

Art and the First Amendment

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Jackson Pollock, "Blue Poles: Number 11, 1952"

"A poem should not mean but be."

Archibald MacLeish, "Ars Poetica" (1926)

"No ideas but in things"

William Carlos Williams, "A Sort of a Song" (xxx)

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I. Introduction

We have it on the highest authority – Justice Souter writing for a unanimous Court in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* – that the paintings of Jackson Pollock are “unquestionably shielded” by the First Amendment.² Of course we pretty much knew that already, from the development of the law of obscenity, driven as it was by a need to ensure that the proscription of obscenity not lead to the suppression of depictions that are merely erotic.³ Beyond authority, though, exactly why are Pollock’s paintings covered by the First Amendment?⁴ Consider that core First

² *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). *See also* *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010) (relying on *Hurley* to support the conclusion that tattooing is an activity covered by the First Amendment, without regard to whether the tattoos use words or are merely decorative).

³ For a discussion, see text accompanying notes --- *infra*.

⁴ For a discussion of the term “coverage,” see text accompanying notes --- *infra*. Using the phrase “not protected by the First Amendment,” the Court has held that recreational dancing is not covered by the First Amendment, *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). *See also* *Brown v. Entertainment Merchants Ass’n*, --- U.S. ---, --- (slip op., at 2)(2011) (using the phrases “qualify for First Amendment protection” and “confer First Amendment protection” to refer to coverage”). Justice Souter, the author of *Hurley*, asserted that “dancing as aerobic exercise is likewise outside the First Amendment’s concern.” *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 581 (1991) (Souter, J., concurring

Amendment doctrine puts under close scrutiny statutes that regulate speech based on its content, and under even closer scrutiny statutes that regulate speech based on the viewpoint it expresses. Yet, what – exactly, or even roughly – is the content of Pollock’s *Blue Poles, No. 11*, or the viewpoint it expresses?⁵

This Essay explores the question of the First Amendment’s coverage of nonrepresentational art, which proves quite difficult to answer satisfactorily – that is, in a doctrinal form that preserves other seemingly “unquestionable” results.⁶ Every approach

in the judgment). I wonder whether *Stanglin*’s treatment of recreational dancing would be the same today, after the commercial success of *Dancing with the Stars*.

⁵ Much of the secondary literature on art and the First Amendment assumes art’s coverage and derives First Amendment rules to deal with specific problems such as the permissible scope of regulation of public art (art owned by public agencies) or of regulation of commercial transactions in art, particularly in public places. For an important discussion of art’s coverage under the First Amendment, see RANDALL P. BEZANSON, *ART AND FREEDOM OF SPEECH* (2009). Marci Hamilton, *Art Speech*, 49 *VAND. L. REV.* 73 (1996), argues for giving nonrepresentational art “stringent First Amendment protection” “as a mean of protecting vital spheres of personal freedom.” *Id.* at 78, 77. See also Janet Elizabeth Haws, *Architecture as Art?: Not in My Neocolonial Neighborhood: A Case for Providing First Amendment Protections to Expressive Residential Architecture*, 2005 *B.Y.U. L.REV.* 1625 (2005) (arguing that expressive architecture should be covered by the First Amendment by analogy to art’s coverage).

⁶ I attempt to keep as close to the doctrinal ground as possible in this Essay, doing my best to avoid adopt controversial accounts of how art “works,” although I suspect that

one might take to explaining why the First Amendment covers art – that art is communicative, that it contributes to the creation of a culture of self-directed individuals, and others I address – generates odd anomalies.⁷ The exploration does not question the conventional *conclusion* that artworks are covered by the First Amendment, but rather worries some of the often-unstated assumptions that underlie that conclusion.⁸ We will see, for example, that some things one might want to say about the question of whether the First Amendment covers nonrepresentational art⁹ lead to the suggestion, implicit in

complete abstinence from art-theory is impossible. *See* note --- *infra* (linking “reader-response” theory to *Hurley*). For an example of insightful analysis relying on art-theory, see Sheldon Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime, and the First Amendment*, 1987 WISC. L. REV. 221.

⁷ L. Michael Seidman suggested to me that the problem I worry over in this Essay is similar to a problem familiar to those who try to figure out exactly why religion is protected distinctively in our constitutional system. *See, e.g.*, STEPHEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995). I find the suggestion thought-provoking and am inclined to agree, but clearly this Essay is not the place to explore the similarities and differences between the subjects.

⁸ I use “worry” in the sense “To get or bring into a specified condition by ... dogged effort.” Oxford English Dictionary Online, def. “worry (v.),” 5 (c) (available at <http://www.oed.com.ezp-prod1.hul.harvard.edu/viewdictionaryentry/Entry/230328>).

⁹ Most of the questions raised in this Essay are posed most sharply in connection with nonrepresentational art but they arise in connection with many representational works as

Archibald MacLeish's observation about poetry, that James Joyce's *Ulysses* might not be covered, surely a peculiar result.¹⁰ I do not mean to question *Hurley's* assertion about Jackson Pollock's paintings. Rather, I believe that by asking how that conclusion might be justified, we will come across some unexpected facets of the First Amendment, with some implications for other doctrinal areas abutting the First Amendment.¹¹

well. For a discussion of representational art, see text accompanying notes --- *infra*. In the main I attempt here to avoid the question of determining what counts as art, using as examples works that I believe are by consensus regarded as serious and indeed important works of late twentieth century art. I occasionally use examples drawn from photography, which as a graphic art raises some of the basic questions I explore here, even though the photographs I use as examples are representational. The basic definitional question is posed, for example, by the activity of hair-styling, which from the perspective of the stylist – and often from an observer's perspective as well – has many of the characteristics of standard art forms. *See, e.g.*, *Blow Dry* (IMF Internationale Medien und Film GmbH & Co. Produktions KG, 2001); *You Don't Mess with the Zohan* (Happy Madison Productions, 2008).

¹⁰ *Cf.* *United States v. One Book Called Ulysses*, 5 F.Supp. 182 (S.D. N.Y. 1933), *aff'd* 72 F.2d 705 (2nd Cir. 1934) (holding that *Ulysses* is not obscene and allowing its importation).

¹¹ In comments on a draft of this Essay, Richard Fallon observed correctly that it combines an acceptance of conventional conclusions with arguments that subvert the most obvious assumptions that would support those conclusions, without replacing those assumptions with other premises – for example, premises drawn from deep theorizing

Part II of the Essay raises and briefly addresses some of the most common immediate responses when one questions art's First Amendment coverage, suggesting that the questions are indeed more complicated than immediate responses suggest. Part III begins to flesh out the reasons why the immediate responses discussed in Part II are at least incomplete. It sets out some preliminary questions, such as the distinction between First Amendment coverage and First Amendment protection, and addresses the role of communication in the First Amendment and in artworks. It uses a recently decided case to indicate why we cannot finesse the coverage question by displacing it with routine conclusions that artworks are covered but not protected, and concludes with some cautionary notes about the methodology of First Amendment argument. Part IV examines why First Amendment theory has taken artworks' coverage for granted, despite the difficulty of fitting such works into general First Amendment theories. I believe that examining why nonrepresentational art is covered by the First Amendment raises deep questions about First Amendment doctrine, and that general First Amendment theories are unlikely to be particularly helpful in addressing those questions because they are, well, too general.

Part V takes up the Supreme Court's stated doctrine as relevant to the coverage issue, including an analysis of the cases and, importantly, the inadequacy of textual

about art – that might do so. Without getting into equally deep issues about legal thought, I merely express my view that such a combination constitutes a valuable form of internal criticism of legal doctrine, and can be the beginning of what I would call a critical legal studies approach to the issue. *See also* note --- *infra* (sketching my reasons for inclining against First Amendment coverage for art).

analysis to resolve the coverage issue. Examining the question of art's coverage in largely doctrinal terms may help us understand questions about the First Amendment's coverage (or absence of coverage) for commercial speech and misleading advertising, for example. In working toward an answer I hope to avoid deep philosophical inquiries into the philosophy of language or art,¹² hoping instead to offer answers to some parts of the question that can be accepted by people who disagree about deep theories of language and art.¹³ The Part also suggests some doctrinal implications of finding artworks covered, particularly with respect to intellectual property law. The Conclusion offers a modest reconstruction of *Hurley*'s observation about the unquestionable coverage of

¹² *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006), sought to distinguish among artworks “without recourse to principles of aesthetics,” *id.* at 95. A prior case had held that streets vendors selling paintings and photographs could invoke the First Amendment, and that the street vendor regulations did not survive intermediate scrutiny. *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996). *Mastrovincenzo* applied intermediate scrutiny and upheld the application of the regulations to those who sold decorated T-shirts. For a discussion of these cases, see Genevieve Blake, Comment, *Expressive Merchandise and the First Amendment in Public Fora*, 34 *FORDHAM URB. L.J.* 1049 (2007).

¹³ I believe that much constitutional doctrine is animated by a search for this sort of overlapping consensus, with each specific First Amendment principle supported by diverse First Amendment theories, rather than a free-standing doctrine, to use Rawlsian terms. I acknowledge, though, that overlapping consensus, much less free-standing doctrine, may be unavailable here (as elsewhere).

Jackson Pollock's paintings, and points out that the Essay's analysis leaves many questions open to further exploration.

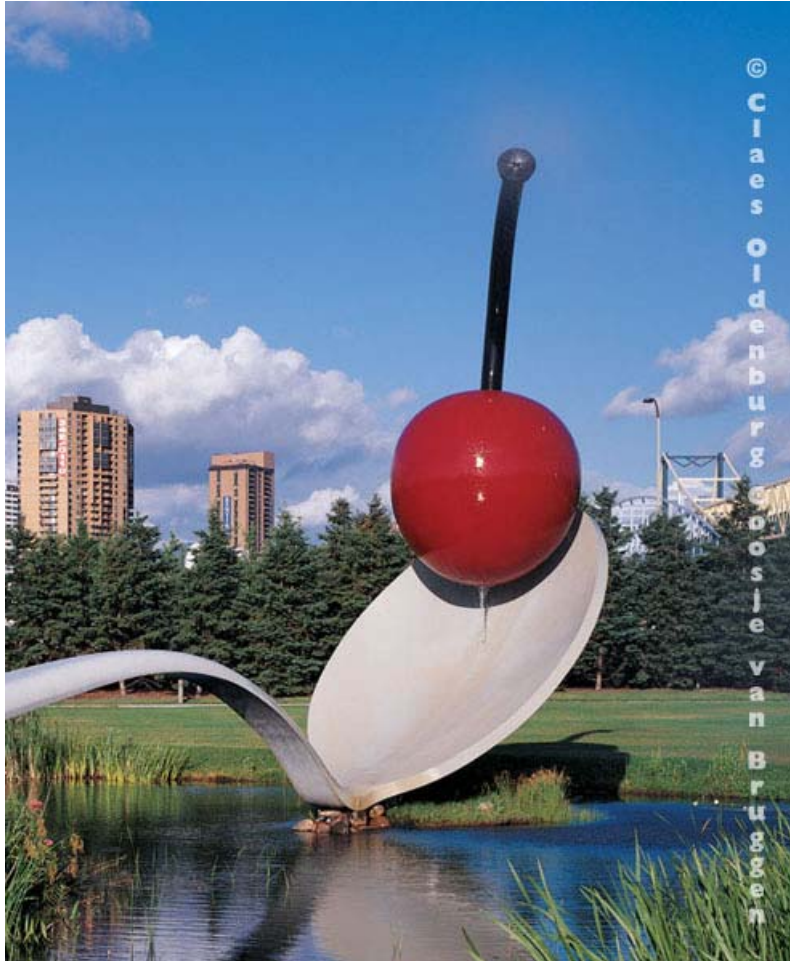
II. Some Incomplete Immediate Answers to the Question of First Amendment Coverage for Artworks

Three "easy" answers are typically offered when one raises the questions of artworks' First Amendment coverage. (1) The least cogent is that regulation of artworks on the basis of their "content" is characteristic of totalitarian regimes,¹⁴ as in Nazi Germany's suppression of "degenerate" art and Soviet Russia's promotion of socialist realist art at the expense of abstraction. The ready response to this is that it confuses a symptom of totalitarianism with its causes. Totalitarianism is bad because it does many bad things, not (merely) because it suppresses art on the basis of its content. Many constitutional provisions, including the First Amendment, limit the bad things totalitarian governments try to do, and it is hardly clear that stopping them from suppressing art on

¹⁴ I use scare quotes here because the term "content-based" is characteristic of First Amendment discourse, whereas the question to be explored is whether these regulations deal with materials covered by the First Amendment. One would not ordinarily say that a contractual provision limiting a person's ability to compete with her former employer is "content based," although in some sense it is. However we describe such contracts, the underlying question is whether the First Amendment places some special limits on the state's power to regulate them – as of course it does not. So too with artworks: Does the First Amendment place special limits on a government's ability to regulate an artwork because in the government's view it is ugly?

the basis of its content has anything to do with stopping them from doing the bad things that make them totalitarian. Or, put another way, it is hard to see Adolf Hitler or Joseph Stalin lurking in the bushes if a city council prohibits the display of a Claes Oldenburg sculpture on private property where the sculpture is visible to the public, because it thinks the sculpture is ugly or silly.¹⁵

¹⁵ Such a regulation is “content based.” Whether the city council could justify such a ban by asserting that the sculpture distracts drivers or lowers property values raises separate questions, addressed below, text accompanying notes --- *infra*. On the possibility of distraction from viewing “art” works, see *Erznoznik v. City of Jacksonville*, 422 U.S. 305 (1975) (holding unconstitutional a city ordinance declaring it a public nuisance to show at a drive-in movie films showing nudity, where the screen is visible from a public street).



