

Painting on a Canvas of Skin: Tattooing and the First Amendment

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INTRODUCTION

“I impose my own set of aesthetics and value judgments as to what beauty is and what it isn’t in the context of the image that [customers] choose,” one tattooist says. “I [] manifest those qualities in a language.”¹ That language, spoken fluently by an increasing number of self-described tattoo “artists,” consists of unique images, honed techniques, innovative color schemes, and other artistic methods or themes. As the tattooists themselves describe it, their work is nothing short of pure art—as expressive as Leonardo’s *Mona Lisa* or T.S. Eliot’s *The Four Quartets*. Yet, unlike Leonardo’s canvas or Eliot’s verses, the First Amendment status of so-called “skin art” has yet to be determined.

The First Amendment, applied to the states through the Fourteenth Amendment,² forbids laws “abridging the freedom of speech.”³ The Supreme Court has interpreted this language as protecting not only basic political expression, but also nontraditional communicative media⁴ (such as dance,⁵ film,⁶ and music⁷) and expressive conduct (such as burning an American flag⁸). The Court has also declared—with little explanation—that the First Amendment protects “artistic expression.”⁹ Nonetheless, precedent leaves a fundamental question unanswered: What is artistic expression?

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¹ Clinton R. Sanders, *Customizing the Body: The Art and Culture of Tattooing* 28 (Temple 1989).

² *Gitlow v New York*, 268 US 652, 666 (1925).

³ US Const Amend I.

⁴ Throughout this Comment, certain types of media (for example, motion pictures) will be identified as “protected” under Court precedent. This is shorthand for saying that those media are *presumptively* protected. For example, though most movies are expressive, not everything that might be colloquially described as a movie necessarily constitutes First Amendment speech regardless of its content.

⁵ *Schad v Borough of Mount Ephraim*, 452 US 61, 65–66 (1981).

⁶ *Joseph Burstyn, Inc v Wilson*, 343 US 495, 501–02 (1952).

⁷ *Ward v Rock Against Racism*, 491 US 781, 790 (1989).

⁸ *Texas v Johnson*, 491 US 397, 399 (1989).

⁹ *National Endowment for the Arts v Finley*, 524 US 569, 602 (1998).

Left to wrestle with this difficult question, two circuits have seen fit to fashion their own approaches. In *White v City of Sparks*,¹⁰ the Ninth Circuit announced a “self-expression” test: an artistic work constitutes protected speech only if it is “an artist’s self-expression,”¹¹ of which “originality” is one mark (among possible others).¹² Building on the self-expression standard for purposes of evaluating allegedly expressive commercial goods, the Second Circuit, in *Mastrovincenzo v City of New York*,¹³ announced a “predominantly expressive purpose” standard: if the objective physical features of the item serve a predominantly expressive end, and the artist intended to convey a message, then the item and the activity that produced it receive protection.¹⁴

Against this backdrop of the still-undefined nature of protected artistic expression generally, courts have split over one allegedly artistic medium in particular: tattooing. Is it pure speech or not speech at all—a mere commercial activity? Alternatively, is it expressive or nonexpressive conduct? As theoretical as these questions may seem, fitting tattooing into the right First Amendment category is no mere exercise in academic abstraction: indeed, the validity of city and state tattooing regulations of all types—outright bans,¹⁵ zoning ordinances,¹⁶ and licensing restrictions¹⁷—hinges on the inquiry.¹⁸ If, for example, tattooing is a purely commercial activity, rather than expressive conduct or pure speech, the state may regulate it with a relatively free hand, so long as its regulations are supported by a legitimate government interest.¹⁹ If instead it is expressive conduct,²⁰ restrictions must pass the stricter test announced in *United States v O’Brien*,²¹ which requires—among other things—the furtherance of “an important or substantial governmental interest.”²² Lastly, if tattooing is

¹⁰ 500 F3d 953 (9th Cir 2007).

¹¹ *Id.* at 956.

¹² *Id.* at 954 (protecting “an artist’s sale of his original artwork”).

¹³ 435 F3d 78 (2d Cir 2006).

¹⁴ *Id.* at 95–97.

¹⁵ See, for example, *Anderson v City of Hermosa Beach*, 621 F3d 1051, 1055 (9th Cir 2010).

¹⁶ See, for example, *Hold Fast Tattoo, LLC v City of North Chicago*, 580 F Supp 2d 656, 658 (ND Ill 2008).

¹⁷ See, for example, *Maiden v City of Manchester*, 2004 WL 1013378, *6 (D NH).

¹⁸ Because most of the tattooing regulations at issue in the cases are content neutral, this Comment assumes throughout that regulations on tattooing are content neutral.

¹⁹ *Schad*, 452 US at 68.

²⁰ To constitute expressive conduct, conduct must satisfy the test in *Spence v Washington*, 418 US 405, 410–11 (1974) (per curiam).

²¹ 391 US 367 (1968).

²² *Id.* at 377.

pure speech, it merits near-full protection and is thus subject only to content-neutral “reasonable time, place, or manner” restrictions.²³

The split over tattooing encompasses roughly three positions. In a line of cases beginning with *Yurkew v Sinclair*,²⁴ several state and federal district courts have held that (1) for purposes of determining its constitutional status, tattooing is an activity to be assessed without regard to the alleged speech it produces (the tattooed image); (2) thus viewed, the process of tattooing is conduct; and, (3) as conduct, tattooing is not sufficiently imbued with communication to merit protection.²⁵ Meanwhile, two Massachusetts courts, while assenting to the first two propositions, disagree with the third, concluding instead that tattooing is sufficiently communicative to constitute expressive conduct.²⁶ Recently, in *Anderson v City of Hermosa Beach*,²⁷ the Ninth Circuit adopted an entirely new position, challenging all three of *Yurkew*’s conclusions, as well as one of the Massachusetts courts.²⁸ First, it rejected as absurd the attempt, for purposes of a First Amendment analysis, to divorce an activity that directly produces alleged speech from the alleged speech itself.²⁹ Second, emphasizing the technical and expressive characteristics of modern tattooing (the “skill, artistry, and care that modern tattooists have demonstrated”), it held that modern tattoos—and, by extension, modern tattooing—are pure speech.³⁰

Critiquing aspects of all three positions, this Comment argues that, to best assess the constitutional status of any given tattooist’s work, courts ought to apply a case-by-case self-expression standard. The courts in this split err in two main respects. First, as *Anderson* shows, and an examination of Supreme Court precedent corroborates, a proper First Amendment analysis of an allegedly expressive activity ought not to separate the process of creating the expression from the final product—the expression itself—to determine whether the activity merits protection. For this reason, *Yurkew* and its progeny, as well as the Massachusetts courts, are mistaken to evaluate tattooing as a type of conduct. Second, by concluding that tattooing writ large is

²³ See *Ward*, 491 US at 791.

²⁴ 495 F Supp 1248 (D Minn 1980).

²⁵ See Part II.A.

²⁶ See *Lanphear v Massachusetts*, No 99-1896-B, slip op at 6 (Mass Super Ct, Oct 20, 2000); *Massachusetts v Meuse*, 10 Mass L Rptr 661, 662 (Mass Super Ct 1999).

²⁷ 621 F3d 1051 (9th Cir 2010).

²⁸ *Id* at 1059–63.

²⁹ *Id* at 1061–62.

³⁰ *Id*.

either categorically protected or unprotected, all three positions wrongly presuppose that American tattooing takes only one general form, either meriting protection or not. To the contrary, expert opinion suggests that the modern practice of tattooing takes two general forms, one best characterized as craft-like, old-school “commercial” tattooing and the other as a “fine art” approach. Further, evidence suggests that, whereas commercial tattooing is generally not expressive, fine art tattooing is. When evaluating challenges to regulations on tattooing, then, courts ought to distinguish between the two, as well as between the hard cases that fall in the middle. Instead of taking the *Anderson-Yurkew* categorical approach, courts should—on a case-by-case basis—ask whether each claimant’s form of tattooing amounts to artistic self-expression. To perform this analysis, courts should ask—in the tradition of *Mastovincenzo* and *White*—whether the claimant-tattooist has objectively manifested an intent to engage in artistic self-expression. Since this test focuses mainly on the objective features of the allegedly artistic speech at issue, it works to deny constitutional protection to those tattooists whose motives are purely commercial (and not at all expressive), while granting protection to those tattooists who conceive of their work as aesthetically communicative.

This Comment comprises three parts. Part I briefly notes the types of tattooing regulations in dispute. It then provides background on relevant First Amendment doctrine, focusing mainly on the speech–conduct distinction, the Supreme Court’s approach to the visual arts, and the subsequent tests adopted by two circuit courts to evaluate the First Amendment status of different forms of alleged artistic expression. Part II turns to the split over tattooing, analyzing the three different positions courts have taken. Finding fault with aspects of all three approaches, Part III advances a solution. Courts ought to recognize that contemporary American tattooing takes two forms: the still-dominant “commercial” style and the “fine art” approach. As the Comment shows, tattooing of the latter type generally constitutes pure speech, but the former is often neither pure speech nor expressive conduct. To discern the First Amendment status of a given tattoo artist’s methods, then, courts ought to perform, on a case-by-case basis, a self-expression analysis centered on the question whether the claimant-tattooist has objectively manifested an intent to engage in artistic self-expression.

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I. BACKGROUND

The dispute over tattooing unfolds against a complex and still-unsettled doctrinal backdrop, which this Part sketches. Part I.A considers the distinction between pure speech and expressive conduct, often raised in the circuit split cases. Part I.B then turns to the thorny question of art speech—often protected as pure speech—outlining the history of the Court’s piecemeal treatment of “artistic expression” as well as the Ninth and Second Circuits’ attempts, in the absence of a Court-provided definition, to perform their own artistic-expression analyses.

A. Pure Speech versus Expressive Conduct

The First Amendment prohibits Congress—and, under the Fourteenth Amendment, the states³¹—from passing any law “abridging the freedom of speech.”³² For the government to run afoul of this Amendment, then, two requirements must be met: (1) the law at issue must “abridge” the freedom of speech, and (2) the abridged expression must fall within the “freedom of speech.” Concerning the abridgement element, the Court has ruled that, “above all else,” it means that the “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”³³ For the purposes of this analysis, though, the more important element is the logically prior one: What is the “speech” that the government has no power to restrict?

Communication takes countless forms. Indeed, almost every ordinary human activity conveys a message—though often indirectly or symbolically. “Symbolism is a primitive but effective way of communicating ideas,” the Court noted in 1943.³⁴ “The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.”³⁵ Still, the Court has rejected “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”³⁶ Instead, to merit First Amendment coverage, allegedly communicative material or activity

³¹ See *Gitlow v New York*, 268 US 652, 666 (1925). See also note 2 and accompanying text.

³² US Const Amend I.

