

LEGAL DEFIANCE: GOVERNMENT-SANCTIONED GRAFFITI WALLS AND THE FIRST AMENDMENT

The caricature face of Maine Governor Paul LePage, wearing a Ku Klux Klan hood and surrounded by the words *homophobe*, *moron*, and *racist* greeted every passerby of the Portland Water District (PWD) in Portland, Maine on September 6, 2016.¹ The image sparked a controversial exchange between local government entities, a rarity since the City of Portland and PWD agreed to provide the hundred-foot wall as a public graffiti site in 2001.² City spokeswoman Jessica Grondin said the city “can’t do anything because [the graffiti is] sanctioned and it’s a matter of free speech.”³ Mayor Ethan Strimling apparently disagreed and asked PWD to paint over the mural, as “equating the governor and his rhetoric [with the KKK] . . . is a step too far.”⁴ Grondin said PWD would not comply with the Mayor’s request, though PWD did not condone the message.⁵

Shortly after the mayor called for removal, an unknown party replaced LePage’s hood with Mickey Mouse ears, momentarily assuaging Portland’s free speech tension.⁶ But the vigilante Mickey artist merely postponed confronting the issue, as some in Portland called for the PWD to end its allowance for public art.⁷ This presents a familiar question in an unfamiliar context: when the government, at any level, creates a space for artists to paint graffiti without prior design approval,⁸ how can—and should—the government censor what is painted on those spaces?

This Note examines that question. Part I discusses a brief history of graffiti and its proliferation in American culture. Part II highlights the issue of government-sanctioned walls and addresses why there has been little, if any, judicial discussion on government regulation of these spaces, despite the prevalence of graffiti in American television, film, clothing, and other industries. Part III hypothesizes as to which legal doctrines would be

1. Peter McGuire, *Scathing LePage Mural Tests Portland’s Stance on Free Speech*, PORTLAND PRESS HERALD (Sept. 6, 2016), <https://perma.cc/76NQ-C3K6>.

2. Sarah Larimer, *Mural Depicting Gov. Paul LePage in KKK Regalia Sparks Painting Fight in Maine’s Biggest City*, PORTLAND PRESS HERALD (Sept. 7, 2016), <https://perma.cc/PC93-9BVS>.

3. *Id.*

4. *Id.*

5. *Id.*

6. McGuire, *supra* note 1.

7. Ed Morin, *Portland Water District to Continue Allowing Use of Graffiti Wall*, BANGOR DAILY NEWS (Mar. 30, 2017, 8:45 PM), <https://perma.cc/CB3Y-WKZ8>.

8. I will refer throughout this essay to these types of public art spaces as “government-sanctioned walls,” “legal graffiti walls,” and “legal walls.” These all refer to walls that are publicly owned and explicitly or impliedly (through lack of enforcement of anti-graffiti regulation) deemed free for use by graffiti artists.

relevant to a First Amendment or other challenge to government regulation of graffiti walls and argues that courts should consider a legal graffiti wall to be a designated public forum, with all regulations subject to strict scrutiny. Because there is little opportunity for artists themselves to challenge government censorship of legal walls, the government must also exercise self-restraint if it opts to provide these legal walls. Part IV outlines the considerations a government must consider when creating and maintaining a legal graffiti space to facilitate a more robust public discourse.

I. GRAFFITI AND EXPRESSION

Graffiti is a powerful means of expression, made of words, images, or a combination of the two, in a place where it is neither expected nor (generally) wanted.⁹ Graffiti lies at the cross-section of art, vandalism, and political expression and enjoys prevalence in urban American culture.¹⁰ This prevalence comes with a high price tag, however: American cities collectively pay \$12 billion per year to remove, cover and abate graffiti.¹¹ Los Angeles alone spends \$7 million annually.¹²

Both private and government actors employ legal graffiti walls to abate this cost and provide alternative forums for speech.¹³ Graffiti walls meet other objectives as well—young people can engage with and develop art

9. See discussion *infra* pp. 13–15; see also Cameron McAuliffe & Kurt Iveson, *Art and Crime (and Other Things Besides . . .): Conceptualising Graffiti in the City*, 5 GEOGRAPHY COMPASS 128, 140 (2011) (“Graffiti disrupts the aesthetic fabric of the urban environment, writing its own story across spaces not intended to act as a communication medium – the walls and ceilings of the city, and trains and trucks that travel through it.”).

10. Today, graffiti and its likeness proliferate most of American culture in the form of TV commercials, clothing, movies, museums, and even subway cars in Disneyworld. See Marisa A. Gómez, *The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art from Graffiti Vandalism*, 26 U. MICH. J.L. REFORM 633, 641 (1993); *N.Y. Wants Disney to Erase Stigma*, CHI. TRIB. (Nov. 24, 1989), <https://perma.cc/PLK3-Q8E6>; *Sherwin-Williams Co. v. City & Cty. of S.F.*, 857 F. Supp. 1355, 1359 (N.D. Cal. 1994) (describing “[h]ip-hop graffiti” as “part of the hip hop culture, which also includes certain styles of music, dress and other components”); see also Sheldon A. Evans, *Taking Back the Streets? How Street Art Ordinances Constitute Government Takings*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 685, 691 (2015) (discussing how graffiti “brought art to the everyman” by its public display).

11. See *Graffiti Vandalism in Riverside*, CITY OF RIVERSIDE, <https://perma.cc/E4XR-CGL4>.

12. Aaron Mendelson, *LA Scrubs Away 30 Million Square Feet of Graffiti Each Year*, S. CAL. PUB. RADIO (Sept. 10, 2015), <https://perma.cc/CB5X-HEZ2>.

13. See, e.g., Rob White, *Graffiti, Crime Prevention & Cultural Space*, 12 CURRENT ISSUES CRIM. JUST. 253, 263 (2001) (discussing efforts to “orient existing graffiti work toward pro-social, legal community projects, and away from illegal, graffiti vandalism . . . by assisting young people in their skill development, providing avenues for the undertaking of community projects, [and] increasing the prospects of writers/artists receiving an income from involvement in commercial projects”). There is, however, a litany of failed “legal wall” projects. See Randy Campbell, *Graffiti “Free” or “Sanctioned” Walls Vignettes from All Over*, NOGRAF NETWORK, <https://perma.cc/J2XS-STVG> (citing several failed attempts at opening legal graffiti wall forums, which resulted in increased tagging and vandalism around the walls and writing that “[w]hat started as a nice project turned the area into a slum”).

skills, legal walls can de-stigmatize an activity commonly seen as deviant, and graffiti can beautify dilapidated communities.¹⁴ To date, there are legal walls in several locations around the world, and many are in the United States.¹⁵ Most legal walls in the United States are privately-owned, but at least three are publicly-owned, government-sanctioned walls.¹⁶ Before delving into the judicial doctrine governing these government-sanctioned art spaces, this Note briefly inquires into the communicative value of graffiti and the current view of graffiti in society.

A. *Who is speaking?*

There is no one homogenous group of graffiti artists—they range from the world-renowned Banksy¹⁷ to local teenagers. Typical artists are young, ethnic minorities, men, and those in a marginal and transitional status.¹⁸ Graffiti requires little economic investment and no requisite skill set, making graffiti accessible to individuals of lower socio-economic status.¹⁹ And older, more experienced artists may continue to paint in the street or work in studios, displaying and selling their work.²⁰

14. See generally Gómez, *supra* note 10; see also Madeleyenn Green, *A Beautiful Mess: The Evolution of Political Graffiti in the Contemporary City*, 8 CORNELL INT'L AFF. REV. 7, 16 (2014) (arguing that the “commodification of street art and its ability to aid in the transformation of formerly dilapidated spaces unearths a new, contemporary function for street art”); Terri Moreau & Derek H. Alderman, *Graffiti Hurts and the Eradication of Alternative Landscape Expression*, 101 GEOGRAPHICAL REV. 106, 118 (2011) (discussing graffiti as having “significant therapeutic potential as a mode of response to trauma and issues of identity negotiation” and being a “natural outlet for marginalized groups to express their internal sense of identity and injustice”) (internal quotation marks and citation omitted).

15. See, e.g., *Find Legal Graffiti Walls Around the World*, <https://legal-walls.net/>.

16. These walls include the PWD wall, discussed *supra* at 1–2; the Richard B. “Rico” Modica Way in Cambridge, Massachusetts, see Modica Way, ATLAS OBSCURA, <https://perma.cc/9E5S-RKVK>; and a wall in Venice, California, see VENICE ART WALLS, <https://veniceartwalls.com>.