Claes Oldenburg, Spoonbridge and Cherry

(2) A seemingly more substantial easy answer is that artworks provoke the imagination, encourage people to think, and the like. A full response to this easy answer will occupy a substantial amount of space below, but the shorthand version of the response is this: Many activities that are not covered by the First Amendment provoke the imagination, encourage people to think, and the like.¹⁶ So, for example, running a small

¹⁶ Cf. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 479 (2011) (“the value of autonomy extends not merely to the speech of persons but also to the actions of persons.”).

business does, as the proprietor has to identify a market niche, devise a marketing strategy, and more. Further, people who *observe* small businesses in operation have their imagination provoked and the like. I will recurrently use the example of ticket-scalping as such a small business, because the public interest in regulating ticket-scalping, while sufficient to satisfy modern requirements of economic due process, is thin enough that adding even a slight increment to the required justification because ticket-scalping might implicate First Amendment concerns such as provoking the imagination might lead to the conclusion that prohibiting ticket-scalping is unconstitutional under the First Amendment.¹⁷

(3) Pointing in the other direction, the third easy response is that the coverage question is largely inconsequential, because governments in the United States rarely attempt to regulate artworks based on their content. Rather, they seek to apply content-neutral regulations that are widely applicable to many activities to artworks that happen

¹⁷ Briefly on the justifications for prohibiting ticket-scalping: The prohibition *prima facie* prevents people who value seeing a performance highly from purchasing tickets from ticket-holders who value doing so less highly. Ticket-scalpers are not exploiting “needs” in any interesting sense. There does not seem to be a strong distributional interest at stake, and to the extent that there is one banning ticket-scalping is ineffective absent price controls on tickets. The public interest in preventing relatively impecunious fans of Lady Gaga from voluntarily exchanging their tickets for large amounts of cash from richer fans is quite unclear to me, and not obviously consistent with underlying values favoring equitable distribution of social goods. And, to the extent that performers are concerned about their relatively impecunious fans, they can impose restrictions on access to tickets.

to present the same social problems as those other activities. And, in general, the Supreme Court's standards for determining when a generally applicable regulation can be applied to material plainly covered by the First Amendment are rather easy to satisfy.¹⁸ The conclusion is that we can treat artworks as covered by the First Amendment without seriously jeopardizing regulations that serve good social ends – and that, when the Court's standards are not satisfied, we should not be troubled by denying the government the ability to regulate the artwork. Again, a full response to this easy answer will occupy substantial space below, and again a shorthand version will have to suffice at this point. We can turn the point around and say that treating artworks as *not* covered by the First Amendment will have few adverse consequences because of the Supreme Court's standards, and that it indeed might be a matter of concern that, for example, the First Amendment might be interpreted in a way that places some artworks outside the scope of historic preservation ordinances.¹⁹ At the least, doing so raises questions about whether the courts should say that the social value of artworks trumps legislative judgments about historic preservation.

The easy answers, I think, are unavailing. We must develop a more complex analysis.

III. Preliminaries: Wondering Why the First Amendment Covers Art

A. Coverage versus Protection

¹⁸ For a discussion of those standards, see text accompanying notes --- *infra*.

¹⁹ For a discussion, see text accompanying notes --- *infra*.

First Amendment analysis conventionally distinguishes between the question of whether some activity is *covered* by the First Amendment and the question of whether that activity, if covered, is *protected* by the First Amendment.²⁰ First Amendment analysis is simply irrelevant to activities not covered by the First Amendment.²¹

²⁰ See Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270-71 (1981) (describing the distinction). An early Supreme Court decision supporting the coverage/protection distinction is *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (asserting that “[t]here are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”). **[citations specific to First Amendment]**. For a discussion of the coverage/protection distinction in constitutional law generally, sometimes described as a distinction between *defining* a right and determining whether an infringement on that right is *justified*, see David L. Faigman, *Reconciling Individual Rights and Governmental Interests: Madisonian Principles versus Supreme Court Review*, 78 VA. L. REV. 1521, 1522-23 (19--). For a treatment in the context of the European Court of Human Rights, see Janneke Gerards & Hanneke Senden, *The Structure of Fundamental Rights and The European Court of Human Rights*, 7 INT’L J.CON. L. 619 (2009). For a treatment from a jurisprudential perspective, see ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS ---* (Julian Rivers trans. 2002).

²¹ Other constitutional provisions may be. Suppose we conclude, for example, that “dwarf tossing,” understood by the participants and observers as performance art, is not covered by the First Amendment. The participants might mount other constitutional claims against a ban on the activity, such as a libertarian-sounding claim that the ban

Consideration of whether a regulation is content-based or content-neutral, for example, is not appropriate for activities not covered by the First Amendment.²²

When activities are covered by the First Amendment, in contrast, we have to apply standard First Amendment doctrine to assess the constitutionality of regulations applicable to those activities. Sometimes activities covered by the First Amendment are also protected by it, but sometimes covered activities are unprotected. Assume that nonrepresentational art is covered by the First Amendment. Consider the Oldenburg example described above.²³ Perhaps the ban is content-based because it is justified with

violates a right protected by the Due Process Clause to engage in consensual and nonharmful activities. (The United Nations Human Rights Committee has issued a report concluding that a ban on dwarf tossing does not violate various human rights, including the right to earn a living and the right to respect for private life. *Wackenheim v. France*, Communication No. 854/1999, 15 July 2002, CCPR/C/75/D/854/1999.) *See also* text accompanying notes --- *infra* (discussing the “too much work” principle).

²² Except perhaps insofar as the *other* constitutional claims incorporate components associated with First Amendment analysis into their own doctrine.

²³ *See* text accompanying notes --- *supra*. *See also* Galina Krasilovsky, *A Sculpture is Worth a Thousand Words: The First Amendment Rights of Homeowners Publicly Displaying Art on Private Property*, 20 COLUM.-VLA J.L. & ARTS 521 (1996) (discussing related hypotheticals). Cf. The Thomas Jefferson Center for the Protection of Free Expression, “The Muzzle Awards,” <http://www.tjcenter.org/muzzles/muzzle-archive-2010/#item03> (visited ---) (describing actions by Chicago City Council member James A Balcer in directing that a mural painted on the wall of a building owned by a

reference to the asserted ugliness or silliness of those sculptures. And, if, as most advocates of the view that art is covered by the First Amendment believe,²⁴ nonrepresentational art is a category that receives something more than low-level protection against content-based regulations,²⁵ the municipal regulation would be constitutional only were it justified by quite strong public policies and advanced those policies with a fair degree of precision. If the city fails to come up with justifications of the required strength, the ban is unconstitutional, and the Oldenburg sculptures are both covered and protected by the First Amendment against the municipal ban.²⁶ In contrast, if the city bans the display of nonrepresentational art in places where drivers might see it,

private entity be painted over because the mural, which depicted three police cameras “emblazoned with ... a crucified Christ, a deer head, and a human skull” was “a threat to this community.”).

²⁴ See, e.g., Hamilton, *supra* note ---.

²⁵ Such a conclusion is not inevitable. The canonical formulation for identifying covered expression that receives a low level of protection against content based regulation comes from *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Such expression “by [its] very utterance inflict[s] injury ... [and] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that might be derived from them is clearly outweighed by the social interest in order and morality.” *Id.* at 572. “Ugly” art might be said by its very appearance to inflict injury and, as I discuss in greater detail below, the assertions that art is “part of [an] exposition of ideas” or is “a step to truth” are extremely difficult to defend.

²⁶ For a general discussion of architectural regulation, see Haws, *supra* note ---.

on the ground that drivers puzzled by what they are viewing might be distracted, the regulation is (probably) content-neutral, and is justified if the city's concern about driver distraction is reasonably well-placed and the ban is reasonably well-suited to achieving the goal of limiting distractions.²⁷ The Calder sculptures would then be covered but not protected.

B. Why the Coverage Question is Puzzling: Communication Through Art and Otherwise

Of course nonrepresentational art is “communicative” in some sense, although one of the points about nonrepresentational art is that what it communicates often depends almost entirely on what a viewer takes it to be communicating. Yet, many other activities are communicative in that way,²⁸ and we should be wary of dismissing questions about the First Amendment's coverage of nonrepresentational art because, being communicative, it is “obviously” covered by the First Amendment.

²⁷ I have inserted the parenthetical “probably” because there is an argument that the distraction occurs because drivers are trying to figure out what the sculpture means and that the regulation is therefore content-based. A similar argument was addressed and rejected in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002).

²⁸ *Cf.* *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (“It is possible to find some kernel of expression in almost every activity a person undertakes - for example, walking down the street or meeting one's friends at a shopping mall - but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”).

Consider several examples. (1) William Carlos Williams was prescribing how a poet should proceed when he wrote, “No ideas but in things.” Poets, he believed, should convey their ideas by the “things” they described.²⁹ For Williams, then, at least some “things” could convey ideas – the things described in poems. But, if those things convey ideas when described in poems, why shouldn’t we think that they can convey ideas when encountered in the physical world? Marcel Duchamp’s “Fountain” is a thing that he used to convey an idea by placing it in an unexpected context; why might it not be communicative in other contexts?³⁰



²⁹ Or, in the advice given budding writers, “Show, don’t tell.”

³⁰ Consider the account of shaming sanctions as a mode through which the community expresses its disapproval of a target’s conduct, sometimes by actions rather than words or symbols. See, e.g., Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996). For additional discussion, see note --- *infra*.

(2) Panhandling communicates something to those who observe a panhandler.³¹ Some will say, “See that? It shows how shiftless and irresponsible some people are,” others, “See that? It shows how terribly thin our social safety net is.”³²

(3) Similarly with ticket-scalping.³³ Some will see a ticket-scalper at work as a demonstration of the vibrancy of unregulated capitalism, providing opportunities for entrepreneurial types to start a small business and make a good living, while others will see the same activity as a demonstration of the failure of unregulated capitalism, which

³¹ To focus on the more substantial questions, I put aside as a distraction the fact that some panhandlers (contingently) sit with signs saying “Homeless and Out of Work” and the like, or utter words in asking for money.

³² As the Second Circuit put it when it held unconstitutional New York’s ban on begging in *Loper v. New York City Police Dep’t*, 999 F.2d 699, 704 (2nd Cir. 1993), “Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. Even without particularized speech, however, *the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance*” (emphasis added).

³³ *Tyson & Brother v. Banton*, 273 U.S. 418 (1927), invalidated an anti-ticket-scalping law as a violation of economic due process. I doubt that anyone thinks that the decision has any precedential value today. Then-Professor Robert Bork raised the question of ticket-scalping in connection with a discussion of the First Amendment in a law-school class or on an examination nearly thirty years ago. I gave what I describe below as a nominalist response, which I now think inadequate.

allows the “greedy” to exploit the “needy.” And, again to state the obvious, the interpretations people give to panhandling and ticket-scalping might have effects on the political choices they make.³⁴

C. Applying the Coverage-Protection Distinction: A Case Study

Consider *Kleinman v. City of San Marcos*.³⁵ Judge Jones provided a crisp statement of the facts:

Appellant Michael Kleinman operates Planet K stores throughout the San Antonio and Austin areas. Planet K stores are funky establishments that sell novelty items and gifts. Kleinman has a tradition of celebrating new store openings with a “car bash,” a charity event at which the public pays for the privilege of sledgehammering a car to “a smashed wreck.” The wrecks are then filled with dirt, planted with vegetation, and painted. Placed outside each store, the “planters” serve as unique advertising devices.

An Oldsmobile 88 car-planter was created upon the opening of a new Planet K store in San Marcos, Texas. Kleinman arranged to have the smashed car

³⁴ I do not think that distinguishing between panhandling and ticket-scalping as “activities” and artworks as “things” works for purposes of analyzing their First Amendment coverage can bear much if any weight. The distinction leads to the odd result – one inconsistent with existing doctrine – that Stravinsky’s music for “The Firebird” is covered by the First Amendment but the ballet performed to that music is not.

³⁵ 597 F3d. 323 (5th Cir. 2010), *cert. denied*, --- S.Ct. --- (2010). Judge Haynes concurred only in the judgment.

planted with a variety of native cacti and painted with scenes of life in San Marcos. Positioned in front of the store, the distinctive planter is visible to motorists traveling north on Interstate 35. Kleinman did not dictate the content of the illustrations, but he requested that the phrase “make love not war” be incorporated into the design. Two local artists, Scott Wade and John Furdy Travis, were commissioned to paint the wreck. At trial, Travis testified that he had no particular message in mind when he painted the car, “just happiness.” He intended his images to convey the idea that “you could take a junked vehicle, junk canvas, and create something beautiful out of it.” Wade sought to transform “a large gas-guzzling vehicle” into “something that’s more respectful of the planet and something that nurtures life as opposed to destroys it.” Wade explained that his intent was to describe American car culture and the link between gasoline and the war in Iraq.³⁶

³⁶ *Id.* at 324-25. I take it that the dealer’s sponsorship of the artwork was inspired, perhaps indirectly, by “Cadillac Graveyard,” located in Amarillo, Texas, 430 miles from San Marcos.



Photo of “Cadillac Graveyard”



Photo of the car/cactus planter in *Kleinman v. City of San Marcos*

The city had an ordinance declaring “junked vehicles” a public nuisance. Such vehicles were “self propelled, inoperable, and ... wrecked [or] dismantled, ... [or were] inoperable for more than 45 consecutive days.”³⁷ The city defended the ordinance against Kleinman’s First Amendment challenge on the ground that the ordinance was a content-neutral regulation aimed at eliminating “eyesores” and promoting public order. The court of appeals expressed some skepticism about Kleinman’s claim – accepted by the city for purposes of litigation – that “this cactus planter” was an artwork. According

³⁷ The ordinance inevitably calls to mind the famous hypothetical ban on “vehicles in the park,” and invites us to consider whether the ordinance should have been construed not to apply to Kleinman’s wrecks.

to the court of appeals, *Hurley*'s discussion of artworks "refer[red] solely to great works of art." The "heavy machinery of the First Amendment" ought not "be deployed in every case involving visual non-speech expression." Before finding that the ordinance survived intermediate First Amendment scrutiny, the court strongly suggested that the ordinance could be applied to the car if it was a "reasonable regulation." "Irrespective of the intentions of its creators or Planet K's owner, the car-planter is a utilitarian device, an advertisement, and ultimately a 'junked vehicle,'" and those "qualities objectively dominate any expressive component of its exterior painting."³⁸

Intermediate scrutiny was appropriate if the vehicle were treated as an artwork because the ordinance was "a content-neutral health and safety regulation," "not intended to regulate 'speech' at all." Applying intermediate scrutiny, the court held that the regulation "protect[ed] the community's health and safety from the problems created by abandoned vehicles left in public view." Junked vehicles were "an attractive nuisance to children," and attracted "[r]odents, pests, and weeds" as well. Junked cars caused "urban blight" and vandalism, and depressed property values. Further, the ordinance was "reasonably tailored," because owners of junked vehicles could keep them on their property if the vehicles were enclosed.³⁹

Some aspects of *Kleinman* are clearly questionable, particularly the court's effort to distinguish between great works of art and other ("mere"?) artworks.⁴⁰ I suspect that

³⁸ 597 F.3d at 326, 327.

³⁹ *Id.* at 328-329.

⁴⁰ *But cf.*, Visual Artists Rights Act, 17 U.S.C. § 106A (a) (3) (B) (providing a right against destruction of "work[s] of recognized stature").

drawing a line between covered and uncovered “visual non-speech expression” would be impossible, at least without invoking content-related criteria. Nor is it clear that one can describe something as an “eyesore” without making a content-based judgment,⁴¹ as indeed the apocryphal comment on Jackson Pollock’s paintings, that “My six-year-old could do that,” suggests.⁴²

⁴¹ Similarly with the effects on property values, which occur – if they do – because of viewers’ adverse reactions to seeing the display. (A look at the Planet K location on Google Maps suggests that the diminution in property values would have to be low. *Go to 910 N Interstate 35, San Marcos, TX 78666.*) *But cf.* *Young v. American Mini-Theatres*, 427 U.S. 50 (1976) (upholding the regulation of adult entertainment clubs on the basis of their secondary effects on the neighborhood, while acknowledging that those secondary effects occur as a result of the cognitive effects the clubs have on their patrons).

