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Architecture as Art? Not in My Neocolonial Neighborhood: A Case for Providing First Amendment Protection to Expressive Residential Architecture

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A Case for Providing First Amendment Protection to Expressive Residential Architecture

I. INTRODUCTION

In the late 1960s in Landue, Missouri, Demiter and Joan Stoyanoff wanted to build a pyramid-shaped home with a flat roof, triangular windows, and doors positioned on the corners of the home.[1] Although the Stoyanoffs' futuristic home conformed to all of the city's building and zoning requirements,[2] the architectural review board denied the couple's request for a building permit because the home failed to "conform to certain minimum architectural standards of appearance and conformity with surrounding structures."[3] The board stated that its purpose was to prohibit "unsightly, grotesque and unsuitable structures" like the Stoyanoffs' proposed home.[4] Landue's mayor defended the board's decision and added that the Stoyanoffs' design was "in fact a monstrosity of grotesque design,"[5] damaging to adjoining property values, and inapposite with the French Provincial, English Tudor, and Colonial architecture of the community.[6] The couple subsequently appealed the board's decision and won at the state circuit court.[7]

1. Missouri *ex rel*. Stoyanoff v. Berkeley, 458 S.W.2d 305, 308 (Mo. 1970).
2. *Id.* at 306.
3. *Id.*
4. *Id.*
5. *Id.* at 307.
6. *Id.*
7. *Id.* at 308. The trial court initially found that the denial of the building permit was in violation of Missouri's takings clause. *Id.* at 306. The Building Commissioner, the individual ultimately responsible for issuing building permits, appealed the decision. *Id.* The case eventually reached the Missouri Supreme Court, at which point the Stoyanoffs argued that the architectural review board was not authorized by Landue's enabling statute. The relevant sections of the enabling statute authorized the community to promote the "health, safety, morals and . . . general welfare of the community" through the enactment of certain zoning ordinances. *Id.* at 308 (quoting MO. REV. STAT. § 89.020 (1959)). The statute required that zoning ordinances be consistent with the community's comprehensive plan and give "reasonable consideration, among other things, to the character of the district." *Id.* (quoting MO. REV. STAT. § 89.020 (1959)). The Stoyanoffs further argued that the ordinance creating the architectural review board was an "unreasonable and arbitrary

Applying rational basis review, the Missouri Supreme Court[8] reversed and held that the aesthetic determinations of the architectural review board were consistent with the city's interest in protecting the "general welfare of the community."[9]

If the court's analysis were applied to a few imagined variations of the Stoyanoffs' design, the results would be troubling from a First Amendment perspective. If the Stoyanoffs' pyramid were expanded one hundred feet and transported to Paris, it would evoke the architectural artistry of I.M. Pei's Louvre entrance. Shrunk to tabletop size, it becomes sculpture. These examples not only beg the Dadaists' question: what is art, they also raise the question of whether residential architecture[10]

exercise of the police power (as based entirely on aesthetic values)." *Id.* at 308. The ordinances in question require that the architectural review board ensure that new buildings "maintain 'conformity with surrounding structures' [and] . . . 'conform to certain minimum architectural standards of appearance.'" *Id.* at 310. The ordinance continued that "unsightly, grotesque, and unsuitable structures, detrimental to the stability of value and the welfare of surrounding property, structures, and residents, and to the general welfare and happiness of the community, be avoided, and that appropriate standards of beauty and conformity be fostered." *Id.* at 310. Furthermore, they argued that the enforcement of these ordinances was an "unlawful delegation of legislative powers (to the Architectural Board)." *Id.*

8. *Id.* at 310. The court applied rational basis scrutiny, which means that a legislative ruling can only be reversed when the result is "oppressive, arbitrary or unreasonable" or conflicts with "a valid preexisting nonconforming use." *Id.*

Generally, appeals courts review zoning decisions under rational basis scrutiny. *See, e.g.*, Seabrook Island Property Owners Ass'n v. Marshland Trust, Inc., 596 S.E.2d 380, 383-84 (S.C. Ct. App. 2004). When First Amendment rights are implicated, however, a higher degree of judicial scrutiny is generally required. Strict scrutiny is applied when the governmental action regulates the specific content of the speech. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (striking down a statute prohibiting indecent interstate commercial telephone calls because the statute was not narrowly tailored to the state's compelling interest). Intermediate scrutiny generally applies when the First Amendment is implicated by a content-neutral statute which limits expressive conduct. *See* Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) ("[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so.").

9. *Stoyanoff*, 458 S.W.2d at 308.

10. This Comment is limited to residential architecture and does not extend to commercial architecture. Speech in one's home deserves higher First Amendment protection than commercial speech. *See infra* note 166–67 and accompanying text; *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 562–63 (1980) ("The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."). Furthermore, the government has an important, long-standing interest in regulating community public areas and skylines given the high number of people who see these architectural forms compared to those who see residential architecture. *See infra* notes 157–58 and accompanying text.

should receive the same level of First Amendment protection afforded other expressive art forms.[11]

In the First Amendment landscape, protection for expressive residential architecture remains undeveloped territory.[12] No court has explicitly considered free speech concerns in cases of residential architecture. This reality is particularly surprising considering that courts have provided First Amendment free speech protections for sexually-oriented businesses,[13] abstract sculpture,[14] and, ironically, semi-permanent homes built to protest homelessness policies.[15]

This Comment argues that residential architecture is an expressive art form, thus passing the threshold inquiry for expressive conduct under First Amendment free speech analysis. Upon passing this initial inquiry, expressive residential architecture would have the presumption of First Amendment protection. According to free speech jurisprudence for expressive conduct, a court would then be required to apply intermediate scrutiny to aesthetic zoning decisions, thereby creating a better balance between a homeowner's expressive interests and a state's interests in regulation. Nevertheless, as this Comment illustrates, weighing a

11. *See infra* Part III.A.

12. Dissenting judges have argued against zoning regulations on expressive grounds without any real indication that the plaintiffs initially based their claim on the First Amendment. *See, e.g.*, Reid v. Architectural Bd. of Review, 192 N.E.2d 74, 78 (Ohio Ct. App. 1963). There have been very few First Amendment challenges to zoning ordinances. In *Burke v. City of Charleston*, a visual artist who had painted a mural on a building in Charleston's historic district challenged the decision of the architectural review board to remove the mural, but was found to lack standing. 139 F.3d 401, 403 (4th Cir. 1998). In *Bohannan v. City of San Diego*, a commercial property owner's free speech claim challenging zoning in a historic district was summarily dismissed. 106 Cal. Rptr. 333, 339 (Ct. App. 1973). Zoning ordinances that dictate the placement of newspaper racks have been challenged and upheld under the First Amendment. *See* City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 772 (1988). Additionally, churches have challenged zoning ordinances under both the Free Exercise and Speech Clauses as well as state statutes protecting these important rights. *See* St. Bartholomew's Church v. City of New York, 914 F.2d 348 (1990); Martin v. The Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints, 747 N.E.2d 131 (Ma. 2001) (finding that a height restriction on an LDS temple was in violation of a Massachusetts statute prohibiting zoning restrictions on religious structures).

13. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. Am. Mini Theatres, Inc. 427 U.S. 50, 80 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

14. *See* United States *ex rel*. Radich v. Criminal Court, 385 F. Supp. 165 (S.D.N.Y. 1974), *quoted in* Galina Krasilovsky, *A Sculpture Is Worth a Thousand Words: The First Amendment Rights of Homeowners Publicly Displaying Art on Private Property*, 20 COLUM.-VLA J.L. & ARTS 521, 527 (1996).

15. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (analyzing a proposed protest of homelessness through the construction of a tent city under the auspices of the First Amendment).

community's legitimate interests, which may be affected by atypical architecture, against a future homeowner's expressive interests is particularly difficult.

Although surmountable, architecture's unique nature creates unprecedented challenges in the application of the Court's expressive conduct jurisprudence. For instance, because architecture is an immovable and lasting structure, the state has an interest (of debatable importance) in protecting the aesthetics of a community over the dictates of an individual property owner. Permanence also distinguishes architecture from other areas of free speech protection, so the application of precedent is difficult. Additionally, because the medium and message of architectural expression are inextricable linked,[16] writing content-neutral regulations and providing reasonable time, manner, and place accommodations are difficult. These complexities may be the unwritten subtext for why courts have not applied First Amendment protection to residential architecture.

The importance of individual expression, however, should outweigh these judiciable difficulties. Individual expression is such a bedrock principle of our democratic system that explaining its importance takes on the tautological feel of a playground response: citizens should be able to express themselves because it is a free country. Not only is individual expression essential for a well-functioning democratic system, its protection under the First Amendment ensures that minority views are not unduly suppressed by the dictates of the majority, thus ensuring an open and vibrant dialogue. Beyond its political justifications, self-expression is innately valuable to individual development and self-realization.[17] Furthermore, unexplained categorical limitations on the application of First Amendment protections skew the balance of power between the government and its citizens.

This Comment imagines the implications of altering the balance of power between government regulation and individual expression by taking two aesthetic zoning ordinances through the course of an expressive conduct inquiry. This Comment first considers ordinances prohibiting excessive architectural similarity or difference with the surrounding community. It argues that excessive similarity or difference ordinances are unconstitutional content-based restrictions on free

16. Samuel E. Poole III, *Architectural Appearance Review Regulations and The First Amendment: The Good, The Bad, and The Consensus Ugly*, 19 URB. LAW. 287, 312–13 (1987).

17. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 592–93 (1982).

expression. It next considers ordinances requiring the maintenance of a community architectural style. This Comment argues that community architectural style regulations, while content neutral, are constitutionally precarious when balanced against a future homeowner's free speech rights.

Part II of this Comment discusses the history and legitimacy of aesthetic regulations and defines the two types of regulations on which this Comment will focus. Part III follows the two architectural regulations through a First Amendment challenge under the rubric of expressive conduct. Part IV discusses the policy benefits of extending free speech protections to residential architecture and guaranteeing it intermediate scrutiny. Finally, Part V offers a brief conclusion and suggests that evaluating aesthetic regulations under intermediate First Amendment scrutiny creates a better balance between individual expression and community interests.

II. BACKGROUND: GENERAL WELFARE AND AESTHETIC REGULATIONS

Concerns about safety, morality, health, and the general welfare traditionally bound the police power of municipalities. However, courts have more recently expanded the interpretation of the general welfare to uphold municipal ordinances based solely on aesthetic considerations. Challenges to aesthetic zoning ordinances are currently analyzed under a rational basis review.

A. Beauty and the General Welfare: The Bounds of the Police Power

The Supreme Court's holding in *Berman v. Parker*[18] expanded the traditional understanding of the police power's general welfare provision to include aesthetic considerations and thereby gave municipalities the right to pass aesthetic zoning ordinances.

In the past, a municipality's concern for "public health, safety, morals, or general welfare"—all appropriate reasons for a state or local legislative body to exercise the police power—provided the justification for comprehensive zoning ordinances.[19] When these concerns were present, courts granted great deference to municipalities as "the main guardian of the public needs to be served by social legislation."[20] Prior

18. 348 U.S. 26 (1954).

19. Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928).

