Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

Freeing Buskers' Free Speech Rights: Impact of Regulations on Buskers' Right to Free Speech and Expression

John Juricich*

ABSTRACT

Buskers are street performers who perform for tips—they are not beggars or panhandlers. Unfortunately, their First Amendment rights are being quelled because they are being treated as such. Cities and municipalities are effectively infringing upon buskers' free speech and expression rights by promulgating vague and inadequate regulations that ban specific conduct often intertwined with busking. Although cities and municipalities have a duty to maintain public spaces, they cannot carry out this duty by arbitrarily violating buskers' constitutional rights. Therefore, the intricate balance between government interests and individual rights is at the heart of this busker dilemma.

Cities and municipalities are doing the courts no favors. The regulations that are being promulgated inevitably result in litigation. Then, the regulations force courts to define indefinable concepts: art and expression. To help alleviate the courts' definitional crisis, cities and municipalities should promulgate regulations aimed directly at advancing the government interests that necessitated the regulation, as opposed to targeting particular types of conduct. This would be a much-needed solution for the courts and would also properly strike a fair balance between government interests and buskers' free speech rights.

* J.D., University of Mississippi School of Law, 2016; B.A., University of Alabama, 2013. Associate, Maynard Cooper & Gale, P.C., Huntsville, Alabama. This Article was written during the *Mississippi Law Journal*'s Comment Program. The author wishes to thank Professor Jack W. Nowlin and Professor George C. Cochran for their continued help and guidance throughout the entire drafting and editing phases of this paper.

Throughout this Article, the case law directly impacting and shaping buskers' free speech rights is thoroughly dissected, and the argument is made that busking—including the solicitation of tips—is protected under the First Amendment. The proposed "advancing the interest" approach is elucidated to show how it will aid the courts and appropriately strike the balance between government interests and buskers' free speech rights. Last, the proposed solution is applied to the busker case of *Young v. Sarles*, to exemplify the problems of the current approach and illuminate the ease of the proposed "advancing the interest" approach to this busker dilemma.

TABLE OF CONTENTS

I. INTRODUCTION 40
II. THE BUSKER DILEMMA 43
A. *Government Interests v. Individual Rights* 43
B. *Courts Defining the Indefinable: New York City's Definition Struggle* 45
1. *Loper v. New York City Police Dept.* 45
2. *Bery v. City of New York* 46
3. *Mastrovincenzo v. City of New York* 47
C. *Pervasive Permitting* 48
1. Permitting Schemes Generally 49
2. Analytical Framework for Permitting Schemes' Constitutionality 50
3. Effect on Buskers 51
III. BUSKING IS PROTECTED UNDER THE FIRST AMENDMENT .. 55
A. *Entertainment Aspect is Protected* 55
B. *Begging Aspect is Protected* 56
C. *The Forum and Scrutiny Analysis* 57
IV. "ADVANCING THE INTEREST" APPROACH 60
A. *Regulations Should be Aimed Directly at Advancing the Governmental Interests at Play in this Busker Dilemma* ... 60
B. *Applying the "Advancing the Interest" Approach to Young v. Sarles* 61
V. CONCLUSION 62

I. INTRODUCTION

"Busking"—the time-honored practice of performing in public places for tips—gives birth to competing interests between First Amendment free

speech and expression rights[1] and states' and municipalities' interests in maintaining the public spaces in which buskers perform.[2] To further the government's interest in maintaining public spaces, cities and municipalities promulgate regulations. A problem arises, however, when those regulations and ordinances are drafted in such a way that they infringe on a person's right to free speech and expression guaranteed under the Constitution—hence, the busker dilemma.[3] When litigation arises from constitutional challenges to these regulations, courts are essentially called upon to do the impossible on a case-by-case basis: define the indefinable concepts of "art" and "expression."

Whether or not it *should* be up to courts to define such a "famously malleable concept"[4] as "art," our society and legal system has, time and again, impressed upon them that exact duty. To further add to a court's difficult task of determining which busking conduct *is* protected under the First Amendment and which *is not*, cities and municipalities promulgating regulations to further a particular governmental interest are, in effect, arbitrarily infringing upon buskers' guaranteed free speech and expression rights. As a result, courts are forced to employ an already shaky analysis to an often unconstitutional regulation. This is an ever-evolving issue that was recently in front of yet another court in the busking case of *Young v. Sarles*, which, given the precedent governing this issue, predictably concluded without a definitive directive for lower courts or cities and municipalities.[5]

Part I of this Article fleshes out this busker dilemma: the conflicting interests arising from busking, the myriad approaches that courts have taken when tackling this issue, and why permitting schemes are but another piece of the broken clockwork of case law governing busking. Part II examines the

---

[1] "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

[2] *See* Jason K. Levine, *Defending the Freedom to be Heard: Where Alternate Avenues Intersect Empty Public Spaces*, 36 U. MEM. L. REV. 277, 279 (2006) ("Public space has long been the social center of our communities. It has been the locus of our freedom of speech and assembly . . . .").

[3] *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 624 (1982) ("[A]ny general rule of [F]irst [A]mendment interpretation that chooses not to afford absolute protection to speech because of competing social concerns is, in reality, a form of balancing.").

[4] Mastrovincenzo v. City of New York, 435 F.3d 78, 90 (2d Cir. 2006).

[5] *See* No. 1:14-CV-01203, Entry No. 22 (D.D.C. filed July 16, 2014). After continued negotiations, WMATA conceded to Alex Young's motion for a summary judgment. The court therefore entered summary judgment and a permanent injunction barring WMATA from enforcing the regulation prohibiting Alex Young from busking.

muddled case law currently governing busking and argues that busking is protected free speech and expression under the First Amendment. This argument is only aided by the Supreme Court's public forum and scrutiny analyses.

Against the background of the unsettled, convoluted precedent regarding the regulation of busking, Part III argues for an approach that does not force a court to embark on the impossible task of determining what *art* or *expression* is in a given case: the "advancing the interest" approach. Regulations, including permit requirements, that attempt to curtail the "evils" that supposedly materialize from busking, whether expressly or implicitly, should not be aimed at any particular type of free speech activity, and should instead be directly aimed at advancing the governmental interests at issue. Thus, instead of promulgating a regulation that bans begging in order to further the governmental interest of combatting pedestrian congestion, the promulgated regulation should be directly aimed at the governmental interest—*ban any activity causing pedestrian congestion on that sidewalk*.

