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Community Rights to Public Art

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COMMUNITY RIGHTS TO PUBLIC ART

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INTRODUCTION

> It is impossible to have a society that is civil and educated without public art . . . . It lifts up humanity and challenges the individual who encounters it to think differently about the world.[1]

In 1932, the Rockefeller family commissioned Diego Rivera to paint an enormous mural as the centerpiece of the RCA Building lobby in Rockefeller Center in New York City. The colorful mural that Rivera painted, titled *Man at the Crossroads*, included images of social, political, industrial, and scientific visions of contemporary society. One night in February of 1934, the Rockefellers hired workers to chisel the mural off the wall without any warning or notice.[2] The mural was broken into pieces before being carted away and dumped.[3] The destruction of his mural shocked Rivera.[4] More importantly, however, the destruction of Rivera's mural permanently deprived the public of a significant work of public art and heritage. The public was stunned at the destruction of the mural; protesters called the

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[1] Raquel Laneri, *Why We Love—and Need—Public Art*, FORBES (May 5, 2009, 6:00 PM), http://www.forbes.com/2009/05/05/state-of-the-city-opinions-george-rickey-public-art.html (quoting Darren Walker, Vice President of the Rockefeller Foundation and Vice Chairman of the Foundation for Art and Preservation in Embassies).

[2] *Rivera RCA Mural Is Cut from Wall*, N.Y. TIMES (Feb. 13, 1934), http://xroads.virginia.edu/~ma04/hess/rockrivera/newspapers/NYTimes_02_13_1934.html.

[3] *Id.*

[4] *Id.*

Rockefellers' act "art murder" and "cultural vandalism."[5] Nevertheless, the mural was the Rockefeller's property and, despite public support for the mural, they had the legal right to destroy it.

More than eight decades later, communities still face this type of loss of heritage through the destruction of public art. Works of art that are intimately connected with the culture of a neighborhood, that are landmarks or identifying features of a neighborhood, or that have been displayed in a neighborhood for decades, can be destroyed in an instant regardless of community sentiment. In 2014, there was public outcry when the owner of 5 Pointz demolished the twenty-plus-year-old "graffiti Mecca" to make way for two new $400 million luxury high-rise apartment towers. On the opposite coast, just last year, Piedmont Avenue neighbors in Oakland were shocked when the owner of Kronnerburger Restaurant destroyed a beloved community mural in connection with its construction of a new restaurant. Instances such as these are not uncommon and follow a similar pattern: A work of public art exists on private property by express or implied permission of the property owner, the work of art becomes a landmark of the neighborhood due to its history, popularity, or fame, and, in spite of strong community support for it to be preserved, the public art is destroyed due to new development, commercialism, or gentrification. When faced with the destruction of public art, artists can attempt to rely on the Federal Visual Artists Rights Act ("VARA") or state moral rights laws to attempt to prevent the destruction of their public artworks. But local communities lack such conferred standing, and often find their hands tied, even though they may stand to lose the most through the destruction of a part of their heritage.[6]

Property owners generally have the right to destroy their own property. This Article argues, however, that certain property is so connected to a community's identity that the community's right to preserve its heritage may trump a property owner's right to destroy. This Article explores existing, yet underutilized, legal solutions a community may use or adapt to preserve public art when that art has become a part of its cultural heritage. Finally, recognizing that preservation has its

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[5] *Id.*

[6] *See infra* Part I.

limits, and that without destruction there will be no space for creation, this Article ultimately sets forth some questions that present challenges to the preservation of public art. This Article focuses on public art owned privately or displayed on private property because of the unique challenges this arrangement poses, specifically, the conflict between private property rights and the public's interest in preserving its heritage.[7] This Article also limits its discussion to public art destroyed by its de jure owner despite a community's desire to preserve it; this Article does not discuss public art destroyed by unauthorized vandals, or public art despised by or destroyed at the request of the community.[8] For the purpose of this Article, an appropriate definition of "public art" is art in any media intended and displayed in the public domain, usually outside or in public buildings and accessible to all persons.[9] "Community" is defined as "the people with common interests living in a particular area."[10]

Part I illustrates recent examples of destruction of public art. Part II examines the inherent conflict between a de jure property owner's right to destroy his property and the public's interest in preserving its cultural heritage. Part III examines a community's interest in public art, and how a work of art may transcend from being merely a piece of private property to becoming part of a community's heritage. Parts IV through VI explore underutilized legal avenues to preserve public art, including national, state, and local preservation laws, legal claims under property law doctrines, and moral rights laws. Finally, Part VII poses some challenging questions to

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[7] In addition, when public art is on public property or owned by public entities, it is often subject to deaccessioning guidelines that govern when the public art may be removed or destroyed. Public entities may also be more easily persuaded by public sentiment to preserve public art than are private owners. Nevertheless, most of the legal avenues discussed in this Article may also be used in the event that the threatened public art is owned by a public entity or displayed on public property.

[8] Examples of public artworks despised by the communities in which they are displayed include Serra's *Tilted Arc* and Blum's *Split Pavilion*.

[9] *See, e.g.*, Curtis L. Carter, *Toward an Understanding of Sculpture as Public Art*, *in* 14 INTERNATIONAL YEARBOOK OF AESTHETICS, "DIVERSITY AND UNIVERSALITY IN AESTHETICS" 161 (2010), http://epublications.marquette.edu/cgi/viewcontent.cgi?article=1062&context=phil_fac.

[10] *Community*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/community (last visited Sept. 8, 2016). The potential problems with defining a "community" are explored further in Part VII.

preservation, especially where preserving public art may contravene artistic intent, inhibit the economic development or growth of a neighborhood, or contradict a property owner's morals.

I. PUBLIC ART LOST FOREVER

One of the more infamous examples in recent times of a private landowner destroying a city's cultural landmark was the destruction of 5 Pointz in New York. 5 Pointz was an abandoned warehouse in Long Island City, New York. In the 1990s, at the request of a few graffiti artists, the owner of the warehouse—Wolkoff—granted permission to "tag" the warehouse.[11] By 2002, the warehouse had become a "graffiti Mecca," and even had its own art curator who regulated the quality and placement of graffiti on the otherwise abandoned warehouse building.[12] Colorful graffiti, distinctive paintings, stencils, and tags covered all available walls of the warehouse. 5 Pointz attracted several internationally renowned graffiti artists to adorn its walls with art.[13] During 5 Pointz's height of fame, as many as ten tourist buses a day brought tourists to visit the site, over 150 travel guides mentioned it as an attraction in New York, *Time Out New York* included it in its "must-see" guide, it appeared as the backdrop in music videos, television shows, and wedding and engagement photos, and it had 179 reviews on Yelp.com.[14] In 2013, Wolkoff planned to tear down 5 Pointz and construct two new $400 million glass and steel high-rise luxury apartment

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[11] Sara Frazier & Jeff Richardson, *5Pointz Building, Graffiti Mecca in Queens, Painted Over During the Night*, NBCNEWYORK.COM (Nov. 19, 2013), http://www.nbcnewyork.com/news/local/5Pointz-Graffiti-Painted-Over-Whitewash-Developer-Queens-232503761.html. In street art terms, "tag" typically refers to "[a] stylized name or signature [of the street artist] done with various materials, such as a marker or an aerosol spray can, often freehand." Jessica Allen, *14 Street Art Terms—Illustrated!*, MENTALFLOSS.COM (July 10, 2013, 5:00 PM), http://mentalfloss.com/article/51583/14-street-art-terms—illustrated.

[12] Dmitry Kiper, *Curator of an Urban Canvas*, THE CHRISTIAN SCI. MONITOR (July 24, 2007), http://www.csmonitor.com/2007/0724/p20s01-ussc.html.

[13] *5Pointz NYC: The Institute of Higher Burning*, 5PTZ.COM, http://5ptz.com/about (last visited Sept. 8, 2016).

[14] *See, e.g.*, William T. McGrath, *What Happens When Street Art Meets Private Property?*, CHI. DAILY L. BULL., Vol. 160, No. 6 (Jan. 8, 2014), http://news.jmls.edu/wp-content/uploads/2014/01/Reprint-JMLS-McGrath-CDLB-14-01-08.pdf; *5 Pointz*, YELP.COM, http://www.yelp.com/biz/5-pointz-long-island-city (last visited Sept. 8, 2016).

towers in its place.[15] Wolkoff claimed that it would be too expensive to maintain the façade of 5 Pointz while gutting and constructing his new apartment buildings. Many believed that Wolkoff was also capitalizing on the fame of 5 Pointz's status as a piece of New York's heritage to sell his apartments.[16] There was vocal support to preserve 5 Pointz—or at least the murals on 5 Pointz—from New York City residents and the national and international art forums. A number of the graffiti artists whose artworks were at risk sued Wolkoff to enjoin the destruction of their art.[17] After the graffiti artists lost their preliminary injunction motion in the United States District Court for the Eastern District of New York, Wolkoff whitewashed the building under cover of night, destroying all of the artwork on the façade. 5 Pointz has since been demolished and construction on the new apartment buildings is under way. The graffiti artists' VARA claim—now for monetary damages—is still pending.[18]

On the opposite coast, in Oakland, California, Piedmont Avenue neighbors were shocked when Kronnerburger, a trendy new burger restaurant, destroyed a beloved neighborhood mural.[19] In 2005, community fundraising allowed Oakland-based artist Rocky Riche-Baird to paint the Key Route Plaza mural on the former Keyline Trolley Station at 4063 Piedmont Avenue, owned by Steven Eigenberg.[20] The colorful mural featured an

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[15] Mallika Rao, *5 Pointz Landlord Says He Won't Back Down on Using the Graffiti Mecca's Name*, HUFFINGTON POST (Nov. 7, 2014), http://www.huffingtonpost.com/2014/11/07/5-pointz-landlord-trademark_n_6124580.html; Inae Oh, *Here Are the Giant Luxury Towers That Will Replace New York's Most Iconic Graffiti Wall*, HUFFINGTON POST (July 31, 2014, 4:58 PM), http://www.huffingtonpost.com/2014/07/31/5pointz_n_5638565.html.

[16] *See, e.g.*, Rao, *supra* note 15.

[17] Cohen v. G & M Realty L.P., 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013).

[18] As of September 10, 2016, this case is still pending. Cohen v. G & M Realty L.P., No. 1:13-CV-05612 (E.D.N.Y. filed Oct. 10, 2013). In addition to the original pending complaint, nine additional artists recently filed a new complaint under VARA against Wolkoff for destruction of their art on 5 Pointz. *See* Castillo v. G & M Realty L.P., No. 1:15-CV-03230 (E.D.N.Y. filed June 3, 2015) (case pending); Benjamin Sutton, *Graffiti Artists Sue 5Pointz Developer for Whitewashing Their Murals*, HYPERALLERGIC (June 15, 2015), http://hyperallergic.com/214616/graffiti-artists-sue-5pointz-developer-for-whitewashing-their-murals.

[19] Ethan Fletcher, *Kronnerburger and Oakland Neighborhood Association at Odds over Mural*, SFGATE (Dec. 16, 2014, 2:45 PM), http://insidescoopsf.sfgate.com/blog/2014/12/16/kronnerburger-and-oakland-neighborhood-association-at-odds-over-destroyed-mural.

[20] Maya Mirsky, *Piedmont Avenue: Landmark Neighborhood Mural Is Destroyed*, EAST BAY TIMES (Dec. 18, 2014, 9:51:47 AM),

orange and silver electric train number 159, a portrait of Francis Marion "Borax" Smith—the creator of the interurban transit key system—portraits of local neighborhood residents, a lively street scene, and images of existing local stores.[21] Over time, the mural had become a beloved landmark of the Piedmont Avenue neighborhood.[22] In December 2014, Eigenberg leased the building to Kronnerburger, and, in spite of community support to preserve the mural, Kronnerburger destroyed the mural while renovating the building for its new restaurant.[23] Piedmont Avenue residents were "horrified and shocked" by the destruction of the mural.[24] Neighbors explained that the public art "was paid for by community donations, and it was just horrifying and shocking that someone would cut a hole out of [the] middle of it without coming back to [the] community first[,] without any notification."[25] The destruction of the mural was a "crushing blow to many people in the neighborhood."[26]

In a separate event, Missoula, Montana residents woke up one morning in May of 2001 to find their beloved community symbol, a public artwork *Peace Sign* on Waterworks Hill, dismantled forever. In May of 1983, four men and two women from Missoula climbed onto US West Communications' 30' x 30' microwave reflector and painted a large peace symbol.[27] The *Peace Sign* looked over the town of Missoula from Waterworks Hill from 1983 through May of 2001.[28] During this time, US West attempted to paint over the peace symbol on multiple occasions, but anonymous community members swiftly reapplied the peace symbol onto the microwave reflector.[29] These community artists even scaled a six-foot barbed wire fence that

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http://www.contracostatimes.com/breaking-news/ci_27158451/piedmont-avenue-landmark-neighborhood-mural-is-destroyed.

