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## AESTHETIC REGULATION AND THE DEVELOPMENT OF FIRST AMENDMENT JURISPRUDENCE

DARREL C. MENTHE\*

For nearly a century and a half, those desiring to improve our cities and countryside have sought constitutional means to control activities of others they deem ugly. By far, most of these legal cases concern outdoor advertising of one kind or another. The questions posed by aesthetic regulations are both descriptive and normative: Is there a freedom to be ugly? Is there a right to be free *from* ugliness? If so, how are these rights derived: as a concomitant of private property, from the right of privacy, or from the First Amendment? Is there a state interest in promoting beauty? What rights do neighbors have, individually or as a community? These legal battles waged over aesthetic regulation pose questions about the boundaries of individual liberty but all too rarely answer them.

It took a long time for aesthetic regulation to become an issue of primarily First Amendment concern. In fact, for much of the twentieth century, aesthetic regulation was considered only to raise issues concerning property rights. It is worth exploring how and why the First Amendment became the touchstone for analyzing aesthetic regulation. What we find, this article suggests, is that the shift to a First Amendment analysis was the result of a broad shift in our cultural view of the nature of aesthetics. Aesthetics is no longer popularly or academically conceived of as a science or the product of education, but as a matter of personal taste. In turn, the sphere of conduct considered to be part of personal autonomy has grown. That dynamic has continued to press itself into First Amendment doctrines, and is not finished.

The cultural shift about the nature of aesthetic judgments is not, however, simply the shift from the objective to the subjective. The Latin maxim *de gustibus non est disputandum* expresses an ancient idea that there is no basis for reasoned argument about personal preferences; reasonable people will differ about what is pleasing to them. In this respect, there has always been appreciation of the subjectivity of taste. To the modern speaker, however, such words take on a new and more urgent meaning. The modern speaker has in mind that each person has an absolute *right* to be the arbiter of what he or she likes best—that no person may be required to accept the aesthetic judgments of others, and certainly not those of the government. This concept reverberates in notions of personal autonomy and pluralism, the building blocks of our liberal,

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\* Attorney, Initiative Legal Group; J.D., Stanford Law School; M.A., International Relations, UCLA.

post-modern society.<sup>1</sup>

The idea that personal autonomy means the right to make aesthetic judgments is profoundly political. On the one hand, it is a democratic attitude to be distrustful of the prerogative of elites to tell free citizens what they should think, feel, and believe. As Judge Learned Hand famously wrote in another context: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them . . . ."<sup>2</sup> Totalitarian states have always sought to control art.<sup>3</sup> Fascism even owes some of its intellectual origins to the artistic avant-garde of the 1920s.<sup>4</sup>

On the other hand, subjectivism tends, at worst, toward the nihilistic. If nothing can be proclaimed aesthetically superior to anything else, then nothing can be sacred. When right and wrong also become matters of personal taste, the concept of "ordered liberty" begins to break down.<sup>5</sup> Things fall apart; the center cannot hold. Subjectivism and democratic self-rule are, thus, in contest as well as in sympathy.

With so much that could be at stake, it is somewhat surprising how much aesthetic regulation there is in practice. Every homeowner who has been fined for not mowing a lawn or penalized for erecting a satellite dish knows the power of the state to dictate aesthetic choices.<sup>6</sup> Some cities put detailed and sometimes jaw-dropping limitations on building, even though architecture can be considered expressive activity.<sup>7</sup> Tolerance, it seems, often ends at the neighbor's unkempt lawn.

The important legal battles over aesthetic regulations do not, however, generally arise from the manicured hedges of suburbia. Rather, they stem from the

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<sup>1</sup> "Post-modern" in this context refers to society after the modernism of the mid-twentieth century. The term post-modern is so fraught that its use is commended only by the absence of decent alternatives. See generally Dale Jamieson, *The Poverty of Postmodernist Theory*, 62 U. COLO. L. REV. 577 (1991).

<sup>2</sup> LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958).

<sup>3</sup> See, e.g., David Cole, *Beyond Unconstitutional Conditions, Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 740 (1992); Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 97-101 (1996); Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789, 809 (1998).

<sup>4</sup> For an excellent discussion of fascism and art history, see GEORGE L. MOSSE, *MASSSES AND MAN: NATIONALIST AND FASCIST PERCEPTIONS OF REALITY* 229-245 (1997) and Andrew Hewitt, *Fascist Modernism, Futurism, and Post-Modernity*, in *FASCISM, AESTHETICS, AND CULTURE* 38-55 (Richard J. Goslan ed., 1992). Mr. Hewitt makes reference to the futurist slogan "*Fiat ars, pereat mundus*." Hewitt, *supra*, at 44 (translated: Let there be art, though the world may perish).

<sup>5</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).

<sup>6</sup> See Robert H. Cutting, *One Man's Ceilin' is Another Man's Floor: Property Rights as the Double-Edged Sword*, 31 ENVTL. L. 819, 861 (2001).

<sup>7</sup> See generally Janet Elizabeth Haws, Comment, *Architecture as Art? Not in My Neocolonial Neighborhood: A Case for Providing First Amendment Protection to Expressive Residential Architecture*, 2005 BYU L. REV. 1625, 1630 n.23 (2005).

justifications advanced to regulate signs and displays.<sup>8</sup> Whatever arguments can be made about whether the First Amendment protects the right to paint one's house a garish shade of orange, the First Amendment singles out "the freedom of the press" in addition to the freedom of speech.<sup>9</sup> There is both a constitutional and normative issue presented in permitting legislation against the display of words and pictures just because a majority finds them to be ugly. We do not trust the government to define truth; why may it define beauty? Was Keats wrong? Is there more we need to know?<sup>10</sup>

Yet sign regulation with aesthetic motives is all but universal. Billboard bans are common, even popular. Local governments routinely ask homeowners and businesses to remove or modify signs or murals for aesthetic reasons. Many municipalities require signs to meet cultural standards of some kind or require that a mural be approved by an appointed cultural commission, even if it is on private property.<sup>11</sup> Some cities prefer smaller signs, but others require larger ones.<sup>12</sup> Sign regulations are also riddled with odd, content-based exceptions.<sup>13</sup> The title of the Federal Highway Beautification Act speaks for itself.<sup>14</sup>

I argue that aesthetic regulation is a useful prism through which to see the

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<sup>8</sup> The idea that pictorial expression is in the same category as verbal expression is more than the exposition of the old saying that "a picture is worth a thousand words." It is probably impossible to understand the literature on pornography and the First Amendment without acknowledging that ideas communicated in pictorial or symbolic form are protected by the First Amendment as surely as if they were expressed in words.

<sup>9</sup> For a discussion of the distinction between the freedoms of speech and of the press, see David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983) (arguing that the freedom of the press predated freedom of speech as a right of criticism of government rather than a right of individual expression); see also Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975) (arguing that the term "press" is more about the communicative aspect of speech while "speech" is more attuned to expression).

<sup>10</sup> John Keats, *Ode on a Grecian Urn*, in *THE POETICAL WORKS OF JOHN KEATS* 233, 234 (H. Buton Fortman ed., 1954).

<sup>11</sup> E.g., L.A., CAL., MUN. CODE § 14.4.20 (2008) (murals require approval of cultural commission); DALLAS, TEX., MUN. CODE 51A-7.1903(b)(2) (1960) (Special sign district created "To encourage the use of signs that are innovative, colorful, and entertaining, and that bring a distinctive character to this district."). But see CHI., ILL., MUN. § 17-12-0504 & -0505 (2008) (exempting from sign ordinances "[w]orks of art with no commercial message" and "holiday decorations with no commercial message").

<sup>12</sup> The city of West Hollywood, for example, permits wall signs along Sunset Boulevard only if they occupy a *minimum* of 5000 square feet, because it wants the famous "Sunset Strip" to resemble Times Square. WEST HOLLYWOOD, CAL., MUN. CODE § 19.34.080(i)(5) (2000).

<sup>13</sup> E.g., ATLANTA, GA., CODE OF ORDINANCES vol. II § 138-60(a)(1) (1995) (making an exception to general ban for outdoor banners for "centennial celebrations of local companies or corporations"); Federal Highway Beautification Act, 23 U.S.C. § 131(c)(5) (making a special exception to sign bans on scenic highways for "signs, displays, and devices advertis-

development of First Amendment jurisprudence. Aesthetic regulation shows how much the development of First Amendment law has really been tied to broader cultural development of ideas of individual autonomy and the subjective nature of aesthetic judgments.

To examine the relationship between aesthetic regulation of speech and the Constitution, this article proceeds in two main parts. Part I assembles and categorizes the justifications brought forth time and again for the government to promulgate aesthetic rules for expressive or communicative activity. These justifications can be broadly characterized as (allegedly) content-neutral or values-oriented. The article then discusses the normative and empirical problems posed by each of these justifications.

Having set forth the historical justifications for aesthetic regulation, Parts II and III outline the development of these justifications as they emerged in the late-nineteenth century. It is not an easy history. As late as 1980, aesthetic regulation was expected to be the wave of the future,<sup>15</sup> yet it has again ebbed.<sup>16</sup> This article concludes with a look to the future and argues that when it comes to protecting and defining individual liberties, the First Amendment may be starting to confront the contradictions inherent in its dramatic expansion.

## I. THE JUSTIFICATIONS FOR AESTHETIC REGULATION OF SPEECH

### A. Overview

Justifications for aesthetic regulation fall into two broad categories. The largest category of justifications, today called “content-neutral,” includes the following: scenic beauty, protection of property values, and traffic and safety concerns. These justifications are frequently enshrined in “purpose” clauses.

Although proponents of aesthetic regulation frequently advance these content-neutral justifications in defense of statutes and ordinances, the legitimacy of such justifications largely depends on deference to legislative pronouncements of purpose. There is rarely any strong connection between the stated purpose and the effects of the legislation. In another context, Dean Kathleen Sullivan summed up this state of affairs in saying: “[W]hat matters when you try to regulate speech is what you aim at, not what you happen to hit.”<sup>17</sup>

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ing the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system”).

<sup>14</sup> Federal Highway Beautification Act § 131.

<sup>15</sup> Samuel Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. REV. 125 (1980).

<sup>16</sup> Kenneth Pearlman, Elizabeth Linville, Andrea Phillips & Erin Prosser, *Beyond the Eye of the Beholder Once Again: A New Review of Aesthetic Regulation*, 38 URB. LAW. 1119, 1119–21 (2006).

<sup>17</sup> Kathleen M. Sullivan, *Symposium: Cities on the Cutting Edge: A Symposium of Emerging Municipal Legal Issues: Discrimination, Distribution, and City Regulation of Speech*, 25 HASTINGS CONST. L.Q. 209, 216–17 (1998).

The second category of justifications for aesthetic regulation derives from values. These justifications are usually broad philosophical arguments about the rights of the community and the role of aesthetics in promoting the general welfare, including the supposed right of a community to legislate aesthetics for the public good or to promote social order. These arguments find less direct support in law reports than in law reviews. However, commentators and courts throughout the past century have repeatedly pointed to these social welfare arguments to justify aesthetic regulation. In a famous 1954 passage in *Berman v. Parker*, the Supreme Court spoke to these:

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.<sup>18</sup>

This power is not without controversy. Consider the firestorm created when the Court reaffirmed this principle in *Kelo v. City of New London*.<sup>19</sup>

These “values” justifications for aesthetic regulation are sometimes directly in tension with the First Amendment, because they include arguments based on the *listener’s* right to privacy or personal autonomy. If freedom of speech includes the right to *communicate* (not just the right to *express* oneself like the proverbial tree falling in a forest), it is necessarily in tension with a right of privacy that entails a person’s right to avoid communication. Freedom of speech and the right to privacy already clash directly with different results in regulations of mail,<sup>20</sup> telemarketing,<sup>21</sup> and door-to-door solicitation.<sup>22</sup>

## B. “Content-Neutral” Justifications for Aesthetic Regulation

### 1. Protection of Property Values

Proponents of restrictive regulation explicitly for “beauty” frequently justify

<sup>18</sup> *Berman v. Parker*, 348 U.S. 26, 33 (1954).

<sup>19</sup> 545 U.S. 469 (2005).

<sup>20</sup> See *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 736 (1970) (“the asserted right of a mailer stops at the outer boundary of every person’s domain”).

<sup>21</sup> See, e.g., *Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1237–38 (10th Cir. 2004) (protecting the right to privacy of the “unwilling listener”).

