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Experimenting with State-Enacted Resale Rights

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EXPERIMENTING WITH STATE-ENACTED RESALE RIGHTS

Guy A. Rub¹

ABSTRACT

Current federal law does not require sellers of fine art to pay a share of the sale price to the artists, although Congress and federal agencies have been debating the advantages and disadvantages of such a duty, commonly referred to as Artists' Resale Rights (ARR), since the 1970s. What is often missing from this discourse is the role that state law might play in this ecosystem. This issue, and especially California's 1976 ARR law, the only state-enacted ARR to date, is the focus of this Article.

States are often said to be the laboratories of democracy as they can experiment with various legal rules and produce rich comparative empirical data. The Article explores whether states can be the laboratories of ARR as well. It reaches three conclusions: First, there is a vibrant debate concerning the impacts and overall desirability of resale royalties, but that debate is driven by relatively scarce empirical data. Second, if states decide to adopt ARR they can provide some of that missing information. Third, subject to minor restrictions, states are allowed to enact ARR legislation, and the recent Ninth Circuit decisions that held the California ARR act unconstitutional are, for the most part, misguided.

¹ Professor of Law, The Ohio State University Moritz College of Law. I would like to thank Adam Thimmesh and the other participants in this symposium for valuable comments and Matt Krsacok for outstanding research assistance. All remaining errors are my own.

TABLE OF CONTENTS

ABSTRACT	651
TABLE OF CONTENTS.....	652
INTRODUCTION.....	653
I. THE DEBATE CONCERNING ARTISTS RESALE RIGHTS	654
A. <i>Money from Art</i>	655
B. <i>The Emergence of Artist Resale Royalties</i>	656
C. <i>Resale Royalties Under Federal Law</i>	657
D. <i>Resale Royalties Under State Law</i>	658
II. THE VALUE OF EXPERIMENTAL ARR DATA	659
A. <i>The Recipients of Resale Royalties</i>	659
B. <i>Effects on the Secondary Markets for Artworks</i>	663
C. <i>Effects on the Primary Markets for Artworks</i>	666
D. <i>The Administrative Costs of ARR</i>	667
III. CAN STATES EFFECTIVELY EXPERIMENT WITH ARR?.....	668
IV. THE CONSTITUTIONALITY OF STATE-ENACTED ARR.....	670
A. <i>State ARR and Out-of-State Sales: The Dormant Commerce Clause</i>	671
B. <i>Preemption by the Copyright Act</i>	677
i. <i>Does State-Enacted ARR Conflict with the Copyright Act?</i>	678
ii. <i>Does the Copyright Act Expressly Preempt State-Enacted ARR?</i>	682
CONCLUSIONS.....	684

INTRODUCTION

States are often said to be the laboratories of democracy, meaning that they can experiment with various legal rules and produce rich comparative empirical data regarding the effectivity of those rules. Other states, as well as the federal government, can use this information to improve their legal systems. This Article explores this potential in one specific context—Artists’ Resale Royalties (ARR).

Part I introduces the current debate concerning ARR, domestically and abroad. When artists create works of fine art—e.g., paintings or sculptures—they have property rights in those works. They can, therefore, sell those works to an interested buyer. But in some jurisdictions, artists are entitled to another source of income—a right to be paid royalties every time their works are resold. Since 1920, when France enacted the first ARR statute, more than seventy countries adopted such a mandatory scheme.

Since the late 1970s, Congress has considered, but never enacted, resale rights on a federal level. At about the same time—the 1970s—state legislators around the country considered enacting such rights in their jurisdictions. Specifically, during the second half of the 1970s, resale royalty bills were introduced in at least nine states,² although only in California has such a bill passed.³ In the last few years, the Ninth Circuit held that the California act is, with minor exceptions, unconstitutional.⁴

This Article explores the potential for state-enacted ARR from three perspectives. First, in Part II, the Article presents the potential for experimentalism in connection with ARR. The desirability of ARR is subject to a fierce debate, both domestically and abroad. That debate focuses on the potential impacts of ARR on the primary and secondary markets for artwork, its effects on prices, and its distributive impact.⁵ Part II explores those conflicting arguments regarding the impact of ARR, and shows how those claims, in many cases, are supported by scarce empirical data.

Part III addresses the role that states can play in providing this missing data. It explains that while states can typically experiment with legal solutions, doing so with ARR will likely yield somewhat helpful yet limited results. The secondary art markets in many states, for example, might be too small to produce meaningful ARR data. In addition, an ARR scheme can be circumvented, which will undermine some of the validity of the data produced from state-enacted ARR.

² Those states include California, Florida, Illinois, Iowa, Maine, New York, Ohio, Pennsylvania, and Texas. *See infra* note 53.

³ CAL. CIV. CODE § 986 (West 2019).

⁴ *Close v. Sotheby’s, Inc.*, 894 F.3d 1061, 1064 (9th Cir. 2018) (holding that the California law is expressly preempted by the Copyright Act with respect to resales that occurred after January 1, 1978); *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1322 (9th Cir. 2015) (en banc) (holding that the California law violates the dormant Commerce Clause with respect to out-of-state sales).

⁵ The primary market for artwork consists of the initial sales by or on behalf of the creating artists while a secondary market is defined negatively as any sale that is not part of the primary market. *See What is the Difference Between the Primary and Secondary Art Market?*, PICASSOMIO, <https://www.picassomio.com/art-appreciation/what-is-the-difference-between-the-primary-and-secondary-art-market.html> [<https://perma.cc/44TX-6WME>].

Part IV concludes the discussion by considering the constitutionality of state-enacted ARR. It does so by taking a critical look at the recent Ninth Circuit decisions that held California's ARR act unconstitutional. This Part explains that, from many perspectives, ARR resembles a state tax, and such taxes are typically enforceable. Indeed, it seems that the Ninth Circuit did not fully address the nuances of the dormant Commerce Clause doctrine before it used it to strike down the California statute as it applied to out-of-state transactions.⁶

The Ninth Circuit decision that found that the Copyright Act preempts the California statute,⁷ even with respect to domestic transactions, is similarly lacking. In it, the Ninth Circuit ignored or at least downplayed the role that state laws already play—and must play—in creating and sustaining markets for information goods. Those state laws are vital for the operation and the success of the federal law scheme. Therefore, it seems inaccurate to suggest, as the Ninth Circuit implied, that states cannot enact ARR legislation simply because they are precluded from affecting the copyright holder's exclusive right (under federal law) to control the distribution of copyrighted works and the limitations thereof. In some respects, many well-established and uncontroversial state laws do just that. The Supreme Court also recognized that rights under the Copyright Act are not shielded from state regulation.⁸

A more nuanced examination of the preemption question suggests that the California act does not undermine the goals of the federal scheme and, in particular, the first sale doctrine.⁹ Indeed, the main rationale for the first sale doctrine is to reduce transaction costs in secondary markets,¹⁰ but ARR do not seem to significantly increase transaction costs in those markets. Indeed, when one evaluates the complex ways in which states already regulate creative markets, it is hard to see why ARR should be singled out as unconstitutional. The scheme might or might not be wise, but it is likely legal.

PART I: THE DEBATE CONCERNING ARTISTS RESALE RIGHTS

The debate concerning Artists' Resale Rights (ARR) in the United States is decades long. The focus of this Article is on state-enacted ARR, but before delving into that complex topic this Part briefly presents the current status of the ARR debate in the United States. Section A succinctly examines how visual artists are being compensated and to what degree ARR can fit within that existing framework. The rest of this Part provides a brief history of ARR, in Europe, under the federal law system, and under state laws.

⁶ See *Sam Francis Found.*, 784 F.3d at 1323–25.

⁷ *Close*, 894 F.3d at 1064.

⁸ See *Watson v. Buck*, 313 U.S. 387 (1941); *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932).

⁹ 17 U.S.C. § 109(a) (2012).

¹⁰ See *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 541–43 (2013).

A. *Money from Art*

How do creative individuals make a living? The answer is, of course, both broad—it includes teaching, performing, servicing their employers, and much more¹¹—and well beyond the scope of this Article. Focusing, instead, just on those creative individuals who sell their creative output—including book authors, music composers, painters, sculptors, and many more—requires acknowledging certain well-known market failures.

The most famous of those market failures has to do with public goods.¹² Creating information goods, including creative works, commonly entails significant upfront fixed costs, such as the costs of writing a book or sculpting a sculpture. However, in most cases, once a work is created, producing additional copies is relatively cheap. In other words, for those works, the average costs (which, by definition, take into account the fixed costs) are higher than the marginal costs (i.e., the costs of producing an additional copy).¹³ Therefore, if the law permits copying, copiers, who do not bear the fixed costs of creation, would be able to charge a price that is close to the marginal costs and below average costs.¹⁴ The authors would then not be able to cover the fixed costs of creation.¹⁵ Knowing that, potential authors will be disincentivized to create and many will decide not to do it.¹⁶ Copyright law addresses that market failure by making unauthorized copying illegal.¹⁷

This market failure, however, occurs only if cheap copying is feasible. Many visual artworks—such as paintings and sculptures—cannot be easily copied. Assuming fraud and forgery—i.e., lying as to the source of a work—are illegal, then there is no way to create a copy of a Van Gogh painting that will significantly compete with or even affect the market for original Van Gogh paintings. As such, for most visual artists, copyright is irrelevant.¹⁸ Because they sell goods that cannot be copied, their business model is not very different from that of carpenters, car companies, or any other seller of chattel or even real property.¹⁹ Like any seller, visual artists only need property rights over the items they are creating. With those rights, and without any intellectual property rights, they can earn a living by selling the physical items they create.

¹¹ See, e.g., Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301, 304 (2013).

¹² See, e.g., Guy A. Rub, *Rebalancing Copyright Exhaustion*, 64 EMORY L.J. 741, 763–64 (2015).

¹³ See Guy A. Rub, *Amazon and the New World of Publishing*, 14 I/S: J.L. & POL'Y FOR INFO. SOC'Y 367, 383 (2018); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1206 (1996).

¹⁴ Sterk, *supra* note 13, at 1204.

¹⁵ Rub, *supra* note 12, at 763–64.

¹⁶ *Id.*

¹⁷ *Id.* at 764.; see 17 U.S.C. § 106(1) (2012).

¹⁸ Guy A. Rub, *The Unconvincing Case for Resale Royalties*, 124 YALE L.J. F. 1, 4–5 (2014) (explaining how visual artists operate under a different business model—the single copy business model—than other creators, who instead use a multi-copies model); see Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 319–21 (2018).

¹⁹ Rub, *supra* note 18, at 5 n.17.

B. The Emergence of Artist Resale Royalties

Visual artworks present another less-common (although not unique) feature—uncertain future value. The future value of most cars and furniture is, to a large degree, predictable. Artworks, at least when it comes to expensive works, are different. While most artworks will either maintain their value or experience reduction over time, a minority of works will *dramatically* increase in value. In many cases, especially when it comes to emerging artists, it is quite difficult to identify those value-increasing works in advance. Such an increase in value, *once it happens*, benefits the owner of the artwork. The owner of a work at that time might, however, not be the artist but a dealer, a collector, or someone else. This scenario in which non-artists gain the increase in value for an artwork is perceived by some as unfair. This concern motivated some countries, starting with France in 1920, to provide artists with a right to receive royalties upon the resale of their works—a right historically called *droit de suite*.²⁰

Professor Monroe Price cynically described this argument:

The *droit de suite* evolved from . . . a vision of the starving artist, with his genius unappreciated, using his last pennies to purchase canvas and pigments which he turns into a misunderstood masterpiece. The painting is sold for a pittance, probably to buy medicine for a tubercular wife. The purchaser is a canny investor who travels about artists' hovels trying to pick up bargains which he will later turn into large amounts of cash. Thirty years later the artist is still without funds and his children are in rags; meanwhile his paintings, now the subject of a Museum of Modern Art retrospective . . . fetch small fortunes at Park-Bernet and Christie's. . . The *droit de suite* is *La bohème* . . . reduced to statutory form.²¹

While Professor Price is by no means the only scholar to mock or at least criticize the justifications for resale rights,²² that rationale led to the enactment and spread of ARR, mainly across continental Europe.²³ By 2013, more than seventy countries adopted ARR.²⁴

²⁰ Brian L. Frye, *Equitable Resale Royalties*, 24 J. INTELL. PROP. L. 237, 241–46 (2017) (exploring the history of resale royalties regimes).

²¹ Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333, 1335 (1968).

