Culture Club or The Clash? Historic Preservation, Aesthetic Uniformity and Artistic Freedom

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CASE NOTES AND COMMENTS

CULTURE CLUB OR THE CLASH?

HISTORIC PRESERVATION, AESTHETIC UNIFORMITY AND ARTISTIC FREEDOM

"Man is in this world to do more than pay taxes and brush his teeth – and that is where the arts come in."

INTRODUCTION

A brilliant contemporary artist paints a challenging political image on the side of a building with the permission of its owner. Days later, the owner receives a letter demanding the image be removed because the artist failed to apply for a permit from the city’s historic preservation commission. The artist believes the work is protected under both the First Amendment and the artist’s moral rights. After consulting an attorney, the artist learns that historic preservation ordinances enjoy broad legal support and his chances of prevailing are slim. The building owner calls the artist and states that if the work is not removed he will be fined by the city. Thus, the artist becomes entangled in a battle between artistic speech and the government’s historic preservation efforts.

Part I gives a brief introduction of the rapid growth and support of historic preservation law in the United States. Part I also describes how the broad authority granted to local preservation commissions empowers commissions to mandate aesthetic uniformity. The question springing from a commission’s ability to enforce aesthetic standards is whether that authority functions as a governmental guise for censorship of the arts. Part II provides a brief background of public art, American moral rights and the legal implications when certain segments of the population find a public work objectionable. Part III merges historic preservation

ordinances with artistic freedom and examines their potential collision. Part III ultimately asks whether historic preservation ordinances potentially function as a governmental guise for censorship of the arts. Finally, this comment examines the scant case law detailing the subtle battle between historic preservation and artistic freedom and proposes clarification of the procedures and standards available to artists seeking to display a work in an historic district. This comment also argues that recent moral rights legislation grants an artist a constitutionally cognizable injury when public art is removed or altered by a preservation enforcement commission.

I. BACKGROUND OF HISTORIC PRESERVATION

A. The National Historic Preservation Act

The National Historic Preservation Act of 1966 (NHPA) is the primary piece of federal legislation illustrating America’s efforts to preserve our heritage and culturally significant structures. The growth of historic preservation districts and particular properties and structures under federal, state, and local protection are rooted in efforts to honor our heritage and culture. Since its inception, the NHPA has enjoyed broad acceptance in courtrooms and with the public. The NHPA provides federal protection, but is also heavily reliant upon local initiative. The NHPA grants authority for a National Register of Historic Places, a grant-in-aid program

3. Id. The NHPA is intended to entrust government to act as a trustee of the historic properties or structures. Id.
4. Id.
promoting preservation and registration. The NHPA also grants authority for a Federal Advisory Council on Historic Preservation which polices federal agencies and projects affecting historic sites.\footnote{7}

**B. The Federal Register of Historic Places**

For local preservation initiatives, the key aspect of the NHPA is the Federal Register of Historic Places.\footnote{8} A local governmental body may suggest protection of a property or structure for listing in the National Register.\footnote{9} Certification of a property or structure requires the local governmental body to comport with certain guidelines, including the establishment of a preservation commission and operation of its own preservation program to protect the properties and structures.\footnote{10} Local initiative is generally

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\footnotetext{7}{16 U.S.C. § 470a, 470b, 470f, 470j. See also Callies, supra note 5, at 10356 (outlining American historic preservation law and the NHPA’s federal benefits).}
\footnotetext{8}{Layperson, supra note 5, at 6.}
\footnotetext{9}{Id.}
\footnotetext{10}{Callies, supra note 5, at 10357 (citing Julian C. Juergensmeyer & Thomas E. Roberts, Land Use Planning and Control Law, 584 (West Group 1998.) The general requirements for designation of an historic structure or property in the National Register criteria are:

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and:

that are associated with events that have made a significant contribution to the broad patterns of our history; or

that are associated with the lives of persons significant in our past; or

that embody the distinctive characteristics of a type, period or method of construction, or that represent the work of a master, or that possess high artistic value, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

that have yielded, or may be likely to yield, information important in pre-history or history.

36 C.F.R. § 60.4 (2002).}
\end{footnotesize}
responsible for nominating preservation properties.\textsuperscript{11}

Listing a property or structure in the Registry is "primarily honorific."\textsuperscript{12} However, tax incentives are given to private owners for rehabilitating and maintaining historic properties or structures.\textsuperscript{13} Once registered, enforcement of the historic preservation ordinance becomes an important issue.

\textbf{C. Local Preservation Ordinance Enforcement Commissions}

The most important aspect of historic preservation for purposes of this comment is the local preservation enforcement commission. Many historic properties or structures, while listed in the Federal Register, are actually protected through local ordinance.\textsuperscript{14} A local ordinance typically includes the formation of a preservation commission as the administrative body that carries out the goals and objectives of the ordinance.\textsuperscript{15} However, the qualifications, procedures and personal biases of enforcement officials are open to criticism.\textsuperscript{16}

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  \item Callies, \textit{supra} note 5, at 10357 (citing Julian C. Juergensmeyer & Thomas E. Roberts, \textit{Land Use Planning and Control Law}, 584 (West Group 1998.)
  \item Callies, \textit{supra} note 5 at 6 (indicating that listing a property or structure in the National Registry carries little legal significance).
  \item 36 C.F.R. § 60.2(c) (2002). \textit{See also}, Callies, \textit{supra} note 5, at 10355 (listing tax incentives among the federal benefits of registering a property with the federal government). In addition to the tax incentives for properties and structures listed in the Federal Registry, federal grants and loans are offered. \textit{Id.} at 10354. In 1995 the Federal Government donated $30,940 million to perform preservation-related activities. \textit{An Overview of Federal Historic Preservation Law}, SG040 ALI-ABA 57, 61 (1996) [hereinafter \textit{Overview}].
  \item \textit{Overview}, \textit{supra} note 13 at 61.
  \item \textit{Id.}
  \item Note that the appointed enforcement officials typically have some credentials in relevant areas, such as real estate and architecture. \textit{Layperson, supra}, note 5 at 12. The commissions usually require parties seeking to alter or add to a protected property or structure to apply for a permit from the commission. \textit{Id.} at 13. During the permit review process, commissions are bound by constitutional concerns of notice and due process. \textit{Id.} at 27. A hearing is generally held before property is designated for protection under local
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A large aspect of American culture is rapid development, which has resulted in the destruction of treasured structures and property. 17 Another important American cultural value is protecting free expression of our artists. 18 It is against this backdrop that this comment explores the tension between preserving aesthetic uniformity and an artist's unfettered right to

ordinance. Id. “Notice must be both timely and sufficiently clear so that affected individuals will be able to appear and contest issues in a meaningful way.” Id.

Commission members are supposed to be unbiased, but this notion has been challenged by some who view commissions as inherently biased and generally in favor of preservation. Id. at 28. In fact, commission members “must avoid prejudging a case or exhibiting personal animosity against any particular individual.” Id. However, commission members are able to prevent the appearance of personal animosity by allowing community members at an open permit hearing to criticize those seeking to alter/add-on/destroy a protected property or structure. For example, a hypothetical situation where it is relatively easy, if a commission member is so inclined, to find members of the community who oppose any alteration to a protected property and allow them to present biased and prejudiced views of the proposal. Subsequently, when the commission votes on the propriety of a proposal, it may escape the appearance of bias by indicating it decided the matter independently.


free expression and speech.

II. BACKGROUND OF PUBLIC ART: THE OLD ENIGMA

A. The “Public” Problem of Public Art

Art is a vehicle for an individual’s expression, a visual commentary or reflection of one’s experiences. When a work is created, the creator alone channels from within a way to display experiences and values. When, for example, a contemporary artist displays a controversial mural on the side of downtown building, economic, political, cultural, and educational issues emerge.

