AESTHETICS IN OHIO LAND USE LAW: PRESERVING BEAUTY IN THE PARLOR AND KEEPING PIGS IN THE BARNYARD

by

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I. INTRODUCTION

Traditional zoning restrictions on residential use, lots, and yards invariably involved what Ohio lawyer Alfred Bettman, an early supporter of urban planning, once described as an official regard for "the look of things."1 These traditional zoning controls though were constitutionally sanctioned on the nuisance analogy basis that such restrictions promoted the orderly development of healthy, safe and quiet residential neighborhoods.2 Aesthetic values generally were held to be beyond the scope of police power regulation.3 In 1930, Judge Cardozo could state: "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."4

Today the narrow vision of early zoning programs based on the German model of a clean and well-ordered community5 is augmented in Ohio and other states by a variety of forms of aesthetic regulation.6 As Norman Williams has pointed out: "In no other area of planning law has the change in judicial attitudes been so complete."7 Rather than simply the prevention of blighted slum districts and the promotion of orderly community development, the focus of

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1 Comment, Constitutionality of Zoning, 37 HARV. L. REV. 834, 857 (1924). Alfred Bettman, a Cincinnati lawyer and early member of that city's Plan Commission, was active in urban planning and reform locally and nationally throughout his career. A discussion of the role played by Bettman's famous amicus brief in the landmark decision of the United States Supreme Court in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), upholding the constitutionality of comprehensive zoning, is found in Tarlock, Euclid Revisited, LAND USE & ZONING DIG., Jan. 1982, at 4, 5-7.


5 The early history and theory of zoning is discussed in S. Toll, ZONED AMERICAN 124-25 (1969).

6 An aesthetic regulation generally is considered to be any police power restriction which has as its purpose the creation or preservation of a visually pleasing environment, whether or not linked with other derivative public purposes such as protecting property values, public safety, or encouraging tourism and economic development. Such a regulation is sometimes said to involve the imposition of restrictions on land use or development that would have no effect on the sensibilities of a person without sight. See Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal, 20 LAW & CONTEMP. PROBS. 218, 223 (1955).

much land use regulation today is on implementing aesthetic policy.\(^8\)

Use of the police power to promote aesthetic values in land use and development has had a nearly universal appeal. In recent years public officials have enacted and courts generally have upheld a variety of forms of aesthetic regulation.\(^9\) Such things as screening fences, the parking of recreational vehicles, the size, type and location of signs and billboards, and the architectural style of structures on the land all have been held to be within the legitimate scope of police power regulation.\(^10\) Traditional legal doctrine which limited the police power to instances of “clear necessity” and prohibited its use to promote purely aesthetic values has been largely replaced by widespread judicial acceptance of the notion that the general welfare may be promoted by police power regulation aimed at maintaining or creating a visually beautiful environment. At the federal level, the Supreme Court has expressly ruled that aesthetic values constitute a legitimate public purpose for police power regulation.\(^11\) Similarly, Ohio and other state courts have ruled that purely aesthetic values may be furthered in regulation of land use and development.\(^12\)

This change in aesthetic doctrine has been based largely on the rationale that unsightly utilization of land can have adverse affects on people or on property values that are just as real and troublesome as those created by noise, smoke, odors or other common nuisances that impact on the quality of the environment. Since one of the basic principles of traditional zoning theory is the separation of incompatible land uses and structures, the unsightly appearance


\(^9\)See Bufford, Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation, 48 UMKC L. Rev. 125 (1980).

\(^10\)See, e.g., I N. Williams, supra note 7, at §§ 11.01-.21.


\(^12\)Ohio court decisions upholding regulation of land use and development to promote purely aesthetic values are discussed infra at text accompanying notes 70-79. The vast majority of state courts that have recently addressed the issue now uphold regulation of land use based largely or exclusively on aesthetic considerations. See, e.g., Bufford, supra note 9; I R. Anderson, American Law Of Zoning §§ 7.13-.25 (1968 & Supp. 1981); I A. Rathkopf, The Law Of Planning And Zoning § 14.01 (1975 & Supp. 1984); Williams, supra note 7, at §§ 11.01-.21.

For a discussion of the so-called “quiet revolution” in land use control which led in part to the enactment of a new generation of police power restrictions on land use and development promoting aesthetic and other general welfare goals see F. Bosselman & D. Callies, The Quiet Revolution In Land Use Control (1971) and F. Popper, The Politics Of Land Use Reform (1981).
of a use or structure which causes or contributes to such incompatibility has been found by courts in Ohio and elsewhere to be a sufficient basis for ruling that the use or structure is just as much in the wrong place and subject to exclusion or regulation, as in the words of Justice Sutherland, "a pig in the parlor instead of the barnyard."\(^{13}\)

To be sure, not everyone is sanguine about this transformation in legal doctrine. Owners of land frequently argue that aesthetic regulation in whatever form necessarily involves the imposition of inherently arbitrary restrictions on private land use and that such restrictions are unconstitutional as an unfair and uncompensated taking of private property rights for public use.\(^{14}\) These arguments reflect the reasoning of traditional doctrine which as a matter of due process prohibited aesthetic regulation of land use and development.\(^{15}\) According to traditional doctrine the police power could not be used to promote aesthetic values since beauty was considered a purely subjective matter of individual taste. Any official notion of visual beauty would therefore be found lacking a rational basis in fact or logic and held to be arbitrary and capricious.\(^{16}\) As a limitation on the police power, traditional doctrine also read into "due process" John Stewart Mill's simple principle that power cannot be rightfully exercised over any member of a civilized society except to prevent harm to others.\(^{17}\) Aesthetic regulation was therefore prohibited by early court decisions since its purpose was solely to secure some "benefit" for society rather than the prevention of harm to health, safety, morals or the general welfare of the community.\(^{18}\)

\(^{13}\) Village of Euclid v. Ambler Realty Co., 272 U.S. at 394-95.

\(^{14}\) While a discussion of the first amendment "taking issue" in the context of aesthetic regulation is beyond the scope of this article, the Ohio Supreme Court generally has applied a "reasonable use" test for validity on this issue. See Negin v. Board of Bldg. & Zoning Appeals, 69 Ohio St. 2d 492, 433 N.E.2d 165 (1982) (minimum lot size restriction held unconstitutional). The United States Supreme Court also has applied a "reasonable use" test for validity when a land use regulation is challenged as an uncompensated and unconstitutional taking of property for public use. See, e.g. Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1979). See generally D. Mandelker, Land Use Law §§ 2.1-30 (1982).

\(^{15}\) Traditional or so-called "early period" aesthetic doctrine in Ohio is discussed infra at text accompanying notes 28-52. A survey of state court decisions applying traditional aesthetic doctrine is found in Rathkopf, supra note 12, at § 14.01.

\(^{16}\) See, e.g., Curran Bill Posting & Distributing Co. v. City of Denver, 47 Colo. 221, 227, 107 P. 261, 264 (1910), where the Colorado Supreme Court, in holding a setback restriction on signs unconstitutional stated: 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, but 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.

\(^{17}\) See, e.g., Passiac v. Patterson Bill Posting, A. & S.P. Co., 72 N.J.L. 285, 287, 62 A. 267, 268 (1905) ("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.").

\(^{18}\) The harm vs. benefit distinction traditionally has been ascribed major significance as a basis for differentiating the scope of the police power from the government's power of eminent domain. See Dunham, A Legal and Economic Basis for City Planning, 58 COLUM. L. REV. 650, 663-69 (1958). At least in the area of aesthetic regulation, that distinction may be more apparent than real in view of the recent decision of the
More recently, debate over aesthetic regulation has focused on both the wisdom and constitutionality of its impact on the democratic values of pluralism and expression. These democratic values which are constitutionally endorsed by the substantive due process guarantee of freedom from arbitrary restraints and the first amendment's protection of expression are often restricted in scope by aesthetic regulation. Today even proponents of aesthetic regulation express concern over the extent to which the official pursuit of aesthetic values may come to override the values of democratic pluralism and individual, political, and religious expression.

There is also an increasing awareness of the extent to which aesthetic regulation is misused by private groups and developers to promote their own narrow vision of the public interest. Critics argue that forms of aesthetic regulation often are used simply to standardize the "subjective preferences" of established residents. As a result (much needed and less expensive) alternative forms of housing and living arrangements are thereby excluded from a community. In this regard, the legitimization of aesthetic regulation is sometimes perceived as providing new opportunities for exclusionary land use policies to be expressed in forms of police power regulation that allow an avowed concern for the quality of the visual environment to mask the politics of intolerance and selfishness.

The efficacy of aesthetic regulation also is being questioned. Some United States Supreme Court that a land use which frustrates a public purpose for regulation is a "harm" regardless of whether the land use is harmful considered apart from that purpose. See Penn Cent. Transp. Co. v. New York City, 438 U.S. at 133-34 n.30. The distinction also has been blurred by Ohio court decisions legitimizing aesthetic regulation of land use to promote the happiness, comfort and general well-being of the community. See Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 73, 458 N.E.2d 852, 856 (1984). A reformulation of aesthetic doctrine in Ohio limiting the scope of police power regulation to the prevention of harm "associational values" derived from existing visual features of the environment is discussed infra at text accompanying notes 164-99.


