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Graffiti Museum: A First Amendment Argument for Protecting Uncommissioned art on Private Property

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NOTE

GRAFFITI MUSEUM: A FIRST AMENDMENT ARGUMENT FOR PROTECTING UNCOMMISSIONED ART ON PRIVATE PROPERTY

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Graffiti has long been a target of municipal legislation that aims to preserve property values, public safety, and aesthetic integrity in the community. Not only are graffitists at risk of criminal prosecution but property owners are subject to civil and criminal penalties for harboring graffiti on their land. Since the 1990s, most U.S. cities have promulgated graffiti abatement ordinances that require private property owners to remove graffiti from their land, often at their own expense. These ordinances define graffiti broadly to include essentially any surface marking applied without advance authorization from the property owner.

Meanwhile, graffiti has risen in prominence as a legitimate art form, beginning in the 1960s and most recently with the contributions of street artists such as Banksy and Shepard Fairey. Some property owners may find themselves fortuitous recipients of "graffiti" they deem art and want to preserve in spite of graffiti abatement ordinances and sign regulations requiring the work's removal. This Note argues that private property owners who wish to preserve uncommissioned art on their land can challenge these laws under the First Amendment, claiming that, as applied, regulations requiring removal are unconstitutional because they leave the property owner insufficient alternative channels for expression.

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INTRODUCTION

Rare bookstore proprietor Hedger Breed arrived at his Ypsilanti, Michigan, shop one day and unexpectedly discovered an image spray-painted on the building.[1] The stenciled graphic, about four square feet in area, consisted of a red heart perched atop the head of a human figure, below which a black object pointed toward the figure's open mouth.[2] One interpretation is that the figure is screaming and pointing a handgun at its mouth,[3] although—as with all art—other interpretations are possible.[4] Mr. Breed, who holds a fine arts degree and formerly managed an art gallery, found the piece "charming," "evocative," and reminiscent of the work of British street artist Banksy.[5] He decided to preserve it. An Ypsilanti ordinance officer, however, explained to Mr. Breed that he would have to remove the graphic per the city's graffiti abatement law,[6] which requires that property owners remove all graffiti from their property at their own expense.[7]

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1. Jordan Miller, *Businessman Sees Art, City Sees Graffiti*, ANN ARBOR NEWS, Jan. 14, 2008, http://www.mlive.com/news/index.ssf/2008/01/business_owner_sees_it_as_art.html.

2. *Id.*

3. *Id.*

4. For a photograph of the graffiti in question, see *id.*

5. *Id.*

6. *Id.*

7. YPSILANTI, MICH., ORDINANCES pt. II, ch. 42, art. II, § 42-46(c) (Supp. 2011) ("It is the duty of both the owner of the property to which the graffiti has been applied, and any person who may be in possession or has the right to possess such property, to at all times keep such property clear and free of graffiti."); *id.* § 42-49 ("It shall be the responsibility of the owner of any property marked or defaced as defined in this section . . . to remove or paint over such markings . . . . Any owner removing such markings . . . may be entitled to restitution . . . for the cost of removing these markings."). The City of Ypsilanti defines "graffiti" broadly to

Dismayed by the ordinance, Mr. Breed went before the Ypsilanti City Council to plead his case. Mr. Breed explained that he understood the law's purpose, but that he nonetheless was "fond of the graffiti and fe[lt] it promote[d] art in the city."[8] Ypsilanti's mayor was unrelenting: Mr. Breed's only options, the mayor advised, were to "go to court or petition the Council for an ordinance change."[9] Despite his perseverance, Mr. Breed's efforts to preserve the graffiti were unavailing, and he ultimately agreed to remove it from his building.[10] Today, Ypsilanti's graffiti ordinance remains the same as it was four years ago when Mr. Breed discovered the graphic.

Property owners like Mr. Breed who want to keep graffiti or uncommissioned street art[11] on their property must contend with two main forms of regulation. The first are nuisance ordinances, similar to the one enacted by the City of Ypsilanti, that require property owners to remove all graffiti from their property. The second are sign regulations governing signs' size, location, and similarly objective characteristics.

This Note argues that private property owners[12] who wish to keep uncommissioned art on their property can successfully claim that graffiti abatement ordinances and sign regulations, as applied, violate their First Amendment speech rights. Part I provides an overview of the modern history of graffiti and street art, defines these terms, and describes the general contours of graffiti abatement ordinances and sign regulations. Part II posits that uncommissioned art is the property owner's expression and thus warrants First Amendment protection. Part III contends that the time, place, and manner test is appropriate for evaluating the constitutionality of land-use ordinances regulating uncommissioned art. Finally, Part IV argues that when applied to uncommissioned art on private property, these regulations fail the time, place, and manner test by leaving the property owner insufficient alternative channels for expression, and are thus unconstitutional.

I. THE ART–LAW DIVIDE

While the art world embraces at least some graffiti as legitimate art, the law precludes individual assessment of graffiti based on artistic merit and

include "any paint, spray paint, pigment or similar means [used] to injure, deface or destroy any public or private property." *Id.* § 42-47. For further discussion of graffiti abatement ordinances, see *infra* Section I.C.1.

8. *Council Meeting Minutes*, CITY OF YPSILANTI 3 (Feb. 5, 2008), https://cityofypsilanti.ewashtenaw.org/bd_city-council/minutes/2008/02-05-08_approved_minutes.

9. *Id.*

10. Mr. Breed's efforts included contacting the Ypsilanti Historic District Commission, City Attorney, and City Manager; none were receptive to his plight. E-mail from C. Hedger Breed to Margaret L. Mettler (Feb. 19, 2012, 09:15 PM EST) (on file with author).

11. For definitions of "graffiti" and "uncommissioned art" as they are used in this Note, see *infra* Section I.B.

12. This Note addresses arguments to preserve uncommissioned art on private residential and commercial property. Works situated on public property—including bridges, roads, monuments, and other government-owned structures—are outside the scope of this Note.

instead uniformly regards it as a nuisance. This Part highlights these divergent perspectives. Section I.A describes the origins of graffiti, the birth of the street art movement, and the art world's recognition of these genres. Section I.B defines the terms "graffiti" and "uncommissioned art" as they are used in this Note. Lastly, Section I.C outlines the ordinances cities have developed to abate graffiti and regulate signage.

A. *Graffiti in Mainstream Culture*

Despite graffiti having roots in ancient Greek and Roman culture,[13] graffiti *writing* emerged in the 1960s in Philadelphia[14] and marked a shift from the gang-related, territorial graffiti that flourished in earlier years toward the rising prominence of graffiti as an art form.[15] Graffiti writing is a stylized form of letter composition—also known as tagging—that typically consists of the artist's name or a pseudonym.[16] Street art—essentially "[a]ll art on the street that's *not* graffiti"[17]—is an outgrowth of the graffiti writing movement.[18] New York artists such as Jenny Holzer and Richard Hambleton in the mid-1970s, and later Keith Haring and Jean-Michel Basquiat, were some of the first associated with the burgeoning street art movement.[19] Today, the line that distinguishes street art from graffiti writing is blurred, with many artists producing works in both genres during their careers.[20]

A new generation of street artists has revitalized interest in the graffiti and street art genres and imbued them with fresh meaning. Bristol, England, native Banksy[21] is likely the most well-known artist affiliated with the street

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13. The term "graffiti" described inscriptions on ancient ruins, through which people communicated about daily life. SCAPE MARTINEZ, GRAFF: THE ART & TECHNIQUE OF GRAFFITI 8 (2009); *see also* Carlo McCormick, *The Writing on the Wall*, *in* ART IN THE STREETS 20 (Jeffrey Deitch et al. eds., 2011).

14. *See* GREGORY J. SNYDER, GRAFFITI LIVES: BEYOND THE TAG IN NEW YORK'S URBAN UNDERGROUND 23 (2009).

15. CEDAR LEWISOHN, STREET ART: THE GRAFFITI REVOLUTION 31 (2008) ("Tagging was invented in the mid-1960s. . . . [The graffiti before 1965] had largely been gang-related and ha[d] its own history and traditions. . . . [Gang graffiti] is separate from graffiti writing. After around 1970, we can clearly start to identify people doing graffiti writing as opposed to gang graffiti.").

16. *See* LISA GOTTLIEB, GRAFFITI ART STYLES: A CLASSIFICATION SYSTEM AND THEORETICAL ANALYSIS 35 (2008).

17. LEWISOHN, *supra* note 15, at 23 (emphasis added) (internal quotation marks omitted). This definition of street art is attributed to John Fekner, one of the first artists affiliated with the genre. *Id.* For a good overview of how the art world distinguishes graffiti from street art, see *id.* at 15–23. See Section I.B for definitions of key terms used in this Note.

18. LEWISOHN, *supra* note 15, at 15.

19. *Id.* at 79; *see also* McCormick, *supra* note 13, at 24.

20. *See, e.g.*, LEWISOHN, *supra* note 15, at 117 ("Banksy comes from a graffiti-writing background, but his work now fits much more into a street-art model.").

21. *See generally* BANKSY, http://www.banksy.co.uk/ (last visited Feb. 29, 2012).

art movement today.[22] Though he aims to remain anonymous[23] and is known only by his pseudonym,[24] Banksy is renowned for stenciling irreverent, politically charged street art pieces on walls around the globe.[25] Banksy's street notoriety has created a vigorous demand for his canvas-based works, which routinely sell through mainstream galleries.[26] But despite his commercial success, Banksy continues to create uncompensated, uncommissioned street art on walls and bridges throughout the world.

Street art's rising popularity in recent years is reflected in both films and museum exhibits recognizing the genre. Banksy is credited with directing the 2010 Oscar-nominated documentary *Exit Through the Gift Shop*, which depicts a thriving, energetic street art subculture.[27] Among the film's dozens of subjects is Los Angeles–based street artist Shepard Fairey,[28] known for his "Obey" sticker campaign featuring wrestler André the Giant, and for creating the iconic "Hope" poster promoting then–presidential candidate Barack Obama.[29] The film also features the *Space Invaders* video game–inspired work of artist Invader, who cleverly integrates tiled mosaics into urban landscapes in cities around the world.[30] Film is not the only medium through which street artists have been acknowledged recently. The Museum of Contemporary Art in Los Angeles hosted "Art in the Streets" during the summer of 2011,[31] one of the first exhibits ever to showcase street art and

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22. *See* LEWISOHN, *supra* note 15, at 120 ("In terms of impact and raising public awareness, Banksy's career is unmatched.").

23. *Banksy*, *in* CURRENT BIOGRAPHY YEARBOOK 2009, at 40, 41 (Clifford Thomas et al. eds., 2009) ("Banksy's refusal to reveal his real name or any other information about himself, and his absence from exhibitions of his work, have drawn much attention in the media and helped to increase his prominence in the art world.").

24. Dan Karmel, *Off the Wall: Abandonment and the First Sale Doctrine*, 45 COLUM. J.L. & SOC. PROBS. 353, 354 n.4 (2012) ("Banksy is a pseudonym, and the artist's true identity is the subject of febrile speculation." (internal quotation marks omitted)).

