

REFUSING TO DRAW THE LINE: A SPEECH-PROTECTIVE RULE FOR ART VENDING CASES

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“Calling it art does not give it some sacred status.”

~ Former New York City Parks & Recreation Commissioner¹

“Artists will be everywhere. No one’s going to stop it. It’s like asking us not to breathe.”

~ New York City Street Artist²

“You can’t say something’s art or not art anymore. That’s all finished.”

~ Arthur Danto³

INTRODUCTION

Courts and legislators have long expressed uneasiness over extending First Amendment protection to “art”⁴ sold on city streets.⁵ Granting such protection to art or “visual-expressive works” sold on

1. Richard Perez-Pena, *Artists Win Court Battle to Sell Their Works Outside Museum*, N.Y. TIMES, Dec. 28, 2001, at D2 (quoting Former New York City Parks & Recreation Commissioner Henry J. Stern on city’s effort to regulate art vendors outside the Metropolitan Museum of Art without a city vending license).

2. Daniel E. Slotnik, *Artists and Vendors Bristle at Proposed Limits in Parks*, N.Y. TIMES CITY ROOM BLOG (Apr. 5, 2010, 2:40 PM), <http://cityroom.blogs.nytimes.com> (quoting artist Noel Donaldson in response to proposed restrictions to cut the number of art vendors in city parks).

3. Amei Wallach, *Is It Art? And Who Says So?*, N.Y. TIMES, Oct. 12, 1997, at B36 (citing Arthur Danto, art critic for *The Nation*).

4. This Note purposively refrains from offering a definition of art. As used in this paper, the term “art” is meant to include, but not be limited to, works that would be accepted by the community as such and/or works that would be widely recognized by the public as such. See generally Amy Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L. J. 1359, 1359 n.3 (1990).

the street could immunize a vast array of merchandise from the city's vending laws, including its licensing requirements. One court feared an onslaught of applicants for vending licenses "who would be possessed of the acumen associated with the followers of Mercury rather than applicants who are true artists illuminated by the aura of Apollo."⁶ The Government argues that vending laws must be applied to all merchandise to further the city's safety and commercial interests,⁷ and thus has prosecuted vendors who persist in selling their works without a license.⁸ Vendors have fought back with First Amendment challenges that claim the restrictive vending laws, which cap the number of licenses at 853 in New York City, violate their right to free speech: that is, their right to sell art.⁹

Art vending cases have thus pitted a deep-seated impulse to protect art against the need to prevent all kinds of merchandise from flooding the streets. The intractable question of how to define and protect art has divided the courts, even those within the same circuit, leading to a hodgepodge of different approaches.¹⁰ The Supreme Court has declined to address the issue directly,¹¹ leaving lower courts to work out how the Court's vague assertions of art's First Amendment value should be applied to the thousands of vendors seeking to sell their works—which range from original paintings to refrigerator magnets—in congested city spaces.

5. This Note will only address works sold on the street, not works that are merely displayed on the street without the expectation of some commercial exchange.

6. *S.F. St. Artists Guild v. Scott*, 112 Cal. Rptr. 502, 505–06 (Cal. Ct. App. 1974).

7. *See, e.g., Mastrovincenzo v. City of New York*, (*Mastrovincenzo II*), 435 F.3d 78, 100 (2d Cir. 2006) (describing New York City's stated objective of "reducing sidewalk and street congestion" through licensing requirements); L.A., CAL., MUN. CODE § 42.15 (2010) (unregulated vending harms Venice Beach boardwalk's commercial life "by eroding the City's tax revenues due to unfair competition [with local merchants], and by offering additional opportunity for the sale of stolen, defective or counterfeit merchandise").

8. *See, e.g., People v. Ndiaye*, 887 N.Y.S.2d 832, 833 (N.Y. Crim. Ct. 2009) (defendant charged for unlicensed sale of jewelry on city street); *People v. Franqui*, 891 N.Y.S.2d 617, 618 (N.Y. Crim. Ct. 2009) (defendant charged for selling "more than ten pieces of costume jewelry" without vendor's license); *People v. Milbry*, 530 N.Y.S.2d 928, 928 (N.Y. Crim. Ct. 1988) (defendant charged for selling floral pastel paintings on city street without a license).

9. *See, e.g., Bery v. City of New York* (*Bery I*), 906 F. Supp. 163 (S.D.N.Y. 1995) (artists seeking to enjoin enforcement of city vending regulation against them); *Christensen v. Park City Mun. Corp.* 554 F.3d 1271 (10th Cir. 2009) (individual artist seeking damages and declaratory relief from city and city officials after arrest for selling prints without vending license).

10. *See* discussion *infra* Part II.

11. *See* discussion *infra* Part I.A.

Part I identifies the two conflicting interests at stake in the dispute over art vending: the vendor's claimed First Amendment right to sell art, and the government's interest in regulating sales in public spaces. Part II then examines the tests employed by the courts to negotiate these competing interests, and describes the art that qualifies as "protected speech" under the tests and the art that does not. In Part III, the Note deconstructs the theories of art's First Amendment value proffered thus far by scholars and the courts. The analysis establishes that, at present, no one has successfully articulated the First Amendment value of art. This Note maintains that, absent a sound theory, courts and legislatures will be unable to devise a rule that protects art as distinct from other merchandise in the vending context.

Drawing on the absence of a theory for art's First Amendment value, Part IV argues that general vending regulations must be neutral as to all merchandise. Thus, rather than propose yet another test that seeks to distinguish protected art from other goods, this Note sets forth a speech-protective rule that does not rely on broad categories or case-by-case determinations of what art is. Specifically, the Note proposes that the city regulate *all* non-written works vended in public spaces in the same content- and form-neutral manner. The regulation would likely take the form of a single lottery system for general vending permits,¹² with an exemption only for written matter in line with the existing regime.¹³ The regulation would grant all vendors of non-written matter equal access to the licensing system, rather than privileging only those who are judged to be selling art.

I.

THE FIRST AMENDMENT AND GOVERNMENT INTERESTS AT STAKE

Part I sets forth the two opposing interests at stake in art vending. First, vendors claim that they are selling art and that a licensing regime that forbids such a sale violates the vendor's freedom of speech. Second, the government has an interest in controlling commerce on

12. The vending regulations established by the New York City Administrative Code distinguish between food vendors and "general vendors." *See* N.Y.C., N.Y., ADMIN. CODE § 20-452 (2009).

13. *See* N.Y.C., N.Y., ADMIN. CODE § 20-453 (2010). The Code provides, "It shall be unlawful for any individual to act as a general vendor without having first obtained a license in accordance with the provisions of this subchapter, except that it shall be lawful for a general vendor who hawks, peddles, sells or offers to sell, at retail, only newspapers, periodicals, books, pamphlets or other similar written matter, but no other items required to be licensed by any other provision of this code, to vend such without obtaining a license therefor." *Id.*

city streets, particularly in population-dense areas such as New York City and San Francisco.

A. *The First Amendment Basis for Protecting Art Vending*

Art's uncertain status under the First Amendment has complicated the dispute over vending. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press" ¹⁴ The Supreme Court has implicitly recognized art as a category of speech protected by the First Amendment. In *Miller v. California*, the Court addressed whether the sale of obscene material—specifically books containing explicit pictures and drawings—merited First Amendment protection. While finding the materials in question did not merit such protection, the Court stated in dicta that "in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression."¹⁵ In another context, the Court has described the abstract, apolitical work of Jackson Pollock as "unquestionably shielded" under the First Amendment.¹⁶ The Court has also noted in dicta that "pictures, films, paintings, drawings, and engravings" generally merit First Amendment protection.¹⁷ And yet, the Court has never offered a definition of art for First Amendment purposes, nor has it fleshed out exactly why art merits First Amendment protection.¹⁸ Furthermore, in *Kaplan v. California*, the Court appears to have relegated art to a lower place than verbal expression in the First Amendment hierarchy.¹⁹ Absent any governing theory of

14. U.S. CONST. amend. I.

15. *Miller v. California*, 413 U.S. 15, 22–23 (1973).

16. In *Hurley v. Irish-American Parade*, 515 U.S. 557, 569 (1995), the Court refers to "the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll."

17. *Kaplan v. California*, 413 U.S. 115, 120–21 (1973).

18. In *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989), the Court asserted that "music," by definition, is a "form of expression and communication" and thus merits First Amendment protection. The Court has not made a similarly broad assertion of art's First Amendment protection. The decision does, however, suggest that appeals to the emotions—not just the intellect—may carry First Amendment value. *See id.* at 790. *Ward* addressed municipal noise regulation on music that may be analogized to the regulations on visual expression at issue here. *See id.*

19. *Kaplan*, 413 U.S. at 119 (finding books have a preferred place over pictorial representations in hierarchy of values). Some lower decisions have suggested a similar hierarchy. *See S.F. St. Artists Guild v. Scott*, 112 Cal. Rptr. 502, 505 (Cal. Ct. App. 1974) (finding that vendor's original paintings, sculptures, and beadwork were not "so likely to communicate expression of the type of ideas held sacred by the First Amendment as to vest them with such broad rights as are held by pamphleteers or purveyors of newspapers").

art's First Amendment value, lower courts have little guidance when faced with First Amendment challenges to vending regulations.

The commercial, public nature of art vending may also weigh in the vendors' favor. The Court has clearly stated, in other contexts, that profiting from the sale of speech does not eliminate the First Amendment value of that speech.²⁰ Moreover, the fact that art vending occurs in city streets and public parks enhances the potential First Amendment interests at stake, as those sites "have immemorially been considered a rightful place for public discourse."²¹ The Court has made clear, however, that even in traditional public forums such as streets and parks "the government may impose reasonable restrictions on the time, place, or manner of protected speech," so long as the restrictions are content-neutral, are narrowly tailored to satisfy a significant government interest, and leave ample alternative means of communication.²² The regulations "may not delegate overly broad licensing discretion to a government official," or "sweep too broadly, penalizing a substantial amount of speech that is constitutionally protected."²³

Drawing from this precedent, lower courts and scholars have identified a legitimate constitutional interest at stake in the art vending cases—the First Amendment right to sell art on public property.²⁴ Yet, the absence of Supreme Court jurisprudence on the First Amendment value of art, particularly art *sold* on public property, has left leeway for city officials to argue for extensive vending restrictions to further government interests.

B. *The Government's Interest in Regulating Art Vending*

City vending laws have historically regulated the sale of services and goods, including art, on the streets and in the parks of densely

20. See *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n. 5, 768 (1988) ("Of course, the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away."); *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.").

21. See *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) ("Streets and sidewalks are 'prototypical' examples of public fora, and have immemorially been considered a rightful place for public discourse."); see also *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public . . .").

22. *Ward*, 491 U.S. at 791 (internal citation and quotation omitted).

23. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

24. This Note will not consider visually-expressive works that are merely displayed in public spaces without the expectation of any commercial transaction.

populated cities. In New York City, the General Vendors Law (Vendors Law), enacted in 1977,²⁵ requires that all general vendors acquire a license before selling non-food goods or services in public spaces.²⁶ In 1979, the Vendors Law was amended to restrict the total number of merchandise licenses available to 853, with an exception for veterans.²⁷ The Vendors Law was also amended to exempt “newspapers, periodicals, books, pamphlets or other similar written matter” from licensing requirements altogether.²⁸ The City purportedly added the written matter exception to adhere to First Amendment principles;²⁹ it provided no such carve-out for visually expressive works.