⁴² The court did not explain why the car/planter was “a utilitarian device.” Clearly it was not usable as an automobile, and it seems to me generally agreed that items that have “ordinary” uses can also be works of art. *See, e.g.*, the Saarinen “womb chair” both in its ordinary use and when placed in a museum:



A well-designed cactus planter could be both utilitarian and a work of art. *Cf.* *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d. 989 (2nd Cir. 1980) (referring to the placement of a category of utilitarian objects in museums as supporting the copyrightability as an artwork of an object with utilitarian uses); text accompanying notes --- (discussing the implications of *Hurley*). Finally, the suggestion that the car/planter was “an advertisement” rather than a work of art seems mistaken. (In a footnote the court observed that it did “not reach the City’s contention” that the car/planter was regulable as commercial speech. 597 F.3d at 327 n.5.) Print newspapers contain advertisements to increase the newspapers’ profitability, and those advertisements are pretty clearly covered by the First Amendment. *Cf.* *New York Times v. Sullivan*, 376 U.S. 254 (1964)

Those aspects of the court’s opinion to one side, its perhaps grudging application of intermediate scrutiny seems defensible. The ordinance is a content-neutral regulation of an activity that is not necessarily expressive but happens to be expressive in this case. The doctrinal standard for determining whether the homeowner’s First Amendment claim is valid comes from *United States v. O’Brien*.⁴³ Does the ordinance “further[] an important or substantial governmental interest ... unrelated to the suppression of free expression,” and is “the incidental restriction on alleged First Amendment freedoms ... no greater than is essential to the furtherance of that interest”?⁴⁴ My aim here is not to provide an analysis of those questions,⁴⁵ but rather to observe that *if* artworks like those displayed by Kleinman are covered by the First Amendment, the conclusion that the ordinance can be applied to them notwithstanding his First Amendment claim amounts to a conclusion that the artwork is covered by the First Amendment but not in this instance protected by it.

My aim in this Essay is to explore the First Amendment’s *coverage* of art, leaving aside questions about the circumstances under which art, if covered by the First Amendment, is also protected by it.

(providing First Amendment protection to a political advertisement printed in a newspaper).

⁴³ 391 U.S. 367 (1968).

⁴⁴ *Id.* at 377.

⁴⁵ I note that some might reasonably think the claim that a work of art, even Cadillac Graveyard, lowers local property values is a weak one, and that the asserted interests in protecting property values and neighborhood esthetics are not substantial enough.

D. Why the Question of Coverage Cannot be Finessed

We might be tempted to finesse the question of coverage by attacking the problem from two different directions. If successful, the combination of attacks would make the coverage question uninteresting.

One direction of attack deals with regulations of artworks that are based on the works' content – their ugliness, for example.⁴⁶ The attack asserts that the grounds for such regulations are typically so weak that the artworks would be protected by a substantive due process requirement that exercises of government power must be minimally rational. Yet, even a reasonably robust rationality requirement – more robust than the current Court seems likely to apply – will be unable to finesse some seemingly content-based regulations. A ban on displaying of offensive artworks on property visible to the public, for example, would almost certainly satisfy even a robust rationality requirement. In such a case we would have to decide whether artworks are covered.

Yet, calling regulations based on ugliness or the like “content-based” might prejudice the inquiry in favor of finding coverage. The reason for regulation is an esthetic judgment about which people will of course differ. In this, though, the reason for regulation seems indistinguishable from all sorts of morals-based legislation, which in most instances are constitutional simply because they reflect moral judgments. In the absence of *other* reasons for thinking artworks covered by the First Amendment, why

⁴⁶ Here too the label “transgressive” suggests why some might be motivated to regulate some artworks.

should esthetic judgments be different from moral ones for purposes of constitutional law?

Consider another version of this approach. Sally Mann's photographs of her daughter are undoubtedly disturbing. They induce thoughts – or better, inchoate feelings, a sense of unease – about childhood sexuality.



Photo of Virginia, by Sally Mann

Yet they are not examples of child obscenity under current definitions. Nor could they be criminalized in a statute that was not unconstitutionally overbroad – but in large part the overbreadth would result from the assumption that art is covered by the First Amendment.⁴⁷ Suppose a state sought to create a separate offense that *would* criminalize Mann's photographs. We could not avoid the coverage question with the contention that,

⁴⁷ For a discussion of overbreadth in child obscenity statutes, see *Massachusetts v. Oakes*, 491 U.S. 576 (1989).

like every statute legislatures might enact that penalized works of art as such, this one would surely be unconstitutional on rationality grounds. The state interests in ensuring the portrayed child's consent to a depiction that will be permanently available and that might lead the child once grown to be ashamed of what she might then perceive as her immodesty should be sufficient to satisfy the mere-rationality requirement.⁴⁸

The other direction of attack deals with content-neutral regulations like the ban on junked vehicles in *Kleinman*. Here the temptation is to assert that every content-neutral regulation applied to every artwork will survive constitutional scrutiny.⁴⁹ The governmental interest will be strong and the incidental impact on speech will be weak, or so this attack hopes. If so, the distinction between coverage and protection would be irrelevant in practice with respect to content-neutral regulations because artworks, even if covered by the First Amendment, would never be protected by it against content-neutral regulations.

⁴⁸ *But cf.* *United States v. Stevens*, 56- U.S. --- (2010) (adopting a historical test for determining when some legislatively created category of speech is permissibly outside the First Amendment's coverage, but reaffirming the constitutionality of creating a category of child pornography that did not fit within the historically identified categories).

⁴⁹ Content-neutral laws are sometimes described as laws of general application that in some applications directly affect speech activities. *See, e.g.,* *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986) (“neither the press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities.”).

Of course it is easy to come up with examples of content-neutral regulations that can be applied to artworks without violating the First Amendment. The most obvious cases involve performance artworks that violate ordinary criminal statutes. Performance art that takes the form of defacing public or private property or interacting with unsuspecting and unwilling bystanders in ways that amount to technical assaults,⁵⁰ for example, is clearly not protected by the First Amendment because the government interest embodied in general criminal law is substantial and excising all artworks from the coverage of those laws is impracticable.⁵¹ Other plausible examples, though, can place under pressure the conclusion that it will always be unproblematic to apply content-neutral regulations to works of art. Consider for example the application of historic preservation ordinances or environmental regulations to works by Christo and Jeanne-Claude. With a building-owner's permission, those artists wrap buildings in cloth for short periods, thereby altering the facades in a manner that might well be found to be inconsistent with an especially stringent historic preservation

⁵⁰ The reference here is to "punking" as performance art. *See* Urban Dictionary, <http://www.urbandictionary.com/define.php?term=punked> (visited ---), especially definitions 1 ("A way to describe someone ripping you off, tricking you, teasing you") and 5 ("What Ashton Kutcher says that makes all the hilarious pranks he pulls on celebrities suddenly okay").

⁵¹ The latter condition is needed to show that the application of the general criminal law to the artwork has no greater impact on expression than is necessary.

ordinance.⁵²



Photo of “Wrapped Reichstag”

⁵² They have had to navigate the shoals of environmental protection regulations for permission to install some of their other works. For a brief discussion of some of these difficulties, see Kriston Copps, “Recognizing Jeanne-Claude,” *American Prospect*, Nov. 24, 2009, http://www.prospect.org/cs/articles?article=recognizing_jeanne_claude (visited ---). One can imagine stringent applications of environmental protection regulations that would bar the installations in a way that would only modestly protect the environment against permanent damage.

The temporary nature of their installations means that the works will have only a modest impact on the interests served by historic preservation ordinances. Perhaps the interest in historic preservation should prevail over the artistic work, but we should not rule out in advance the possibility that the First Amendment ought to make it unconstitutional to apply such an ordinance to one of these wrappings. Yet, by assuming that the First Amendment test used when content-neutral rules affect covered activity will always allow regulation, that is precisely what this attempt to finesse the issue of coverage does.

Consider as well the problem posed by panhandling and ticket-scalping. Undoubtedly we could deal with First Amendment objections to regulations of those activities by finding them covered by the First Amendment but (almost) never protected by it.⁵³ Yet, I have the sense that the covered-but-not-protected argument is too much

⁵³ Perhaps regulations aimed at “aggressive” panhandling define the offense as they do because of concerns that “mere” panhandling – that is, a nonaggressive request for money – is both covered and protected by the First Amendment. *Compare* Gresham v. Peterson, 225 F.3d 899 (7th Cir. 2000) (upholding against a First Amendment challenge a city ordinance prohibiting aggressive panhandling, while noting that the city emphasized that the ordinance permitted a large amount of passive panhandling), *with* Young v. New York City Transit Auth., 903 F.2d 146 (2nd Cir 1990) (upholding ban on panhandling and begging in city subways, “[a]ssuming *arguendo* that begging and panhandling possess some degree of a communicative nature,” *id.* at 157). Similarly with busking, which, absent First Amendment concerns, could readily be dealt with under ordinary regulations directed at obstructions of the sidewalks, which apply to setting up tables outside restaurants and to busking.

work to solve what should be a fairly easy problem. In general terms, the “too much work” principle is put in play when one needs a complicated analysis to reach an answer that intuitively seems so obvious that a simple analysis should suffice.⁵⁴ Assassination provides a standard example of the “too much work” problem in connection with finding an activity covered but not protected. Another example would be shaming sanctions unauthorized by law, imposed by a community vigilante group, such as “tagging” an offender’s car or home with spray painted squiggles. The fact that the shaming sanction is expressive should not require additional work to explain why the state can permissibly subject the vigilantes’ actions to punishment.⁵⁵ Were these arguments to arise because

⁵⁴ I do not know of previous usages of the term for this phenomenon in the legal literature, but I would not be surprised to learn that other scholars have used other terms for the same idea. For myself, I came up with the term on analogy to Bernard Williams’s famous “one thought too many” argument against a large number of approaches to practical reasoning about moral questions.

⁵⁵ Various expressions by Supreme Court justices suggesting that expansive definitions of the First Amendment’s coverage ought to be rejected even when the activities are found to be covered but not protected, suggest some implicit sense that the “too much work” principle should come into play. *See, e.g.*, *Clark v. Community for Creative Nonviolence*, 462 U.S. 288, 301 (1984) (Burger, C.J., concurring) (“It trivializes the First Amendment to seek to use it as a shield in the manner asserted here,” that is, to claim that the activity of sleeping overnight in national parks is covered by the First Amendment); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (opinion of Rehnquist, C.J.) (“nude dancing of the kind sought to be performed here is expressive conduct within the

we somehow had to figure out a way to deal with odd cases on the margin, we might put up with them. But, here they arise because we have simply assumed without much analysis that artworks are covered by the First Amendment.⁵⁶

We will often but not always be able to put the question of coverage aside by finding an artwork unprotected even if covered by the First Amendment. The question of coverage remains independently important.

E. The Inutility of “Intent” as a Standard for Coverage

A common suggestion is that art is covered by the First Amendment because artists intend to communicate or express something, though with nonrepresentational art determining what they intend to express is notoriously difficult.⁵⁷ An “intent” criterion is

outer perimeters of the First Amendment, though we view it as only marginally so.”).

The intuitions behind these expressions are, I think, that using standard First Amendment analysis to reach the conclusion that the activities involved are properly subject to the regulations at issue requires too much work.

⁵⁶ Martha Minow pointed out in comments on an earlier version of this Essay that the problem here may be one of conceptual leakage. Having assumed coverage and then routinely found lack of protection, we may run across a problem where applying the usual First Amendment standards would lead to protection in a context where that result seems mistaken. She suggested that the leakage problem is particularly troublesome in settings involving commercial speech and copyright.

⁵⁷ For a discussion of the Court’s effort to deal with this difficulty by relying on viewers’ interpretations rather than creators’ intentions, see text accompanying notes --- *infra*.

both over- and under-inclusive. That is not enough to disqualify it, because every individual criterion for identifying what falls within a legal category has that characteristic.⁵⁸ But, specifying the problems of mismatch yields additional insights into some of the problems of art's coverage under the First Amendment.



⁵⁸ Indeed, any list of criteria will yield some over-inclusive and under-inclusive outcomes, and the true question is whether the degree of fit between the criteria (taken cumulatively) and the purposes the classification is designed to serve is “good enough.”

David Smith, [get title]

To begin, many modern sculptors would deny that they “intend” to express anything in their work. Rather, they seek to explore the relation between shape and space, nothing more (or less).⁵⁹ Nor, as the epigraph from Archibald MacLeish suggests, is the abjuration of an intent to express limited to some sculptors: Artworks “should not mean but be.” Consider the work known colloquially as “Whistler’s Mother.” Its creator gave it the title “Arrangement in Grey and Black” (with the subtitle “The Artist’s Mother” added to satisfy perceived audience demand), to emphasize that his interest lay less in rendering his mother’s appearance accurately than in exploring the possibilities of a limited palette of color.⁶⁰ Art as form – being rather than meaning – is not intended to communicate even though it may sometimes do so.

⁵⁹ See also text accompanying notes --- *infra* (discussing site-specific artworks).

⁶⁰ See JAMES MCNEILL WHISTLER, *THE GENTLE ART OF MAKING ENEMIES* 127-28 (1890) (“Art should ... stand alone, and appeal to the artistic sense of eye or ear, without confounding this with emotions entirely foreign to it,” and asserting of the work’s title, “Now that is what it is. To me it is interesting as a picture of my mother; but what can or ought the public to care about the identity of the portrait?”).



James McNeill Whistler, Arrangement in Black and White: The Artist's Mother (1871)

A related point is that sometimes artworks are engagements with a tradition. As such, it is not clear that they “mean” anything. Consider here what Picasso’s reimagining of Velazquez’s “Les Meninas” could mean: “I am a Spanish artist greater than Velazquez”⁶¹

⁶¹ For the original:



Velázquez, Les Meninas



Pablo Picasso, Les Meninas

Consider next *non*-artistic activities intended to express something. The ticket-scalper may be a libertarian, and indeed may say to purchasers that she is scalping tickets as a way of subverting the regulatory state.⁶² I doubt that her intent to express her libertarian views through the act of ticket-scalping should bring this activity under the

⁶² *Cf.* *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (upholding the conviction for distributing a handbill of a person whose handbill on one side advertised a tour of a submarine for which a fee had to be paid, and on the other a protest against the city's regulatory system for its wharfs). *See also* Post, *supra* note ---, at 487-88 ("The value of autonomy is at stake whenever human beings act or speak, which implies that virtually all government regulation is potentially subject to constitutional review [under the First Amendment]. This is the essential vice of *Lochnerism*."). I believe that the bracketed insertion captures Post's thought more accurately than the sentence as published.