25. *Banksy*, *supra* note 23, at 40.

26. *See, e.g.*, *'Brangelina' Spend £1 Million on Banksy Work at Contemporary Art Auction in London*, DAILY MAIL, Oct. 12, 2007, http://www.dailymail.co.uk/tvshowbiz/article-487230/Brangelina-spend-1-million-Banksy-work-contemporary-art-auction-London.html.

27. EXIT THROUGH THE GIFT SHOP (Paranoid Pictures 2010); Telephone Interview by Lynn Neary with Jaimie D'Cruz, Producer (Feb. 22, 2011), *available at* http://www.npr.org/2011/02/22/133966402/banksys-exit-reveals-street-art-world-sort-of.

28. EXIT THROUGH THE GIFT SHOP, *supra* note 27. *See generally* OBEY, http://obeygiant.com (last visited Feb. 29, 2012).

29. Randy Kennedy, *Artist Sues the A.P. over Obama Image*, N.Y. TIMES, Feb. 10, 2009, at C1, *available at* http://www.nytimes.com/2009/02/10/arts/design/10fair.html.

30. John Horn & Chris Lee, *Sundance Film Festival: In and Out of the Shadows with Banksy*, L.A. TIMES, Jan. 26, 2010, at D1; EXIT THROUGH THE GIFT SHOP, *supra* note 27. *See generally* SPACE INVADERS, http://www.space-invaders.com (last visited Feb. 29, 2012).

31. Andrew Russeth, *L.A. MOCA's Street-Art Show Sets Attendance Record*, N.Y. OBSERVER, Aug. 10, 2011, http://www.observer.com/2011/08/l-a-mocas-street-art-show-sets-attendance-record.

graffiti.[32] The show was extraordinarily popular, drawing more visitors than any other exhibit in the museum's history.[33]

B. *Graffiti and Uncommissioned Art Defined*

Perhaps in part due to the art world's recognition of street art and the negative connotations evoked by the word "graffiti," art historians seem reticent to refer to artistically meritorious works as "graffiti," preferring the term "street art" instead.[34] The graffiti–street art distinction has no legal significance, however, and municipal ordinances define graffiti far more broadly than the popular conception of the term.[35] Therefore, in the interest of clarity, this Note defines a few key terms early in its analysis.

First, "graffiti" in this Note means any unsanctioned marking of a surface. This expansive definition reflects how municipalities define the term. It is important to note that this conception of graffiti encompasses what many in the art world call "street art" as well as other related genres—including murals, pieces, throw-ups, graffiti writing, and gang graffiti[36]—as long as the work in question is created without prior authorization from the property owner. Second, "uncommissioned art" in this Note means any graffiti[37] that a property owner wishes to keep on his private property.[38]

Importantly, this Note does *not* attempt to define art in any normative sense, nor does it argue that the First Amendment only protects those works meeting some objective standard of beauty. Defining art is a notoriously difficult proposition, one courts are reticent to tackle.[39] This Note advocates

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32. *See* Guy Trebay, *A Risk-Taker's Debut*, N.Y. TIMES, Apr. 24, 2011, at ST1, *available at* http://www.nytimes.com/2011/04/24/fashion/24DEITCH.html.

33. Russeth, *supra* note 31.

34. *See* LEWISOHN, *supra* note 15, at 18 ("One of the principle [sic] reasons for making a distinction between street art and graffiti writing is that graffiti has such a bad public reputation.").

35. *See, e.g.*, L.A., CAL., MUNICIPAL CODE ch. IV, art. 14, § 49.84.2(E) (2010) (" 'Graffiti' means any form of unauthorized inscription, word, figure or design which is marked, etched, scratched, drawn, sprayed, painted or otherwise affixed to or on any surface of public or private property, including but not limited to, buildings, walls, signs, structures or places, or other surfaces . . . .").

36. Much scholarly literature is devoted to defining and distinguishing these categories, and this Note does not attempt to replicate that analysis. For a good discussion of the taxonomy, see Marisa A. Gomez, Note, *The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art from Graffiti Vandalism*, 26 U. MICH. J.L. REFORM 633, 644–51 (1993), and Lori L. Hanesworth, *Are They Graffiti Artists or Vandals? Should They Be Able or Caned?: A Look at the Latest Legislative Attempts to Eradicate Graffiti*, 6 DEPAUL-LCA J. ART & ENT. L. 225, 226–27 (1996).

37. As defined in this Note.

38. Inclusion of the modifier "uncommissioned" in the term "uncommissioned art" is necessary to avoid confusion with the term "art" in its more general sense.

39. *See, e.g.*, Cohen v. California, 403 U.S. 15, 25 (1971) ("[O]ne man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."); Mazer v. Stein, 347 U.S. 201, 214 (1954) ("Individual perception

leaving this task in the hands of property owners—whatever they deem worthy of preservation should be considered "art." Consequently, the argument set forth in this Note applies with equal force to gang scrawls as it does to intricate murals. The only limitations to the scope of works protected are those imposed by existing First Amendment doctrines.[40]

In a related vein, property owners could ostensibly invoke this argument even if they merely seek to avoid paying the cost of graffiti abatement and only *claim* their graffiti is art, but do not genuinely believe it. Promoting broad social values, wholly separate from the agenda of an individual speaker, is perhaps the most essential function of the free speech clause.[41] Among these "greater good" objectives are ensuring the free flow of ideas[42] and "checking the abuse of official [governmental] power."[43] Requiring property owners seeking First Amendment protection for uncommissioned art to prove the authenticity of their message—that is, to show that they sincerely believe their graffiti is art—would do little to advance this important First Amendment function. Thus, this Note assumes that if a property owner's message (artwork) is protected by the free speech clause, it is irrelevant whether that message is espoused by the speaker (property owner) out of sincerity, sarcasm, laziness, or any other motivation.[44]

C. *Municipal Ordinances and Regulations*

Section I.C.1 describes how municipalities treat graffiti legislatively by surveying nuisance abatement ordinances that aim to eliminate graffiti.

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of the beautiful is too varied . . . to permit a narrow or rigid concept of art."); Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."); Martin v. City of Indianapolis, 192 F.3d 608, 610 (7th Cir. 1999) ("We are not art critics, do not pretend to be and do not need to be to decide this case.").

40. For instance, graffiti that meets the *Brandenburg* incitement test would not be protected. *See infra* Section II.C.

41. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269, 271 (1964) ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker."); Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 776 (1986) ("[A] critical difference between free speech claims and free exercise claims is that only the latter trigger a test of sincerity."); Geoffrey S. Frankel, Note, *Untangling First Amendment Values: The Prisoners' Dilemma*, 59 GEO. WASH. L. REV. 1614, 1638 (1991) ("[F]ree speech doctrine, which is focused on the external value of speech, is unconcerned with whether the speaker truly believes in his message.").

42. *See infra* notes 187–188 and accompanying text; *see also* JOHN STUART MILL, ON LIBERTY 121–22 (David Bromwich & George Kateb eds., Yale Univ. Press 2003).

43. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 528 (1977).

44. Lest readers fear abuse of this argument by indolent property owners hoping to avoid paying for graffiti abatement, the expense of litigating the constitutional challenge discussed in this Note would likely impose a de facto subjective value requirement, effectively limiting the argument to those who find at least *some* artistic merit in the graffiti.

Section I.C.2 discusses sign regulations, as uncommissioned art would also typically fall within their purview. Both forms of land-use regulation vary by city. This Section examines New York's and Los Angeles's codes as examples to demonstrate a range of approaches and highlight certain commonalities across municipalities' regulations.

1. Graffiti Abatement Ordinances

Cities typically view graffiti as a threat to the quality of community life,[45] and they spend millions of dollars to remove it from public and private property.[46] Among municipalities' codified efforts to eliminate graffiti are regulations that deem graffiti a nuisance per se[47] and mandate its abatement at the property owner's expense, with or without the owner's consent.[48]

New York's development of its graffiti abatement ordinance roughly parallels the trajectory of similar laws in other U.S. cities. Graffiti regulation efforts in New York from the 1970s through the early 1990s focused on penalizing vandals (graffitists) and restricting the sale of spray-paint and other materials used to create graffiti.[49] When Mayor Rudolph Giuliani took office in 1994, however, he made graffiti abatement a priority, establishing the city's Anti-Graffiti Task Force in 1995[50] and overseeing a ten-fold increase in the number of graffiti-writer arrests from 1994 to 1998.[51]

Continuing Giuliani's tough-on-graffiti mentality, New York's City Council passed a bill in 2005 that for the first time "imposed an affirmative duty on property owners to keep their property free of graffiti."[52] Section 10-117.3 of the New York City Administrative Code, which codifies a modified version of the 2005 law[53] and remains in force today, permits city authorities

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45. *E.g.*, L.A., CAL., MUNICIPAL CODE ch. IV, art. 14, §§ 49.84.1(A)–(C) (2010) (describing graffiti as "a blighting element that leads to depreciation of the value of property[;]... create[s] fear and insecurity within the community[;]" and "leads to violence, genuine threats to life, and the perpetuation of gangs, gang violence, and gang territories").

46. *E.g.*, DEBORAH LAMM WEISEL, U.S. DEP'T OF JUSTICE, PROBLEM-ORIENTED GUIDES FOR POLICE PROBLEM-SPECIFIC GUIDES SERIES NO. 9, GRAFFITI 2 (2004), *available at* http://www.cops.usdoj.gov/pdf/e11011354.pdf ("[A]n estimated $12 billion a year is spent cleaning up graffiti in the United States."); Editorial, *Cleaning Up Graffiti's Act*, L.A. TIMES, Sept. 4, 2011, at A23, *available at* http://articles.latimes.com/2011/sep/04/opinion/la-ed-graffiti-20110904 ("Los Angeles spent $7.1 million last year cleaning graffiti.").

47. *E.g.*, L.A., CAL., MUNICIPAL CODE ch. IV, art. 14, § 49.84.6.

48. *E.g.*, S.F., CAL., PUBLIC WORKS CODE art. 23, § 1304(a) (Supp. 2009). Much of the impetus for graffiti cleanup efforts stems from the alleged connection between graffiti and increased crime, a somewhat spurious rationale discussed in more detail *infra* in Section II.C.

49. Bradley McCormick, *City Drafts Property Owners for Fight Against Graffiti*, 16 CITY L. 25, 25 (2010).

50. Charisse Jones, *Leaving Their Mark Behind*, USA TODAY, Nov. 20, 2000, at A19.

51. Nina Siegal, *From the Subways to the Streets*, N.Y. TIMES, Aug. 22, 1999, http://www.nytimes.com/1999/08/22/nyregion/from-the-subways-to-the-streets.html?pagewanted=all&src=pm.

