

# TALKING CHALK: DEFACING THE FIRST AMENDMENT IN THE PUBLIC FORUM

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## I. INTRODUCTION

The common law lives on analogy—its power to change depends on whether the creative new things individuals do every day that get them into trouble can be correctly assimilated to conduct that has previously been ruled legal or illegal, determined to be the subject of damages, or protected as part of individual liberty. We might find this dilemma captured in the famous Sesame Street ditty that goes, “One of these things is not like the others, one of these things just doesn’t belong . . . .”<sup>1</sup> Since the Supreme Court’s development of ever-more nuanced versions of the public forum doctrine, starting with cases such as *Perry Education Association v. Perry Local Educators’ Association*,<sup>2</sup> among other refinements of its Speech Clause jurisprudence,<sup>3</sup> much free speech jurisprudence has taken on a common law caste, one analogy after another. Because the Supreme Court has provided more robust protection for free speech rights in “public forums,” like streets, parks, and sidewalks, the courts must parse possible analogies to determine whether a sidewalk leading up to a

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<sup>1</sup> JOE RAPOSO & JON STONE, ONE OF THESE THINGS (IS NOT LIKE THE OTHERS) (Columbia 1970), available at [http://members.tripod.com/tiny\\_dancer/one.html](http://members.tripod.com/tiny_dancer/one.html). The Sesame Street analogical process has been cited by more than one legal academic explaining a basic tool of legal analysis. See, e.g., Nancy Millich, *Building Blocks of Analysis: Using Simple “Sesame Street Skills” and Sophisticated Educational Learning Theories in Teaching a Seminar in Legal Analysis and Writing*, 34 SANTA CLARA L. REV. 1127, 1135 (1994).

<sup>2</sup> 460 U.S. 37 (1983).

<sup>3</sup> For example, the Court has also attempted during this period to refine what sorts of threats are outside of “strict scrutiny” protection and what kinds of child pornography are unprotected by the First Amendment. *Virginia v. Black*, 538 U.S. 343, 344, 359 (2003) (holding that “true threats” are unprotected); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (holding that virtual child pornography is protected under the First Amendment).

post office is a “postal sidewalk,” which is not a public forum, or a “sidewalk near a post office,” which is a public forum.<sup>4</sup>

The sudden development of new political protest movements in recent years, most famously the Occupy Wall Street movement and its progeny around the country,<sup>5</sup> has created such a dilemma of analogy for the courts over a very common and seemingly trivial practice: sidewalk chalking in a public forum. Sidewalk chalking has been traced back to sixteenth century Italy when street artists would use chalk to decorate public areas; in recent times, it has inspired street art festivals in places like Lake Worth and Sarasota, Florida.<sup>6</sup> In the United States, sidewalk chalking has been a mainstay of children’s outdoor play for years, and manufacturers have capitalized on its nostalgic popularity and creative appeal to children, as well as the ease with which adults can clean it up. Crayola, for example, offers chalk in shapes like bunnies, a rainbow “rake” that draws multicolored chalk lines all at once, and a set of hand tools to write and blend colors together.<sup>7</sup> But sidewalk chalking has also become a tool of protest for public demonstrators like those in the Occupy movement.

However, First Amendment chalkers have not found the way so smooth. On October 1, 2011, a movement organized by CopBlock.org sponsored a “National Chalk the Police Day” in fifteen cities across the country in response to arrests of New Hampshire protesters for chalking anti-police

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<sup>4</sup> In *United States v. Grace*, 461 U.S. 171 (1983), the Supreme Court held that a public sidewalk in front of the U.S. Supreme Court was a public forum, triggering the time, place and manner test, which requires the court to determine whether speech regulations are content neutral, serve significant government interests and are narrowly tailored, and provide ample speech alternatives. The Court noted that streets, parks, and sidewalks traditionally used for free expression are historically associated with the free exercise of expressive activities and “are considered, without more, to be ‘public forums.’” *Id.* at 177. The “without more” qualification was employed in *United States v. Kokinda*, 497 U.S. 720, 727–29 (1990) (holding that a sidewalk built only for ingress into the post office is not a public forum). See also *Paff v. Kaltenbach*, 204 F.3d 425, 431 n.4 (3d Cir. 2000) (citing *Kokinda*’s distinction between a municipal sidewalk that is a public passageway and a sidewalk that leads only from the parking lot to the post office, and holding that a postal sidewalk is not a public forum because it was constructed “solely to assist postal patrons”).

<sup>5</sup> The district court in *Occupy Minneapolis v. Cnty. of Hennepin*, Civ. No. 11-3412 (RHK/TNL), 2011 WL 5878359, at \*1 n.1 (D. Minn. Nov. 23, 2011), described the Occupy movement, using its own website, as a “‘leaderless resistance movement’ generally protesting Wall-Street and corporate ‘greed.’” For further self-description of the Occupy movement, which identifies itself as being “[t]he 99%” who will not tolerate the greedy rich, see OCCUPY WALL STREET, <http://occupywallst.org> (last visited Sept. 30, 2012).

<sup>6</sup> See, e.g., SARASOTA CHALK FESTIVAL, <https://chalkfestival.org> (last visited Sept. 30, 2012); STREET PAINTING FESTIVAL, INC., <http://www.streetpaintingfestivalinc.org> (last visited Sept. 30, 2012).

<sup>7</sup> See CRAYOLA, <http://www.crayola.com/browse-products.aspx?categories=OUTDOOR#/%2Fproductypeorbrands%3AOutdoor> (last visited Sept. 30, 2012).

signs on city property.<sup>8</sup> For their troubles, chalking protesters were roundly excoriated on website posts,<sup>9</sup> including the usual suggestion, “If they do not like our system[,] they need to go to some place else like Russia, China, Cuba, Saudi Arabia[,] or any such place and see how long they last.”<sup>10</sup>

One post sums up the more measured arguments against the chalkers as follows:

I guess that these guys do not understand that the[y’re] defacing public property which is paid for by tax payers [sic] is also cleaned up by workers who are paid for by taxpayers. I as a taxpayer do not approve of such activities. They have the right to peaceably gather as defined by their local law and have the right to free speech[,] but do not have a right to inconvenience others in any way, damage or destroy property . . . .<sup>11</sup>

More significantly, chalkers have been subject to arrest or prohibited from chalking in more than one jurisdiction. Such cases go back to the 1990s, when Christopher Mackinney 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.<sup>12</sup> More recently, in 2001, a federal district court considered and rejected a challenge to New York’s defacement law by visual artists wanting to chalk; the law prohibited people from defacing or marking on sidewalks or other public property.<sup>13</sup> In 2002, several homeless advocates in California were arrested and convicted for chalking Santa Cruz sidewalks with words such as “[v]andals don’t use chalk” and “[s]leep is not a crime,” after a “chalk crime-spreed” in Santa Cruz.<sup>14</sup> In 2007, John Murtari was arrested for chalking the words, “I ♥ Dom, Sen. Clinton Help Us,” on the sidewalk of New York’s Hanley Federal Building and refusing to stop when a Federal Protective Service

<sup>8</sup> See Kendra Yost, *Protesters Flock to Downtown Jail, Chalk Streets with Anti-Police Slogans*, DOWNTOWN DEVIL (Oct. 3, 2011), <http://downtowndevil.com/2011/10/03/14079/protesters-flock-to-the-streets-chalk-the-streets-with-anti-police-slogans>.