[21] Sam Whiting, *Key to the Past / A Piedmont Mural Captures the Glory of a Bygone Transit System*, SFGATE (Apr. 3, 2005, 4:00 AM), http://www.sfgate.com/bayarea/article/Key-to-the-Past-A-Piedmont-mural-captures-the-2688322.php.

[22] Mirsky, *supra* note 20.

[23] Fletcher, *supra* note 19; Mirsky, *supra* note 20.

[24] Fletcher, *supra* note 19.

[25] *Id.*

[26] Mirsky, *supra* note 20.

[27] Pete Talbot, *Reviving the Missoula Peace Sign: A New Campaign Begins*, NEW WEST (Sept. 7, 2006), http://newwest.net/main/article/reviving_the_missoula_peace_sign_a_new_campaign_begins.

[28] *Id.*

[29] *Id.*

US West erected around the microwave reflector.[30] Beloved by the community of Missoula, the *Peace Sign* adorned bumper stickers, coffee mugs, t-shirts, and other tourist gear. For eighteen years, the *Peace Sign* looked over Missoula. In spite of strong community support to save the *Peace Sign*, Qwest Communications, successor to US West, dismantled the microwave reflector in May 2001.[31] Ten years after Qwest's dismantling of the sign, the acting mayor of Missoula proclaimed May 8, 2011 as Missoula's Day of Peace, scheduling activities in remembrance of the public art and its destruction, narratives of the history of the *Peace Sign*, and discussions on reinstalling the *Peace Sign* in the hills above Missoula, and inviting the community to open houses to visit each of the nine pieces from the dismantled *Peace Sign* housed in private homes around Missoula.[32]

Destruction of public art occurs more often than one might assume. In 2015, the property owner of Green Haus art gallery in Phoenix demolished reknowned Arizonan artist Ted DeGrazia's venerated sixty-five-year-old murals on its walls in spite of strong community support for their preservation.[33] The murals were destroyed to build a new 111-unit luxury apartment complex.[34] In 2014, the owner of the Four Seasons restaurant in New York City removed Picasso's *Le Tricorne* from where it had been hanging since 1959, in spite of serious concerns that its removal would destroy the ninety-five-year-old artwork.[35] In 2014, Detroit's forty-one-year-old public artwork *Color Cubes* was

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[30] *Id.*

[31] *Id.*

[32] MISSOULA CITY COUNCIL, JOURNAL OF PROCEEDINGS 5–6 (May 2, 2011), http://www.ci.missoula.mt.us/ArchiveCenter/ViewFile/Item/3906.

[33] Rick Rojas, *A Fight To Save Pieces of the Past as a Phoenix Enclave Is Reshaped*, N.Y. TIMES (Mar. 26, 2015), http://www.nytimes.com/2015/03/27/us/a-fight-to-save-pieces-of-the-past-in-a-reshaping-phoenix-enclave.html.

[34] Megan Finnerty, *DeGrazia Murals To Get Last Public Look This Weekend*, ARIZ. REPUBLIC (Mar. 6, 2015, 3:49 PM), http://www.azcentral.com/story/entertainment/arts/2015/03/05/degrazia-murals-open-to-public-at-green-haus-in-phoenix-during-art-detour/24402531.

[35] Suzanna Andrews, *Showdown at the Four Seasons*, VANITY FAIR (Oct. 2014), http://www.vanityfair.com/style/society/2014/10/picasso-curtain-four-seasons-restaurant; Benjamin Mueller, *After 55 Years in Vaunted Spot, a Picasso Is Persuaded To Curl*, N.Y. TIMES (Sept. 7, 2014), http://www.nytimes.com/2014/09/08/nyregion/after-55-years-in-vaunted-spot-a-picasso-is-persuaded-to-curl.html.

painted over for a temporary 7–11 advertisement.[36] In 2010, in spite of fundraising and protesting efforts, property owners dismantled the iconic sculpture *The Spindle* in Berwyn, Illinois to make way for a drive-thru Walgreens. During its twenty-one-year tenure in Berwyn, *The Spindle* had been featured on tourism billboards for Berwyn, in music videos, and in movies, including in the cult-classic movie *Wayne's World*.[37] In 2014, the new tenants of The Potter's House painted over the popular *Potter's House Mural* in the Adams Morgan neighborhood of Washington, D.C. The mural, which featured a candle surrounded by rainbow halos, had welcomed the homeless and hungry to The Potter's House since 2010.[38] In 2013, the mural on the side of Hilltop Pharmacy in Hudson Heights, New York, which was created by community teen artists in 2009, was destroyed so that the wall could become a backdrop in a new Liam Neeson period-piece film.[39] These are just a few examples where property owners destroyed or authorized the destruction of public art without regard for the community that had hosted the art for decades, permanently depriving the communities of art that had become part of their heritage.

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[36] Matthew Piper, *Remembering "Color Cubes," Downtown Detroit's Lost Public Art Landmark*, MODELDMEDIA.COM (Feb. 3, 2015), http://www.modeldmedia.com/features/RubelloColorCubes-020215.aspx.

[37] *Spindle – Cars on a Spike (Gone)*, ROADSIDEAMERICA.COM, http://www.roadsideamerica.com/story/6557 (last visited Sept. 8, 2016); *Great Car Spire of Berwyn*, CITYEYESPHOTO.COM, http://www.cityeyesphoto.com/65/great-car-spire-of-berwyn (last visited Sept. 8, 2016) (describing *The Spindle* as a "famous landmark").

[38] Jamie Slater, *The Potter's House Mural Has Been Painter Over*, WASH. CITY PAPER (Oct. 15, 2014, 2:39 PM), http://www.washingtoncitypaper.com/blogs/artsdesk/visual-arts/2014/10/15/the-potters-house-mural-has-been-painted-over; Prince of Petworth, *The Potter's House Mural: Public Art at Risk of Being Destroyed!*, POPVILLE: DC'S NEIGHBORHOOD BLOG (July 23, 2014, 10:45 AM), http://www.popville.com/2014/07/the-potters-house-mural-public-art-at-risk-of-being-destroyed.

[39] Nigel Chiwaya, *Beloved Mural Painted over During Shooting of Liam Neeson's New Film*, DNAINFO: N.Y. (May 14, 2013, 10:03 AM), http://www.dnainfo.com/new-york/20130514/hudson-heights/beloved-mural-painted-over-during-shooting-of-liam-neesons-new-film.

II. THE RIGHT TO DESTROY . . . HERITAGE?

> A well-ordered society cannot tolerate the waste and destruction of resources when such acts directly affect important interests of other members of that society.[40]
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> There are two elements in an edifice, its utility and its beauty. Its utility belongs to its owner, its beauty to everyone. Thus to destroy it is to exceed the right of ownership.[41]

It seems axiomatic that a property owner should have the right to destroy a work of art that she owns. One of the rights of property ownership has traditionally been a *jus abutendi*, or the right to destroy one's property.[42] Property owners do it every day, such as tearing down old sheds to make way for new car garages or recycling used refrigerators when they no longer keep food cool. Therefore, the idea that a community could compel an unwilling property owner to become a permanent curator of public art may seem radical and contrary to the ideals embodied in American property law. However, property rights are not absolute, and a property owner's absolute right to destroy property, once taken for granted, has fallen out of favor over the past decades.[43] Local landmark ordinances, cultural heritage laws, and land use and zoning restrictions—all well-established concepts in U.S. law—recognize a strong public interest in preventing the destruction of certain private property and enforce property owners' obligations to maintain or preserve property for the benefit of the public. When pitted against a property owner's right to destroy, the public's interest in preserving its heritage should prevail.

For instance, the textbook case *Eyerman v. Mercantile Trust Co.*[44] pitted an individual property owner's right to destroy against the community's interests and rights at large.[45] In that case, a property owner requested in her will for her house to be

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[40] Eyerman v. Mercantile Trust Co., N.A., 524 S.W.2d 210, 217 (Mo. Ct. App. 1975).

[41] JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 48 (2004) [hereinafter SAX, PLAYING DARTS] (quoting Victor Hugo).

[42] Roscoe Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 997 (1939).

[43] Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 784 (2005).

[44] 524 S.W.2d 210.

[45] *Id.* at 213.

destroyed upon her death.[46] Community members in the neighborhood brought suit to enjoin the destruction on the grounds of private nuisance, enforcement of restrictive covenants, and public policy.[47] They claimed that the destruction of her house, which was of "high architectural significance, representing excellence in urban space utilization," would decrease neighboring property values and would be contrary to public policy.[48] The court agreed that the destruction would be against public policy.[49] In enjoining the destruction, the court defined the phrase "against public policy" as "that which conflicts with the morals of the time and contravenes any established interest of society . . . so as to be injurious to the interests of the state."[50] The court further stated:

> A well-ordered society cannot tolerate the waste and destruction of resources when such acts directly affect important interests of other members of that society. It is clear that property owners in the neighborhood . . . [and] the St. Louis Community as a whole . . . will be severely injured [should the property be destroyed].[51]

Indeed, certain property is so symbolic of a culture, community, or society that its owner is not the only one to have an interest in its preservation or destruction. In such cases, the community whose culture and heritage the property represents also has significant interest in the property, and its de jure owner should not have the absolute right to destroy it.[52] This type of property is referred to as "cultural property" or "cultural

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[46] *Id.* at 211.
[47] *Id.* at 212.
[48] *Id.* at 213.
[49] *Id.* at 217.
[50] *Id.*
[51] *Id.*
[52] *See* Joseph L. Sax, *Is Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England*, 78 CALIF. L. REV. 1543, 1554 (1990) [hereinafter Sax, *Stonehenge*] ("The implicit theory . . . was that property had two distinct elements. The element that belonged to proprietors was the economic value or use value of their property. . . . The monuments had another element, however—namely, their historic and scientific value—which belonged to the nation. . . . The nation as a collectivity had a preexisting interest in many objects that had always been considered entirely private."); Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1028 (2009) ("[S]ome cultural resources are so sacred and intimately connected to a people's collective identity and experience that they deserve special consideration as a form of cultural property.").

heritage,"[53] and is often ascribed to significant archaeological, ethnographical and historical objects, works of art, and architecture,[54] including pieces such as Stonehenge,[55] England's Crown Jewels,[56] the Afo-A-Kom statue,[57] and the Summer Palace Bronze Heads.[58] These examples of "heritage of all mankind"[59] encompass a dual nature, which means that they may be privately owned, but they are so significant and valuable to the public that the public also retains an interest in them.[60] In other words, even though an individual may be the de jure owner of a piece of cultural heritage, her ownership is qualified. She takes on the role of steward, retaining the property for the benefit of the public; she can use her property for personal enjoyment, but she should not be able to deprive the public, a community, or future generations of their cultural heritage.[61]

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[53] Significant cultural resources have been described as either cultural property or cultural heritage or both. The terms are often used interchangeably. There has been scholarship advocating the use of one term over the other. *See, e.g.*, Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 PENN ST. L. REV. 641, 642 (2011) (explaining that "a powerful and different idea of heritage has increasingly challenged the lofty position enjoyed by property"). This Article uses the term "heritage" to describe significant local cultural resources in the form of public art. This Article uses "heritage" instead of "property" to deemphasize the private ownership concept that the term "property" elicits. This Article does not argue that a neighborhood or community should have any property ownership interest in the public art in their neighborhoods, but merely a significant interest in the preservation of such public art.

