Understanding the First Amendment Limitations on Government Regulation of Artwork

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Local government control of art[1] arises frequently: for example, in the regulation of murals as a form of outdoor signage or advertising, in graffiti abatement, or in government selection of artwork for display in public parks or public buildings. These controls present many familiar First Amendment concerns. Because art has been characterized by the courts as a form of First Amendment-protected speech, regulations pertaining to artwork must be content neutral, contain adequate procedural safeguards, and may not be unconstitutionally vague. Artwork differs from other forms of speech, however, particularly signage, in one critical respect: in the case of artwork, the medium is commonly the message. While a written message on a sign could theoretically be conveyed regardless of the height, size, location, color, materials, or brightness of the sign structure, artwork is different. In many cases, the size, orientation, color, or materials comprising the work are of critical importance to the piece's communicative intent. Thus, while local government aesthetic regulatory interests are implicated in the regulation or control of art, the appropriateness of aesthetic interests in regulating artwork is debatable under the First Amendment.

While the First Amendment broadly applies to artistic media, First Amendment concerns regarding the regulation of architecture are still in an antenatal state. Few court cases have considered First Amendment challenges to local design review requirements, building design mandates, or ordinances that restrict the extent to which buildings may look similar or different from one another.

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Because First Amendment protections have generally expanded since the Constitution was ratified, First Amendment challenges to architectural controls may increase in the coming years.

This article reviews First Amendment issues associated with regulation of artwork. The government practitioner, however, should review the First Amendment doctrines applicable to regulations of all forms of speech, such as content neutrality. The case law pertaining to local government controls of artwork and architecture is actually quite sparse. Cases generally applicable to speech regulation and, as discussed further herein, the government speech doctrine and public forum law, provide additional guidance in this area.

Forms of Local Government Regulation of Art and Architecture

Local governments regulate or control artwork in myriad ways. On private property, art regulation frequently arises via zoning codes, sign regulations, and nuisance abatement controls. Murals, paintings, and other two-dimensional works of art located on private property and that may be affixed to building walls, on signposts, or elsewhere are frequently regulated specially as "murals" or other forms of artwork, or as a form of signs under local sign regulations. Three-dimensional works of art located on private property, including sculptures or statuary, may be regulated by zoning regulations that restrict the placement or size of structures, or by building or fire codes. Additionally, artwork may be regulated by local governments pursuant to their general authority to regulate nuisances; for example, many local governments prohibit graffiti and other nontraditional forms of artwork under their nuisance control codes. In some circumstances, nuisance regulations such as those prohibiting the location of trash or junk cars on private property may limit displays of artwork. Some local governments completely exempt works of art on private property from regulation under zoning or sign codes.

Similarly, local governments may have ordinances or other laws controlling private individuals' use and placement of objects, including artwork, within public property. Local governments may also control artwork on public property through procurement and selection processes for art displays in public buildings. Some local jurisdictions have additionally initiated programs that *require* public art, or cash payments into public art funds, in connection with private development applications. Some such ordinances require review of private developments' public art installations by local art committees. Additionally, recognizing the benefits of publicly-accessible art, many local governments have adopted "percent-for-art" ordinances, requiring that governmental expenditures on public works include public art.

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First Amendment Application to and Protections for Art

Courts frequently err in favor of affording artists' subjective viewpoints significant latitude in determining the First Amendment's application to artwork.[2] Music, theater, film, and visual art—including paintings, prints, photographs, and sculpture—as well as several other forms of expressive conduct, including tattooing, have been found to merit First Amendment protection.[3] One court observed that "[v]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection."[4] A particular work need not be immediately and obviously identifiable as a work of art, i.e., it could be fairly abstract, to be protected.[5]

