Art and the determination of whether something qualifies as art have been the subject of vigorous debate in both the law and the humanities for centuries. Perhaps it is not surprising to see that philosophers, historians, and even artists themselves cannot agree on a universal definition of “art.” Leo Tolstoy, both a writer and a philosopher, believed that, to be considered art, the artwork has to be communicative, expressing an experience or a feeling—either good or bad—that represents the human condition. Federal courts addressing the question of the appropriate level of First Amendment protection for art have sometimes agreed that the key to protection is the communicative value of the work at issue. Others—in both law and other disciplines—have argued, however, that to qualify as art, the work must carry some component that is aesthetically pleasing, lest a mere circle painted on a canvas be considered art.

Well-reasoned as they may be, these theories of art themselves raise other questions that are highly relevant from a legal perspective and are not fully answered:

- Who decides if the work of art is or is not communicative?
- What if one person considers a certain piece of art beautiful and another thinks it is ugly?
- Should the answer to either question even matter at all?

After hundreds, and probably thousands of years of debate on the topic, one thing is certain: art, whatever one’s own definition, is ubiquitous.

Given this ubiquity, it is only natural that art and artistic expression have been evaluated under the Free Speech Clause of the U.S. Constitution, raising questions about whether, when, and why the display of art should be free from government incursion. It is not surprising to find that courts have been generally hesitant to opine on what is or is not art in the context of deciding thorny issues of what is protected under the First Amendment. As U.S. Supreme Court Justice Oliver Wendell Holmes Jr. so aptly warned, judging the value of art is a “dangerous undertaking for persons trained only in the law.” More than 80 years later, Justice Antonin Scalia reinforced that sentiment, noting that, because “there is no use arguing about taste, there is no use litigating about it.” The point is clear: If those trained in art have been unable to agree about what constitutes art, the judiciary is in no better position to do so.

Nevertheless, as art has expanded into new mediums, so has the role of courts in protecting art as expression. With courts needing to examine questions like whether nude dancing at a bar or publicly exhibited junk cars displaying murals are expressions that are protected under the First Amendment, it seems nearly impossible to escape the unyielding questions about whether the communicative value of art is the key to deciphering what measures the government can or cannot take to limit the avenues for that expression.

In an abundance of caution, the U.S. Supreme Court has mimicked the vague definitions of art provided by its philosophical predecessors. Indeed, the Court has never precisely defined art or explained exactly why it deserves First Amendment protection; the Court has only ruled that art merits protection. For instance, in Miller v. California, 413 U.S. 15 (1973), the Supreme Court examined whether sexually explicit pictures and drawings in a book deserved First Amendment protection. Although the Court ruled against the defendant, holding that the mate-
rial in the book was obscene and did not deserve to be protected under the First Amendment, the Court did recognize in dicta that “courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression.” What qualifies as “genuinely serious” expression is obviously in the eye of the beholder, and it is unclear whom the Supreme Court meant should be deciding this question. Nevertheless, the Court clarified that “freedom of speech” as defined in the First Amendment of the Constitution constitutes more than the written or spoken word, and that art, placed alongside other forms of core expression, is protected in a similar—if not the same—manner.

What followed in the next 30 years was a litany of cases exploring the metes and bounds of this proposition. For instance, in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995), the Supreme Court discussed how a parade was a form of expression and, as a result, specified that “the painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll” were “unquestionably shielded” by the First Amendment. Similarly, in Ward v. Rock Against Racism, 491 U.S. 781 (1989), the Court held that “music, as a form of expression and communication, is protected under the First Amendment.” These decisions leave no room for denial: Artistic expression—whatever it may be—is protected speech.

At the same time, however, the Supreme Court’s favorable language in support of constitutional protection has left the extent and scope of such protection somewhat hazy. For example, in Kaplan v. California, 413 U.S. 115 (1973), the Court explicitly put a different value on certain kinds of expression by placing books and verbal expression above visual art on the First Amendment totem pole. The Court reasoned that a book has “a different and preferred place in our hierarchy of values” yet subsequently found that the unillustrated book at issue in the case did not deserve First Amendment protection because the book contained explicitly sexual material.

