

ART'S FIRST AMENDMENT STATUS: A Cultural History of *The Masses*

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ABSTRACT

This Article explores a little-known chapter in the cultural history of The Masses, the radical, iconoclastic, and artistically cutting-edge publication that was the subject of Learned Hand's landmark First Amendment decision in Masses Publishing Co. v. Patten (1917). The Article sets forth the story of an internal battle about freedom of expression in the arts that had shaken The Masses to its core in the year leading up to Hand's famous decision. The Masses was founded on two central premises: first, that absolute freedom of expression was necessary for its mission; and second, that art and politics must be inextricably intertwined in pursuing this mission because creativity was itself an act of political rebellion against capitalism. Yet this marriage between art and politics was a fragile one; indeed it collapsed in the year before Hand's opinion, as editors tried to constrain the political messages of the artists, leading to an artists' strike that forever changed the magazine. At stake in this conflict were urgent questions about the nature of art and the relationship between art and politics. Ultimately the magazine devoted to free speech and free artistic expression—the magazine that would later be pursued by the government for speaking too frankly—set limits on the free expression of its own artists.

By exploring the artistic significance of The Masses and by unearthing this internal censorship battle at the magazine, my goal is to show how the conflict over art at The Masses presaged contemporary debates about the role of art in the First Amendment. The bitter internal struggle over freedom of expression at The Masses anticipated a longstanding problem in free speech law: how do we justify protection for art, often apolitical, irrational, and hard to reduce to a "particularized message," under a vision of the First Amendment that prizes political discourse and assumes a rational marketplace of ideas. The history of The Masses sheds light on our ongoing discomfort about the place of art in the First Amendment.

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INTRODUCTION

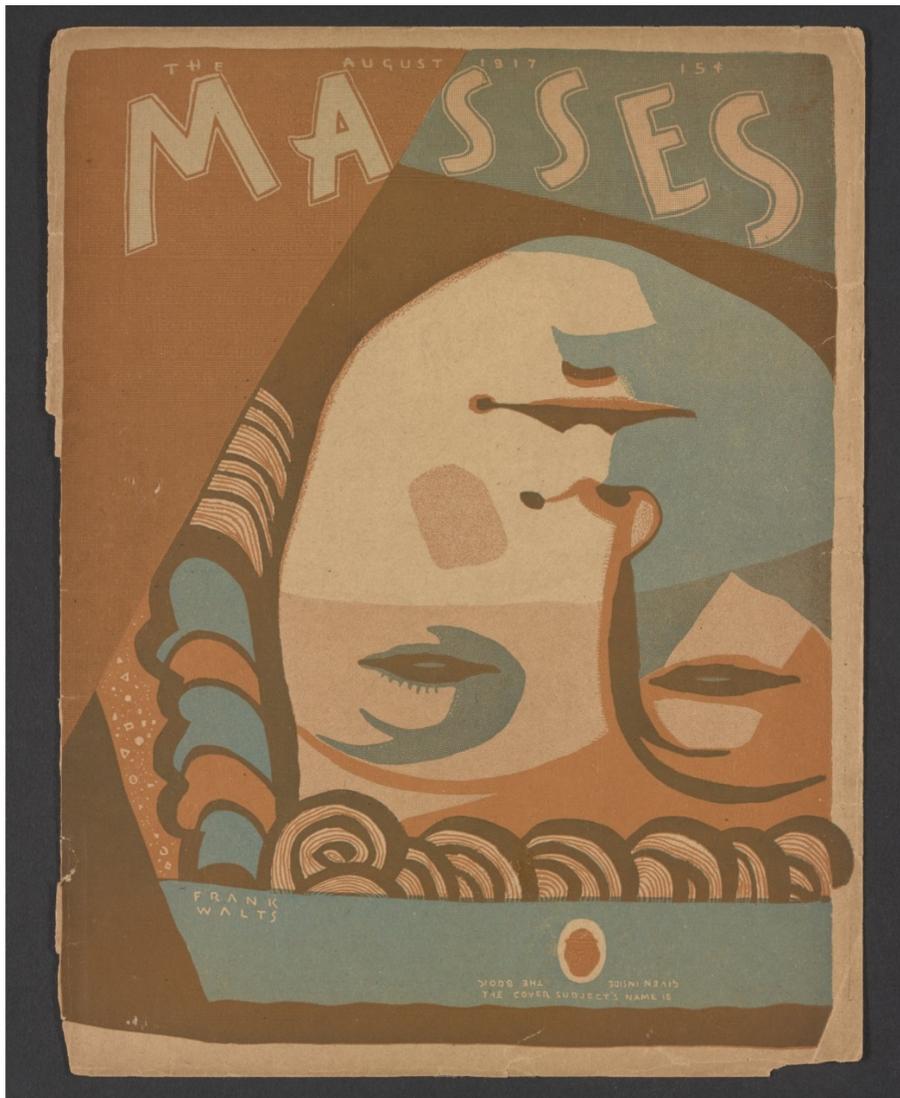


Figure 1: Frank Walts, cover of *The Masses* from the August 1917 issue.

Judge Learned Hand's opinion in *Masses Publishing Co. v. Patten*,¹ saving the iconoclastic magazine *The Masses* from censorship for criticizing the war, has come to be hailed as a turning point in the development of the First

1. *Masses Publ'g Co. v. Patten*, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

Amendment. Modern day scholars revere Hand's courage and brilliance, citing his opinion, overturned by the Second Circuit, as ultimately influencing the Supreme Court's protection of political speech.² In my contribution to this Symposium, I turn to an unexplored aspect of *The Masses* for legal scholars: its significance for the history of art censorship. I set forth a cultural history of *The Masses* and its profound influence on American arts and letters in the twentieth century, showing how the artistic developments championed by the magazine, as well as its political stance, led it to be one of the first targets of artistic censorship in the United States.

Surprisingly, this cultural history reveals that *The Masses* magazine underwent its own internal battle over freedom of expression in the year before Hand's decision, culminating in an artists' strike at the magazine. Ultimately the magazine devoted to free speech and free artistic expression—the magazine that would later be pursued by the government for speaking too frankly—chose to set limits on the free expression of its own artists. As I argue, this internal battle over art censorship at *The Masses* anticipated a longstanding fissure in the First Amendment around the protection of art, a fissure that is still with us 100 years later.

Hand's visionary decision was about a magazine that was itself visionary—a leading outlet for some of the greatest intellectuals, artists, and writers of the day. It became particularly well known for its lasting contributions to visual art. *The Masses* was founded on two linked principles—that absolute freedom of expression was essential to its mission and that art and politics could be perfectly entwined. But this vision proved unsustainable, even before the United States shut the magazine down. An internal battle erupted at *The Masses* over whether artworks were sufficiently political and sufficiently cognizable as “ideas” to merit the absolute freedom that artists at the magazine had once enjoyed. As I show, this conflict about art at the magazine perfectly anticipated contemporary debates in First Amendment law and theory about the status of art as “speech,” and the relationship between text and image. Ultimately, the century-old history of *The Masses*' battle over art has surprising contemporary relevance, not only for free speech law but also for present-day cultural debates. As a new wave

2. For a few of the classic articles articulating Hand's legacy, see, for example, Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment: Masses Publishing Co. v. Patten*, 61 U. COLO. L. REV. 1, 3 (1990); Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 961–62 (1919); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 722–24 (1975); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1235–38, 1288–89 (1983); Geoffrey R. Stone, *The Origins of the “Bad Tendency” Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 416–19 (2002).

of political art has arisen in response to the Trump presidency,³ cultural battles are once again raging about the limits of artistic freedom and the relationship between art and politics.⁴

I. THE CASE

In 1917, the Postmaster General, citing the Espionage Act of 1917, ordered that the August issue of *The Masses* be excluded from the mails.⁵ The relevant provision of the Espionage Act was title I, section 3, which made it a crime during wartime for anyone willfully to “cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States”; or willfully to “obstruct the recruiting or enlistment service of the United States.”⁶ The Act granted the Postmaster General the authority to exclude from the mails any publication that is “in violation of any of the provisions of this Act” or that contains “any matter advocating or urging treason, insurrection or forcible resistance to any law of the United States.”⁷

When *The Masses* sought an injunction against the Postmaster to forbid his refusal to accept its magazine in the mails, Judge Hand granted the injunction.⁸ In an extraordinary opinion, he rejected the prevailing bad tendency test in First Amendment law, and instead set forth a novel interpretation of the Espionage Act of 1917, construing it against the background of our longstanding commitment to the freedom of speech.⁹ His

3. See, e.g., Carl Swanson, *Is Political Art the Only Art that Matters Now?*, N.Y. MAG. (Apr. 17, 2017), <http://www.vulture.com/2017/04/is-political-art-the-only-art-that-matters-now.html> (exploring the rising importance of political art in the contemporary art world).