See, e.g., Costonis supra note 8, at 446-58; Pearlett, supra note 8; Williams, Subjectivity, Expression and Privacy; Problems of Aesthetic Regulation, 62 MINN. L. REV. 1 (1977); Note, Land Use Regulation and the Free Exercise Clause, 84 COLUM. L. REV. 1562 (1984).


observers contend that official aesthetic policies have produced, at best, only mixed results in the enhancement of the design and visual quality of the environment.\(^4\) Recognition of the practical problems involved in the implementation of aesthetic policy and of the limited role that aesthetic regulation may actually play in shaping design and development of the built environment has led some early supporters of aesthetic regulation to counsel against its widespread and indiscriminate implementation in order to avoid the risks of possible unintended and adverse consequences.\(^5\)

Much of the criticism of aesthetic regulation and the problems it raises result in part from the failure of state courts to adequately articulate the legitimate role and scope of aesthetics in regulation of land use and development. While the clear trend in state court decisions is to uphold regulation based "solely on aesthetics,"\(^6\) courts generally have been unable or unwilling to articulate standards and authoritative criteria for judicial review of the validity of official aesthetic policies and decisions. This failure is particularly apparent in regard to judicial review of administrative decisions of public agencies which implement aesthetic policy. The doctrines of "presumption of validity," and "deference to administrative judgment" often substitute for careful analysis and articulation by courts of legal standards which govern the valid role and scope of aesthetic regulation.\(^7\)

While there is increasing awareness of the conflicts, problems, and potential for abuse inherent in aesthetic regulation, this is unlikely to result in widespread judicial retrenchment to traditional doctrine. Instead, Ohio and other state courts in the future are likely to attempt a more careful and definite formulation of authoritative criteria for judicial review of official aesthetic policies and decisions.

The purpose of this article is to initiate such an undertaking through an analysis of aesthetic jurisprudence in Ohio land use law. Judicial development by Ohio courts of the role of aesthetics in land use regulation seems particularly well suited for such a study. Ohio court decisions provide classic examples of the three widely recognized stages in the development of aesthetic jurisprudence and tend to reflect the concerns and difficulties found in recent decisions of other state courts that have legitimized regulation "solely for aesthetics." Analysis of Ohio court decisions may provide fertile ground for an examination of how the formulation of more definite standards for judicial review of official aesthetic policies can serve to reduce the uncertainty and

\(^4\)See Costonis, supra note 8, at 369-71.

\(^5\)Id.

\(^6\)See, e.g., City of Sunrise v. D.C.A. Homes, Inc. 421 So. 2d 1084 (Fla. App. 1982); State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982); Bufford, supra note 9. For a survey of state court decisions upholding land use regulation solely for aesthetic purposes see WILLIAMS, supra note 7, at §§ 11.10-.21.

\(^7\)See Rowlett, supra note 8, at 647-50.
confusion that now exist in regard to the legitimate role and scope of aesthetic regulation in land use and development.

Part II of the article examines the judicial development by Ohio courts of the role and scope of aesthetics in regulation of land use and development. Discussion and analysis focuses on the three stages or periods in the judicial development of aesthetic doctrine in Ohio land use law:

1. The early period when due process considerations supported the doctrine that the police power may not be used to promote aesthetic values;

2. The middle or transition period when early doctrine was reformulated to allow aesthetic considerations in police power regulation so long as regulation furthered some other traditional public purpose (such as preservation of property values); and

3. The modern period when aesthetic doctrine was again reformulated by Ohio courts to expressly allow police power regulation of land use and development to promote purely aesthetic values.

Part III of the article provides an analysis and critique of the legitimate role and scope of aesthetics in regulation of land use and development in view of the standards for validity expressed in Ohio court decisions legitimizing aesthetic regulation. In conclusion the author suggests a reformulation of aesthetic doctrine embodying standards for judicial review of aesthetic regulation which attempt to reflect an express recognition of the problems inherent in, and the social values furthered by such regulation.

II. AESTHETIC DOCTRINE IN OHIO

A. The Early Period

Even prior to the United States Supreme Court's landmark decision upholding the validity of local zoning in Village of Euclid v. Ambler Realty Co., the Ohio Supreme Court had already constitutionally sanctioned local use of the police power for extensive regulation of land use and development. In a case of first impression, Pritz v. Messer, the Ohio Supreme Court upheld the validity of local zoning which restricted by districts the use, area, height and bulk of structures in land development throughout a municipality. The court ruled these local restrictions on land use and development were within the legitimate scope of police power regulation, finding that a reasonable relationship existed between "this effort of the city to plan its physical life" and the "material welfare of the community." Relying on state court decisions from

\[272\text{ U.S. 365 (1926).}\]
\[912\text{ Ohio St. 628, 149 N.E. 30 (1925).}\]
\[\text{Id. at 645, 149 N.E. at 35. Ohio court decisions hold that a police power regulation of land use is valid as a matter of substantive due process so long as the regulation bears a real and substantial relation to a legitimate public purpose — defined to include health, safety, morals or the general welfare. E.g., Benjamin}\]
other jurisdictions, the Ohio court in *Pritz* upheld the validity of local zoning by following the then common "nuisance analogy" that zoning would tend to promote the general welfare by protecting public health, morals and safety.31

The Ohio court in *Pritz* applied the general maxim that where a legislative enactment is challenged as a violation of due process the judicial function is not to determine whether the law is "wise or the best that might have been adopted" but only whether the law in question is constitutional.32 The court stated that the due process issue of whether a law has a real and substantial relationship to legitimate public purpose is a question left in "the first instance" to the discretion of the legislative body which enacted the law.33 A police power restriction on land use would be held unconstitutional, the Ohio court ruled, only where it is clear that the restriction in question has no reasonable connection to a legitimate public purpose.

In *Pritz*, the Ohio court declared that the scope of the police power would generally include any restriction on land use "reasonably necessary for the preservation of the public health, morals or safety."34 All property within the state, the court observed, "is held subject to the implied condition that it will be so used as not to injure the equal right of others to the use and benefit of their own property."35 But in regard to aesthetic policy, the Ohio court in *Pritz* ruled that the scope of the police power would not include restrictions imposed "for purely aesthetic reasons."36 The court noted, however, a restriction on land use that is otherwise valid would not be invalidated simply because "an aesthetic

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Local communities in Ohio have authority to enact police power restrictions on land use and development under the provisions of zoning and subdivision enabling statutes and, in the case of chartered municipalities, under the home rule provisions of Article XIII, § 3, of the Ohio Constitution.

31 112 Ohio St. 628, 651, 149 N.E. 30, 37 (1925).
32 Id. at 639, 149 N.E. at 33.
33 Id. at 639, 149 N.E. at 34.
34 Id. at 638, 149 N.E. at 33.
35 Id. at 638, 149 N.E. at 33. In addition to the due process provision of the fourteenth amendment of the United States Constitution, the Ohio Supreme Court has interpreted as "due process" limitations on police power regulation the provisions of Article I, §§ 1, 19 of the Ohio Constitution. See *Pritz* v. Messer, 112 Ohio St. 628, 634-35, 149 N.E. 30, 32-33 (1925).

Article I, § 1 of the Ohio Constitution states: "All men, are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

Article I, § 19 of the Ohio Constitution states in part: "Private property shall ever be held inviolate, but subservient to the public welfare."

The Ohio Supreme Court may, of course, independently interpret the above provisions of the Ohio Constitution as a more strict due process limitation on state and local regulation than the due process limitation of the fourteenth amendment, and has, in fact, done so in regard to aesthetics. See, e.g., State v. Buckley, 16 Ohio St. 2d 128, 133, 243 N.E.2d 66, 71 (1968) (refusing to expand the scope of the general welfare with respect to regulation promoting visual beauty to coincide with a decision of the United States Supreme Court indicating that such an expansion would be permissible.) The Buckley decision is discussed infra at text accompanying notes 70-77.

36 112 Ohio St. 628, 638, 149 N.E. 30, 33 (1925).
benefit incidentally results" therefrom.\textsuperscript{37}

The Ohio Supreme Court's ruling in \textit{Pritz} that restrictions on land use for aesthetic purposes were beyond the lawful scope of police power regulation was directly applied by that court in \textit{City of Youngstown v. Kahn Brothers Building Co.},\textsuperscript{38} a case decided the same day as \textit{Pritz}. In \textit{City of Youngstown}, the Ohio court held a local ordinance unconstitutional which allowed only single and two family dwellings in a certain district of a municipality. The court found that the restriction's exclusion of apartment dwellings had no reasonable relation to health, safety, morals or the public welfare. Such a restriction, the Ohio court stated, if based on "aesthetic considerations" is beyond the legitimate scope of police power regulation.\textsuperscript{39}

In \textit{City of Youngstown} the Ohio court noted that while the pursuit of aesthetic values is "commendable and desirable" it is "not essential to the public need."\textsuperscript{40} Since the police power "is based upon public necessity," the court stated "the public health, morals, or safety, and not merely an aesthetic interest, must be in danger in order to justify its use."\textsuperscript{41} The Ohio court further observed that the inherent subjectivity of aesthetic values might lead certain legislatures to prefer "to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats."\textsuperscript{42} This problem of agreement "as to what the public needs from an aesthetic standpoint," the Ohio court declared, "makes the aesthetic standard impractical as a standard of restriction upon property."\textsuperscript{43}

The Ohio Supreme Court's decision in \textit{City of Youngstown}, holding the pursuit of aesthetic values to be beyond the legitimate scope of police power regulation, has often been cited by both state courts and commentators as a classic formulation of traditional doctrine during the early development of aesthetic jurisprudence.\textsuperscript{44} This traditional doctrine, adopted by Ohio and other state courts at the time, considered aesthetic values to be beyond the scope of direct state control since official aesthetic judgments were deemed to be inherently subjective and arbitrary, and were said to involve merely questions of taste as opposed to the prevention of some real or substantial harm to the public welfare.\textsuperscript{45}

\textsuperscript{37}Id.
\textsuperscript{38}112 Ohio St. 654, 148 N.E. 842 (1925).
\textsuperscript{39}Id. at 661, 148 N.E. at 844.
\textsuperscript{40}Id.
\textsuperscript{41}Id. at 662, 148 N.E. at 844.
\textsuperscript{42}Id.
\textsuperscript{43}Id.
\textsuperscript{44}See, \textit{e.g.}, \textit{Sun Oil Company of Penn. v. City of Upper Arlington}, 55 Ohio App. 2d 27, 29, 379 N.E.2d 266, 268 (1977); \textit{Anderson}, \textit{supra} note 12 at § 7.17.
\textsuperscript{45}The judicial attitude which shaped traditional doctrine prohibiting aesthetic regulation is said to reflect both the Puritan ethic and the individualistic frontier spirit. \textit{See} Hershman, \textit{Beauty as the Subject of Legislative Control}, \textit{15} \textit{Prac. Law.}, Feb. 1969, at 20:
The traditional doctrine set forth in *City of Youngstown* was later cited and followed by Ohio courts in cases involving local land use restrictions governing the height of fences, excluding churches from residential areas, and prohibiting commercial uses on certain tracts of land when the purpose for regulation was found to involve primarily aesthetic considerations. Ohio court decisions during this early period indicated the traditional doctrine would be followed even when the aesthetic effect of a prohibited use might tend to reduce neighboring property values. As late as 1959 the Ohio Supreme Court, in a decision reviewing the law governing the theory and practice of zoning, held that restrictions on land use and development should not be imposed "simply to please the aesthetic tastes and protect the economic investment of the next-door neighbor."