²² See, e.g., Guy A. Rub, *Stronger Than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 80–81 (2013) (“[L]egislation based on anecdotes is problematic in itself. . . . anecdotes, especially salient stories about famous and beloved artists, tend to make a phenomenon seem significantly more common than it actually is. In fact, in those cases even the anecdotes themselves are factually questionable, as neither the French Impressionist painters nor Mark Twain were starving because of exploitation by greedy, shrewd buyers.”).

²³ Frye, *supra* note 20, at 244–46 (exploring the history of resale royalties regimes outside of France).

²⁴ U.S. COPYRIGHT OFFICE, *RESALE ROYALTIES: AN UPDATED ANALYSIS 2* (2013), <https://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf> [<https://perma.cc/EB45-J6VN>]; see also CANADIAN ARTISTS REPRESENTATION LE FRONT DES ARTISTES CANADIENS, *CARFAC'S SUBMISSION TO THE FEDERAL GOVERNMENT'S STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY FOR THE STATUTORY REVIEW OF THE COPYRIGHT ACT* (2018),

C. Resale Royalties Under Federal Law

Federal law in the United States has never recognized a duty to pay royalties upon the resale of artworks. However, since the 1970s, enacting ARR has been considered both by Congress and state legislators.²⁵ The first federal bill—the Visual Artists’ Residual Rights Act—was introduced in 1978.²⁶ The Bill proposed a wide reform in the rights of visual artists, including the creation of a powerful National Commission on the Visual Arts.²⁷ The bill required any seller of artwork for \$1,000 or more to pay 5% royalties to the commission, to be transferred to the artist.²⁸ The duty to pay was limited to sales at a profit.²⁹ The bill was referred to a committee where it died.³⁰

The next two attempts, in 1986 and 1987, were also parts of broader bills that attempted to provide visual artists rights that they then lacked.³¹ As part of those bigger reforms those bills required sellers of visual art to pay artists 7% of the seller’s profit from any resale of artworks.³² The 1986 bill limited the duty to pay for sales over \$500,³³ while the 1987 bill limited them to sales over \$1,000.³⁴ The bills were eventually turned into the Visual Artist Rights Act of 1990.³⁵ However, during the legislative process, the resale royalty provision was removed and replaced with one requiring the Copyright Office to “conduct a study on the feasibility of implementing” a duty to pay resale royalties.³⁶ In 1992, the Copyright Office submitted that report. It concluded that adding ARR to U.S. law was inadvisable.³⁷

Almost twenty years later, in 2011, the fourth federal bill was introduced.³⁸ It required payment of 7% of the sale price, but only for sales at auctions over \$10,000,

<https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10093096/br-external/CanadianArtistsRepresentation-e.pdf> [<https://perma.cc/4BT8-LP4Y>] (noting that, as of 2018, at least ninety-three countries have adopted ARR).

²⁵ The motivation for this movement is typically attributed to Robert Rauschenberg, one of the greatest visual artists of the twentieth century. In 1958, Rauschenberg sold a painting, *Thaw*, to a dealer for \$900. U.S. COPYRIGHT OFFICE, *supra* note 24, at 6. In 1973, that painting was resold for \$85,000. *Id.* In an outburst that was caught on film, Rauschenberg famously confronted the dealer complaining that “I’ve been working my ass off for you to make all this profit.” *Id.* This story is famous and it inspired (and still inspires) attempted ARR legislation. *Id.* The story is also incomplete and misleading. John Henry Merryman showed that the 1973 auction resulted in a sharp increase in the price of Rauschenberg’s other early works, many of which were still in his possession, as well as his new works, making Rauschenberg a millionaire. John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103, 111 (1993).

²⁶ H.R. 11403, 95th Cong. (1978).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ H.R. 11403, 95th Cong. (as reported to H.R. Comm. on Interstate and Foreign Commerce, Mar. 8, 1978).

³¹ Visual Artists Rights Act of 1987, H.R. 3221, 100th Cong. (1987); Visual Artists Rights Amendment of 1986, H.R. 5722, 99th Cong. (1986).

³² H.R. 5722; H.R. 3221.

³³ H.R. 5722.

³⁴ H.R. 3221.

³⁵ Visual Artists Rights Act of 1990, Pub. L. No. 101–650, § 608, 104 Stat. 5089.

³⁶ *Id.*

³⁷ U.S. COPYRIGHT OFFICE, DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY 149 (1992).

³⁸ Equity for Visual Artists Act of 2011, S. 2000, 112th Cong. (2011).

regardless of whether it is at a profit or not.³⁹ While the bill was only referred to a committee and never discussed further, the drafters thereof also asked the Copyright Office to conduct an updated study.⁴⁰ In 2013, the Copyright Office published its updated report. Now the Copyright Office took the opposite view and recommended that a resale royalty right would be enacted.⁴¹

Two additional bills were submitted following that report: the American Royalties Too Act of 2014⁴² and the American Royalties Too Act of 2018.⁴³ Each of those bills required 5% royalties on all sales at an auction for over \$5,000.⁴⁴ The royalties were however capped at \$35,000 per work per transaction.⁴⁵ Both bills were referred to a committee and never proceeded further.⁴⁶

D. Resale Royalties Under State Law

Congress was not the only legislative body that considered ARR in the second half of the 1970s. In fact, the first American bill to propose resale royalties was not the federal Visual Artists' Residual Rights Act of 1978 but the California Resale Royalties Act (CRRRA), which was introduced in April 1975.⁴⁷ This was not only the earliest ARR bill in the country, but it is the only such bill to date to have passed into law.⁴⁸ The CRRRA provides for 5% royalties on all sales for \$1,000 or more, as long as the artist is alive and the sale is at a profit.⁴⁹ The right is limited to sales "at an auction or by a gallery, dealer, broker, museum, or other person acting as the agent."⁵⁰ In other words, private sales are exempted. It applies if "the seller resides in California or the sale takes place in California."⁵¹

In the years that followed the passage of the CRRRA in 1976 similar bills were introduced in other jurisdictions. We already saw that the first federal act was introduced in 1978.⁵² At the state level from 1977 to 1979 no less than nine additional states—Florida, Illinois, Iowa, Maine, New York, Ohio, Pennsylvania, and Texas⁵³—considered bills that would have added ARR in their laws. None of those

³⁹ *Id.*

⁴⁰ U.S. COPYRIGHT OFFICE, *supra* note 24, at 9.

⁴¹ *Id.* at 65.

⁴² H.R. 4103, 113th Cong. (2014).

⁴³ H.R. 6868, 115th Cong. (2018).

⁴⁴ H.R. 6868; H.R. 4103.

⁴⁵ H.R. 6868; H.R. 4103.

⁴⁶ H.R. 6868; H.R. 4103.

⁴⁷ Assemb. B. 1391, 1975 Leg., Reg. Sess. (Cal. 1975).

⁴⁸ U.S. COPYRIGHT OFFICE, *supra* note 24, at 20.

⁴⁹ CAL. CIV. CODE § 986(b) (West 2019).

⁵⁰ *Id.* § 986(a).

⁵¹ *Id.*

⁵² *Infra* text accompanying note 26.

⁵³ H.File 340, 1979 Gen. Assemb., Reg. Sess. (Iowa 1979); Visual Artists Proceeds Right Act, H.B. 1902, 1979 Gen. Assemb., Reg. Sess. (Pa. 1979); H.B. 808, 112th Gen. Assemb., Reg. Sess. (Ohio 1978); H.B. 1185, 1977 Leg., Reg. Sess. (Fla. 1977); H.B. 1004, 80th Gen. Assemb., Reg. Sess. (Ill. 1977); Residual Rights in Works of Fine Art, H.P. 963, 108th Leg., Reg. Sess. (Me. 1977); Artists' Royalties Act, A. 8171, 1977 Assemb., Reg. Sess. (N.Y. 1977); H.B. 1727, 65th Leg., Reg. Sess. (Tex. 1977).

bills were enacted. In fact, to the best of my knowledge none of those bills were even publicly discussed in a state legislator's forum.

PART II: THE VALUE OF EXPERIMENTAL ARR DATA

Justice Brandeis famously noted that “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁵⁴ Indeed, the role of state laws, as laboratories of democracy in which different legal solutions are tried, is well recognized.⁵⁵

Can states serve a similar function with respect to ARR? This Article addresses this complex question by considering three issues: First, this Part considers the value of experimentalism in this context. The Part explores some of the main open questions concerning ARR that experimental data may shed light on. The following parts question whether states can effectively provide such information, and whether the Constitution allows them to do so.

The desirability of ARR legislation is highly controversial. Proponents and opponents of this measure do not just disagree on its overall desirability, but also on a host of questions concerning its expected impacts. Those impacts come down to four main questions: who will be the expected recipients of ARR, if enacted? How will ARR affect domestic secondary markets for artworks? How will they affect domestic primary markets? How expensive will this system be? Evaluating those questions can shed light on the overall impact of ARR on the art world, its winners and losers, and, of course, its overall desirability.

The value of experimental data does not stop there. ARR schemes can be set up in different ways and those ways can affect the impacts of ARR on various stakeholders. Therefore, exploring the effects of ARR in each jurisdiction requires consideration of those choices as well, and how they might affect the other impacts of this scheme. This Part addresses those choices as well.

A. *The Recipients of Resale Royalties*

Opponents of resale royalties often claim that the primary beneficiaries of resale royalties are the most successful and rich artists.⁵⁶ Naturally, most works that are sold for a high price at auctions are created by that group. The most successful artists who dominate auctions are also quite old or, more commonly, dead. That implies that the recipients of resale royalties are mostly the heirs of very successful artists.

There is some historical, although inconclusive, empirical information to support

⁵⁴ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁵⁵ See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006); Lisa Larrimore Ouellette, *Patent Experimentalism*, 101 VA. L. REV. 65 (2015).

⁵⁶ See, e.g., *infra* note 114.

such a claim. In France, one 1999 report concluded that in a three-year period only about 2,000 artists benefited from the country's resale rights scheme.⁵⁷ The top fifty of those artists received 43% of the royalties collected.⁵⁸ The remaining 1,950 artists received less than €450 annually on average.⁵⁹ Another report concluded "that 70% of the royalties collected [in France] in 1996 were paid to the families of six or seven artists."⁶⁰ A study in Germany found that less than five hundred artists received resale royalties in 1998.⁶¹ Another 2000 study found that nearly 88% of those royalties were paid to the families of deceased artists.⁶² A similar reality exists in Denmark where, in 1998, 86% of the royalties were paid to artists' estates and only 14% to the artists themselves.⁶³ In the United Kingdom, a more recent study in 2008 found that since the introduction of ARR, the top one hundred artists shared 80% of all royalties collected.⁶⁴

Recently, Professor Chris Sprigman and I argued that "the likely beneficiaries [from ARR] will be, almost exclusively, the super-stars of the art world," and that "top-tier artists and their heirs [will] make out like bandits under a resale royalty scheme."⁶⁵ We examined all of the sales at Sotheby's and Christie's over March and April 2018 and concluded that if the ART Act, the latest attempt to enact ARR in the U.S., would have been in effect, and if the market would have performed as it does now, \$2.3 million in resale royalties would have been collected just in those two months.⁶⁶ Fifty-seven percent of the royalties would have been paid to deceased artists.⁶⁷ The Andy Warhol Foundation would have earned (before deducting administrative costs) more than \$300,000 in just those two months, which is 13% of all the royalties collected.⁶⁸ Andy Warhol was, of course, very wealthy in his lifetime and his foundation is very rich as well.⁶⁹ The other major receipts of royalties in the

⁵⁷ Clare McAndrew & Lorna Dallas-Conte, *Implementing Droit de Suite (Artists' Resale Right) in England*, THE ARTS COUNCIL OF ENGLAND 34 (2002), http://www.academia.edu/7553610/Implementing_Droit_de_Suite_artists_resale_right_in_England. [<https://perma.cc/DC4W-TM6X>].

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* It is worth nothing that while both those reports suggest that ARR benefited just a small group of artists, those results are somewhat inconsistent, with one study pointing to a much more significant concentration than the other.

⁶¹ *Id.* at 32.

⁶² *Id.*

⁶³ *Id.* at 39.

⁶⁴ KATY GRADDY, Noah Horowitz & Stefan Szymanski, UK INTELLECTUAL PROP. OFFICE, A STUDY INTO THE EFFECT ON THE UK ART MARKET OF THE INTRODUCTION OF THE ARTIST'S RESALE RIGHT 2 (2008), <https://webarchive.nationalarchives.gov.uk/20140603122011/http://www.ipo.gov.uk/study-droitdesuite.pdf> [<https://perma.cc/VLJ7-ZWT9>].