<sup>22</sup> See, e.g., *Watchtower Bible and Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002) (“It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.”); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating statutes designed to protect privacy by prohibiting the door-to-door solicitation of Jehovah’s Witnesses). But see *Rowan*, 397 U.S. at 737 (reciting a householder’s right to bar solicitors by notice).

this regulation by emphasizing a connection to property values.<sup>23</sup> This may be the most common justification for aesthetic regulations, including regulation of signage.<sup>24</sup> Such a justification is often set forth in the legislation or ordinance itself through a specific statement of purpose.<sup>25</sup> “A good statement of purpose will spell out the relation between design controls and the public welfare by showing that the former will not only render the community more beautiful, but will also protect property values or serve some other financial or commercial purpose.”<sup>26</sup> One of the reasons it is popular for drafters to include a statement of purpose is that the proposed content-neutral justification may not be otherwise discernible from the text of the ordinance and may otherwise appear post hoc when later asserted in court in defense of a regulation.

As was the case in *Kelo* and *Berman*, the U.S. Supreme Court has specifically endorsed the view that the police power encompasses regulations of aesthetic activity designed to protect property values.<sup>27</sup> In *Young v. American Mini-The-*

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<sup>23</sup> Kenneth G. Silliman, *Risk Management for Land Use Regulations: A Proposed Model*, 49 CLEV. ST. L. REV. 591, 619 (2001).

<sup>24</sup> See, e.g., CONN. GEN. STAT. § 8-2 (2007) (“One district . . . may provide that certain . . . uses of land are permitted only after obtaining a special permit or special exception . . . subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values.”); *Carlisle v. Martz Concrete Co.*, No. CA2006-06-067, 2007 WL 2410692 (Ohio Ct. App. Aug. 27, 2007); *City of Mobile v. Weinacker*, 720 So. 2d 953, 954 (Ala. Civ. App. 1998) (“Municipalities have the authority to regulate the use of structures and improvements in certain zones or districts and can use their zoning power to regulate aesthetics in maintaining property values.”); *City of N.Y. v. Am. Sch. Publ’ns., Inc.*, 119 A.D.2d 13, 16 (N.Y. App. Div. 1986) (referencing *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981)) (“A municipality, moreover, may legitimately exercise its police power to advance esthetic values and avoid the cultural clutter caused by, for example, outdoor billboards and the accumulation of signs posted on public property.”).

<sup>25</sup> E.g., ATLANTA, GA., CODE OF ORDINANCES vol II § 16-28A.003 (1995) (listing, inter alia, that the purpose of the sign ordinance is: “(2) To regulate the erection and placement of signs within the City of Atlanta in order to provide safe operating conditions for pedestrian and vehicular traffic without unnecessary and unsafe distractions to drivers or pedestrians; (3) To preserve the value of property on which signs are located and from which signs may be viewed”); *RTM Media, L.L.C. v. City of Houston*, 518 F. Supp. 2d 866 (S.D. Tex. 2007) (“The stated purpose of the ordinance is to improve aesthetics, traffic safety, and property values.”); *Showing Animals Respect & Kindness v. City of W. Hollywood*, 83 Cal. Rptr. 3d 134, 137 (Cal. Ct. App. 2008) (“The purpose of this chapter is to eliminate mobile billboard advertising within the [c]ity in order to promote the safe movement of vehicular traffic, to reduce air pollution, and to improve the aesthetic appearance of the city.”) (quoting WEST HOLLYWOOD, CAL., MUN. CODE § 11.44.010 (2003)).

<sup>26</sup> Julie A. Tappendorf, *Architectural Design Regulations: What Can a Municipality Do to Protect Against Unattractive, Inappropriate, and Just Plain Ugly Structures?*, 34 URB. LAW 961, 964 (2002).

<sup>27</sup> *Kelo v. City of New London*, 545 U.S. 469, 481 (2005); *Berman v. Parker*, 348 U.S. 26, 33 (1954).

aters, the Court permitted content-based regulation of adult-oriented businesses to protect property values.<sup>28</sup> The basic harm the city was attempting to avoid was described as follows: “In the opinion of urban planners and real estate experts who supported the ordinances, the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.”<sup>29</sup> These so-called “secondary effects” have been endorsed as a justification for regulation that is allegedly content-neutral. It is unclear how much of that law survives today outside of the limited area of pornographic businesses.<sup>30</sup>

It is also unclear how content-neutral the protection of property values really is. Some argue that regulation of aesthetics to protect “property values” is ultimately circular because the aesthetic component of property value is not independent of community tastes.<sup>31</sup> The statement that “the market” favors certain aesthetics in real property is really an argument about the accumulated aesthetic preferences of potential purchasers. So, aesthetic regulation designed to protect property values is not content-neutral, but an endorsement of the majoritarian view of what is aesthetically pleasing.<sup>32</sup> This criticism, I suspect, will have increasing salience as courts learn more about economic analysis.

## 2. Traffic Safety

The “traffic safety” justification for aesthetic regulation has a pedigree going back, at least, to the 1930s.<sup>33</sup> In an oft-quoted passage from *Metromedia, Inc.*

<sup>28</sup> *Young v. Am. Mini-Theatres*, 427 U.S. 50 (1976).

<sup>29</sup> *Id.* at 55. See also Harold L. Quadres, *Content-Neutral Public Form Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 HASTINGS L. J. 439, 455–58 (1986).

<sup>30</sup> See, e.g., *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

<sup>31</sup> Kenneth Regan, *You Can't Build That There: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 FORDHAM L. REV. 1013 (1990).

<sup>32</sup> See also Samuel E. Poole III, *Architectural Appearance Review Regulations and The First Amendment: The Good, The Bad, and The Consensus Ugly*, 19 URB. LAW. 287, 323 (1987) (“The most significant first amendment problem with property values as a standard, however, is that in an appearance review context property values are nothing more than an attempt to measure (and impose) majoritarian taste. . . . [A]ll government is doing is measuring community distaste for the expression of an idea.”); James Charles Smith, *The Law of Yards*, 33 ECOLOGY L.Q. 203, 227 (2006) (“The negative effect on property values, if proven, only demonstrates that a significant portion of the homebuying public dislikes the message.”).

<sup>33</sup> *State ex rel. Beck v. City of Hutchinson*, 62 P.2d 865, 866 (Kan. 1936); *General Outdoor Adv. Co. v. Dep't of Pub. Works*, 193 N.E. 799, 825 (Mass. 1935); *Commonwealth v. Haffer*, 180 N.E. 615, 616 (Mass. 1932) (upholding ban on picketing signs to prevent ob-



v. *City of San Diego*, the Supreme Court announced it would defer to any legislative finding that billboards are traffic hazards:

We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable.<sup>34</sup>

Courts before and after *Metromedia* have routinely deferred to such legislative pronouncements in the same manner.<sup>35</sup> The depth of this deference is staggering. The *Metromedia* Court required no offering of evidence by San Diego, and none was discussed.

Without such deference, however, the “traffic safety” rationale might not survive. As early as 1963, critics observed that the threat posed by signs to traffic safety was not well-established in fact.<sup>36</sup> If traffic safety is the real goal, most sign regulations will prove under-inclusive because they only target a small class of outdoor advertising signs, with broad exemptions for favored classes of signs. But signs are not easily distinguished in this way. The *purpose* of every sign—commercial, non-commercial, or political—is to encourage viewers to advert their eyes toward it; very rarely is a sign owner’s goal pure self-expression, without regard to whether the sign communicates effectively.<sup>37</sup> The argument that certain signs (but not others) constitute traffic

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struction of traffic). It also appears in the first modern case to deal with the First Amendment, *People v. Stover*, 191 N.E.2d 272, 274 (N.Y. 1963) (upholding ban on unsightly clotheslines intended as political protest).

<sup>34</sup> *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–08 (1981).

<sup>35</sup> See, e.g., *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814 (6th Cir. 2005) (ban on billboards larger than 120 square feet or more than 6 feet high above the ground); *Lavey v. City of Two Rivers*, 171 F.3d 1110, 1115–16 (7th Cir. 1999); *Gold Coast Publ’ns, Inc. v. Corrigan*, 42 F.3d 1336, 1345 (11th Cir. 1994) (“Consequently, we do not second guess the City’s assessment that newsracks on public rights-of-way pose certain safety risks that the Ordinance seeks to minimize through its narrowly tailored restrictions.”); *Stuckey’s Stores, Inc. v. O’Cheskey*, 600 P.2d 258, 265 (N.M. 1979); *Burns v. Barrett*, 561 A.2d 1378, 1382 (Conn. 1989); *Carlson’s Chrysler v. City of Concord*, 938 A.2d 69, 73 (N.H. 2007) (ban on all outdoor electronic signage); *Montana Media, Inc. v. Flathead County*, 63 P.3d 1129, 1138 (Mont. 2003); *Ghaster Properties, Inc. v. Preston*, 200 N.E.2d 328, 335–36 (Ohio 1964); *Markham Adver. Co. v. State*, 439 P.2d 248, 258 (Wash. 1968).

<sup>36</sup> Marvin M. Moore, *Regulation of Outdoor Advertising for Aesthetic Purposes*, 8 St. Louis U. L.J. 191, 197 (1963).

<sup>37</sup> It is important to distinguish bans on blinking, flashing, or rotating signs. These do not raise the same First Amendment issues where they are applied to all signage. These flashing sign laws are, however, undermined by their exceptions. E.g., ALA. CODE 1975 § 23-1-274 (2) (2007) (“Signs shall not be erected or maintained which contain, include, or are illuminated by any flashing, intermittent, or moving lights, except those giving public service information such as, but not limited to, time, date, temperature, weather, or news.”); 17 DEL. CODE ANN. tit. 17, § 1110 (b)(3) (1974) (“Signs which contain, include, or are illuminated

hazards must be based on evidence that some signs are more effective at communicating than others, but that evidence is never adduced. And if it were adduced, it remains to be seen how the First Amendment's "freedom of the press" squares with a regulatory scheme that disfavors effective communicators because they are effective.

In addition, the "traffic safety" rationale is undermined by the "scenic beauty" rationale that is often carelessly advanced in tandem with it. The Federal Highway Beautification Act ("FHBA") and its state counterparts openly favor scenic vistas along roadways.<sup>38</sup> In enacting such rules, the government is not trying to prevent motorists from taking in the sights while driving—the question is only whether the motorist's eyes are distracted or attracted by the officially beautiful vistas or officially ugly billboards. In other words, the purpose of FHBA is not to keep motorists' eyes fixed on the roads. Indeed, the authorities banning signs in scenic areas to promote tourism evidently believe that an unspoiled wilderness vista will be *more* enticing to motorists' eyes than a view "spoiled" by billboards. For these reasons, it is surprising that the "traffic safety" rationale has survived serious First Amendment scrutiny at all.<sup>39</sup>

### 3. Protection of Visual Resources

As noted above, legislation restricting signage is often motivated by a desire to preserve scenic vistas. Some have argued that sign regulation can be viewed as a form of environmental or conservation regulation, inasmuch as conservation can be viewed as the protection of "visual resources."<sup>40</sup> Although environmentalists would likely consider this a parochial, anthropocentric view of environmentalism,<sup>41</sup> it would be folly to discount the importance of scenic beauty

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by any flashing, intermittent, or moving light or lights are prohibited, except those giving public service information such as time, date, temperature, weather, or similar information[.]; 605 ILL. COMP. STAT. 5/9-112.2 (1993) ("No person shall place, or cause to be placed upon any building or other structure, within 200 feet of any public highway, oscillating, rotating or flashing lights which are of such intensity, when illuminated, to be visible at any time from such highway. This prohibition does not apply to a pole-supported business or brand identification sign with constant illumination and color and in which the only movement is a slow rotation of the entire body of the sign so as to be visible from all directions.").

<sup>38</sup> 23 U.S.C. § 131 (2006). For state counterparts, see, for example, NY CLS High § 86; Ohio Rev. Code. § 5516.05 (2010); Oregon Rev. Stat. § 377.510 (2009); Tex. Transp. Code § 391.002 (2009).

<sup>39</sup> See, e.g., *Kuba v. 1-A Agr. Ass'n*, 387 F.3d 850, 861 (9th Cir. 2004) (stating that although traffic safety is a significant governmental interest, the free expression zone policy at issue was not narrowly tailored).

<sup>40</sup> Mark Bobrowski, *Scenic Landscape Protection Under the Police Power*, 22 B.C. ENVTL. AFF. L. REV. 697, 712 (1995) (noting that there is "an easy alliance between aesthetic and environmental protection").

