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BEAUTY AND THE WELL-DRAWN ORDINANCE: AVOIDING VAGUENESS AND OVERBREADTH CHALLENGES TO MUNICIPAL AESTHETIC REGULATIONS

Randall J. Cude[*]

> *Shall that dirty roll of bunting in the gun-house be all the colors a village can display? A village is not complete unless it have these trees to mark the season in it. They are important, like the town clock. A village that has them not will not be found to work well. It has a screw loose, an essential part is wanting . . . .*
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> . . . .
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> *A village needs these innocent stimulants of bright and cheering prospects to keep off melancholy and superstition.*[1]

INTRODUCTION

Since Henry David Thoreau wrote about the importance of a neighborhood's beauty in fostering civic pride one hundred thirty-six years ago,[2] philosophers, architects and legal scholars have wrestled with the significance of aesthetics[3] to a community and

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[1] Henry David Thoreau, *Autumnal Tints*, ATLANTIC MONTHLY, Oct. 1862, at 387, 396.

[2] *Id.*

[3] Aesthetic is defined as "relating to the beautiful as distinguished from the merely pleasing, the moral, and especially the useful and utilitarian." WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY 34 (1981). This obtuse definition illustrates the difficulty of defining the components of beauty. Sigmund Freud noted that "the science of aesthetics . . . has been unable to give any explanation

its citizens.[4] Is simply planting trees to beautify a community enough, as Thoreau suggests, or is it appropriate for municipalities to go further and enact ordinances that promote aesthetic values?[5] Can objective laws be drawn to regulate a subjective social value such as aesthetics?[6] The problem runs even deeper: inexplicit or imprecise municipal aesthetic policies may leave citizens guessing

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of the nature and origin of beauty, . . . [its] lack of success [has been] concealed beneath a flood of resounding and empty words." SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 32 (James Strachey ed. & trans., 1961).

[4] *See* JOHN J. COSTONIS, ICONS AND ALIENS (1989) (discussing law and aesthetics as they are applied to the historic preservation of the built environment); LE CORBUSIER, WHEN CATHEDRALS WERE WHITE 20-21 (Francis E. Hyslop, Jr. trans., 1947) (criticizing the aesthetic regulation of modern architecture in the United States and France) ("The spirit of France is not rule-bound except in periods of lethargy and ossification. Today, when a new world is surging up under the impulse of technical miracles, the officials of the City of Light apply regulations. And soon there will be no light in the City."); ROGER SCRUTON, THE AESTHETICS OF ARCHITECTURE (1979) (exploring the philosophy and value of aesthetic taste in architecture and urban design); ROBERT VENTURI ET AL., LEARNING FROM LAS VEGAS (1977) (discussing generally the symbolism of signs and architectural ornament in creating aesthetic vitality in the built environment). Costonis argues that the law unduly focuses on the "beauty" standard, causing courts to judge the aesthetic justification of legal initiatives by how visually pleasing the results are. COSTONIS, *supra*, at 20. Costonis instead proposes a paradigm of "icons" (environmental elements which provide communities with a sense of stability, order and reassurance) pitted against "aliens" (intrusions that threaten these icons). COSTONIS, *supra*, at 46-47, 51. In this paradigm, beauty need never necessarily enter into the equation. Although existing environmental stability is encouraged, Constonis' paradigm does not convincingly suggest how a city may enhance aesthetics through legal means, such as regulations.

[5] A criticism of aesthetic regulations is that no objective criteria exists for evaluating them. "Law knows nothing about beauty. It can set speed limits or require that contracts be in writing, but it can neither create beauty nor issue ukases guaranteeing that others will do so. The Constitution contains no recipe for beauty." COSTONIS, *supra* note 4, at 9.

[6] The Supreme Court has noted that "[municipal] aesthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510 (1981) (determining nonetheless that there was no impermissible purpose behind the city's billboard regulations).

about what conduct the law expects of them, and leave bureaucrats uncertain about how to appropriately administrate the law.

To begin the examination of these issues, the difference between "aesthetic regulations" and "aesthetics" as a legitimate municipal interest must first be clarified. In this Note, the term "aesthetic regulation" refers generally to statutes, ordinances and regulations affecting the visual or aural aspects of communicative activities protected under the First Amendment.[7] These aspects include the installation of newsracks,[8] the litter created by leafleting, parades, street sales of artist works, signs and billboards, artist murals, use of sound trucks, amplified speech, etcetera.[9] On the other hand, "aesthetics" is a legitimate municipal interest[10] capable of justifying the enactment of municipal aesthetic regulations. Aesthetics therefore encompasses both the societal goal of promot-

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[7] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The First Amendment is applicable to state statutes via the Fourteenth Amendment, *see* U.S. CONST. amend. XIV, § 1; Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), and to ordinances enacted by cities, *see* Lovell v. City of Griffin, 303 U.S. 444, 450 (1938). Although the words of the First Amendment facially establish an unconditional prohibition on the government's power to enact laws regulating the protected freedoms, the Supreme Court has not interpreted the amendment so as to provide unlimited rights for citizens to engage in any expressive activity at any time. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.").

[8] Newsracks are newspaper or leaflet distribution boxes, usually coin-operated, and typically installed on city sidewalks and in other public places with high pedestrian traffic. *See* Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 179 (1st Cir. 1996).

[9] Aesthetic regulation may also refer to ordinances regulating zoning, nuisance or the architectural appearance of buildings. This Note does not discuss the drafting of these types of aesthetic regulations, which are more closely connected to property rights than First Amendment freedoms.

[10] The Supreme Court has determined that "public safety, public health, public welfare, morality, peace and quiet, law and order" and national security are some of the more conspicuous examples of other legitimate municipal interests, but has not confined the list to these goals. Berman v. Parker, 348 U.S. 26, 32 (1954) (endorsing Congressional authorization of the District of Columbia Redevelopment Act of 1945 to eliminate the aesthetic detriment of slums and substandard housing conditions through the use of eminent domain).

ing beauty and also exists as a broad governmental justification for the means employed to achieve that end. This distinction is important because of its effect on the manner and types of speech that the government may permissibly regulate.

Speech can be regulated by the government in two ways: the government can restrict the dispensing of ideas and information because of the viewpoint of the speaker or because of the effect of the ideas or information on the listener, or the government can restrict the flow of information, without censoring the ideas, in order to pursue goals unrelated to the content of the speech.[11] Aesthetic ordinances typically fall into the latter form of regulation because they limit the activity through which the information or speech is dispensed without disturbing the message content.[12] However, because of the difficulty of establishing legal standards quantifying aesthetics, municipalities may struggle to draft ordinances that both protect governmental aesthetic interests and constitutionally regulate First Amendment activities. Adding to this difficulty is the fact that while the Supreme Court ultimately determines the constitutionality of any challenged regulation, the Justices have historically chosen not to elaborate on statutory text that would be constitutional under particular factual circumstances.[13] Therefore, practitioners wishing to draft aesthetic

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[11] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 789 (2d ed. 1988).

[12] TRIBE, *supra* note 11, § 12-2, at 790. *See* Kovacs v. Cooper, 336 U.S. 77, 83 (1949) (upholding the prohibition of over-amplified sound trucks in residential neighborhoods).

[13] For example, in *Gregory v. City of Chicago*, in which the Supreme Court held that demonstrators arrested while conducting a peaceful march were arrested for participation in the demonstration alone and not for their refusal to obey police orders, Justice Black stated that "[i]t is not our duty and indeed not within our power to set out and define with precision just what statutes can be lawfully enacted to deal with situations like the one confronted here . . . ." 394 U.S. 111, 118 (1969) (Black, J., concurring). *See also* Reno v. ACLU, 117 S. Ct. 2329, 2351 (1997) ("'[This] Court will not rewrite a [state] law to conform it to constitutional requirements.'") (quoting Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397 (1988)); Osborne v. Ohio, 495 U.S. 103, 121 (1990) (stating that the judicial rewriting of statutes would derogate Congress' "incentive to draft a narrowly tailored law in the first place").

ordinances that regulate the time, place, and manner[14] of the expression of content-neutral[15] speech must to piece together and evaluate conflicting court decisions in order to avoid vague and overbroad[16] challenges to their own regulations. The confusion

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[14] Time, place, and manner regulations control access to a public forum for communicative purposes, and are sustained by courts provided that they are drafted and applied in a content-neutral manner. GERALD GUNTHER, CONSTITUTIONAL LAW § 12-4, at 1250 (12th ed. 1991). Judicial scrutiny of time, place, and manner regulations primarily focuses on assuring that they are not pretexts to control speech content, although certain cases also focus on verifying that minimum access to the public forum is preserved. *Id.* § 12-4, at 1250-51. The municipal interests normally advanced as justification for aesthetic regulations, *see supra* note 10, are classified as only substantial or legitimate interests and therefore do not usually survive the strict scrutiny requirement that the ordinance be enacted to achieve a compelling government interest. *See infra* note 73 for elements of the time, place, and manner test.

[15] Content-neutral speech restrictions are justified by government interests independent of the content of the speech and qualify for the application of the time, place, and manner regulations. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Carey v. Brown, 447 U.S. 455, 461 (1980). In contrast, content-based restrictions on speech are presumptively invalid. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (citations omitted). *See also* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986) ("This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment.") (citations omitted). Content-based regulations are therefore always subject to strict scrutiny by courts, and it is necessary for the government to show that the law "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *See Perry*, 460 U.S. at 45 (citations omitted). *See* Part I.A for further discussion of speech content and the applicable levels of judicial scrutiny. Aesthetic ordinances are therefore much more likely to withstand judicial scrutiny if they are content-neutral.

[16] A regulation may be struck down for vagueness if its text is drafted with such indefinite terms that ordinary citizens must guess at their meaning and cannot determine what conduct is permissible. *See* Grayned v. City of Rockford, 408 U.S. 104, 108-11 (1972). In contrast, a regulation may be struck down for overbreadth if it over-regulates an activity over which the government may otherwise exercise control. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423 (1993); Ward v. Rock Against Racism, 491 U.S. 781, 793-94 (1989); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 769-72 (1988). *See* Part I.A for a more detailed discussion of the vagueness and overbreadth doctrines as applied to aesthetic ordinances.

experienced by practitioners has resulted in numerous lawsuits challenging aesthetic ordinances, despite substantial case law on the subject.[17]

This Note does not advocate a change in current First Amendment jurisprudence affecting aesthetic regulations, but rather is intended to assist practitioners in working with existing law by suggesting textual organization and drafting standards for proposed ordinances that will avoid vagueness or overbreadth challenges. Part I of this Note discusses the doctrines of statutory vagueness and overbreadth in general, associated First Amendment challenges, and levels of judicial scrutiny for content-based and content-neutral aesthetic regulations. Part I also examines the allowable extent of time, place, and manner regulation within public fora,[18] as well as the emergence of aesthetics as a legitimate municipal interest. Part II outlines the legal framework employed by courts to examine the text of aesthetic regulations, and identifies substantive and procedural factors that have been repeatedly emphasized by courts in their analysis of vagueness and overbreadth challenges. Part II also focuses on recent aesthetic regulations affecting speech and communicative conduct in public fora having a heightened aesthetic context, such as historic districts and special types of parks. Part III

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[17] *See, e.g.*, Mark Johnson, *ACLU Opposes Plan to Curb Signs*, PROVIDENCE (R.I.) JOURNAL-BULLETIN, May 8, 1997, at 1C (reporting a challenge to a proposed town ordinance restricting the use of political signs); Molly Kinetz, *Sign of Litigious Times*, SACRAMENTO BEE, Mar. 9, 1997, at N1 (reporting a lawsuit challenging a billboard ordinance that was settled after city officials determined that the ordinance would not survive judicial scrutiny because of overbroad drafting); John King, *Brown Battles News Racks*, S.F. CHRON., Mar. 4, 1997, at A1 (noting that several cities, including San Francisco, are currently wrestling with permissible newsrack regulation because of the imprecision of any constitutional formula for ordinance drafting); Jesse Tinsley, *Cleveland Hts. Amends Code for 'For Sale' Signs*, PLAIN DEALER (Cleveland, Ohio), Aug. 6, 1997, at 4B (reporting that the city's zoning code was amended so as to loosen the regulation of signs because of the threat of lawsuits).

[18] A public forum, such as a street or park, is public property that may be used for the purpose of communicative expression. *See* Hague v. CIO, 307 U.S. 496, 515 (1939). Public fora provide an inexpensive and convenient location to a speaker for reaching a large number of people with the speech message. *See infra* note 38 for a discussion of the public forum doctrine.

proposes a practitioner's guide for drafting aesthetic regulations that will avoid vagueness and overbreadth challenges. Textual standards are included for drafting the well-drawn ordinance, incorporating judicially-emphasized elements such as municipal goals and means, permissible delegation of enforcement authority and acceptable permit and insurance procedures. Part III also outlines additional considerations for textual language when a municipality seeks to ban certain types of communicative conduct in public fora having a heightened aesthetic context.

I. SPEECH, AESTHETICS AND THE FIRST AMENDMENT

Municipal aesthetic regulations often partially abridge the right of a citizen or group to engage in free expression, by reducing a citizen's available means of communicating the message to the public.[19] The administration of these regulations by city officials often raises the constitutional question of whether the ordinance's application impermissibly abridges First Amendment freedom of speech or press rights.[20] However, as Chief Justice Burger noted in *Metromedia, Inc. v. City of San Diego*,[21] in which a city ordinance prohibited certain types of outdoor billboards,[22] "to say [that an] ordinance presents a First Amendment issue is not necessarily to say that it constitutes a First Amendment violation."[23]

A court must first determine whether the challenger's expression is entitled to First Amendment protection. The Supreme Court has identified four categories of speech that are each given varying

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[19] For example, in *City Council of Los Angeles v. Taxpayers for Vincent*, an ordinance prohibiting the posting of political campaign posters on utility pole wires, which had been used in the past for this purpose, resulted in the reduced availability of the candidate's political message to the public. 466 U.S. 789, 801-02 (1984).

[20] *Id.* at 803.

[21] 453 U.S. 490 (1981).

[22] San Diego sought to ban the erection of outdoor billboards carrying non-commercial advertising or commercial advertising for goods located off-site. *Id.* at 493-94.

[23] *Id.* at 561 (Burger, C.J., dissenting).

levels of First Amendment protection: pure speech,[24] speech plus an associated activity,[25] symbolic speech,[26] and unprotected speech.[27] Although historically given the greatest First Amendment protection,[28] even pure speech may be subject to reasonable

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[24] Pure speech exists independently from any associated activity, as in the case of political speech. *See* Cox v. Louisiana, 379 U.S. 536, 540-41 (1965) (involving political songs and speeches made during a demonstration protesting racial segregation).

[25] Speech plus an associated activity is a hybrid form of speech combining both speech and conduct, such as picketing or street performances of music. *See* International Brotherhood of Teamsters, Local 309 v. Hanke, 339 U.S. 470, 474 (1950) (upholding a state court injunction against the picketing of a private business).

[26] Symbolic speech involves expression communicated primarily through behavior, rather than words, such as the burning of a draft card, *see* United States v. O'Brien, 391 U.S. 367, 376 (1968), or sleeping in a park in protest of the government's policies for the homeless, *see* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[27] In *Chaplinsky v. New Hampshire*, the Court listed "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words" as unprotected speech, because those words "by their very utterance inflict injury or tend to incite an immediate breach of the peace." 315 U.S. 568, 572 (1942) (citation omitted). These types of speech are also not protected because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* (citation omitted). *See also* Miller v. California, 413 U.S. 15, 24 (1973) (noting that obscene or profane communication is not protected because it depicts or describes "sexual conduct in a patently offensive way" that appeals to the "prurient interest in sex" and does not have "serious literary, political, artistic or scientific value").