⁶⁵ Christopher Sprigman & Guy Rub, *Resale Royalties Would Hurt Emerging Artists*, ARTSY (Aug. 8, 2018, 5:00 PM), <https://www.artsy.net/article/artsy-editorial-resale-royalties-hurt-emerging-artists> [<https://perma.cc/2GUY-LQB3>].

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Jonathan Jones, *Do Rich Artists Make Bad Art?*, THE GUARDIAN (Apr. 27, 2006, 4:27 PM), <https://www.theguardian.com/artanddesign/2006/apr/27/art> [<https://perma.cc/RD4E-PGSJ>] (noting that

sample are similarly mostly the estates of well-known artists such as Henry Matisse, Pablo Picasso, and Roy Lichtenstein.⁷⁰

Even the 43% that would have been distributed to living artists would have been earned mostly by famous, rich, and old artists. The biggest earner of that group would have been the 88-year-old multimillionaire Jasper Johns.⁷¹ Young artists, for the most part, do not have their work sold at major auction houses. If the ART Act were in effect, only 2.28% of the royalties would have been paid to all artists under the age of fifty.⁷² That is less than one-fifth of the royalties just to the Warhol heirs.⁷³

Considering this data, the argument of ARR's opponent is clear: a legal scheme that results in the transfer of wealth to those who are already very rich should be suspected as inequitable and inefficient.⁷⁴ Moreover, the massive transfer to deceased artists' families creates additional equitable concerns. It is obviously more difficult to base a moral or labor-based argument for a scheme that transfers wealth to those who have not worked for it.

Proponents of ARR point to different data. Mark Waugh, for example, a Director at the Design and Artists Copyright Society (DACS), an organization that collects and distributes resale royalties in the U.K.,⁷⁵ noted recently that there are more than 5,000 artists in the U.K. who benefitted from resale royalties distribution since its enactment in 2006.⁷⁶ In 2017, for example, 57% of the artists receiving royalties had artworks sold for €1,000 to €3,000.⁷⁷ It is estimated that about half of them sold only works in that price bracket, which indicates that they are likely not very commercially-successful artists.⁷⁸

What can explain the discrepancy and how can additional data provide information concerning the recipients of ARR? First, there are differences in the data being reported. Sprigman and I focused on the percentage of *royalties* that is channeled to the rich, successful, and typically dead artists. Waugh reported on the percentage of *payees* that are not well-known. It is however quite possible that many

when Warhol died in 1987, he left his heirs more than \$200 million); The Andy Warhol Foundation for the Visual Arts, Inc., IRS Form 990 (2016), <https://pdf.guidestar.org/PDF/Images/2016/133/410/2016-133410749-0d760177-F.pdf> [<https://perma.cc/YY2J-Z2PZ>] (stating that in their 2017 public filings The Andy Warhol Foundation noted that it owns assets worth more than \$350 million).

⁷⁰ Sprigman & Rub, *supra* note 65.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See, e.g., *infra* note 114. But see Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513, 571–73 (2016) (discussing ARR and the opposition of the big auction houses thereto (in the context of distributive rights within copyright law) and concluding that “such opposition shows that *droit de suite* is a true redistributive tool, albeit only in a narrow range of activity,” while not addressing the theoretical claims or the empirical evidence concerning the beneficiaries of ARR).

⁷⁵ *What is DACS?*, DESIGN AND ARTISTS COPYRIGHT SOCIETY, <https://www.dacs.org.uk/about-us/what-is-dacs> [<https://perma.cc/3WES-WEN2>].

⁷⁶ Mark Waugh, *We Owe Artists the Crucial Income Resale Royalties Provide*, ARTSY (Aug. 8, 2018, 5:15 PM), <https://www.artsy.net/article/artsy-editorial-owe-artists-crucial-income-resale-royalties-provide> [<https://perma.cc/A6XH-VV9V>].

⁷⁷ *Id.*

⁷⁸ *Id.*

of the emerging artists in Waugh's dataset received modest amounts compared to the well-known artist in that population.

More importantly, some of the differences in results can be attributed to the differences in the ARR schemes being examined. Sprigman and I based our findings on the ART Act's scheme, while Waugh's data came from the U.K. Several features within the American bill make it less equitable than the British one. First, and foremost, the initial threshold after which royalties are owed is only €1,000 in the U.K., but it is more than four times higher—\$5,000—under the ART Act.⁷⁹ The lower threshold in the U.K. allows many less known artists to receive tiny royalties checks.⁸⁰ Another equality enhancing tool in the U.K. scheme is progressive royalties brackets with a low maximum payment of €12,500.⁸¹ The American scheme, in comparison, includes a flat rate of 5% with a much higher maximum—\$35,000.⁸² That higher cap allows the most successful artist to receive relatively higher royalties under the ART Act.

It might be tempting to suggest that an easy way to mitigate the regressive distributions problem under the ART Act is to adopt the British scheme. It is not that simple. While the British scheme with its low threshold will create a more equitable distribution, doing so will increase the royalties' base and will likely entail a dramatic increase in transaction costs, a topic that will be discussed below.⁸³ In addition, lowering the maximum cap for royalties per work, which can further improve equitable distribution, will be resisted by many ARR opponents, as they perceive them as a basic human right that should not be capped.⁸⁴

This discussion illustrates some issues for which more experimental data can assist decision makers in concluding whether ARR are desirable, and, if so, how such a scheme is to be constructed. The current data on this topic is partial. For example, one of the issues in the data that Sprigman and I collected is that it is based on observations of the current state of secondary art markets in the United States.⁸⁵ But, as further discussed below, the art world might change in reaction to the enactment of ARR. One can question how those changes will affect the inequitable distribution that we documented.

⁷⁹ Compare H.R. 6868, 115th Cong. § 3 (2018), with The Artist's Resale Right Regulations 2006, SI 2006/346, art. 12, ¶ 3(b) (Eng.), http://www.legislation.gov.uk/uksi/2006/346/pdfs/uksi_20060346_en.pdf [<https://perma.cc/7TXJ-NUBZ>] (hereinafter ARR Regulations). Another important distinction is that the U.K. act applies to resales by all professionals including, for example, small galleries, while the American bill applies only to sales by large auction houses. This is why focusing on Sotheby's and Christie's, as Sprigman and I did, *supra* note 65, makes sense in the American context.

⁸⁰ ARR Regulations, *supra* note 79, at Schedule 1. In the U.K. the royalties for a work sold at an auction for €1,000 is €40. *Id.*

⁸¹ *Id.* The highest rate, which requires a 4% royalty, is available just to works sold for up to €50,000. *Id.* The royalties for the next €150,000 in sale price are 3%. *Id.* After that, the rate of royalties falls fast: 1% for the next €150,000; 0.5% for the next €150,000; and only 0.25% for any payment above €500,000. *Id.*

⁸² H.R. 6868, 115th Cong. § 3 (2018).

⁸³ See *infra* Section II.D.

⁸⁴ See, e.g., Donn Zaretsky, *Resale Royalty Update*, ART L. BLOG (July 19, 2014, 12:54 PM), <http://theartlawblog.blogspot.com/2014/07/resale-royalty-update.html> [<https://perma.cc/JH4E-6LYF>].

⁸⁵ Sprigman & Rub, *supra* note 65.

B. Effects on the Secondary Market for Artworks

Opponents of ARR suggest that it will likely negatively affect the secondary markets for artworks.⁸⁶ The duty to pay royalties will discourage buyers and cause some of them to engage in sales in other jurisdictions that do not impose ARR. This risk seems real: First, in many cases, changing the location of a sale from one jurisdiction to another is easy to do; second, the international art world is highly competitive—while the market in the United States is the largest in the world, the markets in China and the United Kingdom are close in their size and infrastructure to the American one.⁸⁷

Indeed, the United States is not the only country in the world that rejects resale royalties. While resale royalties were adopted by more countries in recent decades—a fact that proponents of ARR stress—most of those countries have tiny market shares. Two of the three largest markets—those in the United States and China—are not subject to ARR. And even in the third—that is the United Kingdom—ARR were enacted relatively recently.⁸⁸ While most Western European countries adopted ARR during the twentieth century, the U.K. did not. Then, in 2001, the European Union adopted a directive that forced all member countries to adopt ARR no later than 2006.⁸⁹ Britain fought against the directive but eventually, reluctantly, complied.⁹⁰ It passed ARR regulations in 2006.⁹¹ It, however, used an exception within European directive that allowed “concerned” countries “a limited transitional period during which they may choose not to apply the resale right for the benefit of those entitled under the artist after his death”⁹² and decided that, until 2012, ARR would not apply after the death of the artist.⁹³ Considering that ARR impacts dead artists more than living artists, the U.K. experience is very young. And it might not last for much longer. In 2019, Britain is set to leave the European Union and not

⁸⁶ See, e.g., U.S. COPYRIGHT OFFICE, *supra* note 24, at 51–52; McAndrew & Dallas-Conte, *supra* note 57, at 20–21; Sprigman & Rub, *supra* note 65.

⁸⁷ Joëlle Farchy & Kathryn Graddy, *The Implications of the Artist’s Resale Right*, Standing Committee of Copyright and Related Rights, at 4, World Intell. Prop. Org. [WIPO], Thirty-Fifth Session, SCCR/35/7 (Nov. 6, 2017), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_7.pdf [<https://perma.cc/N8DD-HWGJ>].

⁸⁸ Those three largest markets control the vast majority (close to 80%) of contemporary art auction sales worldwide. *Id.* The fourth largest market, that of France, is about nine times smaller than the third largest (China) and fourteen times smaller than the American market. *Id.* The fifth largest market, that of Germany, is less than half the size of the France one. *Id.* The other markets in the world are much smaller. *Id.*; see also *infra* note 124.

⁸⁹ Directive 2001/84, of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L 272) 32, 32 (stating that in the European Union “the resale right is an unassignable and inalienable right, enjoyed by the author”).

⁹⁰ See, e.g., PHILIP WARD & GRAHAME DANBY, HOUSE OF COMMONS HOME AFFAIRS SELECT COMMITTEE, PARLIAMENT OF THE U. K., SN/HA/4781, ARTIST’S RESALE RIGHT 2–4 (2010), <http://researchbriefings.files.parliament.uk/documents/SN04781/SN04781.pdf>; Christina Fleming, *Artists’ Resale Rights—Brexit’s Positive Impact?*, CHARLES RUSSELL SPEECHLYS: INSIGHTS (Feb. 10, 2017), <https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/commercial/2017/artists-resale-rights---brexits-positive-impact> [<https://perma.cc/SG9E-NFN8>].

⁹¹ ARR Regulations, *supra* note 79.

⁹² Directive 2001/84, *supra* note 89, at 33.

⁹³ Farchy & Graddy, *supra* note 87, at 20.

be subject to its directives.⁹⁴ It is possible that following Brexit, the U.K. will abolish ARR, as some commentators urge it to do.⁹⁵ Considering that reality, implementing ARR in the United States, while ARR are not required in China and might soon be abolished in the U.K., could harm the American secondary market.⁹⁶ That market does not just support the nation's artists, especially as many participants in this market, such as galleries, also invest in the primary market, but it also supports related sectors that provide complementary services to the secondary market.

Proponents of ARR often call for the global adoption of ARR⁹⁷ but, in the meanwhile, they question whether secondary markets are really significantly harmed.⁹⁸ U.S. buyers, the argument goes, will rarely bother to sell works in China and therefore the impact will be marginal.⁹⁹ Mark Waugh, for example, recently commented on the U.K. experience by noting: "Has the secondary market collapsed, or is it depressed? We monitor sales, so we know the answer to that! London is still flourishing, with international galleries joining homegrown dealers to service a global and growing group of collectors."¹⁰⁰

It is quite difficult to evaluate the impact of existing ARR schemes on the size of secondary art markets. First, many factors affect those markets, and isolating the impact of ARR is challenging and requires significant data. The British art market, for example, experienced significant instability in recent years, and its overall size has shrunk. But, considering many other possibly-relevant developments in recent years—for example, the economic crisis of 2008, the sluggish recovery, the increase in digital distribution, the rise of populist leaders around the world, and the Brexit vote and its aftermath—it is difficult to know what the impact of ARR on the

⁹⁴ NIGEL WALKER, HOUSE OF COMMONS, PARLIAMENT OF THE U. K., 7960, BREXIT TIMELINE: EVENTS LEADING TO THE UK'S EXIT FROM THE EUROPEAN UNION 3 (May 23, 2019), <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7960#fullreport> [<https://perma.cc/V53F-YRPL>].

