legal principals, though, can be very misleading. For instance, French law guarantees separation of church and state,9 as does American law.10 In France, however, this means school children are not allowed to wear religious symbols to public schools because to do so would violate secularism.11 Also, like the United States, France prides itself on the freedom of its press.12 Yet, in France, book banning is permitted, and it is illegal to publish poll results before a presidential election.13 The theory of moral rights is just as misleading. Moral rights are not related to our traditional sense of morals, and more importantly, they are not rights in the sense that they are protected by the Constitution. This Note argues that the federal government cannot protect moral rights. Part II demonstrates that the Constitution provides no authority for federal protection of moral rights. This part focuses on the most likely sources of authority: the copyright power,14 the commerce power,15 and the treaty power.16 Part III shows that even if the federal government had the authority to regulate moral rights, such authority would violate the First Amendment.17 Part IV discusses the danger VARA


10. See, e.g., Everson v. Board of Educ., 330 U.S. 1, 16 (1947).


13. Id.


15. Id. art. I, § 8, cl. 3.

16. Id. art. VI, cl. 2; id. art. I, § 8, cl. 18.

17. The building owner in Carter argued that VARA constituted an unlawful taking in violation of the Fifth Amendment. 861 F. Supp. at 326. Although the court rejected this argument, it did so on weak legal grounds. The court likened VARA to historical preservation laws and relied on Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978), which upheld New York
poses to artists. Part V recommends that art continue to be governed by the free market instead of by government. Part VI concludes that VARA should be repealed.

City's historic preservation law, to uphold VARA. *Carter*, 861 F. Supp. at 327-28. This reliance is misplaced because the statute at issue in *Penn* only applied to the exterior of the building. See *Penn*, 438 U.S. at 111-12. VARA extends government regulation to the interior of a privately owned building. See supra note 1.

The *Carter* court found that there was no permanent physical invasion, because protection under VARA only lasted for the life of the artist and, therefore, it was not "permanent." 861 F. Supp. at 328. Common sense dictates that if the artist outlives the owner, there is nothing temporary about it. More importantly, though, the court misconstrued the meaning of "temporary." "Temporary" in takings terms is people handing out leaflets in the parking lot of a shopping center. "Permanent" is a telephone pole being installed on a property. The telephone pole may only be there a short time, but the space it occupies is exclusive and, therefore, permanent. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 429 (1982). The space occupied by the sculpture was exclusive and, therefore, "permanent." See id.

The court also found that the owner was compensated by the increase in value in his property from the sculpture. I doubt even the court believed this was true since later it went on to say, "Indeed, it seems that the preservation of VARA-protected artwork will in certain circumstances make owners' properties more, rather than less" valuable, as if it was surprised by the possibility. *Carter*, 861 F. Supp. at 328 (emphasis added). Even if the sculpture did increase the value of the property, the increase was not compensation to the owner because he was already entitled to it by virtue of the fact that he purchased the sculpture.

In spite of the court's poor handling of the takings issue, the takings argument is difficult to support. The weakness of the takings argument is that if VARA was law when the building owner bought the sculpture, he never received the right to destroy the sculpture in the first place. This right is, of course, a valuable property right and the court would be wrong to award it to the building owner without compensation to the artist. *United States v. General Motors Corp.*, 323 U.S. 273, 377-78 (1945). Interestingly, the takings argument was one of the main arguments at trial. See *Carter*, 861 F. Supp. at 326-29. On appeal, however, the Second Circuit did not address the issue at all. See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1824 (1996). Instead, the court overturned *Carter* on the grounds that the artists were employees, not independent contractors and, therefore, were not entitled to VARA protection. Id. at 87.

If I were to suggest a takings argument, though, I would suggest this theory: The sculpture is personal property, as opposed to the owner's real property which was the subject of the takings argument. Property is a bundle of rights including the right to dispose of the property. *General Motors*, 323 U.S. at 377-78. When the owner decided to get rid of the sculpture, the only right that had any value to him was the right to dispose of it. The right to dispose of it though was reserved in the artist. Therefore, in terms of ownership, the only right in the work of any value belonged to the artist. For all practical purposes, the sculpture belonged to the artist since the building owner's interest had no value. To say the building owner "owned" the sculpture would be a fiction. Because the court ordered the sculpture to remain, a permanent physical invasion had occurred. Without compensation, such an invasion is an unlawful taking. *Loretto*, 458 U.S. at 441. It makes no difference that the sculpture belonged to the artist rather than the government. See id. at 440.
II. NO FEDERAL PROTECTION OF MORAL RIGHTS UNDER THE UNITED STATES CONSTITUTION

