

2021

When Art Might Constitute a Taking: A Takings Clause Inquiry Under the Visual Artists Rights Act

Thomas A. Shelburne

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/jetlaw>



Part of the [Law Commons](#)

Recommended Citation

Thomas A. Shelburne, When Art Might Constitute a Taking: A Takings Clause Inquiry Under the Visual Artists Rights Act, 23 *Vanderbilt Journal of Entertainment and Technology Law* 919 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol23/iss4/6>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Journal of Entertainment & Technology Law* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

When Art Might Constitute a Taking: A Takings Clause Inquiry Under the Visual Artists Rights Act

ABSTRACT

At first glance, a federal statute protecting the moral rights of artists and their artwork seems like a unanimous victory. But it turns out that government action protecting certain works of art attached to buildings may give rise to a valid takings clause claim under the Fifth Amendment. Without compensation, a regulation requiring a landowner to maintain someone else's property on his land would constitute a taking. The Visual Artists Rights Act of 1990 (VARA) requires landowners to maintain protected artwork attached to buildings or potentially face statutory damages. Although only one court has heard and subsequently denied a takings argument in the VARA context, in the highly contextual nature of the statute, there are still compelling arguments to be made that VARA-protected art may constitute a taking. This Note provides background on both VARA and the takings clause and provides various arguments that a VARA landowner-defendant could utilize to avoid liability.

TABLE OF CONTENTS

I.	A BRIEF HISTORY OF VARA.....	921
	A. <i>Moral Rights in the United States Pre-VARA</i>	924
	B. <i>Moral Rights Protection Under VARA</i>	926
	C. <i>A VARA Takings Argument in Court</i>	929
II.	WHEN VARA MIGHT BE A TAKING	930
	A. <i>VARA as a Per Se Physical Invasion</i>	930
	B. <i>VARA as a Regulatory Taking</i>	932
	C. <i>How VARA May Affect a Property's Value and Use</i>	934
III.	POTENTIAL TAKINGS ARGUMENTS IN THE VARA CONTEXT.....	935
	A. <i>Evaluating the Takings Arguments Made in Carter</i>	935
	B. <i>VARA as a Per Se Physical Invasion</i>	936
	C. <i>VARA as a Total Regulatory Taking</i>	938
	D. <i>A Future for VARA?</i>	940
IV.	CONCLUSION.....	941

Imagine that you have just bought a new building in anticipation of opening a trendy new restaurant in Nashville. Before opening, one of the first things you want to do is redecorate your new building to match the restaurant's trendy theme, which includes replacing a mural on the side of the building that does not match your desired aesthetic. Instead, you would like to put up a new mural that is more likely to attract patrons to your restaurant for Instagram-worthy pictures. A few weeks after finishing the new mural and opening your new restaurant, someone you have never met before approaches you and lets you know that she is suing you for destroying her previously popular mural. Does an artist really have a say in how you use the property you own? Under the Visual Artists Rights Act (VARA), an artist may in fact be able to control how another person can use his property if there is protected artwork attached to the property.¹

Congress enacted VARA in 1990 as an amendment to the Copyright Act to provide protection for the "moral rights" of artists.² VARA states that an artist has a lifetime right to prevent any intentional or grossly negligent destruction, distortion, or any other modification of artwork that is of "recognized stature."³ Section 113(d) of VARA applies these rights to works of recognized stature incorporated into buildings in such a way that the property owner cannot remove the work from the building without violating the artist's rights.⁴ As a result, VARA potentially allows an artist to control the use of another person's property in its attempt to balance the economic rights of property owners with the moral rights of artists.⁵ In this balancing act, VARA may give rise to a landowner having a legitimate claim under the takings clause of the Fifth Amendment.⁶

1. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, sec. 604, § 113(d), 104 Stat. 5128, 5130–31 (codified as amended at 17 U.S.C. § 113(d)); cf. *Carter v. Helmsley–Spear, Inc.*, 71 F.3d 77, 88 (2d Cir. 1995). For a comparable situation, see Adam Sparks, *Why Vanderbilt Painted Over Traditional Coach Mural After 27 Years*, THE TENNESSEAN, <https://www.tennessean.com/story/sports/college/vanderbilt/2019/08/19/vanderbilt-coaches-mural-nashville-west-end/2049731001/> [https://perma.cc/Y7VH-X8HE] (Aug. 20, 2019, 1:15 PM).

2. *Carter v. Helmsley–Spear, Inc.*, 861 F. Supp. 303, 313 (S.D.N.Y. 1994) (citation omitted) ("[M]oral rights afford protection for the author's personal, non-economic interests in receiving attribution for her work, and in preserving the work in the form in which it was created, even after its sale or licensing."), *aff'd in part, vacated in part, rev'd in part on other grounds*, 71 F.3d 77 (2d Cir. 1995).

3. 17 U.S.C. § 106A(a), (d).

4. 17 U.S.C. § 113(d); Christopher J. Robinson, Note, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1945 (2000).

5. See Robinson, *supra* note 4, at 1935.

6. William L. Charron & Jason S. Mencher, *Painting Your Way to a Lifetime Tenancy Through the Visual Artists Rights Act*, 95 BNA'S PAT., TRADEMARK & COPYRIGHT J. 196 (2017),

This Note argues that, in the highly contextual nature of VARA cases, § 113(d) may give rise to a valid takings clause argument against the artist. Because of this possibility, courts should keep the takings doctrine in mind when balancing a property owner's economic rights with an artist's moral rights. Part I provides background on VARA within the larger scope of copyright law and the history of the takings clause. Part II applies a potential takings inquiry to VARA and recognizes certain hurdles that such a takings argument must overcome. Part III lays out potential takings arguments that a defendant could utilize to potentially escape VARA liability. Additionally, Part III contends that Congress and the courts should more aptly balance economic property rights with VARA's moral rights when a work of visual art cannot be removed from a building without injury to the art and there is no waiver signed by the artist.⁷

I. A BRIEF HISTORY OF VARA

When the United States finally signed onto the Berne Convention for the Protection of Literary and Artistic Works in 1989, the United States symbolically accepted the treaty's conception of moral rights in connection with works of visual art.⁸ The Berne Convention addresses moral rights in article *6bis*:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.⁹

However, the United States did not immediately amend the Copyright Act to comply with the Berne Convention's concept of moral rights.¹⁰ US law resisted recognizing moral rights in part because of the conflict moral rights have with traditional common law property

<https://pryorcashman.gjassets.com/content/uploads/2020/03/BBNA-Insight-Final-PryorCashman-Charron-Mencher.pdf> [<https://perma.cc/4UY6-Y9LR>]. The takings clause states that private property shall not be taken for public use without just compensation. U.S. CONST. amend. V.

7. See Eric E. Bensen, Note, *The Visual Artists' Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 HOFSTRA L. REV. 1127, 1129 n.3 (1996).

8. Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 945 (1990); Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. Treaty Doc. 99-27 (1986), 1161 U.N.T.S. 3 [hereinafter Berne Convention].

9. Berne Convention, *supra* note 8, at art. *6bis*.

10. Damich, *supra* note 8, at 945–46.

rights.¹¹ Despite the delay, a year after joining the Berne Convention, Congress passed the first federal moral rights law in connection with visual art, the Visual Artists Rights Act.¹²

VARA grants lifetime moral rights to authors of works of visual art.¹³ Moral rights are personal, noneconomic rights that artists have tied to their works.¹⁴ The term “moral rights” is translated from the French phrase “*droit moral*,” relating to an author’s ability to control the eventual fate of the author’s art.¹⁵ As a result of the French translation, the term “moral rights” is a misnomer because moral rights have nothing to do with a traditional sense of morals.¹⁶

VARA’s purpose is to protect two specific moral rights of artists: the rights of “integrity” and “attribution.”¹⁷ The right of integrity allows an artist to prevent any deformation or mutilation to his work, even after title to the work has been transferred, as long as the work is of “recognized stature.”¹⁸ The right of attribution grants an artist the right to be recognized by name as the creator of a work, which includes the right to prevent the use of the artist’s name on deformed art originally produced by the artist.¹⁹ These rights are not transferable but are waivable if signed in a written instrument by the artist.²⁰ This Note focuses primarily on how an artist’s right of integrity under VARA might infringe upon a building owner’s property rights.

11. *Cort v. St. Paul Fire & Marine Ins. Cos.*, 311 F.3d 979, 985 (9th Cir. 2002) (“Until recently it was accepted wisdom that the United States did not enforce any claim of moral rights” (quoting *Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1997))); *Carter v. Helmsley–Spear, Inc.*, 71 F.3d 77, 82 (2d Cir. 1995) (citing 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D–15 (1994)) (“The obligation of the United States to provide *droit moral* . . . was the single most contentious issue surrounding Berne adherence.” (quoting 2 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 1022 (1994))).

12. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified as amended in scattered sections of 17 U.S.C.). On December 1, 1990, the Visual Artists Rights Act was signed into law by President George H. W. Bush as Title VI to the Judicial Improvements Act of 1990. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

13. *Robinson*, *supra* note 4, at 1936.

14. *Id.*

15. Robert J. Sherman, Note, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 379 (1995).

16. *Id.*

17. 17 U.S.C. § 106A(a).

18. 17 U.S.C. § 106A(a)(3)(B); *Carter v. Helmsley–Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (citing RALPH E. LERNER & JUDITH BRESLER, ART LAW 420 (1989)).

19. *Carter*, 71 F.3d at 81 (first citing RALPH E. LERNER & JUDITH BRESLER, ART LAW 419–20 (1989); and then citing 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D–5 (1994)); see *Cort v. St. Paul Fire & Marine Ins. Cos.*, 311 F.3d 979, 985 (9th Cir. 2002) (citing *Carter*, 71 F.3d at 81).

20. 17 U.S.C. § 106A(b), (e).

While VARA is a victory for artists' rights and has a commendable purpose, many of the statute's biggest advocates also note that it does not offer the broad moral rights protections enjoyed throughout Europe and does not bring US law into full conformity with the Berne Convention.²¹ One important distinction between VARA and the Berne Convention is the duration of protection. While VARA offers protection for the life of the artist, the Berne Convention's article 6*bis* requires that moral rights last for the entire length of copyright protection.²² Under VARA, for works created before June 1, 1991, if the author retains a copy of the work, moral rights protection lasts for the life of the author plus seventy years.²³ If the artist did not retain a copy of the work, then the artist possesses no moral rights for the artwork created before June 1, 1991.²⁴ Additionally, article 6*bis* applies to all literary and artistic works, whereas VARA only applies to "works of visual art,"²⁵ with some notable exceptions.²⁶

VARA protects works created on or after June 1, 1991, offering moral rights protection for the lifetime of the author.²⁷ Because VARA does not offer as broad of protection as seen elsewhere, states have the ability to enact statutes to bring moral rights protection closer to the requirements existing within the Berne Convention.²⁸ These state statutes generally provide broader protection than what VARA offers and restrict the alienability of moral rights.²⁹

21. Damich, *supra* note 8, at 947; Laura Gilbert, *Why the Visual Artists Rights Act Is Failing*, ARTSY (Sept. 29, 2015, 10:20 AM), <https://www.artsy.net/article/artsy-editorial-why-the-visual-artists-rights-act-is-failing-to-protect-street-art-and-murals> [https://perma.cc/BA48-W2MV].

22. Damich, *supra* note 8, at 947.

23. Jana S. Farmer & Adam Bialek, *Where Moral Rights May Conflict with the Removal of Confederate Statues*, LAW.COM (Dec. 11, 2017), <https://finance.yahoo.com/news/where-moral-rights-may-conflict-073005258.html> [https://perma.cc/Z8EH-LYBM].

24. *Id.*

25. Berne Convention, *supra* note 8, at art. 6*bis*; Damich, *supra* note 8, at 947. See 17 U.S.C. § 101 for the statutory definition of a "work of visual art."

26. See 17 U.S.C. § 101.

27. Robinson, *supra* note 4, at 1935–36.

28. Damich, *supra* note 8, at 947–48.

29. See, e.g., N.M. STAT. ANN. § 13-4B-2(B), 3(B) (West 2020) (defining "fine art" as "any original work of visual or graphic art of any media . . . of recognized quality"); 5 R.I. GEN. LAWS §§ 5-62-2(20), 4(a) (2020); CONN. GEN. STAT. §§ 42-116s(2), -116t (2019); CAL. CIV. CODE §§ 987–89 (West 2020); 73 PA. STAT. AND CONS. STAT. ANN. §§ 2102–05, 2107 (West 2020); MASS. GEN. LAWS ANN. ch. 231, § 85S (West 2020). New York's moral rights statute emphasizes the value of an artist's reputation, rather than the intrinsic value of the particular piece of art. As a result, display of a mutilated original piece of art is prohibited only if the artist's name is associated with it. See N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 2020). The passage of VARA puts the enforceability of state moral rights statutes into question due to federal preemption.