First Amendment's coverage.⁶³ The justifications for bans on ticket-scalping might be sufficient to satisfy the demands of modern substantive due process in the economic domain. Placing the libertarian ticket-scalper under the First Amendment would seem to require at least a tiny increment in the justification for regulation, and I wonder whether the justifications for bans on ticket-scalping could survive even an extremely modest demand for a bit more justification.⁶⁴

Finally, consider a parent who uses reasonably forceful methods of disciplining his children in public, with the intent to demonstrate – express to those who happen to see

⁶³ *Cf. Nevada Commission on Ethics v. Carrigan*, --- U.S. ---, --- (2011) (“the fact that a nonsymbolic act is the product of a deeply held personal belief – even if the actor would like it to *convey* his deeply held personal belief – does not transform action into First Amendment speech.”). Obviously, the word “nonsymbolic” distinguishes this statement from the issue discussed here.

⁶⁴ For the seemingly applicable standard, see *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (content-neutral regulations must be “narrowly tailored to serve a significant governmental interest”). The weakness of the justifications offered to defend ticket-scalping bans against substantive due process attack suggests that the interest at stake might not be “significant,” and a complete ban on ticket-scalping might not be narrowly tailored in light of the possibility of limiting the ticket-scalper’s profit to some (small) multiple of the ticket’s face-value. *But see id.* at 798-99 (“the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’ *United States v. Albertini*, [472 U.S. 641], at 689.”)

it – his view that such methods are better than less coercive “modern” parenting methods. Here too I doubt that the presence of an intent to express something ought to change the analysis we would otherwise use. The parent might be able to raise a modern substantive due process claim resting on family autonomy, but as with the libertarian ticket-scalper I doubt that the disciplinarian parent should benefit from some increment in protection because of the intent to express something.⁶⁵

These examples bring the “too much work” principle into play. Confronted with the argument that some criteria for bringing art under the First Amendment would also bring other activities under it, some respond that those activities *should* be covered, but that doing so will pose no particular difficulties because the relevant First Amendment analysis will show that regulating those activities is permissible even when regulating art

⁶⁵ In comments on an earlier version of this Essay Glenn Cohen raised the question of whether the First Amendment requires that expressive activity be exposed to someone other than its creator. For example, could the parent claim First Amendment coverage for discipline conducted in private? Given that the parent can claim a constitutional right of parental autonomy for private discipline, the question becomes this: Assuming that the government’s justification for regulation overcomes that parental-autonomy claim, what *additional* justification might be required to overcome the First Amendment claim? My sense is that the First Amendment claim would be overcome by exactly the same government justifications as the parental-autonomy claim would be, in which case the parent has no (effective) First Amendment claim – or, put another way, the private activity is not covered by the First Amendment but only by the parental-autonomy right, such as it is.

is not. The “too much work” principle concedes the possibility, but then observes that reaching the presumably acceptable outcome requires too much analytic work (and that if the same outcomes are always reached, bringing the activities under the First Amendment seems pointless). The proposed criteria, that is, are in fact not general ones, but are jerry-rigged to achieve the desired result of covering art without providing any incremental protection to those other activities.⁶⁶

F. The Attractions and Perils of Nominalism

Perhaps we can begin to make some progress by a rather nominalist approach: The First Amendment is about speech and the press – about words. Perhaps we should

⁶⁶ In correspondence, Corey Brettschneider suggested that we could resolve the “too much work” problem by holding that the First Amendment covers artworks, but protects them less vigorously than it protects political or other traditional forms of high-value speech. This suggestion raises a number of important questions of First Amendment theory, too many to be explored in detail here. (For example, the high-value/low-value distinction currently tracks the covered/uncovered distinction, but Brettschneider’s suggestion would create a third category of covered-but-less-protected material, opening up the possibility that First Amendment doctrine should be structured with numerous layers each receiving its own level of protection.) For now, my primary observation is that Brettschneider’s suggestion would raise questions about the degree of protection to be afforded to works of imaginative literature such as *Ulysses*.

take words, or “word equivalents,”⁶⁷ as the starting point for thinking about nonrepresentational art and the First Amendment. The role of words and word-equivalents is inevitably complex. Treating words as *necessary* for First Amendment coverage will rule out coverage for much nonrepresentational art and leads to results that seem pretty clearly wrong in some instances.⁶⁸ Treating words as *sufficient* is more promising, yet sometimes will seem to find coverage for the wrong reasons. In addition, we can observe a tendency for judges to treat words as sometimes meaningless. Finally, treating the reproduction of words as something covered by the term “press” in the First Amendment leads to odd results as well. Addressing these questions provides a pathway into a deeper understanding of the problems with which this Essay is primarily concerned.

⁶⁷ I develop the idea of “word equivalents” in more detail below, text accompanying notes --- *infra*, but for present purposes it is enough to characterize them as works to which a viewer can give propositional content. An example is provided by Chief Justice Rehnquist’s observation that a protestor’s burning of an American flag “obviously did convey Johnson’s bitter dislike of his country.” *Texas v. Johnson*, 491 U.S. 397, 431 (1989) (Rehnquist, C.J., dissenting). The flag-burning is a word-equivalent with the propositional content (on the Chief Justice’s interpretation) “I bitterly dislike this country.”

⁶⁸ In addition, imputing word-equivalents to nonrepresentational art is almost certainly a fool’s errand. I discuss questions raised by such imputation in more detail below, text accompanying notes --- *infra*.

1. Are Words Necessary?

I think it fair to assume that political commentary lies at the First Amendment's heart. The word *commentary* suggests something using words – as of course does the word *speech*. One might think, then, that on strictly textualist grounds words might be a necessary component of material covered by the First Amendment.⁶⁹ This will of course leave much outside that coverage – including Jackson Pollock's paintings.

This textualism seems difficult to defend. As the Oxford English Dictionary indicates, commentary can take many forms.⁷⁰ Wholly apart from the fact that the First Amendment might well cover more than political commentary, some political commentary occurs without words.

⁶⁹ For a discussion of supplementing a textualist focus on words (“speech”) with a textualist focus on mechanical reproduction (“press”), see text accompanying notes --- *infra*.

⁷⁰ Oxford English Dictionary, Second edition, vol. III, p. 551, entry “commentary,” definition 3.b.: “Anything that serves for exposition or illustration....” (with the following example: “How excellent a Commentary This [Nature] is on the Former [the Scriptures].”).



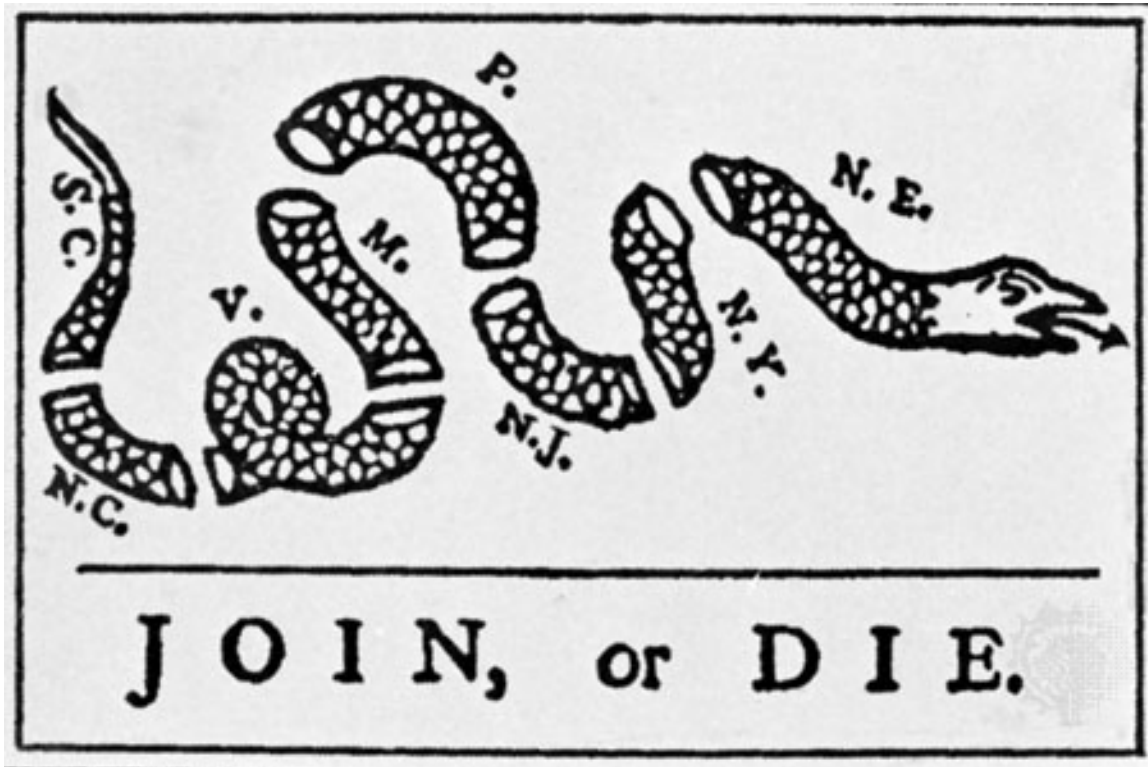
[caption]

What matters, it seems, is that, a large number of viewers will impute roughly the same political content to an image.⁷¹ Words might not be necessary for First Amendment coverage, but perhaps a reasonably widespread imputation of roughly the same meaning is. This suggests why ticket-scalping is outside the First Amendment's coverage: Some viewers may indeed impute political meaning when they observe a ticket scalper, but any such imputation will not be widely enough shared to bring the activity within the First Amendment. Yet, this approach will still not explain why *Blue Poles, No. 11* is covered by the First Amendment. It is entirely unclear whether anyone imputes any meaning to it, much less a political meaning, and whatever meanings are imputed are likely to be not widely enough shared to make the painting a word-equivalent.

⁷¹ For the doctrinal basis for this suggestion, see text accompanying notes --- *infra* (discussing *Hurley*).

2. Are Words Sufficient?

Any acceptable account of the First Amendment's coverage would have to ensure that political cartoons fall within the Amendment.



As published in Pennsylvania Gazette, 1754

The images in such cartoons are inextricable from their political content – and yet sometimes the images would not be understandable as political without accompanying words. The image of a severed snake in what may be one of the ten most famous U.S. political cartoons might well be meaningless, or “only” an image,” without the caption

“Join, or Die.” Perhaps we should conclude that art containing words is covered by the First Amendment.⁷²



Jenny Holzer, Installation for Guggenheim Museum, Bilbao

That conclusion would not explain why nonrepresentational art – art without accompanying words or word-equivalents – is covered. Even more, though, it is plainly overbroad. Jenny Holzer’s installations are made up of words in illuminated neon “signs.”⁷³ Yet, one goes wrong in paying too much attention to the words that flow

⁷² One obvious advantage of doing so is that the First Amendment unquestionably covers Joyce’s *Ulysses* even if that work has many meanings, few of them political.

⁷³ The quality of the reproduction used here is not high; three of the neon signs in the reproduction read “I CRY OUT,” but I cannot decipher the words on the fourth.

through the installations.⁷⁴ The art lies in the words' visual impact and, perhaps, in the cognitive disjuncture between the visual appearance and the meaning observers find themselves almost compelled to impute to the words they are seeing.⁷⁵ If there are reasons for including these works of art within the First Amendment, the fact that they employ words is not one of them.⁷⁶

In addition, a focus on words may be underinclusive as well. Sometimes images without words will convey meaning because the images have been so often associated with specific words that they become the equivalent of words. Think here of the donkey

⁷⁴ I realize that this interpretation of Holzer's work may be controversial, with other interpretations stressing the importance of the words themselves. All I can say is that in my view that Holzer uses words in her works is integral to their force but that the particular words she uses is not.

⁷⁵ Similarly with Renè Magritte's "Ceci n'est pas une pipe."



⁷⁶ I have illustrated Holzer's work with a site-specific installation, for reasons discussed at text accompanying note --- *infra*.

and elephant as symbols of the Democratic and Republican parties. The images have no intrinsic meanings, and there surely are depictions of donkeys and elephants that have no political content. But, deployed in political cartoons, the images have propositional content.

Nonconstitutional law already responds to the fact that images can take on meanings independent of words. A purely symbolic image can be protected by trademark law when it acquires a secondary meaning – a regular association in viewers’ minds between the image and the product to which it is implicitly but, importantly, not openly attached.⁷⁷ Perhaps nonrepresentational art is covered by the First Amendment on similar grounds: Even if not word-equivalents, and therefore not fairly encompassed

⁷⁷ Note, though, that when coupled with *Hurley*’s correct insistence on the multivocality of some covered material – the various interpretations viewers give a group’s inclusion in a parade – , discussed text accompanying notes --- *infra*, this argument for First Amendment coverage of nonrepresentational art threatens the trademark law of secondary meaning itself. The person who infringes a secondary-meaning trademark by taking advantage of the image’s multivocality has produced material that, on this argument, is covered by the First Amendment. (A descriptive term – and, by inference, an image – may be registered as a trademark only if it has “become descriptive of *the applicant’s* goods.” 15 U.S.C. § 1052 (f) (emphasis added). See *Park ‘n Fly v. Dollar Park & Fly*, 469 U.S. 189 (1985).)

within a purely textualist analysis, enough people may impute *some* meanings, and not entirely idiosyncratic ones, to such artworks.⁷⁸

A textualist insistence that words' presence is either sufficient or necessary for First Amendment coverage thus seems mistaken, and unable to account for the coverage of nonrepresentational art. Perhaps the textualist analysis can be salvaged on second-best grounds: Textualism's insistence that words are both necessary and sufficient for First Amendment coverage is indeed arbitrary with respect to any purposes we might impute to the Amendment, but it is better than any alternative in defining that coverage. Arbitrary inclusions (Jenny Holzer's work) and arbitrary exclusions (Jackson Pollock's) are the inevitable result. Perhaps so, but recall that we began with *Hurley's* assertion that Jackson Pollock's paintings were unquestionably covered. The textualist analysis cannot accommodate that assertion, nor the clearly widespread intuition that it is correct.

What is at work in these arguments is a sense – not more than that – that First Amendment coverage turns on treating covered material as somehow equivalent to

⁷⁸ As discussed above, a finding a coverage is not the same as a finding of protection, and perhaps the infringer can *invoke* the First Amendment because the image is covered by it, but is not protected by the First Amendment because trademark law survives the appropriate level of scrutiny, especially when the protection afforded by trademark law to images with secondary meaning is defined with sufficient narrowness. The structure of the argument is familiar from copyright law. *See* note --- *supra*. Yet, as before, this analysis seems to me susceptible to the “too much work” critique: We should be able to establish the conclusion with a less elaborate argument.

words. Many of the moves I have identified seek to convert nonrepresentational art into word-equivalents. What, though, if even words might be meaningless?