A. Limits on Federal Power

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. 18

VARA is unconstitutional because there is no source of power in the Constitution for federal regulation of moral rights. The federal government is a government of limited powers. 19 In determining whether the Constitution provides authority for a certain law, the fundamental question is not what power the federal government should have, but what power the federal government does have. 20 It is a basic truth, reflected in the Tenth Amendment, that if a law is enacted by the federal government without constitutional authority, the law is invalid. 21 “The actual scope of the Federal Government’s authority . . . has changed over the years, . . . but the constitutional structure underlying and limiting that authority has not.” 22 Simply put, no matter how much the people may want a law, Congress may simply not exercise a power it does not have. 23

The importance of keeping the powers of the federal government “few and defined” 24 cannot be understated. “In the tension between federal and state power lies the promise of liberty.” 25

18. U.S. CONST. amend. X.
   The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.
   Id. at 458 (emphasis added).
21. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803) (“It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it. . . .”); see also New York, 505 U.S. 144, 157.
23. Id.
25. Id. at 459.
power in the federal government "as an expedient solution to the crisis of the day" relieves this tension and threatens liberty. Limiting government power is the surest way to prevent federal power from being abused. Detailed regulations defining government authority are no substitute.

B. The Copyright Power

The Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The regulation of moral rights is the regulation of rights in physical property and, as such, it is outside the scope of the federal government's authority under the copyright power. VARA was incorporated into the Copyright law, because moral rights have been viewed as a type of copyright protection. For instance, moral rights protection is embodied in the Berne Convention for the Protection of Literary and Artistic Property ("Berne Convention") which is a treaty for the international protection of copyrights. Among other provisions, the Berne Convention provides that signatories provide moral rights protection that lasts as long as copyright protection. Although VARA was not passed pursuant to the Berne Convention, Congress shared the belief that moral rights protection is a type of copyright protection. Rep. Edward Markey, sponsor of the original VARA bill and supporter of the final bill, illustrated this belief when he lamented that "[t]here is an unfortunate problem, however, in that too often a work is treated simply as a physical piece of property, rather than as an intellectual work. . . ."

However, a work of art is a piece of physical property, not a piece of intellectual property. "The author of a painting, when it is finished, before publication, owns a material piece of personal property, consisting of the canvas and the paint upon it." The right to alter or destroy a

29. Damieh, supra note 8, at 945-46.
30. Id. at 947.
31. See infra part II.D.
33. Local Trademarks, Inc. v. Price, 170 F.2d 715, 718 (5th Cir. 1948) (emphasis added).
piece of property is a long recognized property right. VARA, which regulates the alteration and destruction of a piece of art, therefore regulates property rights, not copyrights.

VARA itself reflects this distinction. Ownership of rights conferred by VARA is "distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work." In fact, VARA, although part of the copyright law, does not apply to copies.

The copyright power does not give the federal government the power to regulate property rights. The property right and the incorporeal right of copyright are "in their nature essentially and inherently distinct." A property right is a right to possess, use, and dispose of a physical thing. A copyright is a right to engage in or authorize certain activities; it does not extend to the physical manifestation of the thing copyrighted. The power to regulate the transfer of personal property is reserved to the states. Thus, the copyright power does not grant Congress authority to regulate moral rights.

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34. See United States v. General Motors Corp., 323 U.S. 373, 378 (1945) (holding that property "denote[s] the group of rights inhere[n] in the citizen's relation to the physical thing, as the right to possess, use and dispose of it") (emphasis added). This is precisely the right the building owner in Carter was trying to exercise. See supra part I.

35. 17 U.S.C. § 106A(e)(2); see also 17 U.S.C. § 106A(b) ("Only the author of a work of visual art has the rights conferred by [VARA] in that work, whether or not the author is the copyright owner.") (emphasis added).

36. 17 U.S.C. § 106A(c)(3) (moral rights granted in 106A do not apply to any "reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with a work of visual art.")

37. Local Trademarks, Inc., 170 F.2d at 718 (citations omitted).

38. See General Motors Corp., 323 U.S. at 378.


40. The physical manifestation of the thing copyrighted is personal property. Local Trademarks, Inc., 170 F.2d at 718.

41. Smith, 686 F.2d at 239-40. The distinction between the copyright and the physical manifestation of the copyright is reflected in the copyright law:

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, . . . in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object . . . .


42. Campbell v. Bagley, 276 F.2d 28, 32 (5th Cir. 1960); see also supra part II.A.
C. The Commerce Clause

The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.\(^4\)

That the copyright power does not extend to the regulation of moral rights does not, in itself, mean the federal government does not have the power to protect moral rights. VARA would still be valid if authority for moral rights regulation could be found elsewhere in the Constitution. The Commerce Clause, which gives Congress the authority to regulate interstate commerce,\(^4\) is a potential source of authority because moral rights regulation requires the regulation of the sale of artwork. Therefore, the Commerce Clause must be addressed before concluding that the federal government does not have the power to protect moral rights.

