Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation

Stephen F. Williams

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Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation

Stephen F. Williams*

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I. INTRODUCTION

In certain Buddhist sects, it is said that individuals can attain salvation by constant reiteration of the name “Amitabha,” a great monk who became the “Buddha of Unlimited Light.” Nothing more.

* Professor of Law, University of Colorado. I would like to express my thanks to Jesse Dukeminier, Arthur H. Travers, and James N. White for their stimulating comments on earlier drafts of this Article.
It is hardly surprising that the doctrine achieved "great popularity."

In *Berman v. Parker*, Justice Douglas laid the foundations of a legal doctrine with similar appeal. Defining the "public welfare" purposes for which private property can be condemned, he said,

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Although written in the context of a condemnation, this language has had a profound effect on the attitude of courts toward land use regulation as well. In recent years, the words "beautiful as well as healthy" have become something of a talisman for courts forced to decide the validity of regulations that serve solely or predominantly aesthetic purposes. Rather than inquire into the nature of the individual and community interests at stake, courts have used the discretion that *Berman* affords state and local governing bodies as a basis for upholding almost any aesthetic regulation.

A classic case is *Reid v. Architectural Board of Review*. Mrs. Reid wished to build a house on land she owned in the Cleveland suburb of Cleveland Heights. Her neighborhood featured houses that were, "in the main, dignified, stately and conventional structures,

2. 348 U.S. 26 (1954). *Berman* involved a taking of private property for urban redevelopment and subsequent resale to private owners. The plaintiff, who owned commercial property in the redevelopment area, conceded that the taking of property to eliminate slum conditions injurious to health was a legitimate government purpose, but argued that to take a person's property solely to develop a better balanced and more attractive community was outside the legislative power. The Supreme Court disagreed, however, holding that "[i]f those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." *Id.* at 33.
3. *Id.* (citation omitted).
4. *See, e.g.*, John Donnelly & Sons, Inc. v. Outdoor Advertising Bd., 339 N.E.2d 709, 717 (Mass. 1975) (ordinance prohibiting off-premise signs in Boston suburb for aesthetic reasons held proper exercise of police power); Housing & Redevelop. Auth. v. Schapiro, 297 Minn. 103, 210 N.W.2d 211 (1973) (acquisition and clearing of blighted area serves public purpose and is proper exercise of police power even when condemned houses are not substandard and thus not a health hazard); United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964) (zoning ordinance prohibiting outdoor advertising—other than on-premise signs—for purely aesthetic reasons upheld); Westfield Motor Sales Co. v. Town of Westfield, 129 N.J. Super. 528, 324 A.2d 113 (Law Div. 1974) (zoning ordinance based solely on aesthetic considerations was within town's police powers); People v. Goodman, 31 N.Y.2d 262, 290 N.E.2d 139, 338 N.Y.S.2d 97 (1972) (prohibition of off-premise signs upheld on aesthetic grounds).
two and one-half stories high." Following the procedures required by a local ordinance, she attached plans and specifications to her building permit application. The house was described as

a flat-roofed complex of twenty modules, each of which is ten feet high, twelve feet square and arranged in a loosely formed "U" which winds its way through a grove of trees. About sixty per cent of the wall area of the house is glass and opens on an enclosed garden; the rest of the walls are of cement panels. A garage of the same modular construction stands off from the house, and these two structures, with their associated garden walls, trellises and courts, form a series of interior and exterior spaces, all under a canopy of trees and baffled from the street by a garden wall.

A wall ten feet high is part of the front structure of the house and garage and extends all around the garden area. It has no windows. Since the wall is of the same height as the structure of the house, no part of the house can be seen from the street.

The Architectural Board of Review denied the application, and Mrs. Reid sought judicial review.

Despite the failure of the authorizing legislation to articulate any criteria for the Board to apply, the reviewing court was able to derive some standards from the legislative statement of purpose:

"The purposes of the Architectural Board of Review are [1] to protect property on which buildings are constructed or altered, [2] to maintain the high character of community development, and [3] to protect real estate within this City from impairment or destruction of value, by [4] regulating according to proper architectural principles the design, use of materials, finished grade lines and orientation of all new buildings, hereafter erected, and the moving, alteration, improvement, repair, adding to or razing in whole or in part of all existing buildings . . . ."

The Board's disposition of the case, however, appeared to be based solely on the second of these standards. It tersely noted:

"This plan is for a single-story building and is submitted for a site in a multi-story residential neighborhood. The Board disapproves this project for the reason that it does not maintain the high character of community development in that it does not conform to the character of the houses in the area."

6. Id. at 70, 192 N.E.2d at 77.
7. Id. at 70-71, 192 N.E.2d at 77. The court appended to the description its own conclusion: "From all appearances, it is just a high wall with no indication of what is behind it. Not only does the house fail to conform in any manner with the other buildings but presents no identification that it is a structure for people to live in." Id. at 71, 192 N.E.2d at 77.
8. Id. at 68, 192 N.E.2d at 76 (quoting the ordinance).
9. Id. at 68, 192 N.E.2d at 75 (quoting the Board's order).
At trial, examination of board members confirmed that the Board had based its decision solely on aesthetic considerations. One member declared, "'Our issue was the fact that it was a single story house in a multi-story neighborhood,'" and, more simply, "'We don't like the appearance of that house in this neighborhood.'" The court invoked the magic words "beautiful as well as healthy" and sustained the Board's determination.12

This treatment represents a dramatic change from the typical pre-Berman disposition. The words with magic effect were then largely at the disposal of the property owner. He could often successfully argue that "'[a]esthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power . . .'" Or he could assert any of a series of claims that may be collectively viewed as a contention that aesthetic considerations, standing alone, are too "subjective" to be the basis of a police power regulation. For example, a fairly typical court said:

It is generally recognized that aesthetic considerations, while not wholly without weight, do not of themselves afford sufficient basis for the invasion of property rights, and this for the more or less obvious reason that while public health, safety, and morals, which make for public welfare, submit to reasonable definition and delimitation, the realm of the aesthetic varies with the wide variation of tastes and culture.14

Thus the courts seem to have adopted an all-or-nothing attitude with respect to aesthetic regulation. At both extremes they have elected to throw up their hands in despair rather than attempt to deal systematically with the issues presented by the facts of each case. This abdication of judicial responsibility is hardly necessary, for the problems raised by aesthetic regulation are essentially similar to ones that courts handle with some measure of intelligent discrimination

10. Id. at 73, 192 N.E.2d at 79 (Corrigan, J., dissenting) (quoting from the trial record).
11. Id. at 74, 192 N.E.2d at 79 (Corrigan J., dissenting) (quoting from the trial record).
12. Id. at 72, 192 N.E.2d at 78. Courts upheld similar exercises of administrative discretion in State ex rel. Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970), and State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217, cert. denied, 350 U.S. 841 (1955). Occasionally, however, property owners challenging the excessive breadth of the delegation of power to the board of review have been successful. See note 110 infra.
in other contexts. Moreover, as a result of the judicial reluctance to grapple with these problems when raised in the context of aesthetic regulation, the law has often slighted the substantial interests of people planning to build, on the one hand, and of neighbors, passersby, and the community at large on the other.

The initial stumbling block to principled judicial treatment of aesthetic regulations appears to be the idea that the judgments underlying their application are too "subjective" to be adequately dealt with by courts. The first part of the Article, therefore, tries to explore the confusion surrounding this claim and to demonstrate that the courts' fears are, for the most part, unfounded. While "subjectivity" encompasses a variety of potential issues, the only one with real significance for aesthetic regulation is the difficulty of articulating meaningful aesthetic criteria. Moreover, that difficulty is only significant in the context of some types of aesthetic legislation. When those types of legislation are at issue, familiar doctrines concerning vagueness and excessive delegation can help guide judicial review.

Having argued that there is no a priori reason for courts to refrain from a principled review of the conflicting interests at stake, the Article next attempts to identify the considerations important to such a review. In doing so, it suggests a basis for classifying architecture as expressive conduct and examines the clash between aesthetic regulation and the first amendment. It then suggests some limits that the first amendment might impose upon various types of aesthetic regulation.

Finally the concepts of "privacy" and "autonomy" are considered and rejected as alternative grounds for protecting aesthetic ex-

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15. For instance, the principal difficulty with aesthetic regulation appears to be legislative vagueness. See notes 46-63 infra and accompanying text. To the extent that aesthetic expression is activity worthy of protection under the first amendment, see notes 66-81 infra and accompanying text, vagueness is indeed a serious problem. But the courts deal effectively with legislative vagueness in other first amendment contexts, and there is no reason to think that they cannot do equally well in the context of aesthetic regulation. See generally notes 82-101 infra and accompanying text.

16. Problems with subjectivity have most often been explicitly used as a basis for judicial invalidation of state attempts at regulation. See text accompanying note 14 supra. It appears, however, that similar considerations may also underlie the post- Berman reluctance to tamper with administrative decisions. Though Berman recognized a power in the state to regulate aesthetics it did nothing to diminish the courts' convictions that the subjective nature of aesthetic judgments makes them unfit for judicial treatment. Thus the courts, being unwilling to deny the state's interest in regulating aesthetics, but lacking a coherent model for evaluating the state's judgments, have evidently felt compelled to approve virtually all state decisions.

17. It is in the first amendment context that one aspect of "subjectivity" becomes relevant. In many cases a regulation's vagueness combines with its impingement upon expressive interests to make it highly vulnerable.
pression since it is doubtful that they provide sound bases for principled adjudication of problems involving aesthetic regulation.

II. THE SUBJECTIVITY OF AESTHETIC JUDGMENTS

Traditional judicial criticism of aesthetic regulation has been directed at its alleged subjectivity. The claim seems to encompass at least three separate contentions: that aesthetic judgments cannot command widespread agreement; that aesthetic judgments cannot be verified; and that the ability to express aesthetic criteria is subject to such extraordinary limits that aesthetics is an unfit subject of legislation. Each of these contentions will be examined in turn. The first, depending on how one interprets it, is either incorrect or irrelevant. The second, though correct, is irrelevant. The third, while it constitutes a significant intuition, is overstated.

A. ABSENCE OF WIDESPREAD AGREEMENT

The contention that aesthetic judgments cannot command widespread agreement is puzzling. If it means that no majority can be assembled behind any aesthetic judgment, there are ample surveys to prove the contrary. Moreover, it seems inappropriate for judges to invalidate the work of legislators on this basis since it is legislators, not judges, whose function it is to divine the will of the majority. If the contention is really that particular aesthetic legislation may be


19. It should be understood at the outset that the argument presented in the following sections is not intended to prove that problems of subjectivity do not exist with respect to aesthetic regulation. Quite the opposite is true. It is freely admitted that, in general, it is impossible to expect (1) that people will always agree in their aesthetic judgments or (2) that aesthetic judgments can be verified or (3) that aesthetic criteria can be articulated with precision. With respect to agreement and verification, however, the problems of aesthetic regulation are neither quantitatively nor qualitatively different from those encountered in relation to other forms of legislation and thus provide no basis for treating aesthetics differently. Only the articulation of regulatory criteria poses more difficult problems in the aesthetic context. This fact does not justify judicial abdication, however, for the courts have available to them certain doctrinal tools that will enable them to afford property owners meaningful review without sacrificing the interests of the state.

20. See, e.g., Kaplan, Kaplan, & Wendt, Rated Preference and Complexity for Natural and Urban Visual Material, 12 PERCEPTION & PSYCHOPHYSICS 564 (1972) (test group ranked slides depicting nature scenes, urban scenes, and scenes combining both natural and artifically created features); Shafer, Hamilton, & Schmidt, Natural Landscape Preferences: A Predictive Model, 1 J. LEISURE RESEARCH 1 (1969) (empirical study in which 250 randomly chosen adults were asked to rank photographs of landscapes in order of scenic beauty).
enacted for the benefit of a strong-willed minority, it is hard to see how that sets aesthetic regulation apart from other legislation. Resale price maintenance, percentage depletion allowances, and teacher-tenure legislation are hardly the result of any groundswell of public opinion. Yet this deficiency is scarcely thought to invalidate them.

On the other hand, some aesthetic regulation may attract political support only by being all things to all people. Citizens may favor an ordinance creating an architectural review board because its mandate is simply to enhance “proper architectural principles.” By definition, these are principles that virtually everybody endorses. In contrast, an ordinance that bans one specific kind of architectural style might be far less attractive politically. But attempts to achieve popular support through such appealing generalities produce vague legislative mandates that, in turn, may lead to arbitrary administrative decrees. This is a basic reason for judicial hostility to legislative vagueness. The problem, however, is not the result of a generic inability of aesthetic judgments to command widespread adherence. Rather it is a result of legislative imprecision, and it should be attacked as such.

B. NonVerifiability

Verification, as used here, is the process of determining the truth or accuracy of a particular statement. The Architectural Board of Review in Reid, for example, attempted to verify its judgment that Mrs. Reid’s house did “not maintain the high character of community development” by arguing that it did not “conform to the character of the [other] houses in the area.” This attempt graphically illustrates some of the hazards that surround any effort to verify aesthetic judgments. Since not all of the houses on North Park Boulevard were identical, some degree of nonconformity must have been tolerated. Obviously, therefore, the judgment that the house was detrimental to the high character of the community cannot be verified by reference to nonconformity alone. Even if it is admitted that Mrs. Reid’s house exhibited a greater degree of nonconformity than was normal, it cannot be said that that variation was ipso facto detrimen-

22. The presumption of validity that attaches to legislation is not conditioned upon proof that it complies with some majoritarian viewpoint. It suffices that the legislation has been adopted by constitutionally established procedures. See generally Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Minorities, 1974 Sup. Ct. Rev. 1, 28-29.
23. See generally notes 46-63 infra and accompanying text.
24. 119 Ohio App. at 68, 192 N.E.2d at 75 (quoting from the Board’s order).
25. Id., 192 N.E.2d at 75 (quoting from the Board’s order).
The inability of the Board to identify some particular aspect of the nonconformity that was detrimental leaves it helpless to prove the validity of its judgment.

The Board's attempt at verification was admittedly crude, but other, more sophisticated efforts have failed for similar reasons. Even if it is conclusively established that a particular work exhibits certain objective characteristics, the conclusion that the composite of these characteristics equals "beauty," or any other aesthetic judgment, can never be unconditionally established. That fact, however, is irrelevant to the question of whether courts are capable of reviewing aesthetic regulation, for it is no more difficult to verify aesthetic judgments than it is to verify many of the judgments that underlie other types of legislative action. In the following section, three basic modes of verification are considered: empirical data, pure reason or "deduction," and a congeries of devices that can be loosely called rhetoric. All three may play a role in any attempt to verify judgments, whether aesthetic, ethical, or political; but all are subject to


27. Achieving a consensus that the work exhibits the characteristics in question may be difficult. Whenever one moves beyond such quantifiable criteria as height, breadth, length, number of windows, doors, and chimneys, one encounters difficulties of articulation that preclude agreement even on the features that the work exhibits. For instance, in an attempt to show that there were "arguments that rely on specific and perceivable features in the work and that consequently can persuade others of the reasonableness of [an aesthetic judgment]," one writer used the following example:

Hitchcock gives three reasons for his evaluation that the home has aesthetic merit: first, the arrangement of the concrete block shell system and the cantilevered slab roof; second, the contrast between the sparse ornamentation and the complex three-dimensional design; third, the unifying placement of the corridor and the wall.