3. Can Words Be Meaningless?

Reading Supreme Court opinions dealing with words that some Justices find troubling, one notices an interesting trope: A Justice will note the words and assert puzzlement at what they mean, or otherwise deprecate the words' communicative effectiveness. Probably the most prominent example is Justice Blackmun's description of Paul Cohen's display of the words "Fuck the Draft" on his jacket as an "absurd and immature antic" and "mainly conduct, and little speech."⁷⁹ More recently, the Court called "Bong Hits 4 Jesus" "cryptic."⁸⁰ Importantly, the Court noted that the words might be interpreted differently by different people: "It is no doubt offensive to some, perhaps amusing to others.... [School] Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one."

⁷⁹ Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting). The characterization Justice Blackmun offered seems to me obviously inapt. Of similar import, but not referring to actual words, is Chief Justice Rehnquist's characterization of a flag-burning as "the equivalent of an inarticulate grunt or roar." Texas v. Johnson, 491 U.S. 397, 432 (1989) (Rehnquist, C.J., dissenting).

⁸⁰ Morse v. Frederick, 551 U.S. 393, 401 (2007).



[Photo credit]

Here again multivocality enters the analysis. A “reasonable” imputation of meaning to otherwise meaningless words – or symbols? – is sufficient to trigger First Amendment coverage.⁸¹ Word-equivalents arise when there is enough convergence in viewers’ understandings of an activity’s meaning for the activity to function as a shorthand for words expressly setting out that meaning.⁸² Perhaps some viewers would

⁸¹ Note that in trademark law invented words can become trademarks. Do consumers and competitors have a First Amendment right to use “to xerox” as a synonym for “to use a photocopying machine” or “onesies” as a synonym for “one-piece infant sleepwear” (before the words become generic and lose trademark protection), because they reasonably impute those meanings to the words?

⁸² An analogy here might be to the visual appearance of an English word transliterated into Greek script (but not translated into Greek). An example: σοκκερ (“soccer” transliterated; the Greek word for soccer is ποδόσφαιρο). The Greek “word” might be

be puzzled at the meaning of burning a flag, but enough people will impute identical meanings to the act for it to count as a word-equivalent.⁸³

I wonder whether many works of nonrepresentational art are word-equivalents, at least if the threshold for determining sufficient convergence in imputed meaning among viewers is more than just a bit above the ground. Is that threshold satisfied by whatever meanings viewers impute to *Blue Poles, No. 11*? More troubling, perhaps, is this question: Is the threshold satisfied by the meanings *readers* give the last line of James Joyce's *Ulysses*?⁸⁴ Or is it enough that every reader gives some meaning to the last lines even though there may be no significant convergence among readers on what that meaning is?

meaningless as a Greek word but could be the equivalent of the English word to someone who knows the Greek alphabet but not Greek.

⁸³ The criteria for determining when “enough” viewers converge on a meaning should, I think, be relatively weak, so that truly idiosyncratic meanings are excluded but odd ones are not.

⁸⁴ “... I was a Flower of the mountain yes when I put the rose in my hair like the Andalusian girls used or shall I wear a red yes and how he kissed me under the Moorish wall and I thought well as well him as another and then I asked him with my eyes to ask again yes and then he asked me would I yes to say yes my mountain flower and first I put my arms around him yes and drew him down to me so he could feel my breasts all perfume yes and his heart was going like mad and yes I said yes I will Yes.” JAMES JOYCE, *ULYSSES* 573 (1922). (This quotation is severely truncated.)

4. The Special Question of Reproductions

The question about *Ulysses* leads to another possibility. Switch from the Speech Clause to the Press Clause, and think in purely textualist terms.⁸⁵ Books are covered by the Press Clause because they are printed by, well, presses. So are books containing pictures, and so, therefore, are books containing depictions of nonrepresentational art.

This gets us something, but not nearly enough. Even with respect to words, this invocation of the Press Clause ends up protecting books but not the manuscripts submitted to publishers. With respect to art, the Press Clause protects reproductions but not the originals. And, this might be consequential if, for example, the government were able to seize the film on which a photograph is imprinted before the film is transmitted for reproduction. Perhaps more interesting, the approach leaves uncovered some of the artworks most likely to be the subject of problematic regulation – site-specific works that might trigger environmental protection or historic preservation concerns.



Photo of Robert Smithson, Spiral Jetty

⁸⁵ I mean to put aside here various originalist interpretations of the Press Clause, some of which treat the Clause as dealing solely with regulation of the mechanical *means* of reproducing speech. See, e.g., Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL RTS. J. 1037 (2009).

G. Two Additional Paths to Avoid if Possible

1. Stipulating that Art is Covered

Finessing the coverage question by moving directly to the protection question is impossible, and dealing with it through a nominalist approach seems troublesome as well. Supreme Court doctrine on other First Amendment issues points out another possibility. That is to “solve” the problem by stipulation – by declaring that nonrepresentational art is categorically included or categorically excluded from the First Amendment’s coverage, without further explanation.

The Court has taken this path in two areas bordering on the issue with which I am concerned.⁸⁶ After holding that commercial speech was not categorically low value, the Court defined commercial speech as speech that “concern[s] lawful activity and [is] not ... misleading.”⁸⁷ Long-standing regulations of misleading advertising would be brought into question were misleading commercial advertisements to be covered by the First Amendment, which may have motivated the Court to exclude such advertisements from its definition of commercial speech.⁸⁸

⁸⁶ For a discussion of why commercial speech and copyright border on the law of art, see text accompanying notes – *infra*.

⁸⁷ *Central Hudson Gas v. Public Service Comm’n*, 447 U.S. 557, 566 (1980).

⁸⁸ For a discussion, see Rebecca Tushnet, *Fighting Freestyle: The First Amendment, Fairness, and Corporate Reputation*, 51 B.C. L. REV. 1457 (2009).

Why, though, is the government entitled to label some advertisements as misleading and thereby exclude them from the First Amendment's coverage?⁸⁹ As the constitutional law of commercial speech has developed, the Court has increasingly emphasized that the government cannot prohibit commercial speech on the paternalistic ground that consumers given information by an advertisement will make imprudent choices.⁹⁰ Yet, characterizing a facially truthful statement as misleading is just that sort of paternalism, expressing the government's judgment that consumers – assisted by competitors' counteradvertising and various forms of consumer-generated content such as web-sites with product reviews – will be unable to determine for themselves the information's accuracy or significance. Excluding misleading speech from the category of commercial speech covered by the First Amendment solves a difficult problem by stipulation.

The Court has treated the First Amendment dimensions of copyright similarly. In *Eldred v. Ashcroft* the Court rejected a First Amendment challenge to the Copyright Extension Act of 1998, holding that it was not different enough from prior copyright extension acts that it had upheld.⁹¹ In discussing the First Amendment claim, the Court

⁸⁹ In *Central Hudson*, the Court used the phrase “whether the expression is protected” to introduce its definition of commercial speech, but the sense of “protection” here is “coverage.” 447 U.S. at 566.

⁹⁰ See especially *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (invalidating a ban on advertising of liquor prices that the state had sought to justify by arguing that lack of information would reduce demand for liquor).

⁹¹ 537 U.S. 186 (2003).

alluded to exceptions built into the structure of copyright law itself. Among those exceptions is the fair-use doctrine. The Court concluded that any First Amendment interest in using another person’s copyrighted words was “generally adequate[ly] ... address[ed]” by “copyright’s built-in free speech safeguards.”⁹² Depending on what the Court meant by “generally adequate,” this may overstate the ease with which copyright can be accommodated with the First Amendment. The *Eldred* analysis suggests that banning “unfair” uses as defined in copyright law would not violate the First Amendment as interpreted outside the copyright context – that is, that unfair uses are defined so as to ensure that the high standards required for content-based regulations are satisfied. Yet, this conclusion might not be warranted. Two examples suggest why.

The first is *Harper & Row, Publishers v. Nation Enterprises*, which held a magazine liable for infringing a publisher’s copyright by embedded approximately 300 words of the most newsworthy portions of Gerald Ford’s memoirs in a 2,250-word article published two weeks before the book’s official release date.⁹³ The Court held that this was not fair use. Second, in adopting the present version of the “fair use” rule in 1976, Congress had before it an “agreement” between authors, publishers, and educators setting out guidelines for classroom copying.⁹⁴ One apparently unfair use is the distribution to a

⁹² *Id.* at 221.

⁹³ 471 U.S. 538 (1985).

⁹⁴ Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions, U.S. House of Representatives Report 94-1976. The precise status of this agreement is unclear, although some courts have relied on them to define fair use. *See, e.g., Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381 (6th Cir. 1996). It

class of copies of a complete short poem, defined as “less than 250 words” and “printed on not more than two pages,” where the distribution is not spontaneous, defined as a decision to distribute the poem occurs “so close in time” to “the moment of its use for maximum teaching effectiveness ... that it would be unreasonable to expect a timely reply to a request for permission.”⁹⁵

In both examples the justification for allowing the imposition of liability for unfair use is to ensure that authors and publishers have sufficient incentives to produce copyrightable material in the first place. As *Harper & Row* put it, copyright is “the engine of free expression.”⁹⁶ It is not clear to me that ordinary First Amendment standards applicable outside the copyright context would make it permissible to impose liability for the publication of newsworthy material, for example in a tort action claiming that the publication cast the subject in a false light, or non-spontaneous distribution of complete short poems in an action seeking damages for injury to reputation.⁹⁷ One could

seems to have been intended as a safe harbor for uses described as fair by the guidelines; whether the agreement was intended to serve as a delimitation of uses that would not be fair remains controversial.

⁹⁵ Agreement on Guidelines, *supra* note ---.

⁹⁶ 471 U.S. at 558.

⁹⁷ I have in mind “confessional poetry,” of which Sylvia Plath’s “Daddy” is an example. Some confessional poems might identify a person with sufficient specificity to make a claim of reputational damage entirely plausible. The development of on-line permissions systems might reduce the time needed to obtain permission to the point where no distribution could fairly be called spontaneous. For a more extended discussion of why

reasonably question whether the incentive-based justification for imposing liability is sufficiently strong to satisfy standards such as the “compelling interest” one applicable outside copyright,⁹⁸ or whether the standards for determining when uses are fair or unfair are sufficiently well-defined to satisfy ordinary notice standards applicable in other First Amendment areas.⁹⁹ Perhaps more important, the incentive-based justification for imposing liability explains why we are engaged in “restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others,” which, in other contexts we have been told “is [a practice] wholly foreign to the First Amendment.”¹⁰⁰

“copyright’s built-in safeguards” might not be sufficient to satisfy non-copyright based First Amendment requirements, see Rebecca Tushnet, *Copy This Essay: How the Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004).

⁹⁸ Cf. *Eldred v. Ashcroft*, 537 U.S. 186, 254-56 (2003) (Breyer, J., dissenting) (questioning whether the Sonny Bono Copyright Term Extension Act could be justified on incentive grounds).

⁹⁹ For discussion, see William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1692–94 (1988); Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1137 (1990) (“It is de rigueur to begin a scholarly discussion by quoting one of the judicial laments that fair use defies definition.”).

¹⁰⁰ *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). For a discussion using this observation to challenge *Buckley*’s correctness, see Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Campaign Finance Reform, Hate*

The tenor of copyright doctrine, I think, is that the main aspects of copyright law simply cannot violate the First Amendment – a classic solution by stipulation.

I do not mean to assert that stipulated solutions are always undesirable. Stipulated solutions may sometimes be inevitable, as when the problems posed are so intractable that integrating a doctrinal solution to a particular problem into the general body of First Amendment law is extremely difficult. Choosing such a solution should be a last resort, though.

2. Balancing

The same can be said of a second path for avoiding the problems of determining why nonrepresentational art is covered by the First Amendment. That path uses a standard balancing analysis that makes the considerations discussed throughout this Essay all relevant to determining the questions of coverage and protection, and trusts the good sense of legislators, administrators, and judges to arrive at sensible solutions. Some performance artworks would not be covered, some would be, some that are covered would be protected, others would not be, depending on the exact contours of the problems presented. A Christo-Jeanne-Claude wrapping might be prohibited if it threatened “too much” environmental damage or if the temporary wrapping of a historic building posed “large enough” risks of permanent damage to the building’s exterior, but not if the environmental threat or the risk to the building’s exterior was “small enough.”

Speech and Pornography Regulation, and Telecommunications Regulation, 42 B.C.

L.REV. 1, 44 (2001).

Balancing tests are familiar in First Amendment law. They tend to have an air of the disreputable about them because they are thought by many to give insufficient guidance *ex ante* to people hoping to engage in activity they believe to be both covered and protected by the First Amendment. For this reason it is helpful to try to pin down with as much precision as possible doctrinal alternatives to a balancing test even though in the end we may end up concluding that balancing is the best we can do.¹⁰¹

IV. First Amendment Theory and the Assumption that Art is Covered

A Why We Assume that the First Amendment Covers Art

I suspect that we assume that even nonrepresentational art should be covered by the First Amendment for several reasons. First, because we think that such art is, in some sense, a “good thing.”¹⁰² But of course not all good things receive constitutional

¹⁰¹ For a good recent discussion concluding that an eclectic approach to coverage is the best we can do, see R. George Wright, *What Counts as “speech” in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217 (2010).

¹⁰² Justice Souter properly included “Arnold Schoenberg’s music” in his list of “unquestionably” covered works, *Hurley*, 515 U.S. at 569, because most of the issues discussed in this Essay arise in connection with instrumental music, especially nonprogrammatic instrumental music. For that reason, although I agree that tensions between the way in which we think about words and the ways in which we think about images have some bearing on this Essay’s deeper implications, as to which see Rebecca Tushnet, *Worth a Thousand Words: Copyright Law Outside the Text* (forthcoming), I do not think that the distinction between words and images can do all the explanatory work.

protection.¹⁰³ And perhaps more interesting, some contemporary artists defend their work on the ground that it is transgressive,¹⁰⁴ meaning, I believe, that it implicitly rejects prevailing standards for determining what fits with the class of good things – and suggesting that defenders of the status quo might have good reasons, from their own point of view, to regulate or suppress such works.¹⁰⁵

As suggested earlier, we may also assume that nonrepresentational art is covered by the First Amendment because we find it hard to imagine circumstances under which governments would try to regulate it; the coverage question, we might assume, is otiose.¹⁰⁶ Perhaps MacLeish’s statement about poems should be given a different meaning from the one ordinarily given it: Nonrepresentational art *simply* is (unlike

For one of the few efforts to analyze music’s First Amendment coverage, see David Munkittrick, *Music as Speech: A First Amendment Category Unto Itself*, 62 FED. COMMUN. L.J. 665 (2010).

¹⁰³ Chocolate ice cream, for example.

¹⁰⁴ For a discussion focusing primarily on art and secondarily on the law, see ANTHONY JULIUS, *TRANSGRESSIONS: THE OFFENSES OF ART* (2003).