20. *Berman*, 348 U.S. at 32.

to *Berman*, courts found that zoning ordinances based solely on aesthetics were beyond the bounds of the police power.[21] One early twentieth-century court even declared that "[a]esthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power."[22] However, courts had frequently upheld municipal ordinances where an aesthetic component was coupled with health or safety concerns.[23]

With *Berman*, the Supreme Court expanded the traditional understanding of the general welfare to justify government action based solely on aesthetic considerations.[24] The Court upheld the validity of a Washington D.C. urban redevelopment act that called for the condemnation of the appellants' department store in the interest of recapturing a neighborhood from urban blight.[25] Ironically, the legislative action upheld in *Berman* was strongly founded in concern for "public health, safety, morals, and welfare,"[26] yet the Court's expansive language defining the general welfare has since been used to uphold ordinances addressing purely aesthetic concerns:

> 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.[27]

21. *See, e.g.*, City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co., 62 A. 267, 268 (N.J. 1905), *overruled by* State v. Miller, 83 N.J. 402, 416 A.2d 821 (1980).

22. Shawn G. Rice, Comment, *Zoning Law: Architectural Appearance Ordinances and the First Amendment*, 76 MARQ. L. REV. 439, 443–44 (1993) (quoting *Paterson Bill Posting*, 62 A. at 268).

23. *See, e.g.*, People v. Stover, 191 N.E.2d 272 (N.Y. 1963), *appeal dismissed* Stover v. New York, 375 U.S. 42 (1963). The clothesline protest of the petitioners was criminalized by a zoning ordinance preventing clotheslines in front of homes. The court bolstered its justification for the ordinance by citing concerns about safety and visibility for traffic. However, it is very likely that the city's real concerns were aesthetic since the ordinance was passed after the petitioners protest began, and the restrictions on clotheslines seemed only to target the protest. Furthermore, the majority seemed most concerned with the property values and the offended "sensibilities" in the community. *Id.* at 274.

24. *Berman*, 348 U.S. at 33.

25. *Id.* at 34–35.

26. *Id.* at 31; *see also id*. at 32–35; Kenneth Regan, Note, *You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 FORDHAM L. REV. 1013, 1026 (1990).

27. *Berman*, 348 U.S. at 33 (internal citation omitted). *Berman* has been used extensively to justify broad legislative power in the face of Takings Clause challenges. *See, e.g.*, Kelo v. City of New London, 125 S. Ct. 2655, 2663–64 (2005).

Since the Court's expansive statement in *Berman*, aesthetic considerations have been a starting point for many zoning ordinances,[28] primarily because of municipalities' concerns about the derivative effects of aesthetics on property values and the "comfort and happiness of the neighborhood residents."[29] For instance, within twenty years of *Berman*, well over 500 communities had architectural review boards.[30] While some jurisdictions have declined to extend *Berman*'s rationale and have continued to tie aesthetic concerns to the more traditional police power interests,[31] others have used *Berman*'s expansive definition of the general welfare to regulate solely on the basis of aesthetic considerations.[32] Confusion persists in part because in 1984 the Supreme Court declined to hear an Ohio case that could have shed light on whether *Berman's* expansive language definitely applied to architectural review.[33]

Absent a reason for closer judicial scrutiny (a statute prohibiting a steeple on a church, for example), zoning ordinances are evaluated under rational basis review. This standard only requires that the statute bear some relationship to the purposes of the police power—namely, health, safety, morality, and the general welfare—and is neither arbitrary nor unreasonable.[34] Despite varying understandings of the scope of the general welfare, the police power clearly gives local governments significant power to regulate the aesthetics of residential building.

28. *Berman v. Parker* marked a fundamental shift in land use law and raised a flood of administrative and legislative actions to protect historic landmarks and to instigate urban renewal. Scott Schrader, Book Review, 89 MICH. L. REV. 1789, 1790 (1991) (reviewing JOHN J. COSTONIS, ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE (1989) (noting that "in no other area of planning law has the change in judicial attitudes been so complete")).

29. Stoyanoff v. Berekeley, 458 S.W.2d 305, 310 (Mo. 1979) (quoting State *ex rel.* Civello v. City of New Orleans, 154 La. 271 (1923)).

30. Rice, *supra* note 22, at 446; *see also* Bachman v. State, 359 S.W.2d 815, 817 (1962) (acknowledging the trend towards upholding ordinances based solely on aesthetics, but still striking down an aesthetic ordinance as arbitrary and unreasonable). Despite its expansive language, the Court upheld the police power in *Berman* under traditional justifications like health and safety. *See Berman*, 348 U.S. at 23–33 (discussing the effect of urban blight on the living conditions and health of residents).

31. Regan, *supra* note 26, at 1014 n.12.

32. *Id.* at 1015 n.13.

33. Vill. of Hudson v. Albrecht, Inc., 458 N.E.2d 852 (Ohio 1984), *appeal dismissed*, 467 U.S. 1237 (1984).

34. *See* BLACK'S LAW DICTIONARY 1178 (7th ed. 1999) ("Police Power").

B. Aesthetic Regulations

Because of the low level of judicial scrutiny applied to zoning ordinances, ill-conceived aesthetic regulations remain unchallenged or are easily upheld. Communities can enact several types of aesthetic regulations.[35] This Comment focuses on the following two types of aesthetic regulation: (1) regulations that prohibit excessive architectural similarity or difference, and (2) regulations that demand conformity to a community architectural style.[36] Compliance with these types of aesthetic zoning ordinances is generally determined by an architectural review board.[37] These boards are usually comprised of citizens with "art, architecture, [or] planning" experience.[38] Their decisions sometimes come under judicial fire, even under rational basis scrutiny, when vague ordinances give them too much power and thereby result in arbitrary determinations.[39] However, many of these ordinances are either unchallenged or upheld, and they effectively function to limit architectural variances in communities. A basic understanding of these two aesthetic regulations will help illuminate both the necessity and difficulty of applying First Amendment protection to residential architecture.

1. Ordinances prohibiting excessive similarity or difference with surrounding residences

Municipalities pass excessive similarity[40] or difference[41] ordinances for a two-fold purpose: (1) to prevent the spread of indistinguishable

35. Historic landmark regulations, ordinances prohibiting junkyards, and billboard and sign regulations all fall under the category of aesthetic ordinances. *See* Poole, *supra* note 16, at 295, 326.

36. Categorical distinctions between these two types of ordinances were adopted for organization purposes in this Comment. In reality, some communities' aesthetic ordinances seem to combine the two. Furthermore, some courts may use concerns about a building's similarity or difference with surrounding structures to uphold a building permit denial under a more general aesthetic zoning ordinance. *See infra* notes 48–61 and accompanying text.

37. Poole, *supra* note 16, at 292–94.

38. 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, 965 (2002).

39. *Id.* at 965–66. *See supra* text accompanying note 34.

40. Tappendorf, *supra* note 38, at 961 n.2.

41. *Id.* at 961.

tract housing,[42] and (2) to prevent nonconforming architectural designs such as the Stoyanoffs.'[43] A former architectural design ordinance for Lake Forest, Illinois, a suburb of Chicago, provides a quintessential example of an excessive similarity or difference regulation.[44] The ordinance provided,

> The City Council hereby finds that excessive similarity, dissimilarity or inappropriateness in exterior design and appearance of buildings . . . in relation to the prevailing appearance of property in the vicinity thereof adversely affects the desirability of immediate and neighboring areas and impairs the benefits of occupancy of existing property in such areas, impairs the stability and taxable value of land and building in such areas, prevents the most appropriate use of real estate and the most appropriate development of such areas . . . and destroys a proper balance in relationship between the taxable value of real property in such areas and the cost of the municipal services provided therefor.[45]

42. *Id.*; *see also* Melissa Westphal, *Byron Growth: Finding Balance*, ROCKFORD REGISTER STAR, Mar. 23, 2004, *available at* 2004 WLNR 16592363 (discussing a city's attempts to avoid neighborhood monotony by passing zoning ordinances prohibiting architectural similarity).

43. *See supra* note 1 and accompanying text.

44. Poole, *supra* note 16, at 305.

45. *Id.* (quoting LAKE FOREST, ILL., BUILDING CODE ch. 9, § 9.107 (1979)). Lake Forest adopted new architectural design ordinances in 2003. The new ordinance requires that new buildings be designed "within the context of the established surrounding neighborhood, preserve the character of the community, protect the unique aspects that distinguish neighborhoods from each other, provide for a diversity of house sizes at various price points, and maintain and enhance property values." LAKE FOREST, IL., BUILDING CODE § 9-86 B (2003), *available at* http://www.cityoflakeforest.com/pdf/cd/bsord.pdf. The city considers the "surrounding neighborhood" as the block in which the proposed home is located, and requires that proposed designs consider "[t]he general character of the larger neighborhood, two blocks in each direction." *Id.* The Building Review Board responsible for permit approval would consider, among other things, how well the exterior elements of the proposed design conformed to the "context of the surrounding neighborhood." *Id.* They would also consider whether the building was consistent with "a chosen style of architecture and the surrounding area." *Id.*

The city takes care to remark that these requirements are "not intended to limit creativity or restrict the options of architectural styles." *Id.* Although this new ordinance avoids explicit language prohibiting excessive architectural similarity or difference, it is functionally equivalent to the previous ordinance. Unless Lake Forest has a neighborhood reserved for eclectic architecture, homes like the Stoyanoffs' would still be excluded from the community because of nonconformity with the surrounding neighborhood.

For an additional example of an excessive difference ordinance, see Rice, *supra* note 22, at 439 (quoting State *ex rel*. Saveland Park Holding Corp. v. Wieland, 69 N.W.2d 217, 219 (Wis. 1955), *cert. denied*, 350 U.S. 841 (1955)).

On its face, this ordinance prohibits excessive architectural similarity and dissimilarity for property value purposes in addition to purely aesthetic purposes.[46] With this ordinance, however, a possible decrease in property values would be intractably tied to the aesthetic tastes of the majority. The city council perceives that property values would drop solely because of future homeowners' distaste for nonconforming design. While property values may clearly be an important governmental interest, as discussed further below, the justification is problematic from a First Amendment perspective because it creates the possibility that minority interests are trumped by majoritarian tastes.[47]

Courts have struck down many ill-conceived ordinances requiring architectural similarity or difference under rational basis review.[48] Similar ordinances, however, have been upheld and have consequently denied homeowners the opportunity to realize their architectural vision.[49] The most famous case illustrating this point is *Reid v. Cleveland Heights*, in which the Ohio Court of Appeals upheld, under rational basis review, the denial of a building permit to a property owner intent on building a modern, modular glass home in a suburb of "dignified, stately and conventional structures."[50] The architectural

46. Most aesthetic regulations are tied to property value. *See* Rice *supra* note 22, at 447. (citing NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN LAND PLANNING LAW § 71C.01, 57 (1988)).

47. In short, the city's end—maintaining property values—may be legitimate, but the means—restricting expressive architecture—may be an illegitimate restraint on free speech. *See infra* Part III.D.1 discussing the First Amendment's important role in protecting indecent or offensive speech from censure precisely because of its unpopularity.