17. Banksy is a well-known British graffiti artist. Most of his fans do not know his identity, but he has attained world-wide fame by “bombing”—outlaw spraying—walls in America and Europe. Will Ellsworth-Jones, *The Story Behind Banksy*, SMITHSONIAN MAG. (Feb. 2013), <https://perma.cc/4736-LPT2>.

18. White, *supra* note 13, at 256 (“[Y]oung people between 15 and 17 often occupy a ‘no man’s land’ in which they are neither children, nor adult. They are marginal to the family and occupational structures of society Marginal status can translate into assertions of presence. This can take the form of graffiti”); see also *Sherwin-Williams Co. v. City & County of San Francisco*, 857 F. Supp. 1355, 1360 (N.D. Cal. 1994) (“Hip hop graffiti writers are overwhelmingly male. They tend to be teenagers, ranging in age from 12 to 20, although some writers begin earlier and some writers continue through their 20s and even 30s. Writers come from all racial, ethnic and social backgrounds and are highly mobile.”) (citations omitted).

19. White, *supra* note 13, at 257; see also Green, *supra* note 14, at 7 (“the advent of iconographic street art [like graffiti] has opened new platforms for international youth to creatively express sociopolitical discontent”).

20. See, e.g., Lois Stavsky, *Street Art: Galleries and Alternative Spaces to See Exhibits in NYC*, TIMEOUT (Apr. 22, 2013), <https://perma.cc/M9NF-TE5L>.

By the 1970s, graffiti had developed into a feature of the youth sub-culture hip-hop movement.²¹ Today, graffiti in urban settings is just one part of a larger graffiti culture. This associative culture may include rites of passage and stylistic similarities, or competitive artistic feats.²² Rob White, a professor in law and sociology at the University of Tasmania, writes that artists paint for a number of reasons: they love it, it boosts their spiritual well-being, they want to engage authentically with society around them, or they feel a buzz by doing something seen as “deviant” and risky.²³ White writes that painting is often a way of “providing excitement and action, a sense of control and an element of risk.”²⁴

B. Where?

Typically urban settings provide the backdrop for graffiti, but its simplicity allows its creators to paint virtually anywhere.²⁵ Graffiti’s location can be communicative; the impact of gallery-displayed graffiti, for example, may not equal the impact of a mural under a heavily trafficked bridge.²⁶ This is because, first, different audiences frequent different places—compare a girls’ bathroom and a public highway—and second, a message can be place-specific, like an anti-war message on the walls of the Pentagon.²⁷

21. Gómez, *supra* note 10, at 642.

22. White, *supra* note 13, at 255; *see also* Sherwin-Williams, 857 F. Supp. at 1360 (identifying “classes” and “crews” within the “social organization of the hip hop culture” and describing “crews” as “groups of friends who write graffiti together and share materials and skills”).

23. White, *supra* note 13, at 257.

24. OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, U.S. DEP’T OF JUSTICE, E11011354, PROBLEM-ORIENTED GUIDES FOR POLICE SERIES (No. 9)—GRAFFITI 7 (2002).

25. *See* Cameron McAuliffe, *Legal Walls and Professional Paths: The Mobilities of Graffiti Writers in Sydney*, 50 URB. STUD. 518, 521 (2013) (“The ability to ‘strike anywhere’ constructs all surfaces of the city as a potential canvas.”).

26. *See* Jonna McKone, *Tagging Rights: Have the Nonprofits, Art Galleries, and Party Planners Who Fete D.C.’s Graffiti Scene Also Tamed It?*, WASH. CITY PAPER (Sept. 9, 2011), <https://perma.cc/K476-XQLY> (She quotes Cory Stowers, a project organizer for MuralsDC, discussed *infra* at 31–32, describing the effect of placement on the impact of graffiti: “When you come up on a fresh piece of graffiti in a random cut space or even just walking down the street, the impact that it has on you versus how you see it on a canvas or in an installation is greatly reduced.”); *see also* Moreau & Alderman, *supra* note 14, at 110 (calling graffiti works “highly geographical expressions”).

27. *See* Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006) (arguing that the place where speech occurs is vital to the communicative message of that speech, and that government spatial regulation impacts the effect of speech, especially political speech); *see also* White, *supra* note 13, at 255 (“The physical place of graffiti implies different types of audiences (e.g. girls only), and different types of messages (e.g. emphasis on sexuality and social relationships).”). The government’s exercise of power over the place of speech is a topic both Zick and White explore; White, for example, argues that the “re-configuration of public spaces and public forums” for law and order purposes is “premised upon social exclusion of designated people from public spaces.” *Id.* at 257. He also discusses “‘coercive crime prevention’ measures” which exclude people and their ideas from certain public areas in favor of social order, diminishing their expressive capacity. *Id.* at 261. *See also* Moreau & Alderman,

C. *What is the message?*

Artists use their paint to communicate a range of messages. Some are political, like the words “Black Lives Matter” and “No Justice No Peace” recently sprayed on Trump International Hotel in Washington, D.C., reflecting inflamed racial tensions during the 2016 presidential election cycle.²⁸ Some are reactions to “real and perceived abuses of authority.”²⁹ Some touch on social movements or values, like the Washington, D.C. metro-stop mural commemorating Sean Taylor, a murdered Washington Redskins football player, which has remained since its creation in 2007.³⁰ Some graffiti is more practical, and is used to mark gang territory or communicate using an “internal language” with other artists in graffiti culture.³¹ Some use graffiti to make their presence known, to rise within graffiti culture, and to connect with others.³² Some paint because painting is something to do.³³

Assertions often challenge majority ideologies and institutions.³⁴ Graffiti artists may find themselves at the margins of social and political life.³⁵ They may paint to challenge the construction of social and commercial institutions, which they view as a detriment to their success, rather than a benefit.³⁶ Some artists also contend that the *illegality* of painting graffiti itself may serve an expressive function, that “risk is part of the form.”³⁷ This

supra note 14, at 121 (arguing that “[p]unitiv[e] discourses that seek to marginalize certain social groups and activities are increasing in cities throughout the United States, creating selective, naturalized ideas about what public space should be used for, who is a legitimate member of the public, and how this translates into exclusionary practices in public space,” and that anti-graffiti campaigns “play a critical and often unquestioned role in not only vilifying graffiti artists but also justifying broader, exclusionary ideas about political identity and what counts for citizenship”).

28. Leah Freeman & Eric Bradner, *Trump’s DC Hotel Vandalized with ‘Black Lives Matter’ Graffiti*, CNN (Oct. 2, 2016, 2:31 PM), <https://perma.cc/2Y4F-LRQX>.

29. White, *supra* note 13, at 256; *see also* Moreau & Alderman, *supra* note 14, at 110 (“Graffiti can be seen as highly geographical expressions of dissatisfaction with dominant and domineering authorities and ideologies.”).

30. Dante Evans, *Sean Taylor: More than Just a Mural*, PULSEFEEDZ (Apr. 6, 2015), <https://perma.cc/7DVE-FHAQ>.

31. CEDAR LEWISOHN, STREET ART: THE GRAFFITI REVOLUTION 15 (2008) (“Graffiti isn’t so much about connecting with the masses, it’s about connecting with different crews, it’s an internal language, it’s a secret language.”).

32. White, *supra* note 13, at 256.

33. *Id.* at 257 (“Some people do graffiti without really thinking about why they are doing it, except that it was the thing to do at the time.”).

34. *Id.* at 256.

35. *Id.*

36. *Id.* *See also* Joe Hermer & Alan Hunt, *Official Graffiti of the Everyday*, 30 LAW & SOC’Y REV. 455, 464 (1996) (claiming that artists are often marginal groups “denied legitimate outlets” who “use graffiti to express the nightmarish existence of street life that often includes overt violence and prostitution”).