This simple approach would force cities and municipalities to promulgate regulations that do not distinguish between certain types of free speech activity. Therefore, rather than a court applying a vague regulation that bans, for example, begging or panhandling to determine whether a person is actually engaging in protected free speech, the court only has to apply a typical "time, place or manner" analysis to determine whether the conduct blocked pedestrian traffic. Utilizing this approach, Part III will also explain what the court's ruling and reasoning should have been in *Young v. Sarles*.

In the recent busker case of *Young v. Sarles*, these two conflicting interests collided once again. Alex Young is a guitarist who performs in public and accepts donations from passersby. Although Young does not *actively* solicit donations, he does set out his open guitar case in order to receive tips from members of the public who enjoy his performance. Among the places where Young performs are the above-ground, "free" areas of Washington Metropolitan Area Transit Authority (WMATA) transit stations. According to regulations promulgated by WMATA's governing authority, persons are allowed to engage in "free speech activities" on WMATA property, so long as the activity is in above-ground areas and is at least 15 feet from a station entrance, escalator or stairway.[6] According to the complaint, Young was busking at the Ballston Metro station on the sidewalk abutting N. Stuart Street in November 2013 when he was approached by a transit police officer and ordered to cease playing and accepting tips. The officer accused Young

[6] Regulations Concerning the Use of WMATA Property and Related Board Resolutions § 100.10(b) (2008).

of engaging in "panhandling" and threatened to arrest him if he did not move elsewhere. In a separate instance in October 2013, Young was ordered to cease his public performing at the West Falls Church Metro Station. A transit police officer told Young that because he was accepting donations, he was engaged in "commercial activity" that is prohibited by WMATA regulations.[7]

Here, we have a time, place or manner restriction. The governmental interest cited for this restriction is the "pedestrian traffic flow in the usual egress and ingress to the station."[8] However, Young has a guaranteed right under the First Amendment to engage in such free speech activities: a perfect illustration of the collision of interests in this busker dilemma.

This Article will illuminate the busker dilemma at issue and make the argument that busking, and all conduct associated with it, is protected under the First Amendment. This Article will then propose a solution to the previous—and quite unsuccessful, given the continued litigation over this issue—attempts at striking a balance between the two important interests at play, and apply that solution to the case of *Young v. Sarles*.

II. The Busker Dilemma

A. Government Interests v. Individual Rights

The Supreme Court has long recognized the government's need and authority to regulate and maintain public spaces.[9] However, people wishing to exercise their First Amendment right to free speech and expression also have a substantial interest at play that is in direct conflict with the government's interests—a guaranteed right to express themselves.[10] Yet, this right

---

[7] *See id.* at § 100.10(d) ("No individual carrying out free speech activities will carry out any commercial activity.").

[8] *Id.* at § 100.10(b).

[9] *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 650–51 (1981) (restricting solicitation to a fixed area to further advance the interest of crowd control); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 685 (1992) (recognizing city's interest in ensuring safe streets and sidewalks); Madsen v. Women's Health Ctr., 512 U.S. 753, 760 (1994) (recognizing government's strong interest in ensuring public safety and order and in promoting the free flow of traffic on public streets and sidewalks); Horton v. City of St. Augustine, Fla., 272 F.3d 1318, 1333 (11th Cir. 2001) (recognizing cities' power to regulate street performances under certain criteria). *Horton* also indicates that cities may have an authority or responsibility to regulate public spaces for aesthetic purposes.

[10] The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of people peaceably to assemble . . . ." U.S.

is not "unabridged." The government may, in most situations, regulate free speech activities with a valid time, place or manner restriction.[11] These time, place or manner restrictions, coupled with cities' and municipalities' permitting schemes, are the most common regulations implemented to further government interests and combat the alleged "evils"[12] of busking or street performing.

On one hand, the government has an interest—more so a duty—to maintain and regulate the public spaces available for free speech and expression. On the other hand, the same citizens that are subject to those regulations have a constitutionally protected free speech right to express themselves on that public space. The interests of the government, to regulate and maintain the public spaces that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"[13] and the competing interests of the buskers, to freely express themselves on those public spaces, have often resulted in legal and political standoffs.[14] Unfortunately, the culmination of these standoffs has produced a lackluster legal doctrine and anything but relevant municipal experience. Municipalities across the nation are promulgating ordinances regulating street performances, expressive vending, camping, panhandling, and related activities, and those same ordinances and regulations are being

---

CONST. amend. I; *see also* Lovell v. City of Griffin, 303 U.S. 444, 450 (1938) (holding that the First Amendment's prohibitions also apply to state and local government rulemakers).

[11] "Despite the broad First Amendment protection accorded expressive activity in public parks, 'certain restrictions on speech in the public parks are valid. Specifically, a municipality may issue reasonable regulations governing the time, place or manner of speech.'" Berger v. City of Seattle, 569 F.3d 1029, 1036 (9th Cir. 2009) (quoting Grossman v. City of Portland, 33 F.3d 1200, 1205 (9th Cir. 1994)); *see also* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[12] "Evil," as used in this Article, is a term of art that courts have used while analyzing whether a certain regulation is narrowly tailored to further the governmental interest the regulation is meant to advance. It is not a derogatory term meant to place a moral stamp on any certain behavior. *See* Frisby v. Schultz, 487 U.S. 474, 485 (1988) (citation omitted) (The regulation must "target[ ] and eliminate[ ] no more than the exact source of the 'evil' it seeks to remedy.").

[13] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

[14] *See* Berger, 569 F.3d at 1034–35 (9th Cir. 2009) (busker in a Seattle park challenging a regulation that prohibited him from engaging in several protected free speech activities, including solicitation of tips); *see generally* Hobbs v. Cty. of Westchester, 397 F.3d 133 (2d Cir. 2005) (busker challenging a regulation that prohibited him from obtaining a permit to busk in a New York park).

challenged based on their constitutionality. Interests are colliding, and the result is not only monetary loss, but also a forfeiture of guaranteed rights.

B. *Courts Defining the Indefinable: New York City's Definition Struggle*

Despite the broad definitional scope of conduct that is protected under the First Amendment by the Supreme Court, courts have persistently struggled with deciding whether certain types of conduct—especially expression that involves commercial aspects such as busking—is free speech. New York City and the Second Circuit exemplify this struggle in three particular cases.

