THE CONSTITUTIONAL IRRELEVANCE OF ART*

BRIAN SOUCEK**

In Masterpiece Cakeshop, *the baker's lead argument to the Supreme Court was that his cakes were artworks, so antidiscrimination laws could not apply. Across the country, vendors who refuse to provide services for same-sex weddings continue making similar arguments on behalf of their floral arrangements, videos, calligraphy, and graphic design, and the Supreme Court will again be asked to consider their claims.*

But arguments like these—what we might call "artistic exemption claims," akin to the religious exemptions so much more widely discussed—are actually made throughout the law, not just in public accommodations cases like Masterpiece Cakeshop. *In areas ranging from tax and tort, employment and contracting discrimination, to trademark, land use, and criminal law, litigants argue that otherwise generally applicable laws simply do not apply to artists or their artworks. This Article collects these artistic exemption claims together for the first time in order to examine what determines their occasional success—and to ask when and whether they should succeed.*

*The surprising answer is that claims of the form "*x *is protected* because *it is art" should never succeed. The category "art" is constitutionally irrelevant. Contrary to widespread assertion among scholars and advocates, a work's status as art has never done any work in the Supreme Court's First Amendment case law.*

** Professor of Law and Chancellor's Fellow, University of California, Davis School of Law. To tackle a topic this broad is to rely on a wide circle of experts and friends. I have learned especially from exchanges with Jonathan Neufeld, Amy Adler, BJ Ard, Ash Bhagwat, Alan Brownstein, Alan Chen, Jessica Clarke, Anthony Cross, Ryan Davis, Andrew Gilden, Lydia Goehr, Tristin Green, James Grimmelmann, David Horton, Matt Lane, Carlton Larson, Dominic McIver Lopes, Sina Najafi, Chris Odinet, Liesl Olson, Robert Post, Russell Robinson, Betsy Rosenblatt, Jennifer Rothman, Roger Shiner, Jessica Silbey, Mark Tushnet, Robin West, Felix Wu, and audiences at the ACS Junior Public Scholars Workshop, the American Society for Aesthetics Annual Meeting, the 2020 Art Law Works-in-Progress Colloquium organized by Peter Karol and Guy Rub, the Art & Law Program in New York City, the British Society of Aesthetics Annual Conference, the College of Charleston, the Loyola Constitutional Law Colloquium, Willamette University College of Law, and the Yale Freedom of Expression Scholars Conference (twice). I am also thankful to my research assistants—Heather Bates, Jon Morgan Florentino, Jane Martin, Reema Pangarkar, Kelsey Santamaria, and Nicolas Sweeney; to Dean Kevin Johnson and the UC Davis School of Law for supporting this project through the Martin Luther King, Jr. Hall Research Fund; to the American Society for Aesthetics for funding my participation in the faculty seminar "Beauty and Why It Matters" at the University of British Columbia; and to James Weldon Whalen and the *North Carolina Law Review* for some of the best editing my writing has ever received.

Instead, the Supreme Court emphasizes individual mediums of expression—categories like paintings and protest marches, books and billboards. Compared to the category "art," these mediums of expression are better defined, easier to administer, and more relevant to that which the law most likely and legitimately wants to regulate. Yet they have gotten far less attention from scholars and lower courts than they deserve.

Understanding the constitutional irrelevance of art—and the constitutional importance of mediums—casts new light on some of the most prominent recent and looming artistic exemption claims at the Supreme Court: not just those made in same-sex wedding cases like Masterpiece Cakeshop *and its kin but also those made in challenges to race discrimination in television and in criminal threat prosecutions brought against rappers. Asking whether a cake, a TV show, or a rap song is art uselessly distracts from the difficult issues actually at stake in those important cases and in First Amendment doctrine more broadly.*

INTRODUCTION

The artist Arne Svenson secretly photographed his neighbors through their apartment windows in Manhattan and sold the pictures in a nearby gallery.[1] Under New York privacy law, using someone's likeness for commercial purposes without their permission is illegal.[2] But when his neighbors sued, Svenson successfully argued that the law did not apply because the images Svenson sold were works of art.[3]

Elsewhere in New York City, artists wanted to sell their paintings, sculptures, prints, and photographs on city streets.[4] Street vendors normally need a permit, but the artists claimed that this would unconstitutionally restrict their artistic expression.[5] They won.[6] A decade later, graffiti artists selling spray-painted hats and shirts made the same claim.[7] They lost.[8]

A town in Texas banned junked vehicles in people's yards.[9] A businessman there claimed that the inoperable Oldsmobile in front of his store—filled with plants and painted with local scenes—was a work of art, not a junked car, so the ordinance shouldn't apply.[10]

The Bachelor television franchise was sued for race discrimination after it failed to cast a single Black bachelor or bachelorette in its first twenty-four seasons.[11] The case was dismissed at the pleading stage because it threatened to affect the creative content of an "artistic form[] of expression."[12]

After being arrested on drug and weapon charges, a teenager in Pennsylvania described online how he was going to maim and kill the police officers who arrested him.[13] Courts were asked to decide whether the teen could avoid additional charges of terroristic threats and witness intimidation because he said what he did within a rap song.[14]

Cook County, Illinois, exempts small theaters from paying sales tax on tickets to live musical performances.[15] Yet it imposed the tax on venues where

1. Foster v. Svenson, 128 A.D.3d 150, 153 (N.Y. App. Div. 2015).
2. N.Y. CIV. RIGHTS LAW §§ 50–51 (Westlaw through L.2021, ch. 1 to 49, 61 to 68).
3. *Foster*, 128 A.D.3d at 159.
4. Bery v. City of New York, 97 F.3d 689, 691 (2d Cir. 1996).
5. *Id.* at 698.
6. *Id.*
7. Mastrovincenzo v. City of New York, 435 F.3d 78, 81 (2d Cir. 2006).
8. *Id.*
9. Kleinman v. City of San Marcos, 597 F.3d 323, 325 (5th Cir. 2010).
10. *Id.* at 324–36.
11. Claybrooks v. Am. Broad. Cos., 898 F. Supp. 2d 986, 989 (M.D. Tenn. 2012).
12. *Id.* at 988.
13. Commonwealth v. Knox, 190 A.3d 1146, 1148–49 (Pa. 2018), *cert. denied sub nom.* Knox v. Pennsylvania, 139 S. Ct. 1547 (2019).
14. *Id.* at 1152–53.
15. COOK COUNTY, ILL., CODE OF ORDINANCES §§ 74-391 to -92 (LEXIS 2015 Cook County Ill. Mun. Code Archive).

DJs, rappers, country singers, and rock bands performed.[16] Musical performances like these, the county said, were not "commonly regarded as part of the fine arts."[17] The venues refused to pay, arguing that the tax officials should not get to decide what is art—even as they fought for tax exemptions available only to the arts.[18]

* * *

Cases like these—which this Article brings together for the first time—raise what we might call "artistic exemption claims": arguments that an otherwise generally applicable law should not apply to someone or something because that someone is an artist or that something is art.

Artistic exemption claims resemble the religious exemption claims discussed in so many recent cases, newspapers, and law review articles. From anti-vaxxers[19] to adoption agencies,[20] Hobby Lobby[21] to Masterpiece Cakeshop,[22] religious exemptions generate ever more legal controversy and

16. *Id.* (limiting the exemption to the "fine arts, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings").

17. *Id.* Cook County has since amended its ordinance to remove "fine" from the term "fine arts." COOK COUNTY, ILL., CODE OF ORDINANCES §§ 74-391 to -92 (LEXIS through Ordinance No. 20-4356, enacted October 22, 2020).

18. Defendants' Motion to Dismiss at 1–2, Cook Cnty. Dep't of Revenue v. Wladyslaw Kowynia, Inc., No. D15050079 (Cook Cnty. Dep't of Admin. Hearings Mar. 31, 2017) (settled).

19. *See, e.g.*, Lauren Sausser, *Parenting: Religious Exemptions to Child Vaccine Requirements Keep Rising in South Carolina*, POST & COURIER (June 17, 2018), https://www.postandcourier.com/columnists/parenting-religious-exemptions-to-child-vaccine-requirements-keep-rising-in/article_64508ab6-6d9e-11e8-b351-3b711fcbe895.html [https://perma.cc/GGD2-KE8F]; *cf.* ALA. CODE § 16-30-3 (Westlaw through Act 2020-206) (providing a religious exemption from Alabama's vaccination requirement).

20. *See, e.g.*, H.B. 837, 111th Gen. Assemb., Reg. Sess. (Tenn. 2020) (providing that no private child-placing agency shall be required to make placements that violate their religious or moral convictions); Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (mem.).

21. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014) (granting closely held corporate employers a religious exemption from having to include birth control coverage in their employee health insurance plans).

22. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018). In *Masterpiece Cakeshop*, a Christian cake "artist" sought an exemption from Colorado's public accommodations law on both religious *and* artistic grounds. *Id.* at 1723; *id.* at 1742 (Thomas, J., concurring in part and concurring in the judgment) (examining the artistic exemption claim made by the cake "artist"). Being required to create cakes for same-sex weddings, the baker said, not only would violate his religious beliefs but would also amount to government-compelled art making. *See* Jack Phillips, *Can I Just Be a Cake Artist Again?*, DENVER POST (Mar. 8, 2019, 12:47 PM), https://www.denverpost.com/2019/03/08/jack-phillips-can-i-just-be-a-cake-artist-again/ [https://perma.cc/V847-KDNG]. All but two Justices dodged the artistic exemption claim when *Masterpiece Cakeshop* was decided in 2018, but the Court has already been asked to consider such claims again. *See Masterpiece Cakeshop*, 138 S. Ct. at 1742 (Thomas, J., concurring in part and concurring in the judgment); *see* Petition for Writ of Certiorari at i, Arlene's Flowers, Inc. v. Washington, No. 19-333 (Sept. 11, 2019) (asking whether the Washington state antidiscrimination law can require a "Christian artist who imagines, designs, and creates floral art" to "create custom art that celebrates sacred ceremonies that violate her faith").

scholarly discussion. But similarly widespread and important exemption claims brought on behalf of art and artists have gotten little attention at all.

As the examples at the start already suggest, artistic exemption claims range widely across the law, from tax and tort to land use, antidiscrimination, and criminal law. Some have been successful, while others have not. But no one has yet given an account of what determines their success or whether or when they deserve to succeed. And more fundamentally, no one has previously questioned whether the umbrella term "art" picks out an appropriate—or even definable—category of things meriting protection. No one has paused to ask whether the concept of art should be doing any constitutional work.

To ask this is decidedly *not* to ask whether individual works of art should receive constitutional protection. The question here is not whether Joni Mitchell's songs, Ernest Hemingway's *The Snows of Kilimanjaro*, or Kehinde Wiley's portrait of President Obama are covered under the First Amendment. Each of these works clearly is covered, though scholars have sometimes struggled to explain why.[23] The question here is whether works like these are covered *because they are art*.

The answer to that question is no. Scholars assume, litigants argue, and lower courts have at times accepted the idea that "art" picks out a constitutionally relevant set of objects and activities deserving of special protection under the First Amendment.[24] But the U.S. Supreme Court has never done so. And nor should it—or so this Article claims. For there are alternative concepts at hand which, while hardly perfect, are easier to define and more relevant to the task: the *mediums of expression* that run throughout the Supreme Court's First Amendment case law.

Mediums of expression like music, dance, film, books, paintings, and sculpture have long received special treatment—as, more recently, have newer

23. *See, e.g.*, MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, FREE SPEECH BEYOND WORDS 70 (2017) ("Every approach one might take to explaining why the First Amendment covers art . . . generates odd anomalies."); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 29 (1971) ("[A] thoughtful judge is likely to ask how an artistic judgment that is wholly idiosyncratic can be capable of supporting an objection to the law. The objection, 'I like it,' is sufficiently rebutted by '*we* don't.'" (quoting Walter Berns, *Pornography vs. Democracy: The Case for Censorship*, PUB. INTEREST, Winter 1971, at 23)); Marci Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 108–09 (1996) ("Theories of art's first amendment content undeniably provide protection to a degree. By basing art's protection on its discursive content, however, these theories compel the courts to find such content in every work of art and force them to struggle with artworks whose communicative essence is nondiscursive and nonrational."); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257 ("Literature and the arts must be protected by the First Amendment. They lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created."); Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 223 ("Although several [theorists] appear to assume that the first amendment protects some forms of artistic expression, they provide no meaningful analysis of why this should be so.").

24. *See infra* Part I and Sections III.A.2–3.

mediums like video games. But this is not because they are art. Non-artistic mediums like billboards, yard signs, and leaflets also receive protection, as do books, movies, and video games, even when they are not works of art. (This Article would be no more protected if it were written in verse and accepted as art.)

Conversely, and more controversially, not every work of art merits First Amendment coverage. Attempts to establish amateur rap or Masterpiece Cakeshop's cakes as art are therefore misplaced. The concept of art as an umbrella term covering all the arts is not just ill-defined. The best definitions of art on offer simply fail to explain why the set of objects and activities they identify should all receive special treatment under the law. The concept of art thus deserves to be constitutionally irrelevant.[25] Arguments claiming that something should be exempt from an otherwise applicable law *because* it is an artwork are therefore unsound.

Part I of this Article canvasses the previously unacknowledged variety of ways and contexts in which these arguments are made. These contexts are hardly marginal. In recent years, fights over artistic exemptions have affected what can be trademarked, what threats can result in prison time, what access LGBTQ couples have to the marketplace, and what entertainment venues get taxed in cities and states throughout the country. It is no exaggeration to say that art exemption claims have reshaped the streetscape of New York City and the racial demographics of our movies, television shows, and plays.

Some artistic exemption claims arise in court; others are carved out by legislatures. Some claims depend on definitional arguments: that an object isn't governed by a particular law because it is an artwork rather than the kind of thing (for example a junked car or true threat) the law purports to regulate. Others call for a balancing of values: they acknowledge that the law applies but argue that art's value outweighs whatever values the law was meant to advance.

Part I develops these distinctions before blurring them—showing how definitional considerations and value-based balancing ultimately intertwine. They come together in courts' longstanding concern with *mediums of expression*. That is to say, the crucial question in most art exemption cases turns out to be neither a definitional one—"Is it art?"—or an evaluative one—"Is it *good* art?" The crucial question usually does not concern art at all. Instead, artistic exemption cases more often turn on the nature, value, and definitional limits of

25. Again, this is not to make artworks themselves strangers to the Constitution. As a unanimous Supreme Court noted, the "painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll" is "unquestionably shielded." Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995). But they aren't shielded *because* they are works of art. The category "art" is not what triggers their protection.

the medium of expression to which an object is said to belong.[26] Artistic exemption claims, when they succeed, do so because they are made on behalf of some member of a recognized medium—painting, for example, or sculpture or music—*not* simply because some object can be labeled a work of art.

Part II pursues this insight, making the philosophical case why courts are correct to focus on individual mediums of expression rather than a more sweeping concept like art. The argument goes beyond the standard claim that art is hard to define. The problem is not just that philosophers don't agree on a definition—it's that the definitions on offer are all legally irrelevant. They do nothing to explain why a set of things so defined should be treated differently by the law than any other sorts of things. Those claiming art exemptions don't just need a definition of art, they need a definition that justifies putting art beyond law's reach.

By contrast, mediums of expression—which can be generally artistic (like music), non-artistic (like billboards or leaflets), or mixed (like books and photographs)—have boundaries that may be shifting or blurred but are still far sharper than that of art. (We might debate whether a cake from Masterpiece Cakeshop is an artwork or not, but it certainly isn't an opera or photograph.) Unlike art in the broad sense—the sense generally used by those making artistic exemption claims—mediums of expression tend to have practitioners and experts who can help establish the necessary boundaries. And most importantly, mediums of expression are distinguished in part by their materiality—the very thing law is most likely and legitimately interested in regulating. Theater, novels, architecture, and poetry all present different potential harms—harms the law may well want to address—but exemptions for "art" would end up lumping them together. Whereas mediums of expression do real constitutional work, determining whether something is art is just a distraction.

Part III shows how this insight allows us to see the Supreme Court's free speech cases in importantly new ways. While scholars and litigants have often treated arthood as a trigger for First Amendment coverage, the Supreme Court never has. And going forward, avoiding talk of art would transform free speech arguments currently pending or looming before the Supreme Court: collisions between wedding vendors and LGBTQ rights,[27] race-based decision-making in

26. *Cf.* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.").

27. The Court dodged this issue in *Masterpiece Cakeshop*. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1723 (2018). But discrimination claims have persisted even against the petitioner in that case. Sam Brasch, *Masterpiece Baker Jack Phillips Is Up Against Yet Another Legal Complaint*, COLO. PUB. RADIO (June 6, 2019), https://www.cpr.org/2019/06/06/masterpiece-baker-jack-phillips-is-up-against-yet-another-legal-complaint/ [https://perma.cc/3XXD-RPXY] (describing the second and third complaints filed against Phillips and Masterpiece Cakeshop). And other conflicts

the television and theater industries,[28] and the criminalization of threats made in rap songs.[29] Some of the issues in these cases may be genuinely hard, but they are made a lot harder by those who think the concept of art has anything to do with them.

In all their varied forms and contexts, artistic exemption claims have one thing in common: they treat art as something that should be above the law. This Article argues that, within constitutional law, the concept of art should instead be irrelevant.

I. ARTISTIC EXEMPTION CLAIMS

To claim an artistic exemption is to demand that some generally applicable law should not apply to a person, object, or activity because the person is an artist, or the object or activity is art.

Importantly, "art" is used in this Article in its broad sense, as an umbrella term uniting all artistic activity, not just its narrower meaning covering only visual art. Here, art includes more than what is studied in an art history department or collected in an art museum. When philosophers of art ask the age-old question "What is art?," they are seeking a definition that covers poetry and music no less than painting and sculpture. (Whether they succeed is another question and one we will return to in Part II.) When we praise someone as "a real artist" or call up the cliché of the "struggling artist," we are as likely to be talking about a songwriter, novelist, or dancer as a painter or photographer. Googling "a true artist" may summon results about nail salon owners and dog groomers alongside articles about people who draw or paint. Tattoo "artists"

between wedding vendors and same-sex couples have continued percolating throughout state and federal courts across the country. *See, e.g.*, Telescope Media Grp. v. Lucero, 936 F.3d 740, 747–48 (8th Cir. 2019); 303 Creative LLC v. Elenis, 746 Fed. App'x 709, 711–12 (10th Cir. 2018); Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 895 (Ariz. 2018); State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1209 (Wash. 2019), *petition for cert. filed*, No. 19-333 (Sept. 11, 2019).

28. Although the Supreme Court decided one case about race discrimination in cable television during its 2019 Term, *see* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1013 (2020), the Court sidestepped a related case which asked "[w]hether a cable operator has a First Amendment right to include racial considerations among the factors it evaluates in making editorial determinations as to what programming to carry on its limited bandwidth," Petition for Writ of Certiorari at i–ii, Charter Commc'ns. v. Nat'l Ass'n. of Afr. Am.-Owned Media, 140 S. Ct. 2561 (2019) (mem.) (No. 18-1185). Paul Clement's petition in that case raised the specter of the musical *Hamilton* having to hire a White actor as George Washington. *Id.* at 26. (Throughout this Article, "White" and "Black" are capitalized, both in keeping with *North Carolina Law Review* style guidance and for reasons well-described by Nell Irvin Painter, *Why 'White' Should Be Capitalized, Too*, WASH. POST (July 22, 2020, 10:57 AM), https://www.washingtonpost.com/opinions/2020/07/22/why-white-should-be-capitalized/ [https://perma.cc/6Z6V-2BSB (dark archive)].)

29. *See* Elonis v. United States, 135 S. Ct. 2001, 2004 (2015); Petition for Writ of Certiorari at i, Commonwealth v. Knox, 190 A.3d 1146 (2018), *cert. denied sub nom.* Knox v. Pennsylvania, 139 S. Ct. 1547 (2019) (No. 18-949) [hereinafter *Knox*, Certiorari Petition].

figure prominently in the results as well.[30] In part, this is because art is not just a category but also an honorific. The fact that belonging to the category is often seen as a form of praise only makes the definitional boundaries harder to maintain.

The struggle to maintain boundaries around the concept of art is a dominant theme in the pages to come. But to be clear, the boundaries that matter are those that cabin art in its widest sense, for this is the sense in which litigants invoke art in the examples that follow.[31] The artistic exemption claims canvased in this part are made not just for photography, paintings, and film, but also for music, dance, and theater—and, as we will see, for wedding cakes, junked cars, and potentially endless other types of installations, performances, and happenings. Claims on behalf of "art," thus broadly defined, pervade the law, in areas ranging from land use and intellectual property to antidiscrimination, criminal, and tax law. The sections that follow take these areas in turn.

These discussions are grouped, however, into what at first seem like two different modes of argument—two different types of claims.

30. *See, e.g.*, True Artists – Association of Certified Tattoo Artists (@TrueArtists), FACEBOOK, https://www.facebook.com/TrueArtists/ [https://perma.cc/WED5-ZYXJ] (describing tattoo artists as "True Artists"); Tigra Lorusso, *Nail Art*, PINTEREST, https://www.pinterest.de/pin/382172718351582112/ [https://perma.cc/E2RV-DD3J] (describing a nail design as "AMAZING! TRUE ARTIST!").

31. To say this is not to say that courts, scholars, or litigants are always clear about the two different ways in which "art" is used. Take, for example, the recent case of a wedding photographer who objected to Louisville's requirement that she serve customers regardless of their sexual orientation. *See* Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't, 479 F. Supp. 3d 543 (W.D. Ky. 2020) (order granting in part and denying in part preliminary injunction). Judge Walker, then still presiding over the Western District of Kentucky, found the photographer's artistic exemption claim likely to succeed based on a series of "straightforward principles:

- Her photography is art.
- Art is speech.
- The government can't compel speech . . . ."