The short answer to the Commerce Clause question is that VARA regulates property rights,\(^4\) property rights are governed by state law,\(^4\) and therefore, the Commerce Clause does not provide authority for VARA.\(^4\) Of course, Supreme Court jurisprudence makes short answers to Commerce Clause questions difficult—a closer look at the question is necessary.

Under Supreme Court cases decided since the New Deal, Congress can reach intrastate trade where necessary to make the regulation of interstate trade effective.\(^4\) In Wickard v. Filburn\(^4\) for instance, Congress, in an attempt to control the volume of wheat moving in interstate

\(^4\) U.S. CONST. art. I, § 8, cl. 3.
\(^4\) Id.
\(^4\) See supra part II.B.
\(^4\) Campbell, 276 F.2d at 32.
\(^4\) Another way to look at it is this: Congress can reach intrastate trade where the intrastate trade has a "substantial effect" on interstate commerce. United States v. Darby, 312 U.S. 100, 119-20 (1941). Where intrastate trade has only a trivial effect on interstate commerce Congress can reach it if the cumulative effect of all similar acts on interstate trade would be substantial. Wickard v. Filburn, 317 U.S. 111, 127-28 (1942). Congress can even reach intrastate activity that has no effect on interstate trade where the intrastate activity is part of a class of activities that has an effect on interstate commerce. Perez v. United States, 402 U.S. 146, 154 (1971). Also, Congress can reach intrastate trade where the intrastate trade is so co-mingled with interstate trade that regulating the intrastate trade would be impossible without also being able to regulate the interstate trade. Darby, 312 U.S. at 120 (citing Houston, E. & W. Texas Ry. v. United States (Shreveport Case), 234 U.S. 342 (1914)).
\(^4\) 317 U.S. 111 (1942).
trade, was able to reach the consumption of home grown wheat, because home grown wheat was the most variable factor in interstate wheat commerce. In *United States v. Darby,* Congress could reach the wages of employees involved in the manufacture of goods intended for interstate commerce, because the use of substandard working conditions in one state would promote the use of substandard working conditions in other states through competition in interstate commerce. In *Perez v. United States,* Congress could reach local loan sharking, because it was a major source of funds for organized crime which operated interstate. In each of these cases, the regulation of interstate trade would have been ineffective had Congress not been able to reach intrastate trade.

Although some may argue that VARA’s purpose is to effectuate the regulation of interstate commerce by protecting works of art, that argument is simply wrong. VARA’s purpose is not to protect works of art, it is merely to protect the reputations of individual artists. It is true that the stated goals of VARA include both (i) protecting the honor and reputation of visual artists and (ii) protecting the works of art, as well as (iii) providing for nationwide standards for (i) and (ii). It is also true that Rep. Markey supported VARA with a story he heard about two entrepreneurs who bought a Picasso print and cut it into 500 one-inch pieces to be sold for $135 each, thus implying that VARA’s purpose was to protect such works. However, the work spoken of by Rep. Markey would not have been protected by VARA—VARA’s protections last only as long as the life of the artist. Because Picasso is dead, none of his works can qualify for VARA’s protections. In contrast, any kindergarten fingerpainting could, in theory, someday be protected by VARA as long as its creator is still alive. Thus, while VARA offers no protection to Picassos, it offers potential protection to fingerpaintings. To believe that VARA’s purpose is to protect works of art, therefore, one would have to come to the absurd conclusion that, in an effort to protect works of art, Congress decided to offer more protection to fingerpaintings than to

50. 317 U.S. at 127.
51. 312 U.S. 100 (1941).
52. 312 U.S. at 109-10.
54. 402 U.S. at 157.
56. 136 CONG. REc. H3111, H3115. The idea was that each buyer would be able to purchase a Picasso piece of his or her very own. Id.
Picassos. Clearly, the more logical conclusion is that VARA's only real purpose is to protect the reputations of individual living artists. Thus, VARA does not address an interstate commerce interest.

Without some interstate commerce interest, VARA does not provide the federal government with grounds to reach beyond interstate commerce as did the statutes in *Darby*, *Wickard*, and *Perez*. To allow Congress to regulate mere intrastate commerce without addressing an interstate commerce interest would be to give Congress unlimited power over all commerce, which is an impossibility under the Constitution.\(^5^8\) The regulation of moral rights is, therefore, beyond the powers granted to Congress under the Commerce Clause.

