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## A Textualist Interpretation of the Visual Artists Rights Act of 1990

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## A Textualist Interpretation of the Visual Artists Rights Act of 1990

### Notes/Citation Information

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# A TEXTUALIST INTERPRETATION OF THE VISUAL ARTISTS RIGHTS ACT OF 1990

BRIAN L. FRYE\*

Philosophy may not interfere with the actual use of language,  
it can only describe it.

—Ludwig Wittgenstein<sup>1</sup>

*For numberless generations, jurists waged total war in the conflict among textualism, intentionalism, and purposivism.<sup>2</sup> Textualists insisted that courts must interpret statutes based on the meaning of their text, intentionalists insisted on the intention of the legislature, and purposivists insisted on the purpose of the statute.<sup>3</sup>*

*Eventually, textualism prevailed. Courts universally recognize that they are obligated to interpret statutes in light of their text, or at least pretend that the text of the statute determined their interpretation.<sup>4</sup> And the few remaining heretics are swiftly identified and corrected by their superiors. As Justice Kagan*

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1. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 124 (G.E.M. Anscombe trans., 2d ed. 1958).

2. See generally, CONG. RES. SERV., R45153, *STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS* (2018).

3. See Lawrence Solum, *Legal Theory Lexicon 078: Theories of Statutory Interpretation and Construction* LEGAL THEORY BLOG (Sept. 13, 2020), [https://lsolum.typepad.com/legal\\_theory\\_lexicon/2017/05/theories-of-statutory-interpretation.html](https://lsolum.typepad.com/legal_theory_lexicon/2017/05/theories-of-statutory-interpretation.html) [<https://perma.cc/5SBR-GUED>].

4. See, e.g., Jesse D.H. Snyder, *How Textualism Has Changed the Conversation in the Supreme Court*, 48 U. BALT. L. REV. 413, 416 (2019).

famously observed, “We’re all textualists now.”<sup>5</sup> Whether you like it or not.<sup>6</sup>

*But what are the practical implications of textualism? Does it always reach the “right” result? And when it produces idiosyncratic results, what should courts do with them?*

*This essay provides a textualist interpretation of a relatively obscure statute, the Visual Artists Rights Act of 1990. It observes that the most plausible textualist interpretation of the statute is the opposite of the statute’s obvious intention and purpose. And it asks whether that is a problem, something we should celebrate, or something we should just accept as an inevitable consequence of statutory interpretation.*

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## I. WHICH TEXTUALISM?

Of course, textualism comes in as many different flavors as there are judges. But Tara Leigh Grove has identified two schools of textualism, with important methodological differences.<sup>7</sup> “Formalistic” textualism instructs interpreters to consider only the text and semantic context of the statute, and disregard both public policy and the practical consequences of their interpretation. “Flexible” textualism instructs interpreters to focus on the text of

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5. Harv. Law School, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> [<https://perma.cc/T5AW-3G9C>] (statement by Justice Elena Kagan); see also Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006) (“Given that nonadherents and adherents of textualism alike place great weight on statutory text and look beyond text to context, it is hard to tell what remains of the textualism-purposivism debate.”).

6. Of course, most legal scholars decidedly do not like textualism, indeed they do not like it at all. See, e.g., William Michael Treanor, *Against Textualism*, 103 NW. L. REV. 1 (2009); Joseph Kimble, *The Ideology of Textualism*, ACS BLOG (July 17, 2017), <https://www.acslaw.org/expertforum/the-ideology-of-textualism/> [<https://perma.cc/7HWE-U34V>].

7. See Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 267 (2020).

the statute, but allows public policy, social context, and practical consequences to inform their interpretation.<sup>8</sup>

At least in theory, the primary purpose of textualism is to enforce judicial neutrality, by preventing judges from interpreting statutes in light of their personal preferences.<sup>9</sup> But as Grove observes, flexible textualism is vulnerable to the same objections as intentionalism and purposivism.<sup>10</sup> After all, if textualists can consider public policy, social context, and practical consequences, they might as well be intentionalists or purposivists.

Accordingly, Grove argues that textualists should be formalists, in order to avoid the siren song of intent and purpose.<sup>11</sup> While I am agnostic as to the relative merits of textualism, intentionalism, and purposivism, I take Grove's description of formalistic textualism as the canonical form of textualism, and will use it as guide for my textualist interpretation of VARA.