Id. at 549 (citations omitted). The Sixth Circuit case that the district court cited for its two claims about art states that the First Amendment covers both words and "*other mediums of expression*, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures." ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 924 (6th Cir. 2003) (emphasis added). Thus, it is clear that the district court's claim that "[a]rt is speech" is meant to extend to this whole variety of mediums, including Chelsey Nelson's photography. *Chelsey Nelson Photography*, 479 F. Supp. 3d at 549. Elsewhere in the same district court opinion, however, Judge Walker talked of the First Amendment's unquestionable protection of "art, music, and literature." *Id.* at 558. There, "art" is used as one medium among several, not an umbrella term embracing the visual arts *and* writing and music. Given its importance in the discussion to come, I emphasize the Sixth Circuit's explicit reference to "mediums of expression," *ETW Corp.*, 332 F.3d at 924, over Judge Walker's broader umbrella term, *Chelsey Nelson Photography*, 479 F. Supp. 3d at 558. Those mediums of expression, rather than "art," are what the Sixth Circuit claims the First Amendment protects. *ETW Corp.*, 332 F.3d at 924.

On one side are *categorization claims*. These argue that a law regulating *x* shouldn't apply to some object or activity, *y*, because *y* is not *x*; *y* is art. Thus, a law banning junked cars should not apply to what is allegedly a sculpture (made from a junked car) in someone's yard. Similarly, an alleged threat should not be seen as criminal because it was actually just a rap lyric. Section I.A considers claims that take this approach.

On the other side are *balancing claims*. These acknowledge that an artistic object or activity is precisely the kind of thing the law covers but insist that the artwork's expressive value outweighs whatever value the law intends to promote. Artists selling their wares on New York City sidewalks or Masterpiece Cakeshop selling cakes in Colorado both admit they are selling goods that would otherwise be subject to street vending or public accommodations laws. Their claim is that their expressive interests are weightier than the government's interest in avoiding sidewalk congestion (in the former case) or promoting equality (in the latter). Section I.B considers these and similar arguments.

Before doing this, though, it is worth pausing to ask where all these artistic exemption claims come from. And here, it may help to compare artistic exemptions to the much better-known exemption claims made on behalf of religion.

Like religious exemptions, artistic exemption claims can be based on either constitutional protections or statutory carve outs. Constitutional religious exemption claims come from the Free Exercise Clause—not very effectively since *Employment Division v. Smith*, [32] but that may soon change. [33] Constitutional protections for works of art, by contrast, have a less explicit source. While other countries provide specific constitutional protections for art,[34] protections in the United States derive from the First Amendment's Free Speech Clause, and justifying them has long been a matter of controversy, given the sometimes awkward or nonobvious fit between art and the marketplace of

32. 494 U.S. 872 (1990).

33. *See id.* at 880–82 (declining to provide constitutional religion-based exemptions to valid and neutral laws of general applicability). *But see* Brief for Petitioners at 37–52, Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (No. 19-123) (arguing that *Smith* should be replaced by a "strict scrutiny test for laws which infringe upon religious exercise").

34. *See, e.g.*, Grundgesetz [GG] [Basic Law] [Constitution], art. 5(3), translation at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html [https://perma.cc/J265-7JJQ] (Ger.) ("Arts and sciences, research and teaching shall be free."); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 24, 1971, 30 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 173 (Ger.), translation at https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1478 [https://perma.cc/7VM5-52V3] (describing the German Basic Law's "comprehensive guarantee of the freedom of artistic activity" and characterizing the "essence of artistic endeavor [as lying in] the free creative process whereby the artist, in his chosen communicative medium, gives immediate perceptible form to what he has felt, learnt, or experienced"); *see also* Raman Maroz, *The Freedom of Artistic Expression in the Jurisprudence of the United States Supreme Court and Federal Constitutional Court of Germany: A Comparative Analysis*, 35 CARDOZO ARTS & ENT. L.J. 341, 358–81 (2017) (helpfully summarizing the German Constitutional Court's case law on art).

ideas and democratic self-governance—what many see as the main rationales for protecting speech.[35]

Deepening the constitutional difference between art and religion: there is no artistic equivalent to the Constitution's Establishment Clause, which limits the state's ability to support religion. The fact that the government can, and does,[36] support the arts in ways it could never support religion may lessen art's need, in comparison to religion's, for constitutional protection from governmental burdens.[37]

For now, however, most exemptions claimed on behalf of religion are actually not constitutional but rooted in statutory law. The Religious Freedom Restoration Act of 1993,[38] for example, provides the possibility of exemptions from nearly any federal law that substantially burdens a religious practice.[39] There is no across-the-board equivalent for art. What federal, state, and local governments have done instead, and often, is to write specific artistic carve outs into particular statutes and regulations. In this, art and religion do prove analogous. Legislative carve outs for religion are found in hundreds of federal laws—from food inspection regulations to copyright, asylum, and drug laws, to Title VII's protections against employment discrimination.[40] Similarly, the examples of artistic exemptions canvased throughout this part include a number of legislated carve outs for various artistic practices.

35. *See supra* note 23 (collecting explanations for protecting art under the First Amendment).

36. *See* Brian Soucek, *Aesthetic Judgment in Law*, 69 ALA. L. REV. 381, 387–412 (2017) (detailing ways in which the government subsidizes art in the United States) [hereinafter Soucek, *Aesthetic Judgment*].

37. Some scholars have justified religious exemptions as a counterweight to the disadvantageous treatment of religion under the Establishment Clause. *See, e.g.*, Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger when Both Clauses Are Taken Seriously*, 32 CARDOZO L. REV. 1701, 1703–04 (2011); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000). According to these counterweight arguments, the state's massive support for the arts should presumably weaken the justification for exempting art from the state's laws. *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 51, 59–62 (2007) (discussing why the United States funds and administers a National Endowment for the Arts but not a National Endowment for Religion); *see also* McConnell, *supra*, at 10 (noting that while General Motors and environmental activists do not get the same exemptions that religious practitioners sometimes do, General Motors—unlike religious organizations—can get bailed out by the government, and environmentalism—unlike religious beliefs—can be taught in schools and promoted through regulations that governmental agencies craft and enforce).

38. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to -4).

39. §6(a), 107 Stat. at 1489 (codified as amended at 42 U.S.C. § 2000bb-3(a)) ("This Act applies to all Federal and state law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act"). The Religious Land Use and Institutionalized Persons Act of 2020, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified as amended 42 U.S.C. §§ 2000cc to -5), requires more targeted exemptions from state laws in the contexts of prisons and land use.

40. *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445–46 (1992).

Technically, these statutory and regulatory schemes offer artistic exemptions *within* the law, not exemptions *from* the law. But laws like these remain relevant even to an Article concerned with art's constitutional status for a few reasons. First, though artists obviously don't need to claim an exemption from a law that already carves out their art, the original drafting of the law itself may have been a response to artistic exemption claims, including constitutional ones.[41] Second, when legislative carve outs are underinclusive—failing to include all that might qualify as art—those whose art is not exempted *by* the law will likely bring exemption claims *against* the law.[42] Third, and relatedly, legislative carve outs that provide exemptions for certain arts, but not others, can be challenged as discriminatory.[43] In such cases, legislative exemptions themselves are said to violate the Constitution's protection for art. The following pages provide examples of all of this and more.

A. *Categorization Claims*

1. Land Use

Since 1990, Michael Kleinman has celebrated the opening of each of his novelty and gift stores with a charity "car bash."[44] Donors pay to smash a car with a sledgehammer, and after, the smashed car gets filled with dirt and plants, painted over by local artists, and displayed in front of the store.[45] In November 2007, this occurred in San Marcos, Texas.[46] The victim: an Oldsmobile 88.[47]

Unfortunately for Kleinman, San Marcos has a junked vehicle ordinance which says that inoperable vehicles that are wrecked or dismantled, lacking a license plate or inspection sticker, and visible from the street are treated as a public nuisance, subject to seizure and demolition.[48] After a complaint was filed about a "nasty looking old vehicle" on the north side of the I-35, the city issued

41. *See infra* Section I.B.2 (discussing the New York City Council's carve out for books and other printed material in its 1982 permit requirements for street vendors).

42. *See infra* Section I.A.3 (discussing claims by music clubs not granted a county tax exemption for admission revenue from "live performance[s] in any of the disciplines which are commonly regarded as part of the fine arts").

43. *See, e.g.*, Bery v. City of New York, 97 F.3d 689, 695–96 (2d Cir. 1996) (considering but not deciding whether an ordinance that distinguishes between written and visual artistic expression discriminates on the basis of content); Soucek, *Aesthetic Judgment*, *supra* note 36, at 465–66 (discussing difficulties distinguishing content, viewpoint, speaker, and medium discrimination in regard to art).

44. Kleinman v. City of San Marcos, 597 F.3d 323, 324 (5th Cir. 2010); Petition for Writ of Certiorari at 28, *Kleinman*, 597 F.3d 323 (No. 08-50960) [hereinafter *Kleinman*, Certiorari Petition].

45. *Kleinman*, 597 F.3d at 324.

46. *Id.*

47. *Id.*; *Kleinman*, Certiorari Petition, *supra* note 44, at 59.

48. SAN MARCOS, TEX., CODE OF ORDINANCES §§ 34.191, 34.194, 34.200, 34.201(a) (LEXIS through Ordinance No. 2020-44, enacted June 16, 2020).

a citation, and a local court found that the object in front of Kleinman's store qualified as a junked vehicle under San Marcos's definition.[49]

Kleinman's counterargument was that the object in dispute was "no longer a vehicle of any kind, but ha[d] been fully recycled and transformed into a planter, and a work of art."[50] The transformation, in fact, was the very point of the artwork.[51] As Kleinman described his project: "I am trying to make a philosophical statement about the need to find ways to combat the pollution caused by automobiles, by finding ways to recycle and reprocess them, and this method does that, by showing how we can turn them into a beautiful work of art."[52] The car-planter artwork, in other words, exemplified the meaning that it was meant to convey.[53] As the communication studies professor who served as Kleinman's expert witness explained, "[T]he use of a junked car as an artistic and communicative medium . . . is a central part of the message that is communicated by the art object."[54] In other words, "[T]he medium is the message."[55]

Kleinman lost this argument.[56] Holding that the object on his lawn fit the definition of a junked vehicle, the court realized at least implicitly that the law cannot remain blind to the material out of which artworks are made.[57] At best, the law can treat the regulated entity as both artwork and a mere thing—in this case, a junked car—at once.

Here, however, Kleinman had a backup argument.[58] In federal court, his claim was not that the local ordinance didn't apply; rather, the ordinance, at least as applied to his junked-car art, was unconstitutional content discrimination.[59] Since the medium was part of the message, regulation of the medium—junked cars—in his case interfered with the message he wanted to

49. *Kleinman*, 597 F.3d at 324–25; Brief of Appellants at 9, *Kleinman*, 597 F.3d 323 (No. 08-50960).

50. Kleinman Affidavit, Record on Appeal at 47, *Kleinman*, 597 F.3d 323 (No. 08-50960).

51. *Id.*

52. *Id.* at 46.

53. Artworks that exemplify their meaning are ones that show, not (just) tell. More formally, they symbolically refer to properties which they themselves possess. Like samples or swatches, they call attention to (some of) their own properties. For a non-artistic example of this, compare the word "polysyllabic," which exemplifies its meaning, with "monosyllabic," which does not. For deep and at times amusing discussions of exemplification, see NELSON GOODMAN, LANGUAGES OF ART 52–67 (1976), and NELSON GOODMAN, WAYS OF WORLDMAKING 32–37, 63–65 (1978).

54. Expert Report of Robert M. Bednar, Ph. D. at 2, *Kleinman*, 597 F.3d 323 (No. 08-50960).

55. *Id.* (quoting MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964)).

56. *See Kleinman*, 597 F.3d at 325.

57. *Id. See generally* ARTHUR C. DANTO, THE TRANSFIGURATION OF THE COMMONPLACE: A PHILOSOPHY OF ART 1–32 (1981) (discussing the difference between "Works of Art and Mere Real Things").

58. *See Kleinman*, 597 F.3d at 326.

59. *Id.*

convey.[60] But this argument too depended on a recategorization. Only by treating the regulated object as an artwork could medium and message merge in this way, such that regulating the former unconstitutionally abridged the latter.

In an unsympathetic 2010 opinion,[61] the Fifth Circuit rejected this move in *Kleinman v. City of San Marcos*.[62] It noted that the Supreme Court had referred to the "painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll" as "unquestionably shielded."[63] But this passage, it said, "refers solely to great works of art," leaving open the question of whether lesser works should get protection at all.[64] The expressive quality of Kleinman's less exalted work was secondary to its function and utility, and thus regulations on its display were only subjected to rational basis review.[65] Then, arguing in the alternative and acknowledging the possible expressive character of the work, the court applied the test established in *United States v. O'Brien*[66] for laws that incidentally burden expression.[67] The *O'Brien* test asks whether a law furthers an important interest unrelated to expression, and whether it does so without incidentally burdening expression more than necessary to further the government's interest.[68] Finding no governmental intent to discriminate and plenty of alternative modes of expression available,[69] the Fifth Circuit denied Kleinman his art exemption. The Supreme Court refused to take the case.[70]

As we will repeatedly see in the examples to come, the First Amendment has particular difficulty dealing with claims like Kleinman's: claims of exemplified meaning. Let's say someone thought that the court system in this country was illegitimate and should be burned to the ground. One especially powerful way of communicating that message would be to literally burn a courthouse to the ground, and yet no court would recognize a First Amendment defense in that case.[71] The problem is this: nearly any action can be understood

60. *Id.*

61. *See id.*

62. 597 F.3d 323 (5th Cir. 2010).

63. *Id.* at 326 (quoting Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995)).

64. *Id.*

65. *Id.* at 327 (claiming this holding could be made "without recourse to principles of aesthetics" (quoting Mastrovincenzo v. City of New York, 435 F.3d 78, 95 (2d Cir. 2006))); *see also infra* Section I.B.2.

66. 391 U.S. 367 (1968).

67. *Kleinman*, 597 F.3d at 328.

68. *O'Brien*, 391 U.S. at 376. For more on *O'Brien*, see *infra* notes 189–91.

69. *See Kleinman*, 597 F.3d at 328–29 (noting that Kleinman could display the work out of sight from the road or could display images of the work to those driving by).

70. 562 U.S. 837 (2010).

71. *Cf.* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 772 (2001) (imagining a driver, arrested for speeding, who claims that driving fast was his way of "'expressing disagreement' with the federally mandated speed limit . . . [or] was 'performance art'").

as expressing endorsement of that very action. But that cannot bring every action within the protective coverage of the Free Speech Clause.[72] And in a world where anything can be an artwork,[73] the First Amendment could potentially be invoked against any regulation at all.[74]

This is the dynamic, and the worry, that was at play in *Kleinman*, where the defense's main argument was a metaphysical one: this object is a work of art, not a junked car. It is easy to understand why the city issued a citation nonetheless. As the philosopher Arthur Danto once wrote: "To mistake an artwork for a real object is no great feat when an artwork is the real object one mistakes it for."[75]

2. Threats and Lies

Although *Kleinman* never got to the Supreme Court, another categorical art exemption claim did. It arose in a criminal threat case, *Elonis v. United States*.[76] The Court dodged the First Amendment issue there, though,[77] and in 2019 it did so again by denying certiorari in a similar case, *Commonwealth v. Knox*.[78]

Elonis and *Knox* both involved prosecutions against men accused of making threats in rap songs. Under his Facebook persona, Tone Dougie, Anthony Douglas Elonis posted rap lyrics describing violent acts against his ex-wife, local elementary schools, and an FBI agent.[79] He was sentenced to three years and eight months for making threats in interstate commerce.[80] Jamal Knox is a rapper whose work is commercially available under his stage name, Mayhem

72. *See O'Brien*, 391 U.S. at 376 ("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.").

73. *See, e.g.*, ARTHUR C. DANTO, WHAT ART IS 26 (2013) [hereinafter DANTO, WHAT ART IS] ("[J]ust because anything *can be* art, it doesn't follow that everything *is* art."); Amy M. Adler, *The Folly of Defining Art*, *in* THE NEW GATEKEEPERS: EMERGING CHALLENGES TO FREE EXPRESSION IN THE ARTS 90, 90 (Christopher Hawthorne & András Szántó eds., 2003).

74. Outside the context of art, a bourgeoning literature has arisen on what some see as the opportunistic expansiveness of recent First Amendment jurisprudence. *See, e.g.*, Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174, 175 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); Vikram David Amar & Alan Brownstein, *The Voracious First Amendment:* Alvarez *and* Knox *in the Context of 2012 and Beyond*, 46 LOY. L.A. L. REV. 491, 491 (2013); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1200 (2015); Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 318 (2018); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 133 (2016).

75. Arthur Danto, *The Artworld*, 61 J. PHIL. 571, 575 (1964).

76. 135 S. Ct. 2001 (2015).

77. *Id.* at 2013.

78. 190 A.3d 1146 (Pa. 2018), *cert. denied sub nom.* Knox v. Pennsylvania, 139 S. Ct. 1547 (2019).

79. *Elonis*, 135 S. Ct. at 2007.

80. *Id.*

Mal.[81] After being arrested on drug and weapon charges, Knox posted a song online that described violence against the police officers who arrested him.[82] Charged with making terroristic threats and with witness intimidation, Knox was convicted and sentenced to a one-to-three year term.[83]

Elonis and *Knox* both asked what it takes for a statement to count as a "true threat," unprotected by the First Amendment. Courts are split: some look to subjective intent while others consider whether a reasonable person would hear in the speech an intent to cause harm.[84] This isn't a question limited to the arts, of course. Elonis himself was charged not just for his threatening rap lyrics but also for a comedy routine that he posted online.[85] But both Elonis and Knox emphasized the artistic nature of their speech.[86] The petition for writ of certiorari in *Knox*, for example, claimed that the case was "of great concern to the music industry," especially now, given that "many artists have directed virulent speech specifically toward the President."[87] Amicus briefs by music scholars and performers, including Killer Mike and Chance the Rapper, were filed in Knox's support.[88] And while the Supreme Court has left the issue open, addressing the intent requirement for criminal threats but not the claimed artistic exemptions, cases involving threats made within various genres of music[89] and other arts[90] have popped up across the country.

81. *Knox*, Certiorari Petition, *supra* note 29, at 3; *see also* ERIK NIELSON & ANDREA L. DENNIS, RAP ON TRIAL: RACE, LYRICS AND GUILT IN AMERICA 101–02, 106–11 (2019) (discussing Knox's prosecution and appeal in the context of rap's broader reception in American courts).

82. *Knox*, Certiorari Petition, *supra* note 29, at 4.

83. *Id.* at 6.

84. *Id.* at 7.

85. *Elonis*, 135 S. Ct. at 2005.

86. *Knox*, Certiorari Petition, *supra* note 29, at 19 ("Imprisoning a person for a statement that is not only objectively nonthreatening but in fact artistically or socially valuable is fundamentally inconsistent with the First Amendment and would erode the breathing space that safeguards the free exchange of ideas."); *see Elonis*, 135 S. Ct. at 2006 ("Art is about pushing limits. I'm willing to go to jail for my Constitutional rights. Are you?").

87. *Knox*, Certiorari Petition, *supra* note 29, at 23–24.

88. Motion for Leave to File Brief as Amici Curiae and Brief of Amici Curiae Michael Render ("Killer Mike") et al. in Support of Petitioner, Commonwealth v. Knox, 190 A.3d 1146 (Pa. 2019), *cert. denied sub nom.* Knox v. Pennsylvania, 139 S. Ct. 1547 (2019) (No. 18-949), 2019 WL 1115837 [hereinafter *Knox*, Brief of Render]; Motion for Leave to File and Brief for Amici Curiae Art Scholars and Historians in Support of Petitioner, *Knox*, 190 A.3d 1146 (No. 19-949) [hereinafter *Knox*, Brief for Art Scholars].

89. *See Knox*, 190 A.3d at 1146.

90. *See, e.g.*, Porter v. Ascension Par. Sch. Bd., 393 F.3d 608, 620 (5th Cir. 2004) (holding student's sketch depicting violent siege on the school was protected speech); Fogel v. Collins, 531 F.3d 824, 832 (9th Cir. 2008) (holding that painted words on rear of van did not constitute true threats outside the scope of protection of the First Amendment's free speech guarantee); LeVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001) (holding that student's poem implying a threat to himself and other students was not protected speech); *In re* George T., 93 P.3d 1007, 1009 (Cal. 2004) (holding that a violent poem disseminated by a juvenile was not a threat); *In re* Ryan D., 123 Cal. Rptr. 2d 193,

The artistic exemption claims made in these cases can again be framed as miscategorization claims, much like Kleinman's. In short: this is a rap lyric, not a threat. Like Kleinman, who thought an artwork had been misidentified as a junked car, the artist-defendants in the true threat cases also claimed that their speech had been put in the wrong categorical box.

To that end, Knox's petition for writ of certiorari argued that "reasonable listeners understand that violent lyrics in music are not literal."[91] His art scholar amici went further:

> [A] work of art is not the same thing as the messages it conveys or the feelings it arouses. A painting, poem, sculpture, or song may be consistent with reality, but that does not mean that it *is* reality. . . . Art does not manifest in the real; the thought-message of an artwork is *experienced*—sensed, felt, processed—not stated. *See* Archibald MacLeish, "Ars Poetica" (1926), ("A poem should not mean/But be.").[92]

The scholars draw a line here between musical lyrics and ordinary, literal expression—between art and reality. The prosecutors and jury erred in Knox's case, they argue, by confusing the former for the latter.