[28] Justice Cardozo characterized "freedom of thought[] and speech" as the "indispensable condition[] of nearly every other form of freedom. . . . [A] pervasive recognition of that truth can be traced in our history, political and legal." Palko v. Connecticut, 302 U.S. 319, 326-27 (1937). Justice Brandeis explained in *Whitney v. California*, that the Framers, "[r]ecognizing the occasional tyrannies of governing majorities, . . . amended the Constitution so that free speech and assembly should be guaranteed." 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). Justice Stone suggested in *United States v. Carolene Products Co.* that heightened scrutiny for restraints on freedom of expression was justified: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which

time, place, and manner regulations if it unreasonably interferes with the rights of other citizens.[29] When speech is associated with an activity or is symbolic, the government may impose broader time, place, and manner regulations than those applicable to pure speech, provided that they are not based solely upon speech content.[30] Finally, unprotected speech may be prohibited by the government altogether.[31] Although aesthetic regulations typically

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are deemed equally specific when held to be embraced within the Fourteenth." 304 U.S. 144, 152 n.4 (1938).

[29] In *Hague v. CIO*, the Supreme Court first recognized the existence of public fora, noting that the freedom of speech right within the public fora was not absolute and could be regulated to avoid interference with the public interest. 307 U.S. 496, 515-16 (1939). This relative, not absolute, privilege formed the foundation for the evolution of the time, place, and manner doctrine. *See infra* note 73 (discussing the application of the time, place, and manner test in Supreme Court cases after *Hague*). For example, a city has the authority to act in good faith to maintain peace and order, to assure that streets will be fit for passenger and vehicular traffic and for other necessary ends of community life. GUNTHER, *supra* note 14, § 12-4, at 1253. *See* Cox v. Louisiana, 379 U.S. 536, 554-55 (1965); Kovacs v. Cooper, 336 U.S. 77, 85 (1949) (barring trucks equipped with sound devices emitting "loud and raucous" noises in residential neighborhoods). In *Cox*, the demonstration included not only political speeches but also picketing, singing and marching to the courthouse in the state capitol. 379 U.S. at 545-46. While the Court held that Louisiana defined its regulation in unconstitutionally overbroad terms, it also determined that government could enact nondiscriminatory restrictions on travel on city streets because a demonstration could place an intolerable burden on the essential flow of traffic. *Id.* at 554-55. Even though such regulations would affect political speech, the Court stated that "[g]overnmental authorities have the duty and responsibility to keep their streets open and available for movement." *Id.*

[30] *Id.* at 555. The Court specifically noted that the First and Fourteenth Amendments do not provide the same type of freedoms to those who communicate ideas by marching or picketing as to those who communicate through pure speech, emphatically stating that "'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Id.* (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).

[31] However, such prohibitions are still subject to a showing by the government that there is a rational basis for the enactment of the regulation. *See Miller*, 413 U.S. at 18 (upholding the conviction of appellant for mailing unsolicited sexually explicit material in violation of a California statute, and

seek to regulate the visual[32] or aural[33] aspects of communicative activities, often concentrating on the means of dispensing speech,[34] any of the speech types may be implicated.

While the government may legitimately regulate communicative activities[35] in order to promote aesthetic interests,[36] courts may

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recognizing that "States have a legitimate interest in prohibiting dissemination or exhibition of obscene material"). One of the few cases where quality of the environment was used as a justification for a content-based regulation was *Paris Adult Theatre I v. Slaton*, in which the Court upheld the restriction of obscenity in places of public accommodation. 413 U.S. 49, 58 (1973).

[32] *See generally* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding on aesthetic grounds a ban on posting signs on public property); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (upholding a ban of billboards on public property).

[33] *See Kovacs*, 336 U.S. at 78 (upholding an ordinance regulating the over-amplification of sound trucks in residential neighborhoods).

[34] *See Vincent*, 466 U.S. at 792 (regulating the use of cardboard signs attached to utility pole crosswires to display political messages); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 412 (1993) (regulating the use of newsracks on public property).

[35] Regulations limiting speech on public property create conflict between two competing interests: while government has a duty to ensure that public property will be used for the purpose for which it was dedicated, restrictions on freedom of speech may conflict with this interest. *See* Schneider v. New Jersey, 308 U.S. 147, 160 (1939) (holding that the purpose of keeping city streets clean and neat by preventing litter caused by leafleting was an insufficient municipal interest to justify speech restrictions in a public forum). The public forum doctrine is used to strike a reasonable balance between these competing interests. *See infra* note 38 (discussing the public forum doctrine).

[36] Aesthetic interests may also be affected by activities that are not communicative. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 129 (1978) (upholding the application of the New York City Landmarks Preservation Law, which prevented the building of a multistory building above the landmarked Grand Central Terminal, because such a building would have been destructive to the Terminal's historic and aesthetic features); Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (upholding an ordinance restricting land use to one-family dwellings because the legislature's exercise of discretion was "reasonable, not arbitrary" and bore "a rational relationship to [the permissible] state objective [of creating land-use legislation addressed to family needs]"); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926) (legitimizing public control of land through zoning ordinances); Welch v. Swasey, 214 U.S. 91, 108 (1909) (upholding a building height regulation which

strike down legislation that is content-based, vague or overbroad, even if the municipal interests are valid.[37] Conversely, the Supreme Court will uphold content-neutral regulations that are appropriate to the nature of the public forum[38] and the asserted

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in part served to visually preserve the Boston cityscape).

[37] *See Schneider*, 308 U.S. at 162. *But see* Grayned v. City of Rockford, 408 U.S. 104, 109-11 (1972) (holding that a noise ordinance prohibiting a person, on grounds adjacent to a school in session, from willfully making noise that disturbs the peace or good order of the school was not unconstitutionally vague or overbroad). Simply because an impermissible application of a regulation can be conceived is not enough to create vulnerability to an overbreadth challenge; for a facial challenge to succeed, there must be a realistic danger that the regulation will significantly compromise First Amendment rights as applied to parties not before the court. *Vincent*, 466 U.S. at 799-800. Legal standards for vague and overbroad challenges are examined in Part I.A. The factors analyzed by courts in determining whether a regulation's text is vague or overbroad under the First Amendment is presented in Part II.

[38] The public forum doctrine provides that regulation of speech on government property traditionally made available for public expression, such as streets and sidewalks, and property that the government has opened for expressive activity, such as the grounds of a government building, receive the highest scrutiny and are upheld only if they are narrowly drawn to achieve a substantial or compelling state interest. *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983) (holding that the school mail system was not a limited purpose public forum merely because the system had been opened for periodic use by civic and church organizations). Other public property, such as airports, receive a more limited review requiring that regulations be reasonable and that the speech is not being censored because of government disagreement with the speaker's view. *See generally* International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992). The Supreme Court has consistently taken a "forum-based" approach when assessing regulations that seek to restrict speech protections on government property. *See id.* at 678 (holding that an airport terminal operated by a public authority is a non-public forum for speech, and a ban on solicitation of religious donations need only satisfy a reasonableness standard); *Perry*, 460 U.S. at 45. However, the Court's approach has undergone changes over the years. *Compare Perry*, 460 U.S. at 46 ("We have recognized that the 'First Amendment does not guarantee access to property [for expressive activity] simply because it is owned or controlled by the government.'") (quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981)), *with Grayned*, 408 U.S. at 115 ("The right to use a public place for expressive activity may be restricted only for weighty reasons.").

governmental interest under the time, place, and manner doctrine.[39] The relatively recent emergence of aesthetics as a legitimate, although subjective, municipal interest, while expanding a city's available justifications for aesthetic regulations, further complicates the task of the municipal practitioner wishing to create an ordinance capable of avoiding a vagueness or overbreadth challenge.[40]

The first recognition of the public forum doctrine occurred with Justice Robert's frequently quoted dictum in *Hague v. CIO*, in which he stated that public streets and parks "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." 307 U.S. 496, 515 (1939). While the use of these public spaces for the communication of views "may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied." *Id.* at 516. Prior to *Hague*, the prevailing law regarding the regulation of speech on public property was contained in Justice (then Judge) Holmes' opinion in *Commonwealth v. Davis*, a case in which a defendant was convicted of speaking in a commons area without a permit. 39 N.E. 113 (Mass. 1895), *aff'd*, Davis v. Massachusetts, 167 U.S. 43 (1897). Holmes stated, in upholding the conviction, that "for the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." *Id.* at 113. *See infra* note 74, discussing the public forum types.

[39] *See supra* note 14, discussing time, place, and manner regulations. *See generally* Ward v. Rock Against Racism, 491 U.S. 781 (1989) (holding New York City's sound amplification guideline valid under the First Amendment as a reasonable place and manner regulation of protected speech because of the city's desire to control noise and maintain the character of Central Park); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 297-98 (1984) (holding that a National Park Service regulation permitting camping only in designated campgrounds was narrowly focused on the Government's interest in maintaining the parks of the nation's capitol in an attractive and intact condition and that the prohibition of sleeping in connection with a demonstration in Lafayette Park and the National Mall was justified as a reasonable time, place, and manner restriction). *See infra* Part I.B for a more detailed discussion of the time, place, and manner doctrine.

[40] The history and emergence of aesthetics as an autonomous municipal interest justifying time, place, and manner regulations is examined in Part I.C.

A. *Vagueness and Overbreadth Challenges*[41] *and the Appropriate Level of Scrutiny*

A municipal aesthetic regulation is unconstitutional on its face[42] if the language of the ordinance is either vague or overbroad.[43] The Supreme Court has developed extensive First

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[41] For a complete discussion of the vagueness and overbreadth doctrines as applied to challenges under the First Amendment, see TRIBE, *supra* note 11, §§ 12-27 to 12-33, at 1022-39; Lawrence A. Alexander, *Is There an Overbreadth Doctrine?*, 22 SAN DIEGO L. REV. 541 (1985); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991).

[42] A statute or ordinance is void on its face, and therefore unconstitutional, if it "'does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise'" of protected expression or associated rights. TRIBE, *supra* note 11, § 12-27, at 1022 (quoting Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (holding that a statute prohibiting all picketing is void on its face because it bans peaceful picketing protected by the First Amendment)). Facial invalidation analysis typically compares the statutory line defining the limits of the regulated conduct with the judicial line specifying protected and unprotected First Amendment activities. TRIBE, *supra* note 11, § 12-27, at 1022. A statute will usually be found facially invalid when every application of the statute creates an impermissible risk of suppression of ideas and there is uncontrolled enforcement discretion by an official. *See* Saia v. New York, 334 U.S. 558, 560-61 (1948) (invalidating an ordinance that prohibited the use of a loudspeaker in public places without permission of the chief of police who had unlimited discretion); Cantwell v. Connecticut, 310 U.S. 296, 307 (1940) (invalidating an ordinance that required a license to distribute religious literature without providing standards for the exercise of licensing discretion); *Hague*, 307 U.S. at 516 (invalidating a statute allowing a city to deny a permit for a public demonstration subject only to the uncontrolled discretion of the director of public safety).

[43] For example, in *City of Lakewood v. Plain Dealer Publishing Co.*, Section 901.181 of the Codified Ordinances, City of Lakewood, stated that "[t]he Mayor shall either deny the application [for a permit], stating the reasons for such denial or grant said permit subject to the following terms . . . ," with Section 901.181 (c) providing the terms for such denial, including: "(7) such other terms and conditions deemed necessary and reasonable by the Mayor." 486 U.S. 750, 769 (1988) (striking an ordinance authorizing the mayor to grant or deny applications for annual permits to publishers to place their newsracks on public property without providing limiting terms and conditions for approval). The Court determined that the ordinance was impermissibly overbroad because it provided

Amendment jurisprudence in this area, although the vagueness and overbreadth doctrines have primarily been applied in cases involving statutes or ordinances that seek explicitly to regulate speech content,[44] or that implicitly have that effect.[45] Challenged aesthetic regulations usually fall into the latter category because they are typically content-neutral on their face. The challenge is usually based on the assertion that the regulation impermissibly forecloses an available method or means of communication, not that the regulation was specifically drawn to regulate speech content.[46] An ordinance drawn without specificity implicates a vagueness challenge whereas the application of the ordinance to regulate beyond constitutional bounds implicates an overbreadth challenge.[47] Although First Amendment challenges to aesthetic ordinances will often be made on both vagueness and overbreadth grounds, each of the doctrines are different.

A vagueness challenge is based on the constitutional recognition that a law's text must provide fair and adequate notice to those whose conduct is intended to be regulated, so that persons of

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the Mayor with unbridled discretion to grant permits. *Id.* at 771-72.

[44] *See* Police Dep't v. Mosley, 408 U.S. 92, 102 (1972) (invalidating a Chicago disorderly conduct ordinance that barred picketing within 150 feet of a school, but exempted peaceful picketing of a school involved in a labor dispute, because it discriminatorily treated certain types of picketing differently).

[45] Government bans on a certain medium or format of expression may have this effect, although such an effect does not automatically invalidate an ordinance. *See* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 803-04 (1984) (upholding the regulation of political signs on public property, because of the Court's determination that there was "not even a hint of bias or censorship in the City's enforcement of th[e] ordinance"); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512-13 (1981) (striking a regulation banning non-commercial billboard advertising by an onsite occupant, while allowing commercial onsite billboard advertising). *See also* GUNTHER, *supra* note 14, § 12-3 at 1216.

[46] *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 416, 428-29 (1993) (sustaining a challenge to the city's selective and categorical ban on the distribution of commercial handbills through the medium of newsracks because the city did not meet its burden of establishing a "reasonable fit" between safety and aesthetics and the means chosen to serve those interests); *Vincent*, 466 U.S. at 803-04.

[47] *See* TRIBE, *supra* note 11, § 12-27, at 1022, § 12-31, at 1033.

common intelligence are not required to guess at the meaning and application of the ordinance to determine their conduct.[48] An ordinance is therefore vulnerable to a void-for-vagueness challenge when it is drafted with proscriptive terms so indefinite that the line between permissible and impermissible conduct is unclear, and the legislative body could practically have drafted the ordinance more precisely.[49] Aesthetic ordinances are challenged on vagueness grounds when the enacted regulation provides either confusing enforcement standards for municipal officials,[50] or imprecise requirements for permissible communicative expression or conduct.[51] Consequently, unconstitutionally vague statutes risk creating a "chilling effect"[52] on the expression of protected speech and are subject to facial invalidation.

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[48] The Supreme Court's method of inquiry in cases involving vagueness challenges was developed in the context of criminal statutes. *See* United States v. Petrillo, 332 U.S. 1, 5-6 (1947) (establishing general standards for a First Amendment challenge of a criminal statute under the vagueness doctrine); Connally v. General Constr. Co., 269 U.S. 385, 391-92 (1926) (discussing situations in which the vagueness doctrine may be applied).

[49] *See Petrillo*, 332 U.S. at 7-8. In *Petrillo*, a challenge was made to the criminal statutory language of the Communications Act of 1934, which prohibited the coercion of radio broadcast licensees to employ more persons than needed by the licensee to perform actual work. *Id.* at 4. Specifically, the term "number of employees needed by such licensee," was challenged for defining the crime in excessively vague terms. *Id.* at 5. The Court determined that Congress drafted the statute with sufficiently precise language to provide an adequate warning as to the proscribed conduct, and therefore the statute was held constitutional. *Id.* at 7.

[50] *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 770 (1988) (noting that explicit textual regulatory standards are required to prevent the unbridled discretion of enforcement officials). Similarly, a facial challenge may be made on overbreadth grounds whenever a licensing law gives a government official or agency substantial power to discriminate based upon speech content by censoring disfavored speech or disliked speakers. *Id.* at 759.

[51] *Id.* at 753.

[52] The Supreme Court is wary of the inhibitory effects of imprecise statutory text on free speech, stating "[t]hose sensitive to the perils posed by . . . indefinite language, avoid the risk . . . only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited." Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (invalidating loyalty oath requiring that state teachers swear "undivided allegiance" to the United States Government).