**D. The Treaty Power**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .\(^5^9\)

The Congress shall have Power . . . To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States . . . .\(^6^0\)

The concept of moral rights is embodied in the Berne Convention treaty.\(^6^1\) This treaty provides for the international protection of copyrights and was signed by the United States in 1989.\(^6^2\) The United States declared that adequate protection of moral rights already existed when it signed the agreement and, therefore, special moral rights protection was not included in the 1988 Berne Implementation Act.\(^6^3\) VARA was

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58. *See United States v. Lopez*, 115 S. Ct. 1624, 1632-34 (1995); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824) ("[T]he enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. . . . The completely internal commerce of a State, then, may be considered as reserved for the State itself."); *supra* part II.A.

59. *U.S. Const.* art. VI, cl. 2.

60. *U.S. Const.* art. I, § 8, cl. 18.

61. Damich, *supra* note 8, at 946.

62. *Id.*

actually modeled after the California Arts Preservation Act. Because VARA was not passed pursuant to a treaty, the treaty power does not provide authority for the regulation of moral rights.

Even if VARA was passed pursuant to the Berne Convention, the treaty power would still not provide a source of federal power, because a treaty may not contravene the prohibitory words of the Constitution. As will be discussed below, VARA violates the First Amendment.

III. VARA VIOLATES THE FIRST AMENDMENT

_Congress shall make no law . . . abridging the freedom of speech . . . ._

A. Art Is Speech

Even if there was authority in the Constitution for the federal government to regulate moral rights, VARA would still be unconstitutional as a violation of the First Amendment. Art is a type of speech protected by the First Amendment’s guarantee of free speech. This protection has become more important in recent years as “[p]aintings . . . become more explicitly political [and] other aspects of the artistic enterprise are devalued.” By regulating the display of art, VARA is regulating speech and, therefore, the constitutionality of VARA must be evaluated under First Amendment standards. VARA violates the First Amendment in several ways.

_Congress for nine years preceding_ the Berne Convention. _Id._ at 978 n.10.

64. Atteley, _supra_ note 4, at 371.
66. _See infra_ part III.
67. _U.S. CONST._ amend I.
70. Congressional enactments are presumed constitutional, but this presumption has less force when the legislation appears on its face to be within a specific prohibition of the Constitution. _United States v. Carolene Prods. Co._, 304 U.S. 144, 152-53 n.4 (1938). When a law infringes on rights protected by the Bill of Rights, the government has the burden of establishing its constitutionality. _Association of Community Org. v. Municipality of Golden_, Colo., 744 F.2d 739, 746 (10th Cir. 1984).
B. Violations of the First Amendment

1. Restricting the Art Owner’s Ability to Destroy a Piece of Art He or She Owns

The Supreme Court has clearly stated that the government may not regulate conduct because of the communicative element in the conduct, yet, this is precisely what VARA does. VARA purports to protect the reputation of the artist by restricting the owner’s ability to destroy a piece of art. A person’s reputation, though, is nothing more than the opinions people hold about that person. The concern addressed by VARA is that destroying a piece of art conveys the owner’s negative opinion of the artist. VARA protects the reputation of the artist by preventing the owner from conveying a negative opinion of the artist through the act of destroying the art.

It is true that “[a] law directed at the communicative nature of conduct . . . , like a law directed at speech itself, [can] be justified by the substantial showing of need . . . .” However, neither the protection of an individual’s reputation nor any other showing of need can justify the regulation of conduct directed at an opinion communicated by conduct. Opinions, which cannot be false, have absolute First Amendment protection. This absolute protection applies no matter how unreasonable

71. Before you yell “Philistine,” keep in mind that I am not encouraging owners to destroy art; I am merely pointing out that they have a right to do so if they choose.
74. See generally Olman v. Evans, 750 F.2d 970, 1007-08 (D.C. Cir. 1984) (Bork, J., concurring).
76. Johnson, 491 U.S. at 406 (citations omitted).
77. Olman, 750 F.2d at 976.
78. Id. at 975 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)). It is true the Supreme Court in Milkovich v. Lorain Journal Co. stated, “We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for ‘opinion’ is required to ensure the freedom of expression guaranteed by the First Amendment.” 497 U.S. 1, 21 (1990). However, this does not contradict the holding of Olman. The Supreme Court in Milkovich affirmed absolute constitutional protection for statements that could not “reasonably be interpreted as stating actual facts.” Milkovich, 497 U.S. at 20 (citations omitted). The Court was concerned about statements of fact being couched in terms of opinion. For example, the statement “In my opinion Mayor Jones is a liar,” would not be protected by the First Amendment because it is really asserting a fact—that the
the opinion of the art may be.79 The government simply may not regulate opinions to prevent them from being unfair.80 Because VARA's regulation is directed at opinion, it cannot be justified by any showing of need. VARA's regulation of moral rights, therefore, is an absolute violation of the First Amendment.