<sup>41</sup> For a discussion of environmentalism in contrast to conservation for human needs, see Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 964–67 (1998).

in selling conservation legislation to the public. As with the other content-neutral justifications, the concept of “visual resources” states an objective basis for regulation. Courts have not yet given sanction to protection of “visual resources” an exclusive basis for regulation. Instead, protection of scenery is frequently tied to goals such as attracting tourists or other more tangible economic benefits.<sup>42</sup>

Conservational or environmental justifications for aesthetic regulation are problematic, however, in that their scope is probably quite limited. Regardless of what aesthetic arguments can be made to support bans on commercial signage along the Pacific Coast Highway or in the Grand Canyon, these arguments are not easily applicable to support bans on signs in dockyards or industrial zones or the broad bans on signs in residential areas. Sub-developments may have aesthetic qualities, but constitutional protection for a vista of “little boxes made of ticky-tacky”<sup>43</sup> is unlikely. These may be seen rather as a set of discrete *exceptions* to constitutional principles, similar to the set of exceptions for official religious expressions by the state permitted under the term “ceremonial deism.”<sup>44</sup>

#### 4. “Visual Blight”

The widespread use of the term “visual blight” in aesthetic regulation cases seems to owe its origin to the 1984 Supreme Court case of *Members of City Council of Los Angeles v. Taxpayers for Vincent*, which upheld a citywide ban on certain kinds of signs.<sup>45</sup> This could be called a per se eyesore rule. Although this particular justification for aesthetic regulation overlaps with other justifications, it is worthy of separate mention because of its origin and frequent use.<sup>46</sup> The phrase derives by analogy from the police power use of eminent

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<sup>42</sup> John Donnelly & Sons v. Campbell, 639 F.2d 6, 11 (1st Cir. 1980); Bobrowski, *supra* note 40, at 714–18.

<sup>43</sup> Malvina Reynolds, *Little Boxes* (1962).

<sup>44</sup> See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36–37 (O'Connor, J., concurring) (“There are no de minimis violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them. Given the values that the Establishment Clause was meant to serve, however, I believe that government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of ‘ceremonial deism’ most clearly encompasses such things as the national motto (‘In God We Trust’), religious references in traditional patriotic songs such as *The Star-Spangled Banner*, and the words with which the Marshal of this Court opens each of its sessions (‘God save the United States and this honorable Court’).”).

<sup>45</sup> *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

<sup>46</sup> The following examples from just the past few years are illustrative of how frequently proponents of restrictive regulation invoke the visual clutter or visual blight justifications. See, e.g., *Horina v. City of Granite City, Ill.*, 538 F.3d 624, 633 (7th Cir. 2008); *Midwest Media Property, L.L.C. v. Symmes Twp., Ohio*, 503 F.3d 456, 467 (6th Cir. 2007); *Pagan v. Fruchey*, 492 F.3d 766 (6th Cir. 2007) (“[A]ppellees focus on the notion that less is required

domain to condemn “blighted” areas.<sup>47</sup> Thus, the concept has its origin in Fifth Amendment, rather than First Amendment, law.<sup>48</sup>

However, the judgment that signs constitute “visual clutter” may lack any objective basis in already ugly industrial areas.<sup>49</sup> Even Justice Brennan wondered aloud in his concurrence in *Metromedia* whether billboards were so obviously less visually appealing than certain gritty cityscapes at the ports.<sup>50</sup> The content-neutrality of this justification must also be measured against the other forms of visual clutter or blight that are widely tolerated. Perhaps it should come as no surprise that the Supreme Court has more than once feebly proclaimed that sign law was “a law unto itself.”<sup>51</sup>

### C. Values-based and Rights-based Justifications

#### 1. The Rights of the Community

The strongest judicial expression that the regulation of aesthetics is a proper

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of a governmental entity when its interests are aesthetics. Appellees suggest that the invocation of aesthetic objectives carries with it some talismanic quality that, under case precedents, legitimizes all signage regulation and relieves them from making [a] showing . . . . Under appellees’ theory, they need not provide evidence that ‘For Sale’ signs create aesthetic harm because the Court has accepted as a matter of course that signs and billboards may be considered a visual blight.”); *Prime Media, Inc. v. City of Brentwood, Tenn.*, 398 F.3d 814, 822 (6th Cir. 2005); *Bell v. Balt. County, Md.*, 550 F. Supp. 2d 590, 592 (D. Md. 2008); *Houston Balloons & Promotions, LLC v. City of Houston*, 589 F. Supp. 2d 834, 839 (S.D. Tex. 2008); *Carlson’s Chrysler v. City of Concord*, A.2d 69, 72 (N.H. 2007); M. Ryan Calo, Note, *Scylla or Charybdis: Navigating the Jurisprudence of Visual Clutter*, 103 MICH. L. REV. 1877 (2005).

<sup>47</sup> *Kelo v. City of New London*, 545 U.S. 469, 480, 483 (2005); *Berman v. Parker*, 348 U.S. 26, 33 (1954).

<sup>48</sup> The origin can also be seen in the “spite fence” laws, a longstanding example of regulation against “visual blight.” These laws allow a neighbor a remedy against a fence erected at the edge of his or her property merely out of spite, even though lawfully constructed. See Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211, 234–35 (2002). Even trees can be “fences” if their planting is motivated by malice. *Wilson v. Handley*, 97 Cal. App. 4th 1301, 1305–13 (2002). One blogger has dubbed this “Bullying by leyland cypress.” Hedgline, High Hedge Nuisance, <http://freespace.virgin.net/clare.h/jhdgphot09.htm> (last visited Mar. 27, 2010). It seems that unless this is a resurrection of the “ancient lights” doctrine—and the courts are clear it is not—the deprivation being remedied must be viewed as an aesthetic injury rather than injury to property.

<sup>49</sup> Quadres, *supra* note 29, at 472.

<sup>50</sup> *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 531–32 (1981) (Brennan, J., concurring).

<sup>51</sup> *Thomas Cusack Co. v. City of Chi.*, 242 U.S. 526, 529 (1917); *Metromedia*, 453 U.S. at 501. For a provocative discussion of how fractured courts handle precedent, see Neal Devins, *Ideological Cohesion and Precedent (or Why the Court Only Cares About Precedent When Most Justices Agree With Each Other)*, 86 N.C. L. REV. 1399 (2008).

exercise of the police power is found in *Berman v. Parker*.<sup>52</sup> In *Berman*, the Court wrote that the concept of public welfare includes values that “are spiritual as well as physical, aesthetic as well as monetary.”<sup>53</sup> The same broad deference to legislative declarations is reflected in *Kelo v. City of New London*,<sup>54</sup> which has become an ideological flashpoint.<sup>55</sup> This justification for aesthetic regulation overlaps with the desire to protect “visual resources,” but its emphasis is not on the intrinsic or objective value, but on the right of the community to both define and protect what it values.<sup>56</sup>

Advocates from both ends of the political spectrum argue that the legislature should have the power to define what society values, but they differ substantially as to the content of those values.<sup>57</sup> Thus, while both sides of the political spectrum today support billboard regulation, they clash in their reasoning.<sup>58</sup>

## 2. Privacy and Personal Autonomy: The Captive Audience

The other major values-based justification for aesthetic regulation is the protection of the *listener's* autonomy. The hallmarks of this justification are phrases such as “intrusive” speech<sup>59</sup> or “unwanted exposure.”<sup>60</sup> Cases that exemplify this line of argument from the early to mid-twentieth century call this a “privacy” justification for aesthetic regulation, although they predate *Griswold v. Connecticut*, which is generally considered the origin of the right to privacy.<sup>61</sup>

However, these opinions seem ad hoc, without a coherent or developed doc-

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<sup>52</sup> 348 U.S. 26 (1954).

<sup>53</sup> *Id.* at 33.

<sup>54</sup> 545 U.S. 469 (2005).

<sup>55</sup> Daniel H. Cole, *Why Kelo is Not Good News for Local Planners and Developers*, 22 GA. ST. U. L. REV. 803, 819–24 (2006) (noting the strong response from both far left and property rights advocates to *Kelo*).

<sup>56</sup> See, e.g., Gregory A. Ashe, *Reflecting the Best of Our Aspirations: Protecting Modern and Post-Modern Architecture*, 15 CARDOZO ARTS & ENT. L.J. 69, 76 nn.54–56 (1997) (concerning public protection of architecture).

<sup>57</sup> Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531 *passim* (2002).

<sup>58</sup> See also Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627, 652 (1990) (“The commercial speech doctrine is the stepchild of first amendment jurisprudence: Liberals don’t much like commercial speech because it’s commercial; conservatives mistrust it because it’s speech.”).

<sup>59</sup> *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974).

<sup>60</sup> *Kovacs v. Cooper*, 336 U.S. 77 (1949).

<sup>61</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965). A terrific discussion of this “traditional” view of *Griswold* is set forth in David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7 (1999). Apparently the notion of privacy rights was relatively uncontroversial before it was extended to reproductive freedoms.

trine. For example, in a 1928 dissent,<sup>62</sup> Justice Brandeis famously proclaimed the “right to be let alone” to be “the most comprehensive of rights and the right most valued by civilized men.”<sup>63</sup> It stands as a sort of constitutional island. In 1952, the Supreme Court deemed constitutional the decision of the District of Columbia to broadcast amplified radio programs (mostly music) on city-owned streetcars.<sup>64</sup> Justice Frankfurter recused himself because he frequently rode the streetcars, and he intimated that others should have done the same.<sup>65</sup> Dissenting, Justice Douglas argued that “[i]f liberty is to flourish, government should never be allowed to force people to listen to any radio program.”<sup>66</sup> The constitutional grounding of this sort of liberty was again not made clear.<sup>67</sup> These may be understood as assertions of the “captive audience” rationale.

A 1975 Note in the *Stanford Law Review* discussed the broader implications of the privacy right of *Griswold*<sup>68</sup> and *Stanley v. Georgia*<sup>69</sup> for aesthetic regulation.<sup>70</sup> This Note argued that “individual autonomy and self-realization are not logically restricted to the interior of a house.”

Nonetheless, protection of a “captive audience” by itself has never achieved the broad constitutional deference of other rationales for aesthetic regulation. The Court has largely followed *Cohen v. California* in rejecting the notion that offensive speech may be banned simply because unwilling listeners will hear it, without more.<sup>71</sup> Ironically, the only place the “captive audience” rationale has succeeded is in connection with abortion rights. In upholding protest-free bubbles around persons entering a reproductive clinic, the Court has stated that these persons were effectively a captive audience who could not “avert their

<sup>62</sup> *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

<sup>63</sup> *Id.* at 478.

<sup>64</sup> *Pub. Utils. Comm’n v. Pollack*, 343 U.S. 451 (1952).

<sup>65</sup> *Id.* at 466 (Frankfurter, J., recusing).

<sup>66</sup> *Id.* at 467.

<sup>67</sup> Curiously, Justice Black would have upheld music programs, but barred news programs. *Id.* at 466. It is worth noting that in 2000, Justices Scalia and Thomas vigorously dissented from a decision permitting the state to restrain anti-abortion protestors by creating a no-approach bubble zone around those entering abortion clinics. *Hill v. Colorado*, 530 U.S. 703 (2000). They complained that “[u]ninhibited, robust, and wide open debate is replaced by the power of the State to protect an unheard-of ‘right to be let alone’ on the public streets”—the very right that so animated Justice Douglas a half-century earlier as the essence of liberty. *Id.* at 765 (Scalia, J., dissenting).

<sup>68</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965) (announcing right of privacy in the context of the marital right to use contraception).

<sup>69</sup> 394 U.S. 557 (1969) (protecting a person’s right to view obscene material within her own home).

<sup>70</sup> Bruce A. Rubin, Note, *Architecture, Aesthetic Zoning, and the First Amendment*, 28 *STAN. L. REV.* 179, 184 (1975).

<sup>71</sup> See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975); *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009).

eyes," as was the case in *Cohen*.<sup>72</sup>

The "captive audience" theory has also been advanced at various times by analogy to nuisance law. There is no question that nuisance law protects against unwanted noise and odors.<sup>73</sup> Why not protect property owners against unwanted sights too? However, aesthetic grounds have largely been rejected as the basis of private nuisance actions, where unsightly or unpleasant things are found to not substantially interfere with a private party's enjoyment of the land.<sup>74</sup> The fact that one can avert one's eyes, but not one's nose or ears, is probably dispositive, if not all that compelling.