48. John Nivala, *Constitutional Architecture: The First Amendment and the Single Family House*, 33 SAN DIEGO L. REV. 291, 331–33 (1996) (describing the illegitimate regulations and actions taken by communities in the interest of aesthetics.); *see* R.S.T. Builders, Inc. v. Vill. of Bolingbrook, 489 N.E.2d 1151, 1152 (Ill. App. Ct. 1986) (rejecting architectural review board permit denial, claiming the board wanted "shutters put on the windows, lights on the outside, aluminum siding, a brick veneer front, and a two-car garage," which overall was too much discretion); Pacesetter Homes, Inc. v. Vill. of Olympia Fields, 244 N.E.2d 369, 373 (Ill. App. Ct. 1968) (ordinance broad and arbitrary); Morristown Road Assoc. v. Mayor, 394 A.2d 157 (N.J. Super. Ct. Law Div. 1978) (vague ordinance); Hankins v. Borough of Rockleigh, 150 A.2d 63 (N.J. Super. Ct. App. Div. 1959) (indicating the aesthetic ordinance was too broad considering the architectural variance in the community); De Sena v. Vill. of Hempstead, 379 N.E.2d 1144 (N.Y. 1978) (denying a building permit to an owner who wanted to build a house styled after a bowling alley even though the community didn't have an aesthetic ordinance).

49. *See Wieland*, 69 N.W.2d at 219.

50. Reid v. Architectural Bd. of Review, 192 N.E.2d 74, 77 (Ohio Ct. App. 1963) (Corrigan, J., dissenting); *Id.* at 76. The dissent described the home as

> a flat-roofed complex of twenty modules, each of which is ten feet high, twelve feet square and arranged in a loosely formed "U" which winds its way through a grove of

review board assessing the application had broad discretion to protect property, "maintain the high standards of the community,"[51] and preserve property value through the application of "proper architectural principles."[52] Despite the building plan's compliance with the zoning requirements for the residential district,[53] the board denied the building permit because the proposed design failed to conform to the design of other homes in the community.[54] The reviewing court noted additional reasons for the denial of the building permit, including possible effects on adjacent lots and property values without any justifying language or evidence from the architectural review board.[55] The proposed home would have cost approximately as much to build as surrounding houses, so the board's decision was not based on the possibility of depressed property values.[56] Still, under rational basis review, concrete evidence affirming the validity of the government's justifications for a statute is not required. The court ultimately held that the architectural review board's aesthetic rationale was consistent with the expansive definition of the general welfare found in *Berman v. Parker*.[57]

The impassioned dissent championed the artistic vision of the homeowner and architect. The dissenting judge felt the majority's property values argument masked a judgment based purely on taste.[58]

> trees. About sixty percent of the wall area of the house is glass and opens on an enclosed garden; the rest of the walls are of cement panels. . . . [The garage and the house], with their associated garden walls, trellises and courts, form a series of interior spaces and exterior spaces, all under a canopy of trees.

Id.

51. *Id.* at 76.

52. *Id.* at 78 (quoting CITY OF CLEVELAND HEIGHTS, OHIO, CODIFIED ORDINANCES § 137.05).

53. *Id.* at 79. During an interrogation, a member of the Board of Architectural Review stated that the building permit was denied solely because of non-conformity with the surrounding structures, not because the design violated the building code. *Id.*

54. *Id.* Interestingly, the ordinance creating the Board of Architectural Review never mentioned a prohibition on excessive similarity or difference. Still, the Board and reviewing court seemed to find that Ms. Reid's home failed to "maintain high character of community development" and conform to "proper architectural principles" because of its dissimilarity with the surrounding neighborhood. *Id.* at 76, 77–78.

55. *Id.* at 76.

56. *Id.* at 79. A member of the Board of Architectural Review denied that their decision was based on the possibility of market-value depreciation, stating instead that the home was in the "same class cost-wise as those in the neighborhood." *Id.*

57. *Id.* at 78.

58. *Id.* at 80–81. The dissent quoted the deposition from a member of the architectural review board illustrating that the board based its decision entirely on its dislike of the proposed design. *Id.* at 79.

Despite the majority's contention that the modern home would be inconsistent with the surrounding neighborhood, the dissent found no predetermined architectural style in the community, making the lack of conformity argument ill-founded.[59] Finally, he argued against prohibitions on excessive difference with the surrounding community in favor of individual expression. He explained,

> Should the appellant be required to sacrifice her choice of architectural plan for her property under the official municipal juggernaut of conformity in this case? Should her aesthetic sensibilities in connection with her selection of design for her proposed home be stifled because of the apparent belief in this community of the group as a source of creativity? Is she to sublimate herself in this group and suffer the frustration of individual creative aspirations?[60]

Clearly, the dissenting judge's answer to these questions is an emphatic no. In his view, the architectural review board's decision, based solely on irrational aesthetic considerations, failed rational basis scrutiny.[61] Despite championing individual expression, the dissenting judge never explicitly considered the free speech interests affected by Ms. Reid's powerlessness to build her modern home. In fact, no court has applied First Amendment free speech scrutiny to residential architecture.

2. Ordinances requiring conformity to an existing community architectural style

Ordinances requiring new buildings to conform to an existing community architectural style are marked by planning and forethought. A carefully planned interest in preserving the aesthetics of the community creates a weightier justification for state action in an expressive conduct balancing test.

Coral Gables, Florida, is an example of a city that has a regulation to preserve the community architectural style. George Merrick, the developer of Coral Gables, Florida, envisioned creating "America's most beautiful suburb."[62] In the early 1920s, he began meticulously designing the community, down to a designated home style for each lot.[63]

59. *Id.* at 80–81.
60. *Id.* at 81.
61. *Id.*
62. Poole, *supra* note 16, at 300.
63. *Id.* at 300.

Restrictive covenants, which ensure that the original character of each lot remained intact, were initially included in each property deed, and these covenants were later codified in the community's charter and zoning ordinances.[64] A 1937 zoning ordinance dictated specific requirements for color, texture, construction techniques, and the design and location of fences.[65] Furthermore, Coral Gables established an architectural review board to ensure that new building adequately "preserve the traditional aesthetic treatment and excellence of design in the community."[66] As of yet, no one has presented a legal challenge to the decisions of Coral Gables's architectural review board.[67]

When communities attempt to create architectural conformity in pre-existing neighborhoods, however, the regulation is vulnerable to legal challenge, even under rational basis scrutiny. For instance, in *Hankins v. Borough of Rockleigh*, a New Jersey superior court overturned the city's denial of a building permit to a couple proposing to build a modern, flat-roofed home.[68] A Rockleigh ordinance required new and renovated homes to conform to either an early American design or the surrounding architectural style and rural setting of the town.[69] In pursuit of this vision, the town expressly banned modern, flat roofs on new buildings.[70] The ordinance failed rational basis review because the town had no preconceived architectural structure. Its existing architectural style was so eclectic that many of the town's existing structures would have also violated the ordinance.[71]

One could argue that, given holdings like *Rockleigh*, greater judicial scrutiny for aesthetic zoning regulations is unnecessary; however, a slight shift in the facts could easily have lead to the opposite outcome.[72] This degree of uncertainty is precisely why intermediate scrutiny is

64. *Id.* at 301.

65. *Id.*

66. *Id.* at 301–02 (quoting CORAL GABLES, FLA., ORDINANCE No. 1525 (1966) (as amended 1983).

67. *Id.* at 302–03 ("[C]hallenges are rare and . . . most of the (infrequent) complaints . . . come from citizens objecting to the review board's laxity.").

68. 150 A.2d 63, 66 (1959).

69. *Id.* at 64.

70. *Id.*

71. *Id.* at 66 ("Half the old-style houses are already partly out of their original architectural design because of . . . flat-roofed extensions. There are in existence almost as many structures . . . fully out of character with the architectural restrictions for dwellings set forth in the ordinance as those which comply with them.")

72. *See infra* notes 49–61 and accompanying text.

required to protect the expressive interests at stake in some residential architecture. The balance of this Comment considers the possible effects of applying free speech jurisprudence to residential architecture. The issues inherent in experimental, modern, or downright ugly residential architecture are quite complex, and individual property owners may not always prevail. Still, providing First Amendment protections to expressive residential architecture creates a better balance between individual expression and community aesthetics by raising the level of scrutiny under which to consider the exercise of the state's police power.

III. FIRST AMENDMENT ANALYSIS

If courts were to determine that architecture is a protected artistic genre like painting, music, or poetry, then it would receive some level of First Amendment protection.[73] Assuming architecture would pass this initial inquiry, the court would then look specifically at the governmental ordinance interfering with free speech. Under an expressive conduct analysis,[74] the court must first consider if the ordinance specifically discriminates against a particular kind of message (a content-based regulation) or applies regardless of the communicative impact of the message (a content-neutral regulation).[75] Content-based ordinances invite strict scrutiny because they directly target protected speech. Content-neutral ordinances regulating nonspeech (in this instance, residential homebuilding) are subject to less exacting scrutiny because they directly address conduct with "'speech' and 'nonspeech'

73. Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 569 (1995). In some instances, a homeowner might successfully argue that the architectural design meets the second threshold inquiry for expressive conduct. A homeowner could intend to portray a certain message, and it might be reasonably certain that the particularized message would be understood. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989). However, classifying architecture as a traditionally protected artistic genre is the stronger and more broadly applicable claim.

74. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968); s*ee also Johnson*, 491 U.S. at 397.

75. Justice Scalia articulates why content-based regulations are unconstitutional, even if they proscribe speech that generally only receives minimal protection. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). He writes, "The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed." *Id.* at 382. To illustrate the difference between content-neutral and content-based laws, Scalia sets forth the following example: "A State might choose to prohibit only that obscenity which is the most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive political messages." *Id.* at 388. *See also* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (Winter 1983).

elements."[76] If an ordinance is content neutral, the court would next consider whether the ordinance advances an important governmental interest.[77] The court would then balance the governmental interest against the expressive interest, determining whether the ordinance burdens speech not implicated by the government's interest,[78] whether it is disproportional to the interest, and whether alternative means of expression exist.[79]

As the balance of this discussion will show, ordinances prohibiting excessive similarity or differences fail content neutrality. Content-neutral aesthetic ordinances, like some community architectural style regulations, fare better, but are still constitutionally suspect and turn on the specific government and expressive interests at stake. Municipalities with aesthetic zoning ordinances prohibiting nonconforming architecture are interested in preserving the community aesthetic, preventing property value decline, and protecting their citizens from exposure to distasteful or offensive buildings. These interests are ill-suited to overcome a homeowner's interest in artistic expression through architecture, in part because of the unclear impact on property values of the aesthetics of neighboring homes; the First Amendment's well-established protections for offensive or distasteful speech; the importance of expression in one's residence; and the difficulty of providing reasonable alternate means of expression.

76. *United States v. O'Brien* articulates the intermediate scrutiny standard well.

> [G]overnmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to that interest.

391 U.S. at 377.

77. *See id.* at 376.

78. Schneider v. New Jersey, 308 U.S. 147, 151 (1939).

79. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.").