The scope of First Amendment protection for artwork, while expansive, is not boundless. The same carve-outs from First Amendment protection applicable to other media of speech, including for obscenity, fighting words, and incitement, exist with respect to artwork. The First Amendment does not protect obscenity.[6] The Supreme Court has defined obscenity as "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value," as determined by an "average person, applying contemporary community standards."[7] The foregoing test does not provide bright-line clarity as to what types of artwork are obscene for constitutional purposes. The Supreme Court has found "hard core" pornography[8] and child pornography[9] to be outside of the scope of First Amendment protection, but courts have struck down local ordinance limitations on speech and expressive conduct as they related to poetry with a sexual content,[10] pornography that may be understood as degrading toward women,[11] depictions of animal cruelty,[12] virtual depictions of child pornography,[13] films or artwork in which obscene images are paired with non-obscene material, and parody material.[14] Artwork that depicts nudity, violence, or thought-provoking portrayals containing sexual content is not likely to fall outside the scope of First Amendment protection. But, to the extent art exhibits material of a vulgar, pornographic nature, it may not enjoy First Amendment protections.

As with artwork of an obscene nature, artwork containing elements of "fighting words," incitement, or defamation also falls outside the umbrella of First Amendment protection. When a work of art is intended to counsel viewers toward criminal violence, it may lack First Amendment protection. But, when an artist does not intend for her work to provoke unlawful action, and when the risk of such unlawful action is not great, the work would presumably be constitutionally protected.[15]

An artist's free speech rights may be limited additionally by state common law limitations on "verbal torts," including defamation—slander or libel—as well as torts such as intentional infliction of emotional distress.[16] Specifically, when defamatory speech is on a matter of private concern and involves private individuals, the First Amendment generally does not protect the defendant speaker.[17] Conversely, when speech critical of another relates to a matter of public concern[18] or when such speech involves a public figure,[19] the speaker may have a First Amendment defense against a tort claim. Thus, artwork that criticizes a public figure or addresses a matter of public concern would likely carry First Amendment protections that would be unavailable if the work criticized or parodied a private individual on a matter of private concern.

While the foregoing exceptions relate to all speech, another exception to First Amendment protection pertains specifically to artwork. In recent decades, courts have established boundaries between art meriting First Amendment protection and commercial merchandise that is not protected speech.[20] Many of these cases arise in the context of street vendors of clothing or other souvenirs that claim that local licensing requirements interfere with protected speech. Commercial merchandise lacking "a political, religious, philosophical or ideological message" falls outside the scope of the First Amendment's protections.[21]

However, artwork does not lose its First Amendment protection simply because it is commercial in nature.[22] Commercial speech receives First Amendment protection, albeit less than noncommercial speech.[23] Commercial speech has been defined by the Supreme Court as "expression related solely to the economic interests of the speaker and its audience,"[24] or speech that otherwise proposes a commercial transaction.[25] Art in the form of commercial advertising, which bears the logo or trademark of a particular business or firm, or that otherwise proposes a commercial transaction, retains First Amendment protection.

First Amendment Limits on Regulation of Art

The First Amendment's application to specific works of art is based in large part on the ownership—public or private—of the underlying property where the artwork is being displayed. Regardless of whether artwork is displayed on public or private property, developing code definitions that meet First Amendment limitations is the most important and difficult task in regulating artwork. Many local regulations contain definitional distinctions between signage and artwork. Because it is almost impossible to distinguish between signage and artwork without reference to the content of the message, these provisions defining artwork are likely content based and may be legally questionable following *Reed v. Town of Gilbert*.[26]

Art on Private Property

Artwork on private property that is subject to local regulation typically falls into two categories: two-dimensional artwork such as wall murals or signage displaying murals or paintings and three-dimensional artwork such as sculpture or statuary. Graffiti is another form of artwork that frequently occurs on private property.