## II. THE DEVELOPMENT OF AESTHETIC REGULATION

It is fair to say that the history of aesthetic regulation is, above all, the history of attempts to regulate billboards.<sup>75</sup> Civic reformers have targeted billboards since the late-nineteenth century. Almost all of the modern justifications for billboard regulation appear in these early cases in one form or another. As

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<sup>72</sup> *Hill*, 530 U.S. at 716 (quoting *Cohen v. California*, 430 U.S. 15, 21 (1971) ("Even in a public forum, one of the reasons we tolerate a protester's right to wear a jacket expressing his opposition to government policy in vulgar language is because offended viewers can 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.'"); see also *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding restriction on picketing on grounds that resident is "captive" within his or her own home).

<sup>73</sup> Note, *Beyond the Eye of the Beholder: Aesthetics and Zoning*, 71 MICH. L. REV. 1438, 1439 n.4 (1973) ("For some reason nuisance law is very protective of the nose."). The author has confirmed that this note was written by Judge Samuel L. Bufford, whose 1980 article on aesthetic regulation bears a similar title. Bufford, *supra* note 15. See also Dix W. Noel, *Unaesthetic Sights as Nuisances*, 25 CORNELL L.Q. 1, 4-5 (1939).

<sup>74</sup> Robert D. Dodson, *Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisances in the New Millennium*, 10 S.C. ENVTL. L.J. 1, 9 (2002). An unforgettable case of this nature is *Wernke v. Halas*, 600 N.E.2d 117, 122 (Ind. Ct. App. 1992) ("In the present case, the evidence concerning the toilet seat is undisputed. The seat and lid are affixed to a piece of blue plywood with a painted brown spot. The plywood is framed and attached to a pole roughly 10 feet tall facing out of Wernke's yard. Wernke claimed the entire contraption was a bird house, and indeed, three small boxes with holes suitable for birds surround the frame. It may be the ugliest bird house in Indiana, or it may merely be a toilet seat on a post. The distinction is irrelevant, however; Wernke's tasteless decoration is merely an aesthetic annoyance, and we are not engaged in the incommensurable task of judging aesthetics. . . . [I]t is not a nuisance.").

<sup>75</sup> An early piece on aesthetic regulation already devoted ten pages to billboard cases and declared that "most of the direct discussion of aesthetics" was about billboards. Clinton Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 S. CAL. L. REV. 149, 168-77 (1954); see also Rubin, *supra* note 70, at 191 n.61 (observing in 1975 that "by far, most aesthetic zoning cases concern billboards."). A brief but lucid discussion of early billboard issues can be found in Craig J. Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification*, 48 U. KAN. L. REV. 463, 468-77 (2000).

early as 1885, a group of citizens persuaded a city council to tear down a billboard without legal justification.<sup>76</sup> In 1916, there was huge public interest in a billboard ban in Chicago.<sup>77</sup> A decade later, the *Michigan Law Review* lamented skylines at the end of the nineteenth century as full of “flaming bill-boards and . . . a great deal of ugliness.”<sup>78</sup> By 1931, billboards had followed the automobile to country roads.<sup>79</sup> Later articles described cityscapes from the first half of the twentieth century with the same kind of disapprobation: ugly and “all-too-freely interspersed with a riot of billboards.”<sup>80</sup> An unsigned Note in the 1973 issue of the *Michigan Law Review* stated categorically that “almost all billboards are aesthetic evils.”<sup>81</sup>

#### A. *Aesthetic Regulation in the Era of Property Rights*

These comments begin during a judicial period often known as the *Lochner* era (roughly from the end of Reconstruction until the Great Depression). This period is usually characterized by its constitutional sanction of laissez-faire economic theory.<sup>82</sup> More broadly, this era may be characterized as one in which the assertion of private property rights was the primary way in which liberty interests were vindicated under the constitution and, in particular, under the Fourteenth Amendment.<sup>83</sup> In this period, aesthetic regulation confronted a judiciary that believed private property was at the core of the meaning of liberty.

Then as now, courts formally eschewed aesthetic justifications for legislation affecting property, declaring aesthetic concerns to be insufficient by themselves to justify such regulation.<sup>84</sup> Aesthetic justifications for regulation did not have a formal place in a world where the *sic utere* maxim was widely recited.<sup>85</sup>

<sup>76</sup> *City of Atlanta v. Dooly*, 74 Ga. 702, 707 (1885). The Georgia court said “we have seldom seen a more unauthorized and wanton invasion of private rights.” *Id.* In the old segregated South, that’s saying something.

<sup>77</sup> Everett L. Millard, *Present Legal Aspect of the Billboard Problem*, 11 ILL. L. REV. 29, 29–30 (1916).

<sup>78</sup> Newman F. Baker, *Aesthetic Zoning Regulations*, 25 MICH. L. REV. 124, 126 (1927).

<sup>79</sup> Henry W. Proffitt, *Public Esthetics and the Billboard*, 16 CORNELL L.Q. 151, 151 (1931) (“The country is overrun with a vast and heterogeneous collection of billboards, most of which are of surpassing ugliness and many of which appear to have been designedly located for the express purpose of despoiling the scenic beauty of the country-side.”).

<sup>80</sup> Robert A. Bergs, Note, *Aesthetics as a Justification for the Exercise of the Police Power or Eminent Domain*, 23 GEO. WASH. L. REV. 730, 735 (1955).

<sup>81</sup> Note, *Beyond the Eye of the Beholder: Aesthetics and Zoning*, *supra* note 73, at 1449.

<sup>82</sup> For the decision that brought about this era, see *Lochner v. New York*, 198 U.S. 45 (1905). For a classic discussion of the debates about the jurisprudence of this period, see Bruce A. Ackerman, *Beyond Carolene Products*, 78 HARV. L. REV. 713 (1985).

<sup>83</sup> Baker, *supra* note 78, at 128–29.

<sup>84</sup> *Id.* at 129.

<sup>85</sup> The maxim is usually rendered as *sic utere tuo ut alienum non laedas* [trans: you may use your property only so as not to injure the property of another]. The *sic utere* maxim has



Until 1911, billboard regulations were generally struck down on a straight property-rights theory.<sup>86</sup> For example, in 1893, the Supreme Court of Kansas struck down a billboard regulation as an irrational invasion on property rights, insisting that the police power extended only to *actual* safety concerns.<sup>87</sup> The restriction of regulation to billboard safety was probably not originally pretextual, given the number of cases involving unsafe billboards at the time.<sup>88</sup>

It is worth noting that in this 1893 case, the court apparently considered the doctrine of legislative nuisance constitutionally impermissible.<sup>89</sup> Today, by contrast, the "legislative nuisance" doctrine is alive and well.<sup>90</sup>

The judicial view of aesthetics can be teased out of these cases. The most celebrated case of this period was probably a 1905 New Jersey case overturning a ban on billboards over eight feet in height. The New Jersey Supreme Court stated that "aesthetic considerations are a matter of luxury and indulgence, rather than necessity, and it is necessity alone which justifies the exercise of the police power to take private property without just compensation."<sup>91</sup> Other cases of the period widely quoted this statement.<sup>92</sup>

The courts give little indication that they think aesthetics are arbitrary or wholly within the province of individuals to define for themselves. The bar on

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been described as one of the bases of the police power. See Clinton Rodda, *supra* note 75, at 152.

<sup>86</sup> Baker, *supra* note 78, at 129.

<sup>87</sup> Crawford v. City of Topeka, 33 P. 476 (Kan. 1893).

<sup>88</sup> E.g., Cason v. City of Ottumwa, 71 N.W. 192 (Iowa 1897) (140 pound 4' x 8' billboard outside opera house was blown upon a woman "with such force as to prostrate and render her insensible"); Village of Oak Harbor v. Kallager, 39 N.E. 144 (Ohio 1894) (church billboard blew down under "extraordinary wind" and injured passerby on other side of street); Smith v. Spitz, 31 N.E. 5 (Mass. 1892) (horse "ran away and killed itself" after being frightened by billboard advertisements that fell into road); Stilwell v. Priest, 85 N.Y. 649 (N.Y. 1881) (plaintiff claimed injury when billboard in Ithaca blew down on top of him).

<sup>89</sup> Cf. Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915) (upholding legislative declaration of nuisance to create zoning districts for a stable, brickyard, or other business that negatively affects the "health and comfort" of a community).

<sup>90</sup> Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 281 (1996). Curiously, Pennsylvania cases continue to recite the rule that "What is not an infringement upon public safety and is not a nuisance cannot be made one by legislative fiat and then prohibited." Commonwealth v. Creighton, 639 A.2d 1296, 1300 (Pa. 1994) (quoting Kadash v. City of Williamsport, 340 A.2d 617, 621 (Pa. Commw. Ct. 1975)). These cases (and those others cited therein) may perhaps be best understood as a linguistic relic standing for the modern proposition that such statutes cannot be purely arbitrary. See Todd D. Brody, Comment, *Examining the Nuisance Exception to the Takings Clause: Is There Life for Environmental Regulations After Lucas*, 4 FORDHAM ENVTL. L. REV. 287 (1993).

<sup>91</sup> Passaic v. Patterson Bill Posting, 62 A. 267, 268 (N.J. 1905).

<sup>92</sup> See Clinton Rodda, *supra* note 75.

aesthetic legislation is not, in other words, connected with the preservation of personal autonomy.

As the California Supreme Court put it in 1909, "That the promotion of aesthetic or artistic considerations is a proper object of governmental care will probably not be disputed. But, so far as we are advised, it has never been held that these considerations alone will justify, as an exercise of the police power, a radical restriction of the right of an owner of property to use his property in an ordinary and beneficial way."<sup>93</sup>

These early cases nevertheless demonstrate a new judicial effort to find ways to justify aesthetic regulations. The result is what is now called a "content-neutral" justification under the police power. Similarly, the earliest articles to discuss sign regulation also suggest that aesthetic offense posed by signs might constitute injury to the property of another, thus covered by the police power of the state.<sup>94</sup>

Values justifications were rare, but were sometimes advanced. For example, a New York appellate court upheld Rochester's ban on large billboards in 1898 on what could be described as a "captive audience" basis:

It is a fact so patent that judicial notice may fairly be taken of its existence that the modern system of advertising by posters is such that one can hardly pass along the streets of any large town without being compelled to gaze upon advertisements which are enormous in size, and not infrequently offensive in their character.<sup>95</sup>

The U.S. Supreme Court weighed in on these issues in the celebrated case of *Welch v. Swasey*, which laid out the standard line against the "taking" of property but tempered it with enough latitude to encompass certain aesthetic regulations.<sup>96</sup> *Welch* reiterated that regulation purely for aesthetic reasons is not constitutionally permissible.<sup>97</sup> However, its ruling implied that almost any non-aesthetic justification would suffice to support a regulation, even where aesthetic grounds are also advanced.<sup>98</sup> Moreover, in an era where legislative judgments about economic matters were routinely cast aside, the *Welch* Court expressed a surprisingly strong deference to legislative judgments about a negative effect on aesthetics and a willingness to uphold them unless "plainly wrong."<sup>99</sup> The Court was beginning to consider whether aesthetic regulation

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<sup>93</sup> *Varney v. Williams*, 100 P. 867, 868 (Cal. 1909); see also Wilbur Larremore, *Public Aesthetics*, 20 HARV. L. REV. 35, 42-43 (1906) (aesthetics alone will not justify the police power, but perhaps really large or bright signs can be removed as nuisances because they might deprive neighbors of sleep).

<sup>94</sup> See generally Baker, *supra* note 78; Noel, *supra* note 73.

<sup>95</sup> *City of Rochester v. West*, 29 A.D. 125, 128-29 (N.Y. App. Div. 1898).

<sup>96</sup> *Welch v. Swasey* 214 U.S. 91 (1909).

<sup>97</sup> *Id.* at 107.

<sup>98</sup> *Id.* at 106-07.

<sup>99</sup> *Id.* at 106.

could be justified by aesthetics itself, if aesthetics were linked to other goals that we would now call content-neutral.