Ohio courts, however, were not always entirely comfortable in following the precedent of traditional doctrine. As stated by an Ohio appellate court in an early opinion, "[i]t offends one's sense of propriety that the beauty of a neighborhood should be violated by a . . . [use] that may conform to the requirements of health, safety, and morals, and yet offend all the canons of good taste." It is "unfortunate," this same court stated, that the police power is "helpless against things that are only ugly in appearance."

B. The Middle Period

By the early 1960's a number of state courts already had rejected traditional aesthetic doctrine. In its place, state courts increasingly adopted the so-called middle or transition period doctrine which held that aesthetic values are within the lawful scope of police power regulation so long as regulation furthers some other non-aesthetic public purpose such as protecting public safety.
or the preservation of property values. Aesthetic jurisprudence was reformed during this period by judicial acceptance of the idea that the "general welfare" of the public might include police power restrictions on land use that permitted, in part, some official notion of visual beauty in regard to the appearance of a community.

This transition in aesthetic doctrine officially occurred in Ohio with the 1964 decision of the Ohio Supreme Court in *Ghaster Inc. v. Preston.* The trial court in *Ghaster* had applied traditional aesthetic doctrine to hold a statute unconstitutional which prohibited commercial signs and billboards within a certain distance of interstate highways within the state. The Ohio Supreme Court held the statute constitutional, finding such a restriction would tend to promote both highway safety and the general welfare of the public who use the highways. The court pointed out that the scope of the police power had been significantly expanded in recent years beyond simply the furtherance of public health, morals and safety. The "general welfare," the Ohio court ruled, is "a separate basis" for police power regulation of land use and the legislature may lawfully consider the effect of such a restriction in promoting "the comfort, convenience and peace of mind of those who use the highways, by removing annoying intrusions upon that use." 6

The Ohio Supreme Court's opinion in *Ghaster* avoided the issue of whether aesthetic considerations alone might constitute a legitimate public purpose for regulation. However, after quoting extensively from other state court decisions, the Ohio court clearly adopted the view that the promotion of visual beauty to enhance the enjoyment and pleasure of motorists by the elimination of commercial signs "offensive to the sight" was a legitimate factor for legislative consideration in adopting land use restrictions. 6 Quoting a New York court decision upholding the regulation of commercial billboards, the court's opinion in *Ghaster* declared that "beauty may not be queen but she is not an outcast beyond the pale of protection or respect." 6

The Ohio court in *Ghaster* also noted that the consideration and weighing of all the factors which inhere in the concept of the general welfare is a function largely left to the discretion of the legislative branch. A legislative determination that a land use restriction promotes certain public purposes, the court declared, would not be set aside by a reviewing court unless on the record it is found to be "manifestly unreasonable." 6 The Ohio court thereby indicated

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54 See, e.g., ANDERSON, supra note 12, at § 7.22.
55 176 Ohio St. 425, 200 N.E.2d 328 (1964).
56 Id. at 437-38, 200 N.E.2d at 337.
57 Id. at 437, 200 N.E.2d at 337.
58 Id. at 436, 200 N.E.2d at 336.
59 Id. at 434, 200 N.E.2d at 335. The Ohio Supreme Court has held that a local ordinance allowing on-site commercial signs but not political signs violates the first amendment. See Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 69 Ohio St. 2d 539, 433 N.E.2d 198 (1982) (citing Metromedia, Inc. v. City
that the usual "presumption of validity rule" accorded legislative determinations in other areas would also be applied to legislative findings regarding an aesthetic purpose for regulation.

Another Ohio court opinion involving the reformulation of traditional aesthetic doctrine during this transition period is the 1963 decision of an Ohio appellate court in *Reid v. Architectural Board of Review*. In *Reid*, the appellate court upheld the validity of a decision by a local Architectural Board of Review (Board) refusing to approve a building permit application for a residential dwelling. The court also upheld the constitutionality of the local ordinance which granted the Board such authority. The court found that the local ordinance promoted the "general welfare" by authorizing the Board to disapprove of building applications when the proposed construction would not maintain the "high character of community development" or "protect real estate from impairment or destruction of value." The court ruled that the fact that one of the purposes of the ordinance was to promote aesthetic values did not render the ordinance invalid.

The appellate court in *Reid* held that the Board had not abused its discretion under the ordinance in refusing to approve the building application in question. The building application had proposed the construction of a single-family house involving a flat roofed complex of twenty modules with walls of glass and concrete panels. The modules were to be arranged in a loosely formed U which, together with a detached garage of similar construction, would be entirely screened off from the street by a solid wall ten feet high enclosing a garden area. The court found that the Board's decision had been based in part on aesthetic objections to the design and appearance of the proposed house since, when viewed from the street, the house would not indicate "a structure for people to live in." However, the court concluded that there were other factors that had influenced the Board's decision. The radical design of the proposed house would not conform to the general character of other houses in the area, would not preserve nearby property values and would be detrimental to future development of three vacant lots nearby. Since these latter described "general welfare" factors had apparently influenced the Board's decision, the court ruled the Board had not relied on purely aesthetic considerations in refusing to approve the application and that the decision of the Board was therefore lawful.

A dissenting opinion by Judge Corrigan argued that the court's decision in *Reid* was not supported by the record developed in the trial court. Houses in
the neighborhood, Judge Corrigan pointed out, had obviously varying lot sizes and price values and represented a melange of architectural styles including, among others Tudor, Spanish Colonial, and flat-roofed modern, with some of brick construction, some of wood, and some a combination of both. The Board's finding that the proposed house would not conform to the character of houses in the area should therefore be reversed, Judge Corrigan maintained, since houses in the neighborhood lacked any distinctive character. Judge Corrigan further argued that there was no support in the record for the court's findings that the proposed house would impair property values in the neighborhood and be detrimental to the development of nearby vacant lots. In Judge Corrigan's view, the Board's decision was based simply on objections to the exterior appearance of the proposed house and therefore violated Ohio law prohibiting restrictions on land use “for purely aesthetic reasons.”

The middle-period formulation of aesthetic doctrine set out in the Ghaster and Reid decisions discussed above was not entirely replaced by the reformulation of aesthetic doctrine which occurred in Ohio and other states during the modern period. The middle-period doctrine, which holds that a police power restriction on land use can be based on aesthetics so long as some other legitimate public purpose is also furthered by regulation, has continued to be applied by Ohio courts as an alternative rationale in cases where a restriction on land use would not satisfy the modern test for validity of a regulation promoting “purely aesthetic values.”

C. The Modern Period

The environmental movement of the 1960's and the 1970's led to the enactment of a new generation of land use controls which were often directed at the management of aesthetic values. Federal, state, and local regulatory programs were established which placed the goal of ensuring an aesthetically and culturally pleasing environment at the forefront of public policy governing land use and development. Within a short time, state courts were called upon to resolve the “due process” constitutionality of land use restrictions which were clearly based on aesthetic considerations. Resulting court decisions which held that the police power may be lawfully used to promote purely aesthetic values are said to mark the modern-period development in aesthetic jurisprudence.

This reformulation of aesthetic doctrine occurred in Ohio with the 1968
decision of the Ohio Supreme Court in *State v. Buckley.* Buckley upheld the constitutionality of a state statute which required junkyards outside of a municipality to be obscured from the view of motorists by a fence of at least six feet in height. The court directly addressed the issue of whether aesthetic considerations alone may support restrictions on land use and development. Declaring that the lawful scope of police power regulation in promoting the general welfare must necessarily "change with the times," the court ruled that aesthetic considerations alone are sufficient to support regulation so long as the aesthetic harm caused by the offending structure or use "is generally patent and gross, and not merely a matter of taste." Applying this standard, the Ohio court held the fencing requirement constitutional, finding the harm caused to the natural aesthetics of the surrounding countryside by an unfenced junkyard to be "generally patent and gross."

The Ohio Supreme Court emphasized in *Buckley* that its decision was "not to be construed as a blanket approval of all regulation based upon aesthetics." Such a broad holding, the court stated, would presuppose "an exact definition of beauty which is acceptable to all tastes." The court further ruled that the "generally patent and gross" standard for validity would have to be satisfied in the context of an aesthetic regulation's application to any given set of facts. An aesthetic regulation would therefore be held unconstitutional, not only in the traditional due process sense when the aesthetic purpose for regulation would not be furthered as applied, but also where a "generally patent and gross" aesthetic harm would not be prevented by the regulation's application due to existing aesthetic conditions in the surrounding area.