<sup>9</sup> See Ademo Freeman, *A Moment of Clarity for Chalk*, COPBLOCK.ORG (Sept. 29, 2011), <http://www.copblock.org/8530/a-moment-of-clarity-for-chalk>.

<sup>10</sup> *Id.* (citation omitted).

<sup>11</sup> *Id.* (citation omitted).

<sup>12</sup> *Mackinney v. Nielson*, 69 F.3d 1002, 1004 (9th Cir. 1995). A list of alleged chalking arrests, beginning in 1991, is posted at NEW MAP MARKERS, [https://www.google.com/fusiontables/DataSource?docid=1nTpiWrquP7PZhPcHdZodG7IRsIGE9hwgd\\_xBWx4](https://www.google.com/fusiontables/DataSource?docid=1nTpiWrquP7PZhPcHdZodG7IRsIGE9hwgd_xBWx4) (last visited November 2, 2012).

<sup>13</sup> *Lederman v. Giuliani*, No. 98 CIV 2024 (LMM), 2001 WL 902591, at \*6–7 (S.D.N.Y. Aug. 7, 2001), *aff’d sub nom. Lederman v. Rosado*, 70 F. App’x 39 (2d Cir. 2003).

<sup>14</sup> *Hopscotcher Bust on Pacific Ave.*, HOMELESS UNITED FOR FRIENDSHIP & FREEDOM (June 29, 2002), <http://www.huffsantacruz.org/press/hopscotch.html> [hereinafter *Hopscotcher Bust*].

Inspector demanded that he do so.<sup>15</sup> And in 2009, Rev. Patrick Mahoney and others were prohibited from chalking on the pavement in front of the White House, in protest of President Obama's position on abortion and the anniversary of *Roe v. Wade*; the chalking prohibition was affirmed by the D.C. Circuit in 2011.<sup>16</sup>

Among the most recent cases, Timothy Osmar, an Occupy Wall Street activist, was charged with violating an Orlando city ordinance that makes it unlawful "to write, print, mark, paint, stamp or paste any sign, notice or advertisement upon the surface of any sidewalk or paved street in the City."<sup>17</sup> His crime was chalking messages such as "Justice Equals Liberty" and "It's Beginning to Look a Lot like a Police State" on the sidewalk.<sup>18</sup> In 2011, a Minnesota federal court turned back a challenge to unwritten rules against sidewalk graffiti enforced against the "Occupy Minneapolis" movement which chalked messages on the Hennepin County plaza.<sup>19</sup> A video was posted to YouTube showing a New York Occupy protester being arrested for writing "Love" on the sidewalk with chalk.<sup>20</sup> And Minneapolis protester Melissa Hill is suing to overturn a federal order banning her from "trespassing" upon Minneapolis federal court property for a year; if she violates the ban, she faces 90 days in jail and a \$1,000 fine.<sup>21</sup> Her offense which triggered the banishment, was chalking an anti-war statement in June, 2011, on a sidewalk in front of the Minneapolis federal courthouse.<sup>22</sup>

The legal standard governing the prohibition of chalking is not seriously in issue in these cases; though there have been vagueness, prior restraint, and other challenges to regulations used to prohibit or punish public

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<sup>15</sup> United States v. Murtari, No. 5:07-CR-387, 2007 WL 3046746, at \*1 (N.D.N.Y. Oct. 16, 2007).

<sup>16</sup> Mahoney v. District of Columbia, 662 F. Supp. 2d 74, 77-79 (D.D.C. 2009), *aff'd sub nom.* Mahoney v. Doe, 642 F.3d 1112 (D.C. Cir. 2011). The district court noted that in 2004, Rev. Mahoney and members of the Christian Defense Coalition allegedly chalked Constitution Avenue and 15th Street while the Metropolitan Police Department chief was there and permitted it, and in 2007, were given permission to chalk near George Washington University and were protected in their activity, despite objections from onlookers. *Id.* at 89.

<sup>17</sup> Osmar v. City of Orlando, 844 F. Supp. 2d 1242, 1243 (M.D. Fla. 2012).

<sup>18</sup> *Id.* The court notes that he wrote some of the messages and intended to write others but was arrested before he could do so. However, his charges were dropped, so he filed suit for declaratory relief that his rights were violated. *Id.*

<sup>19</sup> Occupy Minneapolis v. Cnty. of Hennepin, Civ. No. 11-3412 (RHK/TNL), 2011 WL 5878359 (D. Minn. Nov. 23, 2011).

<sup>20</sup> *Police Arrest Protester for Drawing with Sidewalk Chalk @ Occupy Wall Street 9\_19\_11*, YOUTUBE (Sept. 20, 2011), <http://www.youtube.com/watch?v=QNDenTH5mpU>.

<sup>21</sup> Dan Browning, *Protester's Suit Says Trespass Laws Stifle Free Speech*, STAR TRIB., Mar. 27, 2012, at 1B.

<sup>22</sup> *Id.*

chalking,<sup>23</sup> the few courts considering this problem have consistently identified chalking as a problem triggering the time, place and manner rule.<sup>24</sup> This test requires the government to show that its enforcement of an anti-chalking rule is content neutral, that the government has a significant or substantial government interest in regulating chalking, that the government's rule is narrowly tailored to serve that interest, and that ample alternative methods of communication are left open.<sup>25</sup>

In Part II of this Article, I suggest that the courts have too willingly decided that chalking ordinances are "content neutral," particularly given the history of discriminatory enforcement in some of the jurisdictions considering these challenges. In Part III, I suggest that the courts' finding that the government has a substantial interest in preventing chalking is misplaced, because the situations involving damage or defacement to public property are not analogous to sidewalk chalking. Moreover, in balancing speech versus aesthetic interests in the case of chalking, I suggest that the courts have ignored the Supreme Court's precedents because they discount the public value of chalked speech as an effective means for those with few resources or standard media avenues to immediately protest government actions.

## II. CHALKING AS A CONTENT DILEMMA

Regulation of speech because of the ideas it conveys has always troubled the Supreme Court, but not enough to abolish traditionally recognized causes of action or punishments for certain speech, such as libel and speech immediately causing violence.<sup>26</sup> Although there seems to be no reasoned intellectual framework, and not much more than tradition, justifying what speech receives a high level of protection and what speech is virtually excluded from protection,<sup>27</sup> this distinction has resulted in a bifurcated decision process

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<sup>23</sup> See, e.g., *Mahoney v. District of Columbia*, 662 F. Supp. 2d 74, 83, 85–86 (D.D.C. 2009) (turning back prior restraint and overbreadth arguments), *aff'd sub nom. Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011); *Lederman v. Giuliani*, No. 98 CIV 2024 (LMM), 2001 WL 902591, at \*6–7 (S.D.N.Y. Aug. 7, 2001) (turning back prior restraint, overbreadth, and vagueness challenges as applied to chalking), *aff'd sub nom. Lederman v. Rosado*, 70 F. App'x 39 (2d Cir. 2003).

<sup>24</sup> *Mahoney*, 662 F. Supp. 2d at 87; see also *Occupy Minneapolis*, 2011 WL 5878359, at \*4.

<sup>25</sup> *Mahoney*, 662 F. Supp. 2d at 87; see also *Occupy Minneapolis*, 2011 WL 5878359, at \*4 (leaving out the "narrow tailoring" requirement).