³³ *Police Department of Chicago v Mosley*, 408 US 92, 95 (1972).

³⁴ *West Virginia State Board of Education v Barnette*, 319 US 624, 632 (1943).

³⁵ *Id.*

³⁶ *O’Brien*, 391 US at 376.

must fall within one of two categories: “pure speech” or “expressive conduct” (also called “symbolic speech”).³⁷ If the material or activity constitutes pure speech, a government may subject it to a content-neutral “reasonable time, place, or manner” restriction only. A reasonable restriction is “justified without reference to the content of the regulated speech,” is “narrowly tailored to serve a significant governmental interest,” and “leave[s] open ample alternative channels for communication of the information.”³⁸ But if the activity is instead expressive conduct, the provision must pass a less restrictive four-part test that asks—among other things—whether the government has a legitimate interest in regulating the material and, if so, whether the restriction is narrowly tailored to further that interest.³⁹

Pure speech, which merits the strongest constitutional protection, is notoriously difficult to define.⁴⁰ At the very least, it includes ideas expressed in word form, whether written or spoken,⁴¹ as opposed to “separately identifiable conduct which allegedly was intended . . . to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message.”⁴² Beyond oral and verbal communication, however, the reach of the term “pure speech” is unclear. The Court first used the term in 1965, when it considered the extent to which a state may regulate political demonstrations. The Constitution, the Court held, does not “afford the same kind of freedom to those who would communicate ideas by conduct . . . as [it] afford[s] to those who communicate ideas by *pure speech*.”⁴³ Four years later, the Court considered whether “the wearing of an armband for the purpose of expressing certain [antiwar] views” is protected speech.⁴⁴ The Court determined that it was. Though wearing an armband fell short of pure verbal expression, it was at least “*closely akin to ‘pure speech.’*”⁴⁵

³⁷ See Melville B. Nimmer, *The Meaning of Symbolic Speech under the First Amendment*, 21 UCLA L Rev 29, 31–32 (1973).

³⁸ *Ward v Rock Against Racism*, 491 US 781, 791 (1989).

³⁹ *O’Brien*, 391 US at 377.

⁴⁰ This is because, as some argue, the pure-speech–expressive-conduct distinction lacks coherence. See, for example, Nimmer, 21 UCLA L Rev at 31–32 n 13 (cited in note 37).

⁴¹ See *Texas v Johnson*, 491 US 397, 404 (1989) (“The First Amendment literally forbids the abridgement only of ‘speech,’ but we have long recognized that its protection does not end at the spoken or written word.”).

⁴² *Cohen v California*, 403 US 15, 18 (1971).

⁴³ *Cox v State of Louisiana*, 379 US 536, 555 (1965) (emphasis added).

⁴⁴ *Tinker v Des Moines Independent School District*, 393 US 503, 505–06 (1969).

⁴⁵ *Id.* at 505 (emphasis added).

The general contours of expressive conduct, in contrast to those of pure speech, are a bit easier to discern. In the seminal case of *Spence v Washington*,⁴⁶ the Court considered whether attaching a peace sign to an American flag and hanging that flag out a window constituted conduct rising to the level of protected speech. The pivotal question, as the Court framed it, was whether such conduct was “sufficiently imbued with elements of communication to fall within the scope” of the First Amendment.⁴⁷ That inquiry, in turn, hinged on a two-part test: (1) whether there was “an intent to convey a particularized message” and (2) whether “in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”⁴⁸

Determining whether conduct meets the *Spence* test is not the end of the constitutional inquiry. Once a court deems certain conduct protected, it must then ask whether the government may rightly restrict it.⁴⁹ For this second part of the free speech analysis, the Court in *O’Brien* announced a test. In that case, a group of friends took to the steps of a city courthouse and, in violation of federal law, burned their draft cards.⁵⁰ To evaluate whether the federal law was justified, the Court subjected it to a four-part test:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.⁵¹

In *O’Brien*, the Court found that the prohibition withstood First Amendment scrutiny.⁵²

B. Artistic Expression

The First Amendment protects “artistic expression.” But just what makes a thing artistically expressive? Though the Court has given no explicit answer to the question,⁵³ its precedent provides some

⁴⁶ 418 US 405 (1974) (per curiam).

⁴⁷ Id at 409.

⁴⁸ Id at 410–11.

⁴⁹ Id at 411.

⁵⁰ *O’Brien*, 391 US at 369.

⁵¹ Id at 377.

⁵² Id at 382.

⁵³ See Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 Wis L Rev 221, 243.

clues. Still, some courts require a surer analytical basis for discerning artistic expression than what the Court has provided and so have developed their own tests.

1. Supreme Court precedent.

The Court has suggested two, perhaps competing, rationales for artistic expression's constitutional coverage. First, it has noted that, because art influences the thinking of those who view or hear it, it resembles in function the spoken or written word. In *Joseph Burstyn, Inc v Wilson*,⁵⁴ for example, the Court held that motion pictures—"a significant medium for the communication of ideas"—merit protection, because they "may affect public attitudes and behavior . . . [by] the subtle shaping of thought which characterizes *all artistic expression*."⁵⁵ Decades later, the Court identified those same speech-like qualities in instrumental music. "Music is one of the oldest forms of human expression . . . known [for] its capacity to appeal to the intellect and to the emotions. . . . [A]s a form of expression and communication, [it] is protected."⁵⁶ Such language anchors art speech's protected status to its communicativeness—its ability to evoke thoughts or feelings in others.

A second, related rationale seems to tie art's constitutional coverage simply to the artist's self-expression, regardless of whether such expression is intelligible to others. With language lower courts are fond of quoting,⁵⁷ the Court in *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*⁵⁸ declared that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."⁵⁹ Reiterating this rationale in a

⁵⁴ 343 US 495 (1952).

⁵⁵ *Id.* at 501 (emphasis added) ("The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform."). The logic of *Burstyn* quickly spread. Citing around a dozen cases from the 1970s, the Court in 1981 declared comfortably that "motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee." *Schad v Borough of Mount Ephraim*, 452 US 61, 65 (1981).

⁵⁶ *Ward*, 491 US at 790.

⁵⁷ See, for example, *Tenaflly Eruv Association, Inc v Borough of Tenaflly*, 309 F3d 144, 160 (3d Cir 2002); *Mastrovincenzo*, 435 F3d at 91 n 9.

⁵⁸ 515 US 557 (1995).

⁵⁹ *Id.* at 569 (citation omitted).

dissenting opinion in 1998, Justice David Souter more explicitly tied the importance of artistic expression to its expressiveness. “It goes without saying,” Justice Souter declared, “that artistic expression lies within [the] First Amendment protection,” a conclusion that “turns not on the political significance that may be attributable to such productions . . . but simply on [art’s] expressive character.”⁶⁰

In addition, consistent with these rationales, the Court has suggested that artistic expression merits protection not merely as symbolic speech, but as pure speech.⁶¹ In several artistic expression cases, the Court has used language that closely associates art with ordinary pure speech. For example, in *Kaplan v California*,⁶² the Court wrote that “[a]s with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection.”⁶³ Two years later, the Court took up the question whether certain theater productions constituted artistic expression. After noting several qualities of drama that were conduct-like, the Court concluded, citing *Burstyn*, that this “is no reason to hold theater subject to a drastically different standard [than film].”⁶⁴

Patching together the relevant language from the above cases, most circuits have concluded that the traditional visual arts (paintings, drawings, sculptures, pictures, and the like) are generally protected.⁶⁵

⁶⁰ *National Endowment for the Arts v Finley*, 524 US 569, 602–03 (1998) (Souter dissenting) (quotation marks and citations omitted).

⁶¹ Though this Comment discerns support from Court precedent for the proposition that artistic expression is pure speech, other commentators argue that the connection is tenuous at best. See, for example, Marci A. Hamilton, *Art Speech*, 49 Vand L Rev 73, 104–06 (1996):

Although the Supreme Court has recognized . . . that art should receive some first amendment protection, it has yet to provide a theory to undergird the assertion, or to make clear how much protection art ought to receive. . . . [T]he Court tends to protect art only to the extent that it is a vehicle for ideas, especially political ideas.

See also Nahmod, 1987 Wis L Rev at 243–44 (cited in note 53) (arguing that the Court’s doctrine on offensive and profane speech, symbolic speech, and aesthetic regulation has failed to produce coherent guidelines on artistic expression).

⁶² 413 US 115 (1973).

⁶³ *Id.* at 119–20.

⁶⁴ *Southeastern Promotions, Ltd v Conrad*, 420 US 546, 557–58 (1975).

⁶⁵ See *White*, 500 F3d at 955 (“While not having spoken directly on the protections afforded visual art, the Supreme Court has been clear that the arts and entertainment constitute protected forms of expression under the First Amendment.”); *Mastrovincenzo*, 435 F3d at 95; *ETW Corporation v Jireh Publishing, Inc.*, 332 F3d 915, 924 (6th Cir 2003) (“The protection of the First Amendment . . . includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures.”); *Berger v Battaglia*, 779 F2d 992, 1000 (4th Cir 1985) (“One of the fundamental rights secured by the amendment is that of free, uncensored artistic expression—even on matters trivial, vulgar, or profane.”);

Yet, of those circuits, only two courts—refusing to grant presumptive, categorical protection to certain artistic media without considering, in each case, whether the claimant’s art is expressive—have devised tests for discerning artistic expression when the presence or absence of such expression is not immediately clear.

2. The Ninth Circuit’s self-expression test.

For art to rise to the level of protected speech, it must constitute self-expression, one characteristic of which may be originality.⁶⁶ So held the Ninth Circuit in *White v City of Sparks*. There, the court considered the plight of a traveling artist who painted and sold nature scenes on the city of Sparks’s sidewalks and in its parks. Sparks had prohibited the display and sale of merchandise in those places, unless the would-be merchant had secured a permit under its free-speech-exception policy, which allowed merchandise with an “obvious religious, political, philosophical, or ideological message.”⁶⁷ Steven White, unsatisfied with even the free speech exemption, brought a facial challenge against the vendor-permitting provision.⁶⁸ White “believ[ed] his paintings convey[ed], among other messages, the message that human beings are driving their spiritual brothers and sisters, the animals, into extinction” and thus claimed a First Amendment right to create and sell them publicly.⁶⁹ The city argued, however, that under circuit precedent, a painting for sale in a public forum is protected only if it communicates “an explicit—or an implicit but obvious—message” that falls under one of the categories listed in the permit (such as a religious or political message).⁷⁰ Unconvinced, the court held that, under several of the above-discussed Supreme Court precedents, painting constitutes speech “so long as it is an artist’s self-expression.”⁷¹ Since White’s paintings putatively expressed the message that humans are driving the animals into extinction, they met the self-expression requirement.⁷² For the court, this conclusion followed from the speech-like nature of the medium: “A painting may express a clear social position, as with Picasso’s condemnation of the

Piarowski v Illinois Community College District 515, 759 F2d 625, 628 (7th Cir 1985) (holding that the First Amendment covers “purely artistic” expression, including “art for art’s sake”).

