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Law and Aesthetics: A Critique and a Reformulation of the Dilemmas

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LAW AND AESTHETICS: A CRITIQUE AND A REFORMULATION OF THE DILEMMAS†

*John J. Costonis**

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"What beauty is I know not but it dependeth upon many things."
— Albrecht Dürer¹

Aesthetic policy, as currently formulated and implemented at the federal, state, and local levels, often partakes more of high farce than of the rule of law. Its purposes are seldom accurately or candidly portrayed, let alone understood, by its most vehement champions. Its diversion to dubious or flatly deplorable social ends undermines the credit that it may merit when soundly conceived and executed. Its indiscriminate, often quixotic demands have overwhelmed legal institutions, which all too frequently have compromised the integrity of legislative, administrative, and judicial processes in the name of "beauty."

While the reasons for this regrettable state of affairs are many,

1. A. DÜRER, *Introduction* [to an unfinished work variously titled *Teaching in Painting, Dish for Young Painters, Satus 1512* and *Satus 1513*], in *THE WRITINGS OF ALBRECHT DÜRER* 179 (W. Conway trans. 1958).

most trace in one way or another to misconceptions and abuses attending the very idea of aesthetics. Ideas do have consequences, as Dostoevski admonished,² and the unfortunate effects of this powerful idea gone awry have been far-reaching indeed.

This Article both examines these consequences and explains why they have departed so frequently from the ostensible goals of the policies that produced them. It also surveys the principal legal dilemmas that attend aesthetic policy-making, which is sensitive to the values actually at stake in the type of "aesthetic" controversies that legal institutions are called upon to resolve in American society. The aesthetic controls addressed are those adopted in such areas as zoning, historic or environmental preservation, and urban design to shape the visual appearance of the built and natural environments. The content of the aesthetics idea is explored through two hypotheses advanced to explain the social interest underpinning these controls. The first, which has dominated aesthetic-legal thought throughout this century, locates that interest in the preservation or creation of a visually beautiful environment. The second, which is outlined in Part IV of this Article, de-emphasizes visual beauty in favor of the compulsion of groups to protect their identity and, more broadly, cultural stability itself by forestalling threats to environmental features and settings that anchor or reinforce these reciprocal values.

My contentions are basically three in number. First, the visual beauty interest is a defective predicate for aesthetic policy-making because "beauty," as John Dewey has advised,

is at the furthest remove from an analytic term, and hence from a conception that can figure in theory as a means of explanation or classification. Unfortunately, it has been hardened into a peculiar object; emotional rapture has been subjected to what philosophy calls hypostatization, and the concept of beauty as an essence of intuition has resulted It is surely better to deal with the experience itself and show whence and how the quality proceeds.³

Second, the effort to "deal with the experience itself and to show whence and how the quality proceeds" discloses that the visual beauty interest, insofar as it has any discernible legal content, is subsumed under the stability interest. It is true, of course, that viewers respond affirmatively to particular visual configurations in the environment. Their responses, in fact, are often sufficiently patterned to refute the objection that aesthetics is too subjective to warrant legal

2. Wolfe, *From Bauhaus to Our House* (pt. 1), HARPER'S, June 1981, at 33, 37.

3. J. DEWEY, ART AS EXPERIENCE 129-30 (1934).

protection. But these configurations are compelling because they signify values that stabilize cultural, group, or individual identity, not because their visual qualities conform to the canons of one or another school of aesthetic formalism.

Third, however accurately the stability hypothesis may describe the source of society's demands for aesthetic regulation, its adequacy as a normative basis for aesthetic controls raises a host of legal dilemmas of its own, propelling legal institutions into foreboding terrain that they have desperately attempted to avoid. Visual beauty reasoning has served as a superb avoidance device thanks to its premise that standards of beauty are ontologically based and hence exist "out there," ready to be plucked by aesthetic experts and transformed into legal ukases by policy-makers. Although unverifiable by legal means, this premise has mesmerized these institutions because it dovetails neatly with their attraction to standards that have the semblance of objectivity, impartiality, and predictability.

Stability reasoning, on the other hand, candidly acknowledges that aesthetic response is a social construct, not an ontological given.⁴ How individuals or groups respond to an environmental feature depends on how they construe its message, a process profoundly shaped by the conventions of culture and time. If there is a case for aesthetic regulation, therefore, it must be fashioned from intersubjective patterns of communal aesthetic response. The argument must establish that protecting the stability of these patterns is a proper concern of the police power's "general welfare." It must provide reasonable assurance as well that overriding social and legal values are not sacrificed at the altar of stability.

Neither my view of the stability interest's primacy nor my reservations concerning the state of aesthetic policy or jurisprudence are widely shared at this time. On the contrary, both appear to contradict modern legislative and judicial trends that have been overwhelmingly endorsed in legal and social commentary.

My argument, therefore, is necessarily lengthy,⁵ and is developed

4. This distinction is extensively probed in P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1967). See generally K. MANNHEIM, *IDEOLOGY AND UTOPIA* (1936).

5. This Article's length also reflects my effort to address a variety of mixed legal-social issues not considered in my earlier writings, many of which deal favorably with historic and environmental preservation and the design techniques whose consequences are unfavorably reviewed here. See, e.g., *SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE* (1974); *Development Rights Transfer: An Exploratory Essay*, 83 *YALE L. J.* 75 (1973). These writings assumed the social value of these initiatives, limiting themselves to an assessment of the initiatives' validity from a traditional legal perspective. While I see no reason to modify the legal positions advanced in them, I am less persuaded now of the value of legal scholarship that accepts the theoretical constraints under which I earlier wrote. Unlike these writings, this

in five principal sections. Part I assesses trends in current aesthetic policy and in aesthetic jurisprudence as the latter has evolved over the century. It contends both that the consequences of selected aesthetic policies have indeed varied distressingly from the policies' ostensible goals, and that the modern judicial position that government may regulate "solely for aesthetics" is incoherent if "aesthetics" is defined in terms of the visual beauty interest. Preliminarily considered as well are the basic requirements that any rationale for aesthetic regulation must satisfy with respect to the constitutional values of vagueness-due process, substantive due process, freedom of expression, and a broader set of dilemmas to which a cogent theory of aesthetic jurisprudence must respond. The vagueness-due process — or standards — requirement is highlighted at this and later points in the Article because the failure of an aesthetic measure to satisfy it derives from considerations that largely, although not exclusively, create difficulties under the other two requirements as well.

Part II posits that coherent responses to the troublesome issues besetting aesthetic regulation will not be forthcoming, absent a coherent framework for inquiry. Accordingly, it seeks to limn that framework — now lacking in commentary — by describing the elements of what may loosely be termed the "aesthetic regulation system" as well as those of a proposed prototypical format for legal-aesthetic controversies generally. An actual controversy — that triggered by the 1980 designation of the Isaac L. Rice Mansion as a New York City landmark — illustrates the format. The section concludes that, descriptively considered, the root questions underlying the aesthetic regulation puzzle are two: On what basis are environmental resources selected for preservation and how is new development, which is perceived to threaten them, regulated? In light of this basis, to which social needs is aesthetic regulation targeted? The responses of the visual beauty and cultural stability-identity hypotheses are preliminarily outlined as a point of departure for the discussion that follows.

Part III substantiates the Article's contention that the currently dominant visual beauty rationale should be de-emphasized, if not abandoned altogether. It summarizes the rationale's key premises

Article seeks deliberately to bridge the legal and social spheres, and at many points works from the social back to the legal rather than the other way around. A number of the conclusions suggested by this approach have been painful to me, and my expectations concerning what legal intervention can realistically be expected to accomplish have had to be revised accordingly. But the approach has made vivid for me the overriding importance of the process values that the rule of law should and must safeguard, even at the cost of foregoing particular desired outcomes, if need be.

and pinpoints their conceptual defects in arguing that the rationale is repugnant to the previous constitutional values.

Parts IV and V turn to the cultural stability-identity hypothesis. The former describes the principal elements of that hypothesis and employs it to unravel the earlier-identified dilemmas, which, it concludes, are largely gratuitous offshoots of misconceived visual beauty reasoning. Its major effort, however, is to elaborate and firm up by specific illustration my notion of "associational dissonance," which lies at the heart of all legal-aesthetic controversies. The section uses the aesthetic regulation system and prototypical format constructs to explain and support these contentions.

Part V approaches the social interest in cultural stability and identity from a normative, rather than a descriptive, angle. Premised upon Part IV's contention that these values afford the impetus behind demands for particular aesthetic initiatives, it asks whether and under what conditions such demands should be honored by legal institutions. It responds by testing these values, as exemplified in the cultural stability-identity rationale, against the previously considered vagueness-due process, substantive due process, and freedom of expression strictures. The vagueness-due process question is examined in terms of the challenge it poses for legislators, who must initially assess these demands, while problems posed by all three constitutional norms are probed from the perspective of the courts, which are, or at least should be, their ultimate guardians.

My tentative conclusions will be unsettling to many, particularly special interest groups bent on transforming the idea of aesthetics into an ideology of power to serve their parochial ends. I do not argue that the aesthetics enterprise is inherently repugnant to sound legal or social values.⁶ But I am persuaded that its second-generation problems — those relating to its actual effects rather than to its ostensible goals — confirm that aesthetic policy-making and jurisprudence must be disciplined by courts and legislatures if the rule, rather than the pretense, of law is to govern. My recommendations reduce to the single prescription that, consonant with appropriate institutional constraints, legislatures and courts should take a much harder look at these demands than they do at present. Legislators should insist that they reflect values that are reasonably representative of community-wide sentiment; that their implementation falls within the capabilities of the agencies designated to administer them and thus are not unduly vulnerable to subversion; and that they be

6. See Part V *infra*.

confined by standards intelligible to property owners, the foregoing agencies, and reviewing courts. Absent any of these factors, legislators should simply refuse to endorse the demands. Similarly, the judiciary should take its oversight role more seriously, given the reality that poorly conceived or drafted aesthetic measures often endanger, if not actually violate, first and fourteenth amendment substance and process values. In particular, courts should disapprove measures that lack intelligible standards, not rubber-stamp them on the often fanciful premise that their authors have thoughtfully attempted to accommodate them with these values.

What is extraordinary about these conclusions, of course, is that they are so utterly unextraordinary. That they should require re-statement at all reveals how totally the appeal of "beauty" has hypnotized legislators and courts. Less obvious are the stubborn dilemmas, outlined in Part V, that beset aesthetic regulation even when its social impetus is accurately grasped. Formulated in terms of the foregoing triad of constitutional values, each traces to the challenge of specifying the "harm" that aesthetic regulation seeks to forestall and of ensuring that these values are not compromised in the attempt to prevent that harm. It is these tasks, I believe, that should and will dominate the law-aesthetics agenda in the coming years.

I. INTRODUCTION AND GENERAL CRITIQUE

A. *Recent Trends in Aesthetic Policy*

Long dormant in the nation's folklore, aesthetic values have recently burst into prominence. Singly or combined with other values, they now determine how a substantial part of the nation's wealth is allocated, demand the attention of policy-makers, administrators, and judges, and account for the sprouting of constituencies that seek their implementation in varied environmental contexts. Over the past two or three decades, aesthetic initiatives have proliferated and, many feel, flourished as never before. Visual beauty reasoning, moreover, seems to have found a welcome home in modern judicial opinions that extol regulation enacted "solely for aesthetics."⁷ But appearances in both spheres are as deceiving as they are dramatic, as this and the following subsection illustrate.

Examples of these developments abound. The National Highway Beautification Act⁸ (NHBA), which was intended to restrict

7. See state court cases cited in note 53 *infra*.

8. 23 U.S.C. §§ 131, 136, 319 (1976 & Supp. III 1979).

sharply the number and placement of billboards along federally assisted highways, is a product of this period. Urban renewal was sold to the public in no small part on aesthetic grounds, prompting Justice Douglas's seminal pro-aesthetics dictum in *Berman v. Parker*.⁹ Incentive zoning,¹⁰ a tool proposed to enhance urban design by trading off bonus building rights for developer-provided plazas, galleries, and other design amenities, has been embraced by cities nationwide. The historic preservation movement has also come of age, exponentially increasing its membership, building bridges to powerful allies in political, financial, ethnic, and environmental circles, and successfully lobbying for preservation legislation.¹¹ The neighborhood conservation movement, a creature of the citizen participation fever of the 1960s, has become a force that no astute mayor or city council takes lightly.

Perhaps the most extraordinary achievements were registered by the environmental movement in the 1970s — the “Environmental Decade.” The National Environmental Policy Act of 1969¹² (NEPA) broadcasts the convergence of environmental and aesthetic values. Among the Act's purposes are ensuring “esthetically and culturally pleasing surroundings”¹³ and preserving “important historic, cultural, and natural aspects of our national heritage.”¹⁴ It obligates all federal agencies to engage in an “integrated use of the natural and social sciences and the environmental design arts”¹⁵ and to consider “presently unquantified environmental amenities and values.”¹⁶ Finally, it directs the Council on Environmental Quality to respond “to the . . . social, esthetic, and cultural needs and interests of the nation”¹⁷ The aesthetics-environmental linkage is also featured in the “little NEPAs” of the states.¹⁸

9. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.
348 U.S. 26, 33 (1954) (citation omitted).

10. See generally Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972).

11. See generally Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1981).

12. 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1976).

13. 42 U.S.C. § 4331(b)(2) (1976).

14. 42 U.S.C. § 4331(b)(4) (1976).

15. 42 U.S.C. § 4332(A) (1976).

16. 42 U.S.C. § 4332(B) (1976).

17. 42 U.S.C. § 4342 (1976).

18. The Minnesota Environmental Rights Act, MINN. STAT. § 116B.02 (1980), for example, provides substantial safeguards for that state's environmental resources, which are broadly

But caution rather than euphoria is called for in assessing these developments. The NHBA has been excoriated as the “environmental movement’s greatest failure”¹⁹ because it has hindered rather than expedited billboard removal. Urban renewal is less kindly regarded today than when Justice Douglas lauded it. Many feel that its ostensible goal of battling “slums” and “blight” often served as a ruse enabling powerful downtown interests to profit by wresting control of strategically located areas from their former residents — usually the poor and minority groups.²⁰

Incentive zoning has become “Frankenstein zoning”²¹ in a number of cities. In New York City, for example, it has sanctioned buildings that outstrip even the bulky, light- and air-blocking slabs that frightened the City into adopting zoning in 1916. It has transformed reasonably predictable and impartial zoning procedures into a bazaar, whose wheeler-dealers include the handful of shrewd developers’ lawyers who actually understand what is written — and not written — in the code; a planning staff overly eager to design developers’ buildings or to select favored architects for the job; developers willing to go along in return for outsized zoning dispensations; and mayors panicked by fears of municipal bankruptcy and developer-authored threats to “take their buildings to Houston.” Off to the side, the public is demoralized by a “system” that has spun out of control, and puzzled by “amenities” that are unused, unwanted, or if

defined to include “quietude, recreational and historical resources” as well as “all mineral, animal, botanical, air, water, [and] land” resources. The Act was successfully invoked in *State v. Erickson*, 285 N.W.2d 84 (Minn. 1979), to prevent the demolition of an historically significant structure that municipal authorities had determined threatened public safety due to the structure’s dilapidated state.

19. See C. FLOYD & P. SHEDD, *HIGHWAY BEAUTIFICATION* (1979). These authors contend that the Act has become the captive of the group it ostensibly was enacted to regulate, as reflected in the Act’s requirement that compensation be paid for billboard removal even in cases where no compensation would be required under the federal and applicable state constitutions. In consequence, environmentalists “eagerly await [its] repeal.” See *Outdoor Advertisers Read the Small Print*, N.Y. Times, Oct. 19, 1980, § 4, at 8, col. 3.

20. Substantiation for this darker view is found in M. ANDERSON, *THE FEDERAL BULLDOZER* (1964); and H. GANS, *PEOPLE AND PLANS* 209-25 (1968).

21. Huxtable, *New York’s Zoning Law is Out of Bounds*, N.Y. Times, Dec. 14, 1980, § 2, at 41, col. 1. The misuse of incentive zoning in New York City is also recounted in Barnett, *Onward and Upward with the Art of Zoning*, 6 N.Y. AFF. NO. 3, at 4 (1980); Davis, Brody & Associates & Kwartler/Jones, *Midtown Development Project: Zoning Regulation Study*, in MIDTOWN DEVELOPMENT PROJECT: DRAFT REPORT, App. 1 (N.Y.C. Dept. City Planning, June 1980).

The New York City Planning Commission has acknowledged the problem, and has proposed a thorough overhaul of its incentive system in response. See CITY OF NEW YORK DEPT. OF CITY PLANNING, *MIDTOWN DEVELOPMENT* 9, 19 (June 1981). Similar problems have been experienced in San Francisco in recent years. Hedman, *A Skyline Paved with Good Intentions*, PLANNING, Aug. 1981, at 12; personal interview with Rai Okamoto, Director, San Francisco Planning Dept., July 30, 1980.

attractive, would have been built without a zoning bonus. Whether the buildings constructed under that system are “better architecture” than those that would have been built without it is conjectural at best. That many of them fail to respect their urban design context is clear.

The results on the historic preservation, neighborhood conservation, and environmental quality fronts are also mixed. Historic districting legislation has received the backhanded compliment of Richard Babcock and Clifford Weaver as a “splendid if somewhat contrived device” because the term “[h]istoric has come to mean practically anything that is, in some fashion or another, not run-of-the-mill.”²²

Why this has become so demonstrates how aesthetic initiatives can assume a life of their own — often with disturbing consequences. It reflects that the standards of most preservation ordinances are so vague that, literally read, they qualify almost any building or neighborhood as a landmark or historic district.²³ It is an outcome of zoning debacles that cause shocked neighborhood groups to look to the landmark commission to do the planning commission’s job, and to assume that preservation ordinances adequately substitute for zoning and planning codes.²⁴ In the face of frightful visions of block-

22. C. WEAVER & R. BABCOCK, CITY ZONING 35 (1979). Norman Williams pointedly adds:

To the extent that a designation for historic preservation becomes a symbol of prestige, it is likely to be sought by and on behalf of all sorts of neighborhoods/communities with no historical value whatsoever — *in which case it becomes not much more than a vehicle for local real estate promotion.*

3 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 71A.05 (Supp. 1981) (emphasis added). See R. NELSON, ZONING AND PROPERTY RIGHTS 20, 21 (1977) (historic districting legislation is often used as a subterfuge to achieve “greater collective control and discretion over neighborhood quality”).

23. The New York City Landmark Ordinance, for example, defines an “historic district” as any area containing improvements which have a “special character or special historical or aesthetic interest or value, represent one or more periods or styles of architecture typical of one or more areas in the history of the city,” and “by reason of such factors . . . constitute[s] a distinct section of the city” NEW YORK CITY CHARTER & AD. CODE ANN. ch. 8-A, § 207-1.0(h) (Williams 1976). Other examples of problematic standards are those reviewed in, e.g., *Sleeper v. Old King’s Highway Regional Historic Dist. Commn.*, Mass. App. Ct. Adv. Sh. 609, 417 N.E.2d 987 (March 13, 1981) (new development barred that is incompatible with the “aesthetic tradition of Barnstable County, as it existed in the early days of Cape Cod”); *Gumley v. Board of Selectmen*, 371 Mass. 718, 722, 358 N.E.2d 1011, 1014 (1977) (new development barred that is “obviously incongruous to the historic aspects of [its] surroundings”); *Town of Deering ex rel. Bittenbender v. Tibbets*, 105 N.H. 481, 485, 202 A.2d 232, 235 (1964) (new development barred that is incompatible with the town’s “atmosphere”).

24. These problems are underlined in the complaint of a former chairperson of the New York City Landmarks Preservation Commission:

It is becoming increasingly apparent that there is a growing tendency to use designation for purposes outside the jurisdiction of the law and even at times explicitly denied to the . . . Commission by the law. . . . [L]andmarking is being used to stop demolition, to

busters invading tranquil neighborhoods, the likelihood that spurious designations will result or that the landmark commission possesses neither staff nor expertise to meet the burdens imposed are ignored.²⁵

To relieve these burdens, landmark commissions, which seldom enjoy much budgetary or political clout, are tempted to form alliances with private groups, particularly those in prestigious neighbor-

prevent development and change, to prevent a high-rise with change in use, bulk, scale, etc. These are planning issues reserved for the City Planning Commission. . . .

. . . [P]eople are requesting and gaining designation for a whole array of . . . [improper] reasons: to maintain the status quo, to prevent development, to revitalize an area, to gentrify or gain tax benefits.

Spatt, Letter to the Editor, N.Y. Times, July 8, 1980, at 16, col. 5. See note 22 *supra*.

25. See *id.*

For example, all 33 speakers who testified in favor of the Upper East Side Historic District before the New York City Board of Estimate cited the objection in text, while only 15 identified the need for preserving the East Side's purported architectural-visual unity as a basis for their position. See Transcript of the Stenographic Record of the Discussion on Calendar Number 96: Held at the Meeting of the Board of Estimate on Sept. 10, 1981, City of New York (1981). That this unity exists at all is denied by restoration architect Giorgio Cavaglieri who writes that the "[c]haracter' of [the District] is not due to the preponderance of carefully designed facades with constant elements of style and compatible selections of materials. . . . [Rather it] is created by the small size of the properties and the low level of the roofs [and] . . . [the] strong social force . . . [of] the recollection of the elegance of these addresses which reminds one of the famous names of New York Society." G. Cavaglieri, Regarding the Designation of [the] Upper East Side District, 1, 2 (open letter, June 19, 1979) (emphasis added). Accordingly, he advocates a zoning solution that preserves the District's bulk, height, and scale constancies rather than an historic districting solution addressed to the District's ersatz uniformity of architectural detail. *Id.*

Confirmation that zoning rather than preservation concerns principally account for the Upper East Side's designation appears in the objections of "preservationists" to the first of the development proposals — a 20-story apartment tower on East 71st Street — to come before the Landmarks Preservation Commission following the designation. As described by Paul Goldberger:

Preservationists are arguing that the designation . . . was intended to prevent tall buildings, not to permit them . . . and that the proposed project would destroy the gentle nature of the . . . block on which it would be located, now one of the few full city blocks on the Upper East Side to contain no tall buildings, and that it represents another attempt to shoehorn development into tight Manhattan sites.

Debate over Proposed 71st St. Tower, N.Y. Times, Nov. 10, 1981, at 88, col. 3 (emphasis added). For the view that control of broader design constancies rather than of fine-tuned details is typically the proper or only practicable solution to legal-aesthetics controversies, see text at notes 294-96 *infra*.

Quite apart from the impropriety of a historic preservation solution to a zoning problem, the designation presents the puzzle of what standards the Commission will employ in passing upon this or any other development proposal for the Upper East Side. By the Commission's own count, the District contains 63 different architectural styles, ranging from various Beaux Arts variants to "styles" that the Commission labels as "none" or "modern." See Designation of the Upper East Side Historic District (N.Y.C. Landmarks Preservation Commn. 1981). Inexplicably, the Commission has issued no standards governing the basis upon which new development within the 60-block, 1000-building district will or will not be deemed compatible with the District's existing architecture. Of its massive report's 1387 pages, only three, *id.* at 1385-87, set forth the Commission's findings and recommendations, and one and one-half of these, *id.* at 1385-86, are devoted to an enumeration of the District's boundaries. The remainder describe the District's development history, inventory its buildings, and list the architects who designed some of these buildings.

hoods. The price extracted for the alliance, however, may be a *de facto* devolution to these groups of the commissions' powers to control development — the most intrusive of all land use powers and hence potent weapons for deciding what gets built, what gets changed, and what stays the same. With that devolution comes the leverage of private elites to impose or influence design outcomes that would otherwise be denied them in our aesthetically pluralistic society. Ultimately, authority is dislodged from the public agencies established to ensure that development serves city-wide interests, and exercised by groups whose perspective may vanish at their neighborhood boundaries or be confined by their often-autocratic preferences for this or that architectural style.

Babcock and Weaver confirm similar trends in their portrayal of the neighborhood conservation movement's abuse of land use measures, many of which include a strong aesthetic component. Despite their sympathy for the movement, they compare recently arrived residents of gentrified or gentrifying neighborhoods to

folks who are still fighting to keep the walls up around their suburb or the Vermont environmentalist who moved from New York last year . . . [who] have implicit faith in their own good motives but are convinced that the public health, safety, and welfare demand a zoning ordinance to control the libidinal tendencies of others to pillage, plunder and rape "their" turf.²⁶

The territorial imperative motivates residents of other types of neighborhoods as well. The evidence is compelling, for example, that New York City's Little Italy Special District was adopted at the behest of its Italian-American residents to restrain further movement into and commercial development of the District by an adjacent Chinese-American population.²⁷ Bernard Frieden concurs with Babcock and Weaver in his parallel attack on the abuse of environmental legislation by suburbanites. In *The Environmental Protection Hustle*, he blasts Marin County, a wealthy area north of San Francisco, as

the best place to look for an understanding of what it means to stop suburban growth in the name of environmental protection. It means closing the gates to people who may want to move in and, where possible, even to people who may want to visit; turning to state and federal governments for help in paying the costs of exclusivity; and maintaining a tone of moral righteousness while providing a better living environment for the established residents.²⁸

26. C. WEAVER & R. BABCOCK, *supra* note 22, at 37.

27. See Wang, *Plans and Promises: Like Letters to Santa Claus*, 6 N.Y. AFF. 70 (1980).

28. B. FRIEDEN, *THE ENVIRONMENTAL PROTECTION HUSTLE* 37 (1979). For a similar assessment of the Storm King Mountain controversy litigated in *Scenic Hudson Preservation*

Taken together, these trends signal that aesthetic policy's second-generation issues are considerably more worrisome than is generally recognized. Aesthetics has been transformed from an idea into an ideology that is being employed by preservationists, environmentalists, and developers alike to rationalize pursuits that are at best tenuously related to visual beauty. Some of these pursuits may be unobjectionable under a properly reformulated concept of aesthetics; others are deplorable under any formulation.

As a concept, aesthetics is peculiarly vulnerable to the metamorphosis that it has experienced. However defined, its scope is inherently vague and expansive. Its conventional definition as the pursuit of visual beauty, conceived as an ontological fact rather than as a social construct, confers upon it an aura of legitimacy which special interest groups have exploited.²⁹ Its emotional appeal discourages dissent — everyone is, after all, a lover of “beauty.” And its seemingly unique concerns appear to set it apart from other land use and environmental endeavors, which are widely recognized as the product of warfare among contending groups to control the pace and character of environmental change.

The metamorphosis also conflicts with the pluralism that has been the lifeblood of American art and politics. Ours is not the culture of the Medicis' Florence, Julius II's Rome, or Louis XIV's Versailles, design ensembles that are the envy of many American proponents of aesthetic regulation. In these despotic societies, style

Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), see Tucker, *Environmentalism and the Leisure Class*, HARPER'S, Dec. 1977, at 49.

The admonition of Babcock, Weaver, Frieden, and Tucker that the expansion of traditional land use controls to encompass aesthetic and environmental concerns enlarges the risk that they will be used for exclusionary or other troubling purposes is reflected as well in, e.g., Ackerman, *Impact Statements and Low Cost Housing*, 46 S. CAL. L. REV. 754 (1973); Daffron, *Using NEPA to Exclude the Poor*, 4 ENVTL. AFF. 81 (1975). Litigation that confirms that the issue is a serious and continuing one includes, e.g., Nucleus of Chicago Homeowners Assn. v. Lynn, 524 F.2d 225 (7th Cir. 1975), cert. denied, 424 U.S. 967 (1976); Town of Groton v. Laird, 353 F. Supp. 344 (D. Conn. 1972); Home Builders League v. Township of Berlin, — N.J. —, 405 A.2d 381 (1979); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, appeal dismissed, 423 U.S. 808 (1975); National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965); Polygon Corp. v. City of Seattle, 90 Wash. 2d 59, 578 P.2d 1309 (1978).

29. In their discussion of “reification,” Berger and Luckmann clarify how the characterization of a phenomenon as an ontological fact rather than as a social construct can serve authoritatively to legitimate it:

Reification is the apprehension of human phenomena as if they were things, that is, in non-human or possibly super-human terms. . . . [It] is the apprehension of the products of human activity *as if* they were something else than human products — such as factors of nature, the results of cosmic laws, or manifestations of divine will The basic “recipe” for the reification of institutions is to bestow on them an ontological status independent of human activity and signification Through reification, the world of institutions appears to merge with the world of nature.

P. BERGER & T. LUCKMANN, *supra* note 4, at 89-90 (emphasis in original).

was monopolized by *signorie*, popes, and kings who employed favored artists, supported academies, enshrined particular canons of beauty, and preempted the art market to glorify themselves and their unilaterally proclaimed political and cultural ideals. The styles that they decreed were *official* styles in the most fundamental sense of that term, and aesthetics was one and the same with ideology.³⁰

With the principal exception of Washington, D.C. — which most American design critics prefer to forget³¹ — the design of American cities is the product of cultural, political, legal, and economic forces that embrace pluralism. Louis Sullivan's dictum that "[t]he Roman temple can no more exist in fact on Monroe Street, Chicago, U.S.A. than can Roman civilization exist there,"³² succinctly portrays the formative influence of these forces on the built environment. The premise that America can have the unified design philosophies or cityscapes of the past while remaining faithful to its own pluralistic traditions is naïve, objectionable, or both. Democracy and aesthetic orthodoxy are antithetical. Regrettably, this antithesis has generally been ignored by the Le Corbusiers, Wrights, Gropiuses, and other leading architectural propagandists, by many design critics, and by many members of the preservation movement. The lip service that they pay to the values of pluralism is belied by their desire to impose personal design preferences on society as autocratically as did the despots of the past.³³

30. See generally 2 A. HAUSER, *THE SOCIAL HISTORY OF ART* (1957).

Illustrating his position by reference to the status of art in Louis XIV's France, Hauser comments:

Like all the forms of life and culture of the age, . . . the aesthetic of classicism is guided by the principles of absolutism — the absolute primacy of the political conception over all the other expressions of cultural life [T]he representatives of official classicism want to put an end to all artistic freedom, to every effort to achieve a personal taste, to all subjectivism in the choice of theme and form. They demand that art should be universally valid — that is to say, a formal language . . . which corresponds to the ideals of classicism as the regular, lucid, rational style par excellence. . . . Their universalism is a fellowship of the elite — of the elite as formed by absolutism.

Id. at 192-93.

31. One noted design critic grieves, for example, that "Washington's 'development' is so wrong-headed that it wrings the heart." A. HUXTABLE, *KICKED A BUILDING LATELY?* 172 (1976).

32. L. SULLIVAN, *KINDERGARTEN CHATS* 39 (1947).

33. For this Article's purposes, the most striking aspect of such works as W. GROPIUS, *THE NEW ARCHITECTURE AND THE BAUHAUS* (1965); LE CORBUSIER, *WHEN THE CATHEDRALS WERE WHITE* (1947); and F.L. WRIGHT, *WHEN DEMOCRACY BUILDS* (1945), is the antinomy manifested between ostensible commitment to individual artistic freedom and political pluralism on the one side, and the authors' evident disposition to read their personal preferences as Holy Writ on the other. See generally G. BROADBENT, *DESIGN IN ARCHITECTURE* (1973); R. VENTURI, D. BROWN & S. IZENOUR, *LEARNING FROM LAS VEGAS* (rev. ed. 1977); Wolfe, *supra* note 2.

Design critics, too, are dubious sources of public policy, however insightful their perceptions of their subject may be. Thoughtful critics appreciate that design criticism and public

In addition to their threat to pluralism, recent trends illustrate that aesthetic law and policy are frail vessels for achieving "better" design. Conceiving "better" design in the abstract is virtually impossible;³⁴ and, while conceiving it in the context of preserving or enhancing existing environmental features is possible, the task is by no means simple.³⁵ Constituencies for a resource may offer little help

policy formulation are entirely distinct enterprises. Huxtable, for example, observes that the critic's role is to "have taught someone to see." A. HUXTABLE, *WILL THEY EVER FINISH BRUCKNER BOULEVARD?* 2 (1970). Dewey sharply distinguishes between "aesthetic" and "legalistic" criticism, and notes that a desire for authoritative standing similar to that of the law court judge often leads the critic to "speak as if he were the attorney for established principles having unquestioned sovereignty." J. DEWEY, *supra* note 3, at 229.

But even critics as sensitive to Dewey's distinction as is Huxtable sometimes have difficulty honoring it, and their followings seldom make the effort at all. In an essay entitled *Pop Architecture*, for example, Huxtable advances the following view:

Except for a pathetically small showing, the cultural aristocracy is no longer responsible for most building styles. It is barely holding its own with those isolated examples that represent structural and design excellence, against the tide, or better, flood, of . . . Pop Architecture.

Pop Architecture is the true democratization of the art of architecture in that it represents not just mass consumption but mass taste.

Its standards are set not by those with an informed and knowledgeable judgment, but by those with little knowledge or judgment at all. It is the indisputable creation of the lower rather than of the upper classes.

A. HUXTABLE, *supra*, at 173. In a subsequent essay, she transforms this view into a public policy prescription that supports the Upper East Side Historic District while largely ignoring or misconceiving the issues of policy and pluralism that the designation posed. *See* Huxtable, *A Plan to Preserve the Upper East Side*, N.Y. Times, Aug. 21, 1981, § 4, at 26, col. 1. In that essay, she insists that the root conflict posed by the designation pits the "enrich[ment of] a few builders" against the "impoverish[ment of] the city"; that the Landmark Preservation Commission's report is "meticulously researched and compiled"; that the District qualifies "as a 'toute ensemble,' or coherent whole, as established legally many years ago in New Orleans' Vieux Carré"; that the designation entails a "sensitive and cordial collaboration" between the city's preservation and planning agencies; and that the former agency has devised procedures guaranteeing expedited and principled review of future proposals for change. In fact, the designation's root conflict traces to the very purposes of preservation itself and the role and capabilities of preservation agencies as municipal development control bodies, *see* notes 22-25 *supra*; the report's findings and recommendations conceal rather than justify the basis for the designation, *see* note 25 *supra*; the District, as bounded, is not visually or historically unified, *see id.*; with the acquiescence of the Board of Estimate, the Landmarks Preservation Commission has substituted itself for, rather than collaborated with, the Planning Commission, *see* notes 18-21 *supra* and accompanying text; and such procedures as the former body may have disclosed to Huxtable are not intelligibly detailed in its report, *see* note 25 *supra*.