<sup>26</sup> See, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254, 305 (1964) (recognizing that defamatory speech is not fully protected by the Speech Clause); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (recognizing that "fighting words" are an exception warranting government regulation).

<sup>27</sup> For examples of content restrictions that were recently rejected by the Supreme Court, although they seem analogous to other forms of unprotected speech, see *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2731, 2734 (2011) (rejecting the creation of a category of

that is used to evaluate the government's ability to control speech because of its content. If the speech falls within a small number of defined categories, e.g., inciting speech or fighting words, the government may regulate its content so long as the regulations are reasonable and, at least in some cases, viewpoint neutral.<sup>28</sup> Otherwise, the courts have required most government regulation of speech to be "content neutral,"<sup>29</sup> unless the speakers are utilizing a nonpublic or limited public forum. In this way, the Court has created a sharp distinction between non-valued and valued speech under the First Amendment, though there are a very few exceptions, such as the commercial speech doctrine, where intermediate scrutiny is utilized.<sup>30</sup>

Though none of the chalkers have won their cases, it is not because the content of their speech would be considered unprotected (e.g., fighting words, inciting speech, etc.) In fact, in terms of content, all of the arrested or prohibited speakers' chalkings have been at the core of First Amendment concerns because they are political speech. They have ranged from Ms. Hill's anti-war scrawl, "Don't Enlist, Resist," to Rev. Mahoney's protest of the Supreme Court's and Executive's abortion decisions, to Timothy Osmar's chalk message, "All I Want for Christmas is a Revolution."<sup>31</sup> The only plausible speech exception for some of these messages, the "inciting speech" doctrine, is not even close to being met because the Court's current standard, as stated in *Brandenburg v. Ohio*, prohibits punishment of advocacy speech unless it poses an imminent and likely threat of violence or unlawful activity.<sup>32</sup>

However, even if the "content exclusion" question has been easy in these cases, the courts deciding chalking cases have also been too quick to pass by the question of whether the government's actions in punishing or deterring chalkers are content-neutral. For example, in *Mahoney v. District of Columbia*,

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unprotected, violent speech directed at children, while reaffirming the obscenity exception to the protection of speech); *United States v. Stevens*, 130 S. Ct. 1577, 1583–84 (2010) (rejecting the creation of an exception to the speech doctrine for portrayals of animal cruelty on overbreadth grounds while reaffirming the child pornography exception).

<sup>28</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 387–88 (1992).

<sup>29</sup> See, e.g., *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (noting that "[t]he general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others").

<sup>30</sup> See, e.g., *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 573 (1980) (utilizing intermediate scrutiny to evaluate commercial speech restrictions).

<sup>31</sup> See, e.g., *Osmar v. City of Orlando*, 844 F. Supp. 2d 1242, 1243 (M.D. Fla. 2012); *Mahoney v. District of Columbia*, 662 F. Supp. 2d 74 (D.D.C. 2009), *aff'd sub nom. Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011); *Browning*, *supra* note 21, at 1B.

<sup>32</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that government may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

the federal court reviewed the D. C. defacement statute, which seems to have been comprehensively crafted to cover a multitude of creative “sins,” making it

unlawful for any person or persons willfully and wantonly to disfigure, cut, chip, or cover, rub with, or otherwise place filth or excrement of any kind . . . to write, mark, draw, or paint, without the consent . . . in the case of public property, of the person having charge, custody, or control thereof, any word, sign, or figure upon: (1) Any property, public or private, building, statue, monument, office, public passenger vehicle, mass transit equipment or facility, dwelling or structure of any kind including those in the course of erection; or (2) The doors, windows, steps, railing, fencing, balconies, balustrades, stairs, porches, halls, walls, sides of any enclosure thereof, or any movable property.<sup>33</sup>

The D.C. District Court made “content neutrality” arguments in rejecting the claim that the defacement statute was a prior restraint; the court noted that the statute was largely aimed at conduct, not the underlying speech chalked on the pavement.<sup>34</sup> Moreover, in that court’s view, the statute was content neutral because defacement was punishable whether it was engaged in for the purpose of expressing views (i.e., speech) or just to deface the property (i.e., unprotected conduct).<sup>35</sup> The D.C. Court of Appeals similarly held that this statute was content neutral because it prohibited certain conduct “without reference to the message the speaker wishes to convey,” and because it was not adopted “‘because of [agreement or] disagreement with the message’ a speaker may convey.”<sup>36</sup> Similarly, a Minnesota district court found that under the “plain meaning” rule, the unwritten prohibition against chalking on any topic was content neutral,<sup>37</sup> although it is difficult to understand just how a rule can have a “plain meaning” if it is not written down.

It may be understandable that the courts want to look at the content neutrality problem by focusing on statutory language, since the courts are reluctant to strike down ordinances that may also allow police to deal with non-expressive conduct. However, when we view these cases “as applied,” the claim that such chalking bans are content-neutral is difficult to seriously sustain. Rev. Mahoney offered to produce evidence that the District of

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<sup>33</sup> Mahoney v. District of Columbia, 662 F. Supp. 2d, 74, 82 (D.D.C. 2009) (quoting D.C. CODE § 22-3312.01 (2012)), *aff’d sub nom.* Mahoney v. Doe, 642 F.3d 1112 (D.C. Cir. 2011).

<sup>34</sup> *Id.* at 84.

<sup>35</sup> *Id.*

<sup>36</sup> Mahoney, 642 F.3d at 1118 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))).

<sup>37</sup> *Occupy Minneapolis v. Cnty. of Hennepin*, Civ. No. 11-3412 (RHK/TNL), 2011 WL 5878359, at \*4 (D. Minn. Nov. 23, 2011).

Columbia had allowed chalking for civic and other events throughout Washington D.C. on previous occasions, like an April 26 “Chalk-in” on H Street.<sup>38</sup> Indeed, District officials had allowed him to chalk a sidewalk in previous protests on Constitution Avenue and 15<sup>th</sup> Street and at George Washington University.<sup>39</sup> Nevertheless, his attempt to do discovery to demonstrate just how widespread the practice of approving other chalking was in the District of Columbia was shut down by the D.C. federal courts; his equal protection claim against selective enforcement was shut down, as well.<sup>40</sup>

Similarly, in *Lederman v. Giuliani*, plaintiffs were not permitted to do discovery on their claim that New York’s defacement provisions were unconstitutional as a matter of law because the court thought that the question was one of facial validity, despite the fact that the time, place, and manner rule requires a determination that the law is applied in a content neutral fashion; the court did hold that plaintiffs could pursue a claim of selective enforcement.<sup>41</sup>

The fact that governments throughout the United States have not enforced chalking restrictions in a content-neutral fashion can be illustrated by the rare exception captured in a 2007 Brooklyn news report of a threatened chalking arrest. In this incident, the Department of Sanitation sent a “cease and desist” letter to the mother of six-year-old Park Slope resident Natalie Shea, who had chalked a blue picture on the sidewalk in front of her home even though (ironically) the chalking was apparently illegal only if it was “without the consent” of the owner of the building, Shea’s mother.<sup>42</sup> Claiming that the

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<sup>38</sup> *Mahoney*, 662 F. Supp. 2d at 80, 88; Brief for Appellees District of Columbia and Cathy Lanier (In Her Official Capacity as Chief of the Metropolitan Police Department) at 24–25, *Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011) (No. 09-7131), 2010 WL 2552775, at \*15–16 (noting that Mahoney cited examples including a youth sidewalk art contest sponsored by the D.C. Office of Asian and Pacific Island Affairs; D.C. Public Library annual “Chalk4Peace” events, which included a 2008 chalk art demonstration in front of a business; and the annual George Washington University chalk art event where a street is closed for that purpose.).