⁶⁶ See *White*, 500 F3d at 956.

⁶⁷ *Id.* at 954.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *White*, 500 F3d at 954.

⁷¹ *Id.* at 956.

⁷² *Id.*

horrors of war in *Guernica*, or may express the artist's vision of movement and color."⁷³ Moreover, like motion pictures in *Burstyn*, "[a]ny artist's original painting holds potential to 'affect public attitudes,' by spurring thoughtful reflection in and discussion among its viewers."⁷⁴

The court was careful, however, to cabin its holding to original paintings only.⁷⁵ In a footnote, the court wrote, "We expressly reserve the question whether all paintings merit First Amendment protection. We are not asked to decide the protection accorded to paintings that are copies of another artist's work or paintings done in an art factory setting where the works are mass-produced by the artist or others."⁷⁶

3. The Second Circuit's "dominant expressive purpose" test.

For a piece of (putatively) artistically expressive merchandise (or the activity of making or selling it) to fall within First Amendment coverage, the Second Circuit requires that it pass a half-objective, half-subjective "dominant expressive purpose" test.⁷⁷ This test is designed, fundamentally, to determine whether the claimant has "engaged in artistic self-expression."⁷⁸ It emerged from two cases, each involving a First Amendment challenge to New York City's vendor-licensing laws. In the first, *Bery v City of New York*,⁷⁹ the court considered whether sculpting, painting, or photography was protected speech.⁸⁰ Citing the usual cases, the court rejected the district court's view that the First Amendment shields only "political speech and verbal expression," finding instead that visual art, "as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, [] is similarly entitled to full First Amendment protection."⁸¹ The court therefore concluded that, in contrast to "the crafts of the jeweler, the potter and the silversmith," which only sometimes have expressive characteristics, "paintings, photographs, prints and

⁷³ Id.

⁷⁴ *White*, 500 F3d at 956, quoting *Burstyn*, 343 US at 501.

⁷⁵ *White*, 500 F3d at 956 (emphasis added).

⁷⁶ Id at 956 n 4.

⁷⁷ See *Mastrovincenzo*, 435 F3d at 95.

⁷⁸ Id.

⁷⁹ 97 F3d 689 (2d Cir 1996).

⁸⁰ Id at 691.

⁸¹ Id at 694-95. Indeed, given its "power to transcend [] language limitations and reach beyond a particular language group to both the educated and the illiterate," visual art is, in a sense, a purer speech than language. Id.

sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection.”⁸²

But what of other nontraditional artistic media⁸³ that seemingly serve the same expressive purpose? The court took this question up in *Mastrovincenzo v City of New York*, which involved the sale of graffiti-painted clothing on New York streets. Putting aside as irrelevant the question whether the shirts fit within society’s definition of “art,” the court stated that it “must ultimately determine whether the disseminators of that clothing are genuinely and primarily engaged in artistic self-expression or whether the sale . . . is instead a chiefly commercial exercise.”⁸⁴ To decide this, the court resolved “to examine objective features of the merchandise itself” to discern whether the “items, on their face, appear to serve predominantly expressive purposes,” considering also “other factors such as plaintiffs’ stated motivation for producing and selling” the items.⁸⁵ Combining these elements into a straightforward analytical approach, the court announced the first part of its doctrinal framework: “Once a court has determined that an item possesses expressive elements, it should then consider whether that item also has a common non-expressive purpose or utility. . . . Where an object’s dominant purpose is expressive, the vendor of such an object has a stronger claim to [First Amendment] protection.”⁸⁶

Applying this step of the test to the graffiti-shirt merchants, the court found that the items served a predominantly expressive purpose for several reasons: (1) many of the items displayed text, logos, designs, and creative imagery depicting public figures; (2) none of the clothing was blank; and (3) the prices of the items varied widely according to aesthetic complexity.⁸⁷

⁸² *Bery*, 97 F3d at 696 (noting that the district court improperly equated such crafts with the expressive work of the appellants).

⁸³ Because the decision in *Bery*, which the *Mastrovincenzo* panel could not overturn, declared certain traditional media such as paintings and photographs “presumptively” protected, *Mastrovincenzo*’s dominant expressive purpose test does not apply to them. If the *Mastrovincenzo* court had had its way, however, it probably would have scrapped *Bery* and applied its test explicitly to all putative artistic expression. See *Mastrovincenzo*, 435 F3d at 93, quoting *White v City of Sparks*, 341 F Supp 2d 1129, 1139 (D Nev 2004) (“Applying such a blanket presumption of protected status [as *Bery*] would not only be unnecessary . . . but would also be out of step with . . . the First Amendment’s fundamental purpose—to protect expression.”).

⁸⁴ *Mastrovincenzo*, 435 F3d at 90–91 (declining to “resolve whether plaintiffs’ wares fit within, or can be reconciled with, broader societal definitions of ‘art’”).

⁸⁵ *Id.* at 91.

⁸⁶ *Id.* at 95.

⁸⁷ *Id.* at 96.

Moving to the second step of the test, the court considered “other factors that shed light on how and why an object is being sold or disseminated.”⁸⁸ Declining to set out an “exhaustive list” of those factors, the court mentioned two: whether the artist’s alleged motivation is expressive and whether the “vendor (if different from the artist) purports, through the sale of goods, to be engaging in an act of self-expression rather than a mere commercial transaction.”⁸⁹ Examining the plaintiffs’ testimony, the court confirmed the items’ dominant expressive purpose.⁹⁰ One plaintiff said that his work “is *an expression of the particular idea represented* on the work, as well as [his] own upbringing and style as an artist, identifiable as [his] own by the style and techniques used as well as by his signature.”⁹¹ Similarly, the other plaintiff claimed that his “overarching ambition is to *convey a message in a language that people can understand* and relate to, but that has aesthetic qualities that seem to flow.” He also noted that “he began to display and sell [his] hand-painted hats . . . as a means of artistic expression” even though they also represent his “primary form of income.”⁹² In light of this testimony, the court concluded that the “plaintiffs’ graffiti goods serve a predominantly expressive purpose, and their sale is consequently protected under the First Amendment.”⁹³

II. SPLIT OVER TATTOOING

The constitutional status of tattooing is among the more colorful disputes to surface in connection with the courts’ art speech jurisprudence. Courts have divided into three camps. This Comment considers each. Part II.A discusses *Yurkew* and its progeny,⁹⁴ which hold that tattooing is a type of conduct not sufficiently communicative

⁸⁸ *Mastrovincenzo*, 435 F3d at 96.

⁸⁹ *Id.* at 96–97.

⁹⁰ *Id.* at 97.

⁹¹ *Id.*, quoting Declaration of Kevin Santos, *Mastrovincenzo v City of New York*, No 04-CV-00412, ¶ 7 (SDNY filed Jan 13, 2004) (available on Westlaw at 2004 WL 5466623).

⁹² *Mastrovincenzo*, 435 F3d at 97, quoting Declaration of Christopher Mastrovincenzo, *Mastrovincenzo v City of New York*, No 04-CV-00412, ¶ 11 (SDNY filed Jan 7, 2004).

⁹³ *Mastrovincenzo*, 435 F3d at 97.

⁹⁴ *Yurkew*’s progeny comprises not only *White* and *Hold Fast Tattoo*, but several other state cases not discussed here. See, for example, *State v Brady*, 492 NE2d 34, 39 (Ind App 1986) (denying the First Amendment claim of a tattoo artist prosecuted for the “unlawful practice of medicine”); *People v O’Sullivan*, 96 Misc 2d 52, 53 (NY App 1978) (denying the First Amendment claim of a tattoo artist prosecuted under a city prohibition of nonphysician tattooing). Because these cases merely invoke and apply *Yurkew* to decide the case, providing little analysis along the way, this Part does not discuss them.

to receive protection. Part II.B treats *Massachusetts v Meuse*⁹⁵ and *Lanphear v Massachusetts*,⁹⁶ two Massachusetts state cases holding that tattooing satisfies *Spence* and thus constitutes protected expressive conduct. Part II.C then addresses *Anderson*, a recent Ninth Circuit opinion finding tattooing to be nothing short of pure speech.

A. *Yurkew, White, and Hold Fast Tattoo*: Tattooing Is neither Pure Speech nor Expressive Conduct

Nearly every state and federal district court to consider tattooing has declined to extend it First Amendment protection. The *Yurkew v Sinclair* court was the first. In that case, a federal district court considered a constitutional challenge to a ruling issued by the Minnesota State Fair Board of Managers, a state agency, barring tattooists from renting space on the state fairgrounds.⁹⁷ With the help of two art professors, the plaintiff argued that his form of tattooing, “involving the use of symbolic imagery, creative design and complex technique,” qualified as expressive art.⁹⁸ But where David Yurkew saw an integrated expressive act—the creation of a tattoo design, its skilled application, and the final image on the customer’s skin—the court, zeroing in on the tattoo’s technical application, saw only a mechanical process. As the court tellingly notes in the beginning of the analysis, “[t]he plaintiff seeks to engage in the *process* of tattooing at the state fair, and has disclaimed any interest in displaying his services, the recipients of his tattoos, or any pictures or the like which depict tattoos he has engrafted on his customers.”⁹⁹ Perhaps since only these “disclaimed” interests could conceivably have been characterized as pure speech, the court concluded that “[a]s the process of tattooing is undeniably conduct, the inquiry here must focus on whether such conduct is First Amendment activity.”¹⁰⁰ Dismissing the question whether “the image conveyed by the tattoo[] is an art form or amounts to art” as one of “marginal significance,” the court analyzed the conduct of tattooing under *Spence*: “[P]laintiff’s interest in engaging in conduct involving tattooing does not rise to the level of displaying the actual image conveyed by the tattoo, as the tattoo itself is clearly more communicative, and would be regarded as such by the

⁹⁵ 10 Mass L Rptr 661 (Mass Super Ct 1999).

⁹⁶ No 99-1896-B, slip op (Mass Super Ct, Oct 20, 2000).

⁹⁷ *Yurkew*, 495 F Supp at 1249.

⁹⁸ Id at 1252.

⁹⁹ Id at 1253 (emphasis added).