[54] John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 341 (1989); Paul Daley, *Preservation or Plunder? The Battle over the British Museum's Indigenous Australian Show*, THE GUARDIAN (Apr. 9, 2015), http://www.theguardian.com/artanddesign/2015/apr/09/indigenous-australians-enduring-civilisation-british-museum-repatriation.

[55] *See generally* Sax, *Stonehenge*, *supra* note 52.

[56] Nicole B. Wilkes, *Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute*, 24 COLUM.-VLA J.L. & ARTS 177, 183 (2001).

[57] Merryman, *supra* note 54, at 342.

[58] Derek Fincham, *Call for Return of Chinese "Cultural Relics*," ILLICIT CULTURAL PROPERTY (Oct. 27, 2008), http://illicitculturalproperty.com/call-for-return-of-chinese-cultural-relics.

[59] *See* Convention for the Protection of Cultural Property in the Event of Armed Conflict pmbl., May 14, 1954, 249 U.N.T.S. 240 (proclaiming that "cultural property belonging to any people whatsoever" is "the cultural heritage of all mankind").

[60] Sax, *Stonehenge*, *supra* note 52, at 1554–56; Wilkes, *supra* note 56, at 183.

[61] *See generally* Sax, *Stonehenge*, *supra* note 52; *see also* SAX, PLAYING DARTS, *supra* note 41.

For a famous historical and cultural site like Stonehenge, it may seem obvious that its de jure owner should not have the absolute right to destroy it. This concept of qualified ownership, however, is plainly contrary to a property owner's traditional bundle of rights. Indeed, the idea that there is a public or common right to preserve cultural heritage is still fairly emerging.[62] Less than a century ago, Stonehenge was privately owned property that sold at auction for £6,600.[63] Its owner could have exercised his right to destroy and have Stonehenge dismantled in order to build a new estate. Fortunately, its owner recognized Stonehenge's cultural significance to the public and gifted it to England after three years of private ownership.[64]

III. PUBLIC ART AS COMMUNITY HERITAGE

> Cultural objects nourish a sense of community, of participation in a common human enterprise.[65]
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> Public art is a part of our public history, part of our evolving culture and our collective memory. It reflects and reveals our society and adds meaning to our cities. As artists respond to our times, they reflect their inner vision to the outside world, and they create a chronicle of our public experience.[66]

A piece of public art can become so significant to a community that it becomes part of that community's cultural heritage.[67] This can happen, for example, through age—where the public art is displayed in a community long enough that it becomes a landmark; through fame—where the artwork or artist is or becomes renowned or famous, thereby attaching prestige and notoriety to the public art and the community that hosts it; through a significant event, such as the public art being featured in a film, song, movie, or the site of a historical or memorable

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[62] Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1143 (1990).

[63] Justin Parkinson, *The Man Who Bought Stonehenge – and Then Gave It Away*, BBC NEWS MAG. (Sept. 21, 2015), http://www.bbc.com/news/magazine-34282849.

[64] *Id.*

[65] Merryman, *supra* note 54, at 349.

[66] Penny Balkin Bach, *What Is Public Art?*, ASS'N FOR PUBLIC ART, http://associationforpublicart.org/public-art-gateway/what-is-public-art (last visited Sept. 8, 2016).

[67] Carpenter et al., *supra* note 52, at 1028 ("[S]ome cultural resources are so sacred and intimately connected to a people's collective identity and experience that they deserve special consideration as a form of cultural property.").

event; or through popularity—where the community appreciates the art to the point where it is embraced as a source of community pride. Once a community attaches cultural significance to a piece of public art, that community should have a say in its disposition, especially its threatened destruction.[68]

The benefits of public art to a community are well established. The New Deal introduced the first public art programs in 1934, including the establishment of the Public Works of Art Project and the formation of the Treasury Department's Section of Painting and Sculpture.[69] The program hired artists to create public art for federal buildings to create jobs, stimulate the economy, and increase morale.[70] Many municipalities also have percent-for-arts programs, which establish guidelines for developers and municipalities to spend a certain percentage, usually one percent, of their development funds on implementing public art.[71]

Public art beautifies cities and neighborhoods and enhances quality of life. In a 2008 report that analyzed the financial benefits of beautiful places, the Federal Reserve Bank of Philadelphia found that residents and visitors "are attracted by an area's special traits, such as proximity to the ocean, scenic views, historic districts, architectural beauty, and cultural and recreational opportunities."[72] These beautiful cities "disproportionally attract[] highly educated individuals and experience[] faster housing price appreciation."[73]

Art can foster attachment to a community. "[W]orks of art are elaborate mechanisms for defining social relationships, sustaining social rules, and strengthening social values."[74] In a three-year study of forty-three cities, the Knight Foundation's Soul of the Community project found that the "aesthetics of a

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[68] Clifford Geertz, *Art as a Cultural System*, 91 MLN COMP. LITERATURE 1473, 1475 (1976) (noting that the "placing, the giving to art objects a cultural significance, is always a local matter").

[69] Laneri, *supra* note 1.

[70] *Id.*

[71] Twenty-eight states and territories have active percent-for-arts programs. *National Assembly of State Arts Agencies*, http://www.nasaa-arts.org/Research/Key-Topics/Public-Art/State-Percent-for-Art-Programs.php (last visited Sept. 8, 2016).

[72] Gerald A. Carlino & Albert Saiz, *City Beautiful* 3 (Fed. Reserve Bank of Phila., Working Paper No. 08-22, 2008), https://www.philadelphiafed.org/research-and-data/publications/working-papers/2008.

[73] *Id.* at 33.

[74] Geertz, *supra* note 68, at 1478.

place—its art, parks, and green spaces"—created more resident attachment to a community than education, safety, and local economy.[75] This study supports the notion that "[i]t is impossible to have a society that is civil and educated without public art . . . . It lifts up humanity and challenges the individual who encounters it to think differently about the world."[76]

Public art also brings economic development and rewards to a neighborhood. For instance, in 1993, artist and community activist Rick Lowe founded Project Row Houses, a public art effort in the Third Ward in Houston, revitalizing the historically significant, yet endangered African-American neighborhood by installing public art and artists in abandoned "shotgun houses."[77] The project was considered "the most impressive and visionary public art project in the country," which not only revitalized the Third Ward's economy, but also created social discourse and allowed the community to participate in a common enterprise.[78] Similarly, when artists turned MASS MoCA, a thirteen-acre building site in North Adams, Massachusetts, from an unused, abandoned building into a public art museum, there was a "transformative effect" on the community.[79] Public art also drives economic rewards by attracting tourism. According to votes on TripAdvisor.com, the third most popular tourist attraction in Chicago is *Cloud Gate*, a bean-like public art sculpture in downtown Chicago.[80] Tourists that visit *Cloud Gate* spend money at local restaurants and stores and on taxis and hotels, boosting the local economy.

The moral and economic benefits of public art to a neighborhood are compelling, but public works of art are "more than economic commodities and they oftentimes provide our communities with a sense of cohesion and history. The public's interest in preserving important artistic creations should be

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[75] Jared Green, *Why Public Art Is Important*, THE DIRT (Oct. 15, 2012), http://dirt.asla.org/2012/10/15/why-public-art-is-important.

[76] Laneri, *supra* note 1 (quoting Darren Walker, Vice President of the Rockefeller Foundation and Vice Chairman of the Foundation for Art and Preservation in Embassies).

[77] Michael Kimmelman, *In Houston, Art Is Where the Home Is*, N.Y. TIMES (Dec. 17, 2006), http://www.nytimes.com/2006/12/17/arts/design/17kimm.html.

[78] *Id.*

[79] Jared Green, *The Many Benefits of Public Art*, THE DIRT (Apr. 20, 2011), http://dirt.asla.org/2011/04/20/the-many-benefits-of-public-art.

[80] *Things To Do in Chicago*, TRIPADVISOR.COM, http://www.tripadvisor.com/Attractions-g35805-Activities-Chicago_Illinois.html (last visited Sept. 8, 2016).

promoted and our communities should be able to preserve their heritage when it is in jeopardy."[81] When a piece of public art comes to embody a community's identity and culture, when it becomes a landmark or identifying symbol of a community, when it comes to define a community's social relationships, sustain the community's social rules, or strengthen the community's social values, it transcends being just a piece of art and becomes part of a community's heritage. It becomes "the property of mankind and ownership carries with it the obligation to preserve [it]."[82] Even though the art may be privately owned, such ownership is in the nature of a trust for the community's benefit, and its de jure owner should not be able to destroy it without legal scrutiny.

This Article does not advocate for the absolute right of communities to gain dominion over private property. Just as a property owner should not have an absolute right to destroy community heritage, a community should not have an absolute right to preserve all public art, regardless of whether it qualifies as cultural heritage. However, when a piece of public art transforms from being merely a piece of property to become a community's cultural heritage, community rights may trump those of the individual property owner, and there should be legal avenues available to the community to prevent such destruction.

The Parts below explore currently existing, yet underutilized, legal avenues a community could pursue to prevent the destruction of public art. None of these legal options is a perfect fit for the task, but until legislation is enacted specifically addressing a community's right to preserve public art, the avenues described below at least enhance the possibility of preservation, and further allow the communities to be heard and communicate to property owners the importance of the public art they own.

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[81] SAX, PLAYING DARTS, *supra* note 41, at 24 (quoting Letter from Alan Sieroty to Hon. Edmund G. Brown Jr. (Sept. 3, 1982), at 2 (from California State Archives, on SB 1757)).

[82] *Id.* at 35 (quoting J.W. von Goethe).

IV. PRESERVATION LAWS

> The Legislature hereby finds and declares that there is a public interest in preserving the integrity of cultural and artistic creations.[83]

Preservation laws were traditionally reserved for protecting historical sites and historical features on buildings. Recently, public art, including murals, have started to appear on preservation registries in the United States and elsewhere, signifying a shift in societal attitudes regarding the importance of preserving public art.[84] The U.S. is not the only country to recognize the importance of preserving significant pieces of public art. Victorian Heritage in Australia lists a 1984 mural by New York artist Keith Haring on its heritage database because of its historic, aesthetic, and social significance.[85] English Heritage lists the Abbey Road zebra crossing, which appeared on a Beatles' album cover, as a Grade II Listing,[86] and recently listed a 2014 piece of street art by Banksy, *Spy Booth*, as a Grade II Listing.[87]

In the United States, preservation laws exist at the federal, state, and local levels; some require preservation and others merely encourage preservation. As explained below, these laws can be useful for communities wishing to preserve public art as local heritage.

A. National Historic Preservation Act's National Register of Historic Places

The National Historic Preservation Act authorizes the maintenance of a National Register of Historic Places, which lists "districts, sites, buildings, structures, and objects . . . in American history, architecture, archeology, engineering, and culture" significant to "the prehistory or history of their

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[83] CAL. CIV. CODE § 989(a) (West 1982) (California Art Preservation Act).

[84] *Spreadsheet of National Historic Landmarks*, NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, http://www.nps.gov/Nr/research/index.htm (last visited Sept. 8, 2016).

[85] *Keith Haring Mural*, VICTORIAN HERITAGE DATABASE, http://vhd.heritage.vic.gov.au/places/result_detail/12532 (last visited Sept. 8, 2016).

[86] *Beatles' Abbey Road Zebra Crossing Given Listed Status*, BBC (Dec. 22, 2010), http://www.bbc.com/news/uk-england-london-12059385.