<sup>39</sup> *Mahoney*, 662 F. Supp. 2d at 89. Mahoney alleged that he had chalked body shapes on Constitution Avenue during the 2004 March for Women’s Lives in the personal presence of the Metro police chief without arrest; that he had chalked a protest on Pennsylvania Avenue in front of the White House in 2006, objecting to the arrest of a Falon Gong activist; and that he had chalked “abortion is poverty” at George Washington University in conjunction with a 2007 Sojourners conference, with the protection of the police department. Brief for Appellees District of Columbia and Cathy Lanier (In Her Official Capacity as Chief of the Metropolitan Police Department) at 23–24, *Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011) (No. 09-7131), 2010 WL 2552775, at \*15–16. Ironically, the district court cites this fact as evidence against the plaintiffs’ claims that they were singled out because of their views. *Mahoney*, 662 F. Supp. 2d at 89.

<sup>40</sup> *Mahoney*, 662 F. Supp. 2d at 87 n.7, 97–98.

<sup>41</sup> *Lederman v. Giuliani*, No. 98 CIV 2024 (LMM), 2001 WL 902591, at \*7 (S.D.N.Y. Aug. 7, 2001), *aff’d sub nom.* *Lederman v. Rosado*, 70 App’x 39 (2d Cir. 2003).

<sup>42</sup> See Gersh Kuntzman, *New Face of Vandalism?*, THE BROOKLYN PAPER (Oct. 13, 2007), [http://www.brooklynpaper.com/stories/30/40/30\\_40graffitigirl.html](http://www.brooklynpaper.com/stories/30/40/30_40graffitigirl.html); see also Chris L, Comment



chalking was “graffiti” under City Council local law 111, the Department ordered it removed.<sup>43</sup> This case set off a firestorm of web protests, including the comment, “Someone having fun in the neighbourhood? [sic] Must be time to get that stopped!!!! [sic] Im [sic] surprised a swat team didn’t show up . . . .”<sup>44</sup> A local artist, illustrating the dangers of determining content neutrality based on the “plain meaning” of an ordinance, noted that he was regularly questioned by the police while he was chalking sidewalk art, but that they desisted when they saw that it was chalk and he had never been arrested.<sup>45</sup>

Moreover, even commercial enterprises are known to use sidewalk chalking for less significant purposes than core First Amendment speech. In 2010, for example, Microsoft caused a stir by using chalk art to celebrate the launch of its Windows Phone 7 in San Francisco and New York. San Francisco city officials, who were not consulted for a permit, were not impressed.<sup>46</sup> Moreover, it is not uncommon during the summer to see restaurants and other businesses “chalk” their wares, or university campuses to be chalked to advertise events or issues occurring on campus.

If children, students and businesses are permitted to chalk sidewalks throughout the country without any concern for defacement of public property, and if even artists who produce more elaborate and likely longer-lasting designs are not being sanctioned for chalking, it is difficult to understand why such anti-chalking rules, as applied to protest chalking, are content-neutral.<sup>47</sup>

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to *New Face of Vandalism?*, THE BROOKLYN PAPER (Oct. 16, 2007, 6:39 PM), [http://www.brooklynpaper.com/stories/30/40/30\\_40graffitigirl.html](http://www.brooklynpaper.com/stories/30/40/30_40graffitigirl.html) (noting the cease and desist letter).

<sup>43</sup> The ordinance defined “graffiti” as “any letter, word, name, number, symbol, slogan, message, drawing, picture, writing . . . that is drawn, painted, chiseled, scratched, or etched on a commercial building or residential building” if “not consented to by the owner of the commercial building or residential building.” Kuntzman, *supra* note 42. Of course, the Department of Sanitation had not consulted Natalie’s mother, who owned the property, about whether she had consented to her daughter’s drawing. *Id.*

<sup>44</sup> Jackson, Comment to *New Face of Vandalism?*, THE BROOKLYN PAPER (Oct. 12, 2007, 1:26 AM), [http://www.brooklynpaper.com/stories/30/40/30\\_40graffitigirl.html](http://www.brooklynpaper.com/stories/30/40/30_40graffitigirl.html).

<sup>45</sup> See Kuntzman, *supra* note 42. The artist, Ellis Gallagher, illustrates the dangers of pointing out uneven enforcement publicly. He was arrested for chalking days after the Shea arrest, and noted that the arresting officers were reading the article about Natalie and laughing at the time of the arrest. See Elizabeth Hays, *Artist Vows to Keep Chalking Even After Graffiti Bust*, DAILY NEWS (Oct. 19, 2007), <http://www.nydailynews.com/new-york/brooklyn/artist-vows-chalking-graffiti-bust-article-1.227562>.

<sup>46</sup> See Tom Warren, *Microsoft Says Windows Phone 7 Pavement Graffiti Will Wash off in the Rain . . . But It Hasn’t*, WINRUMORS (Nov. 9, 2010, 12:38 PM), <http://www.winrumors.com/microsoft-says-windows-phone-7-pavement-graffiti-will-wash-off-in-the-rain-but-it-hasnt>. For companies like Microsoft, apparently, the usual punishment for an ordinance violation is cleanup. Because, unfortunately, Microsoft used a chalk art design not easily washed off with rain, the company was asked by the city to remove the “graffiti.” New York City and San Francisco streets and sidewalks were chalked to advertise launch-related concerts. *Id.*

<sup>47</sup> This discrepancy was noted by one of the posters on the CopBlock.org website who noted:

Indeed, it would be an odd application of the public forum doctrine to rule that a chalker inscribing a political message on the most quintessential of public forums like a public plaza in front of the government center could be arrested, while a schoolchild scribbling a personal design on a relatively quiet residential sidewalk could not. Seats of government are precisely those places where First Amendment activity has always been highly protected, even though there is sometimes a dispute, as in *Adderley v. State of Florida*, about what those seats of government actually are.<sup>48</sup>

### III. THE PROBLEM OF ANALOGY: IS CHALKING REAL GRAFFITI?

The problem of analogy—the Sesame Street problem—really comes to a head in the question of whether the government has a “substantial state interest” in preventing protesters, or anyone, from chalking public sidewalks. It is here that categorizing chalking as “like” or “unlike” forms of property vandalism, including paint graffiti, makes a real difference for First Amendment purposes. More careful attention to this question makes it evident that the government’s interest in preventing chalking, if it is not content-based, is relatively insignificant as compared with the speaker’s interest.

In holding that the government’s aesthetic concerns justify punishment of chalking, both the legislatures writing the regulations and the courts that have considered chalking have treated chalking exactly like any other form of graffiti even though it is clearly not. As an example, New York’s defacing statute in *Lederman v. Giuliani* made it unlawful “to deface any street by painting, printing or writing thereon, or attaching thereto, in any manner, any

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If using sidewalk chalk on a sidewalk in front of a police station is vandalism, then why is sidewalk chalk allowed to be sold? . . . Sidewalk is a sidewalk, no matter if it is front [sic] of your house or in front of the police station. It’s all public [sic] owned. I bet the very same people who says [sic] it is vandalism wouldn’t have a problem with people doing it if they did it in front of their own house. But their rationale would be seriously flawed by that as it’s still a PUBLIC SIDEWALK. It’s not vandalism folks. Anyone who says it is, is whacked.