The enforcement mechanism of VARA allows for violations of an artist's moral rights to be subject to all civil copyright remedies.³⁰ These copyright remedies allow a court to grant an injunction to the artist to prevent destruction, mutilation, or any other alteration of a qualifying work.³¹ Artists may also seek monetary damages under the statute, either actual damages or statutory damages.³² For statutory damages, a court may award anywhere from \$750 to \$30,000 per copyrighted work, and this can be increased to \$150,000 per work if the copyright infringement was willful.³³ While other copyrighted works must be registered before infringement to be eligible for statutory damages, VARA-protected works do not have to be registered anywhere to recover statutory damages or attorneys' fees.³⁴

A. Moral Rights in the United States Pre-VARA

Before VARA in the United States, artists were traditionally denied any moral rights protections.³⁵ For example, in the 1949 case *Crimi v. Rutgers Presbyterian Church*, a church painted over a mural portraying a bare-chested Jesus because the church's parishioners felt like the mural overly emphasized Jesus's physical features in lieu of his spiritual qualities.³⁶ After the church painted over the mural, the artist of the mural brought a suit to either compel damages or restore the original painting, arguing that general customs in the art world dictate that works of high artistic standards should not be altered or destroyed.³⁷ Additionally, the artist argued that he had a continued "limited proprietary interest" in his work after its sale to reasonably protect his honor and reputation as an artist, which included his right to prevent the work from any alteration or destruction.³⁸ However, while acknowledging that moral rights are recognized elsewhere, the court held that the concept of moral rights had not received acceptance under US law.³⁹ The *Crimi* court found that when the artist sold the

See Visual Artists Rights Act of 1990, Pub. L. No. 101-650, sec. 605, § 301, 104 Stat. 5128, 5131 (codified as amended at 17 U.S.C. § 301).

30. See Robinson, *supra* note 4, at 1972.

31. 17 U.S.C. § 502.

32. 17 U.S.C. § 504.

33. 17 U.S.C. § 504(c).

34. See Robinson, *supra* note 4, at 1937-38.

35. Chintan Amin, Note, *Keep Your Filthy Hands Off My Painting! The Visual Artists Rights Act of 1990 and the Fifth Amendment Takings Clause*, 10 FLA. J. INT'L L. 315, 319 (1995).

36. *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813, 815 (Sup. Ct. 1949).

37. *Id.*

38. *Id.*

39. *Id.* at 818 (quoting *Vargas v. Esquire, Inc.*, 164 F.2d 522, 526 (7th Cir. 1947)).

mural to the church, he transferred all his rights, title, and interest in the mural.⁴⁰

Crimi's holding that artists do not retain rights in their work after sale was typical for its time in the United States.⁴¹ However, some artists looked outside of copyright law to find remedies in contract law and the tort of unfair competition.⁴² It was not until 1976 that a US court recognized artists' moral rights as a cause of action in *Gilliam v. American Broadcasting Companies*.⁴³ In *Gilliam*, members of the popular comedy group "Monty Python" sued the American Broadcast Companies (ABC) under Section 43(a) of the Lanham Act⁴⁴ for violating the integrity of their television show by substantially editing the show's content that the network found obscene.⁴⁵ Section 43(a) of the Lanham Act seeks to prevent misrepresentations made that may injure a person's business or personal reputation.⁴⁶ The *Gilliam* court found that the edited version of the show substantially departed from and impaired the integrity of Monty Python's work because the comedy group had retained control over the scripts via copyright law.⁴⁷ Despite acknowledging that US law did not presently recognize moral rights, the court recognized that the foundations of US copyright law could not be reconciled with an artist's inability to obtain relief for the mutilation or misrepresentation of their work to the public. Thus, a cause of action for moral rights was born.⁴⁸

40. *Id.* at 819. This raises an interesting question of whether, under VARA, an artist may still hold some form of ownership over the artwork itself, separate from intellectual property. *See id.*

41. Amin, *supra* note 35, at 319–20; *see Crimi*, 89 N.Y.S.2d at 818 (first quoting *Vargas v. Esquire, Inc.*, 164 F.2d 522, 526 (7th Cir. 1947); and then quoting *Yardley v. Houghton Mifflin Co.*, 25 F. Supp. 361, 364 (S.D.N.Y. 1938)).

42. *See Granz v. Harris*, 198 F.2d 585, 587–88 (2d Cir. 1952) (holding that substantial cutting of an original work constitutes misrepresentation in contract law); *Prouty v. Nat'l Broad. Co.*, 26 F. Supp. 265, 265–66 (D. Mass. 1939) (finding an author had a valid cause of action under the tort of misrepresentation when her novel was broadcast on television in inferior artistic and commercial quality).

43. *See Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 25 (2d Cir. 1976).

44. *See Lanham Act*, Pub. L. No. 79-489, § 43(a), 60 Stat. 427, 441 (1946) (codified as amended at 15 U.S.C. § 1125(a)). The Lanham Act is the federal statute that governs trademarks, service marks, and unfair competition.

45. *Gilliam*, 538 F.2d at 17–18.

46. *See* 15 U.S.C. § 1125(a).

47. *Gilliam*, 538 F.2d at 25.

48. *See id.*

B. Moral Rights Protection Under VARA

The first case to interpret VARA was *Carter v. Helmsley-Spear*.⁴⁹ The facts in the thought experiment found in the introductory paragraph of this Note are based on the facts from *Carter*. However, instead of a mural as the art in question, in *Carter*, the US Court of Appeals for the Second Circuit enjoined a building owner from removing a large sculpture that occupied most of the lobby of his building.⁵⁰ The defendants became owners of the building that housed the sculpture through a bankruptcy proceeding and then informed the artists that they intended to remove the art from the building.⁵¹ As a result, the artists sued under VARA and successfully received an injunction to protect the sculpture from removal.⁵²

When other circuits have interpreted VARA, property rights tend to triumph over an artist's moral rights.⁵³ While some proponents of VARA might describe the burdens imposed on property owners as light, consisting of giving notice to the artist and waiting ninety days for the artist to remove the art, the question then becomes how a VARA case could ever transpire.⁵⁴ A common reoccurring issue in VARA cases is failure to give notice to artists.⁵⁵ Eric Bjorgum, a prominent VARA plaintiffs' lawyer, states that property owners simply do not know about VARA.⁵⁶ In his practice, Bjorgum has noticed that once property owners become aware of VARA, they become far less likely to ever have art on buildings, which has negative consequences for not only the artist but the general public as well.⁵⁷

Additionally, the ambiguities within the statute related to the recognized stature standard could lead to excessive litigation and confusion for both the parties involved and the courts.⁵⁸ Even if a party is aware of VARA, there still may be a question of whether the artwork is of recognized stature and therefore even offered any protection. The statute itself does not define "recognized stature." However, one bill introduced to Congress before VARA's enactment instructed courts to look to expert opinion in deciding the stature of a particular work of

49. See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83-84 (2d Cir. 1995).

50. *Id.* at 80-81, 88.

51. *Id.* at 80-81.

52. *Id.* at 81.