Following *Welch*, the Colorado Supreme Court upheld Denver's anti-billboard ordinance. Its constitutional concern was only whether there is an "unreasonable and unnecessary restriction of the right of the landowner to erect structures upon his land."<sup>100</sup> The Colorado Supreme Court went beyond *Welch*, relying in part on a California Supreme Court decision from the previous year stating that the government could use aesthetic justifications for regulation so long as the effect on property was not unreasonable.<sup>101</sup>

The United States Supreme Court also experimented with reasons to uphold ordinances restricting signage. In *Thomas Cusack Co. v. City of Chicago*, the Supreme Court likened the regulation of billboards, which it deemed "offensive structures" to the ability to ban saloons and garages from a given area.<sup>102</sup> The statute at issue in *Cusack* forbade billboards on any block where at least half the buildings on that block were residential, except with the consent of a majority of the owners.<sup>103</sup> The court reasoned that the ordinance was sound because it "permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification."<sup>104</sup> The basis for the Court's decision, then, was a property-rights justification, or a primitive version of the "captive audience" argument. Billboard foes had looked forward to the *Cusack* case with much anticipation, hoping that the Supreme Court would take a broad view of the police powers of a city.<sup>105</sup>

The *Cusack* case is also fascinating in that it comments extensively upon the secondary effects of billboards, arguments that would rise to prominence a half-century later in *Young v. American Mini-Theaters*<sup>106</sup>:

Upon the question of the reasonableness of the ordinance, much evidence was introduced upon the trial of the case, from which the supreme court finds that fires had been started in the accumulation of combustible material which gathered about such billboards; that offensive and insanitary accumulations are habitually found about them, and that they afford a convenient concealment and shield for immoral practices, and for loiterers, and criminals . . . [and] the streets of such sections are more frequented by

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<sup>100</sup> *Curran Bill Posting & Distrib. Co. v. City of Denver*, 107 P. 261, 264 (Colo. 1910) (quoting *State v. Whitlock*, 63 S.E. 123, 128 (N.C. 1908)).

<sup>101</sup> *Varney v. Williams*, 100 P. 867, 868 (Cal. 1909).

<sup>102</sup> *Thomas Cusack Co. v. City of Chi.*, 242 U.S. 526, 528-31 (1917). State courts followed suit. See, e.g., *Ackerman v. Steiner*, 147 A. 746 (N.J. 1929) (finding that a municipal licensing requirement for all signs was not a taking).

<sup>103</sup> *Cusack*, 242 U.S. at 527-28.

<sup>104</sup> *Id.* at 531.

<sup>105</sup> See Millard, *supra* note 77, at 33. Millard wrote that "recognition of aesthetic considerations . . . seems bound to come in time, and propaganda on that basis should be continued with hope and energy." *Id.* at 35.

<sup>106</sup> 427 U.S. 50, 54 (1976).

unprotected women and children . . . [and] most of the crimes against women and children are offenses against their persons.<sup>107</sup>

In doing so, the Court built on a 1911 Missouri case that upheld a billboard regulation on a “secondary effects” basis, with the Court writing that such signs “constitute hiding places and retreats for criminals and all classes of miscreants.”<sup>108</sup> The Missouri Supreme Court spent considerable time discussing the problems caused by these billboards.<sup>109</sup> The court concluded that billboards are in a class by themselves, quite apart from other structures, because it is only cost-effective to build inexpensive billboards, thus all billboards are too inexpensive and of insufficient quality to be safe.<sup>110</sup> In *Cusack*, the U.S. Supreme Court similarly concluded that billboards were “in a class by themselves.”<sup>111</sup> Some state courts tried to save the regulations by denying any aesthetic purpose.<sup>112</sup>

Ultimately, the regulatory forces won out. In the final significant Supreme Court case of this era, *St. Louis Poster Advertising Co. v. City of St. Louis*, the Court acknowledged the aesthetic motivations for regulation but just minimized them.<sup>113</sup> This stands in contrast to the modern view that there is no “de minimis” violation of the Constitution.<sup>114</sup> In 1927, a New York court stated that “we have reached a point in the development of the police power where an esthetic purpose needs but little assistance from a practical one in order to with-

<sup>107</sup> *Cusack*, 242 U.S. at 529.

<sup>108</sup> *St. Louis Gunning Adver. Co. v. City of St. Louis*, 137 S.W. 929, 942 (Mo. 1911), discussed in *Baker*, *supra* note 78, at 129.

<sup>109</sup> *Id.* at 945.

Not only this, but the record also shows that the ground in the rear of all such billboards is thereby practically converted into and is constantly being used as privies and general dumping grounds for all kinds of rubbish and filth. . . . Under that condition we see hundreds, and perhaps thousands, of these billboards, with their solid walls and rear supports, extending from a few feet up to 25 or 30 in height, and possibly more, composed of boards and timbers dry as tinder, covered with paint and paper posters, and packed in behind with dry grass, weeds, paper and other combustible materials, which have been growing and accumulating for months, thereby creating hundreds of menacing conditions throughout the city, which may at any moment be ignited by a spark from a nearby chimney, a lighted match in the hands of some thoughtless child, or by a stump of a burning cigar, tossed aside by some careless hand.

*Id.*

<sup>110</sup> *Id.* at 959.

<sup>111</sup> *Cusack*, 242 U.S. at 529. This is a theme in billboard regulation, and a red flag that courts may be more interested in the result than the rule. Compare *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 501 (1981).

<sup>112</sup> *Cream City Bill Posting Co. v. City of Milwaukee*, 147 N.W. 25, 30 (Wis. 1914) (finding no evidence that a sign ordinance was motivated by aesthetic considerations).

<sup>113</sup> *St. Louis Poster Adver. Co. v. City of St. Louis*, 249 U.S. 269, 275 (1919).

<sup>114</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36 (O'Connor, J. concurring) (“There are no de minimis violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them.”).

stand an attack on constitutional grounds.”<sup>115</sup>

In short, during this period, every justification for regulation was explored, but only as they concerned the taking of property; the First Amendment was absent. These cases reveal little doubt about the nature of aesthetics or about the ability of the government to judge what is or is not aesthetically pleasing. The limitation on doing so came not from notions of personal autonomy, but from limitations on government interference with property.

#### B. *Aesthetic Regulation in the Mid-Twentieth Century (The Modern Era)*

When the solicitude for property diminished, aesthetic regulation could be pushed farther. Although the term “progressive” lives on today as a synonym of the word “liberal,” historical progressivism is a distinct strain of political discourse that has largely disappeared. Progressivism was a political movement of the early 1900s that reacted to perceived excesses of the Gilded Age.<sup>116</sup> On an individual level, progressives believed that personal betterment could lead to societal reform.<sup>117</sup>

Criticism of the limitations imposed upon government in the area of aesthetic regulation accompanied progressivism. As early as 1922, at least one commentator urged restraining property owners from placing businesses in residential zones or placing buildings out of sidewalk lines.<sup>118</sup> When we restrain a man from making his property ugly in this way, this author argued, “we do not so much restrict the one man as set free the many.”<sup>119</sup> This notion of freedom is very different from that advanced by *Lochner* era courts, but it still embraces an objective view of aesthetics.

Indeed, the case law and commentary of this period show the apogee of arguments about scientific or objective aesthetic values and a willingness to openly assert these against the other supposedly “content-neutral” justifications. In the 1920s, critics began to attack the “health and safety” justifications laid out for billboard regulation since the late-nineteenth century. For example, the grievous litanies about the health and safety problems posed by billboards,

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<sup>115</sup> *People v. Sterling*, 220 N.Y.S. 315, 318 (N.Y. Sup. Ct. 1927) (Angell, J.).

<sup>116</sup> An excellent history of this period can be found in MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920* (2003). McGerr describes the radicalism at the center of the Progressive movement that led to its idealism. *Id.*

<sup>117</sup> MCGERR, *supra* note 117, at 127. McGerr takes note of the slogan “Produce Great Persons: The Rest Follows.” Sometimes a phrase can sum up an age with an almost poetic conciseness. The metaphor “produce” in this context is emblematic of mid-century thinking, but is so foreign to any current or late-twentieth-century metaphor for education or human development. It also contrasts dramatically with utter alienation expressed in the motto of the early twentieth-century futurists noted above: *fiat ars, pereat mundus*.

<sup>118</sup> Henry P. Chandler, *The Attitude of the Law Toward Beauty*, 8 A.B.A. J. 470, 474 (1922).

<sup>119</sup> *Id.*

according to one commentator in 1922, are "fantastic."<sup>120</sup>

In 1927, Norman Baker, writing in the *Michigan Law Review*, criticized the "judicial attitude to sacredness of property" as resulting in a "great deal of ugliness."<sup>121</sup> He observed that there was a developing public consciousness about the importance of beauty and argued that it would lead to more progressive courts openly allowing aesthetic regulation under the police power.<sup>122</sup> Another scholar writing about billboard laws in 1931 complained that aesthetic regulation was hindered when "the courts of this country cling tenaciously to our so-called 'constitutional guarantees of liberty.'"<sup>123</sup> Yet another 1931 article noted that the "change is now beginning" and courts are beginning to "give the sense of sight and beauty some legal protection."<sup>124</sup> Nowhere in these opinions is the idea that beauty is merely a matter of personal taste.

The breakthrough in the courts came in 1935, when the Massachusetts Supreme Judicial Court consolidated a host of suits relating to billboards and announced that outdoor advertising could be restrained "in the interest of taste and fitness [and] scenic beauty."<sup>125</sup> If property could be restrained for aesthetic reasons, it was because aesthetics was objective and rational. In 1939, Dix Noel argued that unaesthetic sights should be regarded as nuisance and that an "eyesore" could be determined by simple application of the reasonable person standard (then referred to as the "reasonable man.").<sup>126</sup> This is, at first blush, a traditional "property rights" view of aesthetic regulation, but the shoe is traveling to the other foot: the property of primary concern is now not the sign owner's, but the neighbor's. Noel cites a 1927 Missouri case that used nuisance law to bar a funeral home from a residential area, stating that "constant reminders of death" would substantially impair the enjoyment of the homes subjected to them.<sup>127</sup> This nuisance language was also reflected in a *General Outdoor Advertising*, which held that the state should have the power to "protect people travelling upon highways from the intrusion of the public announcements thrust before their eyes by signs and billboards."<sup>128</sup>

In a phrase evocative to modern ears of Roosevelt's "Four Freedoms,"<sup>129</sup> Noel suggested the "freedom from unsightliness" as a justification for aesthetic

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<sup>120</sup> *Id.* at 472.

<sup>121</sup> Baker, *supra* note 78, at 128.

<sup>122</sup> *Id.* at 129, 142.

<sup>123</sup> Proffitt, *supra* note 79, at 153.

<sup>124</sup> H.S.V.S., *The Present Trend in Billboard Regulation*, 1 ALB. L. REV. 105, 107 (1931). This author summed up the emerging status succinctly thus: "[T]he billboard is no longer, if it ever was, a friend of the courts." *Id.* at 109.

<sup>125</sup> See, e.g., *Gen. Outdoor Adver. Co. v. Dep't of Pub. Works*, 193 N.E. 799 (Mass. 1935).

<sup>126</sup> Noel, *supra* note 73, at 4-5.

<sup>127</sup> *Id.* at 9.

<sup>128</sup> *Gen. Outdoor Adver. Co.*, 193 N.E. at 808, 814.

<sup>129</sup> 87 CONG. REC. 46-47 (1941). The "Four Freedoms" enumerated by Roosevelt in his

regulation.<sup>130</sup> It is almost impossible to imagine these words being uttered a generation before. The meaning of freedom was becoming unmoored from its previous connection to the unfettered use of private property. Already in 1936, a *Harvard Law Review* Note suggested that liberty and billboards were in opposition: "[T]he attempt to fill people's leisure hours with advertisement is an attempt to bind them to the service of a manufacturing scheme."<sup>131</sup>

By mid-century, modernism was at its zenith.<sup>132</sup> The opinion that broad aesthetic regulation could be constitutionally justified by vague references to concerns of public health, safety, and morals was becoming more prevalent.<sup>133</sup> For the first time, some began to argue that aesthetic justifications should suffice, without more, because aesthetics alone were closely connected to the general welfare of society.<sup>134</sup>

The progressive argument for aesthetic regulation was, therefore, solidly values-based. Writing in the idiom of mid-century, Professor Dukeminier offered that "[a]mong the basic values of our communities, and of any society aboriginal or civilized, is beauty."<sup>135</sup> The underlying idea was that there was some objective science behind aesthetics. Accordingly, Dukeminier suggested a technocratic solution: "[D]ecisionmakers whose thinking is sufficiently disciplined and whose technical training and knowledge of human beings are sufficiently extensive to qualify them to pass judgment on the particular problem and develop rational techniques for implementing our generalized, flexible, relativistic community values."<sup>136</sup> That same year, Robert Bergs also wrote that modern sociology, criminology, economics, and psychology show that aesthetics is "inseparable from its effects, positive and negative, on society."<sup>137</sup> The need to ground social values in science probably underlay some of the opinion justifying desegregation in *Brown v. Board of Education*,<sup>138</sup> where the Su-

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January 6, 1941 address are the freedom of speech, the freedom of worship, the freedom from want, and the freedom from fear.