A. The Threshold Inquiry: Architecture as Art[80]

1. Art receives First Amendment protection

Although the Supreme Court has devoted little analysis to artistic expression, the sum of its holdings and dicta indicate that artistic expression merits First Amendment protection.[81] First Amendment protection of art, regardless of how clearly the art is understood,[82] illustrates that in certain contexts, self-expression and artistic expression are constitutionally protected values.[83]

80. For a somewhat disjointed distinction between visual art and architecture, see Krasilovsky, *supra* note 14.

81. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 569 (1995) (indicating that nonrational artistic forms are protected); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975) (disallowing a broad ban on nudity in movies because such a ban would prohibit nudity that the court does not consider obscene, such as "newsreel scenes of the opening of an art exhibit"); Miller v. California, 413 U.S. 15, 24 (1973) (defining obscenity as lacking "serious literary, artistic, political, or scientific value."); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (indicating that films "affect public attitudes . . . in a variety of ways, [including] the subtle shaping of thought which characterizes all artistic expression."); W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624, 632 (1943) ("Symbolism is a primitive but effective way of communicating ideas."); Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1996) ("Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection.").

82. Illustrative of the court's de-emphasis on the clarity of the communication is the "unquestionably shielded" protection of Lewis Carroll's nonsensical *Jabberwocky* compared with the diminished protection of clearly communicated commercial speech, or the lower protection for communicative billboards compared to the high protection for abstract art. *See Hurley*, 515 U.S. at 569.

83. *See id.*; Cohen v. California, 403 U.S. 15, 26 (1971) ("In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."). In *National Endowment for the Arts v. Finley*, Justice Souter argued that art was protected under the First Amendment because of its expressive character, distinct from any derivation from political speech. 524 U.S. 569, 602–03 (1998) (Souter, J. dissenting). He wrote in dissent,

> The constitutional protection of artistic works turns not on the political significance that may be attributable to such productions, though they may indeed comment on the political, but simply on their expressive character, which falls within a spectrum of protected "speech" extending outward from the core of overtly political declarations. Put differently, art is entitled to full protection because our "cultural life," just like our native politics, "rest[s] upon [the] ideal" of governmental viewpoint neutrality.

Id. (internal citations omitted). *But see* Rice, *supra* note 22, at 453 (arguing that the effect of the architecture on the public is more important than its artistic intent).

Clear language granting First Amendment protection to art is found in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.[84] The Court found that in certain traditional genres, "a narrow, succinctly attributable message is not a condition of constitutional protection," as illustrated by First Amendment protection for "the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll."[85] By using nonrepresentational abstract visual art, discordant modern music, and irrational poetry as examples of "unquestionably protected" expression, the Court reaffirmed that the First Amendment protects "not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well."[86] Despite minimal guidance from the Court about why certain artistic forms like painting and poetry are "unquestionably shielded"[87] by First Amendment protection, the reason seems intuitive: merely engaging in these activities is inherently expressive regardless of how they are communicated to others. [88]

Not all expressive activities receive First Amendment protection, however, and legal lines bounding art are particularly dim. For instance, with little explanation, the Court has given some types of dance First Amendment protection, while leaving other types unprotected. In *Dallas v. Stanglin*, the Court cursorily held that the weekend roller-disco

84. *Hurley*, 515 U.S. at 557. The Court upheld the petition of a gay rights group for admission into the Boston St. Patrick's Day parade. The city challenged the directive as a speech compulsion. *Id.*

85. *Id.* at 569.

86. *Cohen*, 403 U.S. at 26. Affirming this idea as it applies to traditionally protected genres of expression, the *Hurley* court stated that constitutional protection is not forfeited by a speaker's failure "to edit [his or her] themes to isolate an exact message as the exclusive subject matter of the speech." *Hurley*, 515 U.S. at 569–70. In *Ward v. Rock Against Racism*, the Court implicitly acknowledged that communication is distinct from expression, and that the First Amendment protects both the expressive and communicative components of traditional artistic expression. 491 U.S. 781, 790 (1989).

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

Id.

87. *Hurley*, 515 U.S. at 569.

88. Hence, artistic expression is distinct from other forms of expressive conduct, which must intend to convey a particularized message and must have a great likelihood that the message will be "understood by those who [view] it." Texas v. Johnson, 491 U.S. 397, 404 (1989) (citation omitted).

dancing of the petitioners was social rather than expressive and consequently not protected by the First Amendment.[89] This distinction between social dancing and expressive dancing points to some requirement for expressive or artistic intent even within traditionally expressive genres. As the Court articulated, "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[90] Decisions protecting artistic expression are burdened with these line-drawing difficulties.[91] In some instances, distinguishing art from non-art is easy;[92] in other instances, the artistic nature of a piece may turn on the attitudes of the viewer.[93] Despite these difficulties, the Court seems to acknowledge elements of artistry in expressive activity even if some forms of the activity may be beyond the bounds of art.[94]

Constitutional commentators acknowledge that the First Amendment protects art, but they fiercely debate the level of protection artistic expression should receive. Many commentators consider artistic

89. City of Dallas v. Stanglin 490 U.S. 19 (1989) (challenging a Dallas ordinance that established age limits and limited hours of operation for certain types of dance halls).

90. *Id.* at 25; *see also* United States v. O'Brien, 391 U.S. 367, 376 (1968) (rejecting the idea that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

91. *See supra* note 79.

92. For instance, a court would have little difficulty distinguishing drip paintings by Pollock from drips on the tarp below a house painter. While the materials used are primarily the same, the artistic intent and aesthetic sensibility of a Pollock painting distinguishes it as art. Art is intentional as art, even if the exact definition remains elusive.

93. For example, in the controversy that embroiled the National Endowment for the Arts in the 1980s, many members of Congress felt that Robert Mapplethorpe's retrospective photography exhibit including homoerotic pictures was pornographic, not artistic. NEA v. Finley, 524 U.S. 569, 574 (1998).

94. For instance, in *Doran v. Salem Inn, Inc.*, the Court found that a municipal ordinance prohibiting topless dancing was overbroad because it could implicate artistic topless dancing. 422 U.S. 922, 933 (1975). It stated,

> "The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in 'any public place' with uncovered breasts. . . . Thus, this ordinance would prohibit the performance of the 'Ballet Africains' and a number of other works of unquestionable artistic and socially redeeming significance."
>
> We have previously held that even though a statute or ordinance may be constitutionally applied to the activities of a particular defendant, that defendant may challenge it on the basis of overbreadth if it is so drawn as to sweep within its ambit protected speech or expression."

Id. (quoting Salem Inn, Inc. v. Frank, 364 F. Supp. 478, 483 (D.C.N.Y. 1973)).

expression important only as derivative or subservient to political expression.[95] Cass Sunstein, for instance, sees diminishing levels of protection as speech gets further from the "central concern of the First Amendment, which, broadly speaking, is effective popular control of public affairs."[96] In his view, apolitical, noncognitive expression with little communicative purpose, like most residential architecture, deserves little constitutional protection.[97] Alternatively, Martin Redish contends that one of the many purposes of the First Amendment is protecting individual autonomy and self-fulfillment, which would include "'nonrational' forms of communication [like music, art, and dance]."[98] One conclusion from this debate is clear: while artistic expression is squarely within the bounds of the First Amendment, the Court's failure to define a clear test for what constitutes artistic expression creates uncertainty about the level of protection a newly considered artistic medium would receive.

Given the Court's failure to define a clear test for determining if any activity is protected as art under the First Amendment, the best way to determine protection may be a simple comparison between protected activities and potentially protected activities.

2. Architecture's similarity to traditionally protected art

Like music, dance, and visual art, residential architecture can be a highly expressive way to communicate lifestyle choices, political stances, and individuality.[99] John J. Costonis, a First Amendment scholar who has written extensively about aesthetic zoning, remarked that architecture may "communicate ideas more effectively than does

95. *See, e.g.*, Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime, and the First Amendment*, 1987 WIS. L. REV. 221, 222 (1987).

96. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 603–04 (1986).

97. *Id.* Sunstein continues,

> Speech that concerns governmental processes is entitled to the highest level of protection; speech that has little or nothing to do with public affairs may be accorded less protection. Second, a distinction is drawn between cognitive and noncognitive aspects of speech. Speech that has purely noncognitive appeal will be entitled to less constitutional protection. Third, the purpose of the speaker is relevant: if the speaker is seeking to communicate a message, he will be treated more favorably than if he is not.

Id. (citations omitted).

98. Nahmod, *supra* note 95, at 243. (quoting M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 58 (1984)).

99. *See supra* text accompanying notes 82–83.

language. . . . [T]he architect [is] a poet who uses not words but building materials as a medium of expression."[100] Like many visual and literary artists, many architects' primary expressive purpose is to convey their unique vision of reality.[101] Robert Venturi, a highly influential architect and theorist, wrote that architecture "evokes many levels of meaning and combinations of focus: its space and its elements become readable and workable in several ways at once."[102] He encouraged architects to use "complexity and contradiction"[103] in architectural form to comment on the complexities of modernity, "to accept an architecture based on the richness and ambiguity of modern experience, [and] to deal with that experience whose anomalies and uncertainties give validity to architecture."[104]

A brief analysis of the quintessentially American architect, Frank Lloyd Wright,[105] illustrates that architecture is inherently expressive, but very difficult to categorize. An observer describing his organic style wrote, "[O]rganic architecture is the expression in architectural terms of an American intellectual tradition rooted in the transcendentalist philosophy of Ralph Waldo Emerson . . . . [It] nurtures in the inhabitant a keen awareness of nature's rhythms . . . and of the social dynamics of family and community life."[106] As proof that the expressive nature of architecture is more than just academic bravado, consider the testimony of an occupant of one of Wright's Usonian homes:

> At first there is the quiet pleasure and thankfulness for being surrounded by something so admirable to look upon—the four walls of any of the rooms. Then comes the business of living. The need for storage space is felt almost to desperation. . . . [Then] [c]omes a time of rebellion, an anger at any dwelling-place that presumes to dictate how its occupants live. . . . Possessions continued to be reduced. . . . In

100. JOHN J. COSTONIS, ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE 94 (1989) (internal quotations omitted).

101. Nivala, *supra* note 48, at 307; *see also* Nahmod, *supra* note 95, at 223 (arguing that the "visual artist, whatever the medium, expresses a view of the world" and that "[w]hen an artist creates, she is shaping a new reality, a form to signify a feeling, and a certain order among perceptions and sensations").

102. ROBERT VENTURI, COMPLEXITY AND CONTRADICTION IN ARCHITECTURE 16 (1973), *quoted in* Nivala, *supra* note 48, at 307 .

103. *Id.*

104. *Id.* at 41.

105. For pictures of Wright's homes, see ALAN WEINTRAUB ET AL., FRANK LLOYD WRIGHT HOUSES (2005).

106. DENNIS P. DOORDAN, TWENTIETH-CENTURY ARCHITECTURE 51 (2002).

> simplicity the individual comes at last to the place from which he started, the human level. He recognizes that it is only as himself, another created being, that he meets all creatures, animal or human. . . . Beauty and truth co-mingle in this house.[107]

Rather than simply expressing an architectural vision, this architectural design dictated an Emersonian lifestyle.

The expressive nature of architecture is aptly explained by the *House Beautiful* editor's offended response to the Edith Farnsworth House by architect Ludwig Meis van der Rohe. The home was a "single glass-enclosed volume" incorporating the "minimalist aesthetic of abstract modern art, an interest in industrial materials, and the elegant simplicity of Japanese design."[108] The editor viewed the design as an attack on the American value of consumerism, writing: "They are all trying to sell the idea that 'less is more,' both as a criterion for design, and as a basis for judgment of the good life. They are promoting unlivability, [and] stripped-down emptiness."[109] As these examples illustrate, visionary, iconoclastic homes communicate complex messages about their designers and residents, in some ways, more effectively than words.