Controversies arising when art becomes viewable by the general public are well documented by legal scholars. The question is

19. Amy Adler, The Thirty Ninth Annual Edward G. Donley Memorial Lectures: The Art of Censorship, 103 W. VA. L. REV. 205, 206. On the other hand, art has been criticized as “pointless self-indulgence” (and even described as “decadent irrelevance”). Id. at 208.

20. Barbara Hoffman, Law for Art’s Sake in the Public Realm, 16 COLUM.-VLA J.L. & ARTS 39, 39 (1991). It is important to accent the competing interests and public disapproval of public art. For example, in 1988, an historic mural painted in 1967 by Edward A. Kane, Sr. in Edwardsville, Illinois came under the scope of subject matter controversy. Id. at 47. The mural contained a figure readily interpreted as African-American with a rope of bondage cut. Id. The local African-American community objected, finding the mural a symbol of the slaves freed in the town by one of Illinois’ early governors. Id.

Another example of the controversy involving publicly displayed works of art occurred in Washington State’s House of Representatives. Id. at 46. A mural created by Michael Spafford was labeled pornographic, after “complaints that its suggestive nature caused children to giggle.” Id. Washington lawmakers objected to perceived sexual overtones of Hercules slaughtering Hippolyta, and “found a scene of Hercules wrestling with death, represented by a skeleton, a depressing sort of theme.” Id. A wise retraction was made in 1989 when the Washington legislature finally uncovered the murals. Id. at 47.

21. See generally Close v. Lederle, 424 F.2d 988, 990 (1st Cir. 1970) (finding an “assault upon individual privacy” regarding sexually controversial paintings displayed in a student center at a university); Marci A. Hamilton, Art
how can we protect an artist’s right to freely express herself and simultaneously expect to appease a large audience, many members of which have no training or particular appreciation for challenging art. How can society first harmonize the idea that art is free to mortify or scare us\textsuperscript{22} while securing the public’s right to avoid such works?\textsuperscript{23} A brief look at America’s hesitant embrace of

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the concept of moral rights24 and increased artist control is an important step in understanding this balancing act of competing interests.

B. American Moral Rights of the Artist: Growing Acceptance

Imagine a marketing firm spotting the exterior wall of a store located on a busy street and contemplating how many people every day would see its advertisement there. When denied permission to use the wall, the firm finds that fifty years ago the former store owners, now long deceased, allowed a neighborhood artist and youth group to paint a mural depicting the economic plight of Mexican Americans.25 This situation implicates the abstract, non-economic moral rights of the artist and their potentially adverse effect on economic and property rights of the marketing firm.

Moral rights stand for the principle, “if only in a very limited application, [that] an artist retains a personality interest, independent of his economic interests, in the physical object of his creation, even if he no longer owns the object.”26 That is, the artist

government is within its rights in limiting certain forms of expression through restrictive funding). Shaya notes that the government is not obliged to fund all forms of expression or to encourage and approve of its content, and that it is allowed to impose restrictions on obscene or lewd expression in the name of preserving public morals.


25. Sheila Muto, Muralists See the Writing on the Wall: It's a Billboard, WALL ST. J. (Cal.), July 14, 1999, at CA1. The author discusses recent case where a Visual Artists Rights Act suit involving the mural “Extinct,” which was located on the exterior wall of a hotel. Id. When the owner attempted to lease the wall to a billboard company to be used as advertisement, the dispute was resolved when the hotel owner allowed the artist to recreate the mural on another wall of the same hotel. Id.

CULTURE CLUB OR THE CLASH

may have sold the work or disposed of it in another manner, but thereafter the artist is still protected from destruction, alteration, or removal of the work. The author’s moral rights “are perpetual, inalienable, and descend to the heirs of the author, even after the author transfers the economic rights to another person or company.”

With America’s growing acceptance of the moral rights of an artist, it will become increasingly difficult to order works

January 31, 2003) (stating moral rights protect a personal interest and not merely a monetary one).

27. John Henry Merryman & Albert E. Elsen, LAW, ETHICS AND THE VISUAL ARTS 593 (Kluwerlaw International Ltd. 1998) (1979). The concept of moral rights “recognizes the artist’s authorship by preserving the integrity of the work and protecting against its deformation and destruction without the artist’s consent.” Id.


29. Other countries, particularly France, include additional moral rights. Id. These additional moral rights include the rights of disclosure and withdrawal as well as the right to reply to criticism. Id. The right of disclosure gives the author the ultimate decision “on when and where to publish.” Id. The right to withdraw states that “when an author’s views change, the author may purchase at wholesale the price all of the remaining copies of the author’s work, then prevent printing of more copies.” Id. The right to reply to criticism gives the author the right to reply to a critic and have such reply published in same publication used by the critic. Id.

The right to withdraw is controversial as it “permits the author to retrieve her work even though it has been sold or published.” Jack A. Cline, Moral Rights: The Long and Winding Road Toward Recognition, 14 NOVA L. REV. 435 (1990), reprinted in Anthony D’Amato and Doris Estelle Long, INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY, 112, 121. If an author, even years after sale of a work, “experiences a change of heart” regarding the work or what it represents, “an artist can recall her creation.” Id. Often, the right to withdraw only applies to literary works. Id.

There has been substantial criticism of moral rights. The lack of standards for deciding moral rights cases “imposes an arduous burden on the courts and the media industry.” Arthur B. Sackler, The United States Should Not Adhere to the Berne Copyright Convention, 3 J.L. & TECH. 207 (1987), reprinted in D’Amato and Long, INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY, 129. In the
removed (even years after their purchase or commission) or to question the propriety of publicly displayed works. An evolutionary glimpse of the incompatibility of moral rights with American culture and American courts’ treatment of legal and artistic issues is helpful in understanding moral rights.

Before the recognition of limited moral rights in America, artists had a difficult time maintaining the condition of their works after the work’s completion. For example, in *Crimi v. Rutgers Presbyterian Church in New York*, the court held the artist had no right to prevent the destruction of his mural once the painting was finished. *Crimi* was decided prior to the Visual Artists Rights Act and state statutes protecting moral rights. In this case, Plaintiff won a contest held by defendant to paint a mural on the rear wall of defendant’s church. The copyright in the work was assigned to the church. The parishioners of the church successfully argued

near future courts will have to wrestle with the question “whether an alteration to a film or manuscript is a mutilation or a judicious edit.” *Id.* Indeed, “practitioners will have no basis for determining moral rights violations and will rely on ad hoc subjective interpretations.” *Id.* See also supra note 26 (proposing a subjective sliding scale standard which incorporates the totality of the circumstances when preservation enforcement commissions consider artist applications).

30. Russel J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists’ Rights in France and the United States*, 28 BULL. COPYRIGHT SOC’Y 1 (1980), reprinted in, D’Amato and Long, supra note 29 at 137. DaSilva notes that while the Constitution mandates copyright law in America, in France copyright is a “natural right” and in Germany copyright is a “right of personality.” *Id.* In contrast, the constitutionally mandated copyright protection in America arising from “the sovereign’s interest in promoting a socially desirable end.” *Id.* Thus, when compared to “Civil Law system(s), the American tradition seems mechanical and uncompassionate.” *Id.* The American system focuses on society’s best interest, while civil law countries tend to focus on the individual author’s interest. *Id.* Critics of moral rights in America argue that the current system “aims more at social balancing than at unilaterally vindicating the artist’s personal interests.” *Id.*

32. *Id.* at 819.
33. *Id.* at 813
34. *Id.* at 814.
their objection to the mural’s portrayal of Christ’s bare chest, and the court allowed the mural to be painted over without notifying the artist. The decision in that case would likely be different in light of American courts’ recent and growing support of moral rights.