It is not entirely clear how art's failure to manifest in the real coheres with the art scholars' discussions of art therapy and catharsis, both of which turn on art's efficacy in altering the presumably real emotions of those who experience it.[93] The categorical claim turns on the not fully coherent idea that art is metaphysically separate from the world of everyday threats.

A similar categorical exemption claim can be found in cases involving constitutional protection for lies and exaggerations. Before it was struck down in 2012, the Stolen Valor Act[94] made it a crime to claim falsely that one had been awarded the Congressional Medal of Honor.[95] "The Act by its plain terms applies to a false statement made at any time, in any place, to any person," Justice Kennedy wrote for a four-member plurality[96] in *United States v.*

195 (Cal. Ct. App. 2002) (holding that a painting depicting a minor shooting a high school police officer was not a threat).

91. *Knox*, Certiorari Petition, *supra* note 29, at 25.

92. *Knox*, Brief for Art Scholars, *supra* note 88, at 8 (citations omitted or shortened); *see also id.* at 12 ("[T]he fact that rap roots itself firmly in the real does not make it any less representational (or any more real) than other forms of violent artistic expression that are entitled to First Amendment protection.").

93. Nor is it clear how the modernism typified by the authority the scholars cite, Archibald MacLeish's "Ars Poetica," is consistent with the politically engaged conception of hip-hop and rap that the amicus brief goes on to describe. For a reevaluation of MacLeish as a politically engaged poet whose later work stands opposed to the high modernism of his more famous poems like "Ars Poetica," see John Timberman Newcomb, *Archibald MacLeish and the Poetics of Public Speech: A Critique of High Modernism*, 23 J. MIDWEST MOD. LANGUAGE ASS'N 9, 9 (1990).

94. 18 U.S.C. § 704(c)(1).

95. United States v. Alvarez, 567 U.S. 709, 730 (2012).

96. *Id.* at 722.

Alvarez.[97] Even so, he added one crucial qualification: "It can be assumed that [the Act] would not apply to, say, a theatrical performance."[98]

The theater exemption Justice Kennedy read into the Stolen Valor Act is nowhere in the text. So how is it justified? Are statements made in theater not falsehoods, since they are true within the world of the play? Perhaps the categorical claim is that the Stolen Valor Act criminalized liars, not actors.

It would be much too strong, however, to say that statements cannot be lies—or for that matter, threats—because they occur within a play. Consider *Hamlet*.[99] Not only are lies told within the world of that play,[100] but *Hamlet*'s plot turns on the fact that a play can be used to cause real effects—even make threats!—within the non-make-believe world. Though Hamlet himself says that the players in his staging of *The Murder of Gonzago* "do but jest, poison in jest; no offense i' the world," the very point of the staging is to cause offense and fear in Hamlet and Claudius's world, not that of Gonzago onstage.[101] King Claudius should feel no less threatened by the fact that he's merely watching theater.

In *Alvarez*, Justice Kennedy suggests a different argument for why lies about congressional medals in plays might be treated differently. Instead of relying on metaphysical claims about theater, or art more generally, Kennedy refers to a line of defamation and emotional distress cases[102] where the Court found that the hyperbolic or parodic statements at issue could not "reasonably be interpreted as stating actual facts about an individual."[103] Key here is the notion of "interpretation." Knowing we are in a theater is less a metaphysical insight than it is an interpretive fact. It is one of many context clues, none necessarily dispositive, that may lead us to interpret a statement as literal, deceptive, or threatening—or not.

A similar question of interpretation emerges when we turn back to the rap cases. The artistic medium (music) and the genre (rap) that were employed by Elonis, Knox, and others can be seen as *interpretively relevant*, even if not metaphysically so. That is to say, the fact that some statement was made within a rap song is surely relevant in determining whether the statement was meant to be, or is properly understood as, threatening. But this is far different than

97. 567 U.S. 709 (2012).

98. *Id.*

99. WILLIAM SHAKESPEARE, HAMLET (Edward Dowden ed., London, Methuen & Co. 1899).

100. As Hamlet accuses the grave-digging clown in Act V: "Thou dost lie in't, to be in't and say it is thine; 'tis for the dead, not for the quick; therefore thou liest." *Id.* at act V, sc. 1.

101. *See id.* at act III, sc. 2.

102. *Alvarez*, 567 U.S. at 722 (citing Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)). The Court in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), in turn, cites *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988), *National Ass'n Letter Carriers v. Austin*, 418 U.S. 264, 284–86 (1974), and *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 13–14 (1970). *Mikovich*, 497 U.S. at 20.

103. *Alvarez*, 567 U.S. at 722 (quoting *Milkovich*, 497 U.S. at 20).

saying, as amici did, that rap lyrics are metaphysically incapable of communicating true threats. Arguing that a statement "was (just) rap" is perhaps best seen not as a categorical defense but rather as a weight put on the interpretive scale. I return to this point in Part III.[104]

For now, it is important to note that even in regard to interpretation, identifying a rap song or play *as art* plays no role. What matters for deciding whether something is a threat or lie is the context provided by the conventions of a given medium, like theater, or of a genre, like rap. As Part II argues, the category "art" does not itself have its own interpretive conventions. So arthood does no interpretive work here at all.

3. Taxes

New York state taxes admission fees for "place[s] of amusement" unless they are a "theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance."[105] Nite Moves, a strip club outside Albany, spent years arguing that the pole and lap dancing it offers constitute "choreographic . . . performance."[106] In 2012, New York's highest court disagreed, finding that the state's Tax Appeal Tribunal need not "extend a tax exemption to every act that declares itself a 'dance performance.'"[107] Three judges dissented, accusing the majority of "mak[ing] a distinction between highbrow dance and lowbrow dance that is not to be found in the governing statute and raises significant constitutional problems."[108] "Under New York's Tax Law," said the dissenters, "a dance is a dance."[109]

In Chicago, similar city and county taxes applied to amusements other than "live performance[s] in any of the disciplines which are commonly regarded as part of the fine arts, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings."[110] In 2016, county officials went after music venues for hundreds of thousands of dollars in unpaid taxes, and a hearing officer agreed that "[r]ap music, country music, and rock 'n' roll do not fall under the purview of 'fine art.'"[111] Eventually,

104. *See infra* Section III.B.1.

105. N.Y. TAX LAW §§ 1101(d)(5), 1105(f)(1) (Westlaw through L.2021, chs. 1 to 49, 61 to 68).

106. 677 New Loudon Corp. v. N.Y. Tax Appeals Tribunal, 85 A.D.3d 1341, 1341–43 (N.Y. App. Div. 2011), *aff'd*, 19 N.Y.3d 1058 (2012).

107. *Id.*

108. 677 New Loudon Corp. v. N.Y. Tax Appeals Tribunal, 19 N.Y.3d 1058, 1061 (2012) (Smith, J., dissenting).

109. *Id.* at 1062.

110. COOK COUNTY, ILL., CODE OF ORDINANCES § 74-391 (LEXIS through Ordinance No. 20-4356, enacted October 22, 2020); *id.* § 74-392(a); *cf. id.* § 74-392(d)(1) (offering tax exemptions to venues that seat 750 or fewer people).

111. Lee V. Gaines, *Cook County Doubles Down: Rap, Rock, Country, and DJ Sets Are Not 'Fine Arts,' Not Exempt from Amusement Tax*, CHI. READER (Aug. 22, 2016), https://www.chicagoreader.com/

the county ended up amending its ordinances to clarify what kinds of DJ sets qualified for the exemption, but litigation over back taxes continued until the parties settled.[112] These kinds of taxes, with exemptions that privilege certain art forms over others, have long been common at the local, state, and even federal level.[113] The federal cabaret tax—which got as high as thirty percent during World War II, but didn't apply to instrumental music in venues without dancing—likely sped the decline of big band jazz (which was taxed) and the growth of bebop (which was not).[114]

The art exemption claims made in the tax cases are categorization claims: they turn on the argument that some activity being taxed as entertainment is really tax-exempt art. These cases are different from those of the preceding sections, however, in three interesting ways.

First, these claims seek to benefit from an exemption already enshrined in a statute. The strip club wants the exemption New York City Ballet already gets;[115] the rock club wants to be treated the same way Chicago treats its classical recital halls.[116] Here, then, we encounter the first artistic analogue to the many statutory carve outs that exempt religious believers or organizations from otherwise applicable legal requirements, from the military draft[117] to Title VII's protection against religious discrimination.[118] As in those cases, the statutory exemption spawns two types of controversies. One is definitional: What is a religious organization? Or similarly: What counts as a choreographic performance? The other concerns unconstitutional favoritism: Why let religious believers but not secular pacifists out of the draft? Why should ballet get a government benefit pole dancing does not?

Bleader/archives/2016/08/22/cook-county-doubles-down-rap-rock-country-and-dj-sets-are-not-fine-arts-not-exempt-from-amusement-tax [https://perma.cc/XKE3-DTRT]; Whet Moser, *This Is What Happens when Courts Decide What Is and Isn't Art*, CHI. MAG. (Aug. 25, 2016), https://www.chicagomag.com/city-life/August-2016/Cook-County-Fine-Arts/ [https://perma.cc/SF6E-4XKD].

112. Settlement Agreement Between Cook County and Wladyslaw Kowynia, Inc., Cook Cnty. Dep't of Revenue v. Wladyslaw Kowynia, Inc., No. D15050079 (Cook Cty. Dep't of Admin. Hearings Mar. 31, 2017) (settled).

113. *See, e.g.*, Carpenteri-Waddington, Inc. v. Comm'r of Revenue Servs., 650 A.2d 147, 152–53 (Conn. 1994) (describing the federal cabaret tax, first imposed during World War I). The tax applied to "vaudeville or other performance or diversion in the way of acting, singing, declamation or dancing, either with or without instrumental or other music" but exempted "orchestras performing instrumental music only." *Id.* at 152.

114. Patrick Jarenwattananon, *How Taxes and Moving Changed the Sound of Jazz*, NPR (Apr. 16, 2013, 4:27 PM), https://www.npr.org/sections/ablogsupreme/2013/04/16/177486309/how-taxes-and-moving-changed-the-sound-of-jazz?ft=1 [https://perma.cc/JB2F-VZCK].

115. *See* 677 New Loudon Corp. v. N.Y. Tax Appeals Tribunal, 19 N.Y.3d 1058, 1059 (2012).

116. *See* Gaines, *supra* note 111.

117. *See* United States v. Seeger, 380 U.S. 163 (1965).

118. *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

The former, definitional questions may give rise to some difficult statutory interpretation problems, but these can all be resolved, at least in theory, by more precise legislative drafting. West Virginia law, for example, avoids the problem that arose in New York by explicitly barring "nude or strip show presentations" from the tax exemption the state offers other "dance presentation[s]."[119] More intractable is the second constitutional worry that arises when one art form is treated less favorably than another.

But this is where another difference between these tax cases and the cases in the preceding subsections comes in. The artistic exemption claims in the earlier cases were all trying to skirt some government *prohibition*. Without an exemption, Kleinman's junked car got ticketed; Elonis and Knox served prison sentences for their rap. By contrast, Nite Moves and the bars in Chicago are not getting shut down; they're being made to pay the same taxes that venues presenting ice dancing or the circus also have to pay. At stake in these tax cases, at least arguably, is something more akin to a government *subsidy*.[120]

The framing here matters from a constitutional standpoint. If Nite Moves is being penalized by a selective tax, the worries about content discrimination that arose in the junked car case return in an even more pointed way.[121] If, however, Nite Moves and the bars in Chicago are just missing out on a subsidy offered to others, this seems no more constitutionally problematic than government arts funding itself.[122]

There is one final difference: tax cases make explicit the kinds of value judgments about art that remained largely under the surface in the earlier subsections. According to the dissenting judges in New York, the strip club was taxed "because [its] performances are, in the majority's view, not 'cultural and artistic.'"[123] In Chicago, the hearing officer wanted musicologists to come testify about why "the music [the clubs] are talking about falls within any disciplines considered fine art."[124] The definitional or category questions in the tax cases

119. W. VA. CODE ANN. § 11-15-9(a)(40) (LEXIS through all 2020 Reg. Sess. Legislation).

120. *See* Soucek, *Aesthetic Judgment*, *supra* note 36, at 459–61. In fact, the government "subsidy" provided to U.S. arts organizations through their tax-exempt status amounts to billions of dollars—as much or more than the direct support the government provides through grant programs. *Id.* at 396 n.73.

121. *See* 677 New Loudon Corp. v. N.Y. Tax Appeals Tribunal, 19 N.Y.3d 1058, 1063 (2012) (Smith, J., dissenting) (imagining, and finding unconstitutional, a state tax imposed on *Hustler* magazine but not *The New Yorker*); *cf.* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 234 (1987) (striking down Arkansas's "selective, content-based taxation of certain magazines").

122. *See Ark. Writers' Project*, 481 U.S. at 236 (Scalia, J., dissenting); Regan v. Taxation With Representation of Washington, 461 U.S. 540, 545–46 (1983); *see also* Brian Soucek, *Discriminatory Paycheck Protection*, 11 CALIF. L. REV. ONLINE 319, 326–30 (2020) (distinguishing selective government subsidies from discriminatory regulation on speech); Soucek, *Aesthetic Judgment*, *supra* note 36, at 459–66 (discussing difficulties with this distinction).

123. *677 New Loudon Corp.*, 19 N.Y.3d at 1062 (Smith, J., dissenting) (quoting *id.* at 1060 (majority opinion)).

124. Moser, *supra* note 111.

were thus being argued at least partially on evaluative grounds. Not just "Is this dance or music?" but "Is this dance or music good enough for the state to subsidize?" Perhaps the courts or administrative hearing officers have no business asking these questions, but insofar as the tax "exemptions" are akin to subsidies, legislators can surely decide what arts activities are worthy of state support.

To give a subsidy—a tax exemption—only to art making deemed worthy requires evaluation and, ultimately, balancing of various governmental interests.[125] Courts don't always acknowledge that. They treat evaluation as if it were classification, categorizing less favored arts as "entertainment" or denying that the dancing in a strip bar is a "choreographic performance."[126] We will return to this point after looking at claims where the balancing is explicit.

B. *Balancing Claims*

The above *categorization claims* argue that a law has been misapplied, having confused art with something else—junked cars, threats, lies, or mere entertainment.[127] By contrast, *balancing claims* acknowledge the applicability of a law but argue that art's expressive value trumps whatever value the law aims to promote, whether that be privacy, personal autonomy, equality, economic fairness, or sidewalk congestion.

1. Privacy and Trademark

When the photographer Arne Svenson exhibited his project, *The Neighbors*, at New York's Julie Saul Gallery in 2013, his neighbors were incensed to learn that they were, in fact, the subject of the show.[128] Over the course of a year, Svenson had taken their photographs from his Tribeca studio with a telephoto lens aimed at their windowed apartments across the street.[129]

New York privacy law prohibits using someone's "name, portrait, picture or voice . . . for advertising purposes or for the purposes of trade without [their] written consent."[130] But when Svenson's neighbors sued him for selling pictures

125. *See, e.g.*, Soucek, *Aesthetic Judgment*, *supra* note 36, at 414–16 (discussing a similar balancing of interests in land use decisions).

126. *See supra* notes 105–14 and accompanying text.

127. *See supra* Sections I.A.2–3.

128. Hili Perlson, *Voyeuristic Photographer Arne Svenson Wins New York Appellate Court Case*, ARTNET (Apr. 10, 2015), https://news.artnet.com/market/arne-svenson-neighbors-photographs-supreme-court-286916 [https://perma.cc/VXU6-74P7].

129. Foster v. Svenson, 128 A.D.3d 150, 152–53 (N.Y. App. Div. 2015).

130. N.Y. CIV. RIGHTS LAW § 51 (Westlaw through L.2021, ch. 1 to 49, 61 to 68). Unlike other states, New York does not recognize a right to privacy tort based on "unreasonable intrusion upon seclusion." *See* Howell v. N.Y. Post Co., 81 N.Y.2d 115, 123–24 (1993). It is hard to imagine Svenson succeeding in his art exemption claim against that tort, were it available.

of them, they lost.[131] State courts in New York decided that "works of art fall outside the prohibition of the privacy statute."[132] Just as courts had previously exempted "newsworthy events and matters of public concern" from New York's privacy statute, the appellate court in *Foster v. Svenson*[133] found "that the public, as a whole, has an equally strong interest in the dissemination of images, aesthetic values and symbols contained in the art work," as well as "the informational value of the ideas conveyed by the art work."[134]

The reasoning in Svenson's case is not entirely clear.[135] Is Svenson's art exempt because it "fall[s] outside" the terms of the statute—perhaps because art is thought to be something other than a "trade" good?[136] That would be a categorization claim: use in art and use "for the purposes of trade" are different things. Other New York courts had previously taken that approach with sculpture, for example. Distinguishing the protected work of a sculptor who wanted to make ten bronzes of model Cheryl Tiegs's face from the unprotected work of a commercial "manikin" manufacturer, a state court found in *Simeonov v. Tiegs* [137] that the sculptor "is an artist who created a work of art"—a "distinctive manner of human expression"—whereas "the manufacturer and seller of the large number of manikins" "clearly was acting 'for purposes of trade.'"[138]

The second half of the *Svenson* quotation suggests a different line of reasoning, however: perhaps art's "aesthetic" and "informational value" to the public is more important than the privacy concerns of the individuals whose images were used and sold. This is a balancing approach, and it too draws on earlier cases from courts in New York. One federal decision, prompted by a Barbara Kruger collage, rejected categorizing, which it said "invites judges to decide what constitutes art or expression—and what does not—thus asking them to . . . draw potentially artificial lines."[139] Instead, the court determined

131. *Foster*, 128 A.D.3d at 163.

132. *Id.* at 158; *see also id.* at 159 ("In our view, artistic expression in the form of art work must therefore be given the same leeway extended to the press under the newsworthy and public concern exemption to the statutory tort of invasion of privacy.").

133. 128 A.D.3d 150 (N.Y. App. Div. 2015).

134. *Id.* at 156, 158–59. *See generally* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 158 n.311 (2020) (citing and discussing numerous court decisions that either allowed or rejected exceptions from liability for artworks).

135. Robert Post and Jennifer Rothman's important discussion of right of publicity cases finds constitutionally salient distinctions among public discourse, commercial speech, and commodities. *See* Post & Rothman, *supra* note 134, at 141–46, 156–62. For them, the level of First Amendment protection turns on classifying something as a commodity rather than a contribution to public discourse, *id.* at 146 (calling the implications "enormous"), yet Post and Rothman clearly acknowledge that there is no "magic bullet" or "mechanical 'test'" for distinguishing one from the other, *id.* at 144, 159.

136. *See id.* at 158–59.

137. 159 Misc. 2d 54 (N.Y. Civ. Ct. 1993).

138. *Id.* at 55–56, 58–59.

139. Hoepker v. Kruger, 200 F. Supp. 2d 340, 352 (S.D.N.Y. 2002).

the reach of New York's privacy law by carrying out "a careful weighing of interests, on a case-by-case basis."[140]

In doing so, the *Hoepker v. Kruger*[141] court looked beyond New York to the California supreme court's well-known transformative use test—another self-described "balancing test between the First Amendment and the right of publicity."[142] Borrowing from the fair use test in copyright,[143] the California supreme court held in *Comedy III Productions v. Saderup*[144] that "when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity."[145] The court cautioned that artistic quality is irrelevant; what matters is "whether the literal and imitative or the creative elements predominate in the work."[146] The more creative the transformation, the heavier the First Amendment interests will weigh in the balance against the economic concerns on the other side of the scale.[147] Back in New York, the *Hoepker* court later summed up the test as asking "whether it is the art, or the celebrity, that is being sold or displayed" when a work of art includes a celebrity's image.[148]

A freewheeling balancing test like this may have more unpredictable results[149] compared to a categorical rule that "any work of art, however much it trespasses on the right of publicity and however much it lacks additional creative elements, is categorically shielded from liability by the First Amendment."[150] But then again, it may not, as the categorical rule just shifts the fight from what is sufficiently transformative to what is art. Part II will have more to say about why that particular shift is unhelpful: even if the results

140. *Id.* at 348.

141. 200 F. Supp. 2d 340 (S.D.N.Y. 2002).

142. Comedy III Prods. v. Saderup, 21 P.3d 797, 799 (Cal. 2001). Don't be confused about the terminological shift from "privacy" to "publicity" here. As Rothman has shown, New York's privacy law—the first in the nation—was from the start "primarily about the right to control 'publicity' about oneself—when and how one's image and name could be used by others in public." Jennifer E. Rothman, Featured Lecture, *The Right of Publicity: Privacy Reimagined for New York?*, 36 CARDOZO ARTS & ENT. L.J. 573, 577 (2018). New York's privacy law is still the state's only "right of publicity" protection—in contrast to California, which offers both common law and statutory protections. *See* JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 82–86 (2018); *see also Comedy III Prods.*, 21 P.3d at 799–800.

143. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576–78 (1994).

144. 21 P.3d 797 (Cal. 2001).

145. *Id.* at 808.

146. *Id.* at 809.

147. *See id.* at 808. Rothman has argued powerfully that courts overemphasize economic rationales for right of publicity protections rather than autonomy and dignitary concerns about how one's identity is used. *See* ROTHMAN, *supra* note 142 at 103–12, 154–57.

148. Hoepker v. Kruger, 200 F. Supp. 2d 340, 349 (S.D.N.Y. 2002).

149. For sharp criticism of this unpredictability, see ROTHMAN, *supra* note 142, at 147–49; Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 913–25 (2003).