53. See Gilbert, *supra* note 21.

54. *Id.*

55. See *id.*

56. *Id.*

57. *Id.*

58. See *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 324-26 (S.D.N.Y. 1994).

art.⁵⁹ In practice, the *Carter* court stated that a plaintiff must show that the art possesses stature in the viewpoints of art experts, members of the artistic community, or by society in general.⁶⁰ As a whole, the recognized stature standard departs from traditional copyright principles because, prior to VARA, copyright law had not given additional rights to copyrightable works based on quality.⁶¹ However, any moral rights statute that offers protection to artwork regardless of quality would certainly be overbroad.⁶²

In one recent situation in Nashville, a local muralist made waves by contacting various news organizations after Vanderbilt University unilaterally decided to paint over one of his murals that depicted the coaches of the university's sports programs.⁶³ Before its removal, the mural had stood for twenty-seven years and undergone numerous updates as coaches came and went.⁶⁴ According to the artist, the painting had become "iconic" to the area.⁶⁵ However, through the years, not everyone thought the mural was iconic in the same way. In fact, the same mural faced complaints from Vanderbilt's NAACP chapter accusing the depiction of former Vanderbilt football coach Derek Mason as being reminiscent of the minstrelsy era in which race was exaggerated in art.⁶⁶ Because Vanderbilt destroyed the mural without informing the artist, he might have a convincing claim under VARA. However, the line between protected "recognized stature" and unprotected art would certainly be an unclear distinction.

VARA has recently come back into the spotlight in the aftermath of the Second Circuit's decision in *Castillo v. G&M Realty L.P.*⁶⁷ In *Castillo*, the art in question was a graffiti-covered compound in New

59. See *Visual Artists Rights Act of 1987: Hearing on S. 1619 Before the Subcomm. on Pat., Copyrights & Trademarks of the S. Comm. on the Judiciary*, 100th Cong. 17 (1987) (statement of Ralph Oman, Register of Copyrights).

60. *Carter*, 861 F. Supp. at 325.

61. Robinson, *supra* note 4, at 1945.

62. *Id.* at 1946. One article contends that the "stature" standard is a higher bar than one requiring "quality." See Peter H. Karlen, *What's Wrong with VARA: A Critique of Federal Moral Rights*, 15 HASTINGS COMM'NS & ENT. L.J. 905, 916–17 (1993).

63. Sparks, *supra* note 1.

64. *Id.*

65. See Matthew Torres, *Vanderbilt Coaches Mural Painted Over Without Artist Knowing*, WTVF, <https://www.newschannel5.com/news/vanderbilt-coaches-mural-painted-over-without-artist-knowing> [<https://perma.cc/U9JU-369F>] (Aug. 19, 2019, 8:21 PM).

66. Nick Cole, *Derek Mason Mural to Be Redone After Complaints*, THE TENNESSEAN, <https://www.tennessean.com/story/sports/college/vanderbilt/2014/03/31/vanderbilt-coach-derek-mason-painting/7113205/> [<https://perma.cc/9XJR-8Z2P>] (Apr. 2, 2014, 12:40 AM).

67. See *Cohen v. G & M Realty L.P.*, 320 F. Supp. 3d 421, 427–28 (E.D.N.Y. 2018), *aff'd sub nom. Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020) (mem.); Charron & Mencher, *supra* note 6.

York known as 5Pointz.⁶⁸ During its existence, the 5Pointz compound housed approximately 10,650 works of art of differing quality and lifespans.⁶⁹ In May 2013, one of the contributing artists learned that property developers sought approval from the city to destroy 5Pointz in order to build luxury apartments on the site.⁷⁰ In response, the artist applied to make 5Pointz a site of cultural significance, but his application was unsuccessful.⁷¹ The artist then turned to VARA and sued the property developer to prevent destruction of the compound and the accompanying art.⁷²

In *Castillo*, first heard by the US District Court for the Eastern District of New York in 2013, the court explicitly recognized that the rights created by VARA are in tension with traditional notions of property rights and attempted to balance the artists' rights and the property owners' rights.⁷³ The court rejected the plaintiff's motion for a preliminary injunction and did not interfere with the developer's desire to tear down the compound so that he could build the luxury apartments but cautioned the developer that he could be exposed to significant monetary damages if the court ultimately determined that the artworks were of "recognized stature" under VARA.⁷⁴ The developer completely ignored the court's warning about damages and began to destroy the compound that same night.⁷⁵ Ultimately, the court found that forty-five of the aerosol works had achieved recognized stature and the developer had violated VARA by destroying them.⁷⁶ The district court awarded statutory damages set at \$150,000 for each work, totaling \$6.75 million in damages.⁷⁷ Persuaded by the seemingly bad faith acts on the part of the developer, the Second Circuit affirmed the district court's judgment in early 2020.⁷⁸

Around the same time the Second Circuit awarded damages in *Castillo*, the US Copyright Office conducted a study to determine whether the government should expand moral rights protections under

68. *Castillo*, 950 F.3d at 162.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 163.

73. *Cohen v. G & M Realty L.P.*, 320 F. Supp. 3d 421, 427 (E.D.N.Y. 2018) (citing *Cohen v. G & M Realty L.P.*, 988 F. Supp. 2d 212 (E.D.N.Y. 2013)).

74. *Id.*

75. *Castillo*, 950 F.3d at 163.

76. *Id.*

77. *Id.* at 164.

78. *Id.* at 178.

US law.⁷⁹ Published on April 23, 2019, the report concluded that “moral rights and contract law [are] ‘generally working well and should not be changed.’ At the current time, ‘there is no need for the creation of a blanket moral rights statute.’”⁸⁰ If Congress ever attempts to amend the moral rights framework in US law, this report could serve as a roadmap for Congress to follow.⁸¹ However, any moral rights expansion in the United States may face staunch opposition, much of which can be traced back to cultural differences between the United States and European countries that offer broad moral rights protection.⁸²

C. A VARA Takings Argument in Court

Only one VARA case has featured a potential takings argument: *Carter v. Helmsley–Spear*.⁸³ In *Carter*, briefly discussed above, the district court enjoined a building’s owners from removing a large sculpture from the building’s lobby, even though the art occupied most of the lobby’s space.⁸⁴ The defendants attempted to argue that requiring the statue to remain on their property was a per se taking in violation of the Fifth Amendment because an injunction would give the artist the right to control the use of the defendant’s property.⁸⁵ The court, emphasizing the substantial burdens faced by the defendants in making the takings argument, was not persuaded.⁸⁶ The *Carter* court found that no taking had occurred because there was no permanent physical invasion, noting that VARA protection lasts only for the life of the author and is therefore neither a facial nor as applied

79. Sam Berten, *A Call for the Expansion of the Visual Artists Rights Act*, UNIV. OF CIN. L. REV. BLOG (June 9, 2020), https://uclawreview.org/2020/06/09/a-call-for-the-expansion-of-the-visual-artists-rights-act/#_ednref8 [<https://perma.cc/AA2N-7DT8>]; *Moral Rights in U.S. Copyright Law*, COPYRIGHTLAWS.COM (Jan. 10, 2020), <https://www.copyrightlaws.com/moral-rights-in-u-s-copyright-law/> [<https://perma.cc/L6PE-NEJZ>]; U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 3 (2019).