In contrast, a statute can be quite specific and yet still be facially overbroad.[53] An ordinance is overbroad when activities legitimately subject to government regulation are regulated by "means which sweep unnecessarily broadly . . . thereby invad[ing] the area of protected freedoms."[54] An overbreadth challenge is typically made to aesthetic regulations when the ordinance over-regulates or prohibits constitutionally protected activity[55] or creates an opportunity for an enforcement official to exercise content-based discretion.[56]

However, when an ordinance regulates expressive conduct, as opposed to pure speech, the effect of the ordinance, both on the curtailment of speech and the advancement of the stated municipal

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[53] GUNTHER, *supra* note 14, § 12-1, at 1202. A vagueness challenge is usually made to the constitutionality of a law on its face, because citizens in general do not have notice of permissible conduct, even if the particular defendant clearly understands the law "as applied" to his own actions. GUNTHER, *supra* note 14, § 12-1, at 1191. In an overbreadth challenge, the regulation is typically challenged both on its face in order to avoid the "chilling effects" of the law on third parties not before the court, and also "as applied" to the particular defendant. GUNTHER, *supra* note 14, § 12-1, at 1191. Both a vague or an overbroad regulation may be invalidated both "as applied" and on its face. GUNTHER, *supra* note 14, § 12-1, at 1191.

[54] NAACP v. Alabama, 377 U.S. 288, 307, 309 (1964) (applying the general standard for determining a law's validity in an overbreadth challenge, the Court found that the failure of the NAACP to register under Alabama's corporate registration and business qualification laws did not thereby oust the NAACP from operating in the state and restrict the freedom of its members to associate for the collective advocacy of ideas).

[55] *See* Grayned v. City of Rockford, 408 U.S. 104, 114-15 (1972) (holding that a noise ordinance prohibiting excessive noise adjacent to a school in session was not vague because it prohibited with fair warning only actual, imminent or willful interference with school activity).

[56] *See* Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989) (upholding a regulation which allegedly allowed city officials to provide inadequate sound for performers in a park bandshell based on the content of their speech); *Plain Dealer*, 486 U.S. at 755 (holding unconstitutional a city ordinance giving the mayor "unbridled discretion" to determine standards for installation of newsracks on public property). The vagueness and overbreadth doctrines may merge in certain situations. For example, an ordinance providing vague textual standards may also be challenged on the ground that the exercise of discretion by the enforcement official is overbroad. *See Plain Dealer*, 486 U.S. at 770.

interests, is also assessed.[57] In such situations, the Supreme Court requires that the ordinance's "'overbreadth . . . must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'"[58] A challenge for overbreadth to an ordinance regulating expressive conduct can therefore only be successful when the protected expression is a significant part of the law's target, and the law's application can realistically curtail the expression impermissibly.[59] Because aesthetic regulations usually specifically target the visual or aural aspects of the dissemination of speech—in other words, conduct—a challenger can usually make a showing that substantial overbreadth exists if the court finds the ordinance generally overbroad.[60]

The overbreadth doctrine is particularly applicable to aesthetic ordinances lacking clear permit fee requirements as well as approval procedures for permission to engage in the expression.[61]

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[57] *See* Sciarrino v. City of Key West, 83 F.3d 364, 369 (11th Cir. 1996) (examining anecdotal evidence to determine the success of a handbill regulation ordinance designed to prevent sidewalk congestion and litter). *Cf.* Roulette v. City of Seattle, 97 F.3d 300, 303-04 (9th Cir. 1996) (relying on evidence of issued summonses and permits to hold that an ordinance prohibiting sitting or lying on a public sidewalk between 7:00 a.m. and 9:00 p.m. in commercial areas of the city does not facially restrain expression).

[58] TRIBE, *supra* note 11, § 12-28, at 1025 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)). This restrictive language was adopted by the Court in reaction to overuse of the overbreadth doctrine during the final years of the Warren Court in the late 1960's and early 1970's. GUNTHER, *supra* note 14, § 12-1, at 1194. *See also* Fallon, *supra* note 41, at 853; Martin H. Redish, *The Warren Court, The Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031, 1056-69 (1983).

[59] TRIBE, *supra* note 11, § 12-27, at 1022.

[60] *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 47 (1994) (invalidating an ordinance banning residential signs except those for identification, security or real estate sales purposes); Cleveland Area Bd. of Realtors v. City of Euclid, 88 F.3d 382, 388 (6th Cir. 1996) (sustaining challenger's assertion that a complete ban on lawn signs was substantially overbroad because it burdened more speech than necessary to serve the stated municipal interest of aesthetics).

[61] *Grayned v. City of Rockford* involved just such a situation. 408 U.S. 104 (1972). The Court held that the ordinance, which prohibited excessive noise adjacent to a school, was narrowly tailored to furthering the city's interest in conducting undisrupted school classes, only punished imminently disruptive conduct, and was not content-based. *Id.* at 119. The Court noted that "it is a

Unclear procedures can lead city officials to impermissibly exercise enforcement discretion that over-censors otherwise protected First Amendment activities.[62] Unfortunately, courts, including the Supreme Court, only analyze the language of the specific ordinance that has been challenged. When striking down the aesthetic regulations, courts do not prescribe language that would have avoided the challenge.[63] Consequently, observing legislators must speculate as to how to avoid constitutional challenges to their own ordinances.[64]

Once an aesthetic ordinance curtailing protected speech has been challenged on vagueness or overbreadth grounds, the level of scrutiny that will be applied is determined by the reviewing court. The determination of the appropriate level of scrutiny is based upon the court's finding of whether the regulation is content-neutral or content-based.[65] In contemporary cases, the Supreme Court uses

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basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined," *id.* at 108, whereas "[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Id.* at 114. *See also* Ernest H. Schopler, Annotation, *Supreme Court's Views as to Overbreadth of Legislation in Connection with First Amendment Rights*, 45 L. Ed. 2d 725 (1976 & Supp. 1996) (discussing the substantive aspects of the overbreadth doctrine and the merits of challenges in specific illustrative fields of legislation).

[62] *See supra* note 50 (referring to the overbroad text of the licensing law that was the subject of challenge in *City of Lakewood v. Plain Dealer Publishing Co.*, which gave government officials the power to discriminate based on speech content).

[63] *See supra* note 13 (noting that courts will not rewrite vague or overbroad regulations to conform to constitutional requirements).

[64] *See supra* note 17 (listing recent news articles discussing pending challenges to aesthetic regulations of various types).

[65] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 183 (1st Cir. 1996) (determining that Boston's Street Furniture Guidelines did not have a content-based impact on newspapers). For an examination of the Supreme Court's recent approach to the regulation of speech content in "cyber-fora," such as the internet, see Reno v. ACLU, 117 S. Ct. 2329, 2346 (1997) (holding the Communications Decency Act, which prohibited the transmission of indecent communication to minors, to be an unconstitutional content-based restriction because of its vagueness and overbreadth).

the standard announced in *Ward v. Rock Against Racism*,[66] in which the Court stated:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.[67]

As part of the inquiry into a law's regulation of content, courts often reassure themselves that the challenged ordinance is not a pretext for censorship.[68] In fact, substantial portions of case opinions are devoted to examining the legislative record, the stated municipal interests in the ordinance text and the means intended to achieve these interests, and the ordinance's actual effect on speech.[69] If a regulation is determined to be content-based or

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[66] 491 U.S. 781 (1989) (upholding the constitutionality of New York City noise regulations as applied to the use of the Central Park bandshell after determining that they were not based upon speech content).

[67] *Id.* at 791. *See also* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984).

[68] *See, e.g.*, Jacobsen v. City of Rapid City, 128 F.3d 660, 663 (8th Cir. 1997) (applying a pretext inquiry in determining that the city's purported interest in ease of airport maintenance, security and safety was a pretext to ban airport newsracks); Gerritsen v. City of Los Angeles, 994 F.2d 570, 575 (9th Cir.), *cert. denied*, 510 U.S. 915 (1993) (determining that the city's ban on handbill distribution was a pretext to abridge the free speech rights of a particular citizen, with whose viewpoint the city did not agree); Young v. New York Transit Auth., 903 F.2d 146, 148 (2d Cir.) (determining that a ban on panhandling and begging in the New York City subway system was not enacted as a pretext to abridge free speech rights), *cert. denied*, 498 U.S. 984 (1990).

[69] *See generally Globe Newspaper*, 100 F.3d at 183-94. After performing their examination, the *Globe Newspaper* court found that the application of the Street Furniture Guidelines resulting in a newsrack ban was "nothing more than an incidental effect of [the Guideline's] stated aesthetic goal of enhancing the historic architecture of the District by reducing visual clutter." *Id.* at 183. *Cf.* Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (invalidating an ordinance that, while enacted to regulate empty storefront merchandise and public safety/welfare structures, economically affected all forms

capable of discriminatory application to only certain citizens,[70] it is subject to strict scrutiny[71] by the court, whereas if it is content-neutral, the court applies an intermediate level of scrutiny.[72] Under the intermediate scrutiny analysis, the time, place, and manner doctrine is used to analyze the restrictions on First Amendment expression.

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of newspaper distribution, discriminated in favor of one class of newspaper publisher, and was not generally applicable).

[70] *See Minneapolis Star*, 460 U.S. at 582-83 (holding unconstitutional through a strict scrutiny analysis an ordinance establishing a tax on newsprint because it applied only to the press and favored one class of publishers over another and was therefore not generally applicable).

[71] *See generally* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 767-68 (1988) (applying a strict scrutiny analysis in striking a newsrack permit ordinance because the mayor could use unbridled discretion to limit the constitutionally protected activity of disseminating newspapers). The *Rock Against Racism* Court also noted that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." 491 U.S. at 791. *See also supra* note 15 (discussing the application of strict scrutiny to content-based regulations).

[72] Under an intermediate scrutiny of aesthetic regulations affecting speech, courts will apply the test advanced in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). *See* Part II.B (discussing the time, place, and manner test developed in *Perry*). Recent federal court decisions using intermediate scrutiny have sometimes yielded seemingly incongruous results. For example, in *Globe Newspaper*, the Street Furniture Guidelines affecting newsracks were determined to be content-neutral, although they resulted in a total ban of newsracks from the Beacon Hill Historic District. 100 F.3d at 183. The *Globe Newspaper* decision is, however, consistent with the Supreme Court's decision in *Rock Against Racism* because the purpose of the Street Furniture Guidelines was not to censor the content of newspapers. *See infra* note 218 (noting the court's language in making this determination). *See also* Part II.B for further discussion of the ordinance drafting implications: based on this court's finding, a broader ban may ironically be more constitutionally permissible than a narrower one for enacting stricter speech limitations in areas of heightened aesthetic context.

B. *Time, Place, and Manner*[73] *Aesthetic Regulation in Public Fora*

Traditional public fora[74] such as parks, streets, and side-

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[73] Time refers to the specific period or point during which an expressive event occurs. Place refers to a definite location or site. Manner has several definitions applicable to aesthetic regulations. It may refer to the actual medium or method of communication, such as a concert. *Rock Against Racism*, 491 U.S. at 784-85 (holding New York City's sound amplification guidelines for outdoor concerts constitutional). It may refer to the person's expressive conduct while using a method of communication. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 289 (1984) (holding regulation forbidding a protest by the homeless expressed by sleeping in a public park in Washington, D.C. constitutional). It also refers to the physical character of the medium, such as the size of newsracks or signs. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 415 (1993) (newsracks); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502 (1981) (signs).

[74] In *Perry*, the Supreme Court set out three categories of public fora: "traditional," such as streets, sidewalks and parks; "limited" purpose, referring to government designated fora opened "for use by the public as a place of expressive activity"; and "non-public," comprising public property not designated for public communication. 460 U.S. at 45-48 (holding that a school mail system is not a limited public forum and that a state may reserve the use of its property for its intended function, as long as the regulation is reasonable and not intended to suppress expression). The Court recognized that the standards by which speech is evaluated "differ depending on the character of the property at issue." *Id.* at 44. These public fora designations recognize the importance of the place where the speech occurs in determining the level of constitutional protection. TRIBE, *supra* note 11, § 12-24, at 987. In traditional public fora, the government may enforce time, place, and manner regulations which are "content neutral, [] narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45 (citations omitted). In limited purpose fora, the government reasonable time, place, and manner regulation is permitted. *Id.* at 46. In non-public fora, in addition to time, place, and manner regulations, government may also restrict the use of the fora to its intended function, as long as the restriction is reasonable and not intended to censor speakers. *Id.*

The Court has included in the limited purpose category of government designated fora school property used for after-hours religious meetings, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 391-93 (1993); the student center of a state university, Widmar v. Vincent, 454 U.S. 263, 267-69 (1981); a state fairground, Heffron v. International Soc'y for Krishna Conscious-

walks[75] are so historically associated with the exercise of the First Amendment rights of free speech and freedom of the press that the Supreme Court has consistently held under the public forum doctrine that the government cannot constitutionally prohibit or broadly deny access to public fora in order to exercise these rights.[76] The public forum doctrine states that speech restrictions should be given greater scrutiny when they take place in areas traditionally or historically associated with First Amendment activity, primarily because public fora such as parks, streets and sidewalks often provide the economically disadvantaged with their only access to communicative expression.[77] Yet a city may nonetheless regulate aspects of expression in a content-neutral manner at certain times and in certain locations in order to achieve legitimate municipal interests. The First Amendment requires that these regulations satisfy the time, place, and manner doctrine, most

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ness, Inc., 452 U.S. 640, 655 (1981); and a municipal theater, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975). The Court has held as non-public fora an airport, International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992); a public school district's internal mail system, *Perry,* 460 U.S. at 45-47; a military base, Greer v. Spock, 424 U.S. 828, 836 (1976); and a county jail, Adderley v. Florida, 385 U.S. 39, 48 (1966).

[75] The Supreme Court has noted that streets and parks "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. 496, 515 (1939). *See also* Frisby v. Schultz, 487 U.S. 474, 480 (1988); Boos v. Barry, 485 U.S. 312, 318 (1988) (invalidating a statute containing a content-based restriction that banned picket signs criticizing foreign governments on the street and sidewalks surrounding their embassies); *Perry*, 460 U.S. at 44. In *Frisby*, the Court also specifically determined that the fact that the streets in question in that case were narrow and of a residential character did not affect their status as public fora, stating that "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." 487 U.S. at 480.

[76] *Hague*, 307 U.S. at 515. *See also supra* note 38 (discussing the origins of the public forum doctrine).

[77] TRIBE, *supra* note 11, § 12-24, at 987. For an example of the inconsistency with which the Court has defined "traditional," see *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (determining that telephone and utility pole crosswires were not a traditional public fora for the hanging of political signs although they had been used for that purpose in Los Angeles for more than 50 years).

clearly stated in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.[78] In *Perry*, the Supreme Court stated:

> For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may . . . enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.[79]

These content-neutral time, place, and manner regulations are enforced through the use of the state's police power.[80] They are typically enacted by municipalities to serve broad goals such as public safety, health and welfare,[81] and are tailored to the particular interests of a city.

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[78] 460 U.S. 37, 45 (1983). *See also Clark*, 468 U.S. at 293 (holding that time, place, and manner restrictions are valid even as applied to expressive conduct protected to some extent by the First Amendment, such as sleeping to protest the conditions of the homeless); *Discovery Network*, 507 U.S. at 414 (holding that a city may regulate newsracks based upon the legitimate municipal goal of safety and aesthetics, but must establish a reasonable fit with the means chosen to achieve those objectives). In cases involving symbolic speech, courts apply a similar test taken from *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *See infra* note 118 (describing the *O'Brien* test). This Note urges that a synthesis of the *Perry* and *O'Brien* tests, as applied in *Clark*, be used as the standard by the municipal practitioner to draft aesthetic regulations best able to withstand challenge.

[79] *Perry*, 460 U.S. at 45 (citations omitted).