1. *Loper v. New York City Police Department.*

In *Loper v. N.Y.C. Police Dep't*, the Second Circuit was confronted with a New York City law that prohibited begging.[15] The court held that in public forums, the government may not prohibit *all* forms of communicative activity.[16] The court had to decide two questions: 1) whether begging was protected free speech; and 2) in what type of forum the City of New York was attempting to prevent begging.[17] Solicitation for money is intertwined with other support-seeking forms of speech such as social, economic, or political issues; without solicitation, many forms of this communication would cease.[18] Relying on this reasoning, the court in *Loper* held that there was little difference between individuals who solicit for charity and individuals who solicit for themselves.[19] After determining that begging is protected free speech, the court then determined that the ordinance at issue attempted to prevent speech in a traditional public forum, and that the ordinance was not content-neutral because it prohibited all speech related to begging, and was therefore content-based.[20]

---

[15] 999 F.2d 699, 701 (2d Cir. 1993).

[16] *Id.* at 704–05 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

[17] *Id.*

[18] *See* Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980).

[19] *See* Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993) (stating that there is "little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. . . . The distinction is not a significant one for First Amendment purposes.").

[20] *Id.* at 703. Courts have not agreed on whether blanket prohibitions of begging are content-based or content-neutral. *Compare* Loper, 999 F.2d at 705 (statute was content-based because it prohibited all speech related to begging), *and* ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 794 (9th Cir. 2006) (ordinance that

This case also illuminates the glaring issue in this busker dilemma: the court is forced to decide what "expression" is, from whose viewpoint, and under what circumstances. This inquiry is bound to change not only with the conveyor and recipient of any purposed expression or message, but also with the changing society and time period. The need for an approach to properly regulate without arbitrarily infringing upon buskers' rights is readily apparent, especially given the court's struggle to define what "expression" and "art" are in a given situation. *Loper* demonstrates the necessity of a solution that takes this inquiry out of a court's hands.

2. *Bery v. City of New York*

The plaintiffs in *Bery v. City of New York* sought a preliminary injunction to prevent New York City from enforcing a General Vendors Law against them.[21] They argued that the ordinance violated their First Amendment right to freedom of expression and their rights under the Equal Protection Clause of the Fourteenth Amendment.[22] On appeal to the Second Circuit, the court reversed the district court's decision, and held that the ordinance violated both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.[23] The Second Circuit's reasoning was that the *sale* of art should receive no less protection than the art itself.[24] In the Second Circuit's view, art such as paintings, photographs, prints and sculptures—as opposed to crafts such as jewelry, pottery and silver mak-

---

banned any solicitation of money or business in a downtown area was content-based), *with* Gresham v. Peterson, 225 F.3d 899, 906 (7th Cir. 2000) (parties stipulated that regulation was content-neutral), *and* Smith v. City of Fort Lauderdale, 177 F.3d 954, 956 (11th Cir. 1999) (statute was content-neutral); *see also Gresham*, 225 F.3d at 905 ("Colorable arguments could be made both for and against the idea that [an] Indianapolis ordinance [targeting panhandling] is a content-neutral . . . restriction.").

[21] 97 F.3d 689, 691–92 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 2408 (1997). The plaintiffs in *Bery* were visual artists who sold their artwork on public sidewalks and an artists' advocacy organization called Artists for Creative Expression on the Sidewalks of New York City. Pursuant to the General Vendors Law, no individual could exhibit, sell, or offer goods for sale in public places in New York City unless the individual first obtained a general vendors license. Because obtaining a license was difficult, if not impossible, for artists who were required to comply with the law, many artists sold their art in the streets without licenses. The result: police arrested the artists and seized their artwork.

[22] *Id.* at 693.

[23] *Id.* at 694–96, 699.

[24] *Id.* at 695.

ing—always attempts to convey a message to its observer, and therefore should receive First Amendment protection.[25]

To further illustrate the courts' jumble when facing this issue, in *White v. City of Sparks*, the U.S. District Court for the District of Nevada had to contend with *Bery* and held the exact opposite of the Second Circuit. Declining to adopt the view of the *Bery* court, the *White* court stated that although the plaintiff "would have this court adopt the *Bery* holding and find that all paintings, photographs, prints and sculptures are inherently expressive, thereby eliminating the need for any individualized inquiry into the expressiveness of a particular piece of art or a particular type of artwork, the court declines this invitation."[26] It is not difficult to see the confusion inherent in these decisions.

3. *Mastrovincenzo v. City of New York*

In *Mastrovincenzo*, the Second Circuit was yet again called upon to adjudicate artistic expression: if the plaintiffs' street wares, featuring graffiti style painting, were "pieces of merchandise"—as opposed to works of art—the plaintiffs had to have purchased vendor permits from New York City.[27] If the court held that the items being sold were protected art, and therefore forms of expression protected by the First Amendment, the city's ordinance requiring vendors to obtain licenses would be a First Amendment violation.[28] The court determined that the plaintiffs' graffiti-decorated items were expressive.[29] The court, although holding that graffiti could be considered expressive and therefore subject to some level of First Amendment protection, found New York's ordinance constitutional on other grounds.[30]

---

[25] *Id.* at 696.

[26] 341 F. Supp. 2d 1129, 1138–39 (D. Nev. 2004).

[27] Mastrovincenzo, 435 F.3d at 81–82 (describing New York City's General Vendors Law, which attempts to limit and regulate streets and sidewalks by requiring individuals who sell merchandise or other non-food items to obtain a vendor's license). The plaintiffs sold hats and other clothing items that they painted and decorated with graffiti according to the individual request of each client. *Id.* at 86.

[28] *Id.* at 81–82 (explaining that artists and vendors who sold paintings, photographs, prints, and sculptures had previously challenged this law as a First Amendment violation, and so the law was not enforceable against vendors of "any paintings, photographs, prints and/or sculpture").

[29] *Id.* at 96–97 (holding that plaintiffs' merchandise had a predominantly expressive purpose, and their motivation behind selling goods was primarily for self-expression, rather than for commercial gain).

[30] *Id.* at 96–100 (finding plaintiffs' merchandise was subject to First Amendment protection due to its predominantly expressive purpose; however, also concluding that New York City's purpose of keeping sidewalks clear and preventing

These three cases demonstrate the extreme difficulty that courts have in trying to define "art" and "expression"—especially when they are asked to provide a bright line between protected expression and unprotected expression involving commercial aspects. The result has been wide-ranging and inconsistent definitions and analyses. Not only do courts' vague and inconsistent definitions do nothing to aid the ongoing problem of cities promulgating inadequate regulations, but the precedential value of each decision becomes less and less valuable for lower courts.