⁹⁵ Compare Fleming, *supra* note 90 with Clare McAndrew, *Why Brexit is a Golden Opportunity for the U.K. Art Market*, ARTSY (Aug. 30, 2018, 4:01 PM), <https://www.artsy.net/article/artsy-editorial-brex-it-golden-opportunity-uk-art-market> [<https://perma.cc/52AL-7LKU>]. It should be noted that ARR was not addressed in the draft agreement that was reached between the British government and the European Union, but in related non-binding understandings the parties noted that resale rights should continue to be protected. See *Political Declaration Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom*, at ¶ 45, XT (2018) 21095, annex, (Nov. 22, 2018), <https://www.consilium.europa.eu/media/37059/20181121-cover-political-declaration.pdf> [<https://perma.cc/YSW4-ESEW>]. The British parliament, however, later rejected the draft agreement, and, implicitly, the non-binding declaration. WALKER, *supra* note 94, at 40. At the time of writing, the fate of Brexit, including whether Britain will maintain its ARR scheme if and when it leaves the European Union, is unclear.

⁹⁶ Sprigman & Rub, *supra* note 65.

⁹⁷ Some of those proponents even started a website to promote that goal. RE SALE RIGHT—ARTISTS ALL OVER THE WORLD, <http://www.resale-right.org> [<https://perma.cc/ZWF6-V9K9>]; see also SAM RICKETSON, PROPOSED INTERNATIONAL TREATY ON DROIT DE SUITE/RESALE ROYALTY RIGHT FOR VISUAL ARTISTS (2015), http://www.cisac.org/content/download/3393/42701/file/SG15-0565_Ricketson_Study-Definitive_2015-07-06_EN.pdf [<https://perma.cc/NNA4-XB5X>].

⁹⁸ See, e.g., McAndrew & Dallas-Conte, *supra* note 57, at 21, 22 n.12; Waugh, *supra* note 76.

⁹⁹ See generally U.S. COPYRIGHT OFFICE, *supra* note 24, at 51–52, 57–58.

¹⁰⁰ Waugh, *supra* note 76.

downsizing of the U.K. secondary markets is.¹⁰¹

Second, many countries adopted ARR decades ago and many countries that adopted it, recently or not, have a small market share.¹⁰² Third, it is not enough to adopt ARR—it also needs to be enforced. Some data from various jurisdictions, including California, suggests that ARR are not well enforced which naturally makes their effect in those jurisdictions negligible.¹⁰³ Fourth, in some jurisdictions, the rate of royalties is much lower than the one proposed in the United States, which proportionally shrinks the impact of ARR. In the U.K., for example, the rate of royalties is just 0.5% for sales over €350,000 and 0.25% for sales over €500,000.¹⁰⁴ Naturally, with such small rates the impact of resale royalties is quite small and hard to detect.¹⁰⁵

The existing data on the effect of resale royalties on secondary markets is lacking and, at times, anecdotal. For example, some have claimed that in the 1960s “the [art] market moved from Paris to the U.S. and U.K.” partly because of “a complicated system of taxes and royalties on art sales that drove both buyers and sellers away from France and towards more liberal trading regimes.”¹⁰⁶ Relatedly, recently, a group of leaders in the French art market published an open letter to their President, Emmanuel Macron, warning him, among others, that if the United Kingdom cease to require ARR payments post-Brexit it might “weaken the French position in a competitive art market economy.”¹⁰⁷

In California, shortly after the passage of the CRRA, Sotheby’s decided to cease holding contemporary art auctions in Los Angeles, which arguably harmed California’s art market.¹⁰⁸ However, to the best of my knowledge, there is only one study concerning the impact of the CRRA on California’s art market and it concluded that the CRRA shrank it, especially by harming small galleries.¹⁰⁹ However, considering that the CRRA was rarely enforced, it is unlikely that the impact was

¹⁰¹ See *infra* note 112 and accompanying text.

¹⁰² See *supra* note 88. See also *The Contemporary Art Market Report: Renewed Growth*, ART PRICE (2017), <https://www.artprice.com/artprice-reports/the-contemporary-art-market-report-2017/renewed-growth> [<https://perma.cc/9CN8-G45C>].

¹⁰³ Anna J. Mitran, *Royalties Too?: Exploring Resale Royalties for New Media Art*, 101 CORNELL L. REV. 1349, 1370 (2016) (“The California Act is often criticized for poor enforcement, and even France, with a large infrastructure of collecting organizations . . . in place, cannot always collect royalties from non-auction sales.”).

¹⁰⁴ ARR Regulations, *supra* note 79.

¹⁰⁵ In the first twelve years in which ARR have existed in the U.K. (2006–2018), including six in which they have applied to dead and living artists, ARR have generated a mere sixty-five million pounds in royalties. Waugh, *supra* note 76. In 2014 the effective royalty rate on post-war contemporary and modern art was only 0.64%. *Id.* In comparison, the data that Sprigman and I collected, *supra* note 65, suggests that just two large auction houses in the U.S. would have generated about \$1.2 million a month in royalties, with an effective royalty rate in those two organizations of over 4%.

¹⁰⁶ McAndrew, *supra* note 95.

¹⁰⁷ Alex Capon, French trade bodies call on President Macron to stop UK art market gaining an advantage from Brexit, ANTIQUES TRADE GAZETTE (Feb. 8, 2019), <https://www.antiquesradegazette.com/news/2019/french-trade-bodies-call-on-president-macron-to-stop-uk-art-market-gaining-an-advantage-from-brexit>.

¹⁰⁸ U.S. COPYRIGHT OFFICE, *supra* note 24, at 22.

¹⁰⁹ See Tom R. Camp, *Art Resale Rights and the Art Resale Market: An Empirical Study*, 28 BULL. COPYRIGHT SOC’Y U.S.A. 146, 149 (1980).

significant.

The data from the United Kingdom is similarly lacking and inconclusive. Early studies—one that was published in January 2008 and another one that was published in 2011, both based on data up to 2007—did not find evidence that ARR diverted business away from the U.K. art market.¹¹⁰ However, those studies include less than two years' worth of data since the implementation of ARR, and during a time in which ARR applied only to living artists.¹¹¹ Recent anecdotal data is inconclusive, with opponents and proponents of ARR citing partial data to show that ARR damaged or did not damage the U.K. secondary markets.¹¹²

C. *Effects on the Primary Markets for Artworks*

Possibly the most controversial claim that the opponents of ARR make is that they are likely to reduce prices in the primary market for artworks. The argument is simple yet powerful. One of the factors that buyers take into account in making rational purchasing decisions is the value of the items purchased in resale markets. Reducing their potential profits, as ARR do, will therefore reduce their willingness to pay, and therefore will lower prices in the primary market.¹¹³ The argument is powerful because the primary market for artworks is the bloodline of the vast majority of artists, including young and emerging artists. Therefore, if the argument is correct, ARR reduce the income of all artists just to compensate the most successful and rich artists. This is why ARR is sometimes described by their opponents as a regressive tax system—one that transfers wealth from the artist population in general to the richest subset thereof.¹¹⁴

¹¹⁰ GRADDY ET AL., *supra* note 64; Chanont Banterghansa & Kathryn Graddy, *The Impact of the Droit de Suite in the UK: An Empirical Analysis*, 35 J. CULT. ECON. 81, 97–98 (2011).

¹¹¹ Relying on such a short period, while valuable, is necessarily lacking because it is difficult to isolate other factors that contribute to the size of the market in that period. The authors of those studies discuss some of those limitations. See Banterghansa & Graddy, *supra* note 110, at 98.

¹¹² Compare, for example, Fleming, *supra* note 90 (“Post War & Contemporary art sales in the UK . . . are now 37% lower than their peak in 2008. Within the Post War & Contemporary art sector, sales of work of living artists at auction reached \$434 million in 2016, representing a decline of 41% year-on-year against a global decline of just 7%.”), with Abby Yolda, *Brexit and Artists’ Copyright: Making the Case for Continued Protection of Creators’ Rights*, A-N (Mar. 13, 2017), <https://www.a-n.co.uk/news/brexit-artists-copyright-making-case-continued-protection-creators-rights> [<https://perma.cc/PZR8-CP5C>] (“[W]ith the UK art market the second largest in the world and valued higher in 2015 than when ARR was first introduced in 2006 (even with recovering from the global recession), the argument that ARR has had a negative impact on the UK art trade is unfounded.”). See also DIGITAL, CULTURE, MEDIA, AND SPORT COMMITTEE, THE POTENTIAL IMPACT OF BREXIT ON THE CREATIVE INDUSTRIES, TOURISM AND THE DIGITAL SINGLE MARKET, H.C., at 170 – 72 (U.K.), <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmmeds/365/36507.htm> [<https://perma.cc/4SAT-4YCR>] (reporting on conflicting claims concerning the impact of ARR on the British secondary markets).

¹¹³ See Rub, *supra* note 22, at 108.

¹¹⁴ Sprigman & Rub, *supra* note 65 (“This reverse-Robin Hood story is not some bug in the system—it is its main feature. . . . Resale royalties schemes are a regressive tax: they take from the poor and give to the rich.”); see also Frye, *supra* note 20, at 241 (“Opponents argue that the resale royalty right is both inequitable and inefficient, because it benefits successful artists at the expense of unsuccessful artists by lowering prices on the primary market . . .”); Rub, *supra* note 18, at 7 (“[R]esale royalties . . . transfer income from younger to older and more successful artists.”).

Proponents of ARR reject this claim by making several possible counter-arguments: first, many buyers of fine art do not buy it as an investment but solely because they appreciate the work, want to hold it, or only enjoy it aesthetically.¹¹⁵ For those buyers, the potential profits from resale are mostly irrelevant. Second, even those who buy as an investment (or partly as an investment) will, in many cases, just absorb the additional costs of resale royalties and will not pass them to the artists from whom they buy art. Moreover, those buyers might discount the royalties in their purchasing decision. Rationally, the argument goes, bringing expected future resale royalty payments to present day values make the low royalties almost negligible. Moreover, buyers, like all humans, suffer from bounded rationality. As such, ARR, which are expected in the far future, are unlikely to affect potential buyers negatively. Finally, many buyers arguably would be happy to know that their actions support artists.

One can see that those counter-arguments cannot rule out that some buyers will take ARR into account in making their purchasing decisions, but it is unclear how big that group is. If it is small in size, the harm to the primary market might be minimal and hardly observable. Of course, the existence of a price decrease in the primary market and its magnitude are affected by other factors such as the royalty rate and their de facto enforceability. A low royalty rate, like that in the U.K., might make the impact on ARR so small that it will not be easily observable.

There is only scarce data concerning the impact of ARR on primary markets.¹¹⁶ As with secondary markets, it is quite difficult to isolate the effects of ARR on any market and separate it from other factors that can affect it.¹¹⁷ In addition, and probably more importantly, primary art markets are drenched in secrecy.¹¹⁸ Unlike the big auction houses, artists and their gallerists do not publish the prices paid in the primary market.¹¹⁹ As such, it is almost impossible to conduct a systematic study on the impact on primary art markets. This problem might not be resolvable even if more jurisdictions adopt ARR.

D. *The Administrative Costs of ARR*

Opponents of ARR claim that they are very expensive to administer. I explained this issue elsewhere:

[R]esale royalties do not just transfer income from younger to older and

¹¹⁵ Michael B. Reddy, *The Droit de Suite: Why American Fine Artists Should Have the Right to a Resale Royalty*, 15 LOY. L.A. ENT. L.J. 509, 529 (1995).

¹¹⁶ One study from the United Kingdom, GRADDY ET AL., *supra* note 64, at 2, did suggest to have that information and it concluded that no impact on primary markets was observed. There are multiple issues with this study, including that it was published in January 2008, only two years after ARR were implemented and when they applied only to living artists.

¹¹⁷ See *supra* Section II.B.

¹¹⁸ See Banterghansa & Graddy, *supra* note 110, at 83–84.

¹¹⁹ Anna Louie Sussman, *The Strategies Art Dealers Use to Discount Artists' Work*, ARTSY (Aug. 20, 2018, 5:19 PM), <https://www.artsy.net/article/artsy-editorial-strategies-art-dealers-discount-artists-work>. [<https://perma.cc/WYE4-UELS>].

more successful artists. They also waste resources along the way because of the significant transaction costs of running the resale royalty rights system. These costs include, among other things, costs of locating the authors and their heirs, costs of monitoring, and costs of litigation.¹²⁰

ARR schemes differ in their handling of those administrative costs. Some systems, such as the British one and the one envisioned by the ART Act, expect large private artists' rights organizations to administer the collection and distribution of royalties in return for a share thereof.¹²¹ Other systems, such as the one created by the CRRA, require a public agency, such as the California Arts Council, to provide that function.¹²² Both systems are wasteful. Every dollar that is spent on the administration of the ARR is a dollar that could have been spent on a more productive use, whether in support of the arts or not. Nevertheless, it is unclear which of those schemes involve higher administrative costs.