The limited recognition of some moral rights in America dramatically altered the case law pertaining to an artist’s continuing personality interest in a work. In a particularly notable case that took place amid growing recognition of moral rights, a California federal court awarded a muralist more than $48,000 in damages, attorneys’ fees and costs under the federal Visual Artists Rights Act of 1990 (“VARA”).

35. Id.


38. 17 U.S.C. § 101 (2000). VARA is federal legislation that seeks to protect artists’ rights. VARA provides that certain creative artists:

(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) subject to the limitations set forth in section 113(d), 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.

Id.
a liquor store partially destroyed a mural plaintiff and 300 neighborhood children painted on the façade of the store.\textsuperscript{39} The 72-foot-long mural was part of a community improvement project that featured anti-drug, anti-alcohol and anti-smoking themes.\textsuperscript{40} The court held that while the building belonged to defendants, the mural belonged to plaintiff under VARA.\textsuperscript{41} The court’s award to the muralist highlights the operation of moral rights protections; it is an abstract injury completely separate from questions of property title and economics. Subsequent cases upholding moral rights follow this analysis and seriously limit the precedential value of \textit{Crimi}\textsuperscript{42} and its progeny.

Thus, with increased recognition of moral rights of artists, the tension between public art and a disapproving public stiffens. As American courts uphold rights of authors never before recognized,


\textsuperscript{40} \textit{Id.}

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} In \textit{Botello} v. Shell Oil Co., 280 Cal.Rptr. 535 (Cal. App. 3d 1991), defendants convinced the trial judge that a mural was not a “painting” under the California Art Preservation Act and therefore not protected by the Act. \textit{Id.} at 536. The muralists in \textit{Botello} sued after painting a large mural in 1980 on the wall of a service station owned by defendant. \textit{Id.} In 1988, defendants authorized the destruction of the wall to which the mural was affixed to make room for a parking lot. \textit{Id.} On appeal, because neither side cited any earlier cases holding a mural is considered a painting, the court held a mural is, indeed, a painting and remanded the case. \textit{Id.} The case was eventually settled. \textit{Id.} at 540. \textit{See also}, United States v. Perry, 146 U.S. 71, 73 (1892) (citing wall panels as “paintings”).

In addition to \textit{Botello}, in an unlitigated case, plaintiffs received $200,000 for the destruction of their mural in San Francisco. \textit{Hanrahan}, No. 97-CV-7470 (C.D. Cal. June 3, 1998)(unpublished) \textit{in} 4 No. 23 ANDREWS INTELL. PROP. LITIG. REP. 3 (1998). The Latino community in and around San Francisco thought the mural particularly valuable especially since one of the muralists trained under the great Diego Rivera. \textit{Id.} The mural was whitewashed in 1998 by the new owners of the building, who claim they were unaware their purchase of the building did not include the rights to the mural. \textit{Id.} This case proves to be one of the largest settlements to date involving a VARA claim and is indicative, when compared to \textit{Crimi}, of the attitude shift in the courts regarding the rights of artists in their works post-creation. \textit{Id.}
the ability of opponents to turn to the legal system to remove or alter works of public art is severely limited. Moreover, the increased recognition of moral rights shows America’s continuing effort to protect unfettered artistic expression. However, the role of art in a democratic society has perhaps never been more in question. America’s support for both artistic expression and

43. Ilhyung Lee, Toward an American Moral Rights in Copyright, 58 WASH. & LEE L. REV. 795, 802 (2001). Moral rights “underscores the personality interest of the author” and “protects against significant alteration of the work or such derogatory use of it that is contrary to the author’s intentions.” Id.
44. Id.

The idea of a public forum where debate thrives is central to the notion of democracy. See generally Daniel Hildebrand, Free Speech and Constitutional Transformation, 10 CONST. COMMENT. 133, 133 (1993). Hannah Arendt’s idea of the “public realm” is “the arena in which members of the public meet, and where competing values, interests, expectations and goals are open for discussion and modification.” Hoffman, supra note 20 at 40 (citing Hanah Arendt, The Human Condition (1958)). See also Jurgen Habermas, The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society (Thomas Burger & Frederick Lawrence trans., MIT Press 1989) (describing open public fora as a display of competing interests and cultural understandings); and Robert C. Post, The Concept of the Public, 13 SW. SOC. SCI. Q. 311, 311 (1933) (explaining American sociologists in the 1930s viewed the “public” as “capable of destroying barriers” and viewing favorably critical interaction and discourse). There can be no democratic public until we have the ability to challenge and communicate regardless of cultural boundary. This comment assumes art does have an important and unmatched place in our society. See generally, Sheldon Nahmod, Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime, and the First Amendment, 1987 WIS. L. REV. 221, 224 n.12, 227. Many among us find solace in a painter’s ability to
DePaul Journal of Art, Technology & Intellectual Property Law, Vol. 13, Iss. 2 [2016], Art. 3

326  

DEPAUL J. ART. & ENT. LAW  [Vol. XIII:313

historic preservation can present awkward disputes when an artist seeks to publicly display an aesthetically challenging work within a preservation district.

III. HISTORIC PRESERVATION AND ARTISTIC FREEDOM

When viewing historic preservation and artistic freedom simultaneously, it is not difficult to envision potential conflict. For portray a familiar feeling visually, or a lyricist’s melody that lends comfort in time of doubt. Indeed, many people derive political, social, and educational philosophies more from creative expression than from politicians, teachers, or even family. For example, many of us hear our own political sensibilities when someone like artist Raymond Lark comments that “I am really not concerned what people have to say about my subject matter . . . [i]t is obvious that said critics are not that familiar with my wide range of subject matter. Whenever you start to dictate to an artist his ‘social responsibility’ you get into an area of censorship. Artists should feel free to record whatever is important or interesting to them.” Edward Smith and Co., Raymond Lark Index Page, available at http://smithlarkwright.com/rt/quotes.html (last visited Nov. 15, 2002). To excuse art as politically and socially irrelevant is to deprive oneself and society of history and the unique undertones of our existence. 136 CONG. REC. H3111, H3115 (daily ed. June 5, 1990). Representative Fish of New York commented at the VARA debates that art must be protected because “it is paramount to the very integrity of our culture that we preserve the integrity of our artworks.” Id. One effort to further this opinion occurred in 1991 at Seattle’s “In Public” project. Douglas McLennan, A Banner Day for In Public, SEATTLE WEEKLY, Aug. 21, 1991 at 45-48. The Seattle Art Museum and the Seattle Art Commission offered a vision of public art. Id. International artists were invited to Seattle to discuss information and ideas addressing the events, experiences and senses that shape our existence. Id. Artists chose the sites they wished to display work on. Id.