My point is not, of course, that architects and critics are not entitled to their personal views or to the privilege of advocating them forcefully. In the free marketplace of aesthetic ideas, they clearly are entitled to a hearing. But in a democracy, those ideas are by no means authoritative simply because they are held by design professionals. They are likely, in fact, to be suspect as sources of public policy because these professionals, like architectural propagandists, tend to ignore process values and tend to engage in what Dewey terms "legalistic" rather than aesthetic criticism. For two views on the implications of this observation, compare O. Y. GASSET, *REVOLT OF THE MASSES* (1932) (expressing consternation over the democratization of taste accompanying the evolution of social democracies in the West), with H. GANS, *POPULAR CULTURE AND HIGH CULTURE* 52 (1974) (a critique of the "plea for the restoration of an elitist order by the creators of high culture . . . who are unhappy with the tendencies toward cultural democracy that exist in every modern society").

34. *See* notes 149 & 254 *infra* and text at note 253 *infra*.

35. *See* text at notes 254, 286-303 *infra*.

because they are often unsure why they seek its protection. Does the demand, for example, that Building *X* or Neighborhood *Y* be designated reflect a genuine conviction that either resource is historically or architecturally distinguished? Or does it derive instead from a diffuse fear of change *qua* change, from romanticism of the past, or from lack of confidence in the city's administration of its zoning code? Even if a design objective is determined, can it be rendered in syntax that both is faithful to that objective and satisfies legal requirements of generality, impartiality, and predictability? The legal and design lexicons and professions, after all, are worlds apart.

Because aesthetic regulation is administered by public bureaucracies, moreover, it is subject to the vicissitudes of public administration.³⁶ Some bureaucrats are extraordinarily competent; others far less so. Even the best are often no match for the battery of lawyers and lobbyists eager to turn problematic aesthetic measures to their clients' advantage. Strong political support for aesthetic measures is seldom guaranteed because coalitions favoring them are not easily forged or maintained, and because politicians tend to sacrifice them to more basic bread-and-butter concerns in a crunch. The be-deviling problems of practical implementation must also be considered. Incentive zoning programs, for example, require detailed, current knowledge of market trends, which public officials often lack.³⁷

Related to these concerns is planning's Murphy's Law of unintended consequences. In the late 1950s, for example, the tower-in-the-plaza format, illustrated by the van der Rohe-Johnson Seagram Building, became the architectural fad in New York City. Accordingly, policy-makers modified the City's zoning code to encourage use of that format. The result: scores of "bargain-basement Mies buildings" — cheap, bland imitations of the original; disruption of formerly uniform street walls by redundant, windswept plazas; and buildings that are discordant in scale and bulk with their neighbors and with the streets on which they front. Aghast at these consequences, policy-makers, urged on by neighborhood groups and wounded design critics, then frenziedly embraced preservation to get the genie back in the bottle. Since we have no idea whether the fu-

36. For sober accounts of these vicissitudes and the often insuperable obstacles they pose to the balanced conception and effective implementation of any planning policies, let alone those as fragile as aesthetic policies, see A. ALTSHULER, *THE CITY PLANNING PROCESS* (1967); E. BANFIELD, *POLITICAL INFLUENCE* (1961); J. BARNETT, *URBAN DESIGN AS PUBLIC POLICY* (1974); A. CATANESE, *PLANNERS AND LOCAL POLITICS* (1974); A. JACOBS, *MAKING CITY PLANNING WORK* (1978).

37. See authorities cited in note 21 *supra*.

ture will bring more of the same or perhaps even something worse, their thinking goes, we should save what we have. No matter that it may not be distinguished — indeed when it was built fifty or a hundred years ago, the contemporary design *avant garde* was calling it derivative, effete, and corrupt. But at least it is comfortable and *known*.³⁸

There is, moreover, the seeming paradox that speculative development constructed with loose or no public controls is often regarded as superb, while development erected with detailed public intervention is not. New York City's Soho, Greenwich Village, and Gramercy Park, London's great squares, and the widely respected buildings and ensembles authored by the Chicago School of Architecture in that city's Loop illustrate the former; New York City's Sixth Avenue and the whole of Washington, D.C.'s civic architecture, the latter. This paradox dissolves with the recognition that the built environment results from a host of forces, among which the law is but a minor factor. Perhaps the current unhappiness with modern architecture is attributable to a dearth of "good" architects. If so, the law can offer nothing to remedy the problem, but its indiscriminate intervention can do a good deal to compound it.

Finally, recent trends indicate that aesthetic initiatives redistribute power to control what does and does not get built, and, hence, to determine who wins and who loses in the community development game. My earlier discussion of historic districting suggests, for example, that power may drift from the planning commission to the landmark commission and even to influential private groups. Or, as the Little Italy Special District example illustrates, power may be exercised on behalf of one ethnic group to the disadvantage of another. More generally, vague legislative declarations of aesthetic policy augment the power of administrators because they must provide the content for these generalities. This power shift is accentuated by the refusal of most modern courts to scrutinize administrative decisions undertaken in the name of "aesthetics."

B. *Trends in Aesthetic Jurisprudence*

My reservations might also be faulted as out of step with the modern courts' enthusiastic endorsement of aesthetic values. Again,

38. *Id.*

The preference for the bland known over the feared unknown appears in architectural critic Paul Goldberger's comment that "[w]e cry not because we think the architectural past was so good, but because we cannot believe the architectural future will be better." P. GOLDBERGER, *THE CITY OBSERVED* xvi (1979).

the charge is superficially appealing. Norman Williams, for example, is surely correct when he asserts that “[i]n no other area of planning law [than in the aesthetic area] has the change in judicial attitudes been so complete.”³⁹ His appraisal is readily confirmed by a sample of recent Supreme Court opinions addressing such diverse topics as standing,⁴⁰ urban renewal,⁴¹ zoning for historic preservation⁴² or community character,⁴³ and, strikingly enough, first amendment expression.⁴⁴ These opinions mirror profound shifts in national attitudes and concomitant legislative responses that elevate aesthetic values to the first rank and bring aesthetic, land use, and environmental concerns together under a common rubric, which the Court has termed the “quality of life.”⁴⁵

39. 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 11.02 (1974 & Supp. 1981).

40. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (“Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . .”); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (injury upon which standing may be predicated includes impairment of “ ‘aesthetic, conservational, and recreational’ as well as economic values”).

41. See *Berman v. Parker*, 348 U.S. 26, 33 (1954).

42. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 129 (1978).

43. See, e.g., *Metromedia, Inc. v. City of San Diego*, 101 S. Ct. 2882 (1981); *Schad v. Borough of Mount Ephraim*, 101 S. Ct. 2176 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *City of New Orleans v. Duke*, 427 U.S. 297 (1976); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

44. See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (FCC regulation of scatological broadcasts); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (governmental ban on obscene movies). In both opinions, a majority of the Court recognized that controls that ban “offensive” environmental objects and controls that ban “offensive” speech each affect a medium — the physical environment in the case of the former, the social environment in the case of the latter — so pervasively that the introduction of “offensive” activities into it threatens to undermine the “quality of life.” Thus, in *Pacifica*, the Court stressed that “the broadcast media have established a uniquely pervasive presence in the lives of all Americans,” 438 U.S. at 748, and justified the FCC’s restrictions in part on the pig-in-the-parlor metaphor employed by the Court to sustain the constitutionality of zoning in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (“A nuisance may be merely a right thing in the wrong place, — like a pig in the parlor instead of the barnyard.”). In *Slaton*, the Court premised obscenity bans on “the primary requirements of decency,” among which it included “the interest of the public in the *quality of life* and the *total community environment* . . .” 413 U.S. at 58 (emphasis added). The Court also relied on aesthetic reasoning in observing that obscenity control, like aesthetic regulation, may be based on “imponderable aesthetic assumptions,” 413 U.S. at 62, and in analogizing obscenity to “garbage” and “sewage,” which the government may regulate not only to “protect . . . public health,” but to safeguard “the appearance of public places” as well. 413 U.S. at 64.

In *Metromedia*, *Young*, and *Mount Ephraim*, see note 43 *supra*, the Court acknowledged that aesthetically based land use and environmental controls can raise serious first amendment issues when they ban or restrict activities on the basis that their expressive character is offensive to the community. These opinions and the first amendment issues that aesthetic regulation may pose are discussed in Part V (C) *infra*.

45. Hence the Court’s explicit endorsement in *Penn Central* of the comment that “historic conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing — or perhaps developing for the first time — the quality of life for people.” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 108 (1978) (quoting Gilbert, *Precedents for*

1. *The Early, Middle, and Modern Period Views*

Lest too much is made of the recent endorsement of aesthetics, however, we should examine how the courts arrived at their present position. Commentary⁴⁶ has distinguished three stages in the evolution of aesthetic jurisprudence, termed here the early, middle, and modern period views. The early period view was hostile to the claim that government's police power encompassed aesthetic initiatives.⁴⁷ In part, this hostility reflected opposition to public measures restricting private property rights.⁴⁸ These courts' opinions also intimated a concern that, to use the syntax of current first amendment doctrine, the state should not impede the interests in expression and self-fulfillment associated with aesthetic activity.⁴⁹ But their most serious objection was that aesthetic preferences are too subjective and arbitrary to constitute a proper object of public ordering. Observing that "[c]ertain legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for

the Future, 36 LAW & CONTEMP. PROB. 311, 312 (1971), (quoting address by Robert Stipe, 1971 Conference on Preservation Law, Washington, D.C. (May 1, 1971)).

46. Among the more frequently cited law review contributions on law and aesthetics are Anderson, *Architectural Controls*, 12 SYRACUSE L. REV. 26 (1960); Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955); Michelman, *Toward a Practical Standard for Aesthetic Regulation*, 15 PRAC. LAW. 36 (1969); Williams, *Subjectivity, Expression and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1 (1977); Comment, *Zoning, Aesthetics and the First Amendment*, 64 COLUM. L. REV. 81 (1964); Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438 (1973); Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U. L. REV. 1075 (1970); Comment, *Architectural Controls: Aesthetic Regulation of the Urban Environment*, 6 URB. LAW. 622 (1974). The most exhaustive and thoughtful treatment of the topic in treatise form is 1 N. WILLIAMS, *supra* note 39, § 11.01-.21 (1974 & Supp. 1980); 3 N. WILLIAMS, *supra* note 39, § 71.01-.14 (1974 & Supp. 1981); *id.* at § 71A.01-.11.

47. Representative early period cases are collected in 1 N. WILLIAMS, *supra* note 39, at § 11.04-.06.

48. The observation cited in *City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, 72 N.J.L. 285, 287, 62 A. 267, 268 (1905) is representative:

No case has been cited . . . which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Aesthetic 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.

49. In *Curran Bill Posting & Distrib. Co. v. City of Denver*, 47 Colo. 221, 227, 107 P. 261, 264 (1910), both concerns were implicated in the following comment:

The cut of the dress, the color of the garment worn, the style of the hat, the architecture of the building or its color, may be distasteful to the refined senses of some, yet government can neither control nor regulate in such affairs. The doctrines of the commune invest such authority in the state, but ours is a constitutional government based upon the individuality and intelligence of the citizen, and does not seek, nor has it the power, to control him, except in those matters where the rights of others are injuriously affected or imperiled.

Similar concerns have been expressed in dissents to more recent opinions as well. See *People v. Stover*, 12 N.Y.2d 462, 472-73, 191 N.E.2d 272, 278, 240 N.Y.S.2d 734, 742, *appeal dismissed*, 375 U.S. 42 (1963); *cf.* *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 76, 192 N.E.2d 74, 81 (1963).

Rembrandt, and for limericks than for Keats," a representative opinion concluded that "[t]he world would be at continual seesaw if aesthetic considerations were permitted to govern the use of the police power."⁵⁰

The middle and modern period courts have been less hostile to public intervention, although for different reasons. The former side-stepped their predecessors' principal objection by upholding particular measures, not because they served aesthetic ends *per se* but because they also advanced such traditional police power goals as the preservation of property values.⁵¹ But the asserted linkages between aesthetics and these goals were often dubious, if not transparently fictional.⁵² By contrast, the modern period courts purport to break with the early and middle periods by proclaiming that government may indeed regulate "solely" for aesthetic ends.⁵³

50. *City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 661-62, 148 N.E. 842, 844 (1925).

51. Representative cases are collected in 1 N. WILLIAMS, *supra* note 39, at §§ 11.07-09.

52. Perhaps the favorite target of the commentators' ire on this ground is *St. Louis Gunning Advertising Co. v. City of St. Louis*, 235 Mo. 99, 137 S.W. 929 (1911), *appeal dismissed*, 231 U.S. 761 (1913), which sustained a billboard ban on the grounds, *inter alia*, that billboards were

constant menaces to the public safety and welfare of the city; they endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscreants [T]he evidence shows . . . that the ground in the rear thereof is being constantly used as privies and dumping grounds for all kinds of waste and deleterious matters, and . . . behind these obstructions the lowest form of prostitution and other acts of immorality are frequently carried on, almost under the public gaze

235 Mo. at 145, 137 S.W. at 942.

53. *See, e.g.*, *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510, *rev'd on other grounds*, 101 S. Ct. 2882 (1981); *State v. Diamond Motors, Inc.*, 50 Hawaii 33, 429 P.2d 825 (1967); *John Donnelly & Sons, Inc. v. Outdoor Advertising Bd.*, 369 Mass. 206, 339 N.E.2d 709 (1975); *Cromwell v. Ferrier*, 19 N.Y.2d 263, 255 N.E.2d 749, 279 N.Y.S.2d 22 (1967); *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963). The status of the modern period view in the 50 states is surveyed in 1 N. WILLIAMS, *supra* note 39, at § 11.10-.21.

The status of aesthetic values has proven as controversial under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1976 & Supp. IV 1980) (NEPA), in cases arising since its enactment as it has been under zoning for most of this century. Although the principal positions expressed in these cases do not fully correspond to the early, middle, and modern views expressed in the text, instructive comparisons can be noted. The NEPA cases can be interpreted as endorsing one of three positions — the "hard look," the "semi-soft look," and the "soft look" — concerning the manner in which a court should review the obligation of federal agencies to consider aesthetic values both in making the threshold determination whether to file an environmental impact statement and, should the decision be affirmative, in preparing that statement. The "hard look" view requires that the agency thoroughly consider aesthetic values at both stages because Congress has explicitly mandated that it do so in § 4331(b)(2) of the NEPA, which includes among its purposes the assurance of "healthful, productive, and aesthetically and culturally pleasing surroundings." The agency's failure to do so entitles aggrieved parties to a mandatory injunction requiring that the agency rectify its omission. *See Ely v. Velde*, 451 F.2d 1130, 1134 (4th Cir. 1971) (proposed construction of a prison in the Virginia Historic Green Springs area; "other environmental . . . factors" than those directly related to health and safety are "the very ones accented in . . . NEPA"); *cf. Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 624 (2d Cir. 1965) (proposed con-

Two points stand out in this picture. First, the judges of all three periods have assumed that visual beauty is the primary or exclusive referent of the term "aesthetics."⁵⁴ To be sure, comments comporting with stability interest reasoning appear from time to time.⁵⁵ Nonetheless, the conclusion overwhelmingly asserted and lauded in commentary⁵⁶ is that "aesthetics" and "visual beauty" are essentially

struction of a storage pump plant on Storm King Mountain; Federal Power Commission must consider as a "basic concern the preservation of natural beauty and of historic national shrines" under § 10 of the Federal Power Act). The "semi-soft look" position also acknowledges Congress's concern for aesthetic values, but reasons that the impossibility of quantifying them frees the agency of supporting its assessment of them with the type of objective evidence that would be possible in measuring a project's health or safety impacts. *See* *City of New Haven v. Chandler*, 446 F. Supp. 925, 930 (D. Conn. 1978) (proposed construction of three transmission towers over New Haven Bay; "elusive character of aesthetics does not mean that such concerns are less weighty," but does indicate that the agency's "finding as to the role of aesthetics need not be supported by statistical evidence"). The "soft look" view is best exemplified by *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972), and *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973) (proposed construction of a detention facility in a mixed commercial-residential high density urban district). In these opinions, the Second Circuit appears to distinguish four types of project impacts: first, those relating directly to health and safety; second, those relating to the "quality of life"; third, those relating to psychological and sociological effects; and fourth, by implication, those relating to visual beauty. It ruled in both *Hanly* opinions that the agency must consider the first two types of impacts in making its threshold decision whether to file an impact statement. Despite the apparently broad scope of the phrase "quality of life," however, it indicated in the second *Hanly* decision that the second category of impacts does not include psychological and sociological effects such as those that might, for example, cause residents of a neighborhood to object to the construction of a detention facility in their midst. *See* 471 F.2d at 833. In the court's terms, "it is doubtful whether psychological or sociological effects upon neighbors constitute the type of factors that may be considered in making [a] determination [to prepare an environmental impact statement] since they do not lend themselves to measurement." 471 F.2d at 833. That aesthetic values are indeed low on the NEPA totem pole for "soft look" courts is confirmed in *City of Columbia v. Solomon*, 13 *Envir. Rep. Cas.* 1301 (D.S.C. 1979) (proposed construction of a parking garage blocking vistas to historic district), which stated that "aesthetic considerations alone may [not] be used as a basis for requiring an [environmental impact statement]." 13 *Envir. Rep. Cas.* at 1307. *See* *Maryland-National Capitol Park & Planning Commn. v. United States Postal Serv.*, 487 F.2d 1029, 1038-39 (D.C. Cir. 1973) (proposed construction of postal facility in suburban Maryland; aesthetic impacts do not justify the same hard look by reviewing courts as "more significant environmental effects relating to both health and injury to natural resources").

54. *See, e.g.*, *Maryland-National Capitol Park & Planning Commn. v. United States Postal Serv.*, 487 F.2d 1029, 1038-39 (D.C. Cir. 1973); *City of Columbia v. Solomon*, 13 *Envir. Rep. Cas.* 1301, 1307-08 (D.S.C. 1979); *Mayor of Baltimore v. Mano Swartz, Inc.* 268 Md. 79, 91, 299 A.2d 828, 835 (1973); *City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 661-62, 148 N.E. 842, 844 (1925). Representative of this view is the statement that "[b]eauty may not be queen but she is not an outcast beyond the pale of protection or respect." *Perlmutter v. Greene*, 259 N.Y. 327, 332, 182 N.E. 5, 6 (1932).

55. *See* cases cited in note 119 *infra*.

56. *See* authorities cited in note 46 *supra*.

Representative of the approach adopted in commentary is Norman Williams's analysis. Having earlier posited that "matters which are essentially aesthetic . . . [are those] which are perceived by the sense of sight," 1 N. WILLIAMS, *supra* note 39, at § 11.01 (emphasis added), Williams defines the central legal problem posed by aesthetic regulation as follows:

When an attempt is made to apply legal sanctions in connection with aesthetics, one simple but very important problem arises: *how to define what is attractive and what is ugly.* The problem of how to define good taste, long debated among philosophers, has a special significance in a legal context; for when legal sanctions are involved, it is essential

synonymous in American aesthetic jurisprudence. Accordingly, the modern period courts' "solely for aesthetics" dicta may be read as expressing the rationale for aesthetic regulation.

Second, the visual beauty interest is only an assumption. Inexplicably, the courts have refrained from washing it in cynical acid. The assumption and its premises, however, no longer command the assent of the extralegal disciplines from which they derive.⁵⁷ The visual beauty interest can be taken seriously as a predicate for aesthetic regulation only if visual beauty itself can be rendered by intelligible standards. That task leads inevitably to confusion. The early and middle period courts comprehended this problem, and, however flawed in other respects, their opinions reflect principled responses to it. The courts of both periods withheld their endorsement of aesthetics by reasoning that the pursuit of visual beauty alone falls outside of the police power's ambit. For those who question the visual beauty rationale but believe that courts should uphold soundly formulated and implemented aesthetic measures, the flaw in both sets of opinions is obvious: They fail to attempt any reformulation of the visual beauty assumption to take account of the social values that aesthetic measures can advance. In a sense, the middle period courts moved in this direction when they searched for purposes other than the pursuit of visual beauty to sustain aesthetic measures. But they were sidetracked by their attempts to assimilate aesthetics to traditional police power ends. Had they recognized that aesthetics is neither derivative of the latter nor exhausted by visual beauty concerns, aesthetic jurisprudence might have been spared many of its present infirmities.

In contrast to their predecessors, the modern period courts have posited that aesthetics and visual beauty are interchangeable. If aesthetics connotes visual beauty alone, the modern view becomes mired in the standards morass that caused the courts of the earlier periods to reject aesthetics as a proper governmental concern. Why the modern period courts should have opted for this view, if indeed they have, is unclear. Their opinions offer little to refute their predecessors' objection that visual beauty is hopelessly subjective and ar-

define rather precisely what is permitted and what is not. Because of the obvious difficulty of drawing the line in such cases, the courts have long been reluctant to recognize the aesthetic factor as an appropriate basis for land use controls.

Id. at § 11.02 (emphasis added).

In contrast to this position, Professor Rose advances a position similar in vital respects to that offered here in her argument that the "chief function of [historic] preservation is to strengthen local community ties and community organization," Rose, *supra* note 11, at 479, or, as she alternatively states that function, "community building." *Id.*

57. See text at notes 128-79 *infra*.

bitrary. Perhaps the modern judges, like the commentators, simply grew impatient with the fanciful linkages that middle period courts had posited between aesthetic and police power pursuits. Perhaps the answer is to be found in recent history. Since the modern period commenced roughly at the same time as the shift in national attitudes favoring aesthetic values, modern judges may have been caught up in the spirit of the times.

It is also conceivable, however, that modern period judges did not intend to link aesthetics exclusively with visual beauty, but inadvertently became prisoners of language that failed to express a more discerning position: namely, that aesthetics connotes the pursuit of cultural stability, in which visual form plays a significant but not dispositive role. Concededly, their "solely for aesthetics" phraseology affords, at most, ambivalent support for this hypothesis. But I find the cultural stability hypothesis both defensible as a description of the direction in which contemporary aesthetic jurisprudence is moving, and more attractive — if still problematic — as a prescription for what that direction ought to be. The hypothesis is consistent with the decisions and, from time to time, the explicit reasoning of the more thoughtful of the modern period opinions. Under it, the modern view can be interpreted as carrying forward the fumbled middle period insight that because aesthetics and visual beauty may not be interchangeable concepts, the search for standards need no longer be identified with the futile quest for a definition of "beauty." In addition, it establishes a framework for constructing a rationale for aesthetic jurisprudence that comports more faithfully with such nonaesthetic legal values as those set forth in the first and fourteenth amendments.

2. *Aesthetic Policy and Nonaesthetic Constitutional Values*

But I am getting ahead of my argument. For the moment, let it be conceded that the modern period courts accept the visual beauty rationale. If so, a cogent justification for aesthetic regulation must begin by specifying the harm that warrants state intervention to prevent "ugly" development or to promote "beautiful" development. On that specification hinges aesthetic regulation's defense against the objection that it violates these constitutional values.

The vagueness-due process challenge is rebutted only if the standards incorporated in the aesthetic initiative meet a threshold of intelligibility so that the regulated class can understand its requirements, the implementing agency can administer it purposively and impartially, and the courts can review it and related ad-

ministrative actions.⁵⁸ Draftsmen of such initiatives cannot meet that threshold absent a reasonably precise sense of both the social interest that they intend to safeguard and the harm that threatens the interest. The freedom of expression challenge is overcome only by a showing that the initiative is “narrowly drawn and . . . further[s] a sufficiently substantial governmental interest.”⁵⁹ It is not enough that the proscribed development is “offensive,” *i.e.*, ugly, in the eyes of some members of the community. A state ban on expression solely on the basis of its offensiveness is censorship pure and simple.⁶⁰ Rather, the *quid pro quo* for aesthetically based infringements on expression is the state’s obligation to demonstrate a plausible nexus between offensiveness and a threat to some independent “sufficiently substantial governmental interest.”⁶¹ The further limitation that the measure be “narrowly drawn” reinforces the need for adequate standards compelled by the vagueness-due process charge.⁶² The substantive due process⁶³ challenge essentially reduces to the

58. For thoughtful judicial assessments of these problems and their source in inadequate standards, see, *e.g.*, *The Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839 (E.D. Va. 1980) (discussed in note 303 *infra*); *City of West Palm Beach v. State ex rel. Duffey*, 158 Fla. 863, 30 So. 2d 491 (1947); *Morristown Road Assocs. v. Borough of Bernardsville*, 163 N.J. Super. 58, 394 A.2d 157 (1978); *Hankins v. Borough of Rockleigh*, 55 N.J. Super. 132, 150 A.2d 63 (1959).

59. *Schad v. Borough of Mount Ephraim*, 101 S. Ct. 2176, 2182-83 (1981).

60. See, *e.g.*, *Schad v. Borough of Mount Ephraim*, 101 S. Ct. 2176 (1981); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Cohen v. California*, 403 U.S. 15 (1971). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-2 to -10 (1978); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975). For treatment of this issue as it bears specifically on architectural expression, see Kolis, *Architectural Expression: Police Power and the First Amendment*, 16 URB. L. ANN. 273 (1979); Williams, *supra* note 46; Note, *Architecture, Aesthetic Zoning, and the First Amendment*, 28 STAN. L. REV. 179 (1975).

61. See *Schad v. Borough of Mount Ephraim*, 101 S. Ct. 2176 (1981).

62. When transposed to the first amendment context, the vagueness objection may reappear under the same name, see, *e.g.*, *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974); L. TRIBE, *supra* note 60, §§ 10-8 to -11; or is intimately linked to prior restraint, see, *e.g.*, *Southwestern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552-53 (1975); *Saia v. New York*, 334 U.S. 558, 559-60 (1948); L. TRIBE, *supra* note 60, at §§ 12-31 to -33; or overbreadth doctrines, see, *e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601, 606-07 (1972); *Stromberg v. California*, 238 U.S. 359, 369 (1931); L. TRIBE, *supra* note 60, at §§ 12-24, 12-28, 12-35; or to the requirement that the challenged measure be narrowly drawn to avoid over- and underinclusiveness, see, *e.g.*, *Schad v. Borough of Mount Ephraim*, 101 S. Ct. 2176, 2186 (1981); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214-15 (1975); L. TRIBE, *supra* note 60, §§ 12-24 to -26.

63. Other objections to which aesthetic measures may be vulnerable in particular instances include, but are not limited to, the claims that they deny equal protection to excluded classes of persons, see cases cited in note 28 *supra*; they are uncompensated “takings,” see *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); they, or actions taken under them, are *ultra vires* the power of the enacting agency, see *Gumley v. Board of Selectmen*, 371 Mass. 718, 358 N.E.2d 1011 (1977); or they deny procedural due process rights aside from vagueness, see *In re Equitable Funding Corp.*, N.Y. L.J., Feb. 8, 1978, at 10, col. 2 (Sup. Ct.). For a thoughtful

proposition that government may proscribe only development that "harms" neighboring property owners or the community as a whole.⁶⁴ Traditionally recognized harms include depreciation of property values and threats to community health and safety. The visual beauty rationale encounters serious, if not insuperable, obstacles in satisfying the first two tests, and may fail the third as well because the social interest that it guards and the harms it purportedly prevents are intolerably imprecise.⁶⁵

3. Dilemmas of Current Legal-Aesthetic Theory

The rationale's imprecision leads to a variety of theoretical impasses as well. It does not specify, for example, the relationship between aesthetic regulation and other forms of land use and environmental regulation. Should aesthetic regulation be split off

treatment of many of these issues as they are posed by recent developments in the historic preservation field, see Rose, *supra* note 11.

My views on the "taking issue," as it bears on historic and environmental preservation, are detailed in Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402 (1977), and Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021 (1975). Broadly speaking, they are more demanding of government than those of commentators who favor extensive public intervention in these spheres, see, e.g., F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* (1973); D. MANDELKER, *ENVIRONMENT AND EQUITY* (1981), but less so than those who do not, see, e.g., B. SIEGAN, *LAND USE WITHOUT ZONING* (1972); Dunham, *Property, City Planning, and Liberty*, in *LAW AND LAND* 28 (C. Harr ed. 1964). My position that government be required to compensate landowners in a greater number of instances than urged by the first group of commentators results from differences in our respective assessments of the legal, political, and equity factors outlined in my earlier articles. This Article's portrayal of the problems attending the definition of aesthetic standards and of the grave abuses to which those problems have given rise comports with the position advanced in those articles by stressing the supporting role that the fifth amendment can play in disciplining indiscriminate aesthetic policymaking. Unlike Justice Brennan, I do not agree that

quite simply, there is no basis whatsoever for a conclusion that courts will have any greater difficulty identifying arbitrary or discriminatory action in the context of landmark regulation than in the context of classic zoning or indeed in any other context.

Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 133 (1978) (footnote omitted). Both the analytical difficulties attending aesthetics standards setting, see Part V (A) *infra*, and the judiciary's flawed record to date in policing inadequate standards, see Parts II (A), III (C)(1) & V (A)(2) *infra*, argue to the contrary. Moreover, such post-*Penn Central* preservation initiatives as New York City's designation of its Upper East Side as a historic district, see notes 25 & 33 *supra* and notes 296 *infra*, warn that the distortions besetting the nation's "aesthetic regulation system," see Part II (A) *infra*, will intensify if the discipline afforded by the fifth amendment was jettisoned in accordance with the prescriptions of such commentators as Bosselman and Mandelker.

64. The "harm" or, as economists put it, "externalities" rationale was employed by the Supreme Court to uphold zoning against a facial constitutional attack on substantive due process grounds in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and has consistently been invoked by state courts ever since. See, e.g., *Home Builders League v. Township of Berlin*, 81 N.J. 127, 405 A.2d 381 (1979); *Udell v. Haas*, 21 N.Y.2d 463, 235 N.E.2d 897 (1968). On the role of the externalities rationale for land use regulation throughout this century, see generally R. NELSON, *supra* note 22.

65. See text at notes 115 & 196-216 *infra*.

from the latter as an ephemeral venture mesmerized by its quest for visual beauty? Or, as suggested earlier, is it not, like them, a weapon unsheathed by contending interest groups to secure control over the use and allocation of environmental resources? If it is, in which respects, if any, can it be differentiated from them?

A jurisprudence founded upon the concept of beauty, moreover, will be as radically nominalistic as it is inelegant if, as John Dewey correctly counseled, the concept only reifies individual responses to an object's visual form.⁶⁶ What can be anticipated of that jurisprudence is a mishmash of opinions dealing with billboards, clotheslines in front yards, junkyards, landmarks, historic districts, adult theaters, urban design relationships, and natural area preserves. Relationships among these categories will remain unspecified, as will linkages between aesthetic initiatives, on the one side, and, on the other, constitutional values and land use and environmental regulation generally.

In addition to its patent imprecision, the visual beauty rationale can be faulted for borrowing from the concert hall or museum assumptions that have little or no place in the courtroom or legislative chamber. One example is the assumption that the judgments required to establish, administer, or review aesthetic programs turn on distinctions comparable in kind and refinement to those made by concertmasters or art critics. Another is the conversion of the premise that beauty can be made to answer to abstract canons of aesthetic formalism into the conceit that legal institutions can use these canons to create a visually beautiful environment.⁶⁷ Not only are such assumptions descriptively inaccurate, but they intensify aesthetic regulation's legal vulnerability.⁶⁸

The visual beauty rationale's most regrettable legacy, however, is that it has diverted attention from aesthetic regulation's root con-

66. See text at note 3 *supra*.

Illustrative is Justice White's preface to his discussion of the aesthetics-first amendment issue in *Metromedia*: "We deal here with the *law of billboards*." *Metromedia, Inc. v. City of San Diego*, 101 S. Ct. 2882 (1981) (emphasis added).

67. The influence of this reasoning is patent in the guiding premise set forth in PLANNING AND COMMUNITY APPEARANCE, REPORT OF THE JOINT COMMITTEE ON DESIGN CONTROL OF THE NEW YORK CHAPTER AIA AND THE NEW YORK REGIONAL CHAPTER AIP (H. Fagin & R. Weinberg eds. 1958). "The central theme of our philosophy then," states the Joint Committee, "is the *positive creation of urban beauty*, not the mere conservation of past achievements of nature and man, nor just the prevention in present building activities of additional ugliness and disorder." *Id.* at 11. For the view that aesthetics law and the public ordering system should be employed not only to preserve the aesthetic character of the nation's regions, but to specify "a character to be created," see K. LYNCH, *MANAGING THE SENSE OF A REGION* 48 (1976).

68. See Part III (C) *infra*.

flicts. The debate over visual beauty is in truth a surrogate for the debate over environmental change itself, or, to be more specific, the question whether that change is culturally disintegrative or culturally vitalizing.⁶⁹ At stake are whether change should be permitted, what form it should take, what its pace should be, who should be benefited and who injured by it, and what role public administration can play as a vehicle for managing change. These questions are crucial because change, as we experience it in the built and natural environments, is strikingly visible and often profoundly destabilizing. To view the debate as a clash among the design set is to trivialize it and thereby miss its point altogether. False, ultimately unanswerable questions are tiresomely batted back and forth while fundamental, perplexing problems go unexamined. Ignored as well are the conflict's consequences for the integrity of the law's decisional processes and for the quality and social consequences of the nation's aesthetic policies.

II. A FRAMEWORK FOR THE LAW-AESTHETICS DEBATE

How should the debate be framed? A century of fruitless exchange counsels against an abstract inquiry into the "nature of beauty." The approach adopted in this Article instead defines the debate's framework in terms both of the larger system from which aesthetic policy emerges and of the format displayed by aesthetic disputes generally. The subsection below outlines the elements of that system, identifies the conditions that its sound functioning assumes, and indicates the respects in which the current system fails to measure up to these conditions. The next subsection employs the Rice Mansion dispute as a point of departure in portraying the elements of the prototypical format. It then sets forth the lead descriptive questions underlying the law-aesthetics debate, and preliminarily sketches the responses to them advanced by visual beauty and cultural stability-identity reasoning. Part III details the content and conceptual and constitutional defects of the visual beauty rationale. The content of the stability hypothesis is addressed in Part IV, and its legal adequacy is the topic of Part V.