Id. at 1443-44. All of these concepts seem extraordinarily vague. When, for instance, is the placement of the wall unifying, and when not? Thus before we can even begin to talk about an ultimate aesthetic judgment, we must overcome the significant difficulty of articulating and agreeing on the relevant characteristics that purportedly yield that judgment. See notes 46-63 infra and accompanying text.

28. Even where the criteria underlying the judgment can be articulated with some precision, but see note 27 supra, the ability to verify the ultimate conclusion is not significantly enhanced. For instance, Leopold attempted to evaluate the "spectacularness" of rivers by looking at such variables as the size and speed of the river, the height of the surrounding mountains, and the narrowness of the valley in which the river ran. L. LEOPOLD, QUANTITATIVE COMPARISON OF SOME AESTHETIC FACTORS AMONG RIVERS (Geological Survey Circular 620, 1969), discussed in Note, supra note 26, at 1444-45. Such characteristics are relatively precise, but the weakness in Leopold's study lies in his assumption that "the spectacular character of rivers is a function of [those characteristics]." Id. at 1445. In what sense can a conglomerate of figures be said to verify the assumption that "spectacularness" is a function of height, size, speed, and width?
limitations that are essentially similar, regardless of the nature of the judgment.

1. **Empirical Verification**

An empirically verifiable contention is one that may be tested by sense perceptions for its predictive accuracy. Take, for example, the claim,

Innocation with a particular serum will protect a person from contracting typhoid.

The empirical proof or refutation of such a claim will always be subject to some qualification; at a minimum, it is subject to the possibility that further tests will require its modification. Nonetheless, verification through the experience of the senses yields data that we typically rely on in everyday life until new data require us to question the former verification.

Empirical verification clearly plays some role in legislative value judgments. For example, suppose someone argues,

We should alter our tax structure to produce greater equality of income because greater equality of income will reduce crime.

If we accept the premise that the merits of egalitarianism may be measured in part by its effect on crime, then it may be possible to gather empirical data that will support or refute the claim. Because of the difficulty of defining a suitable control group, of course, the data will be less persuasive than the typhoid serum data. But the dispute at least poses an empirical question. The same is true if someone else argues,

We should eliminate the progressive characteristics of our tax structure because they adversely affect gross national product.

If it is assumed that the merits of progressivism in the tax structure may, at least in part, be tested by reference to its impact on GNP, empirical verification may help to resolve the issue and support the resulting legislation.

When legislators base their claims directly on ultimate values, however, empirical verification becomes impossible. Thus, consider the argument,

30. See id. at 55, 100.
We should strive for equality of income, not for the purpose of achieving some other goal, but simply because equality of income is fair.

What sense experience might prove or refute the contention? If the egalitarian chooses to redefine fairness in terms of some other criterion, such as improved health, empirical proof reemerges as relevant. But if he does so, he abandons his assertion of egalitarianism as a value in itself and retreats to a claim that it is ancillary to the achievement of some other value.

The absence of a good laboratory is not the only factor that may preclude empirical verification. Suppose someone attacks a proposal on the ground that its adoption would centralize power and cites Acton's maxim, "Power tends to corrupt; absolute power corrupts absolutely." Here we have the ancillary value claim that centralization of power is to be avoided because it leads to corruption. But if someone seriously disputes the maxim, it may be hard to frame an intelligible empirical test of its validity because the concept of "corruption" is so vague and value-laden that adversaries may be unable to agree on a workable definition. Consequently, people with widely disparate political values will not agree on how to label an event even when its "facts" are undisputed. Claims in the form of ancillary value assertions thus range over a spectrum: the more value-laden the terms of the claim, the more it will tend toward an assertion of ultimate values not susceptible to empirical verification.

Ultimate value claims may frequently be mingled with empirically verifiable ones. Consider, for example, the assertion,

Human beings have an unquenchable longing for freedom of speech.

This statement contains a subtle tension between ultimate value claims and empirically verifiable ones. Pushed to the empirical end of the spectrum, the claim might be framed as,

At least ninety percent of people polled will favor freedom of speech.

In this form the issue may be resolved by polling. Pushed in the direction of its ultimate value claim, however, it may reemerge as,

31. How, for example, is the career of Robespierre to be treated—as proof or disproof of the maxim? His immunity to crass bribery won him the title "Incorruptible," but many people would regard his conduct of the Terror as a form of "corruption." Among those who react differently to such regimes as that of Robespierre, the empirical data of history will not yield even primitive verification of Acton's maxim. Neither, for that matter, can empirical data refute it.
In the most profound recesses of every human heart lies a demand for freedom of speech.

In the latter form, the claim goes beyond empirical verification. If a particular human being says he does not care at all about freedom of speech, proponents of the claim can discount his view as not reflecting the "most profound" recesses of his heart.\(^{32}\)

The sorts of claims that are likely to underlie nonaesthetic regulation seem to parallel, for purposes of empirical verification, those underlying possible aesthetic regulations:

1. Ultimate value claims (not as such empirically verifiable)
   - Claims in support of nonaesthetic regulation
     - "Equality of income is fair."
   - Claims in support of aesthetic regulation
     - "Billboards on highways are ugly."

2. Ancillary value claims
   - a. The empirical end of the spectrum
     (empirically verifiable if such pragmatic problems as control group isolation can be overcome)
     - "Equality of income will lessen crime."
     - "Removal of billboards will attract tourist dollars."
   - b. The nonempirical end of the spectrum
     (empirically verifiable in form, but in practice largely an assertion of ultimate value)
     - "Centralization of power corrupts."
     - "Billboards will destroy the tone of San Clemente."

3. Mingling of value judgments with assertions about human psychology (empirical verification substantially precluded by problems in defining the relevant psychological condition)
   - "A regime that does not assure reasonable equality of income can never command the true allegiance of the people."
   - "The souls of our people will be deadened unless we protect the environment from defacement by billboards."

In both realms, factual verification can be helpful, but only up to a point. Raw "facts" cannot resolve the ultimate issue of what values ought to be preferred.

2. Verification by Reason

Nor does "reason" provide a basis for choosing among competing values, whether aesthetic or nonaesthetic. Its role is limited to defining categories and drawing the lines between them in a coherent, consistent way. The refinement of categories is, of course, necessary for evaluation, but any resolution of normative issues, such as determining what is "beautiful" or "good," must rely on other factors. Reason can help articulate the difference between Bauhaus and Baroque, but it cannot tell which is to be preferred; it can define "egalitarian" or "utilitarian" and, by clarifying the lines between them, indicate whether a proposed policy fits into either category or neither, but it cannot indicate whether that policy is desirable.

This limitation on the power of reason is often obscured by the human capacity to utter "absolute truths." It is possible, for example, for the proposition, "All men are mortal," to be stated as an absolute truth, but it becomes such only by being tautological. We may with absolute truth assert that all men are mortal only if we define being human as encompassing mortality. Similarly, the proposition, "A material thing cannot be in two places at once," is absolutely true only because of the meanings that we have agreed to attach to the words "material" and "place."

33. There is obviously a certain arbitrariness in identifying these functions with the exercise of "reason," despite the fact that such a definition arises out of a substantial philosophical tradition (as does the prior treatment of empirical verification). See generally A.J. Ayer, supra note 29, at 71-87. Clearly "reason," if characterized in this way, also plays a role in the process of empirical verification since the definition of various classes of empirical data is essential to organizing those data intelligibly. Some overlap in the two methods of verification obviously exists. Nonetheless, our concern is not to attempt any absolute distinctions between various methods of verification but simply to be sure that we look at each method to see whether its operation (or purported operation) in the realm of aesthetics is different from its operation in regard to other values. We deal here with "reason" separately from empirical verification simply to see whether it can provide verifiability in its separate operation.

34. See id. at 96.

35. See id. at 58. The limitations of deductive reason are especially likely to be obscured in ethical argument. For example, the proposition, "It is only reasonable that one who has caused an accident should compensate the victims of his actions," is really nothing more than the assertion of a definition. The speaker has simply defined "reasonableness" to include a rule mandating compensation by those who cause accidents. The proposition constitutes what C.L. Stevenson calls a "persuasive definition." That is, it takes a concept with a very strong value charge and defines it to include the policy favored by the speaker. See C.L. Stevenson, Ethics and Language 206-26 (1944). One can achieve the same result with words carrying a negative value charge: "It is intolerable that people who cause accidents should escape without compensating their victims." Here the speaker has simply defined the relevant term to include a practice that he opposes. If we agree with him we do so not because the conclusion is compelled by reason but because we share his value system.
A far more subtle example of both the tautological aspects of deductive reason and the way in which it may appear to verify a particular value choice is provided by the contractarian “proof” of utilitarianism. The “proof” hypothesizes a group of people trying to agree upon the principles they would like to have govern society. It then assumes (1) that each person is under a “veil of ignorance” regarding the talents or social position he will acquire by birth and upbringing; (2) that each is trying to maximize his own “utility,” or the satisfaction he will receive from life in the imagined society; (3) that each has no commitment to or interest in any principle that might govern the distribution of “utility” in such a society (such as egalitarianism or libertarianism) or in any of the ethical claims on which such principles might be founded; and (4) that each is risk-neutral (neither averse to taking risks nor having any preference for them). Since utilitarianism, defined in terms of maximizing the average utility, will give each person the highest prospective utility, discounted for risk, it will be preferred to other governing principles.

The key to the tautology, of course, is the exclusion of all commitments to principles relating to distribution or to their ethical underpinnings. By defining the interests that constitute people’s “utility” as excluding all such concerns, the “proof” excludes all values that could compete with utilitarianism. Thus, it has little relevance for

Persuasive definitions can at times be buttressed by pointing to values that would be enhanced or frustrated by adopting or rejecting the argument. For example, the speaker might assert that the imposition of liability will diminish the number of accidents. In so doing he has raised an ancillary value claim that, if intelligible definitions of “cause” and “accident” are supplied, might be subjected to empirical study. See notes 30-32 supra and accompanying text. Even if that claim were to be empirically verified, however, the ultimate value judgment that those who cause accidents should be held liable remains unproven. Instead the original persuasive definition, that nonliability is intolerable, has, by virtue of the empirical verification, simply been altered to say, “It is intolerable not to adopt rule X, which would diminish the number of accidents.” Any effort that relies solely on deductive reasoning and empirical study to verify a normative judgment will ultimately depend on some judgment that those processes cannot validate.

The veil of ignorance parallels the device employed by children for dividing cake: “You cut and I’ll choose.” It thus appears to exclude biases that would arise if the people were aware of the advantages and disadvantages under which they would be required to operate. What it does not exclude, however, is ideological commitment to some vision of a preferred society. For instance, the cake-cutting device succeeds only where there is prior agreement that each actor is motivated by selfishness but that equality is the appropriate standard for division. Consequently, for a veil-of-ignorance proof to be logically sound it must be built on an express premise excluding such factors. Exactly such a premise is embodied in assumption (3) of the utilitarian proof discussed in the text.

From the above discussion, it should be clear that reason's role in the verification of values is limited to establishing a system of terms and distinctions that can be used without internal inconsistency. It alone cannot be used to evaluate the merits of any competing values, whether aesthetic or nonaesthetic. Thus, so far as verification by empirical data or by reason is concerned, the values underlying aesthetic regulation are no different from the values underlying any other type of legislation; neither data nor reason can verify either class absolutely.

3. Verification by Rhetoric or Argument

Meaningful discussion over values can and does take place, however, apart from the organization of sensory data and the process of analytical refinement that we have characterized as "reason." The kindred devices of analogy, metaphor, and precedent, which are the core elements of "rhetoric" or "argument," may each be used to some extent to establish the validity of aesthetic values just as they are used in the realm of ethical or political values. All three represent a comparison between a case about which there is a consensus regarding the "right outcome" (at least among those involved in the discussion) and a case where the "right outcome" is initially in dispute.

38. The outlined "proof" is similar to the approach employed by Professor Rawls to justify his so-called "difference" principle, under which "primary goods" are distributed equally, except that deviations from equality are permitted when the result will be to the advantage of the society's least-favored group. See Rawls, A Theory of Justice 92, 142, 143 (1971). The different outcome is attributable to a different input. Each of Rawls's founding fathers, instead of assuming that his chance of occupying any particular slot in society is proportional to the frequency with which the slot occurs, assumes that he must "choose for the design of a society in which his enemy is to assign him his place." Id. at 152. Given the other assumptions, it is tautologically correct that such a person will choose the principle maximizing the "primary goods" of the "least favored." Rawls seems to think that the utilitarian "proof" demands that the theoretical choosers think their chances of occupying any particular slot "equal" in the sense that each one has an equal chance of being born either rich or poor. See id. at 168. But the utilitarian proof assumes no such thing. It merely assumes that chances are equal in the sense of being proportional to the number of people occupying each slot, so that if a society is to have ten Alphas, twenty Betas, and thirty Gammas, each hypothesized chooser has a one-in-six chance of being an Alpha.

39. For an explicit acknowledgement of the point, expressed in the form of an observation that the choice of tax policy goals is an "aesthetic" one, see H.C. Simons, Personal Income Taxation 18 (1938).

40. This view unequivocally rejects Ayer's extravagant claim that "sentences which simply express moral judgments do not say anything." A.J. Ayer, supra note 29, at 108. Ayer's claim is, of course, an exercise in persuasive definition. See note 35 supra.
Thus, in a dispute over the rights and wrongs of the American incarceration of Nisei during World War II, someone may argue, "Why, it is like the Nazi treatment of the Jews." At that point, someone defending the American action can either dispute the assumption that Nazi treatment of the Jews was evil or point to distinctions between the two cases. If he is unable to do either he is reduced to a shrugging assertion that there "must be" some difference that he has not put his finger on.

The difficulties in this method of verification are readily apparent. First, there must be agreement among the parties on the correct ethical evaluation of a case comparable to the one under discussion.41 Second, anyone who can point to a distinction between the cases and honestly maintain that the distinction has some value for him can resist being persuaded.42 But, subject to these qualifications, ethical values are "proven" by this approach: opinions as to the case initially in dispute are changed by the reference to the agreed case.

Aesthetic discussion often follows a similar pattern. Wisdom's example is dramatic and compelling:

[S]uppose . . . that someone is trying on a hat. She is studying it in a mirror. There's a pause and then a friend says 'My dear, the Taj Mahal'. Instantly the look of indecision leaves the face in the mirror. All along she has known there was something wrong with the hat, now she sees what it is. And all this happens in spite of the fact that the hat could be seen perfectly clearly and completely before the words "Taj Mahal" were uttered . . . But to call a hat the Taj Mahal is not to inform someone that it has mice in it or will cost a fortune. It is hardly to say that it's like the Taj Mahal; plainly it's very unlike and no less unlike now that this far-fetched analogy has been mentioned. And yet nothing will undo the work of that far-fetched allusion. The hat has become a monument and too magnificent by half.43

Of course the persuasive force of the comment depends on previously shared aesthetic values—the propositions that the Taj Mahal has "monumental" characteristics and that the head (or at least this

41. As Perelman observes,

Given a language understood by his audience, the speaker can develop his argumentation only by linking it to theses granted by his auditors, failing which he is likely to be guilty of begging the question. It follows that all argumentation depends for its premises—as indeed for its entire development—on that which is accepted, that which is acknowledged as true, as normal and probable, as valid.