<sup>130</sup> Noel, *supra* note 73, at 15.

<sup>131</sup> George K. Gardner, Note, *The Massachusetts Billboard Decision*, 49 HARV. L. REV. 869, 902 (1936).

<sup>132</sup> See Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 118–28 (2000).

<sup>133</sup> J.J. Dukeminier, Jr., *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROBS. 218, 218–20 (1955).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 224–25.

<sup>136</sup> *Id.* at 229; see also Dennis H. Willms, Comment, *Municipal Corporations—Regulation of Billboards and Advertising Structures for Esthetic Purposes*, 35 MARQ. L. REV. 365, 369 (1952) ("[M]aintaining the beauty of a municipality is sufficient justification for the regulation. . . . As our civilization progresses our courts' idea of what is a luxury and what is a right should change.").

<sup>137</sup> Bergs, *supra* note 80, at 749.

<sup>138</sup> 347 U.S. 483, 494–95 (1954).

preme Court discussed not only moral or historical arguments about equality, but also presented sociological evidence of segregation's deleterious effect on children.

These comments circle around the Supreme Court's landmark 1954 decision in *Berman v. Parker* upholding zoning restrictions for the first time.<sup>139</sup> Justice Douglas wrote of aesthetic zoning: "Miserable and disreputable housing conditions . . . suffocate the spirit by reducing the people who live there to the status of cattle."<sup>140</sup> Ameliorating the "suffocation of the spirit" by lifting aesthetic standards would henceforth be within the police power to regulate for the general welfare. Following *Berman*, Bergs wrote that "[a]ttractive homes raise the level of society,"<sup>141</sup> and that alone would justify the exercise of police power in regulation. By 1960, "[t]he ever present concern of our people for the aesthetic side of life is being reflected by the Courts."<sup>142</sup>

From our position early in the twenty-first century, it is hard to credit such limitless faith in progress.<sup>143</sup> Yet those persons in mid-century earnestly believed they were creating a better world, and a better future, through design and aesthetics.<sup>144</sup> The government could, and should, further these goals.

It is worth noting that even the few voices in favor of billboards struck a tone appropriate to their age. Two short articles published in a Colorado bar journal in 1959 extol the virtues of billboards. One argued that laws against signs hinder tourism,<sup>145</sup> another that "commercial advertisement is a stimulus to an expanding economy" and that the "humor and art" of billboards have "brightened our urban centers."<sup>146</sup>

In a constitutional sense, however, mid-century case law concerning aesthet-

<sup>139</sup> *Berman v. Parker*, 348 U.S. 26 (1954).

<sup>140</sup> *Id.* at 32–33.

<sup>141</sup> Bergs, *supra* note 80, at 749.

<sup>142</sup> Frank Barkofske, Comment, *Regulation of Outdoor Advertising for Aesthetic Reasons: A Jurisprudential View*, 6 ST. LOUIS U. L.J. 534, 543 (1960). Barkofske also praises then-President Eisenhower for the "stimulat[ion] of the cultural and aesthetic side of our nation." *Id.* at 535.

<sup>143</sup> See, e.g., Bergs, *supra* note 80, at 735.

<sup>144</sup> For an interesting exploration of this subject, see the 2007 film "Helvetica," produced and directed by Gary Hustwit, discussing the creation of this typefont in 1957 and its encapsulation of mid-century modernism. *HELVETICA* (Swiss Dots Ltd. 2007).

<sup>145</sup> Joseph F. Little, *Colorado Needs a Constitutional and Effective Roadside Sign Law*, 36 DICTA 475, 488 (1959).

<sup>146</sup> Thomas Gilliam, *The Case for Billboard Control: Precedent and Prediction*, 36 DICTA 461, 474 (1959). Mr. Gilliam also mentioned that there is a "collateral inquiry" about possible effects of sign laws on freedom of speech, although he notes that such a First Amendment argument was raised and rejected out of hand in *United Adver. Corp. v. Borough of Raritan*, 93 A.2d 362 (N.J. 1952). Gilliam, *supra*, at 472. The fact that this author—writing in a publication of the Denver Bar Association—had to dig up a seven-year old citation from New Jersey points to how infrequently First Amendment arguments were raised in this period.



ic regulation remained far from modern. The New Deal era may have turned squarely against the *Lochner* era's politics, but apparently did not move beyond its basic conceptual framework in the area of aesthetic regulation. As before, the only constitutional issue perceived was the state's need to justify intrusion on private property rights.<sup>147</sup> The First Amendment was, as yet, not on the table. That same year, the Supreme Court held that advertising was simply not protected by the First Amendment.<sup>148</sup>

As late as 1965, another commentator observed that sign regulation would always be a taking because a "private owner is forced to yield up rights . . . without compensation."<sup>149</sup> As yet, there is little or no mention of the constitutional concern that, today, is paramount: that signs are a form of *speech*. Similarly, the values of free speech were not brought to bear in these discussions.

### C. Enter the First Amendment

The case law was initially waterproof to any First Amendment concerns. One gets the sense that they were considered a sort of novelty. Consider the early case of *People v. Stover*, concerning a zoning ordinance prohibiting the placement of clotheslines in front of homes.<sup>150</sup> In *Stover*, a citizen erected a clothesline, filled with old cloths and rags, in his front yard as a form of protest against the high taxes imposed by the city. During each of the five succeeding years, the Stovers added another clothesline to elucidate their continued displeasure with the taxes. The city justified the new anti-clothesline ordinance by citing concerns about safety and visibility for traffic.<sup>151</sup>

The regulation was upheld on a hybrid theory of "improving the general welfare" and alleviating a negative effect on property values.<sup>152</sup> The Court was dismissive of any First Amendment assertions:

The ordinance and its prohibition bear "no necessary relationship" to the dissemination of ideas or opinion and, accordingly, the defendants were not privileged to violate it by choosing to express their views in the altogether bizarre manner which they did. It is obvious that the value of their

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<sup>147</sup> For example, in 1942 one scholar suggested an interesting solution to the constitutional problem of banning signs. See Ruth I. Wilson, *Billboards and the Right to Be Seen from the Highway*, 30 GEO. L.J. 723 (1942). She suggested the courts find that there is no property right to erect a sign that is visible from the highway, so there would be no taking in extinguishing that right of visibility. *Id.*

<sup>148</sup> *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (upholding regulation barring hand-bill distribution).

<sup>149</sup> Note, *Aesthetic Control of Land Use: A House Built Upon the Sand*, 59 NW. U. L. REV. 372, 378 (1965).

<sup>150</sup> *People v. Stover*, 191 N.E.2d 272, 273 (N.Y. 1963); see also Haws, *supra* note 7, at 1630 n.23 (2005).

<sup>151</sup> *Stover*, 191 N.E.2d at 274.

<sup>152</sup> *Id.* at 276.

“protest” lay not in its message but in its offensiveness.<sup>153</sup>

It is also worth noting that the sole dissenter in *Stover*, Judge Van Voorhis, was equally dismissive of the First Amendment: the old dinosaur cited to *Lochner* era cases about property rights.<sup>154</sup>

Reviewing this decision, one commentator argues that the city’s real concern was likely aesthetic, because the ordinance was passed after the protest began, and the restrictions on clotheslines seemed only to target that protest.<sup>155</sup> This may understate the case. The target of the ordinance may well have been the anti-tax message itself as much as the unsightliness of ragged clotheslines.

Among the earliest commentaries on the First Amendment and zoning law in 1964 responds to *People v. Stover*, arguing that it missed an opportunity to define the boundary between speech and conduct.<sup>156</sup> The unsigned piece argues that the activity in *Stover* was clearly meant to send a message,<sup>157</sup> and advocates taking account of the First Amendment. Yet the author views the First Amendment as restricted to the “exchange of ideas,” not all free expression.<sup>158</sup> The author’s purpose is to propose rules about “bizarre, nonverbal protests” by civil rights demonstrators.<sup>159</sup> Notably, the author argues that *Stover* relies too much on the visual offensiveness as a justification for regulation, which he argues is too “subjective,” and suggests instead that protection of property values be the proper justification for the regulation at issue.<sup>160</sup>

As noted above, the First Amendment is scarcely mentioned in connection with aesthetic regulation of signs until the 1960s. The few early litigants who raised it in this period were rebuffed—as was the case in *Stover*. In 1961, for example, the highest court in New York upheld a billboard statute against a challenge by a motel owner for taking of property.<sup>161</sup> Apparently, the First Amendment was mentioned in the sign-owner’s briefs. We know this because the Court later amended its opinion to add that a First Amendment challenge was raised and “necessarily” passed upon in the opinion.<sup>162</sup> In 1963, an Alaska court disposed of a First Amendment challenge to an Anchorage statute barring the posting of political posters on public property in just a few sentences.<sup>163</sup> Otherwise, sign regulations were upheld without mention of the First Amendment.

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<sup>153</sup> *Id.* at 277.

<sup>154</sup> *Id.* at 277–79.

<sup>155</sup> Haws, *supra* note 7, at 1630 n.23.

<sup>156</sup> Comment, *Zoning, Aesthetics and the First Amendment*, 64 COLUM. L. REV. 81, 99 (1964).

<sup>157</sup> *Id.* at 91.

<sup>158</sup> *Id.* at 92.

<sup>159</sup> *Id.* at 99.

<sup>160</sup> *Id.* at 91.

<sup>161</sup> *N.Y. State Thruway Auth. v. Ashley Motor Court, Inc.*, 176 N.E.2d 566 (N.Y. 1961).

<sup>162</sup> *N.Y. State Thruway Auth. v. Ashley Motor Court, Inc.*, 10 N.Y.2d 814, 814 (1961).

<sup>163</sup> *Brayton v. City of Anchorage*, 386 P.2d 832, 835 (Alaska 1963).

These cases and commentaries from mid-century tell us something that other, more celebrated First Amendment cases, do not. The presumed objectivity of aesthetic judgments made it possible to find government interests in aesthetic regulation. As that premise underwent contest and change in the late-twentieth century, the case law followed the change. Thus, the constitutional standards remained intact while the range of permissible activity changed significantly.

### III. THE EXPANSION OF THE FIRST AMENDMENT

#### A. *The Freedom to Choose One's Mode of Expression*

In 1967, The Supreme Court of Ohio struck down a law prohibiting political signs within municipal boundaries as violative of the First Amendment.<sup>164</sup> This may have been the first such action by a court. The court found the total ban not well-connected to the claimed harm of traffic hazards.<sup>165</sup> While the court did not announce a new level of legal scrutiny, it scrutinized the asserted interest more closely than before with strong consideration of alternatives.<sup>166</sup>

Similarly, in 1974, a New Jersey court struck down a zoning ordinance that banned all signs, including political signs, for not being narrowly tailored.<sup>167</sup> The court discussed the use of aesthetic considerations at length.<sup>168</sup> This time, the court addressed the asserted interest in protecting property values. While taking the view that aesthetics and property values were "inextricably intertwined," the court added: "We cannot assume that every tasteless choice of paint color or inartistic gardening effort results in a decrease in property values."<sup>169</sup> Although the language of progressivism in sign cases could still be invoked as late as 1980, courts only did so in connection with other goals, such as preservation of natural resources.<sup>170</sup>

Although these cases initially protected only political speech and did not address cultural changes, something was indeed happening. The deference to regulation of the mid-century period was predicated on the assumption that aesthetics could be objectively determined and promoted. Aesthetic regulation was, therefore, inherently rational. One cannot understand the diminution of deference without appreciating that aesthetic judgments were increasingly

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<sup>164</sup> *Peltz v. City of S. Euclid*, 228 N.E.2d 320 (Ohio 1967). If there are older cases, they are unlikely to be much earlier.

<sup>165</sup> *Id.* at 134.

<sup>166</sup> *Id.* at 133.

<sup>167</sup> *Farrell v. Twp. of Teaneck*, 315 A.2d 424 (N.J. Super. 1974).

<sup>168</sup> *Id.* at 426.

<sup>169</sup> *Id.* at 425.

<sup>170</sup> See *State v. Miller*, 416 A.2d 821, 824 (1980) ("The development and preservation of natural resources and clean, salubrious neighborhoods contribute to psychological and emotional stability and well-being as well as stimulate a sense of civic pride.").

viewed as subjective and, therefore, idiosyncratic, even arbitrary, rather than rational and objective.