150. *Comedy III Prods.*, 21 P.3d at 809 n.11.

happen to be more predictable—an open question—they are based on considerations that do little to explain why some people, namely artists, should get exemptions that other transformative creators and speakers lack.[151]

The California supreme court's test is not the only balancing test on offer.[152] A prominent alternative comes from the Second Circuit, whose decision in *Rogers v. Grimaldi*[153] allowed the use of a celebrity's name in a movie title unless it was "wholly unrelated to the movie" or was just a "disguised commercial advertisement for the sale of goods or services."[154] In the suit, Ginger Rogers brought both right of publicity and false advertising claims after Fellini used "Ginger and Fred" as the title of a film.[155]

Focusing on the Lanham Act's[156] prohibition on false advertising,[157] the Second Circuit rejected the categorical approach taken by the lower court, which had refused to apply the Lanham Act to film titles at all since they were said to be "within the realm of artistic expression" rather than serving "a commercial purpose."[158] "Movies, plays, books, and songs," the Second Circuit countered, are still "sold in the commercial marketplace like other more utilitarian products."[159] It makes little sense, then, to categorically exempt them from false advertising law. "The purchaser of a book, like the purchaser of a can of peas, has a right not to be misled as to the source of the product."[160]

What is required instead is balancing: "only where the public interest in avoiding consumer confusion outweighs the public interest in free expression" does the Lanham Act apply.[161] A violation could occur either if the title has no relevance to the work or if it explicitly misleads about the work's source or content.[162]

Even though a work's arthood does not immunize it from a Lanham Act challenge, the *Rogers* court did still seem to make arthood relevant to its balancing test. Consumers of art, after all, don't rely on titles the same ways

151. *See infra* Section II.C.

152. Rothman says that "[a]t least five balancing approaches have been applied to evaluate First Amendment defenses in right of publicity cases." ROTHMAN, *supra* note 142, at 145.

153. 875 F.2d 994 (2d Cir. 1989).

154. *Rogers*, 875 F.2d at 1004 (first quoting Guglielmi v. Spelling-Goldberg Prods., 603 P.2d 454, 457 n.6 (Cal. 1979) (Bird, J., concurring); and then quoting Frosch v. Grosset & Dunlap, Inc., 427 N.Y.S.2d 828, 829 (N.Y. App. Div. 1980)); *cf.* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:144.50 (5th ed. 2020) ("The Second Circuit's *Rogers* balancing test is now widely used by almost all courts.").

155. *See Rogers*, 875 F.2d at 996–97.

156. Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051–1141n).

157. *Id.* § 43(a), 60 Stat. at 441.

158. *Rogers*, 875 F.2d at 997 (quoting Rogers v. Grimaldi, 695 F. Supp. 112, 120–21 (S.D.N.Y. 1988)).

159. *Id.*

160. *Id.*

161. *Id.* at 1006.

162. *Id.* at 999.

they may rely on the label on a can of peas: "[M]ost consumers are well aware that they cannot judge a book solely by its title any more than by its cover."[163]

This suggests an important difference between the balancing in cases like *Rogers* versus that which may have been used in privacy/publicity cases like *Svenson*: a work's status as art seems to affect *both* sides of the balance in the former but not the latter. Consumers are less likely to be led astray by ambiguous or suggestive titles than they are by unclear or misleading product labels; avoiding consumer confusion—the public interest opposed to the First Amendment interests of the artist—is thus lessened by the fact that the product is an artwork. Not so in the *Svenson* case: the fact that his images of his neighbors are artworks does nothing to lessen their privacy concerns. If arthood matters at all to the balancing in *Svenson*, it is only on the side of the artist, not on both sides, as in *Rogers*.

The fact that the *Rogers* court talks in terms of artworks and their titles is actually misleading, however. In fact, its test is not limited either to art or to titles. For one thing, the holding applies to all titled works, not just to artworks. Were the title of a law review article to include a celebrity's name, the *Rogers* test would still apply. The operative distinction is between labeled products and titled works, and the set of titled things extends far beyond artworks. For another thing, courts have used the *Rogers* test in cases where the content rather than the title of works is what was said to mislead. Use of Tiger Woods's image,[164] a painting of the University of Alabama's football uniforms,[165] the well-known cover design of Cliffs Notes in a parody book[166]—all have been given the benefit of the speech-protective balancing test established in *Rogers*. As a test that establishes the bounds of privacy, publicity, false advertising, and trademark claims, *Rogers* balancing isn't confined either to the category of titles or the category of art.

2. Street Vending

New York City requires street vendors to have a permit, and the number of permits has been capped at 853 for over forty years.[167] There have long been exceptions, though: honorably discharged veterans are protected under state law, and vendors of newspapers, magazines, and similar written matter have been exempted since 1982.[168] (The City wrote these exemptions into the law as

163. *Id.* at 1000.

164. ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 937 (6th Cir. 2003).

165. Univ. of Ala. Bd. of Tr. v. New Life Art, Inc., 683 F.3d 1266, 1279 (11th Cir. 2012).

166. Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc., 886 F.2d 490, 497 (2d Cir. 1989).

167. *See* Bery v. City of New York, 97 F.3d 689, 691–92 (2d Cir. 1996); N.Y.C., N.Y., ADMIN. CODE §§ 20-452 to -455 (Westlaw through January 31, 2021). The permit requirement applies to nonfood vendors. *Id.* §§ 20-452 to -453.

168. *Id.* at 698.

a response to First Amendment worries.)[169] In the Giuliani era, with arrests on the rise,[170] a group of painters, sculptors, and photographers challenged the city's regulations. As the district court described their claim: "Plaintiffs . . . take the position that all works of fine art are forms of expression which fall under the First Amendment's protection of 'speech.'"[171] The artists didn't deny that their artworks were subject to the terms of New York City's general vendors' law. Rather, they argued that the expressive value of "fine art" categorically outweighs the concerns about sidewalk congestion that motived the New York City Council to enact the vendors law in the first place.[172]

When the artists' case reached the Second Circuit as *Bery v. City of New York*,[173] the appellate court took a more fine-grained approach to what categories it put on the balancing scales. It began by distinguishing "the crafts of the jeweler, the potter and the silversmith"—whose work it described as only sometimes expressive—from "paintings, photographs, prints and sculptures," which it said "always communicate some idea or concept to those who view it."[174] Having thus categorized, the court then proceeded to balance: New York City, it found, had done nothing to show that its interests in reducing congestion justified the expressive burden it imposed.[175] Along the way, the court accepted the artists' argument that alternative venues—private galleries, for example—either weren't available or were insufficient, since selling on the street was *itself* part of the artists' "expressive purpose."[176] The artists received their exemption.[177]

In granting its medium-specific exemptions, the *Bery* court never explicitly said that artists working in other mediums did *not* merit an exemption. That task was left for a second case, *Mastrovincenzo v. City of New York*,[178] brought a

169. *See Bery*, 97 F.3d at 692.

170. David R. Francis, *What Reduced Crime in New York City*, NAT'L BUREAU OF ECON. RSCH. DIG., Jan. 2003, at 2, 2–3, https://www.nber.org/sites/default/files/2019-08/jan03.PDF [https://perma.cc/PL8C-46RX].

171. Bery v. City of New York, 906 F. Supp. 163, 165 (S.D.N.Y. 1995).

172. *Cf. Bery*, 97 F.3d at 697 (striking the balance in the artists' favor, noting that the city had pointed "to nothing on this record concerning its need to ensure street safety and lack of congestion that would justify the imposition of the instant prohibitive interdiction barring the display and sale of visual art on the City streets").

173. 97 F.3d 689 (2d Cir. 1996).

174. *Id.* at 696.

175. *Id.* at 697.

176. *Id.* at 698.

177. *Id.* at 699. In a surprising turn of events that ended up being hugely consequential for New York City sidewalks, the consent decree the city ultimately reached with the plaintiffs after the remand in *Bery* provided a dramatically larger art exemption than the one originally requested. Bery v. City of New York, No. 94-CIV-4253, at 2 (S.D.N.Y. Oct. 21, 1997) (order granting permanent injunction). Whereas the Second Circuit had affirmed a First Amendment right for painters, sculptors, printmakers, and photographers to sell their work on city sidewalks, the consent decree allowed *anyone* to sell paintings, sculpture, prints, and photographs without a permit. *Id.*

178. 435 F.3d 78 (2d Cir. 2006).

decade later by two artists who made and wanted to sell "clothing painted with graffiti."[179] Although the Second Circuit determined that their clothing had a "predominantly expressive purpose,"[180] it did not accept the artists' claim that their works were paintings, thereby governed by the *Bery* decree. "The term 'paintings,'" it held, "does not include baseball caps, jackets, and other articles of clothing that have been artistically decorated with paints and markers."[181] Thus, the Second Circuit categorized the graffiti artists' painted clothing in a middle-ground: expressive, thus not mere merchandise, but not painting, one of the mediums of expression recognized in *Bery*.

The balancing test it then used was notably more deferential to the city than the one applied in *Bery*. The vendor permit restriction should be upheld, the court said, as long as the government's interests "*would be achieved less effectively absent the regulation*."[182] This is a hard test for the government to lose, unless it acts gratuitously.[183] Here, any broadened exemption would surely increase the number of vendors and cause at least some marginal increase in sidewalk congestion.

The licensing requirement that was struck down as insufficiently tailored when applied to painting, prints, photographs, and sculpture in *Bery* was found to be narrowly tailored and upheld when applied to the goods in *Mastrovincenzo*. The different outcomes had four causes: (1) the *Mastrovincenzo* plaintiffs, unlike those in *Bery*, never claimed that selling on the street was part of their works' meaning; (2) by talking up their artistic bona fides, the *Mastrovincenzo* plaintiffs undermined their argument that other venues, like galleries, were unavailable to them; (3) the *Mastrovincenzo* court expected that line drawing problems would be greater for "policemen on the beat"[184] when art is made out of t-shirts and hats rather than the "more-easily-classified" mediums protected in *Bery*;[185] and finally; (4) *Bery* and *Mastrovincenzo* applied different balancing tests: a more stringent one for traditional mediums of expression and another, more lenient one, for "less orthodox modes of communication."[186]

The different balancing tests employed in *Bery* versus *Mastrovincenzo* are exactly what John Hart Ely predicted in his 1975 essay, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*.[187]

179. *Id.* at 82.

180. *Id.*

181. *Id.* at 103.

182. *Id.* at 98 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989)).

183. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1485 (1975); *see also id.* at 1486 ("[L]egislatures simply do not enact wholly useless provisions.").

184. *Mastrovincenzo*, 435 F.3d at 95.

185. *Id.* at 102.

186. Ely, *supra* note 183, at 1488.

187. *See id.*

Ely noted that the test offered in *O'Brien*—which, as we have seen,[188] pits the government's non-speech-related reasons for regulating against the regulation's incidental burdens on expression[189]—can be understood in two different ways. Courts can uphold regulatory burdens as "no greater than essential" either because (1) alternative regulations would serve the government's interest less effectively; [190] or (2) the marginal difference in effectiveness between a regulation and its alternatives outweighs the burden on communication.[191] Ely argued that the Supreme Court has unconsciously chosen to reserve the second, more speech-protective mode of balancing "for relatively familiar or traditional means of expression, such a pamphlets, pickets, public speeches and rallies . . . and to relegate other, less orthodox modes of communication to the weak, nay useless, 'no gratuitous inhibition' approach."[192]

More recently, Robert Post has similarly highlighted the significance of what he calls "First Amendment media."[193] According to Post, two independent considerations can or should trigger First Amendment scrutiny: (1) the nature of the governmental interests served by a regulation, and (2) "whether the regulation . . . seeks to restrict a recognized medium for the communication of ideas."[194] The two relevant questions, in other words, are: "Why does the state regulate?" and "What does it regulate?"[195] The latter question looks not to individual acts of expression, but to the medium through which the expression occurs. As Post writes: "The very concept of a medium presupposes that constitutionally protected expression does not inhere in abstract and disembodied acts of communication . . . but is instead always conveyed through social and material forms of interaction."[196] Surprisingly few other authors have

188. *See supra* Section I.A.1.

189. United States v. O'Brien, 391 U.S. 367, 377 (1968).

190. Ely, *supra* note 183, at 1484–85. This is the version of the balancing test applied in *O'Brien* itself. *O'Brien*, 391 U.S. at 377–78.

191. *See id.* at 1486–87. Ely offers the example of anti-handbill ordinances: banning them would decrease litter, but the cost to expression would outweigh the benefit.

192. *Id.* at 1488–89; *see also id.* at 1490 ("[I]t seems likely that the Court will continue, either explicitly or implicitly, to distinguish between familiar and unorthodox modes of communication in deciding whether genuinely to balance in evaluating less restrictive alternatives or rather simply assure itself, as it will always be able to, that no gratuitous inhibition of expression has been effected.").

193. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1253 (1995) [hereinafter Post, *Recuperating*].

194. *Id.* at 1255–56.

195. *Id.* at 1255.

196. *Id.* at 1257; *see also* Post & Rothman, *supra* note 134, at 137, 159–60 (noting that the "boundaries of . . . categories [are] anything but obvious" and, consequently, courts struggle to determine what gets First Amendment protection).

given sustained attention to the role mediums of expression play in the Supreme Court's First Amendment doctrine.[197]

Mastrovincenzo hints at both the dangers and the benefits of using mediums of expression to determine the strength of the First Amendment balancing test that courts apply. On the downside, reliance on traditional mediums of expression is inherently conservative; almost by definition, it favors that which is traditional.[198] We see that in *Bery* and *Mastrovincenzo*: canvas painting receives protection that graffiti art does not.[199] But *Mastrovincenzo* also shows an upside of treating different mediums differently. Attending to mediums allows courts to notice that regulatory needs may vary from one medium to another. In *Mastrovincenzo*, the court worried that police would have a harder time distinguishing expressive from nonexpressive painted t-shirts than they would have distinguishing paintings, prints, photographs, and sculptures from other types of merchandise. This made exemptions more costly in *Mastrovincenzo* compared to *Bery*, and it helped justify the different results in those two cases.

The lesson is that traditional mediums may be easier to distinguish than newer modes of expression—or borderline instances of the old modes; this makes it easier to grant them exemptions without sliding down slippery slopes. The question, to which we will return in Parts II and III,[200] is whether certain mediums of expression can be picked out and privileged for reasons germane to law or whether judges will simply favor the mediums they, and people like them,[201] know and enjoy.

Questions like these become especially consequential when less traditional forms of expression are pitted against laws promoting equality.

197. *See infra* Section III.A. For a recent and particularly sensitive discussion of mediums offered for another purpose entirely, see Joseph Blocher, *Bans*, 129 YALE L.J. 308, 324–31 (2019); *See also* Ryan S. Bezerra, *What Dalzell Saw: Medium-Specific Analysis Under the First Amendment*, 17 GLENDALE L. REV. 1, 4 (1999) ("This Paper explores how the Court analyzes First Amendment cases by focusing on how the government regulation at issue flows from or affects the underlying technology or physical characteristics of the impacted medium of expression and how this mode of analysis is consistent with the most widely accepted theory of the purpose of the First Amendment.").

198. *Cf.* Ely, *supra* note 183, at 1489 (expressing the worry that "only orthodox modes of expression will be protected").

199. *See* Mastrovincenzo v. City of New York, 435 F.3d 78, 104 (2d Cir. 2006) ("'[P]aintings,' as it is . . . used and understood in common parlance, refers not to all goods that are 'painted' but only and specifically to painted canvases."). While graffiti might constitute its own medium of expression, in *Mastrovincenzo* itself it was perhaps being used more as a style rather than a medium.

200. *See infra* notes Sections II.C, III.B.1.

201. *See generally* Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019, 8:15 AM), https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/ [https://perma.cc/N59X-Z7EU] (describing the federal judiciary's lack of diversity in regard to race, gender, sexual orientation, religion, and educational and employment background).

3. Antidiscrimination Law

The case that made it to the Supreme Court as *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[202] began in 2012 when Charlie Craig and Dave Mullins were planning a reception to celebrate their wedding.[203] Needing a cake, they visited Masterpiece Cakeshop in Lakewood, Colorado.[204]

Masterpiece Cakeshop qualifies as a public accommodation under Colorado state law, so it has to provide customers the "equal enjoyment of [its] goods" without discriminating on the basis of sexual orientation.[205] The store's owner, Jack Phillips, argued that this violated his Free Speech and Free Exercise rights by "compelling him to exercise his artistic talents to express a message with which he disagreed,"[206] by forcing him to participate "in celebrating what he regards as a religious event,"[207] and by treating religious opponents of same-sex marriage (like Phillips) differently than those who support it.[208]

The first of these arguments was emphatically framed as an artistic exemption claim. And as such, it was clearly a balancing, not a categorizing one. No one disputed the fact that Phillips's cakes were goods sold to the public, subject to Colorado's public accommodations law. Phillips's claim was rather that his "artistic freedom" or "artistic voice"[209] was more important than Craig and Mullins' freedom from discrimination based on sexual orientation.

Phillips's art exemption claim didn't prevail, although he did: seven Justices found in his favor on Free Exercise grounds.[210] Only Justice Thomas, joined by Justice Gorsuch, discussed Phillips's claimed artistic exemption. Justice Thomas noted that "Phillips considers himself an artist," his business logo includes "an artist's paint palette," and Phillips's shop "has a picture that depicts him as an artist painting on a canvas."[211] Further, "Phillips takes exceptional care with each cake that he creates."[212] All of this was marshalled as evidence that his conduct was expressive. The majority, meanwhile, bypassed talk of art entirely, noting only that differences between cakes decorated with

202. 138 S. Ct. 1719 (2018).

203. *Id.* at 1724.

204. *Id.*

205. COLO. REV. STAT. ANN. § 24-34-601(2)(a) (LEXIS through all laws passed during the 2020 Reg. and 1st Extraordinary Legis. Sesss. and Measures approved at the November 2020 Gen. Election).

206. *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

207. Brief for Petitioners at 15, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913762, at *15 [hereinafter *Masterpiece Cakeshop*, Brief for Petitioners].

208. *Id.*

209. *Id.* at 28.

210. *Masterpiece Cakeshop*, 138 S. Ct. at 1729–32; *cf. id.* at 1740 (Thomas, J., concurring in part and concurring in the judgment).

211. *Id.* at 1742 (Thomas, J., concurring in part and concurring in the judgment).

212. *Id.*

words, cakes bearing symbols, and premade versus custom-made cakes together made the "free speech aspect" of the case "difficult."[213]

The Court's punt on these issues will surely be returned. Not only has the issue come up previously in a more solidly artistic context—wedding photography[214]—but it continues to be raised in cases brought by wedding florists, videographers, website designers, and others, including Phillips himself, who has been involved in two subsequent discrimination claims.[215]

Given the future challenges to come, it is worth considering three positions on art's relevance that were voiced in *Masterpiece Cakeshop*. Phillips's claim was that "the Free Speech Clause applies *because*" his cakes "are his artistic expression."[216] According to his Supreme Court brief, he is as protected by the First Amendment as "a modern painter or sculptor, and his greatest masterpieces—his custom wedding cakes—are just as worthy of constitutional protection as an abstract painting like Piet Mondrian's *Broadway Boogie Woogie*, a modern sculpture like Alexander Calder's *Flamingo*, or a temporary artistic structure like Christo and Jeanne-Claude's *Running Fence*."[217] The United States sided with Phillips, arguing that a "custom wedding cake can be sufficiently artistic to qualify as pure speech."[218]

Unwilling to go that far, another group thought the case turned on mediums, not the concept of art.[219] Dale Carpenter and Eugene Volokh, who had supported an exemption for a wedding photographer in a previous case,

213. *Id.* at 1723 (majority opinion).

214. *See* Elane Photography, LLC, v. Willock, 309 P.3d 53, 63 (N.M. 2013).

215. *See, e.g.*, Telescope Media Grp. v. Lucero, 936 F.3d 740, 747 (8th Cir. 2019) (wedding videographers); 303 Creative LLC v. Elenis, 746 F. App'x 709, 710 (10th Cir. 2018) (wedding website designers); Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 896 (Ariz. 2019) (discussing wedding invitation designers); State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1210 (Wash. 2019), *petition for cert. filed*, No. 19-333 (Sept. 11, 2019) (wedding florists); *see also* Brasch, *supra* note 27 (describing the second and third complaints filed against Phillips and Masterpiece Cakeshop).

216. *Masterpiece Cakeshop*, Brief for Petitioners, *supra* note 207, at 16–17 (emphasis added). Phillips in fact went further, claiming that Colorado not only couldn't compel art making like his, *see id.* at 28 ("By enthroning itself as master of Phillips's artistic voice, the [Colorado Civil Rights] Commission invaded the freedom that the First Amendment promises to artists."), but that it couldn't even order Phillips to report what commissions he declines. According to his brief, "the very notion of artistic freedom chafes at a requirement that Phillips must give an account to the government for the use of his artistic discretion." *Id.*

217. *Id.* at 20–21; *see also id.* at 20 ("Like any good work of art, Phillips's wedding cakes convey messages that address not only 'the intellect' but also 'the emotions' of observers.").

218. Brief for the United States as Amicus Curiae Supporting Petitioners at 24, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) [hereinafter *Masterpiece Cakeshop*, Brief for the United States] ("[J]ust as a painter does more than simply apply paint to a canvas, a baker of a custom wedding cake does more than simply mix together eggs, flour, and sugar: Both apply their artistic talents and viewpoints to the endeavor.").