A. *The Aesthetic Regulation "System"*

Broadly considered, aesthetic policy emerges from a complex set of transactions between American society and its legal institutions. What may loosely be termed the aesthetic regulation "system" fea-

69. See text at notes 223-31 *infra*.

tures a number of participants on both sides. The societal actors divide principally into constituencies that oppose and constituencies that favor modifying existing environmental features or settings (*existing resource*). *No-change constituencies* include neighborhood organizations that oppose various kinds of development in their neighborhoods, historic preservationists who seek to block the alteration or demolition of landmarks or structures within historic districts, and environmentalists who contest development in wilderness, coastal, and other natural areas. The environmental features or settings that serve as existing resources and the groups that may qualify as no-change constituencies are open-ended, as the recent proliferation of aesthetic regulation addressed to novel types of resources and supported by novel interest groups attests.

Change constituencies favor new entrants that alter or replace the existing resources. These constituencies include the new entrant's sponsor, which may be a private developer or a public agency. Labor unions and suppliers of capital, building materials, and other real estate services or products are often prominent change agents as well. Also featured may be the new entrant's potential beneficiaries — prospective occupants of a housing development, customers of utility companies that wish to construct or enlarge facilities in natural areas, or students of universities that plan to expand into a surrounding neighborhood.

New entrants, like existing features, cannot be delimited in advance. A random sampling of the former includes billboards,⁷⁰ rag-strewn clotheslines,⁷¹ trailers,⁷² junkyards,⁷³ high-rise buildings,⁷⁴ pump storage plants,⁷⁵ transmission towers,⁷⁶ prisons,⁷⁷ recreational facilities,⁷⁸ and boathouses.⁷⁹ They may be fought because they are proposed as replacements for their correlative existing resource; more frequently, however, the coexistence of the two is in issue. Replacement is illustrated by the demolition of a landmark to make

70. See *Metromedia, Inc. v. City of San Diego*, 101 S. Ct. 2882 (1981).

71. See *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963).

72. See *City of Euclid v. Fitzthum*, 48 Ohio App. 2d 297, 357 N.E.2d 402 (1976).

73. See *Oregon City v. Hartke*, 240 Or. 35, 400 P.2d 255 (1965).

74. See *Polygon Corp. v. City of Seattle*, 90 Wash. 2d 59, 578 P.2d 1309 (1978).

75. See *Scenic Hudson Preservation Conf. v. FPC*, 453 F.2d 463 (2d Cir. 1971).

76. See *City of New Haven v. Chandler*, 446 F. Supp. 925 (D. Conn. 1978).

77. See *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971).

78. See *Sierra Club v. Morton*, 405 U.S. 727 (1972).

79. See *McCormick v. Lawrence*, 83 Misc. 2d 64, 372 N.Y.S.2d 156 (1975).

way for a modern office building; coexistence, by the erection of billboards along a scenic highway.

Other societal actors who influence the formation of aesthetic policy include "taste-makers" and design professionals. The most prominent of the former are architecture and urban design critics who enjoy a strong media following. Design professionals — architects, urban designers, and the like — may function in two roles: as actual designers of new entrants or existing resources (when the latter are components of the built environment), and as propagandists for particular schools or traditions of aesthetic formalism (in which case they may double as taste-makers).

The principal legal actors in the system are legislatures, administrative agencies, and the courts. As the conduit through which the exchange between legal institutions and the larger society commences, legislators perch uneasily on a tightrope, one end of which leads to the larger society, the other, to administrators and the courts. They are the system's cardinal policy-makers because legislation is the major vehicle through which aesthetic policy is formally expressed in the American governmental system. But unlike the *signorie*, popes, and kings of an earlier day, legislators neither conceive that policy autonomously nor legitimate it by their endorsement alone. Instead, they must respond to concerns originating from either end of the tightrope. On the one side, societal preferences afford both the raw material for aesthetic policy and the ultimate basis for its legitimacy,⁸⁰ providing, of course, that the policy is consistent with constitutional requirements. This does not mean that legislators, by themselves or in conjunction with the professional staffs of administrative agencies, do not or ought not to initiate or design aesthetic measures. These functions are as inevitable as they are commonplace in all fields of lawmaking. Aesthetic policy is often too complex to be handled by New England town meeting procedures, and a popular consensus on defensible aesthetic values may fail to emerge absent legislative leadership. What differentiates that leader-

80. For judicial recognition of the indispensable role that patterned community preferences play as the legitimizing basis of all aesthetic regulation, see, *e.g.*, *John Donnelly & Sons, Inc. v. Outdoor Advertising Bd.*, 369 Mass. 206, 224-25, 339 N.E.2d 709, 720-21 (1975); *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 172-73, 193 N.E. 799, 810 (1935); *Westfield Motor Sales Co. v. Westfield*, 129 N.J. Super. 528, 544, 324 A.2d 113, 122 (1974); *Oregon City v. Hartke*, 24 Or. 35, 49-50, 400 P.2d 255, 263 (1965). Additional confirmation of essentially the same point is found in the many cases that stress the centrality to valid aesthetic regulation of community consensus as reified in the person of "average visual sensibilities," see *People v. Stover*, 12 N.Y.2d 462, 468, 191 N.E.2d 272, 276, 240 N.Y.S.2d 734, 739, *appeal dismissed*, 375 U.S. 42 (1963), or as reflected in "concepts of congruity held so widely that they are inseparable from the enjoyment and hence the value of property," see *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 5, 198 A.2d 447, 449 (1964).

ship from despotic rule is the capacity of citizens or groups who disagree to voice their dissatisfaction during the policy-making process and, if need be, in the courts or at the polls as well.

Administrative agencies, prevailing legal folklore suggests, implement legislatively declared aesthetic policy. Their purported subordination to the legislative will is secured chiefly by legislative standards that delineate the values incorporated in that policy. In addition, the more significant decisions of administrative agencies, their budgets, and, at the executive level at least, the appointment of their personnel, are typically subject to legislative ratification. These channeling devices will be effective, of course, only to the extent that legislatures employ them discerningly.

Unlike legislators and administrators, the courts play no direct role in the formulation of particular aesthetic measures. A distinction can thus be drawn between legislatively declared law and court-applied law. Legislative law is affirmative, derivative, and aesthetically oriented: affirmative because it defines positive measures authorizing various forms of public intervention; derivative because its values are extralegal, *i.e.* societal, in origin; and aesthetically oriented because these values, by definition, are aesthetic in content. By contrast, the law used by the courts in reviewing aesthetic regulation is negative, autonomous, and constitutionally oriented: negative because court-applied law is interposed to constrain legislative policy-making; autonomous because it is rooted in constitutional values rather than in transitory community preferences; and, therefore, constitutionally oriented because its decisional principles trace to the federal and state constitutions.

The courts' exclusion from direct participation in formulating aesthetic measures, however, does not deprive them of an influential role in the aesthetic regulation system. The two senses of aesthetics "law" are related, often shading into one another at their edges and beyond. Thoughtful legislators, for example, are reluctant to initiate or endorse community demands for measures that clash with court-applied law, and frequently invoke the latter when refusing to do so.⁸¹ In this sense, aesthetic jurisprudence circumscribes legislatures' aesthetic policies. Similarly, judges do not invariably ignore the public policy dimensions of the measures that they police. While federal judges do not frequently invalidate measures on substantive

81. New York City authorities, for example, rejected the appeals of religious and other groups that adult theaters and bookstores be zoned out of all of the city's boroughs but Manhattan on the basis that this course would run afoul of first amendment strictures. See Marcus, *Zoning Obscenity: Or, the Moral Politics of Porn*, 27 BUFFALO L. REV. 1, 17-18 (1977).

due process grounds,⁸² they often read constitutional provisions to suit their policy preferences.⁸³

If the aesthetic regulation system is to function tolerably well, its legal participants must exercise a discipline appropriate to their respective roles in that system. Not all demands for regulation merit legal endorsement. Some demands may be flatly objectionable as a matter of policy⁸⁴ or of court-applied law,⁸⁵ if provisionally meritorious, they may be presented in a form that precludes intelligent policy analysis or implementation without unfortunate side effects.⁸⁶

Accordingly, legislators should spurn demands of the first type and thoroughly rework those of the second to avoid either undermining the fairness or rationality of the resulting policies or overwhelming administrators and the courts. Administrators should provide legislators with background information to facilitate the assessment of regulatory proposals. They should, moreover, flesh out standards often necessarily left somewhat open-ended by legislators, and justify agency actions with cogent findings to demonstrate their compatibility with these standards. While courts should defer to legislative determinations of the legitimacy of particular aesthetic values, they should safeguard the integrity of the aesthetic policy-making process itself and of important nonaesthetic values by using court-applied law to check the abuse of either.

82. For the status of the substantive due process doctrine in federal constitutional law, see J. NOWAK, R. ROTUNDA & N. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 385-450 (1978); Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350 (1981).

83. A recent illustration is Justice Brennan's concurring opinion in *Metromedia, Inc. v. City of San Diego*, 101 S. Ct. 2882 (1981), where the Court invalidated a billboard ban. Although he acknowledged that "[o]f course, it is not for a court to impose its own notion of beauty on San Diego," his commitment to first amendment values induced him to evaluate San Diego's overall planning beautification efforts, and to disapprove the ban in part because "San Diego has failed to demonstrate a comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors to an unattractive environment." 101 S. Ct. at 2904 (Brennan, J., concurring in judgment). His aggressive scrutiny of the substance of San Diego's planning determinations in *Metromedia* contrasts quite sharply with his evident deference to those of New York City in *Penn Central*, which centered on a taking rather than on a freedom of expression issue. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

84. Included in this group might be the prescription that "America's great historic skylines should be declared national monuments to be carefully preserved, thoughtfully changed and improved, if necessary, but not expanded," W. VON ECKARDT, *BACK TO THE DRAWING BOARD* 85 (1978), or the suggestion of the French writer Albert Guerard that "the entire city of Paris be listed as a monument." N. EVENSON, *PARIS: A CENTURY OF CHANGE 1878-1978*, at 311 (1979).

85. Illustrative is the proposal for excluding "adult uses" from New York City's outer boroughs. See note 81 *supra*.

86. Community group efforts, see text at notes 22-25 *supra*, to employ historic preservation measures as generic growth control tools are illustrative.

The breakdowns in the aesthetic regulation system recorded earlier are attributable to the failure of the system's legal actors to attend to these imperatives. Legislatures often neglect to think through the implications of indiscriminate approval or standardless formulation of particular aesthetic measures.⁸⁷ That administrators have been unable to implement them or that courts have been unable to judicially review them is no less surprising, therefore, than that private groups have too often succeeded in diverting them to goals quite contrary to their ostensible purposes.

Legislative irresponsibility has confronted the courts with a terrible dilemma. Should they rigorously review aesthetic measures and risk aborting potentially meritorious social goals? Or should they instead effectively abdicate their oversight responsibilities and risk compromising the integrity of the aesthetic policy-making process and the primacy of nonaesthetic, constitutional values? Understandably perhaps, the courts have opted for the latter course. In doing so, however, they have inflicted deep structural damage on the system by failing to furnish a much needed discipline over legislative and administrative processes and over society's expectations concerning the proper bounds of aesthetic policy.

Instead of operating with all three of its legal cylinders firing in balanced sequence, therefore, the system's motor has often limped along on only one — its administrators. Little wonder that the system endorses bogus historic district or landmark designations, permits incentive zoning debacles, or acquiesces in the transfer of its public powers to private groups.

B. *A Format for Aesthetic Controversies*

1. *Isaac L. Rice Mansion Dispute*

"[P]erhaps the most agonizing landmark fight in Manhattan in some years,"⁸⁸ opined the *New York Times* over the designation of the Isaac L. Rice Mansion as a city landmark.

The Mansion, an eclectic blend of Beaux Arts and Neo-Georgian styles designed by the carriage trade architects Herts and Tallant, was built in 1901 for Isaac L. Rice, a railroad and electric car magnate. Originally surrounded by the mansions of other *fin de siècle* plutocrats, it alone survives, its neighbors replaced with fifteen-story

87. See text at notes 8-28 *supra* for examples of legislative initiatives that have backfired in part or in whole due to the reasons identified in the text.

88. Goldberger, *Rice Mansion Dispute Has Many Sides*, N.Y. Times, June 26, 1980, at B2, col. 2.

apartment houses and four-story rowhouses. In 1954, the Yeshiva Chofetz Chaim acquired the Mansion for use as a religious school for Jewish children. Unlike Rice, the Yeshiva is not wealthy. "We come always with a deficit,"⁸⁹ Rabbi Feigelstock, the Yeshiva's dean, grumbled after the battle erupted. The *casus belli* was the Yeshiva's proposed \$1.5 to \$2 million sale of the Mansion to a developer who would replace it with a thirty-story, tower-plaza building that would include modern school facilities for the Yeshiva.

The battlelines formed quickly as news of the impending sale circulated. Arrayed on one side were the Yeshiva, large segments of the city's Orthodox Jewish community, the developer, and advocates of increased residential construction to alleviate Manhattan's housing shortage. Leading the opposition was Community Planning Board No. 7, the dominant West Side neighborhood organization. Its ranks were filled with angry West Siders, and it formed alliances with gold-plate, city-wide groups, like the Municipal Arts Society and Citizens Union, and with celebrities like Jackie Onassis and Itzhak Perlman. Ultimately, it was favored with a pro-designation column from the *Times*' architectural critic.⁹⁰

Formally defined, the issue for the Landmarks Preservation Commission and Board of Estimate, the municipal bodies charged with ruling on the proposed designation, was whether or not the Mansion possessed "special character" or "special historical or aesthetic interest or value."⁹¹ A richer assessment was offered by a journalist who, comparing the dispute to an onion, observed: "Peel away a layer . . . and all you find are more layers."⁹²

One layer, certainly, was provided by the ordinance's delphic terminology. For the Citizen Union's spokesman, however, that language was crystal clear. The Mansion, he intoned, "is a landmark, it always was a landmark, it always will be a landmark."⁹³ Rabbi Feigelstock, on the other hand, was perplexed. "By me, Isaac Rice is not anybody," he sulked. "We suddenly heard his name when this whole thing came up."⁹⁴

Perhaps the arts groups genuinely believed that the Mansion

89. Haberman, *Yeshiva Tries To Void Status as Landmark*, N.Y. Times, May 30, 1980, at B1, col. 1, at B2, col. 3.

90. See Goldberger, *supra* note 88.

91. See 2 NEW YORK CITY CHARTER & AD. CODE ANN. ch. 8-A § 207-10(n) (Williams 1976) (landmarks ordinance).

92. Haberman, *supra* note 89, at B1.

93. Haberman, *Board of Estimate Approves, 6-5, Rice Mansion's Landmark Status*, N.Y. Times, June 27, 1980, at B4, col. 1.

94. See Haberman, *supra* note 89, at B2, col. 4.

merited landmark status. But accounts of the proceedings leave little doubt that Board No. 7's concern for the Mansion's preservation was secondary to its apprehension about how a thirty-story tower might change the West Side's land use and socioeconomic character. As is typical of so-called "aesthetic controversies," the concern was neither clearly spelled out nor differentiated. But it apparently encompassed fears that the tower would block existing views, eliminate the open space around the free-standing Mansion, bring "different" people into the neighborhood, and, through its tower-plaza configuration, project an image dissonant with the image of their neighborhood that many West Siders held. In a prior fight against a similar building elsewhere on the West Side, Board No. 7 bemoaned the invasion of the area by "East Side Buildings," advising that "[i]f you want to live in a solid, low-rise, low-key, family-type building, you have to go the West Side and we want to keep that alternative intact."⁹⁵

The Yeshiva, for its part, insisted that the designation proposal was engineered by neighborhood and elitist city-wide groups for ends that paled in the face of the religious and cultural goals that the Mansion's sale would secure. Among the former, the Yeshiva argued, were the view-blockage objection, the designation proponents' readiness "to place bricks and stones above our children,"⁹⁶ and Board No. 7's generic opposition to new development that clashed with its architectural and socioeconomic preferences. Hostility to Orthodox Jewish religious and family life was also cited, one rabbi proclaiming: "A vote against the Yeshiva is literally a vote against the Jewish religious community on the West Side."⁹⁷

An anguished Board of Estimate finally approved the designation. The Board was aggressively lobbied by powerful supporters for both sides; it split sharply in its vote; and its members accompanied their votes with delicately worded justifications. The audience listened intently: one group sporting insignia imprinted with a sketch of the Rice Mansion; another, mostly Hasidic Jews, wearing Torah-inscribed escutcheons.

Summarizing the controversy, the *Times* concluded: "Virtually lost in the turmoil was a discussion of the architectural quality of the Rice Mansion — lost almost as much as Isaac L. Rice himself."⁹⁸

95. Gray, *A West Side Sale Leads To Calls For Revision in The Zoning Law*, N.Y. Times, Sept. 30, 1979, § 8, at 1, col. 5.

96. Haberman, *supra* note 93.

97. Haberman, *supra* note 89, at B2, col. 4.

98. *Id.*

2. Prototypical Format

Scrutiny of the Mansion dispute reveals a format encompassing the following six elements:

(1) an existing resource, the preservation of which is at issue (depending upon the constituency, the Mansion as a landmark building or the West Side as possessing a distinctive character);

(2) no-change constituencies (the Municipal Arts Society and Citizens Union for the preservation of the Mansion, and Board No. 7 and neighborhood residents for the preservation of the West Side's character);

(3) a new entrant (the thirty-story apartment tower);

(4) change constituencies (the Yeshiva as landowner and as provider of religious education, members of the Orthodox Jewish community as consumers of the Yeshiva's services, the developer as a profit-making entrepreneur, and persons desiring housing on the West Side but unable to obtain it because of its scarcity and high cost);

(5) a basis upon which no-change constituencies favor the existing resource; and

(6) a basis upon which the no-change constituencies oppose the new entrant.

An equivalent format can be discerned in aesthetic controversies generally.⁹⁹ Illustrative are disputes triggered by proposals for a pump storage plant on Storm King Mountain,¹⁰⁰ a 307-foot tourist tower adjacent to Gettysburg National Cemetery,¹⁰¹ a tall office tower complex within the perceptual field of the National Capitol,¹⁰² power transmission lines across New Haven Bay,¹⁰³ a tower atop Grand Central Terminal,¹⁰⁴ a Disney resort in Mineral King Valley,¹⁰⁵ and, less sensationally, billboards¹⁰⁶ and junkyards on the

99. Although not explicitly delineated, the elements of the prototypical format described in the text can be discerned in *e.g.*, R. BABCOCK & C. WEAVER, *supra* note 22; B. FRIEDEN, *supra* note 28; R. NELSON, *supra* note 22; C. PERRIN, *EVERYTHING IN ITS PLACE* (1977); Tucker, *supra* note 28.

100. *See Scenic Hudson Preservation Conf. v. FPC*, 453 F.2d 463, 473-76 (2d Cir. 1971).

101. *See Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. Ct. 231, 302 A.2d 886, *aff'd.*, 454 Pa. 193, 311 A.2d 588 (1973).

102. *See United States v. County Bd.*, 487 F. Supp. 137 (E.D. Va. 1979).

103. *See City of New Haven v. Chandler*, 446 F. Supp. 925 (D. Conn. 1978).

104. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

105. *See Sierra Club v. Morton*, 405 U.S. 727 (1972).

106. *See Metromedia, Inc. v. City of San Diego*, 101 S. Ct. 2882 (1981); *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964).

outskirts of residential communities.¹⁰⁷

The first four elements have already been discussed.¹⁰⁸ But the last two have not, and it is in their analysis that the implications for legal-aesthetics theory of the visual beauty and cultural stability approaches become explicit and sharply differentiated.

Preliminary to this analysis, two sets of distinctions must be drawn. First, one must differentiate between aesthetic controls dealing with the selection of existing resources for preservation and those affecting the modification of these resources by new entrants. Illustrative of the former are the landmark designation procedures employed in the Mansion dispute. Other examples include measures providing for the designation of historic districts, nonhistoric design districts, or nature preserves (when these preserves are targeted on the basis of aesthetic as well as ecological characteristics).¹⁰⁹ The latter appear in restrictions on changes to these resources, once designated. Had the Yeshiva sought to add five stories to the Mansion or to alter its facade, for example, it would have been required to obtain the Landmarks Preservation Commission's prior certification that these changes were compatible with the Mansion's existing architectural or aesthetic character.¹¹⁰ Other examples might include controls on modern architecture in historic districts or on plaza-fronted buildings in a design district where unified street walls are mandated.

The second distinction, which deals only with the control of new entrants, distinguishes between measures that assume the prior imposition of some formal design classification on an existing resource and measures that do not. The immediately preceding examples illustrate the former. An example of the latter would be a planning agency's aesthetically based refusal to permit thirty-story apartment towers on the West Side despite the agency's failure beforehand to impose some kind of design district status on the neighborhood.¹¹¹ Other examples include billboard or junkyard controls, which are rarely imposed in conjunction with formal design classification.

107. See *Oregon City v. Hartke*, 240 Or. 35, 400 P.2d 255 (1965).

108. See Part II (A) *supra*.

109. For judicial recognition that the preservation of natural ecological areas may in part stem from aesthetic motives, see *Morris County Land Improvement Co. v. Parsippany-Troy Hills*, 40 N.J. 539, 551, 193 A.2d 232, 239 (1963); *Just v. Marinette County*, 56 Wis. 2d 7, 18, 201 N.W.2d 761, 768 (1972).

110. See NEW YORK CITY CHARTER & AD. CODE ANN. ch. 8-A § 207-4.0 to -6.0 (Williams 1976).

111. For the suggestion that the root problem underlying the Mansion dispute was the absence of zoning controls that roughly fulfilled this function, see text at notes 254-55 *infra*.

With these distinctions in place, the lead question confronting legal-aesthetics theory can be simply put: On what basis are existing resources selected for preservation and new entrants controlled? As important as this question is its corollary: To what social needs does aesthetic regulation respond? Visual beauty and cultural stability reasoning, illustrated by reference to the Mansion dispute, offer differing responses.

3. Responses of the Alternative Rationales

a. Visual Beauty Rationale

Visual beauty reasoning responds to the first question syllogistically. *Major Premise*: Aesthetic regulation's purpose is to maintain a visually pleasing environment by preserving "beautiful" existing resources or by banning "ugly" new entrants. *Minor Premise*: The existing resource (either the Mansion or the West Side) is visually beautiful or, alternatively, the new entrant (the thirty-story tower) is "ugly." *Conclusion*: Therefore, aesthetic regulation should preserve the existing resource (the Mansion or the West Side), or, alternatively, ban the new entrant (the thirty-story tower).

With respect to the tower, two versions of visual beauty reasoning must be distinguished. The more simplistic predicates beauty on the new entrant alone, viewed as if it were an isolated work of art.¹¹² Under this view, the tower was banned because it was "bad architecture." Its more sophisticated variant predicates beauty on the relationship of the new entrant's visual characteristics to the visual characteristics of its surroundings or, in this Article's terms, its correlative existing resource.¹¹³ This variant deems a new entrant "beautiful" if the entrant's visual relationship with the existing resource is "harmonious," "congruent," or "compatible."¹¹⁴

112. For example, the United States Secretary of the Interior opposed the construction of a complex of office buildings in Rosslyn, Virginia. His contention that the buildings would constitute an "aesthetic nuisance" did not prevail in litigation. See *United States v. County Bd.*, 487 F. Supp. 137, 142-44 (E.D. Va. 1979) (discussed in note 119 *infra*). Similarly, a modernistic house that was the subject of an architectural control ban litigated in *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970), was decried by the municipality as a "monstrosity of grotesque design." 458 S.W.2d at 307.

113. For illustrations of judicial reasoning that may be interpreted in this manner, see, e.g., *Maher v. City of New Orleans*, 516 F.2d 1051, 1063 (5th Cir. 1975), *cert. denied*, 427 U.S. 905 (1976); *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971); *Westfield Motor Sales Co. v. Town of Westfield*, 129 N.J. Super. 528, 544-46, 324 A.2d 113, 122-23 (1974). Cf. text at note 119 (interpreting these and similar opinions as predicating beauty on the *visual-semiotic* relationship that new entrants bear to existing resources).

114. The prevalence of these terms is the most striking and consistent feature of the 35 historic districting and landmarking ordinances summarized in chart form in 3 N. WILLIAMS, *supra* note 39, at § 71.14.

Visual beauty reasoning's response to the second question — the societal need addressed by aesthetic regulation — is less easily stated. The “solely for aesthetics” rhetoric of the modern period courts, if taken seriously, suggests that no response is necessary. It is strikingly reminiscent of the “art for art's sake” aphorism used by nineteenth-century Romantics to deny that any justification was required for their artistic pursuits beyond the making of art itself. Likewise, the modern period opinions, if read literally, appear to express the uncharacteristically metaphysical — even Keatsian¹¹⁵ — sentiment that beauty is an absolute social good whose pursuit by government requires no justification by reference to some identifiable value beyond itself. Or, it might perhaps be asserted that intelligible standards of visual beauty do exist, that they are exemplified by the Mansion's Beaux Arts and Neo-Georgian styles and by the West Side's stereometric form, and that the social interest they nurture is the visual delight the public experiences upon exposure to resources exemplifying these formal canons. Conversely, the tower negates these canons, and must therefore be banned to protect the public from visual offense.

These contentions and the premises from which they derive are evaluated in Part III of this Article.

b. *Cultural Stability-Identity Rationale*

Summarizing stability-identity reasoning's response to the lead questions requires a brief glimpse ahead to Part IV, which emphasizes the semiotic properties of existing resources and new entrants¹¹⁶ rather than their visual form as such. These properties, it posits, can function as signs, conveying cognitive and emotional meanings to their human audiences. The meanings derive from two sources: a resource's functional and nonfunctional associations. The former relate to the resource considered in utilitarian terms, much as it might be considered in a zoning ordinance. The Mansion, for example, is a

115. I refer, of course, to John Keats's passage in his *Ode on a Grecian Urn*:
 “Beauty is truth, truth beauty,” — that is all
 Ye know on earth, and all ye need to know.

Keats, *Ode on a Grecian Urn*, in *THE POEMS OF JOHN KEATS* 372-73 (J. Stillinger ed. 1978).

116. The literature on the semiotic properties of the built and natural environments is vast and diverse, technical and impressionistic. Among the sources that have influenced my formulation of the cultural stability hypothesis are the following: G. CLAY, *CLOSE-UP* (1973); W. KIDNEY, *THE ARCHITECTURE OF CHOICE* (1974); K. LYNCH, *THE IMAGE OF THE CITY* (1960); L. MUMFORD, *THE CITY IN HISTORY* (1961); L. MUMFORD, *THE CULTURE OF CITIES* (1938) [hereinafter cited as *THE CULTURE OF CITIES*]; D. PREZIOSI, *THE SEMIOTICS OF THE BUILT ENVIRONMENT* (1979); S. RASMUSSEN, *TOWNS AND BUILDINGS* (1951); R. VENTURI, D. BROWN & S. IZENOUR, *supra* note 33; *MEANING IN ARCHITECTURE* (C. Jencks & G. Baird eds. 1969); Appleyard, *The Environment as a Social Symbol*, 54 *J. AM. INST. PLANNERS* 143 (1979).

structure for residential and institutional uses; the West Side, a physical container for residential and commercial activities; and the tower, a high density, residential building. Nonfunctional associations, on the other hand, derive from the resources' nonutilitarian characteristics.¹¹⁷ The Mansion is also the former palatial home of a plutocrat, the neighborhood's sole surviving specimen of a gilded age, and, in its Beaux Arts and Neo-Georgian design, an icon of associations that trace back to the neoclassical and classical ages of Western history. The West Side, as characterized by Board No. 7, is a "solid, low-rise, low-key, family-type" neighborhood, quite unlike, the Board implies, the trendy, high-rise, fast-paced, swinging singles East Side. As an "East Side building," the tower is a harbinger of an alien lifestyle.

Cultural stability reasoning also posits that environmental resources can enter into the cognitive and emotional lives and, ultimately, help shape the identities of individuals, groups, and communities. These resources do so principally by virtue of their nonfunctional associations, which typically — although not invariably — are more influential in this respect than functional associations. "A house," the aphorism goes, "is not a home." Because identity and cultural stability are reciprocal values, these associations can buttress cultural stability as well.

With these premises in place, stability-identity reasoning's responses become apparent. Identity-nurturing associational bonds binding the West Side or the Mansion to their respective constituencies predominantly account for the former's selection as existing resources. The West Side, Board No. 7 believes, is both a physical container *and* a community integrated by its members' shared commitment to living in a "solid, low-rise, low-key, family-type" neighborhood. So conceived, the West Side is *home* for its constituency, a social construct that anchors their cultural identity. Similarly, the Mansion's associations for the groups that fought for its preservation are a source of cultural continuity, shaping both their conception of New York City as a social entity and their identity as integral elements of that entity.

Nor was the tower banned because it was visually "ugly." Indeed none of the opposition groups had even seen an architectural rendering of it. They reacted instead to the *idea* of the tower as as-

117. Strictly speaking, utilitarian characteristics are also largely socially determined, *see* Rapaport & Watson, *Cultural Variability in Physical Standards*, in *PEOPLE AND BUILDINGS*, 33 (R. Gutman ed. 1972), but the distinction in the text between the two is serviceable for the purposes of this Article.

sociationally dissonant with the Mansion or the West Side. True, the tower's construction would have necessitated the Mansion's demolition. But the landmark groups were driven less by their desire to save the Mansion as a physical entity than to preserve the message that the Mansion broadcasts. For the Mansion, like any other semiotically powerful feature or ensemble, is *both* a signifier *and* the message that it signifies. Destroying such resources destroys their messages as well, as Hitler recognized in his persistent question: "Is Paris burning?"¹¹⁸

The West Side constituency's objection was more complex. Perhaps some of its members genuinely believed that thirty-story apartment towers are inherently ugly or are ugly in relation to the West Side's prevailing stereometry. Perhaps others believed, contrary to the city's planning commission, that the tower would create congestion and other externalities traditionally addressed through zoning and planning controls. A more discerning explanation, I submit, must also account for Board No. 7's distaste for "East Side Buildings" on the West Side, its association of the former with an alien lifestyle, and its root concern that the tower's advent threatened to disintegrate the West Side's existing social fabric. Only because the *Time's* journalist ignored these factors was he puzzled by the apparent anomaly that the Mansion's "architectural quality was virtually lost in the turmoil."

Stability reasoning concludes, therefore, that the social impetus to which aesthetic regulation responds is the preservation of stability-identity values. The meanings that no-change constituencies both read into and derived from the Mansion and the West Side reinforced these values. But the tower imperiled the latter because, as a new entrant, it was associationally dissonant with these existing resources.¹¹⁹

118. L. COLLIN & D. LAPIERRE, *IS PARIS BURNING?* (1965).

119. Despite the ostensible dominance in this century's aesthetic jurisprudence of the visual beauty rationale and its premise of aesthetic formalism, many courts have implicitly or expressly recognized that the cultural stability rationale, and its premise of associational congruence or dissonance, lies at the heart of the aesthetic regulation enterprise. *See, e.g.*, *Schad v. Borough of Mount Ephraim*, 101 S. Ct. 2176 (1981) (discussed in text at notes 357-82 *infra*); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (discussed in text at notes 347-56 *infra*); *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976); *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971); *United States v. County Bd.*, 487 F. Supp. 137 (E.D. Va. 1979); *Commissioner v. Benenson*, 329 A.2d 437 (D.C. 1974); *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 193 N.E. 799 (1935); *Parker v. Commonwealth*, 178 Mass. 199, 59 N.E. 634 (1901); *Sun Oil Co. v. City of Madison Heights*, 41 Mich. App. 47, 199 N.W. 525 (1972); *Westfield Motor Sales Co. v. Town of Westfield*, 129 N.J. Super. 528, 324 A.2d 113 (1974); *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964); *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979); *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commonw. Ct.

III. VISUAL BEAUTY RATIONALE: CONTENT AND CRITIQUE

Three propositions are developed in this Part. First, visual beauty cannot be defined in a manner that meets the threshold requirements of the vagueness-due process test. Second, state dictation of aesthetic outcomes based on a preference for certain canons of aesthetic formalism over others flatly violates interests protected by the first amendment. Third, the grounds advanced to support public intervention in beauty's name may be unpersuasive even under the lesser strictures of substantive due process applied by state courts; these grounds certainly do not satisfy the "sufficiently substantial governmental interest" test required to overcome first amendment objections.

In framing my analysis, I have taken seriously the references in aesthetic jurisprudence¹²⁰ and commentary¹²¹ to "beauty" as aesthetic regulation's organizing principle. While I doubt that judges actually mean what they say or would say it if they did, the "solely for aesthetics" phraseology exists in the opinions nonetheless. Community groups, legislators, and administrators, moreover, are guided by judges' opinions, not by their decisions. The judiciary has failed to discipline the aesthetic regulation system by clearly articulating

231, 302 A.2d 886, *affd.*, 454 Pa. 193, 311 A.2d 588 (1973); *Oregon City v. Hartke*, 240 Or. 35, 400 P.2d 255 (1965).

The aesthetic controversy underpinning the litigation in *United States v. County Bd.* delineates the role of associational dissonance more sharply than the Mansion dispute because the status of the National Capitol as the existing resource in the former is more evident than the status of the West Side as the existing resource in the latter. The United States Secretary of the Interior sued in 1979 to block construction in Rosslyn, Virginia of a group of office towers across the Potomac from, and soaring above, the Capitol building. The Secretary complained that the towers would be an "[a]esthetic nuisance," 487 F. Supp. at 143, blasting them as "monsters that would visually deface the skyline surrounding the national monuments," *see Stewart, Rosslyn: A Monumental Intrusion*, ENVTL. COMM., July 1980, at 7. But did he really mean that they were execrable architecture taken by themselves, as the first version of visual beauty reasoning advises? Not at all. It would have made no difference and indeed probably would have increased their offensiveness if they were the finest work of a Pei or a van der Rohe. *See* note 177 *infra*. Was the objection, as the second version would suggest, solely or even primarily that the towers were "too big" considered in terms of their stereometric relation to the Capitol and the other great monuments? Again, that characterization misses the point of the dispute entirely. By parity of meaning, the Washington Monument would "visually deface" the skyline of the White House, yet obviously no American "sees" the Monument that way. The root objection was that speculatively built commercial towers dwarfing the Capitol would constitute an associationally repugnant intrusion on that cherished totem of national identity, just as the construction in medieval times of a private or government building overwhelming the town's cathedral would have been. One of the Secretary's witnesses got it right in testifying that the towers would "interfere with the perception of the general visitor to Washington . . . in terms of [that city's] historic role . . . as a pilgrimage site for the great national memorials of this Nation." *United States v. County Bd.*, 487 F. Supp. at 145. The outrage, in short, is explicable in terms of associational dissonance, not aesthetic formalism.

