FREEDOM TO EXPRESS A BIOLOGICAL CONSTRUCT:  
THE CASE FOR FIRST AMENDMENT PROTECTION OF BIOART  

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INTRODUCTION  

In 2000, contemporary artist Eduardo Kac made international headlines by partnering with scientists at the Institut National de la Recherche Agronomique (INRA), France where together they genetically engineered an albino rabbit to express an enhanced green fluorescent protein (GFP)\(^1\) so that the rabbit would glow green when exposed to blue light.\(^2\) The entire project from its conception to the final display was intended as an artistic experiment to challenge society’s views on animal experimentation and the selective breeding of pets.\(^3\) This type of work that merges art and biology is called “BioArt.” According to Eduardo Kac, BioArt “employs one or more of the following approaches: (1) the coaching of biomaterials into specific inert shapes or behaviors; (2) the unusual or subversive use of biotech tools and processes; (3) the invention or transformation of living organisms with or without social environmental integration.”\(^4\)

BioArt has arguably existed for centuries.\(^5\) For example, some commentators have described the primitive methods of brewing beer in the Old Kingdom as form of BioArt.\(^6\) Similarly, the artificial selection involved in agriculture has been viewed by some as a form of

\(^2\) Id.
\(^3\) Id.
\(^5\) See Edgar DaSilva, *Art, Biotechnology and the Culture of Peace*, 7 ELECTRONIC JOURNAL OF BIOTECHNOLOGY 130, 131-32 (2004) (arguing that the brewing reliefs in Egypt during the Old Kingdom from 2650 BC are an example of BioArt).
\(^6\) See id.
art. Domesticating maize and selecting the crops that produce the biggest ears with the plumpest kernels is a form of genetic manipulation to create a desired result: a beautiful ear of corn. In one of the first uses of bacteria to produce a work of art, Alexander Fleming, the Nobel Laureate who discovered Penicillin, used a paper soaked in culture medium to produce an image of a guardsman. Three years later in 1936, New York’s Modern Museum of Art displayed Edward Steichen’s *Delphinium*. Steichen treated Delphinium seeds with a mutagen that created both strikingly beautiful flowers and also “ugly, stunted, febrile rejects” that were purposefully withheld from the show, “exposing the role of edited selection in bio-art.”

A modern example of BioArt that challenges the boundaries between art and science is Marc Quinn’s *A Genomic Portrait: Sir John Sulston*. Quinn used the same technique that won Sulston the 2002 Nobel Prize to clone Sulston’s DNA into bacteria colonies that replicated to fill a rectangular agar medium. Quinn described it as the ultimate “realistic” portrait because it not only displays Sulston’s identity, but it also depicts “his parents and every ancestor he ever had back to the beginning of life in the Universe.”

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7 See id.
8 See id.
12 A review of the exhibited said: “The show is ‘breath taking!’ Giant spikes of brilliant dark blues, the intensity of which is amazing against the white background of the walls. There is a plum color never before seen by the writer. . . . Then pure whites against a deep blue background, some of them having startlingly black eyes, all standing stately and regal in their great containers.” Ronald J. Gedrim, *Edward Steichen’s 1936 Exhibition of Delphinium Blooms: An Art of Flower Breeding*, in *SIGNS OF LIFE* 347, 347-47 (Eduardo Kac ed., MIT Press, 2007) (quoting *Modern Art Museum Scene of Steichen Delphinium Exhibit*, GREENWHICH NEWS AND GRAPH, June 27, 1936).
13 Stracey, *supra* note 1, at 496.
15 Quinn, *supra* note 14, at 309.
16 *Id.*; See also Stracey, *supra* note 1, at 497.
17 Stracey, *supra* note 1, at 497.
This paper will argue that this type of expression is deserving of core First Amendment protection. As a result, a regulation that substantially interferes with a person’s artistic expression should be subject to strict scrutiny. Because the true value of artistic expression may not be immediately apparent to the reader, Part I summarizes several commentator’s views regarding the value of artistic expression in American society. Specifically, it argues that artistic expression is vital to the preservation of democracy because it checks government oppression and allows the artist and the viewer to experience alternative world views that reshape their understanding of the world. Next, Part II argues that BioArt is a form of artistic expression capable of achieving the same goals as traditional artistic expression.

The remainder of the paper reviews selected federal case law to construct an analytical framework for evaluating regulations that interfere with artistic expression. The framework asks the adjudicator to first identify an expressive element in an activity or work and then to determine whether that element is the predominate feature. Although the inquiry appears straightforward, the difficulties in determining the strength of expression in an activity or work are magnified by the fact that the art’s message might be different depending on whether the focus is on the viewer or the artist. Specifically, Part III begins by evaluating Supreme Court case law to determine when an activity becomes expressive. Next, the Second Circuit’s Street Vendor cases are used to explore the type of factual inquiries required to evaluate an expressive activity. Finally, Part IV explores how this framework and the First Amendment should be applied to hypothetical regulations limiting BioArt.

I. ARTISTIC EXPRESSION SHOULD BE GIVEN CORE FIRST AMENDMENT PROTECTION
Art is a powerful form of expression that cannot be easily justified by the traditional rationales for protecting speech. Artistic expression should be valued as a distinct form of expression because it conveys more than just a political message. Although there are a plethora of definitions of “art” and the definition of art itself is often a personal experience, this article will adopt Edward Eberle’s definition of art speech as “the autonomous use of the artist’s creative process to make and fashion form, color symbol, image, movement or other communication of meaning that is made manifest in a tangible medium.” Commentators generally point to two reasons why artistic expression is distinct from traditional conceptions of speech: (1) art is capable of conveying feelings, thoughts, and emotions better than traditional modes of communication; and (2) artistic expression is uniquely capable of preventing social and political stagnation. Although artistic expression is valuable independent from traditional political speech, it can nonetheless have political goals or reach political outcomes.

A. Defining Art

A major theme among commentators is that “art” is capable of expressing the nonrational better than other forms of speech. For example, Edward Eberle describes art speech as the “tangible manifestation of the artist’s personality.” For Eberle, art allows individuals to fully

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18 The three traditional rationales for protecting speech are (1) it allows for a marketplace of ideas where the best ideas are eventually selected by society; (2) it promotes self-government; and (3) it allows for individual self-fulfillment. See Sheldon Nahmod, Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment, 1987 Wis. L. Rev. 221 (1987) (arguing that none of these rationales adequately justify protecting artistic expression). Moreover, First Amendment scholar Randal Bezanson argues artistic expression is distinct from traditional speech because “[s]peech is expression that has an identifiable speaker who intends to communicate a specific message to an audience that reasonably understands that message.” Art, in contrast, does not require a specific message or that the audience understands that message. Randal P. Bezanson, Art and Freedom of Speech 272 (University of Illinois Press, 2009) (emphasis in original).

19 This article uses artistic expression as a synonym for art speech.


21 See infra Part I.A-B.

22 See infra Part I.B-C.

23 Eberle, supra note 20, at 6. Eberle also argues that artistic expression is the embodiment of the “the creative process central and unique to human existence.” Id.
express themselves beyond verbal communication. From simple cave drawings to the masterpieces of Da Vinci’s *Mona Lisa* or Picasso’s *Guernica*, each “is a tangible use of the creative process by which the artist or artists communicate some essential truth, vision, symbol or form about themselves, their world or the human condition.” This creative process is essential to the human condition because its products “have the special quality to inspire, satisfy, outrage, or disgust the viewers or listeners of the object of the art.”

Eberle argues that artistic expression is vital to develop a fuller, more satisfied self because it addresses aspects of human life that are beyond ordinary comprehension. Traditional justifications for the First Amendment such as the political speech model fail because they are built around the idea of man as a rational actor. For Eberle, and indeed many other critics, there is much more to human existence and expression than just “rational” thought or communication. This nonrational part of humanity is composed of our “senses, intuition, feelings, and vision.” In short, art offers direct access to the nonrational elements of human existence in ways other forms of speech cannot.

Moreover, artistic expression is unique because within the sphere of art, “a person can contemplate and muse over elements of the human condition free from the pressures or sanctions

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24 Id.
25 Id. at 8.
26 Id. This argument, along with many of Eberle’s arguments for artistic expression, presupposes that art is a unique human enterprise. This premise seems flawed when one considers the multiple examples of “art” in the animal kingdom. For example, Koko, a gorilla studied by Penny Patterson, was taught sign language and routinely finger-painted and generated similar art. *See generally* Francine Patterson and Eugene Linden, *The Education of Koko*, (Holt, Rinehart & Winston: New York 1981). Perhaps it is more than just the act of painting that goes into the artwork, but also the intellectual exercise of rendering an image on a canvas. Is Koko capable of this?

Other, less “evolved” examples of members of the animal kingdom producing art are: decorator crabs attaching garlands to their bodies, bird songs, and other mating rituals. Dominque Lestel, *Liberating Life from Itself: Bioethics and Aesthetics of Animality*, in *Signs of Life* 151, 153 (Eduardo Kac ed., MIT Press, 2007). Lestel is careful to point out, however, that these examples serve only functional ends, and we as humans are attaching the aesthetic meaning. Id. at 156. If this is the case, Eberle is saved.