4. See, e.g., Roberta Smith, *Should Art that Infuriates Us Be Removed?*, N.Y. TIMES (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/arts/design/emmett-till-whitney-biennial-schutz.html> (detailing some of the many recent controversies over politically charged art); Jane Coaston, *An Artist Painted on the American Flag. The Governor of Kansas Wants Her Work Destroyed*, VOX (July 24, 2018), <https://www.vox.com/2018/7/24/17602564/kansas-free-speech-american-flag-art-patriotism-gop-josephine-meckseper-jeff-colyer> (exploring a recent incident involving censorship of political art that was seen as desecrating the American flag).

5. Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 342 (2003).

6. Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217, 219.

7. § 3, 40 Stat. at 230; see Stone, *supra* note 5, at 336–37.

8. *Masses Publ'g Co. v. Patten*, 244 F. 535, 540, 543 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

9. Stone, *supra* note 5, at 335.

decision, quickly overturned,¹⁰ has deeply influenced our understanding of the First Amendment.¹¹

The Postmaster cited eight examples of items published by the magazine that he believed violated the Act, including a poem, three articles, and four cartoons.¹² As Gerald Gunther remarked, the Postmaster's prominent focus on visual images was a significant testament to the emphasis *The Masses* had traditionally placed on publishing visual works; Gunther wrote that the Postmaster's "selection must have pleased those contributors who thought of the magazine mainly as a vehicle for art."¹³ The cartoons at issue are pictured below in Figures 2–5.

10. *Masses Publ'g Co. v. Patten*, 246 F. 2d, 39 (2d Cir. 1917).

11. Stone, *supra* note 5, at 335.

12. *Masses Publ'g Co.*, 244 F. at 536–37.

13. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 131 (2004). As I explain in Part III, *infra*, the visual quality of *The Masses* that came before Hand was dramatically different from the magazine's heyday because the artists' strike of 1916 had led to the exodus of many significant visual artists at the magazine.

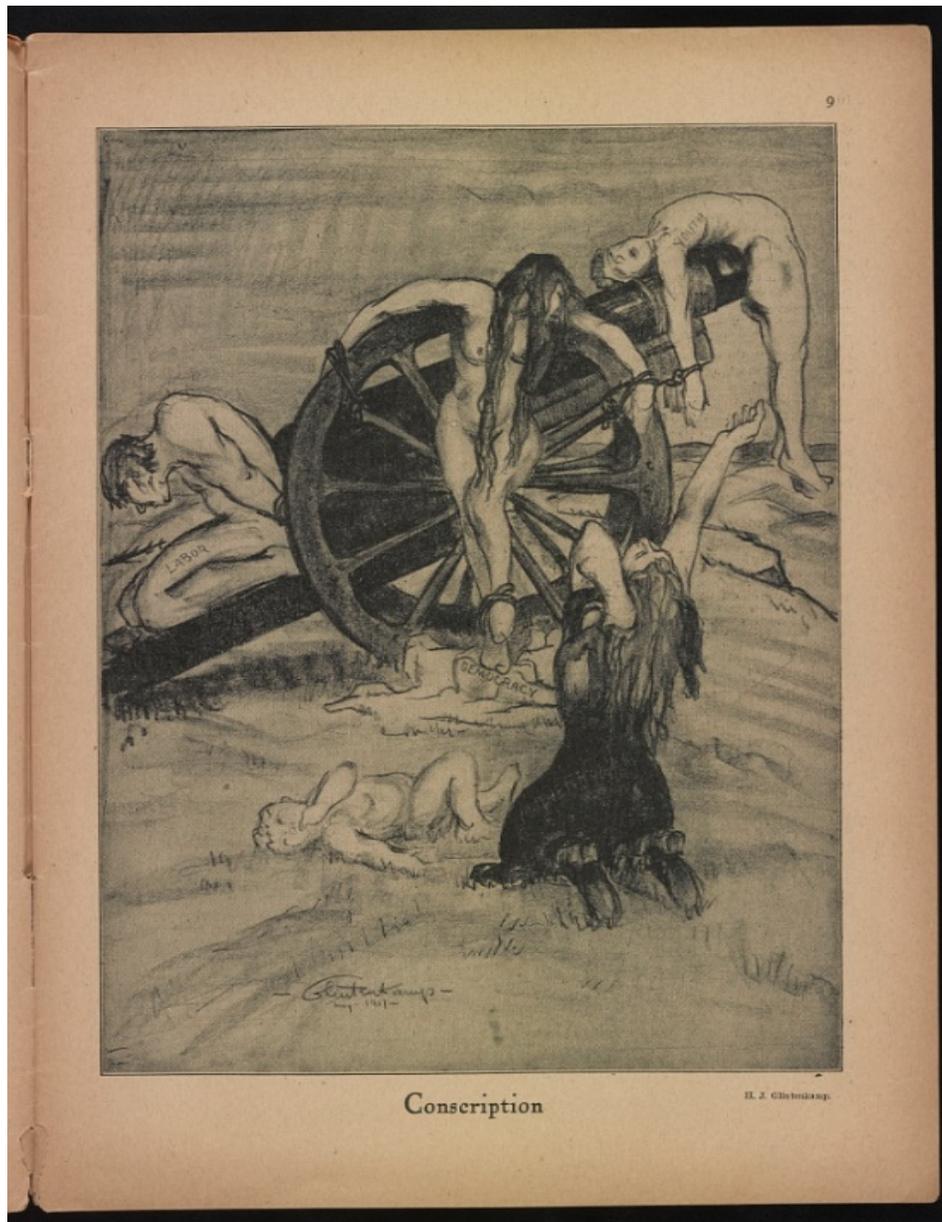


Figure 2: *Conscription* by Henry Glintenkamp.



Figure 3: Henry Glintonkamp's untitled drawing known as *The Liberty Bell*.¹⁴

14. In contrast to its analysis of the other cartoons, the Second Circuit found that if this image had been standing alone without the others, it would not have been enough to warrant the Postmaster's decision. The court wrote,

In the cartoon entitled *Liberty Bell*, the Liberty Bell is presented in a broken form. The idea meant to be conveyed may be that there is no such thing as

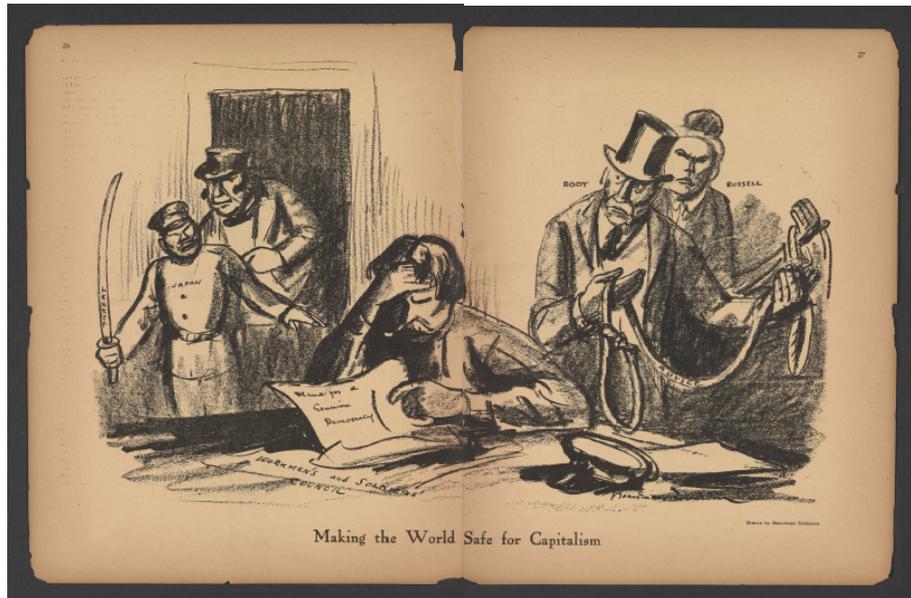


Figure 4: Boardman Robinson, *Making the World Safe for Capitalism*.¹⁵

liberty left in the United States. But whatever it means, taken by itself, it would afford no ground for exclusion from the mails.

Id. at 36.

15. Judge Hand wrote of the image in Figure 4: “The import again is unambiguous and undisputed. The Russian is being ensnared and bullied by the United States and its Allies into a continuance of the war for purposes prejudicial to true democracy.” *Masses Publ’g Co.*, 244 F. at 535. The Second Circuit once again held that the Postmaster General was warranted “in concluding that this cartoon was intended to arouse the resentment of some of our citizens of foreign birth and prevent their enlistment.” *Masses Publ’g Co.*, 246 F. at 37.