When the City Council established the limit of 853 general merchandise licenses in 1979, it reasoned that “the business of general vending is intimately connected with problems of congestion on streets and sidewalks, and . . . an increase in the number of general vendors would worsen those conditions.”³⁰ Cities have also cited the need to maintain a tax base and minimize competition with established local businesses as additional reasons to place restrictions on the number of vendors.³¹ In 1993, New York City estimated that illegal sidewalk vendors cost the city as much as \$300 million per year.³² New rules promulgated by the New York City Department of Parks & Recreation (2010 City Parks Rules) to limit the number of expressive matter vendors in City parks cite concern for the public’s ability to experience and enjoy the parks in other ways.³³ The Parks & Recrea-

25. N.Y.C., N.Y., ADMIN. CODE § B32-491.0 (1977).

26. N.Y.C., N.Y., ADMIN. CODE § 20-453 (2010).

27. See *Bery v. City of New York*, (*Bery II*), 97 F.3d 689, 692 (2d Cir. 1996) (discussing N.Y.C., N.Y., LOCAL LAW 50, § 1 (1979)).

28. N.Y.C., N.Y., ADMIN. CODE § 20-453 (2010). One of the authors of the 1982 carve-out has since described the amendment as “the law of unintended consequences.” Edward C. Wallace, Op-Ed., *Put Vendors in Their Place*, N.Y. TIMES, Apr. 16, 2010, at A17.

29. N.Y.C., N.Y., LOCAL LAW 33, § 1 (1982).

30. *Bery v. City of New York* (*Bery I*), 906 F. Supp. 163, 168 (S.D.N.Y. 1995) (quoting N.Y.C., N.Y., LOCAL LAW 50, § 1 (1979)).

31. L.A., CAL., MUN. CODE § 42.15 (2010) (stating that unregulated vending harms Venice Beach boardwalk’s commercial life “by eroding the City’s tax revenues due to unfair competition [with local merchants], and by offering additional opportunity for the sale of stolen, defective or counterfeit merchandise”).

32. Ronald Sullivan, *Crackdown on Vendors in the Streets*, N.Y. TIMES, Apr. 13, 1993, at B3.

33. See *Notice of Adoption, Revision of Parks Department Rules*, THE CITY REC. (N.Y.C.), Jun. 18, 2010, at 1651–55. The Court has recognized the City’s “substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation.” *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (addressing regulations on sound amplification in a New York City Central Park band shell).

tion Commissioner also expressed fear that vendors transform the city's parks into "year-round flea markets."³⁴ Courts faced with art vending cases have recognized these governmental interests as legitimate and significant.³⁵

The First Amendment issue arises when restrictions on vending constitute an effective bar on the sale of visual expression that qualifies as protected speech. The New York City-imposed limit of 853 licenses for general vendors, set in 1979, remains intact today.³⁶ The waiting list for a vending license is now in the thousands, an estimated twenty-five years long;³⁷ it has been closed to new applications since 1993.³⁸ It is reported that an underground market has developed for general vendors licenses.³⁹ Vendors may also attempt to sell their works without licenses, but they risk arrest and criminal prosecution.⁴⁰ The City may also seize their goods.⁴¹ The City has failed to increase

34. David W. Chen, *New York Seeks Limits on Art Vendors in Parks*, N.Y. TIMES, Apr. 16, 2010, at A13.

35. See, e.g., *Mastrovincenzo v. City of New York (Mastrovincenzo II)*, 435 F.3d 78, 100 (2d Cir. 2006) ("There can be no doubt that New York City's avowed objectives in enforcing its licensing requirement, such as reducing sidewalk and street congestion in a city with eight million inhabitants, constitute 'significant governmental interests.'"). For a critical analysis of the City's cited safety concerns, see Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Plaintiffs-Appellants at 25–26, *Bery v. City of New York (Bery II)*, 97 F.3d 689 (2d Cir. 1996) (No. 95-9089) (arguing that record provides scant evidence of safety problems when art vendors were permitted to sell without licenses).

36. This Note does not address the legitimacy of this precise numerical limit or whether any empirical evidence supports it.

37. Urban Justice Center, *Street Vendors Unite: Recommendations for Improving the Regulations on Street Vending in New York City 1*, <http://www.gothamgazette.com/VendorsUnite.pdf> (last visited May 1, 2010); see *Notice of Opportunity to Comment on Proposed Rule*, THE CITY REC. (N.Y.C.), Mar. 24, 2010, at 712; *General Vendor License*, N.Y.C. DEP'T OF CONSUMER AFFAIRS, <http://www.nyc.gov/html/dca/html/licenses/094.shtml> (last visited May 10, 2010) (waiting list for general vendors license is closed to new non-veteran applicants).

38. Urban Justice Center, *supra* note 37, at 1.

39. The black market is thriving for food vendor permits, which are also capped. Licensed food vendors pay the City 200 dollars for the permit and then flip them on the black market for over 6,000 dollars. See Sean Basinski, Interview, *Answers about New York Street Vendors*, N.Y. TIMES CITY ROOM BLOG (Oct. 7, 2009, 10:49 AM), <http://cityroom.blogs.nytimes.com>.

40. See, e.g., *S.F. St. Artists Guild v. Scott*, 112 Cal. Rptr. 502, 504 (Cal. Ct. App. 1974); *People v. Franqui*, 891 N.Y.S.2d 617 (N.Y. Crim. Ct. 2009); *People v. Ndiaye*, 887 N.Y.S.2d 832 (N.Y. Crim. Ct. 2009).

41. See *Mastrovincenzo v. City of New York (Mastrovincenzo II)*, 435 F.3d 78, 84 (2d Cir. 2006) (noting that when a non-exempt vendor seeks to sell his wares without a license, "[h]e may be charged with a misdemeanor punishable by a fine of between \$250 and \$1,000, and/or imprisonment for up to three months, and his wares may be seized and forfeited").

the number of licenses available, likely fearing a further rise in the number of both licensed and non-licensed vendors.

The City has also limited the specific sites where artists and vendors may sell their wares within parks and squares due to site-specific congestion. In an ironic juxtaposition of high and low art, one prosecution targeted art vendors selling in front of the Metropolitan Museum of Art.⁴² Disputes have also arisen over art vending at the High Line, a space meant to celebrate the interweaving of art, design, and public space.⁴³ The 2010 City Parks Rules drastically reduce the number of expressive material vendors in certain areas of city parks deemed high-traffic areas.⁴⁴

In discussing efforts to regulate art vendors in front of the Metropolitan Museum of Art, former New York City Parks & Recreation Commissioner Henry J. Stern expressed his belief that “the untrammelled and unregulated sale of merchandise on city streets is inappropriate, and calling it art does not give it some sacred status.”⁴⁵ Under a fair reading of the Supreme Court’s muddled jurisprudence, however, calling it art may indeed bestow merchandise with the “sacred status” of protected speech.

Thus, the art vending issue presents a conflict between two legitimate interests: a city’s practical need to regulate commercial activity on the street and the vendor’s First Amendment right to sell expressive goods on the street. At the root of this conflict are the deeper, inextricable questions that so often plague intersections between the art world and the law: what is art, and why does it have First Amendment value? The competing interests at stake in the art vending cases push these two central questions to the forefront.

42. *People v. Balmuth*, 681 N.Y.S.2d 439, 440–41 (N.Y. Crim. Ct. 1998).

43. See Lincoln Anderson, *High Line Arrest Takes Art Argument to Another Level*, 79 THE VILLAGER 26, Dec. 2–8, 2009, available at http://www.thevillager.com/villager_344/highlinearrest.html/.

44. See *Notice of Adoption, Revision of Parks Department Rules*, THE CITY REC., Jun. 18, 2010, at 1651–55. Under the new rules, expressive matter vendors are restricted to certain spots, which are allocated on a first-come, first-serve basis. The rules allow for eighteen spots daily in Union Square Park, with forty additional spots on Tuesdays, Thursdays, and Saturdays. The rules allow for nine vendors in Battery Park, five vendors on the High Line, and sixty-eight vendors in certain areas, such as Central Park. These limits sparked protests from artists, vendors, and local citizens. See Grace Rauh, *Art Vendors Protest Outside Parks Hearing*, NY1.COM (Apr. 23, 2010, 11:03 PM), http://www.ny1.com/1-all-boroughs-news-content/top_stories/117444/art-vendors-protest-outside-parks-hearing; Slotnik, *supra* note 2.

45. Perez-Pena, *supra* note 1.

II.

CURRENT DOCTRINE ON ART VENDING

Courts faced with art vending cases have proposed various tests to delineate art and negotiate the relative weight of its value against the governmental interests. This Part explores these tests and their ultimate inability to provide comprehensive First Amendment protection for art. Part III then explores how the inability of these tests to fully account for art stems from the unsettled question of why art has First Amendment value.

Part II first examines the Southern District of New York's decision in *Bery v. City of New York (Bery I)* and the Second Circuit's reversal (*Bery II*). In *Bery II*, the Second Circuit enjoined the application of New York City vending restrictions to vendors of four types of goods—painting, photographs, sculptures, and prints. Part II then looks at *Mastrovincenzo I* and *Mastrovincenzo II*, in which the district court and Second Circuit, respectively, attempt to work out the implications of *Bery II* beyond these four categories. Finally, this Part analyzes an art vending case from the Ninth Circuit, the only other circuit that has directly addressed the art vending issue at the appellate level.

A. *Doctrinal History of First Amendment Challenges to Vending Laws*

Only recently have courts and legislatures begun to recognize a First Amendment interest in selling art in public spaces. Up through the mid-1990s, relatively few vendors had challenged the application of vending laws to their visually expressive works under the First Amendment.⁴⁶ Art vendors who had attempted such challenges were largely unsuccessful, absent some clear political content in their works.⁴⁷ Then in 1996, the Second Circuit reversed the tide in *Bery v. City of New York (Bery II)*, a sharply disputed decision that granted broad First Amendment protection to the public sale of art in specific media.⁴⁸ Despite widespread criticism,⁴⁹ the decision continues to shape vendor law in New York and other major cities today.

46. See, e.g., *Bery v. City of New York (Bery I)*, 906 F. Supp. 163 (S.D.N.Y. 1995); *S.F. St. Artists Guild v. Scott*, 112 Cal. Rptr. 502 (Cal. Ct. App. 1974).

47. See, e.g., *Bery I*, 906 F. Supp. at 169–70 (declining protection for New York City artists seeking to sell their “apolitical” paintings on the street); *S.F. St. Artists Guild*, 112 Cal. Rptr. at 505 (withholding First Amendment protection from goods that did not involve “the expression of political, economic, religious or social tenets in a symbolic way”).