Freedom\_Fighter, Comment to *A Moment of Clarity for Chalk*, COPBLOCK.ORG (Sept. 29, 2011), <http://www.copblock.org/8530/a-moment-of-clarity-for-chalk>.

<sup>48</sup> In *Adderley v. Florida*, 385 U.S. 39, 41 (1966), the Court considered whether civil rights protesters were lawfully arrested when they occupied a jailhouse driveway and the grassy area around it, noting that “[t]raditionally, state capitol grounds are open to the public.” The Court held that their arrests did not violate the First Amendment, because jails, unlike capitol grounds, are not “open to the public.” *Id.* The only objection to protesters being on the jail driveway was that that part of the jail was “reserved for jail uses” and the demonstrators were not arrested for “what was being sung or said.” *Id.* at 47. Justice Douglas noted that “[t]he jailhouse, like an executive mansion, a legislative chamber, a courthouse, or the statehouse itself is one of the seats of governments whether it be the Tower of London, the Bastille, or a small county jail.” *Id.* at 49 (Douglas, J., dissenting) (citation omitted).

advertisement or other printed matter.”<sup>49</sup> Presumably, even a momentary scrawl on the pavement would violate this statute irrespective of any damage or expense of cleanup.

Similarly, the chalking courts have often relied on *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*,<sup>50</sup> in which candidate Vincent “draped” 48 of his signs over the crosswires of utility poles and stapled them together “at the bottom.”<sup>51</sup> Such courts do not, however, note that in *Taxpayers for Vincent*, the district court found that the signs not only created “visual clutter and blight” but also caused “safety” and “traffic hazards” because of their placement on utility poles, concerns not relevant in sidewalk chalking cases.<sup>52</sup> In *Mahoney*, both the district court and court of appeals cited a number of cases, seemingly without any notice that they involve much more permanent and damaging markings. They include *United States v. Bohlke*, involving a defacement of a White House pillar;<sup>53</sup> *United States v. Frankel*, in which protesters threw blood onto the Capitol steps;<sup>54</sup> and *Wilson v. Johnson*, in which defendant painted “NO WAR” in yellow paint on two campus buildings and the inside of an elevator.<sup>55</sup> The Court of Appeals even cited the

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<sup>49</sup> See *Lederman v. Giuliani*, No. 98 CIV 2024 (LMM), 2001 WL 902591, at \*6 (S.D.N.Y. Aug. 7, 2001) (quoting 2011 N.Y.C. Local Law No. 75, N.Y.C. Admin. Code § 19-138), *aff’d sub nom.* *Lederman v. Rosado*, 70 F. App’x 39 (2d Cir. 2003).

<sup>50</sup> 466 U.S. 789, 815 (1984) (holding the prohibition of the posting of signs on public property constitutional, as applied to the postings of Roland’s signs for his city council candidacy).

<sup>51</sup> *Id.* at 792–93. The Court noted that these signs were forty-eight among the 1207 removed from city property within a one-week period. *Id.* For examples of such court cases following the holding in *Taxpayers for Vincent*, see, e.g., *Mahoney v. District of Columbia*, 662 F. Supp. 2d 74, 83 (D.D.C. 2009), *aff’d sub nom.* *Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011) (holding that defacement statute, D.C. CODE § 22-3312.01 (2012), is “not ‘unconstitutional in every conceivable application’” and can be applied to chalking demonstrations on the White House pavement because it is implemented to protect property, not to inhibit free speech); *Occupy Minneapolis v. Cnty. of Hennepin*, Civ. No. 11-3412 (RHK/TNL), 2011 WL 5878359, at \*4 (D. Minn. Nov. 23, 2011) (holding the county’s restrictions on chalking by protesters when occupying plaza property constitutional, because it is “content-neutral” and the county has “a significant interest in ‘controlling the aesthetic appearance of’ the Plazas”).

<sup>52</sup> *Taxpayers for Vincent*, 466 U.S. 789, 794, 802, 817 (1984).

<sup>53</sup> *United States v. Bohlke*, No. 87-M-1645, 116 Daily Wash. L. Rep. 1697, 1700 (D.C. Super. Ct. July 14, 1988).

<sup>54</sup> *United States v. Frankel*, 739 F. Supp. 629, 631–32 (D.D.C. 1990) (holding that no “prosecutorial vindictiveness” occurred when the case was transferred from Superior Court to District Court, and charges increased, because the prosecution was meant to punish public property damage, not to discourage protesters’ “constitutional right to a jury trial”).

<sup>55</sup> *Wilson v. Johnson*, 247 F. App’x 620, 625 (6th Cir. 2007) (holding that the removal of students’ painted messages and banners from the university and enforcement of disciplinary action was reasonable because the university’s sports and art center were not “public fora”).

*White House Vigil for ERA Comm. v. Clark* case,<sup>56</sup> even though the regulations at issue in that case were focused on signage that could conceal explosives or to be used as weapons and were in part written to ensure that signs were not so large or numerous that they would obstruct tourists' views of the White House.<sup>57</sup> Obviously, none of these concerns were relevant to sidewalk chalking.

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, and whether the courts' facile attempt to analogize chalking to these other forms of vandalism is fair. In each of the chalking cases considered by the federal courts, aesthetics have been offered as the reason that the government may prohibit chalking. In *Mahoney*, where the district court reasoned that the defacement statute's purpose was to protect property, the court claimed that it was "an untenable position that conduct such as vandalism is protected by the First Amendment merely because those engaged in such conduct intend[] thereby to express an idea."<sup>58</sup> This interest has been described as "controlling the aesthetic appearance" of a public space,<sup>59</sup> "promoting esthetic values,"<sup>60</sup> keeping an area "free of 'visual clutter,'" and "'conserving . . . property' through measures 'designed to limit the wear and tear' to which they are subjected."<sup>61</sup>

However, this assertion of aesthetics as a state interest needs to be interrogated in the case of chalking, just as government assertions that speech threatens national security need to be questioned.<sup>62</sup> In the context of both First

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<sup>56</sup> See *White House Vigil for ERA Comm. v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984) (holding regulations on signage outside of the White House constitutional, because the location of the White House makes it "inherently insecure" and the regulations are meant to ensure "presidential and national security").

<sup>57</sup> *Id.* at 1520.

<sup>58</sup> *Mahoney v. District of Columbia*, 662 F. Supp. 2d 74, 84 (D.D.C. 2009), *aff'd sub nom. Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011), *quoted in* *Riely v. Reno*, 860 F. Supp. 693, 702 (D. Ariz. 1994) (internal quotation marks omitted).

<sup>59</sup> See, e.g., *Mahoney*, 642 F.3d at 1118; *Occupy Minneapolis v. Cnty. Of Hennepin*, Civ. No. 11-3412 (RHK/TNL), 2011 WL 5878359, at \*4 (D. Minn. Nov. 23, 2011).

<sup>60</sup> *United States v. Murtari*, No. 5:07-CR-387, 2007 WL 3046746, at \*6 (N.D.N.Y. Oct. 16, 2007) (holding that "graffiti is *not* a generally accepted medium of 'speech' on public or private property" and that the Supreme Court ruled in *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), that city governments had "a substantial interest in promoting esthetic values").

<sup>61</sup> *Mahoney*, 662 F. Supp. 2d at 90.