Other features of each ARR scheme can significantly impact the administrative costs. Those costs are likely correlated to the number of transactions that are subject to royalty payments. This is why every existing or envisioned ARR scheme includes a threshold for low-value works that do not trigger resale rights.¹²³ Keeping that threshold low might seem fairer as it allows more artists to be paid but it also increases the number of transactions and wastes significant administrative costs. Indeed, it is probably inefficient to ask an agency to chase an artist just to give her a tiny royalty check.

Another design feature that can affect administrative costs is the type of sales that are subject to resale rights. If ARR are limited to sales at large public auctions, as the ART Act suggests, then their economy of scale will likely allow those auction houses and the organizations that distribute the royalties to relatively effectively manage them. Expanding ARR to smaller galleries or individual sellers, as is the case with the CRRA, will increase those costs and can significantly burden those small sellers.

While those arguments are likely correct in theory, there is little data concerning the actual costs to the collecting organization and practically no data as to the costs for sellers and their agents.

PART III: CAN STATES EFFECTIVELY EXPERIMENT WITH ARR?

The previous Part showed that ARR are controversial, that proponents and opponents thereof make conflicting claims regarding their impact, and that the available experimental data that could help decision-makers explore those questions is scarce. This Part considers whether states can effectively fill that gap. The next Part considers whether they are allowed to do so.

On the one hand, states can generally provide experimental information by enacting different legal rules, enforcing those rules, and examining the impacts thereof. The existence of more than fifty different legal systems within the United

¹²⁰ Rub, *supra* note 18, at 7.

¹²¹ See H. R. 6868, 115th Cong. § 3 (2018); ARR Regulations, *supra* note 79, at art. 14, ¶ 1.

¹²² E.g., CAL. CIV. CODE § 986(a) (West 2019).

¹²³ See, e.g., *supra* note 79 and accompanying text.

States can provide rich data. In theory this can be done in the context of ARR as well, especially because there are many possible schemes for ARR legislation, as was discussed in Part II. In practice, however, while state experimentalism isn't worthless, there are significant limits to state-enacted ARR and their empirical value.

First, while there are more than fifty legal systems in the United States, many states do not have a large, well-developed secondary art market. The New York resale art market is likely bigger than all the other markets in the country combined, especially when it comes to large public auction houses.¹²⁴ Indeed, some states have tiny markets that might not be able to generate meaningful ARR data, and the significant variation in market sizes will undermine the comparative value of the data generated.

Second, ARR schemes can be circumvented, especially when they are enacted by smaller states, where sales can easily be completed over state lines. Let's assume that Rhode Island enacts ARR but its neighboring states, Connecticut and Massachusetts, do not. Examining the art market in Rhode Island following such a reform might provide misleading information. For example, it is possible that the impact of Rhode Island's ARR on its primary prices, even if observable, will be minimal because the state's largest city, Providence, is an hour away from both Connecticut's and Massachusetts's largest cities (Hartford and Boston), which will allow Rhode Island's sellers to easily circumvent the ARR scheme.¹²⁵

One way in which states can make their ARR more effective is by enforcing them on out-of-state transactions. California's ARR, for example, applies to sales in California and sales by California residents, regardless of the location of the sale.¹²⁶ A similar provision was included in all the bills that states considered in the late 1970s.¹²⁷ There are, however, several issues with such legal mechanisms. First, they can still be circumvented. For example, a California seller can transfer the work to a Delaware corporation which will then sell it in Nevada. States will need to develop sophisticated legal tests to identify and prevent such moves, which might not be trivial. Second, those mechanisms will harm, possibly significantly, the value of the experimental data produced. Once states enforce their ARR scheme on sales in other states, attributing a perceived phenomenon (e.g., a price decrease in a primary market in a certain state) to a specific state's legislation becomes more challenging. Third, as further discussed in Part IV, enforcing ARR on out-of-state transactions might put the constitutionality of such bills in doubt.

As further discussed in Part IV, the constitutionality of those long-arm acts is especially questionable when state-enacted ARR schemes place liability on

¹²⁴ In 2017, 43% of the *worldwide* auction revenue from contemporary art, which is the main market for ARR, was concentrated in New York. *The Contemporary Art Market Report: Renewed Growth*, *supra* note 102. London, Hong Kong, and Beijing accounted, together, for an additional 40%. *Id.* The 540 cities worldwide that had fine art auction markets in 2017, accounted, together, for just 17% of that market. *Id.*

¹²⁵ This discussion assumes that the work itself needs to move in order to have the sale in another state. This might not be the case, which will make circumvention even easier. The question of how to determine the location of a sale transaction is beyond the scope of this work.

¹²⁶ CAL. CIV. CODE § 986(a) (West 2019).

¹²⁷ See *supra* Section I.D.

out-of-state agents of their residents—i.e., the large auction houses. Consequently, states that would like to enact effective ARR have a difficult choice to make: should liability be placed on out-of-state auction houses for selling artworks of their residents outside the state? If the answer is no, circumventing ARR becomes easier because it is difficult to effectively enforce ARR against the sellers themselves, partly because the auction houses do not publish the identity of sellers (or buyers).¹²⁸ If the answer is yes, the connection between the states and the auction house might be too remote to make the ARR legal. When California considered its ARR legislation it struggled with this choice and eventually chose to enact a broader law that applied to out-of-state agents, knowing that it might undermine the CRRA's constitutionality.¹²⁹ As expected, the CRRA was challenged on those grounds. To those challenges, this Article now turns.

PART IV: THE CONSTITUTIONALITY OF STATE-ENACTED ARR

The constitutionality of state-enacted ARR can be challenged on three main grounds. First, such a scheme, when it applies to out-of-state transactions, may violate the dormant Commerce Clause. Second, an ARR scheme, whether it applies to out-of-state transactions or not, may be preempted by the federal Copyright Act. Third, ARR schemes, if applied to works that were previously purchased, might violate the Fifth Amendment's prohibition on taking without compensation, as it applies to the states.¹³⁰

California's Resale Royalties Act (CRRA) was subject to all those challenges, which, once fully litigated, left it as a de facto dead letter. The Ninth Circuit addressed the constitutionality of the CRRA in three opinions. In the first—*Morseburg v. Balyon*—the Ninth Circuit held, in 1980, that the CRRA was not preempted by the Copyright Act of 1909.¹³¹ The Copyright Act of 1909 did not include an express preemption provision and therefore the court applied the general principles of field preemption and conflict preemption and concluded that CRRA

¹²⁸ See *Jenack v. Rabizadeh*, 22 NY 3d 470 (2013) (holding that auctioneers do not require to disclose the name of the sellers after stating that “Jenack and amici argue that . . . it is a time honored and necessary custom and practice of auction houses to maintain the confidentiality of the seller.”). See also Tom Mashberg, *Lawyers Fight to Keep Auction Sellers Anonymous*, N.Y. TIMES (Feb. 3, 2013), <https://www.nytimes.com/2013/02/04/arts/design/battling-to-keep-auction-sellers-anonymous.html> [<https://perma.cc/624D-KJ8U>].

¹²⁹ See CAL. CIV. CODE § 986(a) (West 2019).

¹³⁰ This Part focuses on the first two grounds. For several reasons, the third is of less concern and thus falls outside the scope of this Article. First, the Taking Clause argument has nothing to do with the federalism questions that are the focus of this Article. If Congress ever decides to enact ARR it will face a similar question. Second, to the best of my knowledge, the Taking Clause claim was never fully litigated. Third, the Taking Clause problem can easily be avoided, by applying ARR prospectively and not retroactively. See U.S. COPYRIGHT OFFICE, *supra* note 24, at 60-63 (“[I]n the interests of avoiding constitutional doubt and of minimizing the federal government’s exposure to unnecessary litigation, we recommend that Congress strongly consider making any resale royalty legislation prospective in application.”). As such, the Taking Clause argument does not go to the heart of the ARR scheme itself. See also *infra* note 138.

¹³¹ *Morseburg v. Balyon*, 621 F.2d 972, 975-78 (9th Cir. 1980).

survives both.¹³² That decision had a limited effect because the Copyright Act of 1909 was replaced by the Copyright Act of 1976, which became effective in 1978, one year after the effective date of CRRA.¹³³

It took thirty-five years until the Ninth Circuit addressed the CRRA again. In that timeframe the resale rights were seldom enforced.¹³⁴ Then, in 2011, a group of artists and heirs filed class action complaints against the two largest auction houses in the country—Sotheby’s and Christie’s—as well as eBay, for failing to comply with the CRRA.¹³⁵ That dispute reached the Ninth Circuit twice. First, in *Sam Francis Foundation v. Christies, Inc.* in 2015, the Ninth Circuit decided en banc, over a partial dissent by three judges, that the CRRA, as far as it applies to out-of-state sales, violates the dormant Commerce Clause.¹³⁶ In 2018, in *Close v. Sotheby’s*, the court decided that the surviving parts of the CRRA are expressly preempted by the Copyright Act of 1976, which means that it cannot apply to any resales after January 1, 1978, the federal act’s effective day.¹³⁷ Collectively, those decisions mean that the CRRA applies, at most, solely to artworks that were resold in California in 1977.¹³⁸

This Part critically analyzes those decisions and the issues they raised and suggests that certain state-enacted ARR should survive constitutional scrutiny, and that certain features within an ARR scheme, some of which are lacking in the CRRA, may help it do so.

A. State ARR and Out-of-State Sales: The Dormant Commerce Clause

The first challenge to state-enacted ARR is rooted in the dormant Commerce Clause. While the Commerce Clause grants Congress power to “regulate Commerce . . . among the several States,”¹³⁹ the Supreme Court has “consistently held this language to contain a further, negative command, known as the dormant Commerce Clause,” which prevents states from enacting certain measures that harm interstate commerce.¹⁴⁰ The goals of the dormant Commerce Clause track those of the Commerce Clause itself: “the conviction that in order to succeed, the new Union

¹³² *Id.* at 976–78.

¹³³ *See id.* at 975.

¹³⁴ U.S. COPYRIGHT OFFICE, *supra* note 24, at 22–23; *see also* Patricia Cohen, *Artists File Lawsuits, Seeking Royalties*, N.Y. TIMES (Nov. 1, 2011), <https://www.nytimes.com/2011/11/02/arts/design/artists-file-suit-against-sothebys-christies-and-ebay.html> [<https://perma.cc/GH74-EJQF>] (reporting that since the CRRA’s enactment, about four hundred artists had received a total of \$328,000).

¹³⁵ *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1322 (9th Cir. 2015) (en banc).

¹³⁶ *Id.*, at 1324–25.

¹³⁷ *Close v. Sotheby’s*, 894 F.3d 1061, 1072 (9th Cir. 2018).

¹³⁸ Two additional obstacles stand in the way of potential CRRA plaintiffs. First, claims under the CRRA can be brought only “within three years after the date of sale or one year after the discovery of the sale, whichever is longer.” CAL. CIV. CODE § 986(a)(3) (West 2019). Second, in dictum, the Ninth Circuit suggested that requiring an individual who purchased artwork before the enactment of the CRRA (1976) and resold it in 1977 to pay resale royalties might violate the Takings Clause. *Close*, 894 F.3d at 1075. *See also infra* note 130.

¹³⁹ U.S. CONST. art. I, § 8, cl. 3.