37. McKone, *supra* note 26; *see also* Evans, *supra* note 10, at 692 (“For some, the illegality of their craft is part of its allure and plays into their social commentary.”) (citing Alfredo Aleman,

illegality may be rewarded in subcultures that afford prominence to more daring graffiti feats and may also serve the expressive purpose of defiance against what artists see as oppressive—or, at least, unsympathetic—regimes.³⁸

D. How are they seen?

Graffiti is largely outlawed by city ordinances, and courts have generally upheld these regulations.³⁹ The Supreme Court protected the government's right to promote aesthetic values in *Members of City Council of Los Angeles v. Taxpayers for Vincent*,⁴⁰ a case that has since justified laws restricting graffiti paint sales, chalking, signage, and locations where homeless individuals may seek alms.⁴¹ Graffiti may be considered ugly and disruptive to the clean appearance that city companies and engineers work hard to cultivate.⁴² Graffiti also hits the pocketbook of American citizens.⁴³ When painters create graffiti on a public space, the collective community covers the clean-up cost. If they use private space, they trespass in wanton disregard for the property owner's rights of exclusion. Not surprisingly, many disfavor graffiti for these reasons.⁴⁴

Graffiti Artists Look Toward Los Angeles River for a Canvas, EGP (Aug. 13, 2009), <https://perma.cc/A7TM-79G3>.

38. McAuliffe & Iveson, *supra* note 9, at 131.

39. For example, New York City's prohibition of any "inscription, figure or mark of any type on any public or private building" without "express permission" describes graffiti as a Class A misdemeanor and imposes both fines and potential jail time. N.Y.C., N.Y., CODE § 10-117 (2003); *see also* *Sherwin-Williams Co. v. City & County of San Francisco*, 857 F. Supp. 1355, 1369 (N.D. Cal. 1994) (upholding anti-graffiti lock-up law requiring spray paint to be kept in store areas accessible only by employees, despite paint manufacturer's protests of reduced sales). For a further discussion on the public nuisance law and graffiti abatement regulation, *see* Evans, *supra* note 10, at 738–45, arguing that property owners whose property is painted with value-enhancing graffiti work should receive heightened scrutiny when bringing actions to enjoin the enforcement of anti-graffiti regulations, consistent with the principles that underlie the constitutional takings clause.

40. 466 U.S. 789, 805 (1984).

41. *See, e.g.*, *Johnson v. City & Cty. of Philadelphia*, 665 F.3d 486, 492–93 (3d Cir. 2011) (upholding Philadelphia's law prohibiting the posting of signs on utility poles, streetlights, sign posts, and trees in a public right-of-way, as the law was "narrowly tailored to serve the government's interests in safety and aesthetics"); *Chad v. City of Fort Lauderdale*, 861 F. Supp. 1057, 1062 (S.D. Fla. 1994) (upholding an anti-begging statute on a beach, which it determined to be a non-public forum, or alternatively, if the beach was a public forum, finding the restrictions on the time, manner, and place to be reasonable in light of the government interest in aesthetics, among other reasons).

42. *See, e.g.*, White, *supra* note 13, at 258 (noting that many perceive graffiti as "unsightly art or slogans or tags on public walls, trains and buses").

43. *See supra* notes 11–12 and accompanying text.

44. Graffiti on private property may constitute trespass, Ronald Kramer, *Painting with Permission, Legal Graffiti in New York City*, 11 ETHNOGRAPHY, 235, 237 (2010), and may be costly to remove. *Graffiti Vandalism in Riverside*, CITY OF RIVERSIDE, <https://perma.cc/E4XR-CGL4>. McAuliffe and Iveson also mention another view of graffiti in publicly owned spaces—a view which considers graffiti a "selfish, individualistic and 'private' appropriation of the public realm." McAuliffe & Iveson, *supra* note 9, at 133.

But graffiti often inspires a distaste that goes beyond the aesthetic ugliness and cleanup costs. Graffiti signifies a lack of control, and one graffiti piece can invite more, which in turn snowballs into small-scale criminal activity.⁴⁵ The Broken Windows Theory captures this idea. It alleges that small manifestations of crime or desertion can lead to, or invite, more violent crime.⁴⁶ In addition, graffiti can symbolize anarchist beliefs or, more moderately, a threat to existing institutions.⁴⁷ Graffiti is a direct defiance of authority, one that challenges conceptions of the city as wealthy or “clean.”⁴⁸ Moreover, visibly unruly graffiti may be uncomfortable to see.⁴⁹ It is a reminder of the presence of those who live a different life from other, more affluent residents.⁵⁰

“Graffiti artists” is thus a broad category of people: the term “graffiti” covers many images and words. White, for example, splits graffiti into categories of political, protest, art, tagger, gang, and toilet graffiti.⁵¹ While a legal graffiti wall will not *appeal* to all artists, any restriction—regulations, paint removal, et cetera—should *apply* equally to all artists, regardless of their motivation for painting. For that reason, I intentionally do not limit my discussion to any particular artist or message,⁵² as the government would not be able to allow some graffiti and exclude others

45. The Broken Windows Theory (BWT) was created by James Wilson and George Kelling in their article *Broken Windows*. George Kelling & James Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC (Mar. 1982), <https://perma.cc/NB8M-R2QP>. McAuliffe and Iveson cite several reasons, some of which are described by the BWT, to explain why graffiti is considered criminal and dangerous. McAuliffe & Iveson, *supra* note 9, at 130–31. Derek Alderman and Terri Moreau also write about the notion of cleanliness and order in their 2011 article *Graffiti Hurts and The Eradication of Alternative Landscape Expression*. Moreau & Alderman, *supra* note 14. I draw from these works throughout my analysis. However, see Elizabeth G. Gee, *City Walls Can Speak: The Street Art Movement and Graffiti's Place in First Amendment Jurisprudence*, 20 JEFFREY S. MOORAD SPORTS L.J. 209, 216–27 (2013), noting that recent studies have questioned the BWT's validity.

46. McAuliffe & Iveson, *supra* note 9, at 130–31.

47. White, *supra* note 13, at 258 (“Related to this idea [of the BWT] is the feeling on the part of some that the anti-authoritarianism represented in graffiti is a threat to those in control (i.e. institutional authorities and political leaders), and thereby a threat to 'ordinary' law-abiding citizens.”). Beyond the scope of this Note lies a fertile discussion of the overall societal meaning of graffiti and anti-graffiti regulation.

48. Moreau & Alderman, *supra* note 14, at 114–16.

49. *Id.* at 116 (“If the landscape looks and feels clean, safe, and cared for, it will not invite persons and activities that the majority does not want, such as graffiti or homeless persons.”).

50. White, *supra* note 13, at 258.

51. *Id.* at 254–55.

52. As a note, one student author conceptualized the act of painting graffiti itself as communicative conduct: “If . . . a tagger comes before the court, argues that his act of creating graffiti is a statement of his political beliefs, and provides evidence that he only defaces phone booths because he wants to symbolize his opposition to government wiretapping, the court must determine whether the conduct is protected.” Kelly P. Welch, Note, *Graffiti and the Constitution: A First Amendment Analysis of the Los Angeles Tagging Crew Injunction*, 85 S. CAL. L. REV. 205, 217 (2011). The Court would then turn to *United States v. O'Brien*, 391 U.S. 367 (1968) (establishing a test to determine the validity of government regulation of symbolic speech), for guidance. My discussion of *legal* walls forecloses the defiance-act argument, however, so I do not discuss it.

(unless, for example, graffiti that includes fighting words which incite violence, briefly discussed below).⁵³ The government could not distinguish “graffiti art,” or art with pop culture influences and cultural aesthetic, from “graffiti vandalism,” which encompasses gang graffiti and most tagging, and neither do I.⁵⁴ While my policy arguments focus largely on graffiti as political expressive speech, I do recognize that many works on a legal wall will not be political in nature—or even “artistic”—and should still merit protection.

E. The Problem

Thus, the problem, encapsulated by the incident in Portland, Maine,⁵⁵ is how and whether the government can censor legal graffiti walls. This issue applies to government at all levels, including those on college campuses, who face similar censorship issues. Ohio University allows student graffiti artists free reign over a cement block near campus.⁵⁶ The University touts the wall as a “unique part of the OU culture,” but it struggled with its commitment to free expression on the wall in the wake of national racial tension.⁵⁷ A painting of “Black Lives Matter” was covered with the message that “All Lives Matter.”⁵⁸ A message supporting President Trump’s candidacy—including the words “Build the Wall”—was covered by a Hispanic-Latino student group, writing the message “Build bridges, not walls.”⁵⁹ More recently, unknown painters created a hung figure and the

53. See *infra* p. 37–38.

54. See Gómez, *supra* note 10, at 635, for this distinction between “graffiti art” and “graffiti vandalism.” This distinction is generally based on the motivation of the artist. See Mary Carole McCauley, *Making Their Mark on Graffiti Alley*, BALT. SUN (Dec. 27, 2009), <https://perma.cc/3VQY-NJQ7>. I do not discuss different graffiti mediums, but refer generally to graffiti art created by paint or markers. Similarly, I restrict my topic to specifically graffiti and not street art, which is a broader term encompassing “artwork done using paint, graffiti, markers, stencils, stickers, tiles, adhesive, or other writing methods, all without the prior permission of the property owner.” Evans, *supra* note 10, at 690. Lastly, I do not distinguish among types of graffiti, like “pieces” or larger complex, intricate works; “tags” or one-color signatures or phrases; and “throwups” or “throwies,” which are tags with bubble letters. See Matt Randal, *10 Graffiti Terms to Remember*, WIDEWALLS (Oct. 16, 2014), <https://perma.cc/AW5X-M6VD>.