[80] Chief Justice Marshall defined police power as "[t]he acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 208 (1824). In more recent times, the Court has included in the police power "all the legislative powers which a state may exercise over its affairs." Berman v. Parker, 348 U.S. 26, 31 (1954). The *Berman* Court noted that "[a]n attempt to define [the] reach [of the police power] or trace its outer limits is fruitless . . . [because] the definition is essentially the product of legislative determination addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition." *Id.* at 32.

[81] *See supra* note 10 (listing other municipal interests recognized by the Supreme Court as capable of sustaining time, place, and manner regulations).

When legislation seeks to regulate the visual aspects of communicative activities on public property, courts will consider the nature of the speech forum, the type of activity affected by the enacted regulation, and the asserted governmental interests as a threshold matter in their factual inquiry.[82] Courts make this inquiry because time, place, and manner restrictions ultimately balance the significant interests of a city on behalf of all its citizens with an individual's right to engage in expression protected by the First Amendment. The requirement that alternative channels of communication be left open provides a safety valve to ensure that content-neutral time, place, and manner restrictions do not have an effect that censors or bans the speaker's message.

Particularly in traditional public fora, the Supreme Court also requires that ordinances be drafted with explicit enforcement standards to guide administrating officials.[83] Because inexplicit standards allow arbitrary and discriminatory enforcement that may censor speech or curtail expression,[84] aesthetic regulations are particularly susceptible to challenge by affected persons or groups on vagueness or overbreadth grounds. While the time, place, and manner test forms the framework for judicial inquiry of any challenged aesthetic regulation,[85] there are a finite number of

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[82] *See generally Clark*, 468 U.S. 288.

[83] *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969) (holding that an ordinance allowing the Birmingham City Commission discretion to refuse a parade permit did not provide narrow, objective, and definite standards, thereby abridging First Amendment rights).

[84] *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757-58 (1988) (noting that only standards limiting the licensor's discretion will eliminate the danger of self-censorship, because a newspaper relying on single-issue sales through newsracks could feel pressure to endorse or refrain from criticizing the incumbent mayor); Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814, 818 (9th Cir. 1996) (invalidating an inexplicit ordinance regulating signs and billboards).

[85] International Caucus of Labor Comms. v. City of Montgomery, 111 F.3d 1548, 1550 (11th Cir. 1997) (upholding an ordinance banning sidewalk tables used for the purpose of leafleting). The court noted that when the Supreme Court has not spoken specifically about the requirements for permissible regulation of a particular type of communicative activity, the court will apply the "usual time, place and manner test to each situation, as it arises." *Id.* at 1553.

specific regulatory elements that exist within that framework. Courts analyze these emphasized elements individually for constitutional compliance, because it is through these elements that legislators will tailor aesthetic regulations to suit municipal interests.[86]

C. *The Emergence of Aesthetics as a Legitimate Municipal Interest*

Before discussing the judicial analysis of challenged aesthetic regulations, it is important for the practitioner to realize that aesthetics has emerged as a legitimate municipal interest capable of independently justifying an aesthetic ordinance. Despite Supreme Court decisions establishing aesthetics as a legitimate municipal interest,[87] practitioners drafting aesthetic ordinances may inadvertently overlook the inclusion of aesthetics as an interest.[88]

The recognition of aesthetics as a municipal interest that may be furthered by regulatory means is a relatively recent phenomenon, sparked by citizen reaction to the urban blight and ugliness caused

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[86] These emphasized elements and their judicial analysis are examined in Part II.

[87] *See, e.g.*, City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984) (noting that it is "well settled that a state may legitimately exercise its police powers to advance esthetic values"); Berman v. Parker, 348 U.S. 26, 33 (1954) (noting that the municipal interest of public welfare includes aesthetics). *See infra* notes 100-101 and accompanying text for further discussion of *Berman*.

[88] For example, the New York City Council has drafted several variations of newsrack regulations. *See* New York, N.Y., Initiative 590 (July 18, 1995) (proposing to add N.Y. CITY ADMIN. CODE § 19-128.1, regulating newsracks). However, the City Council failed to include aesthetics as a municipal goal justifying visual and location restrictions on the newsracks. Due at least in part to the threatened opposition of affected newspaper publishers, and despite further hearings, these regulations have yet to be enacted. *See Court Backs a City on News-Box Removal*, N.Y. TIMES, Jan. 10, 1996, at A13. Courts are also unlikely to uphold challenged aesthetic ordinances when testimony is subsequently provided by a municipal official asserting aesthetics as the sole municipal interest, in the absence of a textual or factual showing. *See* E. E. Mazier, *Town-Wide Ban on Neon Signs Without a Nexus to Aesthetic Goal is Impermissible Stricture*, N.J. LAWYER, May 12, 1997, at 26.

by the rapid and haphazard growth of communities in the latter half of the nineteenth century.[89] The regulation of billboards was an early focus of garden clubs and other citizen groups who objected that billboards marred the beauty of the surroundings,[90] thus prompting municipalities to enact a variety of ordinances regulating billboard size, location and existence.[91] These early regulations were struck down by state courts holding that the municipal interest of aesthetics alone did not justify the use of the police power to regulate private property.[92] Community aesthetic concerns were also commonly raised in the context of nuisance[93] claims between

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[89] The "City Beautiful" movement, which began about 1880, focused citizens and design professionals on the importance of city planning as a tool to improve the appearance of cities prior to the enactment of comprehensive zoning and aesthetic regulations. PAUL D. SPREIREGAN, URBAN DESIGN: THE ARCHITECTURE OF TOWNS AND CITIES 38-39 (1965).

[90] ROBERT M. ANDERSON, 1 NEW YORK ZONING LAW AND PRACTICE § 7.08, at 319 (1984) (discussing the regulation of billboards in New York).

[91] *Id.* § 7.08, at 320.

[92] *See, e.g.*, Curran Bill Posting & Distrib. Co. v. City of Denver, 107 P. 261, 265 (Colo. 1910) (recognizing a concern for a citizen's freedom of expression in the context of billboard regulation); Passaic v. Patterson Bill Posting, Adver. & Sign Co., 62 A. 267, 268 (N.J. 1905) (holding that an ordinance regulating the size, height, location, position and material of all fences, billboards and advertisements, with the effect of using the state police power to deprive a landowner of the ordinary business use of his property, could not be justified on aesthetic grounds and must instead be reasonably necessary for the public safety), *overruled in part by* State v. Miller, 416 A.2d 821, 824 (N.J. 1980) (holding that a zoning ordinance regulating signs may accommodate aesthetic concerns). The court opined in *Patterson Bill Posting* 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 to take private property without compensation." 62 A. at 268.

[93] Nuisance is defined as an "activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to the right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damage." BLACK'S LAW DICTIONARY 1065 (6th ed. 1991). A nuisance that affects community aesthetics is "mixed," because it is "both public and private in its effects, public because it injures many persons or all the community, and private in that it also produces special injuries to private rights." *Id.* at 1066 (citations omitted).

neighboring landowners.[94] As with billboard regulations, because of the subjective connotations associated with the word "aesthetic,"[95] for many years it was difficult to convince judges that the unsightly use of land could create an actionable nuisance.[96]

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[94] Such nuisance claims included aesthetically objectionable uses of land for business or industrial purposes, but the outcome of the claims varied depending upon the activity. *See, e.g.*, Powell v. Taylor, 263 S.W.2d 906, 907 (Ark. 1954) (banning a funeral home from a residential district in order to protect the aesthetic sensibilities and mental health of neighboring homeowners); Parkersburg Builders Material Co. v. Barrack, 191 S.E. 368, 371 (W. Va. 1937) (excluding as a form of nuisance an auto wrecking business not clearly located in a residential district merely on the grounds of unsightliness). In general, nuisance law does not provide relief from aesthetic harms. *See* United States v. County Bd., 487 F. Supp. 137, 143 (E.D. Va. 1979) (refusing to find aesthetic injury to be a nuisance where it was alleged that high rise towers to be built on the Virginia side of the Potomac River across from Washington, D.C. would visually interfere with the backdrop that Pierre L'Enfant, the city's designer, envisioned for the monuments).

[95] *See supra* note 3 (defining aesthetic).

[96] ANDERSON, *supra* note 90, § 7.05, at 314 (discussing judicial insistence in the first half of the twentieth century that unsightliness as the basis for an aesthetic nuisance claim was not an appropriate matter for the courts). Chief Judge Cardozo recognized the uncertain legal state surrounding aesthetic regulations in New York during the early 1930's when he observed:

> The organs of smell and hearing, assailed by sounds and odors too pungent to be borne, have been ever favored of the law, more conspicuously, it seems, than sight which perhaps is more inured to what is ugly or disfigured. Even so, the test for all the senses, for sight as well as smell and hearing, has been the effect of the offensive practice upon the reasonable man or woman of average sensibilities. One of the unsettled questions of the law is the extent to which the concept of nuisance may be enlarged by legislation so as to give protection to sensibilities that are merely cultural or aesthetic. The question need not be answered to decide the case at hand.

People v. Rubenfeld, 172 N.E. 485, 486-87 (N.Y. 1930) (citations omitted). In New York, aesthetics was not upheld as a municipal interest capable of justifying speech regulation until the case of *People v. Stover*, 191 N.E.2d 272, 278 (N.Y.), *appeal dismissed*, 375 U.S. 43 (1963) (upholding a Rye, N.Y. ordinance which prohibited the erection and maintenance of clotheslines visible from the street). The ordinance was enacted in reaction to the Stover Family's dissatisfaction with the amount of their taxes, which they expressed by hanging tattered clothing across their front yard. *Id.* at 273. While the prosecutor argued that the

State courts did allow cities to realize the conjunctive aesthetic benefits of ordinances enacted to serve more traditional municipal interests such as safety, health or morals,[97] and slowly these cases were affirmed by the Supreme Court.[98] However, it was not until 1954, in *Berman v. Parker*,[99] a case in which the Supreme Court upheld an urban renewal plan for the District of Columbia, that aesthetics was determined to be an independently legitimate municipal interest.[100] In *Berman*, the Supreme Court recognized for the first time that aesthetics was included within the larger

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clotheslines (to say nothing of Mrs. Stover's fluttering undergarments) would distract motorists and prevent evacuation from the house in case of fire, the court discounted those interests, and instead upheld the ordinance because it tended to preserve the residential character of the neighborhood. *Id.* at 274. The court noted, "[o]nce it be conceded that aesthetics is a valid subject of legislative concern, it seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power." *Id.* at 275. Decisions such as *Stover* were the foundation for a number of Supreme Court decisions involving aesthetic regulations in the 1980's. *See infra* note 116 (listing these Supreme Court cases).

[97] *See* St. Louis Gunning Adver. Co. v. City of St. Louis, 135 S.W. 929, 942 (Mo. 1911) (justifying billboard regulation because billboards are "constant menaces to the public safety and welfare; they endanger the public health, promote immorality, [and] constitute hiding places for criminals and classes of miscreants").

[98] For example, in *Welch v. Swasey*, the Supreme Court upheld two Massachusetts statutes that established building height regulations in Boston. 214 U.S. 91, 106 (1909). Although the *stated* legislative interest was to protect the beauty of the Boston cityscape, the Court sustained the regulations by reasoning that a building height cap would improve fire safety. *Id.* at 107. The Court was unconcerned that the police power was also being used to indirectly further aesthetic ends, noting "[t]hat in addition to these sufficient facts [establishing that the municipal interest of public safety would be served], considerations of an aesthetic nature also entered into the reasons for their passage, would not invalidate them." *Id.* at 108. The Court performed no independent fact-finding, but simply presumed that the issue of fire safety may have entered into the purpose of the Building Commissioner in refusing to approve a permit for a building not in conformance with the statute's height requirements. *Id.* The Court was careful to note that its decision to uphold the ordinance was justified for reasons of public safety, not aesthetics. *Id.* at 107-08.

[99] 348 U.S. 26 (1954).

[100] *Id.* at 32.

municipal interest of public welfare, noting that "[t]he values [public welfare] 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."[101] Although *Berman* did not involve the regulation of First Amendment freedoms,[102] the decision signaled the Court's willingness to permit government efforts to beautify cities.[103] In response, lower courts began to uphold aesthetic regulations that had been previously invalidated,[104] and legislatures soon began to enact statutes and create administrative agencies for the purposes of urban renewal and historic preservation.[105] *Berman* is also significant because the Court deferred to Congress' determination of the defined public interests justifying the enacted aesthetic regulation.[106] The Court noted that it is "the legislature,

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[101] *Id.* at 33.

[102] In *Berman*, the Court determined that aesthetic concerns, in conjunction with other municipal interests, justified condemnation of substandard property to develop "a better balanced, more attractive community" through exercise of eminent domain under the Fifth Amendment. *Id.* at 31, 33.

[103] *See* COSTONIS, *supra* note 4, at 23.

[104] *See* COSTONIS, *supra* note 4, at 23.

[105] *See* COSTONIS, *supra* note 4, at 23-25. *Berman* began a trend among lawmakers to enact land use controls to serve aesthetics ends, such as the National Highway Beautification Act of 1965, 23 U.S.C. §§ 131, 319 (1994), and incentive zoning (permitting developers to construct larger buildings in return for providing plazas and other design amenities) to improve the aesthetics of cities. COSTONIS, *supra* note 4, at 23-24. Congress also approved the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-35, 4341-47 (1994), requiring the filing of environmental impact statements by federal agencies when constructing dams, financed interstate highways or licensed nuclear plants in order to identify and mitigate or avoid harms to environmental aesthetics. COSTONIS, *supra* note 4, at 25.

[106] The Court noted that in the text of the District of Columbia Redevelopment Act of 1945 § 2, 60 Stat. 790 (1951):

> Congress made a "legislative determination" that "owing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas . . . are injurious to the public health, safety, morals, and welfare; and it is hereby declared to be the

not the judiciary, [that] is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs."[107]

With the *Berman* decision and those of state courts across the country,[108] the focus of judicial inquiry changed: future examinations of regulations would focus on whether the means employed to achieve the aesthetic objective were arbitrary or unreasonable,[109] instead of verifying the precise legislative objective. While aesthetics alone was not yet capable of justifying First Amendment regulation—this would not occur in the Supreme Court for another thirty years[110]—aesthetics was finally recognized as

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> policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose."

Berman, 348 U.S. at 28.

[107] *Id.* at 32 (citations omitted).

[108] A similar shift towards recognition of aesthetics as a legitimate municipal goal occurred in other states during roughly the same period, culminating in the *Berman* decision. *See, e.g.*, Sunad, Inc., v. City of Sarasota, 122 So. 2d 611, 614-15 (Fla. 1960) (holding unconstitutional a sign ordinance that discriminated between sizes of on-site advertising signs and billboards, but finding aesthetics to be just cause for sign regulation), *overruled in part by* City of Lake Wales v. Lamar Adver. Ass'n, 414 So. 2d 1030 (Fla. 1982); State *ex rel.* Civello v. City of New Orleans, 97 So. 440, 444-45 (La. 1923) (suggesting in dicta that previously decided cases upholding billboard regulations could have rested logically on aesthetic considerations as easily as those of general welfare); General Outdoor Adver. Co. v. Department of Pub. Works, 193 N.E. 799, 817 (Mass. 1935) (holding that aesthetics is a proper basis for an action in granting and denying permits for billboard and sign locations), *appeal dismissed*, 297 U.S. 725 (1936); Best v. Zoning Bd. of Adjustment, 141 A.2d 606, 612-13 (Pa. 1958) (upholding the ability of municipal officials to enact reasonable zoning ordinances based upon aesthetics); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 69 N.W.2d 217, 222-23 (Wis.) (upholding an ordinance establishing building permit issuance standards for compatibility with previously constructed buildings), *cert. denied*, 350 U.S. 841 (1955).

[109] People v. Stover, 191 N.E.2d 272, 275 (N.Y.), *appeal dismissed*, 375 U.S. 43 (1963).

[110] *See* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (establishing aesthetics as a municipal goal justifying regulation of

an independent, if sometimes underutilized or overlooked, municipal interest.