120. *See* note 54 *supra*.

121. *See* note 46 & 56 *supra*.

principles of court-applied law as a check on abusive or misguided aesthetic initiatives.

A. Summary

“Aesthetics,” as the term is used in the visual beauty rationale, connotes pleasure or offense to the sense of sight resulting from the visual form of environmental features or settings. Consequently, aesthetic regulation’s purpose is assumed to be the creation or preservation of features or settings that are “beautiful” — pleasing to the eye — or, conversely, the proscription of those that are “ugly” — offensive to the eye.¹²² This conclusion is founded upon a variety of outmoded premises that, consciously or otherwise, have been imported into the law from the writings of aesthetic philosophers and other observers of human aesthetic response.

At the outset, it emphasizes the sensory dimension of human aesthetic response over its intellectual, emotional, and cultural aspects. This sensory bias perhaps explains why the term “taste,” which originally referred to sensations experienced by the tongue, has become interchangeable with aesthetic sensitivity generally. The bias directly underpins its equation of ugly sights with offensive noises and odors in reasoning that since the latter two phenomena may be banned as “nuisances,” so too may the former.¹²³ It also underlies the claim that only sighted persons¹²⁴ or, as the courts put it, persons of “average visual sensibilities”¹²⁵ benefit from aesthetic regulation.

The visual beauty approach posits that an object’s formal visual qualities — color, line, proportion, and the like — determine whether it will be perceived as beautiful or ugly. Accordingly, the search for aesthetic standards reduces to an attempt to determine which sets of characteristics can be correlated systematically with positive or negative aesthetic responses.¹²⁶ It necessarily assumes the

122. See notes 46, 54 & 56 *supra*.

123. See, e.g., *Cromwell v. Ferrier*, 19 N.Y.2d 263, 272, 225 N.E.2d 749, 755, 279 N.Y.S.2d 22, 30 (1967); *People v. Rubinfeld*, 254 N.Y. 245, 248-49, 172 N.E. 485, 486-87 (1930). Noel, *Unaesthetic Sights as Nuisances*, 25 CORNELL L.Q. 1 (1939).

Such reasoning has also given rise to the concept of “visual pollution,” a term employed by Chief Justice Burger in defending the San Diego billboard ban: “Pollution is not limited to the air we breathe and the water we drink; it can equally offend the eye and the ear.” *Metromedia, Inc. v. City of San Diego*, 101 S. Ct. 2882, 2920 (1981) (Burger, C.J., dissenting).

124. In his influential article, Professor Dukeminier offers the following operational definition of “aesthetics”: “[I]f a use is offensive to persons with sight but not offensive to a blind man in a similar position, the use is *primarily* offensive aesthetically.” Dukeminier, *supra* note 46, at 223 (emphasis original).

125. See *People v. Stover*, 12 N.Y.2d 462, 468, 191 N.E.2d 272, 276, 240 N.Y.S.2d 734, 739, *appeal dismissed*, 375 U.S. 42 (1963).

126. Skepticism that such correlations can be established obviously underpinned the belief

physiological or sensory predisposition of human beings to experience visual qualities in a relatively uniform manner, the objective existence and discoverability of the qualities that produce visual pleasure or offense, and the capacity of legislators and administrators to render those qualities in a legal form that is faithful to the qualities themselves and to the legal values of clarity, impartiality, and predictability. Implicit in these assumptions is the portrayal of human beings as passive participants in the aesthetic process. Like wax, which receives a seal's imprint, they are acted upon by an external object, it is assumed, but do not themselves enter independently into the process or influence aesthetic response.

A third premise, which grows out of the analogy between works of art and environmental features, is that aesthetic response is determined by the feature viewed as if it existed in isolation from the context in which it is experienced. Just as paintings attached to a wall are viewed independently of the wall, environmental features, it is thought, are also perceived without regard to their contexts. Perhaps this explains why architectural renderings of new buildings typically show only the buildings themselves, not the buildings as elements of the existing physical context into which they will be inserted. The premise, increasingly questioned by courts and commentators,¹²⁷ leads to the conclusion that the predicate of the terms "beautiful" or "ugly" is the environmental feature alone, not the relationship between the feature and its surroundings.

Framed in this manner, the visual beauty rationale is either fundamentally incomplete or flatly erroneous. Its conceptual weaknesses, which I have labelled the sensory, formalistic, and semantic fallacies, are discussed in Section B. Section C then addresses the defects that render it vulnerable to legal attack.

B. *Conceptual Defects*

1. *Sensory Fallacy*

Linking aesthetic response to the impact of sensory data upon the eye is unobjectionable as far as it goes, but it hardly goes very far. All of the senses are engaged by the physical environment,¹²⁸ as a

of the early period courts that aesthetics was too subjective a field for legal regulation. As one court put it, "[t]he world would be at continual seesaw if these conditions were permitted to govern the use of the police power." *City of Youngstown v. Kahn Bros. Bldg. Co.*, 112 Ohio St. 654, 661-62, 148 N.E. 843, 844 (1925).

127. See note 113 *supra*; Michelman, *supra* note 46, at 37.

128. Many aesthetic evaluations of environmental features, settings, or entire cities treat them primarily as works of art — paintings or stage settings. See, e.g., P. GOLDBERGER, *supra* note 38; P. ZUCKER, *TOWN AND SQUARE* (1959). In contrast, Jane Jacobs has commented that

stroll through New Orleans' French Quarter or a dash through New York City's Grand Central Terminal confirms. Hawkers' cries or shrieking brakes, the inviting smell of freshly baked *beignets* or hot pretzels, and the tactile prompting of rough brick facades or of sinuous marble tracery shape our response to these places just as much as their Creole or Beaux Arts visual form.

If pushed too far, moreover, the sensory premise confuses physiological with aesthetic response. Were they identical, two critical pieces of the aesthetic regulation puzzle would fall neatly into place: the offense that aesthetic regulation seeks to prevent, and the assurance that all or most human beings will incur that injury upon exposure to the offensive object. If repeated long enough, for example, a factory whistle's 120-decibel blast will be a nuisance in law as well as in fact because it can damage the ear. Similarly, exposure to a searchlight's intense beam can damage the eye.¹²⁹

But suppose there is substituted for the blast a Brahms symphony or for the searchlight a Chicago School building. Whatever its nature, the "offense" suffered by persons who adjudge these works "ugly" is obviously of a different order.¹³⁰ Whether they will be experienced as inspiring or grotesque, moreover, is hardly as certain as the prediction that most people will find loud noises or glaring lights offensive.¹³¹ It is a false analogy, therefore, to treat sights that cause no physical harm as "nuisances" like loud noises or visual phenom-

"[a] city cannot be a work of art. . . . To approach a city, or even a city neighborhood, as if it were a larger architectural problem, capable of being given order by converting it into a disciplined work of art, is to make the mistake of attempting to substitute art for life." J. JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 372-73 (1961) (emphasis in original). Other writers confirm that cities engage not merely or even primarily the sense of sight, but all of the senses as well as their "viewers'" emotions, myth-making propensities, and intellects. See generally E. BACON, *DESIGN OF CITIES* (1967); Fitch, *The Aesthetics of Function*, in *PEOPLE AND BUILDINGS* 3 (R. Gutman ed. 1972); Ittelson, *Environmental Perception and Contemporary Perceptual Theory*, in *ENVIRONMENTAL PSYCHOLOGY* 141 (H. Proshansky, W. Ittelson & L. Rivlin eds. 2d ed. 1976).

129. See *Shelburne, Inc. v. Crossan Corp.*, 95 N.J. Eq. 188, 191, 122 A. 749, 750 (1923) (glare of 66-foot high, 72-foot long illuminated billboard shining colored lights into plaintiff's hotel ruled a "nuisance").

130. Susanne Langer has rejected the attempt to explain human aesthetic response in terms of physiological factors as an "empty hypothesis, because there is no elementary success that indicates the direction in which neurological aesthetics could develop." S. LANGER, *FEELING AND FORM* 38 (1953).

To like effect, see generally G. BROADBENT, *DESIGN IN ARCHITECTURE* (1973); J. DEWEY, *supra* note 3; R. FRY, *VISION AND DESIGN* (1920); E. GOMBRICH, *THE SENSE OF ORDER* (1979).

131. It is on this basis that a number of courts have properly rejected the analogy between offenses to the senses of hearing and smell, on the one hand, and those to the sense of sight, on the other. See, e.g., *Mayor of Baltimore v. Mano Swartz, Inc.*, 268 Md. 79, 88, 299 A.2d 828, 833 (1973); *Parkersburg Builders Material Co. v. Barrack*, 118 W. Va. 608, 609-10, 191 S.E. 368, 369 (1937).

ena that may cause such injury. Even if the nuisance analogy is apt, the visual phenomena comprehended by it are acutely fewer than the wide-ranging group of entries with which aesthetic regulation deals.

Graver still, the environment-as-sensorium approach insufficiently attends to the power of nonsensory factors to shape human aesthetic response, and thus repeats the enduring error of an entire branch of aesthetic thought. Alexander Baumgartner, who coined the term "aesthetics" in 1735, defined it as the "science of sensory cognition."¹³² The British Empiricists followed suit. Edmund Burke summed up the common view of Locke, Hume, and Hogarth in his claim that beauty is "some quality in bodies, acting mechanically upon the human mind by the intervention of the senses."¹³³ Kevin Lynch, a modern-day exponent of similar sentiments, states that "aesthetic experience is a specially heightened phase of sensation, different in degree, not in kind."¹³⁴ In his view, aesthetic regulation's purposes are not only to proscribe aesthetic nuisances, but "to bring the world within sensory reach, to increase the depth and fineness of our sensations, and to confer that immediate pleasure and well-being that come from vivid perception"¹³⁵

But the sensory premise tells only part of the story and its less informative part at that. Whether in the museum or beyond its walls, we respond not merely to an object's sensuous qualities but, more vitally, to its symbolic import — the *meanings* ascribed to it by virtue of our individual histories and our experiences as members of political, economic, religious, and other societal groups. Absent the intervention of thought, feeling, and culture, these meanings would largely vanish, and aesthetic response would lack the rich and engaging character that Lynch rightly associates with it.

The integration of sensory and nonsensory factors and the dominance of the nonsensory are recurring themes in the writings of modern aesthetic philosophers, psychologists, and social scientists. Susanne Langer insists that art "is not sensuously pleasing and *also* symbolic; the sensuous quality is in the service of its [symbolic] import."¹³⁶ Most modern psychologists, building on research in gestalt psychology, information theory, and allied fields, reject the British

132. A. BAUMGARTNER, REFLECTIONS ON POETRY (K. Aschenbrenner & W. Holther trans. 1954).

133. E. BURKE, A PHILOSOPHICAL ENQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL 210 (2d ed. London 1759).

134. K. LYNCH, MANAGING THE SENSE OF A REGION 9 (1976).

135. *Id.* at 15.

136. S. LANGER, *supra* note 130, at 59.

Empiricists' "bucket theory" of the mind, which treats human perception as a passive process.¹³⁷ They favor instead a "searchlight theory," in which the perceiver's intellect and feelings actively enter into and influence the process's outcome.¹³⁸ Social scientists take the searchlight theory further and reject the view that, by itself, the physical environment predetermines human response to it. In a much noted passage, for example, Herbert Gans observes that

the physical environment is relevant to behavior insofar as this environment affects the social system and culture of the people involved in it or as it is taken up into their social system. Between the physical environment and empirically observable human behavior there exists a social system and a set of cultural norms which define and evaluate portions of the physical environment relevant to the lives of people involved and structure the way people will use and react to this environment in their daily lives.¹³⁹

137. The debate between the "bucket" and "searchlight" schools is reviewed in E. GOMBRICH, *supra* note 130, at 1-16 (1979). Gombrich concludes that the simplistic views of the former, whose major postulates trace to John Locke, have largely been discredited by the findings of modern psychological research. Gombrich's study itself brings together much of that research, particularly in the gestalt psychology and information theory fields, in defense of his overall argument that "[i]n contrast to any stimulus-response theory I would wish to point to the need to regard the organism as an active agent reaching out towards the environment, not blindly and at random, but guided by its inbuilt sense of order." *Id.* at 5. Researchers in other fields agree. Despite his overemphasis on the sensory dimension of human perception, *see* text at notes 134-35, Lynch, for example, has observed:

Environmental images are the result of a two-way process between the observer and his environment. The environment suggests distinctions and relations, and the observer — with great adaptability and in the light of his own purposes — selects, organizes, and endows with meaning what he sees. The image so developed now limits and emphasizes what is seen, while the image itself is being tested against the filtered perceptual input in a constant interacting process. Thus, the image of a given reality may vary significantly between different observers.

K. LYNCH, *supra* note 116, at 6.

138. Illustrative are the conclusions of one commentator that

[v]isual perception, far from being a mere collector of information about particular qualities, objects, and events, turn[s] out to be concerned with the grasping of generalities The mind, reaching far beyond the stimuli received by the eyes directly and momentarily, operates with the vast range of imagery available through memory and organizes a total lifetime's experience into a system of visual concepts. The thought mechanisms by which the mind manipulates these concepts operate in direct perception, but also in the interaction between direct perception and stored experience, as well as in the imagination of the artist, the scientist, and indeed any person handling problems "in his head."

R. ARNHEIM, *VISUAL THINKING* 294 (1969).

139. H. GANS, *supra* note 20, at 5 (1968).

Urbanists agree. Grady Clay, for example, writes that "[a] city is not as we perceive it by vision alone, but by insight, memory, movement, emotion and language. A city is also what we call it and becomes as we describe it." G. CLAY, *supra* note 116, at 17. Donald Appleyard adds:

Imageability is not merely an aesthetic quality of the city or a means for orientation, but the most powerful attribute of the urban symbol system. Aesthetics is not an abstract set of qualities, but something directly linked to the values and tastes of different population groups.

Appleyard, *supra* note 116, at 36.

We do not so much *discover* aesthetically compelling properties in the environment, therefore, as *ascribe* them to it on the basis of our individual and cultural beliefs, values, and needs.

2. Formalistic Fallacy

Visual beauty reasoning also assumes ontologically based canons of beauty which, like natural laws, are objective, discoverable, and renderable in legal form. Objects are beautiful because they exemplify these canons in their proportion, color, line, interval, and related features. Accordingly, the canons afford both a checklist for singling out which existing environmental features should be protected and a recipe for creating beautiful forms.¹⁴⁰

This premise and its corollaries have had their defenders over the ages. Mathematicians from Pythagoras¹⁴¹ to Birkhoff¹⁴² have hypothesized that universal laws of beauty can be stated abstractly in terms of number and interval. Followers of Descartes believed that they could be deduced from "pure reason." "Every art," one Cartesian proclaimed, "has certain rules which by infallible means lead to the ends proposed."¹⁴³ British Empiricists and many experimental psychologists since have looked to observation and inductive reasoning to determine the "qualities in bodies" that cause them to be perceived as beautiful or ugly.¹⁴⁴ Other writers, enthralled by a

140. See note 67 *supra*.

Although the courts have not explicitly articulated the distinction between regulation that preserves an existing feature thought to be "beautiful" and regulation that purports to create beauty afresh, a number have expressed positions premised on the view that the latter is neither a proper nor a feasible goal of aesthetic regulation. Maryland's highest court, for example, invalidated a billboard ban because its purpose "was not the preservation or protection of something which was aesthetically pleasing, but rather was intended to achieve by regulation an aesthetically pleasing result . . ." *Mayor of Baltimore v. Mano Swartz, Inc.*, 268 Md. 79, 92, 299 A.2d 828, 835 (1973). That the court's position was premised on this distinction is evident in its quotation, of the following language from E. FREUND, *STANDARDS OF AMERICAN LEGISLATION* 115-16 (2d ed. 1965):

{I}t is undesirable to force by law upon the community standards of taste which a representative legislative body may happen to approve of But it is a different question whether the state may not protect the works of nature or the achievements of art or the associations of history from being wilfully marred. In other words, emphasis should be laid upon the character of the place as having an established claim to consideration and upon the idea of disfigurement as distinguished from the falling short of some standard of beauty.

268 Md. at 92, 299 A.2d at 835. Justice Hall's qualms about employing the law "to legislate affirmatively" on the subject of beauty, see note 286 *infra*, would also appear to be premised on the distinction.

141. Pythagoras's views are summarized in M. BEARDSLEY, *AESTHETICS FROM CLASSICAL GREECE TO THE PRESENT* 27-28 (1966).

142. G. BIRKHOFF, *AESTHETIC MEASURE* (1933).

143. Beardsley ascribes the quotation to George de Scudéry. See M. BEARDSLEY, *supra* note 141, at 146.

144. For a summary of the positions of Locke, Hume, Burke, Hogarth, and other figures in

particular official or traditional style, have established their "universal" canons by generalizing from the principles of form and proportion reflected in their chosen style. Before 1750, for example, architectural beauty in the West was generally regarded as a harmonious system based on abstract mathematical intervals and analogies to man's proportions.¹⁴⁵ The static, absolutistic conception of beauty that results from this approach is summed up in the contention of Alberti, the Renaissance codifier of this system, that beauty is a "harmony of all the parts," such that "nothing could be added, diminished, or altered, but for the worse."¹⁴⁶

However formulated, the premise is seductive that beauty can be encapsulated in a set of abstract canons relating to the formal appearance of objects. As individuals, we do experience objects as pleasurable or offensive, and describe them by their visual form. We often find, moreover, that our individual response coincides with broader patterns of community response. But the conclusion that these patterns can be explained by formal canons of beauty is a *non sequitur* for a variety of reasons.

First, no one has succeeded in setting forth these canons despite centuries of trying. With refreshing if anguished candor, Albrecht Dürer, himself an advocate of aesthetic formalism, evidenced the futility of these efforts in his confession: "What beauty is I know not, but it dependeth upon many things."¹⁴⁷ Although the conventions of particular styles can be recorded with reasonable fidelity,¹⁴⁸ they

the British Empiricist School, see M. BEARDSLEY, *supra* note 141, at 166-208. The influence of the School's approach to beauty upon subsequent experimental psychologists can be seen in the variety of research projects probing the relation between visual form and human aesthetic response surveyed in C. VALENTINE, *THE EXPERIMENTAL PSYCHOLOGY OF BEAUTY* (1962).

145. See P. COLLINS, *CHANGING IDEAS IN MODERN ARCHITECTURE* 47 (1965).

146. N. EVENSON, *supra* note 84, at 361.

147. A. DÜRER, *supra* note 1, at 179.

148. For judicial recognition of this fact in the context of historic districting legislation, see, e.g., *Maher v. City of New Orleans*, 516 F.2d 1051, 1060-61, 1067 (1975), *cert. denied*, 426 U.S. 905 (1976); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 416-17, 389 P.2d 13, 17-18 (1964); *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 216, 258 S.E.2d 444, 450 (1979).

The indispensable and credible role that past styles play in resolving the standards issue in the historic district context has received Norman Williams's favorable comment. In the case of "areas where the historic architectural style [is] distinctive and quite clearly defined," he notes, there are

no really difficult problems for an administrator in deciding whether an alteration (or even a new building) conform[s] to the prevailing style; the style provided the standards in New Orleans, Santa Fe, Nantucket, Beacon Hill and so on In these instances, the delegation-of-power problem more or less solves itself.

3 N. WILLIAMS, *supra* note 39, at § 71A.06. From the perspective of a fourteenth amendment vagueness-due process analysis and certainly in relation to many other forms of aesthetic regulation, Williams is correct. From the perspective of preservation architects and other design professionals, however, the standards problem remains a complex one. Its many facets are surveyed in the various essays contained in NATIONAL TRUST FOR HISTORIC PRESERVATION,

neither substitute for universal canons of beauty nor authoritatively exemplify a subset of such canons.¹⁴⁹

Since agreement has not been reached on first principles, it comes as no surprise that design professionals have disagreed violently over the aesthetic merits of particular styles, features, and settings. To Ada Louise Huxtable, the New York Public Library is “one of the last of the great nineteenth century buildings”;¹⁵⁰ to Lewis Mumford, it reverberates with the “hollow echoes of expiring breath.”¹⁵¹ The uniform street walls, cornices, and building facades of Baron Haussmann’s Paris, which so delight tourists and Parisians alike, caused Camillo Sitte intense pain. “Why,” he groaned, “must the straight-edge and the compass be the all powerful masters of city building?”¹⁵² New York City’s gridiron street system, a product of its 1811 Official Street Plan, is disdained by many urbanists as a monument to execrable planning and greedy real estate speculation.¹⁵³ Paul Goldberger, on the other hand, extols its “neat, tight, ramrod-straight views that stretch from river to river.”¹⁵⁴ Le Corbusier adds that it is a “model of wisdom and greatness of vision.”¹⁵⁵ In Edith

OLD AND NEW ARCHITECTURE: DESIGN RELATIONSHIP (1980) [hereinafter cited as OLD AND NEW ARCHITECTURE]. Giorgio Cavaglieri, the noted restoration architect, reflects a concern shared by many of his co-essayists in his plaint that “the problem of what is harmonious, what is artistically effective, is so variable that it is not possible to draw up [design review] guidelines and still favor creativity.” Cavaglieri, *The Harmony That Can’t be Dictated*, in *id.* at 37.

149. John Dewey, for example, has observed that “[t]here is no art in which there is only a single tradition. The critic who is not intimately aware of a variety of traditions is of necessity limited and his criticisms will be one-sided to the point of distortion.” J. DEWEY, *supra* note 3, at 311.

The distinction in the text has also been explored in two studies by Professor Gombrich. See E. GOMBRICH, *ART AND ILLUSION* (1960) and *THE SENSE OF ORDER*, *supra* note 130. He addresses whether formal rules can be adduced on the basis of which past styles can be evaluated — the topic of the former study — and on the basis of which design and decoration, considered independently from a past style, can be judged — the topic of the latter. Concerning the first question, his conclusions are strikingly similar to those of Norman Williams regarding standards for historic districts. See note 148 *supra*. “[T]he skill of imitation can be judged by objective standards,” Gombrich writes, “[because] it presents limited problems capable of clearcut solutions.” E. GOMBRICH, *supra* note 130, at x. But standards for design and decoration “lack such touchstones of success and failure.” *Id.* His analysis of the problems that they present leads to three conclusions. First “[t]he geometrical structure of a visual design can never, by itself, allow us to predict the effect it will have on the beholder.” *Id.* at 117. Second, the subjectivity of individual aesthetic response “vitiates the attempts to establish the aesthetics of design on a psychological basis.” *Id.* Third, very little can be gained from investigating “the inherent qualities of form . . . [or] invariable properties of visual configurations” because human aesthetic response cannot be accounted for on these bases alone. *Id.* at 118.

150. A. HUXTABLE, *supra* note 31, at 222.

151. *THE CULTURE OF CITIES*, *supra* note 116, at 438.

152. C. SITTE, *THE ART OF BUILDING CITIES* 32 (C. Stewart trans. 1945).

153. See *THE CULTURE OF CITIES*, *supra* note 116, at 183-86; J. REPS, *THE MAKING OF URBAN AMERICA* 294-99 (1965).

154. P. GOLDBERGER, *supra* note 38, at xiii.

155. LE CORBUSIER, *supra* note 33, at 50.

Wharton's eyes, the city's brownstones, the pride of a number of its designated historic districts, are loathsome buildings clad in "chocolate-coloured coating of the most hideous stone ever quarried [and set within a] cramped horizontal gridiron of a town . . . hide-bound in its deadly uniformity of mean ugliness."¹⁵⁶

The Hundred Years' War still raging between neoclassicists and post-modernists in one camp and modernists in the other, exemplifies similar, if far broader, disagreements over the ideal appearance of the city as a whole.¹⁵⁷ The neoclassicists, who favored Beaux Arts urban design and architectural styles, held sway in the late nineteenth and early twentieth centuries but were driven from the field by the modernists in the following half-century. Regrouped under the postmodernist banner, however, latter-day neoclassicists have counterattacked. They endorse elaborate ornamentation, masonry construction, uniform street walls, buildings fit snugly within larger urban compositions, and the eclectic embrace of traditional architectural styles. Modernists, in contrast, champion monumental buildings standing aloof from their surroundings, irregular street walls, lean ornamentation, and a wide variety of building materials and technologies.

Faith in universal principles of beauty is no longer asserted as dogmatically as in earlier times, moreover, and repeated efforts to verify it empirically have yielded meager results.¹⁵⁸ Social scientists and urbanists dispute the assumptions of that faith as hopelessly narrow and mechanistic.¹⁵⁹ Aesthetic philosophers since Kant's time have followed suit by abandoning the attempt to define beauty as the concordance between these supposed principles and an object's formal visual qualities.¹⁶⁰ Many have come instead to regard beauty as the outcome of an exchange, emotional in nature, between artist and audience.¹⁶¹ Even architects themselves are skeptical of the art-as-

156. C. TUNNARD & H. REED, *supra* note 116, at 131.

157. The contours of the debate appear in, e.g., W. KIDNEY, *supra* note 116 (reviewing the basic elements of the neoclassicist position); L. SULLIVAN, *supra* note 32 (sounding the modernists' battle cry); B. BROLIN, *THE FAILURE OF MODERN ARCHITECTURE* (1976) (summoning the postmodernists to the counterattack). The ebb and flow of the battle in Paris is recounted in N. EVENSON, *supra* note 84, and in San Francisco in M. CORBETT, *SPLENDID SURVIVORS* (1979).

158. See note 130 *supra*.

159. See note 139 *supra*.

160. See M. BEARDSLEY, *supra* note 141, at 209-82.

161. Illustrative of expressions of this viewpoint are R. FRY, *supra* note 130; S. LANGER, *supra* note 130. Fry has written:

In my youth all speculations on aesthetics had revolved with wearisome persistence around the question of the nature of beauty. Like our predecessors we sought for the criteria of the beautiful, whether in art or nature. And always this search led to a tangle of

rules approach: Louis Sullivan, for example, counseled that all mechanical theories of art are vanity, and . . . the best of rules are but as flowers planted over the graves of prodigious impulses which splendidly lived their lives, and passed away with the individual man who possessed these impulses [I]t is within the souls of individual men that art reaches culminations.¹⁶²

A second problem is that aesthetic formalism ignores the dimension of time. Yet time and the process of habituation that occurs over time often condition aesthetic response to an environmental feature or setting more vitally than do formal visual qualities. Over time

[t]he "ugly" building may survive to become "interesting" or "amusing," and finally "beautiful." What was once deemed "monotonous and mechanical" may later be seen as "harmonious and orderly," and the "excessive and vulgar" become "imaginative and vital."¹⁶³

Examples of this process are commonplace, but none illustrates it more vividly than the shift in Parisians' opinion of the Eiffel Tower some years after its construction. Shortly before it was erected in 1889, it was scorned as the "dishonor of Paris" by Gounod, Prudhomme, and other distinguished French writers and artists, organized under the banner of the Committee of Three Hundred (one member per meter of the Tower's height). "Is Paris going to be associated with the grotesque, mercantile imaginings of a constructor of machines . . . ?"¹⁶⁴ the group implored. Although scheduled for demolition twenty years later, the Eiffel Tower still stands, the beloved signature of the Parisian skyline and an officially designated monument.

Aesthetic formalism must also be faulted for its implicit suggestion that judgments akin to those of the museum underlie aesthetic legislation.¹⁶⁵ Most aesthetic controls employ cruder gauges. The aesthetic preferences operative in the decisions to preserve the San Francisco Bay, Virginia's Historic Green Springs, or the New Jersey Pine Barrens cannot be equated in aesthetic complexity or refinement with those underlying a choice between the art of Picasso and

contradictions or else to metaphysical ideas so vague as to be inapplicable to concrete cases Tolstoy [beginning with *What is Art?*] saw that the essence of art was that it was a means of communication between human beings [O]f immense importance was the idea that a work of art was not the record of beauty already existent elsewhere, but the expression of an emotion felt by the artist and conveyed to the spectator.

R. FRY, *supra* note 130, at 292-93.

162. L. SULLIVAN, *supra* note 32, at 185.

163. N. EVENSON, *supra* note 84, at 124.

164. *Id.* at 132.

165. See text at note 67 *supra*.

Turner, Bach and Copland, or Sullivan and Pei. Cruder still are the preferences resulting in bans on frontyard clotheslines in exclusive residential neighborhoods, billboards along scenic highways, or unfenced junkyards on a community's outskirts.¹⁶⁶

It might be retorted that the gap between museum and legal aesthetics closes in the case of landmark buildings and historic districts. After all, city councils and landmark preservation commissions must make judgments about design ensembles and building facades and detailing that are as intricate and refined as any made by architectural historians or museum curators. This argument, although accurate, largely misses the point because beauty, as conceived under the visual beauty rationale, plays a secondary role in the designation process. Many landmarks and historic districts are not even described as "beautiful" by their defenders.¹⁶⁷ Even those that do exemplify the design principles of a particular school of aesthetic formalism with fidelity and grace fail to substantiate the visual beauty rationale. To argue to the contrary is to commit the error of those who equate the canons of form that describe their favored style

166. Many courts are alert to the differences between museum and legal standards noted in text. *See, e.g.*, *Mayor of Baltimore v. Mano Swartz, Inc.*, 268 Md. 79, 88, 299 A.2d 828, 833 (1973) (standards may not be those of an "idiosyncratic group"); *Cromwell v. Ferrier*, 19 N.Y.2d 263, 272, 225 N.E.2d 749, 755, 279 N.Y.S.2d 22, 30 (1967) (standards do not embrace "every artistic conformity or nonconformity"); *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 5, 198 A.2d 447, 449 (1964) (standards do not extend to "some sensitive or exquisite preference"); *Carter v. Harper*, 182 Wis. 148, 159, 196 N.W. 451, 455 (1923) (standards may not include "ultra-aesthetic taste").

Alternative evidence of the antimuseum view of many courts is their insistence that only those uses or activities that are offensive or attractive to broad segments of the community may be addressed in aesthetic legislation. *See* note 80 *supra* and note 286 *infra*. For example, in the same opinion announcing its approval of the "solely for aesthetic purposes" position, the New York Court of Appeals was careful to note that the uses proscribed by aesthetic regulation must be those that are offensive to the "visual sensibilities of the average person." *People v. Stover*, 12 N.Y.2d 462, 468, 191 N.E.2d 272, 276, 240 N.Y.S.2d 734, 739, *appeal dismissed*, 375 U.S. 42 (1963). Likewise, in a decision invalidating a billboard measure, the Maryland Court of Appeals quoted approvingly the observation in *Quintini v. City of Bay St. Louis*, 64 Miss. 483, 490, 1 So. 625, 628 (1887), that "[t]he law can know no distinction between citizens because of the superior cultivation of the one over the other. It is with common humanity that courts and legislators must deal. . . ." *Mayor of Baltimore v. Mano Swartz, Inc.*, 268 Md. 79, 89, 299 A.2d 828, 834 (1973).

167. Visual beauty cannot seriously be predicated, for example, of Chicago's landmarked Water Tower, a Disneyesque parody of a turreted castle erected to cloak the waterworks and standpipes hidden within, or of New York City's Greenwich Village Historic District, which Norman Williams aptly describes as an "architectural melange." *See* 3 N. WILLIAMS, *supra* note 39, at § 71A.06. To like effect is Jane Jacobs's comment concerning the Village's Jefferson Market Courthouse, the trophy in one of the City's bloodier landmark wars, that now abandoned as a courthouse, [the landmark] occupies a prominent site abutting on one of the community's busiest areas. It is an elaborate Victorian building, and opinions differ radically as to whether it is architecturally handsome or architecturally ugly. *However, there is a remarkable degree of unanimity, even among those who don't like the building, that it must be retained and used for something.* J. JACOBS, *supra* note 128, at 397 (emphasis added).

with universal canons of beauty or with some subset of these canons.¹⁶⁸

Finally, the faith that beauty can be made to answer to abstract rules of visual form is easily transformed into the conceit that legal institutions can employ these rules to create a beautiful environment.¹⁶⁹ But conservation or preservation, not creativity or originality, is aesthetic regulation's province.¹⁷⁰ Aesthetic measures derive their standards from an *existing* style or set of visual characteristics exemplified by an *existing* environmental feature or setting selected on the basis of the community's attachment to it. These measures never prescribe rules of visual form in advance of the style's exemplification in some existing resource or aesthetic tradition.

The Mansion dispute, for example, teaches not only that landmarks or distinctive neighborhoods must exist before aesthetic regulation comes into play, but that the preservation of their existence is aesthetic regulation's *raison d'être*. It is true, of course, that new entrants, such as the thirty-story apartment tower, are regulated by law. But in no sense can that regulation be deemed creative or original. What it seeks to do — and it is no small job at that¹⁷¹ — is to ensure that the new entrant is “compatible” with its correlative existing resource.

Modern critics, artists, and aesthetic philosophers confirm this conclusion. Aesthetic criteria, Susanne Langer has written, “are not criteria of excellence; they are explanations of it. . . . As soon as they are generalized and used as measures of achievement they become baneful.”¹⁷² In like vein, John Dewey warns that “standards, prescriptions, and rules [of beauty] are general while objects of art are individual. The former have no locus in time They belong neither here nor there. In applying to everything, they apply to nothing in particular.”¹⁷³ The creative impulse, Siegfried Gideion adds, has “grow[n] only in liberty, for no command can open the way to the unexplored.”¹⁷⁴

168. See note 149 *supra*.

169. See text at note 140 *supra*.

170. See text at notes 116-19 *supra* 222-31 *infra*.

171. The problems of ensuring “compatibility” in the historic preservation field are canvassed in OLD AND NEW ARCHITECTURE, *supra* note 148.