¹⁴⁰ *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015).

would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”¹⁴¹

In *Sam Francis*, the Ninth Circuit held that under the dormant Commerce Clause, California could not require resale royalties in connection with out-of-state transactions.¹⁴² In reaching that conclusion, the Ninth Circuit relied *exclusively* on the unusual extraterritoriality doctrine as expressed by a 1989 Supreme Court decision—*Healy v. Beer Institute*—that stated four conditions “concerning the extraterritorial effects of state economic regulation.”¹⁴³ The first of those conditions is that the “[dormant] Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders.”¹⁴⁴ The Ninth Circuit held that the CRRA fails that condition.¹⁴⁵

Applying *Healy* to the CRRA, in the way that the Ninth Circuit did, is, however, over-simplistic and problematic. *Healy*, like many of the cases that the Supreme Court built upon in that decision, dealt with significant limitations on transactions that took place in other jurisdictions. In *Healy*, the Court struck down a Connecticut law that required beer sellers to sell beer in Connecticut at a price that was equal to or lower than that of neighboring states.¹⁴⁶ One of the stated motivations of that law was to discourage interstate commerce, as Connecticut was worried that its residents would circumvent the state sale tax by buying beer across state lines.¹⁴⁷ The *Healy* rule, however, needs to be applied carefully in other contexts. Indeed, as Jack Goldsmith and Alan Sykes noted, courts cannot literally apply the *Healy* rule and strike down every state law that regulated any out-of-state activity.¹⁴⁸ The CRRA seems significantly less restrictive than the law the Court considered in *Healy*, and therefore courts should be hesitant to strike it down simply because it affects out-of-state conduct.

The Ninth Circuit’s simplistic reliance on *Healy* also ignores the development in the law since the late 1980s. As Brannon Denning noted, *Healy* “represented extraterritoriality’s high tide.”¹⁴⁹ However, “[t]he Court has since retreated; in 2003 [in *Pharm. Research & Mfrs. Ass’n v. Walsh*, 538 U.S. 644 (2003)], it seemed to limit the extraterritoriality principle dramatically” and therefore “[a]t this point, the extraterritoriality principle looks to be quite moribund.”¹⁵⁰ The First Circuit similarly

¹⁴¹ *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

¹⁴² *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015).

¹⁴³ *Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989).

¹⁴⁴ *Id.* at 336 (quotations omitted).

¹⁴⁵ *Sam Francis Found.*, 784 F.3d at 1323.

¹⁴⁶ *Healy*, 491 U.S. at 326, 343.

¹⁴⁷ *Id.* at 326–27.

¹⁴⁸ See Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 790 (2001) (“[The *Healy*] formulation is clearly too broad. Scores of state laws validly apply to and regulate extrastate commercial conduct that produces harmful local effects.”).

¹⁴⁹ Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 979 (2013).

¹⁵⁰ *Id.* at 979.

called the doctrine “the dormant branch of the dormant Commerce Clause.”¹⁵¹ The Sixth Circuit was even harsher in suggesting that “the extraterritoriality doctrine, at least as a freestanding branch of the dormant Commerce Clause, is a relic of the old world with no useful role to play in the new.”¹⁵²

Indeed, the Ninth Circuit’s succinct application of the extraterritoriality doctrine seems misguided. Once that crude approach is abandoned, the CRRA, as a state law that affects out-of-state behavior, should be subject to the common dormant Commerce Clause tests that evaluate whether it is discriminatory against inter-state commerce and whether it survives a balancing test.

Enforcing the CRRA is not inconsistent with the Supreme Court caselaw. The Court recognizes that states can regulate *streams of income* earned by their residents, even if originating out-of-state. The main example of such permissible actions is the imposition of state tax on the out-of-state income. Courts repeatedly recognize that, subject to certain limitations, further discussed below, states are permitted to create such a taxing scheme.¹⁵³ The Constitution allows a state to tax that income even though it likely indirectly affects the trade in another state.

In *Sam Francis*, the Ninth Circuit rejected this claim because resale royalties are not taxes.¹⁵⁴ Indeed, they are not. Taxes are paid to the state while resale royalties are paid to the artists or their heirs. But that, in itself, should not be the end of the analysis. While courts sometimes use differently worded tests in the context of tax and non-tax dormant Commerce Clause cases, there should not be a fundamental difference in the scope of the doctrine in those contexts. In both contexts the doctrine is rooted in the same constitutional provision and promotes the same goals.¹⁵⁵

The real question is therefore not whether resale royalties are taxes but what are the differences and similarities between the two, from a dormant Commerce Clause perspective, that would justify separate or similar treatment. The Supreme Court’s recent dormant Commerce Clause caselaw emphasizes that the inquiry is non-formalistic and should instead apply “a more practical approach that look[s] to the economic impact of” state law.¹⁵⁶ Indeed, “[t]he Court’s Commerce Clause jurisprudence has ‘eschewed formalism for a sensitive, case-by-case analysis of purposes and effects.’”¹⁵⁷ Once formalist classifications are abandoned, at their core, both resale royalties and state tax regulate the stream of income coming to a resident

¹⁵¹ *IMS Health Inc. v. Mills*, 616 F.3d 7, 29 n.27 (1st Cir. 2010).

¹⁵² *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 378 (6th Cir. 2013).

¹⁵³ *See, e.g.,* *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 478–90 (5th ed. 2015).

¹⁵⁴ *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1324 (9th Cir. 2015).

¹⁵⁵ CHERMERINSKY, *supra* note 153, at 478 (“In general, the same basic principles apply to state taxation of interstate commerce as to state regulation of commerce”); Adam B. Thimmesh, *A Unifying Approach to Nexus Under the Dormant Commerce Clause*, 116 MICH. L. REV. ONLINE 101, 105 (2018) (“Regardless of whether under the tax or nontax formulation, the Court’s requirements are all instrumental to the basic goal underlying its dormant Commerce Clause doctrine—the pursuit of a common national market.”).

¹⁵⁶ *Wynne*, 135 S. Ct. at 1796.

¹⁵⁷ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2094 (2018) (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)).

from out-of-state activities. If the focus is, as the Supreme Court implied, on the rationales for the dormant Commerce Clause doctrine,¹⁵⁸ then from an “economic impact” perspective, the effects of ARR are quite similar to those of state taxes.

The dormant Commerce Clause prohibits states from placing an undue burden on interstate commerce.¹⁵⁹ Here, the only relevant parties whose actions might be affected by state tax or state-enacted ARR are the payors-sellers. However, from their perspective there is little difference between the duty to pay resale royalties and a duty to pay taxes for the sale of artworks.¹⁶⁰ Both duties do not directly restrict the transaction itself but require remission of a certain percentage thereof to a third party. From the payor-seller’s perspective, the identity of the ultimate beneficiary of the payment seems irrelevant. Because the payor is the relevant economic actor in this scenario, there seems to be no real differences between the impact of state tax and state-enacted ARR on interstate commerce. Granted, ARR can impact out-of-state transactions. For example, if royalties are due just for sales at public auctions, sellers might be incentivized to use private sales instead or to hold on to works for longer. However, that would have been the exact effect if a state decided to tax the income of its residents from out-of-state sales of art at auctions.¹⁶¹

Therefore, it seems that, from a dormant Commerce Clause perspective, there are significant similarities between state-enacted ARR and state income tax. This, however, does not conclude the inquiry. Indeed, states are not free to impose any tax they wish on out-of-state transactions. The Supreme Court caselaw places four requirements on state taxation of out-of-state transactions: “it (1) applies to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3)

¹⁵⁸ The Supreme Court recently summarized these rationales as: “First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce.” *Wayfair*, 138 S. Ct. at 2091; see also Thimmesch, *supra* note 155, at 102 (describing the doctrine as “an exercise of judicial power to override state autonomy in support of the framers’ goal of a common national market”).

¹⁵⁹ *United States v. Lopez*, 514 U.S. 548, 579–80 (1995).

¹⁶⁰ In *Sam Francis*, the Ninth Circuit implied that the CRRA might be more burdensome than state tax because it requires the seller to seek out the artists and pay them directly. *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1324 (9th Cir. 2015). The court did not focus on this argument, and for good reasons. As is typical to ARR legislation, the CRRA states that payment should be made to the artist, but if she is not found quickly—ninety days in the case of the CRRA—it should be remitted to an agency—a state agency in the case of the CRRA—that will transfer it to the artist. CAL. CIV. CODE § 986(a)(2) (West 2019). The CRRA, like similar ARR bills, does not prescribe any special actions that a seller needs to take to locate such artists nor does it provide for liability for a sluggish search, provided that the royalties were transferred on time to the state agency. *Id.* § 986(a)(3). In other words, the Ninth Circuit was simply wrong to suggest that “[i]f the seller or the seller’s agent fails to locate the artist adequately, the artist may sue for damages plus attorney fees.” *Sam Francis Found.*, 784 F.3d at 1324 n.1. Liability under the CRRA is triggered when “a seller . . . fails to pay an artist . . . or fails to transfer such amount to the Arts Council.” CAL. CIV. CODE § 986(a)(3) (West 2019) (emphasis added).

¹⁶¹ *Cf. Sam Francis*, 784 F.3d at 1323 (pointing out that “if a California resident has a part-time apartment in New York, buys a sculpture in New York from a North Dakota artist to furnish her apartment, and later sells the sculpture to a friend in New York, [the CRRA] requires the payment of a royalty to the North Dakota artist—even if the sculpture, the artist, and the buyer never traveled to, or had any connection with, California” but failing to notice that the same is true if California law would have required its residents to pay tax on out-of-state income, which it does).

does not discriminate against interstate commerce, and (4) is fairly related to the services the State provides.”¹⁶²

In analyzing the long-arm of state-enacted ARR schemes, it is fruitful to distinguish between the burden on state residents and that on their out-of-state agents. Burdening those agents—e.g., Sotheby’s and Christie’s—might be problematic from a dormant Commerce Clause perspective. The question is whether those companies have enough connection to a state that passed an ARR statute that it can be burdened by its regulatory power? The relevant activity itself—an out-of-state sale—is probably not enough and does not create a substantial nexus with the state.

Recently, in *South Dakota v. Wayfair*, the Supreme Court reexamined the nexus requirement in connection with a state law that required out-of-state corporations to collect payments, in that case, sales and use tax, that residents were obliged to pay for online purchases.¹⁶³ Over a strongly worded dissent, the Court held that physical presence in the taxing state is not needed.¹⁶⁴ Nevertheless, as the Court explained, a substantial nexus is still required and that “[S]uch a nexus is established when the taxpayer [or collector] ‘avails itself of the substantial privilege of carrying on business’ in that jurisdiction.”¹⁶⁵

While the exact scope of the nexus requirement post-*Wayfair* is unclear,¹⁶⁶ it is unlikely that it is satisfied just by serving a seller who is a resident of a certain state. Indeed, an auction house does not “avail[] itself of the substantial privilege of carrying on business”¹⁶⁷ in a state by a mere sale of a property of that state’s resident. In fact, it’s hard to see *any* benefits, substantial or not, direct or indirect, that the state bestows on the auction house in such a scenario. The question is therefore whether there are other factors that create enough nexus between California and the auction houses. Christie’s, for example, is not incorporated in California and, until 2017, did not have offices there,¹⁶⁸ and therefore, before 2017, it is doubtful California could have forced Christie’s to comply with the CRRA, regardless of the residency of Christie’s clients.

While it is obviously easier to enforce an ARR scheme on a centralized organization, such as the major auction house, a dormant Commerce Clause analysis of the nexus requirement might undermine the legality of such a scheme. The nexus rule is designed to prevent companies and individuals from being subject to layers of regulations,¹⁶⁹ and in this case, because auction houses serve the residents of all states, it shields companies like Christie’s from complying with the resale royalties

¹⁶² *Wayfair*, 138 S. Ct. at 2091; see also *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 286–87 (1977).

¹⁶³ *Wayfair*, 138 S. Ct. at 2087.

¹⁶⁴ *Id.* at 2099.

¹⁶⁵ *Id.* (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)).

¹⁶⁶ See generally Thimmesch, *supra* note 155.

¹⁶⁷ *Wayfair*, 138 S. Ct. at 2099.

¹⁶⁸ See *About Christie’s Los Angeles*, CHRISTIE’S (2019), <https://www.christies.com/exhibitions/los-angeles> [<https://perma.cc/8QHD-NQAJ>].

¹⁶⁹ *Wayfair*, 138 S. Ct. at 2093 (“The *Quill* majority expressed concern that without the physical presence rule ‘a state tax might unduly burden interstate commerce’ by subjecting retailers to tax-collection obligations in thousands of different taxing jurisdictions.” (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 313 n.6 (1992))).

and other long-arm rules of all states.

The analysis concerning residents is different. Residency itself can establish a substantial nexus to a state, and therefore, states can regulate the stream of income of their residents. Nevertheless, in doing so, states must make sure not to violate the dormant Commerce Clause in other ways, and, in particular, to make sure that their regulations do not discriminate against interstate commerce.