¹⁰⁵ Some recent controversies, such as the withdrawal for city subsidies from the Brooklyn Museum after it exhibited Andres Serrano’s “Piss Christ,” demonstrate that some works of transgressive art succeed in that ambition. See *Brooklyn Institute of Arts & Sciences v. Giuliani*, 64 F.Supp.2d 184 (F.D.N.Y. 1999), for a discussion of the controversy.

¹⁰⁶ See text accompanying notes --- *supra*.

ticket-scalping), which is why governments do not try to regulate it.¹⁰⁷ Yet, governments do sometimes try to regulate such art.¹⁰⁸ And, the answer to the coverage question has implications for other problems. For example, if nonrepresentational art is not covered by the First Amendment, questions about government subsidies for some artworks but not others become relatively easy rather than relatively hard,¹⁰⁹ and we need not take the First Amendment into account in determining whether one person's reproduction of an artwork violates another's rights under copyright or trademark law.¹¹⁰ And, of course, the *a fortiori* argument made in *Hurley* would be unavailable; the case's reasoning would have to be reconstructed.¹¹¹ In the other direction, if nonrepresentational art is covered by the First Amendment, we must face some difficult questions about copyright law and the law of trademark tarnishment.

Another reason for thinking that the First Amendment covers art is that we know that the First Amendment is about communication, and we think that art communicates as well. But, this is a logical fallacy: That the First Amendment covers some things that communicate does not imply that it covers all things that do so. In addition,

¹⁰⁷ I owe this suggestion to Rebecca Tushnet.

¹⁰⁸ For an example of government regulation of art as such, see *Kleinman v. City of San Marcos*, 597 F3d. 323 (5th Cir. 2010), discussed text accompanying notes --- *supra*.

¹⁰⁹ See *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

¹¹⁰ See Eugene Volokh, "Intellectual Property Law and the First Amendment," in *ENCYCLOPEDIA OF THE U.S. CONSTITUTION 1377* (Leonard Levy & Kenneth Karst eds. 2000).

¹¹¹

“communicates,” in its use in the First Amendment context, is a transitive verb. Speech covered by the First Amendment communicates *something*. Yet, what art communicates is often quite unclear.

B. Problems Fitting Art’s Coverage Into Prevailing First Amendment Theory

The questions that animate this Essay can be put in this way: Exactly how is nonrepresentational art different, for First Amendment purposes, from panhandling and ticket-scalping?¹¹² And, how is nonrepresentational art similar to core examples of political speech clearly covered by the First Amendment?

¹¹² Busking combines artistic performance (usually musical) with panhandling. *SEIU v. City of Houston*, 542 F. Supp. 2d 617 (S.D. Tex. 2008), upheld an anti-busking ordinance against a First Amendment challenge, finding the ordinance content-neutral and adequately justified. *Cf. Hobbs v. County of Westchester*, 397 F.3d 133 (2nd Cir. 2005), upholding against a First Amendment challenge a county’s executive order barring a busker, previously convicted of child molestation, from child-oriented performances on public property. The court of appeals found the order content-neutral and sufficiently justified. (The busker there made balloon animals.) These cases suggest a pattern in which activities such as panhandling and ticket-scalping are held covered by the First Amendment but that regulation of those activities (almost) certainly satisfies the applicable First Amendment standards. For a discussion of whether that pattern can provide the basis for a general approach to nonrepresentational art and the First Amendment, see text accompanying notes --- *supra*.

Alexander Meiklejohn's treatment of art indicates why the first question is interesting and difficult. Meiklejohn offered a general account of freedom of speech as a protection for "those activities of thought and communication by which we 'govern.' ... Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."¹¹³ Yet, "there are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values."¹¹⁴ These include "[l]iterature and the arts," which "lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created."¹¹⁵ He continued, "the novel is at present a powerful determinative of our views of what human beings are, how they can be influenced, in which directions they should be influenced by many forces, including, especially, their own judgments and appreciations."¹¹⁶ We might wonder whether nonrepresentational art could be described in similar terms, but even if it could be, we should note that the "governance-relevant" characteristics Meiklejohn identifies in novels also characterize panhandling and ticket-scalping. Or, to fill in the steps, governance-relevant views can be shaped by running a small business. We might require

¹¹³ Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255.

¹¹⁴ *Id.* at 256.

¹¹⁵ *Id.* at 257.

¹¹⁶ *Id.* at 262. *Cf.* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (referring to "the subtle shaping of thought which characterizes all artistic expression.").

that governments provide some reason for requiring that specific businesses be licensed, but we pretty surely do not want to subject licensing requirements to even a modest increment of required justification – of the sort dealt with through the doctrine dealing with content-neutral regulations¹¹⁷ -- because running a small business is governance-relevant. Finally, governance-relevant learning can occur by reading a novel *or* by observing a panhandler or a ticket-scalper.¹¹⁸

The widely used metaphor of the marketplace of ideas shows why the second question is interesting and difficult. Archibald MacLeish’s assertion that “a poem should not mean but be” suggests that art is not “about” ideas nor does it “convey” or “express” them.¹¹⁹ What “idea” does Jackson Pollock’s *Blue Poles: No.11* convey? Even more,

¹¹⁷ See text accompanying notes --- *supra*.

¹¹⁸ Meiklejohn seems to me to argue that the First Amendment protects art because of its effects on the viewer, not because producing art has the effects he describes on the artist. Compare *Hold Fast Tattoo, LLC v. City of North Chicago*, 580 F. Supp. 2d 656 (N.D. Ill. 2008) (holding that “the act of tattooing is not an act protected by the First Amendment”), with *Dawson v. Delaware*, 503 U.S. 159 (1992) (holding that the admission into evidence of the content of the defendant’s tattoos to show his association with the Aryan Brotherhood violated his First Amendment rights). I discuss the possibility of distinguishing between the arts and panhandling by providing a narrow definition of what Meiklejohn calls “the range of human communications,” text accompanying notes --- *infra*.

¹¹⁹ The observation that MacLeish “asserted” this in a poem is a commonplace in commentary on it. See, e.g.,

what idea does *Ulysses* convey? “Human experience is wondrously various,” perhaps. But then, I would think that panhandling and ticket-scalping convey that idea as well.¹²⁰

The most prominent general “theory” of the First Amendment runs into difficulty in explaining art’s coverage.¹²¹ Autonomy-related theories are both promising and problematic. They are promising because artistic expression is, in the Romantic tradition at least, precisely a way in which an artist lives autonomously; they are problematic as a way to distinguish artistic expression from essentially all other human activities, which can be ways in which people live autonomously.¹²² Perhaps not panhandling, but at least some forms of ticket-scalping are autonomous expressions of the self – unless one

<http://www.cummingsstudyguides.net/Guides5/ArsPoetica.html> (visited ---). I use this citation to illustrate how banal the observation has become.

¹²⁰ In referring to Meiklejohn and the “marketplace of ideas” metaphor I have introduced general First Amendment theory. In general, though, I attempt in this Essay to avoid commitments to general theories of the First Amendment, relying instead on stated doctrine (which must of course be informed by theoretical presuppositions but works to some degree independently).

¹²¹ See text accompanying notes --- *supra*.

¹²² To similar effect, see LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY 46 (2010) (“Speech as a means of self-fulfillment and self-realization can be seen as too ill-defined for judges to work with comfortably, *indistinguishable from other meaningful human activities...*”) (emphasis added).

stipulates that the market is not a domain for self-expression, as some autonomy theorists quite controversially do.¹²³

General First Amendment theories that do not invoke either politics or autonomy are hard to come by. Jack Balkin argues that the First Amendment protects a domain in which a democratic culture, not confined to politics, can flourish.¹²⁴ Balkin's is a historicist approach to constitutional law,¹²⁵ and like all such approaches it has difficulties connecting the descriptive with the normative. As applied to art, the argument goes something like this: Nonrepresentational art falls within a category – artworks including works of imaginative literature – that today's legal culture takes as contributing to a more general democratic culture. Further, today's legal culture is inclined to use relatively large legal categories – “artworks in general” – rather than smaller ones such as “representational art” or “written literature” -- for reasons familiar from discussions of the desirability of rules rather than standards. For example, large categories provide better guidance to larger numbers of people, and are easier to administer for judges acting under substantial constraints of time and ability. But, precisely because Balkin's argument must describe the legal culture as committed to a

¹²³ See, e.g., C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989)

(offering an autonomy-based account of freedom of expression that excludes from the First Amendment's reach communications occurring in or driven by the market) .

¹²⁴ See especially J.H. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

¹²⁵ For an exposition of Balkin's historicism, see JACK BALKIN, CONSTITUTIONAL HISTORICISM (forthcoming).

specific version of the “rules/standards” debate, it is vulnerable to the usual normative criticisms of all the positions taken in that debate, and to the additional historicist criticism that the existence of widespread controversy over the “right” way to think about the “rules/standards” question shows that today’s legal culture is not in fact committed to the use of large rather than small categories. Both the normative and historicist criticisms of Balkin’s position take on special force in dealing with questions, such as that of art’s coverage, that test the boundaries of the categories conventionally used.¹²⁶

Similar difficulties attend Robert Post’s weakly sociologized account of art’s coverage. For Post, art “fit[s] comfortably within the scope of public discourse,” which he defines as “all communicative processes deemed necessary for the formation of public opinion,”¹²⁷ because it is a “form[] of communication that sociologically we recognize as art.”¹²⁸ Given the existence of controversies over whether works like “Cadillac Graveyard” and Kleinman’s planter fall within the category “art,”¹²⁹ Post’s “we” must refer to something like “a well-informed and reasonably well-educated and sophisticated group of people who reflect on the nation’s commitment to free expression,” rather than, as one might think, “the people as represented in their legislatures.” And, again as with

¹²⁶ Here too the claims made on behalf of transgressive art are relevant. For a brief discussion, see text accompanying notes --- *supra*.

¹²⁷ Post, *supra* note ---, at 486.

¹²⁸ Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617, 621 (2011).

¹²⁹ See text accompanying notes --- *supra*.

Balkin, Post’s category is the relative large one of “art in general,” rather than “nonrepresentational art” or, perhaps, “art as understood by MacLeish.”¹³⁰

V. First Amendment Doctrine and Art

A. The Supreme Court on Art and the First Amendment

The Supreme Court’s references to art in general, and to art that does not have propositional content apparent on its surface, have been remarkably casual.¹³¹ An early decision, since overruled, held that motion pictures were not covered by free speech principles.¹³² According to Justice McKenna, “The first impulse of the mind is to reject the contention” that “motion pictures and other spectacles” are covered by those principles.¹³³ He acknowledged that motion pictures “may be mediums of thought,” but, he continued, “so are many things ... [such as] the theater, the circus, and all other shows and spectacles.”¹³⁴ Making and showing motion pictures was “a business, pure and simple, ... not to be regarded ... as part of the press of the country, or *as organs of public*

¹³⁰ I think it telling that Post’s core example is the film *Brokeback Mountain*, Post, *supra* note ---, at 620-21, rather than, for example Pollock’s *Blue Poles No. 11*.

¹³¹ See also note --- *supra* (discussing *City of Dallas v. Stanglin*, 490 U.S. 19 (1989)).

¹³² *Mutual Film Corp. v. Industrial Comm’n of Ohio*, 236 U.S. 230 (1915), *overruled*, *Joseph Burstyn, Inc v. Wilson*, 343 U.S. 493 (1952). The Court addressed the coverage of Ohio’s constitutional protection of speech and the press.

¹³³ *Id.* at 243-44.

¹³⁴ *Id.* at 243.

*opinion.*¹³⁵ As *Joseph Wilson, Inc. v. Burstyn* held, the mere fact that an activity is conducted for profit cannot possibly be the basis for placing it outside the First Amendment's coverage,¹³⁶ but Justice McKenna's reference to "organs of public opinion" might have become the basis for serious consideration of the First Amendment's coverage of imaginative literature and nonrepresentational art.

It was not to be. In *Winters v. New York*, Justice Stanley Reed rejected the proposition that "the constitutional protection for a free press applies only to the exposition of ideas," because "[t]he line between the informing and the entertaining is too elusive for the protection of that basic right."¹³⁷ He continued, "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."¹³⁸ Here too we can glimpse the hint of a delineation of the First Amendment's coverage: Activities covered by the First Amendment must somehow teach doctrine or otherwise *convey* ideas even if they are not *expositions* of ideas. It seems clear, though, that neither Justice Reed nor his colleagues saw that line. Justice Felix Frankfurter, dissenting, observed almost off-handedly that "Keats' poems [and] Donne's sermons" are "under the protection of free speech,"¹³⁹ not noticing that Donne's

¹³⁵ *Id.* at 244 (emphasis added).

¹³⁶ *Joseph Burstyn, Inc v. Wilson*, 343 U.S. 493, 501 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.")

¹³⁷ *Winters v. New York*, 333 U.S. 507, 510 (1948).

¹³⁸ *Ibid.*

¹³⁹ *Id.* at 528 (Frankfurter, J., dissenting).

sermons differ from Keats's poems precisely in that the sermons are expositions of ideas whereas treating Keats's poems as such expositions drains them of much of their essence.¹⁴⁰

It would be tedious to compile the passing references to the First Amendment's coverage of undifferentiated categories of "art" and "literature," coupled with mention of the ways in which some forms of art and literature can be, as Justice Clark said, propaganda or vehicles for ideas. The culmination came in the Court's efforts to define obscenity. As the Court understood the problem, obscene materials lay outside the First Amendment's coverage. That made identifying the obscene critically important. And, throughout its efforts to define obscenity the Court has simply assumed that material that

¹⁴⁰ This is true even of poems that seem expressly at least partly didactic. Consider what is lost in saying that the "point" of "Ode on a Grecian Urn" is "Beauty is truth, truth beauty, -- that is all/ Ye know on earth, and all ye need to know." (Note that Keats has the urn itself "saying" this.) Here again this Essay's epigraph from Archibald MacLeish is to the point. *See also* *Brown v. Entertainment Merchants Ass'n*, --- U.S. ---, --- n. 4 (2011) ("Reading Dante is unquestionably more cultured and intellectually edifying than playing *Mortal Kombat*."). I do not mean to minimize the difficulties in distinguishing between didactic imaginative literature – "propaganda through fiction," in Justice Reed's words – and "mere" imaginative literature, and those difficulties might be sufficient to justify a decision not to draw a constitutional distinction between them. But, that is a different rationale from the one the Court has offered.

can be described as “sufficiently” artistic cannot be obscene.¹⁴¹ Its assumption, that is, has been that art is presumptively covered by the First Amendment. I suspect that the Court’s assumption was an unconsidered result of the initial confrontation with works labeled obscene. The celebrated cases, such as that involving *Ulysses*, involved serious written literature, readily enough characterized as covered by the First Amendment if only because the works used words. But, instead of treating the challenged works as (merely) written literature, the courts protected them because of what the courts called the works’ “artistic” value. Then they generalized from the category “written works with artistic value” to “all works, whether written or not, with artistic value,” without realizing that the elimination of words from the works ought to have triggered some thought about how such works could be described as “speech” or “press.”