The First Amendment doctrine relating to regulation of artwork located on private property mirrors the doctrine associated more generally with signage on private property. In reviewing local regulations applicable to art, courts will generally look first to whether a regulation of noncommercial artwork on private property is content and viewpoint neutral,[27] and if so, whether it is tailored to serve a significant governmental interest and whether ample alternative channels of communication are available.[28] If the regulation is content based, strict scrutiny applies, requiring a compelling governmental interest and least restrictive means of achieving that interest.[29] For commercial works, courts apply the *Central Hudson* test requiring such regulations to serve a substantial governmental interest, directly advance that regulatory purpose, and not restrict more speech than is necessary.[30]

Other concerns that might arise in the regulation of artwork on private property include whether the regulation effects an unconstitutional prior restraint,[31] or whether the regulation is vague[32] or overbroad.[33] If a local regulation is content based, the government has failed to establish a substantial regulatory interest, or the regulation is not appropriately tailored to the regulatory interest, it will most likely be invalidated.[34] Similarly, if the regulation does not provide adequate procedural safeguards, such as a concrete review timeframe, or if the regulation leaves administrative officers with unbridled discretion to approve or deny the display of certain artwork, the regulation may be an unconstitutional prior restraint.[35] Moreover, if the regulation is vague or overbroad,[36] or if the regulation suppresses too much speech,[37] it may also be found unconstitutional.

Avoiding Content Bias: Definitions and Other Problems. Content concerns arise in many areas of art regulation, but the most common problems relate to definitions of "sign," "mural," "art," or "artwork." In *Neighborhood Enterprises, Inc. v. City of St. Louis*,[38] the owner of a mural protesting alleged eminent domain abuses by St. Louis, Missouri, challenged the city's enforcement of its sign ordinance against the mural. The Eighth Circuit held that the city's definition of "sign," which exempted from its definition all flags, civic crests, and similar objects, was content based because the code's application to the mural rested on the message of the mural.[39] A similar problem arose when the Norfolk, Virginia, sign ordinance exempted from regulation "works of art which in no way identify or specifically relate to a product or service."[40] The Fourth Circuit found, "On its face, the former sign code was content-based because it applied or did not apply as a result of content, that is,

'the topic discussed or the idea or message expressed.'"[41] The court went on to find that the city's differential regulation of works of art was not narrowly tailored, since artwork could have the same detrimental impact on community aesthetics or traffic safety that garish signage might have.[42]

Case law also provides an example of content neutral treatment of artwork. In *Peterson v. Village of Downers Grove*,[43] the court upheld a local government's ban on "painted wall signs." The court found the ban content neutral because it did not contain references to the message on a given sign.[44] *Peterson* is instructive for local governments regarding the need to establish code definitions that do not create content based distinctions, particularly in the arena of regulating artwork on private property. After *Reed*, it will be challenging for a local government to distinguish between, say, a "mural" and a "sign," or between a "sculpture" and a "structure," in a content neutral manner, although it may be possible to identify specific media of artwork in the same manner as was done in *Peterson*.

Content neutral regulations of artwork should focus on the non-communicative aspects of the artwork. Examples of content neutral regulation of art include regulating the size, height, placement, or lighting of works of art.[45] Unlike with signage, however, regulating some of the locational aspects of art may give rise to claims of content discrimination, particularly when a particular work of art is alleged to be context- or location-specific.[46] Similarly, regulation of materials or color may be problematic, as the materials and colors used in the creation of a work of art are often central to the message of the particular work.[47] More broadly, regulating noncommercial artwork differently from other forms of noncommercial speech may violate the First Amendment. When a local sign code contains different size, height, or other display limitations on murals as compared with political signage, that code is at risk of being found to be content based.[48]