52. McCormick, *supra* note 49.

53. *See id.*

to issue property owners a notice of nuisance immediately upon finding graffiti on their property.[54] Importantly, New York's ordinance makes the nuisance declaration a rebuttable presumption, subject to contrary expression by the property owner that he wishes to keep the graffiti.[55] Silence from the property owner gives the city consent to enter the property and remove the graffiti.[56] Though the rebuttable presumption approach eliminates the First Amendment problem posed by one type of ordinance—graffiti abatement laws—property owners would still have to contend with sign regulations, which could independently preclude the property owner from preserving the art, thus again raising a First Amendment issue.[57]

Most cities do not make the graffiti nuisance declaration a rebuttable presumption, however. The Los Angeles abatement ordinance, for instance, prohibits property owners from preserving graffiti even if they wish to keep it,[58] and gives the city authority to enter a property owner's land and remove the graffiti if the property owner refuses to comply with an abatement request.[59] The ordinance also subjects a noncompliant property owner to criminal misdemeanor liability.[60]

2. Sign Regulations

Even if uncommissioned art could avoid abatement under a city's nuisance ordinances, it might still run afoul of sign regulations. Most cities regulate signs as part of their zoning schemes or through separate sign control ordinances, imposing restrictions on signs' location, size, and similarly objective characteristics.[61]

New York's sign regulations are representative of many U.S. cities' laws. In residential districts, sign height cannot exceed that of either the ground

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54. N.Y.C., N.Y., ADMINISTRATIVE CODE tit. 10, ch. 1, § 10-117.3 (2010).

55. *Id.*

56. *See id.*

57. *See infra* Section I.C.2.

58. L.A., CAL., MUNICIPAL CODE ch. IV, art. 14, § 49.84.3(B) (2010) (making it a crime for property owners to harbor any graffiti on their property that is "visible from a public street or other public or private property"); *see also, e.g.*, ATLANTA, GA., ORDINANCES Part II, ch. 74, art. V, § 74-174 (Supp. 2011); BOS., MASS., MUNICIPAL CODE ch. XVI, § 16-8.5 (2005); MIAMI, FLA., ORDINANCES Part II, ch. 37, §§ 37-2(f)–(g) (2007); SAN DIEGO, CAL., MUNICIPAL CODE ch. 5, art. 4, div. 4, §§ 54.0405(b)–54.0407 (2008).

59. *See* L.A., CAL., MUNICIPAL CODE ch. IX, art. 1, § 91.8903.3.1.

60. *Id.* § 91.8903.2.1.

61. *See* DANIEL R. MANDELKER, LAND USE LAW, § 11.06, at 11-5 (5th ed. 2003). The definition of a "sign" varies by municipality. As an example, land-use law scholar Daniel Mandelker provides the following content-neutral definition: "A lettered, numbered, symbolic, pictorial, or illuminated visual display designed to identify, announce, direct, or inform that is visible from a public right-of-way." DANIEL R. MANDELKER & WILLIAM R. EWALD, STREET GRAPHICS AND THE LAW 91 (rev. ed. 1988). Some cities have adopted Mandelker's exact definition as part of their sign codes. *E.g.*, RANCHO VIEJO, TEX., ORDINANCES ch. 42, art. 1, § 42-4 (2007).

story's height or twenty feet above curb level, whichever is lower.[62] In commercial districts, signs cannot exceed a specified surface area that varies according to the district where the building is located.[63]

Los Angeles, in contrast to New York, imposes one of the most restrictive sign regulation schemes in the country,[64] essentially prohibiting all murals, even those commissioned by property owners.[65] Unless a piece of uncommissioned art contains writing, it would qualify as a mural sign[66] and would therefore be banned under the Los Angeles code.[67] Penalties for violating the code are severe. For each day a property owner is not in compliance, he is subject to a $1,000 fine and up to six months of imprisonment in county jail.[68]

II. First Amendment Protection of Uncommissioned Art

A private property owner who wishes to preserve uncommissioned art may find that because the piece in question does not comply with applicable sign regulations, or falls within the scope of a graffiti abatement ordinance, city officials can mandate its removal. To protect his art, the property owner can invoke the First Amendment and claim that land-use regulations requiring abatement unconstitutionally abridge his free speech rights.[69]

This Part begins by examining several threshold issues for assessing the constitutionality of the land-use regulations discussed in Section I.C. Section II.A argues that the property and expressive rights in uncommissioned art belong to the property owner. Section II.B posits that whether one classifies graffiti as pure speech or symbolic speech, it deserves First Amendment protection. Finally, Section II.C explains that graffiti does not per se fall into speech categories that receive little or no First Amendment protection.

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62. N.Y.C., N.Y., Zoning Resolution art. II, ch. 2, § 22-342 (2011).

63. *Id.* art. III, ch. 2, § 32-642.

64. *See* Adolfo Guzman-Lopez, *LA Proposes Lifting Mural Ban*, S. Cal. Pub. Radio, Dec. 7, 2011, http://www.scpr.org/news/2011/12/07/30248/la-proposes-lifting-artistic-mural-ban/ (noting that muralists fled Los Angeles due to the city's restrictive sign laws). In December 2011, the Los Angeles Department of City Planning proposed amending the city's sign code to allow for the erection of murals, subject to approval via a permit process. *Workshop & Public Hearing Notice: The Mural Ordinance*, L.A. Dep't City Plan., http://cityplanning.lacity.org/Code_Studies/Misc/MuralOrdinance_DiscussionDraft_LADCP.pdf (last visited Feb. 29, 2012). Because uncommissioned art could never comply with a permit scheme that requires approval as a precondition to display, however, it would not benefit from Los Angeles's relaxed proposal.

65. *See* L.A., Cal., Municipal Code ch. I, art. 4.4, § 14.4.4(B)(10).

66. The Los Angeles code defines a mural sign as "[a] sign that is painted on or applied to and made integral with a wall, the written message of which does not exceed three percent of the total area of the sign." *Id.* § 14.4.2.

67. *See id.* § 14.4.4(B)(10).

68. L.A., Cal., Municipal Code ch. IX, art. 1, § 91.6201.5.

69. *See* U.S. Const. amend. I. The Fourteenth Amendment makes the First Amendment applicable against the states. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

A. *The Property Owner's Rights*

The rights in uncommissioned art can be analyzed from two perspectives. A property owner must not only own a piece physically; he must also be able to ascribe the expressive quality of the work to himself such that any proscription of the right to display it would violate the First Amendment. This Section contends that both the property and expressive rights in uncommissioned art belong to the property owner.

Graffiti falls within the scope of physical property rights belonging to the property owner. This inference follows from the fact that a property owner retains rights in whatever permanent structures are on his land[70] as well as fixtures attached to his property.[71] Graffiti qualifies as a fixture because its firm attachment to a permanent structure on the land would make separation of the two nearly impossible without damaging the structure or undertaking a laborious excavation process.[72] And the law is clear that when trespassers, such as graffitists, place fixtures on property, the common law grants the rights in those fixtures to the landowner.[73]

Not only does a landowner possess the *property* rights in uncommissioned art, but he may also claim *expressive* rights in the piece. Courts have not explicitly addressed whether a property owner who fortuitously encounters some form of expression on his property—such as uncommissioned art—may invoke the First Amendment to protect that expression. Nonetheless, property owners in this scenario will easily meet the standing criteria to bring a First Amendment challenge. Standing requires a plaintiff to "allege [a] personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[74] There is no question that a plaintiff–property owner seeking to preserve uncommissioned art would be personally injured by the land-use regulations described in Section I.C, as these restrictions would deprive him of the art he wishes to

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70. A permanent structure such as a house, garage, or other building falls within the classic definition of real property, which includes "land, things therein, or annexed thereto, [and] the space above the soil." FRANK HALL CHILDS, PRINCIPLES OF THE LAW OF PERSONAL PROPERTY: CHATTELS AND CHOSES 2–4 (1914) (footnotes omitted).

71. According to the Uniform Commercial Code, "fixtures" are "goods that have become so related to particular real property that an interest in them arises under real property law." U.C.C. § 9-102(a)(41) (amended 2010), 3 U.L.A. 58 (Supp. 2011).

72. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 24-5, at 853 (5th ed. 2000). When determining whether goods are sufficiently related to realty to achieve fixture status, courts consider the intention of the parties as "manifested by the firmness with which the goods are affixed to the real estate and the amount of sweat that removal would entail." *Id.* Removing graffiti from its permanent structure would entail considerable "sweat." *See, e.g.*, Mark Stryker, *Graffiti Artist Banksy Leaves Mark on Detroit and Ignites Firestorm*, DETROIT FREE PRESS, May 15, 2010, at A1, *available at* http://www.freep.com/article/20100515/ENT05/100514007/graffiti-artist-banksy-leaves-mark-detroit-ignites-firestorm (noting that heavy machinery was used to excavate a Banksy mural from a cinderblock wall).

73. *See* Justice v. Nesquehoning Valley R.R., 87 Pa. 28, 31 (1878); CHILDS, *supra* note 70, at 27–29.

74. Allen v. Wright, 468 U.S. 737, 751 (1984).

keep. This injury would also be redressed were the ordinance held unconstitutional as applied, since the property owner could then retain the artwork.[75]

The property owner is in fact the only party who has standing to pursue a First Amendment challenge in this scenario.[76] This is true even though he did not create the "speech" (artwork) since the law considers the property owner, as art patron, the "speaker" in this context and thereby allows him to assert a First Amendment violation.[77] In *Burke v. City of Charleston*, for instance, the Fourth Circuit held that an artist commissioned to create an exterior building mural lacked standing to pursue a First Amendment challenge against a historic preservation ordinance that required modification of the mural.[78] Only the building owner could bring the claim since it was *his* speech being infringed;[79] the artist, by contrast, had "relinquished his First Amendment rights" when he sold the mural to the building owner.[80] The *Burke* court emphasized that the choice to express the message embodied in the mural belonged solely to the building owner since ultimately *he* was the one who decided whether to display the piece.[81]

The primary difference between *Burke* and a case involving uncommissioned art is that the transaction through which the property owner receives the art in the latter scenario is not contractual, but is rather a legal consequence of the graffitist's trespass.[82] This distinction is inconsequential, however, as the property owner in both scenarios is the party bearing the harm of an ordinance threatening to remove or modify his First Amendment-protected art.[83]

B. *Uncommissioned Art as Speech*

This Section analyzes how uncommissioned art fits within the purview of "speech" under the First Amendment. Expression must fall into one of two rough categories to warrant First Amendment protection: "pure speech"

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75. Given that most graffiti abatement ordinances empower city officials to forcibly remove graffiti from private land, a property owner could also argue a takings violation under the Fifth and Fourteenth Amendments. This legal avenue is beyond the scope of this Note, however.

76. The artist (graffitist) surrenders his First Amendment rights by trespassing on private property because the First Amendment only governs speech restrained by state action; it does not apply to restraints imposed by private actors. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 567–68 (1972).

77. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 570 (1995) ("Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others.").

78. 139 F.3d 401, 405–06 (4th Cir. 1998).

79. *Burke*, 139 F.3d at 405.