Clearly implicit in the court's decision in *Buckley* is that an aesthetic regulation may not impose some official notion of visual beauty on a particular land use solely because the appearance or design of the land use in question is found to be offensive or ugly. The validity of an aesthetic regulation would have to be judged not by whether its impact on a particular land use promotes visual beauty in and of itself, but whether the effect of regulation on the particular land use prevents an appearance or design that is patently or grossly out of harmony with the visual character of the surrounding area. Stated from another perspective, *Buckley* would seem to sanction regulation directed at preventing serious harm to the existing visual character of an area but not regulation which is directed at simply improving the visual beauty of a par-

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76 Ohio St. 2d 128, 243 N.E.2d 66 (1968).
77 Id. at 132, 243 N.E.2d at 70.
78 Id.
79 Id. at 133, 243 N.E.2d at 70.
80 Id.
81 Id. at 132, 243 N.E.2d at 70.
82 Id.
ticular land use or upgrading the visual character of an entire area or neighborhood. Such distinctions can be reasonably inferred from the Ohio court's express refusal in *Buckley* to accept as a standard for police power regulation the much broader "beauty for beauty's sake alone" rationale held acceptable for the power of eminent domain by the United States Supreme Court in *Berman v. Parker*.77

The modern reformulation of aesthetic doctrine set forth in *Buckley* has been applied in a rather straightforward fashion in several later Ohio court decisions. For example, in *Sun Oil Co. v. City of Upper Arlington*,78 an Ohio appellate court upheld the constitutionality of aesthetic provisions in a local zoning code which restricted the use and appearance of freestanding commercial signs. The zoning ordinance prohibited the use of free-standing commercial signs except where related to on-site activities and where an attached sign would be in harmony with the building thereon. The ordinance further imposed height, size, color, number and other aesthetic restrictions on permitted free-standing signs. Citing *Buckley*, the appellate court held the aesthetic restrictions valid, interpreting the ordinance as intending to limit application of the restrictions "to situations where the maintenance of a free-standing sign would be in gross contrast to the surrounding area as to be patently offensive to the surrounding neighborhood, rather than merely a question of taste."79

Similarly, in *P & S Investment Co. v. Brown*,80 an Ohio appellate court upheld the constitutionality of a local zoning restriction which was applied to prohibit the storage of construction trailers in a business district located in close proximity to a residential area. The trailers in question, which had originally been painted red and had been in use for a number of years, were found by the court to be "an eyesore to the neighborhood."81 Applying the *Buckley* test of validity, the court ruled that "when the appearance of a use in violation of permitted uses in a particular zone is in such gross contrast to the permitted uses of such zone as to be patently offensive" prohibition of such use "is a valid exercise of the police power" though the prohibition is "based upon

77Id. at 133, 243 N.E.2d at 70. The Ohio Supreme Court rejected the implication of *Berman v. Parker*, 348 U.S. 26, 33 (1954), that the mere pursuit of visual beauty would be within the scope of police power regulation. Although *Berman* involved the power of eminent domain, the following language from that opinion frequently has been quoted by state courts in support of aesthetic regulation of land use:

> The concept of the public welfare is broad and inconclusive .... The values is 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.

Id. at 33.

Ohio courts have sanctioned the pursuit of visual beauty as a lawful purpose for both private restrictive covenants affecting land use and the exercise of the power of eminent domain. See Bailey Dev. Corp. v. MacKinnon-Parker, Inc., 60 Ohio App. 2d 307, 313, 397 N.E.2d 405, 410 (1977) (restrictive covenant); Richley v. Crow, 43 Ohio Misc. 94, 334 N.E.2d 542 (1975) (scenic easement).

78Id. at 31, 379 N.E.2d at 269.


80Id. at 31, 379 N.E.2d at 269.

81Id. at 538, 320 N.E.2d at 678.
Both appellate courts in the *P & S Investment Co.* and *Sun Oil Co.* decisions interpreted the aesthetic rationale of *Buckley* as limited to regulation which prevents a patent and gross harm to the aesthetic character of the surrounding area. Where Ohio courts have found that such an aesthetic purpose would not be furthered by an aesthetic restriction as applied to a particular land use, the restrictions in question have been held unconstitutional. In *Brooks v. Cook Chevrolet, Inc.*, an Ohio appellate court held an aesthetic restriction in a local ordinance governing the maximum display area of commercial signs to be unconstitutional as applied to free-standing and protruding signs. The court found that a provision of the ordinance which required computation of allowed sign area by including both sides of a sign facing perpendicular to a highway would not result in furtherance of the aesthetic purpose of the ordinance and was therefore arbitrary and unreasonable. In *City of Euclid v. Fitzthum* an Ohio appellate court held unconstitutional a local ordinance which prohibited the outside storage or parking of trailers and recreational vehicles in a residential area. The court found that the ordinance would not promote public health or safety. The court further ruled that the ordinance would be unconstitutional if enacted "for purely aesthetic reasons." Presumably, though the *Buckley* test for validity was not mentioned, the ordinance was struck down because the outside parking or storage of such vehicles would not be patently offensive to the aesthetic character of the area.

Where an aesthetic regulation would not satisfy the modern test for validity established in *Buckley*, Ohio courts in some cases have held the regulation constitutional by application of middle-period aesthetic doctrine. For example, in *City of Pepper Pike v. Landskroner*, an Ohio appellate court in 1977 held a provision of a local zoning ordinance constitutional which prohibited the outside storage of trailers and recreational vehicles in a residential district zoned for single-family use. After discussing the development of aesthetic doctrine in Ohio, including the *Buckley* "patently offensive" test of validity, the court ruled that the regulation in question would be clearly unconstitutional if based solely on aesthetic considerations. However, the court held the regulation valid on the ground that it furthered the legitimate public purpose of protecting the character and integrity of a single-family neighborhood.
Citing Reid v. Architectural Board of Review,91 the court in City of Pepper Pike found the preservation of the character of the neighborhood to be a public purpose supporting the regulation separately and distinctly from what the court described as the regulation's "incidental or secondary aesthetic effect."92 As in Reid, the court provided no explanation for its conclusion that the purpose of preserving the character of an area was not a purely aesthetic purpose for regulation. Such a distinction seems unsupported in view of the Ohio Supreme Court's decision in Buckley that the validity of a purely aesthetic restriction would depend on prevention of a "patently offensive" harm to the character of the surrounding area.93

More recently, in the 1984 decision Village of Hudson v. Albrecht, Inc.,94 the Ohio Supreme Court upheld the constitutionality of aesthetic "look-alike" provisions in a local zoning code and the implementation of the provisions by a local Architectural Board of Review to prohibit the use of solid stone aggregate panels instead of plate glass windows in the front of a retail store located in a commercial shopping plaza. Noting that the evolving trend is to grant aesthetic considerations a more significant role in police power regulation of land use, the Ohio court ruled that an aesthetic restriction affecting the appearance of a community "relates closely to its citizens' happiness, comfort, and general well-being." Accordingly, aesthetic considerations are a legitimate factor to be considered in adopting regulations.95 The Ohio court, however, did not apply the "patently offensive" test of Buckley to determine the validity of the "look-alike" provisions since it found that the provisions in question were not based on solely aesthetic considerations but were also intended to protect nearby property values. Noting "the strong presumption of validity" accorded legislative enactments, the Ohio court held the restrictions valid on the ground that they reasonably furthered "the general welfare" by "protecting real estate from impairment and destruction of value."96

The court in Village of Hudson also rejected the argument that the local ordinance was unconstitutional on vagueness due process grounds because it failed to establish sufficient standards to guide the local Review Board in applying the "look alike" restrictions to building permit applications.97 The Ohio court held the ordinance constitutional, finding that the general purposes of the ordinance (i.e., the protection of property values and the preservation of the appearance and character of community development) were sufficiently adequate criteria to guide the discretion of the Review Board in applying "ac-

9119 Ohio App. 67, 192 N.E.2d 74 (1963). Reid is discussed supra at text accompanying notes 60-66.
93See supra text accompanying notes 73-77.
95Id. at 73, 458 N.E.2d at 856.
96Id. at 73, 458 N.E.2d at 857.
97Id.
cepted and recognized architectural principles” to determine if a proposed structure would or would not be “harmonious” with existing development.98

In a dissenting opinion, Justice Brown argued that the ordinance should be held unconstitutional since the “look-alike” provisions of the ordinance were based on purely aesthetic considerations.99 Justice Brown rejected the majority opinion’s “protection of nearby property values” rationale on the ground that there was no evidence whatsoever in the record that the ordinance as applied would have the effect of protecting real estate from impairment and destruction of value.100

Justice Brown also expressed the view that the ordinance was unconstitutional on vagueness due process grounds because it failed to establish sufficient standards to “adequately circumscribe the process of administrative decision” and “provide . . . an understandable criteria for judicial review” of the local Review Board’s decisions.101 According to Justice Brown, the standard of promoting “harmony with existing structures and terrain,” even when coupled with the statement of purposes in the ordinance, constituted a standard for decision “impermissibly vague and indefinite,” and therefore vested in the local Review Board an “absolute power to impose its will on the private property interest of citizens.”102 The effect of the court’s decision in Village of Hudson, Justice Brown observed, would be to set the stage in Ohio for local governments to enact any aesthetic restriction on private land use that they desire.103

Much of the conflict in Village of Hudson between the opinion of the court and the dissent of Justice Brown on the due process issue of whether the ordinance furthered a legitimate public purpose can be reasonably attributed to a difference in opinion as to whether the case presented a constitutional challenge to the due process validity of the ordinance on its face or as applied. The majority upheld the ordinance as reasonably related to protecting real estate from impairment and destruction of value — a purpose for the enactment expressly set forth in the ordinance itself. The absence of discussion by the court as to whether this purpose would be furthered by the ordinance’s application in the case at hand can be viewed as resulting from the court’s opinion that the case presented only the constitutional issue of the due process validity of the ordinance on its face. This interpretation is supported by the fact that the opinion of the court in Village of Hudson simply affirmed a trial