However, there is an historic pattern of governments dictating artistic values. If a country’s leaders are “materialistic and nihilistic, then artist with those characteristics will gain fame and riches.” Don Gray, “The Artist’s Life,” available at http://www.jessievans-dongray.com/essays/essay008.html. The reasoning is that when artists challenge the societal norms and power structures, the potential for civic unrest generates censorship of such works. Often, “living artists are a threat to the aesthetic, psychological and financial status quo.” Id. (stating also that “most of humanity is at least a generation behind the greatest artists.”) As applied to this comment, a preservation district’s aesthetic status quo and an artist’s challenging work demonstrates an historic shoving match.
example, in an area seeking to attract tourists, historic preservation ordinances aim to increase tourism by preserving some unique aesthetic and historical appeal.\textsuperscript{46} Aesthetic uniformity becomes important to a small town relying on tourist dollars to keep shops open and the economy stimulated.\textsuperscript{47} Aesthetic uniformity and public works of art are combatants in this regard. If a controversial public work is created, many municipalities worry that its content will adversely affect tourism.\textsuperscript{48}

The question of whether historic preservation ordinances may be a governmental guise for censorship of the arts is the central focus

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\item \textsuperscript{46} See Angela C. Carmella, \textit{Landmark Preservation of Church Property}, 34 CATH LA W 41, 42 (1991) (noting a common goal for historic district designation is to increase tourism revenue).
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} Melissa Burger, \textit{Mural Art in Flagstaff} 42-45 (unpublished M.A. thesis, Northern Ariz. Univ. 2001) (copy on file at Cline Library, Northern Ariz. University). This is precisely what happened in Flagstaff, Arizona. A group of Native American youths painted a large mural on the side of a downtown store. \textit{Id.} The mural was essentially divided into two parts, both focusing on a Native-American perspective and reflecting themes such as alcoholism and bondage. \textit{Id.} The bottom of the mural contained brown hands handcuffed to liquor bottles, blood running and skeletal remains, while the top of the mural showed an eagle, an American flag and a mountain backdrop. \textit{Id.} The mural was readily visible to any pedestrian or car driving past that intersection. \textit{Id.} Many complaints came in the local newspaper, the Arizona Daily Sun, quickly after the mural went up. Stephanie Innes, \textit{Mural Design Divides Downtown}, ARIZ. DAILY SUN, July 9, 1994, at A2. One prominent citizen and local author commented, “I was so disappointed. It doesn’t portray anything about Flagstaff... it doesn’t fit into my idea of history of the city.” \textit{Id.} A local merchant stated that, “I know it’s cathartic and it’s good for the kids. It’s just inappropriate there.” \textit{Id.}

The Flagstaff dispute also highlights the argument that some artwork adversely affects tourism. Today, the youth mural remains unaltered and has become a fixture of downtown Flagstaff.

Similarly, consider the undertaking at a small community college in New York in 1991. Hoffman, \textit{supra} note 20, at 96. School officials removed a photographer’s exhibit because a member of a religious order had complained that nude figures therein offended her. \textit{Id.} Upon the artist’s First Amendment suit, the school agreed to place the exhibit in the main library, to publicize the exhibit, host a reception and pay the artist $300. \textit{Id.} \textit{See also} ACLU ARTS CENSORSHIP PROJECT NEWSLETTER, Spring 1992 at 4.
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of this comment, which could highlight some legal forewarning in preservation cases.49

IV. CONSTITUTIONALLY PROTECTED EXPRESSION AND RESTRICTIVE PRESERVATION ORDINANCES

While there is no doubt historic preservation is a legitimate public interest,50 this section focuses on an artist’s Constitutional rights and whether historic preservation ordinances survive Constitutional challenges. An open question exists whether America’s limited moral rights protections afford an artist a Constitutionally cognizable injury granting an artist a cause of action if the work is removed, altered, or destroyed. In Burke v. City of Charleston51 the court was confronted with the difficulty of balancing historic preservation interests and artists’ interests.

49. Cinevision Corp. v. City of Burbank, 745 F.2d 560, 573 (9th Cir. 1984) (requiring decisions to be carefully scrutinized when made by a political body). The holding illustrates the decisions of historic preservation enforcement commissions and is a warning of potentially poor decisions.


Some states put historic preservation provisions in the state Constitution itself. Id. (citing the Madison, Wisconsin preservation ordinance states its purpose, in pertinent part, was to “accomplish the protection, enhancement, and perpetuation of such improvements and of districts that represent or reflect elements of the city’s cultural, social, economic, political, and architectural history”).

51. 139 F.3d 401 (4th Cir. 1998).
A. First Amendment Challenges to Historic Preservation Ordinances

To some extent, historic preservation ordinances necessarily impede some forms of speech and expression.52 However, a preservation ordinance, while promoting aesthetic uniformity, will be struck down if the court finds that the legislation is “content-based, vague or overbroad, even if the municipal interests are valid.”53

A variety of arguments emerge relating to First Amendment challenges to preservation ordinances. First, preservation ordinances have been attacked for being vague.54 The rationale for


53. Id. at 863. In addition to First Amendment challenges, the initial concern for a plaintiff in a preservation challenge is due process. Id. at 910. Due process protections prevent citizens from “arbitrary or discriminatory enforcement” of an ordinance or law. Id. at 876. In essence, due process simply mandates laws be fairly implemented and applied. Among the safeguards provided by due process is the opportunity to be heard. The opponent of the law must be given the opportunity to speak at a hearing where all interested parties are given a bona fide opportunity to present their arguments. Id. at 910. This requirement begs the question who is an interested party regarding enforcement decisions in preservation challenges?

The U.S. Supreme Court has said enforcement commission decisions “are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only public rationalization of an impermissible purpose.” Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510 (1981). Thus, the U.S. Supreme Court realized long ago that enforcement commission hearings and determinations must be closely monitored to ensure neutrality.

The argument that preservation enforcement commissions cannot remain neutral generally fails because the specialized backgrounds of commission members actually help ensure fair decision making. However, this argument takes for granted the interests and preferences of those commission members, regardless of their specialized backgrounds.

54. Cude, supra note 52, at 859.
avoiding vaguely worded laws is that "[a]n unclear law, a law that does not draw bright lines, might regulate, or appear to regulate, more than is necessary, and thus deter or chill persons from engaging in protected speech."55

It is important that the preservation ordinance not hinder constitutionally protected speech. If the preservation ordinance contains "either confusing enforcement standards for municipal officials or imprecise requirements for permissible communicative expression"56 it will be deemed invalid. Therefore, it is critical that the ordinance outline specific standards and give the public notice of what activities, renovations, designs and aesthetic patterns will be acceptable.57

Second, the overbreadth doctrine will strike down a law that functions to quash a person’s protected speech.58 In the context of historic preservation and other aesthetic ordinances, the ordinance is vulnerable if "[u]nclear procedures can lead city officials to impermissibly exercise enforcement discretion that over-censors otherwise protected First Amendment activities"59 such as artistic expression.

The overbreadth challenge to a preservation ordinance includes a determination of the level of scrutiny to be applied.60 If an ordinance discriminates against a protected class of citizens, the court will strictly examine the ordinance.61 However, if the ordinance provides only content-neutral provisions, an intermediate level of scrutiny will be applied.62 The municipalities enforcing preservation ordinances must show, if the court does not find content-neutrality, that the ordinance is narrowly drawn to

56. Cude, supra note 52, at 867.
57. Id. at 899, 900. The danger of unspecified standards from the point of view of the municipality is that "[i]nexplicit standards in a licensing ordinance may be challenged facially without first applying for the license.” Id.
58. Nowak & Rotunda, supra note 55, at 996.
59. Cude, supra note 52, at 870.
60. Id. at 871.
61. Id.
62. Id. at 872.
achieve the goals of the ordinance.\textsuperscript{63} In the context of public art, the municipality desiring to remove a work must show the ordinance is appropriately drafted and does not hinder constitutionally protected speech.\textsuperscript{64} Appropriate preservation ordinance drafting includes ensuring neutral enforcement commission decisions. Neutral enforcement commission decisions are critical to the interests of both the municipality and the artist because the municipality will produce a legitimate and narrowly tailored preservation ordinance and the artist will avoid subjective evaluation of her work's artistic merit.

Thus, a municipality must be careful to preserve not only its historic district but also individual Constitutional rights. An ordinance that lacks specific standards for considering permit applications or that violates due process rights will not be upheld.\textsuperscript{65} In addition to First Amendment challenges, the moral rights of the artist after the sale of the work may afford the artist additional protections if a work is destroyed, removed or altered.