II. THE LEGAL FRAMEWORK FOR JUDICIAL ANALYSIS OF AESTHETIC REGULATIONS

Despite the mandate of the First Amendment,[111] judicial decisions involving challenged aesthetic regulations invariably balance the competing rights of the city, the particular local neighborhood and affected citizens, either explicitly or implicitly.[112] Legal scholars studying First Amendment topics have collected and extensively analyzed these cases and the underlying aesthetic legislation.[113] Other commentators have debated the permissible limits of aesthetic regulation.[114] Yet actually drafting

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political signage). *See* Part II.A for further discussion of *Vincent*.

[111] *See supra* note 7 (discussing the text of the First Amendment).

[112] *See Vincent*, 466 U.S. at 806-07; Eastern Conn. Citizens Action Group v. Powers, 723 F.2d 1050, 1055 (2d Cir. 1983).

[113] *See* Debra T. Landis, Annotation, *Restriction of Use of Public Parks as Violating Freedom of Speech or Press Under First Amendment of Federal Constitution*, 82 L. Ed. 2d 958 (1986 & Supp. 1996) (discussing permit requirements and other restrictions on the use of parks); Dale R. Agathe, Annotation, *Validity and Construction of Statute or Ordinance Protecting Historical Landmarks*, 18 A.L.R.4th 990 (1981 & Supp. 1996) (collecting and analyzing state and federal cases in which courts have construed the validity of state statutes or municipal ordinances protecting historic landmarks); Timothy E. Travers, Annotation, *Validity and Construction of State or Local Regulation Prohibiting Off-Premise Advertising Structures*, 81 A.L.R.3d 486 (1977 & Supp. 1997) (collecting and discussing cases in which courts have construed state or local regulations prohibiting off-premises advertising signs and billboards); L. S. Groff, Annotation, *Authorization, Prohibition, or Regulation by Municipality of the Sale of Merchandise on Streets or Highways, or Their Use for Such Purpose*, 14 A.L.R.3d 896 (1968 & Supp. 1997) (discussing the power of a city to authorize, regulate or prohibit the sale of merchandise on its streets, sidewalks, parks, beaches or highways).

[114] *See* Michael A. Pavlick, Note, *No News (Rack) Is Good News? The Constitutionality of a Newsrack Ban*, 40 CASE W. RES. L. REV. 451 (1990) (arguing that a complete newsrack ban would survive constitutional scrutiny). *But see* Peter Ball, *Extra! Extra! Read All About It: First Amendment Problems in the Regulation of Coin Operated Newspaper Vending Machines*, 19 COLUM. J.L. & SOC. PROBS. 183, 192-93 (1985) (suggesting that total newsrack bans are

an aesthetic ordinance that is invulnerable to challenge is still elusive[115] for many of the subjective reasons that make aesthetics difficult to define and justify. Consequently, although an aesthetic regulation may be drafted to avoid challenge, it nonetheless may still be subjected to challenge.

First Amendment decisions are typically based on a balance between the municipal interests prompting the regulation of speech, the means used to regulate the expression, the type of speech subject to regulation and the place where the speech occurs.[116] When the location of the regulated speech is a traditional public forum, courts apply the time, place, and manner test set forth in *Perry Education Ass'n v. Perry Local Educators' Ass'n*[117] to

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always unconstitutional). Ball's conclusion has been called into question by recent case decisions. *See, e.g.*, Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175 (1st Cir. 1996) (upholding the constitutionality of street furniture guidelines effectively banning newsracks from a historic district in Boston).

[115] *See supra* note 17 (citing selected news articles discussing currently pending challenges to municipal aesthetic ordinances).

[116] *See generally* GUNTHER, *supra* note 14, § 12-4, at 1249-53. The most significant recent cases in which the Supreme Court broadly set the limits of aesthetic regulations were decided in the mid-1980's. *See generally* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); *Vincent*, 466 U.S. 789 (1984); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). These cases were supplemented by a later decision by the Court involving newsracks in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Since 1993, the Supreme Court has heard First Amendment cases involving public fora sporadically. *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (invalidating an ordinance banning the erection of unattended religious structures on government property); City of Ladue v. Gilleo, 512 U.S. 43 (1994) (invalidating a city ordinance that banned all residential signs except those falling into one of ten exemptions, for the principal purpose of minimizing visual clutter). The *Ladue* ordinance failed as a time, place, and manner restriction because the Court determined that handbills and advertisements were inadequate substitute communication media for the banned signs. 512 U.S. at 56.

[117] 460 U.S. 37 (1983). *See supra* Part II.B (outlining the *Perry* test). The Court states in *Perry* that in traditional public fora, content-based restrictions are presumptively invalid and therefore subject to strict scrutiny. *Id.* at 45. In contrast, the *Vincent* Court applied the test from *United States v. O'Brien* and held that an ordinance banning the posting of political signs on street light poles

perform their initial review of the justification for the aesthetic ordinance. If the speech occurring in the public forum is symbolic, the Supreme Court alternatively applies the test outlined in *United States v. O'Brien*.[118]

However, because some elements of the *Perry* and *O'Brien* tests overlap,[119] in past decisions when speech is combined with a symbolic element,[120] the Supreme Court has framed its analysis of the regulation at issue under *O'Brien*, while still relying heavily on the *Perry* time, place, and manner test.[121] The result is the citation of the prongs of the *Perry* test in case opinions, coupled

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was constitutional. *Vincent*, 466 U.S. at 804-05. The difference was the Court's determination that the light poles were not a traditional public forum, but rather a limited public forum. *Id.* at 814. Consequently, even though the ordinance regulated political speech, and aesthetics was the justifying municipal interest, the regulation was constitutional. *Id.* at 815. *See infra* note 118 (outlining the prongs of the *O'Brien* test).

[118] 391 U.S. 367 (1968) (burning of a draft card identified as symbolic speech, but nonetheless permissibly regulated based on the government interest of insuring the availability of draft cards during wartime). The Supreme Court held in *O'Brien*:

> [A] government 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 the furtherance of that interest.

Id. at 377. The intermediate scrutiny of the *O'Brien* test contains elements of the public forum time, place, and manner test from *Perry*. However, the *Perry* test is more speech protective because in addition to the prongs of the *O'Brien* test a speaker must also have access to an alternative means for communicating his message. The Court is slightly less protective of speech containing only a symbolic element, as the *O'Brien* test indicates. *See generally* Harold L. Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 HASTINGS L.J. 439 (1986).

[119] *Compare* the *Perry* test, outlined *supra* Part II.B, *with* the *O'Brien* test, outlined *supra* note 118.

[120] The combination of speech with a symbolic element is often regulated by aesthetic ordinances. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (a demonstration with speeches was combined with the symbolic activity of sleeping overnight in a park).

[121] *Vincent*, 466 U.S. at 804-05, 808-10.

with the recognition of the elements of the *O'Brien* test in the supporting judicial analysis.[122] Recognizing this tendency, and the fact that regulation of the means of speech dissemination may contain both pure speech and symbolic qualities, practitioners should adopt a synthesis of the two tests as a drafting standard for their own aesthetic ordinances.[123]

To be constitutional under the First Amendment, an aesthetic regulation should therefore be: (1) content-neutral; (2) drawn to further an important or substantial governmental interest; that (3) is within the constitutional power of the Government; (4) be narrowly tailored to serve that government interest; and (5) leave open ample alternative channels of communication. Under the synthesized test, the focus of judicial inquiry often becomes whether the government is regulating speech or symbolic expression with the intent to censor because of disagreement with the content of the message.[124] While a city may regulate speech content only if such a restriction is necessary, and narrowly drawn, to serve a compelling governmental interest,[125] a content-neutral aesthetic regulation[126] may be upheld even though it has an

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[122] *See Clark*, 468 U.S. at 299 n.8.

[123] The *Perry/O'Brien* synthesized test was applied by the Supreme Court in *Clark*. *Id.* at 298-99. *Clark* has now come to stand for the proposition that government may enact content-neutral time, place, and manner regulations involving symbolic conduct, to some extent replacing *O'Brien* as the leading case. *Id.* at 297-98. Whether a reviewing court cites to *Clark* or *O'Brien*, the elements of the synthesized test are consistently applied. *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 769 (1995) (citing *Clark*, 468 U.S. at 293); *Vincent*, 466 U.S. at 804-05 (citing *O'Brien*, 391 U.S. at 377).

[124] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[125] In traditional public fora, ordinances proposing to regulate First Amendment freedoms may be subject to strict scrutiny, whether or not they are content-based. *See supra* note 15. However, content-based restrictions are the most difficult for the government to justify under the *Perry* test and are examined most carefully by courts. *See supra* note 15. Because aesthetic ordinances are primarily concerned with the regulation of the visual or aural aspects of communicative expression, they are not typically content-based, although their application may have that incidental effect. *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 763-64 (1988).

[126] *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). Individual Justices have even suggested that an outright ban on certain

incidental restraining effect on speech, if it serves a legitimate or significant municipal interest unrelated to the speech content.[127] Although aesthetics is considered to be a significant interest,[128] it has never been judged by the Supreme Court to be a compelling interest. The application of the synthesized test therefore suggests that practitioners and government officials ensure that their policies reflect valid governmental interests such as public safety, welfare

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types of expression may be constitutional, although the Supreme Court has not yet decided the constitutionality of a ban on newsracks. Justice White's dissent in *Plain Dealer* stated "[t]he Court quite properly does not establish any constitutional right of newspaper publishers to place newsracks on municipal property. The Court expressly declines to 'pass' on the question of the constitutionality of an outright municipal ban on newsracks. . . . [C]ities remain free . . . to enact such bans." 486 U.S. 750, 773 (1988). *See also Capitol Square*, 515 U.S. at 761 (recognizing that the government can ban from a government-owned public forum all unattended displays if it so desired) (O'Connor, J., concurring); *id.* at 802-03 (Stevens, J., dissenting) (same); *Vincent*, 466 U.S. at 810-11 (noting that an aesthetic interest in banning signs on public property is not compromised by not extending the ban to private property, since alternative means are preserved for disseminating the speech message). The potential for a municipality to enact bans on expressive activities is discussed more fully in Part II.B.

[127] *See Clark*, 468 U.S. at 293. A regulation is not content-based simply because an official reviewing the proposed expression must make a determination of whether an activity is in violation of the ordinance. *See* Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 183 (1st Cir. 1996). Courts have upheld ordinances as content-neutral even though an official was required to make this determination, as long as the ordinance provides explicit standards by which the determination can be made. *Id.*

[128] Activities benefitted by aesthetics, such as the promotion of tourism, economic growth and preservation of property are also significant governmental interests. *See* New Orleans v. Dukes, 427 U.S. 297, 304 (1976). The protection of residential privacy, sometimes used as a justification for aesthetic regulations, has also been determined by the Supreme Court as a significant government interest. Frisby v. Schultz, 487 U.S. 474, 484 (1988).

and aesthetics, and not community prejudice,[129] or impermissible motives leading to censorship of speech content.[130]

After the determination of content-neutrality, the reviewing court examines whether the particular time, place, and manner regulation is narrowly tailored to achieve the stated significant municipal interest. In *Ward v. Rock Against Racism*,[131] the Supreme Court established that an ordinance is valid if it does not burden "substantially more speech than is necessary to further the government's legitimate interests."[132] The Court has also determined that the overall municipal context impacted by the ordinance must be taken into consideration, and so requires that an enacted regulation have "more than a negligible impact on aesthetics."[133]

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[129] *See* Gerritsen v. City of Los Angeles, 994 F.2d 570, 578 (9th Cir.) (holding an ordinance prohibiting handbill distribution in certain portions of a historic district unconstitutional because its permit scheme targeted the political activities of a single individual who was disseminating speech with which the city disagreed), *cert. denied*, 510 U.S. 915 (1993).

[130] *See* Cleveland Area Bd. of Realtors v. City of Euclid, 88 F.3d 382, 385 (6th Cir. 1996) (upholding the district court's decision that although a sign ordinance's "principal justification" was aesthetics, the city's actual motivation was to "'curtail[] the negative messages that are often associated with the proliferation of real estate signs in neighborhoods'") (citation omitted).

[131] 491 U.S. 781 (1989).

[132] *Id.* at 799. This determination abandoned the "least restrictive means" test previously in effect for assessing time, place, and manner regulations. In *Rock Against Racism*, the Court stated:

> [T]he regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. "The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests" or the degree to which those interests should be promoted.

Id. at 800 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). The "least restrictive means" test has also been rejected for judging restrictions on commercial speech. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 418 n.13 (1993). The Court does examine whether the manner of restriction is the least severe in analyzing the "fit" between the government's asserted interest and the means chosen to achieve them. *Id.* at 416 n.12 (relying on Board of Trustees v. Fox, 492 U.S. 469, 480 (1989)).

[133] Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 531 (1981).

Such a showing generally requires that the government be engaged in a "comprehensive coordinated effort"[134] to address the aesthetic concerns of the city or affected community.

Finally, the reviewing court examines whether the means of regulation leaves open ample alternative channels for the communication of the speech message. This factual inquiry is made by the court based upon the application of the ordinance to the particular First Amendment activity and circumstances of the case.[135] Because the Supreme Court has held that a municipality may sometimes restrict speech when necessary to advance significant government interests,[136] it has in essence created a reasonableness standard for determining whether ample alternative channels exist. If reasonable alternative channels exist, a court should uphold a municipal ordinance that forecloses a particular method of disseminating speech,[137] or a ban applicable to certain areas of a city.[138]

Many courts utilize a similar legal framework in their time, place, and manner analysis of aesthetic ordinances that regulate First Amendment activities. Within this framework courts consistently emphasize a finite set of elements, and examine the relation-

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[134] *Id.* This requirement is similar to the "direct advancement" element of the test for First Amendment protection of commercial speech advanced in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564-66 (1980). *See infra* note 153 (outlining the elements of the *Central Hudson* test).

[135] *See* Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 192-94 (1st Cir. 1996). Because the ordinance at issue in *Globe Newspaper* affected only newsracks and other street furniture in an aesthetically sensitive historic district, the Court analyzed the available means of newspaper distribution and found that other means, such as vendors, were a more historically appropriate alternative. *Id.* at 189.

[136] City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

[137] *Id.* at 803-04.

[138] *See Globe Newspaper*, 100 F.3d at 178 (ordinance banning newsracks applicable only to Boston's Beacon Hill Historic District); Sciarrino v. City of Key West, 83 F.3d 364, 366 (11th Cir. 1996) (regulation of handbills applicable only in the city's historic district); Gerritsen v. City of Los Angeles, 994 F.2d 570, 573 (9th Cir. 1993) (ordinance regulating handbill distribution applicable only to historic El Pueblo Park section of the city).

ship between municipal interests and permissible means for achieving them, delegation of enforcement discretion, permit procedures, and insurance requirements.[139] The municipal and citizen interests encompassed within these elements are weighed by the courts in their determination of whether a communicative activity will be protected from regulation in a given situation. Part II.A focuses on these emphasized textual elements in cases where specific aesthetic ordinances were constitutionally challenged on vagueness or overbreadth grounds. Part II.B presents a special examination of current cases in areas of heightened aesthetic concern and discusses the implications of these decisions on the drafting of regulations applicable to these special contexts.

A. The Emphasized Elements: Municipal Interests and Permissible Means, Enforcement Delegation and Permit Procedures, and Insurance Requirements

Vagueness and overbreadth challenges to content-neutral aesthetic regulations involve the constitutionality of restraints on the visual aspects of communicative expression through time, place, and manner regulations.[140] Using the legal framework of the synthesized *Perry/O'Brien* test, judicial decisions on the merits of these challenges focus on a specific set of emphasized elements.