[87] *Banksy 'Spy Booth' Mural in Cheltenham Gets Protection*, BBC (Feb. 19, 2015), http://www.bbc.com/news/uk-england-gloucestershire-31539767.

community, State, or the Nation."[88] Even though most of the listings are districts, buildings, and historical sites, two artworks were recently listed in the National Register: the *Detroit Industry* murals by Diego Rivera at the Detroit Institute of Arts and *The Epic of American Civilization* mural by José Clemente Orozco at the Baker Library at Dartmouth College.[89]

Listing in the National Register by itself places "no obligations on private property owners" and "no restrictions on the use, treatment, transfer, or disposition of private property."[90] However, this is not to say that a community would not benefit from listing public art in the National Register. First, property owners may be encouraged to preserve a work of public art if it is listed in the National Register. They may view owning a piece of art in the National Register as an honor, driving interest, prestige, and popularity to the art and its owner. Some may be simply more reluctant to destroy art that is listed in the National Register. Additionally, when a property is listed in the National Register it can also trigger listing under local municipal ordinances, which generally require preservation and provide more protection to listed works.[91]

Also notable is the ability of properties listed in the National Register to be eligible for conservation façade easement donation. By listing murals in the National Register, property owners are eligible to donate conservation façade easements to designated nonprofit organizations to enjoy federal tax benefits.[92] Conservation façade easements allow the property owner to hold

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[88] *How to Complete the National Register Registration Form*, NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, http://www.nps.gov/nr/publications/bulletins/nrb16a/nrb16a_intro.htm (last visited Sept. 8, 2016).

[89] *Supra* note 84.

[90] *National Register of Historic Places Program: Fundamentals*, NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, http://www.nps.gov/Nr/national_register_fundamentals.htm#ownership (last visited Sept. 8, 2016) ("National Register listing places no obligations on private property owners. There are no restrictions on the use, treatment, transfer, or disposition of private property. National Register listing does not lead to public acquisition or require public access. A property will not be listed if, for individual properties, the owner objects, or for districts, a majority of property owners object.").

[91] *National Register of Historic Places*, NAT'L TRUST FOR HISTORIC PRES.: PRES. LEADERSHIP FORUM, http://forum.savingplaces.org/learn/fundamentals/preservation-law/federal/nrhp (last visited Sept. 8, 2016).

[92] *Easements To Protect Historic Properties: A Useful Historic Preservation Tool with Potential Tax Benefits*, NAT'L PARK SERV.: TECHNICAL PRES. SERVS. (2010), https://www.nps.gov/tps/tax-incentives/taxdocs/easements-historic-properties.pdf.

onto and continue using his property, but require him to maintain, protect, and preserve the donated façade in perpetuity.[93] The federal tax credit a property owner receives may help to defray his costs of maintaining the mural on the façade of his building and, theoretically, allow the property owner to share the costs of preserving the façade with the public. Instead of forcing a property owner to become the permanent curator of public art, this solution attempts to incentivize a property owner to list his public art for tax and recognition benefits. It also benefits the community by ensuring preservation of community heritage. The use of conservation easements to protect cultural heritage has increased in popularity,[94] and should remain an incentivizing option to encourage property owners to maintain public art.

B. Local Landmark Preservation Ordinances

A more direct way for a community to preserve public art is through local landmark preservation frameworks. Local landmark preservation ordinances have traditionally been aimed at preserving historic buildings and architectural features. Every state and over 500 municipalities have enacted landmark preservation laws.[95] Some ordinances, like New York City's, require the owner of a protected site or building feature to maintain the site or feature and keep it in good repair.[96] Other ordinances, like Chicago's, merely prevent the owner of a listed site or protected feature from destroying the landmark.[97] Virtually all local landmark preservation ordinances prohibit a property owner from destroying or removing the protected building feature. To protect the public's interest in historically and culturally significant sites, these ordinances often allow properties to be designated without the owner's approval and, sometimes, even over the owner's objection.

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[93] *Id.*

[94] Jessica Owley, *Cultural Heritage Conservation Easements: The Problem of Using Property Law Tools for Heritage Protection* 2 (SUNY Buffalo Legal Studies Research Paper No. 2015-032, 2015), http://ssrn.com/abstract=2243129.

[95] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 107 (1978).

[96] *Id.* at 111–12.

[97] CHIC., ILL., MUN. CODE ch. 2-120, art. XVII, § 2-120-580 (Landmarks Ordinance), http://www.cityofchicago.org/content/dam/city/depts/zlup/Historic_Preservation/Publications/Chicago_Landmarks_Ordinance_2014.pdf.

Local landmark preservation ordinances can also be used to preserve cultural resources. In fact, many if not most ordinances include "works of art" as protectable subject matter. For instance, similar to other landmark ordinances, Chicago's Landmarks Ordinance states that its purpose is to "safeguard . . . historic and cultural heritage, as embodied and reflected in such areas, districts, places, buildings, structures, works of art, and other objects" and to "identify, preserve, protect, enhance, and encourage continued utilization and the rehabilitation of such . . . works of art . . . having a special historical, community, architectural, or aesthetic interest or value to the City . . . and its citizens."[98] Prior to designating a site or building feature as a landmark, the ordinance requires the Chicago Landmarks Commission to consider whether the work's value is an example of the cultural heritage of the City, whether its location is a site of a significant historic event, whether it identifies with a person who contributed significantly to the cultural development of the City, whether it exemplifies a unique architectural type, whether it is identified as the work of a significant creator, whether it represents a cultural theme expressed through works of art, and whether it is in a unique location or has a distinctive appearance.[99] Based on the above criteria, many significant works of public art in Chicago should qualify as landmarks. However, the only works of art currently designated in Chicago are historic monuments, historic buildings containing murals or sculptures, or sculptures associated with historical events, such as the *Pillar of Fire* sculpture created by Egon Weiner in 1961, which marked the site of the origin of the Great Chicago Fire of 1871.[100] Not even Pablo Picasso's famous cubist sculpture, which has been described as "to Chicago what Big Ben is to London or the Eiffel Tower to Paris,"[101] has its own designation under Chicago's Landmarks Ordinance.[102] Nor is

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[98] *Id.*

[99] *Id.* § 2-120-620.

[100] *Chicago Landmarks, Alphabetical List*, CITYOFCHICAGO.ORG, http://webapps.cityofchicago.org/landmarksweb/web/listings.htm (last visited Sept. 8, 2016).

[101] June Sawyers, *The Face That Launched A Thousand ??!?!??*, CHI. TRIB. (Aug. 14, 1988), http://articles.chicagotribune.com/1988-08-14/features/8801230331_1_sculpture-mayor-richard-j-daley-daley-plaza.

[102] "The Picasso," as Chicagoans affectionately call it, is part of the Daley Center landmark designation. It does not have its own designation under the City of Chicago's Historic Landmark Preservation ordinance.

Cloud Gate, affectionately known as "The Bean," designated as an official Chicago landmark, even though the stainless steel bean-like sculpture is visited by millions of tourists each year, is featured in almost every Chicago tourism guide, appears in commercials and in blockbuster movies, and individually has over 9,000 reviews on TripAdvisor.com[103] and over 400 reviews on Yelp.com.[104] While there are understandable reasons why many significant works of public art do not enjoy local landmark status, such as the lack of an immediate risk to such works, the relatively extensive registration process involved, and the limited financial and administrative resources available to municipalities, local landmark ordinances are certainly an underutilized legal avenue for communities to protect public art.

One recent success story is the 2014 designation of the 1959 *Joseph Knowles Mural* at 38 West Victoria Street as an official landmark by the City of Santa Barbara due to the mural's "character, interest or value as a significant part of the heritage of the City, the State or the Nation."[105] The *Joseph Knowles Mural* depicts the history of Santa Barbara County in six panels of polychromatic tiles, including images celebrating "the Chumash, Spanish explorers, the Mission, the California rancho, the American settler, and the modern era."[106] In 2012, 38 West Victoria Street was in the process of being redeveloped and converted into a trendy new public market of local restaurants and independent stores.[107] However, recognizing the mural's cultural significance to Santa Barbara, the *Joseph Knowles Mural* was designated as a landmark, preventing its destruction

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[103] *Things To Do in Chicago*, TRIPADVISOR.COM, http://www.tripadvisor.com/Attractions-g35805-Activities-Chicago_Illinois.html (last visited Sept. 8, 2016).

[104] *The Cloud Gate*, YELP.COM, http://www.yelp.com/biz/the-cloud-gate-aka-the-bean-chicago (last visited Sept. 8, 2016). The Bean has been in movies such as *The Break-Up* (2006), *Source Code* (2011), *The Vow* (2012), *Homecoming* (Kanye West music video, 2008), *Nights and Weekends* (2008), *Dhoom 3* (2013), and *Transformers: Age of Extinction* (2014). *See Cloud Gate*, WIKIPEDIA.ORG, https://en.wikipedia.org/wiki/Cloud_Gate (last visited Sept. 8. 2016).

[105] CITY OF SANTA BARBARA HISTORIC LANDMARKS COMM'N, RESOLUTION RECOMMENDING THAT CITY COUNCIL DESIGNATE AS A CITY LANDMARK THE JOSEPH KNOWLES MURAL (2014), http://services.santabarbaraca.gov/CAP/MG122700/AS122704/AS122734/AI126777/DO126778/2.PDF.

[106] *Joseph Knowles – Santa Barbara Artist and Teacher*, CARTAS, http://cartas.typepad.com/main/2009/07/joseph-knowles-santa-barbara-artist-and-teacher-.html (last visited Sept. 8, 2016).

[107] *See* SANTA BARBARA PUBLIC MARKET, http://sbpublicmarket.com (last visited Sept. 8, 2016).

during the redevelopment project. The Santa Barbara community effectively utilized its landmark ordinance to protect this local cultural heritage.

Utilizing local municipal landmark preservation ordinances to list public art is an effective way to protect art through an already established designation process.[108] Many ordinances extend beyond historical assets to protect cultural assets and allow works of art to be listed, even without the property owner's consent. Once listed, property owners cannot destroy or remove the protected art. Even legal scholars who support a property owner's right to destroy agree that "[w]here a structure . . . has been landmarked through the ordinary processes, destruction is plainly undesirable."[109] Indeed, the Supreme Court acknowledged in the seminal case *Penn Central Transportation Co. v. City of New York* that preservation of significant historical and cultural resources is a valid public purpose under the U.S. Constitution.[110] In 1967, over Penn Central's objections, the New York City Landmarks Preservation Commission designated Grand Central Terminal as a landmark under the City's landmark preservation ordinance.[111] A year later, Penn Central applied to the Landmarks Preservation Commission proposing to either destroy portions of Grand Central to build a fifty-three-story office building, or to build a fifty-five-story office building directly on top of Grand Central. The Commission denied Penn Central's application because it would have destroyed the landmark and ruined its façade.[112] Penn Central sued, claiming that the denial equated to a regulatory taking without compensation, and the case was ultimately appealed to the U.S. Supreme Court.[113] The Supreme Court found that New York City's Landmark Preservation ordinance, which required owners of designated landmarks to keep their buildings' exteriors "in

[108] This solution does have its limitations. For instance, in the 5 Pointz case, the community attempted to list 5 Pointz as a landmark with the New York City Landmarks Commission. The Commission denied the petition because 5 Pointz was less than thirty years old, which is a criteria for landmarks to be listed in New York City. Mallika Rao, *Artists Bid Sad Farewell to 5 Pointz, New York City's Graffiti Mecca*, HUFFINGTON POST (Nov. 21, 2013, 3:00 PM), http://www.huffingtonpost.com/2013/11/21/5-pointz_n_4316483.html.

[109] Strahilevitz, *supra* note 43, at 822.

[110] 438 U.S. 104, 136–39 (1978).

[111] *Id.* at 115.

[112] *Id.* at 116–17.

[113] *Id.* at 128–29.

good repair," was an "appropriate means" to effectuate a substantial public purpose—to preserve a significant historical and cultural heritage.[114]

In contrast to the direct judicial recourse available to individual artists under the Federal Visual Artists Rights Act ("VARA"), discussed in more detail below, local landmark ordinances offer indirect recourse to communities. The powers to enact or amend local landmark laws and designate works of public art as local landmarks lie with the local legislative body and its administrative agencies. However, communities wield influence through their elected representatives, and the actions of the local legislative body reflect the will of its constituency. The existence of a local landmark law and the designation of a given work of public art as a local landmark are, therefore, strong indicators that such a work of art has attained the requisite qualities, such as notoriety and/or popularity, to become an indestructible part of the community's heritage.