43. J. WISDOM, PHILOSOPHY AND PSYCHO-ANALYSIS 248 (1953).
head) is no place for a monument. To some extent, it even presupposes some readiness to see monumentality in the hat. And yet the metaphor produces a genuine shift in a specific aesthetic valuation.\textsuperscript{44} It is true that, because of the problems of articulation unique to aesthetic concepts,\textsuperscript{45} argument by comparison or by other rhetorical devices may be more inconclusive in the realm of aesthetic values than in the realm of nonaesthetic values. Nevertheless, since neither type of value can be conclusively verified by this method, the distinction would seem to be a very modest one.

In summary, it seems doubtful that any material difference exists between the verifiability of aesthetic as opposed to ethical or political values. In both spheres, empirical data, logical analysis, and rhetoric all may play a role and are all subject to similar limitations.

C. OBSTACLES TO THE EXPRESSION OF AESTHETIC JUDGMENTS: THE PROBLEM OF POLYCENTRICITY

One final basis for objecting to aesthetic regulation on subjectivity grounds is that aesthetic judgments are difficult to express with any degree of precision or clarity.\textsuperscript{46} Unlike the problems of consensus and verification, the problem of vague standards is apt to be more troublesome in the context of aesthetic regulation than in other contexts because the problem of articulating aesthetic criteria is so much greater.\textsuperscript{47} In some forms of aesthetic regulation, such as traditional sign codes, legislatures have successfully coped with this problem and have achieved as much clarity as is common in nonaesthetic legislation. The work of Frank Sibley,\textsuperscript{48} however, suggests that attempts to clarify other forms of aesthetic regulation are ultimately doomed to fail. It is impossible, he argues, to express sufficient conditions in nonaesthetic terms (such as square, triangular,
curving, red, blue, bright, pastel) for the application of aesthetic concepts. Bright, primary colors in one painting may contribute toward its being “vivid,” but in another they may not. Thin curving lines may produce “delicacy” in one context but not in another. Thus it is simply not possible to articulate rules by which nonesthetic elements will create or even tend to create an aesthetic effect.

49. See id. at 353.

50. Aesthetic concepts are even less susceptible to definition in terms of conditions than the “defeasible” concepts discussed by Sibley. It is characteristic of defeasible concepts, Sibley writes, that we cannot state sufficient conditions for them because, for any sets we offer, there is always an (open) list of defeating conditions any of which might rule out the application of the concept. The most we can say schematically for a defeasible concept is that, for example, A, B, and C together are sufficient for the concept to apply unless some feature is present which overrides or voids them. But, I want to emphasize, the very fact that we can say this sort of thing shows that we are still to that extent in the realm of conditions. The features governing defeasible concepts can ordinarily count only one way, either for or against. . . . The very notion of a defeasible concept seems to require that some group of features would be sufficient in certain circumstances, that is, in the absence of overriding or voiding features . . . . My claim about taste concepts is stronger; that they are not, except negatively, governed by conditions at all.

Id. at 357-58 (footnote omitted).

51. This conceptual limitation has implications for the kinds of things critics can say about artistic efforts. They may point to nonesthetic features that are physically discernible by anyone but that may be missed by the untrained eye or ear (e.g., “notice the little figure in the foreground,” or “notice the way the shadows play on the surface of the wall”); they may assert that a work manifests some aesthetic concept, see note 52 infra and accompanying text; and they may link a nonesthetic feature with an aesthetic conclusion (e.g., “those lines seem to give the design vitality”). They cannot, however, say, “A, B, and C will always produce a powerful effect.” Nor can they even say, “The more A,—for example, bright colors—the more powerful the painting.”

The difficulties inherent in establishing nonesthetic conditions for applying aesthetic concepts are quite distinct from the issue of whether one may state rules for aesthetic valuation. Even assuming that such rules can be articulated, at least in terms of defeasible concepts, see generally note 50 supra, the dangers of caprice and arbitrariness associated with the application of aesthetic concepts are not eliminated. Since the criteria necessary for the concept of “beauty” cannot be pinned down to nonesthetic conditions, it is of little or no help that one may state sufficient conditions in terms of aesthetic concepts for the evaluative concept “beauty.” See generally Sibley, supra note 48, at 372 n.7.

In terms of the difficulty of establishing conditions for their application, Sibley’s “aesthetic concepts” should be distinguished from concepts of historical style. A large number of buildings are clearly identifiable as representative of specific historical styles. Gothic, Romanesque, Palladian, and Elizabethan, for example, are terms for which the historian of architecture may identify sufficient conditions in fairly precise language. An authoritative source, for example, describes International Modern as “characterized by asymmetrical composition, unrelievedly cubic general shapes, an absence of mouldings, large windows often in horizontal bands, and a predilection for
Legislators attempting to write aesthetic legislation are consequently forced to rely on conclusory aesthetic concepts such as the allusion of the Cleveland Heights ordinance to "high character" and "proper architectural principles."52

Because of this conceptual limitation,53 aesthetic judgments often present the type of problem that Professor Fuller described as "polycentric."54 Polycentric problems arise when three factors coincide: (1) a multiplicity of possible solutions; (2) an interdependency of relevant factors so that the outcome as to one feature of the problem will affect the outcome as to other features; and (3) a multiplicity of relevant factors that makes it difficult to trace one solution's superiority to any particular attribute or combination of attributes.55

The problem of articulating aesthetic standards represents perhaps the extreme case of polycentricity. The number of potential designs is infinite; the choice as to any single factor, say materials, has an impact on all other factors; and one cannot identify any non-white [exterior plastering].” PENGUIN DICTIONARY OF ARCHITECTURE 147 (2d ed. 1972). At least a building that manifests these five characteristics can be firmly brought within the International Modern classification.

One must not push this distinction too far, however. Although it would be impossible to specify the conditions necessary to achieve "delicacy" or "balance," some structures will be unanimously viewed as "delicate" or "balanced." Also, despite coherent definitions of specific historical styles, some buildings will contain elements of more than one style and thus defy classification. Indeed, not only do particular buildings not fit into specific categories, but some categories of historical style are based on what Sibley would call "aesthetic concepts." The Penguin Dictionary of Architecture, for example, defines Baroque as "characterized by exuberant decoration, expansive curvaceous forms, a sense of mass, a delight in large-scale and sweeping vistas, and a preference for spatially complex compositions." Id. at 25. As a general matter, however, concepts of historical style suffer less from the risks of arbitrariness than do concepts of taste.

52. These concepts are even more vague than those referred to by Sibley's "aesthetic terms," such as "unified, balanced, integrated, lifeless, serene, somber, dynamic, powerful, vivid, delicate, moving, trite, sentimental, tragic." Sibley, supra note 48, at 351.

53. When we speak of the limits of language we are by implication speaking of the limits on conceptualization. The observation is of no substantive importance, however, because language remains virtually the only evidence of such powers.


55. See Fuller, supra note 54, at 3-4. Professor Fuller cites the problems surrounding the allocation of broadcast frequencies as an archetypal example of polycentricity. Such a task involves all three of Fuller's factors: (1) there are always many combinations of applicants that might be licensed for a particular region; (2) the grant of a license to one applicant may render the virtues of another applicant redundant; and (3) there is no way to determine what margin of superiority in broadcast experience, for example, would outweigh another applicant's superiority in deconcentration of local media control.
aesthetic features that will even begin to consistently justify the application of any aesthetic concept. At least in other instances of polycentricity one can usually say that certain characteristics will invariably be assets. In attempting to articulate aesthetic standards, however, one cannot say even that much, for the use of stone, or rectilinearity, or inclusion of windows, or any other nonaesthetic feature, is not invariably a "plus."

Fuller argues that polycentric problems are not suited to adjudication because their sprawling character leaves the parties ignorant of where to direct their proofs and argument and thus makes the right to a "day in court" meaningless. Moreover, extreme polycentricity tends to sap administrative decisions of two other qualities that might legitimize them. First, the inability of the decisionmaker to articulate the features that explain his decision inevitably makes any statement of purported reasons appear somewhat ad hoc. Second, the inability to explain a decision makes it impossible for observers, including reviewing courts, to satisfy themselves that the decisionmaker is behaving with consistency.

The implications of this for aesthetic evaluations by administrative agencies are fairly evident. A legislature will rarely be able to articulate standards, directed toward a purely aesthetic goal, that will effectively channel the board's decisionmaking; the agency, by a sequence of adjudications, will rarely be able to construct meaningful "common law" standards against which subsequent decisions may be measured for consistency; and procedural devices, such as a right to a hearing or to judicial review, will rarely play any meaningful role in legitimizing the agency's decision. As a result there is a high risk that the agency's judgments will be either beyond the legislative intent or arbitrary or both.

It has been suggested that the problems of polycentricity in an aesthetic context can be alleviated if an impact on "property values," rather than "mere" beauty, is shown. The claim suggests that the

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56. For instance, in the case of broadcast frequency allocation, see note 55 supra, it can be said that, although the significance of such factors may vary, broadcast experience and deconcentration of media control will invariably be considered assets.

57. See Fuller, supra note 54, at 4.

58. See L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW 563-75 (3d ed. 1968) (presenting a compelling example of this problem in the context of broadcast frequency allocation).

59. For an argument that a standard requiring diminution in property values would provide "objective, measurable foundations" for aesthetic review, see Turnbull, Aesthetic Zoning, 7 WAKE FOREST L. REV. 230, 245 (1971). Courts upholding ad hoc architectural review have sometimes stressed the point that the rejected buildings might impair property values without saying why that would be important. See State ex rel. Stoyanoff v. Berkeley, 458 S.W.2d 305, 309 (Mo. 1970); State ex rel. Saveland
market is available as an objective *deus ex machina* to define beauty. The suggestion is deceptive, for the market speaks in Delphic terms. When a house is sold, the contract ordinarily does not say, "Two thousand dollars has been marked off because the house next door is painted fuchsia." Nor does it even say, "Two thousand dollars has been marked off because the house next door is grotesque." Conceivably, advanced techniques of statistical analysis such as multiple regressions\(^6\) could identify dollar penalties suffered by houses adjacent to particular visual features.\(^6\) But the multitude of factors relevant to perceptions of beauty and the complexity of their relationships make one distinctly skeptical.\(^6\) The same polycentric character that prevents a legislature from articulating a rule of "beauty" will also prevent real estate agents from articulating rules for computing an "ugliness" discount.\(^6\)

In summary, then, the residual value of the "subjectivity" critique appears to lie in the notion that some aesthetic legislation will

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61. Even with such techniques, however, one would at most be able to identify a range of dollar penalties within a particular confidence level. See id. at 398 n.49.

62. If we move from ways in which one might try to read the market to ways in which the market has been read in cases where the point was raised, we find this approach even less satisfactory as a means of gauging beauty. In State *ex rel.* Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970), the evidence on property values consisted of an affidavit of a real estate developer expressing his opinion that the rejected house would depress the market value of other property in the neighborhood. Id. at 307. Turnbull cites an unreported case in which the testimony consisted of three contradictory opinions—one that the house would lower the value of surrounding properties, one that it would not lower their value, and one that it would enhance their value. See Turnbull, supra note 59, at 239-40. One wonders whether any house, even the most diligently conventional, could fail to produce such a range of opinions if the litigants were willing to look hard enough for witnesses. Although the opinion in State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217, cert. denied, 350 U.S. 841 (1955), relies heavily on the claim of injury to property values, it cites no evidence on the matter. Thus, in the cases where evidence of a potential drop in value has been offered, it has been limited to the testimony of real estate brokers concluding that *if* a house were built according to a proposed design, values of adjacent property would fall.

63. Further, intuition suggests that people by and large like what they are accustomed to and dislike any abrupt deviation from the customary. If this is so, then the "ugliness" discount would decrease over time, substantially complicating the task of arriving at a fair valuation.
be offensively vague. As a result, agency implementation is likely to be arbitrary and may extend beyond the true legislative purpose. Yet the murky quality of aesthetic concepts will make it hard for litigants to prove this point to the satisfaction of a reviewing court. The character of aesthetic concepts will also prevent the agency from building up a coherent "common law" of beauty, proper architectural principles, or other such concepts. When these flaws exist in legislation bearing upon first amendment interests, they are very serious indeed.

III. THE FIRST AMENDMENT AND URBAN DESIGN

Most urban design elements lack any message translatable into words. In terms of a first amendment analysis, this raises a threshold issue of whether the implementation of architectural design is expression of a sort entitled to first amendment protection. After addressing this problem and arguing that architectural design is expression protected under the first amendment, we will consider the problems involved in determining whether the government's interests are related to suppression of expression and will attempt to identify additional variables that distinguish permissible from impermissible regulation. Finally, we will examine how these variables apply in a series of urban design problems.

A. DESIGN AS EXPRESSION

It is relatively clear that the choices a person makes as to the design of his dwelling or office and, in general, the uses to which he puts his property are often expressive of the individual's personal preferences and of the image that he wishes to project. Nevertheless, the mere fact that such choices are expressive in this general sense does not justify their protection under the first amendment. Similar arguments regarding expressiveness can be—and have been—made with respect to virtually every human choice. The foods people eat, the places at which they vacation, the careers they choose are all in

64. Signs are the obvious exception.

65. In particular, the variables will be applied to the type of ad hoc architectural review that occurred in Reid, see notes 102-19 infra and accompanying text; historic preservation, see notes 120-24 infra and accompanying text; regulation of stylistic elements not based on history, see notes 125-40 infra and accompanying text; sign regulation, see notes 141-83 infra and accompanying text; and some miscellaneous problems, see notes 184-92 infra and accompanying text.

66. One writer, for instance, has suggested that many Americans reject high-rise apartments because they perceive them as a "threat to one's self-image as a separate and unique personality." Cooper, The House as Symbol of the Self, in Designing for Human Behavior, 130, 134 (J. Lang, C. Burnette, W. Moleski, & D. Vachon eds. 1974). See also A. Rapoport, House Form and Culture (1969).
some sense a reflection of the individual. If such expression justified the full weight of first amendment protection, the courts would in effect be assuming veto power over all legislation.

Architecture, however, is expressive in a more compelling sense than the concept that all acts are manifestations of the individual psyche. Like artistic expression generally, architecture is often a conscious attempt to make a meaningful aesthetic statement. It is this effort at artistic expression that makes it worthy of first amendment protection. Because of its metaphorical nature, the expressive content of architecture will rarely, if ever, constitute the sort of "particularized message" that is common to most political speech. But that fact does not justify dismissing it as nonspeech.

Indeed the courts have not required that other forms of aesthetic expression exhibit a particularized message in order to qualify for first amendment protection. In Joseph Burstyn, Inc. v. Wilson, for

67. See generally R. Barthes, Mythologies (1970); G. Bateson, Steps to an Ecology of Mind (1972). The absurdity of protecting all acts in any way expressive becomes clear if one considers the problem of testing prohibitions against daredevil behavior by the demanding standards associated with first amendment review. Certainly few acts are more expressive of personality than ones of deliberate risk taking; yet few courts would even think of applying first amendment criteria to regulation of such behavior.

68. People have long been aware of the expressive character of aesthetic achievement. Plato, for example, noted the expressive quality of architecture and argued that it should be censored precisely on that account. See The Republic of Plato 85 (rev. ed. B. Jowett trans. 1901). The language of architectural criticism has always presupposed architecture's expressive capacity and has evaluated particular structures in terms of their quality as metaphorical communications. See, e.g., S. Giedion, Space, Time and Architecture 25-27 (4th ed. 1962); J. Ruskin, The Seven Lamps of Architecture, passim (Everyman's Library ed. 1907) (London 1849); 1 E. Viollet-le-Duc, Discourses on Architecture 12-13, 17-20, 24, 29-33 (B. Bucknall trans. 1959) (Paris 1863).