28 Id. at 9.
29 Id.
of normal social forces.”\textsuperscript{30} Judgments that make up the world of knowledge (and the world of law) operate within an established set of rules; however, judgments of art and aesthetics involve “the free use of imagination and intuition.”\textsuperscript{31} Moreover, “[t]he artist and his or her viewer share the bond of communicating and sensing life feelings, sharing meanings. Each thereby participates in the universal experience of being human.”\textsuperscript{32} This experience allows both the creator and the viewer of art to experience new dimensions free from the “control of government and the majoritarian forces that form conventions and the normal rules of society.”\textsuperscript{33} Art speech is valuable because it allows the speaker and the viewer to participate in a creative medium outside the bounds of traditional speech.

\textit{B. Artistic Expression Prevents Cultural and Political Stagnation}

Marci Hamilton argues that art speech is more than just a safety valve.\textsuperscript{34} She argues that artistic expression is necessary in a representative democracy to challenge existing systems of power because “[s]ystems of power, once in place, tend to perpetuate themselves and to become encrusted and unresponsive to external demands for accommodation.”\textsuperscript{35} The Constitution was written to safeguard the liberties of the people by providing checks and balances to prevent a system of power from becoming entrenched. Hamilton points to the Federalist No. 51 to show that the Framers focused on developing a system of checks and balances to limit the power of the Federal Government and to protect the liberties of the people.\textsuperscript{36} In addition to the checks and balances associated with having three branches of government, the people must be also able to

\begin{footnotesize}
\begin{enumerate}
\item Id. at 6.
\item Id. at 15.
\item Id. at 16.
\item Id.
\item Id. at 79.
\item Eberle, \textit{supra} note 20, at 21.
\end{enumerate}
\end{footnotesize}
check government power to prevent tyranny. One such check is the First Amendment which, according to Hamilton, “reinforces the subversive quality of the Constitution by preventing government from suppressing the private spheres of religion, art, and philosophy that can enrich the people’s capacity to challenge government’s ideological hegemony.”

Hamilton argues that artistic expression achieves this function because it involves two phenomena that “occur simultaneously within the participants’ experience of art: (1) the recognition of preexisting world views, and (2) the act of defamiliarization, the distancing of oneself from one’s assumptive world view.” A “world view” is the individual’s awareness of society’s thoughts, ideas, and norms. Art allows the artist and the viewer to encounter new thoughts, experiences, and feelings that are outside the normal realm of the participants’ world view. This is valuable because it brings new ideas and the possibility of change, both of which are not possible within traditional modes of discursive communication.

The experience of defamiliarization occurs when the participant juxtaposes the new world view he or she experiences with his or her existing world view (e.g. painting a forest gray instead of green). It “threatens conventional world views by offering an alternative and by making the conventional world view appear less determined.” For Hamilton, “[a]rt’s instrumental, First Amendment value lies in its capacity to bring to the foreground some aspect of the environment’s complexity that, within the autopoietic system of meaning, had been excluded and to compare the foregrounded material against the reader’s previously held, but now

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37 Hamilton, supra note 34, at 85.
38 Id. at 85.
39 Id. at 88.
40 Hamilton refers to this collection of society’s thoughts, ideas, and norms as a “thought collective.” Id. at 89.
41 Id. at 92.
42 Id. at 92.
43 Id.
backgrounded, original world view.” In contrast, traditional speech occurs within an existing worldview or political structure and as a result it cannot effectuate cultural or political change in the same way that artistic expression can.

C. Artistic Expression and Political Speech

As Hamilton and others suggest, artistic expression has value beyond displaying the nonrational for its own sake: it can have profoundly political implications. Randall Bezanson rejects the theory that art exists in an independent non-rational realm made up of the “imagination . . . mystery and the purely sensory.” For Bezanson, “[f]ree speech, after all, rests on the assumption of individual free will and liberty of belief. It rests on the capacity for free political and economic and social and personal and religious beliefs, which, then, serve the self-governing objectives of representative democracy.” The self-government approach to the First Amendment “contends that representative government depends on the ability of the governed to communicate freely with the government and with one another.” As the argument goes, a free thinking society is better able to participate in the democratic process, which is essential for the operation of government. In other words,

[The point] is that imagination is foundational to self identity—who we are and why, even—and to knowledge and intelligence and insight and creativity. These things are not separate from the capacity to think and conclude, but . . . they are inextricable parts of our mental processes.

44 Id.
45 Bezanson, supra note 18, at 256. Many other scholars have made similar arguments to Bezanson’s. Most notably, Alexander Meiklejohn argued that “Literature and the arts must be protected by the First Amendment. They lead the way toward sensitive and informed appreciation and response to the values of which the riches of general welfare are created.” Alexander Meiklejohn, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245, 257 (1961).
46 Bezanson, supra note 18, at 257.
47 Nahmod, supra note 18, at 235.
For Bezanson, art and the nonrational are valuable to society because they are part of
greater rational ideas.  This interpretation, however, undervalues artistic expression by making
it subservient to a political purpose. Bezanson describes Albert Einstein’s famous formula,
e=mc^2, as a “re-representational perception of common events.”  Similarly, he finds that Isaac
Newton’s “seeing an apple fall but perceiving and then understanding it differently in terms of
gravity” is illustrative of the point that some of the great cognitive minds “see the world
differently, a bit off-center, [and] connected in unappreciated ways.” Because of this, it is not
hard for Bezanson to conclude that art involves a “fostering [of] imagination, re-representation,
and new meaning or significance, aesthetic rather than purely cognitive expression, art serves the
purposes of the First Amendment.”  This line of argumentation runs the risk of justifying art
only to the extent to which it serves particularized rational goals. Nonetheless, it is not
damning to recognize that art has the potential for political expression. Art speech is capable
of conveying ideas, messages, and thoughts in ways that are extraordinarily different form
traditional speech. Although its true value may lie in its ability to convey nonrational ideas, it
should also be noted that rethinking the world through art can serve rational political goals as
well.

II. BIOART IS A UNIQUELY VALUABLE MODE OF EXPRESSION

49 Id.
50 Id.
51 Id.
52 Bezanson does argue that “the point is not that art must serve such ultimately scientific or cognitive ends to qualify for protection or that the apple was art to Newton [but that it is instead that imagination is foundational to
self-identity.” Bezanson, supra note 18, at 257.
53 Id. at 275(emphasis added).
54 This is particularly troubling where Bezanson admits that “artistic expression may but need not concern issues of
self-government and political democracy.” Id. In an attempt to find space in the Constitutional for art protection,
Bezanson jettisons the “abstracted conception of art” that exists in the purely nonrational. See id. In an effort to
rationalize a place for artistic expression in First Amendment jurisprudence, Bezanson has done just that—
rationalyzed artistic expression.
55 See Eberle, supra note 20, at 16-17; Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1996) (discussing
Winslow Homer’s paintings about the Civil war).
BioArt, at its most basic level, can be understood as artistic expression using biotechnology as a medium. By juxtaposing the traditionally rational world of science with the abstract nonrational world of art, BioArt is in a unique position to achieve the type of defamiliarization Hamilton described. A commentary in a research journal argues that the BioArt movement has been successful at jarring the conscience of the audience. The reactions “have gone beyond judgments of beauty in favour of more sublime and apocalyptic assessments.” Moreover, [They] range from accusations of promoting a new ‘artful’ eugenic movement, to cries of aesthetic indulgence in ‘carnivalesque sadism,’ to condemnation of the artists as naïve or unwitting pawns in a market-driven public relations game on behalf of bio-tech industries, using the allure of culture to sell controversial science to a wider audience.

Two examples of how BioArt can defamiliarize are: (1) the discourse of BioArt itself blends science and art to suggest new ways of looking at the biotechnology industry and (2) Marc Quinn’s *A Genomic Portrait: Sir John Sulston* reduces humanity to its most basic building blocks.

First, BioArt pieces together its own language from artistic and scientific discourses to create new meaning. For example, Louis Bec attributes new meaning to the term “construct,” (with emphasis on the first syllable) attributing it to goals beyond simple scientific manipulations. In biological discourse, a “construct” refers to a DNA molecule altered by humans to facilitate insertion into a host organism. In a very real sense it is constructed—*i.e.* it is artificially created—to achieve a functional end. For example, in *drosophila* research, a

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56 Stracey, *supra* note 1, at 497.
57 *Id.*
58 *Id.*
DNA construct is integrated into a host genome to produce new proteins or alter eye color. BioArtists seize the technology to construct organisms with a “poetic objective” capable of creating poems and visual depictions. The goal is to bring human-made life outside of the sterility of the laboratory and into the public eye.

The term “transgenic” also has significant meaning to the artist beyond the scientific definition. In biology, a transgenic organism is one that contains an exogenous DNA sequence. However, once the DNA is inserted into the host genome, it is indistinguishable from the organism’s “natural” DNA. As one commentator suggests, however, calling something “transgenic gives it a dimension of endogenous abnormality, a hidden dimension that divulges the underlying pressure of degrading and impure procedures that engineered it . . . .”