C. City of Los Angeles Municipal Mural Ordinance

In late 2013, the City of Los Angeles enacted a mural ordinance to allow for both the creation of new original art murals and the preservation of vintage original art murals on private property.[115] The ordinance allows original, nonadvertising art murals on private property to "encourag[e] artistic expression . . . foster[] a sense of pride . . . [and] preserv[e] existing murals that are a valued part of the history of the City of Los Angeles."[116] Once a mural is approved and listed on the registry, it must remain unaltered for two years. Even though this ordinance may not meet the goals set out in this Article, because, among other things, it requires a property owner's consent for murals to be listed, this ordinance nevertheless offers interesting mechanisms to identify and protect public art. First, it recognizes the benefits of public art to a community by assigning an ordinance dedicated to its preservation. Second, it expressly seeks neighborhood input on

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[114] *Id.* at 129.

[115] *See* L.A., CAL., MUN. CODE §§ 14.4.2, 14.4.3, 14.4.20 (2007) (as amended by L.A., Cal., Ordinance 182706 (Sept. 4, 2013)), http://clkrep.lacity.org/onlinedocs/2011/11-0923_ord_182706.pdf.

[116] L.A., Cal., Ordinance 182706 (Sept. 4, 2013), http://planning.lacity.org/Code_Studies/Misc/Adop_MuralOrd182706.pdf.

murals before they are listed. It requires an applicant for mural approval to send a notice to the appropriate neighborhood council forty-five days before the mural is registered.[117] These community meetings seek the public's input on the significance of a mural to the community, and have the added benefit of "creating an inclusive discussion about public art."[118]

D. California Art Preservation Act

A few states have enacted art preservation laws that attempt to give the public a voice in the preservation of public art. Unlike the preservation laws discussed above, these art preservation acts apply specifically to public art, and provide the public with an avenue to bring a legal claim to enjoin the destruction of significant public art.

In 1982, California enacted the California Art Preservation Act ("CAPA"). CAPA was the first of its kind in the U.S. to acknowledge "a public interest in preserving the integrity of cultural and artistic creations" independent of the interest of the artist.[119] Specifically, CAPA permits an arts organization "acting in the public interest" to seek an injunction preventing "a work of fine art" from "physical defacement, mutilation, alteration, or destruction."[120] The Act defines "fine art" as an "original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, and of substantial public interest."[121] It looks to opinions of "artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art" to determine whether a piece of art is of recognized quality and substantial public interest.[122] Under CAPA, when facing the destruction of its local cultural heritage, a community in California could enlist a nonprofit art organization to attempt to enjoin the destruction of public art by a property owner.

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[117] Eric Bjorgum, *Los Angeles Gets a New Mural Ordinance*, L.A. LAW. 36 (Jan. 2014).

[118] Deborah Vankin, *L.A.'s Mural Ordinance Is Beginning To Reveal Its Effects*, L.A. TIMES (Mar. 7, 2015), http://www.latimes.com/entertainment/arts/la-et-cm-los-angeles-mural-restore-20150401-story.html.

[119] CAL. CIV. CODE § 989(a) (West 1982).

[120] *Id*. § 989(c), (e)(1); CAL. CIV. CODE § 987(c)(1) (West 1979) (amended 1994).

[121] CIV. § 989(b)(1).

[122] *Id*. § 989(f).

For instance, in *Kammeyer v. Oneida Total Integrated Enterprises*,[123] community members and the Mural Conservancy of Los Angeles sued the U.S. Army Corps of Engineers to enjoin the destruction of the *Bicentennial Freedom Mural* on the Prado Dam in Corona, California.[124] The *Bicentennial Freedom Mural* was painted by high school students in 1976, and depicted an image of the Liberty Bell and the words "200 Years of Freedom, 1776–1976."[125] The plaintiffs raised a number of claims to support the preservation of the mural, including a claim under CAPA. In support of their claims, the plaintiffs produced thousands of signatures and comments from community members "attesting to the Mural's value to the community," affirming that "community members note[d] the sense of civic pride and patriotic appreciation the Mural engender[ed]."[126] The City of Corona, and the neighboring cities of Norco and Eastvale, also produced resolutions supporting the preservation of the 1976 mural.[127] The United States District Court for the Central District of California granted the injunction to preliminarily enjoin "any action that could alter, desecrate, destroy[,] or modify" the *Bicentennial Freedom Mural* on the basis that the injunction would serve the public interest.[128] The court concluded: "California law makes clear that there is 'a public interest in preserving the integrity of cultural and artistic creations.' Accordingly, the Court finds Plaintiffs have shown that an injunction would be in the public's interest."[129]

Massachusetts enacted a similar art preservation provision in its Massachusetts Art Preservation Act ("MAPA") directed at the preservation of public art, which provides the attorney

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[123] No. EDCV 15-869-JGB (KKx), 2015 WL 5031959 (C.D. Cal. Aug. 24, 2015).

[124] *Id.* at *1; *see also* Carolina A. Miranda, *Court Order Halts Destruction of Prado Dam Bicentennial Mural in Corona*, L.A. TIMES (June 10, 2015), http://www.latimes.com/entertainment/arts/miranda/la-et-cam-restraining-order-temporarily-halts-destruction-of-40-year-old-mural-on-prado-dam-20150609-column.html.

[125] Miranda, *supra* note 124.

[126] *Kammeyer*, 2015 WL 5031959, at *10; *see also* Miranda, *supra* note 124.

[127] *Kammeyer*, 2015 WL 5031959, at *10.

[128] *Id.*

[129] *Id.* (citation omitted). The court later dismissed the plaintiffs' claim under CAPA because California state law cannot apply to a federal agency's actions on federal land. The plaintiffs' other claims, including violations of VARA and the National Historic Preservation Act, remain. *See* Kammeyer v. U.S. Army Corps of Eng'rs, No. 5:15-CV-00869-JGB-KK (C.D. Cal. Oct. 9, 2015), ECF No. 59.

general with the ability to assert the rights of an artist if the artist is deceased.[130] MAPA is significantly narrower than CAPA. Specifically, to utilize MAPA, the artist must be deceased, the state attorney general must seek the injunction, and the work of fine art must be "in public view."[131] MAPA defines public view as "on the exterior of a public[ly] owned building, or in an interior area of a public building."[132] However, even though MAPA may prohibit the destruction of public art, it does not protect against "the conceptual destruction or decontextualization that may result from the removal of" public art from the site in which it was placed.[133]

V. PROPERTY LAW DOCTRINES

> Property rights serve human values. They are recognized to that end, and are limited by it.[134]

Legal claims under property law doctrines may also serve as useful tools for a community to prevent the destruction of public art. The doctrines of implied dedication, public prescriptive easement, and the public trust are regularly used by advocates to preserve natural resources, but have rarely been used to preserve cultural resources, and have never been used to preserve public art on private property. Nevertheless, such doctrines are appropriate for protecting the rights of a community in its public art. The Sections below describe these three property law doctrines, and explain the processes in which a community could bring claims under those doctrines.

A. Implied Public Dedication

The common law doctrine of public dedication is a well-established process intended to safeguard public interest in private property. Dedication involves a property owner's intent to offer property to the public, and an acceptance by the public of such property.[135] An owner may offer the property by expressly

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[130] MASS. GEN. LAWS ANN. Ch. 231, § 85S (West 1984) (Physical Alteration or Destruction of Fine Art). New Mexico has an act that reads almost exactly the same. N.M. STAT. ANN., § 13-4B-3 (West 1978).

[131] Ch. 231, § 85S.

[132] *Id.*

[133] Phillips v. Pembroke Real Estate, Inc., 819 N.E.2d 579, 580–81 (Mass. 2004).

[134] State v. Shack, 277 A.2d 369, 372 (N.J. 1971).

[135] Gion v. City of Santa Cruz, 465 P.2d 50, 55 (Cal. 1970) (per curiam).

inviting the public to use the property,[136] granting the property to a public entity,[137] or, in some instances, acquiescing to the public's use of the property.[138] The last option is known as "implied dedication" or "dedication by estoppel," and it occurs "when an owner by his conduct has led the public to believe he has dedicated land to public use and the public has relied on that belief to its detriment."[139] In that instance, the owner will be estopped from denying the dedication.[140] The doctrine of implied public dedication could provide a legal framework to assert a right to preserve public art that has been impliedly dedicated to the public.

Most public dedication case law involves roadways or parklands. Courts have, however, entertained claims asserting implied public dedication of communities' historical heritage. For instance, in *Sons of the Union Veterans of the Civil War, Department of Iowa v. Griswold American Legion Post 508*,[141] the Supreme Court of Iowa considered whether the Griswold American Legion Post 508 ("Post") had dedicated a three-inch, wrought iron Civil War cannon to the City of Griswold. The cannon was used in the Civil War and had been on public display in Griswold since 1911.[142] In 1998, the Post removed the cannon from the Griswold City Park, where it had been displayed, intending to sell the cannon to a private Pennsylvania collector.[143] The plaintiffs—consisting of a veterans group and a nonprofit corporation dedicated to protecting Civil War monuments—sued the Post to keep the cannon in the City of Griswold, arguing, among other things, that the Post had publicly dedicated the cannon to the community of Griswold.[144] The court was not convinced that the doctrine of dedication could apply to personal property like a cannon, because dedication is strictly the "setting aside of *land* for a public use."[145]

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[136] Breslin v. Gray, 193 S.W.2d 143, 145 (Ky. 1946).

[137] Vill. of Villa Park v. Wanderer's Rest Cemetery Co., 147 N.E. 104, 105 (Ill. 1925).

[138] *Gion*, 465 P.2d at 55.

[139] Kratina v. Bd. of Comm'rs, 548 P.2d 1232, 1237 (Kan. 1976).

[140] *Id.*

[141] 641 N.W.2d 729 (Iowa 2002).

[142] *Id.* at 732.

[143] *Id.*

[144] *Id.* at 733.

[145] *Id.* at 733–34.

Furthermore, the court surmised that even if dedication could apply to personal property, there was no intent by the Post to dedicate the Civil War cannon to the public, and there was no acceptance of the cannon by the public.[146]

Similarly, in *City of Chattanooga v. Louisville & Nashville Railroad Co.*,[147] the City of Chattanooga and certain citizens sued to keep the General, a Civil War steam locomotive, in Chattanooga. The General is a famous, historic Civil War train engine that dates back to 1855.[148] The General became famous in the infamous Great Locomotive Chase of 1862, where the General was captured by volunteers from the Union Army bound for Chattanooga and pursued by the Confederate Army by foot and train.[149] The Nashville, Chattanooga & St. Louis Railway, and subsequently The Louisville and Nashville Railroad, owned the General and put the General on public display in Chattanooga beginning in 1891.[150] The General became part of the identity of Chattanooga, so much so that the City adopted the likeness of the General on its official City seal.[151] In 1967, The Louisville and Nashville Railroad announced that it would deliver the General to Georgia for permanent placement and display in Kennesaw, Georgia.[152] The citizens of Chattanooga were up in arms about the potential of losing the General; they subsequently "captured" the General—by attaching it to a lawsuit—while it was in transit to Georgia, refusing to let it leave Chattanooga.[153] Specifically, in 1967, the City of Chattanooga and four citizens filed suit against The Louisville and Nashville Railroad to acquire possession of the General. In addition to claims of estoppel, prescriptive right, and implied contract, the plaintiffs argued that The Louisville and Nashville Railroad dedicated the General to Chattanooga's citizens in the nature of a charitable trust.[154] To establish a public dedication, the plaintiffs had to show a "reasonably certain expression of a

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[146] *Id.* at 735.

[147] 298 F. Supp. 1 (E.D. Tenn. 1969), *aff'd*, 427 F.2d 1154 (6th Cir. 1970).

[148] *Id.* at 2–3.

[149] Phil Leigh, *The Great Locomotive Chase*, N.Y. TIMES (Apr. 13, 2012), http://opinionator.blogs.nytimes.com/2012/04/13/the-great-locomotive-chase.

[150] *Chattanooga*, 298 F. Supp. at 7.

[151] *Id.*

[152] *Id.* at 8.

[153] *Id.* at 2.