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[139] *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417-18 (1993) (analyzing the fit between municipal goals and the means chosen to achieve them); Ward v. Rock Against Racism, 491 U.S. 781, 791-92 (1989) (examining the enacted ordinance for content-neutrality); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 769-70 (1988) (examining whether an ordinance provides for non-discriminatory enforcement); *Vincent*, 466 U.S. at 805 (discussing the justification for the asserted municipal goals); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984) (upholding an ordinance that banned the expressive activity of sleeping in a protest in a national park in Washington, D.C., after verifying the existence of alternative means for communication of the intended message); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 511-12 (1981) (distinguishing between permissible regulation favoring on-site commercial advertising over off-site commercial advertising, and impermissible regulation favoring on-site commercial over non-commercial speech).

[140] *See Plain Dealer*, 486 U.S. at 756.

These elements are examined even when the challenge is not based upon vagueness or overbreadth.[141] These elements create an interface between the factual circumstances of the case and constitutional theory and are used by the reviewing court to balance the rights of the city, the local community and citizens. The emphasized elements are the relationship between the stated municipal interests and the means chosen to achieve them;[142] the delegation of decision-making discretion to regulation enforcement officials;[143] and the procedural and substantive permit and insurance requirements for approval to engage in the regulated communicative conduct.[144] Although not every challenged ordinance will contain each element, the municipal practitioner should consider

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[141] *See generally Globe Newspaper*, 100 F.3d at 182-94 (examining the emphasized elements in analyzing a challenge to an ordinance that established street furniture guidelines for Boston on the grounds that the guidelines impermissibly infringed on distribution rights of newspaper publishers under the First Amendment).

[142] *See* Messer v. City of Douglasville, 975 F.2d 1505, 1508 (11th Cir. 1992).

[143] *See Plain Dealer*, 486 U.S. at 772 (determining that the lack of express standards in a newsrack ordinance allowed the Mayor to set additional conditions or deny permit applications with unlimited discretion); Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814, 818 (9th Cir. 1996) (invalidating an ordinance conditioning a permit to erect a sign or billboard on findings by city officials that the billboards or signs "will not have a harmful effect upon the health or welfare of the general public and will not be detrimental to the welfare of the general public and will not be detrimental to the aesthetic quality of the community or the surrounding land uses"); Miami Herald Publ'g Co. v. City of Hallandale, 734 F.2d 666, 673-74 (11th Cir. 1984) (holding that the conditioning of a license to vend newspapers on compliance with "applicable ordinances" to be determined at the discretion of the city clerk creates an unconstitutionally broad censorial power).

[144] *See* Gannett Satellite Info. Network, Inc. v. Metropolitan Transp. Auth., 745 F.2d 767, 772 (2d Cir. 1984) (finding MTA newsrack licensing fee constitutional as a reasonable time, place, and manner restriction narrowly tailored to serve the significant government interest of raising revenue for the efficient, self-sufficient operation of the rail lines); *Miami Herald*, 734 F.2d at 674 (determining that a newsrack ordinance that conditioned a license to install newsracks on "unspecified conditions precedent" granted city officials the opportunity to discriminatorily deny licenses and therefore was not a narrowly drawn time, place, and manner regulation).

how the precise drafting of each element will add to the clarity and specificity of the ordinance as a whole.

Cities have enacted ordinances or formulated policy regulating such varied expressive activity as parades,[145] picketing,[146] protests and demonstrations,[147] leafleting tables,[148] street sales of art,[149] impromptu sidewalk and park performances of music,[150] and organized concerts.[151] Yet the majority of recent cases have concerned vagueness and overbreadth challenges to ordinances regulating newsracks on city sidewalks[152] and signs of various types.[153] Because newsracks, signs and billboards are semi-perma-

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[145] *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 148 (1969).

[146] *See* Cameron v. Johnson, 390 U.S. 611, 616-17 (1968).

[147] *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 290-91 (1984).

[148] *See* International Caucus of Labor Comms. v. City of Montgomery, 111 F.3d 1548, 1549 (11th Cir. 1997); International Caucus of Labor Comms. v. City of Chicago, 816 F.2d 337, 339 (7th Cir. 1987); International Caucus of Labor Comms. v. Metropolitan Dade County, 724 F. Supp. 917, 920 (S.D. Fla. 1989).

[149] *See* Bery v. City of New York, 97 F.3d 689, 691 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 2408 (1997).

[150] *See* Turley v. New York City Police Dep't, No. 93 Civ. 8748 (S.D.N.Y. Mar. 4, 1996), *injunction granted*, No. 93 Civ. 8748 (S.D.N.Y. Dec. 18, 1997).

[151] *See* Ward v. Rock Against Racism, 491 U.S. 781, 793-94 (1989).

[152] *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 415 (1993); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755 (1988).

[153] *See* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 816-17 (1984) (upholding an ordinance regulating political campaign signs based upon the city's aesthetic interest in avoiding visual clutter); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512-13 (1981) (invalidating an ordinance banning the erection of outdoor advertising displays, such as billboards, carrying non-commercial messages and commercial advertising for goods located off-site). The *Metromedia* Court held that a city may selectively regulate types of commercial speech, but may not do the same with non-commercial speech. 453 U.S. at 506, 513.

The Supreme Court distinguishes between commercial speech and non-commercial speech, holding that while commercial speech may be regulated more broadly than non-commercial speech, it is still protected from unwarranted government regulation by the First Amendment. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980). The *Central Hudson* Court adopted a specific test for evaluating the constitutionality of regulations involving commercial speech as distinguished from more fully

nent structures, their impact on the aesthetics of a community can be particularly noticeable. Consequently, they are often the focus of aesthetic regulations seeking to ameliorate their visual impact, and reviewing courts are generally sympathetic to the city's regulatory interest.[154] The reaction of courts to municipal regulation of more transient forms of speech dissemination, such as leafleting, picketing and demonstrations is less sympathetic.[155] Courts may support the First Amendment rights of a citizen speaking for a limited time more favorably,[156] leaving the city

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protected non-commercial speech. *Id.* at 563-66. The Court held that commercial speech is protected under the First Amendment if the speech concerns lawful activity and is not misleading. *Id.* at 563. However, government must assert a substantial interest served by the commercial speech restrictions. *Id.* at 564. Commercial speech restrictions are then valid only if the regulations seek to implement a substantial government interest, directly advance that interest, and reach no further than is necessary to accomplish the given objective. *Id. See Discovery Network*, 507 U.S. at 427-31 (holding unconstitutional an ordinance banning newsracks carrying commercial advertisements but permitting those carrying newspapers). When the aesthetic regulation affects both types of speech, it may be evaluated using the heightened scrutiny applied to non-commercial speech. *See* Southlake Property Assoc. v. City of Morrow, 112 F.3d 1114, 1116-17 (11th Cir. 1997) (applying a heightened level of scrutiny to a sign ordinance affecting both commercial and non-commercial speech, yet finding the ordinance constitutional because the court determined that it did not reach non-commercial speech and permissibly regulated commercial speech).

[154] *See Vincent*, 466 U.S. at 805; Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 183 (1st Cir. 1996); Messer v. City of Douglasville, 975 F.2d 1505, 1510-11 (11th Cir. 1992).

[155] *See* Schneider v. New Jersey, 308 U.S. 147, 162, 164 (1939) (justifying the burden imposed on municipalities to clean the streets of litter as an indirect consequence of the constitutional protection of the freedom of speech and press). *But see* Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949) ("That more people may be more easily and cheaply reached by sound trucks . . . is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.").

[156] In *Schneider*, the Supreme Court invalidated an ordinance banning handbill distribution on public streets, although the ban was the city's most effective means of serving the substantial municipal interest in minimizing litter and traffic congestion. 308 U.S. at 162. The Court determined that punishing those who actually litter interfered less with First Amendment rights, although the city suffered the aesthetic detriment of litter. *Id.*

and other citizens to accept any aesthetic detriment. The predominance of challenges to newsrack and sign regulations may also reflect the financial ability of newspaper publishers and advertisers to mount these challenges, rather than being truly representative of all viable challenges that may be made to aesthetic ordinances.[157] Despite the diverse types of expressive speech, the emphasized elements recur in varying combinations in virtually all cases. The impact of the emphasized elements on vagueness and overbreadth challenges are individually discussed below.

1. Municipal Interests and Permissible Means

Challenges to aesthetic ordinances are either based on a failure to connect the means of regulation with the stated municipal interest or an assertion that aesthetics alone cannot justify First Amendment regulation in the particular public fora at issue. The leading contemporary Supreme Court decision recognizing the validity of aesthetic regulation is *City Council of Los Angeles v. Taxpayers for Vincent*,[158] in which the Court determined that municipal interests such as aesthetics could outweigh concerns over curtailing freedom of speech under certain circumstances.[159] In *Vincent*, Los Angeles enacted a ban on all signs on designated public property and fixtures, thereby prohibiting a political campaign committee from posting candidate signs on city utility

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[157] There is also the converse concern: that a newspaper or other group wishing to engage in expression in a public fora will be a target of a permit denial and will not have the time or economic means to mount a challenge. This was anticipated in *Plain Dealer*, leading the Court to require that an ordinance provide explicit standards for the granting of a permit. 486 U.S. at 758. For a more recent example, see Caitlin Francke, *For-Sale Sign Case is Won in Court; Judge Says Law on Cars Parked Along Roads is Unconstitutional*, BALTIMORE SUN, Nov. 22, 1996, at 1B (involving a *pro se* case in which a citizen appealed, at his own expense, two $24 parking tickets written because his car had an illegal for sale sign in the window).

[158] 466 U.S. 789 (1984).

[159] *Id.* at 805. In *Vincent*, the Court found that aesthetic interests in avoiding "visual clutter" were sufficiently substantial to justify a content-neutral prohibition against political signs on public property. *Id.*

poles and crosswires.[160] Applying a reasonableness test[161] to the content-neutral ordinance, the Court determined that the utility poles were not public fora, and that such a regulation could stand when it does not seek to prohibit particular viewpoints and is reasonable in a "common sense" way.[162] The Court also held that the regulation need not be the most reasonable solution available,[163] and most significantly, noted that simply because government property *can* be used for expressive activity does not imply a constitutional *requirement* that such uses be permitted.[164] The ruling in this case suggests that clearly stating aesthetics as a municipal goal provides additional latitude for city officials to enact time, place, and manner regulations affecting visual aspects of the speech medium, even when the content is political.[165] Aesthetics may also be used in conjunction with other historically recognized

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[160] *Id.* at 792.

[161] The *Vincent* Court adapted the reasonableness test from *Perry*, stating that:

> Public property which is not by tradition or designation a forum for public communication may be reserved by the State "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."

Id. at 814-15 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)). *Cf.* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993) (applying an additional "reasonable fit" test between municipal means and ends). The ordinance at issue failed, however, because the ban affected only a small percentage of newsracks in the city, the ordinance did not clearly distinguish between commercial and non-commercial publications, and because a ban limited to commercial messages did not have a direct relationship to the stated municipal interest of aesthetics. *Id.* at 429-30. The ordinance was therefore found not to be content-neutral. *Id.*

[162] *Vincent*, 466 U.S. at 815.

[163] *Id.* at 810-12.

[164] *Id.* at 814 (emphasis added).

[165] Political speech is traditionally entitled to the fullest possible constitutional protection under the First Amendment, and the posting of signs is a historic means of communicating a broad range of political ideas and information. *Id.* at 819 (Brennan, J., dissenting) (arguing that subjective aesthetic municipal interests are an insufficient justification to abridge political speech carried on posted signs).

municipal interests carefully chosen to focus on the detrimental effects of the First Amendment expression that the city seeks to regulate.[166]

The issue of whether the text of an aesthetic ordinance must present detailed evidence establishing the validity of the enacted municipal interests has been addressed differently in court decisions.[167] When the Supreme Court determines that an advanced regulatory scheme is self-evidently destined to succeed or fail, it passes on the constitutionality without an extensive examination of the evidence.[168] Yet when the decision is not self-evident, the

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[166] In *Messer v. City of Douglasville*, in which an ordinance regulating signs in the city's historic district was upheld, the ordinance text expressed the city's interest in aesthetics and other conjunctive interests as follows:

> In order to protect the public safety, to assure compatibility of signs with surrounding land uses, to enhance the business and economy of the City of Douglasville, to protect the public investment in the streets and highways, to maintain the tranquil environment of residential areas, to promote industry and commerce, to provide an aesthetically appealing environment, and to provide for the orderly and reasonable display of advertising for the benefit of all its citizens, the city council of Douglasville, Georgia, hereby determines that the public health, safety, and welfare, and to eliminate visual clutter and blight, require adoption of this chapter.

975 F.2d 1505, 1514 n.8 (11th Cir. 1992) (citing CITY OF DOUGLASVILLE, GA. CODE § 26-1 (1989)).

[167] For instance, in *International Caucus of Labor Committees v. City of Montgomery*, the court stated that a city is "'entitled to advance its interests by arguments based on appeals to common sense and logic.'" 111 F.3d 1548, 1551 (11th Cir. 1997) (quoting Multimedia Publ'g Co. v. Greenville-Spartanburg Airport, 991 F.2d 154, 160 (4th Cir. 1993)). Although such arguments may be acceptable to courts, it may behoove municipal practitioners to consider witness testimony or graphic and photographic presentations to buttress the city's municipal interest justification for enacting an ordinance. *See* Sciarrino v. City of Key West, 83 F.3d 364, 367-68 (11th Cir. 1996) (presenting witness testimony of harassment and a videotape illustrating litter problems associated with the use of "barkers" to distribute business handbills as evidence of the city's justification for enacting an off-premises canvassing ordinance).

[168] *Compare* Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 343-44 (1986) (determining on the face of a gambling advertisement regulatory scheme intended to reduce the demand for casino gambling, thus protecting the health, safety, and welfare of the residents of Puerto Rico, that it

Court requires that the government present solid evidence that the regulation will have the intended effect,[169] and credits the city's stated interests when this type of evidence is included in the ordinance's preamble or text.[170] Because the evidence presentation requirement is at the discretion of the reviewing court, the practitioner should include evidence in the text of any enacted aesthetic regulation establishing how the regulatory means will further the city's asserted interest.[171]

Once the legitimate municipal interest is established as significant under the factual circumstances and record, the court continues its inquiry by determining whether the regulation is narrowly tailored to serve the established interest. This narrow tailoring appears in the specific regulation standards, and the element of enforcement delegation and permit procedures.

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will be successful), *with* Rubin v. Coors Brewing Co., 514 U.S. 476, 541 (1995) (determining on the face of a regulatory scheme to ban disclosure of beer alcohol content on labels that it will not be successful in furthering the asserted government interest of suppressing the threat of "strength wars" among brewers in a "direct and material way").

[169] *Compare* Florida Bar v. Went For It, Inc., 515 U.S. 618, 626 (1995) (validating regulation based upon presented statistical analysis and anecdotal data), *with* Edenfield v. Fane, 507 U.S. 761, 770-71 (1993) (holding that the government had not established the material advancement of an interest where no studies were presented showing the likely success of the regulation and where the record "does not disclose any anecdotal evidence" to validate governmental assertions of the regulation's effectiveness).

[170] The Supreme Court has noted that the direct advancement of a single substantial governmental interest is sufficient to prevent the invalidation of the regulation, when buttressed by solid evidence. *See Went For It*, 515 U.S. at 625 n.1.

[171] Some states require that a municipality articulate a tangible, specific objective in order to restrict signs. *See* Mazier, *supra* note 88, at 26. For example, New Jersey requires evidence that a ban on signs relates to stated municipal interests of aesthetics and property values and a factual basis for a particular regulatory scheme. *See* State v. Calabria, 693 A.2d 949 (N.J. Super Ct. Law Div. 1997).