\textit{B. The Role of Moral Rights in the Conflict Between Historic Preservation and Artistic Expression.}

Whether federal moral rights legislation creates a constitutionally cognizable injury granting artists standing to sue in preservation challenges is still an open question. Examination of the moral rights legislation and scholarly comment provide some insight.

Moral rights "permit the author of a work to protect it even after the work has been sold to another."\textsuperscript{66} The protected moral rights

\begin{itemize}
\item \textsuperscript{63} Id. at 875.
\item \textsuperscript{64} Id.
\item \textsuperscript{65} Gresham v. Peterson, 225 F.3d 899, 907 (7th Cir. 2000) (holding a law is impermissibly void for vagueness if the law "contains terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application") (quoting Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984) (quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926))).
\item \textsuperscript{66} Dane S. Ciolino, Moral Rights and Real Obligations: A Property-Law
\end{itemize}
under VARA are the rights of integrity and attribution. The right of integrity prevents "the distortion, mutilation, modification or destruction of a work of visual art." The right of attribution simply requires the artist is properly credited as creator of the work. Congress sought to protect moral rights because it believed American culture could only benefit from encouraging artists to produce works of art. The purpose behind federal, state, and local preservation laws is also to benefit American culture. 

The challenge to the legal community begins when these two interests, sharing a similar purpose, are pitted against one another.

Moral rights questions may arise in cases where artists challenge historic preservation ordinances. Does VARA’s right of integrity prevent the preservation enforcement commission from altering a work after it goes up? When these competing interests begin to


67. Marko Iglendza, Moral Rights Protection Under the Visual Artists Rights Act of 1990: The Judicial Interpretation in Carter v. Helmsley-Spear, 5 DePaul-LCA J. Art & Ent. L. 187, 187 (1995) (citing VARA, 17 U.S.C. § 106A(a)(1) and (2)(1990)). The right of attribution provides the artist a right to claim authorship of a work “to prevent his or her name from being attached to a work which he or she did not create, and to prevent his or her name from being attached to a work that has been altered.” Id.

68. Id.


70. See Layperson, supra note 5 and accompanying text (government’s role in preservation).

71. This assumes the other requirements of VARA have been met. Jill R. Applebaum, The Visual Artists Rights Act of 1990: An Analysis Based on the French Droit Moral, 8 Am. U.J. Int’l L. & Pol’y 191, 202-03 (1992) (noting VARA protects only “works of visual art.”) “Works of visual art” under VARA are limited. Id. For example, VARA protections are only afforded to works of “recognized stature.” Iglendza, supra note 67 at 206-07. However, “recognized stature” is not defined in VARA. Id. at 206. This elusive concept was addressed in Carter v. Helmsley-Spear, Inc., 861 F.Supp. 303 (S.D.N.Y. 1994).
collide, what weight should the courts give to preservation and moral rights, respectively? These are some issues raised when artistic freedom and preservation ordinances conflict.

Additionally, through VARA Congress has shown an intent to recognize more abstract injury concerning artists. Congress solidified this intent by including a provision in VARA stating, “[o]nly 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.” VARA recognizes the abstract injury to the artists’ career and reputation to an extent as well as injury to a work itself. Of course, this abstract injury flies in the face of traditional American notions of property and commerce. It is difficult to convince American lawmakers, for example, that the sale of a painting to someone will not guarantee that the person can do with the painting whatever she desires without regard to the artist.

Moral rights granted by VARA indicate a congressional desire to recognize a non-traditional injury to an artist by way of destruction, alteration, or removal of a work. Therefore, it is reasonable to conclude that artists have a constitutionally cognizable injury granting them standing to sue when their works are altered, removed or destroyed without their consent. However, this approach to moral rights does not always play itself out when

The court held an artist could satisfy the “recognized stature” requirement in VARA by first showing “stature,” such as being “viewed as meritorious” art. Carter, 861 F.Supp. 303 at 325. The artist must also show the work is recognized “by experts, other members of the artistic community, or by some cross-section of society.” Id.

VARA also will not extend protection to a work made for hire. 17 U.S.C. § 101A (2000). The factors to be used in determining whether a work was made for hire include: (1) the hiring party’s right to control the manner and means of creation; (2) the level of skill required; (3) the provision of benefits to the hired party; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party. Carter, 861 F.Supp. at 317. In addition, “[i]ndependent contractors are typically hired only for particular projects,” and those hired to perform various jobs at the will of the hiring party are more likely to be deemed an employee. Id. at 319 (quoting Aymes v. Bonelli, 980 F.2d 857, 863 (1992)).

courts are asked to adjudicate these matters.

C. A Case Involving Public Art and Historic Preservation

The *Burke* decision illustrates the conflict between artists’ rights and historic preservation ordinances to a limited degree. In that case, an artist’s mural was ordered removed from the side of a Charleston nightclub for failure to comply with the city’s historic preservation permit procedure and aesthetic uniformity. The artist brought suit claiming the Board of Architectural Review’s (“BAR”) decision to remove his mural violated his free speech and equal protections rights. The artist also claimed that the preservation ordinance had no uniform standards for approving work, thereby rendering it unconstitutionally vague and overbroad. The artist’s attorney did not bring a VARA claim.

The trial court upheld the ordinance, claiming the artist failed to prove his constitutional claims. On appeal, the artist abandoned his equal protection claim and only appealed concerning the First Amendment issues of vagueness and overbreadth. The appellate court did not even reach the artist’s First Amendment analysis, however, holding the artist had no standing to sue in the first place. The artist’s lack of standing, according to the appellate court, was the result of Burke relinquishing any rights in the mural upon the sale of it to the nightclub owner. In the court’s view, the sale of the mural eliminated any injury the artist might have.

73. 139 F.3d 401 (4th Cir. 1998).
74. Id. at 403.
75. Id. at 404.
76. Id.
77. Id.
78. Id.
79. Id. at 406.
80. Id.
81. Id. The court, misunderstanding the life and career of a professional artist, said, “we fail to discern how the operation of the ordinance in respect to Burke’s right to artistic expression amounts to a concrete injury, rather than mere tangential effect, at best.” Id. See also supra note 67 and accompanying text (discussing moral rights protection).
Furthermore, it was held the artist did not demonstrate redressability. 82

Burke’s attempt to reconcile the competing interests of the artist and the city produced some curious legal reasoning. That case’s suspect reasoning warrants closer analysis to clearly illustrate the conflict involved.

1. Historic Preservation Enforcement Board

Charleston’s BAR is the political body entrusted with the responsibility of applying the preservation ordinance. 83 When the artist’s mural was completed without application to the preservation enforcement commission to alter a building within the preservation district, public controversy began due to the colorful image, which clearly contrasted the traditional aesthetic themes of Charleston. 84 Both prior to and at the public hearing for a permit, 85 residents of Charleston voiced both support and disgust for the mural. 86 The BAR ultimately found the mural unacceptable,

82. 139 F.3d at 406. The court held that even if the historic preservation ordinance was deemed unconstitutional as the artist urged, that result would do nothing to prevent a subsequent owner of the nightclub from simply painting over the mural. Id. at 407.

83. Id. at 403.

84. Id. at 404.

85. Although the artist did not initially apply for a permit, he did so once the BAR brought that fact to his attention. Id. at 403.