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

49. See *Kleinman v. City of San Marcos*, 597 F.3d 323, 327 (5th Cir. 2010) (summarizing criticisms by later courts).

1. *The Bery II Injunction*

In 1995, a group of visual artists sued the city of New York, arguing that the enforcement of the General Vendors Law against art vendors violated their First Amendment rights.⁵⁰ The district court denied the motion for an injunction, reasoning in part that the plaintiffs' non-political art did not "carry either words or the particularized social and political messages upon which the First Amendment places special value."⁵¹ The Second Circuit reversed in a decision that may be read as a ringing endorsement of art's status as protected speech. The court pronounced that four categories of works—paintings, photographs, sculptures, and prints—"always communicate some idea or concept" to the viewer, and thus merit full First Amendment protection.⁵²

While *Bery II* remains binding precedent within the Second Circuit, a number of courts have criticized the decision for simultaneously overprotecting and under-protecting art.⁵³ As one court reasoned, "[c]onceivably, not every item of painting, photograph, print or sculpture that may be offered for sale on City sidewalks . . . is necessarily so expressive as to categorically merit First Amendment protection, but at the same time some objects outside those four categories may also be sufficiently expressive."⁵⁴ The decision also provided little guidance for how courts should handle works in other media.

2. *Mastrovincenzo*

The question of whether works outside of *Bery II*'s four categories may qualify for First Amendment protection arose in *Mastrovincenzo*.⁵⁵ The plaintiffs designed and vended hand-painted clothing featuring designs, words, and numbers in a "graffiti style."⁵⁶ Given the City's closed application list for vending permits, the plaintiffs were effectively barred from selling their works on the street.

50. *Bery I*, 906 F. Supp. at 164 (S.D.N.Y. 1995).

51. *Id.* at 169.

52. *Bery II*, 97 F.3d at 696 (emphasis added).

53. See, e.g., *Mastrovincenzo v. City of New York (Mastrovincenzo II)*, 435 F.3d 78, 93 (2d Cir. 2006) ("whatever may be said of *Bery*'s analytic framework . . ."); *Christensen v. Park City Mun. Corp.* 554 F.3d 1271, 1276 (10th Cir. 2009) (expressing uncertainty over whether "*Bery*, or some close equivalent, is an accurate statement of the law").

54. *Mastrovincenzo v. City of New York (Mastrovincenzo I)*, 313 F. Supp. 2d 280, 294 n.11 (S.D.N.Y. 2004).

55. See *id.* at 280.

56. *Id.* at 290.

Mastrovincenzo did nonetheless sell his work and was arrested twice.⁵⁷ As in *Bery*, the *Mastrovincenzo* plaintiffs challenged the application of the Vendors Law to their works.⁵⁸ The City argued that the plaintiffs' works were "aesthetically pleasing," but ultimately lacked the communicative or expressive qualities that merit First Amendment protection.⁵⁹

The district court disagreed. It found that the plaintiffs' works merited First Amendment protection and granted the preliminary injunction request. The court reached its First Amendment conclusion through a five-factor inquiry that considered: "the individualized creation of the item by the particular artist, the artist's primary motivation for producing and selling the item, the vendor's bona fides as an artist, whether the vendor is personally attempting to convey his or her own message, and more generally whether the item appears to contain any elements of expression or communication that objectively could be so understood."⁶⁰ The five-factor list was not meant to be exclusive—the court noted that "myriad factors" would guide any determination of whether a work is sufficiently expressive to receive First Amendment protection.⁶¹ The City appealed.⁶²

B. Second Circuit: *Bery II* and the Dominant Purpose Inquiry

In *Mastrovincenzo II*, the Second Circuit revisited the *Bery II* decision and set in place the present framework for analyzing restrictions on art vending. While strongly resisting *Bery II*'s reasoning, the court kept in place the carve-out for paintings, photographs, sculptures and prints. It then established a central inquiry for all other visual works: was the work's "dominant purpose" expressive or utilitarian? Thus, in determining whether a work merits First Amendment protection, a court should ask the following:

(1) "whether the sale of plaintiffs' goods is *presumptively* entitled to First Amendment protection" under *Bery II*;

(2) if not, "their sale must be classified as *potentially* expressive";

57. *Id.* at 282.

58. *Id.* at 282–83.

59. *Id.* at 291.

60. *Id.* at 292.

61. *Id.*

62. *Mastrovincenzo v. City of New York (Mastrovincenzo II)*, 435 F.3d 78 (2d Cir. 2006).

(3) where the court finds that the item has some expressive features, “whether that item also has a common non-expressive purpose or utility”;

(4) if the item does have such a common non-expressive purpose or utility, “whether that non-expressive purpose is dominant or not.”⁶³

As for the fourth prong, the court left the question of “dominance” to the discretion of the trial courts, but provided three guiding considerations: “whether an artist’s stated ‘motivation for producing and selling [an] item’ is his desire to communicate ideas”; if the vendor is not the artist, whether the vendor “purports, through the sale of goods, to be engaging in an act of self-expression rather than a mere commercial transaction”; and finally, “the relative importance of the items’ expressive character” may be assessed “by comparing the prices charged for the decorated goods with the prices charged for similar non-decorated goods.”⁶⁴

Thus, rather than attempt a comprehensive definition of art, the Second Circuit introduces the expressive-versus-utilitarian inquiry as a proxy for the First Amendment value that the Supreme Court has seemingly read into art. The inquiry shifts the court’s focus away from the medium of the work, a poor indicator of artistic expression, and toward the work’s purpose, in line with the general view of the First Amendment as protecting the communication of ideas.⁶⁵

The Second Circuit test, however, remains highly problematic. While the court continued *Bery II*’s grant of full First Amendment protection to select mediums, it held that the City’s vending regime comported with First Amendment principles as applied to predominately expressive works that fell outside of those categories.⁶⁶ It thus created a counterintuitive result where a vendor selling mass-produced

63. *Mastrovincenzo II*, 435 F.3d at 93–95 (emphasis added). Subsequent courts have embraced this “dominant purpose” inquiry. *See, e.g.,* *Hunt v. City of Los Angeles*, 601 F. Supp. 2d 1158, 1178 (C.D. Cal. 2009) (withholding First Amendment protection where circumstances suggested that “plaintiffs’ sale of goods was done primarily to make a living, as opposed to communicate a message”).

64. *Mastrovincenzo II*, 435 F.3d at 96–97.

65. *See* *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 184 (1973) (“[T]he public have strong First Amendment interests in the reception of a full spectrum of views—presented in a vigorous and uninhibited manner—on controversial issues of public importance. And, as we have seen, it has traditionally been thought that the most effective way to insure this ‘uninhibited, robust, and wide-open’ debate is by fostering a ‘free trade in ideas’ by making our forums of communication readily available to all persons wishing to express their views.”); *Red Lion Broad. Co. v. Fed. Comm’n Comm.*, 395 U.S. 367, 388–90 (1969) (“It is the right of the public to receive . . . ideas . . . which is crucial here.”).

66. *See Mastrovincenzo II*, 435 F.3d at 100.

photographs receives full First Amendment protection, while a vendor selling original engravings is forced to wait for an essentially unobtainable license. The assumption that the “utilitarian” and the expressive can never coexist also presents problems for post-modern art that incorporates or consists of utilitarian objects and becomes “art” only through recognition of this self-commentary.⁶⁷ The tradition can be traced back to Marcel Duchamp’s “readymades.” As early as 1913, the French artist was creating works of art from manufactured objects such as a urinal and mounted bicycle.⁶⁸ More recently, the “Art Car” designed by Jeff Koons, one of the highest-selling contemporary artists, reflects a blurring between the utilitarian and art as it is traditionally understood.⁶⁹ Koons decorated the 2010 E92 BMW M3 racecar with a frenzy of colored stripes, to reflect the car’s “brutal energy.”⁷⁰ In addition to competing at the 24-hour Le Mans endurance race, the Art Car has been placed on display at various cultural centers.⁷¹

The *Mastrovincenzo* test also presents practical problems. While aimed at providing a more workable set of guidelines for “policemen on the beat,”⁷² the test has failed to substantially clarify what qualifies as art or predominately expressive material. According to the City, police continue to complain that the vending laws grant them insufficient authority over street peddlers or are “too complicated.”⁷³ Dis-

67. The Fifth Circuit invoked the dominant purpose test to deny protection from a junk car painted with anti-war messages. See *Kleinman v. City of San Marcos*, 597 F.3d 323, 327 (5th Cir. 2010).

68. *Readymade*, TATE, <http://www.tate.org.uk/collections/glossary/definition.jsp?entryId=239> (last visited Sept. 13, 2010).

69. Linda Yablonsky, *Jeff Koons, Car Painter*, N.Y. TIMES MAGAZINE BLOG (Apr. 9, 2010, 2:58 PM), <http://tmagazine.blogs.nytimes.com/2010/04/09/artifacts-jeff-koons-car-painter/>.

70. *Id.*

71. The car has been displayed in the United States at the Bechtler Museum of Modern Art. See *Bechtler Museum of Modern Art to Display BMW Art Car*, CHARLOTTE CENTER CITY PARTNERS (May 3, 2010), <http://www.charlottecentercity.org/news/article/221/bechtler-museum-of-modern-art-to-display-bmw-art-car/>. The car has also been displayed at the Pompidou Centre in Paris, France. See Colum Wood, *BMW M3 GT2 Art Car Unveiled by Designer Jeff Koons in Paris, Ready to Race at Le Mans*, AUTOGUIDE.COM (June 2, 2010), <http://www.autoguide.com/auto-news/2010/06/bmw-m3-gt2-art-car-unveiled-by-designer-jeff-koons-in-paris-ready-to-race-at-le-mans.html>.

72. *Mastrovincenzo v. City of New York (Mastrovincenzo II)*, 435 F.3d 78, 95 (2d Cir. 2006).

73. Albert Amateau, *Vendors Don't Buy Arguments for New Laws*, 21 DOWNTOWN EXPRESS 28, Nov. 21–27, 2008, available at http://www.downtownexpress.com/de_290/vendorsdont.html (quoting City Councilman Alan Jay Gerson). It is estimated that there are several thousands of unlicensed general vendors selling on the street at any given time. *Id.* The vending law still states that “[i]t shall be unlawful for any individual to act as a general vendor without having first obtained a license in accor-

content from the City and artists, together with logistical problems of enforcement, has led to proposals for change.⁷⁴ To the extent street vendors are aware of the dominant purpose test,⁷⁵ uncertainty over whether a work is predominately “expressive” or “utilitarian” likely deters vending of craft-related work.

C. Ninth Circuit: Protecting Original Paintings

The Ninth Circuit faced a similar clash between First Amendment interests and vending regulations in *White v. City of Sparks*.⁷⁶ White, a self-described artist, sold his paintings on the streets and in public parks.⁷⁷ He claimed that his depictions of nature scenes conveyed the message “that human beings are driving their spiritual brothers and sisters, the animals, into extinction.”⁷⁸ White brought a facial challenge against the City’s vendor licensing scheme, which required vendors to obtain a permit or pre-approval from the City under a First Amendment exception.⁷⁹

The Ninth Circuit ruled in favor of the artist, holding that “an artist’s sale of his original artwork constitutes speech protected under the First Amendment.”⁸⁰ The court based its finding on the fact that the painting “express[ed] the artist’s perspective,” and thus merited

dance with the provisions of this subchapter” N.Y.C., N.Y., ADMIN. CODE § 20-453 (2010). Under the *Bery II* injunction, however, § 20-453 cannot be enforced against vendors of paintings, photographs, sculpture, or print. *Bery v. City of New York (Bery II)*, 97 F.2d 689 (2d Cir. 1996). It is also reported that officials will not enforce the vending laws against vendors of T-shirts or other items with explicitly political messages. See Robert Lederman, *Vending jewelry, crafts or tee shirts in NYC: what are the actual laws and policies regarding this type of vending on the street or in NYC parks?*, KNOL (July 2009), <http://knol.google.com/k/vending-jewelry-crafts-or-tee-shirts-in-nyc#>.