This holding, in combination with the Supreme Court’s concurrent idyllic language about artistic expression in Miller, left it up to lower courts to develop and determine the standards—or lack thereof—related to what art qualifies as free expression and how much constitutional protection it merits.

Most circuits have approached the difficult task of defining and protecting art by fashioning their own jurisprudence involving First Amendment law and artistic expression. As a result, the courts have issued split opinions—both among one another and sometimes even within the same circuit. Examining the way in which the Second, Fifth, and Ninth Circuits have evaluated visual art highlights the range of approaches taken by the courts in granting constitutional protection to artistic expression.

The Second Circuit has granted visual art broad protection under the First Amendment. In Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996), cert. denied, 520 U.S. 1251 (1997), a group of New York photographers, sculptors, and painters, as well as an artists’ advocacy organization, sought to enjoin enforcement of the General Vendors Law, which prohibited visual artists from exhibiting, selling, or offering their work for sale in public without first obtaining a license. The Second Circuit reversed the decision made by the Southern District of New York, which found that the license requirement did not constitute an unconstitutional infringement of the plaintiffs’ First Amendment rights. In its ruling, the Second Circuit held that artistic expression was entitled to full First Amendment protection.

When the suit was filed, New York City’s General Vendors Law required general vendors to obtain a license to sell nonfood goods or services in public spaces. But when the General Vendors Law changed in 1979, it capped the number of licenses to be issued at any given time to 853. Considering that, at any given time the waiting list consisted of between 500 and 5,000 applicants and the expected waiting period was between three and five years, the ordinance made it nearly impossible to ever get a license. Furthermore, two categories of vendors were exempted from the license limit: veterans and sellers of newspapers, books, pamphlets, or other written material. As a result, the statute did not burden the sale of written work in keeping with the principles of the First Amendment but treated visual artistic expression differently.

According to the district court, this “incidental” burden on the right of artists to sell their work was justified, because the ordinance did not interfere with “pure speech.” As in Kaplan v. California, the Southern District of New York relegated visual art to a lower position than words in the hierarchy of expression deserving First Amendment protection. The district court found that “[a]lthough some art may be very close to ‘pure speech,’ plaintiffs’ art does not carry either words or the particularized social and political message upon which the First Amendment places special value.”

Determining that the ordinance was content-neutral, the court engaged in a balancing test weighing the impact on the artists’ freedom against the city’s interest in the regulation. The district court decided that the city’s content-neutral ordinance should be evaluated under a more lenient level of scrutiny rather than a strict one that coincides with the view that visual art should be lower on the hierarchy of First Amendment protections. As such, the district court accepted the city’s justification for the General Vendor Law as a permissible exercise of the government’s discretion to keep the public streets clear of congestion.

The Second Circuit reversed the lower court’s holding and analysis in a drastic way. First, the Second Circuit explained that the district court’s view of the reach of the First Amendment was more restrictive than warranted by the jurisprudence. The circuit court’s ruling highlighted the extent of the First Amendment’s protections by providing a detailed list of precedents that enumerated entertainment, theater, and music, without regard to words, as mediums of expression that the Constitution undoubtedly aimed to protect as speech just as much as it protected verbal or written expression.

After issuing this list, the Second Circuit dismissed
the district court's flawed perception of visual art. Calling the district court’s view of the First Amendment and visual art “myopic,” the Second Circuit concluded that visual art—including paintings, photographs, prints, and sculptures—always communicates some idea or concept to those who view it. As an example, the court pointed to Winslow Homer's paintings on the Civil War, arguing that one cannot look at them “without seeing, in his depictions of the boredom and hardship of the individual soldier, expressions of anti-war sentiments, the idea that war is not heroic.”

Having granted visual art full protection under the First Amendment, the Second Circuit finally turned to evaluating the level of scrutiny that should be applied to New York City’s ordinance. The circuit court questioned the district court’s labeling of the General Vendor Law as content-neutral, given that the ordinance effectively banned the sale of artwork in public places, thereby eliminating an entire medium of expression. However, the Second Circuit chose not to decide the issue of whether the ordinance was or was not content-neutral, because the reputation would fail even under a less restrictive standard of scrutiny.