80. *Moral Rights in U.S. Copyright Law*, *supra* note 79. The Copyright Office’s report recommended three changes to VARA, which included (1) clarifying that VARA pertains to both artworks created pursuant to a contract and artwork for commercial use; (2) offering guidance for courts trying to interpret the “recognized stature” standard; and (3) not allowing any joint author to waive rights without written consent from other joint authors. U.S. COPYRIGHT OFF., *supra* note 79, at 5.

81. Berten, *supra* note 79; see *Moral Rights in U.S. Copyright Law*, *supra* note 79.

82. Berten, *supra* note 79.

83. *Carter v. Helmsley–Spear, Inc.*, 861 F. Supp. 303, 326–27 (S.D.N.Y. 1994), *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995).

84. *Id.* at 337.

85. *Id.* at 326, 328.

86. *Id.* at 326–28.

permanent physical invasion.⁸⁷ Additionally, the *Carter* court stated that preservation of artwork through VARA may make some properties more valuable by generating public interest in the sites.⁸⁸ The court found that the building owners were already compensated by the artist because of a supposed increase in property value as a result of the sculpture's existence attached to the building.⁸⁹

While the takings arguments were of primary focus in front of the district court in *Carter*, the Second Circuit did not address the issue at all.⁹⁰ On appeal, the Second Circuit overturned the district court's ruling as a result of its finding that the artists were employees and not independent contractors, rendering them ineligible for VARA protection.⁹¹

II. WHEN VARA MIGHT BE A TAKING

A. VARA as a *Per Se* Physical Invasion

Requiring a landowner to maintain an artist's artwork on his land as a result of VARA could potentially be a *per se* physical invasion if the occupation is considered permanent.⁹² At first glance, a VARA defendant may have difficulty arguing that VARA-protected artwork is "permanent" because of the fact that the statute only confers a lifetime right of protection.⁹³ However, despite this hurdle, a landowner may be able to persuade a court that the invading artwork is "permanent," not in the durational sense, but by comparing the statute to other regulations that appeared limited in duration and were still found to be permanent.⁹⁴

Even though VARA protection explicitly only lasts for the lifetime of the artist, a court still may consider any attached artwork as a permanent invasion of another's property because the distinction between temporary and permanent in the takings analysis is far from clear.⁹⁵ The answer surprisingly does not necessarily boil down to an infinite duration of occupation. Rather, the Supreme Court has

87. *Id.* at 327–28.

88. *Id.* at 328.

89. *Id.*

90. *See id.* at 326–27; *Carter v. Helmsley–Spear, Inc.*, 71 F.3d 77, 88 (2d Cir. 1995).

91. *Carter*, 71 F.3d at 88.

92. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421–22 (1982).

93. 17 U.S.C. § 106A(d).

94. *See Loretto*, 458 U.S. at 448 (Blackmun, J., dissenting) (citation omitted).

95. *See Lynn E. Blais, The Total Takings Myth*, 86 *FORDHAM L. REV.* 47, 59–61 (2017).

focused on whether the invading material exclusively occupies a space, comparing a traveler walking on the street to a telephone pole.⁹⁶

The Supreme Court has found invasions that exclusively occupy space within another's property to be permanent, even if the invasion is not infinite in duration.⁹⁷ In *Loretto v. Teleprompter Manhattan CATV Corp.*, a per se physical invasion occurred when a New York statute required a landowner to permit a cable television company to install its equipment on her property.⁹⁸ However, as noted by the dissent, the regulation did not require the television equipment to remain in place permanently, but only so long as the property remained residential and the company wanted to maintain the equipment.⁹⁹ Essentially, a telephone pole, cable television equipment, or a work of art attached to a building could only be invading another person's property for a limited period of time, but still be considered "permanent" under a takings analysis because of the exclusive occupation of another person's land.

Similar to *Loretto*, VARA sanctions an exclusive occupation of someone else's physical property with the property of another person.¹⁰⁰ When a mural occupies a wall of a building, the artwork takes the space occupied by the art from the building owner because he can no longer fully utilize the wall bound to the artwork. As a result, even though a VARA invasion does not appear to be permanent in a durational sense, a landowner may have a fighting chance in persuading a court that the statute meets the requirements of a per se physical invasion.¹⁰¹ If a court does consider the invasion as permanent, a landowner-defendant's chances of success in the argument likely increase substantially.

If the invasion is considered permanent for takings analysis purposes, VARA may also give rise to the artist holding a nonpossessory interest in the use of the property.¹⁰² A person with a nonpossessory interest in a property has the right to use or restrict the use of another person's land, even though he does not hold any title to the property.¹⁰³ In the VARA context, when a work of art attached to a building is

96. See *St. Louis v. W. Union Tel. Co.*, 148 U.S. 92, 98–99 (1893).

97. See *Loretto*, 458 U.S. at 428–30 (citations omitted).

98. *Id.* at 419.

99. *Id.* at 448 (Blackmun, J., dissenting) (citation omitted).

100. See *id.* at 437 (majority opinion).

101. See *id.*

102. See Lawrence W. Andrea, Comment, *Trespass at High Tide: The Supreme Court Gives Heightened Scrutiny to a State Imposed Easement Requirement*, 54 BROOK. L. REV. 991, 995–97 (1988).

103. See *id.* at 994–97.

protected under the statute, the artist has a nonpossessory interest in the use of the property because the landowner can no longer fully use that space how he sees fit. The artist can dictate how the landowner fully utilizes his property by forbidding any destruction, mutilation, or alteration of the artwork attached to the building, even though the artist does not hold any title to the artwork. In this sense, VARA may create a quasi-easement held by artists, potentially denying a landowner his traditional property rights.¹⁰⁴

B. VARA as a Regulatory Taking

Enjoining a landowner from fully using his property or forcing him to endure a decrease in value as a result of VARA's existence could be a regulatory taking. However, under the relevant total regulatory takings analysis, a VARA defendant will likely struggle in establishing the loss of all economic value of the property.¹⁰⁵ As a result, the analysis for a regulatory taking claim for VARA would likely proceed under the *Penn Central* factors.¹⁰⁶ The *Penn Central* factors require a court to consider the character of the invasion, the economic impact of the regulation applied to the property, and the property owner's distinct investment-backed expectations related to the property.¹⁰⁷ Regarding the character of the governmental invasion factor, the Court stated that a taking is more likely to have occurred when the interference with the property is a physical invasion by the government and not merely adjusting economic factors.¹⁰⁸ Using *Penn Central*, a landowner may try to argue that VARA consists of a total regulatory taking of a smaller property interest within the larger bundle of property rights.¹⁰⁹

For example, VARA may deprive a property owner of the right to exclude others from her land, namely the artist. This would be a complete loss of the right to exclude that is less than the whole bundle of rights but would still be a taking. Despite conflicting rulings about whether a total regulatory taking may apply to a smaller property interest within the whole property, *Palazzolo v. Rhode Island* made

104. See *id.* at 991.

105. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026–27 (1992).

106. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 330 (2002) (citing *Lucas*, 505 U.S. at 1019–20, 1019 n.8); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 119–20 (1978).

107. See *Penn Central*, 438 U.S. at 124.

108. *Id.*

109. Generally, courts ultimately end up characterizing partial takings claims as total takings claims if the court plans to award compensation. See *id.*

clear the possibility of a compensable takings claim regarding small physical occupations.¹¹⁰ In *Palazzolo*, the court rejected a landowner's takings argument after a land use moratorium resulted in his property depreciating in value from \$3,150,000 to \$200,000 because the regulation did not fully eliminate all property value.¹¹¹ However, the *Palazzolo* court clearly articulated that a diminution of value case may well warrant compensation and that notice of the regulation does not prohibit recovery.¹¹²

In the expensive New York real estate market featured in *Castillo*, VARA could have significantly depreciated the value of the graffiti-covered warehouses if the landowners could not develop the valuable real estate.¹¹³ While small losses of value resulting from the relevant regulation generally do not constitute compensable takings, the situation in *Castillo* could result in substantial depreciation of value.¹¹⁴

In applying the *Penn Central* factors to a hypothetical temporary takings argument in *Castillo*, the real estate developers possessed an arguably reasonable, investment-backed expectation that they could develop the land they owned as they saw fit.¹¹⁵ The question then becomes whether the artists' moral rights and the public's interest in protecting artwork of recognized stature outweigh the developers' traditional property rights. Arguably, the developers' property interests along with the relevant land use efficiency arguments outweigh the artists' rights and the preservation of artwork.¹¹⁶

A VARA defendant may also be able to argue that the requirement to maintain the artwork and prohibit removal is a temporary regulatory taking.¹¹⁷ A temporary regulatory taking occurs when a regulation temporarily prohibits a landowner from fully using his land.¹¹⁸ In *First English Evangelical Lutheran Church v. Los Angeles*, the Supreme Court found a taking occurred after a local

110. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); Wendie L. Kellington, *New Takes on Old Takes: A Takings Law Update*, LAND USE L., http://landuselaw.wustl.edu/takings_update.htm [https://perma.cc/8SXF-9F4A] (last visited Mar. 7, 2021).

111. See *Palazzolo*, 533 U.S. at 606–09.

112. *Id.* at 606–08; Kellington, *supra* note 110.

113. See *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 162 (2d Cir. 2020).

114. See *id.*; Kellington, *supra* note 110.

115. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Castillo*, 950 F.3d at 162.

116. Drew Thornley, *The Visual Artists Rights Act's "Recognized Stature" Provision: A Case for Repeal*, 67 CLEV. ST. L. REV. 351, 352 (2019).

117. See *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 311–13 (1987).

118. *Id.* at 318.

ordinance temporarily prohibited a church from constructing a recreational area for disabled children.¹¹⁹ In its holding, the Court emphasized that the temporary regulatory takings inquiry must focus directly upon the severity of the burden that VARA imposes upon private property rights.¹²⁰ Therefore, a court should not inquire into the motivation or purpose behind VARA, its value or benefit, or the correctness or effectiveness of the Copyright Office's implementation.¹²¹ Instead, the key to the takings analysis here is answering whether VARA is "functionally comparable to government appropriation or invasion of private property."¹²²

In certain contexts, VARA can be functionally comparable to an invasion of private property if the government requires a landowner to maintain someone else's property on his land.¹²³ Similar to *First English*, a landowner could be enjoined from developing, remodeling, or even fully utilizing the land during the statutory period of protection.¹²⁴ If the graffiti artwork in *Castillo* ended up temporarily prohibiting development, the landowners could have had a persuasive argument that VARA was a temporary regulatory taking because the statute is comparable to the government invading private property.¹²⁵

C. How VARA May Affect a Property's Value and Use

If a court enjoins a landowner from removing unwanted artwork attached to a building as a result of VARA, the art may become an encumbrance on the property.¹²⁶ An encumbrance lessens the value, use, or enjoyment of a property.¹²⁷ Even though the landowner still may be able to sell the property containing the artwork, the value of the property may decrease as a result of the physical occupation.¹²⁸ Because encumbrances can have an adverse effect on a property's value or use, buyers must perform their due diligence in any real estate purchase to identify any potential encumbrances, such as a lien or restrictive

119. *Id.* at 307, 322.

120. *See* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

121. *See id.* at 539–43.

122. *See id.* at 542.

123. *See id.*

124. *See First Eng. Evangelical Lutheran Church*, 482 U.S. at 307.

125. *See Castillo v. G&M Realty L.P.*, 950 F.3d 155, 162 (2d Cir. 2020).

126. *See* James Kimmons, *Encumbrances in Real Estate Defined*, THE BALANCE SMALL BUS., <https://www.thebalancesmb.com/encumbrances-in-real-estate-defined-2866599> [https://perma.cc/Y7FT-FK2F] (Nov. 14, 2019).

127. *Id.*

128. *See id.*

covenant, before completing the transaction.¹²⁹ As a result, when dealing with a property that has artwork attached, it is best practice to find the artist and have him sign a waiver of all VARA rights. However, sometimes building owners act first before asking these questions. In the defense of the landowners who do act first and then face a potential VARA lawsuit, VARA imposes no requirement that artists register their works with the US Copyright Office to be eligible for statutory damages. As a result, even though ignorance of law is never an excuse, a landowner could think that she is acting with no risk given that there is no way for the owner to tell whether VARA protects the artwork before acting.

If courts remain unwilling to find certain VARA-protected artwork as a taking, artists, rather than landowners, are more likely to feel the effects. As landowners catch wind of VARA damages paid by other property owners for unsuspectingly using their own property, landowners may become increasingly wary of hiring artists to paint murals or create other art attached to buildings. Having a judge rather than the free market determine the success of a particular piece of art may lead to doubts about the true merits of a work of art.¹³⁰ If more people become less inclined to install artwork on their properties and people become increasingly suspicious of the true merits of quality artwork, VARA may have detrimental effects for both the art profession and society as a whole.

III. POTENTIAL TAKINGS ARGUMENTS IN THE VARA CONTEXT

At a minimum, traditional notions of property rights clash with an artist's moral rights under VARA.¹³¹ This Part explores potential takings arguments in the VARA context, concluding that there very well may be instances in which a landowner may have a valid takings argument in defense to a VARA lawsuit.

