

**WATCH WHERE YOU CHALK, 'CAUSE THE SIDEWALKS  
TALK: THE FIRST AMENDMENT AND EPHEMERAL  
“OCCUPATIONS” OF PUBLIC PROPERTY**

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INTRODUCTION

On college campuses across the country, the weapon of choice in the duel of clashing political viewpoints is—chalk. Sidewalk chalking has become a popular medium for expression, particularly by young people, for obvious reasons: It’s cheap, it’s immediate, it reaches a geographically targeted audience, and it’s fun and artistic. As one journalist observed: “Chalk art has long been a tableau for social activism, a form of instant

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commentary that takes political expression quite literally onto the streets.”<sup>1</sup> But not everyone shares chalk artists’ enthusiasm. Activists have been cited and even arrested for scrawling political messages on walkways, as happened to anti-abortion protesters in Washington, D.C., in August 2020.<sup>2</sup>

Conflicts on college campuses are commonplace. During a nationwide wave of racial-justice protests in 2020, Texas A&M University changed its policy of tolerating sidewalk chalking, citing the cost of cleanup—without mentioning that students had recently used chalk to call for removing the statue of a former Texas governor and Confederate general from a prominent place on campus.<sup>3</sup> Iowa State University was sued in 2020 after imposing a series of speech restrictions that included banning sidewalk chalking, but the lawsuit quickly settled without a determination on the First Amendment claims.<sup>4</sup>

College campuses are not, by any means, the only battleground. In a March 2022 decision, the federal Ninth Circuit decided in favor of a protester who was criminally charged for repeatedly chalking anti-police messages on the sidewalk outside Las Vegas police headquarters.<sup>5</sup> In a time of great political volatility when protesters are regularly occupying public spaces in droves,<sup>6</sup> more conflicts over the use of sidewalks as a medium for expression are inevitable.

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1. Mike Baker, *Seeing ‘Black Lives Matter’ Written in Chalk, One City Declares It a Crime*, N.Y. TIMES (Aug. 28, 2020), [https://www.nytimes.com/2020/07/16/us/sidewalk-chalk-police-selah-washington.html?fbclid=IwAR27pb7ze1LvP2gC\\_LlLcmkC6yiAN6wnMOfl1NKoUdk-unWLI57mdedlioo](https://www.nytimes.com/2020/07/16/us/sidewalk-chalk-police-selah-washington.html?fbclid=IwAR27pb7ze1LvP2gC_LlLcmkC6yiAN6wnMOfl1NKoUdk-unWLI57mdedlioo).

2. Emily Davies, *Two Protesters Arrested While Chalking ‘Black Pre-Born Lives Matter’ on Sidewalk*, WASH. POST (Aug. 1, 2020), [https://www.washingtonpost.com/local/two-protesters-arrested-for-chalking-black-pre-born-lives-matter-on-sidewalk/2020/08/01/6d966d90-d41f-11ea-9038-af089b63ac21\\_story.html](https://www.washingtonpost.com/local/two-protesters-arrested-for-chalking-black-pre-born-lives-matter-on-sidewalk/2020/08/01/6d966d90-d41f-11ea-9038-af089b63ac21_story.html). The Washington, D.C., case is no isolated occurrence. In 2012, the progressive magazine *Mother Jones* reported that “[o]ver the past five years, at least 50 people in 17 American cities have run afoul of authorities for coloring things with chalk,” including children as young as four years old. Josh Harkinson, *Chalk a Sidewalk, Go to Jail*, MOTHER JONES (Aug. 14, 2012), <https://www.motherjones.com/politics/2012/08/war-chalk-arrests/>.

3. Gabriela Garcia, *TAMU Bans ‘Chalking’ on Campus, Student Leaders Speak out*, KAGS (Aug. 29, 2020), <https://www.kagstv.com/article/news/community/tamu-bans-chalk-use-on-campus-student-leaders-speak-out/499-46f4a992-acaf-42bc-b290-ca2a7fb313de>; Julia Potts, *A&M Revises Campus Signage Policy, Bans Chalking*, THE BATTALION (Aug. 26, 2020), [https://www.thebatt.com/news/a-m-revises-campus-signage-policy-bans-chalking/article\\_d97e5b9c-e7fe-11ea-8d5f-d7981bb78021.html](https://www.thebatt.com/news/a-m-revises-campus-signage-policy-bans-chalking/article_d97e5b9c-e7fe-11ea-8d5f-d7981bb78021.html).

4. Tyler J. Davis, *Free-Speech Nonprofit Drops Lawsuit vs. Iowa State After School Adjusts Chalking, Email Policy*, DES MOINES REGISTER (Mar. 16, 2020), <https://www.desmoinesregister.com/story/news/crime-and-courts/2020/03/13/free-speech-lawsuit-against-iowa-state-dropped-university-adjusts-policies/5042712002/>.

5. *Ballentine v. Tucker*, 28 F.4th 54, 59 (9th Cir. 2022).

6. See Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests->

The “right to write” on public property falls into a tantalizing First Amendment doctrinal gray zone, like the fly ball that just evades the converging fielders. The courts have long told us that sidewalks are amenable to all sorts of expressive use—picketing, marching, leafleting—even if that use occupies the sidewalk temporarily so that a dog-walker or cyclist would have to detour.<sup>7</sup> Conversely, the courts have hesitated to recognize a constitutional right to occupy public property indefinitely in a way that detracts from its primary intended use.<sup>8</sup> Writing on a walkway is a greater intrusion than standing on it to hand out pamphlets, but a lesser intrusion than installing a fixture or taking up residency on it. Hence, the intriguing gray zone.

In 2012, Professor Marie Failing published the definitive analysis of “the law of chalking” as it stood at that time.<sup>9</sup> This Article attempts to update and augment (indeed, perhaps to double) the body of “chalk law” scholarship with recent legal, historical, and technological developments, including (in the latter category) the recent phenomenon of projected outdoor messages as a medium of protest.<sup>10</sup>

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crowd-size.html (citing estimates that anywhere from 15 million to 26 million Americans took part in racial-justice marches following the May 2020 murder of a Black suspect, George Floyd, at the hands of Minneapolis police); Jessica Durando, *March for Our Lives Could Be the Biggest Single-Day Protest in D.C.’s History*, USA TODAY (Mar. 25, 2018), <https://www.usatoday.com/story/news/nation/2018/03/24/march-our-lives-could-become-biggest-single-day-protest-d-c-nations-history/455675002/> (estimating that “March for Our Lives” gun-control demonstrations following the February 2018 mass shooting at a Parkland, Fla., high school were, up to that time, the most-attended single-day series of protests ever in the District of Columbia with some 800,000 participants); Erica Chenoweth & Jeremy Pressman, *This Is What We Learned by Counting the Women’s Marches*, WASH. POST (Feb. 7, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/07/this-is-what-we-learned-by-counting-the-womens-marches/> (estimating that 4.15 million Americans took part in “Women’s March” events protesting the ascension of Donald Trump to the presidency in January 2017, making it “likely the largest single-day demonstration in recorded U.S. history”).

7. See Sandra L. Cobden, *Passive Communication in Public Fora: The Case for First Amendment Protection of Newsracks*, 12 CARDOZO L. REV. 191, 200 (1990) (“Public streets and sidewalks have traditionally served as public fora.”).

8. See, e.g., *Freeman v. Morris*, No. 11-cv-00452-NT, 2011 WL 6139216, at \*12 (D. ME. Dec. 9, 2011) (finding that there is no First Amendment right to camp on public property indefinitely, and noting that allowing plaintiffs to occupy a public park continuously would deny access to other would-be speakers: “Allowing the Plaintiffs to continue indefinitely to occupy the Park would ultimately tend to suppress, rather than promote, the free exchange of ideas. As a traditional public forum, Capitol Park should be available to all comers to communicate their ideas, not just Occupy Augusta”).

9. See generally Marie Failing, *Talking Chalk: Defacing the First Amendment in the Public Forum*, 115 W. VA. L. REV. 755 (2012).

10. See R. George Wright, *The Projected Light Message Cases: A Study in the General Erosion of Free Speech Theory*, 51 IND. L. REV. 583, 587–88 (2018) (documenting growing “phenomenon” of projecting messages onto buildings as a means of political protest).

Part II begins by explaining the evolving concept of sidewalks as “public forums” amenable to expressive use. It looks specifically at the law of public access to college campuses, examining whether the First Amendment analysis changes—or should change—when a walkway is located on state university property as opposed to municipal property. Part III summarizes how courts have handled constitutional challenges when activists have run afoul of prohibitions against chalking, concluding that most—but not all—have deferred to government agencies’ interests in controlling the use of public property. Part IV looks at potentially analogous caselaw in the more-often-litigated contexts of physical occupation of property: Protesters who seek to camp on public property as a means of expression, and publishers who assert a right to install distribution racks on public property. The section concludes that courts have, at times, countenanced the occupation of government property as a necessary adjunct to expression, even where that occupation may deprive others of full use of the space. Part V suggests how courts might apply established principles of public forum law to referee disputes over the ephemeral use of public spaces for expression. Finally, Part VI concludes by explaining why it is valuable for speakers and regulators alike to have clear guidance at a time of resurgent youth civic activism that is likely to bring more protest-speech disputes into the courts.

## I. FIRST THINGS FIRST: THE FORUM BENEATH YOUR FEET

### A. *The Right to Use Public Property as a Platform for Speech*

The First Amendment strictly constrains the government’s ability to restrain or punish speech based on the content of the message or the viewpoint expressed.<sup>11</sup> A content-based or viewpoint-based restriction on speech is presumed to be unconstitutional, and will be invalidated unless it satisfies strict scrutiny as the least restrictive means of accomplishing a compelling government objective.<sup>12</sup> Speech addressing political issues is entitled to especially strong protection, because the First Amendment is understood to promote discourse about matters of public concern, including criticism that the government may deem unwelcome.<sup>13</sup> Regulations on speech are subject to challenge on “overbreadth” grounds if they restrict

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11. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

12. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

13. *See Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”).

substantially more speech than is necessary to accomplish the government's purpose.<sup>14</sup> While the First Amendment is widely understood to protect against direct censorship of a speaker's message, regulations that choke off delivery of the message—in effect, indirect censorship—are equally disfavored, since the right to speak necessarily implies the right to reach an audience.<sup>15</sup>

A “prior restraint” against speaking is regarded as “the most serious and the least tolerable infringement on First Amendment rights,” because it prevents the speaker's message from ever reaching its intended audience.<sup>16</sup> Rather than categorically prohibit speech, it is considered preferable for regulators to impose after-the-fact remedies for individual instances of harm-causing speech, such as libel or slander.<sup>17</sup> A requirement to obtain a government permit or license before speaking is treated as a prior restraint, meaning that it starts with a heavy presumption of unconstitutionality.<sup>18</sup>

The government has somewhat greater authority over speech when a speaker is using publicly owned property as the vehicle to convey a message, such as a protest march that occupies a city street. As the U.S. Supreme Court has stated, “the First Amendment does not guarantee access to property simply because it is owned or controlled by the government.”<sup>19</sup> But the level of governmental control varies with the nature and character of the property.

If property is regarded as a “public forum”—a place that, by tradition or by government designation, is held open for expressive use—then speech on that property gets full-force constitutional protection against content-

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14. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (explaining that a prohibition may be declared facially overbroad if it reaches a “substantial” amount of benign speech as compared with “the statute's plainly legitimate sweep”).

15. See Erik Forde Uglund, *Hawkers, Thieves and Lonely Pamphleteers: Distributing Publications in the University Marketplace*, 22 J. COLL. & UNIV. L. 935, 935 (1996) (“[D]istribution issues very often are free expression issues. No message is viable without some kind of distribution or amplification, which makes protecting the dissemination of ideas as important as protecting their creation.”).

16. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

17. See *Southeastern Promotions v. Conrad*, 420 U.S. 546, 559 (1975) (stating that “a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand”) (emphasis added).

18. See *Kunz v. New York*, 340 U.S. 290, 293 (1951).

We have here . . . an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights.

*Id.*

19. *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981).

viewpoint-based restrictions.<sup>20</sup> Content- or viewpoint-based restrictions on speech in a public forum are unconstitutional unless they represent the least restrictive means to achieve a compelling government objective.<sup>21</sup> A public park is the archetype of a traditional public forum, a space that speakers can freely use for expression without interfering with its primary recreational purpose.<sup>22</sup>

Not all government-owned property is regarded as suitable for expressive purposes. Property may exist as a “limited” public forum—suitable only for speech by a particular subset of authorized users, such as the mail slots inside a public school building—or it may be a “nonpublic forum,” to which no speaker can claim a right of access.<sup>23</sup> If government property is not a public forum either by tradition or by affirmative designation, then its proprietors have greater authority to restrict or exclude speakers, as necessary to maintain the property for its primary intended use.<sup>24</sup>

To illustrate, envision the Supreme Court building and its iconic plaza and entry steps that face the U.S. Capitol across Washington, D.C.’s First Street Northeast. The sidewalk outside the Court’s headquarters is recognized as a public forum, meaning that the Court may not ban picketing, leafleting, or other acts of peaceful political protest in the name of preserving the appearance of judicial decorum and detachment.<sup>25</sup> But once a speaker enters the courthouse, the character and nature of the property is no longer amenable to use as a platform for demonstrations.<sup>26</sup> As with the Supreme Court premises, access to the campuses of state colleges and universities is

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20. *See* *Frisby v. Schultz*, 487 U.S. 474, 480–82 (1988) (applying strict scrutiny to an ordinance that selectively banned certain types of picketing from streets in residential neighborhoods).

21. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

22. *See* *Boardley v. U.S. Dep’t of Interior*, 615 F.3d 508, 515 (D.C. Cir. 2010).

What makes a park a traditional public forum is not its grass and trees, but the fact that it has “immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”

*Id.* (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

23. *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998); *see also* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 54–55 (1983) (identifying teacher mailboxes in public schools as a limited forum such that school authorities may restrict access to only speakers transacting official school business).

24. *See* *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (stating that, in evaluating the constitutionality of a restriction on expression on public property, “[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time”).

25. *United States v. Grace*, 461 U.S. 171, 183 (1983).

26. *See, e.g.,* *Claudio v. United States*, 836 F. Supp. 1219, 1224–25 (E.D.N.C. 1993) (holding that entrance lobby of federal building was a nonpublic forum, considering that the building contained judges’ chambers and courtrooms, implicating heightened security concerns, and the lobby was physically not designed to accommodate expressive activity).

not an all-or-nothing proposition; campuses are best understood to contain a variety of different forums, some amenable to expressive activity and others not.<sup>27</sup>

Even if property qualifies as a public forum, the government may enforce reasonable “time, place and manner” restrictions, so long as they are content-neutral, leave open ample alternative means of expression, and are narrowly tailored.<sup>28</sup> So, for instance, a municipal government may neutrally enforce a noise ordinance limiting the volume of amplified speech at a public gathering without running afoul of the First Amendment.<sup>29</sup> A government agency also can, without regard to the speakers’ messages, manage the demand for a scarce piece of government property so that speakers do not overcrowd the property or drown each other out.<sup>30</sup> Any First Amendment challenge to an ordinance that restricts writing on government property would first have to surmount the defense that the ordinance is no more than a “time, place and manner” regulation justified by legitimate government interests unrelated to the substance of the message.<sup>31</sup> In the context of writing on public property, the government’s content-neutral justifications would likely focus on beautification interests and the avoidance of cleaning expenses.

### B. Cracks in the “Sidewalk as Forum”

Alongside public parks, sidewalks are often—but not always—considered to be traditional public forum property.<sup>32</sup> Just as the forum doctrine itself has wobbled unsteadily over its judicial evolution,<sup>33</sup> the

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27. See Nathan W. Kellum, *If It Looks Like a Duck . . . Traditional Public Forum Status of Open Areas of Public University Campuses*, 33 HASTINGS CONST. L.Q. 1, 36 (2005) (asserting that campuses, like municipalities, contain open spaces where people are encouraged to gather, but also contain limited-access facilities such as sporting arenas, so the forum status of the property should be measured by the specific location to which the speaker seeks access).

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

29. *Id.* at 803.