2. *Enforcement Delegation and Permit Procedures*

Municipalities seeking to regulate communicative activities through time, place, and manner regulations can potentially screen these expressive activities through permit and fee procedures.[172] Although the government may constitutionally impose a content-neutral regulation of expression, it may not condition approval to engage in that expression on obtaining a permit or license from an official who may exercise boundless discretion.[173]

In *City of Lakewood v. Plain Dealer Publishing Co.*,[174] the Supreme Court held that a constitutionally acceptable ordinance must establish content-neutral standards not subject to application by "the unbridled discretion of a municipal official," to insure that the licensing decision is not based on speech content.[175] In *Plain Dealer,* the enacted ordinance allowed the mayor complete discretion to grant or deny a newsrack application without providing any neutral criteria on which to base the decision.[176]

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[172] *See* Gerritsen v. City of Los Angeles, 994 F.2d 570, 575 (9th Cir.) (holding that a city ordinance requiring a permit for handbill distribution in a historic park unconstitutional because the requirement was intended to discourage protest activities), *cert. denied*, 510 U.S. 915 (1993).

[173] Courts use the prior restraint doctrine to hold such laws invalid on their face. *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 770 n.11 (1988). The prior restraint doctrine, like the overbreadth and vagueness doctrines, is based on the means used to restrict speech or expression, and whether such a restriction impermissibly censures. GUNTHER, *supra* note 14, § 12-1, at 1203.

[174] 486 U.S. 750 (1988).

[175] *Id.* at 760. Typically a court will examine the ordinance and search for specifically enumerated factors to be considered by the licensing official in making the licensing decision. *Id.*

[176] *Id.* Section 901.181, Codified Ordinances, City of Lakewood, provided: "The Mayor shall either deny the application [for a permit], stating the reasons for such denial or grant said permit subject to the following terms . . . ." Section 901.181(c) sets out some of the terms for approval of a requested permit, including: "(7) such other terms and conditions deemed necessary and reasonable by the Mayor." *Id.* at 769. The Court determined from this textual language that the ordinance facially contained no limits on the mayor's discretion. *Id.* The *Plain Dealer* majority and dissent agreed, however, that the Court was not passing on the constitutionality of outright bans on newsracks for aesthetic or

The Court required that the city make explicit in its law, either by textual incorporation, binding judicial or administrative construction, or well-established practice, the health, safety or welfare reasons that would allow permit approval or rejection.[177] The Court also required that any future additional conditions be imposed only when based upon narrowly-drawn content-neutral standards.[178]

As noted in Part II, merely creating a permit procedure as part of an aesthetic regulation does not automatically make that regulation's review procedure content-based.[179] However, a court's concern in analyzing fee and permit procedures is whether an enforcement official may act in a way that creates impermissible censorship of expression through the arbitrary denial of a permit.[180] Courts therefore require that an ordinance limit the official's discretion by providing clear and explicit standards for permit approval.[181] These standards must be explicit enough to guide the licensing official and additionally should allow courts to determine easily whether the official is engaging in censorship.[182] The examination centers on whether the ordinance sets forth the entire set of regulations, or if it is enabling legislation, whether it sets out explicit standards for the administrative agency that will promulgate

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other reasons, but rather that the ordinance at issue was unconstitutional because of the impermissible discretion granted to licensing officials in the permit process. *Id.* at 762 n.7, 773 (White, J., dissenting).

[177] *Id.* at 770.

[178] *Id.* at 769-70.

[179] *See supra* note 127 (discussing judicial determination of the content-basis of aesthetic regulation).

[180] *See Plain Dealer*, 486 U.S. at 757. The Court anticipated the possibility that "a newspaper that relies to a substantial degree on single issue sales [through a newsrack could] fee[l] significant pressure to endorse the incumbent mayor in an upcoming election, or to refrain from criticizing him, in order to receive a favorable and speedy disposition on its permit application." *Id.* at 757-58.

[181] *Id.* The Court is typically less concerned with ordinances that are not aimed at expressive conduct, such as building department permit procedures, because these laws are rarely used for the purpose of censorship. *Id.* at 760-61.

[182] *Id.* at 757-58. The concern is that without these licensing standards, officials will later engage in rationalizations and arbitrary criteria for permit approval. *Id.*

the final regulations. Courts are wary of legislation that acts as an inexplicit guideline that delegates policy matters to police, licensing officials, judges or juries for subjective resolution.[183] Inexplicit standards in a licensing ordinance may be challenged facially without first applying for the license,[184] and an associated challenge may be based on the availability of judicial review of decisions made by licensing officials.[185] Although judicial review does not replace explicit standards, the concern, particularly in cases where the permit application involves a particular event or time, is that the absence of review will contribute to speech censorship.[186] The permit process is also examined to determine whether it exists purely as a revenue raising measure,[187] or whether the amount of the fee is so prohibitively expensive that it has the effect of censoring the expression.[188] To avoid these challenges, the practitioner must draft the ordinance so as to

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[183] Grayned v. City of Rockford, 408 U.S. 104, 109 (1972). These standards may exist in another previously enacted statute or ordinance, and if so, will not require repeating in the aesthetic ordinance. *See* Outdoor Communications, Inc. v. City of Murfreesboro, No. 94-5406, 1995 U.S. App. LEXIS 16544, at *11 (6th Cir. June 30, 1995) (unpublished table decision).

[184] Justice Brennan's majority opinion for the Court noted: "[A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based upon the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Plain Dealer*, 486 U.S. at 759.

[185] *Id.* at 771.

[186] *Id.*

[187] *See* Miami Herald Publ'g Co. v. City of Hallandale, 734 F.2d 666, 670-71 (11th Cir. 1984).

[188] *See Outdoor Communications*, 1995 U.S. App. LEXIS 16544, at *6 (holding that the fee requirements of a sign ordinance consisting of a one-time charge of ten dollars plus fifty cents per square foot of proposed sign was not prohibitively expensive and did not effectively ban signs because the ordinance contained an economic hardship appeal provision). Courts have held that a city may charge permit fees to engage in expressive activities in public fora, but the amount of the fee may not exceed that required to defray administrative costs. National Awareness Found. v. Abrams, 50 F.3d 1159, 1165 (2d Cir. 1995); Eastern Conn. Citizens Action Group v. Powers, 723 F.2d 1050, 1056 (2d Cir. 1983). The Supreme Court has upheld the use of a sliding scale fee for First Amendment activities. Cox v. New Hampshire, 312 U.S. 569, 576-77 (1941).

include timely judicial review,[189] and must provide standards for the approval or denial of variances.[190]

3. *Insurance Requirements*

Municipalities may desire that a person or organization wishing to engage in expressive conduct agree to indemnify[191] the city against any liability arising out of the use of public property for communicative purposes. This is typically provided for in the ordinance text by requiring that the person or group supply the city with a liability insurance policy covering the proposed activity.[192] Regulations of this type may produce a vagueness and overbreadth challenge by affected individuals who assert that the city's insurance requirements are merely a pretext for censorship.[193]

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[189] *Plain Dealer*, 486 U.S. at 771.

[190] *See Outdoor Communications*, 1995 U.S. App. LEXIS 16544, at *10-11 (providing variance criteria for the approval of exterior signs). A challenge by an economically disadvantaged party may be blunted by including an ordinance provision that allows an economic hardship variance. For example, in *Plain Dealer*, the Court noted their concern with permit standards that would allow courts to differentiate between a legitimate permit denial and one that was based on an abuse of censorial power caused by the unfettered discretion of a licensing official. 486 U.S. at 758. The Court illustrated this concern by noting that a "newspaper espousing an unpopular viewpoint on a shoestring budget may be the likely target for a retaliatory permit denial [capitalizing on the officials unfettered discretion], but may not have the time or financial means to challenge the licensor's action." *Id.* The Court's analysis suggests not only the necessity that practitioners provide textual standards that limit the licensor's discretion, but also the usefulness of including an economic variance procedure to address the censorship concerns of courts.

[191] Indemnification "restore[s] the victim of a loss, in whole or in part, by payment, repair, or replacement." BLACK'S LAW DICTIONARY, *supra* note 93, at 769.

[192] *See Plain Dealer*, 486 U.S. at 754. The liability insurance policy may be of a short or long term duration depending on whether the proposed activity is semi-permanent, such as the installation of newsracks, or temporary, such as a parade or leafleting.

[193] *Id.* at 755 (holding unconstitutional a municipal ordinance requirement that publishers wishing to display newsracks on public streets indemnify the city for all liability and obtain property damage insurance in the amount of $100,000, naming the city as an additional insured).

Censorship concerns regarding the discretion of the enforcing official to set the amount of the insurance are similar to the concerns surrounding the process of permit approval.[194] The Supreme Court has not definitively answered whether these insurance and indemnity requirements are facially unconstitutional.[195]

In *Eastern Connecticut Citizens Action Group v. Powers*,[196] the Second Circuit noted that insurance requirements may be a special threat to certain controversial groups because underwriters[197] often consider factors such as political beliefs and the likelihood of adverse publicity in deciding whether to accept or reject applications for insurance coverage.[198] The *Powers* court did recommend a standard of "careful scrutiny" for fee and insurance provisions touching on areas of First Amendment expression and added that officials attempting to impose insurance requirements should be prepared to justify the amount of coverage required.[199]

Even if the amount of required insurance coverage may be legitimately justified by a city, the question of whether the city or

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[194] *See supra* note 190 (discussing judicial concerns that high fee requirements may censor the speech of economically disadvantaged persons).

[195] The Supreme Court did not reach the issue of the constitutionality of the enacted insurance requirements that was presented in *Plain Dealer* because the ordinance was invalidated on the grounds that it allowed the Mayor unbridled discretion in approving permits. 486 U.S. at 772. However, the lower court in *Plain Dealer* found the ordinance's insurance requirements unconstitutional because the city did not require insurance of *all* permittees who desired to use public property. Plain Dealer Publ'g Co. v. City of Lakewood, 794 F.2d 1139, 1147 (6th Cir. 1986). The Court has not yet decided this issue.

[196] 723 F.2d 1050 (2d Cir. 1983) (holding an insurance requirement applied to a citizen's group desiring to protest on public property unconstitutional as applied to that particular group, although not unconstitutional per se).

[197] An insurance underwriter is the party assuming the risk in return for the payment of a premium. BLACK'S LAW DICTIONARY, *supra* note 93, at 1527.

[198] *Powers*, 723 F.2d at 1056 n.2 (referring to the finding of the trial court).

[199] *Id.* at 1057. In *Collin v. O'Malley*, a requirement that representatives of the National Socialist [Nazi] Party of America obtain a $100,000/$300,000 liability policy and a $50,000 property damage policy as a condition for a demonstration permit was invalidated as an unreasonable restraint on their First Amendment rights. 452 F. Supp. 577, 578-79 (N.D. Ill. 1978).

the group wishing to exercise First Amendment rights should pay for this insurance may also be raised.[200] Because insurance coverage for tort liability continues to rise, neither groups nor the city may be able to afford insurance coverage.[201] Even justifiable insurance requirements may act to "chill" the expression of free speech, if expression by impoverished persons or groups is effectively prevented as a result of their imposition.[202] Therefore, insurance requirements must be narrowly tailored to be no more restrictive than necessary for the city to protect its property interests.

B. Regulation in Heightened Aesthetic Contexts

Municipalities often wish to enact more limiting aesthetic regulations in areas of heightened aesthetic concern such as historic districts[203] and parks[204] in order to protect the unique character of these settings. These regulations may concern the limitation of

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[200] *Powers*, 723 F.2d at 1052-53.

[201] *See generally* Thomas W. Rynard, *The Local Government as Insured or Insurer: Some New Risk Management Alternatives*, 20 URB. LAW. 103 (1988) (discussing the tort insurance crisis and municipal risk management alternatives).

[202] *Powers*, 723 F.2d at 1053, 1055.

[203] Historic districts are themselves entities created by the application of historic preservation ordinances. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 107 & n.1 (1978). These ordinances, a type of aesthetic regulation, are a time, place, and manner regulation under the First Amendment because they control the location and manner of certain types of expressive activities in a narrowly defined geographic area. *See* Messer v. City of Douglasville, 975 F.2d 1505, 1508-09 (11th Cir. 1992).

[204] National parks and forests are special types of parks where heightened aesthetic concerns exist. Although the National Park Service, and not individual municipalities, promulgates aesthetic regulations governing these areas, the regulation textural considerations and First Amendment analysis by the courts are the same. *See First Amendment Activities on Public Lands Before the Subcomm. on Oversight and Investigations of the Senate Comm. on Energy and Natural Resources*, 104th Cong. 1 (1995) [hereinafter *First Amendment Activities*] (statement of Hon. Craig Thomas, U.S. Senator from Wyoming). Therefore, the content of these regulations provides a useful model for analysis by the municipal practitioner.

sales of tourist items in these areas,[205] the architectural appearance of items such as street furniture,[206] or other conduct not considered visually or aurally appropriate to the character of the historic district or park.[207] The permissible limits of aesthetic regulation in such areas have not yet been clearly decided by the Supreme Court,[208] although a group of lower federal court deci-

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[205] *See* Friends of the Vietnam Veterans Mem'l v. Kennedy, 116 F.3d 495, 498 (D.C. Cir. 1997) (holding constitutional a National Park Service regulation prohibiting the sale of a number of items, including T-shirts, on the National Mall). The Mall is a particularly interesting setting because it not only exists as a politically symbolic public forum, but is also a major recreational park for residents of Washington, D.C.

[206] *See* Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 178 (1st Cir. 1996) (holding that a newsrack ban to promote the municipal goal of maintaining the aesthetic character of a historic district in Boston is constitutional, and that resulting bans on certain types of structures is "merely a practical consequence" of application of power to prohibit inappropriate architectural elements in the district). The balance between interests of speech distribution from such "temporary" structures such as leaflet tables and newsracks, and aesthetics in a historic district is especially fragile and accounts for the willingness of courts to uphold bans in such special districts. *Id.* at 187.

[207] *See, e.g.*, Gerritsen v. City of Los Angeles, 994 F.2d 570, 575 (9th Cir.) (holding that a city ordinance requiring a permit for handbill distribution in a historic park unconstitutional because the requirement was intended to discourage protest activities), *cert. denied*, 510 U.S. 915 (1993); Burke v. City of Charleston, 893 F. Supp. 589, 611 (D.S.C. 1995) (upholding a historic preservation ordinance regulating the display of an artist's mural visible in a historic district), *vacated and remanded*, 1998 U.S. App. LEXIS 5057 (4th Cir. 1998) (failing to reach the First Amendment issue because the court determined that the artist lacked standing because he sold the display rights to the mural). *See* Landis, *supra* note 113, at 963 (collecting and analyzing state and federal cases in which courts discuss whether, or under what circumstances, a restriction of the use of a public park violates freedom of speech or press rights under the First Amendment).

[208] The Court has noted that it is the nature and pattern of a place's normal activities that will determine appropriate time, place, and manner regulation. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). For example, in *City of Ladue v. Gilleo*, the Court examined the constitutionality of residential sign regulations. 512 U.S. 43 (1994). The Court recognized the significance of a speech message located at the site of a speaker: "Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign somewhere else, or conveying the same text or picture by other means. Precisely

sions have upheld aesthetic regulations that set stricter limits on First Amendment expression.[209]

Although the public forum is within an area of heightened aesthetic concern, the synthesized *Perry/O'Brien* test[210] still forms the basis for determining whether the proposed time, place, and manner aesthetic regulation is constitutional. While a city has a stronger basis for its aesthetic interest, avoiding a challenge to these stricter regulations requires explicit textural language connecting the asserted aesthetic interest to the means employed to further the interest.[211] *Globe Newspaper Co. v. Beacon Hill Architectural*

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because of their location, such signs provide information about the identity of the 'speaker.'" *Id.* at 56. However, the Court did not extend protection to every type of non-commercial sign in residential locations. *Id.* at 58 n.17 ("Nor do we hold that every kind of sign must be permitted in residential areas. Different considerations might well apply, for example, in the case of signs [whether political or otherwise] displayed by residents for a fee . . . .").

However, some lower courts have determined that a city has a more significant interest in aesthetics in designated historic areas than in non-historic areas, thus providing the impetus for cities to enact more narrow restrictions than might normally be permitted. *See* Messer v. City of Douglasville, 975 F.2d 1505, 1508-09 (11th Cir. 1992) (holding constitutional a sign ordinance allowing on-site non-commercial signs while prohibiting off-site non-commercial signs in a historic district); *Burke*, 893 F. Supp. at 610.