2. VARA Mandates the Art Owner's Speech by Forcing the Owner to Display a Piece of Art

By forcing an owner to display a piece of art to protect the artist's reputation,81 VARA is forcing the owner to express a particular opinion about the artist. Such an act, because it has a communicative element, is protected by the First Amendment.82 Freedom of speech under the First Amendment includes the freedom not to speak,83 and thus, the freedom not to express an opinion.84 Because an owner has a First Amendment right not to express an opinion, he or she has a First Amendment right not to display a work for the purpose of protecting the artist's reputation.85 Therefore, by forcing the art owner to protect the reputation of the artist, the regulation of moral rights violates the First Amendment.

The art owner also has a First Amendment right not to convey whatever message may be contained in the art itself. The government may not "require an individual to participate in the dissemination of an ideological message by displaying it on his property in a manner and for the express purpose that it be observed . . . by the public."86 It is true

82. See supra part III.B.1.
83. Riley, 487 U.S. at 796-97 (1988). "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech . . . [and is therefore] . . . content-based regulation of speech." Id. at 795.
84. Ollman v. Evans, 750 F.2d 970, 976 (D.C. Cir. 1984); see also supra part III.1.
85. See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein") (emphasis added).
that the purpose of VARA is to protect the reputation of the artist,\textsuperscript{87} not to disseminate the message contained in a particular piece of art. However, by forcing the owner to display the work to protect an artist’s reputation, the government, as a result, is also forcing the owner to communicate the message contained in the art. The goal of protecting an individual’s reputation is not a compelling government interest.\textsuperscript{88} “[S]uch interest cannot outweigh an individual’s First Amendment right to avoid becoming [a] courier for such a message.”\textsuperscript{89} The regulation of moral rights, therefore, violates the First Amendment by requiring the owner to communicate an ideological message.

3. VARA Treats Artists’ Speech Unequally

“[I]t is a central tenant of the First Amendment that the government must remain neutral in the marketplace of ideas.”\textsuperscript{90} All ideas must be considered of equal value under the law and be given an equal opportunity to be heard.\textsuperscript{91} In the area of non-commercial speech, the government may not “evaluate the strength of, or distinguish between various communicative interests.”\textsuperscript{92} Yet, when courts are asked to determine the “stature” of a piece of art under VARA,\textsuperscript{93} they are being asked to determine if the artist’s speech is worthy of government protection. As a result, some speech will receive government protection while other speech will not. Artists have a First Amendment right to have their speech offered the same protection by the government.\textsuperscript{94} Regulation of moral rights, therefore, violates the First Amendment by subjecting artists’ speech to unequal treatment.

Unequal treatment could be permissible if there is an “appropriate governmental interest suitably furthered by the differential treatment.”\textsuperscript{95} However, VARA’s purpose is to protect a living artist’s reputation\textsuperscript{96}

\textsuperscript{87} See supra part II.B.
\textsuperscript{89} Wooley, 430 U.S. at 717.
\textsuperscript{90} Hustler Magazine, Inc., 485 U.S. at 56 (citations omitted).
\textsuperscript{91} Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 96 (1972).
\textsuperscript{92} Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 514 (1981).
\textsuperscript{94} See Mosley, 408 U.S. at 96-98; Metromedia, Inc., 453 U.S. at 514. In this context, it is interesting to note the title of 17 U.S.C. § 106A, the main section of VARA: “Rights of certain authors to attribution and integrity.” (emphasis added). VARA’s legislative history is also enlightening: “This legislation covers only a very select group of artists.” H.R. REP. No. 101-514, 101st Cong., 2d Sess. 11 (1990), reprinted in 1990 U.S.C.C.A.N. 6803, 6921 (emphasis added).
\textsuperscript{95} Mosley, 408 U.S. at 95.
\textsuperscript{96} See supra part II.C.
which is not a compelling government interest.\textsuperscript{97} Therefore, VARA cannot be justified on compelling interest grounds.

4. VARA Subjects Both the Artist’s and the Art Owner’s Speech to Vague Regulatory Standards

For a piece of art to be protected under VARA, it must be a work of “stature.”\textsuperscript{98} However, VARA does not define “stature.”\textsuperscript{99} “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”\textsuperscript{100} Using stature as a standard, without more, is particularly troublesome in this respect, because it “is inherently incapable of being adjudicated with any expectation of accuracy.”\textsuperscript{101} Asking a finder of fact to determine stature calls on the finder of fact to speculate and “render a decision based upon the approval or disapproval of the contents of the statement, its author, or its subject,” which is not permissible under our system.\textsuperscript{102} Ultimately, the vagueness of the term “stature” leaves what is basically a policy decision to the trier of fact to determine on a subjective basis.\textsuperscript{103} This is clearly demonstrated in \textit{Carter} where the judge, although finding the expert witnesses for both sides to be well qualified, ruled in favor of the artist, because the expert for the building owner had a “disdain for contemporary art.”\textsuperscript{104} By discrediting the expert’s testimony because the expert did not like modern art, the judge was merely replacing the expert’s opinion with his own.\textsuperscript{105}