30. See *Crowder v. Hous. Auth. of Atlanta*, 990 F.2d 586, 593 (11th Cir. 1993) (explaining that, even if property at a public housing complex qualifies as a forum, property managers can schedule speakers’ use of the property to accommodate other would-be users without violating the First Amendment).

31. *Searcey v. Harris*, 888 F.2d 1314, 1318–19 (11th Cir. 1989).

32. See *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (“‘[T]ime out of mind’ public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum.” (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939))).

33. See Frank D. LoMonte, *Everybody Out of the Pool: Recognizing a First Amendment Claim for the Retaliatory Closure of (Real or Virtual) Public Forums*, 30 UNIV. FLA. J.L. & PUB. POL’Y 1, 4 (2019) (describing the “dense and befuddling thicket of First Amendment caselaw that has grown up around the” public forum doctrine); Stephen Douglas Bonney, *The University Campus as Public Forum*:

understanding of how much First Amendment protection applies when speakers use public sidewalks has varied unpredictably.

As the public forum doctrine was taking shape during the 20th century, federal courts typically included sidewalks alongside streets and parks in the category of “traditional” public forum, the type of property that by its very character is always considered to be compatible with expressive use.<sup>34</sup> But the Supreme Court appeared to retreat from categorically classifying sidewalks as full-fledged public forums in its 1976 ruling, *Greer v. Spock*.<sup>35</sup> In *Greer*, the Court found no First Amendment right for pacifist political activists to demand access to the sidewalks within a New Jersey military base to hand out campaign literature.<sup>36</sup> The Court rejected the proposition that, just because a piece of government property is accessible to the public, it must necessarily be wide-open for expressive use.<sup>37</sup> The Court looked at how government authorities had traditionally maintained this particular piece of property, and—finding a long practice of restricting expressive activity by outside visitors—distinguished the Fort Dix sidewalk from ordinary sidewalks where expressive use is tolerated.<sup>38</sup>

The pendulum appeared to swing back in 1988 with the Court’s decision in *Frisby v. Schultz*.<sup>39</sup> In *Frisby*, the Court adopted a narrowing construction to uphold a municipal ordinance that banned picketing in residential areas.<sup>40</sup> In its analysis, the Court identified sidewalks, along with public streets, as traditional forum property that—“time out of mind”—had been understood as amenable to public expression.<sup>41</sup> The Court did not examine the character of any specific sidewalk within the municipality: “No particularized inquiry into the precise nature of a specific street is necessary; all public streets are

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*The Legacy of Widmar v. Vincent*, 81 UMKC L. REV. 545, 562 (2013) (“Public forum analysis has so many parts and sub-parts that it resembles a Rube Goldberg device on steroids.”); Uglund, *supra* note 15, at 944 (“Unfortunately, public forum analysis has grown increasingly muddled over the past decade. Lower court applications of the doctrine have been inconsistent and have revealed the doctrine’s weaknesses.”).

34. See *Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968) (commenting that “streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely”). In *Food Employees*, the Court struck down a statute that allowed for complete proscriptions against picketing on sidewalks adjoining privately owned shopping centers. *Id.* at 325.

35. *Greer v. Spock*, 424 U.S. 828, 836 (1976).

36. *Id.* at 838.

37. *Id.* at 836.

38. *Id.* at 836–37.

39. *Frisby v. Schultz*, 487 U.S. 474, 488 (1988).

40. *Id.*

41. *Id.* at 480.



held in the public trust and are properly considered traditional public fora.”<sup>42</sup> The Court found the ban permissible only if understood to apply to picketing that targets a particular home, rather than all sidewalk protests.<sup>43</sup>

Just two years later, the *Frisby* majority’s author, Justice Sandra Day O’Connor, would backpedal from *Frisby*’s approach in *United States v. Kokinda*, a dispute over the expressive use of sidewalks outside a U.S. Post Office building.<sup>44</sup> Citing the functional approach that the *Greer* Court applied, Justice O’Connor’s four-vote plurality in *Kokinda* declined to characterize the sidewalk outside a Bowie, Maryland post office as a traditional public forum.<sup>45</sup> O’Connor attempted to distinguish between the “quintessential public sidewalk” referenced in *Frisby* versus the sidewalk in *Kokinda* that, in the plurality’s view, “was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city.”<sup>46</sup> Four dissenters found the O’Connor pivot unpersuasive and would have adhered to *Frisby*’s categorical approach: “[T]hat the walkway at issue is a sidewalk open and accessible to the general public is alone sufficient to identify it as a public forum.”<sup>47</sup> The precedential force of *Kokinda* is uncertain because Justice Anthony Kennedy’s decisive concurring opinion largely avoided the forum question and found the prohibition on soliciting to be constitutional regardless of the property’s status because the regulation was content neutral.<sup>48</sup> Counting Kennedy, there was arguably a five-vote majority in *Kokinda* for the proposition that the postal walkway was a forum, making the O’Connor functional analysis less persuasive.<sup>49</sup>

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42. *Id.* at 481.

43. *See id.* at 483 (“[W]e construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited.”).

44. *United States v. Kokinda*, 497 U.S. 720, 722–23 (1990).

45. *Id.* at 727.

46. *Id.* at 727–28; *see also* Stephen R. Welby, *Formalism in the Forum?* *United States v. Kokinda and the Extension of the Public Forum Doctrine*, 69 WASH. UNIV. L.Q. 957, 966 (1991) (asserting that the *Kokinda* plurality opinion “clarifies the . . . public forum concept by looking beyond the physical characteristics to the property’s location and purpose”).

47. *Kokinda*, 497 U.S. at 745 (Brennan, J., dissenting).

48. *Id.* at 738 (Kennedy, J., concurring).

49. *See* Dennis J. Courtney, *United States v. Kokinda: Redefining Public Fora?*, 19 N. KY. L. REV. 149, 167–68 (1991) (characterizing the plurality’s reasoning as shaky and suggesting that Justice Kennedy could have found the property to be, at least, a limited public forum). As Courtney points out, the plurality appeared to be looking for indicators that the government had affirmatively “dedicated” the sidewalk for expressive use, which is relevant to the assessment of a designated public forum but not a traditional public forum. *Id.* at 157–58. If sidewalks are (as the Court has long held) traditional public forums, then the majority took a wrong turn in looking for indicators of affirmative designation. *Id.* at 150. It is also worth noting that “streets” are always categorized as traditional public forums, despite the fact

The Supreme Court has forcefully applied the protection of public forum doctrine on college campuses, holding that a public university may not discriminate on the basis of content in allocating meeting space or financial subsidies to student organizations.<sup>50</sup> College campuses are widely regarded as bastions for freedom of expression—places where it is especially important to protect the free exchange of ideas, especially political views and, most especially, those espousing a non-majoritarian position.<sup>51</sup> The status of sidewalks on college campus property might arguably be likened either to the general-purpose sidewalks in the adjoining municipality, or to a special-purpose sidewalk like the post office walkway in *Kokinda*. Like a military base, a state university campus is primarily dedicated to use by a select class of authorized people transacting official business.<sup>52</sup> But unlike a military base, a college campus is typically held open to unrestricted public foot traffic for any number of purposes: jogging, dog-walking, visiting the library, attending guest lectures, patronizing sandwich shops, and so on.<sup>53</sup> This is

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that using a street for expressive activity will invariably interfere with the primary intended purpose of the street. *Id.* So, the fact that the primary intended purpose of a postal walkway is to convey patrons in and out of the building is not legally conclusive of its forum status.

50. See *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (ruling that a university cannot disqualify religiously themed student publications for competing on equal footing with other student publications for financial support); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (holding that a state university cannot deny religious organizations access to meeting space that is available to other student organizations).

51. See *Bowman v. White*, 444 F.3d 967, 979 (8th Cir. 2006).

[I]n times of great national discussion, such as during the height of the Vietnam War or the debate over the war in Iraq, college campuses serve as a stage for societal debate. . . . Thus, public university campuses historically contain places where space is specifically designated by society and universities themselves for speech.

*Id.*; see also Uglund, *supra* note 15, at 939.

[P]ublic universities often are bastions of unorthodox thinking and even radicalism in communities whose political dialogue is mired in the middle. . . . [A]s public institutions, universities should provide the greatest possible latitude for both students and nonstudents to use the university campus as a venue for expressive activity and, ideally, as a forum for dialogue. Public universities are symbols of openness and equal opportunity and should accommodate as much speech by as many people as possible.

*Id.*

52. See *Widmar*, 454 U.S. at 267–68 n.5 (observing that a public university’s campus “differs in significant respects from public forums such as streets or parks or even municipal theaters. A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities”).

53. See *Brister v. Faulkner*, 214 F.3d 675, 677–78 (5th Cir. 2000) (finding that a sidewalk outside the University of Texas-Austin coliseum was a general-purpose public forum amenable to the distribution of leaflets and noting that the arena regularly hosted ticket events to which the public was invited); see also Bonney, *supra* note 33, at 562 (noting that “most public college and university campuses are physically open to all outsiders and, in fact, invite many outsiders to visit campus to audit classes, to

where the *Kokinda* functional analysis may come into play. In an illustrative case examining the forum status of college campus walkways, a federal appeals court concluded that a sidewalk on the University of Alabama campus did not qualify as a traditional public forum.<sup>54</sup> Because the walkway was visibly an “enclave” for internal campus use rather than a thoroughfare for the general public, it was regarded as a limited public forum dedicated to expressive use for only the subset of users for whom the forum was created: members of the campus community.<sup>55</sup> Hence, outsiders had no claim of right to use the property for expression.<sup>56</sup>

Increasingly, state legislatures are preempting constitutional disputes by declaring the open areas of state university campuses to be public forums for expression.<sup>57</sup> These statutes respond to the growing recognition that universities have infringed First Amendment rights by constraining protest activity to “free speech zones” that, at times, are small and remotely located.<sup>58</sup> Some speak broadly without distinguishing among categories of authorized users; for instance, Louisiana law addresses the rights of all speakers without regard to their university affiliation:

Any person who wishes to engage in noncommercial expressive activity on the campus of a public postsecondary education institution shall be permitted to do so freely, as long as the person’s conduct is not unlawful and does not materially and substantially disrupt the functioning of the institution. . . . The outdoor areas of a public postsecondary education institution shall be deemed traditional public forums and open to expressive activities.<sup>59</sup>

Others speak more narrowly in guaranteeing expressive access only for members of the university community; for instance, a 2022 Georgia statute

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use the libraries and other facilities, and to attend lectures, community forums, athletic events, movies, plays, and other theatrical and musical productions”).

54. Keister v. Bell, 879 F.3d 1282, 1284 (11th Cir. 2018).

55. *Id.* at 1290–91.

56. *Id.* at 1291.

57. See Whitney K. Novak, CONG. RSCH. SERV., LSB10438, FREE SPEECH ON COLLEGE CAMPUSES: CONSIDERATIONS FOR CONGRESS 4 (2020).

[A]t least 17 states have passed legislation banning free speech zones on campuses by, for example, deeming common outdoor areas on campuses as traditional public forums and permitting any person to engage in expressive activities in those areas so long as the person is not disruptive or breaking the law.

*Id.*

58. See Bonney, *supra* note 33, at 559 (“Free speech zones can get universities into trouble, especially if they are too small, too isolated, or too restrictive.”).

59. LA. STAT. ANN. § 17:3399.32(B)–(C) (2022).

provides that “[u]nrestricted outdoor areas of campuses of public institutions of higher education in this state shall be deemed public forums for the campus community.”<sup>60</sup>

For purposes of analyzing prohibitions against chalking, it makes no practical difference whether the sidewalk at issue is a traditional or limited public forum. In either case, the same First Amendment analysis applies: Content-based restrictions are presumptively unconstitutional and difficult to justify, while content-neutral regulations on time, place, and manner are more easily justified. The only meaningful distinction between the two types of forum is whether a campus outsider could assert a First Amendment right to use the property, or whether only a person with official university affiliation (e.g., a student or employee) would have that constitutional argument.<sup>61</sup>

Once a piece of government property is recognized as amenable to expressive use, the issue then becomes whether the government has a sufficiently weighty interest in restricting speech. Although beautification does not seem like an especially compelling rationale for restricting the exercise of constitutional rights, federal courts have come to consider aesthetic interests to be sufficient to justify some incursions into free-speech rights.<sup>62</sup> The Supreme Court’s 1954 ruling in *Berman v. Parker* explicitly recognized beautification as falling within the ambit of “public welfare” considerations that a municipality may use its policing powers to advance, although that case was a dispute over property rights and not speech.<sup>63</sup>

60. GA. CODE ANN. § 20-4-11.1(b) (2022).

61. See *Glover v. Cole*, 762 F.2d 1197, 1202 (4th Cir. 1985). In *Cole*, the court concluded that West Virginia University could constitutionally enforce a rule against fundraising by non-affiliated outsiders while allowing students to engage in the same conduct:

Although its campus is open, West Virginia has set aside the campus as an area for peaceful use by students and faculty. Those in charge of the state college thus have a significant interest in protecting the students from the harassment of insistent hawkers and possibly fraudulent solicitations and in preventing the area from becoming overrun and overcrowded.

*Id.*

62. See Randall J. Cude, *Beauty and the Well-Drawn Ordinance: Avoiding Vagueness and Overbreadth Challenges to Municipal Aesthetic Regulations*, 6 J.L. & POL’Y 853, 859 (1998) (observing that “[m]unicipal aesthetic regulations often partially abridge the right of a citizen or group to engage in free expression, by reducing a citizen’s available means of communicating the message to the public”).

63. See *Berman v. Parker*, 348 U.S. 26, 33 (1954).

It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

*Id.*

The Supreme Court has been especially deferential to the aesthetic concerns of government regulators when speakers seek to use *non*-forum property. In the principal case addressing this scenario, *Members of City Council of Los Angeles v. Taxpayers for Vincent*, the justices rejected a constitutional challenge to a prohibition against posting flyers on utility poles, which the city justified primarily on the grounds of “clutter and visual blight.”<sup>64</sup> The Court found that the “visual assault” of unregulated signs was a sufficiently serious concern to outweigh the rights of speakers to use their chosen means of communication in a nonpublic forum.<sup>65</sup> Of relevance to the legal status of chalking, the justices drew a sharp distinction between the highly protected right to personally distribute speech hand-to-hand, such as by leafleting, versus the less-protected right to post unattended messages that actually alter the appearance of public property.<sup>66</sup> Because it involved property that did not qualify as a forum, *Vincent* does not settle the question of whether appearance-based concerns justify a ban on chalking sidewalks, where the speaker has a much stronger claim of entitlement to use the property.

## II. CHALKING AS PROTEST: CASES AND CONTROVERSIES

### A. *Battle Lines Drawn: Campus Chalking Clashes*

As Donald Trump’s 2016 presidential campaign exposed deep ideological fissures across American society, college administrators struggled to balance freedom of expression with avoiding affronts to audience members who might feel harassed if political advocacy devolved into inflammatory attacks on race, gender, religion, or ethnicity. Controversy erupted at Emory University after students took offense to chalk messages supportive of Trump’s signature campaign issue, building a wall across the Texas-Mexico border, which some Emory students saw as expressions of hostility toward Latin-Americans generally.<sup>67</sup> The resulting controversy sparked a national phenomenon—referred to sarcastically as “The

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64. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 794 (1984).

65. *Id.* at 807.

66. *Id.* at 809–10; see Cobden, *supra* note 7, at 203 (commenting that, while the Court has not explicitly stated that “passive” forms of communication get less protection than “active” forms, such as handbilling, in practice that distinction appears to exist).

67. Katie Rogers, *Pro-Trump Chalk Messages Cause Conflicts on College Campuses*, N.Y. TIMES (Apr. 1, 2016), <https://www.nytimes.com/2016/04/02/us/pro-trump-chalk-messages-cause-conflicts-on-college-campuses.html>.