## II. THE PURPOSE OF BERNE & VARA

For better or worse, the Berne Convention for the Protection of Literary and Artistic Works provides the basic framework for copyright law in every country that has created copyright protection.<sup>12</sup> Among other things, Berne requires copyright protection to vest without any formalities, a copyright term pegged to the life of the author, and the recognition of certain moral rights of attribution and integrity under Article 6*bis*.<sup>13</sup>

Under the Copyright Act of 1909, the United States was substantially out of compliance with Berne, and accordingly was not a signatory.<sup>14</sup> Among other things, the Copyright Act of 1976 was designed to bring the United States into substantial

8. *Id.*

9. *See, e.g., id.* at 270.

10. *Id.* at 281.

11. *Id.* at 270.

12. *See The Berne Convention for the Protection of Literary and Artistic Works*, ABOU NAJA, <https://abounaja.com/blogs/berne-convention> [<https://perma.cc/2T6J-ZPPF>]; *Berne Convention*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Berne\\_Convention](https://en.wikipedia.org/wiki/Berne_Convention) [<https://perma.cc/M9HW-SY2P>] (last updated Mar. 11, 2021, 12:31 PM) (As of April 2019, 178 states are parties to the Berne Convention and 28 states are not, although many non-party states have joined other international conventions or agreements that obligate them to enforce certain copyrights in certain circumstances).

13. *Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971)*, LEGAL INFO. INST., <https://www.law.cornell.edu/treaties/berne/6bis.html> [<https://perma.cc/B2QB-CNNJ>].

14. Daniel Gervais, *The 1909 Copyright Act in International Context*, 26 SANTA CLARA HIGH TECH. L.J. 185, 196 (2010).

compliance with Berne.<sup>15</sup> The Berne Convention Implementation Act of 1988 ratified Berne and made the United States a signatory, albeit with a “minimalist approach” to compliance.<sup>16</sup> Specifically, the United States largely abandoned copyright formalities and adopted a copyright term based on the life of the author, but did not create moral rights of attribution or integrity.<sup>17</sup>

The Visual Artists Rights Act of 1990 (“VARA”) was intended primarily to bring United States copyright law into compliance with Article 6*bis* of the Berne Convention, by creating the functional equivalent of the Berne moral rights of attribution and integrity. It provides that the author of a “work of visual art” is entitled to certain waivable rights of attribution and integrity, as defined by the statute.<sup>18</sup>

The rights provided by VARA are intentionally narrower than the moral rights required by Article 6*bis* of Berne.<sup>19</sup> First, the subject matter of VARA is narrower. Berne applies to all works of authorship, but VARA only applies to “works of visual art,” which it defines as a unique or limited-edition painting, drawing, print, sculpture, or photograph.<sup>20</sup> Second, VARA rights are waivable, but Berne rights are not.<sup>21</sup> And third, VARA rights as drafted and interpreted include many exceptions that Berne does not, including an exception for “site-specific” artwork.<sup>22</sup>

Legal scholars have spilled considerable ink debating the wisdom of enacting VARA and of creating moral rights more generally.<sup>23</sup> I will neither dispute nor discuss their conclusions, because they are beside the point. If we are truly “all textualists now,” the only thing that matters is what VARA actually says.

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15. See Geoffrey P. Hull, *Copyright Act of 1976*, THE FREE SPEECH CENTER (2009), <https://mtsu.edu/first-amendment/article/1072/copyright-act-of-1976> [<https://perma.cc/KGE5-YV9T>].

16. Berne Convention Implementation Act of 1988, H.R. 4262, 100th Cong., 102 Stat. 2853.

17. Samuel Jacobs, *The Effect of the 1886 Berne Convention on the U.S. Copyright System's Treatment of Moral Rights and Copyright Term, and Where That Leaves Us Today*, 23 MICH. TELECOMM. & TECH. L. REV. 169, 169 (2016).

18. H.R. 5316, 101st Cong. tit. VI, 104 Stat. 5128 (1990).

19. See generally, U.S. COPYRIGHT OFFICE, 96-33938 CIP, WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS (1996).

20. 17 U.S.C. § 101 (2010).

21. 17 U.S.C. § 106A(e) (1990).

22. See, e.g., *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 143 (1st Cir. 2006).

23. Compare ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2009) with Amy Adler, *Against Moral Rights*, 97 CAL. L. REV. 263 (2009).

The unquestioned conventional wisdom is that VARA protects particular tangible copies of certain works of art: “On its own terms, it is totally clear. VARA extends only to hard copies and then only to certain hard copies.”<sup>24</sup> If Congress can have an “intent,” it obviously “intended” VARA to protect tangible copies. The entire point of the statute was to create rights of attribution and integrity consistent with those required by Berne, and that requires protecting tangible copies.