Analysis of Content Neutral Regulations of Artwork. Content neutral regulations must be supported by a substantial or significant regulatory interest, and the regulation must be narrowly tailored to that interest.[49] In the context of sign and visual display cases, the Supreme Court has found both aesthetic and traffic safety significant and/or substantial as they relate to sign regulation.[50] But there is scant case law on the governmental interests supporting regulation of artwork. While traffic safety may suffice as a governmental interest for purposes of regulating works of art, aesthetics is likely less sound given that the aesthetic concerns of a local government may be at odds with the message of a particular work of art. If the government is in the business of making the community beautiful, can the government prohibit "ugly" artwork whose ugliness is a critical part of its message? A local government's restriction on the size, height, or color of

murals for aesthetic purposes may directly conflict with the central message of a muralist's work. Similarly, whereas many sign codes regulate the placement of signs within property and with respect to street right-of-ways in order to preserve a particular community character, an artist's placement of a sculpture or mural—if the artwork is site-specific—may help to articulate the message that the artist wishes to convey with his or her work.[51]

Furthermore, building safety, nuisance control, and other purposes underpinning zoning and building restrictions have not been widely reviewed for whether they are significant governmental interests in First Amendment litigation. In *Kleinman v. City of San Marcos*,[52] a Texas city had an ordinance prohibiting property owners from keeping junked vehicles on their properties. A novelty store placed a wrecked Oldsmobile 88 in its front lawn, planted it with vegetation, and painted the car colorfully with the message "Make Love Not War." After ticketing the property owner and the commencement of litigation, the city stipulated to the fact that the car planter had some artistic expressive value. The Fifth Circuit found that the car's expressive value was secondary to its utility as a junked vehicle.[53] Applying the intermediate scrutiny test for expressive conduct, the court found that the junked vehicle ordinance was content neutral in purpose and narrowly tailored to serve the government's interest in preventing attractive nuisances to children, prevention of rodents and other pests, and reducing urban blight, vandalism, and depressed property values.[54] While the city's interests in blight prevention and preserving property values may have had some aesthetic component, the court did not analyze whether aesthetic interests alone could support prohibiting the creative car-planter as a form of artwork.

Narrow tailoring requires that the regulation in question directly advance the interest(s) asserted by the government. In the context of artwork, problems may arise where local codes treat murals differently from other forms of noncommercial speech, and where the regulatory interests at stake are not directly served by the differential treatment.

Distinguishing Between Non-Commercial and Commercial Artwork. When a municipal code requires a property owner to obtain a permit for a commercial wall sign, but does not require a permit for a non-commercial mural, how does one address artwork displayed on the wall of a building that contains images of products sold inside the building? Business owners often use blank wall space on the side of a building to advertise products sold inside the building, beautify the premises of their properties, or to convey non-commercial or political messages. Determining whether such images constitute commercial or non-commercial speech is rarely simple.[55]

Case law provides several illustrations of this problem. When a city attempted to prohibit a fuel station owner's mural depicting "the

geography, indigenous plants, and archaeology of Mexico, [the] social advancements of the Mexican people in contemporary society as well as reflections upon a colonial period of Mexican history," placed in an effort to beautify the property and to attract customers to the station, a California court found the mural to be noncommercial speech.[56] And when a shop that sold fishing equipment, including bait and tackle, displayed a painted wall mural depicting fish and other aquatic plant and animal species, the mural was determined to be noncommercial speech: "[A]s the evidence demonstrate[d] . . . it reflects a local artist's impression of the natural habitat and waterways surrounding [the subject shop], and also alerts viewers to threatened species of fish."[57]

Conversely, a mural in Ohio depicting a "mad scientist" outside of a shop that sold nitrous oxide for racing cars was found to constitute commercial speech.[58] In arriving at that conclusion, the court stated, "the crucial inquiry is whether the expression depicted in the appellants' mural either extends beyond proposing a commercial transaction or relates to something more than the economic interests of the appellants and their customers."[59] The court found that "[t]he sign plainly is intended to attract attention to [the racing shop], which directly relates to that company's economic interests."[60] In another case, a Virginia pet day-care owner displayed a mural depicting dogs playing on the side of the building, in plain view of a dog park. The Fourth Circuit concluded that the mural was commercial speech because the mural was intended to attract attention of potential customers, it depicted images relating to services provided on the premises, and the owner had an economic motivation for displaying the mural.[61]

Courts are generally more deferential to governmental regulations of commercial speech as compared with regulations of non-commercial speech, in part because the commercial speech doctrine does not require an initial determination regarding the content neutrality of the regulation in question. But local governments should take care to define the boundary between commercial and non-commercial speech, using distinctions found in case law applicable to the local government.