Chalkening”—in which conservative students scrawled copycat pro-Trump messages on campuses throughout the country.<sup>68</sup> Colleges widely reacted by tightening their rules restricting, or even outright banning, chalk messages on campus walkways.<sup>69</sup>

Even apart from the divisive Trump candidacy, disputes over chalked political messages are a regular staple of campus discourse. Pennsylvania’s Kutztown University revised its restrictive chalking policies under pressure, after an anti-abortion student organization complained its messages were selectively erased.<sup>70</sup> Students have faced disciplinary penalties<sup>71</sup>—and at times, even criminal citations<sup>72</sup>—for drawing messages on campus walkways, even when the messages encompass core political speech or express grievances with college policies.

On occasion, campus disputes have gone as far as the courthouse. A First Amendment advocacy organization, Speech First, sued Iowa State University administrators and trustees in January 2020, challenging a recently enacted policy that restricted chalking on campus sidewalks.<sup>73</sup> The rule limited the use of sidewalks only to registered student organizations, who could write only short messages promoting upcoming events.<sup>74</sup> The regulation was justified as a response to neo-Nazi and anti-transgender messages that

68. Nick Sloan, *Pro-Trump Chalk Campaign Hits KU, Mizzou*, KSHB (Apr. 16, 2016), <https://www.kshb.com/news/thechalkening-a-pro-donald-trump-campaign-hits-ku-mizzou>.

69. See Rogers, *supra* note 67.

“Chalking” on sidewalks has long been a colorful and low-cost way to attract attention to meetups, musicals and other events. But debates over political messages have become so contentious in recent years that many schools have issued policies over who can write them, and where and when they can be written.

*Id.*

70. Justin Wm. Moyer, *A Public University Eases Limits on Chalk Messages after Complaint from Anti-Abortion Group*, WASH. POST (June 12, 2017), <https://www.washingtonpost.com/news/education/wp/2017/06/12/a-public-university-eases-limits-on-chalk-messages-after-complaint-from-anti-abortion-group/>.

71. See Heidi Dong, *Two Students Accused of Property Damage for Chalking*, THE HEIGHTS (June 3, 2020), <https://www.bcheights.com/2018/04/08/two-students-face-sanctions-for-chalking/> (reporting that police confronted two students at Boston College, where chalking is prohibited, over chalked messages including “Black Lives Matter” and referred them to student conduct authorities for disciplinary action); Alexa Lopez, *‘Chalking Is Not a Crime,’* THE MIAMI HURRICANE (Apr. 20, 2011), <https://www.themiamihurricane.com/2011/04/20/chalking-is-not-a-crime/> (reporting that a student organization faced disciplinary charges for vandalism because its members chalked messages on campus sidewalks opposing an industrial park their university was building in a low-income neighborhood).

72. Malia Politzer, *University of Arizona Dropping Charges Against “Sidewalk Chalk Criminals,”* PHOENIX NEW TIMES (Sept. 29, 2009), <https://www.phoenixnewtimes.com/news/university-of-arizona-dropping-charges-against-sidewalk-chalk-criminals-6651531>.

73. Greta Anderson, *Sidewalk Politics*, INSIDE HIGHER ED (Jan. 9, 2020), <https://www.insidehighered.com/news/2020/01/09/iowa-state-university-policies-stifle-free-speech-lawsuit-says>.

74. *Id.*

spawned protests in 2019, but Speech First argued that students would also be restricted from expressing political opinions about Iowa's first-in-the-nation presidential caucuses in February 2020.<sup>75</sup> The university settled the case in March 2020, agreeing to rescind the chalking ban and to relax other speech-restrictive campus policies.<sup>76</sup> Thus, the case produced no judicial guidance about how a rule against chalking—particularly, a rule selectively applying to certain speakers or certain messages—will be treated in the event of a future challenge.

### B. *Is There a Right to Write?*

Speakers cited for defacing public property by writing on sidewalks have occasionally raised the defense that prohibitions on chalking violate the First Amendment. Speakers typically have lost those challenges, because the prohibition is content neutral, based on the damage done to government property rather than the message. But on occasion, courts have found in favor of the chalk artist. At times, courts can avoid the constitutional issue entirely, because statutes that criminalize damaging public property simply may not apply to chalking.<sup>77</sup> But speakers sometimes can prevail either by showing that the regulation was selectively enforced on a viewpoint-discriminatory basis, or that the regulation was facially defective on the grounds of overbreadth.

Several chalking disputes originated with the Occupy Wall Street movement of 2011–2012 (Occupy movement), in which protesters sought to use public property to call attention to perceived economic injustices and corporate profiteering.<sup>78</sup> The Occupy movement began in September 2011 with demonstrators building an encampment in a park near Manhattan's financial district that swelled to several thousand occupants and spread to other cities nationwide and outside the United States.<sup>79</sup> The choice of a Wall

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75. *Id.*

76. Rox Laird, *Iowa State University Settles Free-Speech Lawsuit*, COURTHOUSE NEWS SERV. (Mar. 14, 2020), <https://www.courthousenews.com/iowa-state-university-settles-free-speech-lawsuit/>.

77. See *Jackson v. Williams*, No. 10-CV-14985, 2013 WL 150032, at \*1 (E.D. Mich. Jan. 14, 2013) (concluding that visitor's act of writing message on curb outside county jail did not constitute grounds for arrest under "defacement" statute, because it caused no damage).

78. See Claire Howard, *A New First Amendment Battleground: Challenges Facing Local Governments by the Occupy Movement and Proactive Responses to Future Movements*, 45 URB. LAW. 473, 474–75 (2013) (describing the history and objectives of the Occupy movement).

79. See *id.* at 475 (describing how, as of the end of 2012, more than 1,000 Occupy spinoffs had been documented across the United States in addition to nearly 1,500 internationally). See also James A. Anderson, *Some Say Occupy Wall Street Did Nothing. It Changed Us More Than We Think*, TIME (Nov. 15, 2021), <https://time.com/6117696/occupy-wall-street-10-years-later/> (chronicling history and lasting impact of movement); Kai Ryssdal & Richard Cunningham, *10 Years Later, Was the Occupy Wall*

Street park for a highly visible “occupation” was itself an element of the message, so that the *means* of protest was, arguably, inseparable from its content.<sup>80</sup> While the primary source of conflict with authorities was the ability to camp for a sustained period on public property, in a handful of instances, “occupiers” also ran afoul of prohibitions against chalking on public sidewalks.

In Minneapolis, an offshoot of the national Occupy movement came into conflict with authorities while camping on two plazas adjacent to the Hennepin County Government Center.<sup>81</sup> Before the “occupation,” the county did not have written procedures about people assembling indefinitely on public property, but it did have unwritten policies against sleeping on the plazas, storing personal items there, or affixing signs to, or using chalk on, county structures.<sup>82</sup> After briefly tolerating the protests, the county eventually began to enforce its unwritten policies and issued trespass notices to people who chalked on plaza grounds.<sup>83</sup>

The protesters sued, alleging that county officials were violating their constitutional rights by enforcing the unwritten regulations, including the policy against chalking.<sup>84</sup> A federal district court held that the chalking prohibition did not violate the First Amendment.<sup>85</sup>

The court found that the prohibition was content neutral because it prohibited any chalking on plaza property, on any topic.<sup>86</sup> Accordingly, a relaxed level of First Amendment solicitude applied, which the chalking rule survived: The prohibition served a substantial government interest—controlling the aesthetic appearance of the plaza—and left open sufficient alternative means to communicate, including flyers, signage, or speaking.<sup>87</sup>

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*Street Movement Effective?*, MARKETPLACE (Sept. 14, 2021), <https://www.marketplace.org/2021/09/14/10-years-later-was-the-occupy-wall-street-movement-effective/> (crediting Occupy movement with sparking conversation about economic inequities).

80. See Kristie LaSalle, *The Other 99% of the Expressive Conduct Doctrine: The Occupy Wall Street Movement and the Importance of Recognizing the Contribution of Conduct to Speech*, 18 TEX. J. ON C.L. & C.R. 1, 7 (2012) (asserting that “the location in which protected speech is made is sometimes essential to the message; in such instances, if the speech were to be divorced from the relevant location, its value and impact would be diminished”) (footnote omitted).

81. *Occupy Minneapolis v. County of Hennepin*, 866 F. Supp. 2d 1062, 1066 (D. Minn. 2011).

82. *Id.*

83. *Id.*

84. *Id.* at 1066–67.

85. *Id.* at 1070.

86. *Id.*

87. *Id.* In a similar vein, Occupy movement protesters also lost their First Amendment challenge to a prohibition against chalking on the state capitol grounds in Idaho. *Watters v. Otter*, 986 F. Supp. 2d 1162, 1174 (D. Idaho 2013). The court analyzed the prohibition as a content-neutral time, place, and manner restriction, “substantially justified by the State’s aesthetic interest in combating the very problem chalking entails—the defacement of public property.” *Id.* The court was unpersuaded by arguments that



A protester taking part in the Orlando, Florida iteration of the Occupy movement fared better with his First Amendment claim. In December 2011, Timothy M. Osmar was chalking a political message on the sidewalk in front of Orlando City Hall when a police officer approached and instructed him to stop.<sup>88</sup> Osmar kept writing, and the officer arrested him for violating a city ordinance that outlawed writing or painting on streets.<sup>89</sup> Several days later, Osmar returned to the plaza outside the municipal building, again wrote a political message on the sidewalk—“All I want for Christmas is a Revolution, #Occupy”—and again was arrested for violating the same ordinance.<sup>90</sup> Osmar sued under 42 U.S.C. § 1983, alleging that police were unconstitutionally applying the ordinance to suppress his political speech.<sup>91</sup>

The court had little difficulty concluding that the plaza outside Orlando City Hall is a traditional public forum dedicated to public assembly and debate.<sup>92</sup> The court found that Osmar’s arrests lacked a valid legal basis for several reasons. First, the ordinance on its face did not even apply to his conduct at all, since it prohibited writing only “advertising” messages.<sup>93</sup> Second, writing with chalk does no damage to public property, because it is easily cleansed with water or will disappear after a rainstorm.<sup>94</sup> And third, the City of Orlando had tolerated or even encouraged chalking on other occasions, such as celebrating a 2009 playoff appearance by the NBA’s Orlando Magic, raising the specter of selective enforcement because of disfavor for Osmar’s political viewpoint.<sup>95</sup> Accordingly, the court found the arrests unconstitutional, permanently enjoined city officials from charging Osmar for future acts of chalking political messages on sidewalks, and raised the possibility of a trial for the award of money damages in Osmar’s favor.<sup>96</sup>

The discordant outcomes in these factually similar Occupy movement cases illustrate the considerations on which courts typically focus when a speaker challenges a prohibition on chalking: Speakers typically lose if the ordinance is a straightforward ban that has consistently been enforced

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chalk easily washes off and that chalkers can be made to clean up their drawings as a less-restrictive alternative to outright prohibition, because a content-neutral regulation need not be the least restrictive method for the government to achieve its objective. *Id.*

88. Osmar v. City of Orlando, No. 6:12-CV-185-ORL-DAB, 2012 WL 1252684, at \*1 (M.D. Fla. Apr. 13, 2012).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at \*3.

93. *Id.* at \*4.

94. *Id.*

95. *Id.* at \*5.

96. *Id.* at \*6.

without regard to content, and speakers typically prevail if there is evidence of selective content-based enforcement or other indicators of government overreaching.

### 1. Chalking Prohibitions Upheld

Courts adjudicating challenges to prohibitions against chalking—either by way of a facial challenge, or an as-applied challenge by a person who has been cited—generally adopt a deferential approach toward the government’s proffered justifications for banning writing on public property. When that deferential approach applies, it does not take much for government defendants to defeat First Amendment challenges.

In Washington, D.C., a district court found in favor of the police department and against an anti-abortion activist who sought to use the sidewalk in front of the White House for a chalking protest.<sup>97</sup> In November 2008, Reverend Patrick Mahoney notified the Metropolitan Police Department (MPD) of his intent to carry out a sidewalk chalk demonstration in front of the White House to protest President Obama’s position on abortion and the anniversary of the *Roe v. Wade* decision.<sup>98</sup> The MPD responded that sidewalk chalking would violate the District of Columbia’s defacement statute.<sup>99</sup> Mahoney demanded that the MPD authorize his chalking demonstration given that the District of Columbia had previously approved similar chalking events across the D.C. metropolitan area.<sup>100</sup> But the police issued him only a limited permit, which allowed for banners or signs but explicitly forbade chalking.<sup>101</sup>

Mahoney sued the MPD and the District of Columbia, requesting a temporary restraining order and preliminary injunction to keep the District from interfering with the chalking demonstration.<sup>102</sup> The district court denied Mahoney’s request for equitable relief, but nonetheless, Mahoney went forward with his chalking protest.<sup>103</sup> D.C. police confronted him as he wrote on the street outside the White House and confiscated his chalk, but did not charge or arrest him.<sup>104</sup>

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97. Mahoney v. District of Columbia, 662 F. Supp. 2d 74, 77 (D.D.C. 2009).

98. *Id.* at 78.

99. *Id.* at 79.

100. *Id.*

101. *Id.*

102. *Id.* at 80.

103. *Id.*

104. *Id.*

Mahoney continued pursuing his challenge to the chalking ordinance, both on constitutional grounds and on the grounds of interference with statutorily protected religious-freedom rights, but the court found the claims unavailing. Even though the streets surrounding the White House were traditional public forums, implicating the highest degree of First Amendment scrutiny, the judge deemed the chalking ban to be a permissible content-neutral “time, place, and manner” regulation.<sup>105</sup>

On appeal, the D.C. Circuit fully affirmed the trial court, finding the statute to be constitutional both on its face and as applied to Mahoney.<sup>106</sup> The appeals court found that the statute is “indisputably content neutral” and sufficiently tailored to serve the District’s important esthetic interest in combating the very problem Mahoney’s proposed chalking presented: defacement of public property.<sup>107</sup> Further, since the District did not curtail Mahoney’s means of expression entirely—leaving him free to protest in front of the White House using visual messages on signs, banners, and leaflets—the statute left ample alternative means of expression and thus was not unconstitutional as applied.<sup>108</sup> Concurring, then-Judge Brett Kavanaugh emphasized the view that chalking, despite its ephemeral nature, is equivalent to damaging property: “No one has a First Amendment right to deface government property. No one has a First Amendment right, for example, to spray-paint the Washington Monument or smash the windows of a police car.”<sup>109</sup> An important takeaway from the *Mahoney* case is that a broadly written anti-defacement statute will probably survive a facial challenge, because it will be constitutional in at least some substantial subset of its potential applications (e.g., spray paint that causes lasting damage).<sup>110</sup>

Notably, the *Mahoney* court put emphasis on the District’s interest in preserving the specific property at issue—the front of the White House—“where the special nature of the forum serves to heighten esthetic concerns.”<sup>111</sup> The court rested its rationale on a 1984 challenge to a National Park Service regulation on the size and location of protest signs on the sidewalk outside the White House.<sup>112</sup> The specificity of this holding leaves

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105. *Id.* at 88–89.

106. *Mahoney v. Doe*, 642 F.3d 1112, 1114 (D.C. Cir. 2011).

107. *Id.* at 1118.

108. *Id.* at 1119.

109. *Id.* at 1122 (Kavanaugh, J., concurring).

110. *See id.* at 1119–20 (majority opinion) (rejecting facial First Amendment challenge to defacement statute, because it prohibits all acts of defacement, including defacement of private property, not just expressive chalking on public property).

111. *Id.* at 1118.

112. *Id.* (citing *White House Vigil v. Clark*, 746 F.2d 1518, 1537 (D.C. Cir. 1984)). The court in *Clark* observed that, based on public comments during rulemaking, “many other tourists believe that the

some room for argument in a different factual case, where chalking is not as dissonant with the public's primary use and enjoyment of the property.