74. Amateau, *supra* note 73.

75. The city vaguely advises potential street vendors that “[m]erchandise such as paintings, illustrations, photographs and books can be sold without obtaining a license as these items are protected by the First Amendment, guaranteeing free speech.” See *Street Vending*, NYC BUSINESS SOLUTIONS, http://www.nyc.gov/html/sbs/nycbiz/downloads/pdf/street_vending.pdf (last visited Sept. 13, 2010). The city does not disclose the full extent of *Bery II*’s protection, nor does it account for the *Mastrovincenzo II* court’s ruling that merchandise with sufficient “expression” may also fall under the First Amendment. *Id.* However, vocal art vendor activists, in particular Robert Lederman of A.R.T.I.S.T., have undoubtedly increased awareness about vendors’ rights. See Lederman, *supra* note 73.

76. *White v. City of Sparks*, 500 F.3d 953, 954 (9th Cir. 2007).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

First Amendment value.⁸¹ The court's idyllic description of art vending foreshadowed the holding: it described the plaintiff as "setting up an easel on a city's sidewalks and in parks and selling his paintings to passersby who take an interest in his work."⁸²

The Ninth Circuit's grant of First Amendment protection turned on the fact that the vendor was selling his own work. The decision does not spell out whether it is sufficient for the artist simply to assert that the paintings convey his or her message.⁸³ However, the court's implicit acceptance of White's purported message strongly suggests that the court "got" the paintings.⁸⁴ The court indicated that even a message about form would be sufficient.⁸⁵

The Ninth Circuit explicitly refused to address whether First Amendment protection extends to "paintings that are copies of another artist's work or paintings done in an art factory setting where the works are mass-produced by the artist or others."⁸⁶ The Ninth Circuit thus declined to address whether post-modern art that consciously plays with commercialism and mass production would merit First Amendment protection if it was sold on the street, rather than in high-end galleries. The "art factory setting" where "works are mass-produced" could just as easily refer to the "Factory" of Andy Warhol⁸⁷ as it could to a factory churning out reproductions of Edward Munch's the *Scream*, or decorative paintings for home interiors.

The Ninth Circuit's discomfort with extending protection to works that are not paintings or are not sold by the artist reflects the inherent line-drawing problems involved in these cases. It also reflects how the persistent uncertainty over *why* art merits First Amendment value has complicated efforts to resolve the art vending issue.

81. *Id.* at 956 (holding defendant's "self-expression through painting constitutes expression protected by the First Amendment").

82. *Id.* at 954.

83. The court's reliance on the party's averred artistic intent is reminiscent of the reliance spurred by the transformative inquiry in copyright cases. *See, e.g.*, *Blanch v. Koons*, 467 F.3d 244, 247 (2d Cir. 2006) (artist's affidavit indicating that he intended to "recontextualiz[e]" original work).

84. *White*, 500 F.3d at 957 (stating that plaintiff's paintings "communicate his vision of the sanctity of nature").

85. *Id.* at 956 (reasoning that a painting "may express the artist's vision of movement and color").

86. *Id.* at 956 n.4.

87. Andy Warhol's art studio was termed the "Factory." *See Andy Warhol Biography*, THE ANDY WARHOL MUSEUM, http://www.warhol.org/two_column_list.aspx?id=80&libID=101 (last visited Oct. 21, 2010).

III.

WHY CURRENT THEORIES FAIL TO ADEQUATELY
ARTICULATE THE FIRST AMENDMENT
VALUE OF ART

The current Second Circuit test thus continues to both overprotect and under-protect art, while the Ninth Circuit offers a limited holding that provides little guidance for future courts. Outside of these two circuits, no court has attempted to construct a comprehensive rule to employ in art vending cases. Accepting this absence of a viable test for defining and protecting art in the vending context, Part III explores the related, underlying failure to articulate *why* art has First Amendment value and thus merits full First Amendment protection. Part III examines courts' and scholars' attempts to account for this value in terms of art's form, art's content, and how art "speaks." Specifically, this Part examines theories of art's First Amendment value that (1) equate visual expression with verbal expression; (2) focus exclusively on the individual artist's act of creation; or (3) focus on how art enables people to achieve self-realization or change their views. The Note then deconstructs these theories to show that they are incapable of fully accounting for art. These theories are thus unable to provide the foundation for a new test to define art for purposes of the vending cases. Absent such a foundation, Part IV will maintain, the art vending cases demand a rule that does not seek to draw lines between which visual works merit First Amendment protection and which do not.

A. *Assessing Visual Expression's Value Through a Sender-Receiver Model of Communication*

To maneuver the gap in Supreme Court guidance for First Amendment protection of art, courts have often tried to equate visual expression with verbal expression. Drawing on precedent dealing with verbal expression, courts have applied a sender-receiver model of communication to identify a clearly articulated idea that would merit First Amendment protection. The sender-receiver model suggests that a speaker seeks to convey a single idea to her audience, and her speech holds First Amendment value largely because the audience understands the idea so conveyed.⁸⁸ The First Amendment value of the verbal expression thus comes solely from the content of the message,

88. The sender-receiver model of communication has been used explicitly in the realm of expressive conduct. The Supreme Court has held that First Amendment protection attaches to conduct that is (1) meant to convey a particularized message, where (2) that message is likely to be understood as such by its viewers. *Spence v. State of Washington*, 418 U.S. 405, 409–11 (1974) (per curiam).

rather than the way it is communicated. The subtle and complex ways in which art can give rise to meaning, however, have made the extension of this theory to art particularly problematic.⁸⁹

The Supreme Court has clearly stated that written works merit First Amendment protection.⁹⁰ By assessing visual expression in terms of verbal expression, courts can grant expansive First Amendment protection to visual art without articulating a separate way in which it furthers First Amendment values.⁹¹ *Bery II*, for example, stresses the similarities between visual and verbal expression before extending broad constitutional protection over works in traditional artistic media.⁹² The court reasons that visual artwork and written text “cannot always be readily distinguished” and may equally embody artistic expression.⁹³ The Second Circuit’s dominant purpose test, as applied in

89. This theory of speech is problematic for all forms of speech, given its inherent availability to multiple interpretations. See *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1135 (2009) (noting that “text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable”). Because verbal speech has established its own privileged place in the First Amendment hierarchy, however, this gap in reasoning does not undermine the protection of verbal expression to the degree that it does for visual expression.

90. See *Kaplan v. California*, 413 U.S. 115, 119–20 (1973); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249 (1936) (stating First Amendment intended to preclude any restriction on “printed publications, or their circulation”). This implicit hierarchy is also reflected in the fact that New York City Vending Laws initially exempted written works, but not other expressive works, from vending restrictions. See N.Y.C., N.Y., ADMIN. CODE § 20-453 (2010) (providing “[i]t shall be unlawful for any individual to act as a general vendor without having first obtained a license in accordance with the provisions of this subchapter, except that it shall be lawful for a general vendor who hawks, peddles, sells or offers to sell, at retail, only newspapers, periodicals, books, pamphlets or other similar written matter, but no other items required to be licensed by any other provision of this code, to vend such without obtaining a license therefor”). This protection, however, does not typically hinge on the presence of political content. The privileged place of written speech presents a logical outgrowth of the dominant marketplace of ideas theory of First Amendment value. The gaps in *Bery II*’s reasoning and its assumptions about certain mediums’ expressiveness suggest a fundamental incompatibility between art’s value as “speech” and the marketplace of ideas theory of speech’s value. See *infra* notes 118–19 and accompanying text.

91. See Rebecca Tushnet, *Worth a Thousand Words: The Law Outside the Text* (2010) (unpublished manuscript) (on file with author) (discussing generally courts’ difficulties in handling images as opposed to text).

92. *Bery v. City of New York (Bery II)*, 97 F.3d 689, 695 (2d Cir. 1996).

93. *Id.* The court also notes that expressive works may incorporate both verbal and nonverbal speech. *Id.* Indeed, visual works that incorporate written text—and thus, can literally be read as verbal speech—have been more likely to receive First Amendment protection in the vending cases. See, e.g., *Celli v. City of St. Augustine*, 214 F. Supp. 2d 1255, 1258–59 (M.D. Fla. 2000) (refraining expressly from broad holding, but citing *Bery II* and extending First Amendment protection to visual work that contains “phrases and poems making each artwork a form of political parody or statement”); *Mastrovincenzo v. City of New York (Mastrovincenzo I)*, 313 F. Supp. 2d

Mastrovincenzo II, also invites a comparison of visual and verbal expression. The court begins its explanation for why plaintiffs' goods merit First Amendment protection by noting that they "contain text" and "depict public figures such as the President."⁹⁴ In other words, the court alludes to the paradigm content of protected speech—verbal commentary about a political candidate.⁹⁵ The opinion could thus be construed as premising First Amendment protection for the goods on their verbal or political content.

In its effort to equate visual and verbal expression, *Bery II* even conflates art and images. The court reasons that "words may form part of a work of art, and images may convey messages and stories."⁹⁶ It invokes the Supreme Court's description of visual images as "a primitive but effective way of communicating ideas . . . a short cut from mind to mind."⁹⁷ The *Mastrovincenzo II* court similarly points to the "logos or designs" on the plaintiffs' works in its explanation for why the works merit protection.⁹⁸

Describing visual expression in terms of simple images or symbols allows the courts to more easily equate visual expression with verbal expression.⁹⁹ It also allows the courts to apply the sender-receiver model of communication typically used to ascertain the message, and First Amendment value, of verbal speech. Like words, images and symbols may serve as commonly understood referents that trigger simple ideas; they are used to convey ideas clearly and efficiently. Not all visual images are art, however, and the Supreme Court's description of images may be more appropriately applied to singular symbols and logos—a cross to signify Christianity, or a swoosh to signify Nike—than to art. As opposed to symbols that seek to convey ideas efficiently, art often tries to slow the process of interpretation through the interaction of form and content. Art typically

280, 291 (S.D.N.Y. 2004) (noting that most of the protected items at issue "contain text that, on its own or through its style, is as expressive as any sidewalk calligrapher or Chinese-character painter, apparently neither of whom needs a [vending] license").

94. *Mastrovincenzo v. City of New York (Mastrovincenzo II)*, 435 F.3d 78, 96 (2d Cir. 2006) (citing *Mastrovincenzo I*, 313 F. Supp. 2d at 284).

95. See *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d 600, 605 (6th Cir. 2005) ("[P]olitical speech related to current events is the prototypical example of protected speech.") (citing *Texas v. Johnson*, 491 U.S. 397, 411 (1989)).