¹⁰⁰ Id.

average observer, than the process of engrafting the tattoo.”¹⁰¹ Moreover, the plaintiff failed to show that “the normal observer or even the recipient” would consider the mechanical “process of injecting dye into a person’s skin through the use of needles as communicative.”¹⁰² For this reason, tattooing was not expressive conduct and, thus, did not merit protection.¹⁰³

Facing the same question nearly two decades later, the South Carolina Supreme Court, in *State v White*,¹⁰⁴ held similarly. There, tattoo artist Ronald White challenged a state statute prohibiting tattooing, except when performed by a physician in cosmetic or reconstructive surgery.¹⁰⁵ Presented with the argument that tattooing constitutes pure speech in the same way writing and painting do, the court simply noted its disagreement and turned immediately to the question whether, under *Spence*, tattooing is expressive conduct.¹⁰⁶ Once again, under that analysis, tattooing was found wanting: “Appellant has not made any showing that the process of tattooing is communicative enough to automatically fall within First Amendment protection.”¹⁰⁷ Indeed, unlike burning an American flag—an activity that, though unsafe, conveys a clear message¹⁰⁸—“the process of injecting dye to create the tattoo is not sufficiently communicative to warrant protections and outweigh the risks to public safety.”¹⁰⁹

Arguing that tattooing does constitute expressive conduct under *Spence*, Justice John H. Waller Jr dissented. “[C]reating tattoos is a form of art which is entitled to the same protection as any other form of art,” Justice Waller wrote. “If a painter who creates an image on a piece of canvas has created a work of ‘art’ thereby engaging in ‘speech’ . . . I see no reason why a tattoo artist who creates the same image on a person’s body should be entitled to less protection.”¹¹⁰ For

¹⁰¹ *Yurkew*, 495 F Supp at 1253–54.

¹⁰² *Id* at 1254.

¹⁰³ Though this seems to make up the core of the case’s holding, the court nonetheless mentioned some additional reasons Yurkew’s claim must fail. First, Yurkew failed to show that his tattoos conveyed “political or social thought,” which the court deemed critical to First Amendment protection. *Id* at 1254. Additionally, he neglected to show in what sense tattooing, in the language of *Burstyn*, is a “significant medium for the communication of ideas” or a medium that “may affect public attitudes and behavior.” *Id* at 1255.

¹⁰⁴ 560 SE2d 420 (SC 2001).

¹⁰⁵ *Id* at 421.

¹⁰⁶ *Id* at 423, citing *Spence*, 418 US at 405.

¹⁰⁷ *White*, 560 SE2d at 423 (emphasis omitted).

¹⁰⁸ See *Texas v Johnson*, 491 US 367, 411 (1989).

¹⁰⁹ *White*, 560 SE2d at 423.

¹¹⁰ *Id* at 425 (Waller dissenting).

support, the dissent relied on an article from Tattooartist.com, describing modern tattooing as “an art form and a profession” as well as “the subject of museum, gallery and educational institution art shows across the United States.”¹¹¹ Still, though Justice Waller thought tattooing “protectable,” he characterized it not as pure speech, but as expressive conduct, subject (as such) to the *Spence* analysis.¹¹² Waller’s view is therefore distinguishable from the Ninth Circuit’s in *Anderson*.

In *Hold Fast Tattoo, LLC v City of North Chicago*,¹¹³ the Northern District of Illinois joined the *Yurkew-White* chorus, though it arrived at its conclusion through slightly different reasoning.¹¹⁴ Hoping to open a tattoo studio in North Chicago, plaintiff Hold Fast Tattoo applied for a special-use permit in accordance with the city’s zoning law.¹¹⁵ Dismissing tattooing as “not the kind of business” it wanted in North Chicago, the city denied the plaintiff’s application.¹¹⁶ Noting at once that tattooing is conduct, the court began the basic *Spence* analysis.¹¹⁷ It first found that tattooing is not intended to convey a particularized message: “The very nature of the tattoo artist is to custom-tailor a different or unique message for each customer to wear on the skin. The act of tattooing is one step removed from actual expressive conduct.”¹¹⁸ The court then compared the activity of tattooing to operating a sound truck,¹¹⁹ which the Supreme Court had said was not expressive conduct in *R.A.V. v City of St. Paul*.¹²⁰ Though a sound truck serves as a medium through which individual customers may communicate particularized messages, since the vehicle is not itself expressive, the Court declined to extend it constitutional protection.¹²¹ Tattooing, then, is a “mode of speech because it can be used to convey a message, but in and of itself it is not protected.”¹²² Thus, “[b]ecause the act of tattooing fails the first prong of the test for First Amendment protection, there is no ‘message’ to be

¹¹¹ *Id.*, quoting Hoag Levins, *The Changing Cultural Status of the Tattoo Arts in America* (1997), online at <http://www.tattooartist.com/history.html> (visited June 5, 2011).

¹¹² *White*, 560 SE2d at 425.

¹¹³ 580 F Supp 2d 656 (ND Ill 2008).

¹¹⁴ See *id.* at 660.

¹¹⁵ *Id.* at 658.

¹¹⁶ *Id.*

¹¹⁷ *Hold Fast Tattoo*, 580 F Supp 2d at 659.

¹¹⁸ *Id.* at 660.

¹¹⁹ *Id.*

¹²⁰ 505 US 377, 386 (1992).

¹²¹ See *Hold Fast Tattoo*, 580 F Supp 2d at 660.

¹²² *Id.* (quotation marks omitted).

understood by viewers and tattooing must also fail the second prong.”¹²³ Consequently, tattooing falls outside First Amendment coverage.

B. *Meuse* and *Lanphear*: Tattooing Is Expressive Conduct

Reaching the opposite conclusion under *Spence*, two Massachusetts superior courts have found tattooing “sufficiently imbued” with communication, fitting the definition of symbolic speech.¹²⁴ In the first case, *Massachusetts v Meuse*, the court considered a tattooist’s facial challenge to a law forbidding a nonphysician from “mark[ing] the body of any person by means of tattooing.”¹²⁵ As a preliminary matter, Massachusetts claimed that the plaintiff lacked standing, given that only the bearer of the tattoo, not the tattooist, could be said to engage in speech.¹²⁶ Unconvinced, the court reasoned that, if that were true, only a “painting and its owner—not the artist, whose talents, brushes and paints, created the work—who is making the expression entitled to constitutional protection” falls under the First Amendment.¹²⁷ Turning to the merits, the court took note of the same sociological literature relied upon in the *White* dissent, suggesting that modern “studio” tattooing is indistinguishable in principle from other traditional artistic media. “Tattooing cannot be said to be other than one of the many kinds of expression so steadfastly protected by our . . . Constitution[.]”¹²⁸

In a later case challenging the same statute, *Lanphear v Massachusetts*, the court elaborated on its holding in *Meuse*, clarifying what it thought to be the proper First Amendment framework in which to view tattooing.¹²⁹ “The issue,” the court stated, “is whether an image drawn on skin, a tattoo, is symbolic speech entitled to First Amendment protection.”¹³⁰ Taking the view that *Hurley* means that “[n]o articulable or particularized message” is necessary for material to receive protection as expressive conduct, the court first noted that “[m]uch of the symbolism or meaning of [tattoos] cannot be articulated and is private to the wearer, as is every artwork to its creator or collector.”¹³¹ Therefore, by choosing to

¹²³ *Id.*

¹²⁴ The dissent in *White* reached the same conclusion. See *White*, 560 SE2d at 425 n 9 (Waller dissenting).

¹²⁵ 10 Mass L Rptr at 661 (describing Massachusetts’s ban on tattooing).

¹²⁶ *Id.* (“It was asserted that only the wearer is making a constitutionally protected expression and, therefore, Meuse himself has no standing to challenge the statute.”).

¹²⁷ *Id.* (“That, however, is not the law.”).

¹²⁸ *Id.* at 662, citing Levins, *Tattoo Arts in America* (cited in note 111).

¹²⁹ *Lanphear*, No 99-1896-B, slip op at 11.

¹³⁰ *Id.* at 6.

¹³¹ *Id.* at 5, 7.

have the image inscribed on his or her body, the tattoo-bearer “literally becomes one with the art,” and because “[t]he medium on which the drawn image appears should not be relevant when determining whether something is ‘speech[,]’ the tattoo itself is symbolic speech deserving of First Amendment protection.”¹³² Since the activity of tattooing is “inseparable from the display of the tattoo itself,” the court held, it is protected as expressive conduct, and any restriction on it must pass intermediate scrutiny under *O’Brien* to survive challenge.¹³³

C. *Anderson*: Tattooing Is Pure Speech

For the same reasons the *Lanphear* court determined that tattooing receives protection as expressive conduct, the Ninth Circuit in *Anderson* went a step further, concluding that tattooing rises to the level of pure speech, subject as such only to reasonable time, place, or manner regulations.¹³⁴ Johnny Anderson, co-owner of a tattoo studio in Los Angeles, sought to open a second studio in Hermosa Beach, but the city zoning code prohibited tattooing establishments.¹³⁵ As a matter of constitutional doctrine, the court first held that the First Amendment status of tattooing turned on whether it was (1) a “purely expressive activity,” meaning pure speech, or (2) conduct with a communicative component under *Spence*.¹³⁶ “In other words, we must determine whether tattooing is more akin to writing (an example of purely expressive activity) or burning a draft card (an example of conduct that can be used to express an idea but does not necessarily do so).”¹³⁷

Turning first to the tattoo itself, the court, reviewing First Amendment precedent, noted that when the Supreme Court first considered the constitutional status of music, dancing, and other like activities, it afforded them full First Amendment protection as pure speech—without even mentioning *Spence*’s “expressive conduct” analysis.¹³⁸ The first question, then, is whether a tattoo is as expressive as those other media. Surveying the sociological literature and taking “judicial notice of the skill, artistry, and care that modern tattooists have demonstrated,” the court found that the only “principal difference between a tattoo and . . . a pen-and-ink drawing, is that a

¹³² *Id.* at 8.

¹³³ *Lanphear*, No 99-1896-B, slip op at 11.

¹³⁴ 621 F3d at 1055.

¹³⁵ *Id.* at 1057.

¹³⁶ *Id.* at 1059.

¹³⁷ *Id.*

¹³⁸ *Anderson*, 621 F3d at 1060.

tattoo is engrafted onto a person's skin rather than drawn on paper. This distinction has no significance in terms of the constitutional protection afforded the tattoo."¹³⁹ Thus, "[t]here appears to be little dispute that the tattoo itself is pure First Amendment 'speech.'"¹⁴⁰

If the result—the tattoo itself—constitutes pure speech, then what of the process that produces it? This too, the court concluded, is pure speech.¹⁴¹ It is not a question, the court reasoned, of whether under *Spence* tattooing is sufficiently imbued with communication:

Spence's ... test has been reserved for processes that do *not* produce pure expression but rather produce symbolic conduct that, on its face, does not necessarily convey a message. Burning a flag, burning a draft card, and wearing a black armband, can be done for reasons having nothing to do with any expression, and so require an interpretive step to determine the expressive elements of these processes.¹⁴²

But where pure speech is concerned, free speech doctrine does not distinguish between the processes of producing free speech and those processes' final products. "The process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds."¹⁴³ In the same way, tattooing and tattoos are "inextricably intertwined" in the same expressive activity.¹⁴⁴ "As with putting a pen to paper, the process of tattooing is not intended to 'symbolize' anything. Rather, the entire purpose of tattooing is to produce the tattoo, and the tattoo cannot be created without the tattooing process."¹⁴⁵

Next, the court maintained that it is irrelevant whether the customer has final control over which design he or she wants, for "[t]he fact that both the tattooist and the person receiving the tattoo contribute to the creative process or that the tattooist ... 'provide[s] a service[]' does not make the tattooing process any less expressive activity, because ... the tattooist applies his creative talents as well."¹⁴⁶

¹³⁹ *Id.* at 1061.