55. See discussion *supra* pp. 1–2.

56. Melody Sands, *Graffiti Wall Offers Avenue for Expression*, OHIO TODAY (Spring 2001), <https://perma.cc/P35Y-95XJ>.

57. *Id.* (quoting John Kotowski, Assistant Vice President for Facilities Planning); Conor Morris, *OU President Issues Statement About Trump ‘Wall’ Graffiti*, ATHENS NEWS (Apr. 10, 2016), <https://perma.cc/NL33-7NMP>.

58. Morris, *supra* note 57 (“[University President Roderick] McDavis was responding to a ‘Black Lives Matter’ message painted by the OU Black Student Union being painted over with an ‘All Lives Matter’ message, along with profanity-laden language calling the painters, among other things, ‘neo-progressive f*ks.’”).

59. *Id.* As a note, the “Build a Wall” message has gained particular notoriety for sparking controversy on college campuses, highlighting this same issue of censorship. The Cornell College (Mount Vernon, Iowa) administration sent a message to its community in the wake of the message

words “Build the Wall,” which the Student Senate subsequently covered after OU’s strategic director for diversity and inclusion saw the graffiti.⁶⁰ The University responded to its campus community after each of the aforementioned graffiti works were painted,⁶¹ but some disagreed over whether any response was merited—a commenter on *The Post’s* online story asked, “so this was a graffiti wall and the problem is people put graffiti on it? . . . I’m confused.”⁶² This administration and student response highlights the precise issue of government regulation of sanctioned graffiti spaces (should the Student Senate have painted over the image of a person being hanged?), and as more campuses create spaces for graffiti art, the issue of university censorship will only grow more poignant.

II. THE LACK OF LEGAL CHALLENGE

But why has no one challenged censorship of legal graffiti walls? Several reasons, many of which are normative, may explain. First, the situation in Portland, Maine, may be the first real prospect of a case involving government censorship of legal walls.⁶³ Programs where the government conditions use of the graffiti wall on pre-approval, like the MuralsDC program discussed below, do not face the censorship issue.⁶⁴ Private actors who provide forums for expressive graffiti in urban areas are similarly not subject to First Amendment restraints.⁶⁵

appearing on its kiosks, which are designated graffiti spaces for students. Letter from John W. Harp, Vice President for Student Affairs & Schvalla R. Rivera, Assistant Dean of Students, to Cornell College Campus Community Members (Apr. 11, 2016), <https://perma.cc/VHF3-2GW9>. The kiosks were quickly covered. *Id.* At the University of Minnesota, student groups are given designated spots to paint messages on the Washington Avenue Bridge on campus. The College Republicans painted the “Build The Wall” message, which another student group covered with the words “Stop White Supremacy.” University President Eric Kaler denounced the covering, saying “People in our community may disagree with the sentiment expressed. However, while the University values free speech, the subsequent vandalism of the panel is not the way to advance a conversation.” *College Republicans Paint Controversial Mural on U of M Bridge*, CBS MINNESOTA (Oct. 1, 2016), <https://perma.cc/6BSH-KA55>.

60. Dina Berliner et. al., *Images Depicting a Hanged Figure, 'Build the Wall' Appear on Graffiti Wall at Ohio University*, POST ATHENS (Sept. 20, 2016, 9:10 PM), <https://perma.cc/PTY5-BMBZ>.

61. See Morris, *supra* note 57 (response by University President to campus); Berliner, *supra* note 60 (response by OU spokeswoman).

62. Chris Harmon, Comment to Dina Berliner et. al., *Images Depicting a Hanged Figure, 'Build the Wall' Appear on Graffiti Wall at Ohio University*, POST ATHENS (Sept. 20, 2016, 9:10 PM), <https://perma.cc/PTY5-BMBZ>.

63. I have been unable to find any legal challenges to censorship of legal graffiti walls, or any other related news stories of First Amendment concerns with legal walls. I hypothesize that this issue is not yet ripe, though perhaps it will never ripen.

64. See discussion *infra* p. 31.

65. Several private landowners offer their personal property as a canvas for graffiti artists. In New York, for example, most “legal” graffiti is produced on private property—business walls, factories, vans—where artists sought and obtained permission from the owners. See Eric Felisbret, *Legal Venues Celebrate Graffiti as an Art Form*, N.Y. TIMES (July 16, 2014, 5:50 PM), <https://perma.cc/9W6M-R3PZ>. There are dozens of other local community programs—a property owner collaborated with the city’s

Second, artists retain little interest in their work. Legal walls are fluid and change quickly.⁶⁶ If someone dislikes a piece, they have the power to change it, like the Mickey painter in Portland.⁶⁷ Artists do not violate the law when painting on legal walls, thus eliminating the “unclean hands” concern that pervades arguments *against* graffiti protection.⁶⁸ But the legality element that could possibly allow for graffiti’s protection—a legal space—also detracts from the legal interest an artist would have in their work, as anyone can paint over it. Think of graffiti on legal walls as spoken words on busy street corners: no cause of action exists for one whose publicly spoken message is “covered” by the shouting campaigner right next to him.⁶⁹

Third, most legal graffiti walls seem to be graffiti hijackings rather than intentionally-created forums, and thus are located in lightly-trafficked areas and not busy city centers.⁷⁰ Some cities give up enforcing anti-graffiti regulations, as areas are too difficult to monitor or too costly to clean. And, if graffiti content meriting removal is not in the public’s eye, censorship of these walls is not an issue.

The artist, in addition to the wall, may not be visible. Graffiti is or can be faceless.⁷¹ To challenge an act of government censorship, an artist would

legal department to ensure compliance with a graffiti ordinance in Asheville, North Carolina. *See Foundation Walls Project Provides Space to Asheville’s Street Muralists*, ASHEVILLE CITY SOURCE (Feb. 18, 2016), <https://perma.cc/GA2C-883J>. The HOPE Outdoor Gallery is a well-known privately-owned art space in Austin, Texas. John Paul Titlow, *Please Deface This Park’s Walls*, FAST CO. DESIGN (Nov. 4, 2014), <https://perma.cc/AK6E-V3YR>. However, private walls are subject to the whims of their owners; free speech protections do not extend onto private property.

66. *See, e.g., A Walk Through Modica Way, Graffiti Alley in Cambridge 05/07/2016*, SEEN AROUND BOSTON (May 9, 2016), <http://seenaroundboston.com/a-walk-through-modica-way-graffiti-alley-in-cambridge-05072016/>.

67. Contrast public art displays, which cannot be painted over by individuals taking issue with the work.

68. “Unclean hands” is a legal defense asserted against unethical plaintiffs. If a graffiti artist painted illegally and sought to protect their work under copyright law, for example, a defendant could assert “that the unethical conduct was the creation of the graffiti” and thus prevent the graffiti artist from seeking to enforce “her rights in her work against a defendant who has exploited the work without permission.” John Eric Seay, *You Look Complicated Today: Representing an Illegal Graffiti Artist in a Copyright Infringement Case Against a Major International Retailer*, 21 J. INTEL. PROP. L. 1, 7 (2012). If the artist did not paint illegally, however, no such defense exists.

69. I credit my good friend Madison Acree with this analogy.

70. *See, e.g., McGuire, supra* note 1 (“More than a decade ago, the district and Portland police, tired of consistently painting over graffiti sprayed on the wall, turned it into a public canvas for street art, said [Michelle] Clements, the district spokeswoman.”).

71. Many graffiti artists paint their monikers on their works but are otherwise unidentifiable. Banksy, for example, is a prominent artist that chooses to remain anonymous. Dan Karmel, *Off the Wall: Abandonment and the First Sale Doctrine*, 45 COLUM.J.L. & SOC. PROBS. 353, 354 n.4 (2012). Anonymity is a protected aspect of the Freedom of Speech.