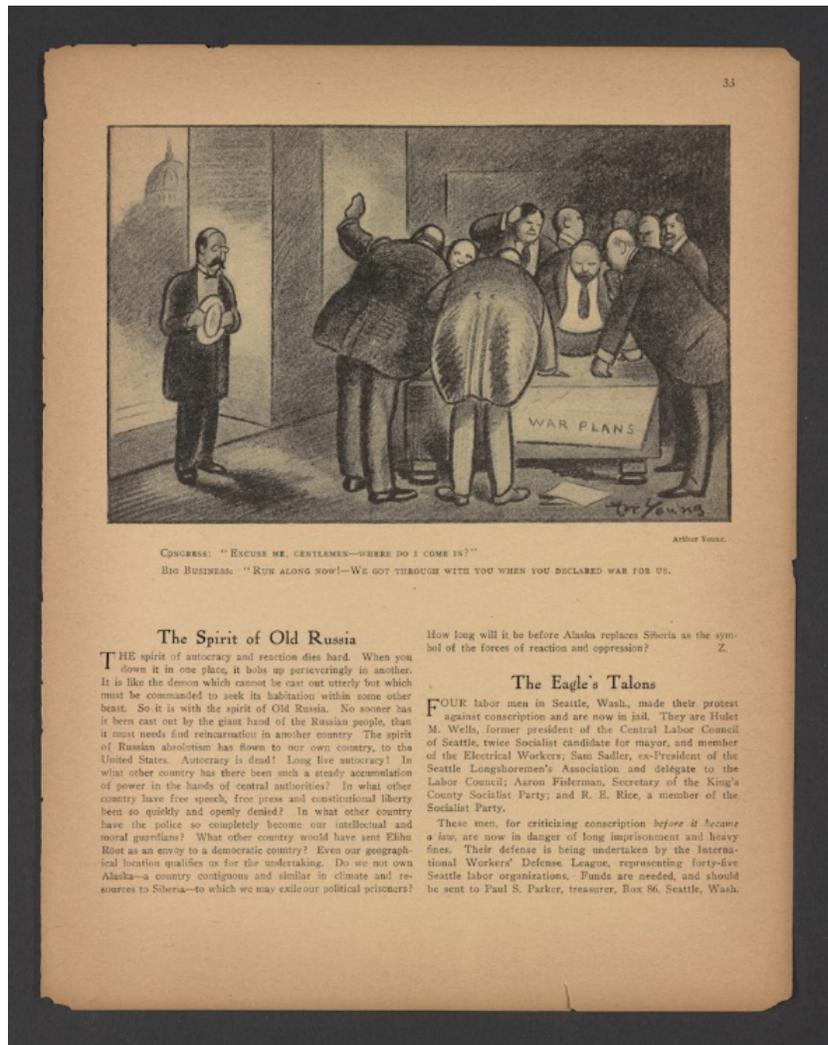


Figure 5: Art Young, *Congress and Big Business*.¹⁶

16. The Second Circuit described this work in Figure 5, *Congress and Big Business* by Art Young, as follows: "Congress is quoted as saying: 'Excuse me, gentlemen, where do I come in?' 'Big Business' replies: 'Run along now; we got through with you when you declared war for us.'" *Id.* at 37. In the Court's opinion, the work was

intended to stir up class hatred of the war and to arouse an unwillingness to serve in the military and naval forces of the United States. The clear import is, if the war was brought on by 'Big Business,' then let 'Big Business' carry it on, and let Labor stand aloof.

Id.

As the reader can see, these cartoons (like the texts that were cited by the Postmaster) were clearly anti-war, but fell far short of anything resembling an express statement to readers that they must resist the draft and thus violate the law.¹⁷ In granting *The Masses*' injunction, Hand did not deny the anti-war sentiment of the work, but focused instead on this lack of express incitement, writing that "none of the cartoons in this paper can be thought directly to counsel or advise insubordination or mutiny, without a violation of their meaning quite beyond any tolerable understanding."¹⁸ Yet the Second Circuit reversed Hand's decision, reverting to the prevailing "bad tendency" test of the day, to find that *The Masses* was unable to overcome the presumption that the Postmaster General was correct in concluding that these cartoons would interfere with enlistment.¹⁹ For example, of the cartoon *Conscription* pictured above in Figure 2, the Second Circuit wrote:

It seems to us to say: This law murders youth, enslaves labor to its misery, drives womanhood into utter despair and agony, and takes away from democracy its freedom. Its voice is not the voice of patriotism, and its language suggests disloyalty. If counsel wished the court to understand that in his opinion the effect of the cartoon would not be to interfere with enlistment, we are not able to agree with him. That it would interfere, and was intended to interfere, was evidently the opinion of the Postmaster General; and this court cannot say that he was not justified in his conclusion.²⁰

II. "A MAGAZINE OF RADICAL ART AND FREEDOM OF EXPRESSION"²¹

The Masses was a radical, iconoclastic, artistically cutting-edge magazine that had lasting cultural significance. Irving Howe described it as "a combination of Circus, nursery, and boxing ring—for almost everything that was then alive and irreverent in American culture."²² Founded in 1911, *The Masses* came into its own when Max Eastman took over as editor in 1912 and transformed the magazine from a fairly straightforward socialist publication into an eclectic vehicle for the leading bohemian intellectuals of the day,

17. See GUNTHER, *supra* note 13, at 135.

18. *Masses Publ'g Co.*, 244 F. at 540–41.

19. *Masses Publ'g Co. v. Patten*, 246 F. 24, 37 (2d Cir. 1917).

20. *Id.*

21. REBECCA ZURIER, *ART FOR THE MASSES: A RADICAL MAGAZINE AND ITS GRAPHICS* 35 (1988) [hereinafter *ART FOR THE MASSES*] (quoting Max Eastman as saying, "We are going to make *The Masses* . . . a magazine of radical art and freedom of expression").

22. WILLIAM O'NEILL, *THE LAST ROMANTIC: A LIFE OF MAX EASTMAN* 40 (1978) (quoting Irving Howe).

combining art, literature, and politics.²³ Eastman wrote of his vision for the magazine: “We are going to make *The Masses* . . . a magazine of radical art and freedom of expression.”²⁴ Indeed, this twinning of radical art and freedom of expression more generally was a central ethos of the magazine. Consider Eastman’s manifesto, which ran every month (with slight variations in wording) on the masthead of *The Masses*.²⁵ The example below (Figure 6) is from the August 1917 issue that led to the case that Hand heard. Eastman described *The Masses* as:

A Revolutionary and not a Reform Magazine; a Magazine with a sense of Humor and no Respect for the Respectable; Frank; Arrogant; Impertinent; Searching for the True Causes; a Magazine Directed against Rigidity and Dogma wherever it is found; Printing what is too Naked or True for a Money-Making Press; a Magazine whose final Policy is to do as it Pleases and conciliate Nobody, not even its Readers—A Free Magazine.²⁶

23. ART FOR THE MASSES, *supra* note 21, at 35.

24. *Id.*; *see also id.* at 125 (describing how the editors turned from “advocating a specific position to ‘free expression’” as their mission); *id.* at 35–36 (describing how this new freedom meant that the magazine would not follow a party line, even a socialist one).

25. Eastman’s manifesto was a departure from, but based in part on, a manifesto written by John Reed. DANIEL AARON, WRITERS ON THE LEFT: EPISODES IN AMERICAN LITERARY COMMUNISM 21 (Morningside ed. 1992).

26. *Id.*

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MASSES

THIS Magazine is owned and Published Co-operatively by its Editors. It has no Dividends to Pay, and nobody is trying to make Money out of it. A Revolutionary and not a Reform Magazine; a Magazine with a sense of Humor and no Respect for the Respectable; Frank; Arrogant; Impertinent; Searching for the True Causes; a Magazine Directed against Rigidity and Dogma wherever it is found; Printing what is too Naked or True for a Money-Making Press; a Magazine whose final Policy is to do as it Pleases and Conciliate Nobody, not even its Readers—A Free Magazine.

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Philadelphia P
"A German attack on England."
Boston Tra

Max Eastman
"UNDERSTANDING GERMAN"

Figure 6: The Manifesto from *The Masses* Masthead, August 1917.