The danger of subjectivity inherent in determining “stature” is especially strong under VARA, because it calls on the trier of fact to make aesthetic judgments.\textsuperscript{106} As Justice Holmes once wrote, it is “a

\textsuperscript{100} \textit{Grayned v. City of Rockford}, 408 U.S. 104, 108 (1972).
\textsuperscript{102} \textit{Olman}, 750 F.2d at 981.
\textsuperscript{103} See \textit{Grayned}, 408 U.S. at 108-09 (1972) (“A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an \textit{ad hoc} and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”).
\textsuperscript{104} 861 F. Supp. at 326.
\textsuperscript{105} The judge was not failing to follow the law by doing this—he was doing exactly what VARA unfortunately invites him to do.
dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits.”\textsuperscript{107} To allow the First Amendment rights of the artist and owner to be subordinated to the subjective, untrained tastes of the judge or jury, would clearly operate “to inhibit the exercise” of free speech and therefore is unconstitutional.\textsuperscript{108}

Calling witnesses to testify about a work’s stature will not provide the court with constitutionally adequate grounds on which to base its decision. Testimony about a work’s stature would provide the court with nothing more than “contradictory opinions about opinions.”\textsuperscript{109} For instance, in \textit{Serra v. United States General Services Administration} (decided before VARA, but struggled with the same questions), both sides called witnesses to testify about the famous “Tilted Arc” sculpture in the Federal Plaza in New York.\textsuperscript{110} The artists called the oxidation of the steel “a golden amber patina,” while the area residents and workers called it “rust.”\textsuperscript{111} Judicially determining whether oxidation is a “golden amber patina” or “rust” is the equivalent of judicially determining whether a glass of water is half full or half empty.

To suggest that using art “critics” as expert witnesses can bring some clarity and objectivity to a VARA proceeding is wishful thinking. In the Fall of 1994, the \textit{New York Times}—hardly known for being unsympathetic to the arts\textsuperscript{112}—published an article which suggested that art criticism has sunk into “paralysis” as a result of “contemporary art’s obsession with itself.”\textsuperscript{113} According to the article, “[a]s art has increasingly become the product of an ongoing exchange about itself, . . . [art critics] have developed their own abstracted vocabulary and obscure frames of reference . . . . The insular nature of the conversation can leave casual readers clueless, and serious readers uncertain.”\textsuperscript{114} To illustrate the “trend toward obfuscation,”\textsuperscript{115} the article reprinted some recent quotes of published art critics. For instance, one critic made this

\textsuperscript{107} Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).
\textsuperscript{108} Grayned, 408 U.S. at 109 (citations omitted).
\textsuperscript{109} Olman, 750 F.2d at 1006.
\textsuperscript{110} 847 F.2d 1045 (2d Cir. 1988). The “Tilted Arc” was a steel wall that cut across the plaza. \textit{Id.} at 1047.
\textsuperscript{111} \textit{Id.} at 1047.
\textsuperscript{112} \textit{See, e.g., Art and Money}, N.Y. \textit{Times}, Dec. 17, 1995, at 12 (expressing concern about the current state of arts funding).
\textsuperscript{114} \textit{Id.} at 16.
\textsuperscript{115} \textit{Id.} at 1.
evaluation: "[Helmut] Federle's grouping of works also suggests a kind of epigenesis of abstraction: each stage offers a greater, more exacting epiphany of the idea of abstraction as such and the essential consciousness—a consciousness that can recognize and deal with essences (in a Husserlian sense)—than the preceding one."116 Another critic wrote, "[p]erhaps we've seen too many sculptures dealing with the human body in the last few years, or perhaps the impressive artisanry (by expert tailors) overwhelmed the metaphoric possibilities of the work, or perhaps the metaphor itself (weight as content) was simply too obvious."117 Could you imagine listening to these statements as a judge? Such testimony would do little to aid the court in its decision.

Of course, it is possible that the nature and quality of art criticism will develop to a point where it can provide some genuine guidance, but not in the context of VARA. The New York Times article suggests that art criticism is obfuscated to hide a "dirty secret whispered by experts who do not want to be named: that much of the art that critics write about is simply not very interesting."118 Given such an ulterior motive for the criticism, it is not surprising that art criticism lacks clarity and decisiveness. However, VARA replaces that ulterior motive with yet another—expert witness fees. Given an art critic's incentive to support the conclusion of the side that hires him, and the subjective nature of art itself, it is folly to believe that expert testimony by art critics in VARA proceedings will ever develop to a point where it can provide useful, constitutionally sufficient criteria on which the court could base a decision.