96. *Bery II*, 97 F.3d at 695.

97. *Id.* (alteration in original) (citing *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943)).

98. *Mastrovincenzo II*, 435 F.3d at 96 (citing *Mastrovincenzo I*, 313 F. Supp. 2d at 284).

99. See Tushnet, *supra* note 91, at 4. ("[C]ourts often translate nontextual works into words while not recognizing the ways in which the translation is flattening and distorting.").

gives rise to multiple, perhaps contradictory, meanings, and allows the viewer to participate in the creation of meaning for herself.

Lower courts evaluating visual expression have at times focused explicitly on the idea of a single “message” sent from the speaker to the audience. One district court construed *Bery II* to premise First Amendment protection on the existence of “(1) a message to be communicated and (2) an audience to receive that message, regardless of the medium in which the message is sought to be expressed.”¹⁰⁰ It reasoned that, “if either is lacking, there is absolutely nothing to transmit ‘from mind to mind.’”¹⁰¹ The *Mastrovincenzo I* court similarly defined art as the moment when a single, rational idea has been successfully transmitted from A to B:

[W]hat is art may be defined and found in this two-way interchange, even in silence—a correspondence at the meeting point of recognition and understanding between an artist stirred enough by creative fluids to give expression to a thought through a chosen medium, and the audience that receives the idea so conveyed.¹⁰²

Here, the visual work is relegated to a kind of conduit through which verbal messages are relayed, denying the interplay between form and content that may in itself create meaning.

Thus, to justify extending broad First Amendment protection to visual expression, courts have often found it necessary to *assume* that art communicates the same way that written matter communicates.¹⁰³ Most importantly, this attempt at equivalence conflicts with the limited Supreme Court guidance regarding visual expression’s First Amendment value. In the few words the Court has devoted to visual art’s First Amendment value, it has stressed the *different, lower* value of visual expression under the First Amendment;¹⁰⁴ it has approved of the fact that a book (and more generally, printed and oral expression)

100. *Montefusco v. Nassau Cnty.*, 39 F. Supp. 2d 231, 242 (E.D.N.Y. 1999).

101. *Id.* at 242 (quoting *Barnette*, 319 U.S. at 632).

102. *Mastrovincenzo I*, 313 F. Supp. 2d at 285–86.

103. This is not to say that art necessarily does communicate differently than written matter. The analysis simply means to highlight how the practice may occur below the surface and thus go unexamined in the art vending context.

104. *See Kaplan v. California*, 413 U.S. 115, 119–20 (1973) (finding books have a preferred place over pictorial representations in hierarchy of values). Some lower decisions have suggested a similar hierarchy. *See S.F. St. Artists Guild v. Scott*, 112 Cal. Rptr. 502, 505 (Cal. Ct. App. 1974) (finding that vendor’s original paintings, sculptures, and beadwork were not “so likely to communicate expression of the type of ideas held sacred by the First Amendment as to vest them with such broad rights as are held by pamphleteers or purveyors of newspapers”). This theory easily aligns with the marketplace of ideas model for protecting verbal speech—both protect efforts to convey an easily discernible message.

“seems to have a different and preferred place in our hierarchy of values” than pictorial representation.¹⁰⁵

At least one court has acknowledged that the focus on a particularized message is “ill-suited” for analyzing art’s expressive quality.¹⁰⁶ Indeed, it is difficult to reconcile such a notion with the Supreme Court’s assertion that Jackson Pollock’s highly abstract action paintings merit full First Amendment protection.¹⁰⁷ The Ninth Circuit attempted to bridge this gap by reasoning that the artist’s “message” may be about content or form.¹⁰⁸ While such a move allows the court to fit abstract art into the rational message model of the First Amendment, it fails to acknowledge how form and content inform one another to create meaning.¹⁰⁹ A theory that reduces an abstract expressionist work to a “message” about form risks excluding a great deal of its potential First Amendment value as speech.¹¹⁰

While courts have rightly expressed skepticism over the sender-receiver theory of protected speech’s value as applied to visual expression, they have not abandoned the underlying notion that speech involves a rational, readily-discernable “message” transmitted from speaker to viewer. Absent a more thorough explanation of how a sender-receiver theory can account for the way art communicates, however, this theory cannot provide a basis for distinguishing art from other works in the vending cases.

105. *Kaplan*, 413 U.S. 115 at 119. The Supreme Court’s recent discussion of public monuments in *Pleasant Grove City, Utah v. Summum*, also implies a distinction between the way visual and verbal expression communicate. See *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1135 (2009) (noting that “text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable”).

106. *Mastrovincenzo I*, 313 F. Supp. 2d at 287.

107. Pollock was an abstract expressionist painter in the 1940s and 1950s whose technique involved dripping paint onto a large canvas on the ground, and with his physical gestures creating an intricate work of drips and lines. See *Jackson Pollack (American, 1912–1956)*, YALE UNIVERSITY ART GALLERY, http://artgallery.yale.edu/pages/collection/popups/pc_modern/details25.html (last visited Sept. 3, 2010).

108. See *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (“A painting may express a clear social position, as with Picasso’s condemnation of the horrors of war in *Guernica*, or may express the artist’s vision of movement and color, as with ‘the unquestionably shielded painting of Jackson Pollock.’”) (quoting *Hurley v. Irish–Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995)).

109. See Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 246 (1987) (“[T]he medium is the message, and . . . one cannot really separate the ‘what’ from the ‘how,’ or the content from the vehicle of expression.”) (internal quotation omitted).

110. Specifically, this reading seems to ignore how important the interaction of form and content may be to the creation of meaning.

B. *Privileging the Creator's Act of Self-Expression*

Courts have also suggested that the artist's creative experience, and the product of that creative experience, merit First Amendment protection because the artist is expressing his or her personal views. The Tenth Circuit found it sufficient for First Amendment purposes that a plaintiff was a self-proclaimed artist whose work has been displayed in galleries and museums.¹¹¹ In *White v. City of Sparks*, the Ninth Circuit held that the First Amendment covered an artist's sale of his or her original painting because the work expressed his or her perspective.¹¹² *White* reveals how the notion of an individual, genius artist encourages courts to focus on the artist's act of creation as the source of its First Amendment value.¹¹³ The Ninth Circuit "expressly reserve[d] the question" of whether works that problematize this notion of "authorship"—i.e., works that are produced by the artist "or others" in an "art factory setting"—merit First Amendment protection.¹¹⁴ Thus, absent a clearly identifiable artist with a specific message to convey, art may lose its potential First Amendment value. *Mastrovincenzo I* also demonstrates this focus on the artist and his or her act of expression. The first four factors in the court's analysis deal exclusively with the vendor's experience. These factors reflect the notion that visual expression demands First Amendment protection because, and only because, the art vendor is literally "speaking" through his or her work. The final factor outlined by the court, which focuses on the artist's success in conveying his or her message, again points to the artist's act and intent as the key sources of the work's First Amendment value.

The artist-focused theory of art's value relies heavily on traditional ideas of a singular artist intending to make art. This theory risks excluding many current works of post-modern art, where it is not uncommon for the "artist" to employ others to execute his or her vision and create the physical work.¹¹⁵ It thus fails to offer a comprehensive account of art's First Amendment value through the present day. The

111. *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1276 (10th Cir. 2009).

112. *White*, 500 F.3d at 956 n.4.

113. See Amy Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 276–77 (2009) (deconstructing assumption of "solo genius author" that underlies moral rights law).

114. *White*, 500 F.3d at 956.

115. For example, The Bruce High Quality Foundation, a collective of anonymous artists, critiques the contemporary art world. Their work was featured in the 2010 Whitney Biennial; they also presented their own show of contemporary art—the "Brucennial." Contemporary artist Jeffrey Koons uses European studios to execute his work. See *Rogers v. Koons*, 960 F.2d 301, 304–05 (2d Cir. 1992) (describing artist's use of studios). Andy Warhol's Factory included a production line.

artist-focused theory of art also sits uncomfortably with the fact that *anonymous* written works are entitled to full First Amendment protection.¹¹⁶

The artist-focused rationale also finds value only in the successful communication of the artist's intent; it largely ignores the experience of the viewer or assumes that the viewer's interpretation of the work will simply follow the artist's. The Ninth Circuit reasoned that "any artist's original painting holds *potential* to 'affect public attitudes,' by spurring thoughtful reflection in and discussion among its viewers,"¹¹⁷ but the court did not indicate that such an impact was necessary for the work to merit First Amendment protection. Such a reading fails to account for the value stemming from the viewer's interpretation, particularly where the viewer discerns a completely different message from the one the artist intended. Yet, a core value of art seems to be its capacity to produce a wide range of meanings; it invites the viewer to contemplate these divergent, and perhaps contradictory, meanings simultaneously. The questioning of "truth" that this experience can give rise to may even carry value under traditional models of the First Amendment.¹¹⁸ Finally, a theory of art's value that rests solely on the creator's experience and attempt at expression does little to resolve the significant line drawing problems that arise in the art vending cases. It cannot explain why the craftsperson's work should receive less First Amendment protection than the painter's if each creator claims that the work reflects his or her perspective.

C. *Scholars' Attempts to Articulate Art's First Amendment Value*

A number of scholars have also tried to articulate art's First Amendment value, beginning from the perspective that the traditional marketplace of ideas model of the First Amendment¹¹⁹ cannot fully

116. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341 (1995) (noting that "[g]reat works of literature have frequently been produced by authors writing under assumed names").

117. *White*, 500 F.3d at 956 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)) (emphasis added).

118. See JOHN STUART MILL, *ON LIBERTY* 60 (Prometheus Books 1986) (1859) ("[I]t is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.").

119. Under the traditional model, freedom of expression seeks the free competition of ideas in a kind of open-access market, allowing the truth to rise to the top. See *Red Lion Broad. Co. v. Fed. Commc'ns Comm'n*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . ."); MILL, *supra* note 118, at 60–61 ("First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility. Secondly, though the

account for art's value and must therefore be abandoned or substantially reworked.¹²⁰ These alternative models, however, have struggled to resolve the significant line drawing problems that theories of art often entail.

Some scholars have argued that art holds First Amendment value because it is critical to individual self-realization and development. For example, Alexander Meiklejohn posits art as “a powerful determinative of our views of what human beings are, how they can be influenced, in what directions they should be influenced”¹²¹ Discussing visual art and literature, he argues that art's social importance amounts to a “governing” importance that merits First Amendment protection.¹²² Martin Redish has argued that the First Amendment ultimately serves the value of “individual self-realization,” which encompasses an individual's ability to realize her full potential by developing her faculties and to control her future by making life-affecting decisions.¹²³ These self-realization theories have been

silenced opinion be an error, it may, and very commonly does, contain a portion of the truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied. Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.”). See generally R.H. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 384–86 (May 1974); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

120. See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974–75 (1977) (advancing “liberty model” of First Amendment over marketplace of ideas theories); Marci Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 111 (1996) (content-based models cannot account for unique way in which art speaks); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (marketplace-of-ideas model is merely sub-value of overarching self-realization value of First Amendment).

121. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 262 (1961).