Accordingly, the Second Circuit held that the General Vendor Law was unconstitutional because the district court had misapplied the standard of scrutiny and ignored the requirement that a content-neutral regulation may restrict the time, place, and manner of protected speech only if the ordinance is narrowly tailored to serve a significant governmental interest.15 The Second Circuit chose not to decide the issue of whether the ordinance was or was not content-neutral, because the reputation would fail even under a less restrictive standard of scrutiny.

In 2006, the Second Circuit revisited the constitutionality of the New York General Vendors Law in *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006)—a case brought by plaintiffs who had sold clothing imprinted with graffiti, which they characterized as artwork on nontraditional canvases. The plaintiffs’ arguments in *Mastrovincenzo* were like those of the plaintiffs in *Bery*. Because the permissible number of licenses had not changed since 1979, the plaintiffs could not compete with the backlog of individuals seeking licenses and were thus effectively banned from selling their clothing as a result of their inability to obtain the required licenses. Claiming that the ordinance violated their First Amendment right to freedom of expression, the plaintiffs sued.

With the *Bery* court’s opinion lingering as precedent, the district court in *Mastrovincenzo* found the plaintiffs’ clothing sufficiently expressive to warrant First Amendment protection. The court considered five nonexhaustive factors in making its decision: “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 fide 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.”17 Acknowledging that almost every object can conceivably be interpreted as having some expressive value, the district court nevertheless found that the clothing merited First Amendment protection and that the city’s General Vendors Law was unconstitutional.

On appeal, however, the Second Circuit recognized a potential difference between clothing and the visual art that was the subject of debate in *Bery*. After meticulously dissecting the history of the *Bery* litigation, the *Mastrovincenzo* court sought to determine whether works outside of *Bery*’s protected forms of traditional art—works other than paintings, photographs, prints, or sculptures—could or should qualify for protection and to what extent they should be protected.18 Acknowledging the inherent problems involved in trying to define “art”—“the contours of which are best defined not by courts”—the court addressed whether the sale of the plaintiffs’ clothing was “predominantly expressive” instead.19

This so-called dominant purpose test, as laid out by the Second Circuit in *Mastrovincenzo*, incorporated *Bery’s* principles while attempting to articulate further a process for courts to use in evaluating the protections provided to particular forms of visual expression. The court laid out a four-part inquiry:

- Are the goods being sold like those enumerated in *Bery*—that is, paintings, photographs, prints, or sculptures? If so, they are presumptively entitled to First Amendment protection.
- If the goods are not like those involved in *Bery*—goods that might include jewelry and pottery, because they sometimes have expressive content—can their sale be classified as potentially expressive and communicative?
- If the court finds the work to be somewhat expressive, does the work have a concurrent nonexpressive, utilitarian purpose that might counsel against protection under the First Amendment?
- Finally, if the work has both a nonexpressive and an expressive purpose, is the expressive purpose dominant or not?20

Using this test, the Second Circuit found that the plaintiffs’ graffiti-painted clothing was protected speech. Even though the clothing was not *presumptively* expressive, it was *predominantly* expressive. According to the plaintiffs, each piece of clothing was unique, customized on an individual basis, and marketed to a particular client. The court concluded that the plaintiffs were entitled to a public forum for their expressive purpose and that the city’s General Vendors Law was unconstitutional.
charged varying fees for the pieces based on the complexity and difficulty of creating the artwork. The court found that this evidence clearly indicated a dominant expressive purpose in the clothing, despite the fact that the plaintiffs also sold their work. The clothing vendors’ goods were thus granted First Amendment protection.

Unlike the street artists in Bery, however, the plaintiffs in the Mastrovincenzo case were not entitled to full First Amendment protection for their clothing. Rather, because the plaintiffs’ clothing was not fully expressive and only predominantly expressive, the Second Circuit responded with an equally diminished level of protection: a subordinated, lesser level of protection than that afforded to, say, a painting.