The aggregate of opinions cannot produce a fact.119 Without clear standards or an objective method to determine which art has "stature," VARA will ultimately subordinate First Amendment rights to the subjective views of a judge or jury. The regulation of moral rights violates the First Amendment by subjecting speech to such standards.

IV. VARA IS BAD PUBLIC POLICY

VARA is likely to hurt, rather than help artists as a group. The attorney for the artists in Carter said, in reference to the decision, "I

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116. Id.
117. Id.
118. Id. at 16.
think it says that art is important and deserves protection.”¹¹² This is a common misconception—laws that offer special protections for certain groups of people do not imply that they deserve protection, but rather, that they need protection.¹¹³ Although such laws are sometimes appropriate, it is doubtful they do much to enhance the reputation of a profession. Laws like VARA, which restrict a person’s ability to transfer property,¹¹⁴ restrict a person’s ability to manage his or her own affairs.¹¹⁵ Such laws are generally associated with children, not adults. The problem for artists is VARA’s implication that artists need this special protection by the government to help them maintain their reputations. It implies that their work is not of sufficient quality to sustain their reputations without federal assistance.¹¹⁶ VARA’s special protections for artists will, therefore, hurt rather than help, the reputation of artists as a group.

This is not to say that artists are not having trouble these days—they are. According to a recent *New York Times* article, arts that depend on new works (i.e., concert halls, theaters) are having trouble, while museums, which “thrive on collections of masterpieces and [do] not depend on new acquisitions,” are doing very well.¹¹⁷ The obvious implication is that there is not as much demand for the work of new artists. The *Times* suggests that one reason for this “crisis” is “the uncertainty in artistic achievement.”¹¹⁸ It even goes on to suggest that, these days, “the very notion of high artistic achievement is often regarded as chimera.”¹¹⁹

It must be tempting to try and counteract this uncertainty by looking to the federal government for endorsement, but the uncertainty regarding artists’ achievement can only be increased by VARA. When a product

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111. See Regents of Univ. of Ca. v. Bakke, 438 U.S. 265 (1978). Although in a different context, the Supreme Court in *Bakke* recognized that “preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection.” Id. at 298 (emphasis added).
112. 17 U.S.C. § 106A provides that the artist may not transfer his moral rights in the artwork. Moral rights are property rights. See *supra* part II.B.
113. The Berne Convention literally prohibits the artist from waiving his moral rights out of “concern about protecting the artist even against himself.” Damich, *supra* note 8, at 947 (citation omitted) (emphasis added).
114. For this reason, VARA should prove to be much more popular among untalented artists than talented ones.
116. *Id.*
117. *Id.*
succeeds in a free market, where no single person has control, there is a presumption that the product succeeded on its merits.\textsuperscript{128} However, when a product succeeds as a result of decisions made by an identifiable person, there is always a suspicion that the decision was made based on the preference of that person rather than on the merits of the product.\textsuperscript{129} This suspicion can lead to uncertainty about the product's quality.\textsuperscript{130}

Under VARA, the success of a piece of art will be determined by a judge rather than the market. As a result, there will naturally be doubts about the merits of the piece. As more cases are pursued under VARA, more works of art will be displayed under court order and there will be more works subject to the same doubt. This can only increase the uncertainty regarding the achievement of current artists.

The irony is that VARA does not give artists anything that they did not have already. Courts already protect artists' rights under various legal theories including copyright, unfair competition, invasion of privacy, defamation, and breach of contract.\textsuperscript{131} Furthermore, an artist has always been free to reserve rights in his or her work, including moral rights, through the contract of sale.\textsuperscript{132}

It may be true that an artist will have to sell his or her work at a lower price to contractually retain rights in the work, but this does not change under VARA. Many public entities are already demanding waivers of VARA rights before allowing an artist to display his or her work.\textsuperscript{133} Although only time will tell, it is safe to assume that these entities will either refuse to display the work, or offer the artist less money, if the artist refuses to waive VARA rights.

A recent study of baby boomers by the National Endowment for the Arts found that “many [baby boomers] simply [had] no interest in [the] arts [and] others [had] a real hostility toward them.”\textsuperscript{134} The Times suggested that part of the problem is that people are “suspicious of anything that smacks of too much elitism.”\textsuperscript{135} VARA will reinforce this image of elitism in the arts by taking decisions regarding art out of the

\textsuperscript{128} CARL KEYSEN & DONALD F. TURNER, ANTITRUST POLICY 11-20 (1959), \textit{reprinted in TRADE REGULATION 3} (Milton Handler et al. eds., 3d ed. 1993).
\textsuperscript{129} See id.
\textsuperscript{130} See id. at 3-5.
\textsuperscript{134} Rothstein, \textit{supra} note 69, at 1.
\textsuperscript{135} \textit{Id.} at 14.
market and putting them into the hands of the federal court system. This can only increase the hostility towards the arts.