<sup>62</sup> For an example of the Court's unquestioning acceptance of such an assertion by the government, see, e.g., *Dennis v. United States*, 341 U.S. 494, 520, 525 (1951) (holding that the determination of whether American Communists who were teaching Marxist doctrine constituted a threat to national security was for the Executive branch to make, ironically citing the Chinese Exclusion Case, *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889), which justified the

Amendment and juvenile delinquency cases, the California courts have had to face the question several times whether chalking really does amount to graffiti that is truly vandalism. In *Mackinney v. Nielsen*,<sup>63</sup> the defendant was arrested when he refused to stop writing his anti “police state” message on a Berkeley sidewalk upon request of an officer. The Ninth Circuit held that the California vandalism statute could not 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>64</sup> The court rejected the defacement claim because chalk was not “paint or any other liquid.”<sup>65</sup> In the later case of *In re Nicholas Y.*,<sup>66</sup> however, where a juvenile was arrested for vandalism for writing a removable “tag” with a Sharpie marker on an AMC theater projection booth window, the court noted that the language of the vandalism statute had been changed to prohibit defacement “with graffiti or other inscribed material” and rejected the defendant’s claim that the statute did not apply to him.<sup>67</sup>

These cases point to the difficulty of finding an appropriate comparison between traditional vandalism and chalking. In traditional vandalism cases, the major concern is that the property is damaged—that it suffers “injury or harm . . . that decreases its value or involves loss of efficiency” though only “‘slight’ damage must be proved.”<sup>68</sup> In *MacKinney*, the Ninth Circuit noted that “[n]o reasonable person could think that writing with chalk would damage a sidewalk.”<sup>69</sup> This view was followed by a New York district court in *United States v. Murtari*, which held that chalking did not “damage” the property.<sup>70</sup> It is difficult to see how a public sidewalk could be damaged in the sense of “loss

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Congressional exclusion of Chinese laborers using a national security rationale “against foreign aggression and encroachment”).

<sup>63</sup> 69 F.3d 1002 (9th Cir. 1995).

<sup>64</sup> *Id.* at 1004.

<sup>65</sup> *Id.*

<sup>66</sup> *In re Nicholas Y.*, 102 Cal. Rptr. 2d 511 (2000).

<sup>67</sup> *Id.* at 512–14; *see also* CAL. PENAL CODE § 594 (West 2011). Most recently, in *In re Roland A.*, the Court of Appeals held that a fifteen-year-old who struck a kitchen table with a baseball bat because he was mad at his mother could legitimately be charged as a juvenile for vandalism, even though the bat did not significantly damage the table. Because some paint from the bat transferred to the table, there was “sufficient” damage within the meaning of the statute to constitute vandalism. *In re Roland A.*, No. F062362, 2011 WL 5560180, at \*1, \*3–4 (Cal. Ct. App. Nov. 16, 2011). The distinction between defacement with paint or liquid and defacement with graffiti was underscored in *Murtari*, where the Court rejected reliance on *Mackinney* because of this statutory change. *See United States v. Murtari*, No. 5:07-CR-387, 2007 WL 3046746, at \*3–5 (N.D.N.Y. Oct. 16, 2007).

<sup>68</sup> *Murtari*, 2007 WL 3046746, at \*4.

<sup>69</sup> *Mackinney*, 69 F.3d at 1005.

<sup>70</sup> *Murtari*, 2007 WL 3046746, at \*5.

of efficiency”<sup>71</sup> either, because chalk pictures do not prevent any uses of the sidewalk. Nor, since this is government property, is it easy to imagine how we the “owner[s]” could suffer any loss of economic value because of the temporary aesthetic blight chalking might cause.

In chalking cases, however, the courts have relied on the notion that “defacement” of the property is a significant enough harm to prohibit or punish chalking. In California, where the statute does not adequately define “defacement,”<sup>72</sup> the California court has resorted to the dictionary meaning of the word: “To mar the face, features or appearance of; to spoil or ruin the figure, form or beauty of; to disfigure.”<sup>73</sup>

This definition identifies three significant problems with courts’ quick conclusions that sidewalk chalking defaces public property, thus exposing the questionability of the courts’ finding that states have a significant interest, aesthetic or otherwise, in preventing sidewalk chalking. First, the dictionary language suggests at least some lengthy duration (reasonable permanency of the change made by the vandalism: the defendant’s actions must “mar,” “spoil or ruin.”) Second, there is an aesthetic judgment that the defendant has made the property “worse off,” that she has changed its aesthetic composition for the worse, at least in the eyes of the property owner. Third, the language of “marring” or “spoiling” assumes that the original features of the property are not recoverable; or if they are, they can only be recovered with significant difficulty or expense.

First, paradigmatic vandalism cases imply that some kind of permanent, harmful change has been made to the property, unless the owner or custodian does something to remove the damage caused by the vandal. Paint graffiti, for example, mars the surface of a building for a long time unless it is removed by laborious attention. By definition, chalking cases involve an aesthetic change to the property that is quite temporary. Absent some protection from the elements, or with the use of inferior materials, chalked messages will come off relatively quickly, even if nobody does anything to remove them. Of course, if chalking is legally protected, there is nothing to stop a persistent

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<sup>71</sup> *Id.* at \*4.

<sup>72</sup> *Lederman v. Giuliani*, No. 98 CIV 2024 (LMM), 2001 WL 902591, at \*6 n.4 (S.D.N.Y. Aug. 7, 2001) (mentioning 2011 N.Y.C. Local Law No. 75, N.Y.C. Admin. Code § 19-138, which defines defacement as “painting, printing or writing thereon [any street], or attaching thereto, in any manner, any advertisement or other printed matter,” and noting 56 R.C.N.Y. § 1-04(a) (2012), which further defines destruction of property to include “writ[ing] upon . . . real or personal property or equipment owned by . . . the [Parks] department”), *aff’d sub nom. Lederman v. Rosado*, 70 F. App’x 39 (2d Cir. 2003). In *Mahoney v. Doe*, 642 F.3d 1112, 1115 (D.C. Cir. 2011), the Court quoted the District of Columbia defacement statute which makes it unlawful for anyone to, inter alia, “write, mark, draw or paint . . . any word, sign, or figure upon” virtually any physical object in the District of Columbia without the permission of the “owner” or custodian in the case of public property. *Id.* at 1115 (quoting D.C. CODE § 22-3312.01 (2012)).

<sup>73</sup> *In re Nicholas Y.*, 102 Cal. Rptr. 2d 511, 513 (2000).

chalker from coming back to refurbish her image, as apparently some of the arrested chalkers did in these cases.<sup>74</sup> But given the transaction costs of continuous chalking to the speaker—that is, the costs of continually having to return to this spot to keep her message intact—we might imagine that it will not take long before the chalked message is obliterated.

Second, it is difficult to imagine a worse place to make an argument for aesthetic harm than a public sidewalk. Traditionally, vandalism or graffiti cases have involved aesthetic “marring” of buildings. These buildings have deliberate design elements of color, size, shape, and texture that are meant to evoke a response from the viewer, even those buildings designed primarily as functional, such as strip malls or skyscrapers. An owner or passerby cannot avoid seeing the aesthetic change to a building, even if she immediately averts her eyes. By contrast, the sidewalk is quite literally “beneath notice”: people walk on it and may not even notice a chalk drawing, unless it is a large or arresting installation. If the viewer is intentionally looking at the graffiti, we may assume that she finds some interest or even value in what is written there, and may not see the chalking as off-putting or a nuisance.