This promise of freedom was a magnet for great artists and writers of the day. Even though *The Masses* did not pay its contributors, artists and writers still chose to give their work to the magazine precisely because of its commitment to freedom of expression.²⁷ This freedom was particularly

27. ART FOR THE MASSES, *supra* note 21, at 34–35. When Eastman took over *The Masses*, he emphasized the marriage of art and politics, which also appealed to writers and artists of the day. He wrote,

appealing to artists and writers who had either been rejected by the conservative press or had been forced to change their art in order to be published.²⁸ As Art Young, an influential art editor at *The Masses*, wrote, even though the magazine offered artists no money, they chose to publish there because it gave them a space “to gallop around in and be free.”²⁹

Attracting prominent intellectuals, artists, and writers of the time, *The Masses* became the central publication of Greenwich Village bohemian culture. It featured poetry by William Carlos Williams and Amy Lowell, fiction by Carl Sandburg, Upton Sinclair, and Sherwood Anderson, work by the leading political cartoonists of the day, and art by members of what has come to be known as the renowned Ashcan School of American Art, including John Sloan, George Bellows, Glenn Coleman, Stuart Davis, and others.³⁰ While its impact on all of arts and culture was significant, *The Masses* played a particularly outsized role in the visual arts as discussed below.³¹ Notable because it put the artists on an equal footing with the writers, the magazine served as a “new kind of art gallery.”³² It was visually magnificent, offering high quality visual production values that allowed artists to convey in reproductions part of the power of their original art works.³³

There are no magazines in American which measure up in radical art and freedom of expression to the foreign satirical journals. We think we can produce one, and we have on our staff eight of the best known artists and illustrators in the country ready to contribute to it their most individual work.

Id. at 35.

28. See *infra* Part II.B for discussion of the Ashcan artists and their differences from mainstream art at the time.

29. Lori Cole, “What is the Matter with Magazine Art?”: *On Censoring the Masses*, ART PRACTICAL (May 27, 2015), <https://www.artpractical.com/feature/what-is-the-matter-with-magazine-art-on-censoring-the-masses/> (quoting Art Young).

30. ART FOR THE MASSES, *supra* note 21, at xv, 24. See *infra* Part II.B for a discussion of the Ashcan school.

31. *Infra* Part II.B; see also RACHEL SCHREIBER, GENDER AND ACTIVISM IN A LITTLE MAGAZINE: THE MODERN FIGURES OF THE *MASSES* 2 (2011) (stating that the magazine’s “use of imagery, in particular, was singular”).

32. ART FOR THE MASSES, *supra* note 21, at 32.

33. *Id.* at 132–39 (describing reproduction techniques the magazine used to make the artworks extraordinarily vivid and immediate).

A. Greenwich Village and the “Lyrical Left”

The Masses was in many ways the perfect magazine for early twentieth-century Greenwich Village.³⁴ The founding vision of *The Masses*—that art and politics should be seamlessly intertwined—was a central characteristic of Greenwich Village bohemianism.³⁵ Indeed, scholars have used the term the “Lyrical Left” to describe the Village’s peculiar inflection of politics, an arts-infused “version of leftism congenial to artist, poets and professors.”³⁶ (Fittingly, *The Masses* has been called the “house organ” of the Village’s Lyrical Left).³⁷ A literary and artistic sensibility pervaded politics; socialists, anarchists, and Bolsheviks worked side by side with painters, writers, and poets. The theory was that this admixture of art and politics would be greater than the sum of its parts. This was so not only because creativity was itself

34. Learned Hand occasionally read *The Masses*, even though he was certainly not a village bohemian and even though he supported the war, unlike *The Masses* editors. GUNTHER, *supra* note 13, at 129. There was nonetheless an “overlap” as Gerald Gunther recounts, between Hand’s circles and *The Masses* crowd. *Id.* Indeed, Hand once introduced editor Max Eastman for a speech at a women’s club in New York. *Id.* at 130. And in my view, Hand’s famous opinion in *United States v. Kennerly*, 209 F. 119 (S.D.N.Y. 1913) evinces a sympatico sensibility with *The Masses* crowd. In *Kennerly*, an obscenity case, Hand advanced a view that was overtly critical of Victorian morality and Comstockian views. Hand wrote, for example, “I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time.” *Id.* at 120; see also Anita Bernstein, *The Representational Dialectic (With Illustrations from Obscenity, Forfeiture, and Accident Law)*, 87 CALIF. L. REV. 305, 326–27 (1999) (noting Hand’s influence in moving obscenity law away from Victorian repression to a “more sophisticated view of the world”); David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 549 (1981) (describing Hand’s criticism in *Kennerly* of the prudery of the existing obscenity standard at the time). This resembled the anti-Comstockian view of censorship that was a central tenet of *The Masses*, which advocated free love and was at the forefront of the sexual revolution. See, e.g., ART FOR THE MASSES, *supra* note 21, at 4–14; see also Rachel Schreiber, *Before Their Makers and Their Judges: Prostitutes and White Slaves in the Political Cartoons of the Masses (New York, 1911-1917)*, 35 FEMINIST STUD. 161, 164 (2009) (analyzing *The Masses* as sometimes defying Victorian norms of sexuality).

35. To get a flavor of the Village as central to bohemian identity, consider that in the year Learned Hand decided the *Masses* case, a group of artists (including John Sloan and Marcel Duchamp) climbed to the top of the Washington Square Arch and, in a mock secession ceremony, declared there was now a “free and independent republic” of Greenwich Village. ROSS WETZSTEON, *REPUBLIC OF DREAMS: GREENWICH VILLAGE: THE AMERICAN BOHEMIA, 1910–1960*, at 1 (2002).

36. David Lubin, *Lies that Tell the Truth: American Artists in the Crucible of War, in WORLD WAR I AND AMERICAN ART* 31, 32 (Robert Cozzolino, Anne Knutsen, & David Lubin eds., 2016).

37. *Id.* at 32; cf. MAX EASTMAN, *ENJOYMENT OF LIVING* 418 (1st ed. 1948) (“The birth of *The Masses* coincided with the birth of ‘Greenwich Village’ as a self-conscious entity, an American Bohemia or gipsy-minded Latin Quarter, but its relations with that entity were not simple.”).

viewed as an act of political rebellion against capitalism,³⁸ but also because the arts were thought to have unique power to reach and move the working classes. For example, John Reed, the well-known journalist and contributing editor of *The Masses*, wrote, “I have found that among men of whatever class, if they are deeply stirred by emotion, poetry appeals; as indeed, all the arts appeal. . . . Art must cease, I think, to be for the aesthetic enjoyment of a few highly sensitive minds. It must go back to its original sources.”³⁹ This belief that there could be a perfect marriage between art and politics thus characterized both *The Masses* and Greenwich Village bohemianism.⁴⁰

B. *The Artistic Importance of The Masses: The Ashcan School*

Although it was influential in many areas of art and culture, *The Masses* was a particularly significant force in the visual arts.⁴¹ Yet as we will see in Part III, it was ultimately in this realm that the magazine underwent its own internal battle about freedom of expression.

Many of the artists of *The Masses* were central figures in what later came to be known the Ashcan School of American Art.⁴² Important artists such as

38. ART FOR THE MASSES, *supra* note 21, at 106.

39. *Id.* at 31 (quoting John Reed, Letter to the Editor, POETRY, Sept. 11, 1912).

40. It is particularly fitting that we held this symposium on *The Masses* here in the Village at NYU School of Law, because the law school is located on a block in Greenwich Village of tremendous significance for *The Masses* and the bohemian intellectuals who comprised the Lyrical Left. Indeed, the law school sits on MacDougal Street between West 3rd and Washington Square, a block that was called “command post of the Greenwich Village rebellion.” WILLIAM B. SCOTT & PETER M. RUTKOFF, NEW YORK MODERN: THE ARTS AND THE CITY 74 (1999). The epicenter of bohemian life was literally across the street from the law school’s western door. The Liberal Club, which acted as the headquarters of the bohemian left, as well as other central hangouts for *The Masses* artists and writers, including the Washington Square bookshop, Polly’s Restaurant and the Provincetown Theater, were all directly across the block. *Id.* In fact, in the course of my research, I learned that one of the most important contributors to *The Masses*, John Reed, lived on the very site of NYU School of Law. ART FOR THE MASSES, *supra* note 21, at 102. Before the law school was built at 40 Washington Square, this address was home to a row of dilapidated cold water flats including 42 Washington Square, Reed’s home, which he memorialized in a jocular poem about the site where the law school now stands. JOHN REED, THE DAY IN BOHEMIA OR LIFE AMONG THE ARTISTS (1913), <http://oldsite.english.ucsb.edu/faculty/eweitzel/engl186/DayInBohemia.htm>. Eugene O’Neill lived next door and then later at this site as well. Frank Riley, *Eugene O’Neill Tribute Cometh to Manhattan*, L.A. TIMES (Aug. 21, 1988), http://articles.latimes.com/1988-08-21/travel/tr-1017_1_o-neill-s-birthday.