Religious architecture further illustrates architecture's expressive qualities and demonstrates architecture's ability to magnify religious experience. As architect and author Christian Norberg-Schultz wrote, "In the Church [building], man's understanding of the cosmos, as well as his own life in the world was kept and visualized. . . . Thus, the church illustrates what architecture is all about, and teaches us how to use its language."[110] Just as religious architecture is an

107. *Id.* at 176. Wright designed his series of Usonian homes to be affordable for the average, middle-class family. *Id.*

108. *Id.* at 169.

109. *Id.* at 169–70 (internal citation omitted).

110. C. NORBERG-SCHULZ, THE CONCEPT OF DWELLING 72 (1985) (*quoted in* Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401, 403 (1991)) (internal quotations omitted). Carmella provides a comprehensive look at the expressive qualities of religious architecture. *Id.* In discussing the importance of religious architecture, two protestant thinkers wrote,

> Architecture for churches is a matter of gospel. A church that is interested in proclaiming the gospel must also be interested in architecture, for year after year the architecture of the church proclaims a message that either augments the preached Word or conflicts with it. Church architecture cannot, therefore, be left to those of refined tastes, the aesthetic elite, or even the professional architect. If the gospel of Christ is worthy of accurate verbal proclamation week by week, it is also worthy of faithful architectural proclamation, where its message speaks year after year.

Id. at 471 (quoting D. BRUGGINK & C. DROPPERS, CHRIST AND ARCHITECTURE 1 (1965)).

integral part of religious expression, residential architecture can be integral to expressions of individual lifestyle choices and conceptions of taste and beauty.

3. Limits on the analogy of architecture as art

Architecture does not easily fit into the jurisprudence that has grown up around art and other expressive conduct. Its commercial nature and functionality seem to distinguish it from more traditional artistic forms. Additionally, some buildings might be so clearly functional and devoid of expressive elements—tract housing, for instance—that they fall outside the scope of First Amendment protection. Still, purely functional residential building does not negate the importance of protecting expressive, artistic architecture, like the iconoclastic designs described in this Comment.

Some might attempt to distinguish traditional art from residential architecture, because homeowners may not choose an original design. Originality of design, however, is not required for First Amendment protection given judicial precedent protecting duplicative, yet artistically expressive, material.[111] Additionally, multiple motivations affecting artistic expression (i.e., creating art for compensation) do not preclude First Amendment protection;[112] this reality implies that a homeowner's concerns about cost do not minimize the artistic nature of his building choice. Along similar lines, the artistic nature of architecture creates an umbrella of First Amendment protection for both the homeowner and the designing architect. Just as the First Amendment protects an author and a book owner,[113] it should protect both the designing architect and the

111. "Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others." Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 570 (1995).

112. *See* Bery v. City of New York, 97 F.3d 689, 696 (2d Cir. 1996). The Court upheld First Amendment protection for the street artists even though the artists were selling their art commercially. The Second Circuit in *Bery* quoted the Supreme Court in *Riley v. National Federation of the Blind of North Carolina*: "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Id.* (quoting Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 801 (1988)).

113. As illustrative that First Amendment rights are not limited to the initial speaker, see *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970) (upholding a teacher's First Amendment right to academic freedom to teach a controversial short story in public school).

homeowner whose expressive interests are realized through a particular architectural design.

Perhaps the courts' failure to give architecture First Amendment protection is because architecture's practicality makes it distinct from purely aesthetic art. Architecture's dual purposes—combining both form and function—might lead some to relegate it beyond the margins of the First Amendment. But, as the occupant of Wright's Usonian house articulated, the functionality of architecture can make it *more* expressive than traditional forms of art like sculpture or painting.[114] In addition to providing a visual commentary about one's beliefs, taste, or politics, architecture expresses an owner's lifestyle choices in unique ways.

The ambiguity in the Court's distinctions between protected artistic expression and unprotected conduct also poses unique problems for classifying residential homes as art. Just as not all dance is artistic expression, as one architectural theorist glibly remarked, not all buildings are architecture.[115] True, the minority of buildings likely have the strong expressive elements of homes like those of the Stoyanoffs or Reids. This criticism, however, is likely true of most categories of activity that could have an artistic element. On any given Saturday night, the number of dancers akin to the disco roller-skaters in *Dallas v. Stanglin*[116] is probably significantly greater than the number of dancers performing Martha Graham or Bob Fosse. Still, the existence of unprotected, social dance does not function to negate First Amendment protection provided artistic dance. Similarly, expressive artistic architecture should be protected despite the existence of homes—tract housing, for instance—with few expressive elements.

All architecture, by definition, has expressive elements or kernels, in Rehnquist's words.[117] Individual design choices (siding versus brick[118]

114. For instance, the French neoclassical architect Louis Boullée advocated "speaking architecture" in which form indicated function. He designed a craftsman's shelter shaped "like the barrel hoops fabricated by a cooper." DOORDAN, *supra* note 106, at xv.

115. ROBERT HARBISON, THE BUILT, THE UNBUILT AND THE UNBUILDABLE: IN PURSUIT OF ARCHITECTURAL MEANING 7 (1991).

116. *See supra* notes 89–90 and accompanying text.

117. *Id.* Architecture has been defined as designing or building a material structure (usually habitable) with aesthetic effect and which transcends mere function. John Hill, *What is Architecture?*, http://www.archidose.org/Mar00/032700.html (last visited Dec. 20, 2005); "Architecture," Word Reference, http://www.wordreference.com/definition/architecture (last visited Dec. 20, 2005). Even tract housing has elements for aesthetic effect—for instance, siding, paint, or decorative embellishments. While these elements are purely for aesthetic effect, these "artistic" kernels are too small to warrant First Amendment protection.

or variations in color, for example) might not place purely functional residential building within the purview of First Amendment protection. However, by their nature and environmental context, the iconoclastic, non-conforming designs discussed in this Comment are expressive in emotional, non-rational ways comparable to protected artistic expression.

This Comment cannot supply a future court with a bright line rule for distinguishing between true artistic expression and *de minimis* expressive kernels to determine if the threshold inquiry for expressive conduct has been satisfied.[119] Determining whether residential architecture is akin to traditional artistic expression is necessarily a fact-bound inquiry; any other approach would detrimentally oversimplify artistic expression. Fortunately, the Supreme Court's First Amendment jurisprudence is well suited to this kind of balancing. Freedom of association cases, for instance, often turn on the relative cohesion of the group advocating a particular exclusionary policy;[120] similarly, First Amendment protection for architecture may ultimately turn on the strength of the artistic intent and expression of the architect or homeowner.

Recognizing, distinguishing, and evaluating the strength of artistic intent and expressive purpose in architecture is difficult but still within the competence of the courts.[121] This Comment now turns to the validity of aesthetic ordinances restricting this protected category of speech.

118. Some communities do regulate these design choices to an exacting level. For instance, in *Georgia Manufacturing Housing Ass'n v. Spalding County*, the court upheld an aesthetic zoning ordinance requiring a 4:12 roof pitch. 148 F.3d 1304 (11th Cir. 1998). In *Morrison v. Boutwell*, the court upheld, under rational basis review, the decision of an architectural review board to refuse a homeowner's request to use vinyl siding, because the prohibition was made clear in the lot's restrictive covenant. 717 So. 2d 427 (Ala. Civ. App. 1998).

119. *See supra* note 117.

120. In *Roberts v. U.S. Jaycees*, for example, the Court acknowledged the First Amendment protection for "collective effort on behalf of shared goals," but ultimately found that the cohesiveness and clarity of the Jaycee's message was insufficient to justify excluding women. 468 U.S. 609, 622 (1984). Alternatively, the Court upheld the rights of the Boy Scouts of America to exclude gay scout masters because of the strength and clarity of the organization's expressive assertion that "homosexual conduct is not morally straight." Boy Scouts of America v. Dale, 530 U.S. 640, 651 (2000).

121. For instance, the Court distinguished between social dance and expressive dance in *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). As the court indicated in *Bery v. City of New York*, "Courts must determine what constitutes expression within the ambit of the First Amendment . . . . This surely will prove difficult at times, but that difficulty does not warrant placing all visual expression in limbo outside the reach of the First Amendment's protective arm." 97 F.3d 689, 696 (2d Cir. 1996).

B. Content Neutrality and Aesthetic Restrictions on Residential Homes

Having established that artistic expression deserves First Amendment protection and that architecture can be artistically expressive, this Comment now considers the effect of these conclusions on the aesthetic zoning regulations discussed in Part II. If an affected citizen were to challenge an excessive similarity and difference regulation as a violation of the First Amendment's Free Speech Clause, a court would likely find that such an ordinance unconstitutionally restricts expression based on the content of the speaker's message. Any alleged similarity to content-neutral zoning ordinances restricting the locations of sexually-oriented business is too tenuous to find excessive similarity and difference ordinances content neutral. In contrast, courts will likely find ordinances requiring conformity with a pre-existing community architectural style neutral about the content of the message expressed in the architectural design.

1. The content-neutrality inquiry

The appropriate inquiry for determining content neutrality asks whether the architectural design endangers the government's interests because of the message that it communicates.[122] An ordinance or statute is content neutral if its application is independent of the message being expressed.[123] After such a determination, the court then applies intermediate scrutiny, balancing the interests of the government against the interest in protecting free speech. On the other hand, a content-based ordinance would apply to certain speech discriminately depending on the specific content of the speech. When applied to highly valued speech like artistic expression, a content-based statute would almost categorically be unconstitutional. As the Court held in *Police Department of Chicago v. Mosley*, "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[124]

For example, the Supreme Court held that a universally applicable ordinance prohibiting noise above a certain decibel level was content neutral.[125] Had the ordinance prohibited a specific genre of music—

122. Texas v. Johnson, 491 U.S. 397, 404 (1989).

123. Stone, *supra* note 75, at 189.

124. 408 U.S. 92, 95 (1972).

125. *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989).

protest songs, for instance—above a certain decibel level and left other musical genres unrestricted, a court would find the ordinance content based and consequently subject to strict scrutiny. In the latter example, the government would have been impermissibly distinguishing between types of music based on the content of the message expressed. In the former example, the government's ordinance incidentally burdened speech while primarily regulating volume. Content-neutral restrictions on speech are then subject to intermediate scrutiny.