The district court in *Mahoney* also relied on an analogous district court ruling from New York, in which a protester was arrested for chalking on the sidewalk outside a federal building.<sup>113</sup> The protester, John Murtari, wrote the message, "I ♥ Dom, Sen. Clinton Help Us," on the sidewalk of New York's Hanley Federal Building on two separate occasions and refused to stop when a Federal Protective Service agent demanded that he do so.<sup>114</sup> Prosecutors charged him both with violating a regulation against damaging federal property and with failure to obey a lawful police order.<sup>115</sup>

The court found that Murtari did not actually damage the property, even though it was "defaced" by the use of the chalk, so he could not be guilty of the property-damage infraction.<sup>116</sup> But the court declined to dismiss the remaining charges, finding that law enforcement agents had a lawful basis to direct Murtari to stop writing: "The fact that defendant may have a right to stand and hold a sign outside of the Federal Building does *not* give him the First Amendment right to write on the plaza in chalk or with any other medium, permanent or otherwise."<sup>117</sup>

## 2. Enforcement Actions Invalidated

Where courts have ruled in favor of those writing on public property, the rulings have generally turned on issues of statutory construction—i.e., whether the chalking was actually illegal in the jurisdiction—rather than on core First Amendment concerns.

For instance, the federal Ninth Circuit ruled in favor of a protester, Christopher Mackinney, who was arrested for writing "[a] police state is more expensive than a welfare state—we guarantee it" in chalk on a public sidewalk in Berkeley, California.<sup>118</sup> Two police officers driving in an unmarked car saw Mackinney and ordered him to stop writing. Even though Mackinney had already stopped writing that particular message, he refused to agree to refrain from further writing, insisting that his actions were legal.<sup>119</sup>

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proliferation of stationary signs within the center zone substantially detracts from their ability to view the White House and its grounds"). *Clark*, 746 F.2d at 1537.

113. *United States v. Murtari*, No. 5:07-CR-387, 2007 WL 3046746, at \*1 (N.D.N.Y. Oct. 16, 2007).

114. *Id.* at \*1–2.

115. *Id.* at \*1.

116. *Id.* at \*4.

117. *Id.* at \*5.

118. *Mackinney v. Nielsen*, 69 F.3d 1002, 1002, 1004 (9th Cir. 1995).

119. *Id.* at 1004.

He was charged with violating California Penal Code § 594, which prohibits defacing “with paint or any other liquid” or damaging property that is not one’s own.<sup>120</sup>

Mackinney was not prosecuted, and sued for damages under 42 U.S.C. § 1983, alleging that the arrest lacked probable cause, violating both his First Amendment and Fourth Amendment rights.<sup>121</sup> The district court granted summary judgment in favor of the defendants, but the Ninth Circuit reversed. The appeals court held that the California vandalism statute could not reasonably be applied to Mackinney, because the law made it illegal to “(1) deface ‘with paint or any other liquid,’ (2) damage or (3) destroy any real or personal property that is not one’s own.”<sup>122</sup> The court rejected the defacement claim because chalk is not “liquid” and there is no evidence that the sidewalk was “damaged.” The Ninth Circuit noted that “[n]o reasonable person could think that writing with chalk would damage a sidewalk.”<sup>123</sup> Thus, the court found in the speaker’s favor on pure statutory-construction grounds, without reaching the First Amendment issue.<sup>124</sup>

In a case citing but distinguishing the *Mahoney* White House case, a federal district court refused to extend *Mahoney*’s reasoning to a chalk message written outside the county jail in Genesee County, Michigan.<sup>125</sup> Melissa Jackson was arrested and charged with criminal defacement after writing the words “My Love, My Everything, Kisses” on the curb outside the jail, where her boyfriend was incarcerated.<sup>126</sup> But the court found that the arrest was an unreasonable application of the city defacement statute, noting that “chalk writing is not permanent and easily washes away with water, and is normally completely erased after a simple rain storm.”<sup>127</sup> The court noted the special nature of the property in *Mahoney*, and found no such heightened aesthetic interest in the premises of the county jail.<sup>128</sup> Even if the Flint defacement ordinance were construed to apply to writing with chalk, the court decided, a jury could conclude that the officer’s conduct in tackling and

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120. *Id.*

121. *Id.*

122. *Id.* at 1005.

123. *Id.*

124. The court did, however, rule in favor of the plaintiff to the extent that his arrest on obstruction charges was based on his verbal exchange with officers asserting his right to continue chalking, which the court recognized as constitutionally protected speech. *Id.* at 1007. The court also remanded Mackinney’s facial First Amendment challenge to the defacement ordinance to the trial court for consideration, but there are no published subsequent proceedings indicating that the challenge was ever adjudicated. *Id.* at 1010

125. *Jackson v. Williams*, No. 10-CV-14985, 2013 WL 150032, at \*3 (E.D. Mich. Jan. 14, 2013).

126. *Id.* at \*1.

127. *Id.*

128. *Id.* at \*3.

arresting Jackson after Jackson asked for the officer's name was inherently unreasonable.<sup>129</sup>

As these cases demonstrate, there is no generalized consensus as to whether chalking messages on public property is constitutionally protected expression. Rather, the handful of available decisions are intensely fact-specific and context-specific, which leaves a would-be speaker with uncertain guidance about where the line is drawn between protected political expression and punishable vandalism.

### III. A RIGHT TO (TEMPORARILY) OCCUPY PUBLIC PROPERTY?

Fleeting occupations of public property, such as marching or pamphleteering, are a staple of political protest, and are well-accepted as constitutionally protected expression. When the occupation is more than merely transitory, the law becomes less clear. Courts have sometimes countenanced incursions onto government-owned property even more intrusive than chalking when a speaker is able to show that the occupation is necessary to convey speech.

The Supreme Court's signature case dealing with an asserted right to occupy public property for expressive use is *Clark v. Community for Creative Non-Violence*.<sup>130</sup> In *Clark*, advocates for the homeless obtained a permit from the National Park Service to erect a symbolic "tent city" in Lafayette Park, adjacent to the White House, to dramatize the need for affordable housing.<sup>131</sup> But the Park Service refused permission for the activists to actually sleep in the tents, invoking a federal regulation against using park property for "living accommodation purposes" outside of designated campsites.<sup>132</sup> The activists sued, producing a confusing flurry of disparate opinions from the D.C. Circuit, with a narrow majority concluding that the ban on sleeping would infringe the protesters' First Amendment rights.<sup>133</sup> The Supreme Court accepted the case and decided in favor of the Park Service.

The justices applied the intermediate scrutiny that adheres to content-neutral regulations of the time, place, and manner of speech on government property.<sup>134</sup> Even assuming that the act of sleeping could be imbued with expressive qualities, the Court found, this regulation implicated only the

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129. *Id.*

130. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 288 (1984).

131. *Id.* at 292.

132. *Id.* at 290–91.

133. *See id.* at 292 (citing *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983)).

134. *Id.* at 293.

manner in which the protesters sought to deliver their message.<sup>135</sup> The Court observed that, even without sleeping in the tents, the protesters could still use Park Service property to convey their message in a variety of ways, including taking turns “in a day-and-night vigil.”<sup>136</sup> In other words, the Court recognized that the First Amendment would allow protesters to take up space on Park Service property for a sustained and perhaps indefinite period of time, so long as they stayed on the right side of the sleeping prohibition. The Court readily concluded that the regulation could be justified by the government’s legitimate interests in “maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence.”<sup>137</sup> The justices were unpersuaded by the D.C. Circuit’s conclusion that less-restrictive alternatives, such as regulating the size or duration of demonstrations, could accomplish the government’s objective of protecting park property, deferring to the Park Service’s authority to decide how best to manage its resources.<sup>138</sup> *Clark* provides the guide star by which expressive occupations of government property are evaluated.

A. “Expressive Sleeping” and the First Amendment

Following the Supreme Court’s lead in *Clark*, most courts have declined to recognize a right to sleep indefinitely on public property, even when the sleeping is understood to convey a message of protest. For example, in Michigan, an appellate court upheld restrictions against overnight use of the State Capitol grounds, rebuffing a challenge from protesters who sought to maintain a “tent city” on the statehouse lawn indefinitely as a way of dramatizing the plight of the homeless.<sup>139</sup> The court found that the regulations afforded adequate means of reaching the target audience other than overnight camping, as the grounds were open 15 hours a day, and that the regulations were justified by the State’s interest in aesthetics as well as concern for keeping the grounds accessible for other potential users.<sup>140</sup>

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135. *Id.* at 294.

136. *Id.* at 295.

137. *Id.* at 296.

138. *Id.* at 299; see also Udi Ofer, *Occupy the Parks: Restoring the Right to Overnight Protest in Public Parks*, 39 FORDHAM URB. L.J. 1155, 1172 (2012) (describing *Clark* as a case of the Court paying extraordinary deference to the management discretion of the executive branch, as opposed to attempting to weigh the interests of the speakers in a balancing approach).

139. See generally *Michigan Up & Out of Poverty Now Coal. v. State*, 533 N.W.2d 339 (Mich. App. 1995) (discussing a First Amendment dispute brought by a social coalition against the state of Michigan).

140. *Id.* at 345–46.

A good many “expressive camping” cases arose out of the aforementioned Occupy movement, which began in Manhattan’s Zuccotti Park as “Occupy Wall Street,” but quickly spawned lookalike encampments in cities across the United States.<sup>141</sup> In the bulk of publicly available cases, Occupy movement protesters failed to convince courts that the First Amendment requires accommodating a continuous, around-the-clock encampment.

In an instructive case, a federal court in Connecticut rebuffed Occupy protesters’ constitutional challenge to a directive ordering them to take down their encampment in a downtown New Haven park, which the city had tolerated for some five months.<sup>142</sup> The court accepted that camping and sleeping in a public space with the intent of conveying a message constitutes speech.<sup>143</sup> But the court found that the city’s prohibition against occupying public parks overnight or erecting structures without a permit—a prohibition that predated the Occupy movement—was a legally permissible time, place, and manner restriction.<sup>144</sup> The court emphasized that, although the Occupy demonstrators could not stage the around-the-clock protest of their choice in their preferred location, they had the options of continuing to demonstrate in the park during daytime hours and/or relocating to another venue within the city where 24-hour occupation was legal—which, in the court’s view, qualified as ample alternative means of communication.<sup>145</sup>

But as with any speech-restrictive policy, prohibitions against Occupy’s “expressive camping” flunked judicial scrutiny if they failed to give speakers adequate notice of what constitutes punishable conduct, or left undue discretion for regulators to make content-based enforcement decisions. For instance, Occupy movement protesters in Columbia, South Carolina, secured an injunction allowing them to maintain their 24-hour vigil on the State Capitol lawn.<sup>146</sup> The protesters showed that the State’s purported ban on overnight occupancy of state property was inconsistently enforced, and existed only in an unpublished internal memo, which gave the public inadequate warning of exactly what conduct was prohibited.<sup>147</sup>

Beyond the Occupy movement context, challengers have succeeded in showing that bans on camping or sleeping on public property are

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141. Ofer, *supra* note 138, at 1158.

142. Mitchell v. City of New Haven, 854 F. Supp. 2d 238, 244 (D. Conn. 2012).

143. See *id.* at 246 (collecting other Occupy cases around the country in which courts held—or simply assumed, without deciding—that camping and sleeping can be expressive).

144. *Id.* at 250, 253.

145. *Id.* at 253.

146. Occupy Columbia v. Haley, 866 F. Supp. 2d 545, 563 (D.S.C. 2011).

147. *Id.* at 559–60.



unconstitutionally overbroad. In a 2007 ruling, Hawaii’s Supreme Court found that an ordinance criminalizing the use of parks for “*living accommodation purposes such as sleeping activities, or making preparations to sleep*” was indefensibly vague and broad.<sup>148</sup> The ordinance was overbroad because it encompassed even expressive activity in which sleeping was a small, incidental part.<sup>149</sup> The ordinance was unconstitutionally vague because it defined criminally punishable “camping” as any behavior that “reasonably appears” to constitute using a park for living accommodations, forcing speakers to consider how their expressive activity might be interpreted by third parties.<sup>150</sup> Similarly, in a 2000 case, a federal judge in New York decided that a city policy against sleeping on sidewalks was overbroad, lacking the narrow tailoring that the First Amendment requires.<sup>151</sup> Applying an intermediate level of scrutiny, the court acknowledged that the city’s safety rationales—both for the sleepers and for pedestrians using the sidewalks—were substantial.<sup>152</sup> But the prohibition was not sufficiently tailored to those rationales; for instance, the city conceded that protesters *standing* on a sidewalk for long periods of time would not be arrested, even if they took up the same amount of space as sleepers.<sup>153</sup> And the city had methods short of criminalization to satisfy its safety concerns, including assigning police officers to provide security, as was routinely done for all sorts of demonstrations.<sup>154</sup>

For purposes of the analogy to chalking, the important takeaway from the body of “expressive camping” cases is that the First Amendment is generally understood to guarantee the ability to take up space on public forum property for some sustained period of time, albeit perhaps not an infinite period of time. If a regulation purports to foreclose the speaker’s preferred (and most effective) method of making a political statement, the regulation must be justified by something more than just the inconvenience imposed on the government or on other users of the property.

*B. (Don’t) Stop the Presses: Courts Require Making Space for News*

While “chalking law” has not been extensively developed in the appellate courts, speakers seeking to justify incursions onto public walkways

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148. State v. Beltran, 172 P.3d 458, 460, 464 (Haw. 2007).

149. *Id.* at 464.

150. *Id.* at 466.

151. Metropolitan Council, Inc. v. Safir, 99 F. Supp. 2d 438, 445 (S.D.N.Y. 2000).

152. *Id.* at 444–45.

153. *Id.* at 445.

154. *Id.* at 447.

for expression can look to a body of analogous precedent in siting disputes over newspaper distribution racks. In that context, courts widely agree that the First Amendment entitles newspaper publishers to take up space—perhaps indefinitely—on public property to distribute their products. Municipalities commonly argue that newsracks must be banned, or tightly restricted, to protect an aesthetically pleasing appearance or protect safety (e.g., to avoid blocking the view of motorists, or forcing pedestrians to detour off a narrow walkway).<sup>155</sup> But those arguments do not always carry the day, particularly if the prohibition categorically prevents publishers from using their preferred distribution method anywhere within the jurisdiction. As one federal judge wrote in striking down an ordinance that banned signs or newspaper vending machines from public property on aesthetic grounds: “[T]he court does not believe that simply uttering the words aesthetics or appearance should magically alleviate any need for evidence connecting the regulation to the state interest, particularly where fully protected First Amendment interests are at stake.”<sup>156</sup>

The Supreme Court has twice grappled extensively with the right to install distribution boxes on public property, and in each instance, sided with the publishers. In *City of Lakewood v. Plain Dealer Publishing Company*, the Court struck down a city ordinance requiring newspaper publishers to obtain a permit before installing coin-operated vending racks along city sidewalks.<sup>157</sup> The justices found the ordinance facially unconstitutional because it gave the mayor unfettered discretion to grant or deny a permit, requiring only that the mayor furnish some explanation for a denial.<sup>158</sup> That discretion, the Court observed, could lead publications to censor themselves in anticipation of having to return to the mayor each year to renew their permits.<sup>159</sup> The Court expressed particular skepticism because the Lakewood ordinance was not a law of general application, but was “directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers.”<sup>160</sup> Significantly, the Court placed great weight on the irreplaceable value of newspaper racks as a targeted method of reaching the speakers’ desired audience: “The effectiveness of the newsrack as a means of distribution, especially for low-budget, controversial

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155. See Heidi C. Fletemeyer, *The First Amendment and Newspaper Vending Machine Regulation*, 69 UNIV. COLO. L. REV. 223, 225–26 (1998) (explaining commonly cited government rationales for regulation).

156. *Southern N.J. Newspapers, Inc. v. New Jersey Dep’t of Transp.*, 542 F. Supp. 173, 186 (D.N.J. 1982).

157. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 772 (1988).

158. *Id.* at 753, 772.

159. *Id.* at 757.