By focusing on the language of biotechnology, the BioArtist forces the audience to reconceptualize the role science plays in everyday life. Kac and Bec’s emphasis on the scientist’s role in constructing life illuminates the differences between the natural and the artificial. It also suggests that scientists do more than conduct experiments or make new biological tools, they are actually creating life. Similarly, by emphasizing that many transgenic organisms have foreign DNA segments, the BioArtist reminds the audience that there is something artificial or unnatural about genetic engineering. This type of word play is particularly useful in the genetically modified food debate. By emphasizing that genetically

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61 See id.
62 Eduardo Kac argues that poetry has “moved away from the printed page.” Eduardo Kac, Biopoetry, 3 TECHNOETIC ARTS 13, 13 (2005). For Kac, now that we live “[i]n a world of clones, chimeras, and transgenic creatures, it is time to consider new directions for poetry in vivo.” Id. He also suggests several works of biopoetry including: “Transgenic poetry: synthesize DNA according to invented codes to write words and sentences using combinations of nucleotides. Incorporate these words and sentences into the genome of living organisms, which then pass them on to their offspring, combining with words of other organisms. Through mutation, natural loss, and exchange of DNA material new words and sentences will emerge. Read the trans poem back via DNA sequencing.” Id.
63 See Lori Andrews, Tissue Culture, JOURNAL OF LIFE SCIENCES 68 (Sept. 2007).
64 See Roman, supra note 60, at 1243-44.
65 See Bec, supra 85-6.
modified foods contain a foreign element that is “abnormal,” BioArtists encourage the viewer to reevaluate the role technology plays in their daily life.

Second, Marc Quinn’s *A Genomic Portrait* discussed in the introduction blends the “nineteenth-century idea of what a genealogical portrait should be” with modern genetic techniques. Quinn extracted a DNA sample from the sitter and replicated it in colonies of bacteria, thus creating an abstract but incredibly accurate representation. Quinn’s portrait is a perfect example of how art can defamiliarize the viewer by “threaten[ing] conventional word views [and] offering an alternative.” The work forces the viewer to reconceptualize what it means to be human and to be part of a family because the work displays not only the individual but also his genetic ancestry. Moreover, the work of art means different things to different viewers. One commentator opines that the piece “implies that not only is a single self or identity discernable from genes alone, but so too is all of human history.” Other critics have argued that the piece oversimplifies what it means to be human because it “reduc[es] . . . complex life to a sort of generic processing system” and it suggests “genes alone determine matters of life and death.” In either case, the viewer is forced to ponder not only what makes a portrait but also what makes a person.

III. THE LAW OF ARTISTIC EXPRESSION

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66 Quinn, supra note 14, at 309.
67 Id.
68 Id.
69 Hamilton, supra note 34, at 92.
70 Stracey, supra note 1, at 497.
71 Id.
The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.” Although there are a variety of justifications for the First Amendment, the general scope of its protection is clear: “All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have full protection of the guaranties.” Because of this, government regulation generally cannot make a distinction based on the worth or content of an idea. Moreover, in *Cohen v. California*, Justice Harlan, writing for the majority of the Court, explained that language is not limited to conveying cold, rational ideas, but it also conveys “otherwise inexpressible emotions as well.”

In addition to the written or spoken word, expressive conduct is also protected under the First Amendment. Interpreting the term “speech” to include “symbolic speech,” the Supreme Court has found that a black armband can symbolize a disagreement with the Vietnam War, or a burning cross can symbolize hatred, violence, and intimidation. The Court has struggled to articulate a clear test when conduct reaches the level of symbolic speech, but it has made it clear that “[the Court] cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” With an eye towards skepticism, the Court evaluates the “nature of [the person’s] activity, combined with the factual context and environment in which it was undertaken” to

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72 U.S. Cont amend. I.  
73 See infra Part I.  
74 Roth v. United States, 354 U.S. 476, 484 (1957). This is not to suggest that there are not limitations to the freedom of speech (e.g. obscenity, fighting words, etc.).  
75 See Roth, 354 U.S. at 484.  
77 “[L]inguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force.” Cohen v. California, 403 U.S. 15, 26 (1971).  
determine if he or she intended to express an idea.82 The idea, however, need not contain a particularized message and the audience is free to interpret that message however it chooses.83

A. Supreme Court Case Law: When Conduct Becomes Art

The protection afforded to expression under the First Amendment is not absolute.84 Restrictions based on the content or worth of the message are subject to strict scrutiny; however, restrictions on conduct that incidentally restrict expression are subject to a lower scrutiny.85 Additionally, government can properly regulate expression by imposing time, place, or manner restrictions.86 No matter the restriction, the Court must balance the weight of the “speech” with the government’s interest in limiting that speech. A classic example is the Pentagon Papers case where the court weighed the government’s interest in national security against the almost insurmountable interest of a free and unrestricted press.87 Although in some circumstances the Court’s balancing is zero-sum, the Court must often deal in degrees. The first inquiry to any First Amendment analysis is whether an activity involves an expressive element.

When an actor combines speech and conduct, government can act as long as its regulation is neutral with regard to the actor’s message.88 As the Supreme Court stated in Ward v. Rock Against Racism:

Even in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are

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82 Spence v. State of Washington, 418 U.S. 405, 409-10 (1974); See also O’Brien, 391 U.S. at 376 (arguing that “We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”)
84 See infra Part IIIA.
85 See infra notes 87-104 and accompanying text.
86 See infra notes 87-104 and accompanying text.
88 O’Brien, 391 U.S. at 376 (1968); Ward, 491 U.S. at 791.
justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communications."89

If, however, the regulation is not content neutral and seeks to regulate a specific aspect of a person’s expression, the regulation must survive strict scrutiny because the balancing is zero-sum. The difficulty arises when the expression and the conduct are inextricably intertwined.

*Ward* provides a modern example of expressive conduct analysis. In *Ward*, the City of New York imposed sound restrictions on those who use Central Park’s amphitheatre and stage structure known as the Naumberg Acoustic Bandshell.90 The City of New York began providing high quality sound equipment but required that a city-employed technician perform all the sound mixing to “insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayoral decree quiet zone of Sheep Meadow.”91 Rock Against Racism (RAR), a group dedicated to the promotion of anti-racist views and sponsor of a program of speeches and rock n’ roll music at the Bandshell, filed suit alleging that the user guidelines were facially invalid because they violated the First Amendment.92

The first step of the First Amendment inquiry is to determine the purpose of the government’s regulation.93 Government regulation of a speech activity is content neutral so long as it is “justified without reference to the content of the regulated speech.”94 In this case, the Supreme Court found that the regulations were not content based because they were directed to the city’s “desire to control noise levels at bandshell events, in order to . . . avoid undue intrusion into residential areas and other areas of the park.95

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90 Id. at 784.
91 Id. at 788 n. 2.
92 Id. at 788-89.
93 See id. at 791.
94 Id. (*quoting* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).
95 Id.
The second step involves a two part inquiry. There must be a significant government interest and the regulation must be narrowly tailored to meet that interest.96 In this case, although “[m]usic is one of the oldest forms of human expression” and “as a form of expression, is protected under the First Amendment,”97 the government has a “substantial interest in protecting its citizens from unwelcome noise.”98 For a time, place, or manner regulation to be narrowly tailored, it need only “promote[] a substantial government interest that would be achieved less effectively absent the regulation.”99 In other words, the Government cannot “regulate expression in such a manner that a substantial portion of the burden on speech does not serve its goals.”100 In Ward, the Court found the regulation narrowly tailored because the city’s interest was “served in a direct and effective way” and absent the regulations, the “City’s interest would have been served less well.”101

Lastly, the regulation must “leave open ample alternative channels of communication.”102 In the case of Ward, the organization could continue to express whatever it chooses, simply at a lesser volume.103 Although RAR had a strong free speech interest in its high value political speech, the government regulations imposed only minor burdens on the organization and did not prevent RAR from effectively conveying its message.

The Ward Court did not struggle to find First Amendment value in Rock Against Racism’s activities. The Court quickly determined that RAR had an easily discernable political message and that music itself is inherently expressive.104 Moreover, the Court easily

96 See id.
97 Id. at 790.
98 Id. at 796 (quoting City Council of Los Angeles Taxpayers for Vincent, 466 U.S. 789, 806 (1984)).
99 Id. at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).
100 Id. at 799.
101 Id. at 800.
102 Id. at 791.
103 Id. at 802.
104 The Court began its analysis with:
distinguished the conduct of playing loud music and the expressive message the organization wished to convey. This may be because RAR’s activity involved spoken words and had a simple, particularized message. When the expressive activity involves little or no spoken words, however, the distinction between conduct and expression can be much more difficult to ascertain. For example, how can one determine when the act of nude bar-room dancing ends and expression begins?

In *Barnes v. Glen Theatre, Inc.*, the proprietors of two Indiana establishments seeking to provide totally nude dancing challenged an Indiana statute banning public nudity. The Supreme Court held, however, that the statute requiring the dancers to wear pasties and G-strings did not violate the First Amendment. At issue at the Supreme Court was whether nude dancing was an expressive activity and if so, to what degree should it be protected under the First Amendment. The State argued that the statute can be properly applied to nude bar-room dancing because the activity “encourag[es] prostitution, increase[es] sexual assaults, and attract[s] other criminal activity.”