But can a good textualist rely on Congressional intent, even when it is obvious? At least in theory, textualists are supposed to limit their interpretation to the text of the statute and its linguistic context.<sup>25</sup> And the text of VARA, interpreted in light of the rest of the Copyright Act, says that the rights of attribution and integrity apply to intangible works of authorship, not tangible copies of those works. In other words, VARA is largely meaningless, because its actual subject matter doesn’t include most of what it was intended to protect.

### III. THE TEXT OF VARA & THE COPYRIGHT ACT

In relevant part, VARA provides that the author of a “work of visual art” has certain rights of attribution and integrity:

- (a) Rights of Attribution and Integrity.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—
  - (1) shall have the right—
    - (A) to claim authorship of that work, and
    - (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
  - (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and
  - (3) subject to the limitations set forth in section 113(d), shall have the right—
    - (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any

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24. Jane C. Ginsburg & Eva E. Subotnik, *Speaking of Moral Rights, A Conversation*, 30 CARDOZO ARTS & ENT. L.J. 91, 94 (2012).

25. See Grove, *supra* note 7, at 273.

- intentional distortion, mutilation, or modification of that work is a violation of that right, and
- (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.<sup>26</sup>

So, VARA creates rights of attribution and integrity for authors of works of visual art, but provides that both rights are limited by the fair use doctrine, as codified in Section 107 of the Copyright Act, as well as specific exceptions codified in Section 113(d) of the Copyright Act.<sup>27</sup>

But what is the subject matter of VARA? Or rather, what is a “work of visual art”? The Copyright Act provides a specific definition:

A “work of visual art” is—

- (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
- (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

- (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;
- (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
- (iii) any portion or part of any item described in clause (i) or (ii);
- (B) any work made for hire; or

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26. 17 U.S.C. § 106A(a).

27. Cathay Y.N. Smith, *Creative Destruction: Copyright's Fair Use Doctrine and the Moral Right of Integrity*, 47 PEPP. L. REV. 601, 605–606 (2020).



- (C) any work not subject to copyright protection under this title.<sup>28</sup>

But what is a “work”? While the Copyright Act doesn’t define the term “work,” it provides considerable guidance about the meaning of the term. For example, the Copyright Act defines the subject matter of copyright in relation to “works”:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.<sup>29</sup>

The Copyright Act also defines a “copy” as a tangible, “material” object in which an intangible “work” is fixed:

“Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed.<sup>30</sup>

In other words, a “work” is an intangible expression, protected by copyright to the extent it includes original elements. A “copy” is a tangible object in which a work is fixed. Or rather, a “work” is an original expression, protected by copyright in any medium, and a “copy” is a particular object that expresses a work.

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28. 17 U.S.C. § 101 (2010).

29. 17 U.S.C. § 102(a) (1990).

30. 17 U.S.C. § 101.

It follows that a "work of visual art" is a particular kind of intangible "work of authorship," fixed in a particular kind of tangible copy. After all, VARA uses the same language as the rest of the Copyright Act and specifies that "works of visual art" are fixed in "copies," just like "original works of authorship" are fixed in "copies." For example, VARA provides that a "work of visual art" must be a painting, drawing, print, sculpture, or photograph.<sup>31</sup> So, under Section 102 of the Copyright Act, a "work of visual art" must be a pictorial, graphic, or sculptural work.<sup>32</sup> VARA simply provides that a "work of visual art" must be fixed "in a single copy" or "in a limited edition of 200 copies or fewer."

Every "work of visual art" must be an "original work of authorship" in order to qualify for copyright protection. But not every "original work of authorship" is a "work of visual art" protected by VARA. Only those "works of authorship" fixed in the right kinds of copies, in the right way, by the right people, are "works of visual art," entitled to VARA protection.

So, under a textualist reading of VARA, a "work of visual art" is defined not as a tangible, "material object" but as a particular kind of intangible "work of authorship," fixed in a particular way. In other words, the VARA rights of attribution and integrity protect the intangible "work of visual art" embodied in one or more particular tangible copies of that work. The VARA right of attribution entitles the authors of such works to claim authorship of works they created, disclaim authorship of works they did not, and disclaim authorship of works they created that are distorted, mutilated, or modified in a way that would harm their honor or reputation.<sup>33</sup> The VARA right of integrity entitles the authors of such works to prevent the intentional distortion, mutilation, modification, or destruction of the work.<sup>34</sup>

The problem is that most of these rights are meaningless when applied to an intangible work of authorship. An intangible work of authorship cannot be damaged or destroyed because it is a concept, not a material object.