160. *Id.* at 760.

neighborhood newspapers, means that the twin threats of self-censorship and undetectable censorship are, if anything, greater for newsracks than for pamphleteers.”<sup>161</sup>

Then in *Cincinnati v. Discovery Network, Inc.*, the Court likewise invalidated a city ordinance that prohibited “commercial publications” from maintaining newsracks on public property.<sup>162</sup> The Court subjected the rule to exacting scrutiny because, by singling out a category of speech for disfavored treatment (newspapers could be dispensed in roadside racks, but not commercial publications, such as magazines offering houses for sale), the ordinance discriminated based on content.<sup>163</sup> Because the ordinance banned only a small minority of the total distribution racks on public property, the Court found that it was not tailored to advance the city’s proffered interests in safety and aesthetics.<sup>164</sup>

Lower courts have widely agreed that, while government agencies can require newspaper distributors to adhere to reasonable permitting conditions, they cannot entirely ban newspaper racks or enforce standardless permitting schemes.<sup>165</sup> In the latter category, the federal Eleventh Circuit followed *City of Lakewood* and struck down a state of Florida policy that entrusted a single state bureaucrat with total discretion to grant or deny permits for newsracks in highway rest areas and to set the fee that each distributor would have to pay.<sup>166</sup> Finding that the First Amendment requires some neutral permitting standards to govern the exercise of discretion, the court opined: “The state of Florida . . . simply cannot continue to take an utterly discretionary, ‘seat of the pants’ regulatory approach towards activity that is entitled to first amendment protection.”<sup>167</sup>

In an especially instructive case, the Fourth Circuit ruled in favor of a newspaper publisher challenging a total ban on newsracks within South Carolina’s Greenville-Spartanburg Airport terminal.<sup>168</sup> The publisher, Multimedia, agreed to customize its distribution boxes to satisfy aesthetic concerns for consistency with the appearance of the newly redesigned

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161. *Id.* at 762.

162. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 412 (1993).

163. *Id.* at 430–31.

164. *Id.* at 418–19.

165. See Peter Ball, *Extra! Extra! Read All About It: First Amendment Problems in the Regulation of Coin-Operated Newspaper Vending Machines*, 19 COLUM. J.L. & SOC. PROBS. 183, 192 (1985) (noting “[i]n the newspaper vending machine cases, the courts have found total bans of newsracks to be unduly harsh”).

166. *Sentinel Commc’ns Co. v. Watts*, 936 F.2d 1189, 1199 (11th Cir. 1991).

167. *Id.* at 1207.

168. *Multimedia Publ’g Co. of S.C. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 156 (4th Cir. 1993).

terminal, but the executive director of the airport authority simply refused to allow the racks under any conditions.<sup>169</sup>

The Fourth Circuit held that the airport terminal was not a public forum, yet still found in the publisher's favor.<sup>170</sup> Even in a nonpublic forum, speech regulations must be reasonable in keeping with the government's need to preserve the primary use of the property, and a categorical prohibition on newsracks was not.<sup>171</sup> Significantly, by analogy to chalking bans, the court rejected the government's contention that the First Amendment is not implicated at all when regulators merely restrict one distribution method for speech that entails a "physical invasion of public property."<sup>172</sup> In other words, even speech that requires taking up space on public property for a prolonged period of time gets some degree of First Amendment protection, and the only question is how much. The court reasoned that even though there were alternative channels available for newspaper distribution, such as the airport gift shop and racks in one of the parking facilities, the ban would make newspapers hard to come by, which was enough of a burden to implicate the publisher's First Amendment rights.<sup>173</sup>

The Airport Commission claimed that the ban was justified by its interests in promoting aesthetics, preserving the revenue of gift shop concessionaires, and protecting safety and security.<sup>174</sup> But the court found that there was no incompatibility between the intended primary use of the airport property—facilitating passenger travel—and the presence of newspaper racks.<sup>175</sup>

By contrast, a more narrowly tailored prohibition survived First Amendment scrutiny in *Gold Coast Publications, Inc. v. Corrigan*.<sup>176</sup> There, a municipality sought not to prohibit newsracks, but simply to mandate that publishers use racks of uniform color and lettering as part of a municipal beautification program.<sup>177</sup> That requirement was found to be constitutional, because it was "not substantially broader than necessary" to achieve the city's

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169. *Id.* at 157.

170. *Id.* at 159.

171. *Id.*

172. *Id.* at 158.

173. *Id.*

174. *Id.* at 161.

175. *Id.* at 163.

176. *See generally* *Gold Coast Publ'ns, Inc. v. Corrigan*, 42 F.3d 1336 (11th Cir. 1994) (holding the city's ordinance prescribing the procedure for obtaining permits, as well as regulations regarding location and design represents a valid time, place, and manner restriction on speech, and does not abridge the newspaper publisher's free-speech rights).

177. *Id.* at 1346.

aesthetic interests and did not entirely prevent the publishers from reaching their desired recipients.<sup>178</sup>

### C. Reading (and Erasing) the Writing on the Wall

Chalking is often penalized under ordinances intended to outlaw graffiti, the practice of painting on walls, subway cars, and other surfaces in a way that lastingly mars the property. Graffiti prohibitions are generally accepted as constitutional, because even though the painting can have an expressive purpose, the government's interest in protecting the appearance of the property and avoiding cleanup expenses is said to outweigh the speaker's interests.

Laws against graffiti are recognized as content-neutral time, place, and manner prohibitions, since they even-handedly proscribe any message painted without the property owner's consent.<sup>179</sup> With content-neutral regulations receiving deferential judicial scrutiny, it is challenging for a person cited for unauthorized painting to argue for a constitutional right to paint messages on public property.<sup>180</sup> Still, critics have argued that First Amendment law should catch up with the evolving sentiment of the art world and place greater value on the work of street artists, particularly when it carries a political message.<sup>181</sup>

It does not necessarily follow that chalking can be outlawed because painting can be outlawed. Painted graffiti has uniquely disagreeable characteristics: It is widely associated with street gangs, which can instill fear

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178. See *id.* (collecting cases in which courts have found that limits on the size, appearance, number, or placement locations of racks are narrowly tailored and constitutionally permissible).

179. See Kelly P. Welch, *Graffiti and the Constitution: A First Amendment Analysis of the Los Angeles Tagging Crew Injunction*, 85 S. CAL. L. REV. 205, 236–37 (2011) (conceding that a proscription against painted graffiti would likely be regarded as content-neutral, meaning that a reviewing court would consider whether the statute “burden[s] no more speech than necessary to serve a significant government interest”).

180. See, e.g., *Wilson v. Johnson*, 247 F. App'x 620, 625 (6th Cir. 2007) (rejecting college student's First Amendment challenge to arrest for painting anti-war messages on the front of a classroom building).

181. See Jenny E. Carroll, *Graffiti, Speech, and Crime*, 103 MINN. L. REV. 1285, 1288 (2019).

While there can be no doubt that graffiti damages property in ways other speech may not, there can also be no doubt that some graffiti carries with it a voice and identity absent in other forums of speech. To deny any possibility of a speech defense to graffiti is therefore to deny the potential speech value of graffiti and to ignore the heavy lift that graffiti—and other forms of illicit speech—may do in a society that is increasingly allegiant to property and power.

*Id.* Carroll suggests that freedom of speech should enter into criminal prosecutions for graffiti art as an affirmative defense, so that a person with an especially compelling argument for access to a specific piece of property might be able to defeat a charge. See *id.* at 1341, 1344, 1345.

of violence in denizens of the neighborhood and diminish property values, and it costs municipalities vast sums to ameliorate.<sup>182</sup> Moreover, unlike prohibited graffiti, every instance of chalk-drawing will be an expressive instance. Vandals might smear paint non-expressively with the purpose of damaging public property, but no one sets out to “damage” public property by smearing chalk on it. Thus, unlike a regulation prohibiting painted graffiti, a regulation prohibiting chalking does not have an incidental effect on a subset of expressive chalkers; every application of the prohibition will prohibit expression.<sup>183</sup>

The defenses typically advanced in support of graffiti artists apply at least as forcefully to chalking as well. Graffiti is a uniquely impactful form of expression because of its transgressive nature. Attaching the artwork to the side of a building expresses a different message than the same drawing might convey on a leaflet.<sup>184</sup> Graffiti is a “small-d” democratic form of communication that reaches a mass audience across class and ideology, in a way that the same artwork on a canvas in an art museum would not.<sup>185</sup> And unlike painting messages on outdoor surfaces—which government agencies rarely encourage<sup>186</sup>—chalking is so widely accepted as a legitimate medium

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182. See Welch, *supra* note 179, at 230 (enumerating justifications cited by Los Angeles policymakers to justify enjoining graffiti, including “protecting residents from fear and insecurity caused by graffiti vandalism, protecting the appearance and property values of the city, preventing millions of dollars of graffiti removal costs, and protecting legitimate, law-abiding artists from unfair competition from taggers”). See also Kelly Oeltjenbruns, *Legal Defiance: Government-Sanctioned Graffiti Walls and the First Amendment*, 95 WASH. UNIV. L. REV. 1479, 1480 (2018) (stating that “American cities collectively pay \$12 billion per year to remove, cover and abate graffiti”).

183. See *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (applying a relaxed degree of First Amendment scrutiny when a regulation is aimed at conduct that can either be expressive or non-expressive, such as setting fire to a draft card, so that the impact on expression is “incidental” to the prohibition on conduct).

184. See Carroll, *supra* note 181, at 1289 (stating, in defense of expressive value of graffiti, that “[t]he medium is itself part of the communication”). Carroll sees graffiti art as a means of pushing back against gentrification and inequities in property ownership, so that its defiant nature is itself intrinsic to the speaker’s message. See *id.* at 1297.

Coupled with the dominant notion that speech is linked to property ownership, with speech rights pivoting around access to property and shrinking public forums, graffiti and other forms of illicit speech give voice to movements that are otherwise pushed out by dominant speech doctrine. Beyond this, graffiti, in claiming a physical space, pushes back on not only notions of ownership, but also neighborhood identity.

*Id.* (footnotes omitted).

185. See Elizabeth G. Gee, *City Walls Can Speak: The Street Art Movement and Graffiti’s Place in First Amendment Jurisprudence*, 20 JEFFREY S. MOORAD SPORTS L.J. 209, 232 (2013) (explaining that graffiti “is a way to have a large and instantaneous audience without having to go through ‘elitist’ channels in the fine art world”).

186. Even painting on public property has been, at times, encouraged—or at least, tolerated—as a form of political expression. See *Frederick Douglass Found., Inc. v. District of Columbia*, 531 F. Supp.

for recreation, artistry, or conveying information that it cannot be said that the practice categorically places people in fear of crime, lowers property values, or carries other undesirable secondary effects.<sup>187</sup>

#### IV. ERASING THE UNCERTAINTY: HOW “RIGHT-TO-CHALK” CLAIMS SHOULD BE ANALYZED

##### A. *Caution Flags in Existing Regulations*

Municipalities and college campuses take varying approaches to regulating the use of chalk on public property. Some educational institutions prohibit the practice entirely, such as the University at Albany and Pennsylvania’s West Chester University.<sup>188</sup> Others simply restrict writing to certain approved areas; it is common to explicitly allow chalking on sidewalks, but disallow it on the sides of buildings and other surfaces.<sup>189</sup>

Many universities require a permit before writers can use outdoor surfaces.<sup>190</sup> Others limit eligibility only to certain categories of speakers, such as officially recognized student organizations, or even to certain messages, such as promotions for upcoming campus events.<sup>191</sup> A common condition of

3d 316, 322–23 (D.D.C. 2021) (rejecting constitutional claims brought by anti-abortion groups denied the opportunity to paint messages outside a Planned Parenthood clinic, who argued that the District of Columbia defacement ordinance was selectively enforced because racial-justice protesters had received city encouragement in painting a “Black Lives Matter” mural across a public thoroughfare).

187. See Nicole Gallucci, *Sidewalk Chalk is Having a Real Moment During the Pandemic*, MASHABLE (May 23, 2020), <https://mashable.com/article/sidewalk-chalk-art-murals-coronavirus-pandemic> (collecting instances from around the country in which people coped with isolation of COVID-19 pandemic quarantine by drawing on sidewalks and driveways, including an instance in Illinois in which police collaborated with high school teacher to furnish chalk to school children).

188. *Chalking, Marking, and Painting on Campus*, UNIV. AT ALBANY, <https://www.albany.edu/risk-management-compliance/policy/chalking-marking-and-painting-campus> (last visited May 10, 2023); *Advertising Policy*, W. CHESTER UNIV., [https://www.wcupa.edu/\\_services/stu/ramseyview/advertisingPolicy.aspx](https://www.wcupa.edu/_services/stu/ramseyview/advertisingPolicy.aspx) (last visited May 10, 2023).

189. See 35.6 *Use of Campus Outdoor Areas and Prohibitions in Use of Outdoor Areas*, UNIV. OF IOWA (Mar. 15, 2021), <https://opsmanual.uiowa.edu/administrative-financial-and-facilities-policies/conditions-use-university-facilities-and-outdoor-3> (allowing use of water-soluble chalk on sidewalks but not any other outdoor surfaces); *Policy: Chalking on Campus*, UNIV. OF MISS. (Aug. 20, 2021), <https://policies.olemiss.edu/ShowDetails.jsp?istatPara=1&policyObjidPara=12812701>.

190. See, e.g., *Free Speech*, UNIV. OF ALA. BIRMINGHAM (Oct. 9, 2000), <https://www.uab.edu/freespeech/>; *Student Organization Posting Policy*, MO. UNIV. OF SCI. & TECH., <https://involvement.mst.edu/involvement/policies/postingpolicy/>, (last visited May 10, 2023); *Chalking Policy and Procedures*, UNIV. OF TENN. CHATTANOOGA (Apr. 29, 2016), <https://www.utc.edu/academic-affairs/policies-and-procedures/chalking> (specifying that eligible organizations must reserve space for chalking at least three days in advance).

191. See *Chalking*, UNIV. OF COLO. COLO. SPRINGS, <https://uces.uccs.edu/chalking> (last visited May 10, 2023) (specifying that only registered student organizations or campus departments may obtain permits to chalk); *University Policy Manual, § III(C)(4)*, CAL. STATE UNIV. SACRAMENTO (Oct. 25,

being allowed to write on campus walkways is including the name of the sponsoring organization as part of the message.<sup>192</sup> Other campuses take permissive, hands-off approaches toward chalking.<sup>193</sup>

The University of Nebraska-Lincoln enforces an especially detailed policy that illustrates the range of restrictions in place at state universities nationally.<sup>194</sup> It bans chalking entirely except for the plazas outside two particular campus buildings, authorizes chalking only by registered student organizations that reserve a space in advance, requires the organizations to write their full names alongside the drawing, and allows drawing only on Mondays and Tuesdays, and only twice per semester for any organization.<sup>195</sup>

As with higher educational institutions, there is no consensus among municipalities about whether and to what degree chalking should be restricted. Some take a relative hands-off approach. For instance, the city of Bangor, Maine has a policy of allowing people to freely write with chalk as well as allowing anyone aggrieved by the message to freely wash it away.<sup>196</sup> At the other extreme, others categorically outlaw the practice.<sup>197</sup> Between total permissiveness and total proscription, other municipalities allow

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2016), <https://www.csus.edu/umannual/student/stu-0125.htm#posting> (providing that chalking is allowed only “to promote campus events”); *Temporary Signage*, UNIV. OF FLA. (Mar. 10, 2022), <https://hub.policy.ufl.edu/s/article/Temporary-Signage> (providing that “individual students as well as businesses, organizations, entities, and other individuals not associated with the University” may not post any signage, including chalk messages); *Campus Space Use Procedures*, GA. INST. OF TECH., [https://space.gatech.edu/sites/default/files/documents/Chapter\\_6\\_-\\_Campus\\_Space\\_Use\\_Procedures.pdf](https://space.gatech.edu/sites/default/files/documents/Chapter_6_-_Campus_Space_Use_Procedures.pdf) (last visited May 10, 2023) (allowing chalking only for purposes of advertising on-campus events).

192. See, e.g., *Chalking on Sidewalks*, UNIV. OF WIS. GREEN BAY, <https://www.uwgb.edu/public-safety/policies/chalking-on-sidewalks/> (last visited May 10, 2023) (stating that identity of sponsoring organization “must be clearly stated in the message”); *Signage*, OKLA. STATE UNIV., <https://meetings.okstate.edu/signage.html> (last visited May 10, 2023).

193. See, e.g., *Chalking on Campus*, UNIV. OF MO. (June 1, 2017), <https://bppm.missouri.edu/policy/chalking-on-campus/> (providing that chalking is allowed on any flat surface exposed to the elements, subject only to content that violates state or federal law, and specifically referencing constitutional protections for speech); *Campus Posting Guidelines*, UNIV. OF N.M., <https://sac.unm.edu/events/posting-guidelines.html> (last visited May 10, 2023) (allowing chalking without regard to sponsoring organization or content, subject only to location restrictions and use of water-soluble chalk).