¹⁴⁰ *Id.* at 1060.

¹⁴¹ *Id.* at 1061.

¹⁴² *Anderson*, 621 F3d at 1061 (citations omitted).

¹⁴³ *Id.* at 1062.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Anderson*, 621 F3d at 1062 (second alteration in original).

Otherwise, the First Amendment would not cover the activity of writing and producing most newspaper articles, since editors generally assign particular stories to the writers, and they retain the final say on what content will appear in the printed article; nor would the Constitution extend to commissioned paintings.¹⁴⁷

Though the court's opinion appears at first to extend sweeping protection to tattoos and tattooing generally, Judge John Noonan, concurring in the judgment, wrote to suggest that its reach may have limits: "[T]attooing may be purely expressive, not that it always is. Any text may be expressive but is not invariably so. A laundry list is normally not protected by the First Amendment, but William Carlos Williams made a grocery list into poetry. . . . A tattoo punitively affixed is unprotected."¹⁴⁸ Here, the judge seems to suggest that, to any particular category of putatively expressive media, the First Amendment ought not to apply automatically. Though Johnny Anderson's tattooing methods may rise to the level of constitutional expressiveness, that does not mean that other tattooists in California, for instance, or the rest of the country, are protected, too.

III. EVALUATING TATTOOING UNDER A CASE-BY-CASE, OBJECTIVE "ARTISTIC SELF-EXPRESSION" STANDARD

This Part comprises three sections. In the first two, the Comment takes aim at several of the courts' erroneous conclusions of law and fact. Part III.A criticizes the *Yurkew* line of cases for analytically separating the process of tattooing from its allegedly expressive end. Part III.B, inspired by Judge Noonan's counsel to consider the way in which a particular form of tattooing is practiced before determining its expressiveness, challenges the notion that American tattooing is characterized by uniformity. It suggests instead that tattooing takes two significant forms, one of which constitutes speech and the other not. Lastly, in light of those considerations, Part III.C offers a new framework for analyzing whether tattooing is protected speech. In as-applied challenges¹⁴⁹ to tattooing regulations, courts ought to subject the tattooing style of each claimant-tattooist to a case-by-case self-expression analysis, an inquiry resembling *White* and *Mastrovincenzo*'s approach.

¹⁴⁷ Id.

¹⁴⁸ Id (Noonan concurring) ("Context is all.").

¹⁴⁹ This Comment does not address facial "overbreadth" challenges and the complications they raise.

A. Evaluating Tattooing in Light of Its Expressive End

To discern the First Amendment status of a given activity, courts must determine whether that activity is pure speech, expressive conduct, or neither. Tied up in this inquiry is a logically prior question: Precisely how, for the purposes of First Amendment analysis, is an allegedly expressive activity to be characterized? Over this threshold matter, the two major sides in this split—*Yurkew* and its progeny on the one hand and *Anderson* on the other—are deeply at odds. *Anderson* insists on casting allegedly expressive activity (here, the process of tattooing) in light of the end to which it is oriented (tattoos).¹⁵⁰ *Yurkew* considers the activity only (there described as the “process of injecting dye into a person’s skin through the use of needles”), ignoring the resulting tattoos.¹⁵¹ This Comment argues that the *Yurkew* approach, distinguishing the “product” of tattooing from the physical activity that produced it, is wrong. If tattoos are themselves purely expressive, then the process by which they are made is also purely expressive, for the same reason that, because works of literature are expressive, so too is the creative activity of writing them.

As most courts are willing to admit, tattoos themselves are in some sense speech-like or expressive. The *Yurkew* court, while dismissing as irrelevant the question whether tattoos are art, notes that tattoos are at least “clearly more communicative” than the process of tattooing.¹⁵² Similarly, in *Hold Fast Tattoo*, the court states that the process of tattooing is “one step removed from actual expressive conduct,” suggesting that the tattoos themselves are expressive, since the tattoo customer—but not the tattooist—uses the etched-in image “to convey a message.”¹⁵³ In *Anderson*, the Ninth Circuit goes even further. Citing several of the Supreme Court cases highlighted above,¹⁵⁴ it declares, “There appears to be little dispute that the tattoo itself is pure First Amendment ‘speech.’”¹⁵⁵ Like paintings or drawings, tattoos often take the form of “words, realistic or abstract images, symbols, or a combination of these, all of which are forms of pure expression that are entitled to full First Amendment

¹⁵⁰ See *Anderson*, 621 F3d at 1061–62.

¹⁵¹ *Yurkew*, 495 F Supp at 1254–55 (emphasis added).

¹⁵² *Id* at 1254.

¹⁵³ *Hold Fast Tattoo*, 580 F Supp 2d at 660.

¹⁵⁴ See Part II.C.

¹⁵⁵ *Anderson*, 621 F3d at 1060.

protection.”¹⁵⁶ Though tattoos are applied to human skin instead of canvas or paper, First Amendment protection does not turn on the nature of the surface to which expressive material is applied.¹⁵⁷

Yet, on what the speech-like nature of tattoos means for the activity of tattooing, the courts part ways. For *Lanphear*, it renders it expressive conduct.¹⁵⁸ For *Anderson*, the characterization of tattoos as speech renders tattooing itself speech,¹⁵⁹ for, as the *Mastrovincenzo* court explained, “objects themselves do not actually communicate—people do. That is, people may, by creating or selling artistic objects, engage in protected speech.”¹⁶⁰ Yet, for *Yurkew*, *Hold Fast Tattoo*, and *White*, the speech-like nature of tattoos is entirely irrelevant. According to those courts, “the threshold and crucial issue . . . is whether the actual process of tattooing, as opposed to the image conveyed by the tattoo itself,” is sufficiently communicative.¹⁶¹ Framed this way, the matter is clear, since “the normal observer or even the recipient [of the tattoo] would [not] regard the process of injecting dye into a person’s skin though the use of needles as communicative,” it is not protected conduct under *Spence*.¹⁶² The court in *White* agrees: “Unlike burning the flag, the process of injecting dye to create the tattoo is not sufficiently communicative.”¹⁶³ “The act itself,” *Hold Fast Tattoo* adds, “is not intended to convey a particularized message.”¹⁶⁴

Supreme Court precedent suggests that, when considering whether a particular activity merits First Amendment protection, courts should take an integrative approach, viewing the speech-producing activity as an inextricable part of the speech itself. As the case law shows, when considering the First Amendment status of an activity producing a form of pure speech, the Court does not apply the *Spence* test, reserving it instead “for processes that do not produce pure expression but rather produce” conduct that “on its face, does not necessarily convey a message.”¹⁶⁵ Consider two of the Court’s canonical First Amendment cases. In *Ward v Rock Against Racism*,¹⁶⁶

¹⁵⁶ *Id.* at 1061.

¹⁵⁷ *Id.*

¹⁵⁸ *Lanphear*, No 99-1896-B, slip op at 5–6.

¹⁵⁹ See note 142 and accompanying text.

¹⁶⁰ *Mastrovincenzo*, 435 F3d at 91.

¹⁶¹ *Yurkew*, 495 F Supp at 1253.

¹⁶² *Id.* at 1254.

¹⁶³ *White*, 560 SE2d at 423.

¹⁶⁴ *Hold Fast Tattoo*, 580 F Supp 2d at 660.

¹⁶⁵ *Anderson*, 621 F3d at 1061 (emphasis omitted).

¹⁶⁶ 491 US 781 (1989).

the Court reviewed a challenge to a city ordinance requiring users of a certain park's bandshell to employ a city-provided sound system and sound technician.¹⁶⁷ The plaintiff, a sponsor of a popular park concert, argued that, because the provision prevented it from amplifying and mixing its sound levels as it saw fit, the law violated its First Amendment freedom of speech.¹⁶⁸ To resolve the matter, the Court could have taken *Yurkew's* nonintegrative view, framing the question of the allegedly expressive activity's First Amendment status this way: Would the normal observer regard the use of a particular sound system or the adjustment of a sound mixer as communicative? Answering no, the Court would then conclude that the activity of using a sound system or mixer is not sufficiently communicative, regardless of the seemingly expressive end of such activity: music. Instead, the Court asked only whether instrumental music is protected speech. Finding music to be "one of the oldest forms" of "expression and communication," it held that it was.¹⁶⁹ If music is expressive, the Court reasoned, then so is the activity that produces it. Having reached this conclusion, the Court notably did not evaluate the regulation under the *Spence* test. Rather, it asked only whether the law was a "reasonable time, place, or manner" restriction.¹⁷⁰

In *Minneapolis Star and Tribune Co v Minnesota Commissioner of Revenue*,¹⁷¹ the Court took a similarly integrative view of pure written speech.¹⁷² Minnesota had imposed a special "use tax" on ink and paper, which the plaintiff, a newspaper, challenged as an unconstitutional burden on the freedom of the press under the First Amendment.¹⁷³ Here, too, under the *Yurkew* approach, the Court could have easily disposed of the case, inquiring simply whether, under *Spence*, a normal observer would have regarded the regulated activity—the act of purchasing ink and paper or perhaps even the act of using that ink and paper to print—as communicative. Once again, the answer is plainly no. Few intend to convey a message when purchasing ordinary writing materials or using those materials to put words or images on a page, at least when those activities are viewed in isolation. The Court, however, did not employ this analysis. The question presented, the Court said, was whether—given that taxes

¹⁶⁷ *Id.* at 784.

¹⁶⁸ *Id.* at 784–85.

¹⁶⁹ *Id.* at 790.

¹⁷⁰ *Ward*, 491 US at 791–803.

¹⁷¹ 460 US 575 (1983).

¹⁷² See *id.* at 582–83.

¹⁷³ See *id.* at 577.

burdening First Amendment rights are valid only if “the burden is necessary to achieve an overriding interest”—the speech-encroaching tax was justified.¹⁷⁴ Whether the law had taxed ink and paper or had prohibited the distribution of newspapers altogether, the freedom of speech and of the press would be implicated.