C. Pervasive Permitting

Among the different types of regulations that cities and municipalities promulgate to further certain interests in maintaining and regulating public space, one in particular is ever prevalent and increasingly pervasive. A permitting regulation is one that requires a busker or street performer (or anyone wishing to engage in free speech activities) to obtain a permit before legally exercising his or her guaranteed rights under the First Amendment.[31] Although permitting schemes are rampant, one bedrock principle remains true of them: they are a prior restraint and carry a presumption of unconstitutionality that is egregious in the mind of the Court.[32]

---

sale of stolen goods was a significant government interest sufficiently tailored to achieve the ends sought).

[31] The issued permits are not limited to buskers. In fact, there is a fairly wide spectrum of permitting schemes that cities and municipalities implement. *See, e.g.*, CAMP Legal Def. Fund, Inc. v. City of Atlanta, 451 F.3d 1257, 1281–82 (11th Cir. 2006) (Atlanta ordinance requiring ninety-day notice before holding an outdoor festival); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1027 (9th Cir. 2006) (Santa Monica ordinance requiring a permit for three categories of community events: (1) parades, processions, or marches, (2) any activity involving 150 people or more, and (3) any activity or event on public property that requires a tent or canopy); Paulsen v. Lehman, 839 F. Supp. 147, 152 (E.D.N.Y. 1993) (New York scheme requiring a permit for the distribution of literature).

[32] *See* Cox v. City of Charleston, 416 F.3d 281, 284 (4th Cir. 2005) ("An ordinance that requires individuals or groups to obtain a permit before engaging in protected speech is a prior restraint on speech."); John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 421 (1983) ("Of the various things referred to as prior restraint, a system of administrative preclearance is the most plainly objectionable. Under such a system, the lawfulness of speech or publication is made to depend on the prior permission of an executive official."). *See also* Nathan W. Kellum, *Permit Schemes: Under Current Jurisprudence, What Permits are Permitted*, 56 DRAKE L. REV. 381, 382 n.5 (2008) (citing Cox v. Louisiana, 379 U.S. 536, 551–52 (1965)) ("A well-recognized concept is that every individual has the right to speak his or her peace in the public square. This right does not fade away just because some may find the message offensive.").

1. Permitting Schemes Generally

Permitting schemes are rapidly becoming one of the most common regulations promulgated by cities and municipalities to further the governmental interest of maintaining and regulating public spaces. However, these permitting schemes are inevitably challenged on a First Amendment basis. A scheme that regulates access to and use of public places has seemingly legitimate purposes, the most typical of these purposes being the assurance of public safety and order.[33] Contrary to those interests and purposes, however, is the core constitutional guarantee that protected speech in a public forum be shielded from undue governmental infringement. Striking a balance between these conflicting interests should be the ultimate goal of any court evaluating permit schemes.

Unfortunately, as has already been brought to light in this Article, along with the increase in permitting schemes come more unsettled legal doctrines and analyses concerning prior restraints.[34] Prior restraints, much like most of the legal doctrine regarding regulation of busking, have been molded by such an inconsistent precedential past that the term itself "has become largely a legal misnomer, and the doctrine a source of confusion and controversy."[35] This is yet another example of the courts needing assistance.

The importance of a permitting scheme that strikes the intricate balance of the legitimate, competing interests at play in this busker dilemma is imperative. A permitting scheme that adequately serves both the governmental interests at play and the First Amendment rights of buskers will allow the courts—when inevitable litigation over the permitting scheme occurs—to begin to set out a valid framework for analyzing such a scheme. In turn, cities and municipalities could promulgate permitting schemes—if

---

[33] For example, the government may constitutionally regulate speech that takes place during rush hour on busy streets, produces dangerously high levels of sound through loud speakers, or involves duplicate uses of public property. Grayned v. City of Rockford, 408 U.S. 104, 115–16 (1972).

[34] Prior restraints are "increasingly derided by legal scholars and frequently misunderstood by the Court itself." Michael I. Meyerson, *Rewriting* Near v. Minnesota: *Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087, 1087–88 (2001). Professor Meyerson worries that the current doctrine is ripe for attorneys to abuse. *Id.* at 1089–90.

[35] Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989). This confusion has even led one legal scholar to conclude that the "[prior restraint] doctrine is so far removed from its historic function, so variously invoked and discrepantly applied, and so often deflective of sound understanding, that it no longer warrants use as an independent category of First Amendment analysis." Jeffries, *supra* note 32, at 437.

absolutely necessary—that would pass constitutional muster under the courts' new, consistent framework.

2. Analytical Framework for Permitting Schemes' Constitutionality

A challenged permitting scheme is subject to an analysis similar to that applied to a normal regulation that either prohibits or requires certain criteria to be met before a person may engage in free speech activity. Permitting schemes are a form of prior restraint and are thus "the most serious and the least tolerable infringement on First Amendment rights."[36]

The Supreme Court, in a number of decisions, framed the constitutionality of permitting schemes. In *Freedman v. Maryland*, the Court delineated procedural requirements for prior restraints, aiming to prevent governmental entities from becoming the final decision-makers on the type of speech that enters the public sphere.[37] In *Shuttlesworth v. Birmingham*, the Court required permit schemes to contain objective and narrow standards to operate as a guide for the decision-maker in granting or denying permit applications, thereby preventing the exercise of unfettered discretion by government officials.[38] The objective standards in *Shuttlesworth* were then applied, in *Forsyth County, Ga. v. Nationalist Movement*, to the assessment of charging permit fees; fees may only be charged on a content-neutral basis, requiring some content analysis in the case of fee-based schemes.[39]

The issue of content became fully amalgamated into the Supreme Court's prior restraint precedent in *Thomas v. Chicago Park Dist.*, when the Court excluded content-neutral schemes from *Freedman*'s procedural safeguards requirement, yet found them suitable for content-based schemes.[40] Finally, additional policy considerations, such as protecting a speaker's interests in anonymity, the constitutional right to spontaneous speech, and the objective burden placed on religious and political expressions by requiring permits for public speech, were addressed by the Court in *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton*.[41]

Though these decisions provide some firm footing when courts take up a permitting scheme issue, they are not nearly enough to provide the much-needed precedential certainty that this inquiry—and the Constitution—de-

[36] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).
[37] 380 U.S. 51, 58–59 (1965).
[38] 394 U.S. 147, 154–55 (1969).
[39] *See* 505 U.S. 123, 127 (1992).
[40] *See generally* 534 U.S. 316 (2002).
[41] 536 U.S. 150, 166–68 (2002). For a thorough discussion on permitting scheme jurisprudence, *see generally* Kellum, *supra* note 32.

mands. As the Court explained in *Watchtower*, "[i]t is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak . . . then obtain a permit to do so."[42]

3. Effect on Buskers

A permitting scheme infringes upon a busker's First Amendment free speech rights in a number of different ways. Furthermore, a court analyzing whether a permitting scheme is constitutionally valid applies a similar—and still ineffective—framework of analysis. The various ways permitting schemes unconstitutionally infringe upon a busker's First Amendment rights will be discussed in turn.

i. Single Speaker Permit

The Supreme Court has not addressed the issue of single-speaker permitting, and there is currently a circuit split: there are at least seven circuits that have directly criticized permit schemes on the basis of their applicability to small groups and single speakers, and only the Second Circuit has upheld a single-speaker permitting scheme.[43] However, it is important to

[42] Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 123, 165–66 (1992).