98 Id. at 74, 458 N.E.2d at 857.
99 Id.
100 Id. at 75-76, 458 N.E.2d at 858-59.
101 Id. at 76, 458 N.E.2d at 859. For state court decisions supporting Justice Brown’s position under similar facts see Morristown Road Assoc. v. Mayor of Bernardsville, 163 N.J. Super. 58, 394 A.2d 157 (1978); City of West Palm Beach v. State ex rel. Duffey, 158 Fla. 863, 30 So. 2d 491 (1947).
102 Village of Hudson, 9 Ohio St. 3d at 77, 458 N.E.2d at 859.
103 Id.
court decision ordering the owner of the retail store in question to submit to the local Review Board its plans to alter the front of the store by replacing plate glass windows with solid stone aggregate panels. The Review Board had not yet ruled on the proposed alteration and the opinion of the court would seem to leave open a later court challenge to a final decision by the Board refusing to approve the alteration in question. The due process validity of the ordinance as applied would then be an issue for resolution in the later court proceeding with its determination presumably governed by existing Ohio case law on point. If a final Board decision were based on purely aesthetic considerations the appropriate standard for court review would be the "patently offensive" test established in Buckley,104 or, if based on protection of property values, whether there exists substantive evidence in the record to support such a finding.105 When so viewed, Village of Hudson seems entirely consistent with earlier Ohio decisions which have upheld land use restrictions under the middle-period formulation of aesthetic doctrine106 and which have applied the Buckley test for validity where regulation furthers purely aesthetic values.107

Also, this view of Village of Hudson may explain in part why the majority of the court did not share the concern of Justice Brown in his dissent as to whether the ordinance set out either sufficient standards to guide the discretion of the Review Board or understandable criteria for judicial review. Treating the decision as simply a ruling on the validity of the ordinance on its face, the court would likely view a final decision by the Review Board that a particular design for proposed development was either "too much alike" or "too different" from surrounding development so as not be "harmonious" with existing development as a decision limited by both the stated purposes of the ordinance and the criteria for judicial review established by Ohio court decisions for determining the validity of a land use restriction as applied.108 Under this analysis, the "subjective considerations" inherent in a Review Board decision in any particular case would in theory be circumscribed by a later reviewing court's evaluation of whether the factual record supported a finding that the purposes for the ordinance, aesthetic or otherwise, would actually be furthered as applied to the particular development in question. This interpretation of the court's opinion in Village of Hudson as retaining the "patently offensive" Buckley test for the validity of a purely aesthetic restriction as applied seems logical and correct, since the case itself did not involve the application of such a restriction and there is little in the opinion to suggest that the

104 See generally supra text accompanying notes 70-77.
106 See generally supra text accompanying notes 55-67.
107 See generally supra text accompanying notes 70-82.
court was overruling Buckley by implication so as to give blanket approval to all regulations based solely on aesthetics.

III. A CRITIQUE AND REFORMULATION

A. Analysis and Critique

Aesthetic doctrine in Ohio governing the due process validity of land use regulation can be briefly restated in the following two simple propositions: (1) a regulation is valid if it has a real and substantial relationship to a legitimate public purpose (other than aesthetics) even though aesthetic considerations may have played a part in its enactment; and (2) a regulation is valid if based on purely aesthetic considerations so long as the harm to the aesthetic character of the surrounding area which the regulation prevents is generally patent and gross, and not merely a matter of taste. As summary statements, the foregoing legal propositions accurately reflect aesthetic doctrine as presently set forth in Ohio court decisions. As a definitive statement of aesthetic doctrine in Ohio, however, the two propositions bring to mind the observation of the late Justice Holmes that “the law” is often simply “chaos — with an index.” As summary statements, the foregoing legal propositions accurately reflect aesthetic doctrine as presently set forth in Ohio court decisions. As a definitive statement of aesthetic doctrine in Ohio, however, the two propositions bring to mind the observation of the late Justice Holmes that “the law” is often simply “chaos — with an index.”

As the discussion below illustrates, these legal propositions, standing alone, appear to provide a less than adequate authoritative formulation of the juridical criteria governing the validity of aesthetic regulation in Ohio.

1. Middle-Period Doctrine

The first proposition restates the middle-period formulation of aesthetic doctrine that a regulation will be held valid, though based in part on aesthetic considerations, if the regulation furthers some other legitimate public purpose. The doctrine was formulated as an attempt to accommodate aesthetic considerations in regulation while recognizing and responding to the concerns expressed in early court decisions regarding the inherent subjectivity of aesthetic controls. The doctrine embodies the view that aesthetic values alone are generally not sufficient to impede the interests in expression and self-fulfillment associated with aesthetic activity and that purely aesthetic considerations are generally too subjective and arbitrary to serve as a legitimate standard for police power regulation of property rights. The search for non-aesthetic public purposes to support regulation by Ohio and other state courts under this middle-period formulation of aesthetic doctrine has been largely an attempt to assimilate aesthetics to traditional police power goals. As applied, the doctrine upholds the validity of a regulation not because it furthers aesthetic values per se but because it furthers aesthetic values per se but because regulation is found to promote some other

109 See supra notes 55-67, 87-111 and accompanying text.
110 See supra notes 70-82 and accompanying text.
111 Cited in C. Haar & L. Liebman, PROPERTY AND LAW; TEACHER'S MANUAL IV-7 (1978).
112 For a survey of state court decisions applying middle-period doctrine see Williams, supra note 7, at §§ 11.07-.09.
traditional public purpose such as morality, public safety, the protection of property values, or the future development of nearby land.\textsuperscript{113}

On its face, middle-period doctrine simply restates the generally applicable due process principle that a regulation is valid if it bears a real and substantial relation to a legitimate public purpose.\textsuperscript{114} In its application, however, Ohio and other state courts have tended to ignore the fact that the traditional public purpose that is found to exist is often simply derivative of the aesthetic considerations supporting regulation.\textsuperscript{115} Moreover, as critics of the doctrine have pointed out, the often assumed linkage between aesthetics and traditional police power goals is in many cases dubious, if not transparently fictional.\textsuperscript{116} Ohio court decisions applying the doctrine, for example, have tended to assume the existence of a linkage between the aesthetic effect of regulation and the protection of property values.\textsuperscript{117} Judicial efforts to verify such a relationship by evidence in the record, however, have been perfunctory at best, a point emphasized by dissenting opinions in both \textit{Reid}\textsuperscript{118} and \textit{Village of Hudson}.\textsuperscript{119} In reality, the relationship between aesthetic regulation and property values is extremely variable and in many instances is simply indeterminable.\textsuperscript{120} Application of the doctrine to support aesthetic regulation based on the "logic" of such a linkage is the result of what Norman Williams has labeled "muddled thinking" which will "hardly stand under critical analysis."\textsuperscript{121} Ohio and other state courts have tended to use the doctrine and its linkage rationale as largely a bootstrapping technique to uphold aesthetic regulation where no clear or even reasonably plausible relationship to some other traditional public purpose can be shown to exist. When applied in this manner, middle-period doctrine in effect allows regulation based solely on aesthetics, and as a result not only undermines the due process protection of freedom from arbitrary restraints, but also circumvents the express limitation imposed on purely aesthetic regulation by the Ohio Supreme Court in its \textit{Buckley} decision.\textsuperscript{122}

Another interpretive problem in application of middle-period doctrine by

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., \textit{Anderson}, supra note 12, at § 7.22. Middle-period court decisions in Ohio are discussed \textit{supra} at text accompanying notes 55-67, 87-111.
\item See, e.g., \textit{Benjamin v. Columbus}, 66 Ohio St. 2d 93, 420 N.E.2d 103 (1981).
\item See, e.g., \textit{Anderson}, supra note 12, at §§ 7.15-20, 7.22-23; Costonis, \textit{supra} note 8, at 374; Michelman, \textit{supra} note 115, at 37; Rowlett, \textit{supra} note 8, at 647.
\item \textit{Reid}, 119 Ohio App. at 70, 192 N.E.2d at 78 (Corrigan, J., dissenting). Judge Corrigan's dissenting opinion is discussed \textit{supra} at text accompanying notes 64-66.
\item \textit{Village of Hudson}, 9 Ohio St. 3d at 74, 458 N.E.2d at 857 (Brown, J., dissenting). Justice Brown's dissenting opinion is discussed \textit{supra} at text accompanying notes 99-103.
\item See Costonis, \textit{supra} note 8, at 416.
\item \textit{Williams}, \textit{supra} note 7, at § 71.18. Professor Michelman refers to such assumed linkages as "escapist reasoning that evades the real issues." Michelman, \textit{supra} note 115.
\item See generally \textit{supra} text accompanying notes 70-79.
\end{enumerate}
\end{footnotesize}
Ohio courts is that decisions in some cases appear to limit an "aesthetic purpose" to situations where a restriction is imposed on a land use or structure solely in an attempt to promote visual beauty in the form of the particular use or structure itself. For example, Ohio courts in both Reid and City of Pepper Pike held that the goal of protecting the "character" of the area surrounding a particular land use or structure was a non-aesthetic and legally sufficient public purpose for regulation of the visual form of the land use or structure. Clearly a restriction on the visual form of a land use or structure which is imposed to protect the aesthetic character of the surrounding area is a purely aesthetic regulation. To rule otherwise seems not only illogical but clearly inconsistent with the view of the Ohio Supreme Court in Buckley that the test for validity of a purely aesthetic regulation is whether the regulation prevents a "patently offensive" harm to the aesthetic character of the surrounding area.

2. Modern Aesthetic Doctrine

The second proposition of law set forth in the beginning of this section restates the Ohio Supreme Court's "patently offensive" Buckley test for the validity of regulation which promotes purely aesthetic values. This doctrine attempts to both sanction aesthetics as a legitimate public purpose for regulation and, at the same time, limit the role and scope of aesthetic regulation to situations where the aesthetic harm to the surrounding area is patently offensive. This modern doctrine shares with middle-period doctrine the common goal of accommodating aesthetics in land use regulation, and the common concern for establishing some standard to deal with the problem of the inherent subjectivity of aesthetic values. Middle-period doctrine dealt with the problem of the inherent subjectivity of aesthetics by requiring a search for a derivative non-aesthetic public purpose for regulation, while modern doctrine addressed the problem by limiting purely aesthetic regulation to preventing a "patently offensive" harm to the aesthetic character of the surrounding area.