That assumption underlies the Court’s most extended recent confrontation with the relation between the First Amendment and contemporary art. In *National Endowment for the Arts v. Finley* the Court tied itself into knots trying to figure out how to deal with a

¹⁴¹ See, e.g., *Roth v. United States*, 354 U.S. 476, 487 (1957) (“The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.”) (emphasis added); *Miller v. California*, 413 U.S. 15, 24 (1973) (“A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have *serious* literary, *artistic*, political, or scientific *value*.”) (emphasis added).

seemingly content-based rule for awarding federal subsidies to art.¹⁴² Suppose the Endowment decided not to provide a subsidy to Jackson Pollock. The First Amendment aside, no one would worry about the grounds on which Congress decided to award selective subsidies. Yet, how could we begin to think about the subsidy's denial by invoking standard First Amendment doctrine about content-based regulations?¹⁴³ For reasons the Court has never bothered to explain, the fact that something is denominated "art" changes the constitutional landscape dramatically.

B. Doctrinal Building Blocks

The Supreme Court has given us three building blocks for understanding why nonrepresentational art is covered by the First Amendment. The first is the *Hurley* case in which Justice Souter declared that Jackson Pollock's paintings were unquestionably covered by the Amendment.¹⁴⁴ He found it necessary to make that statement because of the argument made by the respondents, a group of gay Irish Americans who wanted to participate in Boston's St. Patrick's Day parade, which was conducted by a private organization. The Massachusetts Supreme Judicial Court held that the parade was a place of public accommodation under the state's anti-discrimination laws, and therefore could

¹⁴² 524 U.S. 569 (1998). For a discussion of the case, see BEZANSON, *supra* note ---, at --
-.

¹⁴³ I put aside the possibility that the Endowment might deny the subsidy for reasons orthogonal to its interest in art, for example, on the (hypothesized) ground that Pollock was a Communist.

¹⁴⁴ 515 U.S. 557 (1995).

not exclude gays because of their sexual orientation. The parade organizers contended that a rule requiring that they make the parade available to gays violated their First Amendment rights. The gay group responded by arguing that a parade as such, even one in which participants carried signs identifying themselves or otherwise making statements, did not convey a message.

Justice Souter replied that parades were for “marchers who are making some sort of collective point, not just to each other but to bystanders along the way.”¹⁴⁵ What exactly was the point of the parade? “[A] narrow, succinctly articulable message is not a condition of constitutional protection,” which was why Pollock’s paintings are covered by the First Amendment.¹⁴⁶ Rather, the parade’s organizers had “the autonomy to choose the content of [their] own message,” again, even if that content was not readily articulable.¹⁴⁷ But, if the organizers could not readily articulate what they meant by picking and choosing among applicants for places in the parade, how can we say that they had any message at all? The answer, Justice Souter wrote, lay in the meaning *observers* would impute to participation: “[T]he parade’s overall message is distilled from the individual presentations along the way, and each unit’s expression *is perceived by spectators* as part of the whole.”¹⁴⁸ Viewers seeing the gay group’s banner might

¹⁴⁵ *Id.* at 568.

¹⁴⁶ *Id.* at 569.

¹⁴⁷ *Id.* at 576.

¹⁴⁸ *Id.* at 577 (emphasis added).

mistakenly infer that the parade’s organizers had no objections to the “unqualified social acceptance of gays and lesbians.”¹⁴⁹

Hurley implies that the First Amendment’s coverage depends on whether observers impute “meaning” to what they see.¹⁵⁰ Note, though, that the “meaning” need not be univocal. Some viewing the gay group’s banner in the parade might take it to indicate the sponsor’s indifference to gay sexuality; others might take it to indicate the sponsor’s endorsement of gay sexuality (as one among many); yet others might not think it of any significance at all. We might come up with some limits on the multivocality of objects covered by the First Amendment. *Rumsfeld v. FAIR* suggests a “reasonable observer” standard: The reasonable observer must understand that the object on view *is* expressive, though not all observers will agree on what it expresses.¹⁵¹ Perhaps an object

¹⁴⁹ *Id.* at 574. The resonance between this approach and “reader response” accounts of literature is clear. For an annotated bibliography on reader-response theory, see Jane P. Tompkins, “Annotated Bibliography,” in *READER-RESPONSE CRITICISM: FROM FORMALISM TO POST-STRUCTURALISM* 233-72 (Jane P. Tompkins ed. 1980).

¹⁵⁰ For an explanation of the scare quotes, see text accompanying notes --- *infra*.

¹⁵¹ *Rumsfeld v. FAIR*, 547 U.S. 47, 66 (2006) (distinguishing between “inherently expressive” conduct and other conduct, only the former of which is protected by the First Amendment, and observing, “An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school’s interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.”). *See also* *First Vagabonds Church of God v. City of Orlando*, 610 F.3d 1274 (11th

to which only a handful of people impute “meaning” is not covered, and perhaps truly idiosyncratic imputations of meaning could be disregarded.¹⁵² This analysis has two attractive features. It accounts for the intuition that nonrepresentational art is covered, because one feature of such art is that viewers impute “meaning” – indeed, many “meanings” – to it. In addition, it accounts for the fact that the First Amendment’s coverage may change when enough people start to understand an object as “art” rather than, for example, immature scribbles.

The second building block is *Cohen v. California*, which identifies the meanings that the First Amendment covers.¹⁵³ The case’s facts are well-known, as is its central rationale. Cohen carried a jacket with the words “Fuck the Draft” written on its back. He was arrested for engaging in offensive conduct. As Justice John Marshall Harlan

Cir. 2010) (relying on this passage to hold that a church’s activity in providing food to the homeless in a city park, while intended to communicate a message and understood by some viewers to do so, was not “truly communicative.”). Consistent with the general pattern identified above, text accompanying notes --- *supra*, on rehearing en banc, the Fifth Circuit assumed that the activity was expressive but upheld the city’s prohibition of the distribution of food as “a reasonable time, place, and manner restriction.” *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 761 (11th Cir. 2011).

¹⁵² What counts as “truly idiosyncratic” would have to be quite carefully specified. It is a settled feature in novels dealing with serial killers that the killers can regard what they do as producing works of art, and the very fact that it is a settled feature shows that the imputation of artistry to killings is not idiosyncratic.

¹⁵³ 403 U.S. 15 (1971).

carefully explained, the case turned on whether the state “can excise ... one particular scurrilous epithet from the public discourse.”¹⁵⁴ The state argued that doing so did no damage to anyone’s ability to assert any proposition. Cohen could continue to assert, and write on his jacket, “Down with the Draft,” or “Abolish the Draft.” But, Justice Harlan replied, those words *meant* something different from “Fuck the Draft”: “[M]uch linguistic expression serves a dual communicative function: It conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force.”¹⁵⁵ Prior to *Hurley*, perhaps this building block might have been limited to cases in which the non-cognitive component was attached to some distinctive cognitive one.¹⁵⁶ But, *Hurley*’s endorsement of multivocality means that every form of expression has some cognitive content for some viewers or listeners. *Cohen* is thus available as a general building block.

Here, then, is a second reason that the First Amendment covers nonrepresentational art. *Cohen* provides some reasons for rejecting a distinction hinted at in some prior decisions, between activities that convey ideas and those that expound them, and hint even more mutedly at the possibility that the First Amendment covers works that expound but not works that convey ideas.¹⁵⁷ The intuition is that nonfiction

¹⁵⁴ *Id.* at 22.

¹⁵⁵ *Id.* at 26.

¹⁵⁶ See BEZANSON, *supra* note ---, at --- (suggesting that *Cohen* protects the non-cognitive component only in relation to a cognitive one).

¹⁵⁷ See text accompanying notes --- *supra*.

works expound ideas while works of imaginative literature (sometimes) only convey them. So, it might be thought that nonrepresentational art might convey some ideas, but in general it does not expound them. *Cohen* suggests that the distinction between “conveying” and “expounding” will often be quite thin. Paraphrasing Martin Luther King, Jr.’s *Letter from Birmingham Jail* can restate some of King’s ideas, but a paraphrase that strips King’s rhetoric from the *Letter* transforms its meaning.¹⁵⁸ Similarly, but perhaps to a greater extent, with poems,¹⁵⁹ representational art, and nonrepresentational art. Absent *Cohen*, doctrine might need to be structured to deal with the question, Is the loss of meaning from paraphrase or restatement or statement (in the case of nonrepresentational art) small enough to make nonrepresentational art sufficiently similar to expository writing that it should be covered in the same way that such writing is?

Yet, perhaps that is the wrong way to think about the problem of art’s coverage. *Cohen* might be taken to reject the idea limned by MacLeish that artworks do not mean at all, but rather simply are. For MacLeish, to state what artworks mean is to commit a category mistake, to apply to artworks concepts suitable for something else but unsuitable for them. If so, saying that artworks are covered by the First Amendment would be

¹⁵⁸ I thank Rebecca Tushnet for the example.

¹⁵⁹ Consider here an analysis describing e.e. cummings’s “i sing of olaf glad and big” as “a satire on war, patriotism and societies [*sic*] values.” Lily Seabrooke, Poetry Analysis: E.E. Cummings, available at <http://www.helium.com/items/938079-poetry-analysis-e-e-cummings> (visited ---). The statement is true enough in some sense, but obviously lacking a great deal.

something like saying that dish detergent is covered by the First Amendment. Despite the force of MacLeish's insight, *Cohen* appears to reject it.

So, *Cohen* suggests, nonrepresentational art has the non-cognitive force associated with words.¹⁶⁰ Indeed, nonrepresentational art's multivocality might rest on its non-cognitive force: Representational art, we might think, says something particular; nonrepresentational art "says" many things.¹⁶¹ "No ideas but in things" takes on another meaning: *Only* things convey ideas fully fleshed out, because ideas expressed in words can be polluted by the non-cognitive features of their precise mode of expression. Things, in contrast, allow viewers to impute all possible non-cognitive meanings to the ideas the things embody – and to choose for themselves which of those meanings makes the most sense for them.

But, if *Hurley*'s emphasis on defining the First Amendment's coverage with reference to the meanings viewers impute to covered material and *Cohen*'s emphasis on the non-cognitive aspects of covered material explain why the Amendment covers

¹⁶⁰ Two observations here. First, *all* words have non-cognitive force, "Abolish the Draft" as much as "Fuck the Draft." The former, perhaps, conveys that the speaker has rationally considered all the relevant policies and has concluded in a dispassionate manner that the draft should be rejected as unsound public policy, the latter that the speaker is passionately committed to the draft's abolition. Second, the presence of words is irrelevant to Justice Harlan's point. *See* text accompanying notes --- *infra*.

¹⁶¹ For myself, even the claim that representational art says something particular is questionable. For example, portraits are, to my eyes, quite frequently multivocal. *See, e.g.,* portraits by Ivan Albright.

nonrepresentational art, the two cases threaten to undermine the distinction between covered and uncovered material. At the least, if enough people come to understand ticket-scalping as a performance of opposition to the regulatory state, ticket-scalpers might have a First Amendment defense to the prohibition of their activity.¹⁶² Perhaps more serious, *Hurley* and *Cohen* create what might be thought of as a paradox in copyright law. One standard defense of copyright against First Amendment challenge is that copyright's built-in limitations narrow its scope to the point where the incentive effects of copyright provide a strong enough reason to justify barring people from speaking (by infringing on others' copyrights).¹⁶³ One of those built-in limitations is that copyright protects the expression of ideas but not the ideas themselves. But, given *Hurley* and *Cohen*, it might seem that either nothing is copyrightable or everything is. *Nothing*, because ideas and expression – the cognitive and non-cognitive aspects of

¹⁶² One might read *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), as rejecting a First Amendment claim because the Court believed or assumed that not enough people would associate the presence of a military recruiter on a law school campus with a message that the law school approves of military recruiting generally or the then-applicable “Don’t Ask, Don’t Tell” policy. *See, e.g., id.*, at --- (asserting that “a law school’s decision to allow recruiters on campus is not inherently expressive”); --- (asserting that law students “can appreciate the difference between speech a school sponsors and speech the school permits”). *Hurley*, on which the Court in *FAIR* relied, suggests that the law school might have a substantial First Amendment claim were people to come to associate the presence of military recruiters with the law school as speaker.

¹⁶³ citation

expression – are inseparable: You can't copyright an expression without copyrighting precisely the idea that it expresses. But, tweak the expression a bit – place an emphasis here rather than there – and you have another idea. Further, *Hurley* suggests that if enough viewers see complete copying as an expression around which the “infringer” has placed visible or invisible quotation marks, the quoted material expresses a different idea from the original. But, *Everything*, because “no ideas but in things” implies that every discrete object is simultaneously an idea and an expression of that idea.

The possibility that explaining why the First Amendment covers nonrepresentational art could create chaos in our understandings of the Amendment is compounded by the Court's third and most recent building block. As noted earlier, one common method of evading questions of the First Amendment's coverage lies in assuming that the regulated material is covered, but then observing that the regulation at issue is a general one, not directed at speech.¹⁶⁴ Restrictions on expression are incidental to the general regulation, and the regulation's constitutionality is then said to turn on a relaxed standard of “intermediate scrutiny.” The Court's recent decision in *Holder v. Humanitarian Law Project* throws this analysis into question.¹⁶⁵

The case involved a federal statutory ban on supplying “material assistance” in the form of “training,” “service,” and some forms of “expert advice or assistance” to terrorist groups. As construed by the Court, the ban applied to training and the like that took the form of speech and nothing more. The government urged the Court to hold that the statute taken as a whole covered conduct, some of which took the form of speech.

¹⁶⁴ See text accompanying notes --- *supra*.

¹⁶⁵ 561 U.S. --- (2010).