A divided Court found the statute constitutional as applied and, despite the fractured opinion, a majority of the Court found that nude bar-room dancing was protected to some degree by the Constitution. Additionally, “all of the justices agreed that protected expression need

Music is one of the oldest forms of human expression. From Plato’s discourse in the Republic to the totalitarian state in our times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical composition to serve the needs of the state. The Constitution prohibits any attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment.

*Ward*, 491 U.S. at 790 (citations omitted).


106 *Id.* at 564.

107 *Id.* at 560.

108 *Id.* at 594 (Souter, J., concurring) *(quoting* Brief for Petitioners at 37).

109 The plurality, written by Chief Justice Rehnquist, found that nude dancing was subject to a modest degree of First Amendment protection. *Barnes*, 501 U.S. at 581. Justice Souter in his concurrence and the four dissenters (Justice White, Justice Marshall, Justice Blackmun, and Justice Stevens) found that nude barroom dancing should be awarded relatively strong protection. *Id.* at 587-88 (White, J. dissenting).
not take cognitive or reasoned form, and need not have a cognitive message."110 However, the Court disagreed over the level of protection extended to the expressive conduct.

The time, place, or manner test described above is generally applied only to expression that takes place in public forums; however, the *Barnes* Court noted that it has been applied to conduct occurring on private property as well.111 For conduct that occurs on private property, the Court usually applies the *O’Brien*112 test, which “has been interpreted to embody much the same standards” as the time, place, or manner test described in *Ward*.113 Both tests are designed to balance the government’s interest in restricting conduct with the actor’s interest in expressing his or herself.

Chief Justice Rehnquist, Justice O’Connor, and Justice Kennedy focused on the conduct and limited the expressive value of the dance.114 For the plurality, the statute regulated the conduct of public nudity, not the expressive element of the dance.115 They found that granting full First Amendment protection to nude dance is a slippery slope because “[i]t is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”116 By framing

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110 Bezanson, *supra* note 18, at 257.
113 *Barnes*, 501 U.S. at 566 (*citing* U.S. v. O’Brien, 391 U.S. 367 (1968); *See also* *Ward*, 491 U.S. at 798 (explaining that the time, place, or manner test incorporates much of the same analysis as the *O’Brien* test). Under the *O’Brien* test, in order for a restriction on expressive conduct to be constitutional, four elements must be met: (1) the government regulation must be “within the constitutional power of the Government;” (2) it must “further[] an important or substantial government interest;” (3) the government interest must be “unrelated to the suppression of free expression;” and (4) “the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest.” *O’Brien*, 391 U.S. at 377. The Court has clarified that the fourth element does not require that the restriction be the “least restrictive or least intrusive means” of achieving the government’s interest. *Ward*, 491 U.S. at 798. “Rather, the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’” *Id.* at 799 (*quoting* United States v. Albertini, 472 U.S. 675, 689 (1985)).
114 *Barnes*, 501 U.S. at 570.
115 *Id.*
116 *Id.* at 570 (*quoting* Dallas v. Stanglin, 490 U.S. 19, 25 (1989)).
the issue as one where the State sought to regulate the conduct of public nudity, not limiting the type of expressive dance, the plurality found it easy to uphold the statute.\textsuperscript{117}

The four dissenters found performance dance inherently expressive, and “treat[ed] nude dancing as ‘pure speech’ subject to protection identical to that afforded to political speech.”\textsuperscript{118} For the dissent, the Indiana statute is not a general prohibition of the type upheld in \textit{O'Brien} or \textit{Ward} because the nudity ban does not apply to nudity in performances such as plays, ballets, or operas.\textsuperscript{119} In other words, the state was not interested in prohibiting nudity that had artistic merit. The dissent also found that because “[s]ince the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition.”\textsuperscript{120} Moreover, “when the State enacts a law which draws a line between expressive conduct which is regulated and nonexpressive conduct of the same type which is not regulated . . . the burden [is] on the State to justify the distinctions it has made.”\textsuperscript{121} As a result, the dissent found that the State’s justification of protecting non-consenting others from the harmful message of eroticism and sexuality was not narrowly tailored.\textsuperscript{122} The dissent put it simply: “generally banning an entire category of expressive activity . . . does not satisfy the narrow tailoring requirement of strict First Amendment Scrutiny.”\textsuperscript{123}

Justice Souter also found that dance is inherently expressive, but nonetheless afforded it a lower degree of protection under the First Amendment because the “speech” arose from the

\textsuperscript{117} \textit{Id.} at 570-72.
\textsuperscript{118} Bezanson, \textit{supra} note 18, at 75; \textit{Barnes}, 501 U.S. at 587-90 (White, J. dissenting).
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Barnes}, 501 U.S. at 591 (White, J., dissenting).
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.} at 594 (\textit{citing} Frisby v. Schultz, 487 U.S. 474, 485 (1988)).
\textsuperscript{123} \textit{Id.}
conduct of dancing which is afforded a lesser degree of protection than pure speech. He found that the State’s asserted justification for banning nude bar-room dances was “sufficient under O’Brien to justify the State’s enforcement of the statute.” Justice Scalia appears to admit that some aesthetic or emotional expression can be protected under the First Amendment but found the statute at issue was directly targeting only conduct, and therefore did not trigger First Amendment analysis.

The Court’s debate over what, if any, message should be attributed to performance dance and whose understanding of that message should be adopted highlights the difficulty in applying traditional free speech doctrine to expressive conduct and art in general. As Bezanson argues, the fundamental premise of free speech law is that “[s]peech is expression that has an identifiable speaker who intends to communicate a specific message to an audience that reasonably understands that message.” In Ward, it was easy to find the speaker and attribute a particular message because the “speaker” was literally speaking. In Barnes, however, the protected “speech” is nonverbal communication open to a wide variety of interpretations. It becomes much more difficult to evaluate the speech when a single, succinct message cannot be pinpointed and traced from the speaker to the audience. A dancer may intend to convey a message of “eroticism” or an “endorsement of erotic experience” but the audience may interpret that message as an invitation for sexual exploitation. The problem is compounded when it is unclear whether a particularized message like the “endorsement of erotic experience” can be attributed to the speaker at all.

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124 Barnes, 501 U.S. at 581-82 (Souter, J., concurring).
125 Id. at 583.
126 Bezanson, supra note 18, at 77; Barnes, 501 U.S. at 572-73 (1991) (Scalia, J., concurring).
127 Beanzon, supra note 18, at 272 (emphasis removed).
In *Barnes*, the Court was concerned with the message the dancers wanted to convey and weighed that message with the State’s interest in prohibiting public nudity. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, parade organizers were allowed to exclude a group of homosexuals from marching as a separate unit and displaying a banner in support of the gay, lesbian, and bisexual movement. There, a unanimous Supreme Court found that parades are inherently expressive, regardless of whether or not they convey a concrete particularized message. Perhaps more importantly, the meaning of the parade need not be found in the intent of the parade organizer, but can be found in the audience’s perception of the parade.

The Supreme Court’s decision in *Boy Scouts of America v. Dale* further explains the public’s role in determining the speaker’s message. The Boy Scouts of America terminated an openly gay scout leader after a newspaper published an interview with him advocating homosexual teenagers’ need for gay role models. BSA argued that the public would perceive a failure to terminate Dale as an implicit endorsement of homosexual conduct. The majority agreed, stating that “Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”

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132 *Hurley*, 515 U.S. at 568-69. The Court stated that “Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent’s expression in the Council’s eyes comports with what merits celebration on that day.” *Id.* at 574.
133 The Court argued that “GLIB’s participation would likely be perceived as having resulted from the Council’s customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possible of support as well.” *Id.* at 575; See also Bezanson, *supra* note 18, at 142-43. For a deeper analysis of the multiple different theories of communicative meaning as applied to *Hurley*, see Bezanson, *supra* note 18, at 138-52.
135 *Id.* at 645.
136 *Id.* at 645.
137 *Id.* at 652.
For the majority, the symbolic act of allowing an openly gay scout master to remain in the Boy Scouts sends a strong enough message to warrant First Amendment protection. The dissent took the position that not all forms of conduct are expressive enough to warrant First Amendment protection and BSA’s discrimination outweighed any First Amendment value. This case is important from an artistic expression standpoint because the majority allowed the public to attribute its own meaning to the actions of others. As Bezanson argues, the majority opinion is “attribution to the Boy scouts of a message constructed by an audience and attributed to Dale.” Randall Bezanson argues that the majority took an “artifactual” approach to free speech where speech is only protected if it is “understood as expressive.” Moreover, “[t]he artifact of speech is protected, as was the unwelcome message in Dale, irrespective of the knowledge or intention of the person or thing that produced it.”