194. *Chalking*, UNIV. OF NEB. LINCOLN, <https://bf.unl.edu/policies/chalking> (Dec. 10, 2020).

195. *Id.*

196. Spencer Roberts, *Chalk Messages in Downtown Bangor Generate Controversy*, WABI (Aug. 10, 2020), <https://www.wabi.tv/2020/08/10/chalk-messages-in-downtown-bangor-generate-controversy/>.

197. See, e.g., *Park Use Guide*, CITY OF SACRAMENTO, <http://www.cityofsacramento.org/-/media/corporate/files/parksandrec/parks/parkuseguide-singlepg-w-ap.pdf> (last visited May 10, 2023) (“Paint and chalk marks are not allowed on sidewalks or other surfaces.”); *Chapter 33–Streets & Sidewalks*, CITY OF DICKINSON, <https://dickinsongov.com/2019/09/01/chapter-33-streets-sidewalks/> (Sept. 2019) (“It shall be unlawful for any person to paint any signs upon the sidewalks within the city either with paint, chalk or other substance.”).



chalking only with a government permit, or only under certain circumstances.<sup>198</sup> For example, the city of Milwaukee allows only “decorative designs and patterns” on sidewalks, and prohibits “any images designed to convey a message of any kind,” specifically including “political commentary.”<sup>199</sup>

Existing chalking regulations exhibit some common features that bring their constitutionality into question:

- Requiring a government permit as a precondition to chalking, and limiting eligibility only to certain speakers

Because a permit requirement operates as a prior restraint, it must overcome a “heavy presumption” of unconstitutionality.<sup>200</sup> One reason that permit application regimes are so disfavored is that they interfere with a speaker’s ability to nimbly respond to current events—a special concern with a medium like chalking, which enables concerned citizens to spontaneously address the concerns of the day without the delay associated with designing a billboard or placing an opinion column in a newspaper.<sup>201</sup> It is not even clear that a government agency can enforce permitting requirements for spontaneous instances of speech by individuals or very small groups, because the primary justifications for permits—controlling crowds and preventing large groups from overwhelming a limited space—don’t apply.<sup>202</sup>

Permitting systems are invalid if they delegate unbridled discretion to a government decision-maker to grant or deny a permit without a set of

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198. See, e.g., *Event Logistics Planning Guide*, DENVER PARKS & RECREATION 2, <https://www.denvergov.org/files/assets/public/parks-and-recreation/documents/rentals-and-permits/event-permits/event-logistics-planning-guide.pdf> (last visited May 10, 2023) (prohibiting chalking in Denver’s public parks except if using a biodegradable product preapproved by park staff and requiring artists to take responsibility for cleanup).

199. *Decorative Sidewalk Permit Specifications*, CITY OF MILWAUKEE, DEP’T OF PUB. WORKS, <https://city.milwaukee.gov/ImageLibrary/Groups/cityDPW/divisions/administrative/docs/specialevents/DecorativeSidewalkApplication.pdf> (last visited May 10, 2023).

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

201. See *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 167 (2002) (observing that a requirement to apply in advance for a handbilling permit would inhibit “a significant amount of spontaneous speech,” such as a person’s decision to speak out in support of a candidate); See also John Juricich, *Freeing Buskers’ Free Speech Rights: Impact of Regulations on Buskers’ Right to Free Speech and Expression*, 8 HARV. J. SPORTS & ENT. L. 39, 52–53 (2017) (making the point that a permit requirement inherently chills speech, because the delay associated with obtaining permission may make the speech untimely and ineffective).

202. See Juricich, *supra* note 201, at 51–52 (noting that most federal appeals courts have taken the position that “permitting schemes restricting a single-speaker or small group are unconstitutional because they do not further the typical governmental interest in maintaining peace and order”).

“narrowly drawn, reasonable and definite standards” to guide the decision.<sup>203</sup> One indicator of undue discretion is a policy that fails to spell out the criteria that a decision-maker would apply in considering a permit application, and fails to require an explanation if the permit is denied.<sup>204</sup> Unbridled permitting discretion is problematic because it invites the regulator to make subjective decisions based on the identities of the speakers or their anticipated messages.<sup>205</sup> None of the publicly available municipal or campus policies reviewed in the course of this research contains any of the procedural safeguards required to make speech permits constitutional: they do not specify a turnaround time within which regulators must act on the application, do not offer an opportunity to appeal an adverse decision, and do not provide objective criteria to cabin regulators’ discretion to grant or deny a permit based on content or viewpoint.<sup>206</sup>

Moreover, a number of chalking regulations explicitly make content-based or even viewpoint-based distinctions, such as limiting eligibility to those promoting university-sponsored events.<sup>207</sup> If campus sidewalks are understood to be—at a minimum—a limited public forum for the use of students and other campus invitees, those speakers cannot constitutionally be limited to messages that support government-sanctioned activities, on the basis of concerns as minimal as aesthetics.<sup>208</sup>

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203. *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

204. *See Sentinel Commc’ns Co. v. Watts*, 936 F.2d 1189, 1198–99 (11th Cir. 1991) (flagging these infirmities in a policy that enabled a state bureaucrat to grant or deny permission for newspaper racks on public property without any limits on the exercise of discretion). *See also* *Sauk Cnty. v. Gumz*, 669 N.W.2d 509, 523–24 (Wis. Ct. App. 2003) (observing that permitting standards for expressive activity will be unconstitutional if “they contain only a broad overall purpose that is not tied to any specific factors or considerations”).

205. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) (“Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content.”) (citing *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992)).

206. *See Freedman v. Maryland*, 380 U.S. 51, 58–59 (1965) (setting forth procedural safeguards required to make a permitting system constitutional, including specifying a brief approval period, and providing an opportunity for judicial appeal in which the burden is on the government to justify the denial).

207. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) (“As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.”).

208. *See N. Olmsted Chamber of Com. v. City of North Olmsted*, 86 F. Supp. 2d 755, 768 (N.D. Ohio 2000) (concluding that safety and aesthetic concerns were not sufficiently compelling to justify the city’s content-based sign ordinance, nor could the ordinance survive strict scrutiny because “myriad exceptions the City provides to favored speakers, significantly undercuts the City’s rationales of safety and aesthetics”). Of relevance to the analysis of chalking restrictions, the court in *North Olmsted* noted that directional signs (“Exit Here”) were allowed under the ordinance, while non-directional signs (“Vote Here”) were not, even though the former detracted from aesthetics just as much as the latter. *Id.* The court further found that a carve-out for pole-mounted signs carrying official government notices or flags was

- Affording government-approved speakers preferential access to the forum

Allowing only officially recognized student organizations or other official campus entities to write on campus walkways raises questions about preferencing government-approved viewpoints.<sup>209</sup> Under such a system, a fraternity could write messages recruiting people to join, but individual critics who believe fraternities promote rape culture could not write messages discouraging people from joining.<sup>210</sup> This selectivity issue arose when Occupy movement protesters prevailed in a constitutional challenge to state regulations in Idaho that put government-approved speakers in a preferred status.<sup>211</sup> A judge struck down permitting standards that allowed only government agencies to obtain waivers of various limits on the use of state property for gatherings: “This approach,” the court wrote, “is tantamount to giving priority to the official voice of the State—‘a position which is patently inconsistent with the Constitution.’”<sup>212</sup> Moreover, if the walkways on college campuses are understood to be general-purpose public forums—as is now clearly the case under at least some state statutes<sup>213</sup>—then any campus regulation limiting eligibility to authorized campus insiders, such as registered student organizations, would be even more clearly unconstitutional.

- Insisting that the speaker must “sign” the chalk writing to identify its sponsoring organization

The ability to speak anonymously is a cherished free-speech right that federal courts guard zealously.<sup>214</sup> Anonymity is regarded as essential for the

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an impermissible content-based distinction, because there was no reason to believe official government messages were less distracting or unsightly than other speakers’ messages. *Id.* at 774.

209. See *Turner Broad. Sys., Inc.*, 512 U.S. at 658 (“[L]aws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference.”).

210. See Haley Ott, *Hundreds Protest Campus Sexual Assault at Universities Across the U.S.*, CBS NEWS (Feb. 10, 2021), <https://www.cbsnews.com/news/college-sexual-assault-us-universities-protests/> (describing how students at 17 U.S. campuses used flyers and chalk in a coordinated campaign to raise awareness about sexual assault).

211. *Watters v. Otter*, 981 F. Supp. 2d 912, 925–26 (D. Idaho 2013).

212. *Id.* at 925 (citation omitted).

213. See, e.g., LA. STAT. ANN. § 17:3399.32(B)–(C) (2022) (ensuring the public may utilize “outdoor areas of a public postsecondary institution” for “noncommercial expressive activity”); GA. CODE ANN. § 20-4-11.1(b) (2022) (creating “public forums for the campus community” in outdoor areas of higher-education institutions in Georgia).

214. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (“[A]n author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”).

exercise of First Amendment rights because it enables people to safely express extreme or challenging ideas without fear of reprisals.<sup>215</sup> While it might be constitutional to require the speaker to self-identify as part of a permit application, to ensure accountability if the chalking leaves damage that is not cleaned up, that is different from actually requiring the speaker to “sign” the work so as to self-identify to the larger public audience. A “signature” requirement predictably will discourage speech from people fearful of retaliation, i.e., people with controversial views or views critical of the government agency itself. While a typical civic club would have no problem signing its name to a benign message promoting an upcoming meeting, the type of speaker that *would* hesitate to be identified is exactly the type of speaker whose message government regulators would have a self-interest in suppressing, i.e., victims of campus sexual assault and other whistleblowers. A “mandatory signature” requirement thus collides with well-established First Amendment principles and would carry a heavy burden of justification.

All of these infirmities suggest that regulators have not adequately valued sidewalks as a medium for the exchange of information and ideas. The fact that a good bit of chalking is countenanced—and indeed, at times encouraged<sup>216</sup>—is evidence that chalking does not unduly interfere with the public’s use and enjoyment of sidewalks, clash with the government’s aesthetic interests, or cause prohibitively costly damage.

*B. The Path Forward: Considerations for Future Chalking Conflicts*

In the most recent “right-to-chalk” decision to reach the appellate courts, the Ninth Circuit dealt with a civil claim for damages brought against a Las Vegas police officer who arrested two protesters for writing anti-police messages on a sidewalk outside police headquarters and the local courthouse.<sup>217</sup> Although the charges of defacing public property were eventually dropped, the arrestees sought damages under 42 U.S.C. § 1983 for violation of their constitutional rights, and the police sought dismissal on the grounds of qualified immunity.<sup>218</sup> The Ninth Circuit concluded that qualified

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215. *See id.* at 357 (“Anonymity is a shield from the tyranny of the majority . . . . It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.”) (citation omitted).

216. *See* Failinger, *supra* note 9, at 756 (observing that chalk artistry “has inspired street art festivals” and is a widely accepted form of children’s play).

217. *See* Ballentine v. Tucker, 28 F.4th 54, 54 (9th Cir. 2022).

218. *Id.* at 60.

immunity did not pretermite the case, because the plaintiffs showed that the prohibition against chalking was so rarely enforced that the decision to charge the plaintiffs on this occasion could reasonably be deemed retaliatory.<sup>219</sup> Accordingly, whether the arrest was a viewpoint-based violation of the plaintiffs' First Amendment rights was a question for the jury to decide.<sup>220</sup>

The *Ballentine* scenario—selective, viewpoint-based application of a facially neutral prohibition against chalking—is one route by which a speaker could successfully challenge an enforcement action after enforcement takes place. But because a restrictive ordinance can chill people from even attempting to speak—particularly where disobedience carries criminal penalties—the courthouse door should also be open to a pre-enforcement facial challenge.

In assessing whether a prohibition against chalking is constitutional, a court will first have to consider the forum status of the location where the prohibition applies. Assuming that the walkway qualifies as either a general or limited public forum, then stringent First Amendment protections will apply if the regulation is either facially content-discriminatory or, as is more probable, has been enforced in a content-discriminatory way (for instance, tolerating chalking by officially sanctioned organizations or in connection with government-approved events). If neither is the case—if there is no evidence of content- or viewpoint-based discrimination—then the prohibition still will have to satisfy the test of reasonableness. A content-neutral regulation will be upheld if it is “not substantially broader than necessary to achieve the government’s” legitimate objectives.<sup>221</sup> Reasonableness will be assessed based on whether the restriction is shown to advance the government’s interest in preserving the property for its intended public use.<sup>222</sup>

In determining reasonableness, a court will consider the strength of the government’s proffered justifications. Modes of speech that actually present a safety hazard are the easiest to justify, but there is no safety-based objection to chalk drawings. Nor does a chalk drawing interfere with the intended primary use of a sidewalk for conveying pedestrian traffic. Still, even a less

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219. *Id.* at 62.

220. *Id.* at 63.

221. *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

222. *See Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 320–21 (1968) (stating that “the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it”).

substantial justification, such as visual appearance, can carry decisive weight if the regulation is reasonably well tailored to achieve that objective.<sup>223</sup>

When viewed against the analogous body of “newspaper rack” cases, an outright prohibition on chalking appears difficult to justify. Newsracks present a greater incursion on public property than chalk drawings; they occupy physical space, and they can obstruct the view of motorists or cyclists. Newsracks that rust and fall into disrepair are more aesthetically displeasing than an artistic chalk drawing. Even so, blanket prohibitions on distribution boxes regularly flunk First Amendment scrutiny.<sup>224</sup>

The most effective arguments in favor of newspaper distributors should work with equal, if not greater, force when applied to chalking. First, a complete prohibition is not reasonably tailored to achieve the primary purpose—aesthetics—typically offered as justification. Chalk on a flat sidewalk is visible only from a short distance away—unlike a newsrack—and some chalking is artistically appealing. A parade of sign-waving protesters keeping vigil outside a building will detract more from the landscape than an artistic chalk drawing, yet no court would say that “aesthetics” justifies banning picketers entirely.<sup>225</sup> Indeed, under the current state of First Amendment law, it is possible that a person who writes the words “Ban Abortion” unobtrusively on a sidewalk with chalk is committing a punishable offense, while a person on the same sidewalk waving a gruesome poster of a dismembered fetus is engaging in core constitutionally protected speech,<sup>226</sup> even though the latter indisputably is inflicting more injury on the government’s beautification interests.

The strongest counterpoint for government regulators will be that chalking is not an irreplaceable mode of expression, and that the speaker can

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223. See *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (“It is well settled that the state may legitimately exercise its police powers to advance esthetic values.”).

224. See *Cobden*, *supra* note 7, at 211 (“[T]he question nevertheless remains whether a prohibition of newsracks would survive a careful and thorough application of the time, place, and manner test. With few exceptions, the circuit, district, and state courts which have examined the issue have answered with a resounding no.”) (footnotes omitted); see also *Ball*, *supra* note 165, at 192 (“In the newspaper vending machine cases, the courts have found total bans of newsracks to be unduly harsh.”).

225. See *United States v. Grace*, 461 U.S. 171, 183 (1983) (finding that total ban on signs, flags, and banners on sidewalk outside Supreme Court building was unconstitutional).

226. See *generally* *Swagler v. Sheridan*, 837 F. Supp. 2d 509 (D. Md. 2011) (holding that police violated clearly established First Amendment precedent by preventing demonstrators from displaying signs bearing images of aborted fetuses, despite numerous complaints from passersby that the signs were gruesome and disturbing); *World Wide Street Preachers’ Fellowship v. City of Owensboro*, 342 F. Supp. 2d 634 (W.D. Ky. 2004) (finding that anti-abortion group had constitutionally protected right to display enlarged photo of aborted fetus in public park during Fourth of July festivities); *Grove v. City of York*, 342 F. Supp. 2d 291 (M.D. Pa. 2004) (concluding that police violated anti-abortion protesters’ First Amendment rights by confiscating signs containing graphic images of aborted fetuses and refusing them permission to brandish the signs along a Halloween parade route).

achieve the same objective by passing out handbills or picketing, activities at the core of protected speech on forum property. In this way, a regulator might effectively distinguish the “newspaper rack” line of cases, because a newspaper publisher cannot present multiple pages worth of editorial content on a picket sign, or give away the information free of charge on a handbill.