Both modern and middle-period aesthetic doctrines in Ohio also seem to share the often evidenced assumption that the basic aesthetic value intended to be furthered by regulation of land use is the pursuit of visual beauty. To the extent that this visual-beauty rationale underlies modern aesthetic doctrine in Ohio, it creates substantial, if not insurmountable, interpretive problems in the application of the doctrine. As the discussion below attempts to demonstrate,

115 See supra text accompanying notes 91-92.
116 See supra text accompanying notes 70-76.
117 See generally supra text accompanying notes 70-77.
118 Id.
an assumed visual-beauty rationale for regulation in applying the modern doctrine established in *Buckley* is likely to result in both undue limitation on the role and scope of aesthetic regulation and exacerbation of the problem of establishing intelligible validating standards governing enactment and administration of aesthetic controls.

A visual-beauty rationale for aesthetic regulation appears to have been a presupposition underlying the Ohio court's formulation of modern aesthetic doctrine in *Buckley*. Recognizing the inherent subjectivity of notions of visual beauty, the court in *Buckley* appropriately sought to limit the legitimatization of aesthetic regulation to contexts which would substantially reduce the need and search for idealized standards of beauty — standards embodying some presumably authoritative and objective set of ontologically based canons of aesthetic formalism. Thus, the court refused to legitimize aesthetic regulation directed solely at promoting beauty in the visual form of a particular land use or structure. Regulating the visual form of a particular land use or structure as an isolated work of art would necessarily require a standard of beauty based on some set of principles of aesthetic formalism which embody an infinite variety of combinations of factors such as proportion, color, line, and interval, etc. — an absolutistic standard of beauty that simply does not exist. Quite obviously, the Ohio court refused to sanction such a role for police power regulation.

The *Buckley* court expressly limited the role of aesthetic regulation to controlling the visual form of a land use or structure so as to protect the visual character of the surrounding area. By so limiting the role of aesthetic regulation, the arbitrariness of regulating the visual form of a land use or structure as an isolated work of art is avoided. The legitimizing standard of beauty for regulation is at least grounded in the relationship existing between the form of a particular land use or structure and the visual character of the area within its perceptual field. Limiting aesthetic regulation to this latter described context serves to reduce the range of factors and choices in defining and articulating some standard of beauty to support regulation. Nevertheless, regulatory decisions based on some official standard of beauty, even when limited exclusively to the relationship existing between the visual form of a particular land use or structure and the visual character of the surrounding area, would still seem to be hopelessly subjective and arbitrary, or as Ohio courts have so often stated "merely a matter of taste." Faced with this dilemma but wishing to accom-

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11See supra text accompanying notes 70-77. Other state courts also have implicitly distinguished between regulation protecting existing visual features of the environment and regulation creating visual beauty afresh, the latter purpose being held to be beyond the lawful scope of aesthetic regulation. See, e.g., Mayor & City Coun. of Baltimore v. Mano Swartz, Inc., 268 Md. 79, 92, 299 A.2d 828, 835 (1973).
131See supra text accompanying notes 70-77.
132Id.
moderate the widespread legislative mandate for aesthetic regulation, Buckley simply established as the controlling standard of beauty the "patently offensive" test for determining the validity of aesthetic regulation in this context.\textsuperscript{135} Though incapable of being defined by ontologically based canons of aesthetic formalism, the "patently offensive" standard, as a test for validity, might at least serve to further restrict the degree of subjectivity involved in aesthetic regulation by confining regulation to the prevention of those visual harms which impact widely shared community values.\textsuperscript{136}

The Ohio Supreme Court's formulation of modern aesthetic doctrine in Buckley is in many respects a commendable attempt to legitimize aesthetic values in police power regulation while limiting regulation to the prevention of harms deemed "patently offensive."\textsuperscript{137} In Buckley, the Ohio court, for the first time, expressly upheld land use regulation promoting purely aesthetic values. In doing so, the Ohio court opened the door to an explicit recognition by Ohio courts that the aesthetic character of a community "relates closely to its citizens' happiness, comfort, and general well-being."\textsuperscript{138}

(a) Visual Beauty

While commendable, the formulation of aesthetic doctrine in Buckley seems flawed in several respects. Clearly seeking to prevent regulation where only matters of taste are involved, the court nevertheless seemed to retain the visual-beauty rationale for aesthetic regulation.\textsuperscript{139} A visual-beauty rationale for regulation would continue the standards morass that the court itself tried to avoid by establishing the "patently offensive" test for validity.\textsuperscript{140} Limiting aesthetic regulation to "patently offensive" harms to the visual character of an area still requires as an ultimate validating standard some official but undefinable test for visual beauty. While impliedly recognizing that for purposes of police power regulation the terms "beauty" and "ugliness" must be grounded in the relational connotations existing between a particular land use or structure and the visual character of the area within its perceptual field, the Ohio court's "patently offensive" test must ultimately reflect, even in this relational context, some standard of beauty by which to measure what is "patently ugly."

\textsuperscript{135} Id.

\textsuperscript{136} See P & S Inv. Co. v. Brown, 40 Ohio App. 2d 535, 540, 320 N.E.2d 675, 679 (1974) (applying "patently offensive" test based on "what the reaction of most people in urban communities would be").

\textsuperscript{137} Other state courts which have upheld regulation of land use solely for aesthetics have established standards similar to the "patently offensive" test based on the lawful scope of such regulation. See, e.g., Mayor & City Coun. of Baltimore v. Mano Swartz, Inc. 268 Md. 79, 88, 299 A.2d 828, 833 (1973) (not standards of "idiosyncratic group"); United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 5, 198 A.2d 447, 449 (1964) (not "some sensitive or exquisite preference"); 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) (protecting "visual sensibilities of the average person").


\textsuperscript{139} See supra text accompanying note 74.

\textsuperscript{140} See supra text accompanying notes 70-77.
Such a standard of beauty will necessarily be inherently subjective and arbitrary regardless of whether its undefined content is provided by the court in the exercise of its own independent judgment or on the basis of the court’s view of what most people in the community would consider to be “patently ugly.” Moreover, as a public purpose for regulation, a “beauty for beauty’s sake alone” rationale unlinked to some other more substantial social interest for regulation seems hardly adequate as a governmental interest on which to justify aesthetic regulation’s negative impact on the values of pluralism and expression.

In addition to the substantive due process problem presented by the inherent subjectivity of a visual-beauty rationale for aesthetic regulation, a visual-beauty premise creates the impossible task of satisfying the vagueness due process requirement of setting forth intelligible standards for the implementation and administration of aesthetic regulation by design review boards and other public agencies. If visual beauty, even in the limited context of defining what is “patently ugly,” is the public purpose to be furthered by regulation it would appear to be an intolerantly vague standard on which to base particular regulatory decisions — a problem presented but not in this author’s opinion, satisfactorily addressed in several Ohio court opinions. A visual-beauty rationale provides little, if any, guidance to public officials, citizens or courts concerning the lawful application of aesthetic restrictions. This would seem particularly true in regard to regulation of the details of design such as the substitution of solid stone aggregate panels for plate glass windows in a retail store, as occurred in *Village of Hudson v. Albrecht, Inc.*

Even in a relational context, standards such as promoting “harmonious” development in accordance with “accepted and recognized architectural principles” are essentially meaningless if interpreted and applied on the basis of a visual-beauty premise for regulation. More specific and objective design

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113 This view no doubt accounts for the effort in middle-period court decisions to link aesthetic regulation to traditional public purposes such as safety or protection of property values. See supra notes 53-66, 113-122 and accompanying text. The issue is not directly addressed in court decisions upholding regulation “solely for aesthetics” but a number of commentators have rejected such a narrow basis for regulation. See, e.g., Costonis, supra note 8, at 413-416; Michelman, supra note 115, at 38-42; Williams, supra note 20.

For recent court decisions upholding regulation “solely for aesthetics” but implicitly based on cultural stability-identity values see infra notes 172-78.

114 See, e.g., Giacco v. Pennsylvania, 382 U.S. 399, 403 (1966) (a law is unconstitutionally vague if “it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without legally fixed standards, what is prohibited and what is not in each particular case.”).

116 Ohio St. 3d. 69, 458 N.E.2d 852 (1984).
restrictions, such as a requirement that the "roof pitch" of a proposed structure be "less than three vertical units in twelve" from a structure that it resembles,146 may satisfy the vagueness due process problem but simply create problems in demonstrating that, as applied, such restrictions further the public purpose of preventing a "patently ugly" harm to the visual beauty of the surrounding area.149

To the extent that a visual-beauty rationale underlies the Ohio Supreme Court's "patently offensive" test established in Buckley,150 the resulting "patently ugly" standard for validity would significantly restrict and undermine landmark and historic district regulation.151 As discussed earlier, the "patently offensive" Buckley standard would prohibit regulation of a particular structure solely to promote or preserve "beauty" in the visual form of the structure when viewed in isolation from its surrounding area.152 A validating standard based on prevention of a "patently ugly" harm to the aesthetic character of the surrounding area is one that clearly could not support most, if not all, landmark or historic district designations. In fact, proponents of these forms of aesthetic regulation seldom seek to justify them on the basis of some idealized vision of beauty but rather on the basis of the historical and cultural associations that are thought to exist between a designated structure or set of structures and citizens in the community.153

A visual-beauty rationale for aesthetic regulation, even when restricted by the Buckley "patently offensive" test for validity, seems likely to perpetuate the due process constitutional problems associated with aesthetic regulation in early court decisions.154 Despite efforts of aesthetic philosophers and others throughout the centuries to show the contrary, a regulation based on some official notion of visual beauty must necessarily involve an inherently subjective and arbitrary restriction on private rights.155 Moreover, an official ban on, or preference for, visual forms of private expression based solely on their offensiveness or appeal is censorship in its baldest form and may often impact expression and self-fulfillment interests within the scope of First Amendment protection.156 A visual-beauty rationale for regulation seems unlikely to satisfy the