V. ART SHOULD BE GOVERNED BY THE FREE MARKET

The federal government’s attempt to insulate art from market forces is hopelessly misguided. In Philip Howard’s book, *The Death of Common Sense: How Law is Suffocating America*, he suggests that “government looks increasingly absurd because increasingly it tries to use detailed laws as substitutes for reasonable judgments by individuals.” VARA is a perfect example. The very premise of VARA, that the American people need the federal government to select what art the people of this country will hold in high regard, proceeds on the assumption that the American people have neither the intelligence nor the good sense to decide for themselves. Such an assumption is not the basis for good law. As Judge Learned Hand said, “the First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.” Art is simply safer in the hands of a free market than it is in the hands of a federal regulatory scheme.

It is hardly a radical idea to suggest that art be governed by the free market. In a case where national security was an issue, Justice Holmes concluded “that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.” In another case, holding that states may not require the recital of the Pledge of Allegiance, the Supreme Court wrote, “we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization.” In light of such truths, the fear that we risk imminent intellectual ruin by

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136. Of course, I am not suggesting anything new here; art has always been governed by the free market. However, in the days of federal funding for public broadcasting, the National Endowment for the Arts, the National Endowment for the Humanities, and VARA, the advantages of the market no longer seem to be accepted as self evident.


139. *See supra* part IV.


subjecting art to market competition is unfounded. This is not to suggest that government has no role in the arts—it has a significant role in the arts through the legitimate exercise of the copyright power.\textsuperscript{142} Also, the government has the power to preserve genuine national treasures the old fashioned way—by purchasing them. VARA, though, is akin to the federal government granting copyrights to works that it likes and denying copyrights to works it does not like—this the government does not have the power to do.\textsuperscript{143}

What seems to drive supporters of government intervention in art is a lack of confidence in art itself.\textsuperscript{144} Art critics have long used abstract principles to hide the mediocrity of much art. Twenty years ago, Tom Wolfe, in \textit{The Painted Word}, suggested that the concepts and theories used in art criticism were being used to justify art that had little merit.\textsuperscript{145} As noted earlier, the \textit{New York Times} has asserted that the “dirty secret whispered by experts . . . [is] that much of the art that critics write about is simply not very interesting.”\textsuperscript{146} By taking art out of the competitive marketplace, VARA appears to be the next step in a process of obscuring the mediocrity of many works of art.

Of course, not all art lacks merit—clearly some art is extraordinary. However, like literature, theater and all other creative undertakings, some works are good, some are bad, and most, by definition, are average. The only reliable way to tell the difference, and determine which are worth preserving, is to let them compete unfettered by government regulation.

VI. CONCLUSION

What may be most troubling about VARA is suggested in the title itself: The Visual Artists’ Rights Act of 1990. The very notion that a particular group of people has “rights” not shared by all is abhorrent to our system of justice. Rights are a shield against the law, not a tool to beat others into submission.\textsuperscript{147} To the degree that artists have a special right to have their reputation protected, they have that right at the expense of everyone else’s right to free speech.\textsuperscript{148} Such a right is not a “right” at all, but a privilege. The days of granting special privileges

\textsuperscript{142} U.S. CONST. art. I, § 8, cl. 8.
\textsuperscript{143} See Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 96 (1972); supra part III.B.3.
\textsuperscript{144} See supra part IV.
\textsuperscript{145} Schemo, supra note 113, at 16.
\textsuperscript{146} Id.
\textsuperscript{147} Will, supra note 137, at A41.
\textsuperscript{148} See supra part III.
to classes of citizens, so they would not live under the same rules as everyone else, are gone. The United States does not grant titles of nobility.\textsuperscript{149}

Not that any of this would help artists anyway. Putting artists up on such a pedestal only reinforces the suspicion that the arts are dominated by elitists.\textsuperscript{150} The \textit{New York Times}, in reference to this suspicion, has suggested that “the crisis in the arts [may be] democracy’s revenge.”\textsuperscript{151} VARA will certainly not help artists by putting them in further conflict with democracy.

In a nation built on hard work and competition, by intelligent people who value liberty above all else, legal recognition of moral rights is an embarrassing step backwards. Regulation of moral rights by the federal government clearly violates the Constitution as well as common sense. Accordingly, VARA should be repealed.

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\begin{enumerate}
\item[149.] U.S. CONST. art. I, § 9, cl. 8.
\item[150.] Rothstein, \textit{supra} note 69, at 14.
\item[151.] \textit{Id.}
\end{enumerate}