172. S. LANGER, *supra* note 130, at 406.

173. J. DEWEY, *supra* note 3, at 301.

174. S. GIDEION, SPACE, TIME AND ARCHITECTURE 583 (1941).

3. *Semantic Fallacy*

Under the two versions of visual beauty reasoning outlined earlier,¹⁷⁵ the terms “beautiful” and “ugly” are predicated of, respectively, the visual form of an environmental resource taken by itself or the visual relationship of that form to the visual form of other features that fill its perceptual field. For purposes of legal analysis, the first version is incorrect and the second incomplete. The visual appeal or offensiveness of an existing resource or new entrant is not constant as the first version requires. Resources may be objectionable in one setting and unobjectionable in another. Clotheslines or trailers in front yards, which, like the proverbial pig in the parlor or barnyard,¹⁷⁶ would go unnoticed in industrial districts, are perhaps incongruent in residential zones. Buildings that are regarded as outstanding architecture when considered in isolation may be offensive in particular settings.¹⁷⁷

The rationale’s second version is preferable to its first because this version acknowledges that the terms “beauty” and “ugliness” have relational connotations and that standards sensitive to the emotions these terms express can sometimes¹⁷⁸ be derived from the for-

175. See text at notes 112-14 *supra*.

176. The pig-in-the-parlor metaphor has been employed by the Supreme Court not only in the land use context, see *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), but in the first amendment context as well, see *FCC v. Pacifica Foundation*, 438 U.S. 726, 751 (1978).

177. An artifact that has undoubted aesthetic merit or, at least, is nonoffensive taken by itself may become offensive in the wrong setting because the manner in which it is experienced is profoundly influenced by its perceptual and associational fields. For examples of proposed developments that were found objectionable on this basis, see, e.g., *Ely v. Velde*, 451 F.2d 1130, 1138 (4th Cir. 1971) (prison presents “jarring contrast to the existing architecture and atmosphere in [Historic] Green Springs”); *City of Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 484, 3 So.2d 364, 366 (1941) (*en banc*) (commercial use incompatible with “character of [Miami Beach hotel district] as a resort”); *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 186, 193 N.E. 799, 816 (1935) (outdoor signs incompatible with “places [Beacon Hill and Town of Concord] hallowed by literary and humanitarian associations”), *appeal dismissed*, *General Advertising v. Callahan*, 297 U.S. 725 (1936); *McCormick v. Lawrence*, 83 Misc. 2d 64, 67-68, 372 N.Y.S.2d 156, 159-60 (1975) (boathouse incompatible with “unspoiled” “community setting” of Adirondack wilderness area), *affd.*, 387 N.Y.S.2d 919, 54 A.D.2d 123 (1976); *Westfield Motor Sales Co. v. Town of Westfield*, 129 N.J. Super. 528, 544, 324 A.2d 113, 122 (1974) (group of signs “no matter how tasteful” incompatible with community character).

This proposition is a staple as well of perceptual theory in modern psychology. See generally R. ARNHEIM, *supra* note 138; E. GOMBRICH, *supra* note 130; E. GOMBRICH, *supra* note 149. Arnheim notes that “[t]he mind meets here, at an elementary level, a first instance of the general cognitive problem that arises because *everything in this world presents itself in context and is modulated by that context.*” R. ARNHEIM, *supra* note 138, at 37 (emphasis added).

It is on this basis that postmodernists object to modern architecture, see text at note 157 *supra*, despite their willingness to concede that many modern buildings are spectacular architecture taken by themselves. The buildings’ offensiveness to the postmodernists, therefore, is not an inherent attribute but a function of location in inappropriate settings. See generally B. BROLIN, *supra* note 157; P. GOLDBERGER, *supra* note 38.

178. See text at notes 292-97 *infra*.

mal visual qualities of the new entrants' settings. But its reliance on these qualities alone does not adequately account for the shock occasioned by incongruent new entrants or for the vehement reactions of community groups. Most people simply do not "see" or interpret the physical environment with the same degree of visual refinement as do design professionals. On the other hand, their threshold of what might be termed semiotic sensitivity is often more acute. They, after all, must live with the designer's handiwork. And although often ignored, it is they, not design professionals, who are aesthetic regulation's intended audience.¹⁷⁹

No-change constituencies' portrayal of dissonant new entrants leaves no doubt that, for them, the niceties of aesthetic formalism are entirely secondary to the new entrant's message as the source of their reaction. New entrants are not condemned because they fail to respect the canons of Vitruvius or Ruskin. The language employed by these constituencies reveals instead that they perceive the entrants as portending ills akin to sexual or marital outrage ("rape"; "plunder"), mutilation ("scar"), blasphemy ("sacrilege"), death ("obilterate"), and other shocking violations of personal or group identity. In response to these perceptions, they organize, lobby for legislation and favorable administrative decisions, finance and prosecute lawsuits, and engage in the other costly, emotionally draining tactics demanded of combatants in aesthetics warfare.

These considerations suggest that the visual beauty rationale's second version is not so much wrong as it is incomplete. Perhaps some people do react to an environmental resource solely on the basis of its compatibility with particular canons of aesthetic formalism. But aesthetic formalism is too slender a reed to account for citizen reaction generally. A broadened explanation is required, I submit, that appreciates the profound influence of the visual environment's semiotic properties on the way that people experience and describe that environment.

179. The postmodernists' assault on modern architecture, *see* note 177 *supra*, essentially boils down to the assertion that the latter ignores human semiotic needs in favor of expressionism predicated on the modern architect's pursuit of abstract form. *See* B. BROLIN, *supra* note 157, at 10 ("Public apathy is largely due to the fact that the majority of people are disturbed by the sterile appearance of modern buildings and are not interested in the intellectual ideas that buildings represent."); Colquhoun, *Typology and Design Method*, in PEOPLE AND BUILDINGS *supra* note 117, at 394 (rejecting modern architecture's premise that "shapes have physiognomic or expressive content which communicates itself to us directly"); Wolfe, *supra* note 2 (same).

C. Constitutional Objections

1. Standards

"Aesthetic formalism," which considers "beauty" and "ugliness" to be ontologically based, accessible to human intelligence, and renderable in systematic form as universal or particularized canons or laws, represents a vision advanced by aesthetic writers over the millennia. The vision received its most optimistic expression in Renaissance aesthetic thought, for which art, like science, was both an expression and a discovery of the laws of nature.¹⁸⁰ It has been championed by mathematicians, experimental psychologists, and aesthetic philosophers as well as by kings, popes, and *signorie*.

Although Hitler¹⁸¹ and other twentieth-century despots have continued to expound the vision, it has been severely scaled down, if not abandoned altogether, by modern students of human aesthetic response. Among the reasons for their modesty are the inability to define canons of beauty or empirically to demonstrate their objective character, the impact of time as a relativizer of taste, and the vagaries of human culture and perceptual response. Aesthetic formalism's most persuasive adversary, however, has been the exuberance of human creativity, which refuses to be immobilized by the rules or traditions of earlier times.

The reasons underlying this new-found modesty establish that aesthetic regulation cannot satisfy the vagueness-due process requirement of intelligible standards¹⁸² if those standards attempt to

180. As characterized by Hauser:

The scientific conception of art, which form[ed] the basis of instruction in the academies, begins with Leon Battista Alberti. He is the first to express the idea that mathematics is the common ground of art and the sciences, as both the theory of proportions and the theory of perspective are mathematical disciplines. He is also the first to give clear expression to that union of the experimental technician and the observing artist which had already been achieved in practice by Masaccio and Uccello. Both try to comprehend the world empirically and to derive rational laws from this experience of the world

A. HAUSER, *supra* note 30, at 64 (footnote omitted).

181. Hitler invoked the vision to canonize the architectural traditions of Imperial Rome and to banish the Bauhaus School from the Third Reich. *See* B. LANE, *ARCHITECTURE AND POLITICS IN GERMANY, 1918-1945*, at 171-72, 188-90 (1968); A. SPEER, *INSIDE THE THIRD REICH* 73-75, 151-57 (1970).

182. *See* text at note 58 *supra*.

It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.

Giacco v. Pennsylvania, 382 U.S. 399, 402-03 (1966). The vagueness doctrine rests in part on the concepts of fair warning, *see Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926), in part on the fact that statutory unclarity frustrates judicial review of regulatory and criminal legislation, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 80-81 (1960), and in part on the desire to have legislatures carefully "establish minimal guidelines to govern law enforcement." *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

define "beauty" or "ugliness." For legal-aesthetics purposes at least, these terms express a positive or negative emotional response to extrinsic factors without hinting at what those factors might be. Absent identification and evaluation of the relevant factors, standards-setting in the name of these concepts is impossible. With that identification and evaluation, beauty and ugliness become superfluous as analytic concepts; they are merely conclusory terms that express the emotional character of a particular aesthetic response.

2. *Freedom of Expression*

Should aesthetic measures premised exclusively on visual beauty reasoning survive a first amendment challenge? I think not. A legislative ban on, or preference for, private expression based solely on its offensiveness or appeal is censorship in its baldest form. Although the Supreme Court has yet to hold that environmental features are "speech," the conclusion seems unavoidable in at least some contexts.¹⁸³

For many, architecture and other environmental features communicate ideas more effectively than does language. Louis Sullivan, for example, views the architect as "a poet who uses not words but building materials as a medium of expression."¹⁸⁴ Critics of Robert Venturi's willingness to "learn from Las Vegas"¹⁸⁵ regard his work and ideas as an outrageous assault on their political and social beliefs.¹⁸⁶ For others, architecture expresses emotion through sensuous form, not ideas.¹⁸⁷ But emotion-laden messages are as entitled as discursive ones to first amendment protection. Even when communication assumes a verbal form, the Supreme Court has stressed, the emotive function of language may be "more important" than its discursive function in conveying the "overall message sought to be communicated."¹⁸⁸

The first amendment shelters individual self-fulfillment¹⁸⁹ as well as unhindered communication. Both the artist's exercise of creative

183. See text at notes 325-45 *infra*.

184. L. SULLIVAN, *supra* note 32, at 140 (emphasis deleted). See generally P. COLLINS, *supra* note 145.

185. See R. VENTURI, D. BROWN & S. IZENOUR, *supra* note 33.

186. Venturi and co-authors Denise Scott Brown and Steven Izenour "have been called 'Nixonites,' 'Reaganites,' or the equivalent, by Roger Montgomery, Ulrich Franzen, Kenneth Frampton, and a whole graduating class of Cooper Union." *Id.* at 153 n.18.

187. See S. LANGER, *supra* note 130, at 92-103.

188. *Cohen v. California*, 403 U.S. 15, 26 (1971).

189. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943); L. TRIBE, *supra* note 61, at § 12-1. On the relationship between self-fulfillment and architectural expression, see Williams, *supra* note 46, at 53-57; Note, *supra* note 60, at 183-85; *cf.* Nimmer,

imagination and his or her audience's response afford as immediate a route to self-fulfillment as other activities safeguarded by the first amendment.¹⁹⁰ In fact, the power of art to enrich the lives of individuals and cultures has been compared to the power of religion.¹⁹¹ The comparison is instructive. Like religion, art plumbs the furthest depths of human thought and emotion. Its affirmations are, to be sure, as insusceptible as religious dogmas to verification in the positivistic mode embraced by the law. But nonverifiability does not mean that these affirmations are trivial. On the contrary, it celebrates their richness and ineffability. To permit the state to dictate which affirmations will be countenanced would be unsettling even if cogent justifications could be adduced and intolerable if they could not.

Solicitude for expression and self-fulfillment interests explains why the Supreme Court requires that aesthetic measures regulating expressive activity based on the offensiveness of its content be "narrowly drawn" and advance a "sufficiently substantial governmental interest."¹⁹² The visual beauty approach satisfies neither requirement. A measure whose "standards" appeal to beauty in the abstract is not only intolerably vague, but also runs afoul of the injunction that it be "narrowly drawn." But aesthetic measures are rarely framed so broadly. Rather, they implicitly or directly look to the visual character of an existing style or resource for their standards. The Rice Mansion, for example, was designated under an ordinance that defined a landmark as a structure having a "special . . . aesthetic interest or value," a criterion that the city's agencies presumably concluded the Mansion met by virtue of its mix of Beaux Arts and Neo-Georgian styles.

Such measures appear to avoid the "narrowly drawn" objection because the visual characteristics of existing resources can often be detailed in legislation, regulations, or agency background studies. The first amendment problem, however, is not so easily overcome. In fact, it is exacerbated in these instances since the choice of one style or another as an authoritative exemplar of beauty is one that government may not make. Resolving the standards issue in this way presents an issue parallel to that faced by the Court in *Burnstyn*

The Meaning of Symbolic Expression Under the First Amendment, 21 UCLA L. REV. 29, 57-60 (1973) (describing the self-expression in symbolic speech hair regulation cases).

190. See, e.g., *Schad v. Borough of Mount Ephraim*, 101 S. Ct. 2176 (1981) (nude dancing or "live entertainment" generally); *Cohen v. California*, 403 U.S. 15 (1971) (jacket with inscription "Fuck the Draft").

191. See S. LANGER, *supra* note 130, at 402.

192. *Schad v. Borough of Mount Ephraim*, 101 S. Ct. 2176, 2182-83 (1981).

v. Wilson.¹⁹³ In *Burnstyn*, the Court invalidated a New York statute empowering a public board to ban "sacrilegious" films partly because the board construed that term by reference to the content that particular organized religions had ascribed to it. As Justice Frankfurter wrote in his concurring opinion:

History teaches us the indefiniteness of the concept "sacrilegious" in another respect. . . . In the Rome of the late emperors, the England of James I, . . . or any other country with a monolithic religion, the category of things sacred might have clearly definable limits. But in America the multiplicity of ideas of "sacredness," held with equal but conflicting fervor by the great number of religious groups makes the term "sacrilegious" too indefinite to satisfy constitutional demands based on reason and fairness.¹⁹⁴

If the term "ugly" is substituted for the term "sacrilegious," Justice Frankfurter's reasoning makes clear that the state cannot prefer Beaux Arts over Bauhaus or other styles simply because it believes that the former better exemplifies "beauty."¹⁹⁵

3. *Substantive Due Process*

The substantive due process test is generally satisfied in land use litigation if the challenged measure prevents a landowner from imposing some "harm," proscribed under the police power, upon his neighbors or upon the community as a whole.¹⁹⁶ When aesthetic regulations are challenged, this question requires an inquiry into the character of the harm that government precludes by mandating that development be beautiful or, at least, not ugly.

The response that beauty requires no justification beyond itself¹⁹⁷ may be summarily dismissed. Despite the broad presumption of validity that courts extend to police power measures challenged on substantive due process grounds,¹⁹⁸ government must point to *some* minimally plausible harm as the basis for its measure. Similarly, we may dismiss the claim derived from the moral theory of art ex-

193. 343 U.S. 495 (1952).

194. 343 U.S. at 528.

195. Whether or not the state may prefer *this or that particular Beaux Arts building* to a new entrant exemplifying another style is discussed in text at notes 322-86 *infra*.

196. See text at note 64 *supra*.

197. See text at note 115 *supra*.

198. This presumption has been accorded to land use legislation since *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-89 (1926). See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974); Kolis, *Architectural Expression: Police Power and the First Amendment*, 16 URB. L. ANN. 273, 283-84 (1979); Note, *supra* note 61, at 188-90.

pounded by Plato¹⁹⁹ and, later, by Tolstoy,²⁰⁰ which asserts in substance that bad art makes bad citizens and vice versa.²⁰¹ Nor will the contention that offenses to the eye may be proscribed as nuisances no less than offenses to the ear and nose be given further attention other than to repeat that it confuses physiological with aesthetic reasoning.²⁰²

Two claims do merit extended consideration, but they too are unpersuasive. The first, propounded by architectural propagandists and planning commission design review staffs,²⁰³ analogizes poorly designed buildings or urban design relationships to poorly designed consumer products. Under this reasoning, a "bad building" is viewed as comparable to a "bad automobile." But its proponents overlook that the term "design" may refer either to an object's visual qualities or to its fitness for its intended use.²⁰⁴ Consumer products that are poorly designed in the latter sense, of course, may be regulated under the police power to safeguard public health and safety. So too may buildings and urban design relationships, as the widespread adoption of nonaesthetic development control regulation attests. To be complete, however, the analogy requires proof that buildings and urban design relationships suffering from "bad" design in the former sense are likely to cause similar harms. Despite the repeated, often sweeping assertions to this effect in design literature,²⁰⁵ the linkage has not been demonstrated. A comprehensive

199. See PLATO, REPUBLIC 376-411 (I. Richards trans. 1966); PLATO, LAWS 800-02 (A. Taylor trans. 1934).

200. See L. TOLSTOY, *What is Art?*, in WHAT IS ART? AND ESSAYS ON ART 70 (A. Maude trans. 1932).

201. This view has been endorsed by such critics as John Ruskin, see P. COLLINS, *supra* note 145, at 109-10, who regards a society's architecture and urban design as measures both of its political health and of its citizens' civic virtue. It was praised by Hitler as well who was alert to the propagandistic purposes that official architectural styles can serve. See note 181 *supra*. Wholly apart from the obvious first amendment objections that attend the view, its metaphysical assertion of a linkage between art and civic virtue is simply too problematic to serve as a persuasive justification for aesthetic regulation. Indeed, Lewis Mumford takes a rather different view of the matter than Ruskin: "The more shaky the institution, the more solid the monument: repeatedly civilization has exemplified Patrick Geddes's dictum, that the perfection of the architectural form does not come till the institution sheltered by it is on the point of passing away." THE CULTURE OF CITIES, *supra* note 116, at 434.

202. See text at note 123 *supra*.

203. This contention has been most frequently voiced in interviews that the writer conducted in 1980 and 1981 with members of the urban design staffs of planning commissions in Boston, New York City, and San Francisco.

204. This distinction parallels that elaborated in this Article between the functional and nonfunctional associations of environmental features and settings. See text at notes 116-17 *supra*. The position advanced in text is not persuasive because it confuses the latter with the former type of associations.

205. Von Eckardt, for example, writes:

Ralph Nader has improved automobile safety. Adelle Davis and others who have spoken

review of the evidence concerning the linkage thesis, which is termed "biotechnical determinism" by social scientists, led one respected commentator to conclude that "[i]t is nonsense, . . . to think of direct, causal connexions between built form and human behavior except at the grossest physiological level."²⁰⁶

The second claim asserts that beauty's preservation maintains or increases property values.²⁰⁷ Strictly speaking, its discussion is inappropriate in a critique of the visual beauty rationale, which the mod-

and written about food have, without doubt . . . made people aware of the ill effects of edible junk. There has been no similarly sustained effort to inform and educate the public about the effect of junk building and urban design on their lives.

W. VON ECKARDT, *supra* note 84, at 91. Although she acknowledges that "[t]here is no such thing as simple environmental determinism," Ada Louise Huxtable asserts:

A great deal of irreparable damage can be done to the complex human psyche, and even to patterns of behavior, by bad building. Non-neighborhoods that are the amenity-less residue of speculative greed reinforce the sense of worthlessness of those who cannot escape. You can create desolate wastelands of the spirit as well as of the environment. You can scar people as well as land.

But these are value judgments that social scientists shun. Fortunately environmentalists go where scientists fear to tread.

A. HUXTABLE, *supra* note 31, at 50.

The question for this Article is whether or not the law should go there as well. If by "bad building," Huxtable means bad design in the second of the senses in the text, the answer, I believe, should be yes. The assertion of a relationship between such design and community well-being is plausible from the perspective of legal epistemology, however problematic it may be for the social sciences. See note 206 *infra*. But if she intends bad design in the second sense, *i.e.*, a violation of purportedly authoritative canons of aesthetic formalism, her injunction is difficult to defend notwithstanding legal epistemology's more relaxed standards. Not even minimal evidence has been forthcoming to support that position, which, as argued throughout this Article, is based on a false question in any event.

206. G. BROADBENT, *supra* note 130, at 172. The consensus is clear in the social science literature dealing with the relationship between the built and natural environments and human behavior that a simplistic cause-and-effect analysis that ignores the role of culture and other variables inadequately explains the influence of *functional* design, let alone nonfunctional design, on human behavior. See, *e.g.*, H. GANS, *supra* note 20; Broady, *Social Theory in Architectural Design*, Cassel, *Health Consequences of Population Density and Crowding*, Gutman, *The Questions Architects Ask*, Rapoport & Watson, *Cultural Variability in Physical Standards*, in PEOPLE AND BUILDINGS, *supra* note 117, at 170, 249, 337, & 33 respectively.

While his language is harsher perhaps than the other evaluators of the biotechnical determinism thesis advanced by architectural propagandists and many design critics, Broady nonetheless represents their common position in his observation that

at times, one stands aghast at the naïvete, the sheer lack of intellectual discipline which often marks the enthusiastic designer's confrontation with social theory. Perhaps one ought not to worry about all this hot air: for it may not be taken seriously even by its exponents. Indeed, it sometimes seems to be used not so much to guide design as to bolster morale and to add a patina of words to ideas intuitively conceived. In the end, however, one *must* be concerned. For phoney social theory is likely to produce phoney expectations and spurious designs. It may equally hinder effective collaboration between social scientists and designers and inhibit the development of more valid ideas about the relationship between architectural design and social structure.

Broady, *supra*, at 171 (emphasis in original).

Compare S. FREUD, CIVILIZATION AND ITS DISCONTENTS 29-30 (J. Strachey trans. & ed. 1961): "[T]he science of aesthetics investigates the conditions under which things are beautiful, but it has been unable to give any explanation of the nature and origin of beauty, and as usually happens, lack of success is concealed beneath a flood of resounding and empty words."

207. See text at note 51 *supra*.

ern period courts purportedly endorse, because the claim is a throwback to the supposedly discredited reasoning of the middle period courts. Unlike other commentators, however, I believe that the sharp line drawn between the views of the two periods is largely fictitious. Once it is acknowledged that substantive due process and first amendment strictures require a justification for aesthetic regulation beyond the pursuit of beauty *per se*, the "solely for aesthetics" language of the modern period becomes unsupportable. By identifying benefits other than visual beauty as a basis for upholding aesthetic measures²⁰⁸ or asserting that these measures must be "related if only generally to the economic and cultural setting of the regulating community,"²⁰⁹ modern period judges behave much as their middle period predecessors did.

In truth, the relationship between aesthetic regulation and property values is extremely variable. Reliable evidence indicates that aesthetic regulation can stabilize or increase property values under certain circumstances, as for example, the designation as a historic district of a neighborhood undergoing gentrification or already gentrified.²¹⁰ But preservation restrictions can work the other way as well. Depending on the building in question, landmark designation can severely reduce its value and its concomitant tax yields.²¹¹ Aesthetically based land use measures can freeze development at a level that falls well short of land's optimum economic use, as Walter Firey has documented in his study of land value and land use patterns in Boston's Beacon Hill and Back Bay areas.²¹² In many instances, moreover, the impact of an aesthetic measure on land values is sim-

208. See, e.g., *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 858, 610 P.2d 407, 411, 164 Cal. Rptr. 510, 514 (1980), *revd. on other grounds*, 101 S. Ct. 2882 (1981) (billboard ban serves traffic safety and visual beauty goals); *People v. Stover*, 12 N.Y.2d 462, 466, 191 N.E.2d 272, 274, 240 N.Y.S.2d 734, 737 (clotheslines ban serves property value maintenance and visual beauty goals), *appeal dismissed*, 375 U.S. 42 (1963).

209. *Cromwell v. Ferrier*, 19 N.Y.2d 263, 269, 225 N.E.2d 749, 753, 279 N.Y.S.2d 22, 27 (1967).

The term "cultural" is as critical as the term "economic" in the quoted phrase because it connotes values that can no more be comprehended under the visual beauty interest than can economic values. The argument of this Article, of course, is that the "cultural" values promoted by aesthetic regulation are those embraced by the cultural stability interest. See Parts IV & V *infra*.

Other "solely for aesthetics" opinions that refer to the promotion of cultural values as a valid governmental end include, e.g., *Sun Oil Co. v. City of Madison Heights*, 41 Mich. App. 47, 53-54, 199 N.W. 525, 529 (1972); *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 216, 258 S.E.2d 444, 450 (1979); *Oregon City v. Hartke*, 249 Or. 35, 47, 400 P.2d 255, 261 (1965).

210. See ADVISORY COUNCIL ON HISTORIC PRESERVATION, *THE CONTRIBUTION OF HISTORIC PRESERVATION TO URBAN REVITALIZATION* (1979).

211. See J. COSTONIS, *SPACE ADRIFT*, *supra* note 5, at 65-68.

212. See W. FIREY, *LAND USE IN CENTRAL BOSTON* (1947).

ply indeterminate.²¹³

Judicial evaluation of the relationship between aesthetics and property value also calls into question the supposed necessity of their covariance. Despite the generous lip service given to property values in the opinions, judicial efforts to verify this covariance in the record are perfunctory at best.²¹⁴ More to the point, numerous courts have expressed their willingness to sustain aesthetic measures notwithstanding their recognition that the measures may *reduce* the value of affected property or *hinder* the economic welfare of the community as a whole.²¹⁵

These brief observations confirm Norman Williams's judgment that judicial attempts to support aesthetic regulation by means of the property values argument are a product of "muddled thinking," which will "hardly . . . stand under critical analysis."²¹⁶

Although the modern period courts have not rejected aesthetic regulation on substantive due process grounds,²¹⁷ first amendment challenges furnish a context in which the defenses' flimsiness is likely to prove fatal. Long ignored in aesthetic jurisprudence,²¹⁸ the amendment's potential disciplining influence upon aesthetic policy-making has begun to surface in such recent Supreme Court opinions as *Young v. American Mini Theatres*,²¹⁹ *Metromedia, Inc. v. City of San Diego*,²²⁰ and *Schad v. Borough of Mount Ephraim*.²²¹ These opinions signal that the Court now regards aesthetic regulation as no more immune to the exacting scrutiny mandated by its first amend-

213. An apt example is the impact on land values of a billboard ban in commercial and industrial areas. See *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 10, 198 A.2d 447, 452 (1964) (Hall, J., dissenting) (since the impact is likely to be negligible at best, billboard ban must be sustained on the basis of a "solely for aesthetics" rationale).

214. See, e.g., *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964); *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74 (1963); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955).

215. See, e.g., *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 190-91, 193 N.E. 799, 818 (1935); *Oregon City v. Hartke*, 249 Or. 35, 50, 400 P.2d 255, 263 (1965).

216. 3 N. WILLIAMS, *supra* note 39, at § 71.18.

217. This outcome owes a good deal less to the defenses' merits than to the generic reluctance of those courts to second guess the "wisdom" of legislative judgments. See note 198 *supra*.

218. Prior to the trilogy of Supreme Court opinions cited in notes 219-21 *infra*, the issue was addressed in *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963), which sustained the conviction of a property owner who, in violation of a ban against clotheslines in front yards, had strung his front yard clothesline with tattered rags and undergarments to protest what he believed were unduly high real estate taxes.

219. 427 U.S. 50 (1976).

220. 101 S. Ct. 2882 (1981).

221. 101 S. Ct. 2882 (1981).

ment jurisprudence than any other type of legislative measure that restricts expression whose content is deemed "offensive" by the state.²²² If the property values and "bad" design arguments are shaky under the looser substantive due process test, their prospects for survival lessen when exposed to the much harder look demanded by the first amendment.

IV. STABILITY-IDENTITY NEEDS AS AESTHETIC REGULATION'S SOCIAL IMPETUS

A. *Summary of the Cultural Stability Hypothesis*

Cultural stability and individual, group, and community identity are reciprocal values whose relationship is mediated by social institutions — the loci of shared values that constitute societies' integrated entities rather than loose collections of individuals pursuing the fulfillment of their biological drives.²²³ Family, religion, education, language, and government, for example, manifest and reinforce values that orient the lives of individuals and groups. When rapid or fundamental changes threaten these institutions, society itself risks disintegration because the institutional clasps that hold it together may fail.²²⁴ Thus, society may seek to block the changes or to absorb them, permitting only interstitial modifications in the matrix of values that define its contours.²²⁵ If unable to do either, society will no longer continue as the distinctive entity it formerly had been, and it may disintegrate altogether.²²⁶

By virtue of its semiotic properties, the environment also plays a socially integrative and, hence, identity-nurturing role. Writers, painters, poets, and other artists have intuited and exemplified this fact in their work throughout recorded time.²²⁷ Among social scientists, no one has detailed it as well as Lewis Mumford,²²⁸ who describes the city as "both a physical utility for collective living and a symbol of those collective purposes and unanimities that rise under such favored circumstances."²²⁹ In addition to its utilitarian and

222. See Part V (C) *infra*.

223. See P. BERGER & T. LUCKMANN, *supra* note 4, at 45-50.

224. *Id.* at 90-91.

225. *Id.* at 103-18. Berger and Luckmann refer to these responses as "universe-maintenance" devices. *Id.* at 96, 104.

226. *Id.* at 103.

227. See Russell, *How Art Makes Us Feel at Home in the World*, N.Y. Times, Apr. 12, 1981, § 2, at 1, col. 1.

228. See, e.g., L. MUMFORD, *THE CITY IN HISTORY*, *supra* note 116; L. MUMFORD, *CITY DEVELOPMENT* (1945); *THE CULTURE OF CITIES*, *supra* note 116.

229. *THE CULTURE OF CITIES*, *supra* note 116, at 5.

mute physical aspects, therefore, the environment is a *visual commons* impregnated with meanings and associations that fulfill individual and group needs for identity confirmation. "Identity remains unintelligible unless it is located in a world,"²³⁰ and the environment as a network of socially determined meanings is a visible, relatively permanent component of that world.

These general observations allow us to weave into a unified pattern the various strands of the cultural stability hypothesis adverted to earlier. Preservation of identity and cultural stability is a key determinant of individual and social behavior. Among the many forces that shape these reciprocal values are the "existing resources" in the prototypical format of aesthetic controversies. Like environmental phenomena generally, their import is functional. But existing resources differ from other environmental phenomena because their import is usually much richer in associations that transform them into sources of orientation — "landmarks," if you will — in the emotional and cognitive lives of individuals, groups, and entire communities. "New entrants" may imperil a correlative existing resource, thereby threatening the individuals, groups, or communities bonded to it by associational clasps. The threat materializes in the form of the destruction or alteration of the physical resource, but what shocks its constituencies is the concomitant loss or contamination of the network of meanings — spatially referred values — that it has come to embody for them over time. Their compulsion to blunt or eliminate such threats provides the social impetus for aesthetic policy. Their expectation is that these measures will either ban the new entrant, thereby precluding the harm altogether, or ensure that the new entrant will be as associationally congruent as public intervention can make it.

The cultural stability hypothesis views controversies about "beauty" as surrogates for disagreements about environmental change itself. Aesthetic policy, therefore, serves a role in the social system similar to that which homeostatic mechanisms serve in the human body.²³¹ Physical well-being requires the maintenance of

230. P. BERGER & T. LUCKMANN, *supra* note 4, at 174.

231. For use of this concept in the social sciences, see, e.g., C. ALEXANDER, NOTES ON THE SYNTHESIS OF FORM ch. 5 (1964); E. GOMBRICH, *supra* note 130, at 195-216; P. MARRIS, LOSS AND CHANGE ch. 1 (1974).

The homeostatic function of aesthetic regulation has been recognized in numerous judicial opinions. Perhaps the clearest expression of this recognition is found in *Sun Oil Co. v. City of Madison Heights*, 41 Mich. App. 47, 53-54, 199 N.W.2d 525, 529 (1972), in which the court sustained a sign ordinance, observing:

The modern trend is to recognize that a community's aesthetic well-being can contribute to urban man's psychological and emotional stability. . . . We should begin to realize

certain biological constancies within the body. When they are imperiled, biological indicators signal the danger, and corrective agencies swing into action to prevent or minimize the disturbance. Likewise, individuals and groups must cope with threats to their personal and social identity and, hence, to cultural stability when new entrants imperil existing resources. What they seek when they press aesthetic demands upon governmental policy-makers are measures that will function, in essence, as socially homeostatic devices. From their perspective, the goal of these measures is to regulate the pace and character of environmental change in a manner that precludes or mitigates damage to their identity, a constancy no less critical to social stability than biological constants are to the human body's physiological equilibrium.

B. *Stability-Identity Nexus Between Existing Resources and No-Change Constituencies*

The environment has long been viewed as a mute spatial framework for utilitarian, economic behavior,²³² and scholars have attempted to rationalize public land use controls in terms of economic "externalities."²³³ One can concede — indeed even applaud — the

. . . that a visually satisfying city can stimulate an identity and pride which is the foundation for social responsibility and citizenship.

In *Commissioner v. Benenson*, 329 A.2d 437, 441-42 (D.C. 1974), which addressed the validity of a demolition permit issued for the Willard Hotel, a National Register of Historic Places entrant, the court noted that the "[r]etention of fine architecture, especially in the capital city of a relatively young country such as ours, lends a certain stability and cultural continuity, which can only contribute over the years to national substance." Likewise, in a dissenting opinion arguing that no "public use" supported Detroit's action in acquiring through eminent domain its Poletown neighborhood for sale to General Motors, a Michigan Supreme Court justice objected that the city

chose to march in fast lock-step with General Motors to carve a "green field" out of an urban setting which ultimately required sweeping away a tightly-knit residential enclave of first- and second-generation Americans, for many of whom their home was their single most valuable and cherished asset and their stable ethnic neighborhood *the unchanging symbol of the security and quality of their lives*.

Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 658, 304 N.W.2d 455, 470 (1981) (Ryan, J., dissenting) (emphasis added). Compare this view with text at notes 9 & 20 *supra*. New Jersey's highest court has commented in another billboard case that "[t]he development and preservation of natural resources and clean, salubrious neighborhoods contribute to psychological and emotional stability and well-being as well as stimulate a sense of civic pride." *State v. Miller*, 83 N.J. 402, 409, 416 A.2d 821, 824 (1980). See also *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 185-86, 193 N.E. 799, 815-16 (1935); *Parker v. Commonwealth*, 178 Mass. 199, 203, 59 N.E. 634, 635 (1901); *Westfield Motor Sales Co. v. Town of Westfield*, 129 N.J. Super. 528, 541, 324 A.2d 113, 120-21 (1974).

232. See generally W. FIREY, *supra* note 212; R. NELSON, *supra* note 22.

233. The increasing utilization of economic methodologies and doctrines as a tool of policy analysis in law, see, e.g., G. CALABRESI & P. BOBBIT, *TRAGIC CHOICES* (1978); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Coase, *The Prob-*

utility of such analysis for policy-making but condemn the implication that it preempts other types of analyses. This implication is particularly troubling if economic analysis omits or distorts factors that are demonstrably relevant in aesthetic policy-making. To support this Article's claim that other factors are relevant, we must establish both that individual and group identity are vitally linked to the environment's symbolic import and that this linkage, which Donald Appleyard succinctly portrays as "the sense of self in a place,"²³⁴ aids in explaining why community groups clamor for aesthetic regulation and what they expect from it.