69. The phrase originated in Spence v. Washington, 418 U.S. 405, 411 (1974). The defendant in Spence had taped a well-recognized peace symbol on an American flag and hung the flag upside down outside his apartment window. The Court found that the defendant's act was

a pointed expression of anguish . . . about the . . . domestic and foreign affairs of his government. An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.

Id. at 410-11. The opinion in Spence makes clear the Court's view that the red flag in Stromberg v. California, 283 U.S. 359 (1931), and the black armband in Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) ("an unmistakable message about a contemporary issue of intense public concern—the Vietnam hostilities"), carried messages that were similarly "particularized." 418 U.S. at 410.

70. Artistic expression quite typically lacks any message that can be articulated to the satisfaction of all or even most of its observers. Some art does not even attempt to convey a "message" but has its raison d'être simply as a representation of beauty. It cannot be reasonably argued that this fact alone should allow the state to ban its dissemination. Moreover, even if a work of art is intended to communicate something, its "message" may not always be "particularized" in the sense of being readily identifi-
example, the Supreme Court found films to fall within the ambit of the first amendment without investigating their content or requiring that they contain any message, whether particularized or not. In the process, the Court at least implicitly recognized that films are worthy of protection not only when they contain a "direct espousal of a political or social doctrine" but also when they attempt only "the subtle shaping of thought which characterizes all artistic expression." Similarly no particularized message need be shown to "redeem" a work as nonobscene. That it has serious artistic merit is sufficient. Drama and dance, forms of artistic expression that, like architecture, are three-dimensional, have received similar treatment by the courts. Even "the customary 'barroom' type of nude dancing," an activity that "may involve only the barest minimum of . . .

The wealth of artistic and literary criticism is a monument to the difficulty of defining the "message" contained in many of the world's finest examples of art and literature. It is thus too much to require that all material for which protection under the first amendment is sought contain "a particularized message . . . [likely to] be understood by those who [view] it." Spence v. Washington, 418 U.S. 405, 411 (1974). See also United States v. Ulysses, 5 F. Supp. 182 (S.D.N.Y. 1933), aff'd, 72 F.2d 705 (2d Cir. 1934). If the court had required a "particularized message," Ulysses might well have been held beyond the reach of the first amendment.

71. 343 U.S. 495 (1952).
72. Id. at 501-02.
73. Id. at 501.
74. Id.
76. See Southeastern Prods., Ltd. v. Conrad, 420 U.S. 546, 548 (1975) (holding that a municipality's refusal to permit the performance of Hair in a public auditorium simply because it "involved nudity and obscenity on stage" constituted an impermissible prior restraint); In re Giannini, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968) (holding that dance was entitled to first amendment protection since it was a method of communicating ideas, impressions, and feelings). In the latter case, the court noted that all forms of communication, and not merely the expression of "concrete and definite ideas," are potentially included within the first amendment. Id. at 569, 446 P.2d at 539, 72 Cal. Rptr. at 659. Despite the fact that the first amendment was initially conceived as a safeguard for the exchange of political ideas essential to a workable democracy, the court nonetheless found that

the life of the imagination and intellect is of comparable import to the preservation of the political process; the First Amendment reaches beyond protection of citizen participation in, and ultimate control over, governmental affairs and protects in addition the interest in free interchange of ideas and impressions for their own sake, for whatever benefit the individual may gain. . . . Thus the First Amendment cannot be constricted into a straitjacket of protection for political expression alone. Its embrace extends to all forms of communication, including the highest: the work of art.

Id. at 569 n.3, 446 P.2d at 540 n.3, 72 Cal. Rptr. at 660 n.3.
expression," has been held entitled to first amendment protection "under some circumstances." If such activities are entitled to first amendment protection as forms of aesthetic expression, then architecture should be similarly protected. Urban design, of course, is clearly distinguishable in one respect from other forms of aesthetic expression. Since the latter are usually displayed indoors, while architecture ordinarily appears outdoors, architecture will normally raise a captive audience issue that rarely arises in connection with other forms of artistic expression. Such a distinction does not, however, affect the expressive character of the art or the fact that, as expression, it deserves protection under the first amendment. It is important only as a factor contributing to the state's regulatory interest. Obviously the rights of a property owner to express himself freely must be reconciled with the competing interests of his neighbors and the community at large. But that a form of artistic expression may conflict with other values and interests is no reason to deny the reality of its expressive character.

B. AN OUTLINE OF FIRST AMENDMENT PROTECTION IN THE URBAN DESIGN CONTEXT

Even if aesthetic expression is entitled to first amendment protection, many regulations that have an impact on such expression will survive judicial scrutiny. An important key to any regulation's fate is the court's classification of the underlying government interest. Where the interest that the government seeks to further by a

78. Id.
79. Id. The Supreme Court, in California v. LaRue, 409 U.S. 109 (1972), though upholding a ban on nude dancing in establishments holding state liquor licenses, did so not because it found such activity to be insufficient to invoke the first amendment but because the interest asserted by the state was sufficient to warrant the limited ban imposed. See id. at 118-19. Although it is difficult to envision a situation where such activity, performed in a bar, could have a "particularized message," the Court nevertheless felt that "at least some of the performances to which [the state] regulations address themselves are within the limits of the constitutional protection of freedom of expression . . . ." Id. at 118. Such cases represent at least an implicit recognition that the first amendment model of open political competition applies not only to ideas but also to the disparate tastes and values involved in aesthetic expression. Indeed, one may question whether open political competition would thrive in a society where government could censor aesthetic expression without restraint.
81. Consider a statute regulating the design of architectural models and drawings exhibited in private museums or galleries. Once we have removed the interest of the captive audience, it seems clear that architectural expression is entitled to the same measure of first amendment protection provided a film or photograph. The conflicting values play a role in the process of first amendment analysis but not in the threshold issue of identifying the expressive character of the conduct regulated.
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regulation is related to the suppression of expression, only exceptional circumstances will save it. The rankest example of such an interest is popular or official aversion to the content of the forbidden expression. By contrast, where legislation appears to be genuinely based on a government interest unrelated to the suppression of free expression, the court is likely to rely on a "balancing" operation.

In the context of aesthetic regulation the classification of the government interest may prove particularly troublesome. Even if the purpose underlying an aesthetic regulation can be established unequivocally—for example, protection of property values—it may not always be easy to determine whether that purpose should be classified as related or unrelated to expression. Thus the classification process itself inevitably requires a balancing of several variables. This section examines some of these variables and briefly notes other elements that are significant in the inescapable "weighing" process.

The first variable in the classification process is the extent to which a regulation seeks to protect those who may suffer actual harm independent of their own aesthetic preferences. In Terminiello v. City of Chicago, the Court held that the government could not legitimately invoke popular hostility to expression as a basis for its suppression. But the classification of the government's interest is more


83. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969); Ely, supra note 82, at 1491.

84. In Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), the Court struck down a school district ban on black arm bands, despite a claim that such bands would have a disruptive effect on other students. Id. at 508-09. See also Terminiello v. City of Chicago, 337 U.S. 1 (1949).


86. In O'Brien v. United States, 391 U.S. 367 (1968), for example, the government persuaded the Court that the legislative purpose in prohibiting the destruction of draft cards was to advance the efficiency of the selective service system rather than to limit expression, and on that basis the statute survived. Id. at 381-82.

87. An aesthetic regulation that is "related to" expression is one that aims, at least in part, at suppressing a particular characteristic simply because it is contrary to majoritarian notions of beauty.

88. In other contexts, classification of interests may provide a partial escape from "balancing." The escape is a welcome one. The term describes an impossible intellectual process, that of "weighing" elements for which no common unit of measurement exists. Further, the less often courts are called upon to "balance," the more first amendment guarantees are likely to be insulated from the vagaries of the judges' preferences.

89. 337 U.S. 1 (1949).

90. See id. at 4-5.
complicated if the legislative concern is for injuries that the hostility will impose on innocent third parties. In *Young v. American Mini Theaters, Inc.*, the Court found a city's interest in preventing "urban decay" to be unrelated to expression, even though that decay derived from popular reaction to certain kinds of expression. The case involved geographic restrictions that Detroit imposed on movie theaters specializing in sexually explicit films, forcing these theaters to be somewhat dispersed. Detroit defended the regulation on the theory that concentration of such movie theaters led to urban decay. It appears, however, that the feared decay resulted from popular aversion to smut: an area once entered by purveyors of pornography tended to become less profitable for the "more reputable" businesses. Yet the Court did not view that causal relation as in any way triggering the *Terminiello* doctrine.

This judicial attitude is potentially significant in the realm of architecture. A design that offends widely shared aesthetic viewpoints may depress the property values of neighboring houses. It would be unfair to say that such a property value change, if it can be proven, should have no bearing on how the state's interest is classified. After all, neighbors of a house of exceptionally unpopular design may not only suffer as captive viewers, but they may also suffer the pecuniary loss inflicted upon them through the reaction of others to the offending design. Although the harm inflicted is exclusively the result of popular reaction to a form of expression, the government interest in protecting innocent parties against pecuniary loss seems more tolerable than an interest solely in protecting the feelings of hostile members of the population. Moreover, it is analytically distinct from *Terminiello* in terms of the options open to the state. Where the harm to third parties arises out of the threat of violence,

92. Id. at 71-72 & n.34.
93. "Specifically, an adult theater may not be located within 1,000 feet of any two other 'regulated uses' . . ." Id. at 52.
94. See id. at 81 n.4 (Powell, J., concurring).
95. The majority mentions *Terminiello* but passes on to other matters apparently without perceiving any problem. *See id.* at 64. Justice Powell, in the context of applying the relation-to-suppression-of-free-expression concept of *O'Brien*, mentions it and purports to refute it by saying that if the city had been interested in restricting the message purveyed by adult theaters, "it would have tried to close them or restrict their number rather than circumscribe their choice as to location." *Id.* at 81 n.4. This last statement seems a bit of a non sequitur since the city's rule, which prevented such establishments from locating within a thousand feet of each other, prevented them from achieving the marketing advantages that accrue to clustering of similar enterprises.
96. See notes 60-63 *supra* and accompanying text.
the Court could legitimately require that the state attempt to avoid riot by controlling the hostile audience rather than the speaker. No similar device is available to protect the neighbors of unpopular houses from the consequences of public distaste.

Another variable to be considered in classifying the government’s interest is the extent to which a regulation is directed at specific messages rather than general modes and manners of expression. A regulation seems far more related to suppression of expression when it is directed at the former rather than the latter. The distinction is an important aspect of the doctrine that the first amendment restricts the government to neutrality as between competing ideas.

In the regulation of pure aesthetics, however, where we are usually not dealing with “particularized messages” at all, application of this distinction seems far from clear. It is doubtful that an aesthetic regulation could ever be so clearly antiexpression as is the prohibition of particular messages. Nonetheless, some aesthetic regulations, though not obviously antiexpression, may still be less neutral than others. For example, an unqualified regional prohibition of a particular style, such as neo-Tudor, seems a greater lapse from neutrality than insistence on a particular style in a small neighborhood already dominated by that style.

A third variable to be considered is the extent to which a regulation, while restricting some expression, may actually enhance the value of other expression. Suppose a regulation favors expression that is especially related to the region where it is permitted. Such a line has been drawn, for example, in billboard regulations that permit signs related to businesses carried on at the site of the sign and prohibit signs not so related. Permitting signs bearing messages that may be especially valuable on the particular site and forbidding those that are not site-specific may actually enhance the effectiveness of the permitted signs.

98. Of course the state could establish a fund out of which neighbors of unpopular houses would be compensated. But that solution is perhaps so far outside the bounds of typical legislation that a court would be reluctant to thrust such a burden on the states. Moreover, such a fund would cast the issue of the amount of the harm in its most difficult form, namely that of ascertaining a precise figure. See notes 59-63 supra and accompanying text.
100. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
Along similar lines a city might enact a precise regulation permitting only neo-Tudor buildings in an area that is already dominated by neo-Tudor and defend it by arguing that the exclusion enhances the expressive character of the neo-Tudor. The city could buttress its contention that its intent was to enhance rather than suppress expression by asserting that it was equally ready to enact similar legislation for any district marked by a coherent stylistic pattern. Surely this kind of regulation is less antiexpression, if it is antiexpression at all, than a regulation that prohibits foam houses because the community views them as ugly.

In the context of aesthetic expression, classifying the governmental interest as nonspeech rather than antispeech seems then to require consideration of at least three variables: (1) the extent to which the regulation is based upon concern for people who may suffer independently of their own tastes; (2) the likelihood that the regulation or its enforcement will be message-related; and (3) the likelihood that the regulation will serve to enhance the expressive character of any and all styles. The speculative character of each of these considerations, however, makes one doubt the wisdom of trying to give any ultimate classification the sort of conclusive significance it might enjoy in other contexts.

Even if an urban design regulation escapes classification as antiexpression, it will still be necessary, if the regulation is to withstand a first amendment challenge, to demonstrate that the public interest underlying the regulation outweighs the would-be builder's interest. In weighing the two interests, consideration should be given to the scope of the burdens placed by the design on any "captive audience" and by the regulation on a would-be builder. The captive audience includes both transient passersby and nearby property owners. For viewers in either category, escape from the design may entail substantial burdens. Sometimes a neighbor may be able to escape only by moving from his home at great material and psychic cost, while a visitor may have to forego visits to a region—for example, an historic district—that offers him pleasures completely unattainable elsewhere. The burden that a regulation may impose upon a builder may also vary sharply in both form and degree. In some instances the architect-builder may be excluded from only the tiniest geographical area, while in others he may be effectively banned from implementing the design anywhere in a substantial municipality. In either event he may be confronted with delays and hearing expenses so immense as to make any victory Pyrrhic.
C. APPLICATION OF THE OUTLINE

1. Ad Hoc Architectural Review: The Reid Context

In terms of the considerations discussed above, the kind of architectural review upheld in Reid presents perhaps the weakest possible case for regulation. The ad hoc approach of the Board precludes a court from confidently saying that the government interest was unrelated to the suppression of free expression. Moreover, in terms of the interests to be balanced, the burden on the captive audience seems unusually light, whereas the nature of the Board's behavior imposes the maximum procedural and substantive burdens on the property owner.

In classifying the government interest underlying creation of the Cleveland Heights Architectural Board of Review, we might begin by considering some alternative approaches that the city might have taken. Suppose the city had ordained that, within a narrowly defined geographic area, certain specific stylistic features were prohibited. Pointing to existing features, it could contend that the forbidden ones were simply incongruous. Consequently, it might argue, exclusion of the forbidden features would enhance the expressive character of the structures already existing in the region from which they were excluded and, indeed, the expressive character of the excluded features themselves. The city could improve its case by enacting regulations that protected in Zone B the very features excluded from Zone A (or at least asserting its readiness to do so under some conditions). It could then say, with some measure of plausibility, that its interest was the enhancement of expression. The city might compare its regulatory scheme to a school's requiring that history questions not be raised in biology class and that biology questions not be raised in history class, except, of course, where issues overlapped.

In Reid, however, both the Board's mandate and its procedures make it impossible to conclude that any such concern for the expressive interests involved supported the rejection of Mrs. Reid's design. The municipal legislature's mandate did not identify any coherent

102. For instance, the Board's failure to find, or apparently even consider, any likely drop in property values excludes one means by which it might have strengthened its case on this point. See note 105 infra.