80. *Id.* at 406.

81. *Id.* at 405–06.

82. *See supra* note 73 and accompanying text.

83. *See infra* Section II.B.

or "symbolic speech,"[84] the former receiving more protection than the latter.[85] Section II.B.1 argues that uncommissioned art qualifies as pure speech. Section II.B.2 argues that, alternatively, uncommissioned art qualifies as symbolic speech.

1. Pure Speech

Ideas expressed through the written or spoken word are considered pure speech,[86] a category entitled to presumptive First Amendment protection.[87] What the pure speech category encompasses beyond verbal expression is unclear, however.[88] Graffiti writing is easily a form of pure speech that merits First Amendment protection. Many uncommissioned artworks include no writing, however, making classification of these pieces more difficult. This Section contends that even nontextual graffiti qualifies as pure speech given the broad protection bestowed on art in First Amendment jurisprudence.

Much case law and legal scholarship place the visual arts squarely within the scope of expression entitled to presumptive First Amendment protection.[89] The apparent rationale for bestowing such strong speech protection on art is its power to transcend linguistic boundaries.[90] The Supreme Court in *Kaplan v. California*, for instance, noted that "pictures, films, paintings, drawings, and engravings . . . have First Amendment protection *until* they collide with the long-settled position of this Court that obscenity is not protected by the Constitution."[91] Similarly, the Second Circuit in *Bery v. City of New York* explained that "paintings, photographs, prints and

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84. "Symbolic speech" is also known as "expressive conduct." *E.g.*, 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 11:7 (Supp. 1996).

85. Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 31–32 (1973).

86. John P. Collins, Jr., Case Note, *Speaking in Code*, 106 YALE L.J. 2691, 2694 (1997).

87. *E.g.*, Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 296 (5th Cir. 2001); Nimmer, *supra* note 85, at 31.

88. For instance, the Court in *Tinker v. Des Moines Independent Community School District* held that the wearing of black armbands by students to protest the Vietnam War was "closely akin to 'pure speech' " and thus "entitled to comprehensive protection under the First Amendment" even though the expression was not conveyed through the spoken or written word. 393 U.S. 503, 505–06 (1969).

89. *See, e.g.*, White v. City of Sparks, 500 F.3d 953, 956 (9th Cir. 2007) ("[T]he First Amendment protects an artist's original paintings . . . ."); ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 924 (6th Cir. 2003) ("The protection of the First Amendment . . . includes . . . music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures."); Bery v. City of N.Y., 97 F.3d 689, 695 (2d Cir. 1996) ("Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection."); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 10–11 (1995) ("[O]rdinary art . . . [is] almost always protected [by the First Amendment]. . . . For constitutional purposes, most art is high-value.").

90. *Bery*, 97 F.3d at 695.

91. 413 U.S. 115, 119–20 (1973) (emphasis added).

sculptures . . . *always* communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection."[92]

Should a court determine that an uncommissioned artwork, even one that does not contain text, warrants protection as pure speech, the analysis would proceed directly to application of one of the tests discussed in Part III to determine if the regulation requiring removal of the piece was constitutional. Alternatively, if a court decided that the work was *not* a form of pure speech, the analysis would turn to whether the piece qualified as symbolic speech.

2. Symbolic Speech

Some courts might adhere to a literal interpretation of the pure speech category—restricting it to verbal expression—and therefore require uncommissioned artworks to meet the more burdensome symbolic speech[93] standard. This Section demonstrates that uncommissioned art satisfies even the most demanding version of the symbolic speech inquiry and thus merits First Amendment protection.

The Supreme Court has "long recognized that [First Amendment] protection does not end at the spoken or written word," but rather extends to other forms of expression, including symbolic speech.[94] Among the symbolic speech activities that have received First Amendment protection are the wearing of armbands to protest the Vietnam War,[95] flag burning,[96] and nude dancing.[97] Not all conduct that is minimally expressive receives First Amendment protection, however.[98] The Court in *Spence v. Washington* developed a two-prong test for determining whether conduct is sufficiently communicative to fall within the ambit of the First Amendment.[99] Under the *Spence* test, there must first be "[a]n intent to convey a particularized message" and second, a great likelihood "that the message would be understood by those who viewed it."[100]

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92. 97 F.3d at 696 (emphasis added).

93. Symbolic speech is conduct that has an expressive element. Nimmer, *supra* note 85, at 36. The distinction between symbolic speech and pure speech is not clear, however, and many scholars dispute the usefulness of the categories. *See, e.g.*, John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1494 (1975) ("To some extent expression and action are always mingled: most conduct includes elements of both. Even the clearest manifestations of expression involve some action, as in the case of . . . publishing a newspaper, or merely talking." (quoting T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 80 (1970))).

94. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989).

95. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969).

96. United States v. Eichman, 496 U.S. 310, 318 (1990).

97. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76 (1981).

98. United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

99. 418 U.S. 405, 410–11 (1974) (per curiam).

100. *Spence*, 418 U.S. at 410–11.

Courts applying the *Spence* test have found art sufficiently communicative to warrant First Amendment protection. In *United States ex rel. Radich v. Criminal Court of New York*, for instance, a federal judge held that the First Amendment protected a gallery owner's display of controversial sculptures incorporating American flags meant to protest U.S. involvement in Vietnam.[101] The court explained that the display satisfied the dual-factor *Spence* test, focusing first on the American flag as a quintessential expressive symbol, and second on the great likelihood that the message would resonate with viewers since the timing of the display—during the height of the Vietnam War—would have ineluctable significance.[102]

The symbolic speech test established in *Spence* remained largely unchallenged for more than twenty years, until 1995 when the Court seemed to liberalize the standard in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*[103] Justice Souter, writing for a unanimous Court, noted that "a narrow, succinctly articulable message is not a condition of constitutional protection," and that if protection *were* contingent on "expressions conveying a 'particularized message,' [the First Amendment] would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schonberg, or Jabberwocky verse of Lewis Carroll."[104]

Post-*Hurley*, most circuit courts have expanded the range of expression that qualifies as symbolic speech.[105] For instance, in *Mastrovincenzo v. City of New York*, the Second Circuit held that clothing reminiscent of graffiti was sufficiently communicative to merit First Amendment protection.[106] The court disregarded *Spence*'s "particularized message" requirement and instead held that the clothing was protected because it had a "predominantly

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101. 385 F. Supp. 165, 168–69, 174–75 (S.D.N.Y. 1974).

102. *Radich*, 385 F. Supp. at 174–75.

103. 515 U.S. 557 (1995).

104. *Hurley*, 515 U.S. at 569 (citation omitted). Most courts have interpreted this statement to signify the *breadth* of First Amendment protection. *See infra* note 105 and accompanying text. One court, however, understood the *Hurley* quotation to mean that the First Amendment protects only "great works of art." Kleinman v. City of San Marcos, 597 F.3d 323, 326 (5th Cir. 2010). The Supreme Court declined to resolve what now appears to be a circuit split on the issue. Kleinman v. City of San Marcos, 131 S. Ct. 159 (2010) (denying certiorari). This Note assumes the Fifth Circuit's narrow interpretation is incorrect, as have the majority of circuit courts. *See, e.g.*, Mastrovincenzo v. City of N.Y., 435 F.3d 78, 97 (2d Cir. 2006) (rejecting test that considers " 'bona fides as an artist' in determining whether an item is expressive"); *supra* notes 91–92 and accompanying text; *infra* note 105 and accompanying text.

105. *See, e.g.*, Condon v. Wolfe, 310 F. App'x 807, 819 (6th Cir. 2009); White v. City of Sparks, 500 F.3d 953, 956 (9th Cir. 2007); Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004); Zalewska v. Cnty. of Sullivan, 316 F.3d 314, 319 (2d Cir. 2003); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 159–60 (3d Cir. 2002). *But see* Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 296 (5th Cir. 2001) (retaining *Spence* test for determining whether conduct is expressive).

106. 435 F.3d at 81–82, 96.

expressive purpose."[107] Like the graffiti in *Mastrovincenzo*, uncommissioned art is sufficiently expressive to qualify as symbolic speech.[108]

Even when analyzed only under the Court's articulation of the symbolic speech standard—the *Spence* test viewed in light of *Hurley*—rather than any particular circuit's post-*Hurley* interpretation, uncommissioned art is still sufficiently expressive to warrant First Amendment protection. By declaring that the First Amendment indisputably protects a Jackson Pollock painting, the Court implied that a similarly abstract work would be sufficiently expressive to satisfy the *Spence* inquiry.[109] Uncommissioned art is no more abstract in meaning than a Pollock painting, and thus deserves protection per the *Hurley* Court's reasoning.

C. *Uncommissioned Art Distinguished from Unprotected and Low-Value Speech*

Further justification for granting First Amendment protection to uncommissioned art stems from the fact that it does not per se fall into categories of expression that receive limited or no speech protection. Graffiti is not an inherently sexually explicit medium and therefore is not a form of obscenity[110] or child pornography,[111] types of speech that receive no protection. Uncommissioned art is also unlike expression that incites illegal activity, a form of low-value speech that receives limited First Amendment protection.[112]

Speech must meet the two-prong *Brandenburg* test to be proscribed on the basis of incitement.[113] This requires that the speech is both "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action."[114] The Court has imposed a high threshold for the imminence requirement. For instance, in *Hess v. Indiana*, the Court held that the First Amendment protected a protester's statement "We'll take the fucking street later" during an antiwar rally.[115] The Court reasoned that the speech was insufficient to meet the *Brandenburg* test because it was "not directed to any person or group of persons," and there was no evidence that the protester's "words were intended to produce, and likely to produce, *imminent* disorder."[116]

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107. *Mastrovincenzo*, 435 F.3d at 96.

108. *See id.*

109. *See Hurley*, 515 U.S. at 569.

110. *See* Roth v. United States, 354 U.S. 476, 487 (1957).

111. *See* New York v. Ferber, 458 U.S. 747, 763 (1982).

112. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 195 (1983).

113. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

114. *Id.*

115. 414 U.S. 105, 107 (1973) (per curiam).

116. *Hess*, 414 U.S. at 108–09.

Despite municipalities' contentions to the contrary, graffiti, as a genre, is not inherently dangerous enough to meet the *Brandenburg* standard. Cities often claim that graffiti perpetuates violence and stimulates gang activity.[117] Dubbed the "broken windows theory" in the 1980s, this hypothesis assumes that areas rife with indicia of urban disorder—shattered windows or prolific graffiti, for instance—invite crime by suggesting that no one cares to maintain order in those areas.[118] In truth, the connection between graffiti and crime is specious.[119] One study analyzing the relationship suggests that neighborhoods with more graffiti actually experience *fewer* instances of crime.[120] Moreover, one federal district court has already ruled that graffiti is not inherently threatening enough to meet the *Brandenburg* standard. In *Ecko.Complex LLC v. Bloomberg*, the plaintiff sought a permit to host an outdoor exhibition where artists would paint graffiti on "mock, two-dimensional subway cars."[121] After initially granting the request, the city later revoked the permit out of concern that the plaintiff's proposed display would incite illegal activity.[122] The court roundly condemned the city's "heavy-handed censorship" and held that denying a permit on these grounds was "a flagrant violation of the First Amendment" under the *Brandenburg* standard.[123]

At least in the abstract, graffiti not only fails to give rise to an actionable *Brandenburg* claim for inciting criminal activity, but it also does not inevitably fall into speech categories the Court affords no First Amendment protection. That is, the existence of these categories—obscenity, child pornography, and incitement of illegal activity—is not an *automatic* bar to uncommissioned art receiving First Amendment protection; a case-by-case analysis to determine whether a *particular* piece should be classified as low-value or unprotected speech is therefore still necessary.