2. Excessive similarity and difference regulations fail content neutrality

Excessive similarity or difference regulations are inherently content based and, thus, unconstitutional.[126] Consider the former ordinance for Lake Forest, Illinois.[127] By requiring new buildings to conform to the surrounding neighborhood, the ordinance tacitly rejects experimental or modern design in preference for the traditional look of the community. The implicit nature of the preference does not preclude the ordinance from a content-based classification.[128] These types of aesthetic regulations are particularly questionable because the medium and message of architectural expression are inexorably linked.[129] In that sense, architecture is distinct from other content-neutral aesthetic regulations restricting, for example, signs or billboards.[130] This distinction becomes clear by comparing the content-neutral aesthetic zoning ordinance prohibiting billboards upheld in *City Council of Los Angeles v. Taxpayers for Vincent*[131] with the prohibition on non-conforming architecture upheld in *Reid v. Architectural Board of Review of Cleveland Heights.*[132] As one commentator articulated,

> Unlike a billboard, where structure is merely a forum for a transitory promotion, a building design conveys its statement in the arrangement

126. Very few governmental actions have passed strict scrutiny, particularly in First Amendment analysis. The Supreme Court has found some content-based campaign finance statutes constitutional under strict scrutiny, but in the vast majority of cases, strict scrutiny becomes synonymous with unconstitutionality.

127. *See supra* text accompanying note 45.

128. As the Court indicated in *Young v. American Mini Theatres, Inc.*, "[T]he essence of [content neutrality] is the need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view expressed by the communicator." 427 U.S. 50, 67 (1976).

129. Poole, *supra* note 16, at 313.

130. *See* City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).

131. *Id.*

132. 192 N.E.2d 74. (Ohio Ct. App. 1963).

> of bricks and mortar. . . . Los Angeles did not care if the message was "Vote for Vincent" or "Eat at Joe's"; the focus was on the ugliness of signs. In contrast, Cleveland Heights rejected Ms. Reid's home design precisely because they objected to her personal statement in glass and concrete about a comfortable home environment.[133]

Furthermore, in denying building permits, many communities have justified their decisions based on the seeming neutrality of property values rather than on the subjectivity of aesthetics and thus have attempted to qualify their regulations as content neutral. For instance, in denying Ms. Reid's building permit in *Reid v. Architectural Board of Review of Cleveland Heights*, the court held that, in addition to the lack of conformity, the proposed home would set a precedent requiring the approval of any "design not conforming to the general character of the neighborhood," diminish property values, and be generally detrimental, now and in the future, to the neighborhood.[134] All of these effects are secondary to the architectural review board's initial valuation that the house was aesthetically displeasing.[135] One commentator aptly characterized this taste-based judgment as follows:

> [The] property value [standard is] nothing more than an attempt to measure (and impose) majoritarian taste. When a community says, "We think a pyramid house will hurt our property values," they are simply saying that "enough people will find your house distasteful that it will make our homes worth less." Even if such a conclusion could be proven, the fact remains that all government is doing is measuring community distaste for the expression of an idea.[136]

Laws prohibiting nonconforming architecture function to prohibit unpopular expressions in architecture while allowing mainstream architectural designs. This content-based prohibition is unconstitutional because "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints . . . at the expense of others."[137]

Generally, a city's concerns about the secondary effects of speech do not give content-based regulations of highly valued speech a

133. Poole, *supra* note 16, at 312–13.

134. 192 N.E.2d at 77–78.

135. Poole, *supra* note 16, at 322–23.

136. *Id.* at 323.

137. *Vincent*, 466 U.S. at 804.

constitutional pass, unless those ordinances also pass strict scrutiny.[138] However, in a confusing line of cases, the Supreme Court has found ordinances targeting sexually oriented businesses content neutral based on municipalities' interests in prohibiting the negative secondary effects of those businesses.[139] For example, in *City of Renton v. Playtime Theatres, Inc.*, the Court found that the zoning ordinance that facially appeared to distinguish adult theaters from other types of theaters was content neutral because the city council's "'predominant concerns' were with the secondary effects of the adult theaters."[140] Since the ordinance was primarily enacted because of concern about safety, property values, neighborhood quality, and general quality of life inherently threatened by adult theaters, the Court found the ordinance content neutral.[141]

Based on *Renton* and the similar holding in *Young v. American Mini Theatres, Inc.*, some commentators have argued that excessive similarity or difference ordinances are content neutral because cities are primarily concerned with the detrimental secondary effects of nonconforming architecture. The argument proceeds that cities are only regulating ugly or nonconforming architecture because of their reasonable belief that these homes will detrimentally affect property values.[142] Similarly, defendants of ordinances restricting sexually oriented businesses claimed that the ordinances were content neutral because they focused on the secondary effects of sexually oriented businesses, rather than on their content.

This analogy is misapplied. First, the Court has been reluctant to apply the secondary effects doctrine outside the realm of sexually oriented businesses.[143] Second, even under the unlikely possibility that a court would apply *Renton* to architecture; the secondary effects doctrine is inapposite. *Renton*, as interpreted, distinguishes between regulations

138. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 62–63 (Brennan, J., dissenting).

139. *See id.*; *see also* Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1986).

140. *Renton*, 475 U.S. at 47. *But see id.* at 59–61 (Brennan, J., dissenting) (arguing that many of the secondary effects are just alternate ways of expressing disapproval of adult-theater content and that the language indicating concern over secondary effects was added after a law suit was filed challenging its constitutional validity).

141. *Id.* at 48 (majority opinion).

142. Under this argument, the city is not required to conduct any independent analysis of architecture on property values. In *Renton*, the city was only required to base their justification on reasonable belief that the ordinance will have a positive effect on their substantial government interest. *Id.* at 51–52.

143. Boos v. Barry, 485 U.S. 312, 320–21 (1988); *see also id.* at 334–38 (Brennan, J., concurring) (indicating his displeasure with the majority's assumption that the secondary effects test could apply outside the context of sexually oriented businesses).

based on the "secondary [effects] . . . associated with [a] type of speech,"[144] which are content neutral, and regulations based on the "direct impact" of speech, which are content based.[145] This hair-splitting distinction makes a limited amount of sense if one considers that only patrons receive the direct communicative effect of an adult movie theater's content; the negative secondary effects occur outside of the theater and are arguably disassociated from the content playing inside.[146] In contrast, it is impossible to separate the effects of architecture into direct and secondary categories because buildings and their inherent message or "content" are both immediately in the public space.[147]

In short, the failure of an analogy between ordinances targeting sexually oriented businesses and excessive similarity or difference ordinances leaves the latter without a constitutional escape route to avoid a content-based judgment. Excessive similarity and difference ordinances are content based because they distinguish on the basis of the messages communicated by nonconforming residential architecture.

2. Community architectural style regulations more likely pass content neutrality

Regulations based on community architectural style are more likely to pass the content-neutrality inquiry than are regulations based on excessive similarity or difference. The distinctions between these two sister ordinances are small but significant. Community architectural style ordinances require particular designs in particular neighborhoods, but, at their best, still provide a place for nonconforming architecture. In Coral Gables, Florida, for instance, the carefully designated architectural style was first adopted through private restrictive covenants and then later codified in the community charter.[148] Codifying an architectural style for a specific neighborhood in a community's comprehensive plan removes much of the subjectivity from an architectural review board's decision-

144. *Id.* at 321 (majority opinion).

145. *Id.*

146. *Id.* at 320 ("The content of the films being shown inside the theaters was irrelevant and was not the target of the regulation.").

147. *Id.* at 321. O'Connor splits hairs in a comparable way in her opinion. She imagines an ordinance justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies. Then, she argues, analysis of the measure as a content- based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech. *Id.*

148. *See supra* notes 62–67 and accompanying text.

making process. The enforcement of these provisions does not call for a taste-based assessment of the progressive home design by the architectural review board. As one commentator argued, community architectural style regulations do not label nonconforming architecture inferior to the community style, but instead implicitly communicate,

> Your pyramid design home is unacceptable, not . . . because it is distasteful, but because our community plan for architectural styles calls for a Dutch colonial house in that particular location. If you want to build a contemporary style house, build it in those areas of the city where there are other contemporary designs.[149]

Similar to ordinances designating specific areas for performing arts, sculpture gardens, or protests, these regulations can be interpreted as content-neutral restrictions as long as the city still provides for a reasonable, alternative location for the nonconforming home.[150]

The comprehensiveness and forethought of a community-wide plan for architecture are the distinguishing factors between the majority of excessive similarity or difference regulations and community architectural style regulations.[151] Unlike excessive similarity or difference regulations, which reify the majority of the community's tastes after a neighborhood has developed its own ad hoc architectural style,[152] regulations designating a specific community architectural style give architectural review boards an objective standard on which to base their decisions and provide notice to potential land purchasers concerning the acceptability of their designs. Furthermore, as explained

149. Poole, *supra* note 16, at 332.

150. The trouble with this argument, as this Comment will analyze more fully, *see infra* note 185 and accompanying text, is that the city of Coral Gables has no place for contemporary design.

151. This distinction is supported by the Court's analysis in *Berman v. Parker*, 348 U.S. 26 (1954). In justifying the government's redevelopment plan, the Court argued, "If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly." *Id.* at 35. The distinction is further supported by the Supreme Court's recent holding in Kelo v. City of New London, 125 S. Ct. 2655 (2005). The Court reaffirmed the legitimacy of comprehensive planning in communities.

> [T]he City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. . . . Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us . . . to resolve the challenges to individual owners . . . in light of the entire plan.

Id. at 2665.

152. Reid v. Architectural Bd. of Review, 192 N.E.2d 74, 80 (Ohio Ct. App. 1963) (Corrigan, J., dissenting).

above, the forethought involved in planning for and providing areas in which iconoclastic homes can be built properly accounts for the interests of the community while preserving the First Amendment interests of homebuilders and architects with unique tastes.

Specific community architectural style ordinances pass the content-neutrality test. Although excessive similarity or difference regulations appear to be content based, there is value in considering both types of ordinances in the balance of the First Amendment analysis.

C. Significant Governmental Interest

Upon determining that an ordinance is content neutral, the next step in the First Amendment analysis requires a court to weigh the strength of the government's interests in the regulation against the strength of the expressive interests at stake.

The Court gives a great deal of deference to the power of municipalities to implement zoning restrictions since zoning is possibly "the most essential function performed by local government . . . [as] one of the primary means by which we protect that sometimes difficult to define concept of quality of life."[153] As discussed in Part II, aesthetic considerations fall squarely under the broad scope of the general welfare, justifying a governmental regulatory scheme.[154] Additionally, communities may have various, significant interests that justify aesthetic zoning. For instance, traffic safety could be implicated by a particularly distracting building design or color in a high-traffic area.[155]

Architecture's permanence strengthens most governmental interests in aesthetic zoning against those of a single, transitory property owner. As one commentator conjectured, "Should we fail to act in a unified, well directed manner in our demand for aesthetic concepts . . . the eyesores of today will exist and multiply in the years to come."[156] Justice Brennan discussed this unique trait of property in his dissent in *Nolan v. California Coastal Commission*:

> Property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is more accurately described as

153. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 80 (quoting Vill. of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)).

154. *See supra* text accompanying notes 24–33.

155. Tappendorf, *supra* note 38, at 962–64.

156. Sheldon E. Steinbach, *Aesthetic Zoning: Property Values and the Judicial Decision Process*, 35 MO. L. REV. 176, 186 (1970).

> being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing.[157]

The city skylines in New York and San Francisco illustrate Brennan's point; these cityscapes arise on private property through private capital, but affect all city residents. In a way, skylines become "'urban symbols' of each city's citizens' collective identity."[158] On a smaller scale, neighborhood residents have a similar investment in the aesthetics of their residential community. The government's interest in protecting the communal aesthetic would likely be a particularly strong justification for a community architecture style regulation, given the forethought and planning that distinguish these ordinances. On the contrary, in a community marked with an ad hoc architectural style, the interest of preserving a communal aesthetic would seem weak and disingenuous.