Consistent with the homeostasis metaphor, the factual case centers on how crisis and change affect the associational bonds between people and places. These bonds, for example, cause immigrants and pioneers to name their new environments with the names of the old to achieve continuity in their communal and cultural lives. When cities are destroyed by catastrophe, their citizens move quickly to restore them, as Londoners and Chicagoans did after fires ravaged their cities in 1669 and 1871. Following World War II, the Poles' painstaking restoration of Old Warsaw and the venerable quarters of other Polish cities drained their national treasury and delayed the reconstruction of their war-torn economy. Such compulsive rebuilding undergirds Kevin Lynch's observations that the environment is a "vast mnemonic system for the retention of group history and ideals,"²³⁵ and that "[a]fter a catastrophe, the restoration of the symbolic center of community life is a matter of urgency [owing to the power of the] symbolic environment . . . to create a sense of stability"²³⁶ The loss of a landmark is often experienced by those bonded to it as the loss of a beloved friend, prompting Norma Even-son's comment that buildings, like cities, "are a projection of the human mind and spirit; they are part of human experience. They can be loved; they have a kind of life, and when they are destroyed it

lem of Social Cost, 3 J.L. & ECON. 1 (1960), has encouraged a corresponding expansion of economics-based analysis of land use regulation. See, e.g., Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Krier & Montgomery, *Resource Allocation, Information Cost and the Form of Governmental Intervention*, 13 NAT. RESOURCES J. 89 (1973); Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299 (1977); Siegan, *Non-Zoning in Houston*, 13 J. L. & ECON. 71 (1970). For a recent discussion of the relevance of economic analysis to land use and environmental policy making, see *Symposium: Economic Analysis in the Teaching of Land Use and Environmental Law*, 1 UCLA J. ENVTL. L. & POLY. (1980).

234. Appleyard, *supra* note 116, at 152.

235. K. LYNCH, *supra* note 116, at 126.

236. K. LYNCH, *WHAT TIME IS THIS PLACE?* 40 (1972).

is a kind of death.”²³⁷

The uprooting and relocation of residents of urban renewal areas is another crisis whose effects evidence the powerful ties that bind people to places. After Boston's West Enders were displaced by the clearance of their “slum,” they reportedly experienced an acute “grief reaction.”²³⁸ Among its elements were “feelings of painful loss,” “continued longing,” a “general depressive tone,” “frequent symptoms of psychological or somatic stress,” a “sense of helplessness,” and “tendencies to idealize the lost place.”²³⁹ Accounts of the uprooting of residents from ramshackle sections of Nigerian cities²⁴⁰ and from Rio de Janeiro's *favelas*²⁴¹ attribute similar feelings of bereavement to the loss of identity resulting largely from destruction of the identity-nurturing network of meanings that the displacees had associated with their homes. In light of these findings, it is difficult to quibble with Donald Appleyard's observation that “[t]he home environment, as it evolves with the modifications and adaptations that we make on it, becomes in some sense a *part of ourselves*.”²⁴² Appleyard concludes:

[T]echnical planning and environmental decisions are not only value-based, . . . but identity-based. . . . [P]hysical planning decisions can, and frequently do, threaten the identity and status of certain groups while enlarging the powers of others The environment is divided into “ours” and “theirs;” the trees may be ours, the billboards theirs, the authentic is ours, the phony theirs, downtown may be ours or theirs, as may be the wilderness, the oil, or other natural resources. The city and the natural environment are arenas of symbolic social conflicts and as such raise their own issues of social justice.²⁴³

Revolution and protest, two of the most turbulent expressions of social change, reveal that the associations that places have for people can evoke hatred, disgust, and shame, as well as affection. In 1871, the Communards burned the Tuileries Palace and toppled the Column of the Place Vendôme to vent their rage at France's Royalist

237. N. EVENSON, *supra* note 84, at 124.

238. See Fried, *Grieving for a Lost Home*, in PEOPLE AND BUILDINGS, *supra* note 117, at 233.

239. *Id.* at 230.

240. See P. MARRIS, *supra* note 231, at 43-58.

241. J. PERLMAN, THE MYTH OF MARGINALITY 195-212 (1976).

242. Appleyard, *supra* note 116, at 151 (emphasis added).

Consistent with Appleyard's observation is the attitude of its residents toward the South Bronx, portrayed as the most notorious symbol of the nation's urban ills by two American presidents as well as in the motion picture *Fort Apache*. The residents offer a dissenting perspective in their retort: *They Call It Fort Apache; We Call It Home*, Village Voice, Feb. 11, 1981, at 1, col. 1.

243. *Id.* at 152.

past.²⁴⁴ In 1980, hordes of disaffected young Swiss, known simply as "Movement," attacked the Zurich Opera House after a \$38 million restoration plan was unveiled.²⁴⁵ As they smashed its ornate windows, they shrieked, "Everything for them, nothing for us!", "Money for rock 'n' roll!" and "Down with the theater of the elite!"²⁴⁶ "Movement wants to tear down the opera house," commented one observer, "[because] it sees [it] as a symbol of everything that is wrong in Switzerland."²⁴⁷

Discomfort with the associations of a building or setting may also cause people to oppose its preservation. In the 1930s, Parisians bitterly debated whether the Saint Germain Quarter should be preserved or leveled. One passionate opponent of preservation cried:

What crimes, history, one commits in your name. One ought, at least, to distinguish among the memories it leaves us. There are some it is better to forget. It is impossible to traverse the narrow streets which go from the Quai de Conti to the old abbey of Saint Germain de Prés without seeing again the horrible days of the revolution of which they were the theater, where the walls themselves have retained the cries of the victims of September, and where . . . blood flowed like a river.²⁴⁸

More recently, New Yorkers found themselves ambivalent about honoring the Tweed Courthouse with landmark status since its construction added millions in boodle to the pockets of Boss Tweed and his cronies.²⁴⁹

Usually, however, time so mesmerizes later generations that they preserve even distinctive settings and places whose associations clash openly with current political, social or moral beliefs. The Indonesians, for example, have worshipfully maintained the colonial houses of their former Dutch rulers; the Soviets do the same with the palaces and churches, not to mention the ballet and music, of Czarist Russia. Significantly, the Tweed Courthouse was eventually designated. Perhaps it is the rosy haze of time that explains why so many former warehouses are landmarks in this country.

New entrants may be rich in symbolic import, but they do not stand on the same footing as existing resources because they have not marinated as long in their viewers' consciousness and feelings. Accordingly, whether community groups will scorn a new entrant, as

244. See N. EVENSON, *supra* note 84, at 9.

245. See Copetas, *Trashtime for Zurich*, *ESQUIRE*, July 1981, at 44.

246. *Id.* at 46-47.

247. *Id.* at 50.

248. N. EVENSON, *supra* note 84, at 69 (quoting Mènebrèa, *Les Enseignements du Vieux Pont Neuf*, *URBANISME*, Nov.-Dec. 1932, at 226).

249. See A. HUXTABLE, *supra* note 31, at 266-69.

the Committee of Three Hundred did the Eiffel Tower, depends on whether they experience its associations as harmonious or dissonant with those of its correlative existing resource. Recall that the Committee's objection to the Tower was stated in its question: "Is Paris *going to be associated with* the grotesque mercantile imaginings of a constructor of machines . . . ?"²⁵⁰

C. *Current Legal-Aesthetic Theory's Dilemmas Revisited*

Because visual beauty-based aesthetic theory starts with the wrong question, it becomes mired in dilemmas that it can resolve only partially or not at all. The proper question is not the one it asks — "What is beauty?" — but the one posed by stability reasoning — "Why do environmental resources ground aesthetic responses that, in turn, give rise to the pleasurable emotions connoted by the term beauty?" As a concept, beauty affords no answer to this question. However, stability reasoning does, positing that these emotions are grounded, first, in cultural stability-identity bonds between existing resources and their constituencies, and, second, in the judgment that proposed new entrants and existing resources will be associationally harmonious. Given these premises, stability reasoning demonstrates that the dilemmas of visual beauty reasoning are preordained by its conceptual incoherency.

1. *Standards Dilemma*

To illustrate, the visual beauty rationale's search for standards, defined as objective canons of aesthetic formalism, is both unnecessary and futile. Associational harmony,²⁵¹ not visual beauty, is what

250. See N. EVENSON, *supra* note 84, at 132 (emphasis added).

251. The associationist theory of beauty, *i.e.*, the position that objects are often defined as beautiful on the basis of associations that viewers have with them that are not necessarily related to the object's formal aesthetic qualities, has received the attention of psychologists, sociologists, and social commentators for at least two centuries. The most thoughtful British exponent of the theory is A. ALLISON, *ESSAYS ON THE NATURE AND PRINCIPLES OF TASTE* (6th ed. Edinburgh 1827) (1st ed. Edinburgh 1790), whose approach, Beardsley comments, "represents an abandonment of the persistent attempt to discover a neat formula for the perceptual conditions of beauty, and opens up the possibility of an indefinite range of beauties." M. BEARDSLEY, *supra* note 141, at 204. Thorstein Veblen relied on an associationist linkage between "beauty" and "conspicuous consumption" in penning a devastating attack on the artistic and architectural preferences of the wealthy classes of his time. For his architectural analysis, which describes "the fronts presented by the better class of tenements and apartment houses in our cities . . ." as "an endless variety of architectural distress and of suggestions of expensive discomfort" and concludes that "[c]onsidered as objects of beauty, the dead walls on the sides and back of these structures, left untouched by the hands of the artist, are commonly the best feature of the building," see T. VEBLÉN, *THE THEORY OF THE LEISURE CLASS* 154 (1912). Herbert Gans's study of taste formation, see H. GANS, *POPULAR CULTURE AND HIGH CULTURE* (1974), also employs associationist theory as a basis for linking particular aesthetic preferences with what he terms specific "taste publics." Whether or not the associationist theory

community groups primarily seek from aesthetic regulation, and standards of aesthetic formalism cannot be authoritatively rendered as objective, ontologically based "laws." Similarly misconceived are the premises that aesthetic regulation's standards must be as refined as those of the museum, and that their object is to create a beautiful environment. Instead, these standards are derived — or should be derived — from a profile of the characteristics of the existing resource that have generated the associational bonds between it and its constituencies. These standards are derivative rather than creative in nature, and they typically deal with the broader constancies of urban and natural form, not with their details.²⁵²

The error of basing standards on sensory or physiological factors is equally apparent. While physiological factors play a role in how community groups experience existing resources and new entrants, so too do the intellects and feelings of the groups' members. Once intellects and feelings are acknowledged, however, it is impossible to deny that aesthetic response is necessarily subjective, in that responses are shaped by time, culture, habituation, and personal history.

Visual beauty reasoning's semantic fallacy also results from the false question with which it begins. One of its versions predicates beauty on the visual form of an environmental resource considered as an isolated work of art; the second, on that form in relation to the visual form of the other resources within the protected resource's perceptual field. The first version impossibly burdens the standards-setter. Even if beauty could be accounted for by formal rules of proportion, color, line, and interval, the possible combinations of these elements are infinite.²⁵³ How can the standards-setter hope to categorize them, let alone to select which among them are beautiful and which are not? The number of possible combinations is reduced under the second version, but the range of possible choices remains large, as illustrated by the challenge of fixing standards that ensure the "beauty" of the Manhattan skyline.

Because stability reasoning dispenses with idealized visions of beauty, it reduces drastically the number of possible choices. It begins by taking specific existing resources as the framework for con-

adequately explains "museum aesthetics" is a question on which I have been deliberately silent because "museum" and "legal aesthetics" raise entirely different issues, in my judgment.

252. See text at notes 294-95 *infra*.

253. See E. GOMBRICH, *supra* note 130, at 72-73; cf. C. ALEXANDER, *supra* note 231, at 22-27 (asserting that the search for a "good fit," *i.e.*, ideal forum, is highlighted by the infinite possibilities of incongruity in size and color).

trols on correlative new entrants. That framework is further narrowed by focusing on those of the existing resource's visual characteristics that ground the associations that caused it to be selected for preservation.²⁵⁴ Had these steps been followed in the Rice Mansion dispute, they would have indicated a straightforward and manageable solution: namely, revising the West Side's zoning to ensure that, within reasonable margins, new entrants respect the neighborhood's prevailing bulk, height, and scale relationships, as the proposed thirty-story tower obviously did not do.

The special case of landmarks and historic districts is consistent with the view that aesthetic regulation's standards are association-

254. Professor Alexander offers a parallel analysis and approach in his treatment of the terms "fitness" and "unfitness" as they bear on design, functionally defined. See C. ALEXANDER, *supra* note 231, at 22-30. He posits that good design or, as he puts it, "good fit," can never be defined abstractly or positively because the variables bearing on it are infinite. See *id.* at 24-25. But it can be negatively defined by identifying the elements that fit or fail to fit with the context in which the design problem arises. See *id.* at 22. Whether a design is a fit or a misfit, therefore, can be determined by evaluating its congruency with the context in which it will function. See *id.* at 26. He notes that "even in everyday life the concept of good fit, though positive in meaning, seems very largely to feed on negative instances; it is the aspects of our lives which are . . . incongruous . . . or out of tune that catch our attention." *Id.* at 22.

Much the same can be said about the "design problem" that aesthetic regulation poses if nonfunctional design is substituted for Alexander's functional design and the terms "beautiful" and "ugly," for "fitness" and "unfitness." Aesthetic regulation cannot define beauty abstractly or affirmatively. See text at notes 128-79 *supra*. Rather, the "beauty" of an existing resource is a societal given established by the bonds that have evolved over time between the resource's nonfunctional associations and community groups. Once selected for protection, the existing resource becomes the context against which harmony or dissonance is determined, a process for which beauty in the abstract is superfluous. Absent the existing resource as context and the concept of dissonance as the pertinent yardstick, aesthetic regulation would be impossible because, to quote Alexander, the law would be "searching for some kind of harmony between two intangibles: a form [in fact provided by the new entrant] which we have not yet designed, and a context [in fact provided by the existing resource] which we cannot properly describe." C. ALEXANDER, *supra* note 231, at 26.

Practical confirmation of this analysis is found both in the standards that aesthetic measures employ to regulate new entrants and in the manner in which challenges to specific aesthetic programs are frequently framed. Standards regulating new entrants are invariably derived from a profile of the visual qualities of the existing resource. See, e.g., *Maher v. City of New Orleans*, 516 F.2d 1051, 1062-63 (5th Cir. 1975) (Creole architectural style of French Quarter), *cert. denied*, 426 U.S. 905 (1976); *La Salle Natl. Bank v. City of Evanston*, 57 Ill. App. 2d 415, 432, 312 N.E.2d 625, 634 (1974) (tapered silhouette of skyline running from Evanston's downtown to its Lake Michigan shorefront). Litigation challenging bans on new entrants frequently features the claim that the existing resource has no discernible character, *i.e.*, provides no context, against which the new entrant's harmony or dissonance may be assessed. See, e.g., *Metromedia, Inc. v. City of San Diego*, 101 S. Ct. 2882, 2893-94 (1981) (billboards not incompatible with commercial and industrial districts because the latter lack a character with which the billboards can arguably be said to clash); *Hankins v. Borough of Rockleigh*, 55 N.J. Super. 132, 136-38, 150 A.2d 63, 67 (1959) (ordinance intended to preserve "Early American" character of borough irrational because over half of existing buildings are not of that character); *cf.* *Hanly v. Kleindienst*, 471 F.2d 823, 831 (2d Cir. 1972) (detention facility not incompatible with a high-density commercial apartment area) ("Absent some showing that an entire neighborhood is in the process of redevelopment, its existing environment, though frequently below an ideal standard, represents a norm that cannot be ignored."), *cert. denied*, 412 U.S. 908 (1973).

rather than beauty-based. Visual beauty reasoning fails to explain the apparent anomaly that many landmarks and historic districts are not described as beautiful by their supporters.²⁵⁵ Stability reasoning explains not only their designation but also the designation of others that exemplify the canons of past traditions of aesthetic formalism. Underlying these designations are associational bonds between the resource and community groups. The Chicago Water Tower, for example, was the sole survivor of the Great Fire of 1871 in its area; Chicagoans esteem it as a symbol of the City's triumph over that catastrophe. Likewise, most New Yorkers treasure the "architectural melange" of the Greenwich Village Historic District not for the melange as such, but for the Village's indelible associations as the center of bohemian artistic life in America.

Landmarks and historic districts exemplifying traditional styles are designated because these styles are sources of associations that go back for generations or centuries, offering the fullest play for imagination, fantasy, and specious romanticism. Walter Kidney's study of eclecticism in American architecture from 1880 to 1930 supports this conclusion: He attributes the readiness of Americans to build in the motifs of past styles not only to their belief that these styles are "beautiful," but also to the fact that they are "*freighted with historical associations that every cultured person was familiar with.*"²⁵⁶ "When style was thus determined," he continues in a wonderfully evocative passage,

a house was usually Georgian, Tudor, or Cotswold (Anglo-Saxon home atmosphere), unless it was a mansion and intended to look like one, in which case it might have been Jacobean or one of the Louis (aristocracy of wealth). A church — if not colonial — would, for an old and ritualistic sect, be Gothic (Christian heritage); if it was for some new sect, like the Christian Scientists, it might be decently but noncommittally wrapped in something classical. A synagogue, in the absence of a true Hebraic architecture, was usually Byzantine or Moorish. . . . A school was Tudor or Jacobean (Oxford, Eton). A theater was either Louis XV (courtly diversions) or — especially if a movie house — something utterly fantastic, with some sort of high-pressure Mediterranean Baroque providing the norm (palace of illusions). For the center city, classicism was long the near-universal solution; a cluster of styles, rather than a single style, it clothed the museum, the library, the memorial structure in cool eternal beauty, but broke into rustications, ressauts, and swags, giant orders and Renaissance cornices for the more worldly office buildings, the bank, the apartment house,

255. See text at note 167 *supra*.

256. W. KIDNEY, *supra* note 116, at 2 (emphasis added).

the theater, the clubhouse, and the town mansion²⁵⁷

A better core catalogue of the types of buildings now on the agenda of every historic preservation commission in America cannot be found.

2. *Social Interest Dilemma*

What is the social harm that aesthetic regulation seeks to prevent? Visual beauty reasoning either provides no response or, by addressing itself to the creation or preservation of a visually beautiful environment, misconceives aesthetic regulation's purpose. Stability reasoning, on the other hand, locates that response in the preservation of the reciprocal values of cultural stability and identity. Additionally, stability reasoning furnishes a basis for linking its response to aesthetic regulation's "secondary effects." Both the middle and modern period courts recognized that aesthetic regulation is not unrelated to other police power objectives such as property value maintenance, increased tourism, and prevention of neighborhood deterioration.²⁵⁸ But the middle period courts went astray by claiming that aesthetic regulation invariably produces these effects even though the constancy of the claimed relationship is by no means guaranteed.²⁵⁹ Stability reasoning takes a different tack by distinguishing between the preservation of cultural stability and identity as aesthetic regulation's primary social impetus and these secondary effects as its probable, but not inevitable, concomitants.

3. *Aesthetic v. Land Use-Environmental Regulation Dilemma*

Visual beauty reasoning sharply distinguishes between aesthetic and land use-environmental regulation because pursuit of visual beauty bears no apparent relation to the goal conventionally ascribed to the latter pair — preventing physical or economic harms resulting from proposed development's negative externalities. But this distinction is not so sharp. Both types of regulation are manipulated by contending groups to control the pace and character of environmental change. Measures deemed "aesthetic" by the courts, moreover, are often clothed in traditional land use and environmental garb. The Supreme Court, for example, has applied this label to urban renewal,²⁶⁰ zoning to control the location of pornographic the-

257. *Id.*

258. See text at notes 51 & 208-09 *supra*.

259. See text at notes 207-16 *supra*.

260. See *Berman v. Parker*, 348 U.S. 26 (1954).

aters²⁶¹ or of live nude dancing,²⁶² and environmental measures ostensibly addressed to ecological goals.²⁶³ Conversely, the Advisory Council on Historic Preservation has lauded preservation for its role in controlling crime, furthering energy conservation, stabilizing property values, and revitalizing neighborhoods.²⁶⁴ In addition, the Court has taken the dramatic step of merging the two types of regulation under the single "quality of life" banner.²⁶⁵

These developments cannot be satisfactorily explained by visual beauty reasoning or by traditional externalities analysis. By distinguishing between nonfunctional and functional associations, on the other hand, stability reasoning illuminates why they have occurred and why it is difficult to untangle the two types of regulation. In its purest form, aesthetic regulation is called into being by the nonfunctional associations of resources. The Water Tower was designated as a landmark because it symbolizes Chicago's survival, not because it is a waterworks. Nonaesthetic land use and environmental regulation in its purest form deals with a resource's functions and its functional associations. The high-rise is zoned out of the low-scale neighborhood because it will overload roads and sewers, not because it is an "ant heap," "megalith," or an "East Side building."

But "pure" forms of anything are seldom encountered in nature and even less so in a reality of social constructs. Even if policy-makers might wish to do so, it is virtually impossible to regulate the environment based on functions and functional associations without impinging on nonfunctional associations as well. The wedding cake form of New York City's pre-1961 zoning, for example, is a product of its planners' efforts to bring more light and air to the streets. It does not derive from a mystical attachment to the ziggurat. As any tourist poster of the city illustrates, however, nothing characterizes its visual-associational image more than its ziggurat-punctured skyline. The converse is true as well. Preserving the Rice Mansion as a landmark or the French Quarter as a historic district maintains the nonfunctional associations of both. But it also precludes other forms of development that community groups might oppose on functional grounds that are entirely separable from their desire to retain these nonfunctional associations.

The line dividing the two types of associations wavers, moreover,

261. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

262. *Schad v. Borough of Mount Ephraim*, 101 S. Ct. 2176 (1981).

263. *See Sierra Club v. Morton*, 405 U.S. 727 (1972).

264. *See* ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 210.

265. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 108 (1978).

especially for the apprehensive or hopeful. Community activists may say and perhaps believe that they oppose a high-rise building because of its functional character while the objection actually traces to some mix of its assumed functional and perceived nonfunctional associations. Board No. 7 opposed the thirty-story tower on both counts. Conversely, designating a building as a landmark may be urged less from attachment to it than from fear of the new entrant's functional implications.

To complicate matters still further, associations termed "non-functional" for semiotic purposes may be entirely functional from other vantage points. The shared perception that a new entrant — a concentration of adult theaters, for example — "pillages," "contaminates," or "rapes" may lead to group behavior consistent with the perception whether or not it is rooted in a real world linkage independent of that perception. The converse is true as well. A symbolic public act — designation of an area as a historic district or a modest tree-planting program — may create group expectations of neighborhood revitalization or gentrification that in turn are fulfilled because of the perception that the area is on its way up.

The "functional" role played by nonfunctional associations explains why aesthetic regulation may reinforce other police power goals. It also grounds one of aesthetic policy-making's most intractable genuine dilemmas: To what extent, if any, should legislative or judicial endorsement of an aesthetic measure require evidence, independent of the community's perception, that the ills a measure seeks to prevent or the benefits it is intended to secure would or would not occur absent its approval?²⁶⁶

V. CULTURAL STABILITY RATIONALE: A DEFENSIBLE BASIS FOR AESTHETIC REGULATION?

If the cultural stability hypothesis accurately defines aesthetic regulation's social impetus, does it follow that the impetus is one that aesthetic policy and aesthetic jurisprudence should honor? A positive response for either is by no means self-evident.

Writers who concur that the visual environment is also a semiotic environment have expressed profound philosophical and social objections to preservation. Although Lewis Mumford, for example, views the city as the "best organ of memory man has yet created,"²⁶⁷ he rejects historic preservation on the bases that the artifacts it safe-

266. See text at notes 306-19, 371-78 *infra*.

267. L. MUMFORD, *THE CITY IN HISTORY*, *supra* note 116, at 562.

guards “are completely irrelevant to our beliefs and demands,”²⁶⁸ and that “the city itself, as a living environment, must not be condemned to serve the specialized purposes of the museum.”²⁶⁹ Kevin Lynch, who describes the environment as a “vast mnemonic system for the retention of group history and ideals,”²⁷⁰ nevertheless warns against the “danger” that “the preservation of the environment [may] encapsulate some image of the past . . . that may in time prove to be mythical or irrelevant [because] preservation is not simply the saving of old things but the maintaining of a response to those things.”²⁷¹ He turns preservation on its head by advising that its purpose should be “to make visible the process of *change*,”²⁷² and makes preservationists shudder with such phrases as the need for “self-terminating environment[s],”²⁷³ “disposal of the irrelevant past,”²⁷⁴ and “creative . . . demolition.”²⁷⁵

However one views these contentions, they illustrate a crucial premise of this section: namely, *a community’s decision to preserve is not preordained but is a self-defining political and cultural choice whose validity must ultimately rest on its compatibility with shared community values.*²⁷⁶ The section also reflects my judgment that the choice to preserve, whether or not philosophically or culturally wise, poses no justiciable issue for the courts as long as the stability-identity interest is properly accommodated with constitutional values.²⁷⁷ The values discussed in this section are the three considered earlier in assessing the visual beauty rationale.²⁷⁸ Neither comprehensive nor definitive in scope or intent, the discussion seeks “chiefly [to start] a lot of hares

268. THE CULTURE OF CITIES, *supra* note 116, at 438.

269. *Id.* at 446.

270. K. LYNCH, *supra* note 116, at 126.

271. K. LYNCH, *supra* note 236, at 53.

272. *Id.* at 57 (emphasis added).

273. *Id.* at 112.

274. *Id.* at 116.

275. *Id.* at 57.

276. *See* note 80 *supra*.

277. This review of the relationship between aesthetic policy and court-applied law is by no means exhaustive because, as noted in text, a measure that satisfies that law’s strictures is not necessarily a “wise” measure from a broader social policy perspective. I have in progress a study exploring some of the broader policy issues that space limitations preclude me from addressing in this Article. In addition to the Mumford and Lynch works cited above, other studies that constitute rich sources for that study include, *e.g.*, G. BANZ, ELEMENTS OF URBAN FORM (1970); H. GANS, *supra* note 20; E. GOMBRICH, *supra* note 149; A. KUTCHER, THE NEW JERUSALEM (1973); J. ORTEGA Y GASSET, *supra* note 33; R. SENNETT, THE USES OF DISORDER (1970); T. VEBLÉN, *supra* note 251; R. VENTURI, D. BROWN & S. JZENOUR, *supra* note 33.

278. *See* Part III (C) *supra*.

for people to chase,"²⁷⁹ and thus to coax the law-aesthetics debate in a direction that identifies and responds to real rather than imagined dilemmas.

A. *Standards*

Nothing more graphically illustrates the artificiality of that debate than the standards issue. The visual beauty rationale's premise that standards must be based on "objective" canons of aesthetic formalism not only slights the important issues in legal-aesthetic controversies, but also renders the definition of intelligible standards impossible. Stability reasoning, in contrast, premises that aesthetic standards find their source in intersubjective patterns of community preference.²⁸⁰ If definable at all, these standards must be linked to the visual-semiotic context afforded by a particular existing resource.²⁸¹

The aesthetics standards-setter must cope with a variety of constraints. The "clarity" of these standards is not a linguistic absolute but a practical trade-off among a variety of factors — the limitations of language, particularly as the latter is further cramped by its use for legal purposes; the depth of the community's conviction that regulation is necessary; the clarity or opaqueness of the purposes that the community expects regulation to achieve; the characteristics of the community and the resources in question; and the degree of precision necessary for regulation to achieve its purpose. Only if these trade-offs can be accommodated in a manner that produces standards meeting the threshold of intelligibility discussed earlier²⁸² should the regulatory enterprise go ahead. But that threshold, it must be emphasized, is not fixed independently of the variables with which the standards-setter must deal. As opinions in other fields point up,²⁸³ courts view linguistically vague standards sympatheti-

279. Alfred North Whitehead on William James's pragmatism, *quoted in* S. LANGER, *supra* note 130, at viii.

280. *See* text at notes 80 *supra*, and 286 *infra*.

281. *See, e.g.* Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971); City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 484, 3 So. 2d 364, 366 (1941); General Outdoor Advertising Co. v. Department of Pub. Works, 289 Mass. 149, 186, 149 N.E. 799, 816 (1935); Westfield Motor Sales Co. v. Town of Westfield, 129 N.J. Super. 528, 544, 324 A.2d 113, 122 (1974); McCormick v. Lawrence, 83 Misc. 2d 64, 67-68, 372 N.Y.S.2d 156, 159-60 (1975).

282. *See* text at note 59 *supra*.

283. In *Yakus v. United States*, 321 U.S. 414 (1944), the Court upheld the Emergency Price Control Act of 1942 despite vague enabling legislation. The Act empowered the Price Administration to establish maximum commodity prices when those prices threatened to rise above a level "inconsistent with . . . [its] purpose." The price level set by the Administration was to be fair and equitable, consistent with the purposes of the Act, set forth in § 1 of the Act as "to stabilize prices . . . [and] prevent speculative, unwarranted, and abnormal increases in prices

cally if the object of the regulation is socially compelling.

These constraints reveal why aesthetic regulation is problematic even if standards-setting is pursued on an *a posteriori* rather than *a priori* basis. Legal language is often a clumsy medium for encapsulating visual-semiotic values. Louis Sullivan advised that art "will not live in a cage of words;"²⁸⁴ in design matters "there is a vast domain lying just beyond the reach of words" which can be plumbed only by thinking "in terms of images, of pictures, of states of feeling, of rhythm."²⁸⁵ Community groups are often confused or disingenuous about the goals of aesthetic regulation: they may not know what they really want, or they may decline to express their desires clearly lest other groups find them unpalatable. In either case, it is difficult to determine whether their demands reflect shared community values or the values of a narrow elite.

The United States, moreover, is not a homogeneous "design community," but a myriad of "design communities," some knowledgeable about and deeply committed to particular design outcomes, others indifferent to them. The advent of a downtown skyscraper is a matter of vehement debate and attentive media coverage in San Francisco or Honolulu, but goes ignored by all but a small design coterie in New York City. The environmental resources controlled by aesthetic regulation also vary in character. Illustrative are the differences between the San Francisco Bay, the midtown Manhattan skyline, billboards along interstate highways, and junkyards at the outskirts of a suburb. Finally, the exactitude required of aesthetic standards is variable as well. How precise standards should or should not be is a function not only of the character of the resource being controlled but of the expectations of the resource's constituency and of the capabilities of legal institutions to implement them.

These complexities prompt the conclusion that intelligible standards are no more achievable under the stability-identity than under

and rents" Emergency Price Control Act of 1942, § 1(a), 56 Stat. 23. Chief Justice Stone, in the majority opinion, found the standards to be sufficiently precise. "The standards prescribed by the present Act, with the aid of the 'statement of considerations' required to be made by the Administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards." 321 U.S. at 426. This is not an isolated example of judicial deference to vague legislative standards. *See* National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (upholding the "public convenience, interest, or necessity" standard of § 303 of the Communications Act of 1934 as a sufficiently concrete standard); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (upholding the Economic Stabilization Act of 1970 despite a lack of concrete standards guiding the delegation of legislative power). *See generally* B. SCHWARTZ, ADMINISTRATIVE LAW. §§ 15-18 (1976).

284. L. SULLIVAN, *supra* note 32, at 139.

285. *Id.* at 50.

the visual beauty approach. I have no hesitation in conceding that, depending upon the demands in question, this conclusion may indeed be correct, and in agreeing that when it is, legal institutions should not honor the demands. But the position that intelligible standards may be formulable under appropriate conditions hardly requires proof that public ordering must be capable of implementing *all* aesthetically based demands. The inquiry proposed here is narrower and more practical: When legal institutions are asked to endorse a specific demand, what factors should they consider in assessing whether it is confinable by intelligible standards? Stability reasoning's response can best be outlined by distinguishing between the challenge that the standards issue presents, first, for legislators, as the aesthetic regulation system's principal policy-makers, and, then, for the courts, as the arbiters of the standards' adequacy.

1. *Standards and Aesthetic Policy-Making*

Stability reasoning endorses aesthetic initiatives only if certain conditions are satisfied. First, the policy-maker must determine that associational bonds exist between an existing resource and community groups and that the resource's protection will advance shared community stability-identity values and may further desirable or prevent undesirable "secondary effects." Second, criteria for controlling new entrants must be derivable from those features of the existing resource's visual-semiotic character that account for the community's attachment to it. Finally, these criteria must be rendered as standards that are sensitive to the legitimate needs of affected property owners, administrative agencies, and reviewing courts.

At the outset, policy-makers must recognize that the process by which environmental features or settings become "existing resources" is extralegal, often turning upon serendipitous historical or cultural factors. What were once called "swamps," for example, are now called "wetlands." Dismissed for seventy-five years as a grimy factory district, New York City's Soho is now treasured by artists, tourists, and preservationists for its cast-iron architecture and spacious lofts. Once these resources are called to their attention, policy-makers should examine the claimed associational bonds between the resource and the community to determine whether protecting the resource will advance community-wide identity and stability values. These determinations, like decisions made in every other field of regulatory law, are inherently judgmental and hence vulnerable to error. The issue for aesthetic regulation, as for these other fields, is

whether the risks of error are acceptable. Two factors suggest that these risks can be acceptably contained *if policy-makers choose their targets properly and impose legislative discipline on the regulatory regimes they author.*

First, policy-makers should require a plausible showing that the claimed associational bonds and stability-identity interest represent community values. If the "objectivity" of aesthetic standards resides in their consistency with patterns of community preference, the inquiry should focus upon the prevalence or absence of these patterns. Frequently, it can confidently be resolved one way or the other. Community preferences favoring billboard controls²⁸⁶ or preservation of historical-architectural ensembles such as the French Quarter²⁸⁷ can be compared with one design critic's prescription that the skylines of America's "historic" cities should be "preserved" as national monuments.²⁸⁸ Other proposals will fall somewhere in between. In every case, policy-makers should presume that public intervention is inadvisable, modifying that presumption only if the evidence marshalled through hearings, staff studies, and similar sources substantiates the claimed concordance of the initiative with actual or reasonably likely community-wide preferences. The inquiry, in short, should parallel the one regularly conducted by legislators in the zoning²⁸⁹ and eminent domain²⁹⁰ fields to determine

286. The opinions in *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964), illustrate that only those uses or activities that are offensive or attractive to broad segments of the community may be addressed in aesthetic legislation. According to the majority, this regulation is appropriate in areas in which "concepts of congruity [are] held so widely that they are inseparable from the enjoyment and hence the value of property." 42 N.J. at 5, 198 A.2d at 499. Justice Hall's dissent states:

Beauty and taste are almost impossible to legislate affirmatively on any very broad scale because they are generally such subjective and individual things, not easily susceptible of objective, non-arbitrary standards It would seem [however] that the approach could validly be made and legislation sustained squarely on this basis at least with respect to the prohibition or strict regulation of those activities or conditions which a court can find that practically everyone agrees are non-beautiful in their particular environment, so long as more important values are not overridden And I think a court can properly say we have reached that point with respect to outdoor advertising signs in many settings The situation has become one of the "concepts of congruity held so widely," as the majority puts it.