Despite readers’ curiosity and the public’s interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern

need to file suit and claim ownership of the removed graffiti work. It seems unlikely that an artist would come forward, especially if their painting was removed for obscenity or defamation purposes. The artist also knew that a private party could cover their work at any time, making any improper censorship argument conceptually difficult. Further, minorities or youths in a transitional status most often paint graffiti.⁷² Access to the judicial system—even to a lawyer—may be out of the question. That is, of course, if the painter even considers a First Amendment challenge to government censorship—and if the artist paints to challenge American institutions, why would they use the institution of the law to protect their work?⁷³

In the larger graffiti community, many graffiti artists simply will not use a legal wall.⁷⁴ These artists are opposed to the very spirit and idea of legal walls. One author writes “many graffiti writers embrace illegality as an implicit part of graffiti practice;”⁷⁵ another posits that, for many, “illegality is precisely the point.”⁷⁶

These considerations hold true for university graffiti. While a student group may freely challenge censorship of their painted statement “Build a Wall,” these students or groups may not want to publicly associate with the idea. There are many situations in which a student would not challenge student government or college administration censorship of graffiti painted in sanctioned spaces.⁷⁷

While this Note does not argue that no one will ever challenge government censorship of legal graffiti walls, it seems unlikely that the LePage critic would have filed a claim in defense of his hooded masterpiece. This unwillingness to come forward could create a potential for government abuse of legal graffiti walls, where the government could cover any

about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995).

72. See White, *supra* note 13, at 256.

73. This idea goes one logical step beyond White's statement that artists challenge existing institutions. See *id.* at 258.

74. See generally Kramer, *supra* note 44, at 242–50 (discussing the values and characteristics of graffiti artists that do graffiti art legally). Kramer quotes at length graffiti artists who desire to use graffiti to give back to their communities; while this paragraph notes that many artists will not use a legal graffiti space, many other artists will.

75. McAuliffe & Iveson, *supra* note 9, at 137. The authors also cite another graffiti artist who argued “that graffiti art's key contribution *as art* is fundamentally related to its illegal placement in the public spaces of the city.” *Id.* at 133 (original emphasis).

76. White, *supra* note 13, at 259.

77. Whether the university *should* protect ideas that the speaker is afraid to associate with is a different issue.

unwanted work knowing a challenge from the artist was unlikely. This Note will discuss this potential for abuse in Part IV, but first, it examines how a court should view challenges to censorship of legal walls if a challenge occurs. In addition, this categorization should inform the local and student governments' decisions in creating and maintaining these legal spaces.

III. A JUDICIAL FRAMEWORK FOR LEGAL WALLS

Some graffiti artists have brought copyright claims in defense of their work,⁷⁸ and one author discusses possible takings claims for private property owners who do not wish to have unauthorized graffiti removed.⁷⁹ However, a challenge to legal wall censorship would most likely fall under First Amendment jurisprudence and the constitutional right to free speech.

A. *The First Amendment and Freedom of Speech*

The First Amendment proscribes any law which impermissibly infringes on the freedom of speech.⁸⁰ In addition to protecting actual spoken words, the Free Speech Clause extends to mediums for expressive content, such as paintings, song lyrics, parades—and graffiti.⁸¹ This protection could be conceptualized in two ways: protection afforded to graffiti as *art*, which may be considered expressive speech under the First Amendment, or protection afforded to graffiti as *speech* itself.⁸² This could depend on the nature of the work—a mural versus a phrase—and perhaps the stylistic preferences of the judge, but such a classification should not change the protection the work merits.⁸³

78. See, e.g., *Williams v. Cavalli*, No. CV 14-06659-AB (JEMx), 2015 WL 1247065, at *1 (C.D. Cal. Feb. 12, 2015) (finding that graffiti artists stated a claim for copyright infringement, removal and alteration of copyright information, unfair competition, and negligence when a clothing line used digital images to reproduce the artists' San Francisco mural on some clothing items); see also Al Roundtree, Note, *Graffiti Artists "Get Up" in Intellectual Property's Negative Space*, 31 CARDOZO ARTS & ENT. L.J. 959 (2013) (discussing the proper place for graffiti in Intellectual Property jurisprudence).

79. Evans, *supra* note 10, at 740.

80. U.S. CONST. amend. I.

81. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (protecting the act of burning a flag to protest government policies as expressive content under the First Amendment); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (declaring a parade to be a form of expression, and citing other examples of "the painting of Jackson Pollock, music of Arnold Schönberg, or Jabbawocky verse of Lewis Carroll" as "unquestionably shielded" by the First Amendment); see also David Leichtman & Avani Bhatt, *Federal Courts and the Communicative Value of Visual Art: Is an Intended Message Required for Strong Protection of Rights Under the First Amendment?*, 58 FED. LAW. 25 (2011).

82. See Gee, *supra* note 45, at 218 ("Free speech jurisprudence lacks a firm stance on whether art and forms of artistic expression constitute 'speech' and therefore deserve protection. Many legal scholars and courts tend to agree, however, that art that conveys or communicates a message is clearly protected expression under the First Amendment.").

83. *Id.*

Graffiti can also be political in nature, like the LePage mural in Portland.⁸⁴ This can add an additional layer of scrutiny, as courts have historically granted heightened protection to political speech.⁸⁵

B. Public Art and Graffiti

The Supreme Court has granted high protection for “genuinely serious literary, artistic, political, or scientific expression”⁸⁶ but has never formally defined the term “art” or offered “art” blanket protection.⁸⁷ Courts do, however, generally agree that the First Amendment grants protection for art intended to convey a message.⁸⁸ In addition, the Supreme Court has upheld the ability of local and federal governments to permit and even encourage the public display of art, allowing the government to play a gatekeeper role in determining which art is displayed.⁸⁹

Circuit courts have addressed the protection afforded to art more precisely, with the Second Circuit adopting a notably broad protection of visual art in 1996 when striking down New York’s ban on public sales of street art.⁹⁰ The court found that the very sale of art communicated the message that the artists were young and struggling in the world.⁹¹ In agreeing that art should be available to all and not just the wealthy, the court remarked that “[v]isual artwork is as much an embodiment of the artist’s expression as is a written text.”⁹² This ruling was later tempered by another Second Circuit decision that used a “dominant purpose” test: if the dominant purpose of the work was to communicate a message, the piece merited First Amendment protection.⁹³ The Ninth Circuit has granted protection based on the communicative value of the “art.”⁹⁴ The Fifth Circuit’s approach has

84. An example of a political piece of graffiti is the LePage mural on the PWD, discussed *supra* pp. 1. See also discussion *supra* pp. 9–11.

85. There is a general principle in constitutional law that political speech is “at the core of . . . First Amendment freedoms” and thus merits heightened protection. See *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). I do not expound on this additional protection because my discussion is not limited to political graffiti.

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

87. *Gee*, *supra* note 45, at 218.

88. *Id.*

89. See *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (upholding the NEA’s right to determine which public art projects to fund with public money).

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

91. *Id.* at 696.

92. *Id.* at 695.

93. *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006) (using a four-factor test to determine whether a non-traditional expressive medium (clothing) was predominantly expressive and therefore under the ambit of the First Amendment).

94. See *Leichtman & Bhatt*, *supra* note 81, at 28–29 (discussing *White v. City of Sparks*, 500 F.3d 953 (9th Cir. 2007), wherein the Ninth Circuit affirmed the district court’s finding that an artists’ paintings which he sold in public places were entitled to First Amendment protection because he intended to convey a message through his works).

been notably less enthusiastic about providing First Amendment protection to art, protecting only “great works of art” and distinguishing between “fine art” and “decorative arts.”⁹⁵

Judicial discussion has been more limited regarding graffiti specifically. Some legal decisions have considered the intersection of graffiti and free speech. In *Ecko.Complex LLC v. Bloomberg*, the city of New York denied an urban clothing company a permit to hold a festival, as a graffiti demonstration planned for the festival threatened to incite artists to paint on subway cars.⁹⁶ The district court held the permit denial to be an impermissible infringement on Ecko’s First Amendment rights.⁹⁷ The Second Circuit similarly affirmed a lower court’s preliminary injunction against New York from enforcing its ban on spray paint sales in the case *Vincenty v. Bloomberg*.⁹⁸ The court noted that intermediate scrutiny was the appropriate test, as the content-neutral ban placed only an incidental burden on speech.⁹⁹ The court deferred to the district court’s determination that the ban failed intermediate scrutiny because it did not leave open ample alternatives of communication, as painters with purely innocent purposes could not possess painting materials.¹⁰⁰

Other courts have discussed other oft-used defacement mediums, like chalk, and the treatment given these other mediums can be extrapolated to apply to graffiti. For example, a district court in Nevada found a local police department impermissibly infringed on free speech rights when selectively enforcing graffiti regulations against chalkers who were critical of the department.¹⁰¹ The court may have found the same First Amendment violations if the police enforced anti-graffiti regulations against only graffiti works critical of the government.¹⁰²

The formal legalization of graffiti gained popularity in the mid-80s, and today there are several government projects that incorporate graffiti.¹⁰³ As noted above, there are graffiti-sanctioned walls around the world, many privately owned, and at least three government-sanctioned walls in the

95. *Id.* at 29–30 (discussing *Kleinman v. City of San Marcos*, 597 F.3d 323 (5th Cir. 2010)).