[154] *Id.* at 3.

donative trust intent."[155] Similar to the *Griswold* case, the court in *Chattanooga* held that the plaintiffs failed to show an intent by The Louisville and Nashville Railroad to dedicate the General to the City of Chattanooga and its citizens.[156] The court found it persuasive that The Louisville and Nashville Railroad—rather than the City—exercised control over the General while it was displayed in Chattanooga and assumed financial and custodial responsibility for the maintenance and display of the General.[157] The court explained:

> Such forcing into the public domain of artistic, educational or historic items in the absence of a donative intent and merely because they are capable of being the object of a charitable trust might well have the opposite effect to that which it is the purpose of charitable trusts to encourage, that purpose being the social benefit that comes from the public display of such items.[158]

In coming to their decisions in *Griswold* and *Chattanooga*, the courts seemed persuaded by the public policy implications their decisions could create if the defendants were required to maintain permanent display of the historical relics. For instance, the court in *Chattanooga* noted:

> To hold that the prolonged display of a privately owned historic relic upon private property and at private expense . . . is sufficient . . . to create a charitable trust with respect to such relic could well have the effect of withdrawing from public display privately owned objects of great historic, artistic[,] or educational interest.[159]

However, private property owners are not obligated to display their art publicly in the first place. Indeed, the public display of art is often rewarding to property owners. Public art draws the public's attention and interest to the property, it serves as an identifier promoting a restaurant or commercial building, it is a display of wealth and power by the property

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[155] *Id.* at 11.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.* These arguments are similar to Justice Rehnquist's dissent in *Penn Central Transportation Co. v. City of New York*, where he lamented that Penn Central was prevented from developing its property because it did "*too good* a job . . . in designing and building" Grand Central Terminal. 438 U.S. 104, 146 (1978) (Rehnquist, J., dissenting).

owner, and it allows the property owner to position his ideas, ideals, and artistic sentiments in the public sphere. Once public art becomes famous, commercial property owners can also benefit economically from the fame and notoriety of the public art, especially where the public art has become a landmark. Furthermore, some may argue that this voluntary act of displaying art may have made the community worse off than if these property owners had never displayed the public art. As Joseph Sax explained in regard to significant works of art, "[i]t is insufficient to say that the work would not have existed without their patronage. For they have diverted the time and effort of an artist from other work he might have done, and that—in other hands—might have been better protected . . . ."[160] Similarly, by publicly displaying art and allowing the art to become a landmark of the community, the property owner may have usurped another piece of art that could have shaped into a community's landmark and might have been better protected.

The two cases explored above illustrate how a legal framework could exist under the common law doctrine of public dedication to allow a community to prevent the destruction of public art that has been expressly or impliedly dedicated to the public. For instance, where the public art is real property, such as a mural on a wall affixed to a building, and where there is an expressed or implied intent by the owner to dedicate the public art to the community, a community could prevent destruction by claiming that the owner had publicly dedicated the art to the community. An example would be the case of 5 Pointz discussed in Part I. The community could have raised a colorable argument under the public dedication doctrine that, because Wolkoff opened up his property to the public to use as a canvas, Wolkoff impliedly dedicated his property to the public; by creating art on the walls of the warehouse, maintaining its upkeep, and "us[ing] the land as they would have used public land,"[161] the public accepted Wolkoff's dedication. Because Wolkoff, by his conduct, led the public to believe that he had dedicated his property to public use, and the public relied on that belief to its detriment—by creating masterpieces on its walls—Wolkoff could be estopped from denying the dedication and

[160] SAX, PLAYING DARTS, *supra* note 41, at 58.
[161] Gion v. City of Santa Cruz, 465 P.2d 50, 56 (Cal. 1970) (per curiam).

destroying the art. Furthermore, even though public dedication has never been applied to works of art or personal property, "American courts and legislatures are not constrained to obey historically based distinctions between real and personal property when such distinctions are not useful or relevant," and "[t]he extension of public dedication doctrine to certain important works of art would continue trends in both public dedication and real property law."[162] A community should explore the viability of a common law public dedication claim if it is faced with the potential destruction of its heritage.[163]

B. Public Prescriptive Easement

Under the right circumstances, communities could argue that they have established a public easement by prescription to a piece of public art. A public prescriptive easement is an easement that arises when the general public uses private property for a specific purpose without the property owner's permission for a statutory period of time.[164] Under the classic elements to establish a prescriptive easement, the public's use must be open and notorious, adverse and without permission, and continuous and uninterrupted.[165]

In *Board of Managers of Soho International Arts Condominium v. City of New York*, an artist argued that he had established an easement by prescription to a wall on a condominium building.[166] *Soho International Arts Condominium* involved artwork affixed to the side of a condominium's wall from 1973 to 2002. *The Wall*, also known as *The Gateway to Soho*, was erected on the side of 599 Broadway by New York artist Forrest "Frosty" Myers in 1973. The work appeared on a prominent corner of Broadway and Houston Street, and consisted of a painted electric blue wall and forty-two green aluminum bars

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[162] Note, *Protecting the Public Interest in Art*, 91 YALE L.J. 121, 130–31 (1981).

[163] But see Wilkes's concern in *supra* note 56, at 197–98. Specifically, because public dedication requires "that objects be completely removed from the private realm before embodying any public interest," this could contradict the concept that certain cultural heritage is "imbued with an 'inherently public' quality such that public obligations attach even when these objects are in the possession of a private entity." *Id.*

[164] *See, e.g.*, City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 76 (Fla. 1974); Villa Nova Resort, Inc. v. State, 711 S.W.2d 120, 127 (Tex. App. 1986).

[165] *Daytona Beach*, 294 So. 2d at 76.

[166] No. 01 Civ.1226 DAB, 2003 WL 21403333 (S.D.N.Y. June 17, 2003).

bolted to steel braces.[167] Between 1981 and 2002, the building's owners attempted to permanently remove *The Wall*, alleging that physical damage to *The Wall* was causing leaks within the condominium building.[168] The building's owners also acknowledged that *The Wall* prevented them from posting advertising or billboards on the side of their building, which could generate approximately $600,000 per year in advertising revenue.[169] Advocates for preserving *The Wall* maintained that this was "another example of greed and commercialism chasing art out of Soho."[170]

In 2001, the condo board filed a declaratory action in the United States District Court for the Southern District of New York against Myers seeking a declaration that he had no rights to *The Wall*.[171] Myers counterclaimed, alleging, among other things, that he had established an easement by prescription to the northern wall of 599 Broadway because he had periodically maintained the artwork since 1987.[172] Specifically, Myers claimed that he had "an easement by prescription over, and the right to continued possession and use of, the north wall of the [Building] for the continued display of [*The Wall*] at 599 Broadway."[173] After analyzing elements necessary to establish easement by prescription, the court found that Myers could not establish a prescriptive easement because his use of the wall at 599 Broadway began as permissive.[174] In other words, Myers had permission to access the wall to erect and maintain his artwork. When a property owner gives permission to a user of his property, such use only becomes adverse when permission is withdrawn, or when the user "*expressly* communicates to the owner a claim of right that is adverse to the owner's interest."[175] For Myers, the use did not become adverse until the owners

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[167] Chris Bragg, *High, Bright, 'The Wall' Will Return to Soho Wall*, THE VILLAGER, Vol. 76, No. 47 (Apr. 18, 2007), http://thevillager.com/villager_207/highbrightthewall.html.

[168] *Soho Int'l Arts Condo.*, 2003 WL 21403333, at *4.

[169] Bragg, *supra* note 167.

[170] Ronda Kaysen, *Effort To Save Soho Public Artwork Hits a Wall in Court*, THE VILLAGER, Vol. 74, No. 54 (May 18, 2005), http://thevillager.com/villager_107/efforttosavepublic.html.

[171] *Soho Int'l Arts Condo.*, 2003 WL 21403333, at *1.

[172] *Id.*

[173] *Id.* at *22 (internal quotation mark omitted).

[174] *Id.* at *23.

[175] *Id.*

withdrew their permission for the art's installation on their building in 1997, which did not meet New York's twenty-year statutory period to establish an easement by prescription.[176]

Even though Myers's claim ultimately failed, *Soho International Arts Condominium* illustrates how a community could assert a public easement by prescription to the continued possession and use of the public art or the property upon which it stands. The community would first need to establish the elements of prescriptive easement: that its use of the property was open and notorious, adverse and hostile, and continuous for the statutory period. Furthermore, as a preliminary matter, the public art must be real property or affixed to real property;[177] 5 Pointz is a likely example where art was painted on building improvements comprising real property. However, even though 5 Pointz meets the criterion of real property, a court would not likely find that the public met the element of adversity necessary to establish an easement by prescription because the property owner gave permission for the graffiti artists and the public to tag his warehouse walls. In addition to meeting the element of adversity, the public would also need to show adverse use of the property in order to establish an easement by prescription. In other words, some type of physical trespass onto private property is required. This requirement would essentially preclude the

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[176] *Id.* at *26. While this case was pending, the condo board removed *The Wall* in 2002. But *The Wall*'s saga did not end in 2002. In 2004, the City of New York sued the condo owners at 599 Broadway to replace *The Wall*. In their defense, the condo owners claimed that the City was violating the owners' First Amendment rights, and the City would owe the owners fair compensation for *The Wall* construction if it forced the condo owners to replace *The Wall*. In two separate opinions, the district court dismissed the owners' First Amendment arguments, but found that any reinstallation of the work on the building's wall would be a "taking" requiring just compensation. *See* Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, No. 01 Civ. 1226(DAB), 2005 WL 1153752 (S.D.N.Y. May 13, 2005); Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, No. 01 Civ. 1226(DAB), 2004 WL 1982520 (S.D.N.Y. Sept. 8, 2004). Finally, in 2007, the condo owners of 599 Broadway, the artist Myers, and the City struck a deal to restore *The Wall*. *The Wall* was resurrected again on the prominent corner of Broadway and Houston Street. *See* Bragg, *supra* note 167.

[177] In *City of Chattanooga v. Louisville & Nashville Railroad Co.*, the court dismissed the plaintiffs' prescriptive claim by asserting that there can be no prescriptive rights in personal property, only real property. Specifically, the court stated that "the word 'prescription' refers to the acquisition of an easement or other incorporeal hereditament in real property and is not a term accurately used with reference to interest in personal property." 298 F. Supp. 1, 9 (E.D. Tenn. 1969).

public from claiming a public prescriptive easement over public art that it merely views or visually appreciates, such as the *Potter's House Mural* in Washington, D.C. mentioned in Part I.

Possible candidates for public prescriptive easement claims are public works of art created by the public on private property without the property owner's permission. An example is the recently cleared *Gum Wall* in Seattle, Washington. The *Gum Wall*, an interactive piece of public art, was created over the past twenty-plus years by the public sticking individual pieces of chewed gum on a wall in Pike Place Market.[178] The *Gum Wall* was located on the exterior of the Market Theater in Post Alley under Pike Place Market. Beginning in the 1990s, ticketholders lining up outside the Market Theater started pushing pennies into wads of chewed gum on the theater's brick exterior wall.[179] Sticking gum to the building's exterior soon became a tradition observed by both locals and tourists.[180] Eventually, the gum-covered surface expanded to cover an 8' x 54' area.[181] People used the *Gum Wall* as a space to create artwork, write words, stick posters and business cards, or just contribute to the general mass of gum.[182] In addition to adding their own gum or memorabilia, people also celebrated their visit with pictures and used the *Gum Wall* as a backdrop for wedding photographs.[183] Assuming the wall was privately owned and members of the public did not have permission to stick their gum on the wall, the public could likely have established an easement by prescription to the *Gum Wall*. The public's use of the wall was open and notorious, as the public always left evidence of the use in the form of chewed gum. The use was adverse, and continuous and uninterrupted, as the public continued to stick gum onto the *Gum Wall* for over twenty years, exceeding Washington's statutory period.

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[178] Stuart Eskenazi, *Market Lost & Found*, SEATTLE TIMES (Aug. 6, 2007, 12:00 AM), http://www.seattletimes.com/seattle-news/market-lost-found.

[179] *Id.*

[180] *Id.*

[181] Ellen Brait, *Seattle Gum Wall: Steam-Cleaners at Work To Clear 'Germiest Place on Earth*,' THE GUARDIAN (Nov. 11, 2015), http://www.theguardian.com/us-news/2015/nov/11/seattle-gum-wall-steam-cleaners-pike-place-market.

[182] Stephanie Chen, *Kissing, Chewing – the 'Germiest' Tourist Attractions*, CNN (July 20, 2009), http://edition.cnn.com/2009/TRAVEL/07/20/germy.tourist.spots.