86. The BAR received letters from area resident before the hearing. Burke v. City of Charleston, 893 F.Supp. 589, 595 (D.S.C. 1995). One letter stated: I hope that the [BAR] will use its good taste . . . and refuse to grant a permit to that ugly, controversial mural on King Street that is sophomoric and offensive. A child could have done a more pleasant and artistic mural than this one. Please do not ruin our downtown by allowing this tasteless work to stay . . . Id. (quotations omitted). See also supra note 53 (discussing public disapproval of public art and injecting inappropriate considerations into enforcement commission determinations).

The artist in Burke called an expert witness who was Dean of the School of Arts at the University of Charleston. 893 F.Supp. at 601-2. The witness testified at trial that “[h]e found plaintiff’s mural to be an important work of art, and stated that he could not distinguish between approved and unapproved murals under
claiming that its findings were content-neutral.\textsuperscript{87}

It is well settled that a preservation enforcement commission such as Charleston's BAR must make determinations in a content-neutral manner.\textsuperscript{88} The concern from the point of view of the artist is "whether an enforcement official may act in a way that creates impermissible censorship of expression through the arbitrary denial of a permit."\textsuperscript{89} An enforcement commission may proclaim content-neutrality while acting in a subjective way. If subjective decisions are made, the enforcement commission runs the risk of censorship based on personal or community taste in art. At least the possibility of subjective artistic value judgment was certainly present when Charleston's BAR considered Burke's mural.

The public outcry centered upon disapproval of the image itself. Many members of the community did not find that the mural mirrored their own ideas of what art should be.\textsuperscript{90} However, a local art expert was asked to give the BAR an opinion of the mural, and he voiced his approval of it.\textsuperscript{91} Thus, the BAR found itself in the awkward position of being inundated with community cries for removal, and support for the mural from art professionals. In the face of these subjective views, the BAR remained legally restricted to content-neutrality.

\textsuperscript{87} Id. at 601. One BAR member gave testimony at trial regarding the criteria he uses in applying historic preservation ordinances to proposed structures. Id. The BAR member said he "reviews the proposed structure's size, shape, general configuration and color to determine its harmony with the surrounding area and conformity with the historic preservation laws." Id.

\textsuperscript{88} Cude, supra note 52, at 899.

\textsuperscript{89} Id.

\textsuperscript{90} Burke, 139 F.3d at 404.

The position in which the BAR found itself is indicative of a major problem with applying preservation ordinances to public art. How can an enforcement official remain neutral in an emotionally charged debate essentially disputing what meritorious art should look like? The standards adopted in the preservation ordinance should be the sole guidelines adhered to by preservation enforcements boards.

2. Adoption of Aesthetic Standards to Ensure Content Neutrality

Courts require that aesthetic regulations clearly identify the standards on which they rely, thereby limiting the enforcement official’s discretion. As illustrated by Burke, it is important to severely limit the discretion of enforcement officials in order to maintain content-neutrality. The BAR in Charleston had not, in over sixty years of existence, adopted even one aesthetic standard that would give an artist forewarning of what would and would not be acceptable public art. However, the majority, as Chief Justice Wilkinson pointed out in his strong dissent, found no standing without consideration of the novel competing public interests involved. The issue of whether due process rights were violated by way of the total lack of standards did not come up on appeal.

Standards are the essential protective barrier between arbitrary censorship of constitutionally protected speech and appropriate enforcement of preservation ordinances. Specific standards adopted to give enforcement commissions some jumping off point help to limit the commissions’ discretion in application reviews,

92. Cude, supra, note 52, at 913 n. 182 (stating that “[t]he concern is that without these licensing standards, officials will later engage in rationalizations and arbitrary criteria for permit approval.”).
93. See generally id. at 899.
94. Id. at 899 (citing City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 757 (1988)).
95. Burke, 893 F.Supp. at 611-12.
96. Burke, 139 F.3d at 408. The dissent argued that “[t]hose arguments deserve[d] to be addressed by this court just as they were by the district court.” Id.
97. Id.
which in turn alleviates claims of unlawful subjective decision making. Courts pay particular attention to “legislation that acts as an inexplicit guideline that delegates policy matters to police, licensing officials, judges or juries for subjective resolution.”

Leaving such determinations in the hands of those ill-equipped to make such determinations again beckons the underlying principle of Justice Holmes’s warning that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of [art], outside the narrowest and most obvious limits.” While enforcement commission members are not trained only in the law, Holmes’s ageless warning points to the principle that determinations involving art should adhere to objective standards as closely as possible. Having no specific standards in place from the outset enables enforcement commissions to proclaim content neutrality while essentially making subjective determinations based on artistic preference.

3. The Artist’s Standing to Sue

Although the Burke court did not find standing, the question of whether the artist indeed did have a constitutionally cognizable injury requires a more subtle analysis than the court was willing to conduct.

First, the Burke court found the artist lacked the requisite injury-in-fact to pursue the lawsuit. It claimed that since the artist sold his mural to the nightclub owner, only the nightclub owner was injured by the removal of the mural. The U.S. Supreme Court has attempted to guide the legal community through the difficult injury-in-fact requirement. Injury-in-fact is “an invasion of a legally protected interest which is (a) concrete and

98. Cude, supra note 52, at 900.
100. Burke, 139 F.3d at 405 (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975) and holding that “a plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties”).
101. Burke, 139 F.3d at 406.
particularized, ... and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’” 102 While it is beyond dispute that moral rights protections are abstract, those protections are hardly conjectural or hypothetical as evidenced by the congressional recognition of limited moral rights in VARA. In the case of a professional artist, whether a concrete and particular injury occurs even after sale of a work is a critical question.

The professional artist must establish a reputation in order to generate sufficient income. 103 The injury-in-fact to the artist whose work is removed from visibility is more concrete and imminent than other cases where the Supreme Court found sufficient injury-in-fact. 104 The key consideration is whether the plaintiff alleges to


103. MERRYMAN & ELSEN, supra note 27, at 592, 619. The professional artist “[has] two irreducible needs: to have their art shown and sufficient means with which to live and create.” Id. at 619. The critical ingredient to success for the professional artist is that her works be displayed for others. Thus, any significant hindrance upon the artist’s ability to display works, both publicly or privately, is an injury to the artist’s career.

104. See United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686-87 (1973) (Law student challenged raised freight costs, claiming the rate hike discouraged the use of recycled goods.) The Court found plaintiffs’ allegation that reduced recycling rates equate to more natural resource consumption, which in turn hindered plaintiffs’ right to enjoy the forests, streams, and mountains in Washington D.C. was sufficient injury so long as plaintiffs’ suffered the harm personally. Id. See also Clinton v. New York City, 524 U.S. 417 (1998) (holding a change in market conditions was sufficient injury for standing purposes); Bennett v. Spear, 520 U.S. 154, 168 (1007) (holding that possible reduction in water supply as a result of the Endangered Species Act was sufficient injury for standing purposes); Int’l Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72 (1991) (holding the loss of the right to sue in the forum of plaintiff’s choice is an injury creating standing); Asarco v. Kadish, 490 U.S. 605 (1989) (holding a state court’s decision is capable of creating injury for standing purposes). But see Allen v. Wright, 468 U.S. 737 (1984) (refusing to allow standing to plaintiff claiming tax exemptions to private schools that discriminated on the basis of race were unconstitutional); and Roe v. Wade, 410 U.S. 113 (1973) (refusing to hear a challenge to abortion laws by a married couple claiming injury to “marital happiness” was harmed).