The VARA right of attribution is at least partially coherent, insofar as it entitles artists to claim or disclaim authorship of particular intangible works. But it is incoherent, insofar as it purports to entitle authors to disclaim distorted, mutilated, or modified works. It is impossible to distort, mutilate, or modify an

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31. *See id.*

32. *Id.*

33. *See* 17 U.S.C. § 102.

34. *See* 17 U.S.C. §§ 101-02.

intangible work of authorship. Once an intangible work of authorship is created, it continues to exist in that same form, irrespective of whatever variations anyone subsequently creates. If the work is changed, it becomes a new work, or at least a derivative work with new elements. While the author of an original work may well disclaim authorship of a new work, that is distinct from disclaiming authorship of the intangible work they actually created. Of course, it is also hard to see how the author of a work could constitutionally prevent someone from identifying them as the author of the work, so long as the identification is factually accurate.<sup>35</sup>

But the VARA right of integrity is entirely incoherent because it purports to protect the physical integrity of intangible works of authorship, which have no physical extension to protect. If a “work of visual art” is an intangible “work of authorship,” then it is by definition an ideal object, which can be realized in any medium, or no medium at all. As conceptual artist Sol LeWitt famously observed, “The idea itself, even if not made visual, is as much a work of art as any finished product.”<sup>36</sup> An object is not—and can’t be—a “work of visual art.” Even the artists agree!

In other words, a “work of visual art” is the abstract essence of a work, not any particular object. And obviously, it makes no sense to prohibit the distortion, mutilation, modification, or destruction of an abstraction. No matter what you do to the physical copy in which a work of authorship is realized, you have not affected the work of authorship itself in any way. While you may have infringed the copyright in the original work by creating an unauthorized derivative work, you have not and cannot change the original work itself.

#### IV. REFLECTIONS

This is all quite troubling, because a textualist interpretation of VARA is so obviously inconsistent with the intention and purpose of the statute. Congress enacted VARA because it wanted to protect physical works of art, and VARA was intended to prevent the mutilation and destruction of physical works of art.<sup>37</sup> The entire

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35. *Cf. Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (holding that “reverse passing off” or “plagiarism” of a public domain work cannot be trademark infringement).

36. Sol LeWitt, *Paragraphs on Contemporary Art*, ARTFORUM (June 1967), <https://www.artforum.com/print/196706/paragraphs-on-conceptual-art-36719> [<https://perma.cc/SCQ4-TDKW>].

37. See 17 U.S.C. § 106A (1990).

purpose of VARA was to protect tangible copies, not intangible works.<sup>38</sup>

But that isn't what the statute actually says. If you read the text of the statute in relation to the Copyright Act, and take what it actually says seriously, it only protects certain intangible works of authorship. Is that a problem? Maybe, or maybe not.<sup>39</sup> Plenty of laws talk a big game, but accomplish very little, and we don't care. Maybe VARA is just more of the same. After all, it's at least conceivable that Congress wanted VARA to be a dead letter and drafted the statute accordingly.<sup>40</sup> Textualism commands us to take that possibility seriously.

In the alternative, perhaps we ought to ask whether textualism is actually the right way to interpret statutes. Congress obviously thought VARA would protect tangible copies of works of art, not just the intangible works they embodied. The whole point of VARA was to prevent people from mutilating or destroying physical objects. Should we let a drafting error frustrate the purpose of the legislation? I don't know.

In the meantime, maybe courts addressing VARA claims should reflect on the literal subject matter of VARA and how it might affect the viability of those claims. And maybe courts thinking about statutory interpretation should ask themselves what textualism is supposed to accomplish, and how it is supposed to get there. A textualist interpretation of VARA certainly makes it more consistent with the rest of the Copyright Act, which is a plus! But only at the expense of distorting its purpose out of all recognition.

The very premise of textualism is that courts do not and cannot know what legislatures intended. And yet, in the case of VARA, it at least seems like they can and do. If the intent of a statute is clear, should courts ignore it, because poor drafting made a hash of it? Or should they interpret the statute based on its purpose, even if they do not know why it is so poorly drafted?

It is a conundrum. After all, everyone knows what "no vehicles in the park" is supposed to mean, even if there might be some tough

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38. *See supra* Part III; *see also* Ginsburg & Subotnik, *supra* note 24.

39. *Cf.* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017).