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117. *See, e.g.*, L.A., CAL., MUNICIPAL CODE ch. IV, art. 14, § 49.84.1(C) (2010) ("[T]he spread of graffiti often leads to violence, genuine threats to life, and the perpetuation of gangs, gang violence, and gang territories.").

118. *See* SNYDER, *supra* note 14, at 48.

119. *See, e.g.*, Sherwin-Williams Co. v. City & Cnty. of S.F., 857 F. Supp. 1355, 1361 (N.D. Cal. 1994) ("Gang graffiti accounts for approximately 10% of the graffiti in San Francisco . . . ."); Alan Citron, *No Longer a Gang Monopoly: Upscale Youths Making Own Marks with Graffiti*, L.A. TIMES, Apr. 24, 1988, at 1 ("While graffiti inspires a special fear in Los Angeles because it is usually associated with gangs, authorities said that as much as half of the public scrawling in many parts of the city is not the handiwork of the Bloods or Crips, but of gentrified vandals . . . .").

120. The study compared SoHo, New York and Prospect Heights, New York. In 2006, SoHo had considerably more graffiti than Prospect Heights, but reported no murders and far fewer instances of other crimes. SNYDER, *supra* note 14, at 50–51. That same year, Prospect Heights reported three murders and nearly four times as many robberies and acts of felonious assault as SoHo. *Id.*

121. 382 F. Supp. 2d 627, 628-30 (S.D.N.Y. 2005).

122. *Ecko.Complex LLC*, 382 F. Supp. 2d at 628.

123. *Id.* at 629–30.

III. ARGUING FOR THE TIME, PLACE, AND MANNER TEST

If a court determines that uncommissioned art warrants First Amendment speech protection—as this Note argues it should—it must next assess the constitutionality of ordinances restricting that speech. This Part advocates applying the time, place, and manner test to evaluate the constitutionality of ordinances that would require removal of uncommissioned art.

Perhaps the most important metric guiding the selection of a First Amendment test is whether the regulation challenged is content based or content neutral. A content-based ordinance is one that discriminates according to message, idea, or subject matter.[124] By contrast, a regulation is content neutral "so long as it is 'justified without reference to the content of the regulated speech.' "[125] A content-based ordinance must survive strict scrutiny review, meaning it will only be held constitutional if it is narrowly drawn to achieve a compelling state interest.[126] A content-neutral ordinance must withstand intermediate scrutiny review, meaning it will only be held constitutional if it is substantially related to an important governmental interest.[127]

Both graffiti abatement ordinances and sign regulations are likely content neutral. Graffiti abatement ordinances apply to *all* markings made without advance authorization from the property owner; whether they apply does not depend on the message conveyed by the graffiti.[128] Sign regulations will also be presumed content neutral for purposes of this Note, as limitations on signs' size, shape, and location do not constrain a message's subject matter or viewpoint.[129]

As long as ordinances are content neutral, they may limit the time, place, and manner of speech.[130] This Note therefore argues that the time, place, and manner test is appropriate for assessing the constitutionality of graffiti abatement ordinances and sign regulations. Under this test, ordinances are valid as long as they (1) "are justified without reference to the content of the regulated speech," (2) "serve a significant governmental inter-

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124. SMOLLA, *supra* note 84, § 3:9 (Supp. 2012); *see also* Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972).

125. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)); *see also id.* ("The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

126. *See, e.g.*, Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987). Some formulations of the strict scrutiny standard demand that the regulation be the "least restrictive means" of achieving a compelling state interest. *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

127. *See, e.g.*, City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 440 (2002) (plurality opinion).

128. *See, e.g.*, L.A., CAL., MUNICIPAL CODE ch. IV, art. 14, § 49.84.2(E) (2010).

129. *See, e.g.*, BRIAN J. CONNOLLY & MARK A. WYCKOFF, MICHIGAN SIGN GUIDEBOOK: THE LOCAL PLANNING & REGULATION OF SIGNS 6-3 (2011).

130. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

est," (3) are "narrowly tailored to serve [that] interest," and (4) "leave open ample alternative channels for communication of the information."[131] Alternative channels are especially important in the context of uncommissioned art, as explained more fully in Section IV.B.

One potential counterargument against selecting the time, place, and manner test is that the Court formulated the inquiry for application to public forums, not private property. This argument holds little weight, however, since the Court has invoked the time, place, and manner test multiple times in the private context. In *City of Renton v. Playtime Theatres, Inc.*, for instance, the Court applied the test to an ordinance regulating private commercial property.[132] It applied the test again in *City of Ladue v. Gilleo*, to an ordinance regulating yard signs on private residential property.[133]

Also potentially weighing against selection of the time, place, and manner test is that the Court sometimes evaluates content-neutral restrictions on speech under the framework established in *United States v. O'Brien*, an inquiry nearly identical to the time, place, and manner test except that it contains no alternative channels component.[134] There is considerable confusion about what type of speech restrictions call for application of the *O'Brien* test rather than the time, place, and manner test. Some commentators understand *O'Brien* to apply only to cases involving symbolic speech[135]—not an unreasonable understanding given that *O'Brien* itself was a symbolic speech case and the Court's post-*O'Brien* discussion of First Amendment tests has been somewhat convoluted.[136] This interpretation is not entirely convincing, however, because the Court has applied the time, place, and manner test even to cases involving pure speech.[137] Other scholars argue that *O'Brien* is the standard for all cases involving content-neutral restraints on speech—whether pure or symbolic.[138] This interpretation, however, fails to account for those cases involving content-neutral restrictions where the Court has applied the time, place, and manner test rather than *O'Brien*.[139] Nonetheless, the practical effect of the two tests is so similar that any confusion is immaterial for purposes of this Note.

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131. *Id.*

132. 475 U.S. 41, 46 (1986). The Court also applied the time, place, and manner test to a regulation prohibiting live nude dancing at a private commercial venue in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75–76 (1981).

133. 512 U.S. 43, 56 (1994).

134. 391 U.S. 367, 377 (1968). Under the *O'Brien* test, a content-neutral restriction on speech is constitutional if it "furthers an important or substantial governmental interest . . . [that] is unrelated to the suppression of free expression" and is "no greater than is essential to the furtherance of that interest." *Id.*

135. *See, e.g.*, Ryan J. Walsh, Comment, *Painting on a Canvas of Skin: Tattooing and the First Amendment*, 78 U. CHI. L. REV. 1063, 1068 (2011).

136. *See* SMOLLA, *supra* note 84.

137. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

138. *E.g.*, SMOLLA, *supra* note 84.

139. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

Although the *O'Brien* test has no formal alternative channels provision, this has not deterred the Court from stressing the importance of alternative outlets for expression in cases involving content-neutral restrictions on speech. Justice Harlan, concurring in *O'Brien*, expressed his concern that some statutes might satisfy the test outlined by the majority but nonetheless leave a speaker insufficient avenues for expressing his views:

> I wish to make explicit my understanding that [the Court's test] does not foreclose consideration of First Amendment claims in those rare instances when an "incidental" restriction upon expression, imposed by a regulation which furthers an "important or substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a "speaker" from reaching a significant audience with whom he could not otherwise lawfully communicate.[140]

The time, place, and manner test addresses Justice Harlan's concern by incorporating the alternative channels prong, and the test has been applied post-*O'Brien* to content-neutral restrictions on speech, including those that regulate symbolic speech. *Clark v. Community for Creative Non-Violence* demonstrates this point well. Although the conduct at issue in *Clark*—sleeping in tents to "demonstrat[e] the plight of the homeless"—was undoubtedly symbolic speech, the Court analyzed the content-neutral regulation banning camping in a public park as a time, place, and manner restriction rather than applying the *O'Brien* test, and assessed whether there were ample alternatives for the plaintiffs' expression.[141]

Even in cases where the Court purports to strictly apply the test outlined in *O'Brien*, alternative channels still inform the Court's analysis. In *Barnes v. Glen Theatre, Inc.*, for instance, the Court applied the *O'Brien* test to determine whether an Indiana statute prohibiting public nudity violated the First Amendment rights of adult entertainment venue operators wishing to offer nude dancing.[142] Despite invoking the *O'Brien* test, the Court noted the presence of alternative channels in holding that the ordinance was constitutional. Chief Justice Rehnquist, writing for a plurality, indicated that the statute still allowed for expression of an erotic message since it only proscribed *full* nudity, yet permitted sexually suggestive dancing as long as performers wore some minimal amount of clothing.[143]

The alternative channels component of the time, place, and manner test is what distinguishes it from other forms of intermediate scrutiny. Because this test has been applied to content-neutral regulations restraining both pure

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140. United States v. O'Brien, 391 U.S. 367, 388–89 (1968) (Harlan, J., concurring); *see also* SMOLLA, *supra* note 84, § 9:17 (Supp. 2010) (arguing that "it is a fair reading of *O'Brien* that government regulations which effectively choke off expression" do not satisfy the *O'Brien* test).

141. *Clark*, 468 U.S. at 290–94.

142. 501 U.S. 560, 561, 566 (1991) (plurality opinion).

143. *Barnes*, 501 U.S. at 571 ("[T]he requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic.").

speech and symbolic speech, and to land-use restrictions affecting private property, it is the appropriate inquiry for evaluating the constitutionality of ordinances regulating uncommissioned art.

IV. APPLYING THE TIME, PLACE, AND MANNER TEST

This Part analyzes how a court might apply the time, place, and manner test to land-use regulations that require the removal of uncommissioned art. Section IV.A examines the first three prongs of the test, which would likely weigh in a city's favor. As argued in Section IV.B, however, because there would be insufficient alternative channels for a property owner to express himself, these ordinances, as applied, would nonetheless be unconstitutional. Lastly, Section IV.C describes an additional justification for protecting uncommissioned art under the First Amendment: the presumptive protection afforded expression occurring on a speaker's own property.