[183] Eskenazi, *supra* note 178.

The public could therefore have claimed that it had an easement by prescription to the use of the *Gum Wall* to create art with gum, and to prevent destruction of the wall itself. However, whether the public could have claimed an easement by prescription to prevent the owner from removing the actual gum and other art placed on the wall is arguable. It is commonly understood that a negative easement cannot be established by prescription. Negative easements are easements that prevent a property owner from taking certain action on his property, such as blocking another property's view. Under a public prescriptive easement claim, the actual wall hosting the *Gum Wall* could be forever preserved as a living piece of heritage, permanently dedicated to the public to use for a place for its gum art, even if the owner is permitted to periodically clean it off. Similar arguments could potentially be made for public art "shoe trees," where hundreds of pairs of old footwear are strung up in trees,[184] or "sticker art," where contributors paste layers of stickers on walls, doors, or other objects.[185]

C. The Public Trust Doctrine

The public trust doctrine provides that certain property is held in trust for the benefit of the public and that the public has the right to access and use the property for certain public purposes. The doctrine was first introduced in the United States in *Illinois Central Railroad Co. v. Illinois*,[186] where the Supreme Court declared the State of Illinois to act as trustee of navigable waters within its borders and to protect the public's right to use such waters.[187] So far, the public trust doctrine has primarily applied to real property owned, or once owned, by public entities. However, both litigants and scholars have proposed applying the public trust doctrine to preserve cultural heritage, including heritage owned by private individuals.[188]

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[184] Ashley Powers, *End of the Road for the Shoe Tree*, L.A. TIMES (Feb. 16, 2011), http://articles.latimes.com/2011/feb/16/nation/la-na-shoe-tree-20110217.

[185] Allen, *supra* note 11.

[186] 146 U.S. 387 (1892).

[187] *See generally id.*

[188] *See* Response of the Detroit Institute of Arts to Objections to the City's Amended Plan of Confirmation, *In re* City of Detroit (Bankr. E.D. Mich. May 27, 2014) (No. 13-53846); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 647 (1995); Wilkes, *supra* note 56, at 196 ("The public trust doctrine has never been extended to

For instance, Patty Gerstenblith identified the public trust doctrine as "the most appropriate legal doctrine for explaining the public interest and for protecting the rights of a cultural group in its cultural property."[189] She argued that the doctrine could, among other things, provide the rationale for the government's regulation of the protection of cultural heritage.[190] A recently litigated example involved the Detroit Institute of Arts when it invoked the public trust doctrine to protect the public's interest in its art collection. During its recent bankruptcy proceeding, the City of Detroit's financial creditors sought to force the City to sell some or all of the art collection curated in the Detroit Institute of Arts, a world-class art institute that is "a source of civic pride" and is "a center of arts and culture in Michigan."[191] In its response to the financial creditors' proposal, the Detroit Institute of Arts argued that the public trust doctrine protected the museum's art collection from sale.[192] While acknowledging that Michigan courts had not addressed whether the public trust doctrine applied to cultural heritage such as works of art, the Detroit Institute of Arts urged the court to consider expanding the scope of the public trust doctrine to encompass public resources such as art.[193] "The City retains legal title to the Museum Art Collection, but consistent with the public-trust doctrine, the Museum Art Collection is subject 'to the paramount right of the public to enjoy the benefit of the trust.' "[194] The bankruptcy court found convincing the evidence that the Detroit Institute of Arts offered in support of its position that the City of Detroit held the art in trust for the people of the city and state; it ultimately denied the financial creditors' request without deciding the issue.[195]

protect the public interest in works of art, but [the removal of a Picasso from the San Francisco Museum of Modern Art] seems to highlight the necessity for more extensive regulation to safeguard public expectations in objects that have become part of a local cultural heritage."); Sax, *Stonehenge*, *supra* note 52, at 1558.

189 *Supra* note 188, at 647.

190 *Id.*

191 Response of the Detroit Institute of Arts, *supra* note 188, at 10.

192 *Id.* at 19.

193 *Id.*

194 *Id.*

195 *In re* City of Detroit, 524 B.R. 147, 178–79 (Bankr. E.D. Mich. 2014).

Courts have not yet considered whether the public trust doctrine could apply to cultural heritage or significant works of art. Even though the public trust doctrine originally only applied to navigable waterways, the doctrine is a living doctrine and is "not . . . 'fixed or static,' but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit.' "[196] For instance, from its origins in the Supreme Court's 1892 decision in *Illinois Central* where it applied to public interest in navigable waterways, the public trust doctrine has expanded over time to encompass wildlife and marine life, public and rural parklands, and archaeological resources.[197] One of the natural expansions of the public trust doctrine should be to cover significant works of art.

Additionally, whether the public trust doctrine could prevent the destruction of purely private property is a debated issue. The public trust doctrine was originally imposed as a restraint on the state's ability to dispose of certain publicly owned resources. In recent years, however, some courts have applied the public trust doctrine to govern privately held property.[198] For instance, in *Matthews v. Bay Head Improvement Ass'n*,[199] the New Jersey Supreme Court held that "the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary" to safeguard the public's right to access property held in the public trust.[200] Whether a court would find the public trust doctrine to apply to public art, especially public art that is

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[196] Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) (quoting Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 55 (N.J. 1972)).

[197] Gerstenblith, *supra* note 188, at 649.

[198] *See, e.g.*, *Matthews*, 471 A.2d at 365; *see also* City of Los Angeles v. Venice Peninsula Properties, 644 P.2d 792, 794, 801 (Cal. 1982) (finding that the public trust doctrine could apply to property where "the state and federal government never had fee title"), *rev'd sub nom.* Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198 (1984) (reversing the California Supreme Court's decision because California failed to assert its public trust interest over the property during the federal patent confirmation proceedings pursuant to the Act of March 3, 1851); Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 121 (N.J. 2005) (finding private beach club was required to make its upland sands available to the public under the public trust doctrine).

[199] 471 A.2d 355 (N.J. 1984).

[200] *Id.* at 365.

privately owned, but of great public interest, is uncertain. Nevertheless, the doctrine would be an appropriate legal avenue for protecting the rights of a community in its local heritage.[201]

VI. FEDERAL VISUAL ARTISTS RIGHTS ACT

Looking to the Federal Visual Artists Rights Act ("VARA") to create a framework for a community to protect public art is, at first, tempting. After all, VARA is an often-cited exception to a property owner's right to destroy. Specifically, VARA grants an author of a visual artwork of recognized stature the right to prevent its destruction.[202] VARA also has a set of established guidelines to determine when a piece of public art is of "recognized stature."[203] VARA was the U.S.'s way of granting moral rights to authors of visual arts under the premise that an author injects her spirit into art she creates and, therefore, her personality, integrity, and reputation in the art should be protected.[204] For instance, in *Martin v. City of Indianapolis*,[205] the artist Jan Martin sued the City of Indianapolis under VARA for demolishing his "large outdoor stainless steel sculpture" as part of the City's urban renewal project.[206] Even though the sculpture was, at the time, located on City of Indianapolis property, the court awarded Martin $20,000 for the destruction of his art under VARA.[207]

Some might argue that VARA sufficiently protects communities' interests in public art, because artists themselves are the strongest advocates for their works. "Great architects have strong economic and artistic motivations for seeing that their better works are preserved for future generations. Architects are thus good agents for the public."[208] In other words, because artists look out for their own works, the logical presumption is that they would raise VARA as a claim to prevent the destruction of their public art, which will benefit the public. Unfortunately, this is not always the case, as oftentimes an artist may be deceased, unknown, or unwilling to bring a claim. For

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[201] *See* Gerstenblith, *supra* note 188, at 647.
[202] *See, e.g.*, Martin v. City of Indianapolis, 192 F.3d 608 (7th Cir. 1999).
[203] *See, e.g.*, Pollara v. Seymour, 150 F. Supp. 2d 393, 397 (N.D.N.Y. 2001).
[204] RALPH E. LERNER & JUDITH BRESLER, ART LAW 1070–71 (4th ed. 2012).
[205] 192 F.3d 608 (7th Cir. 1999).
[206] *Id.* at 610.
[207] *Id.* at 614.
[208] Strahilevitz, *supra* note 43, at 820.

instance, in the case of *The Spindle* mentioned in Part I, *The Spindle*—a sculpture consisting of eight cars skewered on a pointy spike—was erected in the parking lot of the Cermak Road Shopping Center in Berwyn, Illinois in 1989.[209] From 1989 to 2008, *The Spindle* stood in Berwyn, was featured on tourism billboards for Berwyn, and made cameo appearances in the movie *Wayne's World* and in Queen's *Bohemian Rhapsody* music video.[210] In 2008, despite protests and fundraising efforts to "Save *The Spindle*," and strong support for its preservation from the Berwyn Arts Council, the new owner of the shopping center dismantled *The Spindle* to make way for a drive-thru Walgreens.[211] Dustin Shuler, *The Spindle*'s artist, was unwilling to bring a claim under VARA to stop the dismantling of his art, explaining: "I kind of think it would be better not to have it in the shopping center because they're all business interests now . . . . I'm not a commercial artist. I'm a fine artist, and this is a piece of fine art."[212] Artists are not always looking out for the public's or the community's interests, and merely relying on an artist to raise a claim under VARA is not sufficient to protect a community's interest in public art.

It has also been suggested that a mere tweak to VARA—providing a community with standing to bring suit—would accomplish the goal of allowing a community to prevent property owners from destroying public art of recognized stature.[213] Because VARA has an established means of recognizing artworks of recognized stature, it would be easy to add community members as having a stake in VARA claims. However, this solution only allows the community to prevent the destruction of art; it does not provide the community a mechanism to prevent

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[209] *Dustin Shuler Dies at 61; L.A. Artist Skewered Cars into Pop Art*, L.A. TIMES (May 13, 2010), http://articles.latimes.com/2010/may/13/local/la-me-dustin-shuler-20100512.

[210] *Id.*

[211] *Spike the Spindle? Way!*, CHI. TRIB. (July 26, 2007), http://articles.chicagotribune.com/2007-07-26/news/0707250705_1_spindle-hurl-cermak-plaza.

[212] Josh Noel, *Fans Mobilize To Save Berwyn's Car Kebab*, CHI. TRIB. (Aug. 13, 2007), http://articles.chicagotribune.com/2007-08-13/news/0708120269_1_spindle-parking-lot-cermak-plaza.

[213] *See* Christian Ehret, Note, *Mural Rights: Establishing Standing for Communities Under American Moral Rights Laws*, 10 U. PITT. J. TECH. L. & POL'Y 1, 3 (2010); Danwill Schwender, *Promotion of the Arts: An Argument for Limited Copyright Protection of Illegal Graffiti*, 55 J. COPYRIGHT SOC'Y U.S.A. 257, 280 (2008); Wilkes, *supra* note 56, at 205–06.

displacement of the art. Specifically, recent case law suggests that courts are unwilling to apply VARA to prevent the removal of site-specific public art. In *Phillips v. Pembroke Real Estate, Inc.*,[214] the artist David Phillips sued Pembroke Real Estate to prevent the latter from removing his artwork, which consisted of separate pieces of sculpture and stonework.[215] In his lawsuit, Phillips claimed that any change in location of his works would "impermissibly alter them," and that his separate sculptures "are meaningful only if they remain in . . . the location for which they were created."[216] While not disagreeing that Phillips's artwork was site specific, the United States Court of Appeals for the First Circuit ruled that VARA does not protect site-specific art.[217] The displacement of public art—even if the art is not destroyed—deprives the community of the art, and no longer benefits the community for which it was originally created. Even if a community could prevent public art's destruction, allowing its owner to displace the public art to a place that is no longer accessible to the community could prove to be almost as harmful to the community as the artwork's destruction.

Finally, suggesting a revision to VARA to include community standing distorts the purpose of VARA to grant moral rights to artists. Moral rights—or droit moral—protect an artist's personality, integrity, and reputation in her art.[218] Moral rights are rights that belong to the artist, so they do not protect the public's interest in the art.[219] They act more as an antidefamation law to help to protect the artist's reputation.[220] "One of the primary misconceptions regarding the French

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[214] 459 F.3d 128 (1st Cir. 2006).