But chalk artistry is an entire medium of expression, and because there are limited public spaces on which to draw *other than* sidewalks, a ban on sidewalk chalking is, effectively, a ban on the medium.<sup>227</sup> For a frustrated chalk artist, writing words on the page of a leaflet is not a substitute for the opportunity to draw, any more than a newspaper’s need to reach its audience could be satisfied by painting the news on a canvas.<sup>228</sup> While a private bookstore will gladly sell the publisher’s newspapers, the bookstore is unlikely to let speakers draw on the side of its building. And while leafleting is an inexpensive and easily accessible alternative method of communication, it lacks some of the qualities that make chalking such a desirable medium. Leaflets require some advance preparation, while chalking enables speakers to react spontaneously to current events. Leaflets are easily ignored, rejected by passersby who assume that the material is unwelcome (e.g., commercial solicitation or religious proselytizing). Audience members may hesitate to accept handout material from those who do not fit a comfortable majoritarian image (e.g., a Black man leafleting on a heavily white campus, or a person in shabby clothing or with limited English proficiency leafleting in an affluent English-speaking area). To use *Ballentine*-like facts, a white police officer is far more likely to see a message calling out police racism when it is visible on the sidewalk outside police headquarters than to accept, and read, a leaflet hand-delivered by a Black protester. Reaching people with leaflets is far more time-consuming than reaching them with a drawing, which can remain unattended in a high-traffic area for hours or days. For all

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227. See Margaret L. Mettler, *Graffiti Museum: A First Amendment Argument for Protecting Uncommissioned Art on Private Property*, 111 MICH. L. REV. 249, 271 (2012) (collecting cases and pointing out that federal courts have struck down ordinances that categorically foreclose entire mediums of expression, such as signs, door-to-door solicitation, or nude dancing).

228. It is worth noting that, in an age where young people are increasingly reliant on social media to learn about current events, a photogenically appealing message will reach a far greater online audience than a post that lacks visual content. See Yiyi Li & Ying Xie, *Is a Picture Worth a Thousand Words? An Empirical Study of Image Content and Social Media Engagement*, 57 J. MKTG. RSCH. 1, 15 (2020) (comparing audience engagement on the social sharing platform Twitter for posts with visible images versus plain text, and concluding “a user who posts a tweet with directly viewable image content will be rewarded by more retweets and likes for the extra time she spends in uploading a picture”). The ability to create a socially shareable piece of public art thus directly relates to the ability to reach the desired audience. *Id.*

of these reasons, leaflets and pamphlets may be an inadequate substitute for the unique impact of a chalk drawing.<sup>229</sup>

In its most recent “sidewalk speech” case, the Supreme Court recognized the unique value of public walkways as vehicles for expression: they are one of the few places in contemporary public life where a speaker can reach people who would not have chosen to encounter the speech voluntarily, but might be persuadable.<sup>230</sup> As Chief Justice John Roberts wrote, in analyzing the impact of a buffer-zone law restricting protesters’ access to the sidewalks outside abortion clinics: “With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out.”<sup>231</sup>

The “constitutional wild card” in the chalking scenario is the cost of cleanup. As with graffiti, regulators regularly cite the trouble and expense of cleanup as a rationale for prohibiting chalking. In the context of painted graffiti, that argument carries great weight, because of the difficulty of erasing a painted message and the possibility that the property might be lastingly damaged. But when the cost imposed by speech is relatively nominal or short-lived, a different calculus applies. For instance, municipalities do not have the authority to prohibit all protest activity on public property by pointing to the cost of assigning police to maintain security at the event. Rather, it is understood that accommodating speech in a public forum is a core governmental responsibility for which the public must absorb some incidental expense.<sup>232</sup> Since chalk, unlike paint, can be

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229. *See Mitchell v. City of New Haven*, 854 F. Supp. 2d 238, 253 (D. Conn. 2012) (rejecting city’s assertion that the availability of social media means that speakers have an ample alternative to occupying public parks: “There is something unsatisfying about telling a movement that aims to make visible an often unseen, ignored population that it should content itself with forms of communication that are only seen when someone seeks them out”).

230. *McCullen v. Coakley*, 573 U.S. 464, 476 (2014).

231. *Id.*

232. *See Mitchell*, 854 F. Supp. 2d at 246 (rejecting city’s contention that, because protesters’ camping damages grass, it is not a constitutionally protected form of expression).

Damage to the grass is a cost or byproduct of Plaintiffs’ expressive activity here, just as road closures are a cost of allowing parades. First Amendment law has ample ways to take account of such costs . . . without requiring courts to deny that the activities giving rise to the costs fall outside the zone of protected speech.

*Id.*; *see also Invisible Empire Knights of the Ku Klux Klan v. City of West Haven*, 600 F. Supp. 1427, 1434 (D. Conn. 1985).

It is society that benefits by the free exchange of ideas, not only the person whose ideas are being shared. In order fully to preserve and protect the people’s right to be informed, it is society that should bear the expense, however great, of



cleaned up completely at minimal cost—or may disappear on its own—the expense associated with accommodating the speech is relatively minor.<sup>233</sup> If the cost of providing security for a march cannot be an absolute barrier to conducting the march, it is difficult to see how the imperative of avoiding nominal cleanup costs can stand up as a rationale for entirely prohibiting chalking.

Finally, any proscription against chalking should consider the effects on the potential audience as well as on the speaker. Federal courts recognize that the First Amendment right to speak necessarily implies a concomitant right to receive information. If a prohibition on chalking makes it more difficult for members of the public to get directions to a lecture or locate a polling place, that is an informational cost that should factor into a First Amendment analysis. In the context of newspaper racks on public property, a federal judge made that observation in striking down a municipality’s near-total ban on roadside newsracks, which made it more difficult for would-be readers to get their news.<sup>234</sup> The marketplace for information and ideas favors wide-open discourse on public forum property, whatever form it may take.

It is important for the courts to formulate a coherent analytical approach to cases involving ephemeral occupations of public property, because no one knows how technology may evolve to allow speakers to “occupy” public spaces for expression. Already, speakers have harnessed technology to project their messages onto both public and private property, a uniquely impactful form of expression because it allows the speaker to directly associate the property with the message, often a message of disdain for the property or its occupants.<sup>235</sup> Projected messages are even a step further removed from graffiti than chalking, because they require no erasure and impose no cleanup cost. Nevertheless, private property owners at times have, understandably, balked at being the unwilling “host” for unwanted messages, feeling that the projection is comparable to a trespass by a protester who

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guaranteeing that every idea, no matter how offensive, has an opportunity to present itself in the marketplace of ideas.

*Id.*

233. See *Ballentine v. Tucker*, 28 F.4th 54, 60 (9th Cir. 2022) (stating that city incurred \$300 cleanup costs from one instance of chalk drawing and \$1,250 on a subsequent occasion).

234. See *Philadelphia Newspapers, Inc. v. Borough Council of Swarthmore*, 381 F. Supp. 228, 243 (E.D. Pa. 1974) (finding that newspaper publishers had a First Amendment right to install distribution racks on public property absent evidence that doing so would present a safety hazard, and remarking that a municipality’s interest in neighborhood beautification “must be balanced not only [against] the right of the plaintiff to distribute its newspapers, but the right of the public to have access that is as free as possible”).

235. See Maureen E. Brady, *Property and Projection*, 133 HARV. L. REV. 1143, 1162–65 (2020) (describing disputes that have gone to court in Nevada, New Jersey, and Pennsylvania involving messages projected onto business establishments accusing the proprietors of anti-union business practices).

refuses to leave the premises.<sup>236</sup> As this technology becomes even better and more accessible, it is predictable that protesters and the proprietors of public spaces will clash over the right to—immaterially—occupy publicly viewable spaces as message boards, including public property.<sup>237</sup>

Because the first wave of disputes over projected messages has involved private property, the cases have not implicated public forum doctrine; rather, they have been analyzed through the lens of property or tort law, with unsatisfying results.<sup>238</sup> But inevitably, law enforcement agencies will be asked to apply the same anti-graffiti ordinances that have been stretched to criminalize chalk messages to this new-and-different form of projected expression. Once the expense of cleanup is removed from the equation, the constitutional question comes even more sharply into focus: Is the government's interest in the cosmetic appearance of public spaces strong enough to override a speaker's interest in using that space to make a point, particularly where the association between the message and the location is itself a substantive part of the message?<sup>239</sup> Could a government agency even take the more extreme step of enforcing content-based prohibitions on projected messages that contravene the agency's own messaging (e.g., a projection at the entryway to Grand Canyon National Park that discourages

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236. See *id.* at 1166–68 (explaining complaints raised by property owners who object to being used as nonconsensual hosts for other people's projected messages, including the risk that the owners' own signage will be obscured, or that their businesses will be associated with unsavory sentiments repugnant to customers). As Brady explains, there is no single legal theory that is a perfect fit to redress the perceived harm to the landowner caused by nonconsensual projection, as there is no physical trespass onto the premises and no lasting structural damage. *Id.*

237. See Corinne Segal, *Projection Artists Bring Light to Social Issues with Attention-Grabbing Protests*, PBS NEWS WEEKEND (Sept. 17, 2017), <https://www.pbs.org/newshour/arts/projection-light-artists-protest> (discussing uncertainties about whether projection is legally protected speech, and describing how a group of New York City activists were arrested and briefly faced charges, later withdrawn, of “unlawful posting of advertisements” for projecting a message of concern about climate change onto the exterior of an art museum).

238. See Brady, *supra* note 235, at 1162–65 (describing how building owners have brought several cases grounded in trespass or nuisance theories, none of which have resulted in published appellate guidance); see also Wright, *supra* note 10, at 612 (observing that “neither broad nor middle range property law theories can guide the legal resolution of the message projection cases in any meaningfully determinate, non-question-begging way” and that free-speech law is “of similarly little use” in addressing the novel scenario of unwanted projection).

239. To draw on an example from the private sector, an artist disgruntled with the presidency of Donald Trump used a Trump-branded hotel near the White House as his canvas for a series of anti-Trump projections, including: “PAY TRUMP BRIBES HERE.” Mikaela Lefrak, *Robin Bell Spent Four Years Projecting Protest Messages on the Trump Hotel. Now What?*, NPR (Jan. 26, 2021), <https://www.npr.org/local/305/2021/01/26/960753513/robin-bell-spent-four-years-projecting-protest-messages-on-the-trump-hotel-now-what>. The association between the hotel entryway and the message—suggesting that people were paying to stay at the hotel to curry favor with the president—would not have been nearly as effective had the artist been forced to stand in a nearby park and hand out the same message on a leaflet instead. *Id.*

visiting national parks, or a projection across the Centers for Disease Control building that questions the safety of vaccines)? While the government's interest in insulating itself against criticism should never carry weight in a First Amendment analysis,<sup>240</sup> the Supreme Court has been receptive to arguments that the government can prefer its own speech to the exclusion of other speakers whose message contradicts or undermines the government's preferred message.<sup>241</sup> Courts will have to develop a coherent framework for evaluating "chalking without the chalk" claims, as technology and creativity both evolve to enable speakers to display their messages in ways that use—but do not lastingly damage—the property of others, including government property.<sup>242</sup>

#### CONCLUSION

As the U.S. Supreme Court was deliberating over the *Dobbs* case that extinguished the constitutional protection for abortion rights recognized in *Roe v. Wade*,<sup>243</sup> abortion-rights activists took to the nation's streets in protest.<sup>244</sup> At least two of them also took to the sidewalks outside the home of Senator Susan Collins, R-Me., a political moderate whose support for conservative Republican Supreme Court nominees has made her a particular target of liberal scorn.<sup>245</sup> Soon after a draft version of the *Dobbs* opinion

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240. See Mary-Rose Papandrea, *The Government Brand*, 110 NW. UNIV. L. REV. 1195, 1234 (2016) ("The government is not a private entity entitled to protect its brand from dilution.").

241. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 470–72 (2009) (holding that municipality may selectively accept or reject donations of monuments to be installed in public parks, because installations are understood to be government speech rather than the speech of any individual).

242. In the category of evolving creativity, inventive speakers have pioneered the practice of reverse graffiti or clean tagging, in which dirt-covered surfaces are selectively cleaned so that the cleaned portions form words or artwork. See Hillary Brenhouse, *Marketing Firms Cleaning Up With 'Reverse Graffiti'*, N.Y. TIMES (June 3, 2010), <https://www.nytimes.com/2010/06/04/business/energy-environment/04iht-rbogad.html> (describing how marketing firms have adopted the "clean tagging" technique from street artists, to stencil commercial messages on public walkways). These works elude punishment under traditional graffiti or vandalism laws since cleaning property is the opposite of damaging it. *Id.*

243. *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 1, 5 (2022).

244. Madeleine Ngo & Lola Fadulu, *With Roe in Peril, Thousands Gather at Marches for Abortion Rights*, N.Y. TIMES (May 14, 2022), <https://www.nytimes.com/2022/05/14/us/abortion-rights-march.html>.

245. See Mike DeBonis & Seung Min Kim, *Collins and Murkowski on the Defensive After Leaked Roe Draft Opinion*, WASH. POST (May 3, 2022), <https://www.washingtonpost.com/politics/2022/05/03/murkowski-collins-roe-abortion-opinion/> (describing criticism leveled at Senate's two moderate Republican female members who, despite their professed support for keeping abortion legal, supported anti-abortion justices nominated by President Donald Trump).

purporting to overrule *Roe* was leaked to the press, igniting widespread public outcry, two women claimed credit for chalking abortion-rights messages on the sidewalk outside Collins's Bangor home.<sup>246</sup> Collins called local police and filed a report of "defacement of public property"<sup>247</sup>—and her reaction provoked a wave of ridicule on social media and political talk shows.<sup>248</sup> Police determined that the chalk messages, which quickly faded, did not constitute grounds for criminal charges, as the city of Bangor has no ordinance against chalking.<sup>249</sup> This episode is just the latest high-profile dispute over the legality of using public sidewalks as a medium to convey political messages.<sup>250</sup>

At first glance, the notion of "a First Amendment right to write on government property" appears farfetched. If chalking is viewed as vandalism, then it is quite difficult to argue for a "right to damage property." Courts understandably would hesitate to make such a leap, for fear of legitimizing more serious acts of vandalism as "expression." But the analysis is not quite so simple, because chalking is *sui generis*. The "damage" it inflicts is fleeting and easily cured,<sup>251</sup> and in many instances, chalking is

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246. Julia Reinstein, *We Spoke to the Woman Who Wrote the Chalk Message That Susan Collins Called the Cops Over*, BUZZFEED NEWS: ABORTION RIGHTS (May 11, 2022), <https://www.buzzfeednews.com/article/juliareinstein/susan-collins-sidewalk-chalker-interview>.

247. *Id.*

248. Tommy Christopher, *Morning Joe Crew Points and Laughs at Susan Collins Over Sidewalk Chalk Police Complaint*, MEDIAITE (May 11, 2022), <https://www.mediaite.com/news/morning-joe-crew-points-and-laughs-at-susan-collins-over-sidewalk-chalk-police-complaint/>; David Badash, *'Aggressive Water Soluble Writing': Collins Mocked for Calling Cops over Sidewalk Chalk Message Urging Support of Women's Rights*, NEW C.R. MOVEMENT (May 10, 2022), <https://www.thenewcivilrightsmovement.com/2022/05/aggressive-water-soluble-writing-collins-blasted-for-calling-cops-over-sidewalk-chalk-message-supporting-womens-rights/>.

249. Dan Neumann, *Activist Responds with Free Speech Chalking Mocking Collins for Calling Cops*, BEACON (May 10, 2022), <https://mainebeacon.com/activist-responds-with-free-speech-chalking-mocking-collins-for-calling-cops/>.