42 N.J. at 11-12, 198 A.2d at 452 (Hall, J., dissenting). Significantly, the billboard legislation sustained in *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 193 N.E. 799 (1935), was enacted pursuant to an amendment to the Massachusetts constitution resulting from earlier Massachusetts decisions questioning the constitutionality of such measures. 289 Mass. at 158-59, 193 N.E. at 803-04.

287. See *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976). The legislation establishing the Vieux Carré (French Quarter) Historic District is based upon an amendment to the Louisiana constitution approved by that state's voters. See 516 F.2d at 1062 n.58.

288. See note 84 *supra*.

289. See, e.g., *Bartram v. City of Bridgeport*, 136 Conn. 89, 68 A.2d 308 (1949); *Dalton v.*

whether a proposed initiative accords with a “public” purpose or merely advances the “private” interest of an individual or a group.

Concededly, my suggestion will deny legal protection to many resources that some citizens believe merit protection. Given aesthetic regulation’s obvious risks, however, the trade-off is both necessary and prudent. Legislative determinations that an environmental feature or setting merits status as an “existing resource” and that its preservation presumptively advances community-wide values are essentially unreviewable by the courts.²⁹¹ If the legislature approves these claims perfunctorily, a much-needed source of discipline for the aesthetic regulation system will be forfeited.

Second, the criteria that policy-makers and administrators use to regulate new entrants can further confine the risk of arbitrariness. Stability reasoning’s identification of the pairing (existing resource-new entrant) phenomenon as a constant of aesthetic controversies suggests that this phase of the standards-setting task may be less problematic than normally supposed, *provided that there is an articulable visual-semiotic basis for the new entrant’s claimed associational dissonance with the existing resource*. Because visual-semiotic features are *object-based*, public planners can and often do profile them neutrally.²⁹² To illustrate, San Franciscans are deeply attached to their city’s image as one of hills descending gracefully to its Bay. This attachment, of course, is entirely subjective. But the criteria necessary to ensure that new entrants do not mar this image can be stated in terms of topographic, engineering, and other objective data and standards. Similarly, Board No. 7’s perception of the thirty-story apartment tower as an “East Side building” is rife with subjective connotations. But zoning controls that would preclude the tower and other buildings like it from upsetting the West Side’s prevailing height, bulk, and scale constancies — and the West Siders’ tranquil-

City & County of Honolulu, 51 Hawaii 400, 462 P.2d 199 (1969); Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

290. See, e.g., Berman v. Parker, 348 U.S. 26 (1954); Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981); Price v. Philadelphia Parking Auth., 422 Pa. 317, 221 A.2d 138 (1966).

291. See text at note 298 *infra*.

292. Outstanding illustrations of the type of background studies that provide a basis for such standards include, e.g., J. BARNETT, URBAN DESIGN AS PUBLIC POLICY (1974) (New York City); M. CORBETT, *supra* note 157 (San Francisco); A. JACOBS, MAKING CITY PLANNING WORK (1968) (San Francisco); A. KUTCHER, *supra* note 277 (Jerusalem). See generally K. LYNCH, *supra* note 116.

Favorable judicial responses to standards prepared on the basis of careful profiles of an existing context include, e.g., Maher v. City of New Orleans, 516 F.2d 1051 (1975) (French Quarter), *cert. denied*, 426 U.S. 905 (1976); A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979) (Oakwood Historic District).

ity about the preservation of their lifestyle — can also be based on objective standards. The same comments apply to billboards, junkyards, and a wide variety of other new entrants. However “subjective” the factors accounting for patterns of community preference may be, technically competent planning staffs will often be able to devise appropriate visual controls to mitigate or preclude the associational dissonance that new entrants create.

The standards problem, therefore, is frequently more a consequence of unresolved community conflicts concerning an aesthetic measure’s purposes than of technical challenges planning staffs encounter in profiling an existing resource’s features.²⁹³ When policy-makers paper over or ignore these conflicts, they complicate the standards-setting task by foisting on administrators and courts issues that, if resolvable, should be addressed by themselves or, if not resolvable, should have precluded their endorsement of the measure in the first place. In my judgment, their failure to heed this admonition is the single greatest cause of the aesthetic regulation system’s current woes.

The most workable standards, moreover, are those addressing the broader constancies of environmental form and context, not those controlling design details. Public intervention’s goal, as Jonathan Barnett puts it, should be to “design the city, [rather than] the buildings.”²⁹⁴ But this prescription does not mean that policy-makers must ignore meritorious initiatives. New entrants that violate these constancies are usually the ones that upset the community. The Mansion dispute illustrates that West Siders were worried about their neighborhood’s bulk, scale, and height constancies, not about the proposed tower’s design as “good” or “bad” architecture. As a general matter, the new entrant in aesthetics controversies is similar to the tower in this respect.²⁹⁵ If public intervention should be predicated on its responsiveness to widespread citizen concerns, these concerns are more likely to be experienced when *contexts*, not *details*, are threatened. After all, changes in contexts are more likely to engage widespread community attention.

These considerations explain why visual beauty reasoning’s premise that legal-aesthetic standards parallel museum standards in refinement and quality is misplaced and unworkable. They presage as well the problems that have plagued landmark, historic district,

293. See A. JACOBS, *supra* note 292; A. KUTCHER, *supra* note 277.

294. J. BARNETT, *supra* note 292, at 186.

295. See note 177 *supra* and examples mentioned in text at notes 99-107 *supra*.

and architectural control regimes that endeavor to control detail rather than, or in addition to, context. As the need for exactitude in standards increases, it becomes more difficult for the community to agree on their content or for public agencies to manage them. Absent genuine architectural unity, standards that control details are virtually impossible to set or administer.²⁹⁶

At this point, one of aesthetic regulation's most trying second generation dilemmas arises. Intelligible standards can be defined only if the community's attachment to an existing resource can be rendered in terms of the resource's articulable visual-semiotic characteristics. But suppose that the attachment relates instead to diffuse socially determined meanings that cannot be translated in this manner. The social impetus for aesthetic regulation is often as forceful in the second case as in the first. But community groups, tastemakers, and other no-change constituencies generally focus on *outcomes*, not on *process*, and lobby vigorously for preservation in both cases. Principled policy-making demands, therefore, that legislators consider the critical difference between the two cases. Their failure to do so has created the hornet's nest of problems outlined earlier: improper diversion of planning responsibilities from one public agency to another; devolution of growth control powers to private elites; regulatory overkill resulting from the imposition of, *e.g.*, historic preservation controls that regulate down to the doorknob when what is actually required are zoning controls respecting broader urban design constancies; and needless introduction of instability and substantial hidden costs into private land markets.²⁹⁷

296. Illustrative is the designation of New York City's Upper East Side as a historic district. Perhaps no section of the city is as socially distinctive as this area, known popularly as the "Silk Stocking District." Although subareas of the designated district undoubtedly do possess the unity of an architectural-visual ensemble and hence could ground intelligible standards, the district as a whole clearly does not. It was on this basis that the writer opposed the district before the City's Board of Estimate. *See* Statement in Opposition by 10 Bleecker Corporation, Transcript of the Stenographic Record of the Discussion on Calendar No. 76, Meeting of the Board of Estimate (Sept. 10, 1981). The same observations apply to the City's Greenwich Village Historic District, which, as noted earlier, has properly been termed an "architectural melange." *See* text at note 167 *supra*. Such examples manifest the deeply troublesome issues identified in text concerning the role of municipal landmark commissions in a city's overall land use control regime.

297. Policy-makers can control for arbitrariness by keeping alert to the constraints that court-applied law imposes upon aesthetic policy-making. Strictly speaking, that law need not address the standards issue as such to serve this purpose. It might, for example, assist policy-makers to determine whether an aesthetic initiative serves the "general welfare," defined either intra- or extramunicipally. Suppose, to borrow from two earlier examples, that adherents of New York City's Little Italy Special District advanced it to favor one ethnic group at the expense of another, or that the demands leading to Marin County's environmental control regime derived from the desire of the county's existing residents to exclude blacks by preventing the construction of additional housing in the county. Policy-makers who appreciate that equal protection strictures function in part to ensure the equity of regulations having *intra-* or

2. *Standards and Aesthetic Jurisprudence*

The courts' role in the standards-setting process is a reactive one. Courts do not fix the content of a community's aesthetic values, and they should not second-guess the legislature's judgment that the challenged standards result from firm community attachment to an existing resource. Both separation of powers considerations and the judiciary's inability to assess these matters warrant a presumption of legislative validity.²⁹⁸ Once the legislators have written their script, however, the courts, as guardians of constitutional values, should actively evaluate it to ensure its internal coherency and the consistency of the regime implemented under it.

An intelligible aesthetic measure specifies with reasonable clarity its purposes, the pertinent visual-semiotic characteristics of the existing resource, and the criteria governing the regulation of new entrants. Absent any one of these elements, affected landowners cannot conform their development plans to the measure, regulating agencies exercise unbridled discretion, and the courts have no yardstick to detect unprincipled regulatory decisions.

Without a clear sense of a measure's purposes, a court cannot determine whether its standards are rational or its subsequent implementation falls within its intended purview. The court would thus be unable to discipline a landmark commission that used its historic districting powers to control growth rather than to advance more limited, bona fide preservation purposes.²⁹⁹ Absent reasonable specification of the existing resource's visual-semiotic properties, the court could not assess a restricted landowner's contention that an

extramunicipal effects would, one hopes, spurn such demands. They would do so not simply because initiatives enacted with the intent and purpose of achieving the above goals would be vulnerable to judicial attack, *see* *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); note 28 *supra*, but also because the reason for the goals' vulnerability is that the values they exemplify cannot be squared with community-wide values as the latter may be defined consistently with the fourteenth amendment. For a thoughtful evaluation of the issues of intermunicipal equity posed by historic preservation, *see* Rose, *supra* note 11, at 478-79, 504-05, 512-17, 521-24.

298. *See* note 198 *supra*.

The point in text is reflected in Justice Rehnquist's dissent in *Metromedia, Inc. v. City of San Diego*, 101 S. Ct. 2882 (1981), from the Court's invalidation of San Diego's billboard ban. On the question of the role of the judge in reviewing the city's determination that billboards are unaesthetic, he stated:

Nothing in my experience on the bench has led me to believe that a judge is in any better position than a city or county commission to make decisions in an area such as aesthetics. Therefore, little can be gained in the area of constitutional law, and much lost in the process of democratic decision making, by allowing individual judges . . . to second-guess such legislative or administrative decisions.

101 S. Ct. at 2925 (Rehnquist, J., dissenting).

299. *See* note 296 and text at notes 22-25 *supra*.

“existing resource” label has been pinned on a feature or setting whose character fails to support the label.³⁰⁰ Likewise, unless such terms as “congruent,” “compatible,” or “harmonious” are defined in terms of visual features that give rise to associational dissonance between the new entrant and the existing resource, neither landowners nor courts can determine why a proposed new entrant has or has not been approved.³⁰¹

The principles underlying these prescriptions are hornbook law. It is all the more extraordinary, therefore, that most modern period courts have not policed aesthetic measures in accordance with them.³⁰² Certainly the courts should not ignore the practical trade-offs that must be accommodated in setting aesthetic standards. But neither should they acquiesce in legislative or administrative violations of these principles, which ensure the fairness and rationality of aesthetic measures and the integrity of the aesthetic policy-making process itself. Surely these values would be better served if, instead of rubber-stamping indefensibly vague measures, the courts sent them back to their authors for the disciplined consideration that they require.³⁰³

300. *See, e.g.*, *State ex rel. City of West Palm Beach v. Duffey*, 158 Fla. 886, 30 So. 2d 492 (Fla. 1947); *Morristown Road Assocs. v. Borough of Bernardsville*, 163 N.J. Super. 58, 394 A.2d 157 (1978); *Hankins v. Borough of Rockleigh*, 55 N.J. Super. 132, 150 A.2d 63 (1959); *cf. Metromedia, Inc. v. City of San Diego*, 101 S. Ct. 2882 (1981) (billboards compatible with commercial and industrial districts because latter lack a character with which billboards can be said to clash).

301. *See* note 300 *supra*; note 254 *supra* and accompanying text.

302. Commentary is unanimous on this point. *See, e.g.*, Kolis, *supra* note 60, at 286; Williams, *supra* note 46, at 2; Note, *supra* note 60, at 180.

Among the host of cases that have approved standards that are indefensibly vague on the basis of the reasoning in text are those cited in note 23 *supra*. The obvious defect of such standards is that they cite the factor of incongruity without offering any profile of the characteristics of the existing resource that afford a context against which the claimed incongruity of the new entrant can intelligibly be assessed. Absent reasonable specification of the context, whether in the legislative measure, administrative regulations, or published background studies, the incongruity standard is meaningless, as Professor Alexander has noted in a related discussion. *See* note 254 *supra*.

303. *The Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839 (E.D. Va. 1980), illustrates that judges can do the job while respecting the constraints of the judiciary's role in the aesthetic regulation system. *See* text at notes 81-83, 291, 298 *supra*. The subsequent history of the opinion, which is clearly the most thoughtful treatment of aesthetic regulation's due process dimension in this century, also illustrates how legislatures, responding to outcome-oriented special interest groups, often improperly discharge their policy-making role in that system.

Challenged in *Bergland* was the Secretary of the Interior's designation of the 14,000 acre Historic Green Springs District as a National Historic Landmark under the Historic Sites, Buildings and Antiquities Act of 1935, current version at 16 U.S.C. §§ 461-467 (1976 & Supp. II 1978) (Antiquities Act), and the District's listing on the National Register of Historic Places, 36 C.F.R. § 60.2(d)(2) (1981). The Antiquities Act provides for the designation of "historic sites . . . of national significance for the inspiration and benefit of the people of the United States," (emphasis added). Its language is narrower than that of the National Historic Preservation Act of 1966, current version at 16 U.S.C. §§ 470-470t (1976, Supp. I 1977, Supp. II 1978

B. Substantive Due Process

Depending on how the issue is framed, the compatibility of the

& Supp. III (1979), *as amended* by Act of March 12, 1980, Pub. L. No. 96-205, Act of May 1, 1980, Pub. L. No. 96-244, Act of Dec. 12, 1980, Pub. L. No. 96-555, *codified at* U.S.C.A. §§ 469c-2-470w-6 (West Supp. 1981) (Preservation Act), which provides for the listing on the National Register of "districts . . . significant in American . . . architecture . . . and culture" 16 U.S.C.A. § 470a(a)(1)(A) (West Supp. 1981) (emphasis added). In revoking the District's listing on the National Register and remanding the matter to the Secretary, Judge Merhige identified the following flaws, *inter alia*, in the Secretary's actions: the Secretary's possible confusion of the broader criteria of the Preservation Act with the narrower criteria of the Antiquities Act, 497 F. Supp. at 846-47; the "paltry statement of reasons for the Secretary's actions," 497 F. Supp. at 847; the Secretary's failure to promulgate either "adequate substantive criteria" defining a National Historic Landmark or designation and listing standards and procedures that protect land-owners' "important property [and] liberty interest[s]," 497 F. Supp. at 854, or "control agency discretion," 497 F. Supp. at 854.

Judge Merhige summarized the "due process failings" of the Secretary's actions by observing:

The Department [of the Interior] had no fixed procedures published in advance by which the Green Springs landowners could plan their response [to the designation]. Important information relied on by the Department was disclosed, if at all, in piecemeal fashion often after any opportunity for meaningful response had passed. Department officials made several off-the-record, undisclosed recommendations to the Secretary, but were unavailable for on-the-record questioning. Finally, the Secretary neglected to explain in sufficient detail the rationale underlying the designation decision.

497 F. Supp. at 856. In remanding for promulgation of both substantive and procedural regulations comporting with his opinion, Judge Merhige "urge[d]" the Secretary not simply to codify the criteria and procedures developed informally in the instant case, but to articulate meaningful standards in as much detail as possible so that the Department's efforts are channeled efficiently, the public may make a meaningful response, and, in the event further judicial review is necessary, a court may determine that the proper standards have been applied.

497 F. Supp. at 857.

While *Bergland* was on appeal to the Fourth Circuit, preservation lobbyists succeeded in persuading Congress to add the following language to § 101(a)(1)(B) of the Preservation Act:

All historic properties listed in the Federal Register of February 6, 1979, as "National Historic Landmarks" [the Historic Green Springs District was so listed] . . . are declared by Congress to be National Historic Landmarks of national historic significance as of their initial listing . . . for the purposes of this act and the [Antiquities Act] . . .

National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, § 201(a), 94 Stat. 2987. A Senate Committee Report explained that the amendment was intended as a response to

[r]ecent legal challenges to the National Historic Landmark program [which] have suggested that landmarks have been designated by the Secretary by inadequate procedures and beyond the scope of the [Antiquities Act] with respect to districts of architectural merit and other historic qualities not mentioned in the [Antiquities Act]. The definition of historic values contained in the [Preservation Act], as amended, is equally applicable to the historic values sought to be preserved by the [Antiquities Act], except for the latter's requirement of national historic significance.

S. REP. NO. 96-943, 96th Cong. 2d Sess. at 23 (1980).

In response to the amendment, the Fourth Circuit remanded the proceedings to Judge Merhige. *The Historic Green Springs, Inc. v. Virginia Vermiculite, Ltd.*, No. 80-1822, No. 80-1823 (4th Cir., order filed Jan. 27, 1981). Observing that "[t]he events that have occurred following the Court's [prior] judgment are somewhat out of the ordinary, and have left the case in an awkward stance," he held, contrary to the designation opponents' statutory interpretation argument that Congress did not intend to validate constitutionally infirm National Register listings, that "Congress intended that the Green Springs District . . . be designated in the National Register without further administrative action." But he also noted, ruefully one suspects, that the opponents had failed to challenge the amendment's constitutionality, and that the "issue of whether the Department of the Interior need promulgate new regulations is now

cultural stability rationale with substantive due process presents both the least and the most troublesome dilemmas considered in this Article. If the question is whether the preservation of stability-identity values is a proper police power concern, the question answers itself, as countless opinions hold³⁰⁴ and social theory confirms.³⁰⁵

But the question can be posed in two other ways. First, should a category of "aesthetic harm"³⁰⁶ be recognized independent of the harms traditionally acknowledged by externalities analysis? Second, even if the validity of the stability-identity interest is conceded, is this interest "sufficiently substantial" to justify an aesthetic measure that impedes expression?

For the better part of this century, courts and commentators have strained to rationalize land use regulation through externalities reasoning. This approach posits that the police power allows states to bar land uses that decrease the economic utility of neighboring properties or the economic welfare of the community.³⁰⁷ In part, the position derives from the judgment of zoning's earliest supporters that only a property value rationale would withstand constitutional attack at a time when public restrictions on land use conflicted with

moot," but warned that "should the Department seek to designate some other property not sheltered by the statute where circumstances similar to those found in the Court's prior opinion exist, it would have to comply with the conditions of the Court's prior order. . . ." *The Historic Green Springs, Inc. v. John Block*, No. 77-0230-R, slip. op. at 1 (E.D. Va., July 20, 1981).

Although the Department has promulgated regulations, *see* 46 Fed. Reg. 56,183, 56,209 (1981) (to be codified at 36 C.F.R. §§ 60.1-60.6, 60.9, 60.10, 60.13-60.15), the legality of which is as yet untested, the *Bergland* proceedings illustrate as forcefully as does New York City's Upper East Side Historic District designation, *see* notes 25 & 33 *supra*, the inattention to process values of the nation's current aesthetic regulation system. To this observer, the system will remain seriously flawed until the fundamental process issues identified by Judge Merhige are addressed with candor and integrity by its participants, including, most pointedly, federal, state, and local legislators.

304. *See* note 231 *supra*.

305. *See* text at notes 223-50 *supra*.

306. *See* *Metromedia, Inc. v. City of San Diego*, 101 S. Ct. 2882 (1981). Justice Stevens also recognized in his dissenting opinion that the interests advanced by aesthetic measures — in *Metromedia*, the billboard ban — "are both psychological and economic," 101 S. Ct. at 2915, and that "[t]he character of the environment affects property values and the quality of life . . ." 101 S. Ct. at 2915. The statements of Justices White (who wrote the plurality opinion) and Stevens could be read, of course, simply as resuscitating the middle period view validating aesthetic regulation not because it advances aesthetic values, but because it supports such traditional police power goals as property value maintenance. *See* text at note 51 *supra*. A preferable and wholly defensible alternative is outlined in text at notes 258-66 *supra*. It recognizes, first, that aesthetics, defined in cultural stability terms, is an independent police power goal; second, that aesthetic regulation, so conceived, often, but not inevitably, advances traditional police power goals; and, third, when it does so, these advantages flow from the enhancement of stability-identity values insofar as that enhancement strengthens the "quality of life." This construction of Justice Stevens's language is substantiated by his reasoning in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). *See* text at notes 347-52 *infra*.

307. *See* text at note 64 *supra*.

the prevailing *laissez-faire* political philosophy.³⁰⁸ In part, it is the product of judicial reluctance to affirm that the prevention of psychic harm is a proper police power goal.³⁰⁹ This reluctance is typified by Judge Cardozo's comment that "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."³¹⁰ The position reappears today in the schizophrenic modern period opinions, which extol zoning "solely for aesthetics" while hastening to point out that aesthetic regulation enhances property values.³¹¹

By explicitly identifying aesthetic regulation's purpose as the preservation of stability-identity values, stability reasoning frontally challenges the preemptive claims of traditional externalities reasoning. The challenge goes to both the factual and value premises of the economic approach. Its factual premise is that aesthetic measures invariably maintain or increase property values. In fact, the relationship between the two is by no means constant. The goal of preserving stability-identity values does not coincide with the goal of preserving property values, and, indeed, may clash with it at times.

308. See A. ALTSHULER, *supra* note 36, at 85-87; R. NELSON, *supra* note 22, at 28.

309. The confused state of aesthetic jurisprudence in this century affords the most pertinent support for the proposition in text. The "soft-look" NEPA opinions, *see* note 53 *supra*, are also pertinent, as evidenced particularly by the statement in *Hanly v. Kleindeinst*, 471 F.2d 823, 833 (2d Cir. 1972), that "it is doubtful whether psychological or sociological effects upon neighbors constitute the type of factors that may be considered in making [a] determination [to prepare an environmental impact statement]." Also relevant is the sharp split among courts earlier in the century on the issue whether psychological harm could ground a private nuisance action. Compare *Stotler v. Rochelle*, 83 Kan. 86, 109 P. 798 (1910) (cancer cottage); *Street v. Marshall*, 316 Mo. 698, 291 S.W. 494 (1927) (funeral home); *Everett v. Paschall*, 61 Wash. 47, 111 P. 879 (1911) (tuberculosis sanatorium), with *Stoddard v. Snodgrass*, 117 Or. 262, 241 P. 73 (1925) (funeral home); *Houston Gas & Fuel Co. v. Harlow*, 297 S.W. 570 (Tex. Civ. App. 1927) (100- by 110-foot gas tank). The former group of cases held that the location of their respective uses in residential areas was a private nuisance; the latter, that it was not. The *Street* court summarizes the opposing contentions:

[Defendant argues that] in order for . . . [a funeral home] to constitute a nuisance, its character must be such as to directly affect the health or grossly offend the physical senses. This position is without support in the decided cases. While it is true that in many, if not all of them, the charge was made that the establishment complained of would communicate contagion, and would emit noxious gases and offensive smells, such charges were almost universally found to be without substantial support in the evidence. A careful reading of the cases will disclose that what has been stressed . . . is this: Constant reminders of death . . . impair in a substantial way the comfort, repose, and enjoyment of the homes which are subject to them.

316 Mo. at 705-06, 291 S.W. at 497. *Everett* puts the issue more briefly: "The question is, not whether the fear is founded in science, but whether it exists; not whether it is imaginary, but whether it is real, in that it affects the movements and conduct of men." 61 Wash. at 51, 111 P. at 880. Finally, it should be noted that dispute about the actionability of psychic harm is not limited to the land use sphere alone. See Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

310. *People v. Rubenfeld*, 254 N.Y. 245, 248-49, 172 N.E. 485, 487 (1930).

311. See text at notes 208-09 *supra*.

Banning the construction of an office tower atop Grand Central Terminal,³¹² retaining Boston's centrally located Beacon Hill in a low-density, predominantly residential status,³¹³ or prescribing a tapered silhouette for Evanston's skyline³¹⁴ cannot be explained solely or even primarily on the basis of utilitarian economic principles. On the contrary, such controls, which are commonplace in the aesthetic sphere, deprive public fiscs and restricted property owners of the increased tax yields and profitability promised by new entrants that are incongruent with existing features or settings on the basis of the new entrant's nonfunctional, but not its functional, associations.

The value premise is the externalities analyst's assumption that the interest in economic utility ought to prevail over other goals, such as nurturing stability-identity values, when the two conflict. Whether or not sound as a matter of policy, the premise is tautological because the analyst assumes the very point in issue. Of course property value maximization should prevail if it is ranked first in the pertinent system of value priorities. But it is precisely this hierarchy that stability reasoning — and, often, aesthetic regulation itself — contests by according greater weight to a new entrant's nonfunctional associations than to its functional ones.

The question can no more be resolved by stability reasoning than by traditional externalities reasoning because, again, the reasoning would be circular. Ultimately, the question is neither economic nor legal, but cultural. However helpful economic analysis may be in quantifying the costs and benefits of aesthetic measures based on a new entrant's functional associations, it cannot quantify those attributable to the entrant's nonfunctional associations or establish a value hierarchy for resolving conflicts between economic and stability-identity goals. Law plays a greater role than economic theory, but only because it is the medium through which the society legitimates its aesthetic preferences. Law may endorse these preferences as they are exemplified in a new entrant's nonfunctional associations or, for nonaesthetic reasons, it may preclude their implementation. Their source, however, is not the law, but cultural factors anterior to it.

Although stability reasoning does not resolve the question, it sheds fresh light on the factors that merit consideration in addressing it. It establishes why values that are not utilitarian in a narrow economic sense shape the way that community groups perceive their

312. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

313. *See* W. FIREY, *supra* note 212.

314. *La Salle Natl. Bank v. City of Evanston*, 57 Ill.2d 415, 312 N.E.2d 625 (1974).

environments. It provides a realistic framework for appreciating what they, often unrealistically, expect aesthetic regulation to achieve. It challenges the premise, ostensibly dominant since zoning's early days, that land use regulation's *summum bonum* should be the pursuit of economic efficiency. In its place it substitutes Walter Cannon's dictum that "[t]he organism suggests that stability is of prime importance. *It is more important than economy.*"³¹⁵

Accordingly, stability reasoning forces a long-overdue reappraisal of the incomplete premise that the "harms" with which the police power should deal encompass only tangible, economically quantifiable impacts of land uses on neighboring properties.³¹⁶ If impairment of stability-identity values bears as vitally on citizen expectations as this Article suggests, deliberate but discerning room must be made for it within the police power as well. Further consideration of the interaction between aesthetic and economic harms is also in order. In many cases, the community subordinates the economic to the aesthetic, and the flow of marketplace choices becomes explicable only by taking the primacy of aesthetic harms into account. The mix and character of residential and commercial uses on Beacon Hill, for example, is determined less by such functional variables as this location's proximity to goods, services, and transportation than by its status as a reservoir of values rooted in Boston's history and traditions.³¹⁷

The reappraisal urged here has been resisted for the better part of this century.³¹⁸ It is feared that there will be no stopping point once "aesthetic harm," defined in this Article's social-psychological manner, is recognized as a proper police power category. The issue goes well beyond aesthetic regulation, for the latter is but the stalking horse of a problem that pervades land use and environmental regulation generally, both of which have also been held in thrall to externalities reasoning.³¹⁹ But my prescription leads to a dilemma of the first magnitude. Clearly, the issue is unavoidable because the physical environment is also a social environment in which many of society's most compelling values are implicated. Just as clearly, legal institutions have in fact afforded protection against these harms for

315. See W. CANNON, *THE WISDOM OF THE BODY* 137 (2d ed. 1939) (emphasis added).

316. This prescription is by no means original to the writer. See generally R. BABCOCK, *THE ZONING GAME* (1968); W. FIREY, *supra* note 212; R. NELSON, *supra* note 22; C. PERRIN, *supra* note 99; S. TOLL, *ZONED AMERICAN* (1969).

317. See W. FIREY, *supra* note 212, at 91-92, 262.

318. See generally notes 309 & 316 *supra*.

319. See generally note 316 *supra*.

most of this century while shrouding their actions in ill-fitting externalities garb. But the gap between community demands for a legal response to these harms and the availability of policy or analytic tools by which legal institutions can cogently evaluate the demands remains distressingly wide to this day.

C. *Freedom of Expression*

An expression-infringing aesthetic measure that satisfies the substantive due process test does not necessarily comport with the more stringent first amendment requirements that it be "narrowly drawn" and advance a "sufficiently substantial governmental interest." Measures premised solely on the visual beauty rationale are illustrative: Standards of visual beauty cannot be "narrowly drawn"; nor does the community's purported interest in visual delight and the problematic relationship that it bears to visual beauty's assumed secondary effects add up to a "sufficiently substantial governmental interest."³²⁰

Would measures premised on the cultural stability rationale overcome these hurdles? Compliance with the "narrowly drawn" standard can only be determined on a case-by-case basis. The following discussion assumes what past experience suggests may often not be true: namely, that the aesthetic measures in question are "narrowly drawn." It concentrates instead on the question whether the preservation of stability-identity values and the concomitant advancement of their likely desirable secondary effects constitute a "sufficiently substantial governmental interest." The vehicle for this inquiry is a hypothetical drawn from the Grand Central Terminal landmarking controversy that led to the Supreme Court's decision in *Penn Central Transportation Co. v. New York City*.³²¹

Suppose that the Penn Central Transportation Company, now joined by its architect Marcel Breuer,³²² filed a second lawsuit,³²³ "*Penn Central II*," challenging the New York City Landmarks Preservation Commission's refusal to approve the Breuer-designed, International Style tower atop the Grand Central Terminal. This time, however, the issue is cast in first amendment rather than fifth amendment terms. The Commission, the plaintiffs argue, abridged their "freedom of speech" because its denial is premised on the mod-

320. See text at notes 183-95 *supra*.

321. 438 U.S. 104 (1978).

322. Or a representative of the Breuer office. Breuer died in the spring of 1981.

323. The original lawsuit, ultimately resolved in the Supreme Court, is *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

ernistic tower's "offensive" associational dissonance with the Beaux Arts Terminal. Indeed, they stress, the Commission's castigation of the tower as an "aesthetic joke"³²⁴ explicitly acknowledges that the tower conveys a cognitive and emotional message that displeases the Commission and, perhaps, citizens generally. If *Penn Central II* made its way to the United States Supreme Court, how would the Court rule? How should it rule?

My principal conclusions can be summarized briefly. First, new entrants often, but not invariably, are "speech" for first amendment purposes. Second, aesthetic measures that regulate or ban new entrants are content-based restrictions, not time, place, or manner restrictions. Third, the captive audience doctrine, as conventionally construed, does not assist in the issue's disposition. Fourth, the appropriate first amendment doctrine for evaluating the issue is thus a reformulated version of the clear-and-present-danger test. Finally, the proper question under this test is whether preclusion of the baneful secondary effects that the community claims will result absent the measure's implementation constitutes a "sufficiently substantial governmental interest." The major dilemma exposed by the inquiry is one for the courts: How should they define the community's burden to show that the impairment of stability-identity values will give rise to effects whose prevention would probably be deemed a "sufficiently substantial governmental interest?"

1. *New Entrants as "Speech"*

The Court might consider denying that the tower is "speech" lest it be flooded with litigation asserting that every aesthetic measure raises a *bona fide* first amendment issue. This option is suggested by *Metromedia, Inc. v. City of San Diego*,³²⁵ which apparently held that communities may ban billboards containing commercial, but not noncommercial messages. Despite the variety of opinions in *Metromedia*,³²⁶ all of the Justices appear to have agreed with Justice White's distinction between the billboards' "communicative aspect"

324. 438 U.S. at 118 (quoting the New York City Landmarks Preservation Commission). Breuer, in turn, reportedly castigated the Terminal's Beaux Arts facades, which his plan would efface, as a "provincial version of a decadent French classicism." J. BARNETT, *supra* note 292, at 71. As a former leading member of the Bauhaus School, Breuer viewed the Terminal's derivative, heavily ornamented, masonry style as a political and social, as well as visual, outrage. See generally Wolfe, *supra* note 2.

325. 101 S. Ct. 2882 (1981) (plurality opinion).

326. Justice White's opinion for the Court was joined by Justices Stewart, Marshall, and Powell. Justice Brennan, joined by Justice Blackmun, filed an opinion concurring in the judgment. Justice Stevens partly concurred with and partly dissented from the plurality opinion. Chief Justice Burger and Justice Rehnquist filed dissenting opinions.

— defined by the messages inscribed on them — and their “non-communicative aspect” — defined by the billboards themselves perceived as unattractive visual entities.³²⁷ If the Court drew the same distinction in *Penn Central II*, it would reason that landmarks legislation deals with aesthetic concerns, review the legislation under the relaxed presumption of legislative validity standard,³²⁸ and almost surely sustain it.

But its reasoning would be disingenuous. If nude barroom-type dancing,³²⁹ black armbands,³³⁰ and flags sewn on pants seats³³¹ may at times be protected as “speech,” it is unclear why the creative expression of one of the twentieth century’s most influential architects is not. A categorical distinction cannot be drawn between aesthetics and the first amendment, moreover, if the latter’s solicitude for communication and self-fulfillment interests is to have any meaning at all.³³² What the Justices should have stated in *Metromedia* is that environmental features and settings are not “speech” simply because their nonfunctional associations evoke an aesthetic response.