41. See SCHREIBER, *supra* note 31, at 3.

42. For discussion of the Ashcan School, focusing on the work of George Bellows, William Glackens, Robert Henri, George Luks, Everett Sinn, and John Sloan, see generally VIRGINIA MECKLENBURG, ROBERT SNYDER & REBECCA ZURIER, METROPOLITAN LIVES: THE ASHCAN

John Sloan, George Bellows, Stuart Davis, and Glenn Coleman all published work in the magazine. The Ashcan School was distinguished by a realist focus on chronicling the quotidian life of the urban working class.⁴³ Encouraged by their teacher, the realist painter Robert Henri, the Ashcan artists roamed the streets, observing city life and recording it using a reporter's sketch technique.⁴⁴ This approach was radical for its time. By chronicling the life of the working class and the down and out, these artists defied the demands of the art establishment of the day that art should depict elevated subject matter.⁴⁵ They also rejected the polished academic style of the day; instead, their work was characterized by a dark palette and gestural open brushwork. They often relied on a coarse crayon technique inspired by Honoré Daumier.⁴⁶

ARTISTS AND THEIR NEW YORK, 1897–1917 (1996). Note that the term “Ashcan” was not initially applied to the group and in fact had originated as a derisive comment on the work. Eventually the Ashcan artists were eclipsed by the Armory Show of 1913, which introduced the Modernist avant-garde artists of Europe to American audiences.

43. See ART FOR THE MASSES, *supra* note 21, at 140; H. Barbara Weinberg, *The Ashcan School*, THE MET: HEILBRUNN TIMELINE OF ART HISTORY (Apr. 2010), http://www.metmuseum.org/toah/hd/ashc/hd_ashc.htm.

44. See ART FOR THE MASSES, *supra* note 21, at 141.

45. Indeed, their works were often rejected by the powerful and conservative National Academy of Design. Kelly M. Suredam, John Sloan and Stuart Davis In Gloucester: 1915–1918, at 22–24 (May 2013) (unpublished thesis, Kent State University), https://etd.ohiolink.edu/rws_etd/document/get/kent1366383474/inline; see also MECKLENBURG ET. AL., *supra* note 42, at 192 (describing Robert Henri's 1907 resignation from the National Academy of Design in protest over the rejection of several artists).

46. See ART FOR THE MASSES, *supra* note 21, at 127–32 (discussing the influence of Daumier).



Figure 7: *Splinter Beach*, George Bellows (1882–1925), first executed in 1913.

An example of this kind of art, first published in *The Masses*, appears above in Figure 7. *Splinter Beach*, a work by celebrated artist George Bellows, depicts a gritty, urban swimming spot popular with the working classes.⁴⁷ It was one of a series of significant works Bellows first published in *The Masses* in 1913.⁴⁸ Pertinently, Bellows was drawn to publishing in *The Masses* not because of its politics but instead because of its commitment to artistic freedom; he was not a socialist or anarchist.⁴⁹ Bellows said of *The Masses*: it “offers the opportunity which artists and writers of young enthusiastic and revolutionary spirit have always wished for in this country.”⁵⁰

47. See *id.* at 168–69 (reproducing the version of the work that first ran in the July issue of 1913).

48. MARIANNE DOEZEMA, *GEORGE BELLOWS AND URBAN AMERICA 187–98* (1992) (discussing the significant works Bellows produced for *The Masses* in 1913).

49. *Id.* at 185.

50. *Id.*

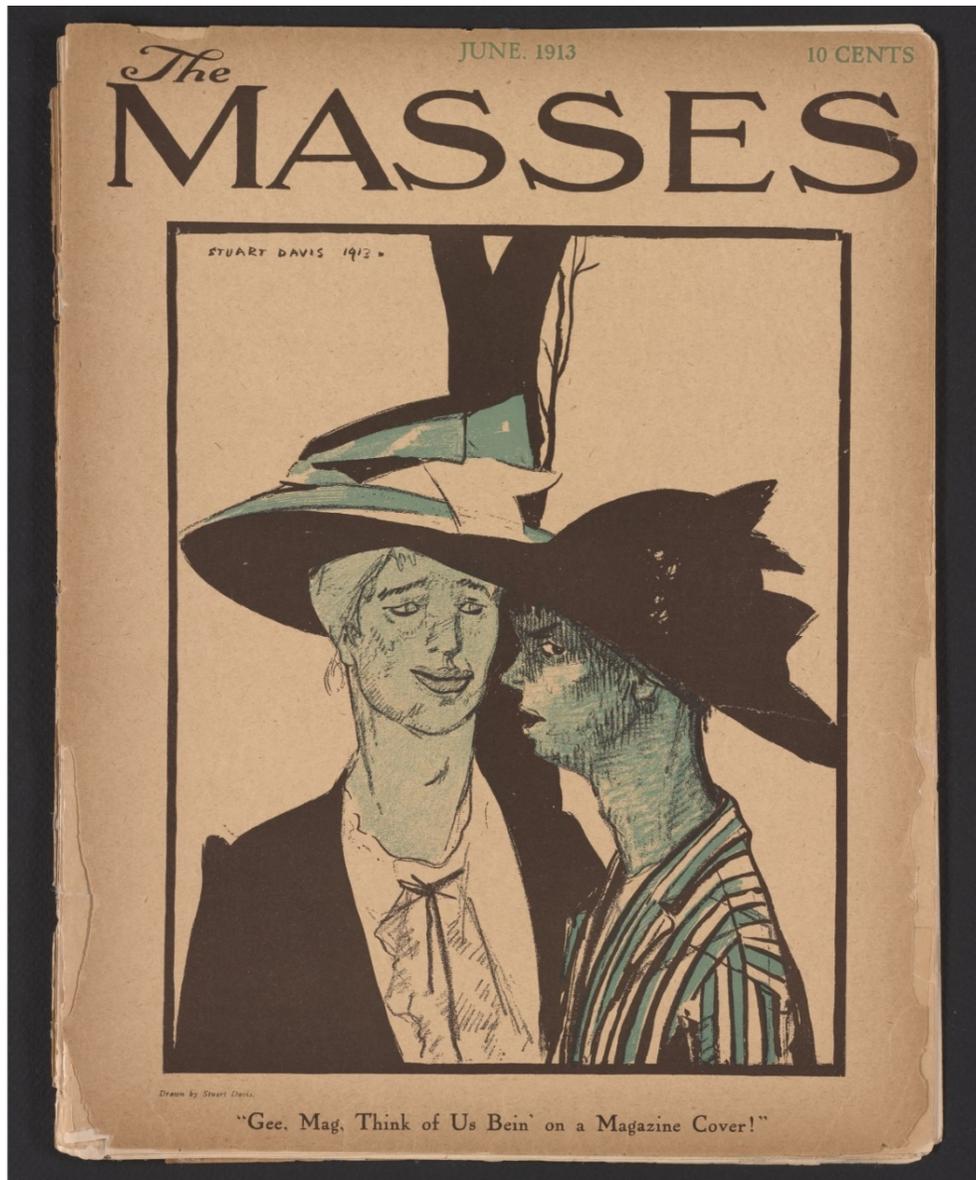


Figure 8: Stuart Davis, *The Masses* cover, June 1913.

Consider as another example the well-known cover of *The Masses* by Stuart Davis, pictured in Figure 8, which depicts two lower-class women, one remarking to another about the shock of being shown on a magazine cover: "Gee, Mag, Think of Us Bein' on a Magazine Cover!" Controversial because of its lower-class subject matter and because it was thought to be ugly by conventional standards, the cover reflected the radical sensibility of *The*

Masses and the Ashcan School that grew out of it: a defiance of traditional norms of beauty and an insistence that gritty, lower-class life was a worthy subject of art.⁵¹

Since Max Eastman took over *The Masses*, there were primarily two types of visual imagery in its pages, cartoons and “fine art.” Cartoons were drawings, usually of a political nature, accompanied by witty captions. They were satiric and biting, mostly modeled after the sophisticated European satire magazines of the day.⁵² In the “fine art” category were depictions of urban life associated with the Ashcan School, but also landscapes and classical nudes.⁵³ That said, there was a fluidity between these categories. As art historian Rebecca Zurier writes, the art works in *The Masses* often “straddled the boundaries between paintings, cartoons, illustrations, and fine prints.”⁵⁴ Furthermore, while some of these realist art works might be seen as overtly political, others were not.⁵⁵ Some of the artists were committed socialists, but as with George Bellows, discussed above,⁵⁶ some of the artists did not share the magazine’s socialist political outlook. Instead their commitment to freedom of expression, and their interest in depicting the lower classes as worthy of respect, made them naturally drawn to the magazine.⁵⁷ As Gerald Gunther remarked, “*The Masses* artists varied in their political beliefs, but shared “a penchant for iconoclasm and confrontation.”⁵⁸

III. THE ARTISTS’ STRIKE AND THE CONFLICT BETWEEN TEXT AND IMAGE, ART AND POLITICS

As discussed earlier, *The Masses* was founded on a commitment to complete freedom of expression in the arts and in political speech. Furthermore, art and politics were to play equal roles in the magazine.⁵⁹ This vision of harmony between art and politics was remarkable because it united two realms that are often conceived of as incompatible opposites, a view

51. Cole, *supra* note 29 (noting that the work was drawn in “sickly blue and green crayon” and that it “served as an antidote to the typical commercial-magazine cover”).