250. See Anne Jungen, *Sidewalk Chalk Earns Onalaska Mom, Daughter Graffiti Tickets*, WIS. STATE J. (Apr. 26, 2017), [https://madison.com/news/local/sidewalk-chalk-earns-onalaska-mom-daughter-graffiti-tickets/article\\_e1fb4279-9326-504e-a2eb-e33970dc7723.html](https://madison.com/news/local/sidewalk-chalk-earns-onalaska-mom-daughter-graffiti-tickets/article_e1fb4279-9326-504e-a2eb-e33970dc7723.html) (reporting that a Wisconsin activist and her teen daughter were issued \$187 worth of graffiti tickets for chalking "Black lives matter" and other political messages on municipal sidewalks in Wisconsin); Krishnadev Calamur, *Jury Acquits Man who Wrote on Sidewalk with Chalk*, NPR: THE TWO-WAY (July 1, 2013), <https://www.npr.org/sections/thetwo-way/2013/07/01/197721394/jury-acquits-man-who-wrote-on-sidewalk-with-chalk> (describing how San Diego man faced a possible 13 year vandalism sentence for repeatedly writing messages critical of banking industry on sidewalks in front of banks, until a jury acquitted him of all charges).

251. *Will Crayola Sidewalk Chalk Stain Driveways and Sidewalks?*, CRAYOLA, <https://www.crayola.com/faq/stain-removal-tips/will-crayola-sidewalk-chalk-stain-driveways-and-sidewalks/#:~:text=In%20most%20cases%2C%20the%20chalk,as%20a%20service%20to%20consumer> (last visited May 13, 2023).

societally tolerated and even encouraged, unlike actual vandalism.<sup>252</sup> Before concluding that writing messages on sidewalks is unprotected activity, we should consider that—as we have seen from the newsrack cases—there is no automatic on or off switch to the First Amendment just because speech takes up space on public property.

The courts have long been protective of forms of expression that are low-cost and widely accessible to people who do not own a printing press or a broadcast transmitter, such as leafleting and pamphleteering.<sup>253</sup> Chalking (and its more contemporary cousin, message projection) can fit into this analytical framework. Like leafleting, writing or projecting a message onto a piece of public property is uniquely targeted to efficiently reach a hyper-local audience of the people most directly involved in a matter of controversy (unlike, for example, television commercials or newspaper ads).<sup>254</sup> Moreover, the use of the government property to convey the message uniquely expresses distaste for government policies; by making the government agency “own” the message, the accusation is more forceful than

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252. See, e.g., Desiree Carver, *Chalk It up: Main Street Hosts Sidewalk Art Competition*, VALDOSTA DAILY TIMES (Oct. 5, 2020), [https://www.valdostadailytimes.com/news/local\\_news/chalk-it-up-main-street-hosts-sidewalk-art-competition/article\\_6ffdfaff-6ab7-5794-99c3-eb58d14803c5.html](https://www.valdostadailytimes.com/news/local_news/chalk-it-up-main-street-hosts-sidewalk-art-competition/article_6ffdfaff-6ab7-5794-99c3-eb58d14803c5.html) (reporting results of city-sponsored chalking competition that involved drawing on sidewalks surrounding historic courthouse); Christian Vosler, *With Sidewalk Chalk As Their Medium, Artists Take to Concrete Canvases*, KITSAP SUN (Aug. 8, 2020), <https://www.kitsapsun.com/story/news/2020/08/08/sidewalk-chalk-their-medium-artists-take-concrete-canvas/3325858001/> (describing sidewalk chalk competition hosted by downtown businesses in Washington municipality); Jessica Coombs, *Cancer Survivor Raises Donations For ‘CURE Childhood Cancer’ With Chalk Art Competition*, WSAV.COM (July 26, 2020), <https://www.wsav.com/community/local-community-gives-back-with-sidewalk-chalk-art-competition/> (reporting that parents of teen cancer survivor organized chalk art competition to raise money for cancer charity); Jacqueline Allison, *Anacortes Neighborhood Thanks Front-Line Workers with Chalk Art Contest*, GOSKAGIT.COM (June 20, 2020), [https://www.goskagit.com/news/covid19/anacortes-neighborhood-thanks-front-line-workers-with-chalk-art-contest/article\\_6bc78340-605a-5520-8fb3-37538293bd51.html](https://www.goskagit.com/news/covid19/anacortes-neighborhood-thanks-front-line-workers-with-chalk-art-contest/article_6bc78340-605a-5520-8fb3-37538293bd51.html) (describing community chalk art competition saluting efforts of paramedics and other first responders during COVID-19 pandemic); Celeste Edenloff, *Chalk Art to Feed Local Law Enforcement*, ALEXANDRIA ECHO PRESS (May 5, 2020), <https://www.echopress.com/community/chalk-art-to-feed-local-law-enforcement> (saluting initiative of children who raised money for charity by seeking donations in exchange for drawing chalk artwork on local driveways).

253. See *City of Ladue v. Gilleo*, 512 U.S. 43, 43–44, 57 (1994) (stating, in the context of a dispute over a city sign ordinance: “Residential signs are . . . an unusually cheap and convenient form of communication . . . Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute”); *Horina v. City of Granite City*, 538 F.3d 624, 631 (7th Cir. 2008) (commenting that “handbilling is both a method of communication that has a long and venerable history that predates the birth of this nation” that courts have vigilantly protected).

254. See Sarah Nelson, *As Clarence Thomas Arrives to Teach, Some Students Protest*, GAINESVILLE SUN (Jan. 27, 2020), <https://www.gainesville.com/news/20200127/as-clarence-thomas-arrives-to-teach-some-students-protest> (describing silent protest by law students who expressed displeasure with Justice Thomas’s appearance as a guest lecturer by projecting the testimony of his sexual harassment accuser, Anita Hill, on the walls of the law school commons).

if the same message appeared on a roadside billboard.<sup>255</sup> Sidewalks are an especially effective platform for reaching a large, diverse audience; the cost of closing expressive access to sidewalks is substantial for speakers, while the cost of tolerating speech is relatively minimal for the government.<sup>256</sup>

Since chalk drawings do not impede the use of walkways for pedestrian traffic and do not inflict any lasting damage on the property, the government's sole justifications for prohibiting chalking will be (1) cleanup expense and (2) aesthetics. To allow an outright prohibition (or a highly restrictive policy that prohibits all but government-approved users) on the basis of expense is problematic as a matter of First Amendment doctrine because quite a bit of speech on public property results in some cost to the taxpayer. A march will require police to close streets and sanitation crews to pick up the resulting litter, but that would not justify a wholesale prohibition on marches. If it is accepted as a boilerplate First Amendment principle that the government cannot shut down expression by imposing unaffordably high permit fees unrelated to the direct cost inflicted by the speaker,<sup>257</sup> then it should be equally well-accepted that the government cannot reach the same result by refusing to quote a price at all and simply claiming "expense." In other words, if cost is the primary concern, the government has alternatives in the form of assessing cleanup fees as part of the permitting process, which in the case of chalk drawing should be minimal.<sup>258</sup>

That leaves aesthetics. Particularly given the expressive value of chalking as a medium, courts should skeptically review restrictions that are

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255. See *iMatter Utah v. Njord*, 980 F. Supp. 2d 1356, 1384 (D. Utah 2013) (finding that a prohibition on protest marches on the streets running past Utah's statehouse, federal courthouse, and other government buildings could not be justified by showing that protesters had access to venues elsewhere in the city, because "it is unlikely that a street march on an adjacent roadway would be as symbolic or as effective" as a march in front of these buildings).

256. See Kellum, *supra* note 27, at 25 ("Because numerous people pass through a public thoroughfare, a speaker can expose many different audiences to his message without need of transport. The benefits of speech here are great. Conversely, the potential costs of speech in the area are low.").

257. See *Turley v. N.Y.C. Police Dep't.*, 988 F. Supp. 667, 672 (S.D.N.Y. 1997).

The cost of obtaining a permit or license fee must be calculated to "meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." . . . A fee in excess of the amount necessary to offset these costs is impermissible.

*Id.* (quoting *Cox v. New Hampshire*, 312 U.S. 569, 571 (1941)); see also *Ne. Ohio Coal. for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109–10 (6th Cir. 1997) (stating that "an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state interest").

258. See Failing, *supra* note 9, at 771 (commenting that chalk is easily brushed away with soapy water, and that "the time and cost of materials to clean up a chalk drawing are insignificant compared to the other cleaning that government employees hired for that work must finish").

justified solely on “aesthetic” grounds, because aesthetics are inherently malleable, and prone to favor majoritarian sensibilities of what is tasteful.<sup>259</sup> Once enforcers are empowered to interdict any expression that they deem unsightly, it is entirely predictable that “aesthetics” will become an exercise in content discrimination.<sup>260</sup> While a safety-motivated rationale can be objectively tested—i.e., how often pedestrians are injured by tripping over newsracks—aesthetic justifications elude validation. Judge Patricia Wald made this observation in her partial dissent in a case involving restrictions on protest signs on the walkways and fencing adjoining the White House:

Because of their subjective nature, aesthetic concerns are easily manipulated, and not generally susceptible of objective proof. The danger is not just . . . that government might adopt an aesthetic rationale as a pretext for an impermissible motive, but rather that so many forms of robust expression are by their very nature boisterous, untidy, unsightly, and downright unpleasant for unsympathetic viewers. Distaste for the vigor with which a message is asserted can too easily be cast as an aesthetic interest in compelling others to be more moderate and decorous—and, in consequence, less effective—in conveying their message.<sup>261</sup>

As Professor Failinger has keenly observed, the rationale that the city has an interest in the “beauty” of an unadorned, functional slab of cement is a skimpy justification for overriding core First Amendment rights.<sup>262</sup>

Ultimately, the question of whether chalking can lawfully be banned from an entire municipality or campus will turn on what it means to afford the speaker ample alternatives to reach the audience. While the alternative means need not be a perfect substitute for the speaker’s desired method, the

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259. *See* *White House Vigil for ERA Comm. v. Clark*, 746 F.2d 1518, 1536 (D.C. Cir. 1984).

In order to establish the constitutionality of an aesthetic regulation of speech, the government must show that the regulation was enacted for purposes other than the effectuation of its drafters’ personal tastes. . . . Arbitrariness or capriciousness in the selection of aesthetic goals may indicate the presence of an impermissible motive either to enact the preferences of individual government officials or to burden unreasonably the exercise of free speech.

*Id.*

260. *See* Failinger, *supra* note 9, at 766 (“The courts’ quick equation of chalking with permanent and visible defacement cases demands that we ask whether aesthetic and property concerns of the government are really so substantial as to justify the punishment of chalking.”).

261. *White House Vigil for ERA Comm.*, 746 F.2d at 1551 (Wald, J., concurring in part and dissenting in part).

262. *See* Failinger, *supra* note 9, at 770 (noting that artwork arguably improves the aesthetic appearance of sidewalks, and interferes less with the sidewalk’s primary intended use than a solicitor interrupting pedestrians to distribute handbills).

alternative will not be effective if it requires the speaker to expend significantly more time or money, or fails to effectively reach the intended recipients.<sup>263</sup> First Amendment caselaw involving more-established forms of media, such as newspapers, recognizes that speakers should not be forced to abandon an entire medium of communication and substitute a less-effective one. Courts would not allow a municipality to completely ban newspapers, even if the distribution boxes clash with the city's preferred aesthetic, because there is no effective substitute. Courts would not tell a newspaper publisher or motion picture producer to simply stand on a street corner and shout their intended messages to the audience, because one medium is not interchangeable with another. Arguably, chalk artistry is its own medium. Reducing the intended message to words on a leaflet is a questionably adequate alternative, just as it would be for a movie producer or newspaper publisher.

Rather than ban chalking entirely, existing law recognizes remedies for the subset of chalked speech that actually causes harm.<sup>264</sup> For instance, disorderly conduct laws might legitimately be applied to a chalk artist who falsely wrote "polling place closed" on election day as a ruse to suppress turnout, or who wrote threatening remarks outside a public school that caused parents to pull their children out of class. The government can bring defacement charges if messages are written on public spaces that, unlike sidewalks, are not recognized as forums amenable to expressive use, such as the front of government buildings.<sup>265</sup> And libel laws provide a civil remedy if any particular message proves to be actionably defamatory—for instance,

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263. See *Horina v. City of Granite City*, 538 F.3d 624, 636 (7th Cir. 2008) (stating that hand-to-hand distribution of leaflets is not an adequate alternative to being allowed to place the leaflets on vehicles and buildings: "[W]e cannot say that an alternative channel of communication is realistic when it requires a speaker significantly—and perhaps prohibitively—more time to reach the same audience"); see also *Mahoney v. Babbitt*, 105 F.3d 1452, 1459 (D.C. Cir. 1997) (ruling against National Park Service, which defended its decision to ban picketers from sidewalks along the route of President Clinton's inaugural parade by arguing that the protesters were given permits to demonstrate elsewhere: "Appellees have offered us no authority for the proposition that the government may choose for a First Amendment actor what public forums it will use. Indeed, it cannot rightly be said that all such forums are equal").

264. See *Horina*, 538 F.3d at 634–35 (observing that a municipality's ban on leaving leaflets on cars and at homes and businesses was not a narrowly tailored response to the problem of littering, because laws already exist to punish littering); *City of Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547, 1556 (7th Cir. 1986) (concluding that a ban on door-to-door canvassing and solicitation outside of daytime business hours and on Sundays was not narrowly tailored to address the stated concern for trespassing and loitering, because existing laws already provided effective remedies for that behavior).

265. See *Wilson v. Johnson*, 247 F. App'x 620, 625 (6th Cir. 2007) (rejecting First Amendment challenge to Tennessee college student's arrest for painting antiwar messages on the side of a campus building, because the building was not a designated public forum and vandalism was both a violation of state criminal codes and campus disciplinary codes).



writing the false accusation “Coach Smith is a pedophile” outside of a school building.

It is important to have clarity because young people are increasingly taking to America’s streets—and at times, actually *using* the streets as a canvas<sup>266</sup>—to engage in political protest at levels not seen since the Vietnam War era.<sup>267</sup> High school and college students do not have meaningful access to traditional mediums for political messaging; they cannot afford to purchase television commercials, billboards, or newspaper ads, or to influence the political process through campaign contributions or political-action committees.<sup>268</sup> Inexpensive peer-to-peer communication methods are of special importance to young speakers—and because young people are subject to school and college disciplinary policies in addition to the local ordinances that apply to all other citizens, they are uniquely likely to face punishment for chalking.

If there is a recognized First Amendment right to erect a newsrack on a public right-of-way to distribute information, then it is incongruous to treat sidewalk chalking as beyond the First Amendment’s reach. Some meaningful level of constitutional protection logically must apply to the ephemeral occupation of public property for speech. Because uncertainty adheres to the regulator’s benefit and the speaker’s detriment, it is important for courts to set clear boundaries on governmental authority, so speakers can proceed confidently without unduly censoring themselves.

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266. See Wyatt Grantham-Philips, *Powerful Photos Show ‘Black Lives Matter’ Painted Across Streets Nationwide*, USA TODAY (June 17, 2020), <https://www.usatoday.com/story/news/nation/2020/06/17/black-lives-matter-painted-city-streets-see-art-nyc-washington/3204742001/> (cataloguing instances across the United States in which muralists painted “Black Lives Matter” on city streets in protest of excessive use of force by police in encounters with Black people).

267. See Anemona Hartocollis & Giulia Heyward, *After Rape Accusations, Fraternities Face Protests and Growing Anger*, N.Y. TIMES (Oct. 1, 2021), <https://www.nytimes.com/2021/10/01/education/fraternities-rape-sexual-assault.html> (remarking on wave of protests outside fraternity houses at college campuses across the United States, demanding tougher responses to allegations of sexual assault against fraternity members); Alia Wong, *The Renaissance of Student Activism*, ATLANTIC (May 21, 2015), <https://www.theatlantic.com/education/archive/2015/05/the-renaissance-of-student-activism/393749/> (observing that, after a period of relative tranquility among college students, “campus protests against racism and bigotry—along with related types of discrimination—have become commonplace,” mirroring a larger societal trend).

268. See *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (disapproving municipal ordinance that forbade knocking on doors or ringing doorbells to offer literature: “Door to door distribution of circulars is essential to the poorly financed causes of little people”).