103. This burden seems minimal quite independent of the quality of the design, which, from the court's description, see text accompanying note 7 supra, strikes this observer as likely to have been extremely attractive. Even absent such considerations, however, the low profile of the house, its setback from the street, and the apparent possibility of plantings in front of the offending wall all combine to create the impression that the building, far from offending passersby, might not even have been noticed by them.
stylistic features of North Park Boulevard. Nor did the Board promulgate, in advance of the rejection, any regulations pinpointing such features. Finally, the Board apparently did not consider the secondary impact the house might have on property values in the neighborhood. Consequently, even assuming that the rejection might have been based upon such comparatively neutral or pro-expression interests, the record left the court no way of assuring itself that such was the case.

Reid is thus a case study of the special problems caused by vagueness in the context of regulations impinging upon free expression. The vague mandate and the failure to identify special neighborhood features in advance allowed the Board to reach a decision that can justifiably be regarded as arbitrary and capricious, and probably beyond the scope of authority that the municipal legislature intended to grant. Moreover, by leaving unclear the purposes of the regulation and the standards to be used in pursuing those goals, the legislature and the Board left the court with no way of vindicating the first amendment interests except through invalidation for excessive vagueness.

Excessively vague legislation cannot be saved by showing that

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104. In fact, the terms of the Board’s mandate consisted only of what one might infer from the legislative statement of purpose. See text accompanying note 8 supra. Even there, the mandate, at least as utilized by the Board, see text accompanying note 9 supra, merely directed it to “maintain the high character of community development, and to protect real estate from . . . impairment or destruction of value, by regulating according to proper architectural principles the design . . . of all new buildings . . . .” 119 Ohio App. at 68, 192 N.E.2d at 76 (quoting the ordinance).

105. To say they did not consider secondary impact may well be overly charitable. From the portions of the trial court record quoted in the dissent of Judge Corrigan, it appears that the possibility of a negative effect on neighboring property values might well have been considered only to find that it was nonexistent:

“Q. Now the Board never took the position that this house would hurt property values along North Park Boulevard, did it?
“A. Our issue was the fact that it was a single story house in a multi-story neighborhood. . . .

“Q. Your objection was grounded upon the appearance of this house and not upon any market value depreciation possibility?
“A. There is no question that the house would be in a class cost-wise with those in the neighborhood.”

119 Ohio App. at 73, 192 N.E.2d at 79 (Corrigan, J., dissenting).

106. As Professor Amsterdam has argued: “It is scarcely consonant with ordered liberty that the amenability of an individual to punishment should be judged solely upon the sum total of badness or detriment to the legitimate interests of the state which can be found, or inferred, from a backward looking appraisal of his trial record.” Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 81 (1960) (student work written by Amsterdam).
the penalized citizen's conduct impinged on interests of a captive audience that the state would have been entitled to protect through proper legislation. The twin cases of *Saia v. New York* and *Kovacs v. Cooper* illustrate the point. In *Saia* the Court invalidated an ordinance that made it an offense to use sound amplification devices on public streets, except for dissemination of "items of news and matters of public concern" pursuant to a permit from the Chief of Police. The Court directly attacked the "uncontrolled discretion" of the police chief on the ground that his veto might be exercised in instances where some people found the ideas, rather than the volume, annoying. In *Kovacs*, by contrast, the Court upheld an ordinance that prohibited the use of amplifiers to emit "loud and raucous noises."

Because aesthetic choices often convey no message, invalidation of aesthetic regulations on vagueness grounds may not be conclusively demanded by this analogy. Nonetheless, the Board's action in *Reid* seems as close to the expression-suppression end of the spectrum as it is possible to get in the realm of pure aesthetics.

Turning from the classification problem to the balancing of interests, it is clear that the captive audience problem exists in *Reid*, as it does to some degree in any case involving the full scale imple-
mentation of architectural designs. But here the captive audience's equities are of questionable significance. First, the house would have been very low. While the court viewed that as cause for complaint, the fact suggests that ordinary trees and shrubbery, possibly already in existence, might have protected the aesthetic sensibilities of the denizens of North Park Boulevard. Second, the absence of any evidence of property value reduction negates any claim that the neighbors' aesthetic displeasure would be compounded by pecuniary loss. Third, nothing in the opinion identifies any special character of Cleveland Heights; thus the captive audience presumably did not include visitors whose opportunity to enjoy some rare pleasure would be marred by seeing Mrs. Reid's house.

By contrast, the burden on expressive conduct seems as great as it can be in the context of architectural expression. The Board's decision was substantively burdensome since it prevented the property owner from using her property in the manner she wished. More important, however, the testimony of the board members suggested that Mrs. Reid's house might well have been excluded from every inch of Cleveland Heights, a very substantial area. The Board indicated clearly that the house was inappropriate in an area of multi-story dwellings. But it is not at all certain that the design would have been permitted even in parts of Cleveland Heights featuring one-story houses. In denying the permit, the Board emphasized that the proposed structure did not conform to the character of the houses in the area. Thus, the lack of windows in front and other unusual design features of the proposed structure might have appeared to the Board to be ample justification for raising this same objection in a single-story neighborhood.

Procedurally the burden is also great. Mrs. Reid bore the burden of applying for aesthetic approval. Losing at the administrative level, it was her burden to challenge the Board's edict. She bore all the burdens of initiating litigation, and she alone bore the costs of delay—her property lay idle, her need for alternative housing dragged

112. See note 105 supra.
113. In 1960 the population of Cleveland Heights was 61,813. BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE, COUNTY AND CITY DATA BOOK, table 6, at 546 (1962).
114. "'Our issue was the fact that it was a single story house in a multi-story neighborhood.'" 119 Ohio App. at 73, 192 N.E.2d at 79 (Corrigan, J., dissenting) (quoting from the trial court record).
115. Id. at 68, 192 N.E.2d at 75 (quoting from the Board's order).
116. That the Board could use the identical argument to exclude this structure entirely from Cleveland Heights graphically illustrates the dangers of permitting after-the-fact justifications to suffice. See notes 106 & 110 supra.
on, and construction costs might well have been rising faster than her wealth.

Before we condemn the approach of Cleveland Heights, however, we must ask some troublesome questions. May a city in no way protect itself from potential monstrosities? If aesthetic concepts cannot be set forth in terms of non aesthetic conditions, can the city justly be faulted for its want of precision?

The first answer is in the form of a pragmatic question: is the hypothesized monstrosity any more than a fictional bogeyman that proves the maxim about hard cases making bad law? After all, economic incentives operate powerfully to prevent almost all of us from indulging our most eccentric aesthetic fancies. We want to be able to resell or to leave something of value to our children. Insofar as most of us will require or want mortgages, the banks exercise a private regulatory veto. The risk, then, is of an unusually rich property owner, indifferent to the dissipation of his wealth, who happens also to have what the community regards as monstrous taste. Further, he must build on such a scale that normal planting will not block the structure out. As a practical matter the risk seems remote to the point of triviality.

If a city can persuade a court that this contingency is worth anyone's concern, the legislature might at least be expected to phrase the substantive standard in terms of the monstrosity for which it is designed and to shift the procedural burdens onto the would-be regulators. Substantively, for example, the legislation could authorize the board to veto only designs that it found to be without serious artistic value or blatantly offensive to community standards. A legislative mandate to an architectural review board, phrased in these terms, would provide comparatively manageable standards for the board to apply and for courts to review. Evidence that critics overwhelmingly found the design without genuine artistic purpose would support a finding that it lacked artistic value.117 A board's finding that the design was blatantly offensive to community standards would seem intelligibly reviewable by a court that had the design before it. For example, a design taking the form of crude and obvious sexual symbolism executed on a large scale would seem to fall below the standard.

I do not suggest that an ordinance permitting the review board to veto a house on either of these grounds would be free from all

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117. This, of course, is exactly the sort of process by which a court determines whether a work manifests such artistic value as would, under Miller v. California, 413 U.S. 15 (1973), redeem it from classification as obscenity. See United Artists Corp. v. Gladwell, 373 F. Supp. 247, 249 (N.D. Ohio 1974); Note, Community Standards, Class Actions and Obscenity Under Miller v. California, 88 Harv. L. Rev. 1838, 1857 (1975).
vagueness. But such a narrow standard would sharply limit the anti-expression consequences of trying to handle the monstrosity threat. The legislature could further protect expressive interests by requiring the board to find that the visual impact of the structure could not be reduced by planting within a reasonable time and at reasonable cost and that the structure was likely to cause a sharp loss of property values.

Procedures that more effectively protect expressive interests without wholly sacrificing the community interest in preventing a monstrosity are also easy to imagine. It makes sense to require that the builder file plans in advance. He will normally have to do so for the nonaesthetic purposes of building permits, and a system that allowed him to proceed subject to later sanctions would be a waste of resources. The other procedural burdens, however, could be put upon the board. A short time limit could be provided within which the board must make its findings, and failure to act within that time would be deemed to constitute approval. If the board made negative findings, it should have the burden of going to court to seek injunctive relief against construction of the rejected design.\textsuperscript{5}

As suggested earlier, in the realm of aesthetic regulation we have no choice but to weigh competing interests; yet there is no unit of measurement common to the interests being weighed.\textsuperscript{118} It would be dogmatic to declare that regulatory schemes such as the one involved in \textit{Reid} are invariably offensive. But at least the established precedents forbidding message-related or unduly vague restraints on expression, even in the face of a seriously injured captive audience, seem to provide considerable basis for the courts' insisting on less onerous alternatives.

2. \textit{Historic Preservation}

State regulation of historic structures typically entails the designation of an historic district or building and a prohibition of demolition, construction, or alteration except pursuant to a permit. A building permit is issued only if the proposed building or alteration will conform to the historical style of the district. In the case of a single landmark, a permit will not be issued for a change that materially alters the structure's exterior character.

In this context it seems fair to classify the government's interest as being unrelated to the suppression of free expression. Historic preservation serves an interest that we have not previously considered

\textsuperscript{118} Cf. \textit{Freedman v. Maryland}, 380 U.S. 51 (1965) (requiring an essentially similar procedure as a condition to a valid system of prior licensing of films).  
\textsuperscript{119} See note 88 supra.
at all—education. The state may argue that artifacts of the past are vivid tools for educating people about the life of past generations. This interest is quite independent of any aesthetic judgment; legislators might view the old structures with aesthetic repugnance, as vestiges of barbarity and folly and yet believe that their retention serves an educational purpose. Since the education interest seems unrelated to the suppression of free expression, a first amendment attack would be largely blunted.

The more conventional interest asserted for historic preservation—economic prosperity deriving from the tourist trade—is slightly more complex. If altered, historic districts may lose their value as tourist attractions. Thus, like protection of property values, the preservation of such districts can be seen as an effort to avert an economic injury that would be inflicted on one group of people (shopkeepers, for example), irrespective of their tastes, as a secondary effect of the tastes of another group of people (tourists). Consequently, the government’s interest in preserving such sites can at most be classified as only partly related to the suppression of free expression. Where a legitimate interest in tourism can be shown, regulation reasonably related to pursuing that interest is certainly no more antiexpression than was Detroit’s smut-dispersion program.

Another government interest that may be invoked in favor of historic preservation, even in instances when the education and tourism rationales are rather attenuated, is the interest in urban “legibility.” The phrase was coined by Kevin Lynch and refers to elemental forms of patterning involving features that distinguish particular streets or districts from others: the prevalence of a particular type of tree along the sidewalks; the prevalence of a particular use, such as retail shops; a series of islands in the middle of a street such as on Park Avenue in New York City; a vista formed by having an exceptional building or natural phenomenon at one end of the street. The function of legibility is not to “please” in any generalized sense but to facilitate the citizen’s use of the city by enabling him to orient himself. Historic preservation is often an effective tool for enhancing legibility. Historic elements can help characterize many neighborhoods of the city by adding to this visual image and can establish landmarks and points of interest and orientation that contribute to

121. See notes 91-95 supra and accompanying text.
the city pattern.123

Finally, the regulators' captive audience argument seems exceptionally powerful in regard to this type of regulation. Property owners are likely to have moved into the district to enjoy its specific character; tourists may have expended considerable efforts for the same purpose. It seems as legitimate for the state to protect their interest in freedom from visual interruption as to prohibit mass meetings outside a hospital.

In contrast to these substantial government interests, the burden on expression seems exceptionally modest. Unless the city has abused the concept of history by defining its historic district too broadly, the property owner has the remainder of the city in which to implement his design. Therefore, he has ample, qualitatively equal, substitutes. If resale of his property within the historic district would result in a drastic loss, moreover, he may have a claim that the regulations constitute an unconstitutional taking of his property. The existence of this traditional due process check assures that the burden on his expressive opportunities will be kept within reasonable bounds.124

The process of historic preservation is, of course, like all aesthetic regulation, subject to the dangers of vagueness. To be properly carried out, such a program should make clear the nature of the city's interests and purposes and specify the landmarks and areas (based on articulated criteria of age and unifying, identifiable architectural features) to which the legislation will apply. If the resulting regulations are narrow in scope and precise in impact, the prevalence of state interests comparatively unrelated to suppression of individual expression, the peculiarly captive nature of the potential audiences and the light burden on expressive interests will combine to render historic preservation largely immune to first amendment attack.


124. The same analysis should sustain preservation of isolated landmarks. The urban legibility interest in preserving a comparatively rare feature of the cityscape that stands out from the contemporary eclectic of surrounding structures is strong. The taking claim, which history suggests is a very real one, see Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974), would seem to assure the property owner a chance to seek an alternative location without suffering a devastating pecuniary loss. See Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), prob. juris. noted, 46 U.S.L.W. 3373 (Dec. 5, 1977). The only aesthetic interest that would seem to be frustrated is the property owner's interest in implementing his design in a particular setting. This seems a modest burden, and, as he usually will not own the surrounding property, it presents a curious case of someone trying to obtain a legal right to use adjacent property as a context for his own design. See note 150 infra and accompanying text.

The same view would also seem to extend to preservation of recent structures of such outstanding quality that they may serve the same legibility function as the classic historic landmark.
AESTHETIC REGULATION

3. **Stylistic Elements Not Based on History**

There are a number of variations on the theme of stylistic elements. A city may require that every building within a particular area have, say, a red-tiled roof but leave all other aesthetic choices to the owner and architect. Or it may specify in greater detail all the elements that it considers essential to a coherent architectural style, such as neo-Tyrolean for a modern American skiing resort. A regulation may require only that structures having the relevant features not be altered, or that all new buildings include the specified features, or even that old, nonconforming buildings be altered to conform. The regulation may apply to an area that is already dominated by the required features or to an area where, at the time the requirement originates, there are very few buildings at all.

Before considering the first amendment problems, we may ask whether such regulations are likely to achieve their goals. Suppose that some persuasive and activist citizens of a municipality observe the prevalence of red-tiled roofs in many Mediterranean towns. They conclude that the roofs contribute to a pleasing effect and induce their city to require red-tiled roofs in all new construction. Will the requirement produce the hoped-for effect? Skepticism seems in order. While the red tile contributed to a pleasing effect in the context of Mediterranean villages, it did so because of a complex and subtle relationship between the tile, the local topography, and such features of local buildings as the slopes of roofs, location and form of windows, and the patina of age. Where one element of such a complex pattern is imposed by fiat on a burgeoning American municipality, the result is far less likely to be pleasing. There it may create only masscult mediocrity.