Special Considerations. An area that has been mostly unexplored in case law relates to local anti-graffiti ordinances. Many local governments have taken measures to prevent graffiti, based primarily on aesthetic concerns and an interest in preventing vandalism and property-related crime. In a 2007 case, a group of graffitists challenged New York City's prohibitions on the sale of aerosol paint cans and broad-tipped markers to persons under 21 years of age, and persons under 21 from possessing such objects in public places, which were intended to control unwanted graffiti in the city.[62] The Second Circuit upheld the district court's determination that regulation was content neutral, but also agreed with the conclusion that the ordinance provisions burdened more

speech than was necessary to achieve the city's goals.[63] Earlier cases found similar restrictions to pass constitutional muster, although not on First Amendment grounds.[64] To the extent anti-graffiti ordinances regulate in a content neutral manner and do not burden more speech than necessary, they are likely to be upheld by courts. Local governments should beware, however, that many current anti-graffiti ordinances likely contain content based definitions of the term "graffiti." An example of a definition of "graffiti" that likely passes muster is one that references graffiti based on its unauthorized nature.[65]

Another area that has received little judicial attention relates to public art programs in private development projects. Some local governments require that private development projects include public art, require dedications of money or artwork in connection with private development projects, or undergo design review of artwork. The constitutionality of these arrangements has not been fully vetted. In a case originating in Washington state, a federal district court found that the city's requirement that signs be of a Bavarian style was not content based, did not constitute forced speech, and that a design review board charged with reviewing signs and architecture in the community did not constitute an unlawful prior restraint despite having "somewhat elastic" criteria for review.[66] Similarly, the Oregon Court of Appeals held that the City of Portland's design review process as applied to billboards did not constitute an overbroad regulation or unconstitutional prior restraint due to the narrow construction of the design review board's purview.[67]

Private Art on Public Property

The regulation of artwork on public property carries different considerations than artwork on private property. Two special problems arise in the regulation of artwork on public property: the sale or display of artwork on public property such as parks, sidewalks, or streets and government selection of artwork for public property, including government buildings, plazas, and parks.

Sale or Display of Private Artwork by Private Individuals on Public Property. Many local codes prohibit the sale of commercial products or the solicitation of business on public property. Some of these code provisions create express exemptions for nonprofit organizations or other forms of noncommercial speech. In cases addressing such regulations, courts first review where the property falls within the public forum doctrine, i.e., whether the property is a traditional, designated, limited, or non-public forum.[68] If the property is a traditional or designated public forum, restrictions must be content neutral and narrowly tailored to serve significant governmental interests, and these restrictions may regulate only the time, place, and manner of speech.[69] If the property is a limited public forum or a non-public forum, the restrictions must only be viewpoint neutral and reasonable, a far more deferential

standard than that which is applied in traditional and designated public fora.[70]

In a 2000 case, St. Augustine, Florida, attempted to enforce its ordinance prohibiting "selling, displaying, offering for sale or peddling any goods, wares or merchandise" on public property, including streets and sidewalks, against a street artist displaying and selling newspapers and art that contained political messages.[71] The code provision exempted nonprofit and religious organizations, but did not contain any exemption for political speech. In a cursory analysis, the court found that the artist's visual art and newspapers were protected by the First Amendment, and found that the public property regulated by the ordinance was a traditional public forum, thus requiring the regulation to be content neutral and narrowly tailored to a significant governmental interest.[72] Because the ordinance favored nonprofit and religious organizations over other forms of non-commercial speech, the court held the restriction content based.[73]