[43] *See, e.g.*, Santa Monica Food Not Bombs, 450 F.3d at 1039 (9th Cir. 2006) (describing how a significant governmental interest for purposes of a prior restraint only arises when "large groups of people travel together on streets and sidewalks"); Cox v. City of Charleston, 416 F.3d 281, 285 (4th Cir. 2005) (describing how application of a permitting requirement "to groups as small as two or three renders it constitutionally infirm"); Am.-Arab Anti-Discrimination Comm. v. City of Dearborn, 418 F.3d 600, 608 (6th Cir. 2005) (striking a permitting system that could apply to groups as small as "two or more persons"); Parks v. Finan, 385 F.3d 694, 698 (6th Cir. 2004) ("[T]he permitting scheme as it presently exists is invalid with respect to individuals."); Burk v. Augusta-Richmond Cty., 365 F.3d 1247, 1259 (11th Cir. 2004) (striking an ordinance as overly broad in part because "it applies to small intimate groups that do not create a legitimate threat to the County's interests"); Cmty. for Creative Non-Violence v. Turner, 893 F.2d 1387, 1392 (D.C. Cir. 1990) (invalidating permit scheme because it could possibly apply to individuals and groups as small as two); *see also* Douglas v. Brownell, 88 F.3d 1511, 1524 (8th Cir. 1996) (describing, in dicta, that an ordinance as applied to groups as small as ten is not narrowly tailored). *But see* Hobbs, 397 F.3d at 151–52 (2d Cir. 2005) (upholding single-speaker permitting requirement only if the performer planned to use "props and/or equipment").

note that the Second Circuit's decision in *Hobbs* involved a governmental interest quite different from those interests typically involved in permitting schemes. The governmental interest in not allowing Hobbs to obtain a permit was that of child welfare and safety, because Hobbs was a convicted child molester and registered sex offender.[44] In contrast, the typical governmental interest is merely to regulate free space and maintain order. *Hobbs* further adds to the spiraling complexity of restricting free speech in public spaces because it, troublingly, in essence denied free speech rights by analyzing the speaker's character.

However, if this issue were directly addressed by the Supreme Court, the Court would likely side with the majority of circuit courts and hold that permitting schemes restricting a single-speaker or small group are unconstitutional because they do not further the typical governmental interest in maintaining peace and order. After all, a single speaker—such as a busker—does not necessitate the same planning and police presence as a large group activity does.

ii. Permit for a Fee

Unlike single-speaker permitting schemes, the Supreme Court has directly addressed the imposition of a fee before obtaining a permit. The Court recognizes that fees may be assessed as part of a system of prior restraint, but the system must still be content-neutral and serve a legitimate governmental interest.[45] So, a city could not impose a permit fee applicable to buskers, but not to religious groups or charities. Furthermore, the government may not impose a permit fee solely for the purpose of generating revenue.[46]

iii. Advance Notice

A regulation that requires a person wishing to engage in free speech and expression to obtain a permit, thus essentially requiring advance notice, hinders spontaneous speech and is therefore unconstitutional. As the Supreme Court specifically acknowledged in *Watchtower*, every citizen not only

---

[44] 397 F.3d at 150.

[45] Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 136–37 (1992).

[46] *Compare* Ne. Ohio Coal. for the Homeless v. City of Cleveland, 105 F.3d 1107, 1110 (6th Cir. 1997) (upholding $50 fee for peddling permit as appropriate way of covering costs incident to implementation of ordinance), *with* Turley v. N.Y.C. Police Dep't, 988 F. Supp. 667, 674 (S.D.N.Y. 1997) (striking down $45 fee for sound device permit as being greater than proven administrative costs). *See also* Kellum, *supra* note 32, at 408–10.

enjoys the right to speech, but also the right to spontaneous speech.[47] This right is obviously jeopardized by a requirement that forces a speaker to supply notice of the proposed speech in advance.[48] The Court has noted that "when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."[49]

In addition to drastically limiting the effectiveness of the speech, the mere imposition of an advance notice requirement could deter people from engaging in their guaranteed First Amendment rights.[50] Further, the delay inherent in advance-notice permitting schemes chills First Amendment rights. Indeed, "[t]here is not much incentive in uttering a statement that will not gain consideration due to the untimely nature of the utterance."[51] Thus, permitting schemes are adverse to the very nature of the constitutionally guaranteed right of spontaneous free speech and expression.

iv. Unfettered Discretion

"Unfettered discretion," with regard to permitting schemes generally, is a fairly settled area of law in free speech jurisprudence. The Supreme Court has reiterated again and again that the government does not enjoy unfettered discretion when deciding who should be able to exercise their First Amendment rights and on what occasions.[52] Thus, if an administrator

---

[47] Watchtower, 536 U.S. at 164, 167–68.

[48] Santa Monica Food Not Bombs, 450 F.3d at 1046 ("Advance notice or permitting requirements do, by their very nature, foreclose spontaneous expression . . . Consequently, in any particular forum, true spontaneous expression and the application of an advance notice requirement are mutually exclusive.").

[49] Shuttlesworth v. City of Birmingham, 394 U.S. 147, 163 (1969) (Harlan, J., concurring); *see also* Grossman v. City of Portland, 33 F.3d 1200, 1206 (9th Cir. 1994) ("[B]ecause of the delay caused by complying with the permitting procedures, '[i]mmediate speech can no longer respond to immediate issues.'") (quoting NAACP v. City of Richmond, 743 F.2d 1346, 1355–56 (9th Cir. 1984)); City of Richmond, 743 F.2d at 1355 ("[T]he delay inherent in advance notice requirements inhibits speech. By requiring advance notice, the government outlaws spontaneous expression.").