Having found the vendors’ work entitled to some First Amendment protection, the Second Circuit concluded its analysis by examining the application of the General Vendors Law to the Mastrovincenzo plaintiffs’ activities. Although the Second Circuit had declined to take a definitive position in Bery, the Mastrovincenzo court found the ordinance to be content-neutral because it differentiated only between various kinds of vendors and not on the content of their speech. Unlike in Bery, however, the court held that the ordinance survived intermediate scrutiny as a valid time-place-manner restriction. Where the Second Circuit in Bery took issue with the city’s failure to tailor its statute narrowly, the Mastrovincenzo court found that the ordinance limiting the business of vending was intimately connected with problems of sidewalk congestion in a city as populated as New York City, and thus the ordinance was appropriately tailored when it came to works such as those at issue. With respect to the availability of alternative channels of communication, the court explained that the vendors could still add their names to the waiting list for licenses or petition the City Council to increase the number of permits issued, despite the fact that these alternatives had failed in the past. The court similarly argued that, if they were interested in turning a profit, the plaintiffs could simply distribute their art to the public for free or enlist licensed vendors to sell their clothing. After providing a laundry list of “available alternatives,” the court explained its reasoning for its departure from the decision it had made in Bery: the clothing, which deserved some, but not full, protection under the First Amendment, was altogether different from the paintings, photographs, prints, and sculptures given full protection in Bery. Ultimately, the court held that the scope of constitutional protection afforded to a work would depend on how expressive or communicative it was.

Overall, the Second Circuit’s approach in Bery and Mastrovincenzo has been helpful in determining what artwork can be protected under the First Amendment. In distinguishing between artwork that is presupmissively expressive, merchandise that is potentially expressive, and merchandise that has no expression, the Mastrovincenzo court handled the very difficult task of defining what art is worthy of protection as speech within the confines of First Amendment principles. Thus, the Mastrovincenzo court shifted the focus from the medium of the alleged artistic expression to the message; whether or not the work actually communicates an idea subject to First Amendment protection has become paramount.

Still, the Second Circuit’s test raises a few issues. By presumptively crowning four traditional media as fully protected works on the same order of verbal and written speech, the court contradicted its own acknowledgment that, just because an item is labeled as “art,” it does not necessarily receive First Amendment protection. Indeed, the Second Circuit seemingly removed the entire analysis of communication from paintings, photographs, prints, and sculptures, making the first step of the Mastrovincenzo test potentially both over-inclusive and under-inclusive. For instance, under the test, a mass-produced photograph of a circle would be presumptively expressive and fully protected, but an original hand-rendered drawing of the Empire State Building on a T-shirt would be only potentially expressive. With its premise that a photographed circle always transmits an idea, but that the more sophisticated work imprinted on a different medium does not, the Second Circuit’s test risks reduction to an argument about the importance of particular mediums and their so-called inherent expressive capacity. As the example set forth here demonstrates, very few would argue that every photograph is so naturally expressive as to merit automatic full protection under the First Amendment, and most would acknowledge that some art outside of the four categories elevated by Bery can be highly communicative.

In a similar vein, the Ninth Circuit has chosen to highlight communication as a defining and sometimes determinative factor in evaluating what level of protection art deserves. In White v. City of Sparks, 500 F.3d 953 (9th Cir. 2007), the plaintiff, an artist named Steven White, sued the city of Sparks, Nev., claiming that the city’s vendor licensing scheme, which prohibited him from selling his art in public streets and parks without a license, violated his First Amendment rights. White earned a living by setting up an easel on streets and in parks and engaging passersby who took an interest in his work. According to White, his paintings of nature scenes—including trees, mountains, animals, and birds—conveyed the message that “human beings are driving their spiritual brothers and sisters, the animals, into extinction.”21 The city of Sparks limited the sale of goods in parks and other public areas to licensed vendors, as was the case in Bery, but the city allowed for an exception: items covered by the First Amendment. In order to qualify for the exception, however, an artist had to seek and receive a preapproved determination from city employees that the merchandise to be sold conveyed “an express or obvious religious, political, philosophical, or ideological message.”22 Intimidated by the licensing requirements and potential for arrest, White refrained from displaying and selling his work in those areas. He sued the city of Sparks for enforcing a vague and overbroad prior restraint on speech under the First Amendment.