In addition, the choice of *mode* of expression was gaining in cultural salience. For example, in the 1950s, civil rights protestors were seen wearing business clothes and engaging in traditional political discourse. By the late 1960s, political rebellion was also expressed in hair and clothing. Indeed, *Cohen v. California* may be as much about the breadth of activity culturally perceived to be “political activity” as it is about where four-letter words can be displayed.<sup>171</sup>

The change in academic legal discourse was also abrupt. In 1972, a Note in the *Cleveland State Law Review* listed “free speech” first in a litany of potential challenges to billboard regulations, but did not mention it again.<sup>172</sup> In a 1973 law student Note on aesthetic regulation, Judge Samuel Bufford devoted just a single sentence to the First Amendment, stating that if a billboard contained political speech, as opposed to commercial speech, the sign might be subject to special protection under the First Amendment.<sup>173</sup> Two years later, a Note in the *Stanford Law Review* devoted almost its entire discussion of aesthetic regulation to First Amendment issues.<sup>174</sup>

Judge Bufford’s 1973 Note straddles two eras in constitutional analysis of aesthetic regulation. It advances a philosophical argument that aesthetic regulation can be based on objective artistic factors.<sup>175</sup> It is noteworthy that such an argument comes surprisingly late in the day. Not until the cultural ground began to shift did anyone feel the *need* to make such an argument.

Thus, the idea that aesthetic judgments are inherently subjective led to litigants and courts asking whether aesthetic choices might be matters of self-expression. This development helped expand the First Amendment beyond traditional modes of communication and introduced the phrase “free expression” into our First Amendment vocabulary.

## B. *Seeking Limits to Expressive Activity*

The speech/conduct distinction, now so familiar, was born out of this period that began to take the expressive nature of conduct seriously. The notion that the First Amendment protected art came first; it led to the immediate problem

<sup>171</sup> See *Cohen v. California*, 403 U.S. 15 (1971). For an excellent discussion of this period, see Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 973–1016 (2008).

<sup>172</sup> Richard Sutton, Note, *Billboard Regulations and Aesthetics*, 21 CLEV. ST. L. REV. 194 (1972).

<sup>173</sup> Note, *Beyond the Eye of the Beholder: Aesthetics and Zoning*, *supra* note 73, at 1459.

<sup>174</sup> Rubin, *supra* note 70, at 181–88 (1975).

<sup>175</sup> Note, *Beyond the Eye of the Beholder: Aesthetics and Zoning*, *supra* note 73, at 1445–49. Richard Sutton, writing the year before, also argues that aesthetics can afford “practical standards” for sign regulation, but does not make a broader philosophical argument. Sutton, *supra* note 172, at 201.

of defining its limits.<sup>176</sup> All conduct is arguably expressive to the extent that it demonstrates a voluntary choice by the actor selected from among other possible actions. The progressive era rules on pornography announced in *Roth v. United States*<sup>177</sup> and *Memoirs v. Massachusetts*<sup>178</sup> were suddenly outdated.<sup>179</sup> The new principle expanded protected expression, putting almost all art within the First Amendment.<sup>180</sup> Left unchecked, however, a First Amendment with ever-broader understanding of “expressive” conduct could swallow the penal code in its entirety.

The logic of subjectivism led to parallel developments in First Amendment law that established new protections for commercial and corporate speech, whether or not it was political or artistic.<sup>181</sup> Accordingly, in 1976, the Supreme Court afforded commercial speech First Amendment protection for the first time.<sup>182</sup> Then, in the landmark 1980 case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court established an intermediate scrutiny test for content-based regulation of commercial speech.<sup>183</sup>

Shortly thereafter, in 1981, the Supreme Court finally put outdoor advertising under First Amendment protection in *Metromedia, Inc. v. City of San Diego*.<sup>184</sup> A revolution in aesthetic regulation was now complete. Absent from the *Metromedia* opinion is the lofty language seen at mid-century about the right of the community to lift itself up by pursuing beauty. Instead, the Court relied upon the same justifications for regulation advanced earlier in the century, such

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<sup>176</sup> For a discussion of this issue, see Daniel F. Wachtell, *No Harm No Foul: Reconceiving Free Speech via Tort Law*, 83 N.Y.U. L. REV. 949, 958–60 (2008).

<sup>177</sup> 354 U.S. 476, 484 (1957) (“[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance”).

<sup>178</sup> A Book Named “John Cleland’s *Memoirs of a Woman of Pleasure*” v. Massachusetts (*Memoirs*), 383 U.S. 413, 418 (1966) (denying protection to material “utterly without redeeming social value”).

<sup>179</sup> Rubin, *supra* note 70, at 191, 198.

<sup>180</sup> *Miller v. California*, 413 U.S. 15, 24 (1973) (“A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”).

<sup>181</sup> See Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 71 (1980). Cox, however, viewed *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) as a retreat from *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), which appeared to him to grant commercial speech the same protection as other forms of speech under the First Amendment. Cox, *supra*, at 34–36; Stephen F. Williams, *Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation*, 62 MINN L. REV. 1, 21–24 (1977).

<sup>182</sup> See *Va. Bd. of Pharmacy*, 425 U.S. 748.

<sup>183</sup> *Central Hudson*, 447 U.S. 557.

<sup>184</sup> 453 U.S. 490 (1981).

as property values, traffic safety, and the like. Instead of being advanced against the Fifth Amendment, about which there was no more need to worry, the Court reclassified these justifications as “content-neutral” justifications under the First Amendment.<sup>185</sup>

### C. *The Speech Hierarchy Compromise*

The search for limiting principles for free expression resulted in an uncomfortable compromise: While almost all expressive activity could find some protection under the First Amendment, it was not put on an equal footing. Instead, the courts moved to a hierarchy of speech classifications.<sup>186</sup>

It is important to note that although the idea of a speech hierarchy may well be inchoate in earlier cases, the hierarchy as we know it did not come into existence until the great broadening of expression under the First Amendment umbrella. In *R.A.V. v. City of St. Paul Minnesota*,<sup>187</sup> for example, Justice Stevens’ concurrence characterizes earlier cases, such as *Chaplinsky v. New Hampshire*<sup>188</sup> and *Roth v. United States*<sup>189</sup> as setting forth a categorical or hierarchical approach to First Amendment protection.<sup>190</sup> It is doubtful, however, that the *Chaplinsky* Court thought it was doing much more than upholding a conviction for “cursing a public officer” in wartime.<sup>191</sup>

The idea of a speech hierarchy does seem to be a compromise. Consider *Clark v. Community for Creative Non-Violence*, where the Court upheld a regulation banning sleeping as a form of free expression.<sup>192</sup> Tellingly, Justice Burger argued that the case “trivialized” the First Amendment.<sup>193</sup> The dissenters chose not to take issue with the basic notion of a speech hierarchy but faulted the majority for not seeing that the protest was *political*, i.e., at the top end of it.<sup>194</sup>

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<sup>185</sup> Of course, this does not explain how these changes ended up under the rubric of the First Amendment rather than some other constitutional provision. For a discussion of that issue, consider generally David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845 (2007).

<sup>186</sup> For a terrific, if too brief, discussion, see Ronald K.L. Collins, Steven H. Shiffrin, Erwin Chemerinsky & Kathleen M. Sullivan, *Thoughts on Commercial Speech: A Roundtable Discussion* (February 23, 2007), 41 LOY. L.A. L. REV. 333 (2007); see also Harold Quadres, *supra* note 29, at 491–96 (1986).

<sup>187</sup> 505 U.S. 377, 417 (1992).

<sup>188</sup> 315 U.S. 568, 571–72 (1942).

<sup>189</sup> 354 U.S. 476, 483 (1957).

<sup>190</sup> *R.A.V.*, 505 U.S. at 417 (Stevens, J., concurring) (citing *Chaplinsky*, 315 U.S. at 571–72; *Roth*, 354 U.S. at 483).

<sup>191</sup> *Chaplinsky*, 315 U.S. at 571.

<sup>192</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984).

<sup>193</sup> *Id.* at 301.

<sup>194</sup> *Id.* (Marshall, J., dissenting). In fact, one can see in the dissent of Justices Brennan and Marshall even older themes harking back to mid-century skepticism of government pur-

Consider also a 1991 argument by Russ VerSteeg that billboards might be protected by the First Amendment under a higher standard than afforded under *Metromedia* if they contained “artwork.”<sup>195</sup> Underlying VerSteeg’s work is the notion that the First Amendment must protect “art” more than commercial signs.<sup>196</sup>

Thus, the speech hierarchy is in a hopeless tension with the democratizing forces that caused it. This tension would be tested in years to come.

#### D. *The Post-Modern Period: Is All Expression Equal?*

As the 1980s came to a close, courts began to waver from the idea of reserving the First Amendment for lofty subjects. In *Ward v. Rock Against Racism*, the Supreme Court upheld a requirement that a City technician monitor sound mixing boards during outdoor rock concerts.<sup>197</sup> In *Ward*, the Court confronted a regulation concerning New York City’s Central Park, in particular an amphitheater and stage structure known as the Naumberg Acoustic Bandshell. In close proximity to the bandshell is a grassy open area called the Sheep Meadow, which the city has designated as a quiet area, and it is not too far from the apartments and residences of Central Park West. The city’s regulation required bandshell performers to use sound-amplification equipment and a sound technician provided by the city. The sponsor of a rock concert challenged this volume control technique.<sup>198</sup> The regulation was ultimately upheld.<sup>199</sup>

Nonetheless, this case placed new limits on aesthetic regulation. The novelty was the way in which the majority assumed that the First Amendment protected a “sound mix” as artistic expression.<sup>200</sup> The *Ward* majority was willing to protect “sound mix” even though it has little or no *propositional* content. This was a departure from the philosophy of the Warren Court obscenity cases, which held that “art” must have “serious artistic or literary merit” to deserve First

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poses. They argued that “government agencies by their very nature are driven to overregulate public forums to the detriment of First Amendment rights.” *Id.* at 315–16.

<sup>195</sup> Russ VerSteeg, *Iguanas, Toads and Toothbrushes: Land-Use Regulation of Art as Signage*, 25 GA. L. REV. 437 (1991).

<sup>196</sup> How do we treat the fact that yesterday’s advertisements can become tomorrow’s art? For example, in the Spring of 2007 London’s Victoria and Albert Museum had a special exhibition of Surrealist art, including a series of 1930s advertisements for Shell and Ford. A description of the show is at Stephen Bayley, *Does This Ring Any Bells?*, THE OBSERVER, Mar. 25, 2007, <http://www.guardian.co.uk/artanddesign/2007/mar/25/design.surrealismatthevanda>. These are the sorts of questions that caused the speech hierarchy to collapse on itself.

<sup>197</sup> *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

<sup>198</sup> *Id.* at 784.

<sup>199</sup> *Id.* at 203.

<sup>200</sup> *Id.* at 793.

Amendment protection.<sup>201</sup> It also showed growing judicial acceptance of the idea that the government had no right to judge artistic merit at all, thus any expressive activity would be protected unless some harm could be shown.<sup>202</sup>

The area of expression outside First Amendment purview continued to shrink. In the 1992 Court decision striking down a ban on cross burning, the majority held that all categories of speech were worthy of some First Amendment protection and disapproved of language that some categories of speech were outside First Amendment protection.<sup>203</sup> In 1995, the Supreme Court declared that personal autonomy was at the heart of the First Amendment.<sup>204</sup>

Legal commentators began to point toward a further leveling of the distinctions that distinguished protected from unprotected expressive activity. Some doubted that obscenity could still be distinguished from "art," which courts now presumed to be protected by the First Amendment regardless of its content.<sup>205</sup> Another commentator wrote that objectivity in judging the merits of "art" is dangerous and merely serves to obscure and entrench subjectivism.<sup>206</sup> The natural result of this thinking is to seek to include within the First Amendment even those last few areas of speech ("fighting words" and obscenity) still declared formally outside its protection.<sup>207</sup>

<sup>201</sup> See *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts (Memoirs)*, 383 U.S. 413, 418 (1966).

<sup>202</sup> See Lori E. Fields, Note, *Aesthetic Regulation and the First Amendment*, 3 VA. J. NAT. RESOURCES L. 237, 244–45, 260 (1984) (arguing that subjective decisions about art are problematic because we "cannot" use a majority's definition of aesthetic expression to define the First Amendment).