A. *Content Neutrality, Substantial Governmental Interest, and Narrow Tailoring*

As discussed in Part III, both graffiti abatement ordinances and sign regulations are likely content neutral and therefore satisfy the first prong of the time, place, and manner analysis. Similarly, both graffiti abatement ordinances and sign regulations likely serve a substantial governmental interest,[144] the second factor in the time, place, and manner test. Promoting community aesthetics, curbing crime and urban blight, and maintaining property values—the aims of graffiti abatement ordinances—are significant governmental interests.[145] Sign regulations promote traffic safety and help create an aesthetically desirable environment, which are also substantial governmental interests.[146]

Narrow tailoring, the third prong of the time, place, and manner test, also likely favors municipalities over property owners. An ordinance meets the narrow tailoring requirement so long as it "promotes a substantial government interest that would be achieved less effectively absent the regulation."[147] Content-neutral regulations of signs on private property are typically narrowly tailored since aesthetic objectives would be achieved less effectively without limitations on the size and location of signs.[148] The narrow tailoring rationale for graffiti abatement ordinances is less clear,

144. The Court seems to use the descriptors "substantial," "significant," and "important" interchangeably. *See Barnes*, 501 U.S. at 567 ("important or substantial governmental interest" (quoting *O'Brien*, 391 U.S. at 377) (internal quotation marks omitted)); *Clark*, 468 U.S. at 293 ("significant governmental interest").

145. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48, 50 (1986).

146. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507–08 (1981) (plurality opinion).

147. *See* United States v. Albertini, 472 U.S. 675, 689 (1985).

148. *See, e.g.*, Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 808–10, 816–17 (1984); Riel v. City of Bradford, 485 F.3d 736, 747, 751 (3d Cir. 2007).

however. Although *limitations* on the display of graffiti could be rationalized by aesthetic interests, similar to the way sign regulations are justified, this does not necessarily provide a convincing rationale for the complete *abatement* of graffiti, as is often required by nuisance ordinances. Municipalities sometimes justify abatement ordinances by citing graffiti's effect on crime, but that link is tenuous.[149] Nonetheless, the Court seems satisfied that the narrow tailoring requirement is met even by minimal proof showing that a municipal objective would be thwarted without a particular regulation.[150] Therefore, this Note assumes, without concluding, that graffiti abatement ordinances would meet the third prong of the time, place, and manner test.

B. *Alternative Channels*

Although the first three prongs of the time, place, and manner test likely favor municipalities, the alternative channels component shifts the analysis in favor of property owners, and serves as the basis for finding graffiti abatement ordinances and sign regulations unconstitutional as applied under the First Amendment. The alternative channels provision ensures that speakers can still communicate a First Amendment–protected message in *some* way despite the limitations imposed by a time, place, and manner restriction. Not only must a court consider whether alternative channels exist, but it must also weigh whether the available alternatives are "ample" for conveying the desired message[151]—an inquiry assessed from the speaker's point of view.[152] Alternatives are not ample "if the intended message is rendered useless or is seriously burdened."[153]

This Section discusses two categories of alternatives that are insufficient to satisfy the final prong of the time, place, and manner test as applied to uncommissioned art: those that prevent the speaker from reaching a public audience and those that are prohibitively expensive. Section IV.B.1 contends that graffiti abatement ordinances and sign regulations violate the First Amendment when they preclude uncommissioned art from being displayed publicly. Section IV.B.2 argues that any alternatives to a property owner retaining uncommissioned art in the location where it was created are too expensive to be considered "ample." Finally, Section IV.B.3 explains why alternative channels are particularly important in an as-applied constitutional challenge, the type of challenge property owners seeking to preserve uncommissioned art would bring.

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149. *See supra* Section II.C.

150. *See, e.g.*, *Renton*, 475 U.S. at 51–52 ("The First Amendment does not require a city, before enacting . . . an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.").

151. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

152. Weinberg v. City of Chi., 310 F.3d 1029, 1041 (7th Cir. 2002).

153. *Id.*; *see also, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 56–57 (1994).

1. Public Visibility and Message Moderation

One of the central tenets of First Amendment jurisprudence is that speakers have a right to reach the public with their message.[154] Although the Court tolerates alteration of the medium through which a speaker conveys his message, as well as some dilution of a speaker's desired message, an ordinance that completely *forecloses* a speaker from reaching a public audience leaves insufficient alternative channels for communication and is thus unconstitutional.

The Court has routinely struck down regulations that prohibit speech activities when there are insufficient alternative *media* to communicate the speaker's desired message. In *City of Ladue v. Gilleo*, for instance, the Court held unconstitutional an ordinance that banned almost all signs on both public and private property, including the display of a political sign in a homeowner's window.[155] Similarly, the Court has struck down ordinances that completely banned the distribution of pamphlets,[156] door-to-door dissemination of literature,[157] and non-obscene nude dancing[158] since they "foreclose[d] an entire medium of expression."[159]

By contrast, ordinances that regulate speech but leave the speaker other media to convey his message are constitutional. In *Frisby v. Schultz*, for instance, the Court upheld an ordinance prohibiting residential picketing against a challenge brought by abortion protesters.[160] The Court reasoned that protesters could still convey their message by distributing literature, knocking on doors, and telephoning residents in the community, and thus the ordinance left open ample alternatives for communication.[161]

Unlike the speech at issue in *Frisby*, however, the expressive value of art inheres in the medium through which the message is conveyed. The two are inextricably tied. As a result, alternatives available in other contexts[162] are

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154. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 49 (1976) (per curiam) (noting that the First Amendment is "designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources' " (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964))); Martin v. City of Struthers, 319 U.S. 141, 146-47 (1943) ("Freedom to distribute information to every citizen . . . is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved."); Berger v. City of Seattle, 569 F.3d 1029, 1049 (9th Cir. 2009) (en banc) (explaining that "an alternative is not ample if the speaker is not permitted to reach the intended audience" (quoting Long Beach Area Peace Network v. City of Long Beach, 522 F.3d 1010, 1024 (9th Cir. 2008), *amended by* 574 F.3d 1011 (9th Cir. 2008))).

155. 512 U.S. at 46, 54, 59.

156. Lovell v. City of Griffin, 303 U.S. 444, 451–52 (1938).

157. *Martin*, 319 U.S. at 145–49.

158. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75–77 (1981).

159. *See Gilleo*, 512 U.S. at 55.

160. 487 U.S. 474, 476–77, 488 (1988).

161. *Frisby*, 487 U.S. at 484.

162. For instance, a speaker can express the same political message through multiple different media by posting lawn signs, distributing pamphlets, or communicating the message directly to individuals through door-to-door transmission.

not available for art. This fact weighs against the constitutionality of regulations requiring uncommissioned art's removal.

Whether alternative media exist for conveying a speaker's message does not end the analysis, however, as ordinances that merely *moderate the potency* of a speaker's message without completely foreclosing the opportunity to speak are constitutional. In *Barnes v. Glen Theatre, Inc.*, for instance, the Court upheld the constitutionality of an ordinance banning public nudity against a challenge brought by adult entertainment venue operators and performers.[163] The Court reasoned that the ordinance did not prevent dancers from conveying a sexually suggestive message since they could still dance in a provocative manner; they merely were precluded from doing so while completely nude.[164] Similarly, in *Ward v. Rock Against Racism*, the Court found that an ordinance limiting the volume at which concert promoters could host a show in Central Park did not violate the First Amendment because the promoters could still host musical performances, albeit at a slightly reduced volume.[165]

Although *Barnes* and *Ward* illustrate that alternatives diluting a speaker's message can be "ample" and thereby defeat a finding that an ordinance is unconstitutional, uncommissioned art does not lend itself to message moderation. As compared to the erotic dance at issue in *Barnes*, which could be performed in a slightly less prurient manner,[166] and the music at issue in *Ward*, which could be played at a reduced volume,[167] uncommissioned art cannot exist in a diluted form. Art's existence is binary. Any regulation that requires the removal of uncommissioned art does not simply weaken the potency of the work's message; it completely forecloses the opportunity for the work to be displayed publicly, and therefore cannot be constitutional when applied to a property owner who wishes to preserve the work.

Indeed, circuit courts applying the time, place, and manner test have routinely held that regulations prohibiting artists and performers from reaching a public audience violate the First Amendment. The Ninth Circuit in *Berger v. City of Seattle*, for instance, considered an ordinance relegating street performers to sixteen locations in an eighty-acre public park.[168] The court held that the summary judgment was inappropriate and remanded for trial, noting that the evidence was "sufficient to support a reasonable inference that the designated locations [did] not provide access to [the street performer's] intended audience."[169]

Similarly, in *Bery v. City of New York*, the Second Circuit held that an ordinance prohibiting painters, photographers, and sculptors from selling their artwork on public streets without a vendor's license violated the First

163. 501 U.S. 560, 572 (1991) (plurality opinion).

164. *Barnes*, 501 U.S. at 571.

165. 491 U.S. 781, 802-03 (1989).

166. *See supra* notes 142–143 and accompanying text.

167. *Ward*, 491 U.S. at 802.

168. 569 F.3d 1029, 1035 (9th Cir. 2009) (en banc).

169. *Berger*, 569 F.3d at 1050.

Amendment.[170] Rejecting the city's contention that alternative avenues of expression existed because the artists could sell their work from home, in galleries, or through street fairs, the court explained that these channels were inadequate because artists were "entitled to a *public* forum" for their expression:

> Displaying art on the street *has a different expressive purpose* than gallery or museum shows; it reaches people who might not choose to go into a gallery or museum or who might feel excluded or alienated from these forums. The public display and sale of artwork is a form of communication between the artist and the public not possible in the enclosed, separated spaces of galleries and museums.[171]

The *Bery* court concluded that because the vending ordinance left the artists insufficient alternative channels for expression, it violated their First Amendment rights.[172]

In *Gilleo*, the Court affirmed that speakers have the right to transmit their message to a public audience even when speaking from their own property. Striking down a comprehensive sign ban, the Court explained that "[d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else . . . . *Precisely because of their location*, such signs provide information about the identity of the 'speaker.' "[173] Thus, foreclosing a speaker's unique opportunity to reach the public by displaying a sign on his property would violate the First Amendment.

One recent Fifth Circuit decision conflicts with the *Gilleo* holding. In *Kleinman v. City of San Marcos*, the plaintiff, Kleinman, challenged a San Marcos, Texas, ordinance preventing him from displaying a "car-planter" in front of his novelty store.[174] San Marcos officials charged Kleinman with violating a city ordinance that banned citizens from keeping junked vehicles on their property.[175] The Fifth Circuit held that the regulation did not violate

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170. 97 F.3d 689, 691–92, 698 (2d Cir. 1996).

171. *Bery*, 97 F.3d at 698 (second emphasis added).

172. *Id.*; *cf.* Travis v. Park City Mun. Corp., 565 F.3d 1252, 1257 (10th Cir. 2009) (noting that an ordinance prohibiting an artist from displaying and selling his artwork on public property without a permit left open ample alternatives because "[n]othing in the sales ordinance prohibit[ed] the sale of art on private property or the ability of artists to display their art in other public parks").