Similarly, the First Amendment doctrine protecting the sale of speech lends analogous support to the integrative approach. Under that doctrine, “the degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away.”¹⁷⁵ After all, “a speaker is no less a speaker because he or she is paid to speak.”¹⁷⁶ Yet, supposing the logic of *Yurkew*’s non-integrative approach were valid, it would provide an out. Were a claimant to challenge a prohibition on the sale of certain expression, the government could attempt—as the City of New York did in *Bery*—to circumvent this doctrine by characterizing the forbidden activity not as speech, but as the “peddling” of speech.¹⁷⁷ When the activity is so characterized, the law appears merely to prohibit a kind of conduct, and, since that conduct does not convey a particularized message, it fails the *Spence* test and thus falls outside the First Amendment.

Yet, for two reasons, this move must fail. First, if extended to its logical conclusion, the argument would rob almost all sales of speech of their constitutional protection, because, in almost every case, the mere sale of speech—viewed as conduct—would not itself be sufficiently communicative under *Spence*. The *Yurkew* principle would sap the doctrine of all its force. Second, as the Court has pointed out, forbidding the sale of certain speech would in most cases “inevitably diminish [the] expressive output” of the class of speakers affected.¹⁷⁸ Lacking the prospect of recovering their costs and earning a living, they would thus be chilled from engaging in expressive activity in the first place.

B. Expressive versus Non-expressive Tattooing: The Commercial-Shop Method and the Fine Art Approach

Determining whether a particular item or activity rises to the level of constitutional “expressiveness” is difficult, as “[e]ach medium

¹⁷⁴ *Id.* at 582.

¹⁷⁵ *City of Lakewood v Plain Dealer Publishing Co.*, 486 US 750, 756 n 5 (1988).

¹⁷⁶ *Riley v National Federation of the Blind of North Carolina*, 487 US 781, 801 (1988).

¹⁷⁷ See *Bery*, 97 F3d at 695.

¹⁷⁸ *United States v National Treasury Employees Union*, 513 US 454, 470 (1995).

of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”¹⁷⁹ This seems especially true of potentially artistic media. Neither painting nor drawing, for instance, is, as such, speech-like. Rather, each derives its expressive character—if at all—from the context in which it is done. A construction worker painting white lines on asphalt to mark a parking lot likely does not thereby engage in self-expression, but a charcoal artist shading eye lashes on an impressionistic portrait likely does. Thus, rather than bestowing categorical protection on paintings or drawings generally, it makes sense, for First Amendment purposes, to distinguish between expressive and non-expressive forms of the two. *White* proves instructive here. Considering the First Amendment status of painting, the court notably declined to declare *all* paintings categorically protected.¹⁸⁰ Instead, it found simply that, where an artist paints original works (as *White* did) and thereby “conveys his sense of form, topic, and perspective,” his painting is expressive.¹⁸¹ As for nonoriginal paintings—factory-produced works or mere copies of originals, for example—the court reserved judgment.¹⁸² The question then, as the court framed it, was not *whether* paintings writ large are protected speech, but rather *which* paintings are protected.

By eschewing *White*’s case-by-case approach, many courts in the split err.¹⁸³ Their mistake—to paraphrase Judge Noonan in *Anderson*—lies in concluding that tattooing writ large is or is not protected speech instead of recognizing that it may or may not be, depending on the particular facts of each case.¹⁸⁴ Perhaps consistent with this categorical approach, the courts also have treated tattooing as if its general characteristics were uniform throughout the nation, failing to realize that contemporary American tattooing takes two general forms.¹⁸⁵ The

¹⁷⁹ *Southeastern Promotions, Ltd v Conrad*, 420 US 546, 557 (1975).

¹⁸⁰ *White*, 500 F3d at 956 n 4.

¹⁸¹ *Id* at 956.

¹⁸² *Id* at 956 n 4.

¹⁸³ The *Meuse* court is perhaps an exception. Quoting an online article entitled *The Changing Cultural Status of the Tattoo Arts in America*, the opinion notes the growing distinction between the “tattoo parlor” and the “tattoo art studio.” *Meuse*, 10 Mass L Rptr at 662, citing Levins, *Tattoo Arts in America* (cited in note 111). On the basis of this article and other findings, the court strikes down the tattooing prohibition as overbroad, neglecting to inquire whether a substantial number of tattoo artists in Massachusetts are of the “tattoo studio” variety or whether, in the first place, that type of tattooing is truly expressive. See *Meuse*, 10 Mass L Rptr at 662–63.

¹⁸⁴ See *Anderson*, 621 F3d at 1068 (Noonan concurring).

¹⁸⁵ Though the literature suggests that, by and large, most American tattooists fit into one camp or the other, there are of course tattooists who practice both the fine-art style and the

first form, dating back to the sailor, soldier, and biker subcultures of the 1950s and 1960s, is called “commercial shop” tattooing.¹⁸⁶ This approach, shunning artistic innovation and emphasizing technical skill, is often not a form of expression. The second kind of tattooing, first surfacing in mainstream American culture in the 1980s (though its conceptual origins trace back to the 1960s’ “Tattoo Renaissance”), is known as the “fine art” style.¹⁸⁷ Embracing creativity, uniqueness in design, and other artistically expressive qualities, fine art tattooing appears just as expressive a medium as painting or drawing.

While the recent emergence of fine art tattooing represented a sudden break with the methods of traditional American tattooing, the commercial-shop approach developed more or less seamlessly from the industry’s decades-old, craft-like conventions. At first a mere exotic fascination—the stuff of world’s fairs and “freak shows”¹⁸⁸—American tattooing first began to bear the marks of a nationwide industry early in the twentieth century, shortly after Samuel O’Reilly’s invention of the electric tattoo machine in 1891.¹⁸⁹ According to anthropologist Margo DeMello, “Tattoos created with the new tattoo machine were less painful, cheaper, and easier and faster to administer, which greatly contributed to the spread of tattooing through the lower classes.”¹⁹⁰ Between 1920 and 1940, the “Golden Age” of tattooing flourished.¹⁹¹ Working-class Americans—nearly all soldiers and sailors—flooded shops in droves for ready-made inscriptions of their favorite images or designs.¹⁹² Patriotic images and military-themed tattoos—flags, eagles, ships, and anchors—abounded.¹⁹³ Servicemen were also fond of inscribing themselves with the name of a loved one: a sweetheart, a son or daughter, or “Mom” or “Mother.”¹⁹⁴ In the 1960s, as the widespread patriotic fervor of the war era waned, tattooing went underground. Chief among the tattoo-bearers of this new generation were bikers, who introduced new

commercial approach. For a discussion of how the First Amendment ought to apply to them, see text accompanying note 248.

¹⁸⁶ See Sanders, *Customizing the Body* at 26 (cited in note 1) (characterizing this tattoo style as “commercial”).

¹⁸⁷ See id. at 19–20, 28 (dubbing a practitioner of this style a “fine art tattooist”).

¹⁸⁸ Margo DeMello, *Bodies of Inscription: A Cultural History of the Modern Tattoo Community* 48–49 (Duke 2000).

¹⁸⁹ Id. at 50.

¹⁹⁰ Id.

¹⁹¹ Id. at 63.

¹⁹² DeMello, *Bodies of Inscription* at 63–64 (cited in note 188).

¹⁹³ Id. at 64.

¹⁹⁴ Id. at 65.

designs into the classic American tattoo canon: the Harley-Davidson logo, marijuana leaves, skulls, and sayings such as “Born to Lose” and “Live to Ride.”¹⁹⁵ For bikers and other countercultural groups of the 1960s, getting inked became something of a rite of passage, as well as a lifelong hobby.¹⁹⁶ As demand for tattoos increased among those groups, the range of popular designs became narrow and uniform.¹⁹⁷ It was in these conditions that the commercial shop first flourished.

1. Commercial-shop tattooing.

Commercial-shop tattooing has two distinguishing characteristics, both of which suggest that it is not a form of expression. First, in contrast to recent fine art tattooists, commercial shops limit their clients’ design choices to a finite number of pre-selected, standardized “flash” images, which the tattooist displays on the parlor walls. Second, as a consequence of this custom, commercial-shop tattooing requires from its practitioners only technical skills, not creative ability.

Throughout its history, commercial tattooing has dealt almost exclusively in what are called “flash” designs.¹⁹⁸ Though the invention of the electric tattoo machine allowed for greater innovation in design, “tattooists were for the most part unconcerned with aesthetic experimentation” and preferred working from “a fixed repertoire of designs displayed on their walls,” limiting themselves to what Professor Susan Benson calls “a highly stereotyped range of images.”¹⁹⁹ So too, in the commercial shops of today, this preference for the tried-and-true prevails: “Clients commonly enter the tattoo studio, spend a few minutes looking at the designs displayed on the walls and then choose a standard image with remarkable regularity.”²⁰⁰

The dominance of flash is, in part, a function of the traditional structure of the industry. Sociologist Clinton Sanders reports that, for decades, a few tattoo supply firms not only have provided most tattooists with the materials they need, but also have served as their main source of tattoo designs.²⁰¹ As a part of their role as “the center of the organizational communications structure” in the tattooing world,

¹⁹⁵ Id at 68.

¹⁹⁶ DeMello, *Bodies of Inscription* at 68 (cited in note 188).

¹⁹⁷ Id.

¹⁹⁸ See Susan Benson, *Inscriptions of the Self: Reflections on Tattooing and Piercing in Contemporary Euro-America*, in Jane Caplan, ed, *Written on the Body: The Tattoo in European and American History* 234, 240 (Princeton 2000).

¹⁹⁹ Id.

²⁰⁰ Sanders, *Customizing the Body* at 101 (cited in note 1).

²⁰¹ Id at 26.

these firms publish newsletters for tattooists and organize tattooist conventions.²⁰² The “work on display in the newsletters and conventions,” which tattooists imitate, “has continued to be overwhelmingly formulaic.”²⁰³

As a result of the commercial shop’s dependence on flash and its attendant lack of creativity and innovation, it is perhaps little surprise that conventional commercial tattooing both resists creative experimentation and stresses technical, easy-to-acquire skill. Indeed, “[m]ost tattooists . . . have . . . had limited exposure to stylistic diversity; and evaluations of tattoo quality have emphasized the apparent technical skill rather than the innovativeness of design content.”²⁰⁴ For that reason, the industry prizes “rapid, consistent execution.”²⁰⁵ In this sense, tattooing functions as a sort of craftsmanship, “conventionally characterized as involving an emphasis upon technical skill, client control over the production and content of the product, the creation of objects that are functional as well as decorative, and the dominance of an occupation orientation on the part of the craftworker.”²⁰⁶ Moreover, as crafts go, it is not an especially difficult one to pick up, a fact suggestive of commercial tattooing’s generally noncreative nature. “[C]ommercial tattooing,” Sanders writes, “while requiring at least minimum technical skill and experience, is not particularly complex relative to other service activities (e.g., that of airline ticket agents or plastic surgeons).”²⁰⁷

2. Fine art tattooing.

The fine art approach, which first emerged in the “Tattoo Renaissance” of the 1960s, is also marked by two features—both of which testify to its aesthetic or speech-like nature. First, it emphasizes creativity and expression, disapproving of the mindless technical style of the commercial “scratchers.” Second, and relatedly, modern fine art tattooists tend to be professionally trained, usually in art schools, a

²⁰² Id.