[50] Grossman, 33 F.3d at 1206 ("Both the procedural hurdle of filling out and submitting a written application, and the temporal hurdle of waiting for the permit to be granted may discourage potential speakers.").

[51] Kellum, *supra* note 32, at 411.

[52] *See* Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 576 (1987) ("'[T]he opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.'") (quoting Lewis v. City of New Orleans, 415 U.S. 130, 136 (1974) (Powell, J., concurring)). Allowing a licensing official to retain unchecked "'discretion has the potential for becoming a means of suppressing a particular point of view.'" Forsyth Cty., 505 U.S. at 130

has the power to grant, modify, postpone, or waive a permit for expressive activity on the basis of vague or non-existent criteria, the regulation is deemed invalid under the prior restraint doctrine.[53]

An issue that is not so well-settled, however, is the issue of unfettered discretion in the hands of an official when there is *no specified time* in a regulation within which the official must make a decision on a permit application. The Supreme Court directly addressed this issue in *FW/PBS, Inc. v. City of Dallas*, when it held that "[w]here the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion. A scheme that fails to set reasonable time limits on the decision maker creates the risk of indefinitely suppressing permissible speech."[54]

However, many appellate courts have used certain language from *Thomas v. Chicago Park Dist.*[55] to hold that *there is no need* for content-neutral permitting schemes to have a fixed deadline for the licensing official to act on a given request.[56] The question then becomes whether the Court, through such language in *Thomas*, definitively ruled that deadlines for a decision are no longer required, thus rendering the appellate courts' interpretation and application correct.

It is more appropriate, however, to conclude that the Court has not ruled on the issue. The Court in *Thomas* was merely stating that the procedural requirements of *Freedman* need not be followed in a content-neutral

---

(quoting Heffron, 452 U.S. at 649 (1981)); *see also* City of Houston v. Hill, 482 U.S. 451, 465–67 (1987) (discussing unguarded discretion found in broad regulation of expressive activities). Furthermore, unfettered discretion results in inequity. *See* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2416 (2003) ("[T]he existence of discretion creates a substantial risk that government actors will contravene equality norms. Left to their own devices, the various entities that exercise discretionary decision-making authority—including police officers, bureaucrats, judges, juries, and even the electorate—may base their decisions on improper considerations.").

[53] In the seminal *Shuttlesworth* decision, the Supreme Court considered, and held invalid, a statute allowing for individual judgment on "public welfare, peace, safety, health, decency, good order, morals or convenience." 394 U.S. at 150–51 (internal citations omitted).

[54] 493 U.S. 215, 227 (1990).

[55] "We have never required that a content-neutral permit scheme regulating speech in a public forum adhere to the procedural requirements set forth in *Freedman*." Thomas v. Chicago Park Dist., 534 U.S. 316, 322 (2002).

[56] *See* Granite State Outdoor Adver., Inc. v. City of St. Petersburg, 348 F.3d 1278, 1283 (11th Cir. 2003); Utah Animal Rights Coal. v. Salt Lake City Corp., 371 F.3d 1248, 1259 (10th Cir. 2004); S. Or. Barter Fair v. Jackson Cty., 372 F.3d 1128, 1138 (9th Cir. 2004).

permitting scheme challenge. Unfettered discretion is still unfettered discretion, and therefore unconstitutional. The Court condemns vague or non-existent standards for awarding a permit;[57] the Court condemns vague or non-existent standards for imposing a fee for a permit;[58] the Court undoubtedly also condemns vague or non-existent standards for determining *when* to decide about a permit.

So, this is but another unsettled area of the law relating to buskers' First Amendment free speech rights and the government's interests in regulating and maintaining the free space upon which buskers perform.

III. Busking is Protected Under the First Amendment

A busker's performance can range from playing the guitar to standing in an awkward position for an impressively long time. Given the extremely broad scope of performance-type conduct that the Supreme Court has recognized as free speech under the First Amendment, and a logical analysis of begging and soliciting jurisprudence, busking—in all its aspects—falls under the ambit of protections afforded by the First Amendment.

Beginning with first principles, claims under the Free Speech Clause of the First Amendment are analyzed in three steps: First, the court "must . . . decide whether [the activity at issue] is speech protected by the First Amendment, for, if it is not, [the court is to] go no further."[59] Second, assuming the activity "is protected speech, [the court] must identify the nature of the forum, because the extent to which the government may limit access depends on whether the forum is public or nonpublic."[60] And third, the court must assess whether the government's justifications for restricting speech in the relevant forum "satisfy the requisite standard."[61] The answer is clear under this analysis: busking—performance and pay—is protected free speech and expression under the First Amendment.

A. Entertainment Aspect is Protected

The Supreme Court has deemed a wide array of conduct, expression, and speech protected under the First Amendment, including entertainment or performance-type conduct intertwined with busking. For example, the

[57] Shuttlesworth, 394 U.S. at 150–51.
[58] Forsyth Cty., 505 U.S. at 133–34.
[59] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985).
[60] *Id.*
[61] *Id.*

Court has held that music without regard to words;[62] theater;[63] film;[64] topless dancing;[65] parades;[66] peaceful protest marches;[67] wearing black arm bands;[68] sit-ins;[69] and refusing to salute the flag[70] are protected. Given the Court's wide-ranging sweep pertaining to conduct protected by the First Amendment, it is hard to imagine a busker's conduct falling outside of its protections.

B. Begging Aspect is Protected

A more vexing issue is whether the solicitation of tips—the very thing separating mere street performance from busking—is protected under the First Amendment. The Supreme Court has not directly addressed this issue. An interesting nuance to the Court's reasoning in another First Amendment speech and expression case, however, sheds some light on a possible outcome should the Court rule on begging conduct. In *Hurley v. Irish–Am. Gay, Lesbian & Bisexual Grp. of Boston*, the Court stated that "[p]arades are . . . a form of expression, not just motion . . . ."[71] This is interesting because the Court is clearly indicating that a movement, so long as it is a movement to "make a point," falls within the protections of the First Amendment.[72]

Logically then, an outstretched hand asking for money clearly falls within the ambit of the First Amendment because it is *making a point* to the person who sees the hand: I need or want money; I am a crusader for the poor and helpless; I am meek and humble; or please help me.[73] Begging conduct need not hold any particularized message—it must merely be a motion to make a point. In fact, "a narrow, succinctly articulable message is not a condition of constitutional protection," and if it were, the First

---

[62] Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).

[63] Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557–58 (1975).

[64] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952).