219. Brief of American Unity Fund & Profs. Dale Carpenter & Eugene Volokh as Amici Curiae in Support of Respondents at 1, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4918194, at *1 [hereinafter *Masterpiece Cakeshop*, Carpenter/Volokh Brief].

drew the line at *Masterpiece Cakeshop*, arguing that it "would trivialize the First Amendment" to say that "baked goods, including very beautiful ones or ones intended for special occasions, are protected forms of 'art.'"[220] Their suggested test to differentiate painting, music, poetry, and parades from cake baking, clothing design, and hairstyling looks at whether a particular medium is inherently expressive or has historically been used for expressive purposes.[221]

Other First Amendment scholars went further, arguing that neither the cake's status as art, nor cake-making's potential recognition as a traditional medium of expression, mattered in *Masterpiece Cakeshop*. As one prominent amicus group said, "The Court does not need to decide here whether bakers are artists," for even Rembrandt would be subject to generally applicable antidiscrimination laws were he to put his paintings up for sale in the window of his shop.[222] Artists and artisans[223] both can be forced to sell their artistry to all comers; they just cannot be forced to create new messages.[224] Going further still, amicus Tobias Wolff agreed with the point about paintings placed in the window[225] but argued in addition that "an artist who sets up a business in which she sells her skills to any paying customer in the commercial marketplace is no

220. *Id.* at *14; *see also id.* at *10 ("Nor can wedding cakes be viewed as inherently expressive, or traditionally protected, simply by raising the level of generality and calling wedding-cake-making 'art'.").

221. *Id.* at *6–14; *see also id.* at *7 ("[W]hen the medium as a whole mainly consists of items that do not convey a message (except perhaps insofar as words may be written on them), it is not protected by the First Amendment—even when the items may be designed with aesthetics in mind and even when the creator subjectively intends to 'express' something by the creation.").

222. Brief of Floyd Abrams et al. as Amici Curiae in Support of Respondents at 1, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) [hereinafter *Masterpiece Cakeshop*, Brief of Abrams et al.] ("If Rembrandt van Rijn puts 'The Descent from the Cross' in his shop window . . . the First Amendment would not condemn a law that says he may not refuse on grounds of ethnicity or religion the business of a Flemish man who wished to hang the painting in a Roman Catholic church.").

223. While Post was a signatory to this brief, he drew a sharper distinction between artists and artisans in other contemporaneous writing. To quote his argument, which prefigures mine to come:

> We do not debate and articulate the meaning of current events through the medium of wedding cakes. We do not carry on national debates through the medium of flowers, cooking, jewelry or furniture. . . . [H]eightened First Amendment scrutiny has typically been reserved for laws that distort meanings conveyed in what the Court has called 'media for the communication of ideas,' in which participants are understood to be self-consciously seeking to address public ideas and matters.

Robert Post, *An Analysis of DOJ's Brief in Masterpiece Cakeshop*, TAKE CARE (Oct. 18, 2017) [hereinafter Post, *An Analysis*], https://takecareblog.com/blog/an-analysis-of-doj-s-brief-in-masterpiece-cakeshop [https://perma.cc/JQ7J-6KMS].

224. *Masterpiece Cakeshop*, Brief of Abrams et al., *supra* note 222, at 4–6.

225. Brief of Professor Tobias B. Wolff as Amicus Curiae in Support of Respondents at 16–17, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) [hereinafter *Masterpiece Cakeshop*, Brief of Wolff].

longer engaged in the creation of her own work."[226] Artists engaged in businesses like this are communicating the customer's message, not their own.[227]

The wedding vendor cases are by far the highest profile, but certainly not the only place where the arts run up against antidiscrimination laws. Consider this: since Title VII prohibits employers from hiring based on race—even when race is claimed to be a "bona fide occupational qualification"[228]—casting an all-Black *Porgy and Bess*[229] or exclusively minority actors as Founding Fathers in *Hamilton* violates federal employment discrimination law. Yet for all the race-based casting on Broadway and in Hollywood,[230] shockingly few cases have been brought to challenge it, and even fewer scholarly articles have analyzed the issue.[231]

There have, however, been arts-related challenges to race discrimination in contracting, including recently at the Supreme Court. The leading case under 42 U.S.C. § 1981 comes from Tennessee, where two Black men sued producers of the *Bachelor*/*Bachelorette* franchise.[232] The first twenty-four seasons of the show had all featured White bachelors or bachelorettes and mostly White suitors. Plaintiffs argued that American Broadcasting Company was responding to—and reinforcing—its viewers' distaste for interracial couples.[233] The case was dismissed at the outset, however: the district court found that television programs are among the "artistic forms of expression" the First Amendment protects and allowing plaintiffs' claims would necessarily affect the content and message these particular shows were (allegedly) trying to convey.[234]

Last Term, the Supreme Court heard another § 1981 claim, this one concerning a cable provider's channel lineup.[235] The petition for writ of

226. *Id.* at 15.

227. *Id.* at 12–13.

228. *See* 42 U.S.C. § 2000e-2(a)(1) (prohibiting race discrimination in hiring); *id.* § 2000e-2(e) (offering a bona fide occupational qualification exception for hiring based on sex, religion, or national origin, but not race or color). As Post notes, Congress was aware of the issue raised by race-conscious casting in theater and film when it debated Title VII, but it failed to deal with the problem. *See* Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 37 n.169 (2000).

229. *See* Michael Cooper, *The Complex History and Uneasy Present of 'Porgy and Bess'*, N.Y. TIMES, https://www.nytimes.com/2019/09/19/arts/music/porgy-bess-gershwin-metropolitan-opera.html [https://perma.cc/QD7W-ZK87] (Sept. 21, 2019) (describing how the Gershwins, in order to avoid performances in blackface, dictated that only Black performers could be cast in their opera—a licensing requirement still in effect for all worldwide productions).

230. A study of three months' worth of casting announcements (or "breakdowns") in 2006 found that 22.5% listed the role's race as White and 8.1% as Black. *See* Russell K. Robinson, *Casting and Casteing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 10–11 (2007).

231. Russell Robinson's 2007 article on the subject is the major exception. *Id.* at 1–2.

232. Claybrooks v. Am. Broad. Cos., 898 F. Supp. 2d 986, 988–89 (M.D. Tenn. 2012) (suing under 42 U.S.C. § 1981).

233. *Id.* at 989. For an explanation of the capitalization choices here, see *supra* note 28.

234. *Id.* at 993, 999–1000.

235. Comcast Corp. v. Nat'l Assoc. of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1013 (2020).

certiorari in a companion case had argued that if cable companies were to be prohibited from taking account of race, the creators of *Hamilton* might be forced to cast a White George Washington.[236] But the Court chose to hear a different case, and the resulting opinion clarified the causation standard for § 1981 claims without discussing art or freedom of expression at all.

These are important, potentially sweeping, artistic exemption claims. But since courts have not done much grappling with them so far, I too will push off doing so until the discussion of future cases in Part III.[237]

* * *

Part I has shown artistic exemptions taking different forms. Categorizers argue that a certain law does not apply to artworks, while balancers acknowledge that it does, but insist that it shouldn't, since the art's expressive value outweighs whatever value the law in question is meant to promote.

These two modes of argument are not as different as they first seem, however. Often the metaphysical distinctions at the heart of the categorizing arguments really have value judgments right under the surface. If pole dancing does not count as a choreographic performance for tax purposes in New York, that is surely because of value judgments about what dance is worth subsidizing, not just ontological arguments about the nature of dance. Meanwhile, the balancers generally don't weigh the value of individual works, but entire categories—whether the paintings, prints, sculptures, or photographs at issue in *Bery*, the custom wedding cakes in *Masterpiece Cakeshop*, or the art photography in *Svenson*. When the balancing comes out in favor of some category of expression, definitional arguments return, as artists like Mastrovincenzo try to show that their work also falls within one of the now-protected categories.

Insofar as the categorizing and balancing modes of argument blur into each other, it is because courts actually tend to employ a form of *categorical balancing*, where the relevant categories to be balanced are often *mediums of expression*. Importantly, art is not itself a medium of expression. Art is not among the categories that should get balanced under the First Amendment. As the next part shows, the category "art" actually does no constitutional work at all.

II. ART'S IRRELEVANCE

Those seeking exemptions for art, as did nearly all the claimants described in Part I,[238] have a heavy burden to shoulder: they need to provide some limiting principle sufficient to keep art exemptions from swallowing the rule of

236. Petition for Writ of Certiorari at 26, *Comcast*, 140 S. Ct. 1009 (No. 18-1171).

237. *See infra* Section III.B.2.

238. The one exception is the group of street vendors who argued in *Bery* on behalf of four specific mediums of expression: painting, sculpture, photography, and prints. *See supra* Section I.B.2.

law. And this principle needs to be one that goes some distance toward explaining why certain things (artworks), unlike other things, deserve exemptions from otherwise applicable laws.

I doubt that those seeking art exemptions can meet this burden. But fortunately, there is no need to do so. The cases above presented another option. Oftentimes, courts have looked to individual mediums of expression rather than art as a whole in artistic exemption cases.[239] And for good reason. Insofar as mediums of expression differ in large part based on their materiality—the very thing most likely to raise legal issues—they are uniquely relevant categories to use in deciding when exemptions under the First Amendment should be possible.

Looking to mediums of expression rather than some overarching notion of art also allows us to draw on the disciplinary expertise of practitioners and scholars working within each medium. The way we talk of "artists," "artsy people," or "art scholars" masks the fact that practitioners create and scholars research not across art in general, but within specific mediums. "Artists" are really painters or architects, musicians, dancers, or playwrights—or maybe some specific combination but not all of the above. Art historians do something different than musicologists, dramaturgs, and so on; scholars and critics too tend to be similarly rooted in particular disciplines. We sometimes lump various disciplines together—under a heading like "the fine arts"—but these groupings are historically contingent and evolving. As I describe below, the various arts may be linked through a chain of analogies, such that every art has something in common with another art, but that doesn't mean that the various arts *all* share anything in common. There are no necessary and sufficient conditions that would explain why the various arts should be treated the same way under the law or why they should be treated differently than non-art expression within the same medium. There is no apparent reason why literature, for example, should get the same exemptions as sculpture, theater, architecture, or ballet—or why it should get any protection beyond that given to non-artistic, everyday prose (like the text you are reading right now).

The rest of Part II develops this normative argument.

A. *Art Versus the Arts*

Dominic McIver Lopes is among the leading contemporary philosophers of art.[240] But that label fits Lopes somewhat awkwardly. For as he has powerfully argued, philosophy of art's primary task—searching for a *theory of art*, an answer to the question: What makes object *x* a work of art?—is best

239. *Supra* Section I.B.

240. Noël Carroll, *Medium Specificity*, *in* THE PALGRAVE HANDBOOK OF THE PHILOSOPHY OF FILM AND MOTION PICTURES 29, 35 (2019) (referring to Lopes as a "leading philosopher[] of art").

pursued by "passing the buck" to two other theoretical projects.[241] First is a *theory of the arts*, which seeks to explain why painting and sculpture, for example, should count among "the arts," while fishing and skateboarding do not. A theory of the arts explains what makes certain kinds of objects or activities art. The second project is to develop *theories of individual arts*. These explain what makes a given object a painting or a certain activity a dance. Lopes argues that an account of what makes something architecture will necessarily differ from an account of what makes something music, and so on for each art, because theories of the arts must take account of the physical medium associated with each.[242]

Lopes's buck-passing theory of art holds that something is a work of art if and only if it is a work that is part of some art kind.[243] So, for example, the *Mona Lisa* is a work of art because the *Mona Lisa* is a painting, and painting is one of the arts. The challenge is thus to explain what makes something a painting and what makes painting an art. The difference between this and the traditional task for the philosophy of art—coming up with a theory of art—is that, unlike a theory of art, Lopes's buck-passing account does not require that all artworks share any particular trait.[244] Paintings might all share a trait—for example, being painted!—without that trait needing to apply also to music or dance or architecture.

Significantly for our purposes here, Lopes argues that we are more likely to succeed in asking whether certain hard cases should be categorized as part of an art kind rather than asking directly whether they count as art.[245] In other words, it will be easier to decide whether Duchamp's *Fountain* is sculpture[246] or Cage's 4'33" is music[247] than to find some single principle by which we can say directly that both are art. In part, this is because the set of things that even arguably qualify as sculpture or music is far narrower and more homogenous than the set of things that are arguably art. (No one wonders whether 4'33" is sculpture, or if *Fountain* is an opera.) Finding workable definitions of each individual art is thus far more likely than defining art as a whole.

Moreover, Lopes observes, "Art as a whole is not the object of any field of empirical inquiry. That is, there are no serious psychological, anthropological,

241. DOMINIC MCIVER LOPES, BEYOND ART 11–15 (2014).

242. *Id.* at 15.

243. *See id.*

244. *See, e.g.*, *id.* at 62.

245. *Id.* at 63.

246. The urinal that Marcel Duchamp signed and dated was rejected for exhibition by the Society of Independent Artists in 1917. *See* DANTO, WHAT ART IS, *supra* note 73, at 26–28.

247. *See* Stephen Davies, *John Cage's 4'33": Is It Music?*, 75 AUSTRALASIAN J. PHIL. 448, 448 (1997) (discussing Cage's score, written for any instrument, instructing the performer to remain silent for four minutes and thirty-three seconds).

sociological, or historical hypotheses about all and only works of art."[248] Lopes argues that his buck-passing theory "sends us off to theorize about the more specific phenomena that absorb the hours of musicologists, anthropologists of dance, sociologists of photography, and their peers."[249]

One final philosophical point before turning back to law. Everything just said about definitional buck passing—shifting from defining art to defining the various arts—can be said as well about aesthetic or artistic value. In other words, instead of giving a unified account of what counts as good art, we might instead pass the buck and try to decide what is valuable in painting, in music, in architecture, and so on.[250]

So what does all of this tell us about art's role in constitutional law? Several things, I hope.

First, anyone who claims that art or art making merits an exemption from the law needs something like a theory of art. Without some criterion shared across the set of things called artworks, it is hard to see why those particular things should together qualify for an exemption.

My summary of Lopes's buck-passing account of art does not prove that it is impossible to define art directly—to identify the criterion that those claiming art exemptions would need. But it does give good reason to believe that focusing on individual arts instead is more likely to succeed. This is both because we're more likely to find commonalities among the objects that are put forward, say, as sculpture than among all the things said to be art, and also because the individual arts are the subject of practical and scholarly knowledge in a way that art itself is not. These are reasons to think that passing the buck and considering exemptions for specific arts are likely to be more cabined and focused than considering exemptions for art in general. In any case, the burden is on those who think otherwise. They are the ones who need to offer a theory of art—one that helps justify exemptions and suggests how they'll be feasibly limited.

Second, a corollary of the first point: insofar as art exemption claims involve a balancing of values, focusing on specific arts rather than art in general should again prove more helpful. As before, Lopes doesn't disprove the possibility of offering a unified account of aesthetic or artistic value. But he suggests that it will be far easier to develop an account of what makes photography or architecture or poetry good than to find some good-making feature that all forms share.[251] Since balancing requires that we know what value

248. LOPES, *supra* note 241, at 65. Lopes argues that when people say "art," they are either thinking of one or several of the particular arts, or they are talking more broadly about "products of culture at large." *Id.* at 66.

249. *Id.* at 82.

250. *See id.* at 101–03.

251. *Id.* at 63.

should be placed on art's side of the balance, Lopes's buck-passing account suggests that we will be more successful if we weigh each art separately. At the end of Part I, I suggested that categorical balancing of this sort is exactly what most courts have actually done.

Third, we can learn from what Lopes says about that to which his buck-passing theory passes the buck: the various arts. These are narrower categories, obviously, than art itself, but also narrower than midlevel categories like "visual arts," "narrative arts," and "performing arts."[252] At the same time, the individual arts are generally broader categories than genres (like rap, or Westerns), styles (like Mannerism), or oeuvres (like that of Mozart).[253] Lopes proposes that the arts are individuated by their medium, where medium is defined as a resource (often material like canvas, stone, bodies, or tones) to which a technique (drawing, printing, carving, arranging, and so on) is applied.[254]

Without wading too far into the weeds of how to individuate various mediums of expression, we can already see a major advantage of talking about individual arts rather than art in general. Individual arts are differentiated by medium. The concept of art, by contrast, combines a wide variety of mediums. And yet it is precisely the medium—the materiality of an artwork and/or the techniques applied there—that is most likely, and properly, the subject of legal regulation.

To give a few examples: The most likely and legitimate reason to regulate music is because of its volume.[255] Depictions by actors in the theater and movies raise potential regulatory issues that depictions in novels and paintings do not, for the former involve real people.[256] The law might therefore care, legitimately, that the actors involved in theater and movies are underage or are denied employment because of their race. Poorly designed architecture can cause harm of a different sort than a bad poem: unlike the poem, architecture can cause physical injury and environmental damage, and even its purely aesthetic demerits can intrude upon passersby or the neighbors across the street, whereas bad poems can more easily be avoided.

The law's willingness to countenance art exemptions surely needs to be sensitive to the varied harms the various arts potentially pose. And these threats are most likely to vary based on the distinctive medium each art employs. Regulating novels is almost always going to be a regulation of content or

252. *See id.* at 134.

253. *Id.* at 133.

254. *Id.* at 139.

255. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989).

256. Thus, a movie version of Vladimir Nabokov's *Lolita* raises concerns that the novel itself does not because, in the movie, the stepfather's sexual obsessions are directed at a character that either must be played by an actual young girl or else moviemakers need to find an older actor who can convincingly play a twelve-year-old.

expression, for what else about a novel is likely to cause harm? But that puts novels in a very different relation to law than architecture, or photography, or performance art. To quote again a deep insight offered by the Supreme Court in a 1975 theater case: "Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."[257]

B. *The Arts Versus Mediums of Expression*

But here an objection arises: How have I shown the concept of art to be irrelevant if all I've done is switch from talking about art to talking about artistic mediums—that is to say, "the arts"? In Lopes's terms, how far has the buck been passed if, rather than talking about a theory of art, we simply start talking about a theory of the arts—a set of conditions that allows us to treat certain kinds of things as art kinds, and therefore candidates for exemptions?

Two responses, one much bolder than the other:

First, finding a satisfactory definition of "the arts" is as unlikely as finding necessary and sufficient conditions for "art" itself.[258] Lopes himself thinks that "disputes over the art status of various activities appeal to analogies and disanalogies that hold only among subsets of the arts."[259] In other words, rather than finding something all of the arts have in common, new arts get recognized by establishing similarities with neighboring arts, not the whole set. The art status of video games, for example, "is often established by stressing their connections to cinema but they may be viewed instead as the popular counterpart of avant-garde computer art."[260] Video games don't have to show something in common with sculpture or ballet to be accepted among the arts.

What is included or not therefore depends on what is already there. The list is historically variable and path dependent.[261] In a pair of famous articles from the early 1950s, Paul Oskar Kristeller traced the emergence of what he called the "modern system of the arts" during the eighteenth century.[262] Only then, Kristeller argued, did the notion of the "fine arts" come to be systematized

257. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).

258. *See, e.g.*, LOPES, *supra* note 241, at 119.

259. *Id.*

260. *Id.* at 118 (citations omitted). Notably, the Supreme Court took a similar approach when it extended First Amendment coverage to video games. "Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)." Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 790 (2011).

261. *See, e.g.*, LOPES, *supra* note 241, at 118.

262. Paul Oskar Kristeller, *The Modern System of the Arts (I)*, 12 J. HIST. IDEAS 496, 497 (1951) [hereinafter Kristeller, *Arts (I)*]; Paul Oskar Kristeller, *The Modern System of the Arts (II)*, 13 J. HIST. IDEAS 17, 17 (1952) [hereinafter Kristeller, *Arts (II)*].

as painting, sculpture, architecture, music, and poetry.[263] Earlier groupings—like the liberal arts or the list of Muses—tended to lump music with mathematics or astronomy, poetry with grammar, and visual art with manual crafts.[264] Later, once the five canonical arts had been established, others like dance, theater, opera, prose literature, and (perhaps more surprising to us now) gardening sometimes did, or sometimes didn't, get included as well.[265]

At the time, commentators tried to show that "the 'imitation of beautiful nature' is the principle common to all the arts."[266] Clearly, that will no longer work as a unifying principle for the arts today, where both beauty and imitation are, at best, optional qualities. But even if it did work as a unifying principle, "imitation of beautiful nature" is a criterion that wouldn't do much to suggest why the arts should be a candidate for legal exemptions. The point, which the following section revisits, is that *even if* some satisfying definition of art or the arts were found, it still might not give us any reason to think that art (or the arts) merits special constitutional protection.

And indeed it doesn't. The real answer to the objection—that talk of *artistic* mediums continues to make art relevant to constitutional law—is to acknowledge the unlikelihood of finding a criterion shared amongst artistic mediums and to go a step further: to say that it makes no constitutional sense to subdivide mediums of expression into that which is and is not artistic. Some prose is literary, other prose is not. What matters to the First Amendment is that prose is a traditional, indeed vital, medium of expression. That some prose might also be deemed art does not change the level of protection it does or should receive.

To be clear, then, this is where my concerns diverge from those of Lopes, writing within the philosophy of art rather than constitutional law. Unlike his, my claim is not that we need to pass the buck from talk of art to talk of the arts and, ultimately, to the question of whether some object belongs within one of those arts. My claim is that, in law, we need to move from talk of art—unpromising and misleading as it is—to talk of mediums of expression. Decisions about whether to recognize some medium of expression for First Amendment coverage purposes will, like Lopes's theory of the arts, rely on analogies from one to another—not commonalities among them all. Recognizing a new medium of expression[267] is not applying a necessary and

263. Kristeller, *Arts (I)*, *supra* note 262, at 497.

264. *Id.* at 505–06.

265. *Id.* at 497.

266. Kristller, *Arts (II)*, *supra* note 262, at 21 (citing CHARLES BATTEUX, LES BEAUX ARTS RÉDUITS À UN MÊME PRINCIPE (1747)).

267. *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (departing from an earlier Supreme Court decision treating movies as commercial spectacles and holding instead that "motion pictures are a significant medium for the communication of ideas").

sufficient condition to a new set of things; it is finding a historically contingent but relevant line from a recognized medium or mediums to some new one. The point is that the medium of expression could be an artistic one (like music), a non-artistic one (like billboards), or a mixed one (like video games). Talk of mediums of expression is not limited to artistic mediums or the subset of things within a mixed medium that count as art.[268] Whether something is expressed using a traditional medium of expression matters greatly. The concept of art does not.