146 See Village of Hudson, 9 Ohio St. 3d at 71, 458 N.E.2d at 855.
147 See supra text accompanying notes 139-43.
148 See supra notes 70-82 and accompanying text.
149 For a comprehensive discussion of landmark and historic district ordinances see C. Duerksen, A HANDBOOK ON HISTORIC PRESERVATION LAW (1983).
150 See supra text accompanying notes 73-77.
151 Landmark and historic district ordinances generally are enacted and upheld by courts, not under a visual-beauty rationale, but based on other values such as tourism, preservation of property values or more recently, preserving the cultural, historical and educational values derived from the visual form of a structure or set of structures. See Williams, supra note 7, §§ 71A.01-11.
152 See supra text accompanying notes 28-45.
153 The most comprehensive and thoughtful criticism of visual beauty as a basis for police power regulation is found in Costonis, supra note 8, at 395-410.
154 See supra note 19; Costonis, supra note 8; Kolis, Architectural Expression: Police Power and the First Amendment 16 URB. L. ANN. 273 (1979); Williams, supra note 20.
United States Supreme Court's requirement that aesthetic measures regulating expressive activity based on the offensiveness of its content be both "narrowly drawn" and advance a "sufficiently substantial governmental interest." 157

As the foregoing discussion attempts to demonstrate, a visual-beauty rationale for aesthetic regulation creates substantial, if not insurmountable, problems in the interpretation of aesthetic doctrine as formulated in Buckley. 158 Retention of a visual-beauty rationale for regulation in interpretation and application of the "patently offensive" Buckley test for validity would seem both unfortunate and unnecessary. As an explanation of the impetus and basis for aesthetic regulation, the visual-beauty rationale is, as John Costonis makes clear, fundamentally flawed by the conceptual defects that exist in its sensory, formalistic, and semantic premises. 159 There is little evidence to support the visual-beauty rationale of preventing "eyesores" or "offensive visual forms" based on the physiological or sensory predisposition of human beings to experience visual qualities in a relatively uniform manner. 160 Aesthetic response to visual form is largely based on the meanings ascribed to it by virtue of thoughts and feelings shaped by the cultural context of our individual histories and our experiences as members of political, economic, religious, and other societal groups. 161 Similarly, notions of visual beauty or ugliness cannot be authoritatively and objectively defined by ontologically based canons of aesthetic formalism but derive their meaning through human responses shaped by time, culture, habitation and personal history. 162 Moreover, the visual-beauty rationale fails to appreciate the profound influence of the visual environment's semiotic properties on the way that people experience and describe that environment. 163 Associational harmony, not an idealized vision of beauty, is the primary impetus and basis for aesthetic regulation.

(b) Associational Harmony

Associational harmony, as the underlying rationale for aesthetic regulation, recognizes that the reciprocal social values of cultural stability and individual, group and community identity are shaped to a significant degree by the semiotic properties of the visual environment. 164 That the semiotic properties of the visual environment play a socially integrative and hence, identity-

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158See supra notes 139-49 and accompanying text.
159See Costonis, supra note 8, at 395-410.
160Id. at 397-400.
161Id.
162Id. at 401-07.
163Id. at 408-09.
164Id. at 418-24. The associationist theory of beauty which holds that objects are 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. Id. at 424 n. 241.
nurturing role in community life is a fact that has been intuited and exemplified in the work of painters, poets, writers and other artists throughout recorded time.\textsuperscript{165} The relationship is clearly reflected in Lewis Mumford's description of 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."\textsuperscript{166} The associational bonds derived from the semiotic properties of the visual environment represent a form of basic human attachment behavior that, as John Bowlby points out, extends from "the cradle to the grave."\textsuperscript{167} The semiotic properties of the visual environment clearly reflect and nurture our "social character" and reaffirm the sense of identity and bonding necessary for positive cooperation in political, economic and social arenas.\textsuperscript{168}

As the social interest furthered by aesthetic regulation, associational harmony seeks to protect the human meanings and associations derived from the form or character of the visual environment that are important sources of orientation in the emotional and cognitive lives of individuals and communities. Regulation thus attempts to preserve and protect the rich network of human meanings and associations derived from the form or character of the visual environment by preventing the alteration or destruction of those features of the visual environment widely perceived to give rise to such meanings and associations. Rather than involving "a mere matter of luxury or indulgence" as posited in traditional legal doctrine, aesthetic regulation protecting semiotic properties of the visual environment from destruction or alteration can be viewed as an attempt to preserve a fundamental type of human relational bonding necessary for a sense of general well-being and social living.

As John Costonis points out, controversies about "beauty" in aesthetic regulation are often, in effect, surrogates for controversies over the impact of change in the visual environment which is perceived as out of harmony or incongruent with, and therefore a threat to diminish or destroy, those features of the visual environment that are felt to play a socially integrative, and, hence, identity-nurturing and culturally stabilizing role in the community.\textsuperscript{169} In this sense, the terms beauty and ugliness are superfluous as analytic concepts in aesthetic regulation, but are merely conclusory terms that express the emotional character of a community's decision to prevent "associational dissonance" in regard to those features of the visual environment which are thought to support and nurture widely shared, though intangible, human values that caused those features to be selected for preservation.\textsuperscript{170} In this view,

\textsuperscript{165} Id. at 418.
\textsuperscript{166} L. MUMFORD, THE CULTURE OF CITIES 5 (1938).
\textsuperscript{169} See Costonis, supra note 8, at 419.
\textsuperscript{170} Id. at 418-20.
aesthetic regulation functions, in essence, as a socially homeostatic device preventing harm to those features of the visual commons widely perceived to be impregnated with meanings and associations that fulfill individual and group needs for identity confirmation. Regulation promoting associational harmony thus attempts to preserve the sense of general well-being rooted in the cultural stability-identity bonds existing between the visual environment and the community.

Associational harmony, as a legitimizing basis for aesthetic regulation, is proposed in recent commentary, and is at least implicitly recognized, as the supporting basis for regulation in several court decisions. Rather than visual beauty for beauty's sake alone, some court decisions have pointed towards recognition of derivative human values related to "associational harmony" as the legitimizing basis for aesthetic regulation. Some court opinions, as in Ohio, do so in general terms by relating regulation of the visual environment to "citizens' happiness, comfort and general well-being." Other court opinions are more specific in regard to derivative human values that in the cultural context of regulation are found to be protected and furthered by a visually pleasing environment. As a Michigan court has pointed out, "a community's aesthetic well-being can contribute to urban man's psychological and emotional stability" and "stimulate an identity and pride which is the foundation for social responsibility and citizenship." The Supreme Court of New Jersey has stated that "the development and preservation of natural resources and clean, salubrious neighborhoods contribute to psychological and emotional stability and well-being as well as stimulate a sense of civic pride." Other courts have similarly stressed the link between aesthetics and derivative human values in the cultural context of regulation.

The "reasonableness" test for validity, often set out in court decisions as limiting the permissible scope of aesthetic regulation under modern doctrine, may well come to be interpreted as requiring a linkage with widely shared human values related to a visually pleasing environment. As New York and New Jersey courts have suggested, aesthetic considerations supporting regulation should bear substantially, if not on economic values, on existing social and cultural patterns of a community or district. Though upholding the general

171Id.
172Id. at 418-34.
validity of aesthetic regulation under modern doctrine, courts may require that an aesthetic restriction not be based on some "museum standard" of beauty held by an artistic elite but rather relate to a visual harm involving a widespread pattern of community preference. As several court decisions have suggested, aesthetic regulation should be based on the "visual sensibilities of the average person"\textsuperscript{179} and not embrace "some sensitive or exquisite preference"\textsuperscript{180} or the standards of "an idiosyncratic group."\textsuperscript{181} Aside from relating the benefits of regulation to property values\textsuperscript{182} or economics,\textsuperscript{183} measuring the reasonableness of aesthetic regulation by a widespread pattern of community preference is likely to be of increasing importance as courts tend to emphasize derivative human values as a basis for such regulation rather than simply beauty for beauty's sake alone.

Also, in ruling on the validity of aesthetic regulation, court decisions in some cases implicitly distinguish between the goal of creating visual beauty as opposed to preventing harm to existing visual features of the environment. As the Maryland court pointed out, in a case where billboard restrictions were held invalid, the purpose for regulation did not relate to "the preservation or protection of something which was aesthetically pleasing, but rather was intended to achieve by regulation an aesthetically pleasing result."\textsuperscript{184} Pointing out that a restricted use or structure may itself have artistic merit when viewed in isolation or in a different visual setting, a number of court decisions have found the legitimizing rationale of aesthetic regulation to be not the creation of visual beauty in regard to a particular use or structure, but the prohibition of a use or structure because it is deemed to be out of harmony or incongruent with the existing character or visual features of the area within its perceptual field.\textsuperscript{185} In this view, modern aesthetic doctrine can be interpreted as legitimizing aesthetic regulation not on the basis of some absolutistic standard of beauty, but on the ground, as in all cases of environmental pollution, that a restricted use or structure is simply "a resource out of place."\textsuperscript{186} This view of the legitimacy of aesthetic regulation is suggested in Freund's work:

\[\text{[I]t is undesirable to force by law upon the community standards of taste which a representative legislative body may happen to approve. . . . But it}\]


\textsuperscript{182}See, e.g., Village of Hudson v. Albrecht, Inc., 9 Ohio St. 3d 69, 458 N.E.2d 852 (1984) and text accompanying notes 94-98 (linking aesthetics with protection of property values).

\textsuperscript{183}See, e.g., Mississippi State Highway Comm'n v. Roberts Enterprises, Inc., 304 So. 2d 637 (Miss. 1974) (linking aesthetics with economic interest in tourism).