The government also has a significant interest in protecting the property values of the surrounding community. The government has recognized the impact of aesthetics on property value in takings claims, providing homeowners compensation for obstructed views, for example.[159] Even so, claiming depressed property values is an unstable hook on which to hang an ordinance restricting speech. Property values do not hinge on any single consideration.[160] The neighborhood characteristics that affect house price assessments include police response statistics, school quality, and the age and size of the surrounding homes.[161] Such characteristics indicate that other factors

157. 483 U.S. 825, 863–64 (1987) (Brennan, J., dissenting) (quoting Joseph L. Sax, *Takings, Private Property, and Public Rights*, 81 YALE L.J. 149, 152 (1972)).

158. Georgette C. Poindexter, *Light, Air, or Manhattanization?: Communal Aesthetics in Zoning Central City Real Estate Development*, 78 B.U. L. REV. 445, 505. (quoting Spiro Kostof, *The Skyscraper City*, 140 DESIGN Q. 32, 47 (1988)).

159. George P. Smith, II & Griffin W. Fernandez, *The Price of Beauty: An Economic Approach to Aesthetic Nuisance*, 15 HARV. ENVTL. L. REV. 53, 77–80 (1991). The article cites *La Plata Electric Ass'n v. Cummins* in which the Colorado Supreme Court valued an obstructed view in a takings claim based on comparative sales data. *Id.* at 78 (quoting *La Plata*, 728 P.2d 696, 700). Additionally, in *Keinz v. State*, the court commented that the valuation of a view "may be a matter of judgment but it is also a matter of dollars and cents." Smith & Fernandez, *supra* at 79–80 (quoting Keinz v. State, 2 A.D.2d. 415, 417 (N.Y. App. Div. 1956)).

160. *See* 1 WILLIAMS & TAYLOR, *supra* note 46, §§ 9.01–.25 (*quoted in* Regan, *supra* note 26, at 1013 n.3).

161. Thomas G. Thibodeau, *Marking Single-Family Property Values to Market*, 31 REAL EST. ECON. 1, 22 (2003). The design of neighboring homes may have some effect on property values, but the effect is not particularly clear. Consequently, other markers are used for assessing property value.

have more to do with housing prices than the design of a neighbor's home.[162]

In sum, the government does have important interests at stake in aesthetic zoning regulations. First, courts have recognized a particularly strong interest in community-wide zoning. Second, architecture's permanence gives the government a greater interest in considerations about housing placement and the social acceptability of architectural design. Finally, property values are an important consideration with aesthetic zoning, although this justification may not be as compelling as many might intuitively think.

The final inquiry in an expressive conduct analysis requires a court to weigh the government's interests in aesthetic zoning against the free speech rights of prospective homeowners.

D. Balancing the Government's Interests Against the Free Speech Rights of Homeowners

In balancing the government's interests against the free speech rights of architects and future homeowners, three considerations are particularly noteworthy: first, the invalidity of prohibitions on offensive speech; second, the Court's special concern about expression in the home; and finally, the government's narrow interest in protecting unwitting observers from offensive speech. First Amendment jurisprudence is particularly sensitive to protecting minority views and expression in the home, which gives iconoclastic residential architecture particularly significant weight when balanced against governmental interests. While the Court has expressed reluctance to subject unwilling observers to offensive speech, these concerns minimally apply to residential architecture and are unlikely, on their own, to tip the balances in the government's favor. The governmental interests in ordinances requiring conformity to a preexisting architectural style may outweigh a homeowner's expressive interests if nonconforming architecture is permitted in some residential zone within the jurisdiction. On the other hand, even if ordinances prohibiting excessive difference or similarity were to pass a content-neutral inquiry, a municipality's interests in these regulations do not outweigh the homeowners' expressive interests in building nonconforming architecture.

162. Reid v. Architectural Bd. of Review, 192 N.E.2d 74, 79 (Ohio 1963) (Corrigan, J., dissenting).

1. Invalidity of speech prohibitions on offensive speech

Outside the context of First Amendment jurisprudence, the importance of community beauty clearly resonates with most people and with the Court, as evidenced by its holding in *Berman v. Parker*.[163] However, the First Amendment stands as a bulwark against the imposition of the subjective tastes of the majority on the minority. Without fail, the Supreme Court has held that offensive or distasteful speech is still fully protected speech.[164] As Justice Blackmun argued in defense of sexually explicit speech in adult bookstores,

> The presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment. . . . [I]n attempting to accommodate a locality's concern to protect the character of its community life, the Court must remain attentive . . . to the protection . . . afford[ed] to minorities against the "standardization of ideas."[165]

In essence, the Court's unwillingness to uphold speech restrictions based on the offensiveness or distaste of the speech strips purely aesthetic zoning of much of its validity in comparison to individual expression. First Amendment precedents upholding offensive, ugly, and insulting speech undermine a municipality's objections to offensive, nonconforming architecture embodied in both excessive similarity or difference ordinances and community architectural style ordinances.

163. 348 U.S. 26, 33 (1954)

164. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 601 (1998) (Souter, J., dissenting); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 505 (1984); Chi. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas."); *see also* Marks v. City of Chesapeake, 883 F.2d 308, 311 (4th Cir. 1989) ("[P]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." (quoting Palmore v. Sidoti, 466 U.S. 429 (1984))). The *Marks* court distinguished offensive speech, which is fully protected, from obscene speech, which is not protected under the First Amendment.

165. Nivala, *supra* note 48, at 314 (quoting Schad v. Borough of Mount Ephraim, 452 U.S. 61, 77, 79 (1981) (Blackmun, J., concurring) (quoting Terminiello v. Chicago, 337 U.S. 1, 4–5 (1949))).

2. The special importance of expression in the home

Also weighing in favor of a potential homeowner seeking to build an atypical home is the Court's "special respect for individual liberty in the home" and "a person's ability to speak there."[166] In striking down an ordinance prohibiting residential signs, the Court found that while regulating the public forum is a "constant and unavoidable" task, the government has a much less pressing need to regulate expression at a private home.[167] *City of Ladue v. Gilleo* is particularly relevant to this discussion because the homeowner's anti-war signs were offensive to some in her community, yet her free speech rights were upheld in part because of the importance of preserving expression in the home. Expression at one's residence, either through lawn signs or artistic architectural design, is particularly important because it constitutes a uniquely intimate reflection of the occupant.

3. Minimal captive audience problems with atypical residential architecture

In evaluating particularly distasteful speech, the Court is attentive to the public's ability to avoid the offense.[168] When offensive speech is "so intrusive that the unwilling audience cannot avoid it,"[169] the "deliberate 'verbal or visual assault' . . . justifies proscription," regardless of the speech's message.[170] The importance of protecting speech usually means "tolerat[ing] insulting, and even outrageous, speech"[171] in the public sphere. On the other hand, the Court held in *Frisby v. Schultz* that the sanctity of the home has outweighed free speech rights when a substantial privacy interest has been invaded in a particularly intolerable way.[172] Again, the permanence of architecture strengthens the government's position—it is very difficult to avert one's eyes in one's own home to avoid seeing a pyramid-shaped house across the street.

166. City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994).

167. *Id.*

168. Erznoznik v. Jacksonville, 422 U.S. 205, 210–11 (1975); Spence v. Washington, 418 U.S. 405, 412 (1974); Cohen v. California, 403 U.S. 15, 21 (1971); Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736 (1970).

169. Hill v. Colorado, 530 U.S. 703, 716 (2000); *see also* Frisby v. Schultz, 487 U.S. 474, 487 (1988).

170. *Hill*, 530 U.S. at 716. (quoting *Erznoznik*, 422 U.S. at 210–11 n.6).

171. *Id.* at 751–52 (Scalia, J., dissenting) (quoting Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 383 (1997)).

172. *Frisby*, 487 U.S. at 484; *Erznoznik*, 422 U.S. at 210.

While the permanence of architecture would strengthen the government's argument, the captive audience justification for these aesthetic regulations is unlikely to apply. First, it is questionable whether even really ugly architecture would constitute a "visual assault" akin to abortion picketers (where the captive audience justification has been most recently applied).[173] Second, the privacy invasion that so concerned the Court in *Frisby* does not occur with expressive architecture; a neighbor may confront an iconoclastic home design upon entering or existing their home, but would not be bombarded with the offensive image within the sanctity of their home.[174] Finally, the Court has applied the captive audience justification sparingly—passersby at an adult drive-in movie theater were instructed to avert their eyes, as were courthouse patrons when assaulted by particularly offensive language emblazoned on a jacket.[175]

Unknown variables—both a future court's disposition and possible facts of a future test case—preclude any conclusive statement about whether the government's interests in regulating community aesthetics would outweigh the expressive rights of a residential property owner. However, the invalidity of regulations prohibiting offensive speech, the questionable implication of offensive architecture on surrounding property values, and the particular importance of expression on one's own property all weigh against the constitutionality of excessive difference or similarity ordinances.

Ordinances requiring harmony with a community architectural style fare a little better in this constitutional balancing. In these instances, the government is protecting a preexisting plan, which reflects buy-in from the existing residents. Consequently, communities like Coral Gables, Florida, have a stronger interest in protecting the communal aesthetic. The constitutionality of regulations protecting a community architectural style may turn on the availability of alternative modes of expression for iconoclastic home builders.

173. *Schenck*, 519 U.S. at 383; *Frisby*, 487 U.S. at 483.

174. In *Frisby*, the ordinance prohibiting picketing an individual home was upheld because of the importance of residential privacy and because the ordinance allowed the protesters ample alternatives. *Frisby*, 487 U.S. at 484.

175. *See* Cohen v. California, 403 U.S. 15, 21 (1971) (Cohen's jacket read, "F*** the draft."); *Erznoznik*, 422 U.S. at 209.

E. Time, Manner, and Place Restrictions on Residential Homes

The final inquiry in a First Amendment expressive conduct inquiry is whether reasonable alternative avenues of expression exist. If such avenues exist, the speaker's expressive interests are less burdened and the government regulation is generally upheld. However, given the unique nature of architectural expression, blurring message and medium, it is doubtful whether comparable expression could occur less obtrusively.[176]

Even when evaluating a political message expressed through architecture, such as a rainbow-painted exterior in support of gay rights or an environmentally efficient home built with recycled materials, it is difficult to imagine that the expressive statement could be made another way with the same magnitude. Using one's home for personal expression is literally a Whitmanesque pronouncement from the rooftops.[177]

Could, however, a city require that an unconventional home be built in a different residential zone? The Court has consistently upheld zoning regulations that severely limit building spaces for businesses peddling offensive speech.[178] In doing so, the Court disregarded the economic hardship this requirement would place on the businesses.[179] Even with businesses, however, reasonability requires some place for expression within the bounds of the municipality.[180] Ordinances prohibiting excessive similarity or difference that apply city-wide effectively exclude nonconforming architecture from the municipality. The lack of an alternative avenue of expression cuts the final thread by which excessive similarity or difference ordinances could remain constitutionally intact.