In addition to injury, the plaintiff must show the injury is “fairly traceable to the
suffer the injury personally.\textsuperscript{105} The artist in \textit{Burke} had a piece of art destroyed by the enforcement commission. His work was no longer viewable by the public and could not be shared with audiences in coming years. There is little doubt that such destruction in some way affects the artist’s reputation and deprives society of the pleasure to view the work in the future. The dissent in \textit{Burke} opined that the majority found no standing in order to dodge the complexity involved in balancing these competing interests.\textsuperscript{106}

Although the artist brought no VARA claim, moral rights complicate the matter in \textit{Burke}. Does VARA’s right of integrity prevent preservation enforcement commissions from altering a work after its production? The \textit{Burke} court’s finding of no standing flies in the face of VARA. The Congressional grant of some moral rights in VARA appears to directly conflict with the court’s finding that the artist suffered no injury. The court did not consider the VARA legislation, and there is no record of either party asserting a VARA claim.\textsuperscript{107}

\begin{footnotesize}

\footnote{105 {Overview, supra} note 13, at 107. The Constitution “requires that plaintiffs allege injury to an interest personal to them” in order to satisfy standing requirements. \textit{Id}.}

\footnote{106 \textit{Burke}, 139 F.3d 401 at 408. The dissent said the arguments of both sides “deserve(d) to be addressed by this court just as they were by the district court.” \textit{Id}.}

\footnote{107 \textit{Burke}, 139 F.3d 408. \textit{See also} 17 U.S.C. \textsection 113 (2000). This section of VARA dictates procedures for a building owner to follow if they wish to}

\end{footnotesize}
V. Injury to an Artist’s Moral Rights, Enforcement Commission Standards and Permit Review Hearings

VARA and America’s limited moral rights protections grant artists a constitutionally cognizable injury when their works are altered, moved or destroyed. New guidelines for preservation enforcement commissions must be installed when considering whether to remove, alter or destroy a work. This section suggests that due process and public hearings for the artist be restricted to relevant and objective parties to better ensure a content-neutral decision of the enforcement commission. Finally, additional considerations that preservation enforcement commissions should employ when determining whether to grant a permit to an artist must be examined.

A. VARA Grants Artists a Constitutionally Cognizable Injury and Standing to Sue in Preservation Disputes.

The appellate court’s decision in Burke, denying the artist an appeal because the bar owner who purchased the work alone suffered injury, is a misreading of the law. In fact, VARA carries a completely different spirit and is controlling law. If a VARA claim had been made, the correct view under VARA is that “title to the soul of an artwork does not pass with the sale of the artwork itself.” The rights granted by VARA clearly show the intent of Congress to protect the reputation of the artist and the work itself.

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*destroy, alter or remove a work. Id. The statute provides that if a building owner wishes to remove a work, permission of the artist must be obtained first. Id. This seems to directly contradict the decision discussed since VARA explicitly grants artists a continued (albeit limited) interest in their works even after sale. Supra note 69 and accompanying text (discussing American moral rights protection).*

108. 136 CONG. REC. H3111-02 at H3113 (statement of Rep. Fish).

109. INGLENDZA, supra note 67 and accompanying text (discussing the purpose and effect of American moral rights protection).

110. Novak and Rotunda, supra note 55, at 76.
The constitutional requirement that a party allege a personal stake is the foundation of the injury analysis. The artist in a preservation ordinance challenge must show a "distinct and palpable injury." Congress, through VARA, has recognized the reputation of the artist and the maintenance of a work of art as legitimate interests triggering a constitutionally cognizable injury. It was said that "congressional intervention was the most appropriate and most effective way to accomplish the goals of protecting works of visual art and the honor and reputations of those who create them." Thus, Congress specifically intended to grant artists of qualifying visual works the right to claim a personal stake in matters such as an enforcement commission's ordered removal of a work.

The act of selling the work to a third party does not erase the artist's continuing personality interest in the work under VARA. Congress provided support for the continuing interest of the artist during the VARA debates. Therefore, in disputes such as *Burke*, courts should not assume that the sale of a work forfeits the artist's continuing moral rights protections.

A narrow analysis of injury guided by the principle that only the actual owner of the art is harmed by its removal, alteration or

111. *Id.*
113. Note that the second requirement of the artist in a preservation dispute to show sufficient injury is to show a "fairly traceable casual connection between the claimed injury and the conduct that plaintiff challenges." *Novak & Rotunda*, supra note 55, at 76. This does not present a problem for the artist challenging a preservation enforcement commission decision since the commission's conduct is directly traceable to the injury suffered by the artist.
114. 136 CONG. REC. H3111 at H3114. Representative Markey discussed one rationale for the avoidance of a strict property analysis pertaining to works of art. *Id.* He told the tale of two entrepreneurs who bought a Picasso and cut it into 500 pieces, selling each individual piece for $135 apiece. *Id.* After successful sales, one of the entrepreneurs stated "if this thing takes off, we may buy other masters as well and give them the chop." *Id.* Markey continued, "[a] work of art is not a utilitarian object like a toaster. It is an intellectual work . . . [w]e must not permit the connection between the artist and his or her work to be severed the first time the work is sold." *Id.*
115. *Supra* note 29 and accompanying text.
destruction is incorrect under VARA. The spirit embodied by VARA and moral rights protections generally require courts to move away from traditional economic and property dogma and toward being the ultimate guardian of cultural contributors. Modern adjudication of preservation disputes involving artists must consider not only the purpose of preservation ordinances but also that "visual art plays an important role in our cultural life, and that artists who have put their hearts and souls into their creations deserve protection for their efforts." Though this injury is somewhat abstract when compared to the more easily accessible purpose of historic preservation, courts must not treat a work of art "simply as a physical piece of property, rather than as an intellectual work[.]" The limited view of art as mere property too narrowly defines injury for purposes of standing to sue under moral rights laws. After all, "[s]ociety is the ultimate loser when these works are modified or destroyed. They should be preserved in the way the artist intended[.]" VARA grants artists in preservation disputes a constitutionally cognizable injury and therefore an artist does have standing to sue. In addition to an artist's ability to satisfy standing requirements, the artist has a difficult barrier once preservation enforcement commissions judge their applications for display.

117. Id.
118. Id. at H3113 (statement of Rep. Kastenmeier).
119. Notice also that Congressional debate of VARA included various members of the House of Representatives using the term 'preserve' when discussing the purpose of the Act. Id. at H3113. For example, it was said that works of visual art "should be preserved in the way the artist intended, and as the important part of our cultural heritage that they are." Id. When one considers the purpose of historic preservation, namely, to preserve buildings and properties of cultural heritage and significance, the competing interests become even more entangled due to a common goal.
120. Cude, supra note 52, at 866.
B. Enforcement Commission Standards and Hearings

1. Enforcement Commission Review Standards

An artist should be particularly concerned with the clarity with which a preservation ordinance communicates aesthetic standards. An ordinance lacking specific standards "implicates a vagueness challenge."\(^{121}\) Unfortunately, many preservation ordinances do not specify precise standards, and instead risk the appearance of "impermissible censorship of expression through the arbitrary denial of a permit."\(^{122}\) The typical preservation ordinance merely

\(^{121}\) Id. at 899.

\(^{122}\) For example, the City of Tavares, Florida’s preservation ordinance provides:

Visual compatibility will be defined in terms of the following criteria:

(1) Front Facade Proportion. The front facade of each building or structure will be visually compatible with and in direct relationship to the width of the building and to the height of the front elevation of other adjacent or adjoining buildings within an historic district . . .

(3). Rhythm of Solids To Voids in Front Facades. The relationship of solids to voids in the front facade of a building or structure will be visually compatible with the front facades of historic sites within the historic district.

(4). Relationship of Materials, Texture and Color. The relationship of materials, texture and color of the facade of a building will be visually compatible with the predominant materials used in the historic sites within the historic district . . .