*Hurley* and *Dale* further complicate the First Amendment analysis. Unlike traditional modes of speech where an individual speaker intentionally and literally speaks a message that an audience predictably interprets, the cases above suggest that the First Amendment protects the

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138 *Id.*
139 *Id.* at 663-65 (Stevens, J., dissenting).
141 *Id.* at 102.
142 *Id.* Bezanson argues that because art is distinct from speech, “art itself, and artists as agents of artistic perception, should be absolutely privileged under the First Amendment.” *Id.* at 275. For Bezanson, free speech law is founded on the basic premise that “Speech is expression that has a identifiable speaker who intends to communicate a specific message to an audience that reasonably understands that message.” *Id.* at 272. As discussed above, the very nature of art is that it may not convey a specific, particularized message. The Supreme Court has allowed audience members or the general public to construct a meaning different from the speaker’s intent. Similarly, *Hurley* stated that works of art without a particularized message were “unquestionably” protected. If art need not have a particularized message, from a particular speaker, and the message can change from viewer to viewer, how can art be classified as speech?

The simple answer for Bezanson is that it cannot be and that art should be unquestionably protected. “This is not because [artists] earn or deserve absolute privilege or even because what they do is expressively more important than political speech or something else. It is instead because absolute privilege is the logically necessary consequence of the qualities that make art distinct from other expression.” *Id.* at 275. Analytically, art cannot fit into the framework for “speech” analysis because with art, “there is no one to blame, no single message to judge, [and] no probably consequence or harm to measure.” *Id.* at 274. Rather, the artist simply unleashes an “aesthetic, interpretive process” for which the viewer to construct his or her own meaning. *Id.*
speaker even if the audience attributes a message to the speaker that he or she did not intend. Although the outcome of the analysis often reflects society’s views of the underlying conduct, the result is the same: the expressive element in the conduct is given some degree of First Amendment protection. This concept, combined with Harlan’s rationale in Cohen that the First Amendment protects the emotive function of ideas, provides a strong foundation for the protection of art.

Courts have generally found “art” protected under the First Amendment insofar as it contains an expressive element. However, as evidenced by the Barnes decision, courts have had considerable difficulty determining whether or not a particular thing—be it a painting, sculpture, photograph, or performance—contains an expressive element. While the Court generally decides whether an act or an object is expressive, the question of whose interpretation of the message conveyed is still open for debate. In Barnes, the Court disagreed over whether the dancer’s intent to convey an “endorsement of eroticism” or the less savory messages interpreted by the audience controlled. However, in Dale, the court assumed that the public’s perception of BSA’s inaction controlled.

If all that is required is that someone understands the artifact or act as expressive, then the artist’s intent is irrelevant. When a person sees DuChamp’s The Fountain and he or she perceives it as conveying a message, it is protected under the First Amendment, regardless of whether or not the “artist” had any expressive intent. Courts however, often take a hybrid approach, focusing on elements both of the audience’s perception and of the performer’s intent.

B. Second Circuit Case Law: When an Item Become Art

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143 Conduct includes both affirmative acts and omissions. In Dale, the Court recognized that the general public interpreted BSA’s failure to terminate Dale as an implicit endorsement of homosexual conduct. See supra notes 130-137 and accompanying text.

144 See Barnes, 501 U.S. at 581 (Souter, J., concurring).
As the above discussion suggests, the Supreme Court has been reluctant to directly address the question: “what is art?” Instead, the Court addresses expressive conduct or the “speech” element of the activity in question. The Second Circuit, however, tackled the question head on and is one of the few courts to do so.\textsuperscript{145} \textit{Bery v. City of New York} involved a challenge to New York City’s General Vendors Laws\textsuperscript{146} which “bar[] visual artists from exhibiting, selling or offering their work for sale in public places in New York City without first obtaining a general vendors license.”\textsuperscript{147} In the interest of protecting free speech, the City Council exempted vendors of newspapers, books, and other written matters but did not provide an exception for artwork.\textsuperscript{148} Artists who were unable to obtain a license argued that the statute violated their First Amendment freedom of expression.\textsuperscript{149}

In ruling for the artists, the court relied on the underlying premise that visual art is entitled to full First Amendment protection.\textsuperscript{150} Rejecting the view that visual art was “mere ‘merchandise’ lacking in communicative concepts or ideas,”\textsuperscript{151} the court found that paintings, prints, photographs and sculptures are inherently expressive and worthy of full First Amendment

\textsuperscript{145} The Second Circuit has largely ignored \textit{Hurley’s} language that the First Amendment does not require the expression of a concrete particularized idea, “While we are mindful of \textit{Hurley’s} caution against demanding a narrow and specific message before applying the First Amendment, we have interpreted \textit{Hurley} to leave intact the Supreme Court’s test for expressive conduct in \textit{Texas v. Johnson.}” \textit{Church of American Knights of the Ku Klux Klan v. Kerik}, 456 F.3d 197, n. 6 at 205 (2nd Cir. 2004). \textit{See also Zalewska v. County of Sullivan}, 316 F.3d 314, 319 (2nd Cir. 2003) (holding that “To be sufficiently imbued with communicative elements, an activity need not necessarily embody ‘a narrow, succinctly articulable message,’ but the reviewing court must find, at the very least, an intent to convey a ‘particularized message’ along with a great likelihood that the message will be understood by those viewing it.”) (citations omitted).

\textsuperscript{146} NYC Code § 20-452 et seq.
\textsuperscript{147} Bery \textit{v. City of New York}, 97 F.3d 689, 691 (2d Cir. 1996). The city also limited the amount of licenses issued at 853 and at any given time there are between 500 and 5,000 applicants on a waiting list to obtain a license which translates into a waiting period of three to five years. \textit{Id.} at 692-93 (2d Cir. 1996). The General Vendors Law defines a general vendor as a person who “hawks, peddles, sells, leases or offers to sell or lease, at retail, [non-food] goods or services . . . in a public space.” NYC Code § 20-452(b). Moreover, public spaces are defined to include parks, plazas, roadways, shoulders, tree space, sidewalk, and terminals. NYC Code § 20-452(d).
\textsuperscript{148} Bery, 97 F.3d at 693.
\textsuperscript{149} \textit{Id.}(citing NYC Local Law 33).
Moreover, the court argued that the written word and art often overlap as evidenced by Chinese characters, which “are both narrative and pictorial representations.”

In addition to finding value in the artwork itself, the court also found a message in the act of marketing art on the street. The court argued “[a]rtists are part of the real world; they struggle to make a living and interact with their environments. The sale of art in public places conveys these messages.” The craft of the artist is distinct from “the crafts of the jeweler, the potter and the silversmith who seek to sell their work.” The court continued: “While these objects may at times have expressive content, paintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view it and as such are entitled to full First Amendment protection.” Thus, Bery articulated two levels of protection for the sale of objects: (1) those objects that are inherently expressive which include paintings, photographs, prints and sculptures; and (2) those objects that are potentially expressive.

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152 The court found:

Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection. Indeed, written language is far more constricting because of its many variants-English, Japanese, Arabic, Hebrew, Wolof, Guaraní, etc.-among and within each group and because some within each language group are illiterate and cannot comprehend their own written language. The ideas and concepts embodied in visual art have the power to transcend these language limitations and reach beyond a particular language group to both the educated and the illiterate. As the Supreme Court has reminded us, visual images are “a primitive but effective way of communicating ideas . . . a short cut from mind to mind.” Visual images and symbols, for example, are used in the Third World so that individuals who are unable to read may readily recognize the party or candidate they wish to vote for. One cannot look at Winslow Homer's paintings on the Civil War without seeing, in his depictions of the boredom and hardship of the individual soldier, expressions of anti-war sentiments, the idea that war is not heroic.

Bery, 97 F.3d at 695 (quoting West Virginia State Board of Education, 319 U.S. at 632).

153 Bery, 97 F.3d at 695.

154 Id. at 696.

155 Id.

156 Id. (citing Bery v. City of New York, 906 F. Supp. 163, 167 (S.D.N.Y. 1995)).

157 Id. at 696. The court concluded that the City’s licensing requirement violated the First Amendment as applied to the plaintiffs because it was not narrowly tailored to the City’s objective of reducing urban congestion. Id. at 696-97.

158 Id. at 696.
The Second Circuit revisited the question of what constitutes art in *Mastrovincenzo v. City of New York*.\textsuperscript{159} In *Mastrovincenzo*, the court found that graffiti style hats and shirts were not “paintings” within the meaning of the *Bery* injunction.\textsuperscript{160} Moreover, the court independently determined that the Mastrovincenzo’s “art” did not deserve the same protection as traditional paintings, photographs, prints, or sculptures.\textsuperscript{161} Mastrovincenzo and his co-plaintiff sold individuals decorated articles of clothing in what they call “graffiti” style.\textsuperscript{162} Mastrovincenzo categorized graffiti style as “highly stylized typography, iconography, and pictorial representation. . . [using] varying combinations of oil paints, spray paints, markers, and permanent paint pens.”\textsuperscript{163}

Rather than focus on whether the merchandise was “art” in the traditional sense, the court applied a two part test to determine whether the vendors were engaging in protected speech.\textsuperscript{164} Noting that “the most reliable means of determining whether a vendor is primarily engaged in an act of self-expression is not to consult the vendor himself,”\textsuperscript{165} the court examined the “objective features of the merchandise itself” to determine if the “plaintiff’s items, on their face, appear to serve predominantly expressive purposes.”\textsuperscript{166} Second, the court looked to the plaintiff’s subjective intent for creating and selling the merchandise, focusing on the creator’s “stated motivation for producing and selling” their objects.\textsuperscript{167}