Take the case of the billboards themselves. They owe their “meaning” to two factors: their graphics and their status as new entrants that, wholly apart from their graphics, were perceived as associationally dissonant with San Diego’s character. Without question, San Diegans opposed the billboards as offensive on the latter basis, a fact that supports the dissenters’ reasoning that the ordinance was indeed “neutral” concerning the messages inscribed on billboards.³³³ By acknowledging that “meaning” in a broad semiotic sense and first amendment “speech” are not always coextensive, the Justices could deny first amendment status to the billboards, conceived as aesthetic entities, but extend it to the Breuer tower without doing violence to logic or to first amendment values.³³⁴ Although

327. 101 S. Ct. at 2889-90.

328. See note 198 *supra*.

329. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975); *California v. LaRue*, 409 U.S. 109, 118-19 (1972).

330. See *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503, 505-06 (1969).

331. *Spence v. Washington*, 418 U.S. 405, 410-11 (1973) (per curiam).

332. See text at notes 184-92 *supra*.

333. *Metromedia, Inc. v. City of San Diego*, 101 S. Ct. 2882, 2916-17 (1981) (Stevens, J., dissenting); 101 S. Ct. at 2920-23 (Burger, C.J., dissenting); 101 S. Ct. at 2924-25 (Rehnquist, J., dissenting).

334. Space limitations preclude treatment of this complex issue, which remains essentially unexplored in the Court’s first amendment jurisprudence. As one commentator has noted, see Note, *supra* note 60, at 185-88, the Court’s likely starting place will be its language in *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (per curiam), that Spence’s nonverbal expression — a flag displayed upside down with a peace symbol affixed to it — was “speech” because “[a]n intent to convey a particularized message was present, and in the surrounding circumstances

exceptions cannot be ruled out,³³⁵ communication and self-fulfillment interests are unlikely to be seriously undermined by regulations banning billboards on associational dissonance grounds.³³⁶ But these values were frustrated by the Commission's decision to deny Breuer permission to build his tower.

The Court might also characterize the tower as a hybrid of noncommunicative and communicative elements, and view the city's measure as directed only incidentally to the latter.³³⁷ If it opted for this course, it would likely invoke the time, place, or manner analysis

the likelihood was great that the message would be understood by those who viewed it." For pertinent nonlegal studies dealing with the semiotic quality of environmental features and settings, see note 116 *supra*.

335. Suppose, for example, that Christo, the "environmental artist" who has wrapped the shoreline of Little Bay, Australia, in mesh fabric, erected a 24-mile "Running Fence" in Marin County, California, and proposed "The Gates," (11,000 to 15,000 banners for New York City's Central Park), were to propose a "Billboard Bonanza" to ring San Diego. On Christo's work and the legal complexities it has created, see *Running Fence Corp. v. Committee to Stop the Running Fence*, 51 Cal. App. 3d 400, 124 Cal. Rptr. 339 (1975).

336. Whether this conclusion contradicts that of the six Justices who voted against the billboard ban in *Metromedia* is unclear. The status of a total ban on billboards carrying commercial and noncommercial messages was not resolved in the decision. 101 S. Ct. at 2896 n.20. *But see* 101 S. Ct. at 2900 (Brennan, J., concurring in judgment). Had San Diego established more cogently that billboards, as such, were associationally dissonant with its character, moreover, a different result may have ensued. *See* 101 S. Ct. at 2906 (Brennan, J., concurring in judgment) (total billboard ban in Williamsburg, Virginia, or Yellowstone National Park would be sustainable because the billboards' "very existence would obviously be inconsistent with the surrounding landscape"). In addition, I suspect that Justice Stevens's observation that "[i]f the First Amendment categorically protected the marketplace of ideas from any quantitative restraint, a municipality could not outlaw graffiti," 101 S. Ct. at 2914 (Stevens, J., dissenting), will come back to haunt the Court. Finally, the majority's reasoning in *Metromedia* is inconsistent with its view in *Schad v. Borough of Mount Ephraim*, 101 S. Ct. 2176 (1981), that a total ban on one category of expression — "live entertainment" in *Schad* — may be permissible if a community cogently demonstrates that the category is associationally dissonant with its character. *See* text at notes 360-64 *infra*. The explanation for the *Metromedia* result lies elsewhere. Despite the Court's ostensible willingness to extend first amendment protection to nonverbal as well as to verbal expression, *see* notes 329-31 *supra*, its apprehension that first amendment values may be impaired is greater in the latter than in the former context, even when those values are not, in fact, seriously threatened.

337. For opinions employing this analysis, see, e.g., *Cox v. Louisiana*, 379 U.S. 559, 563 (1965) (ban on picketing near courthouse upheld as protecting administration of justice from disturbance despite attendant restriction on expression); *Kovacs v. Cooper*, 336 U.S. 77, 87-89 (1949) (ban on sound trucks emitting "loud and raucous noise" upheld as insuring community tranquility despite restriction on expression); *cf.* *Prince v. Massachusetts*, 321 U.S. 158, 169-70 (1944) (ban on children selling magazines on streets upheld as advancing state's child welfare goals despite restriction on religious freedom of child and parents). The analysis may be viewed as a particular version of the "reasonable time, place or manner" or "less drastic means" analysis. Under this approach, regulation of conduct that includes expression — whether verbal or nonverbal — as well as nonexpressive conduct may be regulated if the measure in question is neither intended to suppress the expression nor unreasonably limits it by precluding its communication at, through, or in reasonable alternative sites, media, or periods. *See, e.g.,* *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972); *Poulos v. New Hampshire*, 345 U.S. 395, 405-08 (1953); *Cox v. New Hampshire*, 312 U.S. 570, 574-76 (1941). For discussions of this analysis, including its relation to that in *United States v. O'Brien*, 391 U.S. 367 (1968), see, e.g., L. TRIBE, *supra* note 60, at §§ 12-2 to -7, 12-20; Ely, *supra* note 60.

that it used in *United States v. O'Brien*.³³⁸ In *O'Brien*, the Court sustained a conviction for draft card burning against the challenge that the relevant statute violated the defendant's first amendment rights. The *O'Brien* Court reasoned that

a governmental regulation [incidentally limiting First Amendment freedoms] is sufficiently justified if it is within the constitutional powers of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of the free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.³³⁹

The Court would probably conclude that the tower ban comports with the *O'Brien* requirements: *Penn Central* expressly held that landmark preservation is within the government's constitutional powers;³⁴⁰ the important governmental interest served by the tower ban is the retention of the physical integrity of one of the city's and nation's premier examples of Beaux Arts architecture; the city did not intend to censor Breuer's expression; and the ban is the least restrictive alternative available to safeguard the Terminal's physical integrity.

But this logic is faulty. It ignores that preserving the Terminal's physical integrity is only a means to the Commission's ultimate goal of preserving the Terminal's semiotic integrity. Recall that every existing resource is both a signifier and the message that it signifies.³⁴¹ Destroying the message's physical embodiment destroys the message itself, and it is the message that accounts for the community's attachment to an existing resource. The Commission's objection was not that the Terminal would be physically altered: The landmark ordinance expressly envisages that landmarks may be altered in appropriate instances,³⁴² and the Terminal's original architects expected that a tower might be added to it. The Commission objected instead to the "content" of Breuer's proposed alteration. Accordingly, the *O'Brien* analysis is inapposite because the governmental interest in question — maintaining the Terminal's semiotic integrity — is directly related to the suppression of Breuer's free expression. The landmark ordinance and the Commission's decision under it, there-

338. 391 U.S. 367 (1968).

339. 391 U.S. at 377.

340. 438 U.S. 104, 129 (1978).

341. See text at notes 116-19, 227-30 *supra*.

342. NEW YORK CITY CHARTER & AD. CODE ANN., ch. 8-A, §§ 207-4.0 to -9.0 (Williams 1976).

fore, are content-based rather than time, place, or manner restrictions.

Would the Court sustain these measures if it characterized them in this manner? Predicting its response leads us to its decisions in *Young v. American Mini Theatres*³⁴³ and *Schad v. Borough of Mount Ephraim*,³⁴⁴ which, along with *Metromedia*, are its only opinions dealing squarely with the aesthetics-first amendment issue.

2. Revised Clear and Present Danger Test and Expression-Infringing Aesthetic Measures: *Young and Schad*

Tentatively in *Young* and more definitively in *Schad*, the Court has refitted the clear and present danger test³⁴⁵ for use in evaluating aesthetic measures that hinder expression. With one qualification, the controversies addressed by these decisions exemplify the prototypical format outlined earlier for aesthetic controversies. In *Young*, the challenged measure was designed to preserve Detroit's neighborhoods (existing resource) from invasion by a concentration of adult theaters (new entrant), which neighborhood residents perceived as associationally dissonant with their family-centered lifestyle. In *Schad*, the measure sought to immunize Mount Ephraim's character as a rural, family-centered borough (existing resource) from impairment by the introduction of nude dancing into an adult bookstore (new entrant). The *Young* and *Schad* measures differ from the *Penn Central* landmark ordinance, however, because the former regulate land uses while the latter regulates structures. This difference would be significant for first amendment purposes if the "aesthetics" label could be attached only to measures concerning structures. But the Court itself has rejected this view by expressly characterizing use regulations as instances of "aesthetics" regulation that call first amendment doctrine into play.³⁴⁶

In *Young*, eight Justices agreed that the Detroit ordinance was content-based because it imposed harsher restriction on theaters

343. 427 U.S. 50 (1976).

344. 101 S. Ct. 2176 (1981) (plurality opinion).

345. As that test was stated by Justice Holmes in *Schenck v. United States*, 249 U.S. 47, 52 (1919), "[t]he question in every case is whether the words used are in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." The test and the Court's leading decisions under it are evaluated in, e.g., L. TRIBE, *supra* note 60, at §§ 12-9 to -11; Linde, "Clear and Present Danger" Reexamined: Dissonance in the *Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970).

346. See *Schad v. Borough of Mount Ephraim*, 101 S. Ct. 2176, 2184 (1981); 101 S. Ct. at 2187 (Blackmun, J., concurring); 101 S. Ct. at 2188-89 (Stevens, J., concurring); 101 S. Ct. at 2192 (Burger, C.J., dissenting).

showing pornographic films than on those that did not.³⁴⁷ Only Justice Powell disagreed. He characterized the ordinance as an “innovative, land-use regulation, implicating First Amendment concerns only incidentally”³⁴⁸ and approved it based on an *O'Brien*-type analysis. In contrast, Justice Stevens, joined by three other Justices, scrutinized the ordinance under a revised clear and present danger analysis. He agreed that the evils Detroit sought to prevent were sufficiently plausible and imminent to justify the ordinance’s limited incursion on expression interests. Specifically, he reasoned that the concentration of adult use theaters portends a variety of “secondary effects”³⁴⁹ that would impair the city’s “interest in attempting to preserve the quality of urban life.”³⁵⁰ Despite his alternative rationale, Justice Powell also extolled the city’s efforts to preserve “stable neighborhoods.”³⁵¹ In approving the stability interest advanced by Detroit, a majority of the Court rejected the theater owners’ contention that the city had acted on the “basis of nothing more substantial than unproved fears and apprehensions about the effects of [adult theaters] upon the surrounding areas.”³⁵²

Among the ordinance’s claimed defects was the charge that content-based restrictions — those premised on expression’s “offensiveness” — are permissible only “in the limited context of a captive or juvenile audience,”³⁵³ an exception not applicable to the *Young*

347. They were Justice Stevens, who delivered the opinion of the Court in which Justices White and Rehnquist and Chief Justice Burger joined; Justices Stewart and Blackmun who wrote dissenting opinions; and Justices Marshall and Brennan, who joined in both dissents. Justice Powell concurred in Justice Stevens’s opinion subject to certain exceptions, including Justice Stevens’s characterization of the Detroit ordinance as a content-conscious measure.

348. 427 U.S. at 73 (Powell, J., concurring).

349. 427 U.S. at 71 n.34. These “secondary effects” constitute the “substantive evils,” see note 345 *supra*, whose proscription is permitted under the clear and present danger test.

350. 427 U.S. at 71.

351. 427 U.S. at 80 (Powell, J., concurring).

352. 427 U.S. at 75 (Powell, J., concurring). The theater owners’ contention in *Young*, of course, is the classical surrebutter to the state’s clear and present danger rebuttal of the claim that its measure infringes speech. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

353. 427 U.S. at 86 (Stewart, J., dissenting).

Under the captive audience doctrine, activities or environmental features that are both offensive and unavoidable may be proscribed to protect the privacy rights of potential viewers even though the proscription is framed in terms that are not content-neutral. See, e.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (political advertising in public transit); *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 736-38 (1970) (restrictions on promotional materials sent through the mails deemed offensive by recipient); *cf.* *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932) (billboards advertising tobacco). Other cases where the Court deemed the doctrine relevant in principle but inapplicable under the specific facts include, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208-12 (1975) (drive-in movie screen); *Spence v. Washington*, 418 U.S. 405, 412 (1974) (*per curiam*) (American flag bearing peace symbol hung upside down in window visible from public way); *Cohen v. California*, 403 U.S. 15, 21-22 (1971) (jacket bearing vulgar inscription worn in courthouse).

facts. Distressed by what they viewed as the majority's "drastic departure from established principles of First Amendment law,"³⁵⁴ the dissenters did not deal explicitly with Detroit's assertions concerning the imminent evils portended by the concentration of adult theaters. Although they expressed their sympathy for its "well-intentioned efforts . . . to 'clean up' its streets,"³⁵⁵ they warned that "it is in those instances when protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height."³⁵⁶

In *Schad*, the Court invalidated Mount Ephraim's effort to ban "live entertainment" totally. Despite their diversity,³⁵⁷ the opinions indicate that the Justices are narrowing their differences on four aesthetics-first amendment issues that they hotly disputed or left unclear in *Metromedia* and *Young*. First, *Schad*, unlike *Metromedia*, recognizes that an aesthetically based land use measure regulating nonverbal expression can hinder first amendment values. Disagreeing with the borough's assumption that "because the challenged ordinance was intended as a land-use regulation, it need survive the minimal scrutiny of a rational relationship test,"³⁵⁸ Justice Blackmun expressed the view, endorsed at least implicitly by the other four opinion writers, that "where protected First Amendment interests are at stake, zoning regulations have no such 'talismanic immunity from constitutional challenge.'"³⁵⁹

Second, *Schad* presages the Court's willingness to countenance content-based aesthetic measures even absent captive or juvenile audiences. All of the opinions indicate that communities may use such measures to prevent genuine instances of associational dissonance between existing resources and new entrants. Thus, Justice Burger, joined by Justice Rehnquist in dissent, explicitly premised his approval of Mount Ephraim's selective ban on live entertainment

At least one state has specifically invoked the doctrine in sustaining a billboard ban. See *John Donnelly & Sons, Inc. v. Outdoor Advertising Bd.*, 369 Mass. 206, 226-28, 339 N.E.2d 709, 721-22 (1975). Commentary portraying the doctrine as relevant in principle to unaesthetic activities or environmental features but presumptively insufficient to outweigh the interest in expression that would be forfeited by its application includes, e.g., *L. TRIBE*, *supra* note 60, § 12-19; *Williams*, *supra* note 46, at 24-28, 29, 31-32; *Note*, *supra* note 60, at 197-98.

354. 427 U.S. at 84 (Stewart, J., dissenting).

355. 427 U.S. at 87 (Stewart, J., dissenting).

356. 427 U.S. at 87 (Stewart, J., dissenting).

357. Justice White wrote the opinion for the Court in which four other Justices joined. Concurring opinions were written by Justices Blackmun, Powell, and Stevens, although the latter concurred only in the judgment. Chief Justice Burger wrote a dissenting opinion in which Justice Rehnquist joined.

358. 101 S. Ct. at 2187 (Blackmun, J., concurring).

359. 101 S. Ct. at 2187 (Blackmun, J., concurring) (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 75 (1976) (Powell, J., concurring)).

on the ground that “the citizens of the [b]orough . . . meant only to preserve the basic character of their community.”³⁶⁰ Justice Stevens voted against the borough principally because the record failed to establish whether live nude dancing “introduced cacophony into a tranquil setting or merely a new refrain in a local replica of Place Pigalle.”³⁶¹ Justice Powell, joined by Justice Stewart, noted that a “more carefully drafted ordinance” than Mount Ephraim’s measure “could be appropriate and valid in a residential community where all commercial activity is excluded.”³⁶² The remaining Justices agreed with Justice White that “our decision today does not establish that every unit of local government entrusted with zoning responsibilities must provide a commercial zone in which live entertainment is permitted.”³⁶³ Their objections, like those of Justices Stevens and Powell, were that the borough failed to show that live entertainment clashed with its character, and that it had authored a measure that was both under- and overinclusive in relation to its vaguely stated purposes.³⁶⁴

Third, *Schad* signals that the Court now views the clear-and-present-danger reasoning of Justice Stevens in *Young* as the appropriate standard against which to gauge expression-infringing aesthetic regulation. As Justice White formulated that standard, “when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest.”³⁶⁵ First amendment analysis should, therefore, center upon the plausibility of government’s claim that the new entrant portends evils that land use regulation may legitimately prevent.³⁶⁶ What those evils will be is unsettled, but both *Young* and *Schad* confirm that community stability provides the rubric under which they will be defined. In *Young*, the stability interest was exemplified by the impairment of neighborhood character;³⁶⁷ in *Schad*, by the impairment of overall community character.³⁶⁸

The standard splits the difference between two types of tests. On the one side lies the “compelling state interest” and the classical

360. 101 S. Ct. at 2192 (Burger, C.J., dissenting).

361. 101 S. Ct. at 2190 (Stevens, J., concurring in the judgment).

362. 101 S. Ct. at 2188 (Powell, J., concurring).

363. 101 S. Ct. at 2186 n.18.

364. See 101 S. Ct. at 2185-86.

365. 101 S. Ct. at 2182-83 (footnote omitted).

366. See notes 345 & 352 *supra*.

367. See text at notes 349-52 *supra*.

368. See text at notes 360-64 *supra*.

“clear and present danger” tests suggested by earlier first amendment jurisprudence.³⁶⁹ On the other is the “rational relationship” test traditionally applied in the land use sphere.³⁷⁰ As applied in *Schad*, the standard properly detaches judicial attention from the sweeping generalities of past first amendment and land use cases, and focuses it precisely where it belongs: namely, on the defensibility of the particular aesthetic program considered in terms of the clarity of its standards, the internal coherence of its structure, the rationality of its actual administration, the extent to which it needlessly or necessarily restricts expression, and the cogency of the enacting government’s claim that the regulated activity’s offensiveness poses a threat to community stability.

While praiseworthy, the Court’s formulation of the standard is but a first step in accommodating first amendment and aesthetics interests. The next issue — identified earlier as the area’s major dilemma — concerns the type of proof that government must advance to establish that an “offensive” new entrant impairs the “sufficiently substantial government interest” of community stability. Is it adequate to establish that the offensiveness is of a type that predictably will create community apprehension that its stability-identity values are threatened? Or must the imminence of specific secondary effects also be shown, as the Court requires in applying the clear and present danger doctrine to political speech?³⁷¹

Schad and *Young* suggest that more than the first showing is necessary, but how much more is unclear. *Schad* invalidated the live entertainment ban because Mount Ephraim wholly failed to establish a nexus between that use and impairment of the borough’s character.³⁷² *Young* sustained the adult theater dispersal ordinance because it accepted Detroit’s contention that the concentration of adult theaters “causes” the area to deteriorate and become a focus of crime.³⁷³ In truth, however, Detroit enacted the ordinance principally in reliance on the testimony of Mel Ravitz, a sociology professor and former president of the city’s Common Council, who reasoned that

if people believe something is true, even if it is not originally, they will tend to act as if it were true, and in so doing, help produce the condition that originally was only believed: that if residents of any neigh-

369. See L. TRIBE, *supra* note 60, at § 12-8.

370. See note 198 *supra*.

371. See note 352 *supra*.

372. See text at notes 361-64 *supra*.

373. 427 U.S. at 71 n.34.

borhood believe that the concentration of proscribed uses damages the neighborhood, they will act as if it were true, and will seek to move away and allow people with different standards to move in.³⁷⁴

Stated alternatively, Detroit did not show that a concentration of adult theaters, by itself, “causes” the substantive evils that the city enumerated nor, existing literature suggests, would Detroit have been able to do so.³⁷⁵ Whether such proof is required at all, moreover, is called into question by Chief Justice Burger’s dictum in *Paris Adult Theatre I v. Slaton*³⁷⁶ that “[t]he fact that a congressional directive reflects *unprovable assumptions* about what is good for the people, including *imponderable aesthetic assumptions*, is not a sufficient reason to find that statute unconstitutional.”³⁷⁷

The issue, in short, remains open, and the dilemma that gives rise to it, tormenting. Land use planning seeks to anticipate deleterious trends before they come to pass, and to take steps to prevent them. Too stringent a rule would defeat these worthy ends.³⁷⁸ But if the rule is too lenient, the risks are grave, as *Schad* itself indicates, that communities will ban or restrict “offensive” new entrants because of their “offensiveness” and nothing else, thereby frustrating core first amendment values.

The final issue — the role, if any, of the captive audience doctrine — is considerably less problematic although it has been confused in earlier Court opinions and in commentary. Both have posited that, in principle at least, this doctrine might justify content-

374. As paraphrased in Brief for Petitioners [City of Detroit] at 18-19, *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976).

Ravitz states in sociological terms the legal position endorsed by some early twentieth-century courts, which held that uses causing psychic harm may be proscribed as nuisances. See note 309 *supra*.

375. See generally E. SHAUGNESSY & D. TREBBI, A STANDARD FOR MILLER (1980); U.S. COMMISSION ON OBSCENITY AND PORNOGRAPHY, REPORT 26-27 (1970); R. ZURCHER & R. KIRKPATRICK, CITIZENS FOR DECENCY (1976).

376. 413 U.S. 49 (1972).

377. 413 U.S. at 62 (emphasis added).

378. An example of such a rule is that proposed by Linde in his argument that the clear and present danger test be discarded entirely:

The First Amendment [should] invalidate any law directed in terms against some communicative content of speech or of the press, irrespective of extrinsic circumstances either at the time of enactment or at the time of enforcement, if the proscribed content is of a kind which falls under any circumstances within the meaning of the first amendment.

Linde, *supra* note 345, at 1183 (emphasis in original). Whether or not appropriate in the sphere of political speech — the focus of Linde’s article — this test does not appropriately accommodate expression and land use interests, particularly in view of the Court’s evident solicitude for the latter in recent years. See notes 40-43 *supra*. The categorical nature of Linde’s reasoning, moreover, invites counter-responses such as Justice Stevens’s reasoning in *Young* that nonobscene pornographic speech should receive lesser protection than political speech. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (Stevens, J., concurring).

based restrictions because environmental features like billboards and movie drive-in screens are thrust upon unwilling viewers.³⁷⁹ The doctrine, however, is premised on *privacy* grounds: the right of the *individual* not to be involuntarily exposed to material that he *personally* deems offensive.³⁸⁰ What lies behind the cultural stability interest is 180 degrees in the opposite direction: namely, the interest of the *community qua community* in protecting its *visual commons* — the repository of its spatially referred values — from impairment by new entrants whose associational dissonance mars the quality of *community* life.³⁸¹ Significantly, the captive audience doctrine played no

379. See note 353 *supra*.

380. *Id.*

381. The distinction drawn in the text between privacy and stability interests clearly appears in the Massachusetts Supreme Court's opinion in *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 193 N.E. 799 (1935), sustaining a complex set of state-wide and local billboard restrictions. The court's recognition that the purpose of the billboard restrictions was to protect the community's visual commons rather than an individual's right to privacy is evident in its reasoning that the legislation "is not a mere matter of banishing that which in appearance may be *disagreeable to some*. It is protection against intrusion by foisting the words and emblems of billboards upon the *mass of the public* against *their* desire." 289 Mass. at 182, 193 N.E. at 814 (emphasis added). Its later statements relating to particular billboard restrictions imposed in Concord and along Boston's Beacon Hill and Common, moreover, directly ground the public's "desire" in the cultural stability interest. The restrictions, the court noted, were intended to prevent "incongruous intrusions" upon the cherished associations that these historic locations had come to possess over three centuries for the citizens of the Commonwealth. 289 Mass. at 201, 193 N.E. at 823. To like effect, see *Sun Oil Co. v. City of Madison Heights*, 41 Mich. App. 47, 199 N.W.2d 525 (1972), which, in also sustaining a billboard ban, stated: "[W]e do not think that the right to advertise a business is such that a businessman may appropriate *common* airspace and destroy *common* vistas. Nor do we believe that the right to advertise means the right to interfere with the landscape and the views along public thoroughfares." 41 Mich. App. at 54, 199 N.W.2d at 529 (emphasis added).

My concept of a "visual commons" and its protectability under the police power's general welfare heading is not dissimilar, if I understand him correctly, to Professor Sax's concept of a "visual prospect" as a "common" protectable as a "public right." See Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 159, 162 (1971). The theory advanced by Professor Sax "would recognize diffusely held claims as public rights, entitled to equal consideration in legislative or judicial resolution of conflicting claims to the common resource base, without regard to the manner in which they are held." *Id.* at 159. Concerning visual values, he reasons that "[i]n a somewhat less conventional sense, a visual prospect is also a common. Thus, if the landscape as a visual prospect is not confinable to any single tract of land, no single landowner is entitled to dominate it." *Id.* at 162.

To illustrate what I take to be our common position, San Francisco officials would have been acting fully within the police power had they opted to bar the Transamerica Corporation from appropriating the visual-semiotic values of that city's skyline by constructing a view-dominating, 853-foot pyramidal tower in its midst. Commenting on the success of the corporation's strategy in achieving a corporate "image" in the public mind through its pyramid, one journalist has written:

Possibly the best-known aspect of Transamerica is its corporate home. It's not that the 853-foot structure is reckoned to be the 14th-tallest building in the country, or that it is the tallest of all in San Francisco. It's the shape of the thing — a pyramid. . . . The tower is now an accepted part of the San Francisco skyline, one of the country's best-known buildings, and a considerable marketing tool, featured in corporate television commercials and print ads. The building has appeared on the cover of every annual report since 1972. If few know what Transamerica does, many know where it lives.

Kleinfield, *What Is Transamerica?*, N.Y. Times, Mar. 1, 1981, § 3, at 22, col. 3.

role in *Metromedia* despite the content-based character of its billboard ban, and the Court's recognition that billboards "are large, immobile structures that depend on eye-catching visibility for their value."³⁸²

In light of the foregoing assessment of *Young*, *Metromedia*, and *Schad*, the Court's decision in *Penn Central II* would ultimately turn upon its evaluation of the extent to which it believed that an associationally dissonant tower atop the Terminal would impair stability-identity values. A clue to that outcome is furnished by at least six Justices' willingness to accept the city's claim in *Penn Central* that "preservation of the [Terminal] benefits all New York City citizens and all structures, both economically and by improving the quality of life in the city as a whole."³⁸³ But three factors cut against overconfidence on this score. The quoted language was offered in the context of a "takings" challenge, in which the city's proof problems were markedly less onerous than if it were confronted with a *bona fide* first amendment objection.³⁸⁴ The language stresses the additional *benefits* that the city derives from the Terminal's preservation rather than the *evils* that might befall it were the Terminal not preserved.³⁸⁵ Finally, how exacting the Court would be in demanding that the city furnish proof of the negative secondary effects that it would incur upon impairment of its stability-identity values is currently an open question.³⁸⁶

382. See *Metromedia, Inc. v. City of San Diego*, 101 S. Ct. 2882, 2902-03 (1981) (Brennan, J., concurring in the judgment).

383. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 134 (1978). It is possible, however, that some Justices might see matters differently in *Penn Central II* because it presents a first amendment rather than a "takings" challenge. For example, Justice Brennan, who authored the Court's opinion in *Penn Central*, independently evaluated and found wanting San Diego's claim that its billboard ban advanced substantial traffic safety and aesthetics interests. See *Metromedia, Inc. v. City of San Diego*, 101 S. Ct. 2882, 2903-06 (1981) (Brennan, J., concurring in the judgment).

384. See note 383 *supra*.

385. Prior to *Penn Central*, many land use commentators ascribed major significance to the distinction. For example, Professor Dunham, following Professor Freund, argued that the police power should be differentiated from the eminent domain power on the basis that government, without compensation, may employ the former to prevent a landowner from imposing harms on others but must compensate through eminent domain when it seeks to compel the landowner to provide benefits for the community. See Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 663-69 (1958). But see Sax, *supra* note 381, at 48-50. But *Penn Central* appears to assimilate benefits to harms in its reasoning that *any* land use that frustrates a legislatively declared public purpose is a "harm," whether or not the use is harmful or benign considered independently of that purpose. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 133-34 n.30 (1978).

386. See text at notes 371-78 *supra*.

CONCLUSION

This Article's persistent theme is that aesthetic policy-making is a gamble even under the best of circumstances. Its recent history reveals serious flaws. Its future is clouded by political, conceptual, and philosophical dilemmas, none of which admits to facile resolution and some of which lead to no definitive solution at all. Why then not conclude that, whether cast as the pursuit of visual beauty or as a quest for cultural stability, it should be abandoned altogether?

This course is neither possible nor desirable in my judgment. If the homeostasis metaphor is apt, community demands for aesthetic regulation, already at fever pitch, will intensify as the nation moves into a period of social, technological, and geopolitical change that threatens profound destabilization. Political and social pressures are likely to be such that legal institutions will be unable to spurn these demands even if they wish to. Moreover, "[a]esthetic considerations," as Judge Van Voorhis has observed, "underlie all zoning, usually in combination with other factors with which they are interwoven."³⁸⁷ Legislators are condemned to attend to aesthetic values, therefore, unless they choose to abandon land use and environmental policy-making as well — an even more unlikely option.

The law, moreover, should play a role in the piece. But it must be a prudent one, rather like that of Friar Laurence, who counselled the overzealous Romeo:

These violent delights have violent ends. . . . Therefore love moderately: long love doth so; Too swift arrive as tardy as too slow.³⁸⁸

If aesthetic regulation can lead to "violent ends," it can also purchase "violent delights" because it is rare among legal initiatives in its power to respond to the community's most deeply felt desires and fears. It would be a mistake to dismiss as hyperbole the metaphors of physical and cultural disintegration that aesthetic controversies evoke. For those who invoke them — most of us at one time or another — they are realities against which the ills traditionally addressed by the police power pale.

Cultural stability's primacy as aesthetic policy's *raison d'être*, moreover, is increasingly understood and supported by policy-mak-

387. *People v. Stover*, 12 N.Y.2d 462, 471, 191 N.E.2d 272, 277, 240 N.Y.S.2d 734, 741 (Van Voorhis, J., dissenting), *appeal dismissed*, 375 U.S. 42 (1963). See generally text at notes 260-66 *supra*.

388. W. SHAKESPEARE, *THE TRAGEDY OF ROMEO AND JULIET* Act II, Scene 6 (G. Kitteridge ed. 1940).

ers. The Department of the Interior, for example, authored a policy directive on historic preservation in 1981 acknowledging that

[t]he historic buildings in a community are tangible links with the nation's past that help provide a sense of identity and stability that is often missing in this era of constant change Preservation is an anchor that keeps communities together and reestablishes pride and economic vitality.³⁸⁹

Recognition of stability-identity values as the core interest served by aesthetic regulation, I submit, will also be the trademark of the postmodern period of aesthetic jurisprudence anticipated or perhaps even proclaimed by *Young*, *Schad*, and other recent opinions.³⁹⁰

In the last analysis, the best prescription for coping with aesthetic policy may well be equal parts of a sense of humor, perspective, and wonder. Humor, to assist us in appreciating that, because aesthetic policy is the vehicle by which our culture expresses its most deeply felt values and apprehensions, some rather confused — even silly — things may be urged in its name. Perspective, to gain sufficient distance from our immediate feelings in particular controversies to think through whether we really ought to demand that the law take on something that, perhaps, it cannot or should not handle. And wonder, to marvel not only at the mystery of human creativity but at

389. *A Federal preservation agenda for the 80's*, PRESERVATION NEWS, Oct. 1980, at 7.

390. See notes 80 & 166 *supra* (patterned community preferences provide the basis for the substance and legitimacy of aesthetic regulation); note 381 *supra* (the physical environment also serves as a visual commons to which community identity values are spatially referred); note 231 *supra* (aesthetic regulation serves a homeostatic function by moderating or preventing environmental changes that threaten cultural stability and identity); notes 39-45 *supra* (aesthetic, land use, and environmental law share the common end of preserving the "quality of life"); note 306 *supra* (government under the police power may prevent "aesthetic" or "psychological harm" resulting from environmental changes); note 119, *supra* (associational mechanism affords the basis for patterned community preferences); note 131 *supra* (aesthetic regulation not based solely on human physiological response); note 166 *supra* ("museum" standards differ in refinement, function, and source from legal aesthetic standards); note 140 *supra* (aesthetic regulation seeks to preserve existing resources cherished by the community, not to mandate the creation of original forms of environmental "beauty"); notes 58, 300 & 303 *supra* (courts should review and, in appropriate cases, invalidate aesthetic measures administered to achieve unauthorized or constitutionally defective ends); note 215 *supra* (the validity of aesthetic regulation does not depend upon its supposed function of maintaining property values although the latter is often its effect); notes 113 & 119 *supra* (aesthetic controversies feature an existing resource-new entrant pairing; the propriety of banning or restricting the new entrants depends upon their "compatibility" with the paired existing resources); notes 100-07 & 119 *supra* (standards for the regulation of new entrants derive from the visual-associational characteristics of the existing resource with which they are paired); notes 345-82 *supra* (aesthetic regulation can impinge upon first amendment freedoms; the accommodation of aesthetic and speech values requires the reappraisal and modification of conventional doctrines that evolved independently of one another in first amendment and land use jurisprudence); notes 208-09 *supra* (the formula that government may zone "solely for aesthetics" is essentially meaningless if "aesthetics" is defined as the pursuit of visual beauty as an end in itself; the modern period opinions, no less than those of the middle period, typically cite values other than the enjoyment of visual beauty alone in sustaining aesthetic measures).

the extraordinary fact that, despite our differences in personal history, attitude, and experience, our bonds with one another and with our visual commons shape and daily reinforce our shared humanity.