176. Confronted with the argument that medium and message were inextricably connected in *Ward v. Rock against Racism*, the Court still upheld noise regulation. 491 U.S. 781 (1989). While the volume of their music surely contributed to the intensity of their communication, the lyrics and sound were still expressed even with the volume regulation. In contrast, asking an architect designing environmentally conscious buildings with recycled materials to instead use a recycling sign or bin conveys an entirely different message.

177. WALT WHITMAN, *Song of Myself*, LEAVES OF GRASS, *reprinted in* THE WALT WHITMAN ARCHIVE (Ed Folsom & Kenneth M. Price eds.), *available at* http://www.whitmanarchive.org (last visited Dec. 20, 2005).

178. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (holding that an adult movie theater had a reasonable alternative venue because the city's zoning ordinances allowed the theater on approximately five percent of the city's land); *see also* Rice, *supra* note 22, at 466.

179. *Renton*, 475 U.S. at 54; *see also* Scott D. Berghold, *Effective Zoning of Sexually Oriented Business*, *in* PROTECTING FREE SPEECH AND EXPRESSION: THE FIRST AMENDMENT AND LAND USE LAW 37–38 (Daniel R. Mandelker & Rebecca L. Rubin eds., 2001).

180. *Renton*, 475 U.S. at 54.

Ordinances protecting the coordinated aesthetic of a community may be less suspect because, depending on the city, alternative zones may allow nonconforming architecture.[181] In such instances, a time, place, or manner restriction on speech seems particularly apropos since the zoning ordinances dictate where speech can occur rather than directly regulating the content of the speech.[182]

With time, manner, and place restrictions, permanence and the special character of real property weigh in favor of the prospective home owner. The prospect of requiring a private landowner with nontraditional architectural tastes to uproot, with little regard for economic impact, is unsettling. Even if a homeowner knew of the ordinance prior to purchasing land, requiring one designated neighborhood with all that entails in terms of school choice, commuting time, etc., seems a particularly high price to pay for an unconventional house. The unique nature of property, homeowners' important expressive interests, and lesser regulatory concerns for residences compared with commercial property might make a time, place, or manner restriction unreasonably burdensome. Since First Amendment inquiries are predominantly fact-bound, the constitutionality of community architectural style regulations is unclear, but suspect.

Stretching the boundaries of First Amendment protection to include some residential architecture is difficult but necessary given the important expressive and artistic interests at stake. Acknowledging First Amendment interests in residential architecture will not always lead a court to dismiss a municipality's interest in aesthetic zoning. The acknowledgement does, however, require intermediate scrutiny and a careful weighing of community and individual interests. Were a court to consider ordinances prohibiting excessive similarity or difference with surrounding architecture, it would likely find such ordinances unconstitutional. Even if these ordinances were able to pass the content-neutrality inquiry, the interests of an individual homeowner would still likely outweigh governmental interests at stake. Ordinances requiring conformity to a preexisting community architectural style fare a little better under constitutional scrutiny but remain suspect because of the

181. The example ordinance from Coral Gables, Florida, applies city-wide however. If the prohibition on nonconforming architecture was just created through municipal law, free speech would probably require the city to grant a nonconforming home design a building permit. However, since each deed in Coral Gables had a restrictive covenant, the city might still be able to exclude nonconforming housing.

182. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

difficulties of providing alternative avenues of expression for iconoclastic architecture.

IV. POLICY BENEFITS OF RAISING THE STANDARD OF REVIEW

Regardless of how a particular aesthetic zoning ordinance fares after an expressive conduct inquiry, there is inherent value in providing expressive residential architecture First Amendment protection, because it raises the level of judicial scrutiny in favor of the homeowner. This added level of scrutiny would protect minority interests against the dictates of majoritarian tastes, would encourage architectural creativity and innovation, and would encourage the passage of well-considered, constitutional zoning ordinances.

When I discussed this Comment with classmates, the most typical reaction was, "Fine in theory, but I don't want some 'expressive' monstrosity next door." This view generates some sympathy; however, one of the purposes of the First Amendment is to guard against such majoritarian dictates. A vibrant marketplace of ideas requires the majority to tolerate the outrageous speech found on the periphery in order to provide "adequate breathing space" for the core of First Amendment protection.[183] Creating a legacy of artistic tolerance is much more important for our democratic heritage than codifying the tastes of architectural review boards.[184]

In response to concerns of my classmates, providing First Amendment protection for architecture is unlikely to lead to a pyramid-shaped house on every square block, or even every town. Cases in which architectural designs are rejected for nonconformity or "grotesque design" are uncommon. In Coral Gables, Florida, for instance, the architectural review board requires "style conformity" with the existing community; however, most complaints focus on the board's laxity rather than their strict enforcement.[185] Iconoclasm is rare, particularly in

183. Boos v. Barry, 485 U.S. 312, 322 (1988) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988)).

184. *See* Lee Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 460 (1983) (arguing that "[f]or speech that attacks and challenges community values, the act of toleration serves both to define and reaffirm those values; the act of toleration implies a contrary belief, and demonstrates a confidence and security in . . . the community norm"). While Bollinger's analysis applies more directly to political speech, in this case, architectural "tolerance" would hopefully reaffirm liberalism and tolerance for individual expression over community conformity.

185. Poole, *supra* note 16, at 302.

architecture because of its functionality.[186] As Venturi stated, "If order without expediency breeds formalism, expediency without order . . . means chaos."[187] He warns that "no architect 'can belittle the role of order as a way of seeing a whole relevant to its own characteristics and context.'"[188] In short, given the infrequency of nonconforming architecture, the aesthetic zoning ordinances discussed above may be more damaging to our collective artistic health than an infrequent "grotesque" design in a traditional neighborhood.

Indeed, there may be benefit to the simple acknowledgment that architecture is art. In a landscape of homogeny and globalization, judicial recognition of architecture as an expressive medium might awaken future "McMansion"[189] owners to a diverse array of architectural possibilities. It would be a shame if overly stringent and subjective aesthetic zoning laws led to self-censorship of new architectural innovation.[190]

By clearly drawing expressive architecture within the ranks of protected speech, municipalities would likely jettison subjective aesthetic ordinances, negotiate more readily with landowners over iconoclastic home designs, and pursue litigation only when their aesthetic regulation was of particular importance to the broader community. The affect of providing heightened scrutiny to zoning laws impinging upon First Amendment interests is apparent with the effects of the Religious Land Use and Institutionalized Persons Act (RLUIPA).[191] With the law's passage, Congress provided churches with a much larger stick with which to combat municipal zoning ordinances; in doing so, Congress

186. DOORDAN, *supra* note 106, at xii ("Architecture begins as a process of design that gives form to a wide range of aesthetic and cultural issues, and concludes as a process of construction intimately connected with economic and material concerns."). *See* Poole, *supra* note 16, at 339.

> [Another] logical reason for infrequent litigation is the preselection of community by a builder. People who have strong and distinctive preferences in architectural design and lifestyle may be disinclined to select a building site in a community that actively enforces a contrary design preference. . . . [A] person who favors a radical architectural design may prefer the eclectic setting of Coconut Grove over the highly regulated Coral Gables. The relatively strong economic disincentives to build architecturally unpopular buildings and the community intimidation factor (that continues independent of regulation) suggests that no excessive difference ordinances are much ado about very little.

Id.

187. Nivala, *supra* note 48, at 337 (quoting VENTURI, *supra* note 102, at 41).

188. *Id.*

189. CASES AND MATERIALS ON LAND USE 529 (David L. Callies et. al. eds., 2004).

190. City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 758 (1988) (overturning a city ordinance giving the mayor unbridled discretion to approve or deny newspaper rack displays on government property because of censorship concerns).

191. 42 U.S.C. §§ 2000CC to 2000CC-5 (2000).

tipped the balance from favoring community interests to favoring individual rights.[192] Because of RLUIPA, churches have more negotiating power with municipal governments. Judicial recognition of the artistry in some residential architecture would create the same policy benefits for potentially expressive homeowners.

Finally, there are other ways of ensuring architectural conformity without impeding First Amendment rights.[193] For instance, a neighborhood could adopt a restrictive covenant insisting on conforming architectural styles. Restrictive covenants by private agreement are preferable to conformity by governmental decree.[194] To offset a provable impact on property value by an aesthetically displeasing house, a second possible, but more controversial, option is to allow a private cause of action for aesthetic nuisances. Permanent damages, as provided in *Boomer v. Atlantic Cement Co.*, might be a feasible solution to possible property devaluation while still allowing the aesthetically offensive property owners creative control, so to speak.[195] Courts, however, have been reluctant to recognize aesthetic nuisances.[196] These solutions may not be ideal, but considering the shaky ground on which some aesthetic zoning currently stands, new ideas are in order. Providing intermediate scrutiny to residential architecture could serve to catalyze new thinking about aesthetic zoning, in addition to stimulating architectural creativity.

V. CONCLUSION

Under the rubric this Comment has established, the Stoyanoffs would be able to build their pyramid-shaped home in Landue, Missouri, because, not in spite, of its expressive nonconformity. As explained above, excessive similarity or difference regulations are not content neutral as required to protect free speech. Furthermore, the governmental interests justifying their enactment are outweighed by the expressive

192. *See* John J. Dvorske, Annotation, *Validity, Construction, and Operation of Religious Land Use and Institutionalized Persons Act*, 181 A.L.R. FED. 247 (2002); James L. Dam, *Churches Use New Federal Statute To Win Zoning Cases*, LAW. WKLY. USA, *available at* http://www.lawyersweeklyusa.com/alert/usa/zoning.htm (last visited Dec. 20, 2005).

193. I offer these examples as departure points for further study, not necessarily optimal solutions. They each have their own unique advantages and disadvantages.

194. Regan, *supra* note 26, at 1029–31.

195. Smith & Fernandez, *supra* note 159, at 65 (quoting Boomer v. Atl. Cement Co., 309 N.Y.S.2d 312 (N.Y. 1970)).

196. *Id.* at 66–67.

interests of future landowners under intermediate scrutiny. Community architectural style regulations fare a little better but are still on tenuous constitutional ground. While the governmental interests in protecting the communal expression of a community aesthetic are stronger with these regulations, they may still be suspect because of the difficulty of providing alternative avenues for architectural expression.

Despite this conclusion, applying current First Amendment analysis to architecture is an uneasy fit. This incongruity is perhaps because, as Justice Rehnquist stated, the Court's treatment of zoning board regulations facing free speech challenges have been "a virtual Tower of Babel, from which no definitive principles can be clearly drawn."[197] Adding further complication is architecture's permanence which, coupled with the local government's interest in protecting the aesthetic environment as a whole, might be the subtext for why the Court has yet to acknowledge architecture as art.

However, skirting the artistic nature of architecture does not do justice to our liberal heritage of free expression or to our communal interests. Extending First Amendment protections to landowners with truly expressive intent would provide the freedom to build and potentially create innovative residential housing. Furthermore, it would prevent local municipalities from implementing poorly conceived, subjective land use ordinances. Aesthetic regulations, for good or ill, are now a permanent part of local government's zoning schemes; raising the bar for their legitimacy will help ensure the vitality of constitutionally viable regulations and also protect free expression.

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197. Metromedia v. City of San Diego, 453 U.S. 490, 569 (1981) (Rehnquist, J., dissenting).