The Constitution, however, prohibits neither masscult nor mediocrity. An affected citizen might claim that the requirement was arbitrary, in the sense that it was not rationally related to achieving the Mediterranean effect. Whatever the plausibility of the claim,

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125. For a brilliant analysis of the aesthetic success of some primitive villages and of the difficulties of transplanting that success, see C. Alexander, Notes on the Synthesis of Form (1966). The difficulty in transmitting formulas for aesthetic success is, in part, the difficulty of stating non-aesthetic conditions for aesthetic concepts. See text accompanying notes 46-58 supra.

126. Some have even suggested that our political institutions have a tendency to generate mediocrity. See A. de Tocqueville, Democracy in America, passim (Vintage ed. 1954) (Paris 1839).

127. Of course much legislation is not precisely tailored to the substantive goals it seeks to advance. Not every running of a red light, for example, produces even a risk of danger; thus the prohibition against running red lights may be overly broad. Primarily because of procedural advantages such as ease of enforcement, however, we accept a degree of overinclusiveness.
the municipality can blunt it by a reformulation of its goal. It may argue, for example, that insistence on red-tiled roofs in the zone where they are required enhances the expressive character of those roofs and contributes to the "legibility" of the city. Where circumstances render the latter claim plausible, the regulation will seem comparatively unrelated to the suppression of free expression. But circumstances may render it implausible. For example, if vast tracts of land are subjected to the requirement, the regulation would seem more likely to produce a dulling effect, the very opposite of legibility.

The factual circumstances that determine whether the government interest in requiring certain stylistic features is related or unrelated to expression also affect the balance struck between the competing interests of the captive audience and the builder. A regulation will incline to the forbidden end of the spectrum if the geographic area covered is expansive, if the regulated area has not yet been built up in a form congruent with the requirements, and if numerous features are regulated. The more any of these factors is present, the heavier is the practical burden on the challenging property owner, and the more it begins to appear that the audience, instead of being captive, is simply imposing its tastes on the entire community. But the radically varying sizes of American cities dictate that the proportional impact within the city should not necessarily be controlling and that a court should look at the region as a whole. For example, a municipality may be so small, so fully developed in neo-Tyrolean, and so surrounded by undeveloped land that insistence on neo-Tyrolean throughout its borders will leave expressive opportunities only trivially diminished. If, on the other hand, numerous little hamlets clustered in a region are insisting on neo-Tyrolean, the aggregate impact may be excessive.

An exceptionally innocent variation on this theme is a municipal effort to regulate scale for the purpose of achieving urban legibility.

128. See text accompanying note 101 supra.
129. See text accompanying notes 122-23 supra.
130. It is worth noting that a regulation mandating specific stylistic features triggers a political check not present when a legislature gives a review board a mandate in favor of "beauty" or "proper architectural principles." The latter mandate is likely to be adopted in a haze of well-meaning preference for "beauty." A proposed ordinance requiring red-tiled roofs or neo-Tudor or two-story houses, however, will probably generate enough political hostility to persuade the legislature to confine it to a fairly narrow region.
131. Had the interests of the unrelated house sharers in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), been sufficient to trigger more than a rubber stamping of the village's judgment, the Supreme Court might, nonetheless, have upheld the restriction due to the absence of any evidence that its aggregate impact was substantial.
One form, which has already survived judicial scrutiny, is regulation of height. In *LaSalle National Bank v. City of Evanston,* for example, the city had created a 35-foot-maximum zone, the purpose and effect of which were to achieve "a gradual tapering of building heights toward an open lakefront and park area which could be used for recreational purposes." The court upheld the restriction and gave its blessing to that purpose. In *City of St. Paul v. Chicago, St. Paul, Minneapolis & Omaha Railway,* the court sustained height regulations based on the idea "that the area in front of the mall would be kept clear of obstructions—that [the] park would remain and provide sort of a front door for the Capitol Center downtown project as well as generally the central business district." The argument for keeping the area adjacent to a park low in height, so as to enhance the park's value as a "front door," is a direct incorporation of Kevin Lynch's language of legibility, with its concern for the citizen's ability to orient himself within the city.

Some proposals of the New York City Urban Design Council seek to achieve congruity of scale in a more intricate way. Instead of defining, for each district, specific geometric dimensions to which a landowner must conform, the proposals provide mathematical formulas by which a builder, using the actual setbacks and heights of the existing buildings adjacent to his lot, computes the setbacks and heights that will make his own building most congruent with the environment. The closer he comes to the optimum, the more points the builder is awarded on a scoring system. Each additional point entitles him to increase the floor-to-area ratio and thus allows him

132. Height regulations are sometimes sustained on the ground that they prevent interference with light and air flow and thereby advance health interests. It seems unlikely, however, that the health needs of people in one district within a city could be so different from those of people in another district as to justify different height restrictions. The fact that such differences do exist undercuts the argument that the motivation behind the height restrictions is a health concern. *Cf.* Haar, *Zoning for Minimum Standards: The Wayne Township Case,* 66 Harv. L. Rev. 1051, 1056 (1953) (interdistrict variations in minimum floor areas).

133. 57 Ill. 2d 415, 312 N.E.2d 625 (1974).
134. Id. at 432, 312 N.E.2d at 634.
135. See id. at 432-33, 312 N.E.2d at 634. As a case establishing the validity of urban legibility accomplished through precise regulations, *LaSalle National Bank* is weakened by an apparent reliance, in part, on contentions that the additional density created by high-rise development would adversely affect adjacent neighborhoods. See id. at 430-31, 312 N.E.2d at 633.

137. Id. at 769.
138. See text accompanying note 122 supra.
139. See *Urban Design Council of the City of New York, Housing Quality* (n.d.).
to make a more profitable use of the land. In short, the system offers a pecuniary reward for congruence to neighborhood shapes and scale.

Regulations aimed at achieving congruity of scale seem to impose only a modest burden on expression. First, because they focus on relationships between structures within a very small radius, they are likely to leave a wide range of alternative locations in which the architect and builder can achieve their intended aesthetic effects. Second, they affect only shape and volume—elements historically regulated by much cruder restraints. Third, they are in mathematical form, capable of being applied by a city functionary with a measuring tape and hence do not involve the burdens of vagueness or of ad hoc discretion. Finally, when they are cast in the form of incentives, they have a less drastic impact than outright prohibition.

4. Signs

Signs that are physically located on private property normally exist for one purpose: to communicate with the users of the public streets. Thus sign regulation raises the issue of the extent to which the government may define the appropriate use of its streets; and the concept of the “public forum,” normally applied in first amendment cases involving picketing, assembly, and protest on public property, becomes relevant. Two basic themes emerge from the “public forum” cases. First is a concern with the problem of “equal access,” that is, whether the regulation creates unreasonable distinctions between people’s rights of access or merely diminishes everyone’s access. Regulations of the first kind are offensive because they violate the first amendment requirement of government neutrality between competing ideas. Thus, the equal access inquiry essentially involves the familiar question of whether the government’s interest is related to expression. The second theme addresses the problem of “balancing” interests. The interest of the state in protecting users of public property who may be adversely affected by the communicative activity (the “captive audience”) must be weighed against the interest of the would-be communicators in having some forum for expression. This second problem can be reformulated into the question of whether there is a constitutional right of “minimum access” to a public forum, and, if so, what is the scope of that right.

140. Id. at 21, 23, 25, 27.
142. The Supreme Court’s failure to base any of its decisions on a clear-cut right to “minimum access” makes it difficult to determine the scope of such a right, if
a. Equal Access

Suppose a regulation prohibits all signs in a given geographic area. The prohibition seems completely neutral. Moreover, if the government interest sought to be advanced is safety, it appears to be quite unrelated to the suppression of free expression.

Sign owners, however, may offer evidence purporting to show that signs in fact have no adverse impact on safety, and the court may be convinced that this is true. At this point the government must usually rely on an aesthetically based rationale. It may, for instance, claim that the purpose is to protect property values or tourist trade rather than to suppress expression. As we have previously noted, these claims have a hybrid quality. They are ultimately based on individual aesthetic preferences; yet, to the extent that government seeks to protect a class of people who suffer irrespective of their personal tastes, the interests are unrelated to expression. The government, however, may well go beyond such claims and rest the sign regulation on an express aesthetic judgment that the landscape, residential area, or even manufacturing area is more attractive without signs than with them. In this context, the reliance on a purely aesthetic claim does not seem to offend first amendment values. Since the prohibition is absolute, the regulation neither impinges on equality of access nor enforces any state preference for one advertising design over another. Moreover, the regulation is clearly not aimed at the express messages of the signs, for those who prefer indeed it exists at all. Suggestions in dicta and academic discussion, however, indicate generally the elements on which such a concept might rest. See generally Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1; Stone, Fora Americana: Speech in Public Places, 1974 Sup. Ct. Rev. 233; Note, supra note 141. Professor Stone views Grayned v. City of Rockford, 408 U.S. 104 (1972), as demonstrating that a majority of the Court adheres to a doctrine of the public forum. See Stone, supra at 250-52. Since that case upheld an ordinance prohibiting noisy disturbances near school grounds during school hours, the exact significance of the Court’s favorable reference to the public forum concept is unclear. See 408 U.S. at 115.


144. See text accompanying notes 89-98 & 121 supra.


landscapes or residential and commercial areas without signs may concur completely in the express messages that the signs would communicate. They may be eager to drink the whiskies, use the sun tan oils, and fly on the airlines that would have been advertised by the forbidden signs. Their hostility to the signs would be every bit as great if they were in a foreign tongue or in gibberish or contained no verbal message at all.

Thus, given an absolute prohibition on signs, the only equal access claim that could be raised is the rather thin argument that the state’s preference for the unmarred landscape constitutes an interest in suppression of free expression and is “unequal” in the sense that it favors people who prefer uncluttered landscapes over those who prefer landscapes with billboards. To characterize the competing interests in this manner, however, is misleading. It seems unlikely that most sign owners consciously regard their signs as a means of aesthetic expression, and we have already ruled out the view that unconscious aesthetic expression is entitled to first amendment protection on the ground that otherwise virtually all legislation would raise a first amendment claim.147

But what of sign owners who allege a conscious aesthetic viewpoint that sign-studded landscapes are preferable to natural ones?148 Because a pecuniary interest so patently motivates most sign owners, courts may be skeptical of such claims. One sign owner in a million, however, might persuade a court that he had a conscious intent to improve upon the landscape or cityscape. As against such a sign owner, the government’s purely aesthetic interest seems substantially related to the suppression of expression. If so, the state may prevail only by showing that the “balance” of interests tilts overwhelmingly in its favor. Indeed, it seems to do so. As is typical of billboard cases, the viewers are a captive audience of highway users delivered up to the sign owner like so many sacrificial lambs.149 Moreover, this sign-owning aesthete will almost invariably be using the property of innumerable neighbors as an essential element in the backdrop of his landscape-cum-billboard or cityscape-cum-billboard design.150 Surely the first amendment does not require the state to permit such dra-

147. *See text accompanying notes 66-67 supra.*

148. The claim is not wholly implausible. There are people who have such preferences, including highly trained professional architects who have written books supporting their views. See, e.g., R. VENTURI, D.S. BROWN & S. IZENOUR, LEARNING FROM LAS VEGAS (1972).

149. *See text accompanying note 175 infra.*

150. *See R. VENTURI, D.S. BROWN & S. IZENOUR, supra note 148 (stressing the collective impact of the signs); Schelling, On the Ecology of Micromotives, 25 PUB. INTEREST 59 (1971) (discussing aggregate impacts that differ in quality as well as quantity from the individual decisions that bring them about).*
matic expropriations of private property even by the artistically in- 
clined.

Selective sign control ordinances raise more difficult issues of 
equal access. The most common form of selectivity is to permit signs 
promoting on-premise enterprises but to prohibit altogether signs 
promoting off-premise ones ("billboards"). This distinction can 
hardly be classified as antiexpression. It is, instead, an effort to limit 
the unintended antiexpressive consequences of the broader regulation 
in order to protect a class of signs that relate so closely to their 
locations as to make those locations qualitatively unique. The Su-
preme Court has given the distinction its blessing in dictum and by 
dismissal of appeal for want of a substantial federal question.

Radically different, however, is the case where a municipality 
bans signs generally but creates a series of content-based exceptions 
that have nothing to do with any relationship between the message 
and the location. In Ross v. Goshi, for example, the municipality 
excepted temporary signs, but then denied the benefits of that excep-
tion to "political signs." In the court's view, such an exception could 
not be justified by the aesthetic and safety interests advanced by the 
state. The case closely parallels Erznoznik v. City of Jacksonville.
There the city invoked safety to sustain its ban on nudity in films 
shown at drive-in theaters. The Court found the ordinance "strikingly

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151. Occasionally a legislature will prohibit particular messages. Such a prohibi-
tion is presumably to be tested by exceptionally exacting standards. See, e.g., Linmark 
Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (invalidating a prohibition 
of "For Sale" signs, which had been enacted to reduce "panic selling" by whites).


a ban on political advertisements on buses despite the fact that commercial speech 
was permitted). Although Lehman has thrown the whole area of equal access into 
confusion, it is distinguishable from the situation discussed here. In the present con-
text, the government does not control the situs of the sign itself but only the area into 
which the message is projected. In Lehman, by contrast, the government owned the 
buses and had a property owner's right to control what advertisements were placed 
there. See id. at 299-301. The significance of this fact is illustrated by Justice Black-
mun's repeated reliance on the commercial nature of the mass transit venture, see id. 
at 303, and his reference to the "lurking doubts about favoritism" that might creep 
into the city's choices between competing candidates should there be insufficient space 
for all. Id. at 304. As a rationale justifying discrimination based on content, this 
argument is not at all persuasive, but at least Lehman would appear to have little 
relevance in the situation discussed here. Cf. Linmark Assoc., Inc. v. Township of 
Willingboro, 431 U.S. 85 (1977) (a case subsequent to Lehman holding that such 
content-based distinctions are not permissible, at least when dealing with outdoor 
signs on privately controlled property).


155. See id. at 954.

156. 422 U.S. 205 (1975).
underinclusive” so far as any such interest was concerned, and in essence refused to treat that interest as relevant to the case. Any municipal claim of an aesthetic interest would seem equally undercut by such a package of exceptions.

b. Minimum Access

We turn now to the second of the themes underlying the public forum cases, the question of minimum access. The typical contexts in which minimum access claims have arisen are meetings and marches on public property, use of loudspeakers, and distribution of handbills. The obvious link among these activities is that they are available as means of communication to people with much zeal but little money. Because they entail discomfort and a risk of ridicule and vituperation from the audience, they are likely to be the medium of choice only for people to whom other avenues of communication are relatively inaccessible.

The desirability of preserving a medium that is available to the impoverished is part of a broader interest in the quality of the communicators’ alternatives. In Food Employees Local 590 v. Logan Valley Plaza, Inc., for example, the Court struck down an antitrespass injunction against a union that had been protesting the labor practices of a lessee-store within a shopping center. In so doing the Court recognized the absence of any fully adequate alternative and the direct relationship of the message to the place of protest as significant.