Borrowing from the Second Circuit’s analysis in Bery,
White argued that visual art, which would include his paintings, is per se constitutionally protected because the works are inherently expressive. But the district court declined to extend its ruling beyond protection of White’s paintings, because such a blanket presumption would eliminate the need for individualized inquiry into the expressiveness of a particular piece of art.26 Still, the district court held that, because White’s paintings were intended to convey a message, they were entitled to First Amendment protection.

The Ninth Circuit affirmed the district court’s ruling.27 The circuit’s holding in White turned on the fact that White was selling his own work. After finding that White’s work was expressive, the court emphasized at least three times that the First Amendment protected his paintings, because they were original and communicated his own personal messages about nature. Furthermore, the court expressly reserved the question of whether all paintings merit First Amendment protection, suggesting that a copied painting of another artist’s work or a mass-produced painting may be treated differently. Ultimately, the Ninth Circuit focused on whether or not an artist’s visual work had either an explicit or an implicit message instead of the form or method used. As long as the work in question was the artist’s creation, full First Amendment protection would be given to expressive paintings.

In its own way, however, the Ninth Circuit distinguished treatment between more traditional forms of art like paintings and “expressive merchandise.” In fact, the test used by the city of Sparks for granting approval to artists like White was based upon a standard for protected expression set forth in Gaudiya Vaishnava Society v. City and County of San Francisco, 952 F.2d 1059 (9th Cir. 1990). That case involved a challenge raised by a group of charitable, religious, and political nonprofit organizations to San Francisco’s peddling ordinance, which prohibited nonprofit groups that did not have a permit from selling any merchandise other than books, pamphlets, buttons, bumper stickers, posters, or items that have “no intrinsic value other than to communicate a message.”28 Dismissing the notion that protection applies only when an item is “purely communicative,”29 the Ninth Circuit held that when nonprofit groups engage in activities in which pure speech and commercial speech are inextricably intertwined, the speech must be fully protected under the First Amendment. Because the merchandise the nonprofit organizations wished to sell carried political, religious, philosophical, and ideological messages, the court granted the plaintiffs full First Amendment protection.

In White, the Ninth Circuit highlighted the city of Sparks’ misapplication of this standard to visual art. The Gaudiya standard was meant to apply to merchandise—clothing and jewelry sold by charitable organizations—that “lacked inherent expressive value and gained expressive value only from its sale being inextricably intertwined with pure speech.”30 The standard was not meant to apply to inherently expressive art, such as original paintings. In creating this distinction, the Ninth Circuit created a system that allowed more traditional, visual art to be expressive in any number of implicit or abstract ways, but required “expressive merchandise” to be clearly intertwined with a religious, political, philosophical, or ideological message to be deserving of protection.

Although the test articulated by the Ninth Circuit in White is broad enough to protect various forms of self-expressive visual art, it still requires judges to determine whether or not something communicates a message. It can be argued that the Second Circuit chose to label certain classic forms of art presumptively protected in order to avoid the difficult task of determining what or whether any “succinctly articulable message”31 is being conveyed. Given this uncomfortable requirement, it is likely that the Ninth Circuit will undoubtedly find most original works of art expressive, because nearly anything can conceivably convey some sort of message.

In contrast to the Second and Ninth Circuit’s analyses, the Fifth Circuit’s recent holding in Kleinman v. City of San Marcos, 597 F.3d 323 (5th Cir. 2010), severely undermines First Amendment protection of artistic expression. In this case, the plaintiff, Michael Kleinman, ran a “funky” novelty store. As part of celebrating the opening of a new location, Kleinman held a “car bash” charity event, during which participants paid to smash a donated Oldsmobile ‘88. He then had the wreck filled with dirt and planted with native Texas cacti. Most important, Kleinman commissioned two local artists to turn the smashed vehicle into artwork by painting the Oldsmobile ‘88 car-planter with scenes of life from San Marcos, Texas. Even though neither Kleinman nor the artists had a particular message in mind, Kleinman did request that the design incorporate the phrase “Make love not war.” The artists intended the images to convey “happiness,” the idea that “you could take a junked vehicle, junk canvas, and create something beautiful out of it,” and wanted to transform “a large gas-guzzling vehicle into something that’s more respectful of the planet and something that nurtures life.”32 The car-planter was positioned in front of Kleinman’s new business, in a location visible from the main highway. As a result, the city ticketed Kleinman and his employees for violating the city’s ordinances banning junked vehicles in public places. Kleinman and the artists sued to enjoin the city of San Marcos from removing his car-planter on the grounds that what once was a vehicle was, in fact, now artistic expression protected by the First Amendment.