52. ART FOR THE MASSES, *supra* note 21, at 125–27.

53. *Id.* at 140.

54. *Id.* at 147.

55. *Id.* at 153–54.

56. See *supra* text accompanying notes 47–50.

57. ART FOR THE MASSES, *supra* note 21, at 40.

58. GUNTHER, *supra* note 13, at 129.

59. See, e.g., Cole, *supra* note 29 (“Eastman aligned what he called ‘true art’ with democracy, decrying the fact that most magazines subordinated art to their commercial interests.”).

exemplified in Oscar Wilde's famous maxim that "All art is quite useless."⁶⁰ Nonetheless, the editors and writers of *The Masses* saw the art/politics union as critical to their mission for at least two reasons: first, because they saw creativity as an act of political rebellion against capitalism; second, because they believed art was the vehicle that had the power to link the masses to the elite.⁶¹

Yet this marriage between art and politics was a fragile one; indeed it collapsed in 1916. Ultimately the magazine devoted to free speech and free artistic expression—the magazine that would later be pursued by the government for speaking too frankly—set limits on the free expression of its own artists. Internal fights erupted about whether art was sufficiently clear in its message to achieve social change, about the relationship between art and ideas, text and image. Art lost. *The Masses* instituted a new policy in 1916 to ensure that art was in the service of politics and could be legible as an "idea." This new policy resulted in the artists' strike of 1916, in which many of the great artists who were associated with *The Masses* left the magazine in protest.⁶² As I will argue below in Part IV, this conflict over art at *The Masses* perfectly anticipated contemporary debates about the role of art in free speech theory.

The conflict erupted in 1916 over a seemingly simple issue: some of the editors began to place captions on the artists' works, without their consent, in order to make the work more pointed and political.⁶³ As Art Young, an influential art editor and cartoonist, wrote in defense of the new policy that alienated many of the artists:

They want to run pictures of ash cans and girls hitching up their skirts in Horatio street—regardless of ideas—and without title. On the other hand a group of us believe that such pictures belong better in exclusive art magazines. Therefore we put an emphasis on the

60. OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* 4 (Joseph Bristow ed., Oxford Univ. Press new ed. 2006) (1890). For further discussion of this view that art and politics are incompatible, see, for example, Peter Lamarque, *The Uselessness of Art*, 68 *J. AESTHETICS & ART CRITICISM* 205, 205 (2010). For an example of the opposite view, in which art and politics must be linked, see, for example FRIEDRICH SCHILLER, *ON THE AESTHETIC EDUCATION OF MAN: IN A SERIES OF LETTERS* 9 (Elizabeth M. Wilkinson & L.A. Willoughby trans., 1982) ("If man is ever to solve that problem of politics in practice, he will have to approach it through the problem of the aesthetic, because it is only through Beauty that man makes his way to freedom."). For a deep discussion of the problem of linking aesthetics and politics in the context of copyright law, see Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 *COLUM. L. REV.* 319 (2017).

61. See *supra* notes 38–39 and accompanying text.

62. *ART OF THE MASSES*, *supra* note 21, at 52.

63. *Id.* at 53.

value of constructive cartoons for a publication like *The Masses*⁶⁴

Similarly, editor Floyd Dell wrote in defense of the captioning policy, “we’re running a magazine, not an art gallery We wanted the picture to have some kind of meaning.”⁶⁵ To many of the artists, even those who shared the political views being expressed by the captions, this attempt to pin their work down to an idea or reduce it to mere politics was a violation of the very freedom the magazine stood for. It demoted art, breaching the magazine’s commitment to freedom of expression and to putting art and politics on equal footing.

The result was the artists’ strike of 1916, led by noted artists George Bellows, Stuart Davis, and John Sloan, who rebelled against the attempt to caption their work, reducing it to words and to specific political “meanings.” Ultimately Sloan, Davis, Coleman, and several other prominent artists resigned over the conflict.⁶⁶ This exodus of artists had a striking effect on the look and character of the magazine: *The Masses* of 1917 that came before Judge Learned Hand was a very different magazine than the one that preceded the strike. The post-strike *Masses* featured few of the urban scenes that had made the magazine so remarkable; now it featured primarily “fine art” nudes and landscapes, along with pointedly political cartoons like the ones singled out by the Postmaster General.⁶⁷ The new incarnation of *The Masses* no longer gave art equal footing, which had been one of the magazine’s founding premises; as artist George Bellows lamented, the arts were now demoted, placing “the artists in the conventional position, as the appendage of the literary editors, illustrators of literary lines.”⁶⁸ “With the exodus of the artists who had given the magazine its signature style, it became a dramatically different publication.

How could a debate about something as seemingly minor as captioning art lead to such a stark rupture? At stake in this debate over captioning were urgent questions about the nature and value of art. First, at the most basic level, the new captioning policy threatened authorship and artistic freedom. Editors would add captions to some works without the artists’ consent. They added captions to works that were not intended to contain words at all, or to

64. *Id.* (citation omitted).

65. *Id.* (citation omitted).

66. SCHREIBER, *supra* note 31, at 7.

67. ART OF THE MASSES, *supra* note 21, at 57 (explaining that with the departure of the artists, the magazine began to “publish more and more vehement political cartoons” and “fewer drawings of city life” while “the number of uncaptioned nudes and landscapes increased”).

68. *Id.* (quoting Letter from George Bellows to *The Masses* (1917) (on file with Amherst College Library)).

works that were not intended to “mean” what the captioned words suggested. Indeed, editors sometimes added captions to works that were not intended to “mean” anything at all. To many artists, this violated the commitment to artistic freedom of expression that had defined the magazine since Eastman first took it over in 1912, establishing it as a space for artists “to gallop around in and be free.”⁶⁹ Second, captioning cut to the heart of a debate about the value of art and its relationship to politics: was art for art’s sake, significant enough to stand on its own, or was it merely a tool of politics, and to be subjugated accordingly? Third, and relatedly, the conflict revealed a deeper rupture over the nature of artistic meaning: Was art’s capacity for multiple meanings a virtue or a vice?⁷⁰ Was art valuable only when it could be reduced to an idea, or did it have independent value?⁷¹ What mattered more—words or images?

In short, the captioning debate and the resultant artists’ strike of 1916 cut to the core of what made *The Masses* such an important engine of the Lyrical Left. Eastman described the strike as a struggle between “art and propaganda, poetry and practical effort—between the very two interests whose satisfaction within the same covers had made the magazine unique.”⁷²

IV. THE UNCERTAIN STATUS OF ART WITHIN FREE SPEECH JURISPRUDENCE

In this Part, I argue that the bitter internal struggle over art at *The Masses* anticipated a problem that would later come to vex First Amendment theorists: how do we justify protection for art, often apolitical and hard to reduce to a single “idea,” under a vision of the First Amendment that prizes political discourse and assumes a rational marketplace of ideas? In previous scholarship, I have addressed the uncertain status of art as First Amendment speech.⁷³ Here I return to this issue to show how the arguments about freedom

69. Cole, *supra* note 29 (quoting Art Young).

70. *Cf. Pleasant Grove City v. Summum*, 555 U.S. 460, 475 (2009) (“[T]ext-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable.”).

71. The split was referred to as a division between “artists” and “idea men” or between an “idea man” and a “painter.” ART OF THE MASSES, *supra* note 21, at 129.