²⁰³ Id.

²⁰⁴ Sanders, *Customizing the Body* at 26 (cited in note 1).

²⁰⁵ Arnold Rubin, *The Tattoo Renaissance*, in Arnold Rubin, ed, *Marks of Civilization: Artistic Transformations of the Human Body* 233, 233 (UCLA Museum of Cultural History, 1988) (describing a form of commercial tattooing called “international folk style”).

²⁰⁶ Sanders, *Customizing the Body* at 23 (cited in note 1).

²⁰⁷ Clinton R. Sanders, *Drill and Frill: Client Choice, Client Typologies, and Interactional Control in Commercial Tattooing Settings*, in Rubin, ed, *Marks of Civilization* 219, 226 (cited in note 205).

fact significant only because it suggests that the new tattooing style is quite self-consciously an expressive movement.

Since the Tattoo Renaissance, fine art tattooists have aspired to infuse their work with creativity and innovation. “[O]ver the past 40 years,” Professor Benson writes, “the technical, professional and aesthetic developments . . . have radically shifted [tattooing] from a marginal, predominantly masculine practice to a fashionable and decorative art form.”²⁰⁸ At the heart of this transformation, unsurprisingly, is an outright rejection of the craft-like features of conventional tattooing. As Sanders writes, “Most tattoo artists focus their energies on the creation of large-scale, custom-designed pieces and typically turn down requests to inscribe traditional images,”²⁰⁹ taking “great pains to disassociate themselves from ‘scratchers’ who are technically unskilled and ‘stencil men’ who are incapable of doing creative custom work.”²¹⁰ Professor Benson notes that renowned tattoo artist Ed Hardy condemns the commercial approach’s “failure to meet the complexities of self-realization,” which, Hardy says, forces commercial tattoo shop customers “to fit their individual psyche into pre-congealed images that [are] often very out-of-date.”²¹¹ By contrast, the modern tattoo artist communicates his own expressive vision and encourages the customer to do likewise. “I impose my own set of aesthetics and value judgments as to what beauty is and what it isn’t in the context of the image that they choose,” one tattoo artist reports. “I feel that, through my life’s experience, and studying the history of Western art, and being bombarded with the imagery and the evolution of beauty in our culture, I can manifest those qualities in a language that everyone can understand despite their education.”²¹² Moreover, “[m]ost tattooists aspire to the honorific status of ‘artist,’” Sanders writes. “A unique ‘piece’ custom designed for an individual client/patron is, almost by definition, a work of art. . . . Being in the position to do custom work exclusively [] allows the tattooist to define him or herself as an artist involved in providing clients with a uniquely creative service and product.”²¹³ Achieving this status, then, in addition to enhancing the artist’s creative range, also helps the artist

²⁰⁸ Benson, *Inscriptions of the Self* at 236 (cited in note 198).

²⁰⁹ Sanders, *Customizing the Body* at 27 (cited in note 1).

²¹⁰ *Id.* at 34.

²¹¹ Benson, *Inscriptions of the Self* at 245 (cited in note 198).

²¹² Sanders, *Customizing the Body* at 28 (cited in note 1).

²¹³ *Id.* at 86.

“in educating clients or shaping their wants so that the products are artistically unique.”²¹⁴

Another characteristic of the fine art approach, signifying its new place among the expressive visual arts, is the increasing degree to which its practitioners are artistically trained.²¹⁵ A *New York Times* article reports that “today, many [tattoo artists] come out of art schools, finding fulfillment in painting on skin rather than canvas—all with newer designs, brighter inks, stricter regulations and more hygienic practices.”²¹⁶ In addition to attending school, many have also served a “rigorous apprenticeship with another tattooist.”²¹⁷ As a result of such training, many contemporary tattooists who have emerged from design schools have gained “a broad knowledge of typographic choices,” such as letterform, in addition to schooling in general artistic styles, including impressionism and realism.²¹⁸ This training has “clearly influenced the development of new tattoo styles.”²¹⁹ As a result of all of this, the new tattoo artists, Sanders argues, “emphasize creative over economic values, specialize in custom designed—commonly large-scale—tattoos and are selective about the images they create and the clients with/on whom they will work.”²²⁰ In this respect, their approach resembles that of commissioned painters and drawers,²²¹ whose expressive work, in principle, will almost always fall within the First Amendment’s protection.

* * *

The First Amendment status of a particular claimant’s tattooing methods ought to turn not on whether tattooing in general merits categorical constitutional coverage, but whether the particular claimant’s tattooing constitutes artistic expression. Consistent with the flawed categorical approach, courts in this split have analyzed

²¹⁴ *Id.* at 101.

²¹⁵ This is not to suggest that, because tattoo artists are professionally trained, their work is more speech-like (since it is aesthetically better) than that of commercial tattooists. Rather, that tattoo artists now pursue the sort of professional training that most traditional artists (painters and drawers) typically undergo suggests that they are increasingly conceiving of themselves as expressive artists, not merely commercial craftsmen.

²¹⁶ George James, *From Back Alleys to Beauty Queens*, *NY Times* NJ1 (July 29, 2001).

²¹⁷ Michelle Delio, *Tattoo: The Exotic Art of Skin Decoration* 18 (Carlton 1993).

²¹⁸ Ina Saltz, *Body Type: Intimate Messages Etched in Flesh* 10 (Abrams 2006).

²¹⁹ Mary Kosut, *An Ironic Fad: The Commodification and Consumption of Tattoos*, 39 *J. Popular Culture* 1035, 1045 (2006).

²²⁰ Sanders, *Customizing the Body* at 19 (cited in note 1).

²²¹ See *id.* at 19–20.

tattooing as if its basic features were uniform through the country. In reality, tattooing takes two main forms. The first form, commercial-shop tattooing, has two distinguishing characteristics that suggest it is not a type of speech. First, shunning originality and creativity, commercial-shop tattooists limit their clients' design choices to a finite number of preselected, standardized "flash" images displayed on the parlor walls. Second, commercial-shop calls for only technical, craft-like skills. In contrast, the second type of tattooing—the fine art style—emphasizes creativity and expression and attracts practitioners with professionally acquired skills and sensibilities, qualities one would be surprised to find in a tattooist whose methods were not self-consciously expressive. Under the artistic expression standard, therefore, fine art tattooing likely merits First Amendment protection, whereas the commercial approach does not. This is not to suggest that reaching the right result in a tattooing case is simply a matter of putting a claimant's methods in the right box—fine art or commercial. Rather, as the discussion of fine art versus commercial tattooing illuminates, the inquiry centers on artistic expression: Can the claimant be said to speak through her tattooing?

C. Discerning Whether the Artist Has Objectively Manifested an Intent to Engage in Artistic Self-Expression

Where a party challenges a regulation on tattooing, a court must determine whether tattooing—as practiced by that party—rises to the level of artistic self-expression. How ought this inquiry to proceed? Supreme Court precedent offers little guidance. Having failed to articulate a general First Amendment theory of art speech, the Court has declared simply that artistic expression—because it is expression—is protected.²²² This standard seems to contain multitudes. In particular, its components—both the "artistic" and "expression" elements—seem to lack discernible limits. As the Court has noted, nearly every human act might be described as expressive, so long as the person performing the act intends to communicate something by it: "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."²²³ The Court has explicitly rejected the proposition that

²²² See *National Endowment for the Arts v Finley*, 524 US 569, 602 (1998).

²²³ *City of Dallas v Stanglin*, 490 US 19, 25 (1989).

an activity constitutes “‘speech’ whenever the person engaging in [it] intends thereby to express an idea.”²²⁴ If expression were the touchstone of the art-speech standard, then, it would be difficult to imagine what activity the First Amendment would not cover.

Perhaps, then, the artistic element in the “artistic expression” standard is doing the brunt of the work. But, if so, new difficulties arise. First, to decide what is “artistic,” a judge must determine what “art” is. Yet, of the subject matters particularly ill suited to judicial discernment, divining the meaning of art likely tops the list. On this fundamental point, the courts in this split agree. “The question of what is art is inherently subjective,” the *Yurkew* court stated, and thus it ought not to be dispositive in free speech analysis.²²⁵ Similarly, the *Mastrovincenzo* court emphasized that whether expression fits within “broader societal definitions of ‘art’” is, for First Amendment purposes, irrelevant, because art is a “malleable concept the contours of which are best defined not by courts, but in the proverbial ‘eye of the beholder.’”²²⁶ Simply put, art does not lend itself to legal evaluation. “[W]hile it is possible to make objective measurements of physical properties such as weight and speed,” Judge Richard Posner writes, “it is not possible to make such measurements of artistic value, because people having different values and preferences . . . cannot be brought to agree on how to determine the presence of that attribute or even how to define it.”²²⁷

Though one might argue that determining the meaning of art for free speech purposes is different from discerning artistic quality, in this context the two inquiries largely track one another. A court, for instance, conceivably could characterize particularly low-value art as “not art.” Conversely, it could characterize what would widely be considered “not art” as merely bad art. Consider the infamous example of the *Piss Christ*, an allegedly artistic composition involving a crucifix and a bottle of urine. How ought it to be evaluated under the artistic-expression standard? On the one hand, many regard it as a groundbreaking work of aesthetic genius and thus obviously an example of artistic expression.²²⁸ On the other, many others regard it as nothing more than the functional equivalent of a “fighting word”

²²⁴ *O’Brien*, 391 US at 376.

²²⁵ *Yurkew*, 495 F Supp at 1254.

²²⁶ *Mastrovincenzo*, 435 F3d at 90–91. See also *Cohen v California*, 403 US 15, 25 (1971) (“[O]ne man’s vulgarity is another’s lyric.”).

²²⁷ Richard A. Posner, *Art for Law’s Sake*, 58 Am Scholar 513, 514 (1989).

²²⁸ See *id.* at 515–16. See also Michael Brenson, *Andres Serrano: Provocation and Spirituality*, NY Times C1 (Dec 8, 1989).

aimed at a major religion.²²⁹ Depending on whom you ask, then, *Piss Christ* certainly is or certainly is not art. Yet, perhaps inquiring into contemporary opinion is the wrong approach. After all, “[a]rtistic value is something an audience invests a work with, and as the tastes of audiences change, so do judgments of artistic value.”²³⁰ Though Americans in the early colonial period would no doubt have refused to grace *Piss Christ* with the designation “art,” perhaps more secular, twenty-first century Americans would. Though this difference in perception over time seems plausible, it is—and should be—irrelevant to First Amendment jurisprudence. No court would dare suggest that particular artistic-seeming works float in and out of constitutional coverage, depending on the spirit of the times.