Citing Bery as support, Kleinman argued in the district court that visual art is fully protected by the First Amendment. Therefore, Kleinman contended that the city’s ordinance, by banning all public displays of any junked vehicle, did not leave open any alternative channels of public communication for his car-planter. But the district court disagreed, noting that Bery was limited by Mastrovincenzo’s “dominant purpose” test. In addition to the item being expressive, the district court found that Kleinman’s car-planter had functional elements—it was part of his store’s “corporate image and culture” as he had been installing other car-planter at other store locations for many years. Still, the district court recognized that, even though the car-planter was not “commercial
speech” in the way a billboard or other advertisement might be, it was at least applied art that was distinguishable from Bery’s four traditional works of art. As a result, the district court found that the car-planter was protected, but to a lesser extent. Evaluating it under a lower standard of scrutiny, the court found that the city’s interest in preventing the nuisance that junked cars create was a legitimate government purpose. The court also evaluated the requirement for “alternative channels of communication” and found that the car-planter only had to be hidden from public view behind a fence, but that it was still open to the public. Thus, the car-planter’s message had an alternative public forum available that did not unduly burden the message.

On appeal, the Fifth Circuit affirmed the district court’s judgment on the merits, boldly holding that only “great works of art” merit First Amendment protection.\textsuperscript{30} Channelling Bery, the Fifth Circuit recognized a distinction between “fine art” and “decorative arts” and found that the car-planter was a mere advertisement, completely utilitarian, and ultimately a junked vehicle, thus going where the Second Circuit wouldn’t by injecting itself into making a determination of the value of the work’s status as art. In addition, in sharp contrast to the White court, the Fifth Circuit ignored the plaintiffs’ expressed intentions for the car-planter, suggesting that expressiveness is objectively determinable by the court without regard to the maker’s intended message. “In an abundance of caution,” because the city conceded that the car-planter had some protected expressive content, the Fifth Circuit engaged in an alternative First Amendment analysis, concluding that the city could completely ban any public display of the plaintiffs’ alleged artwork. The court found that there were ample alternative channels of communication because the car-planter could be displayed “behind a fence, indoors, or in a garage enclosure,” or because Kleinman could “erect a sign” or “display a poster” in order to invite the public to view it privately.\textsuperscript{31}

The Fifth Circuit’s holding in Kleinman just one year ago reinforces the numerous problems that the courts continue to grapple with when evaluating visual art and when, whether, and to what extent visual art should be protected as speech. For one, the Kleinman court’s opinion asks judges to determine subjectively what art is “great” enough to deserve First Amendment protection. Although the court touts this as an objective standard, under the Kleinman court’s test, the intentions of the art’s creators are deemed irrelevant. This approach risks giving individual jurists discretion to become the arbiters of “good taste” and offers the potential that modern or unconventional art may also be “great.” Indeed, even though the Kleinman court cited Hurley as Supreme Court precedent for its limited view, the Kleinman ruling ignored the fact that the very same opinion cited Pollock’s abstract paintings and Carroll’s “nonsense” poetry to show the breadth of First Amendment protection.

The Kleinman court’s evaluation of the functionality of the car-planter also leaves room for debate. It is arguable that the car-planter, which was no longer functional as a car, was ultimately a “junked vehicle” as characterized by the Fifth Circuit. The item at issue had been sealed and made safe, thereby addressing the city’s concerns about creating a hazard, and had been transformed into a planter, which was colorfully painted with images and imprinted with a well-recognized political slogan—“Make peace not war.” Indeed, in an effort to convey a message about the toxicity of “gas guzzlers” against the countervailing notion of protecting life, Kleinman and the artist apparently chose the perfect medium: a “dead” car that supported life and conveyed a message of peace. Like the clothing vendors in the Mastrovincenzo case, the Kleinman plaintiffs’ car-planter could easily be characterized as “artwork on nontraditional canvases.”