96. *Ecko.Complex LLC v. Bloomberg*, 382 F. Supp. 2d 627 (S.D.N.Y. 2005).

97. *Id.* at 629.

98. *Vincenty v. Bloomberg*, 476 F.3d 74 (2d Cir. 2007).

99. *Id.* at 84.

100. *Id.* at 88.

101. *Ballentine v. Las Vegas Metro. Police Dep’t*, No. 2:14-CV-01584-APG-GWF, 2015 WL 2164145, at *4 (D. Nev. Apr. 27, 2015).

102. This fairly normative conclusion is based on the regulation at issue: in *Ballentine*, the regulation at issue was an anti-graffiti ordinance. *Id.* at *1. If selectively enforcing the regulation on chalkers was impermissible, there is no reason to believe the regulation *could* be selectively enforced (based on content) against graffiti artists.

103. See Jay Beswick, *The Concept of Sanctioned Walls Has Occurred in Over 100 US Cities in the Last Decade*, NOGRAF NETWORK, <https://perma.cc/J2XS-STVG> (evaluating programs that have been in place since 1985). An example of a project is MuralsDC, discussed *infra* pp. 31–32.

United States.¹⁰⁴ Before proscribing the judiciary's treatment of legal graffiti walls, this Note sifts through public forum doctrine and other relevant First Amendment doctrines.

C. *The Public Forum*

The Supreme Court uses a “forum-based” approach to determine the propriety of government restrictions on the use of public property.¹⁰⁵ Forum analyses are twofold: first, the Court determines the classification of forum and then evaluates any restriction in light of that forum.¹⁰⁶ The Court has historically noted three categories of fora: the traditional public forum, the designated public forum, and the non-public forum.¹⁰⁷

The least protected area is the non-public forum.¹⁰⁸ The government may restrict the time, manner, and place of free speech in these limited public spaces and is free to reserve the forum for communicative purposes.¹⁰⁹ Any restrictions must be reasonable and not merely attempts to suppress certain views or expressions.¹¹⁰ For example, in 1998 the Supreme Court found that a television broadcast of a debate was a non-public forum and upheld the broadcasting company's exclusion of a particular candidate because he lacked popular support.¹¹¹ The Court found such a restriction was not based on the candidate's viewpoint, and was reasonable, as allowing every Congressional candidate a spot at each debate would effectively “dampen the vigor” of the debate.¹¹²

MuralsDC provides a non-public forum example in the graffiti context.¹¹³ The idea of Washington, D.C. Council Member Jim Graham, MuralsDC funds murals by community artists in designated sites throughout the city.¹¹⁴ Selected artists are required to employ youth between ages fourteen and eighteen and teach them skills “in the discipline of graffiti style

104. See *supra* note 15.

105. *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985).

106. *Cornelius*, 473 U.S. at 800; see also Daniel Mach, Note, *The Bold and the Beautiful: Art, Public Spaces, and the First Amendment*, 72 N.Y.U. L. REV. 383, 401 (1997).

107. *Cornelius*, 473 U.S. at 802.

108. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (“Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the ‘First Amendment does not guarantee access to property simply because it is owned or controlled by the government.’”) (citations omitted).

109. *Id.*

110. *Id.*

111. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 681, 683 (1998) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 656 (1994)).

112. *Id.* at 681–83.

113. See *MuralsDC*, D.C. COMM'N ON THE ARTS & HUMANITIES [hereinafter *MuralsDC*], <https://perma.cc/D9F8-9REQ>.

114. See *id.*; see also McKone, *supra* note 26.

sketch work and aerosol mural painting.”¹¹⁵ Program advocates hope MuralsDC will abate graffiti in the Washington area.¹¹⁶ The program is government funded and government run—and government censored.¹¹⁷ Program officials must approve artists’ murals before the painting begins.¹¹⁸ This government pre-approval is absent in the context of legal graffiti walls, as such walls are simply open spaces where artists need not have their designs approved. Legalized graffiti walls are thus unlikely to be considered non-public fora.¹¹⁹

The traditional public forum sits opposite the non-public forum on the Court’s First Amendment spectrum.¹²⁰ This traditionally available space includes streets, parks, and other places where members of the community historically assembled and voiced their opinions.¹²¹ Any time, place, and manner restrictions must be content-neutral and narrowly tailored to serve a compelling government interest. Such restrictions must also leave open ample alternative channels of communication.¹²²

The final forum category is the designated public forum, where the state opens property for expressive activity.¹²³ The state must intend to open this forum and has broad discretion when defining its contours.¹²⁴ Justice

115. *Call for Graffiti and Aerosol Mural Artists*, D.C. COMM’N ON THE ARTS & HUMANITIES (Mar. 4, 2016) [hereinafter *Calls for Graffiti*], <https://perma.cc/VX4P-BEYJ>.

116. *MuralsDC*, *supra* note 113.

117. *Call for Graffiti*, *supra* note 115, at 1–3.

118. *Id.* at 6.

119. In other words, the government takes a step beyond mere possession of property when it creates legal graffiti spaces. I do not analyze the forum categorization of public spaces painted by those with pre-approved designs in programs like MuralsDC, but instead note that the legal walls I discuss do not require pre-approval and are instead created by affirmative government action, either by failing to remove graffiti or by sanctioning the space for graffiti. This action would take legal walls outside non-public forum consideration. I also wish to note that I do not discuss the Government Speech Doctrine in this essay, though an (albeit attenuated) argument could be made that programs like MuralsDC are government speech given the government control over the message. *See, e.g.*, *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015) (upholding Texas’ right to refuse making specialty license plates bearing the Confederate flag, as the license plates are a form of government speech); *Pleasant Grove City v. Summum*, 555 U.S. 460, 472, 481 (2009) (upholding a municipality’s refusal to place a monument from a minor religion in a public park, as the monuments were forms of government speech).

120. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (discussing forum analysis as a spectrum: “At one end of the spectrum are streets and parks which ‘have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’”) (citing *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

121. This traditional public forum is where, “by long tradition or by government fiat,” the space has been “devoted to assembly and debate.” *Perry*, 460 U.S. at 45.

122. *Id.*

123. *Id.*

124. This government intent is vital. The Supreme Court in *United States v. Kokinda*, found the sidewalk outside a post office to be a non-public forum, despite allowances of citizens to distribute leaflets, speak and picket at the site. 497 U.S. 720, 732 (1990). The plaintiffs, distributing campaign literature for the Democratic National Party, argued that the government’s tolerance of other forms of

O'Connor wrote that the forum may be designated "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."¹²⁵ Courts should, in addition to determining the state's intent in opening a designated public forum, examine both the nature of the property and "its compatibility with expressive activity."¹²⁶ Once this designated forum is created, the government retains its interest in the property just as a private party would and may "preserve the property under its control for the use to which it is lawfully dedicated."¹²⁷ As long as the government keeps open the designated forum, any time, place, and manner restrictions are subject to strict scrutiny—restrictions must be reasonable, and content-based regulations must be narrowly tailored and serve a compelling government interest.¹²⁸

A designated forum can be made "generally available" to a class of speakers,¹²⁹ which is distinct from the "selective access" granted in a non-public forum.¹³⁰ The Court has found public forums where public universities designated meeting space for university-recognized groups,¹³¹

speech (leaflets, etc.) created a limited public forum. *Id.* at 720. The Court disagreed, as no such forum was expressly created, and held that the restrictions placed on the sidewalk (a law against soliciting contributions) were reasonable. *Id.* The Court drew a class-based distinction between leafleting and soliciting. The class of members allowed to leaflet could do so because one need not "ponder" a leaflet like one must ponder a solicitation when received. *Id.* at 734; *see also* Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299 (2009) (discussing the characterization of the limited public forum and its vagueness). The government retains the power to "limit" the designated forum it creates, as listed above, but the extent of that power and corresponding First Amendment categorization is unclear.