\textsuperscript{184}Mayor & City Coun. of Baltimore v. Mano Swartz, Inc., 268 Md. 79, 299 A.2d 828 (1973).


\textsuperscript{186}See W. ROGERs, ENVIRONMENTAL LAW 2 (1977).
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
willfully 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.¹⁸⁷

As the legitimizing basis for aesthetic regulation, associational harmony
has been implicitly recognized, at least in part, by Ohio courts. The Ohio
Supreme Court's emphasis in Buckley regarding the visual impact of a land use
or structure on the aesthetic character of the area within its perceptual field
clearly involves a focus on the associational harmony of visual forms.¹⁸⁸
Similarly, Buckley and other Ohio decisions have legitimized regulation to pre-
vent a "patently offensive" harm to the distinctive visual features of an area
that are generally felt to generate a positive aesthetic response, and thus
enhance the happiness, comfort, and general well-being of citizens.¹⁸⁹ Ohio
courts thus have expressly recognized, at least in general terms, that derivative
human values related to the visual environment constitute a legitimizing basis
for aesthetic regulation. Implicit recognition of associational harmony as a
basis for police power regulation also may explain the distinction sometimes
made in Ohio court decisions between regulating the visual form of a par-
ticular land use or structure and protecting the "character" of an area, assum-
ing, as seems likely, that Ohio courts by referring to the "character" of an area
in this context were sanctioning regulation protecting widely shared human
associations derived from existing features of an area's visual environment.¹⁹⁰

Express recognition by Ohio courts of "associational harmony" as the
legitimizing basis for regulation would, when incorporated within the "patent-
ly offensive" test of Buckley, tend to ameliorate the due process constitutional
problems expressed in decisions concerning the arbitrariness and subjectivity
of aesthetic regulation. Rather than simply securing the benefit of creating or
promoting some idealized vision of beauty, associational harmony, as the
legitimizing purpose for regulation, would focus attention on prevention of
"patently offensive" harm to those existing features of the visual environment
whose semiotic properties are widely felt to play a socially integrative and
hence identity-nurturing and culturally-stabilizing role in community life.¹⁹¹ As
a legitimizing standard for enactment, administration, and court review of
aesthetic regulation, it has the potential for substantially reducing the confu-
sion and uncertainty resulting from the futile search for controlling standards

¹⁸⁸ See supra text accompanying notes 70-77.
of community "relates closely to its citizens' happiness, comfort, and general well-being").
¹⁹⁰ See supra text accompanying notes 91-93.
¹⁹¹ See Costonis, supra note 8, at 418-34.
of visual beauty.\textsuperscript{192}

While aesthetic response under the associational harmony rationale is, of course, highly subjective even within a given culture, its "objectivity" would be rooted in both the potential for articulating and describing those specific existing features of the visual environment intended to be protected from associational dissonance, and in the ability of reasonably competent planning staffs to draft intelligible standards for implementation and administration based on relatively neutral and objective criteria, such as height, bulk, scale, topography, and building materials, etc., derived from those visual features.\textsuperscript{193} Its objectivity would also be grounded in the requirement that the desire for protection of certain features of the visual environment reflect a widespread pattern of community preference rather than simply the desires of a narrow elite.\textsuperscript{194} The "patently offensive" test of \textit{Buckley} would further assure that regulation would not involve unrelated or insignificant details of design and visual form by prescribing regulation aimed at promoting the "exquisite preferences" of a community as measured not by some idealized standard of beauty but by the existing features of the visual environment selected for protection.\textsuperscript{195}

In addition to reducing the degree of subjectivity involved in regulation, associational harmony, as the legitimizing rationale for aesthetic regulation, is likely to broaden the lawful scope of such regulation. Where regulation impacts interests in expression that are within the scope of first amendment protection a regulation based on associational harmony is more likely to be capable of being "narrowly drawn" and found to constitute a "sufficiently substantial governmental interest" than a regulation supported by visual-beauty reasoning alone.\textsuperscript{196} Associational harmony, as the social interest furthered by regulation, also would seem to provide a basis for legitimizing landmark and historic district designations under the "patently offensive" test of \textit{Buckley}.\textsuperscript{197} While landmark and historic district designations are not intended to prevent visual harm to nearby areas, they do provide the relational context for analysis insisted upon in \textit{Buckley}\textsuperscript{198} concerning whether the impact of proposed changes in visual form are associationally harmonious with those existing visual features of a protected structure or set of structures that have been selected for preservation.\textsuperscript{199}

\textsuperscript{192}Id. at 432-39.
\textsuperscript{193}See \textit{Williams}, supra note 7, at § 71A.06; Costonis, \textit{supra} note 8, at 426.
\textsuperscript{194}See \textit{P & S Inv. Co. v. Brown}, 40 Ohio App. 2d 535, 320 N.E.2d 675 (1974) (applying "patently offensive" test of \textit{Buckley} based on "what the reaction of most people in urban communities would be").
\textsuperscript{195}See \textit{supra} text accompanying notes 73-76. \textit{See also} Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557 (1955) (aesthetic regulation limited to preventing developments "obviously incongruous" with existing visual features of environment).
\textsuperscript{196}See Costonis, \textit{supra} note 8, at 446-58.
\textsuperscript{197}See generally \textit{supra} text accompanying notes 150-53.
\textsuperscript{198}See \textit{supra} text accompanying notes 70-82.
\textsuperscript{199}See \textit{Williams}, supra note 7, at § 71.14. See generally \textit{Duerksen}, \textit{supra} note 151.
B. Towards A Reformulation

The interpretive problems discussed above suggest the need for a reformulation of aesthetic doctrine governing regulation of land use and development in Ohio. Returning to the first of the two earlier stated legal propositions at the beginning of this section, the foregoing analysis suggests the following restatement of middle-period aesthetic doctrine: A regulation is valid as applied if it has a real and substantial relationship to a legitimate public purpose (other than aesthetic interests in protecting the visual form or character of a structure or area) provided, however, that where the public purpose is derivative of the aesthetic effect of regulation there is evidence in the record which demonstrates a reasonable connection between the aesthetic effect of regulation and that public purpose. This restatement of middle-period doctrine would make clear that regulation of a land use or structure to protect the visual form or character of a nearby area is clearly an aesthetic purpose for regulation. It also would require that a reasonable connection be shown to exist between the aesthetic effect of regulation and the derivative public purpose alleged to be furthered in order to avoid the problem of legitimizing a "purely aesthetic" regulation based on "assumed linkages" that may or may not exist. By requiring that the record demonstrate only a "reasonable connection" for such a linkage to be found, the restatement of middle-period doctrine retains the usual judicial deference to legislative and administrative judgments ordinarily accorded such findings by Ohio courts under the "presumption of validity" principle in other areas of police power regulation.

Returning to the second of the two earlier stated legal propositions at the beginning of this section, the foregoing analysis suggests the following restatement of modern aesthetic doctrine: A purely aesthetic regulation is valid as applied if it bears a real and substantial relationship to preventing a "patently offensive" harm to features of the visual environment selected for protection on the basis of widely shared human associations and meanings attributed to those visual features. This restatement of modern aesthetic doctrine in Ohio retains the "patently offensive" test of Buckley but substitutes for visual beauty reasoning "associational harmony" as the impetus and legitimizing basis for aesthetic regulation — a rationale and context for analysis already implicitly reflected in several Ohio court decisions. As restated, modern doctrine would uphold regulation "solely for aesthetics" only where:

200 See supra text accompanying notes 123-26.
201 See supra text accompanying notes 114-22.
202 See, e.g., Brown v. Cleveland, 66 Ohio St. 2d 93, 420 N.E.2d 103 (1981) (discussing the presumption of validity rule in Ohio).
203 See supra text accompanying notes 70-77.
204 See supra text accompanying notes 164-87.
205 See supra notes 188-90 and accompanying text.
(1) There is a reasonable basis to believe that those features of the visual environment selected for protection reflect and embody widely shared human meanings and associations that the regulation is intended to preserve;

(2) There exist reasonably intelligible standards for regulation derived from those existing features of the visual environment selected for protection; and

(3) That the regulation as applied is reasonably related to preventing a "patently offensive" harm to those features of the visual environment selected for protection.

The restatement of modern doctrine would accord to aesthetic regulation the "fairly debatable" judicial deference given police power regulation in other fields under the ordinarily applied "presumption of validity" maxim by recognizing that a legislative decision to preserve and protect certain features of the visual environment is one that should be deemed to presumptively advance community-wide associational values so long as that question is one upon which reasonable persons may differ. As a validating standard for regulation, the doctrine as restated avoids the standards morass created by visual beauty reasoning and yet has the potential for imposing a greater degree of discipline on aesthetic regulation by requiring intelligible standards derived from those features of the visual environment selected for protection, and by requiring that regulation as applied prevent a "patently offensive" harm to those features of the visual environment sought to be preserved. The doctrine as restated would shift the attention of legislators, administrators, and reviewing courts away from the futile search for defensible standards of beauty or ugliness. Instead, the doctrine would focus on the cogency of a claim that certain features of the visual environment relate to widely shared stability-identity values, the identification and articulation of those specific features of the visual environment sought to be protected, the clarity of regulatory standards derived therefrom, and the extent to which regulation unnecessarily restricts private rights in preventing substantial harm to those visual features. The doctrine acknowledges that aesthetic regulation is based on subjective patterns of community preference as shaped by time and culture, but recognizes, as Ohio court decisions have, that a community's protection of its visual commons to prevent substantial harm to widely held human values derived therefrom constitutes a legitimate public purpose for police power regulation. Given the subjective nature of aesthetic response, the doctrine as restated would seem an appropriate and adequate constitutional standard for validity, leaving questions concerning the necessity for or wisdom of aesthetic regulation to legislative determination.

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**Notes:**