However, even if the courts hypothesize that citizens are mostly hyper-vigilant about what they walk on, the assumption that temporary political chalk graffiti on the sidewalk “blights” or “mar[s]” the surface takes the notion of aesthetic damage well beyond any reasonable understanding of what that term might mean in most circumstances. Public sidewalks are, for the most part, blank squares of gray concrete. Occasionally, a fashion forward jurisdiction may attempt to create some kind of aesthetic design on the ground in its public plazas by, for example, varying the color of slabs that make up the plaza, or using stonework or other materials to change the color or surface of a public plaza. For example, in *Mahoney*, the court had evidence of an extensive and expensive remodel to the area in front of the White House, including specially designed (and easily stainable) sidewalk pavers the National Capital Planning Commission and the National Park Service used to make the area more “attractive.”<sup>75</sup> In these very limited areas, where there is a high likelihood of permanent damage that will be costly to remove, a “defacing” ordinance might be more sensibly applied.

Similarly, there will be unique locations that demand special protection from even temporary defacements: a chalk picture on the cobblestones of Williamsburg will change the aesthetics in a much different way than a similar

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<sup>74</sup> See, e.g., *Osmar v. City of Orlando*, 844 F. Supp. 2d 1242, 1243 (M.D. Fla. 2012) (noting that Osmar was arrested twice for writing chalk messages on sidewalks); *Murtari*, 2007 WL 3046746, at \*1 (noting that Murtari was told to stop writing on the ground outside a Federal plaza, and apparently did, but when the inspector returned “35–40 minutes later,” he was “again writing with chalk”).

<sup>75</sup> Brief of Petitioner-Appellee at \*8–9, \*30, *Mahoney v. Doe*, No. 09-7131 (D.C. Cir. June 3, 2010).

drawing on the sidewalk of a busy city, for example. In *Mahoney*, the D.C. Court of Appeals suggests that there is a substantial “interest in controlling the aesthetic appearance of the street in front of the White House” by “proscribing intrusive and unpleasant formats for expression,” because it is a forum with “special” characteristics.<sup>76</sup> That may make sense given the large number of tourists who come there every day. But these examples are the exception rather than the rule, calling for a much more “narrowly tailored” law than those currently being enforced.

Given that a typical sidewalk slab is a blank canvas of gray, it is difficult to imagine what kind of chalk artwork, even if a message, could “mar” or “damage” its drab aesthetics. Arguably, most chalk art improves a sidewalk, either because it provides an artistic lift that the cold slab cannot, or because it communicates to the reader in words or symbols. This fact suggests that the state’s interest is not aesthetics as normally understood, but the absence of aesthetics, e.g., the drive to create a uniform surface that does not draw attention to itself. Although this interest might rise to significance in a semi-enclosed government space where an aesthetic change or challenging message might slow the passage of large crowds—as, say, in an airport or Grand Central Station<sup>77</sup>—this is not the situation in most of the chalking cases, where the chalker is a lone “speaker” in a large public space or one of a small number who are protesting without blocking pedestrian movement. Indeed, one might argue that in situations where free movement is especially important, a chalked sidewalk is less likely to impede crowd movement than a human protester standing on the sidewalk or in the plaza with a sign or leaflets to hand out to passersby; both activities have been held to be protected speech so long as they do not unduly block passage.<sup>78</sup>

Third, as suggested, even defacement as traditionally defined by the courts suggests that there is some problem or significant effort involved in recovering the original features of the “mar[red]” object.<sup>79</sup> But this is not the approach the courts have taken in the chalking cases. Some of the defendants in

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<sup>76</sup> *Mahoney*, 642 F.3d at 1118.

<sup>77</sup> See *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 675–76, 683–85 (1992) (noting the possible consequences of allowing solicitation and handing out literature in the airport, where travelers have limited time to get to their planes and holding the ban on literature distribution and solicitation to prevent passenger inconvenience in terminals to be reasonable); see also *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 641, 654 (1981) (noting the difficulties of allowing Sankirtan in state fair passageways jam-packed with people and holding that “the State’s interest in confining distribution, selling, and fund solicitation activities to fixed locations is sufficient to satisfy the requirement that a place or manner restriction must serve a substantial state interest”).

<sup>78</sup> See, e.g., *Heffron*, 452 U.S. at 656 (Brennan, J., dissenting) (noting that the First Amendment protects “distribution of literature, sale of literature, and solicitation of funds”).

<sup>79</sup> This was the statutory word used to describe actionable damage in *In re Nicholas Y.*, 102 Cal. Rptr. 2d 511, 513 (2000).



chalking and temporary marking cases have argued that in order to constitute actionable damage or defacement, the harm (aesthetic or otherwise) must be permanent. The courts have rejected this claim, agreeing that even a temporary defacement, even one that can be removed by modest effort by the owner or custodian of the property, is sufficient to justify the government in preventing it. As the D.C. Circuit said in *Mahoney*, “[i]t is true, the defacement at issue is temporary and can be cured. But the same was true in *Taxpayers for Vincent* [where temporary signs were posted on city telephone and other poles]. The government can proscribe even temporary blight.”<sup>80</sup>

This gives a potentially better explanation than aesthetics for the courts’ willingness to uphold chalking banks—money. Unless the government wishes to wait until the chalking disappears with the elements, the government must use public resources to remove it. Yet, chalking does not involve a significant use of public resources—it is not necessary in chalking cases, for example, to repaint or use special materials to scrub a paint-vandalized building or equipment. Generally, soap, water (or a little vinegar) and a brush will quickly clean up a chalking “statement.” Unless the chalking is virtually daily, or a successful chalker encourages other chalkers to fill up a public square with their messages, 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.

Thus, one question that the chalking cases pose in a very direct way is whether the cost of public employees soaping down a sidewalk chalk drawing (if they really need to do so) is really a significant government interest that can overcome the speech interests that the defendant and all of those who see the message have in chalked messages. Boiled down to this single question, the courts’ responses to claims of chalkers is disappointing. The government employs workers to clean up messes, both inside and outside public buildings. They pick up trash that inconsiderate citizens have thrown on the pavement or floor, usually without consequence to the litterer. They clean up messes of all kinds that dogs and children and sometimes adults make on public property, again, usually without consequence to the person who makes the mess. While none of these messes is welcome by either the public or such government workers, chalking is not much more laborious to clean up, and none of these other messes has the First Amendment value that chalking does. Yet, these other messes are tolerated within reasonable margins without criminal or civil sanction as a cost of doing (government) business.

By contrast, the chalking cases suggest that the government’s cleaning up after chalkers is an extra cost beyond these normal cleanup costs that cannot and should not be borne by the government. There is no suggestion in the chalking cases that protest chalking—or that any chalking on public pavement—is valuable speech. There is no thought that chalk messages might

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<sup>80</sup> *Mahoney*, 642 F.3d at 1119.

make the random passerby (who bothers to look) think about ideas in a way that aids him in exercising his duties as a citizen or in expanding his horizons as a person. Indeed, the chalking cases suggest that chalker speech is less valuable than other messy activities that citizens engage in on public property, and that the chalker's interest in speaking (and our hearing his speech) is less valuable than the passerby's interest in littering or soiling government property. That seems to invert the First Amendment on its head. Indeed, the chalking cases reinforce the idea that speech is a private indulgence of the speaker that should not intrude upon the interests of individual members of the public who happen to be passing by or "the taxpayer" whose money cheerfully goes to clean up after dogs and litterers, but not speakers on matters of grave public concern.