125. *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 802–04 (1985); *see also Perry*, 460 U.S. at 45.

126. *Cornelius*, 473 U.S. at 802.

127. *Adderley v. Florida*, 385 U.S. 39, 47 (1966). If the function of the property would likely be inhibited by allowing expression that comes with a public forum, the Court is unlikely to find that a public forum has been created. *Cornelius*, 473 U.S. at 804; *see also Greer v. Spock*, 424 U.S. 828, 838, 840 (1976) (upholding military reservation regulations that prohibited partisan political speeches, demonstrations, and leaflet distribution as the commanders were free to prevent what they saw as a clear danger to the "loyalty, discipline, or morale" of his soldiers).

128. *Perry*, 460 U.S. at 45–46. The government may close or alter the forum anytime it wishes. As long as the government keeps the forum open, "it is bound by the same standards as apply in a traditional public forum." *Id.* at 46; *see also Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) (citing *Cornelius*, 473 U.S. at 802) ("If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny.").

129. *See Widmar v. Vincent*, 454 U.S. 263, 264–65 (1981) (finding limited or designated public fora where a school expressly allowed all university-recognized organizations to use rooms for group meetings).

130. *Forbes*, 523 U.S. at 678 (citing *Widmar*, 454 U.S. at 264) (finding a broadcast debate to be a designated forum open only to candidates with popular support). As a note, while the Court makes this distinction between general access and selective access, its example of general access still only yields access to those within the school community who are school-recognized student groups. *Id.* at 679.

131. *Widmar*, 454 U.S. at 267; *see supra* note 129.

where a city opened a municipal forum for expressive activities,¹³² and where a state statute mandated open forums at school board meetings.¹³³

Legal graffiti walls could be considered traditional public fora, especially if the government opens a wall near a public park or city center, where other speakers may protest or distribute leaflets. In *Mahoney v. Doe*, the Court of Appeals for the D.C. Circuit upheld a defacement statute curbing citizens' ability to "write, mark, draw, or paint" on any public property without consent from its proprietor.¹³⁴ The court noted that the sidewalks involved were traditional public fora, but held the regulation survived First Amendment scrutiny because it was narrowly tailored and served the compelling government interest of promoting aesthetic appearance.¹³⁵ In addition, the court deemed other modes of communication, like banners, to be sufficient alternatives to writing on public surfaces.¹³⁶

In a similar case, *Osmar v. City of Orlando*, a Florida district court found that a sidewalk in front of City Hall was a traditional public forum, even with regard to chalkers.¹³⁷ An Occupy Wall Street protestor challenged his indictment under the city's anti-chalking statute, arguing that the law as applied infringed on his First Amendment free speech rights.¹³⁸ Other groups, he argued, had been able to chalk the sidewalks after receiving permission.¹³⁹ The court agreed, finding the city had selectively enforced its law by permitting favored speech like chalk supporting sports teams, for example, while prohibiting less popular or disfavored speech.¹⁴⁰ However, painting on a wall is not equivalent to standing by that wall and speaking ideas aloud, as evidenced by the very promulgation of anti-graffiti regulations.¹⁴¹

132. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (invalidating local directors' decision to deny petitioners the ability to show the musical "Hair" at municipal theatres, as the theatres were "public forums designed for and dedicated to expressive activities" and the denial constituted prior restraint without justification).

133. *City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 174-76 (1976) (upholding the ability of a teacher to speak at a school board meeting despite the school board's fear that such speech would constitute impermissible negotiations, as the school board meeting was "open to the public" and the regulation prohibiting negotiation was impermissibly broad).

134. 642 F.3d 1112, 1115 (D.C. Cir. 2011).

135. *Id.* at 1118.

136. *Id.* at 1119.

137. No. 6:12-CV-185-Orl-DAB, 2012 WL 1252684, at *5 (M.D. Fla. Apr. 13, 2012).

138. *Id.* at *1. The protestor was a member of the local group "Occupy Orlando," part of the national "Occupy Wall Street" movement. *Id.*

139. *Id.* at *2.

140. *Id.* at *5.

141. *See, e.g., United States v. Murtari*, No. 5:07-CR-387, 2007 WL 3046746, at *5 (N.D.N.Y. Oct. 16, 2007), wherein a district court noted "[t]he fact that defendant may have a right to stand and hold a sign outside of the Federal Building does not give him the First Amendment right to write on the plaza in chalk or with any other medium, permanent or otherwise." *See also* *PETA v. Giuliani*, 105 F. Supp. 2d 294, 318 (S.D.N.Y. 2000) (the fact that a speaker may address an audience from the platform of a public monument would not confer upon the speaker the right to paint a message on that monument).

Ultimately, government-sanctioned graffiti walls should instead be considered designated public fora. The government is explicitly deeming a piece of property open for “generalized use” by graffiti and other artists, a specified class. The government does not pre-approve any work, which disposes of any claim that the walls are non-public fora. Publicly-owned walls are not traditionally places for expression, and while one could argue for a traditional public forum classification, a designated-public forum classification is more plausible and easier to defend.

D. Speech Not Meriting Protection

There must be limits to expressive content on government-sanctioned walls for the same reasons that the Supreme Court allows censorship of obscenity, defamation, fighting words, and other categories of speech.¹⁴² The difficult question is who will define this unprotected speech. Historically, courts have risen to the task, despite the question’s difficulty: the Court in *Roth v. United States* discussed, for example, the “tough individual problems of constitutional judgment involved in every obscenity case.”¹⁴³

E. The Solution in Portland

The provocative LePage mural was covered by another artist, but some in the city called for the Water District to forbid art on its walls. Last March, the PWD Board of Trustees held a city council meeting and voted to keep the wall available for public art. Water District spokeswoman Michelle Clements reported over fifty people in attendance, most of whom favored keeping the wall free for use.¹⁴⁴

But if Portland’s Disney-loving friend had not replaced LePage’s painted hood, the dilemma would have had to be addressed. This Note will now turn to a framework that considers legal graffiti walls to be government-

or to “readom” with graffiti property owned by the Government or another person). The D.C. Circuit rejected this argument, saying the argument that a street—typically a traditional forum—was instead a designated public forum excluding certain mediums of expression, like paint or chalk, was an “odd inversion of the typical forum dispute.” *Mahoney*, 642 F.3d at 1117. However, such an “inversion” would likely stand in court, largely because graffiti on public property has historically been prohibited, unlike public soapbox discourse or distributing leaflets. A graffiti artist is requesting a new right, not a traditional one.

142. *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (defamation). Other categories of speech may include perjury, solicitations to commit crimes, blackmail, and child pornography. See *Frequently Asked Questions—Speech*, FIRST AMENDMENT CTR., <https://perma.cc/6NBF-MNP2>.

143. 354 U.S. at 498.

144. Morin, *supra* note 7.

designated fora, as individual projects are not subject to government pre-approval. As such, a court should subject any regulations or removals to strict scrutiny. In practice, the image of LePage in his KKK garb would have to be truly obscene, as discussed above, to be removed per the request of Mayor Strimling.¹⁴⁵ Similarly, any restriction as to time, place, or manner of painting on legal walls would have to be reasonable and viewpoint-neutral.¹⁴⁶

IV. THE GOVERNMENT'S ROLE

The unwillingness or unlikeliness of artists to come forward could create a potential for government censorship of legal graffiti walls that violates both the intent of the forum and the free speech rights of the artists. The preemptive solution to this potential abuse could come either from the government itself or private individuals and organizations. Private organizations could dedicate themselves to taking a watchdog role. A local organization could, for example, designate wall-watchers to walk the walls once a week to ensure graffiti works are respected and not covered by local government based on their content. Of course, the organization would have to do heavy monitoring to catch a government official covering art—if a piece of graffiti is covered, how can the watchdog organization know whether the government or an individual covered it up? What if an off-duty police officer bought his own paint and covered the work?