72. Cole, *supra* note 29 (quoting Max Eastman).

73. Amy Adler, *The Thirty-Ninth Annual Edward G. Donley Memorial Lectures: The Art of Censorship*, 103 W. VA. L. REV. 205, 205 (2000) [hereinafter *Art of Censorship*] (arguing that the difficulty in justifying coverage for art points to an unsolved problem in First Amendment theory); Amy Adler, *The First Amendment and the Second Commandment*, 57 N.Y.L. SCH. L. REV. 41, 42 (2013) [hereinafter *First Amendment and Second Commandment*] (arguing that the First

of artistic expression at *The Masses* perfectly anticipated contemporary debates about the problematic status of art under the First Amendment.⁷⁴

What is the status of art as “speech” under the First Amendment? The answer is surprisingly uncertain.⁷⁵ The Supreme Court clearly *assumes* that art is within the First Amendment’s coverage,⁷⁶ but for a number of reasons explained below, it is difficult to find a satisfactory rationale to justify that

Amendment offers greater protection for verbal as opposed to visual forms of representation including visual art).

74. Note that the question I address is technically whether the First Amendment provides coverage to art; there is still a secondary question of whether examples of covered speech are nonetheless protected. See Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270–71 (1981) (describing the First Amendment distinction between coverage and protection).

75. Cf. *First Amendment and Second Commandment*, *supra* note 79, at 42 (arguing that the First Amendment offers greater protection for verbal as opposed to visual forms of representation); Amy Adler, *Performance Anxiety: Medusa, Sex and the First Amendment*, 21 YALE J.L. & HUMAN. 227, 228 (2009) (exploring the marginal status of dance and live performance as speech); Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1114 (2005) (exploring the question of whether nude dancing is speech under the First Amendment); Joseph Blocher, *Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment*, 63 DUKE L.J. 1423, 1426 (2014) (discussing the related problem of whether the First Amendment protects nonsense); Alan K. Chen, *Instrumental Music and the First Amendment*, 66 HASTINGS L.J. 381, 384 (2015) (exploring whether instrumental music falls within the scope of the First Amendment); Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 170 (2012) (assuming the First Amendment’s coverage of nonrepresentational art, but noting that the question of how to justify that coverage “proves quite difficult to answer satisfactorily”). See generally *Art of Censorship*, *supra* note 79 (arguing that the difficulty in justifying coverage for art points to an unsolved problem in First Amendment theory); Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73 (1996) (discussing status of art in First Amendment).

For discussion in the lower courts about art’s coverage under the First Amendment, compare *Bery v. City of New York*, 906 F. Supp. 163, 169 (S.D.N.Y. 1995) (upholding regulation on selling art by finding that “art does not carry either words of the particularized social and political messages upon which the First Amendment places special value,”), with *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996) (reversing district court decision and finding that art is protected by First Amendment). See also *Kleinman v. City of San Marcos*, 597 F.3d 323, 326 (5th Cir. 2010) (questioning reach of Supreme Court’s protection of art in *Hurley* by stating, “*Hurley* refers solely to great works of art. Neither in *Hurley* nor in any later case has the Court elaborated on the extent of First Amendment protection for visual non-speech objects or artworks”); *Mastrovincenzo v. City of New York*, 435 F.3d 78, 92–93 (2d Cir. 2006) (noting “paintings, photographs, prints and sculptures” are presumptively expressive); *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 628 (7th Cir. 1985) (stating the freedoms protected by First Amendment “embrace purely artistic as well as political expression”).

76. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995); *Miller v. California*, 413 U.S. 15, 24, (1973) (protecting works that have serious “artistic” value in obscenity law).

assumption within existing First Amendment theory.⁷⁷ As I explore here, three basic, deeply interrelated claims were mounted against art at *The Masses*. Each of these claims maps onto a corresponding argument in contemporary scholarship about the First Amendment status of art. In what follows, I examine each of these claims in the context of both modern free speech theory and *The Masses*' debates about artistic freedom.⁷⁸

A. *The Incompatibility Between Art and Ideas*

“[W]hatever images are, ideas are something else.”⁷⁹

– W.J.T. Mitchell

The artists' strike at *The Masses* emerged in response to the view of some editors that art, standing on its own without words, lacked sufficient meaning or ideas. Indeed, the split at the magazine was referred to as a division between “artists” on the one hand and “idea men” on the other, directly foregrounding a binary opposition between art and ideas.⁸⁰ The assumption was that artworks could not adequately convey a meaning or message; thus, one editor argued that it was essential to add words to art because “[w]e wanted the picture to have some kind of *meaning*.”⁸¹

The difficulty of reducing art works to “ideas” or “messages” has been a recurrent problem in free speech law and theory. This is so primarily because the predominant rationale for protecting speech under the First Amendment is the fabled metaphor of “the marketplace of ideas.”⁸² Once we value speech for its rationally comprehensible ideas, however, as the marketplace model

77. See, e.g., Edward J. Eberle, *Art as Speech*, 11 U. PA. J.L. & SOC. CHANGE 1, 3 (2007) (“The Supreme Court has ruled that particular instances of art speech are protected expression, but has not supplied a satisfactory rationale for protecting art.”); Tushnet, *supra* note 75, at 170 (noting that it is “quite difficult to answer satisfactorily” why nonrepresentational art is within the coverage of the First Amendment).

78. Note that I do not address in this Essay another set of justifications for the protection of art under the First Amendment: autonomy theories of the First Amendment.

79. W.J.T. MITCHELL, *ICONOLOGY: IMAGE, TEXT, IDEOLOGY* 6 (1986).

80. *ART FOR THE MASSES*, *supra* note 21, at 129; see also *id.* at 143–45 (characterizing the split between an “idea man” and a “painter”).

81. SCHREIBER, *supra* note 31, at 9 (quoting Floyd Dell, *Memories of the Old Masses*, 68 AM. MERCURY 304, 484 (1949)) (emphasis added).

82. Although the Court did not use this precise phrase until 1965 in *Lamont v Postmaster General*, 381 U.S. 301, 308 (1965), the famous “marketplace of ideas” metaphor has long referred to the free speech reasoning first introduced by Justice Oliver Wendell Holmes in his famous dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919). See Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 46.

does, then it becomes hard to accommodate protection for a great deal of visual art. It would be a reductive and cramped reading of visual art to suggest that the point of an artwork is to express an idea.⁸³ Indeed, there is an enduring cultural view that images are flatly incompatible with ideas. Visual studies scholar W.J.T. Mitchell describes “the familiar claim that pictures cannot make statements or communicate precise ideas.”⁸⁴ How then to fit them within a marketplace of ideas model of the First Amendment?

This difficulty of reducing artworks—which often seem to revel in their multiplicity of meaning—to simple “ideas” or “messages” has posed a repeated problem for courts.⁸⁵ Consider the artist Richard Serra, who lost a famous First Amendment case against the government for destroying his massive, site-specific, abstract sculpture *Tilted Arc*.⁸⁶ The age-old problem that surrounds visual art, the way it cannot easily be described as expressing a succinct idea, was the artist’s undoing.⁸⁷ The court dwelled on Serra’s failure to “identify any particular message conveyed by” the sculpture or to demonstrate that the abstract work was “expressing any particular idea”⁸⁸ as fatal to his case. Given the resulting “uncertainty as to the meaning” of *Tilted Arc*, he could not claim that the government had destroyed it based on its content and therefore lost his First Amendment case.⁸⁹

Indeed, the difficulty of reducing art to an idea or message was evident even in the case in which the Supreme Court offered one of its most robust

83. This also helps to explain the Court’s struggle with the First Amendment status of cinema. Initially, in 1915, the Court concluded that motion pictures were not “organs of public opinion” but only “mere representations of events, of ideas and sentiments.” *Mut. Film Corp. v. Indus. Comm’n*, 236 U.S. 230, 243–44 (1915). Later, the Court changed its mind, according First Amendment coverage to cinema in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952). But even in this decision, the Court revealed a very cramped vision of the value of cinema, stating that “motion pictures are a significant medium for the communication of ideas.” *Id.* at 501. Although this is undoubtedly true, the statement does not begin to capture the multiple reasons society values cinema.

84. MITCHELL, *supra* note 85, at 66.

85. See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460, 476 (2009) (stating “it frequently is not possible to identify a single ‘message’ that is conveyed by . . .” a monument); cf. Amy Adler, *What’s Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CALIF. L. REV. 1499, 1543–44 (1996) (discussing the values of multiplicity of meaning in contemporary political art).

86. *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1046 (2d Cir. 1988).

87. Cf. MITCHELL, *supra* note 85, at 66.

88. *Serra*, 847 F.2d at 1050–51.