40. Mike Overby (@lethargilistic), TWITTER (May 8, 2020, 9:20 AM), <https://twitter.com/lethargilistic/status/1258778709022003200> [<https://perma.cc/3TMP-5JAT>] (observing, "VARA was intended to confound discussion of American moral rights enough that the Berne Union would relent and recognize US copyrights abroad. If it accomplished that by doing nothing, so much the better.").

calls.<sup>41</sup> But should the burden be on the government to explain, or the public to understand? And when the government purports to explain what it means in exhaustive detail, should we allow it to fall back on common understanding? Not to mention, whose common understanding?

## EPILOGUE

Why does any of this matter? In the early 1970s, Jerry Wolkoff bought an old factory in Long Island City, Queens, New York City, for a song. He leased out studios to artists and let them paint graffiti all over the building. Before long, the building became an iconic example of graffiti art, known as 5Pointz.<sup>42</sup>

Eventually, Wolkoff decided to demolish the factory and replace it with apartments. On August 21, 2013, the New York City Planning Commission unanimously approved Wolkoff's plan to redevelop the property. But the graffiti artists sued to prevent the destruction of the buildings. Among other things, they requested a temporary restraining order, prohibiting the destruction of the buildings, and asserted a VARA integrity claim, arguing that Wolkoff could not destroy their works without providing an opportunity to preserve them.<sup>43</sup> When the district court denied the temporary restraining order, Wolkoff prohibited the artists from visiting the property and told his employees to whitewash the artwork.

The artists proceeded with their VARA claims for the destruction of their works. Ultimately, the district judge found that Wolkoff had improperly destroyed the works, without giving the artists an opportunity to preserve them, and awarded the artists \$6.75 million in statutory damages. And the Second Circuit affirmed the district court's holding, finding that it did not abuse its discretion. And the Supreme Court denied Wolkoff's petition for certiorari.<sup>44</sup> Essentially, the courts said Wolkoff was a jerk, so the plaintiffs were entitled to recover under VARA.

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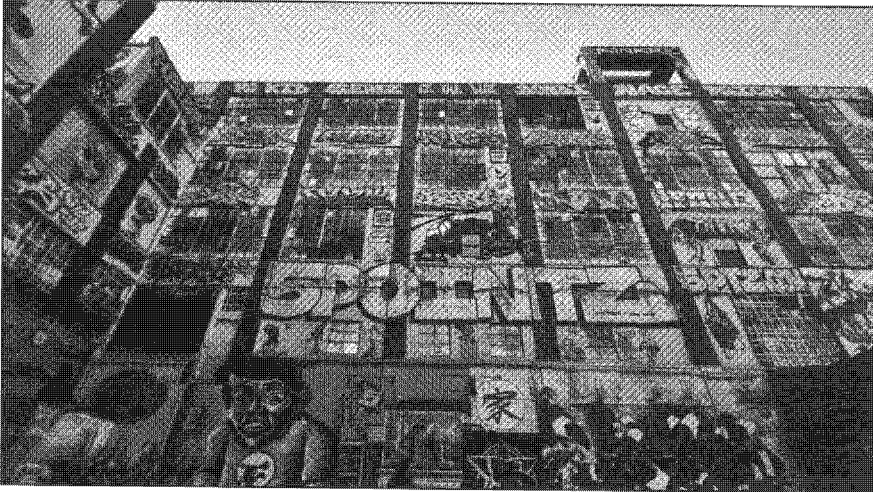
41. See generally, e.g., Pierre Schlag, *No Vehicles in the Park*, 23 SEATTLE L. REV. 381 (1999).

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

43. *Id.* at 214 n. 1.

44. *G&M Realty L.P. v. Castillo*, 141 S. Ct. 363 (2020).

The courts were right, Wolkoff is a jerk. He could have let the artists preserve their works, rather than whitewashing them. But did he actually infringe VARA? I am not so sure. After all, here are some of the works in question.<sup>45</sup>



The works are not destroyed, you are looking at them. This is a reproduction of the relevant works. VARA prohibits the destruction of works of authorship, but these works have not been destroyed. Only particular copies of them were destroyed. In fact, the works in question were quite well documented. All of the works are preserved, the only thing we are missing is particular objects.

So, does our interpretation of VARA matter? I think it does. VARA was at least arguably intended to prevent a building owner from demolishing a building covered with graffiti, in order to preserve the artwork. But a textualist reading of VARA says the work still exists. The philologist in me is inclined to agree.

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45. Forsaken Fotos, "5 Pointz," CREATIVE COMMONS, <https://www.flickr.com/photos/55229469@N07/10675574105/> [<https://perma.cc/997Y-5HMR>]. This image has been altered from the original.