The CRRA might violate the dormant Commerce Clause when it comes to residents because it does not account for the potential problem of double charges.¹⁷⁰ When it comes to states' taxation, the Supreme Court applies what is known as the "internal consistency" test to evaluate this question: "This test, which helps courts identify tax schemes that discriminate against interstate commerce, 'looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.'"¹⁷¹

The CRRA fails this test. If every state in the Union would have passed an act identical to the CRRA, then a sale by a resident of State A in State B would have been charged resale royalties twice: once by the State or residency (A) and once by the State in which the sale occurred (B). In comparison, State A residents would have to pay royalties only once for sales in State A. Therefore, the CRRA discriminates against interstate commerce and is unconstitutional.

This unconstitutionality in the CRRA is, however, easily fixable. A state that wishes to avoid this illegality just needs to account for it. For example, the state can still require its residents to pay resale royalties, even for out-of-state sales, if it gives credit for royalties that are paid under the law of the state in which the transaction took place. Such an act will not discriminate against interstate commerce.

While this Section focuses on the comparison between ARR and taxation of a sale, and thus it utilizes the tax-related caselaw, a similar result could have been reached under the non-tax related dormant Commerce Clause caselaw. Since the CRRA affects out-of-state activity, it can be scrutinized under the dormant Commerce Clause jurisprudence. The first step in such an inquiry is considering whether it discriminates against inter-state commerce.¹⁷² In principle, ARR statutes, at least if they account for the possibility of double-charges, discussed above, do not discriminate against inter-state commerce because they do not create burdens on non-residents or out-of-state transactions that residents or in-state transactions are exempted from. As such, it is hard to see how they promote any protectionist motivation or goals.

Once a state law is determined to be nondiscriminatory it will likely survive a dormant Commerce Clause challenge.¹⁷³ In fact, it has been more than thirty-five years since the Supreme Court invalidated a nondiscriminatory state or local law

¹⁷⁰ This argument was not raised in the recent litigation before the Ninth Circuit.

¹⁷¹ *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1802 (2015) (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995)).

¹⁷² CHEMERINSKY, *supra* note 153, at 455.

¹⁷³ *Id.* at 462 ("Generally, although certainly not always, a court upholds the law once it decides that it is not discriminatory.").

because it was unduly burdensome on interstate commerce.¹⁷⁴ Specifically, courts apply the *Pike* balancing test, which states:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.¹⁷⁵

While the *Pike* test provides courts with enormous discretion,¹⁷⁶ and is therefore somewhat unpredictable, it is unlikely that the CRRA is one of the rare state laws that fail that test. The CRRA represents an attempt by California to improve the wellbeing of local artists. As already discussed, burdening out-of-state transactions promotes that goal because it prevents sellers from easily circumventing it. Therefore, even if the CRRA does not eventually benefit artists,¹⁷⁷ as was discussed above, its burden on out-of-state transactions is minimal, as it only requires a small payment to a state agency, which means that it likely survives dormant Commerce Clause scrutiny.

The conclusion is that the Ninth Circuit oversimplified the constitutionality question concerning the CRRA application to out-of-state transactions. State ARR might be able to survive dormant Commerce Clause scrutiny, subject to two main constraints. First, and most important, it probably cannot apply to out-of-state agents who have no contact that satisfies the nexus requirement to the state. In other words, it is quite likely that an auction house cannot be burdened by state-enacted ARR unless it has some connection to the state, such as conducting businesses therein. Second, state-enacted ARR that is triggered by either residency or the location of a transaction must account for the possibility of double payment. Indeed, the analysis concerning the impact of the state ARR scheme and its constitutionality must carefully balance conflicting interests and cannot be decided based on a *per se* rule.

B. Preemption by the Copyright Act

The Supremacy Clause of the U.S. Constitution states that “the Laws of the United States . . . shall be the supreme Law of the Land.”¹⁷⁸ From this Clause

¹⁷⁴ Brannon P. Denning, *The Dormant Commerce Clause Wynnes Won Wins One: Five Takes on Wynne and Direct Marketing Association*, 100 Minn. L. Rev. Headnotes 103, 115 (2016); see *Edgar v. MITE Corp.*, 457 U.S. 624, 646 (1982).

¹⁷⁵ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁷⁶ *CHEMERINSKY*, *supra* note 153, at 462; see *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (“This process is ordinarily called ‘balancing,’ but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.” (citation omitted)).

¹⁷⁷ See *supra* Part II for a discussion concerning the desirability and impacts of ARR schemes.

¹⁷⁸ U.S. CONST. art. VI, cl. 2.

emerged the federal preemption doctrine under which “state laws that conflict with federal law are ‘without effect.’”¹⁷⁹ The Supreme Court case law identifies three main ways in which state and federal laws may conflict. First, when Congress states that certain state laws are preempted the conflict is “expressed.”¹⁸⁰ Second, field preemption exists “[w]hen Congress intends federal law to ‘occupy the field.’”¹⁸¹ Third, conflict preemption exists “to the extent of any conflict with a federal statute.”¹⁸² State law can also be considered conflict preempted if it is an obstacle to the purpose and goals of the federal legislation.¹⁸³

The preemption of the CRRA was discussed by the Ninth Circuit in two cases. In *Morseburg v. Balyon*, the court held that the CRRA does not conflict with the Copyright Act of 1909.¹⁸⁴ In *Close v. Sotheby’s, Inc.*, the court held that the CRRA is expressly preempted by the Copyright Act of 1976, although, due to *Morseburg* and the principle of stare decisis, it is not preempted under the conflict preemption doctrine.¹⁸⁵ This section considers those questions and takes a critical look into those decisions.

i. Does State-Enacted ARR Conflict with the Copyright Act?

Evaluating the tension between state laws and the federal Copyright Act is a complex task. The last major case in which the Supreme Court addressed the preemption power of the Copyright Act was *Goldstein v. California*, decided in 1973 when the Copyright Act of 1909 was still in effect.¹⁸⁶ In that case, the Court held that Congress did not intend to occupy the field and that the Constitution does not preclude states from creating their own copyright-like mechanisms.¹⁸⁷ Still, the Court continued, state law is preempted if it conflicts with the purpose and objectives of the Copyright Act.¹⁸⁸

Evaluating whether state-enacted ARR conflicts with the Copyright Act therefore requires an understanding of the relevant federal scheme and role that state law plays within that scheme.

Federal copyright law creates property rights in intangible information goods but

¹⁷⁹ *Altria Grp. v. Good*, 555 U.S. 70, 76 (2008) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

¹⁸⁰ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

¹⁸¹ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (quoting *California v. ARC America Corp.*, 490 U.S. 93, 100 (1989)).

¹⁸² *Id.*

¹⁸³ *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Another form of conflict preemption is found “where ‘compliance with both federal and state regulations is a physical impossibility.’” *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Florida Line & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)). This form of preemption, sometimes referred to as actual conflict preemption, is irrelevant to state-enacted ARR.

¹⁸⁴ *Morseburg v. Balyon*, 621 F.2d 972, 978 (9th Cir. 1980).

¹⁸⁵ *Close v. Sotheby’s, Inc.*, 894 F.3d 1061, 1068 (9th Cir. 2018).

¹⁸⁶ *See Goldstein v. California*, 412 U.S. 546, 551–52 (1973). The Court addressed copyright preemption again, almost in passing, in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709–11 (1984).

¹⁸⁷ *Goldstein*, 412 U.S. at 567.

¹⁸⁸ *See id.* at 569–70.

leaves the regulation of the markets in which those rights are bought and sold to state law.¹⁸⁹ As a result of *Erie Railroad Co. v. Tompkins*,¹⁹⁰ the legal infrastructure for much of our market economy is rooted in state laws: contract law, corporate law, payment methods and secured transaction laws, and more. Therefore, as a practical matter, federal copyright law cannot operate on its own. Federal copyright law is the roof to a structure that state laws build and sustain.

If state law provides the framework on which federal copyright law operates, it obviously affects it. In other words, state laws systematically, routinely, and unavoidably impact the operation of federal copyright law. The mere effect of one over the other does not, in itself, justify preemption. It is therefore not surprising that in two decisions the Supreme Court rejected challenges to states' laws although they affected the rights of copyright holders.¹⁹¹

That, of course, does not mean that states are free to operate without considering the federal interests as expressed in the Copyright Act. But caution is warranted before finding state laws, especially those that regulate market transactions, preempted. States laws that regulate creative industries should be preempted only when they pose a significant obstacle to federal policy and goals.

When it comes to state-enacted ARR, the federal scheme in question has to do with the right to control the distribution of copyrighted goods. The Copyright Act provides that copyright owners have “the exclusive right . . . to distribute copies . . . of the copyrighted work to the public.”¹⁹² That right is, however, significantly curtailed by the principles of the first sale doctrine. Under that doctrine—also known as copyright exhaustion—“the owner of a particular copy . . . lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy.”¹⁹³ In other words, copyright owners have the right to control when every copy of their copyrighted protected work is placed in the stream of commerce. However, once they are placed there (i.e., sold) with their authorization, the copyright owners' rights with respect to those specific copies are exhausted, meaning that they can now be freely transferred to others.

There is a certain tension between this federal scheme and ARR. The federal scheme requires the copyright owner's consent in primary markets, but it frees

¹⁸⁹ See David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CALIF. L. REV. 17, 24–29 (1999); Guy A. Rub, *Copyright Survives: Rethinking the Copyright-Contract Conflict*, 103 VA. L. REV. 1141, 1152, 1165 (2017).

¹⁹⁰ 304 U.S. 64, 78 (1938) (holding that federal courts do not have the power to create general federal common law when hearing state law claims under diversity jurisdiction, thus limiting the development of federal law in areas such as contract and private property law).

¹⁹¹ *Watson v. Buck*, 313 U.S. 387, 394, 403–04 (1941) (holding that Florida can enforce a specific law that was designed to extensively regulate the relationship between music composers, publishers, and copyright owners); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 126, 131 (1932) (holding that Georgia can tax the royalties from copyrighted movies). See also *Associated Film Distribution Corp. v. Thornburgh*, 683 F.2d 808 (3d Cir. 1982) (rejecting a challenge to a Pennsylvania statutes that regulated the relationship between movie distributor and theaters).

¹⁹² 17 U.S.C. § 106(3) (2012).

¹⁹³ *Id.* § 109(a).

secondary markets from that restraint. ARR is a legal scheme that affects those secondary markets and creates legal norms that do not exist under federal law. Nevertheless, suggesting that this tension *by itself* means that state-enacted ARR are preempted—as the Ninth Circuit came close to declaring in *Close*¹⁹⁴—is absurd. We already saw that state laws systematically affect markets, including secondary markets, in copyrighted goods. Taxing income from copyrighted goods, which the Supreme Court explicitly allowed in *Fox Film Corp. v. Doyal*,¹⁹⁵ is an example for such a permissible action.

The relevant question is, therefore, whether the goals of the federal scheme—and, in particular, the policies underlying the first sale doctrine—are significantly undermined by a state’s ARR scheme. As I have explored elsewhere, the case law and literature identified several possible non-exclusive rationales for that doctrine.¹⁹⁶

The main justification for copyright exhaustion has to do with transaction costs, as the first sale doctrine commonly eliminates the need to get the copyright owner’s consent for transactions in secondary markets.¹⁹⁷ For example, in *Kirtsaeng v. John Wiley & Sons, Inc.*, its last case on this matter, the Supreme Court stressed that without the first sale doctrine “libraries [will need] to obtain permission . . . before circulating or otherwise distributing . . . books,” which, the Court continues, entails significant costs:

How can [the libraries] find, say, the copyright owner of a foreign book, perhaps written decades ago? . . . And, even where addresses can be found, the costs of finding them, contacting owners, and negotiating may be high indeed.¹⁹⁸

The Court also addressed the impact of that increase in transaction costs on others from booksellers to companies that engage in trade in sophisticated technological products that embed copyrighted materials.¹⁹⁹

None of those concerns or “parade of horrors,” however, applies to ARR.

¹⁹⁴ See *Close v. Sotheby’s, Inc.*, 894 F.3d 1061, 1073–74 (9th Cir. 2018).

¹⁹⁵ *Fox Film Corp.*, 286 U.S. at 131.

¹⁹⁶ See Rub, *supra* note 12, at 773. It should be noted that scholars disagree as to whether the first sale doctrine can preempt state law at all. Compare John F. Duffy & Richard M. Hynes, *Common Law vs. Statutory Bases of Patent Exhaustion*, 103 VA. L. REV. ONLINE 1, 14 (2017) (“[T]he exhaustion doctrine should not be preempting or invalidating non-IP legal mechanisms . . .”), with Ariel Katz, Aaron Perzanowski, & Guy A. Rub, *The Interaction of Exhaustion and the General Law*, 102 VA. L. REV. ONLINE 8, 22 (2016) (“[F]ederal IP law does not give state commercial law unlimited power to regulate secondary markets. . . . the power of states to create certain legal regimes . . . is limited by federal preemption law.”).