<sup>203</sup> *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 384–87 (1992). It is worth noting how *R.A.V.* came out differently from *United States v. O'Brien*, 391 U.S. 367 (1968). In *R.A.V.*, Justice Scalia attempts to explain why the First Amendment protects the right to burn a cross, but not a draft card, but his explanation would probably not be convincing to the *O'Brien* court. The tenor of the *O'Brien* court's announcement of what has come to be known as "intermediate scrutiny" is essentially dismissive of the value of the chosen method of expression. *O'Brien*, 391 U.S. at 377.

<sup>204</sup> *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995). It is ironic that this pronouncement came in a case that was more about squelching speech than permitting it.

<sup>205</sup> See Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1375–78 (1990) Adler concluded: "In the end, we as a society are left with a choice: either we protect art as a whole or we protect ourselves from obscenity. But we choose one at the sacrifice of the other. It is impossible to do both." *Id.* at 1378. This attitude would no doubt have staggered jurists from mid-century, even while they agreed that society should make such choices. Scholars from the early twentieth century would have been shocked by this notion too.

<sup>206</sup> See Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805 (2005).

<sup>207</sup> Eric M. Freedman, *A Lot More Comes Into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make It Particularly Urgent for the Supreme Court to Abandon Its Inside-Out Approach to Freedom of Speech and Bring Ob-*



By the 1990s, some courts were beginning to view *Central Hudson* and the other commercial speech cases through the rear-view mirror. As this article has discussed, the concept of a speech hierarchy was initially created to elevate previously unprotected areas of speech to the protection of the First Amendment. But by the 1990s, the concept of a speech hierarchy came to be seen in the opposite light, as selectively carving out *disfavored* status for categories of speech. This reflects a new worldview where “freedom” under the First Amendment is not conceived of as inherently limited, but inherently all-inclusive.

Most notably, in 1996, the Supreme Court signaled a change in attitude in *44 Liquormart, Inc. v. Rhode Island* by presenting language from earlier cases in a new light.<sup>208</sup> Whereas *Central Hudson* and *Metromedia* trumpeted deference to legislative authorities, the Court in *44 Liquormart* glossed over it.<sup>209</sup> Writing for the majority, Justice Stevens exalted commercial speech.<sup>210</sup> In Justice Stevens’ view, the First Amendment’s “limited” protection for commercial speech seems to shift from a constitutional ceiling to a constitutional floor.<sup>211</sup> Older cases, such as *Metromedia*, espoused deference to state interests in the regulation of commercial speech despite recognizing some First Amendment protection. The Court in *44 Liquormart* took a sharp departure: “The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products.”<sup>212</sup>

This language is all the more striking when compared to the mid-century case of *Valentine v. Chrestensen*, which declared commercial speech to be simply outside First Amendment protection.<sup>213</sup> Even in 1980, then-Justice Rehnquist gruffly wrote in *Metromedia* that the First Amendment was designed to protect political signs, not commercial advertising.<sup>214</sup> The evolution evident in *44 Liquormart* is striking when read next to *Metromedia* and *Valentine*. This is the ultimate destination of the aesthetic subjectivism.<sup>215</sup>

The early-twenty-first century case law confirms that the courts are continu-

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*scenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883 (1996).

<sup>208</sup> See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (condemning bans on “truthful, non-misleading commercial messages”).

<sup>209</sup> *Id.* at 503.

<sup>210</sup> *Id.* at 503–04 (citing *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976)).

<sup>211</sup> *Id.* at 501–02.

<sup>212</sup> *Id.* at 503.

<sup>213</sup> *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

<sup>214</sup> *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 570 (1981) (Rehnquist, J., dissenting).

<sup>215</sup> *Wernke v. Halas*, 600 N.E.2d 117, 122 (Ind. App. 1992).

ing on this path. In the 2000 decision of *Gerawan Farming, Inc. v. Lyons*, the California Supreme Court actually ridiculed the “somewhat” protection for speech under *Central Hudson* as having no constitutional basis, and gave commercial speech full protection under the California constitution.<sup>216</sup> The *Gerawan* court openly wondered how the right to freely speak “on all subjects” could possibly exclude commercial speech.<sup>217</sup>

Moreover, the protection of modes of communication has expanded. These lines of cases must ultimately bear on the last refuge of aesthetic regulation, the regulation of commercial billboards, despite the century-long history of judicial condemnation of their ugliness.<sup>218</sup> In 1978, for example, a Note in the *Harvard Law Review* suggested that billboards could be banned if alternative methods of communication were available.<sup>219</sup> This analysis no longer seems viable. In the 2007 decision of *Federal Election Commission v. Wisconsin Right to Life, Inc.* (hereinafter “*FEC*”), the Supreme Court struck down limitations on broadcast electioneering messages and also rejected the argument that speakers could use alternative methods of communication.<sup>220</sup> This notion of free choice in means of communication was radically reaffirmed in 2010 in *Citizens United v. FEC*.<sup>221</sup>

The *FEC* Court then went on to deride the notion that alternative forms of communication are content-based: “That argument is akin to telling Cohen that he cannot wear his jacket because he is free to wear one that says ‘I disagree with the draft,’ or telling 44 Liquormart that it can advertise so long as it avoids mentioning prices.”<sup>222</sup> The *FEC* Court expanded what it means that “a speaker has the autonomy to choose the content of his own message.”<sup>223</sup>

Perhaps a mortal blow to the idea of a speech hierarchy came in 2007, albeit

<sup>216</sup> *Gerawan Farming, Inc. v. Lyons* (*Gerawan I*), 24 Cal. 4th 468, 497 & n.6 (2000).

<sup>217</sup> *Id.* at 488. Perhaps fearing where this might lead, the California Supreme Court backtracked in *Gerawan II*, stating that even though commercial speech has full protection under the California Constitution, it could be treated with a test just like that of *Central Hudson*. See *Gerawan Farming Inc. v. Lyons* (*Gerawan II*), 33 Cal. 4th 1, 21–22 (2004) (discussing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980)).

<sup>218</sup> See generally Darrel C. Menthe, *Writing on the Wall: The Impending Demise of Modern Sign Regulation Under the First Amendment and State Constitutions*, 18 GEO. MASON CIV. RTS. L. REV. 1 (2007).

<sup>219</sup> Comment, *Developments in the Law—Zoning: Zoning and the First Amendment*, 91 HARV. L. REV. 1550, 1554 (1978).

<sup>220</sup> *Fed. Election Comm’n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 477 n.9 (2007).

<sup>221</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 890 (2010) (“While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts’ own lawful authority.”).

<sup>222</sup> *Fed. Election Comm’n v. Wis. Right To Life, Inc.*, 551 U.S. at 477 (citations omitted).

<sup>223</sup> *Id.* (quoting *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995)).

unwittingly, in *Morse v. Frederick*.<sup>224</sup> The majority upheld a speech restriction on grounds related to the status of the students as school-age children and the pretense that parade-viewing was a school event. That is not so astonishing. What is astonishing is that the Court, including almost all of the justices, indicated it would otherwise have no problem protecting “gibberish” or a “non-sense message” against content-based regulation.<sup>225</sup>

The end result is both a flattening of hierarchies of speech and the promotion of a single standard for judging most free speech cases.<sup>226</sup> Professor Ashutosh Bhagwat argues persuasively that there has been a sort of doctrinal merger that has pushed almost every free speech case towards intermediate scrutiny.<sup>227</sup> This merger, he argues, hinders coherent social policy or “appropriately dictat[es] the relative weights to be accorded speech.”<sup>228</sup> Maybe so, but this article argues that the emergence of a single constitutional standard is the expected result if all value judgments are seen as subjective, as if they were aesthetic preferences, and the First Amendment is held to preclude value judgments by the government.

#### IV. CONCLUSION: THE FUTURE OF AESTHETIC REGULATION

The foregoing discussion shows that the history of aesthetic regulation of signs and displays has driven, or at least foreshadowed, major developments in First Amendment doctrine. We have also seen a historical evolution of the locus of liberty from the Fifth Amendment’s protection of property to the First Amendment’s protection of “freedom of speech.” What seems unavoidable is the recognition that the judicial understanding of the constitutional limits on the police power has changed along with the cultural understanding of whether aesthetic judgments are objective or subjective. To some, this is a troubling conclusion.

What may be more troubling is what comes next. Democratization of aesthetics may have led to broad personal freedom today, but the dialectic of freedom and democracy can lead to other places. At one point, the fear was that the First Amendment could swallow the penal code—that all activity might become protected “expression.” The reverse could be true also. If all legisla-

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<sup>224</sup> 551 U.S. 393 (2007).

<sup>225</sup> *Id.* at 402, 444. The notable exception was Justice Thomas, whose opinion reflected an era of strict classroom discipline that would be unfamiliar to most Americans.

<sup>226</sup> See generally Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (2007); see also Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 675 (2008).

<sup>227</sup> Bhagwat, *supra* note 226, at 831–32 (“[T]he intermediate scrutiny test is fast becoming, in Justice Scalia’s words, a ‘default standard’ applicable to essentially all free speech cases where strict scrutiny is not, for some reason, appropriate.”).

<sup>228</sup> *Id.* at 832.

tion comes to be seen as some interference with expressive activity, and if we cannot value some expressive activity over other activity, then how do we distinguish good from bad legislation? Is legitimacy to be no more than the concomitant of majoritarian processes?

Some have already traveled down this road. David Burnett writes: "The legal history of billboards is notable for the judicial system's remarkable willingness and ability to accommodate the public's dislike of these signs."<sup>229</sup> Burnett applauds the result as the working out of the moral principle of majoritarian rule,<sup>230</sup> following a school of thought that judicial process is meant ultimately to serve the public.<sup>231</sup> There is large majority support for the view that billboards are ugly and unwanted.

This author is not so comfortable with that outcome. If what is at stake in aesthetic regulation is the fundamental right of free speech, then majoritarian rule looks like the tyranny of the majority.<sup>232</sup>

So this article returns to Dean Sullivan's comment ten years ago:

What matters when you try to regulate speech is what you aim at, not what you happen to hit. If you aim at public order, safety, aesthetics, economic infrastructure, or other content-neutral goals and do so in a way that is not subject-matter specific, not speaker-specific, and not idea-specific, then it does not matter if what you happen to hit is speech.<sup>233</sup>

Will this be an accurate statement going forward?

This author wagers it will not. If so-called "content-neutral" justifications are clearly in the ascendancy today, it is not because they are philosophically-sound, but only because they are the only arguments left. As courts begin to look behind those justifications, however, they may increasingly side with their critics. With apologies to Dean Sullivan, the future, this author suspects, will increasingly be concerned about what the regulations "hit."

The result, however, need not be ever uglier skylines, shaking heads at falling cultural standards, and the ritual complaints of *sic transit gloria mundi*. This may be a time, instead, to revisit the values justifications for aesthetic regulation. We have seen that ninety years ago, progressive jurists and scholars chal-

<sup>229</sup> David Burnett, *Judging the Aesthetics of Billboards*, 23 J.L. & POL. 171, 228 (2007).

<sup>230</sup> *Id.* at 230 ("Judicial accommodation of the public desire to suppress billboards is a proper and desirable illustration of the American common-law system at work.").

<sup>231</sup> See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 495 (1994). A slightly less philosophical take comes from Barry Friedman, who observes as an empirical matter that the popular will does (and should) place constraints on the judiciary. Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2600–02 (2003).

<sup>232</sup> See Julie Marie Baworowsky, *From Public Square to Market Square: Theoretical Foundations of First and Fourteenth Amendment Protection of Religious Speech*, 83 NOTRE DAME L. REV. 1713 (2008).

<sup>233</sup> Sullivan, *supra* note 17, at 216–17.

lenged courts to take seriously the idea of aesthetic regulation as a public purpose within the police power of the state. Although they did so in a paternalistic vein that twenty-first century scholars and jurists would scarcely reproduce, such arguments may once again be worth addressing in ways appropriate to our times. So-called “content-neutral” justifications will not solve the problems of democracy and legitimacy inherent in aesthetic regulation. Only values-based justifications can do that.

The time may have come to start talking seriously about putting the First Amendment back in balance with other freedoms.<sup>234</sup> We must begin to have a new discussion how the freedom of expression should be balanced against other *values*, not just how it should be balanced against the abstract notion of state interference.

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<sup>234</sup> The Court’s modern reluctance to balance First Amendment concerns against lesser state interests was highlighted in *United States v. Stevens*, No. 08-769, 2010 U.S. LEXIS 3478 (U.S. Apr. 20, 2010).

The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.” As a free-floating test for First Amendment coverage, that sentence is startling and dangerous.

*Id.* at \*17.