A. Evaluating the Takings Arguments Made in Carter

Even though the defendants in *Carter* failed to convince the Southern District of New York that requiring a large sculpture occupying their building's lobby to remain in the building resulted in a taking, the court very well could have decided the case differently.¹³² In

129. *Id.*

130. Bensen, *supra* note 7, at 1147.

131. *See* Cohen v. G & M Realty L.P., 320 F. Supp. 3d 421, 427 (E.D.N.Y. 2018) (citing Cohen v. G & M Realty L.P., 988 F. Supp. 2d 212 (E.D.N.Y. 2013)).

132. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 326–27 (S.D.N.Y. 1994).

its ruling, the court compared VARA's mandate to *Penn Central's* preservation laws.¹³³ However, while analogous, VARA's main purpose lies in protecting the rights of artists, not in historical preservation of the arts.¹³⁴

In focusing heavily on the fact that VARA protection is only a lifetime right limited in duration, the court misapplied the temporary-permanent distinction displayed in *Loretto*.¹³⁵ Recall that the *Loretto* court struck down the regulation at issue in that case even though the statute did not require the cable television to remain in place forever, but only so long as the building remained residential and the company wanted the equipment in place.¹³⁶ Similarly, in the VARA context, protectable artwork attached to a building must remain in place if it is of recognized stature and the artist wishes the work to stay.¹³⁷ Just like a telephone pole that may only physically invade someone else's property for a finite period of time, the space that the artwork occupies is exclusive, and therefore, should be considered permanent.¹³⁸

Additionally, in finding that the building owners were already compensated by the artist because of the supposed increase in property value derived from the sculpture's attachment to the building, the court misapplied the law.¹³⁹ Even if the artwork did actually increase the value of the property, which seems unlikely because of the limitations on how an owner could use the building's lobby, this increase would not qualify as compensation to the owners because they would have already been entitled to that value as a result of purchasing the building with the accompanying sculpture in the first place. As a result, any increase in value resulting from the artwork could not operate as compensation to the landowners because they will have already paid for any and all value when purchasing the artwork.

B. VARA as a *Per Se* Physical Invasion

In the highly contextual nature of VARA, a landowner may be able to successfully avoid VARA liability by arguing that, depending on the circumstances, certain applications of the statute result in a

133. *Id.*; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978).

134. *See* H.R. REP. NO. 101-514, at 5 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6915, 6915.

135. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982); Blais, *supra* note 95, at 59-60.

136. *Loretto*, 458 U.S. at 438; Blais, *supra* note 95, at 59-60.

137. 17 U.S.C. § 106A(a)(3).

138. *Loretto*, 458 U.S. at 437; Blais, *supra* note 95, at 59-60.

139. *See Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 328 (S.D.N.Y. 1994).

permanent physical invasion or a regulatory taking. Despite the heavy burden on the landowner, this Section demonstrates that VARA may, in certain circumstances, result in a compensable taking. Even though the one court that has heard a VARA case featuring a takings argument (*Carter*) did not agree with the landowners' claims, the court seemingly misapplied the relevant takings analysis, and a future defendant may find a more sympathetic court.¹⁴⁰

Even though any VARA case turns on a highly factual inquiry, a landowner-defendant is most likely to have success arguing that VARA consists of a per se physical invasion by requiring the landowner to maintain someone else's property on the landowner's property. To get past the temporary-permanent distinction hurdle, a VARA defendant should emphasize the connections between the regulation at issue in *Loretto* and the mandates set forth through VARA.¹⁴¹ Despite the *Loretto* regulation not having a permanent effect, the Supreme Court still found the regulatory action to be a permanent physical invasion because the cable television companies exclusively controlled the space occupied by the invading equipment.¹⁴²

VARA-protected artwork can be considered permanent in the sense that the art exclusively occupies the space attached to the landowner's property.¹⁴³ Any per se physical invasion has to be permanent for a court to award compensation.¹⁴⁴ However, permanence does not necessarily mean infinite duration.¹⁴⁵ Even though VARA protection only lasts for the lifetime of the author, there are many similarities to the regulation at issue in *Loretto* and VARA's requirements.¹⁴⁶ If the artwork cannot be removed from the building without destruction and the court enjoins the landowner from removing the work, the artwork effectively snaps significant sticks within the landowner's bundle of property rights.¹⁴⁷ Similar to the television equipment in *Loretto*, the artwork exclusively possesses the space that it invasively occupies, denying the owner the right to use the lobby or wall for his own purposes.¹⁴⁸ Additionally, such a situation removes a landowner's right to exclude the artist from possessing and using the

140. *Id.*

141. *See Loretto*, 458 U.S. at 438.

142. *Id.*

143. *Id.*

144. Blais, *supra* note 95, at 55.

145. *Loretto*, 458 U.S. at 448 (Blackmun, J., dissenting) (citation omitted).

146. *See id.*

147. 17 U.S.C. § 113(d).

148. *Id.*; *see Loretto*, 458 U.S. at 437.

occupied space within the property.¹⁴⁹ As a result, a VARA defendant may have a strong precedential argument, despite the fact that VARA's protection is limited in duration. Still, this may be a substantial burden to overcome.

If a VARA defendant is able to overcome the hurdle that is the permanent-temporary distinction, the likelihood of a successful argument increases substantially because requiring a person to maintain a third party's property on someone else's land is a per se physical invasion. As a matter of property theory, more than one person can have property rights in a specific item of property. As a result, VARA gives property rights in the art to the artists, despite the fact that the landowner clearly holds the title to the work. When a building has a work of VARA-protected art attached to it, both the artist and the building owner could hold property rights in the artwork. VARA would require a landowner to maintain the artist's property on his own property against his will. If forced to maintain the artist's property, the landowner effectively loses his rights to exclude and dispose of property as a result of the statute. Thus, without compensation, such an invasion would be an unlawful taking.

C. VARA as a Total Regulatory Taking

Even if a court does not consider certain applications of VARA as amounting to a permanent physical occupation of property, a landowner-defendant may still be able to argue that VARA is a compensable temporary regulatory taking. A regulatory taking occurs when a regulation's or statute's effect is so burdensome on a property owner that it equates to a direct appropriation of the property.¹⁵⁰ In this analysis, the court must consider the three *Penn Central* factors and determine whether the regulation goes "too far" and results in a taking.¹⁵¹ Recall that these factors consist of the character of the invasion, the economic impact of the regulation on the property, and the property owner's distinct investment-backed expectations.¹⁵²

Regarding the character of an invasion resulting from VARA, the invasion is physical in nature rather than consisting of mere economic adjustments.¹⁵³ Under *Lingle*, a temporary regulatory takings inquiry must focus directly upon the severity of the burden that VARA

149. Charron & Mencher, *supra* note 6.

150. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 537 (2005).

151. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

152. *Id.*

153. *Id.*

imposes upon a landowner's property rights.¹⁵⁴ Here, the critical question would be whether VARA is "functionally comparable to appropriation or invasion" of the landowner's property.¹⁵⁵ A regulatory takings argument under VARA benefits from this rule because VARA requires a landowner to physically maintain the invading artwork on the property without the ability to exclude or fully use his entire property.¹⁵⁶

A regulation may be a compensable taking if it does not advance a legitimate state interest, which is a low standard to meet. Here, the inquiry may depend on how a court interprets VARA's purpose. If a court defines VARA's purpose as protecting the interests of artists, with the preservation of art being a derivative purpose of the statute, there may be less of a legitimate state interest. Given that the state interest standard is a low bar, a court would likely find that VARA promotes a legitimate state interest and would lean against a finding of a compensable taking.¹⁵⁷ However, under the *Penn Central* factors, no single factor is dispositive in a court's determination.¹⁵⁸ Therefore, a court's finding that VARA promotes legitimate state interest does not lead to a certain outcome.

Even if a regulation advances a legitimate state interest, the state action still may constitute a taking if it goes against an owner's reasonable, investment-backed expectations.¹⁵⁹ When buying a property that features attached artwork, the property owner is expected to have awareness of VARA's requirements.¹⁶⁰ However, VARA does not protect all artwork and instead only offers a safe harbor for works of recognized stature. Therefore, even though ignorance of law is no excuse, a landowner may reasonably believe that the artwork does not meet the recognized stature requirement.¹⁶¹ VARA itself does not define recognized stature but instead leaves it to judges to decide which art qualifies.¹⁶² There is also no requirement for artists to register their

154. *Lingle*, 544 U.S. at 539.

155. *Id.* at 542.

156. *See id.*

157. *See Penn Central*, 438 U.S. at 127.

158. *Id.* at 124.

159. *See id.*

160. 17 U.S.C. § 113(d).

161. *See* John Bicknell, Comment, *Is Graffiti Worthy of Protection? Changes Within the Recognized Stature Requirement of the Visual Artists Rights Act*, 17 TUL. J. TECH. & INTELL. PROP. 337, 341 (2014); Robinson, *supra* note 4, at 1937–38.

162. Robinson, *supra* note 4, at 1945.

works to achieve “recognized stature.”¹⁶³ The question then becomes, are judges qualified to become certified art critics? In any event, the line between what may be of recognized stature and what does not qualify is an uncertain one.

Outside of the murky waters of the “recognized stature” requirement, in order to be a compensable regulatory taking, VARA must still render the property at issue valueless.¹⁶⁴ Even though the *Palazzolo* court stated that it could be possible for a diminution of value case to receive compensation, that seems unlikely to apply to a VARA case.¹⁶⁵ While, as noted above, a landowner may attempt to argue that VARA is a total taking of a singular property right, most partial takings claims ultimately end up being characterized as total takings claims if the court plans to award compensation.

As a result, a landowner may endeavor to argue that VARA consists of a total taking of his rights to exclude or fully use his property.¹⁶⁶ While the property interest appropriated is less than the whole, it still may be a compensable taking.¹⁶⁷ However, even though a partial takings claim is possible, most courts would likely characterize any partial takings claim as a total takings claim.¹⁶⁸ In any event, as a practical matter, few takings claims find success when analyzed under the *Penn Central* factors.¹⁶⁹ As a result, a VARA defendant’s best takings argument likely falls under the per se physical invasion category.

D. A Future for VARA?

This Note does not argue that VARA is facially unconstitutional. Rather, this Note contends that, in certain contexts, requiring landowners to maintain someone else’s artwork on their property could require just compensation. In order to avoid these situations, perhaps a court would have to firmly state that courts should prioritize and protect the property rights of landowners over the moral rights of artists. Alternatively, Congress could repeal and amend VARA to

163. Cynthia Esworthy, *From Monty Python to Leona Hemsley: A Guide to the Visual Artists Rights Act*, NAT’L ENDOWMENT FOR THE ARTS (1997), [<http://web.archive.org/web/20030827213232/http://arts.endow.gov/artforms/manage/VARA.html>].

164. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

165. *Id.*

166. See *Kellington*, *supra* note 110.

167. See *id.*

168. See *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1570 (Fed. Cir. 1994); *Kellington*, *supra* note 110.

169. *Kellington*, *supra* note 110.

remove the language of preventing destruction of the artwork attached to buildings from the statute.¹⁷⁰ If Congress did amend VARA in this fashion, the statute would clearly indicate that landowners' property rights should stand firm in the face of any moral rights that an artist has attached to a property. Congress could even act less drastically and require artists to register works of visual art with the US Copyright Office in order to be eligible for statutory damages, as is the case with all other copyrighted works.¹⁷¹ This requirement would more reasonably put the burden on landowners to check the registry before acting and would give all relevant parties clearer information on which to act in any given situation involving VARA. As the statute stands, there remains much uncertainty. Despite the uncertainty, as the US Copyright Office concluded in its 2019 study, the government feels like VARA is currently generally well functioning and changes are unlikely.¹⁷²

IV. CONCLUSION

The Visual Artists Rights Act of 1990 serves a noble purpose of protecting artists' rights and their work. However, in doing so, Congress inevitably gave rise to a clash of property rights in situations when buildings feature attached artwork. When utilized, VARA may sever several sticks in the landowner's bundle of property rights, which may, in certain circumstances, result in a compensable taking. Even though the landowner faces a substantial burden in proving a taking occurred, the fact that the artwork physically invades a landowner's property, requires the owner to maintain someone else's property on his land, and gives a third party the right to control the use of another's property, the landowner may still have a fighting chance.

Proponents of VARA frequently point out that there is a low bar for landowners to meet to avoid any VARA liability and highlight the fact that ignorance of law is no excuse. However, in defense of any landowners that do face potential VARA liability, there are a lot of murky standards within the statute that can lead to unpredictable outcomes. If any VARA amendments ever do arise, perhaps it would ease the tension between traditional property rights and artists' moral rights if Congress supplied more guidelines for the "recognized stature" requirement or potentially added a registry requirement to be eligible for statutory damages. As the statute stands today, however, VARA

170. Thornley, *supra* note 116, at 352.

171. Robinson, *supra* note 4, at 1937–38.

172. *Moral Rights in U.S. Copyright Law*, *supra* note 79.

does open up the possibility for a head-on collision between an artist's moral rights and a landowner's property rights, potentially bringing the question of when art might constitute a taking into the forefront of the litigation.

*Thomas A. Shelburne**

* J.D. Candidate Vanderbilt University Law School, 2022; B.A. Texas Christian University, 2018. Email: thomas.shelburne@vanderbilt.edu. The Author would like to thank Zachary Sturman, Ramon Ryan, and Sean Sullivan for their invaluable advice and support through this process. The Author would also like to thank his family, friends, and mentors for their continued love and support in life. The Author is grateful for all of the guidance and hard work from the board and staff of the *Vanderbilt Journal of Entertainment and Technology Law* in helping publish this note.