[65] Doran v. Salem Inn, Inc., 422 U.S. 922, 932–34 (1975).

[66] Hurley v. Irish–Am. Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557, 569 (1995).

[67] Gregory v. City of Chicago, 394 U.S. 111, 112 (1969).

[68] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969).

[69] Brown v. Louisiana, 383 U.S. 131, 141–42 (1966).

[70] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34 (1943).

[71] 515 U.S. 557, 568 (1995).

[72] *Id.* (defining parade "to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way.").

[73] *See, e.g.*, Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.").

Amendment "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[74] An outstretched hand conveys a message to make a point, and is therefore protected under the First Amendment.

Furthermore, as already discussed, the Second Circuit in *Loper v. N.Y.C. Police Dep't* expressly held that begging is protected under the First Amendment because "[there is] little difference between individuals who solicit for charity and individuals who solicit for themselves with regard to the message conveyed . . . The distinction is not a significant one for First Amendment purposes."[75] Importantly, the *Loper* court makes it expressly clear that begging conveys a message that is intertwined with other forms of speech that seek support, and any ordinance that effectively bars a type of communicative activity protected as First Amendment speech is content-based and thus unconstitutional. This is crucial for the busker dilemma because a city or municipality that attempts to ban or prohibit begging, and then enforces that ordinance or regulation on a busker, is unconstitutionally infringing on a busker's free speech rights.

So, although current jurisprudence—both Supreme Court and the Second Circuit—confirms that begging is a form of protected free speech and expression, a vast majority of cities and municipalities are still promulgating regulations that unconstitutionally bar all begging and, as a result, busking.

C. The Forum and Scrutiny Analysis

The type of forum where a busker is performing is essentially dispositive of the issue of whether a certain regulation is infringing upon that busker's First Amendment rights.[76] A busker is either performing in a "traditional public forum," "designated public forum" or "nonpublic forum." A busker's First Amendment free speech rights are at their apex in a traditional public forum because they have "'by long tradition or by government fiat . . . been devoted to assembly and debate.'"[77] A busker's free speech rights are somewhat limited in a designated public forum because

[74] Hurley, 515 U.S. at 569.

[75] 999 F.2d 699, 704 (2d Cir. 1993).

[76] "Rather, the extent of scrutiny given to a regulation of speech—in effect, how we examine the directness with which it promotes the government's goals and the degree to which it burdens speech—depends on whether the regulation applies in a *public* or *nonpublic* forum." Boardley v. U.S. Dep't. of Interior, 615 F.3d 508, 514 (D.C. Cir. 2010).

[77] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (quoting Perry Educ. Ass'n, 460 U.S. at 45 (1983)).

those forums only exist when "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose."[78] And lastly, a busker's First Amendment rights can be extremely restricted in a nonpublic forum because that particular forum is "[p]ublic property which is not by tradition or designation a forum for public communication."[79]

Of particular importance to this busker dilemma, in regard to the determination of what type of forum buskers are performing in, is the case of *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*.[80] The Port Authority of New York and New Jersey, which owned and operated three major airports in the New York City area and controlled certain terminal areas at the airports, adopted a regulation forbidding the repetitive solicitation of money within the terminals[81]—a perfect example of a regulation piercing the heart of this busker dilemma.

Chief Justice Rehnquist, in writing for the majority, pays homage to the oft-quoted language that public forums have "'immemorially . . . time out of mind' been held in the public trust and used for purposes of expressive activity."[82] Compounding off of the language of this statement, Justice Rehnquist embarks upon an interesting analysis, and intimates that the public forum doctrine is flexible, not rigid.

Justice Rehnquist, in holding the airport terminal at issue was not a public forum, stated that only "[i]n recent years [has it] become a common practice for various religious and non-profit organizations to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities."[83] Justice Rehnquist is indicating here that airport terminals have not "immemorially . . . time out of mind"[84] been held open for public expression. However, Justice Rehnquist further states that, "[w]hen new methods of transportation develop, new methods for accommodating that transportation are also likely to be needed. And with each new step, it therefore will be a new inquiry whether the transportation necessities are compatible with various kinds of expressive activity."[85] Put simply, as society's technology, culture, and attitude toward free speech change, so should the law. Thus, the public

---

[78] Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009).
[79] Perry Educ. Ass'n, 460 U.S. at 46 (1983).
[80] 505 U.S. 672 (1992).
[81] *Id.* at 675–76.
[82] *Id.* at 680 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).
[83] *Id.* (quoting 45 FED. REG. 35314 (May 27, 1980)).
[84] *Id.* at 680 (quoting Hague, 307 U.S. at 515).
[85] *Id.* at 681.

forum doctrine is not a static doctrine, but an elastic one that changes as society and the law predicate.

This bodes well for the busker dilemma: as cities' interests change as a result of technology and new modes of transportation, so should courts' analyses in applying the public forum doctrine. A more expansive public forum doctrine leads to more public space where buskers' free speech rights are at their apex. As busking increases, and the public's interest in busking increases, so should the public forum doctrine.

After establishing that the speech at issue is protected, and identifying the correct forum, the court must finalize the analysis by applying the correct scrutiny test. For the purposes of this Article, I will focus on a time, place or manner restriction in applying the levels of scrutiny because this is the most common regulation conflicting with buskers' First Amendment interests. So, to pass constitutional muster, a time, place or manner restriction must meet three criteria: (1) it must be content-neutral; (2) it must be "narrowly tailored to serve a significant governmental interest"; and (3) it must "leave open ample alternative channels for communication of the information."[86] If a regulation is content-based, then strict scrutiny is applied to the regulation, instead of the intermediate scrutiny applied if the regulation is found to be content-neutral.[87] For a content-based regulation to pass a strict scrutiny analysis, it must "serve[ ] a 'compelling' governmental interest, '[be] necessary to serve the asserted [compelling] interest,' [be] precisely tailored to serve that interest, and [be] the least restrictive means readily available for that purpose."[88]

The Ninth Circuit in *Berger v. City of Seattle* threw another wrinkle into this particular scrutiny analysis. In *Berger*, the Ninth Circuit struck down a time, place or manner restriction—specifically, an "active solicitation" ban—after a busker brought suit, alleging the regulation was content-based because the regulation treated some forms of protected speech differently than others and an officer enforcing the regulation had to examine the content of a busker's expression in order to enforce the regulation.[89] In *Berger*,

---

[86] Ward, 491 U.S. at 791 (quoting Clark, 468 U.S. at 293 (1984)).