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157. See id. at 214.
158. See id. at 215. See also Police Dep’t v. Mosley, 408 U.S. 92 (1972) (invalidating on equal protection grounds a ban on all nonlabor picketing adjacent to public schools).
159. Orazio v. Town of N. Hempstead, 426 F. Supp. 1144 (E.D.N.Y. 1977), raises the issue in an interesting context. The town permitted, without time limit, wall signs advertising businesses conducted on the premises, but apparently prohibited altogether business signs related to off-premises business. It permitted political signs, but only within the six weeks prior to elections. The court viewed the regulatory scheme as manifesting a discrimination against political signs. Even if the restriction is viewed as wholly free of discrimination, however, there is a possible vulnerability. See notes 176-83 infra and accompanying text.
163. In Kovacs v. Cooper, 336 U.S. 77 (1949), the Court sustained a prohibition of “loud and raucous” amplifiers. Justice Black, in dissent, expressly noted the advantage of what he called “public speaking” for those without much money. See id. at 102. See generally Note, supra note 141, at 120 n.14.
164. 391 U.S. 308 (1968).
factors in evaluating the union's right to express itself at that site.\textsuperscript{43} Despite the fact that \textit{Logan Valley} was later overruled with respect to the public's right of access to private property,\textsuperscript{164} the Court did not repudiate its intuition that speech bearing a special relationship to a particular area has a stronger entitlement to protection in that area than does unrelated speech.\textsuperscript{167}

\textit{Hague v. CIO}\textsuperscript{168} can be seen as similarly protecting the quality of alternatives available for free expression. At issue there was an unusually broad foreclosure of public forums. The Court struck down an ordinance requiring a permit for "public parades or public assembly in or upon the public streets, highways, public parks or public buildings of Jersey City."\textsuperscript{169} In an amicus brief, the Committee on the Bill of Rights of the American Bar Association argued that "a city has a virtual monopoly of every open space at which a considerable outdoor meeting can be held, and if its streets and parks may be entirely closed to such meetings, the practical result would be to abolish them."\textsuperscript{170}

To the extent that the minimum access right is motivated by a desire to preserve a variety of qualitatively different forums, especially for the less affluent, billboards would not seem to be a form of expression particularly susceptible to minimum access claims. Far from being labor-intensive and peculiarly open to ill-financed zeal, they are in most cases accessible only to those willing and able to pay for a share of the property interest of the landowner and the superstructure of the billboard owner. Moreover, the message expressed is usually not uniquely suited to the medium employed; the goods pressed upon the public via billboards are usually the same as those advanced through television, radio, magazine, and newspaper advertisements.\textsuperscript{171} In this respect, an explicit contrast can be drawn between the typical billboard communicator and the would-be house builder. For the latter, implementation of the design seems the only possible form in which to achieve his aesthetic purpose. Two-dimensional architectural plans are simply not comparable, nor are

\begin{footnotes}
\item[165] See id. at 321-25.
\item[166] See Hudgens v. NLRB, 424 U.S. 507 (1976). The Court held, in essence, that \textit{Logan Valley} went too far in extending first amendment protection to speakers on private property. See id. at 517-19.
\item[167] Two of the minority opinions expressly asserted that viewpoint. See id. at 524-25 (White, J., concurring); \textit{id.} at 534-43 (Marshall, J., dissenting).
\item[168] 307 U.S. 496 (1939).
\item[169] \textit{id.} at 502 n.1.
\item[171] For discussion of a possible exception for political signs, see text accompanying notes 176-83 \textit{infra}.
\end{footnotes}
scale models. To limit the architect-and-owner to those media is like limiting the choreographer to his sketches\textsuperscript{172} or the pamphleteer to his page proofs.

While the impact of a billboard restriction on the would-be communicator is likely to be minimal, the impact on the "captive audience" is not. First, the intrusion is more or less permanent, rather than episodic as in the case of most public forum uses.\textsuperscript{173} Second, it is more difficult for the captives to escape. A user of public streets and parks who would prefer not to hear the local orators can at least use ear plugs. A user of the sidewalks who wishes to resist the importunities of street protesters can usually avert his eyes. An auto driver, by contrast, cannot safely use the same strategem.\textsuperscript{174} Third, billboards have the characteristic that every member of the audience is captive. At least the participants in a public march or mass meeting come there to take part; they constitute a participatory rather than a captive audience. But no one drives out on the highway in order to look at the billboards. Thus, there are no participants. The viewers view the billboards only because doing so is a condition of getting from point \( A \) to point \( B \) on the streets built with their tax money. Billboard owners, as one court put it nearly forty years ago, are seizing for private benefit an opportunity created for a quite different purpose by the expenditure of public money in the construction of public ways and the acquisition and improvement of public parks and reservations. The right asserted is not to own and use land or property, to live, to work, or to trade. While it may comprehend some of these fundamental liberties, its main feature is the superadded claim to use private land as a vantage ground from which to obtrude upon all the public travelling upon highways . . . an unescapable propaganda . . . .\textsuperscript{175}

The claims for a minimum access rule, then, provide at best a very weak argument for limiting the state's power to regulate billboards. Billboards offer nothing qualitatively unique as a forum, and they impose themselves upon their unwilling audience with inexorable force.

\textsuperscript{172} See text accompanying notes 76-81 supra.


\textsuperscript{174} In this respect the impact on the captive audience may be similar to that found to be significant in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). See note 153 supra. In order to use the buses the traveler must endure importunities, some or all of which he may find offensive but none of which he can avoid completely.

When one moves, however, from the context of general commercial speech to other, more sensitive areas, the problem becomes considerably more complex. A ban on signs, though generally valid, might nevertheless be vulnerable to a minimum access claim when applied to types of speech for which the Court has shown special solicitude or for which none of the alternatives to the billboard seems qualitatively adequate. 176 Take, for example, the homeowner or apartment dweller who would like to post a sign expressing his support for some political candidate. A comparison of Breard v. Alexandria 177 and Martin v. City of Struthers 178 illustrates that the distinction between such preferred speech and ordinary commercial speech can have some meaning. In Martin, a ban on door-to-door distribution of handbills and other writings was held invalid as applied to religious promotional material; 179 in Breard, an ordinance forbidding itinerant merchants from going uninvited onto private property for the purpose of soliciting orders was held valid as applied to salesmen soliciting magazine subscriptions. 180

Of course, handbills may be distinguished from temporary political signs. A municipality can protect its residents from the importunities of uninvited solicitors by forbidding solicitations on the property of residents who have indicated their desire to be let alone. 181 In the political sign context, however, no less restrictive alternative exists that would so fully vindicate the city's interest in sign-free neighborhoods. Rules merely limiting the size and number of signs do not

176. See, e.g., Peltz v. City of S. Euclid, 11 Ohio St. 2d 128, 228 N.E.2d 320 (1967) (invalidating an antisign ordinance insofar as it applied to political signs). The decision did little more than cite Schneider v. State, 308 U.S. 147 (1939), which had held an antileafletting statute unconstitutional on the ground that the state's interest in preventing litter could have been achieved in a less restrictive manner. But Schneider may be distinguishable because leafletting constitutes a specially labor-intensive, poor man's forum—a concept perhaps less applicable to signs on private property. Though the decision is unclear on this point, it is also possible that the ordinance in Peltz singled out political signs for prohibition, while permitting other signs that were indistinguishable except as to message. If so, this would make it an "equal access" case. See notes 151-59 supra and accompanying text.

177. 341 U.S. 622 (1951).
178. 319 U.S. 141 (1943).
179. See id. at 149.
quite do the job.

Nevertheless, the political nature of the proposed sign may enable the owner to prevail. He may argue that there is no less intrusive alternative by which he can economically express his political choice to his neighbors, an audience of special relevance because of their possibly high regard for his opinion. In such a case, it is arguably too great a burden on expression to allow the state to insist that its interests be completely vindicated. The case seems to me a close one.

5. Miscellany: Clotheslines, Recreational Vehicles, and Fences

One classic chestnut of aesthetic regulation—the Stovers' "protest" clotheslines—is easily resolved under the first amendment analysis suggested above. The Stovers erected clotheslines in their front yard, on which they hung old clothes and rags. At some point they established that they did so as a protest against the city's taxes. The city fathers, fighting silliness with silliness, responded with an ordinance prohibiting the maintenance of a clothesline in a front or side yard. It provided for variances in the event of hardship, but the Stovers' application for a variance was denied. The Stovers were prosecuted and convicted, and their sentences were upheld against a first amendment attack on the ordinance.

The threshold requirement of expressive character seems clearly fatal to the Stovers' claim. Although the Stovers ultimately made their intent to protest high taxes clear, certainly nothing in the nature of clotheslines expresses a "particularized message" of tax protest, either ipso facto or in the local political context. Only by a verbal supplement could the Stovers clarify their act's message.

182. Cf. Martin v. City of Struthers 319 U.S. 141, 146 (1943) (recognizing the need to protect door-to-door distribution of political circulars).
183. In Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), cert. denied, 431 U.S. 912 (1977), for instance, a total prohibition of signs in residential areas was invalidated, at least so far as it affected political signs. See id. at 1363, 1372-73. The court quite naturally stressed "the right of residents to express their own views," id. at 1373, but was perhaps a little casual in discarding the interest of captive viewers by saying that signs "can be avoided simply by not looking." Id. at 1367. Life as an ostrich has its drawbacks.

For a view that the first amendment clearly invalidates the prohibition of "public interest" signs, see Stone, supra note 142, at 256-58. Stone's position seems to depend, in part, upon a conclusion that an auto driver is not a "captive" of billboards because he may avert his eyes and drive past. See id. at 270-71. Such a view, however, overlooks the obvious physical peril the driver incurs when he adopts such a strategy, especially in an area crowded with signs.

185. See Note, Symbolic Conduct, 68 COLUM. L. REV. 1091, 1117 (1968) (suggest-
the requirement of expressive character would be rendered meaningless if one could meet it by simply telling people what his behavior was intended to communicate.\(^{186}\)

Suppose, however, that the Stovers had claimed they were engaging in an act of purely aesthetic creation—design by clothesline, as it were. Certainly one could erect clotheslines in an aesthetically expressive way, but a court might well be tempted to resolve the issue by a categorical approach. Very few people will build clotheslines with any expressive intent, and the loss in terms of art and the first amendment that will ensue from their suppression seems trivial compared to the burden of contrived claims and the waste of judicial resources that would inevitably accompany any attempt to sift the genuine communicators from the cranks.\(^{187}\)

While protest clotheslines may be exotic, the permanent parking of huge recreational vehicles in residential areas is not. Communities have responded to the latter phenomenon by requiring that owners provide enclosures for long-term parking. In \textit{City of Euclid v. Fitzhum},\(^ {188}\) such a requirement was struck down on the grounds that aesthetic reasons alone could not support a restriction on property and that the nonaesthetic justifications were insubstantial.\(^ {189}\)

Under the standards set forth in this Article, however, the results would have been very different. Rarely would anyone contend that a recreational vehicle is a mode of expression, and absent such a claim there is very little basis for questioning the city's power to regulate aesthetics.\(^ {190}\) Even assuming such a purpose, the burdens on the vehicle owner's expressive interests are a good deal less substantial than those imposed on Mrs. Reid. The restriction, after all, leaves him perfectly free to display the object in all the situations for which it was designed—on the highway and in campgrounds intended for such vehicles. It hardly seems aesthetically burdensome to require him to

\(^{186}\) Note that the burning of draft cards presents quite a different problem. Because the card is small, observers might not recognize what was being burned. Thus, the protestor's need to reveal that it is a draft card arises not from any ambiguity about the symbolic significance of the burning but simply from the size of the object burned. In \textit{O'Brien}, it is not altogether clear how that ambiguity was resolved. See 391 U.S. at 369 n.1.


\(^{189}\) \textit{Id.} at 302, 357 N.E.2d at 406.

\(^{190}\) See \textit{Berman v. Parker} 348 U.S. 26 (1954); notes 2-3 supra and accompanying text.
shelter it when it is not being used for its intended purposes.

The use of fences may also pose problems of aesthetic regulation. Fence regulations are of two distinct types. In the first, a municipality may require that property used in certain ways, as junkyards, parking lots, and car sales lots, for example, be screened from public view. Resistance to such a demand on first amendment grounds seems impossible. The junkyard owner’s proof of any protected expressive quality would quite rightly face an uphill battle.

In a second form of fence control, a municipality may require that any fences in a residential area be made out of wood or, perhaps, forbid the use of chain link. Such regulations may be troublesome, for at least in some instances an architect’s decision in favor of a prohibited fence may be central to his overall aesthetic purposes. In Japan, for example, centuries of aesthetic tradition are brought to bear on the design of fences. Regulation of this kind is essentially regulation of stylistic elements not based on history. Thus, within the analytical framework suggested earlier for problems of this type, the smaller the area covered and the more the required fence style is already utilized in that area, the easier it will be for the city to argue that the regulation merely enhances the expressive character of conforming fences, protects a captive audience, and imposes only slight burdens on those who do not conform.

IV. PRIVACY AND AUTONOMY

Though it appears that the first amendment constitutes the most appropriate and durable basis for attacks on administrative excess in the area of aesthetic regulation, it has been suggested that the sort of architectural review involved in Reid also invades the owner’s right of privacy. There are two principal problems with such an argument. The failure of the courts to settle on a coherent rationale for the privacy right has made them reluctant to extend it and some-

192. See notes 125-40 supra and accompanying text.
194. The Supreme Court has been unable to agree on the basis for the right of privacy. See Roe v. Wade, 410 U.S. 113, 152-53 (1973), and cases cited therein. Compare Justice Douglas’ opinion for the Court in Griswold v. Connecticut, 381 U.S. 479 (1965), with Justice Goldberg’s concurrence, id. at 486. Because of the Court’s lack of agreement, the lower courts have been inconsistent in determining both the scope of the right and the strength of the state interest necessary to regulate protected activity. See, e.g., cases cited in notes 195-96 infra.
what erratic in applying it. Thus the scope and contours of the right, and perhaps its very existence, are so problematic that a privacy claim is unlikely to strengthen appreciably the protection already afforded aesthetic expression by the first amendment. Second, no rationale that has thus far been articulated in support of a right of privacy would appear to reach the question of aesthetic regulation of urban design.

The right of privacy was first recognized by the Supreme Court in Griswold v. Connecticut. In his opinion Justice Douglas characterized the right as arising out of a penumbral zone created by the interaction of several specific provisions of the Bill of Rights: the first amendment’s protection of free association, the third amendment’s prohibition against the quartering of troops, the fourth amendment’s guarantee against unreasonable searches and seizures, and the fifth amendment’s protection against enforced self-incrimination.

There are two distinct types of privacy interests present in Griswold. The first is the right to be free of prohibitions the enforcement of which would, as Professor Ely has put it, be “virtually impossible without the most outrageous sort of prying into the privacy of

195. See, e.g., Doe v. Commonwealth’s Attorney, 425 U.S. 901 (1976) (summarily affirming a determination that the right of privacy did not protect the consensual sexual activities of adult homosexuals), aff’d mem. 403 F. Supp. 1199 (E.D. Va. 1975); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 & n.13 (1973) (refusing to extend the privacy right to protect the viewing of obscene movies in a theater); Lovisi v. Slayton, 539 F.2d 349 (4th Cir.) (holding that although the right of privacy would protect the consensual sexual activity of a married couple, that protection was waived when a third party was present), cert. denied, 429 U.S. 977 (1976); People v. Parker, 33 Cal. App. 3d 842, 109 Cal. Rptr. 354 (1973) (holding that the right of privacy did not extend to sexual activity performed in a semipublic place while making a movie for commercial distribution).