122. *Id.*

123. See Redish, *supra* note 120 (developing “self-realization model”). For an application of these theories to the art vending cases, see Genevieve Blake, Comment, *Expressive Merchandise and the Public Fora*, 34 FORDHAM URB. L.J. 1049 (2007) (arguing for expanded interpretations of “art” as protected speech in art vending cases).

used as a basis to argue for a more liberal view of what works merit First Amendment protection in the art vending context.¹²⁴

As applied to the art vending cases, however, self-realization theories merely exacerbate the existing line drawing problems.¹²⁵ A vendor-creator has a perfectly legitimate claim that he expresses himself and develops his faculties through the pottery, jewelry, hand-made furniture, or fashion design that he creates and sells. It is difficult to pinpoint the difference, if any, between these acts of self-expression and a vendor's sale of her original painting. Moreover, under these theories, the very act of selling an item in a public space could be deemed to hold First Amendment value. The self-realization theories also suggest that there is no First Amendment interest at stake where someone other than the artist sells the work, unless the vendor's act of sale is indeed deemed a means of self-fulfillment with some First Amendment value. As applied to the vending context, it would thus prevent any large-scale dissemination of an artist's work. It would also prohibit one artist from soliciting another to sell his or her work, thus closing one alternative avenue for vendors who do not obtain a license under the current regime.¹²⁶

IV.

THE "EQUAL SALE" PROPOSAL

As Parts II and III demonstrate, courts and scholars have failed to articulate art's First Amendment value in a way that offers comprehensive protection for art, but also provides a meaningful way to distinguish art from other visual merchandise. Against the backdrop of this failure, the question remains: how do we protect art while serving

124. See Blake, *supra* note 123 (arguing for expanded protection of "art" under these cases in the vending cases).

125. In other contexts, critics of the self-realization theories have persuasively argued that the theories effectively gut the First Amendment of meaning. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971) (reasoning that an individual may develop her faculties through an endless number of activities, including trading stocks and rigging prices).

126. Alternatively, scholar Marci Hamilton has attempted to account for art's First Amendment value from the perspective of *how* it communicates. Hamilton argues that through the technique of defamiliarization, or estrangement, art invites viewers to challenge their existing worldviews. Hamilton, *supra* note 120, at 92. By counteracting the status quo in this way, art helps maintain a truly representative democracy and thus furthers First Amendment values. *Id.* at 111. Yet, the theory that art affects political participation in this way remains highly abstract and potentially applicable to any activity that involves self-development. While the de-familiarization theory advocates broadly for the protection of art, it does not offer a workable definition of "art" and thus lacks a consistent means of distinguishing works that have the capacity to change world views from works that do not.

the governmental interests at stake in the vending cases? Part IV seeks a solution to the art vending cases that works around the inability to articulate what constitutes art and its First Amendment value. This Part first maintains that, absent a viable theory of art's First Amendment value, such a solution cannot discriminate art from other goods. Thus, instead of attempting another such rule, this Note proposes the following solution: the equal regulation of all general vendors, regardless of their merchandise, purpose, or originality, in a content- and form-neutral manner. This "equal sale" regime would avoid the need for vendors, enforcement officials, and judges to determine what qualifies as "art" on a case-by-case basis. Sidestepping this intractable question, it provides a speech-protective rule that is still capable of meeting the governmental interests at stake.

A. *The Art Vending Cases Demand a Bright Line Rule*

Prior attempts to devise a speech-protective rule in these cases have led to broad-stroke classifications of what visual expression holds First Amendment value. The *Bery II* and *Sparks* holdings withhold protection from countless works accepted as art by both the art community and the public at large. For example, the current Second Circuit test, while more encompassing in its recognition of protected works, demands case-by-case determinations of whether works that fall outside of *Bery*'s categories are predominantly expressive. The test gives officials leeway to criminalize works with any utilitarian features. Its inherent subjectivity also invites vendors to sell without permits—thereby increasing the arbitrariness of enforcement and encouraging demands for tougher restrictions on all vendors. Similarly, the Ninth Circuit test relies on the "form" of the work and its originality as markers of protected speech. It explicitly fails to provide any guidance, however, on works in different media that may still have a claim to be art. Thus, the only two circuits that have directly addressed the art vending issue have been unable to develop a tailored solution that sufficiently distinguishes protected speech.

B. *The Equal Sale Approach*

1. *The Equal Sale Approach Described*

Accepting the inevitable line drawing involved in defining and protecting art, this Note proposes a bright-line rule for the vending cases that refuses to define art or account for its First Amendment value. Under the equal sale approach, the City would regulate *all* visually expressive works—from original paintings to factory-produced

jewelry—in a way that does not distinguish between goods based on form, content, or purpose. The regulation would thus refuse to privilege certain goods over others under the theory that they are art, or at least more likely to be understood as art. As explored below, the equal sale approach would likely take the form of a large-scale lottery system for vending permits, re-run on a monthly or semi-annual basis.¹²⁷

This seemingly blasphemous means of regulating works that claim to be art may in fact be the most speech protective way of serving the interests of all artists, not just those working in certain media, while still meeting the recognized interests of the government. It frees up the stranglehold on existing permits for those vendors whose works do not fall squarely within the *Bery* categories. The current licensing regime, with its waitlist of twenty-five years and current prohibition on new applicants, *does* constitute an effective ban on art that is not exempted under the current case law. In contrast to the “dominant purpose” test and the *Bery II* classifications, the equal sale regime would encompass all non-written goods. The legislation would thus reject the hierarchy put in place by the Second Circuit decisions to date. The ambiguity of the current regime in New York City, which requires on-the-spot judgments of art by vendors and enforcement officials, makes consistent and effective enforcement unnecessarily difficult. By subjecting all general vendors to the same regulatory regime, the equal sale approach would also minimize the risk that unlicensed vendors avoid detection—a factor that may have contributed to the strict numerical limit on licenses.

2. *Potential Modes of Enforcement*

What form would the equal sale regime take? A content- and form-neutral system could be instituted through a lottery to allocate general vending permits.¹²⁸ The lottery would be re-run on a monthly

127. Participating as *Amici Curiae* in the *Bery II* litigation, the American Civil Liberties Union proposed a first-come, first-served lottery for assigning licenses. Brief for Am. Civil Liberties Union et al. as *Amici Curiae* Supporting Plaintiffs-Appellants at 26–27, *Bery v. City of New York (Bery II)*, 97 F.3d 689 (2d Cir. 1996) (No. 95-9089). It is not clear, however, whether that lottery proposal would have applied only to certain art vendors or to vendors at large. *Id.*

128. In other First Amendment contexts, a lottery has been proposed as a reasonable means of balancing free speech rights with the governmental interest in managing limited resources. See *Atlanta Journal & Constitution v. City of Atlanta Dep’t of Aviation*, 322 F.3d 1298, 1311 (11th Cir. 2003) (suggesting lottery system vehicle to limit government’s discretion in regulating access to limited number of news racks at Atlanta airport).

or semi-annual basis.¹²⁹ Those who receive permits would be able to vend freely until the next lottery, at which time they would need to reapply to the lottery, along with those vendors who did not receive permits. As under the current New York City regime, vendors of written matter and veterans would be exempted from the system.¹³⁰ San Francisco has instituted a version of this regime through its Street Artists Program, which allows a wide range of vendors to enter a daily lottery for specific sites.¹³¹ Unlike the San Francisco program, however, the regime should allow vending of items created in whole or in part by others, at the very least to allow those who are not allocated a license to sell their goods through other vendors.

An alternative system would allow first-come, first-served vending at designated locations. This system is the approach proposed to limit the number of expressive matter vendors in city parks. While form- and content-neutral, such a system is less desirable for two main reasons. First, unlike the lottery system, it provides vendors with little certainty on a day-to-day basis. Vendors may prepare to sell their works every morning, only to be turned away because spots have already been filled. The system may thus limit a vendor's ability to develop alternative channels through which to sell his or her works. Second, a first-come system may be more difficult to enforce because vendors would not be allocated actual permits or spaces. Lastly, it risks increasing the disputes between vendors,¹³² which may in turn require additional allocations of enforcement staff.

3. *The Constitutional Analysis*

The equal sale regime should satisfy the First Amendment standards for regulations on protected speech. Like the current regimes, it would admittedly prohibit some vending of protected materials at any given point in time—that is, some vendors of works that merit First Amendment protection will not receive a permit each time the lottery is run. The equal sale approach, however, offers one of the least-speech-restrictive means of serving the stated government interests.

129. The constitutionality of a two-year lottery scheme has been upheld even where the regulated goods contained plainly political content. *See Enten v. District of Columbia*, 675 F. Supp. 2d 42, 52–53 (D.D.C. 2009).

130. *See* discussion *infra* Part IV.C.2.

131. *See Street Artists Program*, SAN FRANCISCO ARTS COMMISSION STREET ARTISTS, http://www.sfartscommission.org/street_artists_program/index.html (last visited May 11, 2010). While the program encompasses a wide range of merchandise, it is strictly limited to original works. A vendor must swear under penalty of perjury that no one outside of his or her family helped create the work.

132. *See* Slotnik, *supra* note 2.

The below analysis sets forth how the regulation could withstand a facial challenge.

First, the regime is content-neutral; it may be “justified without reference to the content of the regulated speech.”¹³³ The regulation would serve the government’s recognized safety and congestion concerns, unrelated to the content or form of the vendors’ works. The regulation does not give unbridled discretion to enforcement officials to make decisions.¹³⁴ In fact, it takes discretion away from officials by eliminating the need to determine whether a work falls within a certain exempted category or has a certain purpose.

Second, the regulation is “narrowly tailored” to serve the governmental interest.¹³⁵ It would apply only to non-written, vended works, where the First Amendment interest is uncertain and the line drawing problems are significant.¹³⁶ It would open up the currently inaccessible licensing system to all general vendors. As argued below, other speech-restrictive alternatives to the current regime would be unable to meet the governmental interests or would exacerbate the line drawing problems.¹³⁷ Because previously exempted vendors of paintings, sculptures, photographs, and prints would be subject to the regulatory scheme, New York City would need to increase the total number of general vending permits to further ensure that the regulation provides adequate opportunity for protected speech.

Finally, any regulation on protected speech must also leave open “ample alternative channels of communication.”¹³⁸ The equal sale regime would provide at least as many opportunities as are offered under the prior regime to works that fall outside of the *Bery II* categories. The Second Circuit found such ample alternatives available because the goods could be sold through licensed vendors or established stores.¹³⁹ Because the equal sale regime would provide all vendors with advance notice as to whether they would have a permit, it would help facilitate their use of alternative venues.

133. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

134. *Id.* at 793.

135. *Id.* at 796 (quoting *Clark*, 468 U.S. at 293).

136. *See infra* Part IV.C.2. (discussing the line drawing distinction).

137. *See infra* Part IV.B.5. Moreover, the Court has clearly stated that a regulation need not be the *least* restrictive means imaginable to serve the cited government interests. *Ward*, 491 U.S. at 797–800.

138. *Ward*, 491 U.S. at 802. Given the longstanding bar on new applicants for general vending permits, it is questionable whether the existing regime truly leaves open alternative channels for those who fall outside of *Bery II*’s four categories.