\textsuperscript{159} *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006).
\textsuperscript{160} *Id.*
\textsuperscript{161} *Id.*
\textsuperscript{162} *Id.* at 86.
\textsuperscript{163} *Id.* (quoting Brief of Petitioner-Appellant at 3).
\textsuperscript{164} *Id.* at 91. The court explicitly recognized that their inquiry was not limited to “expressive merchandise,” but rather was “the first step of a larger inquiry into whether the plaintiffs are engaged in protected speech.” *Id.*
\textsuperscript{165} *Id.* at 94.
\textsuperscript{166} *Id.*
\textsuperscript{167} *Id.*
The court admitted that distinguishing between the two types of craft will be difficult, but it had faith that “district courts will prove capable of making such determinations.”\textsuperscript{168} The court articulated a test where the court must first identify an expressive element of any significance, then the court must decide if that expressive element is the predominate feature of the object.\textsuperscript{169} Additionally, if the object is being sold, “courts may gauge the relative importance of the items’ expressive character by comparing the prices charged for the decorated goods with the prices charged for similar non-decorated goods.”\textsuperscript{170} For example, if the vendor charges significantly more for the decorated item than for the undecorated item, it could enhance the claim that expression was the dominant purpose.\textsuperscript{171}

Applying the test to the facts of the case, the court found that the items could objectively be understood to have some expressive or communicative elements but they also have utilitarian features such as covering the wearer’s body.\textsuperscript{172} Moreover, the court found that because neither plaintiff sells undecorated articles and each charge between $10 and $100 per hat depending on the complexity of the design, the “non-expressive uses are secondary to the items’ expressive or communicative characteristics.”\textsuperscript{173}

After determining that the items were predominately expressive, the court evaluated the sellers’ motivation for producing and selling the product.\textsuperscript{174} The court considered several factors including: “(1) whether an artist’s stated motivation for producing and selling [an] item is his desire to communicate ideas, and (2) whether a vendor . . . purports, through the sale of goods, to

\begin{footnotesize}
\begin{enumerate}
\item[168] Id. at 95.
\item[169] Id. at 96.
\item[170] Id.
\item[171] Id.
\item[172] Id.
\item[173] Id.
\item[174] Id. at 96-97.
\end{enumerate}
\end{footnotesize}
be engaging in an act of self expression rather than a mere commercial transaction.\textsuperscript{175} To answer these questions, the court looked to the testimony of the artists, who both testified that their work was an expression of their upbringing.\textsuperscript{176}

Although the court found that the speech was protected, it applied an intermediate scrutiny standard to evaluate the vendor laws, finding it a valid time, place, or manner restriction. The court held that the restriction, “while . . . not the least speech-restrictive means available, is narrowly tailored and leaves regulated parties with ‘ample alternative channels of communication.’”\textsuperscript{177} In short, the court decided that vendors selling potentially expressive merchandise were not entitled to the same level of protection as sculptors and painters.\textsuperscript{178}

The Street Vendor cases highlight the difficulties in determining if an item is “art.” Just as the Supreme Court found parades inherently expressive in \textit{Hurley}, the Second Circuit found paintings, prints, photographs, and sculptures inherently expressive. The difficulty arises when something is “potentially expressive.” The cases illustrate one of the key difficulties in defining “art” as a category of speech protected under the First Amendment: virtually any “craft” can have some aesthetic value.\textsuperscript{179} While the Second Circuit asks whether the expressive element is the “predominate feature” of the object, one commentator argues for a different distinction.\textsuperscript{180} For Bezanson, a “craft” may be aesthetically pleasing, but it is distinct from “art” because craft works “do not carry an artistically transformative meaning, a sensual response that leads to

\textsuperscript{175} \textit{Id.} at 96-97.
\textsuperscript{176} \textit{Id.} at 97.
\textsuperscript{177} \textit{Id.} at 100.
\textsuperscript{178} The court also determined that the graffiti style hats were not “paintings” within the meaning of the \textit{Bery} injunction. The court was careful to articulate that its task is “not to divine the Platonic form of a ‘painting,’” but to determine if the \textit{Bery} injunction’s “paintings” include pictures and symbols drawn on baseball hats, jackets or other articles of clothing. The court looked to the common usage of the term paintings and determined that a “painting” is more than just “any pigment attached to a surface.” Instead, the court found that it refers only to “painted canvases.” Any broader reading of the term would “disrupt the parallelism of the four discrete categories to which the \textit{Bery} injunction specifically applies.”
\textsuperscript{179} See \textit{Mastrovincenzo}, 435 F.3d at 93 (explaining that the jewelry, pottery, and metal work sometimes, but not always, communicate an idea or concept to the viewer).
\textsuperscript{180} Bezanson, \textit{supra} note 18, at 268.
deeper or different meaning on an aesthetic or cognitive level."¹⁸¹ Both approaches, however, require the court to undergo a deep analysis into the intent of the artist, which is potentially problematic.¹⁸²

C. Constructing a Framework for Evaluating Art

Supreme Court case law and the Second Circuit’s method for determining the expressiveness of an item provide the building materials to construct an analytical framework for evaluating artistic expression. The first step is a factual inquiry to determine the expressive elements of an item or an activity. This threshold inquiry is required to determine if the First Amendment is implicated at all. Combining the Supreme Court’s expressive conduct analysis with the Second Circuit’s factual inquiry mitigates the chances of over extending First Amendment protection to a “limitless variety of conduct”¹⁸³ while insuring ample protection for artistic expression. Lastly, because artistic expression is vital to individual expression and American democracy—at least on par with traditional political speech—the court should apply strict scrutiny.

The first step is to make an objective inquiry into the expressive element of the item, informed by the underlying activity performed to produce the art.¹⁸⁴ The court need only identify that some expressive element is present, it need not evaluate the strength of the expression. The second step tightens the inquiry by querying whether the expressive element is the predominate feature of the activity or work. In determining whether the expressive element

¹⁸¹ Id.
¹⁸² The ultimate ruling does not, and indeed cannot, depend on what the message is. It just must determine whether or not there is a message.
¹⁸³ O’Brien, 391 U.S. at 376.
¹⁸⁴ It is impossible to understand whether an item or an activity is expressive without recognizing the activity that produced it. See supra Part I.
is the predominate feature, the court should combine the subjective intent test of the Second Circuit with an inquiry into the audience’s interpretation of the work.

On its own, the Second Circuit’s analysis is underinclusive because it focuses only on the intent of the actor, which minimizes or excludes a category of meaning that the Supreme Court recognized in *Dale* and *Hurley*: the unintended message attributed to an artist by an audience.\(^\text{185}\) For example, the iconic images of the Marlboro Man were part of an advertising campaign intended to increase the sale of cigarettes.\(^\text{186}\) However, the audience has since attributed a meaning beyond a simple desire to sell more products and the piece has become “an iconic work of cultural art.”\(^\text{187}\) The test’s shortcomings, however, are overcome by combining it with the Supreme Court’s analysis discussed above.

The addition of an inquiry into the audience’s interpretation is necessary from a theoretical standpoint because the message of a particular piece is often “created” in the mind of the viewer as a result of a synergistic relationship between the artist and the audience.\(^\text{188}\) Indeed, much of the value of artistic expression comes from juxtaposing world views with the audience’s preexisting viewpoint.\(^\text{189}\) This can often create unintended consequences and allows the individual to interpret the art as he or she chooses. In addition to the theoretical justification for evaluating the audience’s interpretation of the message, the Supreme Court recognized the role of the audience in discerning a message in *Dale* and *Hurley*.\(^\text{190}\) As the Second Circuit noted in *Mastrovincenzo* and *Bery*, it can be difficult for courts to determine whether or not an item or an

\(^{185}\) See supra Part I. B.
\(^{186}\) Bezanson, note 18, at 211.
\(^{187}\) *Id.* Focusing on the intent of the author while ignoring the audience’s perception would result in a conclusion that the piece is commercial speech and therefore subject to substantially less protection under the First Amendment. See generally Thompson v. Western States Medical Center, 535 U.S. 357 (2002).
\(^{188}\) See supra Part I.B.
\(^{189}\) See supra Part I.B.
\(^{190}\) See infra Part II.A.
activity should be considered art. Because of this, the analysis may be supplemented with expert testimony\footnote{See Christine Haight Farley, \textit{Judging Art}, 79 Tul. L. Rev. 805, 809 (2005).} or other extrinsic evidence.\footnote{See \textit{U.S. v. O’Brien}, 391 U.S. 367 (1969).}

To protect the artist’s and society’s interest in artistic expression, courts should apply strict scrutiny. In other words, a regulation that implicates the First Amendment must be narrowly tailored to serve a compelling State interest. The \textit{O’Brien} test has been applied to expressive conduct and artistic expression but \textit{O’Brien} and its progeny gives too much deference to the State and can substantially limit artistic expression.\footnote{For example, in \textit{Tunick v. Safir}, a district court in New York looked to art magazines such as \textit{Flash Art} and \textit{World Art Magazine} to aid its inquiry into whether a photographer was an artist. \textit{Tunick v. Safir}, No. 99CV5053, 1999 WL 511852, *3 (S.D.N.Y. Jul. 19, 1999).} The Court’s fear in \textit{O’Brien} of attributing First Amendment value to all types of conduct is mitigated by the factual inquiry described above to determine the expressive elements of an item or activity. Moreover, the Supreme Court’s analysis in \textit{Dale} and \textit{Hurley} suggests that the interpretation of expressive conduct and works of art is broadening because an artist no longer needs to intend to convey a particularized idea.