C. *The Informative Failure of Leading Theories of Art*

The argument just made rests on pessimism about the prospects of any overarching theory of art, much less one that could justify legal exemptions. By contrast, employing mediums of expression is not only more manageable, but by individuating forms of expression based on their medium, it focuses our attention on the very thing about art that the law most likely and legitimately wants to regulate.

It's worth noting, however, that there *are* overarching theories of art currently on offer. In fact, producing them is something of a cottage industry within contemporary philosophy of art.[269] Before moving on, then, this section looks briefly at three of the most prominent or promising theories to see how they fare. This serves two important purposes. First, it shows that even if these theories of art were successful—and not wildly over- or underinclusive as their critics claim—they would still not explain why art, so defined, is a category of things that merit exemptions from otherwise applicable laws.[270] Second, and even more importantly, these theories, despite their faults, may help explain

268. *See, e.g.*, Winters v. New York, 333 U.S. 507, 510 (1948) ("The line between the informing and the entertaining is too elusive for the protection of that basic right. . . . Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.").

269. *See, e.g.*, STEPHEN DAVIES, DEFINITIONS OF ART 1 (1991) (outlining and developing a perspective on the debate in Anglo-American philosophy about the definition of art); Robert Stecker, *Definition of Art*, *in* THE OXFORD HANDBOOK OF AESTHETICS 137, 137 (Jerrold Levinson ed., 2003) (surveying the primary trends marking the history of the project of defining art in the twentieth century); Thomas Adajian, *The Definition of Art*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2018), https://plato.stanford.edu/archives/fall2018/entries/art-definition [https://perma.cc/F6Y8-UU2V] ("The definition of art is controversial in contemporary philosophy. Whether art can be defined has also been a matter of controversy.").

270. Philosophical or theoretical reasons are not the only ones which might justify special constitutional treatment for a concept like art. There might also, for example, be historical reasons for doing so. We see this in Germany, whose constitutional court has justified the extent of the Basic Law's explicit protection for art by contrasting it with "the artistic policy of the Nazi regime." Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Feb. 24, 1971, 30 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 173 (Ger.), translated at https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1478 [https://perma.cc/7VM5-52V3].

why "art" has the rhetorical power in law that it clearly does. This section thus provides an error theory that partially explains why arthood is invoked so often if it really has the constitutional irrelevance I claim it to have. The three theories that follow have shaped our constitutional jurisprudence in important ways even if they have failed to provide a concept of art that provides a categorical ground for exemptions.

First, consider the Institutional Theory of Art ("Institutional Theory"), according to which "something is a work of art as a result of its being dubbed . . . a work of art by someone who is authorized thereby to make it an artwork by her position within the institution of the Artworld."[271] To avoid getting lost in technicalities, I'll describe this and each of the following theories in connection to its main proponent. For the Institutional Theory, that is the philosopher of art George Dickie.[272]

Putting aside the circularity of Dickie's definition—which defines art in terms of an Artworld, and an Artworld in terms of art[273]—we might in the present context worry more about why the decisions of something called "the Artworld" should be a source of constitutional exemptions to the law. The fact that the Institutional Theory is a procedural rather than substantive theory of art—regardless of whether that makes it better or worse as a theory—certainly makes it less useful in justifying exemptions. After all, the theory gives us no reason to believe that the Artworld's reasons for dubbing something "art" correspond in any way with values the First Amendment is meant to promote. Worse, for the law to treat expressive objects differently based on the whims of the Artworld could raise worries that, depending on how the Artworld is constituted, it might perpetuate conservative, "institutionalist" biases against outsider art and other expression, especially by minorities or other nonprivileged speakers. For the law to adopt and enforce these prejudices is constitutionally problematic in its own right.[274]

At the same time, in discussing mediums of expression above, I wrote of the practical and scholarly knowledge that has developed within many such

271. DAVIES, *supra* note 269, at 8. *See generally id.* at 78–114.

272. *See, e.g.*, GEORGE DICKIE, ART AND THE AESTHETIC: AN INSTITUTIONAL ANALYSIS 33–41 (outlining an institutional theory of art) (1974) [hereinafter DICKIE, ART AND THE AESTHETIC]; GEORGE DICKIE, THE ART CIRCLE, at viii (1984) (reworking the institutional theory of art advanced in previous works); George Dickie, *A Tale of Two Artworlds*, *in* DANTO AND HIS CRITICS 111, 111 (Mark Rollins ed., 2d ed. 2012) (defending his "version of the institutional theory of art"); George Dickie, *Defining Art*, 6 AM. PHIL. Q. 253, 256 (1969) ("It all depends on the institutional setting."); *see also* Soucek, *Aesthetic Judgment*, *supra* note 36, at 424–25 (describing a Nebraska obscenity case in which the court employed what it mislabeled a "Dickey analysis," asking whether the work in question had been exhibited in a "serious venue").

273. DICKIE, ART AND THE AESTHETIC, *supra* note 272, at 29, 33–34.

274. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

mediums.[275] Painters and art historians, composers, instrumentalists, and musicologists—all are authorities on their respective mediums. They are people we might turn to when deciding whether hard cases count as a painting, say, or music. Here is where something like the Institutional Theory has some appeal. Those working in and on each medium of expression might have useful things to say about what falls within it and what does not. But that is different from saying that something is a painting *because* "the Artworld" says so[276]—or that something called "the Artworld," rather than medium-specific communities of expertise, exists at all.

Second, we might turn from procedural theories to substantive ones and seek some essential feature that all artworks share. One leading example comes from Danto, whose philosophical account describes artworks as "embodied meanings."[277] This is to say, first, that artworks—unlike mere things—are *about* something.[278] But more than this, they *embody* that which they are about: (some of) their material properties are themselves part of the meaning.[279] Artworks show, or exemplify,[280] what they are about.[281]

Unlike the Institutional Theory, Danto's essentialist account of art at least points to something—*meaning*—that is relevant to the First Amendment, and that artworks are all said to share. But to say that artworks are about something is, in itself, to make them no different from any other form of expression. For proponents of art exemptions, the question has to be: How is art special in comparison to other things that bear meaning?

This is where Danto's embodiment criterion comes in. Artworks exemplify their meaning; their material properties express something about their message. And sure enough, this point is made in any number of the examples canvased in Part I. The art vendors in New York City claimed that the selling of their works on the streets was itself a crucial part of the works' meaning; the junked car artist in Texas alleged content discrimination, arguing that the junked car medium exemplified the work's message about car culture and the environment. The appeal of Danto's theory in the art exemption context, thus, is clear: if something is art, then—according to the theory—

275. *Supra* Section II.B.

276. To presage the theory of Danto quickly to come: "according the status of art" to something is "less a matter of declaration than of discovery." ARTHUR C. DANTO, AFTER THE END OF ART: CONTEMPORARY ART AND THE PALE OF HISTORY 195 (1997).

277. *See, e.g.*, DANTO, WHAT ART IS, *supra* note 73, at 37.

278. *Id.* at 37.

279. *Id.*

280. *See supra* note 53 and accompanying text (discussing exemplification).

281. Put another way, unlike other meaning-bearing things, for a work of art "there [must] be an interpretation through which we can see that its meaning something explains why it has the form it has." Arthur C. Danto, *Intellectual Autobiography*, *in* THE PHILOSOPHY OF ARTHUR C. DANTO 46 (Randall E. Auxier & Lewis Edwin Hahn eds., 2013).

regulating the material nature of the work is often to regulate its meaning, thereby giving rise to First Amendment worries.

Putting philosophy aside, the legal difficulty here is one that has been mentioned already: exemplified meaning is a particular challenge for Free Speech law.[282] Nothing expresses hostility more than a punch in the face. But surely most of the expressive conduct that exemplifies hostility cannot be seen as speech; the First Amendment is no defense to a charge of aggravated assault. Since, as Danto believes, anything can be art (which is not to say that everything *is* art),[283] art exemptions could be invoked on behalf of anything. Danto's theory of art does not provide a useful limiting principle when legal conflicts arise, particularly over the ways in which art's meaning is embodied.

Third and finally, theories of art that emphasize aesthetic experience might seem able to cabin the expansiveness of Danto's theory of art, since not everything seems like a promising source of aesthetic enjoyment.[284] Here we can look to Monroe Beardsley's aesthetic definition: "An artwork is something produced with the intention of giving it the capacity to satisfy the aesthetic interest."[285] Beardsley cashes out "aesthetic interest" in terms of the quest to have an aesthetic experience, in which we attend to an object's perceptual features and formal design while bracketing out our own practical interests or outside concerns.[286] Beardsley's notion of aesthetic experience descends from a long tradition in philosophical aesthetics in which thinkers dating back to Immanuel Kant and Francis Hutcheson in the eighteenth century have tied the aesthetic to disinterested contemplation—a stance in which we insulate aesthetic judgment from moral, political, or practical judgments about how a work might make the world better or promote our own personal interests.[287]

Aesthetic theories of art have a deep hold on the law. I have described elsewhere U.S. law's penchant for distinguishing beauty from utility, whether in tariff, copyright, or patent law.[288] The strictness with which the law excludes

282. *See supra* notes 71–75 and accompanying text.

283. *See* DANTO, WHAT ART IS, *supra* note 73, at 26.

284. *Cf.* Ted Cohen, *The Possibility of Art: Remarks on a Proposal by Dickie*, 82 PHIL. REV. 69, 78 (1973) (rejecting as candidates for aesthetic appreciation "ordinary thumbtacks, cheap white envelopes, [and] the plastic forks given at some drive-in restaurants").

285. Monroe C. Beardsley, *An Aesthetic Definition of Art*, *in* AESTHETICS AND THE PHILOSOPHY OF ART—THE ANALYTIC TRADITION: AN ANTHOLOGY 58 (Peter Lamarque & Stein Haugom Olsen eds., 2004).

286. *See id.*; *see also* Monroe C. Beardsley, *The Aesthetic Point of View*, 1 METAPHILOSOPHY 39, 46 (1970) (defining "aesthetic gratification" as pleasure taken in, or enjoyment of, the particular formal and regional properties of an artwork).

287. *See generally* THOMAS HILGERS, AESTHETIC DISINTERESTEDNESS: ART, EXPERIENCE, AND THE SELF (2016) (building off Kant and his empiricist predecessors to develop a disinterested theory of art); Alexandra King, *The Aesthetic Attitude*, INTERNET ENCYCLOPEDIA PHIL. (2019), https://www.iep.utm.edu/aesth-at/ [https://perma.cc/5263-RLM7] (defining the aesthetic attitude and providing its history).

288. *See* Soucek, *Aesthetic Judgment*, *supra* note 36, at 407–12, 437–42.

objects capable of any practical use from benefits like reduced tariffs[289] is surely a reaction to the fact that we can take a disinterested aesthetic stance to any number of things that the law has good reason for regulating. A benefit or exemption intended for art could easily be extended to tools, furniture, appliances or many other things if the relevant test was merely, "Can this object spark an aesthetic experience?" After all, we can take different stances on an object at different times. And this is a problem for anyone wanting to base constitutional art exemptions on an aesthetic theory of art. Beardsley's aesthetic theory might not be as capacious as Danto's embodiment theory—surely there are some things, after all, that are just too disgusting or banal to prompt aesthetic experiences. But as camp,[290] everyday aesthetics,[291] and pop art[292] show, people can derive aesthetic experiences from things far outside the bounds of traditional mediums of expression: perhaps even terrorist acts, as the especially controversial example of composer Karlheinz Stockhausen suggests.[293]

That said, the aesthetic theory of art does have an especially crucial lesson to teach about traditional mediums of expression. Some mediums have become traditional precisely because they are so well suited for providing aesthetic experiences. Some may *only* be suited for that purpose. There is just not much else you can do with an opera, symphony, ballet, or novel but enjoy its aesthetic qualities. Contrast these with, say, a beautiful car, chair, or teapot, which can be appreciated either as an aesthetic object or as a tool for transporting, sitting, or steeping. Certain traditional mediums of expression are uniquely efficient at delivering aesthetic experiences and for doing so without remainder—in other words, without doing anything else. Since the law ordinarily has no business regulating aesthetic experience itself, works in these mediums leave the law with little that it might legitimately regulate.

It makes sense, then, that the Supreme Court should regard these mediums as "unquestionably shielded."[294] What does not make sense, though, is to expand this shield by unthinkingly extrapolating from these traditional mediums of expression, which so efficiently and exclusively provoke aesthetic experiences, to the much wider set of things *capable* of provoking aesthetic experiences. The wedding cakes at issue in *Masterpiece Cakeshop* show this

289. *See id.* at 407–10.

290. *See* Susan Sontag, *Notes on 'Camp'*, 31 PARTISAN REV. 515, 515 (1964).

291. *See* YURIKO SAITO, EVERYDAY AESTHETICS 54 (2007).

292. *See* Marshall W. Fishwick, *Pop Art and Pop Culture*, 3 J. POPULAR CULTURE 23, 23–24 (1969).

293. *See* Anthony Tommasini, *Music, The Devil Made Him Do It*, N.Y. TIMES (Sept. 30, 2001), https://www.nytimes.com/2001/09/30/arts/music-the-devil-made-him-do-it.html [https://perma.cc/7WPC-UDQ9] (describing Stockhausen's comments characterizing the 9/11 attacks as "the greatest work of art that is possible in the whole cosmos").

294. Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995) (referring to abstract painting, instrumental music, and nonsense poetry).

extrapolation in action.[295] Phillips's cakes are gorgeous; they can provide aesthetic pleasure in abundance. But cakes do much more than that, and like anything else meant for ingestion, they are ripe for legal regulation to an extent that novels and symphonies should never be.

Like the other theories, aesthetic theories of art say something important about why we might be tempted to offer art exemptions: mediums of expression that have evolved solely to provide aesthetic experiences and nothing else are unlikely subjects for legitimate legal regulation. But lots of things can prompt aesthetic experiences. Using aesthetics as a criterion for legal exemptions without limiting them to specific mediums of expression, or without varying the exemptions medium by medium, would force the law to take a disinterested stance toward things that should legitimately interest it. Mediums like photography, with its (sometimes) real human subjects; architecture, with its intrusions on the lived and natural environment; marches, with their potential to hurt, disrupt, or exclude[296]—these mediums offer aesthetic experiences entwined with nonaesthetic and legally salient effects and injuries. Aesthetic experiences provided by expressive objects or events that do *not* employ traditional mediums of expression—think hunger strikes, riots, or, again, terrorist attacks—are even more problematic from the law's perspective. An aesthetic theory of art, used as the basis for artistic exemption claims, would flatten these distinctions. By contrast, focusing on mediums of expression brings the varied costs of exemptions to the foreground.

* * *

The normative argument made in this part has three steps. First, it expresses skepticism about the possibility of finding a trait shared by all artworks, especially one that would support artistic exemptions in law. Second, it highlights reasons to be more optimistic about defining mediums of expression, given their more limited reach compared to "art" and the fact that many of them have spawned rich practical and scholarly bodies of knowledge. Finally, since the materiality that distinguishes mediums of expression is likely the very thing the law has business regulating, individuating mediums of expression allows us to evaluate different mediums differently for exemption purposes, instead of lumping them indiscriminately together under a catchall category like art. Constitutional law thus should jettison the concept of art in favor of its traditional emphasis on mediums of expression, whether artistic or not.

295. *See supra* Section I.B.3.

296. *See Hurley*, 515 U.S. at 581 (allowing the exclusion of gay, lesbian, and bisexual marchers in a St. Patrick's Day parade).

The following part argues that Supreme Court doctrine largely already does jettison the concept of art—and that important recent and pending cases would be simpler if advocates and scholars would do so too. Section III.A describes the Supreme Court's surprisingly underrecognized focus on mediums of expression. Section III.B then returns to some of the case studies above to show how discarding talk of art would improve future disputes over legal exemption claims made on art's behalf.

III. LAW WITHOUT "ART"

A. *Supreme Court Doctrine*

The claim that the concept of art is constitutionally irrelevant is less revisionary than it sounds. To be sure, advocates constantly argue for art's special constitutional status. That is the basis of the artistic exemption claims made throughout the law, as detailed in Part I. Similarly, scholars working to justify First Amendment coverage for art often assume that art is the category in need of justification.[297] But look a bit deeper, and even some of these scholarly accounts of constitutional coverage of art devolve into discussions of particular mediums of expression.[298] To take one prominent contemporary example: while Mark Tushnet has at times written of art and artistic expression in general when talking about the First Amendment,[299] his recent book on the subject, written with Alan Chen and Joseph Blocher, is careful to focus on specific mediums of expression or even subsets of those mediums—

297. *See, e.g.*, RANDALL P. BEZANSON, ART AND FREEDOM OF SPEECH 280 (2009) ("How can art be defined and distinguished from the forms of 'art' that already are protected because they fit the free speech paradigm?"); Hamilton, *supra* note 23, at 109 (offering a theory for why "nonrational, nondiscursive elements of art are important to the republican democratic enterprise"); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 486 (2011) [hereinafter Post, *Participatory Democracy*] ("Art and other forms of no[n]cognitive, nonpolitical speech fit comfortably within the scope of public discourse."); Post, *Participatory Democracy*, *supra*, at 620 ("[I] consider art as deserving constitutional protection because of its connection to public opinion formation in a democracy."); *id.* at 621 ("So long as *Brokeback Mountain*, and indeed all forms of communication that sociologically we recognize as art, form part of the process by which society ponders what it believes and thinks, it is protected under a theory of the First Amendment that stresses democratic participation.").

298. Just after claiming that art fits "comfortably within the scope of public discourse," for example, Post goes on to specify that "First Amendment doctrine typically regards communication *within recognized media* as presumptively within public discourse and hence within the scope of the First Amendment." Post, *Participatory Democracy*, *supra* note 297, at 486; *see also* Post, *Recuperating*, *supra* note 193, at 1253–56 (discussing Warhol's film *Sleep* and Duchamp's *Fountain* as members of "recognized medium[s] for the communication of ideas"). Similarly, Sheldon Nahmod's account of "artistic expression" and the First Amendment clarifies in an early footnote that "[w]hile this Article deals primarily with the visual arts of painting and sculpture, much of the analysis is applicable to architecture, music and literature." Nahmod, *supra* note 23, at 222 n.2.

299. *See* MARK TUSHNET, ADVANCED INTRODUCTION TO FREEDOM OF EXPRESSION § 3.2 (2018) ("[F]ew scholars of freedom of expression doubt that artistic expression is covered.").

instrumental music, nonrepresentational visual art, and nonsense poetry (and other text).[300]

1. Mediums in Supreme Court Doctrine

These free speech scholars who focus on mediums are faithful to the Supreme Court's own approach in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[301] which unanimously affirmed that "the Constitution looks beyond written or spoken words as mediums of expression" and must cover more than expression with a "narrow, succinctly articulable message." Were it otherwise, the First Amendment "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[302] Painting, music, and poetry are protected, the Court said in *Hurley*, even if it is nonrepresentational or nonsensical.[303] But that is because those works are members of recognized and protected mediums of expression—*not* because they are works of art.[304]

By contrast, Professor Tushnet thinks that "the fact that something is denominated 'art' changes the constitutional landscape dramatically,"[305] and he wonders why that should be so for nonrepresentational art.[306] Here, he and I part ways. For me, the relevant question is not "Why do we protect *nonrepresentational* painting or *instrumental* music?," but rather "Why do we deem painting and music to be traditional mediums of expression?" For the way the Supreme Court's free speech doctrine has proceeded is by identifying a given medium of expression as protected and then applying coverage[307] to all works within that medium, whether representational or not.[308]

As such, the Supreme Court at first didn't extend First Amendment coverage to movies, lumping them not with the press but instead with theater,

300. *See generally* TUSHNET, CHEN & BLOCHER, *supra* note 23.

301. 515 U.S. 557 (1995).

302. *Id.* 569.

303. *Id.*

304. TUSHNET, CHEN & BLOCHER, *supra* note 23, at 143. As Joseph Blocher argues, "*Jabberwocky* is covered by the First Amendment not because its words represent concepts but because it is recognizable as a poem." *Id.*

305. *Id.* at 103.

306. *See id.* at 70.

307. To apply coverage is not necessarily to apply protection. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004) (distinguishing material that the First Amendment applies to (covered material) from that covered material which the government is prohibited from regulating in a particular way (protected material)).

308. *See* Post, *Recuperating*, *supra* note 193, at 1253 ("[The Supreme Court] assumed that if a medium were constitutionally protected by the First Amendment, each instance of the medium would also be protected; courts need not and perhaps should not ask whether any particular film succeeded in communicating its specific message.").

circuses, pantomime, and other "shows and spectacles."[309] It wasn't until 1952 that the Supreme Court formally changed course, admitting that "motion pictures are a significant medium for the communication of ideas."[310] But importantly, in the same case, the Court noted that although basic First Amendment principles remain constant, that doesn't mean that "motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method," the Court said, "tends to present its own peculiar problems."[311]

Time after time, the Supreme Court or its individual Justices have heeded this caution and treated mediums of expression separately rather than lumping them together under terms like art or the arts. Public speechmaking, radio, books, magazines, newspapers, television,[312] the mail,[313] posters, signs, and billboards,[314] marches or parades,[315] leaflets and sound trucks,[316] picketing,[317] and internet websites[318]—the Court has recognized all of these mediums over the years, along with "pictures, films, paintings, drawings, and engravings, . . . oral utterance and the printed word."[319] The Court recently added another recognized medium, video games, although Justice Scalia's analysis in *Brown v. Entertainment Merchants Ass'n*[320] was fairly cursory:

> Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.[321]

It is worth reiterating that the Court's argument is not that video games are artworks and therefore protected. Rather, video games comprise a medium of expression, the techniques and material resources of which are sufficiently

309. Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 243 (1915), *overruled by* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); *see also* John Wertheimer, *Mutual Film Reviewed: The Movies, Censorship, and Free Speech in Progressive America*, 37 AM. J. LEGAL HIST. 158, 160 (1993).

310. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

311. *Id.* at 503 (equating "media of communications of ideas" with "methods of expression").

312. Times Film Corp. v. City of Chicago, 365 U.S. 43, 51 (1961) (Warren, C.J., dissenting).

313. U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 137–38 (1981) (Brennan, J., concurring).

314. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (plurality opinion); *id.* at 524 (Brennan, J., concurring).

315. Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 568 (1995).

316. Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 93 (1977).

317. Frisby v. Schultz, 487 U.S. 474, 486 (1988).

318. United States v. Am. Lib. Ass'n, 539 U.S. 194, 227–28 (2003) (Stevens, J., dissenting).

319. Kaplan v. California, 413 U.S. 115, 119–20 (1973).

320. 564 U.S. 786 (2011).

321. *Id.* at 790.

analogous to those of other previously recognized mediums of expression for coverage to be merited here as well.[322]

Though the bare majority that decided *Brown* ignored the point, one dissenting Justice and two who concurred in the judgment emphasized how—in the Court's previous words—"each medium of expression presents special First Amendment problems."[323] Justice Breyer worried in *Brown* about the unique combination of expression with physical action often present in video games;[324] meanwhile, Justice Alito, joined by Chief Justice Roberts, was struck by the uniquely realistic, immersive, and interactive worlds video games typically offer.[325] "When all of the characteristics of video games are taken into account," Justice Alito wrote, "there is certainly a reasonable basis for thinking that the experience of playing a video game may be quite different from the experience of reading a book, listening to a radio broadcast, or viewing a movie."[326]

Chief Justice Roberts and Justices Alito and Breyer were reflecting the Court's longstanding notion that "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method."[327] As technology and society have changed and new mediums of expression have come before the Court, "[t]he uniqueness of each medium of expression has been a frequent refrain."[328]

Art itself is not a medium of expression. Providing blanket coverage across all artworks would prevent the Court from attending to the unique challenges presented by the various mediums of expression, whether artistic, non-artistic, or mixed.

322. *Id.*

323. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

324. *Brown*, 564 U.S. at 847 (Breyer, J., dissenting).

325. *Id.* at 820 (Alito, J., concurring).

326. *Id.*

327. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (plurality opinion) (quoting Kovacs v. Cooper, 336 U.S. 77, 97 (1949)).

328. *Id.* at 501 n.8; *see also id.* at 557–58 (Burger, C.J., dissenting) ("As all those joining in today's disposition necessarily recognize, '[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.' The uniqueness of the medium, the availability of alternative means of communication, and the public interest the regulation serves are important factors to be weighed; and the balance very well may shift when attention is turned from one medium to another." (citations omitted) (first quoting *id.* at 501 n.8 (plurality opinion)); and then quoting *id.* at 527 (Brennan, J., concurring in the judgment))). *But see* Superior Films, Inc. v. Dep't of Educ. of Ohio, 346 U.S. 587, 589 (1954) (Douglas, J., concurring) ("Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas.").

2. Counterarguments

Arguing against this doctrinal point, Professor Tushnet offers two strong counterexamples that, he thinks, demonstrate the Supreme Court's belief that all art is "presumptively covered by the First Amendment": *National Endowment for the Arts v. Finley*[329] and obscenity law.[330]

Take *Finley* first, a challenge to the moralistic criteria the National Endowment for the Arts ("NEA") began using in awarding grants starting in 1990.[331] Congress had dictated that arts grants be based not just on "artistic merit" standing alone but also "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[332] Performance artists who had been denied grants brought suit, claiming that the decency requirement constituted viewpoint discrimination in violation of the First Amendment.[333]

Tushnet's argument is that no one would think of bringing a First Amendment challenge to most selective government subsidies outside the arts context—to defense contracts or support for farmers, for example.[334] The fact that the parties and courts involved in *Finley* all unthinkingly applied the First Amendment shows, according to Tushnet, that "art" is a constitutionally relevant concept—a First Amendment trigger.[335]

To forestall this conclusion, we might say that as long as the plaintiffs themselves were artists working in a particular medium of expression, the Supreme Court never needed to reach the question, or make the assumption, that *all art* is covered. But since the plaintiffs in *Finley* were raising a facial challenge to the NEA's criteria across the board,[336] I think a better response is to look to what it is the NEA actually endows.

The NEA's enabling legislation defines "the arts" to include:

> music (instrumental and vocal), dance, drama, folk art, creative writing, architecture and allied fields, painting, sculpture, photography, graphic and craft arts, industrial design, costume and fashion design, motion pictures, television, radio, film, video, tape and sound recording, the arts related to the presentation, performance, execution, and exhibition of

329. 524 U.S. 569 (1998).

330. TUSHNET, CHEN & BLOCHER, *supra* note 23, at 102–03.

331. *Finley*, 524 U.S. at 572–73 (1998).

332. *Id.* at 572 (quoting 20 U.S.C. § 954(d)(1)).

333. *Id.* at 577.

334. *See* TUSHNET, CHEN & BLOCHER, *supra* note 23, at 103. To be clear, these examples are mine, not Tushnet's.

335. *Id.*

336. *See Finley*, 524 U.S. at 580.

> such major art forms, [and] all those traditional arts practiced by the diverse peoples of this country.[337]

This is a list of mediums of expression. Art as an umbrella term is nowhere to be found. In place of a theory of art, or even a theory of the arts,[338] federal law enumerates a list of mediums. Were the NEA to give money to, say, non-artistic sound recordings or television shows, its decency requirement would be subject to the same challenge under the First Amendment because a traditional medium of expression would still be affected. Arthood is not the necessary trigger.

Turning to Tushnet's second objection: he says the Court's obscenity cases have "simply assumed that material that can be described as sufficiently artistic cannot be obscene."[339] In fact, the current test for obscenity, from the 1973 case *Miller v. California*,[340] does say that works can be obscene only if they lack "serious . . . artistic . . . value."[341] This would seem to be a clear art exemption, compelled by the First Amendment and, thus, a strong counterexample to my thesis that art is constitutionally irrelevant.

Yet things look a bit different once we fill in the ellipses in the quotation from *Miller*. Obscenity, the *Miller* Court held, must be limited to works that, "taken as a whole, do not have serious *literary*, artistic, *political*, *or scientific* value."[342] It's tautological, of course, that only artworks can have artistic value. But the inclusion of literary value *alongside* artistic value suggests that "artistic" is being used not as a catchall concept, but in a more medium-specific way, referring to quality in the *visual* arts. A painting, print, drawing, movie, or photograph with artistic value, just like a piece of writing with literary value, cannot be criminalized as obscene.[343] Since obscenity is a concept largely confined to a few specific mediums of expression—basically, prose and pictures[344]—talk of literary and artistic value is really tied more to specific mediums of expression than to any notion of art in general. This is an example of art's dual meaning: the broader, umbrella concept that has been invoked throughout this Article, and the narrower, "art gallery" sense, where "art" just refers to visual mediums. The fact that the *Miller* test references the narrow,

337. 20 U.S.C. § 952(b).

338. For the distinction between a theory of art, a theory of the arts, and theories of arts, see *supra* notes 241–42 and accompanying text.

339. TUSHNET, CHEN & BLOCHER, *supra* note 23, at 102.

340. 413 U.S. 15 (1973).

341. *Id.* at 24.

342. *Id.* (emphasis added).

343. For more on how this standard is applied, see Soucek, *Aesthetic Judgment*, *supra* note 36, at 419–26. For a great descriptive account that disrupts the widespread view that obscenity prosecutions no longer happen, see generally Jennifer M. Kinsley, *The Myth of Obsolete Obscenity*, 33 CARDOZO ARTS & ENT. L.J. 607 (2015).

344. *See* Edward J. Eberle, *Art as Speech*, 11 U. PA. J.L. & SOC. CHANGE 1, 26 (2007).

medium-focused sense of artistic does not show that the broad concept used in artistic exemption claims has constitutional significance.

That's one potential response. A second goes the other direction and notes that, by including artistic value alongside not only literary value, but political and scientific value, too, the *Miller* test can really be rephrased or understood as referring to anything that has value beyond its ability to provoke sexual arousal. This is how Frederick Schauer, for example, famously analyzed obscenity: as a "sexual surrogate" that "takes pictorial or linguistic form only because some individuals achieve sexual gratification by those means."[345] On Schauer's account, what the Supreme Court has actually done[346] in its obscenity cases is to isolate "material devoid of intellectually communicative content"—"to separate speech from non-speech."[347] Here the point is not to decide whether some book or picture is art but whether it communicates rather than merely titillates.

On either of these two readings, art as an umbrella concept does no work even in the one area of free speech law that would seem explicitly to invoke it.[348]

3. Application in the Lower Courts

The Supreme Court has, with the possible exception of obscenity, resolutely focused on individual mediums of expression rather than the concept of art. But lower courts have not always been so fastidious.[349] Part I's examples of appellate decisions on junked cars, privacy, and trademark illustrate the point.

345. Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 922 (1979).

346. *See id.* at 900 ("In order fully to understand the Court's approach to obscenity, it is necessary to ignore much of what the Court has *said* about its approach, and look instead at what it has *done*.").

347. *Id.* at 930.

348. For those unsatisfied by these rebuttals, I would only add that if the doctrinal mess that is obscenity law is the one place where the concept of art remains constitutionally relevant, that's not much of a score for my opponents. *See, e.g.*, Kinsley, *supra* note 343, at 609 ("To a person, First Amendment scholars have argued of late that obscenity law is obsolete, outdated, unused, and therefore has little ongoing impact on the status of free expression in this country."); Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1636 (2005) ("[T]he doctrine is unworkable and should be abandoned."). Those unmoved by my responses above can simply treat obscenity as one place where my thesis about art's irrelevance is a revisionary call for change rather than a description of current doctrine.

349. *See, e.g.*, Disc. Inn, Inc. v. City of Chicago, 803 F.3d 317, 326 (7th Cir. 2015) (Posner, J.) ("We must be careful not to impose a minimal standard of 'expressiveness' for determining when an object is art *and therefore protected by the First Amendment* from government prohibition or destruction." (emphasis added)); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 804 (Cal. 2001) ("[T]he United States Supreme Court has made it clear that *a work of art is protected* by the First Amendment even if it conveys no discernable message . . . ." (emphasis added)).

Recall that in *Kleinman*, the junked car case, the Fifth Circuit treated *Hurley*'s Jabberwocky passage as "refer[ring] solely to great works of art."[350] The Supreme Court, it said, has never "elaborated on the extent of First Amendment protection for visual non-speech objects or artworks."[351] The Fifth Circuit's opinion is not entirely clear on this point, but it suggests that masterpieces might merit a level of First Amendment protection that lesser works do not deserve.[352] That cannot be the law.[353] At the very least, it misunderstands how the Supreme Court has treated First Amendment coverage: not by evaluating the quality of individual artworks, setting some line above which coverage is granted, but instead by considering individual mediums of expression. The problem with Kleinman's junked car isn't its quality as an artwork. The problem is that junked cars, or junked car planters, are not traditional mediums of expression.

The courts in *Bery* and *Mastrovincenzo*—the street vending cases—understood this, at least on some level. In *Bery*, the Second Circuit refused to distinguish the Supreme Court's case law on film, theater, and instrumental music from that about parades, marches, and sit-ins.[354] In describing the expressive value of visual forms of communication, the *Bery* court mentioned not just Winslow Homer, but non-art examples like the pictorial representations in written languages such as Chinese and Nahuatl.[355] This is all to say that the Second Circuit did not treat arthood as a necessary requirement for First Amendment coverage. The mediums of expression it emphasized went beyond those used solely or even primarily by artists.

The reason the Fifth Circuit cited the Second Circuit's vendor cases in *Kleinman*, however, was because both courts realized that arthood cannot be a sufficient condition any more than it can be a necessary condition for First Amendment coverage.[356] Both courts were grappling with the fact that arguments of the form "*x* is an artwork, thus protected from regulation" are untenable.[357] If anything can be art, anything can benefit from an art exemption. By contrast, not anything can be a painting, photograph, print, or sculpture—the mediums of expression protected in *Bery*. The Fifth Circuit may have

350. Kleinman v. City of San Marcos, 597 F.3d 323, 326 (5th Cir. 2010).

351. *Id.*

352. *Id.*

353. *See* Soucek, *Aesthetic Judgment*, *supra* note 36, at 456–58 (arguing that the First Amendment is least permissive of aesthetic judgment in law in cases where the removal or destruction of an artwork is at stake).

354. Bery v. City of New York, 97 F.3d 689, 694 (2d Cir. 1994).

355. *Id.* at 695.

356. *Kleinman*, 597 F.3d at 326–27.

357. *Id.* at 327; Mastrovincenzo v. City of New York, 435 F.3d 78, 92 (2d Cir. 2006) ("To say that the First Amendment protects the sale or dissemination of all objects ranging from 'totem poles' . . . to television sets does not take us far in trying to articulate or understand a jurisprudence of ordered liberty; indeed, it would entirely drain the First Amendment of meaning." (citation omitted)).

misunderstood the medium-based distinction drawn by the Second Circuit, but it certainly grasped the need for a distinction narrower than just "art."

The jumble of tests employed in right of privacy/publicity and trademark cases shows a similar move and confusion.[358] The allure of "*x* is art, thus protected" arguments proves strong, as lower court decisions in the Arne Svenson privacy case and the Ginger Rogers false advertising case both show.[359] But as Section I.B.1 described, the principal tests that have emerged in the appellate courts look not to a work's status as art, but to its transformative nature, or to the extent to which someone's name or likeness is related to the meaning of the work.[360] These are tests that are neither limited to art nor automatically satisfied by anything that counts as an artwork.[361]

B. *Clarifying Future Cases*

Although the concept of art does no work in the Supreme Court's First Amendment cases, advocates haven't stopped relying on it when seeking exemptions there. Far from it.

When the rap threat case, *Knox*, was before the Supreme Court on a petition for certiorari,[362] the rapper was supported not just by the National Association of Criminal Defense Lawyers[363] but by "rap artists," "music

358. *See supra* Section I.B.1; *see also supra* note 142 (describing the relation between privacy- and publicity-related causes of action).

359. *See* Rogers v. Grimaldi, 695 F. Supp. 112, 120–21 (S.D.N.Y. 1988) ("Having determined that the speech in question is artistic expression, whether there were alternate avenues open to Fellini to convey his film's message is not subject to examination by this court. Because the speech at issue here is not primarily intended to serve a commercial purpose, the prohibitions of the Lanham Act do not apply . . . ."), *aff'd*, 875 F.2d 994 (2d Cir. 1989); Foster v. Svenson, No. 651826/2013, 2013 WL 3989038, at *1 (N.Y. Sup. Ct. Aug. 5, 2013) ("Art is considered free speech and is therefore protected by the First Amendment.").

360. *See supra* Section I.B.1; *see also* Post & Rothman, *supra* note 134, at 156–62 (describing various tests courts have developed in attempting to distinguish public discourse from commodities in right of publicity cases).

361. In fact, it is difficult to determine what role even mediums of expression play in right of publicity cases. Post and Rothman claim that when people's names or images "appear in a traditionally recognized 'medium for the communication of ideas,' such as fine art, film, newspapers, radio, or books, courts are comfortable classifying them as presumptively public discourse" and offering First Amendment protection. Post & Rothman, *supra* note 134, at 159. But what happens when drawings or paintings are employed "outside of traditional media, as for instance on t-shirts and coffee mugs"—or chewable dog toys? *Id.* at 160; *cf.* VIP Prods. LLC v. Jack Daniel's Props., Inc., 953 F.3d 1170, 1175 (9th Cir. 2020) (finding that "the Bad Spaniels dog toy, although surely not the equivalent of the *Mona Lisa*, is an expressive work"). I am grateful to Robert Post, Betsy Rosenblatt, and Felix Wu for helping me see, though not solve, the difficulties in these cases.

362. *See supra* Section I.A.2.

363. Motion for Leave to File Brief of Amicus Curiae and Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 1, Commonwealth v. Knox, 190 A.3d 1146 (Pa. 2018), *cert. denied sub nom.* Knox v. Pennsylvania, 139 S. Ct. 1547 (2019) (No. 18-949).

industry representatives," and "leading rap music scholars,"[364] as well as the "art scholars and historians" who, as described above, argued that "[a]rt does not manifest in the real."[365]

In *Masterpiece Cakeshop*, the brief for Phillips literally begins by mentioning his "love for art and design" and his goal of creating "an art gallery of cakes."[366] It describes him as "an artist using cake as his canvas with Masterpiece as his studio."[367] And it claims that the First Amendment protects Phillips from complying with Colorado public accommodation law "*because* his wedding cakes . . . are his artistic expression."[368] At oral argument, the bulk of the time on Masterpiece Cakeshop's side was spent distinguishing just who is an artist: Florists? Jewelers? Invitation designers? Hair stylists? Chefs? Tailors? Someone who does makeup?[369] As Justice Kagan joked, the latter is "called an artist. It's the makeup artist."[370]

Nearly all of this was a waste of time. As this final section aims to show, cases that include artistic exemption claims—including some of the more prominent ones that have and will soon come before the Supreme Court—would appear quite different if the concept of art were never mentioned. This is the payoff of this Article's normative argument. We now can see that talk of art in these cases is not just hopelessly vague or undefined; it affirmatively misleads courts away from the real issues that are at stake. Three illustrations of this follow.

1. Rapped Threats

Consider *Knox* first.[371] The strong version of the art exemption claim offered there argued that a threat made in rap cannot be criminalized, for rap is art, and art is something set apart from everyday reality. In the words of the art scholars and historians who filed a brief supporting Knox in the Supreme Court, "A painting, poem, sculpture, or song may be consistent with reality, but that does not mean that it *is* reality."[372] For that reason, they asserted, "it has long

364. *Knox*, Brief of Render, *supra* note 88, at 1, 4.

365. *Knox*, Brief for Art Scholars, *supra* note 88, at 8.

366. *Masterpiece Cakeshop*, Brief for Petitioners, *supra* note 207, at 1, 2017 WL 3913762, at *1.

367. *Id.*

368. *Id.* (emphasis added).

369. *See* Transcript of Oral Argument at 11–20, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2017) (No. 16-111). The transcript notes seventeen uses of the word "artist(s)," seven of "artistic," six of "art," seven of "artisan(s)," and three of "artistry." *Id.* at 103.

370. *Id.* at 12.

371. For background, see *supra* Section I.A.2.

372. *Knox*, Brief for Art Scholars, *supra* note 88, at 8.

been understood that expressions or depictions of violence in art are not intended to bring about the violence they depict."[373]

The hyperbole characteristic of rap[374] may have seeped into the art scholars' brief. For their claim can't literally be true. The very point of some songs—think of "La Marseillaise,"[375] for example—is to bring about the bloody resistance it describes. Historically, entire artistic movements have been built around depicting and inspiring violence.[376] In the present day, the U.S. Army creates video games not just for training but for recruitment—to find people willing "to bring about the violence [the video games] depict."[377]

In none of these cases is the call to violence any less real because it is made through a work of art. In fact, the artistic quality of the call might make it even more inspiring—just think how the music of "La Marseillaise" causes bar patrons to rise together in *Casablanca*'s most moving scene.[378]

At the same time, plenty of statements that could be understood as threats in some contexts clearly aren't in other contexts—whether in songs or theatrical performances, stand-up routines or games of make believe. A joke isn't somehow set apart from reality, as some said of art in *Knox*; it simply provides a context in which we have (defeasible) reasons for not taking a statement literally. Arthood is neither necessary nor sufficient for taking a statement out of the realm of threats. The concept of art does no work in this.

Of course, as described above, the conventions of a given *medium* (say, of theater) or *genre* (for example, rap) likely are relevant factors to consider in determining whether someone working in that medium or genre is threatening.

373. *Id.*; *see also id.* at 12 ("[T]he fact that rap roots itself firmly in the real does not make it any less representational (or any more real) than other forms of violent artistic expression that are entitled to First Amendment protection.").

374. *See id.* at 9 ("Rap also relies on hyperbole far more heavily than most other comparable forms of expression.").

375. *What's the Meaning of La Marseillaise?*, BBC NEWS (Nov. 17, 2015), https://www.bbc.com/news/magazine-34843770 [https://perma.cc/68D3-RYJY].

376. According to the poet Filippo Tommaso Marinetti's "Manifesto for Futurism," which he described as a "manifesto of ruinous and incendiary violence": "We want to glorify war—the only cure for the world—militarism, patriotism, the destructive gesture of the anarchists, the beautiful ideas which kill, and contempt for woman." Barbara Pozzo, *Masculinity Italian Style*, 13 NEV. L.J. 585, 598 n.106 (2013) (quoting F.T. MARINETTI, THE FUTURIST MANIFESTO (James Joll trans.)). *See generally* THE VIOLENT MUSE: VIOLENCE AND THE ARTISTIC IMAGINATION IN EUROPE, 1910–39 (Jana Howlett & Rod Mengham eds., 1994) (explicating "the close relationship between violence and experimental art").

377. *Knox*, Brief for Art Scholars, *supra* note 88, at 8. *See generally* Mike Thompson, *More Than Call of Duty – Killing in the Name of: The US Army and Video Games*, ARS TECHNICA (Jan. 1, 2019, 11:52 AM), https://arstechnica.com/gaming/2019/01/army-video-games/ [https://perma.cc/U2UX-7KFQ] (explaining how the U.S. Army uses video games). Thanks to Darren Hudson Hick for this example.