89. *Id.* at 1051. In previous scholarship, I have shown how this same problem vexes courts in copyright law. See Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 587 (2016) (arguing in the copyright context that to “the extent an artwork has any message or meaning at all, that message may be its defiance of a singular message or meaning—its uncertainty, its multiplicity”).

statements about the First Amendment coverage of art. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Court stated in dicta that the artwork of Jackson Pollock was “unquestionably shielded” by the First Amendment.⁹⁰ Yet if we examine the opinion’s reasoning, it exposes why the First Amendment coverage of Pollock’s art is so difficult to square with the prevailing marketplace of ideas vision of the First Amendment. In previous cases, the Court had inquired into a speaker’s “intent to convey a particularized message” as a pre-requisite for finding that nonverbal expression qualified for First Amendment protection.⁹¹ But in *Hurley*, the Court warned that such a message need not be “narrow” or “succinctly articulable” to qualify for free speech protection, because such a requirement would have failed to protect visual art like Jackson Pollock’s.⁹² Yet by admitting that a search for a succinctly articulable message “would never reach” Pollock’s work, the Court suggested the very difficulty it was trying to avoid: how to translate the value of art into the language of “ideas” or messages that the First Amendment protects?⁹³

B. *The Incompatibility Between Art and Politics*

The second argument made against art at *The Masses* was that art was not sufficiently political. This represented a dramatic break with the vision on which the magazine was founded: that art and politics were to play equal roles and work in harmony. Yet ultimately a conflict between art and politics split *The Masses* staff into two camps, those who believed in art for art’s sake and radical freedom of artistic expression, versus those who believed art should be instrumental to advancing a political message and constrained accordingly.

90. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

91. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

92. *Hurley*, 515 U.S. at 569 (1995).

93. *Id.* It is my view that the choice of Jackson Pollock as an example of art that is “unquestionably shielded” also made the Court’s work easy. Pollock’s art may not be easily reduced to ideas, but it is clearly identifiable as highly “expressive” of his individual will. When we think of Pollock, we think not only of his canvasses, but of the process of his creation: the great, tortured genius in an existential confrontation with his art, pouring his soul onto the canvas in a burst of creative angst. Peter Schjeldahl called Pollock, as famously pictured in *Life Magazine* in 1949, a “pinup of seething manhood.” Peter Schjeldahl, *American Abstract: Real Jackson Pollock*, *NEW YORKER*, July 31, 2006, at 80, 80; see also HAROLD ROSENBERG, *The American Action Painters, in The Tradition of the New* 23–40 (1959) (coining the term “action painting”). As with other “abstract expressionist” artists, the personal, expressive component of Pollock’s work is easy to discern. This would not be so, in my view, for many other artists.

In a similar vein, the difficulty of articulating art's political value has been a recurrent problem in free speech law. The problem is particularly urgent because political speech lies at the heart of the First Amendment, which is often theorized through recourse to principles of self-government. Yet as we have seen when discussing Jackson Pollock, it can be difficult to ascribe *any* meaning or idea to a work of art, let alone to ascribe political meaning to it. Thus it is no wonder that scholars who took democratic self-governance to be the essence of the First Amendment fought about the problem of art long ago. Alexander Meiklejohn, who famously posited that the First Amendment protected speech that informed democratic deliberation, struggled with justifying protection for art that wasn't explicitly political.⁹⁴ Ultimately, Meiklejohn resolved the problem by arguing that literature and the arts had First Amendment value because they inevitably informed our political decisions: arts and literature were forms "of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values."⁹⁵ One can see the slippery slope from literature and art to a whole host of other activities that also inform the voter's "sensitivity to human values" yet seem far afield from First Amendment speech. Indeed, this was one basis of Robert Bork's famous argument in which he pushed back on Meiklejohn's theory; in Bork's democracy-based theory of free speech, he argued that there was *no* principled basis for protecting artistic expression under the First Amendment because art lacks political significance in a way that distinguishes it from other activities.⁹⁶

C. *The Inferiority of Image to Text in First Amendment Law and Theory*

*Because of a profound commitment to protecting communication of ideas, any restraint on expression by way of the printed word . . . stimulates a traditional and emotional response, unlike the response to obscene pictures A book seems to have a different and preferred place in our hierarchy of values, and so it should be.*⁹⁷

– Kaplan v. California

94. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

95. *See id.* at 256.

96. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27–28 (1971) ("Other human activities and experiences also form personality, teach and create attitudes just as much as does the novel, but no one would on that account, I take it, suggest that the first amendment" protects them).

97. *Kaplan v. California*, 413 U.S. 115, 119 (1973).

In the artists' strike at *The Masses*, a third claim against art emerged, separate but closely related to the two we have explored so far. The claim had to do with the relationship between text and image: words were necessary to give visual images relevance. As artist George Bellows lamented, by insisting on captioning visual works, the magazine had now placed "the artists in the conventional position, as the appendage of the literary editors, illustrators of literary lines."⁹⁸

The view of visual art as subordinate to text has also found expression in First Amendment law and theory. In my previous work, I have argued that the modern First Amendment consistently offers greater protection for verbal as opposed to visual forms of representation.⁹⁹ There I explored the resonance between the First Amendment's hierarchical preference for text over image and a longstanding cultural view of images as dangerous and in need of constraint, a view that animated the biblical prohibition on graven images and the history of iconoclasm. As I have shown, the preference for text over image surfaces in a variety of places in First Amendment thinking. It is, however, a peculiar preference, often assumed but rarely acknowledged. Yet the different treatment of text and image within the First Amendment has significant real world implications. It is evident, for example, in the pattern of contemporary obscenity prosecutions, which have focused exclusively on pictorial rather than textual material.¹⁰⁰ The preference for text also arises in child pornography law, which focuses exclusively on pictures.¹⁰¹ It also turns up as an assumption in a variety of scholarly thinking. For example, Catharine MacKinnon's anti-pornography writing argues that pictorial pornography, especially photography, is far more harmful to women than is textual pornography.¹⁰² The uncertain status of visual images, in my view, also influences the Court's jurisprudence about the U.S. flag.¹⁰³ *The Masses'* editors' decision to demote images in the magazine and to treat visual art as an "appendage" of text, tracks this longstanding hierarchical approach to text and image.¹⁰⁴

98. RICHARD H. LOVE, CARL W. PETERS: AMERICAN SCENE PAINTER FROM ROCHESTER TO ROCKPORT 297 (1999) (quoting George Bellows); cf. SUSAN SONTAG, ON PHOTOGRAPHY 83 (2001) ("Moralists who love photographs always hope that words will save the picture.").

99. *First Amendment and Second Commandment*, *supra* note 73, at 42.

100. *Id.* at 46–47 (analyzing the preference in obscenity law for verbal over visual material).

101. *Id.* at 52.

102. *Id.* at 48 (first citing ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY & CIVIL RIGHTS: A NEW DAY FOR WOMEN'S QUALITY (1988); then citing CATHARINE A. MACKINNON, ONLY WORDS (1993)).

103. *Id.* at 55–56.

104. LOVE, *supra* note 97, at 297 (quoting George Bellows as lamenting the treatment of the image as a mere "appendage" to text).

My brief analysis suggests that the debate about art at *The Masses* revealed deep and enduring anxieties about the relationship between art and ideas, art and politics, and text and image, all of which persist in our modern First Amendment jurisprudence. This historical struggle sheds light on the deep-seated roots of our ongoing discomfort about the place of art in the First Amendment.

V. CONCLUSION

This Article has set forth a little-known chapter in the cultural history of *The Masses*, exploring an internal battle about freedom of expression in the arts that had almost destroyed the magazine in the year leading up to Hand's decision. *The Masses* was founded on two central premises: first, that absolute freedom of expression was necessary for its mission; and second, that art and politics must be inextricably intertwined in pursuing this mission because creativity was itself an act of political rebellion against capitalism. But the tension between these two founding principles broke down, as editors tried to constrain the political messages of some of the artists, ultimately leading to the artists' strike that dramatically altered the magazine. By exploring the artistic significance of *The Masses* and by unearthing this internal censorship battle at the magazine, my goal has been to show how the treatment of art at *The Masses* presaged contemporary debates and the role of art in the First Amendment. The bitter internal struggle over freedom of expression at *The Masses* anticipated a longstanding problem in free speech law: how do we justify protection for art, often apolitical, irrational, and hard to reduce to a "particularized message," under a vision of the First Amendment that favors political discourse and assumes a rational marketplace of ideas? This history of *The Masses* has relevance not only to free speech law, but also to contemporary culture, as a new era of political art is emerging in response to the Trump presidency.¹⁰⁵ One hundred years after the *Masses* case, battles are once again raging about the limits of artistic freedom and the relationship between art and politics.¹⁰⁶

105. Swanson, *supra* note 3.

106. Smith, *supra* note 4; Coaston, *supra* note 4.