139. *Mastrovincenzo v. City of New York (Mastrovincenzo II)*, 435 F.3d 78, 101 (2d Cir. 2006).

4. *Keeping the Exercise of Judging Art Out of the Courtroom*

The equal sale approach sidesteps the need to judge if a given work is art, whether that judgment occurs on the street or in the courtroom. The judicial system's struggle to reconcile the art world's way of assessing art's value with its own—whether in the realm of authenticity, copyright, or First Amendment law—highlights the value of this contribution.¹⁴⁰

Judicial opinions addressing the art vending issue often reveal a love or hate for art and the theories that seek to define it. In *Mastrovincenzo II*, the court announced its distaste not only for *Bery II*'s assumptions about art's expressiveness but also for its over-intellectualized approach to a "real world" issue.¹⁴¹ The court emphasized the need to develop a generally-applicable test without "recourse to principles of aesthetics."¹⁴² It made reference to the "interesting and creative, but ultimately absurd, intellectual exercise[]" of considering how many utilitarian objects have some modicum of expression.¹⁴³ The Fifth Circuit similarly expressed doubt that courts must deploy the "heavy machinery of the First Amendment" in every case involving visual expression.¹⁴⁴

As *Mastrovincenzo II* demonstrates, art experts have not provided an easy solution to the task of defining art in the courtroom. In refusing to follow the judgment of a renowned Calder expert regarding an alleged forgery, one court pronounced that: "[t]his is not the [art] market, however, but a court of law."¹⁴⁵

140. For a discussion of the legal world's difficulties in assessing value in the art world, and with handling art generally, see Christine Faight Harley, *Judging Art*, 79 TUL. L. REV. 805 (2005) and Tushnet, *supra* note 91.

141. *Mastrovincenzo II*, 435 F.3d at 94–95 (responding to affidavit from art critic on definitions of art).

142. *Id.* at 95.

143. *Id.* at 94–95. This language resounded with the Fifth Circuit in *Kleinman v. City of San Marcos*, 597 F.3d 323, 326–27 (5th Cir. 2010). *Kleinman* went so far as to suggest that only "great works" of art merit First Amendment protection. *Id.* The case is now being appealed to the Supreme Court.

144. *Kleinman*, 597 F.3d at 327.

145. *Greenberg Gallery, Inc. v. Bauman*, 817 F. Supp. 167, 174 (D.D.C. 1993). See *Herstand v. Stein*, 626 N.Y.S.2d 74, 76 (N.Y. App. Div. 1995) (finding triable issue of fact as to whether artwork was forgery or not where artist explicitly disclaimed work as his own). The fact that these vending cases concern works sold on city streets may further complicate the task of identifying art. Visual expression that challenges notions of form may gain recognition as art primarily through approval from the art community, that is, acceptance by galleries and museums. There may thus be an underlying assumption that "real" art should be economically feasible without being sold on the street.

A system that entrusts the artist or vendor with defining art would be incapable of meeting the governmental interests—a lawyer can easily craft an affidavit asserting the vendor’s belief that he or she is selling art. Whatever categories the system recognizes as “art,” vendors will argue for an interpretation of their works that fall within those categories.¹⁴⁶

More generally, an approach that relies on judges, experts from the art community, or artists themselves to draw lines between art and non-art is bound to produce highly inconsistent outcomes. Art vending cases force judges that seek generally applicable rules and objective determinations to evaluate an inherently subjective form.¹⁴⁷ As the Second Circuit stated in *Mastrovincenzo II*, art is “a famously malleable concept the contours of which are best defined not by courts, but in the proverbial eye of the beholder.”¹⁴⁸ Even if the judicial system could embrace the subjectivity inherent in art, it must acknowledge that defining art at the margins demands case-by-case subjective judgments that are simply not feasible on the scale required in the art vending context.¹⁴⁹

5. *Alternative Speech-Protective Approaches Would Be Less Effective*

Other speech-protective approaches, set forth below, would provide less effective means of regulation. These other approaches would either protect too many works to meet the governmental interests of safety and limited congestion or they would create new line drawing problems. One alternative regulatory regime could extend full First Amendment protection to works with any communicative or expressive element; such a rule would encompass all merchandise, effectively eliminating any licensing requirement for general vendors. In *Mastrovincenzo II*, the Second Circuit noted such an approach before discarding it as unnecessary to protect the First Amendment interests at stake.¹⁵⁰ A significantly over-inclusive, speech-protective rule of

146. See, e.g., *People v. Ndiaye*, 887 N.Y.S.2d 832, 834 (N.Y. Crim. Ct. 2009) (rejecting jewelry vendor’s attempt to characterize her works as “wearable sculpture” exempt from the City licensing regime under *Bery II*).

147. See *Harley*, *supra* note 140, at 854 (“Legal disputes about art thus present an archetypical confrontation between judges and their own subjectivity.”).

148. *Mastrovincenzo II*, 435 F.3d at 90. See *Bery v. City of New York (Bery II)*, 97 F.3d 689, 696 (noting that the question of delineating protected visual expression “does not lend itself to judicial determination”); *Ndiaye*, 887 N.Y.S.2d at 834 (refusing to “assume the mantle of art critic”).

149. The cases may thus be distinguished from individual incidents of censorship.

150. *Mastrovincenzo II*, 435 F.3d at 94–95 (“Fortunately, we need not engage in such interesting and creative, but ultimately absurd, intellectual exercises.”).

this nature may provide a potential solution where the governmental interest is intangible and cases on the margins can be individually adjudicated.¹⁵¹ In the vending cases, however, the rule would fall far short of meeting the recognized governmental interest in limiting street congestion.

Another approach could exempt visually expressive works with clear political content, for which the First Amendment interest has been clearly established. Early courts implicitly followed this approach, expressly refusing to protect art that lacked a clear political message. Courts that have extended First Amendment protection to specific art vendors' works have often cited the works' political messages.¹⁵² While the approach would demand case-by-case determinations by enforcement officers and courts, proponents may argue that courts regularly identify political content in other First Amendment contexts.

Identifying a political message in visually expressive works, however, is often more difficult than identifying a political message in written works. The subtle and indirect ways in which art creates meaning defy one person's ability to easily identify political content. The approach also risks disputes where an art vendor claims that the work carries a political message that the average viewer cannot identify. If art can convey a political message without any readily discernible political *content*, the equal sale approach remains the more speech-protective means of regulation.

C. *Potential Criticisms of the Equal Sale Regime*

1. *Equating Original Paintings and Mass-Produced Trinkets*

The equal sale approach may be challenged as not sufficiently tailored to meet the government interest. Indeed, some may balk at an approach to the First Amendment question that lumps original paintings into the same category as mass-produced trinkets. They may ar-

151. The all-encompassing approach may also be analogized to the Court's short-lived *Memoirs* test for obscenity, pursuant to which artistic works had to be "utterly without redeeming social value" to be labeled obscene and thus stripped of First Amendment protection. *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966) (plurality opinion), *overruled by* *Miller v. California*, 413 U.S. 15, 24–25 (1973). This rule could be interpreted as lacking any exception, since conceivably any work circulating in commerce could have commercial, and thus social, value.

152. See *Bery II*, 97 F.3d at 689 (offering example of Winslow Homer's paintings of Civil War in extending full First Amendment protection to paintings); *Mastrovincenzo II*, 435 F.3d at 96–97 (finding plaintiffs' works that depicted public figures protected under First Amendment); *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (holding painting with environmentalist messages protected).

gue that, whatever line drawing problems art entails, some works clearly have more First Amendment value than others.

The current regime in New York City implicitly reflects this view of an internal hierarchy for vended visual expression: “predominantly expressive” works that fall outside of *Bery*’s four categories are still subject to the City’s vending regulations, while works that fall within those categories receive full First Amendment protection.¹⁵³ In *Mastrovincenzo II*, the court attempted to justify this disparity by reasoning that goods “whose dominant purpose is not clearly expressive” present line-drawing problems “markedly distinct from the more-easily-classified ‘paintings, photographs, prints and/or sculpture’ at issue in *Bery*.”¹⁵⁴ In light of the court’s larger discussion of *Bery*, however, it seems clear that the court would have subjected all visually-expressive works to vending regulations, regardless of medium, if reviewing the issue *de novo*.

Ultimately, this criticism brings us full circle. The Supreme Court’s muddled jurisprudence on art’s First Amendment value has left open the question of whether *all* art merits protection as pure speech. It is possible that protected speech consists of some, but not all, of the ever-elusive sphere of art. Without a clear justification for art’s First Amendment value,¹⁵⁵ it is difficult to determine what makes an easier case for protected speech. The Supreme Court has not held that a painting deserves more protection than other visual media, nor has it provided a basis on which to assume so. Reliance on broad categorizations of art based on medium, such as painting or photography, inevitably invites interpretative differences over the categories themselves.¹⁵⁶

This argument could also be made from a cultural perspective. Separate from the First Amendment question, some may argue that the current City vending regime has a greater likelihood of protecting works with strong cultural value or aesthetic appeal. This concern,

153. *Mastrovincenzo II*, 435 F.3d at 99–100.

154. *Id.* at 102.

155. *See supra* Part III.

156. *Bery II* held that “paintings” merited First Amendment protection, but that holding provided insufficient guidance for the graffiti-painted T-shirts at issue in *Mastrovincenzo I*. After a lengthy analysis in *Mastrovincenzo II*, the Second Circuit held “that the term ‘paintings’ as used in the *Bery* injunction does not include baseball caps, jackets, and other articles of clothing that have been artistically decorated with paints and markers.” *Mastrovincenzo II*, 435 F.3d at 103. The dissent took issue with the majority’s narrow definition of painting. *Id.* at 107 (Sack, J., dissenting) (“It seems to me that the plaintiffs’ works, which would undoubtedly have been ‘paintings’ had they been applied to paper or canvas, remain paintings when they are applied to another surface, even one that shares more mundane uses, such as a blank hat.”).

however, would be best satisfied through increased funding to artists. Outside of the vending context, the government would be free to privilege certain types of visual expression based on merit: through increased arts funding, designated art markets, or commissioned public art. The City may set aside certain streets or spaces for artists and assess individual applications for artistic merit or other qualifications.¹⁵⁷ If artists and the public at large believe the City has provided inadequate opportunities for artists, they may petition the legislature.¹⁵⁸

2. *Why Text Should Be Exempt from the Equal Sale Regime*

What about text? The proposed equal sale regime would exclude vendors of written materials from the general vendors lottery. It would thus extend the current licensing system's exemption for written material vendors.¹⁵⁹ This Note offers two main justifications for this continued exclusion, one doctrinal and one practical.

First, the Supreme Court has firmly established the protected status of written works, without regard to political content or the way in which they communicate their messages. In contrast, the basis for art's First Amendment protection remains unclear, and the scope of any such protection remains largely uncharted. Subjecting written works to the same regime as generally vended matter may give rise to equal protection concerns. In the future, it may be necessary for the City to establish a permit lottery for written material vendors.¹⁶⁰ Until the rationale for art's First Amendment value has been clearly articulated, however, such a regime should remain separate from the regulations for non-written matter.