¹⁹⁷ The first sale doctrine also allows public display of copies of copyrighted materials in some circumstances. 17 U.S.C. § 109(c). That rule is irrelevant to the discussion in this Section.

¹⁹⁸ *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 541 (2013).

¹⁹⁹ *Id.* at 541–43. Similar arguments were made in the literature as well. See, e.g., Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 896–97 (2011); Rub, *supra* note 12, at 789–92 (claiming that the reduction of information costs should be the main justification for copyright exhaustion).

Unlike distribution rights under the Copyright Act, which, without the first sale doctrine, would have been triggered upon any change in possession, including, for example, a loan, ARR are triggered much less frequently—only upon certain sales. More importantly, unlike distribution rights under the Copyright Act, once they are triggered, ARR are quite cheap to manage: the parties do not need to seek the artists, the copyright owners, or any other third party, or secure their permission prior to the sale. And even after the sale, the seller can simply remit the resale royalties to a central entity that will distribute it to the artists.

The differences from a transaction costs perspective do not end here. An additional dramatic difference between distribution rights under copyright law and ARR under state law has to do with those who are subject to the right. Distribution rights, if not exhausted, affect the entire chain of possession of a good. When a seller infringes the copyright by selling an item,²⁰⁰ the item itself becomes tainted: every future possessor of that copy will likely be infringing the distribution right. That feature of copyright law—which is driven by the nature of copyright as an in-rem property right—raises a significant transaction costs concern.²⁰¹

A similar concern does not exist with respect to ARR. Only sellers (and, in some cases, their agents) are liable for the ARR payment. The buyer and third parties are not affected by ARR. The sale is valid whether or not royalties were paid. Indeed, the buyers' rights in the item sold are not affected by the payment of royalties or lack thereof. And even for the sellers the information costs are minimal. For example, under the CRRA, the duty to pay royalties applies to sellers in California or by California residents.²⁰² Sellers know their state or residency and the location of a sale. In addition, a seller only needs to know if the right expired or not. Because the right expires twenty years after the artist dies,²⁰³ all that the seller needs to know is whether the artist is still alive or recently deceased.²⁰⁴ Practically all sellers of expensive artworks—the CRRA, like all ARR schemes, is limited to those works—already know that information.²⁰⁵

Overall, from the seller's perspective, the added transaction costs from ARR

²⁰⁰ Such an infringement is common in those cases in which the first sale doctrine is inapplicable, for example, when the item was originally licensed and not sold. 17 U.S.C. § 109(d) (2012); *see also* Vernor v. Autodesk, Inc., 621 F.3d 1102, 1103–04 (9th Cir. 2010) (holding a downstream possessor liable for copyright infringement for selling an item that was allegedly originally licensed and not sold).

²⁰¹ *See, e.g.*, Christina Mulligan, *A Numerus Clausus Principle for Intellectual Property*, 80 TENN. L. REV. 235, 275–76 (2013); Rub, *supra* note 12, at 790.

²⁰² CAL. CIV. CODE § 986(a) (West 2019).

²⁰³ *Id.* § 986(a)(7).

²⁰⁴ In fact, ARR can be designed to eliminate even those modest costs. For example, ARR can place the burden on the artists to approach sellers and prove their rights in any case of doubt. Another possibility is to require the sellers in such situation to pay the ARR to a central agency, which will investigate the matter and/or transfer the funds for the benefits of the public or artists in general. Those cases in which the seller does not know who the artist is or if she is alive are likely very rare.

²⁰⁵ As an anecdote, one can easily find on the websites of Sotheby's and Christie's the year that the artist was born and died for every work that was auctioned in March–April 2018 in a transaction that would have resulted in resale royalty payment under the ART Act. This is how Sprigman & I easily figured out their age for our study. *See* Sprigman & Rub, *supra* note 65.

schemes seem minimal.²⁰⁶ As such, resale rights do not seem to conflict or undermine the goals of the federal first sale doctrine.²⁰⁷ This result is unsurprising. As was discussed throughout this Part, ARR are quite similar to a tax scheme with different beneficiaries. Sales taxes, while obviously affecting the markets to which they apply, typically do not harm them to the point that conflicts with federal policy.²⁰⁸

ii. Does the Copyright Act Expressly Preempt State-Enacted ARR

Section 301(a) of the Copyright Act includes an express preemption provision:

[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title . . . no person is entitled to any . . . equivalent right in any such work under the common law or statutes of any State.²⁰⁹

While conflict preemption and copyright express preemption typically work in tandem,²¹⁰ their scopes do not completely overlap. One of the stated goals of section 301 was to eliminate certain competition with federal law, regardless of the actual harm that that competition caused.²¹¹ In other words, it was clearly Congress's intention that states would not create copyright-like rights whether or not those rights undermine any other federal policy.

Courts typically use the extra element test to evaluate the equivalency between

²⁰⁶ As further discussed in Section II.D, administering the payment scheme entails additional costs, which might be significant. However, those costs do not affect the parties to the sale transaction and are thus irrelevant to the discussion in this Section.

²⁰⁷ While the main rationale of the first sale doctrine is reducing transaction costs, and while the Supreme Court focused on that rationale, the literature identified a few additional motivations. Even if those additional justifications for the first sale doctrine in general are convincing, which is not without doubt, they seem inapplicable to ARR. For example, copyright exhaustion can foster a used goods market, but to a large degree, this concern is irrelevant in art markets where artworks are typically unique and thus the secondary market mostly doesn't compete with the primary one. Some argue that copyright exhaustion also helps some organizations, such as libraries, preserve old works, see R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 603–10 (2003), but it is hard to see how ARR, which apply to expensive artworks, will undermine their preservation. Finally, some claim that copyright exhaustion promotes privacy by preventing the copyright owner from collecting certain data concerning the use of the work. Perzanowski & Schultz, *supra* note 199, at 896. That concern also seems quite peripheral in the context of ARR and it can easily be addressed by an ARR scheme if decision makers perceive secrecy as a public good (which they might or might not). The CRRA, for example, does not require an auction house to report the identity of the buyer or the seller of any artwork. See CAL. CIV. CODE § 986(a)(1) (West 2019).

²⁰⁸ Obviously, even a permissible tax can just mask a more restrictive policy, which might run afoul to federal policy. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 572 (2012). The Ninth Circuit recognized that possibility in *Morseburg v. Balyon*, 621 F.2d 972, 978 (9th Cir. 1980) (stating that "the possibility of the imposition by the state of very high royalty rates and more than one state 'taxing' a single sale suggests that resale royalty acts under certain circumstances could make transfer of the work of fine art a practical impossibility" but noting that the CRRA did not fall under that exception).

²⁰⁹ 17 U.S.C. § 301(a) (2012).

²¹⁰ See generally Guy A. Rub, *A Less-Formalistic Copyright Preemption*, 24 J. INTELL. PROP. L. 327 (2017).

²¹¹ See H.R. REP. NO. 94-1476, at 129–31 (1976); Rub, *supra* note 210, at 333–34.

state and federal law.²¹² They compare the elements of the state cause of action to the federal one to identify differences.²¹³ Under this test, state-enacted resale rights are likely not equivalent to any of the exclusive rights under the Copyright Act, including its distribution rights.

Some may argue that the rights are equivalent because they are triggered by the same event—the sale of a copy²¹⁴—but that argument is inaccurate. The triggering event is actually different. Infringement of the distribution rights under the Copyright Act happens when a copy is transferred (i.e., changes possession or is sold). But liability under an ARR scheme, including the CRRRA, is triggered much later when the seller fails to pay royalties within the timeframe set forth in the relevant statute.²¹⁵

While this difference might look insignificant by itself it points to a more meaningful distinction concerning the nature of the right itself. ARR only obliges the seller to pay but they do not give the right-holder—i.e., the artist—any power to intervene in the transaction itself. This is dramatically different from the exclusive right of distribution.

In *Close*, the Ninth Circuit missed that point by describing the distribution right under the Copyright Act as one that “grants artists the right to receive full payment on the first (and only the first) sale.”²¹⁶ This is preposterous. The exclusive right under the Copyright Act is not a right to be paid but a right to *control* the distribution.²¹⁷ That is a cornerstone concept in copyright law. Copyright owners can sell copies but they have no obligation to do so. The distribution right also allows them to refuse distribution at all, to delay distribution, to allow it in one market and prohibit or delay it in another, to set any price they wish, and so on. Violation of that right triggers the full set of property remedies under federal law, including statutory damages and criminal liability.²¹⁸ The Ninth Circuit ignored those attributions by

²¹² Rub, *supra* note 210, at 337–38.

²¹³ See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 200 (2d Cir. 1983), *rev'd, on other grounds*, 471 U.S. 539 (1985).

²¹⁴ E.g., *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1070–71 (9th Cir. 2018); 2 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8C.04 (2018) (“[I]t is the same conduct in relation to the same subject matter that triggers either rights or immunities under both federal and state law.”); David E. Shipley, *Droit de Suite, Copyright's First Sale Doctrine and Preemption of State Law*, 38 HASTINGS COMM. & ENT. L.J. 1, 25 (2017).

²¹⁵ The CRRRA gives sellers ninety days to transfer payment. CAL. CIV. CODE § 986(a)(2) (West 2019). Focusing on the triggering event, as Nimmer and others have done, *supra* note 214, raises other concerns. For example, it ignores the fact that there are multiple state laws that are triggered in connection with any sale including laws that are triggered in connection specifically with the sale of artworks—from taxation laws to state regulations of auctions. See, e.g., Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501, 516–520, 554–55 (1988) (exploring state laws that regulate public auctions of artworks, and in particular New York's Arts and Cultural Affairs Law). In addition, the argument ignores other differences such as those with respect to the identity of the right-holder: the holder of the distribution rights is the copyright owner while the holder of the resale royalty rights is the artist. The Ninth Circuit completely ignored that distinction. The court, for example, mentions that “the first sale doctrine limits artists' right to payment to the first sale.” *Close*, 894 F.3d at 1071. However, the first sale doctrine limits the rights of the copyright owner and not the artist.”

²¹⁶ *Close*, 894 F.3d at 1070.

²¹⁷ See 17 U.S.C. § 106(3) (2012).

²¹⁸ *Id.* §§ 504, 506.

claiming that both rights are “right[s] . . . to payment.”²¹⁹ In doing so it not only severely misdescribed the distribution right, but also ignored well-established caselaw, including by the Ninth Circuit itself, that distinguishes between the exclusive rights under the Copyright Act and a right to be paid under state law in other contexts.²²⁰

Indeed, the differences between a duty to pay royalties and the significantly broader exclusive right to control distribution seem to create a qualitative distinction between the two that should allow state-enacted ARR to survive an express preemption challenge.

CONCLUSIONS

I find the idea of Artists’ Resale Royalties misguided at best. Elsewhere I explained that it is based on ill-advised romantic notions, myth, and folklore concerning artistic creation and artistic markets, on unwise historical developments, and on a set of myopic assumptions.²²¹ ARR legislation is ineffective, inefficient, and regressively unjust. I am therefore happy that Congress, so far, has rejected any attempt to pass such a scheme on the federal level.

This Article, however, suggests that there could be value, if limited, to allowing states to experiment with ARR. I do not think that the value of such a legal experiment necessarily outweighs the harm from ARR—it probably does not—but that does not mean that there is no such value. Similarly, just because many, myself included, think that enacting ARR, even by states, is unwise, that does not mean that the Constitution or other federal laws prohibit states from doing so. States are allowed to experiment with ill-advised policies, including ARR. Subject to minor restrictions, federal law allows them to do so.

²¹⁹ *Close*, 894 F.3d at 1070.

²²⁰ For example, multiple courts held that a contractual promise to pay for copying is not preempted because “the right to be paid for the use of the work is not one of those [exclusive] rights [under the Copyright Act].” *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 456 (6th Cir. 2001); see *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 433 (2d Cir. 2012) (“A claim for breach of a contract including a promise to pay is qualitatively different from a suit to vindicate a right included in the Copyright Act and is not subject to preemption.”); see also *Montz v. Pilgrim Films & Television, Inc.*, 606 F.3d 1153, 1157–58 (9th Cir. 2010), on reh’g en banc, 649 F.3d 975 (9th Cir. 2011) (en banc).

²²¹ *Rub*, *supra* note 18, at 1–2.