Second, given the lack of judicial standards by which to classify something objectively as art, the task of judicially defining art poses a risk of “chilling” aesthetic expression. The right to express oneself, the Court has emphasized, “is delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.”²³¹ For this reason, “First Amendment freedoms need breathing space to survive.”²³² This is especially so in the area of artistic expression. Imagine a city health ordinance prohibiting the public display of bodily waste. In that city, suppose someone, like the creator of *Piss Christ*, wished to incorporate human urine in a new aesthetic composition and to have that composition exhibited at the museum downtown. Conceivably, unless the artist knew with a significant degree of certainty that his expressive activity were shielded absolutely as pure speech under the First Amendment and that the city ordinance would likely prove to be unconstitutional as applied to him, the artist would be reluctant to undertake the project. In other words, where the task of defining art is up to the judge, the artist might very well refrain from engaging in the artistic expression in the first place, given the risk that the court might take a narrower or more (or less) nuanced view of the nature of art than the artist does.

Refusing to ascend the dizzying heights of aesthetic theory merely to determine the artistic-expression standard’s scope, a court might take the opposite approach, adopting a purely subjective test: when an alleged artist, in performing an activity or creating an item,

²²⁹ Consider Posner, 58 Am Scholar at 515–17 (cited in note 227).

²³⁰ Id at 514.

²³¹ *NAACP v Button*, 371 US 415, 433 (1963).

²³² Id.

intends thereby to engage in expression, the activity or item thus constitutes protected artistic expression. In other words, an artist engages in protected expression when he or she claims to engage in artistic speech. But this standard is easily manipulated.²³³ Where subjective intent is the benchmark of constitutional coverage, an artist—especially if he is also the seller—has “a strong incentive to emphasize his artistic motivations.”²³⁴ Soon, all clothing manufacturers and retailers, for instance, would have a First Amendment right to engage in their work, so long as they purported thereby to express themselves artistically.

Between the extremes of the (seemingly) objective what-is-art inquiry on the one hand and the purely subjective approach on the other, *Mastrovincenzo* and *White* strike a balance. Though the cases address different types of artistic expression (the selling of allegedly expressive merchandise in *Mastrovincenzo* and the activity of producing and selling paintings in *White*) and thus frame their analyses differently, a common doctrinal framework underlies both. Both cases seem to stand for the proposition that, to determine whether an activity is artistically expressive, a court must look principally for an objective manifestation of the alleged artist’s expressive intent—though, as the cases illustrate, the proper objective indicia may differ depending on context.

In *Mastrovincenzo*, for example, the court considered specifically whether certain sellers of allegedly expressive clothing were engaged mainly in artistic self-expression or commercial enterprise.²³⁵ To resolve the matter, the court announced a two-step test for determining whether the goods at issue—which, importantly, as clothes served a purpose other than expression—had an objectively apparent “dominant expressive purpose.”²³⁶ In light of the special issues raised by allegedly expressive merchandise, the court was careful to note the limits of its test: “[O]ur threshold analysis of the objective characteristics of plaintiffs’ wares should be understood not as a separate ‘expressive merchandise’ test, but rather, as the first step of a larger inquiry into whether plaintiffs are engaged in protected speech.”²³⁷ Applied to merchandise with both expressive and non-expressive purposes, the test works especially well: it separates that

²³³ See *Mastrovincenzo*, 435 F3d at 94 (noting the perils of the subjective approach).

²³⁴ *Id.* at 94.

²³⁵ *Id.* at 92.

²³⁶ *Id.* at 95.

²³⁷ *Mastrovincenzo*, 435 F3d at 91.

merchandise whose main features are seemingly expressive—evincing an expressive intent on the part of the maker or seller—from those items that, while perhaps somewhat expressive, seem primarily to serve practical, nonspeech ends. Applied, however, to items lacking nonexpressive purposes altogether (as well as the activities that produce them), the test adds little. Like many types of paintings and drawings, tattoos, for instance, have not merely a *dominant* expressive purpose, but rather a *purely* expressive purpose.²³⁸ Still, the case helpfully exemplifies one way in which a court might tailor a free-speech inquiry to the central constitutional question: Is the claimant intending to express himself?

While step one of the *Mastrovincenzo* test seems a poor tool for discerning expressive intent in the tattooing context, the basic intuition of step two ought to apply in all visual art cases. Here, a court is to “take into account other factors that shed light on how and why an object is being sold or disseminated” (or, in the case of tattooing, created).²³⁹ For example, in *Mastrovincenzo*, it mattered that the plaintiffs’ alleged art was “highly stylized typography, iconography, and pictorial representation . . . [involving] varying combinations of oil paints, spray paints, markers, and permanent paint pens” applied to the clothing.²⁴⁰ In addition, according to the plaintiffs, “[e]ach piece [was] an individual work of art customized on the spot according to the client’s request [including] such things as names, characters, and pictures on the hats.”²⁴¹ Such variety and originality in design functioned, for the court, as objective manifestations of the plaintiffs’ intent to express themselves through the creation and sale of their goods.

In *White*, the court took a similarly objective approach to discerning the expressiveness of painting,²⁴² the traditional artistic medium most akin to tattooing. In that case, the plaintiff, “[a] painter of nature scenes,” believed that his work “convey[ed], among other messages, the message that human beings are driving their spiritual brothers and sisters, the animals, into extinction.”²⁴³ Yet, it was not on this subjective evidence of intent that the court rested its finding of artistic expression. Rather, the court fixated on the “originality” of White’s work. In composing an original work, “an artist conveys his

²³⁸ A physician-inscribed tattoo to mark an incision is most likely an exception, but, for this Comment’s purposes, it is a negligible one.

²³⁹ *Mastrovincenzo*, 435 F3d at 96.

²⁴⁰ *Id.* at 86 (quotation marks and citations omitted).

²⁴¹ *Id.* (quoting plaintiffs’ discussion of the degree to which they customize each work).

²⁴² See *White*, 500 F3d at 954, 956.

²⁴³ *Id.* at 954.

sense of form, topic, and perspective.”²⁴⁴ If a composition is original, the court suggested, then it seems likely that its creator is engaged in self-expression of one variety or another, whether he is “express[ing] a clear social position” or his own “vision of movement and color.”²⁴⁵ The inquiry into originality to evaluate the expressiveness of a painting thus mirrors in principle the inquiry into “dominant expressive purpose” to evaluate the expressiveness of ordinary merchandise, since both are calculated to discern expressive intent.

How, then, might a tattoo artist objectively manifest her intent to engage in self-expression? A court might consider several factors. As in *White*, it might ask specifically whether the artist appears to convey a sense of form, topic, or perspective in his work, and, as in *White*, the court might also look for traces of compositional originality. More specifically, armed with the sociological evidence concerning the significant differences in modern tattooing styles, the court might inquire simply whether the methods of the claimant-tattooist before it resemble those of the fine art style or the commercial style. Does the tattooist limit his clients’ design choices to a finite number of preselected, standardized “flash” images, displayed on the parlor walls? As a part of practicing his style of tattooing, does the tattooist draw upon only technical ability, eschewing creative skills? Where the answer to these questions is, or at least leans toward, the affirmative, perhaps the claimant-tattooist does not intend thereby to engage in self-expression. On the other hand, does the claimant-tattooist “focus [his] energies on the creation of large-scale, custom-designed pieces and typically turn down requests to inscribe traditional images?”²⁴⁶ Has the tattooist been professionally trained or educated in design school, and, if so, does such training evince the tattooist’s conscious aspiring toward “the honorific status of ‘artist’?”²⁴⁷ Where the answer to these inquiries is or leans toward the affirmative, perhaps the claimant-tattooist is engaging in artistic self-expression.

Like any factor-based standard, though, this proposal is not a one-size-fits-all solution. It applies uneasily, for example, to those tattooists who practice both the fine art and commercial styles. Though the literature suggests that such a hybrid approach is rare

²⁴⁴ *Id.* at 956.

²⁴⁵ *Id.*

²⁴⁶ Sanders, *Customizing the Body* at 27 (cited in note 1).

²⁴⁷ *Id.* at 86.

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among modern tattoo parlors, hybrid shops are not unheard of.²⁴⁸ Even so, supposing that a hybrid shop did challenge a citywide ban on tattooing, a court—under this approach—would still likely find the ban unconstitutional as applied. Pure-speech protection, after all, is nearly absolute, and where a person engages in pure expression, courts are hesitant to put limits on such behavior, for fear of chilling genuine speech. It would be difficult to imagine a court enjoining a tattooist from inscribing flash-design images while simultaneously encouraging him to practice his fine art methods.

Of course, these factors are not exhaustive. (Perhaps no list of factors for discerning artistic expression can be.) Nor will they always be helpful. A tattooist, possessing only technical skills and lacking professional training, might think himself the next Picasso. Likewise, a tattoo “artist,” though he possesses the skills of a Picasso, may simply prefer to earn a living by stenciling cheap, flash designs. Nonetheless, held up next to the possible alternative approaches (deciding what “true art” is or always deferring to the claimant), the objective approach seems best calculated to extend constitutional protection only to those meriting it.

CONCLUSION

The Supreme Court holds that the First Amendment’s guarantee of the freedom of speech extends to artistic expression, a category the Court has left mostly undefined. Filling the doctrinal gap, several circuits have erected their own analytical frameworks for discerning art speech. Whereas most traditional artistic media seem easily to fall within the meaning of artistic expression, less customary modes of expression have proven more contentious. Of the latter group, most controversial is tattooing. Courts have split three ways: some hold that tattooing is neither expressive conduct nor pure speech, others hold that it is expressive conduct, while still another holds that it is pure speech.

This Comment argues that each approach gets something wrong. First, the courts holding tattooing to be a kind of protected or unprotected conduct wrongly separate the process of creating tattoos from that process’s end product: the tattoo itself. In the same way that repeatedly applying a paintbrush to a canvas is inextricably a part of

²⁴⁸ See, for example, *Jade Dragon Tattoo*, online at <http://www.jadedragontattoo.com> (visited June 5, 2011) (advertising a wide array of traditional and customized pieces and classifying its tattooists as “artists”).

the expressive activity that produces paintings, the activity of applying a tattoo pen to skin is just as speech-like as the resulting tattoo. Thus, tattooing is either pure speech or not speech at all. Second, courts err in analyzing tattooing writ large instead of distinguishing between expressive and non-expressive tattooing. Contrary to most courts' assumptions, expert opinion suggests that contemporary American tattooing takes two widespread forms: the commercialized tattoo-parlor approach and the fine art approach. While the latter generally is expressive, the former often is not. To best distinguish between these forms of tattooing, courts ought to apply a case-by-case "artistic self-expression" analysis, calculated to discern whether the claimant-tattooist has objectively manifested an intent to "speak" through his tattooing.