Private organizations could likely think of other ways to discourage government censorship of legal walls. However, the government itself is in a better position to prevent censorship. The government can do this in three ways. First, public officials must recognize the presence of a legal graffiti wall¹⁴⁷ and maintain a strong commitment to free speech and expression

145. The obscenity bar is a high one, however, and it seems unlikely that the LePage mural would have merited removal. The mural's fate, had the Mickey painter not changed the cloak into ears, is beyond the scope of this Note.

146. In line with designated public forum law, see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983). Were PWD and the City of Portland to designate painting hours, for example, they would need to consider that artists with scathing political messages may prefer painting in the dark. A regulation against painting after dark might be impermissible, even if the law's motivation is safety. Such a statute, while allowable on its face, would tend to dissuade deviant speech—the exact speech for which a legal wall attempts to provide a forum. See White, *supra* note 13, at 257 (explaining that graffiti artists are oftentimes in a marginal or transitional status, and that a major purpose of graffiti is protest).

147. While the majority of legal walls will likely be spaces that already sustain heavy graffiti, the city may choose to construct a legal wall instead. If so, the city should consider the potential artists and messages that will be conveyed, and the placement of the spaces. Community leaders would have to look inward to determine if the community includes those who would use the legal wall. Instead of shoving a government-sanctioned wall in a back corner, shielded from the eyes of the public, city leaders should, and *must*, make these walls publicly viewable to create an adequate forum for those with ideas to express. See McAuliffe, *supra* note 25, at 525 (“The very location of these legal walls, at the back

thereon. Simply put, the government or university governing body should do what it says and allow free speech in its created forum.

Second, a local government should establish clear guidelines and procedures for cases in which a work does cross the line into obscenity or other unprotected content.¹⁴⁸ When the police receive a call regarding a troublesome work, they should follow set procedures. For example, the officers could photograph the work, send the picture to a judge who determines whether the work is protected by the First Amendment, and act according to the judge's decision.¹⁴⁹ Additionally, the judge would be restrained by First Amendment jurisprudence. These procedures need not be complicated or time-consuming, but need only allow the local government, and particularly the court, to balance its role as a protector of minority voices with its responsibility to enforce community standards.

Third, the government must refrain from vilifying graffiti itself.¹⁵⁰ Citizens cannot be expected to express themselves on a legal graffiti wall if they know heavy stigma awaits those who use it. Anti-graffiti rhetoric also has a broader impact than just undermining the purpose of a legal graffiti wall: such rhetoric may undermine a culture and its voice altogether. Derek Alderman and Terri Moreau, in their article exploring the recent Graffiti Hurts campaign,¹⁵¹ argue:

Defining graffiti as painful, as destructive, and as a plague excludes, marginalizes, and silences other ways of knowing and responding to the graffitiists, graffiti, and the complex nature of their appearance . . . [anti-graffiti o]rganizations such as Graffiti Hurts play a critical and often unquestioned role in not only vilifying graffitiists but also justifying broader, exclusionary ideas about political identity and

end of parks, the rear of basketball courts at the end of dead-end streets, away from commercial centres, signified the fear of youth, feeding moral panics around the threat of youth, and the need to keep youth at a distance in places that are marginal to the operation of the rest of society.”). City leaders should also remember that they retain power to revoke designated forums, and while they should be slow to exercise that power, it should free leaders to experiment. For example, the city may decide against creating a legal graffiti wall in fear that the area around the wall will become unsafe at night. If safety becomes a concern, or if the legal wall only increases costs of monitoring after a substantial amount of time, the city can disband the forum without First Amendment concerns. Other considerations—who decides which surfaces? who monitors the walls for unprotected speech?—would have to be worked out in time, as the wall becomes an integral part of the city square.

148. See discussion on speech not meriting protection by the First Amendment, *supra* p. 38 and note 142.

149. *Id.* This procedure is not unheard of—judges are regularly called on to make obscenity, fighting words, and other categorical speech determinations.

150. However, refraining from vilifying graffiti itself is distinct from vilifying vandalism and destruction of property.

151. Graffiti Hurts was a program “designed to address the growing graffiti problem in urban areas and small towns” The program provided grants to communities for anti-graffiti efforts. Moreau & Alderman, *supra* note 14, at 112.

what counts for citizenship.¹⁵²

If the local government recognizes a legal wall, that same body should embrace, or at least refrain from vilifying, the expressive form for which it provided a medium.

For many communities, this self-restraint will seem too tall a task for too low a reward. Local governments may simply provide legal spaces subject to pre-approval.¹⁵³ Some communities may refrain from providing these spaces at all, or they may continue allowing individuals and businesses to provide privately-owned spaces.¹⁵⁴ If they do so, potential free speech confrontations will be avoided.

On the other hand, the prevalence of government-sanctioned spaces may grow. Twenty years after Marisa Gomez called for governments to use abandoned spaces for legal graffiti walls, Eric Felisbret, the author of "Graffiti New York," made the same challenge.¹⁵⁵ He called cities to "work to create and preserve legal venues where aspiring artists, who want to stay safe, can work and paint," pointing to a popular former graffiti park called 5Pointz that "brought tourists to the area and international acclaim."¹⁵⁶ These legal walls re-imagine the public space, incorporating more voices and more expressive forms. If legal walls gain popularity and an artist challenges government censorship of such spaces, the judiciary should adopt a strict scrutiny categorization that affords the same protection to graffiti artists as that enjoyed by street speakers or pamphleteers in the context of a designated public forum. If the city chooses to create a legal graffiti space, it must recognize the space and make a commitment to allow free expression on the legal wall, create and abide by clear procedures when handling potentially unprotected expression, and refrain from vilifying graffiti and graffiti artists.

152. *Id.* at 118, 121.

153. Should the government reject an artist's design because it is critical of the government or another institution, the artist could challenge the denial as in *Finley v. Nat'l Endowment for the Arts*, 524 U.S. 569 (1998). *See supra* note 89. Applicants would know (given appropriate, content-neutral criteria) their designs would be accepted even if critical or evocative, if they met certain criteria. Rather than the court determining whether the local government overstepped its boundaries after a graffiti work was painted, as I propose above, the court would act before the painting to examine permit denials. However, pre-approval itself may dissuade certain political messages, and the sponsors of rejected designs may not have resources or connections to file a lawsuit.

154. *See* discussion *supra* note 65 about other private wall owners.

155. *See also* Kramer, *supra* note 44, at 250 ("Should public officials in New York City, for example, reconsider current policies that attempt to suppress graffiti and, instead, work with and incorporate legal graffiti writers into civil life?").

156. Felisbret, *supra* note 65; *see also* Gómez, *supra* note 10, at 701.

CONCLUSION

Government-sanctioned graffiti spaces are those areas provided and policed by the government, but not subject to government pre-approval. There are few such walls in the United States, but if these walls were the subject of a legal challenge, the courts should classify these spaces as designated public fora. Artists can use their talents to communicate whatever messages they choose, free from government pre-approval, but still subject to reasonable time, place, and manner restrictions.

The government's capacity in governing these spaces may be tricky. Artists have little opportunity or incentive to protect their work from government censorship, and outside interest groups are also unlikely to spend the time and resources to ensure the government is not unfairly covering graffiti speech. Thus, the government must act to restrain itself with delineated procedures and objectives.¹⁵⁷ The state must allow artists the freedom to allow the wall to fulfill its purpose—facilitating speech—while still monitoring the wall in light of the interests of the community.

Legal graffiti walls may or may not present a First Amendment problem in the future. If they do, perhaps future local officials could take the advice of the *Portland Herald*, endorsing PWD's stance against Mayor Strimling's call for removal of the KKK LePage mural. The *Herald* wrote:

That's the First Amendment in action – welcoming to a wide range of public expression, if sometimes messy and even irritating. At a time when people can avoid news that doesn't comfort them or confirm their pre-existing notions, we could all use a little more of that messiness.¹⁵⁸

And if the *Herald* is right, American cities should be equipped with the attitudes and guidelines to protect that messiness.

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157. I recognize that government self-restraint is a suspect task. However, our federal system requires the government to do this quite often; the Congressional Oversight Committee, for example, is made up of members of Congress. See *Full Committee*, COMM. ON OVERSIGHT & GOV'T REFORM, <https://perma.cc/BGP7-J3UD>.

158. Editorial, *Our View: During Debate Over LePage Mural, Free Speech Flourishes*, PORTLAND PRESS HERALD (Sept. 12, 2016), <https://perma.cc/BJL7-G66W>.

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