Furthermore, the Fifth Circuit’s ban on the public display of Kleinman’s car-planter is arguably absolute. Unlike the Mastrovincenzo plaintiffs, who could continue to publicly display their graffiti-adorned clothing—and, in fact, were entitled to a public forum for expressing their views—the Kleinman plaintiffs were forced indoors or behind a fence on private property. Indeed, the Second Circuit explicitly recognized that the public display of artwork was a form of communication between the artist and the public that would be overly burdened in a constitutionally impermissible manner if delegated solely to enclosed spaces. The Fifth Circuit, even assuming that the car-planter was expressive, seemed to reject this distinction in the Kleinman case.

As art is continually in flux, so is the constitutional law doctrine pertaining to it as evidenced by First Amendment case law exemplified by these cases that were heard by the Second, Fifth, and Ninth Circuits. With the sheer variety of mediums and the changing standards of what is “expressive,” courts are likely to find themselves struggling with emerging questions. Still, in the face of various complicated issues, the U.S. Constitution has remained unyielding and has withstood the test of time. As the Bery court suggested, simply because decisions are difficult to make in individual cases, it is not beyond the ability of courts to find ways to comport with the principles of the First Amendment while leaving behind questions of aesthetics to philosophers, historians, and artists. Even though art is ubiquitous, the jurisprudence that surrounds it continues to evolve with each new case. TFL

\textbf{Endnotes}

\textsuperscript{1}Leo Tolstoy, \textit{What is Art?} (1896).

\textsuperscript{2}U.S. Const., Amend. 1 (providing that “Congress shall make no law … abridging the freedom of speech”).

\textsuperscript{3}Bleistein \textit{v.} Donaldson Lithographing \textit{Co.}, 188 U.S. 239, 251 (1903) (holding that circus posters were entitled to copyright protection and announcing the principle of “aesthetic non-discrimination”).

ized awards and decorations between 1987 and 1990.


19See Man Apologizes for Claiming to be Medal Winner, CHICAGO TRIBUNE at 6 (May 21, 1997) (“found guilty ... of wearing the [Medal of Honor] without authorization”).

20Company Fined $80,000 for Selling Bootleg Medals, ARIZ. REPUBLIC at A10 (Dec. 4, 1996) (unauthorized sale of 300 Medals of Honor); cf. Nick Adde, Other Than Honorable: Medal Sales Prosecuted, ARMY TIMES at 30 (Dec. 11, 1995) (individual arrested and charged “with selling two unissued Medals of Honor to an undercover agent”).

21Press Release, USAO E.D.N.C., supra, note 5 (Navy Cross, Silver Star, and Purple Heart); Gould, supra, note 5 at 25 (one wore the Distinguished Service Cross, the second wore the Purple Heart); Freeman Klopott, Man Gets 10 Days in Jail for Posing as Navy Veteran, WASH. EXAMINER at 8 (April 9, 2010) (man wore the Silver Star and Purple Heart, among others).


23Lt. Col. Gary D. Solis (Ret.), Stolen Valor on Trial, PROCEEDINGS 52, 53 (Nov. 2010) (“Imprisonment, even for brief periods, has been rare.”).

24United States v. Alvarez, 617 F.3d at 1199, 1200 (9th Cir. 2010).

25Id. at 1202, 1209–1211 (defamation), 1211–1213 (fraud), 1213 (emphasis in original).

26Id. at 1216–1217

27Id. at 1218–1219, 1220, 1221 n.1 (emphasis in original), 1222 (citations omitted).

28United States v. Strandlof, 746 F. Supp. 2d at 1185–1186 (D. Colo. 2010); see also Solis, supra, note 23, at 54.

29Strandlof, supra, note 29, at 1186, 1187, 1188.

30Id. at 1188–1191.


32Perelman, supra, note 18, at 1238 (citing United States v. O’Brien, 391 U.S. 367 (1968)).


34Id. at 817–818, 819 (emphasis in original).

35Id. at 821–822.

36Alvarez, supra, note 24, at 1213.