[87] "Restraints on speech on the basis of its content, except in a few limited categories such as obscenity, defamation, and fighting words, are generally disallowed." Hobbs, 397 F.3d at 148 (2d. Cir. 2005) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992)). Furthermore, this presumption of invalidity may only be overcome if the restriction passes a strict test. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988) (content-based restrictions on political speech "must be subjected to the most exacting scrutiny").

[88] Hobbs, 397 F.3d at 149 (internal citation omitted). *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656 (2004).

[89] 569 F.3d 1029, 1035 (9th Cir. 2009).

the "officer must read it" test was applied to a busking case.[90] *Berger* is a crucial decision for buskers because it is another weapon in their arsenal to battle the growing number of unconstitutional regulations that infringe upon their First Amendment free speech rights.

Busking—in its entirety—is protected speech and expression under the First Amendment. An argument otherwise cuts against the Supreme Court's broad definitional scope under the First Amendment, jurisprudence on begging, and forum and scrutiny analyses.

IV. "Advancing the Interest" Approach

With such an imbalance and unclear framework of analysis for courts, a regulation or permitting scheme aimed directly at advancing the governmental interest at issue—as opposed to a certain type of conduct—is a solution which adequately strikes the intricate balance at play in this busker dilemma. Furthermore, this solution will allow courts to begin to sew up the seams of this bursting legal doctrine. The approach is simple: instead of asking the court to decide whether certain busking conduct is panhandling, begging, or purely free speech and expression, the court need only ask, "does this conduct unreasonably block pedestrian traffic on this street?"

A. Regulations Should be Aimed Directly at Advancing the Governmental Interests at Play in this Busker Dilemma

The important, conflicting interests involved in this busker dilemma, coupled with inadequate jurisprudence, have muddled the legal landscape for both governmental entities and private citizens. Lacking an adequate, unified approach to this issue will only lead to more litigation and First Amendment rights falling by the wayside.

A solution to this growing problem is for cities and municipalities to promulgate regulations that are aimed directly at the governmental interests that necessitated the regulation. In doing so, courts will only have to analyze whether the conduct at issue is protected or not, and will not have to try to define what "art" or "expression" *is* in a given case, based upon language in a vague regulation. This solution strikes a much-needed balance between the governmental interests at play and the First Amendment rights of buskers, and provides a framework of precedential value moving forward. A court

[90] *Id.* at 1052. The "officer must read it test" is satisfied when an officer must evaluate the content of a message to determine whether a regulation applies. If satisfied, the "officer must read it" test supplies evidence that the regulation is content-based. *See also* Forsyth Cty., 505 U.S. at 134.

would simply apply the typical and sturdy constitutional analysis that governs free speech cases.

For example, a regulation that prohibited begging, soliciting, or panhandling would force the court to determine where the line of protected speech and expression ends (i.e., playing music on a public sidewalk), and purely commercial motive begins (i.e., holding out a tip jar).[91] Under the "advancing the interest" approach, the regulation would not encompass busking merely because an open guitar case or tip jar is present, but be more tailored toward to the governmental interest that the regulation is meant to advance. In this scenario, a court would not have to draw a line between protected expression and a definition set out by a regulation; it would need only decide whether the governmental interest was narrowly tailored and served the particular legitimate government interest claimed, which is the test that *should* be applied.

Another key advantage of the "advancing the interest" approach is its broad scope. Cities wishing to encourage or embrace busking could still utilize this approach to allow it, while still adequately regulating public space. If a regulation prohibited conduct that blocked pedestrian traffic, the city enforcing the regulation could construe it as broadly as it wanted to. Busking in that city would go on as long as the city deemed it prudent.

The "advancing the interest" approach would provide stability in case law on this issue, provide guidance for cities and municipalities looking to promulgate regulations in this area, and free buskers' free speech rights from arbitrary infringement. Further, courts would no longer have to shoulder the responsibility of delving into philosophical underpinnings of what "art" or "expression" are in a given case.

B. Applying the "Advancing the Interest" Approach to Young v. Sarles

Although the busking saga of *Young v. Sarles* recently came to a close, it still serves as a perfect illustration of this busker dilemma and a court shrugging its shoulders as a result of it.[92] The regulation at issue in *Sarles* prohibited commercial activity.[93] WMATA claimed that its compelling interest in

---

[91] This issue is superfluous if the Supreme Court holds begging as protected expression under the First Amendment. *See supra* Part II(B) and accompanying discussion.

[92] *See supra* note 5. After continued negotiations, WMATA conceded to Alex Young's motion for a summary judgment. The court therefore, fortunately, did not have to add to a growing body of muddled case law.

[93] According to WMATA's regulations, a "commercial activity" is defined as "any enterprise or venture by groups or individuals for the purpose of promoting or

prohibiting "commercial activity" was to keep people from "obstructing ingress and egress to the stations by selling their wares and . . . spreading out on the sidewalk . . . ." The court had to decide whether Young's busking was protected speech or commercial activity, as defined in the regulations, and if the regulation's prohibition on commercial activity served the claimed governmental interest. However, under an "advancing the interest" approach, the court need not partake in this painstaking analysis, and would only have to decide the issue under a traditional time, place or manner analysis.

The regulation at issue in *Sarles*, under the "advancing the interest" approach, would not single out certain content—begging, panhandling, and effectively busking—with its vague prohibition on "commercial activity"; instead, the regulation would prohibit "all conduct that obstructed ingress and egress" into the transit stations. Thus, the court would only need to do a traditional analysis to decide this case, instead of embarking on a metaphysical analysis of what "art" or "expression" is and whether such "art" or "expression" falls within the protections afforded by the First Amendment. Without a new approach—such as the "advancing the interest approach"—continued litigation and a stymied legislature and judicial system will remain at the forefront of busking regulations.

V. Conclusion

The intricate balance between two conflicting interests—the government's interest in maintaining and regulating public space and a busker's First Amendment free speech interests—shapes the contours of this busker dilemma. If a unified regulatory approach aimed directly at advancing governmental interests instead of singling out conduct is taken, then courts would be able to efficiently analyze these issues and would not be repeatedly forced to define indefinable concepts: "art" and "expression." This would inevitably lead cities and municipalities to begin to tailor regulations so that litigation is not a certainty. A simple solution to a perplexing issue: cities and municipalities need to facilitate artistic expression and aid the courts by following the "advancing the interest" approach.

---

selling products or services, except food, drink and tobacco to transit patrons or the public." Regulations Concerning the Use of WMATA Property § 100.07(d) at 6.