378. *See Madeleine Lebeau: The Face of La Marseillaise in Casablanca*, IRISH TIMES, https://www.irishtimes.com/life-and-style/people/madeleine-lebeau-the-face-of-la-marseillaise-in-casablanca-1.2657566 [https://perma.cc/FK3R-5HJ9] (May 23, 2016, 12:06 PM) (describing the scene); CASABLANCA (Warner Bros. 1942).

Just as someone unfamiliar with traditional theatrical conventions might not understand that the person on stage is playing a role, so too might those who know little about rap fail to realize that the genre is "(in)famous for its exaggerated, sometimes violent rhetoric."[379] Understanding how hyperbole, slang, and violence are standardly employed within a genre—whether rap or reggae or country[380]—can determine whether we hear a lyric as a threat, a confession, a clever rhyme, or fanciful role-play. Put more vividly, getting "body-bagged" takes on a different meaning in a rap lyric than in a police report.[381] Practitioners and scholars of the genre can play a crucial role in educating courts and juries about the genre's conventions, thereby helping them understand the context that could be essential for determining meaning.

In *Knox*, some experts did exactly this.[382] But even as they did this important work, they felt the need to insist that rap is "a form of artistic expression"[383]—that Knox's rap "is a work of poetry."[384] Advocates clearly worried that rap, arising from marginalized communities, would not be taken seriously in court unless it were brought within the mantle of poetry, or better, art. They wanted courts to accept that rap is art, and art cannot be criminalized even when some find it threatening.[385]

But this isn't the right argument. Many rappers are undeniably artists; whether Knox is among them doesn't matter to his case.[386] What matters is that Knox was working within a genre of song in which violent exaggeration is a standard convention. This is a fact that has to be taken into account when interpreting Knox's rap lyrics. Genre conventions affect how words should

379. *Knox*, Brief of Render, *supra* note 88, at 19.

380. *See, e.g.*, Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280, 302 (5th Cir. 2014), *rev'd en banc*, 799 F.3d 379 (5th Cir. 2015) ("Presumably, [listeners] would [not] believe that Johnny Cash literally 'shot a man . . . just to watch him die.' Nor would [listeners] likely conclude . . . that Bob Marley 'shot the sheriff' but spared the deputy's life."); Commonwealth v. Gray, 978 N.E.2d 543, 561 (Mass. 2012) (same); Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 15–16 (2007) ("[W]e accept that these artists [are] making purely artistic statements.").

381. *See* Amici Curiae Brief of the Marion B. Brechner First Amendment Project and Rap Music Scholars (Professors Erik Nielson and Charis E. Kubrin) in Support of Petitioner at 10, Elonis v. United States, 135 S. Ct. 2001 (2014) (No. 13-983) ("[I]n rap battles . . . it is common to use the term 'body bag' to describe an opponent's victory over an adversary (e.g., 'you just got body-bagged').").

382. *See Knox*, Brief of Render, *supra* note 88, at 19.

383. *Id.* at 2.

384. *Id.* at 19.

385. *See, e.g.*, NIELSON & DENNIS, *supra* note 81, at 114 ("[I]t has become apparent that rapper defendants are not considered legitimate artists and rap music does not merit the artistic recognition granted to other forms of art. This perspective helps courts justify weaker First Amendment protections.").

386. Here is one difference between *Knox*, where I take the artistic status of rap to be indisputable, and *Masterpiece Cakeshop*, where the artistic status of cakes is dubious—*but similarly irrelevant*, which is the point.

reasonably be heard. This, rather than rap's *artistic* status, is what should make a difference in determining whether any particular rap is truly threatening.[387]

The impulse to insist on rap's artistic status is understandable, even necessary if you begin with the following assumptions: (1) that art is a protected category in American constitutional law, given special status because of its unique value; and (2) that the homogeneity of the judiciary makes it less likely that judges will value art forms, like rap, that arise in communities other than theirs.[388] The second assumption is surely correct. The first is not.

Given the limits of its experience, the judiciary likely needs experts' help, first, in identifying mediums of expression that are new—or new to many of our judges. As I argued at the end of Part II, traditional mediums of expression should be picked out and privileged not just because they are traditional. (Traditional for whom?) Rather, certain mediums may have become traditional, where they have, because they express so efficiently, with so little nonexpressive remainder.[389] Experts can help courts identify new mediums in which this occurs. Second, judges and juries may need help understanding the genre conventions that shape what gets expressed in any given medium. This is the work so necessary in the rap trials. Importantly, though, neither of these efforts involves convincing judges that a certain expression deserves the honorific "art."

2. Race-Based Casting

Medium matters in a different way when it comes to the exemptions from antidiscrimination laws claimed by television shows, movies, and theatrical productions. Examples of these include the case against *The Bachelor* franchise, sued for casting White leads in its first two dozen seasons; the slippery slope arguments made to the Supreme Court by cable operators warning about imposing colorblind casting on the musical *Hamilton*; and, in fact, claims by the cable operators themselves, who argued that they should be able to consider race in developing their channel roster.[390]

On my reading, *Hamilton* should have a First Amendment right to cast minority actors as the Founding Fathers and *The Bachelor* should be able to promote an antimiscegenationist message—at least if it is willing to admit that as its aim. By contrast, a clothing store like Abercrombie & Fitch shouldn't get an exemption from Title VII's prohibition on race and religious discrimination in order to protect its "brand messaging," even if that messaging involves a

387. To say this is not to deny the legal system's failures in presenting judges and juries with the contextual knowledge needed to understand the genre conventions of rap. For an extensive survey of these failures, see generally NIELSON & DENNIS, *supra* note 18, at 101–20.

388. *See* Root et al., *supra* note 201 (discussing the demographics of the federal judiciary).

389. *See supra* p. 730.

390. *See supra* notes 232–34 and accompanying text.

multisensory, immersive, even theatrical in-store experience.[391] And the cable operators before the Court last Term didn't merit an exemption either. The difference turns on the nature and, as importantly, the boundaries of traditional mediums of expression.

To see why, return to *Hurley*, the Supreme Court's deepest engagement with expressive mediums and antidiscrimination law. In asking whether Boston's St. Patrick's Day parade organizers could exclude a group of gay Irish Americans, the Supreme Court focused on the *inherently* expressive nature of parades: their expressiveness is the very thing that makes parades different than ordinary walks.[392] To force the organizers to include certain marchers would be to control the *expressive content* of their march.[393] It would force a change to the organizers' message no less than a law that dictated what elements a composer could include in their score.[394]

Notably, the unanimous Court in *Hurley* distinguished parades from cable operators who, although covered under the First Amendment,[395] employ a medium with much different conventions. Cable operators are generally seen as conduits for the messaging of the individual channels that they offer for their customers to flip through.[396] The cable network itself does not offer any overarching, unified message—unlike parades, which tend to have a point.[397]

Theater, like parades, is an inherently expressive medium. In fact, as Section II.C described, theater is recognized as a traditional medium of expression in part because it exists for little reason *other* than to express.[398] To change the casting of *Hamilton* is to alter the very point or meaning of the show. *Hurley* prohibits antidiscrimination law from compelling that kind of change. To be sure, some implicit balancing is occurring here. A theatrical production's expressive interests would undoubtedly fail to trump laws against statutory rape or cocaine use on stage, even if producers said that their show's realism required it. By contrast, statutory carve outs *do* exist in some places to exempt theaters from laws like public smoking bans, at least when smoking is "an integral part of the story."[399]

391. Abercrombie & Fitch's "Look Policy" has been the subject of numerous lawsuits, including an appearance-based religious accommodation claim that reached the Supreme Court. *See* Brief for Respondent at 8, EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015) (No. 14-86) [hereinafter *Abercrombie*, Brief for Respondent].

392. Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos. Inc., 515 U.S. 557, 568 (1995).

393. *See id.* at 572–73.

394. *See id.* at 574–75.

395. *Id.* at 570.

396. *Id.* at 576.

397. *Id.* at 576–77.

398. *See supra* p. 730 ("There is just not much else you can do with an opera, symphony, ballet, or novel but enjoy its aesthetic qualities.").

399. CAL. LAB. CODE § 6404.5(e)(4) (2021).

A brilliant comedy sketch shows why exemptions like these for traditional mediums of expression require some rigorous boundary policing. An episode of the Comedy Central show *Nathan For You* tried to help a dive bar skirt the smoking ban in Pasadena by setting up a few audience seats on the side of the room, thereby turning the entire space into a "boundary-pushing theatrical experience" where the regular bargoers and staff were the unwitting performers, suddenly allowed to smoke for the night.[400] "What's the loophole?" someone asks. "Theater law," the show's host answers.[401]

The sketch turns art exemptions into comedy, but serious examples are easy to imagine. Abercrombie & Fitch aims for an immersive, transporting, sensory experience in its stores, but to achieve its desired look and feel, the company has in the past engaged in race and religious discrimination.[402] Giving *Hamilton* an exemption from Title VII's prohibition on race discrimination shouldn't mean that Abercrombie & Fitch merits an exemption too, even if the retailer stresses the "theatrical" nature of its in-store experience. *Hamilton* is theater; Abercrombie & Fitch stores are not. Again, part of the reason traditional mediums of expression have attained that status is because they do so little *but* express. Even when that expression is for sale—*Hamilton* tickets do not come cheap[403]—people are paying for the expression; the expression is not meant, as with Abercrombie, primarily to get them to buy clothing.[404]

What is emerging here are a few guiding principles for granting exemptions from antidiscrimination laws. First, traditional mediums of expression should receive favored treatment when it comes to exemptions because they are inherently expressive—in fact, many exist for little reason other than to express.

Second, the boundaries of these mediums have to be fairly rigorously policed. This will sound like anathema to many contemporary artists and media studies scholars, and the conservatism of the approach is admittedly not one of its more attractive features. But the point is to protect theater, not just anything

400. Kimberley Mcleod, *"That Felt Real to Me": When Reality Theatre and Reality Television Collide*, 39 THEATRE RSCH. CANADA / RECHERCHES THÉÂTRALES AU CANADA 209, 218 (2018).

401. Joshua Alston, Nathan For You *Finally Becomes Full-Blown Experimental Theater*, AV CLUB (Nov. 11, 2015, 10:00 AM), https://tv.avclub.com/nathan-for-you-finally-becomes-full-blown-experimental-1798185644 [https://perma.cc/3N2M-HH49].

402. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2031, 2034 (2015); *cf. EEOC Agrees to Landmark Resolution of Discrimination Case Against Abercrombie & Fitch*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Nov. 18, 2004), https://www.eeoc.gov/eeoc/newsroom/release/11-18-04.cfm [https://perma.cc/6357-W5AA] ("[I]ndustries need to know that businesses cannot discriminate against individuals under the auspice of a marketing strategy or a particular 'look.'").

403. Amanda Harding, *'Hamilton' Tickets Are Still Ridiculously Expensive – But Why?*, SHOWBIZ CHEATSHEET (Sept. 21, 2019), https://www.cheatsheet.com/entertainment/hamilton-tickets-are-still-ridiculously-expensive-but-why.html/ [https://perma.cc/XZ27-KA55].

404. *See Abercrombie*, Brief for Respondent, *supra* note 391, at 7 (describing how Abercrombie & Fitch uses its in-store experience in lieu of advertising).

"theatrical." As the previous point observed, the recognized mediums were recognized in large part because they express so efficiently, with so little remainder. Sculpture is recognized because, as traditionally practiced, its materiality is generally safe, and its only intended purpose is to be looked at. When junked cars or cakes are used instead of stone and marble, or when the "sculpture" is meant to be eaten rather than simply viewed, the calculus changes. Further, enforcement costs and incentives for pretextual exemption claims are far less when someone stages a play in a theater or a show at a gallery than when they label an event or thing in the outside world, especially the commercial world, "performance art" or an "installation." However unsatisfying boundary policing of this sort will be, the real question is whether it is better than the alternatives of either no exemptions or unbounded ones.

Finally, the whole point of exemptions is to protect the expressive interests—the messaging or meaning-making—of the one seeking the exemption. If expressive content is unlikely to be imputed to the one seeking the exemption, or if elements of the expressive object can be changed without greatly changing the overarching message, exemptions are not needed. This is what the Supreme Court has said of the disparate collection of channels provided by cable operators: changes in content won't necessarily alter any overarching message imputed to the operator, so a blanket First Amendment defense is inappropriate.[405] Relatedly, if a speaker disclaims the very message for which they seek First Amendment protection, there is little value served by providing an exemption—even to a work within an otherwise shielded medium of expression. The producers of *The Bachelor* should not be allowed to dodge a race discrimination lawsuit by saying *both* that their show has no racial message *and* that the First Amendment protects racist television shows. The latter is true but, by *The Bachelor*'s own lights, irrelevant to its expressive interests—the very thing the First Amendment is there to protect.

3. Wedding Vendors

We return at last to *Masterpiece Cakeshop*. To get First Amendment protection from Colorado's public accommodations laws, Phillips had three options: try to fit his cakes into one of the traditional, recognized mediums of expression; argue that cakes should be recognized as their own medium of expression, much as movies and video games have been;[406] or skip past mediums entirely and argue directly that his cakes should be protected because they are works of art.

If this Article has done anything, it is to call this last strategy into question. I have already described the problems with the baker's attempted art exemption

405. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 655 (1994).

406. *See supra* notes 307–22 and accompanying text.

claim,[407] which has outlived his case. (Facing another discrimination claim, Phillips asked in a recent newspaper editorial: "Can I just be a cake artist again?")[408]

Assuming art's constitutional irrelevance, Phillips is left needing either to fit his cake making into one of the recognized mediums of expression or to establish cakes as a medium of their own. Both suggestions were made in the briefing. The "479 Creative Professionals" who supported Phillips argued that "[i]n lieu of watercolors or pastels, Phillips uses fondant icing or frosting . . . . The cake itself acts as his canvas and conveys his message."[409] The Solicitor General suggested that a wedding cake was "akin to a sculptural centerpiece."[410] These kinds of argument raise the same worries Abercrombie & Fitch did above: the store's brand messaging might have been theatrical, but it was not actually theater. Similarly, a cake's surface might offer a "canvas," its decoration might be "painterly," and its shape might be "sculptural," but those are metaphors, not classifications.

The most sustained effort to treat cakes *as* a medium of expression, not just metaphorically akin to one, came from a richly illustrated amicus brief by a dozen or so "cake artists" who wrote not in support of either party but of the proposition that their work merits "*as much* protection as those who work in other mediums."[411] Acknowledging that cake making is not a "historically established" medium,[412] amici described their cakes "as edible vehicles to convey messages and emotions."[413] More than mere bakers, cake artists

> must have visual-arts skills to design a cake that is pleasing to the eye—painting, drawing, and sculpting. They need the skills of an interior designer to create a unified whole from a series of individually artistic elements. They require the grace and technical powers of an architect, so that the final product moves from the theoretical to the real.[414]

Admirable in this argument is its attempt to analogically extend previously recognized mediums, as we have seen the Supreme Court recently do with video games.[415] What this argument lacks is consideration of whether cakes are *inherently* expressive—like parades, songs, or handbills—or whether their

407. *See supra* Section I.B.3.

408. Phillips, *supra* note 22.

409. Brief of 479 Creative Professionals as Amici Curiae in Support of Petitioner at 5, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2017) (No. 16-111).

410. *Masterpiece Cakeshop*, Brief for the United States, *supra* note 218, at 24.

411. Brief for Cake Artists as Amici Curiae in Support of Neither Party at 31, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2017) (No. 16-111).

412. *Id.* at 32.

413. *Id.*

414. *Id.* at 4–5.

415. *See supra* notes 320–22 and accompanying text (discussing Brown v. Ent. Merch. Ass'n, 564 U.S. 786 (2011)).

expressiveness is something variable, occasionally added on, or perhaps gained through context or use. It may be relevant to consider, in the language of Part II, how efficient cakes are as mediums for expressing ideas: Can they be said to express without remainder, like poetry, which does almost nothing *but* express?

These questions are important because it is the "remainder"—the nonexpressive aspect of cakes (the tasty, fattening, ingested parts)—that the law is most likely and legitimately wanting to regulate. Insofar as those nonexpressive aspects dominate, cakes become hard to distinguish from any other product or service in the commercial wedding market. Rented tables too can be celebratory when they are festooned with linens and decorations and surrounded by wedding guests, but *adding* expressive elements or context to tables does not make tables a medium of expression. Requiring the table rental company to work with people of all races, religions, or sexual orientations affects the tables' use, not their meaning.

At this point it might help to recall some of what has already been argued:

- Recognized mediums are inherently and often efficiently expressive, and this is what makes First Amendment law generally more solicitous of items within those mediums than it is of other kinds of items or activities.[416]
- The conventions of a medium can help determine the expressive content of items within that medium.[417]
- Laws forcing a change in that expressive content will have a hard time surviving First Amendment scrutiny . . .[418]
- . . . unless they are laws that target a given medium's distinctive harms. Marches, but not novels, have a tendency to disrupt traffic; compared to bad poetry, bad architecture can be both more dangerous and harder to avoid. Size regulations will thus receive far different scrutiny when applied to marches and buildings than to books.[419]
- Finally, worries that generally applicable laws might force changes to expressive content within a medium really amount to worries about forced changes to *someone's* expression. If—perhaps due to the

416. *See* Ely, *supra* note 183, at 1488 n.26 ("It is, therefore, the medium, not the message, that can fairly be labeled untraditional and thus arguably not entitled to protection as strong as other media would be accorded."); *cf.* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 568 (1995).

417. *See supra* Sections I.A.2, III.B.1 (discussing how the medium and genre conventions of rap may be essential for interpreting a potential threat).

418. *See Hurley*, 515 U.S. at 573.

419. *See supra* notes 309–22 (discussing the distinctive challenges posed by each medium of expression).

> medium conventions just mentioned—the expression isn't likely to be attributed to that someone, the worry disappears.[420]

These principles focus our attention on particular aspects of what are admittedly still difficult cases, whether they be about cakes, limo drivers, caterers, florists, calligraphers, or photographers.[421] The fact that some wedding vendors are operating within a recognized medium of expression may well matter, as Carpenter and Volokh have argued.[422] But if so, this is because works within such mediums tend to be inherently meaningful, and accommodation laws could potentially force a change in that meaning—which is to say, in the expressive content attributable to the work's creator. Whether it actually does or not, however, requires us to consider medium conventions both to determine which elements of works in that medium are typically seen as meaningful and to decide whether that meaning typically gets attributed to the author. Laws that require new or customized expressive content will likely be most vulnerable,[423] though even there, questions remain about whether the expressive content is tied to the maker, or whether the maker is simply seen as facilitating the expression of others.[424]

As the Court said in *Masterpiece Cakeshop*, "The free speech aspect of th[ese] case[s] is difficult."[425] The difficulty hasn't gone away. The principles above don't change the fact that these are complicated, fact-intensive decisions. Courts, advocates, and scholars just need to realize that the decisions and the difficulties have nothing to do with determining whether a cake, or anything else, is a work of art.

CONCLUSION

It has long been thought obvious that if something is art, it must be covered by the First Amendment. This Article has aimed to show just how widespread that belief is and how sweeping its implications can be. The reach of privacy, trademark, and tax laws; the ability to turn away LGBTQ couples from your business or take race into account in your hiring; the regulation of street vending and land use; the criminalization of threatening language—all of these turn in part on the success of artistic exemption claims. It surely matters, then, whether the conventional wisdom is correct: whether art really is a category of things and activities the U.S. Constitution specially protects.

420. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 655 (1994).

421. *See supra* note 215 (collecting cases).

422. *See Masterpiece Cakeshop*, Carpenter/Volokh Brief, *supra* note 219, at 4 (distinguishing photographers from bakers and florists).

423. *See Masterpiece Cakeshop*, Brief of Abrams et al., *supra* note 222, at 6 (distinguishing custom-designed goods from premade ones).

424. *Masterpiece Cakeshop*, Brief of Wolff, *supra* note 225, at 15.

425. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1723 (2018).

The conventional wisdom about art and the Constitution is wrong. This is the second thing this Article has aimed to show. To be sure, lots of artworks are covered under the First Amendment but not *because of* their arthood. Art is not, and should not be, a constitutionally relevant concept.

The problem with the conventional wisdom is not just that the concept of art lacks defined, judicially administrable boundaries—though it does. Worse is the fact that the various objects and activities that (arguably) fall within those boundaries lack any common, defining trait that would suggest why *those* things, rather than others, deserve exemptions from otherwise applicable laws.

Rather than asking whether something is art, the Supreme Court has long emphasized mediums of expression instead. Use of a recognized medium triggers more robust balancing of the medium's expressive value against the government's interest in regulation. Because mediums of expression are differentiated in large part by their materiality—the very thing the government is most likely and legitimately wanting to regulate—focusing on them allows courts to vary their scrutiny based on the varied nonexpressive dangers each medium poses. Shifting attention from art to mediums of expression thus foregrounds a set of concepts that are better cabined and more relevant to the law's concerns than the concept of art.

Mediums of expression remain surprisingly underdiscussed, however, both in scholarship and in the courts. The assumption that arthood matters to the Constitution seems to have occluded any sustained examination of the concepts that are doing so much of the real constitutional work. Questions remain about how mediums should be defined, which should be recognized, and in what ways "each may present its own problems" for the law.[426] We need more clarity about how mediums should be individuated, when new mediums deserve to be recognized, and what biases—whether based on race, gender, geography, class or just the inertia of tradition—might keep the law from recognizing expressive mediums already in use. This Article provokes those questions more than it has settled them. But to better understand mediums of expression and the legal exemptions they might sometimes merit, the law first needs to move beyond the concept of art. We need to see "art" as the constitutional irrelevance that it is.

426. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).