Similarly, a New York City law requiring street vendors to obtain a license for the sale of items on city sidewalks was found not to be narrowly tailored or to provide sufficient alternative channels for communication.[74] The restriction capped the total number of licenses available to sidewalk vendors citywide.[75] After finding that the works being sold by sidewalk vendors were subject to First Amendment protection[76] and that the traditional public forum analysis applied to the case,[77] the Second Circuit found that the license requirement and cap were not narrowly tailored to the city's goals of reducing congestion and ensuring clear passage on the sidewalks.[78] The court reasoned that the city could have employed time, place, and manner restrictions to ensure clear passage on the sidewalks while still offering vendors the opportunity to obtain a license, and that exceptions to the licensing cap called into question the rule's tailoring.[79] The court also found that the restriction did not provide ample alternatives, and that the sale of artwork on the street was more accessible than sales in galleries or elsewhere.[80]

To the extent local governments prohibit the sale or display of commercial products on sidewalks or other public properties, exceptions made for non-commercial speech, including non-commercial artwork, should not distinguish among forms of non-commercial speech. Moreover, an outright ban or severe limitations on the display of non-commercial artwork in traditional public fora, such as streets or sidewalks, is likely to fail the narrow tailoring part of the intermediate scrutiny test. Time, place, and manner restrictions are permissible where necessary to ensure safe passage for pedestrians along public sidewalks, or to limit traffic congestion along public streets. Additionally, where the regulation of artwork is taking place in a limited or nonpublic forum,

restrictions and prohibitions can be much broader, so long as they are viewpoint neutral.

Government Selection of Artwork for Public Property. Government agencies, from federal agencies to local governments, often beautify public properties through the use of artwork, including murals, sculpture, and other works of art. In some cases, these works of art are commissioned by the government, and in other cases, they are selected through an artwork selection process. Generally, the government has wide latitude to choose artwork for government properties and to relocate or remove that artwork in the event the government chooses to redevelop or otherwise modify government properties.

Cases addressing questions of government acquisition and placement of artwork have generally held that artwork acquired by the government for display on public property becomes the property and expression of the government,[81] or alternatively, that the government's acquisition and display of artwork creates a nonpublic forum, where the acquisition process need only be viewpoint neutral and reasonable.[82] One court found that a sculpture located on the grounds of a federal government building constituted the expression of the government, and could be relocated freely without the consent of the artist.[83] That court additionally found that even if the sculpture's location had been a public forum, the sculpture's relocation was a time, place, and manner restriction because the government's purpose in relocating the sculpture was related to free passage of pedestrians on the plaza where the sculpture was located.[84] Other cases have held that government acquisition of artwork for display in public buildings or galleries creates a nonpublic forum, and government decisions to reject or remove artwork that could be offensive or critical are permissible when the purposes of the forum are undermined by the artwork's offensive or critical nature.[85]

The foregoing judicial approach to government control of artwork on government property was recently reaffirmed by the First Circuit in the case of *Newton v. LePage*.[86] There, the Maine labor department sought to remove a mural from a waiting room within its offices on the grounds that the mural did not depict evenhanded treatment of organized labor issues. In its analysis, the court did not rely on the public forum doctrine, but rather on the government speech doctrine, which was articulated by the Supreme Court just three years earlier.[87] Although the court did not conclude that the mural was government speech, it nonetheless deferred to the government's choice to remove the mural and concluded that there was no First Amendment violation in so doing.[88]

The government speech doctrine, which carves out from First Amendment application any speech promulgated by the government, lends additional support to local governments

engaged in the selection and ownership of artwork on public property.[89] With the adoption and expansion of the government speech doctrine by the Supreme Court, it can be expected that government decisions regarding the acquisition, display, relocation, and removal of works of art on public property will be subject to even lesser scrutiny.[90] The Supreme Court has found that donated monuments in a public park constitute government speech,[91] as do specialty license plates.[92] Given this recent case law, artwork selected by the government for display on public property is likely to be considered by a court to be government speech.