Anything less than strict scrutiny runs the risk of suppressing a mode of expression that serves a vital role in American society. As described in Part II, artistic expression unlike traditional political speech is uniquely capable of conveying feelings, thoughts, and emotions while providing creative outputs that are “essential to the human condition”\footnote{See supra Part I.B-C.} and challenge entrenched power systems.\footnote{See supra Part I.B-C.} Additionally, protecting artistic expression can provide a profound political message to check entrenched power systems.\footnote{See supra Part I.B-C.}

IV. EXTENDING FIRST AMENDMENT PROTECTION TO BIOART
BioArt has been described by some members of its community as simply art using biotechnology as a medium. BioArt’s unique ability to juxtapose the rational world of science with the traditionally nonrational world of art forces the distinction between purely scientific expression and artistic expression. One concern is the difficulty in determining when a person is acting as a scientist or as an artist. Although the concern over when a person is performing a utilitarian function or an artistic function is not unique to the biotechnology medium, it is magnified by the dichotomy between the “rational” scientist who uses the scientific method to prove a hypothesis and the expressive artist who uses scientific principles to illustrate a feeling, emotion, or idea. A commentator in the art magazine Leonardo answered the question “when does art become science and science art?” with a short, simple, “never.” The commentator argued that Science, as “systematic knowledge derived from observation and experiences,” can never truly enter the realm of art because art “[s]tarts from the spiritual, the subconscious, the imaginative.” The author ends his commentary with “all told, art is art and science is science like East and West; never will the two become one; [but] we do have Chinatown in Los Angeles nonetheless!”

Scientific commentators have argued that although there are fundamental differences between art and science, maintaining strict dividing lines between art and science is limiting and prevents access to broader cultural issues. Despite “divergent or even conflicting intellectual, ethical or aesthetic aims and interests,” art and science may be able to coexist.

A. BioArt as Scientific Expression

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199 Id.
200 Id. at 104.
201 Stracey, *supra* note 1, at 496.
202 Id. at 500.
Protecting BioArt as scientific expression provides at best limited protection.\textsuperscript{203} Although a full examination of the rationales for protecting scientific expression is beyond the scope of this article, it is worth briefly discussing. The distinction between conduct and expression is essential to an understanding of the scope of protection for scientific research. Scientific expression generally refers to the communication and publication of ideas, theories, and research results and is almost certainly subject to the same degree of First Amendment protection as other forms of the written or spoken word.\textsuperscript{204} Scientific research, on the other hand, is primarily conduct.\textsuperscript{205} Commentators have proposed three rationales for protecting scientific research under the First Amendment: (1) it is “an essential step in the process of dissemination of ideas and information;”\textsuperscript{206} (2) it falls under the wider protection of academic freedom;\textsuperscript{207} and (3) it falls under expressive conduct.\textsuperscript{208} The first two rationales do not help the BioArt analysis, but analyzing the scientist’s conduct as expressive conduct provides room for First Amendment protection of BioArt.

The first rationale analogizes research to newsgathering which is afforded a modest degree of protection. The Supreme Court has found that “without some protection for seeking

\begin{thebibliography}{9}
\bibitem{204} Any restriction on the publication of scientific data, ideas, communications, etc. would invariably be a content based restriction and would be subject to strict scrutiny.
\bibitem{205} See John. A. Robertson, \textit{The Scientist’s Right to Research: A Constitutional Analysis}, 51 S. CAL. L. REV. 1203, 1204-05 (1977-78). Robertson argues that the speech-action dichotomy distinction is “a matter of semantics only” because “[m]uch protection expression involves activity or physical movement. Buying and selling books, haranguing crowds, even writing, involve action though no one doubts their first amendment status.” \textit{Id.} at 1240. Robertson also distinguishes between the freedom to choose the “end or topic of research—the particular knowledge that one wishes to develop” and the means for obtaining that knowledge. He argues the choice of research topic is neutral, “and impacts others only though the methods selected for conducting the research and through the application of the resulting knowledge. \textit{Id.} at 1205.
\bibitem{206} \textit{Id.} at 1217.
\bibitem{208} See Keane, supra note 207, at 524-28.
\end{thebibliography}
out the news, freedom of the press could be eviscerated.”209 John Robertson argues that “[b]ecaus[e] academic researchers and scientists publish information and ideas essential for individual, social, and political decision-making, they should enjoy the same rights as the press to gather information.”210 The right to gather information in the newsgathering context, however, is weak and it is questionable whether the Court will protect conduct that is facilitative of future speech.211

Robertson argues that the gathering of scientific information is “crucial to private and public choice[s]” and the results of scientific research “may influence one’s views of the truth of basic structures of the universe, and thus determine an individual’s personal and religious choices.”212 Although scientific inquiry can play an important role in how a person defines him or herself, Robertson implicitly assumes that scientific inquiry is valuable because it conveys complex rational ideas that aid in traditional knowledge.213 With BioArt, however, the purpose of the “scientific inquiry” is not necessarily to add to the substantive knowledge of humankind, but instead to provide the viewer with an emotional experience.

The second rationale argues that scientific inquiry is protected as a form of academic freedom. The Supreme Court has stated “Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”214 Scientific inquiry, as the argument goes, is an essential part of the academic freedom protected by the First Amendment. This rationale also fails to provide a foundation for BioArt because it requires that scientific inquiry to further knowledge. BioArt seeks to transcend

210 Robertson, supra note 205, at 1238-39.
211 See Keane, supra note 207, at 524-28.
212 Robertson, supra note 205, at 1238.
213 Id.
214 Reagents of University of California, 438 U.S. at 312.
the limits of academic pursuit and provide the viewer and artist with a unique experience beyond traditional science.

The third rationale, that scientific research should be protected as a form of expressive conduct, a weak justification for scientific inquiry because it presupposes that the scientist is undertaking the experiment in order to express that a particular type of research is acceptable. As some commentators have argued, this rationale limits First Amendment protection to research fields where a preexisting controversy exists. Scientific expression then, is only protectable when it expresses a political idea about the medium of research. In contrast, evaluating BioArt from the expressive framework allows for greater protection because the ideas conveyed are not limited to an endorsement of a particular field of research but instead include limitless possibility for artistic expression.

B. BioArt as Art

Classifying BioArt as “art” drastically increases the scope of work protected by including space for protection of aesthetics, beauty, and emotion which are excluded from scientific expression. Assuming that BioArt is “art” in the traditional sense, it should be afforded substantial protection under the First Amendment.

One of the values of BioArt is that it is capable of creating strong emotional reactions from the viewer that challenge preexisting world views. Because of this, it is not surprising that many people have had strong negative reactions to BioArt, accusing BioArtists of “promoting a new ‘artful’ eugenics movement” and engaging in “aesthetic indulgence in ‘carnavalesque

215 See Keane, supra note 207, at 524-28.
216 Id. at 526-27.
217 Id.
218 Some commentators have suggested that BioArt is inherently expressive but that suggestion is untenable in a practical setting because it nonetheless requires a definition of BioArt that requires a value judgment of whether or not an experiment or an item is art. See Bec, supra note 59, at 84 (arguing that “[l]ife art is characterized by . . . fashioning the living and assum[ing] that its makeup consists of wholly expressive matter.”).
219 See infra Part II.
sadism.\textsuperscript{220} In addition to the strong reactions to the art itself, there are also concerns with the practical implications of using biological materials for art. There are serious ethical concerns with manipulating life for “art’s sake,” in addition to concerns with animal cruelty\textsuperscript{221} and fears of bioterrorism.\textsuperscript{222}

Suppose in response to growing fears of bioterrorism, Congress enacts a law prohibiting the intentional creation of a transgenic organism unless reasonably justified by a prophylactic, protective, bona fide research, or other peaceful purpose.\textsuperscript{223} Suppose further that at the turn of the 21\textsuperscript{st} century, researchers at the University of Singapore were attempting to create a new method for detecting water pollutants. The researchers genetically engineered Zebra fish\textsuperscript{224} to express either green-fluorescent protein (GFP) or red-florescent protein (RFP) depending on the chemicals the fish is exposed to.\textsuperscript{225} Genetic engineering of the Zebra fish in this context would