On the other side, there is a significant interest of speakers in using chalking as a medium to convey their message, a relatively minor inconvenience for citizens and government that poses maximum benefits for chalkers. When the courts turn to the fourth "time, place, and manner" criterion—whether protesters have "ample alternative[s]" to chalking—the "common sense" that speech is the private business of the speaker that bothers the aesthetic sensibilities of the public is further reinforced, without any real consideration of the cost and effectiveness of alternatives. Some of the courts simply list alternatives. In *Occupy Minneapolis v. County of Hennepin*, the court lists "passing out flyers, carrying or wearing signs, and public speaking," without considering in any careful way whether they are indeed "ample."<sup>81</sup> In *Mahoney*, the D.C. Circuit considered what alternatives to chalking Mahoney had: "The District granted Mahoney approval to conduct an assembly in front of the White House, for which he was 'permitted to possess signs and banners,'" or hand out leaflets.<sup>82</sup> That is, the District and the court will allow Mahoney to plant his own feet on the public sidewalk, but otherwise, he needs to use his personal resources—signs and banners and leaflets—to get his message across.

The court's response in *Mahoney*, typical of other courts considering chalking cases, suggests little attention to the Supreme Court's oft-repeated comment that the First Amendment especially protects those avenues for communication for the "little people," those who do not have the resources to make their views known through newspapers or TV ads, those who have to rely on simple methods such as leafleting and door to door solicitation to get their message heard.<sup>83</sup> That this medium is a "little people['s]" medium is not lost on

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<sup>81</sup> See, e.g., *Occupy Minneapolis v. Cnty. of Hennepin*, No. 11-3412 (RHK/TNL), 2011 WL 5878359, at \*4 (D. Minn. Nov. 23, 2011).

<sup>82</sup> *Mahoney*, 642 F.3d at 1119.

<sup>83</sup> See, e.g., *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 163 (2002) (quoting *Martin v. Struthers*, Ohio, 319 U.S. 141, 146 (1943) ("Door to door

protesters, however. In the Santa Cruz controversy involving homeless chalkers, defendant Becky Johnson noted, “[c]halk is cheap, readily available . . . [and] it is a very effective means of communicating short messages to the general public.”<sup>84</sup>

The anti-chalking courts’ holdings significantly limit the reach of chalkers’ messages. Each of the alternatives cited in the D.C. and Minneapolis cases—flyers or leaflets, banners or signs, and oral speech—forces speakers to be personally present on the sidewalk every moment they want their message to reach people, because the courts are not going to allow these protesters to post temporary signs on public property any more than they can chalk the sidewalks.<sup>85</sup> Therefore, unlike the tens or hundreds of persons who might potentially see their chalked message over the course of the few hours or days it would survive, sign-carriers or leafletters will reach the very small number of people whom they can approach during the limited hours they are able to take off from work or other personal responsibilities. Anyone with a message that he or she wants to widely broadcast is going to have to find a bevy of sign holders to cover the sidewalk 24/7 or use traditional or social media to get the word out. Again, the subtext is that this speech is a nuisance that the government is happy to make as difficult to distribute as possible on government property.

#### IV. CONCLUSION

The chalking cases capture the gulf between common sense and the law that sometimes occurs when controversial speech is at issue. These cases suggest that Justice Marshall was right when he opined that the main problem with government suppression of speech is not that bureaucrats will suppress particular viewpoints, but that they will suppress as much speech as they can because it causes trouble. As he noted in *Clark v. Community for Creative Non-violence*:

The Court evidently assumes that the balance struck by officials is deserving of deference so long as it does not appear to be tainted by content discrimination. What the Court fails to recognize is that public officials have strong incentives to overregulate even in the absence of an intent to censor particular views. This incentive stems from the fact that of the two groups whose interests officials must accommodate—on the one hand, the interests of the general public and, on the

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distribution of circulars is essential to the poorly financed causes of little people.” (internal quotation marks omitted)).

<sup>84</sup> Becky Johnson, *Broken Windows, Broken Theory*, HOMELESS UNITED FOR FRIENDSHIP & FREEDOM (Sept. 27, 2002), <http://www.huffsantacruz.org/press/chalk-downtown-guilty09-27-2002.html>; see also *Hopscotcher Bust*, *supra* note 14.

<sup>85</sup> See *Occupy Minneapolis*, 2011 WL 5878359, at \*4.

other, the interests of those who seek to use a particular forum for First Amendment activity—the political power of the former is likely to be far greater than that of the latter.<sup>86</sup>

The content neutrality standard, particularly as limited to reviewing regulations on their face, does not address the problem that bureaucrats will try to suppress any controversial speech or speech that disrupts business as usual in any way, including blank and boring sidewalks.

As suggested, of course, the real fear of government may be a slippery slope fear. If Mahoney can chalk the sidewalk in front of the White House, what is to stop other groups from chalking every sidewalk in the District of Columbia? What is to stop one private group from erasing Mahoney's chalk drawing and substituting its own, thereby giving rise to conflicts and even violence between chalkers, each of whom thinks his message is more important? There is the concern that if the government permits one speaker to use public property, it must allow everyone to do so without limit, to avoid charges of viewpoint discrimination. This concern is voiced regularly, as in *Taxpayers for Vincent*, where the Court explained why a complete sign ban was permissible.<sup>87</sup>

But, of course, crafting regulation that permits speech without discriminating against speakers is exactly what the “time, place, and manner” doctrine aims at. It attempts to compromise competing First Amendment interests by setting boundaries that permit groups, First Amendment and others, to share the public space. As with other uses of public space, the government is not prohibited from setting limits on the size or permanence of chalked messages, so long as they are content-neutral and indeed do meet the government's interests in protecting the aesthetic or other interests of the government. Therefore, there would seem to be no problem with an ordinance that dedicated some particularly striking areas—perhaps even the White House sidewalk—to other uses. Other ordinances could easily be crafted, requiring chalkers to remove their postings within a certain number of hours or days so that others could have the opportunity to post a message, or preventing the use of some materials that do not easily wash off, or limiting the size of chalked messages.

Given the relatively modest and temporary aesthetic harm that chalking causes, if any, one must ask whether the problem the government has with chalking is, indeed, not an aesthetic one but a communicative one. Sidewalks are appealing precisely because they do not send messages or create conflict.

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<sup>86</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 315 (1984) (Marshall, J., dissenting).

<sup>87</sup> *See, e.g., Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (noting that other equally protected speakers might seek the right to post signs on utility poles, and denying them the right “might create a risk of engaging in constitutionally forbidden content discrimination”).

By contrast, whether they are chalk art or chalk political messages, chalk drawings on sidewalks communicate ideas, ideas which those who walk over them might find offensive or unsettling. And, when chalking is done in conjunction with a protest that already seems to unsettle people's everyday habits, such as the protests in *Occupy Minneapolis*, such a benign practice may seem particularly unsettling. That is to say, chalking might do precisely what the First Amendment expects of the use of public property: it might talk to citizens about our most pressing problems and help citizens decide how they should use their fundamental rights for the betterment of our culture. To prevent the use of this commonly employed medium of expression, to arrest people for drawing in chalk on a sidewalk, evidences an underlying contempt for the value of speech that finds no harbor in Supreme Court jurisprudence.