Conclusion

This article's review of artwork through a First Amendment lens occurs on the frontier of constitutional jurisprudence. Yet as First Amendment protections expand, we may be witnessing an expansion of First Amendment applicability that may sweep up previously unchecked governmental controls on artwork and architecture. Local governments are therefore advised to carefully consider how their zoning codes and other regulations affect the ability of artists and architects to speak through their work and to ensure that local efforts to make regulations content neutral and otherwise consistent with the First Amendment preserve free speech rights of all speakers.

Endnotes

1. For purposes of this article, "art" or "artwork" primarily means any form of physical artistic media, including for example, print media such as painting or photography, or sculpture, carpentry or other three-dimensional forms of artwork.

2. *See, e.g.*, Cohen v. California, 403 U.S. 15, 25 (1971).

3. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (music); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557–58 (1975) (theater); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952) (film); Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1060 (9th Cir. 2010) (tattooing); White v. City of Sparks, 500 F.3d 953, 956 (9th Cir. 2007) (paintings); Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1995) (finding visual art to be entitled to First Amendment protection on par with written or spoken words).

4. *Id.*

5. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557, 569 (1995).

6. Roth v. United States, 354 U.S. 476, 485 (1957).

7. Miller v. California, 413 U.S. 15, 24 (1973).

8. *Id.* at 36.

9. New York v. Ferber, 458 U.S. 747, 764 (1982).

10. *See* Kois v. Wisconsin, 408 U.S. 229, 231–32 (1972).

11. *See* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 331–32 (7th Cir. 1985).

12. *See* United States v. Stevens, 559 U.S. 460, 472 (2010).

13. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 236 (2002).

14. *See* Baker v. Glover, 776 F. Supp. 1511, 1515 (M.D. Ala. 1991).

15. *See* Nelson v. Streeter, 16 F.3d 145, 150 (7th Cir. 1994).

16. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

17. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760–61 (1985).

18. Snyder v. Phelps, 562 U.S. 443, 453, 458 (2011).

19. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).

20. *See, e.g.*, Hunt v. City of Los Angeles, 638 F.3d 703 (9th Cir. 2011); White v. City of Sparks, 500 F.3d 953 (9th Cir. 2007); Mastrovincenzo v. City of New York, 435 F.3d 78, 90 (2d Cir. 2006).

21. *City of Sparks*, 341 F. Supp. 2d at 1139.

22. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 496–98 (1996).

23. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 506 (1981).

24. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

25. *See* Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 473–74 (1989).

26. 135 S. Ct. 2218 (2015).

27. *See id.* at 2226–27.

28. *See* Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989).

29. *See Reed*, 135 S. Ct. at 2231.

30. *Cent. Hudson*, 447 U.S. at 564.

31. *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223–24 (1990); Mahaney v. City of Englewood, 226 P.3d 1214, 1219 (Colo. Ct. App. 2009).

32. *See* Buckley v. Valeo, 424 U.S. 1, 40–41 (1976).

33. *See* Virginia v. Hicks, 539 U.S. 113, 118–19 (2003).

34. *Reed*, 135 S. Ct. at 2226–27.

35. *See FW/PBS*, 493 U.S. at 223–24; *Mahaney*, 226 P.3d at 1219.

36. *See* Grayned v. City of Rockford, 408 U.S. 104, 108–09, 114–15 (1972).

37. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994).

38. 644 F.3d 728 (8th Cir. 2011).

39. *Id.* at 1036.

40. Cent. Radio Co., Inc. v. City of Norfolk, 811 F.3d 625, 629 (4th Cir. 2016).

41. *Id.* at 633 (quoting *Reed*, 135 S. Ct. at 2227).

42. *Id.* at 634.

43. 150 F. Supp. 3d 910 (N.D. Ill. 2015).

44. *Id.* at 920.