173. City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) (second emphasis added).

174. 597 F.3d 323, 324 (5th Cir. 2010). Community members created the planter by removing an old vehicle's roof, tires, and engine, and filling the car with soil, in which they planted cacti and other vegetation. Aimee Villalobos, *Planet K Car Planter Still Under Debate*, U. STAR (San Marcos, Tex.), Mar. 4, 2010, http://star.txstate.edu/content/planet-k-car-planter-still-under-debate. Artists painted the exterior of the vehicle with peace signs and other graphics. *Kleinman*, 597 F.3d at 324–25. For photographs of the car-planter, see Brad Rollins, *Federal Judge Says Car Planter Not Protected by First Amendment*, SAN MARCOS MERCURY (Tex.), Mar. 11, 2008, http://smmercury.com/33705/federal-judge-says-car-planter-not-protected-by-first-amendment/.

175. *Kleinman*, 597 F.3d at 325.

Kleinman's First Amendment rights,[176] as it left ample alternatives for expression.[177] In an argument that can at best be described as illogical, the court posited that "enclosing the car-planter [did] not cut off public access because it le[ft the property owner] free to display the car-planter behind a fence, indoors, or in a garage enclosure."[178] Kleinman, the court insisted, could still encourage the public to view the planter by, for instance, "erect[ing] a sign or display[ing] a poster of the car-planter visible to the public."[179]

This Note argues that the *Kleinman* decision is in error. The notion that a two-dimensional photograph or poster of an original artwork is capable of communicating the work's expressive value is dubious. Would such a flat representation adequately convey the kinetic intrigue of a three-dimensional Alexander Calder mobile or the layered, pooled paint drips of a Jackson Pollock painting? If so, there would be no need for museums—all art's expressiveness could be absorbed simply by viewing images on the internet. It is also untenable to suggest that a work is accessible to the public when hidden behind a fence or confined to a private indoor structure. *Kleinman* simply does not comport with the *Gilleo*, *Bery*, and *Berger* holdings that a speaker is entitled to communicate his message to a public audience.

Additionally, removing uncommissioned art from its original location would destroy that significant component of the work's message derived from the site where it was created. One particularly poignant example is Banksy's 2010 mural *Trees*, which he stenciled on the site of Detroit's now defunct Packard automotive plant.[180] Since the plant closed in 1956, the 3.5 million-square-foot complex has become a veritable ruin, filled with crumbling bricks and shattered windows.[181] Banksy's mural, stenciled on a cinderblock wall amid the rubble, depicted a young boy looking out at his surroundings while holding a paintbrush and paint can; stenciled beside him were the words "I remember when all this was trees."[182] Shortly after Banksy created the piece, owners of a Detroit art gallery entered the property with heavy machinery and removed the cinderblock containing the mural.[183] The gallery owners intended to preserve the mural for display in

176. The court first concluded that the car-planter was not sufficiently expressive to warrant speech protection, *id.* at 327, a finding this Note has already criticized, *see supra* note 104. Nonetheless, "[i]n an abundance of caution," the court applied an intermediate scrutiny test, noting that the car-planter might have some expressive value. *Kleinman*, 597 F.3d at 328.

177. *Kleinman*, 597 F.3d at 329.

178. *See id.*

179. *Id.*

180. *See* Matthew Dolan, *If You Take Street Art off the Street, Is It Still Art?*, WALL ST. J., Mar. 9, 2011, at A1.

181. *Id.*

182. *Id.* For photographs of the mural, see *Saving BANKSY*, DETROITFUNK, May, 11, 2010, http://www.detroitfunk.com/?p=4407.

183. Dolan, *supra* note 180. The Packard plant owner later sued the gallery, claiming that he had not given the gallery owners permission to remove the mural. Mark Stryker, *555*

their gallery. Though reasonable from a legal perspective—the work would otherwise have been subject to abatement under Detroit's graffiti removal ordinance[184]—the move, to many, was inexcusable from an art perspective. Some art critics insisted that the work's message was site-specific and had been destroyed when the mural was relocated.[185] Indeed, the work will now be confined to an indoor gallery[186] and will almost certainly attract a different type of viewer than had it remained on the Packard plant site.

Not only does First Amendment jurisprudence consider public visibility valuable to the *speaker* communicating a message, but it also finds such visibility valuable to the *audience* receiving the message. The Court has explained that the "protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[187] This "marketplace of ideas" rationale[188] is served by forcing viewers of uncommissioned art to confront assumptions about daily life, consider unfamiliar political viewpoints, and contemplate social ideas they may find unpalatable. For instance, when Banksy's stenciled image of two male police officers kissing was removed from its original site on the streets of Brighton, England, and transferred to canvas,[189] one commentator explained that the move had serious ramifications for the gay community:

> Stenciled on the wall of a pub, the original piece was situated in the street, where it could confront a homophobic audience daily. The work's location and context normalized homosexuality, allowing it to gain in visibility and acceptance. But, when a work like this is taken from the street and slapped on a canvas, it becomes separated from any real, lived experience and relegated to the realm of high art. Moreover, its audience becomes much smaller and more homogenous.[190]

Among the bedrock principles of the First Amendment is that speakers have the right to convey their message to a public audience. Ordinances that require property owners to remove or shield uncommissioned art from exterior view violate this fundamental right of speakers by leaving property owners insufficient alternative channels to communicate their message.

Gallery Gets OK to Display Banksy Mural, DETROIT FREE PRESS, Sept. 11, 2011, at F6. The parties settled for $2,500, with the gallery receiving title to the mural. *Id.*

184. *See* DETROIT, MICH., CODE pt. III, ch. 9, art. I, div. 4, subdiv. A, pt. I, § 9-1-111 (Supp. 2011).

185. *See* Dolan, *supra* note 180.

186. *See* Stryker, *supra* note 183.

187. Roth v. United States, 354 U.S. 476, 484 (1957).

188. Justice Holmes, dissenting in *Abrams v. United States*, is credited with the "marketplace of ideas" concept. *See* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (referring to "free trade in ideas").

189. Alexandra Topping, *Brighton Kisses Goodbye to Banksy's Kissing Coppers*, THE GUARDIAN (U.K.), Apr. 22, 2011, at 8, *available at* http://www.guardian.co.uk/artanddesign/2011/apr/21/banksy-kissing-coppers-sold-america. For a photograph of the place, see *id.*

190. Emily Greenberg, *Interfering with Banksy*, CORNELL DAILY SUN, Apr. 26, 2011, http://cornellsun.com/node/47027.

2. Expense

In addition to denying speakers the opportunity to reach a public audience with their message, other alternatives the Court deems insufficient to satisfy the time, place, and manner test are those requiring the speaker to incur considerable expense. In *Martin v. City of Struthers*, for instance, the Court struck down an ordinance that prohibited door-to-door pamphlet distributors from ringing doorbells and knocking on doors.[191] The Court reasoned that the ordinance eliminated an inexpensive medium for disseminating ideas, which was crucial to those without the resources to publicize their message in more extravagant ways.[192] Similarly, in *Linmark Associates, Inc. v. Township of Willingboro*, the Court invalidated an ordinance that prohibited the posting of "For Sale" and "Sold" signs, reasoning that the "options to which sellers realistically [were] relegated[,] primarily newspaper advertising and listing [properties] with real estate agents[,] involve[d] more cost and less autonomy than 'For Sale' signs."[193]

Because a property owner receives uncommissioned art at no cost, any alternative to retaining the piece in its original location would not be ample unless it required minimal additional expenditure by the property owner.[194] The cost of relocating a work of uncommissioned art would vary on a case-by-case basis, but some methods of preservation can be exorbitant. One example is telling. In 2008, the buyer of a garage containing a Banksy mural spent £30,000[195] to have the piece " 'peeled' from the wall" and chemically transferred to canvas, a process that took an art restorer six weeks to complete.[196] Paying to transfer the mural in that instance made sense, considering it was worth an estimated £300,000.[197] Unlike a Banksy mural, however, most uncommissioned art has little extrinsic value, and requiring a property owner to undertake such a costly endeavor can hardly be deemed an ample alternative. Other methods of preservation, such as removing the portion of the physical structure containing the art, as the Detroit gallery

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191. 319 U.S. 141, 142, 149 (1943).

192. *Martin*, 319 U.S. at 146 ("Door to door distribution of circulars is essential to the poorly financed causes of little people.").

193. 431 U.S. 85, 86, 93, 98 (1977).

194. The Court's jurisprudence focuses on comparative, rather than absolute, cost. Thus, a possible alternative fails to be "ample" when the cost of communicating through that channel greatly exceeds the cost of communicating through the channel foreclosed by the ordinance. *See, e.g.*, *Linmark*, 431 U.S. at 93; *Martin*, 319 U.S. at 146.

195. On March 4, 2008, the day the press published this story, £30,000 was equivalent to $59,548.50 in U.S. dollars. *Currency Converter*, OANDA, http://www.oanda.com/currency/converter/ (select "British Pound"; select "US Dollar"; select "Mar. 4, 2008"; and enter "30,000") (last visited Feb. 29, 2012).

196. Elizabeth Hopkirk, *£1,000 Banksy Taken off Wall by German Now Worth £300,000*, EVENING STANDARD (London), Mar. 4, 2008, at A25.

197. Hopkirk, *supra* note 196. On March 4, 2008, £300,000 was equivalent to $595,485 in U.S. dollars. OANDA, *supra* note 196 (select "British Pound"; select "US Dollar"; select "Mar. 4, 2008"; and enter "300,000").

owners did with Banksy's *Trees* mural,[198] are likely less expensive, but again cannot be considered legitimate alternatives when they require destroying a portion of the property owner's building. Such a move would sometimes be physically impossible as well since some works may be too large to place indoors or hide completely from public view.

3. Alternative Channels in the As-Applied Analysis

Expense and opportunity to reach a public audience are among the factors courts consider in assessing whether sufficient alternative channels exist for a speaker to convey his message. Nonetheless, in many of the cases described previously in this Part where courts *have* found a First Amendment violation, it is narrow tailoring and not alternative channels that serves as the basis for holding the law unconstitutional.[199]

In as-applied constitutional challenges—the type property owners seeking to preserve uncommissioned art would assert—however, the alternative channels component *does* substantively affect the time, place, and manner analysis. In *Executive Arts Studio, Inc. v. City of Grand Rapids*, for example, the Sixth Circuit held a Grand Rapids, Michigan, ordinance restricting where an adult bookstore could locate unconstitutional, both facially and as applied to the plaintiff, Executive Arts Studio.[200] Notably, the court explained that even if the ordinance *were* narrowly tailored, it would still violate the plaintiff's First Amendment rights because it foreclosed "Executive Arts . . . from opening its store in all but around a half dozen possible sites in a City with over 2,500 parcels of commercially useable real estate," which, the court held, was "wholly inadequate to provide for reasonable alternative avenues of communication."[201] The court distinguished the case from *City of Renton v. Playtime Theatres, Inc.*, in which the Court upheld a similar ordinance,[202] noting that in the City of Renton, unlike in Grand Rapids, there were more than 500 acres of land available to operate the adult business.[203]

The argument discussed in this Note assumes an as-applied, rather than facial, constitutional challenge. Facially, content-neutral graffiti abatement ordinances and sign regulations likely leave sufficient alternative channels for expression. It is only when a property owner expresses a desire to *keep* graffiti on his property that these regulations abridge his First Amendment rights. For instance, where a property owner *commissions* an artist to paint an outdoor mural on his property, requiring compliance with a content-neutral

198. *See supra* text accompanying notes 180–186.

199. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 54–55 (1994).

200. 391 F.3d 783, 786–87, 796–98 (6th Cir. 2004).

201. *Executive Arts Studio*, 391 F.3d at 797.

202. 475 U.S. 41, 43, 54–55 (1986).

203. *Executive Arts Studio*, 391 F.3d at 797.

sign regulation likely poses no constitutional problem.[204] The property owner in this scenario can investigate the applicable restrictions and convey them to the artist in advance so that the ultimate product conforms to the specifications.[205] Should the property owner fail to do so, he has a reasonable opportunity to have the artist recreate the piece so that it *does* comply with the regulations. By contrast, where a property owner seeks to preserve *uncommissioned* art, requiring the same level of conformance with a sign regulation is unconstitutional.[206] The property owner in this latter scenario has no control over the process through which the art is created. Furthermore, working with the graffitist to recreate an uncommissioned piece to comply with regulations is not a viable option because graffitists remain largely elusive—not surprising considering that they are engaging in an illegal act of trespass.

C. *Presumptive Protection of Private Property*

Beyond the alternative channels analysis—indeed, as part of any First Amendment inquiry—courts consider the forum in which speech occurs. First Amendment protection is particularly strong when a property owner engages in speech on his private land.[207] Because courts routinely hold that limitations on the display of non-obscene, publically visible art on private property are unconstitutional, this instills in uncommissioned art an additional element of presumptive protection. The forum consideration relates closely to the alternative channels inquiry, as one's private land is often the venue of last resort for a speaker to convey his message publicly.[208]

Courts have granted robust First Amendment protection to artworks located on private property. In *United States ex rel. Radich v. Criminal Court of*

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204. Some arguments set forth in this Note would apply even to commissioned art. For instance, if a sign ordinance completely prevented a property owner from displaying artwork publicly, this would pose First Amendment problems. *See supra* Section IV.B.1. The graffiti abatement ordinances discussed in Section I.C.1 are inapplicable to commissioned art—even if the art contains what looks like graffiti writing—since these laws only pertain to works created without advance authorization from the property owner.

205. Although the time, place, and manner test would likely be satisfied in such an instance, other First Amendment doctrines could make the ordinance unconstitutional. For example, the sign ordinance could be an unconstitutional prior restraint on speech. *See, e.g.*, Mahaney v. City of Englewood, 226 P.3d 1214, 1220 (Colo. App. 2010).

206. Given the distinction this Note draws between commissioned and uncommissioned art, a property owner who wishes to display outdoor art on his property and avoid complying with sign regulations might contract with an artist to make a work *appear* uncommissioned. Collusion between property owners and artists is beyond the scope of this Note, however.

207. City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994) ("A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to *speak* there." (citation omitted)); Spence v. Washington, 418 U.S. 405, 411 (1974) (per curiam); Papineau v. Parmley, 465 F.3d 46, 56 (2d Cir. 2006).

208. Although property owners would not be "speaking" but for the involvement of a third party—the graffitist—this does not undermine the validity of the "last resort" argument since the property owner could not, for instance, display an uncommissioned artwork on *public* property.

New York, described in Section II.B.2, a federal district court held that a flag desecration ordinance, which city officials attempted to invoke to preclude a private gallery owner from displaying anti–Vietnam War flag art visible to passersby, violated the gallery owner's First Amendment rights.[209] Similarly, in *Nelson v. Streeter*, the Seventh Circuit held that a controversial painting by a student at the School of the Art Institute of Chicago, which parodied a Chicago politician, could not be removed by city aldermen without violating the student's First Amendment rights.[210] The court noted that because the Art Institute was privately owned property, "officials [had] no more right to enter it uninvited and take the art off its walls than they would have to enter a private home and take 'offensive' art off its walls."[211]

Cases involving the display of artworks on *public* property provide a useful contrast to *Radich* and *Nelson*. Unlike a private citizen who conveys a message in a public forum by orating it or wearing it on his clothing, art displayed on public property is largely detached from its "speaker." Viewers may therefore erroneously assume that the government is associated with, or supports, the message conveyed by the art simply because the art is situated on public property. To avoid such faulty attributions, courts often give the government a freer hand in regulating art on public property than in regulating messages orated by private citizens in public forums.[212] In *Serra v. United States General Services Administration*, for instance, the General Services Administration ("GSA"), a U.S. governmental agency, commissioned artist Richard Serra to create an outdoor sculpture for the Federal Plaza in Manhattan.[213] After five years of public display, the GSA decided to relocate the sculpture in response to public criticism that it obstructed the Plaza and was a possible safety hazard.[214] The court held that the GSA's decision was a reasonable time, place, and manner limitation that left open sufficient alternative channels of communication.[215] Weighing in the court's decision was that the work was on public property.[216]

Although speech occurring on a speaker's own property does receive heightened protection in the First Amendment analysis, the Court recognizes that a speaker's (property owner's) rights must be balanced against those of

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209. 385 F. Supp. 165, 168–69, 184 (S.D.N.Y. 1974).

210. 16 F.3d 145, 147 (7th Cir. 1994).

211. *Nelson*, 16 F.3d at 148; *cf.* Close v. Lederle, 424 F.2d 988 (1st Cir. 1970) (holding that a *public* university could revoke permission given to an artist to exhibit a painting on school premises).

212. *Compare* Cohen v. California, 403 U.S. 15, 22 (1971) (holding that the government must allow a citizen to wear a jacket expressing a controversial message in a public courthouse), *with* Claudio v. United States, 836 F. Supp. 1230, 1235–36 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994) (holding that the government can refuse to display controversial artwork in a public courthouse).

213. 847 F.2d 1045, 1046–47 (2d Cir. 1988).

214. *Serra*, 847 F.2d at 1047–48.

215. *Id.* at 1049–50.

216. *See id.* at 1048–51; *see also, e.g.*, *Claudio*, 836 F. Supp. at 1235–37.

listeners (viewers of uncommissioned art). Speech directed at a truly captive audience does not merit protection under the First Amendment.[217]

In most environments, the Court places the onus on would-be listeners to avoid speech they do not wish to receive;[218] in the privacy of one's own home, however, the calculus is different. One's residence is his final retreat, and the Court acknowledges an individual's right to avoid being a captive listener within his own home.[219] This could be a particular concern for a homeowner seeking to preserve uncommissioned art in a residential setting where the piece is foreign to the larger landscape. Neighbors, if forced to view the art on an everyday basis, could have a valid captive audience argument. In a commercial context, however, where space is likely more visually cluttered with advertising and other signage, the captive audience problem is less a concern.

Two cases addressing the captive audience issue provide some guidance on how a court might apply the doctrine to a case involving art. In *Close v. Lederle*, the court relied on the captive audience doctrine to reject an artist's First Amendment claim, holding that displaying paintings of nude figures in a state university corridor regularly accessed by the public would force passersby to become unwilling viewers.[220] In *Radich*, by contrast, where art was displayed inside a private gallery but visible to passersby on the street, the court rejected a captive audience argument.[221] *Close* and *Radich* are imperfect for application to uncommissioned art, however, as neither involves the outdoor display of art on private property.

This Note recognizes the captive audience problem as a potential hurdle in a property owner's endeavor to retain uncommissioned art. Rather than deeming this a per se obstacle in the First Amendment analysis, however, the issue should be approached on a case-by-case basis,[222] remembering that

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217. *See* Frisby v. Schultz, 487 U.S. 474, 487 (1988). An audience is "captive" when forced to listen to speech it does not wish to receive, without any means of avoiding the message. *See id.*

218. *E.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-19, at 948 (2d ed. 1988) ("Outside the home, the burden is generally on the observer or listener to avert his eyes or plug his ears against the verbal assaults, lurid advertisements, tawdry books and magazines, and other 'offensive' intrusions which increasingly attend urban life.").

219. SMOLLA, *supra* note 84, § 5:4 (Supp. 2011) ("Out of respect for the intense privacy values associated with the home in American law and culture, the Supreme Court often has upheld regulations designed to shelter individuals from uninvited speech in their homes."); *see also Frisby*, 487 U.S. at 484–85.

220. *See* 424 F.2d 988, 989–91 (1st Cir. 1970). The art in *Close* may have been independently objectionable for its depiction of human genitalia in a hallway often used by children, *id.* at 990, and thus—though it fell short of obscenity—entitled to little First Amendment protection irrespective of the captive audience problem.

221. United States *ex rel.* Radich v. Criminal Court of N.Y.C., 385 F. Supp. 165, 178–79 (S.D.N.Y. 1974).

222. *See* Galina Krasilovsky, Note, *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, 551 (1996).

the Court invokes the captive audience rationale to proscribe speech "sparingly."[223] One commentator, for instance, posits that the only outdoor artworks on private property that would run afoul of this doctrine would typically warrant removal for reasons independent of the captive audience problem, such as their "interference with the state's interest in protecting children from indecent speech."[224] Finally, in analyzing this issue, courts must keep in mind that viewers' mere objections to the aesthetic or message conveyed by a work of uncommissioned art are insufficient to invoke the captive audience rationale successfully.[225]

In applying the time, place, and manner test to uncommissioned art, the presumptive protection given to a speaker's expression on his own property is important to consider alongside the alternative channels analysis. One's private land is the locale of last resort when a speaker has no other options to communicate his message to a public audience. Although compromising the privacy of unwilling viewers would pose a captive audience problem, a court must strike a delicate balance, acknowledging that property owners wishing to express themselves through uncommissioned art likely have no viable alternative outlets for expression.

CONCLUSION

Artists such as Banksy and Shepard Fairey have revitalized interest in graffiti as an art form and given rise to conflicts between a property owner's desire to express himself through uncommissioned art and land-use regulations that seek to preserve peace, order, and aesthetics in the community. At the core of First Amendment jurisprudence is the power of speech to generate a rich public discourse by challenging audiences to question their deepest beliefs and consider new points of view. Requiring removal of uncommissioned art would defy First Amendment goals by insulating communities from messages and aesthetics they find unpalatable, while compromising the fundamental constitutional rights of speakers to express themselves to a public audience. Graffiti abatement ordinances and sign regulations that require a property owner to shield his uncommissioned art from public view leave insufficient alternative channels for the property owner's expression, and are therefore unconstitutional.

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223. Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011).

224. Krasilovsky, *supra* note 222.

225. *See, e.g.*, Cohen v. California, 403 U.S. 15, 21 (1971) ("The ability of government . . . to shut off discourse solely to protect others from hearing it . . . depend[s] upon a showing that substantial privacy interests are being invaded . . . . Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections."); Krasilovsky, *supra* note 222.