Compare Connor v. Hutto, 516 F.2d 853 (7th Cir. 1975) (finding that the Indiana sodomy statute would be unconstitutional if it made consensual physical relations between married persons a crime, absent a compelling state interest in preventing such relations), with Bateman v. State, 113 Ariz. 107, 547 P.2d 6 (holding that private consensual sexual activity between two adults may be subject to proper state regulation for the moral welfare), cert. denied, 429 U.S. 864 (1976).

197. In contrast to the confusion that currently surrounds the right of privacy, the first amendment cases constitute a body of law with a powerful, coherent, and intellectually respected tradition.

198. 381 U.S. 479 (1965).

199. See id. at 484-85.
This is the aspect of privacy at which Douglas aimed the rhetorical question: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." Whatever the merits of such an argument in other contexts, at least its relation to architectural regulation is clear. As the enforcement of such regulation requires no snooping, this particular privacy interest has no relevance.

*Roe v. Wade,* however, suggests a second aspect of what is normally labeled the right of privacy that is arguably relevant to aesthetic regulation. *Roe* suggests that the right at stake there and in *Griswold* arises out of the constitutional guarantees of "liberty" and is essentially what Professor Henkin has characterized as a "presumptive immunity to governmental regulation." To the extent that this right guarantees to an individual a freedom of decision regarding his personal life, denoting it a right of privacy is misleading, and "autonomy" would appear to be a more appropriate label. Even when properly labeled, however, the outlines of the right remain unclear. The Supreme Court has, for instance, refused to extend protection to consensual sexual activity between adult homosexuals. On the other hand, some lower courts have given the idea a rather expansive interpretation. The Supreme Court of Minnesota found that autonomy protected "an individual's decision regarding what he will or will not ingest into his body" and thus subjected the state's requirement of water fluoridation to special


201. 381 U.S. at 485-86.

202. Surely we will permit police, under proper conditions, "to search the sacred precincts of marital bedrooms for telltale signs" of the use of arsenic. That being so, it seems fair to conclude that it is something about the substantive crime, independent of the means of enforcement, that triggers hostility to the ban on contraceptive use involved in *Griswold.* Moreover, if the problem is that procedural invasions are likely to take place in the course of enforcement, surely the "fruit-of-the-poisonous-tree" rule or private rights of action against the offending officers are more logical remedies.


204. *See id.* at 152-53.


206. *Id.* at 1410.


208. *See Note, supra* note 207 (an unsuccessful attempt at outlining a right of autonomy).


AESTHETIC REGULATION

Similarly, a federal district court has viewed autonomy as encompassing a right to bathe in the nude at Brush Hollow, a beach in Cape Cod National Seashore.\textsuperscript{212}

Despite the doctrinal confusion, however, the potential value of a right of autonomy to one seeking to test the constitutionality of an architectural regulation is obvious.\textsuperscript{213} Certainly the design of one's house may be viewed as an extension of one's personal appearance and identity, matters as to which a right to autonomy is presumptively relevant.\textsuperscript{214} Moreover, some of our instinctive sympathy for the proposed builder is surely due to our respect for his autonomy, an interest distinct from his interest in aesthetic expression. Yet the right to autonomy remains largely undeveloped. It is as yet a creature of scholarly comment only, with the courts largely unaware of or indifferent to the distinctions between it and the privacy right discussed above. This, coupled with the absence of any clear link with any clause or structural element of the Constitution, makes it doubtful whether autonomy can, at least now, offer anything more than a makeweight in support of the far more substantial and well-developed first amendment standards.\textsuperscript{215}

\textsuperscript{211} The court ultimately upheld the statute on the basis of a "substantial" health interest. See id. at 633-34.

\textsuperscript{212} See Williams v. Hathaway, 400 F. Supp. 122 (D. Mass. 1975). Again the holder of the autonomy interest ultimately lost, as the court found that interest "outweighed" by various pragmatic considerations invoked by the National Park Service.

\textsuperscript{213} The interests hitherto protected by the right of privacy have sometimes been linked to the "home." See Note, supra note 207, at 703. But it seems doubtful whether this link is either meaningful or helpful in the context of architectural review. Some of the activities protected seem at best obliquely related to any home and at worst actually antagonistic to it. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972). Further, the decisions most readily linked to the home have actually relied on more specific concepts. See Stanley v. Georgia, 394 U.S. 557 (1969), (first amendment); Griswold v. Connecticut, 381 U.S. 479 (1965) (marital relationship). Even if the link to the "home" is a real aspect of those decisions, it seems unlikely that it encompasses the exterior of a house. Certainly to the extent that the decisions reflect concern that regulation of activities within the home will lead to governmental snooping, see text accompanying notes 198-202 supra, the basis for that concern is conspicuously absent when architectural exteriors are at stake.

\textsuperscript{214} Cf. Kelley v. Johnson, 425 U.S. 238, 241 (1976) (upholding a police department prohibition of long hair on policemen) (assuming that the Constitution protected to some extent a "liberty" interest in one's personal appearance). See also id. at 249 (Marshall, J., dissenting).

It may be that "personal appearance" is sufficiently coherent and delimitable (as a subcategory of "autonomy") to avoid the risks of unlimited judicial intervention. See notes 66-67 supra and accompanying text.

\textsuperscript{215} A possible alternative would be to transform the "rational basis" test from a rubber stamp into a genuine balancing whenever a prohibition is challenged. See Craven, Personhood: The Right to Be Let Alone, 1976 Duke L.J. 699. This approach
It would appear therefore that the rights of privacy and autonomy, at least as developed to date, offer little that is not better supplied by the first amendment. Nevertheless, some of the values that may underlie and justify those rights deserve at least a brief examination. First of all, a right to privacy might be found to rest upon and be defined in terms of exactly those considerations that underlie the doctrines of vagueness and desuetude. Statutory vagueness is offensive for three reasons. First, it creates a high risk of arbitrary, capricious, irregular, and discriminatory enforcement. Second, the limited nature of federal judicial review of the underlying facts makes such irregularities extremely difficult to spot on a case-by-case basis. Finally, the absence of a legislative judgment precise enough to permit a court to identify the state's interests makes principled performance of its reviewing function impossible.

Professor Bickel has pointed out that exactly the same problems are present when a statute suffers from desuetude: low-level law enforcement officers will decide which cases to prosecute among a large number of committed offenses, and judicial ability to spot capricious or discriminatory decisions will be inadequate. In addition, the reviewing court lacks a clear identification of the substantive evil that the legislature seeks to eradicate—if in fact it still has any intention to eliminate a substantive evil.

Such problems, however, are not limited to situations involving vague or underenforced statutes. Whenever a law proscribes conduct that ordinarily occurs in private and that is associated with no identifiable victim, a significant possibility of arbitrary and discriminatory enforcement exists, for in most cases there is nothing to set the machinery of the law in motion. It is arguable that these dan-
gers outweigh the government interest in punishing such crimes and that the power to do so should be removed or at least severely limited. A "right of privacy" would seem to be a suitable rubric for judicial assertion of such limitations.

Whatever the merits of such a contention generally, in the context of architectural regulation the first amendment coupled with the vagueness doctrine provides a far more promising basis for dealing with the problems of arbitrary enforcement. Where a review board is given a broad commission to advance "beauty," it is potentially a censor of aesthetic expression protected by the first amendment. In that context the first amendment exerts its greatest force and does not need a relatively weak and certainly novel "privacy" claim to reinforce it. When we turn, however, to a specific architectural prescription, for example, a requirement of neo-Tudor or a prohibition of neo-Spanish, not only is there no vagueness but it is clear that the ingredients of a privacy claim are missing. There is likely to be a neighbor claiming injury and demanding relief from the review board, and any violation of the restriction will be completely public.

A second view of the privacy right is based on the idea that an individual should be free to engage in any conduct that is not likely to inflict physical or pecuniary harm on another. Under this conception, legislation aimed at preventing only psychic harms, such as offense to strongly held views of morality, would violate the privacy right. Although this definition enables us to analyze statutes in terms of privacy, it does not explain why courts should be entitled to strike down laws that are aimed at protecting purely psychic interests. Presumably the reason is that psychic harm is, as a category, trivial or worthless, compared to physical or pecuniary harm. Doubtless some people may make such a value judgment, but legislatures that adopt laws penalizing "immoral" conduct presumably regard such psychic harms as important, or at least reflect the values of resources within this pool is likely to be discriminatory. Fletcher, *The Metamorphosis of Larceny*, 89 Harv. L. Rev. 469, 526-27 (1976). In the case of larceny, however, the pool is at least limited by the presence of a particular person or institution that has been injured.

For an instance of this problem in the privacy context, see Dawson v. Vance, 329 F. Supp. 1320 (S.D. Tex. 1971) (refusing to allow a married couple to intervene in a declaratory judgment action challenging the Texas sodomy statute on the ground that no justiciable case or controversy existed since there was no real threat that a married couple would be prosecuted under the statute).

222. *See* notes 102-19 *supra* and accompanying text.


constituents who do. Moreover, modern courts seem to reach out to protect people from psychic harms in other contexts, as, for example, when they permit recovery in tort for the emotional distress of relatives of physically injured people.\textsuperscript{225}

Even if we assume that psychic harm is less worthy of protection, this theory is of little utility in evaluating the impact of aesthetic regulation. First, the theory is internally inconsistent. Despite the contention that psychic harms are generally unworthy of protection, the proponents of this theory universally distinguish between "private immorality" and "public indecency," accepting prohibitions of the latter but not of the former.\textsuperscript{226} The basis for this distinction is unclear, for certainly the harm is no less psychic because of the public nature of the act.\textsuperscript{227} Second, if the distinction is admitted, the theory becomes irrelevant to architectural regulation. Offensive buildings are presumably akin to public indecency\textsuperscript{228} and thus subject to regulation.

A final, closely related rationale for a privacy right has been advanced by Professor Henkin.\textsuperscript{229} He argues that the state should be precluded from legislating morality. Though in many respects this theory is similar to the distinction between types of harm discussed above, Professor Henkin justifies a limitation on the power of the state by pointing out that "morals" are not "in the realm of reason and cannot be judged by standards of reasonableness."\textsuperscript{230} Readers who have persevered to this point will recognize the old cry of "subjectivity" and will anticipate the reply. The inability to validate moral judgments by reference to reason alone does not set morals legislation apart from any other legislation. Neither reason nor empirical proof can vindicate any of the ultimate values upon which legisla-

\textsuperscript{225} See, e.g., Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (sustaining recovery for negligent infliction of emotional distress upon plaintiff not physically injured by defendant).

\textsuperscript{226} See, e.g., H.L.A. Hart, \textit{Law, Liberty and Morality} 38-48 (1963). Hart, in attempting to justify this distinction, points out that the Roman Empire employed different bureaucracies, one for the suppression of public indecency, one for private immorality. \textit{See id.} at 198. That, however, appears to be a shaky peg upon which to hang a constitutional distinction. Hart also argues that prohibitions of private immorality leave the deviant nowhere to turn, while prohibitions of public indecency allow him to do it (whatever it is) in private. \textit{See id.} at 47-48. This distinction assumes away at least one vital issue: what is "it" that the offender wants to do? If, like Diogenes, he finds the public character of his behavior crucial to his gratification, Hart's helpful suggestion is, to him, completely beside the point.

\textsuperscript{227} Thus we are left uncertain as to the reasons both for the inferior status accorded psychic harm and for the distinction between psychic and visual harm.

\textsuperscript{228} Unlike a too-loud noise, offensive buildings do not inflict physical injury, yet their impact is different from bizarre sexual practices conducted in private.


\textsuperscript{230} \textit{Id.} at 407.
tion is based, and argument or rhetoric can validate them only in a
highly contingent sense. 231 This inadequacy is illustrated by Professor
Henkin's own apparent readiness to permit the regulation of public
indecency. 232 In terms of the scope and depth of public feeling, many
more Americans would probably be repulsed by public fornication
than by private sexual deviancy. But such a differential in public
opinion does not constitute evidence that the greater repulsion is
more founded in "reason" than the lesser or that regulation based
on that distinction is "reasonable".

Advocates of Professor Henkin's viewpoint might argue that a
value can be viewed as being "in the realm of reason" if, but only if,
an intelligible argument can be made for it in terms of the accepted
values of the relevant culture. While this may be a perfectly sensible
way of defining the "realm of reason," it exposes the gap in the
argument. It remains for such an advocate to explain why constraints
on private sexual conduct are not reasonably related to the values of
our culture.

Thus, we are left unclear not only as to what the fundamental
basis of the theory is but also as to whether it would encompass
regulation of house exteriors. Professor Henkin's apparent readiness
to accept prohibition of public indecency seems to indicate that he
regards injuries to visual sensitivities as meeting his "reason" test.
But we are left quite in the dark as to why visual sensitivities should
rank so far above moral ones. Again, the supporting theory is insuffi-
cient and the issue impossible to resolve intelligently.

V. BEAUTIFUL AS WELL AS HEALTHY?

If the foregoing analysis of aesthetic regulation is sound, have we
contradicted Justice Douglas' appealing claim that the legislature
may "determine that the community should be beautiful as well as
healthy"? At one level, the answer is easy. If the views expressed in
this Article are sound, the state does not have veto power over every-
ting that accounts for a city's appearance. The legislature or urban
planning staff cannot impose its view of the "beautiful" upon every
detail of municipal appearance.

But the government's hand in urban aesthetics is, nonetheless,
overwhelmingly powerful. There are portions of the city over which
the government exercises undisputed design control: all the buildings
owned by the city, the layout and materials of its streets and side-
walks, its parks, the trees that could (but often do not) line its streets,
its own signs. There is a certain irony in the city's using its heavy

231. See notes 29-45 supra and accompanying text.
232. See Henkin, supra note 229, at 413.
bureaucratic hand to remove motes from the eyes of private architects when it has not removed the beams from those of the engineers, architects, and administrators who make design decisions for the city itself.

Even as to the appearance of privately built parts of the city, the approach suggested in this Article would allow the instruments of the state a substantial hand. At a minimum the city can, given a permissible purpose, mandate a wide range of height, bulk, and setback controls, preserve historic districts and landmarks, eliminate most "off-premises" signs, limit the number and size of "on-premises" signs, and require that such nonexpressive eyesores as junkyards and parking lots be concealed by fencing or hedging. Given careful draftsmanship, all of these can be achieved without infringing upon first amendment values either directly or through undue vagueness. Protection against utter monstrosities and some efforts to achieve legibility through patterning requirements are more questionable, but they should survive if they are narrowly drawn and if their procedural burdens are modest.

The approach outlined in this Article can be seen as a natural evolution of the historic judicial approach to aesthetic regulation. There was merit in the intuitive judicial anxiety about purely aesthetic purposes which led to the requirement of some nonaesthetic state interest to support the regulation. All that was lacking was an explicit recognition that the factors underlying that uneasiness were the dangers of vagueness and of governmental suppression of aesthetic expression solely on the basis of majoritarian tastes. The absence of a clear understanding of the nature of the problem led some of the earlier courts to accept too readily the protection of property values and the tourist trade as legitimate government interests unrelated to suppression of expression despite the fact that these interests are ultimately rooted in the same interests that make a purely aesthetic purpose suspect. Nonetheless, the anxiety about state intervention in aesthetics is sound. All that is needed is a closer focus on the reasons for that anxiety, for once those reasons are identified, the problem of aesthetic regulation has much in common with many other forms of legislation and can be dealt with in much the same way.

234. Such a focus is precisely what Professor Dukeminier called for in Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal, 20 LAW & CONTEMP. PROB. 218, 237 (1955).