[209] Historically, there has been tension between two competing theories of public forum doctrine: that of "assured minimum access," arising when a city decides to ban certain communicative activities in a public forum; and the narrower "equal access" view, which applies in situations where a city allows some speakers, but not others, to use the public forum. GUNTHER, *supra* note 14, § 12-4, at 1250. *See supra* note 38 (comparing the "assured minimum access" position in *Hague v. CIO* with the "equal access" position in *Massachusetts v. Davis*). Recent lower court decisions suggest a willingness to apply the "equal access" view, allowing content-neutral bans of certain forms of expression in areas of heightened aesthetic context. *See Globe Newspaper*, 100 F.3d at 191; *Messer*, 975 F.2d at 1508-09.

[210] 460 U.S. 37, 45 (1983). *See supra* notes 117-119 and accompanying text (discussing the synthesized *Perry/O'Brien* test).

[211] These regulations are often subject to vagueness challenges, alleging that the architectural, historic or aesthetic standards intended to be achieved or preserved are inexplicit. *See generally* Agathe, *supra* note 113 (collecting cases providing examples of textural standards within aesthetic ordinances held not to be vague).

Commission is a recent case in which aesthetic regulations effectively banning newsracks from city sidewalks within a historic district were upheld.[212] On the authority of the City of Boston, the Beacon Hill Architectural Commission enacted a set of street furniture guidelines applicable within the historic Beacon Hill District.[213] The guidelines were facially challenged by a group of newspaper publishers, not because they were inexplicit, but because their effect was to create a newsrack ban.[214] The Commission stated that by regulating the sidewalks through the guidelines, the municipal interest of preserving the Historic Beacon Hill District was furthered,[215] as had been its mandate since 1955.[216] The court first noted that the degree of protection provided by the Constitution depends "'on the character of the property at issue,'"[217] in this case the streets and sidewalks of the historic

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[212] 100 F.3d 175, 194 (1st Cir. 1996) (upholding the constitutionality of Boston's Street Furniture Guidelines that created a ban on newsracks in the Beacon Hill Historic District). In fact the court went so far as to identify aesthetics, as advanced in the regulation, as a "colorable non-content-discriminatory" municipal purpose. *Id.* at 184.

[213] The Street Furniture Guidelines, in relevant part, are as follows:

> Street furniture, as defined below, shall not be permitted in the Historic Beacon Hill District with the exception of approved store-front merchandise stands and those structures erected or placed by authorized public agencies for public safety and/or public welfare purposes. Street furniture is defined as any structure erected or placed in the public or private ways on a temporary or permanent basis.
>
> Authorized public safety/public welfare street furniture includes, but is not limited to, such structures as street lights, traffic lights, mail boxes, fire hydrants, street trees, and trash receptacles. Any such authorized public safety/public welfare street furniture or approved storefront merchandise stands shall be subject to Commission review and shall be in keeping with the architectural and historic character of the District and the criteria for exterior architectural features as specified in Chapter 616 of the Acts of 1955 as amended.

Id. at 181.

[214] *Id.* at 183.

[215] *Id.* at 179.

[216] *Id.* at 178-79.

[217] *Id.* at 182 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983)).

district. The court then determined that the Street Furniture Guidelines were content-neutral,[218] and applied an intermediate level of scrutiny.[219] The court found that while the regulations removed newsracks as a speech medium, other available methods of distribution were left untouched.[220] The regulation was also determined to be narrowly tailored because it promoted the city's significant and substantial interest in preserving the aesthetics of the Historic District, an interest that would not be achieved as effectively without the regulation.[221] The ban was therefore upheld as a valid content-neutral time, place, and manner restriction.[222]

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[218] The court held:

> [There was no] reference to the content of the affected speech, either in its plain language or in its application. . . . [A]s applied to newsracks, it operates as a complete ban without any reference to the content of a given publication whatsoever: uniquely concerned with the physical structure housing the speech, it restricts only the mode of distribution and would plainly apply even if they were empty.

Id. at 183. The court further noted that "[this ordinance] seems to be an example of the very kind of total ban on newsracks that Justice Stevens was willing to assume arguendo might be constitutional in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 427-28 (1993)." *Id.*

[219] *Id.* at 184. The court used as a precedent another First Circuit case, *National Amusements, Inc. v. Town of Dedham*, that held that strict scrutiny is not automatically justified when the practical effect of the ordinance is to regulate the First Amendment rights of a select group. 43 F.3d 731, 736, 739 (1st Cir. 1995).

[220] *Id.* at 185.

[221] *Id.* at 188. This holding overturned the lower court ruling in *Globe Newspaper Co. v. Beacon Hill Architectural Commission* that struck the newsrack ban, because the city's aesthetic interests could have been achieved by a design review of proposed newsracks, as was the case for other types of street furniture in the historic district, instead of a total ban of newsracks. 847 F. Supp. 178, 194 (D. Mass. 1994).

[222] *Globe Newspaper*, 100 F.3d at 194. While *Globe Newspaper* is not currently on appeal, the Supreme Court's holdings involving newsracks and other installations dispensing speech suggest that the Court may be amenable to the First Circuit view. The Court has previously held that disseminators of speech may not make permanent installations on public property. City of St. Louis v. Western Union Tel. Co., 148 U.S. 92, 98-99 (1893) (holding that a telegraph company does not have the right to place its poles on public property). Providing

The final words of the majority opinion in *Globe Newspaper* are significant in setting the emerging boundaries of aesthetic regulations affecting semi-permanent means of dispensing speech, such as newsracks:

> [T]he First Amendment guarantees the right to circulate publications, it does not guarantee the right to do so through private structures erected on public property. . . . [N]ewsracks are nothing more than structures occupying . . . public space on the sidewalks, which - with or without publications within - simply are not immunized from [First Amendment] regulations.[223]

These words could reasonably apply to any temporary structure used to dispense speech, such as newsstands or bus shelters, particularly in areas of heightened aesthetic context.

III. THE WELL-DRAWN ORDINANCE

Because each city is unique, with its own goals and aesthetic character, the purpose of this Note is not to propose a specific model of aesthetic regulation. However, the framework of case decisions reveals that courts typically focus on specific textual aspects of aesthetic regulations when assessing the merits of vagueness or overbreadth challenges.[224] Courts examine the ordinance's stated municipal goals and the associated time, place,

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that the regulation is content-neutral, the Court has not applied strict scrutiny and has deferred to legislative determination of the necessity of the regulation to achieve municipal interests, even when those interests are not explicitly stated in the ordinance. *Compare* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (acknowledging the city's right to choose its municipal interests and the best means to achieve them, providing there is a "reasonable fit" between means and ends), *with* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988) (striking a newsrack ordinance allowing such overbroad discretion to the Mayor that the power could be used to censure). *See* Michael S. Gruen, *Clearing Sidewalk Newsrack Clutter*, 1 CITY LAW 5, 6 (1995) (discussing the history of newsrack regulation and offering advice on constitutionally permissible newsrack regulations for New York City).

[223] *Globe Newspaper*, 100 F.3d at 195.

[224] *See generally supra* Part II (discussing the doctrines of vagueness and overbreadth as applied to challenges to aesthetic regulations).

and manner regulations used as the means for achieving those goals, the limitations on the discretion of enforcement officials to approve or disapprove the regulated expression and the permit application procedures and insurance requirements that must be met before the city approves the expression. The text of proposed aesthetic legislation should address these emphasized elements with language specifically adapted by the practitioner to achieve the municipal interests of the individual city.[225] The municipal practitioner should generally keep in mind the following guidelines while crafting the well-drawn aesthetic ordinance.[226]

First, to avoid a vagueness and overbreadth challenge, it is essential that the ordinance text contain specific, clear, and consistent regulatory language.[227] This is crucial not only because

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[225] For example, the New York City Department of Transportation has recently been reviewing proposals to redesign the city's street furniture, such as bus shelters, newsstands and public toilets, pursuant to previously promulgated regulations. Todd W. Bressi, *A Stealth Streetscape*, OCULUS (published by the New York Chapter of the American Institute of Architects), Oct. 1997, at 5. The permissible advertising on these structures is also regulated. *Id.* While proposals were submitted in April, 1997, Mayor Rudolph Guiliani's administration has yet to release financial or design details, or a timetable for decision. *Id.* Typically in New York, ordinances or administrative regulations allow for aesthetic review of street furniture by the Landmarks Commission and the Arts Commission, as well as community leaders. *Id.* Such scrutiny helps ensure that city officials will make responsible aesthetic decisions benefitting the city.

[226] Several of these guidelines have been suggested by other commentators. *See First Amendment Activities*, *supra* note 204, at 5 (statement of Robert M. O'Neil, Thomas Jefferson Center for the Protection of Free Expression, University of Virginia).

[227] Legal scholars have suggested that differing interpretive theories and varying meanings associated with particular words used in statutory text are themselves to blame for challenges to statutes and ordinances, and therefore it may be inherently impossible to draft a statute capable of evading a vague and overbroad challenge. *See generally* Donna D. Adler, *A Conversational Approach to Statutory Analysis: Say What You Mean and Mean What You Say*, 66 MISS. L.J. 37 (1996). However, even the Supreme Court has noted that "perfect clarity and precise guidance have never been required, even of regulations that restrict expressive activity." Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989) (stating that since we are "'[c]ondemned to the use of words, we can never expect mathematical certainty in our language'") (quoting Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)). Such linguistic analysis is beyond the

the municipality seeks to regulate First Amendment activities, but also because clear language minimizes judicial guesswork about government intent and the regulatory scope of the ordinance.

Second, the ordinance must be truly content-neutral in its regulation of speech. Time, place, and manner regulations often have incidental chilling effects on speech that may not be intended by the municipality—effects that leave the ordinance vulnerable to challenge on overbreadth grounds and susceptible to invalidation by an unsympathetic court.

Third, the municipal practitioner must anticipate that many challenges will rest on the allegation that no viable alternative means exist for the particular expression that is regulated by the ordinance. The ordinance should therefore contain a statement identifying for a future reviewing court other available means for dissemination of the regulated speech, thereby providing a showing of ample alternative channels of communication.

Fourth, the ordinance should provide for procedural due process allowing for prompt review of administrative decisions that deny approval for permits to engage in First Amendment expression.[228] Not only will this help avoid a judicial determination that the ordinance grants unbridled discretion to the enforcement official, but such a procedure also allows an early review of a disputed permit request before the event date passes and it becomes a de facto denial. Even a licensing process with well-established guidelines and standards for denying or granting a permit may be susceptible to the biases of the system's administrators.

Fifth, although the specific content of the text will be tailored to particular community goals and interests, the well-drawn aesthetic ordinance should contain specific organizing features for the benefit of citizens, as well as for a future court that may be

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scope of this Note; however, a vagueness challenge may be blunted by well chosen textual language understandable to the citizens subject to the regulation. While it may not be possible to avoid all challenges, by carefully drafting the ordinance text, successful challenges may be minimized.

[228] In *City of Lakewood v. Plain Dealer Publishing Co.*, the Court stated that a solid foundation for judicial review of an administrator's decision could only be achieved if the aesthetic ordinance required that the reviewing official provide specific and defined reasons for permit denial. 486 U.S. 750, 771 (1988).

called upon to analyze the challenged text. The ordinance should contain a preamble setting out clearly and explicitly every municipal interest upon which the city relies in enacting the ordinance, the reasons they are included and supporting evidence of the necessity of their inclusion. If appropriate, the preamble may also contain a brief legislative history underlying the enactment. The proposed means to achieve each stated interest must be clearly linked back to the preamble.

The practitioner is urged to bear in mind that a commonly underutilized municipal interest justifying aesthetic regulations is aesthetics itself. Aesthetics is often overlooked as an independent municipal interest, possibly because of historically inconsistent court responses in cases that have analyzed this goal.[229] However, the ordinance text should explicitly authorize regulation based upon the city's municipal aesthetic interest in order to enhance the city's economy, property values, tourism and beauty. The text should further emphasize that these narrowly drawn regulations provide the means to correct problems that are inherently aesthetic in nature. Stating these objectives explicitly and relating them to the proposed means of regulation will not only test for the practitioner how narrowly the means are drawn, but will also anticipate judicial objection and second-guessing of the municipal intent behind imprecisely stated municipal objectives.[230]

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[229] *See supra* Part I.C for a discussion of the development of aesthetic regulation in the United States. *Compare* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984) (stating that a city has the constitutional power to improve its appearance through the regulation of signs providing that the text of the ordinance is content-neutral), *with* Schneider v. New Jersey, 308 U.S. 147, 163 (1939) (stating that a state's *presumed* interest in keeping streets clean was insufficient to justify a ban on handbills) (emphasis added). The *Schneider* Court applied strict scrutiny even though the ordinance was not content-based on its face. *Id.* at 162. In recent cases, when an ordinance explicitly states that the prevention of litter, or aesthetics in general, is a municipal interest, strict scrutiny is avoided and lower courts have allowed regulation of handbill distribution, at least where commercial speech is involved. *See* Sciarrino v. City of Key West, 83 F.3d 364, 367-68 (11th Cir. 1996).

[230] *See Vincent*, 466 U.S. at 819-20 (Brennan, J., dissenting) (second-guessing the Court's conclusion that alternative channels for dissemination of the message were available by examining evidence of the large number of legal and

An established municipal aesthetic policy applied in the context of a historic district or park may be sufficient for heightened regulation if the goal of the heightened regulation and the proposed means are made explicit.[231] Most aesthetic regulations that are subjected to a vagueness and overbreadth challenge set out municipal goals that are incompletely related to the regulation methods proposed. For example, while the municipal goals of public safety and welfare are probably sufficiently related to regulations affecting the size, placement, supporting structure and maintenance of newsracks and signs, regulations affecting the shape, appearance and facing materials are less clearly related to these stated goals. The legitimate municipal goal of aesthetics should therefore be included in the goals statement or preamble text in order to avoid an overbreadth challenge based on an insufficient connection to the proposed regulation.

Finally, to avoid abridging First Amendment freedoms, the fee requirements themselves must not be prohibitively expensive. A challenge may be avoided by providing within the permit procedure the availability of a hearing to decide on the award of a variance for economically disadvantaged organizations or individuals.

CONCLUSION

While it may be impossible to create an aesthetic regulation completely invulnerable to challenge simply because of the inherent imprecision of statutory interpretation, it is nonetheless possible for practitioners to draft regulations that will either avoid vagueness or

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illegal signs posted in Los Angeles and inferring that signs were a preferred manner of communication for many speakers).

[231] *See* Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 188-89 (1st Cir. 1996). If such an ordinance is challenged, the practitioner should consider the use of photographic or videotape evidence to demonstrate the aesthetic characteristics of the historic context or park that the regulation is intended to preserve, or use expert testimony about the area's architectural and historic significance. *See Sciarrino*, 83 F.3d at 368 (illustrating the city's municipal interest in the prevention of litter through the presentation of a 30-minute videotape at trial). *See also* Agathe, *supra* note 113 (discussing the use of documentary evidence to substantiate municipal interests).

overbreadth facial constitutional challenges, or be sustained by a reviewing court. However, because judicial interpretation of permissible aesthetic regulation continues to evolve, the municipal practitioner must keep abreast of the latest First Amendment decisions affecting the specific types of expression considered for regulation.

Citizens desire to understand the limits of permissible conduct and courts prefer that legislators provide that definition. The well-drawn municipal aesthetic ordinance will eliminate judicial guesswork by explicitly stating municipal interests and the means to achieve them while creating clear, non-biased and expeditious permit and insurance procedures for implementing reasonable regulation of First Amendment expression in accordance with community values. The municipal practitioner has the means to create circumstances that will promote beauty through legal initiatives, and for good measure, should consider planting a tree.