45. *See Reed*, 135 S. Ct. at 2232; *id.* at 2233 (Alito, J., concurring).

46. *See, e.g.*, Serra v. Gen. Svcs. Admin., 847 F.2d 1045, 1047 (2d Cir. 1988).

47. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969); *but see* Tipp City v. Dakin, 929 N.E.2d 484, 502 (Ohio Ct. App. 2010).

48. *See, e.g.*, Cent. Radio Co., Inc. v. City of Norfolk, 811 F.3d 625, 633 (4th Cir. 2016).

49. *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014).

50. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507–08 (1981).

51. *See, e.g.*, Serra v. Gen. Servs. Admin., 847 F.2d 1045, 1047 (2d Cir. 1988).

52. 597 F.3d 323 (5th Cir. 2010), *cert. den.*, 562 U.S. 837 (2010).

53. *Id.* at 327–28.

54. *Id.* at 328.

55. *See* Kasky v. Nike, Inc., 45 P.3d 243, 253–55 (Cal. 2002).

56. City of Indio v. Arroyo, 143 Cal. App. 3d 151, 154 (1983).

57. Complete Angler, LLC v. City of Clearwater, 607 F. Supp. 2d 1326, 1328 (M.D. Fla. 2009).

58. Tipp City v. Dakin, 929 N.E.2d 484, 494 (Ohio Ct. App. 2010).

59. *Id.*

60. *Id.*

61. Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 370 (4th Cir. 2012).

62. Vincenty v. Bloomberg, 476 F.3d 74, 84 (2d Cir. 2007).

63. *Id.* at 87.

64. *See, e.g.*, Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1127–28 (7th Cir. 1995); Sherwin-Williams Co. v. City and Cnty. of San Francisco, 857 F. Supp. 1355, 1371 (N.D. Cal. 1994).

65. *See, e.g.*, Indianapolis, Indiana's definition:

> Graffiti means any *unauthorized* inscription, word, figure, design, painting, writing, drawing or carving that is written, marked, etched, scratched, sprayed, drawn, painted, or engraved on or otherwise affixed on a component of any building, structure, or other facility by any graffiti implement, visible from any public property, the public right-of-way, or from any private property other than the property on which it exists. There shall be a rebuttable presumption that such inscription, word, figure, painting, or other defacement is unauthorized. This article does not apply to easily removable chalk markings on the public sidewalks and streets.

INDIANAPOLIS—MARION CNTY. CODE § 575-202 (2013) (emphasis added).

66. Demarest v. City of Leavenworth, 876 F. Supp. 2d 1186, 1195, 1196–97, 1202-03 (E.D. Wash. 2012).

67. Clear Channel Outdoor, Inc. v. City of Portland, 262 P.3d 782, 165–66 (Or. Ct. App. 2011).

68. *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 44 (1983).

69. *See id.* at 45–46.

70. *See* Cornelius v. N.A.A.C.P. Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 808 (1985).

71. Celli v. City of St. Augustine, 214 F. Supp. 2d 1255 (M.D. Fla. 2000).

72. *Id.* at 1258–60.

73. *Id.*

74. Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996).

75. *Id.* at 692.

76. *Id.* at 696.

77. *See id.* at 696–97.

78. *Id.* at 698.

79. *Id*.

80. *Id.*

81. *See Serra*, 847 F.2d at 1049.

82. *See* Sefick v. Gardner, 164 F.3d 370 (7th Cir. 1998).

83. *Serra*, 847 F.2d at 1049.

84. *Id.* at 1049–50.

85. *See Sefick*, 164 F.3d at 372–73.

86. 700 F.3d 595 (1st Cir. 2012).

87. *Id.* at 602.

88. *Id.* at 602–03.

89. *Serra*, 847 F.2d at 1049.

90. *See* Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015).

91. Pleasant Grove City v. Summum, 555 U.S. 460, 470–72 (2009).

92. *Walker*, 135 S. Ct. at 2249.