Second, the line drawing exercise for visually expressive works is inevitably more difficult than the line drawing exercise for written

157. See, e.g., *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (assessing grant applications). See also Daniel Mach, Note, *The Bold and the Beautiful: Art, Public Spaces, and the First Amendment*, 72 N.Y.U. L. REV. 383 (1997) (arguing that government regulation of art displays on public property should be limited to decisions about artistic merit).

158. The New York City Council passed a resolution at the end of 2009 calling on the City Department of Small Businesses to develop alternative marketplaces for general vendors unable to obtain a license under the current regime. See N.Y.C., N.Y., N.Y.C. COUNSEL RES. NO. 2302-2009 (Dec. 21, 2009), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=558526&GUID=4B4AB78E-3325-4C1D-97D6-93935E40E555&Options=ID|Text|&Search=vendor>.

159. See *supra* p. 609.

160. See *supra* text accompanying notes 34-43; D.C. MUN. REGS. 24 § 515 (2010) (establishing two-year lottery system for all vendors in restricted locations of District of Columbia).

works. As currently phrased, the Vendors Law exempts vendors of “newspapers, periodicals, books, pamphlets or other similar written matter”¹⁶¹ from the licensing requirements. Outside of cases involving visually expressive works, there has been little debate in the courts over the interpretation of “other similar written matter.”¹⁶² Meanwhile, two cases on the protection of visually-expressive works have reached the Second Circuit, and the lower courts have heard a steady stream of cases calling for the protection of non-written material under the *Bery II* and *Mastrovincenzo II* decisions.¹⁶³

The current Second Circuit regime, which exempts all written material from the licensing regime, but only some visual material, implies that art may be distinguished from non-art at least as easily as written expression may be distinguished from visual expression. This Note takes the position that, to the contrary, the line drawing effort for art—or even “predominately expressive” visual matter—is significantly more difficult than it is for written works. Art routinely defies categories of external form and medium in a way that written material does not. The question “what is a work of art” is inherently more rhetorical than the question “what is a written work.” Considering the practical realities of enforcement, it is easier for an enforcement officer or a court to identify written matter than it is to identify art, or even a work that is predominately expressive rather than utilitarian. Even if people do know art when they see it, a regime that seeks to incorporate this belief would likely give unbridled discretion to enforcement officials.

Scholars may justifiably challenge the belief that text requires different treatment than images for First Amendment purposes. The issue inevitably raises difficult questions with broad implications beyond the law. This Note simply maintains that, absent any further guidance from the Supreme Court, that distinction should be maintained as applied to the art vending cases.

As courts have recognized in the art vending context, works may incorporate both written and visual expression. Here, some line drawing would be required to distinguish exempted “written matter” from those works subject to the general vending lottery. The distinction be-

161. N.Y.C., N.Y., ADMIN. CODE § 20-453 (2010).

162. Only one reported case was located regarding such an interpretative dispute over the “written matter” exemption in New York. *People v. Shapiro*, 527 N.Y.S.2d 337, 347 (N.Y. Crim. Ct. 1988) (holding that calendar and date books do not qualify and that “other written material” does not equate to “printed material”).

163. *See, e.g.*, *People v. Balmuth*, 681 N.Y.S.2d 439, 444 (N.Y. Crim. Ct. 1998); *People v. Franqui*, 891 N.Y.S.2d 617, 618–19 (N.Y. Crim. Ct. 2009); *State v. Chepilko*, 965 A.2d 190 (N.J. Super. Ct. App. Div. 2009).

tween written matter and works that incorporate some text should be at least as clear as the distinctions required by the current system. Just as all images are not art,¹⁶⁴ not all text should be considered written matter. In assessing the *Mastrovincenzo* T-shirts that featured graffiti text, both the trial court and the Second Circuit implicitly recognized that the mere presence of text did not demand application of the written matter exception. This recognition, as applied to other works, should significantly reduce the line drawing problems.

3. *What if the Public Sale is Part of the Message?*

The equal sale approach may also be criticized for assuming that the art vendor's message, as communicated through his or her work, is not informed by the nature of public vending or by the specific public location where the work is sold. This argument suggests that the equal sale approach is not truly content- and form-neutral as applied to visual art because it improperly interferes with the artist's message.

Some courts that have extended First Amendment protection broadly in the art vending context have reasoned that the public and commercial nature of art vending is *intertwined* with the vended works' messages. On this basis, they have been more willing to find that the works merit First Amendment protection and have sharply questioned whether ample alternative channels would exist. In *Bery II*, the Second Circuit adopted the plaintiffs' view that: "[a]nyone, not just the wealthy, should be able to view [art] and to buy [art]. Artists are part of the 'real' world; they struggle to make a living and interact with their environments. The sale of art in public places conveys these messages."¹⁶⁵ The court thus reasoned that the act of selling these works on the street informed and enhanced the artists' message of art vending and the ultimate value of their works under the First Amendment.¹⁶⁶ When another set of art vendors challenged restrictions on selling works outside of the Metropolitan Museum of Art, the state appellate court found *Bery's* analysis persuasive. It reasoned that selling works outside of a museum could uniquely comment on the work inside a museum:

[T]he very marketing in front of the Metropolitan Museum of Art or another landmark may convey part of the message of defendants' works. Such a message might be their belief that art should be available to the public, their quest to communicate through the display and sale of their art to a public with the resources to appre-

164. See discussion *supra* Part III.A.

165. *Bery v. City of New York (Bery II)*, 97 F.3d 689, 696 (2d Cir. 1996).

166. *Id.*

ciate and purchase their works, or their struggle to make a living in the shadow of one of New York City's landmark institutions[.]¹⁶⁷

Bery II and *Balmuth* thus invoke a kind of site-specificity theory in reasoning that the location of the work and the commercial transaction are part of the message. This theory revisits the argument made by artist Richard Serra in his First Amendment challenge to the removal of his commissioned work from a public plaza.¹⁶⁸ The artist argued that “removing or relocating [his work] negates, and therefore destroys, its artistic expression”¹⁶⁹—that is, the location of the work pivotally informed its meaning. The Second Circuit rejected this argument, finding that Serra was free to express his views in other ways.¹⁷⁰ Because the government had commissioned Serra's work, the holding does not directly inform the analysis in vending cases.¹⁷¹ The decision highlights, however, why the site-specificity claim is relatively weak as applied generally to the art vending cases. Serra had studied the plaza, how people moved through it, and the effect of the surrounding buildings before actually creating his work. A truly site-specific work is designed for the location, not simply informed by it. Given that the court failed to embrace the site-specificity argument in *Serra*, a court would almost certainly reject such an argument from a vendor.

Thus, while the site-specificity argument may push in favor of allowing art vending in sites throughout the City, it does not require that all vended works receive First Amendment protection. Context necessarily informs the viewer's interpretation of a work of art—whether it is shown in a museum, a gallery, or a city park. On a practical level, the argument invoked in *Bery II* could justify protecting all vended works that make a claim to be art. Thus, like many of the proposed regulations, it lacks any significant limiting measure.

4. *What if It Is Just About the Money?*

Some courts have reached the opposite conclusion about the comingling of commercialism and expression. They suggest that vending

167. See *Balmuth*, 681 N.Y.S.2d at 444. Because the vendors were vending on the sidewalk, the city had jurisdiction; the Museum did not take sides in the dispute. See *Perez-Pena*, *supra* note 1.

168. See *Serra v. U.S. Gen. Servs. Admin. (Serra II)*, 847 F.2d 1045 (2d Cir. 1988).

169. *Serra v. U.S. Gen. Servs. Admin. (Serra I)*, 667 F. Supp. 1042, 1052 (S.D.N.Y. 1987).

170. See *Serra II*, 847 F.2d at 1050.

171. Both the *Serra* dispute and the art vending dispute suggest a view that art should be “contained” in galleries and museums. They may also suggest that when art occupies public spaces, it should at least be aesthetically pleasing and unobtrusive—it should not force people to confront anything, physically or otherwise.

is not part of the message, and more generally, that real art cannot be both commercial and expressive at its core. *Mastrovincenzo II* designs the dominant purpose test with the goal of determining whether the vendors “are genuinely and primarily engaged in artistic self expression or whether the sale of such goods is instead a chiefly commercial exercise.”¹⁷² In other words, a true artist cannot be driven more by profit than by a desire to express himself in a non-commercial way.¹⁷³ The court reinforced its view of this schism by finding that, because plaintiffs could distribute their goods for free, ample alternative venues for communication existed.¹⁷⁴ Similarly, the early San Francisco court expressed fear that “the widening of First Amendment protection to the vending of products of variegated and uncertain character might well invite applicants for licenses who would be possessed of the acumen associated with the followers of Mercury rather than applicants who are true artists illuminated by the aura of Apollo.”¹⁷⁵ In the eyes of these two courts, expression and profit cannot be co-existing motives. Those adopting this view may thus criticize the equal sale approach for failing to distinguish between an expressive purpose and a commercial one.

The equal sale approach makes no attempt to distinguish between a commercial purpose and an expressive one. It refuses to do so because post-modern art has rendered this distinction meaningless, or at least probed the boundary between art and commerce to such a degree that it cannot be relied on to distinguish art from everything else. For example, in 2009, Andy Warhol’s silk-screening painting of 200 one-dollar bills was auctioned for \$43.8 million.¹⁷⁶ Artist Jeffrey Koons has been described as “pushing the relationship between art and money so far that everyone involved comes out looking slightly absurd.”¹⁷⁷

In the art vending context, bold commercialism has not been paired with an artist’s exalted status or the institutional acceptance of galleries or museums, but it would be difficult to argue that an artist pushing these boundaries should be denied First Amendment protec-

172. *Mastrovincenzo v. City of New York (Mastrovincenzo II)*, 435 F.3d 78, 91 (2d Cir. 2006).

173. *Id.*

174. *Id.* at 101.

175. *S.F. St. Artists Guild v. Scott*, 112 Cal. Rptr. 502, 505 (Cal. Ct. App. 1974).

176. Lindsay Pollock & Philip Boroff, *Warhol’s ‘200 One Dollar Bills’ Fetches \$43.8 Million in N.Y.*, BLOOMBERG.COM (Nov. 11, 2009, 8:53 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a4G3f8EhJSSE>.

177. *See Roger v. Koons*, 960 F.2d 301, 304 (2d Cir. 1992) (quoting New York Times art critic).

tion simply because he or she has not yet been recognized by the art community. Vending regulations should thus reflect that in the street vendor's market, as in the high-end art market, commercialism and expressiveness are inextricably intertwined.

CONCLUSION

Art's uncertain status as protected speech will likely persist absent a new articulation of its First Amendment value. Such a theory, however, would likely hinge on the Court adopting a definition of art—a category that has perpetually resisted categorization. In the art vending cases, to define art has been to criminalize it.

The purpose of this Note is not to offer a new test for defining art or a new theory of art's First Amendment value. Rather, this Note seeks to problematize the theories of art that underlie current efforts to regulate art vending. In their place, it offers a practical solution for the vending issue that is both speech-protective and easily enforceable: a bright line rule that subjects all merchandise to the same regulation. The equal sale regime balances the significant First Amendment and governmental interests at stake, while largely avoiding the line drawing problems that have stymied courts and legislators to date.