According to the government, in such cases the Court should treat the statute as content-neutral and apply intermediate scrutiny to determine whether the conduct-ban had an impermissible incidental effect on speech. Chief Justice Roberts’s opinion for the Court rejected that analysis, holding that the ban regulated speech on the basis of its content: “Plaintiffs want to speak to [designated terrorist groups] and whether they may do so ... depends on what they say. If plaintiffs’ speech ... communicates advice derived from ‘specialized knowledge’ ... then it is barred,” but it would not be prohibited “if it imparts only general or unspecialized knowledge.”¹⁶⁶ The government’s argument that the statute should receive intermediate scrutiny “because it *generally* functions as a regulation of conduct,” the Chief Justice wrote, “runs headlong into” *Cohen v. California*.¹⁶⁷ A regulation is content-based “when the conduct triggering coverage ... consists of communicating a message.”¹⁶⁸

Taken seriously, that standard would convert many regulations heretofore understood to be content-neutral – general regulations of land use, for example – into content-based regulations when the regulated activity “communicates a message.”¹⁶⁹

¹⁶⁶ *Id.* at ---.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Cf. Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Rights*, 413 U.S. 376 (1973) (relying on commercial speech doctrine to reject a First Amendment challenge to the application of an antidiscrimination ordinance to a newspaper’s separate listings of “Help Wanted – Male” and “Help Wanted – Female”). I would think it clear that such a choice “communicates a message,” so that regulations this and similar forms of

Taken together with *Hurley* and *Cohen*, *Humanitarian Law Project* implies that any activity that enough people regard as having some meaning, non-cognitive as well as cognitive, must survive the highest level of scrutiny, because *Hurley* and *Cohen* tell us that those are the conditions for determining when something communicates a message. San Marcos can regulate the car/cactus planter there only if it can show – as it almost certainly cannot – that its interest in avoiding unsightly displays that diminish property values and attract rodents is extremely strong and cannot be advanced by less restrictive methods, such as requiring fencing, explanatory placards, and exterminators. Perhaps more important, the building blocks taken together rather strongly suggest that bans on misleading advertising are constitutionally suspect, particularly when the misleadingness resides in the advertising’s non-cognitive aspects.¹⁷⁰

D. Some Implications

Much of the foregoing probably should be treated as an exploration of First Amendment theory with few practical implications. Direct regulation of artworks as such is rare, and what there is almost always takes the form of content-neutral regulations that readily pass the relevant doctrinal tests. Some questions of copyright and related

discrimination outside the commercial context would be subject to the stringent standard of review that content-based regulations receive.

¹⁷⁰ The classic example are bans on so-called “life style” advertising for products, such as tobacco, the consumption of which poses risks to health and life. Life-style advertising associates that consumption with life-styles that the product’s producers believe consumers to find attractive.

intellectual property law, though, might be affected by resolving questions about art's coverage under the First Amendment.

Artworks (and music) are not uncommon objects of intellectual property litigation,¹⁷¹ probably because there is money to be made from reproducing copyrighted works without paying permission fees. As the Court has observed, copyright law – and associated intellectual property law – has built-in limitations structured to ensure that copyright law does not improperly limit free expression.¹⁷² Among these are fair use, transformative use, and parodic uses. These doctrines would not disappear were we to conclude that artworks were not covered by the First Amendment. But, their structure might change. Promoting free expression would become a policy goal, not a constitutional imperative, and the doctrines could be developed to accommodate the

¹⁷¹ For art, *see, e.g.*, *Blanch v. Koons*, 467 F. 3d 244 (2d Cir. 2006) (magazine photography copied for “high” appropriation art); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1996) (high art photography copied for movie poster). For music, *see, e.g.*, *Bright Tunes Music v. Harrisongs Music*, 420 F. Supp. 177 (S.D.N.Y. 1976) (dealing with the musical similarity between “He's So Fine” and “My Sweet Lord,” without regard to lyrics); *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267 (6th Cir. 2009) (holding that any sampling of a sound recording, no matter how de minimis or unrecognizable, is infringing). Only some of these cases involve arguably “high” art. The classic music-only infringement case not involving any similarity in lyrics, is *Bright Tunes Music v. Harrisongs Music*, 420 F. Supp. 177 (S.D.N.Y. 1976) (*He's So Fine v. My Sweet Lord*)

¹⁷² *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

policy of free expression with other purely copyright-relevant policies. At least around the edges, some uses that would not infringe copyright under a doctrine accommodating copyright policy and the First Amendment might be found infringing under a restructured doctrine: Mere policy goals surely ought to play a smaller role than constitutional imperatives when competing policies are accommodated.

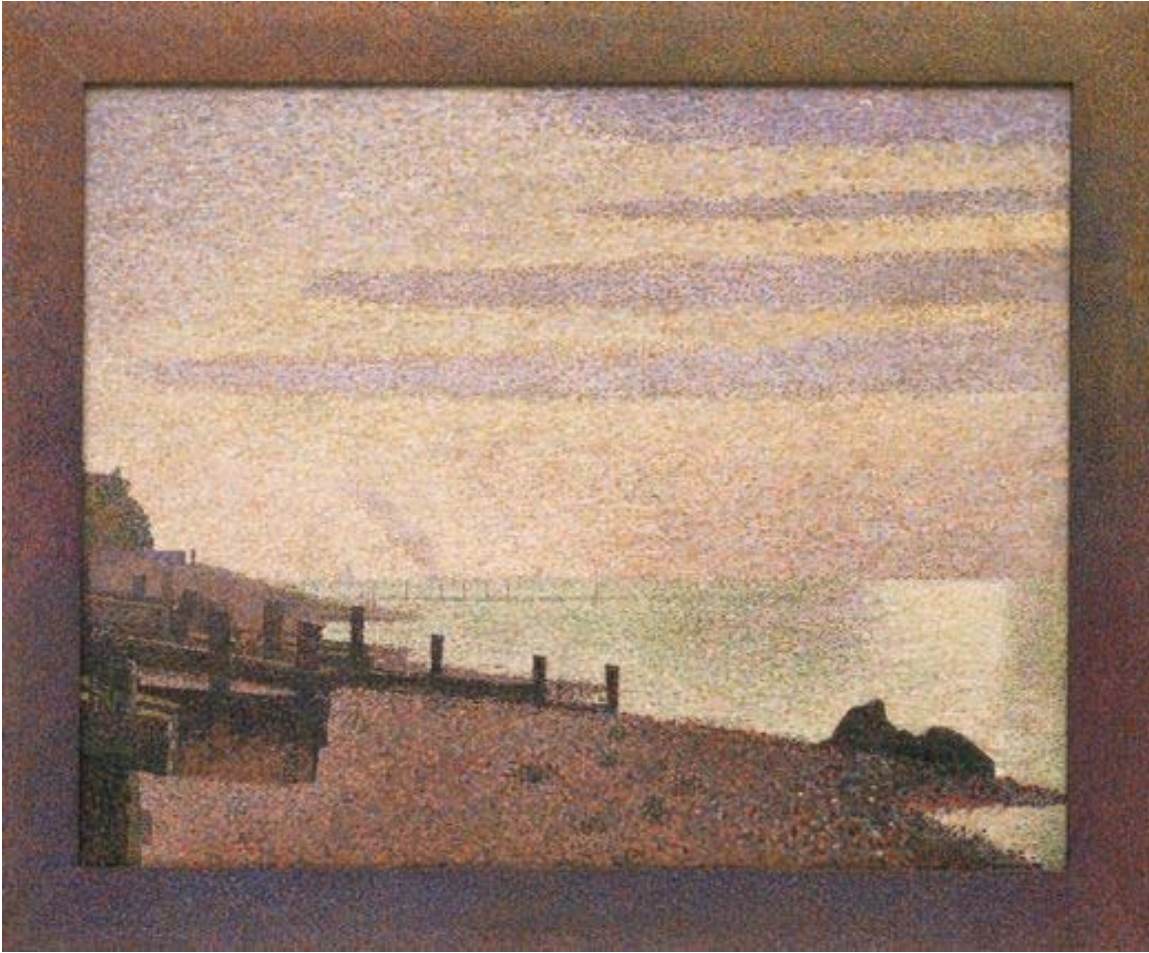
More interesting are some implications of finding artworks completely covered by the First Amendment.¹⁷³ As just noted, intellectual property law has already accommodated the First Amendment to some degree. Yet, full coverage suggests that some reproductions *not* protected by copyright and intellectual property doctrine would be protected by the First Amendment were artworks fully covered. Or, perhaps better, the analytic structure for dealing with intellectual property questions would change. We would ask whether the legal rule sought to be invoked to impose copyright or similar liability is consistent with the First Amendment rather than asking whether the reproduction fits within one of the built-in accommodations.¹⁷⁴

Consider a trademark dilution (“tarnishment”) action.¹⁷⁵ Some visual artists create frames that, in their view, are integral parts of the works themselves.¹⁷⁶

¹⁷³ For a discussion of the distinction between full and less-than-full coverage, see text accompanying notes --- *infra*.

¹⁷⁴ This suggestion has been made before, though not in precisely these terms. *See, e.g.,* Eugene Volokh & Brett McDonnell, *Free Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431 (1998); Mark Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998).

¹⁷⁵ For reasons already alluded to, devising an appropriate hypothetical is difficult.



Georges Seurat, Evening, Honfleur

Suppose a museum curator wants to show how different frames affect the way viewers see and appreciate artworks. She finds a work like Seurat's and makes several reproductions of the scene depicted without obtaining permission to do so.¹⁷⁷ She places

¹⁷⁶ I owe the following two examples to students in my Discussion Group on Art and the First Amendment, Harvard Law School, Fall Term 2010.

¹⁷⁷ Prodded by a comment by Glenn Cohen I put it this way to distinguish between the artwork defined as scene-plus-frame and a work defined as scene-placed-in-a-frame. Cohen suggested another possibility: deliberately separating – and rearranging – the three components of a work designed as a triptych.

each reproduction in a different type of frame: an ornate wooden frame, an austere stainless steel one, no frame at all, and the like.¹⁷⁸ The show “works” in the sense that the frames do change the visual experience. The artist who painted the original might well object that precisely because the new frames change the visual experience, the curator has damaged the artwork in a way analogous to trademark dilution.¹⁷⁹ But, the fact that the show “works” means that it affects enough viewers to satisfy *Hurley*’s audience-oriented test. As a result, the museum would be able to claim First Amendment coverage for its show. The only relevant question is whether the conditions for imposing liability conform to First Amendment requirements, not whether the show fits within a First-Amendment sensitive statutory scheme of liability.

¹⁷⁸ According to Judge Easterbrook, “No one believes that a museum violates [17 U.S.C.] § 106(2) every time it changes the frame of a painting that is still under copyright.” *Lee v. A.R.T. Co.*, 125 F.3d 580, 581 (7th Cir. 1997) (discussing copyright protection for “derivative” works).

¹⁷⁹ One can tinker with the hypothetical to squeeze it into an existing trademark-dilution cause of action, but perhaps it is better to imagine that the artist could take advantage of some sort of moral-right cause of action. *Cf.* Visual Artists Rights Act, 17 U.S.C. § 106A (3) (giving a right to creators of works of visual art “to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation”). Under VARA the question would be whether the alternative frames are a “modification of *that* work,” and it probably is not, although again tinkering with the hypothetical could make it so.

Or consider someone who buys a Katy Perry CD and makes a large number of copies, which he then packages in a jewel-box whose cover-art is of a sort associated with heavy metal. *Hurley* suggests that the seller could claim the First Amendment's coverage if he can show that enough listeners or purchasers regarded the combination of cover art and music to convey a message different from Katy Perry's original CD. It is not clear that the combination fits comfortably within any of copyright's accommodations of the First Amendment. The "new" CD is probably not a fair use, nor is it a parody of Perry's work, though the cover-art may be a comment on her work. The "too much work" principle suggests that it is better simply to ask directly whether the copier has a First Amendment right to do what he did.

Of course most questions of tarnishment and the like arise in connection with commercial speech. It is easy enough to salvage the tarnishment cause of action from the First Amendment by observing that the First Amendment standard applicable to commercial uses that tarnish another's product is different from, and more tolerant of regulation than, the standard applicable to noncommercial speech.¹⁸⁰ Yet, as noted earlier,¹⁸¹ the Court has excluded misleading commercial speech from First Amendment coverage by stipulation. That may not be a stable position. Because speech that tarnishes is misleading or at least very like misleading speech, instability in the Court's commercial speech doctrine, coupled with open acknowledgement of art's First Amendment coverage, might end up undermining the tarnishment cause of action.

¹⁸⁰ See, e.g., *Friedman v. Rogers*, 440 U.S. 1 (1997) (upholding the regulation of the use of trade names by optometrists because such names are potentially misleading).

¹⁸¹ See text accompanying notes --- *supra*.

VI. Conclusion

This Essay has raised questions about the First Amendment's unquestionable coverage of nonrepresentational art. Yet, those questions need not impair the conclusion that such art is indeed covered. Combine a "family resemblance" argument with a "rules versus standards" argument and the questions raised here might receive entirely acceptable answers. The "family resemblance" argument begins with the observation that we need not, and should not, develop a list of necessary and sufficient conditions to determine the First Amendment's coverage. There may be a list of conditions, but we check off only some items on the list to determine that political cartoons are covered, other items to determine that song lyrics are covered, and so on for each candidate for coverage. We find coverage if enough items are checked off. Artworks are sometimes intended to communicate relatively precise messages; they are sometimes the object of suppression because of their assumed political content; they contribute something to the development of a democratic culture; and perhaps more. In short, artworks bear a family resemblance to core political speech.¹⁸²

¹⁸² Perhaps the "family resemblance" approach is sufficiently similar to Balkin's conventionalism as to be vulnerable to the same kinds of criticism I leveled against it. See text accompanying notes --- *supra*. So, for example, questions about coverage might be raised in precisely those circumstances where many people do not see even a general family resemblance between the object in question and political speech. An example might be some forms of performance art. For what it is worth, I am inclined to think that the idea of a family resemblance relies on a certain kind of conventionalism about

The “rules versus standards” argument begins with the observation that some artworks fit all the criteria one might develop for coverage, and others fit many. Distinguishing between artworks that satisfy enough of the criteria we might develop and those that do not is possible in theory, but it may well be beyond the capacity of ordinary legal decision-makers to do reliably across the range of problems they might encounter. Given that there is “propaganda through fiction”¹⁸³ and through some forms of representational art, better to have a rule that all artworks are covered.¹⁸⁴

language, whereas Balkin’s approach relies on conventionalism about cultural products themselves. But, the notion of family resemblances is notoriously slippery, and I do not want to commit too much of my argument to the proposition that artworks bear a family resemblance to political speech.

¹⁸³ *Winters v. New York*, 333 U.S. 507, 510 (1948).

¹⁸⁴ *Cf.* text accompanying notes --- *supra* (discussing the rules-standards question in connection with Balkin’s theory of cultural democracy). I confess to the belief that the line-drawing exercise is not so difficult as to be beyond judicial capacity. It seems to me easy to conclude that “Spiral Jetty” and David Smith’s sculpture, text accompanying notes --- and --- *supra*, are not propaganda through nonrepresentational art, and similarly with a great deal of such art (and nonprogrammatic music). Put another way, I doubt that courts would inevitably do a bad job were they to try to develop categories smaller than “art” (and, just to be clear, the “rules/standards” literature shows that the possibility that one or a small group of art works would be misclassified is insufficient in itself to justify seeking larger rather than smaller categories).

I have no deep quarrel with these conclusions, and so no deep quarrel with Justice Souter's statement in *Hurley* regarding First Amendment coverage for Jackson Pollock's paintings.¹⁸⁵ But, this Essay has suggested that the First Amendment's coverage of artworks either may rest on shaky foundations that ought to be shored up, or may have implications that ought to be explored more extensively than they have been.

¹⁸⁵ I admit to a having a vague sense that it would be better to deny coverage to artworks, though I also have a sense that my motivation may be less anything specific about the First Amendment analysis of artworks than a generalized suspicion of doctrines that give the courts a larger role in our political order than they might otherwise have.