[215] *Id.* at 129.

[216] *Id.* at 135.

[217] *Id.* at 143. *But see* Susanna Frederick Fischer, *Who's the Vandal? The Recent Controversy over the Destruction of 5Pointz and How Much Protection Does Moral Rights Law Give to Authorized Aerosol Art?*, 14 J. MARSHALL REV. INTELL. PROP. L. 326, 343–45 (2015) ("VARA plainly does not entirely exempt site-specific art incorporated in buildings . . . from all moral rights protection, because its Building Exception expressly applies to such art.").

[218] LERNER & BRESLER, *supra* note 204, at 1071–74.

[219] SAX, PLAYING DARTS, *supra* note 41, at 22.

[220] *Id.*

concept of droit moral is the assumption that it seeks to protect the public interest by preserving artworks for posterity."[221] It does not.[222]

VII. QUESTIONING PRESERVATION

> Immutability is valued by society. There is a desire for a steadfast art that expresses permanence through its own perpetualness. Simultaneously, society has a conflicting predilection for an art that is contemporary and timely, that responds to and reflects its temporal and circumstantial context. And then there is a self-contradicting longing that this fresh spontaneity be protected, made invulnerable to time, in order to assume its place as historical artifact and as concrete evidence of a period's passions and priorities.[223]

As a property owner should not have the absolute right to destroy a community's heritage, so should a community not have the absolute right to permanently preserve all public art without regard to whether it constitutes a part of the community's cultural heritage worthy of protection. Indeed, there are inherent problems with forcing a property owner to become permanent curator of art, as well as conflicts with artificially preserving art that was never meant to be permanent or that no longer reflects the demographics of its neighborhood.

For instance, this Article argues that a community's right to public art could trump a property owner's right to destroy, but what constitutes a "community"? For the purpose of this Article, community is defined as "the people with common interests living in a particular area."[224] However, the word community often elicits different meanings across different disciplines. Some definitions utilize a place-based notion of community, defining it as "[a] particular area or place considered together with its inhabitants."[225] Other definitions utilize a people-based notion of

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[221] FRANKLIN FELDMAN ET AL., ART LAW: RIGHTS AND LIABILITIES OF CREATORS AND COLLECTORS 533 (1986 & Supp. 1988).

[222] SAX, PLAYING DARTS, *supra* note 41, at 22.

[223] Patricia C. Phillips, *Temporality and Public Art*, *in* CRITICAL ISSUES IN PUBLIC ART: CONTENT, CONTEXT, AND CONTROVERSY 295, 295 (Harriet F. Senie & Sally Webster eds., 1992).

[224] *See supra* note 10.

[225] *Community*, OXFORDDICTIONARIES.COM, http://www.oxforddictionaries.com/us/definition/american_english/community (U.S. English Dictionary) (last visited Sept. 8, 2016).

community, defining community as "[a] feeling of fellowship with others, as a result of sharing common attitudes, interests, and goals."[226] In the case of the local landmark designation avenue outlined in Section IV.B. above, the designation of public art as a landmark takes place through a democratic process, which typically defines the community that may participate in the process. However, defining community may be a challenge in other contexts, especially where the community may be divided on whether a piece of public art is community cultural heritage worthy of preservation.

Second, should a property owner be required to maintain artwork that is contrary to his morals or beliefs? In the controversial case of Diego Rivera's *Man at the Crossroads*, Rivera's mural, which was commissioned by the Rockefeller family for Rockefeller Center in New York City, included communist political messages and a portrait of Lenin.[227] Disagreeing with Rivera's message, the Rockefeller family had the mural chiseled off the wall.[228] Similarly, the *Potter's House Mural* in Washington, D.C. consisted of a lit candle illuminating rainbow colored lights painted with the words "The Light of the World."[229] The mural had been on the front of The Potter's House in Adams Morgan for four years as The Potter's House operated as a progressive bookstore, coffee shop, and nondenominational spiritual space. A new tenant moved into The Potter's House building and converted it into a coffee house and social justice projects space. The new tenant claimed that the candle-themed mural was too religious and destroyed the mural in spite of community support for its preservation.[230] Even though both cases of destruction described above garnered significant criticism from the community, should property owners be forced

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[226] *Id.*

[227] Allison Keyes, *Destroyed by Rockefellers, Mural Trespassed on Political Vision*, NPR (Mar. 9, 2014, 9:00 AM), http://www.npr.org/2014/03/09/287745199/destroyed-by-rockefellers-mural-trespassed-on-political-vision.

[228] *Id.*

[229] Lauren Landau, *The Potter's House Mural in Adams Morgan May Not Be Around Much Longer*, WAMU 88.5 (Aug. 4, 2014), http://wamu.org/news/14/08/04/adams_morgan_mural_may_not_last_much_longer.

[230] *Id.*

to permanently curate public art contrary to their morals and beliefs merely because the community supports its preservation?[231]

An important aspect of public art is its site-specific nature, in other words, its deliberate incorporation of the location of the art as an integral element of the art.[232] Because artists create public art to display at a specific location, many art scholars believe that most public art would lose its meaning if it were removed from its originally intended site.[233] This is true for satirical works such as Banksy's *Balloon Girl*, which was originally created on Israel's West Bank barrier and featured the silhouette of a girl holding eight balloons and flying over the wall.[234] If it is removed from its location and placed in a sanitized gallery or museum, its meaning, political statement, satire, and, arguably, its artistic value, would be lost. This concept also applies to many contemporary public artworks, where the piece itself may seem esoteric and meaningless, but when placed in a particular location, its meaning is drawn from its environment. "Much of modern sculpture does not exist separate from its context, but rather integrates its context with the work to form, ideally, a seamless whole."[235] For instance, when Richard Serra's unpopular *Tilted Arc* was removed from the Federal Plaza in New York City, he claimed that "[t]o remove *Tilted Arc* . . . would be to destroy it."[236] However, should a property owner be forced

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[231] Some have attempted to address this question under a First Amendment analysis. *See* Barbara Hoffman, *Law for Art's Sake in the Public Realm*, 16 COLUM.-VLA J.L. & ARTS 39, 43 (1991); Richard A. Posner, *Art for Law's Sake*, 58 AM. SCHOLAR 513, 520 (1989).

[232] Fischer, *supra* note 217, at 342.

[233] *See* Francesca Garson, Note, *Before That Artist Came Along, It Was Just a Bridge: The Visual Artists Rights Act and the Removal of Site-Specific Artwork*, 11 CORNELL J.L. & PUB. POL'Y 203, 239 (2001) ("It is clear that the community of respected American artists and art authorities regard the crafted work and the site of site-specific artworks as an indivisible whole. The artists who create these works explain that the meaning and purpose behind the art lie squarely within its physical location.").

[234] *Balloon Debate*, from *Banksy at the West Bank Barrier*, THE GUARDIAN, http://www.theguardian.com/arts/pictures/0,,1543331,00.html (last visited Sept. 8, 2016).

[235] Phillips v. Pembroke Real Estate, Inc., 288 F. Supp. 2d 89, 95 (D. Mass. 2003) (discussing expert testimony by Ricardo Barreto, Executive Director of the Urban Arts Institute of the Massachusetts College of Art).

[236] *Richard Serra: The Case of Tilted Arc*, THE COLL. OF FINE ARTS AT THE UNIV. OF ARIZ., http://cfa.arizona.edu/are476/files/tilted_arc.htm (last visited Sept. 8,

to maintain public art on her property, to walk by it every day, even though she may no longer appreciate the art? There should be a middle ground between allowing an owner to destroy public art and forcing an owner to permanently keep public art on her property. The California Art Preservation Act, described above in Section IV.D., permits a nonprofit organization acting in the public's interest to remove public art from the property owner's property if that art would otherwise be destroyed.[237] This solution, even though it may be considered second best because it removes public art from its original site, could be a winning solution for the community and the property owner where the public art is removable. It would allow the community to preserve its cultural heritage—in a different location within the community—and allow the property owner to rid herself of the undesired public art.

Additionally, in this age of urban renewal, redevelopment, and rapid gentrification, a natural phenomenon is the shift in racial and demographic makeups of neighborhoods. Redevelopment results in the destruction of public art, but for public art that is not destroyed, its original meaning often becomes lost in the new demographic of the neighborhood. For instance, should the 1968 Summer Olympics "power salute" mural in West Oakland, California,[238] which once represented the struggles and triumphs of the community, be left to embellish the side of a brand new Starbucks or Apple store in a gentrified, predominately white middle-class neighborhood? Once public art no longer reflects the community surrounding it, does its artificial preservation conflict with the purpose of public art? What happens "when an art work's passing audience refuses to constitute itself as a public around it"?[239]

2016); *see also* Serra v. U.S. Gen. Servs. Admin., 667 F. Supp. 1042, 1054 (S.D.N.Y. 1987).

[237] CAL. CIV. CODE § 989(e)(1) (West 1982).

[238] *It Only Takes a Pair of Gloves Mural*, OAKLAND WIKI, https://localwiki.org/oakland/It_Only_Takes_a_Pair_of_Gloves_Mural (last visited Sept. 8, 2016). The Oakland mural of the 1968 Olympics "power salute," also known as *It Only Takes a Pair of Gloves*, commemorated the Olympic gold and bronze medalists at the 1968 Summer Olympics who each gave Black Power salutes on the podium. The mural was bulldozed on January 29, 2015.

[239] *See generally* Hoffman, *supra* note 231.

Furthermore, some scholars believe that there is a "clear connection between property destruction and creation."[240] "Urban real estate is a scarce commodity, and the city that places too many of its structures off limits to modern architects risks economic and aesthetic stagnation."[241] In other words, by destroying public art, the property owner is in fact spurring creativity.[242] As Picasso purportedly said, "[e]very act of creation is first an act of destruction."[243] For instance, "[t]he constant destruction . . . of street art forces street artists to come up with new ideas, a new creative or innovative message about current events to express through their artwork. This allows street art to always stay fresh, new, and interesting."[244] Should relics of the past that represent a bygone era not be destroyed or removed to make way for new ideas and creations?

Finally, according to many street artists, public art is transient, so it is not meant to be permanent. By creating art outside, subject to the natural elements of sun, rain, and snow, and the human elements of graffiti and pollution, many artists expect for their work to be temporary and ultimately destroyed.[245] To many, public art's attractiveness is that it is always new, fresh, and constantly changing. A wall could display a Warhol-like painting of President Obama one day, but be tagged with a satirical message to OBEY the next day. Should a community have the right to artificially preserve public art against not only a property owner's right, but also against the artist's intent when she created the work?

Communities will need to grapple with these questions and others on a case-by-case basis as they weigh whether and how to protect works of public art as cultural heritage.

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[240] Strahilevitz, *supra* note 43, at 820.

[241] *Id.* at 821.

[242] *See id.*; *see also* Cathay Y. N. Smith, *Street Art: An Analysis Under U.S. Intellectual Property Law and Intellectual Property's "Negative Space" Theory*, 24 DEPAUL J. ART, TECH. & INTELL. PROP. L. 259, 287–89 (2014).

[243] *Famous Pablo Picasso Quotes*, PABLOPICASSO.ORG, http://www.pablopicasso.org/quotes.jsp (last visited Sept. 8, 2016).

[244] Smith, *supra* note 242, at 287.

[245] *Id.* at 287–89.

CONCLUSION

Property owners generally have the right to destroy their property. Nevertheless, for public art that has become intimately connected with the culture of a neighborhood and is a landmark and identifying feature of a community, the community's right to preserve its heritage should trump a property owner's right to destroy it. Communities faced with the threatened destruction of their cultural heritage could attempt to bring claims under property law doctrines or state art preservation acts to enjoin the destruction of their heritage. Communities could also attempt to utilize established processes under landmark preservation laws to designate public art as protected sites or features to prevent their destruction. However, preservation has its limits. Without destruction, there will be no space for creation. Landmarks that no longer reflect a community or that are no longer celebrated by the community perhaps should be allowed to expire, especially where their preservation no longer nourishes a sense of community, fosters community coherence, or enhances community identity.