TAVARES, FLA., CODE OF ORDINANCES ch. 9, Art. III, § 9-21(f)(2001). The Tavares ordinance is indicative of the problems involved in drafting a preservation ordinance. If the municipality drafts specific standards to be used by its enforcement commission, it may not give the commission enough leeway to carry out the purpose of preservation. The City of Phoenix also provides only broad standards of review in
recites broad guidelines of review, affording enforcement commissions a great deal of latitude. The specificity of aesthetic standards employed by an enforcement commission should be written into the ordinance itself, functioning as “limitations on the enforcement officials to approve or disapprove the regulated expression.”

For example, the Fredericksburg, Texas preservation ordinance is a model of an appropriately drafted ordinance and contains the specificity needed to avoid vagueness challenges. The Fredericksburg standards for application review provides:

C. Paint Color. Traditionally, the base color of

preservation enforcement proceedings. The Phoenix ordinance provides:

D. Standards for Consideration of a Certificate of Appropriateness:
   a. The proposed work will be compatible with the relevant historic, cultural, educational or architectural qualities characteristic of the structure, site or district and shall include but not be limited to elements of size, scale, massing, proportions, orientation, surface textures and patterns, details and embellishments and the relation of these elements to one another.

   PHOENIX, ARIZ. CITY CODE, ch. 8 § 812 (2002).

   Available at http://www.ci.phoenix.az.us/HISTORIC/histord4.html#HIST812 (last visited November 19, 2002).

   Similarly, Philadelphia’s preservation ordinance contains particularly vague standards. Philadelphia’s ordinance provides these standards for application review:

   (.1)the purpose of this section;
   (.2)the historical, architectural or aesthetic significance of the building, structure, site or object . . .
   (.4)the compatibility of the proposed work with the character of the historic district or with the character of its site, including the effect of the proposed work on the neighboring structures, the surroundings and the streetscape; and,
   (.5)the design of the proposed work.


   This wide latitude means that virtually any alteration or creation within Philadelphia’s historic district may be denied. Artists, then, are left guessing whether their works will be acceptable.

123. Cude, supra note 52, at 909.
Fredericksburg's buildings have been soft muted shades of greens, blues, whites, and tans. In order to continue the historic integrity of the buildings in the district, these colors continue to be acceptable today, and do not require review or issuance of a certificate. Base colors such as vibrant or "hot" shades, dark deep shades, and black shades are not acceptable. If one wishes to use these colors a Certificate of Appropriateness must be granted. The painting of existing historic buildings composed of materials such as unpainted stone or unpainted masonry is prohibited.124

The Fredericksburg ordinance clearly describes aesthetic standards for the historic district. An artist seeking to create a work within the district is on notice of what colors may be used and what colors will present issues for the enforcement commission during the application review process.

Enforcement commissions should develop specific aesthetic standards over time. As the preservation ordinance endures, aesthetic themes will develop in the community. The ordinance should be redrafted to further specify the colors and designs that have developed.125 Where the preservation ordinance lacks any standards and grants the enforcement commission extremely broad powers, that ordinance becomes a governmental guise for censorship of the arts.

Adopting standards not only better serves the municipality but also better serves outside parties such as artists by giving them ample notice of what the enforcement commission will consider during review procedures. Thus, municipalities must work to

125. In Burke, the Charleston ordinance existed for over sixty years at the time of the artist's application. 839 F.Supp. 589, 597 (D.S.C. 1995). The inability or unwillingness of Charleston's enforcement commission to adopt standards giving an artist or other parties notice of the aesthetic themes of the city is an inappropriate approach to application review procedures. See supra note 98 and accompanying text (discussing the BAR's lack of specific standards even after sixty years of preservation ordinance enforcement).
reduce the amount of discretion given to enforcement commissions in order to better ensure objective determinations. The longer the ordinance exists, the better equipped the municipality will be to adopt specific standards.

2. Preservation Challenges and Public Hearings

Members of the public speaking at a preservation enforcement commission appeal hearing should not be permitted to influence the commission’s decision by injecting subjective artistic value judgment into what should be a content neutral decision making procedure. In *Burke*, citizens from the community were allowed to inject artistic preferences and personal opinion of the artist’s work. Injecting such testimony into a review proceeding does little to support a municipality’s claim of content neutrality. While the purpose of a public hearing is to allow the community to speak to its officials, enforcement commissions must take measures to avoid being influenced by mere artistic opinion. An open

126. The public hearing is a “give and take of ideas among interested parties.” Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*, 19 UCLA J. ENVTL. L. & POL’Y 293, 319 (2001-2002). However, when the issue of art is presented, the general public’s ability to pose as an interested party and inject subjective opinion based merely upon artistic preference is a grave risk. After all, the enforcement commissions are appointed and live in the community, and will be pressured by the vocal opposition to make a subjective determination. The enforcement commission members, who live in the community and are entrusted with carrying out the will of the community on preservation matters, will adequately represent most of the general public’s interest in virtually every instance by reason of their duties. The “ability to float compromise proposals, the imposition of specific mitigation measures . . . and the concentration of public concerns in the one specific forum” can be preserved while eliminating irrelevant and inappropriate testimony from the hearing. *Id.*


128. There are additional considerations that an enforcement commission should consider in some disputes involving artists. First, the level of scrutiny given to an artwork should be determined on a sliding scale. That is, the enforcement commission should first narrow its investigation by determining the degree to which the work interferes with preservation aesthetics. The
meeting allowing such artistic opinion could be a lethal injection to the artist.

VI. Conclusion

When publicly displayed artwork is placed inside or near a historic preservation district, competing interests arise. The artist's constitutionally protected expression and the legitimate governmental interest of preserving properties and structures of cultural significance collide with an empty middle ground. Both play an important role in preserving American culture and solidifying our sense of place and time.

When historic preservation ordinances are drafted and enforced, the totality of the circumstances should be accounted for, focusing on whether a reasonable person would view the work as disruptive to the aesthetic themes of the area. For example, if a work is merely viewable from, and not situated in, the preservation district, the commission should not review a permit application as rigidly as it would a work placed directly inside the preservation district. Admittedly, this proposal asks courts and preservation commissions to apply subjective considerations, but the subject matter is by definition unique and deserves more subtle analysis.

This approach makes sense because of the balancing of interests in such a situation. Enforcement commission decisions should include consideration of where the artwork actually is placed. Enforcement commission should not have broad authority to dictate the aesthetics of areas outside the preservation district merely because a work is viewable from that district. Another example is if the art is located on the outskirts of the district or in an area such as an alley behind preserved buildings.

Second, even if artwork is situated directly inside a preservation district, the precise location of the work should be taken into consideration by the enforcement commission. For example, if a restaurant is located in the heart of a downtown preservation district, but the artwork in question is situated on the back alley wall of that building, not viewable from the street, the enforcement commission should apply less rigid standards when considering an artist's application. This is another middle ground suggestion that will more adequately balance the First Amendment rights of the artist and the preservation rights of the municipality.

An enforcement commission that does adjust its investigation to these variables will avoid undue restriction of the First Amendment rights of an artist with blanket rationale incapable of flexible application.
municipalities must be careful not to unnecessarily impede an artist’s protected expression. When an artist’s work is completed, a piece of her soul has been memorialized. The injury to the artist resulting from alteration, destruction, or removal of that work is concrete. Recent moral rights legislation grants artists a constitutionally cognizable injury and standing to sue if such alteration, destruction, or removal occurs.

Municipalities must adopt specific standards for review in preservation dispute proceedings. As the ordinance ages, the community should be able to adopt specific standards reflecting its aesthetic theme. Moreover, public hearings must not include parties injecting subjective artistic opinion that erodes the enforcement commission’s ability to make a content neutral decision. These competing interests can coexist, but municipalities must work to clarify their statutes and ensure neutral historic preservation decisions which are not scarred by artistic value judgment.

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