\textsuperscript{220} Stracey, supra note 1, at 497.
\textsuperscript{221} It is unlikely that protecting animals will reach the level of a “compelling government interest.” See U.S. v. Stevens, 533 F.3d 218 (3rd Cir. 2009) (cert. granted April 20, 2009).
\textsuperscript{222} For an example of the PATRIOT ACT’s application to artists see Joyce Lok See Fu, Note, The Potential Decline of Artistic Creativity in the Wake of the PATRIOT ACT: The Case Surrounding Steven Kurtz and the Critical Art Ensemble, 29 COLUM. J.L. & ARTS 83 (2005). In 2004, FBI agents seized laboratory equipment and two benign strains of bacteria from BioArtist Steven Kurtz’s residence after paramedics responding to an unrelated emergency at the Kurtz residence discovered “materials that made them uneasy.” Geoff Brumfield, Bacteria Raid May Lead to Trial for Artist Tackling Biodefence, 427 NATURE 690, 690 (2004). In addition to the biological materials, FBI investigators also seized research materials detailing the history of germ warfare that were part of The Marching Plague, a project that “simulates an anthrax attack as part of its critique of government germ-warfare research.” Id.; See also Rachel Courtland and Steven Kurtz, Q & A: The Four-Year Fight for Biological Art, 453 NATURE 707, 707 (2008). Kurtz was never charged with violating the PATRIOT ACT, but instead was charged with mail and wire fraud. He obtained the bacteria used in his art project from a University of Pittsburgh Scientist, Robert Ferrell. Ferrell pled guilty and was fined $500 for providing the samples to Kurtz while Kurtz’s suit was later dismissed. See U.S. v. Kurtz, No. 04-CR-2008, 2008 WL 1820903 (W.D.N.Y. Apr. 21, 2008); See also No Jail for Geneticist Who Posted Bacteria to Artist, 451 NATURE 879, 871 (2008).
\textsuperscript{223} This hypothetical regulation is modeled after language in the PATRIOT ACT which reads “Whoever knowingly possesses any biological agent . . . of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective, bona fide research, or other peaceful purpose, shall be fined under this title, imprisoned not more than 10 years, or both.” 18 U.S.C. § 175(b).
\textsuperscript{224} In addition to being common tropical fish found in many home aquariums throughout the country, Zebra fish are also a common model organism studied extensively in molecular biology. See generally Philip Ingham, The Power of The Zebra fish for Disease Analysis, 18 HUMAN MOLECULAR GENETICS R107, R107-R112 (2009).
\textsuperscript{225} Zhiyuan Gong et al., Generation of Two-Color Transgenic Zebra fish Using Green and Red Fluorescent Protein Reporter Genes gfp and rfp, 4 MAR. BIOTECHNOL. 146, 152 (2002) (describing a method for creating a multi-colored zebra fish to be used in “comparative studies of development of multiple tissues or organs and
fall under a “bona fide research or other peaceful purpose” because of the potential utility of creating a biodegradable, easy to read pollution monitor.

The first step in the process was to create a fish that permanently expresses the fluorescent color. At some point during the experimentation, the researchers realized the aesthetic value of a “glowing” fish and licensed the technology to Yorktown Technologies which began distributing genetically engineered Zebra fish as pets under the name GloFish®. In this context, the creation of the GloFish would probably violate the hypothetical statute because it was not created for a bona fide research use. Unless a “reasonable . . . peaceful purpose” is understood to allow genetic engineering for artistic expression, the statute would violate the First Amendment.

Preventing the creation of a GloFish implicates the First Amendment because the act of creating the GloFish has a substantial expressive element. By comparing the GloFish to an unmodified Zebra fish, it is plain to the objective observer that the GloFish has a bright, artificial color. The artificiality of the GloFish colors is highlighted by their whimsical names and by the activity required to produce the fish. Names like Electric Green, Starfire Red, and Sunburst Orange suggest that there is something unnatural about the organism. Moreover, the activity used to create the GloFish underscores the artificiality of the GloFish colors because it required the insertion of a foreign gene sequence into the GloFish genome. Lastly, just as in


Andrew Pollack, Gene-Altering Revolution Is About to Reach the Local Pet Store: Glow-in-the-Dark Fish, NEW YORK TIMES, Nov. 11, 2003 at A12.


See Mastrovincenzo, 435 F.3d at 96 (finding the difference in price between the alleged expressive merchandise and the plain unmodified version relevant to determining whether the merchandise had a predominantly expressive element.).
Mastrovincenzo, the final product is substantially more expensive than the blank canvas; a GloFish costs about five times more than an unmodified aquarium Zebra fish.\textsuperscript{230}

The next step of the inquiry looks to intent of the creator and the audience’s interpretation of the item. An approach that focuses solely on the creator’s original intent at the expense of later attribution of meaning would undervalue the artistic value of the GloFish because the original impetus behind GloFish was the development of a tool for detecting pollution. In other words, the creators did not intend to create a work of art. This is in contrast to Eduardo Kac’s \textit{GFP Bunny}, an albino rabbit engineered to glow green, which was intended from its conception to be art.\textsuperscript{231} The final products are strikingly similar: both organisms “unnaturally” produce GFP, are aesthetically pleasing, and have received widespread media attention. An intent based inquiry would exclude the GloFish from First Amendment protection while granting the \textit{GFP Bunny} protection even though both creations convey substantially similar meanings to the public.\textsuperscript{232}

Although the creator may not have intended to create a work of art, the work may still be “art” if the audience has attributed an artistic message to the work. For example, it is not unreasonable to interpret the GloFish and its distribution as a pet as an endorsement of the safety of genetically engineered organisms. The audience could also attribute the opposite message: the GloFish is an abomination and the artificial colors highlight the inherent wrongness in altering life. If any of these suggestions are corroborated by expert testimony or extrinsic evidence, then

\textsuperscript{230} Pollack, supra note 226, at A12.
\textsuperscript{231} See Eduardo Kac, \textit{Life Transformation—Art Mutation}, in \textit{Signs of Life} 163, 165-70 (Eduardo Kac ed., MIT Press, 2007). Additionally, Kac describes the project as comprising “the creation of a green fluorescent rabbit (Alba), the public dialogue generated by the project, and the social integration of the rabbit.” \textit{Id.} at 165.
\textsuperscript{232} \textit{GFP Bunny} has been interpreted to convey a variety of different messages including an emphasis on our ethical responsibility to organisms we control. See Stracey, supra note 1, at 498-99.
the fish should be considered a work of art and its creation should be afforded protection under the First Amendment as artistic expression.

Applying strict scrutiny, the regulation is unconstitutional as applied to artistic expression under the First Amendment. Although preventing bioterrorism is unquestionably a compelling State interest, the means employed are not narrowly tailored to meet that interest. The regulation is overinclusive because it applies to activities that neither pose a threat to national security nor increase the risk of bioterrorism. Manipulating genomes of aquarium fish, lab rabbits, or other benign laboratory organisms is unlikely to increase the threat of bioterrorism; however, the use of these techniques plays an important role in artistic expression. Moreover, there are other means that are substantially less restrictive and are better tailored to meet the government’s goal. For example, a regulation could prevent genetic manipulation of known biological pathogens such as Ebola, plague, or small pox.

Additionally, the regulation eliminates an entire category of expression and does not leave open ample modes of communication. BioArt generates much of its communicative force from the medium and method employed to create the work of art. In other words, genetically engineering biological organisms may be required to convey the artist’s message. In this case, genetic engineering of a common aquarium fish is required to convey the ideas described above. Similarly, in the case of GFP Bunny, genetically engineering the rabbit was essential to Kac’s message.

To suggest that a regulation restricting BioArt should be viewed under strict scrutiny is not to suggest that certain activities, even if undertaken in the name of art, cannot be prohibited.

233 This phenomenon is not limited to BioArt. For an interesting look at site-specific art, see Randall Bezanson & Andrew Finkelman, Trespassory Art, 43 UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM 245 (2010); See also Tunick v. Safir, No. 99CV5053, 1999 WL 511852, (S.D.N.Y. Jul. 19, 1999); Serra v. U.S. General Services Admin., 847 F.2d 1045 (2d. Cir. 1988).
For example, suppose Congress passes a law prohibiting the possession or use of “weaponized” anthrax unless reasonably justified by prophylactic or protective purposes. This regulation should survive a constitutional challenge if applied to an artist arrested for using anthrax in his or her project. The State’s compelling interest in preventing the spread of bioweapons and preserving life is narrowly tailored in this instance because anthrax, the medium, is inherently dangerous and poses a substantial threat to human life. Limiting the possession or use of the substance to only those uses which may result in the preservation or protection of life is therefore justified. Any decrease in the individual’s right to expression is outweighed by the government’s interest in preserving the safety of its citizens.

Taking one last example, suppose that Congress passed legislation banning human cloning for any purpose, citing an interest in preserving human dignity. Here, the regulation does not make a distinction between the content of the message the user conveys and it applies equally to scientific and artistic pursuits. Because scientific expression is generally afforded weaker First Amendment protection, the statute applied to a scientific experiment would be easily upheld. However, if an artist wishes to clone a human for an artistic project, or the audience attributes a political or artistic message to the unintending scientist, a stronger argument could be made for invalidating the statute as applied. This regulation is similar to the anthrax example above because human cloning inherently causes the harm to human dignity cited by Congress. This is a case where the medium itself inherently causes the evils sought to be prevented.

CONCLUSION

Artistic expression should be granted core First Amendment protection because it is essential to the human experience and it provides unique opportunities to contribute to the
political sphere. BioArt is a unique form of artistic expression that juxtaposes the rational scientific world with the abstract world of art. The resulting product challenges the viewer to reconsider the role that biotechnology plays in society. Artistic expression is of such great value to American society that any regulation that curtails art expression should be viewed as suspect.